IN THE SUPREME COURT OF THE STATE OF NEVADA

GREATER LAS VEGAS SHORT TERM RENTAL ASSOCIATION, a nonprofit Nevada corporation; and JACQUELINE FLORES, President and Director, Appellants/Cross-Respondents, v. CLARK COUNTY; CLARK COUNTY BOARD OF COMMISSIONERS, a subdivision of the State of Nevada; and the STATE OF NEVADA,, Respondents/Cross-Appellants.	Docket No. 86264

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE AND LIBERTY JUSTICE CENTER IN SUPPORT OF APPELLANTS AND IN SUPPORT OF PARTIAL AFFIRMANCE

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MOTION FOR LEAVE TO FILE

Pursuant to Nevada R. App. P. 29, the Goldwater Institute and the Liberty Justice Center respectfully move for leave to file the accompanying amicus brief in support of Appellants Greater Las Vegas Short Term Rental Association, et al. Counsel for Amici informed counsel for both parties of their intention to file this motion; counsel for Appellants indicated that they consented; counsel for Respondents/Cross-Appellants Clark County, et al., refused to consent, necessitating the filing of this motion.

Proposed Amici are familiar with the parties' arguments. They believe the attached brief will aid the Court in its consideration of the issues presented in the case. Specifically, the brief explains why "short-term renting" or home-sharing is a residential use that cannot be viewed as different from other residential uses for purposes of constitutional protections. It also explains why the warrantless search provisions of the Ordinance—including the suspicionless premises-inspection, record-keeping and video-surveillance requirements—are not constitutional forms of "administrative search." Further, it explains why the effort to prohibit uses that are not "incidental" to "dwelling" is unconstitutionally vague and violates the privacy rights protected by the Nevada Constitution. Finally, it explains why the 2,500-foot radius requirement violates the Due Process and Equal Protection requirements of the Nevada Constitution.

IDENTITY AND INTEREST OF AMICI CURIAE

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy foundation dedicated to the principles of limited government, economic freedom, private property rights, and individual responsibility through research, public policy briefings, and litigation, which is conducted through its Scharf-Norton Center for Constitutional Litigation. Beginning in 2015, the GI began a project to defend the rights of homeowners to engage in "short term rentals" or "home-sharing." GI drafted Arizona's pioneering Home-Sharing Act, which became law in 2016 (A.R.S. § 9-500.39). GI has also published extensive research on the value of home-sharing and the legal right of property owners to engage in short-term rentals. *See, e.g.*, Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395 (2017); Timothy & Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 131–33, 153–54 (2016). GI has litigated several cases challenging home-sharing bans, including in California (*Hobbs v. City of Pacific Grove*, 301 Cal. Rptr.3d 274 (App. 2022)), Florida (*Marketwise Investments v. City of Miami Beach*, No. 2018-021933-CA-01 (Fla. 11th Jud. Cir. Ct., pending)), and appeared as amicus curiae in cases involving home-sharing in Ohio, (*Kinzel v. Ebner*, 157 N.E.3d 898 (Ohio App.

2020)), and California (*Vacation Rental Owners v. City of Rancho Mirage*, No. E077118, 2023 WL 4445297 (Cal. App. July 11, 2023)).

The Liberty Justice Center (LJC) is a nonprofit, nonpartisan, public-interest litigation center headquartered in Chicago, that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. LJC pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. Together, GI and LJC are litigating a challenge against Chicago's restrictions on home-sharing—under an ordinance strikingly similar to this one—in the Illinois Supreme Court. *See Mendez v. Chicago*, No. O3 C 8182 (petition pending).

THE PROPOSED AMICUS BRIEF WOULD ASSIST THIS COURT IN ITS CONSIDERATION OF THE APPEAL.

Amici curiae "perform a valuable role for the judiciary" because as non-parties, they can "assist the court by broadening its perspective on the issues raised by the parties" and "enrich[] the judicial decisionmaking process." *Connerly v. State Pers. Bd.*, 37 Cal.4th 1169, 1177 (2006) (citation omitted). GI's and LJC's experience and expertise regarding home-sharing will enrich the decision-making process in regard to this petition.

As Judge—now Justice—Alito explained in *Neonatology Assoc., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002), participation by amici curiae "promotes sound decision making" by ensuring "strong (but fair)

advocacy on behalf of opposing views." Judge Alito observed that it was not necessary for an amicus to show that it was impartial, or that the parties to the case are inadequately represented before filing a brief, because "an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Id*. at 131–32.

As described above, GI and LJC are among the nation's foremost experts on the legal, economic, and social issues involved in short-term renting. They are more than qualified to assist this Court in its consideration of this appeal.

No party and no counsel for any party authored any part of the proposed amicus brief, or made any monetary contribution intended to fund its preparation or submission. Nor did any other person or entity make any monetary contribution intended to fund the preparation or submission of the proposed brief. The proposed amicus brief complies with all applicable rules. The motion for leave to file should be granted.

SUMMARY OF ARGUMENT

Short-term renting *is* a "residential use" of property. Many people rent out their own domiciles through the short-term rental process, and there is no constitutional distinction between the protections given to "houses," Nev. Const. art. I, § 18, based on the duration of residency. Nor is there any rational justification to regulate people who reside in, or rent out, a rental home for 29 days

differently from those who do so for 31 days—or at least, no distinction that is not already addressed by less burdensome restrictions on the property rights of homeowners. For example, while there is no doubt that the County has a legitimate interest in prohibiting nuisances such as excessive noise or traffic in a neighborhood, those concerns are already within the County's authority to combat nuisances. In any event, excessive noise or traffic are just as much public offenses when engaged in by someone who lives in a home for a year, as when engaged in by a person who lives in a home for a day.

Yet the County's ordinances draw an arbitrary line between these equally "residential" property uses, treating people's homes as if they were workplaces, and imposing warrantless searches and surveillance mandates on these residences (through Sections 7.100.170(i)(2) and 7.100.170(o)) restricting the freedom of speech of property owners who let people stay in their homes (through Section 7.100.090(b)(4)), and even prohibiting "parties" which would be allowed to people who rent a house for thirty-one days (Section 7.100.180(b)).

These arbitrary and irrational restrictions are unconstitutional, and the District Court was correct to declare them unenforceable.

ARGUMENT

I. Short-term renting is a residential use.

The challenged ordinances treat "short-term rentals" as if they were qualitatively different from long-term rentals, in such a way that the government can prohibit uses or intrude on owners' and residents' property rights and privacy in ways that would never be permissible otherwise.

For example, it would obviously be unconstitutional for the government to prohibit a person from holding a Christmas party in her home at which more than two people per bedroom are present. Probably an extremely large number of Clark County residents who live in two-, three- or four-bedroom homes host Thanksgivings, Christmas dinners, quinceañeras, or Tupperware parties, at which more than four, six, or eight people are present—and it is plain that (absent a traffic or noise problem) it would be constitutionally offensive for the government to punish people for this. Yet the Ordinance dictates how many people may attend a gathering in a house which the resident is renting for fewer than 30 days. Nor would the Constitution tolerate a law that forces a person to record the identities of everyone who comes and goes, and turn that information over to any County official who demands it at any time. Yet the Ordinance mandates this, as well.

The Ordinance inherently reflects an assumption that the government can distinguish between the constitutional rights of people who reside in homes, based

on the number of nights they reside there, or that home-sharing is "merely" a business, rather than a residential use of property. But these are fallacies. Home-sharing is a residential use of property—and the constitutional rights of the people involved are the same, regardless of the duration of their rental. As the Hawaii Federal District Court observed last year, the very word "residential" just means *used as a residence*, and the constitutional rights of the individual do not spring into existence on the thirtieth day. *Hawai'i Legal Short-Term Rental All. v. City & Cnty. of Honolulu*, No. 22-cv-247-DKW-RT, 2022 WL 7471692, at *7 (D. Haw. Oct. 13, 2022). That court observed that courts in 19 states—including such tourism-driven states as Florida and Colorado—have ruled that short-term renting *is* a residential use. *Id.* at n.16 (citing cases).

This makes sense, because short-term residency is not a new phenomenon. It's at least as old as home ownership itself. Home-sharing is a practice deeply rooted in this nation's history and tradition. For generations, people have allowed visitors to stay in their homes instead of hotels, in exchange for money or chores. "New immigrants frequently stayed in the homes of more established immigrants. During the days of segregation, traveling businessmen or musicians would often spend nights in the homes of local residents because they were excluded from hotels." Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-*

Sharing Regulations Chip Away at the Foundation of an American Dream, 39 U. Haw. L. Rev. 395, 396 (2017).

During the era in which Las Vegas was segregated, many entertainers—such as Vegas icon Sammy Davis, Jr.—had to stay in private homes on the "colored" side of town. *See* Sammy Davis, Jr., *Yes I Can: The Story of Sammy Davis, Jr.*, 90 (1965). On one occasion, when he, his father, and his uncle were evicted from a hotel in Michigan, a woman named Helen Bannister took them in. "Once a year," he recalled, they would "say the name of Helen Bannister. That lady saved our lives." *Id.* at 22.

Not only is home-sharing a traditional *residential* use of property, but drawing a line based on the length of a rental makes no sense in the context of constitutional rights. First, a resident's constitutional rights to his or her property and privacy certainly do not increase or decrease with time. A person who resides in a home is every bit as constitutionally protected on her first night staying there as on her thousandth night; an unconstitutional search would be just as unconstitutional on either night. Second, courts have made clear that even *non-residents* enjoy constitutional protections of property and privacy. For example, the U.S. Supreme Court has said that guests in hotel rooms are every bit as protected by the Fourth Amendment as are residents in their domiciles. *See, e.g.*, *Stoner v. California*, 376 U.S. 483, 490 (1964). Even people staying in a tent are

protected by the constitutional prohibition on warrantless searches. *Alward v. State*, 112 Nev. 141, 150 (1996).

The same principle applies with respect to noise or other nuisances. The government's legitimate power to restrict noise, pollution, or traffic congestion is the same with respect to a person who has lived in a home for a decade or two as it is with respect to a person who has resided there for a week or two, or even a day or two. And the constitutional *limits* on government's power are also the same. In short, things that would not be constitutionally tolerable with respect to a 31-day resident do not become constitutional simply because the person resides in the house for 29 days. As the *Hawai'i Legal Short-Term Rental All.* court put it, "[w]hether a use is residential depends much more on what is being done at a residence than for *how long*." 2022 WL 7471692 at *8.

II. Warrantless searches are unconstitutional—including searches of short-term rentals.

The Ordinance forces property owners who rent out their property for 30 days or fewer to consent to warrantless searches of their property on 48 hours' notice, for any reason or for no reason—and makes clear that these searches can include ("without limitation") such intimate spaces as bedrooms and bathrooms, as well as kitchens, garages, yards, etc. Section 7.100.200(b). That is unconstitutional.

First, forcing a person to give up a constitutional right in exchange for permission to use her property triggers the "unconstitutional conditions" doctrine. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). That doctrine forbids the government from requiring waiver of constitutional rights as a condition for obtaining a benefit—even if that benefit is entirely discretionary. The test for an unconstitutional condition consists of two parts: courts ask whether the conditions at issue would be unconstitutional if they were directly imposed by law, as opposed to being made a condition for receipt of a benefit, and whether the conditions imposed affect conduct beyond the scope of the government benefit that the individual receives in exchange. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213–15 (2013). Notably, the U.S. Supreme Court has used heightened scrutiny when applying this test in the context of property use permits, due to what it calls "the special vulnerability of land use permit applicants to extortionate demands." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013).

Note also that the search requirements at issue here apply not just to an ordinary place of business, but to the *home*—a place that has always been considered especially sensitive in the context of searches. The U.S. Supreme Court has held that warrantless searches of the home are "presumptively unreasonable,"

See v. City of Seattle, 387 U.S. 541, 543 (1967), and no court has ever extended the concept of "administrative searches" to the home.

The administrative search doctrine originated in *Camara v. Man. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523 (1967), and *Marshall v. Barlow's, Inc*., 436 U.S. 307 (1978). Those cases said that under some circumstances, searches without a full warrant might be permitted to ensure compliance with basic safety regulations such as fire codes and the like. Yet in *Marshall*, the Court struck down a provision of the Occupational Health and Safety Act that gave inspectors "unbridled discretion" to decide "when to search and whom to search" for potential violations. *Id*. at 323. However important it may be for enforcement officers to seek such evidence, it said, the Constitution does not allow government officers to exercise unbridled discretion to determine whether to search a property: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," and that right would be violated "if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *Id*. at 312 (quoting *See*, 387 U.S. at 543). A warrant or similar form of independent pre-approval by an independent magistrate would ensure that inspections were reasonable, statutorily authorized, and within the scope of a specific purpose "beyond which limits the

inspector is not expected to proceed." *Id*. at 323; *see also City of L.A. v. Patel*, 576 U.S. 409, 421–22 (2015) (ordinance authorizing searches of hotel records without a warrant or pre-compliance review violated Fourth Amendment). So even in the *business* place, warrantless administrative searches are permitted only within strict boundaries.

The warrantless search rule in Section 7.100.100 goes far beyond those boundaries. It forces a property owner who obtains a permit under the Ordinance to consent to *home* inspection by "any" agency of the county. It is plainly absurd to suggest that guests can be constitutionally subjected to such an intrusion based on the duration of their residency; is it any less constitutionally offensive to subject a couple honeymooning in Vegas to a warrantless search of their bedroom because they're staying the weekend in a short-term rental? Of course not. The warrantless and suspicionless search provision of the Ordinance is plainly unconstitutional. Oddly, the Ordinance subtly acknowledges that warrantless searches of homes are, in the Supreme Court's words, "a grave concern," *Camara*, 387 U.S. at 529, because it specifies that *owner-occupied* rental units can only be subjected to suspicionless and warrantless searches during the times when *guests* are staying in the home. But if anything, that makes the constitutional violation worse, because even if a property owner may arguably be characterized as having consented to a warrantless search by obtaining a permit, guests surely cannot be. *Cf. Hoffa v.*

United States, 385 U.S. 293, 301 (1966) ("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office. … [T]he Fourth Amendment protects … the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or … his hotel room.").

Even if this provision were analyzed under the Supreme Court's administrative search doctrine instead of the ordinary rules governing homes, hotel rooms, tents, etc., it must fail. The administrative search doctrine *still* requires some form of an independent magistrate's approval prior to a search, because such approvals "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria," and because such procedures "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Marshall*, 436 U.S. at 323*; see also Feller v. Twp. of W. Bloomfield*, 767 F. Supp.2d 769 (E.D. Mich. 2011) (zoning inspectors violated Fourth Amendment by entering homeowner's backyard without warrant to investigate a claimed violation of a stop work order).

Here, no mechanism is provided for independent pre-search review, or any "opportunity for precompliance review," which the Court found mandatory in *Patel*, 576 U.S. at 423. There's just a bare demand that a property owner

prospectively waive a constitutional right that has been considered fundamental for over four centuries. *See Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1604) ("The house of every one is his castle.").

Thus the ordinance fails not only the basic constitutional prohibition against warrantless searches—even assuming the administrative search doctrine can apply to a private home—but also the broader unconstitutional conditions test. That is because the search provision would be unconstitutional if directly imposed in the form of a law, and because it affects conduct far beyond the scope of the government benefit at issue. *Agency for Int'l Dev.*, 570 U.S. at 213–15.

On this latter point, keep in mind that the "benefit" in question—permission to allow guests to stay in one's home in exchange for compensation—is *not* a purely discretionary government-conferred privilege. Rather, it is an ancient stick in the bundle of property rights, a principle inherent in the background principles of Nevada property law. This right "cannot remotely be described as a 'governmental benefit.'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987). But even if it could be, stripping a homeowner's guests of their constitutional rights goes far beyond the scope of the government program at issue. In other words, if there is any legitimate government interest here, it's merely to ensure that a home is structurally sound, not likely to catch fire, etc., and to prevent noises or other nuisances. But to impose suspicionless, warrantless search

requirements on people—ones that expressly apply to such intimate spaces as the bedrooms and bathrooms used by houseguests, goes far beyond what is necessary to accomplish those goals. Thus the condition demanded here goes "outside the contours of the program itself," and fails the second prong of the unconstitutional conditions test. *Agency for Int'l Dev.*, 570 U.S. at 215.

It's not just searches of the persons and property, either: the very *identities* of renters are also private matters—something into which the government may not justly intrude without probable cause. *Cf. Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 506 P.3d 368, 2022 WL 872708 at *4 (Nev. App. 2022) ("acknowledging the privacy interest the Venetian's guests have in their contact information."); *Techtow v. City Council of N. Las Vegas*, 105 Nev. 330, 334 (1989) (constitutionally protected interest in the identities of customers of a massage parlor).

In *United Prop. Owners Ass'n of Belmar v. Borough of Belmar*, 777 A.2d 950 (N.J. App. Div. 2001), a local government imposed a requirement that homeowners turn over their renters' personal information, including their names, addresses, telephone numbers, and copies of leases, as a condition of renting their property. The court found that this intruded on the rights of property owners "as well as that of their tenants," *id.* at 980, because the ordinance did not require the government to provide any reason for demanding the information, *id.* at 982—and

it noted that such a demand was not necessary to serve the government's interest in preventing occupation violations. *Id*. at 982–83. In short, the "government interest served" by the ordinance—specifically, preventing nuisances or overcrowding—"[did] not outweigh its repressive effect on privacy and associational rights." *Id*. at 971. The demand therefore violated both federal and state constitutional protections of privacy rights. *Id*. at 970. The same is true here.

The Ordinance violates this privacy right. Section 7.100.170(o) requires owners to install street-facing cameras, the video recordings of which must be delivered to the County at any time within 48 hours of a demand, without any requirement for a warrant or showing of probable cause—or even any declared reason whatever. This means that video recordings of people entering or exiting a home must be handed over to the government, without any probable cause (or any cause at all)—and, again, without any opportunity for the kind of pre-compliance review that *Patel* said is constitutionally mandatory. 576 U.S. at 423. Obviously no such requirement would be tolerated if imposed on a person who dwelt in a house for 30 years. Nothing about the fact that a person resides in a home for 29 days makes such a requirement any more tolerable.

Here, Sections 7.100.100(h) and 7.100.170(o) allow the County, albeit on 48 hours' notice,[1] to dispatch inspectors to search the bedrooms occupied by guests—inspectors who would likely learn the identities of these guests, question them, and use any information obtained against them—and, again, on 48 hours' notice, to demand video recordings of all entries and exits from the home, without any suspicion or justification. This offends the state and federal constitutions, and the "administrative search" doctrine cannot excuse it.

III. Arbitrary restrictions on the number of people attending a "party," or on whether people are using property "incidental" to residential uses are unconstitutional—as is the Ordinance's record-keeping requirement.

Not only does the Ordinance purport to authorize suspicionless searches of homes, but it also attempts to dictate what people do while *in* the home. Its prohibitions on "parties," and on activities that are not "incidental" to "dwelling, lodging, [and] sleeping" (Section 7.100.180), are unreasonable intrusions into constitutionally protected privacy and association rights.

This Court has made clear that the rights of privacy and association are "in no way diminished because the issue arises in an economic matter." *Techtow*, 105

[1] Although the Ordinance provides a 48-hour warning requirement, it includes no provision whereby a property owner can challenge the inspection during that 48 hours, so it is unclear what this provision accomplishes. Nothing in the Ordinance provides that searches may take place only during times when guests are absent—although even if this were added, it would not render the search and surveillance requirements constitutional.

Nev. at 334. The County therefore has no more right to dictate what people do inside a home while residing there for 29 days (or 29 minutes) than it has when they reside there for 31 days—or 31 years. Yet the Ordinance attempts precisely this sort of meddling.

The Ordinance defines a "party" as a social gathering which is attended by more people than are authorized by the "maximum occupancy" formula—a formula which only applies based on duration of residency, and which is two persons per bedroom or ten persons per unit. (Sections 7.100.020(n) and 7.100.160.) Remarkably, this does *not* apply to "private guests of the owner" if "unrelated to any Short-Term Rental Unit booking." (Section 7.100.180(b)). And of course it does not apply if a person rents a home for 31 days.

This means that if a property owner allows her guests to hold a Christmas party in her three-bedroom home, there can be no more than six people in the house *if it's a short-term rental*, but if she *herself* holds the *same* party in the *same* house, she can have any number of people if she doesn't charge money. This distinction is irrational, because there is no reason to believe that the exchange of money alone is more or less likely to make a seven-person Christmas party noisier, or to cause a parking problem on the street. This also means a person can have twenty people at her Christmas party if she rents the home for 31 days, but not if she rents it for 29. This distinction, too, is not even rationally related to a

legitimate government interest; it certainly fails the heightened scrutiny applicable to the home setting.[2]

To reiterate: there's no denying that the government may prohibit noise or other nuisances in a neighborhood, but it may only do so through laws that apply to *noise or other nuisances*—not laws that are triggered by arbitrary factors such as the number of people in a house.

What's more, renters—including people who stay even just a single weekend in a house—have the same privacy rights as do long-term residents. *Alward*, 112 Nev. at 150; *Hoffa*, 385 U.S. at 301. The government may not intrude into this without at least a significant justification. But the mere number of people in a home is insufficient grounds for the government to override this privacy. In *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), in fact, the Supreme Court found that it violated the *rational basis test* for the government to discriminate in the granting of food stamps between households with large numbers of people as opposed to households with small numbers, because such a distinction was "clearly irrelevant," and was adopted out of a general hostility toward the "hippie" way of life. *Id*. at 534. The Court said that this "bare [legislative] desire to harm a politically unpopular group" was not a constitutionally legitimate purpose. *Id.*

[2] *Cf. Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) ("When a city undertakes such intrusive regulation of the family … the usual judicial deference to the legislature is inappropriate.").

Accord, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). But precisely the same NIMBYist "purpose to discriminate," *Moreno,* 413 U.S. at 534, is at work here.

The Ordinance embodies a mere prejudice that large groups should be excluded from communities, *regardless of their actual behavior.* Even a quiet "party" is prohibited, based solely on its size. For example, if ten Jewish men[3] choose to sit shiva in a short-term rental with fewer than five bedrooms, they would be in violation of the law, even though they would most likely be especially quiet. As the District Court rightly noted, the right to assemble together is very closely intertwined with religious freedom and other rights protected by the Nevada Constitution. But it is even more arbitrary to prohibit a shiva if the residents have lived in the home for 29 days, but to allow it if they have lived there for 31 days.

Still, it might be the case that such men would be in violation of the Ordinance anyway, because it goes on to prohibit activities that are not "incidental" to "dwelling, lodging, or sleeping." Section 7.100.180(a). While shivas are often held in homes, few people would probably characterize them as "incidental" to "dwelling." That's because these terms are incomprehensibly

[3] Ten men (a *minyan*) is the minimum size of many traditional Jewish practices under religious law.

vague. As Appellants observe, the state and federal constitutions require that restrictions of this sort be phrased in terms clear enough for ordinary people to understand what is permitted and what is forbidden—and that are clear enough to avoid arbitrary enforcement. *See, e.g., Gallegos v. State*, 123 Nev. 289, 293–95 (2007). The Ordinance, however, fails that test.

What is "incidental" to "dwelling"? On one hand, that term seems extraordinarily broad. It might encompass operating a business,[4] or even illicit activities such as drug use or alcohol abuse. *See, e.g., Ex parte Ah Lit*, 26 F. 512 (D. Or. 1886) (opium use in the home constitutionally protected); *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (same with marijuana). Parties, of course, are probably "incidental" to "dwelling" in a house—people have them all the time. They also engage in extremely intimate activities, including sexual activities or the use of substances that many voters would likely wish to keep out of their communities. Yet surely the Ordinance cannot have contemplated so broad a reading of "incidental to dwelling."

True, the term "incidental" is often used in zoning, *see, e.g., Town of Paradise Valley v. Lindberg*, 551 P.2d 60, 61–62 (Ariz. App. 1976), but zoning

[4] Home-based businesses are so common that the City of Las Vegas allows them, and provides helpful guidance on how to obtain a home-based business permit. https://files.lasvegasnevada.gov/business-licensing/Licensing-a-Home-based-Business.pdf

regulations typically add the term "customarily," to assist property owners (and courts) in determining whether a particular use falls within the allowed range. *Id.* Here, that word is omitted, so that even activities *far* outside the customary and traditional understanding of a "dwelling" or "lodging" use would still be acceptable, as long as they are merely *incidental* to "lodging." So, for example, using a house to perform a medical procedure would apparently be permitted, as long as the patient and doctor stayed the night—even though this is not a customary use of a residence. *Cf. Connor v. City of Univ. Park*, 142 S.W.2d 706, 715 (Tex. Civ. App. 1940) (dentist office not a "customary" use of residential property). Yet surely it would be irrational to permit this and to prohibit a shiva.

Section 7.100.170(p) likewise intrudes on fundamental privacy rights in another respect. It requires property owners to keep "adequate and accurate [whatever that means] books and records" of "all financial transactions" for three years, and to provide this information to the government on demand—again, without probable cause, or order by a neutral magistrate, or any opportunity for precompliance review, as required by *Patel, supra*. But in *Techtow*, this Court found such a requirement unconstitutional.

In *Techtow*, the city required any person operating a massage parlor to keep records relating to the services tendered to any patrons, and to make this information available upon demand to city inspectors. 105 Nev. at 334. This

Court said that was unconstitutional because it "impermissibly invades the right of privacy and freedom of association." *Id*. In doing so, it relied on a Washington Supreme Court decision that also prohibited this type of information-surveillance requirement in massage parlors. That decision said that there was no constitutional distinction between the privacy rights of those engaged in profitable enterprises and those not, and that forcing businesses to "supply records of visits for police inspection" was an intrusion into the associational and privacy rights of business owners and their patrons. *Myrick v. Bd. of Pierce Cnty. Comm'rs*, 677 P.2d 140, 144 (Wash. 1984). This Court agreed, adding that "[t]he record keeping requirement presents a strong prospect of deterring law abiding individuals from receiving massages." *Techtow*, 105 Nev. at 335.

But surely if such a requirement is unconstitutionally intrusive in the context of massage parlors—notorious for involvement in prostitution—then surely it is even more unconstitutional in the context of a *residence*, where privacy rights are "'entitled to the highest order of defense.'" *Meisler v. State*, 130 Nev. 279, 283 (2014) (quoting *In re Smartphone Geolocation Data Application*, 977 F. Supp.2d 129, 147 (E.D.N.Y. 2013)).

The point is simple: the basic principle of *sic utere tuo ut alienum non lædas*, which this Court has long regarded as "founded upon substantial reasons of justice and equity," *Boynton v. Longley*, 6 P. 437, 439 (Nev. 1885), allows

government to prohibit uses of property that harm neighbors, create noise and disturbances, crimes, pollution, or traffic. But it does not permit political officials to dictate what shall be permitted activities in a home, or to force property owners to record the identities of residents, or their activities, and turn that information over to the government without a showing of probable cause. As this Court observed in a different context, "our citizens' constitutional right to be secure in their homes, to be free from unreasonable searches and seizures," and their "constitutionally guaranteed right to privacy," "must prevail" in absence of some specific offense that justifies government intervention. *Nelson v. State,* 96 Nev. 363, 366 (1980).

IV. The distance rule is unconstitutionally arbitrary.

Appellants rightly observe that the distance rules—which prohibit home-sharing within a half a mile of a favored casino—constitute an irrational form of economic favoritism. They observe that economic favoritism—i.e., the government's use of power, not to protect the public, but to "protect[] a discrete interest group from economic competition," *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002)—is unconstitutional even under lenient rational basis review.[5] *See* AOB at 30. *Accord*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

[5] This Court has held that the state and federal equal protection doctrines are identical. *Barrett v. Baird*, 111 Nev. 1496, 1509 (1995).

The reason is plain: government exists to protect the *general* welfare and to protect individual rights against harm. But implementing monopolies—prohibiting legitimate economic competition simply to enable a favored few to profit—serves neither goal. For centuries, in fact, this has been regarded as an illegitimate use of the regulatory power. *See generally* Steven Calabresi & Larissa Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1042 (2013).

Although the government's power to regulate trade to protect the public is broad, it does not entitle the government to restrict competition for the *private* benefit of constituents "solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984).

Prohibiting home-sharing within a half-mile of a "resort hotel" does not even arguably promote the public welfare. For one thing, the two businesses are radically different. A person who rents a home for the weekend is simply not seeking the same experience as a person who stays at Caesar's. Nor is there reason to believe that a rental residence that is closer than the 2,500-foot limit poses *more* of a threat to the public welfare if occupied for 29 days than if it is occupied by a person for 31 days. Yet the latter is *allowed* under the Ordinance. There's no reason to believe a property owner will be more diligent in maintaining property if

it's far from a major resort than if it is close, or that a renter is more likely to abide by all laws if she stays in a home far from a resort, as opposed to closer.

Given that there's "no rational relationship" between the distance rule and "any of the articulated purposes" of the Ordinance, "we are left with the more obvious illegitimate purpose to which licensure provision is very well tailored"—namely, it "imposes a significant barrier to competition." *Craigmiles*, 312 F.3d at 228. It's designed simply to ensure that more people stay at a major casino than in a house. But the government has no legitimate role in picking favorites in this way.

When government limits economic competition, through a permit or licensing requirement, that power can become economically valuable. Private interests who stand to profit—by prohibiting competition—will invest time and resources in seeking to obtain a restriction that benefits them financially. *See generally* Paul Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209 (2016). This explains the phenomenon of lobbying, or, as the Founding Fathers called it, factionalism. And it's one of the jobs of the judiciary to restrict this kind of factionalism by enforcing constitutional limits that orient government toward *public* goals, rather than toward private ends. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 93 (Tex. 2015) (Willett, J., concurring).

In *Council of Insurance Agents & Brokers v. Molasky-Arman*, 522 F.3d 925 (9th Cir. 2008), the Ninth Circuit found that a Nevada law that barred non-resident insurance agents from signing insurance contracts in the state unless they got a Nevada-licensed agent to sign the contracts also, was an unconstitutional form of protectionism. As in this case, the government argued that its restrictions would help obtain information that would somehow benefit consumers, but the court said that these rationalizations were "nonsense." *Id.* at 935. "'[E]recting a fence at the [Nevada] border does nothing'" to protect consumers, it said. *Id.* (citation omitted). Instead, the geographical limitation was just designed as a form of protectionism, which was unconstitutional. *Accord, Reitz v. Kipper*, 674 F. Supp.2d 1194, 1200–05 (D. Nev. 2009).

The same is true here: the geographical limitation bears no relationship to the protection of the general public—it exists solely to prohibit economic competition for the benefit of a politically powerful group. But that violates the Due Process and Equal Protection Clauses. *Craigmiles*, 312 F.3d at 224; *Merrifield*, 547 F.3d at 991 n.15.

CONCLUSION

The Court should affirm those portions of the judgment rendered in favor of Appellants and enter judgment in their favor.

Respectfully submitted this 12th day of September 2023 by:

/s/ *Scott Day Freeman*
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GOLDWATER INSTITUTE

CERTIFICATE OF COMPLIANCE

I certify that this MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE AND LIBERTY JUSTICE CENTER IN SUPPORT OF APPELLANTS AND IN SUPPORT OF PARTIAL AFFIRMANCE complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, it is proportionally spaced, has a typeface of 14-point type, and contains 6,353 words, excluding the table of contents, table of authorities, and certifications.

I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. This brief complies with all applicable NRAPs, and in particular NRAP 28(c)(1), which requires every assertion in this brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

Dated: September 12, 2023

/s/ *Scott Day Freeman*
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GOLDWATER INSTITUTE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this completed MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE AND LIBERTY JUSTICE CENTER IN SUPPORT OF APPELLANTS AND IN SUPPORT OF PARTIAL AFFIRMANCE was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Dated: September 12, 2023

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