No. 1-21-1513

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEILA MENDEZ *and* ALONSO ZARAGOZA, Plaintiffs-Appellants, v. CITY OF CHICAGO, *a municipal corporation; and* KENNETH J. MEYER, *in his official capacity as Commissioner of the City of Chicago Department of Business Affairs and Consumer Protection* Defendants-Appellees.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division No. 2016 CH 15489 The Honorable Cecilia A. Horan, Judge Presiding

APPELLANTS' REPLY BRIEF

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Oral Argument Requested

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

Plaintiffs have stated a viable challenge to the Ordinance's warrantless inspections. Indeed, Defendants do not even argue that Plaintiffs' claim fails on the merits but instead argue only that Plaintiffs lack standing and that Plaintiffs' claim is not ripe. Defs.' Br. 13-21.

But Plaintiffs do have standing as Chicago taxpayers to prevent Defendants from using public funds to carry out unconstitutional inspections, as explained in Plaintiffs' opening brief, App. Br. 40-41, and in Section VI below.

And, contrary to Defendants' arguments, Plaintiffs' claim is ripe.

Defendants argue that the claim is unripe because, supposedly, the Building Commissioner cannot conduct any inspections of vacation rentals or shared housing units unless and until he promulgates rules to govern such inspections. Defs.' Br. 15-21. And, Defendants assert, the Building Commissioner has not promulgated such rules. *Id.* at 13.

But regulations with procedural safeguards can only overcome the usual warrant requirement for searches under the "administrative search doctrine," which, as Plaintiffs have explained, does not apply here. App. Br. 15-16.

Further, there is no evidence in the record as to whether the Building Commissioner has, in fact, conducted inspections pursuant to the Code provisions that authorize him to do so. And it is curious, if not incredible, that the Commissioner would not have conducted *any* inspections of short-term rental units in the *six years* since the City Council enacted an ordinance calling for him to do

so—especially given the supposed urgent safety concerns the City has cited to justify other provisions in the ordinances governing short-term rentals. *See, e.g.,* Defs.' Br. 53-55.

Plaintiffs and this Court should not have to take the City's word for it that the Building Commissioner has not conducted, and will not conduct, inspections before he has promulgated rules to govern those inspections. Plaintiffs should be allowed to take discovery on that question, and that is reason enough for the Court to reverse dismissal of Plaintiffs' challenge to the Commissioner's inspection power.

Further, even if the evidence were to show that the Building Commissioner has not yet conducted any inspections pursuant to the Ordinance—and even if the Commissioner were to promulgate rules that appeared to provide safeguards for property owners' rights—Plaintiffs' claim still would be ripe and viable.

Plaintiffs have raised a *facial* challenge to the Ordinance provisions authorizing the Building Commissioner's inspections because the Ordinance allows the Commissioner to conduct inspections "at any time and in any manner" he sees fit. A234-35, C 2094 V2 ¶¶ 61-67. Plaintiffs allege that such "unrestricted" authority to conduct searches of homes used for short-term rentals violates the protection against unreasonable searches and seizures of Article I, Section 6 of the Illinois Constitution. A234, C 2094 v2 ¶ 63.

Defendants argue that this challenge is unripe because the rules the Commissioner might someday promulgate could restrict the Commissioner's

inspections in a way that comports with constitutional requirements. Defs.' Br. 16-17.

Even if the Commissioner *might* restrict his own inspections through rules, that cannot save the Code provisions authorizing the inspections from a facial challenge. In any event, the Ordinance places no constraint on the Commissioner: he is authorized to promulgate whatever rules he likes, regardless of whether they comport with constitutional requirements, and to carry out inspections pursuant to those rules. If the Code authorized the Commissioner to conduct inspections "at any time and in any manner he sees fit," with nothing about promulgating rules, the possibility that the Commissioner *might* see fit to respect the Constitution would hardly suffice to insulate the Code from a facial challenge, as Chicago property owners and their guests would face the constant threat of unconstitutional searches. The Code provisions ostensibly calling for the Commissioner to promulgate rules are no different: the Commissioner may promulgate *any rules he likes*—and *change them* whenever he likes—and then carry out searches pursuant to those rules.

Plaintiffs do not have to wait for the Commissioner to violate anyone's rights before challenging the Code provisions that authorize him to do so, because the Code provisions *themselves* violate those rights. The Commissioner's unconstrained authority to enact whatever rules he wants and then start searching properties deprives property owners of their interest in renting their homes without having them searched *now*. *Cf. Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 265 (1991) (creation of board intended to increase air

traffic injured plaintiffs, who wanted reduced noise, even before the board acted); *Nat'l Fed'n Fed. Employees v. United States*, 727 F. Supp. 17, 20-21 (D.D.C. 1989), *aff'd* 905 F.2d 400 (D.C. Cir. 1990) (creation of Base Closure Commission injured plaintiffs who worked at military bases that might be closed, even before the Commission took any steps to close the particular bases).

Defendants argue that Plaintiffs' claim is unripe because their "alleged harm in continent on an agency action that has not yet occurred or might never occur," citing *National Marine, Inc. v. Illinois EPA*, 159 Ill 2d 381, 390-91 (1994). Defs.' Br. 15. But *National Marine* only addresses challenges to administrative *actions*. Here, Plaintiffs are not challenging administrative action but are facially challenging an *ordinance*. Defendants cite no cases in which a plaintiff facially challenging a statute or ordinance's constitutionality was unripe because an official had not yet promulgated rules to implement it. A facial challenge like the one Plaintiffs raise here *is* ripe because no further factual development is necessary to determine whether the ordinance is unconstitutional *on its face*. *Cf. Triple G Landfills, Inc. v. Bd. of Commr's*, 977 F.2d 287, 289 (7th Cir. 1992) (where plaintiff raised "a facial attack upon the validity of [an] ordinance itself, not a challenge to a particular administrative decision reached thereunder, . . . the case [was] fit for judicial decision").

Thus, this Court should reverse the dismissal of Plaintiffs' facial challenge to the Ordinance provisions authorizing the Building Commissioner to conduct searches of homes used for short-term rentals.

II. Plaintiffs have stated a viable challenge to the Primary Residence Rule.

Plaintiffs have stated a viable substantive due process challenge to the Ordinance's "Primary Residence Rule."

Contrary to Defendants' assertion, Plaintiffs have *not* "abandoned" their challenge to the Rule. *See* Defs.' Br. 22. In their complaint, Plaintiffs have alleged that the Primary Residence Rule violates substantive due process because the Ordinance gives the Commissioner of the City's Department of Business Affairs and Consumer Protection "unbounded and unbridled discretion" to make exceptions to the Rule. A238-40, C 2098-2100 v2 ¶¶ 80-83. In the circuit court, Plaintiffs argued that the Commissioner's unlimited authority to make arbitrary exceptions to the Primary Residence Rule severs any rational connection between the Rule and protection of the public's health, safety, or welfare, and the that the Rule therefore violates substantive due process. C.373. Plaintiffs make the same argument on appeal. App. Br. 21.

`A. Plaintiffs have alleged a redressable injury.

Defendants argue that Plaintiffs lack a redressable injury because the Ordinance provisions authorizing the Commissioner's adjustments are severable from those establishing the Primary Residence Rule. Defs.' Br. 22-25. And Defendants observe that Plaintiffs "never even argued that the commissioner's adjustment is not severable from the primary residence rule." *Id.* at 24. But that is because Defendants have raised this argument for the first time on appeal. In moving to dismiss Plaintiffs' challenge to the Primary Residence Rule based on the

commissioner's adjustments, Defendants first argued that Plaintiffs lack standing because they have not pursued an appeal of an adverse decision by the Commissioner, that Plaintiffs lack standing as taxpayers, and that Plaintiffs lack a property interest in a Commissioner's adjustment that could give them a right to due process, C.248-250. After the circuit court rejected those arguments, C.414-15, C.422, Defendants raised them again in a second motion to dismiss and also argued that the claim failed on the merits. C.483-89. None of those arguments said anything about severability—so Plaintiffs never had any reason to address that issue.

The Commissioner's adjustment is not severable because a provision creating an exemption to a general rule is not severable from the general rule. By striking down the Commissioner's adjustment alone, the court would unconstitutionally rewrite the law to make it different from—and harsher than—the law the City Council enacted. *Commercial Nat'l Bank of Chi. v. City of Chicago*, 89 Ill. 2d 45, 75-76 (1982); *see also Kendall-Jackson Winery, Ltd. v. Branson*, 82 F.Supp.2d 844, 868 (N.D. Ill. 2000) ("Enforcing an Act without an invalid exemption limiting the scope of its application would, in effect, create a new law."). According to Defendants, the City enacted the adjustment provisions "to eliminate an extraordinary burden" that the Primary Residence Rule would otherwise impose on certain applicants. Defs.' Br. 26. If the adjustments were struck down, but the Primary Residence Rule was otherwise left in place, then the Ordinance would impose extraordinary burdens on property owners that the City Council sought to avoid. Defendants argue that,

without the adjustment provisions, the Ordinance would still serve the City's asserted interest in "preserv[ing] affordable housing and protect[ing] neighborhood stability, continuity, and character." Defs.' Br. 25. But—accepting *arguendo* the City's assertions about these provisions' purposes—if a court were to strike the commissioner's adjustment alone, the balance of interests the City sought to establish through the Ordinance would no longer exist; the court's decision would favor one interest at the expense of the other, usurping the legislature's exclusive authority to determine how to balance public-policy interests. Thus, if the commissioner's adjustment provisions were to be held unconstitutional, the proper remedy would be to strike them together with the Primary Residence Rule, leaving the City Council to perform its legislative role of revising the Ordinance to balance the policy interests it seeks to serve in a constitutional manner.

B. Plaintiffs' claim has merit.

On the merits, Plaintiffs' challenge to the Primary Residence Rule, based on the BACP Commissioner's unconstrained authority to grant adjustments, is viable.

Defendants downplay the cases in which the Appellate Court has struck down ordinances with similarly vague criteria, arguing that in this case, unlike those, "the terms are objective and limited by the ordinance's clear purpose." Defs.' Br. 34. But, as Plaintiffs have explained in their opening brief, the Ordinance's criteria are not objective because they are vague and unintelligible, which leaves their meaning to the Commissioner's subjective determinations. *See* App. Br. 21-24. Further, the Ordinance states that the criteria it lists are "by way of example and not

limitation," leaving the Commissioner free to apply other, unspecified criteria. Chi. Muni. Code §§ 4-6-300(l), 4-14-100(a).

Moreover, the Ordinance has no clearer purpose than other ordinances this Court has struck down for their vague criteria. *See* App. Br. 25 (listing cases). The ordinance struck down in *Pacesetter Homes, Inc. v. Village of Olympia Fields* stated its purpose: to avoid "excessive similarity, dissimilarity or inappropriateness in exterior design and appearance of property" because (as summarized by the Court) that could "adversely affect[] the desirability, stability, economic and taxable value, and the like, of nearby property." 104 Ill. App. 2d 218, 220 (1st Dist. 1968). But that stated purpose, even if legitimate, was not enough: the ordinance's vague criteria, which failed to constrain administrative officials' discretion, rendered it invalid. *Id.* at 226. The ordinance struck down in *Waterfront Estates Development, Inc. v. City of Palos Hills*, aimed to ensure that building materials used would be "compatible with the character of the immediate neighborhood," and officials were directed to "determin[e] that the objective of [the] Ordinance [had] been satisfied," 232 Ill. App. 3d 367, 375 (1st Dist. 1992). But, again, the ordinance was still invalid for its vague criteria, whose application would inevitably depend on officials' subjective judgments. *Id.* at 378.

Defendants try to save the Ordinance's vague criteria by asserting that "[t]erms like 'geography' and 'population density' are common concepts" and that everyone "should know what constitutes 'illegal activity' or 'economic hardship.'" Defs.' Br. 28. But although people might know the definitions of each of those words, they still

cannot know what they mean as criteria for an adjustment. The ordinance does not say, for example, *which* geographical characteristics of a property are relevant, or *how* geography should affect whether an adjustment is granted. One of the vague criteria in the ordinance *Waterfront Estates* deemed unconstitutional was "height." 232 Ill. App. 3d at 378-79 n.2. Of course, the meaning of the *word* "height" is clear, and height can be objectively measured. But as a criterion, it was unconstitutionally vague because the ordinance "provide[d] no standard by which a Commissioner (or anyone else) [could] determine whether a building is aesthetically 'too tall' or 'too short.'" *Id.* The Ordinance's criteria have the same fatal defect: even if some of them might have straightforward definitions and be capable of objective measurement, the Ordinance provides no standard for how they should be applied to determine whether an adjustment is proper. And this Ordinance has the additional fatal flaw that its criteria are only included "by way of example," leaving the Commissioner free to apply other, unspecified criteria.

Defendants attempt to overcome this problem by tying the Ordinance's criteria to the purpose of "preserv[ing] housing affordability and neighborhood stability, continuity, and character to the greatest extent possible." Defs.' at 28. But the Ordinance itself does *not* tie the criteria to that purpose. In fact, the Ordinance provisions authorizing adjustments say *nothing* about that purpose—so Defendants are now trying to fill in, through assertions in an appellate brief, what the City Council left out. The Ordinance says only that adjustments may be granted "to eliminate an extraordinary burden on the applicant in light of unique or unusual

circumstances," where doing so "would not detrimentally impact the health, safety, or general welfare of surrounding property owners or the general public," applying specified and unspecified criteria. Chi. Muni. Code §§ 4-6-300(l), 4-14-100(a). Thus, the Ordinance expressly authorizes the Commissioner to make adjustments based on a short-term rental's anticipated effects on the public's health, safety, or welfare *generally*—not just based on the expected effects on affordable housing and neighborhood character.

None of the cases on which Defendants rely bolsters their argument.

In *XLP Corp. v. County of Lake*, an ordinance requiring license applicants to provide "relevant information" specifically enumerated the objective information (e.g., "whether persons listed in the application are of a specified minimum age") that would be relevant. 359 Ill. App. 3d 239, 242-44 (2d Dist. 2005). Thus, *in the context of that ordinance*, "[r]elevance [was] not so esoteric and amorphous a concept that it would allow the decision maker to demand virtually anything from an applicant." *Id.* at 243-44. The decision did hold or imply that factors that are "relevant" to an official's exercise of discretion under will *always* be obvious, under *any* ordinance, and the ordinance it upheld bears no resemblance to the commissioner's adjustment provisions here.

Defendants' other cases are even farther off-point. A decision noting that "we can never expect mathematical certainty from our language," *People v. Ridens*, 59 Ill. 2d 362, 371 (1974), considered the uniquely difficult question, with which courts have long struggled, of what constitutes obscenity—not vague criteria governing an

official's exercise of discretion like those here. And when the Illinois Supreme Court said that "there are limits to the degree of precision attainable by the English language," it did so only as a preface to its explanation that the terms "buttocks" and "any portion of the female breast at or below the areola thereof" are clear enough. *City of Chicago v. Pooh-Bah Enters.*, 224 Ill. 2d 390, 444-46 (2006). And *Everly v. Chicago Police Board*, 119 Ill. App. 3d 631, 638-39 (1st Dist. 1983), simply followed U.S. Supreme Court precedent holding that the government, as an employer, cannot be expected to spell out in detail all the circumstances that could give rise to an employee's termination for cause.

Defendants rely heavily on these irrelevant cases—while relegating to a cursory discussion at the end of their argument the series of cases Plaintiffs have cited that are *directly* on point, which struck down ordinances that authorized officials to grant or deny the exercise of property rights based on vague criteria. *See* App. Br. 25; Defs.' Br. 33-34. Those cases control here: if the criteria in the ordinances they struck down were unconstitutionally vague, so are the criteria here.

By allowing the Commissioner to make judgments about what will serve the public's health, safety, or welfare—applying vague and unspecified criteria—the City gave the Commissioner virtually unlimited discretion, and eliminated any connection between the Primary Residence Rule and any legitimate purpose. Thus, Plaintiffs' claim challenging the Primary Residence Rule based on these vague criteria is viable, and this Court should reverse its dismissal.

III. Plaintiffs have stated a due process challenge to the noise rule.

Plaintiffs have stated a viable due process challenge to the Ordinance's noise rule based on its vagueness—particularly the vagueness of its prohibition, during certain hours, of any sound "louder than the average conversational level at a distance of 100 feet or more," as measured from the property line. Chi. Muni. Code. §§ 4-6-300(a), 4-14-010.

Defendants assert that this rule is not vague because everyone engages in conversation and "so should reasonably be aware of what constitutes an 'average conversational level.'" Defs.' Br. 35. And, Defendants say, people should know they are violating this rule "when guests are yelling, screaming, or laughing uproariously during a raucous party." Defs.' Br. 37. Defendants further assert that the "average lot width in Chicago is 25 feet," so it is unlikely that ordinary noises, such as a crying baby, would be audible "several houses away." Defs.' Br. 38.

One might debate the merits of those arguments—but one cannot dispute that they are *arguments about the merits*—not about whether Plaintiffs have *stated a claim*, which is the only issue before the Court. And Plaintiffs have sufficiently stated a claim by alleging that an ordinary person cannot know how to avoid violating the noise rule, which does not define "average conversational level" (Chi. Muni. Code §§ 4-6-300, 4-14-010), does not exempt "noise created by unamplified human voices" (A231, C 2053 v2 ¶ 44), and includes no objective measurements (A248, C 2070 v2 ¶ 113) or durational requirement (A248, C 2070 v2 ¶ 114). These are questions on which there may be relevant evidence, and Plaintiffs, having

stated a valid claim, are entitled to develop and present that evidence. The claim cannot be dismissed based on the City's mere assertions about the ease of understanding and complying with the rule.

Indeed, Defendants have not cited any case in which an appellate court upheld *dismissal* of a challenge to a noise rule, as Defendants ask this Court to do. In each case, the trial court held proceedings at which the party challenging the rule had an opportunity to present evidence. *See Grayend v. City of Rockford*, 408 U.S. 104 (1972) (rejecting challenge to noise ordinance after trial); *City of Chicago v. Reuter Bros. Iron Works, Inc.*, 398 Ill. 202 (1947) (same); *City of Aurora v. Navar*, 210 Ill. App. 3d 126 (2d Dist. 1991) (affirming permanent injunction against noise rule, issued after hearing at which "both parties presented evidence"); *Town of Normal v. Selzel*, 109 Ill. App. 3d 836 (4th Dist. 1982) (rejecting challenge to noise ordinance after trial); *Mister Softee of Ill., Inc. v. City of Chicago*, 42 Ill. App. 2d 414 (1st Dist. 1963) (reversing temporary injunction against noise ordinance issued after a hearing); *People v. Stephens*, 66 N.E.3d 1070 (N.Y. 2016) (rejecting challenge to noise ordinance after trial).

Further, even without the development of evidence in this case, the cases on which Defendants rely are distinguishable. The ordinance at issue in *Grayend* used the word "willfully" to target "*deliberately* noisy or diversionary activity that disrupts or is about to disrupt normal school activities"; the Ordinance here, by contrast, encompasses *all* noises, regardless of their deliberateness, intent, or effect. 408 U.S. at 111 (emphasis added). *Reuter Bros.* targeted not only noise but also

dust, gas, smoke, fumes, odors, and vibrations emitted by factories, and its terms had "a well-established meaning at the common law in the definition of a common-law nuisance"; here, in contrast, Defendants do not argue that the Ordinance's noise rule merely codifies common-law nuisance principles, and the noise rule differs from the rules for other properties. 398 Ill. at 205-07. *Stelzel* considered an *as-applied* challenge to an ordinance prohibiting "loud and raucous" sounds and concluded that it was apparent that these terms encompassed the defendant's activity; it did not consider a facial challenge like the one Plaintiffs have brought. 109 Ill. App. 3d at 840. The ordinance at issue in *Mister Softee* prohibited noises "distinctly and loudly audible upon [a] public way" made "by various means set forth, including sound amplifiers or similar mechanical devices." 42 Ill. App. 2d at 416. The Court concluded that whether a noise was "distinctly and loudly audible" was a question of fact that could be resolved at trial. *Id.* at 421. Although the Court appeared to apply relatively lax scrutiny to the rule, the case is nonetheless distinguishable inasmuch as it relates to the production of "noise" by *specific means* that are likely to cause noise on public ways and not (like this Ordinance) just any noise that happens to emanate from a home, including *unamplified* human voices. Thus, Plaintiffs should be allowed to develop and present facts—as the *Mister Softee* plaintiff was—to further distinguish the case. Similarly, the ordinance at issue in *Stephens*, a New York case, applied only to "unnecessary noise" emanating from motor vehicles—again, not just *any* noise from a home—noting that "what is usual noise in the operation of a car has become common knowledge . . . and any ordinary motorist

should have no difficulty in ascertaining whether or not excessive or unusual noise accompanied the operation of the vehicle." 28 N.Y.3d 307 at 310. The question of when unamplified human voices in a home exceed the "average conversational level," in contrast, is not obvious.

Defendants' effort to distinguish *Navar*, which invalidated a noise ordinance, fails. Contrary to Defendants' assertion, Defs.' Br. 39, that noise ordinance *was* held to be facially unconstitutional for violating due process based on its vagueness. As Plaintiffs have explained in their opening brief, App. Br. 26-27, there, as here, the ordinance failed "to provide guidance to either those charged with compliance or those charged with its enforcement," "leav[ing] those to be regulated without fair warning of what they may or may not do" and "those charged with its enforcement no direction as to when a violation occurs." 210 Ill. App. 3d at 134-36.

Again, however, it is not necessary for the Court to determine whether Plaintiffs' case is similar enough to *Navar* that they should prevail. At this stage, the Court must only determine whether Plaintiffs have stated a claim. They have, and the dismissal of their due process challenge to the noise rule should be reversed.

IV. Plaintiffs have stated a viable equal protection challenge to the Noise Rule.

Plaintiffs have also stated a viable equal protection challenge to the Ordinance's noise rule.

Defendants argue that this claim fails because the City may prescribe different rules for different zoning districts—so, the City says, it is proper to prescribe a more stringent rule for shared housing units and vacation rentals, which are permitted in

all zoning districts, than for hotels, which are not allowed in residential districts, and bed-and-breakfasts, which are allowed only in higher-density residential districts. Defs.' Br. 41.

But Defendants miss the point of Plaintiffs' argument: short-term rentals are subject to a more stringent noise rule than neighboring properties regardless of what zoning district they're in. In low-density residential districts, short-term rentals are subject to a lower noise threshold than other residential properties; in higher-density districts, short-term rentals are subject to a lower noise threshold than bed-and-breakfasts and hotels. Defendants cannot justify that discrimination by simply observing that different zoning districts may have different rules, because that does not explain why short-term rentals are subject to a more stringent noise rule than others in the *same* zoning district. *See* App. Br. 30.

Defendants point out that hotels and bed-and-breakfasts are "typically" better able to quell and prevent noise from guests. Defs.' Br. 43. Even if that is so, it does not explain why the City subjects those accommodations to a less stringent noise rule—i.e., why those properties should be allowed to make more noise without punishment by the City. If Defendants' assertion is true, it only means that hotels and bed-and-breakfasts are less likely to violate whatever noise rule applies to them—not that there is a good reason to let them be noisier than short-term rentals.

Further, the question of different properties' respective propensities to create noise and disturb others is one of fact, on which there is no record evidence because

the circuit court dismissed the claim. Here again, Plaintiffs have stated a claim—that is, they have made allegations that, if true, would entitle them to relief—and that is reason enough for the Court to reverse its dismissal.

V. Plaintiffs have stated a viable separation-of-powers challenge to the single-night rental ban.

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

As explained in their opening brief, Plaintiffs have stated a valid separation-of-powers challenge to the single-night rental ban because the "until such time" clauses give the BACP Commissioner and the Superintendent of Police unlimited discretion to keep single-night rentals illegal—for *any* reason, with no accountability to anyone. App. Br. 31-33.

Defendants have not even attempted to respond to that argument; they ignore it entirely. And, indeed, the discretion the City has given to these officials is indefensible. For that reason alone, the single-night rental ban should be struck down for unlawfully delegating legislative power to the Commissioner and the Superintendent.

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

Even putting that fatal flaw aside, the single-night rental ban still violates the separation of powers because it fails to provide sufficient standards to guide the Commissioner's and Superintendent's discretion to promulgate rules to legalize

such rentals. *See* App. Br. 33-35. In particular, the ordinance fails to identify "the harm sought to be prevented" by such rules. *E. St. Louis Fed'n of Teachers, Local 1220 v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 178 Ill. 2d 399, 423 (1997)

As Plaintiffs have explained, it is not apparent that the rules must pertain to making rentals "safe"—but, in any event, simply authorizing rules to make rentals "safe" is not enough because the ordinance does not explain *who* is to be kept safe from *what*. App. Br. 34-35. Defendants argue that more specific guidance is "neither necessary nor practical." Defs.' Br. 54. But it is necessary: to constrain executive-branch officials' authority, the City Council must identify the harm to be prevented—it cannot simply enact a broad mandate to enact rules to prevent harm generally. And it is practical: if the City Council wanted rules about building safety, safety from crime, safety from crowding, or safety from disease, it could say so; that would not require "expertise" that legislators lack.

Thus, the City Council's failure to provide guidance for the Commissioner and Superintendent's rules provides another reason why the single-night rental ban violates the separation of powers.

C. The single-night rental ban is not severable from the "until such time" clauses.

As Plaintiffs have explained in their opening brief, the single-night rental ban is not severable from its "until such time" clauses for three reasons, any one of which would suffice: (1) the clauses are essentially and inseparably connected to the ban;

(2) the clauses were the result of a negotiated compromise; and (3) an unlawful exemption to a ban is never severable from the general rule. App. Br. 36-39.

Defendants argue that the clauses are not essentially and inseparably connected to the ban because "the ban can[] be executed without it." Defs.' Br. 46. That ignores and fails to refute Plaintiffs' argument that the clauses are integral to the ban because the clauses define whether and the when the ban is to be in effect. App. Br. 36-37.

Defendants challenge the idea that the "until such time" clauses were the product of a "negotiated compromise" by quoting statements from the legislative history in which several aldermen (mostly Alderman Michele Smith) stated that they were motivated to pass the ban because they wanted to prevent "party houses" and address health and safety concerns. Defs.' Br. 46-48. But those statements only show those individuals' stated motivation to enact the ban. They do not explain why the "until such time" provisions were added to the original version, which lacked it.

Defendants observe that, at the City Council committee hearing on the ban, "[n]o City Council member . . . suggested they would not support it without [the provision authorizing the "until such time" clauses]." Defs.' Br. at 47. But no alderman had a reason to say that, because by that time the clauses had already been added. But Alderman Smith indicated why it had been added: "[f]or those people who favor this [short-term rental] industry."[1]

[1] *2020 Aug 25 – Virtual Committee on License and Consumer Protection*, Vimeo (Aug. 25, 2020) ("Committee Video") at 1:56:28, https://vimeo.com/showcase/6277263/video/451235600.

Defendants argue that this, and Plaintiffs' other evidence that the clauses were the product of a compromise, will not suffice because "evidence of a negotiated compromise must at least 'permeate[]' the legislative record," citing *People ex rel. Chicago Bar Association v. State Board of Elections*, 136 Ill. 2d 513, 535 (1990). But that case does not establish that rule; it only notes that, in that case, evidence of a negotiated compromise *did* permeate the record. So the decision shows that statements permeating the record are *sufficient* to show a negotiated compromise—not that they are *necessary*.

For the reasons Plaintiffs have presented, App. Br. 38, the only apparent explanation for the addition of the "until such time" clauses to the Mayor's original proposed single-night rental ban is that they were the product of a negotiated compromise.

Finally, Defendants argue that the rule that a provision creating an exemption to a ban is not severable from the general rule[2] does not apply because the "until such time" clauses are not an "exemption." Defs.' Br. 50. But of course the clauses exempt *everyone* if the Commissioner and Superintendent have decided that everyone should be exempt. And, contrary to Defendants' assertion, eliminating the clauses would make the law "harsher" because it would eliminate any possibility of the ban being lifted. And, most important, striking the clauses would rewrite the law to create a permanent ban instead of the liftable ban that the City Council enacted. *See Kendall-Jackson Winery*, 82 F.Supp.2d at 868 ("Enforcing an Act

[2] *See Commercial Nat'l Bank*, 89 Ill. 2d at 75-76.

without an invalid exemption limiting the scope of its application would, in effect, create a new law.").

VI. Plaintiffs have standing as taxpayers to bring all their claims.

As explained in their opening brief, Plaintiffs have taxpayer standing to bring all their claims because taxpayers may seek to enjoin the use any amount of public funds for any unconstitutional or unlawful purpose. *See* App. Br. 40-41.

There is no merit in Defendants' argument that Plaintiffs have not established their standing because they have not made a "specific showing" that they will be liable to replenish funds spent to implement the provisions they challenge. The cases on which Defendants rely do not require Plaintiffs to make any more specific allegations than those in their complaint.

In the primary case Defendants rely on, *Schact v. Brown*, a plaintiff alleged that the Cook County clerk disobeyed state laws that required her to remit proceeds of certain court fees to the county treasury and to deposit proceeds of certain court fees into accounts for the operation of specified programs. 2015 IL App (1st) 133035, ¶¶ 4-6. The Appellate Court stated that the plaintiffs had not shown that the misapplication of fees would make them "liable for increased taxes" and then concluded that they lacked standing because they had not made a "specific showing" that they would "be liable to replenish public revenues depleted by [misapplication] of said funds." *Id.* at ¶ 20. But this does not imply that taxpayer plaintiffs must show that their tax bills will actually increase as a result of the misuse they challenge. The *Schact* plaintiff alleged the misapplication of court fees—not misuse

of funds paid by taxpayers. Thus, there was no reason to believe taxpayers would be liable to replenish those funds "[i]n the absence of any allegation" that their misapplication would somehow "adversely impact[] all taxpayers." *Id.* Here, in contrast, Plaintiffs have alleged that the City is misusing general revenue funds that they will be liable to replenish and therefore have alleged a sufficient injury to themselves as taxpayers. A234, C.2094 v2 ¶¶ 58-60.

Defendants' other cases likewise fail to support Defendants' argument. In *Marshall v. County of Cook*, as in *Schact*, a plaintiff lacked standing because he challenged the alleged misuse of court fees, not the misuse of tax revenue. 2016 IL App (1st) 142864 ¶ 16. In *Veazey v. Board of Education*, the plaintiff, unlike Plaintiffs here, failed to properly allege taxpayer standing because he did not plead that he had been, or would be, liable to replenish a particular misappropriation of funds, and the Court stated that he "likely" could correct that defect by amending his complaint to include that allegation. 2016 IL App (1st) 151795 ¶ 34. In *Village of Leland ex rel. Brouwer v. Leland Community School District No. 1*, the plaintiffs failed to establish taxpayer standing because they did not challenge the misuse of tax revenue but instead sought "to somehow recover monies donated by the American Legion for the benefit of school children" that "were derived from the alleged illegal sale of alcohol." 183 Ill. App. 3d 876, 879 (3d Dist. 1989).

Defendants argue that two cases Plaintiffs have cited, *Snow v. Dixon*, 66 Ill. 2d 443 (1977) and *Krebs v. Thompson*, 387 Ill. 471 (1944), are distinguishable from this case because in those cases "evidence showed" that the state had spent or would

spend particular amounts to administer the statutes taxpayers challenged in those cases. But all of Plaintiffs' claims before the Court were resolved on motions to dismiss, so no evidence is available or necessary regarding the amounts the City has spent or will spend to administer the provisions Plaintiffs challenge. At this stage, it is enough that Plaintiffs have alleged that the City will use tax revenue to administer the challenged Ordinance provisions, and that Plaintiffs, as taxpayers, will be liable to replenish the funds. A234, C.2094 V2 ¶¶ 58-60.

Finally, Plaintiffs were not required to allege that the City's expenditures to administer the challenged provisions "will result in an increase in taxes," as Defendants suggest. Defs.' Br. 57-58. The Illinois Supreme Court has held that taxpayers have standing to challenge an unconstitutional statute even if it generates a "profit" for the government. *See Snow*, 66 Ill. 2d at 45-48 (taxpayers had standing to challenge the use of public funds to collect an illegal tax even though costs were allegedly "de minimis"); *Krebs*, 387 Ill. at 474-76 (taxpayer had standing regardless of whether fees generated by challenged statute would "result in a net profit to the state" because the misapplication of any amount of public funds, "great or small," inherently injures taxpayers).

CONCLUSION

The dismissal of Plaintiffs' claims should be reversed.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 5,971 words.

/s/ Jacob Huebert

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. I, Jacob Huebert, an attorney, certify that on December 2, 2022, I electronically filed the foregoing Appellants' Reply Brief with the Clerk of the Court for the Illinois Appellate Court, First Judicial District. I further certify that I served a copy of this Brief on Defendants' counsel of record by the Court's Electronic Filing System and electronic mail to elizabeth.tisher@cityofchicago.org and appeals@cityofchicago.org.

/s/ Jacob Huebert