NO. 24-50187

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KRISTY KAY MONEY; ROLF JACOB SRAUBHAAR,
***Plaintiffs-Appellants*,**

v.

CITY OF SAN MARCOS; AMANDA HERNANDEZ, in her official capacity as Director of Planning and Development Services,
***Defendants-Appellees*.**

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:23-cv-00718-RP

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 24-50187; *Money v. City of San Marcos*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This case raises important questions involving the application of recent Supreme Court precedent regarding ripeness and private property rights. The District Court's decision below not only ignores these recent decisions, but also creates new hurdles to all plaintiffs attempting to raise constitutional claims against unlawful city ordinances. Appellants believe oral argument will prove helpful to the Court in ensuring full deliberation of these important issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: ***Page(s):***

Statutes & Rules:

Other Authorities:

JURISDICTIONAL STATEMENT

Appellants' claims involve facial and as-applied challenges to a municipal ordinance under the United States and Texas Constitutions. The district court had jurisdiction over Appellants' federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over Appellants' state law claims under 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291. On March 13, 2024, the district court entered an order and judgment (ROA.393–95) adopting the report and recommendation of the United States Magistrate Judge (ROA.319–35); granting Defendant's motion to dismiss (ROA. 121–30); overruling Plaintiffs' objections to the report and recommendation of the federal magistrate judge (ROA.336–61); and dismissing as moot Plaintiffs' Motion for Summary Judgment (ROA.20–41). This order disposed of all issues in this case and constituted a final judgment of a United States District Court. The Notice of Appeal was timely filed on March 14, 2024 (ROA.396) pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED

1. Appellants challenge an ordinance which requires them to keep an object on their property for the public's benefit. Appellants applied with the City to remove the object and that request was denied. There is no dispute that the decision is final, and that any appeal is time-barred. Did the District Court err by holding that Appellants' challenge to the ordinance is not ripe because they did not also file a (now time-barred) voluntary administrative appeal?
2. In *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982), the Supreme Court held that a government mandated physical occupation of private property by an unwanted cable box without compensation was a *per se* taking in violation of the Fifth Amendment. Here there is no dispute that the challenged ordinance requires Appellants to keep an unwanted decorative metal grate on the front of their home without compensation. Did the District Court err by holding that Appellants had not pled plausible claims under *Loretto*?
3. The Texas Constitution prohibits cities from regulating land-use for purely aesthetic purposes. Under the challenged ordinance, Appellants are required to keep a decorative metal grate on the front of their home solely due to aesthetic criteria. Did the District Court err by holding that Appellants had not pled plausible claims under the Texas Constitution?

INTRODUCTION

This case involves a constitutional challenge to a local ordinance that requires private property owners to keep unwanted objects attached to their homes to appease the aesthetic preferences of an unelected commission of local bureaucrats.

Pursuant to this ordinance Appellants (hereafter, "the Moneys") applied for and were denied the right to remove a small metal grate from the front of their home bearing the initial of a former homeowner. That decision is now final and unappealable. The Moneys allege that this restriction on their property: (1) is a *per se* taking under the United States' Constitution because it requires the mandatory physical occupation of their property by an unwanted object for a public benefit; and (2) is a violation of Article 1, Section 19 of the Texas Constitution, because it arbitrarily restricts their property rights based on aesthetic factors.

The District Court dismissed these claims, holding: (1) that they were not ripe because the Moneys had failed to exhaust administrative remedies by failing to file a (now time-barred) administrative appeal of the City's final decision to the local zoning board; and (2) that the Moneys had failed to state a claim on the merits under either the United States or Texas Constitution.

But the United States Supreme Court recently held that property owners are not required to exhaust local administrative appeals before

bringing these sorts of land use claims. And the Moneys' well-pled constitutional claims are consistent with binding precedent. The District Court's holdings should be reversed, and the Moneys should have the opportunity to present their claims on the merits.

STATEMENT OF THE CASE

Background

The Moneys own a home in San Marcos where they live with their five children. ROA.43. The home is located in the "Burleson Historic District," but the home is not a historically designated structure, and was considered a "low historic priority" by the City at the time of purchase. ROA.59. The home is adjacent to houses that were built in 2017 and 1984 and down the street from a house built in 2013. *City of San Marcos, My Historic SMTX City of San Marcos Historic Resources Survey Report Phases 1 & 2* (Historic Resources Survey Report), p. 594, 956 (Sept. 2019), https://tinyurl.com/h6n9pf5u. At the time the Moneys purchased the home, it had been long vacant and was in need of repairs. ROA.43.

On the front of the home is a small metal grate with a decorative "Z." ROA.29.

The Moneys would like to remove the "Z" because they later discovered that it is the initial of a previous owner with undisputed ties to the Ku Klux Klan. ROA.44. The grate is attached with several metal bolts and can be easily removed without any damage to the home. ROA.205.

However, as explained below, the Moneys may not remove the grate without permission from the City. ROA.44.

The Challenged Ordinance

For most of Texas history, cities lacked authority to take action to protect historic structures. *Powell v. City of Houston*, 628 S.W.3d 838, 857 (Tex. 2021). In the 1980s, the Texas legislature amended the Texas Zoning Enabling Act to allow greater leeway for Cities to "protect[] and preserv[e] places and areas of historical, cultural, or architectural importance and significance." Tex. Loc. Gov't Code § 211.001.

This authority, however, is not unlimited. Like any exercise of authority under the Zoning Enabling Act, restrictions on the use of property to protect historic structures must be created in accordance with several specific goals outlined by the legislature. Tex. Loc. Gov't Code § 211.004. Moreover, like any exercise of the police power, historic regulations remain subject to constitutional restraints. *Powell*, 628 at 866–67, n. 37 (J. Bland, concurring) (citing *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921)).

Starting in the late twentieth century the City of San Marcos began designating various areas of town as "historic districts." San Marcos's Development Code (Dev. Code) § 4.5.2.1(B)(1)(a)–(g). By 2017, the City had adopted seven historic districts composing a significant portion of the downtown core. *City of San Marcos — Historic Districts*, Map, (2017) https://tinyurl.com/42r2dz39. Despite the implication of the name, many of the homes and structures within historic districts are not historic in any meaningful sense of the word. The Burleson Historic District—at issue here—includes homes built as recently as 2017. See, e.g., Historic Resources Survey Report, p. 225, 605, 884. Other lots have yet to be developed. *Id.*

Nevertheless, all homes, buildings, and lots within historic districts are subject to a host of additional land-use regulations beyond those found in the City's zoning code. Dev. Code § 2.5.5. This case involves one subset of those additional regulations.

Under Dev. Code § 2.5.5.1(B) a property owner may not, among other things, alter, relocate, or demolish any visible portion of a property within a historic district without first receiving a "certificate of appropriateness" (hereafter, "Certificate").

While this is done in the name of "history," the requirement applies whether the property is historic or not. Dev. Code § 2.5.5.1(B). See also, Historic Preservation Meeting (March 2, 2023) (video available at https://tinyurl.com/2p9pt7j5 (7:55–39:24) (Considering an application to add a fence to a house built in 1989.).

Certificate decisions are made by an unelected commission (the Commission) based on the application of a number of mandatory, subjective, aesthetic factors—none of which even mention history. Dev. Code § 4.5.2.1 (I) (1) (a)-(j). For example, the Commission is required to determine whether a change is "visually compatible with other buildings to which they are visually related" in terms of: (1) height; (2) proportion of the building's front façade; (3) proportion of openings within the facility; (4) rhythm of solids to voids in front facades; (5) rhythm of spacing of buildings on streets; (6) rhythm of entrance and/or porch projection; (7) relationship of materials, texture and color; (8) roof shapes; (9) walls of continuity; and (10) scale of a building. Dev. Code § Section 4.5.2.1 (I) (1) (a)-(j)..

When Commission members have tried to consider non-aesthetic factors during the application process, the City Attorney has reminded

them that "it's really about the aesthetic that the Commission approves" and that other factors may not be considered. Historic Preservation Meeting, 26:30 (December 2, 2021) available at: https://tinyurl.com/mt32jyv5

A decision from the Commission is referred to in the Ordinance as a "final decision." ROA.51. A "final decision" may be appealed to the Zoning Board of Adjustments (the "Board") but such appeals must be brought within 10 days, and the scope of that appeal is limited to claims where "the record reflects the lack of substantial evidence" supporting the Commission's decision. Dev. Code § 2.5.5.5(C)(3). The Board "may not substitute its judgment for the judgment of the Historic Preservation Commission on the weight of the evidence," and may not consider the constitutionality of the Development Code or the Commission. Dev. Code § 2.5.5.5.

The Moneys' Application is Denied

In January of 2023, the Moneys filed an application for a certificate to remove the metal grate. ROA.216–17. The City staff concluded that: (1) the grate was not a "distinctive feature of the home in the historic resources survey" (ROA.197); (2) the City could not confirm whether the grate was original to the house (ROA.197); and most importantly, (3) removal of the grate would "***not affect***" the "historical, architectural, or cultural character of the Historic District." ROA.194 (emphasis added).

Nevertheless, the Commission denied the request based on vague appeals to the removal's effect on character of the home. ROA.51; Historic Preservation Meeting, 52:20 (May 4, 2023) available at: https://tinyurl.com/ys9tzssa. At no time during the hearing or subsequent communications with the Moneys did any member of the Commission suggest that this was a close case, that the City was unsure how the ordinance applied to the property, or that any other outcome could be considered. To this day, the City stands by the Commission's decision and reading of the Ordinance.

Because the Moneys do not dispute that the City faithfully applied the terms of the Ordinance, and because administrative appeals are costly, the Moneys did not file a voluntary appeal within 10-days.

As a result, there is no dispute that the denial of the Certificate is now final and unappealable. Dev. Code § 2.5.5.5(A). The Moneys therefore may not remove the grate from their home without risking significant penalties. Dev. Code § 2.3.7.4.

The Moneys File Suit

To avoid this encumbrance on their property, the Moneys filed suit alleging that, both on its face and as applied, the Ordinance: (1) is a *per se* taking under the United States' Constitution because it requires the mandatory physical occupation of their property by an unwanted object for a public benefit; and (2) is a violation of Article 1, Section 19 of the

Texas Constitution, because it arbitrarily restricts their property rights based on aesthetic factors. ROA.1–10.

Because these claims present pure questions of law, the Moneys filed for summary judgment shortly after filing their complaint. ROA.20–41.

After reviewing the complaint and summary judgment motion, the City filed a motion to dismiss under 12(b)(1). ROA.121–130. The City tellingly did not move to dismiss the Moneys' claims on the merits. Rather, the City's primary basis for dismissal was an argument that the Moneys' claims were not ripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank* , 473 U. S. 172 (1985) because the Moneys had failed to exhaust administrative remedies by failing to file a (by then time-barred) appeal with the Board. ROA.126. The City did not point to any basis for how the Board could have granted the relief the Moneys sought, or suggest that the City would reconsider its original decision. Rather, the City claimed as a matter of law that a land-use claim was not ripe until a property owner exhausted administrative appeals with the Board. ROA.127–28. The City therefore requested that the complaint be dismissed with prejudice, and thereby that the Moneys be forced to permanently keep the grate on their property. ROA.130.

The Moneys responded that: (1) *Williamson County* finality does not apply to facial claims; (2) the Moneys had received a final decision from the Commission applying the Ordinance; and (3) the Supreme Court

recently made clear in *Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226 (2021), that administrative exhaustion is not required in these sorts of cases. ROA.159–77.

The City's reply: (1) did not address the Moneys' facial claims, (2) did not dispute that the decision from the Commission reflected the City's definitive view on the interpretation and application of its ordinance, (3) did not dispute the fact that any administrative remedies were time barred, and (4) did not point to any additional fact that would have been relevant to the City's position. Instead, the City relied solely on its position that exhaustion of local administrative appeals was required for ripeness—full stop. ROA.300.

The Magistrate's Opinion

On January 26, 2024, the Magistrate issued her report and recommendations holding that the case should be dismissed. ROA.319–35. The Magistrate first held that the Moneys' claims were not ripe under the *Williamson County* finality requirement because the Moneys had failed to exhaust administrative remedies by filing an appeal with the Board. ROA.325. In doing so, the Magistrate strangely did not discuss or distinguish the Supreme Court's recent decision in *Pakdel*, holding that such administrative exhaustion is not required. Nor did the Magistrate explain how finality could affect the Moneys' facial claims, given binding precedent that *Williamson County* finality does not apply to facial claims.

Next, despite not being requested by the City, the Magistrate *sua sponte* held that the Moneys had *also* failed to state a claim under the United States or Texas Constitutions. ROA.322. In particular, the Magistrate held that the Moneys failed to plead a *per se* takings claim under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), primarily because: (1) the grate was already on the property at the time of purchase and (2) the ordinance was already in effect at the time of purchase. ROA.328–30.

As for the Texas Constitutional claims, the Magistrate held that Texas Supreme Court precedent on aesthetic zoning had not kept up with federal law and therefore was "outdated" and, in any event, the challenged Ordinance is based on history, not aesthetics. ROA.330–34. In doing so, the Magistrate did not cite a single Texas case, discuss the actual text of the Ordinance, or discuss the City's official findings that removal of the grate would have no historic impact. The Magistrate also, did not engage in the proportionality analysis required for Texas rational basis claims.

The District Court's Opinion

The Moneys filed timely objections to the Magistrate's report pursuant to 28 U.S.C. § 636(b)(1)(C). ROA.336–61. As to ripeness, the Moneys pointed out that: (1) *Williamson County* finality does not apply to facial claims, (2) the Moneys had received a final decision from the

Commission, and (3) that under the Supreme Court's decision in *Pakdel*, further administrative exhaustion is not required. ROA.348.

As to the takings claims, the Moneys pointed out, among other things that: (1) the unwanted object in *Loretto* was also already on the property at the time of purchase, and (2) that the Supreme Court has repeatedly held that purchasing property after an ordinance goes into effect does not preclude a takings challenge to that ordinance. ROA.351–55. Therefore, neither of the Magistrate's arguments provided a basis to distinguish *Loretto*. ROA.351–55.

As to the Texas claims, the Moneys explained that: (1) the Texas Supreme Court is not required to follow federal law when interpreting its own constitution, (2) the Texas cases prohibiting aesthetic zoning remain good law; (3) the plain text of the ordinance and the City's official findings show that the denial of the Moneys' certificate were based on aesthetics; and (4) the Magistrate had failed to engage at all in the proportionality analysis required under Texas rational basis cases. ROA.355–61.

Despite these Objections, the district court entered judgment two weeks later, adopting the Magistrate's recommendation in full without comment. The Moneys now appeal.

SUMMARY OF THE ARGUMENT

The district court's decision dismissing this case is contrary to established precedent and should be reversed.

First, the Moneys' claims are ripe. The Moneys challenge the constitutionality of an ordinance that requires them to keep an unwanted object attached to their home for aesthetic purposes. There is no dispute that the Ordinance applies to the Moneys' property and that the City has applied the Ordinance to require the Moneys to keep an unwanted object attached to their home. This is sufficient for ripeness.

The district court nevertheless held that the Moneys' claims were not ripe under the special "finality" test developed for prudential ripeness in *Williamson County*. Under that test, certain as-applied takings plaintiffs must receive a "final decision" from the city applying the ordinance to their properties before they can bring a challenge in court. This requirement is generally met by applying for a permit and being denied—which the Moneys did in this case.

The district court nevertheless held that the Moneys had not received a final decision, because they did not *also* exhaust their local administrative remedies by filing a (by then time-barred) administrative appeal from the Commission's denial of their request to remove the decorative grate.

But it is black-letter law that *Williamson County's* finality requirement does not apply to facial claims. And even for the Moneys' as-applied claims, the Supreme Court has recently clarified that administrative exhaustion is not required for finality. It is sufficient for

finality that the "initial decisionmaker" has come to a definitive position on the how the ordinance applies.

Here, the City does not dispute that the Commission reached a final decision applying the Ordinance to the Moneys' property. Indeed, the Ordinance itself refers to Commission decisions as "final" and the City stands by the Commission's decision. That is all that is required for finality. The Moneys are not barred from federal court because they did not *also* file a (now time-barred) voluntary administrative appeal.

Second, the Moneys pled plausible *per se* takings claims under *Loretto*. Under *Loretto*, requiring a property owner to maintain an unwanted object on their property for public benefit without compensation is a taking, regardless of the public purpose served. Here, it is undisputed that the Moneys are required to keep an unwanted decoration attached to their home for a public benefit without compensation. Indeed, the decoration is approximately the same size and attached in the same way as the object at issue in *Loretto*. The Moneys have therefore pled plausible takings claims under *Loretto*.

The district court rejected this argument primarily because: (1) the decoration was on the Moneys' home at the time of purchase, and (2) the challenged ordinance was already in effect when the Moneys moved in. But: (1) the object at issue in *Loretto* was also on the property at the time of purchase, and (2) the Supreme Court has recently and *repeatedly* held that takings claims are not barred by the fact that the challenged law

was already in effect when the property owner moved in. The district court's decision to dismiss the Moneys' takings claims is therefore contrary to law and should be reversed.

Finally, the Moneys pled plausible claims under Article 1, Section 19 of the Texas Constitution. Like the Federal Due Process Clause, Article 1, Section 19 requires that restrictions on private property rights be rationally related to a legitimate government interest. But, unlike federal rational basis scrutiny, Texas law does not recognize aesthetics as a legitimate basis for land use restrictions, and even if it did, the Texas Constitution requires that restrictions on property rights be at least somewhat proportional to the government interest at stake.

Here, the Moneys allege that: (1) both on its face and as applied, the challenged ordinance is based solely on aesthetics; and (2) even if the ordinance is based in part on history, it is unconstitutional as-applied because the City's own findings show that removal of the decoration would have no historic impact. The Moneys have therefore pled plausible claims under Article 1, Section 19.

The district court nevertheless dismissed these claims. According to the district court, Texas Supreme Court precedent holding that aesthetic zoning is forbidden is "outdated," given the changes in federal law. Moreover, the district court held that even if aesthetic zoning were prohibited under Texas law, the denial of the Moneys' certificate was allegedly based on history, not aesthetics.

But this simply ignores the law and the facts of this case. First, state courts are not required to follow federal trends when interpreting their state constitutions. As such, Texas Supreme Court cases prohibiting aesthetic zoning under the Texas Constitution remain good law, despite the fact that the federal judiciary has chosen to interpret the Federal Constitution differently.

Second, regardless of what it claims now, the City's decision on the Moneys' application was based on aesthetics—not history. Not only are the challenged ordinance criteria all aesthetic on their face, but the City's official findings were that the Moneys' home is not historic, and that removal of the decoration would have *no historic impact*. The City cannot run from those findings now.

The district court failed to discuss this evidence or the text of the ordinance at all. Instead, it relied on various unsupported statements by city officials. But at the motion to dismiss stage the district court was required to assume the Moneys' allegations were true. It certainly should not have disregarded both the text of the Ordinance and actual record evidence in favor of *ipse dixit* from the City. The district court's *sua sponte* decision dismissing this case should be reversed.

STANDARD OF REVIEW

Dismissals under Rule 12 are reviewed *de novo*. *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 520 (5th Cir. 2016). The purpose of a motion to dismiss is not to determine "whether a plaintiff will

ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). A motion to dismiss should be denied if the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

An "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Wilson v. Layne*, 526 U.S. 603, 610 (1999). The Texas Supreme Court put it well:

> If the citizen is not to be left free to determine the architecture of his own house, and the lawful and uninjurious use to which he will put it . . . if by law he is to be allowed to do these things only as officials or the public shall decree, or as may for the time suit the taste of a part of the community, the law might as well deal candidly with him and assert that he holds his property altogether at public sufferance.

Spann, 235 S.W. at 516.

This case turns on whether these foundational constitutional principles may ever see the inside of a courtroom.

Under the challenged ordinance, there is no dispute that the Moneys are currently required to keep a purported Klansman's initial bolted to the front of their home, or face penalties. ROA.130. Under the text of that ordinance and the City's official findings, the sole basis for this invasion of the Moneys' property rights is a list of aesthetic

considerations subjectively interpreted by an unelected commission. San Marcos City Code § 2.191(a). The Moneys' allege that this current, ongoing invasion of their property rights is unconstitutional.

Without even requesting briefing on several issues, the district court held that the Moneys' claims were so implausible as to warrant dismissal, *sua sponte*. But in its rush to get this case off of its docket, the district court completely ignored binding precedent, arguments from the parties, and uncontested facts in the record.

As explained below, the Moneys have presented precisely the sort of plausible claims that deserve their day in court. The district court's decision dismissing the case should be reversed.

I. THE DISTRICT COURT ERRED BY HOLDING THAT THE MONEYS' CLAIMS ARE NOT RIPE

To begin, the Moneys' claims are ripe. "The ripeness inquiry hinges on two factors: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration." *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 679 (5th Cir. 2022). Both factors are met here.

A. The Moneys present pure questions of law that are fit for judicial review.

First, the Moneys' claims are fit for review. A "matter is fit for review when it presents pure legal questions that require no additional

factual development." *Gulfport Energy Corp.*, 41 F.4th at 679. That is certainly true here.

The Moneys challenge the constitutionality of an ordinance which they claim requires them to keep an unwanted object attached to their home for a public benefit without compensation. ROA.7. There is no dispute that the Ordinance applies to the Moneys' home on its face and that the City has applied the Ordinance to the Moneys. ROA.51. There is likewise no dispute that under that application of the Ordinance, the Moneys may not remove the unwanted object from their home without facing penalties. Dev. Code § 2.3.7.4. The sole question remaining is a legal one—i.e., whether that undisputed restriction on the Moneys' property rights violates the Constitution. The Moneys' claims are therefore fit for review. *Gulfport Energy Corp.*, 41 F.4th at 679.

The District Court rejected this approach based on two arguments. *First*, the District Court held that the Moneys' failed to receive a "final decision" under *Williamson County*, because they did not exhaust a (now time barred) voluntary administrative appeal with the Board. ROA.326.

But it is Black-Letter Law that *Williamson County's* finality requirement does not apply to facial challenges. *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 287 (5th Cir. 2012). And even for as-applied challenges, the Supreme Court has recently and repeatedly held that administrative exhaustion is not required to ripen these sorts of land-use claims. *Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226, 2228

(2021); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

That is particularly true when, as here, any administrative appeal would have been to a board that was limited to reviewing the original decision, rather than exercising independent judgment. Compare, *Williamson Cty.*, 473 U.S. at 193 (plaintiff was not required "to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking."), with, Dev. Code § 2.5.5.5(C) (limiting the Board to "substantial evidence" review and noting that the Board "may not substitute its judgment for the judgment of the Historic Preservation Commission.")

The Court's recent decision in *Pakdel*, 141 S. Ct. at 2228 is dispositive on this point. In that case the property owners challenged a local land-use regulation that required them to sign a lifetime lease with certain tenants, unless they applied for and received an exemption. Like this case, the property owners applied for an exemption and were denied. *Id.* at 2228. Like this case, the property owners chose not to pursue the administrative appeal available under the ordinance and the deadline for such appeals had passed. *Id.* And, like this case, the City argued that the property owners' failure to pursue an administrative appeal meant that their claims were not ripe. *Id.* The Supreme Court rejected the City's argument, holding that it was at "odds with the settled rule that

exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. §1983." *Id.* at 2228 (brackets and internal quotation marks omitted) (emphasis in original). Once the City has a fair opportunity to reach a position on the interpretation and application of its ordinance, finality is established. See *id.* at 2230.

Here, there is no dispute that the Moneys received a definitive decision from the City. The Moneys requested a Certificate and that request was denied. ROA.51. The City's Ordinance refers to that decision as a "final decision" and there is no dispute that any voluntary administrative appeal is now time-barred. Dev. Code § 2.5.5.5. The City affirmatively stands behind its decision. ROA.367. As a result, there is no dispute that the Moneys may not remove the initial from their home without facing penalties. Dev. Code § 2.3.7.4. Therefore, just as in *Pakdel* the City has reached a "definitive position" on the scope of its ordinance and no further factual development is necessary. *Pakdel*, 141 S. Ct. at 2230.

Second, the district court suggests (citing nothing) that the Moneys claims are not ripe because they *might* be able to receive a different decision if they *returned* to the Commission and better emphasized their "concerns" about Mr. Zimmerman's Klan ties. ROA.326. But finality only requires that the City have an opportunity to interpret and apply its ordinance. *Pakdel*, 141 S. Ct. at 2230. It does not require that property

owners repeatedly return to the City to test out every possible argument or rhetorical approach for relief before coming to court.

Moreover, the district court provides no reason to believe such rhetoric would be effective. The City itself has never claimed that it was unaware of Mr. Zimmerman's Klan ties or why those ties were distasteful to the Moneys. ROA.367. These connections are well known in San Marcos and undisputed. Nor has the City ever suggested any way that additional discussions of this information could be relevant to the application of the challenged ordinance. To the contrary, the City claims that "[i]t is wholly irrelevant what members of the Commission knew or did not know about [Mr. Zimmerman's] alleged KKK ties." ROA.367.

This makes sense. It is undisputed that the Ordinance does not turn in any way on *why* an applicant wants to remove a decoration from their home. Indeed, an applicant for a certificate of appropriateness is not required to give a reason for the removal *at all*. See ROA.216. Under the Ordinance, the Commission's decision turns solely on several mandatory aesthetic criteria, no matter what. Dev. Code § 2.5.5.4.

Here, there is no dispute that the Commission faithfully applied the challenged Ordinance to the Moneys' application. The City affirmatively stands by that decision. Put simply, the City has come to a "definitive position" on how its ordinance applies to the property. *Pakdel*, 141 S. Ct. at 2230. That is all that is required for finality. *Id.*

B. The Moneys will suffer significant harm if this court withholds consideration.

Withholding review would also cause hardship. As we sit here today, the Moneys allege that they are unconstitutionally required to keep an unwanted object on their property, without compensation, for aesthetic purposes. As both this Court and Texas courts have made clear, this violation of the Moneys rights is *per se* irreparable harm. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("the loss of [constitutional] freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury.'"); *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60, 77 (Tex. App. 1996) ("Under Texas law, a violation of a constitutionally guaranteed right inflicts irreparable injury warranting injunctive relief.")

The District Court nonetheless held that withholding review does not constitute hardship because the Moneys could allegedly simply try again with a new permit. ROA.326 at n. 1. But the prior decision from the Commission is final, and any appeal is time-barred. The City has never suggested that it will, or even *can* reconsider. To the contrary, it moved to dismiss this case *with prejudice*, thus barring any future claims. ROA.130.

More importantly, the District Court's suggestion that the Moneys simply try again misunderstands this case. The Moneys allege that the Ordinance is unconstitutional because it makes their constitutional right

to remove objects from their property subject to the arbitrary aesthetic whims of a commission of unelected bureaucrats. They seek declaratory and injunctive relief to prevent this ongoing encumbrance on their property rights. To make the Moneys spend substantial time and money returning to that same unconstitutional commission, applying the same unconstitutional ordinance, on the bare hope that *this time* the Commission *may* ignore the text of its ordinance and allow the Moneys to exercise their constitutionally protected property rights, is itself a constitutional injury. The Moneys are not required to file meaningless applications "for their own sake." *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001).

II. THE DISTRICT COURT ERRED BY HOLDING *SUA SPONTE* THAT THE MONEYS FAILED TO PLEAD PLAUSIBLE TAKINGS CLAIMS UNDER *LORETTO*

The District Court also erred by holding, *sua sponte*, that the Moneys failed to plead plausible takings claims under *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, (1982). In *Loretto*, the Supreme Court held that a local law preventing an apartment owner from removing a pre-existing cable box from her building was a *per se* taking because it required the physical occupation of private property by an unwanted object for a public benefit. *Id.* at 441.

Here, the Moneys allege a similar *per se* taking because the Ordinance requires the Moneys to keep an unwanted pre-existing metal

grate attached to their home for a public benefit—namely, the Commission's aesthetic preferences for the neighborhood. Indeed, the decoration is of a similar size and attached in the same way as the unwanted cable box in *Loretto*. *Loretto*, 458 U.S. at 422.

The District Court's opinion brushes this similarity aside based on five arguments. But each of these arguments contradicts binding precedent, which the District Court's opinion surprisingly does not address.

First, the District Court argues that any *Loretto* takings claim is barred by *Maher v. New Orleans*, 516 F.2d 1051 (5th Cir. 1975), which rejected a takings challenge based on the denial of a demolition permit. But as the Moneys noted in their briefing in front of the District Court, *Maher* has never been cited by the Fifth Circuit in a *per se* takings case. ROA.183. That's because the plaintiff in *Maher* did not raise *per se* takings claims under *Loretto*. Indeed, *Loretto* had not yet been decided. Rather, the plaintiff in that case argued that the denial of the demolition permit was an *ad hoc* regulatory taking because it would reduce the value of the property and potentially require that they spend more on upkeep. *Maher*, 516 F.2d. at 1065. But "mere diminution in the value of property" has never been sufficient for a taking. *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993). That is a fundamentally different argument than the *per se* takings challenge under *Loretto* presented here. See *Horne v. Dep't of Agric.*, 576 U.S. 351, 360-61 (2015)

(noting the fundamental distinction between *per se* physical occupation takings like *Loretto*, and other forms of regulatory takings). Cases "cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994); see also *De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) ("according to black letter law, 'a question not raised by counsel or discussed in the opinion of the court' has not 'been decided merely because it existed in the record and might have been raised and considered.'"). *Maher* is not controlling here.

Second, the District Court held that *Loretto* could not be applied here because the metal grate the Moneys seek to remove is an "integrated part of a home's façade." ROA.329. But there is nothing in *Loretto* that makes such a distinction. And even if such a distinction were relevant under *Loretto*, it would not apply to the facts here. As the Moneys noted in their prior briefing, the metal grate they seek to remove is purely decorative. ROA.29. It is attached by a handful of bolts and the City concedes it can be removed without damaging the home. ROA.205. It is no more an "integrated part of a home's façade" than the cable box in *Loretto,* which was also installed by the "previous owner." *Loretto*, 458 U.S. at 421. The District Court's opinion cites no case to the contrary.

Third, the District Court argues that the Moneys fail to state a claim under *Loretto*, because the Moneys have "no historically rooted expectation of compensation for complying with zoning regulations." ROA.329. But there is no zoning exception to the takings clause. Indeed,

most modern takings challenges involve zoning ordinances. Cities may not immunize their land-use restrictions by placing them in the zoning code or referring to them as Historic Zoning. To the contrary, *Loretto* applies "without regard" to the government interest served by the restriction. *Loretto*, 458 U.S. at 434-35. The District Court's opinion provides no basis for its departure from this binding precedent here.

Fourth, the District Court's opinion claims that the Moneys fail to state a claim under *Loretto* because the unwanted metal grate was already on the property at the time of purchase. ROA.329. But the unwanted cable-box was already on the property at the time of purchase in *Loretto*. See *Loretto*, 458 U.S. at 421 (noting that the cable box had been installed by the "previous owner" a year prior to Loretto's purchase). The law in *Loretto* prevented the cable box's *removal* several years later. *Id*. The pre-existence of the unwanted object in this case therefore cannot be a basis to distinguish *Loretto*.

Finally, the District Court's opinion claims that the Moneys fail to state a claim under *Loretto*, because the Ordinance was in effect at the time of purchase and therefore acts as background principle of property law that cannot give rise to a taking. ROA.330. (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)). But this *exact argument* (including the citation to *Lucas*) has been rejected by the Supreme Court. See, *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001).

In *Palazzolo*, the plaintiff challenged the validity of a local regulation involving the filling of wetlands. The government argued that no takings claim was available because the regulation was already in effect at the time of purchase and therefore formed a "background principle[] of state property law" under *Lucas*. *Palazzolo*, 533 U.S. at 626. The Court rejected this approach.

As the Court explained, the "background principle" language from *Lucas* referred to common law restrictions on the nature of property rights like nuisance law. *Id.* at 629-30. It does not apply to any statute or ordinance that happens to be on the books when a property is purchased. If it were otherwise, the Court explained, "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* at 627. A "State would be allowed, in effect, to put an expiration date on the Takings Clause." *Id.*

Thankfully, this is not the law. Rather, the Supreme Court has been clear that if the regulation would have been unconstitutional as applied to property owners when it was enacted, then it remains unconstitutional for subsequent purchasers. *Id.* at 629. A takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630.

Since *Palazzolo*, the Court has upheld takings challenges to laws that were on the books decades before the plaintiffs in those cases

purchased their properties. See, e.g., *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1375-76 (2023) (rejecting government's claim that a law that had been in effect since 1935 formed a background principle of law precluding a takings claim); *Horne v. Dep't of Agric.*, 576 U.S. 351, 355, 135 S. Ct. 2419, 2424 (2015) (finding a law that had been in effect since 1937 nonetheless created a *per se* taking).

This makes sense. We would not tell an individual challenging an ordinance segregating neighborhoods on the basis of race that he lacked injury because the ordinance was already on the books when he moved to the area. *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down racial zoning ordinance as violating property rights). Nor would we tell an individual suffering religious discrimination under a decades-old statute that she lacked a claim because she knew what she was getting into when she moved to the state. Property rights are no different. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."). The District Court erred by dismissing the Moneys' takings claims.

III. THE DISTRICT COURT ERRED BY HOLDING *SUA SPONTE* THAT THE MONEYS FAILED TO PLEAD PLAUSIBLE CLAIMS UNDER ARTICLE 1, SECTION 19 OF THE TEXAS CONSTITUTION

The District Court also erred by holding *sua sponte* that the Moneys failed to plead plausible claims under Article 1, Section 19 of the Texas Constitution.

Like the due process clause of the Fourteenth Amendment, Article 1, Section 19 of the Texas Constitution requires that restrictions on property rights be rationally related to a legitimate government interest. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015). But the Texas constitution differs from federal law in two important ways.

First, in Texas, the local police power over private property is largely limited to policing nuisances and other harmful uses. *Milton v. United States*, 36 F.4th 1154, 1161 (Fed. Cir. 2022) (citing *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012); *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012); *Lombardo v. Dallas*, 73 S.W.2d 475 (1934) (distinguishing federal law from Texas law); see also *Spann*, 235 S.W. 513 at 515. Under this approach, zoning based solely on aesthetics is forbidden. *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 517.

Second, unlike federal rational basis scrutiny, Article 1 section 19 requires at least some consideration of proportionality as well as rationality. *Patel*, 469 S.W.3d at 90. If the "loss to the property owner affected, in proportion to the good accomplished [by the ordinance]" is

unreasonable, then the ordinance must fail. *W. U. Place v. Ellis*, 134 S.W.2d 1038, 1040 (Tex. 1940); *Id.* at 1041 ("the seriousness of the restriction upon the private right is to be considered in balance with the expediency of the public interest.").

Here, the Moneys allege that the Ordinance violates this rule on its face and as applied because (1) the Ordinance's criteria are based solely on aesthetics, and (2) even the Ordinance's criteria are tangentially related to something beyond aesthetics, any marginal benefit to that interest is significantly outweighed by the impact on the Moneys' property rights.

The District Court rejected this approach based on two arguments, both of which are barred by binding precedent and ignore the undisputed facts in this case.

A. Contrary to the District Court's assertion, aesthetic zoning is prohibited under the Texas Constitution.

First, the District Court held that aesthetic zoning is permissible in Texas. But under binding Texas Supreme Court precedent, aesthetic zoning violates Article 1, Section 19 of the Texas Constitution, because it exceeds the scope of the police power. *Lombardo*, 73 S.W.2d at 479 ("[r]egulations interfering with private property rights are invalid if founded upon purely aesthetic consideration."); *Spann*, 235 S.W. at 517 ("municipal regulations interfering with private property rights and founded upon purely aesthetic considerations, are universally held

invalid."); see also Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 Fordham L. Rev. 1013, 1014 (1990), available at http://tinyurl.com/2j774me8 (listing Texas as one of twelve states that still prohibit aesthetic zoning under their state constitutions).

The District Court's opinion does not dispute that cases like *Lombardo* and *Spann* flatly preclude aesthetic zoning—nor could it. The holdings of those cases are clear. Rather, the District Court claims that those cases are outdated because in *Berman v. Parker*, 348 U.S. 26 (1954), the United States Supreme Court took a more expansive view of the police power under the Fourteenth Amendment. ROA.331–32.

But Texas courts are not bound by federal precedent involving the Fourteenth Amendment when interpreting the Texas Constitution. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (state courts are not required to follow federal precedent when interpreting state constitutions); *Davenport v. Garcia*, 834 S.W.2d 4, 11-12 (Tex. 1992) (same); *Howell v. Abbott*, 656 S.W.3d 135, 135 n.1 (Tex. 2022) (Blacklock, concurring) (same).

Moreover, there is no evidence that Texas courts moved away from *Lombardo* and *Spann* after *Berman* was decided. To the contrary, *Lombardo* has been cited by Texas appellate courts almost seventy times since *Berman* was decided and was cited by the Texas Supreme Court as controlling authority on the scope of the police power as recently as 2012.

See *City of Dall. v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012). *Spann* has been cited by Texas courts at least sixty-five times since *Berman* was decided and continues to be cited by members of the Texas Supreme Court regarding the scope of the police power. See, e.g., *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 162–63 (Tex. 2010) (Willett, concurring) (citing *Spann*); *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 466 n.10 (Tex. 1997) (same); S*pring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985) (same); *Du Puy v. Waco*, 396 S.W.2d 103, 107 (Tex. 1965) (same).

As recently as 2019, the Austin Court of Appeals cited *Spann's* view of property rights as controlling. See, e.g., *Zaatari v. City of Austin*, 615 S.W.3d 172, 200 (Tex. App.—Austin, 2019) (quoting *Spann*, 235 S.W. at 515) ("[t]he right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right."); *Pool v. River Bend Ranch, LLC*, 346 S.W.3d 853, 860 (Tex. App.—Tyler, 2011) (same).

Unless and until the Texas Supreme Court unequivocally declares that these land-mark cases have been overturned, the District Court was required to follow them when applying Texas law. See *Hux v. S. Methodist Univ.*, 819 F.3d 776, 780 (5th Cir. 2016). Its refusal to do so warrants reversal.

B. Contrary to the District Court's assertion, the challenged portions of the Ordinance turn on aesthetics.

The District Court next held that even if aesthetic zoning is forbidden, the Moneys' claims still fail because the Ordinance is based on "historical considerations, not aesthetics." ROA.332. But this ignores both the text of the Ordinance and the City's official findings in this case.

As noted above, the Ordinance applies whether a property is historic or not. Dev. Code § 2.5.5.1(B). It applies only to visible changes. *Id*. And it turns on aesthetic factors. Section 4.5.2.1 (I)(1)(a)-(j).

Indeed, of the ten mandatory factors that the Commission "shall consider" when reviewing a certificate of appropriateness, *not one* includes a reference to "history." *Id*. Rather, the Commission "shall consider" whether a change is ***"visually compatible*** with other buildings to which they are ***visually related***" in terms of: (1) height; (2) proportion of the building's front façade; (3) proportion of openings within the facility; (4) rhythm of solids to voids in front facades; (5) rhythm of spacing of buildings on streets; (6) rhythm of entrance and/or porch projection; (7) relationship of materials, texture and color; (8) roof shapes; (9) walls of continuity; and (10) scale of a building. *Id*. (emphasis added).

When Commission members have tried to consider non-aesthetic factors during the application process, the City Attorney has reminded them that "it's really about the aesthetic that the Commission approves" and that other factors may not be considered. Historic Preservation

Meeting, 26:30 (December 2, 2021) available at: https://tinyurl.com/mt32jyv5.

Even the City's briefing in this case concedes that "the Ordinance's purpose is connected to the ***visible value*** to the community—preserving ***what people see*** as they travel City of San Marcos streets." ROA.153 (emphasis added). To say that is not an aesthetic-based restriction deprives those words of all meaning.

It also ignores the City's official findings in this case. As noted above, the Moneys' home is not historically designated. ROA.59. When it was purchased, it had been vacant for years, needed repairs, and was considered a "low historic priority." ROA.59. When the Moneys applied for a Certificate to remove the grate, the City's official findings concluded that: (1) the grate was not a "distinctive feature of the home in the historic resources survey" ROA.197; (2) the City could not confirm whether the grate was original to the house (ROA.197); and most importantly, (3) removal of the grate would "***not affect***" the "historical, architectural, or cultural character of the Historic District." ROA.194 (emphasis added). The City cannot now claim that its denial of the Moneys' permit was based on historic impact.

The District Court's opinion completely ignores this evidence. Instead, it focuses on a handful of statements from Commissioners during the application hearing musing about the "historic quality of the façade" or whether the grate was a "character-defining feature of the

house." ROA.333. But non-binding statements from Commissioners expressing their off-the-cuff opinions cannot override the plain text of the Ordinance and the City's own official findings. This is particularly true at the motion to dismiss stage when the court must accept the Moneys' allegations as true. *Mogollon v. Bank of N. Y. Mellon*, No. 21-11212, 2022 U.S. App. LEXIS 34723, at *11 (5th Cir. Dec. 15, 2022) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). If it were otherwise, then cities could immunize wholly unconstitutional ordinances by simply mouthing the word "history" at hearings before denying permits.

This is not the law. Rational basis scrutiny may be lenient, but it does not demand "judicial blindness." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013) (refusing to accept government claim that regulation was based on stated government interest when the text of the regulation did not actually turn on that interest); *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (court was not required to accept government's claimed reason for its action when the "stated policies behind [the challenged law] are only tenuously related to its provisions.").

The District Court's holding that the challenged ordinance is based on history and not aesthetics should be reversed.

C. The District Court failed to explain how the Ordinance as applied is proportional to the government's alleged interest.

Finally, assuming, *arguendo*, that the denial was based on history, rather than aesthetics, the District Court erred by failing to address the proportionality element of Article 1, Section 19 claims.

As noted above, the Texas Constitution requires that restrictions on property rights not only be rational, but also not "unduly burdensome" given the evidence of the government interest at stake. *Patel*, 469 S.W.3d at 87. This requires the court to evaluate the proportionality between the restriction on property rights and the government interest achieved. *U. Place*, 134 S.W.2d at 1040, 1041.

Here the impairment on property rights is severe. The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433. Here, the Moneys may not make *any* change to the visible portions of their home without prior approval from the Commission. As a result, the Moneys are forced to keep unwanted objects on their property solely at leave of the Commission.

At the same time, any impact to a legitimate government interest is minimal to non-existent. Assuming, *arguendo*, that the Ordinance is based *in part* on history, the Moneys' home is not historic, and the City concedes that removal of the grate would "***not affect***" the "historical, architectural, or cultural character of the Historic District." ROA.194

(emphasis added). In such circumstances, the complete elimination of fundamental property rights, like the right to exclude, is unduly burdensome given the government interest at stake. The District Court's failure to address this issue at all is grounds for reversal.

CONCLUSION

The right to own property includes the right "to possess, use and dispose of it." *Loretto*, 458 U.S. at 435. When a family purchases a home, they expect that they will be able to make aesthetic changes. Families often change the color of their home's exterior, attach or remove exterior finishes, or put up their own decorations. Indeed, nothing so much distinguishes between *owning* a home and *renting someone else's* than having the right to change the aesthetic of the home without asking permission from a landlord.

Here, the City turns that assumption on its head. It requires that an unelected commission of bureaucrats act as landlord, deciding what changes to the aesthetics of the Moneys home it will allow. But Texas does not grant cities this sort of authority over private property, and even if it did, the takings clause would require the City to compensate the Moneys for the use of their property for public benefit. If the City wants the Moneys to keep a memorial to the memory of Mr. Zimmerman on the front of their home, the takings clause requires the City to decide whether it wants to pay for it. The District Court's decision dismissing this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/Chance Weldon
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,975 words. This brief also complies with the type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced type-face.

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