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THIRD COURT OF APPEALS
AUSTIN, TEXAS
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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 IV, and TIM KLITCH, Plaintiffs – Appellants and Cross-Appellees, and

STATE OF TEXAS, Intervenor – Appellant and Cross-Appellee,

v.

CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, Defendants – Appellees and Cross-Appellants.

Appeal from Cause No. D-1-GN-16-002620
53rd Judicial District Court of Travis County, Texas

BRIEF FOR APPELLEES AND CROSS-APPELLANTS CITY OF AUSTIN AND MAYOR STEVE ADLER

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Cross-Appellant certifies that the following is a complete list of all parties and counsel to the trial court's judgment or order appealed from.

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RECORD REFERENCES

1.CR refers to the clerk's record of January 18, 2018;

2.CR refers to the clerk's record of January 19, 2018;

3.CR refers to the clerk's record of January 25, 2018;

4.CR refers to the clerk's record of March 6, 2018;

5.CR refers to the clerk's record of March 7, 2018;

6.CR refers to the clerk's record of March 21, 2018.

STATEMENT OF THE CASE

Seven plaintiffs and Texas (together, "Appellants") sued the City of Austin ("City") to enjoin implementation of the City's short-term rental ordinance, alleging state constitution violations. 2.CR.55, 1.CR.192.

Appellants filed traditional motions for summary judgment. 2.CR.95-169, 5.CR.781. The City filed pleas to the jurisdiction and a no-evidence motion for summary judgment. 6.CR.3, 6.CR.11, 2.CR.1299. All parties filed objections to evidence. 2.CR.1949, 1.CR.817, 2.CR.1871.

The trial court granted the City's no-evidence motion for summary judgment. 2.CR.1965. The trial court denied the City's pleas to the jurisdiction and Appellants' motions for summary judgment. *Id.* The trial court granted, in part, objections to evidence filed by Appellants and the City. 2.CR.1967, 3.CR.13652.

ISSUES PRESENTED

Appellants *Zaatari*, et al ("Appellants" or "Plaintiffs")

1. Plaintiffs failed to establish entitlement to summary judgment on any claim.

Appellant State of Texas ("Appellants" or "Texas")

2. Texas did not establish any independent cause of action; because Plainitffs' claims failed, Texas's claims failed.
3. No plaintiff established an impaired vested property right.
4. No plaintiff established a taking.
5. The trial court properly excluded irrelevant and undisclosed affidavits from third-party witnesses.

Cross-Appellant City of Austin ("City")

6. No plaintiff established jurisdiction.
7. The trial court erred by not admitting the complete legislative record.

TO THE HONORABLE THIRD COURT OF APPEALS:

After a comprehensive, multi-year process of public comment and legislative deliberation, the City of Austin adopted zoning regulations that identified short-term rental operations as a "non-conforming" use of property in certain residential neighborhoods. The City provided licensed operators of short-term rental operations in residential neighborhoods with a six-year amortization period to wind-down operations and reinvest as necessary. The City's short-term rental zoning ordinance was enacted to promote public health, public safety, general welfare, and the preservation of historic neighborhoods, and was supported by hundreds of citizen comments collected at numerous public hearings. Appellants' claims—in effect a detailed policy objection to a zoning decision—are unsupported by the evidence. The Court should sustain the trial court's judgment; in addition, the Court should rule that Appellants failed to even establish jurisdiction for their claims.

STATEMENT OF FACTS

I. Over a Five-Year Period, the City Collected Constituent Feedback on the Impact of Short-Term Rentals on Residential Neighborhoods

Although Appellants only challenge the City's 2016 short-term rental regulations, the City began to consider short-term rental regulations as early as 2011. *See* 2.CR.590 (2012 ordinance); *see also* 3.CR.11849[1] (identifying an audit of short-

[1] The trial court granted an objection to certain portions of the legislative record. 2.CR.1967. The City appeals this decision. *See* Argument, VII, *infra*. Alternatively,

term rentals conducted in June 2011). From the outset, concerns were brought forward about short-term rental properties that were poorly maintained, that had code violations, and that generated police and fire reports. 3.CR.11838-39. At the same time, realtors and others were opposed to regulations "in a vacuum," and suggested a fact-finding process prior to new regulation. 3.CR.11840.

Between 2012 and 2016, the City held dozens of discussions and hearings on possible regulations for short-term rental properties, generating thousands of pages of public records and testimony.[2]

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the City requests that the Court take judicial notice of the legislative history of the short-term rental regulations at issue. *See* TEX. R. EVID. 201(b),(c),(f); *see also Office of Public Utility Counsel v. Public Utility Com'n of Texas*, 878 S.W.2d 598, 600 (Tex. 1994) ("A court of appeals has the power to take judicial notice for the first time on appeal"); *Roper v. CitiMortgage, Inc.*, Case No. 03-11-00887-CV, 2013 WL 6465637 at *2, fn. 3 (Tex.App.—Austin Nov. 27, 2013, pet. denied) ("We have the power to take judicial notice of adjudicative facts that are matters of public record *sua sponte* and for the first time on appeal").

[2] Relevant portions of public hearing transcripts include: 3.CR.11819-11892 (Jan. 10, 2012), 3.CR.4345-4360, 4371-4394 (Jan. 12, 2012), 3.CR.6636-6686 (June 7, 2012), 3.CR.12335-12367 (June 26, 2012), 3.CR.12557-12602 (July 31, 2012), 3.CR.7263-7289 (Aug. 2, 2012), 3.CR.12619-12657, 12981, 13250, 13276-13289 (Sept. 11, 2012), 3.CR.7403-7444 (Oct. 16, 2012), 3.CR.7549-7564 (Oct. 18, 2012), 3.CR.13464-13472 (Feb. 28, 2013), 3.CR.13588, 13593 (Apr. 18, 2013), 3.CR.8131-8138 (Sept. 24, 2013), 3.CR.8255-8263, 8277-8303 (Sept. 26, 2013), 3.CR.8882-8909 (Feb. 19, 2015), 3.CR.9673-9690 (June 9, 2015), 3.CR.5773-5811 (June 15, 2015), 3.CR.5821-5824 (June 16, 2015), 3.CR.6002-6014 (June 18, 2015), 3.CR.6067-6073 (Aug. 11, 2015), 3.CR.6211-12, 6214-19, 6229-34, 6253-6341 (Aug. 17, 2015), 3.CR.6464-6487 (Aug. 20, 2015), 3.CR.10231-10263 (Sept. 15, 2015), 3.CR.6723-6765, 6788-6812 (Sept. 17, 2015), 3.CR.10297-99, 10311-15 (Sept. 21, 2015), 3.CR.7054-59, 7131-7152 (Oct. 15, 2015), 3.CR.10743-10771 (Nov. 12, 2015), 3.CR.1105-1114 (Dec. 17, 2015), 3.CR.27-31, 37-38 (Jan. 26, 2016), 3.CR.223-262 (Jan. 28, 2016), 3.CR.329-370 (Feb. 23, 2016).

The City Council adopted at least twelve resolutions and ordinances on the topic of short-term rental regulations in 2012, 2013, 2015, and 2016, culminating in the adoption of the February 23, 2016 ordinance challenged in this litigation.[3]

During the five-year period of public comment, hundreds, and possibly thousands of City residents provided public testimony, both in favor and against increased City regulation of short term rental properties. *See, e.g.,* 3.CR.6201 (Aug. 17, 2015 Planning and Neighborhoods Committee meeting which lasted for ten hours and included approximately 200 registered speakers).

In support of short-term rental regulation, the public record includes documented concerns including issues of public health, public safety, the general welfare, and preservation of historic neighborhoods.

[3] Ordinances and resolutions concerning short-term rentals include: 3.CR.4316 (Jan. 12, 2012 resolution seeking audit of existing rentals), 3.CR.12104 (Apr. 26, 2012 resolution setting public hearing on potential ordinance), 2.CR.590 (Aug. 2, 2012 ordinance initiating "pilot program" regulations), 3.CR.7539 (Oct. 18, 2012 resolution seeking improvements to ordinance), 3.CR.7745 (Oct. 18, 2012 ordinance amending schedule of fines and fees), 3.CR.13409 (Feb. 28, 2013 resolution initiating Code amendments), 3.CR.8382 (Sept. 26, 2013 ordinance amending regulations), 3.CR.509 (June 18, 2015 resolution seeking plan enforcement operations), 3.CR.503 (Aug. 20, 2015 resolution urging enforcement against operators), 3.CR.10598 (Nov. 12, 2015 ordinance amending license requirements), 3.CR.927 (Dec. 17, 2015 ordinance amending license requirements), 2.CR.599 (Feb. 23, 2016 ordinance adopting city-wide regulations).

A. Public health concerns.

The operation of short-term rental properties in residential neighborhoods raises public health concerns, including those arising from over-occupancy and lack of accountability. City water officials testified that residential properties are licensed to serve a specific number of bedrooms, and septic systems are licensed to handle a certain flow. Because some short-term rental operators add additional beds to the homes, in order to accommodate a larger number of guests, these properties can overwhelm existing wastewater systems, with negative environmental impacts. 3.CR1367-74, 1587, 1590, 1663, 6258, 6310.

Citizens and officials also raised concerns regarding short-term rental "bad actors" where tenants dumped trash in the neighborhood and engaged in public urination. 3.CR.355, 490-92, 527, 703, 710, 712, 719, 1411, 1585, 1590, 1663, 6008, 6303, 6728, 10983. Neighbors also presented concerns about fire safety, especially in the context of over-occupancy and parties at residential homes. 3.CR.1391-1425 (petition signed by 571 Austin residents).

B. Public safety concerns.

Neighbors of residential short-term rentals presented testimony that tenants were intoxicated in public. 3.CR.1411-12. Residents complained about open drug use, including at one rental next door to a home with a five-year old child. 3.CR.1585, 6007.

Numerous residents expressed concern about the steady stream of strangers coming in and out of rental properties who demonstrated little respect for or accountability to the long-time residents and families living next door. 3.CR.1391-1425, 5162-5231, 6303.

C. General welfare concerns.

Numerous City residents complained about noise, loud music, vulgarity, and other negative impacts of having a "party house" short-term rental in the neighborhood. 3.CR.709, 787, 1583-84, 4771-72, 5162-5231, 6007-08, 6303.

Many residents complained of illegal parking, as well. 3.CR.710, 786, 1391-1425, 1598, 1665.

Some short-term rental operators completely ignore the concerns of neighbors, and do not regulate tenant misconduct even when cited by City code personnel. 3.CR.6270-71.

D. Negative impacts on historic Austin neighborhoods.

A fundamental objection of many residents was that short-term rentals alter the character of historic Austin neighborhoods. 3.CR.5162-5231. A recurring story told by Austin residents is that a short-term rental opens up next door, advertises that it can accommodate dozens of guests, and suddenly neighbors feel under siege and lose their quality of life. 3.CR.4770-72, 5789-90, 6269-70, 6303-04.

Some residents and officials complained that rental rates at some short-term rental properties—which can exceed $1,000 per night—were driving up rents and impacting affordability in neighborhoods that would otherwise be available for families with children, veterans, and other long-term residents. 3.CR.1279, 1391-1425, 4780-87, 5162-5231, 5767, 5791-92, 6009, 6724, 6728, 7268-72, 8891-93, 9323, 10745, 10759-60, 12585-87.

One City Council member noted that financial incentives to operate short-term rentals were resulting in the tear-down of historic east Austin homes only to be replaced with large residences that host large parties. 2.CR.5796-97, 8886-87.

Former Mayor Lee Leffingwell explained that, as compared to transient tenants of short-term rentals, long-term residents are more likely to support public agencies such as schools and churches, provide anchors for the community, and invest in the well-being of neighbors and homes. 3.CR.4779.

II. The Seven Plaintiffs Did Not Begin Short-Term Rental Operations Until the City Adopted an Annual Licensing Regime

Although Texas seeks to introduce evidence of short-term rental operations that preceded the City's challenged regulations, the plaintiffs in this case began short-term rental operations after the City began its regulatory program.

The City Council established a pilot program to regulate short-term rental properties on August 2, 2012. 2.CR.590 ("2012 ordinance"). The ordinance defined a "Type 2" short-term rental as one that is rented for less than 30 consecutive days,

that is not part of a multifamily use, and that is not owner-occupied. 2.CR.591-92. The new regulations were placed in the City's zoning code. 2.CR.898-1298 (relevant sections at 2.CR.1082-1089).

The 2012 ordinance established a licensing requirement for Type-2 operators. 2.CR.592-93. To obtain a license, an operator was required to submit information and pay a fee. *Id.* The director of the Code Department, upon receipt of a complete application, was authorized to issue a license valid for one-year. *Id.* The ordinance noted that a license "may not be transferred by the property owner … and does not convey with a sale or transfer of the property." 2.CR.593.

No plaintiff operated a short-term rental prior to the 2012 ordinance. The Zaataris did not seek a short-term rental license until 2014. 2.CR.669. The Heberts obtained their license in 2014. 2.CR.59. The Redwines did not remember when they first obtained a short-term rental license, but testified that it may have been in early 2013. 2.CR.799. Klitch received a short-term rental license in 2016. 2.CR.860, 861.

III. The City Amended its Ordinance in 2016 and Announced a 2022 Sunset For Certain Short-Term Rental Operations

On February 23, 2016, the City amended its short-term rental regulations. 2.CR.599 ("2016 ordinance"). The 2016 ordinance maintained various aspects of the 2012 ordinance, including the annual licensing requirement for operators of Type-2 short-term rental properties. 2.CR.600-01. The 2016 ordinance also added new

general requirements for rental properties as well as penalties for non-compliance. 2.CR.605-08.

The 2016 ordinance also announced a "Discontinuance of Nonconforming Short-Term Rental (Type 2) Uses." 2.CR.609. This provision announced:

> A person shall discontinue a nonconforming short-term rental use that is regulated under Section 25-2-789 (*Short-Term Rental* (*Type 2*) *Regulations*), not later than the earlier of:
>
> (1) April 1, 2022; or
> (2) If the license for a short-term rental use is not renewed, the date on which the existing license expires.

2.CR.609.

IV. Plaintiffs Have Successfully Operated STR Properties for Several Years Without Suffering Any Sanction or Penalty

No plaintiff can identify any enforcement action they have suffered due to the City's enforcement of its 2012 or 2016 ordinances. No plaintiff or renter has received a citation for any violation of the ordinances. *See* 2.CR.680, 725, 763-64, 809, 866. As the lead plaintiff admitted, Plaintiffs do not even have evidence of contact between the City's Code Enforcement Department and any occupant or operator of their short-term rental properties. 2.CR.895-96.

In addition, no plaintiff has had any trouble renewing a short-term rental license, and no plaintiff has been threatened with non-renewal of their license. 2.CR.680, 811.

V. Plaintiffs Have Not Taken Any Action to Adjust their Investment Strategy in Preparation for the Announced 2022 Sunset Provision

Despite their claims of potential lost revenue beginning in April 2022, Plaintiffs have made little effort to adjust their investment strategy in preparation for the discontinuance of Type-2 short-term rentals beginning on April 1, 2022.

For example, in regard to the sunset provision, lead plaintiff Ahmad Zaatari testified, "That is five years from now, right? So I, I haven't given it much thought…." 2.CR.670. He admitted that in 2022 he will be able to continue renting his residential property for periods exceeding 30 days, and that he could also choose to live in the property. 2.CR.670.

Plaintiff Jennifer Gibson Hebert testified that she has "no idea" whether she will be able to recover her investment in her Type 2 short-term rental prior to the 2022 sunset. 2.CR.758. She indicated that long-term rentals are not as lucrative as short-term rentals, but had not undertaken any research in regard to the actual differential in expected income. 2.CR.758. She also admitted that she has the option of selling her property instead of continuing rental operations. 2.CR.758.

Plaintiff Lindsay Redwine also testified that did not know if she would recover her investments in her Type-2 rental property prior to the 2022 sunset. 2.CR.801. She admitted that after the sunset the property would still have value and that it could still be utilized as a long-term rental. 2.CR.802.

SUMMARY OF THE ARGUMENT

Appellants made facial and as-applied challenges to the City's 2016 ordinance, but failed to establish a single claim. No plaintiff produced evidence of any economic injury or deprivation of liberty. Appellants challenged the sunset of certain Type-2 rental operations, but produced no expert testimony and no analysis showing they cannot recoup their investments prior to the conclusion of a six-year amortization period. Texas alleges no injury independent of the plaintiffs. Without proof of an injury, Appellants cannot establish jurisdiction.

Texas's supplemental legal theories also fail because there is no vested right at issue. The plaintiffs began short-term rental businesses after the City adopted an annual licensing operation. Short-term rental licenses do not run with the land and are not transferable. There is no evidence that plaintiffs' prospective inability to acquire a Type-2 short-term rental license after April 1, 2022 has any negative affect on the value of their real estate. Without a vested property right, Texas's theories lack jurisdiction.

Finally, even if Appellants established jurisdiction, the City's regulations are a reasonable exercise of its zoning authority. The legislative record shows substantial public concern about issues of health, safety, general welfare, and neighborhood preservation. Under rational basis scrutiny, the 2016 ordinance substantially advances legitimate governmental purposes and survives challenge.

STANDARDS OF REVIEW

"The burden rests upon the individual who challenges a statute to establish its unconstitutionality." *Peraza v. State*, 467 S.W.3d 508, 514 (Tex.Crim.App.—2015). A reviewing court begins with the presumption that a statute is valid and "must seek to interpret a statute such that its constitutionality is supported and upheld." *Id.* "A reviewing court must make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is clearly shown." *Id*. (citations omitted).

"A facial challenge is an attack on a statute itself as opposed to a particular application." *Peraza*, 467 S.W.3d at 514 (citing *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015)). In order to successfully mountain a facial challenge to a statute, a plaintiff must establish "that no set of circumstances exists under which that statute would be valid." *Id.; see also Barshop v. Medina Cty. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 627 (Tex. 1996) ("To sustain a facial challenge, the challenging party must establish that the statute, by its terms, always operates unconstitutionally"). A court reviewing a facial challenge should not consider hypothetical applications of the challenged statute, but should consider actual applications of the law. *Peraza*, 467 S.W.3d. at 515.

By contrast, in making an as-applied challenge, "a litigant must show that, in its operation, the challenged statute was unconstitutionally applied to him; that it may be unconstitutional as to others is not sufficient (or even relevant)." *State ex rel.*

Lykos v. Fine, 330 S.W.3d 904, 910 (Tex.Crim.App.—2011). "Because the scope of an as-applied challenge is narrow, we may not entertain hypothetical claims or consider the potential impact of the statute on a potential future claimant, third party, or anyone other than appellant." *Eugene v. State*, 528 S.W.3d 245, 249-50 (Tex.App.—Houston [14th Dist.] 2017, no pet.).

Subject-matter jurisdiction is a question of law; therefore, this Court reviews a trial court's ruling on a plea to the jurisdiction de novo. *Hall v. McRaven*, 504 S.W.3d 414 (Tex.App.—Austin 2016), *aff'd*, 508 S.W.3d 232 (Tex. 2017). The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). If the relevant evidence is undisputed or fails to raise a fact issue as to jurisdiction, a plea to the jurisdiction must be granted as a matter of law. *Tex. Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004). Subject matter jurisdiction is never presumed, cannot be waived, and may be raised for the first time on appeal. *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-45 (Tex. 1993).

A traditional motion for summary judgment "may not be granted unless the affidavits and other evidence provide that there is no question of fact and that the movant is entitled to judgment as a matter of law." *In the Interest of D.K.M.*, 242 S.W.3d 863, 865-66 (Tex.App.—Austin 2007, no pet.). The Court of Appeals reviews the trial court's decision to grant summary judgment de novo. *Perez ex rel.*

Perez v. Blue Cross Blue Shield of Texas, Inc., 127 S.W.3d 826, 833 (Tex.App.—Austin 2003, pet. denied).

A no-evidence motion for summary judgment should be granted if the movant specifies the elements of the non-movant's claims for which there is no evidence, and the non-movant fails to set forth more than a scintilla of probative evidence to support each challenged element. *Perez*, 127 S.W.3d at 833. The Court applies a legal sufficiency standard of review to a no-evidence summary judgment. *Id.* at 832; *see also Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70-71 (Tex.App—Austin 1998, no pet.).

"In reviewing a summary judgment in which the trial court has not provided the specific basis for its decision, we must review each argument asserted in the motion and affirm the trial court's judgment if any of these arguments are meritorious." *Perez*, 127 S.W.3d at 833.

In reviewing a trial court's decisions whether to admit or exclude evidence, the Court applies an abuse of discretion standard. *Arlington Ind. Sch. Dist. v Texas Atty. Gen.*, 37 S.W.3d 152, 161 (Tex.App.—Austin 2001, no pet.).

ARGUMENT

I. Plaintiffs Failed to Establish Entitlement to Summary Judgment on Any Claim

Plaintiffs brought a laundry list of constitutional claims, including alleged deprivations of assembly, privacy, movement, property, equal protection,

substantive due process, and freedom from unreasonable search and seizure. Plaintiffs persist in all of these claims even though they did not identify a single citation, fine, disruption, or threat thereof that in any way impacted their properties or tenants, and even though they failed to produce any competent evidence of an actual economic injury.

As described below, Plaintiffs failed to establish threshold jurisdiction for their claims. Further, even if Plaintiffs had established a cognizable injury and a waiver of the City's governmental immunity, the City's zoning regulations affecting short-term rental operations substantially advance legitimate governmental interests, and thus pass muster under rational basis review. Accordingly, the trial court did not err in denying Appellants' motion for summary judgment.

A. Plaintiffs failed to establish jurisdiction.

Plaintiffs did not establish jurisdiction. Specifically, Plaintiffs failed to plead a prima facie claim; did not establish standing or ripeness; failed to substantiate a waiver of governmental immunity; and did not establish any vested right to continue Type-2 short-term rental operations in certain residential neighborhoods.

1. Failure to plead a valid cause of action.

Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the

controversy and what testimony will be relevant. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000).

A plaintiff does not establish jurisdiction by making unsupported legal conclusions. *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 826 (Tex.App.—Austin 2014, no pet.); *see also City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (conclusory pleadings insufficient to show jurisdictional facts needed to determine trial court jurisdiction). In *Liberty Mutual*, the 3rd Court considered whether a plaintiff asserted a valid waiver of the City's governmental immunity by alleging that "a wildfire is a substantially certain result" of the City's lack of a maintenance program. *Liberty Mutual*, 431 S.W.3d at 826. The Court ruled that this "mere legal conclusion" need not be taken as true in evaluating the sufficiency of the pleadings. *Id.*

Here, Plaintiffs made claims under five counts, some with distinct sub-claims. *See* 2.CR.71-91. Plaintiffs made little attempt to describe how they suffered personal injury in regard to each legal theory, however.

Plaintiffs asserted each of their claims as both a facial challenge and an as-applied challenge. 2.CR.64. In order to successfully mount a facial challenge to the City's ordinance, Plaintiffs' burden was to establish that no set of circumstances exist under which the ordinance would be valid. *Peraza*, 467 S.W.3d at 514. To state an as-applied challenge his burden was to state specific facts demonstrating that the

application of the 2016 ordinance resulted in actual deprivations of liberty. *Fine*, 330 S.W.3d at 904.

a. Plaintiffs failed to plead a privacy claim.

Plaintiffs' first claim was for violation of the right of privacy. The Texas Constitution guarantees "the sanctity of the individual's home and person against unreasonable intrusion." *See Tex. State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (citing TEX. CONST., art. 1, §§ 9, 25). Plaintiffs focused their privacy claim on this guarantee. 2.CR.72.

Plaintiffs failed to meet their pleading burden because they did not identify a single unreasonable intrusion. No plaintiff identified any specific violation of privacy. Plaintiffs purported to make claims on behalf of third parties, *see* 2.CR.63, but they did not specify any privacy violations suffered by third parties. Instead, Plaintiffs flatly alleged that "tenants' right to privacy is violated by Ordinance 20160223-A.1." 2.CR.72. Such conclusory pleading did not establish jurisdiction for a facial or as-applied challenge.

b. Plaintiffs failed to plead a free assembly claim.

Plaintiffs' second claim was for free assembly. The Texas Constitution protects the right of individuals to "assemble together for the common good." TEX. CONST., art. 1, § 27.

Plaintiffs did not plead any specific violations of their right to assemble, however, nor did they cite any instances in which an occupant's right to assemble was curtailed. Instead, Plaintiffs flatly alleged that "Ordinance 20160223-A.1 is a violation of the freedom of assembly under the Texas Constitution." 2.CR.74. Without any specific allegations of injury, Plaintiffs' pleadings failed to establish jurisdiction.

c. Plaintiffs failed to plead a due course of law claim.

Plaintiffs' third count included three separate claims that the 2016 ordinance violates the Texas Constitution's due course of law protections. *See* TEX. CONST., art. I, § 19. A plaintiff making a due course of law claim must allege that a state law imposes an economic burden on the challenging party that "is so burdensome as to be oppressive" in light of the government's interest. *Patel v. Tex. Dept. of Licensing & Reg.*, 469 S.W.3d 69, 87 (Tex. 2015).

In the first due course of law claim, six plaintiffs alleged that they rely on rental income from their Type-2 short-term rental properties, and that they will not be able to earn this income beginning in 2022. 2.CR.76. In the second claim, all the plaintiffs alleged that the City's short-term rental regulations cause "mandated underutilization" of their residential properties. 2.CR.78-79. In the third claim, Plaintiffs alleged that the ordinance violates their freedom of movement. 2.CR.80.

a. Plaintiffs admitted facts demonstrating that their Type-2 sunset claim was unripe.

Plaintiffs failed to allege a due course of law claim arising from the 2022 sunset provision. Rather, their petition affirmatively negated jurisdiction by admitting that Plaintiffs will not suffer any economic injury, if at all, until the Type-2 sunset occurs on April 1, 2022. *See Waco ISD v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000) (a suit is unripe if plaintiff has not suffered an injury at the time the lawsuit was filed).

The Court lacks subject matter jurisdiction for claims dependent upon future, speculative, and contingent events. *Id.* Here, for various and unpredictable reasons, Plaintiffs may not own their properties when the sunset occurs. Alternatively, they might not obtain renewal of their short-term rental licenses at any time during the coming years, due to failure to pay required fees, repeat offenses, or personal choice. Plaintiffs might also decide to live in their rental properties instead of renting them; or they may decide to lease their properties long-term.

Texas courts do not issue advisory opinions. "By focusing on whether the plaintiff has a concrete injury, the ripeness doctrine allows courts to avoid premature adjudication, and serves the constitutional interests in avoiding advisory opinions." *Waco ISD*, 22 S.W.3d at 852.

Plaintiffs did not allege that they have suffered economic harm or even that the threat of such harm is "direct and immediate, rather than conjectural,

hypothetical or remote." *See* 22 S.W.3d. at 852. Without pleading a ripe constitutional injury, Plaintiffs did not establish jurisdiction.

b. Plaintiffs' "mandated underutilization" claim was negated by reference to the City-wide residential occupancy limits.

Demonstrably flawed allegations do not establish jurisdiction. To the contrary, if pleadings demonstrate an incurable defect, a plaintiff may be barred from re-pleading. *See Westbrook v. Penley*, 231 S.W3d 389, 395 (Tex. 2007).

Here, all seven plaintiffs alleged that they are losing income each month because they are limited to leasing each residential property to up to ten adults or six unrelated adults, regardless of the size of the home. 2.CR.78-79.

This claim of "mandated underutilization" was negated by simple reference to the Austin City Code. The City's general occupancy limit for residential properties is six unrelated adults. 2.CR.986-988 (City Code § 25-2-511). Plaintiffs' properties are residential properties. 2.CR.57, 58, 61. As a matter of law, Plaintiffs could not claim economic injury based upon the occupancy limits referenced in the 2016 ordinance, because these limits applied under the City's general zoning regulations, and thus no injury was caused by the short-term rental regulations.

c. Plaintiffs failed to plead a freedom of movement claim.

Plaintiffs flatly alleged that the Ordinance violates their freedom of movement. 2.CR.80. They did not allege any specific deprivations affecting either

themselves or their tenants, however. Without specific allegations, Plaintiffs failed to establish jurisdiction.

d. Plaintiffs failed to plead an equal protection claim.

Plaintiffs' fourth count contained three different legal theories for how the Ordinance violates the equal rights guarantee of the Texas Constitution. TEX. CONST., art. 1, ¶ 3. The standard for pleading an equal protection claim is virtually identical to pleading a claim under the Texas Constitution's due course of law provision. *See, e.g., Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 244-45 (Tex.App.—Dallas 1994), *rev'd on other grounds*, 964 S.W.2d 922 (Tex. 1998). Thus, Plaintiffs' burden was to plead that the City's ordinance imposes an economic burden on the challenging party that "is so burdensome as to be oppressive" in light of the government's interest. *See Patel*, 469 S.W.3d at 87.

Plaintiffs' first equal protection claim was that the 2016 ordinance arbitrarily discriminates against short-term rental operators as compared to long-term rental operators. 2.CR.84-85. The second equal protection claim was that the 2016 ordinance arbitrarily discriminates against short-term tenants as compared to long-term tenants. 2.CR.85-86. The third claim was that the City's ordinance arbitrarily discriminates against non-owner-occupied short-term rental operators, as compared to owner-occupied short-term rental operators. 2.CR.86-89.

Plaintiffs did not allege an actual equal protection injury, however. As discussed above, plaintiffs presented no evidence of actual economic loss. Under Texas Supreme Court precedent, Plaintiffs must allege a specific, "real world" injury that is "so burdensome as to be oppressive." *Patel*, 469 S.W.3d at 87. Because Plaintiffs did not specify real-world injury, they failed to establish jurisdiction.

e. Plaintiffs failed to plead an unreasonable search or seizure claim.

Plaintiffs' fifth count alleged that the Ordinance violates the Texas Constitution's guarantee against unreasonable searches and seizures. *See* TEX. CONST., art 1, § 9.

Plaintiffs do not specify a single objectionable search or seizure, however. Instead, they simply allege that "Part 7 of Ordinance 20160223-A.1 violates Plaintiffs' freedom from unreasonable search and seizure." 2.CR.193. Such conclusory allegations do not establish the Court's jurisdiction.

2. Failure to establish standing.

In regard to standing, Texas courts adopt the federal standard; thus, Zaatari's burden is to demonstrate "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Brown v. Todd*, 53 S.W3d 297, 305 (Tex. 2001) (citing U.S. Supreme Court precedent).

Here, Plaintiffs failed to establish any injury-in-fact. They did not establish a single, real-world incident in which they were denied privacy, the right to assemble,

or freedom of movement. They did not establish any economic injury to date; they express concerns about economic injuries that may occur when the Type 2 short-term rental program sunsets on April 1, 2022, but such injuries are remote and conjectural. They also do not establish any evidence of an unreasonable search or seizure. Without standing, Plaintiffs cannot establish jurisdiction.

Plaintiffs also complained of injuries that are not traceable to the 2016 ordinance. All seven plaintiffs complain the Ordinance "mandates underutilization" of their properties, even though the City's comprehensive zoning plan sets identical occupancy limits for residential housing citywide.

Finally, Plaintiffs failed to establish redressability because they did not name a City official who is responsible for implementation of the challenged short-term rental ordinance. *See* TEX. CIV. PRAC. & REM CODE, § 65.011(2) (requiring suit against party responsible for performing allegedly wrongful action); *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 ("all parties against whom an injunction must run in order to be effective should be named in a suit for injunctive relief."). Here, Plaintiffs failed to sue any City official with authority over Code enforcement. *Cf.* 2.CR.63 (naming Mayor as a defendant), 2.CR.636-37 (City Manager is City's chief executive officer).

Without a personal injury, traceability or redressability, Plaintiffs failed to establish standing.

3. Failure to establish ripeness.

a. Reliance upon conjecture.

Plaintiffs' core claim is a substantive due process allegation concerning the City's decision to phase out certain "Type 2" short-term rentals—i.e., rentals in residential areas where the owner of the property does not live on-site—but these claims are not yet ripe because the 2016 ordinance's Type-2 sunset provision do not take effect until 2022. *See* 2.CR.609-10.

A claim is not ripe if it relies upon conjectural, hypothetical, or remote injuries. *Waco ISD*, 22 S.W.3d at 851-52. "Under the ripeness doctrine, we consider whether, *at the time a lawsuit is filed*, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Id*.

Here, Plaintiffs filed suit nearly six years before the ordinance's sunset of Type-2 rentals would take effect. *Cf*. 2.CR.4 (Original Petition filed June 17, 2016), 2.CR.609-10 (sunset April 1, 2022). Plaintiffs do not know—and did not establish—if they will own their properties in 2022, how those properties will be used, or whether they will even qualify for a short-term rental license at that time. In essence, they seek an advisory opinion that may or may not apply to prospective events. On this record, Plaintiffs' claims are not ripe and fail to establish jurisdiction.

b. Failure to address amortization period.

Plaintiffs' complaint about the Type-2 sunset relates to the City's decision to phase-out a particular, non-conforming use of residential property: i.e., operation of a short-term rental. The City's decision to end a non-conforming use is consistent with its zoning authority. Plaintiffs' burden was to show that they have not been given sufficient time to recoup their investment in their rental properties, but as discussed above, Plaintiffs failed to even analyze this question.

"A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist." *See Bd. of Adjustment of City of Dallas v. Winkles*, 832 S.W.2d 803, 806 (Tex. App.—Dallas 1992, writ denied). "A municipality's power to terminate existing property uses rendered nonconforming under zoning regulations is a valid exercise of the police power." *Id.* The use of an amortization period, during which the nonconforming use will be permitted to allow the property owner to recoup their investment is considered a "valid exercise of a municipality's police power." *Id.*

"The amortization technique must give the property owner an opportunity to recover its investment in the nonconforming structure or use at the time of the zoning change." *Id.* "The [municipality] must measure reasonableness of the opportunity for recoupment by conditions at the time the existing use becomes nonconforming—not by conditions upon expiration of the tolerance." *Id.*

A property owner may not recover more than the "full value" of a nonconforming structure or nonconforming use. *Id.* "Full value of the structure means actual dollars invested in the nonconforming structure." *Id.* "The reasonableness standard governs the measure of recoupment for amortization of a nonconforming structure or use." *Id.* "It requires only a reasonable opportunity to recoup the owner's actual investment in the nonconforming structure or use." *Id.* "It need allow nothing for appreciation of the value of land or improvements or for profit from an advantageous acquisition." *Id.*

Here, the use of the Plaintiffs' properties as Type-2 short-term rentals became nonconforming as of April 1, 2017. *See* 2.CR.609-10, 612. Despite this nonconforming use, Plaintiffs may operate their rental properties in their present locations until April 1, 2022, a five-year amortization period.[4] Plaintiffs did not precisely quantify their investments in the properties, nor did they allege or prove that the amortization period does not provide them with sufficient time to recoup their investments. Thus, under this record, Plaintiffs did not establish a ripe challenge to the sunset provision.

[4] Plaintiffs were actually provided more than five years on their amortization period because the Ordinance was signed on February 23, 2016. Therefore, they would have known that they should start recouping their investment for over a year prior to the official start of the amortization period on April 1, 2017.

4. Failure to establish a waiver of governmental immunity.

a. Zoning is governmental function.

Plaintiffs must plead specific facts supporting a waiver of the City's governmental immunity and must produce evidence of a prima facie case in order to establish the Court's jurisdiction. *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 635-36 (Tex. 2012).

Plaintiffs' burden is heightened by the fact that the Texas Legislature has specifically defined the City's zoning authority as a governmental function protected by governmental immunity. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(29) (providing immunity for "zoning, planning, and plat approval"). The City's conduct to protect residential neighborhoods and discourage non-conforming uses such as short-term rental properties is squarely within its protected zoning authority. *Wasson Interests, Ltd. v. City of Jacksonville*, 512 S.W.3d 217, 221 (Tex.App.—Tyler 2016, pet. denied) ("The enforcement of zoning ordinances and land-use restrictions is a valid exercise of a city's police powers").

The City of Austin is a home-rule municipality; its power to enact local legislation is hindered only to the extent that such power is curbed by the Texas Legislature. *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993) (citing TEX. CONST. art. XI, § 5) ("Home-rule cities have broad discretionary powers, provided that no ordinance shall contain any provision

inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature") (citations omitted).

There is currently no state law that prohibits or limits the City's short-term rental regulations. In fact, during the 2017 Legislative session both the House (HB 2251) and Senate (SB 451) considered bills that would seek to do just that, but both bills failed to ultimately become law. Thus, under the current state of the law, the City's regulations must be presumed valid.

The Legislature has expressly recognized that the City may enact laws "for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance." TEX. LOC. GOV'T CODE § 211.001. More specifically, the City may regulate "the percentage of a lot that may be occupied," "population density," and "the location and ***use*** of buildings, other structures, and land for business, industrial, residential, or other purposes." *Id.*, § 211.003 (emphasis added).

The City's short-term rental regulations fit squarely within the City's authority. The 2016 ordinance regulates the occupancy limit of lots, the amount of people that live in any one area, and the location and "use" of the buildings within the City's jurisdiction. 2.CR.599-600, 606. There is no law that expressly prohibits the City from prohibiting certain types of uses of properties in certain areas of the City. This authority goes to the fundamental nature of zoning regulations. The 2016

ordinance simply regulates short-term rental use in residential neighborhoods, which is a permitted regulation under state law.

Moreover, under the Texas Tax Code the Legislature has defined short-term rentals to be similar to hotels. *See* TEX. TAX CODE § 156.001(b):

> For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, 'hotel' includes a short-term rental. In this subsection, 'short-term rental' means the rental of all or part of a residential property to a person who is not a permanent resident under Section 156.101.

Section 156.001 is the impetus for why short-term rental operators pay Hotel Occupancy Taxes. Because the Legislature has already determined that short-term rentals are similar to hotels there is no reason that the City cannot regulate and determine where they may be located within the City, and whether they are permitted in residentially zoned areas of the City. The 2016 ordinance is merely a "use" regulation for short-term rental units that are not owner occupied. See *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 390, 397 (1926) (upholding zoning regulations creating "residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded").

As Texas recognizes, short-term rental operations are akin to hotels in some respects, and the City may re-zone these operations to places where their use is more compatible with surrounding uses.

b. As a matter of law, City's regulations are rationally related to its zoning authority.

Plaintiffs' failures regarding jurisdiction, discussed above, also frustrate their ability to establish a waiver of the City's governmental immunity. Further, Plaintiffs' equal protection and due course of law claims fail as a matter of law because the City's short-term rental regulations are rationally related to the City's exercise of zoning power. *See, e.g., Klumb v. Houston Munic. Employees Pens. Sys.*, 458 S.W.3d 1 (Tex. 2015) (holding that sovereign immunity bars plaintiffs' equal protection and due course of law claims concerning Texas pension statute). As the Texas Supreme Court explained, "While it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, immunity from suit is not waived if the claims are facially invalid." *Klumb*, 458 S.W.3d at 13 (citations omitted).

In *Klumb*, plaintiffs' made various claims against the pension board for the Houston Municipal Employees Pension System, including equal protection and due course of law claims. *Id.*, 458 S.W.3d at 13-17. Their equal protection claim alleged that they were treated differently than other city employees who worked for separate legal entities due to municipal outsourcing. *Id.* at 13. Their due course of law claim alleged that the pension board unconstitutionally denied them pension benefits. *Id.* at 15.

The Texas Supreme Court ruled that the equal protection claim failed as a matter of law. *Id.* To state a viable equal protection claim, plaintiffs' burden was to

show that they had been "treated differently from others similarly situated." *Id.* at 13. Because neither a suspect classification nor a fundamental right was involved, plaintiffs were required to further demonstrate that "the challenged decision [was] not rationally related to a legitimate governmental purpose." *Id.* "In conducting a rational-basis review, we consider whether the challenged action has a rational basis and whether use of the challenged classification would reasonably promote that purpose." *Id.* "These determinations are not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (citation omitted).

Based on these standards, the Court ruled that even if the pension board treated similarly situated employees differently, the board's actions were rationally related to at least two governmental objectives: first, to preserve sources of pension funding, and second, to reduce risk of overpaying pensioners or allowing them to "double dip." *Id.* at 13-14. Accordingly, as a matter of law, plaintiffs failed to state an equal protection claim. *Id.* at 14.

Applying *Klumb* to Plaintiffs' allegations concerning the 2016 short-term rental ordinance should lead to the same result: dismissal of Plaintiffs' equal protection and due course of law claims. Plaintiffs did not establish a suspect classification, and there is no fundamental right to engage in short-term rental activities; thus, rational basis scrutiny applies. *Klumb*, 458 S.W.3d at 13.

The City exercises its zoning authority pursuant to Texas Local Government Code, Chapter 211. The City's zoning powers include the purposes of "promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance." TEX. LOC. GOV'T CODE § 211.001. When the City exercises its zoning authority, it is immune to suit. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(29).

The 2016 ordinance is part of the City's zoning ordinances and contained in Chapter 25-2 of the City Code. *See* 2.CR.898-1298. In particular, the short-term rental regulations are contained in Chapter 25-2, Subchapter C ("Use and Development Regulations"), Article 4 ("Additional Requirements for Certain Uses"). 2.CR.1071-1111. Thus, on the face of the challenged regulations, the City is regulating the use of property, a power expressly recognized by the Legislature. *See* TEX. LOC. GOV'T CODE §§ 211.003(a)(2), (4)-(5) ("The governing body of a municipality may regulate … the percentage of a lot that may be occupied … population density, [and] the location and use of buildings, other structures, and land for business, industrial, or other purposes").

Short-term rental properties are temporary or transient housing. *Tarr v. Timberwood Park Owners Ass'n Inc.*, 510 S.W.3d 725, 730 (Tex. App.—San Antonio 2016, pet. filed); *see also Munson v. Milton*, 948 S.W.2d 813, 817 (Tex. App.—San Antonio 1997, pet. denied) ("The Texas Property Code draws a

distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like") (citing TEX. PROP. CODE. § 92.152). In the Tax Code, the Legislature treats short-term rentals like hotels, because both entail "rental of all or part of a residential property to a person who is not a permanent resident" of the property." TEX. TAX CODE § 156.001(b). The Attorney General has made similar findings, ruling that the "rental of a part of the residence constitutes a use for 'purposes incompatible' with the owner's residential use." Op. Tex. Att'y Gen. No. JC-0415 (2001) (examining TEX. TAX CODE § 11.13(k)).

The City's conduct to promote public health and safety, protect residential neighborhoods, and discourage non-conforming uses such as short-term rental properties is squarely within its protected zoning authority. *See Wasson Interests,* 512 S.W.3d at 221 ("The enforcement of zoning ordinances and land-use restrictions is a valid exercise of a city's police powers").

Plaintiffs' equal protection and due course of law claims are analyzed under identical standards of review. As a matter of law, the City's regulation of non-conforming 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.

5. No vested right.

Plaintiffs' challenge to enforcement of the City's 2016 ordinance runs counter to prevailing law, which establishes that "[t]he meaning and validity of a penal statute or ordinance should ordinarily be determined by a court exercising criminal jurisdiction." *Consumer Service Alliance of Texas, Inc. v. City of Dallas ("CSAT")*, 433 S.W.3d 796, 803 (Tex.App.—Dallas, no pet.). An ordinance is penal if imposes a "disability for purposes of punishment." *Id.*

Here, the Ordinance is indisputably penal: it threatens denial of licenses, license suspension, and monetary sanctions for non-compliance. *See* 2.CR.607-08. Plaintiffs could establish an exception to the rule barring penal challenges in civil courts by demonstrating "irreparable injury to a vested right." *Id.*, 433 S.W.3d at 804. Here, as discussed above, Plaintiffs failed to prove any irreparable injury. Further, they failed to establish a vested right because their claims concerns a short-term rental permit that is subject to renewal each year, and because all seven plaintiffs began short-term rental operations after the City adopted its annual licensing regime. Plaintiffs cannot establish that they will even have a license in 2019. *See CSAT*, 433 S.W.3d at 805 ("A right is vested when it has some definitive, rather than potential existence"). Accordingly, Plaintiffs cannot establish jurisdiction for their challenge to the 2016 ordinance.

B. Plaintiffs admitted facts defeating summary judgment.

In addition to failing to establish jurisdiction, Plaintiffs also admitted facts that defeated their motion for summary judgment. In particular, in regard to claims for violation of liberty interests—including alleged deprivations of assembly, privacy, movement, property, equal protection, and freedom from unreasonable search and seizure—the plaintiffs produced no evidence of an actual deprivation, and instead admitted that the challenged ordinance has been constitutionally applied at all times relevant to this controversy.

Lead plaintiff Ahmad Zaatari, and his wife and co-plaintiff Marwa Zaatari, admitted the following: "In the more than two-years that the Zaataris have used [their] property as [a short-term rental], they have never received a complaint." 2.CR.111. This admission, alone, defeats most of Zaatari's claims.

Without a complaint, and without any City charge or citation, the Zaataris cannot establish any injury to protected liberty interests. To state a facial challenge against the City's ordinance, the Zaataris must establish that no set of circumstances exist under which the ordinance would be valid. *Peraza*, 467 S.W.3d at 514. Yet, in their own motion, the Zaataris admitted they have successfully operated their rental property without any abridgment of their rights, thus defeating a facial claim.

Without suffering a complaint, charge, or citation, the Zaataris also cannot establish an as-applied constitutional challenge. To state such a claim, they must

establish a specific constitutional injury. *See State ex rel. Lykos*, 330 S.W.3d at 910. Zaatari may not challenge hypothetical or potential claims through an as-applied challenge. *Eugene*, 528 S.W.3d at 249-50. By admitting they have operated their property without any sanction whatsoever, the Zaataris admit that they cannot support an as-applied challenge, either.

Plaintiffs Jennifer Gibson Hebert and Mike Hebert also failed to establish any actual injury resulting from their operation of a short-term rental property. *See* 2.CR.111-13. They identified no complaints, citations, or sanctions of any sort concerning their property. In support of their motion, they attached an excerpt of Ms. Hebert's deposition transcript, but conspicuously omitted Ms. Hebert's admission that the Hebert property has never been cited for any violation of the City's short-term rental regulations.[5]

> Q: Have you ever been cited as a short-term rental owner for violating any of the short-term rental ordinances?
> A: No.
>
> Q: Have you … ever been cited as [a short-term rental] guest for violating any of the short-term rental ordinances?
> A: No.

2.CR.763-64. No separate evidence was introduced in support of Mr. Hebert. Thus, the Heberts failed to establish a facial or as-applied challenge to the City's ordinance.

[5] *Cf*. 4.CR.63-67 (fragments of J. Hebert deposition transcript), 2.CR.763-64 (admission of no enforcement action).

Plaintiffs Lindsay and Ras Redwine also failed to establish any actual injury resulting from their operation of a short-term rental property. *See* 2.CR.113-14. Like the Heberts, the Redwines identified no complaints, citations, or sanctions of any sort concerning their property. And also like the Heberts, the Redwines submitted a single, fragmented deposition transcript in support of their motion, conspicuously omitting Ms. Redwine's admission that their property has never been cited for any violation of the City's short-term rental regulations.[6]

> Q. Have you ever been cited for violating any of the short-term rental ordinance?
> A: No.

2.CR.809. Ms. Redwine also testified that even though a neighbor of her rental property made multiple complaints of excessive noise, the City investigated the complaints and found no violation. 2.CR.809-810. On this record, the Redwines did not establish a facial or as-applied challenge to the City's ordinance.

Finally, plaintiff Tim Klitch alleged only a single injury resulting from the City's ordinance—namely, occupancy limits on short-term rental properties—and did not identify any City sanction resulting from his rental operations. *See* 2.CR.114-15. The occupancy limit claim—which is brought by Klitch and the other

[6] *Cf*. 4.CR.2893-2902 and 4.CR.74 (fragments of R. Redwine deposition transcript), 2.CR.809 (L. Redwine admission of no enforcement action) and 2.CR.843 (R. Redwine testifying that L. Redwine is more knowledgeable about their rental property).

plaintiffs—is invalid as a matter of law, because the City's general zoning regulations impose the same limitations on residential occupancy as the City's short-term rental regulations. The plaintiffs claim they are losing income due to the City's short-term rental regulations, which limit tenancy to up to ten adults or six unrelated adults. 2.CR.78-80. The City's general occupancy limit for residential properties is six unrelated adults. 2.CR.986-988. Accordingly, Klitch and the other plaintiffs cannot show any occupancy-related injury that was caused by the City's short-term rental regulations.

Klitch failed to establish any other grounds for relief. In support of his motion, Mr. Klitch attached an excerpt of his deposition transcript, but omitted his admission that his property has never been cited for any violation of the City's short-term rental regulations.[7]

> Q: Have any of your guests, to the best of your knowledge, had any dealings with the city in regards to the short-term rental ordinance?
> A: I have no knowledge of any of my guests.
> Q: Have you ever been cited for violating the short-term rental ordinance?
> A: Not that I'm aware of.
> Q: Do you know if any of your guests have ever been cited for violating the short-term rental ordinance?
> A: Not that I'm aware of.

[7] *Cf.* 2.CR.556-566 (fragments of Klitch deposition transcript), 2.CR.866 (admissions of no enforcement action).

2.CR.866. On this record, Klitch failed to establish a facial or as-applied challenge to the City's ordinance.

C. Plaintiffs Did Not Demonstrate that the City's Zoning Ordinance is "Oppressive" in Light of the Governmental Interests Involved

1. The City's ordinance survives rational basis scrutiny.

To show that the City's regulation constitutes a compensable taking or a violation of equal protection or due course of law, Plaintiffs were required to show that either (1) the 2016 short-term rental ordinance's purpose "could not arguably be rationally related to a legitimate governmental interest," or (2) "when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Patel v. Texas Dept. of Licensing & Reg.*, 469 S.W.3d 69, 87 (Tex. 2015).

The *Patel* standard "includes the presumption that legislative enactments are constitutional, and places a high burden on parties claiming a statute is unconstitutional." *Id.* "If the Act is constitutional under any possible set of facts, we should presume that such facts exist without making a separate investigation of the facts or attempting to decide whether the Legislature has reached a correct conclusion with respect to the facts." *Barshop*, 925 S.W.2d at 625.

Here, the City's 2016 short-term rental ordinance was enacted to protect public health and safety, promote the general welfare, and protect the character and

quality of life in the City's residential neighborhoods – all purposes authorized by the Legislature in Chapter 211 of the Texas Local Government Code. TEX. LOC. GOV'T CODE § 211.001. Texas law recognizes that short-term rental uses—also known as "transient" uses—are akin to hotels and motels. TEX. TAX CODE § 156.001(b). As a matter of law, the Court can find that the City's ordinance is related to a legitimate governmental interest. *See Klumb*, 458 S.W.3d at 13.

Furthermore, the City's ordinance was enacted after a lengthy public engagement process that included numerous public hearings over a nearly five-year period. Through these meetings, members of the public, City staff, and elected officials made extensive comments and introduced varied documentation supporting the need for local short-term rental regulations. These comments specifically addressed public concerns related to short-term rentals, including public health, public safety, the general welfare, and preservation of historic neighborhoods.

The public record more than satisfies the City's burden of establishing a legitimate governmental interest that is advanced by the regulation of short-term rental properties and the prospective discontinuation of certain short-term rental properties in residential neighborhoods beginning in April 2022. Plaintiffs can thus only state a due course of law or equal protection claim if they can show that the City's short-term rental regulations are "so burdensome as to be oppressive in light of" the City's regulatory interest. *Patel*, 469 S.W.3d at 87.

Under Texas law, even when the City adopts a zoning ordinance that limits a property owner's prospective expectations of profit, it does not commit a constitutional violation provided that its regulatory conduct furthers a legitimate governmental interest. *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 669, 677-79 (Tex. 2004).

In *Sheffield Development*, the Texas Supreme Court considered the takings claim of a company that purchased 236 acres of land south of Dallas only to have the city implement a moratorium on development and then rezone the property to a less profitable use. 140 S.W.3d at 664-66. As a result of the city's rezoning—which specifically targeted the company in the hope of winning favorable concessions—the company's property diminished in value a total of 50%. *Id.* at 677. Nevertheless, the Court found that the city's conduct advanced a legitimate governmental interest of controlling growth, and that the city's decision was "not materially different from zoning decisions made by cities every day." *Id.* at 676-67, 679. In finding no violation, the Texas Supreme Court noted 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. *Id.* at 673 (*citing Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932-33 (Tex. 1998)).

As compared to the plaintiff in *Sheffield Development*, Plaintiffs claimed almost no injury at all. Plaintiffs presented no evidence of present economic injury,

and instead expressed a concern about potential future injury in five years when Type-2 short-term rentals will be discontinued. The *Sheffield Development* plaintiff suffered an actual economic loss—losing 50% of the value of its land, compared to the value before the challenged zoning decision. Here, by contrast, Plaintiffs have established no diminution in value. They also do not know if they will own the land in question in 2022, whether they will qualify for a short-term rental license, whether they might prefer to live in their property instead of renting it, or if other potential events may or may not occur. Not only is their claim unripe, but it also fails to satisfy their burden of proof: namely, that the challenged regulation is so burdensome as to effect a virtual dispossession of property. *See Sheffield Development,* 140 S.W.3d at 670. Accordingly, the trial court appropriately dismissed Plaintiffs' claims.

2. The City's regulations are not directed at speech.

In attempting to salvage their loss of liberty claims, Plaintiffs seek to characterize the City's zoning regulations as an attack on free speech, but the challenged ordinance is plainly directed at the use of property within city limits.

To support a facial challenge to the ordinance, Plaintiffs must show that "impermissible applications of the law are substantial when judged in relation to the [ordinance's] plainly legitimate sweep." *Ex parte Flores*, 483 S.W.3d 632, 643 (Tex.App.—Houston [14th Dist.] 2015, pet. denied) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612-15 (1973)).

In at least two other cases, federal courts have determined that regulations of short-term rental operations that have an incidental impact on speech or expression do not violate the First Amendment. *See Livable v. City of Chicago*, 2017 WL 955421 (N.D.Ill. Mar. 3, 2017) (slip copy) (upholding Chicago short-term rental regulations); *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066 (N.D.Cal. 2016) (upholding San Francisco short-term rental regulations). The Court should hold the same in regard to the City of Austin's short-term rental ordinance.

The City may adopt zoning ordinances that subject businesses to reasonable time, place and manner restrictions on expressive conduct, so long as the regulations (1) are content-neutral, (2) are designed to serve a substantial government interest, and (3) do not unreasonably limit alternative avenues for communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). *City of Renton* upheld zoning regulations that limited sexually-oriented businesses to a small subsection of the City; the Court found that the regulations were designed to further the legitimate governmental interest in avoiding the "secondary effects" of such businesses on the surrounding community. *Id.* Here, a similar analysis validates the City's ordinance: the ordinance does not target expressive conduct, but rather the uses of residential property; the ordinance advances the City interests of public health, safety, the general welfare, and neighborhood preservation; and Plaintiffs remain free to assemble in a multitude of other manners: they can assemble in non-residential

properties, such as public halls, conference centers, and the like; they can assemble in public; and so forth.

Plaintiffs produced no evidence of actual assembly injuries resulting from the City's enforcement of its ordinance, and instead argued that the ordinance might be applied in an unconstitutional manner. Their argument hinges in large part on occupancy limits applied to short-term rental properties; these limits are part of the City's general zoning regulations, however, and thus Plaintiffs cannot establish that the short-term rental ordinance caused any free assembly injury.

"A statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications." *Ex parte Flores*, 483 S.W.3d at 642-43. Plaintiffs did not produce evidence of substantial burdens on their expressive conduct caused by the 2016 ordinance, and thus did not meet their burden on summary judgment.

3. *Village of Tiki Island* does not support Plaintiffs' claims.

Appellants point to *Village of Tiki Island v. Ronquille,* 463 S.W.3d 562 (Tex.App.—Houston [1st Dist.] 2015, no pet.), as a source of support as to the viability of their claims. *Tiki Island* concerned a very unusual set of facts that are not present here, however, and therefore does not provide support for Appellants.

In *Tiki Island*, the municipality adopted an immediate ban on the vast majority of short-term rental operations. 463 S.W.3d at 565. As a result, the value of the

plaintiffs' residential properties decreased dramatically. *Id.* at 566-67. Because the Village of Tiki Island was a vacation destination, the ban on short-term rentals had a particularly injurious effect. *Id.* at 567. Further, the municipality's policymakers could not articulate any public health, safety, general welfare, or morals concerns that would justify the new zoning restriction. *Id.* at 568. In this record, the Court found that one plaintiff had submitted sufficient evidence to establish jurisdiction. *Id.* at 587.

Here, the City's challenged short-term rental regulations are distinguishable in every material aspect. First, the City did not adopt an immediate ban, but instead declared an amortization period of over six years during which Plaintiffs could recover their investments in the short-term rental use of their residential properties. Second, Plaintiffs made no claim that the City's regulations diminished the value of their property; they cannot, of course, because Austin real estate appreciates dramatically every year. Third, the City Council conducted numerous hearings establishing diverse public health, public safety, general welfare, and neighborhood preservation interests in regulating certain short-term rental properties. Fourth, the City did not ban all short-term rentals, but instead only limited certain Type-2 short-term rentals. Various other types of short-term rentals may continue indefinitely, including Type-2 rentals located in different zoning areas as well as residential short-term rentals where the owner lives on-site. Finally, unlike the Village of Tiki Island,

Austin is not a community dependent upon tourist spending, and Plaintiffs possess numerous avenues of utilizing their properties for economic gain even if they do not continue with short-term rental operations.

4. Appellants introduced no evidence to dispute the efficacy of the amortization period.

Plaintiffs also failed to introduce any evidence that would tend to show that the amortization period embodied in the City's short-term rental ordinance is insufficient to permit Plaintiffs to recover their investment in short-term rental usage of their properties. *See Tiki Island*, 463 S.W.3d at 587 (*citing City of University Park v. Benners*, 485 S.W.2d 773 (1972)).

Under *Benners*, a municipality may terminate existing property uses without constitutional harm by providing an "amortization" period under which a property owner may recover their investment in the nonconforming structure or use. 485 S.W.2d at 777, 779; *see also Winkles*, 832 S.W.2d at 806.

> The property owner can only recoup the "full value" of the nonconforming structure or the nonconforming use. Full value of the structure means actual dollars invested in the nonconforming structure. Full value of the nonconforming use may include other costs such as the cost of removing a nonconforming structure and setting up the business in a different location.

Winkles, 832 S.W.2d at 806 (citations omitted).

Here, Plaintiffs made no attempt to quantify their ability to recoup their investment in short-term rental properties. There are likely several reasons for this.

First, with the exception of the Redwines, all of the Plaintiffs decided, subsequent to the City's adoption of a pilot short-term rental ordinance in 2012, to begin short-term rental operations at their already-purchased homes. Second, Plaintiffs' short-term rental activities do not affect the underlying value of their real estate. Short-term rental licenses are non-transferrable; thus, no subsequent purchaser can buy the short-term rental business from a plaintiff. Perhaps more importantly, however, real estate in Austin is an extremely hot commodity, as this Court may judicially notice, and Plaintiffs likely have the ability at any time to sell their property at substantial profit. Third, as Plaintiffs only vaguely allude to, each of them is likely reaping dramatic profits from their short-term rental operations, and thus Plaintiffs may have already recouped the value of their investments, and then some. In any case, no Plaintiff has produced evidence showing that they will be unable to recoup investments between February 2016, when the ordinance was enacted, and April 2022, when Type-2 short-term rentals will no longer be permitted as a non-conforming use.

The City is under no obligation to ensure that Plaintiffs can rely upon a perpetual, lucrative income stream derived from a non-conforming property use. *See Sheffield Development*, 140 S.W.3d at 679 (City zoning decision that devalued plaintiff's property by 50% did not violate the Texas Constitution). In consideration of the investment-backed expectations of short-term rental operators, the City

provided a six-year window for recoupment of investment and diversification into alternative investment strategies. Plaintiffs did not show that the City's amortization period is unreasonable; therefore, they cannot establish an actionable economic injury.

VIII. Texas Did Not Establish any Independent Cause of Action; Because Plaintiffs' Claims Failed, Texas's Claims Failed

An intervenor must have a justiciable interest in the suit. *In re Union Carbide*, 273 S.W.3d 152, 154-55 (Tex. 2008). A party may intervene if it (1) could have brought all or part of the same suit in its own name or (2) would have been able to defeat all or part of the recovery if the suit had been filed against it. *Guaranty Fed. Sav. Bank v. Horeshoe Oper. Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

Here, Texas did not plead any interest in the suit separate from the Plaintiffs. *See* 1.CR.592-93 (citing general duty to uphold the law), 595-96 (relying upon Plaintiffs' pleadings). The 2016 ordinance does not affect State functions nor does its enforcement interfere with any State law or rule. Thus, the justiciability of Texas' efforts to uphold the rule of law rise and fall with Plaintiffs' ability to articulate and substantiate a cognizable constitutional injury. As the City has argued, Plaintiffs failed to establish jurisdiction because Plaintiffs did not allege a prima facie claim; did not establish standing; did not establish ripeness; did not establish a waiver of governmental immunity; and did not establish a vested property right. Further, Appellants were not entitled to summary judgment because the City established that

its zoning regulations affecting short-term rental properties substantially advanced legitimate governmental interests.

IX. No Plaintiff Established an Impaired Vested Property Right

Texas asserts that the City's ordinance is "impermissibly retroactive," a legal theory that requires Plaintiffs to establish impairment of a vested property right.

This claim is unripe, because Plaintiffs may continue to operate their short-term rental properties for several years, and to date have suffered no impairment of any existing rights. *See Robinson v. Crown Cork & Seal*, 335 S.W.3d 126, 144 (Tex. 2010) (requiring impairment of a right to state a retroactivity claim).

This claim also fails because Plaintiffs have no entitlement to operate their residential properties as short-term rentals. *See Texas Educ. Agency v. American YouthWorks, Inc.*, 496 S.W.3d 244, 260 (Tex.App.—Austin 2016, pet. granted). In *American YouthWorks*, the 3rd Court noted that an employee on an annual, one-year contract has no claim of entitlement to additional employment after expiration of his or her contract. *Id.* at 260-61.

Here, a similar analysis applies. A short-term rental license is an annual, renewable permit, subject to non-renewal or suspension for a variety of reasons, including non-payment of fees and operator misconduct. *See* 2.CR.600-03 (grounds for denial of license), 607 (grounds for suspension of license). All of the plaintiffs began short-term rental operations after the City implemented its annual permit

requirement. Accordingly, Texas cannot establish that Plaintiffs have an entitlement to conduct short-term rental operations at their properties

X. No Plaintiff Established a Taking

Texas claimed that the 2016 ordinance constitutes a regulatory taking, by which the City has "directly appropriate[d] private property" and frustrated Plaintiffs' "investment-backed expectations" without advancing a legitimate governmental interest. 1.CR.595-96. Texas's takings theory is evaluated under the same standard as the due course of law and equal protection theories asserted by Plaintiffs. *Sheffield Development*, 140 S.W.3d at 673. For the same reasons that Plaintiffs' claims fail—including failure to establish jurisdiction, and failure to produce evidence that the City's regulations are "oppressive"—Texas's claims must fail as well.

Texas's legal theory is without jurisdiction because Plaintiffs have not alleged nor can they establish any actual economic injury. Texas bases its argument on *Village of Tiki Island*, but that case does not govern this dispute. The municipality in *Village of Tiki Island* enacted a complete and immediate ban on short-term rentals. *Id.* at 564. Here, unlike in *Village of Tiki Island*, no ban is in effect, and the City's sunset provision concerning owner-occupied short-term rentals in residential neighborhoods will not take effect until April 1, 2022.

An unconstitutional taking may occur if the government physically appropriates property, if the government adopts a regulation that "denies all economically beneficial or productive use of land," or if the government's regulations go "too far" and become akin to a physical taking for which the constitution requires compensation. *Sheffield Development,* 140 S.W.3d at 671-72 Under any of these theories, an essential prerequisite is an actual economic injury, which is not present here.

The Court lacks subject matter jurisdiction for claims dependent upon future, speculative, and contingent events. *Waco ISD*, 22 S.W.3d at 851-52. Here, for various and unpredictable reasons, Plaintiffs may not suffer any economic injury at all as a result of the City's 2016 ordinance. For example, they might not own their properties when the sunset of Type-2 short-term rental licenses occurs. Alternatively, they might not obtain renewal of their short-term rental licenses at any time during the coming years, due to failure to pay required fees, repeat offenses, or personal choice. Plaintiffs might also decide to live in their rental properties instead of renting them; or they may decide to lease their properties long-term.

Texas courts do not issue advisory opinions. "By focusing on whether the plaintiff has a concrete injury, the ripeness doctrine allows courts to avoid premature adjudication, and serves the constitutional interests in avoiding advisory opinions." *Waco ISD*, 22 S.W.3d at 852.

Plaintiffs do not allege that they have suffered economic harm or even that the threat of such harm is "direct and immediate, rather than conjectural, hypothetical or remote." *See* 22 S.W.3d. at 852. Without pleading a ripe constitutional injury, the Court does not have jurisdiction over Texas' takings claim.

Finally, even if Appellants can establish jurisdiction for a takings claim, the City's zoning regulations survive rational basis scrutiny. The City has produced evidence of a legislative record replete with bona fide citizen concerns regarding public health, public safety, the general welfare, and preservation of historic Austin neighborhoods. Because the City's regulations substantially advance legitimate governmental interests, Texas's claims should fail.

XI. The Trial Court Properly Excluded Irrelevant and Undisclosed Affidavits from Third-Party Witnesses

Texas asks this Court to overrule the trial court's exclusion of third-party witness statements, but fails to demonstrate any abuse of discretion.

Texas hardly attempts to even argue that it timely disclosed the witnesses prior to its attempt to introduce witness statements into the summary judgment record. *See Appellants' Brief for the State of Texas* at 43. Once the City timely objected to the proffered statements, *see* 5.CR.1522-1531, Texas's bore the burden of demonstrating good cause for its failure to disclose. *See Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647 (Tex. 1989).

Notably, Texas offered no affidavit or other testimony that would demonstrate good cause. *See* 5.CR.1532. The Texas Supreme Court has considered numerous cases concerning the sufficiency of good cause. *See Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 96 (Tex. 1992) (noting eleven consecutive decisions in which the Court did not find good cause to allow testimony of an improperly disclosed witness). Texas does not identify a single case in which courts have allowed a party to rely upon testimony of an undisclosed witness. Without sworn testimony establishing good cause, and without precedent to support Texas's arguments, this Court uphold the trial court's decision to exclude the affidavits of undisclosed third-party witnesses.

The trial court also acted appropriately because the third-party statements do not support the claims at issue. Unlike the undisclosed witnesses, none of the seven plaintiffs in this case operated short-term rental properties prior to the City zoning regulations at issue. Accordingly, the exhibits are irrelevant to plaintiffs' claims.

XII. No Plaintiff Established Jurisdiction

As discussed above, Plaintiffs failed to establish subject matter jurisdiction for their claims. Accordingly, the trial court erred by denying the City's pleas to the jurisdiction.

XIII. The Trial Court Erred By Not Admitting the Complete Legislative Record

In response to Appellants' motions for summary judgment, which challenged in part whether the City had a legitimate governmental purpose to enact zoning regulations concerning short-term rental properties, the City filed the relevant legislative record. *See* 1.CR.797 (City response to motions for summary judgment), 3.CR.11657 (Vol. 1 of legislative record exhibit), 3.CR.2313 (Vol. 2), 3.CR.7181 (Vol. 3), 3.CR.10097 (Vol. 4), 3.CR.5232 (Vol. 5), 3.CR.3 (Vol. 6), 3.CR.1388 (Vol. 7). Plaintiffs objected on the grounds that the exhibit included voluminous records, to which the City cited to only a portion. 2.CR.1949. The Court agreed. 2.CR.1967.

The trial court erred by excluding the complete legislative record. The Texas Supreme Court has made clear that courts should look to the legislative record to determine the public interest the legislature sought to serve in enacting a particular law. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 419 (Tex. 2011); *Robinson*, 335 at 149. The complete legislative record is relevant for the purpose of Appellants' challenge to the City's regulations, and whether the 2016 ordinance substantially advances legitimate governmental interests.

The complete legislative record is also admissible in light of Appellants' inclusion of selected portions of the record. *See* TEX. R. EVID. 107. Rule 107 permits a party to introduce otherwise inadmissible evidence needed to explain fully and fairly a matter the adverse party introduced. *Walters v. State*, 247 S.W.3d 204, 217-

18 (Tex.Crim.App. 2007). Here, both plaintiffs and Texas selectively included portions of the legislative record. *See* 2.CR.122-23 (plaintiffs' citations to documents from legislative record), 5.CR.794-796 (Texas's citations). The complete record is necessary to explain fully and fairly the entirety of public opinion gathered concerning the City's challenged ordinance, a matter that Appellants introduced.

Alternatively, to the extent that the trial court ruled that the record solely consists of "pages specifically cited" by the City, *see* 2.CR.1967, this Court should rule that each document cited is part of the record.

Finally, in the alternative, the City requests that the Court take judicial notice of the legislative record of the City deliberations concerning adoption of short-term rental regulations. *See* TEX. R. EVID. 201(b),(c),(f); *see also Office of Public Utility Counsel*, 878 S.W.2d at 600 ("A court of appeals has the power to take judicial notice for the first time on appeal"); *Roper*, 2013 WL 6465637 at *2, fn. 3 ("We have the power to take judicial notice of adjudicative facts that are matters of public record *sua sponte* and for the first time on appeal").

CONCLUSION

The City requests that the Court affirm the trial court's order granting the City's no-evidence motion for summary judgment. The City further requests that the Court overrule the trial court's denial of the City's plea to the jurisdiction and the trial court's order excluding the complete legislative record.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document contains 13,976 words, in compliance with Rule 9.4 of the Texas Rules of Appellate Procedure.

\s\ Michael Siegel
MICHAEL SIEGEL
Attorney for Cross-Appellant

CERTIFICATE OF SERVICE

I certify that I served a copy of this motion on counsel of record electronically, in accordance with the Court's rules on electronic filing, on April 30, 2018, as listed below:

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APPENDIX

TAB

1. Order on Plaintiffs' and Texas' Motions for Summary Judgment and the City's Plea to the Jurisdiction and No Evidence Motion for Summary Judgment

2. Order on Plaintiffs' Objections to Defendant's Evidence

TAB 1

CAUSE NO. D-1-GN-16-002620

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSEPH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH, Plaintiffs,	§	IN THE DISTRICT COURT
&	§	
STATE OF TEXAS, Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, Defendants.	§	53rd JUDICIAL DISTRICT

ORDER ON PLAINTIFFS' AND TEXAS' MOTIONS FOR SUMMARY JUDGMENT AND THE CITY'S PLEA TO THE JURISIDICTION AND NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

BE IT REMEMBERED that on this day, the Court considered *Plaintiffs' and Texas's Motions for Summary Judgment* ("Plaintiffs' and Intervenor's Motions") and *Defendants' Pleas to the Jurisdiction and No Evidence Motion for Summary Judgment* (the "City's Motions"). After considering the pleadings, the applicable law, the arguments of counsel, and the evidence on file, the Court is of the opinion that the motions should be granted, as follows:

1. Plaintiffs' Motion for Summary Judgment is ~~GRANTED~~ / DENIED
2. State of Texas Texas's Motion for Summary Judgment is ~~GRANTED~~ / DENIED
3. The City's Plea to the Jurisdiction against Plaintiffs is ~~GRANTED~~ / DENIED
4. The City's Plea to the Jurisdiction against Texas is ~~GRANTED~~ / DENIED

11/21/17

5. The City's No Evidence Motion for Summary Judgment is GRANTED ~~DENIED~~.

So ordered on this 21st day of November, 2017

PRESIDING JUDGE
TIM SULAK

TAB 2

CAUSE NO. D-1-GN-16-002620

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSEPH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH *Plaintiffs*,	§	IN THE DISTTRICT COURT
&	§	
STATE OF TEXAS, *Intervenor*.	§	TRAVIS COUNTY, TEXAS
V.	§	
CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN *Defendants*.	§	53RD JUDICIAL DISTRICT

ORDER
ON PLAINTIFFS' OBJECTIONS TO DEFENDANTS EVIDENCE

BE IT REMEMBERED that on this day, the Court considered Plaintiffs' objections to Defendants City of Austin and Mayor Steve Adler's evidence in support of Defendants' responses to motions for summary judgment. After considering Plaintiffs' objections and the arguments of counsel, the Court ORDERS:

D Exhibit	P Objection	SUSTAINED	OVERRULED
Exhibit M	Voluminous Summary Judgment Record (except pages specifically cited)	JWA	
	Hearsay		JWA
	Relevance		
Exhibit N	Not produced in discovery		
	Relevance		
	Not cited in Defendants' Response		
Exhibit O	Not cited in Defendants' Response		
	Voluminous Summary Judgment Record		JWA
Exhibit P	Not cited in Defendants' Response		JWA
	Voluminous Summary Judgment Record		JWA

		SUSTAINED	OVERRULED
Exhibit Q	Not cited in Defendants' Response		
	Voluminous Summary Judgment Record		
Exhibit R	Not cited in Defendants' Response		
	Hearsay		
	Not valid summary judgment evidence		

So ordered on this 21st day of November, 2017

JUDGE PRESIDING

TIM SULAK