No. 03-17-00812-CV

IN THE COURT OF APPEALS FOR THE THIRD JUDICIAL DISTRICT 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.

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

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of the Case: This suit involves a challenge to specific provisions within the City of Austin's Short-term Rental Ordinance 20160223-A.1 ("the STR Ordinance"), which regulates the short-term rental of single-family residences. Individual STR owners and guests Ahmad Zaatari, Marwa Zaatari, Jennifer Gibson Herbert, Joseph "Mike" Herbert, Lindsay Redwine, Ras Redwine VI, and Tim Klitch (hereinafter, "Appellants") filed suit challenging the STR Ordinance on the ground that it violates Article I, §§ 3, 9, 19, and 27 of the Texas Constitution.

Course of Proceedings: Appellants filed suit on June 17, 2016, against the City of Austin and Mayor Steve Adler. The State of Texas filed its Plea in Intervention on October 5, 2016, and joined as an Intervenor-Plaintiff. Appellants and Texas filed their Motions for Summary Judgment. The City of Austin responded and cross-filed a Plea to the Jurisdiction and No-Evidence Motion for Summary Judgment.

Trial Court Disposition: On November 21, 2017, the 353rd Judicial District Court (the Hon. Judge Tim Sulak presiding) entered a final written order denying Appellants' and Texas' Motions for Summary Judgment, denying the City's Plea to the Jurisdiction, and granting the City's No-Evidence Motion for Summary Judgment. (2 CR: 1965-66). The Trial Court's Order disposed of all claims of the Parties. Appellants and Texas timely appealed the trial court's Order. (2 CR:1973-74).

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully requests oral argument because this appeal involves complex areas of constitutional law and its outcome will impact both property owners and municipal governments throughout the state of Texas. Oral argument is therefore likely to assist this Court.

STATEMENT REGARDING RECORD REFERENCES

The clerk's record comprises 4 volumes and will be cited as "[volume]CR:[page number]."

ISSUES PRESENTED

1. Did the trial court err in denying Appellants' Motion for Summary Judgment?

2. Did the trial court err in granting the City's No-Evidence Motion for Summary Judgment as Appellants produced more than a mere scintilla of evidence necessary to raise a genuine issue of material fact regarding the challenged elements?

TO THE HONORABLE JUSTICES OF SAID COURT:

Appellants are individuals that own and stay at short-term rental properties in Austin, Texas. Appellants defend their rights guaranteed under the Texas Constitution against the intrusion caused by Appellees' 2016 Short-term Rental Ordinance.

STATEMENT OF FACTS

A. Background

This case involves a constitutional challenge to specific provisions within the City of Austin's 2016, Short-term Rental Ordinance (the STR Ordinance). An STR (sometimes referred to as vacation rental or furnished rental) is a residential property rented for a period of less than thirty consecutive days.[1]

STRs have been common in Austin since at least the 1940s.[2] For most of Austin's history, STRs were subject to the same noise, parking, and trash restrictions as everyone else, but were otherwise left alone. Indeed, the practice was even encouraged by the City. The City advertised that "for Austin residents seeking a place to stay for a short period of time renting a house has become an increasingly popular option … [it] offer[s] flexibility, a more authentic Austin experience for visitors, and can provide a source of income for the property owner."[3]

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1 2 CR: 520.
2 2 CR: 1390.
3 2 CR: 536.

B. The City Regulates STRs

In 2012, the City adopted its first ordinance regulating STRs ("the 2012 Ordinance").[4] At that time, there were already more than a thousand STRs operating in the city.[5] The 2012 Ordinance first it required all STRs to register with the City and pay a hotel occupancy tax.[6] Second, it divided STRs into three main categories: Type 1, Type 2, and Type 3.[7] A Type 1 STR is a single family residence rented for less than thirty days that the property owner claims as his homestead for tax purposes.[8] A Type 2 STR is identical to a Type 1, except that the owner does not claim the property as a homestead for tax purposes.[9] A Type 3 STR is an STR in a multifamily structure, like an apartment.[10] The stated purpose of the 2012 Ordinance was to increase tax revenue.[11]

After the 2012 Ordinance was passed, members of the City Council pushed for more regulation. To inform future discussion of the issue, the City conducted a study comparing the public disturbance complaints called in to 311 and 911 against STRs with those of their long-term neighbors. The results of the study were clear—

4 2 CR: 530.
5 2 CR: 1829-30; 2 CR: 1831.
6 2 CR: 530.
7 2 CR: 499-00 (STR Ordinance §§ 25-2-788; 25-2-789; 25-2-790).
8 2 CR: 499 (STR Ordinance § 25-2-788); 2 CR: 520.
9 2 CR: 499 (STR Ordinance § 25-2- 789); 2 CR: 520.
10 2 CR: 500 (STR Ordinance § 25-2-790).
11 2 CR: 530.

STRs actually produce *fewer* neighborhood disturbance complaints per-capita than their long-term neighbors.[12]

Properties Associated with 311 and 911 Calls

	STRs	Sampled Residential
Percent with 311 Calls	22.86%	23.82%
Average # of 311 Calls	1.71	1.85
Percent with 911 Calls	26.87%	28.54%
Average # of 911 Calls	1.96	2.02

SOURCE: OCA analysis of 311 and 911 call data for CY 2011.

Despite this hard data, the push for STR regulation continued. The reasons given for additional regulation varied from basic protectionism—like protecting hotels from competition,[13] or keeping Californians out of the City[14]—to thinly veiled racism. For example, one speaker argued in favor of STR regulations because the neighborhood was "diverse already" and he didn't want it turning into "the east side of Austin. Enough said."[15]

In 2015, the City conducted a second study. This time, code enforcement would investigate complaints against STRs to see if there was a difference in severity between STR complaints and non-STR complaints. The study failed to return any

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12 4 CR: 2503- 11.

13 4 CR: 23 (My position is, simply and clearly, outlaw type two strs... You will do a great favor to the hotel industry.").

14 4 CR: 25 ("Because Austin should be left to the local Austinites. Not Californians.").

15 *Id.*

data because no complaints were called against STRs during the weekend-long study period.[16]

In response, Councilwoman Gallo announced to a group of citizens favoring further STR regulation that a third study of STR complaints would be conducted in the followings weeks.[17] But despite priming the pump, this third study likewise failed to produce evidence that STRs were generating more complaints than their neighbors. During the 5 week study period, the Code Department investigated a total of 19 disturbance complaints against alleged STRs.[18] But when investigated, these disturbances were solely at long-term residential properties, not STRs.[19] Indeed, none of the parties or other disturbances investigated turned out to be licensed STRs.[20]

In late 2015, the City conducted another study of STR complaints. This study compiled all 311 complaints received against licensed STRs during the three-year period of October 2012, through August 2015.[21] During that period, there were only 31 noise complaints against licensed STRs.[22] Only 13 of those complaints were against Type 2s.[23] During that same three-year period, only 40 complaints were

16 4 CR: 16.
17 *Id.*
18 4 CR: 21.
19 *Id.*
20 *Id.*
21 2 CR: 1800.
22 *Id.*
23 *Id.*

recorded against licensed STRs for alleged parking violations.[24] Only 10 of those complaints were against Type 2s.[25]

311 Complaints Against Licensed STRs 2012-2015

	Noise	Parking
Type 2 STRs	**13**	**10**
Total STRs	**31**	**42**

(This compares to the approximately 17,000 complaints against traditional residential properties received by the City in a year.[26])

Moreover, from 2012-2015, the City issued zero citations against licensed STRs or their guests for violating city noise, trash, or parking ordinances, and only 10 notices of violation for trash or occupancy related violations.[27]

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24 *Id.*

25 *Id.*

26 4 CR: 111.

27 *See* 4 CR: 2517 (stating COA 17072-17368 were responsive to Intervenor's request for "All documents related to the citations, if any, that were given to STR Type 2 properties for each of the following calendar years: 2012, 2013, 2014, 2015 and 2016."; 4 CR: 2519 – 2815 (COA 17072-17368) contain zero citations for noise, parking, or trash.; *See also* 2 CR: 1765 (stating that COA 3531-5320 were responsive to Plaintiffs' request for "all citations and notices of violation issued by the city Austin against short-term rental operators or guests."). Those pages contain 7 notices of violation for alleged over-occupancy 2 CR: 1766-69 (COA 3770, 3725, 3773, 3776). Those pages also contain 2 notices of violation failure to remove trash receptacles from the curb in a timely manner 2 CR: 1770-71(COA 3693, 4872), and one notice of violation for debris in the yard. 2 CR: 1772 (COA 3909). There are no citations for noise, trash, parking, or over occupancy. There are no notices of violation for noise or parking.

City of Austin Citations Issued Against STR Owners or Guests 2012-2015

	Noise	Parking	Trash	Over Occupancy
Type 2 STRs	**0**	**0**	**0**	**0**
Total STRs	**0**	**0**	**0**	**0**

City of Austin Notices of Violations Issued Against STR Owners or Guests 2012-2015

	Noise	Parking	Trash	Over Occupancy
Type 2 STRs	**0**	**0**	**0**	**0**
Total STRs	**0**	**0**	**3**	**7**

Likewise, while the City has authority to initiate administrative hearings to remove the STR license of any STR owner with multiple nuisance complaints,[28] the City has not initiated a single administrative hearing to remove the license of any alleged "party house."[29]

Despite this overwhelming evidence that STRs were not producing more neighborhood disturbances than their neighbors, the City Council adopted the STR

[28] Austin City Code §25-1-462; 2 CR 510-11 (STR Ordinance § 1307).
[29] 4 CR: 35.

Ordinance in 2016. The stated purpose of the ordinance was to preserve neighborhood character by reducing public disturbances.[30]

C. The 2016 STR Ordinance

The STR Ordinance regulates STRs in two ways. First, immediately banned new Type 2 licenses and bans all Type 2 STR use after April 1, 2022.[31]

Second, it places restrictions on all STRs effective immediately. Among other things, the STR Ordinance:

1) Bans assemblies of more than 6 adults outside an STR during the day between 7 am and 10 pm;[32]
2) Bans all assemblies (indoors or outdoors) for any purpose "other than sleeping" between 10 pm and 7 am;[33]
3) Bans more than 6 unrelated adults (or ten related adults) from being present on the property at any time;[34] and

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30 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."

31 2 CR: 509-10 (STR Ordinance § 25-2-950).

32 2 CR: 506 (STR Ordinance § 25-2-795 (E)).

33 2 CR: 506 (STR Ordinance § 25-2-795 (D)); 2 CR 524-25.

34 2 CR: 506 (STR Ordinance § 25-2-795 (G)).

4) Requires that STR tenants and guests submit to warrantless searches of the property at all reasonable times in order to determine compliance with the STR Ordinance.[35]

These restrictions do not turn on noise, trash, parking, or other public disturbances.[36] Mere presence on the property during the prohibited time in the prohibited numbers is enough.[37] According to Mayor Adler, the caps aren't just targeted at raging parties, they apply equally to "a family… that is sitting around the pool in a very quiet way in the backyard and not bothering anybody."[38] It doesn't matter "how quiet they are."[39] If "you're renting an STR in this community you're renting it so that people can sleep."[40] [41] Violations of the STR Ordinance are punishable by a $2,000 fine per violation and revocation of the owner's STR license.[42]

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35 2 CR: 510-11 (STR Ordinance § 1301) (the owner or person in charge of the home at the time "shall give code officials free access to the dwelling…at all reasonable times for the purpose of inspection.").

36 2 CR: 521, 523, 524-25.

37 *Id.*

38 4 CR: 5-7.

39 *Id*.

40 *Id*.

41 *See also* 4 CR: 8 (Mayor Adler describing the STR Ordinance before its adoption: "No gatherings of more than 10 of any kind at any time. Six people—gathering of six people outside at any time. No gatherings of anybody, anybody, two people, three people, after 10:00 P.M. …no people on the property in excess of two per bedroom plus two.").

42 Austin City Code §25-1-462; 2 CR: 510-511(STR Ordinance § 1307).

D. The STR Ordinance Injures Appellants

1. Ahmad and Marwa Zaatari

Appellants Ahmad and Marwa Zaatari own and operate a licensed Type 2 STR located in Austin, Texas.[43] The Zaatari Property contains four bedrooms with an outside patio and grill area large enough to comfortably accommodate 10 people. As of 2022, the STR Ordinance prohibits the Zaataris to continue to use their home as a Type 2 STR.[44]

The Zaataris originally purchased the property as their home.[45] When Mr. Zaatari lost his job, they elected to use the home as an STR as a means to pay for the property and generate income while Mr. Zaatari searched for work.[46] While the Zaataris occasionally live in the house, they do not claim it as their homestead. Accordingly, they cannot claim the property as a Type 1 STR.[47]

The Zaataris spent approximately $20,000 in cookware and furniture[48] and approximately 500 hours of Mr. Zaatari's labor improving the property for use as an STR.[49]

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43 2 CR: 543.
44 2 CR: 509-10 (STR Ordinance § 25-2-950).
45 2 CR: 544.
46 *Id*.
47 2 CR: 520 (STR Ordinance § 25-2-789).
48 2 CR: 548.
49 *Id*. at 549.

The Zaataris received a permit to use the home as a Type 2 rental in May 2015. Since that time, the home has generated as much as $2,000 more dollars a month than similarly situated long-term rentals.[50] This additional income has made it possible for Mr. Zaatari to fund a start-up company specializing in education technology.[51] Without the income from the STR, Mr. Zaatari would have to abandon his dream and close his business.[52] In the more than two-years that they operated this property as an STR, they have never received a complaint.[53]

2. Jennifer Gibson Hebert and Mike Hebert

Appellants Jennifer and Mike Hebert own and operate a licensed Type 2 STR in Austin, Texas. The home has three bedrooms, three bathrooms, and comfortably sleeps eight people.[54] As of April 1, 2022, the STR ordinance will make it illegal for the Heberts to use their home as a Type 2 STR.[55]

The Heberts spent $60,000 - $70,000[56] renovating the property, and furnishing the home to make it more appealing as a STR.[57] The Heberts would not have made

50 *Id*. at 548.
51 *Id*. at 549.
52 *Id*.
53 2 CR 546.
54 4 CR: 66.
55 2 CR: 509-10 (STR Ordinance § 25-2-950).
56 4 CR: 64.
57 *Id*.

these modifications if they did not believe they could use the home as an STR. The home is not financially viable for the Heberts as a long-term rental.[58]

Owning a Type 2 STR is a dual benefit for the Heberts.[59] First, it provides additional revenue allowing the Heberts to cover rising property taxes, maintenance costs, and the outstanding mortgage on the home while generating a modest profit.[60]

Second, using her home as an STR as opposed to a long-term rental provides Mrs. Hebert with a place to stay for significant portions of the year when she is in Austin on business.[61] Mrs. Hebert is a native Austinite and local business owner, but she currently lives in California with her husband.[62] The demands of her business require that she spend approximately forty percent of the year in Austin.[63] Because her home is not always booked as an STR, she is often able to stay in her own home while she is in town. If Mrs. Hebert were forced to rent to long-term tenants, the home would not be available for her business trips and she would likely stay at a hotel, a costly option that she does not prefer.[64]

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58 4 CR: 67 ("Q: When you say it wasn't covering the costs, what costs do you mean? A: Well, we were renting it out around $2,500, and our mortgage was around 31- to $3,300, plus our taxes have increased every year significantly.").

59 *Id*. ("Q: And why did -- can you tell me why you decided to switch from long-term rental to short-term rental? A: It wasn't covering the costs, and we had the issue still of when I didn't have place to stay, and so this was a solution to that problem.").

60 *Id*.

61 *Id*.

62 4 CR: 65.

63 *Id*.

64 4 CR: 67.

On occasions when Mrs. Hebert's home is currently unavailable, she often stays in other STRs within the city of Austin as a way to feel connected to the community and have an accommodating place to stay when she comes to Austin on business.[65] As an STR tenant/guest, she is subject to all of the restrictions of the STR Ordinance § 25-2-795 and the threat of warrantless searches under STR Ordinance § 1301. These restrictions impact her ability to use the property and to comfortably entertain family and friends when she is in town.

3. Lindsay and Ras Redwine

Appellants Lindsay and Ras Redwine own and operate a licensed Type 2 STR in Austin.[66] The house has 6 bedrooms and 3 bathrooms.[67] The home shares a yard with 2-bedroom backhouse, which the Redwines also rent out as a licensed Type 2 STR.[68] As of April 1, 2022, the STR ordinance will make it illegal for the Redwines to continue to use their home as a Type 2 STR.[69]

The Redwines purchased the property in 2012 solely for the purpose of using the home as a Type 2 short term rental.[70] Had they not been able to use the property as a Type 2 STR, they would not have bought it.[71]

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65 2 CR: 176.
66 2 CR: 574.
67 *Id*.
68 *Id*.
69 2 CR: 509-10 (STR Ordinance § 25-2-950).
70 2 CR: 575.
71 2 CR: 575; 2 CR: 578.

At the time of purchase, the property had been on the market for over a year.[72] The previous owner said that it was difficult to move a property that size as a long-term residence because it is adjacent to a low-income housing project.[73] The Redwines applied for and received a license to use the property as a Type 2 STR in 2012.[74]

The Redwines spent more than $10,000 and numerous hours renovating the property as a STR.[75] These renovations included installing air-conditioning units, remodeling the bathrooms, painting, landscaping, and furnishing.[76] If the Redwines are not able to use the home as a Type 2 STR, they will have to sell the property at a loss.[77] Use of the property as a STR can generate over $32,000 in quarterly revenue.[78]

4. Tim Klitch

Appellant Tim Klitch owns and operates a Type 1 short term rental in Austin.[79] The home has eight bedrooms and approximately 30,000 sq. ft. of yard space, including an outdoor basketball court.[80] As the STR Ordinance prohibits more

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72 2 CR: 581.
73 2 CR: 575.
74 *Id*.
75 4 CR: 74.
76 2 CR: 575.
77 2 CR: 578.
78 2 CR: 576-77.
79 2 CR: 557.
80 2 CR: 561, 563, 564.

than six adults from being outside the STR, it is illegal for Mr. Klitch's STR guests to play a game of basketball during the daytime, an activity they could lawfully do so at a nearby City park or when he has a family gathering.

Mr. Klitch purchased his home in 1993 and raised his family there.[81] Mr. Klitch would like to retire in several years in the home where he raised his children, but the increased cost of living and property taxes in Austin have forced him to consider other forms of retirement income.[82]

Prior to 2016, Mr. Klitch researched utilizing his home on limited occasions as a Type 1 short term rental.[83] Based on his research, Mr. Klitch invested $500,000–$700,000 dollars and 500–1,000 hours extensively renovating the property to market it to short term renters.[84] These renovations include, landscaping, exterior painting, interior remodeling, and new furnishings.[85] Maintenance costs on the property are now between $30,000 and $50,000 per year due to the upgrades made for use as an STR.[86] Mr. Klitch obtained a Type 1 license in October of 2015.[87]

The STR Ordinance impacted Mr. Klitch's ability to rent out his property. Due to the size of the home, the number of bedrooms, the size of the yard, and

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81 2 CR: 556-57.
82 2 CR: 557.
83 2 CR: 557.
84 2 CR: 557, 565.
85 2 CR: 557.
86 2 CR: 559.
87 *Id*.

available parking, Mr. Klitch's home can comfortably accommodate at least 20 guests without disturbing neighbors.[88] Indeed, Mr. Klitch often hosts gatherings of family and friends of 20 persons when he is using the property as his residence.[89] However, under the STR ordinance, his property may not be used by more than 6 unrelated adults or ten adults at any time. Moreover, these guests may not even lawfully go outside and utilize the basketball court in the day, because the STR limits the home to six guests outdoors.[90]

These restrictions make it difficult to market a property of that size. Indeed, bookings made in the four months prior to the adoption of the STR ordinance generated $50,000. In the eleven months since the ordinance went into effect, Mr. Klitch has only been able to rent the home out twice for a total of $5,000.[91] If these losses continue, Mr. Klitch will be forced to consider selling the house.

STANDARD OF REVIEW

Because this matter was decided on cross-motions for summary judgment, the district court's legal conclusions will be reviewed de novo, and this Court may render the judgment the trial court should have rendered. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W. 3d 118, 124 (Tex. 2010).

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88 2 CR: 561-62.
89 2 CR: 564.
90 2 CR: 506 (STR Ordinance § 25-2-795 (E)).
91 2 CR: 565-66.

To prevail on a no-evidence motion for summary judgment, the movant must allege that, after adequate time for discovery, there is no evidence of an essential element of the Appellants' cause of action. TEX. R. CIV. PROC. 166a(i); *see Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009). If the non-movant can produce a mere scintilla of evidence to raise a genuine issue of material fact regarding the challenged element, then the movant's motion must be denied. TEX. R. CIV. PROC. 166a(i); *see Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). The evidence required to survive a no-evidence motion for summary judgment does not have to be convincing. It must merely be sufficient to allow reasonable and fair-minded people to differ in their conclusions on whether the challenged fact exists. *Forbes*, 124 S.W.3d at 172.

As the City failed to dispute Appellants' summary judgment evidence at the district court as to the purpose, application, or impact of the STR Ordinance, any argument on those issues is therefore waived. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993) (the "non-movant must expressly present to the trial court, by *written* answer or response, any issues defeating the movant's entitlement."); *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.").

SUMMARY OF THE ARGUMENT

The district court's ruling should be overturned for five reasons. First, the STR Ordinance violates the Due Course of Law provision of the Texas Constitution. The Due Course of Law provision requires that, at a minimum, any restriction on individual liberty or private property rights be rationally related to a legitimate government interest and not unduly burdensome given the real-world government interest at stake. Importantly under the *Patel v. Texas Dept. of Licensing and Reg.*, 469 S.W.3d 69 (Tex. 2015), standard, this analysis requires the court to look at the facts in the record to determine both the existence and nature of the government interest claimed. If that interest is not sufficient to justify the burdens placed on individual rights, the ordinance must fail.

It is undisputed that the STR Ordinance, as written, restricts assemblies, privacy, movement, and property rights. Yet, the stated government interest supporting these restrictions—reducing public disturbances—is flatly contradicted by the record. The City's own studies show that STRs generate fewer complaints than their long-term neighbors, the restrictions themselves do not turn on public disturbances, and public disturbances are already subject to neutral laws that can be policed at the property line.

Second, the ban on Type 2 STRs violates the Texas Equal Protection Clause by treating Type 1 and Type 2 STRs differently. The Texas Equal Protection Clause

requires that distinctions in the law be based on a real and substantial difference that is rationally related to a legitimate government interest. The uncontested facts in this case show that there is no real and substantial difference between Type 1 STRs and Type 2 STRs that can justify the eradication of the latter. The sole distinction between Type 1 and Type 2 status is whether the owner claims the property as a homestead on her taxes. Yet the evidence shows that there is no connection between tax status and the stated purpose of the ban: public disturbances.

Third, the various assembly, presence, and use restrictions on STR guests violate the Texas Equal Protection Clause by treating STR owners, tenants, and guests differently than long-term residential users. The sole distinction between STR and a long-term rental is that the STR is rented for less than 30 consecutive days. There is no real and substantial difference between renting a home for 29 as opposed to 30 days that justifies arbitrary caps on who can visit the home, when they can be outside, when they must be in bed, or whether they can refuse a warrantless search. Indeed, the uncontested evidence in the record shows that STRs generate fewer complaints than their long-term neighbors.

Fourth, the STR Ordinance violates Article 1, Section 9 of the Texas Constitution by requiring that STR owners and guests open their homes to warrantless searches at almost any time without probable cause. The government

cannot mandate that one surrender her right to be secure from warrantless searches in order to exercise a basic property right.

Finally, the lower court's grant of the City's No-Evidence Motion for Summary Judgment should be overturned because Appellants produced more than a mere scintilla of evidence necessary to raise a genuine issue of material fact regarding the challenged elements.

ARGUMENT AND AUTHORITIES

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." *Spann v. City of Dallas*, 111 Tex. 350, 356 (Tex. 1921); *see also*, *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 v. City of Dallas*, 73 S.W.2d 475, 479 (1934). Cities may not restrict liberty or property rights merely to serve the predilections of a segment of their citizens. *Id.* ("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*, 111 Tex. at 516 ("A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class.").

The Due Course of Law and Equal Protection clauses of the Texas Constitution exist to ensure that this promise of "constitutional—that is, *limited*—government" is kept. *Patel*, 469 S.W.3d at 95 (emphasis original). Those provisions require that, at a minimum, restrictions on liberty or private property rights be based on real world public harms and even then, not be "unreasonably burdensome" given the evidence of the government interest at stake. *Id*. at 87. This requires that courts "consider the entire record, including evidence offered by the parties." *Id.* If the alleged harm does not exist, or if the restriction is not sufficiently linked to the alleged harm or is unduly burdensome given the real world harm to be prevented, then a restriction on individual liberty or private property rights must fail. *Id.*[92]

The alleged government interest supporting the STR Ordinance is refuted by uncontested facts in the record, including the City's own studies. But, the City chose to adopt the 2016 STR Ordinance anyway. This Court does not have to break new ground to hold that cities may not eliminate a well-established use of private property

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92 *See*, also, *Lombardo*, 73 S.W.2d at 478 ("The police power is founded in public necessity and only public necessity can justify its exercise. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights."); *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))(When, 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.").

or place significant restrictions on the most basic liberties simply to benefit the subjective preferences of one segment of the population.[93]

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT

A. The STR Ordinance Restricts Appellants' Liberty in Violation of the Due Course of Law Provision of the Texas Constitution.

To prevail on a Due Course of Law challenge, Appellants must establish that: 1) the STR Ordinance restricts a constitutionally protected right, and 2) that such restriction is not sufficiently related to the government interest at stake, or that the government interest is not sufficient to justify the restriction. *Patel*, 469 S.W.3d at 87.

The level of fit required between a challenged restriction and the government interest alleged to justify its existence is determined by the constitutional right that is infringed. Restrictions on fundamental rights, such as, assembly and privacy are subject to "strict scrutiny." *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation,* 746 S.W.2d 203, 205 (Tex. 1987). Under strict scrutiny, the ordinance must be narrowly tailored to address a compelling state interest. *Id.*

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[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.*

By contrast, a restriction on private property rights will be unconstitutional if it does not "bear a substantial relationship" to a legitimate government interest[94] or is "as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 87; *City of W.U. Place v. Ellis*, 134 S.W.2d 1038, 1041 (Tex. 1940) (If the "loss to the property owner affected, in proportion to the good accomplished [by the Ordinance]" is unreasonable, then the Ordinance must fail.); *Satterfield*, 268 S.W.3d at 215 (an Ordinance will fail if it is "out of proportion to the end sought to be accomplished.").

The STR Ordinance fails under either standard. As explained below, the STR Ordinance places restrictions on Appellants' freedoms of assembly, movement, privacy, and private property rights. These restrictions do not serve a rational (much less a compelling) governmental interest. Moreover, the various restrictions of the STR Ordinance are so vastly out of proportion to the alleged harm they seek remedy as to render them unconstitutional.

1. *The STR Ordinance Restricts Appellants' Freedoms of Assembly, Privacy, and Movement.*

The STR Ordinance restricts the freedom of assembly (by regulating when and where Appellants or their guests can gather)[95]; the right to privacy (by setting a

94 *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981).
95 CR 2: 506.

bed time,[96] regulating lawful indoor activities,[97] inquiring as to familial status of guests,[98] and requiring that tenants allow government officials to conduct warrantless searches[99]); and the freedom of movement.[100]

The STR Ordinance restricts assemblies on its face. Indeed, it even uses the term "assembly" to define what is being restricted. Article 1, Section 27 of the Texas Constitution protects Texans' fundamental right to "assemble together for their common good." This right is not limited to political assemblies, but applies to any gathering. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 542 (1973) (assembly rights "are exercised not necessarily in assemblies that congregate in halls or auditoriums but in discrete individual actions such as …taking a person into one's home.").

The STR Ordinance also facilely restricts privacy rights. The Texas Supreme Court has held that intrusions into the private activities of a residential dwelling necessarily implicate the right to privacy, (*Clayton v. Richards*, 47 S.W.3d 149, 152 (Tex. App.—Texarkana 2001, pet. denied), as do inquiries into familial status. *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation,* 746 S.W.2d 203, 205 (Tex. 1987) (polygraph questions regarding familial status violated right to privacy). The STR Ordinance regulates everything from whom STR guests

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96 CR 2: 506 (STR Ordinance § 25-2-795 (D), (F)).
97 *Id*.
98 CR 2: 506 (STR Ordinance § 25-2-795 (G)).
99 CR 2: 510-11 (STR Ordinance § 1301).
100 CR 2: 506 (STR Ordinance § 25-2-795).

allow to visit and when and where they can stand in their yards, to when they must go to bed. Its restrictions turn on the familial status of guests by requiring the City to determine whether persons are unrelated. And, the City concedes that these restrictions cannot be enforced without a visual inspection of the interior of the home.[101] These restrictions infringe upon the right to privacy.

Section 25-2-795 of the STR Ordinance also restricts the movement of STR tenants by limiting movement on the property during the day and effectively setting a 10 pm adult curfew for movement inside or outside the home after 10:00 pm.

The Due Course of Law provision protects all rights including the freedom of movement without arbitrary restraint. *Casarez v. State*, 913 S.W.2d 468, 487 n.18 (Tex. Crim. App. 1994), *on reh'g* (Dec. 13, 1995) ("Personal freedom 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.'").

The freedom of movement, even in its narrowest sense, includes the right to move about or "come and go at will." *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995). Curfews and other restrictions on adults' ability to move about freely, like those at issue here, are generally unconstitutional. *Bykofsky v. Borough of*

[101] 2 CR: 524.

Middletown, 97 S.Ct. at 394, 395 (1976) ("a curfew aimed at all citizens could not survive constitutional scrutiny").

The STR Ordinance infringes on the freedom of movement in several ways. First, it prohibits more than six individuals from being outdoors at an STR at any time for any purpose.[102] This prohibition applies even if the home can legally house more than six individuals.[103] Accordingly, if Plaintiffs' guests are congregating on the back patio, or in the yard of the rental for any purpose, a seventh legal guest may not exit the home and stand in the yard lest she be prosecuted for violating the STR Ordinance.

Second, the STR Ordinance prohibits movement, even inside the home, after 10:00 p.m.[104] Specifically, the STR Ordinance prohibits any "assembly," which is defined to include all "group activity other than sleeping."[105] Thus, two STR guests watching television at 10:01 p.m. would be in violation of the Ordinance and subject to up to $2,000 in penalties. Curfews and other restrictions on adults' ability to move about freely, like those at issue here, are generally unconstitutional. *Bykofsky*, 97 S.Ct. at 395.

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102 CR 2: 506 (STR Ordinance §§ 25-2-795 (D), (E)).
103 *Id.*
104 CR 2: 506 (STR Ordinance § 25-2-795 (D)).
105 *Id.*

2. *The STR Ordinance violates Appellants' property rights.*

a. Appellants have a right to use their homes as STRs.

In *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.—Houston 2015), the court held that an individual who purchased a home at a time that STRs were not legally prohibited, had a vested right to use the home as an STR. Here, all Appellants purchased and improved their homes for STR use at a time that STRs were legal.[106]

The "bundle of sticks" associated with private property ownership has long included the right to lease the property to others. *See French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995) (right to lease out property part of the bundle of sticks usually conveyed with title.); *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (1890)("the right to lease [property] to others, and therefore derive profit, is an incident of [fee] ownership.")[107] This Court has recently and repeatedly held that this "right to lease" includes the right to use one's home as an STR. *See*, *e.g.*, *Boatner v. Reitz*, 03-16-00817-CV, 2017 WL 3902614, at *4 (Tex. App. Aug. 22, 2017); *Zgabay v. NBRC Prop. Owners Assn.*, 03-14-00660-CV, 2015 WL 5097116, at *3

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106 2 CR: 575; 4 CR: 56; 4 CR: 74; 2 CR: 575; 2 CR: 557) ("We essentially renovated . . . every square foot of the property inside [and] outside to prepare for short-term rental usage"). 2 CR: 21; 2 CR: 574; 2 CR: 558).

107 *See also*, *Markley v. Martin*, 204 S.W. 123, 125 (Tex. Civ. App.—San Antonio 1918, writ ref'd)("An owner has the "absolute right to lease her property and collect the rents."). An owner similarly has the right to license use of her property by granting others the privilege of staying at her property. *See Long Island Owner's Ass'n, Inc. v. Davidson*, 965 S.W.2d 674, 683 (Tex. App.—Corpus Christi 1998, pet. denied).

(Tex. App.—Austin Aug. 28, 2015). This is true even if the home is in a residential area. *Id.* (citing *Garrett v. Sympson*, 523 S.W.3d 862, 869 (Tex. App.—Fort Worth 2017) ("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…. The 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.").

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); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (The right to use private property has been described as "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions.") Any restriction on that right, therefore, must "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).

b. <u>The STR Ordinance infringes on Appellants' property rights.</u>

The STR Ordinance places various burdens on Appellants' rights to use and dispose of their properties as they see fit. For the Appellants that own type 2 STRs,

the STR Ordinance is particularly problematic. Under the Ordinance, Type 2 rental owners will no longer be allowed to use their properties as STRs after 2022.[108]

Moreover, all Appellants' rights to use their properties are impacted by the STR Ordinance in some way. For example, all Appellants are subject to the assembly and use caps contained in the Ordinance.[109] These caps place a dual burden on Appellants. First, the caps force Appellants' to underutilize their properties. For example, Mr. Klitch owns an eight-bedroom home.[110] Under the Ordinance, he could not rent all eight bedrooms out unless the tenants were all related.[111] Moreover, even if all tenants were related, those tenants would be prohibited from going in the backyard at one time, or inviting any unrelated guests over for dinner.[112] Mr. Klitch testified that these restrictions have made marketing his home as an STR almost impossible.[113]

The Redwines have experienced similar problems. The front house on their property can comfortably sleep ten and the back house can comfortably sleep up to six.[114] Under the STR ordinance, both homes are limited to ten related adults or six unrelated adults.[115] Moreover, the ordinance makes the simultaneous renting of both

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108 STR Ordinance § 25-2-950.
109 *See* CR 2: 506 (STR Ordinance § 25-2-795).
110 2 CR: 556.
111 *See* CR 2: 506 (STR Ordinance § 25-2-795 (G)).
112 *See* CR 2: 506 (STR Ordinance § 25-2-795 (E), (G)).
113 2 CR: 565-66.
114 2 CR: 560.
115 *See* CR 2: 506 (STR Ordinance § 25-2-795(G)).

houses to different groups difficult, as no more than 6 adults may be present in the shared yard at any time, but at least six adults may lawfully stay at either house.[116] Accordingly, individuals staying in the front house could effectively deny the backhouse access to yard by merely standing outside in numbers greater than 5. These caps along with the assembly and warrantless search restrictions of the STR ordinance have caused potential guests to cancel bookings at the Redwines' home.[117]

Second, the caps require that all Appellants' extensively monitor the familial relationships and private activities of their guests, up to and including when those guests go to bed.[118] Failure to do so could subject Appellants' to civil and criminal penalties as well as the loss of their STR licenses.[119] Yet, monitoring such activities is far more burdensome, difficult, and intrusive than a landlord's traditional duties to generally monitor whether guests are creating a public nuisance.

To determine whether the STR Ordinance is being violated, Appellants would have to enter the home, count guests, inquire as to their familial status, look in the back yard, and peek in bedrooms after 10 pm to insure that everyone was sleeping.[120] Mr. Klitch testified that these restrictions have made it virtually impossible to rent

116 *Id.*
117 2 CR: 579-580.
118 2 CR: 528.
119 2 CR: 528; (STR Ordinance § 1307); Austin City Code § 25-1-462.
120 2 CR: 524.

out his home.[121] Mrs. Redwine likewise testified that she has lost bookings because the invasive and impractical nature of these regulations.[122]

Not only are such burdens not placed on other landlords, such interference is forbidden in long-term rentals. *De Leon v. Creely*, 972 S.W.2d 808, 812 (Tex. App.—Corpus 1998) (lease grants a tenant exclusive possession of the premises as against the owner); *Brown v Johnson*, 12 S.W.2d 543 (Tex. 1929) (essential quality in a lease is it should appear to have been intention of one party to dispossess himself of premises and of other to occupy them). As such, the STR Ordinance regulates STR guests unequally in violation of equal protections.

3. *The STR Ordinance does not advance 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).

Establishing the existence of a substantial relationship is "more than a pleading requirement, and compliance with it more than an exercise in cleverness and imagination." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 676 (Tex. 2004); *see also*, *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 218–19 (Tex. App—Austin 2008). The Court must look at the factual record and

121 2 CR: 565-566.
122 2 CR: 579-580.

evidence underlying the Ordinance as well as "all of the surrounding circumstances" to determine whether the Ordinance actually relates to the interest the government claims. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932–33 (Tex. 1998).

For example, in *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 413 (Tex. Civ. App—Austin 1968), the court overturned a local Ordinance limiting the size of underground storage tanks for gasoline. The city argued that the Ordinance was designed to reduce fire hazards. *Id.* Nonetheless, the court did not simply accept the City's hypothetical justification. Instead, it looked at the actual evidence of fire risk created by the larger tanks, compared to smaller tanks. The court held that the "evidence does not show any real fire hazards that would be increased if the restrictions of Section 5 were removed….". *Id.* Accordingly, there was no real and substantial connection between the Ordinance and fire prevention. *Id.*

Similarly here, the evidence does not show any real threat posed by allowing Appellants to continue to operate STRs.

a. <u>The Ordinance is not substantially related to any legitimate government interest.</u>

In determining whether an ordinance restricting property rights serves a legitimate government interest, it is not enough that members of the City Council or a segment of the population oppose a particular use of property. *Spann*, 111 Tex. at at 516. The evidence in the record must show a real-world connection to the objects

of the police power. *Lombardo*, 73 S.W.2d at 478 ("The police power is founded in public necessity and *only* public necessity can justify its exercise.") This connection must be "real vs. merely perceived" and "significant vs. trivial." *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009); *Lombardo*, 73 S.W.2d at 478 (the police power "is commensurate with, *but does not exceed*, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights.")(emphasis added).

The City claims that the STR Ordinance is justified by the fact that STRs are generating public disturbance complaints that affect the character of neighborhoods.[123] But the City concedes that the challenged regulations do not turn on public disturbances.[124] And any real world connection to public disturbances is too trivial to satisfy constitutional scrutiny. Moreover, the City concedes that even if the regulations eliminated STR complaints in their entirety—an unlikely proposition—it would not be a substantial reduction in neighborhood complaints overall.[125] Indeed, the City's own data show there were only 31 noise complaints against licensed STRs over a three year period.[126] Only 13 of those complaints were

123 4 CR: 83, 86.
124 2 CR: 521, 523-525 (walking through each provision and agreeing that it doesn't turn on whether the guests are being noisy or disturbing neighbors).
125 4 CR: 94-95.
126 *Id.*

against Type 2s.[127] This sort of tenuous connection would not be sufficient to satisfy even federal rational basis scrutiny,[128] much less the more searching review required in Texas. *Patel*, 469 S.W.3d at 86 ("holding that the Texas constitution requires a "less deferential" review of economic liberty claims than the federal due process clause.).

Moreover, the City's failure to enforce existing disturbance regulations or remove the licenses of alleged "party houses" undermines its claim that the interest is important.[129] *See*, *State v. Morales*, 826 S.W.2d 201, 205 (Tex. App. Austin 1992), writ granted (Sept. 9, 1992), rev'd on other grounds, 869 S.W.2d 941 (Tex. 1994) ("it is disingenuous to suggest that § 21.06 serves to protect public morality when the State readily concedes that it rarely, if ever, enforces this statute."). Accordingly, the STR Ordinance is not sufficiently related to a legitimate government interest to survive review.

b. Neighborhood opposition to STRs is insufficient to establish a legitimate government interest absent evidence of actual harm.

Given the lack of meaningful data connecting the STR Ordinance to any legitimate exercise of the police power, the City points to statements made by

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127 *Id.*

128 *See*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (striking down state law regulating the sale of caskets under rational-basis scrutiny because the evidence in the record did not support the government's claim that unlicensed casket sellers created "widespread" problems).

129 4 CR: 35.

citizens and members of the City Council during City Council meetings.[130] Indeed, the City argues that "neighborhood opposition, alone, is evidence that the STR Ordinance serves a legitimate government interest."[131]But unsubstantiated statements opposing a property use are not sufficient to deny Appellants their rights, particularly when those statements are contrary to the facts on the ground. *Spann*, 111 Tex. at 358 ("It is a doctrine not to be tolerated in this country that either State or municipal authorities can by their mere declaration make a particular use of property a nuisance which is not so, and subject it to the ban of absolute prohibition."); *Crossman v. City of Galveston*, 247 S.W. 810, 813 (1923) ("The opinion of the city commissioners that the property of plaintiffs in error is a nuisance is not due process. It is not process at all. It has no more vitality than the opinion of other citizens as against the consent of plaintiffs in error.").

The City admits that statements at the City Council were not substantiated and did not distinguish between licensed and unlicensed STRs.[132] Moreover, many of the statements were based on protectionist and racist viewpoints that the City cannot claim constitute a legitimate government interest.[133]

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130 1 CR: 799.

131 4 CR: 91. "Q: Is it the City's position that neighborhood opposition, alone, is evidence that the STR Ordinance serves a legitimate government interest? A: To my knowledge it served as the basis for how the Council made its deliberation."

132 4 CR: 102.

133 4 CR: 23; 4 CR: 25; 4 CR: 16.

It is well established that merely responding to neighborhood opposition to a property use is not a legitimate government purpose. *Lombardo v. City of Dallas*, 124 Tex. 1, 10 (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*, 111 Tex. at 516. This is because, while cities may only restrict a property's use to serve a legitimate government interest, the public may oppose a particular use in their neighborhood for a host of illegitimate reasons. *See, State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (neighbors "are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice."); *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (neighbors may oppose a use "solely for their own interest, or even capriciously...even so arbitrary a think as taste may control."). Deferring to such whims as if they were a legitimate exercise of the police power is "repugnant" to the Constitution. *Id.*

c. <u>The STR Ordinance is unduly harsh and burdensome outweighed by any public benefit.</u>

In *Patel*, the Court held that the Texas Constitution requires an additional level of inquiry even if a regulation satisfies rational basis scrutiny 469 S.W.3d at 87. Namely, the regulation must not so be "unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Id.* The STR Ordinance fails this test.

The burden on Appellants of STR regulation so greatly outweighs any public benefit as to make the Ordinance unreasonable. In the five years preceding the STR Ordinance, the City did not issue a single citation against a Type 2 STR for noise, parking, or trash violations.[134] Even if one considers unverified complaints against STRs as being truthful, the benefit of the STR Ordinance will be negligible. Over a 3 year period there were only 13 noise complaints and 10 parking complaints against Type 2 STRs.[135]

In exchange for these meager public benefits, Type 2 STR owners will sacrifice thousands of dollars and numerous hours invested in converting their homes to Type 2 rentals.[136] Over time, they will be forced to forgo additional hundreds of thousands of dollars in lost income from their properties. In the case of the Zaataris, this lost income means that they could have to sell the house and Mr. Zaatari would have to abandon his new startup company, which relies on income from their STR to stay afloat.[137] For the Redwines, it means that they would have to sell their home at a substantial loss, because the property's size and location makes

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134 *See* 4 CR: 2517 (stating COA 17072-17368 were responsive to Intervenor's request for "All documents related to the citations, if any, that were given to STR Type 2 properties for each of the following calendar years: 2012, 2013, 2014, 2015 and 2016."; 4 CR: 2519 – 2815 (COA 17072-17368) contain zero citations for noise, parking, or trash.; of violation issued by the city Austin against short-term rental operators or guests.").

135 *Id.*

136 4 CR: 56; 4 CR: 74; 2 CR: 1860-1861.

137 2 CR: 549.

it virtually unmarketable as a long-term residence.[138] Appellants will forgo thousands of dollars each year in lost bookings and empty rooms that, but for the ordinance, they could have filled.[139] Due to the ever increasing cost of living in Austin and his impending retirement, Mr. Klitch testified that this lost income could force him to sell the home he raised his children in.[140]

The public benefit of the various restrictions on all STRs would be similarly meaningless. Over a three year period there were only 31 noise complaints and 40 parking complaints against all STRs, city wide.[141] When broken down on a per capita basis, the lack of a public problem is striking. According to the City, there were 1,169 licensed STRs during the study period.[142] Accordingly, each STR accounts for approximately .008 noise complaints and .01 parking complaints per-property, per-year.[143]

A yearly sacrifice of thousands of dollars and hundreds of hours that may result in Appellants selling their homes is unduly burdensome to justify a hypothetical reduction in a dozen unverified noise complaints a year spread across a city of a million people.

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138 2 CR: 578.
139 2 CR: 565-66; 2 CR: 579-80.
140 2 CR: 566.
141 2 CR: 1800.
142 4 CR: 9-11.
143 *Id.*

B. The Ban on Type 2 STRs Violates the Texas Equal Protection Clause

There is no "real and substantial difference" between Type 1 and Type 2 STRs that can justify the complete prohibition of the latter. Both are single family homes rented for less than thirty days.[144] There is no distinction between the types of activities that will take place there, the types of guest that are allowed in the home, or the number of days that the home may be used as an STR.[145] In both types, the owner will not be present when the home is rented.[146] In both types, the owner is required to maintain a local contact to respond to complaints.[147] And in both types, the owner can live in the home.[148] The sole difference between a Type 1 and a Type 2, is that the owner of a Type 1 claims the property as a homestead for tax purposes.[149]

Like the Due Course of Law Provision, the Texas Equal Protection Clause requires that this Court examine the facts in the record to determine whether classifications drawn by the STR Ordinance are "based on a real and substantial difference having relationship to the subject of the particular enactment." *R.R. Comm'n of Texas v. Miller*, 434 S.W.2d 670, 673 (Tex. 1968); *Hunt*, 462 S.W.2d at

144 4 CR: 83.
145 4 CR: 85; 2 CR: 520.
146 4 CR: 82.
147 4 CR: 84.
148 2 CR: 520.
149 2 CR: 520.

540. To be "real and substantial," the difference must be "real vs. merely perceived, and significant vs. trivial." *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009). This requires an evaluation of two things: 1) whether the classification drawn is based on difference that is real—not imaginary, and 2) whether the difference between the classes is rationally related to the purpose of the ordinance. *Hunt*, 462 S.W.2d at 540.

For example, in *Hunt v. City of San Antonio*, 462 S.W.2d 536, 540 (Tex. 1971), the city of San Antonio sought to rezone two parcels based on alleged increased traffic in the area. The Appellants in that case challenged the rezoning as violating the equal protection clause because there was no evidence of an increase in traffic in that area sufficient to treat those lots differently than adjacent neighborhoods. *Id*. While the Court assumed, arguendo, that an increase in traffic could be a legitimate reason to rezone an area, it did not simply defer to the City's claims of traffic increases. *Id.* Instead, the Court looked to the actual evidence, and concluded that "there was no evidence of a 'tremendous increase in traffic.' " *Id.* Accordingly, the distinction drawn by the city was not based on a "real and substantial" difference and the rezoning was unconstitutional. *Id.*

The City may not, by its "mere declaration make a particular use of property a nuisance which is not so, and subject it to the ban of absolute prohibition." *Spann*, 111 Tex. at 516. Homestead tax status is not the sort of meaningful distinction that

would justify a complete prohibition on Type 2 STRs. The alleged purpose of banning Type 2 STRs is to reduce neighborhood disturbances. Yet the record shows that Type 2 STRs do not generate any more complaints than other residential properties. Indeed, in the five years preceding the adoption of the STR Ordinance, the City failed to issue a single citation against a licensed Type 2 STR owner or guest for violating the noise, trash, or parking ordinances.[150] And the City concedes that eliminating Type 2 STRs will not result in a substantial reduction in public disturbances. Because the Ban on Type 2 STRs is not based on a real and substantial difference, it violates the Equal Protection Clause.

C. The Assembly, Presence, and Use Restrictions of the STR Ordinance on STR Guests Violate the Equal Protection Clause of the Texas Constitution.

As explained *supra*, the STR Ordinance restricts the fundamental rights of STR guests by subjecting them to warrantless searches, and by regulating the number of people present in the home, the time that those guests can be present, their familial relationship to one another, the quiet, harmless activities they can engage in inside the home, and the time they must be asleep. None of these restrictions apply to individuals who own their homes or rent their homes for more than thirty-days.

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150 *See* 4 CR: 2517 (stating COA 17072-17368 were responsive to Intervenor's request for "All documents related to the citations, if any, that were given to STR Type 2 properties for each of the following calendar years: 2012, 2013, 2014, 2015 and 2016."; 4 CR: 2519 – 2815 (COA 17072-17368) contain zero citations for noise, parking, or trash.; of violation issued by the city Austin against short-term rental operators or guests.").

The question before this Court is whether there is any inherent difference between renting a home for 29 days as opposed to 30 days that creates a compelling governmental interest that is sufficient to warrant the various draconian provisions of the STR Ordinance. There is not.

Yet even if this Court were to apply rational basis scrutiny to Appellants' claims, the STR Ordinance is unconstitutional because there is no "real and substantial difference" between short and long-term rentals to justify the Ordinance's restrictions. There is no constitutionally meaningful difference between renting a home and other residential uses, despite the fact that the owner of a rental property uses the home to generate income. *Southampton Civic Club v. Couch*, 322 S.W.2d 516, 518–19 (Tex. 1958).

Other jurisdictions have held that treating STRs differently than other residential uses violates equal protection. For example, New Jersey's courts have regularly struck down restrictions on STRs as falling outside the zoning authority. As one court explained, "zoning laws are designed to control types of uses in particular zones and are not ordinarily concerned with periods of occupancy or the property interest of the occupants." *United Prop. Owners Ass'n of Belmar v. Borough of Belmar*, 447 A.2d 933, 936 (App. Div. 1982); *see also, Ocean Cty. Bd. of Realtors v. Twp. of Long Beach*, 599 A.2d 1309, 1311–12 (1991) ("obnoxious personal behavior can best be dealt with officially by a vigorous and persistent

enforcement of general police power Ordinances and criminal statutes of the kind earlier referred to. Zoning Ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations."); *Slaby v. Mountain River Estates Residential Ass'n, Inc.*, 100 So. 3d 569, 578–79 (Ala. Civ. App. 2012) ("We agree with those courts that property is used for 'residential purposes' when those occupying it do so for ordinary living purposes. Thus, so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, as the undisputed evidence indicates renters did in this case, they are using the cabin for residential purposes.")

Moreover, the record does not show that those staying in a home for less than thirty days are substantially more likely than others to engage in nuisance behavior. Indeed, the only study the City ever conducted comparing STRs to long-term rentals found that on average, non-STR's (23.82%) were slightly more likely than STRs (22.86%) to receive a complaint.[151]

Given this lack of meaningful difference, the burdens of the STR Ordinance are arbitrary and unconstitutional. There is no good reason why a person renting a home for 31 days can have dozens of friends over, play in the yard, and stay up all night, but a family renting the house next door is limited to 6 adults, must limit the number of people outside, must be asleep at 10 pm and must submit to warrantless

[151] 4 CR: 2503-11.

searches. Yet, this disparate treatment is precisely the intent and effect of the ordinance.[152] The Equal Protection Clause does not abide such arbitrary and disparate treatment.

D. The STR Ordinance Mandates that Appellants Submit to Unreasonable Searches in Violation of Article I, Section 9 of the Texas Constitution.

Section 1301 of the STR Ordinance violates Article 1, Section 9 of the Texas Constitution because it requires STR owners or guests to submit to warrantless searches of the home at virtually any time, and these searches need not be based on probable cause or exigent circumstances.[153]

The touchstone of what is permissible under Article 1, Section 9, is "reasonableness." *Id.* To determine whether a search is reasonable, courts must "balance the nature and the quality of the intrusion" against the "importance of the governmental interests alleged to justify the intrusion." *Hereford v. State*, 339 S.W.3d 111, 119 (Tex. Crim. App. 2011).

In determining that balance, courts recognize that a private dwelling is "a sacrosanct place in search and seizure law." *State of Texas v. Steelman*, 16 S.W.3d at 488–89. The Texas Constitution "specifically names people's houses as a place in

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152 *See, e.g.* 4 CR: 53(Councilwoman Tovo explaining the purpose of the caps on the number of people present at an STR: "I'm not trying to get to occupancy in there. Here's why we need to have a number because single-family homes can have gatherings up to 50 people, and I do not want short-term rentals to have that same right.").

153 2 CR: 526.

which they are entitled to feel secure from governmental intrusion." *Id.* Searches of a private residence are therefore presumed to be unconstitutional in the absence of a warrant or "exigent circumstances." *Id.*

The STR Ordinance runs afoul of this command on its face. Section 1301 of the STR Ordinance provides that the owner or person in charge of the home at the time "shall give code officials free access to the dwelling…at all reasonable times for the purpose of inspection." This inspection need not be justified by a warrant, or based on probable cause or exigent circumstances.[154] The inspection is also not limited in scope. The officer may search any part of the house.[155] Moreover, because the violations such searches are seeking to uncover involve private activity occurring after 10:00 pm, these searches may occur at all hours of the night. Failure to allow the inspection can result in civil and criminal penalties, including revocation of one's STR license.[156]

Because these searches are not supported by warrant, exigent circumstances, or even probable cause, they are presumptively unconstitutional. *Steelman*, 16 S.W.3d at 488–89. But even if the lack of a warrant were not fatal to section 1301, the search provision still fails because the invasion of privacy is inherently unreasonable.

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154 2 CR: 526.

155 *Id.*

156 *Id.*; *See* CR 2: 510-11 (STR Ordinance §§ 1301, 1307); Austin City Code § 25-1-462.

To determine whether a search is reasonable, courts must "balance the nature and the quality of the intrusion" against the "importance of the governmental interests alleged to justify the intrusion." *Hereford*, 339 S.W.3d at 119. Here, the City concedes that the purpose of the search provision is to determine the number and relationships of the people inside the home and whether or not they are sleeping.[157] The City concedes that these searches are not required to determine public disturbance violations.[158] Noise, trash, and parking violations can be determined at the property line.[159] When public disturbances are removed from the equation, it is not clear that searching homes to determine the number of occupants, their familial status, or whether they are sleeping, serves any legitimate government interest, much less an interest sufficient to justify random warrantless searches of the home. *See*, *Lombardo*, 73 S.W.2d at 478 (the police power "is founded in public necessity and only public necessity can justify its exercise.")

Indeed, even in the context of "administrative" searches — serving to ensure regulatory compliance, rather than seeking the fruits of a crime — the warrant requirement is only waived if exigent circumstances exist, the party is given an opportunity for precompliance review, or when the property is a "closely regulated" business. *Adult Video v. Nueces County*, 996 S.W.2d 245, 255 (Tex. App.—Corpus

157 4 CR: 80-81 Deposition of Reynaldo Arellano at 29: 7 -25; 30: 1-6.
158 2 CR: 526-27.
159 2 CR: 527.

Christi 1999, no pet.); *City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443 (2015) ("absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker").

The City concedes that failure to allow entry can result in penalties to owners and guests of up to $2,000 per violation, and the loss of the owner's STR license.[160] Indeed, the code enforcement officer will make note of any refusal to search the premise precisely so punitive measures can be considered later.[161]

II. THE DISTRICT COURT ERRED IN GRANTING THE CITY'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT.

In its No-Evidence Motion for Summary Judgment, the City raises seven challenges.[162] As explained below, each fail as Appellants have produced more than a mere scintilla of evidence necessary to raise a genuine issue of material fact regarding the challenged elements.

A. Standing

Appellants challenge three different aspects of the STR Ordinance: 1) the prohibition of Type 2 STRs, 2) the restrictions on all STRs, regardless of type, and 3) the restrictions on STR tenants/guests. Appellants have standing to challenge these aspects of the STR Ordinance because they own, operate, or utilize STRs

160 2 CR: 526.
161 *Id*.
162 2 CR: 1301-02.

within the Austin city limits, and are therefore injured by the challenged provisions of the STR Ordinance. Moreover, Appellants have standing to bring these claims on behalf of their tenants/guests who are also injured by the above-challenged provisions of the STR Ordinance.

The standing doctrine identifies suits appropriate for judicial resolution. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). "[T]o challenge a statute, a plaintiff must [both] suffer some actual or threatened restriction under the statute" and "contend that the statute unconstitutionally restricts the plaintiff's rights." *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d at 518.

Appellants' claims arise under the Declaratory Judgment Act. "[W]here there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief, the court need not analyze the standing of more than one plaintiff—so long as that a plaintiff has standing to pursue as much or more relief than any of the other plaintiffs." *Patel*, 469 S.W.3d at 77. The reasoning "is fairly simple: if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs." *Id* at 77-78.

1. *Appellants have standing to challenge the ban on Type 2 STRs.*

With regard to the prohibition on Type 2 STRs (STR Ordinance § 25-2-950), the Zataaris, Redwines and Heberts have clearly been injured by the STR Ordinance

because: 1) they own and operate Type 2 STRs; 2) they have made investments in those properties for the purpose of operating them as Type 2 STRs; and 3) under the STR Ordinance, they will be prohibited from using their homes as Type 2 STRs. This loss of use is sufficient to establish standing. *See*, *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d at 587 (Tex. App. 2015) (STR owner had standing to challenge ban on STRs).

2. *Appellants have standing to challenge the use, presence, assembly, and search requirements placed on all STRs.*

With regard to the use, presence, assembly, and search requirements placed on all STRs, Appellants are likewise injured and therefore have standing. *Texas Workers' Compensation Com'n,* 893 S.W.2d at 518. Appellants own and operate STRs in Austin. The STR Ordinance restricts the number of people that they can rent their homes to, therefore denying them a portion of their return on investment.[163] More importantly, the Ordinance also places excessive burdens on Appellants by requiring that they monitor the familial relationship of guests, who those guests invite over, where the guests gather on the property, and when the guests go to sleep.[164] Moreover, the Ordinance requires that Appellants make their homes available for warrantless searches.[165] Because Appellants claim that these restrictions violate their rights under the Constitution and injure them in a material

163 *See* CR 2: 506 (STR Ordinance § 25-2-795).
164 *Id*.
165 *See* CR 2: 510-11 (STR Ordinance § 1301).

way, these burdens are sufficient to give Appellants standing. *Texas Workers' Compensation Com'n*, 893 S.W.2d at 518.

3. *Appellants have standing to challenge the STR Ordinance's restrictions on STR Tenants/guests.*

With regard to the restrictions on tenants/guests, Mrs. Hebert utilizes STRs as a guest when she travels to Austin on business. Therefore, the STR Ordinance's restrictions on privacy, movement, assemblies, as well as the warrantless search requirement affect her directly.[166] Moreover, because she chooses to rent a home for less than thirty days, the Ordinance subjects her to numerous burdens not imposed on her neighbors in violation of the equal protection clause.[167] Mrs. Hebert therefore has standing to challenge these provisions of the Ordinance. *Garcia*, 893 S.W.2d at 518.

Because Mrs. Hebert has standing to challenge the Ordinance, this Court is not required to address the standing of the other Appellants. However, if is inclined to do so, each of the Appellants also have standing as STR owners to challenge the STR Ordinance on behalf of their guests.

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166 The STR Ordinance's penalties apply to STR tenants/guests on their face. *See, e.g.*, Austin City Code § 25-2-795 (D) ("a licensee or guest may not use or allow another to use a short term rental…"); Austin City Code § 25-2-795 (E) ("a licensee or guest may not use or allow another to use a short term rental…"). Austin City Code § 25-1-462 provides that any "person who violates" the STR Ordinance is subject to penalties. In fact, 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.").

167 2 CR: 525.

In *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229, 237 (1969) and *Barrows v. Jackson*, 346 U.S. 249, 258 (1953), the Court held that Caucasian landlords had standing to bring anti-discrimination claims on behalf of their African-American guests. The Court reasoned that it would be impermissible to require an owner to choose between imposing an unconstitutional restriction or violating the law. *Id.*

The Court's holding was not limited to racial discrimination claims. *See*, *e.g*., *Craig v. Boren*, 429 U.S. 190, 192-197 (1976) (licensed beer distributor could bring equal protection claim on behalf of customers who felt that liquor law discriminated on the basis of sex); *Carey v. Population Services Int'l*, 431 U.S. 678, 682-684 (1977) (vendor of contraceptives had standing to bring privacy claim on behalf of couples challenging a law limiting distribution of contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (private school had standing to bring due process claim on behalf of parents). The thread that ties the cases together is that plaintiffs may not be "obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer … 'sanctions and perhaps loss of license.' " *Craig*, 429 U.S. at 194. The Court "repeatedly has recognized that such injuries establish the threshold requirements of a 'case or controversy' mandated by Art. III." *Id.*

Similarly, Appellants must choose between enforcing the challenged provisions of the STR Ordinance against their guests, "thereby incurring a direct

economic injury through the constriction of [their] buyers' market, or to disobey the statutory command and suffer, …sanctions and perhaps loss of license." *Craig*, 429 U.S. at 194. This injury is sufficient to establish standing.

B. Ripeness

The City also asserts that Appellants did not present a scintilla of evidence that their claims are ripe. This argument fails. A UDJA challenge to the constitutionality of a law is ripe if the law requires "a significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 859 (Tex. App.—Austin, 2004). Appellants have met this burden. The STR Ordinance has been adopted by the City, and it is undisputed that Appellants are burdened by its requirements as discussed *infra.*

First, the STR Ordinance requires a significant change in Appellants' conduct. For example, the use, presence, and assembly provisions restrict the number of people on Appellants' property, when those people can be outside, and when they must be in bed. For Mrs. Hebert, these restrictions apply to her directly because she is an STR tenant. Additionally, Appellants presented evidence that prior to and but for these restrictions, they would operate their STRs differently. For example, Mr. Klitch has an 8-bedroom home, with an outdoor basketball court. The STR ordinance prevents him from renting the home to capacity, or allowing even lawfully present

guests to take advantage of the outdoor basketball court. Since the STR Ordinance has gone into effect, he has seen his rental income drop by thousands of dollars. Mrs. Redwine likewise testified that she had lost multiple bookings due to the STR regulations. The ban on Type 2 STRs goes even further, preventing 6 of the Appellants from continuing to operate their homes as STRs at all.

Second, there are serious penalties attached for non-compliance. In *Mitz*, this Court held that a constitutional challenge to the state's equine dentistry regulations was ripe, because it applied to the appellants on its face and the penalty for non-compliance was $1,000. *Mitz v. Texas State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 26–27 (Tex. App.—Austin, 2008). Appellants risk penalties under the STR Ordinance as well as the potential loss of their STR licenses. Appellants' claims are therefore ripe. Any lack of enforcement by the City does not eliminate the ripeness of Appellants' claims. *See City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 529-30 (Tex. 1894)(constitutional challenge to Austin cemetery regulations ripe even though City had not enforced).

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" Tex. Civ. Prac. & Rem. Cod § 37.002(b). It "is not necessary that a person who seeks a declaration of rights under [the UDJA] 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.' " *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153-54 (Tex. App. 1998). Indeed, it is common to challenge the constitutional validity of a law before the law takes full effect.[168] Accordingly, the City's claim that Appellants' claims are not ripe because the ban on Type 2 STRs will not take full effect for a couple of years simply does not stand.

C. Sovereign Immunity

The City argued that Appellants did not present a scintilla of evidence that they the City had waived sovereign immunity. This argument fails as a matter of law. Appellants filed this lawsuit under the Uniform Declaratory Judgment Act. (UDJA). Tex. Civ. Prac. & Rem. Cod § 37.003. This Court and the Texas Supreme Court have recently and repeatedly held that 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), reh'g denied (July 27, 2015), review denied (Jan. 8, 2016); *City of Elsa v. M.A.L.,* 226 S.W.3d 390, 392 (Tex.2007). Accordingly, because Appellants' claims challenge the constitutionality of the STR Ordinance and seek only declaratory and

[168] *See*, *Smith v. Decker*, 158 Tex. 416, 419, 312 S.W.2d 632, 633–34 (1958) ("if a city ordinance be void…even though the city [is] not immediately seeking to enforce it," injunctive relief is proper.); *Texas v. United States*, 809 F.3d 134, 173 n.137 (5th Cir. 2015), ("a "fundamental principle" injunctions in general, is that an "injunction is of no help if one must wait to suffer injury before the court grants it.").

injunctive relief, the UDJA provides an absolute 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 requires that the relevant governmental entities be made parties, *and thereby waives immunity*").

D. Infringement on Privacy

As explained *infra*, there is no dispute that the STR Ordinance restricts Appellants' privacy on its face. It limits who may be in the home, their familial relationship to one another, when they may be in the yard, what rooms they may occupy, and what time they must be in bed, asleep. To enforce these restrictions, the STR Ordinance requires that Appellants' guests, or in the case of Appellant Hebert, that Appellant herself submit to warrantless searches of the home. Indeed, the City concedes that a visual inspection of private activities inside the home is necessary to enforce the STR Ordinance. Violations of the STR Ordinance are punishable by civil fine, criminal penalties, and revocation of STR license.[169]

Furthermore, a lack of prosecution or enforcement does not negate the infringement upon Appellants' privacy rights. It is well established that an individual

[169] Austin City Code §25-1-462; *See* CR 2: 510-11 (STR Ordinance § 1307).

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*, 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). 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) (quoting *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex.App.—Austin 2000, pet. denied); ("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.").

E. Restriction on Assemblies

As explained *infra*, the STR Ordinance restricts Appellants' freedom of assembly on its face. Indeed, it even uses the term "assembly" to describe the

activities restricted.[170] The STR Ordinance prohibits STR tenants from assembling quietly and peaceably in their rental property's backyard during the day in numbers greater than six; assembling indoors during the day in numbers greater than six (or ten if all members are related); or assembling at all for purposes "other than sleeping" after 10 p.m. Violations of the STR Ordinance are punishable by civil fine, criminal penalties, and revocation of STR license.[171]

As discussed *infra*, a lack of prosecution or enforcement does not negate the infringement upon Appellants' rights.

F. Economic Injury

Under Texas law, it is not necessary to show economic injury to enjoin an unconstitutional ordinance. 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 injuries were necessary, however, Appellants have produced more than a scintilla of evidence to show an economic impact from the STR Ordinance. For Appellants that own Type 2 STRs, the ban on Type 2s will likely force them to sell their properties. The Redwines testified that the location and size of their home makes it significantly less viable as a long term rental, and that

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170 CR 2: 506 (STR Ordinance 25-2-795 (D), (E)).

171 Austin City Code §25-1-462; *See* CR 2: 510-11 (STR Ordinance § 1307).

they would have to sell the property at a loss.[172] Their home currently generates as much as $32,000 in quarterly revenue.[173]

The Heberts testified that due to taxes and mortgage payments, their home is not economically viable as a long-term rental.[174] The Zaataris provided evidence that the difference in income between using the property as an STR versus as a long-term rental can be as much as two thousand per month.[175] This loss of use is sufficient to establish standing. *See*, *Vill. of Tiki Island*, 463 S.W.3d at 562, 587 (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. The Zaatari Property contains four bedrooms with an outside patio and grill area large enough to comfortably accommodate 10 people.[176] The Heberts home has three bedrooms, three bathrooms, and comfortably sleeps eight people.[177] The Redwine's house has 6 bedrooms and 3 bathrooms.[178] The home shares a yard with 2-bedroom backhouse which the Redwines also rent out as a licensed Type 2 Short term rental.[179] Lindsay Redwine

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172 2 CR: 578, 582.
173 2 CR: 576, 582.
174 4 CR: 67.
175 2 CR: 548.
176 2 CR: 1384-88.
177 4 CR: 66.
178 4 CR: 574.
179 *Id*.

testified that multiple potential tenants had refused to rent the home once they were told about the arbitrary restrictions on privacy, assemblies, and the number of people that can be present on the property.[180]

Tim Klitch, who owns an eight-bedroom house with an outdoor basketball court, saw his rental income fall by 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).[181] This evidence is more than a scintilla, and therefore is sufficient to survive the City's No evidence motion for summary judgment.

G. Infringement on a Vested Right

Finally, Appellants have produced more than a scintilla of evidence that the ordinance restricts a vested right. As explained *infra*, there is no reasonable dispute that the STR Ordinance facially restricts Appellants' rights to use their homes as STRs. Appellants have a vested right to use their homes as STRs. *Vill. of Tiki Island*, 463 S.W.3d at 587. Appellants purchased their homes at a time that STRs were legal and made extensive improvement to their homes to use them as STRs. Each Appellant spent significant time and money upgrading their property with the

180 2 CR: 579-80, 1962.
181 2 CR: 565-66.

expectation of using the property as an STR. Indeed, two of the seven Appellants purchased their properties solely to use the property as an STR.[182]

Appellants have therefore established more than a scintilla of evidence that they have a vested property right in using their homes as short-term rentals. The City's No-Evidence Motion for Summary Judgment on this issue should be denied.

CONCLUSION

> "Liberty is not *provided* by government; liberty *preexists* government. It is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable."

Patel, 469 S.W.3d at 92–93 (Willett, J., concurring).

This Court has long protected the notion that a person's home is their castle, whether they be an owner, tenant, or guest. Appellants seek this Court's protection against infringement of their most personal, constitutionally protected rights to privacy, assembly, association, freedom from unreasonable searches, due course of law, and equal protection all infringed upon by the City's STR Ordinance.

Furthermore, the concept of economic liberty is precious under Texas jurisprudence.

> "To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—<u>that it was mine—that my hands were my own</u>, and could earn more of the precious coin.... I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings."

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182 2 CR: 574-75.

Patel, 469 S.W.3d at 92 (Willett, J., concurring) (quoting Frederick Douglass).

Appellants have toiled to build their STR endeavors and enjoyed the liberty to provide a peaceful home for their tenants and guests. None of Appellants have ever had a complaint made against them related to their STR. Nor does the data show that STR's within the City of Austin present a public nuisance. As such, this Court should protect their rights to economic liberty through operation of their STRs as protected by the equal protection and due course of law provisions of the Texas Constitution.

THEREFORE, Appellants respectfully request this Court render the judgment the trial court should have rendered by reversing the trial court to deny the City's No-Evidence Motion for Summary Judgment and to grant Appellants' Motion for Summary Judgment. Appellants request this Court declare the challenged provisions of the STR Ordinance as unconstitutional and enter an injunction in

Appellants favor enjoining their further force and effect. Finally, Appellants request this Court remand this matter to the trial court on the sole issue of award of their reasonable attorneys' fees and costs.

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 14604 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 certify that a copy of the forgoing document was filed and served via ECF on the 29th day of March, 2018, upon the following individuals listed:

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APPENDIX

APPENDIX A

ORDINANCE NO. 20160223-A.1

AN ORDINANCE AMENDING CITY CODE CHAPTERS 25-2 AND 25-12 RELATING TO SHORT-TERM RENTALS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. City Code Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), 25-2-791 (*License Requirements*), and 25-2-792 (*Notification Requirements*) are amended to read as follows:

§ 25-2-789 SHORT-TERM RENTAL (TYPE 2) REGULATIONS.

(A) This section applies to a short-term rental use that:

(1) is rented for periods of less than 30 consecutive days;

(2) is not part of a multifamily residential use; and

(3) is not owner-occupied and is not associated with an owner-occupied principal residential unit.

(B) A short-term rental use under this section may not:

(1) include the rental of less than an entire dwelling unit;

(2) operate without a license as required by Section 25-2-791 (*License Requirements*);

(3) operate without providing notification to renters as required by Section 25-2-792 (*Notification Requirements*); or

(4) include a secondary dwelling unit or secondary apartment except as provided by Sections 25-2-774(C)(6) (*Two Family Residential Use*) and 25-2-1463(C)(6) (*Secondary Apartment Regulations*).

(C) If a license for a short-term rental (Type 2) use meets the requirements for annual renewal under Section 25-2-791(E) (*License Requirements*) and the property received a notice of violation related to the life, health, or public safety of the structure, the property is subject to an inspection every three years by the building official to determine if the structure poses a hazard to life, health, or public safety.

(D) A short-term rental (Type 2) use may not be located on a lot that is within 1000 feet of a lot on which another short-term rental (Type 2) use is located unless the license:

(1) was issued on or before November 23, 2015;

(2) is not suspended after November 23, 2015; and

(3) is renewed timely.

§ 25-2-790 SHORT-TERM RENTAL (TYPE 3) REGULATIONS.

(A) This section applies to a short-term rental use that:

(1) is rented for periods of less than 30 consecutive days; and

(2) is part of a multifamily residential use.

(B) A short-term rental use under this section may not:

(1) include the rental of less than an entire dwelling unit;

(2) operate without a license as required by Section 25-2-791 (*License Requirements*); or

(3) operate without providing notification to renters as required by Section 25-2-792 (*Notification Requirements*).

§ 25-2-791 LICENSE REQUIREMENTS.

(A) This section applies to a license required under Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), and Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*).

(B) To obtain a license, the owner of a short-term rental use must submit an application on a form approved [~~provided for that purpose~~] by the director. The application must include the following:

(1) a certification by the property owner and, if applicable, property manager that the property is not subject to outstanding City Code or state law violations [~~a fee established by separate ordinance~~];

(2) the name, street address, mailing address, and telephone number of the owner of the property;

(3) the name, street address, mailing address, and telephone number of the [~~a~~] local [~~responsible~~] contact required by Section 25-2-796 (*Local Contacts*) [~~for the property~~];

(4) the street address of the short-term rental use;

(5) proof of property insurance;

(6) proof of payment of hotel occupancy taxes due as of the date of submission of the application; and

(7) any other information requested by the director.

(C) Except as provided in subsection (G), the director shall issue a license under this section if:

(1) the application includes all information required under Subsection (B) of this section;

(2) the proposed short-term rental use complies with the requirements of Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), or Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*);

(3) for a short-term rental use regulated under Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), no more than 3% of the single-family, detached residential units within the census tract of the property are short-term rental (including Type 2 and Type 1 second dwelling unit or secondary apartment) uses as determined by the Director under Section 25-2-793 *(Determination of Short-Term Rental Density)*; and

(a) the structure has a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*), issued no more than ten years before the date the application is submitted to the director; or

(b) the structure has been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;

(4) for a short-term rental use regulated under Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), located in a non-commercial zoning district, no more than 3% of the total number of dwelling units at the property and no more than 3% of the total number of dwelling units located within any building or detached structure at the property are short-term rental (Type 3) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and

(a) the structure and the dwelling unit at issue have a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*),

issued no more than ten years before the date the application is submitted to the director; or

(b) the structure and the dwelling unit at issue have been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;

(5) for a short-term rental use regulated under Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), located in a commercial zoning district, no more than 25% of the total number of dwelling units at the property and no more than 25% of the total number of dwelling units located within any building or detached structure at the property are short-term rental (Type 3) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and

(a) the structure and the dwelling unit at issue have a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*), issued no more than ten years before the date the application is submitted to the director; or

(b) the structure and the dwelling unit at issue have been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;[-]

(6) if applicable, the Austin Water Utility determines the septic system complies with Chapter 15-5 (*Private Sewage Facilities*);

(7) the property is not subject to outstanding City Code or state law violations;

(8) the owner pays the fee established by separate ordinance;

(9) the owner does not meet the standards described in Section 25-2-797 (*Repeat Offenses*); and

(10) if applicable, the owner pays the fee required by Section 25-2-798 (*Non-Compliance Fees*).

(D) A license issued under this section:

(1) is valid for a maximum of one year from the date of issuance, subject to a one-time extension of 30 days at the discretion of the director;

(2) may not be transferred by the property owner listed on the application and does not convey with a sale or transfer of the property; and

(3) ~~satisfies the requirement for a change of use permit from residential to~~ short-term rental use.

(E) Except as otherwise provided in Subsection (F), a [~~A~~] license may be renewed annually if [~~the owner~~]:

(1) the licensee pays a renewal fee established by separate ordinance;

(2) the licensee provides documentation showing that hotel occupancy taxes have been paid for the licensed unit as required by Section 11-2-4 (*Quarterly Reports; Payments*) for the previous year; [~~and~~]

(3) the licensee provides updates of any changes to the information required under Subsection (B) of this section;[~~.~~]

(4) the property is not subject to outstanding City Code or state law violations;

(5) the licensee or operator does not meet the standards described in Section 25-2-797 (*Repeat Offenses*);

(6) if applicable, the structure is determined by the building official not to pose a hazard to life, health, or public safety; and

(7) if applicable, the owner pays the fee required by Section 25-2-798 (*Non-Compliance Fees*).

(F) The director may deny an application to renew a license if, on to the date the renewal application was submitted, the license for a short-term rental was suspended as authorized under Section 1307 (*License Suspension*) of Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) [~~An advertisement promoting the availability of short term rental property in violation of city code is prima facie evidence of a violation and may be grounds for denial, suspension, or revocation of a license~~].

(G) After November 23, 2015, the director may not issue a license to operate a short-term rental use described in Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*) except for an application received prior to September 17, 2015. In any event, the director may not issue a license pursuant to an application received after November 12, 2015.

(H) The limitation in subsection (G) does not apply to an annual renewal authorized in subsection (E).

(I) A violation of any provision of the City Code or other applicable law is grounds to deny, suspend, or revoke a license.

§ 25-2-792 NOTIFICATION REQUIREMENTS.

(A) The director shall provide a packet of information with each license summarizing the restrictions applicable to short-term rental use, including:

(1) the name and contact information of the local [~~responsible~~] contact designated in the application;

(2) occupancy limits applicable under Section 25-2-795 (*Occupancy Limits for Short-Term Rentals*) [~~25-2-511 (*Dwelling Unit Occupancy Limit*)~~];

(3) restrictions on noise applicable under Section 25-2-794 (*General Requirements for Short-Term Rentals*) [~~Chapter 9-2 (*Noise and Amplified Sound*)~~], including limitations on the use of amplified sound;

(4) parking restrictions;

(5) trash collection schedule;

(6) information on relevant burn bans;

(7) information on relevant water restrictions;

(8) information on applicable requirements of the Americans with Disabilities Act; and

(9) other guidelines and requirements applicable to short-term rental uses.

(B) The licensee [~~owner~~] or operator of a short-term rental use must:

(1) provide renters a copy of the information packet under Subsection (A) of this section; and

(2) post the packet conspicuously in the common area of each short-term [~~dwelling rental~~] unit included in the registration.

(C) The director shall mail notice of the contact information for the local [~~responsible~~] contact to all properties within 100 feet of the short-term rental use, at the licensee's [~~owner~~] or operator's expense.

PART 2. City Code Chapter 25-2, Subchapter C, Article 4, Division 1, Subpart C (*Requirements for Short-Term Rental Uses*) is amended to add new Sections 25-2-794, 25-2-795, 25-2-796, 25-2-797, 25-2-798, and 25-2-799 to read as follows:

§ 25-2-794 GENERAL REQUIREMENTS FOR SHORT-TERM RENTALS.

(A) A licensee or guest of a short-term rental may not use or allow the use of sound equipment that produces sound in excess of 75 decibels at the property line between 10:00 a.m. and 10:00 p.m.

(B) A licensee or guest of a short-term rental may not use or allow use of sound equipment that produces sound audible beyond the property line between 10:00 p.m. and 10:00 a.m..

(C) A licensee or guest of a short-term rental shall not make or allow another to make noise or play a musical instrument audible to an adjacent business or residence between 10:30 p.m. and 7:00 a.m..

(D) If a building permit prohibiting occupancy of the structure is active, no person may occupy, for sleeping or living purposes, the structure until final inspections have been passed and the building permit is closed.

(E) A licensee or operator may not advertise or promote or allow another to advertise or promote a short-term rental without including:

(1) the license number assigned by the City to the short-term rental; and

(2) the applicable occupancy limit for the short-term rental.

(F) An owner, or a person in control of a dwelling, may not advertise or promote, or allow another to advertise or promote, the dwelling as a short-term rental if the dwelling is not licensed by the director as a short-term rental.

(G) A licensee or operator may not advertise or promote or allow another to advertise or promote a short-term rental in violation of the City Code or state law.

(H) A person must obtain a license to operate a short-term rental before a property may be used as a short-term rental.

(I) Requirements in this section apply only when the dwelling unit is being used as a short-term rental, and apply only to that dwelling unit. For purposes of this subsection, dwelling unit means the area being used as a short-term rental, including a partial unit described in Section 25-2-788(B)(1) (*Short-Term Rental (Type 1) Regulations*).

§ 25-2-795 OCCUPANCY LIMITS FOR SHORT-TERM RENTALS.

(A) In this section:

(1) ADULT means a person 18 years of age or older.

(2) DOMESTIC PARTNERSHIP means adults living in the same household and sharing common resources of life in a close, personal, and intimate relationship.

(3) UNRELATED means not connected by consanguinity, marriage, domestic partnership, or adoption.

(B) Unless a stricter limit applies, not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.

(C) A short-term rental is presumed to have two bedrooms, except as otherwise determined through an inspection approved by the director.

(D) A licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.

(E) A licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m.

(F) For purposes of this section, an assembly includes a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping.

(G) A short-term rental use may not be used by more than:

(1) ten adults at one time, unless a stricter limit applies; or

(2) six unrelated adults.

(H) Requirements in this section apply only when the dwelling unit is being used as a short-term rental, and apply only to that dwelling unit. For purposes of this subsection, dwelling unit means the area being used as a short-term rental, including the partial unit described in Section 25-2-788(B)(1) (*Short-Term Rental (Type 1) Regulations*).

§ 25-2-796 LOCAL CONTACTS.

(A) A licensee of a short-term rental use who does not reside within the Austin Metro Area must identify an individual or individuals to serve as local contacts and respond to emergency conditions.

(B) A local contact designated under subsection (A) must be present within the Austin Metro Area and be available to respond within two hours after being notified of an emergency by a guest of the short-term rental, by a City employee, or by an individual entitled to notice of the contact information under Section 25-2-792(C) (*Notification Requirements*), during any 24-hour period.

(C) If there is a change related to a local contact, the licensee must provide updated or new information to the director in writing within three business days.

§ 25-2-797 REPEAT OFFENSES.

(A) If the director finds that the licensee or operator failed to comply with Section 25-2-794 (*General Requirements for Short-Term Rentals*) or Section 25-2-795 (*Occupancy Limits for Short-Term Rentals*) at least twice in a 12-month period, the director may deny an application to renew a short-term rental license for a period of 12 months.

(B) If the director finds that an owner or person in control of a property violated Section 25-2-794 (*General Requirements for Short-Term Rentals*) at least twice in a 12-month period, the director may deny an application for a short-term rental license for a period of 12 months.

(C) If a property is the subject of repeated substantiated violations of City Code or state law during a 24-month period prior to applying for a license or renewing a license to operate a short-term rental, the director may deny the short-term rental license based on:

(1) the frequency of any repeated violations;

(2) whether a violation was committed intentionally or knowingly; and

(3) any other information that demonstrates the degree to which the owner or occupant has endangered public health, safety, or welfare.

(D) A licensee may appeal the director's decision to deny an application in compliance with the process in Section 1308 (*Appeal From License Suspension or Denial*) of Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*).

§ 25-2-798 NON-COMPLIANCE FEES.

(A) A person that submits an application for a short-term rental license shall pay an additional fee if the application is submitted after the director sends a notice of violation or cites the person for operating a short-term rental without a license.

(B) A person that submits a request to renew a short-term rental license shall pay an additional fee if the request is submitted after the director sends a notice of violation or cites the person for operating with an expired short-term rental license.

(C) The fee described in this section shall be set by separate ordinance and be based on the City's cost to enforce the licensing requirements.

§ 25-2-799 PRIMA FACIE EVIDENCE OF A VIOLATION.

(A) An advertisement promoting the availability of a short-term rental in violation of any City Code or state law requirement is prima facie evidence of a violation and is cause to issue an administrative citation for a violation of Sections 25-2-794(E),(F), or (G) (*General Requirements for Short-Term Rentals*).

(B) Except for a short-term rental use described in Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), a visual inspection of more than six adults by a city employee at a short-term rental is prima facie evidence of and is cause to issue an administrative citation for a violation of Sections 25-2-795(B), (E), and (G)(2) (*Occupancy Limit for Short-Term Rentals*).

(C) Except for a short-term rental use described in Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), a visual inspection of more than ten adults by a city employee at a short-term rental is prima facie evidence of and is cause to issue an administrative citation for a violation of Section 25-2-795(G)(1) (*Occupancy Limits for Short-Term Rentals*).

PART 3. Subsection (D) of City Code Section 25-2-511(*Dwelling Unit Occupancy Limit*) is amended to read:

(D) Except as provided in Subsection (E), for a conservation single family residential, single family attached residential, single family residential, small lot single family, duplex residential use, or two-family residential use[~~, or short-term rental use~~] not more than four unrelated adults may reside on a site, in the following zoning districts:

(1) Lake Austin Residence District (LA) Zoning District;

(2) Rural Residence District (RR) Zoning District;

(3) Single Family Residence Large Lot (SF-1) Zoning District;

(4) Single Family Residence Standard Lot (SF-2) Zoning District;

(5) Family Residence (SF-3) Zoning District;

(6) Single Family Residence Small Lot (SF-4A) Zoning District;

(7) Single Family Residence Condominium (SF-4B) Zoning District;

(8) Urban Family Residence (SF-5) Zoning District; and

(9) Townhouse and Condominium Residence (SF-6) Zoning District.

PART 4. The table in City Code Section 25-2-491(C) (*Permitted, Conditional, and Prohibited Uses*) is amended to replace the existing reference to "Short-Term Rental" with "Short-Term Rental (Types 1 and 3)" and to reflect the following:

Short-Term Rental (Type 2) is a permitted use in the following base districts:

central business (CBD)

downtown mixed use (DMU)

planned unit development (PUD)

general-retail – mixed use (GR-MU)

commercial services – mixed use (CS-MU)

commercial services – vertical mixed use (CS-V)

general retail – vertical mixed use (GR-V).

PART 5. City Code Chapter 25-2, Article 7 (*Nonconforming Uses*) is amended to add a new Section 25-2-950 (*Short-Term Rental Type 2*) to read as follows:

§ 25-2-950 DISCONTINUANCE OF NONCONFORMING SHORT-TERM RENTAL (TYPE 2) USES.

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.

PART 6. Section 202.1 (*Supplemental and Replacement Definitions*) of City Code Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) is amended to add a new definition "short-term rental" to read as follows:

202.1 Supplemental and Replacement Definitions.

SHORT-TERM RENTAL. The use of a residential dwelling unit or accessory building, other than a unit or building associated with a group residential use, on a temporary or transient basis in accordance with Chapter 25-2, Subchapter C, Article 4, Division 1, Subpart C (*Requirements for Short-Term Rental Uses*). The use does not include an extension for less than 30 consecutive days of a previously existing rental agreement of 30 consecutive days or more. The use does not include a rental between parties to the sale of that residential dwelling unit.

PART 7. Section 1301 (*Inspections*), and Section 1307 (*License Suspension*) of City Code Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) are amended to read as follows

1301 Inspections.

The code official shall make inspections to determine the condition of short-term rentals, boarding houses, hotels, rooming houses and bed and breakfast establishments located within the City, to ensure compliance with this chapter and other applicable laws. For the purpose of making inspections, the code official or the code official's representative may enter, examine, and survey, at all reasonable times, all buildings, dwelling units, guest rooms, and premises on presentation of the proper credentials. The owner or operator of a short-term rental, boarding house, hotel, rooming house, or bed and breakfast establishment, or the person in charge, shall give the code official free access to the building, dwelling unit, partial unit, guest room and its premises, at all reasonable times, for the purpose of inspection, examination, and survey.

1307 License Suspension.

(A) Except as provided in subsections (D) and (E), w[~~W~~]henever the code official finds on inspection of the physical premises or review of applicable records of any boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment that conditions or practices exist that violate any provision of the International Property Maintenance Code, City Code, or any rule or regulation adopted under this Code, or that the establishment has failed to comply with any provision, prohibition, or requirement related to the registration, reporting, collection, segregation, accounting, disclosure, or payment of local hotel occupancy taxes, the code official shall give written notice to the owner of the property and the operator of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment

that unless the violations are corrected by an identified deadline, the license shall be suspended.

(B) At the end of the time provided for correction of the violation(s), the code official shall re-inspect the location or records of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment and, if the conditions or practices have not been corrected, shall suspend the license and give written notice to the licensee that the license has been suspended.

(C) On receipt of notice of suspension, the licensee shall immediately stop operation of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment, and no person may occupy for sleeping or living purposes any rooming unit therein, except that the code official may allow continued occupancy by the property owner of a short-term rental use subject to Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*). The notice required by this subsection shall be served in accordance with the notice provisions of applicable law.

(D) The code official may immediately suspend a license if the code official determines that the license was issued in error. A suspension is effective until the code official determines that the licensee has complied with the requirements of the City Code or any rule or regulation adopted under this Code. The code official shall give written notice to the owner of the property and the operator of the establishment that the license is suspended.

(E) If a short-term rental is the subject of two or more substantiated violations of applicable law during the license period, the code official may suspend the short-term rental license. The code official must give notice to the licensee of a notice of intent to suspend a license issued under this subsection.

(F) In determining whether to suspend a license as described in subsection (E), the code official shall consider the frequency of the substantiated violations, whether a violation was committed intentionally or knowingly, and any other information that demonstrates the degree to which a licensee has endangered public health, safety, or welfare.

PART 8. Because of the amendments set forth in Parts 4 and 5 of this Ordinance, Council finds it is not necessary to set or hold the public hearing described in Ordinance No. 20151112-078 and waives the requirement.

PART 9. Parts 4 and 5 of this ordinance take effect on April 1, 2017, and the remaining parts of this ordinance take effect on March 5, 2016.

PASSED AND APPROVED

February 23, 2016 §
§
§

Steve Adler
Mayor

APPROVED:

Anne L. Morgan
City Attorney

ATTEST:

Jannette S. Goodall
City Clerk

APPENDIX B

§ 25-1-462 - CRIMINAL ENFORCEMENT.

(A) A person who violates a provision of this title commits a separate offense for each day the violation continues.

(B) A person who violates this title commits a misdemeanor punishable by a fine not to exceed $2000.

(C) A culpable mental state is not required, and need not be proved, for fines of $500 or less.

(D) A person who violates Chapter 25-12 (*Technical Codes*) commits a misdemeanor punishable by a fine not to exceed $2000 and not less than:

(1) $150 for a first conviction;

(2) $250 for a second conviction; and

(3) $500 for a third or subsequent conviction.

Source: Sections 13-1-60, 13-1-70, 13-1-71, and 13-1-72; Ord. 990225-70; Ord. 031211-11; Ord. No. 20140515-058, Pt. 1, 5-26-14 .

§ 25-2-795 - OCCUPANCY LIMITS FOR SHORT-TERM RENTALS.

(A) In this section:

(1) ADULT means a person 18 years of age or older.

(2) DOMESTIC PARTNERSHIP means adults living in the same household and sharing common resources of life in a close, personal, and intimate relationship.

(3) UNRELATED means not connected by consanguinity, marriage, domestic partnership, or adoption.

(B) Unless a stricter limit applies, not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.

(C) A short-term rental is presumed to have two bedrooms, except as otherwise determined through an inspection approved by the director.

(D) A licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.

(E) A licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m.

APPENDIX C

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