E-FILED
Transaction ID: 1-21-1513
File Date: 6/7/2022 4:20 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-21-1513

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEILA MENDEZ *and* ALONSO ZARAGOZA,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, *a municipal corporation; and* KENNETH J. MEYER, *in his official capacity as Commissioner of the City of Chicago Department of Business Affairs and Consumer Protection*

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division

No. 2016 CH 15489
The Honorable Cecilia A. Horan, Judge Presiding

APPELLANTS' BRIEF

Liberty Justice Center
Jacob Huebert (#6305339)
Jeffrey Schwab (#6290710)
440 North Wells St., Suite 200
Chicago, Illinois 60654
Phone: 312-637-2280
Fax: 312-263-7702
jhuebert@ libertyjusticecenter.org
jschwab@libertyjusticecenter.org

Goldwater Institute
Christina Sandefur
(#6325088/pro hac vice # 61186)
(Verified Statement forthcoming)
500 E. Coronado Road
Phoenix, Arizona 85004
Phone: (602) 462-5000
Fax: (602) 256-7045
csandefur@goldwaterinstitute.org

Attorneys for Plaintiffs-Appellants

Oral Argument Requested

TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiffs allege that various facets of Chicago's rules governing home-sharing—that is, short-term rentals of homes or rooms in people's homes—violate the Illinois Constitution. In the claims at issue in this appeal, Plaintiffs allege: (1) that the Chicago Municipal Code's provisions allowing City officials to search home-sharers' property—without probable cause, a warrant, or any precompliance review—violate homeowners' right to be free from unreasonable searches; (2) that a rule allowing certain homes to be used for home-sharing only if they are the owner's "primary residence"—unless a City official says otherwise—violates due process; (3) that the City's noise rule for home-sharing properties violates due process because it is vague and (4) violates equal protection because it imposes a stricter limit on home-sharers than on others; and (5) that the City Code provisions banning single-night rentals—which give two City officials discretion to eliminate, or not eliminate, then ban, for any reason—violate the separation of powers. Plaintiffs appeal the Circuit Court's dismissal of these claims under 735 ILCS 5/2-619.1.

ISSUES PRESENTED FOR APPEAL

I. Have Plaintiffs stated a viable claim challenging the Chicago Municipal Code provision authorizing searches of home-sharers' residences—without probable cause, a warrant, or any precompliance review—for violating their right to be free from unreasonable searches?

II. Have Plaintiffs stated a viable substantive due process challenge to the Code's "Primary Residence Rule" because the Rule allows an official to make arbitrary exceptions?

III. Have Plaintiffs stated a viable due process challenge to the City's noise rule for home-sharing because it is vague?

IV. Have Plaintiffs stated a viable equal protection challenge to the City's noise rule for home-sharing because it imposes a lower limit on home-sharing properties than the City imposes on others?

V. Do Plaintiffs have standing to challenge the Code provisions that ban single-night rentals—while giving two City officials unlimited discretion to lift or maintain the ban—for violating the separation of powers?

VI. Do Plaintiffs otherwise have standing to bring their claims, both as people directly injured by the City's home-sharing restrictions and as taxpayers injured by the unconstitutional use of public funds?

JURISDICTION

This is an appeal under Illinois Supreme Court Rules 301 and 303 from (1) the trial court's partial dismissal of Plaintiffs' original Complaint, entered October 13, 2017; (2) the trial court's partial dismissal of Plaintiffs' Amended Complaint, entered April 2, 2018; and (3) the trial court's dismissal of Plaintiffs' Third Amended Complaint, entered October 20, 2021. Plaintiffs filed their notice of appeal on November 18, 2021.

ORDINANCES INVOLVED

Plaintiffs challenge several Chicago Municipal Code provisions (presented in full in the appendix) restricting home-sharing, including:

- Chi. Muni. Code §§ 4-6-300(e)(1), 4-16-230 (authorizing warrantless searches of vacation rentals and shared housing units, respectively);
- Chi. Muni. Code §§ 4-6-300(h)(8), (9); 4-6-300(l); 4-14-060(d), (e); 4-14-100(a) (prohibiting rentals of certain properties if they are not the owner's "primary residence," subject to a City official making case-by-case exceptions);
- Chi. Muni. Code §§ 4-6-300, 4-14-010 (establishing an "excessive loud noise" rule that could subject homesharers to license or registration suspensions);
- Chi. Muni. Code §§ 4-6-300(g)(1), (2); 4-14050(e), (f) (prohibiting single-night home rentals unless two City officials have decided to allow them).

STATEMENT OF FACTS

This case challenges various aspects of the City of Chicago's restrictions on home-sharing—that is, of rentals of a home, or a room in a home, for a period of 31 or fewer consecutive days.

Ordinance History and Definitions

The City of Chicago first adopted a Shared Housing Ordinance to regulate the home-sharing industry on June 22, 2016. A25, C 411. From the outset, the Ordinance has recognized two categories of shared-housing arrangements, which it calls "vacation rentals" and "shared housing units." *Compare* Chi. Muni. Code § 4-14-010 *with id.* § 4-6-300(a).

The Ordinance defines a "vacation rental" as "a dwelling unit that contains 6 or fewer sleeping rooms that are available for rent or for hire for transient occupancy by guests," ***not*** including "(1) single-room occupancy buildings or bed-and-breakfast establishments, as those terms are defined in Chi. Muni. Code § 13-4-010; (2) hotels, as that term is defined in Chi. Muni. Code § 4-6-180; (3) a dwelling unit for which a tenant has a month-to-month rental agreement and the rental payments are paid on a monthly basis; or (4) corporate housing; (5) guest suites; or (6) shared housing units registered pursuant to Chapter 4-14 of this Code." *Id.* § 4-6-300. "Transient occupancy" is occupancy for a period of 31 or fewer days. *Id.* § 4-6-290.

The Ordinance defines a "shared housing unit" nearly identically—as "a dwelling unit containing 6 or fewer sleeping rooms that is rented, or any

portion therein is rented, for transient occupancy by guests," not including "(1) single-room occupancy buildings; (2) hotels; (3) corporate housing; (4) bed-and-breakfast establishments, (5) guest suites; or (6) *vacation rentals*." *Id.* § 4-14-010 (emphasis added).

Warrantless Searches

The Ordinance requires any property owner who rents out a room or home as a "vacation rental" to submit to warrantless searches by City officials or third parties. *Id.* § 4-6-300(d)(2)(e)(1). The Ordinance also subjects all vacation rentals to an unlimited number of inspections by the Building Commissioner or any third party he or she may designate "*at any time and in any manner*." *Id.* § 4-6-300(e)(1) (emphasis added).

The Ordinance subjects a "shared housing unit operated by a shared housing unit operator"—that is a shared housing unit operated by someone who operates two or more shared housing units, *id.* § 4-16-100—to inspections by the Building Commissioner (or a third party) "at least once every two years." *Id.* § 4-16-230.

The Ordinance does not require the Building Commissioner to find probable cause or to obtain a warrant before ordering an inspection of a vacation rental or a shared housing unit.

The Primary Residence Rule

The Ordinance also includes provisions prohibiting the use of certain homes as vacation rentals or shared housing units if they are not the owner's

"primary residence"—collectively referred to hereafter as the "Primary Residence Rule."

The Ordinance prohibits the owner of a single-family home from listing that property on a "platform" (such as Airbnb) for short-term rentals—either as a vacation rental or a shared housing unit—unless the home is the owner's "primary residence." *Id.* §§ 4-6-300(h)(8), 4-14-060(d). The Ordinance also prohibits the owner of a unit within a building that has two, three, or four dwelling units (inclusive) from listing that unit on a "platform" and from renting out the unit as a vacation rental or a shared housing unit, unless that unit is: (1) the "primary residence" of the vacation-rental licensee or shared-housing host; and (2) the only unit in the building that is or will be used as a vacation rental or shared housing unit. *Id.* §§ 4-6-300(h)(9), 4-14-060(e).

The Primary Residence Rule does not apply, however, if an owner has received a "commissioner's adjustment." *Id.* §§ 4-6-300(h)(8), (9); 4-14-060(d), (e). Under §§ 4-6-300(l) and 4-14-100(a), the Commissioner of the City's Department of Business Affairs and Consumer Protection (the "Commissioner") may approve such an "adjustment"—i.e., an exception to the Primary Residence Rule—"if, based on a review of relevant factors, the Commissioner concludes that such an adjustment would eliminate an extraordinary burden on the applicant in light of unique or unusual circumstances and would not detrimentally impact the health, safety, or general welfare of surrounding property owners or the general public."

The Ordinance lists factors that the Commissioner may consider in deciding whether to make an exception to the Primary Residence Rule. The factors include: "(i) the relevant geography, (ii) the relevant population density, (iii) the degree to which the sought adjustment varies from the prevailing limitations, (iv) the size of the relevant building and the number of units contemplated for the proposed use, (v) the legal nature and history of the applicant, (vi) the measures the applicant proposes to implement to maintain quiet and security in conjunction with the use, (vii) any extraordinary economic hardship to the applicant, due to special circumstances, that would result from the denial, (viii) any police reports or other records of illegal activity or municipal code violations at the location, and (ix) whether the affected neighbors support or object to the proposed use." *Id.* §§ 4-6-300(l), 4-14-100(a). The Ordinance explicitly declares that these factors are "by way of example and not limitation." *Id.* §§ 4-6-300(l), 4-14-100(a).

Noise Rules

The Ordinance also includes special rules for the amount of noise the City will tolerate from properties licensed or registered for home-sharing.

The Ordinance provides that a vacation rental license or shared housing unit registration for a residential unit may be suspended if the unit has been the site of certain "objectionable conditions" on two or more occasions, while rented to guests. *Id.* §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2). The "objectionable

conditions" that can lead to a license or registration suspension include, among others, "excessive loud noise," which the Ordinance defines as

> (1) any sound generated between the hours of 8:00 p.m. and 8:00 a.m. from within the [unit] or on any private open space having a nexus to the [unit] that is louder than average conversational level at a distance of 100 feet or more, measured vertically or horizontally from the property line of the [unit] or private open space, as applicable; or (2) any sound generated on the public way immediately adjacent to the [unit], measured vertically or horizontally from its source, by any person having a nexus to the [unit] in violation of Section 8-32-070(a); or (3) any sound generated between the hours of 8:00 p.m. and 8:00 a.m. that causes a vibration, whether recurrent, intermittent or constant, that is felt or experienced on or in any neighboring property, other than a vibration: (i) caused by a warning device necessary for the protection of the public health, safety or welfare; or (ii) caused in connection with the performance of emergency work within the [unit] by the licensee or such licensee's agent; or (iii) subject to an exception or exclusion under Section 8-32-170.

Id. §§ 4-6-300, 4-14-010. The Ordinance does not define the term "average conversational level."

This noise rule for vacation rentals and shared housing units differs from Chicago's noise rules for ordinary residential units and other types of "hotel accommodations." The Code's general noise rules (which apply to ordinary residential rentals and entities the Ordinance defines as "bed-and-breakfast establishments" or "hotel accommodations") specifically exempt "noise created by unamplified human voices." *Id.* §§ 8-32-150, 8-32-170. But the Code contains no similar exemption for unamplified human voices in vacation

rentals or shared housing units. Further, the City's general restrictions on noise, which apply to bed-and-breakfasts and hotels, address noise "on the public way" or "on any private open space," not noise "within or having a nexus to" a particular property. *Id.* § 8-32-150; A231, C 2091 v2 ¶ 44; A70, C 39, ¶ 50.

Ban on Single-Night Rentals

In 2020, the City amended the Ordinance to ban single-night rentals of vacation rentals and shared housing units—unless and until the Superintendent of Police ("Superintendent") and the Commissioner choose to lift the ban.

Specifically, the new Ordinance provisions (hereafter the "2020 Amendments") prohibit rentals of vacation rentals or shared housing units for fewer than two consecutive nights and prohibit multiple rentals of a vacation rental or shared housing unit within a 48-hour period. Chi. Muni. Code §§ 4-6-300(g)(1), (2), 4-14-050(e), (f). But the Code provisions banning single-night rentals state that the prohibition shall remain in place only "until such time that the commissioner and the superintendent of police determine that such rentals can be conducted safely under conditions set forth in rules jointly and duly promulgated by the commissioner and superintendent." *Id.* §§ 4-6-300(g)(1), (2), 4-14-050(e), (f).

The Code does not require the Commissioner or the Superintendent ever to determine whether single-night rentals can be conducted safely, or to

promulgate rules to allow safe single-night rentals. Nor does the Code provide any criteria by which the Commissioner or the Superintendent are to determine what constitutes the "safe" conduct of single-night rentals.

Injuries to Plaintiffs

Plaintiff Leila Mendez has alleged that she previously used the Airbnb platform to rent out a residential unit in Chicago for periods of less than 31 days—but ceased doing so to avoid being subject to the restrictions on such rentals that Plaintiffs challenge in this case. A233, C 2093 ¶¶ 54-55. Plaintiff Alonso Zaragoza has alleged that he uses the Airbnb platform to engage in short-term rentals of a residential unit in Chicago, and that the Primary Residence Rule has prevented him from engaging in short-term rentals of a particular residential unit in Chicago. *Id.* ¶¶ 55-57. Plaintiffs also pay sales and property taxes in the City of Chicago and are thus injured, as taxpayers, by the City's use of public funds for unconstitutional purposes. A234, C 2094 ¶¶ 58-60.

Procedural History

Plaintiffs filed their initial Complaint in this case on November 29, 2016. Among other things, that Complaint challenged the Ordinance's warrantless searches for violating the Plaintiffs' right to be free from unreasonable searches and seizures, protected by Article I, Section 6 of the Illinois

Constitution. A73-74, C 2094-95 ¶¶ 61-67; A74-75, C 42-43 ¶¶ 67-72.[1] It also challenged a provision—since repealed—that allowed warrantless inspections of guests' personal information as an unreasonable seizure and invasion of privacy. A75-77, C 43-44 ¶¶ 73-77.

The original Complaint challenged the Primary Residence Rule for violating substantive due process—both because the Commissioner's authority to grant "adjustments" based on arbitrary criteria severs any connection to the public's health, safety, or welfare, and because, even apart from the adjustments, the Rule inherently bears no relationship to the public's health, safety, or welfare. A236-41, C 2096-2102 ¶¶ 68-87; A77-82, C 45-47 ¶¶ 78-92. It also challenged the Primary Residence Rule as a violation of the right to equal protection under the law. A242-43, C 2102-04 ¶¶ 88-96; A83-85, C 51-52 ¶¶ 97-104. It also challenged provisions of the Ordinance that limit the number of units in a building that may be used as vacation rentals or shared housing units as a violation of substantive due process. A244-46, C 2104-07 ¶¶ 97-107; A85-86, C 53-54 ¶¶ 105-114.

The Complaint challenged the Ordinance's noise rule as both a violation of substantive due process, based on its vagueness (A247-49, C 2107-09 ¶¶ 108-18; A88-89, C 56-57 ¶¶ 115-124) and as a violation of equal protection, based

[1] Plaintiffs here cite both their original Complaint and their Third Amended Complaint, which is the operative complaint and includes all relevant claims from Plaintiffs' previous complaints in this case.

on its subjection of home-sharers to a lower noise threshold than other rental entities (A249-51, C 2109-2111 ¶¶ 119-26; A90-91, C 58-59 ¶¶ 125-131).

The Complaint challenged the Ordinance for violating the Uniformity Clause (Article IX, Section 2) of the Illinois Constitution, both because it imposes higher taxes on vacation rentals and shared housing units than the City imposes on other entities it defines as "hotel accommodations" (A92-94, C 60-62 ¶¶ 132-142) and because it imposed different licensing fee schemes on vacation rentals and shared housing units (A94-95, C 62-63 ¶¶ 143-47).

Defendants moved to dismiss, and the Circuit Court partially granted the motion, dismissing all claims except the challenge to the Primary Residence Rule based on the Commissioner's discretion to grant adjustments. A24-47, C 411-33. It granted Plaintiffs leave to amend their Uniformity Clause claim to address certain perceived defects. A25, C 433.

Plaintiffs then filed their Amended Complaint, which was substantially identical to the original, except that it omitted the challenge to warrantless inspections of guests' personal information—which the City had repealed, rendering the claim moot—and modified the Uniformity Clause claim per the Court's order. A97-133, C 434-70.

After the City increased its taxes on home-sharing, Plaintiffs filed a Second Amended Complaint—otherwise substantially identical to the

previous complaint[2]—to revise their Uniformity Clause claim to address that change in the law. A159-95, C 658-94. After discovery, the parties filed cross-motions for summary judgment on the Uniformity Clause claim, which was the only claim remaining in the case at the time. C 825-1317; C 1321-1615; C 1763-1935.

While that motion was pending, the City enacted the 2020 Amendments that added the ban on single-night rentals. *See* C 1944-53. The Circuit Court granted Plaintiffs leave to file a Third Amended Complaint (A222-59, C 2082-2119) to add a claim challenging the ban for violating the separation of powers. C 2081. The Circuit Court next granted summary judgment in Defendants' favor on Plaintiffs' Uniformity Clause claim. A49-59, C 2120-30. Defendants filed a motion to dismiss the Third Amended Complaint—specifically, the separation-of-powers challenge to the ban on single-night rentals, as the only surviving claim—which the Circuit Court granted in order on October 20, 2021 (A60, C 2301), citing reasons stated on the record during hearings of September 17, 2021 (R 274-344) and October 19, 2021 (R 345-353).

Plaintiffs now appeal the dismissals of their challenge to the Ordinance's warrantless searches, their substantive due process challenge to the Primary

[2] By that time, two individuals who had been plaintiffs in the original complaint had voluntarily dismissed their claims. C 605; C 606. Their claims were identical to those of the remaining plaintiffs, so their dismissal from the case is immaterial.

Residence Rule based on the Commissioner's discretion to grant adjustments, their due process and equal protection challenges to the noise rule, and their separation-of-powers challenge to the ban on single-night rentals.

ARGUMENT

I. Plaintiffs have stated a viable claim challenging the Ordinance's warrantless searches.

This Court should reverse the dismissal of Plaintiffs' challenge to the Ordinance's warrantless searches because Plaintiffs' claim has merit and is ripe.

A. Plaintiffs have stated a meritorious challenge to the Ordinance's warrantless searches.

Article I, Section 6 of the Illinois Constitution, protects the people's "right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, [and] invasions of privacy." In construing this protection against unreasonable searches and seizures, the Illinois Supreme Court follows the U.S. Supreme Court's Fourth Amendment jurisprudence. *Fink v. Ryan*, 714 Ill.2d 302 (1996). In protecting against "invasions of privacy," however, "the Illinois Constitution goes beyond federal constitutional guarantees." *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997).

The U.S. Supreme Court "has repeatedly held that searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015) (cleaned up). "This rule applies to commercial premises as well as to homes." *Id.* at 419-20.

An exception to this general Fourth Amendment rule for certain "administrative searches" sometimes allows the government to dispense with

the warrant requirement if it substitutes a regulatory enforcement mechanism that provides procedural safeguards—but that exception does not apply here. That doctrine only applies to businesses in certain closely regulated industries, not to private homes. *Anobile v. Pelligrino*, 303 F.3d 107, 120-21 (2d Cir. 2001) ("[T]he Supreme Court has held administrative searches of homes to be unconstitutional, even in the face of compelling circumstances."). Indeed, in *Patel*, 576 U.S. at 424-26, the Supreme Court held that *hotels* are *not* a "closely regulated" industry. It deemed a city ordinance that required hotels to make guest records available to police to be facially unconstitutional. *Id.* at 412. For businesses like hotels, the Court stated that, "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* at 420.

Applying these principles, a federal district court recently denied dismissal of a Fourth Amendment challenge to a municipal rule that required homeowners who (like Plaintiffs) seek to engage in short-term rentals to submit to a warrantless inspection by a city official before receiving a license. *Calvey v. Town Bd. of N. Elba*, No. 9:20-CV-711, 2021 U.S. Dist. LEXIS 56686, *27-28 (N.D.N.Y. Mar. 25, 2021). Because the government had not shown that "special needs ma[de] the warrant and probable-cause requirements impracticable and that the primary purpose of the searches

[was] distinguishable from the general interest in crime control," the claim could proceed. *Id.* at *28. *See also MS Rentals, LLC v. City of Detroit*, 362 F.Supp.3d 404, 416-17 (E.D. Mich. 2019) (ordinance authorizing warrantless searches of rental properties with no precompliance review facially unconstitutional).

The Ordinance here is much more burdensome than the rule challenged in *Calvey*: it does not require submission to just *one* inspection before licensing; it subjects homeowners licensed for vacation rentals to *unlimited* inspections "*at any time and in any manner*," into the indefinite future. Chi. Muni. Code § 4-6-300(e)(1) (emphasis added). It also subjects homeowners registered as shared housing unit operators to inspections "*at least* once every two years." *Id.* § 4-16-230 (emphasis added). And here, as in *Calvey*, the City has not provided, let alone substantiated, any justification for its warrantless searches with no opportunity for precompliance review. *See also Liberty Coins LLC v. Goodman*, 880 F.3d 274, 291 (6th Cir. 2018) (holding regulations authorizing warrantless searches of precious-metal dealers' "entire businesses," "at all times," even if such dealing was only "a subset of their overall business," facially unconstitutional).

Thus, Plaintiffs have stated a viable claim that the Ordinance provisions authorizing warrantless searches, like *Patel*'s hotel records-inspection requirement, are unconstitutional on their face.

B. Plaintiffs' claim is ripe.

The Circuit Court erroneously deemed Plaintiffs' claim unripe because the City had not yet adopted rules or regulations limiting the warrantless searches that the Ordinance authorizes. The lack of such rules or regulations is not a reason why Plaintiffs' claim is unripe; it is a reason why an injunction—the relief Plaintiffs seek—is *proper*.

Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985), is instructive. It held that a California law authorizing warrantless searches of home-based day cares was too broadly worded because, like the Ordinance here, it authorized searches "at any time," and there were no regulations yet to limit those searches. *Id.* at 721. Because, "absent limiting regulations," the statute "[did] not provide a constitutionally adequate substitute for a warrant," the statute was "invalid under the Fourth Amendment." *Id.* at 721-22. The court enjoined enforcement of that statute, ruling that the state could seek to have the injunction lifted after it promulgated regulations sufficiently limiting its search power. *Id.* at 723.

Likewise here, the City's failure to issue regulations militates *in favor* of an injunction. As in *Rush*, the Ordinance does not provide sufficient procedural safeguards. There is no reason to believe that regulations will remedy that deficiency, especially since the City amended the Ordinance to add a warrant requirement for records inspections (mooting Plaintiffs' challenge to the original version) but chose not to do so with respect to premises inspections. And it is not clear from the Ordinance that the City

must wait to conduct searches until regulations have been promulgated. But even if regulations might hypothetically *someday* be written that would narrow the search power here, the Plaintiffs—like the plaintiffs in *Rush*—are entitled to the relief they seek *now*.

Further, even if there were record evidence that City officials have *voluntarily* limited their inspections in the absence of regulations constraining them—which there is not—that could not save the Ordinance's authorization of *unlimited* warrantless searches with no precomplaince review from a *facial* challenge. *See Gem Fin. Serv. v. City of New York*, 298 F.Supp.3d 464, 499 (E.D.N.Y. 2018) (stating police department memo limiting scope of warrantless inspections under ordinance that gave police "unbridled" discretion "only serv[ed] to further highlight" the ordinance's facial unconstitutionality). In the absence of an actual *legal* constraint on officials, the Ordinance subjects vacation rental licensees and shared housing unit operators to warrantless searches with no precompliance review. *See id.*

Under the Ordinance's plain language, homeowners licensed to engage in vacation rentals or registered as shared housing unit operators could be searched at any time. They do not have to wait until the City knocks before seeking relief. *See Miles Kimball Co. v. Anderson*, 128 Ill. App. 3d 805, 807 (1st Dist. 1984) ("The mere existence of a claim . . . in which the ripening seeds of litigation may be seen and which cast doubt, insecurity, and uncertainty upon plaintiff's legal rights or status . . . establishes a condition

of justiciability."); *see also Dolezal v. Plastic & Reconstructive Surgery, S.C.*, 266 Ill. App. 3d 1070, 1083 (1st Dist. 1994) (holding plaintiff performing procedures at hospital could challenge non-compete agreement that, on its face, precluded him from working at the hospital, even though it had not been enforced).

Thus, there is no reason why a court cannot review the City's flagrantly unconstitutional Ordinance now, to eliminate the *current*, constant threat of violations of Plaintiffs' and others' right to be free from unreasonable searches and invasions of privacy. Plaintiffs' claim is ripe, and its dismissal should be reversed.

II. Plaintiffs have stated a viable substantive due process claim challenging the Primary Residence Rule based on the Commissioner's unlimited discretion to make exceptions.

Plaintiffs have stated a viable substantive due process challenge to the Ordinance's Primary Residence Rule based on the Commissioner's unlimited discretion to make exceptions to the Rule.

A plaintiff challenging an ordinance for violating substantive due process must show that the ordinance bears no rational relationship to a legitimate governmental purpose—i.e., that it is not rationally related to protecting the public's health, safety, or welfare. *See Chi. Title & Trust Co. v. Vill. Of Lombard*, 19 Ill. 2d 98, 105 (1960). The plaintiff must show that "the ordinance constitutes arbitrary, capricious and unreasonable municipal action; that there is no permissible interpretation which justifies its adoption,

or that it will not promote the safety and general welfare of the public." *Triple A Servs. v. Rice*, 131 Ill. 2d 217, 226 (1989).

Here, Plaintiffs allege that the Ordinance violates substantive due process because it gives the Commissioner "arbitrary and unlimited discretion" to make exceptions to the Rule ("adjustments") without providing "sufficient objective criteria to guide the Commissioner's exercise of discretion." A238, C 2098 ¶¶ 80-81. Plaintiffs allege that, subject to such arbitrary exceptions, the Primary Residence Rule does not serve the public's health, safety, or welfare. *Id.* ¶ 82.

The Ordinance's "relevant geography" factor is vague and unintelligible—and thus cannot sufficiently guide the Commissioner's discretion—because the Ordinance does not define that term. *Id.* ¶ 82(a). Even if most people understand the dictionary definition of "geography," that definition does not explain how "geography" is relevant to determining whether someone is entitled to an adjustment. Without such an explanation, the Commissioner can only decide for himself or herself in what ways "geography" is relevant, which can only lead to arbitrary results.

The term "relevant population density" likewise is vague and unintelligible because the Ordinance does not specify which geographical unit's population density is relevant. *Id.* ¶ 82(b). Nor does it specify how population density is relevant to whether an adjustment would affect the public's health, safety, or welfare. *Id.* This factor therefore allows the

Commissioner to grant and deny adjustments based on his or her subjective, personal assessment of how population density relates to whether an adjustment is appropriate. *Id.*

The "legal nature and history of the applicant" factor is also vague and unintelligible because the Ordinance does not define it and because the Ordinance authorizes the Commissioner to grant or deny an adjustment based on his or her subjective, personal view regarding an applicant's "legal nature" or "legal history." A239, C 2098 ¶ 82(c). The Ordinance does not specify which aspects of an individual's "nature" or "history" are relevant, leaving it entirely up to the Commissioner to determine what facets of an applicant's legal past matter. *Id.* This creates obvious opportunities for abuse and unfairness, as citizens may be denied rights based on subjective judgments based on long-ago "legal" events, potentially including judgments about whether citizens have been sufficiently punished for past wrongdoing.

The "extraordinary economic hardship" factor is likewise vague, unintelligible, and undefined. *Id.* ¶ 82(d). The Ordinance does not specify how "economic hardship" is relevant to whether an adjustment would serve the public's health, safety, or welfare. This factor therefore authorizes the Commissioner to grant and deny adjustments based on nothing more than his or her subjective, personal assessment of applicants' need.

The City has defended this factor (C 489) by citing a case involving administrative review of a historic-preservation commission decision, *Zaruba*

v. Village of Oak Park, 296 Ill. App. 3d 614 (1st Dist. 1998). That case applied a village ordinance that prohibited certain changes to buildings designated as "historic landmarks" but authorized exceptions where the village issued a "Certificate of Economic Hardship." *Id.* at 616. The ordinance specified that such a "Certificate" was appropriate when a property designated as a landmark could not "be put to a reasonable beneficial use or the owner [could not] obtain a reasonable economic return thereon without the proposed [change to the property]." *Id.* at 621-22. Therefore, the ordinance in *Zaruba* made relatively clear where its economic-hardship exception applied—in contrast with the Ordinance at issue here, which gives the Commissioner no similar guidance.

The "any police reports or other records of illegal activity or municipal code violations at the location" factor is also vague and arbitrary, because it authorizes the Commissioner to grant or deny citizens' property rights based on unspecified "illegal activit[ies]" and "municipal code violations" that were not committed by the applicant, including even illegal actions of which the applicant was the victim. A239-40, C 2099-2100 ¶ 82(e). Further, many illegal activities and code violations have no bearing on whether granting an exception to the Rule would affect the public's health, safety, or welfare. *Id.*

Finally, the "whether the affected neighbors support or object" factor is also vague, arbitrary, and not rationally related to the promotion of a legitimate interest. A240, C 2100 ¶ 82(f). The Ordinance does not define

"affected neighbors," and, worse, it authorizes the Commissioner to grant or deny property rights based on the subjective, personal, or privately-interested desires of particular private parties rather than the public's health, safety, or welfare. *Id.*

In dismissing Plaintiffs' claim the Circuit Court did not find that these factors are clear. Nor did it address the Commissioner's authority to consider additional, unspecified factors in deciding whether to grant adjustments. Ruling at a hearing, the Court simply stated:

> I agree with the City that one can imagine application in which the adjustment provision is not vague. And that's all that's really required. For a facial challenge to proceed the plaintiffs must allege facts that establish [that] . . . vagueness permeates the ordinance. And I can't say that here.

R 168.

It is not apparent what that means. It is true that, as a general matter, "an enactment is facially invalid only if no set of circumstances exist under which it would be valid," *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 306 (2008), but the Ordinance's adjustment criteria are inherently, unavoidably vague; there is no "set of circumstances" under which they would not be. Thus, it is apparent from the Ordinance's face that the Commissioner's authority to grant or deny adjustments is unconstrained. That, by itself, renders the Ordinance unconstitutional.

Further, they are only examples, so the Commissioner may also arbitrarily select *other* criteria for adjustment decisions. The Circuit Court

said "I don't believe that's fatal either," citing *General Motors Corp. v. State of Illinois Motor Vehicle Review Board*, 224 Ill. 2d 1 (2007). R 168. But nothing in *General Motors* approves such unlimited discretion.

Indeed, Illinois courts have struck down other ordinance provisions that did not sufficiently constrain local officials' discretion to grant or deny a permit or license. For example, the Appellate Court has struck down ordinances that conditioned the issuance of a building permit on vague criteria, such as whether a building's features or materials would be "inappropriate." *See Waterfront Estates Dev., Inc. v. City of Palos Hills*, 232 Ill. App. 3d 367, 377-78 (1st Dist. 1992) (stating terms "inappropriate" and "inadequate" did not "adequately limit [the government's] discretion); *R.S.T. Builders, Inc. v. Vill. of Bolingbrook*, 141 Ill. App. 3d 41, 44 (3d Dist. 1986) (stating terms "harmonious conformance," "inappropriate materials," "durable quality," "good proportions," exposed accessories," and "monotony of design . . . fail[ed] to prescribe adequate standards"); *Pacesetter Homes, Inc. v. Vill. of Olympia Fields*, 104 Ill. App. 2d 218, 221, 225-26 (1st Dist. 1968) (holding ordinance that allowed denial of permit for "excessive similarity or dissimilarity of design" gave officials "too broad a discretion"); *see also Hanna v. City of Chicago,* 388 Ill. App. 3d 909, 916 (1st Dist. 2009) (stating terms "value," "important," "significant," and "unique," among others, in landmark-designation ordinance were "vague, ambiguous, and overly broad").

In these decisions, the Court did not consider whether officials *might* voluntarily adopt some narrow interpretation of the vague criteria that could render them clearer and more objective. The ordinances were unconstitutional on their face because their criteria were vague, and they did not constrain officials' discretion. The same is true of the factors in the Ordinance here. Therefore, Plaintiffs have stated a viable claim challenging the Ordinance on that basis, and the Court should reverse the claim's dismissal.

III. Plaintiffs have stated a viable due process challenge to the Ordinance's vague noise rule.

Plaintiffs have stated a viable due process challenge to the Ordinance's noise rule because it does not provide sufficient notice to enable an ordinary person to determine what constitutes "excessive loud noise."

"Due process is violated if a law is so vague and devoid of standards as to leave the public unsure of what is and is not prohibited or if it fails to supply adequate guidelines to the administrative body which must enforce it." *City of Aurora v. Navar*, 210 Ill. App. 3d 126, 132 (2d Dist. 1991). "The language of an ordinance must convey sufficiently definite warning and fair notice of what conduct is proscribed, and whether notice is adequate is measured by common understanding and practices." *Id.* at 133.

Applying these standards, the Appellate Court in *Navar* struck down as unconstitutionally vague an ordinance stating that "[a]ny commercial activity audible from adjacent premises, or conducted out-of-doors, after 9 p.m. is

declared a nuisance." *Id.* at 131. The city argued that terms such as "audible" and "adjacent premises" had commonly understood meanings, but the Court held that the vagueness question turns not on whether individual words have a meaning, but on whether, when used together, they create a clear, commonly understood standard. *Id.* Because the city's definition of "nuisance" did not create such a standard, the ordinance was unduly vague. *Id.*

Similarly, the noise rule here is unconstitutionally vague because it is confusing: it does not provide fair notice of what conduct is proscribed. One might understand the City's noise rule that applies to bed-and-breakfasts, hotels, and long-term residential units, because, unlike the Ordinance challenged here, it exempts "noise created by unamplified human voices." *Compare* Chi. Muni. Code §§ 8-32-150, 8-32-170 *with id.* §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2). A person of average intelligence would understand a restriction on amplified sounds louder than average conversations to include things like music or movies played through, for example, stereo speakers, musical instruments, car horns, or bullhorns. But when are *unamplified* voices considered "louder than average conversational level?" It is impossible to say. Without some objective standard, Chicago's prohibition on noises above "average conversational level" that "hav[e] a nexus to" a home-sharing property would permit officials to revoke home-sharers' licenses whenever a baby cries or a garage door opens.

It is not necessary, of course, for the Court to reach the merits of this claim, since this is the appeal of a dismissal. Plaintiffs have sufficiently stated their cause of action by alleging that an ordinary person cannot know how to avoid violating the noise rule, which does not define "average conversational level" (*Id.* §§ 4-6-300, 4-14-010.), does not exempt "noise created by unamplified human voices" (A231, C 2053 v2 ¶ 44), and includes no objective measurements (A248, C 2070 v2 ¶ 113) or durational requirement (A248, C 2070 v2 ¶ 114). The dismissal of Plaintiffs' due process challenge to the Rule therefore should be reversed.

IV. Plaintiffs have stated a viable equal protection claim challenging the Ordinance's noise rule.

Plaintiffs have also stated a viable equal protection claim challenging the Ordinance's noise rule.

When government treats people or properties differently, its classifications must be rationally drawn to promote a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 447-48 (1985) (striking down ordinance that required special use permit for homes for the mentally disabled but not for other uses such as apartments, multiple dwellings, or fraternity houses). Thus, in *Jacobson v. Department of Public Aid*, the Illinois Supreme Court struck down a law requiring parents to take financial responsibility for children residing in their parents' home, while exempting parents whose children resided elsewhere, holding that exempting non-residential parents did not further the State's goal of making families

responsible for their own support and replenishing public aid coffers. 171 Ill. 2d 314, 325 (1996).

Similarly, Plaintiffs allege that there is no rational reason for the City to subject home- sharing to a lower noise threshold than other rentals. That is, if the City's goal is to eliminate "excessive noise," there is no reason why *all* properties in a given area should not be subject to the same noise limits. (A250, C 2072 v2 ¶¶ 120-23) That is sufficient to state a claim.

The Circuit Court held that Plaintiffs failed to state an equal protection claim because short-term rental properties are not similarly situated to hotels and bed-and-breakfasts, which are subject to a less restrictive rule because they "have owners and employees on site that can monitor and control loud noise." A43, C 429. It also concluded that short-term rentals are different from hotels and bed-and-breakfasts because "vacation rentals and shared housing units are permitted in all residential zoning districts, unlike hotels which aren't permitted in residential districts, and bed-and-breakfasts which are only permitted in high-density residential districts." *Id.* The court thus concluded that "it is reasonable to restrict noise made by transient guests occupying vacation rentals and shared housing unit, who have no other investment in the neighborhood, in order to maintain the quality of life for those who live permanently in residential neighborhoods." *Id.*

The Circuit Court's analysis misses the point of Plaintiffs' claim. Plaintiffs' claim does not depend on the assumption that short-term rentals

are exactly like hotels or bed-and-breakfasts, and Plaintiffs do not deny that different zoning districts might have different expectations regarding noise, or that the City might have more difficulty enforcing noise restrictions against some entities. Plaintiffs allege that the Ordinance imposes stricter noise rule on short-term rentals than on other rental entities (A232, C 2053 v2 ¶ 44), *regardless* of the zone they are in, *without relation to* the relative ease of enforcement and thus unreasonably "singles out 'vacation rentals' and 'shared housing units' of unfavorable treatment" (A233, C 2072 v2 ¶ 122).

Plaintiffs allege that, within each zone, homesharers are *always* subject to a heightened noise rule, while other rental entities are *always* subject to a lesser standard. For example, in low-density residential zoning districts, home-sharing renters must adhere to a lower noise threshold than long-term residential renters. And in higher-density neighborhoods, where tolerance for noise might be greater, the Ordinance *still* subjects homeshareres to a lower noise threshold than B&Bs and hotels, *regardless of zoning*.

If home-sharing is more likely to result in noise problems than ordinary rentals in residential neighborhoods, as the Circuit Court apparently assumed, that might justify strengthening enforcement against homes used for home-sharing—but it cannot justify subjecting home-sharing to a *different noise limit* than other rental entities. That makes as little sense as having a lower speed limit for a particular car model because the City believes the model's owners are especially likely to drive fast.

Plaintiffs have sufficiently alleged that the City treats home-sharing differently from other rentals and that there is no legitimate justification for imposing a lower noise *threshold* (not a different enforcement mechanism)—*regardless* of zone—on home-sharing than on other rentals. Plaintiffs allege that this difference in treatment is not rationally related to a legitimate public interest. The question at the motion-to-dismiss stage is whether, if Plaintiffs prove their allegations, they would be entitled to relief. The answer to that is yes, and the Court should reverse this claim's dismissal.

V. Plaintiffs have standing to challenge the Ordinance's ban on single-night rentals.

Contrary to the Circuit Court's conclusion, Plaintiffs have standing to challenge the Ordinance provision that gives the Commissioner and the Superintendent unlimited discretion to lift or maintain the Ordinance's ban on single-night rentals.

A. The ban on single-night rentals violates the separation of powers because it allows the Commissioner and the Superintendent to keep single-night rentals illegal for any reason.

Plaintiffs have alleged a valid separation-of-powers claim because the provisions they challenge give the Commissioner and the Superintendent unlimited discretion to decide whether single-night rentals will remain illegal in Chicago. The provisions allow these officials to keep single-night rentals illegal for *any reason* and therefore unlawfully grant them arbitrary lawmaking power.

Although a legislative body "may delegate the authority to execute the law," it "cannot delegate its legislative power to determine what the law should be." *E. St. Louis Fed'n of Teachers, Local 1220 v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 178 Ill. 2d 399, 423 (1997) ("*Local 1220*"). When a legislative body delegates functions to an official or agency, it "may not invest that agency with arbitrary powers"; it may not give an agency "the power in its absolute and unguided discretion to apply or withhold the application of the law or to say to whom a law shall or shall not be applicable." *People v. Tibbitts*, 56 Ill. 2d 56, 59 (1973).

The provisions that Plaintiffs challenge give the Commissioner and Superintendent absolute, unguided discretion to determine whether single-night rentals will remain illegal in Chicago. Again, these provisions state that single-night rentals shall be prohibited "until such time that the commissioner and superintendent of police determine that such rentals can be conducted safely under conditions set forth in rules jointly and duly promulgated by the commissioner and superintendent." Chi. Muni. Code §§ 4-6-300(g)(1), (2), 4-14-050(e), (f). But neither these provisions nor any other Code provision requires the Commissioner and Superintendent to determine whether or how "such rentals can be conducted safely" or to promulgate rules to allow safe single-night rentals. Therefore, the 2020 Amendments give the Commissioner and Superintendent *unlimited* discretion to keep single-night

rentals illegal *for any reason*—including reasons unrelated to safety or to any other legitimate purpose.

If the City Council provided sufficient guidance, it might (arguably) lawfully *direct* officials to promulgate rules for the safe operation of single-night rentals. But that is not what the City Council has done here. Instead, it has left the public-policy question of *whether* such rules should or will be promulgated—or even *considered*—entirely up to the Commissioner and the Superintendent, who have no obligation to act or to justify their failure to act.

For that reason alone, Plaintiffs have stated a claim that the provisions banning single-night rentals should be struck down for unlawfully delegating legislative power to the Commissioner and the Superintendent.

B. The ban on single-night rentals violates the separation of powers because it does not provide sufficient standards to guide the Commissioner's and Superintendent's discretion.

Even if the City Council have not unlawfully given the Commissioner and the Superintendent unlimited discretion as to *whether* to legalize single-night rentals, the provisions banning single-night rentals still violate the separation of powers, because they fail to provide sufficient standards to guide the Commissioner and the Superintendent's discretion in promulgating rules to legalize such rentals.

A "[p]roper delegation of authority must provide sufficient standards to guide the administrative body in the exercise of its functions." *Local 1220*, 178 Ill. 2d at 423. To provide sufficient standards, legislation must identify:

"(1) the persons or activities potentially subject to regulation; (2) the harm sought to be prevented; and (3) the general means available to the administrator to prevent the identified harm." *Id.*

The provisions Plaintiffs challenge fail to meet (at a minimum) the second criterion. The ban provisions state that single-night rentals will only be prohibited until the Commissioner and Superintendent "determine that [single-night] rentals can be conducted safely under conditions set forth in rules jointly and duly promulgated by the commissioner and superintendent." Chi. Muni. Code §§ 4-6-300(g)(1), (2); 4-14-050(e), (f). But the provisions say nothing about the scope or purposes of the rules that the Commissioner and the Superintendent may promulgate and therefore have not identified the "harm sought to be prevented."

One might guess that the rules would pertain to the "safe" conduct of single-night rentals. But the provisions do not say that the rules *must* be directed exclusively toward that purpose. And, in any event, an ordinance simply authorizing officials to enact rules to make rentals "safe" does not adequately identify the harm to be prevented. *Who* is to be kept safe? Guests? Homeowners? Neighbors? Whomever else the Commissioner and Superintendent deem sufficiently important? And what are these people—whoever they are—to be kept safe *from*? Crime? Disease? Dangerous building conditions? Any conceivable threat to "safety" in any sense of the word? The

Ordinance does not say—which means that it does not sufficiently identify the harm the Commissioner and Superintendent's rules may address.

By failing provide minimal guidance on what the rules promulgated by the Commissioner and the Superintendent may address, the 2020 Amendments give those officials insufficiently constrained authority to make law and thus constitute an unlawful delegation of legislative power.

C. Plaintiffs have standing to pursue their separation-of-powers claim.

Plaintiffs have standing to pursue their separation-of-power claim. The Circuit Court erred in concluding otherwise.

To have standing, a plaintiff must show injury in fact to a legally cognizable interest that is (1) distinct and palpable, (2) fairly traceable to the defendant's actions, and (3) substantially likely to be prevented or resolved by the grant of requested relief. *Maglio v. Advocate Health & Hosp. Corp.*, 2015 IL App. (2d) 140782, ¶ 22. Plaintiffs here have standing because the ban on single-night rentals prevents them from engaging in single-night rentals, as they wish to. A233, C 2093 v2 ¶ 54.

Nonetheless, the Circuit Court concluded that Plaintiffs lack standing. The court found that the provision authorizing the Superintendent and the Commissioner to lift the ban on single-night rentals is severable from the ban itself. R 351. Thus, the court reasoned, if Plaintiffs were to prevail and the court were to deem the ban-lifting provisions unconstitutional, the ban

provisions would remain in place, and Plaintiffs could obtain no relief for their injury. *Id.*

The court erred in holding that the Commissioner and Superintendent's authority to lift the ban is severable from the ban itself—and thus erred in relying on that incorrect premise to conclude that Plaintiffs lack standing.

To determine whether a provision in challenged legislation is severable, a court must conduct a two-part inquiry considering (1) "whether the valid and invalid portions of the statute are essentially and inseparably connected in substance," and (2) "whether the legislature would have enacted the valid portions without the invalid portions." *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 19. The "until such time" clauses here are not severable under either criterion.

First, the "until such time" clause is "essentially and inseparably connected in substance" to the ban. At each place in the Code where they appear, the ban and the "until such time" clause are not two separate provisions but a *single* provision—indeed, a single sentence:

> It shall be unlawful for any shared housing host to rent any shared housing unit, or any portion thereof, for any period of less than two consecutive nights until such time that the commissioner and superintendent of police determine that such rentals can be conducted safely under conditions set forth in rules jointly and duly promulgated by the commissioner and superintendent.

Chi. Muni. Code. § 4-14-050(e); *see also id.* §§ 4-6-300(g)(1), (2); 4-14-050(f) (provisions banning multiple shared-housing-unit rentals in a 48-hour period

and banning single- night vacation rentals, each with the same "until such time" language in the same sentence as the ban). The ban is defined by reference to whether the Commissioner and Superintendent have taken action; that is, the "until such time" clauses define *whether* and *when* the ban is to be in effect. The "until such time" clauses are thus integral to the ban, not incidental to or separate from it.

Second, there is a strong reason to believe that the City Council would not have enacted the ban without the "until such time" clauses. The clauses are the product of "a negotiated compromise" reached so the City Council would pass the 2020 Amendments. *See People ex rel. Chi. Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 536 (1990) (provision not severable because bill reflected a "negotiated compromise" and that severing it would therefore "do violence to the legislative intent which succeeded in putting together a unified package for passage"). The version of the 2020 Amendments that Mayor Lightfoot introduced on July 22, 2020[3] would have *permanently* banned single night rentals; the provisions banning single-night rentals did not include the "until such time" clauses.[4] But when the City Council's

---

[3] https://chicago.legistar.com/View.ashx?M=F&ID=8682505&GUID=3C100E56-7BFF-4AF4- 96EB-C8364E7C8BC4.

[4] *See* Office of the City Clerk – Record #: SO2020-3986, https://chicago.legistar.com/LegislationDetail.aspx?ID=4598068&GUID=D52C7F3B-D8CA- 40A0-8CE4-934E269B50FC.

Committee on License and Consumer Protection took up the proposed legislation at its meeting of August 25, 2020, it considered and approved a substitute ordinance—the version the City Council ultimately passed—which added the "until such time" clauses. This change reflected a compromise to ensure the ordinance's passage. Alderman Michele Smith, a sponsor of the 2020 Amendments,[5] characterized the substitute ordinance as a "compromise."[6] And at the August 25 Committee meeting, Alderman Smith cited the "until such time" clauses as a reason why aldermen who (unlike her) support home-sharing should vote for the measure:

> For those people who favor this industry, I also favor . . . to require two days of rentals. But the law provides that if this emergency ends, or at a proper time, that could be lifted. I think that's fair.

This shows that the "until such time" clauses were added to the 2020 Amendments to secure votes to ensure its passage. This case therefore presents precisely the "compromise" scenario where severance is *not* warranted. *See Chicago Bar*, 136 Ill. 2d at 536.

---

[5] *See* Office of the City Clerk – Record #: SO2020-3986, *supra* note 4.

[6] John Byrne, *Lightfoot Proposal Would Ban Single-Night Vacation Rental Bookings in Chicago*, Chi. Trib. (Aug. 25, 2020), https://www.chicagotribune.com/politics/ct-lori-lightfoot-vacation- rental-crackdown-20200825-a2g2qx7nefctvk7vfi5gaig5lm-story.html; Todd Feurer, *Aldermen to Ban Single-Night Home-Sharing Rentals in Effort to Crack Down on Illegal Parties*, CBS Chicago (Aug. 25, 2020), https://chicago.cbslocal.com/2020/08/25/aldermen-to-ban-single- night-home-sharing-rentals-in-effort-to-crack-down-on-illegal-parties/.

Finally, there is an additional reason—sufficient by itself—why the "until such time clauses" are not severable from the bans: A provision creating an unlawful exemption to a general rule is not severable from the general rule. By striking down the exemption alone, a court would unconstitutionally rewrite the law and defeat the legislature's intent. *Commercial Nat'l Bank of Chi. v. City of Chicago*, 89 Ill. 2d 45, 75-76 (1982); *see also Kendall-Jackson Winery, Ltd. v. Branson*, 82 F.Supp.2d 844, 868 (N.D. Ill. 2000) ("Enforcing an Act without an invalid exemption limiting the scope of its application would, in effect, create a new law."). Here, the City Council did not approve a *permanent* ban on short-term rentals, irrevocable without a further act of the City Council, but rather one that could theoretically be lifted by the Commissioner and the Superintendent—a less stringent rule than an outright ban. To strike the "until such time" clause while leaving the ban in place would improperly rewrite the law to make it *harsher* than the one the City Council approved.

Thus, the Circuit Court erred in deeming the provisions authorizing the Commissioner and Superintendent to lift (or not lift) the Ordinance's ban on single-night rentals to be severable from the ban itself—and by relying on the premise to conclude that Plaintiffs lack standing to bring their separation-of-powers challenge. This Court should therefore reverse the dismissal of Plaintiffs' separation-of-powers claim.

VI. Plaintiffs have standing to bring all of their claims.

Finally—apart from the standing issue related to the separation-of-powers claim addressed above— Plaintiffs have standing to bring all of their claims.

Plaintiffs have standing primarily because they have alleged that the Ordinance provisions at issue in this appeal directly injure them. Plaintiff Mendez has alleged that the challenged provisions harm her because she previously used the Airbnb platform to engage in short-term rentals of a home in Chicago but ceased doing so because of the burdens the Ordinance imposed on her. A233, C 2093 v2 ¶ 55. Plaintiff Zaragoza has alleged that the provisions harm him because he rents out a home as a shared housing unit and is thus subject to warrantless searches, the noise rule, and the ban on single-night rentals, and because he has an additional residential unit that he would use for short-term rentals if the primary residence rule did not bar him from doing so. A233, C 2093 v2 ¶¶ 55-57.

In addition, and in the alternative, Plaintiffs both have standing as taxpayers.[7] "It has long been the rule in Illinois that. . . taxpayers have a

[7] The Circuit Court initially agreed that Plaintiffs had standing on that basis, and so held, twice, in ruling on Defendants' motions to dismiss Plaintiffs' original complaint and Plaintiffs' amended complaint. A28-29, C 414-15; A48, C 605; R 169. But in ruling on Defendants' motion for summary judgment with respect to Plaintiffs' Uniformity Clause challenges to the Ordinance's surcharge on home-sharing and licensing fee scheme—not at issue in this appeal—the Circuit Court rejected its earlier analysis and determined that Plaintiffs lacked taxpayer standing to pursue their Uniformity Clause. The court did not, however, vacate or otherwise overrule its previous decisions on taxpayer standing. Out of an abundance of caution, Plaintiffs address the issue here to ensure that they preserve it.

right to enjoin the misuse of public funds"—i.e., that "[t]he misuse of [public) funds for illegal or unconstitutional purposes is a damage which entitles [taxpayers] to sue." *Barco Mfg. Co. v. Wright*, 10 111. 2d 157, 160 (1956). The use of public funds to administer an unconstitutional ordinance is a "misuse of public funds" that taxpayers have standing to challenge. *See Snow v. Dixon*, 66 Ill.2d 443, 449-52 (1977) (taxpayer had standing to enjoin use of public resources to collect illegal tax); *Krebs v. Thompson*, 387 Ill. 471, 473 (1944) (taxpayer had standing to challenge licensing law for professional engineers because state used public funds to administer it); *Crusius v. Ill. Gaming Bd.*, 348 111. App. 3d 44, 51(1st Dist. 2004) (taxpayer had standing to challenge statute regarding gambling licenses because state used public funds to administer it). The misuse of public funds injures taxpayers because they are the funds' "equitable owners" and will, by definition, be "liab[le] to replenish" State treasury funds after they are spent. *Barco* 10 111. 2d at 160.

Here, both Plaintiffs pay sales and property taxes in Chicago. A234, C 2056 v2 ¶ 58. Defendants have never denied, let alone rebutted, Plaintiffs' allegations that they are taxpayers and that the City is using general revenue fund— i.e., Plaintiffs' tax dollars, which Plaintiffs are liable to replenish—to implement the Ordinance. (A234-35, C 2056-57 v2 ¶¶ 65-66). Thus, Plaintiffs have standing as taxpayers to challenge the use of general revenue funds to implement the provisions they challenge.

CONCLUSION

The Court should reverse dismissal of Plaintiffs' constitutional claims.

Dated: June 7, 2022

Respectfully submitted,

LEILA MENDEZ and ALONSO ZARAGOZA

By: /s/ Jacob Huebert
One of their Attorneys

Liberty Justice Center
Cook County No. 49098
Jacob Huebert (#6305339)
Jeffrey Schwab (#6290710)
440 North Wells St., Suite 200
Chicago, Illinois 60654
Phone: 312-637-2280
Fax: 312-263-7702
jhuebert@ libertyjusticecenter.org
jschwab@libertyjusticecenter.org

Goldwater Institute
Christina Sandefur
(#6325088/pro hac vice # 61186)
500 E. Coronado Road
Phoenix, Arizona 85004
Phone: (602) 462-5000
Fax: (602) 256-7045
csandefur@goldwaterinstitute.org

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages.

/s/ Jacob Huebert

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

I, Jacob Huebert, an attorney, certify that on June 7, 2022, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the Illinois Appellate Court, First Judicial District. I further certify that I served a copy of this Brief on Defendants' counsel of record by the Court's Electronic Filing System and electronic mail to Stephen.collins@cityofchicago.org and appeals@cityofchicago.org.

/s/ Jacob Huebert