No. 22-0044

IN THE SUPREME COURT OF TEXAS

CITY OF GRAPEVINE,

Petitioner,

v.

LUDMILLA B. MUNS, RICHARD MUELLER, KARI PERKINS, KEVIN PERKINS, PAMELA HOLT AND A-1 COMMERCIAL AND RESIDENTIAL SERVICES, INC.,

Respondents.

On Petition for Review from the Second Court of Appeals, Fort Worth, Texas No. 02-19-00257-CV

BRIEF OF RESPONDENTS

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ALTERNATIVE STATEMENT OF THE CASE

Nature of the case: In 2018, the City of Grapevine adopted an ordinance which banned owners of single-family dwellings from "renting, bartering, trading, letting or otherwise allowing the use of a dwelling . . . for compensation" for less than 30 days.

The respondent homeowners challenged the ordinance as unconstitutional. After the homeowners obtained a temporary injunction, and following summary judgment cross-motions which the trial court denied, the City filed a plea to the jurisdiction contending that the homeowners' constitutional theories are not viable.

ISSUES PRESENTED

1. Is it the proper role of government to decide how long people stay in private homes? Specifically:

   Does a landowner have a vested right, for purposes of stating due process and takings claims, in deciding how long to lease out land?

   Does a landowner have a reasonable, investment-backed expectation, for purposes of a takings claim, that an existing and permitted use of property will continue?

2. Are a city's position statements, legal opinions, and threats of future enforcement "decisions" which trigger statutory administrative remedies?

3. Does residential zoning forbid short-term leasing?

INTRODUCTION

This is not a case about zoning. The homes at issue have always been – and remain to this day – zoned as residential.

This is not a case about someone misusing a residence as a business. The Homeowners rent out their residentially-zoned homes for residential purposes to ordinary people who do what people ordinarily do in homes.

This is not a case pitting "neighbors" and "residents" against "strangers" and "transients." Short-term tenants are neighbors and residents just like anyone else who pays for and exercises the sole and exclusive use of a home.

This case is about a local government's resistance to free markets. In 2018, the City of Grapevine declared – in defiance of history, reason, evidence, and precedent – that short-term leasing is

not residential, and that non-permanent-residents are criminals. The City contends that a home is not a home, rightly speaking, if those who lease it do not pass a government length-of-residency test. The City contends that people who stay for less than 30 days are a nuisance and danger to the community. This Court rightly rejected such repugnant contentions in *Spann*, *Tarr*, and *JBrice*.

It is taken as a given that cities zone districts into residential and commercial areas; no one in this case is challenging that. To the contrary: the Homeowners in this case desire and benefit from residential zoning because their tenants wish stay in homes, not hotels.

This case raises an issue more fundamental and profound than zoning. It asks whether the government has the power to dictate how long people can (or must) stay in private homes, a decision which for hundreds of years has belonged solely to individuals pursuing their enlightened self-interest in land transactions. As a necessary corollary, this case asks whether the monitoring, surveillance, and interrogation regime necessary to police people's comings and goings from private homes is compatible with liberty.

The answer to both questions is an emphatic *No*.

STATEMENT OF FACTS

I. The City gaslights its residents by telling them that short-term leasing was always illegal even if no one knew it.

The Homeowners in this case bought homes which were zoned for use as "single-family detached dwellings," a designation which the City agrees refers, in essence, to "residential use." *City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 WL 6068952, at *1-2 (Tex. App. – Fort Worth Dec. 23, 2021) ("*Muns*"); City Brief at xvii (Issue 4); **Tab B** (table of pre-2018 ordinances, with terms highlighted).

The Homeowners then did what free people in America have been doing for centuries: decide for themselves, answerable to no one, who may stay in their homes and for how long. Stated more precisely, the Homeowners bought, improved, and furnished their homes to rent out for whatever duration they decided satisfied their intertwined personal and economic needs, and most particularly for short terms. *Muns*, 2021 WL 6068952, at *2; 3CR998-1000, 1633; 1CR436-39, 446-47, 462-96; Supp.RR62-63, 66-67, 70, 72, 75-76, 116, 161-62, 172-76, 181-82, 209-221.

At any other time in history, the Homeowners' motivations in settling on a particular tenant and lease term would not be open to scrutiny. But with the explosion of the market for short-term rentals, cities like Grapevine, in opposition to the invisible hand of individuals pursuing their self-interests, want to seize from landowners their right to decide how long to lease and, by extension,

to whom to lease. And non-permanent-residents need not apply. Landowners, understandably, are responding by suing. *See*, *e.g.*, *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. – Austin 2019, pet. denied) (invalidating ordinance); *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (approving takings claim); *Marfil v. City of New Braunfels*, Civ. Action No. 6:20-CV-00248-ADA-JCM, 2021 WL 8082644 (W.D. Tex. July 29, 2021), *report and recommendation adopted* (W.D. Tex. Sept. 15, 2022) (dismissing const'l challenges).

The problem the City faced, once it decided to require everyone to be permanent occupants, became how to fend off the inevitable lawsuits. The City hit upon a disinformation campaign – specifically, *gaslighting*. It told everyone that if they thought they were allowed to rent for short terms, they must be imagining things. The City announced in 2018 that the City's zoning law had always required tenants to be permanent residents. City Brief at 1-7, 13, 36, 38-41. And to make doubly sure there was no doubt about that, "single-family detached dwelling" zoning would be, according to the City, "clarified" to state explicitly that short-term rentals are prohibited.

That narrative was false, and City knew it. The City had never believed its zoning forbade short-term leasing, nor had it ever enforced any such ban. 2021 WL 6068952, at *2. There were homeowners – including those in this case – who had *specifically asked* the City if short-term leasing was restricted, and the City told

them "No." 2021 WL 6068952, at *2; Brief of Appellees at 3-7. And the City was, all the while, happily collecting homeowners' short-term occupancy taxes. *Muns*, *id.*; 1CR463; Supp.RR103, 113, 133 (Silverlake/Holt, $32,000); Supp.RR68 (Perkins). Nobody in Grapevine – not residents, not visitors, not property owners, not the City, not the police – thought leasing for short terms was banned. Nothing – *nothing* – in the phrase "single-family detached dwelling" gives anybody fair notice that a short duration of occupancy is forbidden, or for that matter permanent occupancy mandated.

Yet the City seized as the pretext for revising history the same argument that opponents of short-term leasing have been flogging for years – that leasing for short terms is not a residential use. The City fully embraces the logical consequence of that argument in its brief: if a tenant does not establish "permanent" residency, the "single-family detached dwelling" in which they stay is not a "single-family detached dwelling." City Brief at 1-7, 13, 36, 38-41 (discussions of permanence).[1]

Another thing the City did was claim various unproven harms and demonize short-term tenants as threats to neighborhoods. Its brief doubles-down on that. City Brief at 38-40. These unfounded claims also appear in the recitals of the new ordinance. CR1573. The

[1] Another logical consequence of the City's argument is one the City conspicuously ducks from: if "single-family detached dwelling" imposes a minimum duration of occupancy and mandates permanent residency, it necessarily applies to owners as well as tenants. Snowbirds and owners of vacation homes, for example, not being permanent residents, cannot stay in their own homes for short terms.

Homeowners showed, however, that the City has no data, studies, or evidence to back these claims up – *none*. Supp.CR9 (Plaintiffs' Resp. to City No-Evidence MSJ), 521 (table of citations); 587 (ll. 67:7-68:4), 589 (ll. 75:14-80:21), 602 (ll. 35:13-36:25), 611 (ll. 69:25-74:4), 634-36 (ll. 34:10-41:12), 647-48 (ll. 35:3-39:4). All the City can point to is "an increase in *complaints* regarding STRs." City Brief at 5 (emph. added).

But at the time in question, the *Tarr* case, which would ultimately throw cold water on the contention that a short-term stay is not residential, was still working its way through this Court. *See Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274 (Tex. 2018). *Tarr* became final on October 5, 2018, but by then the City had already adopted its ban on short-term leasing.

The Homeowners sued, asserting takings, substantive due process/due course of law, and retroactivity claims.

II. This case relates to other pending and recently-decided cases.

This case intersects with other cases of which the Court may wish to take note:

- This Court reaffirmed and extended *Tarr* in *JBrice* on April 22, 2022, driving a stake through the heart of the argument that the duration of a lease determines the character of the use. *See JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n, Inc.*, 644 S.W.3d 179 (Tex. 2022). The reasoning in *Tarr* and *JBrice*, which were restrictive covenant cases, readily carries over to

ordinances since subdivisions are, in a sense, *zoned* residential or commercial just as cities are. That explains why, soon after *Tarr* was decided, the Third Court relied on it in invalidating Austin's ban on short-term leasing. *See Zaatari*, 615 S.W.3d at 188-91.

- On August 30, 2022, the Fifth Circuit held that an ordinance which bars homeowners who are not permanent residents from renting out their homes for short terms discriminates against interstate commerce. *See Hignell-Stark v. City of New Orleans*, 46 F.4th 317, ___, 2022 WL 3584037, at *6 (5th Cir. 2022). That would seem to sound the death knell for the City of Austin's continued refusal to let non-residents rent out their homes for short term,[2] but it also partly dictates the outcome in this case, as will be shown.

- This Court is considering a petition by homeowners around the state whose leasing rights were abruptly taken away by a voting majority of other subdivision homeowners. *See Poole Point Subdivision Homeowners' Ass'n v. DeGon*, No. 03-20-00618-CV, 2022 WL 869809 (Tex. App. Mar. 24, 2022, pet. filed), *and Adlong v. Twin Shores Prop. Owners Ass'n*, No. 09-21-00166-CV, 2022 WL 869801 (Tex. App. Mar. 24, 2022, pet. filed). While *Tarr* and

[2] *See* City of Austin, *"Things to Know About the Texas Third Court of Appeals Ruling and Short-Term Rentals"* (Accessed 09/21/22 at: https://www.austintexas.gov/article/things-know-about-texas-third-court-appeals-ruling-and-short-term-rentals) ("Type 2 residential – No, the decision does not require the City to issue new Type 2 licenses in residential areas.).

JBrice hold that leasing for short terms is a residential use under common restrictive covenant wordings, those cases left open the question whether an "*amendment*" to restrictive covenants can take away leasing rights from owners who relied on prior restrictions. It was in response to *Tarr* that subdivisions began using "amendment" procedures to impose new restrictions on leasing not envisioned by the original scheme of development. If that is allowed, the buyers of real property won't know what they're buying since any of the rights that existed at closing can disappear afterwards.

- Another point of intersection is that the restrictive covenant amendment cases implicate constitutional concerns even though restrictive covenants are private contracts. The aggrieved homeowners in those cases have pointed out to the Court that if the courts enforce amendments which deprive homeowners of rights under preexisting contracts (restrictive covenants), such court enforcement constitutes "government action" which impairs existing contracts. The argument derives from a U.S. Supreme Court decision which, while standing alone in American jurisprudence, this Court has indicated remains vital. *See Shelley v. Kraemer*, 334 U.S. 1 (1948) (court enforcement of discriminatory restrictive covenants violates equal protection); *The Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997). While *Shelley* "remains undefined outside

of the racial discrimination context," *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995), it appears never to have been raised where vested property rights are threatened.

- On September 16, 2022, a Texas federal district court dismissed claims identical to those brought by the Homeowners here, in that instance challenging New Braunfels' ban on short-term rentals. *Marfil v. City of New Braunfels*, 2021 WL 8082644. The case, handled by undersigned counsel, will shortly be appealed to the Fifth Circuit.

SUMMARY OF ARGUMENT

The fundamental right of individuals to own and use land antedates and underpins founding instruments. Leasing has always been encompassed by that right, and the lease term is necessarily inherent within leasing. Texas adheres to these foundational principles upon which the American system of limited government and free markets is premised. The City of Grapevine seeks to chip away at them.

Leasing and the rights encompassed within it, such as the lease term, are vested by virtue of their foundational nature. People have intertwined rationales, both personal and economic, for exercising the right to lease for whatever term they decide is best. When the government seizes that right, it deprives people of liberty and property.

Substantive due process review is the only meaningful way foundational property rights can be protected from seizure because they are the ideological precursors to all other rights. The lease term cannot be excised from the right to lease without killing the patient. Lease term and lease price are inextricably linked, for one thing, and for another, government enforcement of a minimum lease term creates a police state.

The government's power to zone districts for different kinds of uses is not the issue; the districts in this case were and remain zoned for residential use. This Court has held repeatedly that leasing for short terms is a residential use, and the vast majority of other states agree. The City of Grapevine has criminalized residential use of residences in residential districts, which is completely irrational.

Property owners also have a more limited vested right in deciding the lease term if the government has previously imposed no limit on it. When the government later imposes such a limit, people who invested money in real estate in reasonable reliance on the prior law have a right to recoup their investment even if, going forward, they are forbidden from continuing to lease for the duration they wish. Recompense or recoupment is the classic constitutional remedy for such a taking.

A form letter from a city department espousing a legal position and threatening future enforcement of an ordinance following a grace period meets none of the requisites for a "decision" by an "official"

triggering statutory administrative remedies. Holding otherwise would cause confusion and mayhem.

The Court's *Tarr* and *JBrice* precedents establish that leasing for short terms is residential and therefore does not run afoul of residential zoning. "Single-family detached dwelling," defined with reference to a "single housekeeping unit," neither facially nor impliedly has anything to do with either leasing or anyone's duration of occupancy. And none of the homeowners in this case have ever sought to run a hotel, bed-and-breakfast, or for that matter any other "home occupation" from their homes. They merely rent their homes out to tenants who do what people ordinarily do in homes.

ARGUMENT

I. The Homeowners have a historically-vested right in leasing, including the lease term.

A. Property rights predate and underlie Constitutions.

There is no more profound statement about America than this: anyone can own land. "Private property ownership is a fundamental right in the United States." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012). Private land ownership and its intrinsic privileges exist separate and apart from government, as natural rights. *Zaatari*, 615 S.W.3d at 200 (quoting *Spann v. City of Dallas*, 111 Tex. at 356).

From that presupposition, a nation founded on limited government and respect for the individual grew and prospered. Our

Constitution derives from a conception of natural rights, set down by Thomas Jefferson, which predates our foundational instruments:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men . . . .
>
> The first Supreme Court embraced the principle:
>
> [I]t is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact . . . .

VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310, 1 L.Ed. 391 (1795).

Colonists came to America to get land, and they wanted land in order to be free. America is unapologetically capitalist, and capitalism rests not only – very literally – on land, but also on an underlying ideology that human beings have an inherent right to own and use land.

One can certainly hold a different belief. Once, on the other side of the world, there was an experiment which took away everyone's land and put all decisions concerning it in the hands of the state. That state disastrously mismanaged its vast resources and could not feed its

people. That system, the would-be cure for free-market capitalism's ills, collapsed and vanished.

There is no other model, only amendments, provisos, and quid-pro-quos to the one that emerges from foundational principles about the rights of human beings. We either acknowledge natural rights as the basis for organizing society around the rights of individuals, or else we collectivize everything and starve.

B. Cities chip away at the foundation.

American cities now want to take away from private landowners the right to decide how to allocate the use of land. These cities have decided that the government should do that and, in so doing, dictate people's comings and goings.

We have seen that before, and we know how it ends.

The Court of Appeals upheld the Homeowners' due course of law claim because leasing is a natural right incident to fee ownership and inextricably bound up with it. *Muns*, 2021 WL 6068952, at *19 (citing cases). A property owner's decisions who may possess land and for how long implicate personal and economic considerations inextricably intertwined. James Madison, at age 78, spoke at Virginia's Constitutional Convention in 1829, reflecting on these intertwined natural rights:

> It is sufficiently obvious, that Persons and Property, are the two great subjects on which Governments are to act: and that the rights of persons, and the rights of property are the objects for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right,

> gives to property when acquired a right to protection as a social right. The essence of Government is power; and power lodged as it must be, in human hands, will ever be liable to abuse.

James Madison, "Speech in the Virginia Constitutional Convention" (1829), in *James Madison: Writings* at 824 (Jack N. Rakove ed., Library of America 1999); *see also Monroe Cnty. Comm'n v. Nettles*, 288 So. 3d 452, 465 (Ala. 2019) (Parker, C.J., dissenting) (quoting Madison).

The rationales of the Homeowners in this case illustrate in spades the inextricably intertwined nature of property rights and personal liberty:

- Pam Holt sought to create a "home away from home for individuals whose family members are receiving treatment for cancer." CR462; Supp.RR92, 105, 120. She herself is an STR vacationer with her family. Supp.RR92.
- Luci Muns lives part-time on part of her property while renting out another part, which allows her to afford the property. CR487-88; 2RR151, 159; Supp.RR159. Her STR income allowed her to change careers. CR488.
- Paul Trippett seized the opportunity to buy his future retirement home, but he could not afford it unless he could live in it part-time and rent it out part-time. CR491.
- Richard Mueller rents out a property for short terms so that his mother, who lives elsewhere, has a place to stay when visiting her grandchildren. CR495.

Also CR998-1000 (summary judgment motion, citing unrebutted evidence). These are not, as the City would have it, nefarious aims; these are the laudable actions of individuals pursuing enlightened self-interest. By the same token, tenants who rent from the

Homeowners are not, as the City portrays them, criminals, strangers, or the loaded term "transients." City Brief at 3, 4, 19, 37-40. They are ordinary people seeking places of abode in the places they wish to go. Their leasing activity is free-market capitalism at its essence, where the personal and the economic combine in the pursuit of enlightened self-interest.

C. Property rights become vested by virtue of being foundational.

1. Abstract principles give rise to vested rights.

The scientist Stephen Wolfram posits that everything real arises from abstract rules which operate outside of time:

> The set of all possible rules is something purely formal. It can be represented in an infinite number of ways. But it's always there, existing as an abstract thing, completely independent of any particular instantiation.
> . . .
> We might have assumed that to get our universe we'd need some definite input, some specific information. But what we're discovering is that our universe is in some sense like a tautology; it's something that has to be the way it is just because of the definition of terms. In effect, it exists because it has to, or in a sense because everything about it is a "logical inevitability", with no choice about anything.[3]

Wolfram's ambitious physics project echoes Locke's conception of natural law as abstract rules, everlasting, which govern the relations among human beings. This Court has grounded its decisions over the years on that philosophical framework because it was the Framers'.

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[3] Stephen Wolfram, *Why Does the Universe Exist? Some Perspectives From Our Physics Project* (Accessed 09/21/22 at: https://writings.stephenwolfram.com/2021/04/why-does-the-universe-exist-some-perspectives-from-our-physics-project/).

See Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 383 (Tex. 2012) (listing core property rights, quoting JESSE DUKEMINIER & JAMES KRIER, PROPERTY 86 (3d ed. 1993), for the proposition that "[P]roperty is an abstraction. It refers not to things, material or otherwise, but to rights or relationships among people with respect to things.").

Just so, this case implicates abstract rules which underlie the real-world relationships between people. It asks the Court to reaffirm that some property rights are foundational. Among the rights this Court recognized in *Evanston Ins. Co.* are the following:

- the right to manage use by others;
- the right to the income from use by others;
- the right to security (that is, immunity from expropriation);
- the lack of any term on these rights.

These constitute *leasing*, encompassing rent, allocation, and duration.

This Court's recognition of such inherent rights has long animated its constitutional jurisprudence and still does: "One can readily agree that Texans have inalienable rights, whether included in a constitution or not." *Texas Dep't of State Health Services v. Crown Distrib'g LLC*, 647 S.W.3d 648, 677 (Tex. 2022) (Young, J., concurring) (citing concurring op. in *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69, 92-93 (Tex. 2015).

2. The exercise of natural rights in the real-world vests rights in people.

As a jurisprudential matter, "to be constitutionally protected, a property interest must be 'vested.'" *Crown Distrib'g*, 647 S.W.3d at 655. "Vested" has assumed varied meanings, depending on the context, but in its deepest sense when constitutional questions are implicated, it asks whether an individual has a "legitimate claim of entitlement" to an interest. *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018). A narrow, specific activity, such as making hemp cigarettes, is not a vested right, *id.,* but the unassailable right to *work for pay* is, *Patel*, 469 S.W.3d 69. Earning a living, just like owning land, assumes a system of free exchange among individuals which undergirds the American conception of liberty.

The rights attendant upon the ownership of land, because foundational, are necessarily vested in every individual. The Supreme Court reminded everyone of this again in 1948:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

Shelley v. Kraemer, 334 U.S. at 10.

The U.S. and Texas Constitutions presuppose such basic property rights and, for that reason, do not need to list them for them to be vested. *But see Crown Distrib'g,* 647 S.W.3d at 678 (Young, J.,

concurring) ("our distinct Texas constitutional tradition seems to provide some evidence that the judiciary exists to protect rights that are textually expressed, but not to discover new ones in the due-course clause itself"). In the same way, the founding documents do not set out a right to travel, but they make no sense without it. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999) (the right to travel is "firmly embedded" within U.S. jurisprudence); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). Property ownership, for the same reasons as travel, is "so important that it is assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all." *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring).

For these reasons, it was not, as the City here would have it, a throwaway line when this Court said, in 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." *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 22, 13 S.W. 453, 454 (1890). The jurists who wrote that had personal memories of when the Texas Constitution was adopted.

More than a hundred years later, this Court reaffirmed the principle: "Private property rights have been described 'as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions.'" *Severance v.*

Patterson, 370 S.W.3d 705, 709 (Tex. 2012) (internal quotes omitted). And the Court said it again recently: "The right to own, use, and enjoy one's private property is a fundamental right." *City of Baytown v. Schrock*, 645 S.W.3d 174, 179 (Tex. 2022) (takings case, though ordinance which did not affect land use was not a taking).

Underlying and pre-dating everything we cherish, and the foundation of this democracy and our state and federal Constitutions, is the individual's right to own land and, within that land's metes-and-bounds and its "bundle of rights," dictate who may occupy it, for how long, and for how much money. *Evanston Ins. Co.*, 370 S.W.3d at 383. For those reasons, leasing and its incidents are vested rights because they are not "predicated upon the anticipated continuance of an existing law" or "subordinate to the legislature's right to change the law." *Crown Distrib'g*, 647 S.W.3d at 655.

Our system is unimaginable without a landowner's right to convey the possessory interest in land for whatever duration the individuals involved deem most suitable.

D. Substantive due process protects foundational property rights from majoritarian tyranny.

In an era where government is accorded vast regulatory powers, property owners face an uphill battle when they challenge mere "regulation." That is exactly what the City banks on, and that explains why the City downplays how significant a ban on short-term leasing is.

But if we acknowledge and embrace the founding tenets, only substantive due process review can safeguard natural rights. Denying substantive review on the basis that founding instruments can be amended ignores the fact that ideological presuppositions underlie those instruments. *See Crown Distrib'g*, *id.*, *at* 664-80 (Young, J., concurring) (questioning the validity of substantive due process). If the government criminalizes the duration of stay in private homes, it should not be necessary to amend the constitution to *reaffirm* such presuppositional rights. Land, ultimately, is everything, and the leasing of land is, in a historically-resonant and fundamental sense, the invisible hand.

That logic implicates an even deeper question. What if a majority were to amend the Constitution to collectivize all farmland, or ban all leasing, or forbid travel? Such amendments defy the natural rights which underpin the Constitution, so we would look to the courts, being a co-equal branch of government, to safeguard natural rights by invalidating amendments which would, in effect, create a different system. *See generally* Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press (1st Ed. 2017) (**Tab D**); Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 Am. J. Comp. L. 657, 670 (Summer 2013) ("[A]nother theory, rooted in American, French, and German origins, is that the amendment power is substantively limited by its very nature as a creature of the

constitution."); *see*, *e.g.*, U.S. Const. art. V (forbidding certain amendments). No lesser adjudicative or legislative process would be up to the task; the only other alternative is one we dare not contemplate. Only the judiciary, sitting in substantive review of laws which undermine foundational rights, stands between individual liberty and majoritarian tyranny.

This question about undoing the original compact is timely. Property rights are under assault all over the nation because of short-term leasing. This Court is currently being asked to answer a question directly analogous to the one here in the consolidated *Adlong/DeGon* restrictive covenant cases.[4] Majorities of owners in subdivision are altering the original schemes of subdivision development to, in essence, create new and different subdivisions, ones where people are required to be permanent residents. Those cases are troubling because, unlike the relief valve of compensation or recoupment offered by a takings claim, it's not obvious that subdivision homeowners who are abruptly deprived of rights they purchased at closing can get *anything* in compensation for what's taken from them.

E. Leasing is a whole enchilada.

The City says it merely wants to *regulate* leasing a little. City Brief at 21, fn. 13. But, as this Brief has shown, a little is a lot when it comes to government control of the lease term. Renting for short durations has always been assumed to be inherent within the right

[4] No. 22-0316 (consolidating 22-0318).

to lease because duration of possession is integral to a lease's purpose. *See, e.g., Gouhenant v. Cockrell*, 20 Tex. 96, 98 (1857); *Ruhl v. Kauffman & Runge*, 65 Tex. 723, 726 (1886); *Holmes v. Coalson*, 178 S.W. 628, 631 (Tex. Civ. App.—Fort Worth 1915). Price and term interrelated are the essence of a lease transaction.

That deep intertwining is why a minimum duration of lease amounts to government appropriation of land. As the experiences of the Homeowners in this case illustrate, the Grapevine ban effectively deprives the Homeowners of both their own use and their leasing rights. Grapevine insists someone has to be a permanent occupant, but the Homeowners purchased premised on using the homes themselves part of the time and renting them out at other times. The income from short-term renting is what allowed the owners to afford the properties in the first place. CR437-39 (allegations), 462-64 (Holt affid.), 479-81 (Kari Perkins), 482-85 (Kevin Perkins), 487-90 (Muns), 491-93 (Trippett), 495-97 (Mueller), 997; SuppCR59-221. The loss of short-term rental rights – both the income and the flexibility in allocating periods of occupancy – thwarts the purposes of the Homeowners' investments. It also deprives both them and their tenants of possession if neither intends to establish permanent residency in Grapevine.

Equally troubling, a minimum lease duration, as the City's embrace of a permanent-residency requirement shows, limits people's movements and invades their private affairs. Enforcing a ban on short

periods of occupancy requires the state to monitor, surveil, control, and interrogate anyone on the land or involved with it. *Zaatari*, 615 S.W.3d at 199, fn. 9 ("As the city concedes, enforcement of section 25-2-795 requires visual monitoring by the City or its agents of private activities."). Cities become, in essence, walled, patrolled compounds where people have to flash permanent-residency cards to demonstrate their bona fides as lawful possessors of land.

This case, apparently the first of its kind to reach a state high-court, is an inflection point. Texas has thirty-million people and the tenth largest economy in the world. It annually hosts millions of people from everywhere. Meanwhile, its cities are criminalizing short stays in private homes. Vacationers, refugees, emergency workers, soldier's families, circuit-riding judges, oil rig techs, the sick and infirm – in short, every sort of person needing or desiring a temporary abode – are getting shut out from the life of ordinary neighborhoods based on anecdotal or unsubstantiated claims of harm. *See Spann*, 235 S.W. at 516) (just because some people don't like something doesn't mean the government can ban it). If this Court does not reaffirm a vested right in leasing which encompasses the lease term, the result will be government monitoring and control of people in their homes, and people will be prosecuted for what amount to status crimes. Texas will toss away the welcome mat and circle the wagons.

There is a vested right in leasing and its duration because liberty as historically conceived and handed down to us depends on it.

F. Zoning is irrelevant to this case.

Citing cases upholding residential zoning, the City argues that because it has the power to zone residential districts under *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), it can ban short-term leasing. City Brief at 14-18. But this case has nothing to do with zoning. The districts at issue were and remain zoned for residential use.[5] As the Third Court in *Zaatari* noted, banning leasing according to duration does not "advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature." 615 S.W.3d at 190.

In any event, neither *duration of occupancy* nor *leasing* are zoning classifications. The apt comparison to *Village of Euclid* would be if the homeowners set up real estate offices or shoe factories at their homes. The Homeowners here, however, do nothing more than rent out their single-family detached dwellings for short-term residential use. *Muns*, 2021 WL 6068952, at *10-11. In fact, it is *precisely* because the homes are zoned residential that the Homeowners rent them out to people who need the sole and exclusive possession of entire homes, as opposed to the more limited, licensed use of, say, a hotel room. *See JBrice*, 644 S.W.3d at 186, fn. 30 ("Under Tarr, a short-term rental—even one subject to hotel occupancy taxes—is not a hotel use if the owner conducts no business onsite.").

At the end of the day, then, the Grapevine STR ban actually *undermines* residential zoning by taking away a residential use which

[5] The specific city code provisions are analyzed below.

Texas cases such as *Tarr*, *JBrice*, *Tiki Island Village*, and *Zaatari* have recognized and affirmed.

II. The Homeowners' takings claim states a limited property interest because the ban takes away a previously-allowed use.

"In the absence of a properly pled takings claim, the state retains immunity." *Hearts Bluff*, 381 S.W.3d at 476. In reviewing a plea to the jurisdiction in a takings case, the Court determines whether the plaintiff's pleadings, construed in favor of the plaintiff, allege sufficient facts affirmatively demonstrating the court's jurisdiction to hear the case." *Id*.

The vested-rights analysis in the previous sections applies equally to both the due process and takings claims. *Muns*, 2021 WL 6068952, at *12, 19. However, the takings claim, unlike the due process and retroactivity claims, seeks to provide recoupment or recompense to the Homeowners if their right to lease for short terms gets taken. CR446 (Third Am. Pet'n, DJ claim).

The court of appeals held, as a jurisdictional matter, that the Homeowners' vested right in leasing is sufficient in and of itself to support their takings claim. *Muns*, 2021 WL 6068952, at *12. However, it did not resolve, in the takings context specifically, whether the prior ordinances *in and of themselves* gave the Homeowners a reasonable expectation of continuing short-term leasing. *Id*. The Homeowners did, nonetheless, demonstrate a more limited property interest arising from the prior ordinances.

As a jurisprudential matter, while there is no set formula, the three guiding factors set out in *Penn Central*, *Sheffield*, and *Mayhew* govern regulatory takings challenges. *Hearts Bluff,* 381 S.W.3d at 477-78. In essence, the inquiry is a case-by-case one whether the regulation has gone "too far" so as to constitute a taking. *Id*. at 477. In this case, the City raises only the third factor – the extent to which the regulation interferes with the economic expectations of a property owner.

A. "Vested" in this context refers to economic expectations.

In takings cases, the "vested" terminology sometimes gets used when analyzing whether someone has demonstrated *Penn Central* "reasonable, investment-backed expectations." *See*, *e.g.*, *Tiki Island*, 463 S.W.3d at 585-87.[6] However, this brief adheres to the *Penn Central* terminology.

The relevant "expectations" encompasses two factors: 1) the economic impact of the regulation, and 2) the extent to which the regulation interferes with distinct investment-backed expectations. *Id*. at 489. The City in essence contends, relying on *Benners*, that the Homeowners lacked any reasonable, investment-backed expectation that they could continue renting out their homes for short terms. City

[6] The City, for its part, cites a new due process case instead of a takings case when arguing that the Homeowners have not demonstrated a "vested" right. City Brief at 15 (citing *Crown Dist'g*).

Brief at 23-25 (citing *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972)).[7]

B. *Benners* does not apply to takings which are counterbalanced by recompense or recoupment.

Benners does not inform this case because it held that an ordinance which barred a previously-allowed use did not, because of its compensatory counterweight, thwart the property owner's economic expectations. The ordinance gave property owners a recoupment period which negated their economic losses. *See Benners*, 485 S.W.2d at 779; *see generally Coyel v. City Of Kennedale*, No. 2-04-391-CV, 2006 WL 19604, at *4 (Tex. App. – Dallas Jan. 5, 2006, pet. denied).

Recoupment is critical. The City of Grapevine didn't allow recoupment or recompense. All it allowed was a 45-day "conditional grace period" to run off existing leases, and even that was immediately revocable on the flimsiest of pretexts:

> Violations of City Ordinances will not be tolerated during the conditional grace period. Any violation of City Ordinance will result in the termination of the conditional grace period, including but not limited to: disturbing the peace, obscenity, littering, building code violations, high weeds and grass, lighting, noise, nuisance violations,

[7] Yet again, however, the City starts from the false premise that the Homeowners' use is not residential. What the City is really contending is that a city can take away a very specific "use" otherwise meeting zoning standards. *See*, *e.g.*, *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL 3198398, at *9 (Tex. App.—Dallas June 29, 2018, pet. denied) (mem. op.) (city tinkered with commercial zoning to disallow auto-repair shops); *Wild Rose Rescue Ranch v. City of Whitehouse*, 373 S.W.3d 211, 216 (Tex. App.— Tyler 2012, no pet.) (city outlawed an animal shelter which had been operating for many years).

> parking on unimproved surfaces, blocking sidewalks or driveways, etc. Such violations during the conditional grace period will result in an order to immediately cease the STR, and will result in prosecution as described above.

CR674.[8] The Homeowners got nothing when their previously-allowed right to lease without duration restrictions was taken from them. *Benners*, therefore, does not control.

C. The takings claim is valid because the Homeowners were deprived of all or most of their investment-backed expectations.

The ordinances gave Homeowners leasing rights unrestricted by duration before 2018. That is important because this Court has explained in takings cases that "[t]he existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation." *Hearts Bluff*, 381 S.W.3d at 491 (quoting Texas and U.S. cases).

In a case factually all-but identical to this one, the First Court relied on that principle in upholding a homeowners' takings claim challenging a city's ban on short-term leasing, concluding that a homeowner has a "narrow, vested . . . right" in a preexisting use under prior ordinances. *Vill. of Tiki Island*, 463 S.W.3d at 587 (citing *Benners*, 463 S.W.3d at 587, as concerns the importance of recoupment).

Just as in *Tiki Island*, the Homeowners in this case invested substantial sums in reliance on ordinances which allowed residential uses without any restriction on the length of residential occupancy.

[8] Reproduced below in full.

Just like in *Tiki Island*, each Homeowner "made the decision to purchase [a] house based on representations about [the] ability to rent it out short term," and each Homeowner "relies on the income from some rentals to pay for the house." *Id.*, 463 S.W.3d at 580. That constitutes "evidence of a reasonable investment-backed expectation of an ability to do short-term rentals." *Id.*

While it is a more limited variety of right than a natural right, the right to rent for short terms under prior ordinances supports a takings claim because, in essence, the City *gave*, and then it *took*.

III. Exhaustion of administrative remedies does not apply.

The City contends that a cease-and-desist letter it sent out to homeowners rises to the level of a "decision" of an "administrative official" which the Homeowners were obliged to appeal administratively before any suit could be filed. City Brief at 25.

Re: Short Term/Transient Rental Prohibition – 1203 Bellaire Dr

Dear STR Owner/Operator,

Be advised that short term/transient rentals ("STR's") are prohibited in the City of Grapevine. STR's are not listed as a permitted use in any Zoning classification in the City, and as such, are not allowed. Following a lengthy observation and study period which began in November of 2017, on September 4, 2018, the Grapevine City Council conducted a Public Hearing to allow for public input regarding STR's. Following the Public Hearing, the City Council approved Ordinance 2018-065 that affirmed the prohibition on STR's in Grapevine. Single family dwelling transient rentals (aka STR's) are defined as "the rental or offer for rental of any dwelling or any portion of a dwelling for a period of less than 30 days. The complete Ordinance is attached.

In order to give the STR owners and operators a reasonable time to honor commitments that have already been made, and/or to market their home(s) for other, permitted uses, the City will allow for a forty-five (45) day conditional grace period for compliance. Please be advised that the grace period will end on October 22, 2018. After that time, any person found to be in violation of the Zoning Ordinance regarding STR's will be issued a citation, and upon conviction thereof shall be fined in a sum not to exceed $2,000.00. A separate offense shall be deemed committed upon each day during or on which a violation occurs or continues.

Violations of City Ordinances will not be tolerated during the conditional grace period. Any violation of City Ordinance will result in the termination of the conditional grace period, including but not limited to: disturbing the peace, obscenity, littering, building code violations, high weeds and grass, lighting, noise, nuisance violations, parking on unimproved surfaces, blocking sidewalks or driveways, etc. Such violations during the conditional grace period will result in an order to immediately cease the STR, and will result in prosecution as described above.

It has also come to our attention that there are a number of illegal dwelling units that are being used for STR's. Accessory structures such as garage apartments and back yard apartments are not legal for separate residential occupancy in any Single Family Zoning districts. Single family dwellings that have been divided into multiple dwelling units are also illegal. Please be advised that these structures may not be used as living quarters under any circumstances.

Thank you for your attention. City staff from all departments are available to meet with you in person or by phone regarding the ordinance. Please contact the Development Services Department at (817)410-3154 with any questions you might have. We look forward to your prompt compliance.

Sincerely,

Development Services
City of Grapevine

DEVELOPMENT SERVICES DEPARTMENT
The City of Grapevine • P.O. Box 95104 • Grapevine, Texas 76099 • (817) 410-3154
Fax (817) 410-3018 • www.grapevinetexas.gov

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A. The letter is neither specific nor effective, so it is not a "decision" triggering Chapter 211.

Local Government Code Chapter 211 gives city residents administrative appeal rights from decisions of city officials. Because Chapter 211 is ground-level justice without the usual evidentiary formalities, it ought to be construed in way that ordinary people can understand.

Chapter 211 does not define "decision," so resort can be had to the dictionary. *See Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). Black's defines "decision" as a "judicial or agency ***determination after consideration of the facts and the law***; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case." Black's Law Dictionary (11th Ed. 2019).

Persons of ordinary intelligence know what a decision by a city official is: something which says "you violated an ordinance, so the City is punishing you." A "decision" is ***effective*** in some way upon someone in particular and, in the words of the statute, has rendered them "aggrieved." Stated succinctly, "you did *this*, and now we have decided *that*, with the consequence of *the other*."

The language and context of Chapter 211 indicate that a "decision" must also be ***specific*** enough so that a reversal by the board can undo the punitive effect of the official's action. *See*, *e.g.*, *E. Cent. Indep. Sch. Dist. v. Bd. of Adjustment for City of San Antonio*, 387 S.W.3d 754, 761 (Tex. App. – El Paso 2012, pet.

denied) (under § 211.011(b), "decision" means a physical record such as minutes); *cf. Risoli v. Bd. of Adjustment of City of Wimberley*, No. 03-17-00385-CV, 2017 WL 4766724, at *4 (Tex. App. Austin – Oct. 20, 2017, no pet.) (city manager's cease-and-desist letter was never filed as an official record of any decision).

The City's letter satisfies none of the foregoing criteria. The following points are readily apparent from the letter:

- This is a form letter addressed not to any individual, but generically to *anybody* the City believed was an "STR Owner/Operator." City Brief at 8.
- No official signed it; it is from a department. No one would have any idea that any particular official had done anything in particular concerning a particular City resident.
- It apprises owners of a grace period, meaning no one was in violation of the ordinance for the next 45 days. Yet, under the City's interpretation, an appeal under Chapter 211 had to noticed within either 15 or 20 days. City Brief at 27 (citing CR851 for 15 days); Tex. Admin. Code § 211.010(b) (20 days). Whichever deadline applies, the grace period makes it logically impossible for an appeal from the letter to arise.
- The letter tells owners that "*after*" the grace period, violators "*will be*" cited for violations. That is, an official will, in the future, issue a citation to that owner, representing at that point a "decision" ripe for appeal.
- The letter also says that if owners violate other ordinances during the grace period, those violations "*will result* in an order to immediate cease the STR." Again, a conditional threat of a decision which may happen in the future, and as to a specific homeowner who violates.

- It invites owners to "meet with . . .City staff from all departments." Were this something specific which had to be appealed administratively, it would not be an open invitation to sit down to a chat with any City employee.

- It asks for "*prompt* compliance." Again, not an assertion of past or ongoing violations, but by its own terms something which "looks forward" to subsequent compliance.

Given these features, no reasonable person would believe the City had made any specific decision about any specific person's past or ongoing rentals which would trigger an administrative process for subsequent "reversal," "modification," or other statutorily-authorized administrative relief. Tex. Local Gov't Code § 211.008(b), (c).[9]

B. The letter is just information, so there was no "enforcement."

The court of appeals concluded that the letter was "purely informational" and therefore not "made in the enforcement" of the zoning ordinance. *Muns*, 2021 WL 6068952, at *7. The City responds that the court of appeals has hobbled municipal enforcement of zoning by requiring an "overt threat of prosecution." City Brief at 30.

The court of appeals was right because the letter does no more than threaten future enforcement contingent on current compliance. Yes, as the City says, some Homeowners did stop renting given the clear threat of future prosecution. But that's the point: based on information which afforded the homeowners knowledge that the City

[9] The trial judge took the City to task on this point. Supp.RR45-46, 49-51.

intended to prosecute violations in the future (after the 45-day grace period), a homeowner could avoid enforcement by ceasing to rent and staying in compliance. In sum, enforcement had never happened in the past and was not happening now, but soon it would if you keep doing what we believe you were doing.[10]

C. Any administrative "decision" in 2018 regarding what the pre-2018 ordinances meant would be a legal nullity.

The City acknowledges black-letter law that the Homeowners could not have asked the board of adjustment to declare the STR ban unconstitutional. City Brief at 31. The City contends, instead, that the appealable "decision" was the City's gaslighting declaration that the pre-2018 ordinances had always banned STR's. That has to be rejected for the following reasons.

1. A board decision declaring incorrect the City's legal position concerning the pre-2018 ordinances would be merely advisory.

A tribunal's declaration concerning the meaning of the prior ordinances would be merely advisory. The City has never prosecuted anyone for STR's under the pre-2018 ordinances, and

[10] In any event, it's not clear why enforcement would be through the board of adjustment at all, a fact hinted at in the City's brief. City Brief at 28 ("citation . . . conviction . . . fine"). Chapter 211 "grants municipalities specific authority to pass substantive ordinances regulating zoning." *See City of Dallas v. TCI W. End, Inc.*, 463 S.W.3d 53, 57 (Tex. 2015) (comparing Chapters 54 and 211); Tex. Local Gov't Code § 211.012(a), (b). When the ordinances so adopted impose fines, as the STR ban does (**Tab A**), cities can issue misdemeanor citations which they prosecute in either municipal court or in "quasi-judicial" administrative procedures. *See generally id.* at 57-58; Tex. Local Gov't Code Ch. 54. Chapter 211 may be a red herring.

there is no reason it would since the 2018 ordinance is on the books.[11] Were the Homeowners to seek an administrative appeal without any citation, ticket, or other evidence of enforcement of the pre-2018 ordinance, an administrative tribunal, scratching its head what was expected of it, would not take upon itself the task of declaring "wrong" the statements of city representatives concerning laws which had effectively been superseded.

2. A board decision declaring incorrect the City's legal position concerning the pre-2018 ordinances would be moot.

The meaning of the pre-2018 ordinances became moot on September 4, 2018. The 2018 STR ban is plain and explicit, rendering it at best unnecessary, at worst improper, for a board of adjustment to declare the meaning of the prior ordinance.

3. A board decision declaring incorrect the City's legal position concerning the pre-2018 ordinances would not wipe the 2018 STR ban off the books.

The City argues that if the board of adjustment declared the City's letter mistaken as to the meaning of the pre-2018 ordinances, that alone would solve all the Homeowners' problems: at that point, "STRs would have been permitted in the City." City Brief at 32-33. The City contends another ordinance would be required. City Brief at 33.

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[11] Presumably the City could because it now contends that STR's have been banned since at least 2000. It could scour its tax receipt records to determine what property owners paid the short-term occupancy tax, and then start issuing citations for everyone whose money it was "happy" to accept. *Muns*, 2021 WL 6068952, at *2.

This argument makes no sense. The 2018 ordinance is on the books, and it unmistakably bans short-term rentals. That is so even if it recites a legally erroneous interpretation of prior ordinances. The City seems to be saying that because the City *takes the position* that the 2018 ordinance "reaffirmed" the pre-2018 ordinance, the 2018 ordinance would go *poof!* if the board of adjustment disagreed. How would that work? The board is only empowered to "reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination." Tex. Local Gov't Code § 211.009(b). Nothing in Chapter 211 allows a board of adjustment to invalidate an existing ordinance. That's why the Homeowners asserted constitutional claims in a court of law.

D. The City's cases requiring administrative exhaustion are not on point.

The City relies on two cases in which an administrative procedure could have determined whether a specific decision by an official concerning a specific individual was correct. Neither case has any bearing on this one.

City of Grapevine v. CBS Outdoor, Inc., No. 02-12-00040-CV, 2013 WL 5302713 (Tex. App.—Fort Worth Sept. 19, 2013, pet. denied) (mem. op.), represents a very typical failure by a party to exhaust administrative remedies. It teaches that a specific denial

by a specific city official of a specific request for a variance, at clear pain of enforcement, triggers Chapter 211.

CBS Outdoor's billboard hung partly over land the state was taking, but the pole remained in the City of Grapevine. CBS instigated the administrative appeal process but then failed to follow through:

1. CBS sent the City a written request for permission to alter its billboard.
2. A City official responded specifically to CBS's written request with a written denial in which "the City specifically stated . . . that CBS could not move, alter, or adjust the sign."
3. After receiving the formal denial of its request, "CBS did not challenge the propriety of, or the authority underlying, that decision."

CBS ignored the City's denial and altered its billboard, whereupon the City then sent CBS a letter ordering CBS to tear it down. Upon the city's jurisdictional challenge based on exhaustion, CBS asked the Court to ignore CBS's written request and the City's resulting denial of that request.[12] The court faulted CBS for failing to appeal the original clear denial of CBS's specific request.

[12] CBS wanted to shift the administrative appeal timeframe forward by seizing on the *subsequent* letter from the City ordering tear-down, which CBS did manage to appeal administratively. *Id*. at *2, 4-5.

CBS Outdoor's resolution of a garden-variety, botched administrative appeal says nothing to this case. The city's denial of CBS's request was a "sweeping directive that, viewed objectively, prohibited CBS from taking virtually any legal action whatsoever with the sign." *Id.* at *4 (cleaned up). The Court expounded upon the *specificity* of the steps involved:

> [W]hen CBS specifically requested to shift the face of the sign, the City did not specifically deny the request by responding, "The City denies your request to shift the face of the sign." Instead, the City specifically stated—in what were unquestionably much broader terms—that CBS could not move, alter, or adjust the sign.

Id. It is that kind of specificity which alerts people to the need to pursue administrative remedies. No such specific actions occurred in this case.

Sumner v. Board of Adj. of City of Spring Valley Vill., No. 14-15-00149-CV, 2016 WL 2935881 (Tex. App.—Houston [14th Dist.] May 17, 2016, pet. denied) (mem. op.), is similar to the *CBS Outdoor* case in that the complainant botched the appeal of a specific decision by an official concerning a specific property. There, a city official issued a permit for a drainage scheme, following which the complainant sought relief before the board of adjustment. After the board denied relief, the same city official issued a certificate of occupancy. *That* decision was the one the complainant challenged in court. Unfortunately, the complainant had never appealed *that* decision, so the case against the city

official relating to the certificate of occupancy had to be dismissed. Again, lots of specificity and a clear decision by an official.

In this case, the only conceivable "administrative decision" was one in the homeowners' favor: "[S]ome of the Homeowners contacted the City's Planning and Zoning Department to ask about any restrictions on STRs, City employees told them that the City had no restrictions, regulations, or permit requirements for STRs." *Muns,* 2021 WL 6068952, at *2. Of course, the homeowners had no need to appeal these City statements since they gave the homeowners the green light to rent.

In essence, the City asks the Court to ignore Chapter 211's requirement of specificity and invite administrative mayhem and mass deprivations, through inadvertence, of administrative due process. Any time a city official offers commentary at a council meeting on the meaning of an existing ordinance, every affected citizen will have to read the tea leaves whether to lodge an administrative appeal. Any time a letter goes out informing citizens of the City's position on an issue and the City's intentions as to future enforcement, citizens will have to inundate the City with appeal filings asking administrative judges to pontificate on whether the City's position is correct. This would render Chapter 211 a farce.

IV. The court of appeals correctly held that the pre-2018 ordinances did not ban short-term leasing.

The City contends the court of appeals issued an advisory opinion as concerns the 2018 ordinance because 1982 zoning ordinance already required tenants to establish permanent residency. City Brief at 34. The City contends it can now just prosecute the Homeowners for violating the 1982 zoning ordinance instead of the 2018 one. That argument fails for several reasons, all of which stem from the fact that the 1982 zoning ordinance allowed renting for short terms and, as a corollary, did not require tenants to be permanent residents.

A. The Fifth Circuit's *Hignell-Stark* decision undermines the contention that the City could require permanent residency.

The new *Hignell-Stark* Fifth Circuit decision defeats the City's contention that the 1982 zoning ordinance required permanent residency. *Hignell-Stark* holds, under the Commerce Clause, that a city cannot discriminate against out-of-state residents when issuing licenses for short-term renting. *See Hignell-Stark*, 2022 WL 3584037, at *6. In that case, New Orleans was refusing to issue short-term rental licenses unless owners proved that the homes they rented out for short terms were also their principal residences – in essence, New Orleans was imposing a permanent-residency requirement on owners. *Id.*, at *1.

Hignell-Stark involved a requirement placed on owners, but it also controls this case because the City contends that someone (in this case, the tenant) has to be a permanent resident for the 1982 zoning

ordinance to be satisfied. Anyone who makes their primary residence outside of Texas could not rent a single-family detached dwelling in Grapevine. That patently discriminates against out-of-state residents in the way forbidden by *Hignell-Stark*. If, as the City contends, the 1982 zoning ordinance forbade out-of-state residents from renting homes in Grapevine, that requirement was never valid in the first place.

B. This Court's decisions in Tarr and JBrice undermine the City's contention that short-term leasing is not a residential use.

This Court's decisions in *Tarr* and *JBrice* likewise defeat the City's contention that the 1982 zoning ordinance required tenants to establish permanent residency in order to qualify as valid residents and amiable neighbors.

1. Residential zoning allows any duration of residential use.

The City claims the 1982 zoning ordinance forbids "single-family dwelling transient rentals." It reasons that people who do not establish permanent residency cannot logically use homes as "single-family detached dwellings." City Brief at 3-4.

The main flaw of this argument is that the zoning ordinance in essence allows residential uses. In requiring that tracts be used for "single-family detached dwellings," the zoning ordinance allows all the uses to which a family might put a detached dwelling. That is analogous to what the restrictive covenants in *JBrice* required:

"private single family residence[s] for the Owner, his family, guests, and tenants." 644 S.W.3d 179, 182.

By the same token, the 1982 zoning ordinance by necessary implication rules out commercial uses which are not expressly allowed, just as did the express prohibitions on such uses in *Tarr* and *JBrice*. A "dwelling," after all, is not a "business." *See JBrice*, 644 S.W.3d at 185 ("When the income derived from a use is in the form of rent, and the nature of that use is residential occupancy, then this residential-use provision does not prohibit it."). Yes, a landlord is in business, but that does not mean that business activity occurs at the rental house. The evidence here, for instance, shows that the Homeowners arrange their rentals through the internet, not *at* their homes. CR1037, 1063, 1066, 1310, 1321, 1323, 1332, 1336. The Court explained the significance of that fact in *JBrice*:

> [A] leasing business does not occupy the [home] premises; its tenants do. Because tenants are included among those permitted to use the townhomes, with no expressed restriction as to the minimum duration of such use, a short-term tenant does not violate the residential-use covenant.

644 S.W.3d at 185.

2. Other definitions in the ordinances have no bearing on the duration of leasing.

The definitions within the ordinances relating to "single-family detached dwelling" do not have any bearing on leasing or duration of use. As of 2000, those definitions were as follows:

> 140. Family shall mean any number of individuals living together as a single housekeeping unit interdependent upon one another.
>
> 394. Single-family detached dwelling shall mean an enclosed building having accommodations for and occupied by only one family, which building must of itself meet all the lot area, front yard, side yard, rear yard, height and other zoning requirements.

One searches in vain here for anything which would reasonably place a property owner on notice of either a leasing restriction or a duration restriction on occupancy.

The City, nonetheless, lavishes pages on the argument that "'single housekeeping unit' . . . provides a duration restriction on leasing houses." City Brief at 37-41. It insists that the persons renting the house "must be sufficiently stable and permanent so as not to be fairly characterized as purely transient." City Brief at 38.

As an initial matter, the City never explains how "leasing" creeps in to the argument. Owners, after all, use their own properties as second, vacation, temporary, transient, and intermittent homes. Since it would be absurd to suggest that a residential zoning ordinance bars owners or their guests from deciding their *own* term of occupancy, the City avoids confronting this fatal flaw in its argument.

Too, the City cites solely a sprinkling of cases from other states which directly conflict with *Tarr* and *JBrice*. *See*, *e.g.*, *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886 (Pa. 2019), *and Styller v. Zoning Bd. of Appeals of Lynnfield*, 487 Mass. 588, 599 (2021); *but see Lake Serene Prop. Owners Assoc., Inc. v. Esplin*, 334

So.3d 1139 (Miss. 2022) (new restrictive covenant case agreeing with *Tarr* but differentiating *Slice of Life* as an ordinance case). In fact, *Tarr* and *JBrice* represent the large majority of decisions nationally: by a lopsided 19-3 margin, other states hold that short-term leasing is residential. **Tab C**.

The City also points to the definition of "business service" in the 2000 ordinances:

> 36. Business service shall mean a commercial use, other than retail sales and professional services, devoted to . . . (c) The providing of temporary abodes for transient persons, such as a hotel or motel . . . .

There are two problems with the City's reliance on this definition when contending that tenants have to establish permanent residency:

1. The definition is "commercial use," in particular that variety of commercial use which is akin to hotels. The court of appeals, it should be noted, held that "[b]ecause the Homeowners do not simultaneously occupy the STRs, their STRs are not a commercial use and thus not a "business service." *Muns*, 2021 WL 6068952, at *11. Commercial use occurs when an owner crosses the line from conveying the sole and exclusive possession of an entire home (leasing it out) to staffing it and maintaining partial control while others stay there, as occurs with a hotel or motel. *See JBrice*, 644 S.W.3d at 186 (where owner rented out entire home for tenant's exclusive use, the use was a residential lease); *Tarr*, 556 S.W.3d at 276 ("So unlike what one might

expect at a hotel, rental groups were alone in Tarr's house, unaccompanied by employees and without services a hotel stay might provide, such as cooked meals or housekeeping.").[13]

2. "Business service" is not in the chain of definitions for "single-family detached dwellings" in the first place. It is part of a separate "customary home occupation" regulatory regime. If an owner wishes to carry on a trade in a home, the owner has to make sure the trade fits within the meaning of a "customary home occupation." The Homeowners in this case, however, do not seek to "carry on an occupation" in the homes they rent out. *See JBrice*, 644 S.W.3d at 185 ("As JBrice notes, its leasing business does not occupy the premises; its tenants do"). If a homeowner began operating hotel in a home, or set up a real estate leasing office in a home, or allowed tenants to set up shop, *then* there would be a home occupation.

In sum, *Tarr* and *JBrice* rule out the City's contention that the 1982 zoning ordinance barred short-term residential use and, as a corollary, required permanent occupancy.

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[13] Owners who think they are merely renting out their homes sometimes cross the line into commercial use by remaining too involved on the premises. *See*, *e.g.*, *Roaring Lion, LLC v. v. Exclusive Resorts PBL 1, LLC*, CAAP-11-0001072, 2013 WL 1759002 (Haw. Ct. App. Apr. 24, 2013) ("in determining whether rental activities exceed the scope of "residential use," one factor other jurisdictions have found relevant is whether the owner provided services or conducted transactions on-site"). The Grapevine ordinances – as do most "residential use" zoning ordinances – forbid that.

C. The 2000 bed-and-breakfast ordinance is a red herring.

It's quite true, as the City notes, that in 2000, the City began allowing bed and breakfasts in some zoning districts – though not, it should be noted, in the districts implicated in this case. *Muns*, 2021 WL 6068952, at *2 and fn. 7. But the allowance of bed-and-breakfasts is irrelevant to anything in this case.

The 2000 ordinance's definition of "bed and breakfast facility" mentioned "transient rentals," but it did so to exempt them (as well various other residential and commercial uses) from any requirement of bed-and-breakfast licensure, as its language makes clear:

> 29a. BED AND BREAKFAST FACILITY shall mean an accessory use to a single- family dwelling unit in which no more than twelve (12) rooms in the principal residential structure are set aside for guest clients; breakfast is available on-site to only such guest clients at no extra cost; length of stay of guest clients ranges from one (1) to thirty (30) days; and the owner/operator of the principal structure resides on-site. Bed and breakfast homestay does not include uses such as motels, hotels, community residential homes, boarding or lodging houses, apartment dwellings, guest cottages or single-family dwelling transient rental.

CR817; Brief of Appellants Tab C (table of implicated ordinances).

While the availability of a license to run a B&B was certainly a boon to those who want to run such businesses, it has nothing to do with this case. The Homeowners have never sought to run B&B's. Far from it: they rent out their residentially-zoned homes for residential purposes, conveying the full possessory interest. *Muns*, 2021 WL 6068952, at *2 (reciting the Homeowners' manner of use).

PRAYER FOR RELIEF

The Court should affirm the court of appeals and remand the case for trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on September 26, 2022, a true and correct copy of this response brief was served by efiling on:

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/s/ J. Patrick Sutton

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i)(2)(D) because it contains **10,725** words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ J. Patrick Sutton

No. 22-0044

IN THE SUPREME COURT OF TEXAS

CITY OF GRAPEVINE,

Petitioner,

v.

LUDMILLA B. MUNS, RICHARD MUELLER, KARI PERKINS, KEVIN PERKINS, PAMELA HOLT AND A-1 COMMERCIAL AND RESIDENTIAL SERVICES, INC.,

Respondents.

APPENDIX

Grapevine Ordinance 2018-065 (STR ban)	Tab A
Selected Grapevine pre-2018 ordinances	Tab B
Cases nationally addressing STR's as "residential use"	Tab C
Excerpt from Roznai 2018 (author's proof by permission)	Tab D

TAB A

ORDINANCE NO. 2018-065

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF GRAPEVINE, TEXAS ADOPTING A NEW ARTICLE VI TO CHAPTER 14 OF THE CODE OF ORDINANCES REGARDING SINGLE-FAMILY DWELLING TRANSIENT RENTALS; REPEALING CONFLICTING ORDINANCES; PROVIDING A PENALTY; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City of Grapevine is authorized to adopt and enforce ordinances necessary to protect health, life, and property to preserve good government and the security of its inhabitants; and

WHEREAS, the City of Grapevine has adopted a comprehensive Zoning Ordinance to regulate the location and use of buildings and land in full accordance with Chapter 211 of the Local Government Code; and

WHEREAS, single-family dwelling transient rentals have been identified in the City's Zoning Ordinance since at least April 18, 2000, with the adoption of Ordinance No. 2000-47; and

WHEREAS, single-family dwelling transient rentals are not currently listed as a permitted use in any Zoning District within the City; and

WHEREAS, there has been a proliferation of single-family dwelling transient rentals within residential areas of the City; and

WHEREAS, single-family dwelling transient rentals do not fit in or fall under the definition of single-family attached dwelling or single-family detached dwelling under the Zoning Ordinance; and

WHEREAS, single-family dwelling transient rentals are not consistent with the character or nature of single-family residential uses under the Zoning Ordinance; and

WHEREAS, single-family dwelling transient rentals are not suitable in residential neighborhoods, are not compatible with residential uses, and the neighborhood adjacency of single-family dwelling transient rentals in residential neighborhoods is harmful; and

WHEREAS, in the absence of being listed as a permitted use in any Zoning District, single-family dwelling transient rentals are prohibited under the City's Zoning Ordinance; and

WHEREAS, single-family dwelling transient rentals in the City of Grapevine, with their attendant traffic, parking, noise, litter, and the influx of non-residents into residential

areas is incompatible with the intent of residential districts in the City and the desires and expectations of the City's residents and is contrary to the long-standing character of the community; and

WHEREAS, single-family dwelling transient rentals in residential areas of the City pose a risk of increased public nuisances, disruption of neighborhoods, and additional enforcement related issues; and

WHEREAS, the City's Police Department has responded to multiple calls for service at known addresses of single-family dwelling transient rentals in residential areas of the City; and

WHEREAS, the calls for service attributable to single-family dwelling transient rentals in residential areas of the City include noise, parking, and disturbance complaints; and

WHEREAS, the increase in calls for service attributable to single-family dwelling transient rentals in residential areas of the City result in an additional burden on the Police Department; and

WHEREAS, the City of Grapevine City Council has determined that it is a necessity to regulate activities as provided for herein to safeguard the public; and

WHEREAS, the City of Grapevine is authorized by law to adopt the provisions contained herein; and

WHEREAS, the City Council of the City of Grapevine deems the passage of this ordinance as necessary to protect the public, health, safety, and welfare; and

WHEREAS, the City Council is authorized by law to adopt the provisions contained herein, and has complied with all the prerequisites necessary for the passage of this Ordinance, including but not limited to the Open Meetings Act.

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAPEVINE, TEXAS:

Section 1. That all matters stated hereinabove are found to be true and correct and are incorporated herein by reference as if copied in their entirety.

Section 2. That a new Article VI to Chapter 14 is hereby adopted and added to the Code of Ordinances as follows:

"ARTICLE VI. SINGLE-FAMILY DWELLING TRANSIENT RENTALS

14-150 - Definitions

Single-family dwelling transient rental – The rental or offer for rental of any dwelling or any portion of a dwelling for a period of less than 30 days.

Rental – The renting, bartering, trading, letting or otherwise allowing the use of a dwelling or room or rooms within a dwelling for compensation. This shall not restrict, limit or interfere with any homeowner from participating in a leaseback upon the sale of a dwelling.

Leaseback – An arrangement where the seller of a home leases the home back from the purchaser. In a leaseback arrangement, the specifics of the arrangements are typically made prior or immediately after the sale of the home.

14-151 - Single-family Dwelling Transient Rentals Prohibited

All single-family dwelling transient rentals are hereby prohibited and unlawful within the City of Grapevine."

Section 3. That City staff is hereby directed to proceed with a notice and enforcement initiative as to single-family dwelling transient rentals.

Section 4. That all ordinances or any parts thereof in conflict with the terms of this ordinance shall be and hereby are deemed repealed and of no force or effect; provided, however, that the ordinance or ordinances under which the cases currently filed and pending in the Municipal Court of the City of Grapevine, Texas shall be deemed repealed only when all such cases filed and pending under such ordinance or ordinances have been disposed of by a final conviction or a finding of not guilty, nolo contendere, or dismissal.

Section 5. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not to exceed two thousand dollars ($2,000.00) and a separate offense shall be deemed committed upon each day during or on which a violation occurs or continues.

Section 6. If any section, article, paragraph, sentence, clause, phrase or word in this ordinance, or application thereto any person or circumstance is held invalid or unconstitutional by a Court of competent jurisdiction, such holding shall not affect the validity of the remaining portions of this ordinance; and the City Council hereby declares it would have passed such remaining portions of the ordinance despite such invalidity, which remaining portions shall remain in full force and effect.

Section 7. The fact that the present ordinances and regulations of the City of Grapevine, Texas are inadequate to properly safeguard the health, safety, morals, peace and general welfare of the public creates an emergency which requires that this ordinance become effective from and after the date of its passage, and it is accordingly so ordained.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAPEVINE, TEXAS on this the 4th day of September, 2018.

APPROVED:

Mayor
William D. Tate

ATTEST

Tara Brooks
City Secretary

APPROVED AS TO FORM:

City Attorney

TAB B

Citation	Relevant Text of Ordinance	Appellees' Comments
App. D, § 6	Sec. 6. - General provisions. A. Territorial application. These regulations and restrictions in this ordinance shall apply to all buildings, structures, land and uses within the corporate limits of the City of Grapevine. B. General application. After the effective date of this ordinance, all buildings and structures erected, remodeled, altered and relocated and any use of land, buildings or structures established shall comply with the applicable provisions of this ordinance. Existing buildings, structures and uses of land not complying with the provisions of this ordinance may continue subject to the provisions of the nonconformities section of this ordinance. C. General prohibition. No building or structure; no use of any building, structure or land; and no lot of record or zoning lot, now or hereafter existing, shall hereafter be established, altered, moved, divided or maintained, in any manner except as authorized by the provisions of this ordinance.	Relied on by the City for the proposition that anything not expressly allowed is forbidden. Brief of Appellant at 1, 18-21.

App. D, § 12 (**added by Ordinance No. 2000-47**)	Sec. 12. - Definitions. A. The following words, when used in this ordinance, shall have the meanings respectively ascribed to them in this section, unless such construction would be inconsistent with the manifest intent of the city council or where the context of this ordinance clearly indicates otherwise: . . . 29a. Bed and breakfast facility shall mean an accessory use to a single-family dwelling unit in which no more than 12 rooms in the principal residential structure are set aside for guest clients; breakfast is available on-site to only such guest clients at no extra cost; **length of stay of guest clients ranges from one to 30 days**; and the owner/operator of the principal structure resides on-site. Bed and breakfast homestay does not include uses such as motels, hotels, community residential homes, boarding or lodging houses, apartment dwellings, guest cottages or **single-family dwelling transient rental.** 36. Business service shall mean a commercial use, other than retail sales and professional services, devoted to: . . . (c) The providing of temporary abodes for transient persons, such as a hotel or motel. 64. Commercial shall mean any business, other than a customary home occupation or manufacturing business, which involves the exchange of goods or services for the remuneration of a person occupying the premises upon which the transaction or part thereof takes place.	The 2000 ordinance introduces the concept of the short-term rental of homes, denominating them as "single-family residential transient rentals." However, it does not define or restrict them. Furthermore, it conspicuously exempts them from the bed & breakfast regulations. No other ordinance addresses short-term rentals of ordinary homes. The City relies on this provision for the contention that leasing a home renders the home a "hotel" if the duration of the lease is short.

	70. **Customary home occupation** shall mean an occupation customarily carried on in the home by a member of the occupant's family provided that: (a) The home occupation shall be **clearly secondary to the residential use of the dwelling** and there may be no evidence of the home occupation visible to the neighborhood. (b) There shall be no structural alteration to the premises/building or any of its rooms, which changes the residential character of the dwelling. (c) There shall be no installation of machinery or additional equipment other than customary to household operations. (d) No person other than a member of the family of the owner or the resident of the dwelling shall be employed or work in such home occupation and such employees must also be occupants of the residence. (e) A home occupation may not create noise, vibration, glare, fumes, odors, or electrical interference which is detectable off of the premises, and may not cause visual or audible interference in radio or television receivers or fluctuations in line voltage off of the premises. (f) A home occupation must be carried on wholly within the principal dwelling, and not in an accessory building. (g) No signs or displays advertising the home occupation may be placed on the property where the home occupation is conducted. (h) Any activity conducted on the premises shall be of such a nature as to not appreciably increase the vehicular traffic or pedestrian activity in the neighborhood, and shall not encourage queues, browsing of displays, or any similar activity. (i) Outside storage of merchandise or equipment is prohibited.	"Occupation," referring to a business use as opposed to "occupancy," is not the same thing as "residential use of the dwelling." The ordinance sets out the various business uses which are allowed in a residential home.

Citation	Relevant Text of Ordinance	Appellees' Comments
	(j) Parking for the home occupation must be provided on a paved surface off of the street and not in a required front yard. (k) A customary home occupation shall not include the physical or medical treatment of persons or animals, retail sales, **business services**, barber shops, beauty shops, dance studios, carpenter shops, electrical shops, plumber shops, radio shops, auto repairing or painting, furniture repairing, or sign painting. . . . **140. Family shall mean any number of individuals living together as a single housekeeping unit interdependent upon one another**. 325. **Premises** shall mean a piece of land or real estate owned, rented, **leased**, used or occupied distinct from those adjacent, by virtue of different ownership, rental, lease, usage or occupancy. 394. **Single-family detached dwelling** shall mean an enclosed building **having accommodations for and occupied by only one family**, which building must of itself meet all the lot area, front yard, side yard, rear yard, height and other zoning requirements.	The City points to the renting of homes for short terms as falling within the definition of "business services," defined in the "Definitions" portion of Appendix D, above. "Family" is not a sanguinary relationship. Premises may be leased.
App. D, §§ 3, 13-17	[Several kinds of "Single-Family Residential Districts" authorized	"Residential" is not defined.

Citation	Relevant Text of Ordinance	Appellees' Comments
App. D, § 12	Sec. 13. - R-20 Single-Family District Regulations. . . . USES GENERALLY: In an R-20 Single-family district no land shall be used and no building shall be erected for or converted to any use other than as hereinafter provided. A. Permitted uses: The following uses shall be permitted as principal uses: 1. Single-family detached dwellings. . . . B. Accessory uses: The following uses shall be permitted as accessory uses to a single-family detached dwelling provided that none shall be a source of income to the owner or user of the principal single-family dwelling, except for customary home occupation. . . . 2. Servants' quarters **not leased or rented** to anyone other than the family of a bona fide servant, giving more than 50 percent of his or her employed time at the **premises** to which the servants' quarters is an accessory use and in the employ of **the family occupying said premises**. . . . 6. Model homes and model home parking lots are permitted as a **temporary use** in new subdivisions . . . . D. Limitation of uses: 1. No more than three persons unrelated by blood or marriage may occupy residences within an R-20 Single-Family district. . . .	In a single-family zoning district like those at issue, an owner cannot lease out accessory dwellings separately from the main dwelling. However, there is no restriction on short-term stays in the main dwelling even though this ordinance directly addresses both "temporary uses" and the leasing and occupancy of a principal dwelling. This is an instance where one district's zoning limits "Single-Family" use according to a sanguinary relationship.

App. D, § 15	Sec. 15. - R-7.5 Single-Family District Regulations. PURPOSE: The R-7.5 Single-family district is established to provide for areas requiring minimum lot sizes of 7,500 square feet in order to promote low population densities within integral neighborhood units. This district is intended to be composed of single-family dwellings together with public, denominational and private schools, churches and public parks essential to create basic neighborhood units. USES GENERALLY: In an R-7.5 Single-family district no land shall be used and no building shall be erected for or converted to any use other than as hereinafter provided. A. Permitted uses: 1. Single-family detached dwellings. 2. Churches, convents and other places of worship. 3. Parks, playgrounds and nature preserves, publicly owned. 4. Temporary buildings when they are to be used only for construction purposes or as a field office within a subdivision approved by the city for the sale of the real estate of that subdivision only. Such temporary construction buildings shall be removed immediately upon completion or abandonment of construction and such field office shall be removed immediately upon occupancy of 95 percent of the lots in the subdivision. 5. Model homes and model home parking lots are permitted as a **temporary use** in new subdivisions, provided a notice is continually posted in a prominent place in a livable area in the home and the owner signs an affidavit on a form approved by the director of community development affirming compliance with all the regulations of this section. B. Accessory uses: The following uses shall be permitted as accessory uses to a single-family detached dwelling provided that none shall be a source of income to the	One of the detached-single family detached dwelling zoning districts at issue. The R-5.0 Zero-lot-line dwelling district at App. D, § 16 is identical in the relevant respects. Duration of occupancy is not regulated for single-family detached dwellings. "Temporary use" was regulated, but short-term leasing was not. "Users" encompasses lessees.

Citation	Relevant Text of Ordinance	Appellees' Comments
	<u>owner or user</u> of the principal single-family dwellings, except for customary home occupation: 1. Off-street parking and private garages in connection with any use permitted in this district. . . . 4. Accessory buildings. . . . 6. Customary home occupation. . . . 8. Sale of merchandise or goods, including but not limited to garage sales and yard sales, shall be limited to a maximum of once per quarter, for a period not to exceed three continuous days. For the purpose of this subsection, the month of January shall constitute the first month of the first quarter. With the exception of item 8, when any of the foregoing permitted accessory uses are detached from the principal single-family dwelling, said uses shall be located not less than 45 feet from the front lot line and shall meet the requirements of section 42.C., D., E., F., and G.	
App. D § 49(B)(11) (added by Ordinance No. 92-41)	Sec. 49. - Special use permits. . . . 11. Bed and breakfast facility in any designated historic landmark subdistrict.	A permit is required for B&B's in historic areas.

Citation	Relevant Text of Ordinance	Appellees' Comments
App. D § 41 (added by Ordinance No. 92-41)	Sec. 41. - "PD" Planned Development Overlay. PERIOD OF VALIDITY: . . . D. Limitation of uses: Uses prohibited shall be those uses specifically prohibited within the underlying zoning district. The following uses are expressly prohibited within a "PD" Planned Development Overlay and cannot be established as a permitted, conditional, or accessory use under any circumstances: . . . 13. Bed and Breakfast	B&B's are prohibited in certain areas.
Ch. 15, art. V, §§ 15-50 et. seq.	Sec. 15-50. - Definitions. The following words, terms, and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning: **Permanent residence**: A place where the person abides, lodges, or resides for **14 or more consecutive days**. . . . Sec. 15-52. - Renting to person prohibited from establishing residence. (a) It is unlawful to let or rent any place, structure or part thereof with the knowledge that it will be used as a permanent or temporary residence by a sex offender prohibited from establishing such permanent residence or temporary residence pursuant to the terms of this article.	Ordinance applicable to sex offenders *mandates* short-term leasing to such persons.

Citation	Relevant Text of Ordinance	Appellees' Comments
Ch. 21, art. II, § 21-20	Sec. 21-20. - Definitions. As used in this article, the following terms shall have the respective meanings ascribed to them: . . . Hotel: A building in which members of the public obtain sleeping accommodations for a consideration. The term includes a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, rooming house, or airport terminal, but does not include a hospital, sanitarium, or nursing home. Occupancy: The use or possession, or the right to the use or possession, of any room in a hotel if the room is one ordinarily used for sleeping and if the occupant's use, possession, or right to use or possession extends for a period of less than 30 days. Occupant: Anyone who, for a consideration, uses, possesses, or has a right to use or possess any room in a hotel if the room is one ordinarily used for sleeping.	The City collects an occupancy tax whose broad definition encompasses single-family dwellings rented for less than 30 days.

TAB C

Pro STR

(1) *Wilson v. Maynard*, 2021 S.D. 37, ¶ 6, 961 N.W.2d 596, 599

(2) *Vera Lee Angel Revocable Trust v. Jim O'Bryant And Kay O'Bryant Joint Revocable Trust*, 2018 Ark. 38 (2018)

(3) *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 1D16-4782, 2017 WL 1534769, at *2 (Fla. Dist. Ct. App. Apr. 28, 2017)

(4) *Gadd v. Hensley*, 2015-CA-001948-MR, 2017 WL 1102982, at *6 (Ky. Ct. App. Mar. 24, 2017)

(5) *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 2015 COA 113, ¶ 18, 2015 WL 4760331 (Colo. App. Aug. 13, 2015)

(6) *Wilkinson v. Chiwawa Communities Ass'n*, 86870-1, 2014 WL 1509945 (Wash. Apr. 17, 2014)

(7) *Roaring Lion, LLC v. v. Exclusive Resorts PBL 1, LLC*, CAAP-11-0001072, 2013 WL 1759002 (Haw. Ct. App. Apr. 24, 2013)

(8) *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez,* 2013-NMCA-051, 300 P.3d 736, 743 (N.M. App. Feb. 8, 2013)

(9) *Slaby v. Mtn. River Est. Resid'l Assoc., Inc.*, 2012 WL 1071634 (Ala. Ct. Civ. App. March 30, 2012)

(10) *Mason Family Trust v. DeVaney*, 146 N.M. 199 (2009)

(11) *Ross v. Bennett*, 148 Wash. App. 40 (Wash. Ct. App. – Div. 1 2009)

(12) *Applegate v. Colucci*, 908 N.E.2d 1214 (Ind. Ct. App. 2009)

(13) *Scott v. Walker*, 274 Va. 209 (2007)

(14) *Lowden v. Bosley*, 395 Md. 58 (2006)

(15) *Mullin v. Silvercreek Condo. Owners Assoc., Inc.*, 195 S.W.3d 484 (Missouri Ct. App. 2006)

(16) *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826 (2003)

(17) *Yogman v. Parrott*, 325 Or. 358 (1997)

Contra

(1) *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886 (Pa. 2019)

(2) *Styller v. Zoning Bd. of Appeals of Lynnfield*, 487 Mass. 588, 599 (2021)

(3) *Pandharipande v. FSD Corp.*, No. M202001174COAR3CV, 2022 WL 1280438, at *6 (Tenn. Ct. App. Apr. 29, 2022)

TAB D

unique method provided in Article 20(4) of the German Basic Law for protecting unamendability through civil action: 'All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.' Tushnet calls this a 'political defense' of the eternity provision.[155] Hence, unamendability and its institutional enforcement may provide sufficient additional time for 'the people' to reconsider their support for a change contrary to their fundamental values, and thereby even impede the triumph of revolutionary movements.[156]

C4.S13

CONCLUSION

C4.P78 To sum up the argument thus far, the amendment power is a constitutional power delegated to a certain constitutional organ. Since it is a delegated power, it acts as a trustee of 'the people' in their capacity as a primary constituent power. As a trustee, it possesses only fiduciary power; hence, it must *ipso facto* be intrinsically limited by nature. Conceived in terms of delegation, certain acts by the amendment authority could be considered as going beyond permissible bounds, since they would flout the terms of the 'delegation'. Put differently, the understanding of the amendment power as a delegated power means that *a vertical separation of powers* exists between the primary and secondary constituent powers.[157] As in the horizontal separation of powers, this separation results in a power block. The holder of the amendment power is not permitted to conduct any amendment whatsoever, but may be restricted, either explicitly or implicitly, from amending certain principles, institutions, or provisions. Certain constitutional decisions thus require the re-emergence of the primary constituent power and force 'the real sovereign to return from its retirement in the clouds'[158] in certain constitutional moments. Therefore, constitutional unamendability is not eternal and can be overcome or changed through the exercise of the primary constituent power.

C4.P79 Identifying the amendment power as a delegated authority is the first step in understanding its limited scope. Chapter 5 will explain *how*, according to this theoretical presupposition, the amendment power is limited, and will delve into the question of what might constitute a breach of that trust and, therefore, an impermissible amendment.

[155] Tusnet (n. 58).

[156] Ackerman, *We the People: Foundations* (n. 124) 20–1.

[157] See Georges Frédéric Schutzenberger, *Les lois de l'ordre social, Tome Second* (Joubert 1850) 19 (noting that often, the special functions of the constituent power are exercised by the legislature. This is, for him, the consequence of an imperfect separation of powers between the constituent and legislative powers).

[158] Harris (n. 84) 198.

C5

5

The Scope of Constitutional Amendment Powers

C5.P1 In Part I of this book, the various explicit and implicit limitations that may be imposed on the amendment power were described. Part II of this book suggests that such unamendability rests on a solid theoretical ground. This argument began in Chapter 4, in which it was claimed that the amendment power is not to be equated with the primary constituent power. Instead, it is a power established by the constitution and is delegated with the task of amending it. Due to its nature, it must be understood as limited. Based upon this theoretical presupposition, this chapter elucidates *how* the amendment power is limited. It also provides the theoretical ground that explains explicit and implicit unamendability.

C5.S1 ## EXPLICIT UNAMENDABILITY

C5.S2 ### *The validity of unamendable provisions*

C5.P2 The idea of constitutional entrenchment is debated extensively in the literature.[1] However, because unamendability takes constitutional entrenchment to its extreme, it is often described as 'absolute'.[2] Ferdinand Regelsberger argued that 'there is no law which cannot be changed. A legislator … cannot control the unchangeability of a legal norm.'[3] For this reason, the French unamendable provision of 1884 was widely criticized, with various authors claiming that, while its moral or political value is evident, its legal effect is disputed.[4] It was described as 'useless verbiage' or 'an empty phrase'.[5] Notwithstanding such

[1] See, for example, Elai Katz, 'On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment' (1995–6) 29 Colum. J. L. & Soc. Probs. 251; Ernest A. Youni, 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2007-2008) 10 U. Pa. J. Const. L. 399; Russell Patrick Plato, 'Selective Entrenchment against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amenability' (2007) 82 NYU L. Rev. 1470; N. W. Barber, 'Why Entrench?' (2016) 14(2) Int'l J. Const. L. 325.

[2] Richard Albert, 'Constitutional Handcuffs' (2010) 42(3) Arizona State L. J. 663, 672, 678, fn. 42.

[3] Ferdinand Regelsberger, *Pandekten: Systematisches Handbuch der Deutschen Rechtswissenschaft* I Abt Bd 1, 7 Teil s. 109 (1893) quoted in Hans Kelsen, 'Derogation' in Ralph A. Newman (ed.), *Essays in Jurisprudence in Honor of Roscoe Pound* (American Society for Legal History 1962) 339, 343.

[4] Joseph Barthelemy, *The Government of France* (George Allen & Unwin Ltd. 1924) 23.

[5] John W. Burgess, *Political Science and Comparative Constitutional Law* (Ginn 1893) 172; Robert Valeur, *French Government and Politics* (Nelson and Sons 1938) 281.

criticism, Hans Kelsen's view was that there is no reason to suppose a norm cannot stipulate that it cannot be repealed:

C5.P4 > Contrary to a widespread opinion in the field of jurisprudence, the question whether norms exist which cannot be derogated must be answered in the positive if the question means: whether there are norms whose validity—according to their own meaning—cannot be repealed by a derogating norm, and if the question does not mean whether not every norm may lose its efficacy, and thereby its validity, and be replaced by another norm regulating the same subject matter in a different way.[6]

C5.P6 Therefore, for Kelsen, a norm could be declared as unamendable, yet such a declaration cannot prevent the loss of its validity by a loss of efficacy. Moreover, since a provision prohibiting any amendments is not invalid by its very nature, in the case of unamendable provisions, it is not legally possible to amend the protected provisions.[7] Indeed, nowadays unamendable provisions are commonly considered valid.[8]

C5.P7 The theory hereby presented supports the validity of unamendable provisions, but relies on questions concerning the *sources* of constitutional norms. The secondary constituent power which is a delegated power may be restricted by the primary constituent power from amending certain principles, institutions, or provisions. The motives for such restrictions and the aims they are designed to accomplish vary (see Chapter 1). What is clear is that the amendment power, which is established by the constitution and subordinate to it, is exercised solely through the process established within the constitution. It is bound by any explicit unamendability that appears in the constitution, set by the primary constituent power. Gözler is thus correct in his assertion that:

C5.P9 > The legal validity of these substantive limits is beyond dispute because they were laid down in the constitution by the constituent power. Therefore, the amendment power, being a power created and organized by constitution, is bound by the limits provided by the constitution.[9]

C5.P11 Gözler's approach is positivistic, resting on a purely textual basis. The theory advanced in this book, as is elaborated in this chapter, is much wider, as it supports implicit unamendability even if it is not explicitly written in the constitutional text. For now, however, it is sufficient to note that, viewed from the perspective of the formal theory introduced in Chapter 4, explicit unamendability reflects the idea that any exercise of the amendment power must abide

[6] Kelsen (n. 3) 343–4.

[7] Ibid, 344; Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd. 2007) 259; Hans Kelsen, *General Theory of Norms* (Clarendon Press 1991) 109–10. On the loss of efficacy of constitutional provisions, see also Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62(3) Am. J. Comp. L. 656.

[8] Claude Klein, 'A Propos Constituent Power: Some General Views in a Modern Context' in Antero Jyränki (ed.), *National Constitutions in the Era of Integration* (Kluwer Law International 1999) 31, 37.

[9] Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008) 52.

by the conditions, rules, and prohibitions stipulated in the constitution, including substantive limits. In that respect, unamendable provisions 'can be seen as a procedural constraint which can be surmounted by an entirely new constituent act'.[10] From the perspective of the substantive theory, unamendable principles are an example of the fact that the amendment power is limited with regard to the content of certain amendments and, in the words of Schmitt, can amend the constitution 'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved'.[11] However, the substantive theory can only explain those unamendable provisions that aim to prevent fundamental changes in an effort to ensure the constitution's integrity and the continuity of its constitutive principles. But unamendable provisions may simply derive from constitutional compromise and contingency and cover a wide range of topics, not necessarily the basic principles of the constitutional order (see Chapter 1). These cannot be supported by the substantive theory. The theory of delegation explains all types of unamendable provisions. The secondary constituent power, as a delegated power, acts as a trustee of the primary constituent power. It must obey those 'terms' and 'conditions' stipulated in the 'trust letter', namely the constitution.

C5.P12 What are the legal implications of a conflict between a new constitutional amendment and an unamendable provision? Unamendable provisions create a normative hierarchy between constitutional norms. Just as a constitutional law prevails over ordinary legislation,[12] an unamendable constitutional provision established by the primary constituent power prevails over a constitutional amendment established by the secondary constituent power. When resolving conflicts between unamendable provisions and contrasting later amendments, the paramount factor is not *lex posterior derogat priori*, meaning their 'chronological order of enactment', but rather the sources of these constitutional norms. Thus, the constituent power is divided conforming to a hierarchy of powers—primary and secondary—governed by the principle *lex superior derogat inferiori*, meaning that the hierarchical superior norm supersedes a lower norm. Therefore, the constitutional rule issued by a higher hierarchical authority prevails over that issued by a lower hierarchical authority.[13] In other words, a future amendment conflicting with an unamendable provision is not formulated by the same authority, but rather by an inferior one~~, which is~~ the secondary

[10] Julian Rivers, 'Translator's Introduction' in Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xxi.

[11] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr., Duke University Press 2008) 150.

[12] Mauro Cappelletti and John Clarke Adams, 'Judicial Review of Legislation: European Antecedents and Adaptations' (1965–6) 79 Harv. L. Rev. 1207, 1214.

[13] Carlos González, 'Popular Sovereign versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?' (2002) 80 Wash. U. L. Q. 127, 131, 153. Likewise, Maria Cahill recently argued that unamendability exists to defend not only specific content, but also the continuing existence of constituent power and its superordinate quality. See Maria Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' (2016) 75(2) Cambridge L. J. 245, 257.

amended by means of the same procedure required to amend other provisions, they would *almost* be devoid of meaning. Why almost? The declaration of unamendability remains important even if conceived as eventually amendable, because its removal would still necessitate political and public deliberations regarding the protected constitutional subject. Unamendability might have a 'chilling effect', leading to hesitation before repealing the so-called unamendable subject. Such deliberations, then, grant the unamendable provision an important role. Moreover, even at the minimum, the unamendability adds a procedural hurdle, and thus better protection, since the double-amendment process is still procedurally more difficult than a single amendment process. The double-amendment procedure should therefore be rejected on both theoretical and practical grounds. To reiterate, in rejecting the double-amendment procedure, it is not claimed that unamendable provisions are 'eternal', since even self-entrenched unamendable provisions can be circumvented by acts of the primary constituent power.

C5.S5 ## IMPLICIT UNAMENDABILITY

C5.P21 As described in Chapter 2, courts in various jurisdictions have ascertained a certain constitutional core and a set of basic constitutional principles which form the constitution's identity and which cannot be abrogated through the amendment procedure. In this section, it will be argued that the global trend of recognizing implicit unamendability rests on a solid theoretical basis and is compatible with the general thesis presented in this book.

C5.S6 ### *Foundational structuralism*

C5.P22 The first implied limitation derived from the theory of delegation is the most basic: *the constitutional amendment power cannot be used in order to destroy the constitution*. Michael Paulsen notes that 'The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction … The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one, where an alternative construction is fairly possible.'[30] This postulation applies equally to amendment provisions.[31] The amendment authority entrusted with the amendment power cannot use this power in order to destroy the very same instrument from which its authority streams and on which it is built. The delegated amendment power is the internal method that the Constitution provides for its self-preservation. By destroying the Constitution, the delegated power subverts its own *raison d'être*.[32]

[30] Michael Stokes Paulsen, 'The Constitution of Necessity' (2003–4) 79 Notre Dame L. Rev. 1257.

[31] This was acknowledged in *Kesavanda Bharati v. State of Kerala*, AIR 1973 SC 1461, 1426: 'Article 368 cannot be construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called as lawful "Harakiri".' See H. R. Khanna, *Judicial Review or Confrontation* (Macmillan Co. of India 1977) 11.

[32] Sampson R. Child, 'Revolutionary Amendments to the Constitution' (1926) 10 Const. Rev. 27, 28.

C5.P23 Thomas Cooley wrote that the US Constitution's framers abstained from forbidding changes that would be incompatible with the Constitution's spirit and purpose, simply because they did not believe that those would be possible under the terms of the amendment process itself. An amendment converting a democratic republican government into an aristocracy or a monarchy would not be an amendment, but rather a revolution. His metaphor is astoundingly clear:

C5.P25 > The fruit grower does not forbid his servants engrafting the witch-hazel or the poisonous sumac on his apple trees; the process is forbidden by a law higher and more imperative than any he could declare, and to which no additional force could possibly by given by re-enactment under this orders.[33]

C5.P27 The amendment power was introduced for the purpose of preserving the constitution, not destroying it. Therefore, even in the absence of any explicit unamendability, the power to 'amend' the constitution clearly cannot be used in order to abolish the constitution.[34] This would be a breach of trust.

C5.P28 The idea of implicit unamendability might be analogous to Wesley Hohfeld's scheme of jural correlatives. With the creation of an agency power, the agent is subject to liabilities and his powers may be revoked or denied by the principal.[35] In other words, alongside the legal power of the agent, namely the constitutional amendment authority, rests the liability to not undermine the same constitution itself. Therefore, to amend the constitution so as to destroy it and create a completely new constitution would be an action *ultra vires*, or a usurpation of the amendment power that 'the people' have not delegated to the amendment authority.

C5.P29 The second limitation derives from the first one, but it is one logical step forward: *the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution*. The constitution, in that respect, is not the mere formal existence of the document; rather, it includes the constitution's essential features. Each constitution has certain fundamental core values or principles, which form 'the spirit of the constitution'.[36] As Gerhard Anschutz wrote in 1922 on the democratic principle that guided the Weimar Constitution of 1919, it is

[33] Thomas M. Cooley, 'The Power to Amend the Federal Constitution' (1893) 2 Mich. L. J. 109, 118–20. See, similarly, Landon W. Magnusson, 'Selling Ourselves into Slavery: An Originalist Defense of Tacit Substantive Limits to the Article V Amendment Process and the Double-Entendre of Unalienable' (2010) 87 Uni. Detroit Mercy L. Rev. 415.

[34] Schmitt (n. 11) 150; William L. Marbury, 'The Limitations upon the Amending Power' (1919–20) 33 Harv. L. Rev. 223, 225; Upendra Baxi, 'Some Reflections on the Nature of Constituent Power' in Rajeev Dhavan and Alice Jacob (eds), *Indian Constitution—Trends and Issues* (N.M. Tripathi Private Ltd. 1978) 122, 143; Ulrich K. Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44 Isr. L. Rev. 429, 435; William F. Harris II, *The Interpretable Constitution* (The Johns Hopkins University Press 1993) 183.

[35] Wesley N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale L. J. 710, 727.

[36] Howard Newcomb Morse, 'May an Amendment to the Constitution be Unconstitutional?' (1948–9) 53 Dick. L. Rev. 199.

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