Hon. Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RENTBERRY, INC., a Delaware Corporation, and Delaney Wysingle, an individual, Plaintiffs, vs. CITY OF SEATTLE, a Washington Municipal Corporation, Defendant.	No. 2:18-cv-00743-RAJ CITY OF SEATTLE'S OPPOSITION TO, AND CROSS-MOTION FOR, SUMMARY JUDGMENT **NOTE ON MOTION CALENDAR:** **October 19, 2018**

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I INTRODUCTION

Only by misconstruing the Ordinance at issue can plaintiffs mount any semblance of a First Amendment challenge. In an effort to shoehorn a garden-variety economic regulation into a First Amendment problem, plaintiffs vastly overstate the reach of the Ordinance, characterizing it as a wholesale "website ban." To the contrary, the Ordinance does not prohibit or target any form of protected expression. It does not prohibit Mr. Wysingle from using the Rentberry website to communicate with current or prospective tenants or market his rental home, and it does not prevent Rentberry from doing anything at all. The *only* conduct the Ordinance prevents is nonexpressive commercial conduct—the use by a landlord or prospective tenant of an automated bidding technology to execute a rental transaction. Thus, properly construed, the Ordinance does not implicate—much less offend—the First Amendment. Alternatively, if it did regulate commercial speech, it easily would survive intermediate scrutiny. Accordingly, even if this Court concludes this case is justiciable—which it is not—the City is entitled to judgment as a matter of law.

II FACTUAL BACKGROUND

A. The relevant Ordinance.[1]

In response to the undeniable and unprecedented affordable housing crisis sweeping across the region, the City of Seattle (City) has enacted several laws aimed at addressing this crisis. One of those laws is at issue in this lawsuit.

In January 2018, a group of students from the University of Washington,[2] concerned with the impact of new technology—specifically auction technology—on students' ability to find adequate

[1] The City will refer to the law as the "Ordinance" and provide specific citations to the Seattle Municipal Code (SMC).

[2] The students were representatives from the Associated Students of the University of Washington (ASUW), which is the "democratic voice of students that engages the campus community through programming, services, and advocacy." *See* http://www.asuw.org/ (last visited September 12, 2018).

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and affordable rental housing while attending college, sent the Seattle City Council a request to legislate in the area of online auctioning technology as it relates to rental housing in Seattle. *See* Declaration of Michael K. Ryan (Ryan Decl.), Exhibit A. In February 2015, members of the ASUW presented at a committee meeting of the Housing, Health, Energy, and Workers' Rights Committee. Part of that presentation included a PowerPoint presentation entitled "Online Rent Auction: Barrier to UW Students." *See id.* at Exhibit B. Specifically, the ASUW called for legislation imposing a "moratorium on Rent Bidding Services" because, in its view, "[a]uctions have been shown repeatedly to raise prices" and "[t]he time to act is now, before the issue becomes unmanageable." *See id.*In support of its view, the ASUW presented citations to newspaper reports indicating that with the influx of this new form of renting homes, the costs of rents in cities like San Francisco and San Jose had risen by five percent. *See id.*; *see also* Ryan Decl., Exhibits C & D (newspaper articles). In addition, the students pointed to studies from the residential real estate market supporting the view that auctions repeatedly increased home prices. *See id.* at Exhibits E, F, & G (studies). Several Committee members expressed concerns with regulations having to "catch up" with new technologies and noted that studying the impacts of such technology before it takes root was better than being reactive to those technologies after they have taken root.[3]

On March 19, after considering the matter, including the news reports and studies the students had cited, the City Council passed Ordinance No. 12551, and the Mayor signed the bill into law on March 30, 2108. *See* Dkt. # 22-1. The Ordinance, which is now codified, contains a single prohibition: "[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. The Ordinance defines "rental housing

[3] A video of the committee meeting is available at http://www.seattlechannel.org/mayor-and-council/city-council/2018/2019-housing-health-energy-and-workers-rights-committee/?videoid=x87650 (last visited September 12, 2018), and the relevant portions discussing rental auctions begin at 1:31:50.

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bidding platform" or "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 terms, to landlords for approval or denial. Merely publishing a rental housing advertisement does not make a person a rental housing bidding platform.

See SMC 7.24.020. This prohibition expires after one year, unless the City Council affirmatively extends it by an additional twelve months. *See* SMC 7.24.090.B-C. During this one-year period, Seattle's Office of Housing and Office for Civil Rights and the Seattle Department of Construction and Inspections (SDCI) are to coordinate to study whether the online auction technology complies with other Seattle laws and regulations relating to rental housing and determine the effect of the use of those platforms on "equitable access to Seattle's rental housing market." *See* Dkt. # 22-1 at p. 6.

Under the SMC, SDCI is the agency tasked with enforcing the Ordinance. *See* SMC 7.24.120.A & SMC 7.24.020; *see also* Declaration of Jessica Long (Long Decl.), ¶ 3. SDCI interprets the Ordinance as only prohibiting landlords and potential tenants from using the auction function on websites such as Rentberry. *See id.* at ¶ 7. In other words, a landlord would not be in violation of the Ordinance if she listed her rental home, advertised a price, or communicated with tenants or potential tenants about the property. *See id.* at ¶ 8. Likewise, SDCI interprets the Ordinance as having no direct application to websites like Rentberry because the Ordinance is directed at the conduct of landlords and potential tenants, not any entity hosting an online auction *See id.* at ¶ 5. Thus, in SDCI's view, the Ordinance only prohibits the act of renting a property via an online or application-based auction technology.

B. Relevant facts regarding plaintiffs and procedural history.

On May 23, 2018, plaintiffs filed this lawsuit alleging that the Ordinance violates the First Amendment. *See generally* Dkt. # 1. Shortly thereafter, the parties' counsel conducted a telephonic

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conference to discuss how to proceed. During the call, counsel for the City informed plaintiffs' counsel that the enforcing agency did not construe the Ordinance as prohibiting Rentberry from doing anything, and further explained that the only conduct the Ordinance prohibited was engaging in a rental transaction for Seattle properties using online auctioning technology. *See* Ryan Decl. at ¶ 6; *see also* Dkt. # 20 at p. 5.

On June 25, 2018, plaintiffs filed a motion for a preliminary injunction. *See* Dkt. # 20. In support of that motion, Mr. Wysingle filed a signed declaration dated May 15, 2018. *See* Dkt. # 20-4. In that declaration, Mr. Wysingle declared that his "rental home is currently occupied" and that he "planned to use a bidding platform to advertise my property and find a new tenant, but I cannot do so because" of the Ordinance. *See id.* at ¶ 3. While the City was able to depose Mr. Wysingle, Rentberry's CEO was not made available for a deposition because he had apparently left the United States and did not plan to return until October of this year. *See* Ryan Decl., ¶ 7.

Mr. Wysingle testified that that he owns two properties in the City, only one of which he rents out. *See id.* at Exhibit H, pp. 9-10. Mr. Wysingle also testified that (1) at the time he filed his Complaint and signed and filed his original declaration, he did not in fact have any tenant renting his home; and, (2) at that time, he did not have a house to place on the rental market because his rental home was undergoing a remodel. *See id.* at pp. 16, 27-30.[4] When pressed for a date by which his rental home could be placed on the market, Mr. Wysingle candidly admitted that he could not provide a date certain by which his rental property would be ready to list and to rent. *See id.* at p. 30. Mr. Wysingle was also asked about his intentions to utilize Rentberry. In this regard, Mr. Wysingle admitted that (1) he did not have an account with Rentberry; (2) he did not really understand how the website worked; and (3)

[4] When asked about these obvious discrepancies, Mr. Wysingle acknowledged that his declaration was not accurate, claiming that the discrepancies were "an oversight." *See id.* at pp. 29-30.

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the Ordinance allowed him to communicate in numerous ways with potential tenants and advertise his property on Rentberry. *See id.* at pp. 31-42, 50-67, & 73-74. Shortly after the deposition, plaintiffs withdrew their injunction request.

On August 17, 2018, plaintiffs filed this motion. The very same day, plaintiffs' counsel informed the City that Mr. Wysingle had "executed a new lease agreement this afternoon for his Seattle rental property." *See* Ryan Decl., Exhibit I, p. 2. The lease is for a ten-month term, which expires on June 30, 2018, and the rent is set at $2,800.[5] *See id.* at Exhibit J. In response to this development, counsel for the City reiterated that "the agency charged with enforcing the challenged Ordinance does not interpret the Ordinance as prohibiting Rentberry from doing anything," raised concerns as to the justiciability of this case in light of this new development, and offered to provide plaintiffs "a sworn declaration from a Seattle official charged with enforcement under this Ordinance so that there is no doubt how the City interprets this Ordinance" if plaintiffs voluntarily agreed to dismiss this case. *See id.* at Exhibit I, pp. 1-2. Plaintiffs' counsel promptly refused, and the City reserved its right to seek costs and fees associated with this case should the City prevail. *See id.* at p. 1.

III LEGAL STANDARD

Because plaintiffs bring only a facial challenge, they must demonstrate that the Ordinance is "unconstitutional in every conceivable application[.]" *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016) (quotation omitted). Such challenges are "disfavored" because they "often rest on speculation," run the risk of prematurely interpreting statutes, are contrary to "fundamental principle[s] of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State*

[5] This is a substantial increase over prior rent. Ryan Decl., Exhibit H at pp. 13 & 42.

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Republican Party, 552 U.S. 442, 450-51 (2008) (citations and quotations omitted).

IV ARGUMENT

The Ordinance is not a "website ban." A proper understanding of the Ordinance is necessary to resolve the threshold question in this case: whether plaintiffs can satisfy their burden under Article III. Plaintiffs fall far short in this regard, and consequently, this case is not justiciable. However, even if this Court concludes that Article III is satisfied, the Ordinance does not regulate speech, but rather only regulates nonexpressive commercial conduct. And, even if the Court disagrees, the Ordinance is constitutional under the test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) (hereinafter "*Central Hudson*"). Accordingly, the City is entitled to judgment as a matter of law.

A. The Ordinance is not a "website ban."

As a preliminary matter, plaintiffs grossly misconstrue the Ordinance. To be sure, labelling something a "website ban" has rhetorical appeal, as it conjures up notions of the old censorship boards of the past that are anathema to the First Amendment. Just as sure, though, slapping a label on something does not make it so. The entirety of plaintiffs' argument departs from a false premise stemming from a misreading of the Ordinance. Given the parties' divergent views as to the scope and breadth of the Ordinance, it is critical to first understand what conduct the Ordinance does and does not regulate. *See, e.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1188-92 (9th Cir. 2015) (construing scope of statute in First Amendment case to determine whether enforcement agency's interpretation was permissible).

By its plain terms, the Ordinance only prohibits "[l]andlords and potential tenants [from] using rental housing bidding platforms for real property located in Seattle city limits." *See* SMC 7.24.090.A. On its face, the Ordinance says nothing about the content of any website. Its only prohibition applies

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to "landlords and potential tenants;" it says nothing about what a website can or cannot do. Thus, by its very terms, the Ordinance does not prohibit Rentberry from doing anything. Rentberry is free to run its website as it sees fit. And the fact that Seattle's regulation may disrupt Rentberry's preferred business model does not have any First Amendment consequences. *See, e.g.*, *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 47-48 (1st Cir. 2005) ("The First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit or with the listener's ability to act upon the communication.").[6] Likewise, the Ordinance does not prevent Mr. Wysingle from advertising his property, communicating with potential tenants, or using Rentberry's website to evaluate his competition and establish a market price. It only prevents him from using Rentberry's (or some other website's) on-line bidding technology.

"It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (citations omitted). Consequently, when analyzing a facial challenge under the First Amendment, "a federal court must consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (alterations, quotations, & citations omitted); *see also Yamada*, 786 F.3d at 1188 (9th Cir. 2015). Indeed, an enforcing agency's "reasonable limiting interpretation merits [ ] deference." *Yamada*, 786 F.3d at 1190 n.2 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982)).

Consideration of legislative history is appropriate in determining whether SDCI's construction of the law is appropriate. *Yamada*, 786 F.3d at 1189-90. As the Staff Memorandum explains, the

[6] As discussed *infra* at Part V.B., none of plaintiffs' submissions explain how Rentberry's First Amendment rights are impacted at all by not permitting landlords and potential tenants from utilizing Rentberry's auctioneering technology.

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impetus behind the Ordinance was a presentation by a student association from the University of Washington about "setting apartment rents using online bidding services." *See* Dkt. # 22-3, at p. 2. The concern expressed by those students, which was backed by studies and news reports, was that such "auctions can drive up the price" in the context of residential home sales. *See id.* at n.1. Given this history, SDCI's interpretation of the Ordinance is completely consistent with the City Council's ultimate objective—prohibiting the use of online bidding technology in rental transactions.

Thus, even if there were ambiguity in the law as to the scope of the Ordinance, the agency charged with enforcement of the Ordinance has made clear that it does not apply to Rentberry *per se*, nor does it apply to any of the expressive activities catalogued in plaintiffs' Motion. Instead, the Ordinance prohibits one thing, and one thing only—the use of an auction function on a website to consummate a rental transaction. Rentberry is free to advertise Seattle properties. Rentberry is free to market Seattle properties. Mr. Wysingle is free to communicate with tenants and prospective tenants about renting his home; free to list his suggested rental price on Rentberry; and free to manage his relationship with his tenants, including payments, maintenance requests, etc., through Rentberry. The only thing the Ordinance prevents is Mr. Wysingle's completely hypothetical use of an automated bidding function on Rentberry (or other sites) to rent his home.

B. This case is not justiciable.

Article III, section 2 of the United States Constitution limits federal jurisdiction to actual "Cases" or "Controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Justiciability is a threshold question that must be resolved in every federal proceeding. *City of Los Angeles v. Kern*, 581 F.3d 841, 845 (9th Cir. 2009). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding on the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The role of the federal courts "is neither to issue advisory

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opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). Courts should assume the absence of jurisdiction unless the record affirmatively shows otherwise. *See San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

Plaintiffs bear the burden of establishing standing. *Clapper*, 568 U.S. at 408 (2013). "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of *the particular claims* asserted." *Oregon Prescription Drug Monitoring Program v. DEA*, 860 F.3d 1228, 1233 (9th Cir. 2017) (quotation omitted). To establish standing, a plaintiff must show that (1) it has suffered an injury-in-fact; (2) that injury is fairly traceable to the challenged law; and, (3) the relief requested would redress that injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). "[S]tanding is determined as of the commencement of litigation." *Yamada*, 786 F.3d at 1203 (alterations omitted).

To satisfy the "injury-in-fact requirement," a plaintiff must show that she has suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations and citations omitted). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way. For an injury to be concrete, it must actually exist; in other words, it is real, and not abstract." *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quotations & citations omitted). Allegations of future injury are only sufficient where "the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 568 U.S. 414 n.5).

In pre-enforcement challenges like this one, a plaintiff "may meet constitutional standing

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requirements by 'demonstrat[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Even under this "relaxed standing analysis for pre-enforcement challenges, plaintiffs must still show an actual or imminent injury to a legally protected interest." *Lopez*, 630 F.3d at 785 (citations and quotation omitted). The Ninth Circuit considers several factors when determining whether "pre-enforcement plaintiffs," like the plaintiffs here, have satisfied their burden of demonstrating "a credible threat of adverse state action sufficient to establish standing."

> First, we have considered whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them. Second, we have considered whether the plaintiffs have failed to establish, with some degree of concrete detail, that they intend to violate the challenged law. We have also considered a third factor, whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the government. Such inapplicability weighs against both the plaintiffs' claims that they intend to violate the law, and also their claims that the government intends to enforce the law against them.

Id. at 786. Because Plaintiffs cannot satisfy Article III, the City is entitled to summary judgment.

Mr. Wysingle. Mr. Wysingle lacks standing because at the time he filed his Complaint, he was not subject to the Ordinance, as he did not have—and in fact, currently does not have—a rental home to rent out using online auction technology. While Mr. Wysingle claimed in his Complaint and initial declaration that "[m]y rental home is currently occupied, but I will need to find a new tenant in summer of 2018," *see, e.g.*, Dkt. # 20-4 at ¶ 3; this testimony was false. As explained above, during his deposition Mr. Wysingle testified that he has not had a tenant in his rental home since February of 2018, that his rental home was currently under renovation, and that he could not provide any specific timeframe by which his home would be available to rent. Thus, Mr. Wysingle cannot demonstrate that the Ordinance has caused him, or would cause him, any injury-in-fact because as of the date he filed

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his Complaint, he had no rental property subject to the Ordinance. Thus, Mr. Wysingle lacks standing. *See, e.g.*, *Yamada*, 786 F.3d at 1204 (finding Article III standing lacking where party "was not subject to" the challenged law "as of the date the complaint was filed"). It necessarily follows that Mr. Wysingle cannot trace any injury to the challenged Ordinance and the relief he requests would not redress any harm specific to him.

In addition, during his deposition Mr. Wysingle readily admitted that he was not sure whether he would use websites like Rentberry to rent his home and that he was merely considering doing so. In fact, we now know that Mr. Wysingle did not use Rentberry to rent his home. Thus, Mr. Wysingle cannot establish any actual intention to engage in conduct prohibited by the Ordinance. This, too, cuts against standing. *Lopez*, 630 F.3d at 787-88 ("Without these kinds of details, a court is left with mere some day intentions, which do not support a finding of the actual or imminent injury that our cases require.") (quotations omitted). When coupled with the undeniable fact that at the time the Complaint was filed, Mr. Wysingle did not have a home that he could place on the Rentberry website, Mr. Wysingle lacks Article III standing and therefore is not entitled to injunctive or declaratory relief.

Lest there be any doubt that Mr. Wysingle's claim is not justiciable, the fact that he is no longer even potentially subject to the Ordinance puts such doubt to rest. It is undisputed that Mr. Wysingle only has one property that he rents out. It is likewise undisputed that such property is no longer on the rental market because it was rented out on August 17, 2018. Article III's case or controversy requirement is not met with respect to Mr. Wysingle because "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quotation omitted); *see also Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005) (en banc) ("Article III requires that a live controversy persist throughout all stages of the litigation."). Consequently, even assuming Mr. Wysingle had standing at

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some point during this litigation, he can longer satisfy Article III's case or controversy requirement, because he lacks standing or, alternatively, because his case is now moot. *See Arizonans*, 520 U.S. at 69 (resignation from public employment mooted complaint challenging law that might apply to public employees). "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at 68 n.22 (quotation omitted). And this Court does "not have the constitutional authority to decide moot cases." *Gator.com*, 398 F.3d at 1129 (quotation omitted).

In sum, not only did Mr. Wysingle lack the necessary personal stake in the litigation to which he lent his name when the Complaint was filed, but he lacks such a stake at this point in time. Whether viewed through the lens of standing or mootness, both of which are rooted in Article III, the result is the same: Mr. Wysingle has no personal stake in this case.

Rentberry. Rentberry lacks standing because the Ordinance does not prevent it from doing anything. It is free to advertise Seattle properties. It is free to market itself, and its services, to Seattle landlords and tenants. Indeed, nothing in the Ordinance prevents Rentberry from enabling its online auction technology with respect to Seattle properties. Rather, the Ordinance only prohibits landlords and tenants from using the online auction function. Thus, Rentberry is free to do whatever it wants with respect to properties located in Seattle. Consequently, because the Ordinance does not apply to Rentberry, it cannot satisfy Article III's standing requirements. *Lopez*, 630 F.3d at 788 (discussing cases where injury-in-fact requirement cannot be met "where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities").

It is no answer for Rentberry to say that its voluntary decision to refrain from listing Seattle properties on its website somehow creates the requisite injury-in-fact, because "self-censorship alone is insufficient to show injury." *Lopez*, 630 F.3d at 792; *see also Laird v. Tatum*, 408 U.S. 1, 13-14

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(1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"). Rentberry, moreover, has been on notice since this litigation began that nothing in the Ordinance prohibits Rentberry from advertising properties, communicating with landlord and tenants, or enabling its auctioning technology for Seattle properties. Thus, the choice not to "open its website to Seattle property listings," Dkt. # 22-5 at ¶ 11, is Rentberry's choice alone. Such self-inflicted "injuries" are insufficient to establish standing. *Clapper*, 568 U.S. at 416 (noting parties cannot "manufacture standing merely by inflicting harm on themselves"); *see also Habeas Corpus Resource Ctr. v. DOJ*, 816 F.3d 1241, 1251 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 1338 (2017) (taking measures to prevent harm, even reasonable ones, insufficient to establish that injury is "certainly impending"); *Chamber of Commerce of United States v. City of Seattle*, No. C16-0322RSL, 2016 WL 4595981, at * 4 (W.D. Wash. Aug. 9, 2016) (Lasnik, J.). Here, the enforcing agency has made it unequivocally clear that the Ordinance does not apply to any of Rentberry's activities. Thus, any claim of fear of future harm lacks "credibility." *Lopez*, 630 F.3d at 788.

Finally, plaintiffs' submission never explains what First Amendment interest *Rentberry* has in having its paid subscribers use its bidding function or how *its* speech is being impacted by the Ordinance. At most, Rentberry claims that its "auctioning technology" is "[a] key feature of [its] platform." Dkt. # 22-5 at ¶ 4.[7] Such a vague and conclusory assertion, with no elaboration or explanation, is not the type of evidence that is sufficient to establish injury-in-fact. *See, e.g.*, *Lujan*, 504 U.S. at 561-62 (explaining heightened evideCntiary burden when claiming injury to another). For example, Rentberry does not claim that without the use of its "auctioning technology" it cannot

[7] Notably, Rentberry's non-litigation documents do no refer to its auctioning technology as key or central to how its website functions. According to a whitepaper issued by Rentberry, its "Auctioning Technology acts as a pricing oracle and is part of Rentberry's Unique Selling Proposition (USP), which allows tenants to bid, sign legal rental documents and settle payments using BERRY tokens, all in one visit to the Rentberry website or mobile app." *See* Ryan Decl., Exhibit K at p. 16.

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engage in the types of activities that fall within the protection of the First Amendment, such as advertising properties or communicating with potential subscribers about its services. Indeed, Rentberry's own "Terms of Use" note that it provides "only a neutral online venue" and that "Rentberry does not counsel parties to a real estate transaction, show properties, or negotiate rental or sales contracts." Ryan Decl., Exhibit L at p. 3. Nor does Rentberry provide any evidence that its potential subscribers would not use the website if they could not use the auctioning technology during a rental transaction. What is more, the Complaint and the Rentberry declaration are both devoid of any claim that Rentberry is attempting to invoke the First Amendment rights of its hypothetical future customers. Be this at it may, Rentberry would be hard-pressed to do so because "[p]laintiffs who have suffered no injury themselves cannot invoke federal jurisdiction by pointing to an injury incurred only by third parties." *Lopez*, 630 F.3d at 792.

Because neither plaintiff can satisfy Article III's requirements, the City is entitled to judgment as a matter of law.

C. The Ordinance regulates nonexpressive commercial conduct, not speech.

Regardless of justiciability, plaintiffs cannot meet their burden of establishing that the First Amendment applies to the conduct the Ordinance regulates. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). As explained, the Ordinance only prohibits the use of an internet bidding function in the execution of a rental transaction. In assessing whether the First Amendment even applies, this Court must determine "whether the Ordinance primarily targets speech or speakers, or is better construed as an economic regulation." *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp.3d 1066, 1076 (N.D. Cal. 2016). That determination is dispositive because "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct, [and] the First Amendment does not prevent restrictions directed

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at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Accordingly, the Ninth Circuit has explained that the "threshold question is whether conduct with a 'significant expressive element' drew the legal remedy or the ordinance has the inevitable effect of singling out those engaged in expressive activity." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quotations omitted).

All the Ordinance does is regulate how a commercial transaction—the rental of a home in exchange for money—is conducted. The Ordinance at issue here "regulates conduct, not speech" because "[i]t affects what" landlords and tenants "must *do*,"—refrain from using auctioneering technology to effectuate a commercial transaction—"not what they may or may not *say*." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (hereinafter "*FAIR*"). The Ordinance does nothing more than regulate how a rental transaction occurs. The Ordinance is targeted not at "expressive conduct," but rather at a commercial transaction. Landlords and tenants "remain free under the [Ordinance] to express whatever views" they may have regarding the costs of a rental home. *Id.* The Ordinance does not prohibit all communications about prices, only those done through a specific medium—on-line auctioneering technology. Insofar as the act of renting out a property requires a landlord and tenant to communicate with one another, any possible impact on speech is "plainly incidental to the [Ordinance's] regulation of conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quotations omitted).

The use of an automated bidding function to facilitate a rental transaction is not inherently expressive; rather, it is nonexpressive commercial conduct. *See, e.g.*, *Livable v. City of Chicago*, 2017 WL 955421, at * 6 (N.D. Ill. Mar. 13, 2017) (regulating "home sharing . . . regulates conduct—the

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temporary rental of property in exchange for money—instead of speech."). Here, unlike the regulation at issue in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the Ordinance does not tell a landlord how he must convey his price or what he may or may not say about his price to a potential tenant.[8] By contrast, the law at issue in *Expressions Hair Design* banned "surcharges" for credit card purchases, and this ban, in turn, impacted how a seller communicated a price to a customer. Unlike here, the merchants in *Expression Hair Design* wanted to convey a distinct message to consumers by communicating prices in a certain way: We "are not the bad guys—[ ] the credit card companies, not the merchants, are responsible for the higher prices." 137 S. Ct. at 1148. The same is not true here because the Ordinance regulates how the underlying transaction is conducted as opposed to dictating what a landlord may or may not say to a potential tenant.

Plaintiffs never even attempt to explain how participating in an online auction is an expressive act subject to First Amendment protection. Nor have plaintiffs attempted to explain how being prohibited from using an online auctioneering technology stifles any message they are trying to send, thereby turning an otherwise economic regulation into one that impermissibly regulates expressive conduct. Because the act of participating in an online auction in the context of a rental transaction is "not inherently expressive," such conduct does not fall within the ambit of the First Amendment. *See, e.g.*, *FAIR*, 547 U.S. at 64 ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not *sufficiently interfere with any message*

[8] Nor does the Ordinance prevent a potential tenant from expressing a price to the landlord. A potential tenant is free to do so by any number of means. The only way she cannot do so under the Ordinance is through online auction technology. In this way, the Ordinance is akin to a regular time, place and manner restriction, insofar as it simply regulates certain aspects of a practice, while not altogether banning it. Importantly, no potential tenants are plaintiffs in this case, which impacts the standing analysis because plaintiffs face a higher burden when an alleged injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*[.]" *Lujan*, 504 U.S. at 562.

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of the school.") (emphasis added); *see also Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018) (rejecting argument that "payment of wages" was "inherently expressive"); *Int'l Franchise Ass'n*, 803 F.3d at 408 ("A business agreement or business dealings between a franchisor and franchisee is not conduct with a 'significant expressive element.'") (quotation omitted); *Airbnb*, 217 F. Supp.3d at 1076 ("A Booking Service as defined and targeted by the Ordinance is a business transaction to secure a rental, not conduct with a significant expressive element."); *Homeaway.com, Inc. v. City of Santa Monica*, 2018 WL 1281772, at * 6 (C.D. Cal. Mar. 9, 2018), *appeal filed* (9th. Cir. Mar. 21, 2018) ("A booking transaction as defined and targeted by the Ordinance is a business transaction to secure a short-term rental, not conduct with any significant expressive element."). Plaintiffs' view of the First Amendment begs the ultimate question: What message are landlords trying to convey by renting a home through an online auction? Plaintiffs have not even attempted to answer that question.

Plaintiffs reliance on several Supreme Court cases is misplaced because the cases on which plaintiffs rely involve inherently expressive conduct. For example, in *Edenfield v. Fane*, the Court addressed "Florida's blanket ban on direct, in-person, uninvited solicitation by CPA's[.]" 507 U.S. 761, 767 (1993). Likewise, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court addressed a law that "effectively" forbade the "advertising or other affirmative dissemination of prescription drug price information" in the State of Virginia. 425 U.S. 748, 752 (1976). The same is true of *Sorrell*, which addressed a law prohibiting the sale of "prescriber-identifying information" to marketers, prohibited information from being "used for marketing," and barred certain individuals from "using the information for marketing." 564 U.S. at 563. Here, plaintiffs cannot seriously contend that the Ordinance bans communication akin to solicitation, advertising, or marketing. Rather, it prohibits nonexpressive commercial conduct—

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using a specific form of technology to carry out a rental transaction.

Furthermore, plaintiffs cannot demonstrate that the Ordinance was "motivated by a desire to suppress speech." *Int'l Franchise Ass'n*, 803 F.3d at 409. In fact, plaintiffs concede that the Ordinance was motivated by a desire to determine whether on-line auctioning technology complies with other City laws[9] and to further study what impact such technology would have on Seattle's rental market. The Ordinance is, therefore, nothing like the law in *Sorrell*, which was motivated by a desire to suppress the speech of specific speakers (pharmaceutical manufacturers) about a specific topic (brand-name drugs), based on the viewpoint of the speaker at issue (pro brand-named drugs). 564 U.S. at 564-65. At bottom, the Ordinance is directed at a specific business transaction, "not to any message" a landlord or potential tenant expresses. *Int'l Franchise Ass'n*, 803 F.3d at 409.[10]

Finally, this Court should reject plaintiffs' expansive view of the First Amendment, because accepting plaintiffs' argument is "tantamount to finding that any regulation of commercial activity involving a buyer and a seller would implicate the First Amendment[.]" *A.B.C. Home Furnishings, Inc. v. Town of East Hampton*, 947 F. Supp. 635, 643 (E.D.N.Y. 1996). Because the Ordinance only regulates nonexpressive commercial conduct, and any impact on speech is purely incidental to the

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[9] Whether a state court judge struck down one of those laws is irrelevant because the relevant inquiry here is the City's motivation for passing the law, not its efficacy.

[10] Plaintiffs' argument that the Ordinance is a prior restraint is without merit. *See* Dkt. # 22 at 9-11. First, it is doubtful whether the prior restraint doctrine applies to commercial speech. *Hunt v. City of Los Angeles*, 638 F.3d 703, 718 n.7 (9th Cir. 2011). Second, the Ordinance, which merely prohibits a specific type of nonexpressive commercial conduct, looks nothing like a prior restraint, as prior restraints typically involve licensing schemes that vest too much discretion in the hands of, or provide no time guidelines for, licensing officials. *See id.* Likewise, plaintiffs' claim that the Ordinance regulates non-commercial speech is also devoid of merit. *See* Dkt. # 22 at 11-12. Not only does the Ordinance not sweep as broadly as plaintiffs claim, but the examples cited (none of which the Ordinance prohibits) all involve interactions between a landlord and a tenant involved in a commercial relationship. *See id.* (citing "maintenance service requests, housing references, and the like"); *see e.g.*, *Livable*, 2017 WL 955421, at *6 (N.D. Ill. Mar. 3, 2017) (rejecting similar argument). In this case, the Ordinance targets nonexpressive commercial conduct between a landlord and a *potential* tenant; thus, any claim that a landlord/tenant relationship is something more than merely a commercial relationship; *but see San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, 881 F.3d 1169, 1176 (9th Cir. 2018); is beside the point because the Ordinance does not regulate any ongoing relationship; rather, it regulates conduct that might establish such a relationship.

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Ordinance's purposes, this case does not implicate, much less violate, the First Amendment. Consequently, the City is entitled to judgment as a matter of law.

D. The Ordinance satisfies Central Hudson.

Even if the Ordinance at issue restricted commercial speech, it survives constitutional scrutiny under the four-part test laid down by the Court in *Central Hudson*:

> (1) if the communication is neither misleading nor related to unlawful activity, then it merits First Amendment scrutiny as a threshold matter; in order for the restriction to withstand such scrutiny, (2) [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech; (3) the restriction must directly advance the state interest involved; and (4) it must not be more extensive than is necessary to serve that interest.

World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 684 (9th Cir. 2010) (quotations omitted). Because the first prong addresses the content of a communication and is thus inapplicable to a law that does not regulate speech, the City will only address *Central Hudson*'s last three prongs. Even if viewed as regulating commercial speech, the Ordinance withstands scrutiny nonetheless because it directly advances the City's substantial interest in studying—and, if necessary, regulating—rental housing bidding platforms, and it is narrowly tailored to serve that interest.

1. The City has a substantial interest in studying and determining whether and how to regulate rent-bidding technology before it proliferates.

Plaintiffs effectively concede that the City has a substantial interest in studying the impacts of this new technology on the rental market before it proliferates. *See* Dkt. # 22 at p. 18. Nonetheless, it bears noting that the City has a substantial interest in understanding and effectively regulating potentially game-changing new technology—particularly technology with a track record of increasing the cost and availability of rental housing. It only takes a passing familiarity with the impact of companies like Uber and Lyft, or Airbnb, to understand the potential for new technologies to upend traditional markets in a matter of years. Furthermore, basic common sense suggests that

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should the City fail to regulate such technology before it proliferates and becomes entrenched, the consequences for the City's rental housing market could be significant—making it even more difficult for renters to find affordable rentals.

2. A limited moratorium on the use of rent-bidding technology directly advances the City's interest in effectively regulating such technology.

Contrary to plaintiffs' contentions, a time-limited prohibition on the use of rent-bidding technology directly advances the City's interest in buying time to study and, if necessary regulate, a potentially disruptive new technology before it proliferates.

As a preliminary matter, plaintiffs overstate the degree of empirical support *Central Hudson* requires. Data and news reports from other jurisdictions indicating that auctions inflate prices is more than sufficient to satisfy *Central Hudson*, as courts "have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995); *see also Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1206 (9th Cir. 2013) (en banc) ("We do not demand mathematical precision from Congress; rather, we demand a 'fit' between the ends and the chosen means.") (citation omitted).

Indeed, in the absence of this empirical data, the City could have relied on mere deductions, inferences, and common sense without offending the First Amendment. *See, e.g., Turner Broadcasting Syst., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of those events based on deductions and inferences for which complete empirical support may be unavailable"); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding restrictions on political speech on the basis of history, consensus, and "simple common sense" where empirical data was unavailable); *Macromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) ("hesitat[ing] to disagree with the

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accumulated, common-sense judgments of local lawmakers and of the many reviewing courts"). Common sense only confirms what the studies and articles underpinning the Ordinance conclude: bidding wars through auctions inflate prices. *See, e.g.*, Ryan Decl., Exhibit D at p. 2 ("Lubinsky admits the site has driven up rents in competitive markets like San Jose and San Francisco an average of 5 percent above listing price."); Exhibit E at p. 3 ("Results indicate that for house sales, auctions lead to greater selling prices across all cities examined."); Exhibit F at p. 1 ("auctions extracted higher prices than private negotiations."); Exhibit G at p. 57 ("In none of the cases studied did auctions result in lower prices than private-treaty sales."). "Nothing in *Edenfield*, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more." *Florida Bar*, 515 U.S. at 628; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (finding "anecdotal evidence and educated guesses" insufficient to justify restriction on commercial speech where government "did not offer any convincing evidence" that the regulation advanced stated purpose).

Plaintiffs further suggest that before it may regulate auctioning technology, the City needs to permit the use of such technology in order to ascertain its potential impact. *See* Dkt. # 22 at p. 20. That suggestion is misguided. While experimenting with rent-bidding technology within the City might provide more robust data than other means of studying this phenomenon, allowing this technology to proliferate unchecked while the City studied the issue would offset any such gains. Furthermore, requiring the City to test the impact of rent-bidding technology before regulating it would force the City to subject its residents to potential harm before taking action. The Supreme Court roundly rejected such a requirement in *Burson*, a case applying the more exacting strict scrutiny standard but nevertheless upholding "campaign-free zones" within 100 feet of polling places.

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> Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights."

504 U.S. at 209 (quotation omitted). Here—assuming for the sake of argument that the Ordinance implicates speech—any infringement on constitutionally protected rights is minimal, as commercial speech is entitled to less protection under the First Amendment than other forms of speech, *Central Hudson*, 447 U.S. at 562-63, and the restriction is time-limited. Thus, nothing in the First Amendment prevents the City from taking preemptive action to assess the risks this new technology presents to the stability of the rental market before such technology takes hold. *Burson*, 504 U.S. at 209; *see also Minority Television Project, Inc*, 736 F.3d at 1207 ("Congress's prophylactic action, based on common sense, congressional understanding of how political advertising works, and record evidence, did not need to await an empirical study to support its predictions.").

Plaintiffs' appeals to under-inclusivity fare no better. "It is well established that a law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny." *Contest Promotions, LLC v. City and Cty. of San Francisco*, 874 F.3d 597, 604 (9th Cir. 2017). Indeed, courts routinely uphold restrictions on commercial speech that fail to address every aspect of a problem. *See, e.g., id.* ("We find no constitutional infirmity in the ordinance's failure to regulate every sign that it might have reached…"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) ("It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising."); *World Wide Rush, LLC*, 606 F.3d at 685 ("Our First Amendment jurisprudence, however, contemplates some judicial deference for a municipality's reasonably

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graduated response to different aspects of a problem.") (quotation omitted); *Jim Gall Auctioneers, Inc. v. City of Coral Gables*, 210 F.3d 1331 (11th Cir. 2000) (rejecting challenge to regulation prohibiting auctions at private residences while permitting other commercial activity at the same).

The cases on which plaintiffs principally rely—*Rubin, supra* and *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993)—are readily distinguishable. "In each of those cases, the government created a distinction between permissible and prohibited forms of commercial speech, and, in each case, the distinction undermined the government's asserted interests in the regulation as a whole." *World Wide Rush, LLC*, 606 F.3d at 686; *accord Minority Television Project, Inc.*, 736 F.3d at 1208 ("The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further.") (quotation omitted); *see Rubin*, 514 U.S. at 489 ("There is little chance that [the challenged law] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects."); *City of Cincinnati*, 507 U.S. at 417-18 (finding insufficient "'fit' between the city's goal and its method of achieving it" where regulation at issue would result in the removal of 62 newsracks while allowing about 1,500-2,000 newsracks to remain in place). In stark contrast, allowing landlords and potential tenants to engage in rent bidding without the use of online or application-based rental housing bidding services will not undermine the City's objectives in enacting the Ordinance. Absent the use of the rent bidding platforms the Ordinance targets, it is very difficult to imagine rent bidding occurring on a scale that would have any measurable impact on the rental housing market.

3. The Ordinance is no more expansive than necessary to serve these ends.

The final prong of the *Central Hudson* analysis does not require a perfect "fit" or the least

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restrictive means to achieve a given end. Instead,

> what [precedent] require[s] is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.

Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 906 (9th Cir. 2009) (quotation omitted). Furthermore, "it is up to the legislature to choose between narrowly tailored means of regulating commercial speech." *Am. Acad. Of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1111 (9th Cir. 2004).

Plaintiffs' arguments as to over-inclusivity are unpersuasive. A limited, one-year moratorium on the use of rent-bidding technology is both directly related and proportionate to the interest the City aims to advance—namely an opportunity to study and determine whether and how to regulate such technology before it becomes entrenched. Indeed, the moratorium will likely be over by the time Mr. Wysingle is able to avail himself of such new technology, should he so choose. And during that one-year moratorium, Rentberry is free to run its website as it sees fit.

Finally, plaintiffs suggest that the availability of various mechanisms to address affordable housing render the Ordinance unconstitutional. *See* Dkt. # 22 at 23. Even if the City were required to adopt the least restrictive alternative, which it is not, the alternatives plaintiffs suggest address housing affordability generally and have no bearing on the interest the Ordinance is designed to further—determining the impacts this new technology will have on communities throughout Seattle and assessing the interaction of this law with other City laws and the rental housing market. Plaintiffs demand a level of exactness between the regulation and the intended result that finds no support in *Central Hudson* and its progeny.

V CONCLUSION

Even if this Court determines Article III is satisfied, and the Ordinance targets expressive

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conduct, the Ordinance survives scrutiny under *Central Hudson*. Accordingly, the City is entitled to judgment as a matter of law.

DATED this 13th day of September 2018.

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CERTIFICATE OF SERVICE

I certify that on the 13th day of September, 2018, I caused a true and correct copy of this document to be served on the following via ECF electronic service:

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