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

RAFAEL MARFIL, VERGE PRODUCTIONS LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY ROHLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES,	§	
***Plaintiffs*,**	§	**Civil Action No. 6:20-cv-248-ADA-JCM**
v.	§	
THE CITY OF NEW BRAUNFELS, TEXAS,	§	
***Defendant*.**	§	

PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The plaintiff homeowners ("Homeowners") ask the court to reconsider the Magistrate Judge's Report and Recommendation ("R&R") and file these objections, as authorized by Federal Rule of Civil Procedure 72(b)(2). Objections are made to the Magistrate Judge's recommendations (1) that the Homeowners' several constitutional claims be dismissed, and (2) that leave to amend the complaint be denied.

TABLE OF CONTENTS

I. Introduction

The Homeowners seek to rent out their homes to whomever they wish, for whatever duration they wish, free from government interference, intrusion, surveillance, and monitoring. Such leasing freedom, a bedrock of liberty,[1] is now being undermined by unproven claims of harm which are, at bottom, pretexts for the deprivation of constitutionally-protected rights. Even if the asserted harms were proven, there are less drastic ways for cities to address them – as indeed the city here has already done.

People come and go from houses, and for all sorts of reasons. They also drive to and from them and park at them. They play in the yard and drink beer on the porch. They behave badly sometimes, irking their neighbors. They are owners, family members, renters, guests, and friends.

[1] *See generally* Thomas Piketty, *Capital in the Twenty-First Century* Ch. 1 (2014) (the traditional basis of social organization and industrial development in Western societies is those who pay land rents and those who receive them).

The owner of a home is entitled, by the nature of fee ownership, and at the merest whim, to decide to go somewhere else so that friends, family, guests, or acquaintances can take over the occupancy for a time. People own second homes precisely to stay in them occasionally. But can that owner, however, effectively be required to leave the home vacant at other times? It is conceded that, from the perspective of a neighbor peering through the curtains to monitor the comings-and-goings next door, the people coming and going may not be permanent residents. They may look different, or drive a Harley, or have ten children. But that is the nature of residential home occupancy: owners – not neighbors, and not the government – get to decide who comes and goes from their homes and for how long.

Some cities are trying to take away this fundamental freedom to dictate the occupancy of one's own home by prohibiting owners from using their own homes intermittently and then renting them out at other times. In so doing, these cities also seek to bar renters from enjoying the same freedoms of home occupancy and enjoyment which owners, family, guests, and friends have. The Austin Court of Appeals rejected such ordinances on the basis that leasing for short-terms is a protected right.[2] The Fort Worth Court of Appeals very recently said something even more profound: there is no need to hold that leasing for short terms is a fundamental right because leasing, broadly, is a fundamental right already.[3] That is because owners of real property, by virtue of having the right to determine their own comings and goings, are entitled to convey the possessory interest when they are not staying in their own homes. *An owner's decision about when to lease is what leasing intrinsically is.*

---

[2] *Zaatari v. City of Austin*, 615 S.W.3d 172, 191-92 (Tex. App. – Austin 2019, pet. denied).

[3] *City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 WL 3419675 (Tex. App. – Fort Worth Aug. 5, 2021, no pet. h.).

For that reason, ordinances which take away a property owner's right to decide who occupies a home and for how long are repugnant to basic human freedoms enshrined in Anglo-American history and jurisprudence. Government, in our tradition, does not, except in exigent circumstances, have the power to decide who is allowed to stay in a home, or for how long, or even whether the owner is entitled to earn rent. Government can regulate leasing, certainly, for the same reason it can regulate escape routes in shirt factories. Concerning leasing, what matters is whether those who stay in a home are engaging in the ordinary incidents of residential occupancy, as opposed to running a business there or plotting a bank heist. That core, historically-resonant choice of *who gets to stay in a private home for how long*, for money or for free, for days or years, is foundational. This court should reject the Report and Recommendation of the Magistrate Judge and allow this case to proceed.

II. The Homeowners are entitled to discovery under controlling federal precedent.

Federal precedent requires this case to proceed to discovery. The complaint alleges unequivocally that the City has *no* findings, reports, or data to support the ban on short-term leasing in residential areas.[4] The Magistrate Judge, however, concluded that "perceived" harms are enough, that neighborhood opposition is enough, and so the Homeowners are not entitled to prove there is no evidence or affirmatively *disprove* the claims of "perceived" harm. That was error.

The Magistrate Judge took at face value, without analysis: (1) the complaint's reference to City-convened workshops which addressed "protection of residential neighborhoods,"[5] and (2) the STR ordinance's preamble, which states as follows:

> 144.5.17-1.Purpose. This section is intended to provide a procedure to allow the rental of private dwellings to visitors on a short-term basis, while

[4] Complaint ¶ 28.

[5] Complaint ¶ 28.

> 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.

[Doc. 20 at 13-14]. The Magistrate Judge did not allow for the possibility that the City has nothing to back up these claims, or that the Homeowners will affirmatively disprove them. Yet disproving claimed harms is exactly what happened in cases controlling on this court.

Rational basis scrutiny under Texas law and binding Fifth Circuit precedent requires that courts allow plaintiffs to refute even facially plausible government justifications with evidence obtained in discovery. The Magistrate's dismissal of the case without discovery, without even addressing this well-established case law, is enough for reversal.

To decide a rational basis claim under the Due Course of Law provision "will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties."[6] For example, in *Patel v. Texas Dep't of Licensing & Regul.*, the plaintiffs were able to refute the government's facially plausible claims that the requirements for cosmetology licensure were rational solely by looking to record evidence from discovery.[7] Similarly, in *Humble Oil & Ref. Co. v. Georgetown*,[8] the court held that discovery and a trial was appropriate to determine whether facially plausible government justifications for gasoline station regulations were, in fact, sufficient to

---

[6] *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015).

[7] *Id.* at 88-90.

[8] *Humble Oil & Ref. Co. v. Georgetown*, 428 S.W.2d 405 (Tex. Civ. App. – Austin 1968, no writ) (overturning ordinance limiting size of gasoline delivery trucks by considering actual economic consequences and relying on expert's testimony that the regulation did not promote safety).

survive a Due Course of Law challenge under rational basis. Looking at the facts in the record, the court concluded that the regulations were unconstitutional.

This is likewise true under the more lenient federal rational basis standard.[9] In *St. Joseph Abbey*, plaintiffs were able to refute facially plausible claims that local casket regulations were justified by public health concerns, based on information derived from discovery, including the fact that Louisiana allowed individuals to be buried in a bag, or in no casket at all.[10] As the court noted, rational basis scrutiny "does not demand judicial blindness" to the facts.[11] Nor does it require that the court merely accept, without investigation or discovery, "abstraction for hypothesized ends" or "post hoc hypothesized facts."[12] Rather, Plaintiffs must be allowed to "negate a seemingly plausible basis for the law by adducing evidence of irrationality."[13] This requires discovery.[14]

In *City of Los Angeles v. Patel*, which the Magistrate Judge cited but failed to analyze, a facial challenge to a statute was upheld following a bench trial and evidence.[15] The case forcefully establishes the principle that "a plaintiff must *establish* that a 'law is unconstitutional in all its applications.'"[16] That necessarily requires discovery. The Magistrate Judge's refusal to allow any discovery here is doubly problematic because courts that have heard challenges to STR ordinances have generally found that the record

[9] *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

[10] *Id.* at 226.

[11] *Id.* at 226.

[12] *Id.* at 223.

[13] *Id.*

[14] *See also Brantley v. Kuntz*, 98 F. Supp. 3d 884, 891 (W.D. Tex. 2015) (noting that St. Joseph Abbey applies and requires evaluation of evidence.).

[15] *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 414, 135 S. Ct. 2443, 2448, 192 L. Ed. 2d 435 (2015).

[16] *Id.* at 418 (emph. added).

evidence ultimately does not support the alleged government interests put forward to justify the ordinances.[17]

III. The Magistrate Judge erred in relying on evidence of the existence of opposition to STR's.

The Magistrate Judge approved as the rationale for the STR ban evidence that community opposition exists. This does not rise to the level of a rationale at all.

Under Texas law, the "right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right."[18] While cities have the authority under the police power to regulate this right in order to protect public health and safety, the police power may only restrict property rights when those threats are present.[19] Cities may not restrict liberty or property rights merely to serve the predilections of a segment of their citizens.[20]

The Due Course of Law and Equal Protection clauses of the Texas Constitution exist to ensure that this promise of "constitutional – that is, *limited* – government" is kept.[21] They require that, at a minimum, restrictions on liberty or private property rights be based on real world public harms and even then, not be "unreasonably burdensome" given the evidence of the government interest at stake.[22] This requires that courts "consider the entire record, including evidence offered by the parties."[23] If the alleged

---

[17] *See, e.g., Zaatari*, 615 S.W.3d at 191-92 (Tex. App. – Austin 2019, pet. denied) ("the record before us shows that the ordinance serves a minimal, if any, public interest while having a significant impact on property owners' substantial interest in a well-recognized property right.").

[18] *Zaatari*, 615 S.W.3d at 200 (quoting *Spann v. City of Dallas*, 111 Tex. 350, 356 (Tex. 1921)); *see also Barber v. Texas Dep't of Transp.*, 49 S.W.3d 12, 18 (Tex. App.—Austin, 2001), *rev'd on other grounds*, 111 S.W.3d 86 (Tex. 2003).

[19] *Lombardo v. City of Dallas*, 73 S.W.2d 475, 479 (1934).

[20] *Id.* ("nor can the right of a person to use his property in a lawful manner be made to depend upon the unrestrained predilection of other property owners."); *Spann*, 111 Tex. at 516 ("A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class.").

[21] *Patel*, 469 S.W.3d at 95 (emphasis in original).

[22] *Id.* at 87.

[23] *Id.*

harm does not exist, or if the restriction is not sufficiently linked to the alleged harm or is unduly burdensome given the real world harm to be prevented, then a restriction on individual liberty or private property rights must fail.[24]

Unsubstantiated statements opposing a property use are not sufficient to deny property rights, particularly when those statements are contrary to the facts on the ground.[25] The Texas Supreme Court in *Spann*, in voiding an ordinance allowing neighbors to veto a building, addressed the weight to be accorded the sensibilities of displeased neighbors: "[I]t is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors."[26] The Texas Constitution under *Spann* limits the ability of cities to limit non-harmful uses of property and requires that any allegation of harm be based in fact, not assumption. The Texas Supreme Court recently went out of its way to reiterate the vitality of *Spann*.[27]

Decisions under the U.S. Constitution are to the same effect. The Supreme Court, in *Roberge*, invalidated an ordinance which allowed adjoining landowners to block an otherwise allowable use of a property.[28] The Magistrate Judge nevertheless concluded that the fact that community opposition exists is a legitimate rationale for banning a historically-vital property use. In effect, the Magistrate Judge has given unfettered

---

[24] *Id.*

[25] *Spann v. City of Dallas*, 111 Tex. 350, 358, 235 S.W. 513, 516 (1921) ("It is a doctrine not to be tolerated in this country that either State or municipal authorities can by their mere declaration make a particular use of property a nuisance which is not so, and subject it to the ban of absolute prohibition."); *Crossman v. City of Galveston*, 247 S.W. 810, 813 (1923) ("The opinion of the city commissioners that the property of plaintiffs in error is a nuisance is not due process. It is not process at all. It has no more vitality than the opinion of other citizens as against the consent of plaintiffs in error.").

[26] *Id.*

[27] *See Powell v. City of Houston*, No. 19-0689, 2021 WL 2273976, at *23, fn. 37 (concurrence) (Tex. June 4, 2021).

[28] *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122, 49 S. Ct. 50, 52, 73 L. Ed. 210 (1928).

discretion to neighbors to control a landowner's use – precisely what *Spann* and *Roberge* forbid.

IV. The Magistrate Judge was required to follow new Texas cases which support the Homeowners.

Texas is on the leading edge of STR jurisprudence, and yet the Magistrate Judge refused to follow important new Texas intermediate appellate decisions which are in accord that property owners have constitutionally-protected rights in leasing. The Magistrate Judge concluded there is not enough "consensus" [Doc. 20 at 7-8], but that is not the standard.

A federal court, "in the absence of authority from the State's highest court . . . must follow the decisions of intermediate state courts unless there is "convincing evidence that the highest court of the state would decide differently."[29] That is "especially true where the intermediate court has determined the precise question at issue."[30]

With yet more compelling precedent on point since the Magistrate Judge issued his Report and Recommendation, the clear trend in Texas is to protect the right to rent for short terms, whether in and of itself, or else as a right already subsumed within the broader right to lease.

In 2015, the Houston Court of Appeals affirmed a temporary injunction based on a constitutional challenge to an STR ban in *Vill. of Tiki Island v. Ronquille*.[31] That is a takings case where a City refused to grandfather a property owner who had a "narrow, vested right" to rent for short terms because prior ordinances had allowed it. That is a narrower constitutional challenge than presented here because the plaintiff homeowners

---

[29] *City of San Antonio, Texas v. Hotels.com, L.P.*, 876 F.3d 717, 722 (5th Cir. 2017) (cleaned up).

[30] *Id.*

[31] *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 579 (Tex. App. – Houston [1st Dist.] 2015, no pet.) (takings challenge to STR ordinance, adjudged as valid, sought damages for lost profits uniquely from short-term leases).

assert a broad vested right to rent for any duration, but the case shows the validity of constitutional attacks on STR bans.

In 2019, the Austin Court of Appeals invalidated the City of Austin's STR ban on retroactivity grounds, and the Texas Supreme Court recently denied review of that case.[32] The City of Austin conceded that STR's are residential in nature, but it nevertheless tried to ban just those STR's where the home is not the owner's declared homestead. In effect, Austin was shutting out everyone who does not permanently reside in the City of Austin. The Austin Court of Appeals invalidated that ordinance on retroactivity grounds, concluding that leasing for short terms is a historically settled right of property owners.

On August 5, 2021, after the Magistrate Judge issued his Report and Recommendation in this case, the Fort Worth Court of Appeals rejected the City of Grapevine's attempt to have several constitutional challenges to an STR ban dismissed.[33] In the course of that opinion, the court all but approved the homeowners' takings, retroactivity, and due course of law challenges under the Texas Constitution. The decision rests on an extensive evidentiary record, demonstrating the importance of discovery. Just as importantly, the court declared as a matter of law that the homeowners' rentals were a residential use, not a commercial use as contended by the city.[34] Indeed, the court found that homeowners have a vested right in leasing for all durations because a ban on STR's would force the homeowners to "leave their properties vacant when they are not using them." The homeowners in that case had previously obtained a temporary injunction preventing the City of Grapevine from enforcing the STR ban, and as a result of the opinion, the injunction continues as that case proceeds to trial.

---

[32] *Zaatari*, 2019 WL 6336186, at *8.

[33] *City of Grapevine*, 2021 WL 3419675, at *18.

[34] *Id.* at *9.

The only somewhat contrary authority supports the Homeowners at this stage of these proceedings. The Fort Worth Court of Appeals also recently upheld the denial of temporary injunction to homeowners seeking to block a partial STR ban applicable in residential areas outside major sports and entertainment areas in the City of Arlington.[35] As in *City of Grapevine*, there was a full-on evidentiary hearing in which hard data and witness testimony was presented.[36] The homeowners didn't get their temporary injunction, but their case goes on and will proceed to trial.

The law is in its early days on STR issues and is far from settled, even in Texas. But the Texas cases all go one way in the relevant respects –sustaining the viability of constitutional claims and allowing discovery. That reaffirms the importance of allowing litigants their day in court rather than summarily dismissing their claims. Whether homeowners can be deprived of the right to decide how long to rent out their homes is important – probably the most important property-rights issue of our time – and not lightly to be dismissed when they specifically allege that a city has no data or evidence to support a ban on STR's.

V. The STR ban is not a zoning ordinance.

The Magistrate Judge was wrong to analyze this as a zoning case and rely on authorities upholding zoning ordinances. [Doc. 20 at 9, 14]. The STR ban is not *itself* a zoning ordinance. Thus, cases upholding zoning designations are not factually on point, even if, ultimately, the standard of review for the STR ban is the same is the same as applies to zoning ordinances.

The Texas Supreme Court recently explained how to spot a zoning ordinance: it is a "comprehensive plan by which the city is divided into districts wherein property is

[35] *Draper v. City of Arlington*, No. 02-19-00410-CV, 2021 WL 2966139, at *1 (Tex. App. – Fort Worth July 15, 2021, no pet. h.).

[36] *Id.* at *6-7, 10-11.

limited to specified uses," chiefly residential and commercial, but also building characteristics such as "single family" or "multi-family."[37] That is the type of comprehensive plan upheld in the *Village of Euclid* and *Benners* cases cited by the Magistrate Judge.[38] New Braunfels has adopted its own "comprehensive plan,"[39] and the districts it creates are set out at § 144-3.1 of the Ordinances. Just as described in *Powell v. City of Houston*, the New Braunfels zoning scheme creates districts according to (1) building characteristics and (2) their use as either commercial (including industrial) or residential.

The Austin Court of Appeals, in the recent *Zaatari* case, rejected the City of Austin's contention that the STR ban there was a zoning ordinance entitled to conclusive deference on its face: "We also note that a ban on type-2 short-term rentals does not advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature."[40]

The duration of a use plays no part in the New Braunfels zoning scheme. It is no metric for anything in that scheme. This case involves dwellings in residential zones which are accorded the right to engage in the residential uses allowed by Section 144-3.3, including those incident to use as a "one-family dwelling." Separately listed are numerous "Non-residential uses." Nowhere is *duration of use* a zoning classification or metric for a use.[41] Nowhere, for that matter, is *leasing* a zoning classification. Thus, when a

---

[37] *Powell v. City of Houston*, No. 19-0689, 2021 WL 2273976, at *5 (Tex. June 4, 2021).

[38] *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)

[39] New Braunfels Code of Ordinances § 144-1.1 ("Ordinances").

[40] *Zaatari*, 615 S.W.3d at 190.

[41] There appears to be no precedent for zoning of that type, at least not yet. *See generally*, *Powell v. City of Houston*, 2021 WL 2273976, at *4-5 (describing the ways in which zoning has been defined). It is possible that in the future, given the development of the short-term home rental market, cities may zone whole districts for "short-term residential use."

homeowner in New Braunfels leases out a home, it is a given that there is a "dwelling" as a building type, and the "use" of that dwelling has to be "residential." Now, the homeowner cannot operate a leasing headquarters from the home (for example, the offices of "Stay-Cay Home Rentals, Your Vacation Home Rental Specialist") because that would not be a residential use. The tenants, for their part, cannot operate a motorcycle repair shop or pop-up bakery from the home because that, too, would not be a residential use. But the question of *duration* of use is irrelevant to the classification of any district under the New Braunfels zoning ordinance.

This is important because the Magistrate Judge should have put more emphasis on the Texas cases which have addressed short-term rental ordinances. Texas is on the leading edge of the jurisprudence, as exemplified by *Tarr*,[42] *Tiki Island Village, Zaatari*, *Draper*, and *City of Grapevine*. And as will be seen, the fact that the Homeowners fully support their residential zoning designation and the rights that endows is important because the New Braunfels STR ban *undermines* residential zoning by taking away a pattern of residential use which the Texas cases have recognized and affirmed, a strong indicator of the STR ban's irrationality.

VI. Rational basis is the correct standard of review for most of the Homeowners' claims.

As another preliminary matter, the Magistrate appears to have confused the Homeowners' claim for a strict construction of a zoning ordinance with the strict scrutiny that applies to suspect classifications. The Homeowners are not contending that the STR ban is subject to strict constitutional scrutiny, like in equal protection cases involving suspect classifications. The Homeowners agree that a rational-basis review is appropriate for their federal constitutional and state equal protection claims. (Their state due process/due course of law claim is another matter because it affords them greater

[42] *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274 (Tex. 2018).

protection.) But implicated in that inquiry is whether there is any rational basis for the City to effectively categorize short-term rentals as a commercial use appropriate only for commercially-zoned districts.

The Magistrate Judge should have, as a first step, strictly interpreted the Homeowners' residential zoning designation (apart from the STR ban contained within it) to allow short-term leasing. *Short-term leasing is a residential use, period.*[43] Had the Magistrate Judge acknowledged that, his analysis would have proceeded from the baseline premise, as the *City of Grapevine* court's did,[44] that the Homeowners have broad leasing rights in their zoning districts irrespective of duration of leasing.

There is no dispute that the Homeowners live in districts zoned as residential under the New Braunfels zoning scheme. They seek both to occupy the homes themselves, for any durations they wish, and also to lease out their homes at other times. They therefore contend [Doc. 1 ¶ 53] that the residential zoning designation for their zoning districts[45] must be interpreted under the standard in *City of Kermit v. Spruill*: strictly in favor of the free use of property.[46] That initial step, while not the constitutional standard for analyzing the STR ban, is important because the STR ban effectively classifies STR's as a commercial use, as if the Homeowners' homes were in different zoning districts. It does that implicitly by allowing STR's within commercially-zoned districts[47] while forbidding them in residentially-zoned districts: *"Short term rental within residential districts is prohibited."*[48] The complaint therefore alleges as follows:

---

[43] *See*, *e.g.*, *Tarr*, 556 S.W.3d 274, 289-92; *Zaatari*, 615 S.W.3d at 189 (citing *Tarr* for the proposition, broadly, that STR's are a residential use).

[44] 2021 WL 3419675, at *18.

[45] Ordinances § 144-3.3.

[46] *City of Kermit v. Spruill*, 328 S.W.2d 219, 223 (Tex. Civ. App. 1959, writ refused n.r.e.).

[47] Ordinances § 144-5.17-3(c).

[48] Complaint ¶ 26.

> 27. However, the owners of homes located in commercial districts are entitled to seek a permit [to rent for short terms]. Ordinances § 144-5.17-3(c). Thus, the manner in which the City banned STR's amounts to a declaration or finding that ordinary residential leasing is *not* residential if the lease term is less than 31 days.
>
> * * *
>
> 29. . . . Thus, the City equates *duration* of use (long or short) with the *character* of use (residential or commercial), the *conduct* of occupants (bad or good), and the *condition* of the premises (safe or unsafe). According to the City of New Braunfels, *short-term* = commercial, bad, and unsafe, whereas *long-term* = residential, good, and safe.

It's as if the City is saying, your home is residential, but it's also commercial, depending on how long someone stays there. That conflation of duration of stay with nature of stay is what is subject to rational-basis scrutiny, and as will be seen, it fails the test miserably.

VII. Leasing for short terms is a fundamental right.

The Magistrate Judge concluded that leasing for short terms is not a fundamental right of property ownership. [Doc. 20 at 7]. To reach that conclusion, he relied on the fact that the holding in *Zaatari* was not final. [Doc. 20 at 8, fn. 2]. But that was wrong: review was denied in that case on June 11, 2021, six weeks before the Magistrate Judge's Report and Recommendation.

Just as importantly, there is new precedent since the Magistrate Judge's Report: the *City of Grapevine* case. That decision goes even further than *Zaatari* (which declined to even address substantive due process/due course of law issues since it decided that leasing for short-terms is a "settled" right) in concluding that the right to lease is fundamental right and that it encompasses leasing for short terms since owners are constrained in their own use of their land if they cannot lease it out when they are not there. The Magistrate Judge's Report and Recommendation is thus superseded by events.

Yes, it is true that the Texas Supreme Court has not yet weighed in, but the new Texas cases are far and away the most important decisions in Texas, if not the entire U.S. Besides that, the issue before the court *right now* is not whether the intermediate

Texas appellate decisions are correct, but, since they were decided on evidentiary records, whether discovery is necessary in this case. Obviously, considering the Texas cases at least, discovery is warranted.

VIII. In any event, there is no rational basis for the STR ban.

Yet even at this stage, without discovery, the New Braunfels STR ban does not survive minimal scrutiny under the rational-basis standard.

A. Dismissal requires a claim bordering on the absurd.

In the recent *Hines* case, the Fifth Circuit upheld a Rule 12(b)(6) dismissal while also defending the result in *St. Joseph Abbey*. Why? Because "the [*St. Joseph Abbey*] court tried to conceive of other potentially rational bases but could not think of any."[49] That is a high bar, to be sure, but the reason the plaintiff in *Hines* could not clear it was that his claims were absurd. Said the court in an insightful line:

"It is rational to distinguish between humans and animals." [50]

Agreed. Some constitutional challenges simply do not pass the sniff test. In *Hines*, a veterinarian asserted that he had a *right* to treat animals via telephone since medical doctors are allowed to do so. Faced with the fact that humans can speak to doctors on the phone to discuss their symptoms or needs, the vet retorted that some humans, such as infants, are likewise unable to speak, perhaps overlooking the role of parents. Anyhow, the government obviously has a rationale for requiring vets to lay hands on an animal under treatment instead of trying to talk to the animal on the phone. Thus, it is abundantly clear that "[t]he law's differentiating between medical doctors and veterinarians is a logical distinction."[51]

---

[49] *Id.*

[50] *Id.* at 275.

[51] *Id.*

Nothing so obvious is presented here. While veterinarians cannot claim "phoning it in" as a constitutional right (said the court in *Hines*: "It is not irrational for a state to change in stages its licensing laws to adapt to our new, technology-based economy."),[52] landowners have historically vital leasing rights, including the right to lease out a home for any duration they desire and without having to explain to government why.[53] That freedom, uncontroversial until recently, is sufficiently "settled" and "vested" (in jurisprudential parlance) that its deprivation rises to the level of being both unconstitutionally retroactive and a violation of substantive due process, as the new Texas cases indicate.[54]

The Homeowners here, just as in the new *City of Grapevine* case, claim that, quite apart from the issue of rental income, a city has "unreasonably interfered with their rights to use and enjoy their properties" by passing a ban on STR's.[55] The Homeowners are losing more than just rental income; they are losing the fundamental right to decide who gets to stay in their homes and for how long. *That* is the nub of the case. People are losing the right to decide their movements. The injurious deprivation of that right is so clear that the Austin Court of Appeals felt it did not even need to reach a substantive due process analysis; retroactivity was enough.[56] *Property owners are obviously entitled, under centuries of Anglo-American law and settled foundational rights, to decide who gets to stay in their homes and for how long*.

---

[52] *Id*. at 276.

[53] STR's are not dependent on technology as the veterinarian's telephone examinations were. STR's have existed time out of mind; the internet has just made them more widely available.

[54] *See City of Grapevine v. Muns*, 2021 WL 3419675, at *12, 17 (Tex. App. – Fort Worth Aug. 5, 2021, no pet. h.); *Zaatari v. City of Austin*, 615 S.W.3d 172, 191 (Tex. App. – Austin 2019, pet. denied).

[55] *City of Grapevine*, 2021 WL 3419675, at *12.

[56] *Zaatari*, 615 S.W.3d at 192.

B. The proffered rationales for the STR ban are nonsensical.

The Fifth Circuit in *Hines* dismissed a nonsense claim, but it pointed out that in other cases, "great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."[57] In this case, however, the Magistrate Judge accepted nonsensical explanations of "perceived issues that accompany STR's." [Doc. 20 at 13]. All are readily negated.

1. "Protection of residential neighborhoods"/Preservation of the "residential nature of certain areas of the city."

Short-term rentals were already occurring in residential neighborhoods when the City passed its STR ban, but the owners of those homes were allowed to continue; it was later entrants such as the plaintiffs here who were denied. [Doc. 20 at 2]. If STR's harm neighborhoods, the City would have banned them without exception. Instead, the City handed existing short-term landlords a monopoly and allowed them to continue indefinitely. The number of such "grandfathered" rentals and their effects are unknown because no discovery has occurred.

In any event, the underlying assumption of the STR ban (and the Magistrate Judge's Report and Recommendation) is that leasing for short-terms is a commercial use which undermines the residential character of a neighbor. That is flatly false. *Short-term leasing is residential and always has been; it is part of the fabric of neighborhoods already*. The argument that such leasing is commercial has been soundly rejected in Texas and all over the U.S.[58] In fact, both the new Texas cases, *City of Grapevine* and *Zaatari*, hold

---

[57] *Hines*, 982 F.3d at 274.

[58] *Tarr*, 556 S.W.3d at 291-92 (Tex. 2018); *Wilson v. Maynard*, 2021 S.D. 37, ¶¶ 17-20 (S.D. June 16, 2021) (noting majority rule); *Slaby v. Mountain River Ests. Residential Ass'n, Inc.*, 100 So. 3d 569, 582 (Ala. Civ. App. 2012); *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 219 So. 3d 111, 114 (Fla. Dist. Ct. App. 2017) (citing cases from thirteen jurisdictions that have held restrictive covenants limiting the use of a property to "residential purposes" do not prohibit short-term rentals). *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash.2d 241, 327 P.3d 614, 620

that the short-term leasing is a long-established residential use.[59] Both cases looked to the *Tarr* precedent of the Texas Supreme Court in holding, without equivocation, that short-term leasing is residential.[60] The core problem with the Magistrate Judge's Report and Recommendation is that it assumes that a "neighborhood" is defined by long-term occupancies, but that is wrong. Or if it's not wrong as to the neighborhoods in this case, there is no way the court can tell because there is no evidentiary record.

But even apart from the fact that neighborhoods are historically a mix of occupancy durations, and by owners and tenants alike, a neighborhood is not "protected" when a historically-sacrosanct residential use is banned. By definition, it is *harmed* by such a ban. Homeowners are prevented from exercising a right long assumed to exist. They are deprived of freedom to come and go as they please and, relatedly, determine who else does. Short-term leasing is part of the fabric of residential neighborhood life and always has been. New Braunfels's STR ban destroys liberty in a fundamental sense because it takes control of homes away from owners and puts it in the hands of government officials and neighbors. Worse, it replaces liberty with 24-7 surveillance: how else does the government enforce a ban on *renters for short terms* without surveilling and running checks on everyone?[61] "Orwellian" is no understatement.

2. "Excessive traffic, trash, noise, and density."

Since the leasing of homes is already allowed as a residential use, there is no rational basis – much less a factual one – for concluding that leasing a home for a short

---

(2014) ("If a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is residential, not commercial, no matter how short the rental duration.").

[59] *City of Grapevine*, 2021 WL 3419675, at *17; *Zaatari*, 615 S.W.3d at 189.

[60] *City of Grapevine*, 2021 WL 3419675, at *9 (determining as a matter of law that ordinance allowing "single family detached dwellings" also allows STR's); *Zaatari*, 615 S.W.3d at 191

[61] The STR ban includes an Orwellian provision which authorizes every car parked overnight at a home to be checked for "different surnames." Complaint ¶ 26 (Ordinance 5.17-7(f)). Relatedly, the evidence the Homeowners submitted in their pending motion for a preliminary injunction shows that city officials actively surveil and harass owners to see who is staying in homes.

period causes different or more traffic, trash, noise, or density than leasing for months or years.[62] At any given snapshot in time, a rented home can house the maximum allowed number of tenants under state or local law.[63] Tenants are entitled to do what residential tenants normally do – eat, sleep, live, pray, love, play their stereo, and, yes, generate garbage. Of course, sometimes tenants may get too noisy, or overfill the garbage, or park illegally, but that is true of *any* occupant, whether owner, guest, or tenant. That the occupants of a home at a given snapshot in time have the possessory interest for a longer or shorter time has no bearing on how much traffic or noise there is: there is always the amount of traffic and noise which those who occupy the neighborhood's homes cause in the normal course of living. *Short-term tenants are neighbors, so the things they do form part of the pattern of neighborhood life.*

The Magistrate Judge also seems to be concluding that the frequency with which the occupants move in and move out has some bearing on "traffic." This cannot logically be true since owners, guests, and tenants come and go during their period of possession for all sorts of reasons. All the Magistrate Judge has described is people engaged in movement at their homes, which they are of course free to do for any reason they choose, whether they are trundling suitcases, unloading boxes from Costco, or going back and forth in flip-flops from the waterpark. This whole notion that those legally entitled to be living in a home cause additional "traffic" over and above what long-term residents cause

---

[62] In the Austin case, in fact, a city's evidence actually showed *exactly the opposite*. *See Zaatari*, 615 S.W.3d at 189. The reasons can be intuited: (1) Badly-behaved long-term tenants are hard to dislodge, whereas badly-behaved short-term tenants are soon gone at lease-end. (2) Owners of STR's have every incentive to rent out their furnished homes to renters who will care for the house and its furnishings.

[63] *See* Tex. Prop. Code § 92.010 (lease occupancy limit of 3 adults per bedroom). The New Braunfels ordinances purport to restrict lease occupancy to 2 persons per bedroom plus 2 additional persons total. Section 144.5.17-4(a). The New Braunfels maximum short-term lease occupancy appears to be preempted by § 92.010 to the extent the ordinance imposes stricter requirements than the Legislature did.

is false. It's worse than false, because it serves as a pretext to prevent landowners from deciding how to use their land and to manufacture probable cause for 24-7 surveillance.

There is another reason the Magistrate Judge's conclusion about "traffic, noise, trash, and density" is nonsensical. If tenants are doing what tenants ordinarily do – meaning their use of a home is residential – whatever traffic, noise, trash, and density exists merely reflects the prevailing pattern of residential use since *short-term rentals are a normal residential use consistent with residential zoning*. The Magistrate Judge appears to have assumed that tenants for short terms are engaged in things *other* than the ordinary incidents of residential occupancy, but there is zero logical or evidentiary basis for any such conclusion. The fact that tenants come into New Braunfels and use their rental homes for vacation- or leisure-type activities (or convalescence, freedom from persecution, or anything else) does not distinguish their use of the homes they rent from anyone else's use of those homes.

Finally, "density" cannot serve as a rationale for banning STR's. The plaintiffs, in seeking to rent for short *durations* of occupancy, are not seeking *denser* housing, or multi-unit housing, or rental occupancy over and above what Texas law[64] allows. The "density" rationale is analogous to the "single family" argument rejected in *Tarr*, where the Texas Supreme Court distinguished architectural characteristics from the manner in which tenants occupy a home.[65] In this case, as in *Tarr*, the homeowner plaintiffs seek merely to allow ordinary rental occupancy up to the limit the Legislature has expressly allowed[66] in the single-family dwellings they own. That does not entail any kind of "density" change by any conceivable metric. Nor is there any logical reason that the number of occupants (or cars the occupants drive and park) is greater with a short-term rent than for anyone

[64] *See* Tex. Prop. Code § 92.010.
[65] 556 S.W.3d at 287-87.
[66] *See* Tex. Prop. Code § 92.010.

else who enjoys use of a home. Whatever "density" means in the City's proffered rationale, the duration of a home rental or the number of permissible occupants under the Texas maximum-rental-occupancy law has nothing to do with it. Single-family dwelling neighborhoods are the least dense form of development; the City could not further alleviate density in the neighborhoods in question without knocking down houses and leaving lots vacant.

3. "Municipalities must draw the line somewhere."

The Magistrate Judge concluded that, when it comes to denying homeowners the freedom to decide how long to rent out a home, "municipalities must draw the line somewhere." [Doc. 20 at 15].

Wrong! There is no permissible line.[67] The Homeowners stake out a clear position here: government may not take away from landowers the freedom to decide tenants' lengths of stay, any more than government can dictate the length of homeowners' length of stay. Moreover, the two are inextricably intertwined, because when property owners decide their own comings-and-goings, they are also deciding the possible duration of their tenants' comings and goings. *Banning short-term rentals deprives owners of short-term stays in their own homes.* That is precisely why the homeowners' due course of law claim in *City of Grapevine* was recently allowed to proceed:

> [The homeowners] . . . pleaded that the STR Ordinance denies them rental income from their STRs and denies their "own property use and enjoyment" because the STR Ordinance would force them to "leave their properties vacant when they are not using them." Construing the Homeowners' pleadings liberally in their favor, we conclude that they have pleaded that they have a vested right to use their properties as STRs under both the Zoning Ordinance and the common law.
>
> . . . [W]e conclude that they have a fundamental leasing right arising from their property ownership. Private property ownership is a fundamental

[67] The hot-sheets motel example is a commercial use, so the *reductio ad absurdum* case is inapt. In any event, the New Braunfels ordinances define a short-term rental as at least one night. Ordinances § 144.5.17-2 (definitions).

> right. *Hearts Bluff*, 381 S.W.3d at 476 (citing *Severance v. Patterson*, 370 S.W.3d 705, 709 (Tex. 2012) (op. on reh'g)); *Severance*, 370 S.W.3d at 709 ("Private property rights have been described 'as fundamental, natural, inherent, inalienable, not derived from the legislature[,] and as pre-existing even constitutions.' " (quoting *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977))). Property ownership includes the right to lease to others. *See Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453, 454 (1890) ("The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership."); *see also Terrace*, 263 U.S. at 215, 44 S. Ct. at 17–18 (noting that "essential attributes of property" include "the right to use, lease[,] and dispose of it for lawful purposes"). The right to lease is a stick within a property owner's metaphorical bundle of rights. *See* Emily M. Speier, Comment, *Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community*, 44 Pepp. L. Rev. 387, 395–97 (2017).[68]

This is a powerful statement that the government may not dictate how long someone – owner or tenant – can or must[69] occupy a home.

The other problem with the Magistrate Judge's conclusion that a line can be drawn is that every feature of short-term rentals which the STR ban targets applies equally to long-term rentals, whether the line is 30 days or 90 days or a year, thereby rendering every line arbitrary.[70] Stated another way, the length of a given lease does not determine the character of someone's use, so there is no rational basis for allowing some lengths of leases but not others.

None of this is to argue that a city cannot require a license or impose a tax based on a line, but that is not the issue in this case. This case is about core freedoms enjoyed by the owners of land to decide who gets to stay in their homes and for how long. There may be – and in most places are – paperwork or taxes based on that decision, but so long

---

[68] *City of Grapevine*, 2021 WL 3419675, at *19.

[69] *See Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255, at *6 (Tex. App. – Austin April 29, 2020) (in challenge to Austin STR ban, court agreed that city could not, despite the city's contention to the contrary, impose a minimum *actual, physical stay* requirement for a renter who had the full possessory interest for 30 days but only stayed for several days of her lease).

[70] Complaint ¶¶ 41-42

as the freedoms to decide who and for how long can still be meaningfully exercised, the rest is paperwork.

IX. The Magistrate Judge failed to analyze this case under the Texas Constitution's standard for an as-applied due course of law challenge.

The Magistrate Judge recited the additional protections afforded to a party raising an as-applied due course of law challenge under the Texas Constitution, but he failed to analyze this case under that standard. [Doc. 20 at 12]. When that standard is applied, the Homeowners have both a right to obtain discovery and, ultimately, a valid challenge.

In *Patel v. Texas Dept. of Licensing and Regulation*, the Texas Supreme Court invalidated regulations requiring thousands of hours of training for eyebrow threaders. In so doing, it set out an alternative to the rational-basis test:

> [S]tatutes are presumed to be constitutional. To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, *or is so burdensome as to be oppressive in light of, the governmental interest*.[71]

In addition, the Texas Supreme Court stressed the importance of an evidentiary record:

> Although whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties.[72]

A law which forbids landowners from deciding for themselves who stays in their homes and for how long is so burdensome on the right to lease as to be oppressive in light of the governmental interest asserted by the City. In this case, the City has asserted interests in (1) protecting neighborhoods and (2) combatting "perceived" harms (traffic,

---

[71] 469 S.W.3d at 87 (emph. added).

[72] *Id.*

trash, noise, density). As for protecting neighborhoods, the Homeowners have already shown that a short-term rental ban does not advance that interest in the first place because short-term rentals are already part of the fabric of residential neighborhoods. As for the "perceived," harms, they are of course unproven at this stage. But in any event, the governmental interest in combatting them is readily achievable with less drastic means than depriving people of constitutional rights. The *Zaatari* opinion says it all on this score:

> The City contends that it enacted short-term rental regulations to address the following public-interest issues relating to short-term rentals:
>
> > • Public-health concerns about over-occupancy affecting the sewage system and creating fire hazards and about "bad actor" tenants who dump trash in the neighborhood and urinate in public;
> >
> > • public-safety concerns regarding strangers to neighborhoods, public intoxication, and open drug use;
> >
> > • general-welfare concerns about noise, loud music, vulgarity, and illegal parking; and
> >
> > • the negative impact on historic Austin neighborhoods, specifically concerns of residents that that short-term rentals alter a neighborhood's quality of life and affect housing affordability.
>
> The City does not explain which of these public-interest issues supports a ban on type-2 short-term rentals, and notably, there is nothing in the record before us to show that any of these stated concerns is specific or limited to type-2 short-term rentals. Type-2 short-term rentals are simply single-family residences that are not owner-occupied or associated with an owner-occupied principal residential unit—i.e., they are not designated as the owner's homestead for tax purposes. See Austin, Tex., Code § 25-2-789(A).
>
> More importantly, nothing in the record supports a conclusion that a ban on type-2 rentals 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.[73]

[73] *Zaatari*, 615 S.W.3d at 189.

All the City of New Braunfels has to do is regulate the perceived harms. In fact, it already does.[74] The City knows very well how to address the "perceived" harms of short-term rentals; the drastic measure of an STR ban is too burdensome and oppressive.

X. The Homeowners' Motion to Amend is not futile.

The Homeowners sought leave to amend [Doc. 15], solely to add an additional plaintiff [Doc. 15 exh.]. The Magistrate Judge recommends the motion be denied because he recommends dismissal of all claims. [Doc. 20 at 17]. Because the Homeowners have stated valid claims, amendment should be allowed.

XI. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the court deny the City of New Braunfels' motion to dismiss and grant Plaintiffs' motion to amend.

Respectfully submitted,
/s/ J. Patrick Sutton
J. Patrick Sutton
Texas Bar No. 24058143
1706 W. 10th Street
Austin, Texas 78703
Tel. (512) 417-5903
jpatricksutton@jpatricksuttonlaw.com

[74] Ordinances § 144.5.17-4 (regulating max. occupancy, parking, safety, conduct, signs, and other aspects of short-term rentals).