



rental property, dictates the movement and association of “assemblies” in short-term rentals, and sets a bedtime for tenants. The City cannot carpet bomb the constitutional rights of short-term rental owners and lessees under the auspices of zoning or code enforcement. Such regulations violate the Texas Constitution and must be struck down.

## **II. DISCOVERY CONTROL PLAN**

1. Plaintiffs intend to conduct Level 3 discovery under Rule 190 of the Texas Rules of Civil Procedure.

## **III. PARTIES**

### **A. PLAINTIFF HOMEOWNERS**

#### *i. Ahmad and Marwa Zaatari*

2. Mr. and Dr. Ahmad and Marwa Zaatari, individuals who reside in Austin, Travis County, Texas, were both born and raised in Lebanon, immigrating to the United States during adulthood.

3. The Zaatari family came to the United States to pursue the American dream through our country’s merit-based opportunities for advancement, escaping the onerous political maneuvering and crony restrictions on economic liberty in Lebanon.

4. Married in 2010, Dr. Zaatari was pursuing her doctorate in environmental engineering at the University of Texas, and Mr. Zaatari was working for National Instruments.

5. In 2013, Dr. Zaatari graduated from the University of Texas with her Ph. D. Soon thereafter, Dr. Zaatari joined a startup company working on indoor air quality, creating new technology to design filters that improve the lives of individuals living in high pollution areas such as China.

6. In July 2014, the couple had their first child.

7. In December 2014, the Zaararis purchased a condominium in South Austin at 1505 Rockdale Circle Unit B, Austin, Texas 78704 (Zaatari Property).

8. The Zaatari Property contains four bedrooms with an outside patio and grill area large enough to comfortably accommodate 10 people. On occasion, the Zaararis would entertain in excess of six persons for backyard social events, as do many of their neighbors.

9. Soon after purchasing the Zaatari Property, the oil market plummeted, and Mr. Zaatari lost his job.

10. As with many families, the Zaararis struggle to keep up with the high cost of living and affordability living in Austin. The Zaararis have a mortgage on their property and pay nearly ten thousand dollars in property taxes per year. So that Dr. Zaatari can work to help support her family, the Zaararis must pay for daycare for their son.

11. Mr. Zaatari was able to regain employment at a startup company building wireless modular sensors that enable students to explore science in everyday life. However, Mr. Zaatari's experience with the recession and downturn in the economy forced the Zaararis to realize the tumultuous nature of entrepreneurship. The couple desired to find a stable source of income to secure a reliable future for their son.

12. Thus, the Zaararis decided move their family into an apartment in order to rent out the Zaatari Property as a short-term rental property.

13. The Zaararis invested a substantial amount of money into renovating the property and purchasing new furniture to make their tenants feel at home.

14. In May 2015, the Zaararis secured a Type 2 STR rental license from the City of Austin.<sup>1</sup>

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<sup>1</sup> The Zaararis' property is licensed under number 2015-051504.

15. The Zaatari use their income from the Zaatari Property to pay the high taxes and debt on their home, supplement their income with a consistent, reliable source, pay for daycare costs, and invest in their son's future.

16. If the Zaatari lose the ability to rent out their home on a short-term basis, the loss of income will force them to sell the property and potentially relocate away from Austin.

*ii. Jennifer Gibson Hebert and Joseph "Mike" Hebert*

17. Joseph "Mike" Hebert and Jennifer Gibson Hebert, individuals, met through work and were married in November 2009.

18. Mr. Hebert is a small-business owner, operating a water conditioning company in California.

19. Mrs. Hebert owns and operates a family business in Austin that specializes in event planning, marketing print production, and digital marketing.

20. The Heberts bought a 1150 square-foot home together in Travis Heights in 2004. The home is currently rented out long-term to the couples' friends, who work as missionaries in Africa and India.

21. In 2005, the Heberts purchased a house at 2300 South 2<sup>nd</sup> Street in Bouldin (Hebert Property), and subsequently renovated it. They purchased the Hebert Property, a 1950 square foot home, partly with the expectation that it might be utilized as a short-term rental in the future.

22. The Hebert Property contains 3 bedrooms and can comfortably accommodate 8 tenants.

23. Since Mrs. Hebert's business is based in Austin and Mr. Hebert's is based in California, the couple initially split their time between Austin and California. After the Heberts' married, Mrs. Hebert moved her residency to California.

24. Austin’s high property taxes created a significant hardship for the couple. In 2015, the Heberts paid \$16,700 in property taxes on the Hebert Property alone.

25. In order to alleviate the financial burden, the couple decided to rent the Hebert Property as a short-term rental for periods they were in California, keeping the property available for times they were in Austin (unless already rented).

26. Thus, in 2014, the Heberts applied for and secured a Type 2 rental license from the City of Austin for the Hebert Property. The license — number 2014002140 — was issued on January 15, 2014, and expires January 15, 2017.

27. The Heberts also applied for a Type 2 STR license on their Travis Heights property in 2014. The City informed the Heberts that their census tract did not have any Type 2 licenses available, but kept the application pending as the first home on the waitlist.<sup>2</sup> Since this time, several properties within the census tract have ceased to operate as short-term rentals. Despite the Heberts’ entitlement to receive a STR license for the Travis Heights property, the City has kept them on the waiting list in perpetuity, thus constituting an implicit denial of their application, although they otherwise qualify and applied prior to the current moratorium.

28. In 2014 and 2015, the Heberts paid more than \$10,000 a year in property taxes on the Hebert Property, and thousands of dollars in home expenses keeping and maintaining this property.

29. All of the Hebert Property costs were covered by income from the short-term rental of the property.

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<sup>2</sup> Austin limits the number of available Type 2 short-term rental licenses per census tract. Specifically, Section 25-2-791(C)(3) of the Austin Municipal Code Section requires the director to issue a short-term rental license only if “for a short-term rental use regulated under Section 25-2-789 (Short-Term Rental (Type 2) Regulations), no more than 3% of the single-family, detached residential units within the census tract of the property are short-term rental (including Type 2 and Type 1 second dwelling unit or secondary apartment) uses as determined by the Director under Section 25-2-793 (Determination of Short-Term Rental Density).”

30. The couple uses the income from their short-term rental of the Hebert Property to:
  - a. Pay the mortgage, property taxes, and home expenses on the Hebert Property;
  - b. Afford to maintain the property as their Texas home;
  - c. Off-set the burden of increasing property taxes; and
  - d. Give back to the community by providing an affordable, comfortable place for their tenants to stay and enjoy Austin.

31. The Heberts currently have forty 5-star reviews on their home. They have never had any complaints from their neighbors, nor citations from the City of Austin.

32. The Heberts take pride in allowing visiting families a chance to commune around a dining room table together and giving their tenants a taste of the city they love.

33. If the Heberts lose their ability to rent out their properties on a short-term basis, they will suffer harm caused by the loss of income and ability to afford and keep ownership of these properties.

***iii. Lindsay and Ras Redwine VI***

34. In 2010, Lindsay Redwine got divorced and found herself as an unemployed interior designer and a single mother with 2 small daughters.

35. Soon after, Mrs. Redwine lived in a duplex and rented the other half as a licensed short-term rental, which provided her only source of non-child support income.

36. When they met, Mr. Redwine had a successful career in wildlife management in West Texas.

37. Mr. Redwine chose love over career and moved to Austin to be with Lindsay and her daughters. Mrs. Redwine's divorce decree contained a geographic restriction requiring her to reside with her daughters within Travis County.

38. The Redwines pulled together their savings, borrowed money from family and purchased an investment property in Travis Heights (Redwine Property) in 2011 to rent out on a short-term basis.

39. The Redwine Property is located at 2111 Travis Heights Boulevard, Austin, Texas 78704. The property includes both a main home and a guest home, which are rented together but hold separate short-term rental licenses.

40. The Redwines furnished the Redwine Property, obtained two Type 2 rental licenses,<sup>3</sup> and rented the property out to pay their bills.

41. The Redwines operate the Redwine Property main house and guesthouse as Type 2 rentals and rely on the revenue from such properties for basic necessities.

42. If the Redwines lose the ability to rent their home out on a short-term basis, they will not only have to sell the Travis Heights property, but be left without income and forced to seek alternate careers.

***iv. Tim Klitch***

43. Tim Klitch purchased a duplex at 1901 Dillman Street in 1993 (Klitch Property).

44. Mr. Klitch and his wife lived in one portion of the duplex for 15 years while raising three children. During this time, the Klitches rented the other duplex.

45. In 2008, Mr. Klitch converted the duplex into a single-family residence.

46. After Austin's adoption of short-term rental regulations in 2012, Mr. Klitch renovated the Klitch Property with the intention of using the STR income to allow him and his wife to retire in their home and afford the increasing property tax burden.

47. Mr. Klitch's renovations were delayed 6 months after the City of Austin

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<sup>3</sup> At double the cost, due to City requirements that each unit have a separate STR license.

erroneously alleged that several decade-old permits were still pending on the property. After spending thousands of dollars in professional fees to clear the old permits, the renovation project was completed in 2015.

48. The Klitch Property is now 6,000 square feet with 8 bedrooms and 8 bathrooms and is licensed as a Type 1 STR.<sup>4</sup>

49. Mr. Klitch's home has the space, beds, and parking to host groups of more than 20 tenants. However, Ordinance 20160223-A.1 does not allow him to rent his home to capacity.

50. If the STR Ordinance continues to have a negative effect on Mr. Klitch's ability to generate income from his home, he may be forced to either sell his property or redevelop his lots into more dense housing.

## **B. PLAINTIFF TENANTS**

### *i. Jennifer Gibson Hebert*

51. As mentioned above, Jennifer Gibson Hebert lives with her husband in California, though she owns and operates a business in Austin, Texas.

52. Ms. Hebert spends approximately 40% of her time each year in Austin, Texas, working at her business and enjoying Austin living.

53. When Ms. Hebert is in town and her Hebert Property is booked, she typically rents another short-term rental in Austin, Texas as her Austin home during her time in Texas, and intends to continue to do so.

### *ii. Plaintiff Tenants, by and through Plaintiff Homeowners*

54. Plaintiff Homeowners also sue on behalf of tenants of their short-term rentals due to the STR Ordinance's infringement upon their tenants' rights protected under the Texas

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<sup>4</sup> Mr. Klitch's property is licensed under permit number 2015-128001.

Constitution due to the STR Ordinance’s requirement that the Plaintiff Homeowners restrain their tenants’ freedoms of privacy, movement, assembly, and freedom from warrantless searches.<sup>5</sup>

**C. DEFENDANTS**

55. Defendants are the City of Austin and the Mayor of Austin Steve Adler, in his official capacity.

56. The City of Austin is a home rule municipality headquartered in Travis County, Texas.

57. Defendant Adler is the duly elected Mayor of the City of Austin.

58. Pursuant to Texas Civil Practice and Remedies Code Section 17.024(b), Defendants Mayor Adler and the City of Austin may be served by serving the mayor, clerk, secretary, or treasurer of the city at 301 West 2<sup>nd</sup> Street, Austin, Texas 78701. Plaintiffs request that the Clerk issue citation and service of process on Defendants.

59. Because a constitutional challenge to the STR Ordinance is made, the Attorney General of Texas is required to be served with process at 300 W. 15th Street, Austin, Texas 78701, as required by Texas Civil Practice and Remedies Code Section 37.006(b). Plaintiffs request that

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<sup>5</sup> Plaintiffs risk legal penalties — including the loss of their short-term rental licenses — if they fail to enforce Ordinance 20160223-A.1 by restraining their guests’ freedoms of privacy, movement, assembly, and freedom from warrantless searches. Regulations that violate the constitutional rights of a group may be challenged by a third party if such party is tasked with enforcing the unconstitutional law through his or her own compliance.. *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (holding that contraceptive provider had standing to challenge law against non-marrieds’ use of contraceptives, and stating that “[t]he relationship there between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself.”); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (allowing a contraceptive provider to challenge restrictions on contraceptive use, saying “[c]ertainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime.”). The court will not enforce by coercion what it is unwilling to enforce in equity. *Walker v. Pointer*, 304 F. Supp. 56, 60-61 (N.D. Tex. 1969) (tenants evicted because they hosted black guests could assert the rights of the guests because “[t]he financial penalization of whites breaching restrictive covenants to sell to non-caucasians might produce, to borrow a contemporary term, a ‘chilling effect’ on the attitudes of subsequent white vendors”); *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (property owners who sold to blacks are not liable for violation of racial restrictive covenant as “[t]his Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity”).

the Clerk issue citation and service of process upon the Texas Attorney General.

#### IV. JURISDICTION AND VENUE

60. This Court has subject matter jurisdiction because Plaintiffs seek to vindicate their rights under the Texas Constitution via the Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE § 37.003. Plaintiffs seek a declaration that Ordinance 20160223-A.1 is unconstitutional on its face and as applied.

61. Venue is proper in Travis County, Texas pursuant to Sections 15.002(a)(3), 15.005, 15.011, and 65.023 of the Texas Civil Practice and Remedies Code.

#### V. STATEMENT OF FACTS

62. Approximately 55% of Austin residents rent their homes. 2014 Comprehensive Housing Market Analysis 48, CITY OF AUSTIN (July 2014), *available at* [https://austintexas.gov/sites/default/files/files/NHCD/2014\\_Comprehensive\\_Housing\\_Market\\_Analysis\\_-\\_Document\\_reduced\\_for\\_web.pdf](https://austintexas.gov/sites/default/files/files/NHCD/2014_Comprehensive_Housing_Market_Analysis_-_Document_reduced_for_web.pdf) (reflecting a steady 45% homeownership rate in Austin as of 2014).

63. Part of the reason for such a high rental rate is the cost of homeownership in Austin. Austin home values have increased more than 78% in the last 15 years. *Id.* at 48. More than 30% of Austin's homes are valued above \$300,000, and these values continue to rise. *Id.* at 7.

64. In line with these increasing home values, Austin property taxes have increased. Among homeowners planning to move, 28% cited the inability to pay their property taxes. *Id.* at 78.

65. Many Austin property owners — including Plaintiffs — rent out their homes on a short-term basis to afford the increasing cost of living in Austin due to the economics that short-term rentals generate more revenue than long-term rental use of the same property.

**A. STR ORDINANCE HISTORY**

66. The City of Austin requires residential homeowners to obtain a license prior to leasing out their property for a period of less than 30 days (a “short-term rental”). *See* Austin, Tex., Code of Ordinances § 25-2-788-793; *see also* City of Austin Short-Term Rentals 1, MAYORS INNOVATION PROJECT, *available at* [http://www.mayorsinnovation.org/images/uploads/pdf/13.STR\\_101.pdf](http://www.mayorsinnovation.org/images/uploads/pdf/13.STR_101.pdf) (outlining the history of the STR regulation in Austin, beginning with an ordinance requiring registration in 2012).

67. The City established three different categories of short-term rentals and corresponding licenses:

- i. Type 1 and 1A: Owner-occupied residential rentals;<sup>6</sup>
- ii. Type 2: Residential rentals the owner does not claim as his homestead; and
- iii. Type 3: Rentals that are part of a multifamily complex.

*See* Austin, Tex., Code of Ordinances § 25-2-788-793.

68. In June 2015, the Austin City Council directed the City Manager to gather information on short-term rentals, and to make recommendations to amend the City Code and

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<sup>6</sup> The label “owner-occupied” is never defined in Austin’s City Code. In a 2012 report, the City Auditor interpreted the phrase as follows:

“We assume that a home is owner occupied if the location address of the STR is the same as the mailing address indicated in the TCAD property database. For duplexes or other multi-unit properties, an STR is considered as owner occupied if the owner’s mailing address is on the same TCAD parcel.

Mailing addresses indicated as a P.O. Box in the City of Austin with a homestead exemption are assumed to be an owner occupied property for our analysis.”

Short-term Rentals Audit 16, AUSTIN CODE DEPARTMENT (Aug. 2012) <https://www.austintexas.gov/sites/default/files/files/Auditor/au12114.pdf>. However, investigation with the City of Austin indicates that the Code Licensing Department now equates the phrase “owner-occupied” with the homestead exemption. Email from Marcus Elliott, Division Manager, City of Austin, Code Department, to author (April 7, 2016 16:25 CST) (“If the Travis Central Appraisal District (TCAD) records show the property has a Homestead Exemption, HS, it is considered owner-occupied. . . . If TCAD records do not show a homestead exemption, the property does not qualify for an owner-occupied Short-Term Rental (STR) License.”).

improve enforcement against properties “operating in violation of the City Code, or operating without a license.” See Austin, Tex., Resolution 20150820-052 (Aug. 20, 2015), available at <http://www.austintexas.gov/edims/document.cfm?id=248719>.

69. In August 2015, the Austin Code Department presented this information to the City Council, summarizing the number of short-term rental licenses active in the City of Austin, as well as the quantity and nature of complaints on such properties, and the frequency of enforcement. See *Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation*, AUSTIN CODE DEPARTMENT (Aug. 2015), [https://www.austintexas.gov/sites/default/files/files/STR\\_status\\_and\\_Recommendations\\_Aug\\_17\\_2015\\_final\\_draft.pdf](https://www.austintexas.gov/sites/default/files/files/STR_status_and_Recommendations_Aug_17_2015_final_draft.pdf).

70. The Austin Code Department reported that:

- a. as of August 2015, 59% of short-term rental licenses were Type 1 or Type 1A rentals; 31% were Type 2; and 10% were Type 3 rentals;
- b. there were 353 total complaints on short-term rental properties between October 2012 and August 2015;
- c. 200 (57%) of the code complaints between 2012 – 2015 were made against unlicensed short-term rentals solely due to their lack of a current short-term rental license;
- d. 9.37% of the total complaints filed against *all* short-term rentals mentioned overcrowding or noise issues; and
- e. the majority of such noise and occupancy complaints related to Type 1 rentals. *Id.* at 4, 10.

71. The Code Department’s presentation and accompanying Council discussion

emphasized that the real dilemma was enforcing the ordinances already on the books. Austin, Tex., Resolution 20150820-052 (Aug. 20, 2015), *available at* <http://www.austintexas.gov/edims/document.cfm?id=248719> (“the difficulty in enforcing non-compliant and non-licensed short-term rentals is a combination of the City not taking full advantage of its existing authority and enforcement components that need to be strengthened in the current City Code.”).

72. In fact since October 2012, the Code Department has only referred five complaints to the Municipal Court for prosecution. Email from Michelle Rich, Court Clerk, City of Austin Municipal Court to author (May 24, 2016 15:07 CST) (responding to open records request). All such complaints involved the operation of unlicensed rentals. *Id.*

73. Since the initiation of short-term rental licensing regulations in October 2012, there have been zero (0) citations issued for noise, occupancy, trash or other violations of the Austin Municipal Code that are documented to have stemmed from a licensed short-term rental properties or tenants. *Id.*

74. A report by the City Auditor reaffirmed these findings, noting that “Code violation investigation, documentation, and resolution practices vary across cases,” and finding issues with the procedures followed in 77% of code complaints. *See, e.g.,* Consistency of Austin Code Investigations and Resolutions Audit 1, AUSTIN OFFICE OF THE CITY AUDITOR (April 2016), *available at* [http://www.austintexas.gov/sites/default/files/files/Auditor/AU15116\\_FINAL\\_Report.pdf](http://www.austintexas.gov/sites/default/files/files/Auditor/AU15116_FINAL_Report.pdf).<sup>7</sup>

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<sup>7</sup> In April 2016 the Office of the City Auditor released this 27-page report on regulatory enforcement in Austin. Short-term rental regulations were not only encompassed within the report’s findings generally, but were explicitly highlighted as an example of the real-world impact of the City of Austin’s inconsistent practices and the time-sensitive nature of complaints. *See* Consistency of Austin Code Investigations and Resolutions Audit 1, AUSTIN OFFICE OF THE CITY AUDITOR 3 (April 2016), *available at* [http://www.austintexas.gov/sites/default/files/files/Auditor/AU15116\\_FINAL\\_Report.pdf](http://www.austintexas.gov/sites/default/files/files/Auditor/AU15116_FINAL_Report.pdf) (showing that 51% of code complaints were not investigated within the required two-day timeframe).

75. The City then adopted Ordinance 20151112-078 taking effect November 23, 2015, which provides in relevant part:<sup>8</sup>

“After November 23, 2015, the director may not issue a license to operate a short-term rental use described in Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*) except for an application received prior to September 17, 2015. In any event, the director may not issue a license pursuant to an application received after November 12, 2015.”

*Id.*

76. On February 23, 2016, the City Council voted to adopt Ordinance 20160223-A.1. Significantly, the STR Ordinance prohibited new Type 2 short-term rentals from operating in previously-permitted residential areas and phased out all existing residential Type 2 rentals. Austin, Tex., Ordinance 20160223-A.1, Parts 4-5; Austin, Tex., Code of Ordinances § 25-2-491(C). In addition, Ordinance 20160223-A.1 restricted the number of people allowed to step foot on any short-term rental property, dictated the movement and association of “assemblies” at short-term rentals, and set a bedtime for tenants. Austin, Tex., Ordinance 20160223-A.1.

77. Austin Mayor Steve Adler signed Ordinance 20160223-A.1 into law on February 23, 2016, which took effect March 5, 2016. Austin, Tex., Ordinance 20160223-A.1 (February 23, 2016).

## **B. STR ORDINANCE**

78. The STR Ordinance (Ordinance 20160223-A.1) eliminates the right of individuals in residential districts to obtain short-term Type 2 licenses; phases-out existing Type 2 licenses in residential districts; prohibits outdoor group activities during the day; criminalizes joint activities “other than sleeping” after 10:00 p.m.; caps the number of individuals who may be *present* on the

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<sup>8</sup> Within months of enacting Ordinance 20151112-078, Austin’s City Council revisited the Code Department’s August presentation and made further changes to the short-term rental regulations. *See Work Session of the Austin City Council*, CITY OF AUSTIN, (February 23, 2016), <https://austintexas.gov/departments/city-council/2016/20160223-wrk.htm> (showing documents referenced during City Council work session on short-term rentals).

property at any given time; and limits the number of adults who can use a rental home regardless of its size. Austin, Tex., Ordinance 20160223-A.1.

79. First, Ordinance 20160223-A.1 changes the zoning restrictions such that Type 2 short-term leases are no longer allowed in residential districts.<sup>9</sup> Austin, Tex., Ordinance 20160223-A.1, Part 3. Instead, Type 2 rentals are only permitted in seven select mixed use and commercial districts.<sup>10</sup> Austin, Tex., Ordinance 20160223-A.1, Part 4; Austin, Tex., Code of Ordinances § 25-2-491(C).

80. Homeowners who purchased property in a residential district with the intent to use the property as Type 2 short-term rentals are now prohibited from obtaining a Type 2 license. *Id.*

81. Existing Type 2 rental licensees are required to “discontinue [their] nonconforming short-term rental use” no later than April 1, 2022. Austin, Tex., Ordinance 20160223-A.1, part 5.

82. The STR Ordinance imposes regulations that impact Type 1 and Type 3 rentals too, however. For licensees of all types — Type 1, Type 1A, Type 3, as well as those Type 2 owners temporarily permitted to continue operating through 2022 — a licensee or tenant is now prohibited from engaging in or allowing the following activities at a short-term rental:

- a. “assembling” with a group of more than six adults outside between 7:00 a.m. and 10:00 p.m.; or

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<sup>9</sup> Specifically, Type 2 rentals are not allowed in the Lake Austin (LA), Rural Residence (RR), Single Family Residence Large Lot (SF-1), Single Family Residence Standard Lot (SF-2), Family Residence (SF-3), Single Family Residence Small Lot (SF-4A), Single Family Residence Condominium (SF-4B), Urban Family Residence (SF-5), Townhouse and Condominium Residence (SF-6), Multifamily Residence Limited Density (MF-1), Multifamily Residence Low Density (MF-2), Multifamily Residence Medium Density (MF-3), Multifamily Residence Moderate-High Density (MF-4), Multifamily Residence High Density (MF-5), or Multifamily Residence Highest Density (MF-6) districts. Austin, Tex., Ordinance 20160223-A.1, Part 3 (Feb. 23, 2016); *Standard Land Uses and Map Designations*, City of Austin (July 5, 2015), [https://austintexas.gov/sites/default/files/files/Planning/zoning\\_landuse\\_chart.pdf](https://austintexas.gov/sites/default/files/files/Planning/zoning_landuse_chart.pdf).

<sup>10</sup> The seven mixed and special use districts in which Type 2 rentals are still allowed are: the Central Business (CBD), Downtown Mixed Use (DMU), General-Retail - Mixed Use, and Vertical Mixed Use (GR-MU and GR-V), and Commercial Services - Mixed Use and Vertical Mixed Use (CS-MU and CS-V) districts. *See* Austin, Tex., Ordinance 20160223-A.1, Part 4; Austin, Tex., Code of Ordinances § 25-2-491(C).

- b. “assembling” with a group of any size or age at any location on the premises between 10:00 p.m. and 7:00 a.m.

Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95.

83. Furthermore under the STR Ordinance, no more than ten related adults may use a short-term rental at one time — regardless of the square footage or capacity of the home. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95.

84. No matter how many adults are legally using the rental, the STR Ordinance states that “not more than two adults per bedroom plus two additional adults may be *present* in a short-term rental between 10:00 p.m. and 7:00 a.m.” Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95 (noting also that each home is presumed to have 2 bedrooms).

85. Finally, the STR Ordinance requires short-term rental licensees and tenants to permit officers into their homes to “enter, examine, and survey, *at all reasonable times*, all buildings, dwelling units, guest rooms, and premises.” Austin, Tex., Ordinance 20160223-A.1, Part 7 (Feb. 23, 2016) (emphasis added). Such home inspections do not require a warrant, exigent circumstances, pre-compliance review, or probable cause. *Id.*

### **C. ENFORCEMENT**

86. Property owners share responsibility for their tenants’ violations of Ordinance 20160223-A.1, and for ensuring effective enforcement of such ordinance — even if it infringes on their tenants’ privacy and rights. *See, e.g.*, Austin, Tex., Ordinance 20160223-A.1, Part 7, § 25-2-794(C) (“a licensee or guest of a short-term rental shall not make *or allow another to make* noise”); § 25-2-795(D) (“a licensee or guest may not use *or allow another to use* a short-term rental for an assembly”); § 25-2-795(E) (“a licensee or guest may not use *or allow another to use* a short-term rental for an outside assembly”) (emphasis added).

87. Violations of the STR Ordinance result in a fine up to \$2,000 per day. Austin, Tex., Code of Ordinances §§ 25-1-462(A-B) (also providing that “a culpable mental state is not required, and need not be proved, for fines of \$500 or less”).

88. Furthermore, the City has the discretion to revoke a short-term rental license if the “short-term rental is the subject of two or more substantiated violations . . . during the license period.” Austin, Tex., Ordinance 20160223-A.1, Part 7, § 25-12-213..

89. Violations of the STR Ordinance are counted on a *per property* basis, rather than an individual basis. Austin, Tex., Ordinance 20160223-A.1, Part 7, § 25-12-213(E) (“If a short-term rental is the subject of two or more substantiated violations. . .the code official may suspend the short-term rental license”).

## VI. CAUSES OF ACTION

### A. COUNT ONE: ORDINANCE 20160223-A.1 VIOLATES PLAINTIFF TENANTS’ CONSTITUTIONAL RIGHTS TO PRIVACY.

90. The preceding paragraphs are realleged and incorporated by reference.

91. Pursuant to Texas’ Uniform Declaratory Judgment Act, Plaintiffs respectfully request that this Court enter a judgment declaring Ordinance 20160223-A.1 to be in violation of Plaintiff Tenants’ rights to privacy protected by the Texas Constitution, and coerces Plaintiffs to enforce such unconstitutional regulations against their own tenants.

92. “[A] right of individual privacy is implicit among those general, great, and essential principles of liberty and free government established by the Texas Bill of Rights. Tex. Const., art. I, Introduction to the Bill of Rights.” *Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (internal quotations omitted); *see also Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. App.—Hous. [1st Dist.] 1995, writ. denied) (“Texas courts have long recognized both a common law and a constitutional right of privacy”); *Clayton*

*v. Richards*, 47 S.W.3d 149, 152 (Tex. App.—Texarkana 2001, pet. denied) (“The Texas Constitution protects personal privacy from unreasonable intrusion and guarantees the sanctity of the home and person against unreasonable intrusion.”).

93. Plaintiffs have a heightened right to privacy in the bedroom. *Lawrence v. Tex.*, 539 U.S. 558, 564 (2003) (discussing the right to privacy in the bedroom).

94. The “right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.” *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987).

95. Here, tenants’ right to privacy is violated by Ordinance 20160223-A.1.

96. Ordinance 20160223-A.1 dictates tenants’ movement inside the home and setting a bedtime for tenants *See supra*, Section A(ii), and facts stated therein; Austin, Tex., Ordinance 20160223-A.1, Part 2, § 25-2-795 (February 23, 2016). Section 25-2-795(D) violates the sanctity of the marriage bed, as any group activity “other than sleeping” is prohibited after 10:00 p.m.

97. Furthermore, the government cannot demonstrate that its intrusion on the right to privacy is reasonably warranted to achieve a compelling objective, nor can they show that such objective cannot be achieved through less intrusive means.

98. Occupancy and noise complaints do not represent a sufficiently-compelling threat to public safety to justify the City in invading private dwellings to dictate home activities and bedtimes.

99. Nor is the Ordinance narrowly tailored. The Code Department cannot gather evidence of regulatory violations without entering short-term rentals and conducting bed checks between 10:00 p.m. and 7:00 a.m.

100. The City of Austin unreasonably and unconstitutionally intrudes on the privacy of tenants in their homes and bedrooms by prohibiting joint activities inside the home past 10:00 p.m., effectively dictating a bedtime for the tenants. Such regulations are unwarranted and must be struck down.

**B. COUNT TWO: AUSTIN CITY ORDINANCE 20160223-A.1 VIOLATES PLAINTIFF TENANTS' FREEDOM OF ASSEMBLY.**

101. The preceding paragraphs are realleged and incorporated by reference.

102. Pursuant to Texas' Uniform Declaratory Judgment Act, Plaintiffs further ask this Court to declare that Ordinance 20160223-A.1 is in violation of Plaintiff Tenants' — including Jennifer Gibson Hebert's — freedom of assembly and free speech rights, protected by the Article 1, Section 27 of the Texas Constitution, and coerces Plaintiff Homeowners to inflict such violations against their tenants.

103. The Texas Constitution does not “permit a State to make criminal the exercise of the right of assembly simply because its exercise may be ‘annoying’ to some people.” *Olvera v. State*, 806 S.W.2d 546, 549 (Tex. Crim. App. 1991).

104. Article 1, Section 27 of the Texas Constitution protects Texans' fundamental right to “assemble together for their common good.” This right “is not limited to seeking governmental redress of grievances, and may not be unduly curtailed” by laws or ordinances. *Faulk v. State*, 608 S.W.2d 625, 633 (Tex. Crim. App. 1980) (Clinton, J., dissenting) (warning that overbroad ordinances can have a “chilling effect” on the freedom of assembly).

105. Ordinances that restrict the freedom of assembly must further a compelling state interest, and “be narrowly tailored to prevent reaching a substantial amount of constitutionally protected conduct.” *Sotto v. Wainwright*, 601 F.2d 184, 191 (5th Cir. 1979) (“A state must advance a compelling justification to preserve a law or regulation that breaches any fundamental right”);

*Olvera v. State*, 806 S.W.2d 546, 549 (Tex. Crim. App. 1991) (discussing anti-picketing statutes); *Geissler v. Coussoulis*, 424 S.W.2d 709, 712 (Tex. Civ. App.—San Antonio 1967, writ ref’d n.r.e.) (“The right to assemble peaceably is ‘cognate to those of free speech and free press.’”).

106. Here, Plaintiffs have already demonstrated that Ordinance 20160223-A.1 is neither narrowly-tailored, nor does it further a compelling state interest. Even if it did however, such regulation would be unwarranted in light of less intrusive means.

107. Ordinance 20160223-A.1 is a facial violation of the freedom of assembly under the Texas Constitution. Tex. Constitution, Art. 1, Sec. 27. I

108. Plaintiffs respectfully request that this Court declare the STR Ordinance a facial violation of the freedom of assembly and enjoin its enforcement.

**C. COUNT THREE: AUSTIN CITY ORDINANCE 20160223-A.1 VIOLATES PLAINTIFFS’ SUBSTANTIVE RIGHTS UNDER THE TEXAS DUE COURSE OF LAW CLAUSE.**

109. The preceding paragraphs are realleged and incorporated by reference.

110. Pursuant to Texas’ Uniform Declaratory Judgment Act, Plaintiffs respectfully request that this Court enter a judgment declaring Ordinance 20160223-A.1 to be a violation of the substantive due course of law clause contained in Article 1, Section 19, of the Texas Constitution.

111. Article I, Section 19 of the Texas Constitution protects citizens from the deprivation of “life, liberty, [or] property . . . except by the due course of the law of the land.”

*i. Plaintiffs’ Right to Economic Liberty and Private Property.*

112. Economic regulations — including zoning ordinances and other land restrictions — are unconstitutional under Section 19’s substantive due course of law requirement if, “when considered as a whole, the statute’s actual, real-world effect as applied to the challenging party

could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.” *Patel v. Tex. Dept. of Licensing & Reg.*, 469 S.W.3d 69, 87 (Tex. 2015); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 631–32 (Tex. 1996) (noting that “Texas cases have applied [the same] test to uphold the constitutionality of zoning ordinances and other regulations that affect economic rights,” and applying such test to substantive due course of law and equal protection claims).

113. Ordinance 20160223-A.1’s prohibition on residential Type 2 rentals, as well as the occupancy and “presence” restrictions, violate this guarantee by preventing Plaintiffs’ from using their property in non-harmful ways.

114. While the City may claim a legitimate interest in establishing noise and occupancy regulations, that interest simply does not justify the wholesale elimination of Plaintiffs’ rights to rent their homes for less than thirty days (in the case of Type 2 rentals), or their right to fully utilize their rental property (in the case of the arbitrary occupancy and use caps).<sup>11</sup>

**a. Prohibition on Type 2 Rentals.**

115. First, by prohibiting Type 2 rentals, the City is preventing property owners with alternate properties designated as their homesteads from using their land to generate income and recover a return on their investments.

116. Ahmad Zaatari, Marwa Zaatari, Jennifer Gibson Hebert, Joseph “Mike” Hebert, Lindsay Redwine, and Ras Redwine VI have Type 2 short-term rental licenses and rely on their rental income to pay monthly property expenses, such as mortgage payments, taxes, and

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<sup>11</sup> As noted above, the City of Austin’s heightened interest in noise and occupancy regulations in short-term rentals is not supported by data. Less than 10% of all short-term rental complaints are related to occupancy or noise in licensed short-term rentals. *See Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation* 10–11, AUSTIN CODE DEPARTMENT (Aug. 2015), [https://www.austintexas.gov/sites/default/files/files/STR\\_status\\_and\\_Recommendations\\_Aug\\_17\\_2015\\_final\\_draft.pdf](https://www.austintexas.gov/sites/default/files/files/STR_status_and_Recommendations_Aug_17_2015_final_draft.pdf). The City has not issued a single formal citation or ticket related to over-occupancy or noise issues in a short-term rental. Email from Michelle Rich, Court Clerk, City of Austin Municipal Court to author (May 24, 2016 15:07 CST).

homeowners' insurance.

117. Ahmad Zaatari, Marwa Zaatari, Jennifer Gibson Hebert, Joseph “Mike” Hebert, Lindsay Redwine, and Ras Redwine VI will be prohibited from renting out their homes for less than 30 days come 2022. *See* Austin Ordinance 20160223-A.1.

118. This blanket prohibition on Type 2 rentals is not rationally related to the protection of public health, safety or welfare, and is unduly burdensome when considered in light of the alleged government interests it is designed to address.

119. Since the initiation of short-term rental licensing regulations in October 2012, the City has issued (0) citations issued for noise, occupancy, trash or other violations of the Austin Municipal Code that are documented to have stemmed from a licensed short-term rental. Email from Michelle Rich, Court Clerk, City of Austin Municipal Court to author (May 24, 2016 15:07 CST) (responding to open records request).

120. Of the complaints against licensed STR units, owner-occupied, Type 1 rental units triggered the greatest number of reports — both in absolute and percentage terms.

121. Ordinance 20160223-A.1’s occupancy, noise, and “presence” restrictions addresses less than 10% of the code complaints received by the City. *See Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation 10–11*, AUSTIN CODE DEPARTMENT (Aug. 2015),

[https://www.austintexas.gov/sites/default/files/files/STR\\_status\\_and\\_Recommendations\\_Aug\\_17\\_2015\\_final\\_draft.pdf](https://www.austintexas.gov/sites/default/files/files/STR_status_and_Recommendations_Aug_17_2015_final_draft.pdf) (showing that less than 10% of complaints relate to occupancy and overcrowding issues in licensed short-term rentals).

122. Furthermore, this small number of complaints has not led to even one occupancy, noise, or “presence” restriction prosecution. Emails from Michelle Rich, Court Clerk, City of

Austin Municipal Court to author (May 24, 2016 15:07 CST) (responding to open records request for all citations, notices of violation, or complaints stemming from a short-term rental since September 1, 2012 with five case files, all involving unlicensed STRs); Email from Michelle Rich, Court Clerk, City of Austin Municipal Court to author (May 26, 2016 8:50 A.M. CST) (confirming that the City has not issued any noise, occupancy, or other code-related tickets in which the officer knew and noted that the property was being used as an STR).

123. Although the City claims it has an interest in “improving enforcement,” the City has not increased the number of permanent employees in the STR Code Enforcement department. Email from Michael Searle, Policy Director, District 8 Council Office, City of Austin, to author (March 27, 2016 17:39 CST) (“In the FY 2015/16 budget, one support position (Program Coordinator) was added to the STR licensing unit. Otherwise, there has been no other permanent additions to the licensing or enforcement units. . . . Currently, there are two permanent Code Officers in the enforcement unit and two permanent support staff positions (one filled, one vacant) in the licensing unit. . . . [T]his is different from FY2014/15, due to the additional support staff position added in the FY2015/16 budget.”).

124. Ordinance 20160223-A.1 continues to rely on the Code Department for enforcement. *See* Transcript of Austin City Council Work Session at 49 (Feb. 23, 2016).

125. Rather than furthering a governmental interest by improving enforcement, the City Council chose to completely prohibit Type 2 short-term residential rentals, and severely restricting all others; potentially regulating them out of profitability.

**b. Mandated Underutilization.**

126. Furthermore, the STR Ordinance prevents homeowners from renting their homes to capacity. *See*, Austin, Tex. Ordinance 20160223-A.1, part 2, § 25-2-795 (capping tenants at (a)

ten adults or (b) six unrelated adults regardless of the size of the home, and limiting the number of people present after 10:00 to two adults per bedroom, plus two additional adults, with an assumption that each home has two bedrooms).

127. These arbitrary caps are in addition to any caps in place for fire and safety purposes and have no rational connection to the public health, safety, or welfare.<sup>12</sup>

128. Moreover, even if these caps had some basis in a legitimate state interest, the ordinance's actual, real-world effect as applied to Plaintiffs is so burdensome as to be oppressive in light of the alleged governmental interest.

129. The Zataris' short-term property has 4 bedrooms with the ability to accommodate 10 people. The STR Ordinance prohibits Ahmad from renting his home to its safe capacity. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95.

130. The Hebert's short-term rental contains 3 bedrooms and can accommodate 8 tenants. Yet, the Heberts are prohibited from allowing more than six people to be present in their home after 10:00 p.m., or allowing group gatherings of unrelated people under Ordinance 20160223-A.1. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95. Indeed, the Heberts could not place 2 related people in each room without violating the caps.

131. Lindsay and Ras Redwine, VI's short-term rental has 5 bedrooms in the main home, and 2 bedrooms in Unit 2, with the capacity to accommodate 12 tenants in the main home and 4 tenants in the back home. Ordinance 20160223-A.1 prohibits the Redwines from renting their homes to capacity. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95.

132. Tim Klitch's short-term rental property has 8 bedrooms and 8 bathrooms, with the capacity to accommodate more than 20 people. Ordinance 20160223-A.1 prohibits Mr. Klitch

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<sup>12</sup> For example, Chapter 25-2, Subchapter C of the Austin City Ordinances sets general use and development regulations include dwelling unit occupancy limits. *See* Austin, Tex., Code of Ordinances § 25-2-511.

from renting his home to capacity. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95.

133. Austin City Councilman Don Zimmerman, in the Council meeting on January 28, 2016, explicitly acknowledged that Ordinance 20160223-A.1 would deprive homeowners' of their economic rights, saying “[p]eople bought these things [i.e., short-term rental homes] and are depending on them for income.” Transcript of Austin City Council Regular Meeting (Jan. 28, 2016), *supra*, at 184.

134. There is no legitimate reason that Plaintiffs should be forced by law to allow bedrooms in their homes to remain empty, merely because they have chosen to rent to individuals for less than 30 days.

135. Moreover, even if a legitimate interest exists, the burdens placed on Plaintiffs by forcing them to leave rooms empty in their rental homes — forgoing substantial income — far outweigh any public benefit created by the artificial caps.<sup>13</sup>

136. Prior to enactment, the City Council reviewed data from the Code Department, reflecting that the majority of the complaints on short-term rentals were against unlicensed units. *See Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation, supra*, at 10.

137. As stated above, occupancy, noise, and “presence” restrictions account for less than 10% of the code complaints received by the City, and zero (0) tickets or citations. *See Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation* 10–11, AUSTIN CODE DEPARTMENT (Aug. 2015),

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<sup>13</sup> The City of Austin’s stated interest in enacting Ordinance 20160223-A.1 was to improve enforcement against properties “operating in violation of the City Code, or operating without a license.” *See* Austin, Tex., Resolution 20150820-052 (Aug. 20, 2015), available at <http://www.austintexas.gov/edims/document.cfm?id=248719>.

[https://www.austintexas.gov/sites/default/files/files/STR\\_status\\_and\\_Recommendations\\_Aug\\_17\\_2015\\_final\\_draft.pdf](https://www.austintexas.gov/sites/default/files/files/STR_status_and_Recommendations_Aug_17_2015_final_draft.pdf) (showing that less than 10% of complaints relate to occupancy and overcrowding issues in licensed short-term rentals).

138. Thus, Plaintiffs ask this Court to declare Ordinance 20160223-A.1 “so burdensome as to be oppressive in light of, the [stated] governmental interest,” and to strike the ordinance down as a violation of Article I, § 19. *Patel*, 469 S.W.3d at 87.

**ii. *Plaintiff Tenants’ Right to Freedom of Movement.***

139. Ordinance 20160223-A.1 also violates STR tenants’ — including Jennifer Gibson Hebert’s — freedom of movement under the Texas Constitution’s substantive due course of law clause, and coerces all Plaintiffs to enforce such a violation against their own tenants.

140. The due course of law clause provides protection for rights central to the “scheme of ordered liberty,” including “the freedom to leave one’s house and move about at will.” *Bykofsky v. Borough of Middletown*, 97 S.Ct. 394, 395 (1976) (Marshall, J. dissenting); *Casarez v. State*, 913 S.W.2d 468, 487 n.18 (Tex. Crim. App. 1994), *on reh’g* (Dec. 13, 1995) (“Personal freedom ‘consists in the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law.’”).

141. The freedom of movement is a fundamental right, and any restriction must be “narrowly drawn” to further a “compelling state interest.” *Bykofsky*, 97 S.Ct. at 395 (Marshall, J. dissenting) (United States Supreme Court Justice John Marshall opining, “a curfew aimed at all citizens could not survive constitutional scrutiny”); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (“Persons ‘wandering or strolling’ from place to place have been extolled by Walt Whitman and Vachel Lindsay. . . . The difficulty is that these activities are historically

part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.”).

142. Ordinance 20160223-A.1, Part 2, § 25-2-795 violates this standard by dictating the location and movement of lessees on their own rental property, prohibiting all outdoor group activities at short-term rentals during the day, and setting a strict bedtime at night.

143. Section 25-2-795(G) caps the number of people who can use a short-term rental property to ten adults at one time. *See* Austin, Tex., Ordinance 20160223-A.1, § 25-2-795(G)(1) (February 23, 2016) (stating that a short-term rental may not be used by more than ten adults). This regulation applies to any activity at the short-term rental, from dinner parties to protected political assemblies and exercises of free speech. *Id.*

144. Yet, no more than six people may be outside in an “assembly” between 7:00 a.m. and 10:00 p.m. regardless of the capacity of the rental home or the number of lessees staying on the property. *See* Austin, Tex., Ordinance 20160223-A.1, Part 2, § 25-2-795(E) (February 23, 2016); Austin, Tex., Ordinance 20160223-A.1, Part 2, § 25-2-795(F) (February 23, 2016) (defining “assembly” to include a non-exhaustive list of gatherings as well as “similar group activit[ies] other than sleeping”).

145. Thus, ten adults legally utilizing a large short-term rental in Austin are prohibited from being outside together to swim in a backyard pool, play with their kids on a swing set, enjoy a summer barbeque, or engage in any other non-sleeping activity; only six may venture outdoors between 7:00 a.m. and 10:00 p.m. *See* Austin, Tex., Ordinance 20160223-A.1, Part 2, § 25-2-795(E-F) (February 23, 2016).

146. Section 25-2-795(D) goes even further in its regulation by setting a bedtime for

adults. Section 25-2-795(D) prohibits the use of short-term rentals for indoor or outdoor assemblies of any size or age range between 10:00 p.m. and 7:00 a.m. *See* Austin, Tex., Ordinance 20160223-A.1 S 25-2-795(D) (February 23, 2016). Furthermore, the STR Ordinance does not allow more than “two adults per bedroom plus two additional adults” to be present in a short-term rental between 10:00 p.m. and 7:00 a.m., with a presumption that there are 2 bedrooms. *See* Austin, Tex., Ordinance 20160223-A.1 S 25-2-795(B) (February 23, 2016).

147. Thus, Section 25-2-795(D) prohibits lessees from hosting a group activity, such as a Bible study, past 10:00 p.m., gathering a group of retirees for a bingo night, bringing home a date after dinner, hosting a slumber party for their children, participating in a religious or political gathering, opening Christmas presents with their family before 7:00 a.m., or doing anything else that would interfere with the City’s strict bedtime and nine-hour sleep schedule. *See* Austin, Tex., Ordinance 20160223-A.1, part 2, § 25-2-795(F) (February 23, 2016); *see also* Transcript of Austin City Council Regular Meeting at 174 (Jan. 28, 2016), *available at* <http://www.austintexas.gov/edims/document.cfm?id=247435> (Short-term licensee Julia Taylor testified against the occupancy ordinances, saying, “if I host a dinner party for seven friends, I’m effectively violating the code”). In fact, Section 25-2-795(D) violates the sanctity of the marriage bed, as any group activity “other than sleeping” is prohibited after 10 pm.

148. Ordinance 20160223-A.1 is outlandish on its face, not narrowly tailored to the targeted activity, nor does it further a compelling state interest.

149. The City of Austin cannot justify its unconstitutional restriction on the freedom of movement.

**D. COUNT FOUR: AUSTIN CITY ORDINANCE 20160223-A.1 EXCEEDS THE SCOPE OF THE CITY’S REGULATORY ZONING POWER, AND CONSTITUTES AN ULTRA VIRES ACT.**

150. The preceding paragraphs are realleged and incorporated by reference.

151. Pursuant to Texas' Uniform Declaratory Judgment Act, Plaintiffs respectfully request this Court to strike down Ordinance 20160223-A.1 as an *ultra vires* act that exceeds the City's legal zoning authority under Article 11, Section 5 of the Texas Constitution. Tex. Const. art. XI, § V (“[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.”); TEX. LOC. GOV'T CODE § 211.001 *et. seq.* (giving cities general zoning authority, and stating that “the powers granted under this subchapter are for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.”).

152. “[A]cts of officials which are not lawfully authorized are not acts of the State,” and the court must “attempt to reassert the control of the state” by striking down the overreach. *City of Dallas v. Turley*, 316 S.W.3d 762, 769 (Tex. App.—Dallas 2010, pet. denied); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (“To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority”).

153. Here, Mayor Steve Adler's execution of Ordinance 20160223-A.1 constitutes an *ultra vires* act that exceeds the City's lawful zoning authority and must be struck down.

154. A city's zoning power stems from its police power, and must be “exercised for the purpose of promoting health, safety, morals, or the general welfare of the community.” *Id.*; *Lombardo v. City of Dallas*, 73 S.W.2d 475, 476 (Tex. 1934); *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 675 (Tex. 1973) (Pope, J. concurring) (“Zoning regulations are grounded upon the reasonable exercise of police powers.”); *Ellis v. City of W. U. Place*, 175

S.W.2d 396, 397 (Tex. 1943) (“[Z]oning ordinances fall within the police power of municipalities and that such power, ‘may be exerted to regulate the use, and where appropriate or necessary prohibit the use, of property for certain purposes in aid of the public health, morals, safety, and general welfare,’”).

155. A “statute enacted under the guise of police power that . . . is not reasonably related to safeguarding the public's health, safety or welfare is an invalid exercise of that power.” *Satterfield v. Crown Cork & Seal Co., Inc.*, 268 S.W.3d 190, 214 (Tex. App.—Austin 2008, no pet.). The “mere assertion by the Legislature that a statute relates to the public health, safety, or welfare does not of itself bring such statute within the police power of a state.” *Id.* at 215.

156. The zoning power permits only reasonable restrictions, and cannot “be exercised arbitrarily.” *City of W. U. Place v. Ellis*, 118 S.W.2d 907, 909 (Tex. Civ. App.—Galveston 1938) *aff'd*, 134 S.W.2d 1038 (Tex. Comm'n App. 1940) (zoning power “is not to be exercised arbitrarily”); *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953) (noting that the zoning power “is not an arbitrary one, hence our courts must determine whether zoning ordinances constitute a reasonable exercise of that power.”); *City of Lubbock v. Stubbs*, 278 S.W.2d 519, 523 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.) (“The zoning powers of municipalities, of necessity, are limited. It is not within the power of any municipal body to execute into law a rule or classification that is unreasonable, capricious or arbitrary.”); *Brehmer v. City of Kerrville*, 320 S.W.2d 193, 196 (Tex. Civ. App.—San Antonio 1959, no writ.) (“it is not within the power of any municipal body to make classifications that are unreasonable, capricious or arbitrary”).

157. Zoning power is wielded arbitrarily if it prohibits residential uses of property in residential districts, or bans commercial uses in commercial districts. *City of W. U. Place v. Ellis*, 118 S.W.2d 907, 908 (Tex. Civ. App.—Galveston 1938) *aff'd*, 134 S.W.2d 1038 (Tex. Comm'n

App. 1940).

158. Short-term rentals are a recognized residential use, appropriate for residential areas. *See* Austin, Tex., Code of Ordinances § 25-2-3(10) (defining “short-term rental” as the rental of a residential dwelling unit or accessory building”); *Zgabay v. NBRC Prop. Owners Assn.*, 03-14-00660-CV, 2015 WL 5097116, at \*3 (Tex. App.—Austin Aug. 28, 2015) (holding that the undefined phrase “single family residential use” in a HOA restrictive covenant allowed short-term home rentals).

159. The City of Austin is attempting to prohibit residential property owners from using their homes within residential districts for residential purposes. *See* Austin, Tex., Ordinance 20160223-A.1, Parts 4–5.

160. Thus, Ordinance 20160223-A.1 is arbitrary and unreasonable, and exceeds the scope of the City’s zoning power.

161. The City attempts to use land use regulations to prohibit tenants from engaging in gatherings, parties, and other social activities.

162. The City’s vague ban on “assemblies” and restriction of movement is overly-broad and demonstrates that the difficulty of applying land use regulation to prevent the alleged harm is found in the seeming inability to define the offending groups precisely enough so as not to include innocuous groups within the prohibition.

163. Austin’s use of land regulations to restrict tenant and owner behavior encompasses lawful, constitutionally-protected activities, including a prohibition on family breakfast “assemblies” before 7:00 a.m., watching a presidential debate in an “assembly” of friends past 10:00 p.m., or stargazing on the back porch in an “assembly” with your spouse. *See* Austin, Tex., Ordinance 20160223-A.1, Part 2, § 25-2-795 (February 23, 2016).

164. Such a prohibition on unpleasant activity is not a proper use of the City’s power to regulate zoning and land use.

165. Thus, the STR Ordinance exceeds the City’s zoning power in two respects: (1) by arbitrarily prohibiting the use of residential property in a residential district for residential purposes, and (2) by attempting to regulate annoying behavior via land use restrictions.

166. Mayor Adler’s execution of this ordinance constitutes an unlawful *ultra vires* act, and must be struck down.

**E. COUNT FIVE: AUSTIN CITY ORDINANCE 20160223-A.1 VIOLATES PLAINTIFFS’ RIGHT TO EQUAL PROTECTION.**

167. The preceding paragraphs are realleged and incorporated by reference.

168. Pursuant to Texas’ Uniform Declaratory Judgment Act, Plaintiffs further ask this Court to declare Ordinance 20160223-A.1 a violation of Plaintiffs’ right to equal protection under Article 1, Section 3 of the Texas Constitution.

169. Article 1, Section 3 of the Texas Constitution guarantees that “[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges.”

170. Property and economic liberty regulations must be struck down under the equal protection clause if, “when considered as a whole, the statute’s actual, real-world effect . . . is so burdensome as to be oppressive in light of, the governmental interest.” *Patel v. Tex. Dept. of Licensing & Reg.*, 469 S.W.3d 69, 87 (Tex. 2015) (applying quoted standard to economic due course of law violation); *see also, In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 674 n.8 (Tex. App.—Dallas 2010, pet. dism’d) (noting the use of the same tests for the equal protection and due process clauses); *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 244-45 (Tex. App.—Dallas 1994), *rev’d on other grounds*, 964 S.W.2d 922 (Tex. 1998) (“The same standards may also apply

to equal protection, substantive due process, and procedural due process claims.”); *Rivers v. Cavazos*, 68 F.3d 469 (5th Cir. 1995) (noting that the “review under equal protection is essentially the same as that under substantive due process”); *Pace v. U.S.*, 585 F. Supp. 399, 402 (S.D. Tex. 1984) (“Plaintiff issues challenges on both due process and equal protection grounds. The standard governing the two is the same”).

171. At a minimum, discriminatory zoning regulations are subject to rational basis scrutiny under Texas’ equal protection clause, and must be struck down if shown not to be rationally related to a legitimate state interest. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 939 (Tex. 1998) (“Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause.”).

172. An ordinance is not rationally related to a legitimate state interest if it creates a distinction between two similarly-situated classes, and such distinction bears no relationship to the alleged objective. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (striking down permitting requirements for assisted living centers because the city’s legitimate interest in limiting development in the floodplain did not give it carte blanche to draw distinctions between developments that bore no relationship to flood mitigation); *Glen Oaks Utilities, Inc. v. City of Houston*, 340 S.W.2d 783, 784 (1960) (“Justice requires that a court must have authority to go behind an ordinance which is valid on its face and inquire into the facts surrounding its enactment.”).

*i. Rentals for Less Than 30 Days v. Rentals for More Than 30 Days.*

173. Ordinance 20160223-A.1 places a myriad of occupancy and use restrictions on licensees who rent their properties for less than 30 days, while such regulations are not placed on adjacent properties that are rented for a term longer than 30 days.

174. For example, short-term licensees must ensure that no more than six people are outside at a short-term rental at any time, no more than ten people are present after 10:00 p.m., and all occupants are separated or sleeping promptly at 10:00 p.m. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95.

175. This disparate treatment of short-term rental licensees is not rationally related to any legitimate state interest, and is far more burdensome than necessary given the evil they allegedly are designed to address.

176. The City has not issued any tickets against licensed short-term rentals for noise, use, or trash violations since October 2012. Email from Michelle Rich, Court Clerk, City of Austin Municipal Court to author (May 24, 2016 15:07 CST) (responding to open records request).

177. A residential unit rented for 29 days does not require substantially different occupancy and use restrictions than a residential unit rented for 30 days. Any alleged governmental interest in limiting noise, trash, and crowding in residential areas is equally applicable to long-term rentals.

***ii. Short-Term Tenants v. Long-Term Tenants.***

178. Furthermore, the STR Ordinance violates equal protection by infringing on the fundamental rights of tenants who rent units for less than 30 days, without applying the same regulations to tenants at neighboring rental units.

179. Tenants at a short-term rentals must be alone or asleep by 10:00 p.m., are subject to warrantless searches, cannot gather with more than five friends outdoors during the day, cannot invite more than nine individuals over at any time, etc. Austin, Tex., Ordinance 20160223-A.1, Part 2, §§ 25-2-794-95; Part 7 § 1301. None of these restrictions apply to tenants at neighboring homes who rent for 30 days or more. *Id.*

180. “Strict scrutiny. . . is applied to a law that . . . affects a fundamental liberty right.

The burden to justify such a distinction rests on the party defending it, and such a law cannot be upheld unless it serves a compelling state interest and is ‘closely tailored to effectuate only those interests.’” *Lucas v. U.S.*, 757 S.W.2d 687, 703-04 (Tex. 1988) (outlining the levels of scrutiny applied to equal protection claims under the Texas Constitution).

181. This disparate treatment violates the fundamental rights of tenants to assembly, privacy, and movement, protected under the Texas Constitution.

182. Long-term tenants are similarly situated with respect to health, safety, and code enforcement issues as short-term tenants.

183. The distinction between long-term tenants and short-term tenants does not serve a compelling state interest, nor it is closely tailored to effectuate only those interests.

184. Moreover, the distinction is not rationally related to any legitimate state interest.

185. Thus, the STR Ordinance must be declared unconstitutional and struck down.

***iii. Owner-Occupied Rentals v. Non-Owner-Occupied Rentals.***

186. Ordinance 20160223-A.1 treats non-owner-occupied residential short-term rentals differently from owner-occupied short-term rentals creating an oppressive, undue burden without a rational basis.

187. Rather than rationally advancing a legitimate state interest, the City enacted the prohibition on short-term Type 2 residential rentals as a way of picking winners and losers.

188. Austin’s desire to improve enforcement of the City Code does not rationally justify its difference in treatment between Type 1, 1A and Type 2 categories - short-terms rentals that are “owner-occupied,” and those that are not.

189. Prior to the enactment of Ordinance 20160223-A.1, the City did not distinguish between owner-occupied rentals (Type 1 and 1A) and non-owner-occupied rentals (Type 2) in

terms of zoning districts. Rather, all such rentals were permitted in the same districts.

190. Nothing about the nature of owner-occupied housing immunizes it from Code violations or justifies a difference in treatment between owner-occupied and non-owner-occupied housing.

191. Whether a unit is labeled “owner-occupied” has no connection with the owner’s actual presence or residence on the property during the short-term rental period. Email from Marcus Elliott, Division Manager, City of Austin, Code Department, to author (April 7, 2016 16:25 CST) (“When the property is rented as an owner-occupied (STR), the owner is supposed to rent the entire dwelling unit. So, the owner would not be present during the rental, except in the STR Type 1A.”).

192. A tenant or licensee’s willingness to comply with the law, or propensity to hold disruptive crowded parties does not vary based on whether the property is “owner occupied.” Type 2 and Type 1 rental homes are similarly situated with respect to the Code enforcement problem.

193. Between October 2012 and August 2015, owner-occupied Type 1 and 1A rental units triggered a greater number of the code complaints reported to the City of Austin than those triggered by Type 2 — both in absolute and percentage terms. *See Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation 11*, AUSTIN CODE DEPARTMENT (Aug. 2015),

[https://www.austintexas.gov/sites/default/files/files/STR\\_status\\_and\\_Recommendations\\_Aug\\_17\\_2015\\_final\\_draft.pdf](https://www.austintexas.gov/sites/default/files/files/STR_status_and_Recommendations_Aug_17_2015_final_draft.pdf) (reflecting approximately 59.1% of all code complaints against licensed short-term rentals in these districts were related to Type 1 or 1A housing).

194. Austin has issued only five tickets or citations to short-term rental tenants since the licensing regulations were adopted in September 2012. Emails from Michelle Rich, Court Clerk,

City of Austin Municipal Court to author (May 24, 2016 15:07 CST) (responding to open records request for all citations, notices of violation, or complaints stemming from a short-term rental since September 1, 2012 with five case files, all involving unlicensed STRs); Email from Michelle Rich, Court Clerk, City of Austin Municipal Court to author (May 26, 2016 8:50 A.M. CST) (confirming that the City has not issued any noise, occupancy, or other code-related tickets in which the officer knew and noted that the property was being used as an STR).

195. Yet, Austin decided to single out Type 2 non-homesteaded rentals in November 2015 and March 2016, treating them different than similarly situated properties with a greater number of code complaints. Austin, Tex., Ordinance 20160223-A.1, parts 4-5; *See Short Term Rental (STR): Staff Recommendations for Changes to Existing Regulation 10–11*, AUSTIN CODE DEPARTMENT (Aug. 2015), [https://www.austintexas.gov/sites/default/files/files/STR\\_status\\_and\\_Recommendations\\_Aug\\_17\\_2015\\_final\\_draft.pdf](https://www.austintexas.gov/sites/default/files/files/STR_status_and_Recommendations_Aug_17_2015_final_draft.pdf).

196. Austin chose to discriminate between short-term rentals on the basis of owner occupancy out of prejudice and favoritism, rather than to further a legitimate state interest. *See* Transcript of Austin City Council Work Session at 45 (Feb. 23, 2016), <http://www.austintexas.gov/edims/document.cfm?id=248913> (City Councilwoman Pool explicitly vocalized this intent at the Council’s meeting on February 23, 2016, saying, “[w]e’re expressing a preference for having the owners live on the property for a lot of reasons. And less preference for having the commercial rentals being inside the neighborhoods.”);<sup>14</sup> at 50 (Feb. 23, 2016) (Councilman Cesar telling his fellow council members, “As y’all know, I certainly prefer the Type 1 use over the Type 2 use.”); at 58 (Feb. 23, 2016) (Councilwoman Gallo assuring the

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<sup>14</sup> Even this is a misnomer, through. For Austin families that reside full-time at their home, they would not be considered a Type 1 licensee because they do not claim the homestead exemption for their home.

audience that, “we've heard very loud and clear the concerns of neighbors who have said very clearly they do not want Type 2 strs which are non-occupied rental units operating in their neighborhoods.”).

197. The prohibition on non-owner-occupied rentals is excessively burdensome so as to be oppressive in light of the governmental interest. *See Patel v. Tex. Dept. of Licensing & Reg.*, 469 S.W.3d 69, 87 (Tex. 2015).

198. There is no rational basis for singling out and prohibiting residential Type 2 rentals, nor does it further a legitimate state interest.

199. Rather, the City is picking winners and losers. This is unconstitutional under the equal protection clause of the Texas Constitution and must be declared unconstitutional and struck down.

**F. COUNT SIX: AUSTIN CITY ORDINANCE 20160223-A.1 AUTHORIZES UNREASONABLE WARRANTLESS SEARCHES.**

200. The preceding paragraphs are realleged and incorporated by reference.

201. Pursuant to Texas’ Uniform Declaratory Judgment Act, Plaintiffs further ask this Court to declare that Ordinance 20160223-A.1 violates Plaintiffs’ freedom from unreasonable search and seizure.

202. Article 1, Section 9 of the Texas Constitution protects citizens from unreasonable searches, providing:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Tex. Const. art. I, § 9.

203. In the context of “administrative” searches — serving to ensure regulatory

compliance, rather than seeking the fruits of a crime — the warrant requirement is only waived if exigent circumstances exist, the party is given an opportunity for precompliance review, or when the property is a “closely regulated” business. *Adust Video v. Nueces County*, 996 S.W.2d 245, 255 (Tex. App.—Corpus Christi 1999, no pet.); *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015) (“absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker”).

204. Just last year, the Supreme Court of the United States struck down a parallel Los Angeles ordinance authorizing warrantless hotel searches, noting that “on demand” searches “conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable,” and violate citizens’ constitutional right to protection from unreasonable searches. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (“absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker. . . . we see no reason why this minimal requirement is inapplicable here”).

205. Part 7 of Ordinance 20160223-A.1 gives police even more “on demand” authority than that authorized by Los Angeles’ unconstitutional provision.

206. The City of Austin requires short-term rental licensees to permit officers into their homes to “enter, examine, and survey, at all reasonable times, all buildings, dwelling units, guest rooms, and premises.” Austin, Tex., Ordinance 20160223-A.1, Part 7 (Feb. 23, 2016).

207. The Austin ordinance is not limited to a single registry, sheet of paper, or even a single room.

208. Without warrant, justification, or even a chance to protest, Ordinance 20160223-A.1 authorizes code officers to intrude upon and search citizens' bedrooms, pantries, nurseries, and everywhere in between. No room, closet, or drawer is off limits.

209. Ordinance 20160223-A.1 requires licensees to submit to unreasonable warrantless searches, or risk legal penalties, including the loss of their short-term rental licenses.

210. Plaintiffs respectfully request this Court to declare that Part 7 of Ordinance 20160223-A.1 violates Plaintiffs' freedom from unreasonable search and seizure under Article 1, Section 9 of the Texas Constitution. *See City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015).

## **VII. APPLICATION FOR PERMANENT INJUNCTION**

211. An injunction must issue "where a violation of a constitutional right is clearly established." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981) (granting injunction on first amendment grounds, and requiring city to issue parade permit); *see also Henry v. Greenville Airport Commn.*, 284 F.2d 631, 633 (4th Cir. 1960) (holding, in equal protection context, that "[t]he District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right."); *S.W. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 368 (Tex. Civ. App.—Amarillo 1979).

212. "The denial of a constitutionally guaranteed right . . . as a matter of law, inflicts an irreparable injury." *S.W. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 368 (Tex. Civ. App.—Amarillo 1979).

213. Plaintiffs' Original Petition, above, demonstrates that enforcement of the STR Ordinance violates the Texas Constitution, which guarantees Plaintiffs' rights to economic liberty, freedom of movement, privacy, freedom of assembly, freedom from unreasonable search and

seizure, and equal protection.

214. Plaintiffs are facing imminent and irreparable harm from the City's continued enforcement of the STR Ordinance.

215. Plaintiffs have no other adequate legal to adequately compensate for the continued deprivation of their constitutional rights.

216. Plaintiffs respectfully ask the Court, following trial on the merits, to issue a permanent injunction against the City of Austin, enjoining the City's enforcement of Ordinance 20160223-A.1.

### **VIII. ATTORNEYS' FEES**

217. Under the Uniform Declaratory Judgment Act, Plaintiffs are entitled to recover "costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

218. Plaintiffs seek award of their reasonable attorneys fees for the preparation of this suit, prosecution of this suit, and all appeals.

### **IX. REQUEST FOR DISCLOSURE**

219. Plaintiffs request that Defendants disclose the information and materials described in Rule 194.2 of the Texas Rules of Civil Procedure.

### **X. PRAYER AND CONCLUSION**

**THEREFORE**, Plaintiffs request the Court issue the following relief:

- i. A declaration that Ordinance 20160223-A.1 is a violation of Plaintiffs' rights under the due course of law clause of the Texas Constitution;
- ii. A declaration that Ordinance 20160223-A.1 is an unconstitutional violation of Plaintiffs' right to equal protection under the Texas Constitution;

- iii. A declaration that Ordinance 20160223-A.1 is an unconstitutional violation of Plaintiffs' freedom of movement;
- iv. A declaration that Ordinance 20160223-A.1 is a violation of Plaintiffs' right to privacy under the Texas Constitution;
- v. A declaration that Ordinance 20160223-A.1 is a violation of Plaintiffs' freedom of assembly under the Texas Constitution;
- vi. A declaration that Ordinance 20160223-A.1 is a violation of Plaintiffs' right to privacy under the Texas Constitution;
- vii. A declaration that Ordinance 20160223-A.1 is a violation of Plaintiffs' freedom from unreasonable search and seizure protected under the Texas Constitution;
- viii. A declaration that Ordinance 20160223-A.1 is an ultra vires act that exceeds the zoning powers of the City of Austin and Mayor Steve Adler;
- ix. A permanent injunction prohibiting the City of Austin from enforcing Ordinance 20160223-A.1;
- x. An award to Plaintiffs of their attorneys' fees and reasonable costs; and
- xi. All other and further relief to this Court may deem proper in law or equity.

Respectfully Submitted,



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