No. 20-538

IN THE

Supreme Court of the United States

RENTBERRY, INC. AND DELANEY WYSINGLE,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* RENTAL HOUSING ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITIONERS

PHILIP A. TALMADGE
Counsel of Record
TALMADGE/FITZPATRICK
2775 Harbor Avenue SW,
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
phil@tal-fitzlaw.com

Counsel for Amicus Curiae

299752

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

A. INTEREST OF *AMICUS CURIAE* RHAWA 1

B. STATEMENT OF THE CASE. 2

C. SUMMARY OF ARGUMENT 5

D. ARGUMENT 5

(1) The Purpose of 42 U.S.C. § 1983 Actions to Vindicate Federal Constitutional Rights Is Undercut by Giving Government the Opportunity to Moot Such Claims Without Proving the Unequivocal Cessation of Unconstitutional Conduct in the Future 6

(2) Governments, Like Other Parties, Should Not Be Able to Render a 42 U.S.C. § 1983 Action Moot, Unless They Unequivocally Cease the Unconstitutional Acts that Were the Predicate for Such Action 8

Table of Contents

Page

(3) The City Has Not Unequivocally Ceased Its Unconstitutional Practices, Particularly Given Its Council's Implacable Hostility Toward Landlords. 11

D. CONCLUSION. 15

TABLE OF CITED AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Slater,
528 U.S. 216 (2000) 9

Already LLC v. Nike, Inc.,
568 U.S. 85 (2013) 8

Bd. of Trustees of Glazing Health and Welfare Trust v. Chambers,
941 F.3d 1195 (9th Cir. 2019) 9

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 12

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 9

Fikre v. Fed. Bureau of Investigation,
904 F.3d 1033 (2018) 8, 9

Friends of Earth, Inc. v. Laidlaw Env't Servs., (TOC), Inc.,
528 U.S. 167 (2000) 8

Lopez v. Candaele,
630 F.3d 775 (9th Cir. 2010) 7

Los Angeles County, Cal. v. Humphries,
562 U.S. 29 (2010) 7

Page

Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658 (1978) 6, 7

Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2010) 8

Reed v. Town of Gilbert, 576 U.S. 155 (2015) 7

Rentberry, Inc. v. City of Seattle, 814 F. App'x 309 (9th Cir. 2020) 10

Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) 7, 12

STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. I . . . . . *passim*

42 U.S.C. § 1983 . . . . . *passim*

Fed. R. Civ. P. 10(c) 5, 15

Fed. R. Civ. P. 37(2)(a) 1

Ordinance 125551 . . . . . *passim*

Ordinance 125840 . . . . . 2, 4

Cited Authorities

Page

Ordinance 126053 . . . . . *passim*

Seattle Keeps Making It Harder for Small Landlords Like Us, Seattle *Times*, Feb. 9, 2020 13

Seattle City Council Mem., March 2, 2020, https://seattle.legistar.com/ View.ashx ?M=F&ID=8169362&GUID=13F261E3-9B02-4F1C-AFEE-B291A12E5B40 . . . . . .3, 4

Seattle City Council Mem., May 31, 2019, https://seattle.legistar.com/ View.ashx ?M=F&ID=7283899&GUID=4D779D3F -7241-47E0-B10A-7A512F498E67 4

SMC 14.08. 12

A. INTEREST OF *AMICUS CURIAE* RHAWA

This memorandum is submitted on behalf of the Rental Housing Association of Washington ("RHAWA") supporting the petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This memorandum is filed with the consent of the parties pursuant to Rule 37(2)(a).[1]

RHAWA is a 5,000 plus member non-profit organization of rental housing owners (single family homes to multi-family communities) in Washington. Its objectives are to oversee the general welfare of the rental housing industry, lead advocacy efforts, provide continuous development of skills and knowledge, and assist members to provide appropriate services to the renting public.

RHAWA represents the interests of rental housing owners to state and local legislative bodies, news media and the general public. RHAWA is actively involved in the Washington State Legislature and local governments on any legislation affecting landlords. Its staff studies the regular meeting agendas of the local governments, meets with city and county council members, and reports to its board about any issues which affect the local community. RHAWA has participated as an *amicus curiae* in Washington State courts and in this Court.

RHAWA is also involved in educating and encouraging member involvement on issues affecting the rental housing industry. RHAWA offers educational programs which enhance rental property owners' knowledge and provides different fora for the sharing of pertinent information in the rental housing industry and social interaction.

RHAWA also offers products and services rental property owners need to be successful, while encouraging the highest standards of ethics and integrity for its members. RHAWA promotes the value of the rental housing industry to the community and educates renters about the process of becoming a tenant and being a good tenant.

RHAWA members have utilized in the past, and would utilize in the future, rent bidding websites that are the subject of this action.

B. STATEMENT OF THE CASE

RHAWA adopts the Statement of the Case set forth in the petitioners' petition at 6-13. As noted there, the City of Seattle's ("City") Council has enacted three ordinances addressing rent bidding websites. Ordinance 125551 banned rent bidding websites for a year, amended by Ordinance 125840, renewing the ban. App. at 71a-80a. Ordinance 126053 that theoretically repealed the Council's prior ban on rent bidding websites, app. at 106a-112a, was a far cry from an unequivocal cessation of its prohibition on such websites. Rather, the Council made clear that its new ordinance is a proverbial Sword of Damocles held over such websites to ensure that they either knuckle under to the Council's demands as to their structure and operations, or they will be banned. In the meantime, the City would seek to improve its posture for future litigation on such websites.

Initially, the City's ban on rent bidding websites was either the product of remarkable incompetence or blatant bad faith. The ostensible rationale for Ordinance 125551 and its moratorium on rent bidding websites was the need for "additional information" regarding their

operation. However, as the Council's own staff *admitted* in a memorandum on Ordinance 126053, no data could be gathered if the websites were shut down:

> Data collection on the use and function of rental housing bidding platforms is not possible when a prohibition is in place. Moreover, without such data the City cannot determine whether bidding platforms have an impact on equitable access.

Seattle City Council Mem., March 2, 2020, https://seattle.legistar.com/ View.ashx?M=F&ID=8169362&GUID=13F261E3-9B02-4F1C-AFEE-B291A12E5B40. By this remarkable admission, the Council conceded that its ban on rent bidding websites, and the attendant violation of users' First Amendment rights for 12 months[2] was *unjustified*. The Council had *no data* and could not obtain any actual data on the websites' activities; those websites involved a legitimate exercise of First Amendment rights by the bidders and the websites themselves. Such a suppression of First Amendment rights by a government on unsubstantiated, vague impressions of "misuse" of such sites clearly violated their users' First Amendment rights.

Although the City claims Ordinance 126053 repealed the earlier prohibition of rent bidding websites, the City's decision to "cease" its unconstitutional conduct was not unequivocal but rather was a strategic one, calculated to better support its position on § 1983 litigation that had been filed; it was *not* a complete, unequivocal cessation of its unconstitutional conduct in the future. The staff memorandum on Ordinance 125840 was fully aware of

2. The ban existed from April 30, 2018 to April 30, 2019.

this litigation. Seattle City Council Mem., May 31, 2019, https://seattle.legistar.com/ View.ashx?M=F&ID=7283899&GUID=4D779D3F-7241-47E0-B10A-7A512F498E67. Similarly, the Council staff memorandum on Ordinance 126053 clearly understood that the Council ban on rent bidding websites was the subject of § 1983 litigation:

> Shortly after passage of Ordinance 125551, Rentberry and a private individual sued the City, arguing that the prohibition interfered with freedom of speech. On March 15, 2019, the U.S. District Court for the Western District of Washington ruled in favor of the City. The Plaintiffs appealed to the Ninth Circuit Court of Appeals, where litigation on the current prohibition is pending.

Seattle City Council Mem., March 2, 2020, https://seattle.legistar.com/ View.ashx?M=F&ID=8169362&GUID=13F261E3-9B02-4F1C-AFEE-B291A12E5B40. The Council fully appreciated that its legislation was calculated to affect this litigation, and future litigation. As will be noted *infra*, Ordinance 126053 also revealed that it was not intended to be an unequivocal cessation of the City's unconstitutional conduct, but merely a hiatus in the City's war on such websites.

C. SUMMARY OF ARGUMENT

This case merits review by this Court under Rule 10(c).

The essential purpose of actions under 42 U.S.C. § 1983 is to vindicate constitutional rights. The City violated the First Amendment rights of bidders who seek to rent properties on rent bidding websites like Rentberry, as well as the rights of the website operators themselves.

A policy on mootness that treats governments differently than private actors by allowing them to assert that they have theoretically ceased any unconstitutional activities fundamentally undercuts the Congressional purpose in enacting the constitutional tort, particularly where there is no proof by the government that it has *unequivocally* ceased the unconstitutional activity not only for the present but in the future.

Here, there are ample grounds to believe that the City has not unequivocally ceased its unconstitutional assault on rent bidding websites or their users. Rather, the City has opted for an interlude to defer a reckoning on its unconstitutional behavior while it improves its litigation posture. If the Court opts to retain a mootness analysis in connection with actions under 42 U.S.C. § 1983, the Court should require that governments and private entities alike bear the burden of proving on the record that the unconstitutional conduct has ceased unequivocally.

D. ARGUMENT

RHAWA fully agrees with the petitioners' argument in their petition at 13-25 that the Ninth Circuit's invocation

of a "good faith cessation" principle to allow the City to dodge its liability to the petitioners under 42 U.S.C. § 1983 on mootness grounds is improper. RHAWA focuses its argument to this Court on why the City's assertion that it has "ceased" its unconstitutional conduct toward petitioners is a mere smoke screen to buy time when it fully intends to persist in its unconstitutional conduct. The City should not be afforded relief on mootness grounds. This Court should grant review to refine its mootness principles, in the § 1983 setting, as petitioners have requested.

(1) The Purpose of 42 U.S.C. § 1983 Actions to Vindicate Federal Constitutional Rights Is Undercut by Giving Government the Opportunity to Moot Such Claims Without Proving the Unequivocal Cessation of Unconstitutional Conduct in the Future

In analyzing the question of mootness, it is important to resort to the basic principles that animated Congressional action in enacting 42 U.S.C. § 1983. As this Court is well aware, by its terms, that 42 U.S.C. § 1983 establishes a constitutional tort where an actor under color of state law violates another's federal constitutional rights. The importance of this tort to the Congressional purpose in enacting the Civil Rights Act of 1871 vindicating federal unconstitutional rights cannot be overstated. *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 665-89 (1978). Justice Brennan's painstaking historical analysis in *Monell* made clear that the Act applied to municipalities like the City. Municipalities may be held liable as "persons" under § 1983 "when execution of a government's policy or custom, whether made by its

lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id*. at 694. *See also*, *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29 (2010).

Where First Amendment rights are restricted or banned, a claim under 42 U.S.C. § 1983 is stated. Government restrictions on expressive conduct require heightened scrutiny and may violate the First Amendment, even in the commercial setting. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) (Vermont law that restricted sale, disclosure, and use of pharmacy records involved speech with an economic motive, but its burden on vital expression violated the First Amendment). Attesting to the importance of First Amendment claims, plaintiffs have standing to raise such claims even in the absence of direct inquiry from the challenged restriction. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010).

Rentberry and Wysingle established the requisite *prima facie* elements of a 42 U.S.C. § 1983 claim. The City's ordinances suppress such First Amendment expression under color of state law. The essence of rent bidding websites is expression under the First Amendment, communications regarding rental units. The City's Ordinance 125551 banned expressive activity by banning the affected websites; it singled out website proprietors and users to foreclose such expressive activity, thereby violating the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). The City's prohibition was content-based, attempting to prevent communications regarding

rental properties in Seattle. Rentberry and the users of such sites like RHAWA's members will suffer harm.

(2) Governments, Like Other Parties, Should Not Be Able to Render a 42 U.S.C. § 1983 Action Moot, Unless They Unequivocally Cease the Unconstitutional Acts that Were the Predicate for Such Action

"Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2010) (quoting *Friends of Earth, Inc. v. Laidlaw Env't Servs., (TOC), Inc.*, 528 U.S. 167, 189 (2000)) (emphasis added). The burden of proving such a true cessation of the wrongful conduct must fall squarely upon the party claiming mootness. *Already LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.*

The petitioners have clearly articulated in their petition at 16-20 that the decisions of the various Circuit Courts of Appeals are split on the mootness analysis, too often affording excessive latitude to governments that theoretically cease unconstitutional practices so as to moot legitimate 42 U.S.C. § 1983 claims.

The Ninth Circuit itself held in *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033 (2018) that a § 1983 claim by

a person placed by the FBI on a No Fly List was not moot even though the FBI removed him from that list, stating:

> Because there are neither procedural hurdles to reinstating Fikre on the No Fly List based solely on facts already known, nor any renouncement by the government of its prerogative and authority to do so, the voluntary cessation doctrine applies. Fikre's due process claims are not moot.

Id. at 1041. The court was particularly cognizant of the fact that the voluntary cessation of unconstitutional conduct does not automatically deprive the federal courts of the power to hear a case absent assurance that there is no reasonable expectation that the conduct can recur. *Id.* at 1037 (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Moreover, the party claiming mootness has a "heavy burden" of proving that the unconstitutional conduct cannot reasonably be expected to start up again. *Id.* (citing *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)). While a government is presumed to act in good faith, that government must *prove* its behavior is entrenched or permanent. *Id. See also*, *Bd. of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) (recognizing inconsistency in 9th Circuit mootness precedent and holding that party challenging mootness need show only that there is a reasonable expectation on the record that the offending legislation will be reenacted).

The Ninth Circuit did not even comply with its own mootness standard in *Fikre*. Contrary to the "heavy burden" placed by this Court in *Adarand Constructors* on

the City to establish mootness, the court effectively placed the burden of proving a "reasonable expectation" that the City would not enact the same or similar ordinance on petitioners. *Rentberry, Inc. v. City of Seattle*, 814 F. App'x 309 (9th Cir. 2020). The City proved little as to its future action concerning rent bidding websites, app. at 36a-45a, and the Ninth Circuit opinion offers scant evidence of any real analysis by that court of the City's future conduct. Nothing in that opinion suggests the City will unequivocally cease its illicit treatment of rent bidding websites. Instead, the court simply states that the language of Ordinance 125551 and the City's "efforts to gather data on the impact of rent-bidding platforms" fail to overcome the presumption of government good faith. The court obviously overlooks the legislative history of the ordinances and the context of the Council's extreme anti-landlord bias in making its summary "analysis." The application of this "good faith" exception sweeps far too broadly. Critically, absent a reaffirmation by this Court of the proper test for mootness in the § 1983 setting, lower courts will be tempted to cut corners and clear their dockets when governments purport to stop unconstitutional activity.

This Court should grant review and direct that governments may not render § 1983 cases moot by merely *claiming* the unconstitutional conduct has ceased. Rather, such defendants must bear the burden of proving that the unconstitutional activity has ceased, *and will not recur in the future*, to render any claim moot. A lower court dismissing a § 1983 claim as moot must articulate an analysis on the record that such a burden has been sustained.

(3) The City Has Not Unequivocally Ceased Its Unconstitutional Practices, Particularly Given Its Council's Implacable Hostility Toward Landlords

The City has not, in fact, ceased its unconstitutional attempt to prohibit rent bidding websites in Seattle in enacting Ordinance 126053. Pet. at 9-13. It has merely delayed the effort to prohibit such First Amendment-protected speech, as its legislative history documents. Moreover, given the Council's well-documented antipathy toward landlords generally, as will be noted *infra*, this is hardly surprising.

With regard to Ordinance 126053, this Court need go no further than the Ordinance's own language to discern that the City has no intention of ceasing its unconstitutional restrictions on rent bidding websites.

Section 3 of the Ordinance states:

> 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.

App. at 111a. Section 4 directs the City's Office for Civil Rights to conduct testing to determine if such websites comply with SMC 14.08. Section 5 contains an implicit threat of further restriction:

> 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.

Id.

Notwithstanding the euphemism of "mitigating any unintended consequences," the fist is readily apparent in that proverbial velvet glove. Nothing in the City's supplemental Ninth Circuit brief on mootness dispels the reality that its Council will likely regulate such sites out of existence. The City would have the courts believe that the flurry of studies by various City agencies will not result in severe regulation of free speech on such sites. App. at 40a-43a. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566. The Council is not abandoning its intent to shut down rent bidding websites and First Amendment-protected speech therein, it is merely deferring such action to another day, getting its position more firmly based for the litigation it knows will come. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.11 (1982) (Court refused

to dismiss an appeal as moot where city revised the challenged ordinance, but announced its intention to reenact offending provisions in future).

Moreover, the Council's intent to continue its suppression of rent bidding websites must be placed in appropriate context of the Council's oft-expressed legislative antagonism toward landlords. Ordinance 126053 is merely a pause while the Council strengthens its position for litigation it knows will come when it resumes its suppression of such websites. This fact is confirmed by the Council's implacable antagonism toward landlords, large and small.[3]

In the last few years, the Council has enacted legislation

- dictating to whom landlords can rent by mandating the first person in time must be the lessee;
- mandating that landlords accept roommates as additional occupants under a rental agreement;
- foreclosing criminal background checks on prospective tenants and making persons with criminal history a protected class;
- limiting initial move-in charges by landlords, giving tenants, in effect, interest-free loans;

3. *See Seattle Keeps Making It Harder for Small Landlords Like Us*, Seattle *Times*, Feb. 9, 2020, https://www.seattletimes.com/opinion/seattle-keeps-making-it-harder-for-small-landlords-including-a-proposed-ban-on-winter-evictions/.

- mandating payment plans when tenants cannot pay their rent, without penalty or interest;

- mandating notices on landlord's intent to sell;

- mandating acceptance by landlords of non-electronic payments;

- mandating that landlords include voter registration forms;

- a rental inspection/registration ordinance that precludes rental of any units that are not inspected and allows city personnel the opportunity to conduct illegal searches in the guise of the inspections;

- establishing an eviction moratorium, without any rental payments to landlords.

The Council has not respected landlord property rights in the past, and it is highly unlikely that it will do so in the future generally, or in the specific context of rent bidding websites.

The City failed to sustain its requisite burden of proving on the record that its First Amendment-violative conduct would not recur. Similarly, the Ninth Circuit's memorandum opinion inadequately addressed the City's proof, or lack thereof, of an unequivocal end to its unconstitutional conduct, as required by this Court's mootness jurisprudence.

D. CONCLUSION

This case presents an important one for the clear articulation of this Court's mootness principles in the 42 U.S.C. § 1983 context where a government merely alleges that it has discontinued on unconstitutional practice. Review by this Court is merited. Rule 10(c). This Court should grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED November 10, 2020.

Respectfully submitted,

PHILIP A. TALMADGE
Counsel of Record
TALMADGE/FITZPATRICK
2775 Harbor Avenue SW,
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
phil@tal-fitzlaw.com

Counsel for Amicus Curiae

Kiren Mathews

From: Deborah J. La Fetra
Sent: Tuesday, November 10, 2020 11:37 AM
To: Incoming Lit; Ethan W. Blevins; Jim M. Manley
Subject: FW: 20-538, Rentberry Inc v City of Seattle, Amicus Brief of Rental Housing Association of Washington
Attachments: 20-538 Amicus Brief.pdf

Deborah J. La Fetra | Senior Attorney
Pacific Legal Foundation
930 G Street | Sacramento, CA 95814
916.419.7111

PACIFIC LEGAL FOUNDATION
Defending Liberty and Justice for All.

From: Marianna Iannotta <miannotta@counselpress.com>
Sent: Tuesday, November 10, 2020 11:36 AM
To: Deborah J. La Fetra <djl@pacificlegal.org>; erica.franklin@seattle.gov
Cc: phil@tal-fitzlaw.com; Matt Albers <matt@tal-fitzlaw.com>
Subject: 20-538, Rentberry Inc v City of Seattle, Amicus Brief of Rental Housing Association of Washington

Greetings,

Attached please find the *Amicus Brief of Rental Housing Association of Washington*

Docket 20-538
Caption: Rentberry Inc v City of Seattle
Counsel of Record: Philip A Talmadge
Firm: Talmadge/Fitzpatrick

Thank you.

CP File No. 299752

COUNSEL PRESS
10 East 40th Street, 5th Floor
New York, NY 10016

(212) 685-9800 Office
(212) 340-0653 Direct
(800) 427-7325 Toll Free
(718) 696-0653 Facsimile

View our website.
miannotta@counselpress.com