

No. 25-50025

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**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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RAFAEL MARFIL; VERGE PRODUCTIONS, L.L.C.; ENRICO MARFIL;  
NAOMI MARFIL; KOREY A. RHOLACK; DANIEL OLVEDA; DOUGLAS WAYNE  
MATHES  
*Plaintiffs - Appellants,*

*v.*

CITY OF NEW BRAUNFELS, TEXAS,  
*Defendant - Appellee.*

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On Appeal from the U.S. District Court for the  
Western District of Texas, Waco Division

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**BRIEF *AMICUS CURIAE* OF THE GOLDWATER INSTITUTE IN  
SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR  
REHEARING EN BANC**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the following *amici curiae* (with state of incorporation) hereby proffer that each has no parent companies, subsidiaries, or affiliates that have issued shares to the public:

Goldwater Institute (Ariz.).

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), the above-captioned *amici* seek to file this brief in order to impress upon the entire Fifth Circuit the broader socioeconomic risks of failing to accept a rehearing and rule in Plaintiff-Appellants' favor.<sup>1</sup>

The **Goldwater Institute** is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater litigates and files amicus briefs when it or its clients' constitutional and economic rights are implicated. This is one such case, and Goldwater writes to highlight the constitutional and broader economic implications. Author Sam Spiegelman is an expert in property law and housing policy, and offers his unique insights, having done so as counsel for another amicus in *Marfil I*.

In accordance with FRAP 29, counsel has filed a motion for leave to file alongside this brief. *Amici* affirm that no counsel for any party authored this brief in any part and that no person other than *amici*, their members, or their counsel have made a monetary contribution to fund its preparation or submission.

## ISSUES ADDRESSED BY *AMICUS CURIAE*

The extent to which short-term rentals and similar increased access points to housing advance the dual policy objective of increasing housing at reduced prices.

### INTRODUCTION AND SUMMARY OF ARGUMENT

This controversy highlights two unresolved aspects of the ongoing housing debate—one legal, the other political. **First**, under the common-law conception of ownership, private proprietors are firmly within their “bundle of rights” to lease realty for as long or as short as they wish. They can only be prohibited from engaging in nuisance or harmful uses. Since at least *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), the Supreme Court has clarified that property rights are fundamental and thus subject to at least a *heightened* degree of judicial scrutiny. *Id.* at 158 (2021) (“We cannot agree that the right to exclude is an empty formality, subject to modification at the government’s pleasure. On the contrary, it is a ‘fundamental element of the property right’ that cannot be balanced away.”) (cleaned up).

**Second**, America’s housing sector has been in turmoil for decades now—at least as early as the mid-2000s. Despite widespread awareness and justified concern for the ever-dwindling supply of available units, innovative solutions—

including short-term rentals alongside accessory-dwelling units and rowhouse developments—remain relatively few and far between.

## ARGUMENT

### I. BANS ON STRS SERVE NO JUSTIFIABLE PUBLIC PURPOSE SUFFICIENT TO OVERCOME CONSTITUTIONAL SHORTCOMINGS

*Amici* recognize that short-term rentals—like any economic arrangement—can produce social costs that their owners and tenants can never fully internalize. And that *regulating* them is well within a local government’s prerogative. The fear that short-term rentals erode a locale’s sense of community and aesthetic character animates its opponents like nothing else.

But given the rights implicated on the other side of the ledger, bans on short-term rentals of any duration cannot rely on mere buzzwords (*e.g.*, “neighborhood character”) or *any* conceivable purpose to stave off judicial scrutiny. Far from Justice William O. Douglas’s much-derided declaration that when a legislature speaks, the public interest has been declared in terms “well-nigh conclusive,” *Berman v. Parker*, 348 U.S. 26, 32 (1954), when lawmakers target a fundamental attribute of ownership—here the right to gainful use—they must clearly delineate the public interests involved and explain how a particular ban or regulation furthers that interest. As one scholar put it, “[s]haring and bartering housing

resources is not new. Historically, the concept has long existed in the context of lodging purchased on a time- or space-limited basis in inns and boarding houses, rooms for rent, housing cooperatives, and informal arrangements.” Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern Sharing Economy: Are Short-Term Rental Restrictions an Unconstitutional Taking*, 42 *Hastings Con. L.Q.* 557, 561 (2015).

This so-called “sharing stick” in the “bundle” of property rights occupies the flipside of a coin with the right to exclude others from one’s property. The right to exclude is, arguably the “*sine qua non*” of property rights. Thomas Merrill, *Property and the Right to Exclude*, 77 *Neb. L. Rev.* 730, 730 (1998) (emphasis original). And the *protection* of this and other elemental property rights is the reason for which government is in the first place constituted. *See* John Locke, *Second Treatise on Government*, Ch. 9, §124 (1689) (“The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property.”). *See also* *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (1795) (“The preservation of property . . . is a primary object of the social compact.”).

Both of these factors—(1) property as the right to exclude and its correlative

right to *include* (read: to share) and (2) that government exists to protect it—presuppose a right to *use* one’s property however one wishes. It is, after all, through use that objects in the world become property:

Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.

Locke, *supra*, Ch. 5, § 27.

Provided, of course, that a specific use is not so harmful to the public interest—to the person and property of others—as to justify (or perhaps even *require*) government’s intervention. *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887) (finding legitimate a limited exercise of the state police power to regulate the use of private property to protect the public from harm); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1969) (same). *See generally* Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 Cornell L. Rev. 276 (1936). And if a particular exercise of the fundamental rights to exclude, include, and use *does* harm a public interest then, as discussed, the lawmaking body should at least be required to “show receipts.” To explain to the court why and how a particular infringement on fundamental property rights is fine-tuned to the task of protecting a specified public interest.

The same common-law tradition that imbues ownership with fundamental rights also *contours* it in various ways, but just to the extent necessary to prevent or abate uses that produce certain public harms. *Cedar Point Nursery*, 594 U.S. at 160–61 (explaining the various “background principles” of Anglo-American law—*e.g.*, “entry to avert imminent public disaster” or “entry to prevent serious harm to a person, land, or, chattels” that permit government action *without* triggering eminent domain).

Carveouts for the sake of public protection are not ancillary to a sovereign’s police power. They *are* that police power. Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 Wash. U. L.Q. 1, 2–3 (1978) (“*Sic utere [tuo alienum non laedas]*” — essentially, prevention of harm to other persons and property—“is the fountainhead maxim from which both the common law of nuisance and the police power arose.”). “Effective judicial limitations on the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted . . . [T]he maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely.” Freund, *The Police Power: Public Policy and Constitutional Rights* 60–61 (1904).

## II. PARTICULARIZED BANS ON SHORT-TERM RENTALS MUST BE NARROWLY TAILORED TO ENSURE MAXIMAL PROTECTION OF PROPERTY RIGHTS AND THE RIGHT TO “ESTABLISH A HOME”

Bans on short-term rentals lacking sufficient police-power justification or the narrow-tailoring to ensure only as-necessary restrictions implicates more than just the property rights to exclude and include—*viz.*, to host. Adjacent to these rights is a tenants’ right—indeed anyone’s right—to “establish a home.” In the seminal case on the topic, the U.S. Supreme Court confirmed that “*exclusion of the new [philanthropic] home [for indigent children and elderly] from*” the relevant zone was “*not indispensable to the general zoning plan,*” and that Seattle officials had, at least, to proffer a “determination that the proposed building use would be inconsistent with public health, safety, morals, or general welfare.” *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928). Instead, exclusion of the home merely required enough of its would-be neighbors to say “no,” and for whatever reasons they wished, no matter how arbitrary. *Id.* at 118.

*Roberge* presents a particularly stark dichotomy between justified and unjustified exclusionary purposes, but the lesson is the same in closer cases—that the right to “establish a home” shares with property rights the protections of a

heightened judicial scrutiny. One that does not trust lawmakers' mere claims that their police-power purposes are "well-nigh conclusive," *Berman, supra*, at 31, but that demands legislatures explain, in at least *some* detail, why an exclusionary measure is warranted and how less drastic alternatives *are not feasible*.

New Braunfels and other jurisdictions seeking to preserve a neighborhood's "residential character" can (and should) rest assured. , in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the U.S. Supreme Court clarified that "[a] quiet place where yards are wide, people few, and motor vehicles restricted *are* legitimate guidelines in a land-use project addressed to family needs." *Id.* at 9 (citing *Berman*, 348 U.S. at 31) (emphasis added). But the question here—as in any emergent case—is whether such restrictions are designed and implemented in due consideration of individuals' most vaunted constitutional rights (i.e., those deemed fundamental, including the rights to vote, to enter into free association, to access the courts, to privacy, etc.). *Id.* at 7 (internal citations omitted).

What are New Braunfels proffered justifications for banning short-term rentals? Providing a cogent answer to this question is especially vital in light of the historical record, wherein short-term leases were long viewed as permissible in Texas jurisdictions. *See JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n*,

644 S.W.3d 179, 185 (Tex. 2022); *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 291 (Tex. 2018). As expected, New Braunfels argues that the ban is needed to reduce or prevent noise pollution and increased traffic, despite a panoply of data points indicating no such danger: Crucial, too, is that despite paeans to “preservation,” New Braunfels, evidently, has not issued any nuisance abatements against properties used as short-term rentals. Preventing and abating noise pollution and increased traffic are legitimate police-power bases for interfering with fundamental individual rights *provided* this is what the challenged measures aim to achieve. New Braunfels’s longstanding socio-economic composition at least suggest that its near-blanket short-term rental ban is not even tailored to those ends. Officials might have more constitutional support had the ban targeted specific neighborhoods (*e.g.*, low-decibel residential zones that do not already host a broad array of guest accommodations). New Braunfels, in turn, might at least have done studies on the extent, if any, to which short-term rentals cause nuisances or reduce existing property values. The city did none of these things but still expect the Court to take its lawmakers’ at their word. To trust that the ban furthers legitimate public purposes, despite any evidence and the “workshop” manner through which it was deliberated—a process that bears

unflattering similarities to the majoritarian consent requirement struck down in *Roberge*.

The data points on New Braunfels in particular undermine any nexus between workaday regulations to prevent or reduce noise pollution and traffic congestion, on the one hand, and prohibiting short-term rentals, on the other. Especially since many existing short-term rentals—apparently vital to New Braunfels’ tourism-based economy—have been grandfathered out of the ban. *Id.* at 12. See New Braunfels Convention and Visitors Bur., *The Economic Impact of New Braunfels’ Hospitality Industry* 9 (2023) (“The value added supported by the hospitality industry accounts for 10.8% of the estimated gross area product in New Braunfels.”). See also New Braunfels Econ. Dev. Corp., *New Braunfels Workforce Housing Study* 12–14 (2018) (analyzing housing data and recommending more renter-friendly policies).

### **III. SHORT-TERM RENTALS AND OTHER INCREASED ACCESS POINTS TO HOUSING SERVE VITAL ROLES IN INCREASING AMERICA’S HOUSING STOCK AT DECREASED COSTS**

Casting aside for a moment concerns over community and aesthetic considerations, it remains that there is great need for short-term rentals, even (in many contexts, especially) those with terms less than thirty consecutive days. If

local governments are permitted to proscribe them pell-mell, either via the letter of the law or through discretionary decisionmaking, it will fuel a wave of bans which, coupled with existing exclusionary zoning regimes against multifamily housing and other non- single-family builds, has since 1964, cost the American GDP upwards of 36% of what it otherwise would have accumulated. Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 Am. Econ. J.: Macroeconomics 1, 1 (2019).

Forcing traveling nurses, pilots, hotel workers, management and technical consultants, and substitute teachers to sign month-plus leases instead of terms of weeks—as is more financially efficient for some—will not solve community erosion. Neither will a tourism-driven city’s decision to ban short-term rentals that lend vital support to that economic base. It will, however, increase the costs of engaging in these careers, reducing the number of participants, and ultimately redound to the serious detriment of those communities who have come to rely on the highly transient sector of the workforce. And all to preserve relatively *de minimis* benefits. Last year, the *Harvard Business Review* noted that “the presence of short term rentals increases the annual rent of the median tenant” in New York City “by \$125.” Sophie Calder-Wang *et al.*,

*What Does Banning Short Term Rentals Really Accomplish?*, Harv. Bus. Rev. (Feb. 15, 2024) (<https://tinyurl.com/3eybtbna>). That small increase pales in comparison to the “overall rise in housing costs in the recent past,” the solution for which is more housing *of all kind*.

From an economic perspective, *amici* disagrees that the drawbacks of even very short stays (*e.g.*, a weekend away) outweigh their advantages. *See, e.g.*, Peter Coles et al., “Airbnb Usage Across New York City Neighborhoods: Geographic Patterns and Regulatory Implications” in *The Cambridge Handbook of the Law of the Sharing Economy* 127 (2018) (“Given the limited incentives to convert housing units that we observe in the data, along with the downward trend in these incentives over time, it seems unlikely that Airbnb is currently having a major effect on the affordability of rental housing in New York City.”). Municipal governments certainly have the devolved power to restrict tourism and short-term-work stays. But such measures should not be taken lightly—not just in view of potential constitutional traps, but considering the emergent economic importance of gap-filling housing arrangements.

## CONCLUSION

For the reasons set forth above, and those outlined in Plaintiff's filings, *amicus* urges the Court to grant Plaintiffs-Appellants' Petition for Rehearing En Banc.

Dated: July 9, 2026.

Respectfully submitted,

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s/Sam Spiegelman  
Sam Spiegelman

*Counsel for Amicus Curiae*

Dated: July 9, 2026.

## CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

/s/ Sam Spiegelman  
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