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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MENDEZ LEILA vs. CITY OF CHICAGO
2016-CH-15489

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MEMORANDUM FILED

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CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LEILA MENDEZ, et al.,)
)
Plaintiffs,) Case No. 2016-CH-15489
)
v.) Judge Sanjay T. Tailor
)
CITY OF CHICAGO, et al.,)
)
Defendants.)
)

PLAINTIFFS' RESPONSE
TO DEFENDANTS' SECTION 2-619.1 MOTION TO DISMISS

This case challenges one of the most extreme anti-home-sharing ordinances in the United States; Chicago's anti-home-sharing ordinance (the "Ordinance") allows officials to search home-sharers' private residences "at any time and in any manner" without a warrant or probable cause, arbitrarily limits *who* can engage in home-sharing, imposes unintelligible noise restrictions on home-sharers, and imposes discriminatory taxes and fees on home-sharing. And it does all of this to deprive Plaintiffs of "one of the most essential sticks in the bundle of rights that are commonly characterized as property," namely, the right to decide whether and which guests to allow to stay in their homes. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

Plaintiffs—taxpayers and property owners—filed this case seeking declaratory and injunctive relief against several provisions of the Ordinance. Proceedings were briefly stayed while the City amended the Ordinance in response to this case, thereby resolving one of Plaintiffs' claims (Count II), allowing them to voluntarily dismiss it. Now Defendants seek to dismiss Counts I, III, and V for lack of standing and Counts III through VIII for failure to state a claim. For the reasons set forth below, Defendants' Motion should be denied.

LEGAL STANDARD

In reviewing the sufficiency of a complaint under Section 2-615, the court must accept as true all well-pleaded facts and reasonable inferences, and construe the allegations in the light most favorable to the Plaintiffs. Only if no set of facts can be proved that would entitle Plaintiff to recovery should the motion be granted. *Doe v. Lawrence Hall Youth Servs.*, 2012 IL App (1st) 103758, ¶ 15. "A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint but asserts affirmative defenses or other matter" that would avoid or defeat the claim, *id.* at ¶ 16, but here, too, all properly pleaded facts must be accepted as true and the Court address only the questions of law presented by the pleadings. *Id.*

ARGUMENT

I. Plaintiffs have standing to bring their claims.

The City's arguments that Plaintiffs lack standing to bring Counts I, III, and V must fail because Plaintiffs have standing both as taxpayers and as property owners subject to the Ordinance. To establish standing, Plaintiffs must make allegations sufficient to show that they are suffering or likely to suffer injury to a legally cognizable interest, fairly traceable to the Defendants, which this Court could remedy. *Messenger v. Edgar*, 157 Ill. 2d 162, 170–71 (1993). In determining whether a party has standing, the Court assumes as true the allegations in the complaint. *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 19-20. Defendants bear the burden of proving that Plaintiffs lack standing. *Id.*

A. Plaintiffs have taxpayer standing to bring their claims.

As a threshold matter, all Plaintiffs have standing as taxpayers. "It has long been the rule in Illinois that . . . taxpayers have a right to enjoin the misuse of public funds" – *i.e.*, that "[t]he misuse of [public] funds for illegal or unconstitutional purposes is a damage which entitles

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[taxpayers] to sue." *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956). The use of public funds to administer an unconstitutional enactment is a "misuse of public funds" that taxpayers have standing to challenge. *See Snow v. Dixon*, 66 Ill.2d 443, 449-52 (1977) (taxpayer had standing to enjoin use of public resources to collect illegal tax); *Krebs v. Thompson*, 387 Ill. 471, 473 (1944) (taxpayer had standing to challenge licensing law for professional engineers because state used public funds to administer it); *Jenner v. Ill. Dep't of Comm. & Econ. Opp.*, 2016 IL App (4th) 150522, ¶ 18 (taxpayer had standing to challenge use of public funds to administer illegal regulation); *Crusius v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 51 (1st Dist. 2004) (taxpayer had standing to challenge statute regarding gambling licenses because state used public funds to administer it). The misuse of public funds injures taxpayers because they are the funds' "equitable owners" and will, by definition, be "liab[le] to replenish" State treasury funds after they are spent. *Barco* 10 Ill. 2d at 160.

Here, each Plaintiff pays property taxes, and three plaintiffs pay sales taxes, in Chicago. (Compl. ¶ 64.) Also, all Plaintiffs, to the extent they engage in home-sharing, are subject to the Ordinance's new 4% tax on home-sharing (*id.* ¶¶ 51-53), revenues from which are applied to enforcing the warrantless search provisions of the Ordinance they challenge. *See* Chi. Muni. Code § 3-24-030(b) (specifying that tax is to be spent "for . . . administration and enforcement of Section 4-6-300 and Chapter 4-14," which include the warrantless search provisions). Defendants have not rebutted Plaintiffs' allegations that the City is using general revenue funds (in addition to funds provided by the special tax the Ordinance adds) – *i.e.*, their tax dollars, which they are liable to replenish – to implement the Ordinance. (Compl. ¶¶ 65-66.)

Plaintiffs may challenge the use of their tax dollars to implement these unconstitutional provisions, *regardless* of whether the Ordinance otherwise affects them directly. The Illinois

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Supreme Court has rejected the City's argument (MTD 4), that Plaintiffs must show that the Ordinance will create a "specific budgetary deficiency." That 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 45-53 (taxpayers had standing to challenge use of public funds to collect 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); *see also Jenner*, 2016 IL App (4th) 150522 ¶¶ 18, 21, 25, 49 (taxpayer injury arises out of misuse of public funds, "regardless of the ultimate effect of such illegal use on the treasury").

Schact v. Brown is not to the contrary. There, 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. Therefore, 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,

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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.

B. Plaintiffs also have standing independently of their taxpayer status.

1. Plaintiffs have standing to challenge the Ordinance's warrantless searches.

Plaintiffs also have standing to bring Count I, challenging the Ordinance's warrantless searches, because it directly applies to them.

A party is injured for standing purposes where she is "force[d]…to modify [her] behavior in order to avoid future adverse consequences" resulting from a challenged law. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998); *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1182 (D.N.M. 2011). Where a party must refrain from activities she would otherwise undertake in order to avoid the burden of an unconstitutional law, she has been injured for standing purposes. *See, e.g., Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 672 (D.C. Cir. 2013) ("Several members aver that they live or work in close proximity to smelters and have reduced their time outdoors in response to concerns about pollution—precisely the kinds of harms the Supreme Court has deemed sufficient to show injury in fact."); *Smith v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1141 (7th Cir. 1994) (party who is "required to face the Hobson's choice between forgoing behavior that he believes to be lawful and violating the challenged law" has been injured for standing purposes).

Plaintiff Leila Mendez has standing because she has ceased to rent out her Chicago home for periods of fewer than 31 days in order to avoid being subject to warrantless searches under the Ordinance. Compl. ¶ 63.[1] But for the warrantless search provisions, she would make her

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[1] Ms. Mendez's decision to alter her behavior to avoid the searches does not undermine her standing. On the contrary, under the principle of "unconstitutional conditions," it shows that she

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property available for shorter periods. *Id.* ¶¶ 60, 62, 71, 76. In other words, she has been forced to refrain from exercising her constitutionally-protected property rights and to forgo business opportunities as a direct consequence of the challenged provisions. She therefore has standing to challenge the Ordinance's constitutionality. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–82 (2000) (party had standing because he "would like to fish, camp, swim, and picnic in and near the river . . . but would not do so because he was concerned that the water was polluted"); *Native Am. Arts, Inc. v. J.C. Penney Co.*, 5 F. Supp. 2d 599, 602 (N.D. Ill. 1998) (lost business opportunities are injury for standing purposes).

Because Ms. Mendez has standing, it is unnecessary for the Court to inquire further. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy [the] case-or-controversy requirement."); *Buttell v. Walker,* 59 Ill. 2d 146, 152 (1974) ("Since we hold that [two plaintiffs] have standing, we need not consider whether the remaining plaintiffs also have standing.").

Nonetheless, the other Plaintiffs, who have not refrained from home-sharing, also have standing because they face the threat of having their homes searched at any time. The plaintiffs in *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015), had standing to challenge an ordinance that authorized searches and seizures of their records by police without consent or warrant. Here, too, Plaintiffs are subject at any time to warrantless searches against their will. (Compl. ¶¶ 22-25,

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has been injured. As explained in *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1182 (D.N.M. 2011), which considered the constitutionality of a high school's regular policy of conducting warrantless searches at social functions, the "threat of deprivation, of a constitutional right is sufficient, standing alone, to constitute irreparable injury." The plaintiff was not required to submit to a warrantless search before challenging that unconstitutional condition. 792 F.Supp.2d at 1183.

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70.)[2] True, in *Patel,* the property owners had been searched in the past, but in a case for injunctive relief, past injury is just one way of showing the likelihood of future injury—it is not necessary. *See Cohan v. Bensenville Hosp. Inc.*, No. 15 CV 00214, 2016 WL 2733281, at *2 (N.D. Ill. May 11, 2016). What mattered in *Patel* was that property owners were subject to unannounced and warrantless searches. So are Plaintiffs, and they likewise have standing.

The Third Circuit followed these principles in *Free Speech Coalition v. Attorney General U.S.,* 787 F.3d 142 (3d Cir. 2015), holding that plaintiffs had standing to challenge rules authorizing searches even though they had not been searched yet.[3] The rules forced producers of adult films to obtain and keep information about performers, give it to investigators on demand, and allow investigators to inspect their business premises "at reasonable times" without a warrant. *Id.* at 155. Filmmakers had standing to sue, even though no inspection program was yet in place, because they were "suffering real costs as a condition of compliance" with the regulation. *Id.* at 165-67. Even with "no pending prosecution" and no "formal inspection regime in place," the plaintiffs had standing because they still had to "be prepared to face an inspection without warning and at law enforcement's discretion." *Id.*[4]

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[2] This fact is evident from the face of the Ordinance, but even if it were not, this Court must assume as true all allegations in the complaint for purposes of a Motion to Dismiss. *Maglio*, 2015 IL App (2d) 140782, ¶¶ 19-20.

[3] Actually, some had been, but the court found that this was "not sufficient on its own to confer standing." *Id.* at 167. Instead, the plaintiffs had standing because they "were 'direct targets of an ordinance they allege to be unconstitutional, complaining of what that ordinance would compel them to do.'" *Id.* (citation omitted).

[4] The district court's opinion is also instructive. *See Free Speech Coalition v. Attorney General U.S.*, 2012 WL 6059189, *3 (E.D. Pa. Dec. 5, 2012) (plaintiffs had standing because "the statute authorizes the . . . government to conduct warrantless searches . . . during 'regular working hours and at other reasonable times,' thus placing them in harm's way day-in and day-out, all year long"); *see also Noble v. Tooley*, 125 F. Supp. 2d 481 (M.D. Fla. 2000) (plaintiffs had standing to challenge policy authorizing warrantless searches of their home, not because of prior incidents of searches, but because of the existence of the policy).

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Precisely the same is true of these Plaintiffs. The Ordinance is directed at them; it requires them to make significant changes in their business practices; if they refuse to comply with it, including the warrantless search provision, they are subject to punishment. (Compl. ¶ 29.) Plaintiffs Sasso, Zaragoza, and Lucci rent their properties, and intend to continue doing so, which subjects them to enforcement of the Ordinance. (*Id.* ¶ 61.) Just as in *Free Speech Coalition*, there is "no dispute that Plaintiffs intend to continue to engage in conduct that subjects them to enforcement" of the challenged requirements, and "nothing prevents law enforcement from resuming inspection . . . even if we accept the Government's representation that it has no current plans to do so." 787 F.3d at 166. They are suffering real costs as a condition of compliance with the unlawful Ordinance. (Compl. ¶¶ 60-65.)

Even if a person has not been prosecuted for violating a regulation, he may seek prospective relief to block its enforcement if "failure to comply" will result in penalties. *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 417–18 (1942). Such standing "does not cease . . . merely because it is not certain whether the [government] will institute proceedings to enforce the penalty . . . for non-compliance." *Id.; see also Schuchardt v. President of the United States*, 839 F.3d 336, 352 (3d Cir. 2016) (party could challenge email surveillance program upon plausible allegation that his emails were subject to surveillance); *Mich. Wolfdog Ass'n, Inc. v. St. Clair Cty.*, 122 F. Supp. 2d 794, 804 (E.D. Mich. 2000) (parties could bring facial challenge to ordinance authorizing warrantless searches of properties where certain dog species were kept).

In short, Plaintiffs are not required to "await the consummation of threatened injury to obtain preventive relief." *Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983). Standing requirements are met if the challenged law is likely to be enforced against a plaintiff, the consequences of enforcement are significant, and the plaintiff has been forced to

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alter her conduct as a consequence of the challenged law. *Doe v. Prosecutor, Marion Cty., Ind.*, 566 F. Supp. 2d 862, 872 (S.D. Ind. 2008). That is all true here. Thus, Plaintiffs have standing.

Finally, there is no merit in Defendants' argument that Plaintiffs lack standing because they do not allege that they operate vacation rentals or are shared housing unit operators. (MTD 3.) As alleged in Complaint ¶¶ 17-21, the Ordinance's confusing definitions of "shared housing unit" and "vacation rental" are substantially identical except that each excludes the other, making it impossible to know which category applies to a property. *Compare* Chi. Muni. Code § 4-6-300 with § 4-14-010. And, even assuming that Plaintiffs' properties are shared housing units rather than vacation rentals, Plaintiff Zaragoza *does* meet the definition of a shared housing unit operator because he wishes to rent more than one property. (Compl. ¶ 62.) If Zaragoza or the other plaintiffs fail to comply with the Ordinance, they are subject to punishment by, among other things, fines of $2,500 to $3,000 per offense, and injunctive relief by the City to shut down their rental operations. *See* Chi. Muni. Ord. §§ 4-6-300(i)- (*l*). That means they have standing.

2. Plaintiffs' claim challenging warrantless searches is ripe.

The City also contends that Plaintiffs' claim is unripe because the City has not yet adopted regulations to govern how warrantless searches are conducted. (MTD 5.) This argument fails for two reasons.

First, it is premised on the "administrative search" doctrine, which sometimes allows the government to dispense with the warrant requirement if it substitutes a regulatory enforcement mechanism that provides procedural safeguards. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). But the doctrine applies only to businesses in certain closely regulated industries, *not to private homes*. *Anobile v. Pelligrino*, 303 F.3d 107, 120–21 (2d Cir. 2001) ("[T]he Supreme Court has held administrative searches of homes to be unconstitutional, even in the face of

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compelling circumstances."). Nor does it apply to home-based businesses generally. *Blackwelder v. Safnauer*, 689 F. Supp. 106, 138 (N.D.N.Y. 1988). Indeed, the Supreme Court expressly refused to apply the doctrine to *hotels* in *Patel.* 135 S.Ct. at 2451-54. Because the administrative search doctrine does not apply, it does not matter *what* regulatory substitute the City might fashion. *See Free Speech Coalition*, 825 F.3d at 169-71.

Second, the current lack of rules limiting searches under the Ordinance is not a reason why Plaintiffs' claim is unripe; it is a reason why an injunction is *proper*. *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985), is instructive. There the court held that a California law authorizing warrantless searches of home-based[5] day cares was too broadly worded, because it (like the Ordinance here) authorized searches "at any time," and there were no regulations yet to limit those searches. *Id.* at 721. It held that, "absent limiting regulations," the statute "[did] not provide a constitutionally adequate substitute for a warrant" and was "therefore invalid under the Fourth Amendment." *Id.* at 721-22. It therefore enjoined enforcement of the statute, ruling that the state could seek to have the injunction lifted after promulgating regulations sufficiently limiting its search power. *Id.* at 723.

Likewise here, the City's failure to issue regulations militates *in favor* of an injunction. It is not clear from the Ordinance that the City must wait to conduct searches until regulations have been promulgated. As in *Rush*, the Ordinance does not provide sufficient procedural safeguards. There is no reason to believe regulations will remedy that deficiency, especially since the City could have added a warrant requirement when it recently amended the Ordinance to add a

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[5] The court carefully noted that the administrative search exception did not apply to homes generally, but that warrantless searches were only permitted "in those portions of the provider's home where day care activities take place only when the home is being operated as a family day care business." *Id.* at 721. The Ordinance here, by contrast, authorizes searches of the Plaintiffs' homes "at any time" and without limit, even if those homes are not being rented out at the time.

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warrant requirement for records inspections (resolving Plaintiffs' privacy claims in Count II) but chose not to do so.

Now that the Ordinance is in effect, Plaintiffs could be searched at any time. They do not have to wait until the City knocks at the door before seeking relief. *See Miles Kimball Co. v. Anderson*, 128 Ill. App. 3d 805, 807 (1st Dist. 1984) ("The mere existence of a claim . . . in which the ripening seeds of litigation may be seen and which cast doubt, insecurity, and uncertainty upon plaintiff's legal rights or status . . . establishes a condition of justiciability."); *see also Dolezal v. Plastic & Reconstructive Surgery, S.C.*, 266 Ill. App. 3d 1070, 1083 (1st Dist. 1994) (plaintiff performing procedures at hospital could challenge non-compete agreement that, on its face, precluded him from working at the hospital, but had not been enforced).

2. Plaintiff Zaragoza has standing to challenge the Primary Residence Rule.

Plaintiff Zaragoza has standing to challenge the Primary Residence Rule (and thus to bring Count III) not only because he is a Chicago taxpayer but also because it directly injures him. Zaragoza owns a three-unit residential building in Chicago and wishes to rent out one unit through Airbnb. (Compl. ¶¶ 62, 93.) The Primary Residence Rule, however, prohibits him from doing so because the building is not his primary residence. (*Id.*) Thus, the Rule injures Zaragoza and he may challenge it.

II. Plaintiffs have stated civil rights claims upon which relief may be granted.

A. Plaintiffs have stated a due process claim against the Primary Residence Rule.

Plaintiffs have alleged all facts necessary to state a substantive due process challenge to the Primary Residence Rule.

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1. The rational basis test calls for meaningful review of whether a law is reasonably designed to serve the public's health, safety, or welfare.

A party bringing a substantive due process challenge to an ordinance must show that it bears no rational relationship to a legitimate governmental purpose – *i.e.,* that it is not rationally related to protecting the public's health, safety, or welfare. *See Chi. Title & Trust Co. v. Vill. of Lombard*, 19 Ill. 2d 98, 105 (1960).

This "rational basis" test is deferential, but it is not as deferential as the City argues. It does not prohibit courts from considering evidence bearing upon whether an ordinance actually serves the public's health, safety, or welfare. (*See* MTD 7.) To the contrary, plaintiffs bringing a substantive due process claim *must* present "clear and affirmative evidence" to show that "the ordinance constitutes arbitrary, capricious and unreasonable municipal action; that there is no permissible interpretation which justifies its adoption, or that it will not promote the safety and general welfare of the public." *Triple A Servs. v. Rice*, 131 Ill. 2d 217, 226 (1989).

Also, not every law that addresses a health, safety, or welfare problem – no matter how minimally – necessarily satisfies the rational basis test. Although the test does not require laws to serve the government's interests by the least restrictive means, it does require that laws be *reasonably* designed to serve their purpose. *Figura v. Cummins*, 4 Ill. 2d 44, 49 (1954).

Thus, the Illinois Supreme Court has not treated the rational basis test as a rubber stamp; it has applied the rational basis test to strike down laws that were not reasonably designed to serve the public's health, safety, or welfare. For example, in *Chicago Title & Trust Co.*, it scrutinized a village ordinance that prohibited a gas station from locating within 650 feet of an existing gas station, 19 Ill. 2d 98, and struck that ordinance down because evidence presented at trial negated any health or safety justification for it. *Id.* at 103-07. The court observed that, even if the village was motivated by a concern for fire safety, it was "clearly unreasonable" to require

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650 feet between gas stations but only 150 feet between a gas station and a hospital or church. *Id.* at 104-05. It also rejected traffic congestion as a justification because "the problems of traffic . . . were not shown to be any different with respect to filling stations than with respect to other businesses." *Id.* at 105. Because the ordinance "ha[d] no rational connection with the objects of governmental police power" and only served to limit competition, it was unconstitutional. *Id.* at 107.

The Illinois Supreme Court has also struck down as unreasonable laws that banned far more harmless activity than necessary to serve any governmental interest. In *Figura*, it held that a statute prohibiting people from processing metal springs in their homes was unreasonably overbroad. The trial court had upheld the ban, concluding that it protected public safety because a "foot press" used by some home workers would, "if unguarded, [would be] dangerous to small children," but the Court concluded that banning *all* spring processing was an unreasonable means of addressing this concern because evidence showed that 75 percent of home workers never used a foot press, and any danger foot presses posed could have been "entirely eliminated by a regulation requiring foot presses used in the processing of metal products by home workers to be provided with guards." 4 Ill.2d at 48, 51. Similarly, *People v. Weiner* struck down a prohibition on the sale of mattresses, quilts, and comforters made with second-hand materials because evidence showed that all danger to health and safety could be eliminated by requiring the materials to be sterilized. 271 Ill. 74, 79-80 (1915).

As these cases illustrate, the Court has rigorously applied the rational basis in cases affecting the right to use one's property to earn a living. *See also Church v. State*, 164 Ill. 2d 153, 169-72 (1995) (striking statute for licensing alarm contractors not "calculated to enhance the expertise of prospective licensees"); *People v. Johnson*, 68 Ill. 2d 441 (1977) (striking licensing

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law protecting established plumbers from competition without providing any benefit to the public, following a line of cases doing the same); *Gholson v. Engle*, 9 Ill. 2d 454, 459-60 (1956) (striking law requiring a funeral director to also be a licensed embalmer because evidence showed no justification for tying one occupation to the other). And the Court has struck down statutes and ordinances under the rational basis test in other contexts. *See, e.g., Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 389, 393-409 (1997) (tort-reform act failed rational basis test); *People v. McCabe*, 49 Ill. 2d 338, 340-50 (1971) (evidence proved lack of rational basis for "gross disparity" between statutes' 10-year minimum sentence for a first sale of marijuana and one-year maximum sentence for a first sale of a stimulant or depressant drug).

2. Plaintiffs have alleged sufficient facts to support their substantive due process claim.

Plaintiffs have made sufficient allegations to support their claim that the Primary Residence Rule violates substantive due process because it is not reasonably designed to serve any legitimate governmental interest. Specifically, they have alleged that "restricting *who* may rent out a single-family home or dwelling unit in a building with two, three, or four units as a vacation rental or shared housing unit" – as the Rule does – "bears no relationship to the public's health, safety, or welfare." (Compl. ¶ 85.) Plaintiffs allege that there is "no reasonable basis for concluding that guests staying at homes which are the primary residences of the owners would pose a lesser threat to the public's health, safety, or welfare than would guests who stay at homes which are not the primary residences of their owners." (*Id.* at ¶ 86.) Plaintiffs further allege that a regulation "actually directed toward protecting the public's health, safety, or welfare would address *how* such homes and units are used – *e.g.,* by prohibiting specific nuisance activities or specified noise levels, imposing mandates on property management companies, etc., so as to ensure that actions taken by guests in a vacation rental or shared housing unit do not harm

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others" – and that "[l]imiting allowable ownership accomplishes none of these purposes." (*Id.* at ¶ 87.) Plaintiffs allege that the Rule violates substantive due process because it gives the Commissioner "arbitrary and unlimited discretion" to make exceptions ("adjustments") to the Rule without providing "sufficient objective criteria to guide the Commissioner's exercise of discretion." (*Id.* at ¶¶ 90-91.) As a result, Plaintiffs allege, the City's determinations of who may rent out a single-family home or building with four or fewer units for more than 120 days a year bear no necessary relationship to the public's health, safety, or welfare. (*Id.* at ¶ 92.)

If proven, these factual allegations would establish that the Primary Residence Rule is arbitrary, unreasonable, and unrelated to the public's health, safety, or welfare and thus violates substantive due process. Therefore, Count III of Plaintiffs' complaint states a claim for violation of substantive due process and should not be dismissed.

3. The City's purported justifications for the Primary Residence Rule cannot warrant dismissal of Plaintiffs' claim.

The City's purported justifications for the Primary Residence Rule are irrelevant at this stage. Having sufficiently alleged a substantive due process claim, Plaintiffs are entitled to introduce evidence to negate the City's alleged rational bases for the Rule.

Besides, the City's justifications for the Rule are dubious. The City primarily relies on its supposed interest in preserving the "character" of neighborhoods where the types of homes affected by the Rule – single-family homes and buildings with two to four dwelling units – are found. (MTD 8-11.) But the City has not established that most or many homes affected by the Rule are actually *in* areas that primarily or exclusively contain such homes – *i.e.,* areas that have the "character" the Rule allegedly helps to preserve. Many homes affected by the Rule are in *other* areas, such as "RT4" residential areas, which may also contain apartment buildings with more than four units. *See* Chi. Muni. Code § 17-2-0304-B (specifically contemplating 19-unit

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buildings in RT4 districts). In "RT4" areas, some homeowners' property rights are restricted by the Primary Residence Rule, but others are not, for no rational reason. And many units restricted by the Rule are in commercial and business buildings with apartments above the first floor. *See* Chi. Muni. Code §§ 17-3-0207 (business and commercial), 17-4-0207 (downtown). In those places, the Rule could not serve the City's "residential character" purpose and therefore arbitrarily deprives residents of their property rights for no good reason.

The City's efforts to justify the Rule based on home-sharing's alleged effects on property values are contradictory. First it asserts that the Rule serves its interest in preventing residents' property values from *decreasing*. (MTD 9.) But two paragraphs later, it argues that the Rule prevents rents (and, thus, property values) from *increasing*. (MTD 11.) Thus the City appears to have no coherent idea about home-sharing's effects on property values, and could not have designed its ordinance to reasonably address those effects.

The City's argument that the Rule will cause properties to be better maintained defies common sense. To see why, one need only consider whose home is likely to be cleaner: a person who frequently seeks to make money by attracting people to rent out a home on Airbnb, or a person who never has visitors. It is obvious that people whose income depends on having attractive property have a strong incentive to maintain that property. *Cf. Edwards v D.C.*, 755 F.3d 996, 1006 (D.C. Cir. 2014) (where business "already ha[d] strong incentives to provide a quality consumer experience," restriction on that business lacked rational basis).

4. There is no defect in the portion of Plaintiffs' challenge based on the Rule's "adjustment" exception.

There is no merit in the City's argument that the portion of Count III addressing the "adjustment" exception to the Primary Residence Rule fails to state a claim because Plaintiffs supposedly "do not have a property interest in receiving an adjustment." (MTD 13.)

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The City's argument depends on inapposite cases that considered whether parties had a protected interest in some benefit that entitled them to *procedural* due process – *e.g.,* a hearing – before the government denied them that benefit. *See Big Sky Excavating, Inc. v. Ill. Bell. Tel. Co.*, 217 Ill. 2d 221, 241 (2005) (no protected right to continuation of existing law); *Polyvend, Inc. v. Puckorius*, 77 Ill. 2d 287, 294 (1979) (no right to future state contract); *C. Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696 ¶ 27 (no right to terminal operator's license); *Suburban Downs, Inc. v. Ill. Racing Bd.*, 316 Ill. App. 3d 404, 413 (1st Dist. 2000) (no right to award of horse racing dates); *Petersen v. Chi. Plan Comm'n*, 302 Ill. App. 3d 461, 467 (1st Dist. 1998) (no right to preservation of public park); *Akmakjian v. Dep't of Prof'l Reg.*, 287 Ill. App. 3d 894, 896 (1st Dist. 1997) (no right to hearing on petition to expunge criminal record). (MTD 13-14.)

Plaintiffs' claim is not based on procedural due process – *i.e.,* it does not concern what procedures the Commissioner must follow before denying an adjustment. Rather, Plaintiffs' *substantive* due process claim alleges that the Rule is not reasonably designed to serve the public health, safety, or welfare, in part because it gives the Commissioner unlimited discretion to make exceptions based on factors unrelated to the public's health, safety, or welfare. (*See* Compl. ¶¶ 90-92.) The relevant property right for this claim is Plaintiffs' right to rent out their property, which exists independently of any statute or ordinance. *See Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 310 (2008) ("[T]he privilege of every citizen to use his property according to his own will is both a liberty and a property right.") (internal marks omitted).

B. Plaintiffs have stated an equal protection claim against the Primary Residence Rule.

Plaintiffs have also alleged sufficient facts to establish an equal protection claim challenging the Primary Residence Rule (Count IV). Under the rational basis test, a party states a claim for a violation of equal protection where it alleges that the government has treated

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similarly situated parties differently and the different treatment does not serve a legitimate governmental purpose. *See People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 123-24 (1998).

Here, Plaintiffs have alleged that Rule irrationally discriminates between two classes of people that are similarly situated: (1) owners of buildings with two, three, or four dwelling units, who are subject to the Rule; and (2) owners of buildings with five or more dwelling units, who are not subject to the Rule. Plaintiffs allege that this discrimination serves no legitimate purpose because there is no reason to believe that the former group's home-sharing guests pose a greater threat to the public's health, safety, or welfare than the latter group's home-sharing guests. (Compl. ¶¶ 98-101.) Plaintiffs further allege that "[a] regulation actually directed toward protecting the public's health, safety, or welfare would address *how* . . . homes or units are used – i.e., it would be directed at ensuring that actions taken by guests in a vacation rental or shared housing unit do not harm others or create nuisances," as with "rules to limit noise, enforce parking restrictions, and deal with other nuisances." (*Id.* at ¶ 102.)

Thus, Plaintiffs have alleged exactly what they must to state an equal protection claim. If proven, Plaintiffs' allegations would establish that the City is treating similarly situated classes of people differently for no legitimate purpose. Therefore, the Court should not dismiss their claim but instead should allow it to proceed so Plaintiffs may support it with evidence.

The City argues that owners of buildings with four or fewer units and owners of buildings with five or more units are not similarly situated (MTD 15), but that is a factual question that cannot be resolved on a motion to dismiss. *See Marcavage v. City of Chicago*, 659 F.3d 626, 631-32 (7th Cir. 2011). Likewise, the City's attempt to justify the Rule's discrimination (MTD 15-16) cannot justify dismissal because Plaintiffs may rebut it with evidence.

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Further, the City's purported rational basis is again dubious. The City asserts that "large apartment and condominium buildings [which are not subject to the Rule] are likely to be found in highly-developed and bustling areas of the City," and therefore "the impact on the residential quality of life in those communities from absentee owners and high-volume short-term rentals is less, if it exists at all, than in traditional, low-intensity residential neighborhoods." (MTD 15.) But, as discussed above, many areas of Chicago are zoned to allow buildings with four or fewer units alongside buildings with five or more units, and presumably many dwelling units restricted by the Rule are in business and commercial districts, where the Rule could not serve its purported purpose. So in many instances, the Rule discriminates in favor of the owner of a unit in one building and against the owner of a unit in a neighboring building, or restricts the use of property where it certainly will not affect "residential quality of life," for no good reason.

There is also no merit in the City's argument that allowing units in buildings with five or more units "to be rented more days per year . . . benefits the City because it adds to the stock of room available to tourists and visitors, since they are likely to want to stay in denser areas of the City." (MTD 15-16.) This argument cannot justify the Rule's application in the many areas of the City that have buildings with five or more units but are less dense, where the owner of a unit in a five-unit building enjoys greater rights than the owner of a unit in a neighboring four-unit building for no apparent reason. And of course visitors "want to stay" *wherever they choose to stay*, so the Rule will only deny some visitors lodging options they otherwise would have chosen and thus, if anything, *disserve* the City's putative interest in accommodating visitors.

This is merely to illustrate that the Rule is not as obviously rational as the City suggests. Again, Plaintiffs need not prove their case at this stage. Having stated a claim, they are entitled to rebut the City's arguments with evidence on summary judgment or at trial.

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C. The Plaintiffs have stated a substantive due process challenge to the rental caps.

Plaintiffs have also sufficiently stated a substantive due process claim against the Ordinance's rental caps in Count V. Plaintiffs allege that the City has "no rational foundation for restricting the number of [licensed] vacation rentals or [registered] shared housing units within a building, as the rental cap provisions do" because "[a] regulation actually directed toward protecting the public's health, safety, or welfare would [instead] address *whether* or *how* such units are used – *i.e.,* it would be directed at ensuring that actions taken by guests in a vacation rental or shared housing unit do not harm others." (Compl. ¶¶ 108-09.) Plaintiffs allege that the caps are irrational because they "are not tied to how often – or even *whether* – a property is actually rented out to guests" but instead are "triggered by a property owner merely obtaining a license to rent out a property as a vacation rental, or by registering a home as a shared housing unit, even if he or she never actually rents out the property at all." (*Id.* ¶ 107.) Plaintiffs further allege that the only true purpose of the caps is "to protect the traditional hotel industry against legitimate economic competition" from home-sharing. (*Id.* ¶ 111.)

If proven, these allegations would establish that the rental caps are not reasonably designed to serve the public's health, safety, or welfare. Plaintiffs have therefore stated a substantive due process claim in Count V of their complaint, and the Court should not dismiss it. Here again, because Plaintiffs have stated a claim, the City's purported rational bases for the rental caps cannot justify dismissal.

Moreover, the City's rationalizations fail on their face. The City asserts that the rental caps serve its interest in preventing residential buildings from becoming "de facto" hotels. (MTD 17.) But the caps do not restrict the number of units in a building that are *actually rented*, or the number of days units are rented. Instead, the caps restrict how many units that may be *licensed* as

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vacation rentals or *registered* as shared housing units. Thus, the caps allow the owner of one unit in a building to prevent the owner of another unit from home-sharing merely by *listing* a rental property on a platform such as Airbnb, without ever renting it out. Thus, even if one assumes that the City has an interest in restricting how many units in a building are used for home-sharing, or how often they are used for home-sharing, the caps are not a reasonable means of serving that interest: They irrationally treat units that could have *no* effect on the City's alleged interest – those that are registered but never rented out – the same as units that would presumably have the *greatest* effect on its alleged interest – those that are rented out every night of the year.

Putting that fatal flaw aside, the Rule is not reasonably designed to serve its alleged purpose because it applies regardless of where a building is located or whether the building is otherwise residential. Thus, the Rule restricts property rights in many instances where doing so would not even serve the City's alleged interest.

The cases from outside Illinois that the City has cited to justify imposing rental caps actually highlight the caps' extraordinary overbreadth. (MTD 17.) The schemes upheld in those cases did not impose rental caps in *all* buildings *everywhere*, as Chicago's Ordinance does, but instead targeted rentals in *specific districts* where the government believed restrictions were necessary to preserve neighborhoods' residential character. *See Dean v. City of Winona,* 843 N.W.2d 249 (Minn. Ct. App. 2014) (upholding ordinance limiting the number of lots on a block eligible to be certified as rental properties "in certain districts of the city"); *Kasper v. Brookhaven*, 142 A.D.2d 213 (N.Y. App. Div. 1988) (upholding ordinance restricting rental of single-bedroom apartments in "specified single-family residence zoning districts").

Finally, the City's argument that it may impose rental caps to protect the hotel industry (MTD 18) is meritless. The City's cases from other jurisdictions approving of laws enacted

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solely to benefit private interests conflict with the law of Illinois and other jurisdictions that have rejected economic protectionism as a permissible purpose. *See, e.g., People v. Brown*, 407 Ill. 565, 584 (1950) (laws may not bestow "special and exclusive favors" on a particular group); *Koos v. Saunders*, 349 Ill. 442, 448 (1932) (government may not use police powers "to serve a purely private purpose"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose . . . ."); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from competition is not a legitimate governmental purpose."). And there is no merit in the City's assertion that it may protect the hotel industry from competition to ensure its "viability" as "an important source of jobs and tax revenue" that "enhances the City's ability to attract tourists and conventions." (MTD 18.) Home-sharing likewise provides people with jobs and income, provides tax revenue (more per rental under the Ordinance's discriminatory taxation), and attracts visitors. Indeed, the notion that hotels need to be protected assumes that home-sharing will attract visitors who otherwise would have stayed at hotels. Thus, the Ordinance simply engages in pure protectionism, favoring some lodging providers over others.

D. Plaintiffs have stated a due process claim against the vague noise rule.

Defendants' conclusory argument that the noise rule is not vague (MTD 19-20), is insufficient to deny Plaintiffs an opportunity to be heard on their due process claim against it.

To begin, Defendants' examples of ordinances that have withstood vagueness challenges – based on terms such as "distinctly and loudly audible," "disturbing the peace and comfort of occupants of adjacent premises," and "loud and raucous sounds" and "disturbing the comfort of occupants" – were far clearer than the rule challenged here, which prohibits "any noise,

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generated from within or having a nexus to the rental of the shared housing unit [*sic*]" that is "louder than average conversational level," and which can lead a license or registration suspension. Chi. Muni. Code §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2).[6] (MTD 20.)

In *City of Aurora v. Navar*, 210 Ill.App.3d 126, 131 (2d Dist. 1991), the court struck down as unconstitutionally vague an ordinance stating that "[a]ny commercial activity audible from adjacent premises, or conducted out-of-doors, after 9 p.m. is declared a nuisance." The city argued that the terms such as "audible" and "adjacent premises" had commonly understood meanings, but the court held that the vagueness question turns not on whether individual words have a meaning, but on whether, when used together, they create a clear, commonly understood standard. *Id.* Because the city's definition of "nuisance" did not create such a standard, the ordinance was unduly vague. *Id.*

Similarly, the Ordinance's noise rule is vague because it is confusing – the terms are used in a way that precludes a person of ordinary intelligence from understanding what behavior is prohibited. One might be able to understand the City's noise rule that applies to B&Bs, hotels, and long-term residential units, which, unlike the Ordinance challenged here, exempts "noise created by unamplified human voices." *Compare* Chi. Muni. Code §§ 8-32-150, 8-32-170 *with* Chi. Muni. Code §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2). A person of average intelligence would understand a restriction on *amplified* sounds louder than average conversations to include things like music or movies played through stereo speakers, musical instruments, car horns, bullhorns, etc. But when are *unamplified* voices considered "louder than average conversational level"? It is impossible to say. Without some objective standard, Chicago's prohibition on noises above

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[6] Even if "average conversational level" were not vague, consider the number of noises that are "louder" than that: using a vacuum cleaner, a blow-dryer, a kitchen food processor, an alarm clock, a lawn-mower—all of these are typically louder than the "average" conversation, and all would have "a nexus" to the use of a shared housing unit.

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"average conversational level" that "hav[e] a nexus to" a home-sharing property would permit officials to revoke home-sharers' licenses anytime a baby cries or a garage door opens.

Again, it is not necessary to reach the merits here. Plaintiffs have sufficiently stated their cause of action by alleging that an ordinary person cannot know how to avoid violating the noise rule, which does not define "average conversational level" (Compl. ¶ 49), does not exempt "noise created by unamplified human voices" (*Id.* ¶ 50), and includes no objective measurements (*Id.* ¶ 120) or durational requirement (*Id.* ¶ 121). Defendants' motion to dismiss Count VI therefore should be denied.

E. Plaintiffs have stated and equal protection claim against the noise rule.

In arguing for dismissal of Plaintiffs' equal protection challenge to the noise rule, Defendants do not deny that the City subjects home-sharing to different noise standards than other rental entities; they simply argue that the discrimination is justified. (MTD 21.) But Plaintiffs need not win their case to survive a motion to dismiss; they simply need to plead sufficient to state a claim upon which relief can be granted. They have done so.

When government treats people or properties differently, its classifications must be rationally drawn to promote a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 447-48 (1985) (striking down ordinance that required special use permit for homes for the mentally disabled but not for other uses such as apartments, multiple dwellings, or fraternity houses). Thus, in *Jacobson v. Department of Public Aid*, the Illinois Supreme Court struck down a law requiring parents to take financial responsibility for children residing in their parents' home, while exempting parents whose children resided elsewhere, holding that exempting non-residential parents did not further the State's goal of making families responsible for their own support and replenishing public aid coffers. 171 Ill.2d 314, 325 (1996).

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Similarly, Plaintiffs allege that there is no rational reason for the City to subject home-sharing to a lower noise threshold than other rentals – that, if the City's goal is to eliminate "excessive noise," there is no reason why *all* properties in a given area should not be subject to the same noise limits. (Compl. ¶¶ 126-29.) This is sufficient to state a claim.

Defendants argue that home-sharing units are often located in different zones than hotels and B&Bs, so there is "a rational basis for applying the excessive loud noise restriction only to" the former. (MTD 21-22.). That misses the point. Plaintiffs do not argue that home-sharing and hotels are exactly alike, nor do they deny that different zoning districts might have different expectations regarding noise or that the City might have more difficulty enforcing noise restrictions against some entities. Plaintiffs allege that the Ordinance imposes stricter noise rules on homesharers than "other rental entities" (Compl. ¶ 50), *regardless* of the zone they are in, *without relation* to relative ease of enforcement, and thus unreasonably "singles out 'vacation rentals' and 'shared housing units' for unfavorable treatment." (*Id.* at ¶ 128.)

Plaintiffs allege that, within each zone, homesharers are *always* subject to this heightened noise rule, while other rental entities are *always* subject to a lesser standard. For example, in low-density residential zoning districts that Defendants characterize as "generally intended to be relatively quiet" (MTD 22), home-sharing renters must adhere to a lower noise threshold than long-term residential renters. And in higher-density neighborhoods, where tolerance for noise may be greater, the Ordinance *still* subjects homesharers to a lower noise threshold than B&Bs and hotels, *regardless of zoning*. Thus, the City's justification for subjecting shared housing units and vacation rentals to a lower noise threshold than other rental entities must fail.

The City's unsubstantiated claim that home-sharing poses "a greater risk that rental activity may erupt into an uproar" than B&Bs and hotels where managers are present (*id.*) cannot

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justify denying Plaintiffs an opportunity to make their case. If home-sharing is more likely to result in "noise problems" (*id.*), that might justify strengthening enforcement against homes used for home-sharing, but it cannot justify subjecting home-sharing to a *different noise limit* than other rental entities. That makes as little sense as having a lower speed limit for a particular car model because the City believes the model's owners are especially likely to drive fast.

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

F. Plaintiffs have stated a claim under the Uniformity Clause.

1. Plaintiffs have sufficiently alleged a Uniformity Clause violation.

Plaintiffs have also stated a claim under the Uniformity Clause (Article IX, § 2) of the Illinois Constitution, which provides:

> In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

Plaintiffs have sufficiently alleged that the Ordinance violates the Uniformity Clause in two ways: (1) by imposing a 4% surcharge on rentals of vacation rentals and shared housing units that is not imposed on the renting or leasing of other "hotel accommodations" and (2) by imposing different licensing fees than it imposes on other "hotel accommodations."

The Uniformity Clause "imposes more stringent limitations than the equal protection clause on the legislature's authority to classify the subjects and objects of taxation." *Allegro*

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Servs. v. Metropolitan Pier & Exposition Auth., 172 Ill. 2d 243, 249 (1996). It requires any tax classification to "be based on a real and substantial difference between those taxed and those not taxed" and to bear some "'reasonable relationship' to the object of the legislation or to public policy." *Ball v. Vill. of Streamwood*, 281 Ill. App. 3d 679, 684-85 (1st Dist. 1996).

Once Plaintiffs establish a good-faith Uniformity Clause challenge, "the taxing body must produce a justification for the classification." *Geja's Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill. 2d 239, 248 (1992). *Only then* must Plaintiffs show that the justification is insufficient as a matter of law or unsupported by the facts. *Id.* at 248-49. Thus, even if Defendants *state* a justification for the differential treatment of vacation rentals and shared housing units, it is not appropriate to dismiss Plaintiffs' claim, as long as they could state some set of facts that, if proven, would persuade the Court that Defendants' justification is insufficient.

Plaintiffs have alleged facts establishing a Uniformity Clause claim based on the Ordinance's discriminatory taxation of home-sharing units. Plaintiffs allege that, "[f]or purposes of taxation, there is no real and substantial difference between vacation rentals and shared housing units – which are subject to an addition 4% tax – and other establishments included in the definition of 'hotel accommodations,' which are not subject to that tax." (Compl. ¶ 135.) Plaintiffs allege that the Ordinance's "definition of a bed-and-breakfast establishment . . . is substantially similar to, and overlaps with, the Ordinance's definitions of vacation rentals and shared housing units" and that the City therefore "cannot justify imposing a 4% tax on vacation rentals." (*Id.* ¶¶ 136-37.) And Plaintiffs allege that the Ordinance's stated purpose of the 4% tax – funding services for the homeless – "does not bear any reasonable relationship to the object of the legislation" requires because "[t]here is no reason to believe that vacation rentals and shared housing units have anything to do with homelessness, let alone any reason to think that vacation

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rentals and shared housing units have any *greater* connection to homelessness than other traveler housing accommodations, such as hotels, bed-and-breakfast establishments, or even non-commercial activities such as staying in a friend's guest room." (*Id.* ¶¶ 138-39.)

Plaintiffs also allege facts establishing a claim that the Ordinance's discriminatory fees violate the Uniformity Clause. They have alleged there is no "real and substantial difference between hotels, bed-and-breakfast establishments, vacation rentals, and shared housing units" that could justify imposing different fees on them (*Id.* ¶¶ 143-45) and that the "Ordinance's different fee schemes for vacation rentals and shared housing units are especially unjustifiable because the Code's definitions of the two types of rentals are virtually identical." (*Id.* ¶ 144.)

Because Plaintiffs have alleged sufficient facts to state a uniformity claim (on two grounds), dismissal of Count VIII is improper – again, notwithstanding the City's putative justifications, which Plaintiffs may rebut with evidence.

2. Plaintiffs have sufficiently alleged different classes of taxpayers

The City's argument that Plaintiffs' Uniformity Clause must fail on the ground that Plaintiffs "do not identify a class of taxpayers that is separate from, and taxed differently than, people staying at vacation rentals and shared housing units" (MTD 23) fails both legally and factually.

The City argues that a Uniformity Clause claim requires discrimination between different classes of *taxpayers* rather than different classes of *goods or services taxed*, citing *Heyman v. Mahin*, 49 Ill. 2d 284, 287-89 (1971). But *Heyman* is not controlling because it considered a claim brought under Article IX, Section 1, of the 1870 Illinois Constitution, which explicitly addressed uniform taxation of *persons*. The current Illinois Constitution's Uniformity Clause, in

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contrast, applies to "any law classifying the *subjects or objects* of non-property taxes or fees," making clear that laws must tax *like things alike* unless it can justify treating them differently.

And even if the City were correct about the law, its argument would still fail. In the City's view, Plaintiffs can only state a good-faith uniformity challenge if they "allege that there is one class of customers who stay only at vacation rentals and/or shared housing units, and another class who stay only at other hotel accommodations, such as hotels or B&Bs." (MTD 24.) The City argues Plaintiffs could not make or support such an allegation because, it says, "[t]here is no class of people who stay only at one particular kind of accommodation." (*Id.*) That is false. Of course there are people who only stay at one type of accommodation or the other: *e.g.*, people who visit Chicago one time and stay in a hotel; and people who visit one time and stay at a unit rented through a home-sharing platform. Therefore, even if a uniformity claim did require the existence of two wholly separate classes of taxpayers, Plaintiffs would satisfy that requirement.

Thus, regardless of whether the Uniformity Clause concerns taxation of things, people, or both, Plaintiffs have stated a claim.

CONCLUSION

Plaintiffs respectfully ask this Court to deny Defendants' motion to dismiss.

Dated: March 27, 2017

Respectfully submitted,

LEILA MENDEZ, SHEILA SASSO,
ALONSO ZARAGOZA, AND MICHAEL LUCCI

By:
One of their Attorneys

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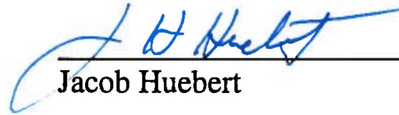
CERTIFICATE OF SERVICE

I, Jacob Huebert, an attorney, hereby certify that on March 27, 2017, I served the foregoing Response to Defendants' Section 2-619.1 Motion to Dismiss on Defendants' counsel by electronic mail to Andrew W. Worseck (Andrew.Worseck@cityofchicago.org) and Ellen W. McLaughlin (Ellen.McLaughlin@cityofchicago.org).



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Chancery DIVISION

Litigant List

Printed on 03/28/2017

Case Number: 2016-CH-15489

Plaintiffs

Plaintiffs Name	Plaintiffs Address	State	Zip	Unit #
MENDEZ LEILA			0000	
SASSO SHEILA			0000	
ZARAGOZA ALONSO			0000	
LUCCI MICHAEL			0000	

Total Plaintiffs: **4**

Defendants

Defendant Name	Defendant Address	State		Unit #	Service By
CITY OF CHICAGO			0000		
MARIA GUERRA LAPACEK			0000		

Total Defendants: **2**