Case No. 25-3088

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHELLEY HAUSE and STEPHEN HAUSE,

Plaintiffs-Appellants,

v.

CITY OF FAYETTEVILLE, ARKANSAS,

Defendant-Appellee.

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

On Appeal from the United States District Court
for the Western District of Arkansas
Case No. 5:24-CV-5143,
Honorable Timothy L. Brooks, J., presiding

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, Amicus Goldwater Institute certifies that it is a non-partisan tax-exempt education foundation under Section 501(c)(3) of the Internal Revenue Code, has no parent corporation, has issued no stock, and has no parents, trust, subsidiaries, and/or affiliates that have issued shares or debt securities to the public.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of Amicus Goldwater Institute is set forth in the accompanying motion to file.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case turns on the question of whether the Fayetteville Ordinance treats in-state and out-of-state property owners equally. In trying to answer that question, the District Court committed a fundamental, and reversible, error: it applied an excessively formalistic analysis. The Supreme Court has made clear that in Dormant Commerce Clause cases, courts should "eschew[] formalism for a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Yet the court below held that the Fayetteville Ordinance treats both the same because both "must jump through the same hoop: acquiring a primary full-time resident" for nine months of the year. *Hause v. City of Fayetteville, Arkansas*, No. 5:24-CV-5143, 2025 WL 2697489, at *5 (W.D. Ark. Sept. 22, 2025). That's a formalistic similarity—but in *practical* reality, this is *not* the "same hoop." It's two different hoops. A full-time Fayetteville resident can qualify as the nine-month renter *herself*, which no out-of-stater can do. Instead, the latter are legally forced to contract with an in-stater as a condition of doing business. And that is forbidden by the Dormant Commerce Clause. *Granholm v.*

Heald, 544 U.S. 460, 474 (2005); *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 389-90 (1994).

Cases involving trade across state lines have never turned on questions of mere paper formalities, but have always depended on a *realistic* assessment of the *actual* burdens that a challenged restriction imposes. *See, e.g., Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 527 (1959); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945); *cf. Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 933-37 (9th Cir. 2008). By satisfying itself with formalistic resemblances instead of considering substantive burdens, the District Court committed reversible error.

It's undeniable that the Ordinance's purpose is discriminatory. It's designed to give preference to local residents in operating Short Term Rentals ("STRs"), by imposing a burden that locals can easily satisfy while out-of-state owners cannot. The District Court's reliance on formalism ignores the Supreme Court's admonition that "Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce …. 'The commerce clause forbids discrimination, whether forthright or ingenious.'" *Healy*, 512 U.S. at 201 (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)).

Home-sharing through short-term rental is a residential property use like any other. *See, e.g., Houston v. Wilson Mesa Ranch Homeowners Ass'n*, 360 P.3d 255,

259 ¶ 18 (Colo. App. 2015). Like any other residential property use, it's subject to regulation—and there are plenty of ways to regulate STRs to serve legitimate interests such as preventing excessive noise or parking, without discriminating against out-of-staters. The government can also address a shortage of housing in many different ways, none of which involve unconstitutional discrimination against non-residents. Instead, the City has chosen to employ a mechanism that excludes out-of-staters while benefiting locals. That's unconstitutional.

ARGUMENT

I. Dormant Commerce Clause jurisprudence is guided by practical realities, not formalistic pseudo-equality.

The basic principle of Dormant Commerce Clause jurisprudence is that by giving Congress exclusive authority to legislate with respect to interstate commerce, the Constitution creates a "federal free trade unit" in which cross-border commercial enterprise is "protect[ed] … against local burdens and repressions" *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949), or "parochial discrimination," whether overt or covert. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985).[1]

[1] *Ward* was technically an Equal Protection Case, because Congress had waived its Commerce Clause exclusivity by statute in that case. For purposes of this case, however, "[t]his is a distinction without a difference," *id*. at 882, because the Commerce Clause imposes a *more* demanding standard than the Equal Protection Clause. *See id.* at 881.

While *explicit* discrimination between states is obviously contrary to that rule and is therefore "virtually *per se* invalid," *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994), a court cannot just stop with the question of whether a challenged statute is *explicitly* discriminatory. That would allow local governments to easily evade the rule by cleverly designing regulatory burdens in a way that benefits insiders and blocks outsiders without saying so outright. Few local governments will be so foolish as to *expressly* discriminate against out-of-state commerce, given the *per se* rule. Instead, they're far more likely to impose *superficially* identical or similar burdens, which are *practically* different. That's why courts must "'[i]n each case … determine whether the statute … will in its *practical operation* work discrimination,'" and ensure that the restriction in question is not a "'mere expedient or device to accomplish, by indirection, what the [government] could not accomplish [directly], viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.'" *Healy*, 512 U.S. at 201-02 (citations omitted; emphasis added).

In other words, the fact that a statute or ordinance *seems* to impose the same burden on in-state and out-of-state entities is not determinative. To cite a few examples, in *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 546 (2015), Maryland imposed an identical tax on in- and out-of-state commerce, and

(with respect to the "county tax") provided no credits for either. *Id.* at 546. In *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 84-85 (1984), Alaska's requirement that timber be processed at an in-state facility applied equally to in- and out-of-state wood producers. In *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981), the law prohibited both in- and out-of-state trucks from being longer than 60 feet. Yet these laws and others like them were found unconstitutional because as a matter of *practical reality* they created a discriminatory barrier against out-of-state businesses and resulted in *functional* inequality of treatment.

This Court made clear in *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267-68 (8th Cir. 1995), that there are *three* ways a regulation can discriminate against out-of-staters for Commerce Clause purposes. First, it can be expressly discriminatory. Second, it might be "facially neutral" but with a "discriminatory purpose." Third, it can be genuinely neutral but still have a "discriminatory effect." *Id.* at 267. The *SDDS* court found that the law at issue there fell into the second category: it was discriminatory—and thus subject to strict scrutiny—because although "facially neutral,"[2] it "export[ed] costs to out-of-staters." *Id.* at

[2] Actually, as in *SDDS*, there is also evidence here of literal discriminatory intent. It's a matter of common knowledge that the Fayetteville Ordinance was adopted out of a desire to provide special preferences for insiders against outsiders. One City Council member, for example, said one reason for the Ordinance is that using a home as an STR "takes [it] away from citizens wanting to rent," and harms "the

271. To emphasize: because that "the [relevant] market" was "such that the [challenged law] so predominantly affect[ed] only out-of-staters," the challenged law was "discriminatory in effect, and must receive strict scrutiny." *Id*. Market realities, not mere formalistic identities, are the governing consideration.

But here, the District Court assumed that there are only *two* ways to violate the Clause: if it's explicitly discriminatory or if it's neutral with a discriminatory effect. *See Hause,* 2025 WL 2697489, at *3—that is, if the Ordinance doesn't fall into category 1 or category 3, it's constitutional. In reality, however, it falls—as the law in *SDDS* did—within category 2: it's facially neutral, but still has a discriminatory purpose, and for that reason, it should be subject to *heightened* scrutiny.

The Fayetteville Ordinance is patently discriminatory. It divides STR licenses into two categories and, as a practical matter, imposes such stringent conditions on the availability of Type 1 licenses that out-of-state owners cannot qualify. The reason is that while it may be commercially practicable for a Fayetteville resident who lives in her house to vacate that house for three months

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integrity of a neighborhood," which is just a dysphemism for allowing outsiders to stay in the community. Logan Begneaud & Lauren Spencer, *Fayetteville Approves Short-Term Rental Enforcement Position Amid Housing Crisis, Lawsuit Over Regulations*, 5News (Aug. 6, 2024), https://www.5newsonline.com/article/news/local/fayetteville-short-term-rental-enforce-lawsuit-housing-crisis/527-ab45d89e-aa86-4783-b185-a0817c6bd510.

of the year in order to rent it out, it's not commercially practicable for an out-of-state property owner to find a renter to make a house a domicile for nine months of the year and then vacate for the remaining three months.[3]

Thus the burden here is *far* more severe than the burden that was found unconstitutional in *Pete's Brewing Co. v. Whitehead*, 19 F. Supp.2d 1004 (W.D. Mo. 1998). There, a Missouri law required liquor producers to put a label on their products identifying the location of the facility where the liquor was produced and packaged. That was *facially* neutral, but the *practical* consequence was that out-of-state liquor producers were forced to create new labels for their products, whereas in-state liquor producers would not have to. *See id.* at 1011. Observing that "when a statute raises the cost of doing business for out-of-state producers without raising the cost for in-state producers, it gives the in-state producers an economic advantage," the court found the requirement violated the Dormant Commerce Clause. *Id.* at 1013.

The burden here is also vastly greater than the burden found unconstitutional in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), which actually didn't require out-of-state producers to do *anything*. In that case, North Carolina simply prohibited apple-growers from marketing apples as having

[3] Non-residents also have the option, of course, of obtaining a Type 2 license, but that's subject to the absolute 475 permit cap and also requires a Conditional Use Permit, so that option does not alleviate the discriminatory burden.

been approved by state apple inspectors. As a formal matter, that was even-handed, because it applied to both in- and out-of-state producers. But as a matter of practical reality, it worked a harsh burden on Washington producers, because that state operated an inspection regime that imposed higher standards than federal regulators employed. *See id.* at 351. By forbidding Washington growers from advertising that fact, the North Carolina statute "ha[d] the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system," and that unconstitutionally discriminated against interstate commerce. *Id*.

Or take *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), which involved a city ordinance prohibiting the sale of milk unless pasteurized at a facility within five miles of Madison. *Id.* at 350. Again, this requirement was facially neutral—it applied equally to both in-state and out-of-state milk companies—but it had the "practical effect" of "exclud[ing] from distribution in Madison wholesome milk produced and pasteurized in Illinois," and that was unconstitutional. *Id*. at 354.

Yet here, the trial court took the formalistic instead of the substantive approach. It said the Fayetteville Ordinance doesn't discriminate because "out-of-state owners like Plaintiffs" could simply "leas[e] a house to a long-term tenant for nine months of the year." *Hause*, 2025 WL 2697489, at *3. That's the same as—

if not worse than—saying that the out-of-state liquor companies in *Whitehead* could simply have put new labels on their products, or that the Washington apple growers in *Hunt* could simply have not labeled their apples, or that the Illinois milk producers in *Dean Milk* could just have had their milk pasteurized in Madison. To force an out-of-state property owner to go through the time and expense of locating a tenant who will reside in a house for nine months of the year—and then vacate the premises for three months—is obviously the practical equivalent of a prohibition.

And the differential consequences of that prohibition are not merely coincidental. By definition, *residents* of Fayetteville *automatically* qualify for Type 1 licenses. As the City itself emphasizes, Type 1 licenses are "available only for a 'full time residence'—meaning someone *who lives in Fayetteville* at least nine months of the year must occupy the property." City's Opposition to Plaintiffs' Motion for Summary Judgment at 1 (emphasis in original). By definition, that's a residency-based discrimination. And while as a *formalistic* matter, it's conceivable that an out-of-state property owner could lease a property to a resident for nine months, and then throw the resident out for the other three, that isn't a commercial reality.

A. The government cannot force out-of-staters to contract with in-staters as a condition of doing interstate commerce.

Even if it were commercially practicable, however, the requirement would still be an inescapably residency-based form of discrimination (and thus unconstitutional), because residency in Fayetteville remains a but-for cause of licensing availability. Domicile of the owner *or a person in privity with the owner* is still a necessary condition of obtaining a Type 1 license. And that's an unconstitutional burden.

Consider *Granholm, supra*. There, the state argued that its prohibition on direct shipment of wine by out-of-state wineries was non-discriminatory because out-of-state wineries could simply contract with in-state sellers to deliver wine to consumers in the state. *See* 544 U.S. at 469. But that was just the problem: "The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers," the Court said. "These two extra layers of overhead increase the cost of out-of-state wines…. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market." *Id*. at 474.

Or consider *Molasky-Arman, supra*, which involved a Nevada statute that prohibited insurers from issuing policies on persons or property in Nevada unless

that policy was co-signed by a Nevada-licensed insurance agent. 522 F.3d at 929.[4] That was also *facially* neutral: both in-state and out-of-state agents had to provide the signature of a Nevada-licensed insurance agent. And the state indeed insisted that the requirement was not protectionist in nature, but was designed to protect Nevada consumers. *Id.* at 934-35. Yet it was obviously discriminatory, *see id*. at 936, because the consequences were to increase the operating costs of out-of-state businesses *vis-à-vis* in-state businesses. Out-of-state agents could, of course, simply contract with in-state agents to do business—but the state cannot constitutionally impose such a requirement.

In fact, it has *always* been the rule that local governments cannot require out-of-state businesses to contract with in-state businesses as a condition of carrying on their trade, unless such a requirement can survive heightened judicial scrutiny. *See C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 389-90 (1994); *Wunnicke*, 467 U.S. at 97; *Dean Milk*, 340 U.S. at 354; *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 12-14 (1928); *Minnesota v. Barber*, 136 U.S. 313, 328 (1890).

[4] *Molasky-Arman* was brought under the Privileges and Immunities Clause rather than the Dormant Commerce Clause, but as the Ninth Circuit observed in *Marilley v. Bonham*, 844 F.3d 841, 850 (9th Cir. 2016), "the two clauses share the same underlying concerns" and have a "'mutually reinforcing relationship.'" (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978)).

Here, as in *Granholm,* the Ordinance has the practical effect of forcing out-of-state property owners, but not in-state property owners, to contract with a Fayetteville resident for nine months of the year in order to provide shelter to renters during the remaining three months. This requirement increases the costs of out-of-state owners, and consequently those looking to rent, in a way that isn't true for in-state owners. And that cost—and in most cases the inability to find a Fayetteville resident willing to reside in the house for nine months of the year—can and probably does effectively bar all out-of-state property owners from operating STRs.

The District Court therefore committed a fallacy[5] in concluding that the Fayetteville Ordinance is nondiscriminatory because "out-of-state owners … can get Type 1 licenses by leasing a house to a long-term [Fayetteville resident] for nine months of the year." *Hause*, 2025 WL 2697489, at *3. Being forced to contract with an in-state party in order to do business in the area—an expense not borne by in-state residents—is *just the discrimination complained of*.

[5] Specifically, it committed the fallacy of question-begging—that is, "put[ting] the bunny in the hat" by assuming the conclusion instead of proving it. *United States v. Jannotti*, 673 F.2d 578, 626 (3d Cir. 1982) (Aldisert, J., dissenting). The question presented is whether imposing a special cost on out-of-state parties is discriminatory; the District Court answered that there would be no discrimination if out-of-state parties would just pay the extra cost.

B. There is *one* STR market.

Nevertheless, the court below concluded that the Ordinance doesn't discriminate because the kind of STR governed by Type 1 licenses differs from the kind of STR governed by Type 2 licenses. Because these are two different markets, the court said, the government can impose different regulations on them.

What is the "distinguishing feature" between these two allegedly different markets? *Hause*, 2025 WL 2697489, at *4. Simply the fact that Type 1 STRs are—by fiat of the Ordinance—occupied by a Fayetteville resident for nine months of the year, and Type 2 are those that aren't. *Id.* at *1. *See also id.* at *4 (noting that the *only* distinguishing feature of Type 1 and Type 2 is "the … nine months during which Type 1 rentals must serve as primary full-time residences.")

That isn't a real distinction at all. It simply begs the question, by saying that the government can divide a market into two categories, then regulate them differently because they are two different categories—the difference being the fact that the government has chosen to regulate them differently!

Markets cannot be defined by mere *ipse dixit*. *Shak v. JPMorgan Chase & Co.*, 156 F. Supp.3d 462, 483 (S.D.N.Y. 2016). They must be defined by objective factors such as "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). In other words, goods or services

constitute the same market if there is "reasonable interchangeability for the purposes for which they are produced." *Acme Precision Prods., Inc. v. Am. Alloys Corp.*, 484 F.2d 1237, 1241 (8th Cir. 1973) (quoting *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 404 (1956)). If the government can simply proclaim by pure say-so that two markets are different, and subject to differential treatment, due to the fact that it has proclaimed them to be different, then there's no limit to the discriminatory burdens it can impose.

The reality is that STRs comprise a single market: a market for places to stay temporarily in a home. They compete with—i.e., are substitute goods for—other forms of lodging, such as hotels or bed-and-breakfasts. Obviously there are differences between these different types of lodging (that's just what makes them competitors), but exact identity is not required. What counts is "reasonable interchangeability," *Acme Precision Prods*., 484 F.2d at 1243 n.10, and it is obvious that Type 1 and Type 2 STRs are "reasonably interchangeable."

In support of its purported distinction between the two, the District Court cited *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1961), which found a distinction between sold wholesale to canneries, and fish that's fresh-frozen for retail sales. But there, the Court drew the distinction based on *reasonable interchangeability*—that is, it distinguished the two markets because "the freezer ships do not compete with those who freeze fish for the retail market…. Their

competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen." *Id*. at 204. So those really were two different markets. Here, however, Type 1 and Type 2 STRs obviously compete for the *same* customers, because unlike with the Alaska fish markets, there is "cross-elasticity of demand" here. *Brown Shoe Co.*, 370 U.S. at 325. The only distinction between Type 1 and Type 2 is that the government has chosen to draw a line. That is not enough to permit discrimination.

The District Court rejected this reasoning on the grounds that such an allegedly "expansive" definition of the market would leave the government unable to "distinguish between … brick and mortar liquor stores and their online counterparts because they both sell liquor." *Hause*, 2025 WL 2697489, at *4. But *of course* the government can distinguish between on-line and in-store alcohol sales.[6] What it cannot do is force out-of-state businesses to contract with in-state businesses as a condition of doing business. The Supreme Court said just that in a case involving alcohol sales: *Granholm,* in which it said the state cannot "require[] all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers." 544 U.S. at 474. And just as

[6] Because (to quote the case the District Court cited), "trips to a winery [are] a distinct experience incommensurate with—and, therefore, unlikely to be replaced by—a trip to either a mailbox or a retail liquor store." *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007). In other words, there's no cross-elasticity of demand or reasonable interchangeability.

it cannot achieve such an end indirectly, so it cannot accomplish it directly by arbitrarily treating the same market as if it were two different markets.

II. There are plenty of non-discriminatory means to attain Fayetteville's legitimate goals.

Home-sharing is often the target of discriminatory burdens by locals who wish to exclude outsiders—a motive often disguised by euphemisms such as "maintaining the character of the neighborhood." Of course, a mere desire to keep outsiders away is not a legitimate government interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985). But a city can have legitimate concerns about traffic, noise, the preservation of property values, etc. *Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989). The government must still pursue those interests in a constitutional manner. Fortunately, there are plenty of ways to do this that do not offend constitutional limits as the Fayetteville Ordinance does.

As far as noise, traffic, or property maintenance are concerned, the City can enforce its already existing prohibitions on nuisances, which apply equally to houses that are rented for one week as to houses rented for a year. There's no need to draw additional (and arbitrary) lines between short- and long-term rentals with respect to virtually any of the ordinary police-power concerns of a city. The same applies to restrictions intended to preserve property values or property maintenance concerns. Homesharing is a residential use, the same as any other, and laws

against trash in yards, or weeds, or excessive parking on the street, can address those problems without any need to discriminate against homesharing. "There is nothing magic about home-sharing. Indeed, when determining whether a shared housing arrangement is consistent with local residential or family zoning, state courts have considered how a home is being used rather than the relationships between the parties involved in or characteristics of the transaction." 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, 429 (2017).

Not only is homesharing a legitimate residential use, but it's highly beneficial to communities. It enables property owners to maintain and improve their properties, and to generate extra income to help cover the cost of their homes. It also enables travelers to experience neighborhoods they otherwise would be situated far from (because hotels are often located in downtown areas). This helps generate commercial traffic for local businesses, including stores, restaurants, art galleries, and nightclubs, which, in turn, generates tax revenue for local governments.

As far as housing availability is concerned, local governments can allow for new home construction, increasing the supply instead of seeking ways to ration existing stock. Yet even though Northwest Arkansas is now recognized as one of

the regions in the United States with the greatest need for new housing, it has done relatively little to approve much-needed new supply. A report last year by the Walton Family Foundation found, among other things, that density limits, parking requirements, and lengthy plan-review processes have delayed the construction of housing in Northwest Arkansas. *Our Housing Future: A Call to Action for Northwest Arkansas* 12 (Walton Family Found. May 2025).[7] So has NIMBYism and other pressures that "disincentiviz[e] single-family construction." *Id.* at 13. That report found that "the region has grown … housing production has failed to keep pace" with population growth, with the unsurprising result that "housing costs have increased significantly." *Id.* at 14.

Astoundingly, Northwest Arkansas authorities have issued only around 6,000 building permits per year in recent years—and that's a drastic increase from previous years, according to the *Skyline Report*,[8] which monitors such matters. Fayetteville accounts for about one tenth of this number. This is an improvement, but it's ludicrously below market demand in a region which needs more than 9,000 units just to satisfy *low-income* housing needs. *See Our Housing Future, supra* at 3. And as long as housing supply remains so drastically below demand—as a

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[7] https://static.waltonfamilyfoundation.org/93/1a/2ed20c6340e6ac95149721dc11cc/our-housing-future-report.pdf.

[8] https://talkbusiness.net/wp-content/uploads/2025/09/1H_2025ResidentialHhighlights_.pdf.

result of delays caused largely by the permitting process—excluding outsiders by restricting property use in ways that benefit locals serves as a device for rationing existing supply, thereby making it harder for newcomers to find a place to stay.

The result, in effect, is to transfer wealth from outsiders who are willing to pay artificially inflated costs to insiders who "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). Worse, it transfers wealth from property owners who have invested hard work into improving their properties, to the pockets of local residents who are given a special privileged access to those properties.

These considerations are all relevant here because they show that the Ordinance's discrimination is not tailored to legitimate government interests. To understand this, consider *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504 (2019), which involved a state law requiring a two-year residency for anyone applying for a liquor-sales permit. That case differed from the ordinary Commerce Clause case, because it involved the Twenty-First Amendment, which requires a slightly more government-friendly balancing of interests than applies to most Commerce Clause cases. *See id.* at 539. Yet the Court *still* found it unconstitutional, because there was no reason to think the state's legitimate "objective[s] could not easily be achieved by ready alternatives." *Id*. at 540. There

was no reason to think the residency requirement "promote[d] responsible sales and consumption practices." *Id.* at 542.

Likewise, here, there's no reason to think the Ordinance's requirement of a full-time nine-month resident will ensure against neighborhood nuisances or reduce pressure on the Fayetteville housing supply. The fact that a Fayetteville domiciliary resides in the house for three quarters of the year in no way ensures that the house will not be a source of nuisances—the resident herself might just as well play loud music or have parties that cause excessive parking on the street, whereas the 3-month residents could be as quiet as church mice. Indeed, research suggests that STRs tend to *reduce* the amount of noise and other neighborhood nuisances. *See* Gorkem Turgut, et al., *Noisebnb: An Empirical Analysis of Home Sharing Platforms and Noise Complaints* (July 25, 2020).[9]

The idea that barring people from renting houses to those who need them on a short-term basis will somehow reduce the cost of housing in Fayetteville is economically illiterate. The overwhelming cause of the increase in housing prices is limitation on supply caused by regulation—*not* the diversion of housing stock to STR use. *See* Eliza Terziev, *Blaming Short-Term Rentals Won't Solve the Housing Crisis*, Reason Foundation (Jan. 12, 2026);[10] Sophie Calder-Wang, et al., *What*

[9] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660527.
[10] https://reason.org/commentary/blaming-short-term-rentals-wont-solve-the-housing-crisis/.

Does Banning Short-Term Rentals Really Accomplish?, Harvard Bus. Rev. (Feb. 14, 2024)[11]; Tobias Peter, *Setting the Record Straight on Short-Term Rentals, Housing Affordability, and Misguided Government Market Interventions,* American Enterprise Inst. (Nov. 20, 2023).[12] "Easing land use restrictions would have a far greater impact on affordability without eliminating a potential income source for property owners. Even in areas where STRs have a significant effect, communities would be better served by addressing restrictive land use policies before limiting what homeowners can do with their properties." *Id.* And certainly requiring STRs to house a Fayetteville resident for nine months of the year will have vastly smaller impact on the housing market than the proverbial drop in the bucket. There are only about 600 STRs in Fayetteville. *Fayetteville Airbnb Market Analysis 2026: Short Term Rental Data & Vacation Rental Statistics in Arkansas, United States,* Airroi.com (Jan. 1, 2026).[13] Statistically, the Ordinance will have a negligible impact on housing prices. When Santa Monica, California, restricted STR use, it had no effect on prices. Cayrua Fonseca, *Short Term Rentals*

[11] https://hbr.org/2024/02/what-does-banning-short-term-rentals-really-accomplish.
[12] https://www.aei.org/research-products/report/setting-the-record-straight-on-short-term-rentals-housing-affordability-and-misguided-government-market-interventions/.
[13] https://www.airroi.com/report/world/united-states/arkansas/fayetteville.

and Residential Rents: Evidence from a Regulation in Santa Monica, 18 Intl. J. Housing Markets & Analysis 1169 (2025).[14]

If Fayetteville wants to address its housing shortage, the rational way to do that is to authorize more construction—not to deprive out-of-state property owners of the right to use their land.

CONCLUSION

The District Court did not apply the *realistic* scrutiny Commerce Clause cases require. Doing so reveals why the Fayetteville Ordinance's discriminatory scheme must be declared unconstitutional. The judgment should be *reversed*.

Respectfully submitted this 17th day of February 2026.

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[14] https://www.emerald.com/ijhma/article-abstract/18/5/1169/1250339/Short-term-rentals-and-residential-rents-evidence.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: February 17, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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