No. 26-

IN THE

Supreme Court of the United States

RAFAEL MARFIL; VERGE PRODUCTIONS, L.L.C.; ENRICO MARFIL; NAOMI MARFIL; DANIEL OLVEDA; AND DOUGLAS WAYNE MATHES,

Petitioners,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long held that "property rights in the land include the right to use, lease and dispose of it for lawful purposes," and that "the Constitution protects these essential attributes of property." *Terrace v. Thompson*, 263 U.S. 197, 215 (1923). For more than a century, it has reviewed local restrictions on those rights by asking whether, on the record, the restriction bears a rational relationship to a legitimate government interest. *See Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

The Fifth Circuit closed that door twice. It held that homeowners challenging a ban on leasing their homes for fewer than thirty days could not invoke the Due Process Clause at all, because state law did not separately recognize "the right to lease one's home on a short-term basis." And it held that, under *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), evidence that the ban did nothing to serve the City's stated interests was "beside the point."

The questions presented are:

1. Whether a property owner challenging a restriction on a traditional incident of ownership, such as the right to lease, must first identify a state-law entitlement to the precise use restricted before receiving even rational-basis review.

2. Whether, in rational-basis review of a local land-use restriction, property owners may rebut the government's asserted justification with record evidence, as in *Nectow* and *Cleburne*, or whether *Beach Communications* forecloses any consideration of that evidence.

PARTIES TO THE PROCEEDING

Petitioners are Rafael Marfil; Verge Productions, L.L.C.; Enrico Marfil; Naomi Marfil; Daniel Olveda; and Douglas Wayne Mathes. They were plaintiffs-appellants in the court of appeals.

Respondent is the City of New Braunfels, Texas. It was the defendant-appellee in the court of appeals.

Korey A. Rholack was also a plaintiff-appellant in the court of appeals. He sold his property after the judgment below and is not a petitioner in this Court. *See* Rule 12.6 letter filed with this petition.

No party has a stock ticker symbol.

CORPORATE DISCLOSURE STATEMENT

Petitioner Verge Productions, L.L.C. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. The remaining petitioners are natural persons.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Marfil v. City of New Braunfels, No. 6:20-cv-00248 (W.D. Tex.) (order adopting report and recommendation and dismissing complaint entered September 15, 2022; order granting summary judgment entered January 10, 2025);

Marfil v. City of New Braunfels, No. 22-50908 (5th Cir.) (judgment vacating and remanding entered June 16, 2023), reported at 70 F.4th 893;

Marfil v. City of New Braunfels, No. 25-50025 (5th Cir.) (judgment entered June 18, 2026; rehearing en banc denied July 21, 2026).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–21a) is reported at 178 F.4th 941. The order denying rehearing en banc (App. 59a–60a) is unreported. The district court's order granting summary judgment (App. 22a–28a) is unreported but available at 2025 U.S. Dist. LEXIS 6256.

The court of appeals' earlier opinion in this case (App. 29a–30a) is reported at 70 F.4th 893. The district court's order adopting the magistrate judge's report and recommendation and dismissing the complaint (App. 31a–33a) is unreported. The magistrate judge's report and recommendation (App. 34a–58a) is unreported but available at 2021 U.S. Dist. LEXIS 257996.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2026. A timely petition for rehearing en banc was denied on July 21, 2026. On October 2, 2026, Justice Alito extended the time to file a petition for a writ of certiorari to and including November 18, 2026. No. 26A441. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution (App. 79a) provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of the City of New Braunfels's short-term rental ordinance, New Braunfels, Tex., Code of Ordinances § 144-5.17, are reproduced at App. 61a–78a.

INTRODUCTION

Rational-basis review is the most modest protection the Constitution offers. It asks only whether a restriction bears a rational relationship to a legitimate government interest. Governments win most of these cases, and they should.

But for more than 150 years, property owners have at least been able to get in the courthouse door, present evidence, and ask a court to look. Sometimes they won. Often they lost. Either way, the decision rested on the record. *See Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 505 (1870); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

The decision below closes that door twice.

Petitioners own homes in New Braunfels, Texas. Several sit directly across the street from the entrance to Schlitterbahn, one of the largest water parks in the country. One Petitioner shares a yard with a short-term rental the City still permits.

Like generations of New Braunfels families before them, Petitioners want to rent their homes to other families when they are not using them. The City forbids it.

It does so even though its own staff found that short-term renting in the area would be "compatible with neighboring residential development," and even though, in more than a decade, it has not issued a single nuisance citation to any of the hundreds of short-term rentals it already allows.

The Fifth Circuit did not weigh any of that. First, it held that the Due Process Clause did not apply at all, because Texas courts had not recognized a freestanding "right to lease one's home on a short-term basis." App. 2a. Under that rule, a property owner must find a state-created right defined at the exact level of the regulation he challenges before receiving even rational-basis review. He never will.

Second, it held that even where rational-basis review applies, evidence that a restriction does nothing to serve its stated purposes is "beside the point," because "a legislative choice is not subject to courtroom fact-finding." App. 20a & n.8 (quoting *FCC v. Beach Commc'ns, Inc.*, 508

U.S. 307, 315 (1993)). On that view, naming a legitimate interest ends the case.

Neither holding can be squared with this Court's precedents. This Court has never required a property owner to show a state-law entitlement to a particular use before challenging a restriction on a traditional incident of ownership. And it has never held that courts must close their eyes when a property owner presents evidence that a land-use restriction is irrational. Under the rules applied below, both *Nectow* and *Cleburne* would have come out the other way.

Nor are these questions merely academic. On the issue of what counts as "property," the Sixth Circuit rejected the state-law-only approach to the Fourteenth Amendment just this year, applying the same approach this Court has to property under the Takings Clause. *See O'Connor v. Eubanks*, 189 F.4th 527, 531 (6th Cir. 2026) (citing *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023)).

And since *Beach Communications*, courts have been uneven on whether evidence plays any role in rational-basis review at all. Indeed, the Fifth Circuit cannot agree with itself. Three years ago, it remanded this very case so the parties could gather the very evidence the panel below now deems categorically irrelevant to the rational-basis analysis. *Compare* App. 30a, *with* App. 20a n.8.

But whether your property receives even the modest protections of rational-basis review should not turn on what circuit you live in. And without evidence, rational-basis review is no review at all.

Petitioners do not ask for heightened scrutiny. They do not ask the Court to second-guess local policy. They ask only for the modest review this Court applied in *Euclid*, *Nectow* and *Cleburne*. Rational-basis review is deferential. But it is still review. The petition should be granted.

STATEMENT OF THE CASE

Petitioners own homes in high traffic areas of New Braunfels, Texas. ROA.1236–39. Their neighborhoods include long-term rentals, in-home businesses, and grandfathered short-term rentals. *Id.* Some of Petitioners' homes are directly across the street from one of the largest waterparks in the country. *Id.*

Like generations of New Braunfels families before them, they would like to rent their homes to other families on a short-term basis. ROA.1177–80. The City admits that short-term renting is technically a "residential use," that these are high traffic areas, and that but for neighborhood objections, short-term renting would be "compatible with residential development in the area" and presents "no other factors that will substantially affect the public health, safety, morals, or general welfare." ROA.1482 (staff report); *see also* ROA.1236–39 (City's designated witness describing the neighborhood). When asked, the City could not produce a single nuisance citation issued in a decade to any of the over 740 short-term rentals it already allows in the city. ROA.1584, 1586, 1595.

Nevertheless, under a city ordinance, Petitioners are forbidden from renting their homes on a short-term basis. New Braunfels, Tex., Code of Ordinances § 144-5.17-3(a) (App. 64a); *see id.* § 144-5.17-7(g)–(h) (App. 76a–77a).

Petitioners filed suit alleging that this seemingly arbitrary restriction on their traditional leasing rights violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment under cases like *Cleburne* and *Nectow*. ROA.487–500.

The district court initially dismissed the case for failure to state a claim. App. 31a–58a. According to that court, it was irrelevant under rational-basis scrutiny whether short-term rentals are technically residential, or produce fewer externalities than other uses in the area. It was sufficient that a portion of the community opposed additional short-term rentals, that the city believed they might undermine residential character or increase nuisances, and because ultimately, "municipalities must draw the line somewhere." App. 51a–53a.

The Fifth Circuit vacated that decision and remanded for discovery, implicitly holding that evidence could, at least hypothetically, be relevant to the outcome. App. 29a–30a.

The evidence on remand was substantial. For example, the City claimed its prohibition was designed to prevent nuisances. *See* § 144-5.17-1 (App. 61a). But the City admitted in discovery that it had no data showing that short-term rentals produce more nuisance issues in New Braunfels than other residential properties. ROA.1204.

To the contrary, the City did not produce a single nuisance citation issued to a short-term rental in more than a decade. ROA.1584, 1586, 1595. It had never begun a proceeding to revoke a short-term rental permit, even though its code generally calls for one after repeated

complaints. ROA.1203. And the most it could produce was twenty-three complaints, citywide, over five years, none of which were for significant disturbances. ROA.2058.

The City attempted to fill the gap with studies from other cities, but each of those studies concluded that short-term rentals produced either fewer residential nuisance complaints than other homes or that there was no meaningful difference. ROA.1074, 1087 (Dallas); ROA.1113, 1116 (California); ROA.1120 (New York).

And the records in challenges to similar ordinances in other Texas cities showed the same thing. *See Zaatari v. City of Austin*, 615 S.W.3d 172, 189–90 (Tex. App.—Austin 2019, pet. denied) (city's own data showed short-term rentals produced "significantly fewer" nuisance complaints per capita than long-term housing, and "nothing in the record" connected the ban to nuisance reduction); *Browning v. Town of Hollywood Park*, No. SA-23-CV-01485-XR, 2023 U.S. Dist. LEXIS 234886, at *5–6 (W.D. Tex. Dec. 22, 2023) (finding no factual basis "in the record to support the conclusion that a ban on short-term rentals would resolve [nuisance] concerns") (ROA.1170).

The evidence on residential character was no different. The City did not dispute that short-term renting is a residential use. ROA.858, 1196. And its own staff found that short-term renting would largely be compatible with these neighborhoods. ROA.1234, 1238, 1482.

Indeed, the neighborhoods already contain short-term rentals, in-home businesses, long-term rentals, and for most of the Petitioners, Schlitterbahn Water Park. ROA.1232–40. Doug Mathes's home shares a yard with

a grandfathered short-term rental and is adjacent to a giant waterslide. ROA.1239–40, 1817. The Marfils' homes are literally across the street from Schlitterbahn and have four short-term rentals within a few hundred feet. ROA.1235–37.

Nevertheless, the district court granted summary judgment for the City, explicitly invoking "much of the same logic" as its prior dismissal. App. 22a–23a. Once again, the court did not address any of the local facts. Nor did it address *Cleburne*, *Nectow*, or the Fifth Circuit's prior holding that evidence might matter. *See* App. 22a–28a. It instead again relied solely on the City's invocation of residential character and local opposition. App. 25a–27a.

This time, a different panel of the Fifth Circuit affirmed. App. 1a–21a. On the due process claim, it never reached rational-basis review. App. 12a. The court did not dispute that the ordinance restricted Petitioners' use of their properties. But it held that to get in the door to rational-basis review, Petitioners must also show that the restriction impacted a protected interest under state law. App. 6a (treating "as dispositive, the existence—or absence—of a property interest under state law").

To determine whether such an interest exists, the court held that it was not enough to show that Texas recognizes a right to lease. Indeed, the court acknowledged that the right to lease is "a core incident of property ownership." App. 9a (quoting *Modern Builders, LLC v. City of Fort Worth*, No. 02-25-00275-CV, 2026 WL 1501055, at *7 n.20 (Tex. App.—Fort Worth May 28, 2026)). Petitioners must

separately show that state law grants a standalone right "to lease for less than 30 days." *Id.*

Relying on two intermediate state appellate decisions issued months after this case was argued, the court concluded that no such right exists under state law. App. 9a–11a (discussing *Modern Builders* and *City of Dickinson v. Crystal Cruise Invs., LLC*, No. 01-24-00684-CV, 2026 WL 530391 (Tex. App.—Houston [1st Dist.] Feb. 26, 2026)). The court acknowledged that the Supreme Court of Texas "has not yet considered" the question. App. 12a. It nevertheless concluded that the ordinance's restriction on Petitioners' ability to lease their homes was not subject to review at all under the Due Process Clause. App. 12a.

On the equal protection claim, the court applied rational-basis review but held that the record did not matter. As the court put it, "a legislative choice is not subject to courtroom fact-finding." It was therefore "beside the point" what the record may, or may not show. App. 20a & n.8 (quoting *Beach Commc'ns*, 508 U.S. at 315). Absent "some showing of an improper motive or purpose, the courts are not meant to second guess the line drawing by the City." App. 20a.

Despite forming the cornerstone of Petitioners' briefing and oral argument, the opinion does not mention *Nectow*. *See* Pls.' C.A. Br. 38–40, 47, 52–53; C.A. Doc. 100, at 3. It cites *Cleburne* only once, for the general principle that similarly situated persons must be treated alike. App. 14a.

The Fifth Circuit denied rehearing en banc on July 21, 2026. App. 59a–60a. Justice Alito extended the time to file this petition to November 18, 2026. No. 26A441.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's threshold rule denies even rational-basis review to traditional property rights, in conflict with this Court's precedents and the decisions of other courts.

The Fourteenth Amendment protects "property." When that amendment was ratified, property meant more than bare title. It included the right to use what one owned. As Blackstone put it, the right of property "consists in the free use, enjoyment, and disposal of all [one's] acquisitions." 1 William Blackstone, *Commentaries on the Laws of England* 134 (1765).

The right to lease was part of that bundle. Twelve years before the Fourteenth Amendment was ratified, New York's high court observed that a law making it a crime "to live in, or rent, or sell" one's house would deprive the owner of property without due process. *Wynehamer v. People*, 13 N.Y. 378, 420 (1856). The Civil Rights Act of 1866—the Fourteenth Amendment's statutory forerunner—likewise specifically listed the right to lease as one of six property rights for protection. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. And this Court has held that restrictions on leasing trigger review under the Fourteenth Amendment for more than a century. *Terrace v. Thompson*, 263 U.S. 197, 215 (1923).

To be sure, getting in the door to rational-basis review does not mean that a property owner will win—he probably will not. But until relatively recently, it was not controversial that a restriction on leasing would get review.

Here the Fifth Circuit unnecessarily complicated this threshold inquiry—first, by requiring a showing of a specific state-law entitlement, and second, by defining that entitlement at precisely the level of the regulation challenged.

Neither approach can be squared with this Court's precedents.

First, this Court has never held state law to be the exclusive source of private property rights. *See Tyler*, 598 U.S. at 638. And the Sixth Circuit explicitly rejected that approach to the Fourteenth Amendment just this year. *See O'Connor*, 189 F.4th at 531.

This makes sense. As this Court explained in the takings context, state law is one source of property rights but "cannot be the only source." *Tyler*, 598 U.S. at 638. If it were, then states could circumvent review of even the most egregious restrictions on property by simply "disavowing traditional property interests" long recognized under the law." *Id.* (quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998)).

But the Fourteenth Amendment was designed, at least in part, to protect some baseline of property from the arbitrary whims of state law. This Court has therefore held that "property," at a minimum, encompasses "traditional

property law principles, plus historical practice and this Court's precedents." *Id.* (citation omitted).

Second, by requiring a showing of a state-granted right to lease a residential dwelling "for less than thirty days," rather than just a "right to lease," the Fifth Circuit required far too granular a showing.

In the property context, this Court typically does not define the right at precisely the level of the regulation challenged. In *Nectow*, for example, the property owner did not have to first show a specific state-granted entitlement to engage in the specific business he wanted on the property to get in the door to rational-basis review. *See Nectow*, 277 U.S. at 185–89. Indeed, that business use was prohibited by the very law he was challenging. The traditional right to use property was enough.

The growers in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), likewise did not have to identify a state-law right to exclude union organizers for three hours a day, 120 days a year, to warrant review. The traditional right to exclude was enough.

This makes sense. If property rights were defined as narrowly as the Fifth Circuit suggests, you could never find them. A homeowner challenging a ban on blue paint would need a state-law "right to paint one's house blue." A landowner challenging a ban on fences would need a "right to build a four-foot fence." Every restriction would carry its own immunity.

Nor does the Fifth Circuit provide any independent explanation for why the "right to lease" should be

distinguished from the "right to lease for less than thirty days." Generally speaking, restrictions on the duration of the exercise of a right are restrictions on that right. A durational restriction may, or may not, ultimately be constitutional, but no one typically argues that it does not implicate the underlying right.

For example, no one would say that a city ordinance banning church services shorter than thirty minutes leaves the free exercise of religion untouched because longer services remain available. Nor would anyone demand that the affected congregants first identify a specific state-law "right to worship for less than thirty minutes" before being entitled to review.

So too here. Petitioners should not be required to show a separate, standalone "right to lease for less than thirty days" before getting the benefit of rational-basis review. The "right to lease" is enough.

II. The Fifth Circuit's holding that evidence is irrelevant to rational-basis review conflicts with *Nectow* and *Cleburne* and deepens confusion in the lower courts.

Winning a rational-basis case is hard. Every bit of deference and every presupposition cuts in the government's favor. *See Heller v. Doe*, 509 U.S. 312, 319–21 (1993); *Beach Commc'ns*, 508 U.S. at 313–15.

But since the ink was barely dry on the Fourteenth Amendment, this Court has insisted that it is not impossible. *Yates*, 77 U.S. (10 Wall.) at 505.

The reason comes down to one word: evidence.

As this Court explained in *Euclid*, the rationality of a land-use restriction often cannot be decided in the abstract, but may turn on the facts of the locality. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926).

And, when the government claims that a restriction on property is rationally related to an interest within the police power, that statement—while entitled to deference—is not alone dispositive. *Yates*, 77 U.S. (10 Wall.) at 505. The Court may look at the record produced by the parties. *Nectow*, 277 U.S. at 187–88. And, in doing so, it may conclude that the restrictions the government has imposed, or the classifications it has drawn, are irrational given the facts on the ground. *Cleburne*, 473 U.S. at 448–50; *Nectow*, 277 U.S. at 188–89.

To hold otherwise would "place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." *Yates*, 77 U.S. (10 Wall.) at 505.

The Fifth Circuit's decision here makes even this modest review impossible. It insists that this Court's decision in *Beach Communications* makes local evidence categorically irrelevant. App. 20a & n.8 (quoting *Beach Commc'ns*, 508 U.S. at 315).

But, as explained below, that approach directly conflicts with *Nectow*, would impermissibly read *Beach Communications* as overturning 150 years of precedent *sub silentio*—something this Court did not claim to

be doing—and would effectively make most zoning unchallengeable. *See* Parts II.A–C, *infra*.

To be sure, the lower courts' treatment of evidence in rational-basis review has been uneven since *Beach Communications*. *Compare St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013), *and Danker v. City of Council Bluffs*, 53 F.4th 420, 423-25 (8th Cir. 2022), *with* App. 20a & n.8. Indeed, the Fifth Circuit now disagrees with itself in this very case. *Compare* App. 30a (remanding for discovery), *with* App. 20a n.8 (holding the resulting evidence "beside the point"). But if rational-basis scrutiny is no longer a test, this Court—not the Fifth Circuit—should say so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

A. This case is on all fours with *Nectow*

To begin, the Fifth Circuit's new evidence-free approach cannot be squared with *Nectow*—and the Fifth Circuit never tried to do so.

In *Nectow*, a property owner challenged a local restriction that prevented him from using his property for business use. *Nectow*, 277 U.S. at 185–87. Arising shortly after *Euclid*, the city claimed that the use would undermine residential character, and that its judgment on this point should be dispositive. *See id.* at 187–88; *Euclid*, 272 U.S. 365.

But this Court did not simply take the city at its word. It looked at the record produced by the plaintiff. *Nectow*, 277 U.S. at 186–88. While the lot was zoned residential,

it was near a Ford Motor Company plant, and there were train tracks and a soap factory nearby. *Id.* at 185–86. Moreover, a special master reviewed the evidence and found that the relatively modest proposed business use would not be disruptive to the area. *Id.* at 187. The Court therefore concluded that the city's restriction was not rationally related to a legitimate government interest, and was therefore unconstitutional. *Id.* at 188–89.

Here, Petitioners do not seek to introduce a business into residential areas—short-term renting is conceded to be a residential use, and it already exists there. But it is not clear why the same test applied in *Nectow* would not apply here.

As in *Nectow*, several of Petitioners' homes sit next to a high-traffic use—in this case, Schlitterbahn Water Park, one of the largest water parks in the country. ROA.1235–36, 1239–40. As in *Nectow*, other high-traffic uses are nearby, including a diner, a day spa, a bakery, a strip center, a gas station, and the freeway. ROA.1232–33, 1235–36. And as in *Nectow*, the record shows that the restriction does nothing to serve the public welfare in these locations. The City's own staff found that short-term renting would be "compatible with neighboring residential development." ROA.1234, 1482. The City admits it would not "undermine a sense of community." ROA.1238. And the City has not issued a single nuisance citation to a short-term rental in more than a decade. ROA.1584, 1586, 1595.

One might argue that the Ford Motor Plant at issue in *Nectow* contributed more traffic to the neighborhood than Schlitterbahn Water Park does here, or that the property owner's desired business in *Nectow* would have been less

disruptive to the neighborhood than allowing Petitioners to rent their homes to other families for a term of less than thirty days.

But those sorts of factual distinctions would be applying *Nectow*, not displacing it. The Fifth Circuit's decision here declares that such facts are categorically irrelevant one way or the other.

Similarly, one might argue that *Nectow* is old, or that the arguments presented by the City are different. For example, the Fifth Circuit here made much of the fact that Petitioners purchased after the ordinance was in effect, App. 2a–3a; that short-term tenants were, by nature of duration, less likely to "coach little league," App. 18a–19a n.7; that the majority of surrounding property owners opposed Petitioners' plans to lease their homes, App. 3a n.1; and that the City conducted hearings and workshops before making its decision, App. 20a n.8.

But it is not clear why any of that would make the nature of the neighborhoods at issue or the facts regarding the comparative impacts of short-term rentals categorically irrelevant to the rational-basis analysis. To the contrary, almost sixty years after *Nectow*, this Court rejected identical arguments in *Cleburne*, before applying the same rational-basis test it applied in *Nectow*. *See Cleburne*, 473 U.S. at 447–50.

In *Cleburne*, this Court struck down a local zoning restriction that prevented the property owners from establishing a thirteen-person group home for the mentally handicapped in a residential area. *Id.* at 435–37, 450.

There, as here, the property owner purchased the property after the challenged ordinance went into effect. *Id.* at 435–36. There, as here, the handicapped tenants of the group home were definitionally less likely to "coach little league" than others in the area. There, as here, the majority of property owners surrounding the proposed group home sent written objections to the city. *Id.* at 448. And there, as here, the city conducted hearings on the issue before making its decision. *Id.* at 437.

None of those things prevented this Court from engaging in the modest task of looking at the record to see if it was rational to believe that the group home would produce more traditional externalities like crowding and traffic than other uses the city allowed. *Id.* at 449–50. Nor did they prevent the Court from holding that, because the "record d[id] not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests" beyond those presented by other uses allowed in the area, the prohibition on the group home was unconstitutional. *Id.* at 448.

The Fifth Circuit's opinion provides no answer for this tension. Despite forming the cornerstone of Petitioners' briefing and oral argument below, both the district court and the Fifth Circuit fail to discuss *Nectow* or *Cleburne* at all. *Nectow* does not appear in the opinion a single time. And *Cleburne* appears just once in a string cite. App. 14a.

B. The Fifth Circuit effectively reads *Beach Communications* as overruling 150 years of precedent *sub silentio*

The Fifth Circuit's answer to this appears to be *Beach Communications*. It points to language from that case holding that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." App. 20a & n.8 (quoting *Beach Commc'ns*, 508 U.S. at 315).

But *Beach Communications* was not about whether courts could consider evidence produced by plaintiffs undermining the government's asserted justification for a restriction. Indeed, the same Term, this Court reiterated that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321.

Beach Communications was about whether the government must produce evidence to justify its classifications in the first place—an issue Petitioners do not dispute. 508 U.S. at 315.

The Fifth Circuit's reading would make that case contrary to generations of precedent. *Euclid* itself held that local evidence could be relevant to the rationality of a zoning ordinance.

The reason was simple: the zoning authority is based in cities' inherent authority to police "negative externalities" produced by property use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013) (citing *Euclid*,

272 U.S. 365); *see also Euclid*, 272 U.S. at 387 (grounding the zoning power in the maxim *sic utere tuo ut alienum non laedas*).

But whether a use produces significant externalities is often a question of place. *Euclid*, 272 U.S. at 387–88. A restriction that may be rational in a crowded city could be an arbitrary restriction on property rights in rural areas. *Id.* at 387. The rationality of a zoning ordinance therefore should not be decided solely in the "abstract" but may be based on consideration of the "circumstances and the locality." *Id.* at 388.

This was no *Lochner*-era hangover. In 1870—just two years after the Fourteenth Amendment was ratified—this Court struck down a local ordinance restricting the building of docks in certain areas. *Yates*, 77 U.S. (10 Wall.) at 505. The City argued that the restriction was necessary to prevent local nuisances and obstructions of the waterways, and that its legislative judgment on that matter should be final. *See id.* No other facts should matter. *Id.*

The Court did not dispute that preventing obstructions and nuisances was a legitimate government interest. But it vehemently disagreed that it was required to simply ignore the facts on the ground when determining whether the prohibition was rationally related to that interest. As the Court put it, "the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character." *Id.* at 505. To hold otherwise, the Court concluded, "would place every house, every business, and

all the property of the city, at the uncontrolled will of the temporary local authorities." *Id.*

State courts at the time likewise considered evidence in their rational-basis analysis. *See, e.g., Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 198–99 (1873); *State v. Fisher*, 52 Mo. 174, 177 (1873); *Barling v. West*, 29 Wis. 307, 315–16 (1871); *Hayes v. Appleton*, 24 Wis. 542, 543–45 (1869).

Nothing in *Beach Communications* suggests that it intended to depart from this longstanding tradition.

Just as courts need not blindly accept federal declarations that federal legislation is rationally related to the exercise of an enumerated power, courts need not rubber-stamp local government declarations that local legislation is rationally related to the police power. *Compare United States v. Morrison*, 529 U.S. 598, 614 (2000) (citations and quotations omitted) ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so . . . whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") *with Lawton v. Steele*, 152 U.S. 133, 137 (1894) (the government's "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.").

C. The Fifth Circuit's rule would make zoning ordinances unchallengeable

The bigger problem is that the Fifth Circuit's evidence-free approach makes most land-use regulation unchallengeable.

If evidence is wholly irrelevant to the rational-basis analysis, then the rational-basis test collapses into a game of simply being able to name a legitimate government interest.

For example, imagine a city decides to ban blue houses. Under an evidence-free approach to rational-basis scrutiny, the city could simply claim that the ban was to reduce flooding—no doubt, a legitimate government interest—and the analysis would be at an end. The plaintiff would have no way to rebut that claim, because the mountain of evidence showing no correlation between painting a house blue and flood risks would be categorically irrelevant.

The problem is not limited to land use. Most of what the government does is subject to rational-basis review. Converting that baseline review into a meaningless word game matters.

D. This decision aggravates a circuit split

Finally, the Fifth Circuit's decision deepens a split in the lower courts. Since *Beach Communications*, the law on this topic has been less than clear.

The Second, Sixth, Eighth, Ninth and Tenth circuits will still consider evidence in the rational basis analysis

after *Beach Communications*. *See, e.g., Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2d Cir. 2015) (emphasis in original) (rejecting rational basis challenges to LED regulations because "at least *some* evidence exists that LED lights may cause *some* harm to consumers"); *Craigsmiles v. Giles*, 312 F.3d 220, 225-29 (6th Cir. 2002) (applying evidence-based review to strike down occupational licensing regime); *Danker v. City of Council Bluffs*, 53 F.4th 420, 424 (8th Cir. 2022) (upholding pit bull ban after considering plaintiffs' evidence); *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (applying evidence in rational basis challenge to strike down certain occupational requirements); *Dias v. City & County of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (reversing dismissal in rational basis challenge to pit bull ban, because evidence might matter).

By contrast, the Seventh Circuit has held that there is "never a role" for evidence in the rational basis analysis. *Nat'l Paint & Coatings Ass'n v. City of Chi.*, 45 F.3d 1124, 1127 (7th Cir. 1995). And that it therefore "might be right" that economic regulations can "never flunk the test of rationality." *Cent. States, Se. & Sw. Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 806 (7th Cir. 1999); see also *Convenience Store Ass'n v. Cook*, 808 F.3d 318, 325 (7th Cir. 2015) (characterizing factual disputes as "policy" disagreements beyond judicial review after *Beach Communications*).

The Fifth Circuit now disagrees with itself. *Compare St. Joseph Abbey*, 712 F.3d at 223 (plaintiffs "may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality"), *Hignell-Stark v. City of New Orleans*, 154 F.4th 345, 355–56 (5th Cir. 2025) (striking down short-term rental ordinance

under evidence-based rational basis review), *Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006) (applying evidence-based rational basis review to land-use restriction), *and* App. 30a (remanding this case for discovery), *with* App. 20a & n.8 (holding the resulting evidence "beside the point").

Guidance is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 18, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-50025

RAFAEL MARFIL; VERGE PRODUCTIONS, L.L.C.; ENRICO MARFIL; NAOMI MARFIL; KOREY A. RHOLACK; DANIEL OLVEDA; DOUGLAS WAYNE MATHES,

Plaintiffs-Appellants,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant-Appellee.

Filed June 18, 2026

OPINION

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:20-CV-248

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges.*

Appendix A

STEPHEN A. HIGGINSON, *Circuit Judge*:

Plaintiffs-Appellants, owners of properties located in the City of New Braunfels, Texas, appeal the district court's entry of summary judgment in favor of the City. Appellants claim that the City's zoning ordinance (the "Ordinance") regulating short-term property rentals in certain residential districts—enacted years before any Appellant purchased their property—violates the Due Process and Equal Protection Clauses of the United States and Texas Constitutions. Their due process claim rests on the premise that Texas law recognizes a protected property interest in "the right to lease one's home on a short-term basis." Texas courts, however, have held that it does not. We further hold that the Ordinance survives rational-basis review under the Equal Protection Clause. The district court's judgment is accordingly AFFIRMED.

I.

This appeal turns on the City of New Braunfels's ordinances surrounding short-term rentals. In 2006, the City enacted a comprehensive zoning ordinance. NEW BRAUNFELS, TEX., ORDINANCES ch. 144, § 1.1 *et seq.* Nov. 8, 2006). Section 5.16 of the Ordinance was entitled "Short term rental or occupancy in one and two unit dwellings," and it outlined certain restrictions on the occupancy of such dwellings "for less than 30 consecutive days" outside of certain commercial districts absent a special use permit. It also prohibited short-term rentals in certain districts zoned "Residential." Section 5.16 was amended in 2011 to expand the regulation of short-term rentals, but

the designation of the "Residential" districts in the City at issue here, where short-term rentals are prohibited, did not change.

Each Appellant purchased their property after the City had enacted the Ordinance's prohibition on short-term rentals in Residential districts. Appellant Doug Mathes purchased his property in 2011. The remaining Appellants purchased their properties in 2017 and 2018. Appellants' properties are all located in zoning districts designated "Residential," where short-term rentals are prohibited under both the 2006 and the 2011 versions of the Ordinance. The Ordinance contains provisions by which a property owner can apply for a zoning change to his property for the purpose of engaging in short-term rentals. Appellants (other than Mathes) all applied for and were denied a zoning change.[1]

1. After purchasing neighboring properties in 2018, Enrico and Rafael Marfil engaged in illegal short-term rental of their properties, leading to at least one complaint from a neighbor. The City thereafter opened an investigation into both properties, culminating in the issuance of Notices of Violation by the City. Thereafter, in 2019, Rafael Marfil, Verge Productions, LLC, Enrico, and Naomi Marfil applied to the City for a zoning change of their property to allow for short-term rentals. As part of the zoning change process, neighbors were invited to comment; the City received several comments regarding the Marfil applications; most were against the proposed change, although two were in favor. The City's Planning Commission recommended that the City Council deny the requests, which it did. The City Council's decision was not appealed. Appellants' complaint does not challenge the City's procedure for applying for zoning changes or assert that there was error in the proceedings conducted with respect to their requests for a zoning change.

In response, Appellants sued the City for alleged violations of the Unites States and Texas Constitutions. The district court dismissed all claims in 2020 pursuant to Federal Rule of Civil Procedure 12(b)(6). A panel of our court vacated and remanded in a one-paragraph opinion, noting that, "based on the complaint's well-pled allegations, plaintiffs are entitled to engage in discovery in an attempt to surmount the currently high bar for challenging local zoning ordinances under the Constitution." *Marfil v. City of New Braunfels*, 70 F.4th 893, 893 (5th Cir. 2023) (Mem). We did not address the merits of the Appellants' claims.

Following discovery, the parties filed cross-motions for summary judgment. The district court ultimately entered judgment in favor of the City on all claims. This appeal followed.

II.

"Because this case is before the court on cross motions for summary judgment, we review the district court's rulings de novo and construe all evidence and inferences in favor of the non-moving parties." *Evanston Ins. Co. v. Mid-Continent Cas. Co.*, 909 F.3d 143, 146 (5th Cir. 2018) (citation omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

III.

We separately analyze Appellants' due process and equal protection claim.

A.

We first address Appellants claim of a due process violation under the United States Constitution and a due course violation under the Texas Constitution. Appellants' brief states that their "claims involve facial and as-applied challenges" to the Ordinance. But Appellants do not brief the facial challenge, nor did they raise it in the district court. Accordingly, we only address the as-applied challenge. *Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021) ("We do not ordinarily consider issues that are forfeited because they are raised for the first time on appeal.").

The Fourteenth Amendment to the United States Constitution states that no person shall be "depriv[ed] . . . of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Article I, Section 19 of the Texas Constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." There is no "meaningful distinction" between "due process" in the United States Constitution and "due course" in the Texas Constitution. *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

"To prevail under the Due Process Clause, Appellants must first 'allege a deprivation of a constitutionally protected right.'" *Hignell-Stark v. City of New Orleans*, 154 F.4th 345, 353 (5th Cir. 2025) (quoting *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006)). "The Constitution does not create property interests; 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Id.* (quoting *Schaper v. City of Huntsville*, 813 F.2d 709, 713 (5th Cir. 1987)). "Accordingly, we usually treat, as dispositive, the existence—or absence—of a property interest under state law." *Id.* at 322.

That issue is dispositive here. Appellants assert the existence of a property interest under Texas law. They argue that the "right to lease" is "an inherent liberty and property right" and that "Texas courts have repeatedly held that this 'right to lease' includes the right to lease one's home on a short-term basis." Appellants either overstate or misstate the holdings of the Texas courts.[2]

In certain cases involving retroactive ordinances and/or regulatory takings claims, Texas courts have found a vested or settled property interest allows continued engagement in short-term rentals of property where the property owner had already been engaged in such activity prior to the enactment of the ordinance. *See, e.g., Zaatari*

2. Appellants are represented by counsel who have been actively involved in a multitude of cases throughout Texas challenging municipal short-term rental regulations, wherein they have repeatedly—and unsuccessfully—asked the Texas state courts to declare such a protected property interest exists under Texas law.

v. City of Austin, 615 S.W.3d 172, 188 (Tex. App.—Austin 2019, pet. denied) (finding ordinance unconstitutionally retroactive); *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 582 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (regulatory taking claim).

But, contrary to Appellants' assertions, the Texas courts have not found a vested property interest in "the right to lease one's home on a short-term basis."[3] Appellants cite *City of Grapevine v. Muns*, 651 S.W.3d 317 (Tex. App.—Fort Worth 2021, pet. denied), in support of their cause, which extensively discussed the nature of the right claimed by Appellants.[4]

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3. In *Zaatari*, which Appellants rely on heavily, the court distinguished between "vested" rights and "settled" interests. *Zaatari*, 615 S.W.3d at 190.That court "conclude[d] that owners of type-2 rental properties have a settled interest in their right to lease their property short term" based on the record before it, which included a finding that the city had admitted that short-term rentals were an "established practice" in Austin, and a showing that some of the plaintiffs had engaged in short-term rentals before the passage of the ordinance. *Id.* at 191. This is not the same as a protected or vested property interest for purposes of due process or due course of law analysis. *See, e.g., City of Dickinson v. Crystal Cruise Invs., LLC*, No. 01-24-00684-CV, — S.W.3d —, —, 2026 WL 530391, at *5 (Tex. App.—Houston [1st Dist.] Feb. 26, 2026, no pet.) (discussing the nature of vested property rights in connection with Texas due course claim).

4. In *Grapevine*, property owners who were already engaged in short-term renting challenged an ordinance banning short-term rentals. 651 S.W.3d at 325. The city filed a plea to the jurisdiction asserting that the trial court lacked subject-matter jurisdiction. The appellate court's holding affirmed that the property owners had pleaded viable claims such that they were entitled to proceed. *Id.* at 328–29.

In *Grapevine*, the property owners brought regulatory takings claims as well as asserting the ordinance was unconstitutionally retroactive and violated the due course clause. *Id.* at 325. In its discussion of the due course of law provision, the court held, "although the Homeowners have a vested right in their properties, they do not have a vested right under the Zoning Ordinance to use them as [short-term rental]s." *Id.* at 346 (footnote omitted). The *Grapevine* court further clarified its limited holding with respect to any purported vested right to lease on a short-term basis:

> In its motion for en banc reconsideration, the City asks us to reconsider our holding that Texas property owners have a vested right to lease their homes on a short-term basis. *This overstates our holding.* To be clear, we hold that a property owner has a vested right to lease his property. Whether the durational restrictions imposed by the [Short-Term Rental] Ordinance violate the Homeowners' due-course-of-law rights regarding their right to lease goes to the case's merits, an altogether improper inquiry at this stage of the case.

Id. at 347 (emphasis added).[5]

5. The Supreme Court of Texas denied review, *City of Grapevine v. Muns*, 671 S.W.3d 675, 676 (Tex. 2023), with two Justices concurring to express that the case before them was "a less-than-ideal vehicle for resolving the constitutional issues" and that it was "premature for [the Supreme Court of Texas] to render a final decision that binds all our cities, the legislature, and the lower courts," *id.* at 677 (YOUNG, J., joined by BLACKLOCK, J., concurring in the denial of the petition for review).

Most recently, in *Modern Builders, LLC v. City of Fort Worth*, No. 02-25-00275-CV, — S.W.3d —, 2026 WL 1501055 (Tex. App.—Fort Worth May 28, 2026, no pet. h.), the Second Court of Appeals, which had decided *Grapevine*, returned to the issue, addressing similar short-term rental regulations in Fort Worth, where property owners in districts where short-term rentals had never been allowed raised constitutional challenges to the city's zoning scheme. *Id.* at —, 2026 WL 1501055 at *1. Determinatively, the court found that 1) there was no vested right to lease the properties short-term; and 2) the city's ordinances were rationally related to legitimate government interests in preserving the character of single-family residential neighborhoods. *Id.* at —, 2026 WL 1501055 at *1.

Indeed, the court specifically noted its prior discussion and holding in *Grapevine*: "Answering the question left open in *Grapevine*, then, we hold that the Owners do not have a vested common-law right to use their properties as short-term rentals." *Id.* at —, 2026 WL 1501055 at *7 (footnote omitted). The court went on to explain the significance of properly defining the property interest at stake, which is the exact property interest asserted by Appellants in their complaint:

> In defining the interest at stake here, and narrowing it as we should, we thus distinguish between a right to lease and a right to lease for less than 30 days; the former is a core incident of property ownership, the latter a specific use

> carrying no common-law categorical vested-right protection.

Id. at — n.20, 2026 WL 1501055 *7 n.20.

Similarly, in *City of Dickinson v. Crystal Cruise Investments, LLC*, — S.W.3d at —, 2026 WL 530391, at *5, the First Court of Appeals addressed a zoning ordinance limiting short-term rentals and reversed the trial court's order enjoining the enforcement of the ordinance. In its analysis of the protected interest asserted, the court discussed the nature of the rights protected under the due course of law protections afforded by the Texas Constitution:

> A constitutionally protected right must be a vested right, which is something more than a mere expectancy based upon an anticipated continuance of an existing law. A right is vested when it has some definitive, rather than merely potential existence. Under this Court's precedent, the right to lease is not absolute and does not establish a vested property interest. Further, property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Dickinson's vacation rental ordinance was in place for six years before Crystal Cruise bought the property, so under this Court's precedent, Crystal Cruise cannot show that it has any vested right to use

> the property as a vacation rental as a matter of law.

Id. at —, 2026 WL 530391, at *5–6 (citation modified).

Thus, the two Texas appellate courts to squarely address the question of whether the protected property right claimed here by Appellants exists under Texas law have held that it does not. And that matters. "In instances[, like this one,] where the State's highest court has not spoken on the direct question, federal courts are required to make an *Erie* guess and determine, in their best judgment how the State's highest court would resolve the issue if presented with the same case." *McGlothin v. State Farm Mut. Ins. Co.*, 925 F.3d 741, 745–46 (5th Cir. 2019) (citation modified). "In making our *Erie* guess, we look first to those Texas Supreme Court cases that, while not deciding the issue, provide guidance as to how the Texas Supreme Court would decide the question before us." *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558, 564 (5th Cir. 2010). "Though the decisions and dicta of the Texas Supreme Court weigh more heavily in our *Erie* analysis, we also consider those decisions of Texas appellate courts in determining how the Texas Supreme Court would rule on this issue." *Id.* at 566. "When making an *Erie* guess, we do not adopt innovative theories of state law but aim simply to apply that law as it currently exists." *Weatherly v. Pershing, L.L.C.*, 945 F.3d 915, 920 (5th Cir. 2019) (citation modified). "If the law of the state is to be changed, it is up to the supreme court of the state and not this court to change the substantive law of that state." *In re DePuy Orthopaedics, Inc., Pinnacle*

Hip Implant Prod. Liab. Litig., 888 F.3d 753, 765 n.5 (5th Cir. 2018) (citation modified) (quoting *Jackson v. Johns–Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986) (en banc), *abrogated on other grounds by Salve Regina Coll. v. Russell*, 499 U.S. 225, 242, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)).

The Supreme Court of Texas has not yet considered whether a protected property interest in "the right to lease one's home on a short-term basis" exists. And, as noted, the two Texas appellate court decisions to squarely examine the issue have held that there is no such protected right. Unless and until such time as the Supreme Court of Texas rules differently, we must "apply that law as it currently exists." *Weatherly*, 945 F.3d at 920 (internal quotation marks and citation omitted). "Because Appellants have not alleged a protected property interest under [Texas] law, their due-process claims fail." *Hignell-Stark*, 154 F.4th at 354; *see also Tex. Dept. of State Health Servs. v. Crown Distrib., LLC*, 647 S.W.3d 648, 653 (Tex. 2022) (declining to reach rational basis or oppressiveness arguments because due course clause does not protect the asserted interest).

B.

Appellants also assert claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the Texas Constitution.[6] Appellants' complaint asserts the

6. We reject Appellants' argument that the district court failed to address the Equal Protection claims in its order. The district court expressly found that "the ordinance limiting short

Ordinance makes a distinction between rentals of twenty-nine days (banned) and rentals of thirty days (permitted) in the designated Residential Districts. Appellants posit that "both short and long-term rentals are residential uses," that there is "no significant difference between the two that would fall within the scope of the police power," that "short term rentals do not cause substantially more nuisances than long-term rentals," and that this is "particularly true as applied to Plaintiffs' properties which are in high traffic areas surrounded by other short-term rentals." In other words, Appellants argue that the Ordinance's line drawing either is arbitrary or does not meaningfully advance a legitimate government interest, failing rational-basis review.

The Fourteenth Amendment of the United States Constitution states that equal protection of the laws shall not be denied to any United States citizen. U.S. CONST. amend XIV, § 1. Likewise, Article 1, Section 3 of the Texas Constitution guarantees that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." "Because 'the federal analytical approach applies to equal protection challenges under the Texas Constitution,' we do not address separately the [Appellants'] claim under the Texas Constitution." *Lindquist v. City of Pasadena*, 669 F.3d 225, 233 (5th Cir. 2012) (first quoting *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002);

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term rentals seems to meet rational basis by preserving residential character." That ruling speaks directly to the Equal Protection claim.

and then citing *Lindquist v. City of Pasadena*, 525 F.3d 383, 386 n.1 (5th Cir. 2008)).

"The equal protection clause essentially requires that all persons similarly situated be treated alike." *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 932 (5th Cir. 1988) (first citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); and then citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). "'Similarly situated' means 'in all relevant respects alike.'" *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 978 (5th Cir. 2022) (quoting *Tex. Ent. Ass'n, v. Hegar*, 10 F.4th 495, 513 (5th Cir. 2021)).

Assuming without deciding that the Ordinance discriminates against similarly situated property owners, Appellants have not overcome rational-basis review. The parties do not dispute that rational-basis review applies because Appellants have not alleged that they belong to a protected class that would trigger strict scrutiny of their equal protection claims. *Glass v. Paxton*, 900 F.3d 233, 244 (5th Cir. 2018). The burden is on Appellants to show the district court erred in granting the City's motion for summary judgment, and rational basis is a high bar to overcome:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy,

> a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *see id.* at 320, 113 S.Ct. 2096.

Texas's substantive due process jurisprudence illustrates the point. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 939 (Tex. 1998) ("In analyzing [the equal protection] claim, we apply the same standards as to the[ ] substantive due process analysis."). Under Texas law, a "generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose." *Id.* at 938 (collecting cases). "This deferential inquiry does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed *at the time of enactment* that the ordinance would promote its objective." *Id.* (emphasis added) (citing *Williams v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). "If it is at least fairly debatable that the decision was rationally related to legitimate government interests, the decision must be upheld." *Id.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)). "The ordinance will violate substantive due process only if it is

clearly arbitrary and unreasonable." *Id.* (citation omitted) (emphasis omitted).

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 393, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (quotation omitted). "We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts." *Id.* (quotation omitted). As we held in *Shelton v. City of College Station*:

> The difference between an inquiry into whether there was any possible rational basis for legislation and an inquiry into the actual basis of legislation is significant. A court's assumption of the power to decide between competing legislative proposals or to require the state to prove the validity of its choice is quickly the right to change the legislative process itself.

780 F.2d 475, 481 (5th Cir. 1986) (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972)).

We explained, "[f]ar from treating the question of rationality as a historical fact necessarily subject to

evidentiary procedures and findings of a trial court," courts should look "for a conceivable rational basis for the implicit judgment of the governing body that its legislative purpose was served by its decision." *Id.* at 484. Even where the government is asked "to point to a rational basis employed in reaching its decision, as opposed to a basis later hypothesized by others, nothing requires proof of *the*, as distinguished from *a*, basis of decision." *Id.* (emphasis in original).

These restraints on judicial review have added force "where the legislature must necessarily engage in a process of line-drawing." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980). Defining the class of persons subject to a regulatory requirement "'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 83–84, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)).

Applying these precepts here, we agree with the district court's finding that the City's goal of "preserving residential character" of the neighborhoods at issue satisfied the rational-basis requirement. The City enacted the 2006 Ordinance to "promot[e] health, safety, and the general welfare of the public," and regarding the zoning districts, it noted that, "each district has been established with reasonable consideration for the character of the district and its peculiar suitability for the particular uses,

and with the view of conserving the value of buildings and encouraging the most appropriate use of land throughout the community." The City enacted the 2011 amendment, which further regulated short-term rentals because, "the City Council of the City of New Braunfels, Texas, finds it necessary to amend the regulatory standards of short term rentals and occupancy to protect residential neighborhoods in New Braunfels."

We have previously held that "the protection of residential integrity is a legitimate objective of a zoning regulation." *Jackson Ct. Condos., Inc. v. City of New Orleans*, 874 F.2d 1070, 1078 (5th Cir. 1989) (citation omitted)(addressing a city-wide moratorium on time-share arrangements). We have also held that an ordinance "explicitly intended to 'enhance property values, promote economic development, and provide identity and a sense of community'" concerned "purposes [that] easily serve as the rational basis for a municipal zoning ordinance." *Yur-Mar, L.L.C. v. Jefferson Par. Council*, 451 F. App'x 397, 401 (5th Cir. 2011). And most recently, we found that preventing nuisances, promoting affordable housing, and protecting neighborhoods' residential character were legitimate local purposes. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 328 (5th Cir. 2022).[7]

7. The Second Court of Appeals has similarly found objectives such as safeguarding the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public; and minimizing the adverse impacts resulting from increased transient rental uses in neighborhoods that were planned, approved, and constructed for single-family residences to be permissible. *Draper v. City of Arlington*, 629 S.W.3d 777, 786 (Tex. App.—Fort Worth, 2021, pet.denied). It further noted:

The distinction at issue in the Ordinance—between twenty-nine and thirty days—represents reasonable line drawing by the City. Similarly, the prohibition of short-term rentals in certain neighborhoods zoned as residential also represents reasonable line drawing by the City. In enacting the Ordinance and the amendment, the City determined the necessity of regulating short-term rentals. "This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns, Inc.*, 508 U.S. at 316, 113 S.Ct. 2096.

Similarly, the City had to draw the line between zoning districts somewhere. A review of the zoning maps offered into evidence by the City shows one line drawn

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> It stands to reason that the residential character of a neighborhood is threatened when a significant number of homes . . . are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other "unmitigatable [sic], adverse impacts" cited by the Council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.

Id. at 792 n.21 (quoting *Ewing v. City of Carmel-By-The-Sea*, 234 Cal.App.3d 1579, 286 Cal. Rptr. 382, 388 (1991)).

was down South Union Avenue. One side of this street is zoned commercial, and one side is zoned residential. Of course, the City could have drawn the line somewhere else, but it did not. It is true that some of Plaintiffs' properties are close to, or even abut, these lines, but as the Supreme Court noted in *United States Railroad Retirement Board v. Fritz*, it is inevitable that "some persons who have an almost equally strong claim to favored treatment [will] be placed on different sides of the line." 449 U.S. at 179, 101 S.Ct. 453 (citation omitted). The cases are clear that absent some showing of an improper motive or purpose, the courts are not meant to second guess the line drawing by the City. And Plaintiffs have not presented evidence that shows any improper purpose. Rather, they argue the City should have either drawn the line differently or not drawn a line at all.

Because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data,"[8]

8. For this reason too, it is beside the point that, according to Appellants, "short-term rentals do not produce meaningfully more disturbances than other residential uses." What's more, the City's Ordinance was enacted after a deliberative process, which revealed complaints from the citizenry about short-term rentals in residential neighborhoods. The Development Code Steering Committee began working on the Ordinance in 2001 and made a recommendation to the Planning Commission in March 2006, a five-year process. Similarly, the record shows that when enacting the 2011 amendment, the City's Planning Commission held a public hearing and workshops, and then the City Council also held public hearings on the proposed amendment. We are satisfied that the City's "legislative choice" here was at least "based on rational speculation." *Beach Commc'ns, Inc.*, 508 U.S. at 315, 113 S.Ct. 2096.

Beach Commc'ns, Inc., 508 U.S. at 315, 113 S.Ct. 2096, we find no violation of the Equal Protection Clauses of either the United States or the Texas Constitutions.

IV.

Finding no reversible error, we AFFIRM the judgment of the district court.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT FOR CITY OF NEW BRAUNFELS AND DENYING SUMMARY JUDGMENT FOR PLAINTIFFS, FILED JANUARY 10, 2025

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TEXAS WACO DIVISION

6:20-cv-00248-ADA-JCM

RAFAEL MARFIL, VERGE PRODUCTIONS LLC,
ENRICO MARFIL, NAOMI MARFIL,
KOREY ROHLACK, DANIEL OLVEDA,
AND DOUGLAS WAYNE MATHES,

Plaintiffs,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant

Filed January 10, 2025

ORDER GRANTING SUMMARY JUDGMENT FOR CITY OF NEW BRAUNFELS AND DENYING SUMMARY JUDGMENT FOR PLAINTIFFS MARFIL ET AL.

I. SUMMARY

The standard governing this issue has not changed from when this case was filed and ruled on. This Motion

must be GRANTED considering all of the briefing and in agreement with much of the same logic which lead the magistrate judge in this case to recommended GRANTING the 12.b.6 Motion. Rational basis is the appropriate standard of review governing this Ordinance and is extremely deferential in favor of the city. Even under the lens of the Summary Judgment standard, there remains no genuine dispute of material fact that there are legitimate purposes for which this Ordinance was enacted. **THEREFORE, IT IS ORDERED** that Defendant's Motion for Summary Judgment (ECF No. 45) is **GRANTED**. Conversely, Plaintiff's Motion for Summary Judgment (ECF No. 46) is **DENIED.**

II. BACKGROUND

1. PROCEDURAL HISTORY

Defendant filed a Motion to Dismiss for Failure to State a Claim on 04/22/2020. ECF No. 9. Plaintiff responded on 04/27/2020. ECF Nos. 11, 12. After, a number of motions in support or against the motion were filed. *See* ECF Nos. 13,14. Plaintiff filed a Motion for Preliminary Injunction and filed additional support. *See* ECF Nos. 16,18,19. Defendant responded to that motion on 06/16/2021. ECF No. 17. Plaintiff also filed a motion to amend. ECF No. 15. Ultimately, Judge Manske issued a Report and Recommendation for the failure to state a claim motion. ECF No. 20. That report recommended that this Court GRANT the Motion to Dismiss for Failure to State a Claim and DENY as moot the Motion to Amend. *See id.* This Court Adopted Judge Manske's Report and

Recommendation. ECF No. 29. However, the Plaintiff appealed, and the Fifth Circuit overruled this Court's adopted ruling. ECF No. 31. The Fifth Circuit, other than Judge Haynes in dissent, overruled this Court and stated that "some factual development may often occur in these cases." *Id.* Now, after the completion of discovery, the issue appears ripe for a ruling.

2. THE DISPUTE

ECF No. 20, Section I "Background" contains an in-depth review of the non-legal background information related to this case. The issue at large is that the homeowner Plaintiffs allege that the City of New Braunfels housing ordinance violates substantive due process and equal protection under both Texas and the United States constitutions. In addition, or in the alternative, Plaintiffs assert that precedent from Texas law itself preempts this Ordinance.

3. REQUESTED RELIEF

The Defendant requests that this Court rule that the ordinance is constitutional in their motion for Summary Judgment. ECF No. 45. The Plaintiffs request contrary relief by requesting that this Court rule that the ordinance is unconstitutional in their own motion. ECF No. 46.

Appendix B

III. ANALYSIS

1. No Genuine Dispute of Material Fact for Preserving Residential Character.

The Court finds compelling that there exists no genuine dispute of material fact in favor of the City of New Braunfels. Specifically, the ordinance limiting short term rentals seems to meet rational basis by preserving residential character. For an initial issue, this Court believes that rational basis is the appropriate standard of review for an ordinance such as the one set by the City of New Braunfels. While Plaintiff does not appear to directly challenge that rational basis should be the applicable standard, the Plaintiff does cite to a number of cases which relied on a different standard of review. In agreement with the Magistrate Judge's recommendation and the surrounding case law, this Court believes that rational basis is the appropriate standard here, Onto the residential character issue, it is true that a city cannot force its citizens to take some actions that would improve the character of the neighborhood. However, in a non-retroactive facing ordinance like this, the question is if this can rationally relate to preservation of the residential character of the neighborhood. This Court can clearly understand how short-term renters could affect the residential character within neighborhoods, specifically those which are zoned for single or dual family living. Plaintiff argues that this logic could be extended to permit the City to force homeowners to have their homes occupied. While it may appear as a tougher distinction to make than it appears on the surface, this Court believes that compelling a

homeowner to action is different than preventing one of the numerous options available for renting. In the same way, an action preventing homeowners from living in their homes or requiring all homeowners to short term rent would be noticeably distinct from the ruling set on this ordinance's distinct facts. The Court does not agree that banning short term rentals is even approachably similar to banning the elderly, or banning single moms, or banning childless couples. The question is not how far rational basis could be stretched in another set of facts which are entirely different from this case. The question is whether this ordinance, as written, can survive rational basis. The preservation of this residential character is supported by both numerous statements from affected residents in New Braunfels and in Fifth Circuit precedence which support protection of residential integrity. *See Hignell Stark v. City of New Orleans*, 46 F.4th 317, 328-29 (5th Cir. 2022); *Yur-Mar, L.L.C. v. Jefferson Parish Council*, 451 Fed. App'x 397, 401 (5th Cir. 2011); *Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070, 1078 (5th Cir. 1989). Therefore, this Court finds that there exists a rational basis for this ordinance **at least**[1] for the preservation of residential character.

2. Regardless of Patel application, proportionality favors government interest.

The Plaintiff asserts that under the Texas Constitution, an ordinance like this is considered and weighed to see if

1. This order should not be viewed as denying the other rational basis claims raised by the Defendant.

the government interest is proportional to the limitation on property right. Defendant disputes whether Patel should even be applicable in cases similar to this. This Court does not need to reach that decision. If Patel were to apply, the Plaintiff still loses. While the Plaintiff asserts that there is no government interest, this Court instead finds in the inverse. This ordinance was not retroactive. Therefore this restriction was only applicable to those who in the future wanted to purchasers of buy or begin renting with the knowledge that this restriction was already in place.

This Court fails to see how it can be unduly burdensome to use a house in accordance with the limitations that were in place when they chose to purchase the additional properties. Those who were grandfathered in will not be stripped of that previously and current enjoyed right. What is left is a small subset who did not previously use the residences as short term rentals and now present a desire to. As noted above, this Court does find that there are rational government interests that would provide weight in this analysis and ultimately if Patel did apply, this Court still believes that summary judgment would be warranted on behalf of the Defendant.

THEREFORE, IT IS ORDERED that Defendant's Motion for Summary Judgment (ECF No. 45) is **GRANTED** and Plaintiff's Motion for Summary Judgment (ECF No. 46) is **DENIED.**

So **ORDERED** this 10th of January, 2025.

/s/ Alan D. Albright
ALAN D. ALBRIGHT
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 16, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50908

RAFAEL MARFIL; VERGE PRODUCTIONS, L.L.C.; ENRICO MARFIL; NAOMI MARFIL; KOREY A. RHOLACK; DANIEL OLVEDA; DOUGLAS WAYNE MATHES,

Plaintiffs-Appellants,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant-Appellee.

Filed June 16, 2023

OPINION

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:20-CV-248

Before JONES, CLEMENT, and HAYNES, *Circuit Judges*.[1]

1. Judge Haynes dissents. She would affirm for the reasons stated by the district court.

Appendix C

EDITH H. JONES, *Circuit Judge*:

Plaintiffs here appeal the Rule 12(b)(6) dismissal of their complaint alleging that the City of New Braunfels's zoning regulation banning shortterm rentals of residential properties in certain areas of the city is unconstitutional. The district court ordered dismissal by approving a few conclusory paragraphs in a magistrate judge's recommendation. This court's relevant case law, however, indicates that some factual development may often occur in these cases, and that summary judgment may often follow. *See, e.g.*, *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 935–37 (5th Cir. 1988). We make no prediction on the future course of this case, but based on the complaint's well-pled allegations, plaintiffs are entitled to engage in discovery in an attempt to surmount the currently high bar for challenging local zoning ordinances under the Constitution.

VACATED and REMANDED.

APPENDIX D — ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, FILED SEPTEMBER 15, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

6:20-cv-00248-ADA-JCM

RAFAEL MARFIL, VERGE PRODUCTIONS LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY ROHLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES,

Plaintiffs,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant.

Filed September 15, 2022

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation of United States Magistrate Judge Jeffrey C. Manske. ECF No. 20. The Report recommends that this Court grant Defendants' Motion to Dismiss (ECF No. 9) and deny Defendants' Motion to Amend (ECF No. 15). The Report and Recommendation was filed on July 29, 2021.

Appendix D

A party may file specific, written objections to the proposed findings and recommendations of the magistrate judge within fourteen days after being served with a copy of the report and recommendation, thereby securing *de novo* review by the district court. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A district court need not consider "[f]rivolous, conclusive, or general objections." *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 410 n.8 (5th Cir. 1982) (en banc), *overruled on other grounds by Douglass v. United States Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)).

After Judge Manske granted an unopposed motion for extension of time to file objections to the report and recommendation, Plaintiff filed objections on August 25, 202. ECF No. 23. Additionally, the Plaintiff filed a supplement to its objection to the report and recommendation on May 16, 2022. The Court has conducted a *de novo* review of the motion to dismiss, the responses, the report and recommendation, the objections to the report and recommendation, the supplement to the objection, and the applicable laws. After that thorough review, the Court is persuaded that the Magistrate Judge's findings and recommendation should be adopted.

IT IS THEREFORE ORDERED that the Report and Recommendation of United States Magistrate Judge Manske, ECF No. 20, is **ADOPTED**.

IT IS FURTHER ORDERED that Plaintiffs' objections are **OVERRULED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 9) is **GRANTED** in accordance with the Report and Recommendation.

IT IS FINALLY ORDERED that Defendants' Motion to Amend (ECF No. 15) is **DENIED** as futile.

SIGNED this fifteenth day of September, 2022.

/s/ Alan D Albright
Alan D Albright
United States District Judge

APPENDIX E — REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, FILED JULY 29, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

C.A. NO. 6:20-CV-00248-ADA-JCM

RAFAEL MARFIL, VERGE PRODUCTIONS LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY A. ROHLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES,

Plaintiffs,

v.

CITY OF NEW BRAUNFELS, TEXAS,

Defendant.

Filed July 29, 2021

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the

Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the Court is Defendant's Motion to Dismiss ("Def.'s Mot. to Dismiss", ECF No. 9), and the attendant Response ("Pls.' Resp.", ECF No. 12), Reply ("Def.'s Reply", ECF No. 13), and Sur-Reply in Opposition[1] thereto ("Pls.' Sur-Reply", ECF No. 14). Also before the Court is Plaintiffs' Motion to Amend Complaint ("Pls.' Mot. to Amend," ECF No. 15). For the reasons explained below, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** and Plaintiffs' Motion to Amend be **DENIED** as futile.

I. BACKGROUND

The City of New Braunfels ("City") is home to the Schlitterbahn, a massive waterpark attracting more than a million guests each summer. Pls.' Compl. at 7. In this case, each of the plaintiffs ("Homeowners") own a home in New Braunfels and share a similar story: a financial

1. Plaintiffs did not move for leave to file the Sur-Reply. Thus, the Sur-Reply is not properly before the Court. *See* Local Rule CV-7 (detailing permitted filings). Nonetheless, the Court notes that the submitted authority, an Opinion from the Texas Attorney General on "[w]hether a local governmental entity under an emergency declaration has the authority to prevent an owner of a second home from occupying that property or limiting occupancy of housing based on length of the occupancy's term," is completely irrelevant to the Court's analysis. As illustrated below, the Ordinance in question was not enacted under an emergency declaration.

venture into the booming tourism industry, disrupted by a single line of a local government ordinance. *See generally* Pls.' Compl.

The City announced plans to begin regulating short-term rentals ("STRs") in 2011. Pls.' Compl. at 8. Owners engaging in STRs at that time were grandfathered in with special permits allowing them to continue renting for short terms. *Id.* Any later entrants to the market were not allowed the same permits. *Id.* Later in 2011, the City adopted the new zoning ordinance at subsection 5.17 of Chapter 144. *Id.* In the present case, the conflict arises from section 5.17 (the "Ordinance"), which states: "Short Term Rental within Residential Districts is prohibited." Ordinances § 144-5.17-3(a). Owners in commercially zoned districts may still seek a permit to engage in STRs. Ordinances § 144-5.17-3(c). The definition of STR and the penalty for violating the Ordinance are as follows:

> 5.17-2. Definitions
>
> . . . .
>
> Short term rental means the rental for compensation of one- or two-family dwellings, as defined in the IRC (International Residential Code), for the purpose of overnight lodging for a period of not less than one night and not more than 30 days other than ongoing month-to-month tenancy granted to the same renter for the same unit. This does not apply to hotels, motels, bed and breakfasts, resort

properties as defined in this chapter, or resort condominiums. . . .

5.17-7. Enforcement/penalty

. . . .

(e) The provisions of this subsection are in addition to and not in lieu of any criminal prosecution or penalties as provided by city ordinances or county or state law.

(f) Proof. Prima facie proof of occupancy of a dwelling is established in any prosecution for violation of this section if it is shown that vehicles with Case 6:20-cv-00248-ADA-JCM Document 1 Filed 03/30/20 Page 8 of 22 Page 9 of 22 registrations to persons having different surnames and addresses were parked overnight at the dwelling. Establishment of a prima facie level of proof in this subsection does not preclude a showing of illegal "occupancy" of a dwelling by a person in any other manner.

(g) Offense. It is an offense for the property owner, any agent of the property owner, or the occupant(s) to directly occupy or indirectly allow, permit, cause, or fail to prohibit an occupancy in violation of this section 144-5.17. Each day that a unit is occupied in violation of this ordinance shall be considered a separate offense, and, upon conviction, shall be subject

> to a minimum fine of $500.00 to a maximum fine of $2,000.00 per violation.
>
> (h) Each day of violation of said standards and provisions of this section constitutes a separate offense and is separately punishable, but may be joined in a single prosecution.

Ordinances § 144-5.17.

The May 9, 2011 council meeting cited "several workshops" on the "protection of residential neighborhoods" as support for the Ordinance. Pls.' Compl. at 9. The Ordinance's preamble also contains evidence of the basis for the restriction on STRs in residential zones. Ordinances § 144-5.17-1. It states that the purpose of 5.17 is to preserve STRs in some instances "while ensuring that such rental use does not create adverse impacts to residential neighborhoods due to excessive traffic, noise, and density." *Id.*

Plaintiff Homeowners all own homes in the City and are subject to the City of New Braunfels's ordinances. Pls.' Resp. at 10. Each Homeowner bought their home after the 2011 version of the Ordinance was adopted. *Id.* at 6. Homeowners state various reasons for engaging in STRs, including income, ease of travel for the owner, and desire to share their home. *Id.* at 11-12. None of the Homeowners intend to operate an ongoing business at their homes and hope to convey possession to tenants in the manner of ordinary home rental. *Id.* at 12-13.

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Homeowners brought this action, alleging that the Ordinance deprives them of equal protection and due process under the U.S. and Texas Constitutions. *See generally* Pls.' Compl. In addition, or in the alternative, Homeowners allege that the state Constitution preempts the Ordinance. *Id.* The seeks to dismiss the Homeowners' claims under 12(b)(6).

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Upon a motion to dismiss for failure to state a claim, a court may dismiss an action that fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court accepts all well-pleaded facts as true, viewing them in the light most favorable to the non-movant. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

To survive a motion to dismiss, a non-movant must plead enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court determines whether the plaintiff has stated both a legally cognizable and plausible claim; the Court should not evaluate the plaintiff's likelihood of success. *Lone Star Fund V. (U.S.), LP v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). Based upon the assumption that all the allegations in the complaint are true, the factual allegations must be enough to raise a right to relief above the speculative level. *Twombly*, 550

U.S. at 555. A court, however, need not blindly accept each and every allegation of fact; properly pleaded allegations of fact amount to more than just conclusory allegations or legal conclusions masquerading as factual conclusions. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002); *see Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

When the non-movant pleads factual content that allows the court to reasonably infer that the movant is liable for the alleged misconduct, then the claim is plausible on its face. *Iqbal*, 556 U.S. at 678. The plausibility standard, unlike the "probability requirement," requires more than a sheer possibility that a defendant acted unlawfully. *Id.* The pleading standard under Rule 8(a)(2) does not require detailed factual allegations but demands greater specificity than an unadorned, "the-defendant-unlawfully-harmed-me accusation." Fed. R. Civ. P. 8(a)(2); *Iqbal*, 556 U.S. at 678. A pleading offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. Additionally, a complaint does not meet the standard if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557. Evaluating the plausibility of a claim is a context-specific process that requires a court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

Homeowners allege that the Ordinance violates substantive due process and equal protection under the

Texas and United States Constitutions. *See generally* Pls.' Compl. In addition, or in the alternative, Homeowners assert that Texas law preempts the Ordinance. *Id.* at 20.

For the following reasons, the Court determines today that Homeowners fail to allege facts at the 12(b)(6) stage sufficient to overcome the deferential rational basis test. Because Homeowners' Complaint contains constitutional challenges to a zoning ordinance, determining the standard by which the Court reviews the Ordinance is crucial. Moreover, the rational basis standard must coexist with Rule 12(b)(6) principles. Thus, the Court begins its analysis with a discussion of the appropriate standard of review. Next, the Court details Homeowners' due process and equal protection claims. Then, the Court analyzes the Homeowners' claims under the rational basis test within the 12(b)(6) framework. Finally, the Court analyzes Homeowners' state law preemption claim. Accordingly, the Court **RECOMMENDS** the City's Motion to Dismiss be **GRANTED**, and Plaintiffs' Complaint be **DISMISSED WITH PREJUDICE** for failure to state a claim.

A. Texas case law indicates that the rational basis test applied within the scope of Rule 12(b)(6) is the appropriate standard of review for the Ordinance regarding Homeowners' equal protection and due process claims.

Homeowners present two arguments in support of strict scrutiny for the Ordinance. First, Homeowners argue that zoning ordinances are in derogation of common law property rights, and strict construction is accordingly

appropriate. Pls.' Compl. at 18. The City argues strict construction does not apply when determining the constitutionality of an ordinance. Def.'s Mot. to Dismiss at 7. Instead, the City argues that the Ordinance is subject to rational basis review regarding the equal protection and due process claims. *Id.* at 7-8.

The Ordinance is subject to rational basis review. Defendant correctly points out that the concept of strict construction in the zoning ordinance context refers to the initial step of interpreting an ordinance to determine whether it applies to the conduct in question. Def.'s Mot. to Dismiss at 7 (citing *Town of Annetta S. v. Seadrift Dev.*, 446 S.W.3d 823, 825-26 (Tex. App. 2014)). Strict construction in the zoning restriction context generally does not apply to determining whether an ordinance is valid. *Id.* Instead, strict construction functions solely to determine when an ordinance applies to given conduct. *See, e.g., Town of Annetta S.*, 446 S.W.3d at 830 (finding that strict construction against the Town was appropriate to determine whether the word "regulation" in the ordinance encompassed the conduct in question); *Thomas v. Zoning Bd. of Adjustment*, 241 S.W.2d 955, 957 (Tex. App.—Eastland 1951) (finding that strict construction against the zoning board was appropriate to determine whether a swimming pool was an "accessory" under the ordinance); *Bryan v. Darlington*, 207 S.W.2d 681, 683 (Tex. App.—San Antonio 1947) (finding strict construction of a zoning restriction appropriate when determining whether the structure in question violated the restriction); *Johnson v. Wellborn*, 181 S.W.2d 839, 841 (Tex. App.—San Antonio 1944) (finding that strict construction was appropriate to

determine whether a home satisfies the requirements of a restrictive covenant).

Only one case, *City of Kermit*, similarly utilizes the concept of strict construction the way Homeowners attempt to use it. *See City of Kermit v. Spruill*, 328 S.W.2d 219, 223 (Tex. App.—El Paso 1959) (finding strict construction of fire limit ordinances appropriate for determining whether they were unconstitutionally vague). Even so, the court in *Kermit* cited *Thomas v. Zoning Bd. of Adjustment*, a case that utilizes strict construction only as an initial step in determining whether an ordinance applied to a given set of conduct. *See id. Kermit* is, therefore, an outlier and is unpersuasive to the Court in light of the abundance of case law to the contrary.

Second, Homeowners argue that the right to lease is fundamental. To prevail on a substantive due process claim, Homeowners must establish that they held a constitutional property right protected by the 14th amendment. *Spuler v. Pickar*, 958 F.2d 103, 106 (5th Cir. 1992). An independent source, like state law, must establish this right. *Hidden Oaks, Ltd. v. City of Austin*, 138 F.3d 1036, 1046 (5th Cir. 1998). Thus, Texas law must inform the determination of whether the right to lease is a fundamental property right. *Spuler*, 958 F.2d at 106.

Since STRs are a relatively novel issue, there is no consensus among the Texas courts in determining whether the right to lease property is a fundamental right protected by the Due Process Clause. Nonetheless, from a survey of Texas case law, the Court is convinced that the

right to lease is not a fundamental right subject to strict scrutiny. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (reserving strict scrutiny for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution).

Homeowners argue that short-term rentals are an established practice and are historically allowable, as stated recently by a Texas appellate court.[2] Pls.' Compl. at 5 (citing *Zaatari v. City of Austin*, 615 S.W.3d 172, 190-91 (Tex. Civ. App.—Austin Nov. 27, 2019)). The Court concedes that, at the baseline, the right to own private property is a fundamental right. *Hearts Bluff v. State*, 381 S.W.3d 468, 476 (Tex. 2012); *see City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 48 (Tex. 1936) ("the right of property is the right to use and enjoy, or dispose of the same, in a lawful manner and for a lawful purpose."). Even so, as Defendant correctly points out, Homeowners fail to identify a single case that concludes the right to lease is fundamental in Texas. Def.'s Reply at 2. Instead, Homeowners rely on dicta from a number of cases to support the novel right to lease claim. *See* Pls.' Compl. at 4-5 (citing *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995) (noting the right to lease is part of the bundle of sticks usually conveyed with title); *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (1890) (explaining that "the right to lease to others, and therefore

2. *Zaatari* is currently pending review by the Texas Supreme Court. *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. Civ. App.—Austin Nov. 27, 2019).

derive profit, is an incident of ownership"); *Markley v. Martin*, 204 S.W. 123, 125 (Tex. Civ. App.—San Antonio 1918) (stating that an owner has the "absolute right to lease her property and collect the rents")).

The Texas Attorney General intervened in *Zaatari* in favor of the Property Owners to contend that the ordinance's ban on short-term rentals of non-homestead properties was unconstitutionally retroactive because of the well-settled nature of the right to lease. *Zaatari*, 615 S.W.3d at 180. Nonetheless, no Texas or Fifth Circuit court, including the *Zaatari* court, has expressly held that the right to lease is fundamental and subject to strict scrutiny. Even if *Zaatari* had expressly held that the right to lease is fundamental, the Texas Supreme Court has not yet reviewed the case.

Furthermore, as the City notes, the law is clear that a property owner within a city cannot lease property in a manner that the city has declared unlawful via zoning ordinances. *See Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926); *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972) ("property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made"); *City of Houston v. Guthrie*, 332 S.W.3d 578, 597 (Tex. App.—Houston [1s Dist.] 2009) (finding that to a desire to lease a fireworks stand on their property during certain portions of the calendar year was not an "absolute right").

Lastly, the fundamental right to lease private property is inapposite to other traditionally protected interests. The Supreme Court considers the right to marry, have children, the upbringing of one's children, marital privacy, use contraception, and abortion fundamental rights. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (collecting cases). As the City correctly points out, the right to lease property for short durations is objectively out of place on that list. Def.'s Reply at 2.

Because the Court is persuaded that the concept of strict construction of zoning ordinances is inapplicable to the present case and that the right to lease is not fundamental in Texas, rational basis is the appropriate standard of review for the Ordinance. In the zoning context, rational basis review is "extremely deferential." *Lee v. Whispering Oaks Homeowners' Ass'n*, 797 F.Supp.2d 740, 751 (W.D. Tex.—San Antonio). The court may ask whether there was a conceivable factual basis for the Ordinance and nothing more. *Id.* Generally, zoning ordinances are upheld and presumed to be valid if the classification in the law "is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The City is not required to articulate the purpose or rationale for the Ordinance expressly. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Homeowners have the burden of negating every conceivable basis the City may have had for the Ordinance. *Id.* There is no need for the means to perfectly fit the ends, and a classification does not fail rational basis merely because it results in some inequality. *Id.* at 321. Even so, increased oversight by the courts is necessary when state laws impede on rights

protected by the Constitution. *City of Cleburne*, 473 U.S. at 440.

For the sake of clarity, the relationship between rational basis review and Rule 12(b)(6) motions is worth briefly untangling. Rational basis review requires the enforcing party to prevail (the City) if there is any conceivable, reasonable justification for the Ordinance. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 (1984). Rule 12(b)(6) requires the plaintiff (Homeowners) to win if "relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 104. Rational basis cannot overcome a plaintiff's established 12(b)(6) benefits. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-460 (7th Cir. 1992). Rule 12(b)(6) is a procedural standard, "while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail." *Id.* The Seventh Circuit resolved this dilemma in *Wroblewski*, stating:

> While we therefore must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting "facts" in light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.

Id. at 460.

Thus, in the present case, the Court must take all of Homeowners' allegations as true and apply these allegations as "facts" in the context of the deferential rational basis standard. *See id.* To prevail, the alleged facts must be sufficient to overcome the presumption of rationality in the City's favor. *See id.* The Court will now briefly detail the contours of Homeowners' due process and equal protection claims.

1. Homeowners' Due Process Claim

The Fourteenth Amendment to the United States Constitution states that no person shall be "depriv[ed] of life, liberty, or property, without due process of law." Article I, § 19 of the Texas Constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." There is no meaningful distinction between "due process" in the U.S. Constitution and "due course" in the Texas Constitution. *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

There are two types of due process violations: substantive, implicated here, and procedural. Substantive due process violations occur when a law removes a vested or fundamental right not expressly mentioned in the U.S. or Texas Constitutions. *See Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (stating that the Due Process Clause protects the fundamental liberties which are, objectively "deeply rooted in this Nation's history and tradition); *Moore v. East Cleveland, Ohio*,

431 U.S. 494, 503 (1977) (explaining that appropriate limits on substantive due process "come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society"). Moreover, substantive due process "forbids the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Additionally, the U.S. Supreme Court requires a precise description of the asserted fundamental right. *Glucksberg*, 521 U.S. at 722.

Homeowners allege two instances of substantive due process violations, arguing that the Ordinance is both facially invalid and invalid as applied. Pls.' Compl. at 18. A facial challenge is an attack on the statute itself as opposed to a particular application of a statute. *City of L.A., Cal. v. Patel*, 576 U.S. 409, 415 (2015). It is the most difficult challenge to mount successfully because the challenger must establish that "no set of circumstances exists under which the act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). An as-applied attack on a statute asserts "that the statute, although generally constitutional, is unconstitutional when applied to the challenging party's particular circumstances." *Ex Parte Moon*, No. 01-18-01014-CR, 2020 at *9 (Tex. App.—Houston [1st dist.], no pet.). While Texas laws and the United States Constitution generally align, Texas offers additional review protection for parties asserting an as-applied challenge:

> The standard of review for as-applied substantive due course challenges to economic regulation statutes includes an accompanying consideration . . .: whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.

Patel v. Tex. Dept. of Licensing and Regul., 469 S.W.3d 69, 86 (Tex. 2015).

Homeowners argue that the Ordinance is facially invalid and invalid as applied because requiring the designation of STRs as commercial is arbitrary for conflating the character of use with the duration of use. *Id.* In addition, Homeowners bring the as-applied challenge because of the "illusory" nature of the option to rezone to commercial and continue engaging in STRs. Pls.' Compl. at 7.

2. Homeowners' Equal Protection Claim

The Fourteenth Amendment of the U.S. Constitution states that equal protection of the laws shall not be denied to any United States citizen. U.S. Const. amend XIV, § 1. Article 1, Section 3 of the Texas Constitution guarantees that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." The Texas standards mirror the federal framework for determining whether a statute violates the equal protection clause. *Rose v.*

Doctors Hosp., 801 S.W.2d 841, 846 (Tex. 1990). To prevail on an equal protection claim, a plaintiff must establish that the government treated that plaintiff differently than similarly situated parties without a rational basis for doing so. *Downs v. State*, 244 S.W.3d 511, 518 (Tex. App. – Fort Worth 2007). In Texas, municipalities "may regulate the location of and use of buildings for business, industrial, residential, or other purposes." Tex. Loc. Gov't Code § 211.003(a)(5). As established above, this legislation is upheld and presumed to be valid if the classification in the statute "is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Homeowners allege two instances of alleged equal protection violations. First, Homeowners allege that owners in residentially-zoned areas who engage in rental periods exceeding 30 days can rent freely, but owners who rent for less than 30 days are banned. Pls.' Compl. at 14. Second, the owners who received permits at the outset of the STR regulations can continue engaging in STRs, while later owners are banned. *Id.*

3. Homeowners fail to allege facts sufficient at the 12(b)(6) stage to overcome the deferential rational basis test, and thus the due process and equal protection claims should be dismissed.

The Homeowners' due process and equal protection claims, viewing all allegations as true, do not overcome the Ordinance's presumption of rationality. The Ordinance

appears to have several legitimate municipal purposes. First, the Ordinance aims to protect residential neighborhoods from the perceived issues that accompany STRs. The Ordinance itself states that "[t]his section is intended to . . . ensur[e] that [short-term] rental use does not create adverse impacts to residential neighborhoods due to excessive traffic, noise, and density." Ordinances Ch. 144 § 5.17-1(a). Although not required to offer a rationale for the Ordinance, the council meeting in reference to the Ordinance cited workshops aimed at the "protection of residential neighborhoods." Pls.' Compl. at 9. Second, some members of the New Braunfels community oppose STRs. Homeowners' Complaint tells stories of neighbors regularly harassing owners for not living in the home full-time. *Id.* at 11-12. Third, the Ordinance seeks to preserve the residential nature of certain areas of the city. Homeowners state that central New Braunfels has remained mostly older, single-family dwellings due to residential zoning restrictions. Pls.' Compl. at 22.

Any one of these rationales for the Ordinance satisfies the rational basis test. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that zoning ordinances are upheld and presumed to be valid if the classification in the statute "is rationally related to a legitimate state interest"); *Wroblewski*, 965 F.2d at 459-460 (finding that the complaint's "conclusionary assertion that the policy is "without rational basis" [was] insufficient to overcome the presumption of rationality coupled with the readily apparent justification for the policy").

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Homeowners complain that the City had no rational basis for concluding that homes rented out for short periods actually affect trash, noise, or parking more significantly than long-term rentals. *Id.* at 19. Even assuming this is true, the test is not whether STRs actually affect these elements but whether the Court can conceive that the Ordinance could potentially assuage these problems. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that classifications must be upheld against equal protection claims if there is any reasonably conceivable state of facts that could provide a rational basis for the classification). Moreover, the Court need not use its imagination to conceive of the way zoning ordinances preserve the nature of a city center or understand a community member's concerns; these are scenarios that already exist. Pls.' Compl. at 11, 22.

Homeowners also complain that the distinction between short-and long-term rentals is an arbitrarily drawn line. Pls.' Compl. at 14. This complaint is also irrelevant under rational basis review because municipalities must draw the line somewhere. *See Heller*, 509 U.S. at 321 (explaining that a classification does not fail because it is merely "not made with mathematical nicety"); *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("The fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration.").

Homeowners' complaint concerning the grandfather permits is unavailing in the same vein. Grandfathering is a legitimate, well-recognized legislative tool. *See S. Wine and Spirits of Am., Inc. v. Div. of Alcohol and Tobacco*

Control, 731 F.3d 799, 812 (8th Cir. 2013) (explaining that grandfather clauses do not "doom the statute"; they do not "demonstrate the invalidity of rule from which they are carved"); *Lindquist v. City of Pasadena, Tex.*, 669 F.3d 225, 236 (5th Cir. 2012) (holding that preventing only new entrants into a market is sometimes more appropriate than an outright ban); *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (stating that sometimes a gradual approach as opposed to an outright ban is appropriate, and not constitutionally impermissible). Furthermore, the Ordinance does not fail rational basis merely because a grandfather clause creates some inequality. *See Heller*, 509 U.S. at 321. Therefore, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** with respect to Plaintiffs' due process and equal protection claims.

B. Homeowners fail to plead a state-law preemption claim adequately, and the claim should be dismissed.

In addition, or in the alternative to the due process and equal protection claims, Homeowners allege that the Texas Constitution, combined with the Texas Property and Tax Codes, preempts the Ordinance. Pls.' Compl. at 20.

The Texas Constitution provides that city ordinances shall not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Art. XI, Sec. 5(a). The standard for implied preemption is as follows:

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> The mere entry of the state into a field of legislation does not automatically preempt that field from city regulation. Rather, local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable. Absent an express limitation, if the general law and local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency.

City of Laredo v. Laredo Merch. 's Ass'n, 550 S.W.3d 586, 593 (Tex. 2018)

The City and Homeowners agree that there is no express preemption in the present case. Def.'s Mot. to Dismiss at 16; *see id.* (explaining that the Legislature's intent to limit local laws must "appear with unmistakable clarity"). Homeowners have the burden of overcoming a strong presumption against preemption. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

Homeowners argue that the Ordinance undermines State legislative intent because the Legislature expressly taxes STRs as part of the hotel occupancy tax. Pls.' Compl. at 21. Even if the State taxes the STRs, this "does not automatically preempt that field from city regulation." *City of Laredo*, 550 S.W.3d at 593. Additionally, where the City permits STRs, they are subject to taxation. Tex. Tax Code § 156.001(b). As the City articulates, restricting

the location of an STR is not contradictory to the tax code because the code merely mandates taxes where STRs are occurring. Def.'s Mot. to Dismiss at 16. Homeowners fail to articulate how the tax code requires a specific location or quantity of STRs. Def.'s Mot. to Dismiss at 16. Moreover, Texas law expressly authorizes zoning ordinances. *See* Tex. Loc. Gov. Code § 211.005(5) (granting municipalities the express power to regulate "the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes"). This grant of power contains no limitations as to whether the state taxes the regulated areas or whether the owner occupies the property as a tenant or not. *Id.*

Homeowners also fail to adequately allege how the Ordinance conflicts with the Texas Property Code. The definition of "lease" within the code contains no durational limits on leases. *See* Tex. Prop. Code § 92.001(3) (defining "lease" as "any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling"). Because state law does not expressly limit duration, the Ordinance is not preempted merely for enacting stricter regulations. *See, e.g. State v. Portillo*, 314 S.W.3d 210, 216 (Tex. App.—El Paso 2010) (holding that state helmet law does not preempt city helmet law merely because it was stricter); *Barnett v. City of Plainview*, 848 S.W.2d 334, 339 (Tex. App.—Amarillo 1993) (holding that state law does not preempt an ordinance when local law adds additional requirements to a state law).

As addressed above, implied preemption is disfavored, and Homeowners fail to allege facts to indicate that the Ordinance and Texas law cannot coexist peacefully. Therefore, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** with respect to Plaintiffs' state-law preemption claim.

C. Homeowners' Motion to Amend should be denied as futile.

Homeowners have recently sought leave to amend their Complaint. *See* Pls.' Mot. to Amend. As Homeowners point out, the only change the proposed Amended Complaint makes is the addition of another homeowner, Karen Naugle. *Id.* at 1. Because the proposed Amended Complaint does not substantively alter Homeowners' pleadings in a way that would change the above analysis, the Court **RECOMMENDS** that Plaintiffs' Motion to Amend be **DENIED** as futile.

IV. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED**. Plaintiffs' Complaint should be **DISMISSED WITH PREJUDICE** for failure to state a claim. The Court additionally **RECOMMENDS** that Plaintiffs' Motion to Amend be **DENIED** as futile.

Appendix E

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150-53; *Douglass*, 79 F.3d at 1415.

SIGNED this 29th day of July, 2021.

/s/ Jeffrey C. Manske
Jeffrey C. Manske
United States Magistrate Judge

APPENDIX F — ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 21, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-50025

RAFAEL MARFIL; VERGE PRODUCTIONS, L.L.C.; ENRICO MARFIL; NAOMI MARFIL; KOREY A. RHOLACK; DANIEL OLVEDA; DOUGLAS WAYNE MATHES,

Plaintiffs-Appellants,

versus

CITY OF NEW BRAUNFELS, TEXAS,

Defendant-Appellee.

Filed July 21, 2026

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:20-CV-248

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges.*

Appendix F

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

APPENDIX G — NEW BRAUNFELS, TEXAS ORDINANCE NO. 2011-37

Sec. 144-5.17. – Short term rental or occupancy.

5.17-1. *Purpose.* This section is intended to provide a procedure to allow the rental of private dwellings to visitors on a short term basis, while ensuring that such rental use does not create adverse impacts to surrounding neighborhoods due to excessive traffic, noise, and density. Additionally, this section is intended to ensure that the number of occupants within such rental units does not exceed the reasonable capacity of the structure to cause health and safety concerns, and that minimum health and safety standards are maintained in such units to protect visitors from unsafe or unsanitary conditions.

5.17-2. *Definitions.*

Floodway means the channel for a river or other water course and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.

Habitable space means a space in a dwelling for living, sleeping, eating or cooking. Bathrooms, toilet rooms, closets, halls, storage or utility spaces and similar areas are not considered habitable spaces.

Non-residential district means the following zoning districts: R-3, R-3L, R-3H, MU-A, MU-B, C-1, C-1A, C-1B, C-2, C-2A, C-3, C-4, C-4A, C-4B, C-0, M-1, M-1A,

and M-2A. This includes all subsequently approved special districts identified as non-residential unless otherwise specified within the special district.

Occupant means the person or people over the age of three who are sleeping in the short term rental.

Operator means every natural person, firm, partnership, association, social or fraternal organization, corporation, estate, trust, receiver, syndicate, branch of government or any other group or combination acting as a unit who is the proprietor of a short term rental, whether in the capacity of owner, lessee, sub-lessee, mortgagee in possession, license or any capacity. Where the operator performs his or her functions through a managing agent of any type of character, other than an employee, or where the operator performs his or her functions through a rental agent, the managing agent or the rental agent shall have the same duties as his or her principal.

Owner means the person or entity that holds legal and/or equitable title to the private property.

Resort condominiums means a form of housing tenure and other real property where a specified part of a piece of real estate (usually of an apartment house) is individually owned and rented out for use of persons for less than 30 days while use of and access to common facilities in the piece such as hallways, heating system, elevators, exterior areas is executed under legal rights associated with the individual ownership and controlled by the association of owners that jointly represent ownership

of the whole piece.

Resort property means a compound of buildings and facilities located together that provides lodging, entertainment and a relaxing environment to people on vacation. This includes 24-hour security and 24-hour front desk personnel. These units comply with all commercial building code standards.

Short term rental means the rental for compensation of a privately owned dwelling, including but not limited to, a single-family dwelling, two-family dwelling (duplex), tri-plex, quadraplex, multifamily dwelling, apartment house, tiny home, townhome, manufactured home, industrialized home, or garage apartment, rented by the public for consideration and used for dwelling, lodging or sleeping purposes for a period of not less than one night and not more than 30 days other than ongoing month-to-month tenancy granted to the same renter for the same unit. This term is not applicable to hotels, motels, bed and breakfasts, dormitories, recreational vehicle parks, hospitals, medical clinics, nursing homes, convalescent homes, foster homes, halfway houses, transitional housing facilities, resort properties as defined in this chapter, or resort condominiums.

Short term rental decal means the decal issued by the city as part of a short term rental permit that identifies the subject property as a short term rental, the short term rental permit number, the owner or rental agent's name and 24-hour emergency contact phone number of either the owner or the rental agent, or via an electronic database

available to emergency responders and code enforcement officers as provided by the city.

Sleeping room means a habitable space within a dwelling designed or used for sleeping, as referred to in the adopted International Residential Code (as amended) in the following sections: Light, ventilation and heating (R305), Minimum room areas (R304), Ceiling height R(305) and Emergency escape and rescue openings (R310), including a bedroom. Tents, hammocks, yurts, recreational vehicles, and non-habitable spaces shall not be considered a sleeping room. Every sleeping room must have at least one operable emergency escape and rescue opening as per all applicable city-adopted codes, regulations and ordinances.

5.17-3. *Applicability.*

(a) Short term rental within residential districts is prohibited.

(b) Short term rental is prohibited in any floodway located within the city limits, regardless of zoning district.

(c) Short term rental permit. A short term rental permit is required in all zoning districts. Subject to subsection 144-5.17-5, an owner shall obtain and maintain a current permit for all short term rentals as defined in this chapter. Inspections are required as specified in subsection 144-5.17-6.

(d) Special use permit. In addition to the short term rental permit, a special use permit, as defined in section 144-1.4 of this chapter, is required in all zoning districts except C-4, C-4A and C-4B where a short term rental is proposed in a single-family dwelling or a duplex only, constructed pursuant to the International Residential Code, where not otherwise prohibited in this chapter. The process for requesting consideration of a special use permit is outlined in section 144-3.6 of this chapter.

5.17-4. *Standards.* All short term rentals permitted pursuant to this chapter are subject to the following standard requirements:

(a) *Occupancy.* The maximum number of occupants allowed to sleep in a short term rental is two occupants per sleeping room plus an additional two occupants.

(b) *Bathrooms.* Not less than one full bathroom shall be provided for each five occupants of the short term rental, according to the chart provided below. This full bathroom must meet the minimum International Residential Code standards (R306, Sanitation) and include a wash basin, toilet and tub or shower. Half bathrooms must contain, at a minimum, a washbasin and toilet for the purposes of this section; a full bathroom may be used in lieu of a half bath.

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5 occupants	1 full bath (hereafter referred to as 1)
6-9 occupants	1 full bath and 1 half bath (half baths hereafter referred to as .5)
10 occupants	2 baths
11-14 occupants	2.5 baths
15 occupants	3 baths
And so on...	

(c) *Short term rental decal display.* As part of a short term rental permit, the city issued short term rental decal shall be posted on the front of each short term rental in a location that is accessible and legible to an individual at the entry of the short term rental, or via an electronic database available to emergency responders and code enforcement officers as provided by the city.

(d) *Advertising.* The short term rental permit number, maximum occupancy as permitted, and life-safety inspection expiration date must be listed in all advertising for the short term rental.

(e) Parking. A minimum of one off-street parking space per sleeping room shall be provided. No required parking shall be permitted within public right-of-way or access easements as defined by city and state regulations regarding parking.

(f) *Life safety.*

(1) All building and fire related construction shall conform to the city's adopted building codes.

(2) A 2A:10B:C type fire extinguisher (a standard five-pound extinguisher) shall be properly mounted within 75 feet of all portions of the structure on each floor and will be maintained in accordance with the manufacturer's specifications.

(3) Every sleeping room shall have at least one operable emergency escape and rescue opening.

(4) An evacuation plan shall be posted conspicuously in each sleeping room.

(g) *Conduct on premises.*

(1) Each occupant and visitor to a short term rental shall comply with all applicable provisions of the City Code, including, without limitation: noise and disorderly conduct restrictions from chapter 82, Offenses and miscellaneous provisions; litter prohibition from chapter 50, Environment; and others such as parking, and trespassing provisions. No occupant of or visitor to a short term rental shall cause or permit a public nuisance to be maintained on such property. This information shall be included in the rental agreement and inside the short term rental as specified in subsection (7), Tenant indoor notification, below.

(2) All occupants shall be informed in writing of relevant city ordinances including, but not limited to, the city's nuisance, water conservation, noise and disorderly conduct ordinances by the owner/operator of the short term rental.

(3) Excessive noise or other disturbance outside the short term rental is prohibited between the hours of 10:00 p.m. and 8:00 a.m. This includes, but is not limited to, decks, portals, porches, balconies, patios, hot tubs, pools, saunas or spas.

(4) No sleeping is allowed outdoors.

(h) *Signage.* Signage shall be in compliance with the city's current sign code.

(i) *Tenant indoor notification.* The operator shall post in a conspicuous location of the dwelling the following minimum information:

(1) Maximum number of occupants.

(2) Location of required off-street parking, other available parking and prohibition of parking on landscaped areas.

(3) Quiet hours and noise restrictions.

(4) Restrictions of outdoor facilities.

(5) 24-hour contact person and phone number.

(6) Property cleanliness requirements.

(7) Trash pick-up requirements, including location of trash cans.

(8) Flooding hazards and evacuation routes. Including information on the emergency siren system.

(9) Emergency numbers.

(10) Notice that failure to conform to the occupancy and parking requirements is a violation of the City Code and occupant or visitor can be cited.

(11) Other useful information about the community.

(j) *Rental agreement notification.* The rental agreement between the owner/operator of the short term rental and the occupant shall include by attachment, all of the information provided on the tenant indoor notification signage.

5.17-5. *Short term rental permit.*

(a) *Application.* Application for a short term rental permit shall be in writing on an application

form available in the planning and development services department, shall be accompanied by a one-time payment of the fee per appendix D of this Code and shall include the following information, at a minimum:

(1) A list of all owners of the short term rental including names, address and telephone numbers.

(2) A sketch or narrative describing the location of the available parking spaces as required by this section.

(3) A sketch of the floor plan.

(4) The name, address and 24-hour telephone numbers of a contact person who shall be responsible and authorized to respond to complaints concerning the use of the short term rental.

(5) Proof of hotel occupancy tax compliance with V.T.C.A., Tax Code ch. 351, before permit is granted.

(6) A statement that the owner of the short term rental has met and will continue to comply with the standards and other requirements of this section.

(7) Provide current email address of owner/operator, if applicable.

(8) If owner/operator has a property management or agent, owner/operator shall provide property management or agent phone number, mailing address and email address.

(b) *Completeness of application.* If the application is incomplete or the full fee has not been paid, the planning director shall notify the applicant in writing, within ten business days of the date of the application, that the application is incomplete and will not be considered by the city until the application is complete and/or the full fee is paid. If the full fee is not paid or the application is not compete within 45 days of the date of the application, the application shall expire.

(c) *Insurance.* General commercial liability insurance (or its equivalent) coverage of a minimum of $500,000.00 per occurrence of coverage is required for all short term rentals. The owner must provide a copy of the certificate of insurance which shows the name insured, any additional insureds, the location address, the effective date, the coverage limit and type. The owner must notify the city within 30 days if the insurance status changes and provide the city with updated insurance information. The short-term rental permit shall be suspended until proof of updated insurance is provided.

(d) Annual renewal. A short-term rental permit may be renewed annually if:

(1) The permittee pays inspection fee and passes inspection to be conducted by the fire marshal in accordance with subsection 144-5.17-6.

(2) The permittee provides documentation showing that local hotel occupancy taxes have been paid for the permitted unit as required for the previous year.

(3) The permittee provides documentation of insurance requirements of subsection (c) above.

(4) The property is not subject to outstanding city code or state law violations.

(5) The permittee or operator has no outstanding city fees or fines.

(6) The permittee or operator does not meet the standards described in subsection 144-5.17-7 regarding repeat offenses.

(7) The city shall deny an application to renew a permit if, on the date the renewal application was submitted, 12 months has not expired since a revocation pursuant to subsection 144-5.17-8.

(e) *Transferability.* A short term rental permit is transferable to a new property owner, if the new property owner submits a short term rental permit application and agrees in writing to comply with the requirements of this section. A new owner must apply for a short term rental permit within 90 days from the closing date of the purchase. The new owner must provide a copy of the closing statement with the short term rental permit application form. Failure of the new property owner to apply for permit within 90 days from the closing date will revoke the short term rental permit.

(f) *Appeal.* If an application for a short term rental permit or renewal is denied, the owner or operator may appeal to the planning commission by written notice delivered within 30 days of denial or revocation.

5.17-6. *Inspections.* To ensure continued compliance with the requirements of this section a short term rental shall be inspected in the following methods:

(a) *Transfer inspection.* As part of the transfer of a short term rental permit to a new owner, in accordance with subsection 144-5.17-5(e), Transferability, and the issuance of a new short term rental permit the city's fire marshal shall conduct an inspection to verify compliance with this section.

(b) *Fire extinguishers.* The owner/operator is responsible for obtaining annual independent inspections of the fire extinguishers in compliance with the city's current fire code and is responsible for its maintenance in accordance with the manufacturer's specifications.

(c) *Immediate inspection.* The city's code enforcement division and fire marshal's office will perform inspections immediately when a violation is suspected.

(d) *Fire inspection.* The city's fire marshal's office will perform inspections annually for non-sprinklered structures and perform inspections every other year for sprinklered structures for compliance with this section. The fee for fire inspections is per appendix D of this Code.

5.17-7. *Enforcement/penalty.*

(a) Emergency contact. The owner/operator of the short term rental shall provide the city with a 24-hour contact number. The 24-hour contact is required to be able to travel to the short-term rental within 60 minutes under reasonable circumstances. Should a law enforcement officer or code enforcement officer respond to the short term rental and issue a citation/notice of violation for any violation of city ordinances, the owner/operator shall be called by the officer. The owner/operator shall attempt to contact the

occupants within one hour of the call to address the occupants about the complaints. Should a second complaint be filed and citation/notice of violation issued to any part of the occupants or guests, the owner/operator must take appropriate steps, in accordance with the individual rental agreement, to assure future complaints do not occur. Should three separate citations/notices of violation be issued to an occupant or their guest(s), involving separate occupants under separate rental agreements within a six-month period, the short term rental permit and/or special use permit may be revoked in accordance with the revocation process specified in subsection 144-5.17-8, Revocation.

(b) Violations of any subsection of this section may result in revocation of the short term rental permit and/or special use permit in accordance with subsection 144-5.17-8, Revocation.

(c) Failure to pay hotel occupancy tax timely is considered a violation of this section and may result in revocation of the short term rental permit and/or special use permit in accordance with subsection 144-5.17-8, Revocation. Owner shall have 30 days from the date the city or state issue a notice of delinquency to submit delinquent hotel occupancy tax to city and state before revocation of the short term rental permit/special use permit begins.

(d) Failure to successfully complete the renewal process of a short term rental permit is considered a violation of this section. Owner shall have 45 days from the date city issues notice of denial to gain compliance of noncompliant items before the revocation of the short term rental permit begins.

(e) The provisions of this subsection are in addition to and not in lieu of any criminal prosecution or penalties as provided by city ordinances or county or state law.

(f) Prima facie proof of violation of this section is established if it is shown that visual inspection of more than the posted occupancy load (subsection 144-5.17-4(i)(1)) was made by a code enforcement officer, building inspector, fire inspector or police officer at a unit. Establishment of a prima facie level of proof in this subsection does not preclude a showing of illegal "occupancy" of a dwelling by a person in any other manner.

(g) Offense. It is an offense for the property owner, any agent of the property owner, or the occupant(s) to directly occupy or indirectly allow, permit, cause, or fail to prohibit an occupancy in violation of this section 144-5.17. Each day that a unit is occupied in violation of this ordinance shall be considered a separate offense, and, upon conviction, shall be subject to a minimum fine of $500.00 to a maximum fine of $2,000.00 per violation. Should a property owner operate

a short-term rental without a permit, a non-compliance fee of $2,000.00 will be assessed.

(h) Each day of violation of said standards and provisions of this section constitutes a separate offense and is separately punishable, but may be joined in a single prosecution.

(i) Repeat offenses. It shall be deemed a repeat offense:

(1) If the permittee, operator, owner or person in control of the property fails to comply with any of the provisions of this section (144-5.17) more than twice in a 12-month period, and/or

(2) If the property is the subject of repeated health or safety violations of city code or state law during a 24-month period prior to applying for a permit or renewing a permit to operate a short term rental.

5.17-8. *Revocation.* If any violations stated in subsection 144-5.17-7, Enforcement/penalty, of this section have been committed and not corrected within the time specified, the city shall begin the procedures to revoke the special use permit in accordance with subsection 144-3.6-5(f), and revoke the short term rental permit in accordance with the following:

(a) The city shall give 30-day written notice to the owner/operator regarding the public hearing dates which include a recommendation by the planning commission, and public hearing and decision by the city council.

(b) The city shall provide written notice to property owners within 200 feet of the subject property at least 15 days prior to the public hearings.

(c) If a short term rental permit and/or special use permit is revoked, the owner/operator may not reapply for the same property for a period of 12 months.

5.17-9. *Abrogation and greater restrictions.* This section is not intended to repeal, abrogate, or impair any existing easements, covenants, or deed restrictions. However, where this section and another ordinance, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restrictions shall prevail.

(Ord. No. 2012-49, § 1 (Exh. A), 9-10-12; Ord No. 2017-06, § 2, 1-9-17; Ord. No. 2018-21, § 2, 3-26-18; Ord. No. 2020-20, § 2, 3-9-20; Ord. No. 2024-96, § 5, 12-9-24)

APPENDIX H — UNITED STATES CONSTITUTION, AMEND. XIV

USCS Const. Amend. 14, Part 1 of 21

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.