Hon. Richard A. Jones

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

RENTBERRY, INC., a Delaware corporation, and Delaney Wysingle, an individual, Plaintiffs, v. The City of SEATTLE, a Washington municipal corporation, Defendant.	Civil Action No. 2:18-cv-00743-RAJ **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: *October 19, 2018* *ORAL ARGUMENT REQUESTED*

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INTRODUCTION

The First Amendment embodies a "longstanding rule" that "restricting speech should be the government's tool of last resort." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013). Yet the City here has restricted speech as a first resort, relying only on the ghost of a suspicion. The City imposed a moratorium on the use of housing websites that allow users to bid on rent because the City Council speculated that such websites might conflict with local regulations or might inflate housing prices. This knee-jerk assault on speech does not withstand First Amendment scrutiny.

STATEMENT OF THE CASE

The website ban

On March 19, 2018, the Seattle City Council voted to enact a "one-year prohibition on use of rental housing bidding platforms." Seattle City Council Ordinance 125551 at 1:5-6 (Exhibit 1); *see also* SMC § 7.24.090(B). During that year, "[l]andlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." *Id.* § 7.24.090(A). This website ban defines "rental housing bidding platform" as "a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions including but not limited to housing costs and lease term, to landlords for approval or denial." *Id.* § 7.24.020. The ban was signed by the Mayor on March 30, 2018, and went into effect on April 29, 2018.

During the moratorium, the Ordinance assigns several city departments to coordinate a study regarding the banned platforms. *Id.* § 7.24.090(C)(3). Specifically, the Ordinance calls upon the Office of Housing, the Office for Civil Rights, and the Department of Construction and Inspection to investigate whether bidding platforms comply with fair housing laws and what impact such platforms might have on "equitable access to Seattle's rental housing market." *Id.* § 7.24.090(C)(3). The results of the study are to be submitted to the City Council before the ban expires. *Id.* If, however, the city departments request more time to complete the study or the City

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Council needs more time to review it, the Council can extend the one-year ban for another year. *Id.* § 7.24.090(C).

The Ordinance expressly concedes that the City "has not . . . studied" whether rental bidding platforms harm the rental housing market or defy local regulations. Exhibit 1 at 1:18-25. The Ordinance notes only that "it is unclear whether . . . these new services comply with the City's code, including new regulations such as first-in-time." Exhibit 1 at 1:18-20. The City's only specific reference to a potentially relevant regulation is the first-in-time rule recently struck down as unconstitutional in King County Superior Court. *Id.*; *see also Yim v. City of Seattle*, Case No. 17-2-05595-6 (King Cty. Sup. Ct. 2018), Order on Cross Motions for Summary Judgment, attached as Exhibit 2. The City also confessed that "it is uncertain whether and how these services impact Seattle's rental housing market, as these services may have different effects on markets depending on the scarcity of housing supply." Exhibit 1 at 1:23-25.

This absence of evidence did not dissuade the Council from taking drastic action. The City banned the use of the websites until it decides whether it would allow landlords and tenants to communicate on rental bidding platforms. The Ordinance says, "[T]he Council wishes to understand new technologies and innovation that may have impacts on communities throughout Seattle prior to these new technologies and innovations becoming entrenched without regard to whether their impacts are in line with Seattle's values of equity and Seattle's work toward expanding access to rental housing." *Id.* at 2:5-8. Thus, "the Council wishes to know more about how these services function and the impact they may have on Seattle's rental housing market before allowing landlords and tenants to use them within the City." *Id.* at 2:10-12. A city staff memo to a committee of the Council says the website ban serves three purposes: "(1) to study whether these types of services are compliant with the City's current laws; (2) to give the City time to create a regulatory framework if necessary before use of such services proliferates; and (3) to determine current and potential impacts on Seattle's Housing Market." Seattle City Central Staff, Asha Venkataram, CB 119198: Prohibiting Use of Rental Housing Bidding Platforms 1 (Mar. 7,

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2018), attached as Exhibit 3. The memo identified two websites as targets of the ban: Rentberry and Biddwell. *See* Exhibit 3 at 1.

Plaintiffs

1. Rentberry

Rentberry is a startup founded in late 2015 as a platform to facilitate communication about housing and related services. Declaration of Oleksiy Lyubynskyy ¶ 2, attached as Exhibit 5. Rentberry's technology is designed to make the rental process less costly and more convenient and secure. *Id.* Rentberry employs various innovations designed to bring fresh technology to a rental industry that has seen little technological advancement. *Id.* ¶¶ 4-8.

One such innovation is Rentberry's proprietary bidding technology. *Id.* ¶¶ 4-5. It benefits both tenants and landlords by facilitating communication among all interested parties. *Id.* The bidding technology helps landlords respond to changes in the rental market, while potential tenants can easily communicate the price they are willing to pay and see competing offers. *Id.* The bidding feature reduces delay, inefficiency, and uncertainty in the rental process. *Id.* ¶¶ 4-5. Figure one in Exhibit 5 displays a screenshot of the website's bidding feature. *See id.* ¶ 12, Figure 1.

The platform allows landlords to post asking prices for rent and the security deposit. *Id.* ¶ 4. Applicants can communicate their bid above or below the landlords' asking prices. *Id.* Rentberry utilizes an algorithm to provide potential tenants with a recommended bid based on market conditions. *Id.* ¶ 5. A potential tenant on Rentberry can see details about the highest bid, as well as various characteristics about the high bidder, such as their credit score, their monthly salary, whether they have pets, and the number of roommates. *Id.* They can also see the average credit score of individuals interested in that property, as well as an estimation of the overall demand for that unit. *Id.* Landlords can view all bids submitted and application details, including background check information provided by Rentberry. *Id.* The bidding feature is an integral component of Rentberry and landlords using Rentberry cannot post a fixed price or refuse to allow bids. *Id.* Landlords retain the right to select any bidder or no bidder. *Id.*

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Rentberry's website provides a search engine that allows registered users to filter searches for housing by price range, housing type, number of bedrooms, amenities, and so on. *See id.*, Figure 3. Search results display customized advertisements posted by landlords, which can include photographs, descriptions, and rental criteria. *See id.*, Figure 2. After finding a desirable listing, potential tenants submit their bids and complete the application process on the Rentberry site. *Id.* Once a bid is posted, Rentberry provides a forum for landlord-tenant communication, maintenance requests, and rent payment. *Id.* Currently, Rentberry does not allow landlords to list properties in Seattle, although it did have landlord users in Seattle prior to the moratorium. *Id.* ¶ 11. If not for the website ban, Rentberry would make its site available to Seattle tenants and landlords. *Id.*

2. Delaney Wysingle

Delaney Wysingle owns and rents out a single-family home in Seattle. Declaration of Delaney Wysingle ¶ 2, attached as Exhibit 4. After inheriting the home in 2015, he rented it out to a single tenant from June 2015 to February 2018. *Id.* Wysingle's property is currently vacant following a remodel, and he is searching for a new tenant. *Id.* ¶¶ 3, 5. If not for the website ban, Wysingle would advertise his property and select his next tenant through a rental bidding platform. *Id.* ¶ 4. He wants to experiment with rental bidding platforms because he believes they provide innovative features that can help landlords and tenants to settle on rent based on fair market value. Wysingle would be willing to accept a bid below his asking price if the applicant seemed qualified. *Id.* ¶ 4.

ARGUMENT

Government officials cannot ban use of websites just because they worry that the speech on those sites *might* violate local laws or *might* raise housing prices. When it comes to the internet, the First Amendment favors an unhindered environment for speech: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). Whether this Court proceeds under the rubric of strict or intermediate scrutiny, a law banning use of a website without any evidence of harm cannot stand.

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I. The website ban is subject to the First Amendment because it restricts speech

By prohibiting use of rental bidding platforms, the Seattle moratorium restricts speech in the form of communication about prices and other speech activities on the platforms, such as housing advertisements. The moratorium must therefore satisfy First Amendment scrutiny.

Information about price and market demand is valuable to landlords and tenants alike, and the First Amendment protects "the consumer's interest in the free flow of truthful commercial information." *United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001). Information "as to who is producing and selling what product, for what reason, and at what price" is "indispensable" to wise economic decisions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 424 U.S. 748, 765 (1976); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (A "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.") (citation omitted). The First Amendment's role in safeguarding such information preserves the "public interest that those decisions . . . be intelligent and well-informed." *Virginia State Bd.*, 424 U.S. at 765.

Indeed, communication about prices enjoys specific First Amendment protection. In *Virginia State Board of Pharmacy*, the Supreme Court invalidated a state rule that forbade pharmacists from advertising prices. 425 U.S. at 773. The Court held that a state cannot suppress price advertising because of fears about the "information's effect upon its disseminators and its recipients." *Id.* Likewise, in *44 Liquormart v. Rhode Island*, the Supreme Court held that a state law preventing liquor stores from posting prices was a speech restriction. 517 U.S. 484, 495 (1996). Such restrictions on pricing information could not withstand First Amendment scrutiny because speech about pricing offers "vital information about the market." *Id.* And recently, in *Expressions Hair Design v. Schneiderman*, the Supreme Court held that regulations impose a burden on protected speech when they restrict the method that businesses use to communicate about their prices. 137 S. Ct. 1144, 1150-51 (2017).

Speech restrictions that stifle reciprocal communication between buyer and seller pose an even greater threat to protected speech than a one-way advertisement. *See Va. State Bd. of*

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Pharmacy, 425 U.S. at 756 ("[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both."). For example, in *Edenfield v. Fane*, the Supreme Court addressed a state ban on direct solicitation by certified public accountants. 507 U.S. 761, 763-64 (1993). The Court noted that the restricted speech was "of considerable value" because solicitation allowed "direct and spontaneous communication between buyer and seller." *Id.* at 766. Reciprocal communication of this sort offers greater value than a one-way advertisement because buyer and seller can better negotiate, assess market demand, and reach a fully informed arrangement based on mutual communication. *See id.*

In light of these precedents, a mutual bidding process is protected commercial speech. As the Supreme Court has repeatedly held, communicating about price is protected by the First Amendment. Indeed, a restriction on bidding presents a greater First Amendment concern than the price-advertising restrictions in *Virginia State Board of Pharmacy* and *44 Liquormart* because bidding involves the kind of reciprocal buyer-seller communication that the Supreme Court deemed to be of "considerable value" in *Edenfield*. *Id.* Several courts have subjected bidding restrictions to First Amendment analysis. For example, in *Department of Professional Regulation, Board of Accountancy v. Rampell*, the Florida Supreme Court held that a law prohibiting accountants from bidding for work "restricts economic expression constituting commercial speech." 621 So. 2d 426, 428 (Fla. 1993). Such bidding constituted communication about prices subject to First Amendment protection, and the law failed to pass intermediate scrutiny. *Id.* at 428, 430-31. A federal district court in Florida drew a similar conclusion. *Jim Gall Auctioneers, Inc. v. City of Coral Gables*, 210 F.3d 1331, 1332 (11th Cir. 2000) (noting but not addressing the district court's holding that running an auction constituted protected commercial speech).

Bidding is not simply a business activity. When a law regulates "the communication of prices rather than prices themselves," that law regulates speech. *Expressions Hair Design*, 137 S. Ct. at 1151. Broad authority to regulate commercial transactions does not include within it the power to directly regulate speech related to those transactions. *See 44 Liquormart*, 517 U.S. at 512 ("Thus, it is no answer that commercial speech concerns products and services that the government

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may freely regulate. Our decisions . . . have made plain that a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods.").

Instead of recasting commercial speech as commercial activity, the Supreme Court applies intermediate, heightened scrutiny as the proper means to balance the state's interest in regulating commerce with market participants' speech interests. *See 44 Liquormart*, 517 U.S. at 499; *see also Sorrell*, 564 U.S. at 570 (rejecting the state's argument that sharing prescriber-identifying information is conduct). The Court in *44 Liquormart* noted that a government's traditional authority to regulate commerce was adequately protected by imposing a less severe level of scrutiny, not by redefining commercial speech as a business activity: "The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." *Id.* at 499 (quoting Laurence Tribe, *American Constitutional Law* §§ 12-15, 903 (2d ed. 1988)).

The Supreme Court specifically addressed the difference between price regulation and regulation of communication *about* price in *Expressions Hair Design*. The court of appeals below had held that state law regulating credit-card surcharges was a price regulation and therefore did not regulate speech. *Expressions Hair*, 137 S. Ct. at 1148. The Supreme Court disagreed, noting that the law "tells merchants nothing about the amount they are allowed to collect . . . . What the law does regulate is *how* sellers may communicate their prices." *Id.* at 1151 (emphasis added). In the context of bidding, a law that imposed some kind of cap on the highest bid might be an example of a price regulation with an incidental effect on speech. A restriction on communicating a bid, however, is a speech regulation, not a price regulation.

The bidding that occurs on platforms like Rentberry is protected commercial speech about pricing. Under the City's moratorium, "[l]andlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." SMC § 7.24.090(A). A landlord posts a threshold price and renters post competing bids. These bids are designed to communicate valuable information among landlords and potential tenants alike by

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helping them assess demand for a unit and settle on a reasonable price. Market information is vital in our free enterprise system, and bidding is a valuable way to share market information. *See F.E.R.C. v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 774, 776 (2016) (describing market mechanism in auction context). Bidding online, just as in an auction, involves many people expressing their preferences. Thus, the bidding component of these banned websites involves protected speech.

The moratorium extends to other protected speech as well. It imposes a blanket ban on the use of an entire online platform for residential housing in Seattle. The bidding component of such platforms is not singled out for proscription. Rather, use of any element of the platform or application—if the platform includes a bidding component—is forbidden as to Seattle properties. This is clear from the definition of "Rental housing bidding platform," which "means a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions." SMC § 7.24.020. The moratorium extends to a platform that facilitates bidding and "wherein" bidding occurs, not just bidding alone.

This is consistent with the ordinary meaning of "platform" in the software context, which is defined as a software system rather than one particular function on a website. *See* http://www.dictionary.com/browse/software-platform. The City's own legislative history uses "platform" in this common-sense fashion. An internal staff memo to a Council committee stated: "Rental housing bidding platforms such as Rentberry and Biddwell are *sites* for online auctions that allow landlords to list available rental units and potential tenants to bid on those units." Exhibit 3 at 1 (emphasis added). Thus, the City understood "rental housing bidding platforms" to be "sites" where landlords advertise and tenants bid—not just the bidding function on those sites.

The City's definition of a rental bidding platform as an "application" or "online platform" further demonstrates that the moratorium extends to the whole software or website, not just the bidding function. The Ordinance clarifies that "[m]erely publishing a rental housing advertisement does not make a person a rental housing bidding platform." SMC § 7.24.020. This exception,

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however, does not reach advertisements published on a website that otherwise satisfies the definition of a rental housing bidding platform.

Another proof of the moratorium's broad scope is the law's application to landlords. "Landlords and potential tenants" are both forbidden from using bidding platforms. SMC § 7.24.090(A). If bidding alone was the only function of these sites singled out for proscription, then forbidding landlords from using rental bidding platforms would be pointless; after all, the landlords do not post bids, only the potential tenants do. If—as the City is likely to argue—this moratorium only proscribes posting bids, then the moratorium's express application to landlords would be surplusage. *See United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

The breadth of the moratorium restricts an array of speech on these platforms unrelated to bidding, such as advertising a Seattle unit through images and descriptions, use of search engine functions for prospective tenants, communicating about maintenance requests, providing references, and so forth. *See Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (search engine results are protected speech). Moreover, Rentberry's website cannot function without the bidding component. Exhibit 5 ¶ 5. Thus, even if listing and bidding on a price did not constitute protected expression, the website ban nonetheless forbids a wide array of protected speech. The ban therefore must satisfy First Amendment scrutiny.

II. Strict scrutiny should apply to the moratorium

Strict scrutiny should apply to the moratorium because it imposes a prior restraint—the most egregious form of speech restriction—and because it restricts an inextricably intertwined mixture of commercial and noncommercial speech. Alternatively, intermediate scrutiny—the traditional test for commercial speech restrictions—should apply.

a. The website ban must satisfy strict scrutiny because it imposes a prior restraint

Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraint arises when government wields the power "to deny use of a forum in advance of actual

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expression." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Thus, prior restraints "bear[] a heavy presumption against [their] constitutional validity." *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)). In order for a prior restraint to pass constitutional muster, the government must satisfy strict scrutiny. *Nebraska Press Ass'n*, 427 U.S. at 571.

A speech moratorium is a prior restraint. For example, this Court invalidated a Seattle moratorium on adult cabaret licenses as a prior restraint on speech. *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102, 1107 (W.D. Wash. 2005). The cabaret moratorium not only failed to provide a "prompt time frame" for lifting the speech restriction, but it also went a "step further in suppressing protected speech and prohibiting any new adult cabarets from opening." *Id.* at 1108. Although the Seattle cabaret moratorium lasted a startling 17 years, a federal court struck down a similar cabaret moratorium that lasted only 120 days. *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1362 (M.D. Fla. 2000).

Prior restraints arise often in licensing settings like the Seattle cabaret moratorium, but prior restraints are not limited to those settings. A prior restraint also arises when a government imposes a temporary order or law that prevents someone from speaking in advance. *See, e.g.*, *New York Times*, 403 U.S. at 714 (proposed temporary injunction against publication of classified information was a prior restraint); *Nebraska Press Ass'n*, 427 U.S. at 570 (injunction against news coverage on a criminal trial while the trial was ongoing was an unconstitutional prior restraint); *Real v. City of Long Beach*, 852 F.3d 929, 935 (9th Cir. 2017) (plaintiff properly alleged that zoning ordinance targeting tattoo parlors constituted a prior restraint in violation of the First Amendment).

A speculative approach to speech regulation is another feature of prior restraints. Prior restraints seek to halt speech in advance "predicated upon surmise or conjecture that untoward consequences may result." *New York Times*, 403 U.S. at 725-26 (government sought to temporarily enjoin publication of sensitive information on the Vietnam War based on the government's unfounded concern that it *might* endanger national security).

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Seattle's moratorium is a prior restraint because it gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions*, 420 U.S. at 553. The moratorium creates a blanket ban on protected speech for a full year, with the option to extend the ban for another year. The moratorium serves a preventative function, offering only speculation as its justification. As such, it is subject to strict scrutiny.[1]

b. The website ban must face strict scrutiny because it regulates a mixture of commercial and noncommercial speech based on content

The website ban is also subject to strict scrutiny as a content-based restriction on intermingled commercial and noncommercial speech. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny.").

The website ban restricts both commercial and noncommercial speech on the basis of content. The commercial speech doctrine generally applies when the speech "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 776. Yet an economic motivation for speech is "clearly [] insufficient by itself to turn [communications] into commercial speech." *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 67 (1983). Speech that, at first blush, appears commercial may nonetheless be entitled to the full force of First Amendment protections if it is "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795-96 (1988).

Rentberry facilitates a panoply of communications between landlords and tenants. These include not just property advertisements, but also direct communication between landlords and

[1] Heightened judicial scrutiny applies to a law regulating commercial speech that "imposes a burden based on the content of speech and the identity of the speaker." *Sorrell*, 564 U.S. at 567. As a prior restraint, the website ban bears these markings because it bans speech based on its content (communication about rental housing) and based on the speakers (landlords and potential tenants). It must therefore face strict scrutiny. This conclusion has a Supreme Court pedigree, but it is nonetheless foreclosed in this Court by Ninth Circuit precedent. In *Retail Digital Network v. Prieto*, over Chief Judge Thomas's dissent, the Ninth Circuit held that content-based restrictions on commercial speech need only satisfy intermediate scrutiny. *Retail Digital Network*, 861 F.3d 839, 846 (2017); *id.* at 851 (Thomas, C.J., dissenting). Wysingle and Rentberry therefore preserve this argument over the proper reading of *Sorrell* for later proceedings.

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potential tenants, maintenance service requests, housing references, and the like. *See* Exhibit 5 ¶¶ 6-8. As a state court in this Circuit noted, the "landlord-tenant relationship, though it surely has a commercial component, is more complex, personal and permanent than the relationship between the seller of goods and services and his or her potential buyer." *Baba v. Bd. of Supervisors of the City and County of San Francisco*, 124 Cal. App. 4th 504, 516 (2004). Even the algorithms that Rentberry uses to communicate information to users—such as housing and pricing recommendations—enjoy full First Amendment protection. *See Universal Studios v. Corley*, 273 F.3d 429, 445-48 (2d Cir. 2001) (computer code is protected speech). Additionally, Rentberry compiles and disseminates information through its search engine, a form of protected, noncommercial speech. Exhibit 5 ¶ 6; *see also Sorrell*, 564 U.S. at 570 ("The creation and dissemination of information are speech within the meaning of the First Amendment."), *Langdon*, 474 F. Supp. 2d at 629-30 (search engine results are compilations of information enjoying First Amendment protection). Wysingle wishes to engage in this array of speech activities facilitated by Rentberry and prohibited by the moratorium. Exhibit 4. Thus, the commercial speech doctrine does not apply here, and the Court should review the content-based restrictions in the website ban under strict scrutiny.

III. The moratorium fails even intermediate scrutiny because it does not directly advance the City's interests and is more extensive than necessary

While strict scrutiny is the proper standard for assessing the moratorium, the Ordinance cannot survive even the more forgiving intermediate standard of review for restrictions on purely commercial speech. The City proffers three rationales for the website ban: (1) to study whether rent-bidding platforms comply with local law; (2) to study the impact of rent-bidding platforms on the Seattle housing market; and (3) to give the City time to create a regulatory framework *if necessary* before the use of these platforms expands. This preemptive strike against speech fails even under intermediate scrutiny.

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Pacific Legal Foundation
10940 NE 33rd Pl., Suite 210
Bellevue, Washington 98004
(425) 576-0484

Commercial speech restrictions are subject to a four-part test, set out in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), which asks:

- Whether the speech is related to lawful activity and is not deceptive;
- Whether the government interest at stake is substantial;
- Whether the speech restriction "directly and materially" serves that interest; and
- Whether the restriction is "no more extensive than necessary."

See also World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 684 (9th Cir. 2010).

The first step is a threshold issue that determines whether the restricted speech enjoys First Amendment protection. *Id.* If the speech at issue passes this threshold, then the government bears the burden of satisfying the other three steps. *Valle Del Sol*, 709 F.3d at 816. The website ban targets speech that is neither unlawful nor deceitful, so the City must show that its interest is substantial, that the ban furthers that interest, and that the ban is not more extensive than necessary to achieve the interest. At minimum, the City fails steps three and four because the ban does not directly advance a substantial government interest and goes far beyond what is necessary to achieve its interest.

a. The website ban does not target misleading speech or speech related to unlawful activity

The speech targeted by the website ban meets the threshold inquiry of *Central Hudson*: it is neither deceptive nor related to unlawful activity. The Ordinance raises a concern that rental bidding might not comply with local laws or regulations. *See* Exhibit 1 at 1:17-20. But the City Council makes no finding to that effect. Instead, the Ordinance only ventures that "it is unclear whether the structure and operation of these new services comply with the City's code." *Id.* Indeed, a primary rationale for the Ordinance is to study whether the speech at issue is lawful. The City's speculative concerns cannot strip the targeted speech of First Amendment protection.

The only specific law cited by the City as possibly in tension with rental bidding platforms is the City's first-in-time rule. *Id.* First-in-time requires landlords to rent to the first qualified

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10940 NE 33rd Pl., Suite 210
Bellevue, Washington 98004
(425) 576-0484

applicant. *See* SMC § 14.08.050. That rule, however, was struck down as unconstitutional by the King County Superior Court, which held the first-in-time rule was an uncompensated taking for private use and that it violated landlords' due-process and free-speech rights. *See* Exhibit 2. Thus, even if the City made an express determination that rental bidding violates first-in-time, the rule is no longer in effect and cannot support the website ban.[2] And even if first-in-time were in effect and in conflict with rental bidding, the website ban is substantially broader than necessary to ensure compliance with first-in-time, since the first-in-time rule does not extend to all properties, such as accessory dwelling units, while the website ban does. *See* SMC § 14.08.050(F).

The speech proscribed by the website ban is neither unlawful nor deceptive, so the City must satisfy the other three steps of *Central Hudson*. The moratorium and its legislative history point to three interests purportedly served by the ban: "(1) to study whether these types of services are compliant with the City's current laws; (2) to give the City time to create a regulatory framework if necessary before use of such services proliferates; and (3) to determine current and potential impacts on Seattle's Housing Market." Exhibit 3 at 1. Even assuming that the City can show that its interests here are substantial, it cannot satisfy either the advancement or narrow tailoring requirements.

b. Suspending speech as a preemptive strike while the City engages in further fact-finding does not directly advance the government's interests

A regulation of commercial speech must "directly advance" the government's substantial interest. *Central Hudson*, 447 U.S. at 564. The City cannot satisfy the direct advancement step for three reasons: (1) the City cites no evidence that use of rental bidding platforms is harmful or unlawful; (2) the ban does not advance the City's interest in studying rental bidding platforms; and (3) the website ban is underinclusive because it allows landlords and tenants to bid on rent by other means.

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[2] The City filed a notice of appeal in the *Yim* case in April 2018. *Yim v. City of Seattle*, Case No. 17-2-05595-6 (King Cty. Supr. Ct. 2018), *appeal docketed*, No. 95813-1 (Wash. Supreme Ct. Apr. 26, 2018). The order invalidating the ordinance, however, has not been stayed pending appeal.

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10940 NE 33rd Pl., Suite 210
Bellevue, Washington 98004
(425) 576-0484

1. The City banned speech without any evidence of harm

A speech restriction does not directly advance the government's interests if the restriction only swipes at speculative harms.[3] "The First Amendment requires a more careful assessment and characterization of an evil" before imposing a speech restriction. *Playboy*, 529 U.S. at 819. When government restricts speech to "prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured.'" *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). Even under intermediate scrutiny, the City's fear must find substance in evidence that "the harms it recites are real" rather than "*mere* speculation and conjecture." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 188). This demand for concrete evidence is not satisfied by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). For example, in *Edenfield v. Fane*, the government banned CPA solicitation without presenting any studies suggesting that personal solicitation for accounting services increased the risk of fraud. *Edenfield*, 507 U.S. at 771. With nothing more than "a series of conclusory statements," the government failed to satisfy its burden. *Id.*

Just as courts demand concrete evidence of harm, they also view prophylactic speech restrictions with extreme skepticism. The Supreme Court has consistently frowned upon "preventative rules in the First Amendment context." *Id.* at 777. In *Edenfield*, Florida tried to defend its solicitation ban as a prophylactic rule that helped to diminish the likelihood of fraud. *Id.* at 768. The Court rejected this approach: "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 777 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Here, the City candidly admits in the text of the Ordinance that it does not know whether there exists any basis for its fears that bidding on rents might not comply with city regulations or that rental bidding platforms might cause housing costs to rise. *See* Exhibit 1 at 1:17-25. The City

[3] The Supreme Court considers the speculative nature of an alleged harm under the direct-advancement step of *Central Hudson*. *See, e.g.*, *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999).

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stated that "it is unclear" whether the rental bidding websites violate local ordinances and likewise "uncertain whether and how these services impact Seattle's rental housing market." *Id.* It is far from obvious that bidding would inflate prices in Seattle's housing market, given that bidders can bid below a landlord's default price. *See Coalition for Icann Transparency Inc. v. Verisign, Inc.*, 464 F. Supp. 2d 948, 964 (N.D. Cal. 2006) (rejecting notion that an auction system of allocating resources—as opposed to a lottery system—would have "predictable adverse price effects" on consumers). Swatting at phantoms does not directly advance the government's interest in compliance with local laws or policies. The City cannot ban speech based on anxiety.

2. The website ban does not facilitate the government studies that are the purpose of the Ordinance

A restriction on commercial speech must have a "logical connection" between means and end. *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009). For example, in *Rubin v. Coors Brewing Company*, the Supreme Court struck down an internally contradictory regulatory scheme on First Amendment grounds. To combat strength wars in the alcohol industry, federal law prohibited brewers from listing alcohol content on beer labels, but it also *mandated* disclosure of alcohol content on wine labels. *Rubin*, 514 U.S. at 488. The Court invalidated this self-defeating scheme: "[T]he irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve [its] end." *Id.* at 489. The speech regulation simply was not "drawn to achieve" the purported government interest. *See Sorrell*, 564 U.S. at 572.

The website ban has no logical connection to the City's fact-finding purposes. The City's purposes as articulated by the Ordinance are to study the effects and legality of rental bidding platforms. *See* Exhibit 1. Banning the use of such websites during the course of investigation cannot assist the departments assigned to study these platforms. Indeed, the website ban undermines any investigation because the City cannot observe the impact of rental bidding platforms in Seattle while such platforms are banned. And the City itself admits that the impact of these bidding platforms depends on local market conditions, which means that evidence from other markets is of limited value. *See id.* at 1:23-25 ("[T]hese services may have different effects on

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10940 NE 33rd Pl., Suite 210
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(425) 576-0484

markets depending on the scarcity of housing supply."). The ban therefore lacks any logical connection to the City's interests in understanding rental bidding. Like the self-defeating labeling law in *Rubin*, the moratorium in fact stymies those interests.

A city staff memo raised a third possible rationale for the ban not directly related to fact-finding: "to give the City time to create a regulatory framework *if necessary* before use of such services proliferates." Exhibit 3 at 1 (emphasis added). The City offers no reason to believe that imposing a "regulatory framework" will be substantially more difficult if these websites already have a presence in the Seattle market. But more important, this interest hinges on a nonexistent finding of harm, which in turn depends on the studies that the ban itself undermines. The presumption of harm evident in the City's reflexive approach to regulation clashes with the fundamental notion that speech restrictions "should be the government's tool of last resort." *Valle Del Sol*, 709 F.3d at 826; *see also Edenfield*, 507 U.S. at 777 (The Supreme Court has an unforgiving approach "to the use of preventative rules in the First Amendment context.").

3. The website ban is underinclusive because it does not ban bidding in the residential rental market in general

A speech regulation also runs afoul of the advancement step of *Central Hudson* if it is underinclusive. *Valle Del Sol*, 709 F.3d at 824. Underinclusivity arises when a regulation reaches only a subset of the speech that causes the alleged harm, such that the regulation fails to achieve its purported goal or makes irrational distinctions between regulated and unregulated speech. *Metro Lights*, 551 F.3d at 906. A classic example of an underinclusive commercial speech restriction arose in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). To reduce clutter and eye sores, Cincinnati prohibited commercial handbills in news racks on public property but allowed noncommercial handbills. *Id*. at 412. The distinction between commercial and noncommercial handbills bore no relationship to the city's interests, since both types of handbill contributed equally to the proliferation of news racks. *Id.* at 425. The restriction thus lacked the required "fit between its goals and its chosen means" because the distinction drawn between commercial and noncommercial handbills "has absolutely no bearing on the interests [Cincinnati]

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Bellevue, Washington 98004
(425) 576-0484

has asserted." *Id.* at 428. The Supreme Court encountered another underinclusive law in *Rubin*, the law prohibiting alcohol content on beer labels ostensibly to curtail strength wars. *Rubin*, 514 U.S. at 487-88. The law was underinclusive in several respects: it did not prevent brewers from disclosing alcohol content in advertisements, did not apply to distilled spirits, and did not preclude brewers from using descriptive terms to boast about alcohol strength. *Id.* at 488-89. The resulting gap in the regulatory scheme "makes no rational sense if the Government's true aim is to suppress strength wars." *Id.* at 488. The law therefore failed the direct advancement test. *Id.* at 491.

The website ban is likewise underinclusive because it targets only specific bidding forums. It does not, for example, prohibit a landlord from posting an ad on Craigslist that states: "Monthly rent will be based on the highest bid offer among qualified applicants. Please submit bids by email." Nor would it prevent prospective tenants from countering the landlord's advertised rent by simply calling the landlord or meeting in person to offer a bid. These other bidding activities, however, pose the same alleged concerns as rental bidding platforms and lack the transparency offered by bidding sites like Rentberry. Thus, the distinction between bidding behavior in other contexts and rental bidding websites has no bearing on the interests asserted by the City. Like the underinclusive handbill law in *Discovery Network* and the labeling law in *Rubin*, the moratorium targets only one forum in which the speech at issue occurs. This myopic focus "makes no rational sense if the Government's true aim" is to address rental bidding. *See Rubin*, 514 U.S. at 491.

c. The website ban is more extensive than necessary

This final prong of the *Central Hudson* test addresses the "fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco*, 533 U.S. at 556 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)). The means must be "narrowly tailored to achieve the desired objective." *Id.* A preemptive ban on speech—with no evidence of harm—is more extensive than necessary because less restrictive means exist and because the moratorium extends to speech that does not relate to the government's interests.

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Bellevue, Washington 98004
(425) 576-0484

1. The City has less restrictive alternatives

While the commercial speech test does not require the government to adopt the least restrictive means to accomplish its interest, the *availability* of less restrictive alternatives indicates that a law is more extensive than necessary. *See Rubin*, 514 U.S. at 491 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary."). For example, in *44 Liquormart, Inc. v. Rhode Island*, the state banned advertising liquor prices in order to encourage temperance. 517 U.S. at 507. Rhode Island argued that a price advertising ban promoted this goal because the ban would mitigate competition and thereby maintain high prices. *Id.* at 505. The Supreme Court, however, held that the ban was more extensive than necessary because less restrictive means to inflate alcohol prices existed—namely to increase taxes on alcohol. *Id.* at 507.

Like in *44 Liquormart*, Seattle wants to influence the cost of a product (housing) within its jurisdiction. The only difference is that Seattle wishes to reduce rather than inflate those prices. As the Supreme Court noted in *44 Liquormart*, there are many ways to control price for a product that do not involve speech restrictions. For example, Seattle could influence housing prices by offering subsidies or other incentives to developers to increase the supply or by subsidizing renters below a certain income level. Seattle is already engaged in non-speech-restrictive efforts to lower the cost of housing, such as the Multifamily Tax Exemption that creates incentives to provide low-income housing. *See* SMC § 5.73. Such alternatives do not restrict speech and offer a more direct route to addressing housing costs. Hence, the moratorium is more extensive than necessary given these alternatives.

2. The website ban is overinclusive

A speech restriction will fail if it is either seriously underinclusive or overinclusive. *Valle Del Sol*, 709 F.3d at 823-24, 828. For instance, in *Lorillard Tobacco Co. v. Reilly*, the Supreme Court held that restrictions on outdoor tobacco ads were more extensive than necessary because the restrictions forbade advertising in most metropolitan areas throughout Massachusetts. 533 U.S. at 561-62. The Court held that the "broad sweep" of the ad restrictions indicated that the

Pacific Legal Foundation
10940 NE 33rd Pl., Suite 210
Bellevue, Washington 98004
(425) 576-0484

government "did not carefully calculate the costs and benefits associated with the burden on speech imposed by the regulations." *Id.* at 561 (internal quotation marks omitted). The Court also noted that the "range of communications restricted seems unduly broad" because it forbade oral communication about tobacco and smaller signs, neither of which posed a major threat to the government's interest in public health. *Id.* at 563.

The website ban is overinclusive because it bans speech that does not relate to bidding or otherwise implicate the City's interests. Since the ban extends to an entire online platform, rather than just the narrow act of bidding, an array of speech on rental bidding websites like Rentberry is forbidden. A landlord such as Wysingle, for example, cannot post advertisements for rental properties on Rentberry's online platform. Nor can a prospective tenant utilize Rentberry's search function and search recommendations for housing in Seattle. Landlords like Wysingle cannot use the search function to evaluate the competition. Likewise, tenants and landlords in Seattle cannot use the portal through which landlords and tenants can communicate or make rent payments. None of these website features relate to the City's interest, yet the moratorium wholly forbids the use of these sites for Seattle properties. As with *Lorillard*, the City has not carefully balanced the costs and benefits of the website ban. *Id.*

CONCLUSION

The website ban strangles speech without any evidence of harm or any attempt to balance the speech interests at stake with the City's interests. The ban therefore fails both strict and intermediate scrutiny. Plaintiffs' Motion for Summary Judgment should be granted.

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Pacific Legal Foundation
10940 NE 33rd Pl., Suite 210
Bellevue, Washington 98004
(425) 576-0484

DATED: August 17, 2018.

Respectfully submitted,

By: s/ ETHAN W. BLEVINS
By: s/ BRIAN T. HODGES
Ethan W. Blevins, WSBA # 48219
Brian T. Hodges, WSBA # 31976
Pacific Legal Foundation
10940 Northeast 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Fax: (425) 576-9565
Email: EBlevins@pacificlegal.org
Email: BHodges@pacificlegal.org

By: s/ WENCONG FA
Wencong Fa, California Bar # 301679 **
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
Email: WFa@pacificlegal.org

By: s/ JAMES M. MANLEY
James M. Manley, Arizona Bar # 031820 **
Pacific Legal Foundation
3217 East Shea Blvd., #108
Phoenix, Arizona 85028
Telephone: (916) 288-1405
Email: JManley@pacificlegal.org

** Pro hac vice

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018, I electronically filed the foregoing MOTION FOR SUMMARY JUDGMENT, EXHIBITS 1-5, and PROPOSED ORDER ON MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties.

Dated: August 17, 2018.

s/ ETHAN W. BLEVINS
Ethan W. Blevins, WSBA # 48219

Attorney for Plaintiffs

Pacific Legal Foundation
10940 NE 33rd Pl., Suite 210
Bellevue, Washington 98004
(425) 576-0484