**No. 03-17-00812-CV**

# IN THE THIRD COURT OF APPEALS
# AUSTIN, TEXAS

**AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSEPH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH,**

*Plaintiffs-Appellants*,

*&*

**STATE OF TEXAS**,

*Intervenor-Appellants*,

v.

**CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN**,

*Defendant-Appellees*.

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*On Appeal from the 53rd Judicial District, Travis County, Texas*
*Cause No. D-1-GN-16-002620-CV*

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# APPELLANTS' REPLY BRIEF

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**ORAL ARGUMENT REQUESTED**

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## EXECUTIVE SUMMARY

The City's silence is deafening. After two years of litigation, the City remains largely silent in defense of what the STR Ordinance actually does. The City makes no mention of its restrictions on adults while at an STR: to eat dinner outside with six other friends, to be awake after 10 pm, or to be secure from unrestricted searches by Austin Code Compliance. The City makes no mention of its unequal treatment of persons entitled to equal treatment under the law: persons at an STR versus at a long-term rental, long-term landlords versus short-term landlords, Type 1 versus Type 2 STR owners. The City's briefing does not mention these things at all.

Instead, the City points vaguely to its zoning authority and to anecdotal statements made at City Council meetings in support of some form of STR regulation. But the question before this Court is not whether the City has authority to zone, or to enact some form of STR regulation. It is whether the City has constitutional authority to pass the STR Ordinance at issue in this case. It does not.

In *Patel v. Texas Department of Licensing and Regulation*, the Texas Supreme Court held that, at a minimum, restrictions on individual liberty or private property rights must be based on real world public harms and even then, must not be "unreasonably burdensome" given the evidence of the government interest at stake. Importantly, the Court held that this analysis must be based on actual evidence that

the restrictions relate to the government interest at issue.[1] Here, the actual evidence – from the City's own uncontested records – disproves the City's claim that STR's in Austin are a public nuisance warranting such severe restrictions on Constitutional rights.

The City does not dispute this evidence. Nor does the City explain any connection between the challenged restrictions in the STR Ordinance and the alleged government interest at stake. Instead, the City raises two substantive arguments and a laundry list of jurisdictional arguments that were rightly rejected by the lower court. First, the City argues that the STR Ordinance is a zoning ordinance and therefore permissible (apparently irrespective of what the restrictions in the Ordinance are) because STRs are a non-conforming use, akin to hotels. Second, the City argues that the STR Ordinance is rationally related to a legitimate government interest because the STR Ordinance was enacted after a public engagement process where members of the public, City staff, and elected officials made "comments" in support of regulating STRs.

These arguments fail as a matter of law. First, the STR Ordinance is not a zoning ordinance targeting non-conforming uses like hotels in residential neighborhoods. The Texas Supreme Court has recognized that STRs are a residential use. The Austin City Code likewise recognizes STRs as a residential use, distinct

[1] The City concedes that the evidence-based approach of *Patel* applies in this case.

from commercial uses like hotels, and allows Type 1 STRs to continue operating in residential settings. Moreover, even if the STR Ordinance were a zoning ordinance, it is well established that zoning ordinances are subject to constitutional restraints.

Second, the uncontested facts in this case show that the STR Ordinance is not rationally related to a legitimate government interest and is unduly burdensome even if some government interest exists. The City may not constitutionally eliminate a vested property right, or submit STR guests to arbitrary restrictions, a 10:00 pm adult bedtime, and warrantless searches simply because a segment of the community has decided that it no longer approves of a well-established use of private property.

Finally, the City falls back to the Maginot Line of local government litigation: jurisdiction. Instead of defending the actual ordinance it passed, the City's main focus is to throw multiple arguments at this Court as to why it cannot be sued—each of which was rightly rejected by the trial court. As explained below, each of these arguments fails.

At the end of the day, the question in this case is not whether the City may zone, or how many people supported STR regulation. The question is whether the City may constitutionally ban all type 2 STRs (but allow type 1 STRs and long term rentals), place arbitrary caps on who may be present on the property, set a 10:00 pm bedtime, restrict when guests can be outside, and require submission to warrantless searches, when the uncontested facts in the record refute the City's stated

governmental interest for such restrictions. On that question, despite dozens of pages of briefing, the City is strangely silent.

## ARGUMENT

Appellants bring several separate constitutional claims, but the core idea of these claims is basically the same: The City may not eliminate vested property rights, restrict fundamental liberties, or discriminate against STR owners or guests unless the record shows a legitimate, real-world government interest that justifies doing so. The City portrays this as a policy objection,[2] but whether invasions of constitutional rights are adequately justified by a government interest is not a question of policy; it is a question of Constitutional law. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932–33 (Tex. 1998) ("Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question… is a question of law, not a question of fact.").

The City concedes that *Patel*'s evidence based approach applies to both Appellants' due course of law[3] and equal protection claims.[4] Accordingly, the question before this Court is whether, based on the evidence, the STR Ordinance is substantially related to a legitimate government interest, or is "as a whole is so

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2 City's Br., at 3.
3 City's Br., at 19.
4 City's Br., at 22.

unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 87.

In the case of equal protection claims, the question is whether the classifications are justified by a "real and substantial difference" that is rationally related to the purpose of the STR Ordinance. *Hunt v. City of San Antonio*, 462 S.W.2d 536, 540 (Tex. 1971). The STR Ordinance cannot meet these burdens.

## I. UNCONTESTED FACTS & ARGUMENTS[5]

The essential facts in this case are not in dispute. STRs have been prevalent and legal in Austin for decades.[6] All of the Appellants in this case purchased and upgraded their homes for STR use when STRs were legal.[7]

In 2016, the City adopted the STR Ordinance at issue in this lawsuit. There is no dispute that the STR Ordinance bans Type 2 STRs,[8] prevents more than six adults from ever standing in the back yard at an STR,[9] prevents more than six unrelated

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[5] The following facts and arguments were raised by Appellants both here and in the district court. The City did not dispute these facts or arguments in the trial court or in its opening brief. Any objections to those facts or arguments are therefore waived. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered."); Tex. R. App. P. 38.1(g)("the court will accept as true the facts stated unless another party contradicts them."); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 283 (Tex. 1994) (party raising only jurisdictional claims in brief was not allowed to challenge facts or raise new merits arguments in reply); *Anderson Prod. Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 424 (Tex.1996) (declining to consider issue first raised in reply brief).

[6] 2 CR: 520; Appellants' Br., at 4.

[7] 2 CR: 575; 4 CR: 56; 4 CR: 74; 2 CR: 575; 2 CR: 557; 2 CR: 21; 2 CR: 574; 2 CR: 558); Appellants' Br., at 29.

[8] 2 CR: 509-10 (STR Ordinance § 25-2-950); Appellants' Br., at 10.

[9] 2 CR: 506 (STR Ordinance § 25-2-795 (E)); Appellants' Br., at 10.

adults from being present at an STR, at any time,[10] and requires that STR tenants and guests be in bed by 10 pm[11] and submit to warrantless searches.[12]

The City's stated purpose of these restrictions was to reduce public disturbances.[13] But, there is no dispute that these restrictions do not target or turn on public disturbances[14] and will not substantially reduce public disturbances, even if effective.[15] Moreover, the uncontested facts show that Type 2 STRs (which are banned under the ordinance) did not produce more disturbances than Type 1 STRs (which are allowed to continue operation).[16] And STRs, as a class, generate fewer public disturbances than their long term neighbors.[17]

Because Appellants are owners, tenants, and guests of STRs in the City of Austin, these restrictions apply to them on their face.[18] And the City has never contested the evidence in the record showing that Type 2 Appellants' homes will generate less income as long-term rentals,[19] possibly forcing them to sell their

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10 2 CR: 506 (STR Ordinance § 25-2-795 (G)); Appellants' Br., at 10.

11 2 CR: 506 (STR Ordinance § 25-2-795 (D)); 2 CR 524-25; Appellants' Br., at 10.

12 2 CR: 510-11 (STR Ordinance § 1301); Appellants' Br., at 11.

13 4 CR: 96-97, 99; Appellants' Br., at 10.

14 2 CR: 521, 523, 524-25; Appellants' Br., at 11.

15 4 CR: 94-95.

16 2 CR: 1800; Appellants' Br., at 41, 43.

17 4 CR: 2503- 11; Appellants' Br., at 6.

18 Appellants' Br., at 52 ("the City concedes that, on its face, the STR Ordinance and its penalties apply to STR owners and guests."); 2 CR 527; 4 CR: 44 ("Q: So on its face, you would agree that that section of the Short-Term Rental Ordinance applies to licensees or guests, correct? A: Yes.").

19 2 CR: 548; 4 CR: 67; 2 CR: 575; 2 CR: 576-77; 2 CR: 565-66; Appellants' Br., at 12-18.

homes.[20] Nor does the City contest the evidence in the record that Appellants have already lost renters due to the draconian use restrictions mentioned above.[21]

As explained in Appellants' opening brief, these undisputed facts are sufficient to hold the STR Ordinance unconstitutional. The Ordinance violates the due course of law provision (by restricting liberty and property rights in the name of public disturbances, when the restrictions have nothing to do with public disturbances);[22] the equal protection clause (by treating Type 1 and Type 2 STRs differently, STRs and non-STRs differently, and persons located at an STR and non-STR differently without justification);[23] [24] and the prohibition against unreasonable searches (by requiring that STR owners, tenants, and guests submit to warrantless searches that are not based on probable cause or exigent circumstances).[25]

The City's brief does nothing to refute these claims. It does not mention, much less defend, the reasonableness of 10:00 pm bedtimes, warrantless searches, or arbitrary caps on who can stand in the yard. Nor does it attempt to establish that Type 1 STRs are different than Type 2 STRs in some meaningful way that would justify the complete prohibition of the latter. (The sole difference between Type 1

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20 *Id.*; see also Appellants' Br., at 39-40, 59-60.
21 2 CR: 565-66; 2 CR: 579-580; Appellants' Br., at 18, 32-33, 40, 55.
22 Appellants' Br., at 24-38.
23 *Id.* at 41-43.
24 *Id.* at 43-46.
25 *Id.* at 46-49.

and Type 2 STRs is whether the owner claims the property as a homestead on his taxes.)[26]

In addition to restrictions on STR owners, the City likewise does not dispute that the STR Ordinance places significant restrictions on the liberty of individuals present at STRs, including 10:00 pm bedtimes, warrantless searches, and arbitrary caps on who can stand in the yard. As explained in Appellants' opening brief, these restrictions impact STR guests' freedom of assembly, privacy, and movement, as well as the Texas Constitution's protections against unreasonable searches[27] and are therefore subject to strict scrutiny.[28]

Yet, the City does not address the merits of these strict scrutiny claims at all.[29] Nor does the City explain why it believes strict scrutiny should not apply to restrictions on STR guests' freedoms of assembly, privacy, or movement.

Instead, the City raises a number of claims that appear in several formulations, addressed below. The basic gist is the same: the City claims it may treat STRs differently as a matter of zoning because STRs are allegedly not a residential use, portions of the public showed up to support some form of STR regulation, and in

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26 Appellants' Br., at 5; 2 CR: 499 (STR Ordinance § 25-2- 789); 2 CR: 520.
27 Appellants' Br., at 24-28, 46-49.
28 Appellants' Br., at 24, 44.
29 The City does, however, spend multiple pages inexplicably arguing that the STR Ordinance does not target the content of speech. Appellants have never raised a free speech claim.

any event, Appellants lack standing because they have never been prosecuted under the Ordinance. As explained below, the City's arguments fail.

## II. AUSTIN'S STR REGULATIONS ARE NOT ZONING

The City argues that the STR Ordinance is justified under its zoning power because STRs are allegedly transient housing akin to hotels.[30] This argument fails because STRs are not transient commercial housing, the STR Ordinance is not a zoning restriction, and even if it were a zoning restriction, it is still unconstitutional.

### A. This Court and the Texas Supreme Court have held that STRs are a residential use.

This Court has repeatedly found STRs to be a "residential use," no different than their neighbors. *Boatner v. Reitz*, 03-16-00817-CV, 2017 WL 3902614, at *4 (Tex. App.—Austin, 2017); *Zgabay v. NBRC Prop. Owners Assn.*, 03-14- 00660-CV, 2015 WL 5097116, at *3 (Tex. App.—Austin, 2015). As this Court explained, "if a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, as was done in the present case, this use is residential, not commercial, no matter how short the rental duration." *Boatner*, 2017 WL 3902614, at *4. An "owner's receipt of rental income from either short- or long-term rentals in no way detracts from or changes the residential characteristics of the use by the tenant." *Id.* The Texas Supreme Court agrees. *See*, *Tarr v. Timberwood Park Owners Ass'n Inc,* 2018 WL 2372594 (decided May 25, 2018).

[30] City's Br., at 33.

The Austin City code likewise recognizes that STRs are a residential use[31] and excludes STRs from the list of commercial uses, which includes hotels.[32] Moreover, Type 1 STRs remain permitted and lawful in residential areas under the STR Ordinance.[33]

The City bases its argument that STRs are commercial on *Tarr v. Timberwood Park Owners Ass'n Inc.*, 510 S.W.3d 725, 731 (Tex. App.—San Antonio, 2016) and a provision in the state tax code which allows cities to collect the hotel occupancy tax from STRs.[34] But *Tarr* was recently overturned by the Texas Supreme Court and the City's tax argument was rejected by this Court in *Boatner*, which the City fails to address. 2017 WL 3902614, at *6.

In *Boatner*, a neighborhood association argued that STRs were inherently commercial and therefore not consistent with the term "residential use." The association claimed its argument was supported by the fact that Tex. Tax Code § 156.001(b) allows cities to charge STRs a hotel occupancy tax.

This Court rejected the notion that state tax law had any bearing on whether STRs were a residential use. 2017 WL 3902614, at *6, n. 2. For the purposes of regulation, what matters is the actual activity taking place. *See*, *Boatner*, 2017 WL

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31 Austin City Code § 25-2-3 (B)(10).
32 *See* Austin City Code §25-2-4 (B).
33 2 CR: 499-00 (STR Ordinance §§ 25-2-788; 25-2-789; 25-2-790).
34 City's Br., at 30, 33-34 (citing *Tarr v. Timberwood Park Owners Ass'n Inc.*, 510 S.W.3d 725, 731 (Tex. App.—San Antonio, 2016); and Tex. Tax Code § 156.001(b)).

3902614, at *4. "If a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, as was done in the present case, this use is residential, not commercial." *Id.* The Texas Supreme Court is in accord, noting that "Although the owners remit a lodging tax, that fact does not detract from the conclusion that no commercial activity takes place on the premises." *Tarr*, *supra,* at * 27 n. 14. The City's arguments are therefore precluded as a matter of law.

### B. The STR Ordinance is not a zoning ordinance.

The City's zoning argument also fails because the STR Ordinance is not a zoning restriction. The zoning power is "in derogation of common-law rights to the use of property" and should be narrowly construed. *City of Kermit v. Spruill*, 328 S.W.2d 219, 223 (Tex. Civ. App. 1959), writ refused (1960). In Texas, the zoning power is limited by statute. Tex. Loc. Gov't Code Ann. §211.004 lays out seven specific purposes for which the zoning power may be used. Tex. Loc. Gov't Code Ann. § 211.003 lays out eight specific ways that the purposes of §211.004 may be pursued.

These categories generally pertain to how the property itself is used, not what is done in it. For example, cities may regulate the height of buildings, size of yards, or the location of industrial or business structures. *See*, Tex. Loc. Gov't Code Ann. § 211.003. By contrast, the short-term rental ordinance regulates who may be present

on the property, the duration of their stay, and when they must be asleep.[35] Whereas the zoning authority is primarily concerned with dividing the city into zones of residential, commercial, or industrial use, the short term rental ordinance is designed to limit private residential activities occurring in a residential structure within an area zoned for residential use.[36] While zoning restrictions are triggered by the location of the property and the nature of its use, the STR Ordinance is triggered by how the owner files his taxes and how long the tenants stays.[37] Therefore, the STR Ordinance falls outside the zoning authority.

### C. Zoning does not trump the Texas Constitution.

Even if the STR Ordinance were a zoning ordinance, that would not immunize the City from Appellants' constitutional challenge. It is well established that "zoning decisions must comply with constitutional limitations." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d at 933 "[A]rbitrary and discriminatory regulations will not be upheld, but only such regulations as are reasonable and have a substantial relation to the health, safety, morals or general welfare of the community." *City of Sherman v. Simms*, 143 Tex. 115, 118–19 (Tex. 1944). Here, Appellants prove that the ordinance is arbitrary, discriminatory, and unconstitutional. The City may not

35 STR Ordinance § 25-2-795.
36 STR Ordinance § 25-2-795.
37 STR Ordinance § 25-2-788, 789; 2 CR 520.

immunize itself by claiming, *ipse dixit*, that this ordinance falls under the zoning power.

## III. THE STR ORDINANCE DOES NOT SERVE A LEGITIMATE GOVERNMENT INTEREST

The Texas Constitution requires that restrictions on the use of private property "bear a substantial relationship to the health, safety, morals or general welfare of the community." *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981).[38] Establishing a substantial relationship is "more than a pleading requirement…[or] an exercise in cleverness and imagination." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 676 (Tex. 2004) (There must be actual evidence that the restriction addresses a legitimate threat to public health and safety.). *Id.*

Moreover, even if a sufficient connection to a legitimate government interest exists, if the "loss to the property owner affected, in proportion to the good accomplished [by the Ordinance]" is unreasonable, then the Ordinance must fail. *City of W. U. Place v. Ellis*, 134 S.W.2d 1038, 1040 (Tex. 1940).

Under the Equal Protection Clause, government must go further and show not merely that the ordinance was rational, but that the *categories* the ordinance creates (Type 1 vs. Type 2; STR vs. Non-STR) are based on a "real and substantial difference" that is related to the legitimate purpose of the law. *Hunt*, 462 S.W.2d at

[38] The City agrees with this articulation of the test. *See*, City's Br., at 16.

540. In other words, the City must explain how claiming a property as a homestead is sufficiently related to public disturbances to justify the complete prohibition on non-homesteaded STRs –*i.e.* Type 2 STRs. And the City must show how renting a home for 29 as opposed to 30 days is sufficiently related to public disturbances to justify arbitrary caps, 10:00 pm bedtimes, and warrantless searches. The City does not meet this showing.

### A. The City's own hard data do not tie Austin STRs to public disturbances.

From the outset of this litigation, the City has argued that the legitimate government interest addressed by the STR Ordinance is preserving neighborhood character by reducing public disturbances.[39] But as explained in Appellants' opening brief, the uncontested facts in this case, including the City's own studies, flatly refute any claim that STRs are generating more disturbances than their neighbors, or creating disturbances in significant numbers that would justify the STR Ordinance.[40]

The City points to anecdotal statements about so-called "party houses" made at City council meetings, but the City admits that it never verified any of those statements, and concedes that many of the complaints regarding "party houses"

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[39] 4 CR: 99 ("A: So it [the purpose of the ordinance] relates in the larger picture, in terms of trying to protect the neighborhood's character, in terms-in-particularly in a residential area. Q: And that comes back to, as you said earlier, avoiding disturbances? A: Yes.");

4 CR: 96-97 ("Q: Is it the City's position that this evidence—that this .8 percent of all complaints against residential properties justifies the regulations contained in the short term rental ordinance? A: Yes").

[40] Appellants' Op. Br., at 5-10.

pertain to unlicensed STRs, which are not relevant to this lawsuit.[41] Indeed, the City could not confirm if there had *ever* been "more than one" licensed STR "party house."[42] And in the past five years, the City has not initiated a single proceeding against a licensed STR for having multiple complaints.[43] Moreover, even if there were evidence of disturbances, the record is clear that the challenged provisions do not directly address disturbances, are not triggered by disturbances,[44] and will not substantially reduce disturbances[45], even if effective.

In other words, despite some public opposition to STRs, there is no connection between any actual harm from public disturbances caused by licensed STRs and the actual regulations the City enacted. The STR Ordinance therefore fails.

### B. Anecdotal public opposition cannot trump rights guaranteed under the Texas Constitution.

Despite all the data to the contrary, the City claims that "the public record more than satisfies the City's burden of establishing a legitimate governmental interest" because the STR Ordinance "was enacted after a lengthy public engagement process" where "members of the public, City staff, and elected officials made extensive comments…" in support of regulating STRs.[46] On its face, this

41 4 CR: 23; 4 CR: 25; 4 CR: 16.
42 4 CR: 105.
43 4 CR: 35.
44 2 CR: 521, 523-525.
45 4 CR: 94-95.
46 City Br., at 41.

argument indicates that the City believes that public opposition alone is sufficient to establish a legitimate government interest. Indeed, the City has made this claim previously.[47] As explained in Appellants' opening brief, and summarized below, this argument is precluded by Supreme Court precedent.

Alternatively, the City's argument could indicate that it believes that under *Patel*, the mountain of the City's own hard data and studies showing that STRs are not producing disturbances can be refuted by the fact that someone at a city council meeting said otherwise. This too is precluded by law.

**1. Public opposition alone is not a legitimate government interest**

The City claims that the STR Ordinance serves a legitimate government interest, because some individuals at meetings expressed support for STR regulation (while setting aside the opinions of those testifying in opposition). Indeed, the City makes a great deal of these discussions, noting that the Council deliberated for five years. But there is no deliberative body exception to the Texas Constitution. Nor is popular opinion a sufficient cause to reduce constitutional rights. "Majorities don't possess an untrammeled right to trammel." *Patel,* 469 S.W.3d at 95 (Willett concurring).

The Texas Supreme Court has repeatedly held that merely responding to neighborhood opposition to a property use is not a legitimate government purpose.

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47 4 CR: 91.

*Lombardo v. City of Dallas*, 124 Tex. 1, 10 (Tex. 1934) ("nor can the right of a person to use his property in a lawful manner be made to depend upon the unrestrained predilection of other property owners"). *Spann v. City of Dallas*, 111 Tex. 350, 357–58 (Tex. 1921) ("A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class."); *see also, e.g.*, *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912). Indeed, Appellants have cited numerous cases to this effect,[48] and the City's brief does not attempt to distinguish any of them. The City's appeal to populism therefore fails.

### 2. Under *Patel*, anecdotal testimony cannot overcome undisputed empirical facts

An alternative reading of the City's argument is that anecdotal stories of problems or opinions about potential problems at STRs are sufficient to overcome the City's own data, which proves that STRs do not produce more disturbances than their neighbors and a tiny amount of disturbances over all. This argument is also precluded by Texas Supreme Court precedent. First, the Court has repeatedly held that municipal authorities cannot "by their mere declaration make a particular use of property a nuisance which is not so." *Spann v. City of Dallas*, 111 Tex. 350, 358 (Tex. 1921); *Crossman v. City of Galveston*, 112 Tex. 303, 311(Tex. 1923) (same).

[48] Appellants' Br., at 36-38.

The mere "opinion of the city commissioners that the property of plaintiffs in error is a nuisance" is not sufficient evidence to justify regulation under the police power. *Crossman,* 112 Tex. at 312. Neither is the "opinion of other citizens." *Id.*

Second, the City's argument is contrary to *Patel.* In *Patel*, the Court held that plaintiffs could refute a claimed government interest by pointing to facts in the record. If those facts could be disregarded based on unconfirmed anecdotal statements made at city council meeting, *Patel* is little more than a paper barrier. A City will always be able to rummage through the minutes of council meetings, for some statement that agrees with their position, like an individual "entering a crowded cocktail party and looking over the heads of the guests for one's friends" *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J. concurring). Such formalism is contrary to the practical, real-world approach mandated by *Patel.*

### C. The City raises new governmental interests for the first time on appeal that are untimely, unconvincing, and not supported by the record.

No doubt aware of the weakness of its position, the City now attempts to buttress its government interest claims with additional justifications for the ordinance that were not raised in the trial court. But *post hoc* justifications for violations of individual rights are no longer sufficient under the Texas rational basis test. *Patel*, 469 S.W.3d at 116 (Willett, J., concurring). ("Texas judges weighing state constitutional challenges should scrutinize government's actual justifications

for a law…not something they dreamed up after litigation erupted.") Indeed, *post-hoc* arguments are increasingly disfavored by the courts, even when applying the more lenient federal rational basis test. *See, St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts.") Moreover, arguments not raised at the trial court are generally waived. *City of Houston*, 589 S.W.2d at 677 ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered.") Accordingly, the City's governmental interests asserted now for the first time to support the STR Ordinance should be rejected.

Nonetheless, out of an abundance of caution, Appellants address the City's new claims below.

**1) The STR Ordinance has nothing to do with sewer systems.[49]**

The City now points to statements made during council meetings suggesting that STRs could overwhelm existing wastewater systems if used by more people than the system was designed for.[50] But there is no evidence that STRs actually

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[49] "Septic systems" were mentioned in a parenthetical buried in a footnote on page 13 of the City's response to Appellants' Motion for Summary Judgment. Arguments raised without explanation in a footnote are waived. *City of El Paso v. Mazie's L.P.*, 408 S.W.3d 13, 17 (Tex.App.—El Paso 2012, pet. denied) (issue raised only in a footnote to a brief was waived); *Kirkpatrick v. State*, No. 08-14-00255-CR, 2016 WL 6092961, at *10 (Tex. App.—El Paso 2016), petition for discretionary review refused (Apr. 26, 2017) ("a one line sentence in a footnote does not an appellate argument make.")

[50] City's Br., at 6.

produce this problem. And even if some evidence existed, it is not sufficient to show a rational basis for the challenged STR regulations for at least two reasons.

First, the challenged regulations have no connection to wastewater. The STR Ordinance bans Type 2 STRs regardless of size or plumbing, imposes a 10 pm bedtime, forbids people from standing in the yard, restricts presence based on familial relationship, and mandates compliance with warrantless searches. The City does not explain how the box one checks on their taxes, when guests stand in the yard, the time of day that one is awake, or whether the couple using a restroom are married or not has any effect on wastewater capacity.

Second, the City's alleged concern for wastewater is contradicted by the fact that long-term rentals can have 50 guests at a time.[51] In S*t. Joseph Abbey*, 712 F.3d at 226, the court rejected the state's claim that its casket selling requirements were rationally related to protecting the public from decaying remains because the court noted that the state allowed individuals to be buried without the aid of a casket at all. This court should likewise reject the City's post hoc appeal to wastewater problems to justify restricting STRs, when it allows 50 people to visit long-term rentals at a time.

[51] 4 CR: 53.

**2) The STR Ordinance has nothing to do with housing affordability.[52]**

The City also claims that the STR Ordinance is rationally related to the City's interest in increasing housing affordability.[53] In support of this claim the City points to statements made at City Council meetings arguing that STRs could drive up the cost of housing.[54] The record simply does not support the City's argument.

The City's own study concluded that STR regulations would have no effect on housing affordability.[55] And the City's representative testified that the City had no data showing that converting "housing stock from short-term rentals back to traditional residential housing would have a substantial impact on housing prices."[56]

But the City's argument suffers from a larger problem. The vast majority of the challenged regulations would not change the housing stock at all. The presence assembly, use, and warrantless search provisions of the STR Ordinance, for example, apply to all STRs, including those where the owner resides most of the year and only rents it out part-time. If those provisions affect housing availability at all, it is only because by making STRs less viable, they might force out Type 1 STR owners that are dependent on STR income to remain in their homes. Forcing some

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52 "Affordability" was mentioned in a one sentence parenthetical in a footnote on page 13 of the City's response to Appellants' Motion for Summary Judgment. Arguments raised without explanation in a footnote are waived. *City of El Paso*, 408 S.W.3d at 17.

53 City's Br., at 8.

54 *Id.*

55 3 CR: 7973.

56 3 CR: 2167.

people out of their homes so that others can buy them is not a legitimate government interest. *See*, *Calder v. Bull*, 3 U.S. 386, 388 (1798) ("…a law that takes property from A and gives it to B… cannot be considered a rightful exercise of legislative authority.").

**3) The STR Ordinance has nothing to do with the demolition of historic homes**

The City also claims that the STR Ordinance protects "historic Austin neighborhoods."[57] But the City was asked about historic preservation directly during depositions, and the only relationship between the ordinance and historic places the City could articulate was the now-refuted claim that STRs generate more public disturbances than their neighbors.[58]

Given the failure of this argument, the City now presents the new argument raised by "one city council member" that "financial incentives to operate short-term rentals" could result in "the tearing down of historic east Austin homes only to be replaced with large residences."[59]

This argument fails for at least three reasons. First, the opinion of "one city council member" is not evidence of a problem that is sufficient to eradicate constitutional rights. *Crossman*, 247 S.W. at 813 ("The opinion of the city commissioners that the property of plaintiffs in error is a nuisance is not due process.

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57 City's Br., at 7.
58 4 CR: 99.
59 City's Br., at 8.

It is not process at all."). Second, the regulation itself has no connection to protecting historic buildings. The STR Ordinance applies regardless whether the STR has any historic value. Finally, the City already has authority to regulate the demolition of historic homes through its historical designation ordinances. It does not need to eliminate vested property rights or set 10 pm bedtimes to do so.

**4) The STR Ordinance has nothing to do with fire safety**

The City also points to instances where citizens raised hypothetical "concerns" about fire safety.[60] But citizen opinions are not evidence. *Crossman*, 112 Tex. at 312. And there is no actual evidence in the record that STR guests are more likely to cause fires or that Type 2 STRs are more flammable than Type 1 STRs. This absence of evidence is fatal to the City's argument. *See, Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 413 (Tex. Civ. App—Austin 1968) (striking down local regulation of the size of underground gasoline tanks because the "evidence does not show any real fire hazards that would be increased if…Humble were permitted to install underground storage tanks of larger capacity.")

More importantly, the STR Ordinance itself has nothing to do with fire safety. The ordinance bans Type 2 STRs *regardless* of whether they have fire safety features, bans more than six people on the property *regardless* whether it can safely accommodate more, sets a 10 pm bedtime *regardless* whether guests are actively

[60] City's Br., at 6.

creating fire hazards, and requires guests submit to warrantless searches *regardless* of risk of fire. The City's argument therefore fails.

**5) The STR Ordinance has nothing to do with schools and churches**

Finally, the City points to Mayor Leffingwell's opinion that STR tenants are less likely than long-term tenants "to support public agencies such as schools and churches" or "invest in the well-being of neighbors and homes."[61] This argument likewise fails.

The Mayor's statements are contradicted by the City's official findings which concluded that limiting STRs "will not have an impact on [Austin] schools."[62] If anything the increased tax-revenue from STRs is a boon to local public education. Second, the Mayor's opinion is not competent evidence of a legitimate government interest. *Crossman*, 247 S.W. at 813. Moreover, there is no evidence that STR owners are less likely to invest in their homes. If anything, the record in this case shows that STR owners spend significant amounts of time and money upgrading their properties.

Texas Courts need not "accept disingenuous or smokescreen explanations for the government's actions." *Patel*, 469 S.W.3d at 112 (Willett, concurring). Nor

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61 City's Br., at 8.

62 3 CR: 7974.

should they "be contortionists, ignoring obvious absurdities to contrive imaginary justifications for laws." *Id.* at 106.

### D. The City's burden argument misconstrues Appellants' *Patel* claims as takings claims.

In *Patel*, the court held that requiring 320 hours of unrelated training at a cost of a few thousand dollars, was an unduly burdensome condition placed on the practice of eyebrow threading, given the government's limited health and safety interest at stake. 469 S.W.3d at 90. The City agrees that *Patel* applies in this case, but argues that the STR regulations are not unduly burdensome because Appellants' have not shown a greater than 50% reduction in the value of their property.[63]

This argument misunderstands Appellants' claims and misstates the *Patel* inquiry. First, Appellants do not rely solely on the lost value of their property to show burden. As explained in Appellants' opening brief, the STR Ordinance burdens Appellants' constitutional rights as guests by restricting when and where they can be on the property, inquiring as to their familial relationships, requiring a 10 pm bedtime, and requiring that Appellants submit to searches.[64] It burdens Appellants as owners by forcing them to underutilize their properties, and more importantly, requires that they constantly monitor the familial relationship, movement, and bedtimes of their guests, lest they be subject to severe penalties, including the loss

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[63] City's Br., at 43 (citing *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 669, 677-79 (Tex. 2004)).

[64] Appellants' Br., at 51.

of their license.[65] For Type 2 owners, the STR Ordinance also wholly eliminates a pre-existing property right, and imposes unreasonable burdens on Appellants' right to make living.[66] As a result of this loss, some appellants will be forced to sell their properties. Mr. Zaatari might have to abandon his startup company. These burdens are wholly independent of whether or not the property maintains market value.

Second, the City misunderstands *Patel* by equating it with a takings inquiry. *Sheffield*, the only case the City relies on, was a takings case.[67] The sole discussion of property values in that case was where the Court asked "whether the City went so far in restricting *Sheffield's* use of its property that the rezoning was more like a taking." *Sheffield*, 140 S.W.3d at 677.

The *Patel* inquiry does not turn on "whether the City went so far in restricting [Appellants'] use of [their] property that the rezoning was more like a taking." Instead, the Court asks whether the burden of the ordinance is justified by the real world government interest at stake? In *Patel*, the court held that marginal increases

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65 *Id.*

66 *Id.*

67 The City claims that *Sheffield* held that "it would apply the same analysis to a takings claim a due course of law claim, and an equal protection claim under the Texas Constitution." City's Br., at 42. But that claim is not found in the text of the *Sheffield* opinion. The Court's only reference to due process or equal protection was as follows:

> whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. In resolving this legal issue, we consider all of the surrounding circumstances.

*Sheffield*, 140 S.W.3d at 673.

in public safety were not sufficient to justify hundreds of hours of costly unrelated training. 469 S.W.3d at 90. Here, the subjective preferences of neighbors are not sufficient to justify the eradication of basic property rights, violations of assembly, movement, and privacy, and the loss of thousands of dollars in investments.

## IV. APPELLANTS ARE INJURED AS A MATTER OF LAW AND FACT.

The City's primary argument is that Appellants' fail to state a claim because they have not been prosecuted and allegedly have not experienced significant financial injuries from the enforcement of the STR Ordinance.[68] This argument forms the basis for most of the City's claims regarding standing, ripeness, jurisdiction, and the merits of this case.[69] Indeed, it is the only objection the City raises to Appellants' claim that Section 1301 of the STR Ordinance violates the warrantless search provision of the Texas Constitution.[70]

This argument fails for three reasons. First, the City's violation of Appellants' constitutional rights is *per se* injury. Second, Appellants are not required to await prosecution or show economic injuries before bringing a constitutional claim for injunctive relief. Third, even if some showing of injury were required, Appellants easily meet that burden. [71]

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68 City's Br., at 12, 16, 18, 19, 20, 21, 23, 24, 25, 36-39.

69 *Id.*

70 City's Br., at 23.

71 The City falsely claims that Appellants "admitted that the challenged ordinance has been constitutionally applied at all times relevant to this controversy," because Appellants admit that they have not been prosecuted. City's Br., at 36. This is absurd. The fact that the ordinance has not

### A. Denial of constitutional rights is sufficient to establish injury.

The City argues that Appellants' fail to establish a violation of their economic liberty or property rights under the due course of law and equal protection clauses because they have not produced "evidence of actual economic loss." As explained in section C, below, this argument is predicated on a falsehood. Appellants have produced evidence of financial injury due to the STR Ordinance. But, more importantly, the extent of Appellants' financial injuries is irrelevant to whether they can state a claim for injunctive relief. It is well established that any "denial of a constitutionally guaranteed right… as a matter of law, inflicts an irreparable injury." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). Appellants are not required to articulate with precision how much money the City's violation of their fundamental rights will cost them.

### B. Appellants are not required to await enforcement before seeking injunctive relief under the Uniform Declaratory Judgments Act.

The City also argues that Appellants fail to state a claim under any constitutional provision because they have not been prosecuted or personally hassled by code enforcement. But a plaintiff challenging the constitutionality of an ordinance is not required to submit to "actual arrest or prosecution" before challenging an ordinance that "deters the exercise of his constitutional rights." *Steffel v. Thompson*,

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been applied against Appellants in the form of prosecution is not an admission that the ordinance is being constitutionally applied.

415 U.S. 452, 459 (1974). It is sufficient that he "allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [law]." *Babbit v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

This is doubly true for constitutional claims brought under the UDJA. The UDJA is clear that actual injury is not required before bringing suit for declaratory relief. *City of Waco v. Texas Nat. Res. Conservation Comm'n*, 83 S.W.3d 169, 175 (Tex. App.—Austin 2002); ("A claimant is not required to show that the injury has already occurred"); *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153–54 (Tex.App.—Austin 1998, no pet.) ("a person seeking a declaratory judgment need not have incurred actual injury"); *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex. App.—Austin 2000) ("there is no requirement that an agency undertake an enforcement action before the potential subject of that action can file suit for declaratory judgment"). This makes sense. The purpose of the UDJA is to "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations" before the law is violated and injuries occur. Tex. Civ. Prac. & Rem. Cod § 37.002(b). That purpose would be thwarted if Appellants were required to await prosecution before bringing UDJA claims in this court.

For example, in *Mitz v. Texas State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 26–27 (Tex. App.—Austin, 2008), this Court held that equine dentists

who wished to practice their trade without becoming licensed veterinarians had standing to challenge the constitutionality of a state law that that required a veterinary license to practice equine dentistry. *Id.* The government argued that the equine dentists lacked standing because it had never enforced the challenged law against them personally, and therefore any injuries were conjecture. This Court disagreed, noting that the challenged law applied to the equine dentists on its face and that the dentists thus "face[d] the hardship of either complying with the Act or facing the jeopardy of sanction or penalty." *Id.* at 26. That injury was sufficient to state a claim. *Id.*

The United States Supreme Court is in accord. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 6–8 (1988) (landlords had standing to challenge a city ordinance that placed restrictions on the prices they could charge to certain "hardship tenants," despite the fact that they currently had no "hardship tenants" and had not been prosecuted. It was enough that they were "subject to the terms of the Ordinance" on its face.).

Here, as in *Mitz* and *Pennell,* there is no dispute that the challenged provisions of the STR Ordinance apply to Appellants as owners and tenants of STRs in Austin. This is "a sufficient threat of actual injury" for standing purposes.

### C. Even if a showing of economic injury were required, Appellants meet that burden.

Under Texas law, any violation of a constitutionally protected right is an irreparable injury warranting injunctive relief. *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). Even if economic injury were required, however, Appellants meet that burden. For Appellants that own Type 2 STRs, the ban on Type 2s could force them to sell their properties. The Redwines testified that they would have to sell the property at a loss.[72]

The Heberts likewise testified that their home is not economically viable as a long-term rental.[73] The Zaataris provided evidence that the difference in income between using the property as an STR vs as a long-term rental can be as much as $2,000 per month.[74] This loss of use is sufficient to establish standing. *See*, *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App. 2015) (STR owner had standing to challenge ban on STRs).

The restrictions on all types of STRs have also significantly impacted the Appellants. All Appellants have properties that, but for the STR Ordinance, could accommodate more than 6 unrelated adults.[75] Tim Klitch, who owns an eight-bedroom house with an outdoor basketball court, saw his rental income fall by

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72 2 CR: 578, 582.
73 4 CR: 67.
74 2 CR: 548.
75 2 CR: 1384-88; 4 CR: 66; 4 CR: 574

thousands of dollars because the ordinance effectively precludes him from filling the home (no more than 6 adults can be present at an STR) or allowing his guests to use the outdoor facilities (no more than 6 adults can be outside an STR).[76] Lindsay Redwine testified that multiple potential tenants had refused to rent the home once they were told about the arbitrary restrictions in the STR Ordinance.[77] These injuries are sufficient to establish jurisdiction, ripeness, and standing.

## V. THE CITY'S AMORTIZATION ARGUMENT IS IRRELEVANT BECAUSE APPELLANTS DO NOT BRING TAKINGS CLAIMS.

The City argues that Appellants are not injured because they will allegedly have time to recoup their investments before the STR prohibition takes full effect in 2022.[78] This argument fails because it confuses takings claims—to which amortization arguably[79] applies—with due course of law claims—for which amortization is irrelevant. The United States Supreme Court has explained this issue succinctly:

> [the takings clause] does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.' Conversely, if a government action is found to be impermissible-for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process-that is the end of the inquiry. No amount of compensation can authorize such action.

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76 2 CR: 565-66.

77 2 CR: 579-80, 1962

78 City's Br., at 26-27.

79 Texas makes a compelling argument that amortization is no longer a valid defense to a takings claim and would fail in this case, even if applicable. Appellants' agree with Texas's position, but do not repeat it here because amortization is wholly irrelevant to Appellants' claims.

*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)(emphasis added).

Accordingly, because Appellants challenge the constitutional validity of the STR Ordinance, not a lack of compensation, the fact that Appellants hypothetically could see some return on their investment before Type 2 STRs are completely eliminated is wholly irrelevant. *Id*.

## VI. THE CITY'S JURISDICTIONAL 'HAIL MARYS' FAIL.

In addition to the arguments addressed above (many of which double as both jurisdictional and merits arguments in the City's brief) the City raises five purely jurisdictional arguments. Like the jurisdictional claims addressed above, these arguments were raised in the City's Plea to the Jurisdiction, which was rightly denied by the lower court. This Court should likewise reject these arguments.

### A. Appellants' claims are not barred by sovereign immunity.

The City argues that Appellants' claims are barred by sovereign immunity. This argument fails. Appellants filed this lawsuit under the UDJA. Tex. Civ. Prac. & Rem. Cod §37.003. The UDJA provides a "waiver of immunity for claims challenging the validity of ordinances." *Harvel v. Texas Dep't of Ins.-Div. of Workers' Comp.*, 511 S.W.3d 248, 253 (Tex. App.—Austin 2015). Accordingly, because Appellants' claims challenge the constitutionality of the STR Ordinance and seek only declaratory and injunctive relief, the UDJA provides a clear waiver of sovereign immunity for Appellants' claims. *See Patel*, 469 S.W.3d at 75–76

("sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief."); *Dallas v. Brown*, 373 S.W.3d 204, 208 (Tex. App.—Dallas 2012, pet. denied) ("[f]or claims challenging the validity of ordinances or statutes, the Declaratory Judgment Act … waives immunity.").

Notably, the City does not present any evidence or argument disputing that the UDJA waives sovereign immunity in this case. In fact, the City's briefing does not mention the UDJA at all. Read generously, the City argues that it is immune because the City believes that Appellants' claims will fail on the merits—an approach rejected by the Supreme Court. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000). Taken at its broadest, the City effectively claims that it may have constitutional challenges dismissed on sovereign immunity grounds by claiming, *ipse dixit*, that a regulation is related to zoning, regardless of whether the evidence supports such a claim.[80]

But it is well established that "zoning decisions must comply with constitutional limitations" and that the validity of challenges to zoning claims requires an evaluation of evidence. *Mayhew*, 964 S.W.2d at 933; *Hunt*, 462 S.W.2d at 540. Indeed, even the more lenient Federal rational basis standard "does not

[80] *See*, City's Br., at 31, 33-34. ("When the City exercises its zoning authority, it is immune to suit."); ("As a matter of law, the City's regulation of nonconforming uses is rationally related to the legitimate governmental purpose of maintaining a consistent plan of zoning. Accordingly, Plaintiffs' claims should be dismissed for want of jurisdiction.").

demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." *St. Joseph Abbey,* 712 F.3d at 226.

The City points to *Klumb v. Houston Munic. Employees Pens. Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) for the proposition that this Court may dismiss Appellants' equal protection and due course of law claims on jurisdictional grounds without looking at the evidence. But *Klumb* is inapposite. First, *Klumb* was decided before *Patel* clarified that an evidence based approach to rational basis scrutiny claims applies. *Patel* is now controlling.

Second, *Klumb* did not involve fundamental rights, private property rights, or a situation where the record flatly contradicted the alleged government interest. In *Klumb*, the petitioners challenged an agency's new interpretation of an administrative statute that treated city employees differently than contractors when assigning government pension benefits. Petitioners argued that this disparate treatment violated the due course of law and equal protection clauses of the Texas Constitution.

The Court acknowledged that the "sovereign immunity does not bar a suit to vindicate constitutional rights." *Klumb*, 458 S.W.3d at 13. But noted that the waiver of sovereign immunity requires that petitioners actually plead a facially viable constitutional claim. *Id.* As the Court explained, "before any substantive or

procedural due-process rights attach … [triggering the waiver of immunity] … the Petitioners must have a liberty or property interest that is entitled to constitutional protection." *Id.* at 15. The petitioners' claims were "facially invalid" and therefore not cognizable under the UDJA "because the Petitioners ha[d] no vested property right to the pension-plan contributions and future retirement benefits at issue." *Id*. at 15.

The petitioners' equal protection claims likewise failed because the Court held that it was rational to treat non-city employees differently than city employees for the purpose of establishing pension benefits. The petitioners did not present evidence (or even allege that such evidence existed) refuting this rational presumption and it was not the job of the court to "engage in courtroom fact finding" to do so. *Id.* at 13.

Here, unlike *Klumb*, the STR Ordinance eliminates vested property rights and places restrictions on the rights of assembly, privacy, and movement. Also, unlike *Klumb*, Appellants do not seek fact-finding from the court—the uncontested facts in the record show that the ordinance is arbitrary and unconstitutional. The City does not argue that Appellants have failed to plead the elements of a constitutional claim—nor could it. Instead, the City appears to claim, contrary to decades of precedent, that any restriction on land use, however severe and however scant the evidence of legitimate government interest, is *per se* immune from suit because cities

have the power to zone.[81] The Court's decision in *Klumb* cannot carry that much weight.

### B. Appellants' injuries are traceable to the STR Ordinance.

The City argues that Appellants' claims of "mandated underutilization" are not a result of the STR Ordinance, because the City's general occupancy limit for residential properties was already six unrelated adults before the STR Ordinance was enacted.[82]

The City's argument fails because the challenged provisions of the STR Ordinance do not turn on "occupancy," in the sense that term is used in the City Code. Instead, the STR Ordinance restricts "use," "presence," and "assemblies" at short term rentals. That word choice was intentional.

Prior to adopting the STR Ordinance, the City's legal department explained that the occupancy limits already in the code for single family use would not be applicable to STRs because the existing residential occupancy restrictions turn on whether an individual "resides" on the property.[83]

Council woman Gallo echoed that distinction. "We want to have the ability for code not to have to get into the discussion of whether somebody is sleeping there

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81 *See*, City's Br., at 31, 33-34.

82 City's Br., at 39.

83 2 CR: 1803 ("We would not use that in this context [regarding STRs] because reside doesn't really fit the description of what's happened.").

or not if they're in the property…[we want] the ability to walk up, see a number of people that are over the limits and actually cite at that point."[84]

Councilwoman Tovo made this distinction between residential occupancy limits and the caps of the STR Ordinance clear. "I'm not trying to get to occupancy in there…single-family homes can have gatherings up to 50 people, and I do not want short-term rentals to have that same right."[85] The City may not ignore the plain language and legislative history of the ordinance in order to avoid this Court's jurisdiction.

### C. Appellants sued the proper defendants.

The City argues that Appellants lack standing because they allegedly "failed to sue any City official with authority over Code enforcement."[86] The City's argument fails for two reasons. First, Plaintiffs are not required to sue an implementing official in order to seek relief under the UDJA. The UDJA is clear that municipalities are "persons" subject to suit under its provisions. Tex. Civ. Prac. & Rem. Code Ann. § 37.001 ("In this chapter, 'person' means an individual…or *municipal* or other corporation of any character.")(emphasis added). The Texas Supreme Court has thus repeatedly held that the government entity itself, and *not* the implementing officer, is the proper party in a suit challenging the constitutionality

84 2 CR: 1802.
85 2 CR: 1805.
86 City's Br., at 24.

of an ordinance under the UDJA. *Patel*, 469 S.W.3d at 76–77 (Tex. 2015); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011) (same). Accordingly, by listing the City of Austin as a defendant in this case, Appellants have sufficiently established redressability under the UDJA.

Second, even assuming that an official must be named to establish standing, the Mayor is the appropriate party sue. According to the Article 1 § 10 of the City Charter, the Mayor is the "head of the city government" for the purpose of defending City ordinances in litigation. In other words, the City charter explicitly states that if you want to sue the City regarding the constitutionality of an ordinance, you must sue the Mayor. The City cannot ignore its own charter to avoid jurisdiction.

### D. The challenge to the ban on Type 2 STRs is ripe.

The City claims that the challenge to the ban on Type 2 STRs is not ripe because Appellants are grandfathered in until 2022.[87] The City's attempt to kick the can down the road on this issue is improper and fundamentally misunderstands the nature of Appellants' injuries and the requirements of ripeness under the UDJA.

A UDJA claim is ripe if "(1) a justiciable controversy exists as to the rights and status of the parties; and (2) the controversy will be resolved by the declaration sought."). *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App.

[87] This claim does not appear to be directed to Appellants' other claims and couldn't be. The other provisions of the STR Ordinance took effect immediately.

1998). A justiciable controversy, however, "does not necessarily equate with a fully ripened cause of action." *Id.*

> It is not necessary that a person who seeks a declaration of rights under this statute shall have incurred or caused damage or injury in a dispute over rights and liabilities, but it has frequently been held that an action for declaratory judgment would lie when the fact situation manifests the presence of 'ripening seeds of a controversy.'

Id. at 153-54.

The "ripening seeds of a controversy" appear where "the claims of several parties are present and indicative of threatened litigation" which "seems unavoidable, even though the differences between the parties as to their legal rights have not reached the state of an actual controversy." *Moore*, 985 S.W.2d at 154.

In the present case, Appellants challenge the City's ban on Type 2 STRs. That ban is not hypothetical. It took effect on November 12, 2015. Because the City has grandfathered Appellants' STR permits until 2022, the City argues that the complete effects of the STR Ordinance will not be felt by Appellants until that time. But the City's staggered implementation of the STR Ordinance does not render Appellants' claims hypothetical. The STR Ordinance applies automatically. There is no condition precedent that could save Appellants from losing the right to use their homes as STRs—their demise is written into law. The City may not adopt an ordinance and then pretend as if it does not intend for that ordinance to go into effect.

### E. The City may not escape this Court's jurisdiction by claiming the STR Ordinance is a criminal ordinance.

The City's final argument is that this Court lacks jurisdiction to enjoin the STR Ordinance because it is a "criminal statute."[88] As a rule, "a party cannot seek to construe or enjoin enforcement of a criminal statute in a civil proceeding without a showing of irreparable injury to the party's vested property rights." *Texas Educ. Agency v. Leeper,* 893 S.W.2d 432, 441 (Tex. 1994). The City argues that the STR Ordinance is criminal, and therefore outside of this court's jurisdiction, because it "threatens denial of licenses, license suspension, and monetary sanctions for non-compliance."[89]

The City's argument fails for two reasons. First, by its own terms the STR Ordinance is not a criminal ordinance. Second, even if the STR Ordinance were a criminal ordinance, this Court would retain jurisdiction because the STR Ordinance impacts vested property rights.

#### 1. The STR Ordinance is not a criminal ordinance.

The STR Ordinance is not a criminal ordinance. By its own terms, violations of the STR Ordinance may be adjudicated at a civil proceeding where STR owner bears the burden of proof. The Ordinance is therefore civil as a matter of law. See, *Jernigan v. State*, 313 S.W.2d 309, 310 (Tex. Crim. App.—1958) (recognizing that

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88 City's Br., at 35.

89 City's Br., at 35.

license cancelation enforceable through administrative process was civil); see also, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (holding that a forfeiture provision was a civil sanction despite codification in criminal code).[90]

The City suggests that the STR Ordinance is criminal because it contains penalties. But if that were true, then every land use ordinance in the City Code is likewise criminal. Austin Code § 25-1-462, provides that any person who violates the City's land use ordinances is subject to up $2,000 in penalties. But it is well established that this Court has traditionally exercised jurisdiction over property claims. *Tafel v. State*, 536 S.W.3d 517, 520 (Tex. 2017) (holding that proceedings against property are civil). Cities may not circumvent this Court's traditional jurisdiction under the UDJA by simply attaching penalties to their ordinances.

**2. Even if the STR Ordinance were a criminal ordinance, this Court would maintain jurisdiction because the STR Ordinance restricts vested property rights**

In *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994), the Court held that civil courts may enjoin a criminal ordinance that impacts vested property rights. As explained in Appellants' opening brief, Appellants have a vested property right in

[90] Indeed, reading the STR Ordinance as a criminal ordinance would raise serious due process concerns because criminal convictions generally require that the government provide proof beyond a reasonable doubt. *See, In re Winship*, 397 U.S. 358 (1970), ("the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.").

using their homes as STRs. They purchased their homes at a time that STRs were legal, and made significant investments in using their homes as STRs. As the First Court of Appeals recently explained, this is sufficient to show a vested right. *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.—Houston 2015) (property owner had vested right in continued STR use). The City tries to distinguish *Tiki Island* by pointing out that the *Tiki Island* ordinance lacked an amortization period.[91] But *Tiki Island* did not make that distinction. Moreover, amortization is only relevant to the issue of compensation. It is wholly irrelevant in determining whether a vested right exists.

The City also argues that Appellants lack a vested right because "all of the plaintiffs began short-term rental operations after the City implemented its annual permit requirement."[92] But this argument relies on the faulty assumption that the City created the right to use one's home as an STR when it created its licensing program in 2012. This assumption is wrong as a matter of law and fact.

The right to lease, like all property rights, is a "foundational liberty not a contingent privilege" granted by city government**.** *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012). It is "not derived from the legislature and" preexist[s] even constitutions." *Eggemeyer v.*

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91 City's Br., at 45-46.
92 City's Br., at 50-51.

*Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). The City did not create the right to lease when it started requiring registration, any more than it created the right to own property when it created a program to assess property taxes. Indeed, the City itself concedes that STRs were a well-accepted practice in Austin long before the City created its licensing procedure.[93] The City's vested rights argument therefore fails.

## VII. THE LOWER COURT RIGHTLY EXCLUDED THE CITY'S VOLUMINOUS RECORDS

In the lower court, the City attempted to dump over ten thousand pages into the record in response to Appellants' motion for summary judgment. Less than 200 of these pages were cited or referenced in the City's briefing. The lower court rightly granted Appellants' voluminous record objection and excluded all pages that were not specifically cited by the City in its summary judgment briefing. That decision was correct and should be upheld here.

A court's decision to exclude evidence will be upheld unless it was "an abuse of discretion." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). An abuse of discretion will not be found, unless "the court acted in an unreasonable or arbitrary manner," *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex.

[93] A 2011 memorandum from the City openly admits that "[t]he practice of renting out a house, or a portion of a house[,] for a short period of time is an established practice in Austin." 1 CR: 796. As a city with legislative, academic, and entertainment events happening on a daily basis, "the practice of renting out a residential unit for . . . short term visitors has historically been treated as an allowable use." *Id.*

1991), or "without regard for any guiding rules or principles." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

Here, the exclusion of the City's voluminous records was not arbitrary and should be upheld. A general reference to a voluminous summary judgment record is inappropriate. *See Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 81 (Tex. 1989) ("Such a general reference to a voluminous record which does not direct the trial court and parties to the evidence on which the movant relies is insufficient."); *Eaton Metal Prods., L.L.C. v. U.S. Denro Steels, Inc.*, No. 14–09–00757–CV, 2010 WL 3795192, *6 (Tex.App.—Houston [14th Dist.] Sept. 30, 2010, no pet.) (holding that "[b]lanket citation to voluminous records" of approximately 700 pages was improper and did not raise a fact issue). It is not the court's "duty to search the record for supporting evidence" *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994). Or as the Fifth Circuit colorfully put it, "judges are not like pigs, hunting for truffles buried in briefs." *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. App'x 373, 379 (5th Cir., 2016).

The City points to the dissenting[94] opinion in *Molinet v. Kimbrell*, 356 S.W.3d 407, 419 (Tex. 2011), for the proposition that the court was *required* to include the entire legislative record, whether the City cited to it or not. But the dissenters in

[94] The City fails to note it is citing to a dissent.

*Molinet* merely pointed out that courts *may* look "to legislative history to determine meaning of term that lent itself to two equally plausible interpretations." *Id.*

The City is not arguing that specific statements in the legislative history of the STR Ordinance could help the Court understand an ambiguous term. It is arguing that courts are required, as a matter of law, to include the entire transcripts of every city council meeting that mentioned a proposed ordinance (however tangential the reference) any time a citizen wishes to bring a challenge to a local ordinance. The lower court did not abuse its discretion in rejecting such a request.

As a backup argument, the City asks this Court to take judicial notice of the entire record of public debate over the STR Ordinance.[95] But the City may not use judicial notice to circumvent the exclusion of improperly cited evidence. Even if it could, it could not do so for the purpose the City seeks. Generally speaking, a court may take judicial notice that a statement has been made in a public record, but a "court may not, however, take judicial notice of the truth of allegations in [those] records." *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.—Austin, 1994).

To the extent the City is asking the Court to take judicial notice of the fact that the City had public meetings before it adopted the ordinance, there is no objection. But to the extent that the City seeks to bring such deliberations in as facts to invite the Court to dig through the record and "help government contrive post hoc

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[95] City's Br., at 56.

justifications" such a request is improper. See *Patel*, 469 S.W.3d at 112 (Willett, J., concurring).

## CONCLUSION

In Texas, 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." *Barber v. Texas Dep't of Transp*., 49 S.W.3d 12, 18 (Tex. App.—Austin, 2001), rev'd on other grounds, 111 S.W.3d 86 (Tex. 2003). While cities have the authority under the police power to regulate this right in order to protect public health and safety, the police power may *only* restrict property rights when those threats are present. *Lombardo*, 73 S.W.2d 479. Cities may not restrict liberty or property rights merely to serve the predilections of a segment of their citizens. *Id.*

The Courts of our republic are designed to be "impenetrable bulwarks" against such majoritarian whims. James Madison, 1 Annals of Cong. 457. When, as in this case, an ordinance "purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 218–19 (Tex. App—Austin 2008) (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

For years, the City has pointed to public sentiment and raised jurisdictional arguments to avoid the central issues of this case. But what it has not done, because it cannot do it, is point to any actual evidence of public harm in the record that justifies the intrusive and punitive ordinance it passed. Instead, the City claims that if enough people support it, the City can eliminate vested property rights, restrict assemblies, set adult bedtimes, and mandate submission to warrantless searches, all in the name of zoning. But unconstitutional actions do not become constitutional because they are adopted by majority vote and placed in the land-use section of the city code. Such majoritarian formalism is inconsistent with the nature and dignity of a free people.

Accordingly, for the reasons set forth above, this Court should affirm the lower court's denial of the City's Plea to the Jurisdiction, overrule the granting of the City's No-evidence Motion for Summary Judgment, and reverse and render judgment on behalf of Plaintiffs.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this Petition for Review contains 11788 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

ROBERT HENNEKE

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all parties or their attorneys of record in compliance with the Texas Rules of Civil Procedure on the 30th day of May 2018.

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