NO. 06-22-00078-CV

IN THE COURT OF APPEALS
FOR THE SIXTH JUDICIAL DISTRICT
TEXARKANA, TEXAS

Shana Elliott and Lawrence Kalke,
Plaintiffs/Appellants,

v.

City of College Station, Texas; Karl Mooney, in his Official Capacity as Mayor of the City of College Station; and Bryan Woods, in his Official Capacity as the City Manager of the City of College Station
Defendants/Appellees.

On Appeal from the
85th Judicial District Court, Brazos County

APPELLANTS' REPLY BRIEF

ROBERT HENNEKE
TX Bar No. 24046058
rhennek@texaspolicy.com
CHANCE WELDON
TX Bar No. 24076767
cweldon@texaspolicy.com
CHRISTIAN TOWNSEND
TX Bar No. 24127538
ctownsend@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

IDENTITY OF PARTIES AND COUNSEL

Plaintiffs/Appellants:	Shana Elliott Lawrence Kalke
Appellate and Trial Counsel for Plaintiffs/Appellants:	Robert Henneke rhenneke@texaspolicy.com Chance Weldon cweldon@texaspolicy.com Christian Townsend ctownsend@texaspolicy.com Texas Public Policy Foundation 901 Congress Avenue Austin, Texas 78701 Telephone: (512) 472-2700 Facsimile: (512) 472-2728
Defendants/Appellees:	City of College Station, Texas Karl Mooney, in his Official Capacity as Mayor of the City of College Station Bryan Woods, in his Official Capacity as the City Manager of the City of College Station
Appellate and Trial Counsel for Defendants/Appellees:	John J. Hightower jhightower@olsonllp.com Allison S. Killian akillian@olsonllp.com Olson & Olson, LLP 2727 Allen Parkway, Suite 600 Houston, Texas 77019 Telephone: (713) 533-3800 Facsimile: (713) 533-3888 Adam C. Falco Deputy City Attorney afalco@cstx.gov

College Station City Attorney's Office
P.O. Box 9960
1101 Texas Avenue
College Station, Texas 77842
Telephone: (979) 764-3507
Facsimile: (979) 764-3481

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Constitutional Provisions:

Other Authorities:

Rules:

INTRODUCTION

Appellants' claims in this case are straightforward. There is no dispute that Article 1, Section 2 of the Texas Constitution requires that individuals have some ability to vote for the municipal authorities that regulate them. City's Br. at 35; *Ex parte Lewis*, 45 Tex. Crim. 1 (1903); *Brown v. Galveston*, 75 S.W. 488 (Tex. 1903); *Walling v. North Cent. Texas Municipal Water Authority*, 359 S.W.2d 546 (Tex. Civ. App. 1962).

At the same time, there is no dispute that, in direct conflict with this rule, College Station denies Appellants the right to vote while regulating their property. CR: 3. Such regulations, challenged here, are therefore unconstitutional.

The City attempts to avoid this straightforward question by arguing that it does not know what the challenged ordinances mean; that it has not enforced the challenged ordinances against the Appellants yet; and in any event, that claims under Article 1, Section 2 are nonjusticiable under the political question doctrine.

But, as explained below, the City's arguments would require this Court to ignore the plain text of the challenged ordinances; the City's prior statements about the application of those ordinances; basic principles of standing and ripeness; and binding precedent on the application of the political question doctrine in Texas. The district court's judgment should therefore be reversed.

ARGUMENT

I. APPELLANTS HAVE STANDING.

The City begins by claiming that Appellants lack standing. But this argument is meritless. Appellants own property that is currently subject to the ordinances that they challenge. CR: 4–5. As explained in Appellants' opening brief, this restriction on Appellants' property rights is sufficient to establish standing. App. Br. at 11-14; *Zaatari v. City of Austin*, 615 S.W.3d 172, 184 (Tex. App.—Austin 2019, pet. denied). Indeed, despite spending more than a dozen pages on the topic, the City's response brief fails to cite *a single case* where a property owner whose property was subject to a regulation did not have standing to bring a facial challenge to that regulation. City's Br. 15–27.

This makes sense. "Texas's standing test parallels the federal test for Article III standing." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018). To establish standing a plaintiff must allege: (1) a personal injury; (2) that is fairly traceable to the challenged regulation; and (3) likely to be redressed by the requested relief. *Id.*

When, as in this case, the plaintiff is the object of the regulation he challenges, these three criteria are easily met because "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir., 2015). In such circumstances, the plaintiff need not await enforcement

to challenge the restriction on his rights. The "increased regulatory burden" of being subject to the challenged law "typically satisfies the injury in fact requirement." *Id*. at 266.

This is particularly true regarding facial challenges involving property rights. As explained in Appellants' opening brief, the mere existence of a land-use ordinance restricting property use places an immediate encumbrance on every property it covers. App. Br. 11-14. This "increased regulatory burden" is sufficient to establish standing. *Contender Farms*, 779 F.3d at 266; See also *Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 530 (Tex. 1894) (mere existence of an ordinance limiting the use of property injures regulated property owners); *Zaatari*, 615 S.W.3d at 184 (existence of an unconstitutional ordinance limiting the use of property injured property owners, even if the ordinance has not yet been enforced and no other economic injuries have yet occurred).

Here, Appellants raise facial constitutional challenges to ordinances that plainly restrict their ability to use their properties. CR: 8–9. This encumbrance on Appellants' properties is sufficient to establish standing. App. Br. 11-14.

The City raises three arguments in response, each of which fails.

A. There is no reasonable dispute that the challenged ordinances apply to Appellants on their face.

First, the City argues that the injuries in this case are too speculative for standing because the City claims (for the first time on appeal) that it does not know whether it interprets its ordinances to apply to Appellants' properties or not. City's Br. at 14. In particular, the City claims that because it has not yet enforced the Ordinances against Appellants it has not yet "had an occasion to construe how the regulations might apply to the residential properties in its ETJ." *Id*.

But the City's newfound confusion over the meaning of its ordinances is belied by both the text of those ordinances and the City's prior testimony.

Section 7.5 of the City's Unified Development Ordinance provides that: "*All* off-premise and portable signs *shall* be prohibited *within the Extraterritorial Jurisdiction* of the City of College Station." CR: 156 (emphasis added). It strains credulity to argue that there is any ambiguity as to whether the ordinance applies to properties in the ETJ.

Similarly, College Station's driveway ordinance makes clear that it applies to "*all* streets, sidewalks, and driveways. . . *within the extraterritorial jurisdiction of the City*." CR: 116 (emphasis added). Despite multiple opportunities, the City has not produced a single argument as to how that plain text does not apply to Appellants' properties.

Indeed, at deposition, City Manager Bryan Woods repeatedly agreed that the challenged ordinances apply to Appellants on their face. CR: 74, 75, 116, 156.

The transcript speaks for itself:

> Q: [Mr. Weldon] it says: (Reading) "All off-premise signs and portable signs shall be prohibited."
> What does that mean?
>
> A: [Mr. Woods] All off-premise and portable signs shall be prohibited.
>
> Q: Okay. So, if my clients want to put up an off-premise or portable sign, is that that prohibited under the text of this ordinance?
>
> A: In the text of this ordinance, yes.

CR: 74.

Similarly, Mr. Woods agreed that the City's driveway ordinance also applied to Appellants' properties in the ETJ.

> Q: [Mr. Weldon] Okay. So, it applies to the ETJ, correct?
>
> A: [Mr. Woods] It applies to: (Reading) The entire subdivided and unsubdivided portion of the city, the extraterritorial jurisdiction by the city as established by a Texas Local Government Code.

CR: 75.

When asked again, he reiterated the point:

> Q: So, can you point to anything in this ordinance that says that it does not apply to the ETJ?
>
> A: No, I can't.
>
> Q: Okay. Because on its face this applies in the ETJ, correct?
>
> A: As I stated previously, Section 2 covers the city and the ETJ, yes.

CR: 75.

The City attempts to soften this testimony's impact by claiming that Mr. Woods was simply giving his "off-the-cuff lay opinions." City's Br. at 5, n. 2. But Mr. Woods was not testifying as a layman. He is a named Defendant in this case. CR: 4. His testimony was given in his "official capacity as city manager." CR: 69. As City Manager, he is officially tasked under the City Charter with the application, interpretation, and enforcement of the ordinances at issue. CR: 51. He was deposed in this case because the City presented his affidavit in its plea to the jurisdiction as *dispositive* on the City's position on the application of the challenged ordinances. CR: 29, 33, 34. The City may not present an affidavit containing Mr. Woods' interpretation and application of its ordinances as dispositive in its plea to the jurisdiction and then disingenuously characterize his later testimony about *that same affidavit* as the non-binding musings of a layman.

But even if the City could run from its own prior statements, it does not help its case. To establish standing, Appellants are not required to

show *with certainty* that the uses of their properties are prohibited. If the use is at least "arguably" proscribed by the law they wish to challenge, then standing is established. *Contender Farms*, 779 F.3d at 268 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014)). That burden is certainly met here.

As noted above, the plain text of the challenged ordinances support Appellants' reading. In such circumstances, the government may not avoid review even if it *affirmatively* claims that it does not read its laws to apply to the plaintiffs' conduct. See *United States v. Stevens*, 559 U.S. 460, 480 (2010). It certainly cannot avoid review by claiming, as the City does here, that it does not know whether its ordinances apply or not. *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014) (rejecting argument that injuries were "speculative" because the government agency claimed it could not know what its own regulation might mean until it applied it); see also, *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (standing established, even when the government disagrees on the application of the law, if plaintiffs' interpretation that the law applies to them is "reasonable enough.") The City's first argument therefore fails.[1]

[1] Appellants originally challenged three ordinances below but have only challenged two on appeal. App. Br. at 1–2. The City strangely focuses most of its standing argument on alleged ambiguities in the text of the one ordinance Appellants *have not* raised here—the City's firearm ordinance. City's Br. at 13, 14, 22. But due to this ambiguity (and the City's claim below that the firearm ordinance did not apply at all in its entire ETJ) Appellants did not raise the validity of the firearm ordinance

B. Appellants' injuries under the challenged ordinances are not "speculative."

The City next argues that Appellants' injuries are "hypothetical" because it has not enforced its ordinances against them, *yet*. City's Br. at 30. But, when a party is "'subject to the terms of the Ordinance' . . . it is not 'unadorned speculation' to conclude that the Ordinance will be enforced against [them]." *Pennell v. San Jose*, 485 U.S. 1, 7-8 (1988) (internal citations omitted). Cities do not pass ordinances for no reason.

The City cavalierly responded to this argument below by claiming that it has a "stack" of ordinances with no opinion on whether they should ever be enforced or not. RR: 7. But the challenged ordinances are not long-forgotten laws about cattle rustling or spitting on sidewalks. The sign ordinance was passed in 2011 and (with brief exceptions during COVID) has been regularly enforced. *City of College Station Reminding Local Businesses of Business Sign Ordinance, Educating Before Citing*, KRHD 25 (July 13, 2021), https://tinyurl.com/4eta2mtk; Andy Krauss, *City of College Station Begin Enforcing its Sign Ordinance Again*, (July 14, 2021), https://tinyurl.com/24z4zu7. The driveway ordinance was updated as recently as 2017, and the City's website has explicit instructions for how property owners should comply. *Residential Building*, City of College Station, https://tinyurl.com/mrxh4s98. In such

---

in this appeal. See, generally, App. Br. at 1–2. Instead, Appellants have focused their arguments on the two ordinances for which the application to their properties is crystal clear and uncontroverted. See *supra*, see also, App. Br. at 1–2. The City, tellingly, does not discuss the text of these ordinances in its brief.

circumstances, it is not mere "speculation" that the Ordinances will be applied to Appellants.

The City objects that even if the ordinances apply, there is no evidence that Appellants are "actually engaged" in activities that would violate the City's ordinances. City's Br. at 5, 22. But, this argument shows a two-fold misunderstanding of how the standing test is applied.

First, as explained above, the mere encumbrance of property, standing alone, is sufficient injury for standing when the plaintiffs bring a facial challenge. See Section I, *supra*. Further evaluation of Appellants' activities is not required.

Second, even outside of the property rights context, a plaintiff is not required to violate the challenged law or "confess that he will in fact violate the law" in order to have standing for a facial challenge. *Contender Farms*, 779 F.3d at 267–68. It is enough to show an intention to engage in protected activity that is arguably covered by the challenged law.

Here, Ms. Elliott testified that she currently "intend[s] to make improvements to [her] driveway including but not limited to paving the graveled part of the driveway" but that she "cannot make those changes right now without facing a penalty from College Station." CR: 42-43.

Mr. Kalke provided similar descriptions of his plans. He noted that he is currently "seeking to add a mother-in-law suite to [his] property," and that doing so "would require an extension of [his] driveway to the

new structure" as well as "changes to [his] current driveway and additional pavement being added to extend the driveway." CR: 47. Like Ms. Elliott, Mr. Kalke testified that the reason he has not done so is because he "cannot make those changes right now without facing a penalty from College Station." CR: 47.

With regard to the City's sign ordinance, both Ms. Elliot and Mr. Kalke testified that they currently want to place off-premise portable signs in their yards, but have not done so because "under College Station's code of ordinances, [they are] forbidden." CR: 43, 47. Indeed, both Appellants even noted the purpose and proposed contents of some of that signage. *Id*.

These are not hypothetical desires to do something, maybe, someday. They are sworn statements about Appellants' current plans to use their properties in concrete ways that are currently being thwarted by the City's ordinances. Appellants need not actually violate the law in order to create standing. *Contender Farms*, 779 F.3d at 267–68, *Ex parte Young*, 209 U.S. 123, 163 (1908). The City's standing arguments are meritless.

II. APPELLANTS NEED NOT AWAIT ENFORCEMENT TO HAVE RIPE CLAIMS.

The City next argues that even if Appellants have standing, Appellants' claims are not ripe because, again, the City has not enforced its ordinances against them, *yet*. City's Br. at 30. But both state and

federal law are uniform that a facial challenge to a land use regulation is ripe the moment the act is passed. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1042 n.4 (1992); *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 60 (Tex. 2006). A property owner certainly need not await enforcement to ripen his claims. *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 590 (Tex. 2018) (allowing constitutional challenge to ordinance where suit was filed before effective date); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626–27 (Tex. 1996) (rejecting State's argument that plaintiffs "must actually be deprived of their property before they can maintain a [facial] challenge to this statute.").

In *Zaatari*, for example, property owners challenged the City of Austin's ban on short-term rentals in residential areas as being unconstitutionally retroactive in violation of Article 1, Section 16 of the Texas Constitution. *Zaatari*, 615 S.W.3d at 188. The City argued that these claims were not ripe, because the ban contained a grace-period and would not go into effect for six years. *Id* at 184. The City claimed that this delay meant that any injuries were merely speculative, because the property owners might sell their properties, or the City could amend the ordinance in the interim. The court flatly rejected these arguments, holding (like every other court) that a facial challenge to a land-use ordinance is "ripe upon enactment." *Id*. at 184.

This makes sense. Ripeness turns on whether there has been sufficient factual development to crystalize the issue for the court. When, as in this case, a party brings a facial challenge to the government's authority to regulate his property—full stop—it presents a pure question of law. *Zaatari*, 615 S.W.3d at 184. No further factual development is needed. *Id.*, see also *Smithfield Concerned Citizens for Fair Zoning v. Smithfield*, 907 F.2d 239, 242 (1st Cir. 1990) (explaining the distinction for ripeness purposes between facial and as applied challenges to land-use ordinances); *Beacon Hill Farm Assocs. II Ltd. P'ship v. Loudoun Cty. Bd. of Supervisors*, 875 F.2d 1081, 1082–83 (4th Cir. 1989) (same).

The City raises two objections, both of which fail.

A. Pre-enforcement review is not limited to First Amendment Claims or Takings Claims.

First, the City claims—without citing a single case—that cases allowing for pre-enforcement review are limited to cases involving criminal penalties, the First Amendment, or Takings claims. City's Br. at 31–34. But this is demonstrably false.

As an initial matter, the Supreme Court has made clear that pre-enforcement injunctions are available whether the law at issue is "civil or criminal." *Terrace v. Thompson*, 263 U.S. 197, 214 (1923). Indeed, in Texas it is easier—not harder—to enjoin civil ordinances than criminal ordinances due to the bifurcation of claims between the Texas Supreme Court and the Court of Criminal Appeals. See *State v. Morales*, 869

S.W.2d 941, 945 (Tex. 1994). The City provides no justification for its proposed departure from precedent.

Similarly, there is no support for the claim that pre-enforcement review is limited to First Amendment or Takings claims. To the contrary, a mere glance at the cases cited in Appellants' opening brief flatly disproves the City's argument. For example, the ripeness dispute in *Zaatari* involved, among other things, retroactivity and Due Course of Law claims under the Texas Constitution. *Zaatari*, 615 S.W.3d at 184. Similarly, *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 432 (Tex. App.—Austin, 2018, pet. denied) was a state law preemption case. *Contender Farms*, 779 F.3d at 262, involved a statutory challenge to agency rule making. *Pearson v. Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992), was a due process challenge to a zoning ordinance. And *Ex parte Young*—the quintessential pre-enforcement review case—involved federal due process and equal protection challenges to railroad rates. *Ex parte Young*, 209 U.S. 123, 144 (1908).

The City's claim that pre-enforcement review is limited to First Amendment or Takings cases is simply false.

B. *Patel* and *Garcia* do not help the City's case.

Second, the City points to *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) and *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995) for the proposition that actual enforcement is required to establish ripeness. But the City's reliance on

those cases is odd. In *Patel*, the Court rejected the exact arguments the City makes here. *Id*. at 78. In that case, several eyebrow threaders brought challenges to the Texas Cosmetology statutes, arguing that requiring eyebrow threaders to receive cosmetology licenses violated the Texas Constitution. Like the City here, the state argued that the threaders claims were not ripe because the threaders had "not faced administrative enforcement." *Id*. The Court rejected that approach in little more than a paragraph. *Id*.

The City strangely spends three pages discussing the facts of *Patel,* attempting to derive a new rule of ripeness from the fact that some of the threaders in *Patel* had received warning letters. City's Br. at 17-20 (discussing *Patel*); See also, City's Br. at 24, 25, 28 (relying on its manufactured rule from *Patel*). But the fact that the Court in *Patel* held that warning letters were *sufficient* to establish ripeness in that case does not mean that warning letters are now *necessary* in every case. As noted above, the Texas Supreme Court dealt with ripeness in *Patel* in little more than a paragraph. The warning letters were mentioned in a single sentence without further discussion. The Texas Supreme Court typically does not overturn a century of precedent *sub silentio*. It certainly would not do so in a case finding that the plaintiffs' pre-enforcement claims were ripe.

Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 519 (Tex. 1995) similarly does not help the City. In *Garcia*, the plaintiff sought to

challenge the timing mechanism for bringing claims under a state disability statute, but he was not yet disabled, had never filed for disability under the statute, and the statute contained explicit waiver provisions that could apply to remedy his injuries. *Id.* Given this uncertainty, the Court held that the plaintiff's lawsuit was premature. *Id.*

Here, unlike the plaintiff in *Garcia*, Appellants' injuries are already ongoing. Appellants already own the property in question, they already seek to engage in the prohibited property use, and there is no statutory waiver mechanism that could potentially remedy these injuries. Moreover, as the City's witness testified at deposition, the challenged ordinances apply to Appellants' properties on their face (CR: 74–75 (Pgs. 23–27)), the city manager has an obligation to enforce ordinances as written, (CR: 73 (Pg. 15)), and nothing prevents city officials from enforcing ordinances against Appellants' tomorrow (CR: 71 (Pg. 11)). That is sufficient to establish ripeness.

C. The City's cramped view of ripeness conflicts with the plain text and purpose of the Uniform Declaratory Judgments Act.

Finally, it is worth pointing out that the City's artificially cramped view of ripeness conflicts with the plain text and purpose of the Uniform Declaratory Judgments Act (UDJA).

Appellants brought their claims for equitable relief under *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009)—the Texas equivalent of an *Ex parte Young* claim—and under the UDJA. CR: 7. The UDJA is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Tex. Civ. Prac. & Rem. Code § 37.002(b). It provides that a "person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." *Id.* § 37.004(a).

The purpose of that language was to create an avenue for "preventative justice" that allows a court to provide guidance to the parties who disagree about rights and responsibilities "before the wrong has actually been committed." *Cobb v. Harrington*, 144 Tex. 360, 367, 368 (1945). In other words, the UDJA exists, in part, to clarify the availability of pre-enforcement review.

For example, in *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 685 (Tex. 2020), which the City repeatedly cites, the parties disagreed over the scope of an easement. The plaintiffs interpreted the easement narrowly. The defendant interpreted the easement more broadly. Like the City in this case, the defendant argued that the dispute was not ripe because, while it believed it had authority to do so, it had never acted

under its broader interpretation of the easement and there was no evidence it ever would. *Id.* The Court flatly rejected this approach to ripeness. As the Court explained, the parties had a legitimate disagreement about the scope of the easements which left the plaintiffs "unsure what portions of their land they [could] utilize without fear of [Defendant's] encroachment on their use and enjoyment of the land." *Sw. Elec. Power Co.*, 595 S.W.3d at 684. That disagreement and uncertainty was sufficient to establish ripeness. *Id.*

That is precisely the sort of conflict at issue here. The City claims that it has authority to regulate property in its ETJ. City's Br. at 2. If that is true, it places a number of obligations on the Appellants in this case and limits their ability to lawfully use their property. Indeed, Appellants have refrained from undertaking activities on their property due to the City's asserted authority.

Appellants dispute the City's lawful authority to regulate their properties and seek declaratory relief to remove this Sword of Damocles from over their heads. That is precisely the sort of dispute that can be remedied by declaratory relief under the UDJA. As in *Sw. Elec. Power Co.*, 595 S.W.3d at 684, Appellants do not have to wait for the City to act in order to ripen their claims.

The City objects that the UDJA does not eliminate the traditional requirements for standing and ripeness. City's Br. at 42–44. But that argument attacks a strawman. Appellants do not argue that the UDJA

expands standing or lowers the requirements of ripeness. Appellants contend that the UDJA merely codifies a view of standing and ripeness that has existed under Texas law for more than a century— namely, that property owners are entitled to pre-enforcement review of municipal ordinances that arguably restrict their rights. As noted *supra*, both text, history, and precedent support this view of the UDJA.

The City's contrary view of ripeness not only conflicts with this precedent, but would render the plain text of the UDJA anomalous. The City cites no on point precedent for such an approach.

III. TEXAS SUPREME COURT PRECEDENT PRECLUDES THE APPLICATION OF THE POLITICAL QUESTION DOCTRINE TO ARTICLE 1, SECTION 2.

The City next argues that even if Appellants have standing, this Court lacks subject matter jurisdiction over Appellants' claims because of the "political question doctrine." City's Br. at 34–42. But as explained below, this argument is precluded by precedent.

A. The Texas Supreme Court has never held any provision of the Texas Constitution non-justiciable under the political question doctrine.

First, as Appellants note in their opening brief, the Texas Supreme Court has *never* held that *any* claim under *any* provision of the Texas Constitution presents a nonjusticiable political question. App. Br. at 5–6 (citing *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 779–80 (Tex. 2005)).

Indeed, the Texas Supreme Court has applied the political question doctrine only once, in a tort claim involving a dog bite on a U.S. military base in Afghanistan. *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 254 (Tex. 2018). Even then, the Court took pains to note the distinction between constitutional claims and other issues. See, *id.* ("to the courts alone belongs the power to authoritatively interpret the constitution.").

The City provides no case to the contrary. This Court should not cut a path where the Texas Supreme Court has dared not tread.

B. The City's claim that Article 1, Section 2 is a nonjusticiable political question is precluded by binding precedent that the City fails to address.

Second, any argument that claims under Article 1, Section 2 are non-justiciable is belied by the fact that Texas Courts, including both the Texas Supreme Court and the Texas Court of Criminal Appeals, have adjudicated claims under Article 1, Section 2. See, e.g., *Ex parte Lewis*, 45 Tex. 7 Crim. 1 (1903); *Brown v. Galveston*, 75 S.W. 488 (Tex. 1903); *Walling v. North Cent. Texas Municipal Water Authority*, 359 S.W.2d 546 (Tex. Civ. App. 1962). App. Br. At 6–7.

Despite being cited and discussed in Appellants' opening brief and all of Appellants' briefing in the district court, the City has steadfastly refused to ever address these cases. Indeed, these cases are not even cited in the City's brief. The City's silence is telling.

C. The Federal Guarantee Clause is not at issue in this case.

Instead of addressing this binding Texas precedent, the City points to case law involving the Federal "Guarantee Clause" holding that separate provision of the Federal Constitution nonjusticiable. City's Br. 39–40. But the Texas Supreme Court has been clear that the Texas Constitution is entitled to an independent interpretation, particularly when its text differs from its federal counterpart. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986); see also App. Br. at 8–10.

As the Appellants' point out in their opening brief, the Federal Guarantee clause has a different text, history, and structure than Article 1, Section 2, all of which counsel against a copy-paste application of Federal precedent. App. Br. at 8–10. Most notably, the Federal Guarantee Clause places the burden on Congress to provide a benefit, thus leaving the particulars in its discretion. U.S. Const. Art. IV, Sec. 2. By contrast, Article 1, Section 2 appears in the Texas Bill of Rights, which explicitly restricts legislative power. Tex. Const. Art. 1, Sec. 29 ("every thing in this 'Bill of Rights' is excepted out of the general powers of government."). The City does not point to a single case, Texas or federal, that has ever held a Bill of Rights provision to be nonjusticiable. Indeed, the City does not respond to this argument at all.

Instead, the City points to cases like *Bonner v. Belsterling* where the Texas Supreme Court analyzed a challenge under the *Federal*

Guarantee clause. 138 S.W. 571 (Tex. 1911). But even if precedent regarding the Federal Guarantee clause was relevant—and it is not—*Bonner* does not help the City's case. The Court in *Bonner* did not rule that the Guarantee clause was nonjusticiable in that context. Rather, the Court held that the low demands of a republican form of government had been met because the provisions at issue allowed the regulated parties to vote for those that regulated them, "just as is required to constitute a republican form of government." *Id*. at 574. This analysis is simply the application of the straightforward rule Appellants submit in this case.

Bonner, along with the other cases cited by the City, certainly does not stand for the proposition that a case brought under a different constitutional provision – with different text, history, and precedent – is nonjusticiable.

D. The legislature is not immune from Article 1, Section 2.

At the end of the day, the City's arguments regarding the political question doctrine boil down to a single, unsupported claim: that the legislature has granted cities the authority to regulate in the ETJ and therefore it is not for the courts to second guess whether such authority is constitutional. City's Br. at 41–42.

But "the Constitution nowhere suggests that the Legislature is to be the final authority on whether it has discharged its constitutional

obligation." *Neeley* 176 S.W.3d at 778. To the contrary, "Judicial duty—so arduous a duty, Hamilton called it—requires courts to be bulwarks of a limited Constitution against legislative encroachments." *Patel*, 469 S.W.3d at 123 (internal citations omitted).

Indeed, the Supreme Court rejected arguments almost identical to those presented by the city here in *Neeley*. 176 S.W.3d at 776. There, the government argued that Article VII, Section 1 of the Texas Constitution was nonjusticiable under the political question doctrine because the Legislature should have final authority to determine what constituted a "suitable" provision for an "efficient" public school finance system as demanded by the Texas Constitution. *Id*. The Court rejected this argument, holding that "while the Legislature certainly has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds." *Id*. at 784–85. "If the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate. The constitutional commitment of public education issues to the Legislature is primary but not absolute." *Id*. at 778.

The same is true here. When the Texas Framers crafted Article 1, Section 2, they could easily have said that Texas may institute any form of government the Legislature deems appropriate. They did not do so.

Rather, as in *Neely*, the Framers placed a "limitation" on that authority—namely, that any government created must be "republican." Tex. Const. Art. 1, Sec. 2.

To be sure, that limitation is a modest one. Property owners must merely be allowed to vote at some point for those that regulate their property. But, like every other provision of the Texas Bill of Rights, it is a limitation that Texas Courts—not merely the Legislature—have a duty to enforce. See Tex. Const. Art. 1, Sec. 29. The City's arguments to the contrary fail.

CONCLUSION

As noted at the outset, this case presents a straightforward question of law: can a city constitutionally regulate property well outside of its borders where the property owners receive no city services and can never vote for those who pass those regulations?

Appellants, who currently live under these unconstitutional conditions, request relief from this Court to stop this ongoing violation of their rights—a form of relief recognized in this state for more than a century.

The City seeks to deny Appellants their day in court. It would prefer that its longstanding exercise of regulatory authority over persons and property outside of its borders without electoral accountability continue unquestioned.

But to achieve this result, the City would have this Court ignore the City's own testimony, rewrite the rules of Texas standing and, for the first time in Texas history, hold a provision of the Texas Bill of Rights is nonjusticiable. This Court should not do so.

The district court's judgment dismissing this case with prejudice should be reversed.

Respectfully submitted,

/s/Chance Weldon
ROBERT HENNEKE
Texas Bar No. 24046058
rhenneke@texaspolicy.com
CHANCE WELDON
Texas Bar No. 24076767
cweldon@texaspolicy.com
CHRISTIAN TOWNSEND
Texas Bar No. 24127538
ctownsend@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone:(512) 472-2700
Facsimile: (512) 472-2728
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this brief contains 5,444 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.

/s/Chance Weldon
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2023, a true and correct copy of the foregoing document was filed electronically, and all counsel of record indicated below have been served via electronic service.

John J. Hightower
jhightower@olsonllp.com
Allison S. Killian
akillian@olsonllp.com
Olson & Olson, LLP
2727 Allen Parkway, Suite 600
Houston, Texas 77019

Adam C. Falco
Deputy City Attorney
afalco@cstx.gov
College Station City Attorney's Office
P.O. Box 9960
1101 Texas Avenue
College Station, Texas 77842
Counsel for Appellees

/s/ Chance Weldon
CHANCE WELDON

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Chance Weldon
Bar No. 24076767
cweldon@texaspolicy.com
Envelope ID: 73205448
Status as of 2/28/2023 4:24 PM CST

Associated Case Party: Shana Elliott

Name	BarNumber	Email	TimestampSubmitted	Status
Yvonne Simental		ysimental@texaspolicy.com	2/28/2023 4:16:34 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	2/28/2023 4:16:34 PM	SENT
Christian Townsend		ctownsend@texaspolicy.com	2/28/2023 4:16:34 PM	SENT
Chance DWeldon		cweldon@texaspolicy.com	2/28/2023 4:16:34 PM	SENT

Associated Case Party: City of College Station, Texas

Name	BarNumber	Email	TimestampSubmitted	Status
John J.Hightower		jhightower@olsonllp.com	2/28/2023 4:16:34 PM	SENT
Allison Killian		akillian@olsonllp.com	2/28/2023 4:16:34 PM	SENT
Adam C.Falco		afalco@cstx.gov	2/28/2023 4:16:34 PM	SENT