SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

KEENA BEAN, et al., Plaintiffs, v. CITY OF SEATTLE and the STATE OF WASHINGTON, Defendants.	No. 18-2-56192-2 SEA PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

Named Plaintiffs Keena Bean, John B. Heiderich, Gwendolyn A. Lee, Matthew Bentley, Wesley Williams, Joseph Briere, Sarah Pynchon, William Shadbolt, and Boaz Brown, on behalf of themselves and those similarly situated, (together, "Plaintiffs") file this combined response to the Motions to Dismiss by the City of Seattle ("City Br."; Docket No. 18) and the State of Washington ("State Br."; Docket No. 19), (together, "Defendants"). This Court should deny both motions for the following reasons.

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First, article I, § 7 of the Washington Constitution mandates that the government obtain a warrant for any search for which it has not received consent. In the context of rental inspections, the Washington Supreme Court has only carved out an exception to this warrant requirement when a landlord, acting as a private citizen and in his or her own interest, authorizes a private inspection, the results of which are not turned over to the government. Here, however, the city of Seattle's (the "City" or "Seattle") inspection regime, authorized by the statute of the state of Washington (the "State"), turns private inspectors into agents of the government—acting on behalf of the government's interests—by requiring failing inspection results be turned over to the government.

Second, Defendants' arguments that Plaintiffs have not met the standard for a facial challenge fail because every inspection conducted without a warrant or consent by private inspectors acting as state actors violates article I, § 7 of the Washington Constitution. Even if this were not true, though, Plaintiffs' complaint alleges that the City has attempted to conduct warrantless inspections of the homes of a majority of Plaintiffs and thereby raises an as-applied challenge.

Third, the Defendants' arguments that Seattle's ordinance and the State's law are constitutional because renters do not have a reasonable expectation of privacy against landlords fails because (i) the Washington Constitution protects against warrantless searches of homes regardless of a resident's expectation of privacy, and (ii) while renters must permit their landlords to enter for things like making repairs or showing the home to potential buyers, they have no such obligation to permit entry when a landlord acts as an agent of the state.

Finally, Plaintiffs' suit against the State should proceed because even if this Court were

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to strike down the City's warrantless rental inspection regime, the City could continue to conduct warrantless inspections pursuant to the State law.

II. RELIEF REQUESTED

Plaintiffs respectfully request that this Court deny both motions to dismiss.

III. EVIDENCE RELIED UPON

Plaintiffs rely on the allegations in their Complaint. These allegations "are presumed to be true" for purposes of resolving these motions. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) (holding dismissal of claims was improper under CR 12(b)(6)). Plaintiffs also rely upon the Declaration of Sarah Pynchon in Support of Plaintiffs' Response to Defendants' Motions to Dismiss ("Pynchon Decl.") and the authentication Declaration of William R. Maurer in Support of Plaintiffs' Response to Defendants' Motions to Dismiss ("Maurer Decl."), both of which contain documents referenced in the Complaint. *See* 9 David E. Breskin, Wash. Prac., Civil Procedure Forms and Commentary § 12.47 (3d ed.) ("Either party may submit documents not included in the original complaint for the court to consider in evaluating a CR 12(b)(6) motion.").

IV. COUNTER-STATEMENT OF FACTS

This case is a proposed class action regarding the constitutionality of the portions of the City's Rental Registration and Inspection Ordinance (the "RRIO"), which requires tenants in rental homes and apartments to submit to intrusive inspections for housing code violations even if the tenants do not consent and the City does not have a warrant. The suit also challenges the constitutionality of RCW 59.18.125, a portion of the State's Residential Landlord Tenant Act (the "Act"), which authorizes municipalities to pass ordinances to conduct such warrantless

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inspections. The suit seeks to invalidate these portions of the RRIO and the Act that violate article I, § 7 of the Washington Constitution, which provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

A. The RRIO Program and RCW 59.18.125

1. The City's RRIO Program.

Through the 1980s, Seattle used a complaint system to address code violations. Tom Byers & Claire Powers, *Improving Rental Housing Conditions in Seattle: Issues and Options* 5 (2008). In 1990, the City implemented a citywide, proactive inspection program. The Washington Supreme Court invalidated this program because it allowed inspectors to obtain search warrants to enter homes without consent and without authority of the law. *City of Seattle v. McCready ("McCready I")*, 123 Wn.2d 260, 280, 868 P.2d 134 (1994). Seattle then reverted to a complaint-based system of rental inspections. Byers & Powers, *supra*, at 6.

In 2013, Seattle enacted the RRIO, another proactive inspection program. This program requires all Seattle landlords and tenants to submit to mandatory inspections of rental properties beginning in 2015. *See* Compl. ¶ 17; Seattle Municipal Code ("SMC") §§ 22.214.010 *et seq*. The RRIO requires landlords to register their properties with the city. Compl. ¶ 18; SMC § 22.214.040; .040.A. Registration requires a certificate of compliance issued after an inspection. Compl. ¶ 19; SMC § 22.214.050. As of January 1, 2019, a landlord's registration is valid for two years from the date the City issues the registration. Compl. ¶ 20; SMC § 22.214.040.C; Seattle, Ordinance No. 125705, § 1.

Under the RRIO, Seattle inspects 10 percent of the city's rental properties (chosen randomly) each year. Compl. ¶ 21; SMC § 22.214.050.A. The City will thus inspect 100

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percent, or a percentage close to 100 percent, of the properties subject to the ordinance within 10 years, whether they are empty or occupied. Compl. ¶ 21. The RRIO applies "to all rental housing units," defined as "a housing unit that is or may be available for rent, or is occupied or rented by a tenant or subtenant in exchange for any form of consideration." Compl. ¶ 22; SMC §§ 22.214.030, .020.10. This is a vast swath of the housing in Seattle—almost 153,000 rental housing units. Compl. ¶ 22; Maurer Decl. ¶ 3, Ex. A at 2, http://www.seattle.gov/Documents/Departments/SDCI/Codes/RRIO/RRIOAnnualReport.pdf.

The constitutional problem with the RRIO arises from its provisions regarding who can conduct these inspections. To comply with the RRIO program's inspection requirement, landlords may use city inspectors or private inspectors. Compl. ¶ 24; SMC § 22.214.050.C. Initially, the program did not require private inspectors to provide the results of a failed inspection to the City. Compl. ¶ 30. However, in 2016, the City issued Statement of Legislative Intent 25-2-A-2, which requested that the SDCI—which implements the RRIO program—revise the program to make inspections by private inspectors as close as possible to those conducted by City inspectors. *Id*. The City then amended the RRIO to force private inspectors to provide the results of the inspection to the City so that the City could audit them and use them as criteria for selecting additional units for inspection. *Id*. ¶¶ 31, 33; SMC § 22.214.050.J.

The RRIO now contains the following language: "If a rental property owner chooses to hire a private qualified rental housing inspector" and "a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of compliance must be provided to [SDCI]." Compl. ¶ 32; SMC § 22.214.050.J. Thus, the results of a failed inspection come into the City's possession and any distinction between city inspectors and

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private inspectors is destroyed. Compl. ¶ 32. Put another way, under the RRIO, ostensibly private inspectors are, in fact, agents of the City. *Id*. As of 2015, private inspectors conducted about 60 percent of the 5,000 inspections performed by the city. *Id*. ¶ 25.

2. RRIO Inspections Are Invasive.

Seattle's RRIO inspections are wall-to-wall, covering "each habitable room in the unit." Maurer Decl. ¶ 4, Ex. B at 4, http://www.seattle.gov/DPD/cs/groups/pan/@pan/documents/web_informational/s048492.pdf; Compl. ¶ 26. Inspectors have a blank slate to look in all areas meant for "living, sleeping, eating or cooking." Compl. ¶ 27. This means inspectors search bedrooms shared by intimate partners and search children's rooms without the consent or presence of parents. *Id*.

When inspectors gain access to the interior of the home, they have the ability to view religious, political, medical, and other personal information about the tenants—things like holy books, medications, photographs of politicians. *Id*. ¶ 28. Inspections also reveal the presence of expensive goods or reserves of cash or precious metals, jewelry, or stones, or, alternatively, demonstrate conditions of poverty. *Id*. Because Seattle gives inspectors full access to bedrooms, they can view undergarments, medical devices, and religious, recreational, and intimate possessions. *Id*. ¶ 29.

3. RRIO Inspections Are Mandatory.

Under the RRIO, tenants cannot refuse an inspection. Under the RRIO, "[a] tenant shall not unreasonably withhold consent for the owner or owner's agent to enter the property." *Id*. ¶ 35; SMC § 22.214.050.H.1.d. The City's literature for tenants advances the perception that they have no right to refuse an inspection. The "renters" information on the City's RRIO

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website states that "City and state law says that you cannot unreasonably deny access for the inspection." Compl. ¶ 37; Maurer Decl. ¶ 5, Ex. C, http://www.seattle.gov/sdci/codes/licensing-and-registration/rental-registration-and-inspection-ordinance/renters.

If a tenant objects to the inspection of their home, the RRIO makes her landlord its enforcer. The RRIO explicitly "place[s] the obligation of complying with its requirements upon the owners of the property and the rental housing units subject to [the RRIO]." Compl. ¶ 34; SMC § 22.214.075.D. In the pamphlet, "What You Need to Know About Inspections," the City tells landlords, "You should work out access to the unit with your renter. Renters cannot unreasonably deny access for a RRIO inspection." Compl. ¶ 36; Maurer Decl. ¶ 6, Ex. D at 2, http://www.seattle.gov/Documents/Departments/SDCI/Codes/RRIO/RRIOWhatYouNeedtoKnowAboutInspections.pdf. The owner of the property may thus be liable for fines of a cumulative civil penalty of $150 a day for the first ten days after failure to comply with the inspection and $500 for each day thereafter if they wish to honor a tenant's right to deny an inspection. Compl. ¶¶ 4, 34; SMC § 22.214.086.A.1.

4. RRIO Inspections Are Always Conducted by State Actors and Without Search Warrants.

If the tenant does not grant consent, state law authorizes the City to obtain a warrant to conduct the inspection. Specifically, RCW 59.18.150, permits the City—if it chooses—to seek a warrant to inspect the property when the government has probable cause (also referred to as individualized suspicion) to believe that there is a problem with the property. Compl. ¶ 38. State law does not, however, mandate that a municipality obtain such a warrant. This is a problem in Seattle because the City has adopted a policy and practice of not seeking warrants, which would

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require putting individualized suspicion (if there were any basis for individualized suspicion) on paper before a neutral magistrate. Instead, the City forces landlords to coercively obtain tenant consent.[1] Compl. ¶ 38. Indeed, the City has never obtained, or even sought, an inspection warrant since the RRIO went into effect in 2015. *Id*. ¶¶ 5, 38; Maurer Decl. ¶ 7, Ex. E at 7, http://clerk.seattle.gov/~CFS/CF_320336.pdf.

B. The City Has Applied the RRIO Against Some of the Plaintiffs.

1. The City Has Attempted to Apply the RRIO Against Plaintiffs Heiderich and Lee.

Plaintiffs John B. Heiderich and Gwendolyn A. Lee have owned and operated rental properties in Seattle for more than forty years. Compl. ¶ 11. In 2017, Ms. Lee's tenants in a multi-unit building objected to warrantless inspections of their living space. Maurer Decl. ¶ 8, Ex. F at 000114. Ms. Lee sent a series of communications to the City with both the tenant objections and constitutional legal arguments against inspection program. *Id*. The inspector refused to enter a Certificate of Compliance, and, on March 2, 2017, the SDCI referred the matter to the City Attorney's office for legal action. *Id*. at 000112-115.

SDCI review Officer Diane Davis issued a Director's Order[2] dated April 21, 2017 sustaining the notice of violation on the ground that the landlord should have strong-armed their tenants into complying with the rental-inspection "request." According to the Director's Order:

Ms. Lee stated that once [the] tenants did not allow access to the selected units

[1] The State appears to accept this fact. *See* State Br. 11 ("Plaintiffs allege that 'the City has a policy and practice of not seeking warrants.' Even were this true, it would not render the Washington statute facially unconstitutional." (citation omitted)).

[2] The Director's Order is both a public record and judicially noticeable as a "legislative fact," i.e. "the sort of background information a judge takes into account when determining the constitutionality or proper interpretation of a statute." *See* 5 Karl B. Tegland, Wash. Prac., Evidence Law and Practice § 201.16 (6th ed).

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> **by the City-employed inspectors, the City should have sought a warrant under SMC 22.214.075.B to pursue entry of these units. This assumes it was the City's responsibility to complete the inspection and provide the Certificate of Compliance. This is incorrect.** The code states that 'It is the intent of this Chapter 22.214 to place the obligation of complying with its requirements upon the owners of the property and the rental housing units subject to this Chapter 22.214.' The owner provides the certification. The owner provides proper notice to tenants. The owner is responsible for ensuring that the selected units are available for inspection.

Id. at 000115; emphasis added. The Director's Order also made it clear that it required landlords to serve as agents of the City—without "encourage[ing] cooperation from their tenants to facilitate the required inspections . . . the owners have not established that the failure to complete the inspections was beyond their control." *Id*. at 000116.

2. The City Enforced the RRIO Against Plaintiffs Pynchon, Shadbolt, Bentley, Williams, and Briere.

On May 14, 2018, Plaintiffs Sarah Pynchon and William Shadbolt received an inspection notice for the rental home where Plaintiffs Matthew Bentley, Wesley Williams, and Joseph Briere reside. Compl. ¶¶ 41–42; Pynchon Decl. ¶ 3. On July 11, 2018, Bentley, Williams, Briere, and their housemates wrote to SDCI stating that they would not voluntarily allow a city or private inspector inside the home. Compl. ¶ 42; Pynchon Decl. ¶ 4. The tenants invoked their "rights under Article I, Section 7 of the Washington Constitution, which requires the government to obtain a warrant based upon individualized probable cause before it can conduct a rental inspection without consent." Compl. ¶ 42; Pynchon Decl. ¶ 4, Ex. A.

On July 14, 2018, Pynchon also wrote to the SDCI to inform the city that the residents of the property were refusing a government inspection of their home and that she fully respected her tenants' decision in the matter. Compl. ¶ 43; Pynchon Decl. ¶ 5, Ex. B. On August 23, 2018, SDCI responded to Ms. Pynchon. While SDCI acknowledged receiving the tenants' letter, it

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only responded to Ms. Pynchon. Compl. ¶ 44; Pynchon Decl. ¶ 6, Ex. C. The letter laid out the requirements of the RRIO and extended the date by which the inspection must occur to October 15, 2018. Compl. ¶ 44; Pynchon Decl. ¶ 6, Ex. C. The letter threatened penalties of up to $150 a day for the first ten days of noncompliance and $500 per day thereafter. Pynchon Decl. ¶ 6, Ex. C. Otherwise, the letter ignored the landlord and tenants' constitutional objections to the inspection. *Id*.; Compl. ¶ 44.

The City never responded to the letter submitted by Mr. Bentley, Mr. Williams, and Mr. Briere. Compl. ¶ 45. On November 14, 2018, the SDCI wrote to Ms. Pynchon threatening action against her for respecting her tenants' privacy: "[U]nder RRIO it is your obligation to complete the inspection. Any enforcement action resulting from failure to complete the RRIO inspection will be taken against you. At the same time, your tenants have an obligation to not unreasonably deny you access for activities such as an inspection." *Id*. ¶ 46; Pynchon Decl. ¶ 7, Ex. D. Plaintiffs Shadbolt and Pynchon have been forced by the city to either invade the privacy of their tenants or face daily fines in the hundreds of dollars. Compl. ¶ 47. Plaintiffs filed this lawsuit on December 4, 2018, and no further correspondence occurred after the filing of the Complaint.

C. The Remaining Plaintiffs Face the Threat of Warrantless Inspections Under the RRIO.

Because Seattle plans to inspect all of its rental housing stock, all Seattle renters are subject to warrantless searches of their homes. Plaintiff Keena Bean rents a Seattle apartment home, which is currently subject to Seattle's rental-inspection program. *Id*. ¶ 10. She is a young professional who cares deeply about maintaining privacy in her home. *Id*. The prospect of

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having strangers enter her home and inspect it in detail, either while she is present or not, is worrisome to her. *Id*. ¶ 49. She has experienced unwanted intruders in previous living situations, heightening her interest in maintaining her safety and security. *Id*. In addition to her general hesitation to let strangers into her home, she fears that an inspection could reveal personal details about her—including where she stores personal items and where she sleeps. *Id*.

Ms. Bean's landlords, Plaintiffs Heiderich and Lee, are unwilling to act as the vehicle by which the City will intrude into Ms. Bean's home without her consent and are committed to helping their tenants protect their constitutional rights. *Id*. ¶ 11. Furthermore, they do not want to be placed in an adversarial position with their own tenants by compelling tenants to have an inspection against their will. *Id*. ¶ 51.

For Plaintiff Boaz Brown, the prospect of having strangers entering every part of his home undermines his security in his home. *Id*. ¶ 50. Because of this, he has already taken steps to hide and store some items that he wishes to keep private in the event inspectors force their way inside. *Id*. He does not feel that he should have to take these steps to maintain his privacy in his own home. *Id*.

V. COUNTER-STATEMENT OF ISSUES

Have Defendants met their burden in showing beyond doubt that Plaintiffs can never prevail on their constitutional claim?

VI. AUTHORITY AND ARGUMENT

A. The Standard for A Motion to Dismiss

CR 12(b)(6) motions should be granted only "sparingly and with care." *Bravo v. Dolsen*

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Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (citation omitted). "[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Id*. These "[h]ypothetical facts may be introduced to assist the court in establishing the 'conceptual backdrop' against which the challenge to the legal sufficiency of the claim is considered." *Id*. Finally, "[w]hen an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion." *Id.* at 751.

B. This Court Should Deny Both Motions to Dismiss

This Court should deny both motions for the following reasons.

First, the RRIO intrudes on tenants' "private affairs" without a warrant—something the Washington constitution does not permit. Seattle's attempt to get around this requirement by giving the option of "private" inspectors who would not invoke state action and thus evade constitutional requirements does not work because the RRIO mandates that "private" inspectors must provide failing reports to the government, the one thing that the Washington Supreme Court has held turns a private actor into a state actor. All inspectors are thus government actors bound by article I, § 7 and must obtain search warrants before conducting inspections.

Second, the Defendants attempt to shoehorn a "facial versus as-applied" distinction onto Plaintiffs' claims and assert that Plaintiffs have failed to meet the standard for striking down laws on their face. This argument fails for two reasons. First, the Defendants are only able to make this argument by rewriting Plaintiffs' claims. They turn Plaintiffs' suit into a challenge to the RRIO *per se* and, because there are instances where the statute may be applied constitutionally, it is not facially unconstitutional. That is not the suit Plaintiffs have brought,

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however. Plaintiffs are challenging the application of the RRIO every time the City does not obtain consent or a warrant. Compl. ¶¶ 53–55; 63–71; Req. Relief ¶ 4. Every time this occurs, it is unconstitutional and the standard for a facial claim is thus satisfied. In any event, Plaintiffs are also making as-applied claims because the City has attempted to apply the RRIO to a majority of them. Defendants' "facial versus as-applied" argument thus fails because Plaintiffs have successfully pled both kinds of challenges.

Third, the Defendants' argument that both the RRIO and RCW 59.18.125 are constitutional because tenants have no reasonable expectation of privacy fails for two reasons as well. First, article I, § 7 does not require a reasonable expectation of privacy to apply. It protects tenants from having the government inspect their property without a warrant and without consent, full stop. Second, the Act may strip a tenant of the reasonable expectation of privacy from a landlord acting as a landlord, but it does not strip the tenant of a reasonable expectation of privacy against landlords and their agents acting on behalf of the government.

Fourth, Plaintiffs' claims against the State are necessary because even if they were to prevail against the City and have the unconstitutional portions of the RRIO struck down, the City could still engage in warrantless inspections pursuant to RCW 59.18.125. Because Plaintiffs cannot obtain complete relief without the State, this Court should retain them as a defendant.

In considering these issues, it is important to consider what Plaintiffs are not asking this Court to do. They are not asking the Court to prevent the City or the State from making efforts to improve the rental housing stock in Seattle. *See* City Br. 2; State Br. 2–4. They also do not seek to allow landlords to let their properties deteriorate into substandard or harmful conditions.

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Instead, they simply are asking this Court to protect the sanctity of rental tenants' homes and to stop the government from dragooning landlords and private inspectors into being unwilling agents of the government. There is a simple remedy for Plaintiffs' constitutional claims against the City and State: when the government wants to inspect a property and does not have consent, it can obtain a warrant. This is what the Washington Constitution has required for over one hundred years and there is no reason the City and State cannot continue to comply with this simple constitutional dictate now.

1. All Inspections Conducted Under the RRIO Are Per Se Unconstitutional Because They Are Done Without a Warrant by State Actors.

Washington has a uniquely demanding warrant requirement for non-consensual searches. Article I, § 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Search warrants "provide[] the requisite 'authority of law'" and "[u]nder article I, section 7 of the Washington Constitution, warrantless searches *are per se unreasonable*." *State v. Morse*, 156 Wn.2d 1, 4, 7, 123 P.3d 832 (2005) (emphasis added) (reversing conviction for warrantless apartment search). There are only narrow "[e]xceptions to the warrant requirement," which "are to be jealously and carefully drawn." *Id*. at 7 (citation and quotation marks omitted). The Washington Constitution is particularly protective of the sanctity of a person's home: "In no area is a citizen more entitled to his privacy than in his or her home. For this reason, the closer officers come to intrusion into a dwelling, the greater the constitutional protection." *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) (citation omitted) (reversing conviction based on infrared thermal detection).

The Washington Supreme Court has already foreclosed Seattle from arguing that rental

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inspections are not a disturbance of private affairs. *McCready I*, 123 Wn.2d at 271 ("Seattle does not claim, nor could it, that a non-consensual inspection of residential apartments is not a disturbance of 'private affairs' under Const. art. 1, § 7.").

Defendants do not dispute that Seattle conducts only warrantless rental inspections and that a search warrant involves states action per se. *See* RCW 59.18.150(4)(b) ("A search warrant must only be issued upon application of *a designated officer or employee of a county or city prosecuting or regulatory authority*") (emphasis added). Rather, Seattle and the State believe this case should not proceed because some of the warrantless inspections are conducted by "private" inspectors who they contend are not "state actors" and not subject to article 1, § 7's warrant requirement. Defendants base this position in *City of Pasco v. Shaw*, 161 Wn.2d 450, 166 P.3d 1157 (2007). *See* City Br. 5–8; State Br. 13–17. But these arguments ignore *Shaw's* key finding—inspections were private there because reports of failed inspections did not reach government hands. Seattle's RRIO and the State's inspection disclosure requirements violate this ruling by doing precisely that: turning over failed inspection reports to the government.

In 1997, the city of Pasco adopted a rental-inspection program that required landlords to obtain a certificate of inspection ensuring that the property complied with the housing code. *Shaw*, 161 Wn.2d at 455. The landlord could choose to have either the city or a private inspector perform the inspection. *Id*. at 456. The Pasco ordinance required landlords to have a certificate of inspection, but did not require the city itself to search for housing violations. *Id*. at 460.

In the suit stemming from tenant objections to the inspections, the issue before the Washington high court was "whether the Fourth Amendment or article I, section 7 is violated where a landlord and a privately engaged inspector inspect a rental property for code violations

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that impact health and safety." *Id*. at 459. The Court held that Pasco's ordinance violated neither constitutional provision because the private inspectors were not state actors. *Id*. at 461. First, the court considered whether private inspectors were state actors, functioning "as an agent or instrumentality of the state." *Id*. at 460. In making this determination, the Court looked to the "capacity" of the person at the time of the search "rather than to the person's primary occupation." *Id*. "Critical factors ... include [1] *whether the government knew of and acquiesced in the intrusive conduct* and [2] whether the party performing the search intended to assist law enforcement efforts or to further his [or her] own ends." *Id*. (citation and quotation marks omitted; emphasis added; alternations and omission in original). The Court concluded that the fact that the city never saw—and thus had no direct knowledge of—the inspection meant that the inspection was purely done for the landlord's purposes

> Significantly, if a private inspector finds code violations, the ordinance does not require the inspector to turn his or her findings over to the city. Thus, a landlord can remedy any violations found by an independent inspector, submit to another inspection, and obtain a license based on the new inspection, without the city ever being notified of the original violations.

Id. at 460–61. The negative inference of the decision is that if the city did see the report, the inspector was acting for the city's benefit and there would be state action.

Both Defendants here passed legislation inconsistent with *Shaw*. In 2010, the Washington Legislature amended the Act to state that "[i]f a rental property owner chooses to hire a qualified [private] inspector other than a municipal housing code enforcement officer, and a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of inspection *must be provided to the local municipality*." RCW 59.18.125(6)(e) (emphasis added).

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The RRIO is inconsistent with *Shaw* because it forces private inspectors to provide the results of the inspection to the City so that the City can select additional units for inspection. *See* SMC § 22.214.050.J. ("If a rental property owner chooses to hire a private qualified rental housing inspector … [and] … a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of compliance must be provided to [the SDCI].") The legislative history makes clear that this requirement is about furthering the government's interests—not the interests of the landlords. The code change had its genesis in Statement of Legislative Intent 25-2-A-2, which was an effort to have SDCI "strengthen the RRIO auditing program to ensure that inspections by private inspectors are on par with those completed by City inspectors…." Maurer Decl. ¶ 9, Ex. G at 1. Seattle indicated in passing the RRIO that "[w]ithout the notice of any failures, SDCI cannot use its discretionary authority to address more extensive maintenance or safety issues by requiring additional inspections." *Id.* at 4. Accordingly, when landlords hire private inspectors, these private inspectors are aiding code enforcement, not the interests of the landlords.

The Code itself shows that private inspectors are a burden, not a benefit, to both landlords and tenants. Even Seattle is concerned that private inspectors may engage in unlawful activity inside someone's home, exposing tenants and landlords to the possibility of dangerous instructions. SMC § 22.214.060.E states that "The Department is authorized to revoke a qualified rental housing inspector's registration if it is determined that the inspector … is *convicted of criminal activity that occurs during inspection of a property*." (Emphasis added.) This part of the ordinance is not comforting to tenants already apprehensive about strangers entering their homes. Private inspectors are a liability to landlords—certainly not a benefit.

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Seattle also argues that "to the extent that Plaintiffs' claim relies on the argument that RRIO mandates that a private inspector give the City any failed inspection results, the claim fails. No state action is involved when a landlord provides to the City documentation of an inspection done by another private party hired by the landlord." City Br. 9. The constitutional problem is not *who* gives the reports to the City; it is that the law requires the government *receive* them. "The relevant inquiry under the Washington constitution in determining whether there has been a search is whether the State has unreasonably intruded into a person's 'private affairs.'" *Young*, 123 Wn.2d at 181 (citation and quotation marks omitted); *State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) ("[T]he fact defendant placed his garbage at the curb rather than in his backyard has no bearing on whether an unreasonable intrusion into his private affairs occurred.").

Under both the RRIO and the Act, there is simply no difference between public and private inspectors because private inspectors must turn their results over to the government. In Seattle, these results are reviewed, audited, and used as a means of conducting more warrantless searches on innocent peoples' homes.

2. Plaintiffs Have Pled Sufficient Facts to Proceed with Both Facial and As-Applied Challenges.

In the following sub-sections, Plaintiffs will explain that they (i) sufficiently pled a challenge seeking to enjoin warrantless rental inspections conducted under RRIO and RCW 59.18.125, which is "facial" only to the extent it seeks remedies beyond the Plaintiffs' circumstances; and (ii) they have sufficiently pled an as-applied challenge because Defendants have applied the RRIO to most of them by attempting warrantless inspections.

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i. The Scope of Plaintiffs' Facial Challenge.

Seattle argues that "because Plaintiffs have brought a facial challenge, they must show that no set of circumstances exists in which RRIO can be constitutionally applied." City Br. 10; *see also* State Br. 2, 13–19.[3] Defendants can only make this argument by defining Plaintiffs' claims far beyond what they are. Plaintiffs are challenging the RRIO and RCW 59.18.125 only to the extent that they permit inspections without warrants or consent. Compl. ¶¶ 53–55; 63–71; Req. Relief ¶ 4. They do not seek a wholesale striking down of the RRIO or RCW 59.18.125.

This claim is only "facial" to the extent that it requests a remedy that applies beyond the named Plaintiffs—but of course this is true in any class-action. In *John Doe No. 1 v. Reed*, the U.S. Supreme Court examined the proper way to consider a facial challenge when it upheld a public-records law that a state interpreted to require publication of the names of referendum-petition signers. 561 U.S. 186, 194, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). The parties

[3] In addition, the "facial versus as-applied" distinction concerns the scope of the remedy, not what the plaintiff has pled. In *Citizens United v. FEC*, the U.S. Supreme Court noted that "the distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, *not what must be pleaded in a complaint*." 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (emphasis added). None of the "facial versus as applied" cases cited by Seattle or the State was resolved on a motion to dismiss governed by CR 12(b)(6). *Shaw* itself was decided at summary judgment after an answer had been filed. 161 Wn.2d at 457.; City Br. 4–5 (citing *State v. Shultz*, 138 Wn.2d 638, 642, 980 P.2d 1265 (1999) (arson convict's facial challenge to modification of restitution order); *City of Seattle v. Huff*, 111 Wn.2d 923, 924, 767 P.2d 572 (1989) (facial challenge to phone harassment charge on the eve of a criminal trial); *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004) (affirming district court striking down mandatory license suspension on its face after motion to dismiss criminal charges); *Didlake v. State*, 186 Wn. App. 417, 422, 345 P.3d 43 (2015) (resolving facial challenge to driver's license suspensions under CR56(C)); *State v. McCuistion*, 174 Wn.2d 369, 275 P.3d 1092 (2012) (Sexually violent predator filed petition for release from involuntary civil commitment.); City Br. 11 (citing *State v. Blight*, 89 Wn.2d 38, 44, 569 P.2d 1129 (1977) (facial challenge as grounds for appeal of criminal conviction); *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 801, 158 P.3d 1251 (2007) (facial challenge after final order denying parental rights); *State v. Nelson*, 81 Wn. App. 249, 256, 914 P.2d 97 (1996) (facial challenge on appeal of criminal conviction); *Doe v. State*, No. 75228-6-I, 2017 WL 2242304, *3–4 (Wash. Ct. App. May 22, 2017) (resolving facial challenge on summary judgment); State Br. 1, 9 (citing *Shaw*, 161 Wn.2d at 458); State Br. 9 (citing *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 626, 71 P.3d 644 (2003) ("[W]e affirm the superior court's denial of the summary judgment motion."); *Tunstall v. Bergeson*, 141 Wn.2d 201, 206, 5 P.3d 691 (2000) ("This case comes to the court on direct review from the trial court's summary judgment rulings.")).

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disagreed as to whether plaintiffs raised a facial or as-applied challenge under the First Amendment. *Id*. It seemed facial in that it challenged the law's application to all referendum petitions, not just plaintiffs'; it seemed as-applied in that it did not challenge the entirety of the public-records law, but only its applicability to referendum-petition signers. *Id*. The Court held that "[t]he label is not what matters." *Id*. The challenge was facial because the remedy sought was an injunction that went beyond plaintiffs' circumstances. *Id*. The situation is no different here—this lawsuit does not challenge the entirety of the RRIO, only its applicability to tenants, including the members of the putative class, who object to warrantless inspections and landlords who do not want to force warrantless inspection on unwilling tenants.

Nowhere in Defendants' briefing do they address the actual allegations as pled. They do not even argue that warrants are ever sought under RRIO. Nor do they quibble with the remedy Plaintiffs seek: "an order permanently enjoining the City from conducting warrantless rental inspections pursuant to the RRIO or RCW 59.18.125." Compl., Req. Relief ¶ 4. Instead, each party imagines hypothetical constitutional applications that they allege show that the challenged laws can be constitutionally applied. In its argument, Seattle hypothesizes two supposedly constitutional scenarios that warrant dismissal of "facial claims"—one "in which inspection results are not provided to the City, and another in which a rental unit is inspected while vacant." City Br. 12. As to the first scenario, whether a property subsequently passes or fails is irrelevant because the unconstitutional warrantless search will have already occurred by the time that determination is made by the inspector. The inspector will have entered the entire home—including bedrooms, bathrooms, sinks, kitchens, and, in some instances, the tenant's refrigerator, for housing code violations. Compl. ¶¶ 2–3. It also ignores the key issue in *Shaw*,

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which was concerned not with passing inspection reports being reported to the government, but with reports of *failed* inspections going to the government. 181 Wn.2d at 460–61.

As to the second scenario, searches of vacant units are non-sequiturs. Such searches are not the subject this of class-action, which represents only two putative classes—both of which involve occupied properties. Plaintiffs' proposed class (and its subclasses) make this clear. The Complaint seeks certification of the following two subclasses:

> (1) All tenants of rental homes and apartments in Seattle subject to RRIO and the Washington Residential Landlord-Tenant Act that do not, and will not, consent to an inspection of their homes without a warrant;
>
> (2) All landlords that own properties in Seattle subject to RRIO and the Washington Residential Landlord-Tenant Act in which tenants who do not, and will not, consent to an inspection of their homes without a warrant, reside.

Compl. ¶ 55. A search conducted without a warrant and against the will of the tenant can never be constitutional in any application and stopping those searches from happening is all Plaintiffs seek to do here.

Similarly, the State argues that Plaintiffs "cannot carry their heavy burden of proving that RCW 59.18.125 necessarily permits warrantless searches because RCW 59.18.125 provides for warrants." State Br. 10. This argument misapprehends the Washington Constitution. It is of no moment that RCW 59.18.125 provides an optional warrant requirement—it runs afoul of article I, § 7 by not affirmatively *requiring* a warrant. Put another way, the State is arguing that the Act is constitutional because it gives the government the option to comply with the Washington Constitution.

Creating an option for municipalities to obey the Constitution cannot save this portion of the Act. Municipalities must follow the Washington Constitution: "The provisions of this

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Constitution are mandatory, unless by express words they are declared to be otherwise." Const. art. I, § 29. Article I, § 7, of course, contains no "express words" making it optional. In contrast to the Fourth Amendment, the Washington Constitution has a "blanket" warrant requirement; it "is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008); *id*. at 641 (reversing conviction based on repairman consent to search of house). Put simply, in Washington, the government must have a warrant before *any* search, whether it is reasonable or not.[4] *Id.* at 634. RCW 59.18.125 thus does not meet the standards dictated by article I, § 7.

ii. The Plaintiffs Have Pled As-Applied Claims

Seattle also argues that there are "no allegations that inspections of tenant Plaintiffs' homes have occurred" and therefore Plaintiffs have not pled an as-applied claim. City Br. 4 n.4. But Seattle's characterization of this case as a pre-enforcement challenge is incorrect. The City has indeed applied the RRIO to a majority of Plaintiffs and they have sufficiently pled that the RRIO and the Act are unconstitutional as applied to them. The Complaint alleges in detail that Seattle attempted a warrantless inspection of Plaintiffs Bentley, Williams, and Brier—threatening their landlords with fines and penalties if they do not force the inspection to happen without a warrant. Compl. ¶¶ 41–51. The housemates and their landlord then commenced this

[4] There are a few exceptions to the warrant requirement such as exigent circumstances, but these "are to be jealously and carefully drawn." *Morse*, 156 Wn.2d at 7. "The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement." *Id*. Neither Defendant has argued that searches pursuant to the challenged laws here are always conducted pursuant to exigent circumstances.

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lawsuit. The outcome of this interaction between the housemates and the City remains unresolved.

As legal support, the City cites *Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 759–60, 43 P.3d 471 (2002). The case stated "[i]f we find 'applied challenges' justiciable before anything has been applied, we risk becoming an advisory court and overstepping our constitutional authority." *Id.* But the City ignores the facts of *Asarco* which involved a challenge to an Ecology Department clean-up plan that had not even been issued yet. *Id*. at 474–75. Here, by contrast, the RRIO has gone into full effect, and the City (and its agents) have been conducting warrantless rental inspections. If Seattle's logic prevailed, the only way to assert a constitutional challenge would be to submit to unconstitutional conduct, something that is clearly not required. *See Peterson v. Hagan*, 56 Wn.2d 48, 65, 351 P.2d 127 (1960) ("[T]he constitutionality of a statute must be determined by what can be done under it rather than by what has been done. The constitution guards against the chances of infringement.").

3. The Washington Constitution Requires that Plaintiffs Be Free from Intrusion in Their Private Affairs in Their Rental Homes.

Seattle argues that tenants do not have a "reasonable expectation of privacy" in their homes because "the inspection under RRIO does not exceed what is already permitted by the [Act]"—letting the landlord inside for things like repairs and to show a property for sale. City Br. 7. The State concurs. State Br. 17. These arguments are wrong on the law and the facts.

Washington residents do not need to possess a "reasonable expectation of privacy" before article I, § 7 applies. Instead, the Washington Constitution asks, "whether the State has unreasonably intruded into a person's 'private affairs.'" *Young*, 123 Wn.2d at 181. "The private

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affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry." *Id*. Indeed, article 1, § 7 is "not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives." *Id*. at 181–82.

In *McCready I*, the Washington Supreme Court explicitly foreclosed the Defendants from making an expectation of privacy argument here: "Seattle does not claim, nor could it, that a non-consensual inspection of residential apartments is not a disturbance of 'private affairs' under Const. art. 1, § 7." 123 Wn.2d at 271. This is because private affairs include "disclosure of beliefs or associations, whether familial, political, religious, or sexual, as well as the disclosure of intimate or personally embarrassing information." *State v. Pippin*, 200 Wn. App. 826, 839, 403 P.3d 907 (2017) (extending article 1, § 7 to a homeless person's tent). Seattle's RRIO inspections touch on all of these.[5] Plaintiff Boaz Brown has already taken steps to safeguard his personal effects from inspectors' prying eyes. Compl. ¶ 50. Plaintiff Keena Bean is distressed by the prospect of having strangers enter her home and view personal information about her. *Id*. ¶ 10. In addition, inspectors can view countless personal details that are in plain view in a person's apartment home—political campaign stickers, a framed photograph of the Pope, an

[5] Rental inspections are also classic trespasses, rooted in traditional property rights, where the government violates the Fourth Amendment when it "physically occupie[s] private property for the purpose of obtaining information." *United States v. Jones*, 565 U.S. 400, 404, 132 S. Ct. 945, 181 L. Ed. 2d (2012); *see id.* at 406. (applying trespass doctrine to GPS tracker on the underbody of a Jeep "on the public roads, which were visible to all"); *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (applying *Jones* "in the curtilage of the house," where police "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.") The Washington Supreme Court has endorsed this view. *See State v. Mecham*, 186 Wn.2d 128, 149, 380 P.3d 414 (2016) (noting that a Fourth Amendment search occurs either when there is a "reasonable expectation of privacy" or "whenever 'the Government obtains information by physically intruding' on persons.'") (quoting *Jardines*, 569 U.S. at 5)).

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open Quran, and photographs of the family are just a few hypothetical examples and may be considered by this Court.

By framing this argument in terms of subjective tenant expectations, the Defendants are confusing the Fourth Amendment with article 1, § 7 and ignore the heightened scrutiny that Washington law places on interior home searches—and the way the RRIO inspections violate this test.[6]

Second, Defendants misinterpret the Act. The Act does not provide landlords with a blanket right of entry in all circumstances. Instead, it describes the very limited circumstance under which a tenant must not unreasonably withhold consent to the landlord's entry "to inspect the premises, make necessary or agreed repairs, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors." RCW 59.18.150(1). The important distinction is whether the landlord is acting as a state actor. If landlords are acting as state actors, they are restricted by the mandatory provisions of article I, § 7.

In support, Defendants cite *Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369 (1997) for the proposition that tenants do not have a reasonable expectation of privacy for any entry involving their landlord. City Br. 7; State Br. 18. But Defendants interpret *Kalmas* far beyond what it actually says. The plaintiffs in *Kalmas* had a lease with an agreed-upon right to enter

[6] Both Defendants also cite *Shaw* for the proposition that a reasonable expectation of privacy test should govern here. City Br. 7; State Br. 17–18. But *Shaw's* reference to a reasonable expectation of privacy was rooted in the Fourth Amendment, not article 1, § 7. *See Shaw*, 161 Wn.2d at 458 ("Under the Fourth Amendment, to determine whether a search has occurred, we ask whether the government action invaded a 'justifiable, reasonable, or legitimate expectation of privacy'") (citation omitted).

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provision, and the landlord gave notice and the property manager brought potential buyers to show them the rental property. The tenant did not allow them in and proceeded to call 911 for assistance. Under threat of arrest, tenant allowed officers to accompany the property manager inside. The tenant subsequently sued, arguing "that when an officer facilitates a search by a private party, a Fourth Amendment violation occurs." *Kalmas*, 133 Wn.2d at 217. But because "Plaintiffs themselves asked the police to perform a caretaking function[,]" and the landlord followed the notice provisions in the lease, there was no Fourth Amendment violation. *Id.* In discussing a landlord's right of entry under RCW 59.18.150, the court made clear: "This statute gives a landlord *a limited* right to invade the privacy of a tenant in his or her residence *for limited purposes, one of which is to exhibit the dwelling*." *Id*. at 219 (emphasis added).

This holding does not mean that having the title "landlord" means carte blanche to always enter a tenant's property. To gain entry under *Kalmas* or RCW 59.18.150(1), the person has to be acting as a landlord and not as an agent of the government inspecting the property. Here, Plaintiff landlords brought this suit specifically because they did not want to enter their tenants' property. This has nothing to do with the landlords in *Kalmas* who were enforcing a private contractual provision that aided in the sale of the property. Furthermore, the state actors in *Kalmas* were not the landlords—they were the police, who the tenants invited in as an escort. Again, the facts here stand in sharp contrast to *Kalmas*; the Plaintiffs do not want government agents entering their homes without a search warrant, and neither do their landlords.

4. The State Is a Necessary Party to Obtain Complete Relief.

A party is necessary to an action if "in the person's absence complete relief cannot be accorded among those already parties." CR 19(a). The State is a necessary party to this action

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because it allows the City to conduct warrantless inspections with private inspectors who report the results of any failed inspection to the government. Compl. ¶ 39. Indeed, even if Plaintiffs were successful in striking down the RRIO, or if the City repealed the unconstitutional portions of the ordinance, the Act would require the City to hand failed inspection reports to the government. *Id.* ¶ 40; *see Veradale Valley Citizens' Planning Comm. v. Bd. of Cty. Comm'rs of Spokane Cty*., 22 Wn. App. 229, 234, 588 P.2d 750 (1978) (determining parties were necessary because "any judgment rendered by the court would be ineffectual" without them). Specifically, the Act provides that "[i]f a rental property owner chooses to hire a qualified [private] inspector other than a municipal housing code enforcement officer, and a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of inspection *must* be provided to the local municipality." Compl. ¶ 40; RCW 59.18.125(6)(e) (emphasis added). Thus, the state is a defendant in this lawsuit because Seattle could proceed under the state statute even if RRIO's warrantless rental-inspection regime was struck down.

VII. CONCLUSION

Plaintiffs respectfully request that Defendants' Motions to Dismiss be denied in the manner described in this response and this case proceed to discovery and summary judgment.

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I certify that this brief contains 8,312 words in compliance with the Local Civil Rules.

Dated: March 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on March 18, 2019, I caused to be served a copy of the foregoing PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS and the attached [PROPOSED] ORDER via e-filing with the King County Superior Court e-file system on all counsel of record.

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