CASE 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
Case No. 1:23-cv-00718-RP

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR. R. 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 disqualification or recusal.

1.	Appellants:	Kristy Kay Money Rolf Jacob Straubhaar
2.	Counsel for Appellants:	Robert Henneke Chance Weldon Christian Townshend Texas Public Policy Foundation
2.	Appellees:	City of San Marcos Amanda Hernandez
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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34, Appellees believe that the facts and legal arguments relative to this appeal are adequately presented in the Brief of Appellees and the record on appeal; thus, the Court's decisional process of the issues presented would not be significantly aided by oral argument. Appellees therefore submit that oral argument is unnecessary to the disposition of this appeal and respectfully request that the Court affirm—in all respects—the district court's dismissal order and final judgment (ROA.398-400) based on the briefs and record before it. However, should this Court determine that oral argument is necessary in this case, Appellees respectfully request oral argument to respond to Appellants and to any questions from the Court.

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BRIEF OF APPELLEES

CITY OF SAN MARCOS AND AMANDA HERNANDEZ, in her official capacity as Director of Planning and Development Services (collectively, "Appellees"), Appellees herein, submit the following arguments and authorities in support of its response to the appeal by Appellants Kristy Kay Money and Rolf Jacob Sraubhaar ("Appellants") of the District Court's March 13, 2024 Order and Final Judgment dismissing Appellants' case against Appellees for failing to state a claim under both federal and state law. ROA.398-400.

STATEMENT OF THE ISSUES

Appellees do not agree that Appellants have properly framed the issues in this appeal, and therefore restate the issues to explain the basis of the District Court's ruling more accurately:

1. Whether the District Court properly concluded that Appellants' federal takings claim was not ripe.

The District Court properly dismissed Appellants' federal takings claim because the claim was not ripe when Appellants failed to obtain a final decision from the City of San Marcos before pursuing their claim.

2. Whether the District Court properly concluded Appellants failed to state a *per se* federal takings claim.

The District Court properly dismissed Appellants' *per se* federal takings claim when there were no facts alleged that the government physically occupied Appellants' house or authorized others to do so.

3. Whether the District Court properly concluded Appellants failed to state a plausible claim under the Texas Constitution.

The District Court properly dismissed Appellants' claim under the Texas Constitution even if the regulation was based on aesthetic reasons, but is further and expressly authorized under the public and statutorily recognized basis of historical preservation.

STATEMENT OF THE CASE

This matter arises from a decision of the San Marcos Historic Preservation Commission. In 2017, Appellants purchased real property located in the Burleson Historic District, designated a Historic District more than 10 years earlier, in 2005. ROA.8; ROA.143. The purpose of the Historic District is set out in the language of the ordinance:

> **Section 4.5.2.1 Historic District**
>
> **A. Purpose.** The purpose of HD, Historic District is to promote the educational, cultural and economic welfare of the public and of the City by preserving, conserving, and protecting Historic Structures, Streets and neighborhoods that serve as visible reminders of the history and cultural heritage of the City, the State and the United States. Furthermore, it is the purpose of HD, Historic District to strengthen the economy of the City by stabilizing and improving property values in historic areas and to encourage new Buildings and developments that shall be compatible with the existing historic Buildings and squares.

ROA.143.

Per the provisions of the San Marcos Development Code, Appellants were required to seek a Certificate of Appropriateness from the San Marcos Historic Preservation Commission ("Commission") to make certain alterations to the property, specifically including alterations to the front façade. ROA.138. Section 2.5.5.1(A) states:

> **Purpose.** The purpose of a certificate of appropriateness is to assure that construction, alteration, restoration, relocation, or demolition of a structure, or alterations to the site or appurtenances in a Historic District or a Historic Landmark is congruous with the historical, architectural or cultural aspects of the district or landmark. Furthermore, the purpose of a certificate of appropriateness is to make certain that historic structures, streets and neighborhoods are preserved and protected.

ROA.138. A decision of the Commission may be appealed to the San Marcos Zoning Board of Adjustments within ten days of the Commission's decision. ROA.140. Within the Ordinance specific information is provided about what is being protected and preserved, along with more information and guidance about the historical styles and materials from the various historical times reflected in the San Marcos historical districts. ROA.254.

The Commission is directed to consider the following factors when reviewing a Certificate of Appropriateness:

> A. Consideration of the effect of the activity on historical, architectural or cultural character of the Historic District or Historic Landmark;
> B. For Historic Districts, compliance with the Historic District regulations;
> C. Whether the property owner would suffer extreme hardship, not including loss of profit, unless the certificate of appropriateness is issued; and
> D. The construction and repair standards and guidelines cited in Section 4.5.2.1.

ROA.142.

Six years after purchasing the property that they knew was located in and was subject to the restrictions of the Historic District regulations, Appellants submitted a request for removal of a Juliette balcony located on the second story front façade. ROA.11. Appellant Money appeared at the Commission hearing and, when asked why she sought removal of the balcony, she indicated that they did not like it and a vague reference to "values." ROA.144, 4:10-4:30, 7:12-8:00. There was no mention of the basis for removal pled in the lawsuit. ROA.144, 4:10-4:30, 7:12-8:00. At the hearing, Commission members discussed the historical nature and significance of the balcony. ROA.144, 5:50-7:00, 8:17-9:21. The request for removal was denied by the Commission following a unanimous vote during the hearing. *Id.*

The Commission send a letter on May 5, 2023, advising Appellants that they could appeal to the Zoning Board of Adjustments within ten days, which Appellants never did. ROA.146.

Instead, Appellants filed suit alleging unconstitutional *per se* taking in violation of the United States Constitution and an unconstitutional violation of Article I Section 19 of the Texas Constitution. ROA.7-8. Appellants also filed a motion for summary judgment five days after filing their Complaint, before Appellees had been served or appeared. ROA.25.

Appellees moved to dismiss the state and federal claims. ROA.126. Magistrate Judge Susan Hightower considered all motions, responses, replies, and Appellants' sur-reply and recommended granting the motion to dismiss. ROA.324-327.

The Magistrate Judge noted that "[t]he Zoning Board never had the opportunity to review Plaintiffs' request to remove the balcony, so it is unknown what decision it would have reached—particularly had Plaintiffs ever raised their asserted concern about Zimmerman's Klan association." ROA.331.

Magistrate Judge Hightower also determined that Appellants had failed to state a *per se* takings claim. ROA.333-335. In doing so, the Magistrate Judge distinguished the *Loretto* decision, noting that "the Juliette balcony is intrinsic—and apparently original." ROA.334. "The balcony was on the home when Plaintiffs bought it." ROA.334. "Plaintiffs allege no facts stating a plausible claim that the government has 'invaded' or physically occupied Plaintiffs' home or caused them to suffer the 'special kind of injury when a *stranger* directly invades and occupies the owner's property." ROA.334 (emphasis in original). "The government has done nothing to permanently affix an object to their property or permit any stranger to do so, and Plaintiffs have no 'historically rooted expectation of compensation' for complying with zoning regulations." ROA.334. Magistrate Judge Hightower also

noted that "the Code is a pre-existing limitation on Plaintiffs' title to their home in the Burleson Historic District." ROA.335. Accordingly, the Magistrate Judge recommended that the *per se* takings claim should be dismissed. ROA.335.

Magistrate Judge Hightower also concluded that Appellants' claims under the Texas Constitution should be dismissed. ROA.336-339. In support of Appellants' argument that purely aesthetic matters could not be regulated, the Magistrate Judge noted that Appellants relied on a "nearly ninety-year-old case" in which "the court used the word 'aesthetic' just once, in a sentence near the end of a lengthy quote from 30 Texas Jurisprudence, p. 120, § 58." ROA.336.

Additionally, Magistrate Judge Hightower concluded that "the Commission rested its decision on historical considerations, not aesthetics," incorporating the Commissioners' statements into the decision showing that historic considerations were taken into account. ROA.337-339.

District Judge Robert L. Pitman adopted Magistrate Judge Hightower's recommendation, granted the motion to dismiss, and ordered Appellants' claims dismissed without prejudice.[1] ROA.398-99. Judge Pitman then issued a Final

[1] Appellants insult the integrity of the District Court and accuse the District Court of being in a "rush to get this case off its docket." *See* Appellants' Brief, P. 19. However, it was the Appellants who filed a summary judgment motion five days after filing suit and prior to an Answer even being filed, rushing to have the matter resolved and removed from the District Court's docket.

Judgment pursuant to the Order. ROA.400.

SUMMARY OF ARGUMENT

The District Court properly dismissed Appellants' claims. First, the Appellants' federal takings claim was not ripe because they failed to secure a final decision from the City of San Marcos. Appellants failed to seek a determination from the Zoning Board, who had the authority to issue a decision that could have mooted Appellants' claims.

Second, the District Court properly dismissed Appellants' *per se* federal takings claim because there was no physical invasion of Appellants' property by the City of San Marcos or by any stranger authorized by the City. The balcony was already present when the Appellants purchased the home, voluntarily placed there by a previous property owner. A municipality may regulate the use of private property in the interest of historic preservation and restricting alteration of a structure's façade is not a *per se* taking.

Finally, the District Court properly dismissed Appellants' claims under the Texas Constitution. Contrary to Appellants' argument, purely aesthetic considerations for the general welfare are permissible governmental considerations when it comes to property regulation. Moreover, Texas law expressly authorizes a municipality to regulate the use of private property in the interest of historic

preservation, and that is what occurred in this case. Preservation of the integrity of historic buildings is a legitimate governmental use of its power. Lastly, Appellants had an obligation and failed to exhaust administrative remedies, thus barring them from proceeding on this claim.

The District Court's dismissal and final judgment should be affirmed in all respects.

ARGUMENTS AND AUTHORITIES

A. Standard of Review

The District Court dismissed Appellants' claims pursuant to Rule 12(b)(1) and Rule 12(b)(6). This Court evaluates the District Court's decision under Rule 12(b)(1) *de novo*. *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id*. The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Id*. "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id*. The plaintiff must allege "a plausible set of facts establishing jurisdiction." *Di Angelo Publ'ns, Inc. v. Kelley*, 9 F.4th 256, 260 (5th Cir. 2021).

This Court reviews dismissal under Rule 12(b)(6) *de novo*. To survive dismissal for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Hamilton v. Dallas Cnty.*, 79 F.43 494, 499 (5th Cir. 2023). In determining whether a plaintiff's claims survive a Rule 12(b)(6) motion, the factual information to which the court addresses its inquiry is generally limited to (1) the facts set forth in the complaint; (2) documents attached to the complaint; and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201. *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019). Courts may also consider documents attached to a defendant's motion that are referenced in the complaint and central to the plaintiff's claims. *Id.* A motion to dismiss pursuant to Rule 12(b)(6) "admits the facts alleged, but challenges plaintiff's rights to relief based upon those facts." *Ramming*, 281 F.3d at 162.

B. The District Court correctly dismissed Appellants' federal taking claim because it was not ripe.

The District Court properly dismissed Appellants' federal taking claim because it was not ripe for consideration without a final decision issued by the City of San Marcos.

In 2019, the United States Supreme Court made clear that there was no requirement that plaintiffs exhaust state remedies prior to asserting a takings claim under the United States Constitution. *Knick v. Township of Scott, Penn.*, 139 S. Ct. 2162, 2167, 2170 (2019).

However, this case did not overrule precedence related to the ripeness requirement. A party alleging a regulatory taking must still demonstrate that they received a "final decision" from the governmental entity or official that demonstrates how the regulations at issue would apply to the specific property at issue. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 735 (1997). A claimant must do more than claim that a land-use regulation as written enacts an unconstitutional taking; the claimant has to show how the government plans to apply the regulation to their land. *Id* at 738-39.

Because a claimant who asserts a regulatory taking must prove that the government "regulation has gone 'too far,'" the court must first know "how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U. S. 340, 348 (1986). The takings determination requires a final decision from the government entity so it can evaluate the takings claim. *See, e.g., DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218-19 (5th Cir. 2021)("Only after the final regulatory

decision will a court have before it the facts necessary to evaluate a regulatory takings claim[.]").

"When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel v. City & Cnty. Of San Francisco, Cal.*, 141 S.Ct. 2226, 2228 (2021) (per curiam). "The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* (citations omitted). Further, "[a]pplication of the futility exception is rare," and "conclusory or unsupported allegations of futility will not suffice". *Murphy v. City of Galveston*, 2021 WL 1220104, at *5 (S.D. Tex. Mar. 31, 2021).

Appellants' reliance on *Pakdel* is misplaced. In that case, the plaintiffs' request for an exemption from the regulation had been denied twice. *Pakdel*, 212 S.Ct. at 2229. The "government's definitive decision on the issue has inflicted an actual, concrete injury of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government." *Id*. at 2230.

The *Pakdel* decision provides that, while exhaustion of administrative processes is not required for ripeness, the "finality requirement" remains. *Id.* at 2231 (internal citations omitted). There is no finality when "avenues still remain for the

government to clarify or change its decision." *Id* (internal citations omitted). While Appellants had no obligation to exhaust administrative remedies in order to proceed with the federal constitutional claims, they did have an obligation to show that they secured a "final decision" from the City of San Marcos. Appellants failed to make any such showing in this matter.

Appellants assert both "facial" and "as applied" claims in their challenge of the City of San Marcos ordinance. The Complaint expressly states that "the Ordinance (both on its face and as applied) grants the Commission authority that exceeds the municipal police power." ROA.13, ¶ 56. They later additionally assert that both on its face and as applied, the Ordinance violates their constitutional rights. ROA.14, ¶ 64.

Appellants' claims raise several allegations as to the basis and support for Appellants' claims, the Commission's decision, whether there was additional evidence that could have been presented to the Commission, and whether Appellants could have the matter reconsidered or could have appealed and presented their claims to the Zoning Board. ROA.48-49, ¶¶ 7-12.[2] These claims demonstrate both

[2] The fact that Appellants missed the deadline to secure a final decision from the City of San Marcos on this issue is immaterial. A claim does not become ripe and subject to litigation and review by the Court by just failing to timely secure a final determination. Otherwise, that would undermine the purpose of the finality requirement—to secure a review of the government's definitive position on the issue.

the failure of Appellants to seek a final determination, and the reason that a final determination is needed for the Court to review the governmental action.

Appellants claim that the Ordinance does not require them to present any reason or raise any issue before the Commission as to why they seek an exception, admitting they failed to mention the alleged KKK history of the prior owner (and further basing their lawsuit on this seemingly relevant fact). However, it is axiomatic that Appellants should have presented some basis for seeking an exception from the Ordinance. The only basis Appellants provided was that they did not like it and made a vague reference to their values.

As noted in Magistrate Judge Hightower's Report and Recommendation, the Commission noted the integrity of the historic district and Appellant Money's response was "Yeah. It's integrity, that ideal that propels us to want things to be similar to our family's values. So I can see that we share the same value of integrity, it's just a matter of application." ROA.338.

Had they presented the grounds asserted in their lawsuit to the Historical Commission and/or on appeal to the Zoning Board of Adjustments, their request for removal may have been considered differently. This could have mooted Appellants' as applied challenges to the Zoning Ordinance. But that is just

speculation, because Appellants failed to present the reason they now allege to either the Historical Commission or the Zoning Board.

Appellants also complain that "administrative appeals are costly." But this is an irrelevant factor in determining ripeness, is an allegation that is facially inaccurate (particularly as compared to the time and cost of pursuing this lawsuit), and is not supported by citation to the appellate record.

Appellants simply failed to present any basis for an exception to the Ordinance. That the City of San Marcos did not argue that the former owner's KKK ties were not known, that the City did not state the Commission was mistaken, or that the Commission would change its decision in any way, is wholly irrelevant to the ripeness requirement.

Appellants argue that owners should not be required to "repeatedly return to the City to test out every possible argument or rhetorical approach for relief before coming to court." *See* Appellants' Brief, P. 23. However, Appellants did not return at all. In fact, it is not disputed that, once Appellants received the denial from the Commission, Appellants made no attempt whatsoever to appeal to the Zoning Board. While owners are not required to "repeatedly return," they are required to obtain finality, and it is undisputed Appellants did not do so.

Appellants can only speculate as to whether the Commission would have rendered a different decision if confronted with the evidence of the former owner's alleged KKK ties or whether the Zoning Board would have denied the appeal. Such speculation establishes that this matter was not ripe – that there was no final determination.

C. The District Court correctly found that Appellant failed to state a *per se* taking claim.

The District Court correctly concluded that the Appellants failed to state a *per se* takings claim because there was no governmental, physical invasion of Appellants' property.

The elements required for proving a Fifth Amendment takings claim are significantly different depending on whether the claim being asserted is a physical taking or a regulatory taking. *See, e.g., Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-323 (2002). For a physical taking, compensation is owed if the property was taken for governmental purpose; as opposed to a regulatory taking, for which compensation is owed only after a more fact-intensive inquiry balancing factors related to the purpose and financial impacts of the regulation. *Id.* "When the government, rather than appropriating private

property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies." *Id.*, at 321–322.

Appellants rely largely on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), but that case is readily distinguishable. It involved the government appropriating part of a rooftop for a cable box. *Id.* The City of San Marcos did not install the Juliette balcony on the façade of Appellants' residence. Nor did the City of San Marcos order or authorize someone else to enter the premises and install it. There was no "permanent physical invasion" of the property by the City of San Marcos. *Compare, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

There is no "historically rooted expectation of compensation" for complying with zoning regulations. *Loretto*, 458 U.S. at 441. Further, a municipality has the constitutional power to regulate the use of private property in the interest of historic preservation. *Mayes v. City of Dallas*, 747 F.2d 323, 324 (5th Cir. 1984).

Even the denial of a demolition permit—a far more significant limitation on the right to alter the property—is assessed under the regulatory taking scheme. *See, e.g., Maher v. New Orleans*, 516 F.2d 1051 (5th Cir. 1975) cert. denied, 426 U.S. 905 (1976). An ordinance banning quarrying or mining activities within city limits was assessed as a regulatory taking, despite the denial "requiring" the landowner to

keep the minerals in the ground. *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, (5th Cir. 2004)("Because there is no allegation that Tehuacana has physically occupied Vulcan's property, if Vulcan is to be compensated the Ordinance must constitute a regulatory taking.").

The Supreme Court affirmed the use of preexisting limitations upon a landowner's title in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), *citing Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978) and *Lucas*, 505 U.S. at 1028-29. The District Court correctly concluded that the Ordinance at issue is a preexisting limitation on Appellants' title.[3]

Likewise, Appellants' reliance on *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) is misplaced. In that case, the Supreme Court expressly noted that the "right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." *Id*. at 627. While the Court stated that future generations may challenge unreasonable limitations on the use and value of land, that is not what is occurring in this matter, nor does it form the basis for the District Court's decision. Instead, the Ordinance

[3] Appellants equate the limitations in the use of their property in a historic district as being the same as historic religious or racial discrimination found in old deed restrictions. This assertion is without merit, as any such restrictions would violate the Equal Protection Clause, something that is not at issue here. *See City of College Station, Tex. v. Star Ins. Co.*, 735 F.3d 332, 338 (5th Cir. 2013), *citing City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985).

at issue is a valid use restriction under the *Penn Central* test. *See Cedar Point Nursery*, 594 U.S. at 148.

The essential question is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id*. at 149. The Supreme Court in *Penn Central* made clear that it has repeatedly determined that land-use regulations that destroy or adversely affect recognized real property interests are nevertheless constitutional and do not amount to a taking (even for aesthetic reasons). *Penn Cent. Transp. Co.*, 438 U.S. at 128-29 (citations omitted).

The Court further noted that it "has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city," including preserving structures and areas with special historic, architectural, or cultural significance, such being "an entirely permissible governmental goal." *Id*. at 129 (citations omitted).

That is the issue in this case. The government has an entirely permissible goal in preserving a historic district and maintaining the architectural and cultural significance of the area. The District Court's conclusion was not based on the age of the Ordinance, as Appellants imply, but rather on the entirely permissible pre-

existing limitation on the title to the property in the historic district.

Such a limitation is not governmental physical occupation; it is a constitutional exercise of regulatory authority. Accordingly, the District Court did not err in dismissing Appellants' *per se* takings claim.

D. The District Court properly dismissed Appellants' Texas Constitution taking claim.

1. The government may rely on aesthetic considerations.

The District Court did not err in dismissing Appellants' claim under the Texas Constitution. Appellants claim that "zoning based solely on aesthetics is forbidden" under Texas law. This is based on dicta from the Texas Supreme Court nearly 100 years ago when it noted that "Regulations interfering with private property rights are invalid if founded upon purely aesthetic consideration." *Lombardo v. City of Dallas*, 124 Tex. 1, 10, 73 S.W.2d 475, 479 (1934).

That case did not define or discuss what was meant by this use of the term aesthetics, nor do Appellants in their filings. Aesthetics are generally defined as related to beauty. *See, e.g., Black's Law Dictionary, 2nd Ed.* ("A beautiful image or element."); *Merriam-Webster Dictionary* ("A branch of philosophy dealing with the nature of beauty, art, and taste and with the creation and appreciation of beauty"; "a particular theory or conception of beauty or art: a particular taste for or approach to

what is pleasing to the senses and especially sight"; "a pleasing appearance or effect").

As noted above, the United States Supreme Court has expressly ruled that the government "may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Cent. Transp. Co.*, 594 U.S. at 129.

While not ruling as directly on the issue, the Texas Supreme Court has also recognized the authority to regulate zoning as related to aesthetics. In *Powell v. City of Houston*, 628 S.W.3d 838 (Tex. 2021), the City of Houston had passed a historic preservation ordinance allowing the City to designate historic districts and required owners of properties to seek approval before modifying or developing their property. The Supreme Court of Texas noted that city ordinances are "presumed to be valid" and that courts "have no authority to interfere unless the ordinance is unreasonable and arbitrary—a clear abuse of discretion." *Id*. at 842. Proving such a burden is a "heavy one." *Id*. The Supreme Court of Texas "turn[ed] to federal courts" to determine whether historic preservation may be constitutional. The Court noted that "over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic **or aesthetic** importance." *Id*. at 847 (quoting *Penn Central*, 438 U.S. at 107)

(emphasis added). Certainly, if the Supreme Court of Texas had intended to maintain that ordinances concerned with aesthetic are impermissible under Texas law, it would have done so while reviewing the extensive United States Supreme Court decisions on the issue.

The Supreme Court of Texas in *Lombardo* used the word "aesthetic" just once, in a sentence near the end of a lengthy quote from 30 Texas Jurisprudence. 73 S.W.2d at 479.

While Appellants correctly assert that the *Lombardo* decision has been cited numerous times, it has not been cited for this limited proposition since the 1950's, but instead has been cited for the more general proposition that the government has the police power to promote the public convenience or the general prosperity, and to promote the public health, the public morals, or the public safety. *See, e.g*., *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012); *Tabrizi v. City of Austin*, 551 S.W.3d 290, 301 (Tex. App.—El Paso 2018, no pet.); *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 615 (Tex. App.—Texarkana 2008, no pet.).

In fact, in a Westlaw search containing the terms "Lombardo" and "aesthetic" or "aesthetics" shows that the *Lombardo* decision and the word "aesthetic" revealed only 11 results, one of which is the *Lombardo* decision itself and another is Magistrate Judge Hightower's Report and Recommendation. One involves a

different *Lombardo* decision unrelated to this issue.

The remaining eight results include:

1. *Texas Midstream Gas Services, LLC v. City of Grand Prairie*, 608 F.3d 203 (5th Cir. 2010) (citing *Lombardo* for a different reason and concluding that applying primarily aesthetic standards in an attempt to avoid "unsightly" "eyesores" was a valid use of the government's zoning power);

2. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (citing *Lombardo* generally, but also noting the Supreme Court had ruled in *Penn Central* that preserving desirable aesthetic features was a permissible basis);

3. *City of Pharr v. Pena*, 853 S.W.2d 56, 61 (Tex. App.—Corpus Christi 1993, no writ), *distinguished on other grounds*, *Board of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424 (Tex. 2002) (citing generally to *Lombardo* but stating that aesthetics "represent a legitimate goal");

4. *Connor v. City of University Park*, 142 S.W.2d 706 (Tex. Civ. App.—Dallas 1940, no writ) (stating "in zoning, the aesthetic consideration is not to be ignored");

5. *Niday v. City of Bellaire*, 251 S.W.2d 747 (Tex. Civ. App.—Galveston 1952, no writ) (following *Lombardo* on aesthetics);

6. *City of Texarkana v. Mabry*, 94 S.W.2d 871 (Tex. Civ. App.—Texarkana 1936, no writ) (following *Lombardo*);

7. *Dumas v. City of Dallas*, 648 F.Supp. 1061 n.1 (N.D. Tex. 1986), *aff'd in part, vacated in part on other grounds*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (noting in the same footnote that *Lombardo* ruled zoning is a proper exercise of police power and that promoting aesthetic values is a legitimate purpose of zoning);

> 8. *Howeth Investments, Inc. v. City of Hedwig Village*, 259 S.W.3d 877 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing to *Lombardo* for the general proposition that the government may use its police power to promote public health, public morals, or public safety, but mentioning aesthetics in passing with regard to the statements of the commissioners).

Thus, out of the eight decisions which mention aesthetics and the *Lombardo* decision, only two of the decisions follow *Lombardo*, a 1936 decision and a 1952 decision. The remaining six recognize that aesthetics can be considered, even as the sole basis for the zoning ordinance, including this Court in *Texas Midstream Gas Services, LLC v. City of Grand Prairie*, 608 F.3d 203 (5th Cir. 2010).

Appellants' reliance on *Spann v. Dallas*, 235 S.W. 513 (Tex. 1921), a decision which is more than 100 years old, is also misplaced. This Court has noted that, "[w]hile *Spann* does say that purely aesthetic considerations are not a proper basis for the exercise of police powers, later cases indicate that aesthetics should not be ignored, but may properly be considered by a city as one of a number of factors followed in the exercise of police powers." *Price v. City of Junction, Tex.*, 711 F.2d 582, 588-89 (5th Cir. 1983), *citing Connor*, 142 S.W.2d at 712 and *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 780 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ). Thus, Appellants' argument that *Lombardo* and *Spann* control is outdated, inapplicable, and irrelevant. The more recent and applicable

authorities consistently conclude that the government may reach decisions on purely aesthetic principles.

2. The Commission relied on more than aesthetics.

Moreover, even if a Commission decision based solely on aesthetics were not permitted under Texas law, the Commission's decision was not based solely on aesthetics, if at all. The Commission used four criteria to determine whether to approve or deny the Appellants' application: (A) consideration of the effect of the activity on historical, architectural or cultural character of the Historic District or Historic Landmark; (B) for Historic Districts, compliance with the Historic District regulations; (C) whether the property owner would suffer extreme hardship, not including loss of profit, unless the certificate of appropriateness is issued; and (D) the construction and repair standards and guidelines cited in Section 4.5.2.1. ROA.140.

The statements made by the Commissioners demonstrated that they made their decision based on the historic nature of the matter, not aesthetics, including the integrity of the historic district and the character-defining features of the district and property. ROA.337-339.

One staff member gave a presentation in which she said: "This balcony could be historic material. You can see in this photograph that there is a Z that can be seen

on the balcony, which one could assume that refers to the Zimmerman family who originally built the home in the 1930s." ROA.337-338. Additionally, the Commissioners stated:

> **Commissioner 1:** "Just looking at the images and so forth, it strikes me as being original to the house and really seems like a character-defining element of the house. It's like one of the – it seems to really define the historic quality of the façade, to me."
>
> **Commissioner 2:** "I agree. I think it is very important historically because it's got the Z on it and it was the Zimmerman house. And the reason that we have houses in the historic district is we're trying to make a connection in some ways to the past. And just to go in and destroy the one thing that really points it out as being the Zimmerman house seems like it would be a shame to take that off and I don't know why you'd want to take that off, because it certainly helps define the house. It helps define the history."

ROA.338.

A third commissioner then asked Appellant Money directly why she wanted to remove the balcony:

> **Money**: "Um, well, you know, every person is different. We just – we don't like it. We don't want it on. I think our application, um, speaks for itself."
>
> **Commissioner 2**: "But if everybody did that in historic districts – if everybody did what they wanted and what they liked, then the historic district would have no integrity. It wouldn't even be historic anymore."
>
> **Money**: "I understand where you're coming from. Yeah.

> It's integrity, that ideal that propels us to want things to be similar to our family's values. So I can see that we share the same value of integrity, it's just a matter of application."
>
> **Commissioner 1**: "I mean, that's the whole point of a historic district, is to retain character-defining features, and that is a character-defining feature. Certainly it appears to date from the '30s just from what I can tell as an architectural historian. And it doesn't seem to cause any problems. It's relatively minor in the sense of, you know, functionally, it's not hurting anything. I can't see how it could hurt anything. So I don't really see a justification for removing it, given the fact that the house is in a historic district and that's a character-defining feature of the house."
>
> **Commissioner 2**: "You know, so many of us who restore these houses struggle to keep the original character-defining aspects of the house and the materials that are originally used and all, and that's the whole point of being in a historic district, you know, to kind of like respect the past."

ROA.338.

While Appellants complain that the District Court considered "off the cuff comments" of the Commissioners made during their consideration of the Appellants' application, they claim that the Commission's decision is limited to purely aesthetic matters due to an stray comment made by a city attorney in an entirely unrelated matter.

In addition, the analysis conducted by the staff shows that removal of the "Z"

and the balcony could affect the historical significance of the property:

> "The balcony could be historic material. A 'Z' can be seen on the balcony which one could assume refers to the Zimmerman family who originally built the home in the 1930s."

ROA.202-203.

Further, the Commission relied on the Secretary of the Interior's Standards for Rehabilitation 2, 3, 4, and 5. 36 C.F.R. § 67.7(b). ROA.203; ROA.339. These standards do not solely involve aesthetic considerations. Instead, they require that the "historic character of a property shall be retained and preserved . . . removal of historic materials or alteration of features and spaces that characterize a property shall be avoided." 36 C.F.R. § 67.7(b)(2). The property "shall be recognized as a physical record of its time, place, and use." *Id*., § 67.7(b)(3). "Changes that create a false sense of historical development . . . shall not be undertaken." *Id*. Changes that have acquired historic significance "shall be retained and preserved." *Id*., § 67.7(b)(4). Finally, distinctive features that "characterize a historic property shall be preserved." *Id*., § 67.7(b)(5). None of these provisions "uniformly turns" on aesthetic considerations.

Additionally, there is nothing in the Ordinance that supports Appellants' argument that the Ordinance's criteria "are based solely on aesthetics." The Ordinance fully complies with Texas Local Government Code section 211.003 and

is intended to "preserve and maintain the character of the historic buildings in San Marcos." ROA.238. The Ordinance seeks to "preserve the integrity of the historic buildings." ROA.238.; *see also Christopher Columbus Street Market LLC v. Zoning Bd. of Adjustment*, 302 S.W.3d 408, 417-19 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (Commission may weigh all evidence before it, both favorable and unfavorable).

The District Court correctly concluded that the Appellants failed to state a claim under the Texas Constitution.

3. Appellants waived their proportionality argument.

With regard to proportionality, Appellants did not assert this argument in either their Response to Appellees' motion to dismiss or in their Sur-Reply. A party cannot raise arguments for the first time in their objections to the magistrate's recommendation. *Freeman v. Cnty. Of Bexar*, 142 F.3d 848, 851 (5th Cir. 1998) ("A party who objects to the magistrate judge's report waives legal arguments not made in the first instance before the magistrate judge'); *Cupit v. Whiteley*, 28 F.3d 532, 535 (5th Cir. 1994) (arguments that could have been raised before the magistrate judge, but were raised for the first time in objections before the district court, were waived). Because the Appellants did not make this assertion before the Magistrate Judge, they waived this argument before the District Court, and in turn, have waived

the argument before this Court.

Even if not waived, however, the argument fails. Magistrate Judge Hightower concluded the Appellants' sole argument on this issue, that the Ordinance violates the Texas Constitution because it restricts property for purely aesthetic purposes which is forbidden under Texas law, failed for the reasons set forth above. There was thus no need for the Magistrate Judge or the District Court to address any other argument.

4. The City had a legitimate interest and Appellants were not unduly burdened.

Even if Appellants' argument is considered, there is no undue burden on Appellants for the numerous reasons set forth above. Appellants have nothing more than conclusory statements that maintaining the balcony in its current state is "severe" and "unduly burdensome." But there is nothing in the appellate record to support those claims. Appellants owned the property for six years before seeking to remove the balcony.

Appellants' reliance on *Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015) is misplaced. In that matter, the plaintiffs challenged a regulation which required them to obtain and maintain a license to practice their

trade, something not at issue here. The Supreme Court of Texas stated that a challenge to an "economic regulation statute" requires a demonstration of city a rational relationship to a legitimate governmental interest, or that it is so burdensome as to be oppressive in light of the governmental interest. *Id*. at 87.

The Ordinance at issue here is not an economic regulation. In any event, the City has a legitimate governmental interest in preserving the district's character, history, and aesthetic features. *See Mayhew*, 964 S.W.2d at 934 (citations omitted); *Christopher Columbus Street Market LLC*, 302 S.W.3d at 417-19, *citing* TEX. LOC. GOV'T CODE § 211.003(b). Because Appellants are not unduly burdened, and because the City had a legitimate governmental interest in preserving the character and integrity of the historic district, the District Court correctly concluded the Appellants failed to state a claim under the Texas Constitution and properly dismissed the claim.

5. Appellants Failed to Exhaust Administrative Remedies.

As an additional ground for dismissal of the Texas constitutional claims, one not reached by the District Court due to its ruling based on the grounds above, Appellants' claim fails due to a failure to exhaust administrative remedies. It is undisputed that they failed to do so.

Texas law requires a party to exhaust remedies available at the administrative

level before proceeding at the judicial level, and claims based on the Texas Constitution are not exempt from this rule. *Garcia v. City of Willis*, 593 S.W.3d 201, 211 (Tex. 2019). A litigant is "at least required to seek administrative relief before filing a takings claim in district court." *Id.* at 212; *see also id.* at 211 ("[A] litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim." (quoting *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012))(internal quotation marks omitted)).

This principle applies when reviewing land use decisions by a local government entity. *See, e.g. Murphy v. City of Galveston*, 557 S.W.3d 235, 241 (Tex. App.-Houston [14th Dist.] 2018, pet. denied)("Because the Property Owners did not appeal the loss of the property's 'grandfather' status to the ZBA, they failed to exhaust their administrative remedies, and the trial court did not have subject-matter jurisdiction over their takings claims."); *City of Dallas v. Gaechter*, 524 S.W.2d 400, 405 (Tex. Civ. App.-Dallas 1975, writ dism'd)(holding that when the applicability of a Zoning Ordinance is questioned, administrative remedies must be exhausted before redress can be obtained from the courts.)

Although administrative bodies do not have the authority to rule on the constitutionality of statutes and ordinances, that does not mean that a plaintiff can

always forgo an administrative remedy and pursue a constitutional claim in court. *Garcia*, 593 S.W.3d at 211. In *Garcia*, the Texas Supreme Court noted that it had "never globally exempted claims based on the Texas constitution from statutory exhaustion-of-administrative-remedies requirements." *Id.* Instead, if the administrative proceeding might "obviate[] the need" for the constitutional claim, a party must exhaust its administrative remedies. *Id; City of Dallas v. Stewart*, 361 S.W.3d at 579 ("a litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim."); *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011)("When there exists provision for compensation—or, as here, for the property's return—a constitutional claim is necessarily premature.").

It is immaterial whether the administrative proceeding could have resolved all the claims being asserted—including constitutional—as long as the appellate body could "render relief that would have mooted those claims." *Watson v. City of Southlake*, 594 S.W.3d 506, 522 (Tex. App.—Fort Worth 2019, pet. denied)(citing *Garcia*, 593 S.W.3d at 211–12). The only question is whether the administrative proceeding could have rendered the claims moot. *Stewart*, 361 S.W.3d at 579.

Appellants wanted to remove a balcony and the Historic Commission denied permission to do so. While an appeal of this decision to the Zoning Board would not

have provided a platform for contesting the constitutionality of portions of the City's Development Code, the Board did have the authority to reverse or remand for reconsideration the Commission's decision as related to the balcony removal. Such a determination would have rendered moot the question of whether being compelled to keep the balcony was an unconstitutional taking. As such, failure to exhaust administrative remedies is another reason that Appellants' state law takings claim was properly dismissed.

CONCLUSION

The District Court did not err by dismissing Appellants' claims. Appellants' federal claim was not ripe, as they failed to secure a final decision from the City of San Marcos before filing suit. Additionally, Appellants were not asserting a federal *per se* takings claim and thus the District Court properly dismissed this claim. It is undisputed that there was no physical invasion by or at the direction of the government; only an integral component of the historical home that was installed by a previous owner. Lastly, the District Court also correctly dismissed Appellants' claim under the Texas Constitution. Appellants' reliance on decades-old authority that a government may not restrict the use of property based on purely aesthetic principles is outdated and invalid under current law. Moreover, the decision at issue was not based on aesthetics; it was based on the historic value. Lastly, the claim was

barred as a result of failing to exhaust administrative remedies prior to pursuing the claim.

Accordingly, the District Court's dismissal of this matter should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,618 words.

2. This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman typeface.

/s/ Joanna Lippman Salinas
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellees' Brief was filed electronically in compliance with 5th CIR. R. 25.2, in addition to seven paper copies via U.S. mail for delivery to the clerk within three calendar days in compliance with 5th CIR. R. 31.1, and served electronically, via e-mail, to the following counsel of record, on this, the 6th day of June 2024.

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