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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RENTBERRY, INC., a Delaware corporation; DELANEY WYSINGLE, an individual, Plaintiffs-Appellants, v. CITY OF SEATTLE, a Washington municipal corporation, Defendant-Appellee.	No.19-35308 D.C. No.2:18-cv-00743-RAJ ORDER*

Appeal from the United States District Court for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Submission Deferred March 4, 2020**

Submitted July 29, 2020

Seattle, Washington

Before: IKUTA, R. NELSON, and HUNSAKER, Circuit Judges.

After reviewing the parties' supplemental briefing on mootness, we conclude this case is moot.

First, Appellants have not met their burden of showing a "reasonable expectation" that Seattle will enact a same or similar ordinance in the future. *See Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc). Neither the language of the repeal ordinance nor Appellee's efforts to gather data on the impact of rent-bidding platforms are sufficient to overcome the presumption that "the government is acting in good faith" when it voluntarily ceases challenged activity. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010).

Second, while "[a] live claim for nominal damages will prevent dismissal for mootness," *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002), Appellants' last-minute request for nominal damages is not live because it was not raised before the district court. Their inclusion of a catch-all request for "such additional relief as may be just and proper" in the complaint does not allow Appellants to now attempt to "wrest a claim for nominal damages from [this] general prayer for relief for the first time on appeal." *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1213–14 (9th Cir. 2018) (quoting *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 869 (9th Cir. 2017)).

Because there is no "change in the legal framework governing the case" and Appellants do not have a "residual claim . . . that was understandably not asserted previously," *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482–483 (1990)), we vacate the district court's

judgment and remand with an instruction to dismiss this case as moot.

VACATED AND REMANDED.

*This order is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RENTBERRY, INC., a Delaware corporation; and DELANEY WYSINGLE, an individual, Plaintiffs, v. CITY OF SEATTLE, Defendant.	Case No. 2:18-cv-00743-RAJ ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on the parties' motions for summary judgment. Dkt. ## 22, 26. For the reasons below, the Court **GRANTS** Defendant's motion and **DENIES** Plaintiffs' motions.

II. BACKGROUND

Concerned about the effect of auctioning technology on their ability to find affordable housing, students at the University of Washington petitioned the Seattle City Council (the "City Council") in January 2018. Dkt. # 27, ¶ 2; Dkt. # 27-1. They called on the City Council to enact legislation banning the use of "online bidding services" to set rent prices within its borders. *Id.*; Dkt. # 27-2. After considering the matter, the City Council passed Ordinance No.

125551 (the "ordinance") in March 2018. Dkt. # 22-1. The ordinance adds Section 7.24.090 to the Seattle Municipal Code, which reads in part: "Landlords and potential tenants are prohibited from using rental housing bidding platform for real property located in Seattle city limits." Dkt. # 22-1 at 6. The ordinance expires automatically after one year unless the City Council exercises its authority under Section 7.24.090.C to extend the prohibition for an additional twelve months. *Id*. Section 7.24.090.C permits an extension if Defendant City of Seattle requests more time to complete its study into the potential effects of auctioning technology on the Seattle rental market. *Id*.

Plaintiff Rentberry, Inc. is a startup company that uses bidding technology to assist landlords and potential tenants in facilitating rental transactions. Dkt. # 22-5, ¶ 2. Rentberry claims that it would open its website to Seattle property listings but for the ordinance. *Id*. Plaintiff Delaney Wysingle owns a rental property in Seattle. Dkt. # 22-4. He began remodeling his rental property in March 2018 and would ultimately like to use Rentberry to find a tenant. *Id*.

On March 23, 2018, Plaintiffs filed a suit against the City of Seattle (the "City") for declaratory and injunctive relief. Dkt. # 1. Plaintiffs claim the ordinance violates their right to free speech under the First and Fourteenth Amendments. *Id*. On August, 17, 2018, Plaintiffs moved for summary judgment. Dkt. # 22. On September 13, 2018, the City filed a cross-motion for summary judgment and a response to Plaintiffs' motion. Dkt. # 26. Plaintiffs filed their

response on October 4, 2018 and the City filed their reply on October 18, 2018. Dkt. ## 29, 31.

III. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets the initial burden, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

However, the court need not, and will not, "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also*, *White v. McDonnel-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the court need not "speculate on which portion of the record the nonmoving party

relies, nor is it obliged to wade through and search the entire record for some specific facts that might support the nonmoving party's claim"). The opposing party must present significant and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). Uncorroborated allegations and "self-serving testimony" will not create a genuine issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002); *T.W. Elec. Serv. V. Pac Elec. Contractors Ass'n*, 809 F. 2d 626, 630 (9th Cir. 1987).

IV. DISCUSSION

The City argues in their motion that this case is not justiciable, and, in any event, the ordinance regulates nonexpressive conduct. Dkt. # 26 at 13-19. Plaintiffs claim in their motion that the ordinance cannot survive any First Amendment analysis. Dkt. # 22.

A. Standing

On a motion for summary judgment, "a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999). Accordingly, a plaintiff must support its allegations of injury by affidavit or evidence of specific facts. *Snake River Farmers' Ass'n, Inc. v. Dep't of Labor*, 9 F.3d 792, 795 (9th Cir. 1993).

Here, Plaintiffs assert that Wysingle suffered a concrete injury to his speech rights, as he is unable to solicit or receive bids for his rental property because of the ordinance. Dkt. # 29 at 2. To show that he has standing to seek an injunction, Wysingle filed a

declaration stating that he intended to use Rentberry to advertise his property and would have done so but for the ordinance. *Id*. at 7. Plaintiffs also claim that Rentberry has standing because (i) it has a First Amendment interest in disseminating its proprietary software and (ii) it has third-party standing on behalf of its users. *Id*. at 11-13.

In disputing standing, the City contends that Wysingle is not, nor has he ever been, a member of Rentberry; that he did not have a rental house ready to list at the time the Complaint was filed; and that he currently does not have a house ready to list on Rentberry. Dkt. # 26 at 15; Dkt. # 27-8 at 13-14; Dkt. # 31 at 1. Furthermore, because Wysingle rented out his property after the lawsuit was filed, the City argues that any potential claim he has is now moot. Dkt. # 26 at 16-17. As for Rentberry, the City claims that the ordinance only covers landlords and potential tenants, and thus does not cause Rentberry any injury. *Id*. at 17-18. According to the City, neither plaintiff has standing.

To invoke the jurisdiction of the federal courts, a plaintiff must establish standing, which consists of three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Because "[c]onstitutional challenges based on the First Amendment present unique standing considerations," plaintiffs may establish injury in fact without first suffering a direct injury from the challenged restriction. *Lopez v. Candaele*, 630 F.3d 775, 783 (9th Cir. 2010); *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1001, 1006 (9th Cir. 2003).

When First Amendment plaintiffs sue before violating a statute, the Ninth Circuit looks at several factors in determining standing. These include whether plaintiffs have shown a reasonable likelihood that the government will enforce the challenged law against them; whether plaintiffs have established, with some degree of concrete detail, that they intend to violate the challenged law; and whether the challenged law is applicable to plaintiffs, either by its terms or as interpreted by the government. *Lopez*, 630 F.3d at 786; *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (requiring showing of "realistic danger"). Pleading the mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 657 (9th Cir. 2002) (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983)). Rather, a plaintiff must allege he or she "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks and citations omitted). For injunctive relief, which Plaintiffs seek here, there must be a showing of a real or immediate threat of an irreparable injury. *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1100 (9th Cir. 2000) (internal quotations and citations omitted).

i. Wysingle

Wysingle argues the ordinance applies to landlords like him and restricts his ability to solicit or receive bids. Dkt. # 29 at 6-7. He claims this violates his First

Amendment speech rights. *Id*. Wysingle adds that the declaration he submitted with the Complaint shows his intent to use Rentberry's bidding platform and that the threat of enforcement is clear from the City's website. *Id*. (citing *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001)). Wysingle submits that these facts, taken together, demonstrate that he has standing for injunctive relief.

The Court does not agree. The facts demonstrate that at the time the lawsuit was filed Wysingle was not a member of Rentberry and his rental house was under renovations. Dkt. # 30-1 at 4, 8. Even several months into the lawsuit, Wysingle testified that he could not say exactly when his rental home would be available and the best he could do was speculate. Dkt. # 30-1 at 3 ("I'm at the mercy of the contractors. They are very busy right now, and so as soon as they finish, I will list, I'm guessing by the end of the month."). As the Ninth Circuit has explained, "some day" intentions without specificity do not support finding an "actual or imminent" injury. *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1140 (9th Cir. 2000). Accordingly, Wysingle's expressed intention to use bidding technology—if and when renovations are complete on his rental property, or if and when he joins Rentberry or some similar site—do not qualify as a concrete plan. *Lopez*, 630 F.3d 775; *Thomas*, 220 F.3d at 1140 (explaining the landlords' intent to violate law prohibiting discrimination based on marital status "if and when an unmarried couple attempts to lease one of their rental property" insufficient to confer standing).

Plaintiffs nonetheless claim that Ninth Circuit's decision in *Clark v. City of Lakewood*, 259 F.3d 996,

1006 (9th Cir. 2001), warrants finding that Wysingle has standing here. The Ninth Circuit found in *Clark* that a cabaret owner whose business closed due to an ordinance had standing to seek an injunction. 259 F.3d at 1008. The alleged harm was actual and imminent because, despite the cabaret closing, the owner continued to hold all licenses needed to operate and stated unequivocally that he would go back into business if the ordinance were enjoined. *Id*.

The Court finds the facts here distinguishable from those in *Clark*. The cabaret owner in *Clark* had been operating a business at the time of ordinance, had recently gone out of business because of the ordinance, and stated unequivocally that he would go back into business if the ordinance were enjoined. By contrast here, at the time of the lawsuit, Wysingle had never used a bidding platform to rent a property and his lone rental property was under renovations with no certain time for completion. Additionally, Wysingle had not created an account on Rentberry or another site that used bidding technology. Dkt. # 30-1 at 8 ("I haven't used Rentberry, so I don't know how they lay it out. . . . I'm not a member on the website, so I don't know what the layout is."). Under these facts, the Court concludes that Wysingle's claimed injury is not immediate and thus insufficient to seek injunctive relief.

ii. Rentberry

Rentberry claims that it has standing in its own right as well as third-party standing on behalf of its users. The Court disagrees because Rentberry has not shown injury in fact. Both traditional and third-party standing require a plaintiff to show an injury in fact. *See, e.g., Sec. of State of Md. v. Joseph H. Munson Co.*,

Inc., 467 U.S. 947 (1984) (explaining that the crucial issue is whether the plaintiff satisfies the "injury-in-fact" requirement before asserting the rights of third-party). While third-party standing generally requires some hindrance to a third-party in protecting its own rights, the Supreme Court has expressed a reluctance to strictly adhere to this requirement in the First Amendment context. *Id*. Nonetheless, the Supreme Court still requires an injury to the purported plaintiff. *Id*. There is no evidence before the Court to conclude that Rentberry meets this requirement.

On its face, the ordinance only applies to landlords and tenants and thus does not regulate Rentberry's conduct. *See Lopez*, 630 F.3d at 788 (indicating that claims of future harm lack credibility when the challenged speech restriction by its terms is not applicable to the plaintiffs, or the enforcing authority has disavowed the applicability of the challenged law to the plaintiffs). The City's interpretation of the ordinance further confirms its inapplicability to Rentberry. Dkt. # 28, ¶¶ 5, 6. Rentberry explains, however, that its auctioning technology "cannot be turned off," and so it chose not to open its website to the Seattle market. Dkt. # 29 at 12. But again, the ordinance does not restrict Rentberry from operating within the city limits and self-censorship alone does not constitute injury for standing purposes. *See Laird v. Tatum*, 408 U.S. 1, 13 (1972) (subjective chill is not a substitute for objective harm or threat of future harm). Rentberry's other purported injury—the right to disseminate its propriety software—is likewise not prohibited by the ordinance and is not supported by the facts. Indeed, Rentberry fails to specify by declaration or otherwise any of its business relationships or users impacted by the ordinance. *Sec.*

of State of Md., 467 U.S. at 950-51 (third-party standing met where plaintiff identified specific customers impacted by state regulation and the impact of the regulation on the parties' business relationships). Rentberry only declares that "Seattle is one of the key markets . . . since 42% of residents rent their homes." Dkt. # 22-5 at 4. The Court finds Rentberry's injury is speculative at best.

Finally, Rentberry makes one last argument in support of standing—that it was specifically targeted by the ordinance and thus it is permitted to seek redress. Dkt. # 29 at 13 (citing *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012)). However, this argument fails for the reason as the others do: Rentberry must still demonstrate an injury tied to the government regulation. *See Melendres*, 695 F.3d at (affirming plaintiffs had standing to bring constitutional claim where government policy targeted them for seizure in violation of the Fourth Amendment). For the reasons stated, the Court finds the injury in fact requirement has not been met. Because Rentberry fails to show that it has standing as a matter of law, its claim must be dismissed.

B. First Amendment

Even assuming Plaintiffs had standing, their First Amendment claim would fail. Plaintiffs argue that the ordinance bans protected speech. The relevant provision reads: "Landlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." SMC § 7.24.090.A. Plaintiffs argue the ordinance infringes on their First Amendment right to communicate prices or post advertisements on a "rent-bidding website." Dkt. # 29 at 13.

"[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Accordingly, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* 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).

The Court finds the ordinance regulates conduct, not speech. It prohibits the use of a bidding platform to conduct a rental transaction, an activity which courts in this circuit have found to lack a significant expressive element. *See, e.g., Airbnb, Inc. v. City and Cnty. of San Francisco*, 217 F.Supp.3d 1066, 1076 (N.D. Cal. 2016) (finding short-term rental transaction lacks significant expressive element); *Homeaway.com, Inc. v. City of Santa Monica*, 2018 WL 1281772, at *5 (C.D. Cal. Mar. 9, 2018) (same); *see also Int'l Franchise Ass'n, Inc.*, 803 F.3d at 409 ("A business agreement or business dealings between a franchisor and a franchisee is not conduct with a 'significant expressive element.'"). To be sure, the ordinance makes clear that "[m]erely publishing a rental housing advertisement" does not transform a person or website to a "rental housing bidding platform." Dkt. #22-1 at 6. It is also clear from the record that the ordinance was "not motivated by a desire to suppress speech" and does not have "the effect of targeting expressive activity." *Int'l Franchise Ass'n, Inc.*, 803 F.3d at 409; *see also Simon &*

Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (noting movies, books, magazine articles, tape recordings as examples of classic expressive activity). Ultimately, the Court finds that the ordinance does not meet threshold conditions to require additional First Amendment analysis. The City is entitled to summary judgment.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's motion and **DENIES** Plaintiffs' motions. Dkt. ## 22, 26.

DATED this 15th day of March, 2019.

s/ Richard A. Jones
The Honorable Richard A. Jones
United States District Judge

FILED
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MOLLY C. DWYER,
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RENTBERRY, INC., a Delaware corporation; DELANEY WYSINGLE, an individual, Plaintiffs-Appellants, v. CITY OF SEATTLE, a Washington municipal corporation, Defendant-Appellee.	No. 19-35308 D.C. No. 2:18-cv-00743-RAJ Western District of Washington, Seattle ORDER

Before: IKUTA, R. NELSON, and HUNSAKER, Circuit Judges.

Appellants' Motion for Supplemental Briefing on Mootness (Dkt. No. 46) is hereby GRANTED. Appellants shall file their brief not exceeding 3600 words on or before May 28, 2020. Appellees shall file an answering brief not exceeding 3600 words on or before June 29, 2020. Appellants may then file a reply

brief not exceeding 1800 words on or before July 13, 2020.

In particular, the parties should address whether Appellants have "a reasonable expectation that [the City of Seattle] will reenact the challenged provision or one similar to it," *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc),as well as the impact of the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. City of New York*, 590 U.S.____(2020).

No. 19-35308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rentberry, Inc., and Delaney Wysingle,
Plaintiffs – Appellants,
v.
The City of Seattle,
Defendant – Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Richard A. Jones, District Judge

APPELLANTS' SUPPLEMENTAL BRIEF ON MOOTNESS

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* * * * *

INTRODUCTION

Pursuant to this Court's order dated April 28, 2020, Appellants submit this supplemental brief explaining why the pending lawsuit was not mooted by Respondent City of Seattle's voluntary actions. The City twice renewed the rent bidding moratorium during the pendency of this lawsuit, but once briefing was complete and the case set for oral argument, the City repealed the moratorium and at the same time enacted a replacement ordinance that contemplates

further regulation of rent-bidding platforms. Such actions cannot moot this constitutional challenge. *See Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc). Moreover, the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n (NYSRPA) v. City of New York*, 140 S. Ct. 1525 (2020), and Federal Rule of Civil Procedure 54(c) support continuation of this lawsuit because Appellants have not received all the relief sought in their complaint.

I. SEATTLE HAS CREATED A ROADMAP TO FUTURE REGULATION OF RENT-BIDDING PLATFORMS OF THE SAME OR SIMILAR NATURE

A case "becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party. . . . As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added). To establish mootness, defendants have a heavy burden to meet *Chafin*'s "demanding standard." *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019); *see also Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (jurisdiction "may abate if the case becomes moot because it can be said with assurance there is no reasonable expectation that the alleged violation will recur . . . and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation") (cleaned up). Unless Seattle can prove that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007), its

voluntary repeal and replacement of the unconstitutional rent-bidding ban does not deprive this Court of Article III jurisdiction over this constitutional challenge.

The premise underlying the "absolutely clear" standard is not that defendants may secretly plan to resume the challenged conduct at the first opportunity, but that they are free to reinitiate it in the future (whether they planned to do so all along or not). That discretion creates the continuing harm and the potential waste of judicial resources—the "argument from sunk costs" to which the Supreme Court has attributed the "absolutely clear" standard. *Friends of the Earth, Inc. v. Laidlaw Env. Svcs. (TOC), Inc.*, 528 U.S. 167, 191–93 (2000) (no mootness due to voluntary cessation even though "the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased.").

Although repeal of the previous ordinance may trigger concerns over mootness, *Chambers*, 941 F.3d at 1197, the case is not moot if "there is a reasonable expectation that the legislative body is likely to enact the same or substantially similar legislation in the future." *Id.* Seattle's reenactment of the rent-bidding ban need not be a "virtual certainty;" there need only be "a reasonable expectation of reenactment" as shown by the record. *Id.* at 1199.

The legislative history of the repeal ordinance and other factors demonstrate that Seattle is prepared to reenact the ban or similar legislation. It does not matter that the ordinance enacted after the study may be somewhat less oppressive. *Ne. Fla. Chapter of Associated General Contractors of America v. City of*

Jacksonville, Fla., 508 U.S. 656, 662 (1993) (no mootness where "new ordinance may disadvantage [plaintiffs] to a lesser degree than the old one" if they are disadvantaged in "the same fundamental way"). "If the amended ordinance threatens to harm a plaintiff in the same fundamental way—even if to a lesser degree—the plaintiff will still have a live claim for prospective relief." *Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) (First Amendment case). The Court is "particularly wary of legislative changes made in direct response to litigation." *Id.*[1]

The First Amendment forbids speech restrictions absent some evidence of harm. *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) ("regulating speech must be a last—not first—resort"). The first and second moratoria banned communication on rent-bidding platforms for the express purpose of conducting a study to determine whether the City could identify such harm. Plaintiffs' Motion for Summary Judgment, Exh. 1, ECF 22-1 at 5; ER 18. By banning communication on the platforms, however, Seattle ensured that its "study" had no relevant market information on which to base its conclusions. Ord. 126053 ("WHEREAS, the Office of Housing transmitted its study on rent bidding ('Rent Bidding Study') in July 2019, and found that because of the brief period of operation of the rental housing bidding platforms in Seattle, the effects of

[1] The notion that government should enjoy special deference as to their assertions to refrain from reinstating constitutionally offensive conduct runs counter to the very premise of Section 1983, which was enacted because Congress "realized that state officers might, in fact, be antipathetic to the vindication of [constitutional] rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

these platforms on the Seattle housing market and on equitable access could not be analyzed").

Despite the lack of information underlying the July 2019 study, Seattle's Office of Housing made several recommendations that served as the basis for the current ordinance: "Modify [SMC 7.24.090, the moratorium] to be effective ***in perpetuity***, or until rental bidding platforms can affirmatively demonstrate compliance with all federal, state and local laws, and fair and equitable operations." Decl. of Blevins to Supp. Record, Exh. 1 at 11–12 (emphasis added). The intent to enact future regulation is clear, unless rent-bidding platforms[2] "affirmatively demonstrate" compliance with the law *and* Seattle's undefined demand for "fair and equitable operations." *Id.* Seattle explicitly contemplates amendments to the city's Unfair Housing Practices to "include requirements for rental bidding platforms to ensure compliance and equitable access such as: HCV [Housing Choice Voucher] accessibility; anonymous profiles; accessible formats for people with disabilities; multiple language support; [and] listed screening criteria." *Id.* The study further recommends that Seattle "[m]odify rental bidding platforms operations to allow HCV holders to be competitive in the rent auction process."[3] Current Ordinance 126053, § 6, adopts the Housing study's

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[2] Appellant Rentberry is one such platform. Non-parties Biddwell (https://www.biddwell.com/) and LiveOffer (https://propertyconnect.com/liveoffer-rental) also offer rent-bidding platforms to facilitate landlord-tenant communications and would have their communications in Seattle silenced or otherwise curtailed by Seattle's past and recommended future regulation.

[3] "Competitive" is undefined.

recommendation to urge all rental bidding platforms to post the "Seattle Open Housing Poster" on their websites. In short, Seattle's Office of Housing recommends mandating how a private company communicates with its users and facilitates communications among users. The sponsor of the rent-bidding ban legislation is receptive to these recommendations. Seattle City Council, Finance & Housing Committee, at 1:09:01–12 (Mar. 3, 2020) (Bill sponsor Teresa Mosqueda explained that the city needs to "get ahead of the technology" to "ensure our values are met.").[4]

The new ordinance, Ordinance 126053,[5] plainly was enacted in response to this case. The city staff report specifically references this pending litigation in discussing the substance and purpose of the new ordinance, Seattle City Council Central Staff, *CB 119752: Repealing a prohibition on use of rental housing bidding platforms* (CB 119752 Staff Report) at 3 (Mar. 2, 2020).[6] The staff report concludes:

> If the data shows that the platforms are functioning for bidding purposes and if there is an impact on equitable access to rental housing, then the Council via CB 119752 would request that [Office of Housing] and [Office of Civil Rights] work with the Council to determine whether and how the recommendations outlined in the Rent Bidding Study

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[4] http://www.seattlechannel.org/videos?videoid=x111738&Mode2=Video.

[5] http://clerk.ci.seattle.wa.us/search/ordinances/126053.

[6] https://seattle.legistar.com/View.ashx?M=F&ID=8169362&GUID=13F261E3-9B02-4F1C-AFEE-B291A12E5B40.

> should be implemented, including mitigating any unintended consequences.

Id. The current ordinance thus seeks to obtain data to determine whether communication between landlords and tenants via rent-bidding platforms "are functioning for bidding purposes" and has "an impact on equitable access to rental housing." Ord. 126053, § 5. "Impact" and "equitable" are undefined by the city, giving it plenty of leeway for further regulation. At bottom, this language suggests that Seattle retains its view that speech rights exercised by landlords and prospective tenants are a privilege that the City can micromanage, rather than fundamental, individual rights that are constitutionally protected.[7] *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (no mootness where voluntary cessation "does nothing to remedy the source of the . . . original policy" that treats certain actions as a privilege granted by the government rather than a constitutional right).

While the City takes the position that the new ordinance moots the claims here, it has never once

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[7] The city's reenactment of the ban is cleared by the Supreme Court's denial of certiorari in *Yim v. City of Seattle*. The first and second ordinances' findings described Seattle's concern that rent-bidding platforms were incompatible with its "first-in-time" ordinance demanding that landlords offer a 48-hour right of first refusal to lease rental properties to applicants in the order in which they apply. When *Rentberry* was filed, a Washington trial court had invalidated the first-in-time ordinance as violating the state constitution. The Washington Supreme Court subsequently reversed, and the U.S. Supreme Court denied certiorari. *Yim v. City of Seattle*, 194 Wash. 2d 651 (2019), *cert. denied*, No. 19-1136, 2020 WL 1906600 (U.S. April 20, 2020).

taken the position, either in filings before this Court or in public statements, that it believes that the recent changes to its ordinance are constitutionally required. Resp. to Plaintiffs-Appellants' Mot. for Supp. Briefing on Mootness, docket entry 47, at 8 n.8 (Apr. 17, 2020) ("To be clear, for the reasons previously briefed, the City maintains that the recently-repealed 7.24.090 was constitutionally implemented."). Indeed, the ordinance places the onus on rent-bidding platform companies to proactively "show evidence of compliance and considerations of current law" before Seattle will allow communication via rent-bidding platforms. *See* CB 119752 Staff Report, *supra* at 3 ("[A]llowing these platforms to function without submitting an affirmative plan to comply with fair housing laws as recommended in the report may increase the risk that violations of those laws occur.").

The clear import of the ordinance is that Seattle plans to reinstate its ban (or similar speech-restricting regulations on rent-bidding platforms) after it generates the necessary data.[8] *See Chambers*, 941 F.3d at 1198; *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3. (1993) (repealing an old law in favor of a new one that is "sufficiently similar" and "disadvantages [plaintiffs] in the same fundamental

[8] The type of data sought by the City is unclear. Appellants' counsel submitted Public Records Act requests to the Office of Housing and the Office of Civil Rights seeking disclosure of the methodology of both previous tests and studies and tests and studies currently being conducted. The requests are attached as Exhibit A to Plaintiffs-Appellants Motion for Supplemental Briefing. The Office of Civil Rights responded on April 21, 2020, that it has no responsive documents. The Office of Housing advises that it will respond by June 16, 2020.

way," will not moot a plaintiff's claims). Indeed, Council member Teresa Mosqueda, the bill's sponsor, expressed her desire for an interim report in anticipation of taking possible regulatory action well before the report deadline established by the ordinance. Seattle City Council, Finance & Housing Committee, at 1:13:22–14:28 (Mar. 3, 2020) ("If it turns out before June of next year that we can see that things are escalating out of control . . . we have to be vigilant and recognize our access to housing laws that we have on the books and the principles of the city to make sure that people have access to affordable housing is so strong that we do want to be vigilant and so . . . this committee may be interested in an interim report.").

Public documents and legislative history demonstrate that Seattle remains committed to regulating communication on web-based rent-bidding platforms. The particular parameters of the regulation make little difference to the key issues presented and fully briefed in this litigation. Seattle's voluntary cessation cannot establish that this case is moot.

II. THIS CASE IS NOT MOOT BECAUSE PLAINTIFFS-APPELLANTS HAVE NOT RECEIVED ALL THE RELIEF SOUGHT IN THEIR COMPLAINT

The prayer for relief in Appellants' complaint sought a declaration that Seattle's ban on rent-bidding platforms violated Rentberry's and Wysingle's freedom of speech protected by the First and Fourteenth Amendments, an injunction forbidding enforcement of the ordinance; costs and attorneys' fees; and "other such additional relief as may be just

and proper." This last request is not mere boilerplate; it encompasses other relief to which a prevailing party would be justified under the law. *Z Channel Ltd. P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991) (a party does "not foreclose relief in damages by failing to ask for them"); *Western District Council v. Louisiana Pacific Corp.*, 892 F.2d 1412, 1416–17 (9th Cir. 1989) (case not moot where court could grant remedy of rescission even though plaintiff had not requested it).

While Appellants' request for injunctive relief may turn out to be unnecessary, all other types of relief may still be awarded by this Court. As to the prayer for declaratory relief, in *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015), this Court considered the effect of such a prayer in syllogistic fashion: (1) the declaratory relief that certain statutes were facially unconstitutional remained available; (2) the plaintiff continued to assert that the statutes were unconstitutional; and (3) the defendant continued to assert that the statutes were constitutional. *Id.* (quoting the district court). Although the defendant offered immunity to the plaintiff from prosecution, *id.* at 1024, this Court held that "there still exists 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* at 1026 (citations omitted). *See also Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX, 2013 WL 5445483, at *15 (D. Ariz. Sept. 30, 2013) (First Amendment challenges to campaign finance statutes seeking relief of nominal damages and attorneys' fees could not be mooted although statutes' repeal obviated need for injunctive relief).

The Supreme Court's short per curiam decision in *NYSRPA*, 140 S. Ct. 1525, offers minimal guidance in how to analyze the effect of subsequent legislation on mootness but strongly suggests that any damage claim—including for nominal damages—prevents mootness. After the Court granted certiorari in *NYSRPA*, the state amended its firearm licensing statute and the city amended its related rule to permit transportation of firearms "in the precise manner" requested in the petitioner's prayer for relief in their complaint. Without further analysis, the Court held that the petitioner's claims for declaratory and injunctive relief with respect to the old rule were moot. *Id.* at 1526. However, the Court noted that a claim for damages caused by the old rule would *not* be mooted by the enactment of new legislation. Because the petitioners had not requested damages initially, the Court vacated the decision below and remanded for the lower courts to consider whether the petitioners could add such a claim. *Id.*

Justices Alito, Gorsuch, and Thomas issued a dissenting opinion. They would have rejected the suggestion of mootness for several reasons, but primarily because the petitioners did not receive all the relief they sought—they perceived no reason to remand on that issue. The operative complaint's prayer for relief in *NYSRPA* sought to enjoin New York's travel restrictions, a declaration that the challenged restrictions violated the Second Amendment, attorneys' fees, costs of suit, and "*[a]ny such further relief as the [c]ourt deems just and proper*." (citation omitted). Based on this last claim for relief, the dissenters identified a "separate and independent reason" that the case is not moot: should the petitioners prevail, they would be entitled to

damages under 42 U.S.C. § 1983 even without expressly requesting them. *Id.* at 1535. The dissent's opinion on this point, which was not addressed in the per curiam opinion, reflects settled law.

When a plaintiff's constitutional rights have been violated, nominal damages may be awarded without proof of any additional injury. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986). The Ninth Circuit expands this discretionary award to an entitlement. "In this Circuit, nominal damages *must* be awarded if a plaintiff proves a violation of his constitutional rights." *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992) (emphasis added) (nominal damages "must" be awarded as "symbolic vindication" of the plaintiff's constitutional claim based on law enforcement officers' warrantless entry of his house, regardless of whether this constitutional violation caused any harm).

The general request for relief at the end of many complaints (*e.g.*, "such additional and further relief which the court deems just and proper") provides sufficient notice for relief not specifically requested in the complaint. Fed. R. Civ. P. 54(c); *Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 249 (3d Cir. 1999) (awarding specific performance as "just and proper" relief); *Fed. Sav. and Loan Ins. Corp. v. Texas Real Estate Counselors, Inc.*, 955 F.2d 261, 269–70 (5th Cir. 1992) (prejudgment interest included in "any other relief, both special and general, to which [plaintiff] may be justly entitled."). Furthermore, so long as a complaint gives notice of a plaintiff's claims and their grounds, omissions in a prayer for relief are no barrier to redress of

meritorious claims. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978); *Pension Benefit Guar. Corp. v. East Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994) ("If a pleading provides a defendant notice of the plaintiff's claims and the grounds for the claims, omissions in a prayer for relief do not bar redress of meritorious claims.") (citations omitted); *State Farm Mut. Auto. Ins. Co. v. Coates*, 933 F.2d 1015, *1 (1991), quoting *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("it need not appear that the plaintiff can obtain the *specific* relief demanded as long as the court can ascertain from the face of the complaint that *some* relief can be granted"); *Webster v. Mozilo*, Case No. CV 08-6579-VBF(SHx), 2009 WL 10698955 *3 (C.D. Cal. July 23, 2009) (awarding rescission as "other relief the court deems appropriate").[9]

In *Klein v. Laguna Beach*, 810 F.3d 693, 696–97 (9th Cir. 2016), this Court awarded nominal damages and attorneys' fees after the plaintiff's First Amendment lawsuit achieved "future-oriented goals" by prompting the defendant city to repeal challenged aspects of an ordinance regulating sound trucks. It did not matter that he did not seek compensatory

[9] Although *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), noted in dicta that a claim for damages "asserted solely to avoid certain mootness" should be inspected closely, such inspection reveals no reason that nominal damages could not be awarded to Appellants in this case should they ultimately prevail. "Nothing blocks an award of nominal damages from a city." *NYSRPA*, 140 S. Ct. at 1538 (Alito, J., dissenting). While the amount of nominal damages is trivial by definition, the amount of attorneys' fees to which Appellants may be entitled is significant and § 1988 makes these fees available to ensure a robust defense of civil rights.

damages. A claim for nominal damages precludes mootness, *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002), even if related claims for injunctive relief are rendered moot. *Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir. 1979). If "there is any chance of money changing hands," no matter how "uncertain or even unlikely," the case is not moot. *Mission Product Holdings*, 139 S. Ct. at 1660; *NYSRPA*, 140 S. Ct. at 1537 (Alito, J., dissenting) (The "question is not whether petitioners would actually succeed in obtaining such damages or whether their loss was substantial. If there is a possibility of obtaining damages in any amount, the case is not moot.").

CONCLUSION

Seattle has steadfastly and successfully defended its rent-bidding platform ban without suggesting any doubts about its constitutionality or wisdom. Only after this case was fully briefed and set for oral argument in this Court did Seattle acknowledge that it passed the previous ordinances with no justification whatsoever and, seeking time to generate that justification, now seeks dismissal. The case is not moot and dismissal would be a waste of judicial resources and thwart the public interest in having the legality of the rent-bidding platform ban settled. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

DATED: May 28, 2020. Respectfully submitted,

s/ ETHAN W. BLEVINS

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Attorneys for Plaintiffs – Appellants

No. 19-35308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENTBERRY, INC., a Delaware Corporation; and DELANEY WYSINGLE, an Individual,
Plaintiffs – Appellants,
v.
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

SUPPLEMENTAL BRIEF OF APPELLEE CITY OF SEATTLE ON THE ISSUE OF MOOTNESS

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* * * * *

I. INTRODUCTION

This litigation is a case study in civil procedure – may Plaintiffs-Appellants ("Appellants") maintain their appeal from the dismissal of their case due to lack of standing (on grounds that "Wysingle's claimed injury [was] not immediate and thus insufficient to seek injunctive relief" and Rentberry had no "injury in fact") (ER 07), when the underlying ordinance at issue has been affirmatively repealed, rendering the case

moot? The case is moot because Appellants are no longer even arguably impacted by the repealed ordinance and there is no substantial likelihood that the City will reimpose a "moratorium" on rental bidding platforms. "While the doctrines of standing and ripeness focus on the suit's birth, the doctrine of mootness focuses attention on the suit's death."13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.1, at 735–37.

There is no reasonable expectation that the City will enact the challenged provision or one similar to it. The City affirmatively repealed the rent-bidding platform prohibition and any future regulation is wholly conditional on (1) the data actually showing an impact on equitable access to rental housing and (2) future work with the Office for Civil Rights and the Office of Housing to determine whether and how the recommendations adopted from the Rent Bidding Study should be implemented. None of the possible regulations in the Repeal Ordinance are "substantially similar" to or a "lesser degree" of the challenged moratorium. While Appellants conclude: "[t]he particular parameters of the regulation make little difference to the key issues presented and fully briefed in this litigation"(Appellants' Supplemental Brief on Mootness ("Mootness Brief"), Dkt. No. 50, at 9), the City respectfully submits that the particular parameters matter greatly – the Repeal Ordinance does not contemplate reinstating a ban or moratorium.

Additionally, for the first time, Appellants argue a claim for nominal damages in a bid to avoid mootness, citing the dissent in *New York State Rifle & Pistol*

Ass'n v. City of New York ("*NYSRPA*"). However, in *NYSRPA* the Court did not alter the legal landscape discouraging a last-minute bid for nominal damages to avoid mootness. Ninth Circuit precedent recognizes that "bootstrapping restitution into an ancillary prayer for relief at this stage of the litigation runs afoul of binding Ninth Circuit law." *Bain v. California Teachers Association*, 891 F.3d 1206 (2018). As such, this case should be dismissed as moot.

II. FACTS

Appellants brought suit seeking declaratory and injunctive relief, enjoining The City of Seattle from enforcing Seattle Municipal Code (SMC) 7.24.090. ER03.

SMC 7.24.090(C), at issue in this case – referred to by Appellants as "the moratorium" –was set to sunset by its own terms on July 17, 2020. SA007; SMC 7.24.090(B).

The City Council repealed SMC 7.24.090 on March 9, 2020, and submitted the repeal for the Mayor's signature on that same day[1]. On March 13, 2020, the Mayor signed the repeal, which became fully effective on April 12, 2020. Therefore, as of April 12, 2020, there is no barrier to using rental bidding platforms in the Seattle market.

As part of the Repeal Legislation, City Council "request[ed] that the Office of Housing [. . .] collect data to track whether rental housing bidding platforms are functioning for bidding purposes or only

[1] The full repeal ordinance and legislative history ("Repeal Ordinance" or "Repeal Legislation") are available at: http://seattle.legistar.com/LegislationDetail.aspx?ID=4347682&GUID=BBF4AC18-6093-4F74-8700-2C43F7881148

for advertising or other non-bidding functions, to determine whether the use of the platforms in Seattle is having an impact on equitable access to Seattle's rental housing market. The Council requests the Office of Housing provide the results of its data collection and analysis by June 1, 2021." *Id*. at Section 3.

Additionally, City Council requested "that the Office for Civil Rights conduct testing to determine if the use of the rental housing bidding platforms for bidding purposes is in compliance with SMC 14.08. The Council requests the Office for Civil Rights provide the results of testing by June 1, 2021." *Id*. at Section 4.

Finally, City Council requested that "*if* the data has shown that the platforms are functioning for bidding purposes and there is an impact on equitable access to rental housing, the Office for Civil Rights and the Office of Housing work with Council to determine *whether and how* the recommendations outlined in the Rent Bidding Study should be implemented, including mitigating any unintended consequences." *Id*. at Section 5 (emphasis supplied).

The potential relevant recommendations of the Rent Bidding Study are outlined in the ordinance itself and include: investigation of compliance with Seattle's "first-in-time" tenant screening requirements; analysis of the effects on landlords and tenants; compliance with provisions of the Residential Landlord-Tenant Act and other Washington State laws; and recommendations that rental housing bidding platforms should show evidence of compliance and considerations of current law, that rental bidding platforms affirmatively demonstrate compliance with

all federal, state, and local laws as well as consideration of fairness and equity; and that the Seattle Municipal Code's regulation of unfair housing practices be modified to include requirements that rental bidding platforms ensure compliance and equitable access for those persons with housing choice vouchers, and make operations competitive for those with vouchers; anonymize user profiles; make platforms accessible to persons with disabilities; provide multiple language support; add a requirement to list screening criteria; and require that an Open Housing Poster be posted on all platforms. Repeal Ordinance.

III. ARGUMENT

The City of Seattle has affirmatively repealed SMC 7.24.090 prior to its natural sunset date of July 17, 2020. Repeal Ordinance.

An action is moot when the issues presented are no longer live, and the mootness inquiry asks whether there is anything left for the court to do. *Western Oil & Gas Ass'n v. Sonoma Cnty.*, 905 F.2d 1287, 1290 (9th Cir. 1990). Here, where Appellants sought declaratory and injunctive relief, enjoining The City of Seattle from enforcing SMC 7.24.090, there is no further relief this Court can provide as SMC 7.24.090 no longer exists.

A. THERE IS NO REASONABLE LIKELIHOOD THAT A MORATORIUM WILL BE REIMPOSED.

1. There is no roadmap, or evidence of a future intent, to reenact the challenged moratorium on rent-bidding platforms.

In *Board of Trustees*, this Court, en banc, recognized that governmental action taken to repeal legislation was more likely to render a case moot than private action.

> However, we treat the voluntary cessation of challenged conduct by government officials "with more solicitude... than similar action by private parties." *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (internal quotation marks omitted) ("[W]e presume the government is acting in good faith."). For this reason, the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal.

Board of Trustees of Glazing Health and Welfare Trust v. Chambers, 941 F.3d 1195, 1198.

In fact, the primary holding of *Board of Trustees* was to:

> join the majority of our sister circuits in concluding that legislative actions should not be treated the same as voluntary cessation of challenged acts by a private party, and that we should assume that a legislative body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire. *Therefore, in determining whether a case is moot, we should presume that the repeal, amendment, or expiration of legislation will render an action challenging the*

> *legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it.*

Id. at 1199 (emphasis added).

While a party challenging the presumption of mootness need not show that enactment of the same or similar legislation is a "virtual certainty," the reasonable expectation of enactment cannot be based on speculation, as it is here. *Id*.

The precedents cited by Appellants are all distinguishable. In *City of Mesquite v. Aladdin's Castle, Inc.*, the City had affirmatively indicated an intent to reinstate an offending ordinance after voluntary cessation – "reenacting precisely the same provision."[2] In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, the City had already implemented a revised ordinance that similarly burdened the plaintiff ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so.").[3] Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court found an announcement that the Governor had "directed the Department" to cease the challenged behavior "does not moot this case."[4] The announcement in *Trinity* was clearly not legislative action.

The recent United States Supreme Court holding in *New York State Rifle & Pistol Ass'n v. City of New*

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[2] 455 U.S. 283, 289 & n.11, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982).
[3] *Board of Trustees* at 1198, citing508 U.S. 656, 662-63, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).
[4] 137 S.Ct. 2012, 2019, n.1.

York, 140 S. Ct. 1525, 1526 (2020), in which the City of New York amended the rule being challenged on appeal and instituted a replacement rule, also drives home that "[Appellants'] claim for declaratory and injunctive relief with respect to the City's old rule is therefore moot." In *New York State Rifle & Pistol Ass'n v. City of New York*, the Court ruled that when:

> the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." *Id*.

That is not the case here – there is no new ordinance, just a conditional possibility of some future regulation. As such, there are no ripe residual claims and the injunctive and declaratory relief sought by Appellants is moot and should simply be dismissed[5].

Appellants argue that "Seattle has created a roadmap to future regulation of rent-bidding platforms of the same or similar nature." Dkt. 50 at 1, *et seq*. Further, Appellants argue that "[t]he clear import of the ordinance is that Seattle plans to reinstate its ban (or similar speech-restricting

[5] It bears noting that any remand to the District Court to consider whether Appellants may add a damages claim at this late stage would be futile. The District Court has already decided that Appellants do not have standing to proceed and has dismissed their case on the merits as the ordinance impacts conduct, not speech.

regulations on rent-bidding platforms) after it generates the necessary data." *Id*. at 8. Not only is this patently wrong based on a logical reading of the Repeal Ordinance; it also misstates the actual legal challenge brought by Appellants in this case.

a) Based on a plain reading of the Repeal Ordinance, there is no reasonable likelihood that substantially similar legislation will be passed in the future.

The Repeal Legislation "requests" that the Office of Housing:

> 1) Collect data to track whether rental housing bidding platforms are functioning for bidding purposes or only for advertising or other non-bidding functions, to determine whether the use of the platforms in Seattle is having an impact on equitable access to Seattle's rental housing market. The Council requests the Office of Housing provide the results of its data collection and analysis by June 1, 2020;
>
> 2) Conduct testing to determine if the use of the rental housing bidding platforms for bidding purposes is in compliance with SMC 14.08. The Council requests the Office for Civil Rights provide the results of testing by June 1, 2021; and
>
> 3) If the data has shown that the platforms are functioning for bidding purposes and there is an impact on equitable access to rental housing, the

> Office for Civil Rights and the Office of Housing work with Council to determine whether and how the recommendations outlined in the Rent Bidding Study should be implemented, including mitigating any unintended consequences.

Therefore, the Repeal Legislation removes any present barrier for rental bidding platforms (which was the basis for Appellants' challenge) and merely requests that the Office of Housing track the impacts of implementation of rental bidding platforms, should that occur. The Repeal Legislation does not suggest any prescribed result and is highly conditional. First, it assumes that rental bidding platforms will commence in Seattle, which is not at all certain. Second, it asks the Office of Housing to gather data. Third, it requests recommendations on "mitigating any unintended consequences" if, and only if, the data shows an actual "impact on equitable access to rental housing." Appellants entirely ignore this threshold condition in the Repeal Legislation that there be an actual impact on equitable access to rental housing. As the City Council is presumed to be acting in good faith by affirmatively repealing SMC 7.24.090, which was already set to sunset under its own provisions in July 2020, and any future legislation is entirely speculative, this matter is moot.

Appellants also conflate the Rent Bidding Study with the actual legislation governing the City. While the Rent Bidding Study "does not recommend either the reinstatement or prohibition of rental bidding platforms," it does offer a possible recommendation to "modify [the prohibition on rent-bidding platforms] to

be effective in perpetuity, or until rental bidding platforms can affirmatively demonstrate compliance with all federal, state, and local laws, and fair and equitable operations." (SA023-24). The first part of that recommendation – to make the prohibition effective in perpetuity – was not incorporated into the legislation at all. *See* Repeal Ordinance, *generally*. The second part, that the rent-bidding platforms may need to show legal compliance before commencing business, was incorporated in the recitals setting forth the possible future regulations to be considered:

> WHEREAS, the Rent Bidding Study indicated that rental housing bidding platforms should show evidence of compliance and considerations of current law before reinstating the use of the platform by landlords and tenants; and
>
> WHEREAS, the Rent Bidding Study recommended that rental bidding platforms affirmatively demonstrate compliance with all federal, state, and local laws as well as consideration of fairness and equity; and
>
> WHEREAS, the Rent Bidding Study specifically recommended that the Seattle Municipal Code's regulation of unfair housing practices be modified to include requirements that rental bidding platforms ensure compliance and equitable access for those persons with housing choice vouchers, and make operations competitive for those with vouchers; anonymize user profiles; make platforms accessible to persons with

> disabilities; provide multiple language support; add a requirement to list screening criteria; and require that an Open Housing Poster be posted on all platforms[6].

Future legislation would only consider these recommendations if the gathered data showed an adverse impact on equitable housing, but this case is also not about those speculative list of regulations – it is about a complete ban on rental bidding platforms, a "moratorium." ER02; Appellants' Opening Brief at 2. In the prayer for relief in their complaint, Appellants sought "a declaration that *Seattle's ban on rent-bidding platforms* violated Rentberry's and Wysingle's freedom of speech . . . [and] an injunction forbidding enforcement of the ordinance." Mootness Brief at 9. This case has always been about a complete ban, not whether the City could require Rentberry to post an Open Housing Poster or affirmatively demonstrate legal compliance before being allowed to operate in Seattle.

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[6] Although the recital contains mandatory language, the effective legislation only "encourages rental housing bidding platforms to post the Seattle Open Housing Poster on their website to ensure compliance by those utilizing their services." Repeal Ordinance, Section 6. This poster is a more inclusive version of the Federal Fair Housing Act Poster that rental bidding platforms would arguably have to post under 42 U.S.C. § 3601 *et seq*. Again, this is not the type of harm challenged in this case.

b) Appellants seemingly challenge any potential regulation of rental bidding platforms, even if wholly different in kind than a moratorium.

Throughout this litigation, Appellants have argued that SMC 7.24.090 was unconstitutional precisely because allegedly the City did not have the basis to support a prohibition on rental bidding platforms. *See, e.g.*, Appellants' Opening Brief at 1 ("The City of Seattle slapped a moratorium on the use of these platforms without evidence of harm. The City's overzealous reaction to this new platform for speech does not satisfy First Amendment scrutiny."); *Id.*at 1-2 ("The City passed the moratorium based on speculation and conjecture, the moratorium does not serve the government's asserted interests, and the moratorium is more extensive than necessary . . ."). This case, and all of its briefing, is directed at Appellants' lack of standing, that the prohibition on rental-bidding platforms restricts conduct, not speech, and should this court move past the first two issues, an analysis under *Central Hudson*[7] of a full prohibition on rent-bidding platforms.

Appellants have never previously challenged (nor could they) the City's ability to place any regulations on online bidding platforms – they challenged the City's ability to enact a moratorium on rental bidding platforms "prophylactically" as a purported "ban first and gather evidence later" approach. Dkt. 8 at 25. Now Appellants decry the City's efforts to do exactly what they have demanded all along – study the issue

[7] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

before acting. Based on the clear reading of the legislation, if rental bidding platforms came to Seattle, and if they had an actual impact on equitable access to housing, any subsequent remedial legislation would be in a very different legal posture as it would be evidence-based on the results of data collection in the Seattle market and real-world impacts.8[8] Additionally, the primary issue in play in the current litigation is standing: neither Appellant has standing to pursue their claims. Hypothetically, if Rentberry became active in the Seattle market, if future legislation were passed, and Mr. Wysingle was actually impacted by that legislation, the legal analysis in a future lawsuit would be very different. In short, the present case is moot and any future concern unripe for consideration.

B. APPELLANTS' LAST-MINUTE BID FOR NOMINAL DAMAGES TO AVOID MOOTNESS RUNS AFOUL OF BINDING NINTH CIRCUIT PRECEDENT.

Appellants raise a nominal damages claim for the first time in this litigation, pointing solely to their demand for "other such additional relief as may be just or proper." Mootness Brief at 9. They do not deny that they have never raised a specific claim for damages or that they specifically sought declaratory

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[8] To be clear, for the reasons previously briefed, the City maintains that the recently-repealed 7.24.090 was constitutionally implemented, as the District Court clearly held. Appellants' criticize the City for not admitting that the original implementation was unconstitutional; however the only Court to have reviewed the ordinance found it constitutional and the City again declines to admit otherwise.

and injunctive relief concerning the now repealed ordinance. *Id.*

Only two years ago, in *Bain v. California Teachers Association*, this Circuit clarified that it would "reject [Appellants'] attempt to manufacture jurisdiction and avoid mootness by suddenly seeking restitution." 891 F.3d 1206, 1214. As in the present case, the plaintiffs in *Bain* "over and over again, throughout the various legal maneuvers . . . consistently represented that [they were] seeking only declaratory and injunctive relief." (citing *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1096-97) (alteration in original). Specifically, this Circuit has rejected relying on the very clause seeking "other such additional relief as may be just or proper," which Appellants now insist is relevant and not boilerplate in their response to a challenge of mootness, when the complaint did not include any damages claim whatsoever. *Bain*, at 1213 (citing *Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 141 (2d Cir. 1994) (complaint's prayer for "such other relief as the Court deems just and proper" did not suffice to support a late-in-the-day claim for nominal damages to avoid mootness because "there is absolutely no specific mention in the Complaint of nominal damages" (internal quotation marks and adjustment omitted)); *R.S. & V. Co. v. Atlas Van Lines*, 917 F.2d 348, 351 (7th Cir. 1990)(contract claim was moot where complaint failed to seek nominal damages)).

Finally, nothing in *NYSRPA* changes this outcome. The *per curium* decision summarily stated "On remand [which had already been ordered to resolve other residual claims], the Court of Appeals and the District Court *may* consider whether

petitioners *may* still add a claim for damages in this lawsuit with respect to New York City's old rule," but did not offer any analysis of its decision to do so. 140 S. Ct. at 1526-1527. Likewise, dissent, like Appellants, analyzes the unremarkable proposition that nominal damages can generally be available even if not specifically pled in the complaint (*Id*. at 1536 *et seq*.), before turning to the "[o]ne final point about damages [that] must be addressed," namely a "claim of damages 'asserted solely to avoid otherwise certain mootness.'" *Id*. at 1537 (distinguishing *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). However, this non-binding analysis, while distinguishing its own *dicta*, leaves the Ninth Circuit precedent under *Bain* completely intact. As such, the City submits that this court should decline Appellants' last-minute bid to avoid mootness and dismiss this matter completely.

IV. CONCLUSION

As the Seattle City Council passed a repeal of SMC 7.24.090, which was effective on April 12, 2020, and for the reasons set forth above, The City of Seattle submits that this case should be dismissed as moot.

Respectfully submitted this 29th day of June, 2020.

s/ Brian G. Maxey

SEATTLE CITY ATTORNEY'S OFFICE

* * * * *

No. 19-35308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rentberry, Inc., and Delaney Wysingle,
Plaintiffs – Appellants,
v.
The City of Seattle,
Defendant – Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Richard A. Jones, District Judge

APPELLANTS' SUPPLEMENTAL REPLY BRIEF ON MOOTNESS

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* * * * *

INTRODUCTION

Pursuant to this Court's order dated April 28, 2020, Appellants submit this supplemental reply brief explaining why this lawsuit is not moot.

I. THE CITY INTENDS TO ENACT SAME OR SIMILAR LEGISLATION

The City argues that if it enacts any type of regulation short of a permanent ban, then all the

litigation to date in this case is for naught. City Brf. on Mootness at 13–14. This ignores this Court's admonition in *Bd. of Trustees of Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019), that a case is not moot if a city enacts legislation "*similar*" to the repealed ordinance. The key question for this Court on the merits is whether regulation of rental-bidding platforms represents regulation of speech or conduct. This threshold question does not depend on the particular contours of the regulation. If regulation of rental-bidding platforms implicates First Amendment speech rights, this Court would reverse the district court's ruling and remand to determine whether the government can justify the infringement.

Trustees explains that legislative repeal will not moot a case when there is "a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it." *Id.* at 1199.[1] Whether such an expectation is reasonable depends on the circumstances of the repeal and professed intentions of those in a position to resume regulation.[2] Here, the new ordinance threatens to apply the Rent Bidding

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[1]The City incorrectly employs a "substantial likelihood" test rather than "reasonable expectation." *See* City Brf. on Mootness at 1.

[2] Courts frequently determine a party's likely future behavior based on existing facts and circumstances. *See Knecht v. Fidelity Nat. Title Ins. Co.*, No. C12–1575RAJ, 2014 WL 4057148, *9 (W.D. Wash. Aug. 14, 2014) (where defendant refused to state its intentions regarding future foreclosure actions, court determined that it was "reasonable to suspect" that it would resume previous unlawful conduct based on past and present circumstances); *Burgess v. Gilman*, No. 3:03 CV 0707 ECR RAM, 2006 WL 449212, *6 (D. Nev. Feb. 23, 2006) (court reviews record for "objective indicia of intent" to resume use of trademark).

Study's policy recommendations, up to and including a total ban, and puts the burden on private companies to justify speech rather than on the government to restrict speech. In doing so, the ordinance consistently reflects the legislature's future intentions.

The new ordinance explicitly states that, pending the study results, the Council will "determine whether and how the recommendations outlined in the Rent Bidding Study should be implemented, including mitigating any unintended consequences." Ord. 126053 § 5. This places the burden on the rental-bidding platform industry to prove compliance with the City's undefined goals and values. *Id.* ("WHEREAS, the Rent Bidding Study indicated that rental housing bidding platforms should show evidence of compliance and considerations of current law before reinstating the use of the platform by landlords and tenants; and WHEREAS the Rent Bidding Study recommended that rental-bidding platforms affirmatively demonstrate compliance with all federal, state, and local laws as well as consideration of fairness and equity…"). This completely inverts the constitutional protections of the First Amendment. *See Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981) (as a "general principle," an ordinance that "regulate[s] or infringe[s] upon the exercise of first amendment rights . . . is presumptively unconstitutional and the state bears the burden of justification."). The City's claims of only modest future regulation ring hollow given its past willingness to completely ban speech based on nonexistent evidence.

Seattle's Office of Housing's Rent Bidding Study recommends modifying the original and renewed

ordinance "to be effective ***in perpetuity***, or until rental-bidding platforms can affirmatively demonstrate compliance with all federal, state and local laws, and fair and equitable operations." Decl. of Blevins to Supp. Record, Exh. 1 at 11–12 (emphasis added). The City seeks to distance itself from this recommendation, City Brf. on Mootness at 12, because the phrase "in perpetuity" was not incorporated into the final ordinance. The language of the ordinance need not duplicate the underlying study to evidence intent to reenact the same *or similar* legislation. It is enough that the ordinance generally relies on the Rent Bidding Study and is consistent with public statements by Teresa Mosqueda, the ordinance's sponsor, urging the Departments of Housing and Civil Rights to move quickly if "things are escalating out of control." *See* Appellants' Supp. Brf. on Mootness at 9.

The City makes no attempt to counter the persistent declarations by members of the City Council and its staff that plainly indicate an intent to pursue future legislation in the same vein as the repealed ordinance. *See* Appellants' Supp. Brf. on Mootness at 6–9. The City's choice to ignore these statements in its brief suggests that no members of the City Council or staff expressed alternative views; apparently all agree that the City anticipates regulating rental-bidding platforms to "promote its values," *id.* at 6, regardless of the effect on individual speech rights.

The ordinance and legislative history present a consistent theme that future regulation—up to and including a permanent ban on rental-bidding platforms—remains on the table.

II. NOMINAL DAMAGES ARE MANDATORY FOR VIOLATION OF CONSTITUTIONAL RIGHTS

The City ignores multiple cases cited by Appellants in their opening supplemental brief supporting an award of nominal damages in this case, Appellants' Supp. Brf. on Mootness at 9–14, and never addresses Federal Rule of Civil Procedure 54(c) ("[F]inal judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."). Nominal damages need not be explicitly sought. *See* Appellants' Supp. Brf. on Mootness at 9–12 (*citing, e.g.*, *Z Channel Ltd. P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991)). *See also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (Under Rule 54(c), a court can enter an injunction striking down a statute even if the plaintiff only sought relief on as-applied grounds.); *State of Idaho Potato Comm'n v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 720 (9th Cir. 2005) ("district court may award relief not prayed for" under Rule 54(c)).

Instead, the City relies almost entirely on *Bain v. California Teachers Ass'n*, 891 F.3d 1206 (9th Cir. 2018). *Bain* is distinguishable. First, the actions that mooted the *Bain* case were those of the *plaintiffs* themselves. The case involved a First Amendment challenge to a public employee union's requirement that union members support the union's political and ideological activities (above and beyond collective bargaining). *Bain*, 891 F.3d at 1208. During the litigation, the plaintiff-teachers left their positions, such that none of them could benefit from the requested injunctive and declaratory relief. *Id.* at

1209. As none of the teachers intended to return to their jobs or rejoin the union, the case was moot. *Id.* at 1214. In this case, by contrast, the *defendant* City relies on its *own* actions to justify mootness and Appellants remain the targets of the City's contemplated regulation or ban of rental-bidding platforms.

Second, the *Bain* plaintiffs sought to avoid mootness by seeking leave to add new parties on appeal; a highly disfavored maneuver that the court rejected. *Id.* at 1215. Rentberry does not seek anything comparable to adding new parties—it seeks solely to have its request for nominal damages—an entitlement for any plaintiff who proves a constitutional violation—acknowledged as encompassed within the prayer for additional other relief that the court deems just and proper.

Relatedly, the *Bain* plaintiffs sought *restitution*, not nominal damages. *Bain*, 891 F.3d at 1212. The *Bain* court treated these two types of relief as analogous, but other cases clearly explain that they serve different purposes. As *Bain* acknowledges, restitution is a type of "money damages to remedy past wrongs." *Id.* Nominal damages in a constitutional case are different because they are not meant to compensate someone who has suffered a financial injury; they are a "symbolic vindication" of a constitutional right. *Cummings v. Connell*, 402 F.3d 936, 942 (9th Cir. 2005). Violations of core constitutional protections support claims for nominal damages, even if the plaintiff does not suffer cognizable monetary damages. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Klein v. Laguna Beach*, 810 F.3d 693, 697 (9th Cir. 2016) (awarding nominal—but not

compensatory—damages where plaintiff's First Amendment lawsuit achieved "future-oriented goals."). In this Circuit, a plaintiff who prevails in a civil rights action under section 1983 "is entitled to nominal damages as a matter of law." *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir. 1991). *See also Gerritsen v. City of Los Angeles*, 66 F.3d 335, *1 (9th Cir. 1995) (mem.) ("Where a party's constitutional rights have been violated, an award of nominal damages is mandatory."); *Sanders v. Grimes*, No. 1:18-cv-01285-AWI-JLT (PC), 2020 WL 1433007, *5 (E.D. Cal. Mar. 24, 2020) (same, citing *Floyd*).[3]

Finally, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), does not preclude an award of nominal damages should Appellants prevail in this case. *Arizonans* noted in dicta that a claim for damages "asserted solely to avoid cert mootness" should be inspected closely, which this Court is doing via these supplemental briefs. The briefing reveals no reason that nominal damages could not be awarded to Appellants in this case should they ultimately prevail. Cities are routinely ordered to pay nominal damages. *See, e.g.*, *Soffer v. City of Costa Mesa*, 798 F.2d 361, 363 (9th Cir. 1986) (nominal damages awarded against city for constitutional violations where

[3] Two other cases cited by the City are similarly distinguishable. In *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097 (9th Cir. 2001) (cited by *Bain*), this Court rejected the plaintiff's request for *compensatory* damages to avoid mootness after because the plaintiff had previously, explicitly, and strategically disavowed any intent to seek damages. The case did not involve the mandatory nominal damages owed to any prevailing plaintiff in civil rights litigation. *RS&V Co. v. Atlas Van Lines*, 917 F.2d 348 (7th Cir. 1990), involved a private contract dispute without any constitutional or civil rights component.

plaintiff did not claim or offer to prove any compensatory damages); *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 524 (9th Cir. 1999). An award of nominal damages is not a trivial matter; it changes the legal relationship between the parties, thus making it possible for prevailing Appellants who have vigorously defended civil rights to seek attorneys' fees under 42 U.S.C. § 1988. *See Lewis v. County of San Diego*, 798 Fed. App'x 58, 62 (9th Cir. 2019); *Wilcox v. City of Reno*, 42 F.3d 550, 556–57 (9th Cir. 1994).

CONCLUSION

This case is not moot and the Court should proceed to oral argument and decision.

DATED: July 10, 2020. Respectfully submitted,

s/ ETHAN W. BLEVINS

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON
AT SEATTLE

RENTBERRY INC., a Delaware corporation, and Delaney Wysingle, an individual, Plaintiffs, v. THE CITY OF SEATTLE, a Washington municipal corporation, Defendant.	)	Civil Action No. _____ **CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, Rentberry, Inc., and Delaney Wysingle, by and through undersigned counsel, hereby file this Complaint against Defendant City of Seattle (hereinafter "the City") and allege as follows:

INTRODUCTION

1. This civil rights action seeks to vindicate Plaintiffs' rights of freedom of speech protected by the First Amendment to the United States Constitution. The City is violating those rights by enforcing a ban on rental bidding websites that facilitate communication between landlords and renters in the City of Seattle.

JURISDICTION AND VENUE

2. This case is brought pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 2201 and 2202.

3. This Court has subject matter jurisdiction based on 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

4. Venue in this Court is appropriate pursuant to 28 U.S.C § 1391(b).

PARTIES

5. Plaintiff Rentberry, Inc., is a start-up founded in late 2015 as an online platform to assist users—both landlords and renters—to find and manage rental housing. Rentberry's purpose is to reduce costs, delay, and uncertainty in the rental process. Rentberry operates a website that facilitates communications between landlords and tenants in 4,948 cities.

6. Rentberry's innovative online communication platform allows renters and landlords, including landlords like Plaintiff Delaney Wysingle, to communicate about rental properties and maintain lasting landlord–tenant relationships.

7. A key feature of the Rentberry platform is its online bidding technology, which increases transparency and efficiency and allows landlords and tenants to adjust to changes in housing markets by bidding on the rental rate for a housing unit.

8. Rentberry facilitates communications between landlords and renters regarding lease terms, including rent, deposits, and lease duration, through its online bidding process.

9. Rentberry's bidding platform is designed to facilitate communication of price information in real time, to ensure that landlords price their properties optimally in both hot and slow markets, while potential tenants enjoy complete visibility on competing offers and the ability to seamlessly negotiate rental terms online.

10. As well as lease terms, including rent, deposits, and lease duration, Rentberry also facilitates communication on a wide variety of topics related to housing between landlords and renters regarding maintenance requests, housing references, search engine functions, and reviews. Many of these communications do not propose a commercial transaction.

11. All of the communications Rentberry facilitates are inextricably intertwined with the complex, personal, and long-lasting relationships between landlord and tenant that are initiated by the bidding process.

12. The bidding feature is an integral component of Rentberry's website.

13. Rentberry collects a fee at different stages in the rental process: Tenants pay $9.99 per application (this includes credit report/score, criminal/background check); Landlords pay $19.99 for document execution and rent collection functionality; Landlords pay $24.99 to utilize the platform if they have more than 3 properties on the platform; Brokers pay $24.99 to utilize the platform.

14. Rentberry is incorporated in Delaware (EIN: 47-4933743) and operates from an office in San Francisco, California.

15. Plaintiff Delaney Wysingle is a landlord who owns and manages a single-family rental home in Seattle.

16. Mr. Wysingle has owned and managed his rental property for three years and intends to continue to do so in the future.

17. Mr. Wysingle periodically needs to find new tenants for his rental property and will need to do so again in the summer of 2018.

18. Mr. Wysingle plans to communicate with prospective tenants using Rentberry and other "rental housing bidding platforms," as defined in SMC 7.24.090. Mr. Wysingle would use bidding platforms to save time, settle on a mutually beneficial arrangement with prospective tenants, and determine the best market rent through bidding. Mr. Wysingle would consider a bid below his initial asking price if the applicant seemed otherwise qualified. Mr. Wysingle would also use Rentberry's search functions for Seattle properties in order to evaluate competition and view dynamic pricing in the residential housing market.

19. Mr. Wysingle values the right to easily communicate with his tenants, and Rentberry would facilitate easier communication with both existing and prospective tenants. Mr. Wysingle cannot afford to absorb losses because of a tenancy gone bad. Mr. Wysingle treasures his right to ensure compatibility by easily communicating with eligible applicants and tenants.

20. Defendant City of Seattle is a Washington state municipality located in King County and chartered by the State of Washington.

FACTS

21. On March 19, 2018, the City Council voted to amend Seattle's Rental Agreement Regulation Ordinance, SMC 7.24.020 to .160, by approving Ordinance No. 125551 (hereinafter the "website ban").

22. Exhibit 1 is a true and accurate copy of the website ban.[1]

23. On March 30, 2018, Mayor Jenny Durkan approved the website ban.

24. On April 29, 2018, the website ban became effective and is codified at SMC 7.24.020 and 7.24.090.

25. The website ban establishes a one-year prohibition on the use of "Rental housing bidding platforms," like Rentberry, "that connect[] potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions including but not limited to housing costs and lease term, to landlords for approval or denial." SMC 7.24.020; SMC 7.24.090(A), (B).

26. Rentberry is a "Rental housing bidding platform" as defined by the website ban.

27. The City's staff memo regarding the website ban identified two websites as targets of the website ban: Rentberry and Biddwell.

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[1] The website ban is also available online: http://seattle.legistar.com/LegislationDetail.aspx?ID=3347171&GUID=750FB212-7C08-4E0A-AA72-579F2242A561&FullText=1

28. Exhibit 2 is a true and accurate copy of the staff memo.[2]

29. "Landlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." SMC 7.24.090(A).

30. Landlords and tenants are free to discuss "competing bids on certain lease provisions including but not limited to housing costs and lease term," so long as they do not communicate via a rental housing bidding platform.

31. By banning landlords and potential tenants from using Rentberry's innovative communications platform for real property located in Seattle city limits, the website ban operates as a prior restraint on lawful expression.

32. By banning the use of rental housing bidding platforms like Rentberry, the website ban prohibits all speech communicated on the platform, including bidding.

33. Failure to comply with the Rental Agreement Regulation Ordinance, including the website ban, subjects landlords and tenants to a $500 fine for the first violation and a $1,000 fine for each subsequent violation within a five-year period. SMC 7.24.130(F)(1). Additional violations within a three-year period can result in criminal charges. SMC 7.24.150.

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[2] The staff memo is also available online: http://seattle.legistar.com/View.ashx?M=F&ID=5872575&GUID=23EFA295-6878-47E3-8B7B-D549967137F9

34. But for the City's enforcement of the website ban, Rentberry would make its site available to facilitate communications between Seattle landlords and tenants.

35. But for the City's enforcement of the website ban, Mr. Wysingle would use rental bidding platforms, including Rentberry, to communicate with potential tenants.

36. The website ban was passed to prevent landlords and tenants from communicating via rental housing bidding platforms while

> the Office of Housing coordinate[s] with the Seattle Office for Civil Rights and the Seattle Department of Construction and Inspections to determine whether rental housing bidding platforms comply with The City of Seattle's fair housing and rental regulation laws and conduct a study of the current or potential impacts rental housing bidding platforms have and could have on equitable access to Seattle's rental housing market.

SMC 7.24.090(C)(3).

37. The website ban prevents landlords and tenants from communicating via rental housing bidding platforms because "it is unclear whether the structure and operation of these new services comply with the City's code, including new regulations such as first-in-time." Ordinance 125551 at 1, lines 18-20.

38. The first-in-time regulation referenced in the website ban does not apply if the landlord is legally

obligated to or voluntarily sets aside the rental unit for "specific vulnerable populations." SMC 14.08.050(A)(4)(a), (b). Accessory dwelling units and detached accessory dwelling units are also exempted.

39. The first-in-time rule referenced in the website ban has been declared unconstitutional. *Yim v. City of Seattle*, Case No. 17-2-05595-6 (King Cnty. Super. Ct. 2018), *appeal docketed*, No. 95813-1 (Washington Supreme Court Apr. 26, 2018).

40. The City Council did not make any legislative findings and has no evidence that rental housing bidding platforms violate the City of Seattle's fair housing and rental regulation laws.

41. The City Council did not make any legislative findings and has no evidence that rental housing bidding platforms have any impact on equitable access to Seattle's rental housing market.

42. The City Council did not make any legislative findings and has no evidence that the website ban directly advances a substantial governmental interest.

43. The connection between rental housing bidding platforms and any governmental interest is "unclear," "uncertain," and "has not been studied in Seattle." Ordinance 125551 at 1, lines 18-25.

CLAIM FOR RELIEF

(Free Speech)

(First and Fourteenth Amendments)

44. Plaintiffs incorporate the allegations in the preceding paragraphs.

45. The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, protects the truthful, nonmisleading speech that Mr. Wysingle would engage in on rental bidding platforms, including Rentberry.

46. The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, protects the truthful, nonmisleading speech that is facilitated by Rentberry's website.

47. On its face and as enforced by the City, the website ban prohibits Plaintiffs from engaging in lawful communication through a rental housing bidding platform.

48. The speech ban imposed by the website ban burdens Plaintiffs' rights of free speech.

49. The speech ban imposed by the website ban is not tailored to serve a substantial government interest.

50. By prohibiting Plaintiffs from communicating through a rental housing bidding platform, the City currently maintains and actively enforces a set of laws, practices, policies, and procedures under color of state law that deprive Plaintiffs of their rights of free speech, in violation of the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment and 42 U.S.C. § 1983.

51. Plaintiffs have no adequate remedy at law to compensate for the loss of these fundamental freedoms and will suffer irreparable injury absent an

injunction restraining the City's enforcement of the website ban.

52. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of the City's unconstitutional laws, practices, and policies. *See* 28 U.S.C. §§ 2201, 2202.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter judgment in their favor as follows:

A. Declare that SMC 7.24.090(A) violates Plaintiffs' rights to freedom of speech protected by the First and Fourteenth Amendments on its face and as applied;

B. Preliminarily and permanently enjoin Defendant, its officers, agents, servants, employees, and all persons in active concert or participation with them from enforcing SMC 7.24.090(A);

C. Award Plaintiffs their costs, attorneys' fees, and other expenses in accordance with law, including 42 U.S.C. § 1988; and

D. Order such additional relief as may be just and proper.

DATED: May 23, 2018. Respectfully submitted,

s/ BRIAN T. HODGES

* * * * *

Attorneys for Plaintiffs

CITY OF SEATTLE
ORDINANCE 125551
COUNCIL BILL 119198

AN ORDINANCE relating to fair housing; establish a one-year prohibition on use of rental housing bidding platforms, requesting a study of rental housing bidding platforms; amending Section 7.24.020 of the Seattle Municipal Code; and adding a new Section 7.24.090 to the Seattle Municipal Code.

WHEREAS, online or application-based platforms that: provide landlords the ability to list rental housing units, oblige potential tenants to bid on certain lease provisions, and allow landlords their choice of tenant based on the tenant's bid and screening criteria, have recently appeared in many housing markets, including Seattle's; and

WHEREAS, over the past several years, the City Council has passed a variety of amendments to the Seattle Municipal Code regulating rentals, revising the housing code, and updating fair housing protections, resulting in a new and different regulatory landscape; and

WHEREAS, emerging technologies have caused consumers to rapidly escalate the use of application based and online services, and it is unclear whether the structure and operation of these new services comply with the City's code, including new regulations such as first-in-time; and

WHEREAS, Seattle's housing market has become very competitive over the past decade, causing scarcity issues for tenants; and

WHEREAS, it is uncertain whether and how these services impact Seattle's rental housing market, as these services may have different effects on markets depending on the scarcity of housing supply; and

WHEREAS, the benefits and drawbacks of such services to landlords and tenants have not been studied in Seattle; and

WHEREAS, the City of Seattle is committed to ensuring equitable access to rental housing, and platforms that require use of a computer and internet in order to access rental housing may hinder the ability for certain communities to meaningfully identify and obtain needed housing; and

WHEREAS, the Council wishes to understand new technologies and innovation that may have impacts on communities throughout Seattle prior to these new technologies and innovations becoming entrenched without regard to whether their impacts are in line with Seattle's values of equity and Seattle's work toward expanding access to rental housing; and

WHEREAS, the Council wishes to know more about how these services function and the impact they may have on Seattle's rental housing market before allowing landlords and tenants to use them within the City; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Section 7.24.020 of the Seattle Municipal Code, last amended by Ordinance 125222, is amended as follows:

7.24.020 Definitions((,))

***

"Rental agreement" means a "rental agreement" as defined and within the scope of RCW 59.18.030 and RCW 59.18.040 of the RLTA in effect at the time the rental agreement is executed. At the time of the passage of the ordinance codified in this chapter, the RLTA defined "rental agreement" as "all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit."

"Rental housing bidding platform" or "platform" means a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions including but not limited to housing costs and lease term, to landlords for approval or denial. Merely publishing a rental housing advertisement does not make a person a rental housing bidding platform. This definition shall expire on the date Section 7.24.090 expires.

***

Section 2. A new Section 7.24.090 is added to the Seattle Municipal Code as follows:

7.24.090 Use of online or application based rental housing bidding services prohibited

A. Landlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits.

B. This Section 7.24.090 shall expire one year after the effective date of the ordinance introduced as Council Bill 119198 unless Council exercises its

authority under subsection 7.24.090.C, in which case it shall expire at the end of the extension.

C. Council has the authority to extend the prohibition in subsection 7.24.090.B by up to twelve months if the Office of Housing requests more time to complete the study of rental housing impacts, or if Council needs more time to review the study or discuss potential action.

Section 3. The City Council requests that the Office of Housing coordinate with the Seattle Office for Civil Rights and the Seattle Department of Construction and Inspections to determine whether rental housing bidding platforms comply with The City of Seattle's fair housing and rental regulation laws and conduct a study of the current or potential impacts rental housing bidding platforms have and could have on equitable access to Seattle's rental housing market. The Office of Housing shall submit the study, which should include compliance determinations by the Office for Civil Rights and the Department of Construction and Inspections, to the Chair of the Housing, Health, Energy, and Worker's Rights Committee of City Council within twelve months of enactment of the ordinance introduced as Council Bill 119198.

Section 4. The provisions of this ordinance are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection or portion of this ordinance, or the application thereof to any person or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 5. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council on the 19th day of March, 2018, and signed by me in open session in authentication of its passage this 19th day of March, 2018.

s/ Bruce A. Harrell
President of the City Council

Approved by me this 30th day of March, 2018.

s/ Jenny A. Durkan
Mayor

Filed by me this 30th day of March, 2018.

s/ Monica Martinez Simmons
City Clerk

(Seal)

Seattle City Council Central Staff

March 7, 2018

M E M O R A N D U M

To: Housing, Health, Energy, and Workers' Rights Committee Members

From: Asha Venkataraman, Council Central Staff

Subject: CB 119198: Prohibiting Use of Rental Housing Bidding Platforms

On March 8, 2018, the Housing, Health, Energy, and Workers' Rights (HHEWR) Committee plans to discuss and vote on Council Bill (CB) 119198, sponsored by Councilmember Mosqueda. The HHEWR committee discussed a draft version of this bill at its meeting on February 15, 2018. CB 119198 prohibits landlords and renters in the City from using rental housing bidding platforms for one year. Rental housing bidding platforms such as Rentberry or Biddwell are sites for online auctions that allow landlords to list available rental units and potential tenants to bid on those units. Landlords can then choose the tenant based on their bid and other application materials submitted. CB 119198 requests that the Seattle Department of Construction and Inspections (SDCI) and the Seattle Office for Civil Rights (SOCR) study whether such rental bidding platforms comply with Seattle's rental regulation and fair housing laws, administered by SDCI and SOCR respectively. It also requests that SOCR and SDCI conduct an analysis of the impact such platforms have on Seattle's housing market. This memorandum describes the purpose of CB 119198, the specifics of the bill, and proposed amendments.

CB 119198 Overview

In January 2018, the Associated Students of the University of Washington (ASUW) sent Councilmembers an ASUW legislative directive, which called for a ban on setting apartment rents using online bidding services. ASUW's concerns centered on the potential for increasing the cost of housing for university students, which could result in more homeless students, given studies of how these types of services impact competitive housing markets.1 ASUW presented its concerns at the February 15, 2018 meeting of the HHEWR committee.

After being made aware of this issue, Councilmember Mosqueda focused on three main purposes for CB 119198: (1) to study whether these types of services are compliant with the City's current laws; (2) to give the City time to create a regulatory framework if necessary before use of such services proliferates; and (3) to determine current and potential impacts on Seattle's housing market. CB 119198 accomplishes the first by requesting SOCR and SDCI to study whether use of these platforms comply with the City laws that SOCR and SDCI administer. SOCR enforces Fair Housing protections, which include first-in-time protections. First-in-time requires a landlord to offer a rental unit to the first applicant who meets the landlord's advertised screening criteria. SDCI enforces rental agreement regulations and the housing code. It is not currently clear whether these platforms are compliant with these laws. CB 119198 accomplishes the second by prohibiting landlords and potential tenants from using rental bidding platforms for one year, so that the City can determine if and how it wants to regulate

these platforms. SDCI will enforce this prohibition under existing enforcement provisions in Seattle Municipal Code (SMC) Chapter 7.24. Lastly, CB 119198 accomplishes the third focus by requesting SOCR and SDCI study or select a third party to study the impact on housing markets, so the City is aware of the effects of platforms such as these on Seattle's housing market.

Proposed Amendments

Amendment text is provided in Attachment A.

Amendment 1, sponsored by Councilmember Mosqueda

This amendment adds recital language about the equity implications of rental bidding platforms and revises recital language to make clear the bill is concerned with rental housing markets, not residential sales.

This amendment also clarifies Section 3 of the legislation, specifying which departments and offices Council is requesting conduct studies. The amended language makes clear that the Office of Housing (OH) will be coordinating with SOCR and SDCI to study compliance with current City law, and conducting a study about the current and potential impacts that rental housing bidding platforms have or could have on equitable access to the City's rental housing market. This section asks OH to submit the study to the HHEWR committee within one year of CB 119198's enactment.

Amendment 2, sponsored by Councilmember Juarez

This amendment adds an option for Council to extend the prohibition against use of these platforms

for up to an additional twelve months if OH believes more time is necessary to complete the study requested by Council or Council needs more time to review the study and consider potential action.

Attachments:

A. Proposed Amendments to CB 119198

cc: Kirstan Arestad, Central Staff Director

Amy Tsai, Supervising Analyst

CITY OF SEATTLE
ORDINANCE 125840
COUNCIL BILL 119507

AN ORDINANCE relating to fair housing; establishing a one-year prohibition on use of rental housing bidding platforms; amending Section 7.24.020 of the Seattle Municipal Code; and adding a new Section 7.24.090 to the Seattle Municipal Code.

WHEREAS, online or application-based platforms that provide landlords the ability to list rental housing units, oblige potential tenants to bid on certain lease provisions, and allow landlords their choice of tenant based on the tenant's bid and screening criteria have recently appeared in many housing markets, including Seattle's; and

WHEREAS, over the past several years, the City Council ("Council") has passed a variety of amendments to the Seattle Municipal Code regulating rentals, revising the housing code, and updating fair housing protections, resulting in a new and different regulatory landscape; and

WHEREAS, emerging technologies have caused consumers to rapidly escalate the use of application-based and online services, and it is unclear whether the structure and operation of these new services comply with the Seattle Municipal Code; and

WHEREAS, the Council wishes to understand new technologies and innovations that may have impacts on communities throughout Seattle, prior to these new technologies and innovations becoming entrenched; and

WHEREAS, the Council wishes to know more about how these services function and the impact they may have on Seattle's rental housing market before allowing landlords and tenants to use them within Seattle; and

WHEREAS, the Council passed Ordinance 125551 in March 2018, prohibiting landlords and potential tenants from using rental housing bidding platforms for real property located in Seattle city limits; and

WHEREAS, Ordinance 125551 also included a request for the Office of Housing to "conduct a study of the current or potential impacts rental housing bidding platforms have and could have on equitable access to Seattle's rental housing market"; and

WHEREAS, in 2018, Rentberry, Inc. and Delaney Wysingle, an individual, sued The City of Seattle for its prohibition against landlords and potential tenants' use of rental housing-bidding platforms, arguing that the prohibition interfered with their freedom of speech; and

WHEREAS, on March 15, 2019, Judge Richard A. Jones ruled in favor of The City of Seattle, stating that the use of the online rental housing bidding service Rentberry provides is conduct, not speech;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Findings

A. Seattle's housing market has become very competitive over the past decade, causing scarcity issues for tenants.

B. It is uncertain whether and how these application-based and online services impact Seattle's

rental housing market, as these services may have different effects on markets depending on the scarcity of housing supply.

C. The benefits and drawbacks of such services to landlords and tenants have not been studied in Seattle.

D. The City of Seattle is committed to ensuring equitable access to rental housing, and platforms that require use of a computer and internet in order to access rental housing may hinder the ability for certain communities to meaningfully identify and obtain needed housing.

E. The use of new technologies and innovations can spread quickly, whether or not their impacts on communities are in line with Seattle's values of equity and work toward expanding access to rental housing.

F. Studies suggest that the auction model of rental housing-bidding works to increase rents, and rental housing-bidding software will place an additional increased upward pressure on rents.

G. Rent increases have been shown to disproportionately impact low-income households and households of color.

H. The Office of Housing is conducting the study on rental housing-bidding and estimates it will be completed in June 2019.

Section 2. Section 7.24.020 of the Seattle Municipal Code, last amended by Ordinance 15 125558, is amended as follows:

7.24.020 Definitions

* * *

"Rental agreement" means a "rental agreement" as defined and within the scope of RCW 19 59.18.030 and RCW 59.18.040 of the RLTA in effect at the time the rental agreement is executed. At the time of the passage of the ordinance codified in this chapter, the RLTA defined "rental agreement" as "all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit."

"Rental housing bidding platform" or "platform" means a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions including but not limited to housing costs and lease term, to landlords for approval or denial. Merely publishing a rental housing advertisement does not make a person a rental housing bidding platform. This definition shall expire on the date Section 7.24.090 expires.

* * *

Section 3. A new Section 7.24.090 is added to the Seattle Municipal Code as follows:

7.24.090 Use of online or application based rental housing bidding services prohibited

A. Landlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits.

B. This Section 7.24.090 shall expire one year after the effective date of the ordinance introduced as Council Bill 119507 unless the City Council exercises

its authority under subsection 7.24.090.C, in which case it shall expire at the end of the extension.

C. The City Council has the authority to extend the prohibition in subsection 7.24.090.A by up to 12 months if the Office of Housing requests more time to complete the study of rental housing impacts, or if the Council needs more time to review the study or discuss potential action.

Section 4. The provisions of this ordinance are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection or portion of this ordinance, or the application thereof to any person or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 5. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by the Seattle Municipal Code Section 1.04.020.

Passed by the City Council on the 10th day of June, 2019, and signed by me in open session in authentication of its passage this 10th day of June, 2019.

s/ Bruce A. Harrell
President of the City Council

Approved by me this 17th day of June, 2019.

s/ Jenny A. Durkan
Mayor

Filed by me this 17th day of June, 2019.

s/ Monica Martinez Simmons
City Clerk

(Seal)

SEATTLE
Office of Housing

RENT BIDDING STUDY

Date: July 3, 2019

To: Seattle City Council, Housing, Health, Energy & Workers' Rights Committee, Chair Mosqueda

From: Emily Alvarado and Bin Jung, Office of Housing

OVERVIEW

Seattle Ordinance 125551 established a one-year moratorium on rental housing rent bidding platforms and directed the Seattle Office of Housing (OH) to study the potential impacts of rent bidding platforms on Seattle's housing market. The ordinance was passed after online and mobile application-based rental bidding platforms, Rentberry and Biddwell, entered the Seattle housing market in 2017. Rentberry was quickly criticized by the Associated Students of the University of Washington Student Senate (ASUW). ASUW brought up the issue with City of Seattle Councilmembers, after which City Council decided to move forward with a moratorium on rental bidding platforms. The Seattle City Council instituted Ordinance 125551 in April 2018. The brief duration of rental bidding platforms operating in Seattle prevented local data collection. As a result, the effect of rental bidding platforms on the Seattle rental housing market and on equitable access to housing cannot be analyzed. Rental bidding platforms have been in operation in other cities, which provides insight into how the City of Seattle could proceed. However, rental bidding platforms have been largely

unpopular amongst renters and municipalities, and their establishment in cities is questionable. This study provides relevant information from other cities regarding rental bidding platforms where available, and identifies how the platforms could pose potential violations of City, State, and Federal laws and regulations if allowed to operate in Seattle. The report details:

- Background information
- Issues and potential violations
- Topics for further analysis

BACKGROUND

Rental bidding is a practice where prospective tenants compete for a rental unit by negotiating with the landlord on the amount of rent charged. Rental bidding has become more common over the past decade due to high demand for rental housing and the scarcity of rental housing, specifically at lower-income ranges. Rental bidding platforms institutionalize the practice of rent bidding by creating an online auction marketplace for rental housing. Multiple sources have likened rental bidding platforms to "eBay for housing."

However, in the past few weeks, some rental bidding platforms have transitioned to focus more on advertising rental properties than on rental bidding. Previous conversations with trade organizations representing landlords had revealed that using rental bidding platforms as an additional advertising opportunity would be of interest to landlords, specifically smaller landlords who conduct their own advertising. A recent review showed a large

percentage of listings posted on rental bidding platform websites were advertisements for properties listed on StreetEasy, Zillow, Craigslist, and realtor.com. Few listings were exclusive to the rental bidding platform, questioning if rental bidding would actually occur for the property. As rental bidding platforms continue to evolve, fewer challenges could be posed leading to less need to take further analysis or additional action.

The design of rental bidding platforms varies. In general, landlords list available properties on the platform and set an initial asking monthly rent. Prospective tenants create user profiles, which can include information such as names, photographs, credit scores, background checks, personal references, work history, previous residences, and links to social media accounts. After finding a rental unit to their liking, prospective tenants offer a monthly rent bid to the landlord for their consideration. Bids are allowed to be submitted for a period of time, after which landlords select a tenant based on their monthly rent bid and additional screening criteria.

The design of some rental bidding platforms allows prospective renters to see the number of bids placed and the current highest bid. Other platforms do not provide that information, and bidders provide a closed bid without knowledge of the current highest bid amount. After the landlord selects the winning bid, the landlord-tenant relationship and screening process move offline. However, some rental bidding platforms have incorporated automated landlord services such as background checks, lease signings, rent collection, and maintenance requests into their

operations, and encourage landlords and tenants to conduct all business through their app.

The objective of rental bidding platforms is to create an online market place that connects landlords and prospective tenants, and provides an opportunity to negotiate rents. Rent bidding platforms often profit by receiving a commission for successful lease signings. In the case of Rentberry, if the landlord selects an offer with a monthly rent greater than their initial listed price, Rentberry receives an additional monthly payment of 25% of the difference. [Moffitt, 2016]

Rent bidding platforms became active in the San Francisco Bay Area and major Australian cities in 2017, and were universally met with critique from tenant organizations and the media. Commentary from the San Francisco Rent Board, Australian tenant unions, and various media outlets underscored the potential for rental bidding platforms to exploit scarce rental markets, exacerbate housing affordability crises in their respective cities, and discriminate against low-income households and populations vulnerable to displacement. [Jacobs, 2019]

In response, rent bidding platforms asserted the technology could provide an opportunity to reset a housing market with inflated rents. These claims are unable to be validated, partially due to the fact that rental bidding platforms were originally released exclusively in cities experiencing housing affordability crises and tight rental markets. Although rental bidding platforms have since expanded to other cities, any effect that rental bidding platforms have on weak or strong housing markets is difficult to disaggregate and attribute directly to

rental bidding platforms. Currently, Seattle is also in a severe affordable housing crisis where the demand for rental housing, specifically affordable rental housing for low-income households, outstrips the supply. As a result, an analysis of the effect of rental bidding platforms in a weak Seattle market cannot be conducted until a surplus of affordable housing stock at all income levels is reached.

In Seattle, the ASUW called on the City of Seattle to ban rental bidding platforms after the app Rentberry was released in 2017 and rental housing in the University District began to appear on the app. The ASUW statement noted existing high rents, the cost of housing as a significant part of the cost of education, and Seattle's standing as one of the most competitive housing markets in the United States. ASUW also referenced Rentberry's initial marketing to landlords that claimed that apartment rents would rise an average of 5% when listed on their app, and also noted that Rentberry changed this claim in response to public backlash.

ASUW brought up the issue of rental bidding with City of Seattle Councilmembers, and in March 2018, the City of Seattle approved Ordinance 125551. The Ordinance established a one-year prohibition on the use of rental bidding platforms and requested a study from the Seattle Office of Housing on rental bidding platforms. Rentberry, Inc. and Delaney Wysingle, an individual that owned a rental property in Seattle, then sued the City over the prohibition. Rentberry and Wysingle claimed that the ordinance violated their right to free speech under the First and Fourteenth Amendments. In March 2019, District Court Judge Richard A. Jones ruled in favor of the

City of Seattle, concluding that the use of rental bidding platforms was a form of conduct, not speech. The Plaintiffs have appealed to the Ninth Circuit Court, and the appeal is currently pending.

ISSUES AND POTENTIAL VIOLATIONS

Ordinance 125551 detailed multiple concerns regarding rental bidding platforms, including:

- Compliance with federal fair housing protections, state rental housing regulations, and Seattle Municipal Code (SMC)
- Equitable access to rental housing
- The effect of rental bidding on the housing market depending on the scarcity of housing supply
- A lack of information regarding benefits and drawbacks to landlords and tenants

The issues and potential violations posed by rental bidding platforms as they relate to these concerns are presented below. Although focused on local implications, this section includes information and insight from other cities with rental bidding platforms in operation. In particular, the experience of the city of Melbourne, Australia provides an interesting case study.

Compliance with fair housing protections – Housing discrimination against protected classes

Discrimination in housing is prohibited at the federal, state, and local levels. Laws and regulations at the state and city levels broaden the number of communities protected against housing

discrimination. Rental bidding platforms could potentially violate anti-discrimination law if their design and operations do not comply with federal, state, and city regulations. Discrimination and implicit bias in housing is widely known and well-studied. Research on discrimination in online housing rental services is also growing, providing a foundation by which to understand the implications of rental bidding platforms.

The Fair Housing Act of 1968 prohibits discrimination in housing based on the basis of race, color, religion, sex, disability, familial status, or national origin. The Fair Housing Act was intended to supplement the Civil Rights Act of 1964, and marked the creation of federal enforcement provisions against discrimination in housing. In Washington State, it is illegal to discriminate against prospective and current tenants on the basis of sexual orientation, gender identity, and veteran/military status. Furthermore, within the city limits of Seattle, it is illegal to discriminate based on political ideology, use of a trained guide dog, or use of a Housing Choice (Section 8) Voucher. These additional protections were added by the city and state to address systematic harm and move towards more fair and equitable access to housing.

The design and interface of some rental bidding platforms mimic other housing rental apps, such as Airbnb and HomeAway, that have been criticized for allowing racial discrimination to occur on their platforms. A solid body of academic research, articles, social media testimonials, and anecdotal evidence on racial discrimination witnessed on Airbnb exists, and

can inform best practices for other online housing rental apps.

Airbnb is a cornerstone of the sharing economy, and positions itself as a platform that connects people who have particular goods, in this case, housing, with those who wish to obtain them. Airbnb requires users to create profiles with real names and pictures to create this community of people and facilitate a sense of trust and sharing amongst them. However, prospective guests who were Black, had disabilities, or were transgender have repeatedly been refused lodging on Airbnb in multiple cities nationwide and around the world. [Glusac, 2016] The major criticism is that the use of real names and photos in user profiles triggers racial profiling and discrimination. All of these prospective guests listed are members of protected classes in the city of Seattle, and it would be illegal to discriminate against them.

A 2016 study found that guests with distinctively Black names were 16% less likely to be accepted relative to identical guests with distinctively White names. The study conducted a field experiment where messages were sent to 6,400 listings on Airbnb across five cities. Messages sent by accounts with distinctively Black names received a positive response 42% of the time, compared to 50% of the time for accounts with distinctively White names. An additional analysis found that discrimination against accounts with distinctively Black names was limited to hosts who had never previously had a Black guest, suggesting that the host's behavior is consistent with broader underlying pattern of discrimination. [Edelman, Luca, & Svirsky, 2016]

Federal and state government audits testing for racial discrimination since the Fair Housing Act was passed has shown an overall decrease in face-to-face discrimination in regulated offline, in-person housing markets. This is not to imply that discrimination does not exist. The Seattle Office of Civil Rights (OCR) has tested for, and found, discrimination against protected classes in the Seattle housing market. Offline housing markets can be audited and tested for housing discrimination, whereas testing for discrimination in online platforms is still a relatively new, but critical, monitoring practice.

Furthermore, the anonymity of online markets in conjunction with key product design choices could work to discourage discrimination in housing rental platforms. For example, eBay uses online user handles rather than real names. These online user handles can offer fewer indicators of race or ethnicity, whereas platforms that make race, sex, disability, and other protected class characteristics visible may trigger explicit/implicit bias and discrimination.

Compliance with fair housing protections – Subsidy discrimination

Rental bidding platforms may be incompatible or inherently problematic with housing subsidy programs if the auction process consistently raises rents beyond voucher holders' ability to pay, regardless of the affordability of the initial asking rent. Housing Choice Voucher (HCV) holders may be rendered uncompetitive in rental bidding platforms, which could be discriminatory, violate fair housing law, and impede equitable access to housing if available housing is listed exclusively on these platforms.

As stated, the Revised Code of Washington prohibits discrimination of a prospective tenant based on source of income. Source of income refers to benefit or subsidy programs, such as housing and public assistance programs, veteran's benefits, social security, or other supplemental security income. Housing Choice Vouchers, previously called Section 8 vouchers, are classified as a source of income. Furthermore, in 2016, the City of Seattle passed alternative source of income protections, which expanded fair housing protections for renters who use alternative sources of income and subsidies to pay for housing costs. This expanded the applicable subsidy programs to include short-or long-term subsidy offered by a government programs, private nonprofits, or any other assistance program that pays a tenant's rent through a direct arrangement between the program and the property owner.

The Housing Choice Voucher (HCV) program is a housing subsidy program administered by the Seattle Housing Authority (SHA). The program assists low-income families, individuals, seniors, and people with disabilities in finding housing in the private market. A monthly maximum rent amount is calculated for households participating in the program; households pay typically 30-40% of their monthly income towards the maximum rent, and the HCV pays the remaining portion. HCV holders must find housing with a rent that is either at, or below, the maximum amount listed on their voucher.

Use of a HCV requires coordination between the voucher holder, SHA, and the landlord of the rentable unit. After a voucher-holding household finds a suitable unit, the landlord of the unit must complete

and return an SHA Leasing Kit for approval. SHA must determine the rent to be reasonable for the HCV holder and the neighborhood before approval. If there is a question about the rent, SHA may engage in a negotiation process with the landlord to set an affordable and reasonable rent. SHA then conducts a Housing Quality Standards (HQS) inspection of the unit to ensure it is decent, safe, and sanitary. If the unit does not pass inspection, the landlord is required to make repairs before a tenant move-in. The final lease is not signed until the Leasing Kit is received, the rent is approved, and a HQS inspection is completed. All three parties, tenant, HCV, and landlord will need to sign an agreement.

The average time for a HCV household to move into an apartment is approximately two weeks, but that is subject to change. Variables such as return of the Leasing Kit, rent negotiation, and HQS inspection could extend the time it takes for a lease to be signed and a tenant to move in. There is no commitment between the landlord and tenant, and either party can cancel the process until a lease is signed. The necessity for time and coordination has been challenging for some HCV holders in their housing search. Most large property management companies utilize a dynamic pricing algorithm that relies on time-based pricing reflecting market supply and demand to set rents for their available units. Rents are subject to change throughout the month. HCV holders are unable to confirm their eligibility to move into a unit until the Leasing Kit is completed and approved by SHA and the unit passes SHA inspection. The rent amount is set when a HCV holder applies for an apartment and provides the landlord with a Leasing Kit. However, the time between the offer of a

Leasing Kit and actual move-in is subject to coordination and approval by SHA. This may require a resetting of rent by the property management company as dictated by their pricing algorithm, which could restart the process or price out the tenant from the available unit.

On rental bidding platforms, landlords select a tenant based on their rent offer and additional screening criteria. Although rental bidding platforms advocate that a landlord can conduct a holistic evaluation of the tenant, a rent auction could cause a landlord to judge higher rent offers with more weight than other screening criteria. HCV households are at a disadvantage in rent auctions due to their rent and income limits and although HCV holders are protected under multiple levels of the law, rental bidding platforms have yet to implement design interventions that prevent source of income discrimination. Low-income households at large are also implicated, echoing the major critique that higher-income households will have a competitive edge in rent auctions and that disadvantaged populations will be further isolated from housing opportunities.

Lack of information on effect to Seattle's housing market and to tenants and landlords

Rental bidding platforms are a relatively nascent technology that appeared in select major cities in 2017. The brief duration of rental bidding platforms in Seattle prevented local data collection, and data on rental bidding platforms from other cities is also minimal. Rental bidding platforms appear to be utilized for their advertising capacity, but there is lack of information tracking the effect of rental

bidding platforms on successful lease signings or the demographics of renters who secure housing on the platforms. To OH's knowledge, no studies or audits have been conducted to collect data on these platforms. The difficulty in disaggregating the effect rental bidding platforms have on the housing market from other market factors also contributes to the lack of information on the technology. Any study on the effect of rental bidding platforms on a housing market would require a rigorous methodology in order to draw significant and sound conclusions.

Before the app Rentberry's release in San Francisco, the company conducted a test to see what the effect of the app would be on landlords in the San Francisco/San Jose area. Rentberry concluded that landlords would be able to see a 5% increase on rents when using its rental bidding app. [Kendall, 2017] The sample size was ten landlords and Rentberry did not divulge its analysis, and so the results of the test should be viewed in isolation. After immediate negative press on the app's ability to increase rents, Rentberry soon after stated that rents for housing units listed on its app had decreased by 5% within 10 test cities. [Mims, 2017] No subsequent data has been released by Rentberry or any other app to demonstrate that rental bidding platforms result in lower rents, particularly in strong rental markets.

Seattle has an extremely competitive housing market with a scarcity of affordable housing stock for low-income households and populations vulnerable to displacement. More information about rental bidding platforms and their effect on the local housing market, landlords, and tenants will not be available unless rental bidding platforms are reinstated. However,

clear concerns exist on how rental bidding platforms' design and operation could violate federal, state, and local law, and negatively affect low-income households and protected classes. These protections and issues are not unique to Seattle, and rental bidding platforms have also not demonstrated compliance with regulation and accessibility requirements in other cities.

Equitable access –Digital inequality

The design and interface of rental bidding platforms presents more issues regarding accessibility and equitable access to housing opportunities. Digital inequality is an established concern for those with limited internet access, English language learners, and populations with disabilities. New technologies offer opportunities to engage a broader and more diverse population than the traditional formats of posters, newspapers/television, phone calls, mailings, and in-person announcements/conversations alone. However, new technologies can be exclusionary if their design and interface do not consider and amend design for disadvantaged populations. In addition, equitable access is also questioned if housing opportunities are listed exclusively on rental bidding platforms.

Multiple factors contribute to digital inequality including device and internet access, skill level and technological literacy, and support/technical assistance. Rental bidding platforms require a computer or smartphone with internet access to view the rental housing opportunities listed. Low-income households have lower rates of in-home broadband internet connectivity compared to higher-income households, and are more likely to depend on

smartphones rather than computers to have internet access at home. [U.S. Department of Housing and Urban Development, 2016] Computer access maybe limited to shared machines in public spaces such as libraries, which present additional obstacles of time, availability, and age of technology. Smartphones may be ubiquitous, but internet speed and data packages can be costly and be an additional barrier to access.

Furthermore, smartphones are only as valuable as one's ability to utilize them. Technological literacy and skill levels with new technologies vary among English language learners, seniors, and populations with disabilities. Moreover, new technologies may also not always be available in formats or languages that are compatible to population needs, forcing people to seek out support or technical assistance in order to utilize the app. Rent auctions through an app are a time-sensitive process that requires consistent engagement with the technology.

CASE STUDY: MELBOURNE, AUSTRALIA

The City of Melbourne's experience with rental bidding platforms provides an interesting example by which to understand the entry of a technology into a contested environment and its ultimate resolution. Rental bidding platforms, including Rentberry, entered the Melbourne housing market in 2017. The City of Melbourne, located in the state of Victoria, had been experiencing massive population growth in the past years that outpaced the production of housing, leading to an affordability crisis. The pressure of the crisis was felt throughout the city. Media reports and articles reflected broad concern regarding the rapid increase of rents in rental housing, the decrease in homeownership opportunities, and the gentrification

of neighborhoods. The City's comprehensive plan charted the goal to accommodate and house over 1.6 million new residents in the next 35 years and highlighted initiatives to increase density and create more affordable housing. [Victoria State Government, 2016]

Similar to other cities, rental bidding platforms faced immediate criticism in Melbourne and other Australian states from residents, tenant unions, and media outlets. Tenants Union of Victoria, a governmental organization that promotes and protects rights of tenants and residents in the state, fiercely opposed Rentberry and the practice of rent bidding. Although Rentberry marketed itself to bring transparency to an opaque landlord-tenant rent negotiation, Tenants Union of Victoria stated rental bidding platforms aggravated a lack of transparency around rental prices in housing, and placed lower-income populations competed with higher-income populations in a bidding competition.[Robb & Zhou, 2017]

Housing issues and concerns are addressed by the Consumer Affairs unit in the state of Victoria. In 2016, Consumer Affairs Victoria commissioned a report on rental experiences for tenants, landlords, and property managers in the state. The report surveyed 1,836 tenants in Melbourne, and found that up to 20% of prospective tenants had offered to pay more than the listed renting price to give themselves a competitive edge over other applicants. In most cases, the prospective tenant offered a higher rent, but nearly a quarter of tenants reported that a higher rent amount was suggested to them by the real estate agent or landlord. The report also found that the

practice of offering higher monthly rents became more common with higher income populations, with 50% of those in the middle to highest quintiles of income offering to pay more than the listed rent. [Ernst & Young, 2016]

This study affirms that higher income households are able to be more competitive in rent auctions than low-income households by the sheer nature of being able to offer more rent. Although offering more rent was not illegal in Victoria, concerns were raised regarding the prevalence of the practice and its effect on low-income households in securing housing. As housing issues fell within the purview of consumer affairs, Consumer Affairs Victoria concluded that advertising a property at a price lower than what a landlord was willing to accept could have been deemed 'false and misleading conduct,' which was a violation of law. [State government of Victoria, 2016] Therefore, rental bidding and rental bidding platforms posed to be a potential mechanism for false and misleading conduct by allowing landlords to list monthly rents they knew were not genuine asking amounts. In September 2018, the Victorian Government passed the Residential Tenancies Amendment Bill, which included a reform that prohibited rental auctions and required fixed rent amounts in advertisements for available housing units. [Parliament of Victoria, 2018]

There are clear differences in how the City of Melbourne and the City of Seattle address housing issues. Contrary to the state of Victoria, Australia, landlord-tenant issues in Washington State are generally regulated under the Residential-Landlord Tenant Act rather than the Consumer Protection Act. However, the example of Melbourne surfaces the

question of whether rental bidding platforms comply with the wide range of state law.

RECOMMENDATIONS AND FURTHER ANALYSIS

Seattle's housing affordability crisis is a critical issue for the City and its citizens. Recent revisions to the housing code and updates to fair housing protections expand equitable access to rental housing, and demonstrate the City's commitment to equity. The following topics should be investigated if rental bidding platforms are to be allowed to operate in Seattle.

First-in-Time case

In 2016, the City of Seattle passed First-in-Time legislation, which required landlords advertising rental housing to offer tenancy to the first qualified applicant that met the established screening criteria. The objective of First-in-Time was to combat implicit bias resulting in housing discrimination. First-in-Time was overturned in 2018, and the City of Seattle successfully sought direct review by the Washington State Supreme Court. The outcome of this case may affect rental bidding platforms, in that rental bidding platforms would violate First-in-Time if it were to be restored. The Supreme Court heard oral argument on that matter on June 11, 2019. The timeline following the oral argument is to be determined as decisions typically require a few months, although they could take longer.

Further analysis on the effect on landlords and tenants

As stated previously, there is little data on the effect of rent bidding platforms in Seattle, given the limited time period they were in operation locally. Conversations with representatives from trade organizations representing Washington State landlords provided limited information on the effect of rental bidding platforms on membership operations. A representative of the Washington Multi-Family Housing Association (WMFHA), a professional trade organization that represents larger multi-family properties, stated that the organization's constituency did not use rental bidding platforms when they existed in Seattle (B. Waller, personal communication, April 22, 2019). WMFHA's constituency would also most likely not be interested in the service due to the large size of the buildings and the prevalent use of dynamic pricing algorithms to set rents. A representative from the Rental Housing Association of Washington, which represents small rental property owners and managers, remarked that the majority of their membership also did not use rental bidding platforms in advance of the moratorium, although a percentage may be interested in trying the platforms in the future if they were to be reinstated, if only for the advertising opportunity (S. Martin and H. Pierce, personal communication, April 25, 2019).

Regarding the effect of rental bidding platforms on renters, future analysis could include which populations or demographics more frequently achieve winning bids in comparison to the demographics of all bidders. An online audit could also be done to evaluate

housing discrimination and implicit bias on rental bidding platforms. The experience of Housing Choice Voucher (HCV) holders should be researched further to better understand if HCV holders are consistently rendered uncompetitive, or otherwise discouraged or prevented from using rent bidding platforms. Additional research on the geographic location of properties utilizing rental bidding platforms could also provide information on the effect of these platforms in different local markets, and the extent to which they can intensify real estate pressures in a neighborhood.

Other Washington State law violations

The compliance of rental bidding platforms with all provisions of the Residential-Landlord Tenant Act is to be determined, as is their compliance with all other Washington State laws. For example, Washington State requires real estate brokers to be licensed and regulated, and, in general, leasing property in exchange for compensation is something that requires a broker's license. Whether rental bidding platforms may need to be comply with real estate broker requirements due to their operations should be determined. Finally, auctioneers are also required to be licensed in Washington State, and it is not clear whether a rent bidding auction may require an auctioneer license.

Rent control

The imposition of controls on rent or the regulation of rent in residential rental buildings that are not low-income housing is prohibited by RCW 35.21.830. The prohibition of rental bidding platforms may be in violation of this regulation if interpreted to be a

control on how much rent private persons can charge for rental properties.

Additional services – Security deposits and background checks

Some rental bidding platforms extend their scope to include automated landlord services such as security deposit and rent collection, and maintenance requests. For example, Rentberry allows prospective renters to bid on security deposit amounts in addition to the monthly rent. This could be a potential violation of City of Seattle Ordinance 125222, which limits the security deposit and non-refundable move-in fees amount to the amount of the first full month's rent.

In Washington State, landlords must also notify prospective tenants by writing, or posting, what types of information will be accessed in the tenant screening, and what criteria may result in denial of the application prior to obtaining any information about a prospective tenant. This could pose a potential issue for rental bidding platforms that incorporate automated landlord services into their products. Currently, two major rental bidding platforms, Rentberry and Bidwell, include automated landlord services in their operations. Automated landlord service applications can also provide background checks using a third-party provider.

In 2017, the City of Seattle passed Fair Chance Housing legislation, which prohibits landlords from committing unfair practices against renters based on arrest or conviction records, or criminal history. If rental bidding platforms were to be reinstated in the City, then all of their services would need to comply with this code and regulation. Landlords are

prohibited from inquiring about criminal history, performing criminal history background checks, requiring disclosure about criminal history, or rejecting an applicant, or taking an adverse action based on a prospective tenant's criminal history. Landlords are also required to provide Fair Chance Housing language on all applications for rental properties, including online applications. A lawsuit has been brought against City of Seattle regarding Fair Chance Housing, but the Office for Civil Rights (OCR) has full authority to enforce the ordinance while litigation is pending.

Recommendations

The Office of Housing offers options for consideration but does not recommend either the reinstate mentor prohibition of rental bidding platforms, namely due to the pending First-in-Time appeal and that decision's direct consequence on rental bidding platforms. However, reasonable conclusions can be made on rental bidding platforms based on their design and potential violations to federal, state, and local law and regulation. Notwithstanding a firm recommendation, rental bidding platforms should show evidence of compliance and consideration with law and regulation before reinstatement in the City of Seattle. Specifically, rental bidding platforms should demonstrate how operations would comply with federal fair housing laws, Housing Choice Voucher (HCV accessibility, and anti-housing discrimination regulation.

In order to ensure compliance and encourage equitable access to all populations, the following recommendations are offered for consideration:

- SMC 7.24.090 – Use of online or application based rental housing bidding services prohibited
  - Modify to be effective in perpetuity, or until rental bidding platforms can affirmatively demonstrate compliance with all federal, state and local laws, and fair and equitable operations
- SMC 14.08 –Unfair Housing Practices
  - Include requirements for rental bidding platforms to ensure compliance and equitable access such as:
    - HCV accessibility
    - Anonymous profiles
    - Accessible formats for people with disabilities
    - Multiple language support
    - Listed screening criteria
- SMC 14.08.015 –Seattle Open Housing Poster
  - Require Seattle Open Housing Poster on all rental bidding platforms
- Modify rental bidding platforms operations to allow HCV holders to be competitive in the rent auction process

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CITY OF SEATTLE
ORDINANCE 126053
COUNCIL BILL CB 119752

AN ORDINANCE relating to fair housing; regulating rental housing bidding platforms; repealing a one-year prohibition on use of rental housing bidding platforms; repealing Section 7.24.090 of the Seattle Municipal Code; and amending Section 7.24.020 of the Seattle Municipal Code.

WHEREAS, online or application-based platforms that provide landlords the ability to list rental housing units, oblige potential tenants to bid on certain lease provisions, and allow landlords their choice of tenant based on the tenant's bid and screening criteria appeared over the last several years in many housing markets, including Seattle's; and

WHEREAS, the City Council ("Council") wished to determine whether the structure and operation of new application-based and online services complied with the new and different regulatory landscape in Seattle from changes to Seattle's laws including regulating rentals, revising the housing code, and updating fair housing protections; and

WHEREAS, the Council wishes to know more about how these services function and the impact they may have on Seattle's rental housing market before allowing landlords and tenants to use them within Seattle; and

WHEREAS, the Council passed Ordinance 125551 in March 2018, prohibiting landlords and potential

tenants from using rental housing bidding platforms for real property located in Seattle city limits; and

WHEREAS, Ordinance 125551 also included a request for the Office of Housing to "conduct a study of the current or potential impacts rental housing bidding platforms have and could have on equitable access to Seattle's rental housing market"; and

WHEREAS, the prohibition expired on April 30, 2019; and

WHEREAS, the Council passed Ordinance 125840 in June 2019, instituting another year-long prohibition against landlords and potential tenants using rental housing bidding platforms for real property located in Seattle city limits, in anticipation of the July 2019 release of Office of Housing's study and the need for time to consider subsequent action after the report' s issuance; and

WHEREAS , the Office of Housing transmitted its study on rent bidding ("Rent Bidding Study") in July 2019, and found that because of the brief period of operation of the rental housing bidding platforms in Seattle, the effects of these platforms on the Seattle housing market and on equitable access could not be analyzed; and

WHEREAS, the Rent Bidding Study reviewed potential issues associated with compliance with fair housing protections and equitable access; and

WHEREAS, the Rent Bidding Study recommended investigation of several topics if rental housing platforms were allowed to operate in Seattle, including compliance with "first -in- time" tenant screening requirements, which have since been

affirmed by the Washington State Supreme Court; analysis of the effects on landlords and tenants; and compliance with provisions of the Residential Landlord-Tenant Act and other Washington State laws; and

WHEREAS, the Rent Bidding study indicated that rental housing bidding platforms should show evidence of compliance and considerations of cu1Tent law before reinstating the use of the platform by landlords and tenants; and

WHEREAS, the Rent Bidding Study recommended that rental bidding platforms affirmatively demonstrate compliance with all federal, state, and local laws as well as consideration of fairness and equity; and

WHEREAS, the Rent Bidding Study specifically recommended that the Seattle Municipal Code's regulation of unfair housing practices be modified to include requirements that rental bidding platforms ensure compliance and equitable access for those persons with housing choice vouchers, and make operations competitive for those with vouchers; anonymize user profiles; make platforms accessible to persons with disabilities; provide multiple language support; add a requirement to list screening criteria; and require that an Open Housing Poster be posted on all platforms; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section I. Section 7.24.020 of the Seattle Municipal Code, last amended by Ordinance 125950, is amended as follows:

7.24.020 Definitions

"Rental agreement" means a "rental agreement" as defined and within the scope of RCW 59.18.30 and RCW 59.18.040 of the RLTA in effect at the time the rental agreement is executed. At the time of the passage of the ordinance codified in this chapter, the RLTA defined "rental agreement" as "all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit."

~~"Rental housing bidding platform" or "platform" means a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions including but not limited to housing costs and lease term, to landlords for approval or denial. Merely publishing a rental housing advertisement does not make a person a rental housing bidding platform. This definition shall expire on the date Section 7.24.090 expires.~~

"Security deposit" means any payment, fee, charge, or deposit of money paid to the landlord by the tenant at the beginning of the tenancy as a deposit and security for pe1formance of the tenant's obligations in a written rental agreement, but does not include payment of a reservation fee authorized by RCW 59.18.253(2) or a payment to assure the payment of rent, provided that a security deposit may be applied to rent as provided in Section 7.24.030. Security deposits include payments, charges, or deposits for the purpose of:

1. Repairing damage to the premises, exclusive of ordinary wear and tear, caused by the tenant, or by a guest or licensee of the tenant.

2. Compensating the landlord for the tenant's breach of the tenant's duties prescribed in the rental agreement to restore, replace, or return personal property or appurtenances.

3. Compensating the landlord for the tenant's failure to return keys to the premises, except that a landlord shall not retain any portion of the deposit for keys for lock mechanisms that must be changed upon a change of tenancy pursuant to subsection 22.206.140.A.7.

*****

Section 2. Section 7.24.090 of the Seattle Municipal Code, last amended by Ordinance 125840, is repealed:

((~~7.24.090 Use of online or application-based rental housing bidding services prohibited~~

~~A. Landlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits.~~

~~B. This section 7.24.090 shall expire July 17, 2020 unless the City Council exercises its authority under subsection 7.24.090.C, in which case it shall expire at the end of the extension.~~

~~C. The City Council has the authority to extend the prohibition in subsection 7.24.090.A by up to 12 months if the Office of Housing requests more time to complete the study of rental housing impacts, or if the Council needs more time to review the study or discuss potential action.~~))

Section 3. Upon the effective date of the repeal of the prohibition, the City Council requests that the Office of Housing to collect data to track whether rental housing bidding platforms are functioning for bidding purposes or only for advertising or other non-bidding functions, to determine whether the use of the platforms in Seattle is having an impact on equitable access to Seattle's rental housing market. The Council requests the Office of Housing provide the results of its data collection and analysis by June 1, 2021.

Section 4. Upon the effective date of the repeal of the prohibition, the City Council requests that the Office for Civil Rights conduct testing to determine if the use of the rental housing bidding platforms for bidding purposes is in compliance with SMC 14.08. The Council requests the Office for Civil Rights provide the results of testing by June 1, 2021.

Section 5. The City Council requests that if the data has shown that the platforms are functioning for bidding purposes and there is an impact on equitable access to rental housing, the Office for Civil Rights and the Office of Housing work with Council to determine whether and how the recommendations outlined in the Rent Bidding study should be implemented, including mitigating any unintended consequences.

Section 6. The City Council encourages rental housing bidding platforms to post the Seattle Open Housing Poster on their website to ensure compliance by those utilizing their services.

Section 7. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten

days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council on the 9th day of March, 2020, and signed by me in open session in authentication of its passage this 9th day of March, 2020.

President of the City Council s/ Teresa Mosqueda
Teresa Mosqueda, Councilmember

Approved by me this 13th day of March, 2020.
s/ Jenny A. Durkan
Mayor

Filed by me this 13th day of March, 2020.
s/ Monica Martinez Simmons
City Clerk

(Seal)