



**BACKGROUND  
MENEZ v. CHICAGO**

Executive Summary

The Goldwater Institute and the Liberty Justice Center filed this case to protect the rights of people who want to offer their private homes to overnight guests, but who have been deprived of the right to do so by a complicated new Chicago ordinance that imposes confusing and unfair new prohibitions on home-sharing. Those restrictions hurt communities and violate the constitutional rights of responsible homeowners.

The Problem

Home-sharing is a long-standing American tradition. For centuries, property owners have let people stay in their homes, rather than in a hotel, sometimes in exchange for money or doing chores. Today, “sharing economy” technology has empowered homeowners and travelers to connect better than ever before. Online home-sharing platforms like Airbnb and Homeaway enable people to rent their homes to visitors to make money and help pay their mortgages. Consumers benefit from more choice and lower prices. Communities attract visitors who support local businesses. And people are given an incentive to buy dilapidated homes and fix them up.<sup>1</sup>

Home-sharing websites now offer more rooms than the Hilton or Marriott chains. With expensive hotels no longer their only option, visitors who might otherwise have been deterred by the high cost of lodging are visiting new destinations and patronizing local economies. And home-sharing isn’t just for tourists. A recent study by the travel-expense company Concur found that home-sharing bookings by business travelers have grown 56 percent over last year. And home-sharing is helping people earn more money: One study showed that Chicagoans earned nearly \$49 million using Airbnb to rent out their homes in 2015, with South Side hosts alone earning \$2.61 million.<sup>2</sup> More importantly, home-sharing represents an essential aspect of private property rights: a property owner has a basic right to decide whether or not to let someone stay in his or her home.

Unfortunately, many local governments have responded, not by welcoming the new economic opportunities home-sharing represents, or respecting the rights of property owners—but by banning home-sharing or imposing rules that unreasonably restrict home-sharers’ freedom of choice.

In some cities, restrictions on home-sharing have consequences far beyond property rights. San Francisco and Anaheim, California, haven’t just imposed massive penalties on homeowners who rent their homes; they have also enacted new ordinances that force home-sharing platforms like Airbnb and Homeaway to snoop on property owners who use their websites. San Francisco’s law threatens these companies with \$1,000 daily fines

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<sup>1</sup> See Christina Sandefur, “Life, Liberty, And The Pursuit of Home-Sharing,” *Regulation*, vol. 39, no. 3 (Fall, 2016), pp. 12-15, <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2016/9/regulation-v39n3-3.pdf>

<sup>2</sup> Airbnb Action, Sweet Home, Chicago: Airbnb is Thriving in the Windy City, Jan. 9, 2016, <https://www.airbnbaction.com/sweet-home-chicago-airbnb-is-thriving-in-the-windy-city/>; Airbnb Action, Airbnb is Booming on the South Side, Feb. 17, 2016, <https://www.airbnbaction.com/airbnb-is-booming-on-the-south-side/>.

for each listing of an outlawed rental. New York state lawmakers recently cracked down on online advertising for home-sharing, imposing similar fines on people who publicize their willingness to let guests stay in their apartments.

### The Chicago Ordinance

But the most draconian rule is probably the new law in Chicago, signed on June 24, 2016. Spanning 58 pages of complicated legal jargon, the Chicago ordinance levies a whopping \$10,000 licensing fee on rental platforms like Airbnb.<sup>3</sup> And it imposes restrictions on home-sharing that are so confusing that few attorneys – much less ordinary homeowners – will be able to understand them. Yet homeowners who fail to comply with these unfair and confusing regulations can be shut down, fined, or even imprisoned.

In order to rent out a home under the new ordinance, home-sharers must first determine whether it applies to them. That’s not easy, because the ordinance classifies home-sharing properties as either “vacation rentals” or “shared housing units”—but does so in words that are nearly identical, and, at the same time, exactly the opposite! In other words, the ordinance defines “vacation rental” as “a dwelling unit that contains 6 or fewer sleeping rooms that are available for rent,” and defines a “shared housing unit” as “a dwelling unit containing 6 or fewer sleeping rooms that is rented”—yet the ordinance also says that if a property is a “shared housing unit,” it is not a “vacation rental,” and if it is a “vacation rental,” it is not a “shared housing unit.”<sup>4</sup> This wording makes it impossible to know whether a property falls into one category or the other.

The ordinance also caps the number of homes within a building that can be registered with a platform such as Airbnb. If a building has five or more units, only six units or one quarter of the total number of units (whichever is less) can be licensed for home-sharing.<sup>5</sup> In buildings with four or fewer units, only *one* unit can be licensed for home-sharing.<sup>6</sup> And these caps are not tied to how often – or even whether – a property is actually rented to guests. Rather, the caps are triggered when a property owner merely gets a license, even if he or she never actually rents out the property at all. No such limits apply to hotels, motels, or bed-and-breakfasts, however. They can rent out as many units to overnight guests as they wish.

Other homes are forbidden from being rented at *all* unless the unit is the owner’s “primary residence”<sup>7</sup>—unless the government gives the owner a special exception under subjective and arbitrary rules. More on that below.<sup>8</sup>

The ordinance also singles out home-sharers for unfair treatment in other ways. For example, home-sharers must pay a special 4 percent tax that doesn’t apply to hotels, motels, or bed-and-breakfasts.<sup>9</sup> And home-sharers can completely lose the right to rent their homes if city officials think guests are making noises “louder than average conversational level.”<sup>10</sup> Yet the ordinance never defines what “louder than average conversational level” means—and contains no objective measurement criteria, the way other cities’ noise ordinances do. The noise rules are based entirely on the subjective opinion of city officials. Worse, the noise rules single out home-sharers for unfavorable treatment: the same rules don’t apply to operators of bed-and-breakfasts or hotels.<sup>11</sup>

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<sup>3</sup> Ordinance No. O2016-5111 (2016). Most of the ordinance’s provisions will go into effect on November 21, 2016. The ordinance adds several new sections to the Chicago Municipal Code. The ordinance is cited herein by reference to the sections of the Municipal Code.

<sup>4</sup> Compare Chi. Muni. Code § 4-6-300 with § 4-14-010.

<sup>5</sup> *Id.* §§ 4-6-300(h)(10), 4-14-060(f).

<sup>6</sup> *Id.* §§ 4-6-300(h)(9), 4-14-060(e).

<sup>7</sup> *Id.* §§ 4-6-300(h)(8), 4-14-060(d).

<sup>8</sup> *Id.* §§ 4-6-300(h)(8), (9); 4-14-060(d), (e).

<sup>9</sup> *Id.* § 3-24-030.

<sup>10</sup> *Id.* §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2).

<sup>11</sup> *Id.* §§ 8-32-150, 8-32-170.

Even more astonishingly, the ordinance forces home-sharers to give up their constitutional rights against arbitrary searches. Anyone licensed under the ordinance must open his or her home to city inspectors “*at any time and in any manner,*” as often as city officials desire—without a warrant.<sup>12</sup> Another provision requires home-sharers to collect guests’ sensitive personal information, including their names, home addresses, signatures, and dates they visited, and to keep the information for three years—during which time city inspectors can demand the information for any reason they wish without getting a warrant.<sup>13</sup>

Home-sharers who don’t comply can be hit with fines of \$1,500 to \$3,000 *per day*.<sup>14</sup>

## The Law

These regulations aren’t just detrimental to homeowners, travelers, and communities; they’re also illegal under the United States and Illinois constitutions. Private property is a fundamental human right—the guardian of all other rights. Other freedoms, like freedom of the press or religion, would be meaningless if people were prohibited from owning printing presses or churches. America’s Founders understood this, and that’s why the U.S. Constitution mentions private property more often than any other right.

Yet government regulations have chipped away at this foundation of freedom, imposing restrictions on property rights that have consequences far beyond property itself.

Take the right against unreasonable searches and seizures, protected by the Fourth Amendment to the U.S. Constitution, or the similar right to privacy protected by the Illinois Constitution. By forcing home-sharers to allow city inspectors to search their property or demand their guests’ personal information whenever a bureaucrat wants it, Chicago officials are violating these other rights at the same time that they restrict private property. Yet courts have also made clear that government may not force people to give up their constitutional rights in exchange for permission to use property that belongs to them.<sup>15</sup> Nor may the government force business or homeowners to give up their right to be free from unwarranted searches as a condition of their right to use their property.<sup>16</sup>

When government forces people to give up crucial constitutional rights in exchange for permission to use their own homes, citizens are more at risk of being made “offers they can’t refuse.” That’s why courts imposed the so-called rule against unconstitutional conditions: it “functions to ensure that the Government may not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly.”<sup>17</sup>

Yet Chicago officials are doing just that: forcing people to give up their constitutional rights in exchange for being allowed to share their homes with overnight guests.

The federal and state constitutions also forbid the government from imposing vague laws—laws that are so broadly worded that citizens cannot know what is and isn’t illegal. Such laws, the Supreme Court has explained, “authorize and even encourage arbitrary and discriminatory enforcement.”<sup>18</sup> Chicago’s ordinance does both, empowering city officials to revoke home-sharing licenses whenever they say guests have made noise

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<sup>12</sup> *Id.* §§ 4-6-300(e)(1), 4-16-230 (emphasis added).

<sup>13</sup> *Id.* §§ 4-6-300(f)(2), (3); §§ 4-14-040(8), (9).

<sup>14</sup> *Id.* § 4-6-300(k), 4-14-090(a).

<sup>15</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>16</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015); *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218, 1220 (N.D. Ill. 1998); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311–12 (1978).

<sup>17</sup> *Louisiana Pacific v. Beazer Materials & Services*, 842 F. Supp. 1243, 1248 (E.D. Cal. 1994).

<sup>18</sup> *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

exceeding the “average conversational level,” and allowing city officials to exempt some home-sharers from the ordinance whenever those officials decide to do so—based on subjective and arbitrary criteria.

The U.S. and Illinois constitutions also require government to treat people equally under the law.<sup>19</sup> But the Chicago ordinance prevents some people from renting their homes while allowing others to do so, and taxes residential home-sharers at a higher rate than commercial hotels, motels, and bed-and-breakfasts, without good reason for treating them differently.

Finally, the federal Constitution forbids state and local governments from imposing rules that discriminate against people who reside in other states. Under what lawyers call the “dormant commerce clause,” states may not put up barriers against businesses that are headquartered in other states, or restrict the rights of people who travel to other states for business purposes. As the Supreme Court has put it, the Constitution creates a “federal free trade unit” which “protect[s] interstate movement of goods against local burdens and repressions.”<sup>20</sup> Prohibiting a Chicago home-owner—or a person from another city or state who owns a home in Chicago—from renting out that home, simply because it is not his primary residence, is unconstitutional—and unfair. By letting Chicago residents offer their homes for rent, but forbidding non-residents who own property in Chicago from doing the same thing, the ordinance treats in-state and out-of-state persons differently.

Such a rule doesn’t just discriminate; it also does nothing to protect people against any danger that home-sharing might arguably create. Cities don’t outlaw backyard barbecues just because some get noisy, or prohibit graduation parties because guests sometimes take up parking spots on the street. Instead, they rely on existing rules to limit noise, enforce parking restrictions, and deal with other nuisances. There’s no need for additional, special rules specifically restricting home-sharers and their guests – let alone the kind of extreme and arbitrary rules Chicago has imposed.

### Case Logistics

The plaintiffs in this case are Leila Mendez, Alonso Zaragoza, and Michael Lucci, who live and offer homes for rent in Chicago, Illinois; and Sheila Sasso, who resides in Arizona and offers her Chicago home for rent. The defendants are the City of Chicago and a Chicago city officials acting in her official capacity.

The case was filed in the Circuit Court of Cook County, Illinois, on November 15, 2016.

### The Legal Team

**Timothy Sandefur** is Vice President for Litigation. Before joining Goldwater, he served 15 years as a litigator at the Pacific Legal Foundation, where he won important victories for economic liberty in several states. He is the author of four books, *Cornerstone of Liberty: Property Rights in 21st Century America* (coauthored with Christina Sandefur, 2016), *The Right to Earn A Living* (2010), *The Conscience of The Constitution* (2014), and *The Permission Society* (2016), as well as some 45 scholarly articles on subjects ranging from eminent domain and economic liberty to antitrust, copyright, slavery and the Civil War, and political issues in Shakespeare, ancient Greek drama, and *Star Trek*. He is an Adjunct Scholar with the Cato Institute, a graduate of Hillsdale College and Chapman University School of Law.

**Christina Sandefur** is Executive Vice President at the Goldwater Institute. She also develops policies and litigates cases advancing healthcare freedom, free enterprise, private property rights, free speech, and taxpayer

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<sup>19</sup> The Fourteenth Amendment to the United States Constitution provides that states cannot “deny to any person within its jurisdiction the equal protection of the laws.” The Due Process Clause of the Illinois Constitution (Article I, Section 2) provides that “[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.”

<sup>20</sup> *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949).

rights. Sandefur has won important victories for property rights in Arizona and works nationally to promote the Institute's Property Ownership Fairness Act, a state-level reform that requires government to pay owners when regulations destroy property rights and reduce property values. She is also a co-drafter of the Right to Try initiative, now law in over half of the states, which protects terminally ill patients' right to try safe investigational treatments that have been prescribed by their physician but are not yet FDA approved for market. Sandefur is the co-author of the book *Cornerstone of Liberty: Private Property Rights in 21st Century America* (2016). She is a frequent guest on national television and radio programs, has provided expert legal testimony to various legislative committees, and is a frequent speaker at conferences. Sandefur is a graduate of Michigan State University College of Law and Hillsdale College.

The **Goldwater Institute** opened in 1988, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater's home state of Arizona. Today, the Goldwater Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name. In 2016 in Arizona, the Goldwater Institute successfully challenged home-sharing regulations and spearheaded the nation's first state home-sharing law to protect people's rights to share their homes, while allowing government to enforce reasonable rules against nuisances.

**Jacob Huebert** is Senior Attorney at the Liberty Justice Center (LJC), where he litigates cases to protect economic liberty, free speech, and other constitutional rights. He led LJC's successful court challenges to an Evanston, Illinois, ordinance that prevented food trucks from operating in that city and a Bloomington, Illinois, ordinance that prohibited individuals from starting new vehicle-for-hire businesses there. His other cases include, among others, a lawsuit challenging Illinois' campaign finance law, which restricts the campaign contributions of all but a privileged few, and a lawsuit challenging Illinois' illegal implementation of a scheme to award tax credits to select businesses. Huebert is a former clerk to a judge of the U.S. Court of Appeals for the Sixth Circuit and a graduate of Grove City College and the University of Chicago Law School.

**Jeffrey Schwab** is a Staff Attorney at the Liberty Justice Center, where he leads LJC's lawsuit challenging the City of Chicago's tax on streaming entertainment services such as Netflix and Spotify, the first tax of its kind in the nation. His cases also include, among others, a First Amendment challenge to a Downers Grove, Illinois, sign ordinance that threatens to destroy a moving business by taking away an 80-year-old sign it depends on to reach potential customers. Before joining LJC in 2014, Schwab worked at a downtown Chicago law firm where his practice areas included, among others, constitutional law cases under the First Amendment's Free Speech and Free Exercise Clauses and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Schwab is a graduate of Grove City College and the University of Michigan Law School.

The **Liberty Justice Center** is a non-profit, non-partisan litigation center that specializes in protecting individual rights and enforcing limits on government power. Since its founding in 2011, LJC has worked to eliminate political privilege in Illinois, focusing especially on economic liberty and free speech.