No. 25-50025

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAFAEL MARFIL, VERGE PRODUCTIONS, LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY A. ROHLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES,
Plaintiffs - Appellants,

v.

CITY OF NEW BRAUNFELS, TEXAS,
Defendant - Appellee.

On Appeal from the United States District Court
for the Western District of Texas, Waco Division
No. 6:20-cv-00248-ADA-JCM, Alan D. Albright, Judge Presiding

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS–APPELLANTS AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Dated: April 1, 2025

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public interest law firm that litigates for greater judicial protection of individual rights, including rights that are not currently deemed "fundamental" and are therefore subject to rational basis review. It routinely represents individuals *pro bono* in property rights and economic liberty cases, and the Institute's Zoning Justice Project aims to protect and promote the freedom to use property. The Institute also litigated *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), this Circuit's definitive framework for reviewing the constitutionality of restrictions on property and liberty under rational basis review.

ARGUMENT

The rational basis test is a meaningful standard of review. All too often, the government invites courts to apply the test in a manner that requires abandoning the judiciary's customary truth-seeking function. But that turns the rational basis test into no test at all. If the government is restricting liberty and property—whether such a restriction is rational requires that courts review not only whether the asserted

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amicus* states that counsel for all parties have consented to the filing of this brief.

governmental interest is legitimate (and not fantasy), but also that the required rational relationship between the government's means and ends is real. As recognized by the Fifth Circuit when it reversed the district court's dismissal in *Marfil I*, evidence plays a key role in the analysis.

The purpose of this brief is twofold. First, it addresses how the Fifth Circuit and Supreme Court apply rational basis review. *Amicus* also highlights how the analysis of Plaintiffs' state constitutional claim fails to track the governing test established by the Texas Supreme Court. Second, this brief explains why the framework does not change when analyzing zoning regulations like that at issue in this case—courts are mindful of legitimate governmental interests but also protective of private property owners' right to use their property.

In Part I, *amicus* demonstrates that the rational basis test, as applied by the Supreme Court and the Fifth Circuit, is a meaningful standard of review. It is a test that requires courts to employ reasonable but not unfettered deference, and that considers record evidence and the statutory context of the challenged restriction. In Part II, *amicus* applies those principles to the zoning context to demonstrate that courts can and do apply a meaningful test when reviewing zoning restrictions. The right to use private property is deeply rooted in our constitutional architecture. When the government restricts property rights, a rational basis must actually exist.

I. Under Supreme Court and Fifth Circuit precedent, rational basis review is not a rubber stamp—it is a meaningful test under which evidence matters.

Rational basis review is a deferential standard, but plaintiffs can and do win under it. This is true both at the Supreme Court and in this Court. That means real rational basis review has some teeth.[2] These teeth are revealed by examining how the test is actually *applied* in the Supreme Court and Fifth Circuit, not just how it is *described*.

The Supreme Court engages with evidence, facts, and statutory context when applying the rational basis test. So does the Fifth Circuit, as exemplified by *St. Joseph Abbey v. Castille*—this Court's definitive framework for conducting rational basis review in constitutional challenges to restrictions on people and property, economic and otherwise. 712 F.3d 215 (5th Cir. 2013). That is because rational basis review, though deferential, requires courts to be judicious when scrutinizing the rationality of the government's restrictions and allow plaintiffs to negate asserted governmental interests using evidence. *See id.* at 223; *see also Hines v. Quillivan*, 982 F.3d 266, 278 (5th Cir. 2020) (Elrod, J., dissenting in part) ("Rational basis review is a level of scrutiny, not a rubber-stamping exercise.").

[2] *See Harris County v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 323–24 (5th Cir. 1999) ("[T]he rational basis test 'is not a toothless one.'" (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976))).

Part A below demonstrates that, at the Supreme Court, plaintiffs can and do win under rational basis review; and they generally do so by showing there is no legitimate governmental interest or negating with evidence any rational means-ends connection. Part B shows that the Fifth Circuit treats the rational basis test as the Supreme Court does: by engaging with evidence. In Part C, *amicus* shows that the test for Article I, Section 19 claims under the Texas Constitution is more demanding than federal rational basis review.

A. At the Supreme Court, plaintiffs can and do win under rational basis review.

Since 1970, plaintiffs have won more than 20 rational basis cases at the Supreme Court.[3] Those cases show that the Court invalidates government action under rational basis review when: (1) the law lacks a legitimate governmental

[3] *See*, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 614–15 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141–42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77–78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196–97 (1971); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970).

interest; or (2) there is no logical connection between the law and the governmental interest proffered for it.[4] These cases further show that the Court does not settle for conjecture or bare assertions from any party; rather, the Court evaluates a challenged law in the context of the record and wider statutory background. As the Court recognized in *Heller v. Doe*: "[E]ven the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation." 509 U.S. 312, 321 (1993).

Legitimacy of Interest. First, a statute fails the rational basis test when the government only asserts illegitimate interests.[5] For instance, targeting a disfavored group is not a legitimate government interest.[6] Neither is naked economic

[4] Plaintiffs have also prevailed in the Supreme Court under rational basis review when a challenged law lacks proportionality, i.e., when the public harm far outweighs any plausible public benefit. *See, e.g.*, *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 343–46 (holding that the asserted public benefit of administrative convenience for the government was trivial compared to the manifest injustice of assigning tax liability arbitrarily); *James*, 407 U.S. at 141–42 (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicted on debtors); *see also Lindsey*, 405 U.S. at 77–78; *Reed*, 404 U.S. at 76–77.

[5] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 706 (5th ed. 2015) ("Although the Court has phrased the test in different ways, the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose.").

[6] *See, e.g.*, *City of Cleburne*, 473 U.S. at 448 (finding that prejudice against the mentally handicapped motivated the adverse government decision to deny a group home permit); *Romer*, 517 U.S. at 635 (finding no legitimate interest in animus based

protectionism where there is no other rational connection to a legitimate governmental interest.[7]

Logical Connection. Second, the means-ends fit must actually be rational. Since its beginnings, for a challenged law to survive under rational basis review "the existence of a rational basis" is required, and "facts may properly be made the subject of judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). A law is not rational and will be struck down under rational basis review if it is not logically connected to the governmental interest offered to support it. For example, in *Zobel v. Williams*, 457 U.S. 55 (1982), a state program distributed oil money to Alaskans based on the length of their state residency, with those who lived in the state long before the enactment of the law receiving considerably more than those who moved to Alaska later. *Id.* at 57. Alaska justified the law, in part, by

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on sexual orientation); *Hooper*, 472 U.S. at 623 (finding no legitimate interest in creating different classes of bona fide residents); *Zobel*, 457 U.S. at 65 (finding no legitimate interest in creating permanent classes of bona fide residents); *Moreno*, 413 U.S. at 534 (holding that a "bare congressional desire to harm a politically unpopular group" is not a legitimate government interest).

[7] When the government favors one group over another, it must justify the unequal treatment with something more than a naked desire to benefit the favored group. *See Metro. Life Ins. Co. v. Ward*. 470 U.S. 869, 878 (1985) (invalidating an Alabama law that protected domestic insurance companies from out-of-state competition when the law was naked economic favoritism with no rational connection to any valid public justification). Where the Court does uphold a protectionist law, it does so only if it is rationally related to a separate, *legitimate* governmental interest.

asserting that the statute would encourage settlement in the sparsely populated state. *Id.* at 61. The Court, with the benefit of a full record, rejected this justification. It struck down the program because, if the goal was to encourage people to move to Alaska, it made no sense to pay long-term residents more than recently arrived residents. *Id.* at 62-63, 65.[8]

The rational basis test is a meaningful standard of review and record evidence plays an important role. This is true even though government lawyers often invoke dicta from the Court that, if taken literally, would mean that it is no test at all. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) ("[A]bsent some reason to infer antipathy . . . judicial intervention is generally unwarranted[.]"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature . . . ."); *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483,

[8] *See also City of Cleburne*, 473 U.S. at 449–50 (finding no logical connection between the City's asserted interest in ensuring group homes were not too big and the City's routine granting of permits for group homes of similar too-big size); *Williams*, 472 U.S. at 24–25 (finding no logical connection between Vermont's asserted interest in encouraging state residents to purchase cars in state and Vermont's taxing of cars that were purchased out of state *before* their owners moved to Vermont); *Quinn*, 491 U.S. at 108 (finding no logical connection between an individual's ability to understand politics and an individual's ownership or non-ownership of land); *Chappelle*, 431 U.S. 159 (same); *Moreno*, 413 U.S. at 534 (finding no logical connection between stimulating the agricultural economy and providing food stamps only to households containing people who are related to one another); *see also Mayer*, 404 U.S. at 196; *Turner*, 396 U.S. at 363–64.

487–88 (1955). Again, what matters is how the rational basis test is *applied*, not merely how it is sometimes *described*.

And the Supreme Court actually applies the test by engaging with evidence.[9] For instance, in *Schware v. Board of Bar Examiners of New Mexico*, the plaintiff sought to take the bar exam but was denied due to his past membership in the Communist Party—a fact which, the government asserted, indicated the plaintiff had bad moral character.[10] 353 U.S. 232, 238 (1957). The Supreme Court explained that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239. After extensively discussing the factual record the Court determined that Mr. Schware was of good moral character (and rejected the government's rationale for barring him from taking the bar exam). *Id.* at 246–47. So too in *City of Cleburne v. Cleburne Living Center*, where the Supreme Court relied on the record to reject the government's bare assertions claiming that middle school students would harass the mentally handicapped if allowed to live nearby. 473 U.S. 432, 447–50 (1985).

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[9] Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373 (2016).

[10] Today the case would be treated as a First Amendment case. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). In 1957 the Supreme Court analyzed it under rational basis review. *See Schware*, 353 U.S. at 239.

If the Court in *Schware* and *Cleburne* had credited the government's bare assertions and ignored the record, those cases would have come out differently.

B. The Fifth Circuit applies the rational basis test as the Supreme Court does—by engaging with evidence.

The rational basis test is likewise a meaningful standard of review in the Fifth Circuit. In this Court, like at the Supreme Court, plaintiffs can and do win rational basis cases.[11] The Fifth Circuit's decision in *St. Joseph Abbey v. Castille* provides the definitive framework. 712 F.3d 215 (5th Cir. 2013). In *St. Joseph Abbey*, this Court struck down a Louisiana law prohibiting casket sales except by licensed funeral directors because the law was not rationally related to any legitimate governmental interest. *Id.* at 227. This Court's unanimous panel applied the requisite deference while engaging with the evidentiary record, the wider statutory context, and the logic of the government's asserted rationales. The Court also addressed the dicta often invoked by the government to cast the rational basis test as a mere rubber stamp.

[11] *See, e.g.*, *Stratta v. Roe*, 961 F.3d 340 (5th Cir. 2020); *Da Vinci Inv., Ltd. P'ship v. Parker*, 622 F. App'x 367 (5th Cir. 2015); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008); *Simi Inv. Co., Inc v. Harris County*, 236 F.3d 240, 251 (5th Cir. 2000); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039–40 (5th Cir. 1980); *Doe v. Plyler*, 628 F.2d 448, 459 (5th Cir. 1980); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980); *Thompson v. Gallagher*, 489 F.2d 443, 449 (5th Cir. 1973).

First, this Court rejected Louisiana's argument that economic protectionism alone—a naked desire to enrich funeral directors at the expense of other entrepreneurs and the public—is a legitimate government interest. *Id.* at 222.[12]

Next, this Court recognized that Louisiana had asserted other public health and safety rationales for the challenged law that *were* legitimate, and that plaintiffs had a right to introduce evidence to negate them. *Id.* at 223. Then, this Court explained that its analysis would be "informed by the setting and history of the challenged rule." *Id.* This latter point is crucial because it illustrates that courts should not look at a governmental interest only in the abstract or in hypothetical terms. Rational basis review must be rational.

Finally, this Court considered Louisiana's legitimate interests in consumer protection and public health and safety, and found that the record evidence negated any logical connection between the challenged licensing law and those interests. The Court first analyzed the licensing board's assertion that the law "restrict[ed] predatory sales practices by third-party sellers and protect[ed] consumers from purchasing a casket that is not suitable for the given burial space" and found that,

[12] This Court, along with the Sixth and Ninth Circuits, have held that private economic protectionism is not a legitimate interest. *See St. Joseph Abbey*, 712 F.3d at 222; *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). The Second Circuit has split with this Court on that question. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015).

although the argument was, on its face, a "perfectly rational statement of hypothesized footings for the challenged law," the hypothesis was nevertheless "betrayed by the undisputed facts." *Id.* The Court went on to consider how the challenged law fit within the full "matrix of Louisiana law," *id.* at 225–26, and concluded that the "grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices." *Id.* at 226. Nor did permitting only licensed funeral directors to sell caskets protect consumers, because the evidence showed that funeral director training in Louisiana required no instruction on selling caskets or counseling grieving clients. *Id*. at 224. Louisiana "[did] not even require a casket for burial." *Id.* at 226.

Notably, the Fifth Circuit addressed the government's reliance on the Supreme Court's decision in *Williamson v. Lee Optical*—an attempt at casting rational basis review as no different than a rubber stamp in the government's favor. The Court explained it did not matter how the Supreme Court *described* the rational basis test in *Lee Optical*; rather, what matters is how the Supreme Court *applied* the test. *See St. Joseph Abbey*, 712 F.3d at 223 (explaining that "*Williamson* [*v. Lee Optical*] insists upon a rational basis"). A district court applying *St. Joseph Abbey* explains it well:

> [T]he Fifth Circuit explained, despite its healthy measure of deference to the legislature, *Lee Optical* "placed emphasis on the

> 'evil at hand for correction' to which the law was aimed" and "insist[ed] upon a rational basis, which it found." *Id.* at 221, 223 . . . . The Fifth Circuit therefore evaluated the agency's proffered rational bases "informed by [the scheme's] setting and history," "[m]indful that a hypothetical rationale, even post hoc, cannot be fantasy," and urging the correct "analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts."

Brantley v. Kuntz, 98 F. Supp. 3d 884, 891 (W.D. Tex. 2015) (quoting *St. Joseph Abbey*, 712 F.3d 215).[13] Rational basis review is not a rubber stamp, neither under *St. Joseph Abbey* nor *Lee Optical*.

In short, "a hypothetical rationale, even post hoc, cannot be fantasy . . . and the [government's] chosen means must rationally relate to the state interests it articulates[.]" *St. Joseph Abbey*, 712 F.3d at 223. But as Appellants show in their opening brief, the district court failed to properly apply rational basis review when it chose to credit the city's bare assertions and ignore evidence negating those assertions. *See* Pls.' Br. at 31–47.

C. Law of the Land Clause claims under the Texas Constitution are governed by the evidence-based test announced in *Patel*.

In 2015 the Texas Supreme Court clarified the test that courts must apply when reviewing deprivations of liberty and property under Article I, Section 19 of

[13] In *Brantley*, the court declared Texas's mandatory minimum barber facility requirements unconstitutional as applied to African hair-braiding schools, and did so with the benefit of a full record at summary judgment. *See* 98 F. Supp. 3d at 894.

the Texas Constitution. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). In *Patel*, the high court not only clarified the applicable test (because three lines of authority applying three different tests had emerged), *id.* at 80–87, but it also expressly rejected the dissenters' invitation to embrace a hyper-deferential version of rational basis review, *id.* at 90–91. Under the test that *Patel* instead adopted, the district court below was bound to consider the "actual, real-world effect" of the challenged restriction and analyze whether that effect has a rational connection to a legitimate government interest. *Id.* at 87. And the analysis does not stop there. If a rational connection does exist, under *Patel* the court should have next turned to analyzing whether the "actual, real-world effect" of the challenged restriction is still "so burdensome" as applied to the challenging party "as to be oppressive in light of the governmental interest." *Id.* And application of the *Patel* test must "consider the entire record, including evidence offered by the parties." *Id.* Texas courts recognize that *Patel* is more demanding than the federal rational basis test. *Id.* at 90–92.

The district court below has now twice misapplied *Patel*. Despite acknowledging that "'Texas offers additional review protection," ROA.297, it did not conduct the inquiry *Patel* requires, concluding instead that the result would be no different than under the federal rational basis test. That is reversible error.

Under federal rational review and the Texas Supreme Court's *Patel* test, the district court was required to apply a standard of review that engages with the record evidence. The government gets reasonable deference, not blind deference, and a challenging party can use evidence to negate the government's assertions.

II. Zoning restrictions on the use of private property must be justified with evidence, too.

Rational basis review of zoning restrictions is no different—meaningful judicial review is required. As has always been the case, the government's power to restrict the essential right to use private property is limited to protecting the public from significant threats to health and safety. Historically, both state and federal courts would weigh evidence to determine whether zoning restrictions had, at the very least, a substantial relationship to the public health, safety, or welfare. *See, e.g.*, *Nectow v. City of Cambridge*. 277 U.S. 183 (1928), *Spann v. City of Dallas*, 235 S.W. 513 (Tex. 1921). However subsequent cases have been interpreted, the precedent (both at the time it was decided and now) shows that courts do not, and should not, stop at the government's mere assertion of a legitimate governmental interest, but rather must engage with record evidence to ensure there exists a rational basis for the zoning restriction.

Part A below demonstrates that the constitutional right to use one's property is deeply rooted and fundamental, and restrictions on that right must advance substantial—not theoretical—public harms. Part B shows that zoning has not only undermined that essential right but also caused economic and social harms, often being justified on flimsy grounds such as the government's interest in "preserving residential character." In Part C, *amicus* shows that rational basis review in the zoning context is like rational basis in other contexts—it is not a rubber stamp.

A. The right to use private property is deeply rooted and fundamental.

Long before our federal and state constitutions were formed, private property had been understood as one of the three "great and primary rights," on par with personal liberty and personal security. 1 William Blackstone, *Commentaries on the Laws of England* *141. This "absolute" and "inherent" right included "the free use, enjoyment, and disposal" of property, *id.* at *138, and the constitutions of the United States and Texas were instituted to protect it. James Madison understood that government was "instituted to protect property of every sort," and thus "that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, *On Property* (Mar. 29, 1792). Given this deeply rooted and fundamental right to use property, historically the government's legitimate power to regulate it extended only to the protection of the public from significant threats to

health and safety.[14] As Thomas Cooley emphasized, "the police power could only be used to restrict 'a particular use of property' that was previously lawful if it had become a 'public nuisance, endangering the public health or the public safety.'"[15] For example, governments could "interfere with the control by individuals of their property" to mitigate significant and tangible harms, such as "the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity."[16]

These ideals find practical expression in cases like *Buchanan v. Warley*, 245 U.S. 60, 74 (1917), in which the Supreme Court struck down a racial zoning code on the express grounds that the "essential attributes" of property necessarily included the "right to acquire, use, and dispose of it." The Texas Supreme Court has a similar history. It too defines not just *ownership* of private property as a "fundamental" right, *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012), but the *use* of it as well. *Spann v. City of Dallas*, 235 S.W. at 515 ("[A] law which forbids the use

[14] True, this power has seemingly expanded to encompass the "nebulous category of protection of the 'public welfare'." Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 Tex. L. Rev. 1, 26–27 (2024). But as discussed in Parts II.B. and II.C., *infra*, even such vague interests are challengeable.

[15] *See id.* at 27 (quoting Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 595 (2d ed. 1871)).

[16] Cooley, *supra* note 15, at 594.

of a certain kind of property[] strips it of an essential attribute and in actual result proscribes its ownership . . . . Like every other fundamental liberty, it is a right to which the police power is subordinate.").[17]

In the twentieth century, as zoning laws became ubiquitous, courts still maintained serious protections for private property rights. In fact, just two years after greenlighting zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court decided *Nectow v. City of Cambridge*. 277 U.S. 183 (1928). In *Nectow*, a zoning law prevented the plaintiff from using a 100-foot strip of his land for commercial purposes (thereby greatly reducing the property value), even though "an inspection of the entire area affected" showed that such commercial uses were consistent with surrounding uses and the 100 feet were ill-suited for residential purposes. *Id*. at 186–88. Finding that the zoning restriction on the plaintiff's property did not in fact "substantial[ly] relat[e]" to public health, safety, or welfare, and recognizing that the restriction greatly diminished the property's value, the Court held that "the invasion of the property . . . was serious and highly injurious," and struck the zoning restriction on Fourteenth Amendment due process grounds. *Id*. at 188–89.

[17] The right to use one's property includes the right to lease property to others for profit. *See Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (Tex. 1890).

Texas jurisprudence is much the same. In *Spann v. City of Dallas*, the high court considered a zoning restriction that flatly prohibited building any business (no matter the character) within a residential district, except with the consent of 75% of property owners in the district and the building inspector's entirely discretionary approval of the building's design. 235 S.W. at 513. But the plaintiff's property, if used for business, was worth nearly double what it was worth for residential use. *Id.* at 514. The Court struck down the restriction under Article I, Section 19 of the Texas Constitution, explaining that the police power was "founded in public necessity," and, therefore, that the "abridgment of a particular use of private property" was unjustified unless it "endanger[ed] or threaten[ed]" the public. *Id.* at 515. Thus, the Court held, the government could not prohibit plaintiff's ordinary, harmless business use merely because it was "repugnant to the sentiments of a particular class," or because "his tastes [were] not in accord with those of his neighbors," or merely to prevent the "depreciat[ion of] the value of surrounding improved and unimproved property." *Id.* at 516. In other words, because the object of the restriction was not to protect the public from "any threatening injury," it was impermissible. *Id.*

Thus, our history, and high court opinions such as *Nectow* and *Spann*, teach that the right to use private property is fundamental; the government's power to

restrict it is limited, and any exercise of that power must, at the very least, substantially relate *in fact* to the public health, safety, or welfare. *Nectow*, 277 U.S. at 188. And *Nectow* and *Spann* remain good law. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–41 (2005) (citing *Nectow*); *Money v. City of San Marcos*, No. 24-50187, 2025 WL 429980, at *7 (5th Cir. Feb. 7, 2025) (recognizing *Spann* as precedent); *Powell v. City of Houston*, 628 S.W.3d 838, 867 n.37 (Tex. 2021) (Bland, J., concurring) (describing *Spann* as holding "that the police power is subject to the limitations of the Constitution, including the protection of private property").

B. Despite these historical protections, modern zoning has undermined property rights to the harm of everyone.

Modern zoning, which dictates how all private land in a jurisdiction may be used and what may be built on it, might seem incongruent with this rich history and tradition protecting property rights. And that is because modern zoning, though still purportedly rooted in health and safety, became a go-to tool for something else: exclusion of disfavored people and minorities[18] from certain areas, and exclusion of disfavored uses—especially multi-family housing—from single-family residential areas.[19] The apparent support for such exclusion is found in the Supreme Court's

[18] Michael Allan Wolf, *The Zoning of America: Euclid v. Ambler* 138–39 (2008).
[19] *See* Maureen Brady, *Turning Neighbors Into Nuisances*, 134 Harv. L. Rev. 1609, 1664 (2021).

1926 decision in *Village of Euclid v. Ambler Realty Co.*, in which the Court equated apartments to nuisances, describing them as "mere parasite[s]" that "utterly destroy[]" the "residential character" of single-family neighborhoods. 272 U.S. 365, 394 (1926).

A second wave of zoning in the 1970s[20] involved a "large expansion of exclusionary zoning"[21] and governments across the country "aggressively expanded use segregation, significantly tightened density rules, and imposed months of additional public review on development applications."[22] The apparent support for this wave was the U.S. Supreme Court's embrace of zoning in the name of "general welfare"—an interest that could seemingly include things like subjective aesthetics, *see, e.g.*, *Berman v. Parker*, 348 U.S. 26 (1954), and deeply intimate choices, like who we live with, *see Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

The explosion of zoning has proven disastrous. Decades of restrictions on building have led to a widely acknowledged national crisis in affordable housing.[23]

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[20] *See* M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* (2022) at 64. *See also* Richard D. Kahlenberg, *Excluded: Why Snob Zoning, NIMBYism, and Class Bias Build the Walls We Don't See* 52–53, 60, 73–74 (2023).
[21] Kahlenberg, *supra* note 20, at 60.
[22] Gray, *supra* note 20, at 64.
[23] *See id.* at 51–65; Kahlenberg, *supra* note 20, at 52–59; Braver & Somin, *supra* note 14, at 2–3 & n.1.

Racial and economic segregation has been entrenched.[24] So has intergenerational poverty.[25] The environment has been impacted by forcing people to build housing that uses more energy and requiring more driving than they would otherwise choose.[26] And it makes society as a whole less prosperous.[27]

Modern zoning is not problematic simply because it is anathema to our rich history of property rights or because it has produced negative outcomes. It is problematic because it does these things in the name of a growing list of questionable aims. Indeed, today, zoning restrictions on the use of private property are increasingly justified by highly nebulous government interests such as protecting "spiritual" and "aesthetic" values or promoting "family values, youth values, and the blessings of quiet seclusion." *Belle Terre*, 416 U.S. at 6, 9. As the district court holding exemplifies, "[p]rotection of residential character" has become "the mainstay of zoning justifications."[28] In many ways, such ambiguities amount to little more than "vibes," yet governments commonly retreat to them to justify all manner

[24] *See* Richard Rothstein, *The Color of Law* 48–57 (2017); Gray, *supra* note 20, at 79–90; Wolf, *supra* note 18, at 138–43.
[25] *See* Kahlenberg, *supra* note 20, at 43–50.
[26] *See* Gray, *supra* note 20, at 93–105.
[27] *See id.* at 68–78; Braver & Somin, *supra* note 14, at 8–9.
[28] Gray, *supra* note 20, at 139.

of zoning restrictions.[29] As the next section explains, even if courts must accept questionable justifications as legitimate, they must not do so in a factual vacuum. A zoning ordinance must, like any law, bear a rational relationship to a legitimate government interest *in light of the relevant facts and circumstances*.

C. Courts consider facts and evidence against a backdrop of property rights when reviewing zoning regulations.

Rational basis review is a real standard, which does not stop at "vibes." And there is only one rational basis test; whether the government restriction at issue is a zoning law, an economic regulation, or something else, "rational basis" means having a rational relationship to a legitimate government purpose.[30] This Court has long understood that. *See, e.g.*, *Mahone v. Addicks Util. Dist.*, 836 F.2d 921 (5th Cir. 1988). For the same reason that the relationship between a government's economic restriction and its interest "cannot be fantasy," *St. Joseph Abbey*, 712 F.3d at 223, analysis of the rationality of a zoning restriction "cannot be conducted in a vacuum." *Mahone*, 836 F.2d at 936. Thus, though a zoning restriction "may be premised on a hypothetical purpose," that purpose "must still be found 'legitimate,'" *id.* at 936-

[29] Indeed, the district court below upheld the City's short-term rental ordinance on the theory that the ordinance rationally related to the "preservation of the residential character of the neighborhood." ROA.2151. But the Court did not explain, with record facts or otherwise, how the short-term rental ordinance advanced that goal.
[30] *See* Chemerinsky, *supra* note 5.

37 (citing *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985)). So even if a "legitimate purpose can be hypothesized, the rational relationship must be real." *Id.* at 937 (citing *Cleburne*, 473 U.S. at 447–50).

In short, evidence matters when reviewing zoning restrictions. Even *Village of Euclid* demands this. 272 U.S. at 388 (rationality analysis cannot be done "by an abstract consideration" of the regulation, "but by considering it in connection with the circumstances and the locality"); *Mahone*, 836 F.2d at 937 ("[D]etermination of the fit between the classification and the legitimate purpose—the search for rationality—may also require a factual backdrop.") And nothing in *Berman* or *Belle Terre*—arguably the Supreme Court's most permissive zoning precedents—suggests that facts do not matter. In *Belle Terre*, the Court upheld a zoning law that restricted all housing to single-family and defined "family" as limited to only two people sharing a house—unless the people in the house were related by blood or marriage. *See* 416 U.S. at 2. But later, in *Cleburne*, the Court struck down an ordinance it characterized as similar to the one it upheld in *Belle Terre*. The difference in *Cleburne*, however, was that the plaintiffs used record evidence to negate the city's assertions for why it was restricting the property owner, and to show that the city's means were not rationally related to their supposed (and presumably legitimate) ends. *See* 473 U.S. at 447–50.

Indeed, reviewing the facts on the ground is exactly what the Supreme Court did in *Nectow v. City of Cambridge*, 277 U.S. at 186–88 (discussing "an inspection of the entire area affected"), and the Supreme Court of Texas did in *Spann v. City of Dallas*, 235 S.W. at 354 (finding the planned property use was in "in no way harmful"). Those cases show that, in the zoning context, courts consider the nature of the property and the proposed use in the context of surrounding uses, as well as the impact the regulation has on the value and access enjoyed by the property owner. *See, e.g.*, *Nectow*, 277 U.S. at 186–88. Where the facts negate the existence of dangers or threats to the public, and reveal the restriction exists merely to appease "the sentiments of a particular class," or somehow prop up the value of others' properties at the expense of the property owner, courts should be skeptical that those restrictions are justified. *See, e.g.*, *Spann*, 235 S.W. at 516; *see also Money v. City of San Marcos*, No. 24-50187, 2025 WL 429980, at *5 (5th Cir. Feb. 7, 2025) (affirming that aesthetics alone do not justify zoning restrictions).

The facts of this case should therefore engender this Court's skepticism. Plaintiffs showed that New Braunfels is a tourist destination, ROA.1046; short-term rentals have been prevalent there for decades and hundreds are currently operating, *id.*; Plaintiffs' properties are near high-traffic commercial uses and other short-term rentals, ROA. 1239–40; short-term rental enables Plaintiffs to afford their properties

and allows them continued access to it, ROA.1616; the City itself previously determined that Plaintiffs' properties as short-term rentals would not harm the public, ROA.1234; the City could not produce any nuisance citations issued to short-term rentals in the years preceding passage of the restrictions, ROA.1584–86, 1595; and studies have shown that short-term rentals do not generate more nuisances than long-term rentals. *See* ROA.1103–18.

The district court's order simply ignores all of this. Rather than engaging with record evidence, as rational basis review requires, the district court relied on the nebulous "preservation of the residential character" justification, without more.[31] ROA.2151. That rubber-stamping was error.

[31] At some point, a governmental interest may become so vague or abstract that, practically speaking, there exists no set of facts that can refute it. As this case shows, "preserva[tion]" of "residential" or "neighborhood" character, see *Euclid*, 272 U.S. at 394, teeters on that brink. Likewise with vague concepts like spirituality, aesthetics, "values," and the "blessings of quiet seclusion." *Belle Terre*, 416 U.S. at 9. Any regulation pertaining to residential life theoretically implicates such interests. And while such capacious aims invite—indeed, virtually demand—fact-free analysis, courts must still "consider[] [the restriction] in connection with the circumstances and the locality." *Euclid*, 272 U.S. at 388.

CONCLUSION

The Court should engage with the facts in the record to properly review the City's short-term rental restriction under *St. Joseph Abbey* and *Patel*. If those facts negate the city's asserted justifications, it should reverse.

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Respectfully submitted,

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Dated: April 1, 2025

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