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' REPLY BRIEF

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Appellants (the Moneys) raise constitutional challenges to a local ordinance that requires them to keep unwanted objects on their property for purely aesthetic purposes.

There is no dispute that if the Moneys remove a small metal "Z" from the front of their home they will be subject to civil and criminal penalties under a local ordinance that prohibits all changes to the front of their home that could affect the aesthetic character of the neighborhood. The Moneys allege that this government mandated physical occupation of their home for solely aesthetic purposes is facially unconstitutional under both the United States and Texas Constitutions.

Under existing law, the Moneys did not have to do anything further to bring these claims to court. *Zaatari v. City of Austin*, 615 S.W.3d 172, 184 (Tex. App.—Austin, 2019) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

But the Moneys chose to give the City a chance to be reasonable. The Moneys applied with the City to remove the "Z," insisting that they did not like its aesthetic, and that its association with a notorious previous owner was contrary to their family's values. ROA.221–22.

As expected, the City applied the Ordinance as written and denied the Moneys' request. The City stands by its interpretation of the Ordinance.

Nevertheless, the City claims that it cannot be sued for this ongoing invasion of the Moneys' property rights, because the Moneys did not file

a (now time-barred) voluntary administrative appeal to a local board that, under the terms of the ordinance, had no authority to grant the relief the Moneys seek. Moreover, the City claims that the United States and Texas Constitutions have nothing to say about these sorts of ordinances.

As explained in the Moneys' opening brief and below, these arguments are directly contrary to binding precedent.

ARGUMENT

I. *WILLIAMSON COUNTY'S* PRUDENTIAL RIPENESS TEST DOES NOT BAR REVIEW OF THE MONEYS' FEDERAL TAKINGS CLAIMS.

To begin, the City contends that the Moneys' takings claims fail to meet the special prudential ripeness test created in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). City Br. at 11. But, as explained below, *Williamson County* does not apply to the Moneys' facial challenge. And even as to the Moneys' as-applied claim, the modest burden of *Williamson County* finality has been met.

A. *Williamson County*'s prudential ripeness test does not apply to facial challenges.

First, the City fails to explain how *Williamson County* bars the Moneys' facial challenge. As noted in the Moneys' opening brief, *Williamson County* finality does not apply to facial claims. *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 287 (5th Cir. 2012).

The City's sole response is that the Moneys also bring an as-applied takings challenge. City Br. at 13. But the existence of an as-applied

challenge has no bearing on whether the Moneys' facial challenge is ripe. At a minimum, the district court's holding that the Moneys' facial challenge was not ripe should be reversed.

B. The Supreme Court has recently and repeatedly held that administrative exhaustion is not required for *Williamson County* finality.

The Moneys' as-applied challenge likewise satisfies *Williamson County's* prudential ripeness test. An as-applied claim is ripe under *Williamson County* once the property owner has received a "final" decision from the "initial decisionmaker" applying the challenged Ordinance to the property. *Doyle v. United States*, 165 Fed. Cl. 161, 166–67 (2023) (citing *Pakdel v. City & Cty. of S.F.*, 594 U.S. 474 (2021))

This requirement is a "modest" one. *Id.* at 166. Unlike administrative exhaustion, which requires that property owners raise all claims and check all boxes before proceeding to federal court, the purpose of finality is simply to allow the government an opportunity to come to a position about how often vague land-use restrictions apply before being hauled into court. *Id.*

That burden is met here. The Moneys applied for a certificate of appropriateness which was denied. ROA.56. The Ordinance refers to that decision as a "final decision." ROA.56. And, to this day, the City stands by the outcome. The Moneys may not remove the "Z" from their home without facing penalties. Dev. Code § 2.3.7.4. That is all that is required for finality. *Pakdel*, 594 U.S. at 478 (finality is met once the

property owner is left with the choice between complying with the restriction on their rights "or facing the wrath of the government.")

The City objects that the Moneys did not file a (now time-barred) voluntary administrative appeal of the denial of their Certificate to the Zoning Board of Adjustments (the Board). But as explained in the Moneys' opening brief, the Supreme Court has repeatedly held that "administrative exhaustion of state remedies is not a prerequisite for a takings claim." *Pakdel*, 594 U.S. at 480 (cleaned up). Once the initial decisionmaker has reached its decision, the claim is ripe. *Doyle*, 165 Fed. Cl. at 166–67.

As explained in the Moneys' opening brief, this case is indistinguishable from the Court's recent decision in *Pakdel*. As in *Pakdel*, the Moneys filed a request for a permit that was denied. Compare *Pakdel*, 594 U.S. at 475., with ROA.56. As in *Pakdel* the Moneys chose not to pursue an administrative appeal, and any appeal would now be time-barred. Compare *Pakdel*, 594 U.S. at 478., with ROA.56. And as in *Pakdel*, the government stands by its decision, leaving the Moneys with a choice between complying with this restriction on their rights "or facing the wrath of the government." *Pakdel*, 594 U.S. at 478. Therefore, just as in *Pakdel*, finality is met.

Indeed, even before the Court clarified the finality standard in *Pakdel*, administrative exhaustion would not have been required in this case. In *Williamson County*, the Court made clear that an appeal to the

Board of Zoning Appeals was not required for finality "because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." 473 U.S. at 193. Here, as in *Williamson County*, the Ordinance makes clear that the Board does not exercise independent decision-making authority. ROA.141. Appeals are limited to "substantial evidence" review, and the Board, "may not substitute its judgment for the judgment of the Historic Preservation Commission." ROA.141. Administrative exhaustion is therefore not required. *Williamson Cty.*, 473 U.S. at 193.

C. The City's new finality argument fails.

In its motion to dismiss, the City did not dispute that the Moneys received a final decision from the Commission. The City simply argued that the Commission's decision was not sufficient for finality because the Moneys did not appeal that decision to the Board. ROA.133.

Now, for the first time on appeal, the City argues that the Moneys did not receive a final decision from the Commission. Assuming this argument is not waived, it fails. See *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 203 (6th Cir. 2021) (*Williamson County* finality arguments that are not raised are forfeited). As explained above, *Williamson County* finality is a modest burden. It only requires that the "initial decisionmaker" come to a conclusion about how an ordinance applies. *Williamson Cty.*, 473 U.S. at 193. Here, the Commission concluded (as the plain text of the Ordinance would suggest) that the

Moneys may not remove the "Z," *period*. The Commission held that this prohibition applies even though keeping the "Z" on the home is contrary to the Moneys' values. City Br. at 14. That is all that is required for finality.

In its response, the City does not argue that any pertinent facts "were not known" or that "the Commission was mistaken," or that "the Commission would change its decision in any way." City Br. at 15.

Rather, the City tries to confuse the Court. The City now suggests—citing nothing—that had Ms. Money emphasized Mr. Zimmerman's Klan ties at the final hearing, that the Moneys' application "*may* have been considered differently." City Br. 14 (emphasis added).

But this late-breaking argument is disingenuous. The City admits that the Commissioners already knew about Mr. Zimmerman's alleged Klan ties. City Br. at 15. And the City admits that those ties are "wholly irrelevant" to its application of the Ordinance. ROA.372. In short, the City admits that Ms. Money's alleged lack of emphasis at the hearing had no effect on the outcome.

More importantly, the City's argument misunderstands finality. Finality does not require that property owners raise every rhetorical strategy at the administrative level. *Palazzolo*, 533 U.S. at 622. It merely requires that the City have an opportunity to clear up any ambiguity about the Ordinance. *Id.* The City points to nothing in the Ordinance, or the Moneys' claims here, that turns on Mr. Zimmerman's

Klan ties. Rather, the Commission's holding on the application of the Ordinance is clear—the Moneys may not remove the "Z," despite its conflict with their values. That is sufficient clarity for finality. *Id.* The Moneys should not be barred from court because of alleged verbal imprecision on an issue the City admits it was aware of and admits is "wholly irrelevant." City Br. at 15.

II. THE MONEYS PLED VIABLE TAKINGS CLAIMS UNDER *LORETTO*.

Moving to the district court's *sua sponte* holdings on the merits, the City's response also fails to rebut the Moneys *per se* takings claims under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

In *Loretto*, the plaintiff purchased a building with a small metal cable box that had been attached to the building by a previous owner. 458 U.S. at 422. The Court held that a law requiring the plaintiff to keep that pre-existing cable box attached to her building was a *per se* taking because it required the physical occupation of her property for a public benefit without compensation. *Id.*

Here, as in *Loretto*, the Moneys purchased a home with a small metal object attached to the home by previous owner. As in *Loretto*, the Moneys are required to keep that small metal object attached to their home for an alleged public benefit. Therefore, just like *Loretto*, the Moneys have adequately pled a takings claim. The City raises several arguments in response, each of which fails.

A. There is no historic zoning exception to the Takings Clause.

First, the City claims that there is no taking here because cities have the authority to engage in historic zoning, and "[t]here is no 'historically rooted expectation of compensation' for complying with zoning regulations." City Br. at 17.

But there is no zoning exception to the Takings Clause. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 707 (1999).

The City's sole authority to the contrary is a misquote from *Loretto*. But, contrary to the City's misquotation, *Loretto* did not hold "[t]here is no 'historically rooted expectation of compensation' for complying with zoning regulations." City Br. at 17 (quoting *Loretto*, 458 U.S. at 441.) To the contrary, the Court concluded that "a permanent physical occupation of property *is a taking*. In such a case, the property owner *entertains a historically rooted expectation of compensation.*" *Loretto*, 458 U.S. at 441 (emphasis added).

In any event, the Moneys do not dispute that cities have the power to zone. Rather, the Moneys claim that the way the City has chosen to exercise its authority under *this ordinance* runs afoul of the Takings Clause. The City may not avoid this claim simply because its unconstitutional restriction on the Moneys' property rights was placed in the zoning code. *Powell v. City of Hous.*, 628 S.W.3d 838, 866–67, n. 37 (Tex. 2021) (Bland, J. concurring) (the historic zoning power is "subject

to the limitations of the Constitution, including the protection of private property.") (citing *Spann v. City of Dall.*, 235 S.W. 513, 515 (Tex. 1921).

Nor do the Moneys suggest that the City is powerless to protect historic structures. The City's own ordinances provide a mechanism to protect historic structures via the same sort of regulatory regime it seeks to impose here, by condemning the area as an "historic easement." ROA.235. But in that case, the City would have to pay for it. ROA.235. The Moneys simply oppose the City's attempt to achieve this "desire by a shorter cut than the constitutional way of paying for the change." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

B. The Supreme Court has repeatedly held that post-enactment transfer does not preclude takings claims.

Next, the City claims that there is no taking here because the Ordinance was on the books when the Moneys purchased their home and the Ordinance therefore forms a "preexisting limitation on Appellants' title." City Br. at 18. But as explained in the Moneys' opening brief, this argument has been repeatedly rejected by the Supreme Court. App. Br. at 28–30 (collecting cases).

The City responds that those cases involved unlawful or unreasonable restrictions on property, and that this ordinance is allegedly neither. City Br. at 18. But this argument assumes what it is trying to prove. The reason this case exists is because the Moneys believe that the challenged ordinance is unlawful. The City therefore cannot

hide behind the fact that its ordinance was on the books when the Moneys moved to town. *Palazzolo*, 533 U.S. at 629.

C. This Court does not treat mandatory physical occupations of property as "use" restrictions.

Next, the City claims that the Ordinance is not a mandatory occupation, it is a restriction on use. City Br. at 19.

But the City's historic district guidelines "have no control on the use of the building." ROA.233. Rather, as in *Loretto*, the City requires that the Moneys keep an object attached to the front of their home.

The City claims that this Court has refused to apply *Loretto* in other physical occupation cases involving minerals and demolition permits. City Br. at 17–18. But neither case the City cites contains such a holding.

In *Vulcan Materials Co. v. City of Tehuacana*, this Court found that an ordinance restricting the removal of minerals was likely a total taking under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). 369 F.3d 882, 891 (5th Cir. 2004). The Court mentioned physical occupation claims in two sentences. *Id.* at 888. One sentence noted that such claims exist under Texas precedent. *Id.* And a second sentence noted that the plaintiff had not raised the issue. *Id.* That is not precedent for whether *Loretto* can apply here.

Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) also says nothing about *Loretto* claims. In that case, the plaintiff claimed that the denial of a demolition permit was a taking because maintaining the

existing structure would be costly and therefore the denial of the demolition permit reduced the value of the property. *Id*. at 1065. *Loretto* claims were not raised or discussed. Indeed, *Loretto* had not yet been decided. Nothing in that case suggests that this Circuit has departed from subsequent binding precedent holding that physical occupation claims are examined under *Loretto*. See *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("Cases cannot be read as foreclosing an argument that they never dealt with.")

In any event, the Moneys do not ask the Court to make broad declarations about the outer bounds of *Loretto*. They ask that the Court apply *Loretto* to a small metal object attached to the front of a home—the same facts at issue in *Loretto* . That is not the sort of claim a court should dismiss *sua sponte*.

D. As in *Loretto*, the fact that government agents did not personally install the "Z" is wholly irrelevant to whether the City's ban on removing the "Z" constitutes a mandatory physical occupation.

Next, the City claims that *Loretto* does not apply because the City "did not install the Juliette balcony on the façade of Appellants' residence" or "order or authorize someone else to enter the premises and install it." City Br. at 17.

But nothing in *Loretto* or its progeny requires that government agents be the ones to invade the property. In *Loretto*, the cable box was installed by a "previous owner"—not the government. 458 U.S. at 421.

There, as here, the government simply prevented the plaintiff from removing it.

E. The fact that the Moneys technically maintain title to the property does not preclude takings claims under *Loretto*.

Finally, the City implies that *Loretto* is inapplicable because the Moneys, rather than the government or someone else, technically hold title to the unwanted "Z". City Br. at 16–17. But this argument places form over substance in a way the Supreme Court has rejected in *per se* takings claims. See *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 155(2021) (rejecting the government's argument that *Loretto* did not apply because the government had not technically taken a formal easement under state law).

The Moneys do not own the "Z" in any meaningful way. As the Texas Supreme Court has explained, the ownership of property includes "right of use, enjoyment and disposal." *Spann*, 235 S.W. at 514. Anything "which destroys any of these elements of property, to that extent destroys the property itself." *Id.*; see also *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 398 (6th Cir. 1999) (same). Here, the Moneys may not move, use, trade, alter or destroy the "Z" without leave from the City. ROA.139. Indeed, even minor changes to the "Z's" appearance are forbidden. ROA.139. Nor is there any other use that the Moneys may derive from the "Z". The Juliette balcony is not functional. Its only value is to be looked at—something the Moneys do not wish to do. In short, the

"Z" exists on the Moneys' home solely for the benefit of the City or the Moneys' neighbors. In that sense, it is no different than the cable box at issue in *Loretto*. The fact that the City has left the Moneys with paper title to the "Z" is irrelevant.

III. THE MONEYS WERE NOT REQUIRED TO EXHAUST LOCAL ADMINISTRATIVE REMEDIES BEFORE BRINGING THEIR STATE LAW CLAIMS.

Moving to the state constitutional claims, the City argues that the Moneys' claims under the Texas Constitution are barred because they allegedly did not exhaust administrative remedies for seeking compensation before filing suit. City. Br. at 31.

While the City admits that the Supreme Court did away with the state exhaustion requirement for federal takings claims in *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019), (City Br. at 11); the City apparently assumes that this requirement still remains for state-law takings claims. City Br. at 31–33 (citing pre-*Knick* Texas takings cases).

Thankfully, this Court need not resolve this question because the Moneys do not bring state-law takings claims or any other state-law claim seeking compensation. The Moneys argue that the Ordinance exceeds the police power and is therefore unconstitutional under the Texas Constitution, regardless of whether compensation is paid. The Moneys seek solely declaratory and injunctive relief to prevent this ongoing unlawful restriction on their property.

Under Texas law, administrative exhaustion is generally not required for: (1) challenges seeking solely prospective injunctive relief; (2) challenges raising pure issues of law; (3) certain constitutional challenges; or (4) situations where the administrative body could not provide the relief requested. See e.g. *White Deer Indep. Sch. Dist. v. Martin*, 596 S.W.3d 855, 861–62 (Tex. App.—Amarillo, 2019); *City of Richardson v. Bowman*, 555 S.W.3d 670, 686 (Tex. App.—Dallas, 2018) . In short, exhaustion is not required for the types of state-law claims presented here.

This distinction makes sense. Until recently, both state and federal law required takings plaintiffs to exhaust state law remedies before seeking compensation in court. *Knick*, 588 U.S. at 191. These cases were based on the (now defunct) presumption that a takings clause violation does not occur until compensation is officially and finally denied. *Id.* Therefore, a takings claim could not be ripe while there were still administrative avenues available that could provide compensation and therefore moot the takings claim. *Garcia v. City of Willis*, 593 S.W.3d 201, 211 (Tex. 2019).

Those concerns are not present when—as here—the party argues that the regulation at issue is beyond the police power and therefore would violate their rights, even if compensation was paid. See *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006) (noting the distinction for exhaustion purposes between a case seeking a particular

decision from an agency and one challenging the validity of the statute the agency applies).

The Moneys state-law claims do not arise from any alleged right to a permit or a right to compensation. Rather, the Moneys argue that the City lacks authority to regulate their property in the manner it does under the Ordinance—full stop. The Moneys were not required to raise these claims before the Board through an administrative appeal because the Board had no authority to grant the relief they seek. Even if the Board could have reversed the Commission's decision on the "Z," it would not moot this case. The Moneys would remain subject to the same ordinance and would have to go before the same unconstitutional Commission anytime they wanted to make any aesthetic change to the property. This ongoing unconstitutional burden on their property rights would be sufficient to keep this case alive. *City of Grapevine v. Muns*, 651 S.W.3d 317, 333 (Tex. App.—Fort Worth, 2021) ("we agree with the Homeowners that they were not required to exhaust their administrative remedies before filing suit because their claims in this suit are challenging the STR Ordinance's constitutionality and would not have been mooted by an administrative decision."). The City's exhaustion arguments therefore fail.

IV. THE MONEYS PLED VIABLE DUE COURSE OF LAW CLAIMS UNDER THE TEXAS CONSTITUTION.

The City's arguments on the merits of the Texas claims also fail. Like the Federal Due Process clause, Texas's Due Course of Law clause requires that restrictions on private 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 Texas courts' interpretation of the "Due Course" clause varies from federal rational-basis scrutiny in two ways that are relevant to this case.

First, Texas courts take a narrower view of what constitutes a legitimate government interest to regulate property. In Texas, the police power over private property is largely limited to policing harmful or incompatible uses. *Milton v. United States*, 36 F.4th 1154, 1161 (Fed. Cir. 2022) (citing *Lombardo v. Dallas*, 73 S.W.2d 475 (Tex. 1934)). As the Texas Supreme Court has explained, "the police power is subordinate to the 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." *Lombardo*, 73 S.W.2d at 479. As such, "the police power may be invoked to abridge the right of the citizen to use his private property when such use will endanger public health, safety, comfort or welfare—*and only* when this situation arises." *Id*. (emphasis added).

Applying this harm-based approach to the police power, the Texas Supreme Court has long held that "[r]egulations interfering with private

property rights are invalid if founded upon purely aesthetic consideration." *Lombardo*, 73 S.W.2d at 479; see also, *Spann*, 235 S.W. at 517 (collecting cases).

Second, unlike federal rational basis scrutiny, Texas rational basis 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).

The Ordinance fails this test.

A. The Ordinance is not rationally related to a legitimate government interest.

To begin, the Ordinance is not rationally related to a legitimate government interest. There is no dispute that the Ordinance does not target nuisances or other things that would traditionally fall within the police power. Rather, the City has consistently pointed to two alleged government interests for its ordinance—preserving historic structures and preserving aesthetics.

But, as explained below, the Ordinance is not rationally related to preserving historic structures. And aesthetics, standing alone, is not a legitimate basis to restrict property rights under the Texas Constitution.

1. The Ordinance is not based on history.

To begin, the Ordinance is based on aesthetics, not history. As explained in the Moneys' opening brief, the Certificate of Appropriateness requirements: (1) apply whether a home is historic or not; (2) apply to vacant lots; (3) only apply to aesthetic changes to a property; and (4) turn on a list of mandatory aesthetic criteria that do not even mention history. App. Br. at 35–36.

Under the City's requirements, a back-porch swing built by Davy Crockett himself would receive no protection (because it is not visible from the street), but a tacky set of vinyl front window shutters from 1985 would have to remain a permanent fixture unless the Commission approved the aesthetics of removing them. See, ROA.226–27.

An Ordinance that provides no protection for actual historic structures, but flatly prohibits aesthetic changes to non-historic buildings and vacant lots cannot be held to be rationally related to preserving historic structures. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013) (holding that a law restricting casket sales was not rationally related to preventing leakage of human remains into the soil when the law simultaneously allowed individuals to be buried without a casket at all).

The City raises three arguments in response.

First, the City points to the general guidelines for permits, which require the Commission to consider "the effect of the activity on

historical, architectural or cultural character of the Historic District or Historic Landmark." City Br. at 25.

But this vague reference to "historical character" does not change the aesthetic nature of the Ordinance, or its application in this case. At a minimum, the general guidelines are listed in the disjunctive. As a result, applications can be—and often are—denied solely based on "architectural or cultural character," which the Texas Supreme Court recognizes as aesthetic criteria. See *Spann*, 235 S.W. at 516.

More importantly, the guidelines' vague reference to "historical character" is a reference to maintaining an historic appearance or aesthetic, not to preserving actual historic structures. The criteria for receiving a Certificate bear this out. As noted *supra*, the Ordinance applies to vacant lots and non-historic structures. App. Br. at 6. And all ten mandatory criteria for receiving Commission approval turn on "visual compatibility" without a single reference to history. App. Br. at 35. As the City Attorney has made clear, "it's really about the aesthetic that the Commission approves" ROA.190.

Second, the City points to the Secretary of the Interior's Standards for Rehabilitation—a subset, of a subset, of national standards that the Commission *may* also consider when making its determination. City Br. at 28. Like the guidelines discussed above, these guidelines also contain a passing reference to the word "historical."

But, in context, it's clear that these too turn on aesthetics. The Secretary's standards allow the City to consider "features and spaces that characterize a property" with an eye towards "[d]istinctive features [and] finishes" and avoiding "a false sense of historical development, such as adding conjectural features or architectural elements from other buildings." ROA.202. But, as noted above, these restrictions apply to vacant lots and non-historic homes. ROA.226. In that context, whether something is a "distinctive feature," or creates a "false sense of historic development" is an aesthetic judgment—i.e., does this *look* historic? It has nothing to do with actually preserving historic structures.

Practice bears this out. The City's own findings in this case were that the Moneys' home was *not* historic and that removal of the "Z" would "not affect" the "historical, architectural, or cultural character of the Historic District." ROA.64; ROA.199. Nevertheless, the City denied the Moneys' request for a Certificate, based on the same criteria it points to now. ROA.56.

Similarly, the City recently spent half an hour applying these criteria to a fence for a non-historic home built in the 1980s. ROA.42. The City may not now claim that those criteria turn on preserving historic structures. To the contrary, as the City declared in its briefing below, the purpose of the criteria is about "preserving what people see." ROA.158.

Finally, the City contends that even if the challenged provisions turn on aesthetics, the Commission's decision in this case was based on historic impact. City Br. at 25.

But, as noted *supra*, the City's official findings were that the Money's home is not historic and that removal of the "Z" would not affect the historic character of the district. ROA.199. The City may not avoid the plain text of its Ordinance and its own official findings simply because a Commission member referred to the "Z" as a "character-defining element of the house." City Br. at 26.

2. Aesthetic preference alone is not a legitimate basis to restrict property rights under the Texas Constitution.

Turning to the City's actual justification for its ordinance, aesthetics are not a legitimate basis under the Texas Constitution to restrict private property rights. *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 517.

Texas is not alone in this approach. Several other states have rejected aesthetics alone as a legitimate government interest for zoning under their state constitutions. Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 Fordham L. Rev. 1013, 1014 (1990), (listing Texas as one of twelve states that still prohibit aesthetic zoning).

As explained *supra*, the Texas Supreme Court has largely limited the scope of the police power over private property to policing harm. *Spann*, 235 S.W. at 515.

Contrary to the City's unsupported suggestion, this approach to property rights is not some long-forgotten precedent. It is cited regularly as controlling. See, e.g., *Labrie v. State*, No. 09-21-00027-CV, 2022 Tex. App. LEXIS 1315, at *24 (Tex. App.—Beaumont, Feb. 24, 2022) (Because "the right of the citizen to use his property as he chooses so long as he harms nobody is an inherent and constitutional right, the police power of the State cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort, or welfare.") (quoting *Spann*, 235 S.W. at 515); *Zaatari*, 615 S.W.3d at 200 (the "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.") (quoting Spann, 235 S.W. at 515); *Pool v. River Bend Ranch, LLC.*, 346 S.W.3d 853, 860 (Tex. App.—Tyler 2011) (same) (citing *Spann*, 235 S.W. at 515); *LJD Properties, Inc. v. Greenville*, 753 S.W.2d 204, 207 (Tex. App.—Dallas, 1988) ("Since the right of the citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for abridgment of a particular use of private property, unless such use reasonably endangers or

threatens the public health, the public safety, the public comfort or welfare.") (quoting *Spann*, 235 S.W. at 515).

Applying this approach, the Court has long held that aesthetic zoning is forbidden. *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 517. This theory is largely codified in the Zoning Enabling Act which is where Texas cities derive their statutory authority for zoning. Tex. Loc. Gov't Code § 211.004. Under the ZEA zoning is limited to seven criteria, none of which involve aesthetics. *Id.*

The City raises two arguments in response. *First* the City claims that the Texas Supreme Court essentially approved the constitutionality of aesthetic zoning in *Powell*. City Br. at 30. But *Powell* was a narrow statutory case about the procedural requirements of the ZEA and the City of Houston's charter. The Court specifically stated that it *was not* reaching any constitutional questions about aesthetic or historic zoning. *Powell*, 628 S.W.3d at 842–43 (noting that amici, including the Attorney General of Texas, had argued that aesthetic regulations were not within the police power, but that the parties had not raised the issue and therefore the Court could not—and would not—reach it). Four Justices wrote separately in concurrence, agreeing that the Court could not reach the issue, but also noting that even historic regulations remained subject to the Court's traditional police power analysis laid out in *Spann*. See *Powell*, 628 S.W.3d at 866–67, n. 37 (Bland, J. concurring) (citing *Spann*, 235 S.W. at 515). The Texas Supreme Court typically does not overturn

a century of precedent by explicitly refusing to reach an issue and then citing existing precedent on that issue as authority.

Second, the City claims that federal courts—including this Court—have rejected Texas's approach to aesthetic zoning, and that some subsequent Texas appellate court cases have allegedly called the traditional Texas approach into question. City Br. at 24. But, as explained in the Moneys' opening brief, Texas courts are not required to follow federal precedent when interpreting the Texas Constitution. App, Br. at 33. And most of the Texas court cases cited by the City *confirm*, rather than deny, that zoning based solely on aesthetics is forbidden. See, e.g., *Houston v. Johnny Frank's Auto Parts*, 480 S.W.2d 774, 780 (Tex. Civ. App.—Fort Worth 1972) (applying *Spann* on aesthetics); *Niday v. City of Bellaire*, 251 S.W.2d 747, 750 (Tex. Civ. App.—Galveston 1952, no writ) (following *Lombardo* on aesthetics); *City of Texarkana v. Mabry*, 94 S.W.2d 871, 875 (Tex. Civ. App.—Texarkana 1936) (following *Lombardo* on aesthetics). Others are agnostic on the issue. See, e.g., *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 934 (Tex. 1998) (discussing federal takings law, not Texas Due Course of Law claims). To the extent any other cases question that principle—as the City suggests—it is axiomatic that a Texas court of appeals cannot overturn Texas Supreme Court precedent.

In any event, this Court need not resolve such tensions. When exercising supplemental jurisdiction over state law claims, a federal

court's obligation is simple. It should follow the decisions of the state's highest court. *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 44 (2018). If an opinion of the Texas Supreme Court is directly on point, that is the end of the analysis. The court may not disregard that precedent, even if the court "think[s] a precedent's best days are behind it." *Ass'n of Club Execs. of Dall., Inc. v. City of Dall.*, 83 F.4th 958, 965 (5th Cir. 2023). If the case law is conflicting, a "lower court should follow the case which directly controls . . . even if the lower court thinks the precedent is in tension with some other line of decisions." *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023)(cleaned up).

Here, the only Texas Supreme Court cases on the topic are clear — aesthetic zoning is forbidden. *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 517. As explained in the Moneys' opening brief, those cases remain good law and are regularly cited without controversy in Texas. The lower court was not free to guess as to the future direction of Texas law.

B. The Ordinance is unduly burdensome as applied.

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 the Money's 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. *W. 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 "Z" would "***not affect***" the "historical, architectural, or cultural character of the Historic District." ROA.199 (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.

The City raises two arguments in response. *First*, the City claims that the Moneys waived their proportionality argument by not raising it in response to the City's motion to dismiss. City Br. at 29–30. But the City's motion to dismiss was based solely on ripeness. ROA.126–35. It

did not challenge the merits. The Moneys were not required to respond to arguments that were not raised.

There is no dispute that the Moneys raised and fully briefed proportionality in their summary judgment motion—which was filed *before* the City filed its motion to dismiss. ROA.43–44. The Moneys likewise raised and fully briefed the issue *again* in their objections to the Magistrate's report, once the Magistrate decided to dismiss the Moneys' claims on the merits *sua sponte*. ROA.327. In short, the Moneys have raised and fully briefed proportionality at every opportunity in this case. That is not what waiver looks like.

Second the City claims that the undue burden/proportionality test from *Patel* is limited to right to earn a living claims. City Br. 30–31. But the undue burden test was applied in property rights cases more than a century before the Texas Supreme Court expanded that test to cover right to earn a living claims in *Patel*. See, e.g., *Hous. & T. C. R. Co. v. Dallas*, 84 S.W. 648 (Tex. 1905) (applying burden and proportionality test to property-rights based challenge to a local ordinance restricting railroad crossings); *W. U. Place v. Ellis*, 134 S.W.2d 1038, 1040, 1041 (Tex. 1940) (same). Indeed, the very first case cited by *Patel* when discussing the undue burden test was a property rights based challenge to a zoning statute. *Patel*, 469 S.W.3d at 87. The City's attempt to limit the undue burden test fails.

CONCLUSION

For the forgoing reasons and those discussed in the Moneys' opening brief, the District Court's judgment dismissing this case should be reversed and vacated, and the Moneys should be allowed to argue their case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 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.

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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 6,477 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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