No. 19-35308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENTBERRY INC., a Delaware Corporation; DELANEY WYSINGLE, An Individual,

Plaintiff/Appellant,

vs.

THE CITY OF SEATTLE, a Washington Municipal corporation,

Defendant/Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Case No. 2:18-cv-00743RAJ

BRIEF OF APPELLEE CITY OF SEATTLE

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I. INTRODUCTION

The District Court correctly recognized that neither Mr. Wysingle nor Rentberry had standing to bring this suit for entirely speculative alleged harms–Mr. Wysingle did not (and still does not) have an apartment ready for rent utilizing a rent-bidding platform, and Rentberry was unaffected by the City's ordinance. ER 6-9. Rentberry does not appeal its lack of standing[1]; and despite efforts to cure his lack of standing, Mr. Wysingle still does not have an apartment ready for rent. Appellants' Opening Brief, *generally*. Similarly, the District Court correctly found that 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. ER 10. Thus, properly construed, the Ordinance does not implicate—much less offend—the First Amendment. However, if this Court disagrees with the District Court with respect to both standing and impact on conduct, this matter should be remanded to the District Court for

[1] As argued at 16, *supra*, Rentberry has waived its appeal as to standing and should no longer be considered an Appellant. As such, Appellee refers to Plaintiff/Appellant throughout this brief in the singular, where appropriate.

further proceedings to develop the record on intermediate scrutiny of commercial speech; in the alternative, the record before this Court clearly meets the standard under *Central Hudson*.[2] Accordingly, this Court should affirm the dismissal of this matter by the District Court on all grounds.

II. JURISDICTION

Appellee concurs with Appellant's statement of jurisdiction.

III. ISSUES

1. **Appellant lacked standing at the time this matter was filed, and, despite extraordinary efforts to cure standing *ex post facto*, Appellant still lacks standing.**

2. **The ordinance at issue only restricts conduct, not speech, and therefore does not implicate the First Amendment.**

3. **If the Ordinance implicates commercial speech, the Court should remand for further proceedings; the record before the Court meets the *Central Hudson* test.**

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[2] *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) (hereinafter "*Central Hudson*").

IV. STATEMENT OF THE CASE

A. The relevant Ordinance.

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, concerned with the impact of new technology—specifically auction technology—on students' ability to find adequate 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. SER 4-8. 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." SER 9-17. 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." *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. *Id.*; SER 18-27. In addition, the students pointed to studies from the residential real estate market supporting the view that auctions repeatedly increased home prices. SER 28-82. Several Committee members expressed concerns with regulations having to "catch up" with new technologies and noted that studying technological impacts before they take root was better than being reactive to those technologies after they have taken root.

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, 2018. ER 15-16. 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 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. *Id*.

Merely publishing a rental housing advertisement does not make a person a rental housing bidding platform. *See* SMC 7.24.020. This prohibition was set to expire after one year, unless the City Council affirmatively extended it by an additional twelve months. *See* SMC 7.24.090.B-C. The purpose of this one-year period was to allow the City to study whether the online auction technology complied 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." ER 19-20.

On April 30, 2019, the Ordinance expired per its terms. On June 10, 2019, the City Council passed a replacement Ordinance with similar terms; this ordinance was signed by the Mayor on June 18, 2019, with an effective date of July 18, 2019. SA 002-009.

Under the SMC, Seattle Department of Construction and Inspections ("SDCI") is the agency tasked with enforcing the Ordinance. *See* SMC

7.24.120.A & SMC 7.24.020; SER 231, ¶ 3. SDCI interprets the Ordinance as only prohibiting landlords and potential tenants from using the auction function on websites such as Rentberry. SER 232, ¶ 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. *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 *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. Shortly thereafter, the parties' counsel conducted a telephonic 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. SER1-3, ¶ 6.

On June 25, 2018, Plaintiffs filed a motion for a preliminary injunction. ER 70. In support of that motion, Mr. Wysingle filed a signed declaration dated May 15, 2018. *See* SER 234-236. 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. *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. SER 1-4, ¶ 7.

Mr. Wysingle testified that he owns two properties in the City, only one of which he rents out. SER 88-89. 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. SER 97-100. When pressed for a date by which his rental home could be placed on the market, Mr. Wysingle admitted that

he could not provide a date certain by which his rental property would be ready to list and to rent. SER 100. 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) the Ordinance allowed him to communicate in numerous ways with potential tenants and advertise his property on Rentberry. SER 101-131. Shortly after the deposition, plaintiffs withdrew their injunction request. ER 70.

On August 17, 2018, Plaintiffs' counsel informed the City that Mr. Wysingle had "executed a new lease agreement this afternoon for his Seattle rental property." SER 134-36. The lease is for a ten-month term, which expires on June 30, 2019, and the rent is set at $2,800. SER 138. 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. SER 135-36. Plaintiffs' counsel refused. *Id*.

On June 1, 2019, Mr. Wysingle renewed the lease on his sole residential apartment. SA045-SA050. At the time, no Ordinance or moratorium limiting the use of rental bidding platforms was in effect. Despite this, Mr. Wysingle claims he renewed the lease in June 2019 "rather than advertising the property, in part because the moratorium prevents me from using Rentberry to advertise the property." SA046. Mr. Wysingle does not explain what other factors, "in part," led to his decision not to use Rentberry. Mr. Wysingle attaches an undated screenshot of a Rentberry location search for the proposition that the service was unavailable to him. SA052.

V. ARGUMENT

The District Court correctly found that Mr. Wysingle did not have standing when he filed this suit, and nothing that has occurred since the filing has, or legally can, change that fact. Similarly, the District Court fully understood that the Ordinance does not regulate speech, but rather only regulates nonexpressive commercial conduct. And, even if this Court disagrees, the

Ordinance is constitutional under the test set forth in *Central Hudson*. Accordingly, this Court should affirm the District Court's dismissal.

A. This case is not, and has never been, 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 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).

Plaintiff (now Appellant) bears the burden of establishing standing.

Clapper, 568 U.S. at 408. "[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 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, Plaintiff 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 Plaintiff 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 Appellant cannot satisfy the requirements of Article III, the District Court's ruling should be upheld and this case dismissed for lack of standing.

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," SER 234, ¶ 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 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. Thus, Mr. Wysingle fails 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). At the time the Complaint was filed and at many junctures during this suit, Mr. Wysingle did not have a home that he could place on the Rentberry website. Therefore, Mr. Wysingle lacks Article III standing and therefore is not entitled to injunctive or declaratory relief.

In an attempt to create standing where none exists, Mr. Wysingle now supplements the record on appeal to include allegations that on June 1, 2019, he renewed his lease. SA 046, ¶4, SA 49-50. That lease runs until June 30, 2020,

at which time Mr. Wysingle allegedly hopes to use Rentberry to market his apartment. SA 046, ¶5. However, on June 1, 2019, the Ordinance in dispute had not been in effect for two months and its replacement Ordinance had not been presented to City Council and, ultimately, was not effective for an additional two months. Therefore, at the time Mr. Wysingle last renewed his lease, there was no legal impediment to his use of Rentberry. Mr. Wysingle submits an undated screen shot and rank hearsay within hearsay— "Alex Lubinsky, CEO of Rentberry, informed my attorneys that this lack of support is caused by the City of Seattle's rental bidding moratorium"—presumably to show he tried and could not use the rental bidding platform in June 2019. There was no moratorium in place in June 2019, and any lack of services was not a direct effect of the expired City Ordinance. Whether or not Rentberry made business calculations about whether to turn on its services after the lapse of the ordinance is legally irrelevant to a standing analysis.

Mr. Wysingle's purported intent to use Rentberry in July 2020, assuming that his current tenant vacates, and no other variables interfere with the availability of the apartment, is far too speculative to show current standing and certainly cannot retroactively create standing at the timing of the filing of this

case. As the District Court held (citing *Thomas*, 220 F. 3d 1134, 1140 (9th Cir. 2000), "'some day' intentions without specificity do not support a finding of 'actual or imminent' injury." ER 07. Substituting one speculative future date for another does not make the injury any more actual or imminent, and certainly does not fix the problem of initial standing – in fact, it concedes that issue.

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 and again in June 2019. 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 some point during this litigation, which he did not, he cannot 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 currently. 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 because he has suffered no actual harm.

Rentberry. The District Court correctly held that Rentberry lacks standing because the Ordinance does not prevent it from doing anything. ER 08. Similarly, the District Court found that any claimed harm associated with other aspects of its services, such as advertising, was due to "self-censorship" – Rentberry alleged that it chose not to open its website to the Seattle market because it could not turn off its auctioning fiction. ER 09. Appellant offers no argument whatsoever that the District Court erred in these regards and appears

to have abandoned the appeal of Rentberry's standing. This Court should decline to try to divine what argument Rentberry might have made. *See W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir.2012) (We will not "do an appellant's work for it, either by manufacturing its legal arguments, or by combing the record on its behalf for factual support."); *see also* Fed. R.App. P. 28(a)(9)(A) (requiring appellant's opening brief to contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). The District Court's dismissal of Rentberry should be upheld.

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

Regardless of justiciability, Appellant cannot meet his 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 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 specific form of commercial transaction—the on-line 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. In any event, 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 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.[3] 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.

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 Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018) (rejecting argument that "payment

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[3] 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.

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*, 918 F.3d 676 (9th Cir. 2019) (Affirming that "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."). Plaintiff's view of the First Amendment begs the ultimate question: What message are landlords trying to convey by renting a home through an online auction? Plaintiff has no answer.

Plaintiff's reliance on several Supreme Court cases is misplaced because the cases on which Plaintiff relies 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, Plaintiff cannot seriously contend that the Ordinance bans communication akin to solicitation, advertising, or marketing. To the contrary, Mr. Wysingle used Zillow to advertise his property on-line. SA046. Rather, it prohibits nonexpressive commercial conduct—using a specific form of technology to carry out a rental transaction.

Furthermore, Plaintiff 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, Plaintiff concedes that the Ordinance was motivated by a desire to determine whether on-line auctioning technology complies with other City laws[4] and to further study what impact such technology would have on Seattle's

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[4] 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

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.[5]

Finally, this Court should reject Plaintiff's expansive view of the First Amendment, because accepting Plaintiff's 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*

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law, not its efficacy, and the First-in-Time ordinance is pending review by the Washington State Supreme Court.

[5] Plaintiff's argument that the Ordinance is a prior restraint is without merit. 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.*

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 Ordinance's purposes, this case does not implicate, much less violate, the First Amendment. Consequently, the District Court's dismissal should be upheld.

C. This Court should not undertake a *Central Hudson* analysis, but the Ordinance easily meets the *Central Hudson* requirements.

1. The Court should not undertake a *Central Hudson* analysis on the undeveloped record.

The original ordinance at issue expired in early 2019, and a new, functionally identical ordinance, was passed this summer. SA004-SA009. In support of the new ordinance, the City of Seattle's Office of Housing completed a "Rent Bidding Study," which was presented to the City Council. SA013-SA024. Appellant offers these supplemental materials to support his arguments on the merits of a *Central Hudson* analysis should the Court find that 1) he has standing and 2) the ordinance impacts speech, not just conduct. As argued above, the Court should uphold dismissal on both points. However, the factual landscape has changed—further research conducted and a new ordinance passed, and the parties should be allowed to develop the record

prior to consideration under *Central Hudson* based on the supplemental materials. The District Court did not reach the *Central Hudson* analysis, and should be allowed to consider it based on a newly developed record. Simply put, the "Rent Bidding Study" may not be the sole evidence the City would bring to bear on its considerations, and therefore, should this Court move pass standing and the ordinance's sole impact on conduct, Appellee requests that this matter be remanded to the District Court for further proceedings.

2. Strict scrutiny does not apply to the Ordinance.

Appellant argues that the Ordinance should face strict scrutiny because it impacts "a mixture of commercial and non-commercial speech." Appellant' Brief at 23. This is simply not true. 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, advertising, direct communications, service requests, or algorithms. Rentberry is free to run its website as it sees fit and provide a whole panoply of rental real estate services, but landlords and tenants may not utilize a rent bidding service. 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."). 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).

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 Appellants' Brief. 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.

3. Under the record before this Court, the ordinance survives constitutional scrutiny under *Central Hudson*.

The *Central Hudson* test to determine the constitutionality of limitations on commercial speech has four parts:

> (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.

The City has a substantial interest in studying and determining whether and how to regulate a potentially game-changing new technology—particularly technology with a track record of increasing the cost and availability of rental housing. 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.

Appellant argue that the only law identified by the City that could be in conflict with the Ordinance is the City's "first in time" ordinance, codified at SMC 14.08. Appellant's Brief at 27. They further argue that the fact that SMC 14.08 has been found unconstitutional by the King County Superior Court should somehow relieve the City of any concern about a conflict between that law and rental bidding systems. *Id.*; ER 23-32. This argument is misplaced. The City is prudent to keep its current moratorium in place until the constitutionality of SMC 14.08 is fully resolved – the case has been briefed

and argued, and legislative consistency is best served by waiting until the Washington Supreme Court decides the outcome.

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

As a preliminary matter, Plaintiff overstate the degree of empirical support *Central Hudson* requires: "conclusive evidence" is not the standard. 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).

The Office of Housing report cited by Appellant details several critical concerns that easily meet the *Central Hudson* threshold. SA014-SA026. First, on-line housing services, such as Airbnb, have been associated with racially

disparate outcomes, potentially in violation of the Fair Housing Act of 1968. SA016 ("A solid body of academic research, articles, social media testimonials, and other anecdotal evidence on racial discrimination on Airbnb exists, and can inform best practices for other online rental housing apps.") SA016. Specifically, the Report cites to a 2016 study that identified a disparity in response rates to "distinctively Black names" as opposed to White names. *Id*. In contrast, 1) off-line, face to face markets have shown decreased discrimination in Federal and State audits and 2) the Seattle Office of Civil Rights has the capacity and skills to audit and test for discrimination in off-line housing markets, but have not fully developed capacity for on-line markets. SA017. These are real, articulated concerns, that have the potential to effect real people, and support the City's interest in limiting the use of on-line rental bidding platforms. Again, the Ordinance does not impact any form of communication beyond the platforms.

The Report also identified conflicts between rental bidding platforms and Housing Choice Voucher holders (SA 17-18), the inconsistent data presented by Rentberry's own (and non-transparent) analysis of its platform on rental prices (SA 18), the case study out of Melbourne that "affirms that

higher income households are able to be more competitive in rent auctions" because they were able to bid more, and flags other issues such as the first-in-time case, other Washington law provisions such as the Rental Landlord Tenant Act, and the intersection of real estate broker licensing, and raises additional concerns about ancillary services on rental bidding platforms. SA 21-23. Although Appellant decries the initial analysis as "speculative," the Report raises several significant issues and highlights that rental bidding platforms are complex. The fact that the City's analysis was not completed in year one of the first ordinance is of no moment—research has been commenced and thus far points to rental bidding platforms as unwise.

This is more than enough to satisfy the City's burden, should the Ordinance be found to implicate speech. 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 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. SER 21. (Rentberry CEO "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."); *Id.* ("Results indicate that for house sales, auctions lead to greater selling prices across all cities examined."); SER 50 ("auctions extracted higher prices than private negotiations."); SER 67 ("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).

b) The Ordinance addresses the government interests.

The Ordinance is focused on preventing use of on-line bidding systems until the City has enough information that such systems will not cause further exacerbation of pricing in housing markets or discriminatory impacts.

Appellant cites to *IMDb.com Inc. v. Becerra*, 257 F. Supp. 3d 1099 (N.D. Cal. 2017) for the proposition that the City may "not impose a speech burden before discovering the information it needs to justify" the ordinance. However, *IMDb.com*, 1) was solely a discovery dispute, 2) dealt with non-commercial speech, 3) was an outright restriction on speech, not a time place manner restriction, 4) and dealt directly with the content of the information. *Id.* ("In a normal civil case, these kinds of irrelevant and burdensome discovery requests are merely annoying. But this is a First Amendment case, involving a statute that restricts non-commercial speech. The statute does not merely restrict the time, place, or manner in which people may express themselves; it is an outright restriction on the publication of certain non-commercial information.") Here, in contrast, the Ordinance regulates

conduct, and at worst, implicates commercial speech. Appellant conflates standards of review and levels of scrutiny.

Plaintiff further suggests that before it may regulate auctioning technology, the City needs to permit the use of such technology in order to ascertain its potential impact.. That suggestion is misguided and contrary to established case law. 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.

> 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.").

Plaintiff's appeals to under-inclusivity are unpersuasive. "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 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). *Rubin* and *Cincinnati* are also 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 v. Discovery Network*, 507 U.S. 410, 417-18 (1993)(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. This is especially true given the Office of Housing Report, which specifically identified the difficulties in auditing and testing on-line systems as well as historic examples where on-line systems allowed discrimination. Moreover, 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.

c) 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 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).

Plaintiff's arguments as to over-inclusivity are unpersuasive. A time-limited 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 continue to study, delve deeper, 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, Plaintiff suggests that the availability of various mechanisms to address affordable housing render the Ordinance unconstitutional. Even if the City were required to adopt the least restrictive alternative, which it is not, the alternatives Plaintiff 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. Plaintiff demands a level of exactness between the regulation and the intended result that finds no support in *Central Hudson* and its progeny.

VI. CONCLUSION

As Mr. Wysingle does not, and has never had, standing to bring this suit, because the Ordinance at issue only restricts conduct, not speech, and because the Ordinance would withstand *Central Hudson* scrutiny if found to implicate speech, this Court should affirm the dismissal of this matter by the District Court.

Respectfully submitted this 13th day of September, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. I certify this brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,438 words, excluding parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).
2. I certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is composed of proportionally spaced type using Microsoft Word with Times New Roman 14-point type.

Respectfully submitted this 13th day of September, 2019.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee City of Seattle state that they are unaware of any related cases pending in this Court.

Respectfully this 13th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2019, I electronically filed this Brief of Appellee City of Seattle with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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