No. 22-50908

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

On Appeal from the United States District Court
for the Western District of Texas, Waco Division

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 22-50908; *Marfil v. City of New Braunfels*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This case involves important questions about the scope of local authority over private property rights and whether property owners may ever challenge arbitrary restrictions on those rights in court. The district court's decision below not only ignores binding precedent from this Court and Supreme Court, but would make it significantly more difficult, if not impossible, to bring constitutional challenges to local land-use regulations. Appellants believe oral argument will prove helpful to the Court in ensuring full deliberation of these important issues.

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JURISDICTIONAL STATEMENT

Appellants' claims involve facial and as-applied challenges to a municipal ordinance under the Texas and United States Constitutions. The district court had jurisdiction over Appellants' federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over Appellants' state law claims under 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291. On September 15, 2022, the district court entered an order and judgment (ROA.428–29) adopting the report and recommendation of the United States Magistrate Judge (ROA.278–95); granting Defendant's motion to dismiss (ROA.46–99); overruling Plaintiffs' objections to the report and recommendation of the federal magistrate judge (ROA.299–324); denying Plaintiffs' motion for preliminary injunction (ROA.200–48); and denying Plaintiffs' motion to amend the complaint (ROA.175–99). This order, along with the text order docketed on September 20, 2022, mooting Plaintiffs' motion for preliminary injunction (ROA.5), disposed of all issues in this case and constituted a final judgment of a United States District Court. The Notice of Appeal was timely filed on October 11, 2022 (ROA.430) pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED

1. Under the Due Process clause of the 14th Amendment, restrictions on private property use must be rationally related to a legitimate government interest. A property owner may prevail under this test by producing evidence rebutting the government's claimed interest in the restriction. Did the district court err by holding that a city's unsupported claims of a government interest were sufficient to dismiss the case, prior to discovery, regardless of whether those claims are contradicted by the allegations in the complaint, publicly available evidence, and state law?

2. Under the Due Course of Law provision of the Texas Constitution (Art. I, Sec. 19), regulations on private property must be rationally related to a legitimate government interest, and not unduly burdensome given the government interest at stake. Like the Federal due process clause, a property owner may prevail under this test by producing evidence rebutting the government's claims. But Texas law also provides greater protections than Federal law by limiting municipal land-use authority to restricting harmful property uses and by requiring some analysis of proportionality. Did the district court err by dismissing Appellants' state law claim without any consideration of this distinct test?

3. Under the Equal Protection clauses of the United States and Texas Constitutions, distinctions between permissible and impermissible land uses must be rationally related to a legitimate government interest. A property owner may prevail under this test by producing evidence rebutting the government's claimed interest in the distinction. Did the district court err by holding that factual differences between property uses were irrelevant on a motion to dismiss, because "municipalities must draw the line somewhere?"

INTRODUCTION

This case raises fundamental questions about when, if ever, a constitutional challenge to a local land-use ordinance can survive a motion to dismiss.

Since time immemorial, property owners in New Braunfels have made their homes available for rent on a short-term basis for others seeking to visit the city. Texas courts have repeatedly recognized this longstanding practice as consistent with "residential use." And substantial evidence suggests that these sorts of rentals do not produce more nuisance activity than their long-term counterparts.

Despite this history and evidence, the City of New Braunfels amended its zoning ordinances to ban short-term rentals from all residential areas in the City, claiming that such restrictions were necessary to maintain the residential character of neighborhoods and to prevent nuisance behaviors.

Appellants (hereafter, the "Property Owners") own homes in traditionally high traffic areas that they would like to lease on a short-term basis. They argue that the City's ordinance violates the Due Course of Law provision of the Texas Constitution as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In particular, they claim that: (1) short-term rentals are a well-established and judicially recognized residential use of property in Texas; (2) short-term rentals do not produce more nuisances than other residential uses; and

therefore (3) the City's decision to ban this well-established residential use of property arbitrarily limits their property rights in violation of the Texas and United States Constitutions. This argument is in accord with several Texas cases holding that short-term rental bans are constitutionally suspect.

In the face of this history, data, and precedent, the district court dismissed the Property Owners' claims with prejudice prior to any discovery. Applying an overly deferential form of rational basis scrutiny, the district court concluded that it did not matter whether Texas courts had recognized short-term rentals as a residential use, or whether short-term rentals in fact cause *any* nuisances. Under the district court's rational basis test, it was sufficient that "some members" of the New Braunfels community opposed short-term rentals and that the City Council claimed that eliminating short-term rentals could help reduce nuisances.

But this nihilistic approach to rational basis scrutiny conflicts with binding precedent from this Court and the Texas Supreme Court. Moreover, if the district court's overly deferential approach to rational basis scrutiny were accepted, it would place an insurmountable barrier to *any* challenge to local land-use ordinances. After all, it will always be the case that *some* members of the community oppose a given property use. And a city can always *claim* that its ordinance is designed to abate

nuisances if it knows that such a claim need not be based in fact. Thankfully, this is not the law in this circuit.

The district court's judgment dismissing the Property Owners' claims with prejudice, prior to any discovery, should be reversed.

STATEMENT OF THE CASE

Background

Short-term rentals are nothing new. Americans have been renting out homes on short-term leases for generations. Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395, 396 (2017). A quick survey through Lexis-Nexis shows numerous examples of week-to-week rentals of houses across the country going back more than a century. *See e.g.*, *Bradford v. State*, 22 Ala. App. 171, 171 (1927) (discussing contract for weekly rent of a furnished house); *Carnegie v. Perkins*, 191 N.C. 412, 413, (1926) (weekly rental of part of a house); *Raymond v. Strickland*, 124 Ga. 504, 506 (1905) (discussing weekly rental contract for house in Georgia); *Wineman v. Phillips*, 93 Mich. 223, (1892) (weekly rental contract for a house in Detroit); *Horton v. Handvil*, 41 N.J. Eq. 57, 61, (1886) (discussing weekly rental contract).

The same is true in Texas. *See, e.g.*, *Williams v. State*, 120 Tex. Crim. 285, 286, 47 S.W.2d 298, 299 (1932) (discussing weekly rental of houses in Falls County); *Coalson v. Holmes*, 111 Tex. 502, 506, 240 S.W.

896, 897 (1922) (discussing weekly rental of three-bedroom houses in Ft. Worth in 1912).

Historically, short-term leases have been viewed as an acceptable residential use of property in Texas. *See JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n*, 644 S.W.3d 179, 185 (Tex. 2022); *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 291 (Tex. 2018) (same). As the Texas Supreme Court recently explained, the majority view amongst appellate courts is that the residential nature of a property use turns on what the tenants do on the property, not how long they are there. *See*, *id*. So "long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities" on the property, they are using it "for residential purposes." *Tarr*, 556 S.W.3d 274, at 291, n.14 (quoting *Slaby v. Mt. River Estates Residential Ass'n*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012). Indeed, the majority of courts across the country have come to the same conclusion. *See Hawai'i Legal Short-Term Rental All. v. City & Cnty. of Honolulu*, No. 22-cv-247-DKW-RT, 2022 U.S. Dist. LEXIS 187189, at *16–18 (D. Haw. Oct. 13, 2022) (cataloging nineteen cases across the country holding that short-term rentals are a residential use and only five to the contrary).

Despite this history, some Texas cities recently began to regulate or prohibit short-term leases. *See, e.g.*, Corpus Christi, Tex., Ord. No. 032642 (2022); Arlington, Tex., Ord. Nos. 19-014, 19-022 (2019); San

Antonio, Tex., Ord. No. 2018-11-01-0858 (2018); Grapevine, Tex., Ord. No. 2018-065 (2018); Austin, Tex., Ord. 20120802-122 (2012).

For the most part, these cities claimed that short-term rental bans were necessary to preserve neighborhood character or abate alleged nuisance behavior at short-term rentals. *See id.* But when challenges to these ordinances have been raised, the evidence has not supported these cities' claims.

For example, when property owners challenged the City of Austin's short-term rental ordinance, documents turned over in discovery showed that the City's own studies prior to adopting its ordinance had confirmed that short-term rentals produced "*significantly fewer*" nuisance complaints per-capita than long-term housing, and a tiny number of complaints overall. *Zaatari v. City of Austin*, 615 S.W.3d 172, 189–90 (Tex. App.—Austin, 2019) (emphasis added). Looking at this evidence, the Third Court of Appeals concluded that "nothing in the record supports a conclusion that a ban on type-2 rentals would resolve or prevent the stated [nuisance] concerns" (*Id.* at 189) and that "the ordinance serve[d] a minimal, if any, public interest while having a significant impact on property owners' substantial interest in a well-recognized property right." *Id.* at 191–92.

Various studies across the country have produced similar results. For example, the City of Dallas's internal studies prior to adopting its short-term rental ordinance showed no meaningful difference between

short and long-term rentals with regard to nuisance behavior. City of Dallas, Office of Data Analytics and Business Intelligence, *Short-Term Rental Data Analysis* (May 3, 2021), https://tinyurl.com/4nz65559. A study of three cities in California concluded that the presence of short-term rentals does "not result in heightened nuisance issues" in residential neighborhoods and that the presence of short-term rentals "may actually reduce the rate of nuisance complaints." California Economic Forecast, *The Effect of Short Term Rentals on Neighborhood Nuisance Complaints Along the Central Coast* (June 28, 2016), https://tinyurl.com/ycjty8h8. And a similar study in New York found that entry of short-term rentals into a neighborhood was "associated with a reduction in residential noise complaints." Gorkem T. Ozer, et. al., *Noisebnb: An Empirical Analysis of Home Sharing Platforms and Noise Complaints,* (Acad. of Mgmt. Ann. Meeting Proc., 2020), https://ssrn.com/abstract=3660527.

As a result, Texas Courts have often held short-term rental bans to be constitutionally suspect. *See, e.g.*, *City of Grapevine v. Muns*, 651 S.W.3d 317 (Tex. App.—Fort Worth, 2022) (Due Course of Law); *Zaatari*, 615 S.W.3d 172 (retroactivity); *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex. App.—Houston, 2015) (takings); *but see Draper v. City of Arlington*, 629 S.W.3d 777 (Tex. App.—Fort Worth, 2021).

As explained below, the City of New Braunfels' Ordinance follows this pattern.

New Braunfels Bans Short-term Rentals

Like many Texas cities, short-term rentals have been prevalent in New Braunfels neighborhoods for decades, if not longer. Long considered a tourist destination, the City is home to the world famous Schlitterbahn Waterpark, Texas's oldest dancehall, Texas's oldest bakery, nearby Natural Bridge Caverns, the Texas Ski Ranch, and a 10-day annual sausage festival known as Wurstfest. City of New Braunfels, Living & Visiting, https://www.nbtexas.org/2993/Living-Visiting. Given these attractions, a quick google search unsurprisingly shows advertisements for short-term rentals in New Braunfels neighborhoods as early as the 1960s. *Classified Ads*, New Braunfels Herald Zeitung, August 25, 1985, at 14B, https://tinyurl.com/3am89urb; *Classified Ads*, New Braunfels Herald Zeitung, January 10, 1984, at 10, https://tinyurl.com/257tms27; *Classified Ads*, New Braunfels Herald Zeitung, Sept. 10, 1973, at 9C, https://tinyurl.com/bdza3vy4; *Classified Ads*, New Braunfels Herald Zeitung, Mar. 28, 1968, at 9C, https://tinyurl.com/5cj4d2w9. (sources attached for the convenience of the Court to Appendix Tab 5)

Eventually, however, certain interest groups within the city pushed for a change. The City conducted several "workshops" where these groups suggested ways the City could dictate lease terms for private property owners. ROA.15. The City does not dispute that these groups produced no data showing that renting one's home out for less than

thirty-days causes more problems than other residential uses in New Braunfels. *Id*.

Nevertheless, the City adopted Ordinance. No. 2011-37 ("the Ordinance") prohibiting all short-term rentals in residential areas. ROA. 48. In a bit of political bargaining, the Ordinance grandfathered certain pre-existing short-term rentals in residential areas—effectively creating a short-term rental monopoly for a select group of homeowners. New Braunfels, Tex. Ord. No. 2011-37, §5.16(c)(4).

Appellants' Injuries

The Property Owners in this case are not part of the lucky few allowed by the city to exercise their full leasing rights.

Rafael Marfil was born in New Braunfels, but he lives and works elsewhere in Texas. ROA.17. He purchased the house at issue in this case because he wants to own property in the city and remain connected to the community. *Id*. Making the property available for short-term renting allows Rafael to afford the house, maintain flexibility in being able to use the house when he wants, and also offer others an opportunity to visit his hometown. *Id*. The house lies directly across from the entrance to Schlitterbahn, one of the largest waterparks in the country. *Id*. 415 N. Union Ave., available at Google Maps, https://tinyurl.com/2atyfuhb. It is not viable as a long-term rental. ROA.239.

Rafael's brother and sister-in-law, Enrico and Naomi Marfil, have similar desires. Making their property available for short-term renting allows them to remain a part of New Braunfels without leaving the house vacant when they are not using it. *Id.* Like Rafael, Enrico and Naomi's house is also right across the street from Schlitterbahn. 435 S. Union Ave., available at Google Maps, https://tinyurl.com/36u796cm. It is also not viable as a long-term rental. ROA.17.

Korey Rohlack owns property at 1265 E. Common Street. *Id,* available at Google Maps, https://tinyurl.com/5xjvrbpa. When he bought the property in 2017, it was an unimproved lot. ROA.17. Korey is an airline pilot. *Id.* He wants to build a home that he can rent out while he is away for work and use when he returns. *Id.* Because of the City's ban on short-term rentals, Korey's lot is still undeveloped. ROA.18.

Daniel Olveda owns a house at 1267 Common Street. *Id.* available at Google Maps, https://tinyurl.com/3bhhtfaw. On the advice of City officials Daniel applied for a variance to allow him to lease the house on a short-term basis. *Id.* Despite the City's own studies confirming that Daniel's property should be zoned commercial and the approval of the Planning and Zoning Commission, the City Council rejected the change, preventing Daniel from renting out his house for less than a thirty-day term. *Id.*

Douglas Wayne Mathes also owns property that he would like to lease out on a short-term basis. *Id.* 185 Cross River St., available at

Google Maps, https://tinyurl.com/4yjd8p7b. Douglas bought the house in 2011 as a way to earn sufficient income to buy a permanent home for his family. ROA.18. It is next-door to a grandfathered short-term rental and sits 50 feet from the entrance to Schlitterbahn. *Id*. Nevertheless, with New Braunfels' ban on short-term rentals in his area, Douglas is unable to rent his property for less than 30 days. *Id*.

Proceedings Below

The Property Owners filed suit alleging that the City's ban on short-term rentals unreasonably denied them the use of their property in violation of the Due Process Clause of the Fourteenth Amendment, the Due Course of Law provision of the Texas Constitution (Article 1, Section 19) as well as the Equal Protection clauses of the United States and Texas Constitutions. ROA.7–28 (complaint).

In particular, the Property Owners argued that short-term rentals are a well-established and judicially recognized residential use in Texas, and evidence shows that short term rentals do not produce more disturbances than other residential uses. ROA.10–12, 15. As such, the Property Owners argued that the City's decision to prohibit short-term rentals from all residential areas—including areas adjacent to commercial uses—was unreasonable and not supported by the police power. ROA.19–25.

The City filed a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6). ROA.46–99. The City did not dispute that short-term rentals have been

held to be consistent with residential use by the Texas Supreme Court. ROA.51–52. Nor did the City dispute that it had *no evidence* that short-term rentals are incompatible with residential use.

Instead, the City argued that the Property Owners' claims should be dismissed because, under rational basis scrutiny, zoning decisions are allegedly not subject to *any* factual rebuttal. ROA.59. The City argued further that it is sufficient under rational basis scrutiny that *some* members of the New Braunfels community "vigorously oppose" short-term rentals and that the City believes banning short-term rentals will preserve the residential character of neighborhoods. ROA.54. To allow any sort of factual inquiry in this case, the City argued, "would improperly subject this 'run-of-the-mill zoning dispute' to an additional administrative appellate review process." *Id.*

The Magistrate's Decision

The City's motion to dismiss was assigned to the Magistrate Judge, who granted the motion. ROA.278–95. The Magistrate began by holding that the right to lease one's home is not a fundamental right, and therefore that the Property Owners' Federal and State due process and equal protection claims were all subject to rational basis scrutiny. ROA.286.

Next, the Magistrate conceded that, at the motion to dismiss stage, the court was required to accept as true the Property Owners' factual allegations that there is no meaningful difference between short-term

rentals and long-term rentals with regard to nuisance behaviors like noise, parking, or trash. ROA.291.

Nevertheless, without citing any of this Court's recent rational basis cases, the Magistrate held that dismissal of the Property Owners' due process claims was appropriate for three independent reasons, each of which the Magistrate held would have been sufficient by itself. *Id*.

First, the Magistrate held that it was undisputed that "some members of the New Braunfels community" oppose short-term rentals and this opposition alone was sufficient to provide a legitimate government interest for banning short-term rentals. ROA.290–91.

Second, the Magistrate held that Ordinance serves an established zoning interest by "preserv[ing] the residential nature of certain areas of the city," despite the fact that Texas courts have repeatedly held that short-term rentals are residential in nature. ROA.291. Once again, the Magistrate concluded that any conflicting evidence on this issue would be irrelevant. *Id*. The City's unsupported statement was dispositive. *Id*.

Third, the Magistrate held that the Ordinance served a legitimate government interest by reducing nuisance behaviors like noise, parking, and trash in residential areas, despite the fact that short-term rentals do not actually impact those behaviors more than long-term rentals. *Id*. Again, the Magistrate held that whether short-term rentals "actually effect" these issues was irrelevant. *Id*. The City's claim that they did was dispositive under rational basis scrutiny. *Id*.

The Magistrate's approach to equal protection claims was similarly dismissive. He concluded that it was irrelevant whether there was any meaningful factual difference between short-term rentals and rentals for more than thirty days, because when crafting zoning ordinances "municipalities must draw the line somewhere." ROA.292.

Finally, because the Magistrate did not see any "meaningful distinction" between rational basis scrutiny under the Texas Constitution and the Fourteenth Amendment, he did not engage in any separate analysis of the Property Owners' claims under the Texas Constitution. ROA.288, 290.

The District Court's decision

In accord with Federal Rule of Civil Procedure 72(b)(2) the Property Owners filed objections to the Magistrate's decision. ROA.299–324. The Property Owners pointed out that the decision was contrary to Texas precedent and failed to even discuss this Court's more recent precedent in cases like *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013), which allows for a more evidence-based approach to rational basis scrutiny. ROA.303.

In response, the City doubled down on its arguments that facts are irrelevant in rational basis cases. ROA.335.

After almost 13 months, the District Court adopted the Magistrate's opinion in full without comment. ROA.428–29.

The Property Owners now appeal to this Court.

SUMMARY OF THE ARGUMENT

The Property Owners' challenges to the City's Ordinance were viable as pled and should not have been dismissed. When the City banned short-term rentals, it placed a significant limitation on traditionally recognized private property rights under Texas law. The Property Owners allege that this restriction does not bear a rational relationship to any legitimate government interest. To the contrary, the Property Owners claim that each interest the City claims the Ordinance serves is either not a legitimate interest, standing alone, or has no factual connection to short-term rentals and will not be addressed by a short-term rental ban. Under both this Court's precedent and Texas law, these allegations are sufficient to survive a motion to dismiss. Indeed, similar challenges to short-term rental bans brought in Texas courts have been permitted to proceed to discovery.

The district court, instead, dismissed the Property Owners' claims with prejudice based on five arguments, each of which is contrary to precedent and would render virtually any challenge to local land-use ordinances impossible. That judgment should be reversed.

First, the court held that "some members of the New Braunfels community oppose short-term rentals" and that this opposition alone is sufficient to provide a legitimate government interest for the Ordinance. But it is well-established that mere opposition by a portion of the population is not sufficient to justify a ban on a traditionally accepted use

of residential property. To hold otherwise would render every land-use ordinance *ipso-facto* constitutional. After all, if *no one* supported an ordinance, it would not pass.

Second, the court held that banning short-term rentals from residential neighborhoods served a zoning purpose by excluding non-residential uses from residential areas. The sole basis for this conclusion was the City's *ipse dixit* determination in its ordinance that short-term rentals are now incompatible. But Texas courts (and the majority of courts around the country) have held that short-term rentals are residential in nature. And there is no evidence that short-term rentals are incompatible with residential use. The City may not justify a ban on a well-established residential property use by simply relabeling the use as incompatible in its zoning code. Indeed, if unsupported government claims of incompatibility alone were dispositive on a motion to dismiss, no zoning ordinance could ever be declared unconstitutional.

Third, the court held that banning short-term rentals is rationally related to nuisance abatement, once again, solely because the City said so. But, as the Property Owners allege in their complaint, evidence shows that there is no meaningful difference between short-term rentals and long-term rentals with regard to nuisance behaviors. As the Supreme Court has explained, a city may not simply declare a use of property to be a nuisance unless it in fact has that character. To hold otherwise would insulate any zoning ordinance from constitutional

scrutiny, as nuisance abatement is virtually always acceptable under the police power.

Fourth, the court improperly dismissed the Property Owners' claims under Article 1, Section 19 of the Texas Constitution as virtually indistinguishable from their federal claims. But the Texas Constitution provides greater protection for property rights than its federal counterpart. Applying this heightened test, similar challenges brought to short-term rental bans in Texas Courts have been permitted to proceed to discovery. The court erred by not following these Texas cases interpreting Texas law.

Finally, the court improperly dismissed the Property Owners' Equal Protection claims. The Property Owners allege that short-term rentals are a judicially recognized residential use, and that there is no meaningful connection between homes rented for 30-days and any of the police power concerns the ordinance allegedly targets. Therefore, the City's decision to exclude 30-day rentals while allowing other rentals was arbitrary.

The court did not grapple with these concerns at all, but instead simply declared the distinction between short-term rentals and other rentals to be constitutional because the city "must draw the line somewhere." But while it is true that cities must "draw the line somewhere," that does not give cities *carte blanche* to draw the line wherever they want. Nor does it permit courts to forgo the ordinary

police power analysis mandated by the Equal Protection clause. The court therefore erred and should be reversed.

STANDARD OF REVIEW

A dismissal for failure to state a claim under Rule 12(b)(6) is reviewed *de novo*. *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 520 (5th Cir. 2016). The purpose of a motion to dismiss is not to determine "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). A motion to dismiss should be denied if the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

In Texas, "[t]he right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right." *Spann v. Dallas*, 235 S.W. 513, 515 (1921); *accord Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 310 (1795). It "does not owe its origin to constitutions." *Id.* It "existed before them." *Id.* It "is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights." *Id.*

Of course, property rights are not unlimited. Individuals may not use their property in ways that are harmful to others. *Lucas v. S.C.*

Coastal Council, 505 U.S. 1003, 1029 (1992). And local governments have considerable authority under their police powers to ensure that requirement is met. *See id.*

But local authority over property rights is also "not unlimited." *Wash. ex. rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928). Restrictions on property rights must be firmly based in the police power, not mere majority preference. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). And even under rational basis scrutiny, property owners may present evidence to refute government claims that the elimination of long-standing property rights serves a legitimate government interest. *Id.* *See also Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013). Mere government declarations that a regulation serves a legitimate interest have never been sufficient to win the day. *Id.*

This case presents a straightforward application of these principles. When the City banned short-term rentals, it placed a significant limitation on private property rights. Like other property owners who have successfully challenged short-term rental ordinances, the Property Owners here seek the opportunity to present evidence to challenge the City's factual assertions that its ban on short-term rentals advances a legitimate government interest.

In dismissing this case, the district court denied the Property Owners access to this baseline protection of their property rights, by

holding, in effect, that the facts on the ground have no relevance to whether a prohibition on property rights is unconstitutional. ROA.291.

As explained below, this approach is contrary to this Court's precedent, contradicts established Texas law, and would virtually eliminate judicial protection for *any* property right, not just short-term rentals. The district court's judgment should be reversed.

I. THE PROPERTY OWNERS PLED A VIABLE CLAIM UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Property Owners' first claim is that the ban on short-term rentals has deprived them of liberty and property rights in violation of the Due Process clause of the Fourteenth Amendment. ROA.21–25. To state a viable claim under the Due Process clause, a plaintiff must allege: (1) a liberty or property interest that is protected by the Fourteenth Amendment; and (2) that the restriction on that interest is not rationally related to a legitimate government interest. *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006). The Property Owners have met this burden.

A. The Property Owners sufficiently pled a property interest entitled to protection under the Fourteenth Amendment

First, there is no dispute that the City's short-term rental ban implicates liberty and property interests subject to protection by the Fourteenth Amendment. Indeed, while the District Court held that the

City's infringement on the Property Owners' rights was reasonable, it did not dispute that banning short-term rentals implicates liberty and property rights protected by the Fourteenth Amendment.

This makes sense. In Texas, the right to own property includes the right to use it. *Spann*, 235 S.W. at 515. As the Texas Supreme Court put it, "[p]roperty in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal." *Id.* This view of property predates Texas to the time of William Blackstone. As Blackstone put it, "[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions . . . ." William Blackstone, *Commentaries on the Laws of England*, 1:134 (1765). *See also Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435 (1982) (The right to own property includes the rights "to possess, use and dispose of it.").

Implicit in the right to use one's property is the right to lease that property to others. *Zaatari v. City of Austin*, 615 S.W.3d 172, 190–91 (Tex. App.—Austin, 2019) (citing *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (Tex. 1890)). Indeed, the recognition that the right to lease is inherent in property ownership predates the ratification of the Fourteenth Amendment. Writing in 1856, New York's high court famously noted that "a law which should make it a crime for men either to live in, or rent, or sell their houses" would deprive an individual of property without due process of law, in violation of that state

constitution's Due Process clause. *Wynehamer v. People*, 13 N.Y. 378, 420 (1856). The Supreme Court of the United States subsequently applied similar reasoning to the Fourteenth Amendment. *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (holding that the right to lease is an inherent property and liberty right protected by the 14th Amendment).

Texas courts have repeatedly held that this "right to lease" includes the right to lease one's home on a short-term basis. *Zaatari*, 615 S.W.3d at 190-91; *City of Grapevine v. Muns*, 651 S.W.3d 317, 346–47 (Tex. App.—Fort Worth, 2022); *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 578 (Tex. App.—Houston, 2015). And the Texas Attorney General has confirmed this view. Tex. Att'y Gen. Op. No. KP-0308 (2020) at *2, https://tinyurl.com/yzw55jmb. Indeed, as explained above, short-term rentals have been part of Texas residential communities for more than a century. This is sufficient to establish the first element of a 14th Amendment claim.

B. The Property Owners sufficiently pled that the ordinance is not rationally related to a legitimate government interest.

Having established that banning short-term rentals implicates rights protected by the Fourteenth Amendment, the next question is whether the City's elimination of short-term rentals in residential areas is rationally related to a legitimate government interest. *Mikeska*, 451 F.3d at 379.

While this standard is deferential, it is not "toothless." *Harris County v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 323 (5th Cir. 1999). Rational basis review is fact intensive. *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, 945 F.3d 206, 225 (5th Cir. 2019). The review "places no affirmative evidentiary burden on the government, [but] plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality." *St. Joseph Abbey*, 712 F.3d at 223. The government action "must rationally relate to the state interests it articulates." *Id.* And the Court must examine the government's claimed "rationale informed by the setting and history of the challenged rule." *Id.*

Here, the Property Owners alleged that the City's decision to prohibit short-term rentals was not rationally related to a legitimate interest because: (1) short-term rentals are a long-standing and judicially recognized residential use of property in Texas, (2) evidence shows that short-term rentals do not undermine residential character or cause more nuisance issues than long-term rentals, and (3) the City's decision to single out short-term rentals from other residential uses is therefore arbitrary and unreasonable. ROA.19–25.

As discussed *infra*, this conclusion is in accord with other Texas cases that have permitted challenges to short-term rental Ordinances to proceed to discovery. *See, e.g.*, *City of Grapevine*, 651 S.W.3d 317;

Zaatari, 615 S.W.3d 172. It should have been sufficient to survive a motion to dismiss here.

In response, neither the City, nor the court below, disputed the fact that short-term rentals are well established, or that there is no evidence that short-term rentals are incompatible with residential use. ROA 51–52, 291. Rather, both the City and the court below argued that any evidence with regard to government interest was irrelevant. ROA.59. It was enough that the City *claimed* that its ordinance advanced legitimate interests. ROA 338.

But this approach is flatly precluded by this Court's precedent. When it comes to land-use regulations, government *ipse dixit* that a regulation serves a legitimate government interest is not sufficient to prevail on summary judgment, much less at the motion to dismiss stage. *See Mikeska*, 451 F.3d at 381.

In *Mikeska*, this Court heard a substantive due process challenge to the City of Galveston's refusal to connect utilities to homes located on the beach. The city argued, without evidence, that this local policy served a legitimate interest in "protecting public access to public beaches"—a fact the plaintiffs disputed. *Id*. at 380. The district court nonetheless granted summary judgment in the city's favor based solely on the city's unsupported claim. *Id*. This Court reversed.

In explaining its judgment, this Court noted that the "rational basis test requires not only a legitimate state interest, but also that the

government action is rationally related to furthering that interest." *Id.* The city's "just trust us" approach only met half of that equation. It established that there was a legitimate state interest at stake—the protection of public access to the public beach—but there was "nothing in the record" to suggest how the city's ban on utility connections advanced that interest. *Id.* at 381. To be sure, this Court noted, "facts may come to light that indeed serve to indicate that there was a rational basis for the government's action." *Id.* at 380. For example, evidence could be produced that "reconnecting the utilities involved hanging obtrusive wires or placing unsightly water meters that would discourage public use of the beach." *Id.* at 381. However, there was "no indication of such facts in the record at th[e] summary judgment stage, and [this Court] decline[d] to invent them." *Id.* Summary judgment in favor of the city was therefore improper. *Id.*

So too here. It may be the case that residential zoning and nuisance abatement are legitimate government interests. But the City admits that there is nothing in the record showing that banning short-term rentals is rationally related to that interest. ROA.59. To the contrary, at the motion to dismiss stage, the court must accept the Property Owners' allegations as true that short-term rentals do not undermine residential character or cause more nuisance issues than long-term rentals. ROA.10–12, 15. Dismissal is therefore precluded by this Court's precedent.

The district court nonetheless dismissed the Property Owners' claims based on three arguments, each of which, the court held, would be sufficient, standing alone, to uphold the Ordinance. ROA.291. As explained below, each of these holdings are contrary to this Court's precedent and would radically reshape the way courts protect private property rights.

1. Mere opposition by "some members" of the community is not a sufficient government interest to eliminate well established property rights

First, the district court held that any factual development was unnecessary because it was undisputed that "some members of the New Braunfels community oppose short-term rentals" and this opposition *alone* is sufficient to provide a legitimate government interest for banning short-term rentals. ROA.291.

But mere "objections [by] some fraction of the body politic" are not a sufficient basis to prohibit a well-established use of private property. *See City of Cleburne*, 473 U.S. at 448. While the police power over property is broad, it "is not unlimited." *Roberge*, 278 U.S. at 121. Even a popular restriction on private property rights "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). And the court must look at the facts in the record to ensure that burden is met. *Id*. at 188–89. This remains true whether the property restriction

is supported by a segment of the population, a bare majority, or every other person in the city except the property owner affected. A property right, like any other right protected by the Constitution, "can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736–37 (1964). A contrary conclusion would render the Constitution's protections for property rights mere nullities. After all, if *no one* supported an ordinance, it would not pass.

The district court therefore erred as a matter of law by holding that mere opposition by a segment of the community, without more, is a sufficient rational basis to justify the City's Ordinance.

2. Texas precedent establishes that excluding short-term rentals from residential areas does not advance a zoning interest, because short-term rentals are a residential use

Second, the district court held that factual development is irrelevant because the City claimed that the short-term rental ordinance serves an established zoning interest by "preserv[ing] the residential nature of certain areas of the city." ROA.291.

But Texas courts have held that short-term rental bans do "not advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature." *Zaatari*, 615 S.W.3d at 190. *See also JBrice Holdings*, 644 S.W.3d at 185 (noting in the context of a deed restriction that short-term rentals are residential in nature); *Tarr*,

556 S.W.3d at 291 (same). *But see Draper v. City of Arlington*, 629 S.W.3d 777, 792 (Tex. App.—Fort Worth, 2021).

This is in accord with numerous courts around the country. *See Hawai'i Legal Short-Term Rental All. v. City & Cnty. of Honolulu*, No. 22-cv-247-DKW-RT, 2022 U.S. Dist. LEXIS 187189, *16–18 (D. Haw. Oct. 13, 2022) (cataloging nineteen cases across the country holding that short-term rentals are a residential use and only five to the contrary).

This makes sense. "Zoning laws are designed to control types of uses in particular zones and are not ordinarily concerned with periods of occupancy or the property interest of the occupants." *United Prop. Owners Asso. of Belmar v. Borough of Belmar*, 447 A.2d 933, 936 (App. Div. 1982) (holding short-term rental ban unlawful). The question of whether a use is residential or not is determined more "by *what* is being done at a residence than *for how long*." *Hawai'i Legal Short-Term Rental All.*, 2022 U.S. Dist. LEXIS 187189, at *18 (emphasis in original). In the case of short-term rentals, short-term tenants use the home the same way that long-term tenants might. They "relax, eat, sleep, bathe, and engage in other incidental activities." *See Tarr*, 556 S.W.3d 274, at 291, n.14 (quoting *Slaby v. Mt. River Estates Residential Ass'n*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012). Short-term rentals are therefore, by definition, "residential." *Id.*

That is not to say that short-term rentals may never be regulated at all. But if a city claims that the basis for that regulation is that short-

term rentals are "non-residential," or "inconsistent with residential use" there must be *some* factual basis for this re-defining of Texas law. *See Mikeska*, 451 F.3d at 381. "Merely asserting—and accepting—'Because government says so' is incompatible with individual freedom." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69,106 (Tex. 2015) (Willett, J., concurring).

Here, the Property Owners allege that there is *no evidence* showing that short-term rentals have somehow become incompatible with residential use after more than a century of common acceptance in Texas—a fact that the City did not dispute below. ROA.25. Instead, the City relies solely on the fact that it chose to re-label short-term rentals as incompatible in its ordinance. But the City "does not have unlimited power to redefine property rights" through mere labels. *See Loretto*, 458 U.S. at 439. Indeed, if labels alone were sufficient, *any* prohibition on a property use would be *ipso facto* constitutional, as long as the City labeled the prohibited use as incompatible in its zoning ordinances. *See Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200–01 (9th Cir. 1998). For example, a city could prohibit all rental housing, prohibit all two-bedroom homes, or prohibit single adults from living in residential areas, and those prohibitions would be wholly unchallengeable under the district court's standard so long as the zoning ordinance labeled those uses "non-residential." *See*, *id*.

Thankfully, this is not the law. Even under rational basis scrutiny, property owners have the right to present evidence in court to rebut a city's claim that a long-standing residential use of property has magically transformed into something else. *Ipse dixit* from the city is not dispositive. The district court's judgment on this point should be reversed.

3. The City may not circumvent review of its ordinance by labeling it a nuisance abatement measure.

Finally, the district court held that discovery was unnecessary to resolve this case because the City claimed in its ordinance that prohibiting short-term rentals would help to prevent nuisance concerns like traffic and noise. ROA.290–91.

But, as the Property Owners properly allege in their complaint, short-term rentals *do not* produce more nuisances than other residential uses—a fact that has been confirmed by Texas Court challenges and multiple independent studies. ROA.25; *Zaatari*, 615 S.W.3d at 190; *see S*tatement of Facts *supra*. Indeed, the City below did not dispute the fact that there is *no data* showing that short-term rentals produce more nuisance behaviors than other residential uses in New Braunfels. ROA.165.

The district court brushed these facts aside, holding that it was irrelevant whether short-term rentals "actually affect" the amount of

nuisance behaviors in neighborhoods. ROA.291. According to the district court, the City's mere assertion that its short-term rental ban will result in nuisance reduction is sufficient to dismiss the case. *Id.*

But it is a fundamental principle of constitutional law that a city may not, by mere "declaration make [a property use] a nuisance unless it in fact ha[s] that character." *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 505 (1870). *See also Lucas*, 505 U.S. at 1031-32 (1992); *Houston v. Lurie*, 224 S.W.2d 871, 874 (1949) ("even the State may not denounce that as a nuisance which is not in fact."). Instead, when such claims are disputed, Courts have a duty to review the facts on the ground. *See Mikeska*, 451 F.3d at 380-81.

In *Yates,* for example, the Supreme Court prevented the enforcement of an ordinance that prohibited property owners in certain areas from constructing docks on their property. 77 U.S. at 505. The City argued that its ordinance declared that docks built in certain areas were a nuisance and that this legislative determination and line-drawing should be dispositive. *Id.* at 505. The Court rejected this approach, explaining that while cities had the power to restrict nuisance activities under the police power, "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.* To hold otherwise, the Court explained, "would place every house, every business, and all the property of the city,

at the uncontrolled will of the temporary local authorities." *Id.* *See also F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F. Supp. 3d 879, 891 (E.D. Mich. 2020) ("a municipality may not immunize its local zoning ordinance from constitutional challenge by declaring that any violation of the zoning code is a nuisance.").

Indeed, under this Court's precedent, even a "seemingly plausible" justification for a law will not be accepted if it is contrary to the facts on the ground. *St. Joseph Abbey*, 712 F.3dat 223. For example, in *Harris County v. Carmax Auto Superstores Inc.*, –this Court evaluated a challenge to a law prohibiting car sales on Sundays. 177 F.3d 306, 323–24 (5th Cir. 1999). The government argued that the sales ban served a legitimate government interest because reducing the work week for salesmen would arguably reduce car prices paid by consumers. *Id.* While this Court held that the government's argument was sufficient at the preliminary injunction stage, it noted that the plaintiffs had alleged that the "cost per car sold is lower with a seven-day week than with a six-day week" and warned the district court that when it considered the issue on the merits it would have to determine whether the government's claimed interest in price reduction was supported by the record. *Id.*

Similarly, in *St. Joseph Abbey*, this Court invalidated a Louisiana statute that required individuals to become licensed funeral directors as a condition of selling handmade caskets. 712 F.3d at 218. The state argued that its licensing regime was rationally related to a legitimate

state interest in policing "deceptive sales tactics" regarding caskets. *Id* at 225. But this Court did not merely accept the state's claim that its law was sufficiently related to a police power interest. Instead, the Court looked at the record. In doing so, this Court noted that the record was "bereft of evidence indicating significant consumer injury caused by third-party sellers." *Id*. Moreover, even if there were some connection between third-party sellers and deceptive practices, this Court noted that Louisiana law "already police[d] inappropriate sales tactics by *all* sellers of caskets." *Id*. (emphasis added). This Court therefore looked with a jaundiced eye at the state's claims that the purpose of the licensing regime was to prevent deceptive practices. *Id*.

So too here. This Court is not required to merely accept the City's unsupported claim that a ban on short-term rentals is rationally related to nuisance abatement. *Yates*, 77 U.S. at 505; *Lucas*, 505 U.S. at 1031–32; *Mikeska*, 451 F.3d at 380-81; *Harris County*, 177 F.3d at 323–24; *Houston*, 224 S.W.2d at 874. The district court therefore erred by dismissing the Property Owners' claims prior to discovery based solely on the *ipse dixit* of the City.

II. THE PROPERTY OWNERS PLED A VIABLE CLAIM UNDER ARTICLE 1, SECTION 19 OF THE TEXAS CONSTITUTION

If there were any doubt as to whether the Property Owners had pled valid claims under the Due Process clause of the Federal Constitution, that doubt vanishes with regard to their claims under the Texas

Constitution. Indeed, multiple Texas courts evaluating Texas constitutional challenges to local prohibitions on short-term rentals have allowed those challenges to proceed to discovery. *See, e.g.*, *City of Grapevine*, 651 S.W.3d 317; *Zaatari*, 615 S.W.3d 172; *Vill. of Tiki Island*, 463 S.W.3d 562.

Unless and until the Texas Supreme Court says otherwise, the district court in this case should have been bound by those decisions. *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940) (citations omitted) (When a state's highest court has yet to speak on an issue of state law, a federal court should "follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently."); *Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501, 505 (5th Cir. 2019) (same).

Moreover, Texas courts' willingness to allow short-term rental challenges to proceed to discovery makes sense. For the most part, Texas case law interpreting Article 1, Section 19 tracks the federal interpretation of the Fourteenth Amendment. *NCAA v. Yeo*, 171 S.W.3d 863, 867 (Tex. 2005). Accordingly, the arguments above regarding the Fourteenth Amendment apply with equal force to Texas Constitution.

However, Article 1, Section 19 of the Texas Constitution also provides greater protections for property rights than its federal counterpart in two important ways. First, the rational basis test in Texas is more rigorous than federal law. *Patel v. Tex. Dep't of Licensing &*

Regulation, 469 S.W.3d 69, 87 (Tex. 2015). Restrictions on individual liberty or private property must not only be rationally related to a legitimate government interest, but also must not be unduly burdensome given the real-world government interest at stake. *Id*.

In other words, Texas law requires at least some consideration of proportionality as well as rationality. *Id*. at 90. If the "loss to the property owner affected, in proportion to the good accomplished [by the ordinance]" is unreasonable, then the ordinance must fail. *W. U. Place v. Ellis*, 134 S.W.2d 1038, 1040 (Tex. 1940); *Id*. at 1041 ("the seriousness of the restriction upon the private right is to be considered in balance with the expediency of the public interest."). This analysis must be conducted based on the facts in the record and "all of the surrounding circumstances." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932–33 (Tex. 1998); *Patel*, 469 S.W.3d at 87 (The court must "consider the entire record, including evidence offered by the parties."); *City of Dallas. v. Stewart*, 361 S.W.3d 562, 575-76 (Tex. 2012) (Any "determination regarding the police power, is a question of law and not fact that must be answered based upon a fact-sensitive test of reasonableness.").

Second, Texas law is more restrictive than federal law on the scope of the police power over private property rights. While the United States Supreme Court expanded the scope of the police power over property somewhat in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), Texas Courts have not uniformly followed that approach. Under the Texas

Supreme Court's decision in *Spann*, the zoning power is limited to abating common law nuisances and truly incompatible or harmful uses of property. *Spann*, 235 S.W. at 515. As that Court has noted, the police power "may be invoked to abridge the right of the citizen to use his private property when such use will endanger public health, safety, comfort or welfare—and *only* when this situation arises." *Lombardo v. Dallas*, 73 S.W.2d 475, 479 (1934) (emphasis added). A city may not ban a common use of property merely because the City deems the use contrary to some amorphous public good or aesthetic sense, or merely because the use it is "repugnant to the sentiments of a particular class." *Spann*, 235 S.W. at 516. *See also*, *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 466 n.10 (Tex. 1997) (citing *Spann* for the proposition that an ordinance would be unconstitutional if it is "not to protect the public health, safety or welfare from any threatening injury from a store, but to satisfy a sentiment against the mere presence of a store in a residence part of the City.").

In *Euclid,* the United States Supreme Court explicitly questioned Texas's approach to the police power in *Spann* as potentially too narrow. *See Euclid*, 272 U.S. at 391 (questioning *Spann*). But, despite this federal criticism, Texas courts still apply *Spann* to this day. *See, e.g., Powell v. City of Houston*, 628 S.W.3d 838, 867 n.37 (Tex. 2021) (four-justice concurring opinion noting local land use regulations are subject to *Spann*); *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 162–63

(Tex. 2010) (Willett, concurring) (citing *Spann*); *Du Puy v. Waco*, 396 S.W.2d 103, 107 (Tex. 1965) (citing *Spann*); *Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953) (police power limited to incompatible uses); *Lombardo*, 73 S.W.2d at 479 (applying *Spann*); *San Antonio v. Zogheib*, 101 S.W.2d 539, 541 (Tex. 1937) (applying *Spann*); *Zaatari*, 615 S.W.3d at 200 (quoting *Spann*). As the Texas Supreme Court is fond of reminding everyone, unlike the Federal Constitution, the Texas Constitution "enshrine[s] landownership as a keystone right, rather than one relegated to the status of a poor relation." *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (citations omitted).

Applying this test, the Property Owners' claims are clearly sufficient to survive a motion to dismiss. As discussed *supra*, short-term rentals are a well-established residential use of property in Texas, and there is no evidence that local conditions in New Braunfels are unique in any way that would justify a claim that short-term rentals inherently produce more nuisance behaviors than their long-term counterparts. ROA.25. To the contrary, the evidence suggests that there is no meaningful difference between short-term rentals and other residential uses when it comes to nuisances. *Id.* Moreover, even if there were some marginal correlation between nuisances and short-term rentals—a factual determination that would be inappropriate at the motion to dismiss stage—banning short-term rentals would still be

unconstitutional because the elimination of a well-established property right is wholly disproportionate and unduly burdensome given the minor government interest at stake. *Patel*, 469 S.W.3d at 87. As the Third Court of Appeals made clear in other contexts "nothing in the record supports a conclusion that a ban on [STRs] would resolve or prevent the stated concerns. In fact, many of the concerns cited by the City are the types of problems that can be and already are prohibited by state law or by City ordinances banning such practices." *Zaatari*, 615 S.W.3d at 189. Fundamental property rights cannot be eliminated for such marginal, hypothetical benefits.

Because the district court failed to grapple with this case law—indeed it failed to even discuss it—its decision dismissing the case was in error and should be reversed.

III. THE PROPERTY OWNERS PLED A VIABLE CLAIM UNDER THE EQUAL PROTECTION CLAUSE

The district court also improperly dismissed the Property Owners' Equal Protection claims under the United States and Texas Constitutions. In contrast to a "due process action, which looks solely to the government's exercise of its power vis-a-vis the appellants, an equal protection claim asks whether a justification exists for the *differential* exercise of that power." *Mikeska*, 451 F.3d at 381 (emphasis in original). To bring an equal protection claim, the property owner must show that the difference in treatment with others similarly

situated was irrational. *Id.* Or, as the Texas Supreme Court put it, differential treatment must be "based on a real and substantial difference having relationship to the subject of the particular enactment." *R.R. Com. of Texas v. Miller*, 434 S.W.2d 670, 673 (Tex. 1968). A land-use restriction "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary." *City of Cleburne*, 473 U.S. at 446.

Like the Due Process clause, this Court's analysis of whether the classifications drawn rationally relate to a legitimate government interest should be based on the record. *St. Joseph Abbey*, 712 F.3d at 223. For example, in *Hunt v. San Antonio*, the city of San Antonio sought to rezone two parcels based on alleged increased traffic in the area. 462 S.W.2d 536, 540 (Tex. 1971) The Appellants in that case challenged the rezoning as violating the equal protection clause because there was no evidence of an increase in traffic in that area sufficient to treat those lots differently than adjacent neighborhoods. *Id.* While the Court assumed, arguendo, that an increase in traffic could be a legitimate reason to rezone an area, it did not simply defer to the City's claims of traffic increases. *Id.* Instead, the Court looked to the actual evidence, and concluded that "there was no evidence of a 'tremendous increase in traffic.'" *Id.* Accordingly, the distinction drawn by the city was not based on a "real and substantial" difference and the rezoning was unconstitutional. *Id.*

Here, the question is whether the City's decision to treat rentals of less than 30-days differently than rentals of more than 30-days bears a rational connection to the City's claimed interests in residential character and nuisance abatement. As explained above, it does not. Short-term rentals are a judicially recognized residential use, and at the motion to dismiss stage, the court must accept as true the Property Owners' assertion that there is no connection between increased nuisance behavior and 30-day rentals. *Twombly*, 550 U.S. at 572 ("a judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint.") (internal citations removed). That should have been sufficient to survive a motion to dismiss. *See Mikeska*, 451 F.3d at 381–82.

Rather than deal with these questions, the district court simply dismissed the Property Owners' claims holding that while distinguishing between 30 and 31-day rentals may involve some arbitrariness, "municipalities must draw the line somewhere." ROA.292.

But that has never been the standard in zoning cases. It is true that courts do not require "mathematical nicety" from cities. *Heller v. Doe*, 509 U.S. 312, 321 (1993). And cities often do, in fact, have to draw the line somewhere. But that does not mean that *any* line a city choses to draw is automatically constitutional. Indeed, even *Heller*—the case upon which the district court relied here—did not take such a nihilistic approach to rational basis review. Instead, the Court stated 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. *See also*, *City of Cleburne*, 473 U.S. at 450 (looking to evidence to determine rationality of disparate treatment); *St. Joseph Abbey*, 712 F.3d at 223 (same); *Mikeska* 451 F.3d at 381–82 (same); *Hunt*, 462 S.W.2d at 540 (same). To hold otherwise would mean that every zoning ordinance is *ipso facto* constitutional, because every zoning ordinance involves line-drawing.

Here, the Property Owners seek the opportunity to prove, based on the record, that the line the City drew with regard to short-term rentals was not rationally related to a government interest. The district court erred by denying them that opportunity.

CONCLUSION

The founders of our country believed that the right perhaps most in need of judicial protection from majority rule was the right to own and use property. Not only is the protection of property rights essential to human flourishing; property rights are the rights perhaps most likely to be trampled if the democratic process is left to its own devices. *See* John Adams, *Defense of the Constitutions of Government of the United States*, 1 THE FOUNDERS' CONSTITUTION 591 (P. Kurland & R. Lerner eds. 1987).

To be sure, American jurisprudence has not lived up to this ideal. Since the 1930s, private property rights have been largely demoted to second-tier status, with only marginal protections. But however

inadequate those protections are as a matter of original public meaning, those post-1930s protections are still *real*. When cities eliminate or restrict well-established uses of property, this Court's precedent gives property owners a chance to argue—*based on the record*—whether those restrictions are justified under the police power. To hold otherwise would convert rational basis scrutiny from an already government friendly test, to a practical immunity from suit.

The district court's decision below removed even these meager protections for private property rights. In doing so, it erred. This Court should therefore reverse the district court's judgment granting the City's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Chance Weldon
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,892 words. This brief also complies with the type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: December 13, 2022 */s/Chance Weldon*
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