No. 13-20-00536-CV

In the Court of Appeals for the Thirteenth District of Texas

CITY OF SOUTH PADRE ISLAND,

Appellant,

v.

SURFVIVE, ANUBIS AVALOS, AND ADONAI RAMSES AVALOS,

Appellees.

On Appeal from the 138th District Court of Cameron County, Texas
Cause No. 2019-DCL-01284, Honorable Arturo Nelson

APPELLEES' VERIFIED RULE 29.3 MOTION FOR RELIEF

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

Appellees SurfVive, Adonai Avalos, and Anubis Avalos (together, "Appellees" or "Food Truck Appellees") move this Court to temporarily preserve their rights on appeal, as vindicated below in the district court's effectively final order enjoining Appellant City of South Padre Island (the "City") from enforcing two unconstitutional provisions in its city code. *See*

CR.3058; Order Granting Pls.' Mot. Summ. J. (Exhibit D) ("MSJ Order") (granting Appellees summary judgment in full). As this Motion will show, the City is gaming the statutes and rules governing appellate procedure in order to persist in denying the Food Truck Appellees their constitutional rights. Because Texas Rule of Appellate Procedure 29.3 allows the Court to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal," and because the Appellees' rights continue to be deprived while the City pursues its frivolous interlocutory appeal, the Food Truck Appellees move the Court for an order enjoining the City from enforcing its Permit Cap, South Padre Island, Tex. Code ("SPI Code") §§ 10-31(C)(2), (F)(2)(a), and Restaurant Permission Scheme, *id.* § 10-31(C)(3), until disposition of the appeal.

This Motion proceeds in two parts: Part I summarizes the history of proceedings before the district court, which culminated in the district court's granting full summary judgment to the Food Truck Appellees under Article I, Section 19 of the Texas Constitution. Part II then explains why the Court should grant this Motion.

I. The City Violated the Texas Constitution and the District Court Granted Summary Judgment to Appellees.

The Texas Constitution protects economic liberty. *See* Tex. Const. art. I, § 19; *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015). Invoking that protection, the Food Truck Appellees filed this lawsuit to challenge the constitutionality of two permitting restrictions that stifled their ability to operate food trucks on South Padre Island. *See* CR.22–24; Pls.' Original Pet. and App. for Inj. Relief (Exhibit A) ¶¶ 84–103. 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* SPI Code §§ 10-31(C)(2) and 10-31(F)(2)(a) (the "Permit Cap"). The second restriction forced permit applicants to persuade a local restaurant owner to sign on in support of the permit application. *Id.* § 10-31(C)(3) (the "Restaurant Permission Scheme"). In other words, the Restaurant Permission Scheme installed local restaurant owners as gatekeepers to the very permits their would-be food-truck competition needed to open for business. These anticompetitive provisions are separate and distinct from the City's unchallenged requirements that food trucks obtain a permit in the first place, pass the required inspection, and comply with the Texas Food

Establishment Rules, 25 Tex. Admin. Code §§ 228.1 *et seq.* (Tex. Dep't of State Health Services).

Soon after the case began, the City's behavior during discovery required the district court's intervention. In one instance, the court had to order the City to attend its entity deposition after it refused to show up. *See* Discovery Order (Exhibit B) at 2. The court also had to consider and reject the City's attempt to block discovery involving twelve non-party restaurant owners on the City's Food Truck Planning Committee—the very group that crafted the Permit Cap and Restaurant Permission Scheme. *Id*. At the close of discovery, the parties filed cross-motions for summary judgment.

At summary judgment, the Food Truck Appellees specifically 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." CR.1551; Pls.' Mot. Summ. J. (Exhibit C) at 1. Appellees also

moved for nominal damages of $1, attorneys' fees, and costs. *Id*. The relief the Food Truck Appellees moved for at summary judgment mirrors the relief they prayed for in their Original Petition and Application for Injunctive Relief. *See* CR.25–26; Pls.' Original Pet. and App. for Inj. Relief (Exhibit A) at 19–20.

The district court granted Food Truck Appellees' motion for summary judgment in full. *See* CR.3058; Order Granting Pls.' Mot. Summ. J. (Exhibit D) ("IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED.") (emphasis in original). The MSJ Order's text is plain, and its scope is unmitigated. In a concurrent order, the district court rejected the City's meritless jurisdictional defenses and denied its summary-judgment motion. CR.3057; Order Den. Def.'s 2d Plea Juris. & Mot. Summ. J. (Exhibit E). No outstanding issues remain for the district court to resolve except the *amount* of attorneys' fees and costs.

The City filed its Notice of Interlocutory Appeal on December 14, 2020, limited to the district court's concurrent order denying the City's second plea to the jurisdiction. *See* Notice of Interloc. App. No appeal is

taken from the summary judgment against the City. Nor has the City sought to stay the district court's MSJ Order.

Meanwhile, the City continues to defy the MSJ Order. On January 14, 2021, the City issued a statement via its official Facebook account concerning this case, informing the public that "no judgment or order of any kind was entered granting specific relief," and that the Permit Cap and Restaurant Permission Scheme "will remain in effect[.]" City's Statement of Jan. 14, 2021 (Exhibit F). Before the City issued that statement, counsel for the Food Truck Appellees approached the City and tried to resolve its ongoing defiance of the MSJ Order. *See* Exhibit G. In response, the City wrote that the MSJ Order is merely "a *document* entitled 'Order Granting Plaintiffs' Motion for Summary Judgment'" and that the MSJ Order "did not . . . award Plaintiffs any remedy sought in their motion." *See* Exhibit H at 2 (emphasis added).

Procedural gamesmanship is the only explanation for the City's odd decision to defy the MSJ Order while neither appealing it nor seeking a stay. Conveniently for the City, an *interlocutory* appeal strips the district court of jurisdiction to enforce the MSJ Order. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b). This Court's intervention is needed to correct the City's

gamesmanship and vindicate Appellees' constitutional rights during the pendency of this appeal.

II. This Court Should Prevent the City from Continuing to Violate the Texas Constitution During This Interlocutory Appeal.

A. Rule 29.3 Relief Is Needed Due to the City Flouting the District Court's Authority and the Texas Constitution.

The City is flouting both the district court's authority and the Texas Constitution. Simply, this Rule 29.3 Motion asks this Court to do what the City refuses to: Read the district court's MSJ Order "in light of the motion upon which it [is] granted." *See Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404–05 (Tex. 1971); *see also Estate of Hoskins*, 501 S.W.3d 295, 301–02 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (applying *Fair*). The district court's MSJ Order unambiguously grants "Plaintiffs Motion for Summary Judgment," *see* CR.3058; Order Granting Pls.' Mot. Summ. J. (Exhibit D), and the motion that the court granted sought declaratory and injunctive relief to enjoin enforcement of the Permit Cap and Restaurant Permission Scheme, CR.1551; Pls.' Mot. Summ. J. (Exhibit C) at 1. Rather than read the MSJ Order the same way Texas courts do, the City professes ignorance of its terms.

Moreover, at the same time the City professes ignorance, it studiously refuses any action to ascertain those terms. Counsel for Appellees suggested that the parties could resolve any confusion about the MSJ Order by simply asking the district court. *See* Exhibit G at 1. But the City refused, representing that—by its filing of an interlocutory appeal—the district court is prohibited from explaining the Order's contours. *See* Exhibit H at 2. Next, counsel for Appellees proposed asking *this* Court to enforce the district court's MSJ Order. *See* Exhibit G at 1. But the City opposed that path as well, asserting that the stay of proceedings triggered by its interlocutory appeal deprives this Court of any power to protect Food Truck Appellees' newly vindicated constitutional rights. *See* Exhibit H at 2.

The City's professed ignorance and ducking of its obligations are in bad faith. Its justification for flouting the district court's MSJ Order is that its interlocutory appeal "stays all . . . proceedings in the trial court." Tex. Civ. Prac. & Rem. Code § 51.014(b). Although that appeal does not put the MSJ Order at issue, the City refuses "any effort" to understand or enforce that order. *See* Exhibit H at 2–3. This Court should intervene.

B. This Court Should Grant Rule 29.3 Relief to Protect Appellees' Newly Vindicated Constitutional Rights.

Appellees seek a Rule 29.3 order temporarily enjoining the City's enforcement of the Permit Cap and Restaurant Permission Scheme—the same relief the district court ordered. Rule 29.3 gives this Court authority to "make any temporary orders necessary to preserve the parties' rights until disposition of the [interlocutory] appeal." Tex. R. App. P. 29.3. To obtain relief under Rule 29.3, the Food Truck Appellees must make a "clear showing that enjoining the ordinance[s] . . . during the pendency of this appeal is necessary to preserve [their] rights." *See Tex. Assoc. of Bus. v. City of Austin*, No. 03-18-00445-CV, 2018 WL 3967045, at *1 (Tex. App.—Austin Aug. 17, 2018, pet. denied) (granting Rule 29.3 motion and enjoining challenged ordinances from taking effect).

A Rule 29.3 order is necessary to prevent irreparable harm. Constitutional violations are routinely recognized as irreparable harms warranting injunctive relief. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Appellees Surfvive, Anubis Avalos, and Adonai Avalos seek to operate their food trucks on South Padre Island and have prevailed in court against the anti-

competitive and unconstitutional barriers to entry that stifled their ability to do so for years. *See* CR.1606–13, SurfVive Aff.; CR.1614–19, Avalos Aff. (Anubis); CR.1620–25, Avalos Aff. (Adonai); *see also* Exhibit I (affidavits); CR.3058, MSJ Order (Exhibit D). And as explained above, the City is flouting the district court's authority and continues enforcing the Permit Cap and Restaurant-Permission Scheme despite the district court declaring both unconstitutional and permanently enjoining further enforcement.

And unlike the preliminary injunction context, the district court's MSJ Order was an entry of summary *judgment* on a full record after discovery. That the City keeps enforcing the Permit Cap and Restaurant Permission Scheme—*after* the district court declared them both unconstitutional and permanently enjoined them—reflects the distilled essence of irreparable injury.

The Texas Supreme Court has pronounced that a Rule 29.3 Motion is the appropriate means to shield a party from irreparable harm when an interlocutory appeal triggers a stay of proceedings under Section 51.014(b) of the Texas Civil Practices and Remedies Code. Just two years ago, the high court stated that 51.014(b) "does not prevent [a party] from

asking the court of appeals to protect it from irreparable harm. Rule 29.3 expressly contemplates that such relief is directly available in the court of appeals." *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019).

The Rule 29.3 order Appellees seek is limited. It asks only that this Court temporarily enforce the same terms as the MSJ Order entered below, which enjoined the City from enforcing the Permit Cap and Restaurant Permission Scheme. This will protect the constitutional rights of the Food Truck Appellees, as the district court recognized when it entered summary judgment that the Permit Cap and Restaurant Permission Scheme violate the Texas Constitution.

CONCLUSION AND PRAYER

For these reasons, Food Truck Appellees ask the Court to GRANT the Rule 29.3 Motion and ENJOIN the City from enforcing the Permit Cap and Restaurant Permission Scheme, SPI City Code §§ 10-31(C)(2), (C)(3), and (F)(2)(a), until disposition of the City's interlocutory appeal.

RESPECTFULLY SUBMITTED this 21st day of January, 2021.

INSTITUTE FOR JUSTICE

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VERIFICATION

STATE OF TEXAS §
TRAVIS COUNTY §

My name is Arif Panju, my date of birth is [redacted], and my address is 816 Congress Avenue, Suite 960, Austin, Travis County, TX 78701. Pursuant to Tex. Civ. Prac. & Rem. Code § 132.001(a), I, Arif Panju do verify and declare under penalty of perjury that the facts stated in Appellees' Verified Rule 29.3 Motion for Relief are within my personal knowledge and are true and correct. The exhibits attached to this Motion are true and correct copies of Exhibits A through I as either filed in the district court or, in the case of emails and public statements by the City of South Padre Island, collected and maintained in the course of my representation of Plaintiffs/Appellees in this matter.

Executed in Travis County, State of Texas, on the 21st day of January, 2021.

Arif Panju

CERTIFICATE OF CONFERENCE

As required by Texas Rule of Appellate Procedure 10.1(a)(5), I certify to the Court that I conferred with opposing counsel on December 23, 2020, about the merits of this motion, and opposing counsel has indicated that he opposes the motion.

/s/ Arif Panju
Arif Panju (TX Bar No. 24070380)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 2021, a true and correct copy of the foregoing Verified Rule 29.3 Motion for Relief was filed with the Clerk of Court and served in compliance with Tex. R. App. P. 9.5(b)(1) via the Court's electronic filing system on the following counsel of record:

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Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT A

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 Cameron County - 138th District Court _____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION,
APPLICATION FOR INJUNCTIVE RELIEF,
AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, SurfVive; Anubis Avalos; and Adonai Ramses Avalos, Plaintiffs herein, and file their Original Petition, Application for Injunctive Relief, and Request for Disclosure against the City of South Padre Island, Texas, Defendant herein. In support of their Original Petition, Application for Injunctive Relief, and Request for Disclosure, Plaintiffs would show the Court the following:

I. INTRODUCTION

1. This lawsuit seeks to vindicate Plaintiffs' economic liberty rights under Article I, § 19 of the Texas Constitution, to operate their mobile-food-unit businesses, colloquially known as "food trucks," free from unreasonable and protectionist government interference.

2. Plaintiffs challenge the constitutionality of two restrictions under the City of South Padre Island's vending laws, which: (1) prohibit entrepreneurs from operating a food truck

business in South Padre Island unless the owner of a restaurant signs off on their permit application, contained in § 10-31(C)(3) of the South Padre Island City Code (the "Restaurant Permission Requirement"); and (2) prohibit more than twelve food trucks from obtaining operating permits for South Padre Island, Texas, contained in §§ 10-31(C)(2), (F)(2)(a) of the South Padre Island City Code (the "Permit Cap").

3. Plaintiffs own and operate food trucks that offer their customers affordable, freshly prepared food. The food trucks that Plaintiffs operate allow them to support their families and communities, and also to employ others seeking to do the same.

4. With four million annual visitors, South Padre Island is an attractive location for food-truck entrepreneurs seeking to feed hungry residents and the island's many visitors. But in response to complaints by brick-and-mortar restaurants, the City of South Padre Island has made it impossible for independent mobile vendors like Plaintiffs to operate on private property on the island.

5. The City of South Padre Island's ("Defendant") enforcement of its Restaurant Permission Requirement prohibits Plaintiffs SurfVive, Anubis Avalos, and Adonai Ramses Avalos (collectively, the "Plaintiffs") from operating their food trucks unless the owner of a brick-and-mortar restaurant in South Padre Island signs off on their permit applications. To have any chance at satisfying this restriction, the City forces Plaintiffs and other vendors to ask owners of competing restaurants to sign off on their permit applications, or else not open for business. The Restaurant Permission Requirement applies to all food trucks seeking to operate on private property in South Padre Island, Texas.

6. Defendant also enforces its Permit Cap in order to limit the number of food trucks in South Padre Island. To have any chance at operating a food truck once Defendant issues twelve

active mobile-food-unit permits, the food truck entrepreneurs must wait, indefinitely, until a food truck operating in South Padre Island relinquishes its permit. Plaintiffs want to operate their existing food trucks and, in the case of the Avalos brothers, expand by adding additional trucks, and do so regardless of whether they are the first, twelfth, or twentieth truck seeking to operate on the island.

7. Defendant's Restaurant Permission Requirement and Permit Cap do not address any public health or safety concern; their purpose and actual real-world effect are to protect restaurants and other brick-and-mortar food establishments from competition by food trucks.

8. Defendant's actions deprive Plaintiffs of their right to pursue a lawful occupation free from unreasonable government interference, impose oppressive burdens with no countervailing public benefits, and violate the guarantees afforded Plaintiffs by the Due Course of Law Clause of Article I, § 19 of the Texas Constitution. Accordingly, Defendant's Restaurant Permission Requirement and Permit Cap should be declared unconstitutional and permanently enjoined.

II. PARTIES AND SERVICE OF PROCESS

PLAINTIFFS

9. Plaintiff SurfVive is a 501(c)(3) nonprofit organization based in Bayview, Cameron County, Texas that owns the SurfVive food truck, a permitted mobile food unit in Cameron County, Texas. SurfVive was founded in 2016, and its operations are run by Erica Lerma. Defendant's enforcement of its Restaurant Permission Requirement is barring SurfVive from operating its food truck in South Padre Island, Texas because the owner of a restaurant did not sign off on SurfVive's permit application. Defendant has further interfered with SurfVive's ability to operate its food truck by enforcing its Permit Cap, which prohibits SurfVive from operating its food truck until a permit becomes available.

10. Plaintiffs Anubis Avalos and Adonai "Ramses" Avalos are brothers who reside in Cameron County, Texas. Anubis and Ramses are co-owners of the Chile de Árbol food truck, a permitted mobile food unit in Cameron County, Texas. The Chile de Árbol food truck currently operates on private commercial property in Cameron County, Texas. Plaintiffs Anubis and Ramses Avalos seek to grow their food truck business to South Padre Island, Texas, but Defendant's enforcement of its Restaurant Permission Requirement prohibits Anubis and Adonai from opening a Chile de Árbol food truck on the island without the signed permission of a South Padre Island restaurant owner. Defendant is further interfering with their ability to operate a food truck on the island by enforcing its Permit Cap, which prohibits the opening of a Chile de Árbol food truck on the island until a permit becomes available.

DEFENDANT

11. Defendant City of South Padre Island is a municipality organized under the laws of the State of Texas. Defendant is located at City Hall, 4601 Padre Boulevard, South Padre Island, Cameron County, Texas.

III. DISCOVERY CONTROL PLAN

12. Plaintiffs intend to conduct Level 2 discovery under Rule 190.3 of the Texas Rules of Civil Procedure.

IV. JURISDICTION AND VENUE

13. Plaintiffs bring this lawsuit pursuant to the Due Course of Law Clause contained in Article I, § 19 of the Texas Constitution, and the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.003.

14. Plaintiffs seek declaratory and injunctive relief against the enforcement of Defendant's Restaurant Permission Requirement and Permit Cap, related implementing rules and

regulations, and the practices and policies of Defendant, that unconstitutionally deny Plaintiffs the ability to operate their mobile food establishments free from unreasonable and protectionist government interference.

15. The Court has subject matter jurisdiction because Plaintiffs seek to vindicate their rights under the Texas Constitution, because Plaintiffs seek a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code Ann. § 37.003, and because Plaintiffs seek injunctive relief against a municipality organized under the laws of the State of Texas, *see* Tex. Civ. Prac. & Rem. Code Ann. § 65.021.

16. Venue is proper in Cameron County pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.002(a)(1), (3).

V. FACTS

THE FOOD TRUCK INDUSTRY IN THE UNITED STATES

17. Plaintiffs hereby incorporate the allegations set forth above, all of which are fully re-alleged here.

18. Mobile food establishments, such as the food trucks operated by Plaintiffs, are commercial vehicles that allow entrepreneurs to travel from place to place, or remain at a fixed location, in order to sell and serve food to customers.

19. Food trucks take many different forms. Some only serve food that is prepared and prepackaged in a licensed commercial kitchen. Others, like those operated by Plaintiffs, are self-sufficient mobile kitchens that let those working on board prepare and serve food directly from the truck.

20. In addition to providing new jobs, food trucks offer communities a greater and more varied selection of food choices.

21. Food trucks complement, rather than replace, existing brick-and-mortar restaurants. Many mobile vending entrepreneurs later open restaurants, and many restaurant entrepreneurs expand by opening food trucks.

PLAINTIFFS AND THEIR FOOD TRUCKS

SURFVIVE

22. Plaintiff SurfVive is a 501(c)(3) non-profit organization whose mission is "to sow love through surfing, food, and all forms of art." SurfVive's mission centers on promoting healthy living. In pursuit of this mission, SurfVive runs a free surfing school, operates learning gardens to teach the importance of responsible food choices, and runs a composting service. SurfVive's operations are run by one of its co-founders, Erica Lerma.

23. To support its mission and promote healthy eating, SurfVive purchased a food truck in March 2018 in order to sell smoothies, coffee, and vegetable bowls in South Padre Island.

24. After purchasing its food truck, SurfVive obtained a mobile-vending-unit permit from Cameron County, Texas. Before issuing the permit, the Cameron County Public Health Environmental Health Program required that SurfVive's food truck pass a fire inspection, along with submitting proof of a Texas sales and tax permit, insurance, contract for disposal of waste water, and certified food manager certification, among other requirements.

25. SurfVive sought to operate its food truck in South Padre Island, Texas beginning in April 2018, but it learned that Defendant had no permits available. As a result, SurfVive could not operate its food truck on the island.

26. To vend in South Padre Island, Defendant requires mobile food units to operate on private property in designated areas identified in § 10-31(C)(1) of the South Padre Island City Code.

27. On June 2, 2018, Defendant's Environmental Health Director, Victor Baldovinos, contacted Erica Lerma to inform her that the mobile-food-unit permit cap had been raised from six to twelve, and that SurfVive could apply for one of the newly available permits.

28. In her capacity as SurfVive's director, Erica Lerma obtained Defendant's application and scouted potential vending locations. In the course of doing so, Erica noticed a section of the application labeled "Local Establishment Support," which asked for a name, address, and signature. Erica interpreted this as requiring the name, address, and signature of the owner on whose property SurfVive would vend; in an attempt to satisfy the application requirement, Erica identified the Plaza Island Center at 5009 Padre Boulevard as SurfVive's would-be vending location, and obtained signatures from the Plaza's owner.

29. Erica Lerma submitted SurfVive's application for a mobile-food-unit permit on September 24, 2018.

30. Defendant's Environmental Health Director, Victor Baldovinos, contacted Erica on September 24, 2018, the same day SurfVive filed its mobile-food-unit application, asking her to come meet with him because SurfVive's "application [was] missing information."

31. On October 1, 2018, Erica Lerma met with Director Baldovinos to discuss SurfVive's permit application. At the appointment, Director Baldovinos informed Erica that SurfVive's mobile-food-unit permit application needed the signature of a local restaurant owner, and explained that the "Local Establishment Support" section of the permit application was the Restaurant Permission Requirement, and that SurfVive's application would not be approved until the owner of a South Padre Island restaurant signed the permit application.

32. Erica asked Director Baldovinos why SurfVive needed to obtain permission from a would-be brick-and-mortar competitor in order to apply for a permit, and Director Baldovinos

informed her that the Restaurant Permission Requirement was necessary for passage of Defendant's mobile-food-unit ordinance. Director Baldovinos further informed Erica that several local restaurant owners had included the Restaurant Permission Requirement in the ordinance and were on a committee, but he refused to identify the restaurant owners who served on this committee without an open records request. In response, Erica filed an open records request.

33. Erica filed an open records request seeking documents regarding Defendant's Food Truck Planning Committee, formalized in section 10-31.1 of the City of South Padre Island's City Code. Entitled "Evaluation," the Code describes the Committee as being responsible for "evaluat[ing] the program's effectiveness" and for "tak[ing] their recommendations to City Council no later than April 17, 2017." In response to Erica's open records request, Mr. Baldovinos informed Erica that the Committee was "headed by Arnie Crennin from Gabriela," an Italian restaurant and pizzeria in South Padre Island, and that the "[o]wners" of the following restaurants were invited to the Committee: Parrot Eyes, Padre Rita Grill, Padre Island Brewing Company, Louie's Backyard, Pier 19, and Laguna Bob's.

34. SurfVive rejects, on principle, Defendant's Restaurant Permission Requirement and being forced to get a would-be brick-and-mortar competitor to sign off on their mobile-food-unit permit application in order to open for business on the island.

35. Defendant's Permit Cap, together with its Restaurant Permission Requirement, also interferes with SurfVive's efforts at expanding its programs, including having to invest in a second SurfVive food truck without knowing if Defendant will ever have an available mobile-food-unit permit for the second truck.

ANUBIS AND ADONAI "RAMSES" AVALOS

36. Plaintiffs Anubis and Adonai "Ramses" Avalos own and operate Chile de Árbol, a permitted mobile food unit in Cameron County, Texas. Anubis and Ramses co-own their business, which they operate on nights and weekends.

37. Ramses and Anubis Avalos are brothers who share passions for music and healthy food. A local piano teacher and accompanist for school choirs, Ramses shares his musical gift with students in the community. His brother, Anubis, similarly passes on his love of music to his guitar students, when he is not working his day job as a high school teacher.

38. In spite of their busy schedules, the Avalos brothers decided to embark on a new venture. Both Ramses and Anubis adhere to a vegan diet and, after having difficulty finding affordable and flavorful meatless food options, they decided to open a food truck, Chile de Árbol.

39. Before opening for business, Anubis and Ramses had to satisfy the requirements for Cameron County's mobile-vending-unit permit. The Cameron County Public Health Environmental Health Program required that their Chile de Árbol food truck pass a fire inspection, along with providing proof of a Texas sales and tax permit, insurance, contract for disposal of waste water, and certified food manager certification, among other requirements.

40. Anubis and Ramses opened Chile de Árbol in November 2017, setting up shop on Tuesdays through Saturdays at The Broken Sprocket, a food truck park in Brownsville, Texas. They serve a wide variety of meals, including tacos, burgers, and Indian-inspired bowls. All options are free of meat, eggs, or dairy. Since opening Chile de Árbol, the Avalos brothers have earned a loyal customer following.

41. Anubis and Ramses want to expand their Chile de Árbol food truck business by bringing their tasty food options to residents and visitors in South Padre Island. Like SurfVive, however, they reject Defendant's Restaurant Permission Requirement and being forced to get a would-be brick-and-mortar competitor to sign off on their mobile-food-unit permit application in order to open for business on the island. Defendant's Permit Cap also interferes with the Avalos brothers' efforts at expanding their food truck business, including having to invest in a new Chile de Árbol food truck without knowing if Defendant will ever have an available mobile-food-unit permit that allows them to open for business on the island.

SOUTH PADRE ISLAND'S RESTAURANT PERMISSION REQUIREMENT FOR FOOD TRUCKS

42. Defendant severely restricts the marketplace for mobile food vending in the city of South Padre Island.

43. A permitted mobile food unit (referred to herein as a "food truck" or "food trucks") is subject to Chapter 10 of the South Padre Island Code, including the operation requirements and restrictions contained in § 10-31.

44. According to Defendant's Restaurant Permission Requirement, an applicant for a mobile-food-unit permit "must be supported locally and have the signature of an owner or designee of a licensed, free-standing food unit in South Padre Island before being eligible for a permit." South Padre Island, Tex., Code § 10-31(C)(3).

45. Section 10-31(C)(3) means that, for food trucks to have any chance at vending in South Padre Island, an applicant must persuade the owner of a brick-and-mortar restaurant to sign their permit application, even though the applicant would be competing with the restaurant.

46. The Restaurant Permission Requirement applies to all food trucks seeking to operate on private property in South Padre Island, Texas.

47. Upon information and belief, the Restaurant Permission Requirement was written, and advocated for, by South Padre Island restaurant owners.

SOUTH PADRE ISLAND'S PERMIT CAP ON FOOD TRUCK PERMITS

48. Defendant further restricts food trucks from operating in South Padre Island by severely limiting the number of available mobile-food-unit permits. Under the Permit Cap, "[n]o more than Twelve (12) mobile food unit permits may be issued per month on the island[,]" South Padre Island, Tex. Code § 10-31(C)(2), and a mobile-food-unit permit is "valid for 30 days[,]" *id.* at § 10-31(F)(2)(a).

49. Under South Padre Island, Tex. Code §§ 10-31(C)(2) and 10-31(F)(2)(a), there can only be only twelve permitted mobile food units in South Padre Island at any given time.

50. The Permit Cap applies to all food trucks seeking to operate on private property in South Padre Island, Texas.

51. Upon information and belief, the Permit Cap was written, and advocated for, by South Padre Island restaurant owners.

IMPACT OF RESTAURANT PERMISSION REQUIREMENT AND PERMIT CAP ON SOUTH PADRE ISLAND'S FOOD TRUCKS

52. Defendant's Restaurant Permission Requirement and the Permit Cap significantly burden food truck businesses wishing to vend in South Padre Island.

53. The Restaurant Permission Requirement significantly burdens food truck owners seeking to vend in South Padre Island because it gives restaurant owners power to veto their food-truck competition by refusing to sign a mobile-food-unit permit application.

54. In order to submit a complete permit application to Defendant, a food truck owner must approach restaurant owners in South Padre Island and ask for a signature granting them permission to compete with the restaurant for customers in South Padre Island.

55. Owners of South Padre Island restaurants, or other brick-and-mortar food establishments, may refuse to sign an application for any reason, and need not provide a reason for refusing to do so.

56. Upon information and belief, owners of restaurants and other brick-and-mortar food establishments often refuse to sign off on a food truck owner's mobile-food-unit application.

57. Even if a South Padre Island restaurant owner does sign a food truck's permit application, Defendant will deny the application under the Permit Cap if it has already issued twelve mobile-food-unit permits.

58. The Permit Cap significantly burdens would-be vendors once twelve food trucks obtain mobile-food-unit permits; Defendant flatly prohibits any other food trucks from vending on the island until an existing permit holder relinquishes their permit.

59. Both the Restaurant Permission Requirement and Permit Cap create significant business risk for existing and aspiring food truck entrepreneurs. There are many fixed and variable costs involved with starting a new food truck or growing an existing food truck business. This investment can be lost if no South Padre Island restaurant owner is willing to sign a food truck's permit application (or renewal). Further risking a food truck owner's investment in their food truck business is Defendant's Permit Cap, including food truck owners having to invest in a new food truck without knowing if Defendant will ever have an available mobile-food-unit permit allowing the truck to open for business.

60. In South Padre Island, food truck entrepreneurs are forced to weigh their business investment against the prospect that no restaurant owner will allow them to enter the market by signing their permit application, or that none of Defendant's twelve mobile-food-unit permits will ever become available.

THE RESTAURANT PERMISSION REQUIREMENT'S FAILURE TO ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST

61. The Restaurant Permission Requirement advances no public health or safety purpose, nor any other legitimate governmental interest.

62. Defendant has no evidence that the Restaurant Permission Requirement advances any legitimate governmental interest.

63. The purpose and effect of the Restaurant Permission Requirement is to protect restaurants and other brick-and-mortar food establishments from competition by food trucks.

THE PERMIT CAP'S FAILURE TO ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST

64. The Permit Cap advances no public health or safety purpose, nor any other legitimate governmental interest.

65. Defendant has no evidence that the Permit Cap advances any legitimate governmental interest.

66. The purpose and effect of the Permit Cap is to protect restaurants and other food establishments from competition by food trucks.

VI. INJURY TO PLAINTIFFS

67. Plaintiffs hereby incorporate the allegations set forth above, all of which are fully re-alleged here.

68. The Restaurant Permission Requirement prohibits Plaintiffs from operating their food trucks in South Padre Island unless they obtain the signature of a South Padre Island restaurant owner on their permit applications.

69. The Restaurant Permission Requirement allows owners of South Padre Island restaurants and other brick-and-mortar food establishments to veto their food-truck competition by refusing to sign Plaintiffs' mobile-food-unit permit applications.

70. The Permit Cap prohibits Plaintiffs from operating their food trucks in South Padre Island unless Defendant happens to have issued fewer than twelve mobile-food-unit permits.

PLAINTIFF SURFVIVE

71. Plaintiff SurfVive seeks to operate its SurfVive food truck on private property at the Plaza Island Center, 5009 Padre Boulevard, South Padre Island, without first obtaining the signed permission of a South Padre Island restaurant owner.

72. But for the specific application of the Restaurant Permission Requirement against Plaintiff SurfVive, it would have obtained a mobile-food-unit permit and began operating its food truck in South Padre Island in September 2018.

73. But for the specific application of the Restaurant Permission Requirement against Plaintiff SurfVive, its attempt to obtain a mobile-food-unit permit would not require approaching its would-be brick-and-mortar restaurant competitors and asking for their signed permission to open for business.

74. But for the specific application of the Permit Cap against Plaintiff SurfVive, it would have applied for a mobile-food-unit permit in South Padre Island in April 2018.

75. But for the specific application of the Permit Cap against Plaintiff SurfVive, it would be eligible for a mobile-food-unit permit, regardless of how many permits Defendant has issued to other food truck owners.

76. But for the specific application of the Restaurant Permission Requirement and Permit Cap against Plaintiff SurfVive, it would immediately obtain a mobile-food-unit permit and

operate in South Padre Island. In so doing, Plaintiff SurfVive's food truck would be able to generate revenue that supports SurfVive's programs; instead, SurfVive's food truck cannot operate on the island.

77. But for the specific application of the Restaurant Permission Requirement and Permit Cap against Plaintiff SurfVive, it could expand its programs and invest in a second food truck free from the significant business risk created by Defendant's Restaurant Permission Requirement and Permit Cap.

PLAINTIFFS ANUBIS AND ADONAI "RAMSES" AVALOS

78. Plaintiffs Anubis and Adonai "Ramses" Avalos seek to operate their food truck, Chile de Árbol, in South Padre Island.

79. But for the specific application of the Restaurant Permission Requirement against Plaintiffs Anubis and Ramses Avalos, they would seek a mobile-food-unit permit in order to expand their Chile de Árbol food truck business in South Padre Island, something they have found very difficult to do because the Restaurant Permission Requirement prevents them from operating a food truck without first obtaining the signed permission of a South Padre Island restaurant owner.

80. But for the specific application of the Permit Cap against Plaintiffs Anubis and Ramses Avalos, they would seek a mobile-food-unit permit in order to expand their Chile de Árbol food truck business in South Padre Island, something they have found very difficult to do because the Permit Cap bars food trucks from operating on the island once Defendant issues mobile-food-unit permits to twelve food trucks.

81. But for the specific application of the Permit Cap against Plaintiffs Anubis and Ramses Avalos, they would be eligible for a mobile-food-unit permit, regardless of how many permits Defendant has issued to other food truck owners.

82. But for the specific application of the Restaurant Permission Requirement and Permit Cap against Plaintiffs Anubis and Ramses Avalos, they would obtain a mobile-food-unit permit and operate in South Padre Island as soon as possible.

83. But for the specific application of the Restaurant Permission Requirement and Permit Cap against Plaintiffs Anubis and Ramses Avalos, they could pursue new vending locations and invest in a second food truck free from the significant business risk created by Defendant's Restaurant Permission Requirement and Permit Cap.

VII. CAUSES OF ACTION

(TEX. CONST. ART. I, § 19—DEPRIVATION OF LIBERTY; DUE COURSE OF THE LAW OF THE LAND)

84. Plaintiffs hereby incorporate the allegations set forth above, all of which are fully re-alleged here.

85. Article I, § 19 of the Texas Constitution provides that:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.

86. Among the rights secured by the due course of the law of the land guarantee of the Texas Constitution, commonly known as the constitution's "substantive due course of law" guarantee, is the right to earn an honest living in the occupation of one's choice free from unreasonable government interference.

87. Defendant has violated the substantive due course of law guarantee in Article I, § 19 of the Texas Constitution by enacting and enforcing the Restaurant Permission Requirement,

which bars Plaintiffs from operating their food trucks on private property in South Padre Island without first obtaining the signature of a South Padre Island restaurant owner on their mobile-food-unit permit application.

88. Defendant's Restaurant Permission Requirement violates Article I, § 19 of the Texas Constitution both on its face and as-applied to Plaintiffs.

89. Defendant has no legitimate governmental interest for enacting or enforcing the Restaurant Permission Requirement against Plaintiffs, or other mobile food establishments.

90. The purpose of Defendant's Restaurant Permission Requirement is not rationally related to a legitimate governmental interest.

91. The Restaurant Permission Requirement's actual, real-world effect is not connected to a legitimate governmental interest.

92. The Restaurant Permission Requirement's actual, real-world effect is so burdensome as to be unconstitutionally oppressive.

93. Defendant has violated the substantive due course of law guarantee in Article I, § 19 of the Texas Constitution by enacting and enforcing the Permit Cap, which bars Plaintiffs from operating their food trucks on private property in South Padre Island once Defendant issues mobile-food-unit permits to twelve food trucks.

94. Defendant's Permit Cap violates Article I, § 19 of the Texas Constitution both on its face and as-applied to Plaintiffs.

95. Defendant has no legitimate governmental interest for enacting or enforcing the Permit Cap against Plaintiffs or other mobile food establishments.

96. The purpose of Defendant's Permit Cap is not rationally related to a legitimate governmental interest.

97. The Permit Cap's actual, real-world effect is not connected to a legitimate governmental interest.

98. The Permit Cap's actual, real-world effect is so burdensome as to be unconstitutionally oppressive.

99. Defendant's police power does not extend to engaging in economic protectionism benefitting restaurants and other food establishments at the expense of food trucks and other mobile food establishments.

100. Pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001–37.011, Plaintiffs respectfully request the Court enter a judgment declaring that the Restaurant Permission Requirement, contained in § 10-31(C)(3) of the South Padre Island City Code, violates the Due Course of Law Clause of Article I, § 19 of the Texas Constitution, both on its face and as-applied to Plaintiffs.

101. Pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001–37.011, Plaintiffs respectfully request the Court enter a judgment declaring that the Permit Cap, contained in §§ 10-31(C)(2) and 10-31(F)(2)(a) of the South Padre Island City Code, violates the Due Course of Law Clause of Article I, § 19 of the Texas Constitution, both on its face and as-applied to Plaintiffs.

VIII. APPLICATION FOR PERMANENT INJUNCTION

102. Plaintiffs hereby incorporate the allegations set forth above, all of which are fully re-alleged here.

103. Plaintiffs respectfully ask the Court to set their application for permanent injunction for a hearing and, following the hearing, to issue a permanent injunction against Defendant.

IX. ATTORNEYS' FEES

104. Plaintiffs hereby request all costs and reasonable attorneys' fees, as permitted by section 37.009 of the Texas Civil Practices and Remedies Code.

X. REQUEST FOR DISCLOSURE

105. Plaintiffs request that Defendant disclose to Plaintiffs, within 50 days of the service of this request, the information and materials described in Rule 194.2(a), (b), (c), (e), (f), (i), and (l) of the Texas Rules of Civil Procedure.

XI. PRAYER AND RELIEF REQUESTED

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For a permanent injunction barring Defendant from enforcing South Padre Island City Code § 10-31(C)(3);

B. For a permanent injunction barring Defendant from enforcing South Padre Island City Code §§ 10-31(C)(2) and 10-31(F)(2)(a);

C. For a declaratory judgment that Defendant's enforcement of South Padre Island City Code § 10-31(C)(3) against Plaintiffs violates the Due Course of Law Clause contained in Article I, § 19 of the Texas Constitution, both on its face and as-applied, by unreasonably interfering with Plaintiffs' right to earn a living free from unreasonable government interference;

D. For a declaratory judgment that Defendant's enforcement of South Padre Island City Code § 10-31(C)(2) and 10-31(F)(2)(a) against Plaintiffs violates the Due Course of Law Clause contained in Article I, § 19 of the Texas Constitution, both on its face and as-applied, by unreasonably interfering with Plaintiffs' right to earn a living free from unreasonable government interference;

E. For an award of one dollar in nominal damages;

F. For an award of attorneys' fees and court costs; and

G. For all other legal and equitable relief to which Plaintiffs may be entitled.

RESPECTFULLY SUBMITTED this 28th day of February, 2019.

INSTITUTE FOR JUSTICE

By: /s/ Arif Panju
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Email: kwest@ij.org

Attorneys for Plaintiffs

* Motion for Admission *Pro Hac Vice* to be filed.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF CAMERON §

BEFORE ME, the undersigned authority, on this day personally appeared Erica Lerma, in her capacity as Director of SURFVIVE, a 501(c)(3) nonprofit organization, whose name is subscribed below and after having been duly sworn, on her oath stated that the facts set forth in paragraphs 9, 22–35, 52–60, 71–77, of the foregoing Plaintiffs' Original Petition, Application for Injunctive Relief, and Request for Disclosure are within her personal knowledge and are true and correct.

E Lerma

ERICA LERMA
DIRECTOR OF SURFVIVE

SUBSCRIBED AND SWORN TO before me on this the 27 day of February, 2019.

PAUL L. FOURT
Notary Public, State of Texas
Comm. Expires 02-24-2023
Notary ID 124011480

P Fourt Jr

Notary Public — State of Texas

My Commission Expires: 2/24/23

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF CAMERON §

BEFORE ME, the undersigned authority, on this day personally appeared ANUBIS AVALOS, whose name is subscribed below and after having been duly sworn, on his oath stated that the facts set forth in paragraphs 10, 36–41 52–60, 78–83 of the foregoing Plaintiffs' Original Petition, Application for Injunctive Relief, and Request for Disclosure are within his personal knowledge and are true and correct.

Anubis Avalos
ANUBIS AVALOS

SUBSCRIBED AND SWORN TO before me on this the 27 day of February, 2019.

PAUL L. FOURT
Notary Public, State of Texas
Comm. Expires 02-24-2023
Notary ID 124011480

P Fourt Jr
Notary Public — State of Texas

My Commission Expires: 2/24/23

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF CAMERON §

BEFORE ME, the undersigned authority, on this day personally appeared ADONAI RAMSES AVALOS, whose name is subscribed below and after having been duly sworn, on his oath stated that the facts set forth in paragraphs 10, 36–41 52–60, 78–83 of the foregoing Plaintiffs' Original Petition, Application for Injunctive Relief, and Request for Disclosure are within his personal knowledge and are true and correct.

ADONAI RAMSES AVALOS

SUBSCRIBED AND SWORN TO before me on this the 27 day of February, 2019.

PAUL L. FOURT
Notary Public, State of Texas
Comm. Expires 02-24-2023
Notary ID 124011480

Notary Public — State of Texas

My Commission Expires: 2/24/23

Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT B

RECEIVED 1/17/2020 3:40 PM
2019-DCL-01284 / 40072744
ELVIRA S. ORTIZ
Cameron County District Clerk
By Adriana Munoz Deputy Clerk

CAUSE NO. 2019-DCL-01284

SURFVIVE, ANUBIS AVALOS AND ADONAI RAMSES AVALOS	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	
VS.	§	**138TH JUDICIAL DISTRICT**
	§	
CITY OF SOUTH PADRE ISLAND,	§	
Defendant	§	**CAMERON COUNTY, TEXAS**

ORDER

==========

BE IT REMEMBERED THAT on the 9th day of January, the Court took under consideration the following pending matters before it specifically, Plaintiffs' Motion for Protection [filed Dec. 6, 2019]; Plaintiffs' Motion for Emergency Hearing [filed Dec. 9, 2019]; Plaintiffs' Emergency Motion to Compel Attendance at Entity Deposition and Motion for Sanctions [filed Dec. 9, 2019]; Plaintiffs' Motion for Protection of Nonparty Broken Sprocket [filed Dec. 12, 2019]; Defendant's Motion to Abate and Special Exception [filed Nov. 19, 2019]; Defendant's Motion to Quash Plaintiffs' Notices of Intent to Serve Non-Party Request and Subpoena [filed Nov. 19, 2019]; Defendant's Motion to Compel Discovery Responses [filed Nov. 20, 2019]; Defendant's Motion to Quash the Deposition of Nonparty Arnie Creinin [filed Nov. 27, 2019]; Defendant's Second Motion to Compel Discovery Responses and Motion for Sanctions [filed Dec. 9, 2019]; Defendant's Opposition and Motion to Strike Plaintiffs' Motion for Emergency Hearing and Response to Plaintiffs' Opposition to Defendant's Motion to Quash [filed 12/11/2019]; Defendant's Response to Plaintiffs' Motion for Protection of Non-Party Broken Sprocket and Third Motion to Compel [filed 12/13/2019]; and Defendant's Opposed Motion to Refer Case to Mediation [filed Dec. 16, 2019]. The Court also reviewed the parties' briefs in response to the above-referenced motions and heard oral argument on the 9th day of January 2020. Having reviewed the motions, responses, and governing law, the Court now enters the following Orders:

1. IT IS HEREBY ORDERED that Plaintiffs' Motion for Protection is GRANTED in part and DENIED in part, as more fully set forth below:
    a. Plaintiffs are protected from discovery seeking financial records, including income statements, balance sheets, and/or any prepared financial statements;
    b. Plaintiffs are protected from discovery seeking banking information, including bank statements, deposit slips, and/or cancelled checks;

c. Plaintiffs are protected from discovery seeking records of all businesses which operate under Surfvive;
d. Plaintiffs are protected from discovery seeking driver's license numbers and social security numbers;

2. IT IS HEREBY ORDERED that Defendant's Motion to Compel Discovery Responses and Defendant's Second Motion to Compel Discovery Responses and Motion for Sanctions are both GRANTED in part and both DENIED in part, as more fully set forth below:

a. Plaintiff Surfvive shall produce its filings with the Internal Revenue Service and IRS Form 990 for 2017, 2018, and 2019;

b. Plaintiff Surfvive shall produce a copy of all registrations for the operation of its food truck in order to sell to the general public for 2017, 2018, and 2019;

c. Plaintiff Surfvive shall produce a copy of all leases and rental agreements that Surfvive was a party to for the years 2017, 2018, 2019;

d. Plaintiff Surfvive shall produce a copy of its corporate book, Articles of Incorporation, bylaws, and minute entries for 2017, 2018, and 2019;

e. Plaintiff Surfvive shall produce a copy of titles to automobiles, motor vehicles, trucks, tractors, trailers, and boats owned by Surfvive for 2017, 2018, and 2019;

f. Plaintiff Surfvive shall produce documents in its possession that reflect assumed name certificates filed by Surfvive for 2017, 2018, and 2019;

g. Defendant's Motion for Sanctions is DENIED.

h. Plaintiffs' shall produce the responsive documents identified in 2(a) through 2(f) within a reasonable time after plaintiffs' depositions are noticed by Defendant, but no later than sixty (60) days from the date of this Order;

3. IT IS HEREBY ORDERED that Plaintiffs' Emergency Motion to Compel Attendance at Entity Deposition and Motion for Sanctions is GRANTED in part and DENIED in part, as more fully set forth below:

a. Defendant shall produce its witness(es) at its entity deposition so that Plaintiffs may take Defendant's deposition within sixty (60) days from the date of this Order;

b. Plaintiffs' Motion for Sanctions is DENIED.

4. IT IS HEREBY ORDERED that Defendant's Motion to Quash Plaintiffs' Notices of Intent to Serve Non-Party Request and Subpoena and Defendant's Motion to Quash the Deposition of Nonparty Arnie Creinin are both DENIED;

5. IT IS HEREBY ORDERED that Plaintiffs may depose the Committee members that participated on the Food Truck Planning Committee. The following Committee members are ORDERED to appear at their noticed nonparty depositions within 60 days from the date of this Order: Arnie Creinin, Dan Stanton, Daniel Salazar, Dave Davis, Katherine Nowak, Kerry Schwartz, Mark Haggenmiller, Michael Lafferty, Shane Wilson, Theresa Metty, Virginia Guillot, and William Donahue;

6. IT IS HEREBY ORDERED that Plaintiffs' Motion for Protection of Non-Party Broken Sprocket is GRANTED;

7. IT IS HEREBY ORDERED that Defendant's Third Motion to Compel is DENIED;

8. IT IS HEREBY ORDERED that Defendant's Motion to Abate is DENIED and Defendant's Special Exception is DENIED as moot;

9. IT IS HEREBY ORDERED that Plaintiffs' Motion for Emergency Hearing is DENIED as moot;

10. IT IS HEREBY ORDERED that Defendant's Motion to Strike contained in Defendant's Opposition and Motion to Strike Plaintiffs' Motion for Emergency Hearing and Response to Plaintiffs' Opposition to Defendant's Motion to Quash is DENIED as moot;

11. IT IS FINALLY ORDERED that Defendant's Opposed Motion to Refer Case to Mediation is GRANTED in part and DENIED in part, as more fully set forth below:

    a. The Parties are hereby ORDERED to mediation by no later than April 15, 2020;

    b. The Court appoints Attorney Reynaldo G. Garza Jr. to serve as mediator in this case. The mediation shall be a full-day mediation and the costs of mediation shall be borne equally by the parties;

    c. Mediation shall take place only after Plaintiffs take Defendant's entity deposition and after Plaintiffs take depositions of the Committee members that participated on the Defendant's Food Truck Planning Committee;

    d. Mediation shall take place only after Defendant deposes Plaintiffs.

SIGNED on the 23rd day of JANUARY 2020.

Signed: 1/23/2020 10:48 AM

HON. ARTURO CISNEROS NELSON
JUDGE PRESIDING

FILED
2019-DCL-01284
January 24, 2020 2:27 PM
ELVIRA S. ORTIZ
CAMERON COUNTY DISTRICT CLERK
BY: Munoz, Adriana

APPROVED AS TO FORM:

Copies Sent to 1/24/2020

/s/ Arif Panju
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/s/ Frank Zabarte
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/s/ Ricardo J. Navarro
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Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT C

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

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.

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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

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]

[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

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.

***

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.

***

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.

***

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:

Francisco J. Zabarte
J. Arnold Aguilar
AGUILAR ZABARTE, LLC
990 Marine Dr.
Brownsville, TX 78520

Ricardo J. Navarro
DENTON, NAVARRO, ROCHA, BERNAL, & ZECH, P.C.
701 E. Harrison Ave., Suite 100
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Counsel for Defendant

/s/ Arif Panju

Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT D

RECEIVED 6/2/2020 12:02 AM
2019-DCL-01284 / 43389234
ELVIRA S. ORTIZ
Cameron County District Clerk
By Adriana Munoz Deputy Clerk

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

Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT E

RECEIVED 6/19/2020 5:55 PM
2019-DCL-01284 / 43906676
ELVIRA S. ORTIZ
Cameron County District Clerk
By Adriana Munoz Deputy Clerk

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

ORDER DENYING DEFENDANT'S SECOND PLEA TO THE JURISDICTION AND MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on *Defendant's Second Plea to the Jurisdiction and Motion for Summary Judgment.* Upon consideration of the submissions and arguments of counsel, IT IS HEREBY ORDERED that *Defendant's Second Plea to the Jurisdiction and Motion for Summary Judgment* is DENIED.

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

Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT F

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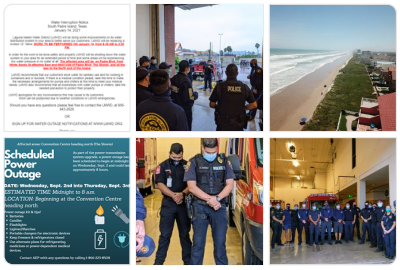

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City of South Padre Island
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Statement Regarding Food Truck Litigation:

City officials recently conferred with Texas Municipal League ("TML"), insurance carrier, assigned attorneys and have agreed to follow their recommendation to appeal the district judge's ruling denying the City's plea to the jurisdiction. The City, along with their attorneys, believe this decision to appeal will be in the best interest of the city, its citizens and residents, and will provide much-needed clarification of the City's Mobile Food ordinance and a municipality's authority to regulate and enforce sanitation and public health and safety requirements, as allowed under State law.

This appeal process, which TML counsel believes has a good chance of success, will also provide needed clarification of the district judge's preliminary ruling.

No written findings, conclusions or reasoning was given by the district Judge, and no judgment or order of any kind was entered granting specific relief, damages, or instructions to the City. The City has not violated any court orders and has always fully complied with the law. The health and safety of City residents and visitors will always remain a priority.

The current City Council and administration, who were mostly not involved in the enactment of the Mobile Food Ordinance, continue to strongly desire to put this matter behind them and move on with important City matters that need attention, but protecting the public health and safety of the City's residents and visitors is most important.

The Mobile Food Ordinance will remain in effect until further orders are issued by the Court of Appeals.

Protecting the health and safety of the public and requiring the proper sanitation conditions will always be a priority and will also assure the public and mobile food vendors of a successful, safe and sanitary environment.

Sincerely,

Mayor Patrick McNulty

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Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT G

Arif Panju

From: Arif Panju
Sent: Wednesday, December 23, 2020 12:02 PM
To: arnold aguilar; Ric J. Navarro; Francisco Zabarte
Subject: RE: Surfvive, et al. v. City of South Padre Island, No. 2019-DCL-01284
Attachments: Summary Judgment.tif

Arnold—

I am resending the below message confirming my conversation with you on Monday afternoon, 12/21, which I originally sent yesterday evening. It contains the following changes: (1) it corrects the quote from the district court's order granting Plaintiffs' Motion for Summary Judgment (cited twice below); and (2) clarifies that the order granting Plaintiffs' MSJ was signed on November 30, 2020 (but sent from chambers to counsel on December 7). I am also including as an attachment the district court's order granting Plaintiffs' MSJ.

***

Thank you for taking the time to speak with me on Monday afternoon about the district court's November 30, 2020 order that granted Plaintiffs' motion for summary judgment ("MSJ") (emailed to counsel on December 7, 2020). As you know, Plaintiffs' MSJ argued that South Padre Island's Restaurant Permission Scheme and Permit Cap violated the Due Course of Law guarantee in Article I, Section 19 of the Texas Constitution. The first page of Plaintiffs' Motion asked the Court to grant the Motion which sought "a declaratory judgment," "a permanent injunction barring Defendant from enforcing [either provision]," and an "award [to] each Plaintiff [of] one dollar ($1) in nominal damages," along with attorney's fees and costs.

On our call yesterday afternoon, I asked if the City agrees that the November 30 order granted Plaintiffs the relief their Motion sought. In response, you stated that the City does not know what the November 30 order means and needs to "figure it out." At various points, you suggested that perhaps the Court intended to only grant partial relief to Plaintiffs, despite no text in the order suggesting any such limitation. Indeed, the district court's order states, in full: "Upon consideration of the submissions and argument of counsel, IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED."

Indeed, despite this unqualified language, you suggested that the City does not view the district court's order as having granted *any of the remedies* sought in Plaintiffs' MSJ. For instance, I asked you whether the City recognizes whether the November 30 order enjoined it from enforcing the Restaurant Permission Scheme and Permit Cap. You refused to recognize that the City is subject to a permanent injunction. And when I asked if the City would continue to enforce the Permit Cap or Restaurant Permission Requirement, you refused to answer in the negative, stating again that the City does not know whether there is a permanent injunction in place.

Plaintiffs do not believe that the City's interpretation of the November 30 order is reasonable or justified by the order's text. The text is plain, and its scope is unmitigated. But I noted that one easy way to resolve any confusion about the order's scope is to simply ask the district court. But you rejected our invitation to do just that, representing that the City's filing of an interlocutory appeal prohibited that court from explaining the contours of its own order.

Despite that rejection, I suggested another path to get the City clarity on the order. I noted that Plaintiffs intended to file a motion in the Thirteenth Court of Appeals seeking enforcement of the district court's November 30 ruling on the merits during the pendency of the City's interlocutory appeal. Such a motion would allow the Thirteenth Court to provide the City an opportunity to seek clarification of the district court's order, should the City actually want clarification. In response, you confirmed that the City would *oppose* such a motion.

Lastly, I noted that the November 30 orders resolved both the jurisdictional issues in this case along with the merits—plaintiffs raised a single cause of action and prevailed at summary judgment. Therefore, I suggested that it would be far more efficient for the appellate court to review both issues simultaneously. To that end, I asked whether the City would be willing to file a notice appealing both issues, thereby avoiding the specter of piecemeal litigation. You refused that request and responded that the City intends to proceed on just the interlocutory appeal.

This series of responses is quite concerning. My clients sought and obtained a permanent injunction so they could operate their businesses. Now the City professes ignorance about whether such a permanent injunction exists while simultaneously refusing to engage in any process by which that ignorance could be lifted. This is untenable, and gives rise to the inference that the City is engaging in gamesmanship at the expense of my clients' constitutional rights and the district court's authority to interpret and enforce the Texas Constitution.

To that end, please confirm whether Plaintiffs' understanding of the City's position is correct. From our call, I understood that:

(1) the City recognizes that Plaintiffs' motion for summary judgment was granted by the district court;
(2) the City does *not* know what the district court meant in its order when it announced: "*Plaintiffs' Motion for Summary Judgment* is GRANTED";
(3) the City does not recognize the district court's order granting Plaintiffs' MSJ as providing Plaintiffs with any remedy sought in their MSJ; and
(4) the City will oppose Plaintiffs' motion in the Thirteenth Court seeking to enforce the district court's ruling on the merits and the permanent injunction that prohibits the City from continuing to enforce the laws that Plaintiffs successfully challenged under the Texas Constitution.

Please confirm by December 29 whether Plaintiffs' understanding of items (1) through (4) are correct. We hope to work with you to ensure that the issues in this case are resolved efficiently, and that the parties abide by their obligations as officers of the Court.

_____
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Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT H

Arif Panju

From: arnold aguilar <arnold@aguilarzabartellc.com>
Sent: Monday, December 28, 2020 1:57 PM
To: Arif Panju
Cc: Ric J. Navarro; Francisco Zabarte; Roger Hughes; Vivien Diamond
Subject: Surfvive, et al. v. City of South Padre Island

Arif,

I would like to clarify some of the matters you raised in your recent email of December 23 regarding the issues raised in your motion for summary judgment, the court's ruling on that motion, whether the district court has issued an enforceable injunction, and the authority of the district court or court of appeals to determine the contours of that order.

Your petition requested entry of two permanent injunctions, declaratory judgment on two issues, and an award of one dollar in nominal damages, attorneys' fees and costs. Although you challenged the merits of the two challenged portions of the City's ordinance, your motion for summary judgment asks only that "[t]he laws should therefore be declared unconstitutional and permanently enjoined." The district court's Order thereafter provided, *in toto*, "[t]his 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."

Texas Rule of Civil Procedure 683 provides that "[e]very order granting an injunction … shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint *or other document*, the act or acts sought to be restrained…." (emphasis added). "The requirements of Rule 683 are mandatory and must be strictly followed." *Interfirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (*per curiam*). *See also Qwest Communs. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000). "That is, the order must provide a 'detailed explanation of the reason for the injunction's issuance.'" *City of Corpus Christi v. Friends of the Coliseum*, 311 S.W.3d 706, 708 (Tex. App.—Corpus Christi-Edinburg 2010, no pet.), *quoting Adust Video v. Nueces County*, 996 S.W.2d 245, 249 (Tex. App.—Corpus Christi 1999, no pet.). "A trial court's order stating its reasons for granting a temporary injunction must be specific and legally sufficient on its face and not merely conclusory." *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 744 (Tex. App.—Dallas 2011, no pet.)

"[A]n injunction decree must be as definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing." *Villalobos v. Holguin*, 146 Tex. 474, 480, 208 S.W.2d 871, 875 (1948). "An injunction must be definite, clear, and concise, leaving the person enjoined in no doubt about his duties, and should not be such as would call on him for interpretations, inferences, or conclusions." *Vaughn v. Drennon*, 202 S.W.3d 308, 316 (Tex. App.—Tyler 2006, no pet.). "[T]he obvious purpose of [rule 683] is to adequately inform a party of what he is enjoined from doing and the reason why he is so enjoined." *El Tacaso, Inc.*, 356 S.W.3d at 744. "Even if a sound reason for granting relief appears elsewhere in the record, the Texas Supreme Court has stated in the strongest terms that rule of civil procedure 683 is mandatory." *Id.* at 745. "If an order fails to comply with these requirements, it is void and should be dissolved." *City of Corpus Christi*, 311 S.W.3d at 708.

As I am sure you will agree, the district court's order does not set forth the reasons for its issuance, it is not specific in terms, and it does not describe in reasonable detail and not by reference to the complaint or any other

document, the acts to be restrained, as required by Rule 683. That order also does not specifically enjoin the parties from taking or not taking any action, thus making it no more than an indication that the judge believes the Plaintiffs might someday be entitled to an as yet undefined injunction. "Because the order provides nothing that would enable [the City] to know exactly what duties or obligations are imposed upon [it], it is unenforceable." *Tarr v. Lantana Sw. Homeowners' Ass'n*, No. 03-14-00714-CV, 2016 Tex. App. LEXIS 13372, 2016 WL 7335861, at *28 (Tex. App.—Austin Dec. 16, 2016), dism'd as moot *sub nom. Felix Auto Tech v. Maeberry*, No. 01-16-00526-CV, 2017 Tex. App. LEXIS 268, 2017 WL 117330, at *1 (Tex. App.—Houston [1st Dist.] Jan. 12, 2017, no pet.). Therefore, to the extent you would contend that the district court's order somehow constitutes an injunction, it is void for lack of specificity in having failed to meet the requirements of Rule 683 and is unenforceable.

As set out in our Notice of Interlocutory Appeal, we challenge the district court's denial of the City's entitlement to dismissal of Plaintiffs' claims on the basis that its immunity from those claims has not been waived. The trial court is without jurisdiction to consider the merits of Plaintiff's claims without first determining whether it has jurisdiction to do so. "Immunity 'implicates a court's subject-matter jurisdiction over pending claims', and '[w]ithout jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case.'" *Zachry Constr. Corp. v. Port of Hous. Auth.*, 449 S.W.3d 98, 105 (Tex. 2014). We therefore continue to challenge authority of the trial court to take any further action on Plaintiffs' claims, as the law allows, because the trial and all other proceedings in this action are stayed pending resolution of the interlocutory appeal. TEX. CIV. PRAC & REM. CODE § 51.014(b), (c).

As the Texas Supreme Court has explained, neither the district court nor the court of appeals has the authority to lift the stay for the trial court to consider the matter as you suggest.

> Courts cannot add equitable or practical exceptions to section 51.014(b) that the legislature did not see fit to enact. The statute creates a clear and definite rule, and its text admits of no exceptions to that rule. The stay is of "*all* other proceedings in the trial court," and the text dictates that the stay lasts until "resolution of th[e] appeal," not until the court of appeals lifts the stay. Here, the court of appeals' order lifted the stay only for a limited purpose, but the statute contains no indication that courts of appeals may authorize further trial court proceedings as long as those proceedings are "limited." The statute stays "*all* other proceedings in the trial court," not "some" or "most" such proceedings.

In re Geomet Recycling, LLC, 578 S.W.3d 82, 87 (Tex. 2019), *quoting* TEX. CIV. PRAC. & REM. CODE § 51.014(b) (emphasis added). In short, we do not agree to waive the stay of all proceedings so you can request that the trial court issue an injunction favoring the Plaintiffs.

Therefore, in response to your queries, we would submit the following:

1. The City recognizes the court signed a document entitled "Order Granting Plaintiffs' Motion for Summary Judgment.
2. To the extent you would contend that the district court's order somehow constitutes an injunction, that order did not specify what it intended in granting the Plaintiffs' motion, does not set forth the reasons for its issuance, it is not specific in terms, and it does not describe in reasonable detail and not by reference to the complaint or any other document, the acts to be restrained, as required by Rule 683, thus making any implied injunction void and unenforceable. Otherwise, it is unclear what the trial court may have indicated in entering that order other than an intention that it may enter an injunction at some undetermined date.
3. The City recognizes that the district court's order did not identify or award Plaintiffs any remedy sought in their motion.
4. Although it is unclear what "ruling on the merits and … permanent injunction" the Plaintiffs would seek to enforce, because neither the district court nor the court of appeals has the authority to lift the

stay for the trial court to consider the matters you suggest, the City would be opposed to, and does not agree to waive, any effort to consider those matters.

I trust this satisfies your concerns.

J. Arnold Aguilar
AGUILAR ★ ZABARTE, LLC
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(956) 504-1100
(956) 504-1408 FAX

BOARD CERTIFIED Texas Board of Legal Specialization PERSONAL INJURY TRIAL LAW — Texas Bar College Professionalism Through Education — American Board of Trial Advocates

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From: Arif Panju [mailto:apanju@ij.org]
Sent: Wednesday, December 23, 2020 12:02 PM
To: arnold aguilar <arnold@aguilarzabartellc.com>; Ric J. Navarro <rjnavarro@rampage-rgv.com>; Francisco Zabarte <frank@aguilarzabartellc.com>
Subject: RE: Surfvive, et al. v. City of South Padre Island, No. 2019-DCL-01284

Arnold—

I am resending the below message confirming my conversation with you on Monday afternoon, 12/21, which I originally sent yesterday evening. It contains the following changes: (1) it corrects the quote from the district court's order granting Plaintiffs' Motion for Summary Judgment (cited twice below); and (2) clarifies that the order granting Plaintiffs' MSJ was signed on November 30, 2020 (but sent from chambers to counsel on December 7). I am also including as an attachment the district court's order granting Plaintiffs' MSJ.

***

Thank you for taking the time to speak with me on Monday afternoon about the district court's November 30, 2020 order that granted Plaintiffs' motion for summary judgment ("MSJ") (emailed to counsel on December 7, 2020). As you know, Plaintiffs' MSJ argued that South Padre Island's Restaurant Permission Scheme and Permit Cap violated the Due Course of Law guarantee in Article I, Section 19 of the Texas Constitution. The first page of Plaintiffs' Motion asked the Court to grant the Motion which sought "a declaratory judgment," "a permanent injunction barring Defendant from enforcing [either provision]," and an "award [to] each Plaintiff [of] one dollar ($1) in nominal damages," along with attorney's fees and costs.

On our call yesterday afternoon, I asked if the City agrees that the November 30 order granted Plaintiffs the relief their Motion sought. In response, you stated that the City does not know what the November 30 order means and needs to "figure it out." At various points, you suggested that perhaps the Court intended to only grant partial relief to Plaintiffs, despite no text in the order suggesting any such limitation. Indeed, the district court's order states, in full: "Upon consideration of the submissions and argument of counsel, IT IS HEREBY ORDERED that *Plaintiffs' Motion for Summary Judgment* is GRANTED."

Indeed, despite this unqualified language, you suggested that the City does not view the district court's order as having granted *any of the remedies* sought in Plaintiffs' MSJ. For instance, I asked you whether the City recognizes whether the November 30 order enjoined it from enforcing the Restaurant Permission Scheme and Permit Cap. You refused to recognize that the City is subject to a permanent injunction. And when I asked if the City would continue to enforce the

Permit Cap or Restaurant Permission Requirement, you refused to answer in the negative, stating again that the City does not know whether there is a permanent injunction in place.

Plaintiffs do not believe that the City's interpretation of the November 30 order is reasonable or justified by the order's text. The text is plain, and its scope is unmitigated. But I noted that one easy way to resolve any confusion about the order's scope is to simply ask the district court. But you rejected our invitation to do just that, representing that the City's filing of an interlocutory appeal prohibited that court from explaining the contours of its own order.

Despite that rejection, I suggested another path to get the City clarity on the order. I noted that Plaintiffs intended to file a motion in the Thirteenth Court of Appeals seeking enforcement of the district court's November 30 ruling on the merits during the pendency of the City's interlocutory appeal. Such a motion would allow the Thirteenth Court to provide the City an opportunity to seek clarification of the district court's order, should the City actually want clarification. In response, you confirmed that the City would *oppose* such a motion.

Lastly, I noted that the November 30 orders resolved both the jurisdictional issues in this case along with the merits—plaintiffs raised a single cause of action and prevailed at summary judgment. Therefore, I suggested that it would be far more efficient for the appellate court to review both issues simultaneously. To that end, I asked whether the City would be willing to file a notice appealing both issues, thereby avoiding the specter of piecemeal litigation. You refused that request and responded that the City intends to proceed on just the interlocutory appeal.

This series of responses is quite concerning. My clients sought and obtained a permanent injunction so they could operate their businesses. Now the City professes ignorance about whether such a permanent injunction exists while simultaneously refusing to engage in any process by which that ignorance could be lifted. This is untenable, and gives rise to the inference that the City is engaging in gamesmanship at the expense of my clients' constitutional rights and the district court's authority to interpret and enforce the Texas Constitution.

To that end, please confirm whether Plaintiffs' understanding of the City's position is correct. From our call, I understood that:

(1) the City recognizes that Plaintiffs' motion for summary judgment was granted by the district court;
(2) the City does *not* know what the district court meant in its order when it announced: "*Plaintiffs' Motion for Summary Judgment* is GRANTED";
(3) the City does not recognize the district court's order granting Plaintiffs' MSJ as providing Plaintiffs with any remedy sought in their MSJ; and
(4) the City will oppose Plaintiffs' motion in the Thirteenth Court seeking to enforce the district court's ruling on the merits and the permanent injunction that prohibits the City from continuing to enforce the laws that Plaintiffs successfully challenged under the Texas Constitution.

Please confirm by December 29 whether Plaintiffs' understanding of items (1) through (4) are correct. We hope to work with you to ensure that the issues in this case are resolved efficiently, and that the parties abide by their obligations as officers of the Court.

Arif Panju
Managing Attorney – Texas
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Appellees' Verified Rule 29.3 Motion for Relief

EXHIBIT I

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

AFFIDAVIT OF SURFIVE DIRECTOR ERICA LERMA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS

COUNTY OF CAMERON

I, Erica Lerma, being an adult of legal age, swear under penalty of perjury that the following statements are true, and I could testify competently to them if called upon:

1. I am co-founder of Plaintiff Surfvive, a 501(c)(3) non-profit organization.

2. I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment in my capacity as SurfVive's director.

3. SurfVive's mission is "to sow love through surfing, food, and all forms of art." SurfVive's mission centers on promoting healthy living and healthy food options.

4. SurfVive advances its mission in several ways, including through its free surfing school, by operating learning gardens, and by operating a food truck to teach the importance of responsible and healthy food choices.

5. To support its mission and promote healthy food options, SurfVive leased a food truck on April 1, 2018 in order to sell smoothies, coffee, and vegetable bowls in South Padre Island, Texas. Currently, SurfVive's lease agreement is ongoing, on a month-to-month basis, and it includes a purchase option for $10,000.

6. SurfVive obtained its food truck in order to vend in South Padre Island, Texas beginning in April 2018, but after obtaining a food truck it learned that the City of South Padre Island ("City") had no available mobile food unit permits. As a result, SurfVive could not operate its food truck in South Padre Island, Texas. If one of the City's mobile food unit permits were available in April 2018 SurfVive would have submitted an application in April 2018. SurfVive's inability to begin operating its food truck in South Padre Island in April 2018 has had a devastating impact on SurfVive's ability to vend and advance its mission.

7. After SurfVive learned that the City capped its mobile food unit permits to six total and that none were available in April 2018, SurfVive sought a permit from Cameron County, Texas in order to begin vending in the county using its food truck.

8. SurfVive obtained a permit to operate its food truck from Cameron County Public Health on May 9, 2018. In order to obtain a permit to operate its food truck from Cameron County, SurfVive satisfied the Cameron County Public Health's Environmental Health Program requirements including passing a food truck inspection (with a fire inspection), along with submitting proof of a Texas sales and use tax permit, insurance coverage, a contract for disposal of waste water, and a certified food manager certification, among other requirements.

9. On June 2, 2018, the City's Environmental Health Director, Victor Baldovinos, contacted me via Facebook Messenger to inform me that the mobile food unit permit cap had been raised from six to twelve, and that SurfVive could apply for one of the newly available permits.

10. SurfVive obtained a copy of the City's mobile food unit application and began scouting potential vending locations for its food truck. In the course of doing so, I noticed a section of the application labeled "Local Establishment Support," which asked for a name, address, and signature. I interpreted this as requiring the name, address, and signature of the private property owner on whose property SurfVive would park its food truck in order to vend. In an attempt to satisfy the application requirement for "Local Establishment Support," I identified the Plaza Island Center at 5009 Padre Boulevard as SurfVive's would-be vending location and obtained a signature from the Plaza's owner/designee.

11. I submitted SurfVive's mobile food unit permit application to Director Baldovinos on September 24, 2018.

12. Director Baldovinos contacted me on September 24, 2018, the same day SurfVive filed its mobile food unit application with the City, asking me to come meet with him in person because SurfVive's application was missing information.

13. I met with Director Baldovinos on October 1, 2018 to discuss SurfVive's mobile food unit permit application. At the appointment, Director Baldovinos informed me that to be eligible for a permit SurfVive's mobile food unit permit application needed the signature of a local restaurant owner under the "Local

Establishment Support" section of the mobile food unit permit application. Director Baldovinos informed me that the "Local Establishment Support" section of the permit application was not for identifying the private property owner that had allowed SurfVive to operate from his property. Director Baldovinos explained that "Local Establishment Support" referred to the permitting requirement under South Padre Island Code § 10-31(C)(3) that required SurfVive to convince the owner or designee of local restaurant in South Padre Island to sign SurfVive's mobile food unit permit application.

14. During my October 1, 2018 meeting with Director Baldovinos concerning SurfVive's mobile food unit permit application I asked why SurfVive needed the signed permission from the owner of a local restaurant in order to be eligible for the City's mobile food unit permit, and Director Baldovinos informed me that this signature requirement from a local restaurant owner was necessary for passage of the City's mobile food unit ordinance.

15. At no time did Director Baldovinos inform me that if I provided proof of a commissary agreement for SurfVive's food truck that he would waive the requirement that I obtain the signature of a local restaurant on SurfVive's mobile food unit permit application. Nor did any of my research show such a waiver exists.

16. I also learned during my October 1, 2018 meeting with Director Baldovinos concerning SurfVive's mobile food unit permit application that there were several local restaurant owners that participated on a Food Truck Planning Committee and worked on the City's food truck ordinance. I asked Director

Baldovinos to identify the restaurant owners on the Food Truck Planning Committee but he would not disclose their names to me; rather, Director Baldovinos informed me that I had to file an open records request to obtain information about the Food Truck Planning Committee. As a result, I sent an open records request to the City seeking information regarding the City's Food Truck Planning Committee.

17. No one, including no City official, ever informed me that SurfVive could participate on the Food Truck Planning Committee or that it was open to anyone. Nor was SurfVive or I ever invited to join the Food Truck Planning Committee.

18. SurfVive has limited resources. It is a significant burden on SurfVive and its director to dedicate time and resources at identifying local restaurant owners in South Padre Island that are willing to meet with its director to discuss SurfVive's mobile food unit permit application. It is also a significant burden on SurfVive to dedicate time and resources at convincing a local restaurant owner in South Padre Island to sign off on in support of SurfVive's mobile food unit permit application.

19. I am not aware of any other city in the Rio Grande Valley that requires a food truck owner to convince a local restaurant owner to sign off on a mobile food unit permit application, or that caps food truck permits. Thus, I also reject both of these restrictions, on principle, as they unreasonably interfere with SurfVive's food truck to operate in South Padre Island.

20. It is a significant burden on SurfVive to be unable to operate its food truck in South Padre Island because the City has no available mobile food unit permits due to the City's cap on mobile food unit permits.

21. SurfVive regularly scouts possible vending locations for its food truck in South Padre Island. The City's permit cap imposes significant burdens on SurfVive and its ability to secure a vending location without any available mobile food unit permits due to the City's mobile food unit permit cap.

22. If the City's permit cap on mobile food unit permits, together with the requirement that mobile food unit permit applicants obtain the signature of a local food establishment on its permit application, are both declared unconstitutional, SurfVive will re-apply for the City's mobile food unit permit so that it can immediately begin vending in South Padre Island from private property located within one of the City's designated vending zones.

23. SurfVive does not object to the City's other permit requirements for mobile food units that are not being challenged in this lawsuit, and SurfVive plans to satisfy those other permitting requirements if it is successful in this lawsuit, including satisfying the requirements on mobile food units contained in the Texas Food Establishment Rules (such as the State of Texas's commissary requirement).

24. The City's cap on mobile food unit permits together with the City's requirement that mobile food unit permit applicants obtain the signature of a local food establishment on their permit application, have significantly burdened SurfVive's ability to operate its food truck and advance its mission.

25. The actual, real world effect of the permit restrictions that SurfVive challenges in this lawsuit have resulted in SurfVive being unable to generate revenue from operating its food truck in South Padre Island. As a result, SurfVive has not

been able to afford exercising the purchase option for the food truck that it leases, nor has SurfVive been able to grow its menu, customer base, or programs.

26. The City's cap on mobile food unit permits together with the City's requirement that mobile food unit permit applicants obtain the signature of a local food establishment on their permit application have also significantly burdened SurfVive's ability to generate revenue from its food truck sufficient to cover the operating expenses of the food truck itself. As a result, SurfVive temporarily reduced its vending in Cameron County during the winter of 2019-20 as it worked on lining up additional vending opportunities for its food truck.

FURTHER AFFIANT SAYETH NOT.

I affirm, under penalty of perjury, that the facts stated in this Affidavit are true and correct.

ERICA LERMA, DIRECTOR
SURFVIVE

Sworn and subscribed before me this 29th day of May, 2020

Notary Public

My Commission Expires 6-25-2021

DAVID HELMS JR
Notary ID #125329296
My Commission Expires
June 25, 2021

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

AFFIDAVIT OF ANUBIS AVALOS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS

COUNTY OF CAMERON

I, Anubis Avalos, being an adult of legal age, swear under penalty of perjury that the following statements are true, and I could testify competently to them if called upon:

1. I am co-owner of the Chile de Árbol food truck, a permitted mobile food unit based in Brownsville, Cameron County, Texas, that I operate on nights and weekends.

2. I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment.

3. I have a passion for music and healthy food. During daytime hours I am a music teacher at the Brownsville Independent School District and, along with my brother Adonai Ramses Avalos, I operate the Chile de Árbol food truck in order to earn an honest living.

4. I adhere to a vegan diet and, after having difficulty finding affordable and flavorful meatless food options, my brother and I decided to open a food truck, Chile de Árbol. We spent months developing our recipes and menus and seek to offer health food options in the Rio Grande Valley.

5. Before opening our food truck for business, I had to satisfy the requirements for the City of Brownsville's mobile food unit permit. The City of Brownsville required that my Chile de Árbol food truck pass an inspection (including a fire inspection), along with providing proof of a Texas sales and use tax permit, insurance, contract for disposal of waste water, and certified food manager certification, among other requirements.

6. My brother and I opened Chile de Árbol in November 2017, setting up shop on Tuesdays through Saturdays at The Broken Sprocket, a food truck park in Brownsville, Texas. We serve a wide variety of meals, including tacos, burgers, and Indian-inspired bowls. All options are free of meat, eggs, or dairy. Since opening Chile de Árbol, we have earned a loyal customer following.

7. In addition to vending from our base of operations at the Broken Sprocket, we have sought to identify other parts of the Rio Grande Valley that may serve as promising locations for expanding our food truck business. We have traveled with our food truck to other parts of the Rio Grande Valley in order to test other markets and also bring our food to a wider array of customers.

8. I have taken several steps to expand my Chile de Árbol food truck business to South Padre Island, Texas including driving to South Padre Island in order to scout possible vending locations and going online in order to learn about the City of South Padre Island's ("City") mobile food unit requirements. I have also spoken with potential investors interested in expanding my Chile de Árbol food truck business to South Padre Island. As part of my efforts, I learned that the City imposes a cap that limits the number of mobile food unit permits to twelve total, and also conditions eligibility for those permits on being able to find the owner of a local fixed food establishment, such as a local restaurant, to sign off on my mobile food unit permit application.

9. In order to expand our Chile de Árbol food truck business in South Padre Island, my brother and I decided that it would be a good idea to participate in an event in South Padre Island in an effort to test out the vending market there. We signed up for the event, obtained the necessary permit, and operated our food truck in South Padre Island during the event.

10. Our experience scouting locations in South Padre Island, and also operating our Chile de Árbol food truck at the event in South Padre Island, only strengthened our desire to operate a food truck in South Padre Island.

11. The inability to know if the City's mobile food unit permit will be available for my Chile de Árbol food truck due to the City's permit cap significantly burdens my ability to secure a vending location in South Padre Island, which I need before beginning operations there on a part-time basis using our existing food truck. Since we are based out of Brownsville, Texas, we would need to invest in a vending location in South Padre Island, which cannot happen unless I know that there will be a mobile food unit permit available. If I invested in a vending location but the City no did not have permits during the months that we wanted to vend, or if no local restaurant owners agreed to sign my permit application if a permit was available in order to comply with South Padre Island Code § 10-31(C)(3), it would be devastating to my food truck business. Thus, the City is unreasonably interfering with my ability to earn a living by operating a food truck in South Padre Island.

12. The City's permit cap on mobile food unit permits, together with the requirement that I obtain the signature of a local restaurant owner on a permit application, also impose significant burdens on my ability to invest in a second food truck and begin operations in South Padre Island. Investing in a second food truck will require me to invest substantial resources in addition to securing a vending location. If I invested in a second food

truck and the City no longer had available permits, or if no local restaurant owners agreed to sign my permit application, it would be devastating to my food truck business.

13. I can only invest in a second food truck and secure a vending location if I know that I will be able to secure a permit when ready to begin operations. And if there is a permit available, I would still need to convince a local restaurant owner to sign my permit application. As a result, both the City's permit cap and requirement that I obtain a local restaurant owner's signature unreasonably interfere with my ability to open for business in South Padre Island.

14. As a full-time teacher and food truck operator I have limited time and resources that I must dedicate wisely. It is a significant burden on me to dedicate time and resources to identifying local restaurant owners in South Padre Island that are willing to meet with me to discuss a mobile food unit permit application. It is also a significant burden on me to dedicate time and resources to convincing one or more local restaurant owner in South Padre Island to agree to sign off in support of a mobile food unit permit application.

15. I base my food-truck operations in Brownsville, Texas and it makes sense to centralize where I base the operations of my food truck business as it grows. This would allow me to efficiently manage my food truck business without having to replicate certain tasks related to food preparation and storage at different locations. Ideally, I would base my prep/storage and related tasks in Brownsville, Texas.

16. I am not aware of any other city in the Rio Grande Valley that requires a food truck owner to convince a local restaurant owner to sign off on a mobile food unit permit application, or that caps food truck permits. Thus, I also reject both of these restrictions, on principle, as they unreasonably interfere with my ability to operate my food truck in South Padre Island and impose significant burdens on my ability to vend in South Padre Island.

17. It is a significant burden on me and my food truck business to be unable to operate a food truck in South Padre Island because the City has no available mobile food unit permits due to the City's cap on mobile food unit permits.

18. If the City's permit cap on mobile food unit permits, together with the requirement that mobile food unit permit applicants obtain the signature of a local food establishment on their permit application, are both declared unconstitutional I will apply for the City's mobile food unit permit so that it can begin vending in South Padre Island from private property located within one of the City's designated vending zones.

19. I do not object to the City's other permit requirements for mobile food units that are not being challenged in this lawsuit, and I plan to satisfy those other permitting requirements if I am successful in this lawsuit, including satisfying the requirements on mobile food units contained in the Texas Food Establishment Rules (such as the State of Texas's commissary requirement).

20. The City's cap on mobile food unit permits together with the City's requirement that mobile food unit permit applicants obtain the signature of a local food establishment on their permit application, have significantly burdened my ability to operate a Chile de Árbol food truck in South Padre Island.

21. The actual, real world effect of the permit restrictions that I am challenging in this lawsuit have resulted in me being unable to generate revenue from operating a Chile de Árbol food truck in South Padre Island. As a result, I have been unable to proceed with the expansion of my food truck business.

FURTHER AFFIANT SAYETH NOT.

I affirm, under penalty of perjury, that the facts stated in this Affidavit are true and correct.

ANUBIS AVALOS

Sworn and subscribed before me this 28th day of May, 2020

Notary Public

SYLVIA M. HERNANDEZ
Notary Public, State of Texas
Comm. Expires 11-28-2020
Notary ID 130913252

My Commission Expires 11-28-2020

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

AFFIDAVIT OF ADONAI RAMSES AVALOS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS

COUNTY OF CAMERON

I, Adonai Ramses Avalos, being an adult of legal age, swear under penalty of perjury that the following statements are true, and I could testify competently to them if called upon:

1. I am co-owner of the Chile de Árbol food truck, a permitted mobile food unit based in Brownsville, Cameron County, Texas, that I operate on nights and weekends.

2. I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment.

3. I have a passion for music and healthy food. During daytime hours I work with music programs at schools and also teach music. Along with my brother Anubis Avalos, I operate the Chile de Árbol food truck in order to earn an honest living.

4. I adhere to a vegan diet and, after having difficulty finding affordable and flavorful meatless food options, my brother and I decided to open a food truck, Chile de Árbol. We spent months developing our recipes and menus and seek to offer health food options in the Rio Grande Valley.

5. Before opening our food truck for business, I had to satisfy the requirements for the City of Brownsville's mobile food unit permit. The City of Brownsville required that my Chile de Árbol food truck pass an inspection (including a fire inspection), along with providing proof of a Texas sales and use tax permit, insurance, contract for disposal of waste water, and certified food manager certification, among other requirements.

6. My brother and I opened Chile de Árbol in November 2017, setting up shop on Tuesdays through Saturdays at The Broken Sprocket, a food truck park in Brownsville, Texas. We serve a wide variety of meals, including tacos, burgers, and Indian-inspired bowls. All options are free of meat, eggs, or dairy. Since opening Chile de Árbol, we have earned a loyal customer following.

7. In addition to vending from our base of operations at the Broken Sprocket, we have sought to identify other parts of the Rio Grande Valley that may serve as promising locations for expanding our food truck business. We have traveled with our food truck to other parts of the Rio Grande Valley in order to test other markets and also bring our food to a wider array of customers.

8. I have taken several steps to expand my Chile de Árbol food truck business to South Padre Island, Texas including driving to South Padre Island in order to scout possible vending locations and going online in order to learn about the City of South Padre Island's ("City") mobile food unit requirements. I have also spoken with potential investors interested in expanding my Chile de Árbol food truck business to South Padre Island. As part of my efforts, I learned that the City imposes a cap that limits the number of mobile food unit permits to twelve total, and also conditions eligibility for those permits on being able to find the owner of a local fixed food establishment, such as a local restaurant, to sign off on my mobile food unit permit application.

9. In order to expand my Chile de Árbol food truck business in South Padre Island, my brother and I decided that it would be a good idea to participate in an event in South Padre Island in an effort to test out the vending market there. We signed up for the event, obtained the necessary permit, and operated our food truck in South Padre Island during the event.

10. Our experience scouting locations in South Padre Island, and also operating our Chile de Árbol food truck at the event in South Padre Island, only strengthened our desire to operate a food truck in South Padre Island.

11. The inability to know if the City's mobile food unit permit will be available for my Chile de Árbol food truck due to the City's permit cap significantly burdens my ability to secure a vending location in South Padre Island, which I need before beginning operations there on a part-time basis using our existing food truck. Since we are based out of Brownsville, Texas, we would need to invest in a vending location in South Padre Island, which cannot happen unless I know that there will be a mobile food unit permit available. If I invested in a vending location but the City no did not have permits during the months that we wanted to vend, or if no local restaurant owners agreed to sign my permit application if a permit was available in order to comply with South Padre Island Code § 10-31(C)(3), it would be devastating to my food truck business. Thus, the City is unreasonably interfering with my ability to earn a living by operating a food truck in South Padre Island.

12. The City's permit cap on mobile food unit permits, together with the requirement that I obtain the signature of a local restaurant owner on a permit application, also impose significant burdens on my ability to invest in a second food truck and begin operations in South Padre Island. Investing in a second food truck will require me to invest substantial resources in addition to securing a vending location. If I invested in a second food

truck and the City no longer had available permits, or if no local restaurant owners agreed to sign my permit application, it would be devastating to my food truck business.

13. I can only invest in a second food truck and secure a vending location if I know that I will be able to secure a permit when ready to begin operations. And if there is a permit available, I would still need to convince a local restaurant owner to sign my permit application. As a result, both the City's permit cap and requirement that I obtain a local restaurant owner's signature unreasonably interfere with my ability to open for business in South Padre Island.

14. As a music instructor and food truck operator I have limited time and resources that I must dedicate wisely. It is a significant burden on me to dedicate time and resources to identifying local restaurant owners in South Padre Island that are willing to meet with me to discuss a mobile food unit permit application. It is also a significant burden on me to dedicate time and resources to convincing one or more local restaurant owner in South Padre Island to agree to sign off in support of a mobile food unit permit application.

15. I base my food-truck operations in Brownsville, Texas and it makes sense to centralize where I base the operations of my food truck business as it grows. This would allow me to efficiently manage my food truck business without having to replicate certain tasks related to food preparation and storage at different locations. Ideally, I would base my prep/storage and related tasks in Brownsville, Texas.

16. I am not aware of any other city in the Rio Grande Valley that requires a food truck owner to convince a local restaurant owner to sign off on a mobile food unit permit application, or that caps food truck permits. Thus, I also reject both of these restrictions, on principle, as they unreasonably interfere with my ability to operate my food truck in South Padre Island and impose significant burdens on my ability to vend in South Padre Island.

17. It is a significant burden on me and my food truck business to be unable to operate a food truck in South Padre Island because the City has no available mobile food unit permits due to the City's cap on mobile food unit permits.

18. If the City's permit cap on mobile food unit permits, together with the requirement that mobile food unit permit applicants obtain the signature of a local food establishment on their permit application, are both declared unconstitutional I will apply for the City's mobile food unit permit so that it can begin vending in South Padre Island from private property located within one of the City's designated vending zones.

19. I do not object to the City's other permit requirements for mobile food units that are not being challenged in this lawsuit, and I plan to satisfy those other permitting requirements if I am successful in this lawsuit, including satisfying the requirements on mobile food units contained in the Texas Food Establishment Rules (such as the State of Texas's commissary requirement).

20. The City's cap on mobile food unit permits together with the City's requirement that mobile food unit permit applicants obtain the signature of a local food establishment on their permit application, have significantly burdened my ability to operate a Chile de Árbol food truck in South Padre Island.

21. The actual, real world effect of the permit restrictions that I am challenging in this lawsuit have resulted in me being unable to generate revenue from operating a Chile de Árbol food truck in South Padre Island. As a result, I have been unable to proceed with the expansion of my food truck business.

FURTHER AFFIANT SAYETH NOT.

I affirm, under penalty of perjury, that the facts stated in this Affidavit are true and correct.

ADONAI RAMSES AVALOS

Sworn and subscribed before me this 28th day of May, 2020

Notary Public

SYLVIA M. HERNANDEZ
Notary Public, State of Texas
Comm. Expires 11-28-2020
Notary ID 130913252

My Commission Expires 11-28-2020