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No. 21-1513

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**IN THE**
**APPELLATE COURT OF ILLINOIS**
**FIRST JUDICIAL DISTRICT**

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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.

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On Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
No. 2016 CH 15489
The Honorable Cecilia A. Horan, Judge Presiding

# BRIEF OF DEFENDANTS-APPELLEES

Corporation Counsel
of the City of Chicago
2 N. LaSalle Street, Suite 580
Chicago, Illinois 60602
(312) 744-3173
elizabeth.tisher@cityofchicago.org
appeals@cityofchicago.org

MYRIAM ZRECZNY KASPER
Deputy Corporation Counsel
SUZANNE LOOSE
Chief Assistant Corporation Counsel
ELIZABETH MARY TISHER
Assistant Corporation Counsel
Of Counsel

## POINTS AND AUTHORITIES

## NATURE OF THE CASE

The Chicago City Council enacted an ordinance to regulate the burgeoning shared housing industry, in order to preserve affordable housing and the stability, continuity, and character of the City's residential neighborhoods. Plaintiffs, Leila Mendez and Alonso Zaragoza, own homes in Chicago that they use for shared housing. They sued the City and the Commissioner of Business Affairs and Consumer Protection ("BACP"), alleging that various aspects of the ordinance violate the Illinois constitution. The challenged provisions include those authorizing the building commissioner to promulgate rules governing inspections, authorizing the BACP commissioner to grant adjustments to the rule limiting certain rentals to the owner's primary residence, prohibiting excessive noise, and authorizing the BACP commissioner and the superintendent of police to promulgate rules for safely operating single-night rentals. The circuit court dismissed these claims, and plaintiffs appeal. Plaintiffs also raised claims against the guest record inspection, rental cap, and surcharge provisions, but do not challenge the dismissal of those on appeal. All questions raised are on the pleadings.

## ISSUES PRESENTED

1. Whether plaintiffs lack standing to challenge the inspection provisions, and whether the claim is ripe.

2. Whether plaintiffs lack standing to challenge the commissioner's

adjustment to the "primary residence" provisions, and whether the commissioner's adjustment satisfies substantive due process.

3. Whether the ordinance's noise rule satisfies substantive due process and equal protection.

4. Whether plaintiffs lack standing to challenge the safe-rental provisions, and whether those provisions are a proper delegation.

5. Whether plaintiffs lack taxpayer standing.

## JURISDICTION

On October 13, 2017, the circuit court dismissed the inspection, primary residence rule, rental cap, and noise rule claims. C. 411-33.[1] On April 2, 2018, the court dismissed the commissioner's adjustment claim. C. 605; R. 168. On October 15, 2020, the court entered summary judgment for the City on the surcharge claim, C. 2130, and on October 20, 2021, the court dismissed the safe-rental claim, C. 2301; R. 349-51. That order resolved the last outstanding issue in the case. C. 2301. Plaintiffs filed a notice of appeal on November 18, 2021. C. 2302-04. This court has jurisdiction pursuant to Ill. Sup. Ct. R. 303.

## ORDINANCES INVOLVED

**Municipal Code of Chicago, Ill. §§ 4-6-300(a), 4-14-010 provide, in part:**

"Excessive loud noise" means: (1) any sound generated between

[1] The record on appeal consists of the common law record, which we cite as "C. ___," and the report of proceedings, which we cite as "R. ___."

> the hours of 8:00 p.m. and 8:00 a.m. from within [the vacation rental or shared housing unit] or on any private open space having a nexus to the [vacation rental or shared housing 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 [vacation rental or shared housing unit] or private open space, as applicable . . . .

**Municipal Code of Chicago, Ill. §§ 4-6-300(g)(1), 4-14-050(e) provide, in part:**

> It shall be unlawful for [any licensee engaged in the business of vacation rental or any shared housing host] to rent [or lease] any [vacation rental or 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. . . .

**Municipal Code of Chicago, Ill. §§ 4-6-300(l)(1), 4-14-100(a) provide, in part:**

> The commissioner is authorized to grant an adjustment to allow: (1) [issuance of a license to a vacation rental or the operation of a shared housing unit] located in: (i) a single family home that is not the [applicant's or shared housing host's] primary residence; or (ii) a building containing two to four dwelling units, inclusive, where the dwelling unit is not [the applicant's or shared housing host's] primary residence . . . .
>
> Such an adjustment may be approved only 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.
>
> Factors which the commissioner may consider with regard to an application for a commissioner's adjustment include, by way of example and not limitation: (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) measures the applicant proposes to implement

> and 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 a 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.

**Municipal Code of Chicago, Ill. § 4-6-300(e)(1) provides:**

> The building commissioner is authorized to mandate an inspection of any vacation rental, at any time and in any manner, including third-party reviews, as provided for in rules promulgated by the building commissioner.

**Municipal Code of Chicago, Ill. § 4-16-230 provides:**

> The building commissioner is authorized to mandate an inspection of any shared housing unit operated by a shared housing unit operator at least once every two years, at a time and in manner [sic], including through third-party reviews, as provided for in rules promulgated by the building commissioner.

## STATEMENT OF FACTS

### I. Shared Housing Ordinance.

*2016 Ordinance.* On June 22, 2016, City Council enacted a shared housing ordinance. C. 131-89. The ordinance added chapter 4-14 to the Municipal Code to govern shared housing units. C. 166-80. The ordinance defines "shared housing unit" as "a dwelling unit containing 6 or fewer sleeping rooms that is rented, or any portion therein is rented, for transient occupancy by guests." Municipal Code of Chicago, Ill. § 4-14-010. The ordinance also expressly excludes from the definition of "shared housing unit" hotels, bed-and-breakfasts, vacation rentals, and other accommodations covered elsewhere in the Municipal Code, id., and amends the definitions of these other terms to expressly exclude shared housing units, see, e.g., id. § 4-

6-180 (defining "hotel" to exclude "shared housing units").

The ordinance also contains several provisions governing the registration and operation of shared housing units. It prohibits the listing or rental of any shared housing unit that is "a single-family home" or is "located in a building containing two to four dwelling units," unless the single-family home or dwelling unit is the "host's primary residence." Municipal Code of Chicago, Ill. § 4-14-060(d), (e) ("primary residence rule"). It also authorizes the BACP commissioner to grant an adjustment to this rule if it concludes, "based on a review of relevant factors," that 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." Id. § 4-14-100(a) ("commissioner's adjustment").

The ordinance also prohibits illegal activity, objectionable conditions, egregious conditions, and nuisances. Municipal Code of Chicago, Ill. § 4-14-050(a). It defines "egregious conditions" to include drug trafficking, prostitution, gang-related activity, violent acts, and overcrowding, among others, and "objectionable conditions" to include disturbing the peace, public drunkenness, harassment, loitering, unlawful waste disposal, lewd conduct, and excessive loud noise, among others. Id. § 4-14-010. In turn, the ordinance defines "excessive loud noise" to include "any sound generated between the hours of 8:00 p.m. and 8:00 a.m. from within the shared housing unit or on any private open space having a nexus to the shared housing unit

that is louder than average conversational level at a distance of 100 feet or more." Id. ("noise rule").

The ordinance also added chapter 4-16, C. 180-82, which governs "shared housing unit operators," defined as "any person who has registered, or who is required to register, as the shared housing host of more than one shared housing unit," Municipal Code of Chicago, Ill. § 4-16-100. The ordinance authorizes the building commissioner to conduct inspections of "any shared housing unit operated by a shared housing unit operator at least once every two years" at a time and in a manner "as provided for in rules promulgated by the building commissioner." Id. § 4-16-230 ("inspection provision").

Finally, the ordinance amended the provisions governing vacation rentals located in chapter 4-6 of the Municipal Code. C. 137-53. It amended the definition of "vacation rental" to omit language that a vacation rental cannot be an owner-occupied dwelling unit, C. 139; see Municipal Code of Chicago, Ill. § 4-6-300(a), and included provisions identical in all material respects to those discussed above governing shared housing units, see id. §§ 4-6-300(h)(8), (9) ("primary residence rule"), 4-6-300(l)(1) ("commissioner's adjustment"), 4-6-300(a) ("noise rule"), 4-6-300(e)(1) ("inspection provision").

*2017 Amendments.* On February 22, 2017, City Council amended two provisions of the 2016 ordinance that required vacation rental licensees and shared housing hosts to make guest records available to city officials "upon request." C. 214, 215. The amendments struck the "upon request" language

and added that city officials may inspect guest records "pursuant only to a proper search warrant, administrative subpoena, judicial subpoenas, or other lawful procedure." Municipal Code of Chicago, Ill. §§ 4-6-300(f)(3), 4-14-040(b)(9) ("guest record provisions").

*2020 Amendments.* On September 9, 2020, City Council again amended the ordinance. C. 2153-96. It added provisions prohibiting vacation rental licensees or shared housing hosts from renting any unit "for any period of less than two consecutive nights," Municipal Code of Chicago, Ill. §§ 4-6-300(g)(1), 4-14-050(e) ("single-night rental ban"), and also provided that the prohibition will remain in place "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," id. ("safe-rental provision").

## II. Proceedings Below

*Complaint and First Motion to Dismiss.* On November 29, 2016, plaintiffs filed a complaint against the City and BACP's Commissioner (collectively "the City"), alleging several provisions of the shared housing ordinance violate the Illinois constitution and seeking declaratory and injunctive relief. C. 29-64.[2] As relevant here, they allege the inspection provisions violate their right to be free from unreasonable searches and

[2] The complaint also alleged claims from two other plaintiffs, Sheila Sasso and Michael Lucci. C. 30. Sasso and Lucci moved to voluntarily dismiss their claims, C. 587-88, 648-49, which the court granted, C. 605, 656. Thus,

seizures because they authorize warrantless searches of their premises, C. 42-45; the primary residence rule, along with the commissioner's adjustment, violates substantive due process because it is not rationally related to a legitimate governmental interest and is impermissibly vague, C. 45-50; the primary residence rule violates equal protection because it arbitrarily discriminates against hosts who rent out single-family homes and units in buildings containing four or fewer dwellings, C. 50-53; and the noise rule violates substantive due process and equal protection because it is vague, C. 56-58, and arbitrarily discriminates against shared housing units and vacation rentals by subjecting them to harsher restrictions than it does hotels and bed-and-breakfasts, C. 58-60.

As to their injuries, Mendez alleged that she owns a home in Chicago, C. 30 ¶ 5, and that she "previously used the Airbnb platform to rent out her home," but "no longer does so for periods of 31 or fewer days, however, to avoid being subject to warrantless searches and other restrictions the Ordinance places on shared housing units," C. 41 ¶ 63. Zaragoza alleged that he owns a home and an additional three-unit residential building in Chicago. C. 30 ¶ 7. He further alleged that he rents out a room in his home as a "shared housing unit" and will be "subject to warrantless searches," "warrantless inspections of [his] guest records," and "the 'excessive noise' rules," C. 41 ¶ 61, and that he "would like to use the Airbnb platform to rent

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Sasso and Lucci are not parties to this appeal.

out a dwelling unit" in his three-unit building but "because the unit is not his primary residence," the ordinance "prohibits him from doing so," C. 41 ¶ 62. Finally, they alleged the City uses "general revenue funds" to implement and enforce the ordinance, C. 41 ¶ 65, and that, as Chicago taxpayers, they "will be liable to replenish" these funds, C. 42 ¶ 66.

On November 30, 2016, plaintiffs moved for a preliminary injunction. C. 77-92. On February 23, 2017, the City sent a letter to plaintiffs confirming "that it will not conduct inspections," pursuant to the inspection provisions, "unless rules and regulations for such inspections are promulgated." C. 219. On February 24, 2017, plaintiffs withdrew their preliminary injunction motion. C. 206-08.

Also on February 24, 2017, the City moved to dismiss the complaint for failure to state a claim and for lack of standing and ripeness. C. 226-31. On October 13, 2017, the circuit court granted in part and denied in part the City's motion. C. 411-33. The court first concluded that plaintiffs have taxpayer standing to challenge the ordinance, C. 414-15, because "it is reasonable to infer" that plaintiffs "will be liable to replace public funds that will be used to administer" the ordinance," C. 415. As to the inspection provisions, the court dismissed that claim as not ripe, C. 415-17, because the ordinance authorizes inspections only "as provided for in rules and regulations promulgated by the building commissioner," C. 416 (quotation omitted), and the "commissioner has not yet promulgated [such] rules and regulations, C. 417. As to the primary residence rule, the court dismissed

both the substantive due process and equal protection challenges to the rule itself, C. 417-20, 423-25, but rejected the City's argument that plaintiffs' challenge to the commissioner's adjustment fails for lack of a property interest, C. 421-23. The court noted that the factors the commissioner is required to consider may be "neither arbitrary nor vague as a matter of law," but "in the absence of any such argument," the City's motion to dismiss the commissioner's adjustment "must be denied." C. 423. Regarding the noise rule, the court dismissed both the substantive due process and equal protection challenges, C. 426-29, because the ordinance "gives a person of ordinary intelligence a clear boundary between the level of permissible [and] impermissible noise," C. 427, and because shared housing units and vacation rentals are not similarly situated to hotels and bed-and-breakfasts and, regardless, there is a rational basis for differential treatment, C. 429.

*Amended Complaint and Second Motion to Dismiss.* On November 8, 2017, plaintiffs filed an amended complaint, C. 434-69, and on December 22, 2017, the City moved to dismiss that complaint, C. 478-94. On April 2, 2018, the court granted the City's motion in part and denied it in part. C. 605. As relevant here, the court concluded that plaintiffs' substantive due process challenge to the commissioner's adjustment fails because plaintiffs have not shown that any "vagueness permeates the ordinance," as required for "a facial challenge to proceed." R. 168.

*Second Amended Complaint and Summary Judgment.* On September 21, 2018, plaintiffs filed a second amended complaint. C. 658-93. The parties

moved for summary judgment, C. 825-52, 1321-45, and on October 15, 2020, the court granted summary judgment to the City, C. 2130. The court first concluded that plaintiffs lacked an injury-in-fact and taxpayer standing. C. 2122. As to taxpayer standing, the court noted that the appellate court decision it had relied on earlier in denying the City's motion to dismiss on the basis of standing had been vacated by the supreme court, and that the law on taxpayer standing is not as "expansive" as that case had suggested. C. 2122. The court explained that taxpayer standing is a "narrow doctrine" that requires a "specific showing that the plaintiffs will be liable to replenish public revenues depleted by" the alleged misuse of funds, C. 2123 (quotations omitted), and that plaintiffs made no such showing, C. 2123-24. The court also concluded that plaintiffs' uniformity clause challenge fails on the merits. C. 2124-30.

*Third Amended Complaint and Third Motion to Dismiss.* On October 15, 2020, plaintiffs filed a third amended complaint, C. 2082-2117, in which they added a claim that the safe-rental provision violates the separation of powers, C. 2115-17. They alleged that the ordinance "entirely delegate[s] the public-policy decision of whether, when, and under what conditions single-night rentals of vacation rentals and shared housing units will be lawful in the City of Chicago to the Commissioner and the superintendent of police," C. 2116 ¶ 148, and that this delegation "directly injures" them "because they previously rented out shared housing units for single nights and would do so again but for the ban," C. 2116 ¶ 151.

On December 7, 2020, the City moved to dismiss the third amended complaint, C. 2132-49, on the grounds that plaintiffs lack standing, C. 2140-41, the claim is not ripe, C. 2141-43, and the claim fails on the merits, C. 2143-49. On October 20, 2021, the court dismissed plaintiffs' claim for lack of standing, C. 2301; R. 351, explaining that the safe-rental provision "is severable from the remainder of the ordinance," so if it were stricken, "the remaining ordinance" would "preclude single night rentals in total," and thus plaintiffs' injury would not be "redressed," R. 351.

## ARGUMENT

The City seeks to preserve affordable housing and the stability, continuity, and character of its residential neighborhoods, while still allowing shared housing units and vacation rentals. Because shared housing units and vacation rentals are allowed in all Chicago neighborhoods, including single-family ones, City Council could rationally take steps to ensure that these businesses will not jeopardize the public health, safety, and welfare of residential neighborhoods. Plaintiffs take issue with various aspects of the ordinance, but their complaint was properly dismissed. Each claim fails, because plaintiffs lack standing, the claim lacks merit, or both.

This court reviews the circuit court's grant of a motion to dismiss de novo, Carlson v. Rehabilitation Institute of Chicago, 2016 IL App (1st) 143853, ¶ 11, taking "all properly pleaded facts as true" and ordering dismissal only when "it appears that no set of facts under the pleadings can

be proved that would entitle plaintiff to recover," id. ¶ 12. This court "may affirm for any reason supported by the record regardless of the basis cited by the [circuit] court." Id. ¶ 11. Under these standards, the judgment of the circuit court should be affirmed.

## I. PLAINTIFFS' CHALLENGE TO THE INSPECTION PROVISIONS FAILS FOR LACK OF STANDING AND RIPENESS.

"The related doctrines of standing and ripeness seek to insure that courts decide actual controversies and not abstract questions." Lebron v. Gottlieb Memorial Hospital, 237 Ill. 2d 217, 252 (2010) (quotation omitted). Plaintiffs claim the inspection provisions violate their right to be free from unreasonable searches and seizures, C. 2094-95, but they fail to present any actual controversy. The inspection provisions do not even apply to plaintiffs, so they cannot show the requisite injury. Additionally, the building commissioner has not yet promulgated any rules governing inspections, and the ordinance provides that inspections will not occur until such rules are in place. Thus, the claim is not ripe.

### A. The Inspection Provisions Do Not Apply To Plaintiffs, So They Cannot Show Any Injury.

To challenge the constitutionality of a statute or ordinance, a plaintiff "must have sustained, or be in immediate danger of sustaining, a direct injury as a result of the enforcement of the challenged [provision]." Carr v. Koch, 2012 IL 113414, ¶ 28; accord In re M.I., 2013 IL 113776, ¶ 32 (plaintiff must "be within the class aggrieved by the alleged unconstitutionality");

Village of Chatham v. County of Sangamon, 216 Ill. 2d 402, 423 (2005) (courts will not determine constitutionality of provision "that does not affect the parties to the cause under consideration"); Greater Chicago Indoor Tennis Clubs, Inc. v. Village of Willowbrook, 63 Ill. 2d 400, 407 (1976) (plaintiff "who is not directly affected by a statute or an ordinance is without standing to attack its constitutionality") (quotations omitted). The inspection provisions do not even apply to plaintiffs, so they are not in any danger of sustaining a direct injury as a result of the provisions' enforcement.

When construing an ordinance, courts "start with the plain language." Sullivan v. Village of Glenview, 2020 IL App (1st) 200142, ¶ 23. Here, the ordinance authorizes the commissioner to inspect "any vacation rental," Municipal Code of Chicago, Ill. § 4-6-300(e)(1), or "shared housing unit operated by a shared housing unit operator," id. § 4-16-230, and defines "shared housing unit operator" as "any person who has registered, or who is required to register, as the shared housing host of more than one shared housing unit," id. § 4-16-010. Thus, the provisions apply only to individuals who operate vacation rentals or more than one shared housing unit. That does not describe plaintiffs. They allege that they rent out their homes "as shared housing units," C. 2093-94 ¶¶ 55-56, 64, a term the ordinance defines to explicitly exclude "vacation rentals," Municipal Code of Chicago, Ill. § 4-14-010; see also id. § 4-6-300(a) (defining "vacation rental" to exclude "shared housing units"). And they allege that they each operate only a single shared housing unit. C. 2093 ¶ 55 (Zaragoza uses Airbnb "to rent out a home"); id.

(Mendez used Airbnb "to rent out a home"). And while Zaragoza alleges he also owns a three-unit building that he wishes to use for shared housing, he acknowledges he is unable to do so because it is not his primary residence, C. 2093 ¶ 57, and plaintiffs abandoned on appeal any challenge to the primary residence rule. The inspection provisions do not even apply to plaintiffs, so they are plainly not in any danger of sustaining a direct injury as a result of any inspections, and thus lack standing.

### B. The Building Commissioner Has Not Yet Promulgated Any Rules Regarding Inspections, So Plaintiffs' Claim Is Not Ripe.

The ripeness doctrine prevents courts from prematurely "entangling themselves in abstract disagreements over administrative policies" and interfering in administrative decisions before they have "been formalized" and their "effects felt in a concrete way." Morr-Fitz, Inc. v. Blagojevich, 231 Ill. 2d 474, 490 (2008) (quotation omitted). A claim is not ripe "'[i]f the harm that a plaintiff claims is merely speculative or contingent,'" Township of Jubilee v. State, 405 Ill. App. 3d 489, 498 (3d Dist. 2010) (quoting State Building Venture v. O'Donnell, 391 Ill. App. 3d 554, 561 (1st Dist. 2009), rev'd on other grounds, 239 Ill. 2d 151 (2010)); see also Drayson v. Wolff, 277 Ill. App. 3d 975, 979 (1st Dist. 1996) ("contingent or uncertain"), such as where the alleged harm is contingent on an agency action that has not yet occurred or may not ever occur, e.g., National Marine, Inc. v. Illinois EPA, 159 Ill. 2d 381, 390-91 (1994) (challenge to agency's preliminary notice of potential liability not ripe where notice did not determine plaintiff's liability

and it was "not clear" whether agency would "even initiate" any "enforcement proceeding against plaintiff").

Plaintiffs' alleged harm – being subject to inspections – is contingent on agency action: the building commissioner's promulgating rules governing inspections. The ordinance authorizes inspections at a time and in a manner "as provided for in rules promulgated by the building commissioner." Municipal Code of Chicago, Ill. §§ 4-6-300(e)(1), 4-16-230. Thus, without any implementing rules, the ordinance does not subject plaintiffs to inspections. Where a statute "merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its command," the statute itself does not "have any force" in the absence of regulations. United States v. Mersky, 361 U.S. 431, 437-38 (1960). The ordinance here declares the "range of its operation" – inspections of shared housing units and vacation rentals – but leaves for the building commissioner to determine "the means to be utilized to effectuate its command" – the time and manner in which the commissioner may conduct those inspections. In other words, the rules will contain critical elements of the inspection scheme not provided in the ordinance itself.

Importantly, those elements bear directly on the constitutionality of the inspection scheme. An administrative search is constitutional so long as "the subject of the search" has "an opportunity to obtain precompliance review before a neutral decisonmaker." City of Los Angeles v. Patel, 576 U.S. 409, 420 (2015). The ordinance directs the commissioner to prescribe the

time and manner in which it will conduct inspections and, without those rules, the court cannot yet assess whether the inspection scheme includes the required precompliance review. In addition, whether the commissioner will even promulgate rules, let alone whether those rules will violate the constitution, is wholly speculative. Plainly, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986); see also EPA v. Brown, 431 U.S. 99, 104 (1977) ("[T]o review regulations not yet promulgated . . . would be wholly novel[.]"). For all these reasons, plaintiffs' claim regarding the inspection provisions is not ripe.

Plaintiffs nevertheless insist they have "stated a meritorious challenge" to the inspection provisions. Brief of Plaintiffs-Appellants [hereafter "Plaintiffs Br."] 15. But their argument merely highlights why this claim is not ripe. Plaintiffs acknowledge that administrative searches are constitutional so long as "'the subject of the search [is] afforded an opportunity to obtain precompliance review before a neutral decisionmaker.'" Id. at 16 (quoting Patel, 576 U.S. at 420). And they do not dispute that agency rules can properly limit the scope of a broadly worded statute. That is the lesson in Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985), which plaintiffs cite, Plaintiffs Br. 18, where the court upheld a statute authorizing "unannounced visits to family day care homes at any time," as properly limited by regulations providing "standards to guide inspectors" and "restrict" their "unbridled discretion," Rush, 756 F.2d at 721-22 (quotation

omitted). See also Anobile v. Pelligrino, 303 F.3d 107, 118 (2d Cir. 2002) ("enabling statute" need not provide safeguards for administrative searches, where safeguards will be provided in regulatory scheme).

Plaintiffs also argue that the ordinance here – which expressly directs the building commissioner to promulgate rules limiting the ordinance's scope – authorizes "unlimited inspections" "with no opportunity for precompliance review." Plaintiffs Br. 17. That argument is baseless. They point to language that vacation rentals, for example, may be inspected "'at any time and in any manner,'" id. (quoting Municipal Code of Chicago, Ill. § 4-6-300(e)(1)), but blatantly ignore the qualifying language immediately following that clause – "as provided for in rules promulgated by the building commissioner," Municipal Code of Chicago, Ill. § 4-6-300(e)(1); see id. § 4-16-230. The commissioner is not authorized to conduct inspections at any time and in any manner; he is authorized to conduct inspections at a time and in a manner as provided for in promulgated rules – rules that do not yet exist and, when promulgated, may provide for precompliance review. It is axiomatic that "[n]o part of a statute should be rendered meaningless or superfluous," Van Dyke v. White, 2019 IL 121452, ¶ 46, and that courts must not "read out of a statute a limitation that the legislature expressed," Commonwealth Edison Co. v. Illinois Commerce Commission, 398 Ill. App. 3d 510, 523 (2d Dist. 2009). That is precisely what plaintiffs are asking the court to do here.

Plaintiffs further argue that the lack of rules governing inspections "is

a reason why an injunction . . . is proper," Plaintiffs Br. 18, and they cite Rush for the proposition that courts may enjoin the enforcement of an administrative search statute in the absence of regulations "sufficiently limiting [the government's] search power," id. (citing Rush, 756 F.2d at 723). Plaintiffs misapply Rush. Unlike the ordinance here, which expressly calls for rules limiting the building commissioner's search power, the statute in Rush contained no such language. Rather, it authorized officials to "enter and inspect any place providing personal care, supervision, and services at any time, with or without advance notice." 756 F.2d at 716 n.5. Thus, enforcement was not contingent on any rules prescribing the time and manner in which officials could conduct inspections; it authorized immediate inspections "at any time or any place providing care and supervision to children." Id. at 722. Here, the commissioner may conduct inspections only "as provided for" in its implementing rules, which means there can be no inspections until there are rules. Indeed, courts have recognized the distinction between a statute – like the ordinance here – that "specifically 'call[s] for'" regulations and thus "has no force or effect unless and until an agency promulgates regulations to enforce it," Maxwell v. Rubin, 3 F. Supp. 2d 45, 49 (D.D.C. 1998) (quoting Mersky, 361 U.S. at 438), and those, as in Rush, where the law does not require such regulations, Maxwell, 3 F. Supp. 2d at 49.

None of the other cases plaintiffs cite for their assertion that they "are entitled to the relief they seek now," Plaintiffs Br. 19, is remotely on point.

In Miles Kimball Co. v. Anderson, 128 Ill. App. 3d 805 (1st Dist. 1984), the defendant demanded from plaintiff's counsel $150,000 to settle a claim, id. at 807, and in Dolezal v. Plastic & Reconstructive Surgery, S.C., 266 Ill. App. 3d 1070 (1st Dist. 1994), the plaintiff performed procedures at a hospital he was expressly prohibited from servicing under a noncompetition agreement, id. at 1083. Thus, both involved actual controversies – a far cry from the circumstances here, where plaintiffs challenge a nonexistent inspection scheme.

For all these same reasons, plaintiffs' argument that there are no "actual legal constraint[s]" preventing them from being "searched at any time," Plaintiffs Br. 19, is meritless. The ordinance itself is a legal constraint because, by its plain language, it has no force or effect in the absence of rules. Plaintiffs assert that "it is not clear from the Ordinance that the City must wait to conduct searches until the regulations have been promulgated," id. at 18-19, but, again, they do not address the ordinance's qualifying language. And the only case they cite to support this argument, Gem Financial Service, Inc. v. City of New York, 298 F. Supp. 3d 464 (E.D.N.Y. 2018), is inapposite. That case involved an inspection scheme without any procedural safeguards or any call for regulations providing such safeguards. Id. at 474-75. The deputy commissioner of police had drafted a memo outlining procedures for ensuring inspections "survive constitutional challenge," id. at 474, but the memo had "no binding effect," so it could not "save the statute from a facial challenge," id. at 499. That is not the case here, where the ordinance itself

expressly calls for rules that, once promulgated, will be binding on the building commissioner.

Finally, plaintiffs argue that "[t]here is no reason to believe that regulations will remedy" any deficiency in the ordinance, particularly since City Council amended the ordinance to add a warrant requirement for the inspection of guest records "but chose not to do so with respect to premises inspections." Plaintiffs Br. 18. This argument is frivolous. City Council's decision to amend one ordinance and not the other does not bear on whether the building commissioner will draft rules providing procedural safeguards. In fact, unlike the premises provisions, the guest record provisions did not call for any implementing rules; they expressly imposed on home sharers a duty to "keep guest registration records" and "make such records available for inspection" by city officials "during regular business hours or in the case of an emergency." Municipal Code of Chicago, Ill. §§ 4-6-300(f)(3), 4-14-040(b)(9) (2017); C. 144, 172. So, the only way for City Council to provide any safeguards was to amend the ordinance. There is no reason for City Council to define procedures for the premises provisions because it tasked the building commissioner with doing so. More fundamentally, plaintiffs cannot avoid dismissal on their "belief" that the rules will not provide any safeguards; courts can hear only "actual controversies," not "abstract questions" based solely on speculation. See Lebron, 237 Ill. 2d at 252. Thus, plaintiffs' challenge to the inspection provisions is not ripe.

## II. PLAINTIFFS' CHALLENGE TO THE COMMISSIONER'S ADJUSTMENT FAILS FOR LACK OF STANDING AND ON THE MERITS.

Plaintiffs claim that the commissioner's adjustment to the primary residence rule violates substantive due process because the factors are vague, unintelligible, and not reasonably related to the public health, safety, and welfare, and give the commissioner unbridled discretion to make exceptions to the primary residence rule. C. 2098 ¶¶ 80-82. But they have abandoned on appeal their challenge to the primary residence rule itself, and arguments abandoned on appeal are "forfeited," AMCO Insurance Co. v. Erie Insurance Exchange, 2016 IL App (1st) 142660, ¶ 18 n.1, and cannot be raised in the reply brief, People v. Chatman, 2016 IL App (1st) 152395, ¶ 40; see Ill. Sup. Ct. R. 341(h)(7). And as we explain below, eliminating the commissioner's adjustment would not provide plaintiffs any relief from the primary residence rule; and without any redressable injury, plaintiffs lack standing. In addition, the commissioner's adjustment satisfies substantive due process because it is rationally related to a legitimate governmental interest and is not facially vague.

### A. Plaintiffs Cannot Allege A Redressable Injury Because, Even Without The Severable Commissioner's Adjustment Provision, The Primary Residence Rule Still Applies.

To support standing, a plaintiff must show: (1) an injury to a legally cognizable interest; (2) fairly traceable to the defendant's actions; (3) that is "substantially likely to be prevented or redressed by the grant of the relief

requested." Village of Chatham, 216 Ill. 2d at 419-20. Where a plaintiff challenges the constitutionality of a statute that is severable, it must demonstrate standing with respect to each challenged provision. See id. at 420-24. In Village of Chatham, the county challenged a statute providing that property subject to an annexation agreement is also subject to the ordinances, control, and jurisdiction of the annexing municipality, on the ground that an amendment exempting certain counties from that provision created an arbitrary classification. Id. at 416-19. The county complained that it had "suffered an injury in being denied the same protection" as the counties entitled to the exemption. Id. at 421. The court rejected that argument, explaining that if it were "to strike down" the amendment, the county "would not obtain relief or be impacted in any way" because the remaining provision subjecting annexed properties to the ordinances, control, and jurisdiction of the annexing municipality would remain in place and "apply to all counties." Id. at 422. For that reason, the county had not sustained an injury "likely to be redressed by the relief requested" and thus lacked standing. Id. at 423-24.

Village of Chatham is controlling here. Plaintiffs allege injury from a rule, yet they challenge only the exception. And an order invalidating the exception will not provide plaintiffs any relief from the rule itself. Mendez does not even allege that the primary residence rule or the commissioner's adjustment prevents her from renting out her home. And although Zaragoza alleges the primary residence rule "prevents him from renting out a unit,"

C. 2100 ¶ 84, on appeal he challenges only the commissioner's adjustment, which, we explain below, is severable from the primary residence rule, which would remain in place even if the court invalidates the adjustment.

The Municipal Code contains a severability clause, Municipal Code of Chicago, Ill. § 1-4-200, and such clauses "establish a presumption that the legislature intended for an invalid statutory provision to be severable," Jacobson v. Department of Public Aid, 171 Ill. 2d 314, 329 (1996), which can be overcome with evidence that "the legislature would not have passed the law without the provisions deemed invalid," In re Pension Reform Litigation, 2015 IL 118585, ¶ 95. Plaintiffs have never even argued that the commissioner's adjustment is not severable from the primary residence rule, let alone introduced any evidence of legislative intent. And it is clear from the text and purpose of the ordinance that City Council intended for the primary residence rule to survive if other provisions were invalidated.

In determining whether a statutory provision is severable, courts first consider "'whether the valid and invalid portions of the statute are essentially and inseparably connected in substance.'" People v. Henderson, 2013 IL App (1st) 113294, ¶ 19 (quoting People v. Alexander, 204 Ill. 2d 472, 484 (2003)). If the valid sections "are complete and capable of being executed," that is strong evidence of severability. Pension Reform, 2015 IL 118585, ¶ 95. The commissioner's adjustment is codified in an entirely different section of the Code than the primary residence rule, so it can easily be deleted from the ordinance without upsetting the rule. In other words, the

primary residence rule would remain complete and capable of being enforced. Next, courts consider "whether the legislature would have enacted the valid portions without the invalid portions," Henderson, 2013 IL App (1st) 113294, ¶ 19, a determination that can be made by considering whether the ordinance "still serves" its legislative purpose, Northern Illinois Home Builders Association v. County of DuPage, 165 Ill. 2d 25, 48-49 (1995) (quotation omitted). Here, without the commissioner's adjustment, the primary residence rule would still preserve affordable housing and protect neighborhood stability, continuity, and character, and plaintiffs have adduced no evidence to the contrary. Thus, plaintiffs have not alleged a redressable injury, as required for standing.

### B. The Commissioner's Adjustment Is Rationally Related To A Legitimate Governmental Interest And Is Not Facially Vague.

In any event, the commissioner's adjustment satisfies due process. An ordinance satisfies due process if it "bear[s] a rational relationship to a legitimate governmental interest," Fedanzo v. City of Chicago, 333 Ill. App. 3d 339, 347 (1st Dist. 2002), and "'convey[s] sufficiently definite warning and fair notice of what conduct is proscribed,'" O'Donnell v. City of Chicago, 363 Ill. App. 3d 98, 106 (1st Dist. 2005) (quoting City of Aurora v. Navar, 210 Ill. App. 3d 126, 133 (2d Dist. 1991)). Importantly, ordinances are "entitled to a presumption of validity," which can be overcome only by "'clear and convincing evidence,'" id. at 105 (quoting City of Evanston v. Ridgeview House, Inc., 64 Ill. 2d 434, 440 (1962)), and any "doubt must be resolved in

favor of an interpretation which supports the ordinance," Lakin v. City of Peoria, 129 Ill. App. 3d 651, 656 (3d Dist. 1984). Plaintiffs mounting a facial challenge "face an especially difficult burden," Berrios v. Cook County Board of Commissioners, 2018 IL App (1st) 180654, ¶ 30, of showing that the ordinance "is incapable of any valid application," Maschek v. City of Chicago, 2015 IL App (1st) 150520, ¶ 82. "'Facial invalidation is, manifestly, strong medicine that has been employed by the court sparingly and only as a last resort.'" Berrios, 2018 IL App (1st) 180654, ¶ 30 (quoting Pooh-Bah Enterprises, Inc. v. County of Cook, 232 Ill. 2d 463, 473 (2009)).

The commissioner's adjustment easily satisfies due process. First, it is rationally related to a legitimate interest in maintaining affordable housing and preserving neighborhood stability, continuity, and character. "The City has a legitimate governmental interest in encouraging the long-term stability and economic growth of its neighborhoods," LMP Services v. City of Chicago, 2019 IL 123123, ¶ 20, as well as a related interest in preventing the "displacement of lower income families," Nordlinger v. Hahn, 505 U.S. 1, 12 (1992); see also id. (government "has a legitimate interest in local neighborhood preservation, continuity, and stability"). The ordinance authorizes the commissioner to grant very limited exceptions to the primary residence rule to "eliminate an extraordinary burden on the applicant," where doing so "would not detrimentally impact the health, safety, or general welfare of surrounding property owners or the general public." Municipal Code of Chicago, Ill. §§ 4-6-300(l)(1), 4-14-100(a). The adjustment thus

carries forward the goals of the primary residence rule, to prevent hosts from buying up single-family homes and other small dwellings and using them solely for shared housing – which helps ensure that this housing is available for families who need it and protects residential neighborhoods from excessive noise and other disturbances.

Second, the commissioner's adjustment provides adequate notice of what conduct is proscribed. An ordinance fails to provide adequate notice – or, is unconstitutionally vague – if "'persons of ordinary intelligence must necessarily guess at its meaning,'" O'Donnell, 363 Ill. App. 3d at 106 (quoting Waterfront Estates Development, Inc. v. City of Palos Hills, 232 Ill. App. 3d 367, 376-77 (1st Dist. 1992)), or it fails to provide "reasonable standards to law enforcement to ensure against authorizing or even encouraging arbitrary and discriminatory enforcement," Wilson v. County of Cook, 2012 IL 112026, ¶ 21. On a facial challenge, the plaintiff must show that the vagueness "'permeate[s] the text'" of the ordinance. Id. ¶ 23 (quoting City of Chicago v. Morales, 527 U.S. 41, 55 (1999)). Here, the commissioner's adjustment factors are sufficiently definite to allow persons of ordinary intelligence to understand when the primary residence rule applies and to ensure the commissioner fairly and impartially authorizes adjustments.

When construing an ordinance, the court examines the plain language "in light of its common understanding and practice," Wilson, 2012 IL 112026, ¶ 24, and must "consider the ordinance in its entirety," Vino Fino Liquors, Inc. v. License Appeal Commission, 394 Ill. App. 3d 516, 524 (1st Dist. 2009),

as well as the "legislative objective and the evil the [law] is designed to remedy," In re R.C., 195 Ill. 2d 291, 299 (2001); see, e.g., Medley v. Department of Insurance, 223 Ill. App. 3d 813, 818-19 (4th Dist. 1992) ("rehabilitation sufficient to warrant the public trust" not clear on its own, but in context of insurance licensing, it was clear that licensee must "be trusted to engage in selling and securing of insurance policies"); City of Collinsville v. Seiber, 82 Ill. App. 3d 719, 725-26 (5th Dist. 1980) ("unsightly" and "junk" were "significantly explained in the context of the ordinance as a whole"). And where the ordinance does not define terms, "courts will assume" they have "their ordinary and popularly understood meaning." Wundsam v. Gilna, 97 Ill. App. 3d 569, 577 (1st Dist. 1981).

None of the terms in the commissioner's adjustment is beyond the ken of the average person. Terms like "geography" and "population density" are common concepts, and every person should know what constitutes "illegal activity" or "economic hardship." And the text and purpose of the ordinance illuminate how those terms are relevant to determining when an adjustment is appropriate. As we note above, the commissioner's adjustment seeks to preserve housing affordability and neighborhood stability, continuity, and character to the greatest extent possible. And elsewhere, the ordinance prohibits such nuisances as drug trafficking, violent acts, overcrowding, excessive noise, public drunkenness, harassment, unlawful garbage disposal, and lewd conduct. Municipal Code of Chicago, Ill. §§ 4-6-300(a), (g), 4-14-010, 4-14-050(a). Thus, it is clear the commissioner may grant an adjustment

only where an applicant shows a significant economic need and its rental would not detrimentally impact the community in the ways described above.

In that context, one can easily imagine how the commissioner would apply these factors. "Relevant geography" and "relevant population density" allow the commissioner to consider whether the unit is in an area composed primarily of single-family homes or one where there is already more noise and activity. "The degree to which the sought adjustment varies from prevailing limitations" and "size of the building and the number of units contemplated for the proposed use" allow the commissioner to consider the extent the adjustment will impact housing availability or neighborhood continuity, stability, and character. For example, an application to indefinitely rent out every unit in a four-unit building would have a greater impact on these interests than an application to rent out, for a limited time, a single unit in a much larger building. "Legal nature and history of the applicant" and "any police reports or other records of illegal activity or municipal code violations at the location" allow the commissioner to consider the risk the applicant poses to the safety of the community. Where the applicant has been cited numerous times for excessive noise, lewdness, public drunkenness, or other disturbances, or has a history of dealing drugs or committing violent acts, they may be unable to operate shared housing in a responsible manner. Likewise, the commissioner may consider "the measures the applicant proposes to implement and maintain quiet and security in conjunction with the use" and "whether the affected neighbors

support or object to the proposed use." Again, these factors allow the commissioner to determine whether the operation will create a nuisance. And, finally, the commissioner may consider "any extraordinary economic hardship to the applicant, due to special circumstances, that would result from a denial." Thus, if the applicant demonstrates, for example, that it cannot sell or otherwise use its property and requires the additional income, then an adjustment may be warranted.

None of plaintiffs' arguments undermines this reading. Plaintiffs offer only conclusory statements that certain factors are "vague and unintelligible" Plaintiffs Br. 21-22, but they fail to support this with any authority or reasonable construction of the ordinance and instead pluck terms out of their context, which, as we explain, is improper, see Vino Fino, 394 Ill. App. 3d at 524. They also argue that the ordinance does not explain how the factors are relevant to whether someone is entitled to an adjustment, Plaintiffs Br. 21-23, but that too ignores the ordinance's context and purpose. "Relevance is not so esoteric and amorphous a concept that it would allow the decision maker to demand virtually anything from an applicant." XLP Corp. v. County of Lake, 359 Ill. App. 3d 239, 243-44 (2d Dist. 2005). Rather, information is relevant "only if it relates in some substantial way" to the purpose of the ordinance. Id. at 244. Thus, the commissioner cannot demand just any information from applicants, but only information related to determining whether the applicant has an economic hardship and can operate its shared housing unit in a way that preserves housing affordability

and neighborhood continuity, stability, and character.

Essentially, plaintiffs urge a level of precision not required or even possible in legislative drafting. "'Condemned to the use of words, we can never expect mathematical certainty from our language.'" People v. Ridens, 59 Ill. 2d 362, 371 (1974) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)); accord City of Chicago v. Pooh-Bah Enterprises, Inc., 224 Ill. 2d 390, 444 (2006) ("[T]here are limits to the degree of precision attainable by the English language."); Everly v. Chicago Police Board, 119 Ill. App. 3d 631, 639 (1st Dist. 1983) (ordinance need not "spell out in detail" conduct proscribed). On the contrary, terms may be "marked by 'flexibility and reasonable breadth,'" Ridens, 59 Ill. 2d at 371 (quoting Grayned, 408 U.S. at 110), to allow for situations the legislative body could not anticipate, Everly, 119 Ill. App. 3d at 639. Here, it is not possible for City Council to anticipate every instance where "geography" or "population density" may be relevant, and the terms are flexible enough to allow the commissioner to consider each applicant's unique circumstances. In addition, the constitution tolerates a greater "degree of vagueness" where the law is civil in nature, Wilson, 2012 IL 112026, ¶ 23; and business regulations, in particular, "may be less precise than other forms of legislation," Pooh-Bah, 224 Ill. 2d at 443. In short, when construing an ordinance, particularly one regulating business activity, "common sense cannot and should not be suspended." Id. Plaintiffs have, indeed, abandoned all common sense by suggesting that applicants who wish to operate shared housing cannot, under any circumstance, determine how

these factors are relevant to their applications.

Furthermore, plaintiffs do not even identify any set of circumstances in which the application of these factors is uncertain. But even if their conclusory assertions could be read as such, that is not enough to invalidate the ordinance on its face. An ordinance is not vague merely "because the mind can conjure up hypothetical situations in which the meaning of some terms may be in question." Granite City Division of National Steel Co. v. Illinois Pollution Control Board, 155 Ill. 2d 149, 164 (1993). There will always be those "marginal cases," Gadlin v. Auditor of Public Accounts, 414 Ill. 89, 96 (1953) (quotation omitted), where the terms are "susceptible to misapplication," Granite City, 155 Ill. 2d at 164, but that does not render an ordinance unconstitutionally vague, id.; see also Gadlin, 414 Ill. at 96. Plaintiffs have done nothing more than speculate that there may be circumstances in which the application of the criteria is uncertain. That is not sufficient to carry plaintiffs' heavy burden on a facial challenge.

Plaintiffs also argue that the factor allowing the commissioner to consider "whether the affected neighbors support or object to the proposed use" improperly delegates to the commissioner the authority "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." Plaintiffs Br. 23-24. Again, the commissioner's discretion under this factor is properly limited by the purpose of the ordinance, to preserve housing and neighborhood character, so the "privately-

interested desires" of neighbors that are not in any way related to that purpose cannot be considered. Moreover, "[t]he desires of neighboring property owners" are frequently considered in zoning and other property cases, and such views are relevant to the extent they inform whether a particular use will be consistent with the purpose of the ordinance. People ex rel. Klaeren v. Village of Lisle, 316 Ill. App. 3d 770, 783-84 (2d Dist. 2000); see also Amalgamated Trust & Savings Bank v. Cook County, 82 Ill. App. 3d 370, 382 (1st Dist. 1980) ("rights of adjacent and abutting property owners are to be considered"). For example, if a neighbor presents evidence that a proposed unit will impact the neighborhood or that the applicant has previously engaged in disruptive conduct that has created a nuisance, that is relevant and appropriately considered.

Finally, plaintiffs cite several cases where "Illinois courts have struck down other ordinance provisions that did not sufficiently constrain local officials' discretion to grant or deny a permit or license," Plaintiffs Br. 25, but none of those cases involved even remotely comparable ordinances. Rather, they all involved ordinances governing building design and materials and used such terms as "inappropriate" and "incompatible," Waterfront Estates, 232 Ill. App. 3d at 377-78; "harmonious conformance," "inappropriate materials," "durable quality," "good proportions," and "monotony of design," R.S.T. Builders, Inc. v. Village of Bolingbrook, 141 Ill. App. 3d 41, 44 (3d Dist. 1986); "excessive similarity or dissimilarity of design," Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 221 (1st Dist.

1968); and "value," "important," "significant," and "unique," Hanna v. City of Chicago, 388 Ill. App. 3d 909, 916 (1st Dist. 2009). Those are all descriptive terms informed by an individual's own preferences – what might be inappropriate, harmonious, important, or monotonous to one person might not be to another. That is not the case here, where the terms are objective and limited by the ordinance's clear purpose. Moreover, in Hanna, the court noted that, while "professionals in disciplines of history, architecture, historic architecture, [and] planning" may grasp terms like value, important, significant, and unique, "a person of common intelligence" cannot "determine from the face of the ordinance" how they apply. 388 Ill. App. 3d at 916. No such professional qualifications are necessary to understand the terms here or their relevance to an adjustment. Thus, the commissioner's adjustment satisfies substantive due process.

## III. PLAINTIFFS' CHALLENGES TO THE NOISE RULE FAIL ON THE MERITS.

Plaintiffs' challenges to the noise rule should also be rejected. They claim the noise rule violates substantive due process because it is vague, unintelligible, and allows for "arbitrary and discriminatory enforcement," C. 2108 ¶ 115, and equal protection both because it subjects shared housing units and vacation rentals to different standards than it does hotels and bed-and-breakfasts, C. 2110 ¶ 120, and because "[t]his difference in treatment bears no reasonable relationship to protecting the public's health, safety, or welfare," C. 2110 ¶ 121. These claims fail. The noise rule is not vague in all

applications, nor does it arbitrarily discriminate against shared housing units and vacation rentals. Thus, the noise rule satisfies substantive due process and equal protection.

### A. The Noise Rule Is Not Vague In All Applications.

An ordinance is not impermissibly vague if "persons of ordinary intelligence" need not "guess at its meaning." O'Donnell, 363 Ill. App. 3d at 105 (quotation omitted). The noise rule easily satisfies this requirement. It prohibits, between the hours of 8:00 p.m. and 8:00 a.m., from any shared housing unit or vacation rental, any sound that is "louder than average conversational level at a distance of 100 feet or more," as measured from the property line, Municipal Code of Chicago, Ill. §§ 4-6-300(a), 4-14-010. The average person engages in conversations daily, so should reasonably be aware of what constitutes an "average conversational level."

Plus, the noise rule gains meaning from its context. The "particular context" of a noise ordinance is relevant to determining "the prohibited quantum of disturbance." Grayned, 408 U.S. at 112 (quotation omitted). The rule prohibits excessive noise generated between 8:00 p.m. and 8:00 a.m. from shared housing units and vacation rentals, which are zoned as dwellings, so what is "louder than average conversational level" is measured by its impact on the typical overnight activity in residential neighborhoods, namely, sleeping. The average person lives in a residential neighborhood and regularly ensures that any nighttime activities – including conversations – do not disturb neighbors. Guests staying at shared housing units and

vacation rentals are no less capable of moderating their conduct to avoid disturbing a slumbering neighborhood.

Moreover, "louder than average conversational level" is even more precise than those standards upheld in other noise ordinances. For example, in City of Chicago v. Reuter Brothers Iron Works, Inc., 398 Ill. 202 (1947), the court held that the terms "disagreeable" and "annoying" have a "well-established meaning" in the context of "a common-law nuisance." Id. at 207. Likewise in Town of Normal v. Stelzel, 109 Ill. App. 3d 836 (4th Dist. 1982), the court held that the terms "loud and raucous," although abstract, have "through daily use, acquired a content that conveyed to any interested person a sufficiently accurate concept of what [is] forbidden," id. at 840, and in Mister Softee of Illinois, Inc. v. City of Chicago, 42 Ill. App. 2d 414 (1st Dist. 1963), the terms "distinctly and loudly audible," too, had acquired meaning through daily use, id. at 420-21. The phrase "louder than average conversational level" is even clearer than terms like "loud" and "raucous" because it is less capable of subjective interpretation. And it is more definite than "distinctly and loudly audible" because it provides a metric to determine when the offending noise has become so audible as to run afoul of the ordinance – when it is louder than an average conversation. As courts have recognized, "'noise regulation poses special problems of draftsmanship and enforcement,' as the 'nature of sound makes resort to broadly stated definitions and prohibitions not only common but difficult to avoid.'" People v. Stephens, 66 N.E.3d 1070, 1073 (N.Y. 2016) (quoting People v. New York

Trap Rock Corp., 442 N.E.2d 1222, 1226 (N.Y. 1982)). The noise rule, despite lacking specific decibel levels, provides an objective, common sense standard that the average person can easily apply.

Plaintiffs' argument that it is "impossible to say" when unamplified human voices are considered "louder than average conversational level," Plaintiffs Br. 27, is nonsensical. People moderate their voice levels daily when they engage in conversations – they know how to raise their voices to be heard over the din of a crowded restaurant or lower them to a whisper in the library – and they also moderate their nighttime activities to avoid disturbing sleeping neighbors. Indeed, as the circuit court noted, even a "toddler" can learn when to use "his 'inside' voice." C. 428. And even if there were marginal situations where it was not clear whether a particular noise violates that standard, that would not be fatal. On a facial challenge, the vagueness must "permeate the text" of the ordinance, Wilson, 2012 IL 112026, ¶ 23 (quotation and alteration omitted), and it plainly does not do so here. It will be obvious, for example, when guests are yelling, screaming, singing, or laughing uproariously during a raucous party, that their voices have exceeded an average conversational level. Plaintiffs fail to even acknowledge such scenarios.

Instead, plaintiffs point to hypothetical situations involving crying babies and garage door openers. Plaintiffs Br. 27. But an ordinance is not unconstitutional merely because someone can dream up a hypothetical circumstance where the terms may be uncertain. Granite City, 155 Ill. 2d at

164. More importantly, this argument ignores the text of the noise rule and its context. For starters, the rule prohibits only noise exceeding average conversational level "at a distance of 100 feet or more," as measured from the property line of the unit. Municipal Code of Chicago, Ill. §§ 4-6-300(a), 4-14-010. The average lot width in Chicago is 25 feet, Scott Heskes, "Sizing Homes for the Second City," *American Builders Quarterly*, Apr. 1, 2012, https://americanbuildersquarterly.com/2012/sizing-homes-for-the-second-city/, so noise must exceed average conversational level as heard from approximately four houses away. The sounds of a crying baby and garage door opener may exceed an average conversational level when heard from a few feet away, but likely not from several houses away. In fact, when considered in light of the distance standard, the risk of marginal cases evaporates. Even a loud conversation is unlikely to disturb residents four houses down, while a raucous party with yelling, screaming, and loud music on the front lawn most definitely will.

The absurdity in plaintiffs' argument is even more apparent in the context of the noise rule's application only during overnight hours in residential neighborhoods. Essentially, plaintiffs argue that the ordinance will prohibit many noises normally heard within residential neighborhoods – like crying babies and garage door openers. But this court rejected a similar argument in Mister Softee, where the plaintiffs argued that an ordinance prohibiting "distinctly and loudly audible" noises on the public way would prohibit whistling, honking, radios, holiday bells, and other noises "normally

heard on city streets," allowing city officials "unlimited discretion to pick and choose which sounds they wish to restrain and which they seek to permit." 42 Ill. App. 2d at 419-20. The court explained that the ordinance plainly does not seek to prohibit any and all noises that are commonplace on city streets, but only those that are "distinctly and loudly audible" – terms that have acquired meaning through daily use, such that they reasonably convey what conduct is prohibited in this context. Id. at 420-22. In other words, the ordinance sought to regulate only those noises clearly out of character in the context of a busy city street, a determination best "left to the judgment and discretion of administrative officers." Id. at 421. Likewise, the ordinance here clearly seeks to regulate only those noises out of character for a nighttime residential neighborhood, not babies or garage doors – sounds that are a normal and expected part of the background. When construing an ordinance, particularly one regulating business activity, "common sense cannot and should not be suspended." Pooh-Bah, 224 Ill. 2d at 444. Distinguishing between a noise that violates the ordinance and one that does not is a common sense assessment that can properly be made by ordinary individuals, as well as the city officials tasked with enforcement.

Finally, plaintiffs cite Navar, but that case does not help them. The court there struck down the ordinance not on vagueness grounds, but because it prohibited all commercial activity audible at adjacent premises after 9:00 p.m. without any qualifying language. 210 Ill. App. 2d at 134-36. In other words, there was "no language" in the ordinance by which an operator of a

commercial activity "can judge whether the noise it generates is of a kind or volume to constitute a nuisance." Id. at 134. By contrast, the noise rule provides a clear, objective standard – it prohibits noise "louder than average conversational level at a distance of 100 feet." Municipal Code of Chicago, Ill. §§ 4-6-300(a), 4-14-010. Thus, the rule satisfies substantive due process.

### B. The Noise Rule Does Not Arbitrarily Discriminate Against Shared Housing Units And Vacation Rentals.

To allege a viable equal protection claim, "a plaintiff must allege that there are other similarly situated people who are being treated differently than him and that there is no rational basis for the difference." Strauss v. City of Chicago, 2021 IL App (1st) 191977, ¶ 45, aff'd on other grounds, 2022 IL 127149. Rational-basis review is "'highly deferential to the legislature,'" so courts must not "focus on whether the provision at issue is the best method to achieve the desired result or even wise." Dotty's Café v. Illinois Gaming Board, 2019 IL App (1st) 173207, ¶ 34 (quoting Village of Lake Village v. Stokovich, 211 Ill. 2d 106, 125 (2004)). Rather, legislation "passes the rational basis test if there is any reasonably conceivable state of facts that could provide a rational basis for the legislation." Strauss, 2021 IL App (1st) 191977, ¶ 46 (quotation omitted). Importantly, legislative judgments "are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data," Arangold Corp. v. Zehnder, 204 Ill. 2d 142, 147 (2003), and the court "'may hypothesize reasons for the legislation, even if the reasoning advanced did not motivate the

legislative action,'" Dotty's Café, 2019 IL App (1st) 173207, ¶ 34 (quoting People ex rel. Lumpkin v. Cassidy, 184 Ill. 2d 117, 124 (1998)). The noise rule, which applies to shared housing units and vacation rentals but not to hotels and bed-and-breakfasts, easily satisfies these standards.

Shared housing units and vacation rentals are not similarly situated to hotels and bed-and-breakfasts, and it is rational to impose more stringent noise restrictions on the former. "Preserving quiet is a significant governmental interest," People v. Arguello, 327 Ill. App. 3d 984, 988 (1st Dist. 2002), as is the preservation of neighborhood stability, LMP Services, 2019 IL 123123, ¶ 20, and the government may regulate properties differently to achieve those ends, see, e.g., Chicagoland Chamber of Commerce v. Pappas, 378 Ill. App. 3d 334, 368 (1st Dist. 2007) (government may tax properties differently to discourage rapid turnover in home ownership).

For starters, shared housing units and vacation rentals are permitted in all residential districts, while hotels are not allowed in any residential districts and bed-and-breakfasts are allowed only in higher-density ones. That alone is a valid basis for treating them differently; properties in different zones are not similarly situated. See, e.g., Harvey v. Town of Merrillville, 649 F.3d 526, 531-32 (7th Cir. 2011) (subdivision consisting of mostly duplexes not similarly situated with subdivision comprised exclusively of single-family homes); Vision Church v. Village of Long Grove, 468 F.3d 975, 1002 (7th Cir. 2006) (establishments permitted in commercial

districts not similarly situated to churches, which are also permitted in residential ones). And this makes sense. When properties are located in different districts, their impacts on surrounding properties are different. A business located in a commercial district may be "innocuous," Eleopoulos v. City of Chicago, 3 Ill. 2d 247, 252 (1954), but when placed in a residential neighborhood may become the proverbial "pig in the parlor," Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); see, e.g., Eleopoulos, 3 Ill. 2d at 252 (hot-dog stand "perfectly legitimate" in commercial zone but, in residential zone, would have "a diminishing effect on the desirability of the area for residential purposes"). Shared housing units and vacation rentals are essentially businesses permitted in residential neighborhoods. While the impacts of guest accommodations in commercial districts may be relatively benign, those impacts become significant in the context of a quiet community of single-family homes. Bed-and-breakfasts, too, are less impactful to neighbors, as higher-density residential districts are more heavily populated with apartment buildings and condominiums and thus are more likely to already generate noise from vehicular and pedestrian traffic. The federal district court recognized as much when it recently upheld the City's shared housing ordinance against an equal protection challenge in Mogan v. City of Chicago, No. 21 C 1846, 2022 WL 159732 (N.D. Ill. Jan. 18, 2022), on the ground that, because "vacation rentals and shared housing units operate in neighborhoods that hotels do not," there is a rational basis for imposing more stringent regulations on the former. Id. at *15.

Moreover, home-sharing is not operated in the same way as other guest accommodations. Hotels and bed-and-breakfasts typically have a property owner or manager on site to quell noise and prevent major disturbances before they happen, and guests are more likely to maintain quiet if they know on-site managers are present. On the other hand, guests at shared housing units and vacation rentals are not subject to such oversight, leaving it to neighbors and the City to enforce noise restrictions. This is another reason for differential treatment. "Different products or services do not as a matter of constitutional law, and indeed common sense, always require identical regulatory rules." Illinois Transportation Trade Association v. City of Chicago, 839 F.3d 594, 598 (7th Cir. 2016). Because shared housing units and vacation rentals offer a different service to guests than is offered at hotels and bed-and-breakfasts – namely, the opportunity to stay in a home that typically does not have any on-site owner or management present – they may be subject to different regulatory schemes.

Plaintiffs effectively concede that shared housing units and vacation rentals are not similarly situated to hotels and bed-and-breakfasts by stating that their claim "does not depend on the assumption that short-term rentals are exactly like hotels or bed-and-breakfasts." Plaintiffs Br. 29-30. They also effectively concede that there is a rational basis for the differential treatment when they admit that "different zoning districts might have different expectations regarding noise" and "that the City might have more difficulty enforcing noise restrictions on some entities." Id. at 30. In other words,

plaintiffs concede the noise rule survives rational-basis review, which is fatal to their claim. See Strauss, 2021 IL App (1st) 191977, ¶ 45.

Nevertheless, plaintiffs argue that the ordinance impermissibly subjects shared housing units and vacation rentals to the more restrictive noise standard "regardless of the zone they are in," and "without relation to the relative ease of enforcement." Plaintiffs Br. 30. In other words, plaintiffs argue for perfect rationality as to every regulated property. Rational-basis review does not demand that. "The fit between the means and the end to be achieved need not be perfect," Triple A Services v. Rice, 131 Ill. 2d 217, 228-29 (1989), and if there is any reasonable basis for a classification, "it passes constitutional muster even though in practice it results in some inequality," Strauss, 2021 IL App (1st) 191977, ¶ 46. The noise rule may, in practice, regulate some properties that do not pose a risk of excessive noise, but the rational-basis test "tolerates overinclusive classifications" and "other imperfect means-ends fits." St. Joan Antida High School Inc. v. Milwaukee Public School District, 919 F.3d 1003, 1010 (7th Cir. 2019); accord Heller v. Doe, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."). Plaintiffs also contend that the City could just strengthen enforcement against problem properties, Plaintiffs Br. 30, but that sort of narrow tailoring is appropriate under strict scrutiny, not rational-basis review, where the court must not question the wisdom of the legislature's policy choices, see Dotty's Café, 2019 IL App (1st) 173207,

¶ 34. Thus, the noise rule satisfies equal protection.

## IV. PLAINTIFFS' CHALLENGE TO THE SAFE-RENTAL PROVISION FAILS FOR LACK OF STANDING AND ON THE MERITS.

Plaintiffs' challenge to the safe-rental provision fares no better than their other claims. They assert that the safe-rental provision violates the separation of powers because it "entirely delegate[s] the public-policy decision of whether, when, and under what conditions single-night rentals of vacation rentals and shared housing units will be lawful" to the BACP commissioner and the superintendent of police. C. 2116 ¶ 148. This claim fails for lack of standing because the safe-rental provision is severable from the single-night rental ban and, as such, its invalidation will not redress plaintiffs' alleged injury. In addition, the claim fails on the merits because the delegation of authority is guided by intelligible standards.

### A. Plaintiffs Have Not Alleged A Redressable Injury Because The Safe-Rental Provision Is Severable From The Single-Night Rental Ban.

As we explain above, standing requires an injury to a legally cognizable interest that is fairly traceable to the defendant's actions and redressable by the grant of the requested relief, Village of Chatham, 216 Ill. 2d at 419-20, and must exist for each provision of a challenged statute, id. at 420-24. Plaintiffs allege the single-night rental ban "directly injures [them] because they previously rented out shared housing units for single nights and would do so again but for the ban." C. 2116 ¶ 151. The ordinance prohibits hosts from renting any unit "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." Municipal Code of Chicago, Ill. §§ 4-6-300(g)(1), 4-14-050(e) (emphasis added). Plaintiffs challenge only the safe-rental provision of this ordinance, not the single-night ban itself. But because the safe-rental provision is severable from the ban itself, an order invalidating the safe-rental provision will not redress plaintiffs' alleged injury – they would still be unable to rent out their units for single nights.

Again, the Municipal Code contains a severability provision, Municipal Code of Chicago, Ill. § 1-4-200, which establishes a presumption that can be overcome with evidence that the legislature would not have passed the ordinance without the invalid provision, see Pension Reform, 2015 IL 118585, ¶ 95; Jacobson, 171 Ill. 2d at 329. Plaintiffs have adduced no such evidence. To the contrary, the text of the ordinance itself, as well as its purpose and history, strongly supports severability.

First, absent the safe-rental provision, the ban will still be "complete and capable of being executed." See Pension Reform, 2015 IL 118585, ¶ 95. The safe-rental provision can easily be deleted from the end of the sentence to preserve the ban itself. Plaintiffs argue that the safe-rental provision is "integral to the ban," Plaintiffs Br. 37, but fail to explain how the ban cannot be executed without it.

Second, the legislative record supports the conclusion that City

Council would have enacted the ban without the safe-rental provision. At the August 25, 2020 Virtual Committee on License and Consumer Protection, BACP Commissioner Rosa Escareño, who headed a working group to address problematic shared housing units, testified that the ban on single-night rentals was to prevent "the proliferation of party houses that impact neighborhoods and contribute to public safety." Virtual Committee on License and Consumer Protection, Vimeo (Aug. 25, 2020), at 1:42:42-56 https://vimeo.com/showcase/6277263/video/451235600 [hereafter "Virtual Committee"]. Alderman Michele Smith, a sponsor of the legislation, added that, at a prior joint committee hearing concerning the "difficulties of short-term rentals," id. at 1:46:25-27, many aldermen "shared their own experiences" with problematic houses that "pose[ ] a health" and "public safety danger," id. at 1:46:35-41, and emphasized that single-night rentals are a "public health emergency," id. at 1:57:0l2-04. Alderman Michael Scott, Jr. also testified that "[n]eighbors don't want large-scale parties." Id. at 2:02:34-36. Finally, Alderman Brendan Reilly commended Commissioner Escareño's and Alderman Smith's work on this legislation and the progress toward better regulating the industry, id. at 2:07:07-08, while Alderman Brian Hopkins, too, professed his support for the ordinance, id. at 2:11:29-32. No City Council member spoke out against the ban or suggested they would not support it without the safe-rental provision, and City Council voted unanimously to adopt it, City of Chicago, Office of the City Clerk, Record #SO2020-3986, https://chicago.legistar.com/LegislationDetail.aspx?ID=

4598068&GUID=D52C7F3B-D8CA-%2040A0-8CE4-934E269B50FC.

Nevertheless, plaintiffs argue "there is strong reason to believe that the City Council would not have enacted the ban without" the safe rental provision. Plaintiffs Br. 37. They cite evidence they contend reveals the ordinance was "the product of 'a negotiated compromise,'" id. (quoting People ex rel. Chicago Bar Association v. State Board of Elections, 136 Ill. 2d 513, 536 (1990)), but their evidence accomplishes no such thing.

Plaintiffs first note that the version of the ordinance Mayor Lightfoot introduced would have permanently banned single-night rentals, Plaintiffs Br. 37-38, but there are no statements indicating why the safe-rental provision was added nor any indication that City Council would not have passed the ordinance without it. Plaintiffs next argue that, in the press, Alderman Smith "characterized the substitute ordinance as a 'compromise.'" Id. at 38.[3] That is not probative either. For starters, "[s]tatements of individual legislators made outside the context of legislative debates" are not "meaningful evidence of legislative intent," Morel v. Coronet Insurance Co., 117 Ill. 2d 18, 24-25 (1987), even when they are made by the bill's sponsor,

[3] John Byrne, "Lightfoot Proposal Would Ban Single-Night Vacation Rental Bookings in Chicago," Chicago Tribune (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://www.cbsnews.com/chicago/news/aldermen-to-ban-single-night-home-sharing-rentals-in-effort-to-crack-down-on-illegal-parties/.

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980). But also, plaintiffs take Alderman Smith's comments out of context; the very articles plaintiffs cite reveal that Alderman Smith was characterizing the primary residence rule as a compromise, not the single-night rental ban.[4]

Plaintiffs further point to Alderman Smith's statement at the August 25, 2020 committee meeting that "'[f]or those people who favor this industry,'" the safe-rental provision is "'fair.'" Plaintiffs Br. 38 (quoting Virtual Committee at 1:56:28-50). That a City Council member believes the safe-rental provision is "fair," does not speak to whether the ordinance was a compromise. Moreover, it is not clear to whom Alderman Smith was referring when she addressed "people who favor this industry," or how many, if any, City Council members insisted on the safe-rental provision – indeed, even plaintiffs admit that they "don't have a head count." R. 325. And while a precise head count may not always be required, evidence of a negotiated compromise must at least "permeate[ ]" the legislative record. Chicago Bar Association, 136 Ill. 2d at 535; see, e.g., id. at 534-35 (floor debates replete with statements that bill creating judicial subcircuits and subdistricts was "bipartisan effort" to find "an adequate solution to" the lack of "fair and

[4] See Byrne, supra (Smith stating she "would have preferred to restrict the rentals only to people's primary residences," but "the mayor's ordinance is a good compromise"); Feurer, supra (Smith stating she "would have preferred the city also require that hosts only be allowed to offer short-term rentals at their primary residence," but ordinance "is a reasonable compromise").

adequate representation among minority members of the bar," and that it "was worked out as a compromise" to provide opportunities for minority Democrats and Republicans alike) (quotations omitted). Plaintiffs identify no such statements permeating the legislative record here. On the contrary, as we explain above, the record is replete with evidence of support for the ban.

Finally, plaintiffs argue that "an unlawful exemption to a general rule is not severable from the general rule" because striking the exemption would "improperly rewrite the law to make it harsher than the one" approved by the legislature. Plaintiffs Br. 39. But the safe-rental provision does not exempt any individuals or conduct from the rule. It merely authorizes the commissioner and the superintendent to promulgate rules setting forth the conditions under which the ban may at some point be lifted across the board. Severing it from the ban will not create a harsher law – or even affect the law at all; it will merely eliminate the delegation to the commissioner and the superintendent to promulgate rules. Thus, plaintiffs lack standing to challenge the safe-rental provision.

### B. The Safe-Rental Provision Provides Intelligible Standards To Guide The Discretion Of The Commissioner and The Superintendent.

A legislature may delegate to an administrative body "the authority to execute the law," so long as the delegation "provide[s] sufficient standards to guide the administrative body in the exercise of its functions." East St. Louis Federation of Teachers v. East St. Louis School District No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 423 (1997). The constitution does not

require "'absolute criteria whereby every detail necessary in the enforcement of the law is anticipated,'" but merely "'that intelligible standards be set to guide the agency charged with enforcement.'" Id. (alteration omitted) (quoting Hill v. Relyea, 34 Ill. 2d 552, 555 (1966)). A delegation is proper if the statute identifies three factors: "(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 delegation in the single-night rental ordinance properly identifies those three factors.

The first and third factors are easily dispensed with. The ordinance clearly regulates vacation rental licensees and shared housing hosts who rent their units "for any period of less than two consecutive nights" and also clearly states that the commissioner and superintendent shall address any harm from single-night rentals through "rules jointly and duly promulgated." See Municipal Code of Chicago, Ill. §§ 4-6-300(g)(1), 4-14-050(e).

As to the second factor, the ordinance also clearly identifies the harm sought to be prevented – harm to the public health and safety resulting from single-night rentals. With regard to this factor, "the legislature may use broader or more generic language than with the first factor," East St. Louis, 178 Ill. 2d at 423, and its "'precision'" will "'necessarily vary according to the nature of the ultimate objective and the problems involved,'" South 51 Development Corp. v. Vega, 335 Ill. App. 3d 542, 551 (1st Dist. 2002) (quoting People v. Carter, 97 Ill. 2d 133, 137 (1982)). Where there is "technical

complexity" and a "diversity of problems" that require a high "degree of detail," precise standards will not be possible, Board of Education v. Page, 33 Ill. 2d 372, 376 (1965), because it is the administrative body, not the legislature, that has the experience and expertise to resolve such complex problems, Hill, 34 Ill. 2d at 555-56; see, e.g., id. (hospital superintendent and staff work with and treat hospitalized persons and thus "can determine more understandingly and advantageously when the welfare of the person and of the community may require a discharge or continued hospitalization"); Franciscan Hospital v. Town of Canoe Creek, 79 Ill. App. 3d 490, 494-96 (3d Dist. 1979) (administrative body has expertise to determine when aid is necessary to alleviate poverty and promote public "health and welfare").

Moreover, the "delegation standards 'derive much meaningful content from the purpose of the subject legislation, its factual background and the statutory context in which they appear,'" South 51, 335 Ill. App. 3d at 551 (alteration omitted) (quoting Carter, 97 Ill. 2d at 137), so they "should not be tested in isolation," Carter, 97 Ill. 2d at 137. In Carter, for example, the supreme court upheld a delegation to the attorney general to exempt certain persons from the Franchise Disclosure Act "if he finds that the enforcement of this Act is not necessary in the public interest." Id. at 136-37. The court explained that "in the public interest," although indefinite standing alone, is an "intelligible standard" when considered in light of the Act's purpose – "to protect the investments of people buying franchises and to insure that before entering into a franchise agreement they are fully informed of the

franchisor's financial conditions." Id. at 137-38. Thus, the attorney general could waive enforcement only upon finding that the franchisor's financial information is "readily available through other sources." Id. at 138. See also South 51, 335 Ill. App. 3d at 551-53 (delegation to promulgate rules "necessary and appropriate for the protection of consumers" sufficiently definite in light of statute as a whole and its legislative history).

Applying these principles here, the delegation – to determine when single-night rentals can be "conducted safely," Municipal Code of Chicago, Ill. §§ 4-6-300(g)(1), 4-14-050(e) – is guided by adequate standards. Both the legislative history and ordinance as a whole shed light on the purpose of this provision. As we note above, statements from Commissioner Escareño and City Council members at the August 25, 2020 committee meeting reveal a concern about guests hosting large parties at single-night rentals. Commissioner Escareño testified that "the proliferation of party houses" "impact[s] neighbors" and threatens "public safety," Virtual Committee at 1:42:42-56, particularly where there is "overcrowding," id. at 1:43:00-17, and COVID risk, id. at 1:59:51-2:02:00, while Alderman Smith testified that "party houses" pose both a "health" and "public safety danger," id. at 1:46:35-41, and can result in "overcrowding," id. at 1:57:14-28. The text of the ordinance, too, targets overcrowding, along with such nuisances as drug trafficking, violent acts, excessive noise, public drunkenness, harassment, unlawful garbage disposal, and lewd conduct. Municipal Code of Chicago, Ill. §§ 4-6-300(a), (g), 4-14-010, 4-14-050(a). It is apparent that single-night

rentals can be "conducted safely" when rules are in place that prevent large, overcrowded parties, particularly those that create the types of nuisances noted above.

And while the ordinance does not detail the precise scope of the rules the commissioner and superintendent are tasked with promulgating, such detail is neither necessary nor practical. "The point in delegating a task to the executive branch is to allow the executive to efficiently accomplish a particular objective using its experience and expertise when the legislative branch could not perform the task with the same expertise or efficiency." AFSCME v. State, 2015 IL App (1st) 133454, ¶ 26. Here, BACP has worked closely with the superintendent of police "to conduct rigorous enforcement and to respond to problematic units and unlicensed activity across the City," Virtual Committee at 1:39:55-1:40:07, and to gather data to determine where problematic units are located, the problems they are creating, and how to strengthen enforcement, id. at 1:41:36-1:42:19. Thus, they are the entities with the experience and expertise to resolve this issue. And given the complexity of the health and safety problems single-night rentals pose, and the need to gather data to understand those problems, it was not possible for City Council to articulate standards with any more precision. Indeed, as the cases we cite above illustrate, broad standards that direct agencies to protect health and safety, supplemented by a legislative purpose, are more than adequate to prevent arbitrary and discriminatory enforcement.

For all these reasons, plaintiffs' argument that the ordinance provides

no standards to guide City officials in determining what is "safe," Plaintiffs Br. 34, is utterly meritless. Plaintiffs ignore well-established precedent that the standard articulating the harm sought to be prevented may be couched in general terms and must be considered in light of the text, purpose, and history of the legislation. See, e.g., South 51, 335 Ill. App. 3d at 551. Worse still, they fail to cite any pertinent authority and instead pepper their brief with questions attempting to inject ambiguity into the ordinance where there is none. Plaintiffs Br. 34 ("Who is to be kept safe?"; "And what are these people – whoever they are – to be kept safe from?"; "Any conceivable threat to 'safety' in any sense of the word?"). "A reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments," and any argument that fails to satisfy these requirements is "forfeited." Atlas v. Mayer Hoffman McCann, P.C., 2019 IL App (1st) 180939, ¶ 33 (quotation omitted). Forfeiture aside, the questions plaintiffs pose can easily be answered – neighbors and the public are to be kept safe from overcrowding, excessive noise, illegal activity, and other nuisances caused by single-night rentals used for party houses. Thus, the delegation does not violate separation of powers.

## V. PLAINTIFFS LACK TAXPAYER STANDING ON ALL CLAIMS.

""Taxpayer standing is a narrow doctrine permitting a taxpayer the ability to challenge the misappropriation of public funds.'" Schacht v. Brown, 2015 IL App (1st) 133035, ¶ 19 (quoting Illinois Association of Realtors v. Stermer, 2014 IL App (4th) 130079, ¶ 29). Taxpayer standing "requires a

specific showing that the plaintiffs will be liable to replenish public revenues depleted by [the government's] alleged retention or misuse of said funds," id. ¶ 20, the absence of which renders the complaint "'fatally defective,'" Veazey v. Board of Education, 2016 IL App (1st) 151795, ¶ 34 (quoting Wexler v. Wirtz Corp., 211 Ill. 2d 18, 22 (2004)); see, e.g., id. (plaintiff failed to "specifically plead" he will be liable to replenish misappropriated funds); Marshall v. County of Cook, 2016 IL App (1st) 142864, ¶ 16 (plaintiff "presented no evidence" he will be liable for increased taxes due to misappropriated fees). "The mere possibility that under some circumstances" a municipality "may be required to make up a deficiency in public funds" is insufficient, Dudick v. Baumann, 349 Ill. 46, 50 (1932), as is a "simple allegation of taxpayer status," Village of Leland ex rel. Brouwer v. Leland Community School District No. 1, 183 Ill. App. 3d 876, 879 (3d Dist. 1989).

Plaintiffs fail to show they are liable to replenish public revenues as a result of the City's enforcement of any provision of the ordinance, offering instead only the bare assertion that the City uses "general revenue funds" to enforce the ordinance, C. 2094 ¶ 59, and that, "as Chicago taxpayers," they are therefore "liable to replenish" those funds, C. 2094 ¶ 60. But, as the cases we cite demonstrate, such generic assertions cannot support taxpayer standing. A "specific showing" is required. Schacht, 2015 IL App (1st) 133035, ¶ 20.

Plaintiffs argue that, because they are "equitable owners" of the general revenue fund, they are, by definition, "liable to replenish" the fund.

Plaintiffs Br. 41. But, again, that defies this court's precedent. At most, it suggests a "mere possibility" of liability, but that alone falls far short of establishing taxpayer standing. See Dudick, 349 Ill. at 50.

None of the cases plaintiffs cite is to the contrary. Three of their cases involved the Public Monies Act, 735 ILCS 5/11-301, Snow v. Dixon, 66 Ill. 2d 443, 449-52 (1977); Barco Manufacturing Co. v. Wright, 10 Ill. 2d 157, 158 (1956); Krebs v. Thompson, 387 Ill. 471, 472 (1944), which allows taxpayers to file suit to "restrain and enjoin the disbursement of public moneys by officers of the state," Barco, 10 Ill. 2d at 160, and is not at issue here. Moreover, in each of those cases, the plaintiffs did specifically show their liability to replenish public revenues. See id. at 159 (plaintiffs specifically alleged that unlawful disbursements would result in a higher tax rate); Snow, 66 Ill. 2d at 449-50 (evidence showed State expended $41,400 to collect illegal tax); Krebs, 387 Ill. at 473 (evidence showed cost of administering act would amount to nearly $11,000). As for plaintiffs' other case, Crusius ex rel. Taxpayers v. Illinois Gaming Board, 348 Ill. App. 3d 44 (1st Dist. 2004), this court acknowledged that a taxpayer must show both ownership of funds and liability to replenish the treasury and held that these requirements were satisfied by plaintiff's specific showing of an "expenditure of the state resources" that "was traceable to [defendants'] actions." Id. at 50.

Unlike in these cases, plaintiffs here do not allege that the City will expend any additional general revenue funds administering the challenged provisions or that such expenditures will result in an increase in taxes for

which plaintiffs will liable. Taxpayer standing is a "narrow doctrine," Schacht, 2015 IL App (1st) 133035, ¶ 19, but plaintiffs' expansive reading would allow nearly every taxpayer to challenge any City conduct. That is not consistent with this court's precedent, nor sound public policy. Plaintiffs lack taxpayer standing.

## CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the circuit court.

Respectfully submitted,

Corporation Counsel
of the City of Chicago

BY: s/Elizabeth Mary Tisher

ELIZABETH MARY TISHER
Assistant Corporation Counsel
2 N. LaSalle Street, Suite 580
Chicago, Illinois 60602
(312) 744-3173
elizabeth.tisher@cityofchicago.org
appeals@cityofchicago.org

## CERTIFICATE OF COMPLIANCE

I certify that this response brief conforms to the requirements of Rule 341(a). The length of this brief, excluding the pages containing 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, and the certificate of service, is 14,754 words.

s/ Elizabeth Mary Tisher
ELIZABETH MARY TISHER, Attorney

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that I served the foregoing on the persons listed below via *File & Serve Illinois* on October 25, 2022.

Jeffrey Schwab
Liberty Justice Center
141 W. Jackson Blvd., Suite 1065
Chicago, Illinois 60604
jschwab@libertyjusticecenter.org

Jacob Huebert
Christina Sandefur
Goldwater Institute
500 E. Coronado Road
Phoenix, Arizona 85004
jhuebert@goldwaterinstitute.org
csandefur@goldwaterinstitute.org

s/ Elizabeth Mary Tisher
ELIZABETH MARY TISHER, Attorney