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

RESPONSE TO PETITION FOR REVIEW

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ALTERNATIVE STATEMENT OF THE CASE

Nature of the case: In 2018, the City of Grapevine passed an ordinance which banned homeowners from "renting, bartering, trading, letting or otherwise allowing the use of a dwelling . . . for compensation" for less than 30 days. The respondent homeowners, who have intertwined personal and economic reasons for leasing out homes for short terms, 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.

ISSUE PRESENTED

Do homeowners challenging an ordinance which takes away their right to decide how long people may stay in their homes plead viable constitutional claims?

> Specifically, is it the proper role of government to decide how long people stay in private homes?

INTRODUCTION

Two important property-rights cases will be presented to the Court this term. Both arise because the internet, in freeing the flow of information, has made it easier for marketplace participants to enter into a bargained-for exchange for the possessory interest in land. Stated succinctly, short-term home leasing, though in existence time out of mind, is now far more common.

This has upset a lot of apple carts, however, resulting in unprecedented new restrictions being imposed on private land. The new restrictions deprive owners of property rights they've enjoyed for generations. In one type of case, subdivisions are imposing new restrictions which undo the bargain purchasers originally struck. That kind of case may indirectly involve government action if courts end up enforcing the new restrictions against those who relied on prior restrictions.

This case, however, involves direct government action which deprives landowners of preexisting rights. The City of Grapevine passed an ordinance in 2018 which gives to the government the power to decide what the term (duration) of a lease should be. The City's petition frames the case narrowly, hoping to downplay the

profound constitutional issues it raises. But this case is not about regulating leasing around the margins; it about what leasing fundamentally *is* in an unapologetically capitalist system in which individuals are economic actors pursuing self-interest.

> *Leasing is dwelling*, which means places of rest, relaxation, abode, celebration, procreation, and privacy.
>
> *Leasing is freedom*, personal and economic, for tenants and landowners making choices where they wish to lay down their heads.
>
> *Leasing is the most important, historically central, bargained-for exchange*, one in which the exchange of money for possession of land for a specific term is the backbone of capitalism.

Leasing, in sum, implicates in innumerable ways the choices people have been free to make without government interference for centuries.

Now, however, because the free flow of information has caused more people to engage more flexibly in the exchange of money for possession of land, local governments across the state seek to deprive private property owners of the right to decide who stays on their land and for how long. The City of Grapevine and other local governments contend it is now the government's job to do that. That is alarming in and of itself, but its implications are positively Orwellian: regulating the duration of people's occupancy in homes requires a massive, unprecedented monitoring, surveillance, interrogation, and prosecution apparatus.[1] Local governments, on

[1] *See Zaatari v. City of Austin*, 615 S.W.3d 172, 200 (Tex. App. – Austin 2019, pet.

the pretext of seeking to regulate noise, nuisances, trash bins, and parking, are seizing control of people's private lives in private spaces.

Seen in that light, banning home occupancy according to how long someone stays is the thin end of a very big wedge. As cities pry the door open to peer (*literally*) into homes,[2] a new order will arise in which no one will be safe, private, and secure in their homes. The knock on the door will be a uniformed officer shining a flashlight into the house and demanding to know intimate details about the occupants' affairs. The wrong answer will generate judicial proceedings and punishment for the mere crime of not resting one's head long enough in a home. What's next, ankle bracelets? Tracking apps? What Grapevine has done is emphatically *not* regulation around the margins of a purely economic activity; it is the beginning of a police state in which homes are no longer places of private refuge.

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denied) ("As the city concedes, enforcement . . . requires visual monitoring by the City or its agents of private activities . . . .").

[2] *Zaatari's* warning was prescient. In a later case where a homeowner is seeking through a mandamus action to force the City of Austin to issue a short-term rental license after *Zaatari* invalidated the Austin STR ban, the City of Austin submitted code enforcement officers' notes reporting in surprising detail what they were seeing inside a home. *See Anding v. Adler, Mayor*, No. D-1-GN-21-003795 (Travis 345th Dist.). The City of Austin relied on this evidence to show that the equities did not favor mandamus relief since the City's code officers could not confirm that the occupants they were surveilling were, in fact, the legal owners.

STATEMENT OF FACTS

I. Local governing bodies are taking away people's freedom to decide how long they stay in homes.

Since this case is being presented before final judgment to establish the baseline viability of constitutional claims,[3] it's important for the Court to see how it fits into the broader context of similar claims pending around the state and the country.

Cities and subdivisions are banning landowners from deciding how long others may use their land. Those governing bodies pursue two approaches: (1) contending that longstanding ordinances or restrictive covenants which require "residential use" and bar "commercial use" have always banned STR's; or (2) taking away existing property rights from owners who invested large sums in reliance on those rights.

The significant features of the legal landscape are as follows:

- This Court held in *Tarr v. Timberwood Park* in 2018 that the leasing out a home for a short duration does not mean the home *itself* is a business.[4] Currently, 22 states hold that STR's are a residential use; 4 states go the other way.[5]
    - Nevertheless, the main arguments against short-term leasing advanced in *Tarr* – that homes are

[3] The petition for review focuses on substantive due process, but review should encompass all three constitutional theories asserted by the homeowners since all three are recurrent.

[4] *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 291 (Tex. 2018) (declining to interpret "residential" as prohibiting short-term rentals).

[5] Appendix (table of cases).

businesses if leased for less than *x* days, or that tenants must establish permanent residency to qualify as "residents" – will not die; lawsuits directly defying the holding in *Tarr* are still being filed.[6]

- Other courts and litigants seize on owners' payment of the Texas Hotel Tax or on prohibitions on "hotels" or "bed and breakfasts" to conclude that leasing for short terms means that a home is a "business."[7]

- The Austin Court of Appeals held in 2019 that the City of Austin could not bar owners who do not permanently occupy their homes from renting their homes out for less than 30 days.[8] Further, relying on *Tarr*, that leasing for short-terms is a residential use.[9] The City of Austin interprets the holding to mean that only those persons who already had short-term rental licenses as of 2019 can continue renting for

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[6] *See*, *e.g.*, *Duncan v. Prewett*, No. 03-21-00244-CV (Tex. App. – Austin 2021) (under submission) (owner of a vacation home contends that if tenants in neighboring homes are vacationing, the neighboring homes are forbidden "vacation rental businesses"); *Quach v. Council Creek S. Prop. Owners' Ass'n, Inc.*, No. 53194 (Burnet 424th Dist. 2022) (HOA contends that short-term rentals are a "business or commercial purpose" because the homeowner is "renting the property to individuals outside of a single household, on a short-term basis, and receiving business income from such rentals.").

[7] *See*, *e.g.*, *JBrice Holdings LLC v. Wilcrest Walk Townhomes Ass'n, Inc.*, 638 S.W.3d 712, 716 (Tex. App. – Houston [14th Dist.] 2020, pet. granted) (under submission) ("It is undisputed that JBrice was using the Properties for hotel or transient use. JBrice pays hotel taxes . . . .").

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

[9] *Id.* ("We also note that a ban on [non-owner-occupied] short-term rentals does not advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature.").

short terms.

- A new decision of the Austin Court of Appeals bucks *Tarr*, holding that new restrictions barring leasing for short terms merely reaffirm residential purposes.[10]

- The Fort Worth Court of Appeals here broadly validated a constitutional right to lease, leaving it to the trial court to determine at final trial whether that right encompasses leasing for short terms. Contemporaneously, a different panel of the Fort Worth court turned back homeowners' request for a temporary injunction in a similar case. While the holdings are based on the differing records and procedural postures, the superficially disparate results result in a lack of clarity whether constitutional claims will ultimately be validated.

- Constitutional challenges in the Western District of Texas to New Braunfels' ban on short-term rentals have been at the federal Rule 12(b)(6) dismissal stage for two years, awaiting the dust to settle in state courts.[11]

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[10] *Compare Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614 (Tex. App. – Austin Aug. 22, 2017, no pet) (holding, before *Tarr*, that short-term rentals are a residential use), and *Zgabay v. NBRC Prop. Owners Ass'n*, No. 03-14-00660-CV, 2015 WL 5097116 (Tex. App. – Austin Aug. 28, 2015, pet. denied) (same), *with Poole Point Subdivision Homeowners' Ass'n v. DeGon*, No. 03-20-00618-CV, 2022 WL 869809, at *4 (Tex. App. – Austin Mar. 24, 2022, no pet. h.) ("The minimum duration requirement created by the [new] Amendment [barring short-term rentals] reinforced the existing residential use and occupancy restriction and the prohibition against commercial activities.").

[11] *See Marfil v. City of New Braunfels*, Civil Action No. 6:20-cv-00248-ADA-JCM (W.D. Tex. 2020).

- The cities of Fort Worth, Galveston, Fredericksburg, and Corpus Christi (among others) have curtailed or banned short-term leasing. Sometimes they are interpreting preexisting "residential" zoning to ban short-term leasing as commercial in character. Sometimes they adopt new ordinances which either outright ban leasing for short terms or else impose onerous or labyrinthine requirements which amount to a ban. Challenges are being prepared.

- Counties and small cities are likewise using preexisting ordinances as the pretext to curtail or ban short-term leasing as a "commercial use." That includes barring homeowners from renting for short terms unless the owner upgrades services and infrastructure to commercial specifications as if the homes were not homes.

- When subdivisions do acquiesce to *Tarr*, they purport to "amend" their restrictive covenants to take away leasing and other property rights from people who relied upon those rights when buying.[12] There are many such cases around the state brought by owners facing financial calamity from new leasing bans, at least two of which this Court will

[12] There are striking cases where new restrictions seek to take away important agricultural or commercial rights from existing owners, or single out a wealthy owner for the lion's share of assessments. The ways are endless in which a majority, at the expense of a minority, might attempt to rewrite the original bargain set forth in restrictive covenants.

soon be asked to review.[13]

- Texas is on the leading edge of the jurisprudence nationally on the constitutionality of bans on short-term leasing. The *Village of Tiki Island* takings case from the Houston First Court in 2015 appears to be the first case in the U.S. addressing the issue and validating a narrow, vested constitutional right to rent for short terms.[14] Next came *Zaatari* in 2019, validating a retroactivity claim. Then came this case at the end of 2021. There are a scattering of other decisions nationally, all recent. All rejected constitutional challenges to short-term rental bans, but none discusses property owners' historical right to set the lease term, the liberty interests implicated, or the government monitoring and surveillance required to enforce a minimum lease term.[15]

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[13] *See DeGon*, 2022 WL 869809; *Adlong v. Twin Shores Prop. Owners Ass'n*, No. 09-21-00166-CV, 2022 WL 869801 (Tex. App. – Beaumont March 24, 2022, no pet. h.); *see also Chu v. Windermere Lakes Homeowners' Ass'n, Inc.*, No. 14-21-00001-CV (Tex. App. – Houston [14th Dist.]) (under submission).

[14] *See Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 579 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

[15] *See Mogan v. City of Chicago*, No. 21 C 1846, 2022 WL 159732, at *13 (N.D. Ill. Jan. 18, 2022) ("The Court agrees—the Ordinance does not physically invade property but instead merely regulates the home sharing industry with an intent to promote 'the health, safety, morals, or general welfare' of the City's residential neighborhoods."); *Nekrilov v. City of Jersey City*, 528 F. Supp. 3d 252, 279-82 (D.N.J. 2021) (rejecting constitutional challenges to STR ban); *Wallace v. Town of Grand Island*, 184 A.D.3d 1088, 1091, 126 N.Y.S.3d 270, 273 (2020) (same); *Nguyen v. City of Buena Park*, No. 820-CV-00348, 2020 WL 5991616, at *6 (C.D. Cal. Aug. 18, 2020).

II. The City of Grapevine did not restrict the duration of home leasing before 2018.

The City asserts that STR's were banned in Grapevine as far back as 1982. Thus, it contends that because the homeowners did not challenge the older ordinances, they are barred for various reasons from challenging the new ordinance.

The court of appeals determined as a matter of law based on the plain wording of the prior ordinances that the City never restricted the leasing of homes by duration before 2018. Even the City didn't believe it did, as the court of appeals noted: "In fact, when some 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."[16] The City told the same thing to a major leasing website.[17] All the while, the City was raking in property owners' short-term occupancy taxes, "without incident and with the City apparently happy to accept them."[18]

All the prior Grapevine ordinances did was zone the homeowners' districts to require "single-family detached dwellings." Nothing on the face of such wording suggests a duration restriction,

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[16] *See City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 WL 6068952, at *2 (Tex. App. – Fort Worth Dec. 23, 2021, pet. filed).

[17] 3CR1634.

[18] *Muns*, 2021 WL 6068952, at *2; *see*, *e.g.*, *Kracke v. City of Santa Barbara*, 63 Cal. App. 5th 1089, 1097, 278 Cal. Rptr. 3d 370, 375 (2021), *review denied* (Aug. 11, 2021) (where city historically allowed STR's and collected taxes on them, city could not contend it had always banned STR's).

much less one specifically on leasing.[19] Consistent with this Court's *Tarr* precedent and relying on restrictive covenant caselaw, the court of appeals held that "single-family detached dwelling" encompasses residential tenancy for any duration:

> As the Zoning Ordinance defines the word, "family" does not require that the people living as a "single housekeeping unit" be related by blood or marriage. Moreover, neither "single-family detached dwelling" nor "living together as a single housekeeping unit interdependent upon one another" has any occupancy-duration requirements, and neither phrase addresses leasing, whether short- or long-term. We decline to add occupancy-duration restrictions when none are there. We thus conclude that the term "single-family detached dwelling" . . . does not prohibit STRs . . . so long as the renters meet the Zoning Ordinance's definition of "family."[20]

Grapevine's prior ordinances did, it is true, *refer* to short-term home rentals, just not in a way that supports the City's contention. The prior ordinances mentioned short-term leasing in one narrow instance – bed and breakfast regulation – where such leases were *exempted* from any regulation:

> Bed and breakfast homestay does not include uses such as motels, hotels, community residential homes,

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[19] *Muns*, 2021 WL 6068952 at *10-11 (rejecting contrary authority in other states); *see also*, *Tarr*, 556 S.Wd.3d at 285 (silence not a restriction); *compare*, *e.g.*, *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 829 (Ind. 2011) ("single family dwelling" held to bar leasing for short terms).

[20] *Muns*, 2021 WL 6068952, at *10. This Court recently went over this ground during oral argument in *JBrice* (argued Feb. 3, 2022) (set to decide, in part, the issue already decided in *Tarr*).

> boarding or lodging houses, apartment dwellings, guest cottages or single-family dwelling transient rental.[21]

The court of appeals agreed with the homeowners that the B&B ordinance is irrelevant and that short-term rentals are a residential use.[22]

In addressing a city's attempt to make the same kind of argument, a new California decision is on all-fours.[23] It summarily rejects the argument that "single-family residential" zoning bans short-term rentals, concluding that the argument "has no textual or logical basis."[24]

III. Landlords have always exercised the right to decide the lease term.

For centuries, landlords have leased out real property for whatever term they and their tenants settled upon.[25] These were private affairs. No one interfered, and no one was the wiser what the contracting parties decided. However, the marketplace for these

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[21] *Muns, id.*, at * 2.

[22] *Id.*, at *11.

[23] *See Keen v. City of Manhattan Beach*, No. B307538, 2022 WL 1021928 (Cal. Ct. App. Apr. 6, 2022).

[24] *Id.*, at *3-4.

[25] *See* Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053, 1056 (1989) (noting that "rights to sell, lease, give, and possess" property "are the sticks which together constitute" the metaphorical bundle); *see Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453, 454 (1890) ("The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership."); *see generally* Thomas Piketty, *Capital in the Twenty-First Century* Ch. 1 (2014) (the traditional basis of social organization and industrial development in Western societies is those who pay land rents and those who receive them).

arrangements was smaller and more local in nature before the internet, and there were no online calendars or ads to see who was renting out their homes when.

What the internet hasn't changed is property owners' varying motivations for renting out homes for short terms. The homeowners in this case represent a fair sampling:

- Pam Holt, whose mother survived cancer, created a "home away from home for individuals whose family members are receiving treatment for cancer."[26]
- Luci Muns lives part-time on part of her property while renting out another part, which allows her to afford the property.[27] Her STR income allowed her to change careers.[28]
- Paul Trippett bought his future retirement home, but he could not afford it unless he could live in it part-time and rent it out at other times.[29]
- Richard Mueller rents out a property for short terms so that his mother has a place to stay for her extended visits.[30]

Holt's motivation is by no means uncommon. In addition to medical-related stays, short-term leasing provides homes for people

[26] 1CR462; 2Supp.RR92, 105, 120.
[27] 1CR487-88; 2RR151, 159; 2Supp.RR159.
[28] 1CR488.
[29] 1CR491.
[30] 1CR495.

fleeing war-torn countries and transitioning to U.S. residency; people dislocated by disasters; temporary workers; emergency workers and responders; military families; airline workers; people exploring places to live permanently; people on vacation or just wishing to be somewhere else.

Another reason people buy homes which they ultimately rent out for short-terms is as second- or vacation-homes.[31] These buyers depend on the expected rental income to afford such homes for their own intermittent use. For these owners, a ban on leasing for short-terms is a ban on all leasing since the owner cannot use their own home as a second- or vacation-home if the government requires them to rent it out for long terms. Grapevine requires them to leave their homes vacant when they are not using them.

The several examples above, however, do not do full justice to the core rationale for renting out properties for short terms: individuals' inherent freedom to decide for themselves – without having to justify their decision to the government or anyone else – how long and to whom to convey the possessory interest in land.

IV. It defies logic and has never been shown that *duration of stay* causes harm.

The City contends that until someone has stayed in a home for 30 days, they are intrinsically a harm and a threat. That not only defies logic, but the evidence in this and other cases has failed to

[31] *See*, *e.g.*, *Boatner*, 2017 WL 3902614, at *1; *Zgabay*, 2015 WL 5097116, at *1; *Craig Tracts Homeowners' Ass'n, Inc. v. Brown Drake, LLC*, 2020 MT 305, ¶ 18, 402 Mont. 223, 230, 477 P.3d 283, 287.

show the harms alleged. The City never issued a citation related to short-term renting prior to the 2018 ban.[32] The homeowners' uncontroverted summary judgment evidence showed that the City had no study, data, review, investigation, or other evidence of harm.[33] As the court of appeals noted,[34] the record in the *Zaatari* case was the same, even to the point of showing that long-term rentals and owner-occupied homes were *worse*.[35] This case has a temporary injunction record and a summary judgment record, so it has been well developed for purposes of establishing the viability of the homeowners' claims as pled.

SUMMARY OF ARGUMENT

The Court should not take up the exhaustion of administrative remedies issue. The question whether general, informational statements from a city such as those at issue here constitute a "decision" subject to administrative appeal is unique to this case, is not likely to recur, and is not important.

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[32] *Muns*, 2021 WL 6068952, at *2; 3CR1577; Supp.CR609 (ll. 15:12-15:22), 614 (depo. of police Capt. Bills).

[33] 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).

[34] *Muns*, 2021 WL 6068952, at *2, n. 10.

[35] *Zaatari*, 615 S.W.3d at 189 (reciting city's litany of purported harms, concluding that neither the record nor logic supports the asserted harms and that other ordinances were already targeted at those harms).

By contrast, whether it is the role of government to decide how long people may stay on private land is an urgent, vital question, with a significant impact on both the economy and personal liberty.

Huge sums of money already invested in land are at stake, so a decision at this juncture invaliding historically-sacrosanct landowner rights, before still more money is put at risk, would at least stanch the losses. Tenants, too, on a mass scale, plan their lives around the availability of homes for rent for short terms, so a decision now would allow adjustment to a new regime with limited if any short-term housing in the places people wish to go.

Equally important are personal liberty issues. Duration of stay in a private home is being criminalized. That, in turn, necessitates a monitoring, surveillance, and enforcement police state built on the pretext of regulating noise, litter, parking, maximum occupancy, and nuisances. This is happening all over the state. Whether it implicates constitutional rights urgently needs to be decided given the profound consequences on people's lives and private affairs. Proceeding to final trial of this case does not make sense if landowners have no protected right in the first instance to decide who comes and goes from their land and on what schedule.

Subdivisions with homeowners associations have taken on more and more of the characteristics of local governments. At the same time, state courts are the final enforcers of restrictive covenants which take away preexisting property rights. This case is

likely to inform the many pending cases in which subdivisions have recently adopted new restrictions which deprive existing owners of important preexisting property rights – not just leasing, but commercial and agricultural uses too. Government action is, directly or indirectly, implicated in both kinds of cases, and the jurisprudence ought to reckon with that in a coherent way.

ARGUMENT

I. The Court should not take up the exhaustion of administrative remedies issue.

The City's exhaustion of administrative remedies issue should not be taken up. The facts are case-specific, without precedent, and not likely to recur. More fundamentally, importance hasn't been shown.

What the City is arguing, in essence, is that whenever a city announces a legal position or its intention to enforce an ordinance, every conceivably-affected citizen has to race within the statutory deadlines to lodge an administrative appeal or else forever lose the right to challenge the city's position. The court of appeals considered that argument based on the record and the common-sense import of Local Government Code Chapter 211. The court of appeals determined there was no specific "decision" which could have been administratively appealed; there were only general, informational statements from city officials threatening later enforcement:

> Both statements [by the official at the city council meeting and in the city's notice letter to property owners] are purely informational, essentially telling the

> Homeowners how the City had recently decided to interpret the Zoning Ordinance, with Williams's notice detailing the penalties for violating it and stating that the City would start enforcing the Zoning Ordinance 45 days in the future, even though the City had not enforced it thus far.[36]

The City has not cited a single case involving similar general, informational communications and threats of future enforcement. The two cases the City cites (Pet'n at 12-13) involved specific individuals aggrieved by specific decisions by specific officials targeted at those individuals.[37]

This issue is unlikely to recur. Cities do not want an avalanche of administrative appeals every time they communicate legal positions and prosecutorial intentions. It would generate confusion and system-overload. Administrative hearings would devolve into arguments about the meaning of ordinances, divorced from any specific factual context. Under the City's theory, property owners would be asking an administrative hearing officer either to allow renting in the future, or else bar the issuance of citations. Hearing officers would either decline or else wouldn't understand what they're supposed to decide since there would be no formal citation to reference or specific evidence to weigh. Relatedly, as the court of appeals concluded, an administrative appeal could not adjudicate constitutional questions anyway, so those could not be mooted by whatever the administrative hearing officer decided. It makes no

[36] *Muns,* 2021 WL 6068952, at *7.

[37] *Id.*, at *8 (rejecting comparison to *CBS Outdoor*).

sense for a city to proceed in this way, and there is no reported case where one has.

More fundamentally, the City has not explained why the exhaustion of remedies issue is important. The Court cannot take up the case if jurisdiction has not been demonstrated.

II. Whether landowners have a natural right to decide how long to allow someone else to possess their land is one of the most important property rights issues of our time.

The court of appeals determined that the homeowners pled facts sufficient to satisfy the elements of several constitutional claims.[38] Cases similar to this one are pending around the state and more are planned. The Court should take up the constitutional issues in this case to determine whether owners of real property have a constitutionally-protected right to decide for themselves, without government interference, who may stay in their homes and for how long. The question is broader than just a tenant's length of stay because an owner's own use is inextricably intertwined with that of others whom the owner would allow to use the property. The question is important; has never been decided by this Court; and is recurrent.

[38] *Muns*, 2021 WL 6068952, at *5 (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)).

A. The amount of money at stake is huge and growing, so this is a critical juncture for decision.

The constitutional issues are important because of their outsized economic impact and their profound implications for personal liberty.

The economic impact cannot be overstated, both for owners and tenants:

- Real property investors large and small have been relying for decades on leasing rights unrestricted by duration.[39] These owners stand to lose large sums they invested in reasonable reliance on rights which had never before been called into question.[40] The past twenty years in particular, with the rise of internet leasing websites, have seen large amounts of investment capital by investors of all sizes move into the short-term rental housing market.[41] A

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[39] *Zaatari*, 615 S.W.3d at 191.

[40] *Id.*; *Muns*, 2021 WL 6068952, at *15 ("invested significant sums").

[41] *See* AirDNA, *AirDNA's 2022 Forecast; U.S. Short-Term Rental Outlook Report* (Dec. 7, 2021) (accessed April 7, 2022 at: *https://www.airdna.co/blog/2022-forecast-us-short-term-rental-outlook-report*); Global Newswire, *Vacation Rental Market Size to Surpass US$112.3 Bn by 2030* (Dec. 22, 2021) (accessed April 7, 2022 at: *https://www.globenewswire.com/news-release/2021/12/22/2357097/0/en/Vacation-Rental-Market-Size-to-Surpass-US-112-3-Bn-by-2030.html*); iPropertyManagement *Vacation Rental Industry Statistics* (Nov. 29, 2021) (aggregating sources of data) (accessed April 7, 2022 at: *https://ipropertymanagement.com/research/vacation-rental-industry-statistics*); Omer Rabin, *The Growth Of The Short-Term Rental Industry And Technology's Role In It*, Forbes (Jan. 27, 2020) (accessed April 7, 2022 at: *https://www.forbes.com/sites/forbestechcouncil/2020/01/27/the-growth-of-the-short-term-rental-industry-and-technologys-role-in-it/?sh=4d1119d13359*); *see, e.g.*, Malia Spencer, *Vacasa to go public after buying Austin's TurnKey Vacation Rentals*, Austin Bus. J. (July 30, 2021) (accessed April 7, 2022 at:

decision invalidating property owners' right to decide the duration of leasing will cause losses immediately, but it will also stanch the flow and allow investors to avoid future losses.

- On the tenant side, certainty is important too. Millions of people – including people who already own homes – now structure their lives and plans around the availability of homes for short terms, whether rented, swapped, or exchanged in some other fashion.[42] Ending that is going to alter behavior on a mass scale, but at least the uncertainty that now prevails will be eliminated in Texas. People will stop assuming that they have a right to contract with property owners to obtain the sole and exclusive possession of homes for any particular length of time.[43] The historical concept of "leasing" as a natural right bundled with fee ownership will die, revocable at will by the government.

In sum, *en masse*, people have relied on historical property rights and freedom of movement and travel to buy and sell the short-term possessory interest in ordinary homes. A decision by this Court

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https://www.bizjournals.com/austin/news/2021/07/30/vacasa-to-ipo-via-spac-in-7.html).

[42] The Grapevine ordinance sweeps broadly in this respect, encompassing any beneficial exchange.

[43] By no means is 30 days a universally-acknowledged minimum lease term, so if government does get to decide the minimum term, it could presumably be a year just as well as a month. Subdivisions which have imposed new minimum lease terms are all over the map on what constitutes the necessary minimum.

validating or invalidating such rights has huge economic consequences but will, at least, resolve the issue before more still money is put at risk.

B. The term of a lease implicates profound, fundamental freedoms for owners and tenants.

The consequences for personal liberty are no less profound, not to say frightening. To put it in stark terms: *duration of stay in a home, in and of itself, has been criminalized.*

The Texas Constitution "guarantee[s] the sanctity of the individual's home and person against unreasonable intrusion."[44] State and federal courts consistently hold that the right to privacy within the home extends to temporary stays.[45] Included in the right to privacy is the right to be free from government intrusion into the home and invasion of the right to be let alone.[46]

Cities, instead of enforcing existing laws and ordinances regulating nuisances, noise, parking, trash, and over-occupancy are creating vast new monitoring and surveillance apparatuses to find out who is staying in homes and for how long.[47] Already, in cities around the state such as Austin, enforcement personnel scan the internet to find homes advertised for rent then use that information

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[44] *Texas State Emps. Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987); *see* Tex. Const., art. I, §§ 9 (prohibiting unreasonable searches and seizures), 25 (prohibiting quartering of soldiers in houses).

[45] *See generally Zaatari*, 615 S.W.3d at 199-200 (citing authorities).

[46] *Id.*

[47] *See, e.g., id.* at 199 and n. 9.

to surveil and interrogate anyone they find on the property, inquiring into people's movements and private affairs.[48] Neighbors suspicious of people they don't know call in the complaints that someone is not staying long enough to qualify as a lawful home occupant. Never before has mere duration of stay in a home been a basis for government enforcement and intrusion. If Grapevine succeeds, there will be no more truly private homes because government will control lease terms and every home will be subject to inspection for the presence of unauthorized persons.

Accordingly, this case should be taken up to establish whether citizens have a constitutional right to decide for themselves their own comings and goings on private land; or whether, instead, anyone found on private land is subject to investigation and interrogation concerning their movements and private affairs.

This Court will face that issue sooner or later given how many similar cases are pending or in the works. Sooner is preferable

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[48] *See id.* (STR ban violated freedom of assembly and probably also rights of association, privacy, and movement). Austin, for example, has a contract with a company, Host Compliance LLC, which monitors people's homes. Official memorandum PDF accessed at: *https://www.austintexas.gov/edims/pio/document.cfm?id=323708*; Contract PDF accessed April 7, 2022 at: *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwigrc74moL3AhWXm2oFHdNKAYAQFnoECB8QAQ&url=http%3A%2F%2Fwww.austintexas.gov%2Fedims%2Fdocument.cfm%3Fid%3D322855&usg=AOvVaw3qxN3RAH5qVSUXLmf1x9ar*; company and product info. accessed April 7, 2022 at: *https://granicus.com/solution/govservice/host-compliance/*. The City of Fredericksburg, which recently restricted short-term rentals, announced on its web site that has hired the same surveillance firm (*https://www.fbgtx.org/845/Short-Term-Rentals*).

because: (1) personal freedoms and huge sums of money are at stake; (2) an unnecessary trial can be avoided if the respondent homeowners turn out not to have the rights they assert; and (3) the legal question whether the constitutional right exists in the first instance is squarely and cleanly presented on a well-developed record.

III. A decision in this case would affect subdivisions when courts are asked to uphold new restrictive covenants which deprive existing owners of their rights.

As mentioned in this Response's introduction, cases involving subdivision restrictive covenants cross over into government-action territory. That merits a brief discussion because if the Court takes up this municipal ordinance case, the holding may bear on the restrictive covenant cases pending around the state and soon to be presented to the Court. The two types of cases, in the aggregate, impact the large majority of Texans since most live in cities or subdivisions or *both*.

A city ordinance which abruptly bans short-term leasing is analogous to a newly-recorded restrictive covenant which bans such leasing after someone buys land in reliance on wide-open leasing rights.[49] That being the case, if this Court recognizes in the

[49] *See Grace Fellowship Church, Inc. v. Harned*, 2013-Ohio-5852, ¶ 32, 5 N.E.3d 1108, 1115 (Ohio App. 2013) ("Applying amendments to existing landowners could completely alter a landowner's ability to use his property for the purposes for which it was intended. This would be similar to a governmental taking by a private entity and is not an equitable policy. . . . [I]t would create complete uncertainty and buyers would not be able to purchase a property with existing covenants for fear of what changes may eventually be made.").

municipal ordinance context a property owner's constitutional right to decide how long a lease should last, the Court's holding should address, in some fashion, the crossover into restrictive covenant law.

The precise question has never been put before a court, but it will be. Restrictive covenants are private contracts, but when a court enforces them, that is government action.[50] Furthermore, as subdivisions and the laws surrounding them have developed over the decades, homeowners' associations have taken on significant aspects of local government, reinforcing the government-action analogy. To cite a few of the parallels:

- association boards of directors act in many ways like city councils within subdivision boundaries;
- subdivision assessments are in effect taxes, with liens and foreclosures of homes as penalties for nonpayment;
- fines and injunctions are punishment for misconduct in the same way that a municipal department or municipal court might impose such penalties;
- architectural control and the committees which enforce architectural requirements are equivalent to municipal

[50] *See Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948) (court enforcement of discriminatory restrictive covenants violates equal protection); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 88-94 (Tex. 1997) (recognizing *Shelley* as U.S. Constitutional precedent and holding that, under the Texas Constitution, what constitutes government action is determined case-by-case).

zoning and permitting;[51]

- procedural due process applicable to subdivisions has increased to the point where it looks quasi-governmental, with hearing and appeal procedures resembling local government administrative procedures.[52]

The close correspondences between subdivision action and government action suggest at least three viable constitutional theories when new restrictive covenants are imposed *after* someone buys land.

1. The U.S. and Texas Constitutions forbid any law **impairing the obligation of contracts**.[53] Restrictive covenants are treated under the law like contracts.[54] Buyers cannot be bound by restrictions of which they were not on notice at the time of purchase.[55]
2. Relatedly, there is a **retroactivity** problem since a new restriction has effectively been made retroactive to the time of someone's purchase, stripping them of settled

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[51] *See*, *e.g.*, *Myers v. Tahitian Vill. Prop. Owners' Ass'n, Inc.*, No. 03-21-00105-CV, 2022 WL 91660 (Tex. App. – Austin Jan. 6, 2022, pet. filed) (HOA over 6000 homes writes and enforces exhaustive building requirements and fees).

[52] *See*, *e.g.*, Tex. Prop. Code Ch. 209.

[53] U.S. Const. art. I, § 10, cl. 1; Tex. Const. art. I, § 16; *see generally U.S. Tr. Co. of N.Y. v. New Jersey,* 431 U.S. 1, 25 (1977); *Liberty Mut. Ins. v. Tex. Dep't of Ins.*, 187 S.W.3d 808, 824 (Tex. App.—Austin 2006, pet. denied).

[54] *Tarr v. Timberwood Park*, 556 S.W.3d at 280 (quoting precedent).

[55] *Id*. at 280-81.

rights.

3. If restrictive covenants do not restrict leasing – particularly if they are silent on the subject, as is common,[56] or else expressly declare a "right to lease"[57] – then leasing is a natural right which vests as of the time of purchase.[58] **Substantive due process** should protect that right against government action (in this instance, enforcement in a court) that lacks any rational basis. If there is no evidence that duration in and of itself causes or equates to the harms asserted, there is no rational basis for such a restriction and court enforcement of it.

For the foregoing reasons, the developing jurisprudence on a property owner's natural right to set the lease term will run on parallel tracks – municipal ordinance cases and subdivision restrictive covenant cases – which ultimately converge.

PRAYER FOR RELIEF

The Court should grant review to declare that landowners have a natural, constitutional right to decide for themselves the duration

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[56] *See*, *e.g.*, *id.*, at 285, 291.

[57] This fact was present in the *JBrice* case in which a "right to lease with no restriction" was found to restrict leasing, but the court of appeals declined to mention the express rights wording. *JBrice*, 638 S.W.3d at 714.

[58] *See Rancho Viejo Cattle Co., Ltd. v. ANB Cattle Co., Ltd.*, No. 04-20-00143-CV, 2021 WL 4443709, at *9 (Tex. App. – San Antonio Sept. 29, 2021, pet. filed) ("The disputed clause uses the word 'right' rather than a restricting word such as 'only,' 'restricted,' or 'limited.' A "right" is '[s]omething that is due to a person by just claim, legal guarantee, or moral principle.'").

of their leases, affirm the decision of the court of appeals, and remand the case to the trial court for further proceedings and trial.

Respectfully submitted,
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/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 – "RESIDENTIAL USE" CASES

Restrictive covenants requiring "residential use" allow short-term leasing

(1) *Lake Serene Property Owners Association Inc. V. Clyde Delbert Esplin*, No. 2020-CA-00689-SCT, 2022 WL 713417, at *2 (Miss. Mar. 10, 2022)

(2) *Wilson v. Maynard*, 2021 S.D. 37, ¶ 23, 961 N.W.2d 596, 602

(3) *Craig Tracts Homeowners' Ass'n, Inc. v. Brown Drake, LLC*, 2020 MT 305, ¶ 18, 402 Mont. 223, 230, 477 P.3d 283, 287

(4) *Tarr v. Timberwood Park Owners' Ass'n, Inc.*, 556 S.W.3d 274, 290-92 (Tex. 2018)

(5) *Vera Lee Angel Revocable Tr. v. Jim O'Bryant & Kay O'Bryant Joint Revocable Tr.*, 2018 Ark. 38, 8, 537 S.W.3d 254, 258 (2018)

(6) *Forshee v. Neuschwander*, 2018 WI 62, ¶ 27, 381 Wis. 2d 757, 769, 914 N.W.2d 643, 649

(7) *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 219 So. 3d 111, 115 (Fla. Dist. Ct. App. 2017)

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

(9) *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 2015 COA 113, ¶ 18, 360 P.3d 255, 259 (Colo. App. 2015)

(10) *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 327 P.3d 614, 619-21 (2014)

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

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

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

(14) *Dunn v. Aamodt*, 2012 WL 137463 (W.D. Ark. Jan. 18, 2012)

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

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

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

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

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

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

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

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

Restrictive covenants requiring "residential use" forbid short-term leasing

(1) *Edwards v. Landry Chalet Rentals, LLC*, 51,883 (La. App. 2 Cir. 2/28/18), 246 So. 3d 754, 757, *writ denied*, 2018-052 (La. 6/1/18), 244 So. 3d 437

(2) *Hensley v. Gadd*, 560 S.W.3d 516, 524 (Ky. 2018)

(3) *Eager v. Peasley*, 322 Mich.App. 174, 911 N.W.2d 470, 478 (2017)

(4) *Shields Mountain Prop. Owners Ass'n, Inc. v. Teffeteller*, E2005-00871-COA-R3CV, 2006 WL 408050, at *4 (Tenn. Ct. App. Feb. 22, 2006)

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