Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

KEEP CHICAGO LIVABLE, et al, Plaintiffs, v. CITY OF CHICAGO, Defendant.	No. 16 C 10371 Hon. Sara L. Ellis

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Ordinances

Plaintiffs challenge the City's Shared Housing Ordinance (the "Ordinance") – which contains routine regulations governing what are essentially home-based hotels – on First Amendment, procedural and substantive due process, and equal protection grounds. Their claims fail as a matter of law. Plaintiffs' First Amendment rights are not implicated, let alone violated, by the Ordinance. The Ordinance applies only when a host seeks to rent a unit – which is a business activity, not speech. And the Ordinance provisions challenged by Plaintiffs, such as the requirements that a unit be registered with the City, and that the registration number be made known to a guest, are minimal regulations of only commercial conduct. They do not intrude upon any actual speech or social relations between host and renter. Moreover, Plaintiffs fail to state a claim that the Ordinance is unconstitutionally vague in violation of procedural due process, because Plaintiffs cannot – and do not even attempt to – show that the terms they challenge are vague in all of their applications. Further, Plaintiffs fail to state a claim that the Ordinance violates substantive due process, because renting housing units to strangers is not the kind of intimate or expressive association protected by the Constitution. Finally, Plaintiffs' equal protection challenges fail because the Ordinance is a rational response to the City's legitimate interests in regulating the new online home-sharing industry. Fundamentally, the Ordinance is a logical, legal use of the City's established authority to regulate commercial activity and protect consumers and City residents. As explained below, the Complaint should be dismissed in its entirety, with prejudice.

BACKGROUND

To address a number of concerns posed by the burgeoning home-sharing industry, the Chicago City Council passed the Ordinance on June 22, 2016. Am. Compl. ("AC") Ex. 1 ("Ordinance"). The Ordinance was amended on February 22, 2017. AC Ex. 2.

Although the Ordinance regulates different types of short-term rental accommodations

offered via different types of listings and platforms, Plaintiffs challenge the Ordinance's treatment of shared housing unit rentals offered via the on-line Airbnb platform. See, e.g., AC ¶¶ 6-9, 15-25. Plaintiff Keep Chicago Livable is an organization of shared housing hosts that educates hosts and renters about home sharing issues. Id. ¶¶ 13-14. The individual Plaintiffs are hosts or guests who use, or would like to use, Airbnb to rent shared housing units. See id. ¶¶ 8, 9, 15-25. Plaintiffs Monica Wolf and Doe do not live in Chicago, but use Airbnb when visiting Chicago. Id. ¶¶ 23-25.

In general, a "shared housing unit" is a dwelling unit of 6 or fewer sleeping rooms that "is rented, or any portion therein is rented," for transient occupancy by guests. Ordinance § 4-14-010. A website like Airbnb is classified as a "short term residential rental intermediary," which is defined as any person who, "for compensation or a fee," uses a platform (such as a website) "to connect guests with a short term residential rental provider for the purpose of renting a short term residential" and "primarily lists shared housing units on its platform." Id. § 4-13-100. To use Airbnb, would-be hosts post listings that contain prices for shared housing unit rentals, and guests request to book those accommodations. Compl. ¶¶ 35-37.

A shared housing unit listed on a short term residential intermediary's website must be registered with the City. Ordinance § 4-14-020(a). Registration with the City is accomplished by Airbnb's bulk submission of all units listed on the platform to the City for registration. Id. § 4-13-230. Units that may legally be used for short-term rentals are assigned a registration number, which must then be included in listings. Id. § 4-14-020(f).[1]

[1] A unit that is bulk-registered by Airbnb as a shared housing unit may maintain an Airbnb listing without also having to obtain a vacation rental license, which is required for short term rentals that are offered on advertising platforms or by other means. See id. § 4-6-300 (explaining that for purposes of the license requirement, "vacation rentals" do not include registered shared housing units); § 4-13-100 (definition of "advertising platform"). Thus, hosts offering transient

In order to be registered, shared housing unit hosts must attest that they have reviewed a summary of the requirements of the Ordinance and "acknowledge that the listing, rental and operation of shared housing units in the city are subject to those requirements." Id. § 4-13-215, as amended. And the Ordinance requires hosts to comply with various regulations designed to protect the visitors renting the units as well as the quality of life in the surrounding community. The Ordinance requires shared housing hosts to notify the police if the host "knows or suspects that any criminal activity" is occurring in the unit. Id. § 4-14-040(b)(3). If a host "provides food to guests," he or she must "comply with all applicable food handling and licensing requirements." Id. § 4-14-040(b)(7). Hosts may also be held responsible for "excessive loud noise," which the Ordinance defines as "any noise, generated from within or having a nexus to the rental of the shared housing unit, between 8:00 P.M. and 8:00 A.M., that is louder than average conversation level at a distance of 100 feet or more, measured from the property line . . . ." Id. § 4-14-080(c)(2). A shared housing registration may be suspended or revoked after a pre-deprivation hearing if "objectionable conditions" such as excessive noise occur on "three or more occasions." Id. Finally, the Ordinance places limits on the number of units that may be offered for short-term rental in certain types of buildings. See id. §§ 4-6-300(h)(9),(10); 4-14-060(e),(f).

ARGUMENT

I. Plaintiffs Fail To State Any First Amendment Claim (Counts I-III).

In Counts I-III, Plaintiffs allege that the Ordinance's requirement that shared housing units listed on Airbnb be registered with the City violates the First Amendment. Count I

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accommodations in the City have flexibility in whether they are registered as a shared housing unit and/or licensed as a vacation rental, depending on the manner in which they wish to market their properties.

contends that the registration requirement acts as a prior restraint on non-commercial speech. Count II asserts that the Ordinance impermissibly compels speech by requiring listings to include the unit's registration number, requiring the host to attest to having read a summary of the Ordinance's requirements, and requiring the host to notify the police of criminal activity occurring in the unit. Count III alleges that the Ordinance is "content-based" discrimination because it applies to shared housing hosts who rent units online.

As a threshold matter, all of Plaintiffs' First Amendment claims fail for an overarching reason: The Ordinance does not regulate speech; it regulates business conduct – the commercial activity of offering and renting short term rentals. Furthermore, even if the Ordinance regulated speech rather than conduct, Plaintiffs would still fail to state any First Amendment claim because they cannot satisfy the particular elements required for their three First Amendment theories.

A. The Ordinance regulates commercial conduct, not speech (Counts I-III).

As this Court held in ruling on Plaintiff's Motion for a Preliminary Injunction, the Ordinance "falls outside the purview of the First Amendment" altogether because it "does not target speech but rather the business practices associated with home sharing, only incidentally burdening speech if at all." See Mem. Op. & Order Mar. 13, 2017, ECF No. 36 ("Op."), at 14. Indeed, the rental of accommodations on online platforms is commercial activity that is subject to general business regulations, just like other businesses. See Op. at 10-14. See also Left Field Media LLC v. City of Chicago, 822 F.3d 988, 990-92 (7th Cir. 2016) (affirming denial of a preliminary injunction against ban on peddling outside Wrigley Field, even though plaintiff wished to sell literature, because regulation of sidewalk peddling is not regulation of speech).

Plaintiffs allege that social interactions (such as making friends and learning about different cultures) are attendant to some Airbnb transactions. See AC at ¶¶ 22, 24, 25, 38-40.

But the Amended Complaint makes clear that no associations between a shared housing host and guest occur without an actual, or contemplated, commercial transaction. See id. ¶ 37. And any speech or social interaction that accompanies these commercial transactions does not transform the commercial conduct regulated by the Ordinance into protected speech. See Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."); Second City Music, Inc. v. City of Chicago, 333 F.3d 846, 849 (7th Cir. 2003) (explaining that licensing of second hand music dealers "could affect speech in only an indirect way"); Graff v. City of Chicago, 9 F.3d 1309, 1317 (7th Cir. 1993) (Ripple, J., concurring) ("[T]he First Amendment does not require that we create unlikely scenarios for the censorship of speech and require city governments to draft their regulations to avoid these scenarios.").[2] For just this reason, another federal court rejected a First Amendment challenge to San Francisco's shared housing ordinance, explaining that "[a] Booking Service as defined and targeted by the Ordinance is a business transaction to secure a rental, not conduct with a significant expressive element." Airbnb, Inc. v. City & Cnty. of San Francisco, 217 F.Supp.3d 1066, 1076 (N.D. Cal. 2016).

On this basis alone, Plaintiffs' claims in Counts I-III should be dismissed. But even if the Court were to conclude that the Ordinance regulates speech rather than conduct, Counts I-III

[2] By Plaintiffs' logic, any business license requirement would be subject to First Amendment challenge because most people who engage in commercial activity communicate with their customers. For example, under Plaintiffs' theory, a person wishing to cook food for pay could claim that a restaurant license requirement unlawfully inhibited his ability to talk to diners. A bar owner who rents out a party room to political fundraisers could challenge a liquor license requirement as an impediment to discourse on politics. These situations do not implicate the First Amendment. To the contrary: the Seventh Circuit has held that "regulation of conduct may proceed even if the person who wants to violate the legal rule proposes to express an idea," and that "we do not doubt that Chicago may apply general zoning and business-licensing rules" even as to "bookstores and newspapers," businesses whose core purpose is to disseminate speech. Left Field Media, 822 F.3d at 990-92.

should still be dismissed because each count fails to state a claim under the applicable law, as explained below.

B. Plaintiffs fail to state a prior restraint claim (Count I).

In Count I, Plaintiffs allege that the Ordinance operates as a "prior restraint" on non-commercial speech (or as Plaintiffs call it, "fully protected speech"), because it requires shared housing hosts to register before listing an accommodation for rent. AC ¶¶ 41-50. According to Plaintiffs, the registration requirement restricts "social interaction between host and guest," id. ¶ 46, and therefore "chills and penalizes a significant amount of primarily noncommercial speech," id. ¶ 47. This claim fails for two reasons.

1. Any speech regulated by the Ordinance is commercial speech, which is subject to *Central Hudson* analysis rather than prior restraint doctrine.

First, the Ordinance does not regulate, let alone significantly chill and penalize, non-commercial speech. Rather, listings of shared housing units are – at most – "commercial" speech, which is afforded "lesser protection" than other speech because "speech proposing a commercial transaction . . . occurs in an area traditionally subject to government regulation." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562-63 (1980) (citation omitted).

The Seventh Circuit has identified guideposts for identifying commercial speech, including whether (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech. See United States v. Benson, 561 F.3d 718, 725 (7th Cir. 2009) (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983)). In other words, commercial speech is not limited to the exchange of money for goods, but encompasses communications promoting and facilitating that transaction. Each Benson criterion applies here, as listing a rental dwelling involves advertising a specific unit for

booking in exchange for money.

Plaintiffs do not allege that the Ordinance imposes an unlawful prior restraint on commercial speech. Nor could they. Traditional prior restraint doctrine is ill-suited to commercial speech. See, e.g., Central Hudson, 447 U.S. at 571 n. 13 ("commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it"); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 532 n. 7 (6th Cir. 2012) (observing that "many of the seminal commercial speech cases, including Central Hudson itself, dealt with prophylactic bans on speech," and "[n]one of these cases applied the framework reserved for prior restraints on protected speech.").

Rather, the test that applies to commercial speech is Central Hudson, and under that doctrine, it is clear that the City may restrict the listing of unregistered units altogether. When commercial speech is at issue, the threshold inquiry is whether the speech is related to legal activity; commercial speech that is misleading or relates to an unlawful transaction is not protected at all. Central Hudson, 447 U.S. at 561, 564. See also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (explaining that government "may regulate or ban entirely" speech "proposing an illegal transaction"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388-89 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

Here, Plaintiffs' claim fails at this threshold inquiry. Listing an unregistered unit is not protected commercial speech because it is a communication related to unlawful activity, since the underlying act of renting a unit that is not registered or is ineligible for registration is

unlawful. Id. §§ 4-14-020(a), 4-14-050(i). Accordingly, any restriction on listing units whose owners have not complied with the Ordinance's registration requirement does not violate the First Amendment. See Airbnb, Inc., 217 F.Supp.3d at 1079 (holding that because "it is illegal to list a unit for rental that is not lawfully licensed or registered," plaintiffs cannot seek "to set aside on First Amendment grounds an ordinance that they contend would restrict their ability to communicate offers to rent unregistered units").

2. Even if prior restraint doctrine applied, Plaintiffs fail to state a claim.

The second reason why Plaintiffs' prior restraint claim fails is that the Ordinance does not operate as a prior restraint on speech, whether non-commercial or commercial. A regulation constitutes a prior restraint only if: "(1) the speaker must apply to the decision maker before engaging in the proposed communication; (2) the decision maker is empowered to determine whether the applicant should be granted permission on the basis of its review of the content of the communication; (3) approval of the application requires the decision maker's affirmative action; and (4) approval is not a matter of routine, but involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the decision maker." Samuelson v. LaPorte Cmty. Sch. Corp., 526 F.3d 1046, 1051 (7th Cir. 2008).

Here, Plaintiffs fail to satisfy the first, second, and fourth elements because they identify no protected communications for which they must receive approval. The Seventh Circuit has explained that prior restraint analysis is reserved for regulations raising the prospect of content-based censorship, wherein government officials "prevent the dissemination of ideas or opinions thought dangerous or offensive." Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001). But here, in determining whether a unit may be registered, the City does not review the content of any communications, nor does approval of a unit involve the exercise of

judgment or formation of an opinion. Rather, determining whether a unit is eligible for registration is a ministerial act, conducted by applying the content-neutral criteria set out in the Ordinance, such as whether the unit is within a restricted building or has a history of disqualifying conduct, such as illegal activity on the premises or uncorrected code violations. See Ordinance §§ 4-13-260(a), 4-14-020(b), (d), (h).

In short, because the Ordinance does not require the City to review or approve the content of any communication, prior restraint doctrine does not apply. See Thomas v. Chicago Park Dist., 227 F.3d 921, 923-24 (7th Cir. 2000), aff'd 534 U.S. 316 (2002) ("prior restraint" framework did not apply to permitting scheme that "d[id] not authorize any judgment about the content of any speeches or other expressive activity"). See also Blue Canary Corp., 251 F.3d at 1123 (calling prior restraint challenge to liquor license requirement a "red herring"); Master Printers of Am. v. Donovan, 751 F.2d 700, 713 (4th Cir. 1984) ("[P]rior restraints have only been held to exist where there is a direct restraint on speech. . . . The Secretary does not seek to enjoin speech activity, but rather merely seeks disclosure.").[3]

C. Plaintiff's "compelled speech" claim fails (Count II).

In Count II, Plaintiffs allege that "the Shared Housing Ordinance violates the First Amendment because it compels speech that is nonfactual and/or controversial and for a purpose other than to protect consumers." AC ¶ 52. Plaintiffs claim the Ordinance "compels" speech by requiring hosts to include a registration number in their listings, id. ¶ 53, report suspected criminal activity to the police, id. ¶ 58, and attest that shared housing rentals are subject to the Ordinance, id. ¶ 59. To the extent that these requirements compel any "speech" at all, however,

[3] Further, any claim of a "prior" restraint is belied by the fact that the Ordinance allows a unit to be listed (as well as booked and rented), while a registration application is pending – that is, unit owners are allowed to list their units before any ultimate decision as to the unit's eligibility. See Ordinance § 4-13-230(d).

they are commercial disclosures permissible under First Amendment jurisprudence.

Mandatory disclosures required in connection with commercial activity are subject to review under the "reasonable relationship" standard established in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985). Under this standard, when a mandated commercial disclosure provides "purely factual and uncontroversial information," it is lawful so long as it is "reasonably related" to the government's interest, unless it becomes "unduly burdensome" to the point that it chills protected speech. Id. at 651-52.[4]

The Ordinance easily survives review under Zauderer's reasonable relationship test. First, the Ordinance's registration requirement requires only factual, uncontroversial information: the inclusion of a registration number in advertisements of rental units, and an acknowledgement that the Ordinance applies to a host's unit. The content of this information is not subject to dispute. While Plaintiffs contend that including a registration number in their listings would prevent them from operating anonymously, AC ¶ 55, this has nothing to do with whether the number is purely factual information. And Plaintiffs suggest no basis for a right to carry on commercial activity anonymously or hide that activity from the City. Plaintiffs similarly fail to allege that the attestation requirement is controversial under Zauderer. See id. ¶ 59. Indeed, everyone is bound by the laws whether they wish to acknowledge it or not, and

[4] Zauderer recognized that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." Id. at 652 n. 14. The Zauderer standard is therefore akin to rational basis review. See King v. Gov. of the State of New Jersey, 767 F.3d 216, 236 (3rd Cir. 2014) ("[T]he Supreme Court has treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny."); Disc. Tobacco, 674 F.3d at 554 (Stranch, J., concurring) ("If a commercial-speech disclosure requirement fits within the framework of Zauderer and its progeny, then we apply a rational-basis standard."). To satisfy the reasonable relationship standard, the City need not produce evidence that the mandated disclosures further its interest. See, e.g., id. at 564 ("A common-sense analysis will do. And the disclosure has to advance the purpose only slightly.").

knowledge of the law is presumed. See, e.g., Staten v. Neal, 880 F.2d 962, 966 (7th Cir. 1989). Moreover, contrary to Plaintiffs' allegations, merely acknowledging that activity is subject to the Ordinance does not require hosts to agree that the Ordinance is lawful or foreswear legal challenges.

Second, the disclosure requirements are reasonably related to the City's legitimate interests. The City requires a license number to be listed for the same reasons that it requires a business license to be posted in a brick-and-mortar establishment. The information is required to enforce the Ordinance, investigate violations and complaints, inform potential guests that a unit is in compliance with the law, and otherwise protect consumers and the public.[5] The attestation is also reasonably related to the City's interests; it ensures that hosts are aware upfront of the rules and regulations governing their activity, rather than learning about those requirements only after they allow a violation to occur and a customer or the City complains. Plaintiffs' conclusory assertion that these requirements have "no consumer protection function," AC ¶¶ 53-54, 56, is insufficient to defeat the logical relationship between the requirements and the City's interests.

Third, listing a number in an advertisement and acknowledging that the Ordinance applies to shared-housing activity are not unduly burdensome tasks.

Finally, as to Plaintiffs' challenge to the requirement that a host notify the police if the host "knows or suspects that any criminal activity" is occurring in the unit, Ordinance § 4-14-040(b)(3), this provision, like the others, compels no speech because it does not require a host to convey any particular message or express any viewpoint. See United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) (stating that "the First Amendment may prevent the government

[5] Other City ordinances similarly require that licensees include their license number in advertisements. For example, license numbers are required in advertisements for home repair MCC § 4-6-280, residential real estate developers, id. § 4-6-050, and general contractors, id. § 4-6-080.

from compelling individuals to express certain views"). Plaintiffs do not explain why requiring hosts to report criminal activity would require a host to state any non-factual or controversial information, or information that expresses any particular message or viewpoint, particularly given that the only thing a host is required to report is what he or she believes to be true. See, e.g., Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 469-70 (1997) (holding requirement that fruit growers contribute to a general advertising fund constitutional because it did not compel the growers to "endorse or to finance any political or ideological views" or other speech they disagreed with). Nor do Plaintiffs allege that the notification requirement would be so unduly burdensome as to chill protected speech. For all of these reasons, Count II should be dismissed.

D. The Ordinance does not unlawfully regulate speech based on its content (Count III).

In Count III, Plaintiffs claim that the Ordinance is a "content-based" restriction on speech because it applies only to certain types of commercial activity – offers of transient housing communicated on the Internet – and cannot satisfy strict scrutiny. AC ¶ 67. This claim fails for multiple reasons.

First, the Ordinance does not restrict any speech based on its content. As explained in Section I.A, the Ordinance regulates the listing of rental accommodations, which is commercial conduct, not protected expression.

Second, and as explained in Section I.B., to the extent the Ordinance impacts speech at all, that speech is commercial. And courts have rejected the idea that strict scrutiny applies to regulations of commercial speech. See, e.g., Peterson v. Vill. of Downers Grove, 150 F. Supp. 3d 910, 927-28 (N.D. Ill. 2015); Airbnb, Inc., 216 F.Supp.3d at 1078 (even content-based regulations of commercial speech "need only withstand intermediate scrutiny").

Third, Plaintiffs' suggestion that the City regulates shared housing units, but not other types of transient accommodations, see AC ¶¶ 68-69, is simply untrue. Hotels, bed and breakfasts, and other establishments are all regulated under different sections of the Municipal Code. See, e.g., MCC §§ 4-6-180 (hotels), 4-6-220 (single-room occupancy buildings), 4-6-290 (bed and breakfasts), 4-6-300 (vacation rentals).

Finally, Plaintiffs' argument that an ordinance regulating a specific type of business is content-based under the First Amendment would lead to bizarre results. Title 4 of the Municipal Code contains ordinances regulating many commercial activities, from dry cleaners to health clubs. No court has suggested that these should be deemed unconstitutional merely because each addresses a specific occupation. The Court should therefore reject Plaintiffs' claim that the Ordinance is an unconstitutional "content-based" speech restriction and dismiss Count III.

II. The Ordinance Is Not Unconstitutionally Vague (Count IV).

In Count IV, Plaintiffs assert that provisions of the Ordinance violate the Fourteenth Amendment's due process clause because they are unconstitutionally vague. As no Plaintiff has been cited for violating the Ordinance, Plaintiffs may bring only a facial, pre-enforcement challenge. For that claim to succeed, Plaintiffs must demonstrate that the law is impermissibly vague in all of its applications. See Fuller v. Decatur Pub. School Bd. of Ed., 251 F.3d 662, 666-67 (7th Cir. 2001) (citing Vill. of Hoffman Estates, 455 U.S. at 497); see also Schor v. City of Chicago, 576 F.3d 775, 781 (7th Cir. 2009). Plaintiffs cannot surmount this hurdle with respect to any elements they contend are vague.

Plaintiffs first argue, generally, that the Ordinance is too "long" and "prolix" for people to understand. AC ¶ 75. While this argument ignores that much of the Ordinance addresses various topics, many of which have no application to shared housing hosts, even if it were true, the fact that a law is lengthy does not mean it that its particular provisions are vague. Indeed, a

statute's length may reflect the government's effort to be precise and detailed rather than curt and vague. See, e.g., Asgeirsson v. Abbott, 696 F.3d 454, 466-67 (5th Cir. 2012). Plaintiffs' argument that the Ordinance's complexity and length render it vague should be disregarded.

Moreover, Plaintiffs fail to identify any specific provision in the Ordinance that is unconstitutionally vague in all its applications. Under vagueness doctrine, a statute need not provide "perfect clarity and precise guidance," Sherman v. Koch, 623 F.3d 501, 519 (7th Cir. 2010), but only a "reasonable degree of clarity" so that "people of common intelligence can understand [a statute's] meaning," Gresham v. Peterson, 225 F.3d 899, 908 (7th Cir. 2000). A law is unconstitutional only if it "fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." Sherman, 623 F.3d at 519. And the degree of permissible imprecision "depends in part on the nature of the enactment." Id. Laws imposing civil penalties – like the Ordinance – do not demand the same level of specificity required of criminal laws "because the penalties for noncompliance are less severe." Gresham, 225 F.3d at 908; see also Fuller, 251 F.3d at 667.

Plaintiffs first point to the exception to the registration requirement for "guest suites," claiming this term cannot be understood by a person of common intelligence. AC ¶ 76; Ordinance § 4-6-300, as amended. But the Ordinance makes clear that a guest suite is a unit that is "not offered, advertised or made available for rent or hire to members of the general public" and is available only to the "invitees" or "family members" of residents of the building. Ordinance § 4-6-300(a), as amended. Accordingly "guest suites" clearly refers to units that are available to building residents for the use of their family members and friends and are not offered for rent to the public at large. At any rate, this provision is certainly not vague in all of its

applications. See Levas & Levas v. Vill. of Antioch, 684 F.2d 446, 451 (7th Cir. 1982) ("[A] finding of unconstitutional vagueness cannot be based on uncertainty at the margins, or on a parade of bizarre hypothetical cases.").

Plaintiffs next contend that the restrictions on "providing food" to guests are vague, AC ¶¶ 77-80, but they rely on a strained reading of "providing" to make this argument, suggesting that a host might "provide food" by merely having food in his or her refrigerator, id. ¶ 78. "Providing" is readily understandable to mean that a host supplies food deliberately to a guest as part of the accommodation (such as by cooking breakfast for the guest). Merely having food for the host's own consumption in the unit would not violate the Ordinance. Other than this strained reading, Plaintiffs do not explain any way in which the Ordinance's food safety provision is vague in all of its applications – or even as applied to them. No Plaintiff even alleges that they provide food to their guests as part of a shared housing accommodation. See id. ¶¶ 15-25.

Plaintiffs' challenge to the Ordinance's noise provision, id. ¶¶ 81-83, fares no better. A shared housing registration may be suspended or revoked after a pre-deprivation hearing if "objectionable conditions" such as excessive noise occur on "three or more occasions." Ordinance § 4-14-080(c)(2). The Ordinance defines "excessive loud noise" as "any noise, generated from within or having a nexus to the rental of the shared housing unit, between 8:00 P.M. and 8:00 A.M., that is louder than average conversation level at a distance of 100 feet or more, measured from the property line . . . ." Id.

Plaintiffs argue that the phrase "louder than average conversation level at a distance of 100 feet or more" is vague, AC ¶ 83, but this language is easily understood to mean that the noise is audible at a volume greater than an average conversation even when its source is over 100 feet away. Whether noise is louder than conversation level will usually be apparent, such as

when loud music emanates from a rental. Because it is easy to imagine situations that would clearly violate the noise provision (such as late-night shouting, screaming, or singing), Plaintiffs cannot show that the Ordinance is unconstitutionally vague in all conceivable applications. Furthermore, cases upholding similar language against vagueness challenges demonstrate that the Ordinance falls comfortably within the range of imprecision permitted in civil statutes regulating noise. See, e.g., Kovacs v. Cooper, 336 U.S. 77, 79 (1949) ("loud and raucous"); Munn v. City of Ocean Springs, Miss., 763 F.3d 437, 440 (5th Cir. 2014) ("noise that annoys . . . a reasonable person of ordinary sensibilities"); Sharkey's, Inc. v. City of Waukesha, 265 F.Supp.2d 984, 992 (E.D. Wis. 2003) ("unreasonably loud noise . . . which tends to cause a disturbance . . . [in] the surrounding neighborhood," and "noise . . . tending to unreasonably disturb . . . persons in the vicinity").[6]

Finally, Plaintiffs argue that the fact that the Ordinance places caps on the number of shared-housing units that can be rented in certain type of buildings renders it vague. See AC ¶¶ 84-89. Plaintiffs do not even attempt to explain how the rental caps would apply to their own properties. They accordingly are required to demonstrate that the caps on rentals are vague in any conceivable application, but they cannot make that showing. It is easy to envision situations where application of the caps will be perfectly clear, such as when the owner of a high-rise building attempts to utilize more than six of the building's units as shared-housing units. And, contrary to Plaintiffs' contention that they will have no way to determine whether the caps apply to prevent rental of their units, id. ¶¶ 88-89, hosts will be informed in writing if they can obtain a

[6] See also, e.g., Mister Softee of Illinois, Inc. v. City of Chicago, 42 Ill.App.2d 414 (1st Dist. 1963) (noise "distinctly and loudly audible" on public streets); Dube v. City of Chicago, 7 Ill.2d 313, 324 (1955) (noise "disturbing the peace and comfort of occupants of adjacent premises"); City of Chicago v. Reuter Brothers Iron Works, Inc., 398 Ill. 202, 206 (1947) (noise of a "disagreeable or annoying nature"); Town of Normal v. Stelzel, 109 Ill.App.3d 836, 840 (4th Dist. 1982) ("loud and raucous sounds").

registration number for a unit and legally list it on Airbnb, see Ordinance § 4-14-030(b), (c).

III. The Ordinance Does Not Violate Substantive Due Process (Count V).

In Count V, Plaintiffs claim that the Ordinance violates the Fourteenth Amendment's substantive due process clause because it restricts their freedom of "intimate and expressive association," and thus deprives them of a "fundamental liberty interest." AC ¶¶ 95, 97. The Supreme Court has recognized distinct liberty interests in the freedoms of "intimate association" and "expressive association." Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). But Plaintiffs' claim fails because none of the Ordinance provisions targeted by Plaintiffs interfere with their ability to enter into protected intimate or expressive associations.

First, as to intimate associations, Plaintiffs Monica Wolf and Doe contend that the City's prohibited buildings list burdens their right to form intimate associations with shared housing hosts when they visit Chicago. AC ¶¶ 8, 102-03. But despite Plaintiffs' fanciful generalizations about the motivations, "shared norms," and bonds of Airbnb hosts and guests, see, e.g., id. ¶¶ 32, 34, 38, 100, commercial transactions between strangers arranged on the Internet are not protected intimate associations under the law. Rather, constitutional protection extends only to close intimate relationships that are small, selective, and secluded, such as marriage, childbirth, childrearing, and cohabitation with relatives. See Roberts, 468 U.S. at 619-20; Goodpaster v. City of Indianapolis, 736 F. 3d 1060, 1072 (7th Cir. 2013). Indeed, the only specific examples of host-guest interactions that Plaintiffs provide are Monica Wolf's desire to discuss bourbon, AC ¶ 102, and Doe's wish to learn about Chicago neighborhoods and buildings, id. ¶ 103. These are not protected intimate associations. Moreover, even if Plaintiffs' purported relationships qualified as "intimate" under the law, their claim would fail because the City does not interfere with Plaintiffs' ability to engage in these associations. While Plaintiffs contend that their associations are prevented by the prohibited buildings list, that list merely represents buildings

whose owners, managers, or boards have opted – on their own – to prohibit short term rental activity. See Ordinance §§ 4-13-260(a); 4-13-270(c); 4-14-020(d)(2). Accordingly, it is the decisions of those third parties, not the City, that inhibit any purported intimate association.

As to expressive associations, these encompass the formation of groups to pursue "collective effort on behalf of shared goals." Roberts, 468 U.S. at 622. See also Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 68 (2006) (explaining that the right of expressive association protects individuals' ability to "join together and speak"). And, as the Seventh Circuit has explained, "[i]t goes without saying that a group must engage in expressive association in order to avail itself of the First Amendment's protections for expressive association." Christian Legal Soc'y v. Walker, 453 F.3d 853, 862 (7th Cir. 2006). Here, however, Plaintiffs do not allege that the Ordinance prevents Airbnb users from engaging in any type of collective expressive activity, and it does not.

Moreover, while Plaintiffs Benjamin Wolf and Wolsey wish to use Airbnb to meet particular people and discuss particular topics with them, AC ¶¶ 105-09, they do not explain how the Ordinance prevents them from doing so. And, in any event, the constitutionally protected right of association "has never been expanded to include purely social gatherings. Rather, it is contingent on the presence of underlying individual rights of expression protected by the First Amendment." URI Senate v. Town of Narragansett, 631 F.3d 1, 12 (1st Cir. 2011) (rejecting a claim that an ordinance regulating "unruly gatherings" implicated the First Amendment). See also Kohlman v. Vill. of Midlothian, 833 F.Supp.2d 922, 939 (N.D. Ill. 2011) (rejecting expressive association claim by Hells Angels motorcycle club members because they held no "public position on an issue of political, social, or cultural importance," and there is no constitutional right to "social association"). Even if the Ordinance limits hosts' ability to meet or

socialize with their paying guests, it does not suppress any type of collective effort to promote ideas or further goals, and accordingly does not implicate expressive association. See id. at 937 ("Because the . . . right to associate evolves from rights that are explicitly enumerated in the First Amendment, protection for that right is limited to associations that engage or seek to engage in activities protected by the First Amendment."). Count V should therefore be dismissed.

IV. Plaintiffs' Challenge To The Ordinance's Treatment Of Guest Suites Should Be Dismissed (Count VI).

In Count VI, Plaintiffs Maller and McCarron challenge the Ordinance's treatment of "guest suites." A guest suite is "a dwelling unit that is available for rent or for hire for transient occupancy solely by the invitees or family members of residents of the building which contains the dwelling unit, and is not offered, advertised or made available for rent or hire to members of the general public." Ordinance § 4-6-300(a), as amended. Guest suites are excluded from the definition of shared housing units. See id. § 4-14-010.

Maller is a tenant in an apartment building that offers a guest suite "as an amenity to its residents." AC ¶¶ 18, 123. She is unable to rent her apartment on Airbnb due to her building manager, id. ¶ 18, but she asserts that she "theoretically" could invite a traveler to stay in her building's guest suite if that person paid a fee to building management, id. ¶ 124. McCarron used to rent an apartment in a building that offered a guest suite as an amenity to its residents. Id. ¶¶ 125, 127. Building management placed the building on the City's prohibited buildings list, and therefore she could not have rented her apartment on Airbnb. Id. ¶¶ 20, 125, 126. Maller and McCarron contend that it violates equal protection for their apartment buildings to be able to "openly market" their guest suites to people who would otherwise be prohibited from staying in Maller or McCarron's own apartment units via Airbnb. Id. ¶ 130.

This claim fails for two reasons: The claim is non-justiciable, and Plaintiffs fail to state a

claim on the merits.

A. Count VI is partially moot, and Plaintiffs lack standing.

Initially, Count VI is moot as to McCarron. "For a case to be justiciable, a live controversy must continue to exist at all stages of review, not simply on the date the action was initiated. A case becomes moot when a court's decision can no longer affect the rights of litigants in the case before them and simply would be an opinion advising what the law would be upon a hypothetical state of facts." Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 596 (7th Cir. 2006) (citations omitted). Here, there is no ongoing dispute between McCarron and the City because McCarron no longer lives in the apartment building that had a guest suite. See AC ¶ 125. At the same time, McCarron does not seek damages for any alleged past violation of her equal protection rights. See id. Count VI, WHEREFORE clause. Accordingly, there is no live controversy between McCarron and the City regarding how the City treats guest suites in apartment buildings, and her claim should be dismissed as moot. See Brown, 442 F.3d at 596-98 (challenge to school district's education program offered to autistic student became moot once student enrolled in a different school district).

Moreover, both Plaintiffs lack standing. To have standing, Plaintiffs must show that they are suffering an injury caused by the Ordinance's treatment of guest suites and that the injury would be redressed by a decision in their favor. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs' alleged injury is being denied the ability to rent their apartments as shared housing units. But that injury is not caused by the Ordinance's definition of guest suite or shared housing unit. Rather, according to Plaintiffs' own allegations, Maller's current inability (and McCarron's prior inability) to rent their apartments as shared housing units results from the decisions of building management to prohibit shared housing rentals altogether.

See AC ¶¶ 18, 126. Put another way, even if the City were enjoined from excluding guest suites from the shared housing regulations, Plaintiffs would still be unable to rent their units on Airbnb because their buildings do not (or, in McCarron's case, did not) allow it. Therefore, Plaintiffs' injury would not be redressed by a decision in their favor, and they lack standing.

B. Count VI fails to state a claim.

Even if Plaintiffs' challenge to the Ordinance's treatment of guest suites were justiciable, it would still be subject to dismissal because it fails to state a claim under equal protection standards. Because the Ordinance regulates economic activity, Plaintiffs' claim is reviewed under the rational basis test. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Under that test, the City's regulation is valid so long as it is "rationally related to a legitimate state interest." Id. To prevail, Plaintiffs must show that (1) shared housing units are similarly situated to guest suites, and (2) there is no rational basis for the City's different treatment of the two. See Greer v. Amesqua, 212 F. 3d 358, 370 (7th Cir. 2000); Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 370-71 (11th Cir. 1987); Derfus v. City of Chicago, 42 F. Supp.3d 888, 897 (N.D. Ill. 2014). Plaintiffs fail on both prongs.

First, guest suites are not similarly situated to shared housing units. Shared housing units are offered for rent by their individual owners or tenants to members of the public. See Ordinance § 4-14-010. On the other hand, "guest suites" are not rentable by the general public. The Ordinance makes clear that a guest suite is "not offered, advertised or made available for rent or hire to members of the general public" and is available only to the "invitees" or "family members" of residents of the building. Id. § 4-6-300(a), as amended. By Plaintiffs' own allegations, guest suites are "amenities" offered by an apartment building's ownership or

management to the building's tenants. AC ¶¶ 119, 127. Because guest suites and shared housing units are not similar, the City does not violate equal protection by treating them differently.

Second, even if guest suites were similarly situated to shared housing units, the City's distinction satisfies rational basis review. That standard is "a paradigm of judicial restraint," FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993), and recognizes that the City is "accorded wide latitude" in the regulation of its "local econom[y]." Dukes, 427 U.S. at 303. Under rational basis review, distinctions drawn by the City bear "a strong presumption of validity" and "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Beach Commc'ns, 508 U.S. at 313-14. The Court is not to judge the "wisdom, fairness, or logic" of the City's policy, id. at 313, but rather should "accept the [City's] answer" as to how best to regulate. National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1127 (7th Cir. 1995). Rational basis review invalidates only those approaches that stem from "sheer senselessness." Pontarelli Limousine, Inc. v. City of Chicago, 929 F.2d 339, 343 (7th Cir. 1991).

Here, the City may rationally conclude that guest suites do not require the same kind of regulatory oversight that applies to shared housing units, and may therefore be exempted from the definition of shared housing unit, for at least three reasons. First, guest suites are not available to the general public, but shared housing units are. The City may rationally choose to focus its consumer safety interests on the latter because they are available to a much larger universe of potential visitors. See Beach Commc'ns, 508 U.S. at 317 (citation omitted) ("[a] sensible regulatory program requires that a division between the regulated and unregulated be made in a manner which best conserves regulatory energies and allows the most cost effective use of available resources"). Second, and relatedly, guest suites are overseen and rented by

professionals – it is the building's ownership or management that maintains guest suites and sets the terms of their use. On the other hand, shared housing units are rented out by individual tenants, most of whom are unlikely to have experience in managing living quarters for transient use by strangers. The City may therefore rationally conclude that its regulatory energies should focus on those units that are not being rented out by professionals. Third, invitees or family members who stay in guest suites have a preexisting relationship with the tenant who invites them to stay in the building's guest suite, and that relationship can give them assurance that the building's guest suite is a safe and appropriate place to stay. But with shared housing units, most customers are likely to be strangers to the tenant. The City may therefore rationally conclude that greater regulatory oversight of shared housing units provides those customers with a peace of mind that would otherwise be absent were the customers to rent from a total stranger without City regulations. See Hyland v. Metro. Airport Comm'n, 884 F. Supp. 334, 338 (D. Minn. 1995) (explaining that additional government oversight provides the public "with demonstrated assurance that the carrier serves the public interest").

For all of these reasons, Count VI should be dismissed.

V. Plaintiff Wolf Fails To State An Equal Protection Claim Against The City's Regulation of Hotels (Count VII).

In Count VII, Plaintiff Wolf contends that the City violates equal protection by subjecting shared housing units to a more burdensome set of regulations than apply to hotels, even though both businesses rent rooms for transient occupancy. AC ¶¶ 12, 139-40. Like Count VI, this claim fails because Plaintiffs cannot satisfy either prong of an equal protection claim.

First, shared housing units and hotels are not similarly situated. For one, and as Plaintiffs themselves allege, Wolf's shared housing unit is offered by an individual, but hotels are owned and run by corporations. Id. ¶¶ 10-12. Relatedly, a shared housing unit is not required to be

owner occupied, nor is there any requirement that the host be present during a visitor's stay. On the other hand, it is common knowledge that hotels are enterprises that have various staff on site, such as managers, security guards, front desk personnel, and housekeepers. And shared housing units are zoned differently than hotels. Shared housing units are permitted in all types of residential districts, but hotels are not allowed in residential districts at all. See Ordinance, Sections 12, 13. Given these important differences between shared housing units and hotels, Plaintiff Wolf cannot meet the threshold requirement that he be similarly situated to a hotel operator.

Second, even if these differences were not enough to show a lack of similarity, they provide a rational basis for the City to apply a different package of regulations to shared housing units than hotels. Because shared housing units, unlike hotels, are primarily located in residential neighborhoods or buildings, a set of regulations tailored to shared housing units helps minimize the impact that short term rental activity has on neighbors. Similarly, because shared housing units can be offered by individuals who are not hospitality professionals and may rent their unit only sporadically, rather than as a full-time business, it is reasonable to apply a different set of operating requirements and safety standards than apply to hotels.

Further, Plaintiffs' claim that the City's shared housing regulations are more burdensome than its hotel regulations is not supported by Plaintiffs' alleged facts. Plaintiffs rely on a chart in Paragraph 12 that purports to show that hotels have virtually no regulation compared to shared housing units. But the chart is grossly misleading, because the only source for the chart is the Ordinance, which by and large, does not address hotels at all. Rather, as Plaintiffs recognize, a separate City ordinance addresses hotels, see MCC § 4-6-180, *et seq*, and hotels are subject to

various other City regulations,[7] as well as federal and state law. See, e.g., Hotel and Motel Fire Safety Act of 1990, Pub. L. 101-391; Hotel Floor Plan Posting Act, 425 ILCS 50/0.01 *et seq.* Plaintiffs' chart makes no effort to comprehensively catalogue the regulations governing hotels, and therefore any comparison it purports to draw between hotels and shared housing units is worthless.

More importantly, even if Plaintiffs were correct that the shared housing regulations are more burdensome, that would not be the basis for an equal protection claim. As the above precedent illustrates, courts are not to sit as a superlegislature weighing the "fairness" or "wisdom" of economic regulations. Beach Commc'ns, 508 U.S. at 313. Accord, Dukes, 427 U.S. at 303.[8] Accordingly, Plaintiffs are wrong as a matter of law that the City must "level the playing field" between shared housing units and hotels. AC ¶¶ 10-11. Indeed, the Seventh Circuit recently rejected this same argument when the taxi industry argued that the City's taxi regulations were more burdensome than those that apply to ridesharing services, such as Uber. See Illinois Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 598-99 (2016) (City did not violate equal protection by "failing to place as many regulatory burdens on [ridesharing vehicles] as on the taxicab companies"). See also Rhode Island Hospitality Ass'n v. City of Providence ex

[7] These are summarized at: https://www.cityofchicago.org/city/en/progs/inspectionspermitting/hotels.html.

[8] Indeed, notions of "fairness" and "burden" are particularly inapt when reviewing economic regulations because legislatures often pass laws that "advance [one industry participant's] "economic interest," Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 108 (2003), something that an industry competitor will undoubtedly view as "unfair." See also, e.g., Nordlinger v. Hahn, 505 U.S. 1, 17-18 (1992) (rejecting argument that statute was irrational because it placed "startup businesses . . . at a severe disadvantage in competing with established businesses"); Dukes, 427 U.S. at 304-06 (holding that city could rationally exempt older pushcart vendors from a ban on selling in French Quarter, even while recent vendors were subject to the ban); Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (it is not for courts to decide "whether a statute bears too heavily upon" a business or is "incompatible with some particular economic or social philosophy"). Cf. Pontarelli, 929 F.2d at 341 (discussing Supreme Court decisions upholding "protectionist, anticompetitive" legislation under rational basis).

rel. Lombardi, 667 F.3d 17, 40 (9th Cir. 2011) (rejecting claim that ordinance violated equal protection because it "distinguishes between hotels and other tourism-related industries"); McLean v. City of Big Bear Lake, 270 F. App'x 498, 499 (9th Cir. 2008) (affirming dismissal of a claim that city violated equal protection by applying a "more onerous" set of regulations to bed and breakfasts than to single family homes used as vacation rentals). In short, the City may apply different regulatory packages to each industry in order to foster its legitimate governmental interests, even if the burdens on shared housing are greater.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court dismiss the Amended Complaint in its entirety, with prejudice, and grant the City such further relief as the Court deems just and appropriate.

Date: June 14, 2017

Respectfully submitted,

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