AN UNFAIR CHANCE FOR THE FORMERLY INCARCERATED: *YIM V. CITY OF SEATTLE* AND THE COMMERCIAL SPEECH DOCTRINE

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Formerly incarcerated persons face disproportionately challenging barriers to housing upon reentry; criminal records are used as a basis to deny otherwise suitable prospective tenants. In 2017, the City of Seattle passed the "Fair Chance Housing Ordinance," prohibiting landlords from relying on criminal history when evaluating prospective tenants. In 2023, the Ninth Circuit struck this provision down on the grounds that this complete ban violated Seattle landlords' constitutionally protected free speech rights. The circuit court held that the ordinance implicated commercial speech and failed to pass intermediate scrutiny review under the four-part test outlined in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York. *The Ordinance was deemed "more extensive than necessary," and since other jurisdictions had less restrictive local laws that allowed landlords to consider some modicum of criminal history, Seattle's blanket ban could not stand.*

The commercial speech doctrine is a confusing area of constitutional law. This Note explores the inconsistencies of the Supreme Court's rulings on commercial speech. Commercial speech is subject to intermediate scrutiny review, but the Supreme Court has never completely articulated how lower courts should apply that standard of review. If a stricter interpretation is correct, then the Yim v. City of Seattle *majority was right. If a more lenient standard is correct, then the* Yim *dissent was right. This Note argues that* Yim *exemplifies the collateral consequences of this*

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ambiguous doctrine: Formerly incarcerated persons continue to be punished long after serving their sentences.

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INTRODUCTION

Carolina Landa, a Mexican-American woman, possesses a criminal record.[1] Landa wanted to move to Olympia, Washington, to attend college.[2] After applying for four different apartments and undergoing a criminal background check each time, Landa was denied tenancy despite meeting all other eligible criteria.[3] Landa was denied solely based on her criminal history.[4]

Christopher Poulos, a white man, possesses a criminal record.[5] Even though he received a prestigious internship at the White House, Poulos struggled to find housing in Washington, D.C., due to his criminal history.[6] Poulos eventually secured a sublet through social media,[7] but even then, his name was not on the lease and he had to sneak in and out of the building to avoid the security guards.[8] As illustrated by these respective stories, individuals with a criminal history face structural barriers to housing.[9] To secure stable housing, governmental support is crucial for such individuals.

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1 Christopher Poulos, *Criminal Record Based Housing Discrimination Harms Public Safety*, 19 SEATTLE J. SOC. JUST. 399, 401 (2021). This Note uses "criminal record" or "criminal history" interchangeably to refer to individuals convicted of a crime. While those with arrest records but no convictions certainly face barriers to housing, that situation is beyond the scope of this Note. For an explanation of how arrest records can be a severe obstacle to securing housing, see Valerie Schneider, *The Prison to Homeless Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421, 431 (2018).

2 Poulos, *supra* note 1, at 401.

3 *Id.* Eventually, Landa found housing when a landlord "was open to discussing her past," and later accepted her and her young son as tenants. *Id.* at 402.

4 *Id.* at 401.

5 *Id.* at 399–401; *see also* Charlotte West, *Seattle's Fair Housing Law Is the Most Progressive in the Country. But Now, Landlords Are Challenging It*, NBC NEWS (May 19, 2019, 5:03 AM), https://www.nbcnews.com/news/nbcblk/seattle-s-fair-housing-law-most-progressive-country-now-landlords-n1004321 [https://perma.cc/4WC5-3C56].

6 Poulos, *supra* note 1, at 399–400. Poulos originally found an apartment he was interested in, but the leasing company categorically banned anyone with a felony drug conviction, thus he was then ineligible for tenancy. *Id.* at 400.

7 The person Poulos rented from was also in recovery from addiction and was willing to take him in, so Poulos was able to secure housing. *Id.*

8 *Id.*

9 *Id.* at 401 ("People with convictions are routinely forced to live outside of the rules and even the laws, and recidivism is often driven by harmful exclusions which prevent successful reentry into society. I was excluded from the normal process to secure housing, so I made my way outside of the normal policy, as have millions of others living with convictions. The idea that people with criminal records do not live in many apartment buildings simply because the lease terms prohibit us is an illusion. We do live in the units but are forced to occupy them 'off the books' and 'under the radar,' which means at least a slight return to the type of thinking and behaviors that led many of us to incarceration in the first place.").

Next to employment, stable housing is the second most important factor in reducing the risk of re-offending.[10] However, formerly incarcerated persons are far more likely to be homeless than the general public,[11] and one New York study found that a person without stable housing is seven times more likely to re-offend than a person with stable housing.[12] What emerges is an endless cycle of homelessness and reincarceration.[13] The widespread availability of tenant screening procedures and criminal background checks makes it exceedingly difficult for applicants with criminal records to secure housing.[14] To rectify this, municipalities across the nation have enacted ordinances designed to restrict landlords from considering or relying on prospective

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10 Stable housing can be defined as "the extent to which an individual's customary access to housing of reasonable quality is secure . . . in the absence of threats." Tyler J. Frederick, Michal Chwalek, Jean Hughes, Jeff Karabanow & Sean Kidd, *How Stable Is Stable? Defining and Measuring Housing Stability*, 42 J. CMTY. PSYCH. 964, 965 (2014) (emphasis omitted); *see also* Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 11 (2014) (explaining how housing can contribute to reducing the risk of recidivism); Peter Leasure & Tara Martin, *Criminal Records and Housing: An Experimental Study*, 13 J. EXPERIMENTAL CRIMINOLOGY 527, 527 (2017) ("Ex-offenders consistently identify stable housing as one of the most important factors to a successful reentry." (citations omitted)).

11 Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html [https://perma.cc/CLA4-8YER].

12 Without housing, individuals are significantly more likely to commit "crimes of survival," such as burglary or selling drugs for money, and homelessness can act as a direct path to re-arrest. Schneider, *supra* note 1, at 432–33. People without housing also "live private lives in public spaces," leading to more arrests and, later convictions, of public urination and other minor crimes. *Id.* at 432; *see also* Bell, *supra* note 10 (referencing a New York study); 40 NAT'L HOUS. L. PROJECT, HOUSING LAW BULLETIN 61 (2010) (noting that another New York City study of over 40,000 individuals returning from state correctional facilities revealed that "[i]ndividuals who entered a homeless shelter within the first two years after release faced a higher risk of re-incarceration"). Alfred Blumstein & Kiminori Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, NAT'L INST. JUST. J., June 2009, at 10, 11 ("It is well known—and widely accepted by criminologists and practitioners alike—that recidivism declines steadily . . . occur[ing] within three years of an arrest and almost certainly within five years." (footnote omitted)).

13 Schneider, *supra* note 1, at 433; *see also* NAT'L HOUS. L. PROJECT, FAIR CHANCE ORDINANCES: AN ADVOCATE'S TOOLKIT 3 (2020) ("People experiencing homelessness are 11 times more likely to face incarceration when compared to the general population."); Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 277–78 (2009) (explaining the severe effects of incarceration, including strained familial relationships, societal isolation, and widespread stigma).

14 About ninety percent of landlords screen tenants for any criminal history. NAT'L HOUS. L. PROJECT, *supra* note 13, at 4. In 2006, seventy-four out of the eighty-one million records on file in the states were recorded in an automated database. Blumstein & Nakamura, *supra* note 12, at 10–11 (discussing how employers' usage of criminal background checks can result in arbitrary practices that largely overestimate the relevance and accuracy of criminal records in the hiring process).

tenants' criminal histories.[15] These ordinances are commonly referred to as "fair chance" housing ordinances.[16]

In 2017, the City of Seattle passed the "Fair Chance Housing Ordinance" ("the Ordinance").[17] Joining a number of localities,[18] the Ordinance was a comprehensive piece of legislation that prohibited private landlords from using background checks to screen prospective tenants.[19] Codified as Seattle Municipal Code Chapter 14.09,[20] the Ordinance banned landlords from inquiring about criminal history (the "inquiry provision"),[21] taking an adverse action based on that criminal history (the "adverse action provision"),[22] and requiring a prospective tenant to disclose their criminal history.[23] Seattle's Fair Chance

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15 Rachel M. Cohen, *Will Limiting Background Checks Make Housing Fairer?*, VOX (June 14, 2023, 7:00 AM), https://www.vox.com/policy/23750632/housing-landlords-renter-fair-chance-criminal-record-background-check [https://perma.cc/ABU9-QZMF]; *see* NAT'L HOUS. L. PROJECT, *supra* note 13, at 4.

16 Cohen, *supra* note 15. Such legislation is similar to "ban-the box" policies, which prohibit employers from asking about criminal records. *Id.*

17 SEATTLE, WASH., MUN. CODE §§ 14.09.005–.09.025; *see* Cohen, *supra* note 15 ("The movement [of enacting fair chance laws] has picked up steam in liberal localities over the last decade, first in cities like Oakland, Berkeley, Seattle, and Portland."); *see also* West, *supra* note 5 (noting how Seattle's ordinance is "one of the most far-reaching housing laws in the country").

18 For example, Detroit's "Ban the Box" policy prohibits landlords from initially inquiring about a prospective tenant's criminal background, and in Cook County, Illinois, the Just Housing Amendment requires landlords to consider other qualifications before asking about criminal history. West, *supra* note 5.

19 Daniel Beekman, *Discrimination Alleged at 13 Seattle Rental Properties*, SEATTLE TIMES (May 31, 2016, 7:51 AM), https://www.seattletimes.com/seattle-news/13-rental-properties-in-seattle-accused-of-discrimination [https://perma.cc/S7TG-WHT4] ("African-American testers, for example, were shown fewer units, quoted higher prices and told more frequently than white testers about criminal-background . . . checks . . . ."); Daniel Beekman, *Seattle Group Wants to Lift Rental Barrier for Those with Criminal Records*, SEATTLE TIMES (Dec. 13, 2015, 3:56 PM), https://www.seattletimes.com/seattle-news/politics/push-starts-to-lift-rental-barrier-for-those-with-criminal-records [https://perma.cc/PGH4-QW9Q] (discussing how a coalition of tenant-friendly organizations attempted to bolster its proposal for decreasing housing barriers for people with criminal records by highlighting the 2015 data that showed that Black and Latino testers were told about criminal background checks more than white testers).

20 § 14.09.005.

21 *Id.* § 14.09.025(A)(2) ("It is an unfair practice for any person to . . . *inquire* about . . . criminal history." (emphasis added)).

22 *Id.* ("It is an unfair practice for any person to . . . *take an adverse action* . . . [based on] criminal history." (emphasis added)).

23 *Id.* ("It is an unfair practice for any person to . . . *require disclosure* [on] . . . criminal history." (emphasis added)). Since the landlords did not challenge the constitutionality of the Requirement Provision, this Note does not discuss this provision any further.

Ordinance was thought to be the most progressive in the country as landlords could not consider or inquire into any criminal history.[24]

In 2018, Seattle-based landlords sued the City, alleging that the Ordinance's inquiry and adverse action provisions violated their state and federal free speech and substantive due process rights.[25] The City removed the case to the Unites States District Court for the Western District of Washington,[26] which held both provisions constitutional,[27] and the landlords appealed to the United States Court of Appeals for the Ninth Circuit.[28]

A three-judge panel on the Ninth Circuit partially reversed and partially affirmed.[29] The court upheld the adverse action provision but struck down the inquiry provision.[30] Applying the four-factor *Central Hudson* test,[31] the Ninth Circuit found that the inquiry provision could not survive intermediate scrutiny review.[32] The circuit court assumed without deciding that the Ordinance regulated commercial speech,[33] and held that the Ordinance "impinge[d]" on the landlords' First Amendment free speech rights.[34] Alternatively, the court found that the adverse action provision did not violate the landlords' substantive due process rights,

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24 *See* Cohen, *supra* note 15 ("[I]n 2017, [Seattle] passed the most progressive fair chance ordinance in the country, prohibiting landlords from asking about 'any arrest record, conviction record or criminal history' or refusing to rent to them because of that history."); *see also* West, *supra* note 5 (quoting an attorney at Columbia Legal Services, a Washington state legal advocacy organization, saying "[a]s far as we could tell, [the Fair Chance Ordinance] was the most progressive that had been passed by any jurisdiction in any country"). Other jurisdictions allow a modicum of criminal history to be considered, such as the New Jersey Fair Chance in Housing Act. N.J. ADMIN. CODE § 13.5-1.8. New Jersey landlords can reject applicants based on criminal records with first-degree offenses in the last six years, second-degree offenses in the last four years, and fourth-degree offenses in the last year. *Id.*

25 *See* Yim v. City of Seattle, No. C18-0736, 2021 WL 2805377, at *1 (W.D. Wash. July 6, 2021), *aff'd in part, rev'd in part and remanded*, 63 F.4th 783 (9th Cir. 2023), *cert. denied*, No. 23-329, 144 S. Ct. 693 (2024).

26 Answering Brief of Appellee at 9, Yim v. City of Seattle, No. 21-33567 (9th Cir. Jan. 28, 2022).

27 *Yim*, 2021 WL 2805377, at *1.

28 Yim v. City of Seattle, 63 F.4th 783, 791 (9th Cir. 2023), *cert. denied*, No. 23-329, 144 S. Ct. 693 (2024).

29 *Id.* at 787.

30 *Id.* ("We conclude that the Ordinance's inquiry provision impinges upon the First Amendment rights of the landlords, as it is a regulation of speech that does not survive intermediate scrutiny. However, we reject the landlords' claim that the adverse action provision of the Ordinance violates their substantive due process rights.").

31 *See infra* notes 109–114.

32 *Yim*, 63 F.4th at 793.

33 *Id.*

34 *Id.* at 787.

holding that the landlords did not possess a fundamental property right to exclude.[35]

This Note argues that *Yim v. City of Seattle* demonstrates the problematic ambiguity of *Central Hudson* and the pressing need for the United States Supreme Court to clarify the commercial speech doctrine. This Note will analyze the majority opinion, the concurrences, and the dissent in turn, ultimately contending that either could be correct depending on which interpretation of *Central Hudson* reigns supreme. This Note will conclude that the dissent's interpretation most faithfully reflects the original intent of the commercial speech doctrine: The Ordinance survives intermediate scrutiny review and is a constitutional restriction on speech.

Part I opens with an overview of how people with criminal records are discriminated against, both nationally and in Washington state.[36] It then details the Ordinance, differentiating between the key provisions at issue in *Yim v. City of Seattle*.[37] Part II summarizes the facts of *Yim* and the lower court ruling. It then discusses the majority opinion with a particular focus on dissecting the holding on the inquiry provision.[38] Part II also explores the two concurrences and the dissent. Part III analyzes the Ninth Circuit ruling, discussing the extensive scholarship on the confusion surrounding the *Central Hudson* test. Part III ends with a comparison of the different scrutiny interpretations behind *Central Hudson*.[39]

I. BACKGROUND

A. *Housing Discrimination and Criminal Records in the United States*

Following the "Tough on Crime" era, the American prison population expanded drastically in the twenty-first century.[40] The United States has one of the highest incarceration rates in the world, with a rate

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35 *Id.*

36 *See infra* Sections I.A–B.

37 *See infra* Section I.C.

38 *See infra* Part II.

39 *See infra* Part III.

40 NAT'L HOUS. L. PROJECT, *supra* note 13, at 3. According to a 2016 study, "[t]he United States prison population grew by 500 percent over the last 40 years." *Id.*

of 355 incarcerated persons per 100,000 residents.[41] Since peaking in 2009,[42] the national prison population has slowly declined at a rate of 0.5% to 3% annually.[43] Imprisonment levels remain excessive,[44] however, as the prison population in 2021 was nearly six times larger than fifty years ago.[45]

The racialized nature of incarceration rates is well-documented in the United States. For Black men, the lifetime probability of imprisonment is four times the probability for white men.[46] One in five Black men and one in eight Latino men will be incarcerated at some point during their lives while the rate for white men is one in twenty.[47] This staggering disparity is reflected at each stage in the criminal justice system. People of color experience increased police interactions at a rate disproportionate from both the total population percentage and the likelihood that a crime has been committed.[48] Conviction numbers are higher when the defendant is Black versus when the defendant is white.[49]

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41 Schneider, *supra* note 1, at 423; *U.S. Criminal Justice Data*, SENT'G PROJECT, https://www.sentencingproject.org/research/us-criminal-justice-data [https://perma.cc/UK6N-YTQL].

42 ASHLEY NELLIS, SENT'G PROJECT, MASS INCARCERATION TRENDS 1 (2024) ("The prison population expansion that commenced in 1973 reached its peak in 2009, achieving a seven-fold increase over the intervening years.").

43 PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., PRISONERS IN 2010, at 1 (2011), https://bjs.ojp.gov/content/pub/pdf/p10.pdf [https://perma.cc/69MV-2H5C]. Since 2010, there has been an overall twenty-five percent drop in imprisonment, but this is misrepresented by 2020 numbers, where the fourteen percent decline was due to pandemic-caused accelerated releases. NELLIS, *supra* note 42, at 1–2; NAZGOL GHANDNOOSH, SENT'G PROJECT, ONE IN FIVE: ENDING RACIAL INEQUITY IN INCARCERATION 3 (2023), https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration [https://perma.cc/2F5F-8TT2].

44 GHANDNOOSH, *supra* note 43, at 5 ("U.S. prisons held 1.2 million people in 2021, reflecting a 25% reduction from peak year 2009. While notable, this pace of prison downsizing is insufficient in the face of the nearly 700% buildup in imprisonment since 1972."). Additionally, the incarceration rate in the United States is between five and eight times that of other Western countries, such as France or Germany. *Id.*

45 *Id.*

46 *Id.* at 3.

47 *Id.* at 7.

48 Schneider, *supra* note 1, at 426 (citing Jesse Kropf, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. MOD. CRITICAL RACE PERSP. 75, 82 (2012)).

49 Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 926 (2019). Among felony charges in 2012, for example, 59% of those convicted were white, while 38% were Black, a stark overrepresentation given that Black Americans made up 13% of the total population and white Americans made up 77%. *See* Rebecca J. Walter, Jill Viglione & Marie Skubak Tillyer, *One Strike to Second Chances: Using Criminal Backgrounds in Admission Decisions for Assisted Housing*, 27 HOUS. POL'Y DEBATE 734, 734 (2017).

Minority communities bear the brunt of mass incarceration's harsh consequences.[50] For example, mass incarceration denies access to certain rights, privileges, and benefits, and severely restrains social citizenship.[51]

Every year, more than 600,000 people are released from state and federal prisons, but the majority struggle to find housing upon reentry.[52] Many incarcerated persons are held far from their hometowns, and typically do not have an opportunity to secure housing prior to release.[53] Recently released individuals often lack social ties to family or friends and reentry programs are sparse, meaning such individuals lack sufficient support to secure stable housing.[54] Housing options for formerly incarcerated persons are extraordinarily limited, and may include residing with family members, transitional housing, homeless shelters, subsidized housing, and private housing.[55] However, these options are often not viable: parole conditions can bar formerly incarcerated persons from living with family members who possess a criminal history;[56] transitional housing receives limited funding and faces public support

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50 The explosion of "Tough on Crime" legislation disproportionately targeted minority neighborhoods for aggressive policing and harsh mandatory systems, which contributed to racial differences in mass incarceration. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1278 (2004); *see also* Schneider, *supra* note 49, at 935–36 (discussing a 2015 New Orleans study on treatment of prospective tenants, which showed that Black testers with criminal backgrounds experienced negative differential treatment fifty percent more of the time compared to white testers of similar backgrounds); Camila Domonoske, *Denying Housing over Criminal Record May Be Discrimination, Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say [https://perma.cc/W6XB-2CLN] ("Housing Secretary Julian Castro puts [refusal to rent to people with criminal records] another way, NPR's Corley reports: 'When landlords refuse to rent to anyone who has an arrest record, they effectively bar the door to millions of folks of color for no good reason.'").

51 Roberts, *supra* note 50, at 1291. Formerly incarcerated persons can become ineligible for many federally funded health and welfare benefits, including the risk of their driver's licenses being suspended, losing the right to vote, and no longer qualifying for certain employment licenses. *Id.*; *see also* Lyles-Chockley, *supra* note 13, at 267–68 (noting that one of mass incarceration's gravest collateral consequences is the denial of citizenship, including the loss of parental rights, voting rights, jury duty, employment, military service, federal welfare benefits, and public housing).

52 Cohen, *supra* note 15; Megan C. Berry & Richard L. Wiener, *Exoffender Housing Stigma and Discrimination*, 26 PSYCH. PUB. POL'Y & L. 213, 213 (2020) ("The vast majority of the approximately 600,000 people that leave prison or jail each year in the United States face difficult barriers to reentry and reintegration into the community.").

53 *See* Peter Leasure, *Securing Private Housing with a Criminal Record*, 58 J. OFFENDER REHAB. 30, 31–32 (2019).

54 *See id. See generally* Poulos, *supra* note 1; *supra* notes 1–9 and accompanying text.

55 *See* Leasure & Martin, *supra* note 10, at 527 (citing CATERINA GOUVIS ROMAN & JEREMY TRAVIS, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISON REENTRY vi (2004)); *see also* Leasure, *supra* note 53, at 32–33.

56 Leasure, *supra* note 53, at 32.

issues;[57] homeless shelters are short-term solutions;[58] and government-subsidized housing (public housing) is subjected to strict state and local policies that systematically exclude many formerly incarcerated people.[59]

Local public housing authorities have broad discretion to deny leases to persons (1) who have previously been evicted from public housing due to drug-related criminal activity; (2) who have partaken in illegal or disruptive drug and alcohol usage, even if that behavior happened a long time ago; and (3) those who have engaged in any other criminal activity if the local public housing authorities consider them a "safety risk."[60] Regardless of whether such conduct is indicative of a "good tenant," the third category allows local public housing authorities to reject prospective tenants for any criminal activity.[61] Vague guidelines allow public housing authorities' discretion to remain unchecked,[62] and public housing is not a reliable option for people with criminal records.[63]

For private housing, the odds of securing stable housing are even worse.[64] Because private landlords deny applicants based on criminal backgrounds, a significant portion of the U.S. population is barred from accessing safe and secure housing.[65] Housing providers use criminal background checks to screen potential tenants and deny otherwise

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57 *Id.*

58 *Id.*

59 *Id.*; *see* HUM. RTS. WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 1–2 (2004), https://www.hrw.org/sites/default/files/reports/usa1104.pdf [https://perma.cc/AJ7N-DG8Z].

60 HUM. RTS. WATCH, *supra* note 59, at 3.

61 The Buffalo Municipal Housing Authority, for example, considers activities like crimes of violence against people, crimes or offenses that involve disturbing the peace, and drug-related criminal activity. Schneider, *supra* note 1, at 437. Some crimes certainly do indicate whether someone will be able to fulfill lease obligations, but public housing authorities are allowed to include public intoxication, truancy, failure to pay fare, public swearing, jaywalking, or not wearing a seatbelt. *Id.* at 437–38.

62 The listed categories grant public housing authorities broad discretion to "exclude a wide swath of people with criminal records without any reasonable basis to believe they actually pose a risk" to anyone. HUM. RTS. WATCH, *supra* note 59, at 3.

63 *Id.* at 4 ("Most PHAs automatically deny eligibility to an applicant with a criminal record without considering rehabilitation or mitigation.").

64 Many formerly incarcerated individuals cannot afford private housing. Schneider, *supra* note 1, at 437. Given that private housing represents ninety-seven percent of the total United States housing stock, the lack of affordable private housing is increasingly concerning. JOAN PETERSILIA, CAL. POL'Y RSCH. CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 69 (2006), https://www.prisonpolicy.org/scans/carc/understand_ca_corrections.pdf [https://perma.cc/BP5Q-YE8J]; *see also* Poulos, *supra* note 1.

65 Comment, *Housing Law—Criminal Screening of Tenants—Seattle Bans the Use of Criminal History in Rental Decisions—Seattle, Wash., Ordinance 125393 (Aug. 23, 2017)*, 131 HARV. L. REV. 1844, 1844–45 (2018). Eighty percent of National Multi-Housing Council members, according to a 2005 survey, screened tenants' criminal histories. *Id.* at 1844 n.1 (citing David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 12 (2008)).

qualified applicants.[66] The Fair Housing Act (FHA) prohibits discrimination against any person on the basis of race, color, religion, sex, familial status, disability, or national origin.[67] However, formerly incarcerated persons are not a protected class under the FHA.[68] Criminal records—which encompass a broad range of crimes, from minor misdemeanors to violent felonies[69]—serve as an "absolute bar" to securing both private and public housing and exacerbate an already extraordinarily difficult path to securing housing.[70] The wave of "fair chance" housing ordinances aim to ensure that prospective tenants with criminal records are not unfairly discriminated against in the application process and to eradicate private housing discrimination overall.[71]

B. *The Housing Situation in Seattle*

Racial disparities in the Washington state prisons and jails echo national trends. In Washington state, Black Americans constitute 3.4% of the state population, but account for 18.4% of the prison population.[72] Latinos and Native Americans comprise 11.2% and 1.3% of the state population but make up 13.2% and 4.7% of the state's prison population

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66 *See* Memorandum from Demetria L. McCain, Principal Deputy Assistant, Sec'y for Fair Hous. & Equal Opportunity, to the Off. of Fair Hous. & Equal Opportunity (June 10, 2022), https://www.hud.gov [https://perma.cc/8WR6-ZX9H] ("For example, housing providers commonly use tenant screening companies that provide background check reports that are often inaccurate, incomplete, or have no relationship to whether someone will be a good tenant. This information is then used to deny housing to otherwise qualified applicants."). *See generally* Cohen, *supra* note 15.

67 42 U.S.C. § 3604(a)–(b).

68 The 2016 Department of Housing and Urban Development (HUD) Guidelines lists out three different theories of liability—disparate treatment, disparate impact, and refusal to make reasonable accommodations—relating to criminal records. *See* U.S. DEP'T HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016). However, under each of these theories, a criminal record is not enough to determine discrimination, but is instead analyzed in relation to the FHA's protected characteristics. *Id.* at 2. The 2016 guidelines are purely aspirational, and the HUD's "ability to restrict housing discrimination against exoffenders is limited." Berry & Wiener, *supra* note 52, at 214.

69 "Many of those with criminal records pled guilty to or were convicted of minor misdemeanors such as shoplifting, disorderly conduct, or trespass . . . ." Schneider, *supra* note 1, at 431. Such crimes have little to no bearing on whether an individual will successfully fulfill their lease obligations or prove to be a good neighbor. *Id.*

70 *Id.*; *see also* Berry & Wiener, *supra* note 52, at 213 ("[C]riminal history reduces the willingness of housing authorities to rent to applicants . . . .").

71 Cohen, *supra* note 15.

72 RACIAL & SOC. JUST. INITIATIVE, RACIAL EQUITY TOOLKIT TO ASSESS POLICIES, INITIATIVES, PROGRAMS, AND BUDGET ISSUES 3 (2017), https://seattle.legistar.com/View.ashx?M=F&ID=5353774&GUID=74FB446B-F93A-4DC2-9202-83924A6353E6 [https://perma.cc/RND6-3WKH].

respectively.[73] In King County, where Seattle is located, the numbers are even more concerning. Black Americans make up 6.8% of the overall population but account for 36.3% of the jail population.[74]

The 2017 annual statewide count of unhoused persons revealed that 11,643 people were experiencing homelessness in King County.[75] This number increased to 13,368 people in 2022.[76] In 2015, the Seattle Office of Civil Rights conducted 124 tests and found evidence of housing discrimination in thirteen properties, or in 2,800 rental units.[77] Of the forty-two tests conducted relating to race, 64% of the testers reported disparate treatment.[78] Moreover, approximately 90% of Seattle landlords reported that they perform criminal background checks, with nearly half noting that they would refuse a prospective tenant based on their criminal history.[79] Housing discrimination against people with criminal records was clearly prevalent, and as a result, the City of Seattle enacted the Ordinance in 2017.[80]

C. *The Fair Chance Ordinance*

The Ordinance's dual goals are: (1) reducing the barriers to housing faced by people with criminal records; and (2) reducing intentional and unintentional discrimination against people of color, who are

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73 *Id.*

74 *Id.*

75 COUNT US IN, HOMELESSNESS IN KING COUNTY (2017), https://www.seattle.gov/Documents/Departments/Homelessness/CountUsIn2017.pdf [https://perma.cc/FXG8-J9SH]. Every year, Washington state works with the U.S. HUD to conduct a statewide count of all individuals residing in temporary housing programs, in shelters, or "places not meant for human habitation." *Annual Point in Time Count*, WASH. STATE DEP'T COM., https://www.commerce.wa.gov/serving-communities/homelessness/annual-point-time-count [https://perma.cc/2ZCQ-AT79].

76 KING CNTY. REG'L HOMELESSNESS AUTH., 2022 POINT IN TIME COUNT 1 (2022), https://kcrha.org/wp-content/uploads/2022/06/PIT-2022-Infograph-v7.pdf [https://perma.cc/RB4D-BY22]. Homelessness remained impacted by racial disparities in King County, Washington, as 25% of the people experiencing homelessness were Black despite comprising just 7% of the county's population. *Id.* at 2. These statistics demonstrate the pressing need for an ordinance that addresses racial disparities amongst those with criminal records trying to secure private housing.

77 Daniel Beekman, *Discrimination Alleged at 13 Seattle Rental Properties*, SEATTLE TIMES (May 31, 2016, 7:51 AM), https://www.seattletimes.com/seattle-news/13-rental-properties-in-seattle-accused-of-discrimination [https://perma.cc/CH6P-PNMM].

78 *Id.*

79 Yim v. City of Seattle, 63 F.4th 783, 787 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

80 *Id.*

disproportionately represented in the criminal justice system.[81] In 2017, as part of the City's Housing Affordability Action Plan, Seattle Mayor Ed Murray emphasized that "[f]urthering fair housing for all our residents is an affirmation of the City's longstanding commitment to race and social justice."[82] In the preamble of the Ordinance, the City explicitly acknowledged that racial bias plays a strong role in the tenant screening process and further compounds racial discrimination in the private housing market.[83]

Section 14.09.25 of the Ordinance placed numerous restrictions on private landlords, stipulating that "[i]t is an unfair practice for [any landlord] to require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history," subject to certain enumerated exclusions.[84] At issue in *Yim v. City of Seattle* were the inquiry and adverse action provisions.[85]

The inquiry provision prohibited landlords from asking about a prospective tenant's criminal history, including requesting records that consist of "identifiable descriptions and notations of" indictments, formal criminal charges, and convictions.[86] The adverse action provision prevented landlords from taking such an action against that prospective tenant.[87] An adverse action is a refusal to engage in or negotiate a rental

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81 *Id.* at 789; Yim v. City of Seattle, No. C18-0736, 2021 WL 2805377, at *8 (W.D. Wash. July 6, 2021), *aff'd in part, rev'd in part and remanded*, 63 F.4th 783 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

82 CITY OF SEATTLE, HOUSING SEATTLE: A ROADMAP TO AN AFFORDABLE AND LIVABLE CITY5 (2015), https://www.seattle.gov/documents/Departments/HALA/Policy/MayorsActionPlan_Edited_Sept2015.pdf [https://perma.cc/4BPY-Y6AQ].

83 SEATTLE, WASH., ORDINANCE 125393, at 1, 2 (Aug. 23, 2017) (codified at S.M.C. § 14.09) ("[R]acial inequities in the criminal justice system are compounded by racial bias in the rental applicant selection process, as demonstrated by fair housing testing conducted by the Seattle Office for Civil Rights in 2013 that found evidence of different treatment based on race in 64 percent of tests, including some cases where African American applicants were told more often than their white counterparts that they would have to undergo a criminal background check as part of the screening process . . . .").

84 SEATTLE, WASH., MUN. CODE § 14.09.025(A)(2); *see infra* notes 88–91 and accompanying text.

85 *Yim*, 63 F.4th at 790 (9th Cir. 2023), *cert. denied*, No. 23-329, 144 S. Ct. 693 (2024). This Note concentrates on the inquiry provision and analyzes the landlords' free speech claim. *See infra* Parts II–III. In 2024, *Washington Law Review* published a student comment focusing on the Ordinance's adverse action and the landlords' substantive due process claim in *Yim*; the comment ultimately argued that the property right to exclude should not exist in a substantive due process setting as the government has a right to regulate commercial property, such as rental apartments. *See* Jack May, Comment, *Wrong or (Fundamental) Right?: Substantive Due Process and the Right to Exclude*, 98 WASH. L. REV. 1355 (2023).

86 SEATTLE, WASH., MUN. CODE § 14.09.010 (defining the term "criminal history").

87 *Id.* § 14.09.025.

real estate transaction, a denial of tenancy, a false and intentional representation that real property is not available for rent, and applying different terms (such as higher rental rates).[88] The adverse action provision did not apply to landlords of federally assisted housing subject to federal requirements,[89] single-family dwelling units where the landlord also resides,[90] and accessory dwelling units if the landlord resides on the same lot.[91]

II. THE COMMERCIAL SPEECH DOCTRINE AND *YIM V. CITY OF SEATTLE*

A. *The Commercial Speech Doctrine in First Amendment Jurisprudence*

The First Amendment is firmly enshrined in American legal thought: The government, whether that be federal, state, or local, may not "abridg[e] the freedom of speech."[92] As a general rule, speech is protected from government regulation unless it falls under a category of unprotected speech.[93] However, not all protected speech is treated equally; instead, the United States Supreme Court has created a "hierarchy of [F]irst [A]mendment values" that are subject to varying degrees of scrutiny.[94] Professor James G. Pope described this hierarchy as a three-level "ladder with two rungs straddling a 'black hole' . . . [and]

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88 *Id.* § 14.09.010.

89 *Id.* § 14.09.115(B) ("[The Ordinance] shall not apply to an adverse action taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy, including but not limited to when any member of the household is subject to a lifetime sex offender registration under a state sex offender registration program and/or convicted of manufacture or production of methamphetamine on the premises of federally assisted housing.").

90 *Id.* § 14.09.115(C).

91 *Id.* § 14.09.115(D).

92 U.S. CONST. amend. I; Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1626 (1997) ("Yet as any student of American jurisprudence is quick to realize, there is perhaps no section of the Constitution more fervently debated than the First Amendment.").

93 VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1–2 (2024). Categories of unprotected speech include obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child sexual abuse material. *Id.*

94 James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 192 (1984) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

[e]ach level corresponds to a central institution in our society."[95] At the top, political speech receives the highest level of protection, followed by miscellaneous speech (artistic and scientific expression), then commercial speech at an intermediate level, and finally, unprotected speech and nonspeech at the bottom.[96] The protection of political speech stems from the idea that the First Amendment protects the free flow of ideas between a listener and a speaker, so strict scrutiny review is required.[97] On the other hand, commercial speech merely protects the free flow of commercial information so the listener can make "well-informed consumer decisions," and intermediate scrutiny review is warranted.[98]

The commercial speech doctrine is marred by intense debate and confusion.[99] The Supreme Court has never fully defined commercial

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95 *Id.* at 192–93 (explaining that the top rung corresponds to "the system of representative government, the second rung to the commercial market, and the black hole to the system of labor relations" (footnotes omitted)).

96 *Id.* at 193–94 ("To round out the picture, the ladder may be situated between two areas of nonprotection. To one side the speaker may fall off the ladder into an explicitly unprotected category of speech; to the other side, he may fall off into 'nonspeech' or conduct." (footnote omitted)).

97 *See* Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 395, 400–01 (2012); *see also* Kleindienst v. Mandel, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) ("[T]he First Amendment protects . . . the freedom to hear as well as the freedom to speak. . . . The activity of speaker becoming listeners and listeners becoming speakers in the vital interchange of thought is . . . indispensable to the discovery and spread of political truth.'").

98 Pomeranz, *supra* note 97, at 401; *see also* Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) ("[The] extension of First Amendment protection to commercial speech is justified primarily by the value to consumers of the information such speech provides."); Oleg Shik, *The* Central Hudson *Zombie: For Better or Worse, Intermediate Tier Review Survives* Sorrell v. IMS Health, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561, 562 (2015) (explaining that the "intermediate-tier standard acknowledged that forms of speech proposing a commercial transaction deserved at least some protection against state regulation, albeit secondary in value to core 'personal' speech afforded to individuals. Partly because of its arguably higher 'rank' in societal value, core 'personal' speech is protected against governmental regulation on a stringent 'strict scrutiny' basis." (footnote omitted)).

99 *Compare* Pomeranz, *supra* note 97, at 402 (arguing that the Supreme Court must treat the commercial speech doctrine differently than core speech, which receives the highest level of scrutiny), *and* Shik, *supra* note 98, at 564 (2015) (arguing that in the absence of the Supreme Court explicitly overhauling the commercial speech doctrine, lower courts should continue treating commercial speech differently from political speech), *and* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154, 1163, 1169–70 (arguing that the more lax treatment of commercial speech is warranted since the speaker's interests are whether to engage in an economic transaction rather than exchange ideas in an open, free society), *with* Waters, *supra* note 92, at 1630 (arguing that commercial speech should receive full First Amendment protection as core speech receives), *and* Troy L. Booher, *Scrutinizing Commercial Speech*, 15 GEO. MASON. U. C.R. L.J. 69, 74 (2004) (arguing that no justification exists for the differential treatment of

speech,[100] but a commonly accepted definition is speech that merely proposes a commercial transaction.[101] To review constitutional challenges to commercial speech, the Supreme Court developed a four-part test in the landmark 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[102] In *Central Hudson*, the Public Service Commission (PCS) of the State of New York banned advertising that promoted the electricity usage during the 1973 to 1974 winter fuel shortage; three years later, the PCS extended the ban in a policy statement that defined advertising as promotional (meant to induce the purchase of electricity) and informational (meant to encourage shifts of energy consumption).[103] While informational advertising was permitted, promotional advertising was entirely banned because the PCS was worried that such advertising would send misleading and contrary signals when energy conservation was necessary.[104] An electric company, Central Hudson Gas & Electric Corp., filed suit in state court, alleging that the ban unconstitutionally restricted commercial speech under the First Amendment.[105]

After the New York Court of Appeals upheld the ban,[106] the United States Supreme Court reversed, holding that the government could only ban forms of communication if such communications were more likely to deceive than inform the public.[107] The Court articulated a four-part analysis for appraising commercial speech restrictions.[108] Under this test, a court must analyze whether (1) the disputed commercial speech

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commercial speech and the doctrine should be abandoned), *and* David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 361 (1990) (arguing that the Supreme Court has failed to analyze commercial speech properly in accordance to First Amendment values and this speech category should be granted full protection).

100 Waters, *supra* note 92, at 1628 ("[A]t the most basic level, the Court has never been able to develop a satisfactory definition of commercial speech.").

101 *See* KILLION, *supra* note 93, at 2.

102 447 U.S. 557, 557 (1980). For a comprehensive overview of the doctrine's history leading up to *Central Hudson*, see McGowan, *supra* note 99, at 361–71 (examining the Court's case law and the slow development of constitutionally protected commercial speech up to *Central Hudson*).

103 Specifically, there was a statewide electrical shortage and the State wanted to discourage usage since the interconnected utility system did not have enough stocks to support customers' demands during the 1974 to 1975 winter. *Central Hudson*, 447 U.S. at 558–60.

104 The PCS was concerned that additional electricity would create higher production costs to generate output and result in increased rates for consumers, which would be inefficient and burdensome. *Id.* at 560.

105 *Id.*

106 The New York Court of Appeals ruled that "the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue." *Id.* at 560–61.

107 *Id.* at 562–63.

108 *Id.* at 564.

concerned lawful activity and is not misleading;[109] (2) whether the asserted government interest was substantial in regulating that speech;[110] (3) whether the regulation directly advanced the governmental interest asserted;[111] and (4) whether the regulation was not more extensive than necessary to serve that interest.[112] The Court elaborated the standard further by explaining:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[113]

The Court reasoned that New York's asserted interest of preventing utility rate inequities was not substantially advanced by a complete ban of promotional advertisements and struck down the ordinance.[114] In the years that followed, the *Central Hudson* test survived various challenges and remains the dominant test to survey commercial speech challenges, including the challenge brought in *Yim v. City of Seattle*.[115]

B. *The Facts of* Yim v. City of Seattle

The plaintiffs were four landlords: Chong and Marilyn Yim, Kelley Lyles, Eileen, LLC, and the Washington state Rental Housing Association

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109 *Id.* at 566. The government's power to regulate and restrict commercial speech is limited when the communication at issue is neither misleading nor related to unlawful activity. *Id.* at 564.

110 *Id.* ("The State must assert a substantial interest to be achieved by restrictions on commercial speech.").

111 The Court has struck down regulations that only had ineffective or remote support for the asserted state interests. *Id.* (referencing its decision in *Virginia State Board of Pharmacy*, where the advertising ban did not have a direct effect on the protection of the ethical or performance standards of a profession (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 769 (1976))).

112 *Id.* at 566.

113 *Id.* at 564.

114 *Id.* at 569 ("The link between the advertising prohibition and appellant's rate structure is, at most, tenuous."). The Court did find there to be a direct link between the State's asserted interest of energy conservation and the ban, but found that PCS did not satisfy its burden of showing that its interests would have been better served by a more limited restriction on promotional advertising and thus failed to satisfy the fourth prong. *Id.* at 569–71 ("In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.").

115 For a discussion of the enduring nature of the *Central Hudson* test, see *infra* Part III.

(RHA).[116] The RHA is a trade group that is comprised of over 5,300 landlord members, including the landlords here, that provides background screening products and services.[117] Among these include a screening report available for purchase. The report includes a criminal history section, which required an applicant to provide, with regard to any criminal offense, the jurisdiction, sentence length, probation length, and a short description of the offense.[118]

Chong and Marilyn Yim own a duplex and triplex, and regularly check for criminal backgrounds of prospective tenants.[119] The Yims were supposedly willing to consider individuals with a criminal history depending on the severity of the offense, the number of convictions, and any other factors considered relevant to both their personal safety and the safety of their other tenants.[120] Kelly Lyles rents out a house, and, as a single woman who frequently interacts with her tenants, conducts criminal background checks.[121] Lyles strongly prioritized her personal safety when selecting her tenants, but reportedly would have considered a tenant struggling with an addiction provided that they were in a recovery program.[122] Scott and Renee Davis operated Eileen, LLC, a seven-unit residential complex in Seattle.[123] The Davises were supposedly willing to consider applicants with a criminal history depending on the crime of conviction and the safety needs of their other tenants.[124] The plaintiff landlords collectively sued the City of Seattle in state court.[125]

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116 Appellants' Opening Brief at 11, Yim v. City of Seattle, No. 21-33567 (9th Cir. Mar. 21, 2023), *cert. denied*, No. 23-329, 144 S. Ct. 693 (2024).

117 Yim v. City of Seattle, No. C18-0736, 2021 WL 2805377, at *1, *7 (W.D. Wash. July 6, 2021), *aff'd in part, rev'd in part and remanded*, 63 F.4th 783 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024). A prospective tenant can request a comprehensive reusable screening report to give to a prospective landlord, which contains information like the tenant's criminal history, eviction history, credit history, and other factors. WASH. REV. CODE § 59.18.030(4) (2023); Appellants' Opening Brief, *supra* note 116, at 12.

118 Appellants' Opening Brief, *supra* note 116, at 12. To use such services, landlords must become RHA members and certify property ownership. *Id.*

119 *Id.* at 11–12.

120 *Id.*

121 *Id.* at 13.

122 The Brief does not indicate that Lyles would rent to individuals with criminal history. *Id.*

123 *Id.* at 12.

124 *Id.*

125 Yim v. City of Seattle, No. C18-0736, 2021 WL 2805377, at *1 (W.D. Wash. July 6, 2021), *aff'd in part, rev'd in part and remanded*, 63 F.4th 783 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

C. *The Lower Court Ruling*

After the City removed the case to federal court,[126] the parties filed cross motions for summary judgment.[127] The landlords argued before the district court that the inquiry and adverse action provisions of the Ordinance were facially unconstitutional.[128]

1. The Free Speech Claim and the Inquiry Provision

The landlords alleged that the inquiry provision violated their free speech rights on First Amendment grounds, arguing that the provision's complete ban on inquiring about criminal history "does not allow a residential landlord to base a rental decision upon personal safety, safety of other tenants, or revulsion due to convictions for sex offenses, crimes against children, or even hate crimes."[129] The landlords also claimed that the Ordinance regulated noncommercial speech, and strict scrutiny review applied.[130] In response, the City argued that the provision regulated conduct, not speech, so the First Amendment was not implicated.[131] The district court determined that the inquiry provision directly regulated the landlords' speech, and not just their conduct, so the Ordinance implicated the First Amendment.[132] The court also concluded that the Ordinance was a content-based restriction on speech because it specifically restricted Seattle landlords from asking about criminal history.[133]

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126 Answering Brief of City of Seattle, *supra* note 26, at 9.

127 Yim v. City of Seattle, 63 F.4th 783, 790 (9th Cir. 2023), *cert. denied*, No. 23-329, 144 S. Ct. 693 (2024).

128 *Yim*, 2021 WL 2805377, at *1. The landlords specifically sought to enjoin the City from enforcing the provision against anyone, not just the landlords themselves. *Id.* at *4. On a facial constitutional claim, a plaintiff has to show "that no set of circumstances exists under which [the Ordinance] would be valid." *Id.* (citing United States v. Stevens, 559 U.S. 460, 472 (2010)).

129 *See* Complaint at ¶ 22, Yim v. City of Seattle, 18-2-11073-4 (Sup. Ct. Wash. King Cty. May 1, 2018).

130 *Yim*, 2021 WL 2805377, at *5. For an in-depth discussion of the lower court ruling and the parties' arguments at the trial level, see Tom Stanley-Becker, *Breaking the Cycle of Homeless and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. PA. J.L. & PUB. AFF. 257, 298 (2022).

131 *Yim*, 2021 WL 2805377, at *5.

132 *Id.*

133 *Id.* Content-based restrictions on speech are laws that apply to particular speech because they regulate a topic discussed or an idea expressed. VICTORIA L. KILLION, CONG. RSCH. SERV., IF12308, FREE SPEECH: WHEN AND WHY CONTENT-BASED LAWS ARE PRESUMPTIVELY UNCONSTITUTIONAL 1 (2023). Content-based restrictions are presumed unconstitutional and are subject to strict scrutiny review, which is a high bar for the government to meet. *Id.*

Concluding that the Ordinance restricted commercial speech, the district court applied *Central Hudson* and held that the inquiry provision of the Ordinance survived intermediate scrutiny.[134] Looking to the first prong, the inquiry provision did not target speech that was either misleading or proposed illegal activity.[135] The district court then determined that the landlords "all but concede[d]" that the City's dual interests were substantial.[136] The Ordinance directly advanced those interests and the City proved by showing sufficient empirical evidence that Seattle landlords consider criminal history amongst potential tenants; the Ordinance "materially reduce[s] barriers to housing for those with criminal records."[137] The court then found that the inquiry provision satisfied the fourth prong.[138] Applying *Board of Trustees of the State University of New York v. Fox*,[139] the court rejected the landlords' argument that the City should have allowed the landlords to consider some degree of criminal history and held that the Ordinance permissibly burdened a limited amount of speech.[140] The City, in the court's view, made a valid legislative decision to ban a landlord's consideration of any criminal history, even if less burdensome methods could have existed, and the Ordinance reasonably fit the City's objectives.[141]

2. The Due Process Claim and the Adverse Action Provision

The landlords further argued that the adverse action provision violated their state and federal substantive due process rights because the Ordinance deprived them of their right to rent property to a tenant of

134 *Yim*, 2021 WL 2805377, at *7–13.

135 *Id.* at *7–8 ("Indeed, the central purpose of the Ordinance is to prevent landlords from learning and using *true* information about prospective occupants' criminal histories . . . [t]he speech at issue [] does not propose an illegal transaction.").

136 *Id.* at *8.

137 *Id.* at *9–12. The City's burden was not a heavy one, and it only had to show that it did not enact the Ordinance based on mere speculation. *Id.* at *9 (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001)); *see also* Stanley-Becker, *supra* note 130, at 296–300 (explaining the nuances of the lower court ruling).

138 *Yim*, 2021 WL 2805377, at *12–13.

139 492 U.S. 469, 469 (1989) (holding that government restrictions on commercial speech do not have to be "the least restrictive means of achieving the government interests asserted").

140 *Yim*, 2021 WL 2805377, at *13.

141 *Id.* ("Reasonable people could disagree on the best approach, but the Court's role is not to resolve those policy disagreements; it is to determine whether there are numerous obvious and less burdensome methods of achieving *the City's* objectives.").

their choosing.[142] The two parties disagreed over which standard of review should be applied.[143] The landlords argued that because a property right was involved, the stricter "substantially advances" test is applicable, and the court must determine whether the Ordinance was "effective in achieving some legitimate public purpose."[144] The City argued the more legislatively deferential rational basis test was applicable, and that the only relevant analysis for a due process claim is the Ordinance's actual purpose, not the effectiveness in achieving that purpose.[145] The district court agreed with the City.

Relying on *Village of Euclid v. Ambler Realty Co.*,[146] the district court employed this rational basis test and determined that the landlords failed to show that the Ordinance was unconstitutional on its face.[147] The court found that the City's reasons for enacting the statute were legitimate and that the adverse action provision directly advanced those legitimate purposes, thus satisfying rational basis review.[148] The district court granted the City's summary judgment motion and denied the landlords' motion.[149] The landlords appealed the district court's ruling on both provisions to the Ninth Circuit.[150]

D. *The Appeal*

On the inquiry provision, the plaintiff-landlords reaffirmed their lower court argument that the Ordinance was unconstitutional on free

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142 *Id.* at *1–2. The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. After certifying several questions regarding the plaintiffs' state substantive due process claims to the Washington Supreme Court, the state court found that the Washington Constitution provides the same protections as the Fourteenth Amendment. *See Yim*, 2021 WL 2805337, at *2; *see also* WASH. CONST. art. I, § 3 (2024).

143 *Yim*, 2021 WL 2805377, at *3.

144 *Id.* (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005)).

145 *Id.*

146 In *Euclid*, the Supreme Court held that a municipal ordinance does not violate a property owner's substantive due process rights unless it is "clearly arbitrary and unreasonable." 272 U.S. 365, 395 (1926).

147 *Id.* The Supreme Court in *Lingle v. Chevron U.S.A. Inc.* determined that the "substantially advances" test is not the correct one when evaluating challenges to government regulation, and instead, courts must "defer to legislative judgements about the need for, and the likely effectiveness of, regulatory actions." *Id.* (quoting *Lingle*, 544 U.S. at 545). This reasoning falls in line with Ninth Circuit jurisprudence, where the rational basis test is used to evaluate property-based substantive due process cases. *Id.*

148 *Id.*

149 *Id.*

150 Yim v. City of Seattle, 63 F.4th 783, 791 (9th Cir. 2023), *cert. denied*, No. 23-329, 144 S. Ct. 693 (2024).

speech grounds.[151] First, the landlords stated that they have a right to receive and access public information, which the Ordinance violated by preventing criminal background screening and impermissibly blocked information for a small, disfavored class (private landlords).[152] Second, the landlords argued that the district court correctly found the inquiry provision to be a content-based restriction on speech,[153] but the Ordinance regulates noncommercial speech.[154] Therefore, the court incorrectly applied intermediate scrutiny when it should have applied the more demanding strict scrutiny standard.[155] The landlords argued that because they ask about criminal history to protect rental income and to ensure personal safety,[156] which involves both commercial and noncommercial elements of the regulated speech, strict scrutiny should have been applied.[157]

Third, the landlords argued that even if the Ordinance does regulate commercial speech, the district court misapplied *Central Hudson*.[158] The

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151 Appellants' Opening Brief, *supra* note 116, at 17 ("The ban on inquiries into criminal history violates Appellants' First Amendment rights to share and receive public information . . . .").

152 *Id.* at 20–22. Specifically, the landlords argued that the Ordinance restricts their right to receive publicly accessible information, or criminal records, and that impermissibly blocks information for a small, disfavored class. *Id.* at 22. In *Sorrell*, the Supreme Court determined that denying a specific group access to public information simply because of how they planned to use that information required heightened judicial (strict) scrutiny. Sorrell v. IMS Health, Inc., 564 U.S. 552, 564 (2011).

153 *See* Appellants' Opening Brief, *supra* note 116, at 19–20. The landlords argued that because they cannot ask about a prospective tenant's criminal history yet are free to ask about other topics, such a prohibition constitutes a restriction on speech based on conduct, and the Ordinance's application then "hinges on the topic discussed." *Id.* at 20. For a discussion on content-based speech versus commercial speech and the applicable standards of review, see *supra* note 131 and accompanying text.

154 Appellants' Opening Brief, *supra* note 116, at 23–30.

155 *Id.* at 24–25 ("The district court wrongly held that the Ordinance is subject only to intermediate scrutiny because '[m]ost instances in which a landlord asks someone seeking to rent property about his or her criminal history are commercial speech.'"). Commercial speech is speech that does "no more than propose a commercial transaction." *Id.* at 23 (quoting Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 66 (1983)).

156 *Id.* at 25; *see supra* notes 119–124 and accompanying text (explaining the *Yim* plaintiffs' policy of inquiring about a prospective tenant's criminal history).

157 Appellants' Opening Brief, *supra* note 116, at 23. When commercial and noncommercial elements of speech are "inextricably intertwined," as the landlords argued was the case here, strict scrutiny applies to the whole. *Id.* (quoting Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 958 (9th Cir. 2012)). The landlords contended that, because they had noneconomic reasons for asking about criminal history, the district court erred in holding that the Ordinance exclusively regulated commercial speech. *Id.* at 30. Moreover, the landlords argued that their right to receive public information was impaired, warranting the application of strict scrutiny. *Id.* at 26.

158 *Id.* at 30. The landlords listed three reasons why the Ordinance fails even under intermediate scrutiny: (1) the Ordinance exempts the best housing option for formerly incarcerated persons, or public housing; (2) the Ordinance extends to speech that does not impede on the City's legitimate interests; and (3) there are less-restrictive alternatives available. *Id.*

landlords conceded on the first two prongs, but alleged that the Ordinance did not directly or materially advance the government's interests, as required by the third prong, since its exemptions rendered it underinclusive and overbroad.[159] Specifically, because the Ordinance does not apply to federally assisted housing, private landlords were impermissibly singled out when private and public housing are similarly situated and pose the same risk of undermining the City's interests.[160] The landlords then argued that the City could have addressed its interests through less restrictive alternatives on speech—such as passing a law that focused on restricting racial bias among the Seattle Police Department[161]—and the inquiry provision is not more extensive than necessary.[162]

The City maintained that the inquiry provision did not implicate the First Amendment,[163] and even if it did, that the Ordinance was a valid regulation of commercial speech because only speech arising between a landlord and a prospective tenant—a purely economic transaction—was targeted.[164] The City argued that the inquiry provision directly advanced the City's interests since, as the district court acknowledged,[165] there was ample evidence that criminal histories "pose[d] the largest barrier to those seeking housing and have a disparate impact on communities of color."[166] Finally, the City contended that the inquiry provision was not more extensive than necessary and the lower court was correct in holding

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159 Appellants' Opening Brief, *supra* note 116, at 31–36. For the listed four factors, see *supra* notes 109–112 and accompanying text.

160 The landlords argued further that subsidized, or public, housing would have *actually* served the City's interests in increasing housing options for formerly incarcerated individuals, "yet this [was] the very housing that the City ha[d] exempted." Appellants' Opening Brief, *supra* note 116, at 32.

161 *Id.* at 41 (arguing that the City could better achieve its goals of reducing housing barriers and racial discrimination through implementing laws that rectify the source of criminal history).

162 *Id.* at 38.

163 Answering Brief of City of Seattle, *supra* note 26, at 9. The City argued that the inquiry provision is an economic regulation of commercial *conduct*, not speech. *Id.* at 12–13 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." (quoting Sorrell v. IMS Health, Inc., 564 U.S. 552, 567 (2011))). The City contended that the district court mistakenly found that the First Amendment was implicated because the Ordinance regulated what landlords could ask. *Id.* at 15.

164 *Id.* at 15. The City argued that "[a]ny regulated speech [of the inquiry provision] is commercial—it occurs within the context of, and is inextricably linked to, commercial transactions between landlords and tenants." *Id.* at 17.

165 Yim v. City of Seattle, No. C18-0736, 2021 WL 2805377, at *10–11 (W.D. Wash. July 6, 2021) (discussing the evidence that the City relied on in enacting the Ordinance), *aff'd in part, rev'd in part and remanded*, 63 F.4th 783 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

166 Answering Brief of City of Seattle, *supra* note 26, at 27. Because the inquiry provision was supported by more than mere speculation and was rectifying real and legitimate harms, the third "directly advances" prong was satisfied. *Id.* (citing Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

that the inquiry provision was reasonable, and a more narrowly-drawn inquiry provision would not actually address the goal of reducing barriers and racial discrimination for those with a criminal history who are seeking housing.[167]

Regarding the adverse action provision, the landlords again raised a federal substantive due process claim, asserting that they have a fundamental right to exclude under the Fourteenth Amendment.[168] The landlords asserted that the district court incorrectly held that the Ordinance survives rational basis review,[169] and argued that a more stringent "substantially advances" test is the applicable standard of review.[170] A "substantially advances" test requires courts to engage in a means-ends test to determine whether the regulation of private property has some legitimate public purpose.[171] The City defended the lower court ruling, arguing that the asserted right is not fundamental and that the adverse action provision survives deferential rational basis review.[172]

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167 The City argued that the fourth *Central Hudson* prong only required a "reasonable fit" between the City's legitimate interests and the means used to serve such interests, which the Ordinance satisfied. *Id.* at 34 (citing Valle del Sol Inc. v. Whiting, 709 F.3d 808, 825 (9th Cir. 2013)).

168 Appellants' Opening Brief, *supra* note 116, at 45 ("By extinguishing landlords' fundamental right to exclude individuals with serious criminal histories, the Ordinance violates due process."). The landlords argued that a property owner's right to exclude is a fundamental right under the Fifth Amendment's Takings Clause. *Id.*; *see also* Cedar Point Nursery v. Hassid, 594 U.S. 139, 158 (2021) (emphasizing that the property right to exclude is not an empty formality). Therefore, strict scrutiny review was the applicable standard of review. Appellants' Opening Brief, *supra* note 116, at 45–46 (citing Washington v. Glucksberg, 521 U.S. 702, 722 (1997)).

169 They argued that because federally assisted housing providers and sex offenders are exempted from the Ordinance, the Ordinance itself is not rationally related to the City's legitimate interests of reducing barriers to housing and racial discrimination, nor the adverse action provision. Appellants' Opening Brief, *supra* note 116, at 51, 53–55, 57.

170 *Id.* at 47.

171 *Id.* ("The Supreme Court devised the 'substantially advances' test to ensure that zoning and land-use restrictions that impair an owner's right to make productive use of property relate to a legitimate end of government." (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).

172 The City argued that "[t]he adverse-action provision implicates landlords' economic and property-use interests, which are not fundamental rights under substantive due-process law." Answering Brief of City of Seattle, *supra* note 26, at 41 (citing Slidewaters LLC v. Wash. State Dep't of Lab. & Indus., 4 F.4th 747, 758 (9th Cir. 2021)).

E. *The Majority Opinion*

Reviewing de novo,[173] Judge Kim McLane Wardlaw delivered the majority opinion for the Ninth Circuit, partially reversing and partially affirming the lower court ruling.[174]

1. The Inquiry Provision

On the inquiry provision question, the court reversed the lower court ruling, holding that the Ordinance failed under *Central Hudson* and encroached on the landlords' First Amendment free speech rights.[175] The court then did not decide whether the Ordinance regulated commercial or noncommercial speech.[176] Since the Ordinance failed even under the laxer *Central Hudson* standard (intermediate scrutiny), it assumed without deciding that the inquiry provision restricted commercial speech, determining that "[b]ecause the 'outcome is the same whether a special commercial inquiry or a stricter form of judicial scrutiny is applied,' we do not need to decide whether the Ordinance regulates commercial or noncommercial speech."[177]

Addressing the first *Central Hudson* factor, the Ninth Circuit held that the Ordinance did not prohibit misleading speech,[178] and while criminal records themselves may be based on unlawful activity, the actual act of reviewing criminal records is a lawful activity.[179] The court reasoned

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173 Yim v. City of Seattle, 63 F.4th 783, 791 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

174 Judge Wardlaw also authored a separate concurring opinion, explicitly arguing that the Ordinance regulated commercial speech. *Id.* at 799. Judge Mark J. Bennett joined in the majority but wrote a separate partial concurrence, arguing that the Ordinance regulated noncommercial speech. *Id.* at 803. Judge Ronald M. Gould concurred and dissented in part. *Id.* at 809. Both parties filed unsuccessful petitions for certiorari with the Supreme Court. *See* Yim v. City of Seattle, No. 23-329, 2024 WL 218780 (U.S. Jan. 22, 2024) (mem.). On July 23, 2024, the Western District of Washington, on remand, issued a slip opinion that found the struck-down provision (the inquiry provision) was severable and did not render the Ordinance, in its entirety, unconstitutional. Yim v. City of Seattle, No. 18-cv-736, 2024 WL 3511112, at *1 (W.D. Wash. July 23, 2024). On October 10, 2024, the landlords filed an appeal that is currently pending in the Ninth Circuit.

175 *Yim*, 63 F.4th at 787.

176 *Id.* at 793. This is odd considering there were two votes—Judge Wardlaw and Judge Gould—in favor of holding that the Ordinance regulated commercial speech, and it is unclear why that was the outcome. *See infra* Sections II.F.1 (Judge Wardlaw's concurrence), II.G (Judge Gould's dissent).

177 *Yim*, 63 F.4th at 793 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011)).

178 *Id.* at 793–94. The Ninth Circuit found the City's argument to be circular and unconvincing. *Id.* at 793 n.15.

179 "A prohibition on reviewing criminal records therefore is not speech that 'proposes an illegal transaction' and does not escape First Amendment scrutiny under *Central Hudson*." *Id.* at 794 (quoting Valle del Sol Inc. v. Whiting, 709 F.3d 808, 821 (9th Cir. 2013)).

that the Ordinance satisfied the second prong: The City's interests—reducing housing barriers for those with criminal records and rectifying intentional and unintentional racial discrimination[180]—were substantial.[181] The bulk of the opinion was then spent discussing the last two prongs.

Under factor three, to prove that the Ordinance directly advanced its substantial interests, the City must show that (a) the harms it seeks to rectify are real, and (b) that the inquiry provision addresses those interests in a meaningful way.[182] The Ordinance also must not have contained provisions that "undermine and counteract" such interests.[183] The Ordinance's purpose was to resolve a homelessness crisis and fight racial discrimination, and the Ninth Circuit did not dispute the "real" nature of those harms.[184] The circuit court rejected the landlords' argument that the Ordinance's exemption for federally assisted housing rendered it impermissibly underinclusive,[185] finding that there was no cited evidence indicating that the Ordinance's effectiveness on private landlords was negatively impacted.[186] Instead, the court noted the exemption strengthened, rather than weakened, the Ordinance because preemption by federal law was avoided.[187] Therefore, the court found that the Ordinance directly advanced the City's interests.[188]

The final *Central Hudson* prong required the Ordinance to not be more extensive than necessary to accomplish the City's substantial

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180 *See id.* at 794–95.

181 *Id.* at 794.

182 "A restriction 'directly and materially advances' the government's interests if the government can show 'the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Yim*, 63 F.4th at 794 (quoting Fla. Bar. v. Went For It, Inc., 515 U.S. 618, 626 (1995)).

183 *Id.*

184 *Id.*

185 *See id.* at 795; *see also supra* note 160 and accompanying text (explaining the landlords' federal exemption argument on appeal). The court further noted that, looking to the language of the Ordinance, the federal exemption seemed to only apply to the adverse action provision and "[t]he only provision that would appear to exempt federal housing from the inquiry provision is the first exemption, which generally provides that the Ordinance 'shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law.'" *Yim*, 63 F.4th at 795 (quoting S.M.C. § 14.09.115(A)).

186 *Yim*, 63 F.4th at 795 ("While the Ordinance might better achieve its goals if it applied to more types of landlords, there is no evidence that exempting federal landlords from the adverse action provision undermines the effectiveness of subjecting private landlords to the inquiry provision.").

187 Under federal law, housing providers who receive federal assistance are required to automatically deny tenancy for prospective tenants with certain convictions, such as for a federal drug or sex offense. *Id.* (citing 24 C.F.R. § 982.553(a)(1)(ii)(C)). Had the City of Seattle enacted the inquiry provision without the federal exemption, the Ordinance would have been preempted by federal law and the City would have needed to revise it. *Id.*

188 *Id.*

interests.[189] The circuit court relied on its previous case of *Ballen v. City of Redmond*, which held that the court must "consider 'the availability of narrower alternatives' which accomplish the same goal, but 'intrude less on First Amendment rights.'"[190]

To determine whether a more limited restriction would serve the City's interests equally as well, the Ninth Circuit looked to similar ordinances in other jurisdictions.[191] None of them required a complete ban on inquiring about criminal history. The majority organized the other jurisdictions' ordinances into two categories: Type I and Type II.[192] Type I ordinances require landlords to conduct an initial screening of potential tenants without looking at their criminal history and to notify applicants whether they passed that initial screening, permitting a lookback period for certain conviction types and lengths.[193] Type II ordinances allow landlords to either (1) consider an applicant's entire criminal history, but complete a written individualized evaluation of the applicant and explain any rejection in writing; or (2) consider only a limited subset of offenses without any additional procedures.[194] Because the other ordinances permitted a landlord to inquire about a prospective tenant's most recent, serious offense, the court found the City of Seattle could have implemented a significantly less burdensome restriction on private landlords' speech that achieved the same goals.[195] The inquiry provision's complete ban was disproportionate to the City's interests, not narrowly tailored, and failed to survive intermediate scrutiny.[196]

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189 *Id.* at 796 ("In considering the 'fit between the legislature's ends and the means chosen to accomplish those ends,' the fit must not necessarily be the 'least restrictive means,' but 'reasonable' and through 'a means narrowly tailored to achieve the desired objective.'" (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989))).

190 *Id.* at 795 (quoting Ballen v. City of Redmond, 466 F.3d 736, 743 (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993)).

191 *Id.* Type II ordinances allow landlords to either consider an applicant's entire criminal history but complete a written individualized evaluation of the applicant and explain any rejection in writing, or consider only a limited subset of offenses without any additional procedures. *Id.* at 797; *see* PORTLAND, OR., CITY CODE § 30.01.086 (2025); MINNEAPOLIS, MICH., CITY CODE § 244.2030 (2024).

192 *Yim*, 63 F.4th at 796–97.

193 *Id.*; *see* COOK CNTY., ILL. CODE § 42-38 (2024); S.F., CAL., POLICE CODE art. 49 (2024); D.C. CODE §§ 42-3541.01–42-3541.09 (2024); DETROIT, MICH., CITY CODE § 22-8-5 (2024); N.J. ADMIN. CODE §§ 13:5-1.1–13:5-2.7 (2025). The Ninth Circuit cited the San Francisco Administrative Code, but should have cited the Police Code, which sets out the procedures for criminal background screening in housing. *Yim*, 63 F.4th at 797 (citing S.F., CAL., ADMIN. CODE §§ 87.1–.11 (2024)).

194 *Yim*, 63 F.4th at 797; *see* PORTLAND, OR., CITY CODE § 30.01.086; MINNEAPOLIS, MINN. CITY CODE § 244.2030.

195 *Yim*, 63 F.4th at 797.

196 *Id.* at 798 ("Because a number of other jurisdictions have adopted legislation that would appear to meet Seattle's housing goals, but is significantly less burdensome on speech, we conclude

2. The Adverse Action Provision

The Ninth Circuit unanimously affirmed the district court ruling that the adverse action provision was constitutional,[197] rejecting the landlords' argument that they had a fundamental right to exclude under the Fourteenth Amendment Due Process Clause.[198] As such, the court applied rational basis review.[199] Rational basis review is deferential to legislative decisions, and here, the City only needed to show a legitimate reason for enacting the Fair Chance Ordinance.[200] The City's dual goals of reducing barriers to housing and combating racial discrimination were enough reason to determine that the Ordinance was logically connected to accomplishing those goals.[201] The adverse action provision was deemed constitutional, and the lower district court ruling was affirmed.[202]

F. *The Concurrences*

Judge Wardlaw and Judge Mark J. Bennett each concurred, addressing the issue the majority opinion avoided. Taking the unusual step of writing a concurrence to her majority opinion, Judge Wardlaw argued that the Ordinance regulates commercial speech; demonstrating why the majority opinion had not reached that conclusion, Judge Bennett concurred to argue that it regulated noncommercial speech.[203]

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that the inquiry provision at issue here is not narrowly tailored, and thus fails intermediate scrutiny.").

197 *Id.* at 799. None of the three judges concurred or dissented on the adverse action provision. *Id.* at 787.

198 *Id.* at 798 ("The landlords argue that we should apply strict scrutiny to the Ordinance because the right to exclude is 'fundamental.' However, the Supreme Court has never recognized the right to exclude as a 'fundamental' right in the context of the Due Process Clause.").

199 *Id.*

200 *Id.* at 799 (citing Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234 (9th Cir. 1994)).

201 *Id.*

202 *Id.* ("[W]e find the adverse action provision easily survives rational basis review.").

203 *Id.* at 800 (Wardlaw, J., concurring); *id.* at 803 (Bennett, J., concurring in part).

1. The Ordinance Regulates Commercial Speech

Judge Wardlaw agreed with the district court that the Ordinance regulates commercial speech.[204] Relying on the Supreme Court's three-part test in *Bolger v. Youngs Drug Products Corp.*,[205] Judge Wardlaw argued that the core of a rental application is economic since it proposes no more than a commercial transaction and relates to the specific product of rental housing, satisfying the first two *Bolger* components that the speech is an advertisement and refers to a particular product.[206] On the third factor of whether the speaker has an economic motive, Judge Wardlaw determined that landlords are primarily motivated by economic concerns when inquiring about or screening for a prospective tenant's criminal history,[207] regardless of the landlords' proffered arguments of their concern for their tenants' and their own safety.[208] Therefore, the Ordinance regulated commercial speech and intermediate scrutiny applied.[209]

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204 *Id.* at 800 (Wardlaw, J., concurring) ("The district court correctly concluded that the very core of the Ordinance here—a prohibition on requiring disclosure or making inquiries about criminal history generally on rental applications—falls squarely within the realm of commercial speech.").

205 463 U.S. 60, 66–67 (1983). The 1983 case lays out a three-factor test clarified by the Ninth Circuit: (1) the speech is an advertisement; (2) the speech refers to a particular product; and (3) the speaker has an economic motivation. *Id.*; *see* Hunt v. City of Los Angeles, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger*, 463 U.S. at 66–67). The presence of all three factors strongly supports an inference that the type of speech regulated is commercial. *Yim*, 63 F.4th at 800 (citing *Bolger*, 463 U.S. at 67).

206 *Bolger*, 463 U.S. at 66. Judge Wardlaw claimed that the core of a rental application is economic, even if it is not a traditional advertisement. *Yim*, 63 F.4th at 800 (citing United States v. United Foods, Inc., 533 U.S. 405, 409 (2001)). She further argued that a rental application that allows landlords to make inquires on criminal history relates specifically to the product of "rental housing." *Id.* (citing *Bolger*, 463 U.S. at 66).

207 "Courts have generally found that speech associated with deciding whether to engage in a particular commercial transaction—such as extending a lease, obtaining credit reports, or securing real estate—is motivated primarily by economic concerns." *Yim*, 63 F.4th at 800–01. In *San Francisco Apartment Ass'n v. City of San Francisco*, another case cited by Judge Wardlaw, the Ninth Circuit held that all speech between a landlord and tenant relates entirely to an economic or commercial transaction. 881 F.3d 1169, 1176 (9th Cir. 2018).

208 Judge Wardlaw contended that even with safety concerns, all the information landlords attempt to extract from prospective tenants relates to economic decisions of whether or not to enter a contractual relationship. *Yim*, 63 F.4th at 802. Moreover, Judge Wardlaw noted that the landlords' arguments on appeal do not identify a single part of a rental transaction that is noncommercial in nature. *Id.*

209 *Id.* at 803.

2. The Ordinance Regulates Noncommercial Speech

Judge Bennett argued that the Ordinance was a content- and speaker-based restriction on noncommercial speech and strict scrutiny applied.[210] Judge Bennett contended that the landlords were motivated by noneconomic reasons to consider a prospective tenant's criminal history, so the Ordinance governed noncommercial speech.[211] Therefore, *Sorrell v. IMS Health, Inc.* was the controlling decision, not *Central Hudson*.[212] In *Sorrell*, the Supreme Court held that a Vermont law—which prohibited pharmacies from selling prescriber-identifying information to pharmaceutical manufacturers, but allowing such information to be sold to academic researchers—was unconstitutional, as it disfavored specific speakers and speech with a particular content.[213] Judge Bennett reasoned that *Yim* mirrors *Sorrell* because the Ordinance barred a certain group's (the landlords') access to and use of publicly available information and that was a content- and speaker-based restriction.[214] Judge Bennett ultimately opined that the Ordinance failed under both strict scrutiny review and intermediate

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210 *Id.* (Bennett, J., concurring in part).

211 Because commercial speech is inextricably intertwined with noncommercial speech, the commercial speech at issue becomes fully protected speech under the First Amendment. *Id.* at 804–05 (citing Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 958 (9th Cir. 2012)). Judge Bennett claimed that a landlord motivated by safety reasons is not engaging in commercial speech when considering a prospective tenant's criminal history, so the Ordinance does not regulate commercial speech and *Bolger* is not necessary. *Id.* (citing IMDb.com Inc. v. Becerra, 962 F.3d 1111, 1122 (9th Cir. 2020)).

212 *Id.* at 803 ("Thus, under Sorrell, a law that imposes content-and speaker-based restrictions on noncommercial speech is subject to strict scrutiny."); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

213 *Sorrell*, 564 U.S. at 563–64.

214 *Yim*, 63 F.4th at 803–04; *see also supra* notes 151–162 (discussing the plaintiff-landlords' arguments on appeal). In Judge Bennett's view, the Fair Chance Ordinance allowed the public to access and use criminal records, but landlords were not allowed to do so. *Yim*, 63 F.4th at 804 ("Indeed, this criminal history information is available to everyone *except* a landlord seeking information about a prospective tenant." (footnote omitted)). Laws that regulate speech based on content trigger strict scrutiny because the text applies to speech based on subject matter, topic, or viewpoint of that speech. KILLION, *supra* note 133, at 1. Laws that restrict or compel speech can potentially prevent certain ideas or viewpoints from public debate, contrary to the purpose of the First Amendment. *Id.*; *see also* Abrams v. United States, 250 U.S. 616, 630–31 (Holmes, J., dissenting) (explaining the "marketplace of ideas" theory).

scrutiny review[215] because it did not directly advance the City's asserted interests,[216] and its restrictions on speech are not narrowly tailored.[217]

G. *The Dissent*

Judge Ronald M. Gould concurred in part and dissented in part. He agreed that the adverse action provision did not violate the landlords' substantive due process rights.[218] He agreed with Judge Wardlaw that the Ordinance regulated commercial speech;[219] however, he argued that the inquiry provision survived intermediate scrutiny.[220]

Judge Gould highlighted four main areas where the majority opinion fell short.[221] First, he contended that the majority offered no evidence that the alternative housing ordinances would adequately, if at all, serve the City's dual goals:

> 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. The opinion's reasoning rests entirely on one federal panel's take as to what works in housing policy

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215 *Yim*, 63 F.4th at 805. However, even though Judge Bennett said strict scrutiny applied, he did not analyze the Ordinance as such, but instead critiqued the final two *Central Hudson* factors. *Id.* ("The Ordinance then necessarily fails strict scrutiny, which I believe is applicable. To reinforce that the Ordinance would not survive strict scrutiny, I highlight other reasons why it fails intermediate scrutiny.").

216 The concurrence argued that because landlords can consider sex offender registry information and take adverse action, the law contradicted the City's stated goals and the City did not justify why a landlord could consider a sex offense but not murder, for example. *Id.* at 805–06. The Ordinance's exceptions then undermined the City's stated interests. *Id.* at 806. He also agreed with the landlords' argument on appeal that the Ordinance was underinclusive because it exempted federally assisted housing providers, and further contended that a landlord can ask about criminal conduct and not criminal convictions, which was illogical. *Id.*; *see supra* note 159.

217 *Yim*, 63 F.4th at 808–09. Specifically, Judge Bennett argued that the Ordinance's restrictions on speech were overbroad since it banned a significant amount of noncommercial speech (such as asking other people, who are not the prospective tenant, about that tenants' criminal history). *Id.* at 808. Judge Bennett also argued that because alternatives, like inquiring only about violent offenses, existed, the City's interests would still be protected and thus the Ordinance does not survive the fourth *Central Hudson* prong. *Id.* at 809.

218 *Id.* at 809 (Gould, J., concurring in part and dissenting in part).

219 *Id.*

220 *Id.* Judge Gould agreed with Judge Wardlaw's concurrence that the Ordinance regulated commercial speech. *Id.* He further supported the majority's finding that Seattle adequately showed that the Ordinance "directly advances" the City's dual goals. *Id.*

221 *Id.* at 810–13.

> based on summaries of statutes alone. *How is this anything other than a federal court "second-guess[ing]" the considered judgment of a democratically elected local government*?[222]

Allowing landlords' increased access, he argued, would be counterproductive and would reduce the Ordinance's effectiveness at prohibiting discrimination.[223] Second, relying on *Hunt v. City of Los Angeles*, Judge Gould argued that commercial speech restrictions have only been struck down by the Ninth Circuit when they were "substantially excessive" and "disregard[ed] far less restrictive and more precise means."[224] The core of the Ordinance was to reduce housing discrimination based on *all* types of criminal records, including newer and violent records, so the inquiry provision's blanket ban was not substantially excessive.[225]

Third, he argued that, contrary to the majority's conclusion,[226] the City carefully considered less restrictive alternatives before enacting the inquiry provision.[227] As Judge Gould pinpointed and the public record showed, the inquiry provision originally included a lookback period for recent offenses; at a public hearing to consider the lookback period, a proponent of a blanket ban argued that the widespread accessibility to new and old criminal records only serves to "open the door" to unwarranted discrimination.[228] The city council supported this perspective, and the proposal to eliminate the lookback period was supported unanimously.[229] In Judge Gould's view, the majority opinion "may [have disagreed] with Seattle's read of the evidence, but . . . [t]hat is an unpersuasive basis for overruling Seattle's considered effort to tackle a vexing local issue."[230]

Finally, he analogized *Yim* to a Third Circuit case that upheld a similar provision of a Philadelphia ordinance that prohibited employers

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222 *Id.* at 810 (internal citations omitted) (emphasis added) (quoting *id.* at 795 (majority opinion); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989)).

223 *Id.*

224 *Id.* at 810 (quoting Hunt v. City of Los Angeles, 638 F.3d 703, 717 (9th Cir. 2011)).

225 *Id.* at 811.

226 *See id.* at 795 (majority opinion).

227 *Id.* at 811 (Gould, J., concurring in part and dissenting in part).

228 *Id.*; *see also* City of Seattle, *Civil Rights, Utilities, Economic Development and Arts Committee 8/8/17* at 1:02:15–1:17:50, SEATTLE CHANNEL (Aug. 8, 2017), https://www.seattlechannel.org/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79673 [https://www.seattlechannel.org/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79673] (discussing an amendment to eliminate a lookback period in the Ordinance, which was ultimately voted to pass).

229 SEATTLE CHANNEL, *supra* note 228, at 1:17:52–1:17:55.

230 *Yim*, 63 F.4th at 811–12.

from asking about prospective job applicants' salary histories in order to prevent sex discrimination.[231] In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, the Third Circuit found that Philadelphia's ordinance regulated commercial speech and then applied the *Central Hudson* factors, holding that it survived intermediate scrutiny.[232] Unlike in the *Yim* majority, the Third Circuit found the provision was narrowly tailored to fit Philadelphia's dual goals (remedying wage discrimination and promoting wage equity), since employers remained free to inquire about any other topic except salary history.[233]

Judge Gould argued that the Ninth Circuit should have followed the Third Circuit's reasoning: the Ordinance only banned a landlord's inquiry about a singular topic (criminal history) and, like the Philadelphia ordinance, did not prevent a landlord from inquiring about a prospective tenant's rental, income, or job history, nor from requesting character references to inquire about potential unsafe behavior.[234] Like the Philadelphia employers in *Greater Philadelphia*, Judge Gould asserted that Seattle landlords had "ample alternatives" to inquire about a prospective tenant's ability to execute a lease.[235] Judge Gould rejected the notion that the circuit court should not evaluate the effectiveness of the landlords' proffered less restrictive alternatives—such as allowing landlords to consider recent crimes—because that was a policy analysis that should be left to the legislature.[236] Therefore, the inquiry provision's blanket ban was narrowly tailored to the City's aims and survived intermediate scrutiny.[237]

III. ANALYSIS

A. *The Conundrum of* Central Hudson

In *Central Hudson*, the Court decided that commercial speech was subject to intermediate scrutiny, which acts as a middle tier between

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231 *See id.* at 812 ("I believe the Third Circuit's reasoning is far more grounded in both the facts of the case and in commercial speech precedent than that of today's result."); Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116, 121 (3d Cir. 2020).

232 *Greater Phila. Chamber of Com.*, 949 F.3d at 140.

233 *Id.* at 154–55.

234 *Yim*, 63 F.4th at 812.

235 *Id.* at 812 (quoting Fla. Bar. v. Went For It, Inc., 515 U.S. 618, 634 (1995)).

236 *Id.* at 812–13.

237 *Id.* at 812.

rational basis and strict scrutiny review.[238] The tiers found their beginning in the Equal Protection and Due Process Clauses.[239] Rational basis is the most deferential of the three tiers; a regulation must merely be "rationally related to a legitimate government purpose."[240] This level is premised on the notion of judicial restraint:[241] Courts will rarely second guess the evidentiary record underlying a regulation nor invalidate a democratically elected legislative action.[242] When the governmental regulation impedes on a fundamental right or impermissibly targets a protected class, however, courts will employ the most stringent tier: strict scrutiny.[243] Strict scrutiny—the level used to evaluate most governmental restrictions on speech[244]—requires a law to be "narrowly tailored to further compelling government interests."[245] To put it plainly, the government must ensure that the law is the least restrictive alternative.[246]

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238 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980) (Blackmun, J., concurring). In their most basic form, the three levels of scrutiny function as forms of constitutional analysis by courts. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784; *see also* R. Randall Kelso, *Exacting Scrutiny Used in Current Supreme Court Doctrine*, 127 PENN STATE L. REV. 375 (2023) (providing a complex analysis of the Supreme Court's various standards of review beyond the three traditional tiers).

239 Bhagwat, *supra* note 238, at 784; Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016) (explaining how regulations and classifications must be rationally related as a matter of due process and equal protection).

240 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 565 (5th ed. 2015) (emphasis omitted).

241 *Id.* at 707; Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1365–66 (2003) ("Rationality review is often characterized by an indulgent inference in which the Court asks whether the legislature *could* reasonably have concluded, based mere supposition, that the classification would further *any* legitimate purpose, whether or not it is a purpose anyone actually thought of at the time.").

242 CHEMERINSKY, *supra* note 241, at 707 ("[T]he Court allows the more democratic branches of government to make decisions except in areas where there is reason for heightened judicial scrutiny. Legislation often involves arbitrary choices favoring some over others, and judicial deference leaves these decisions to the political process." (footnote omitted) (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981))). Rational basis has been critiqued for having "gone too far in its deference," since a legitimate government interest can essentially be proffered for any law. *Id.* at 707–08; *see also* Todd Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 494 (2017); Nachbar, *supra* note 239 (noting that rational basis review is well known for essentially being "no review at all" (quoting FCC v. Beach Commc'ns, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring))).

243 CHEMERINSKY, *supra* note 241, at 567, 707.

244 Hunter B. Thomson, *Whiter* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 172–73 (2013); *see also supra* notes 93–96.

245 CHEMERINSKY, *supra* note 241, at 567 (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

246 *Id.* (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)).

Deemed as "strict in theory and fatal in fact," government regulations rarely survive this level of review.[247]

Intermediate scrutiny review was first developed by the Court in the context of the Equal Protection Clause in the 1976 case *Craig v. Boren*.[248] *Craig* held that gender classifications were subject to heightened, but not strict, scrutiny.[249] A law survives this level of review only when it is "substantially related to an important government purpose";[250] intermediate review purports to create a lower obstacle for the government to overcome.[251] The Court has never fully defined the intermediate standard of review, and, as Justice William Rehnquist noted in his *Craig* dissent, it is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices."[252] This criticism rings true in the commercial speech setting.[253]

However, much of the confusion surrounding *Central Hudson* stems from the malleability of the fourth prong—a regulation must be no "more extensive than is necessary" to further the government's interests[254]—which has rendered the appropriate level of scrutiny unclear.[255] Instead of ensuring that courts can consistently apply

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247 Herz, *supra* note 242, at 1365 (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

248 Craig v. Boren, 429 U.S. 190 (1976).

249 *Id.* Similar to the commercial speech context, a sex classification law needs to be substantially related to an important state interest rather than narrowly tailored to a compelling interest (as required in strict scrutiny review). Deborah Brake, Donna Lenhoff, Sharon Elizabeth Rush, Elizabeth Schneider & Ann Shalleck, *Centennial Panel Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER & L. 1, 7 (1997).

250 CHEMERINSKY, *supra* note 241, at 566.

251 Marc Jonathan Blitz, *The Pandora's Box of 21st Century Commercial Speech Doctrine: Sorrell, R.A.V., and Purpose-Constrained Scrutiny*, 19 NEXUS 19, 30 (2014).

252 *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting); *see also* Blitz, *supra* note 251, at 14. Justice Rehnquist also dissented in *Central Hudson*, arguing that the four-part test granted commercial speech First Amendment protection that was "virtually indistinguishable from that of noncommercial speech," and essentially unlocked a "Pandora's Box." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting); *see also* Kate Maternowski, Note, *The Commercial Speech Doctrine Barely Survives* Sorrell, 38 J.C. & U.L. 629, 635 (2012) ("The *Central Hudson* test has had its critics on the Court ever since its inception.").

253 The Supreme Court Justices were, and still are, conflicted on how much First Amendment protection is warranted for commercial speech. Pomeranz, *supra* note 97, at 392; *see also id.* at 392–93 & 392 n.14 (listing out the various Justices who disagree over the application of the *Central Hudson* test in the Supreme Court's jurisprudence). The only prong the Justices have agreed on is the first one, where the government has a right to restrict misleading and deceptive commercial speech. *Id.* at 414.

254 *Cent. Hudson*, 447 U.S. at 566.

255 *See* Kayla R. Burns, *Reducing the Inherent Malleability of Mid-Level Scrutiny in Commercial Speech: A Proposed Change to the Second, Third, and Fourth Prongs of the* Central Hudson *Test*,

intermediate review to commercial speech cases,[256] the multi-factor test has become a "sliding scale under which the level of scrutiny is dependent upon the governmental interest being asserted."[257]

Looking to the fourth prong's language of "no more extensive than necessary,"[258] the *Central Hudson* Court found that an excessive restriction cannot survive if the governmental interest could be served as well by a more limited alternative.[259] In subsequent cases, the Court has either given legislative deference or followed an exceedingly rigid standard when considering the fourth prong, with a growing preference for the latter.[260] For example, in the 1989 case of *Board of Trustees of State University of New York v. Fox*, the Court held that the fourth prong only requires a reasonable fit and a law does not need not be the least restrictive version.[261] On the other hand, in the 1995 and 2001 cases of *Rubin v. Coors Brewing Co.* and *Lorillard Tobacco Co. v. Reilly*, the Court struck down both laws at issue on the grounds that neither were "sufficiently tailored" to the government's goals, and the government could have considered less restrictive alternatives.[262] This rigid standard mirrors a "least restrictive means" test, which is employed in a strict scrutiny

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44 LOY. L.A. L. REV. 1579, 1583 (2011) (explaining that the key issue surrounding the application of the fourth prong is that courts do not know the appropriate level of scrutiny). This is not unique to the commercial speech doctrine, as First Amendment jurisprudence, taken as a whole, is embroiled with differing scrutiny levels. John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 2 (2023) ("The Supreme Court's First Amendment jurisprudence instead relies on a dizzying array of standards of review, including strict, exacting, intermediate, and rational basis review.").

256 Waters, *supra* note 92, at 1628–29 (explaining that *Central Hudson* caused unpredictable results and guidelines, largely due to the Court's inability to fully define commercial speech).

257 Andrew S. Gollin, *Improving the Odds of the* Central Hudson *Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 MARQ. L. REV. 873, 876 (1998).

258 *Central Hudson*, 447 U.S. at 572.

259 *Id.* at 564.

260 *See* Pomeranz, *supra* note 99, at 391 ("The U.S. Supreme Court has not upheld a commercial speech restriction since 1995." (citation omitted)); *see also* Waters, *supra* note 92, at 1629 ("Despite the incongruous results produced by the *Central Hudson* test, recent cases may indicate that the Court is embarking on a new era of greater protection for commercial messages.").

261 Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989) (holding that the fourth prong only requires a reasonable fit between a legislature's means and ends, and upholding a university resolution banning commercial businesses from operating on campus); *see also* Fla. Bar v. Went For It, Inc. 515 U.S. 618, 632 (1995) (finding that the fourth prong does not require the government to use the "least restrictive means" to restrict speech, and upholding a law that banned targeted direct mail solicitation by personal injury lawyers within thirty days of the accident).

262 Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down a law that banned beer label advertising because less restrictive alternatives existed, and employing a stringent analysis of the fourth *Central Hudson* "not more extensive than necessary" prong); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (striking down a law banning outdoor advertising of tobacco within 1,000 feet of a playground on grounds that the law was not sufficiently tailored to the government's interest of preventing underage tobacco use).

context.[263] Although the Court explicitly decided that the First Amendment grants lesser protection for commercial speech and that *Central Hudson* remains good law,[264] the test's ambiguity has sparked a swinging pendulum between a more deferential application (a reasonable fit) and a more stringent application of intermediate review (the least restrictive means).[265]

In *Yim*, Judge Wardlaw employed an interpretation of *Central Hudson*'s fourth prong that is more akin to strict scrutiny review. By considering other jurisdictions' ordinances and determining the City of Seattle could have implemented a less burdensome restriction rather than a complete ban on landlords' ability to inquire about a prospective tenant's criminal history,[266] the Ninth Circuit held that the inquiry provision was not narrowly tailored to fit the City's objectives.[267] In the court's view, the City essentially did not use the "least restrictive means" when enacting the Ordinance, mirroring a strict scrutiny analysis despite analyzing the Ordinance under an intermediate scrutiny analysis.[268] In his concurrence, Judge Bennett argued that *Central Hudson* was not the correct test to apply since the Ordinance regulated noncommercial speech, so its constitutionality must be analyzed under strict scrutiny.[269] In contrast, Judge Gould argued that the more deferential interpretation of intermediate review was warranted.[270] In his view, there was a reasonable fit between the City's dual goals and the inquiry provision's blanket ban and the Ninth Circuit should engage in the more deferential form of intermediate review.[271]

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263 *See supra* notes 245–247.

264 *Cent. Hudson*, 447 U.S. at 573.

265 Blitz, *supra* note 251, at 31 ("[T]he intermediate scrutiny of *Central Hudson* is a bit of a gray zone. . . . There is no presumption of constitutionality or unconstitutionality—and judges may well disagree sharply about the result this four-part test should produce."); Matthew Passalacqua, *Something's Brewing Within the Commercial Speech Doctrine*, 46 VALPARAISO U. L. REV. 607, 643–48 (2012) (detailing the two different standards used by the Court).

266 Yim v. City of Seattle, 63 F.4th 783, 796–98 (9th Cir. 2023), *cert. denied*, No. 23-329, 2024 WL 218780 (U.S. Jan. 22, 2024).

267 *Id.* at 798.

268 *Id.* at 795–98.

269 *Id.* at 803 (Bennett, J., concurring in part).

270 *Id.* at 809 (Gould, J., concurring in part and dissenting in part).

271 *Id.* at 812.

B. *The Less Exacting Intermediate Scrutiny Interpretation Reigns Supreme*

In *Fox*, the Supreme Court rejected the notion that *Central Hudson* imposed a "least restrictive means test," and instead interpreted the fourth prong as a much more flexible standard.[272] *Fox* concerned a university resolution that prohibited the operation of private commercial enterprises on campus with the exception of a few categories.[273] Writing for the Court, Justice Antonin Scalia noted that as long as government restrictions—in both commercial and noncommercial speech cases[274]—were "narrowly tailored" to a substantial government interest, there was no need for a municipality to eliminate all alternatives that imposed a lesser burden on speech.[275] "Narrowly tailored" is traditionally used in a strict scrutiny setting and the government must use least restrictive means when enacting a law;[276] however, Justice Scalia emphasized that under the fourth *Central Hudson* prong, "narrowly tailored" simply requires a reasonable fit between a legislature's ends and means, reflecting an intermediate level of review.[277] *Fox* reaffirmed the subordinate constitutional position of commercial speech,[278] and fundamentally

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272 Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) ("[T]he application of the *Central Hudson* test was 'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech—which we held does *not* require the least restrictive means." (quoting S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 n.16 (1984))). It is important to note that the Court used the "least restrictive" requirement prior to *Fox*—in *Central Hudson* and *Zauderer*—and *Fox* fundamentally changed the application of the fourth prong. Todd J. Locher, Comment, Board of Trustees of the State University of New York v. Fox*: Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335, 1344 & n.89 (1990).

273 *Fox*, 492 U.S. at 471–72. The resolution permitted private businesses who worked in "food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services, and cultural events." *Id.* at 472 (quoting the language of the State University of New York's regulation). A housewares company that hosted Tupperware demonstrations on campus and did not fall under these categories filed a lawsuit alleging a First Amendment free speech violation. *Id.*

274 *Id.* at 477–78 ("We have refrained from imposing a least-restrictive means requirement—even when core political speech is at issue . . . [w]e uphold such restrictions so long as they are 'narrowly tailored' to service a significant government interest" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

275 *Id.* at 478.

276 CHEMERINSKY, *supra* note 242, at 567. The Court has used the phrase "narrowly tailored" in both strict and intermediate scrutiny contexts, which further adds to the confusion surrounding the differences between the two levels of scrutiny. *Id.*

277 *Fox*, 492 U.S. at 480–81.

278 *Id.* ("[W]e think it would be incompatible with the asserted 'subordinate position [of commercial speech] in the scale of First Amendment values' to apply a more rigid standard in the present context." (footnote omitted)).

changed *Central Hudson*'s fourth prong, allowing more burdensome commercial speech regulations to survive judicial review.[279]

In *Yim*, Judge Gould followed *Fox*. The dissent looked to the Third Circuit case of *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, which presented a similar First Amendment challenge.[280] The Philadelphia ordinance—which included an inquiry provision banning employers from inquiring about prospective employees' wage histories—was enacted to reduce racial and gender wage gaps.[281] Deciding that the ordinance regulated commercial speech and applying *Central Hudson*,[282] the Third Circuit found that the ordinance was narrowly tailored as it "simply prohibit[ed] employers from inquiring about wage history at a specific point in time[,]" and reasonably carried out the government's goal of dismantling the wage gap.[283] The Third Circuit also affirmed that *Central Hudson* does not require a municipality to address a certain harm completely nor does proposed legislation need to be the least restrictive measure, echoing *Fox*.[284] If *Fox* controls, the Third Circuit ruling reflects the correct intermediate scrutiny analysis that the Ninth Circuit should have employed in *Yim*.

Judge Gould viewed the Seattle Ordinance in the same light. The blanket ban on landlords inquiring about criminal history was not more extensive than necessary and was reasonably related to serve the City's substantial dual goals of breaking down housing barriers and combating racial discrimination.[285] Currently, sixteen jurisdictions have passed or

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279 David Rownd, *Muting the Commercial Speech Doctrine:* Board of Trustees of the State University of New York v. Fox, *109 S. Ct. 3028 (1989)*, 38 WASH. U. J. URB. & CONTEMP. L. 275, 276 (1990) ("[The] Supreme Court retreated from previous formulations of the doctrine by choosing not to impose a least restrictive means requirement on commercial speech regulations.").

280 Yim v. City of Seattle, 63 F.4th 783, 812 (9th Cir. 2023) (Gould, J., concurring in part and dissenting in part), *cert. denied*, 144 S. Ct. 693 (2024); Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116, 121(3rd Cir. 2020).

281 Like Seattle's ordinance, Philadelphia's ordinance consisted of the inquiry provision—an employer cannot ask about a prospective employee's wage history—and the reliance provision—an employer cannot rely on such history in setting a prospective employee's wage. *Greater Phila. Chamber of Com.*, 949 F.3d at 121. The ordinance was enacted to "address the disparity in the pay of women and minorities," and involved extensive legislative background, including thousands of peer-reviewed research studies on job-market obstacles faced by certain minorities. *Id.* at 121; *see also id.* at 122–31 (discussing the ordinance's legislative history).

282 The Third Circuit found that the ordinance precluded all employers from inquiring into wage history, without focusing on any particular viewpoint, so strict scrutiny was inappropriate. *Greater Phila. Chamber of Com.*, 949 F.3d at 138. Interestingly, the circuit court found *Sorrell* to be inapplicable in this situation, as commercial speech jurisprudence has consistently applied intermediate scrutiny to commercial speech restrictions, even those that were content- and speaker-based. *Id.* at 139 (citing Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)).

283 *Id.* at 155.

284 *Id.* at 156–57 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476–78 (1989)).

285 *Yim*, 63 F.4th at 810.

implemented fair chance ordinances nationwide.[286] The Ninth Circuit analyzed seven different jurisdictions with ordinances similar to Seattle's, none of which imposed a blanket prohibition, to support its conclusion that the City could have employed less restrictive means to implement its goals.[287]

Each of the cited ordinances, described as Type I and Type II, permitted a landlord to inquire about a prospective tenant's criminal history to some degree.[288] The Type I ordinances permit a lookback period after conducting an initial screening and giving a conditional offer, but landlords have to award prospective tenants the opportunity to provide mitigating information against the background check.[289] The ordinances of Washington, D.C. and San Francisco allow landlords to consider any convictions within the last seven years.[290] San Francisco's ordinance also only applies to public housing.[291] New Jersey landlords can consider a large variety of offenses.[292] Type II ordinances gave landlords an option to either consider a prospective tenant's entire criminal history with a written individualized evaluation or consider a limited range of offenses.[293] Portland and Minneapolis landlords can consider

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286 Stanley-Becker, *supra* note 130, at 280 & n.115 (citing BERKELEY, CAL., CODE § 13.106 (2024); CHAMPAIGN, ILL., CODE § 17-4.5 (2020); COOK COUNTY, ILL., CODE § 42-38 (2024); DANE COUNTY, WIS., ORDINANCES, § 31 (2015); DETROIT, MICH., CITY CODE § 22-8 (2024); D.C. CODE, § 42–3541 (2025); MADISON, WIS., CODE, § 39.03 (2020); MINNEAPOLIS, MINN., CODE, TIT. 12 § 244.2030 (2024); NEWARK, N.J., CODE § 2:31 (2024); OAKLAND, CAL., CODE, § 8.25 (2020); PORTLAND, OR., CODE, § 30.01.086 (2025); RICHMOND, CAL., CODE § 7.110 (2017); S.F., CAL., POLICE CODE art. 49 (2024); SEATTLE, WASH., CODE § 14.09 (2017); ST. PAUL, MINN., CODE, § 193.04 (2021); URBANA, ILL., CODE, § 12-37 (2020)). It is important to note that the Madison and Dane County ordinances were preempted by state law, and the St. Paul Ordinance was repealed in 2021. *Id.* at 280 n.115. Furthermore, New Jersey has a statewide fair housing ordinance. *See* N.J. ADMIN. CODE § 13:5 (2022). In 2021, Ann Arbor adopted Ordinance No. 21-06 that also imposed a blanket ban on landlord inquiries into criminal history, taking a step further than Seattle's ordinance, where a landlord must give a conditional offer of tenancy in order to inquire about criminal history required under federal and state law. *See* ANN ARBOR, MICH., CODE, CH. 122 § 9:600 (2021). In 2023, New York City passed the Fair Chance for Housing Act with a lookback period of three years for misdemeanors and five years for felonies after a completion of a prison sentence. *See* N.Y.C., N.Y., ADMIN. CODE § 8-102a (2025).

287 *Yim*, 63 F.4th at 797 (majority opinion). The jurisdictions were Cook County, Illinois; San Francisco, California; Washington, D.C.; Detroit, Michigan; Portland, Oregon; Minneapolis, Minnesota; and the State of New Jersey. *Id.*; *see supra* note 191 and accompanying text.

288 *Yim*, 63 F.4th at 796.

289 COOK COUNTY, ILL. CODE § 42-38 (2023); S.F. POLICE CODE art., 49 § 4901–4920 (2024); D.C. CODE §§ 42-3541 (2025); DETROIT, MICH., CITY CODE § 22-8-5 (2024); N.J. ADMIN. CODE § 13:5 (2024); *see also Yim*, 63 F.4th at 797.

290 D.C. CODE § 42-3541.02(d) (2025); S.F. POLICE CODE art. 49 § 4906(a)(5) (2024).

291 S.F. POLICE CODE art. 49 § 4906(a) (2024) ("Regarding applicants or potential applicants for Affordable Housing, and their household members . . . .").

292 *See* N.J. ADMIN. CODE § 13:5-1.8(b)(1)–(4) (2024).

293 *Yim*, 63 F.4th at 797.

misdemeanor convictions in the last three years or felony convictions in the last seven years without any additional procedures.[294]

Contrary to the Ninth Circuit's decision,[295] the mere existence of these ordinances provides almost no empirical support for the conclusion that they would actually achieve the City's dual goals of breaking down housing barriers and preventing racial discrimination in a meaningful way.[296] As Judge Gould noted, the majority did not look to evidence or data of these ordinances' effectiveness in comparison to Seattle's inquiry provision.[297] Instead, the majority disregarded the City's extensive research behind its enactment of the Ordinance,[298] and impermissibly second-guessed "the considered judgment of a democratically elected local government."[299]

Consider one aspect of the Ordinance in particular. The original version of Seattle's Fair Chance Housing Ordinance included a two-year lookback period,[300] which allowed landlords to inquire about and screen for criminal history if the prospective tenant's record was less than two years old.[301] This was later changed to no lookback period.[302] On August 17, 2017, the Civil Rights, Utilities, Economic Development, and Arts Committee—which consisted of Seattle City Council members, including a former criminal law attorney[303]—voted unanimously to eliminate the two-year lookback period, noting that allowing landlords to consider these records would be "continuing to treat a prospective tenant as a defendant" and does not serve to minimize barriers to housing for formerly incarcerated individuals.[304]

The Ninth Circuit stated that Seattle offered "no reasonable explanation" why this more narrowly tailored version could not have

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294 *Id.*; *see also* PORTLAND, OR., CITY CODE, § 30.01.086(E)(1)(a)(6) (2025); MINNEAPOLIS, MINN. CITY CODE § 244.2030(c)(1)(f) (2024).

295 *Yim*, 63 F.4th at 798.

296 *Id.* at 810 (Gould, J., concurring in part and dissenting in part) ("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[.]'" (alteration in original)).

297 *Id.* at 810.

298 *See generally* City of Seattle's Suppl. Excerpts of R., Index Volume, Yim v. City of Seattle, 63 F.4th 783 (9th Cir. 2023) (No. 21-33567).

299 *Yim*, 63 F.4th at 810 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989)).

300 City of Seattle's Suppl. Excerpts of R., *supra* note 298, at 303.

301 SEATTLE CHANNEL, *supra* note 228, at 1:02:27–1:02:43.

302 City of Seattle's Suppl. Excerpts of R., *supra* note 298, at 303.

303 SEATTLE CHANNEL, *supra* note 228, at 1:02:27–1:02:43.

304 *Id.* at 1:06:24–1:06:29, 1:13:13–1:13:19, 1:17:53–1:17:58. The committee also emphasized the "abundant evidence" demonstrating the link between stable housing and lower recidivism rates, and the importance of dismantling a system that perpetuates homelessness for people with criminal records. *Id.* at 1:04:01–1:05:14.

achieved the same purpose.[305] However, the City's extensive legislative history indicates the opposite.[306] The entire purpose behind the Ordinance was to address widespread and harmful racial discrimination for people with criminal records in the Seattle private housing market.[307] According to the Racial Equity Toolkit, created by the Seattle Race and Social Justice Initiative, a lookback period runs contrary to the purposes of a fair chance housing ordinance.[308] Lookback periods result in an access gap for those who are among the most vulnerable to homelessness[309]: formerly incarcerated persons reentering society.[310] In the City's view, the inquiry provision's blanket ban was reasonable.[311]

Therefore, under *Fox*'s interpretation of the *Central Hudson* prong, the City did not have to consider whether the Ordinance's inquiry provision was the "best solution"; it merely had to consider whether the blanket prohibition reasonably fit the City's dual goals, and, as Judge Gould emphasized, it did.[312]

C. *The Strict Scrutiny Interpretation Reigns Supreme*

After *Fox*, however, the Court struck down laws regulating commercial speech on grounds that mirrored a strict scrutiny analysis of the fourth *Central Hudson* prong.[313] *Rubin v. Coors Brewing Co.* concerned a federal act that prohibited beer labels from indicating any

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305 Yim v. City of Seattle, 63 F.4th 783, 798 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

306 *See* City of Seattle's Suppl. Excerpts of R., *supra* note 298. The nearly 600-page record demonstrates detailed research into the relationship between housing discrimination, race, and people with criminal records. *Id.* From advisory committee recommendations that legislation is necessary to increase access to housing, to letters detailing the racial inequities of the Washington state homeless population, the City of Seattle did not pass the Ordinance lightly. *See id.* at 22–24, 274–80, 303. For a detailed overview of people with criminal records in the Seattle housing market, see *supra* notes 75–80 and accompanying text.

307 *See* City of Seattle's Suppl. Excerpts of R., *supra* note 298, at 276 ("Racial equity is central to the issue of fair chance housing.").

308 RACIAL EQUITY TOOLKIT, *supra* note 72, at 7.

309 *Id.*

310 *See supra* notes 10–14 (describing the link between homelessness and recidivism).

311 SEATTLE, WASH., ORDINANCE 125393, at 1–5 (2017) (codified at S.M.C. § 14.09) (describing the purposes behind the Ordinance, including increasing access to formerly incarcerated persons within their first month of reentry).

312 Yim v. City of Seattle, 63 F.4th 783, 812 (9th Cir. 2023) (Gould, J., concurring in part and dissenting in part), *cert. denied*, 144 S. Ct. 693 (2024).

313 *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 476–77 (1995); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 484 (1996); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 527 (2001); Sorrell v. IMS Health Inc., 564 U.S. 553, 564 (2011). For an explanation of the Court's decisions between *Fox* and *Rubin*, see Gollin, *supra* note 257, at 889–91.

alcohol content.[314] The Court held that the act was not "sufficiently tailored" to meet the federal government's stated interests of curbing a strength war between beer brewers and preventing consumers from choosing beer based on the level of alcohol content.[315] Writing for the Court, Justice Clarence Thomas stressed that Congress could have considered narrower alternatives—such as directly limiting the alcohol content of beer and prohibiting certain marketing efforts by companies—and offered only "brief anecdotal evidence and educated guesses," failing to justify a blanket ban on all beer labels.[316] In *Rubin*, the Court placed a substantial burden on the government and fourth prong then resembled the "narrowly tailored" requirement of strict scrutiny, where governments must enact laws in their least restrictive forms.[317]

This notion became clearer in *44 Liquormart, Inc. v. Rhode Island*. *44 Liquormart* assessed the constitutionality of two Rhode Island statutes: The first completely banned the advertisement of retail liquor prices by in-state vendors and out-of-state manufacturers except within licensed premises; and the second banned the broadcast of such advertisements by news media.[318] Here, Rhode Island's substantial interest was reducing statewide alcohol consumption and argued that higher liquor prices equated to lower alcohol consumption.[319] Like in *Rubin*, the Court found that the advertising ban was not narrowly tailored because Rhode Island had sufficient alternatives available, such as directly regulating higher prices, increasing taxation, or funding educational campaigns on the dangers of excess drinking.[320] The Court also explicitly noted that a state has a "heavy burden of justifying [a] complete ban,"[321] marking an implicit departure from the more deferential *Fox* standard.[322]

The Court's commercial speech jurisprudence in *Rubin* and *44 Liquormart* indicated a continuing preference for a regulation to be the "least restrictive means" under *Central Hudson*, particularly because of the 2011 ruling of *Sorrell v. IMS Health Inc.* In *Sorrell*, the Court considered the constitutionality of a Vermont law prohibiting the "sale,

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314 *Rubin*, 514 U.S. at 478.

315 *Id.* at 483–84.

316 *Id.* at 490–91.

317 *Id.* at 491–92; Booher, *supra* note 93, at 77.

318 *44 Liquormart*, 514 U.S. at 489–90.

319 *Id.* at 487, 493.

320 *Id.* at 507.

321 *Id.* at 484; *see also id.* at 505 ("In evaluating the ban's effectiveness in advancing the State's interest, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" (quoting Cent. Hudson Gas Elec. & Corp., v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980))).

322 Nat Stern, *The Stubborn Survival of the* Central Hudson *Test for Commercial Speech*, 45 SEATTLE U. L. REV. 647, 676–77 (2022); *see* Booher, *supra* note 93, at 77.

disclosure, and use of pharmacy records that reveal prescribing practices of individual doctors" by pharmacies for marketing purposes.[323] Vermont's stated interests were (1) protecting medical privacy, and (2) improving statewide public health by preventing a negative effect of pharmaceutical marketing on doctors' prescription decisions.[324] Writing for the Court, Justice Anthony Kennedy stated that because Vermont's law was a content- and speaker-based government regulation on commercial speech, this triggered a "more heightened judicial scrutiny" and purported to apply strict scrutiny.[325] However, Justice Kennedy proceeded to then outline the *Central Hudson* factors—but did not explicitly say so—and analyzed the statute as such, notably finding that Vermont's law was not narrowly tailored to fit the state's substantial interests although, as the dissent pointed out,[326] he did not point to any less restrictive alternatives.[327] *Rubin*, *44 Liquormart*, and *Sorrell* demonstrate the Court's treatment of the *Central Hudson* factors as a strict scrutiny test: If the government's substantial interests can be served by a less burdensome alternative on commercial speech, a law cannot survive the fourth prong.

In *Yim*, the Ninth Circuit applied this stricter interpretation in evaluating the constitutionality of the inquiry provision in the Ordinance. *Rubin* requires governments to investigate and implement less restrictive alternatives before enacting a law to regulate speech.[328] Because other jurisdictions have fewer sweeping restrictions that allow landlords to inquire about a prospective tenants' criminal history to some degree and the Ordinance originally had a two-year lookback

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323 Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

324 *Id.*

325 *Id.*; Shik, *supra* note 98, at 571.

326 *Sorrell*, 564 U.S. at 600 (Breyer, J., dissenting). The dissent, authored by Justice Breyer, proceeded to apply the *Central Hudson* factors and noted that the majority could not "point to any adequately supported, similar effective 'more limited restriction,'" and stated that Vermont's law was a constitutional restriction on commercial speech. *Id.* at 593, 600.

327 *Id.* at 577 (majority opinion). *Sorrell* caused intense confusion among the lower courts since the Court seemed to impose a strict scrutiny standard, although it did not formally abandon intermediate review for commercial speech regulations under *Central Hudson*. Thomson, *supra* note 244, at 185. For a detailed explanation of *Sorrell*'s majority and dissenting opinions, see *id.* at 185–92, and Shik, *supra* note 98, at 570–76. However, *Sorrell* did not purport to overhaul *Central Hudson* and lower courts continue to apply the four-factor test, indicating that *Central Hudson* is still very much in place. Stern, *supra* note 322, at 668; Shik, *supra* note 98, at 564.

328 Rubin v. Coors Brewing Co., 514 U.S. 476 (1995). Additionally, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), overruled *Posadas de Puerto Rico Associates. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), in which commercial speech was essentially granted minimal constitutional protection. *See* Gollin, *supra* note 257, at 908. According to Andrew S. Gollin, the *Fox* standard seemingly grew out of the *Posadas* decision and, logically, *Fox* should also have been overruled in *44 Liquormart*. *Id.*

provision,[329] Judge Wardlaw, joined by Judge Bennett, stated that the City of Seattle "offered no reasonable explanation why the more 'narrowly tailored' version of the bill could not 'achieve the same objective' of reducing racial barriers in housing."[330] Therefore, the City had to consider whether the blanket ban was the "best solution" and, as the circuit court held, it was not.

D. Yim *and* Central Hudson*: Why Does It Matter?*

First Amendment jurisprudence and the commercial speech doctrine has grown increasingly restrictive on governments' regulatory powers.[331] The fourth *Central Hudson* prong has produced inconsistency and frustration. Under *Fox*'s interpretation of the fourth prong, the Ordinance easily survives intermediate scrutiny because the City of Seattle was not required to implement the least burdensome restriction on landlords' exercise of commercial speech. Under the more demanding interpretation of *Rubin* and *44 Liquormart*, the Ordinance cannot survive intermediate scrutiny due to the existence of narrower ordinances in other jurisdictions. Ultimately, both interpretations are correct under the murky *Central Hudson* test.

Yim demonstrates a pressing need for the Supreme Court to explicitly overhaul or maintain the commercial speech doctrine, and in turn, calls for clarity of the *Central Hudson* test.[332] Commercial speech "rests on the idea that expression advocating an economic transaction merits less constitutional protection than other types of expression,"[333] and a more stringent interpretation of the fourth prong—where the government's burden is increased to a level mirroring strict scrutiny and turns on the existence of less burdensome alternatives—contradicts these First Amendment values.[334] This creates a fundamental issue because a government regulation will almost always have a less burdensome

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329 Yim v. City of Seattle, 63 F.4th 783, 796–97 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

330 *Id.* at 798 (9th Cir. 2023) (quoting Bd. of Trs. Of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

331 *See* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134 ("The First Amendment has emerged as a powerful deregulatory engine.").

332 *See* Passalacqua, *supra* note 265, at 649; Stern, *supra* note 322, at 700.

333 Thomson, *supra* note 244, at 202.

334 Pomeranz, *supra* note 97, at 413 ("Intermediate scrutiny reflects the values inherent in the First Amendment's protection of commercial speech, while it simultaneously recognizes the government's legitimate and substantial interest in regulating overreaching commercial communication."); *see also supra* notes 94–98 (explaining the varying levels of constitutional protection for different types of speech).

alternative, but that does not necessarily mean it would be the most effective alternative.[335]

The Court's inconsistent interpretation of the fourth prong has allowed lower courts to pick and choose how much deference to grant to democratically elected legislative decisions under the fourth prong.[336] Ultimately, the Court should uphold the less exacting interpretation of the fourth prong. Commercial speech is speech motivated by primarily economic concerns, and as evidenced by *Central Hudson*, warrants lesser protection.[337] Requiring governmental commercial regulations to adhere to the least restrictive form "hinders the government's ability to attack societal problems from multiple vantage points," and reflects a treatment of commercial speech that warrants greater protection.[338] If a government can be found to have "carefully calculated" the costs and benefits on burdening commercial speech, courts should give deference to that analysis when deciding whether a reasonable fit exists between the means and ends of the regulation at issue.[339]

The Fair Chance Ordinance was enacted to address a pressing issue in the City of Seattle's private housing market: misuse of tenant screening processes that perpetuated housing discrimination against formerly incarcerated individuals.[340] By prohibiting landlords from inquiring about a prospective tenant's criminal history, the City was attempting to dismantle barriers that otherwise qualified applicants faced.[341] Government intervention is necessary to ensure that the racially skewed cycle of homelessness and incarceration is eradicated.[342]

In *Yim*, Judge Wardlaw determined that the City of Seattle did not carefully calculate the "costs and benefits" when burdening private landlords' speech—which the circuit court determined without deciding was commercial speech[343]—because other jurisdictions "have adopted legislation that would appear to meet Seattle's housing goals."[344] However,

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335 Pomeranz, *supra* note 97, at 413.

336 Maternowski, *supra* note 252, at 640; Passalacqua, *supra* note 265, at 615–16 (noting how the Court applied multiple standards to expand the commercial speech doctrine post-*Central Hudson*).

337 KILLION, *supra* note 93, at 2.

338 Passalacqua, *supra* note 265, at 645.

339 *Id.* at 647.

340 SEATTLE, WASH., ORDINANCE 125393, 1, 2 (Aug. 23, 2017) (codified at S.M.C. § 14.09); Yim v. City of Seattle, 63 F.4th 783, 789 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

341 Memorandum, *supra* note 66.

342 Taylor N. Haefele, Note, *Wisconsin's 2011 Act 108, Legislative Inaction, and Severe Racial Wisconsin's 2011 Act 108, Legislative Inaction, and Severe Racial Disparity: A Recipe for a Fair Housing Violation*, 23 MARQ. BENEFITS & SOC. WELFARE 109, 133 (2022).

343 *Yim*, 63 F.4th at 793.

344 *Id.* at 796, 798 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

as Judge Gould emphasized, the Ninth Circuit ignored the extensive record detailing the City's decision to implement a more sweeping ban on landlords' speech than other jurisdictions.[345] The City did carefully conduct a cost-benefit analysis,[346] and the Ninth Circuit should have deferred to the City's judgment like the Third Circuit did in *Greater Philadelphia*: Under the less exacting interpretation of the fourth prong, the Ordinance easily survives intermediate scrutiny.[347]

CONCLUSION

Formerly incarcerated persons face disproportionately challenging barriers to securing safe and stable housing, which crucially lowers the risk of reoffending.[348] The widespread usage of tenant screening procedures used by private landlords renders the private housing market nearly inaccessible for such individuals.[349] The harsh consequences of incarceration bleed into the reentry stage, as racial bias and criminal background checks go hand-in-hand.[350] After collecting years of data and research on discrimination in the City's housing market,[351] the City of Seattle enacted the Fair Chance Ordinance to dismantle barriers for prospective tenants with a criminal history and reduce intentional and unintentional discrimination against people of color, who are overrepresented in the criminal justice system.[352]

The fourth *Central Hudson* prong has proven to be unworkable, and the government's burden to restrict commercial speech remains unclear. In *Yim,* the Ninth Circuit was allowed to choose how much deference to grant to the City of Seattle. If *Fox*'s less exacting interpretation controls, the Ninth Circuit should have deferred to the City and upheld the Ordinance's inquiry provision, as the blanket ban reasonably fit the City's dual goals. If the stricter interpretation controls, the Ninth Circuit was correct in striking down the inquiry provision, as the City could have molded the Ordinance after less restrictive ordinances in other jurisdictions.

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345 *Id.* at 811–12 (Gould, J., concurring in part and dissenting in part).

346 *See supra* notes 295–311 and accompanying text (detailing the City's legislative record).

347 *Id.* at 812; Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020).

348 Polous, *supra* note 1, at 401.

349 Comment, *supra* note 65.

350 Roberts, *supra* note 50

351 *See supra* note 307 and accompanying text.

352 SEATTLE, WASH., ORDINANCE 125393, at 1, 2 (Aug. 23, 2017) (codified at S.M.C. § 14.09).

The future of the *Central Hudson* test remains unclear. What is clear, however, is that since Seattle's Fair Chance Ordinance inspired other jurisdictions to implement ordinances with similar blanket bans,[353] the Ninth Circuit's ruling will have a harmful effect on the constitutionality of those ordinances. *Yim v. City of Seattle* ensures that formerly incarcerated persons will continue to be punished long after completing their time.

353 *See* Stanley-Becker, *supra* note 130, at 279–86 (discussing the existing ordinances in depth).