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SUPREME COURT OF TEXAS
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No. 22-0499

In the Supreme Court of Texas

SURFVIVE, ANUBIS AVALOS, AND ADONAI RAMSES AVALOS,

Petitioners,

V.

CITY OF SOUTH PADRE ISLAND,

Respondent.

On Petition for Review from the Thirteenth Court of Appeals at Corpus Christi and Edinburg, Texas
No. 13-20-00536-CV

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONAL PROVISIONS

CODES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the Case:	Action for declaratory judgment, injunctive relief, and nominal damages of $1 challenging the constitutionality of S. Padre Island, Tex., Code of Ordinances ("SPI Code") § 10-31(C)(3) ("Restaurant Permission Scheme") and §§ 10-31(C)(2), (F)(2)(a) ("Permit Cap"), under Article I, § 19 of the Texas Constitution and the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.003.
Trial Court:	The Honorable Arturo Cisneros Nelson, 138th Judicial District Court, Cameron County, Texas.
Trial Court Disposition:	Before discovery commenced, Respondent City of South Padre Island ("City") filed its first plea to the jurisdiction challenging only the availability of nominal damages ($1) as a remedy for a constitutional violation. Supp. CR.6–14. The district court took it under advisement. After discovery closed, the parties cross-moved for summary judgment and the City filed its second plea to the jurisdiction raising immunity and standing arguments. CR.64–105, 501–61. In two concurrent orders issued November 30, 2020, the district court granted the Plaintiff Food Truck Petitioners' motion for summary judgment in full, CR.3058 (App. 1), and it denied the City Respondent's second plea to the jurisdiction and competing summary-judgment motion, CR.3057 (App. 2).
Court of Appeals:	In the Thirteenth Court of Appeals, the City appealed only the district court's concurrent order that denied its second plea to the jurisdiction. CR.3059–62. The appeal triggered an automatic stay of proceedings, *see* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(b) (staying district court proceedings pending interlocutory appeals),

	CR.3061, which deprived the district court from enforcing its summary-judgment ruling and entering a final judgment. The Appellant was City of South Padre Island. The Appellees were Surfvive, Anubis Avalos, and Adonai Ramses Avalos.
Court of Appeals Disposition:	Justice Longoria, joined by Justice Benavides and Justice Tijerina, reversed the district court, rendered judgment granting the City's second plea to the jurisdiction, and dismissed Food Truck Petitioners' claims. The Thirteenth Court held that the Petitioners lack a viable Article I, Section 19 claim challenging the City's Restaurant Permission Scheme and further held that Petitioners lack standing to challenge the Permit Cap. *See City of South Padre Island v. Surfvive*, No. 13-20-00536-CV, 2022 WL 2069216 (Tex. App.—Corpus Christi–Edinburg June 9, 2022, pet. filed) (mem. op.). *See* App. 3. No motions for rehearing or *en banc* review are pending.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Tex. Gov't Code Ann. § 22.001(a) because this case presents constitutional issues that are important to the jurisprudence of the state.

ISSUES PRESENTED

1. Just two months ago in *Texas Department of State Health Services v. Crown Distributing LLC*, a four-Justice concurrence called for cases to answer foundational questions about Article I, § 19's Due Course of Law Clause: "[W]hat *does* that clause protect—and how does it do so?" No. 21-1045, 2022 WL 2283170, at *13–28 (Tex. June 24, 2022) (Young, J., concurring) (emphasis in original). The concurrence seeks cases allowing an examination of the premises underlying this Court's leading economic-liberty precedent, *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015). This case provides the vehicle for this examination because there is a preserved argument about the scope of the Due Course of Law Clause, and undersigned counsel, which litigated *Patel*, is prepared to present the "relevant and probative historical evidence." *Crown Distrib.*, 2022 WL 2283170, at *27.

   The issue presented is: What is the scope of the Due Course of Law Clause, its relationship to the Fourteenth Amendment, and its substantive protections for the right to pursue a common occupation?

2. The Thirteenth Court's decision seriously undermined the Due Course of Law Clause's protections by holding that private economic protectionism—the naked preference for existing businesses over new entrants—justifies restrictions on the right to pursue a common occupation. This dangerous ruling upends *Patel* because virtually every barrier to entering a common occupation can be recast as the legislature's desire to protect existing businesses from competition. Under the decision below, *Patel* itself was wrongly decided because the cosmetology laws this Court found so oppressive to eyebrow threaders could easily be reframed as the legislature's desire to protect existing salons from competition. This case is an ideal vehicle for addressing the issue because, as the appellate court correctly held, there is no rational health-and-safety reason for the challenged regulations. Hence, whether Petitioners win or lose depends entirely on whether private economic protectionism is a valid justification for a law.

   The issue presented is: Is private economic protectionism a legitimate government interest in Due Course of Law Clause challenges to restrictions on the right to pursue a common occupation?

3. The Thirteenth Court held that Petitioners lack standing to challenge the cap on food-truck permits even though the cap had been met and no permits were left.

   The issue presented is: If a Texan cannot obtain a permit because no permits are left, does standing to challenge that provision require anything more than showing that no permits exist?

STATEMENT OF FACTS

I. South Padre Island Protects the Private Financial Interests of Local Restaurant Owners.

The Thirteenth Court's account of the facts and procedural history is generally reliable, but the decision omits key evidence about the history and purpose of the challenged food-truck restrictions and how they fenced out Petitioners Surfvive, Anubis Avalos, and Adonai Avalos ("Food Truck Petitioners" or "Petitioners").

The Restaurant Permission Scheme[1] and Permit Cap[2] were designed to do one thing: stop food trucks from competing with local restaurants as much as possible. When the City of South Padre Island ("City" or "SPI") first presented its proposed food-truck ordinance to the SPI Council, the draft contained neither protectionist provision. *Compare* CR.1998–2002 (City's original proposal, No. 15-11), *with* CR.2275–80 (enacted ordinance, No. 16-05). Those were added at the behest of local restaurant owners. *See* CR.632–33, 673–74, 678, 696–704, 970. For example, one local restaurateur complained that "if you take that cream away from us" by letting food trucks

[1] The "Restaurant Permission Scheme" restricts permit *eligibility*: 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." S. Padre Island, Tex., Code of Ordinances ("SPI Code") § 10-31(C)(3).

[2] The "Permit Cap" restricts permit *availability*: SPI Code § 10-31(C)(2) caps the number of permits (currently 18), and § 10-31(F)(2)(a) makes those permits expire monthly.

compete, "I think it's materially going to hurt our business." CR.2260 (104:21–105:3). He asked to "limit the number of permits." CR.2261 (108:18–22). The SPI Council unanimously voted to allow local restaurant owners to add their desired protectionist barriers:

> [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.

CR.2017–18. The Mayor gave them clear instructions: "[M]ake 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." CR.1264–65 (27:1–28:8).

The euphemistically named "Food Truck Planning Committee," headed by local restaurateur Arnie Creinin, devised the protectionist restrictions. CR.2022. According to Mr. Creinin, the City's original ordinance "needed to be massaged, if you will." CR.1116 (134:16–21). This process produced the Restaurant Permission Scheme and Permit Cap, *see* CR.1375–80, which the SPI Council promptly enacted, CR.945–49, 1383–87.

Significantly, as the Thirteenth Court recognized, the Permission Scheme and Permit Cap are pure protectionism. As to the Permission Scheme, the court held that the scheme's plain text and the record evidence of its operation revealed no rational connection to public health and safety.

City of South Padre Island v. Surfvive, No. 13-20-00536-CV, 2022 WL 2069216, at *7 (Tex. App.—Corpus Christi–Edinburg June 9, 2022, pet. filed) (mem. op.).

II. The Food-Truck Ordinance Stopped Petitioners from Operating in South Padre Island.

Petitioner Surfvive is a charity dedicated to healthy living, and, along with a free surfing school, it operates a food truck serving wholesome food. CR.562–63. Petitioners Anubis and Adonai Avalos are music teachers by day. In their spare time, they began operating a food truck, Chile de Árbol, which offers their original vegan recipes. CR.570–71, 576–77.

The challenged provisions shut Petitioners out of South Padre Island. Surfvive leased a food truck in April 2018, CR.3011, and then learned that no food-truck permits remained—the Cap was six and all were issued, CR.2661, 3011, CR.2761 (City's May 2018 presentation to SPI Council). The City later raised the Cap to 12 permits and Surfvive applied, but the City rejected that application because it lacked restaurant permission. CR.1608–09. Permits were unavailable at all relevant times. *See, e.g.*, CR.2662 (Cap reached in 2020).

The Avalos brothers fared no better. While operating their food truck in a Brownsville food-truck park, the brothers took several steps to secure a vending site on South Padre Island, including scouting the island for

potential vending sites.[3] CR.571–72, 577–78. But the Permission Scheme and lack of permits ultimately made that expansion impossible. CR.572, 578.

SUMMARY OF THE ARGUMENT

Issue 1: This Court should grant review to answer a foundational question about the Due Course of Law Clause ("due-course clause") that a four-Justice concurrence posed two months ago in *Texas Department of State Health Services v. Crown Distributing LLC*: "[W]hat *does* that clause protect—and how does it do so?" No. 21-1045, 2022 WL 2283170, at *13–28 (Tex. June 24, 2022) (Young, J., concurring) (emphasis in original). The Justices posed this question because "[w]e still do not really know, even as we approach the sesquicentennial of our current Constitution." *Id.* at *13. The concurrence seeks cases about the premises underlying the leading economic-liberty precedent, *Patel v. Texas Department of Licensing & Regulation*, which, relying on the due-course clause's protections for the right to pursue a common occupation, invalidated a cosmetology-licensing scheme as applied to eyebrow threaders. 469 S.W.3d 69 (Tex. 2015).

Patel, however, merely "assumed . . . that the due-course clause substantively protected the threaders' claimed rights." *Crown Distrib.*, 2022 WL 2283170, at *18 (Young, J., concurring). Accordingly, *Patel* "could not

[3] Food trucks must vend on private property. SPI Code §§ 10-31(A)(3), (C)(1).

and did not reach that crucial first question of whether the due-course clause even applies" to economic freedoms. *Id.* Nor could the *Crown Distributing* majority itself reach that crucial question because the challenged law involved selling smokable cannabis products, which is a traditional vice activity, not a common occupation. *Id.* at *5–12. The concurrence called on "lower courts, able counsel, amici, and scholars" to bring cases "so that [the Court] can systematically articulate what the People of our State meant by 'the due course of the law of the land.'" *Id.* at *14 (Young, J., concurring).

This case presents an ideal vehicle for answering the concurrence's question for two reasons. First, the City put the scope of the due-course clause at issue in a case involving a common occupation—selling food. Second, undersigned counsel Institute for Justice litigated *Patel* from the district court through victory before this Court. We are prepared to present the "relevant and probative historical evidence." *See id.* at *27 (Young, J., concurring).

Issue 2: Review is warranted on the validity of private economic protectionism as a purpose for lawmaking. *Patel* stands for the proposition that the due-course clause protects the substantive right to pursue a common occupation. The decision below, however, drastically undermined that right by holding that the government may abridge it simply to protect existing

businesses from new entrants. That pernicious holding swallows economic rights whole. Virtually every barrier to occupational freedom either is or can be characterized as a naked preference for A over B. If the Thirteenth Court is right, *Patel* itself was wrong because the restrictions this Court found so oppressive there could easily be reframed as the legislature's desire to protect existing salons from eyebrow-threader competition.

This case is also the perfect vehicle for examining private economic protectionism. The Thirteenth Court held that the ordinance and record evidence reveal no rational connection to public health and safety. The lower court upheld the ordinance solely because private economic protectionism serves "the legitimate government interest in retaining current businesses and preventing economic decline." *Surfvive*, 2022 WL 2069216, at *8. The protectionism question is squarely presented.

Issue 3: This Court should also grant review to reverse the Thirteenth Court's insupportable holding that Petitioners lacked standing to challenge the Permit Cap even though none were available at all relevant times.

ARGUMENT

I. This Case Is an Excellent Vehicle for Examining the Foundations of the Due Course of Law Clause.

A. The *Crown Distributing* Concurrence Calls for Cases About the Original Meaning of the Clause.

The *Crown Distributing* concurrence calls on "lower courts, able counsel, amici, and scholars" to bring cases that "focus on the constitutional text, history, and structure" of Article I, Section 19 "so that [this Court] can systematically articulate what the People of our State meant by 'the due course of the law of the land.'" 2022 WL 2283170, at *14 (Young, J., concurring). This inquiry "is necessary because our cases, piled one on top of the other, have rarely, if ever, paused to examine their foundations." *Id.* That reality, the concurrence explains, means that "[w]e still do not really know, even as we approach the sesquicentennial of our current Constitution," what the due-course clause means. *Id.* at *13.

Central to the concurrence is *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), this Court's leading due-course precedent. In *Patel*, "several individuals practicing commercial eyebrow threading and the salon owners employing them assert[ed] that, as applied to them, Texas's [cosmetology] licensing statutes and regulations violate the Texas Constitution's due course of law provision." *Id.* at 73. The core

question there asked what "standard of review applie[s] when economic legislation is challenged under Section 19's substantive due course of law protections." *Id.* at 80. To answer that, this Court began by "review[ing] the history of the due course of law language in Article I, § 19." *Id*. at 82. That survey, which spanned the Republic of Texas's 1836 Constitution through case law to the present day, concluded that the due-course clause protects substantive economic rights via a more stringent standard than federal rational-basis review. *Id*. at 82–87.

The justification for Section 19's heightened attention to economic liberty is that "the drafting, proposing, and adopting of the 187[6] Constitution was accomplished shortly after the United States Supreme Court decision in the *Slaughter-House Cases* by which the Court put the responsibility for protecting a large segment of individual rights directly on the states." *Id*. at 86–87. In 1873, the *Slaughter-House Cases* infamously read the Privileges or Immunities Clause out of the newly ratified Fourteenth Amendment, thereby upholding New Orleans's economic restrictions on how many butchers can ply their trade. 83 U.S. (16 Wall.) 36, 74–81 (1873). That "temporal legal context"—the 1876 Constitution's ratification right after *Slaughter-House*—indicates that "Section 19's substantive due course provisions undoubtedly were intended to bear at least some burden for

protecting individual rights that the United States Supreme Court determined are not protected by the federal Constitution." *Patel*, 469 S.W.3d at 87.

This historical analysis would seem to have settled whether the due-course clause protects the right to pursue a common occupation. The *Crown Distributing* concurrence, however, is less sure, asserting that "the question of the due-course clause's definitive scope necessarily remained as open after *Patel* as it was before it." 2022 WL 2283170, at *13 (Young, J., concurring). This is because "*Patel* considered only how the courts should conduct the rational-basis test when the due-course clause applies; *Patel* did not address *whether* the due-course clause applied." *Id.* (emphasis in original). As the *Crown Distributing* majority explained: "We did not address the first-step issue in *Patel* because the [government] in that case did not argue that the plaintiffs failed to assert a protected interest." *Id.* at *3 n.16. "Instead," the government "*assumed* . . . 'that the [threaders] had a protected, but not fundamental, liberty interest' and focused their arguments only on the second-step issue" (*i.e.*, the applicable standard of review). *Id.* As such, "the parties never presented to this Court the issue of whether the eyebrow threaders asserted a protected interest." *Id.*

The *Crown Distributing* concurrence calls for cases to address this "first-step issue": "Future cases will require us to make harder decisions based on analysis of what the due-course clause meant in 1876 and whether there is any good reason for it to mean anything different today." *Crown Distrib.*, 2022 WL 2283170, at *13 (Young, J., concurring). Without committing to "any particular view," *id.* at *22, the concurrence sketches various possibilities about the clause's scope and relationship to the federal due-process clause, *id.* at *20–25. It also explores a reading under which the clause is "an important procedural limitation yet not a freestanding font of substantive rights." *Id.* at *22.

The concurrence seeks cases with two key features: (1) a preserved argument about the scope of the due-course clause; and (2) "able counsel," *id*. at *14, who can present the "relevant and probative historical evidence that judges can use in the non-academic context of setting boundaries in deciding actual cases," *id.* at *27. As explained next, this case is a perfect fit.

B. This Case Presents Exactly What the *Crown Distributing* Concurrence Called for.

1. Preserved Argument: The court below confronted the threshold question that the *Crown Distributing* concurrence wants this Court to consider: "[W]hat *does* that clause protect—and how does it do so?" *Id.* at *13. The City put the scope of the due-course clause at issue by arguing that

Patel is narrowly "limited to the framework in which it arose, namely a regulatory prohibition on entry into the profession as a whole." *Surfvive*, 2022 WL 2069216, at *5 (internal quotation marks omitted); *see also* App. 7 at 17 ("The Court must first define what liberty interest Plaintiffs claim before determining if that right is protected by substantive due course of law."). In short, the City argued that the due-course clause protects, *at most*, the threadbare interest in *entering* an occupation. As applied to the facts, the City argued that "Plaintiffs' alleged liberty interest is the operation of a [food truck.]" App. 7 at 31. But, the City asserted, the "ordinance does [not] preclude entry in the [food-truck] business"; it merely regulates those who have already joined the industry. *Id*. Hence, according to the City, the "liberty interest does not extend to a particular amount of profit from the business" or restrictions on the operation of the business. *Id.*

The City's argument below preserved the "first-step" question that this Court did not reach in *Crown Distributing*. That case was about the purported right to sell smokable cannabis products, not the right to pursue a common occupation. There, the petitioners asserted a *Patel* claim that the due-course clause "invalidates a new Texas law that prohibits the processing and manufacturing of smokable hemp products." *Crown Distrib.*, 2022 WL 2283170, at *1. The government in *Crown Distributing* disputed whether the

due-course clause applied: "The Department argued . . . that the due-course clause does not protect the Hemp Companies' interest in manufacturing or processing smokable hemp products." *Id.* at *3. This Court agreed, holding that the due-course clause did not apply because it, "like its federal counterpart, has never been interpreted to protect a right to work in fields our society has long deemed 'inherently vicious and harmful.'" *Id.* at *5 (quoting *Murphy v. California*, 225 U.S. 623, 628 (1912)). *Crown Distributing* did not examine the scope of the clause with respect to "a right to 'engage in any of the *common* occupations of life,' or [] a right to follow or pursue a '*lawful* calling, business, or profession.'" *Id.* at *4 (citations omitted).

Here, Petitioners are plainly pursuing a common occupation: selling prepared food. People have been selling food since ancient times, *see, e.g.*, *John* 6:5 (English Standard Version) ("Jesus said to Philip, 'Where are we to buy bread, so that these people may eat?'"), and since Texas's early days, *see, e.g.*, *Peck v. City of Austin*, 22 Tex. 261 (1858). The venerable chuck wagon, a precursor to Petitioners' food trucks, fed hungry cowboys and vaqueros, becoming an icon of Texas culture. *See* National Park Service, *The Chuckwagon*, Sept. 5, 2021, https://www.nps.gov/places/the-chuckwagon.htm. In *Ex parte Baker*, the Court of Criminal Appeals struck

down the City of Temple's protectionist ordinance restricting anyone "not operating a regularly established store or warehouse" within the city from entering town to sell and deliver "fruit, vegetable[s], garden products, meats," etc. from "any car, wagon, truck, automobile, or any other vehicle." 78 S.W.2d 610, 611 (Tex. Crim. App. 1934). In short, selling food is a quintessential common occupation that courts have long recognized.[4]

2. Able Counsel: Undersigned counsel—the Institute for Justice—was the public-interest law firm that represented the successful petitioners in *Patel* from the trial court through this Court. Likewise, the Institute has represented the Food Truck Petitioners here from the beginning. Bringing

[4] To preview just a slice of the historical support for the due-course clause's protections of the right to pursue a common occupation: As early as 1847, the Texas Supreme Court invoked the Magna Carta in interpreting the phrase "due course of law of the land." *Janes v. Adm'rs of Reynolds*, 2 Tex. 250, 251 (1847) ("It will not be necessary . . . to ascertain with precision the exact scope and meaning, or the extent of the rights thereby secured" because "the common law of England . . . was the basis of our jurisprudence, and [we] give to the terms the signification in which they are generally understood in the constitutions . . . governed by common law."). Occupational liberty was protected at common law under Magna Carta. *See, e.g.*, *Dominus Rex v. Tooley* (1613) 80 Eng. Rep. 1055, 1055–59 (KB) (terminating prosecution for alleged violation of an apprenticeship requirement for upholsterers because under Magna Carta, "a man is not to be restrained that he shall not labor for his living"). Like the common law, the due-course clause constrains the government's power and acts as a structural protection for liberty. *See* Tex. Const. art. I, §§ 19, 29. Invasions of liberty, "if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty[.]" 1 William Blackstone, Commentaries on the Laws of England *121–22 (1765). As the framers endeavored to explain to the people in 1875: "[T]he new bill of rights asserted and protected the liberty of the citizen 'by every safeguard known to constitutional law[.]'" Seth Shepard McKay, *Seven Decades of the Texas Constitution of 1876* 138 (1943) (quoting Address to the People of Texas, available at https://tinyurl.com/2khac7c3).

together *Patel*, the instant case, and the "relevant and probative historical evidence" falls squarely within undersigned counsel's expertise. *Crown Dist.*, 2022 WL 2283170, at *27.

II. Review Is Separately Warranted Because the Thirteenth Court's Decision Destroyed the Due-Course Right to Practice a Common Occupation by Upholding Naked Economic Protectionism.

A. By Holding that Private Economic Protectionism Is a Legitimate Government Interest, the Lower Court Effectively Nullified *Patel*'s Protections for the Right to Pursue a Common Occupation.

Review is separately warranted on the validity of using public power for private economic protectionism. Absent any future reexamination of *Patel*'s premises, it is Texas's controlling authority on the right to pursue a common occupation. The decision below, however, severely undermined that right with the radical holding that naked economic protectionism alone—protecting market incumbents by shutting out new entrants—is a legitimate government interest: "Appellees[']contention that SPI was acting to protect 'brick and mortar' restaurants . . . does not negate SPI's evidence that the ordinance was created to promote economic development, including the legitimate government interest in retaining current businesses and preventing economic decline." *Surfvive*, 2022 WL 2069216, at *8.

This holding is not mere error. It swallows economic rights whole. Virtually every barrier to a common occupation, no matter how arbitrary and oppressive, can be recast by a forgiving court as the laudable legislative desire to "retain[] current businesses and prevent[] economic decline." *See id.* This is such a wrecking ball that *Patel* itself was wrongly decided if the Thirteenth Court is right. The onerous barriers into the cosmetology field that this Court found so oppressive could have been waved off as the legislature's desire to "retain current [cosmetology] businesses and prevent [their] economic decline." *See id.*

A majority of federal courts in recent years—despite being bound by federal rational-basis review, which is more lenient than the *Patel* test—have emphatically rejected private economic protectionism as a legitimate government interest. Closest to home, the Fifth Circuit struck down funeral-licensure restrictions on monks who sold their handmade caskets, reaffirming that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *see also Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) ("[N]aked economic preferences are impermissible to the extent they harm consumers."); *Merrifield v. Lockyer*,

547 F.3d 978, 991 n.5 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational."); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) ("This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.").

And the two rogue circuits that have blessed private economic protectionism—notwithstanding the 1985 U.S. Supreme Court decision to the contrary, *see Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) ("[A]cceptance of [the] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context.")—have not done so because there is anything *good* about pure protectionism. Instead, these courts believe that life is an unprincipled brawl in which legislators and lobbyists may use public power for the private gain of a connected few. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2nd Cir. 2015) ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics."); *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[W]hile baseball may be the national pastime of the citizenry,

dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.").

This jaundiced view is inimical to any conception of the United States as a constitutional republic of limited government, and it is certainly anathema to the historical understanding of economic freedom and opportunity here in Texas. Simply put, the "Texas Constitution has something to say when barriers to occupational freedom are absurd or have less to do with fencing out incompetents and more to do with fencing in incumbents." *Patel*, 469 S.W.3d at 104 (Willett, J., concurring, joined by Lehrmann and Devine, JJ.).

The wrongness of the Thirteenth Court's protectionism holding is evident in that the lower court, in effect, imported the reviled holding of *Kelo v. City of New London*, 545 U.S. 469 (2015), into due-course jurisprudence. "In *Kelo*, a city took private property through eminent domain only to turn it over to other private parties for economic development." *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 196 (Tex. 2019) (Blacklock, J., dissenting, joined by Lehrmann and Boyd, JJ.) (citing *Kelo*, 545 U.S. at 473–75). This notion of using public power for purely private benefit—what the Thirteenth Court sanctioned below—is so contrary to Texans' liberty that they amended their Bill of Rights after *Kelo* to clarify that the phrase "'public

use' does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development." Tex. Const. art. I, § 17. And in doing so, the People were not announcing a *new* right. They were underscoring for overly deferential courts that eminent domain in Texas had never encompassed public power for private gain. It is no more plausible that public power for private gain is acceptable in the due-course of law context than it is in the eminent-domain context.

B. This Case Is the Perfect Vehicle for Examining Private Economic Protectionism.

This case perfectly presents the private-protectionism question. The City's draft ordinance contained no Restaurant Permission Scheme or Permit Cap. Local restaurant owners then loudly demanded protectionism, the Mayor told them to rewrite the law, and they revised it for the sole purpose of abrogating occupational freedom and reducing consumer choice. The self-interest of these insiders was so brazen that there is not even a fig leaf of public concern. The Thirteenth Court rejected the City's argument that the "restaurant permission requirement 'protects the general health and safety of the public.'" *Surfvive*, 2022 WL 2069216, at *7.

Yet, rather than that being fatal to the anti-competitive restriction, the Thirteenth Court rescued the ordinance by holding that it serves "the legitimate government interest in retaining current businesses and

preventing economic decline." *Id.* at *8. This holding was the sole basis for overturning the district court's correct conclusion that the permission requirement violates the due-course clause. *See id.* Therefore, who wins and who loses here depends solely on the validity of private economic protectionism.

III. The Thirteenth Court's Standing Analysis Conflicts with Established Law on Futility.

The Thirteenth Court's perfunctory standing analysis also warrants review. Candidly, this issue falls closer to the "error correction" end of the spectrum, but the Court can reaffirm the blackletter principle that standing never requires futile permit applications. Moreover, judicial economy favors reversing the Thirteenth Court now and reinstating the trial-court judgment. The City can then decide whether to appeal the Permit Cap on the merits. The alternative is that Petitioners make a futile future application under a Cap with no available permits, forcing the parties to relitigate from scratch. That makes little practical sense.

Standing on the Permit Cap should not be in question. Addressing the City's standing argument below, Petitioners wrote: "[I]t would have been pointless to apply for permits that were capped—no permits were available because of the Permit Cap when SurfVive obtained its food truck in April 2018, CR.1607, 2743, and none were available when Appellees wrapped up

discovery in 2020 . . . *see* CR.2662." App. 8 at 32–33. Under such facts, standing is clear because a pointless application for permits that didn't exist wasn't necessary. *See Moore v. Dep't of Agric.*, 993 F.2d 1222, 1222 (5th Cir. 1993) (holding that white farmers need not apply to a program categorically closed to "Whites").

Inexplicably, the Thirteenth Court disagreed in a three-sentence paragraph with no basis in law or the record: "Merely stating that the cap would have prevented them from obtaining a permit had they applied is presenting a hypothetical situation, not a concrete injury." *Surfvive*, 2022 WL 2069216, at *3. Yet what could be more concrete than the fact that no permits were available under the Cap? And what proposition of law could be more settled than the principle that permit applications are never required "when a policy's flat prohibition would render submission futile"? *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005). To the contrary, what is "hypothetical" on this record is that any permits were or will ever be available. Review ensures that the thin, errant analysis below doesn't bar the courthouse door to Texans with real constitutional claims.

PRAYER

Food Truck Petitioners ask the Court to grant their petition, reverse the court of appeals, and render judgment in their favor.

Dated: August 24, 2022.

RESPECTFULLY SUBMITTED,

INSTITUTE FOR JUSTICE

By: /s/ Arif Panju

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that on August 24, 2022, I caused a true and correct copy of the foregoing Petition for Review and the attached Appendix to be sent to the following counsel by United States certified mail, return receipt requested:

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ATTORNEYS FOR RESPONDENT

/s/ Arif Panju

CERTIFICATION

I certify that all factual statements in this Petition for Review are supported by competent evidence in the appendix or record to which the petition has cited.

/s/ Arif Panju

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Petition for Review contains 4,496 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Arif Panju

APPENDIX

INDEX TO APPENDIX

RECEIVED 6/2/2020 12:02 AM
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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

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2019-DCL-01284 / 43906676
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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

NUMBER 13-20-00536-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

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.

MEMORANDUM OPINION

Before Justices Benavides, Longoria, and Tijerina
Memorandum Opinion by Justice Longoria

Appellant the City of South Padre Island (SPI) challenges the trial court's denial of its plea to the jurisdiction. In six issues, SPI alleges the trial court erred in denying its plea because: (1) governmental immunity bars the recovery of nominal damages for a violation of Texas Constitution Article I, § 19; (2) appellees Surfvive, Anubis Avalos, and Adonai

Ramses Avalos lacked standing to challenge SPI's ordinance; (3) appellees failed to establish a waiver of immunity from suit; and (4–6) appellees did not establish that the challenged sections of SPI's ordinance violated substantive due course of law as applied to appellees. We reverse and render.

I. BACKGROUND

In February 2019, appellees filed their original petition, application for injunctive relief, and request for disclosure against SPI, arguing that SPI's city ordinance relating to the operation of mobile food units (MFUs) violated appellees' "economic liberty rights under Article I, § 19 of the Texas Constitution, to operate their mobile-food-unit businesses, colloquially known as 'food trucks.'" Section 10-31 of SPI's Code of Ordinances relates to MFUs, which are defined as: "[a] vehicle mounted, self or otherwise propelled, self-contained food service operation, designed to be readily movable (including, but not limited to catering trucks and trailers) and used to store, prepare, display, serve or sell food. Mobile units must completely retain their mobility at all times." SOUTH PADRE ISLAND, TEX., CODE OF ORDINANCES, ch. 10 § 10-31(A)(2) (2020). Section 10-31 requires MFUs to comply with all applicable laws including SPI's own ordinances.

Appellees specifically complained about § 10-31(C)(3), which appellees refer to as the "Restaurant Permission Requirement," and §§ 10-31(C)(2) and 10-31(F)(2), which appellees refer to as the "Permit Cap." Section 10-31(C)(3) requires that 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. Limit one local owner's (or designee's) signature per applicant." *Id.* § 10-31(C)(3). Section 10-

31(C)(2) limits the number of permits to be issued per month to twelve. *Id.* § 10-31(C)(2). Section 10-31(F)(2) states that "[t]he permit holder of a[n] [MFU] must apply to the Environmental Health Services Department prior to selling anything" and establishes that permits are valid for thirty days. *Id.* § 10-31(F)(2). Appellees' petition alleged that the complained-of sections in SPI's MFU ordinance prevented appellees from operating their food trucks in SPI. They further argued that SPI could not advance any legitimate government interest for the restaurant permission requirement or the permit cap.

SPI filed a plea to the jurisdiction and a motion for summary judgment, which the trial court took under submission. Subsequently, SPI filed a second plea to the jurisdiction and a no evidence and traditional motion for summary judgment. Appellees filed a response and their own motion for summary judgment seeking declaratory relief, a permanent injunction, and nominal damages. The trial court denied SPI's second plea to the jurisdiction and motion for summary judgment and granted appellees' motion for summary judgment. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (allowing an appeal from a denial of a plea to the jurisdiction by a governmental unit).

II. PLEA TO THE JURISDICTION

A plea to the jurisdiction is a dilatory plea; its purpose is "to defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction over a pleaded cause of action. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We review de novo a trial court's ruling on a challenge to

its subject matter jurisdiction. *Id.* at 228. When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015); *Miranda*, 133 S.W.3d at 226. When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even where those facts may implicate the merits of the cause of action. *Miranda*, 133 S.W.3d at 227. We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Ryder*, 453 S.W.3d at 927. Where the pleadings generate a fact question regarding the jurisdictional issue, a court cannot sustain the plea to the jurisdiction. *Id.*

A. Standing

We review questions of standing de novo. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004). This is because standing is a component of subject matter jurisdiction. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) (citations omitted) ("Without standing, a court lacks subject matter jurisdiction to hear the case."). Standing is a threshold requirement to maintaining a lawsuit. *See Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012) (citations omitted) ("Standing is a constitutional prerequisite to suit. A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it."). To establish standing in Texas, a plaintiff must allege "a concrete injury . . . and a real controversy between the parties that will be resolved by the court." *Id.* at 154. Specifically, the plaintiff must allege a threatened or actual injury—it may not be hypothetical. *See Allstate Indem. Co. v. Forth*, 204 S.W.3d

795, 796 (Tex. 2006); *see also DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008) (citations omitted) ("For standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical.").

By its second issue, SPI argues that appellees lack standing to challenge SPI's ordinance because: (1) neither appellee submitted a complete permit application, (2) they cannot establish they would qualify for a permit absent the challenged sections of the ordinance, (3) the unchallenged portions of the ordinance give appellees an alternative basis to obtain a permit, and (4) their challenges to the permit cap are purely speculative.

1. Completed Permit Application

Relying on *Korr, LLC v. County of Gaines*, No. 11-18-00130-CV, 2020 WL 2836491, *2–4 (Tex. App.—Eastland May 29, 2020, no pet.) (mem. op.), SPI argues that neither appellee submitted a complete permit application and therefore neither appellee has standing to bring a claim alleging a threatened or actual injury from the challenged portions of SPI's ordinance. The appellant in *Korr* filed a petition against Gaines County alleging a portion of a county regulation relating to subdivision plat approvals was unconstitutional. *See id.* at *1. Arguing in a plea to the jurisdiction that appellant was not an "owner or holder of an interest" in the subdivision "or any other real property in Gaines County," Gaines County argued that appellant's "suit did not involve a justiciable claim because KORR lacked standing, because KORR's claims were not ripe, and because KORR's claims were moot." *Id.* The trial court granted Gaines County's plea to the jurisdiction. *See id.* at *2. Subsequently, the Eleventh Court of Appeals upheld the trial

court's ruling, finding, among other things, that the appellant "failed to present any evidence that it had been affected by the complained-of regulation or that it had filed or attempted to file a subdivision plat after Gaines County adopted the complained-of regulation." *Id.* at *3.

SPI argues the facts here are similar to those in *Korr* because SPI contends neither appellee has filed a complete application that has been denied, meaning they have not been affected by the complained-of ordinance. However, SPI does not dispute that Surfvive submitted an application which was deemed incomplete by SPI for failure to comply with the restaurant permission requirement as it lacked a signature from a local restaurant approving the food truck. In *Korr*, the court reasoned that the appellant lacked standing because it presented no controverting evidence to the evidence and it could only present hypothetical situations in which it would be affected by the complained of regulation. *See id.* Here, Surfvive applied for a permit but was denied for failure to comply with the restaurant permission requirement of SPI's ordinance. Accordingly, Surfvive's claims as to the restaurant permission requirement are not purely hypothetical. *See DaimlerChrysler Corp.*, 252 S.W.3d at 304–05.

As to the permit cap, appellees argue that it would have been "pointless" for them to apply when the number of permits were capped. However, appellees do not indicate how they were in fact injured by the cap. Merely stating that the cap would have prevented them from obtaining a permit had they applied is presenting a hypothetical situation, not a concrete injury. *See id.*

2. Qualifications

SPI further argues that, even absent the challenged portions of the ordinance, appellees have not established that they meet the remaining requirements for a permit. SPI contends that appellees lack standing because they do not qualify under the Texas Department of State Health Services regulations; specifically, SPI states appellees lack a commissary or central preparation facility (CPF). *See* 25 TEX. ADMIN. CODE ANN. § 228.221. Providing no authority to support this contention, we find SPI has waived this argument. *See* TEX. R. APP. P. 38.1(i) (requiring that briefs "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). However, to the extent SPI argues that appellees lack standing because their claims are meritless, we note "a plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress." *DaimlerChrysler Corp.*, 252 S.W.3d at 305. Therefore, we reject this argument.

3. Alternative to CPF

In one paragraph in its standing argument, SPI argues that the restaurant permission requirement is not a barrier, but rather it "provides an alternative" to the requirement, namely, "connect to a CPF/commissary." Again, SPI provides no support or explanation for this contention, thereby waiving this argument. *See* TEX. R. APP. P. 38.1(i). Furthermore, the ordinance clearly states that any 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." SOUTH PADRE ISLAND, TEX., CODE OF ORDINANCES, ch. 10 § 10-31(C)(3) (2020) (emphasis added). This language leaves no

room for the alternative approach argued by SPI on appeal.

4. Summary

Accordingly, we find that appellees had standing to assert their claim as to the constitutionality of the restaurant permission requirement as Surfvive demonstrated it was personally aggrieved. *See Heckman*, 369 S.W.3d at 152 n.64 (holding that where multiple plaintiffs sue for injunctive or declaratory relief, only one plaintiff must have standing to pursue as much or more relief than any of the other plaintiffs). Because we have determined that neither appellee presented any injury, aside from a hypothetical one, regarding the permit cap, we find that appellees lack standing to assert a claim as to the constitutionality of the ordinance in so far as it relates to the permit cap. *See DaimlerChrysler Corp.*, 252 S.W.3d at 305–07; *see also Korr*, 2020 WL 2836491, at *2–4. We overrule SPI's second issue as it relates to the restaurant permission requirement and sustain it in so far as it relates to the permit cap.[1]

B. Substantive Due Course of Law Violation

[1] In post-submission letter briefing, SPI raised the issue of mootness, stating that SPI had increased the permit cap. Having found that appellees lacked standing to bring a claim as it relates to the permit cap, we need not address the mootness argument on appeal. *See* TEX. R. APP. P. 47.1.

SPI also argues that the Avalos brothers lack standing to bring a claim as to the restaurant permission requirement because they no longer operate a food truck, having closed their business. We note, however, that the evidence presented by SPI to prove that the Avalos brothers closed their business indicates it could be a temporary closure and such closure does not prevent the Avalos brothers from reopening or engaging in the food truck business. We overrule SPI's mootness arguments as they relate to the Avalos brothers in this regard.

SPI also presented evidence that Surfvive chose not to apply for a permit when told there was one available, after the start of litigation. SPI contends this renders Surfvive's claims moot. Surfvive, however, responded that even with an available permit, the restaurant permission requirement was still in place, which Surfvive argues is unconstitutional, and thus its arguments are justiciable. We agree. We overrule SPI's mootness arguments as they relate to Surfvive in this regard.

In its third issue, SPI argues that appellees did not establish a waiver of SPI's immunity. By its fourth and sixth issues, SPI argues that appellees did not establish that the restaurant permission requirement violated substantive due course of law or that it is facially invalid under substantive due course of law.[2] SPI contends that immunity from suit is not waived if appellees' constitutional claims are facially invalid. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011).

SPI challenges the trial court's jurisdiction to consider appellees' claims based upon sovereign immunity. "Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Miranda*, 133 S.W.3d at 225–26 (citing *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999)). To proceed in a suit against state entities and officials, a plaintiff must establish a waiver of immunity, *see Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Jones*, 8 S.W.3d at 638, or that sovereign immunity is inapplicable. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009) (sovereign immunity does not prohibit "suits to require state officials to comply with statutory or constitutional provisions"); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) ("[S]uits for equitable remedies for violation of constitutional rights are not prohibited."). While it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, *Heinrich*, 284 S.W.3d at 372, immunity from suit is not waived if the constitutional claims are facially

[2] In its fifth issue and by part of its sixth issue, SPI makes the argument that appellees did not establish a substantive due course of law violation regarding the permit cap, and they did not establish that the permit cap was facially invalid. Having already determined that appellees lacked standing to assert a claim regarding the permit cap, we decline to reach the merits on issue five and the part of issue six related to the permit cap. *See* TEX. R. APP. P. 47.1.

invalid. *See Klumb v. Houst. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015).

Immunity is waived only to the extent the plaintiff pleads a viable constitutional claim. *Id.* at 8. To satisfy this showing, plaintiffs must do more than merely name a cause of action and assert the existence of a constitutional violation. *See generally id.* at 13–14 (concluding the appellants did not present a viable equal protection claim where (1) neither a suspect classification nor a fundamental right was involved, and (2) the appellee's actions were rationally related to certain government interests); *Andrade*, 345 S.W.3d at 11 (considering substance of equal protection claim against Secretary of State in reviewing ruling on a plea to the jurisdiction and explaining that Secretary retained immunity unless the plaintiffs pleaded a "viable claim").

Here, appellees asserted in their petition that the complained of portions of SPI's food truck ordinance violate their "economic liberty rights under Article I, § 19 of the Texas Constitution" by infringing on appellees' "right to earn an honest living in the occupation of one's choice free from government interference." Appellees asserted the complained of portions of the ordinance were unconstitutional "both on its face and as-applied to [appellees]."

1. As-Applied

To support their position that the ordinance is unconstitutional as applied to them, appellees analogize their alleged constitutionally protected right to operate their MFUs to the protected economic liberty interest of occupational freedom that was at issue in *Patel v. Texas Department of Licensing & Regulation*. *See* 469 S.W.3d 69 (Tex. 2015). In *Texas Alcoholic Beverage Commission v. Live Oak Brewing Co.*, the court discussed *Patel* at

length:

> In *Patel*, the plaintiffs were individuals who practiced commercial eyebrow threading and salon owners employing eyebrow threaders (the Threaders). *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 73 (Tex. 2015). The Threaders had brought as-applied challenges based on the due course of law clause of the Texas Constitution to licensing statutes and regulations (the cosmetology scheme) that required 750 hours of cosmetology training, largely unrelated to commercial eyebrow threading, to obtain a license to practice. *Id.* at 73–74; *see* TEX. CONST. art. I, § 19. Similar to appellees' claims, the Threaders alleged that the cosmetology scheme "violated their constitutional right 'to earn an honest living in the occupation of one's choice free from unreasonable government interference.'" *Patel*, 469 S.W.3d at 74.
>
> The Texas Supreme Court concluded that the Threaders had met their "high burden" of proving that the cosmetology scheme was unconstitutional as applied to them based on the Texas Constitution due course of law protections. *See id.* at 90. In reaching its conclusion, the Texas Supreme Court set forth the following test for overcoming the presumption of constitutionality:
>
> > To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.
>
> *Id.* at 87. The court's analysis in its application of this test focused on the Threaders' constitutional right to occupational freedom and the State's concession that "as many as 320 of the curriculum hours [were] not related to activities that threaders actually perform." *See id.* at 89–90. The evidence showed that the Threaders were entirely shut out from practicing their trade until they completed the "oppressive" required training and that the threader trainees had to pay out-of-pocket expenses for that training "and at the same time lose the opportunity to make money actively practicing their trade." *Id.* at 88–90.

537 S.W.3d 647, 656 (Tex. App.—Austin 2017, pet. denied).

SPI contends that the *Patel* test was meant to be limited to the framework in which it arose, namely "a regulatory prohibition on entry into the profession as a whole." SPI argues that appellees are not barred from entry into the food truck business but rather appellees are losing profits from not being able to operate in a specific location. SPI points to evidence that appellees are in fact capable of and have, either presently or in the past, operated food trucks elsewhere in this state. Thus, SPI argues that appellees have not been barred from engaging in the occupation of their choice, but rather they are merely barred as to the location in which they may engage in their occupation.

To the extent that SPI argues that the ordinance does not deprive appellees of a protected liberty interest, we disagree. SPI relies on the holding in *Texas Southern University v. Villarreal*, 620 S.W.3d 899, 908 (Tex. 2021) for the proposition that because appellees are able to apply for a permit "later and operate elsewhere in the meantime," they have not been deprived of a liberty interest. However, in *Villareal*, a student was dismissed from the law school for failure to maintain the required grade point average. *See id.* at 903. The student argued that the school "mishandled [an] investigation into [an] alleged cheating incident," which led to his dismissal. *Id.* at 904. The student did not challenge the required grade point average, but rather the actions taken by the school to enforce the requirement. *See El Paso Indep. Sch. Dist. v. McIntyre,* 584 S.W.3d 185, 199 (Tex. App.—El Paso 2018, no pet.) (stating that for the equitable rule to apply, the claim must be directed not to the action of a governmental employee but to a rule or a statute).

The Supreme Court of Texas has made clear that its holdings in *Patel* must remain "properly limited to the particular legal framework" in which they were made. *See Hegar*

v. Tex. Small Tobacco Coal., 496 S.W.3d 778, 788 n.35 (Tex. 2016). And, as set out in the earlier discussion of appellees' claim, the statute at issue here creates an economic barrier of entry into a given profession in that it inhibits appellees' ability to pursue an economic or professional opportunity. *See Transformative Learning Sys. v. Tex. Educ. Agency*, 572 S.W.3d 281, 293 (Tex. App.—Austin 2018, no pet.).

Accordingly, we follow the guidance as set forth in *Patel* to determine if appellees, the proponent of the as-applied challenge to SPI's ordinance, have overcome the presumption that the ordinance is constitutional. *See* 469 S.W.3d at 87*. Patel* clarified the standard of review for as-applied substantive due course challenges, stating: "the standard of review for as-applied substantive due course challenges to economic regulation statutes includes an accompanying consideration as reflected by cases referenced above: whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Id.* (internal citations omitted). The *Patel* court emphasized that this standard includes the presumption of constitutionality and places a high burden on parties claiming a statute violates substantive due course of law. *See id.*

> In sum, statutes are presumed to be constitutional. To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under [§] 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.

Id.

"[A]n ordinance violates due process if it 'has no foundation in reason and is a

mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety[,] or the public welfare in its proper sense.'" *Draper v. City of Arlington*, 629 S.W.3d 777, 786 (Tex. App.—Fort Worth 2021, pet. denied) (quoting *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 187–88 (1928))). Whether an ordinance violates due course of law is a legal question, but "the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties." *Patel*, 469 S.W.3d at 87; *see City of San Antonio v. TPLP Off. Park Props.*, 218 S.W.3d 60, 65 (Tex. 2007) ("The trial court resolves disputed fact issues, but the ultimate question of whether an action or ordinance regulating property violates due process is a question of law." (citing *Mayhew*, 964 S.W.2d at 932)).

It is appellees' burden to overcome the presumption that the ordinance is constitutional. *See Patel*, 469 S.W.3d at 87. SPI's stated purpose in enacting the ordinance was "to promote a diversity of foods and benefit the City's economy . . . [and] to provide for regulation of mobile food establishments in order to protect the health, safety[,] and welfare of the citizens."

Appellees assert that SPI's ordinance "relate[s] to one purpose alone—protecting local restaurant owners from food-truck competition." In response, SPI argues that the restaurant permission requirement "protects the general health and safety of the public," a legitimate governmental interest, by providing food truck operators an alternative means to comply with the state's CPF or commissary requirement.

SPI's argument is that creating an alternative to the state's requirement "protects

the general health and safety of the public because [SPI] lacks a CPF or commissary from which an MFU can daily operate as required by" the state. However, we have previously discussed SPI's contention that the restaurant permission requirement serves as an "alternative" to the state requirement that a food truck operate from a CPF or commissary. The relevant portion of SPI's ordinance reads as follows:

> (C) Mobile Food Unit and Permit Requirements.
>
> > (3) 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. Limit one local owner's (or designee's) signature per applicant.

See SOUTH PADRE ISLAND, TEX., CODE OF ORDINANCES, ch. 10 § 10-31(C)(3) (2020). This requirement contains no language indicating it is an alternative to a state requirement, nor does it indicate that the "free-standing food unit" that provides a signature to allow a food truck to operate on SPI will also operate as a CPF or commissary. Instead, it operates as a separate and distinct requirement in addition to applicable state laws. *See id.* § 10-31(B) ("All [MFUs] shall comply with all applicable laws, including the requirements of this article . . . ."). Accordingly, we disagree with SPI's contention that the restaurant permission requirement serves as an alternative to the state's CPF or commissary requirement.

Appellees argue that SPI enacted the ordinance to protect the "brick and mortar" restaurants from increased competition. Appellees presented evidence that purported to show that SPI included the restaurant permission requirement at the behest of local restaurant owners, who "objected to food-truck competition and opposed [SPI's] original food truck ordinance" which included no restaurant permission requirement. The evidence

in the record included the first iteration of the restaurant permission requirement, which was suggested by a local restaurant owner. SPI does not dispute that input was sought from "local businessmen," but contends the ordinance recommendations ultimately came from SPI's health director. SPI argues that the ordinance served to benefit SPI's economy and promote economic development, a legitimate governmental interest. *See EP Hotel Partners, LP v. City of El Paso*, 527 S.W.3d 646, 658 n.11 (Tex. App.—El Paso 2017, no pet.) ("[C]ommentators have recognized that it is a common practice for governmental entities to offer 'economic incentives' as a means of attracting corporations to develop projects within their purview in the hope of stimulating local growth and ensuring prosperity."); *see also* Martin E. Gold, *Economic Development Projects: A Perspectiv*e, 19 Urb. Law. 193, 193 (1987) (observing that economic development projects are characterized by state, city, and local governments' provision of "various concessions to induce private industry into locating, *staying*, or expanding within their borders by providing assistance and subsidies for such private development," such as tax exemptions or abatements, for "long-term benefits for the municipality" (emphasis added)); Patricia J. Askew, *Comment, Take It or Leave It: Eminent Domain for Economic Development—Statutes, Ordinances & Politics, Oh My!*, 12 Tex. Wesleyan L. Rev. 523, 527 (2006) (defining "economic development" as the "process of site selection and community marketing used to attract and *retain businesses* and jobs, and ideally prevent, but at least impede, the cycle of economic decline and urban decay" through influencing "the location decisions of private corporations for the benefit of some particular geographic area, . . . local, regional, state, or national" (footnotes omitted) (emphasis

added)).

Victor Baldovinos, SPI's environmental health director, testified in his deposition that he is involved in the inspection of restaurants and MFUs in the city. As part of his role, he is also in charge of the application and permitting process for MFUs. Baldovinos stated that SPI did a thorough investigation to determine a way to allow MFUs to operate in the city. He explained that investigation kept "fairness and the protection of health and safety" in the forefront of all decisions. Appellees contention that SPI was acting to protect "brick and mortar" restaurants based on SPI's inclusion of those restaurants in its ordinance development does not negate SPI's evidence that the ordinance was created to promote economic development, including the legitimate government interest in retaining current businesses and preventing economic decline.

SPI also presented evidence that several food trucks currently operate on SPI, having complied with the ordinance in full. Attached to its motion, SPI included the deposition testimony of Jerry Leal, a food truck owner who operates on SPI. When asked about what he had to do to comply with the restaurant permission requirement, Leal explained that while he was dining on the island, he asked the owner of that particular restaurant if they would sign off on his permit. Upon learning that the owner of this particular restaurant had already signed for another food truck, Leal sought out another restaurant to sign on his behalf, specifically stating: "So I was like, well, I'm going to go and knock on all their doors, like–you know what I'm saying. It's not hard, you know. So that's what I did." Leal explained that he was able to find someone to sign his permit application fairly easily, and went on to testify that he found that the permit process on

SPI was not very difficult compared to other cities he has operated in, such as Austin, which he described the permitting process as "overwhelming." SPI also provided evidence that the Avalos brothers never attempted to comply with the ordinance, and that Surfvive, when given the opportunity to comply, chose not to and instead challenged the ordinance.

While appellees contend that the real-world effect as applied to them is oppressive, they have not presented any evidence of how they have been oppressed. Specifically, Surfvive's owner, at her deposition, testified that she "never went to a restaurant owner or tried to go to a restaurant owner" to attempt to comply with SPI's ordinance. While she did receive a signature from a local business on SPI, it was not a restaurant, nor was it in the zoned area for food trucks. She further testified that while she does not believe the restaurant permission requirment should be enforced, she agreed she would be able to comply "if [she] had to."

Accordingly, based on the evidence presented, we conclude that appellees failed to present evidence tending to prove that the food truck ordinance violates their substantive-due-course-of-law rights and thus failed to show that they were likely to prevail on their request for a declaration that the ordinance violates their substantive-due-course-of-law rights under Article 1, § 19 of the Texas Constitution. We find that appellees did not present evidence to rebut the presumption that the ordinance is constitutional. *See Patel*, 469 S.W.3d at 87; *Draper*, 629 S.W.3d at 789.[3] We sustain SPI's third and

[3] Appellees assert that they raised both as-applied and facial challenges to the constitutionality of SPI's ordinance. Having determined that appellees did not meet their burden to rebut the presumption that the ordinance is constitutional as-applied to appellees, we necessarily hold that appellee's facial challenge also fails. For a statute to facially violate a constitutional provision, the statute must by its terms always and

fourth issues. We also sustain SPI's sixth issue insofar as it relates to the restaurant permission requirement.

C. Nominal Damages

A plaintiff may recover nominal damages when its legal rights have been invaded and it either (1) has not sustained an actual loss or (2) has sustained an actual loss but failed to prove the amount of the loss. *Trevino v. Sw. Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. App.—Corpus Christi–Edinburg 1979, no writ). Nominal damages are appropriate when a party fails to prove the precise amount of its loss, or a party suffered no actual loss. *See generally id.* at 584. Here, nominal damages were awarded in the amount of one dollar. In its first issue SPI challenges the trial court's award of nominal damages, arguing SPI is immune. Having determined the trial court erred in denying SPI's plea to the jurisdiction, we need not address the merits of SPI's immunity argument as appellees did not establish a violation of their rights. *See id.* Accordingly, because the trial court erred in awarding nominal damages, we sustain SPI's first issue.

III. Conclusion

We reverse the judgment of the trial court, render judgment granting SPI's plea to the jurisdiction, and dismiss appellees' claims.

NORA L. LONGORIA
Justice

Delivered and filed on the
9th day of June, 2022.

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in every instance operate unconstitutionally. *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 623 (Tex. 1996). To clear the facially unconstitutional hurdle, the statute must be unconstitutional in every application. *See In re S.N.*, 287 S.W.3d 183, 194 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

THE THIRTEENTH COURT OF APPEALS

13-20-00536-CV

City of South Padre Island
v.
Surfvive, Anubis Avalos, and Adonai Ramses Avalos

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

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes the judgment of the trial court should be reversed and rendered. The Court orders the judgment of the trial court REVERSED and RENDERS judgment in accordance with its opinion. Costs of the appeal are adjudged against appellees.

We further order this decision certified below for observance.

June 9, 2022

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Sec. 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Sec. 10-31. - Mobile food units.

(A) In this section:

(1) *Permit holder* means the person to whom the health authority issues a permit for a mobile food unit permit required by Chapter 10 of the Code of Ordinances.

(2) *Mobile food unit (MFU)* has the meaning established in Title 25, Part 1, Chapter 228 Subchapter A (Definitions) of the Texas Administrative Code and shall also mean a vehicle mounted, self or otherwise propelled, self-contained food service operation, designed to be readily movable (including, but not limited to, catering trucks and trailers) and used to store, prepare, display, serve or sell food. Mobile units must completely retain their mobility at all times. A Mobile Food Unit does not include a stand or a booth.

(3) Push carts and roadside food vendor are strictly prohibited.

(B) All mobile food units shall comply with all applicable laws, including the requirements of this article, except as otherwise provided in this section. The Environmental Health Director or designee may impose additional requirements to protect against health hazards related to the conduct of mobile food units and may prohibit the sale of potentially hazardous foods. The provisions of this section shall be enforceable by the Environmental Health Director or designee.

(C) Mobile Food Unit and Permit Requirements.

(1) Designated Areas. The designated areas for mobile food units are District zoned "EDC" ("Entertainment District Core"), "BF" ("Bay Front"), and "PBN" ("Padre Boulevard North").

(2) No more than eighteen (18) mobile food unit permits may be issued per month on the Island.

(3) 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. Limit one local owner's (or designee's) signature per applicant.

(4) Permit fees are as follows:

(a) September through February a monthly fee of $100 shall be charged;

(b) March through August a monthly fee of $500 shall be charged; or

(c) January through December (calendar year), yearly fee of $1,800 shall be charged.

(D) The City Manager or City Council may authorize additional "Designated Areas" with additional Mobile Food Establishments as needed.

(E) A mobile food unit:

(1) Must obtain a health permit by the Health Director.

(2) Must demonstrate mobility of the mobile food unit at any time, if requested by the Environmental Health Director or designee.

(3) Must provide hand washing facilities within the mobile food truck (i.e. an insulated container with a spigot that can be turned on to allow potable, clean, free flowing warm water; a wastewater container); soap; disposable towels; and a waste receptacle.

(4) Must show evidence that restrooms and hand washing will be provided for patrons as necessary.

(5) Must have a current Texas Department of Motor Vehicle Registration Sticker.

(6) Must provide single-service articles, which are biodegradable or recycled products, for use by the consumers.

(7) All mobile food units may participate in South Padre Island special events.

(F) The permit holder of a mobile food unit:

(1) Must comply with all requirements of Chapter 10 of the Code of Ordinances.

(2) Must apply to the Environmental Health Services Department prior to selling anything.

(a) A mobile food establishment permit is valid for 30 days.

(3) Must submit proof of Sales and Use Tax Permit issued by the State of Texas. If the permit allows multiple locations, then you must provide evidence of being a "list filer" and show proof that the City of South Padre Island is

included on that list.

(4) Must display, at all times, the Health Permit in a conspicuous place where it can be easily read by the general public on the mobile food unit.

(5) Shall keep the area around the mobile food establishment clear of litter and debris at all times.

(6) Shall have adequate and approved garbage and refuse storage facilities for the operator's use and shall have garbage and refuse storage facilities immediately adjacent to the exterior of the mobile food establishments that are insect and rodent-proof for use by consumers. All garbage, refuse and garbage containers must be removed by the Mobile Food Unit upon departure.

(7) Shall obtain a permit from the Fire Department for the use of Liquid Propane gas equipment for each mobile food establishment and shall make the permit available for inspection upon the request of the Fire Chief or designees or the Environmental Health Director or designee, if liquid propane is utilized by the Mobile Food Unit.

(G) A mobile food unit may use a barbecue pit when:

(1) Must be enclosed in a trailer or the mobile food unit.

(2) The barbecue pit is used only for cooking. Processing, portioning, preparation, or assembly of food must be conducted from inside the mobile food establishment.

(3) A hand-washing system as defined in the Texas Food Establishment Rules, is provided adjacent to the barbecue pit.

(4) Food from a barbecue pit must be protected from the elements at all times. Including, but not limited to, airborne debris, flying insects, birds, and bird droppings.

(H) A mobile food unit is limited to signs as required by Chapter 15. The signs must be secured and mounted flat against the mobile food unit, and may not project more than six inches from the exterior of the mobile food unit.

(I) A permanent water or wastewater connection is prohibited.

(1) All water used in the mobile food unit must be from an approved public

water system. A mobile food unit may also use commercially bottled water.

(2) The materials that are used in the construction of a mobile food unit's water tank and accessories shall be safe, durable, corrosion resistant, nonabsorbent, and finished to have a smooth and easily cleanable surface.

(3) A wastewater holding tank in a mobile food unit shall be sized 15% larger in capacity than the water supply tank and sloped to a drain that is 1 inch in inner diameter or greater and equipped with a shut off valve.

(4) Mobile Food Unit tank inlet.

A Mobile Food Unit's water tank inlet shall be:

(a) 19.1mm (¾ inch) in inner diameter or less; and

(b) Provided with a hose connection of a size or type that will prevent its use for any other service;

(c) Fill hose and water holding tank shall be labeled as "Potable Water."

(J) Electrical service may be provided by:

(1) Temporary service;

(2) An onboard generator with the making of noise not to exceed (75) decibels; or

(3) Solar panels.

(K) A mobile food unit's construction:

(1) Exterior shall be of weather-resistant materials and shall comply with all applicable laws.

(2) Interior shall be constructed of smooth, durable, easily cleanable surfaces.

The mobile food unit shall be completely enclosed. No open truck beds; windows shall be screened or kept closed.

(3) The surface of the servicing area shall be constructed of a smooth nonabsorbent material, such as concrete or machine-laid asphalt and shall be maintained in good repair and kept clean.

(L) Appointments for Mobile Food Unit inspections may be made by contacting the Environmental Health Department at (956) 761-8123, Monday—Friday, 8:00 a.m.

—5:00 p.m., excluding holidays.

(M) All permit holders shall comply with this section. A violation of this section shall be fined as provided by Section 21-2 of the Code of Ordinances.

(Ord. No. 18-15 , 5-16-2018; Ord. No. 21-08 , 5-19-2021)

Sec. 10-31.1. - [Evaluation].

The Food Truck Planning Committee will meet as necessary, to evaluate the program's effectiveness and will take their recommendations to City Council no later than April 17, 2017.

Sec. 10-32. - Food trailers; mobility.

Notwithstanding the requirement of mobility, a food trailer which is transported by a vehicle and then detached is permitted so long as both the permit holder and the trailer meet all the other conditions of this ordinance but such trailer must be removed within seventy (72) hours of the request under Section 10-31(E)(2).

(Ord. No. 18-15 , 5-16-2018)

Sec. 10-33. - [Exceptions].

Notwithstanding any other provision in this Code of Ordinances, this ordinance governing Mobile Food Units and Food Trailers identified in this Article II provides an exception for any of the activities authorized herein.

Secs. 10-34—10-49. - Reserved.

CASE NO. 13-20-00536-CV

IN THE THIRTEENTH COURT OF APPEALS

CITY OF SOUTH PADRE ISLAND — **APPELLANT**

VS.

SURFVIVE, ANUBIS AVALOS,
And ADONAI RAMSES AVALOS — **APPELLEES**

APPELLANT'S BRIEF

ROGER W. HUGHES **ADAMS & GRAHAM, L.L.P.** **P.O. Box 1429** **Harlingen, Texas 78551-1429** **COUNSEL FOR APPELLANT** **CITY OF SOUTH PADRE ISLAND**	**ARNOLD AGUILAR** **AGUILAR & ZABARTE, LLC** **900 Marine Dr.** **Brownsville, TX 78520** **COUNSEL FOR APPELLANT** **CITY OF SOUTH PADRE ISLAND**

ORAL ARGUMENT IS REQUESTED

IDENTITY OF PARTIES AND COUNSEL

I. Appellant:

Appellant/Defendant	Counsel
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II. Appellees:

Appellees/Plaintiffs	Counsel
SurfVive Anubis Avalos Adonai Ramses Avalos	Arif Panju INSTITUTE FOR JUSTICE 816 Congress Ave., Ste 960 Austin, Texas 78701 Phone: (512) 480-5936 Keith Diggs INSTITUTE FOR JUSTICE 398 S. Mill Ave., Suite 301 Tempe, AZ 85281 Phone: (480) 557-8300

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Pages:**

TEXAS RULES

TEXAS STATUTES

TEXAS REGULATIONS

TEXAS CONSTITUTION

TREATISES

STATEMENT OF THE CASE

Nature of the case

In February 2018, SurfVive, Anubis Avalos, and Adonai Avalos, ('Plaintiffs') sued the City of South Padre Island ('City') concerning its food truck ordinance. CR 7. They asked for a declaration that City Code §§10-31(C)(2), 10-31(C)(3), and 10-31(F)(2)(a) violated Texas Constitution, Art. I, §19 (Due Course of Law); a permanent injunction barring enforcement; $1 nominal damages; and attorney's fees. CR 25.

Disposition

The City filed a Plea to the Jurisdiction and Motion for Summary Judgment that immunity barred recovery of nominal damages. CR 35. The trial court took it under submission. RR 40-42, 48-49.

The City the filed its Second Plea to the Jurisdiction and Motion for Summary Judgment (No Evidence and Traditional), challenging Plaintiffs' standing and their constitutional claims. CR 64. Plaintiffs filed a Motion for Summary Judgement for declaratory relief, a permanent injunction, and nominal damages. CR 501, 1545.

On Nov. 30, 2020, the trial court signed an order denying the City's Second Plea to the Jurisdiction and Motion for Summary Judgment. CR 3057; App. 1. The same day it signed a one sentence order granting Plaintiffs' Motion for Summary Judgment. CR 3058; App. 2.

The City timely filed a notice of interlocutory appeal. CR 3059.

STATEMENT REGARDING ORAL ARGUMENT

The City urges that oral argument will aid the decisional process. TEX. R. APP. P. 39.1. Oral argument will clarify the proper interpretation of the challenged ordinance and why it serves the City's interest to protect the public's health and safety.

ISSUES PRESENTED.

1. Whether governmental immunity bars the recovery of nominal damages for an alleged violation of Texas Constitution, Art. I, §19.
2. Whether Plaintiffs lacked standing to challenge the City's ordinance to obtain a permit for mobile food units because:
    a. The Avalos Plaintiffs never applied for a permit;
    b. SurfVive withdrew its incomplete, inadequate permit application;
    c. Plaintiffs did not prove that SPI Code §§10-31(C)(2) or (3) actually restrict them; and,

d. Plaintiffs did not prove that, but for the challenged regulations, they would qualify for a permit.

3. Whether Plaintiffs established a waiver of the City's immunity from suit to challenge ordinances that presumably were enacted for legitimate governmental interests in health and safety.
4. Whether Plaintiffs established that SPI Code §10-31(C)(3)'s requirement that a local free-standing food establishment provide food truck with support and sign the permit application violated substantive due course of law as applied to Plaintiffs.
5. Whether Plaintiffs established that SPI Code §§10-31(C)(2) and (F)(2)(a)'s limit of twelve food truck permits per month violated substantive due course of law as applied to Plaintiffs.
6. Whether Plaintiffs established that SPI Code §§10-31(C)(2, 3) and (F)(2)(a) are facially invalid under substantive due course of law.

Statement of Facts

Plaintiffs challenge only two portions of the City's food truck ordinance: SPI Code §§10-31(C)(2) & (C)(3). SPI Code §10.31(C)(3) requires food trucks be supported by a local free-standing food establishment and that establishment must sign the truck application for a permit. SPI Code §10-31(2) currently limits permits to twelve. Otherwise, they do not challenge the remainder of the City Code and state requirements for food trucks. Within the context of State and local regulation for food service, the City's Code is reasonable and protects public health.

A. Texas' Mobile Food Units regulation makes connection to a licensed food establishment critical to protecting the public health.

The Texas Department of State Health Services ('DSHS') created the Texas Food Establish Rules (TFER)[1] to 'safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented.' 25 TEX. ADMIN. CODE §228.1; App. 3. Key to this purpose was daily operation of food trucks from a licensed food establishment.

Under the TFER, Mobile Food Units ('MFU') – food trucks -- "shall operate from a central preparation facility or other fixed food establishment and shall report to such location daily for supplies and for cleaning and servicing operations." 25 TEX. ADMIN. CODE §228.221(a)(4)(B), 228.221(b)(1, 2); CR 111; App. 3. A CPF is

1 The TFER are found at 25 TEX. ADMIN. CODE §228.1, et seq.; App. 1.

an approved and licensed retail food establishment[2] at which (1) food is prepared, stored, and wrapped, (2) the MFU is supplied with fresh water and ice, (3) emptied of waste water into a proper waste disposal system, and (4) cleaned, including washing, rinsing, and sanitizing of food-contact surfaces that cannot be immersed in its utensil-washing sinks. 25 TEX. ADMIN. CODE §228.2(15). In populous counties or cities, health authorities must require MFUs to return daily to the commissary or food service establishment from which they operate for cleaning and other services. TEX. HEALTH & SAFETY CODE §437.0074(a).

That location must meet the requirements of subchapter F, which includes easily cleanable flooring/walls, adequate sinks and toilets, and approved receptacles for waste. 25 TEX. ADMIN. CODE §§228.221(b)(2), ---.171, --.175, --.176, --.185; App. 3. The MFU servicing area must have overhead protection, a location to flush liquid waste separate from the location for potable water servicing, and potable water servicing equipment. 25 TEX. ADMIN. CODE §228.221(c)(1); App. 3.

The TFER set hygiene standards for the MFU itself. 25 TEX. ADMIN. CODE §228.221(a)(6-11); App. 3. These included on-board storage of liquid waste, removal of sewage and liquid waste at an approved servicing area, and toilets conveniently located for employees during operation. 25 TEX. ADMIN. CODE

2 "Food establishment" generally refers to restaurant, food store, etc., that provides food directly to the consumer, including a CPF. 25 TEX. ADMIN. CODE §228.2(57).

§228.221(a)(9, 11); App. 3.

For the initial permitting inspection, the MFU owner must present (1) a certified food manager certificate, (2) a letter of authorization from a CPF to verify use if the MFU owner does not own the CPF, (3) the CPF's current health inspection, (4) written authorization from the service area if owned by a third party, and (5) a menu. 25 TEX. ADMIN. CODE §228.221(a)(4); App. 3.

The TFER permitted the City to impose additional requirements to protect against health hazards related to MFU's conduct. 25 TEX. ADMIN. CODE §228.221(a)(1); App. 3.

B. The City's Code created a local support alternative to operating from a CPF on the mainland.

The City's Code §10-10 adopts the Texas Food Establish Rules (TFER). App. 4; CR 111. For MFUs, it required:

a) they operate only in designated zones. §10.31(C)(1).

b) Applicants must 'be supported locally and have the signature of a licensed free-standing food unit on South Padre Island.' §10.31(C)(2).

c) a certified food protection manager.[3] §10-12.1.

d) hand washing facilities inside the MFU. §10-31(E)(3)

e) proof that restrooms and handwashing are provided for patrons. §10-

3 *See* TEX. HEALTH & SAFETY CODE §438.101, et. seq.; 25 TEX. ADMIN. CODE §228.2(59).

31(E)(4).

f) approved refuse storage containers for use by consumers. §10-31(F)(6). App. 4. Because MFUs could not operate in public ways, MFUs must park on private property, effectively requiring that owners' permission. CR 704.

The Island presented challenges to fulfilling the TFER's requirement for daily operation from a CPF or commissary. The Island has no CPF or commissary; the nearest one was in Harlingen. CR 159, 245, 802, 807. The Island was landlocked, its only access being the Queen Isabella causeway. CR 642, 659. Because bridge traffic often stalled during peak months, operating from a CPF on the mainland could provide problems keeping products safe for consumption if a refrigerator goes bad and traffic is delayed for an extended period while the MFU is in transit. CR 642, 659, 804. Further, the City's small area limits the number of MFUs that can fit. CR 633.

The support of local free-standing restaurants was an option that allowed MFU a place within the City to store and prepare food, and to deposit grease and waste water (a/k/a 'grey water'). CR 804, 814. The local support requirement was an alternative to and consistent with the TFER rule to operate from a CPF/commissary.[4] CR 159, 166-67, 185, 189-90, 193-4, 814. Otherwise, an

4 TDSHS representatives informed City Environmental Health Director Baldovinos that an MFUs could utilize a restaurant on SPI as a CPU or commissary. CR 802, 446-452; App. 8.

applicant could operate from a CPF/commissary outside the City. CR 809. In fact, one MFU did. CR 810, 813.

A local, licensed restaurant provided a place to properly clean the MFU, prepare and store food, and dispose of sewage, grease, and grey water. CR 804, 814. If refuse and grey water were not properly disposed, it could pollute the beaches and waterways. CR 626-26, 703.

C. SPI Code §10-31 was a 'pilot program' and a cap on permits conserved the City's limited resources to conduct health inspections.

Prior to 2016, the City did not permit food trucks. SPI Ordinance 16-05 was intended to start a "pilot program" a living document that could be revisited and modified in light of experience. CR 748-49, 751. Ord. 16-05, §10-31(C)(1, 2) designated two small areas for MFU and limited monthly permits to six. CR 1384. The City Manager could waive the cap. *Id*.; SPI Code §10-31(D); App. 4.

The cap served the public good by conserving the City's resource to inspect MFUs and thereby avoid food-borne illness and problems associated with too many MFU in the zone. CR 180-86, 770. Inspection was central to preventing food-borne disease. CR 626. This was a special pilot program and the City lacked the resources to inspect unlimited MFUs.[5] CR 746, 748, 751, 878-79. First, the City's

5 SurfVive argued there should be no cap; the City must allow unlimited MFUs. CR 272-77, 290. Permits should be issued to any MFU having a commercial property owner's permission to lease space, even up to 1200 MFUs. CR 272-74. All lots should be allowed to give space to all many MFUs as desired. CR 272, 275, 285. The market would weed out the mediocre. CR 272.

Environmental Health Department had only 1 ½ health and code inspectors to cover the entire City, the latter a part-time employee from Port Isabel. CR 750-51. Inspecting MFUs before and after issuing permits is critical . CR 626-27. In 2016, Director Baldovinos asked for a budget increase of $2500 (depending on demand for permits) to offset the potential increased load. CR 662,-63, 751, 752, 779, 1231, 1534. He initially believed his department could hand only six MFUs. CR 750. MFUs were more work because they are mobile and inspectors don't know where they will be. CR 183, 757-59, 770. During the summer season, they conduct five times more MFU inspections than off-season. CR 772. This requires hiring additional staff and paying overtime. CR 759.

Second, the designated MFU zone was small and would not accommodate unlimited trucks. CR 185, 633. MFUs posed traffic issues arising from increased parking and pedestrian traffic. CR 697.

In 2017, the City expanded the MFU zone. CR 2284; App. 16. At that time only 4 permits had been issued. CR 2282.

SPI Ordinance No. 18-15 later raised that limit to twelve (12). SPI Code §10-31(C)(2); CR 154-44; App. 4, 7. Based on experience, Baldovinos believed his department could handle the additional inspections and the zones could accommodate the additional trucks. CR 832. The City has never denied a MFU permit application because of the cap. CR 444-455, 826, 845-48.

D. The City develops a pilot program to introduce MFUs and protect public health.

The City first considered allowing food trucks to vend on SPI in 2008. CR 127. After thorough research, including investigation of other cities' regulations and contacting the DSHS, Baldovinos presented Draft Ord. 15-11 to the City Council for its consideration in July 2015. CR 610, 631-32, 640. It had been posted for comments and there was considerable social media discussion. CR 1212. Baldovinos believed there were restaurant owners for and against. CR 677-78.

Draft Ord. No. 15-11 was intended to address health and safety challenges arising from MFUs, such as customer parking, noise, large congregations, loitering, impeding traffic, trash, gray water, grease traps, food temperatures, and hygiene practices. CR 670-72, 645-648, 1207-16. Councilman Stahl asked about limiting permits now and reconsider if the City were overrun. CR 1209. Councilman Listi wanted to hear from the businesses because some restaurants said they did not care. *Id*. Councilman Avalos felt this deserved a conversation about impact on local business, parking issues, and the cost of code enforcement. CR 1211, 1213.

The matter was tabled until August 2015. CR 907. At that meeting, Councilman Stahl wanted feedback from local food businesses; Councilman Listi suggested connecting MFU to local businesses and limiting permits but reconsidering as program grows. CR 1258-59. At the Mayor's suggestion, an *ad hoc* committee was formed to consider and report suggestions about Ord. 15-11 to

the Council for discussion. CR 721-22, 973, 1261, 1264.

In February 2016, SPI Ord. 16-05 was presented to the Council. CR 725; 1382; App. 5. Baldovinos wrote the proposal that included a larger MFU zone, a six permit cap, and the local support requirement. CR 750, 765. A year later, the City adopted SPI Ord. 17-05 that increased the designated zones for MFUs and reduced the yearly permit fee. CR 2284; App. 6.

In 2018, SPI Ord. 18-15 increased the permits to twelve because experience showed Baldovinos his department could handle that load. CR 832-33; App. 7.

E. SurfVive did not apply for an MFU permit and does not comply with Texas' or SPI's standards for health and safety.

When the permit cap was raised, Baldovinos advised SurfVive co-owner Erica Lerma that permits were available and emailed a link to the City Code. CR 854. Lerma advised she would "start trying to find a local restaurant to sponsor us." CR 2743-44. Lerma never approached a local restaurant. CR 856, 865-66. Instead, she obtained space at Plaza Island Center, 5009 Padre Boulevard, which is not in the zone for MFUs. CR 865-66.

In September 2018, she submitted SurfVive's application, co-signed by Plaza Island Center. CR 281, 293. The application was incomplete because it was not signed by a local licensed food establishment, 5009 Padre Blvd. was not in the zone, there was no authorization from a CPF/commissary, and nothing about a certified food manager. CR 173, 176-77, 293, 865-66. After Baldovinos told her the

application would not be approved without the support of a licensed local restaurant, she took back the application and never submitted a completed one. CR 281, 867.

Lerma agreed MFUs must abide by the same standards as restaurants for equipment cleanliness and hygiene, including state rules, in order to avoid contaminating food or water, which can lead to food poisoning, including botulism, salmonella and other diseases, including the Coronavirus that may have started at an outdoor food market in China. CR 238-40. She also understands that rules are necessary to ensure a safe environment and that cities and licensing agencies have a duty to protect the public from dangers relating to health. *Id*.

Though Surfvive had a wastewater disposal agreement with the Olmito Water Supply Corporation, Lerma had no idea where Surfvive got its potable water and could not confirm it was not loaded from a garden hose. CR 243-44. SurfVive's truck also did not have a grease trap and it did not make arrangements to dispose of any grease it might have. CR 245. Though Surfvive had an agreement with Olmito WSC to dispose of gray water, it did not have a servicing area where it could return for vehicle cleaning, discharging of solid wastes, refilling water tanks and ice bins, and boarding food. CR 241-256. It also had no agreement with other parties for handling refrigerator or other maintenance problems or for employees' access to restrooms and cleaning their hands afterwards. CR 250-51.

During the suit, SurfVive made no effort to qualify for a permit. Lerma has

not sought locations in City zones designated for MFUs or approached a local restaurant for support. CR 269-70. She could not identify a SPI restaurant that rejected a request to support SurfVive; she admitted that, during the lawsuit, one local owner was willing to sign. CR 270-72, 291-92. Lerma believes she could get a local restaurant to sign, but it should not be required. CR. 272. She was willing to associate with a CPF, but that should not be required either. CR 264.

F. The Avalos Plaintiffs never applied for a permit.

The Avalos Plaintiffs never applied for a MFU permit and were never denied one. CR 307, 333, 360. They never asked a SPI restaurant owner to sign an application for a permit and were never denied a permit. CR 307, 333, 360. Nor were they ever told there was no permits available because of a cap. CR 335, 360.

They own one MFU under the name Chile de Arbol. CR 303. The have a contract to operate it from The Broken Sprocket, of a food truck park in Brownsville, Texas. CR 296-97, 348. Their contract requires they work out of Broken product's park. CR 301, 318, 348-49. The MFU is 'semi-permanently' parked there and they are happy with Brownsville. CR 303-04.

The Avalos brothers do not have a CPF, have never been part of a commissary, do not know if the Broken Sprocket would qualify as a CPF, and do not have a CPF they could use for operation on SPI. CR 323-24, 327-28.

The Avalos Plaintiffs allege the local support and cap requirement interferes

with their ability to expand by investing in a second truck to operate in the City. CR 16, 22. They have no formal business plan or analysis to proceed on that idea. CR 304-06. Adonai Avalos talked with his brother about costs and went 'little events in other cities' to test the market. CR 304. He talked to a customer about investing, who then asked for a business plan, but Adonai did put one together. CR 305-06. He has never done a cost/benefit analysis or made formal inquiries to other companies about a second truck. CR 306.

G. Obtaining an MFU permit in SPI is not difficult or onerous, and the process is simpler than in other cities.

Jerry Leal owns two food trucks on SPI known as the Pineapple Ninjaz. CR 227. After a prior venture in McAllen failed, he came to SPI and invested in food trucks because the cost was considerably less than for a restaurant. CR 227. He first checked on the permitting requirements, however. *Id*. He also has operated MFUs in Austin, San Antonio and Corpus Christi, each of which required him to be a member of a commissary, which required payment of a fee in addition to the cities' fees and rent to landowners where his truck would be parked. *Id*. In comparison, the application process in SPI is much simpler. *Id*. SPI simply does not have the same infrastructure as Austin and has limited space on which MFUs could be located because it is an island. *Id*. He found it easier to work and to obtain a permit in SPI than in other places. *Id*.

Before applying for his first truck's permit, he approached two restaurants for support before a third restaurant agreed to sign off on his permit application. CR 227. The first already supported an MFU;[6] the second was closed, so he walked across the street to the third. CR 2950-51, 2994-95. He got support from a hotel for his second truck. CR 2956, 2966. He understood SPI required him to have support from a business to serve as a commissary because SPI has no commissary, though obtaining such support was not difficult or onerous. CR 2983-84. In addition he has never been denied a permit because of a permit cap. CR 227.

H. Food Safety Expert Israel Ramos explained why SPI Code §§10-31(C)(2) & (3) are rationally related to public health and safety.

Israel Ramos is a food safety and integrated pest management consultant with over 30 years of experience in the field. CR 364. He has an MS in Food Safety from Michigan State University Veterinary School, was a guest lecturer for that school's online program in food safety, and worked with the Texas Department of State Health Services as a food safety auditor, conducting audits of restaurants, convenience stores, MFUs, street vendors and others for food safety. CR 365-66, 368, 370, 372, 374. Ramos was asked to review SPI Code §§ 10-31(C)(2) & (3) to determine whether they reflected, and were authorized under, applicable state standards. CR 380. He reviewed the pleadings and evidentiary responses in this case,

6 SPI Code §31-10(C)(3) allows each local free-standing establishment to support only one MFU. App. 4.

researched and reviewed the US Food and Drug Administration Food Code, the Texas Health and Safety Code (TFER), the SPI Code, and food codes of other cities. CR 385-86.

He then concluded that §§ 10-31(C)(2) & (3)

> are not overly burdensome to MFU operators when weighed against the interest of the city in protecting public health and safety. Requiring MFUs to have a central preparation facility that is permitted as a Retail Food Establishment by the regulatory jurisdiction on record is in line with the federal and state statutes and rules set forth to protect public health and safety.

CR 427; App. 9. Cameron County and Brownsville have adopted the TFER that requires a CPF and have no local support alternative. CR 434; App. 9.

The permit cap was reasonable. In small or rural cities, resources get stretched which presents substantial public health risks. CR 389. Some regulation is needed to control the risk, which be done via zoning or capping permits. CR 391. By not capping permits, the City could be creating a public health risk when resources get stretched thin. CR 391-92. The cap allows the ability to have resources to follow up with inspections after granting permits. CR 419.

SUMMARY OF THE ARGUMENT

The City's Environmental Health Director, Victor Baldovinos, summed it up: the City of South Padre Island was 'a small city with big city problems.' CR 158, 1686. It is a small city, connected to the mainland by one bridge. It has seasonal influx of tourists to enjoy the bay and beaches, as well its cuisine and entertainment. Opening this community to food trucks invited all the challenges and opportunities faced by Texas' largest municipalities, complicated by the City's unique location

and environment and its limited resources compared to large metropolitan areas. Not surprisingly, the City opted to proceed with a pilot program geared to its circumstances that could grow as the City evaluated the outcome.

Standing. To establish standing, Plaintiffs must first identify some actual restriction they have or will suffer caused by §10-31(C)(2) or (C)(3). First, the Avalos Plaintiffs never applied for a permit; SurfVive submitted an incomplete and defective application, which it withdrew rather than fix. Second, the local support requirement did not restrict them, because they could have qualified by connecting to a CPF. Third, assuming they ever qualify, whether the cap prevents them from getting a permit depends on a series of contingencies.

No waiver of immunity for nominal damages. Texas Constitution, Article I, §19, does not create a private action for damages, which leaves governmental immunity intact against monetary claims. Immunity bars all claims for monetary relief however labeled. This includes money relief labeled as injunctive or declaratory relief.

Substantive due course of law. The Court must first define what liberty interest Plaintiffs claim before determining if that right is protected by substantive due course of law. Plaintiffs cite authorities involving complete bars to entering a profession. But SPI Code 10-31 does not regulate entry into the business of food trucks, just operation inside the City. Plaintiffs are free to do food truck business

elsewhere. Therefore, they do not claim a liberty interest protected by substantive due course of law.

The local support requirement is rationally related to protected public health and not unduly oppressive. First, state law requires MFUs operate daily from licensed CPFs or a commissary. However, the nearest one is in Harlingen. A daily commute created risks of food spoilage, especially if traffic jammed the bridge. Section 10-31(C)(3) was a reasonable substitute, one approved by DSHS. Section §10-31(C)(3) was an alternative; the applicant does not need local support if it chose to operate daily from a CPF/commissary. Plaintiffs admit that, if they prevail, they must do that anyway.

Third, the evidence shows the local support requirement is not onerous. Plaintiffs never attempted to get a local restaurant to support them; one volunteered to help SurfVive. Plaintiffs simply do not wish to look. Mr. Leal gave real examples of how easily he got support for two MFUs. Otherwise, they offer no evidence of the time or expense involved to find local support.

Fourth, the cap is reasonable and not an onerous burden within the ordinance as a whole. Plaintiffs advocate no cap – the City must allow unlimited number of food trucks, which is nonsense. The City is small and has designated a limited zone for MFU operation. Only so many will fit, given the zone's size and available places to park. No one disputes that the City has limited resources to inspect MFUs for

compliance, especially if there is no limit on MFU. The City explained how adding MFU inspection before and after issuing the permit presented new burdens and challenges, especially during Spring Break and the tourist season. Some cap is reasonable. Where to draw that line is precisely the kind of regulatory decision courts leave to local authorities.

Plaintiffs central argument is 'naked economic protectionism' – that panicked brick-and-mortar restaurant owners feared competition from MFUs, dreamed up the local support requirement and cap, and then forced the City Council to adopt them to squash competition. The record shows different, but the deeper problem is that the motives of private citizens and individual legislators are not competent to determine the rational relation of legislation to a valid exercise of police power. Otherwise, nearly every economic regulation enacted by state and local authorities would be open to substantive due course of law challenges.

Further, economic development is a valid governmental interest; a law motivated by protectionism may have a rational purpose. Naked economic preference is not a valid governmental interest when it harms consumers without any benefit to public health and safety. For better or worse, all economic regulation will benefit some groups and burden others. Within a regulated industry like food service, legislative compromises among stakeholders are commonplace. Ameliorating the economic fallout to businesses affected by market shifts is a valid

state purpose. It was rational for the City to adopt a pilot program and make changes in stages, rather than make hasty policy changes.

ARGUMENTS AND AUTHORITIES

A. Standard of review.

1. Plea to the jurisdiction.

Governmental immunity, unless waived, protects municipalities from lawsuits for damages absent legislative consent. *General Servs. Comm 'n v. Little-Tex Insulation Co.,* 39 S.W.3d 591, 594 (Tex. 2001). A plaintiff must show that immunity has somehow been waived by statute or legislative consent. *City of Lubbock v. Rule,* 68 S.W.3d 853, 857 (Tex. App.—Amarillo 2002, no pet.).

A plea to the jurisdiction challenges the trial court's subject matter jurisdiction to hear a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The existence of subject matter jurisdiction is a question of law that the Court reviews *de novo*. *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). Plaintiffs have the burden to affirmatively demonstrate jurisdiction, including a waiver of governmental immunity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 540 (Tex. 2019).

A plea to the jurisdiction may challenge either the plaintiff's pleadings or the existence of jurisdictional facts on the ground that they do not support subject matter jurisdiction. *Tex. Dep't & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004).

When the pleas challenges the pleadings, the Court must determine if the pleader has alleged sufficient facts to affirmatively demonstrate the trial court's jurisdiction to hear the cause. *See Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Plaintiffs have the burden to plead facts affirmatively showing jurisdiction. *Miranda*, 133 S.W.3d at 226-27. The trial court construes the pleadings liberally in Plaintiffs' favor, accepting the alleged facts as true. *Id*.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the Court considers relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even where those facts may implicate the merits of the cause of action. *Miranda*, 133 S.W.3d at 227. If the evidence creates a fact question regarding jurisdiction, the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the factfinder; however, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law. *Miranda*, 133 S.W.3d at 228.

Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156-57 (Tex. 2004). A movant seeking a no-evidence summary judgment must assert that "there is no evidence of one or more essential elements of a claim or

defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i). "The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *Id.*

2. Standard to review facial versus 'as applied' constitutional challenges.

The distinction between facial versus 'as applied' constitutional challenges is important. The Court begins with a presumption of constitutionality. *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 754 (Tex. 2020).

In a facial challenge to a statute's constitutionality, the court considers the statute as written, rather than as it operates in practice. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 1994). A facial challenge claims the statute, by its terms, always operates unconstitutionally. *Tenet Hosps. Ltd. v. Rivera*, 445, 702 (Tex. 2014). A facial challenge is the most difficult challenge to mount because Plaintiffs must establish there is no set of circumstance under which the statute is valid, that it will always operate to deprive those affected of their rights. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626-27 (Tex. 1996); *In the Interest of S.N.*, 287 S.W.3d 183, 193-94 (Tex. App.—Houston [14th Dist.] 2009, no pet.). The Court considers the statute as written, rather than how it operates in practice. *FM Props.*, 22 S.W.3d at 873. The Court may also consider legislative history and reasonable constructions by the agency charged to enforce it. *Id*. The Court presumes the existence of facts under

which the statute is constitutional without investigating or attempting to decide whether the Legislature reached a correct conclusion about the facts. *Barshop*, 925 S.W.2d at 625. The challenger must establish how the challenged regulation is unconstitutional on any possible state of facts. *Id*.

An as applied challenge asserts that a statute, while generally constitutional, operates unconstitutionally as applied to the claimant because of his particular circumstances. *Tenet Hosps.*, 445 S.W.3d at 702; *Barshop*, 925 S.W.2d 626-27. The standard of review for as applied substantive due course challenges to economic regulation statutes requires Plaintiffs prove either (1) the City code's purpose could not arguably be rationally related to a legitimate governmental purpose, or (2) when considered as a whole, the statute's actual, real-world effect as applied to Plaintiffs could not arguably be rationally related to, or is so burdensome as to be oppressive in light of the government's interest. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).

Because the as applied standard incorporates the presumption that enactments are constitutional, this places a high burden on parties challenging their constitutionality. *Patel*, 469 S.W.3d at 87; *Texas Alcoholic Beverage Com. v. Live Oak Brewing Co.*, LLC, 537 S.W.3d 647, 659 (Tex. App—Austin 2017, pet. denied). If the statute is susceptible of two interpretations, the constitutional interpretation prevails. *EBS Sols.*, 601 S.W.3d at 754. This deferential inquiry focuses on whether

the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998).

B. The undisputed evidence established Plaintiffs lack standing to challenge the SPI Ordinance.

Standing limits subject matter jurisdiction to cases involving a distinct injury to the plaintiff and 'a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought.' *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 517-18 (Tex. 1995). Standing consists of some interest peculiar to the person individually and not just as a member of the public. *Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019), *citing Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Texas courts have no jurisdiction to render advisory opinions, which are opinions that decide abstract questions of law without binding the parties. *Texas Ass'n of Bus.*, 852 S.W.2d at 444. A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

Texas adopts the federal standing test. *Heckman v. Williamson County*, 369 S.W.3d 137, 154-55 (Tex. 2012).

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical'".

> Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). To challenge the City's Ordinance, Plaintiffs must suffer some actual or threatened restriction under the statute and contend that the statute unconstitutionally restricts the plaintiff's rights. *Patel*, 469 S.W.3d at 77. Plaintiffs lack standing to challenge SPI Code §§ 10-31(C)(2) or (C)(3) for unconstitutionally affecting their ability to operate an MFU in the City because (1) neither submitted a complete permit application, (2) they cannot establish they would qualify for an MFU permit absent the challenged requirements, (3) the unchallenged portions of the ordinance give them an alternative basis to obtain a permit, and (4) their fear of denial due to the cap is speculative.

First, the Ordinance applies only to MFUs within the City; Plaintiffs are not prevented from operating MFUs elsewhere or from selling food generally. Until they submit a complete application for a permit that is denied, their claim is not ripe and they lack standing. *KORR, LLC v. County of Gaines*, No. 11-18-0130-CV, 2020 WL 2836491, 2020 Tex. App. LEXIS 4170, *8 (Tex. App.—Eastland May 29, 2020, no pet.) (mem. op.) In *KORR*, plaintiff challenged a county ordinance that required subdivision applicants post a bond. Because plaintiff had not submitted an application and did not own land in a proposed subdivision, it lacked standing. *Id*.

at *8. Even had plaintiff owned land affected by the ordinance, the claim was not ripe because the claimed injury depended on hypothetical facts. *Id*.

Similar to *KORR*, Plaintiffs have not submitted a complete application nor have they established they can. Whether the challenged sections restrict them is hypothetical. The Avalos Plaintiffs need a second MFU to handle service in the City, but that may never happen. They may be unable to find space in the designated zones. They may contract with a CPF and not need local support. The cap may not be exhausted.

Second, without a CPF and a proper service area, Plaintiffs do not meet TFER's MFU standards, thereby precluding a right to operate MFUs. SPI Code § 10-31(C)(3) does not actually or potentially restrict an actual right to right to operate MFUs in the City because they do not meet the unchallenged TFER standards and there is no evidence they will. Without the qualifications to operate an MFU in Texas, Plaintiffs have no particularized interest distinguishable from the general public. Declaratory judgment upon these issues would constitute no more than an advisory opinion dependent on whether Plaintiffs become qualified under the unchallenged regulations.

SurfVive is not, and has never been, part of a commissary or CPF. CR 247, 255. Though Lerma indicated Surfvive would be willing to engage a CPF if required, she did not identify any CPF with which she has ever been associated or

where any proposed CPF would be located. CR 269-72, 291-92. Moreover, Lerma saw no reason SurfVive should join one. CR 255.

The Avalos brothers understood the need for a CPF, but do not have any connection to one or a commissary. CR 323-24. They have never been part of a commissary, do not have a signed letter of authorization from a CPF, do not know if the Broken Sprocket would qualify as a CPF, and do not have a CPF they could use for operation on SPI. CR 323-24, 299. Their idea of expansion to the City requires money and a second truck, but they have taken no concrete steps toward either. CR 304-06.

Third, the local support requirement is not a barrier to operate in the City because the Ordinance provides an alternative: connect to a CPF/commissary. Plaintiffs' sole argument is that they will not take these steps until they are assured permits will be available. This effectively concedes the local support requirement does not restrict them. Rather, they do not want to attempt to qualify for a permit until assured permits are available. This puts the cart before the horse. The cap does not restrict them if they are unqualified for a permit.

Their fear of the cap is hypothetical because it depends on when they apply and the number of pending qualified applicants. The City has never denied a permit because the cap was exhausted. CR 444-45, 826, 845-48. When SurfVive applied,

permits were available. Instead of following through, Lerma withdrew an incomplete application and did nothing more. CR 281, 867.

The Avalos Plaintiffs never applied and never tried to find out when permits are available. CR 307, 333, 335, 360. Further, to expand to the City they need investment capital for a second truck yet have made only vague efforts to realistically determine feasibility. CR 304-06. They have made no cost/benefit analysis for expansion to the City – weighing the costs (fees to a CPF, rental of space in the City's zone, permit fees, etc.) vs the benefits (anticipated revenue). CR 305-06. In short, the cap does not restrict them because their intent to operate in the City is contingent on decisions they have not made.

C. Governmental immunity bars nominal money damages.

Plaintiffs requested nominal damages of $1 under Texas Constitution, Article I, section 19. CR 25. They neither plead nor establish a waiver of governmental immunity. As matter of law, there is no waiver.

The Texas Supreme Court has held that there is no implied private right of action for damages under the Texas Constitution. *City of Beaumont v. Bouillion,* 896 S.W. 2d 143, 146-50 (Tex.1995). This Court has held that there is no implied right of action for damages under section 19. *City of Harlingen v. Obra Homes, Inc.,* 2005 Tex. App. LEXIS 256, *24 (Tex. App. -Corpus Christi Jan. 13, 2005, no pet.). Sister Courts have agreed. *City of Houston v. Downstream Envtl., L.L.C.*, 444

S.W.3d 24, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("There is no implied right of action to recover money damages for violation of the due-course-of-law provision in the Texas Bill of Rights."); *Jackson v. Houston Indep. Sch. Dist.*, 994 S.W.2d 396, 400-01 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Without citation to any authority, Plaintiffs argue that immunity bars only compensatory money damages and nominal money damages are akin to declaratory or equitable relief. CR 51-3. This argument mistakes both the scope of immunity and the nature of nominal damages.

First, the Supreme Court is clear that governmental immunity applies to any monetary claim.

> "We also have stated in every suit against a governmental entity for **money damages**, a court must first determine the parties' contract or statutory rights; if the sole purpose of such a declaration is to obtain a **money judgment**, immunity is not waived.

City of El Paso v. Heinrich, 284 S.W.3d 366, 370-371 (Tex. 2009) [emphasis added].

> To compel a tax refund by mandamus is to grant Retrospective monetary relief. Retrospective **monetary claims**, even by way of mandamus or declaratory relief, are generally barred by immunity, absent legislative consent.

In re Nestle USA, Inc., 359 S.W.3d 207, 212 (Tex. 2012) [emphasis added]. *Also City of Houston v. Houston Mun. Emples. Pension Sys.*, 549 S.W.3d 566, 576 (Tex. 2018) ("Another is that retrospective monetary claims are generally barred."); *Travis*

County v. Pelzel & Assocs., 77 S.W.3d 246, 251 (Tex. 2002) ("Thus we remain convinced that section 89.004 does not waive immunity from suit for a money claim against the County."). The immunity waiver cannot depend on the amount of money sought or awarded.

Labeling a money claim as equitable or declaratory relief does not shield it from immunity. *Heinrich*, 284 S.W.3d 366, 370-371; *Bouillion*, 896 S.W.2d at 149; *Jackson*, 994 S.W.2d at 400-01 (though couched as equitable relief, claim for back wages was barred). Plaintiffs cite not authority that nominal damages are some form of equitable or declaratory relief. Accepting their argument would undermine *Heinrich* and *Bouillion*.

Second, nominal damages are not wholly divorced from compensation. When available, they can be awarded where no harm is proven or where the claimant fails to prove substantial harm. RESTATEMENT (SECOND) OF TORTS §907. Nominal damages were awarded for defamation *per se* because the law presumed some damage, but not a specific amount; if the amount awarded exceeded a nominal sum, then it required evidentiary support. *In re Lipsky*, 460 S.W.3d 579, 593-94 (Tex. 2015). Likewise, the law presumed some nominal damage was suffered from a contract breach. *Allbritton v. Mading's Drug Stores, Inc.*, 138 S.W.2d 901, 904 (Tex. Civ. App.--Galveston 1940, no writ); *Cotherman v. Oriental Oil Co.*, 272 S.W. 616, 618 (Tex. Civ. App.—Amarillo 1925, no writ). For trespass against possession, the

law supposed some damage however inconsiderable the injury. *Champion v. Vincent*, 20 Tex. 811, 815 (1858); *Henry v. Williams*, 132 S.W.2d 633, 635 (Tex. Civ. App.—Beaumont 1939, no writ). It was the legal presumption of some injury that entitled plaintiff to a trivial sum. Put differently, if Article I, section 19, provides no private right of action for damages, that includes nominal damages.

D. As applied to Plaintiffs, SPI Code §§10-31(C)(2) and (3) do not violate substantive due course of law.

1. Plaintiffs' claimed liberty interest protects only entry into the profession as a whole, not operation in a specific location.

Plaintiffs' alleged liberty interest is the operation of a MFU business. CR 7. The City's ordinance does preclude entry in the MFU business. It affects only operating MFUs within the they City.

The *Patel* test must be limited to the legal regulatory framework in which it arose, i.e., a regulatory prohibition on entry into the profession as a whole. *Hegar v. Texas Small Tobacco Coalition*, 469 S.W.3d 778, 788 n.35 (Tex. 2016); *Transformative Learning Sys. v. Texas Educ. Agency*, 572 S.W.3d 281, 298 (Tex. App.—Austin 2018, no pet.). The liberty interest does not extend to a particular amount of profit from the business. *Texas DMV v. Fry Auto Servs.*, 584 S.W.3d 138, 143 (Tex. App.—Austin 2018, no pet.). *See also Doss v. Morris*, 642 Fed. Appx. 443, 446 (5th Cir. 2016) (no clearly established right to lost profits).

SPI Code §10-31 does not bar entry into the MFU business as a whole.

Plaintiffs can own MFUs and operate elsewhere. The Avalos Plaintiffs operates an MFU in Brownsville. CR 303. SurfVive operates multiple businesses in the City. CR 12. Brief interruptions in a person's occupation or calling do not constitute deprivations in the same way as a complete prohibition on the right to engage in a calling. *Doss*, 642 Fed. Appx. at 447; *A-Pro Towing & Recovery LLC v. City of Port Isabel*, No. 19-0016, 2020 WL 4794657, 2020 U.S. Dist. LEXIS 148648, *15 (S.D. Tex. Aug. 18, 2020). Whether Plaintiffs carried on their business, especially business outside the City, bears on whether the Ordinance adversely affected them at all. *Doss*, 642 Fed. Appx. at 447; *A-Pro Towing*, at *17-19.

2. Plaintiffs do not dispute that – except for the two challenged sections -- §10-31 is rationally related to a valid interest and is not oppressive.

SPI Ord. 16-05 provided " . . . City of South Padre Island deems it appropriate to provide for regulation of mobile food establishments in order to protect the health, safety and welfare of the citizens." CR 1383; App. 5. The first MFU proposal was intended to address health and safety challenges such as customer parking, noise, large congregations, loitering, impeding traffic, trash, gray water, grease traps, food temperatures, and hygiene practices. CR 670-72, 695-98. Plaintiffs do not dispute these are all valid interests.

What Plaintiffs do not challenge is equally important because that defines the government's valid interest in and justifies the unchallenged regulatory framework. *Live Oak*, 537 S.W.3d at 656. Plaintiff challenged only the local support

requirement and the monthly cap. CR 25, 508-09, 538, 2852, 287.[7] They agree the City has a legitimate interest to enforce rules for food safety, hygiene in food preparation and sales, preventing food-borne illness, and controlling traffic and trash. CR 238-40, 324-25. They do no challenge the TFER, the permit fees, the MFU zoning, or the need for a CPF/commissary. CR 538. They agree that, if the two challenged sections are stricken, they must comply with the remaining Ordinance and the TFER. CR 2853, 3033. Thus, they effectively concede that, except for the two challenged sections, §10-31 is rationally related to a valid purpose and is not oppressive or burdensome.

3. SPI Code §10-31(C)(3) was designed to give MFUs an alternative, convenient means to comply with the TFER that requires they operate from a CPF or commissary.

The record as a whole establishes a rational relationship between the local support option and public health and safety. Plaintiffs offer no evidence that, as applied to them, it is irrational.

The Court must consider SPI Code §10-31(C)(3) in the context of the entire framework of regulating food establishments and MFUs. *Live Oak*, 537 S.W.3d at 658. It must be viewed inside the system requiring MFUs operate from a CPF or

7 Plaintiffs incidentally challenged SPI Code §10-31(F)(2)(a), which says MFU permits are valid for 30 days. CR 8, 24, 113, 507; App. 4. On its face, §§(F)(2)(a) does not limit the number of permits. Plaintiffs did not claim that the duration of permits somehow offend due course of law. CR 7, 501. Therefore, they have waived in challenge to SPI Code §10-31(F)(2)(a).

commissary; the City was entitled to seeks a balance to preserve viability of the system. *Id*. Existing alternatives may justify some restrictions. *Id*. (artisan beer brewers could still distribute direct to retailer and consumers; rule prohibiting them from receiving payment to assign territorial rights was reasonable).

The local, free-standing food unit support requirement is an alternative to satisfying the State requirement for a CPF or commissary. CR 166-67. A CPF or commissary serves a variety of health concerns – a sanitary place to prepare food and clean equipment, sanitary food storage overnight, obtaining potable water, disposal of grey water and refuse in an environmentally proper way, etc. The DSHS required a CPF because not all food establishment operations can be fulfilled by an MFU alone. CR 446. A licensed or permitted restaurant can serve as a commissary because it automatically qualifies as a permitted food establishment under the TFER, while other businesses without commissary equipment such as a wastewater disposal site, freshwater source, and ware-washing and sanitizing equipment may not qualify. DSHS representatives informed Baldovinos that an MFU could instead utilize a restaurant on SPI as a CPU or commissary. CR 159, 450-52.

SPI Code 10-31(C)(3) protects the general health and safety of the public because the Island lacks a CPF or commissary from which an MFU can daily operate as required by the TFER. Using a CPF/commissary off the Island could provide problems keeping products safe for consumption if a refrigerator goes bad and traffic

is delayed for an extended period of time while in transit to and from to the CPF. The local support requirement, as it reflects TFER's CPF requirement, is therefore rationally related to SPI's interest in protecting public health and safety and protecting the public from food-borne illnesses or health and safety issues that may arise.

The City's expert Ramos concluded §10-31(C)(3) was rationally related to health and safety because it fulfilled the TFER §228.221(b)(1)'s requirement MFUs operate from a CPF or commissary. CR 412, 414-16, 419; App. 9. The TFER sets the minimum requirements. CR 388. Using a local licensed food establishment serves that purpose because they can fulfill commissary guidelines. CR 396. The City confirmed this with the DSHS. CR 450-52.

4. The local support option is not oppressive or unduly burdensome, especially compared to finding an off-Island CPF or commissary.

The record as a whole establishes the local support option is not unduly oppressive for Plaintiffs. Plaintiffs offer no evidence that, as applied to them, it is unduly oppressive.

Because there exists no CPF or commissary on SPI, the restaurant support option is not so burdensome as to be oppressive in light of the City's interest in health and safety. First, SPI Code §10-31(C)(3) is an option. Plaintiffs can qualify by associating with a CPF or commissary. They can ask the City Manager waive the cap. They do not explain why §10-31(C)(3) is so oppressive within a scheme that affords them another option. Getting a local restaurant to allow the use of its

kitchen and facilities is much less burdensome than meeting the state requirement of finding a CPF on the mainland. The Avalos Plaintiffs voluntarily agreed to share profits with the Broken Sprocket to get some facilities and a location.

Second, Plaintiffs' claims of burden are conclusory speculation. Regardless, no restaurant ever denied a request from SurfVive or Avalos, and Lerma was offered such support even without requesting it. CR 270-72, 291-92. The Avalos brothers never even tried. CR 307, 333, 360. Though Lerma claimed she could get a restaurant owner's signature; she simply doesn't want to. CR 272. In *Patel*, the Supreme Court found the unrelated 320 hours of training was oppressive because the tuition was $3,500 - $9,000, plus out-of-pocket expenses. 469 S.W.3d at 89-90. Here, Plaintiffs offer no proof of the cost to obtain local support versus the cost of support from an off-Island CPF/commissary.[8]

The real-world is Jerry Leal. CR 227. He has operated in MFUs in Austin, San Antonio, and Corpus Christi, all of which required commissary support in addition to permit fees and rent to the owners where his trucks parked. CR 227. The City's application process was simpler. CR 227. He found a local restaurant support with little effort. CR 209-210, 2950-51, 2956, 2966, 2994-95.

8 To the extent Plaintiffs' affidavits attached to Plaintiffs' Motion for Summary Judgment (CR 562-581, 1606-1625) contradict their deposition testimony about the burden, they are shams. The Court may require a sufficient explanation and may grant summary judgment for the City in the absence of one. *See Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 90 (Tex. 2018).

5. SPI Code §10-31(C)(2) is rationally related to public health and safety concerns; abolishing any cap is irrational for a small island city.

The record as a whole establishes a rational relationship between a cap on permits and public health and safety. Plaintiffs offer no evidence that, as applied to them, the monthly cap is irrational.

Plaintiffs' challenge is not just to the number of permits. They argue for no cap at all and would let the market weed out the unprofitable MFUs. CR 272-77, 285. Survival of the fittest MFU protects profits; it does not protect the public from food-borne disease, pollution, traffic congestion, etc.

Under the circumstances, some cap is reasonable for the City. This is a pilot program and the City has limited MFUs to designated zones. CR 748-49, 751. The City is small and must worry about vehicle and pedestrian congestion, littering around MFUs, etc. CR 185, 633, 637. It has a small staff of health inspectors. CR 750-51. Even Lerma finally admitted unlimited MFUs was ridiculous. CR 276-77. Because some cap is rational, it is not for courts to second-guess cities on where to draw the line. *Compare Patel*, 469 S.W.3d at 89 (courts should not second-guess the legislature on the extent of training needed for different commercial service providers).

The cap was reasonable when adopted and amended because (1) this was a pilot program in a small part of the city, (2) Baldovinos was concerned he lacked sufficient inspectors to take on MFUs, and (3) inspecting MFUs was important to

health and preventing food-borne illness. First, the City has 1 ½ health inspectors. CR 750-51. Baldovinos based the cap on what he thought his department could handle. CR 170-71, 178, 750. Inspecting MFUs was beyond the normal course of his department. CR 183.

Moreover, this is a pilot program to see how MFUs developed. CR 147, 149, 183. The zoned area could support only a limited number. CR 184. It is not irrational for the City to change licensing laws in stages to adapt to market changes; it is reasonable to have a trial period rather than make hasty policy changes. *Hines v. Quillivan*, 982 F.3d 266, at *20 (5th Cir. 2020). Based on experience, the City enlarged the zones and increased permits. CR 832. The Court should defer to City's decision concerning an ongoing process.

Finally, adequate MFU inspection was critical to health and preventing disease; the number should be limited to what his department could reasonably inspect. CR 180-83, 626. He had seen the difference in MFUs in Valley cities that had no health inspectors. CR 184. The City's expert Lerma pointed out the health risks to a small city that cannot adequately inspect MFUs. CR 389-92. By conserving the inspection resources, a cap ensures adequate control and inspections. CR 392-93, 419.

6. The cap is not unduly burdensome to Plaintiffs; they never submitted a complete application or tried to find out permits are available.

Plaintiffs argue the cap is oppressive as to them because they don't know a permit will be available when they apply. CR 566, 572. Most people in regulated businesses understand the need to research the practicalities to get regulatory approval. Plaintiffs simply wish to be excused from doing the homework other businesses accept as normal due diligence.

First, no one has been denied a permit because the cap was exhausted. CR 335, 360, 444-45, 826, 845-48. The yearly permits expire in December, so all 12 were available in January 2020. CR 844. By February 2020, ten permits had been issued and two were pending applications. CR 844-48.

Second, any supposed burden is conclusory or self-inflicted. When SurfVive submitted its defective application, a permit was available. CR 281, 867. Rather than remedy the defects, Lerma chose to withdraw it. CR 281, 867. The Avalos Plaintiffs never applied and made no effort to learn when permits are available. CR 333, 335, 360.

Because no Plaintiff has taken the effort to learn when permits are available, their opinions are conclusory. Conclusory affidavits are no evidence. *See University of Tex. Rio Grande Valley v. Hernandez*, No. 13-19-0180-CV, 2021 Tex. App. LEXIS 897, *7-8 (Tex. App.—Corpus Christi Feb. 4, 2021, no pet. h.) (mem. op.).[9]

9 To the extent Plaintiffs' affidavits attached to Plaintiffs' Motion for Summary Judgment (CR 562-581, 1606-1625) contradict their deposition testimony about the burden they are shams. The

7. Statements by citizens or councilmembers are not attributable the City and do not determine the rational relationship between the challenged sections and public health and safety.

Plaintiffs' claim that that the local support requirement and cap are 'economic protectionism' is based largely on statements by private citizens and individual councilmen. CR 407 529. Plaintiffs assert the two challenged sections were created by local restauranteurs and adopted by the City to further their scheme to squash competition. CR 512, 514, 518-28, 547. The record shows different and the remarks are not competent evidence.

Rather than evaluate whether the City Council "could have rationally believed at the time of enactment" that §§ 10-31(C)(2) and (3) would promote its objective, Plaintiffs rely on statements by public citizens and individual councilmembers to find an unwritten motive for the ordinance. Though they argue the challenged two challenged sections are 'economic protectionism' written by local restaurant owners (CR 512, 514, 518-28, 547), the initial suggestion for input from local businesses and a cap came from the councilmen. CR 1209, 1211-13. The City Council only asked "to have a local group of restauranteurs to get together and come up with ideas on modifying the proposed ordinance and bring back to City Council for discussion and action." CR 973. It hardly nefarious that the Council would want the input from local

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Court may require a sufficient explanation and may grant summary judgment for the City in the absence of one. *See Lujan*, 555 S.W.3d at 90.

businessmen. Ultimately, however, any recommendations made to the Council only came from Health Director Baldovinos. CR 750, 765.

Regardless, even public statements of Councilmembers would not establish the basis for any ordinance, however, much less statements of citizens. As the Texas Supreme Court has held, "[e]vidence of one official's motives cannot be attributed to the City itself." *Sheffield Dev. Co., Inc. v. City of Glenn Heights,* 140 S.W.3d 660, 680 (Tex. 2004). Discovery into instructions given by Council members in the context of City business or their mental thought-processes and deliberations is improper. To that end, Texas law prohibits judicial inquiry into the mental deliberations and motives of its elected officials serving on commissions and boards of elected government bodies. *Clear Lake Water Authority v. Salazar*, 781 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1989, no writ).

"[T]he subjective knowledge, motive, or mental process of an individual legislator is irrelevant to a determination of the validity of a legislative act because the legislative act expresses the *collective will* of the legislative body." *Sheffield Development*, 140 S.W.3d at 678 n.91, *quoting Sosa v. City of Corpus Christi*, 739 S.W.2d 379, 405 (Tex. App.—Corpus Christi 1987, no writ) (emphasis in original). *See also, City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 105 (Tex. App.—Corpus Christ 1991, writ denied) (public officials' mental process, subjective

knowledge and motives are irrelevant to an act of the City, such as the passage of an Ordinance).

> Legislators across the country cast their votes every day for or against the position of another legislator because of what other members say on or off the floor or because of what newspapers, television commentators, polls, letter writers and members of the general public say. We may not invalidate such legislative action based on the allegedly improper motives of legislators.

Zilich v. Longo, 34 F.3d 359, 363 (6th Cir. 1994). The pragmatic ground for rejecting the principle urged by the Plaintiffs is that its acceptance would put at hazard a vast amount of routine legislation. *Fraternal Order of Police Hobart Lodge #121, Inc. v. Hobart*, 864 F.2d 551, 555 (7th Cir. 1988).

The City's stated purpose in enacting Ordinance No. 16-05 was "to promote a diversity of foods and benefit the City's economy … [and] to provide for regulation of mobile food establishments in order to protect the health, safety and welfare of the citizens." CR 1383; App. 5. The statements cited by Plaintiffs are not probative concerning the City's legitimate governmental interest in protecting the public's health, safety and general welfare.

Moreover, the alleged protection does not negate a valid government interest. Promoting economic development is a traditional and long-accepted function of government. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005). SPI Code §§10-31 had benefits and burdens to both MFUs and brick-and-mortar restaurants. It neither

excluded MFUs from the City nor gave brick-and-mortar restaurants control over their entry. MFUs were given a designated area of operation, which was enlarged; after a year, the permit fees were lowered; after two years, the number of permits was doubled; and, local support was unnecessary if MFUs operated from a CPF or commissary. Further, SPI Code §10-31 did not affect operating outside the City.

The compromises among stakeholders in the legislature process are common and justifiable. *Live Oak*, 537 S.W.3d at 658. Balancing the benefits and burdens within a regulated industry is entirely rational. *Id*.; *San Francisco Taxi Coalition v. City & County of San Francisco*, 979 F.3d 1220, 1225 (9th Cir. 2020) ("For better or worse, governmental regulations today benefits some groups and burden others."). The rational relationship test recognizes that incidental burdens may be unavoidable when legislating to safeguard public safety and health. *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

A law motivated by protectionism may have a rational basis; 'naked economic preference' is impermissible when it harms consumers. *Hines*, 982 F.3d. at *14 *citing Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011). The key is that the protection actually harms consumers without any benefit to the public health and safety. *Hines*, 982 F.3d at *14-15; *San Francisco*, 979 F.3d at 1225. Plaintiffs do not establish actual harm to food consumers. Instead, there

are more MFUs than in 2016, permit fees are cheaper, and the designated zones are larger.

Here, some City councilman expressed concern that the economy had already shuttered local businesses while others felt MFUs were a growing business. CR 1207, 1211-12. Ameliorating the economic fallout to businesses most affected by market shifts is a valid state purpose, even if some question its wisdom. *San Francisco*, 979 F.3d at 1225. Courts do not judge the wisdom of legislative choices and must assume the democratic process will rectify improvident decisions eventually. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

E. SPI Code §§10-31(C)(2) & (3) are facially valid.

To the extent that Plaintiffs asserted a facial challenge, they failed to allege or meet the "heavy burden" to demonstrate that there was no set of circumstances under which §10-31(C)(2) and §10-31(C)(3) would operate constitutionally. *See Live Oak*, 537 S.W.3d at 659 (in context of appeal from summary judgment ruling, facial challenge rejected because plaintiffs neither argued nor demonstrated that statute operated unconstitutionally in every case). For the reasons that the 'as applied' challenge fails, so does and facial challenge. *Id*.

PRAYER

WHEREFORE, Appellant City prays that this Court vacate the trial court's orders, grant its jurisdictional pleas and dismiss all or part of Appellees' claims for

lack of jurisdiction, and grant it such other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned certifies Appellant's Brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B).

Exclusive of the exempted portions in Tex. R. App. P. 9.4(i)(1), this Brief contains 9,808 words. The Brief has been prepared in proportionally spaced typeface using:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was forwarded on this 12th day of February 2021, to the following counsel of record:

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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

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

CODES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE[1]

Nature of the Case	Plaintiffs SurfVive, Adonai Avalos, and Anubis Avalos ["Food Truck Appellees"] sued Appellant City of South Padre Island ["City"] to challenge the constitutionality of South Padre Island Code of Ordinances ["SPI Code"] §§ 10-31(C)(2) and 10-31(F)(2)(a) [the "Permit Cap"], and § 10-31(C)(3) [the "Restaurant Permission Scheme"], under Article I, Section 19 of the Texas Constitution. The Food Truck Appellees sought declaratory and injunctive relief, nominal damages of $1, attorneys' fees, and court costs. CR.22–26.
Course of Proceedings	The City filed a plea to the jurisdiction challenging whether $1 in nominal damages is a permissible remedy for violations of the Texas Constitution, which Appellees opposed. CR.35–42, Supp. C.R.6–13. The district court heard argument and took that plea under advisement. After discovery closed, the parties cross-moved for summary judgment and the City filed a second plea to the jurisdiction to raise its jurisdictional defenses invoking immunity from suit and lack of standing. CR.64–104, 501–60.
Trial Court	138th Judicial District Court, Cameron County, the Honorable Arturo Nelson, presiding.
Trial Court's Disposition	In two concurrent orders issued November 30, 2020, the district court granted Food Truck Appellees' motion for summary judgment in

[1] Dissatisfied with Appellant City of South Padre Island's Statement of the Case, Appellees include this one under Texas Rule of Appellate Procedure 38.2(a)(1)(B).

full, CR.3058, invalidating the Permit Cap and Restaurant Permission Scheme, and it denied the City's second plea to the jurisdiction and competing summary-judgment motion, CR.3057. The only issue left for the district court to decide is the *amount* of attorney's fees. The City did not appeal the district court's order granting summary judgment to the Food Truck Appellees—it filed this accelerated interlocutory appeal only from the district court's concurrent order denying its second plea to the jurisdiction. CR.3059–62.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary to resolve the City's interlocutory appeal from the denial of its plea to the jurisdiction. *See* ARGUMENT *below*, Part I. On the other hand, most of the City's brief addresses the merits of the Food Truck Appellees' underlying claim, even though the merits are outside the proper scope of the City's interlocutory appeal. *See id.* Part II.

If the Court considers reaching the merits (and it should not), then the Food Truck Appellees would join the City in urging oral argument. *See* Appellant's Br. ["City Br."] 2.

ISSUES PRESENTED[2]

To the extent that the City suggests in its Issues Presented that this accelerated interlocutory appeal of the district court's order denying its second plea to the jurisdiction can reach issues not raised in that plea, the City is incorrect. The City did not appeal the district court's order granting the Food Truck Appellees' motion for summary judgment. To

[2] Dissatisfied with the City's Issues Presented, Appellees include these "Issues Presented" under Texas Rule of Appellate Procedure 38.2(a)(1)(B).

avoid any confusion over the proper issues for review in this appeal, Appellees suggest the issues be presented as follows:

1. Whether the City is immune from a suit challenging the constitutionality of its ordinances under the Texas Constitution.
2. Whether Food Truck Appellees lack standing to challenge City ordinances regulating mobile food unit permits.
3. Whether the remainder of the issues the City raises in its brief are improperly raised in this accelerated interlocutory appeal.

INTRODUCTION

This case is a constitutional challenge to a pair of anti-competitive restrictions written by South Padre Island restaurant owners—at the City's invitation—to fence out food-truck competition. The first restriction limits the total number of available food truck permits to twelve. *See* South Padre Island Code of Ordinances ["SPI Code"] §§ 10-31(C)(2) and 10-31(F)(2)(a) ("Permit Cap"), despite the City imposing no similar permit cap on restaurants. The second restricts eligibility for those twelve permits: to qualify, applicants must persuade a local restaurant owner to endorse the vendor's application. *Id*. § 10-31(C)(3) ("Restaurant Permission Scheme"). In other words, the City installed local restaurant owners to serve as gatekeepers for the permits their food-truck competition would need. Because of these restrictions, Food Truck Appellees cannot secure the permits they need, and thus cannot open for business on South Padre Island. As the court below held, the two restrictions violate the Food Truck Appellees' right to pursue their occupation free from unreasonable interference, *see* Tex. Const. art. I, § 19.

But the merits of that holding are not before this Court. That is because the City chose to not appeal (or seek a stay of) the district court's order granting full summary judgment to the Food Truck Appellees. Instead, the City noticed an interlocutory appeal of the district court's concurrent order denying its second plea to the jurisdiction only. Thus, this interlocutory appeal concerns only whether the court below erred in denying the City's second plea to the jurisdiction. And to resolve this appeal, only two sets of facts matter: (1) City law restricts the Food Truck Appellees, and (2) the Food Truck Appellees challenged the constitutionality of City law. Based on this simple fact pattern, the court below correctly held that the Texas Supreme Court's jurisdictional holdings in *Patel v. Tex. Dep't of Licensing & Reg.*, 469 S.W.3d 69, 75–78 (Tex. 2015), foreclose both of the City's jurisdictional arguments based on immunity from suit and standing. The Court should thus AFFIRM the district court's denial of the City's plea.

Despite not appealing the summary judgment order, the City curiously devotes much of its opening brief to the merits. City Br. 31–44. The City's merits arguments are outside the scope of this appeal and this Court should DISMISS those arguments as improper.

And even if those merits arguments were properly before this Court—which they are not—this Court should AFFIRM. That is because, in the "actual, real world," the Permit Cap and Restaurant Permission Scheme bear no connection to any legitimate governmental purpose. *See Patel*, 469 S.W.3d at 87 (describing constitutional standard). Both restrictions were designed to fence out food truck vendors so that they would not compete with local brick-and-mortar restaurant owners on the island. On a full record following discovery, the district court below recognized as much, and granted summary judgment *in full* to the Food Truck Appellees, CR.3058.

STATEMENT OF FACTS

Appellees SurfVive and the Avalos brothers are homegrown, law-abiding Rio Grande Valley entrepreneurs who simply want a fair opportunity to vend to customers on South Padre Island. The only things standing in their way are the City's Permit Cap and the Restaurant Permission Scheme. The Food Truck Appellees sued the City to challenge the constitutionality of those two restrictions. And controlling precedent from the Texas Supreme Court makes clear that these basic facts—that the ordinances actually restrict Appellees' conduct and that Appellees

challenged those ordinances' constitutionality—are all this Court needs to affirm the district court's denial of the City's plea to the jurisdiction.

The City's statement of facts, City Br. 4–16, nevertheless focuses on several irrelevant food-safety restrictions—about grease traps, refrigerator repair, commissaries, and such—that the City *admits* the Food Truck Appellees "do not challenge."[3] City Br. 4. SurfVive and the Avalos brothers are not suing for exemption from any food-safety restrictions. *See* CR.7–29. Facts about grease traps and refrigerators are not relevant to whether the Permit Cap and Restaurant Permission Scheme violate the Texas Constitution, let alone the far narrower issues before this Court, namely, the City's jurisdictional defenses based on standing and immunity from suit.

In the sections that follow, the Food Truck Appellees will correct the City's incomplete and misleading factual narrative. Section A identifies the challenged ordinance provisions. Sections B–C tell of the Food Truck Appellees' frustrations in being unable to obtain food truck

[3] The City asserts Appellees "effectively concede" that the unchallenged portions of the City's vending ordinance are "not oppressive or burdensome." *See* City Br. 33. That is incorrect. Appellees challenged two restrictions--the Permit Cap and Restaurant Permission Scheme-- under Article I, Section 19, and their lawsuit in no way "effectively concede[s]" anything about other provisions not part of this lawsuit.

permits because of the City's Permit Cap and Restaurant Permission Scheme and explain how those unusual restrictions restrict their ability to operate food trucks on South Padre Island. Sections D–E lay out the facts in the record that unravel the City's post-hoc rationales for having enacted the Permit Cap and Restaurant Permission Scheme. Finally, Section F recounts the protectionist origin of the City's unconstitutional food-truck permit restrictions.

A. This Case Challenges the City's Permit Cap and Restaurant Permission Scheme—Nothing Else.

As mentioned above, this case is a constitutional challenge to two (and only two) unusual food truck restrictions in the City's Code of Ordinances. First, the Permit Cap restricts the number of food truck permits on South Padre Island to twelve.[4] SPI Code §§ 10-31(C)(2),

[4] The City implies in its brief that the Permit Cap consists solely of SPI Code § 10-31(C)(2) (City may issue twelve permits per month), and argues that Appellees waived their challenge to § 10-31(F)(2)(a) (food truck permits last 30 days) because the latter provision "does not limit the number of permits." *See* City Br. 33 n.7. The City is wrong; Appellees have not waived their challenge to § 10-31(F)(2)(a). Indeed because the Permit Cap consists of *both* provisions working together, Appellees challenged *both* in their original petition. *See* CR.7–9, 17, 24–25. The first restricts monthly permits at twelve total, *see* SPI Code § 10-31(C)(2), and § 10-31(F)(2)(a) ensures that those permits expire at the end of each month. By enforcing both *together*, the City's Permit Cap ensures no more than 12 food trucks can operate on South Padre Island at any given time. *Accord*, CR.2662 (City permit data reflecting 12-permit cap reached in 2020).

(F)(2)(a). Second, the Restaurant Permission Scheme requires applicants to convince a local restaurant owner on South Padre Island to sign off on their food truck permit application before they may qualify for one of those twelve permits. SPI Code § 10-31(C)(3).

These are unusual laws—Texas cities of all sizes regulate food trucks without resorting to permit caps or empowering restaurant owners to veto entry into the market.[5] These laws are also separate from the Texas Food Establishment Rules, which are enforced by the Texas Department of State Health Services and regulate all retail food establishments for things such as food safety, hygiene, and water use. *See* 25 Tex. Admin. Code, ch. 228 [hereinafter TFER]; *id.* § 228.221 (provision on food trucks).

The City incorporated the TFER into its own health and safety rules, *see* SPI Code § 10-10, and both SurfVive and the Avalos brothers

[5] As cited in the district court, CR.516, 2868, Texas cities *do not* regulate food trucks by capping permits and restricting eligibility for food-truck permits on whether the owner a local restaurant endorses the permit application. *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.*

are happy to comply with all of those regulations. CR.567, 574, 580. By contrast, this lawsuit is solely about the City's Permit Cap and Restaurant Permission Scheme, and the plain text of both restrictions make clear that neither involve the TFER at all. CR.7–29; 501–60.

B. The City's Permit Cap Fenced Out SurfVive. When SurfVive Later Applied for an Available Permit It Was Ineligible Due to the Restaurant Permission Scheme.

Twice, SurfVive sought a City food truck permit but was stymied by the Permit Cap and Restaurant Permission Scheme. SurfVive is a charity dedicated to healthy living. CR.562. Its operations include a free surfing school, community gardening, and a food truck that promotes responsible eating. *Id*.

To provide healthy food options in South Padre Island, SurfVive leased a food truck beginning in April 2018, from which it sells smoothies, coffee, and veggie bowls.[6] CR.563. But shortly after obtaining its food truck, SurfVive's director learned that none of the City's original six

[6] The City criticizes SurfVive for not having a grease trap in its food truck. *See* City Br. 12. Besides having nothing to do with SurfVive's standing to sue, this criticism ignores that SurfVive does not use grease—not in its smoothies, coffee, or veggie bowls. That is why the Cameron County health authorities logically concluded SurfVive had no need for a grease trap and permitted its food truck. *See* CR.2753.

permits were available because of the Permit Cap. *Id.*, CR.2661, *accord* CR.2761.

Unable to open for business on South Padre Island due to the Permit Cap, SurfVive sought and obtained a Cameron County food truck permit to vend on county land outside the City's jurisdiction. CR.563, 2753. To get the county permit, SurfVive passed food-safety and fire inspections and submitted proof of state sales-tax registration, insurance coverage, a wastewater disposal contract, and a certified food manager certification, among other requirements. CR.563. SurfVive remains both willing and able to repeat these and similar steps as required for a City food truck permit. CR.567.

After several months of vending on county land, the City itself notified SurfVive that a food-truck permit had become available when the cap was raised to twelve permits, *see* CR.2743—showing that the City knew SurfVive wanted a permit. In response, SurfVive scouted potential vending locations, CR.564, identified a location, *id.*, and submitted its food-truck permit application to the City, CR.2747 (SurfVive application submitted to City); *see also* City Br. 11 (recognizing "SurfVive's application"). But the City did not approve SurfVive's application;

instead, the City deemed SurfVive ineligible for a food-truck permit under the Restaurant Permission Scheme because its application lacked "the support of a licensed local restaurant."[7] City Br. 11–12; CR.1608–09. The City's anti-competitive restrictions had fenced out SurfVive once again. And in 2020, with the City issuing twelve permits, the Permit Cap ensured that none were available for SurfVive or anyone else. CR.2662.

C. The Avalos Brothers Cannot Establish a Vending Location on South Padre Island Because of the Permit Cap and Restaurant Permission Scheme.

The Permit Cap and Restaurant Permission Scheme also fence out the Avalos brothers' food truck from South Padre Island. The brothers co-own the Chile-de-Árbol food truck, which sells vegan tacos, burgers, and Indian-inspired veggie-and-rice bowls at a Brownsville food-truck park. CR.570–71, 576–77. To vend there, the Avalos brothers got a food truck permit from the City of Brownsville. CR.571, 577, 2755. Like SurfVive's Cameron County permit, the Avalos brothers' City of Brownsville permit required them to pass food-safety and fire inspections and submit proof of state sales-tax registration, insurance coverage, a

[7] In its brief, the City criticizes SurfVive's application for proposing a vending location outside one of the City's designated vending zones, and for not including its food manager certification when applying, *see* City Br. 11, but SurfVive can easily comply with (and does not challenge) those requirements, CR.1607, 1611, 2753.

wastewater disposal contract, a certified food manager certification, among other requirements. CR.571, 577. Also like SurfVive, the Avalos brothers are willing and able to repeat these and similar steps for a City food truck permit. CR.574, 580.

The Avalos brothers have taken several steps to vend in South Padre Island. Both brothers scouted the island for potential vending sites, researched the City's vending ordinances, and also tested the food-truck market by bringing Chile-de-Árbol to an event on South Padre Island. CR.571–72, 577–78. As the Avalos brothers explained to the district court, they want to first bring their *existing* Chile-de-Árbol food truck to South Padre Island and establish a vending site there on a part-time basis. CR.572, 578. Due to the City's anti-competitive restrictions, however, the brothers cannot afford to invest in a ground lease on South Padre Island without certainty that a City food-truck permit would be available (Permit Cap), and that they would be eligible for a permit (Restaurant Permission Scheme). CR.572, 578. The Avalos brothers have also met with investors about expanding Chile-de-Árbol with a *second* food truck. CR.571, 577. But the Permit Cap and Restaurant Permission Scheme have made it impossible to operate their existing food truck in

South Padre Island, much less expand to a second food truck. CR.572–73, 578–79.

To illustrate, as noted above the record confirms that in 2020 the City issued all twelve of its food-truck permits, leaving none for the Avalos brothers or anyone else. CR.2662. But even if one of those twelve permits had been available, the uncertainty saddling the Avalos brothers remains because the City's Restaurant Permission Scheme empowers local restaurant owners to decide which food truck owners are "eligible" for a permit. SPI Code § 10-31(C)(3). Both the City's Permit Cap and Restaurant Permission Scheme thus restrict the Avalos brothers' ability to operate their food truck on South Padre Island.

D. The Permit Cap Restricts Food-Truck Competition—It Has Nothing to Do with City Inspectors or Inspections.

The City claims that the Permit Cap conserves inspection resources and reinforces its food truck zoning designations. *See* City Br. 8–9. But at its own entity deposition, the City testified:

(1) that the City sets permit fees in amounts that will allow it to cover the cost of inspecting permitted food trucks, CR.759 (170:14–25), CR.760 (171:8–12), CR.762 (173:12–17);

(2) that the City charges food truck owners eighteen times more per year for a permit than what it charges

restaurant owners for a permit, *compare* SPI Code § 10-31(C)(4) ($1,800) *with id*. § 2-75 ($100); *accord* CR.761 (172:3–5); and

(3) that despite pricing its food-truck permits at a rate equivalent to what it costs to permit eighteen restaurants, "[t]he inspection is the same inspection we utilize at restaurants . . . it's no different than a restaurant," CR.622 (33:3–8), and that its "goal" is to inspect food trucks "twice a year," *id*. (33:12–15).

In other words, no evidence shows that the City lacks resources to inspect food trucks.

Indeed, the City inspects hundreds upon hundreds of brick-and-mortar restaurants—without needing a permit cap at all—while charging those restaurants a tiny fraction of the permitting fees that food trucks must pay. The City permits over 500 food establishments, CR.2365 (529 annual permits), and its own inspection data reveal that the City regularly inspects those hundreds of food establishments. In 2019, the City performed 52 times as many total food establishment inspections as food truck inspections. CR.2425–47 (527 total inspections/ 10 food truck inspections); *see also* CR.2369–424 (322/7 in 2016, 443/10 in 2017, and 255/3 in 2018).

At the same time, inspecting food trucks is no more burdensome than inspecting brick-and-mortar food establishments. According to the City:

> The [food truck] inspection is *the same* inspection we [the City] utilize at restaurants. So, we inspect, of course, floor, walls, and ceilings. We inspect temperatures. We inspect hygienic practices. It's a plethora of things that we inspect on, but it's *no different* than a restaurant.

CR.622 (emphases added). If anything, food truck inspections are easier for the City because food trucks are small and inspections do "not [take] very long"— about "20 minutes." CR.620–22. Yet, as noted above, the City collects $1,800 in annual fees from each food truck versus only a $100 per year from each restaurant. CR.761–62,785. Thus, in the real world, the Permit Cap results only in the City having less permit revenue to pay for inspections.

There is also no real-world evidence that the Permit Cap reinforces the City's food truck zoning designations. *See* SPI Code § 10-31(C)(1). The City's code already controls where food trucks can vend on South Padre Island: commercially zoned private property that falls within three designated vending zones. SPI Code §§ 10-31(A)(3), (C)(1). And although the City asserts that it also needs the Permit Cap to limit the number of

food trucks operating on private property in those zones, *see* City Br. 9, it offers no explanation, because there is none, for why no cap is needed to restrict the number of restaurants operating on private property in those same exact areas. The closest the City came at its entity deposition to explaining this distinction was claiming that the limited commercial areas the City has designated for food trucks can suffer from traffic congestion, but the City then recognized that its loitering laws "have addressed" those concerns. CR.697. And in any event, the Food Truck Appellees are not challenging City zoning designations. *See* CR.7–26.

E. The Restaurant Permission Scheme Is Not an "Alternative" to TFER's Central Preparation Facility Requirement.

The City is no more successful when it tries to justify its Restaurant Permission Scheme by recasting it as an "alternative" to the state-law requirement that food trucks base their operations from a food-preparation facility. *See* City Br. 6–8. Here again, the real-world facts in the record and the text of the Restaurant Permission Scheme contradict the City's bare assertions.

State regulations require food trucks to "operate from a central preparation facility or other fixed food establishment," (e.g., a

commissary or restaurant located in the Rio Grande Valley or elsewhere in Texas). TFER § 228.221(b)(1). Under this State rule (which Appellees do not challenge), food trucks must "report to [the facility] daily," and keep with them both a "letter . . . verify[ing] facility use" and a copy of the facility's "most current health inspection." TFER § 228.221(a)(4)(B)–(C), (b)(1). Importantly for this case, the TFER leaves it up to food truck operators to decide their facility's location—there is no requirement that the facility be in the same city as a food truck's vending site (or vending sites).

By contrast, the Restaurant Permission Scheme has nothing to do with where food is prepared. It is simply a permission requirement:

> 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. Limit one local owner's (or designee's) signature per applicant.

SPI Code § 10-31(C)(3). Nothing in the Restaurant Permission Scheme requires preparation at the restaurant or regulates food safety. And once the restaurant owner's signature is obtained, the scheme requires no interaction between the food truck permit applicant and the local restaurant. *Id.*; *see also* CR.2597–98.

The City's deposition testimony about how it enforces the Restaurant Permission Scheme confirms that it has nothing to do with a food truck's operations. To ensure compliance with the scheme:

(1) a City official calls the local restaurant owner that signed off on the food-truck-permit application;

(2) the City official confirms that the restaurant owner signed the application; and

(3) the City official verifies that the restaurant owner has signed no other food truck's application. CR.801 (212:14–25).

That's it. The City does not inquire into whether the food truck permit applicant and local restaurant owner have reached any agreement under which the latter would serve as the former's preparation facility. *See* CR.894 (305:12–23). The only legal effect of the Restaurant Permission Scheme is to ensure that all "applicant[s]" for a food-truck permit be "supported locally" by someone owning a restaurant "on South Padre Island" in order to be "eligible" for a permit. SPI Code § 10-31(C)(3); *see also* CR.801 (212:14–25).

The City's brief also ignores the obvious: The Restaurant Permission Scheme is not an alternative to TFER due to the simple fact that food trucks must comply with TFER no matter whether the City enforces its Restaurant Permission Scheme. Indeed, the City's own code

requires food trucks to comply with TFER, separate from and in addition to acquiring permission from a local restaurant owner. *See* SPI Code § 10-10 (adopting 25 Tex. Admin. Code Ch. 228, including the TFER Facility Rule, § 228.221(b)(1)). And the rules for complying with TFER give food truck owners all the flexibility they need—they leave it up to the food truck owner to decide for themselves whether to base their operations from a commissary *or*, if they prefer, from a permitted food establishment located anywhere in the state of Texas. By contrast, the Restaurant Permission Scheme serves only to empower local restaurant owners to decide who is eligible for the City's twelve permits.[8]

If the Restaurant Permission Scheme were truly an "alternative" to TFER's central preparation facility requirement, City Br. 6–8, then the City ordinance enacting the Restaurant Permission Scheme would say so. It does not. *See* SPI Code § 10-31. The Food Truck Appellees all plan

[8] The City's actions and words conflict on the Restaurant Permission Scheme. The City claimed at deposition that it would (and did) "waive the restaurant permission requirement" for a food truck owned by Bill Miller BBQ since it had a preparation facility elsewhere in Texas. CR.810–12. But no evidence shows that the City issued a food truck permit to Bill Miller BBQ. The permit records produced by the City contain no such permit. *See* CR.2660–2741. In any event, the City's food truck ordinance, which enacts the Restaurant Permission Scheme, does not mention waiver anywhere. *See* SPI Code § 10-31. Nor has the City ever notified SurfVive that the Restaurant Permission Scheme could be waived (in contravention of the plain text of SPI Code § 10-31(C)(3)). CR.565.

to comply with the TFER facility rule. CR.567, 574, 580 (affidavits). They simply object to the City's separate mandate that a local restaurant owner "support" their application before they can be "eligible for a permit." SPI Code § 10-31(C)(3); CR.566, 573, 579.

F. The Real Purpose of the Restaurant Permission Scheme and Permit Cap Is to Insulate Brick-and-Mortar Restaurants from Food Truck Competition.

The Restaurant Permission Scheme and Permit Cap were designed to do one thing: exclude food-truck operators from competing with local restaurant owners. Extensive real-world evidence in the record confirms this.

According to the City, the "months" of research that went into its original draft food truck ordinance (No. 15-11) had nothing to do with the Permit Cap and Restaurant Permission Scheme, as both restrictions appeared later in the final ordinance (No. 16-05) only after local restaurant owners objected to food-truck competition and opposed the City's original food truck ordinance. *See* CR.632–33, 673–74, 696–704 (confirming that City's research was entirely related to unchallenged aspects of food truck regulation). The City's early research instead surveyed how other Texas cities regulate food trucks, reviewed the City's

administrative and regulatory capacities, and explored conventional public-interest concerns such as health, food safety, parking, traffic, noise, crowding, trash, and environmental impact. *Id*. City staff "spent more time [on] this [draft] ordinance than any other ordinance." CR.669.

When the City presented its original food-truck ordinance to the SPI City Council in July 2015, it contained no Permit Cap and no Restaurant Permission Scheme. CR.1997–2002; CR.1798 (165:8–13), CR.1808–09 (175:16–176:4). The City recommended to the City Council that it approve its original food-truck ordinance, CR.1997, and testified at deposition that that recommendation was based on the "months of work" performed by City officials, CR.1712 (79:15–24). The City also admitted that its original ordinance, which it recommended for approval despite containing no Permit Cap or Restaurant Permission Scheme, did not put the public's health and safety at risk. CR.1689 (56:3–8).

It was only *after* the City presented its original ordinance to the City Council that local restaurant owners objected that allowing food trucks would cut into their profits. CR.678 (89:16–21), 970. And at deposition, the City admitted that is exactly what happened, CR.678 (89:16–21), with the transcript of that City Council meeting confirming

the same (and reflecting that local restaurant owners demanded a cap on food-truck permits), *see* CR.2260 (104:21–105:3), CR.2261 (108:18–22); CR.2262 (111:3–6; 111:18–22).

The City's brief similarly omits evidence showing that, in response to the local restaurant owners' objections, the SPI City Council returned three weeks later and took official action to allow local restaurant owners to modify the City's original ordinance by passing:

> "[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."

CR.2017–18 (emphasis added). And after unanimously approving this motion, the Mayor spoke on the record to restaurant owner Arnie Creinin, stating that the local restaurateurs 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." CR.1264–65 (27:1–28:8).

The City never issued any public notices about the Food Truck Planning Committee's meetings. Those meetings took place at local restaurants and never complied with the Texas Open Meetings Act.

CR.721–22, 918–19. But the members of that planning committee made clear their desire to exclude food truck competition:

- "[I]f you take that cream away from us, I think it's materially going to hurt our business."
- "[F]ive trucks aren't going to hurt me . . . [b]ut 15 are going to start to eat us up."
- "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."
- "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."

E.g., CR.1216, 1217, 1221, 1223; Ron Whitlock Reports, *SPI Food Trucks*, YouTube (Jul. 27, 2015), https://youtu.be/yXDWAaO4xF0 (video at 17:23–:35), *cited in* CR.521–22.

The Permit Cap and Restaurant Permission Scheme were born at the first Food Truck Planning Committee meeting. CR.1966 (333:15–18); CR.1967 (334:1–6). According to restaurant owner Mr. Creinin (head of the Committee), the City's original ordinance "needed to be massaged, if you will." CR.1116 (134:16–21). The first appearance of the Permit Cap and Restaurant Permission Scheme is in an email from Mr. Creinin following the Committee's first meeting to City officials and the other

restaurant owners on the Committee containing proposed modifications to the City's original ordinance. *See* CR.1375–80; *see also* CR.1112–16 (130:19–134:4), CR.1118–19 (136:24–137:5). Eleven days later, the Permit Cap and Restaurant Permission Scheme made their way to the SPI City Council, and into the enacted ordinance. *Compare* CR.1375–80 (Email to Committee and City officials with modified food-truck ordinance dated Feb. 6, 2016) *with* CR.1231–36 (Agenda Request Form and Ordinance No. 16-05 dated Feb. 17, 2016).

Other proposals by the Food Truck Planning Committee confirm that it was not concerned about the basic health and safety regulations contained in the City's original ordinance; they were instead solely concerned with adding restrictions designed to fence out food-truck competition. *Compare* CR.1998–2002 (City's original ordinance No. 15-11), *with* CR.2275–80 (Committee-modified ordinance No. 16-05). The Food Truck Planning Committee suggested saddling food truck permit applicants with high fees,[9] forcing them away from restaurants using buffer zones, CR.1967 (334:7–10), and even restricting food truck

[9] For example, one Committee member (and restaurant owner) suggested charging food truck owners $10,000 for a permit. CR.1813 (180:11–14).

ownership to local restaurants, CR.767 (178:12–16), all to fence out food truck operators from the Rio Grande Valley and elsewhere. Simply, the whole purpose of the Food Truck Planning Committee was to dream up restrictions to protect restaurant owner profits. Its chosen weapons were the Permit Cap and Restaurant Permission Scheme.

SUMMARY OF THE ARGUMENT

The trial court correctly exercised jurisdiction, and then correctly granted full summary judgment to the Food Truck Appellees below.[10] CR.3057–58. In this interlocutory appeal the City raises the same meritless jurisdictional arguments that the district court denied. This Court should affirm.

Texas courts have jurisdiction over any constitutional challenge to a law that imposes an "actual or threatened restriction" on the plaintiff. *Patel v. Tex. Dep't of Licensing & Reg.* 469 S.W.3d 69, 77 (Tex. 2015) (quoting *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995)). In such cases, "sovereign immunity is inapplicable." *Patel*, 469 S.W.3d at 75–76. The Food Truck Appellees' constitutional challenge

[10] The City did not appeal the district court's order granting full summary judgment to the Food Truck Appellees. Rather, it appealed the district court's concurrent order denying its second plea to the jurisdiction only. CR.3059–62.

meets these standards, and the City's plea to the jurisdiction was properly denied. In other words, Appellees have standing to challenge the constitutionality of the restrictions fencing them out of South Padre Island, and the City is not immune from the Texas Constitution.

Turning to the merits, this Court should dismiss the City's transparent attempt to shoehorn the merits of Appellees' successful Article I, Section 19 claim into this interlocutory appeal. Those issues were decided by the district court's order granting Appellees summary judgment—an order the City did not appeal. Because the merits of this matter are not properly before this Court, it should reject the City's invitation to address the merits in this appeal.

Even though it would be improper to reach the merits, Appellees wish to preserve their arguments on those issues against the City's efforts to relitigate them here. Simply put, the City's Permit Cap and Restaurant Permission Scheme violate the Due Course of Law Clause in Article I, Section 19. The district court agreed and declared both unconstitutional at summary judgment. CR.3058, 1551.

As the court below recognized, *Patel* controls the constitutional analysis in this case. There, the Texas Supreme Court clarified the test

governing Due Course of Law Clause challenges to statutes and rules regulating economic activity. 469 S.W.3d at 87. The high court made clear that the *Patel* test requires meaningful scrutiny and not a mere rubber stamp. *Id.* Importantly, the *Patel* test grounds the required constitutional analysis in the "actual, real world" and evidence plays a central role. *Id.*

The City cites *Patel*, but does not apply its test. Instead, the City repeats the same arguments that it offered to the district court—where it argued for the most deferential form of *federal* rational-basis review—not the *Patel* test. It advances the same post-hoc justifications for the challenged restrictions that it offered at summary judgment and relies on bare assertions to support those justifications, which are insufficient to satisfy *Patel*. The City repeats those arguments to this Court, with the only difference being that the City has removed from its opening brief all the citations to the federal rational-basis cases it invoked below.

This is insufficient under *Patel*. In the "actual, real world," *see* 469 S.W.3d at 87, there is no rational connection between the City's anti-competitive permitting restrictions and any legitimate governmental purpose. The Food Truck Appellees prevailed at summary judgment because they showed that record evidence negates the City's post-hoc

justifications. And beyond negating the City's justifications, it shows that the two restrictions accomplish only one thing in the actual, real world: preventing food-trucks from competing with local restaurants in South Padre Island. In short, the City used its public power to engage in private economic protectionism—picking winners and losers in the marketplace. And mere protectionism, with nothing more, cannot sustain a law challenged under Article I, Section 19.

ARGUMENT

This is a two-part response. Part I addresses the jurisdictional issues presented in the City's interlocutory appeal—the only issues that are properly before this Court. Part II preserves Appellees' response to the City's untimely arguments on the merits.

I. ISSUES WITHIN SCOPE OF INTERLOCUTORY APPEAL

This is an interlocutory appeal from the "deni[al of] a plea to the jurisdiction." Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); *see* CR.3059; Tex. R. App. P. 28.1(a) (accelerating this type of interlocutory appeal). As such, the issues before this Court are limited to jurisdictional arguments. "Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*." *Tex. Dep't of Parks &*

Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004). "Whether a court has subject matter jurisdiction is a question of law." *Id.* at 226. With the benefit of a full record, the Court may "consider relevant evidence" and must "take as true all evidence favorable to the nonmovant" Food Truck Appellees. *Id.* at 227–28.

Of all the City's arguments, only two qualify as jurisdictional: the City's assertion of immunity from suit and the Food Truck Appellees' standing to sue. Both arguments fail.

A. No Government Is Immune from Constitutional Remedies.

The City asserts "governmental immunity" and claims that the Food Truck Appellees neglected some burden of "establish[ing] a waiver of the City's immunity from suit." City Br. 2–3. This is wrong. The City is confusing the "two distinct principles" of "immunity from suit and immunity from liability." *See Miranda*, 133 S.W.3d at 224. This section untangles those principles and shows why the City is wrong on both.

1. Immunity from Suit (Declaratory and Injunctive Relief).

Immunity *from suit* simply does not apply to constitutional cases. "[S]overeign immunity is inapplicable in a suit against a governmental

entity that challenges the constitutionality of a statute and seeks only equitable relief." *Patel*, 469 S.W.3d at 76. The Food Truck Appellees' only claim is that the City violated the Texas Constitution's Due Course of Law Clause. CR.22–24 (citing Tex. Const. art. I, § 19). The City is wrong that the Food Truck Appellees "have the burden to affirmatively demonstrate . . . a waiver of governmental immunity" on this claim.[11] *See* City Br. 20. The City's approach "would effectively immunize it[self] from suits claiming [an ordinance] is unconstitutional"—an argument the Texas Supreme Court has rejected as "illogical." *Patel*, 469 S.W.3d at 76.

2. Immunity from Liability (Nominal Damages).

"In contrast [to immunity from suit], immunity from liability is an affirmative defense that cannot be raised by a plea to the jurisdiction." *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009). The City's assertion of immunity from nominal damages is an assertion of immunity from liability, which the City simply may not litigate in an accelerated

[11] Even if the Food Truck Appellees had to establish a waiver, they met such a burden here, since the Uniform Declaratory Judgments Act—which their petition invokes—waives governmental immunity "for challenges to the validity of an ordinance." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019); *see* CR.10–11 (pleading jurisdiction).

interlocutory appeal.[12] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) (confining interlocutory appeal to government's "plea to the jurisdiction"); *cf. below* Part II.A (showing that the merits are outside scope of appeal). This appeal is the wrong vehicle for the City's nominal damages issue, and the Court should not entertain it.

If the City wants to challenge the district court's ability to grant Appellees $1 in nominal damages—it will need to appeal from the order granting Appellees $1 in nominal damages. *See* CR.3058 (Order granting Pls.' Mot. for Summ. J.), CR.1551. If it does, the City will have to address the difference between compensatory damages (which are unavailable for violations of the Texas Constitution) and nominal damages (which are available to remedy violations involving "non-economic harm to civil or property rights"). *See MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 665 (Tex. 2009) ("[N]ominal damages are not for

[12] None of the cases cited by the City to support its immunity argument concern nominal damages. *Cf. City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566 (Tex. 2018) (pension claim); *In re Nestle USA, Inc.*, 359 S.W.3d 207 (Tex. 2012) (tax refund claim); *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009) (pension claim); *Travis Cnty. v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246 (Tex. 2002) (contract claim); *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995) (constitutional claim for compensatory damages); *City of Houston v. Downstream Envtl., L.L.C.*, 444 S.W.3d 24 (Tex. App.—Houston [1st Dist.] 2014) (same) *City of Harlingen v. Obra Homes, Inc.*, No. 13-02-268-CV, 2005 WL 74121 (Tex. App.—Corpus Christi Jan. 13, 2005) (same); *Jackson v. Houston I.S.D.*, 994 S.W.2d 396 (Tex. App.—Houston [14th Dist.] 1999) (same).

compensation; they are for cases in which there are no damages, or none that could ever be proved."). Simply, the district court properly granted $1 in nominal damages to remedy a violation of Appellees' constitutional rights. But until the City appeals the order granting Appellees summary judgment, this Court has no jurisdiction to consider it.

B. The Food Truck Appellees Have Standing to Challenge the Constitutionality of Restrictions That Apply to Them.

The facts also demonstrate that Food Truck Appellees have standing to challenge the Permit Cap and Restaurant Permission Scheme. The City states the controlling *Patel* jurisdictional holding correctly: "To challenge the City's Ordinance, [Appellees] must suffer some actual or threatened restriction under the [ordinance] and contend that the [ordinance] unconstitutionally restricts the [Appellees'] rights." City Br. 25 (citing *Patel*, 469 S.W.3d at 77); *see also Garcia*, 893 S.W.2d at 517–18. "[O]nly one plaintiff with standing is required." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011); *accord Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 152 n.64 (Tex. 2012) (recognizing that courts "need not analyze the standing of more than one plaintiff" when

"there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief.").[13]

The Food Truck Appellees easily meet *Patel*'s standing test. They have suffered an actual restriction under the Permit Cap because all twelve permits have issued under that cap. CR.2662. And they suffered an actual restriction under the Restaurant Permission Scheme because the City Code conditions their permit eligibility—let alone issuance—on securing the "support[]" of their would-be competitors. SPI Code § 10-31(C)(3). That is sufficient to establish standing. The Food Truck Appellees want to operate food trucks on South Padre Island. The City will not allow them to do so because: (1) there are no permits; and (2) local restaurant owners have not given their permission for Appellees to qualify for permits. The Food Truck Appellees challenged the

[13] The City suggests elsewhere that Texas "adopts" the federal standing test. City Br. 24–25. Even if federal law applied, Appellees meet the requirements of injury in fact, traceability, causation, and redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). To be clear:

- **Injury in fact**: the Food Truck Appellees are prohibited to vend on South Padre Island. *See* Statement of Facts A–C.
- **Fairly traceable/causation**: this prohibition arises from the Permit Cap and Restaurant Permission Scheme. *See* Statement of Facts D–E.
- **Likely redressable**: the constitutional remedies sought by the Food Truck Appellees would recognize injury done, invalidate the Permit Cap and Restaurant Permission Scheme, and enjoin any vending prohibition traceable to those challenged provisions. *See* CR.25–26 (original prayer for relief).

provisions that prevented them from opening their food trucks. Standing here is simple.

The City offers four arguments against the Food Truck Appellees' standing, but none of them reckon with *Patel*, and all fail.

The City's first theory is the only one for which it cites legal authority. This theory, that no Appellee "submitted a complete permit application," City Br. 25, is ultimately irrelevant because the Permit Cap and Restaurant Permission Scheme make it futile to apply. The Restaurant Permission Scheme requires a local restaurateur's signature "before [an applicant is] eligible for a permit"; this signature is a component of a complete application. SPI Code § 10-31(C)(3); *see* Statement of Facts E *above*. As the City recognizes, SurfVive *did* submit an application, *see* CR.2747; SurfVive's application was deemed incomplete by the City based on the missing signature from a local restaurant owner. City Br. 11. In other words, the City claims that Appellees had to successfully persuade a restaurateur to sign their application before they would have standing to challenge the Restaurant Permission Scheme. But obviously Appellees cannot be put to such a Catch-22. Moreover, it would have been pointless to apply for permits

that were capped—no permits were available because of the Permit Cap when SurfVive obtained its food truck in April 2018, CR.1607, 2743, and none were available when Appellees wrapped up discovery in 2020 and moved for summary judgment, *see* CR. 2662.

The City has offered no evidence that Appellees can operate despite the Permit Cap and without a local restaurant owner's permission. The City's only authority, *KORR, LLC v. Cnty. of Gaines*, No. 11-18-00130-CV, 2020 WL 2836491, at *3 (Tex. App.—Eastland May 29, 2020, no pet.) (mem. op.), dealt with the unripe claims of a developer who did not own the property whose land-use restrictions he was challenging. Here, unlike the developer in *KORR*, the Food Truck Appellees actually own the food-truck businesses subject to the challenged City restrictions; and they would be operating today but for those restrictions.

The City's remaining three theories against standing, all without support in the caselaw, are weaker still. First, the City asserts that the Food Truck Appellees must "meet the unchallenged TFER standards." *See* City Br. 26–27. But even if this mattered, there is evidence (which must be construed in the nonmovant Appellees' favor) that the Appellees

would meet those standards. *See* Statement of Facts B–C *above*. Next, the City repeats its erroneous characterization of the TFER facility rule as an "alternative" to compliance with the Restaurant Permission Scheme. As explained above, Statement of Facts E, the TFER facility rule requires food trucks to contract for food handling and preparation with physical facilities that can be located anywhere in Texas, whereas the Restaurant Permission Scheme regulates nothing about food safety and requires food-truck applicants to get signed permission from a restaurant owner located on South Padre Island.[14] Finally, the City argues that the Appellees' claim is "hypothetical," City Br. 27–28, but as explained above, the only things preventing the Food Truck Appellees from operating on South Padre Island are the Permit Cap and Restaurant Permission Scheme. *See* Statement of Facts B–C *above*.

* * *

[14] If, contrary to the text of SPI Code § 10-31(C)(3), the Restaurant Permission Scheme's requirement of "local[]" "support[]" were satisfied by engagement with a TFER-compliant facility *anywhere in Texas*, then the Appellees would be entitled to a declaratory judgment saying so, to "avoid constitutional infirmities" with the Restaurant Permission Scheme's literal meaning. *See City of Fort Worth v. Rylie*, 602 S.W.3d 459, 468 (Tex. 2020) (citing *Barshop v. Medina Cnty. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 629 (Tex. 1996)). Of course, such a construction is beyond the scope of this interlocutory appeal. *See* Section II.A *below*.

"Occupational freedom, the right to earn a living as one chooses, is a nontrivial constitutional right entitled to nontrivial judicial protection." *Patel*, 469 S.W.3d at 123 (Willett, J., concurring). It is appropriate that the Food Truck Appellees seek constitutional relief for their constitutional rights, and the courts have the power to hear their claim. The City's interlocutory appeal of its plea to the jurisdiction can and should be DENIED, and the case REMANDED for what little remains to be done in the district court.

II. ISSUES OUTSIDE SCOPE OF INTERLOCUTORY APPEAL

In its notice of interlocutory appeal, the City stressed the district court's obligation to "determin[e] whether it has jurisdiction" before "consider[ing] the merits of [the Food Truck Appellees'] claims." CR.3059. But now, the City ignores the very principle it accused the district court of violating. Its opening brief includes 14 pages of argument explicitly on the merits—almost twice as much as the City's 8 pages of argument on jurisdictional issues. *See* City Br. 31–44. The Court should disregard that part of the City's brief because it is not properly before this Court, given that the City chose not to appeal the district court's order resolving

Appellees' constitutional claims. *See* CR.3059. But if this Court does reach the merits, it should affirm the ruling below.

Below, Section II.A shows the Court that the City's attempt to argue the merits is procedurally improper. In Section II.B., the Food Truck Appellees explain why this case is governed by the Texas Supreme Court's decision in *Patel* and why the City's attempts to escape the meaningful scrutiny called for by *Patel* all fail. In Section II.C, Appellees apply the *Patel* test, which provides three independent bases for declaring the Permit Cap and Restaurant Permission Scheme unconstitutional. In other words, if the Permit Cap and Restaurant Permission Scheme fail under even one of *Patel*'s three inquiries, they violate Article I, Section 19's Due Course of Law Clause. Finally, in Section II.D., Appellees show why the City's facial vs. as-applied distinction is both wrong and irrelevant.

A. Interlocutory Appeals Do Not Reach the Merits.

"Appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute explicitly provides such jurisdiction." *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (citing *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998)).

"Section 51.014(a)(8) was designed to . . . resolv[e] the question of sovereign immunity prior to suit *rather than after a full trial on the merits*." *Koseoglu*, 233 S.W.3d at 845 (emphasis added). Such statutes must be fairly construed. *Dallas Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019). And "courts have construed Section 51.014(a)(8)," on which the City relies here, "as allowing review of only the portion of an order addressing the plea to the jurisdiction." *Id*. at 761 n.36 (collecting cases); *see, e.g.*, *City of Weslaco v. Borne*, 210 S.W.3d 782, 791 (Tex. App.—Corpus Christi 2006, pet. denied) (noting that "immunity from suit" is "the only form of immunity which may be properly challenged on an interlocutory appeal from the denial of a plea to the jurisdiction"). Simply put, the merits are not jurisdictional issues and are therefore outside the scope of the statute authorizing interlocutory review.[15] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a).

[15] In some cases, undisputed evidence offered in support of a plea to the jurisdiction can "implicate[] both the subject matter jurisdiction of the court and the merits of the case." *Miranda*, 133 S.W.3d at 226. In *Miranda*, for example, the court evaluated certain factual evidence as it related to the State's assertion of sovereign immunity under the Tort Claims Act and a related premises-liability statute. *Id*. at 225, 231–32. By contrast, no facts are necessary in this case to determine whether sovereign immunity is waived under the Texas Constitution. *Patel* plainly holds that it is. *See* 469 S.W.3d at 75–77.

B. The *Patel* Test Controls and Evidence Plays a Central Role. The City Fails to Apply *Patel* and Evades It.

The *Patel* test controls the constitutional analysis in this case. As the Texas Supreme Court made clear in 2015 when reconciling three lines of authority applying different tests—Texas courts must apply the standard of review announced in *Patel* in Due Course of Law challenges to laws and regulations governing economic activity. 469 S.W.3d at 86–87. As explained in Part 1, the *Patel* test has three distinct steps and record evidence plays a central role in the constitutional analysis. If a challenged law fails under *any* of *Patel*'s three individual inquiries it violates Article I, Section 19 of the Texas Constitution. Rather than *apply* the *Patel* test, the City merely cites it but then makes the same arguments it offered in the district court for applying federal rational-basis review—a standard the *Patel* majority expressly rejected. In Part 2, Appellees show why the City's attempts to evade the *Patel* test all fail.

1. The *Patel* test controls.

Patel controls this case. The test set forth in *Patel* governs any "challenge to an economic regulation statute under Section 19's substantive due course of law requirement[.]" 469 S.W.3d at 87.

The constitutional analysis under *Patel* is rooted in the record evidence reflecting how the challenged laws operate in the "actual, real world"—not what the government conceives out of whole cloth after litigation erupts. *Id.* (courts applying the *Patel* test must "consider the entire record, including evidence offered by the parties"). Under that test, courts must first determine whether a challenged law's "purpose" is "rationally related to a legitimate governmental interest[.]" *Id.* (*Patel* Step One). Second, if it is, those courts must next determine whether, if "considered as a whole, [a] statute's actual, real-world effect . . . could not arguably be rationally related to . . . the governmental interest." *Id.* (*Patel* Step Two). Third, even if the evidence shows that an actual, real-world connection between means and ends exists, the *Patel* test also calls on courts to conduct a burden inquiry and determine whether, "when considered as a whole, the statute's actual, real-world effect . . . is so burdensome as to be oppressive in light of, the governmental interest." *Id.* (*Patel* Step Three). These inquiries are distinct—a law that fails even one is unconstitutional. *Id.*

To the extent the constitutional analysis the City applies in its opening brief resembles anything in the *Patel* decision, it is the test

supported by the dissenting justices, *id*. at 138 (Hecht, C.J., dissenting) ("[R]egulation is unconstitutional only if it lacks a rational relationship to a legitimate government interest."). *See* City Br. 33–35, 37–38. But as the *Patel* majority made expressly clear, the test it announced is a "different standard" than the dissent's "rational relationship" test, which it criticized as "for all practical purposes no standard." 469 S.W.3d at 90–91.

The City's arguments on the merits are largely identical to those it raised in the district court—but in this Court it has removed the case citations applying federal rational basis review (which, as noted above, the Texas Supreme Court rejected). *Compare* City Br. 37–38 *with* CR.92–93, 102–04 (raising same arguments in defense of Permit Cap and relying on federal rational-basis review); *compare* City Br. 33–35 *with* CR.92–93, 98–102 (raising same arguments in defense of Restaurant Permission Scheme and relying on federal rational-basis cases).

The City's application of *Patel* in this Court relies on hypothetical justifications and conceivable facts—and thus finds no basis in the text of the *Patel* decision. The City's claim that the inquiry under *Patel* is a "deferential inquiry," *see* City Br. 23–24 (citations omitted), and its

argument that the Court should "defer to [the] City's decision" to cap food truck permits, *id*. at 38, conflicts with the Texas Supreme Court's observation in *Patel* that "judicial deference is necessarily constrained where constitutional protections are implicated." 469 S.W.3d at 91. By invoking hypothetical justifications and facts conceived out of whole cloth after litigation began, the City's brief ignores *Patel*'s specific command that courts must consider evidence rooted in the "actual, real world" in resolving claims under Article I, Section 19. *Id*. at 87.

In short, *Patel* is the Texas Supreme Court's definitive framework for judging challenges to economic regulations under the Due Course of Law Clause. The *Patel* test demands meaningful judicial review based on evidence, not the rubber stamp urged by the City. As discussed next, the City's attempts to evade *Patel* all fail.

2. The City's attempts to evade the *Patel* test fail.

The City urges this Court to cabin *Patel* by pointing to four decisions, each of which does not apply. At the same time, all of the City's cases agree that *Patel* is the correct test for Due Course of Law challenges to laws restricting someone in their chosen private occupation.

First, the City points to a footnote in *Hegar v. Texas Small Tobacco Coalition* that notes that *Patel*'s "test[] [is] properly limited to the particular legal framework[] in which [it] arose." 496 S.W.3d 778, 788 n.35 (Tex. 2016), *see* City Br. 31. But the "particular legal framework" that *Hegar* referred to was Article I, Section19's Due Course of Law Clause. *Id*. The *Hegar* plaintiffs tried to apply it to a different part of the Texas Constitution—the Equal and Uniform Clause under Article VIII, Section 1. *Hegar* did not suggest any limitation of *Patel* beyond the clause to which it applies. In other words, *Hegar* says *Patel* should be limited to claims like those brought by the Food Truck Appellees, not that *Patel* should be limited to that case's exact facts. *Hegar* in no way limits the *Patel* test's application to claims under Article I, Section 19.

Second, the City points to *Transformative Learning System v. Texas Education Agency*, in which the Third Court of Appeals also refused to apply *Patel*. *See* 572 S.W.3d 281, 293 (Tex. App.—Austin 2018, no pet.), *see* City Br. 31. But *Transformative Learning* refused to apply *Patel* only because the statute at issue there, which concerned "the rights and obligations of recipients of state funding," did "not erect an economic barrier of entry into a given profession," and did "not inhibit an

individual's ability to pursue economic or professional opportunity." 572 S.W.3d at 293. And so, *Transformative Learning* does not limit *Patel* here either, since both the Permit Cap and Restaurant Permission Scheme are "barrier[s] of entry" that "inhibit [Appellees'] ability to pursue [their food truck businesses]" in South Padre Island. *Id.*

Third, the City challenges Appellees' economic liberty interest by offering a one-sentence argument invoking *Texas DMV v. Fry Auto Servs.*, 584 S.W.3d 138, 143 (Tex. App.—Austin 2018, no pet.). According to the City, "[t]he liberty interest does not extend to a particular amount of profit from the business." City Br. 31. But the City's selective omission of the rest of the Third Court's holding is misleading. In *Fry Auto*, the Third Court found that "full service deputies" had "no right to a particular amount of profit *realized from performing public services on the government's behalf*." 584 S.W.3d at 143 (emphasis added). In that case, private companies were deputized by county tax collectors to "enter title and registration information into [Texas's Registration and Title System] and collect all the required fees and taxes associated with the title and registration." *Id.* at 142. The Third Court found that "perform[ing] public service on the government's behalf" was "unlike [the

lawful calling] protected in *Patel*[.]" *Id.* But the Food Truck Appellees are not performing government services—when they sell smoothies and vegan tacos, they are pursuing a "lawful calling" and therefore "fall under the shield of economic liberty addressed in *Patel*." *Id.* at 144.

Fourth, the City's brief also argues that *Patel* is limited only to challenges involving laws that *completely bar* entry into a profession. City Br. 31–34. The City points to *Texas Alcoholic Beverage Commission v. Live Oak Brewing*, 537 S.W.3d 647, 657 (Tex. App.—Austin 2017, pet. denied), *see* City Br. 32–34, for the proposition that *Patel* applies only to cases in which a challenged law bars a plaintiff entirely from his chosen occupation.[16] But *Live Oak* adds little. For one thing, the challenged ordinances *do* completely bar Appellees from operating a food truck on South Padre Island: The record establishes that but for the ordinances, Appellees would comply with all other regulatory requirements and

[16] The City also invokes a federal case to argue that "brief interruptions in a person's occupation" are different from a "complete prohibition" on the right to earn a living. *See* City Br. 32 (citing *A-Pro Towing & Recovery LLC v. City of Port Isabel*, No. 19-0016, 2020 WL 4794657 (S.D. Tex. Aug. 18, 2020). But that case is easily distinguishable on its facts. The tow truck company in *A-Pro Towing* could still operate in Port Isabel, and only sued because "on a few occasions" a City official "diverted calls away" from the tow truck company. *Id.* at *6. The Food Truck Appellees did not sue because "on a few occasions" they couldn't open for business, *id.*, they sued because they cannot open for business at all on South Padre Island.

operate their food trucks. *See* CR.1611, 1618, 1624. And for another, the City mischaracterizes the holding in *Live Oak*, in which the Third Court *applied* the *Patel* test, only to determine that the statute at issue survived review under *Patel*. 537 S.W.3d at 657. In *Live Oak*, three breweries brought a Due Course of Law challenge to a state statute making it illegal for breweries to sell "territorial rights" to distributors even though distributors may sell such rights to each other. *Id.* at 649–52. The Third Court distinguished *Patel* because the breweries were still able to "self-distribut[e] their product" or seek contract leverage against their distributors in other ways. *Id.* at 656–57. That is impossible here, where Appellees cannot vend on South Padre Island under the challenged restrictions.[17]

* * *

The City's attempt to distinguish *Patel*—like its attempt to treat *Patel* as a mere rubber stamp—ignores the plain text of the *Patel* opinion. It ignores the body of law applying *Patel*. And it ignores the simple reality

[17] The City's reading of *Patel* also glosses over the fact that Ashish Patel, the lead plaintiff, was *not* denied entry into his profession. *Patel* involved two sets of plaintiffs: individual threaders challenging a license barring entry to their profession, and businessowners such as Patel who were operating licensed threading businesses that only wanted to hire more threaders. *See* 469 S.W.3d at 73–75.

that, even if *Patel* were limited in the way the City claims it is, *Patel* would still apply because the Permit Cap and Restaurant Permission Scheme completely bar the Food Truck Appellees from operating their food trucks. For these reasons, the Court should reject the City's attempt to distinguish *Patel*.

C. The City's Permit Cap and Restaurant Permission Scheme Fail Under Each Step in *Patel*.

The Permit Cap and Restaurant Permission Scheme are unconstitutional because they fail under each of *Patel*'s three steps. Appellees will explain why the City's failure to correctly apply the *Patel* test (and its failure to address most of the record) proves fatal to each of its post-hoc justifications.

In Part 1, the Food Truck Appellees explain why the Permit Cap and Restaurant Permission Scheme fail under *Patel* Step One. After using evidence to negate each of the City's post-hoc justifications, Appellees show that the record unambiguously confirms that the actual purpose of both anti-competitive laws is economic protectionism, which is illegitimate and cannot sustain a law under *Patel*. In Part 2, Appellees demonstrate why the actual, real-world effect of the Permit Cap and Restaurant Permission Scheme advances none of the City's post-hoc

justifications. Rather, the record reflects that the challenged laws accomplish precisely what they were designed for: protecting local restaurants from food-truck competition. Finally, in Part 3, Appellees turn to the burden inquiry under *Patel* Step Three. The Permit Cap and Restaurant Permission Scheme are unconstitutionally oppressive because they impose burdens on Appellees for which the public gets nothing in return.

1. The Permit Cap and Restaurant Permission Scheme fail under *Patel* Step One.

Patel Step One insists on a rational connection between the law's actual purpose and a legitimate governmental interest. *See* 469 S.W.3d at 87. When a law's purpose serves only to pick winners and losers in the marketplace, and nothing more, it fails under *Patel* Step One. The Food Truck Appellees first negate with evidence the City's post-hoc justifications for the Permit Cap and Restaurant Permission Scheme. After doing so, Appellees return to the record and show why the City's restrictions are illegitimate economic protectionism—which cannot sustain a law.

The Permit Cap

First, the Permit Cap fails under *Patel* Step One because both justifications proffered by the City are refuted by the record evidence.

The City attempts to defend its Permit Cap, first, as a means of protecting "public health and safety" by ensuring it is not inspecting too many food trucks, *see* City Br. 37–38, and second because the "City is small" and therefore the "number [of food trucks] should be limited to what [the City] could reasonably inspect." *Id*.

The City's argument that it must limit food trucks because it cannot afford to inspect them is simply false. The City can (and does) set permit fees for food trucks in amounts that allow it to cover the cost of inspecting food trucks. CR.1803 (170:14–25), CR.1804 (171:8–12), CR.1806 (173:12–17). The record unambiguously confirms that the City addresses this concern using other means. It charges food-truck owners $1,800 per year for a permit—an excessively high amount that is *eighteen times* greater than what the City charges for a restaurant permit, which are not capped. *Compare* SPI Code § 10-31(C)(4) ($1,800 per year for food trucks) *with id*. § 2-75 ($100 per year for restaurants); *accord* CR.1805 (172:3–

5.[18] 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.*, CR.1707 (74:1–11) (citing ability to hire "reserve" or "part-time" inspectors).[19]

The City's argument is also belied by the months the City spent studying its original food-truck ordinance, CR.1712 (79:15–24), a process that included weighing the City's administrative and regulatory functions, CR.1718 (85:9–13). Yet after months of researching how to regulate food trucks, the City recommended that the City Council adopt a food-truck ordinance with *no* Permit Cap. CR.1997–2002 (Agenda Request Form and Ordinance 15–11, Jul. 15, 2015).

Nor does the City fare any better by trying to justify the Permit Cap by asserting that South Padre Island *is small*. City Br. 37. The City invokes its small size to argue it causes it to "worry about vehicle and pedestrian congestion," City Br. 37, but this justification is negated by

[18] Food trucks and restaurants fall under the City's definition of "food establishment," *see id.* § 10-11.1 (definitions), but the City caps only food-truck permits.

[19] Even federal courts applying rational-basis review have rejected this exact type of administrative convenience justification. *See Brantley v. Kuntz*, 98 F. Supp. 3d 884, 892–93 (W.D. Tex. 2015) (rejecting justification based on inability to inspect because evidence showed the regulatory agency charged fees to cover inspections and could hire additional inspectors).

the City's own deposition testimony, where it admitted that its loitering laws "have addressed" those concerns. CR.697 (108:12–24). Literally no other type of business operating in this "small" city, including restaurants, are made to suffer under a permit cap. Yet no evidence shows that the lack of a permit cap on those other businesses has given rise to the harms the City claims will exist in the absence of the Permit Cap on food trucks.[20]

When, as here, there is not even a hypothetical connection between the Permit Cap and the City's asserted justifications, let alone a rational connection between means and ends required under *Patel* Step One, the requirement must be struck down. The record evidence described above,

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[20] The City's brief relies on inadmissible legal opinions from its "food safety" expert. *See* City Br. 15–16. For instance, the City asserts its expert's report concluded that the challenged laws are (1) "rationally related to public health and safety," City Br. 15, and (2) are "not overly burdensome to MFU operators when weighed against the [City's] interest . . . in protecting public health and safety[,]" *id.* at 16. Both opinions directly involve questions of law under the *Patel* test, *see* 469 S.W.3d at 87, and are questions to be answered by courts—not food safety experts. At deposition, the City's expert could not even explain why he used the legal term of art "rationally related" in his expert report, stating, "I don't remember where it came from." *See* CR.2631 (183:6–25). The City mentions none of this. It asks the Court to accept, at face value, pure legal conclusions that the expert himself could not even explain. Under Texas Rule of Evidence 702, expert testimony is admissible only if it "will assist the trier of fact to understand the evidence or determine a fact in issue." *See Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 134 (Tex. App.—Corpus Christi 1999, pet. denied) (affirming exclusion of expert testimony because its legal conclusions had no probative value). Here, the City's expert testimony involves legal questions—not factual ones

which the City ignores, negates the City's justifications for the Permit Cap. Simply, the Permit Cap fails under *Patel* Step One.

The Restaurant Permission Scheme

Second, the City's contention that the Restaurant Permission Scheme is "an alternative to satisfying the State requirement for a CFP or commissary," *see* City Br. 34, is simply incorrect. As explained above, the TFER Facility Rule requires food trucks to "operate from a central preparation facility or other fixed food establishment[.]" SPI Code § 10-10 (incorporating 25 Tex. Admin. Code § 228.221(b)(1)). The Restaurant Permission Scheme, by contrast, requires a would-be food truck to "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). Nothing about the Restaurant Permission Scheme suggests that the signature on a permit application reflects an agreement to use the signatory's facilities as a central preparation facility. *See id.* Even the City's expert shares Appellees' reading of the Restaurant Permission Scheme.[21] And, indeed, the City's own code separately

[21] Q: Does the Restaurant Permission Requirement say anything about using a central preparation facility or commissary?

- A: No.

requires food trucks to operate out of a commissary or similar facility, because the City incorporated the TFER into an entirely different section of its code. *See* SPI Code § 10-10 (adopting commissary rule in 25 Tex. Admin. Code § 228.221(b)(1)). In short, the Restaurant Permission Scheme adds nothing beyond giving private businesses unbridled discretion to decide whether a new private business is eligible to open and begin serving customers. *See Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 487 (Tex. App.—Austin 2012, pet. denied) (observing that "a delegation of unbridled discretion" to a private entity "would potentially raise constitutional concerns[.]").

* * *

The actual, real-world purpose of the City's Permit Cap and Restaurant Permission Scheme is to protect local restaurant owners from food-truck competition. As explained above, the record negates each of the City's post-hoc justifications. Instead, the record unambiguously

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. . .

Q: [D]oes the [Restaurant Permission] [R]equirement actually require food trucks to use the local restaurant for anything in particular?

- A: Not in this. Not as it's written in this section, no.

CR.2597–98 (149:15–18, 149:25–150:4).

shows that the Permit Cap and Restaurant Permission Scheme were custom-made for economic protectionism.[22]

The City attempts to avoid this evidence by asking this Court to ignore it. The City offers that it is "hardly nefarious that the Council would want input from local businessmen." City Br. 40–41. The City then pivots and asks the Court to ignore this evidence because courts ought not "inquir[e] into the mental deliberations and motives of its *elected officials*." *See* City. Br. 41 (emphasis added) (citing *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 680 (Tex. 2004)). But this misses the mark: The point of this evidence is not to show that the City had secret, evil motives. Instead, it explains why the post-hoc rationales concocted by the City's attorneys fall flat: It isn't surprising that the Permit Cap and Restaurant Permission Scheme do not advance public

[22] More evidence of the economic protectionism 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 Committee-proposed modification to the original ordinance further shows a desire to limit food-truck competition. One Committee member (and restaurant owner) suggested charging food truck owners $10,000 for a permit. CR.1813 (180:11–14). In the end, the SPI City Council enacted the modified food-truck ordinance imposing $3,600 in permit fees to operate a food truck for one year (or the equivalent cost of permitting *thirty-six* restaurants), *see* CR.1830 (197:10–15), before later settling at $1,800 annually. This is yet more evidence of the Committee's anti-competitive motivations.

health and safety when none of the unelected people writing them expected them to do so.

After falsely criticizing the use of evidence of an official's motives, the City attempts to justify the City's economic protectionism by labeling it "economic development," City Br. 42 (citing *Kelo v. City of New London*, 545 U.S. 469, 483 (2005)). But the City's attempt to invoke a federal takings case, to justify protectionism under the Texas Constitution, fails. Despite its broad interpretation of the public use requirement, the U.S. Supreme Court in *Kelo* reaffirmed the principle that purely private transfers of land—takings that involved simply securing benefits to certain private interests without any legitimate public purpose—violate the Takings Clause. *See* 545 U.S. at 477 ("[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party").

The same is true of pure economic protectionism, which serves only the interest of other private parties and is divorced from any legitimate public health, safety, or welfare interest, and thus violates both the Texas Constitution and U.S. Constitution. In *Patel*, three justices wrote a concurrence emphasizing 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.).[23] The Court should do the same here and reject protectionism. 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. Appellees have negated the City's asserted justifications

[23] The result is the same under the U.S. Constitution. This admonition against economic protectionism is shared by the Fifth Circuit, which has rejected such 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) (holding that "neither 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 licensed funeral directors restricted the Abbey's monks from selling handmade caskets. *Id.* at 222–27. The Fifth Circuit noted 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." *Id.* at 226.

and thus prevail under *Patel* Step One. The only justification remaining is illegitimate economic protectionism—which cannot sustain the City's Permit Cap and Restaurant Permission Scheme.

* * *

The Permit Cap and Restaurant Permission Scheme relate to one purpose alone—protecting local restaurant owners from food-truck competition. The Court should thus find that the actual purpose of the Permit Cap and Restaurant Permission Scheme is illegitimate economic protectionism and declare both unconstitutional.

2. The Permit Cap and Restaurant Permission Scheme also fail under *Patel* Step Two.

Besides failing the first step of the *Patel* test, the Permit Cap and Restaurant Permission Scheme also fail under the second step of the *Patel* test because the "actual, real-world effect" of both anti-competitive laws fails to advance the City's post-hoc justifications. 469 S.W.3d at 87.

The Permit Cap

The Permit Cap fails *Patel* Step Two. As noted earlier, the City asserts that it needs the Permit Cap (1) because of "limited resources . . . to conduct health inspections" of food trucks, City Br. 8, 37–38; and (2)

because South Padre Island is "a small island city," *id.* at 37–38. Notably, the City makes no attempt to conduct an analysis under *Patel* Step Two in its opening brief. *See* City Br. 37–38.

Experience shows that, in the "actual, real world," *Patel*, 469 S.W.3d at 87, the City needs no arbitrary permit cap for it to inspect permitted food establishments. For example, the City charges $100 per year for each restaurant permit it issues, *see* SPI Code § 2-75; *accord* CR.1805 (172:3–5), but the City has no cap on restaurant permits to ensure it has sufficient resources to conduct inspections. In other words, the real-world evidence shows that the City, despite not capping permits of any other type of food establishment, has resources to inspect hundreds of restaurants and temporary food establishments. *See, e.g.*, CR.2425–47 (527 total inspections in 2019).

Nor are food-truck inspections any different or more burdensome than restaurant inspections. According to the City, a food-truck "inspection is the same inspection [it] utilize[s] at restaurants . . . it's no different than a restaurant," CR.622 (32:25–33:8), its "goal" is to inspect permitted food trucks "twice a year," *id.* (33:12–15), and the time it takes to inspect a food truck is "not very long," CR.1664 (31:21–23). In other

words, according to the City's own testimony and document production, in the real world the City does not use permit caps to ensure it has sufficient resources to inspect *any* food establishment. The City, per its own count, has over 500 permitted food establishments, *see* CR.2365, and no evidence shows that it cannot perform regular inspections. Thus, the City's administrative-convenience justification is purely speculative and ignores *Patel*'s command that the Court's analysis "consider the entire record, including evidence offered by the parties." 469 S.W. at 87.

Moreover, a look across Texas shows that, in the "actual, real world," the City is not using its Permit Cap to address concerns related to being a small city. Across Texas, cities of all sizes allow food trucks without capping food-truck permits. *See, e.g.*, n.5. *above*. It is fantasy to assert that the Permit Cap is justified by concerns about limited space on a "small island."

The Restaurant Permission Scheme

The record evidence likewise confirms that the Restaurant Permission Scheme fails *Patel* Step Two. As noted above, the City attempts to justify this anti-competitive restriction on permit eligibility by recasting it as "an alternative to and consistent with the TFER." *See*

City Br. 7, 33. But the record makes clear that, in the real world, the City's enforcement of the Restaurant Permission Scheme in no way reflects an effort to confirm that a food truck has an agreement with a commissary or food establishment and is basing their operations from that location. Once a food truck application is submitted, a City official verifies compliance with the Restaurant Permission Scheme by calling the local restaurant owner whose contact information and signature appear on the application and just asking if the local restaurant owner *actually signed* it. CR.801 (212:14–25). At no point does the City ask about any sort of ongoing agreement between the local restaurant owner and the food truck owner whose application he signed off on, including one under which the restaurant would act as a commissary. CR.894 (305:12–23).

The record confirms that, in the actual, real world, the sole action the City takes to enforce its Restaurant Permission Scheme is to verify the restaurateur's signature on a permit application. That tracks the Scheme's text and confirms that the Restaurant Permission Scheme does nothing more in the real world other than delegate power to local restaurant owners to serve as gatekeepers to the City's food-truck

permits. As noted above, 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*, 375 S.W.3d at 487. The Restaurant Permission Scheme makes those concerns concrete. By essentially empowering private restaurateurs as City officials, the City delegates to them the unfettered discretion to grant or deny a food-truck permit by controlling who is eligible and who is not.

* * *

The actual, real-world effect of the Permit Cap and Restaurant Permission Scheme is protecting local restaurant owners from food truck competition. For example, in April 2018 all six of the City's original permits had been issued. CR.2661. There were no available food-truck permits for anyone—including SurfVive after it obtained its food truck in April 2018. CR.1607. When the City increased its Permit Cap from six to twelve, CR.1872–73 (239:21–240:1), SurfVive applied, only to find out that it could not get a food-truck permit unless a local restaurant signed off in support of its application. CR.1608–09. The Permit Cap's actual, real-world effect of reducing food-truck competition continued during this

litigation: The City's permit records confirm that there were no available permits in 2020 because all twelve had already been issued. CR.2662.

The real-world effect of the Permit Cap and Restaurant Permission Scheme also restricts the Avalos brothers from operating their existing food truck on South Padre Island, much less invest in a second truck to do so. In the real world, the Permit Cap and Restaurant Permission Scheme create an uncertain business environment. Despite having taken steps to scout potential vending locations on the island and testing the market there by participating in a food-truck event, *see* Statement of Facts C, the Avalos brothers' food-truck business cannot invest in a vending site on South Padre Island without knowing if a permit is available (Permit Cap), and that they will be eligible for a permit if one is available (Restaurant Permission Scheme). CR.1616–17, CR.1622–23.

The Permit Cap and Restaurant Permission Scheme fail under both Step One and Step Two of *Patel*. And as the Food Truck Appellees show next, the evidentiary record confirms that both of these anti-competitive restrictions impose oppressive burdens on Appellees without any corresponding public benefit. As a result, both laws also fail under *Patel* Step Three.

3. *Patel* Step Three: The Permit Cap and Restaurant Permission Scheme also fail under the burden inquiry because both restrictions burden Appellees while providing the public with nothing in return.

The absence of any actual, real-world connection between the Permit Cap and Restaurant Permission Scheme and a legitimate interest also answers the inquiry under *Patel* Step Three—oppressiveness. *See* 469 S.W.3d at 87. Here the burdens are oppressive. If the Court finds that the Permit Cap or Restaurant Permission Scheme survive the first two steps of the *Patel* test, then it must analyze the challenged laws under *Patel* Step Three.

The Permit Cap and Restaurant Permission Scheme have categorically deprived Food Truck Appellees of the ability to operate on South Padre Island. When SurfVive leased a food truck it was unable to obtain a permit in April 2018 because none of the original six permits were available. CR.1607, CR.2661. 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 during 2020 there were no available food-truck permits. CR.2662. Appellees therefore may not vend under the Permit Cap and, even if a permit were available, Appellees would need

to identify and secure their would-be competitors' permission under the Restaurant Permission Scheme, which means time away from advancing SurfVive's programs and operating the Avalos brothers' existing food truck. CR.1610, 1617, 1623. Those burdens are oppressive.

On the public-benefit side of the scale, there is nothing. The record contains no evidence that the Permit Cap and Restaurant Permission Scheme confer any public benefits whatsoever. In other words, the Food Truck Appellees must endure these burdens even though there are no countervailing public benefits. The only benefit is a private one, enjoyed by private restaurant owners who wrote the anti-competitive restrictions at the South Padre Island City Council's invitation.

A law that restricts one's liberty for no reason other than to financially benefit a group of private market participants is inherently oppressive. Under the Texas Constitution, no one should be subject to purposeless government action (or, even worse, government action that serves no purpose except an illegitimate one like private economic protectionism).

* * *

The Permit Cap and Restaurant Permission Scheme impose unconstitutionally oppressive burdens on Appellees. Those burdens are greater than the burden in *Patel* (the City limits 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.

D. The Permit Cap and Restaurant Permission Scheme Violate Article I, § 19—Both Facially and As-Applied.

The City next argues that the Food Truck Appellees "failed to allege" or "demonstrate" that the City's anti-competitive restrictions are facially invalid. *See* City Br. 44. The City is simply incorrect and misapprehends the distinction between facial and as-applied relief. Although *Patel* was decided on an as-applied basis, it invalidated the challenged law—the decision does not even hint at one standard of review for facial challenges and a separate one for as-applied challenges under Article I, Section 19. *See, e.g.*, 469 S.W.3d at 86–87. As the Texas Supreme Court has held, "the line between facial and as-applied challenges is not so well defined that it has some automatic effect[.]" *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 & n.76 (Tex. 2012) (quoting *In re Cao*, 619 F.3d 410, 439 (5th Cir.2010) (en banc) (Jones, C.J., concurring

in part and dissenting in part)). If the Court determines that the challenged laws are unconstitutional under *Patel*, and that determination does not turn on a fact specific to SurfVive or the Avalos brothers, then both laws are facially invalid.

In any event, the record makes clear that the Food Truck Appellees brought both facial *and* as-applied claims. CR.23–25. Their claims are facial in the sense that Appellees requested relief from the Permit Cap and Restaurant Permission Scheme for *everyone* who operates a food truck; and they are as-applied in the sense that, failing facial relief, Appellees sought as-applied relief for themselves based on their unique factual circumstances—as food truck owners who could bring their food trucks to South Padre Island and begin vending. *Id.*

Finally, even if Appellees had brought only an as-applied challenge, that distinction would not be a basis for this Court to find the challenged restrictions facially sound. As the U.S. Supreme Court has made clear, the facial/as-applied distinction only matters as to the scope of the remedy, and not whether a constitutional claim is valid or not:

> The distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is

> both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.

Citizens United v. FEC, 558 U.S. 310, 331 (2010) (emphasis added); *see also In re Nestle*, 387 S.W.3d at 617.

Appellees alleged that the challenged restrictions are unconstitutional because those restrictions prevent them from operating their food trucks on South Padre Island, and, as discussed above, the record reflects that the Permit Cap and Restaurant Permission Scheme do so without serving any corresponding public purpose. That is sufficient to bring it within the scope of *Patel*. Because the facial/as-applied distinction concerns only the scope of remedy, and because Appellees sought both forms of relief, they are entitled to both forms of relief because the record and applicable law supports it.

CONCLUSION

In light of the foregoing arguments and authorities, the Food Truck Appellees respectfully ask the Court to affirm the district court's denial of the City's plea to the jurisdiction. Appellees also ask the Court to reject the City's attempt to seek review of the merits and whether $1 in nominal damages are a proper remedy for violations of the Texas Constitution—

those issues are not properly raised in an interlocutory appeal of an order denying a plea to the jurisdiction. If the Court does reach the merits and the nominal damages issue it should invalidate the Permit Cap and Restaurant Permission Scheme under Article I, Section 19 of the Texas Constitution, as the district court did, and also affirm that the district court may award nominal damages to remedy violations of the Texas Constitution.

RESPECTFULLY SUBMITTED this 24th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Appellees' Response Brief contains 14,310 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Arif Panju

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2021, a true and correct copy of the foregoing Appellees' Response Brief 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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CASE NO. 13-20-00536-CV

IN THE THIRTEENTH COURT OF APPEALS

CITY OF SOUTH PADRE ISLAND — **APPELLANT**

VS.

SURFVIVE, ANUBIS AVALOS,
And ADONAI RAMSES AVALOS — **APPELLEES**

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT IS REQUESTED

Table of Contents

Table of Authorities

Cases: **Pages:**

Texas Constitutional

Texas Regulations

Texas Statutes

Texas Ruless

Municpal Ordinances

Summary of the Argument

Relying on hyperbole and demagoguery, Plaintiffs read *Patel* expansively to be a 'white horse case,' rather than limited to the facts presented as the Texas Supreme Court instructed it should be read, and they ignore subsequent caselaw instructing courts to do so. The Court should reject not only *Patel*'s application to this case, but whether Plaintiffs' have a protected liberty interest at stake. They do not have standing to pursue a constitutional challenge because they have not established they would qualify to operate MUFs in the City *but for* either of the challenged sections. Without proof they meet with nonchallenged sections or the denial of a permit to operate an MFU on SPI, Plaintiffs' complaints are only speculative or conjectural and they have not established their standing to pursue their claims.

The City's issues are all within the scope of an interlocutory appeal. The summary judgment implicitly denied the City's jurisdictional plea and is appealable. Because the waiver of jurisdiction turns on the existence of a valid constitutional challenge, the City may challenge whether Plaintiffs alleged one and whether evidence exists that supports the allegations.

Plaintiffs offer no real defense of their alleged facial attack on the ordinance and instead claim the facial vs. as-applied distinction is irrelevant. It matters because, carefully analyzed, Plaintiffs assert only a facial challenge. *Patel* applies only to as-applied challenges. Facial challenges cannot be disguised by mislabeling

them to avoid their more rigorous (and difficult) standard. Therefore, Plaintiffs' entire analysis under *Patel* is irrelevant.

Plaintiffs' standing argument rests on excuses and tenuous assurances. The do not dispute that they are unqualified under the unchallenged parts of the ordinance and have not associated with a CPF or commissary. Their assurances that they will do so if the court rules in their favor are pie-crust promises – easily make and likely to be broken. If they were serious, they could associate with a CPF or commissary, line up a vending location, and get their applications in line for the next permit.

Plaintiffs failed to show the City's ordinance affects the liberty interest from *Patel* – a bar to entry into an occupation as whole. They do not show how this bars them from operating MFUs generally. They have never operated MFUs in the City; they do not claim they lost existing customers or revenue. They remain free to operate MFUs outside the City. In short, they have not been deprived of pursuing an occupation.

Further, other Texas cities limit permits and require MFUs operate local licensed restaurants or commissaries. Corpus Christi and San Antonio have lotteries for MFU permits in specific areas; McAllen capped MFU permits until 2018. Most cities require MFUs operate daily from a commissary or licensed food establishments; the daily operation requirement ensures such facilities are local. Large cities have commissaries that are licensed food establishments.

Plaintiffs' *Patel* analysis depends chiefly on condemning the statements and motives of some local restaurant owners, rather than on any evaluation of the City Ordinance's stated purpose of protecting legitimate governmental interest in the public's health, safety and general welfare. The owners' statements are no evidence because comments by private citizens do not reflect the intent of the City.

The local support option is not an oppressive burden. Plaintiffs could have associated with a CPF or commissary outside the City as an alternative. Moreover, the ordinance gives local restaurants no power different than that held by a CPF or commissary under the TFER.

The cap is not an oppressive burden. If permits are unavailable, the application is put in line for the next one. Historically, every application has gotten a permit. Assuming either Plaintiff could otherwise qualify for a permit, they could have submitted the application and gotten in line.

Argument and Authorities

A. Scope of the Appeal.

Plaintiffs argue the City did not appeal the summary judgment and the merits of their claims are not within the scope of an interlocutory appeal. Response Brief, pp. xii, 2, 23-244, 26-7, 36-7. First, the City's Notice did include the summary judgment. CR 3059. Second, insofar as the summary judgment implicitly denied

the City's plea, the City can challenge whether Plaintiffs plead and offered facts of an immunity waiver for their constitutional claim.

1. The City may and did appeal the summary judgment as an implicit denial of its jurisdictional plea.

Plaintiffs' summary judgment – as an implicit denial of the City's plea -- is subject to appeal under Texas Civil Practice and Remedy Code section 51.014(a)(8). The City's notice cited the summary judgment as implicitly ruling on jurisdiction. CR 3058. The trial court could not grant summary judgment without jurisdiction; an interlocutory ruling on the merits implicitly denies the jurisdictional challenge. *Thomas v. Long,* 207 S.W.3d 334, 339-40 (Tex. 2006); T*exas Mun. League Intergovernmental Risk Pool v. City of Hidalgo*, No. 13-19-00096-CV, 2020 WL 1181251, 2020 Tex. App. LEXIS 2093, *7-9 (Tex. App.—Corpus Christi Mar. 12, 2020, no pet.) (mem. op.) (order of appraisal was appealable). Granting a partial summary judgment is an implicit denial of the plea and is appealable under section 51.014(a)(8). *City of Houston v. Estate of Jones*, 388 S.W.3d 663, 665 (Tex. 2012).

2. The City's pleas may challenge whether the pleadings or proof assert valid Constitutional claims.

Appellees make a strawman argument that the City challenges the merits. The City challenged both the Plaintiff's pleadings and the existence of jurisdictional facts to waive immunity. CR 64; SCR 6. Plaintiffs had the burden to both allege facts and offer evidence of the jurisdictional facts. *Texas Dep't of Parks & Wildlife v.*

Miranda, 133 S.W.3d 217, 225-28 (Tex. 2004). A plea can also properly challenge the existence of jurisdictional facts, even when they implicate the merits. *Id*. at 226. When a defendant challenges the pleadings or evidence relating to the jurisdictional issue and provides evidence that may rebut the pleadings and thus undermine the alleged waiver, that evidence should be considered in ruling on the plea. *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 468, 476 (Tex. 2012); *Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004). *See also Tamayo v. Lucio*, No. 13-11-0746-CV, 2013 Tex. App. LEXIS 8944, *7-8 (Tex. App.—Corpus Christi-Edinburg July 18, 2013, no pet.) (mem. op.).

Merely alleging a constitutional challenge for injunctive and declaratory relief does not waive immunity. Immunity from suit is not waived if the constitutional claims are facially invalid. *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015). This means the claims must be properly pleaded to negate immunity. *Id*.; *City of Beaumont v. Ermis*, No. 09-15-00451-CV, 2017 WL 1178348, 2017 Tex. App. LEXIS 2731, *10-11 (Tex. App.—Beaumont Mar. 30, 2017, no. pet.) (mem. op.). The pleading must do more than merely identify a constitutional right and assert a violation. *Klumb*, 458 S.W.3d at 13-14; *Hughs v. Dikeman*, No. 14-19-0696-CV, 2020 Tex. App. LEXIS 8437, *14-5 (Tex. App.—Houston [14th Dist.] Oct. 27, 2020, pet. filed). Conclusory allegations are insufficient. *Hugh*, *id*. at *14-5; *Doe v. Univ. of N. Tex. Health Sci. Ctr.*, No. 02-

19-00321-CV, 2020 Tex. App. LEXIS 2817, *8 (Tex. App.--Fort Worth Apr. 2, 2020, pet. filed) (mem. op.). The City contends that the same logic requires the *Miranda* framework apply when the plea challenges the existence of facts supporting a constitutional claim.

The same analysis applies to declaratory relief. The DJA is not a general waiver of immunity. *Texas Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). DJA §37.006(b) waives immunity for suits challenging the validity of ordinances. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373n.6 (Tex. 2009). Nonetheless, plaintiff must still plead a valid constitutional claim to waive immunity for declaratory relief. *Houston Firefighters' Relief & Ret. Fund. v. City of Houston*, 579 S.W.3d 792, 800 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). Again, the City contends that *Miranda* applies when the pleas challenge the factual support for the constitutional claim.

Patel does not hold differently. There, the Supreme Court found that plaintiffs pleaded a viable constitutional claim. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015). *See Houston Firefighters*, 579 S.W.3d at 800-01.

B. Whether immunity is waived for nominal damages is within the scope of §51.014(a)(8); Plaintiffs do not establish a waiver.

Rather than defend their nominal damages claim, Plaintiffs argue without citation to authority the City cannot challenge it by interlocutory appeal. Response,

pp. 28-29. The challenge falls within section 51.014(a)(8). See supra at, pp. 4-6.

Tacking a nominal damages claim onto a constitutional claim for injunctive relief does not shield it from interlocutory review. *Compare Weslaco Ind. Sch. Dist. v. Perez*, No. 13-12-0581-CV, 2013 WL 3894951, 2013 Tex. App. LEXIS 9259 (Tex. App.—Corpus Christi July 25, 2013, no pet.) (mem. op.). In *Perez*, an interlocutory appeal from the denial of a plea to the jurisdiction, this Court reversed a state constitutional claim for damages, but upheld denial for the contract claim. *Id*. at *7, 14. Waiver of immunity for claimed damages under the state constitution may be reviewed on interlocutory appeal separately from the remaining claims.

Plaintiffs must properly plead a valid constitutional claim as a condition precedent to securing judicial relief. *Klumb*, 458 S.W.3d at 13. The City briefed substantial authority that Texas Constitution, Article I, section 19, does not support nominal damages. Appellant's Brief, pp. 28-31. Plaintiffs offer no response, suggesting a tacit concession.

C. The alleged restriction necessary to support standing has not occurred and is not imminent; it is conjectural and unlikely.

To establish a threatened restriction on a protected right, Plaintiff must prove an invasion of their right that is particularized and imminent, more than conjectural; the injury must be likely and redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). If they do not qualify absent the challenged ordinances or have alternative ways to qualify, then the local support option is no

barrier. If every qualified applicant eventually got a permit, then the permit cap does not stand in their way.

Plaintiffs have failed to distinguish themselves from the general public. They have never sold food in the City, never submitted a complete application, and have no proof they presently meet the unchallenged requirements (or ever will do so). Chile de Arbol has no actual, serious plan to operate in the City and no truck available to do it. Under Plaintiffs' reasoning, someone with no truck, no commissary/CPF, no certified food manager, no vending location, and never applied for a permit has standing to challenge the ordinance based only on thinking they might later apply.

Plaintiffs' alleged injury is neither concrete nor imminent. Plaintiffs struggle to overcome these undisputed facts:

1. SurfVive's application was defective for reasons unrelated to the local support requirement[1], and it chose to withdraw it. CR 173, 176-177, 280-83, 856-67, 293.
2. The Avalos Plaintiffs never applied. CR 307, 333, 360.
3. Plaintiffs are free to operate food trucks elsewhere and are not barred from the occupation generally.

[1] SurfVive admits its application lacked a vending location inside the MFU zones. Response Brief, p. 9 n.7; CR 268, 280.

4. They do not presently qualify for a permit under the unchallenged regulations. CR 241-254, 323-24, 327-28.

The unchallenged portions of the SPI ordinance give them an alternative basis to qualify for a permit with local support. Their fear of denial due to the cap is conjectural.

1. The challenged ordinances do not render an application futile.

Plaintiffs' first excuse for not applying is that the challenged sections made it futile to apply. Response Brief, pp. 32-3. Plaintiffs misconstrue local support and how the City applied the cap. SPI requires the applicant be 'supported locally and have the signature of . . . a licensed, free standing food unit on South Padre Island.' SPI Code §10-31(C)(3). But SPI Code §10-10 also adopted the TFER, which requires the MFU have a CPF Authorization and operate daily from a CPF or commissary. 25 TEX. ADMIN. CODE §228.221(a)(4)(B), 228.221(b). While §10-31(C)(3) does not expressly describe the alternative, it must be harmonized with the TFER that does require operation from a CPF or commissary.[2] Applying both would require applicants have both 'local support' and operate daily from a CPF. Consequently, SPI interprets them as alternatives – if the applicant has a CPF or

[2] The City's expert, Ramos, agreed. He conceded §10-31(C)(3) did not expressly say MFU's could use a commissary or CPF instead. CR 2597. However, the TFER set a baseline that required MFUs use a CPF or commissary; the ordinance allowed applicants the option to use a local restaurant instead. CR 2556, 2577, 2603, 2616, 2626. By adopting the TFER, SPI required the local-support restaurant act as a commissary. CR 2627.

commissary[3], then 'local support' is unnecessary. CR 802, 817, 904, 907. The Court must consider the City's interpretation. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 1994). Therefore, Plaintiffs can apply without local support by associating with a CPF or commissary.

The City issued Bill Miller BBQ a temporary permit without local support based on its commissary. CR 810-12, 935. Plaintiffs' denial of this (Response Brief, p. 17 n.8) is misleading because they offered evidence Bill Miller got a permit #7775 (CR 2436) and were provided the permit in discovery. App. 5.

Moreover, Plaintiffs do not claim any licensed SPI restaurant refused to support them. Before applying, Ms. Lerma said she would look for local support, but did not claim she was refused. CR 265, 298. After she withdrew SurfVive's application, she was offered local support and inexplicably refused it. CR 270-72, 291-92. The Avalos Plaintiffs admitted they never looked for local support and knew of no one who had been refused support. CR 307, 333, 360, 2858.

The cap does not make applying futile. The City issues on a first-apply-first-served basis. CR 822. If a permit is not available, the application is numbered and held until a permit becomes available. CR 822, 870, 871-72. Yearly permits renew monthly and are issued in January to the first ones who apply. CR 844, 871-72. In

[3] A commissary is a licensed food establishment with sufficient equipment to serve as a CPF. CR 2546-47, 2585, 2590, 2595, 2626.

2019, not all the permits were issued in January; a few applicants got only monthly permits. CR 2661. In January 2020, only 11 yearly permits were issued. CR 2662. By February 2020 it had received 18 applications, and all received permits; one permit was potentially available. CR 826-27, 844-47. Consequently, this shows qualified applicants got permits, despite the cap.

Factually, a futility argument about the cap falls short. A permit was available when SurfVive submitted its application.[4] The Avalos Plaintiffs admit no one ever told them permits were unavailable because of the cap. CR 335, 350. Plaintiffs could have submitted valid applications to get in line for the next available permit. CR 822, 870, 871-72.

2. Plaintiffs' assurances that they will satisfy non-challenged permit requirements are equivocal and unsupported.

Plaintiffs claim an equivocal, unsupported intent to satisfy the remaining requirements once they prevail. Though they testified they did not challenge and would satisfy the remaining requirements (CR 2852-53, 3033), Lerma did not think it necessary to operate from a CPF. CR 255, 264. In the trial court, Plaintiffs had no problems with the remaining requirements (CR 567, 2852-53, 3033), but now their Response denies this. Response Brief, p. 4 n.3. This suggests Plaintiffs' intent

[4] The cap did not restrict SurfVive before September 2018 because prior to that date it was unprepared. Thought Lerma found a truck in March, she was still discussing opportunities for it in June. CR 281-82. She first checked on permit availability in June when permits were available (CR 286) but she did not find a vending location until September 2018. CR 282.

is short-lived -- they will contest the remaining requirements later rather than satisfy them. Likewise, Plaintiffs did not know what a CPF was or what the TFER required. CR 247, 259-61, 323-331, 333. Their assurance of compliance is no evidence because they lack a practical understanding of what the rules require.

Plaintiffs offered no proof they currently satisfy the remaining requirements. SurfVive has a County health permit,[5] but concedes the County did not require a CPF. CR 257-58, 2753. Chile de Arbol has a Brownville MFU permit, but there is no proof what Brownsville requires. CR 2755. Their waste-water disposal agreements did not qualify as a CPF or commissary. CR 241, 245, 247, 260, 299, 324, 327.

3. Chile de Arbol failed to prove it has concrete plans to operate in the City.

The Avalos Plaintiffs now claim that the cap burdened in getting an SPI vending location for their existing MFU to operate in the City.[6] CR 1616, 1622. The rely on conclusory statements in their post-deposition affidavits that contradict their earlier testimony.[7] First, their sworn petition said it interfered with their plans

[5] SurfVive asserts it vended for months on County land but its record cite shows only that it had a permit. Response Brief, p. 8 citing CR 2743. SurfVive had vended only at the Broken Sprocket, which was a one-day deal. CR 246.

[6] Avalos does not wish to invest in a vending location until he knows a permit is available. CR 1616, 1622. This puts the cart before the horse – Chile de Arbol cannot qualify for a permit without a location. Moreover, Avalos does not know what cost is involved to get a location. He did no cost-benefit analysis. CR 306.

[7] Plaintiffs rely chiefly on affidavits submitted after their deposition that contradicted earlier testimony. CR 562-581, 1606-1625. Because they offer no explanation for the about-face, the

to buy a second MFU to operate on the island. CR 9, 16, 22, 28-29. Second, Ramses Avalos previously testified he was happy in Brownsville, but was "open to *possibly* going to another city." CR 304 [emphasis added]. He did events in other cities to test the feasibility for a second MFU, not the existing one. CR 304. The contract with the Broken Sprocket requires their MFU be at its park Wednesday through Saturday and pay a 10% of gross revenue. CR 297, 310, 348, 355. Chile de Arbol did not explain it could operate an MFU from Sunday-Tuesday in SPI, especially if 10% went to Broken Sprocket.

Whether the cap prevents Chile de Arbol from vending in SPI is speculation because it depends on remote possibilities that Avalos has not calculated. What is missing is the plan Avalos admitted he lacked, one showing that vending in SPI would be profitable. CR 305-06. Avalos identified no evidence of a market in SPI for Chile de Arbol's product, expected revenues, expenses, existing MFU competition, proposed hours, etc. Without a cost-benefit analysis, Chile de Arbol had no substantial reason to seek an available permit. CR 306.

D. Plaintiffs fail to plead or prove SPI Code §10-31 is facially invalid; their excuse undermines *Patel's* application.

To mask the consequence of their failure to plead or prove a facial challenge, Plaintiffs obscure its meaning and effect. Response Brief, pp. 64-66. Because their

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Court should disregard them. *See Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 90 (Tex. 2018).

petition essentially asserts a facial challenge, the *Patel* as-applied analysis is not applicable. Instead, only the strict rational relation scrutiny is applicable; they must establish that no circumstances exist in which ordinance could be constitutional. Their petition and evidence falls short of establishing a valid facial attack.

Carefully read, their petition is a facial challenge disguised as an as-applied challenge. The petition asserted that §10-31(C)(3) applied to all MFUs and required all MFUs to have permission from a brick-and-mortar restaurant, and significantly burdened all MFU owners. CR 16-18 (¶¶44-47, 53-56). They alleged the permit cap applied to all MFUs and significantly burdened would-be vendors until a permit became available. CR 17-18 (¶¶50, 58). Allegedly, the two provisions created a significant business risk for existing and aspiring MFU entrepreneurs. CR 18 (¶59). The prayer seeks an injunction against enforcement generally and a declaration the provisions are facially invalid. CR 25. They do not allege the ordinance is generally constitutional and their circumstances makes it unconstitutional to enforce it against them.

The distinction between as-applied and facial challenges is critical. A facial challenge asserts the statute always operates unconstitutionally; it invalidates the statute and bars enforcement against anyone under any circumstances. *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014); *HCA Healthcare Corp. v. Texas Dep't of Ins.*, 303 S.W.3d 345, 349, 351 (Tex. App.—Austin 2009, no pet.). An as-

applied challenge concedes the statute's general constitutionality, but asserts it operates unconstitutionally on the claimant due to the claimant's peculiar circumstances. *Rivera*, 445 S.W.3d at 702.

Plaintiffs have the heavy burden to establish there are no circumstances under which the ordinance could operate constitutionally. *Texas Alcoholic Beverage Com. v. Live Oak Brewing Co., LLC*, 537 S.W.3d 647, 659 (Tex. App—Austin 2017, pet. denied). *Patel* sets the test only for as-applied challenges. 469 S.W.3d at 86-87. Thus, if Plaintiffs' bottom-line is that §10-31(C) can never apply constitutionally, then *Patel*'s standard is irrelevant. Parties cannot avoid the daunting standard for facial challenges by the label placed on their challenge. *Lund v. Giauque*, 416 S.W.3d 122, 127-28 (Tex. App.—Fort Worth 2013, no pet.); *A.H.D. Houston, Inc. v. City of Houston*, 316 S.W.3d 212, 222 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Plaintiffs do not identify where they pleaded or offered facts satisfying a facial challenge. Instead, they argue the distinction matters only to the scope of the remedy, citing *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Texas procedure imposes a controlling difference. To defeat immunity, Texas imposes specific pleading requirements. *Miranda*, 133 S.W.3d at 226-27. Plaintiffs must allege a valid constitutional violation; conclusory allegations are insufficient. *Klumb*, 458 S.W.3d at 13-14; *Hughs*, 2020 Tex. App. LEXIS 8437 at *14-5. *Citizens United*

addressed only federal pleading requirements. *Citizens*, 558 U.S. at 331. Under Texas practice, Plaintiffs must allege and offer facts that meet the heavy burden that under no circumstance could §10-31(C) (2, 3) operate constitutionally. *Live Oak*, 537 S.W.3d at 659.

Because Plaintiffs' facial attack fails, there is no need to analyze under *Patel*'s as-applied standard.

E. As applied to Plaintiffs, SPI Code §10-31(C)(2) and (3) are rationally related to valid governmental interest.[8]

1. The *Patel* analysis does not apply to an ordinance that does not bar entry into a profession as a whole.

The liberty interest under Due Course of Law in *Patel* was a bar to entry into or from practicing a chosen occupation as a whole. What Plaintiffs claim is a nebulous right to earn a living free from unreasonable government interference though they remain able to carry on their business. CR 22, 25. Plaintiffs have not previously operated food trucks in the City and are free to operate them anywhere else. They do not claim their business revenue has declined or they have lost customers. In short, the liberty interest protected by Due Course of law does cover the right to operate food trucks in a specific venue in which Plaintiffs have never

[8] Plaintiffs challenge SPI Code §10-31(F)(2)(1) [permits last 30 days] because it is somehow part of the permit cap. Response, p. 5 n. 4. They do not explain how. Their Petition did not allege any reason the permit's duration obstructed getting a permit and thereby is unconstitutional. CR 7. They did not make this argument below. CR 501, 2861.

operated and while they remain able to operate food trucks outside the venue.

The *Patel* test is limited to the legal regulatory framework in which it arose, i.e., a regulatory prohibition on entry into the profession as a whole. *Hegar v. Texas Small Tobacco Coalition*, 496 S.W.3d 778, 788 n.35 (Tex. 2016); *Transformative Learning Sys. v. Texas Educ. Agency*, 572 S.W.3d 281, 293 (Tex. App.—Austin 2018, no pet.).[9] Plaintiffs' misconstrue 'legal framework' to refer to any Due Course of Law challenge. But *Patel* is limited to a regulatory framework that bars entry into a common calling as a whole.

In *Hegar*, the tobacco coalition argued a tax, levied on tobacco products to recoup healthcare costs after the Tobacco Litigation, violated Due Course of Law under *Patel*. 469 S.W.3d at 788 n.35. The 'legal framework' was the challenged tax scheme, not Article I, §19. Contrary to Plaintiff's argument, that is exactly how the Austin court interpreted *Hegar* in *Transformative Learning*.

> And, as set out in the earlier discussion of TLS's takings claim, the statute at issue here does not erect an economic barrier of entry into a given profession. [Texas Education Code] Section 12.128 does not inhibit an individual's ability to pursue economic or professional opportunity. It does not impair an individual's ability to obtain a charter and establish an open-enrollment charter school. . . . In short, the "legal framework at issue does not implicate the concerns of *Patel*, but rather the rights and obligations of recipients of state funding.

[9] Plaintiffs argue that in *Patel* Ashish Patel sued as owner of a business that hired threaders. *Patel*, 469 S.W.3d at 73-75. Plaintiffs ignore that the Supreme Court did reach whether Patel had standing. 469 S.W.3d at 78, 91.

572 S.W.3d at 293. *Patel* applied when the regulatory scheme as a whole erected a barrier to a given profession. *Id*. *See Live Oak*, 537 S.W.3d at 659 (to determine statute's constitutionality, "we must consider it in the context of the statutory framework of the three-tier system within which appellees operate."). *Texas DMV v. Fry Auto Servs.*, 584 S.W.3d 138 (Tex. App.—Austin 2018, no pet.) is apposite because the issue was whether *Patel* applied to a different regulatory framework. *Id*. at 143.

Plaintiffs cite no authority that laws regulating a business within a specific locale deprives one of a liberty interest protected by Due Course of Law. *Live Oak* is apposite because, within the regulatory system, the regulation did not require the breweries to give away sales territories and it allowed self-distributing of products. 537 S.W.3d at 656-57.

A liberty interest to engage in an occupation is not infringed by government action that does not altogether destroy the business. *Driver v. Godfrey*, No. 9:16-cv-10, 2016 U.S. Dist. LEXIS 183160, *13-16 (E.D. Tex. Dec. 29, 2016), *opin. adopted*, 2017 WL 405478, 2017 U.S. Dist. 12831, *3-4 (E.D. Tex. Jan. 31, 2017). The freedom to operate MFUs outside SPI bears directly on whether SPI's Code adversely affects a liberty interest at all. *Doss v. Morris*, 642 Fed. Appx. 443, 447 (5th Cir. 2016); *A-Pro Towing & Recovery LLC v. City of Port Isabel*, No. 19-0016,

2020 WL 4794657, 2020 U.S. Dist. LEXIS 148648, *17-19 (S.D. Tex. Aug. 18, 2020).

Plaintiffs must establish an entry barrier that prevents them from operating food trucks generally. *Live Oak*, 537 S.W.3d at 657. At worst, Plaintiffs complain that one venture among others is temporarily stalled. Plaintiffs are not disqualified from operating an MFU, nor are they 'shut out' of the City. If they associate with a commissary or CPF and meet the other requirements, they can get on the list for the next available permit.

2. Plaintiffs concede the City has a valid governmental interest.

Plaintiffs misstate their as-applied burden under *Patel*. The proponent of an as-applied challenge must demonstrate either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest, or (2) when considered as a whole, the statute's actual, real world effect as applied to the challenger could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the government interest. *Patel*, 469 S.W.3d at 87. Either is a high burden. *Id*.

SPI's MFU ordinance was enacted to provide for regulation of mobile food establishments in order to protect the health, safety and welfare of the citizens. CR 1383. This includes health and safety challenges such as customer parking, noise,

large congregations, loitering, impeding traffic, trash, gray water, grease traps, pollution, food temperatures, and hygiene practices. CR 670-72, 695-98. Plaintiffs agreed the City has a legitimate interest to enforce rules for food safety, hygiene in food preparation and sales, preventing food-borne illness, avoid pedestrian and vehicle congestion, provide for truck employees to have toilets, etc. CR 238-40, 324-25. They do not challenge the TFER, the permit fees, the MFU zoning, or the need for a CPF/commissary. CR 538, 567, 2853, 2858.

3. Plaintiffs fail to plead or prove the local support option and permit cap cannot arguably be rationally related to those interests.

First, the rational relationship scrutiny does not turn on the statute's ultimate effectiveness, but on whether the enacting body could rationally have believed at the time of enactment the ordinance would promote the objective. *Mayhew v. Town of Sunnyvale*, 964 S.W. 922, 938 (Tex. 1998). If there is any conceivable state of facts that could provide a rational basis the Court must uphold the ordinance. *Mauldin v. Tex. State Bd. of Plumbing Examiners*, 94 S.W.3d 867, 873 (Tex. App.—Austin 2002, no pet.). The ordinance does not fail rational-basis scrutiny if there is an imperfect fit between the means and the end. *Id*. The enactment may be based on rational speculation unsupported by evidence or empirical data. *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ).

Second, the rational-basis scrutiny is not performed in a vacuum. In *Patel*, the Supreme Court said the statute's constitutionality was a law question, not the existence of rational basis. 469 S.W.3d at 87. Rational scrutiny begins with the regulatory framework. *Transformational Learning*, 572 S.W.3d at 293. The Court must consider the statute as a whole rather than its isolated provisions. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). In *Patel*, the Supreme Court found the 750 hours of education 'could be' rationally related to health/safety and instead relied on the actual burden of compliance. Id. at 89-90.

Plaintiffs do not assert that that the challenged sections could not *arguably* conserve health inspection resources or reduce traffic/pedestrian congestion. Respondent's Brief, pp. 47-50. In fact, other cities have similarly limited mobile food vending permits[10]. In 2013, the City of McAllen enacted a 12-permit limit for MFUs that lasted until 2018. App. 1; Mitchel Ferman, "McAllen to loosen restrictions of food trucks," Oct. 9, 2018, www.apnews.com. San Antonio has a lottery for MFU vending sites in the Downtown area. App. 2. Corpus Christi holds annual drawings for limited mobile vending permits for beach and public park spaces. Corpus Christi Code §38-21(b); see also App. 3.

[10] The Court may take judicial notice of city ordinances, which are available through each city's website. *Ex parte Puga*, No. 13-17-00351-CR, 2019 Tex. App. LEXIS 602, 2019 WL 386410, *5 n.1 (Tex. App.—Corpus Christi Jan. 31, 2019, pet. ref'd), citing TEX. R. EVID. 204(a), (b)(1) (a court make take judicial notice of municipal ordinances on its own) and *Amarillo v. R.R. Comm'n of Tex.*, 511 S.W.3d 787, 794 (Tex. App.—El Paso 2016, no pet.) (taking notice of city ordinances).

Likewise, the City could reasonably and rationally conclude that support from local licensed restaurants served public health and safety. The requirement that MFUs operate from a commissary or licensed food establishment is virtually universal. CR 2560. Larger cities have commissaries for MFUs. CR 2558. Several Texas cities require MFUs operate from a local CPF, commissary, *or* licensed food establishment. Austin Code §10-3-92(A)(10) (local CPF); Dallas Code §17-82 (h)(1) (must operate daily from CPF, commissary, or fixed food establishment); Houston Code, §20-22(e, f) (must operate daily from commissary that is a licensed food establishment); McAllen Code, §54-51(d)(1) (must operate from CPF or other licensed food establishment). The approved MFU commissaries in San Antonio are local restaurants. See App. 4. State law requires that in large counties MFUs operate daily from a commissary or food establishment. TEX. HEALTH & SAFETY CODE §437.0074(a). The universal requirement to operate *daily* from a commissary or restaurant ensures they will be local.

The Court must consider the City's construction. *FM Props.*, 22 S.W.3d at 873. Baldovinos construes 'local support' to require the restaurant provide services like a commissary and to be an alternative to a CPF. CR 895, 901, 904. Licensed food establishments have sufficient sanitation equipment to serve as commissaries. CR 2546-47, 2585, 2590, 2995, 2626. TDSHS advised Baldovinos that a local licensed restaurant could serve as a commissary or CPF. CR 446-452, 802.

In short, Plaintiffs failed to carry their burden to plead or offer proof.

F. As applied to Plaintiffs, the real-world effect of SPI Code §§10-31(C)(2) and (3) is arguably rationally related to a valid governmental interest.

1. Plaintiffs fail to plead or prove that in the real world the permit cap does not arguably serve a valid interest.

Plaintiffs do not defend their argument below that any cap is unconstitutional. CR 272-77, 285. The relief they request logically results in unlimited permits, but choose to ignore the resulting impact on public health and welfare of limitless MFUs descending on a small resort town. If Plaintiffs admit some cap is rational, then courts should not second-guess local government on where to draw the line. *Compare Patel*, 469 S.W.3d at 89.

Instead, Plaintiffs argue the cap does not conserve the City's limited health inspection resources because, at $1800 per yearly MFU permit, it could hire all the inspectors it needs.[11] The City has 1 ½ health inspectors and must hire more during the peak season, as well as pay overtime. CR 750-51, 759. MFU fees were never intended to offset all costs because the City does not charge fees to make a profit. CR 779-80. Inspecting MFUs takes more time because inspectors must hunt them down and then inspect the surroundings. CR 758-59, 761-62.

[11] Plaintiffs did not plead the permit fee amount violated due course of law or equal protection. CR 7. They have waived any such constitutional challenge. *Loftin v. Lee*, 341 S.W.3d 352, 356 n.11 (Tex. 2011). Further, Plaintiffs testified their only two complaints were the cap and local support; they would satisfy the remaining requirements including paying the fees. CR 2852-53, 2858.

Moreover, Plaintiffs do not do their math.[12] Twelve permits produce $21,600 per year. There is no proof that would cover the salary and benefits for even one inspector. It amounts to little more than minimum wage pre-tax, and there is nothing to show the City can hire even one qualified health inspector for $21,600/year. Further, by the time the City has advertised the position and interviewed applicants, the damage to health and safety may be done.

Plaintiffs then misquote Baldovinos to say loitering laws have 'addressed' pedestrian congestion around MFUs, citing CR 697. What he said was that the police handle loitering violations during Spring Break and his staff helps. *Id*. He did not say enforcing loitering laws eliminated congestion issues.

The City's failure to cap restaurant permits is a false comparison. The number of restaurants is controlled by the available lots in areas zoned for commerce and by building codes. CR 2565.

2. Plaintiffs fail to plead or prove that in the real world the local support option does not arguably serve a valid interest.

SPI Code §10-31(C)(3) does not endow local restaurants with the power to exclude MFUs from the City. The supposed power is illusory because MFUs have

[12] *Brantley v. Kuntz*, 98 F. Supp.3d 884 (W.D. Tex. 2015) is distinguishable. The Court relied on a Legislative report that the agency's inspection backlog resulted from gross fiscal mismanagement. *Id*. at 892. Further the barber schools had to pay the costs associated with inspection and the agency was authorized to hire outside inspectors. *Id*. at 893. Neither is the case here.

the option to associate with a CPF or commissary. Further, it is no different than TFER's requirement that MFUs operate daily from a commissary or CPF. CR 2577. By Plaintiffs' reasoning, the CPFs and commissaries can exclude MFUs – yet Plaintiffs do not object to compliance with the TFER, which requires CPFs.

The City does not ignore whether restaurants provide actual support to MFUs. The City construes 'supported locally' to mean providing the support commissaries or CPFs provide; signing the application verifies that the restaurant will provide the support. CR 895, 901. Because the City inspects them, it knows which have the necessary equipment. CR 897-98. The City verifies the signature and then checks that the restaurant has the facilities to support an MFU. CR 896, 901. If the restaurant stops operating, the MFU permit becomes invalid. CR 902.

SPI Code 10-31(C)(3) does not confer the 'unbridled discretion' the Austin court referenced in *Texas Bd. of Chiropractic Examiners v. Texas Med. Ass'n*, 375 S.W.3d 464, 487 (Tex. App.—Austin 2012, pet. denied). TBCE challenged on separation-of-powers grounds a statute incorporating AMA's CPT codes to define the 'surgical procedure' chiropractors could not perform. *Id*. By adopting a specific CPT Codebook, the Legislature had not delegated its authority to define surgery. *Id*. SPI Code §10-31(C)(3) does not cede to restaurants any authority to define the ordinance's terms. They can decide only whether to provide support to a MFU, which may not preclude a permit.

Plaintiffs speculate the real purpose of the ordinance is not found in the ordinance's text or how the City applies it, but from the statements by local restaurant owners. Response Brief, pp. 20-23. Plaintiffs deny they are trying to show that the elected officials had secret, illicit motives (Response Brief, p. 53), but if so then the owners' statements are not probative of the *City's* purpose for the ordinance. Evidence of an official's motives or mental process cannot be attributed to the City; only the legislative act expresses the collective will of the legislative body. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 678 n.91, 680 (Tex. 2004). If an official's motives and thinking are no evidence of the ordinance's intent, then those of the owners are even less probative.

The record shows the Council's purpose was to enact a program to responsibly introduce MFUs into the City consistent with public health. The Mayor asked staff to make a MFU proposal to "give it shot" because he thought there was an opportunity. CR 1207. Council members brought up sanitation issues, traffic/pedestrian congestion, the cost of enforcement, etc. CR 1209-12. The Food Truck Planning Committee's proposals were to go to the City staff for analysis, which in turn was responsible to the Council for proposals.[13] CR 733-34, 1046,

[13] Plaintiffs' claim that the Committee violated the Open Meetings Act is red herring. The Act applies only if an elected or appointed member directed the committee, which Plaintiffs do not claim. TEX. GOV'T CODE §555.001(3)(A). A citizen advisory board does not qualify. *Fiske v. City of Dallas*, 220 S.W.3d 547, 551 (Tex. App.---Texarkana 2007, no pet.). Moreover, the issue is moot because there was no official decision made at committee meetings to invalidate.

1262-63. Instead of obstructing MFUs, the Council has increased the zones for them and the available permits. CR 154, 2282. Every qualified applicant has gotten a permit. CR 444-55, 826, 845-48. This hardly shows the sole effect is to protect restaurants from competition.

Plaintiffs misconstrue the City's economic development argument. Appellant's Brief, pp. 42-44. The point is that the 'real purpose' Plaintiffs ascribe to the City can survive rational-basis scrutiny and is not illegitimate *per se*. The City briefed substantial caselaw that the key whether is the legislation harms consumers without any benefit to the public. Appellant's Brief, pp. 43-44. Balancing burdens within a regulated industry is entirely rational. *Live Oak*, 537 S.W.3d at 658.

Plaintiffs rely on Justice Willett's concurrence in *Patel*, 469 S.W.3d at 122 that condemned 'naked economic protectionism.' First, Justice Willett cited no authority that legislation protecting a business is *per se* illegitimate. Second, neither the majority, dissenting, nor other concurring opinions agreed. The City urges the better reasoned authorities do not agree with Justice Willett. Appellant's Brief, pp. 42-44.

St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) supports the City. In *St. Joseph*, state law allowed only funeral homes to sell caskets; however, it did not require burial in a casket, create casket standards, or require funeral home directors have expertise in casket selection. *Id*. at 224-25, 226. The Fifth Circuit

reaffirmed that favoring one industry is not an illegitimate interest when that action can be linked to advancing the general welfare. *Id*. at 222. The law failed only because there was no arguable connection between restricting casket sales to funeral homes and consumer protection. *Id*. at 226. This paradigm does not apply because the City's ordinance does not ban MFUs from selling food without regard to sanitation requirements.

G. Plaintiffs fail to plead or prove that, as to them, SPI Code §10-31(C) (2, 3) is oppressively burdensome in light of SPI's governmental interest.

The purported burden to Plaintiffs is both self-inflicted and conjectural.

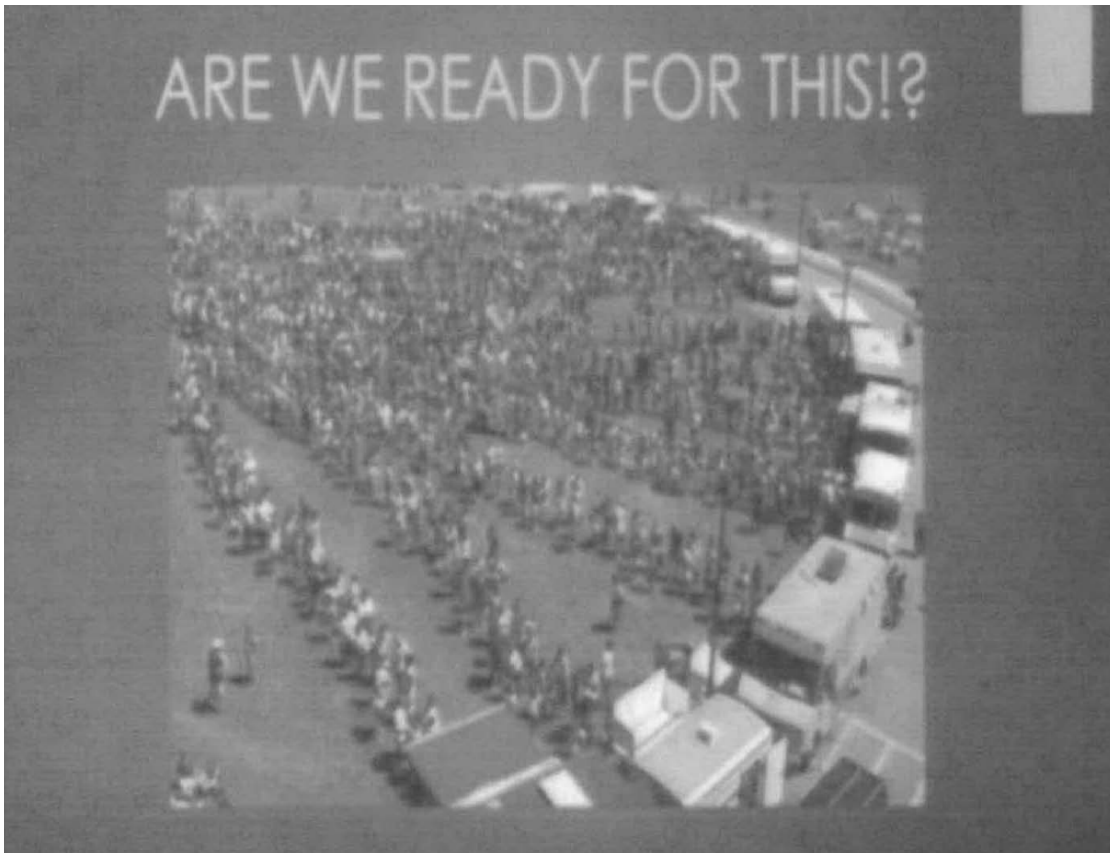
Plaintiffs never approached a local restaurant to ask for support; SurfVive inexplicably denied a spontaneous offer of support. CR 307, 333, 360, 856, 865-66, 270-72, 291-92. The local support requirement is no more burdensome than TFER's requirement that Plaintiffs operate from a CPF or commissary (to which they have no objection and must eventually comply). CR 567, 2576-77. Plaintiffs offer no reason why they have not associated with a CPF or commissary as an alternative.

The cap does not bar them because qualified applications are held until a permit is available. CR 822, 844, 871-72. Every qualified application has received a permit eventually. CR 826-27, 844-47, 870-72. When SurfVive tendered its defective application, permits were available; instead of curing the defects it

withdrew its application. CR 856-57, 865-67. Permits were available during the lawsuit at the beginning of January 2020. CR 826, 844-46, 2662.

PRAYER

The City of South Padre Island is a home rule municipality that draws thousands of visitors to its beaches, bays, restaurants, and outdoor activities. The large number of visitors expect their visit to be satisfying and safe. Plaintiffs' plan for food trucks is survival-of-the-fittest: unlimited food trucks that decide their sanitation practices and leave to the City and resulting problems of traffic/pedestrian congestions, littering, pollution from disposing of food and grey water, etc. In 2015, Mr. Baldovino's presentation to the City Council posed an important question about the challenges:



CR 966. The City's MFU Ordinance is intended to provide the necessary regulatory structure to ensure that MFU food and operation meet the minimum standards for sanitation and safety, a classic role for local government.

WHEREFORE, Appellant City prays that this Court vacate the trial court's orders, grant its jurisdictional pleas and dismiss all or part of Appellees' claims for lack of jurisdiction, and grant it such other relief to which it may be entitled.

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned certifies Appellant's Reply Brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B).

Exclusive of the exempted portions in Tex. R. App. P. 9.4(i)(1), this Brief contains 6,445 words. The Brief has been prepared in proportionally spaced typeface using:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was forwarded on this 13th day of April 2021, to the following counsel of record:

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