No.____

In the Supreme Court of Texas

IN RE SURFVIVE, ANUBIS AVALOS, AND ADONAI RAMSES AVALOS,

Relators.

On Petition for Writ of Mandamus to the
Thirteenth Court of Appeals, Corpus Christi–Edinburg

PETITION FOR WRIT OF MANDAMUS

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"App." refers to this petition's appendix. "MR." refers to the mandamus record.

STATEMENT OF THE CASE

Nature of the Case: The City of South Padre Island ("City") is enforcing two anti-competitive food-truck permitting restrictions despite that the district court rendered both void under Article I, Section 19 of the Texas Constitution at summary judgment. First, the City restricts the total number of available food truck permits at twelve. *See* SPI Code §§ 10-31(C)(2) and 10-31(F)(2)(a) (the "Permit Cap"). Second, the City restricts eligibility for those twelve permits—to qualify, applicants must convince a local restaurant owner to sign off in support of the vendor's application. *Id*. § 10-31(C)(3) (the "Restaurant Permission Scheme"). Relators are food-truck operators SurfVive, Adonai Avalos, and Anubis Avalos ("Vendors"), who sued the City and challenged the constitutionality of the Permit Cap and Restaurant Permission Scheme under the Due Course of Law Clause, Tex. Const. art. I, § 19. MR.1–23. After discovery closed, the parties cross-moved for summary judgment and the City filed a plea to the jurisdiction. MR.24–84, 128–169. In two concurrent orders issued November 30, 2020, the district court granted the Vendors' motion for summary judgment in full, MR.85 [App. B], and it denied the City's plea to the jurisdiction and competing summary-judgment motion, MR.86. The only issue left for the district court to decide is the *amount* of attorney's fees. Vendors have prevailed on the merits, but the City is blatantly defying the district court's judgment and order and continues enforcing the Permit Cap and Restaurant Permission Scheme.

Vendors must turn now to this Court for relief because the City is relying on the stay of proceedings under Section 51.014(b) of the Texas Civil Practice and

Remedies Code in order to defy the district court's summary-judgment ruling with impunity. Although the case has been decided on summary judgment, and the City has chosen not to appeal or seek a stay of that ruling, it has so far prevented the Vendors from gaining any benefit from their victory by appealing the district court's concurrent order against it on the plea to the jurisdiction only. MR.117–120. That appeal triggered an automatic stay of proceedings, *see* Tex. Civ. Prac. & Rem. Code § 51.014(b) (staying district court proceedings pending interlocutory appeals) [App. E], which the City has used to defy the district court's summary-judgment order by continuing to enforce the Permit Cap and Restaurant Permission Scheme. The result is that although Vendors prevailed on the merits under Article I, Section 19, and the provisions of the Texas Constitution's Bill of Rights are self-executing, Vendors still cannot obtain permits to operate their food trucks on South Padre Island, causing them irreparable harm.

Having no adequate remedy in the district court, the Vendors on January 21, 2021 sought relief in the Thirteenth Court of Appeals under Tex. R. App. P. 29.3 [App. D], seeking an order prohibiting enforcement of the Permit Cap and Restaurant Permission Scheme. MR.170–183.

Respondent: The Honorable Thirteenth Court of Appeals, Corpus Christi–Edinburg.

Challenged Action: On February 12, 2021, the Thirteenth Court of Appeals denied the Vendors' motion for Rule 29.3 relief without opinion. MR.349 [App. A]. That denial allowed the City to continue enforcing the Permit Cap and Restaurant Permission Scheme, despite the fact that the district court has ruled those laws violate Article I, Section 19 of the Texas Constitution.

STATEMENT OF JURISDICTION

The Court has jurisdiction under Texas Government Code section 22.002(a).

ISSUE PRESENTED

Relators—food truck vendors SurfVive, Adonai Avalos, and Anubis Avalos ("Vendors")—*won* their constitutional challenge to two food-truck permitting restrictions enforced by the City of South Padre Island ("City"). The district court granted the Vendors' motion for summary judgment in full, declaring void under Article I, Section 19 both the City's food truck permit cap (barring all but 12 food trucks), *see* SPI Code §§ 10-31(C)(2) and 10-31(F)(2)(a) ("Permit Cap"), as well as the City's mandate that a local restaurant owner endorse a food truck's permit application, *Id*. § 10-31(C)(3) ("Restaurant Permission Scheme"). The City did not appeal or seek a stay of the district court's summary-judgment order.

"A law that is declared void has no legal effect." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (internal citations omitted). But despite the district court's ruling at summary judgment, the City is defying the court's authority by continuing to enforce its Permit Cap and Restaurant Permission Scheme. The district court cannot protect the Vendors from irreparable harm because the City pursued an *interlocutory* rather than a

regular appeal after judgment was granted, triggering a stay of district-court proceedings by appealing the court's concurrent order denying the City's plea to the jurisdiction. Knowing this, the City has flouted the district court's summary-judgment order with impunity. Unable to turn to the district court, Vendors sought relief in the Thirteenth Court of Appeals under Rule 29.3. The Thirteenth Court of Appeals denied Rule 29.3 relief without opinion.

The issue presented is whether the Thirteenth Court of Appeals' denial of the Vendors' Verified Rule 29.3 Motion—which sought an order prohibiting enforcement of the Permit Cap and Restaurant Permission during the pendency of appeal—is a clear abuse of discretion.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Vendors SurfVive, Adonai Avalos, and Anubis Avalos require this Court's intervention. On a full summary judgment record, the trial court declared that two permitting restrictions in South Padre Island's vending laws violate Article I, Section 19 of the Texas Constitution. Because "the Bill of Rights is self-executing to the extent that anything done in violation of it is void," *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148–49 (Tex. 1995) (citing *Hemphill v. Watson*, 60 Tex. 679, 681 (1884)), the challenged restrictions cannot be enforced. Notably, the City has neither appealed nor sought a stay of the district court's summary judgment ruling. Rather, the City is blatantly defying the district court's judgment and order.

Despite that ruling, the City continues to enforce the unconstitutional permitting restrictions that are depriving Vendors from operating their food trucks on South Padre Island. The City's defiance of the district court's summary-judgment works an irreparable harm on Vendors and time is of the essence. By strategically timing its defiance of the district court's ruling, the City's enforcement of the Permit Cap and Restaurant Permission Scheme is fencing out the Vendors' food trucks during the busy travel season in South Padre Island, which has arrived with Spring Break and will continue through the summer with the post-pandemic reopening of the Texas economy. The

City's continued enforcement of the food-truck permit restrictions struck down by the district court prevents the Vendors from obtaining the permits they need to open for business: The Permit Cap means that no permits are available to Vendors or anyone else (all twelve permits have already been issued), and the Restaurant Permission Scheme means local restaurant owners can continue to act as gatekeepers for those permits. The harm Vendors suffer continues every day, and it cannot be remedied by seeking compensatory damages, which are unavailable for violations of the Texas Constitution. Only this Court's intervention can rectify Vendors' real and irreparable harm.

The constitutional bind that Vendors find themselves in results from the City's irregular procedural moves. After the district court granted the Vendors' motion for summary judgment *in full*, the City noticed an *interlocutory* appeal of the district court's concurrent order denying the City's plea to the jurisdiction. That interlocutory appeal triggered a stay of district-court proceedings under Section 51.014(b) of the Texas Civil Practice and Remedies Code. The City has used that stay to defy the district court's ruling and continue enforcing the invalidated restrictions, while simultaneously asserting that it does not understand the district court's

unequivocal pronouncement that "IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED." (emphasis in original).

With the doors to the district court closed to them, the Vendors sought relief from the Thirteenth Court of Appeals under Rule 29.3. *See also In re Geomet*, 578 S.W.3d 82, 90 (Tex. 2019) (recognizing availability of appellate relief as inherent judicial power). But the court of appeals without opinion denied Rule 29.3 relief, thereby leaving the terms of the district court's judgment unenforced.

Now, the Vendors have nowhere but this Court to turn. There is no other adequate remedy by appeal. The Vendors have a court order in hand granting them summary judgment and declaring void the City's Permit Cap and Restaurant Permission Scheme, but they have no way to enforce that order. This inability to enforce a judgment by a Texas court in a constitutional challenge—due to a legislatively enacted stay of proceedings—raises profound separation of powers concerns. *See* Tex. Const. art. II, § 1. To avoid those concerns, this Court should grant Vendors' petition for a writ of mandamus and order the Thirteenth Court of Appeals to issue Rule 29.3 relief enjoining enforcement of the Permit Cap and Restaurant Permission Scheme, pending final resolution of the City's interlocutory appeal.

STATEMENT OF FACTS

A. Invoking the economic liberty protections of the Due Course of Law Clause, Tex. Const. art. I, § 19, Vendors sued the City to challenge two restrictions that interfered with their ability to operate food trucks on South Padre Island. MR.1–23. The first restriction capped the number of active food truck permits issued by the City at twelve (even though the City imposes no similar cap on local brick-and-mortar restaurants). *See* South Padre Island, Tex. Code ("SPI Code") §§ 10-31(C)(2), 10-31(F)(2)(a) ("Permit Cap"). The second restriction required that permit applicants obtain a local restaurant owner's signature in support of their food-truck permit application to be eligible for a permit. *Id*. § 10-31(C)(3) ("Restaurant Permission Scheme"). In other words, the Restaurant Permission Scheme installed local restaurant owners as gatekeepers to the permits needed by their would-be competitors.

Fenced out of the vending market in South Padre Island during nearly two years of litigation, the Vendors operated their food trucks in nearby jurisdictions. After learning that no permits were available because of the City's Permit Cap and Restaurant Permission Scheme, SurfVive obtained a permit from Cameron County to vend on county land outside the City's jurisdiction. MR.95, 114. The Avalos brothers, who co-own the Chile de Árbol

food truck, vended at a Brownsville food truck park during this litigation. MR.102–03, 108–09, 116. Like SurfVive's Cameron County permit, the Avalos brothers' City of Brownsville permit required passing food safety and fire inspections, submitting proof of a Texas sales and use tax permit, insurance coverage, contract for disposal of wastewater, and food manager certification, among other requirements. MR.95, 103, 109. Vendors are willing and able to repeat these and similar steps for a City permit.[1] MR.99, 106, 112. But neither SurfVive nor the Avalos brothers can open for business in South Padre Island using their existing food trucks, as neither can afford to lease a vending site without knowing that a permit is available (Permit Cap), and that they will be eligible for a permit (Restaurant Permission Scheme). MR.98–99, 104, 110.

At the close of discovery the parties cross-moved for summary judgment. MR.24–84, 128–169. The Vendors' summary-judgment motion sought the same relief that they requested in their Original Petition and Application for Injunctive Relief. *Compare* MR.30 (Pls.' Mot. for Summ. J.),

[1] For example, Vendors intend to comply with the Texas Food Establishment Rules, *see* MR. 99, 106, 112, which require that mobile food units (i.e., food trucks) base their operations from either (1) a central preparation facility, *or* (2) a food establishment located in Texas (e.g., a restaurant in the Rio Grande Valley or elsewhere). *See* 25 Tex. Admin. Code § 228.221. The City incorporated these State regulations in § 10-10 of the SPI Code—Vendors do not challenge the Texas Food Establishment Rules in SPI Code § 10-10 and intend to comply with them.

with MR.19–20 (Orig. Pet. and App. for Inj. Relief). Specifically, they moved for a "declaratory judgment that [the City's] enforcement of sections 10-31(C)(2), 10-31(C)(3), and 10-31(F)(2)(a) of the South Padre Island City Code against Plaintiffs violates the Due Course of Law Clause in Article I, Section 19 of the Texas Constitution," along with "a permanent injunction barring [the City] from enforcing sections 10-31(C)(2), 10-31(C)(3), and 10-31(F)(2)(a) of the South Padre Island City Code." MR.30 [App. C].[2]

The district court granted the Vendors' summary-judgment motion in full on November 30, 2020. *See* MR.85 [App. B] ("MSJ Order") ("Upon consideration of the submissions and arguments of counsel, IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED.") (emphasis in original). In a concurrent order, the district court rejected the City's jurisdictional defenses and denied its competing summary-judgment motion. MR.86. No outstanding issues remain for the district court to resolve except the *amount* of attorney's fees and costs.

B. Rather than seek a stay of the district court's summary-judgment order or otherwise appeal that judgment, the City has chosen to defy that ruling. First, the City filed its Notice of Interlocutory Appeal on December 14, 2020. MR.117–20. That notice, which only appealed the district court's

[2] The Vendors also moved for nominal damages of $1, attorney's fees, and costs. MR.30.

concurrent order denying the City's plea to the jurisdiction, automatically triggered a stay of proceedings in the district court. *See id*. (invoking Tex. Civ. Prac. & Rem. Code § 51.014(b)).

Next, on January 14, 2021, the City's Mayor misled the public after conferring with counsel and the Texas Municipal League, releasing a statement on the City's official Facebook account asserting that the district court entered "no judgment or order of any kind . . . granting specific relief," and that the Permit Cap and Restaurant Permission Scheme "will remain in effect[.]" MR.87. Before that public statement, counsel for the Vendors approached the City and tried to resolve its ongoing defiance of the MSJ Order. MR.88–89. In response, the City described the MSJ Order as merely "a document" that "did not . . . award Plaintiffs any remedy [.]" MR.91–92.

The City is thus defying the district court's ruling at summary judgment while neither appealing it nor seeking a stay. Its *interlocutory* appeal, which stayed proceedings in the district court, stripped that court of jurisdiction to enforce its MSJ Order. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b). With the district court unable to enforce its own judgment, the Vendors sought relief in the Thirteenth Court of Appeals under Rule 29.3 of the Texas Rules of Appellate Procedure, and on January 21, 2021 moved the court of appeals for an order barring enforcement of the Permit Cap and Restaurant Permission

Scheme. MR.170–83. The Thirteenth Court of Appeals denied Rule 29.3 relief on February 12, 2021. MR.349 [App. A].

C. As Vendors file this Petition the City continues defying the district court's summary judgment ruling. All 12 of the City's food truck permits are issued and none remain due to the Permit Cap, not for the Vendors or anyone else. MR.124–25. The City's defiance of the district court's MSJ Order is not just depriving Vendors of the permits they need to open for business in South Padre Island; it is fencing out other food truck operators seeking to earn an honest living too. For example, disabled U.S. Army veteran Scott Bovee operates a BBQ food truck in South Padre Island—he is trying to grow his business by adding a second food truck now that the Texas economy is reopening in the wake of the COVID-19 pandemic. MR.121–23. He contacted the City on March 12, 2021 after identifying the second food truck that he wants to purchase—but the City has no permit for Mr. Bovee, informing him that it has issued all of its 12 food-truck permits and none remain due to the Permit Cap. MR.123–25. Instead of a permit, the City offered Mr. Bovee a spot on a waiting list behind another food-truck owner waiting for a permit, should one of the City's twelve permits become available. MR.124–25.

Like the Vendors, food truck operators in the Rio Grande Valley find themselves fenced out of South Padre Island, all due to the City's defiance of the district court's ruling that its permitting restrictions are unconstitutional.

STANDARD OF REVIEW

To obtain mandamus relief, a relator must show that the respondent abused its discretion and no adequate appellate remedy exists. *In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding). A court of appeals "has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). And this Court has recognized that mandamus relief is appropriate when the court improperly denies necessary interim relief. *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 438–39 (Tex. 1999) (per curiam). Here, the Vendors prevailed on the merits and merely seek enforcement of the district court's order and judgment, which the City is blatantly defying.

ARGUMENT

I. The Thirteenth Court of Appeals Clearly Abused Its Discretion in Denying Temporary Relief Under Rule 29.3.

"When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. To establish entitlement to that relief, movants must state the relief sought, the

legal basis for the relief, and the facts necessary to establish a right to that relief. *See, e.g.*, *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1990, no pet.); *see also*, *e.g.*, *McNeely v. Watertight Endeavors, Inc.*, No. 03-18-00166-CV, 2018 WL 1576866, at *1 (Tex. App.—Austin Mar. 23, 2018, order) (per curiam). Here, enjoining enforcement of the City's Permit Cap and Restaurant Permission Scheme pending appeal is not only appropriate, but required.

The Vendors are entitled to an order enjoining enforcement of the Permit Cap and Restaurant Permission Scheme because it is the only way "to preserve the parties' rights" during the pendency of the City's interlocutory appeal. Tex. R. App. P. 29.3; *see* Tex. Gov't Code § 22.002(a). Vendors have prevailed on the merits, with the district court granting full summary judgment in Vendors' favor on November 30, 2020. MR. 85 [App. B] ("IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED.") (emphasis in original); *see also* MR.30 [App. C] (Pls.' Mot. Summ. J.). This ruling established the status quo that the Vendors now seek to preserve. When two weeks later the City noticed its appeal from a concurrent order (denying its plea to the jurisdiction), *see* MR.86, 117–120, the City's Permit Cap and Restaurant Permission Scheme had already been declared unconstitutional, rendered void and unenforceable, and

permanently enjoined, MR.85 [App. B]. The Vendors had already vindicated their rights under Article I, Section 19. No argument the City advances in response changes that basic reality.

Despite the district court having granted full summary judgment, the City noticed an interlocutory appeal that triggered a stay of proceedings (whereas appealing the granted judgment would not have triggered a stay). MR.117–120 (invoking Tex. Civ. Prac. & Rem. Code § 51.014(b)). This enables the City to defy the district court's MSJ Order with impunity, by continuing to enforce the Permit Cap and Restaurant Permission Scheme.

The City's actions in breach of the status quo are causing irreparable harm. Constitutional violations are textbook examples of irreparable harms warranting injunctive relief. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Unable to enjoy the remedy they secured after two years of litigation due to the City's defiance of the district court's MSJ Order, the Vendors cannot qualify for, nor obtain, food-truck permits to operate in South Padre Island.[3] Time is of the essence. The busy travel season has arrived, with

[3] Compensatory damages are unavailable to remedy the City's continued violation of Vendors' constitutional rights because such damages are barred by the Texas

Spring Break and the post-pandemic reopening of the Texas economy, but the Vendors cannot participate. The harm Vendors seek protection from in this Court is real and irreparable. By strategically choosing to trigger a stay of proceedings using an interlocutory appeal, the City's defiance of the district court's MSJ Order allows it to prevent the Vendors from securing permits for yet another year, even though the district court has ruled in Vendors' favor.

That result cannot be squared with the Texas Constitution. Like the rest of the Texas Constitution's Bill of Rights, Article I, Section 19 is self-executing. Our state charter explicitly announces the consequences of laws that violate a provision of Article I:

> The guarantees found in the Bill of Rights are excepted from the general powers of government; the State has no power to commit acts contrary to the guarantees found in the Bill of Rights. Tex. Const. art. 1, § 29. Section 29 has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void. *Hemphill v. Watson*, 60 Tex. 679, 681 (1884). When a law conflicts with rights guaranteed by Article 1, the Constitution declares that such acts are void because the Bill of Rights is a limit on State power. *Id*. The framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional violation. The framers intended that a law contrary to a constitutional provision is void.

Constitution. *See, e.g.*, *Bouillion*, 896 S.W.2d at 149. "An injury is irreparable if the injured party cannot be adequately compensated in damages[.]" *Tex. Assoc. of Bus. v. City of Austin*, No. 03-18-00445-CV, 2018 WL 3967045, at *1 n.2 (Tex. App.—Austin Aug. 17, 2018, pet. denied).

Bouillion, 896 S.W.2d at 148–49. No argument the City advances in response changes this constitutional reality. When the district court struck down the Permit Cap and Restaurant Permission Scheme under Article I, Section 19, it confirmed that both laws became "void because the Bill of Rights is a limit on State power." *Bouillion*, 896 S.W.2d at 149.

This Court should grant mandamus relief because the Vendors prevailed on the merits and are suffering irreparable harm due to the City's continued enforcement of the restrictions they successfully challenged. Indeed, Vendors' case for mandamus is *stronger* than recent instances in which this Court granted mandamus relief to parties who, unlike SurfVive and the Avalos brothers, had yet to successfully litigate their claims.[4] For example, this Court recently granted mandamus in *In re State of Texas*, in which Governor Abbott sought a stay of local orders issued by the Mayor of Austin and the Travis County Judge shortly before the New Year's Eve 2021 weekend. *See* Pet. for Writ of Mandamus at 1–2, *In re State of Texas*, No. 21-0001 (Tex. Jan. 1, 2021). The Governor argued that mandamus relief was

[4] There are also recent instances of parties obtaining Rule 29.3 temporary relief in Texas appellate courts when, unlike Vendors here, they have yet to prevail on the merits of their claims. *See, e.g.*, *Tex. Gen. Land Office v. City of Houston*, No. 03-20-00376-CV, 2020 WL 4726695, at *2 (Tex. App.—Austin July 31, 2020, order) (per curiam) (reinstating district court's temporary injunction); *Watertight Endeavors, Inc.*, 2018 WL 1576866, at *1 (granting Rule 29.3 relief because "the trial court's [temporary] injunction order is not suspended during the appellants' interlocutory appeal").

warranted because he was likely to prevail on his argument that the challenged local orders conflicted with his own executive order. *Id*. at 6–7. This Court conditionally granted the Governor's petition for writ of mandamus and directed the court of appeals to issue Rule 29.3 relief. [App. F]. This Court should do the same here, where petitioners *have already prevailed* on the merits. The Texas Constitution's self-executing Bill of Rights demands it.

II. Vendors Have No Adequate Appellate Remedy.

Vendors have also exhausted every other avenue for interim relief. The district court cannot issue an order to enforce its own ruling, because the City's interlocutory appeal deprived it of jurisdiction. The Thirteenth Court of Appeals continues to exercise jurisdiction over the City's interlocutory appeal and has refused Vendors' request for temporary relief during that appeal. Without mandamus relief, the Vendors' constitutional rights will continue being violated until the MSJ Order's terms can be enforced.

Thus, this Court's intervention is urgently needed. The City has made clear that it will keep enforcing the Permit Cap and Restaurant Permission Scheme despite the district court declaring both restrictions void under Article I, Section 19 of the Texas Constitution. The City has misled the public by representing that the district court entered "no judgment or order of any

kind . . . granting specific relief." MR.87. And since the City insists that the Permit Cap and Restaurant Permission Scheme "will remain in effect[,]" *see id.*, the Vendors cannot bring their food trucks to South Padre Island and open for business despite a summary-judgment ruling saying that is their constitutional right.

The alternative—allowing the City to flout a constitutional injunction—would raise serious concerns under the separation of powers guarantee enshrined in Article II, Section 1 of the Texas Constitution. The judiciary is a separate and co-equal branch. As this Court recognized in *In re Geomet Recycling, LLC*, "serious constitutional questions" can arise if a party cannot seek protection from irreparable harm in a Texas court due to the legislatively enacted stay of proceedings under Section 51.014(b) of the Texas Civil Practice and Remedies Code. 578 S.W.3d 82, 89–90 (Tex. 2019). "Rule 29.3," this Court held, "broadly empower[s] the court of appeals to preserve parties' rights when necessary." *Id.* at 89. And unlike the relators in *In re Geomet*, Vendors here have prevailed on the merits at summary judgment, MR.85, and are entitled to Rule 29.3 relief in support of their economic liberty under Article I, Section 19 of the Texas Constitution.

Article II, Section 1 empowers Texas courts, not the state legislature or municipal subdivisions, to declare that a law is void under Article I, Section

19. That is what the district court did in declaring the Permit Cap and Restaurant Permission Scheme void. The Thirteenth Court of Appeals should have given effect to that declaration. But it did not.

Vendors therefore call on this Court to reassert the judiciary's role in enforcing the Texas Constitution by holding that the Thirteenth Court of Appeals clearly abused its discretion in denying Rule 29.3 relief. The court of appeals failed to preserve the Vendors' constitutional rights pending appeal, despite the district court having vindicated those rights at summary judgment. Having sought and been denied Rule 29.3 relief by the Thirteenth Court of Appeals, Vendors have no other adequate appellate remedy.

PRAYER

The Court should grant Vendors' petition for a writ of mandamus and order the Thirteenth Court of Appeals to issue Rule 29.3 relief prohibiting enforcement of the City's Permit Cap, SPI Code §§ 10-31(C)(2), 10-31(F)(2)(a), and its Restaurant Permission Scheme, SPI Code § 10-31(C)(3), until disposition of the City's interlocutory appeal.

RESPECTFULLY SUBMITTED this 15th day of March, 2021.

INSTITUTE FOR JUSTICE

/s/ Arif Panju

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MANDAMUS CERTIFICATION

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Arif Panju

CERTIFICATE OF SERVICE

On March 15, 2021, this Petition for Writ of Mandamus was served electronically on Roger W. Hughes and J. Arnold Aguilar, counsel for the City of South Padre Island, via rhughes@adamsgraham.com and arnold@aguilarzabartell.com, respectively.

/s/ Arif Panju

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 3,695 words, excluding exempted text.

/s/ Arif Panju

No.____

In the Supreme Court of Texas

IN RE SURFVIVE, ANUBIS AVALOS, AND ADONAI RAMSES AVALOS,

Relators.

On Petition for Writ of Mandamus to the
Thirteenth Court of Appeals, Corpus Christi–Edinburg

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February 12, 2021

Hon. Arif Panju
Institute for Justice
816 Congress Avenue, Suite 960
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* DELIVERED VIA E-MAIL *

Re: Cause No. 13-20-00536-CV
Tr.Ct.No. 2019-DCL-01284
Style: City of South Padre Island v. Surfvive, Anubis Avalos, and Adonai Ramses Avalos

Dear Counsel:

Appellees' verified rule 29.3 motion for relief in the above cause was this day DENIED by this Court.

Very truly yours,

Kathy S. Mills, Clerk

cc: Hon. J. Arnold Aguilar (DELIVERED VIA E-MAIL)
Hon. Roger W. Hughes (DELIVERED VIA E-MAIL)

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CAUSE NO. 2019-DCL-01284

SURFVIVE, ANUBIS AVALOS, and ADONAI RAMSES AVALOS,	IN THE DISTRICT COURT
Plaintiffs,	
v.	CAMERON COUNTY, TEXAS
CITY OF SOUTH PADRE ISLAND,	
Defendant.	138th JUDICIAL DISTRICT

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on *Plaintiffs' Motion for Summary Judgment*. Upon consideration of the submissions and arguments of counsel, IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED.

Signed this 30 day of November, 2020.

Honorable Arturo Cisneros Nelson
138th District Court of Cameron County
JUDGE PRESIDING

FILED 2:20 o'clock P M
ELVIRA S. ORTIZ - DISTRICT CLERK

NOV 30 2020

DISTRICT COURT OF CAMERON COUNTY, TEXAS
By _____ Deputy

Copies to: 12/7/2020-email
Hon. Arif Panju
Hon. Fransisco J. Zabarte

CAUSE NO. 2019-DCL-01284

SURFVIVE, ANUBIS AVALOS, and ADONAI RAMSES AVALOS, *Plaintiffs*, v. CITY OF SOUTH PADRE ISLAND, *Defendant.*	IN THE DISTRICT COURT CAMERON COUNTY, TEXAS 138th JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Tex. R. Civ. P. 166a(a), (c), Plaintiffs SurfVive, Anubis Avalos, and Adonai Ramses Avalos, through their undersigned counsel, respectfully move this Court to grant summary judgment in favor of Plaintiffs in the above-captioned action and (1) enter a declaratory judgment that Defendant's enforcement of sections 10-31(C)(2), 10-31(C)(3), and 10-31(F)(2)(a) of the South Padre Island City Code against Plaintiffs violates the Due Course of Law Clause in Article I, Section 19 of the Texas Constitution, both on its face and as-applied; (2) enter a permanent injunction barring Defendant from enforcing sections 10-31(C)(2), 10-31(C)(3), and 10-31(F)(2)(a) of the South Padre Island City Code; (3) award each Plaintiff one dollar ($1) in nominal damages; (4) for an award of attorney's fees and court costs; and (5) any other legal or equitable relief the Court may deem just or appropriate. "A party seeking to recover upon a claim . . . or to obtain a declaratory judgment" may move for summary judgment by "stat[ing] the specific grounds therefor." Tex. R. Civ. P. 166a(a), (c). This Motion is based on the below memorandum of law, accompanying affidavits, and exhibits.

INTRODUCTION

This case is about whether the government can use its power to pick winners and losers in the marketplace—economic protectionism. Up to four million people visit South Padre Island, Texas each year.[1] Defendant City of South Padre Island ("City") allows only twelve food trucks to operate at any given time—but enforces no

[1] Panju Aff., Ex. 1 (Transcript of City's Entity Deposition) ("City Tr.") at 54:22–55:7.

such cap on local brick-and-mortar restaurants. There are no more food-truck permits available in 2020. Not only does the City arbitrarily limit food-truck permits, but it only issues those permits to applicants who can convince a local restaurant owner to support the permit application. This anti-competitive food-truck permitting scheme violates the Texas Constitution.

This is a far different ordinance than the one the City initially presented to the South Padre Island City Council ("SPI City Council"). The product of months of research, it contained no permit cap or restaurant-permission requirement. But after local restaurant owners publicly complained about food-truck competition, the SPI City Council asked a group of local restaurant owners to modify the City's original ordinance. The result was a permit scheme that caps the number of food-truck permits and requires that applicants convince a local restaurant owner to sign off on their application. This permit scheme has stymied Plaintiff SurfVive's ability to operate its food truck in South Padre Island, and prevented Plaintiffs Anubis and Ramses Avalos from being able to expand their Brownsville-based food-truck business to the island.

This economic protectionism is not a legitimate use of government power. The Texas Supreme Court's decision in *Patel v. Texas Department of Licensing & Regulation* governs this case and subjects challenged laws to meaningful scrutiny rooted in the evidentiary record. 469 S.W.3d 69 (Tex. 2015). Under *Patel*, laws that exist to protect one group of market participants from competition by another will not be sustained. As Plaintiffs show in their motion for summary judgment, the

record evidence not only lays bare the economic protectionism at the heart of the City's food-truck ordinance, it also fatally undermines the City's post-hoc justifications. Because the City's Permit Cap and Restaurant Permission Scheme further no legitimate interest, this Court should declare both unconstitutional under the Due Course of Law Clause in Article I, Section 19 of the Texas Constitution.

STATEMENT OF FACTS

I. Plaintiffs and Their Food Trucks.

Plaintiff SurfVive is a 501(c)(3) non-profit charity and its mission centers on promoting healthy living and healthy food options. SurfVive Aff. ¶¶ 1, 3. SurfVive advances its mission in several ways, including through its free surfing school, by creating learning gardens, and by operating a food truck to teach the importance of responsible and healthy food choices. *Id*. ¶ 4. To provide healthy food options in South Padre Island, SurfVive leased a food truck on April 1, 2018 in order to sell smoothies, coffee, and vegetable bowls. SurfVive's lease agreement is ongoing, on a month-to-month basis, and it includes a purchase option to buy its food truck for $10,000. *Id*. ¶¶ 5, 6.

SurfVive twice attempted to operate its food truck in South Padre Island but was unable due to the City's anti-competitive food truck laws. First, after obtaining its food truck, SurfVive learned that the City had no available food-truck permits because the City caps the number of available permits. *Id*. ¶¶ 6–7. Instead of vending on the island, SurfVive sought a permit from Cameron County, Texas in

order to begin vending in the county using its food truck. *Id.* ¶ 7. Second, after a City official informed SurfVive's director that a permit was available she began scouting for vending locations, identified a location, and submitted SurfVive's food-truck-permit application. *Id.* ¶¶ 10–11. The City official processing the application informed SurfVive's director that the City could not approve the application because eligibility for a food-truck permit requires the signature of a local brick-and-mortar food establishment on the permit application (and that SurfVive's application was missing this signature). *Id.* 13–14; *see also* Panju Aff., Ex. 31 (SurfVive's Application).

Plaintiffs Anubis and Ramses Avalos are brothers that co-own the Chile-de-Árbol food truck which they seek to expand to South Padre Island. Avalos (Anubis) Aff. ¶¶ 1, 8; Avalos (Ramses) Aff. ¶¶ 1, 8. Anubis and Ramses have a passion for music and healthy food: Anubis is a full-time music teacher for the Brownsville I.S.D. and Ramses works with music programs and also teaches music. Avalos (Anubis) Aff. ¶ 3; Avalos (Ramses) Aff. ¶ 3. Both adhere to a vegan diet and, after having difficulty finding affordable and flavorful meatless food options, they decided to open up the Chile-de-Árbol food truck; the brothers spent months developing recipes for tacos, burgers, and Indian-inspired food bowls that were free of meat, eggs, and dairy. Avalos (Anubis) Aff. ¶¶ 4, 6; Avalos (Ramses) Aff. ¶¶ 4, 6. Since November 2017, the Avalos brothers have earned an honest living by operating their Chile-de-Árbol food truck on nights and weekends from the Broken Sprocket

(a Brownsville, Texas-based food-truck park), where they have earned a loyal following. Avalos (Anubis) Aff. ¶¶ 3, 6; Avalos (Ramses) Aff. ¶¶ 3, 6.

Anubis and Ramses Avalos have taken several steps to expand their food truck business to South Padre Island. Avalos (Anubis) Aff. ¶¶ 7–10; Avalos (Ramses) Aff. ¶¶ 7–10. The Avalos brothers have scouted possible vending locations in South Padre Island, researched the City's food-truck ordinances, spoken with investors, and have taken their Chile-de-Árbol food truck to an event in South Padre Island to test out the vending market there. *Id*. But the City's cap on food-truck permits, along with the requirement that a local brick-and-mortar restaurant sign off on food-truck-permit applications, impose significant burdens on the Avalos brothers' ability to expand their food-truck business in South Padre Island.

First, the Avalos brothers must secure a vending location in order to operate their existing food truck in South Padre Island on a part-time basis. Avalos (Anubis) Aff. ¶ 11; Avalos (Ramses) Aff. ¶ 11. But without knowing if a permit is available, or whether a local restaurant owner will even sign off on their permit application when they arrive in South Padre Island, they cannot invest resources in securing a vending location. *Id*. Second, the business risk is multiplied if the Avalos brothers invest in a second food truck (instead of using their existing food truck)—both anti-competitive permitting requirements are stifling their ability to expand into South Padre Island. Avalos (Anubis) Aff. ¶ 12; Avalos (Ramses) Aff. ¶ 12. Anubis and Ramses can only operate their food truck, or invest in and operate a second food

truck, if they know that they can secure a permit to operate in South Padre Island. Avalos (Anubis) Aff. ¶ 13; Avalos (Ramses) Aff. ¶ 13.

Plaintiffs SurfVive, Anubis Avalos, and Ramses Avalos filed this lawsuit to challenge the constitutionality of the City's arbitrary cap on food-truck permits and its requirement that they obtain the signature of a would-be brick-and-mortar competitor in order to qualify for a permit to open for business.

II. The City Protects Restaurants from Food-Truck Competition.

For years, local brick-and-mortar restaurants were the only dining option in South Padre Island. That changed in April 2016 when the SPI City Council enacted a food truck ordinance. Panju Aff. Ex. 2 (Minutes of SPI City Council, Apr. 6, 2016). But the City's food-truck ordinance became law only after two anti-competitive permitting restrictions were added at the behest of local restaurant owners. *See infra* Part II.A.–B, 6–10. First, the City agreed to cap the number of available food-truck permits. Second, the City also restricted its food-truck permits by forcing applicants to convince the owner of a local restaurant to sign off on their food-truck-permit application before they can open for business. Both are unusual laws.

A. The Permit Cap.

The City arbitrarily limits the number of available food-truck permits. *See* South Padre Island, Tex. Code ("SPI Code") §§ 10-31(C)(2) and 10-31(F)(2)(a) ("Permit Cap"). Under the Permit Cap, "[n]o more than [t]welve (12) mobile food unit permits may be issued per month on the Island[,]" *id.* § 10-31(C)(2), and a mobile-food-unit permit is only "valid for 30 days[,]" *id.* § 10-31(F)(2)(a). In other

words, only twelve food trucks can operate at any time. Although food trucks and restaurants both fall under the City's definition of "food establishment," *see id.* § 10-11.1 (definitions), the City only caps permits for the former. *See* SPI Code Ch. 10, Art. II; *see also* Panju Aff., Ex. 1 (Transcript of City's Entity Deposition) ("City Tr.") 283:11–13.

Food truck permits are expensive. A single food truck permit costs $500 per month between March and August, and $100 per month between September and February. *See* SPI Code § 2-75 ("Mobile Food Unit Health Permit Applications"). The City also sells an annual food-truck permit costing $1,800 per year. Restaurant permits cost much less: $100 *per year*. City Tr. 172:3–5; *see also* SPI Code § 2-75. At deposition, the City could not identify any city that charges $500/month for a food-truck permit. City Tr. 188:18–21.

At its entity deposition, the City testified that it sets permit fees for food trucks in amounts that will allow the City to cover the cost of inspecting permitted food trucks. City Tr. 170:14–25; 171:8–12; 173:12–17. Even though the City charges *eighteen* times more on an annual basis for a food-truck permit than a restaurant permit, it testified that the "inspection is the same inspection [it] utilize[s] at restaurants . . . it's no different than a restaurant." City Tr. 33:3–8. And the City's stated "goal" for inspections of permitted food trucks "is twice a year[.]" *Id.* 33:12–15. The City also testified that the time it takes to inspect a food truck is "not very long," *id.* 31:21–23, that it takes as little as "20 minutes to do an inspection," of a

"custom-made" food truck, and that it can "take a little longer" when inspecting a food truck that is "constantly in use," *id*. 31:23–32:4.

The City's Permit Cap is an unusual law. At deposition, the City could not identify any evidence that imposing a cap on the number of available food-truck permits protects health and safety (and it offered only speculation to justify the cap, including that perhaps it saw a permit cap in a city ordinance that it studied, *id*. 300:16–19). But when pressed, the City could not identify any other city that limits the number of available food truck permits. *Id*. 300:6–11. And as discussed below, *see infra* Part III.A–B, 10–22, there was no cap on food-truck permits, nor excessive fees for those permits, when South Padre Island City officials first researched and presented the original food-truck ordinance to the SPI City Council. Those were added only after the SPI Council voted to allow local restaurant owners to modify the draft ordinance.

B. The Restaurant Permission Scheme.

Qualifying for a food-truck permit requires convincing the owner of a local fixed food establishment—i.e., a local restaurant owner—to sign off on the permit application. *See* SPI Code § 10-31(C)(3) ("Restaurant Permission Scheme"). Under the Restaurant Permission Scheme, an "[a]pplicant must be supported locally and have the signature of an owner or designee of a licensed, free-standing food unit on South Padre Island before being eligible for a permit." SPI Code § 10-31(C)(3). The City's permit application has a section labeled "Local Establishment Support," which requires the signature of the local brick-and-mortar food establishment's

owner and contact information. *See* Panju Aff. Ex. 3 (Mobile Food Unit Permit Application); City Tr. 306:13–20.

To verify compliance with the Restaurant Permission Scheme, the City: (1) calls the local restaurant owner that signed off on the food-truck-permit application; (2) confirms that they indeed signed the application; and (3) verifies that the restaurant owner has not supported any other food truck's application. City Tr. 212:14–25. The City's inquiry goes no further, including not inquiring about whether the food-truck owner and the local restaurant owner that signed the food-truck permit application have any agreement, including by which the restaurant would serve as a commissary. *See* City Tr. 305:12–23.

By contrast, the original food-truck ordinance that City officials researched and presented to the SPI City Council contained no protectionism. It did not force food-truck-permit applicants to obtain the signature of a local restaurant owner on their application. *See infra* Part III.A, 10–12. Like the Permit Cap, the Restaurant Permission Scheme was added only after the SPI City Council voted to allow a group of local restaurant owners to modify the original food-truck ordinance City officials had spent months researching. *See infra* Part III.B, 12–22.

***

The City's Permit Cap and Restaurant Permission Scheme are unusual laws. Cities across Texas regulate food trucks without imposing an arbitrary cap on the number of available food-truck permits or requiring that applicants for those

permits find the owner of a brick-and-mortar restaurant to sign off in support of a food-truck-permit application.[2]

III. The History of the Permit Cap and Restaurant Permission Scheme.

The history of the Permit Cap and Restaurant Permission Scheme reveals that both restrictions were motivated by a desire to protect local restaurants from competition. In Part A, Plaintiffs explain how the City's original food-truck ordinance—the product of months of work and research by City officials—contained no Permit Cap or Restaurant Permission Scheme. In Part B, Plaintiffs explain that after local restaurant owners expressed concerns about food-truck competition, the SPI City Council voted to allow a group of local restaurant owners to join with the City in rewriting the ordinance. That effort led to the Permit Cap and Restaurant Permission Scheme.

A. The City Originally Proposed a Food-Truck Ordinance with No Permit Cap and No Restaurant Permission Scheme.

The original food-truck law drafted by the City contained no protectionism for local restaurant owners. The City presented its original food-truck ordinance to the SPI City Council in July 2015 and it contained no Permit Cap and no Restaurant Permission Scheme. *See* Panju Aff., Ex. 4 (Agenda Request Form and Ordinance 15-11, Jul. 15, 2015); City Tr. 165:8–13; 175:16–176:4. The City recommended to the

[2] *See, e.g.*, Amarillo Code § 8-5-21(c); Austin Code §§ 10-3-91 *et seq.*; Brownsville Code § 22-126; Corpus Christi Code § 38-18; Dallas Code § 17-8.2; Edinburg Code § 112.18; El Paso Code § 9.12.800; Fort Worth Code § 16-131; Galveston Code §§ 19-51 *et seq.*; Harlingen Code §§ 127 *et seq.*; Houston Code §§ 20-22, 20-37; McAllen Code § 54-51; Midland Code §§ 8-4-1 *et seq.*; Mission Code §§ 42-361 *et seq.*; New Braunfels Code § 90-2; San Antonio Code §§ 13-61 *et seq.*; San Marcos Code §§ 18.101 *et seq.*

Council that it approve its original food-truck ordinance, Panju Aff., Ex. 4 at 1; City Tr. 79:15–18, and testified at deposition that its recommendation to approve its original food-truck ordinance relied on the "months of work" performed by City officials, City Tr. 79:15–24. The record confirms that the City undertook a comprehensive effort to research and draft its original food-truck ordinance at the mayor's request, City Tr. 43:2–5, and that the culmination of that work was a proposed ordinance with no Permit Cap and no Restaurant Permission Scheme. At deposition, the City admitted that it would not have presented its original food-truck ordinance to the SPI City Council if it thought that original ordinance put the public's health and safety at risk. City Tr. 56:3–8. In other words, the lack of a Permit Cap and Restaurant Permission Scheme did not give rise to any risk to the public.

In 2015, the City performed a "thorough investigation" into how to regulate food trucks in South Padre Island before presenting an ordinance to council. City Tr. 64:5–13; *see also id.* 101:21–102:15; 104:20–105:7; Panju Aff., Ex. 5 (City's Presentation to SPI City Council, Jul. 15, 2015). The City's investigation involved: (1) reviewing how other jurisdictions in Texas regulate food trucks, City Tr. 43:14–44:5; 64:14–18; 103:12–14; 104:6–19; (2) addressing the City's administrative and regulatory functions, City Tr. 85:9–13; (3) addressing concerns related to health and safety, food-borne illnesses, parking, traffic, noise, crowding, trash, and environmental impact, City Tr. 84:20–23; 107:1–5; 108:5–15; 112:9–14; 114:6–10. According to the City, its staff "spent more time on this ordinance than any other

ordinance." City Tr. 80:22–23. After its thorough investigation, the City's environmental health director drafted the proposed food-truck ordinance and also asked the Texas Department of State Health Services to review it and provide feedback. 56:21–57:18.

The City presented its original food-truck ordinance to the SPI City Council in July 2015 but it was tabled. Panju Aff., Ex. 6 (Minutes of SPI City Council, Jul. 15, 2015). It was at this meeting that local restaurant owners objected to allowing food trucks in South Padre Island because it would hurt their bottom line. City Tr. 89:16–21.

B. The City Council Voted to Let Local Restaurant Owners Rewrite the City's Original Food-Truck Ordinance.

The record evidence lays bare the origin of the Permit Cap and Restaurant Permission Scheme. It reveals that both restrictions are rooted firmly in the desire of local restaurant owners to limit food-truck competition. As explained in Part 1, several local restaurant owners complained about allowing food trucks to operate in South Padre Island without limiting their ability to compete. Three weeks after the SPI City Council tabled the City's original food-truck ordinance, it unanimously voted for:

> "[A] motion to have a *local group of restaurateurs* get together and come up with ideas on modifying the proposed ordinance and bring [it] back to City Council for discussion and action."

Panju Aff., Ex. 7 (Minutes of SPI City Council, Aug. 5, 2015) at 1–2 (emphasis added).

In part 2, Plaintiffs explain how a group of local restaurant owners formed what was called the Food Truck Planning Committee ("Committee") and began larding economic protectionism into the City's original food-truck ordinance. *See* Panju Aff., Ex. 8 (Email from Creinin to Committee members, Aug. 9, 2015). No food-truck owners were on the Committee, nor does any evidence show any were ever invited to participate.

In Part 3, Plaintiffs show how local restaurant owners' concerns about food-truck competition were resolved when the SPI City Council passed a food-truck ordinance containing the Permit Cap and Restaurant Permission Scheme.

1. Local restaurant owners' concerns about food-truck competition.

Several local restaurant owners complained about food trucks competing with restaurants in South Padre Island. Below, Plaintiffs summarize evidence reflecting the concerns of several restaurant owners.

Restaurant owner Dave Friedman[3] suggested that the SPI City Council should limit food-truck competition when discussing the City's original food-truck ordinance in July 2015. Mr. Friedman was concerned that "if you take that cream away from us, I think it's materially going to hurt our business." Panju Aff., Ex. 10 (Reporter Tr. of Jul. 15, 2015 SPI City Council Meeting) at 104:21–105:3. He expressed a desire to "limit the number of permits" because "five trucks aren't going

[3] Mr. Friedman owned several restaurants in 2015 including Sea Ranch, Pier 19, and Laguna Bob. Panju Aff., Ex. 9 (Transcript of Arnie Creinin Deposition) ("Creinin Tr.") at 57:22–58:13. The City confirmed that Mr. Friedman operated permitted restaurants in South Padre Island. City Tr. 97:2–5.

to hurt me . . . [b]ut 15 are going to start to eat us up." *Id*. at 108:18–22. Mr. Friedman joined the Committee. *See infra* Part III.B.2, n.6.

Restaurant owner Arnie Creinin[4] also made public comments at that July 2015 hearing. Agreeing with Mr. Friedman, Panju Aff., Ex. 10 at 111:3–6, Mr. Creinin expressed a desire to limit the number of permitted food trucks, *id*. at 111:18–22 ("[I]t should be a limited amount of people[.]" Mr. Creinin suggested that the SPI City Council create a "taskforce of five, six, seven restauranteurs [sic]" to work with the City official who put together the original ordinance. *Id*. at 111:23–112:3. Mr. Creinin spearheaded the Committee's efforts to modify the City's food-truck ordinance to include the Permit Cap and Restaurant Permission Scheme. Panju Aff., Ex. 9 (Transcript of Creinin Deposition) ("Creinin Tr.") 78:9–15; *see also infra* Part III.B.2, n.6.

At deposition, Mr. Creinin stated that the Permit Cap helps mitigate the impact that food-truck competition would have on restaurant owners' profits. He testified that limiting the number of food-truck permits helps private restaurants assess the impact of food-truck competition. Creinin Tr. 90:24–91:6 ("[W]hen we issued the first four, five, six, he had the opportunity to come and say, 'Oh, my business is getting killed.'"). According to Mr. Creinin, too many permitted food trucks could create too much competition for restaurants. *Id*. ("That was one of the reasons why we limited that to six, so that if we issued 10 or 15, and all of a sudden,

[4] Mr. Creinin was the then-owner of Gabriella's Italian Restaurant, Creinin Tr. 11:22–12:4, and also has an ownership interest in the Palm's Resort and Café, *id*. at 12:16–24. The City confirmed that Mr. Creinin operated a permitted restaurant in South Padre Island. City Tr. 97:2–5.

we had businessowners, you know, coming at us with machetes saying 'Hey, what are you guys doing to us?'").

Mr. Creinin also expressed concern that food trucks might compete with his own restaurant. At deposition, he speculated that a food truck could start selling pizzas near his Italian restaurant. *Id*. at 71:19–25; 72:4–12. Mr. Creinin noted that not limiting food-truck permits could lead to food trucks opening for business on private property all over South Padre Island and creating new competition for restaurants. *Id*. at 72:4–73:5.

Another restaurant owner concerned about food-truck competition was Micheal Laferty, the owner of the PadreRitaGrill restaurant. *See* Panju Aff., Ex. 11 (Email from Laferty to Committee members, Aug. 19, 2015) ("My initial opposition was, and still is, that I am not convinced that South Padre Island has the population to support added competition for the already existent businesses."). Mr. Laferty wanted to "mitigate the damage" from food trucks and "level the playing field for all concerned[.]" *Id*. The head of the Committee, Mr. Creinin, testified that he was aware that Mr. Laferty worried that food trucks would dilute and make smaller the portion of the pie available to everybody. Creinin Tr. 88:20–89:1.

Mr. Laferty also appeared on a local broadcast show to ask, "at what point are we going to have more [food-establishment] supply than we have demand?" Ron Whitlock Reports, *SPI Food Trucks*, YouTube (Jul. 27, 2015), https://www.youtube.com/watch?v=yXDWAaO4xF0 (video at 11:47–:51).[5] Mr. Laferty warned that

[5] A copy of this video has been submitted to the Court and opposing counsel as an exhibit to Plaintiffs' counsel's affidavit. *See* Panju Aff., Ex. 12 (Video of Ron Whitlock Reports, *SPI*

without control by local restaurants, "the pie [could] get larger for the consumer but smaller for the producer, and that's my whole concern." *Id.* (video at 11:55–12:00). And he conditioned his support for any food-truck ordinance on control by local restaurants: "If [food trucks] are going to come in as the old robber barons did [and] scrape the cream off the top, not hire our people, not support our business community—I don't think we need 'em here." *Id.* (video at 17:23–:35). Mr. Laferty joined the Committee. *See infra* Part III.B.2, n.6.

The owner of the Parrot Eyes restaurant, then councilwoman Virginia Guillot, also opposed the City's original food-truck ordinance and expressed a desire to limit food trucks to (1) events, or (2) for a specific purpose so long as it involves local business owners as the "participating vendors." Panju Aff., Ex. 14 (Committee Questionnaire of Virginia Guillot). In other words, Ms. Guillot opposed allowing food trucks to operate independently and compete for customers. Ms. Guillot also joined the Committee. *See infra* Part III.B.2, n.6.

2. The Food Truck Planning Committee.

The Food Truck Planning Committee ("Committee") was formed after the SPI City Council asked local restaurant owners to come up with ideas on how to modify the City's original food-truck ordinance. *See* Panju Aff., Ex. 8 (Email from Creinin to Committee members, Aug. 9, 2015). The Committee was tasked with "review[ing]

Food Trucks, Jul. 27, 2015). The parties have stipulated that the video is a true and correct recording of Mr. Laferty, and further stipulated that Mr. Laferty's statements therein may be admitted into the record as if Mr. Laferty had made the statements in a deposition. Panju Aff., Ex. 13 (Joint Stipulation Concerning Evidence Involving Certain Nonparty Witnesses, entered May 12, 2020).

the [City's] draft ordinance and recommend[ing] modifications." Panju Aff., Ex. 15 (Agenda Request Form and Ordinance 16-05, Feb. 17, 2016). Before the Committee began modifying the City's original food-truck ordinance, the Mayor advised restaurant owner Mr. Creinin that they should "make it restrictive so that it doesn't hurt the local businesses" but not "so restrictive where outsiders start saying 'Hey, this is unfair' and decide[] to take legal action." Panju Aff., Ex. 16 (Reporter Tr. of Aug. 5, 2015 SPI City Council Meeting) at 27:1–28:8.

Multiple restaurant owners on the Committee expressed concerns to Mr. Creinin that food trucks would cut into restaurant profits. Creinin Tr. 56:25–57:11; *see also supra* Part III.B.1. The Committee circulated the City's original food-truck ordinance at the first Committee meeting; according to the head of the Committee (Mr. Creinin), it "needed to be massaged, if you will." Creinin Tr. 134:16–21. Mr. Creinin asked eleven people (mostly owners of local restaurants) to meet and discuss how to regulate food trucks in South Padre Island. Panju Aff., Ex. 8 (Email from Creinin to Committee members, Aug. 9, 2015); Creinin Tr. 111:19–112:10; *accord* City Tr. 328:24–329:1. Seven of the eleven invitees were connected to local restaurants (six were local restaurant owners and one worked for Mr. Creinin's restaurant). Creinin Tr. 112:7–115:18. The remaining four individuals were the City Manager, the City official who worked on the City's original food-truck ordinance, a local business owner, and a member of an advocacy organization named Property Owners Who Care.[6] *Id*.

[6] Mr. Creinin of Gabriella's Italian Restaurant identified the eleven individuals that he invited via email to the Committee's first meeting. *See* Creinin Tr. 112:7–118:8. Seven

After the Committee's first meeting, a draft ordinance containing the Permit Cap and the Restaurant Permission Scheme was circulated.[7] *See* Panju Aff., Ex. 18 (Email to Committee members with modified food-truck ordinance, Feb. 6, 2016); *see also* Creinin Tr. 130:19–134:4; 136:24–137:5. First, the Committee members proposed limiting the number of food-truck permits. Panju Aff., Ex. 18 at 3, §§ 10-31(C)(2), (F)(2)(a). At deposition, Mr. Creinin addressed the Committee's proposed limit: "[I]t started with a number ten, and then it was, 'Well, why don't we just do the first six, and then when number six comes, we can roll up another four or five or six so we don't have a stampede?'" Creinin Tr. 137:19–138:9; *see also id*. at 138:23–140:5. Nobody on the Committee opposed adding the Permit Cap. *Id*. at 139:17–19. At its entity deposition, the City admitted that it knew that local restaurant owners on the Committee proposed the Permit Cap. City Tr. 333:15–16.

The Committee also proposed a second restriction on food-truck permits whereby eligibility for a permit would require convincing a local restaurant owner to sign the application in order to indicate his or her support. Panju Aff., Ex. 18 at

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individuals owned or operated restaurants at the time: (1) Dan Stanton (Louie's Backyard); (2) Dave Friedman (multiple restaurants, *see* n.3); (3) Theresa Metty (Café on the Beach/Palms Resort); (4) Mark Haggenmiller (South Padre Island Brewing Company); (5) Virginia Guillot (Parrot Eyes); (6) Micheal Laferty (PadreRitaGrill); and (7) Dave Davis (employee at Gabriella's Italian Restaurant). *Id*. Two were City officials: Victor Baldovinos and City Manager Bill DiLibero. *Id*. The final two individuals were local business owner Kerry Schwartz and Shane Wilson from Property Owners Who Care. *Id*.; *see also* Panju Aff., Ex. 8 (Email from Creinin to Committee members, Aug. 9, 2015). In its original responses to Plaintiffs' Request for Disclosures, the City described the Committee as being "[a]ppointed by Council to study and propose [the] ordinance (2016–2018)." Panju Aff., Ex.17 (Def.'s Resp. to Pls.' Request for Disclosure, served Apr. 24, 2019).

[7] The twelve individuals listed in the email containing the Committee's modified ordinance are the same individuals listed in the email invitation for the Committee's first meeting. *Compare* n.6 *with* Creinin Tr. 130:19–134:4; 136:24–137:5.

3, § 10-31(C)(3); City Tr. 334:1–6. Mr. Creinin confirmed at deposition that the Committee recommended inserting restaurant owners into the food-truck-permitting process in this manner. Creinin Tr. 140:6–141:5.

The record evidence also shows that Committee members proposed several other anti-competitive restrictions on food trucks. For example, one suggestion was imposing a proximity restriction to prohibit food trucks from operating within a certain distance of a restaurant. City Tr. 334:7–10. A restaurant owner on the Committee proposed "charging $10,000 . . . per year" for a food-truck permit. City Tr. 180:11–14; 334:20–22. Another Committee member proposed "only allowing current restaurants to own food trucks." City Tr. 178:8–17. Ideas for economic protectionism abounded. Of these, only the Permit Cap, Restaurant Permission Scheme, and excessive permit fees ($3,600 for twelve months)[8] made their way into the final food-truck ordinance. Panju Aff., Ex. 19 (Agenda Request Form (2nd reading) and Ordinance 16-05, Apr. 6, 2016); *see also* City Tr. 177:19–23; 178:2–21.

The City did not create or post any notices to inform the public about the Committee's meetings. City Tr.132:18–21. Indeed, no evidence shows that the City made any attempt to have the Committee comply with the Texas Open Meetings Act, Tex. Gov't Code § 551. The Committee held its meetings not at City Hall, but at local restaurants. City Tr. 329:24–330:13. The Committee "regulated themselves" according to the City official who spearheaded the City's original food-truck

[8] The City testified that $3,600 was a reasonable amount to charge for an annual food-truck permit. City Tr.192:24–193:5. Restaurant owners are charged only $100 annually for a food-establishment permit. City Tr. 172:3–5.

ordinance—he attended some meetings, at which he testified he "would just sit back and let them . . . duke it out," and that he "was not going to get in the middle of it." City Tr.335:2–6. When Plaintiff SurfVive's director asked that same City official to identify the restaurant owners on the Committee, she was asked to submit an open-records request to learn the names of those working on the ordinance's rewriting. City Tr. 319:17–320:8; Panju Aff., Ex. 20 (City's Resp. to SurfVive's Open Records Request).

3. The SPI City Council enacted a food-truck ordinance containing economic protectionism for local restaurant owners.

The SPI City Council adopted the Committee's proposed modifications. A draft ordinance containing those modifications was shared with the City a few days before being presented to the SPI City Council. Panju Aff., Ex. 18 (Email to Committee members with modified food-truck ordinance, Feb. 6, 2016). The City used "input from the Food Truck Planning Committee" to modify the City's original food-truck ordinance, City Tr. 166:16–21, and it was set on the SPI City Council's agenda for a vote. Panju Aff., Ex. 15 (Agenda Request Form and Ordinance 16-05, Feb. 17, 2016). Both the City and the Committee recommended approval of the modified ordinance. *Id*. at 2 ("FTPC and Staff Recommend Approval"). On the day of the vote, the Mayor called up the agenda item and immediately asked the restaurant owner in charge of the Committee (Arnie Creinin) to address the SPI City Council. *See* Panju Aff., Ex. 21 (Reporter Tr. of Feb. 17, 2016 SPI City Council

meeting) at 49:24–50:19. Mr. Creinin informed the Council that "[w]e're going to issue six . . . six licenses to start."[9] *Id*. at 51:4–12

The City's food-truck ordinance became law on April 6, 2016 after its second reading. Panju Aff., Ex. 2 (Minutes of SPI City Council, Apr. 6, 2016). It contained the Permit Cap,[10] the Restaurant Permission Scheme, and monthly permit fees that meant it would cost $3,600[11] to operate a food truck for one year. Arnie Creinin, the Committee's head, received the first food-truck permit (leaving only five available). *See* Creinin Tr. 44:1–6. About two years later, the Permit Cap was amended to twelve permits—a number the Committee chose, voted on, and that the City asked the SPI City Council to approve. Panju Aff., Ex. 24 (Reporter Tr. of May 2, 2018 SPI City Council Meeting) at 21:16–22:17.

There is no evidence that the Permit Cap or Restaurant Permission Scheme benefit the public in any way. Both impose massive burdens that have stymied Plaintiffs' ability to operate their food trucks in South Padre Island. *See supra* Part I. The record confirms that the City and the Committee took no steps to evaluate what impact the Permit Cap and Restaurant Permission Scheme would have on food-truck owners and consumers. Rather, the evidence reflecting the motive behind

[9] The SPI City Council unanimously voted in favor of the modified food-truck ordinance containing the Permit Cap and Restaurant Permission Scheme. Panju Aff., Ex. 22 at 2 (Minutes of SPI City Council, Feb. 17, 2016).

[10] The Permit Cap was later raised to 12 permits. *See* SPI Code §§ 10-31(C)(2); 10-31(F)(2)(a).

[11] The City added the option of an annual food-truck permit costing $1,800 in May 2017. Panju Aff., Ex. 23 (Agenda Request Form and Ordinance 17-05, May 3, 2017); City Tr. 196:2–17.

both shows they were meant to further local restaurant owners' interest in controlling food-truck competition.

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The record reflects, time and time again, that local restaurant owners on the Committee were motivated by a desire to limit food-truck competition. City officials spent months researching and vetting the original ordinance before presenting it to the SPI City Council in July 2015, and it did not propose capping food-truck permits nor requiring food-truck owners to gain the support of their would-be brick-and-mortar competitors. In other words, prior to local restaurant owners publicly complaining about food-truck competition, the record contains no evidence that the City ever believed that the public's health and safety required it to limit food-truck permits or require that restaurants sign off on food-truck-permit applications. Instead, the evidence shows that the Permit Cap and Restaurant Permission Scheme came to be only after local restaurant owners complained about competing with food trucks, only after the SPI City Council asked a group of those owners to form the Committee, and only after that Committee finished its efforts to restrict food-truck competition. Indeed, as noted above, the *Mayor himself* instructed the Committee to propose restrictions that would protect local businesses.

The test governing Plaintiffs' claim under Article I, Section 19 is focused on the evidentiary record. As discussed below, that record fatally undermines the City's post-hoc justifications for the Permit Cap and Restaurant Permission Scheme.

STANDARD OF REVIEW

"To obtain a traditional summary judgment . . . a movant must produce evidence showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551 (Tex. 2019).

SUMMARY OF THE ARGUMENT

The Court should find that the Permit Cap and Restaurant Permission Scheme violate Article I, Section 19 of the Texas Constitution. As explained in Part I, the Texas Supreme Court's decision in *Patel v. Texas Department of Licensing & Regulation* governs this case. 469 S.W.3d 69 (Tex. 2015). Under *Patel*, Texas courts must analyze Due Course of Law Clause challenges by applying meaningful scrutiny rooted in the evidentiary record.

As explained in Part II, *Patel* provides three independent bases for striking down the Permit Cap and Restaurant Permission Scheme. First, they violate the Texas Constitution's substantive due course of law protections because they are not rationally connected to a legitimate government purpose—they serve only the illegitimate purpose of economic protectionism. *See infra* Part II.A, 27–42. Second, the evidence shows that the Permit Cap and Restaurant Permission Scheme's actual, real-world effect do not advance any legitimate government purpose. *See infra* Part II.B, 43–49. Third, both the Permit Cap and Restaurant Permission Scheme fail *Patel*'s burden inquiry, as the record makes clear that both restrictions are so burdensome (while providing the public no benefit) that they are

unconstitutionally oppressive. *See infra* Part II.C, 49–53. For these reasons, Plaintiffs prevail under *Patel* and the Court should strike down the City's anti-competitive food-truck-permit restrictions under Article I, Section 19.

ARGUMENT

I. The Test Announced in *Patel* Controls This Case.

Patel, as the Texas Supreme Court's authoritative interpretation of the Texas Constitution's Due Course of Law Clause, controls this case. 469 S.W.3d at 69. Article I, Section 19 protects individuals and their businesses against unreasonable governmental interference. *See* Tex. Const. art. I, § 19.[12] The Texas Supreme Court announced that the *Patel* test governs any "challenge to an economic regulation statute under Section 19's substantive due course of law requirement[.]" 469 S.W.3d at 87. Plaintiffs raised such a challenge to an economic regulation—the Permit Cap and Restaurant Permission Scheme—and invoked Article I, Section 19's substantive due course of law provisions. *See* Pls.' Original Pet.¶¶ 84–101.

The Texas Supreme Court made clear in *Patel* that the rights enshrined in the Due Course of Law Clause require meaningful, evidence-based judicial review. 469 S.W.3d at 80–87. Under the test laid out in *Patel*, the Permit Cap and

[12] "A pro-liberty presumption is . . . hardwired into the Texas Constitution, which declares no citizen shall be '*deprived* of life, liberty, property, [or] privileges or immunities'—phrasing that indicates citizens already possess these freedoms, and government cannot take them 'except by the due course of the law of the land.'" *Patel*, 469 S.W.3d at 93 (Willett, J., concurring, joined by Lehrmann and Devine, JJ.) (footnote omitted) (quoting Tex. Const. art. I, § 19).

Restaurant Permission Scheme must satisfy each part of a three-step inquiry.[13] *Id.* at 87. First, courts must look at whether there is a logical connection between a challenged law's purpose and a legitimate governmental interest. *Id.* No such connection is present here. Second, if such a connection were present, this Court would then look at evidence in the record to determine if the Permit Cap and Restaurant Permission Scheme actually advance the government's alleged legitimate interest in the real world. *Id.* Here, the record evidence in this case provides no reason to believe that either anti-competitive permit requirement does. Third, courts apply *Patel*'s burden inquiry to determine whether a challenged law's actual, real world effect is so burdensome as to be oppressive. *Id.* Here, even if the record showed that the challenged laws advance a legitimate governmental interest, the evidence also shows that the Permit Cap and Restaurant Permission Scheme both place an unconstitutionally oppressive burden on Plaintiffs (with no benefit to the public). Any one of these grounds provides an independent basis to strike down the Permit Cap and Restaurant Permission Scheme as unconstitutional under Article I, Section 19 of the Texas Constitution.[14]

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[13] The *Patel* test, technically, could be described as a two-part test in which the second part has two distinct inquires: whether a challenged law advances a legitimate governmental interest in the real world and, if so, whether the burden of the law is nevertheless oppressive. 469 S.W.3d at 87. For ease of explanation, Plaintiffs will use three steps to describe the *Patel* test.

[14] The *Patel* majority made clear that the *Patel* test is a "different standard" than the "rational relationship" test applied by federal courts while criticizing such review as "for all practical purposes no standard" at all. 469 S.W.3d at 90. Under *Patel*, "an independent judiciary must judge government actions, not merely rationalize them." *Id.* at 120 (Willett, J., concurring, joined by Lehrmann and Devine, JJ.).

II. The Permit Cap and Restaurant Permission Scheme Fail Under *Patel*.

The Permit Cap and Restaurant Permission Scheme cannot survive under *Patel*. As explained below, each of *Patel*'s three steps provides an independent ground for this Court to hold that both anti-competitive restrictions violate the Due Course of Law Clause. In Part A, Plaintiffs explain how the Permit Cap and Restaurant Permission Scheme fail under *Patel* Step One by negating the City's asserted justifications for each restriction and explaining why economic protectionism cannot serve as a legitimate government purpose supporting the challenged laws. In Part B, Plaintiffs' analysis turns to *Patel* Step Two, which focuses on the "actual, real-world effect[s]" of the Permit Cap and Restaurant Permission Scheme. *See Patel*, 469 S.W.3d at 87. Here, Plaintiffs show how record evidence demonstrates that the Permit Cap and Restaurant Permission Scheme do not advance the City's asserted justifications in the actual, real world; rather, both advance only the illegitimate purpose of protecting local restaurant owners from food-truck competition. Finally, in Part C, Plaintiffs turn to *Patel*'s burden inquiry and explain why the laws fail under *Patel* Step Three because the "actual, real world effect" of the Permit Cap and Restaurant Permission Scheme as applied to Plaintiffs "is so burdensome as to be oppressive" in light of the government's interest. *See id*. The evidence clearly reflects that the Permit Cap and Restaurant Permission Scheme prohibit Plaintiffs from operating their food trucks in South Padre Island while providing the public with nothing in return.

A. The City's Food-Truck-Permit Restrictions Fail Step One of *Patel*.

The first step of *Patel* asks whether the law's purpose is rationally connected to a legitimate government interest. 469 S.W.3d at 87. No such connection exists here for three separate reasons. First, the City's claim that the Permit Cap would reduce City inspectors' workloads (and thus have the resources to inspect permitted food trucks) is directly undermined by the record. It is transparently illogical for the City to justify the Permit Cap in this way because, as discussed below, it sets the price of a food truck permit at *eighteen times* higher than a restaurant permit, and the City testified that it sets the cost of permit fees in order to offset the cost of inspections. Second, the City's Restaurant Permission Scheme is not rationally connected to its interest that food trucks operate from a commissary. This post-hoc justification is negated by the plain text of the provision, by the fact that the City already has a commissary rule under its Code (and the Restaurant Permission Scheme is not it), and by evidence of the City's enforcement—which consists of verifying that a local restaurant owner signed off on a food-truck-permit application and nothing more. Third, the record evidence shows that the true purpose of the Permit Cap and Restaurant Permission Scheme is to protect local restaurant owners from food-truck competition. But economic protectionism is not a legitimate purpose. Here, the evidence showing that the Permit Cap's purpose is to limit food-truck competition is overwhelming.

1. Less Work for Government Inspectors Is Not A Legitimate Interest for the Permit Cap.

Courts applying *Patel* must look to a challenged law's actual "purpose."[15] *See Patel*, 469 S.W.3d at 87; *accord id.* at 116 ("Texas judges weighing state constitutional challenges should scrutinize government's *actual* justifications for a law—what policymakers *really* had in mind at the time, not something they dreamed up after litigation erupted.") (Willett, J., concurring, joined by Lehrmann and Devine, JJ.).

The City has asserted that its Permit Cap, which prohibits more than twelve food trucks from entering the market, is legitimate because it means that government inspectors will have less work to do and will thus be able to inspect the food trucks operating in South Padre Island. *See* City Tr. 279:11–18. Asserted justifications must be plausible, and this assertion is fantasy. Although administrative convenience can be a legitimate government interest in the abstract, both logic and the City's own testimony undermine its position.

[15] The government may not conceive hypothetical justifications for challenged laws because that conflicts with the majority opinion in *Patel*. The Texas Supreme Court analyzed a three-way split of authority that had emerged under the Due Course of Law Clause, 469 S.W.3d at 80–82, and the test the Court announced incorporates the first two lines of authority (real and substantial and rational-basis with evidence), but not the third line (federal rational basis without evidence that permitted the government to conceive justifications). *Compare id.* at 80–82 *with id.* at 87. Indeed, even under the more lenient federal rational-basis test, the Fifth Circuit has held that a "hypothetical rationale, even post hoc, cannot be fantasy." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (finding law that allowed only licensed funeral directors to sell caskets to lack a rational basis and instead just protect funeral directors from competition). And under *Patel*, the government must advance a law's actual purpose—it may not conceive justifications out of whole cloth.

The City claims its Permit Cap was necessary because having too many food trucks to inspect would be administratively inconvenient. City Tr. 279:11–18 (justifying the Permit Cap by claiming twelve food trucks is what it could "safely . . . absorb"). Fencing out food trucks from the market by invoking administrative convenience fails *Patel* Step One for three reasons: (1) the City admits it sets permit fees in amounts that will allow it to cover the cost of inspecting permitted food trucks and it charges $1,800 per year for a food-truck permit—which is what it would cost to purchase *eighteen* restaurant permits; (2) the City has shown that it can hire additional inspectors if it needs them and proposed doing exactly that when it originally recommended that the SPI City Council adopt its original food-truck ordinance; and (3) the City's own testimony contradicts its post-hoc justification—it admitted at deposition that its inspections of food trucks are no different than its inspections of restaurants and that it spent months researching its original food-truck ordinance (which it recommended to Council *without* a Permit Cap).

First, Plaintiffs already have to pay $1,800 for an annual food-truck permit or up to $500 for a monthly permit. SPI Code § 10-31(C)(4)(b)–(c). The City admits that it sets permit fees for food trucks in amounts that allow it to cover the cost of inspecting food trucks. City Tr. 170:14–25; 171:8–12; 173:12–17. If permit fees cover the cost of inspections, it makes no sense to justify restricting food-truck permits to avoid administrative costs. The irrationality of the City's justification for the Permit Cap is further bolstered by the City's concession at deposition that a food-truck

"inspection is the same inspection [it] utilize[s] at restaurants . . . it's no different than a restaurant." *Id*. at 33:3–8. The City also testified that its "goal" is to inspect permitted food trucks "twice a year," *id*., and that the time it takes to inspect a food truck is "not very long," *id*. 31:21–23; 34:19–22. Thus, the City's speculative administrative concern fails at the outset.

Indeed, federal courts have rejected this exact type of administrative convenience justification. For example, in *Brantley v. Kuntz*, the court rejected the administrative convenience justification based on the inability to inspect when raised by the Texas Department of Licensing and Regulation. 98 F. Supp. 3d 884, 892–93 (W.D. Tex. 2015). It did so because the plaintiff pointed to evidence showing that the Department charged fees to cover inspections and could hire additional inspectors. *Id*. at 893. Plaintiffs do the same here: As noted above, the City admits it sets permit fees to cover the cost of inspection. And as explained below, the City also admits that it has the ability to hire additional inspectors.

Second, the City's concern about being able to safely absorb more food trucks is particularly implausible given its ability to hire outside inspectors if it needs to. *See, e.g.*, City Tr. 74:3–11 (citing ability to hire "reserve" or "part-time" inspectors). The original food-truck ordinance proposed by the City contained no cap on food-truck permits; when it was presented to the SPI City Council, it came with a request for $2,500 to hire a part-time inspector to help inspect food trucks, and simply deferred to the SPI City Council on how much to charge for a permit. City Tr. 74:1–11; *see also* Panju Aff., Ex. 4 (Agenda Request Form and Ordinance 15-11,

Jul. 15, 2015) at 1. Thus, if inspecting food trucks becomes too costly, the City will have funds from permit fees to offset the cost of inspections—and it charges eighteen times more for a food-truck permit than what it charges for a restaurant permit ($1,800 annually v. $100 annually). And if the administrative burden of inspecting the food trucks becomes too much, the City has shown that it can hire outside inspectors to assist with inspections—and the City admits that it is no harder to inspect a food truck than it is to inspect a restaurant.

Third, the undisputed evidence contradicts the City's administrative convenience justification for enforcing the Permit Cap. While it disclaims having the resources to inspect more than 12 food trucks a year, in fact the City permits and inspects over 500 brick-and-mortar food establishments, Panju Aff., Ex. 25 (Def.'s Resp. to Pls.' Interrog.) at No. 21. Despite charging restaurant owners one-eighteenth the cost of a food truck permit ($100 annually versus $1,800 annually for a food-truck permit, *see* SPI Code § 2-75), and despite not enforcing a cap on permits for brick-and-mortar restaurants or any other food establishment, City Tr. 283:11–13, the City's own inspection data reveals that it inspects hundreds of permitted food establishments each year, Panju Aff., Ex. 26 (City's Food Establishment Inspection Statistics) (527 total inspections in 2019).

Finally, the City spent months studying its original food-truck ordinance, City Tr. 79:15–24, and that comprehensive process included weighing the City's administrative and regulatory functions, *id.* 85:9–13. After months of researching how to regulate food trucks, the City recommended a food-truck ordinance to the

SPI City Council that contained no limit on the number of available food-truck permits. Panju Aff., Ex. 4 (Agenda Request Form and Ordinance 15–11, Jul. 15, 2015). This evidence confirms that the City's claim that it needs the Permit Cap in order to inspect food trucks is a post-hoc justification.

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There is not even a hypothetical connection between the Permit Cap and the City's post-hoc administrative convenience justification, let alone a logical connection supported by the record. The evidence negates the City's asserted interest for the Permit Cap as a measure to ensure it can inspect food trucks and thus the Court should reject it.

2. The City's Attempt to Justify the Restaurant Permission Scheme as a Public Health Commissary Requirement Also Fails.

The City defends its Restaurant Permission Scheme as a public-health measure to require food trucks to use a commissary as their base of operations. City Tr. 213:8–23; 224:16–24. First, Plaintiffs explain why the City's Restaurant Permission Scheme is not a commissary requirement—in fact, SPI's commissary requirement is contained in an *entirely different* section of the SPI City Code that Plaintiffs are not challenging.[16] Second, Plaintiffs show why the City's Restaurant Permission Scheme fails under *Patel* Step One.

[16] Plaintiffs are challenging the constitutionality of the Restaurant Permission Scheme, not the commissary rule contained in SPI Code Section 10-10 (which incorporates Tex. Admin. Code § 228.221(b)(1) (commissary rule)). *See* Pls.' Original Pet. at ¶¶ 2, 84–103. Nor do the Plaintiffs object to complying with a commissary requirement. SurfVive Aff. ¶ 23; Avalos (Anubis) Aff. ¶ 19; Avalos (Ramses) Aff. ¶ 19.

a. The Restaurant Permission Scheme is not a commissary rule.

The City's attempt to justify its Restaurant Permission Scheme as a commissary requirement is transparently illogical, given that the City already *has* a commissary rule and it is not the Restaurant Permission Scheme. Section 10-10 of the SPI City Code adopts Tex. Admin. Code Ch. 228—the Texas Food Establishment Rules ("TFER")—and it is those administrative rules that require food trucks in Texas to "operate from a central preparation facility or other fixed food establishment," Tex. Admin. Code § 228.221(b)(1). By contrast, the City's Restaurant Permission Scheme is contained in SPI Code § 10-31(C)(3), and it requires something entirely different:

> "Applicant must be supported locally and have the signature of an owner or designee of a licensed, free-standing food unit on South Padre Island before being eligible for a permit."

SPI Code § 10-31(C)(3).

The Restaurant Permission Scheme does not require a food truck to use the brick-and-mortar restaurant's kitchen, and the requirement does not require the restaurant owner, or anyone else, to verify that the truck has a commissary available elsewhere. By its plain terms, the Restaurant Permission Scheme is not the City's commissary rule. Instead, it delegates to local restaurant owners the power to act as gatekeepers to the permits that food trucks need to open for business.

b. The Restaurant Permission Scheme fails *Patel* Step One.

The Restaurant Permission Scheme fails *Patel* Step One for three reasons. First, the plain text of the Restaurant Permission Scheme does not require food trucks to use a local restaurant as their commissary. Instead, it only requires that food-truck-permit applicants persuade the owner of a local restaurant to sign off on their application, nothing more. Second, the original food-truck ordinance that the City presented to the Council contained no Restaurant Permission Scheme. Rather, the City Code incorporates by reference the TFER, which contains the administrative rule requiring food trucks to base their operations out of a commissary or permitted food establishment. The Restaurant Permission Scheme appeared only after a group of local restaurant owners formed the Committee and proposed modifications to the City's original food-truck ordinance. Third, the City's testimony undermines its post-hoc justification for the Restaurant Permission Scheme.

First, the City's Restaurant Permission Scheme is an unusual law. Its plain text prohibits eligibility for a food-truck permit unless the owner of a local restaurant has signed off on a food-truck-permit application. It requires nothing more. The text mentions nothing about a commissary, nothing about *using* a commissary as its base of operations, and in no way refers to SPI Code Section 10-10 (incorporating by reference the TFER commissary rule). *See id.* Notably, the City's own expert confirmed the same. Panju Aff., Ex. 27 (City Expert Tr. 149:5–150:10). Given this, the City's post-hoc justification that the Scheme ensures that

food trucks operate from a commissary falls flat. *See* SPI Code § 10-31(C)(3); *see also supra* Part II.A.2.b..

Second, the City has shown that the way to ensure that food trucks comply with the TFER commissary rule is by simply adopting the TFER commissary rule. When City officials researched and presented the original food truck ordinance to the SPI City Council it contained no Restaurant Permission Scheme. *See* Panju Aff., Ex. 4 (Agenda Request Form and Ordinance 15-11, Jul. 15, 2015). And the City's Code instead adopted the TFER commissary rule. SPI Code § 10-10 (incorporating by reference Chapter 228 of the Texas Admin. Code which includes § 228.221(b)(1) (commissary rule)). In other words, the City's Restaurant Permission Scheme adds nothing—it simply lets local restaurant owners serve as gatekeepers to permits.

Third, the record negates any logical connection between the Restaurant Permission Scheme and having food trucks operate from a commissary.

- The City testified at its entity deposition that it verifies compliance with its Restaurant Permission Scheme by placing a phone call to the owner of the local restaurant identified under the "Local Establishment Support" section of the City's food-truck-permit application; the purpose of that call is to confirm that the restaurant owner actually signed off in support of the food-truck-permit application. City Tr. 212:14–213:3.

- The City also conceded that it does not verify whether or not there is an agreement between the food-truck owner and the local restaurant owner that signed off in support of a food-truck-permit application, let alone verify that a food truck is using the local restaurant as its commissary. *Id.* 305:12–23.

The City's testimony confirms that the sole action the City takes to enforce its Restaurant Permission Scheme is to verify the restaurateur's signature. That is consistent with the Scheme's text and confirms that the Restaurant Permission Scheme does nothing more than delegate power to local restaurant owners to serve as gatekeepers to the City's food-truck permits.

Texas courts have recognized that "a delegation of unbridled discretion" to a private entity "would potentially raise constitutional concerns." *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 487 (Tex. App.—Austin 2012) (pet. denied) (finding no such delegation). The Restaurant Permission Scheme makes those concerns concrete. It essentially deputizes private restaurateurs as City officials and delegates to them the unfettered discretion to grant or deny a food-truck permit. In *Patel*, three justices of the Texas Supreme Court wrote separately to emphasize that economic protectionism—as embodied here in the Permit Cap and Restaurant Permission Scheme—is not a legitimate use of government power and burdens entrepreneurs:

> "[U]nder the Texas Constitution, government may only pursue constitutionally permissible ends. Naked economic protectionism,

> strangling hopes and dreams with bureaucratic red tape, is not one of them. And such barriers, often stemming from interest-group politics, are often insurmountable for Texans on the lower rungs of the economic ladder (who unsurprisingly lack political power)—not to mention the harm inflicted on consumers deprived of the fruits of industrious entrepreneurs.

See Patel, 469 S.W.3d at 122 (Willett, J., concurring, joined by Lehrmann and Devine, JJ.).

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There is not a rational connection, let alone a hypothetical connection, between the Restaurant Permission Scheme and the requirement that food trucks operate out of a commissary. The City's post-hoc justification that the Restaurant Permission Scheme is a commissary requirement is negated by the provision's plain text, by the City's actual commissary rule contained in SPI Code Section 10-10, and by the City's own testimony that it is enforced as a signature requirement and nothing more. The Restaurant Permission Scheme is not logically connected to a legitimate government end. As demonstrated below, it is connected only to anti-competitive animus.

3. The Permit Cap and Restaurant Permission Scheme fail *Patel* Step One because they are rationally connected only to an illegitimate purpose: economic protectionism.

Economic protectionism is not a legitimate government purpose under the Due Course of Law Clause. It is no surprise that the Permit Cap and Restaurant Permission Scheme are not rationally connected to the City's post-hoc justifications, since both anti-competitive permit restrictions are tailor-made to serve an entirely different interest. The record reveals the true, illegitimate, purpose for the Permit

Cap and Restaurant Permission Scheme: Both are surgically tailored to protect local restaurants from food-truck competition.

As the Texas Supreme Court did in *Patel*, the Fifth Circuit rejected economic protectionism as a legitimate government interest under the U.S. Constitution. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."). In *St. Joseph Abbey*, the Fifth Circuit struck down Louisiana's casket cartel (including the barriers to entry enacted at the behest of licensed funeral directors), because the anti-competitive laws protecting the cartel restricted the Abbey's monks from selling their handmade caskets. *Id*. at 222–27. In order to sell caskets—a box—the State of Louisiana required satisfying irrational licensing laws that required St. Joseph Abbey to build a layout parlor for thirty people, a display room for six caskets, an embalming facility, and task one of their monks to become a licensed funeral director by completing coursework and an apprenticeship. *Id*. at 218. The Fifth Circuit struck down the challenged laws and held that "the great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." 712 F.3d at 226.

Nor is *St. Joseph Abbey* an outlier. Courts across the nation have repeatedly invalidated restrictions motivated by protectionism.[17] For example, after invoking

[17] This partial list of cases invalidating laws motivated by economic protectionism reflects that individuals and their businesses face such laws in a range of industries. *See, e.g.*, *Ladd*

Patel and its reasoning, the Pennsylvania Supreme Court recently reversed an attempt to dismiss a challenge by a vacation rental property manager who was denied the right to earn a living after the state's real-estate commission began enforcing anti-competitive broker licensing requirements against her. *See Ladd v. Real Estate Comm'n*, No. 33 MAP 2018, ___A.3d___, 2020 WL 2532285 (Pa. May 19, 2020). In *Ladd*, managing a vacation property as a short-term rental was illegal unless a person first complied with real-estate-broker education and licensing requirements, among other onerous restrictions. *Id.* at **1–5. The Pennsylvania Supreme Court echoed the Texas Supreme Court and *Patel*'s insistence that economic liberties receive meaningful protection. *Id.* at **12–13.

In each of the cases described above (and cited in note 17), the government had asserted pretextual justifications for the challenged laws. The City does the same here in defense of its Permit Cap and Restaurant Permission Scheme. And in each case, courts found that economic protectionism was not enough to sustain a

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v. Real Estate Comm'n of the Commonwealth of Pennsylvania, No. J-71-2019, 2020 WL 2532285, **10–15 (Pa. May 19, 2020) (invoking *Patel*'s "heightened" test to reverse a lower court's dismissal of a challenge to a prohibition on managing short-term rental properties without first satisfying irrelevant real-estate-broker licensing requirements); *Craigmiles v. Giles*, 312 F.3d 220, 224–29 (6th Cir. 2002) (law that allowed only licensed funeral directors to sell caskets lacked a rational basis and instead just protected funeral directors from competition); *Merrifield* v. *Lockyer*, 547 F.3d 978, 990–92 (9th Cir. 2008) (finding licensing scheme for pest controllers that exempted those dealing with certain pests lacked a rational basis and have the primary purpose of protectionism); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698–701 (E.D. Ky. 2014) (finding regulations on moving companies lacked a rational basis and were instead just protectionist); *Santos v. City of Houston*, 852 F. Supp. 601, 607–08 (S.D. Tex. 1994) (finding ban on jitneys lacked a rational basis and was "economic protectionism in its most glaring form"); *California v. Ala Carte Catering, Co.*, 159 Cal. Rptr. 479, 484 (Cal. App. Dep't Super. Ct. 1979) (finding law that prohibited food trucks from operating near restaurants lacked a rational basis and was instead a "naked restraint of trade.").

law. The Court should do the same here. The government can pass laws that protect the public health, safety, and welfare. But the government cannot pass laws that serve no purpose other than to protect local restaurant owners from competition.

The history of the Permit Cap and Restaurant Permission Scheme reflect that both are rationally connected to illegitimate economic protectionism and nothing more.[18] The original food-truck ordinance that City officials drafted and presented to the SPI City Council in July 2015 only bolsters that the Permit Cap and Restaurant Permission Scheme are an attempt to protect local restaurant owners from food-truck competition. That original ordinance did not limit the number of available food-truck permits. *See* Panju Aff., Ex. 4 at 2–6 (Agenda Request Form and Ordinance 15-11, Jul. 15, 2015). Nor did it force food-truck owners to convince the owner of a brick-and-mortar food establishment to sign off in support of a food-truck-permit application. *See id*. (Ordinance 15-11).

But the record unambiguously shows how that original ordinance changed once several local restaurant owners complained about food-truck competition and suggested limiting the number of available food-truck permits. *See supra* III.B.1., 13–16. In response, the SPI City Council voted to let this group of local restaurant owners propose modifications to the City's original ordinance. *See* Panju Aff., Ex. 7 (Minutes of SPI City Council, Aug. 5, 2015) at 1–2. Once that group of restaurant owners met as the Committee, they quickly came up with both the Permit Cap and

[18] Courts look to the history of a challenged law to determine whether it reflects an attempt to engage in economic protectionism. *See St. Joseph Abbey*, 712 F.3d 215, 223–27 (invalidating Louisiana's casket cartel).

Restaurant Permission Scheme. *Compare* Panju Aff., Ex. 18. (Email to Committee members with modified food-truck ordinance, Feb. 6, 2016) *with* Panju Aff., Ex. 15 (Agenda Request Form and Ordinance 16-05, Feb. 17, 2016). Those restrictions then made their way into the food-truck ordinance the SPI City Council ultimately enacted.

This history shows beyond any doubt that the City enacted the Permit Cap and Restaurant Permission Scheme at the behest of local restaurant owners who complained that food trucks would hurt their profits. Simply, the Permit Cap and Restaurant Permission Scheme reflect the proverbial naked transfer of wealth from food truck owners to restaurant owners.[19] *Cf. St. Joseph Abbey*, 712 F.3d at 223–23 ("economic protectionism, that is favoritism," for its own sake, "is aptly described as a naked transfer of wealth."); *Ala Carte Catering, Co.*, 159 Cal. Rptr. at 484 (finding law that prohibited food trucks from operating near restaurants lacked a rational basis and was instead a "naked restraint of trade.").

Further evidence of the economic protectionism contained in the City's food-truck ordinance goes beyond the Permit Cap and Restaurant Permission Scheme. The ordinance also charges excessive fees for food-truck permits. This evidence matters because it is yet more evidence that the Committee's modifications to the original ordinance were motivated by a desire to limit food-truck competition. At deposition, the City testified that it "always defer[s] to the Council for permit fees,"

[19] *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1732 (1984) (arguing that hostility to naked preferences is so engrained in our constitutional structure that it "serves as the most promising candidate for a unitary theory of the Constitution.").

City Tr. 168:4–7, and thus the City's original food-truck ordinance did not address the cost of permit fees. *See* Panju Aff., Ex. 4 (Agenda Request Form and Ordinance 15–11, Jul. 15, 2015). But after the group of local restaurant owners began proposing modifications the Committee not only discussed permit fees, City Tr. 178:2–17, but one Committee member (and restaurant owner) even suggested charging food truck owners $10,000 for a permit, *Id.* 180:11–14. In the end, the City's food-truck ordinance required food trucks seeking to operate in South Padre Island to pay $3,600 in permit fees in order to vend for one year (or thirty-six times higher than the $100 per year that restaurant owners pay for their annual permit), before reducing the amount to $1,800 annually. Compare City Tr. 197:10–15 (totaling $3,600 annually) with SPI Code § 2-75 ($100 annually).

As the record unambiguously shows, the City's Permit Cap and Restaurant Permission Scheme were custom-made to serve an illegitimate purpose: economic protectionism. Even the Mayor himself instructed the head of the Committee, local restaurant owner Arnie Creinin, to make the food-truck ordinance more restrictive to protect local businesses (while cautioning him to not make it so restrictive that it might invite a legal challenge). Panju Aff., Ex. 16 at 27:1–28:8 (Reporter Tr. of Aug. 5, 2015 SPI City Council Meeting). In other words, the Committee was formed for the very purpose of bending the levers of government power to serve private interests.

B. The City's Food-Truck-Permit Restrictions Fail Step Two of *Patel*.

Even if the City's Permit Cap and Restaurant Permission Scheme were logically connected to legitimate government interests—which they are not—they would still fail under the second part of the *Patel* test because the "actual, real-world effect" of both restrictions does not advance the City's post-hoc justifications. 469 S.W.3d at 87. This inquiry "require[s] the reviewing court to consider the entire record, including evidence offered by the parties." *Id*. In other words, does the evidence show that the challenged laws actually advance the government's asserted interests in the real world? The record shows that the answer is no.

1. The Permit Cap's actual, real-world effect advances no legitimate government interest.

The City's Permit Cap also fails under *Patel* Step Two because its actual, real-world effect does not advance the City's interest in having the resources it needs to inspect food trucks. The City's assertions that the Permit Cap advances these interests, *see, e.g.*, City Tr. 279: 12–18, are not only unsupported by the evidence in the record. Moreover, as discussed below, the record also undermines the City's claims that the Permit Cap advances a legitimate end in the real world.

First, in the real world, the City is able to inspect food establishments when no cap exists to arbitrarily limit the number of permits. The City regularly inspects restaurants and temporary food establishments (where no cap limits the number of available permits). Panju Aff., Ex. 26 (City's Food Establishment Inspection Statistics) (527 total inspections in 2019). The City has over five hundred permitted food establishments per its own count, *see* Panju Aff., Ex. 25 (Def.'s Resp. to Pls.'

Interrog.) at No. 21., and there is no evidence that it cannot perform regular inspections. But the City is justifying the Permit Cap that limits total food-truck permits to twelve total while charging $1,800 per year for a single, annual food-truck permit—the same price it charges for *eighteen* annual permits to operate eighteen restaurants. *Compare* SPI Code § 10-31(C)(4) ($1,800) *with* City Tr. 172:3–5 ($100). Nor is there evidence that the $100 it charges restaurants annually for food establishment permits leaves the City with insufficient resources to cover the cost of inspections.[20]

Second, the fact that the City never believed it was unable to inspect food trucks without arbitrarily limiting the number of food-truck permits further demonstrates that the Permit Cap advances no legitimate interest in the real world. It is undisputed that the City evaluated the administrative and regulatory burdens involved with inspecting food trucks when working on its initial draft of the food-truck ordinance. City Tr. 85:9–13. It is also undisputed that when the City presented that initial draft to the City Council, it contained *no* limit on the number of food-truck permits. *See* Panju Aff., Ex. 4 (Agenda Request Form and Ordinance 15-11, Jul. 15, 2015). Even after the City began enforcing the Permit Cap, no evidence suggests it had any concerns about its ability to inspect food trucks. In

[20] What's more, the City's ability to inspect temporary food establishments (limited-term permits to operate a temporary food establishment for a few days at a time) is notable because they are temporary—these are not permanent food establishments that the City is already aware of (and thus able to plan for necessary inspections). For example, in 2019, the City inspected 293 temporary food establishments and there is no evidence that it lacked resources to do so. Panju Aff., Ex. 26 (City's Food Establishment Inspection Statistics) at Bates SPI00642–664.

other words, the City's post-hoc assertions at deposition that it needs the Permit Cap to ensure it has resources to inspect food trucks fly in the face of the record—in the actual, real world, there was no concern motivating anyone, anywhere, to limit food-truck permits so that the City could inspect permitted food trucks.

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The actual, real-world effect of the Permit Cap does not advance, and is not connected to, the City's asserted interest in ensuring it has the resources it needs to inspect food trucks. As described above in Part II.B.3, the evidence reveals that the Permit Cap has one effect in the real world, and it reflects what it was intended to accomplish: limiting food-truck competition.

2. In the real-world, requiring that a restaurant owner sign off on a food-truck-permit application advances no legitimate interest.

The City's Restaurant Permission Scheme also fails under *Patel* Step Two. The actual, real-world effect of requiring food-truck owners to obtain the signature of a local restaurant owner on their food-truck application—and nothing other than a signature—advances no legitimate government interest. Plaintiffs have already explained how the plain text of the Restaurant Permission Scheme imposes no requirement other than getting the signature of a local restaurant owner on their permit application. *See supra* Part II.A.2.

The evidence further demonstrates that in the actual, real world, the City treats the Restaurant Permission Scheme as a signature requirement and nothing more. When a food truck application is turned in, the City testified it simply verifies

that a local restaurant owner signed the application by calling the restaurant owner to ask if he or she signed it. *See* City Tr. 212:14–213:3. The City does not inquire about whether the local restaurant owner and food-truck-permit applicant reached any agreement, whether for commissary services or otherwise, let alone check that one exists. *Id*. 305:12–23. Confirming that a restaurant owner has signed off on a food-truck-permit application does not advance the City's asserted interest of requiring compliance with Texas Administrative Code Section 228.221(b)(1) because, in the real world, the City is not confirming that a food truck is "*operat[ing]* from a central preparation facility or other fixed food establishment . . . ." The only thing the Restaurant Permission Scheme advances in the real world is giving local restaurant owners the power to grant or withhold permission to enter the food-truck market. That is protectionism.

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The actual, real-world effect of the Restaurant Permission Scheme does not advance, and is not connected to, the City's asserted interest in ensuring that food trucks are operating out of a commissary. As Plaintiffs show next, the record confirms the Restaurant Permission Scheme and the Permit Cap's actual, real-world effect: economic protectionism.

3. The actual, real-world effect of the Permit Cap and Restaurant Permission Scheme is to reduce food-truck competition.

The only purpose advanced by the Permit Cap and Restaurant Permission Scheme in the actual, real world is illegitimate economic protectionism.

One year after the City began allowing food trucks to operate in South Padre Island, approximately thirty applications for food truck permits were picked up—but only three food trucks were permitted and operating in South Padre Island. City Tr. 230:24–231:10; 233:2–6. During this time, the City was aware that permit applications were picked up and that food-truck operators "were going to go . . . find a sponsor and also find a location and, for whatever reason, they [did] not come back." City Tr. 230:17–23. By April 2018 (approximately two years after food trucks were allowed in South Padre Island), all six available permits had been issued. Panju Aff., Ex. 28 (City's MFU Permit Issuance Data) at Bates SPI00807. In other words, there were no available food-truck permits for anyone— including Plaintiff SurfVive after it obtained its food truck in April 2018. SurfVive Aff. ¶ 6. The Permit Cap's actual, real-world effect of reducing food-truck competition continues today: the City's permit records confirm that there are no available permits in 2020 because all twelve have been issued. *See* Panju Decl., Ex. 28 at Bates SPI00808.

Food truck owners like Plaintiffs Anubis and Ramses Avalos are just as aggrieved as SurfVive. The Avalos brothers have an established food-truck business in nearby Brownsville, Texas and want to begin operating in South Padre Island. Avalos (Anubis) Aff. ¶¶ 7–10; Avalos (Ramses) Aff. ¶¶ 7–10. Together, the brothers have searched for vending locations, researched the City's regulations on mobile-food units, spoken to potential investors, and tested the vending market in South Padre Island by vending at a food-truck event there. *Id*. But the real-world effect of the Permit Cap has made it impossible for the Avalos brothers to bring their

existing food truck and healthy food options to South Padre Island, much less invest in a second truck to do so. In the real world, the Permit Cap creates an uncertain business environment— it would be devastating to the Avalos brothers' food-truck business to invest in a vending location on the island, or in a second food truck, only to find out that no permit is available. Avalos (Anubis) Aff. ¶¶ 11–13; Avalos (Ramses) Aff. ¶¶ 11–13.

Like the Permit Cap, the actual, real-world effect of the Restaurant Permission Scheme is to also stifle food-truck competition. It forces food-truck owners to do a useless thing: asking their brick-and-mortar competitors to sign off on their permit applications so that they can open for business. *See* Panju Aff., Ex. 29 (Mobile Food Unit Applications with Signatures of Restaurant Owners). When the City increased its Permit Cap from six to twelve, City Tr. 239:21–240:1, Plaintiff SurfVive applied only to find out that it could not obtain a permit unless a local restaurant signed off in support of SurfVive's application. SurfVive Aff. ¶¶ 9–14. And as noted above, SurfVive is not alone. *See* City Tr. 230:17–23.

The City acknowledged at deposition that after it enacted its food-truck ordinance—including the anti-competitive Permit Cap and Restaurant Permission Scheme—there was a "low turnout." City Tr. 206:15–19. This is further evidence that the actual, real-world effect of the Restaurant Permission Scheme was less food-truck competition for local restaurants—hardly a surprise, given that food-truck competition was local restaurateurs' stated concern. For the Plaintiffs, the actual, real-world effect of the Restaurant Permission Scheme means that they

must spend time they do not have identifying and convincing restaurant owners to sign off on their permit applications instead of actually operating their food trucks. SurfVive Aff. ¶ 18; Avalos (Anubis) Aff. ¶ 14; Avalos (Ramses) Aff. ¶ 14.

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The actual, real-world effect of the Permit Cap and Restaurant Permission Scheme is to advance illegitimate economic protectionism for local restaurant owners. As Plaintiffs show next, the evidentiary record confirms that both of these anti-competitive food-truck-permit restrictions serve only to impose burdens on food-truck owners and nothing more.

C. The City's Food-Truck-Permit Restrictions Fail Step Three of *Patel* Because Imposing Burdens on Plaintiffs for No Public Benefit Is Oppressive.

The Permit Cap and Restaurant Permission Scheme also fail *Patel* Step Three. If the Court finds that either anti-competitive permit restriction survives under the first two steps of the *Patel* test, it must analyze that restriction under *Patel*'s burden inquiry. 469 S.W.3d at 87. That inquiry requires an as-applied analysis rooted in the evidentiary record and asks courts to determine "whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying government interest." *Patel*, 469 S.W.3d at 87. In other words, this analysis requires a comparison of the level of burden against the usefulness of the law. *Id*. If the record reveals that there is no rational

sense of proportionality between the private burdens and public benefits,[21] the law violates Article I, Section 19 of the Texas Constitution.

As *Patel* makes clear, proper balancing must weigh the clear loss the law inflicts on Plaintiffs against an alleged governmental benefit. In that case, the Texas Supreme Court found that there was evidence that the practice of eyebrow threading posed some health risks that regulation could possibly address, including the potential, in extreme circumstances, to "spread [] highly contagious bacterial and viral infections." *Patel*, 469 S.W.3d at 89. But this potential public benefit was nevertheless weighed against the fact that the state was requiring threaders to take at least 320 hours of irrelevant training in order to thread eyebrows. *Id*. Unlike in *Patel*, the Permit Cap and Restaurant Permission Scheme do nothing for public safety. Here, Plaintiffs cannot get a license at all under the Permit Cap (whereas in *Patel* a license was ultimately available). Even if a permit is available, the Restaurant Permission Scheme leaves it to a local restaurant owners' arbitrary decision whether a food-truck owner is eligible for a permit. The Court also considered it significant that the challenged law imposed burdens that forced the threaders to "lose the opportunity to make money actively practicing their trade[.]" *Id*. at 90. In other words, the degree of burden must be justified by what is achieved by the law.

The Permit Cap and Restaurant Permission Scheme are unconstitutionally oppressive under *Patel* because they impose burdens on Plaintiffs in exchange for

[21] The burden inquiry "require[s] the reviewing court to consider the entire record, including evidence offered by the parties." *Patel*, 469 S.W.3d at 87.

zero or immeasurably tiny public benefits. First, the Permit Cap imposes massive burdens. Plaintiff SurfVive leased a food truck and was unable to obtain a permit in April 2018 because none of the original six permits were available. *See* SurfVive Aff. ¶¶ 5–6; Panju Aff., Ex. 28 (City's MFU Permit Issuance Data). Plaintiffs Anubis and Ramses Avalos face the uncertainty of not having permits available if they invest in a vending location and a second food truck. Avalos (Anubis) Aff. ¶¶ 11–14; Avalos (Ramses) Aff. ¶¶ 11–14. The Avalos brothers' concerns about the burdens imposed by the Permit Cap are confirmed by the City's permit records, which reflect that the City's food-truck permits have previously run out, and that even today (and for the remainder of 2020), there are no available food-truck permits. Panju Aff., Ex. 28 (City's MFU Permit Issuance Data). Plaintiffs seek to vend in South Padre Island, but the Permit Cap acts as an outright bar on their ability to do so. By any measure, this is a profound burden.

Turning to the benefit side of the scale, the record is devoid of any evidence that the Permit Cap confers any public benefits (it only arbitrarily limits the public's food options and Plaintiffs' ability to operate a food truck in South Padre Island). The City offers only bare assertions that the Permit Cap ensures it will have enough resources to inspect food trucks—which Plaintiffs have explained above is transparently illogical and directly undermined by the evidence.

The Restaurant Permission Scheme also fails under the burden inquiry. On the burden side of the scale, it forces Plaintiffs to ask their would-be brick-and-mortar competitors for their signature—and nothing other than their signature—on

a food-truck-permit application so that they can open for business. *See* SPI Code § 10-31(C)(3). Plaintiffs must bear the burden of going around South Padre Island and asking restaurant owners whether they are willing to sign off on their food-truck-permit application. Taking time to secure their would-be competitors' permission to vend means SurfVive's director must take time away from advancing its programs, just as it forces the Avalos brothers to take time away from operating their food truck. SurfVive Aff. ¶ 18; Avalos Aff. (Anubis) ¶ 14; Avalos Aff. (Ramses) ¶ 14. Those burdens are oppressive.

On the public-benefit side of the scale, there is nothing. The record contains no evidence that the Restaurant Permission Scheme confers public benefits whatsoever, and the City's own testimony confirms that it does nothing other than verifying whether a local restaurant owner actually signed in support of the submitted food-truck-permit application—nothing more. City Tr. 212:14–25; 305:12–23

The record also reflects that the Permit Cap and Restaurant Permission Scheme impose economic burdens that have prevented Plaintiffs from earning income. As noted above, in *Patel*, the Court found that requiring 320 hours of irrelevant training that resulted in the loss of income was oppressively burdensome in light of a public benefit that evidence showed to be extremely small. *Patel*, 469 S.W.3d at 90. Here, the inability to operate a food truck also means Plaintiffs are losing the opportunity to generate revenue and earn income. SurfVive Aff. ¶¶ 25–26; Avalos Aff. (Anubis) ¶¶ 20–21; Avalos Aff. (Ramses) ¶¶ 20–21.

***

The Permit Cap and Restaurant Permission Scheme impose an unconstitutionally oppressive burden. Indeed, the burden on Plaintiffs here is plainly greater than the burden in *Patel* (the City limits the available permits *in addition to* imposing burdensome requirements) and the interest of the government is plainly weaker. It is thus inconceivable that the burden here could be constitutional while the burden in *Patel* was not.

CONCLUSION

The Permit Cap and Restaurant Permission Scheme are unconstitutional under Article I, Section 19's Due Course of Law Clause. The evidence in this case shows that both anti-competitive permit restrictions fail under each of *Patel*'s three steps. The Permit Cap and Restaurant Permission Scheme exist solely to protect local restaurant owners against food-truck competition—an illegitimate use of government power—and both restrictions advance no legitimate government interest in the real world. The City's cap on food-truck permits along with its requirement that permit applicants convince a local restaurant owner to sign off in support of the application serve no legitimate interest and the record shows that the actual, real-world effect of both is protecting local restaurants and nothing more. These restrictions impose oppressive burdens on Plaintiffs and their ability to operate food trucks in South Padre Island, while providing the public with nothing in return. The laws should therefore be declared unconstitutional and permanently enjoined.

Dated: June 1, 2020.

Respectfully submitted,

/s/ Arif Panju

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2020, I caused the foregoing Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support to be filed and served upon the following counsel of record:

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/s/ Arif Panju

Vernon's Texas Rules Annotated
Texas Rules of Appellate Procedure
Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)
Rule 29. Orders Pending Interlocutory Appeal in Civil Cases (Refs & Annos)

TX Rules App.Proc., Rule 29.3

29.3. Temporary Orders of Appellate Court

Effective: June 1, 2020
Currentness

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24. [1]

Credits
Eff. Sept. 1, 1997.

Footnotes

1 Vernon's Ann.Rules App.Proc., rule 24.1 et seq.

Rules App. Proc., Rule 29.3, TX R APP Rule 29.3
Current with amendments received through January 1, 2021

End of Document

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle D. Appeals
Chapter 51. Appeals
Subchapter B. Appeals from County or District Court (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 51.014

§ 51.014. Appeal from Interlocutory Order

Effective: June 14, 2019
Currentness

(a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351;

(10) grants relief sought by a motion under Section 74.351(l);

(11) denies a motion to dismiss filed under Section 90.007;

(12) denies a motion to dismiss filed under Section 27.003;

(13) denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to Section 75.0022; or

(14) denies a motion filed by a municipality with a population of 500,000 or more in an action filed under Section 54.012(6) or 214.0012, Local Government Code.

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) or in a suit brought under the Family Code, stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

(d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:

(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

(d-1) Subsection (d) does not apply to an action brought under the Family Code.

(e) An appeal under Subsection (d) does not stay proceedings in the trial court unless:

(1) the parties agree to a stay; or

(2) the trial or appellate court orders a stay of the proceedings pending appeal.

(f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, § 3.10, eff. Sept. 1, 1987; Acts 1989, 71st Leg., ch. 915, § 1, eff. June 14, 1989; Acts 1993, 73rd Leg., ch. 855, § 1, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 1296, § 1, eff. June 20, 1997; Acts 2001, 77th Leg., ch. 1389, § 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 204, § 1.03, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 97, § 5, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 1051, §§ 1, 2, eff. June 18, 2005; Acts 2011, 82nd Leg., ch. 203 (H.B. 274), § 3.01, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 44 (H.B. 200), § 1, eff. May 16, 2013; Acts 2013, 83rd Leg., ch. 604 (S.B. 1083), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 916 (H.B. 1366), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 961 (H.B. 1874), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 4, eff. June 14, 2013; Acts 2015, 84th Leg., ch. 1236 (S.B. 1296), §§ 3.001, 3.002, eff. Sept. 1, 2015; Acts 2019, 86th Leg., ch. 1273 (H.B. 36), § 1, eff. June 14, 2019.

V. T. C. A., Civil Practice & Remedies Code § 51.014, TX CIV PRAC & REM § 51.014
Current through the end of the 2019 Regular Session of the 86th Legislature

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FILE COPY

THE SUPREME COURT OF TEXAS
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Austin, Texas 78711

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Friday, January 1, 2021

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Ms. Sherine Elizabeth Thomas
Travis County Attorney's Office
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RE: Case Number: 21-0001
Court of Appeals Number: 03-20-00619-CV
Trial Court Number:

Style: IN RE STATE OF TEXAS

Dear Counsel:

The Supreme Court of Texas issued an order in the above-referenced case stating:

"Without hearing oral argument, and having considered "Defendants Travis County and City of Austin's Joint Response in Opposition to Plaintiff's Application for Temporary Injunction," we conditionally grant the petition for writ of mandamus and direct the court of appeals to issue relief under Texas Rule of Appellate Procedure 29.3, instanter, enjoining enforcement of Travis County's County Judge Order 2020-24 and the Mayor of the City of Austin's Order No. 20201229-24 pending final resolution of the appeal. Our writ will issue only if the court of appeals does not comply."

Sincerely,

Blake A. Hawthorne, Clerk

by Claudia Jenks, Chief Deputy Clerk

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

cc: Mr. Jeffrey D. Kyle (DELIVERED VIA E-MAIL)
Mr. Kyle D. Hawkins (DELIVERED VIA E-MAIL)

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