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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 23-0767

In the Supreme Court of Texas

SHANA ELLIOTT AND LAWRENCE KALKE,
Petitioners,

v.

CITY OF COLLEGE STATION, TEXAS; KARL MOONEY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF COLLEGE STATION; AND BRYAN WOODS, IN HIS OFFICIAL CAPACITY AS THE CITY MANAGER OF THE CITY OF COLLEGE STATION
Respondents.

From the Court of Appeals Sixth Appellate District of Texas at Texarkana, Case No. 06-22-00078-CV

PETITIONERS' REPLY BRIEF ON THE MERITS

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This case presents a simple question. Are claims brought under a provision of the Texas Bill of Rights within the jurisdiction and competence of Texas courts? As explained in Petitioners' opening brief, the text, history, and tradition of the provision at issue indicate that the answer is yes.

The City's response largely ignores these textual and historical arguments. Instead, the City spends much of its response string-citing out of context quotes about judicial restraint, making consequentialists arguments, and misapplying a multi-factor federal test. As explained below, these arguments fail on their own terms.

The rest of the City's response focuses on issues that were not reached by the court below—*i.e.*, standing and ripeness. But the City's arguments are largely disingenuous, misunderstand Petitioners' claims, and contradict more than a century of precedent.

The City chose to exercise unlawful jurisdiction over Petitioners' property by passing ordinances which plainly restrict what they may do with their homes. Petitioners may challenge this ongoing restriction on their rights.

If taken seriously, the City's standing and ripeness arguments would make it virtually impossible for any property owner to ever receive pre-enforcement review of an ongoing violation of their rights. This Court should not eradicate longstanding protections for property rights because the City would rather play word-games than defend its ordinances.

ARGUMENT

I. THE CITY FAILS TO CONVINCINGLY DEFEND THE LOWER COURT'S RADICAL CONCLUSION THAT THIS CASE INVOLVES A POLITICAL QUESTION.

A. Contrary to the City's assertion, Article 1, Section 2 does not grant unlimited unreviewable authority to government.

The first factor for finding a political question is whether the provision at issue provides "a textually demonstrable constitutional commitment of the issue[s] to a coordinate political department." *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777–78 (Tex. 2005) (citation omitted). To meet this burden, it is not sufficient that the Constitution grants power to a separate branch over a given subject matter. *Id.* at 778. Rather, the text must indicate that this grant was intended to be exclusive and unreviewable. *Id.*

For example, at the federal level, Congress is granted the authority to regulate interstate commerce. *United States v. Morrison*, 529 U.S. 598, 614 (2000). But while this grant is broad, the Supreme Court has never suggested that it is unlimited or unreviewable. Rather, courts have an obligation to determine whether what is regulated is, in fact, interstate commerce. *Id.*; See also *Williams v. Rhodes*, 393 U.S. 23, 28–29 (1968) ("the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers

are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.")

Closer to home, the Texas Constitution grants the Legislature the authority to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. art. VII, § 1. But this grant was not deemed sufficient to render claims under that provision non-justiciable. As this Court explained, the duty to comply with Article 7, Section 1 "is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards….by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions." *Neeley,* 176 S.W.3d at 776.

Here, the City suggests that Article 1, Section 2 grants the Legislature unlimited, unreviewable authority to determine the structure of municipal governments. Resp. Br., at 34. But, as explained below, this ignores the text, structure, and history of that provision.

1. The text of Article 1, Section 2 makes clear that it is designed to limit government power.

To begin, the City's view of Article 1, Section 2 ignores the operative text. Article 1, Section 2 provides, in part, that:

> The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Tex. Const. art. I, § 2.

The City focuses on the second part of the text—*i.e.*, that "the people" have the "right to alter, reform or abolish their government in such manner as they may think expedient." The City concludes that this means that the Legislature, as a representative of the people, is vested with unlimited authority to decide the structures of local government. Resp. Br., at 34.

But this ignores the "limitation" language that was added in 1875. As noted in Petitioners' opening brief, several of Texas's previous constitutions contained the same granting language the City points to here. Pet. Br. at 20–21. But, in 1875, the Texas delegates added a limitation to that provision. Since that time, the power of the Legislature to "to alter, reform or abolish their government" is "*subject to this limitation,*" that it be a "republican form of government." Tex. Const. art. I, § 2 (emphasis added).

Whatever that language means, one thing is certain—the men who drafted it intended for it to be a limitation on the legislative power. We know this, because they literally used the word "limitation" in the text. See *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 466 (Tex. 2011).

The City's response to this textual critique is a string-cite of unrelated cases discussing the virtues of judicial restraint. See Resp. Br. at 41—44. But Petitioners are not asking this Court to make a policy decision or manufacture a limitation on government power from nothing.

Petitioners seek to enforce a limitation found in the text. When the text of the Constitution provides a limitation on government power, pretending it does not exist is not restraint. It is abdication.

2. Bill of Rights provisions generally are not read as unlimited grants of government authority.

The City's reading of Article 1, Section 2 is also inconsistent with the structure of the Texas Constitution. As explained in Petitioners' opening brief, the ratifiers of our Constitution did not place Article 1, Section 2 in the preamble, or in Article 3, which lays out the delegated authority of the legislature. They placed it in the Bill of Rights.

At the time, bills of rights were generally understood to place judicially enforceable limits on government power. See Pet. Merits Br. at 18–19 (discussing history). Our Constitution makes this long-held understanding explicit. Tex. Const. art. I, § 29 (providing that "every thing in this 'Bill of Rights' is excepted out of the general powers of government.")

The City's reading of Article 1, Section 2 as an unlimited grant of authority to the Legislature would render that provision anomalous. Indeed, even federal courts have not gone so far as to deem a Bill of Rights provision to be a political question. *Williams v. Rhodes*, 393 U.S. 23, 28–29 (1968).

The City raises two responses. *First*, the City suggests that "the United States Supreme Court has pointedly refused to find the Tenth

Amendment enforceable…[a]nd has relegated the Ninth Amendment to practical irrelevance." Resp. Br., at 44.

But the Supreme Court has recently and *repeatedly* adjudicated claims under the Tenth Amendment. See, e.g., *Bond v. United States*, 572 U.S. 844, 853 (2014) (holding that an individual could bring claims directly under the Tenth Amendment). The Ninth Amendment has likewise been adjudicated. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring). The City's inability to note these landmark cases is telling.

Moreover, even if the Supreme Court had never adjudicated those provisions, it would not mean that they present non-justiciable political questions. The Third Amendment—prohibiting the quartering of troops in homes—has happily never had occasion to come before the Supreme Court. This does not mean that courts are powerless to enforce the explicit limitations of the Third Amendment.

Indeed, even if some federal bill of rights provision had been deemed a dead letter, that would not change the general proposition that in 1875, the ratifiers of the Texas Constitution would have presumed that bill of rights provisions generally limit, rather than expand, government power. The burden therefore falls to the City to point to something in the text, history, or tradition of Article 1, Section 2 that overcomes this presumption. It points to nothing.

Second, the City claims that it is Petitioners that are trying to interfere with rights, because the right protected by Article 1, Section 2 is the right of the people "to alter, reform or abolish their government in such manner as they may think expedient." Resp. Br., at 42–43. But, again, this ignores the text. Article 1, Section 2 does not grant the people the *unlimited* right to decide the structure of government. That right is "subject to this limitation" that it be "a republican form of government." Tex. Const. art. I, § 2. As this Court has recognized in other contexts, this sort of conditional language "both empowers and obligates." *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003). And both the power and the obligation are judicially enforceable. *Id.*

3. Cases from the time of ratification show that the ratifiers of Article 1, Section 2 believed that its language would be judicially enforceable.

The City's view is also inconsistent with history. As noted in Petitioners' opening brief, courts at the time of ratification and for decades after had no issue enforcing "republican form of government" clauses. Pet. Br. at 17 (collecting cases).

Indeed, this Court adjudicated a claim under Article 1, Section 2 as recently as 1947, without suggesting that it was beyond the scope of judicial review. *Ramsey v. Dunlop*, 205 S.W.2d 979, 983 (1947) (holding that Article 1, Section 2 of the Texas Constitution prohibits an individual who did not receive the most votes in an election from taking office).

In response, the City points to *Luther v. Borden*, where the Court refused to intervene in a dispute over which of two rival governments was the legitimate government of Rhode Island. 48 U.S. (7 How.) 1 (1849). According to the City, the mere existence of *Luther* means that the ratifiers of the Texas Constitution would have believed that "republican form of government" clauses were unenforceable. Resp. Br. at 47–48.

But this reads *Luther* too broadly. *First*, *Luther* did not hold that *all* republican form of government clause challenges were non-justiciable. It held that those particular facts involving the validity of competing state governments presented a non-justiciable controversy. Courts continued to hear republican form of government challenges long after *Luther* was decided. See *New York v. United States*, 505 U.S. 144, 184–85 (1992) (collecting cases).

Second, even if *Luther* was conclusive as to the federal republican form of government clause, it would not mean that the Texas ratifiers intended our "republican form of government" clause to be unenforceable. To the contrary, this Court has recognized that states often amend their constitutions to protect rights that the federal courts have neglected. See *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015) (noting that the inclusion of privileges or immunities language in Article 1, Section 19 may have been a response to United States Supreme Court narrowing the protections of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*).

Despite *Luther*—or perhaps because of it—the Texas Framers amended the language of Article 1, Section 2 to include a republican form of government clause for the first time in our history. We should not assume they did so for no reason.

4. *Brown v. Galveston* does not support the City's view of unlimited unreviewable authority.

Finally, because the City finds no support in text, history, or tradition, it points to a stray quote from *Brown v. Galveston*, 75 S.W. 488 (Tex. 1903)—a case that did not adjudicate Article 1, Section 2 claims, or the political question doctrine. But *Brown* is not helpful.

In *Brown*, the plaintiff challenged a new charter which created a mixed form of representative government for the City of Galveston. Under the new charter, Galveston would be governed by a board of commissioners rather than a traditional mayor and aldermen. *Id*. at 489–90. Two members of the board would be elected directly by the people of Galveston, but three others would be appointed by the Governor. *Id*. The plaintiff argued that this arrangement violated Art. 6, Section 3 of the Texas Constitution, which guaranteed certain Texas Citizens "the right to vote for mayor and all other elective officers." *Id*. at 492. According to the plaintiff, Article 6, section 3 presupposed that there would be a mayor and elected officials to vote for. *Id*. As such, the new charter's mixed election and appointment system violated Article 6, Section 3. *Id*.

While the Court acknowledged that it was a close case, it ultimately rejected the plaintiff's argument. The Court explained that the Constitution generally grants authority to the legislature to decide the structure of municipal governments. *Id.* And "the power of the Legislature can be limited only by a prohibition contained in the Constitution either in express terms or by fair implication arising from the instrument." *Id.* at 492. Looking to the text, the Court noted that Article 6, Section 3 did "not declare that there *shall* be a mayor for each town and city." *Id.* (emphasis added). It merely confirmed that should there be a mayor, certain Texans shall have the right to vote for that office. *Id.* at 493. The Court therefore refused to read an additional mandate into Article 6, Section 3. *Id.*

The City quotes the first part of the *Brown* court's analysis for the proposition that the Legislature's power to decide the structure of municipal governments is effectively unlimited and unreviewable. Resp. Br. at 32-33. But *Brown* itself recognized that the power of the Legislature is not unlimited. 75 S.W. at 492.

This makes sense. The Legislature could not, for example, create cities where only white men could vote. Such an arrangement would violate the explicit limitations of Article 1, Section 3a of the Texas Constitution.

Similarly, the Legislature may not create forms of government that are not republican, because doing so would conflict with the explicit limitations contained in Article 1, Section 2.

Nor would *Brown* be dispositive if this case were to reach the merits. It is one thing to hold that a mixed form of government with both elected and appointed officers is republican. Republics have had these sorts of mixed forms from the beginning. It is another thing all together to uphold the structure at issue here. Under the current ETJ regime, Petitioners get no say in the regulations that govern their land. They do not vote for the City council or anyone who appoints its members. The City Council is elected by a completely foreign polity over which Petitioners have no say.

Whether that arrangement violates Article 1, Section 2 is a question for another day. But nothing in *Brown* suggests that it is a question courts are powerless to answer.

B. Contrary to the City's assertion, the text of Article 1, Section 2 provides a judicially manageable standard.

The City also fails to show that the text of Article 1, Section 2 fails to provide a "judicially manageable" standard. *Neeley*, 176 S.W.3d at 779. A text presents a judicially manageable standard when its meaning and application can be found with "familiar principles of constitutional interpretation" such as "examination of the textual, structural, and historical evidence put forward by the parties." *Zivotofsky v. Clinton*, 566

U.S. 189, 201 (2012). In such circumstances, the fact that the application is vague or difficult does not render the case a political question. *Neeley*, 176 S.W.3d at 778–79.

1. This Court and others have adjudicated claims under Article 1, Section 2.

Perhaps the best indication that a constitutional provision provides a judicially manageable standard to decide cases, is that judges have managed to decide cases under that provision. Texas courts have already shown that they can apply Article 1, Section 2. *Ramsey*, 205 S.W.2d at 983; *Kennelly v. Gates*, 406 S.W.2d 351, 356 (Tex. App.—Houston 1966, no writ); *Walling v. North Central Texas Municipal Water Authority*, 359 S.W.2d 546, 549 (Tex. App.—Eastland 1962, writ ref'd n.r.e.) (per curiam); see also, *City of Pasadena v. Smith*, 292 S.W.3d 14, 18 (Tex. 2009) (holding that a "republican form of government" forbids the exercise of certain legislative authority by unelected private parties.) None of these cases presented the sort of difficulty one would imagine if Article 1, Section 2 was wholly beyond the competence of courts to apply. The City's response does not attempt to distinguish these cases.

2. The term "republican form of government" is not beyond judicial comprehension.

Nor is the term "republican form of government" too vague to understand. As explained in Petitioners' opening brief, dictionaries and case law contemporaneous with the ratification of the Texas Constitution

show that a "republican form of government" requires, at a minimum, *some* form of elected representation. Pet. Br. at 3.

The City objects that one historical source also recognized that republican forms of government can involve officers "appointed" by the people. Resp. Br., at 47. But it is unclear how that argument helps the City's case. To the extent the City points to historical sources to claim that Petitioners' standard for a "republican form of government" is too narrow, the City effectively concedes that the meaning of the term can be deciphered by an appeal to original sources. If that is so, then Article 1, Section 2 provides a judicially manageable standard, and the lower-court's decision was wrong. See *Zivotofsky*, 566 U.S. at 201.

To the extent the City claims that a broader definition of "republican" would defeat Petitioners' claims on the merits, it would not. The City Council is elected—not appointed. Petitioners do not get to vote for the City Council or the people who vote for the City Council. They neither vote for, *nor appoint*, those that regulate them. The City's argument fails.

3. Article 1, Section 2 is not a mere declaration of political principles.

Nor is Article 1, Section 2 a mere declaration of political principles, as the City suggests. As explained above, the ratifiers of Article 1, Section 2 would have believed that language was judicially enforceable. Indeed, since the ink was barely dry on our Constitution, this Court has

made clear that the "rule of construction applicable [to the Texas Constitution] is that effect is to be given, if possible, to the whole instrument, and to every section and clause of it." *Lastro v. State*, 3 Tex. Ct. App. 363, 373 (1878).

4. This Court is not required to decide every possible application of Article 1, Section 2 in advance in order to conclude that its text provides a judicially manageable standard for deciding cases.

Finally, the City repeatedly suggests that Petitioners have failed to articulate a judicially manageable standard because they have not explained how the provision would apply in other hypothetical cases. For example, the City falsely claims that Petitioners proposed standard might allow for non-citizen voting. See, e.g. Resp. Br. at 36, n. 7. But this is neither relevant, nor true.

First, Petitioners are not required to pre-judge the outcome of every future case to establish that a Bill of Rights provision is justiciable. When the United States Supreme Court first held that the Second Amendment protected an individual right to bear arms in *District of Columbia v. Heller*, 554 U.S. 570 (2008), it did not specify whether "the people" covered by the Second Amendment included non-citizens. *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011). As a result, that issue is currently percolating through the lower federal courts. Compare *United States v. Figueroa-Camarillo*, No. 1:23-CR-00946-WJ,

2024 U.S. Dist. LEXIS 67711 (D.N.M. Apr. 12, 2024) with *United States v. Carbajal-Flores*, No. 20-CR-00613, 2024 U.S. Dist. LEXIS 40974 (N.D. Ill. Mar. 8, 2024).

But the fact that the Second Amendment's application to non-citizens was not discussed in *Heller* does not mean that the Second Amendment lacks a judicially manageable standard. It just means that courts can—and often should—leave future cases for another day. See *VanDevender v. Woods*, 222 S.W.3d 430, 433 (Tex. 2007) ("the cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more.")

<u>Second</u>, nothing in Petitioners' argument mandates non-citizen voting. If the issue of non-citizen voting arose in a future case, this Court would decide it the same way it always does—by looking at the text, structure, and history of the provision, and applying it to the facts. For example, the Court might consider whether "the people" referred to in Article 1, Section 2 is a term of art that is limited to citizens. Or it might note that republics—including the United States—have distinguished between citizens and non-citizens throughout history when it comes to voting rights. In short, it would apply the "familiar principles of constitutional interpretation." *Zivotofsky*, 566 U.S. at 201

In any event, the Court need not reach the issue here. The sole question here is whether courts may interpret Article 1, Section 2 at all.

C. The "discriminating analysis" test is an improper basis to deny subject matter jurisdiction.

Finally, the City points to what it calls the "discriminating analysis" test. But this is just another way of saying, "consequentialist judging."

In *Baker,* the Court held that "cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker v. Carr*, 369 U.S. 186, 211–12 (1962). Or, to put it in the terms used above, the Court should closely consider: (1) whether the text shows a demonstrable commitment of the issue to a coordinate political department; (2) whether there is "judicially manageable standard"; and (3) what the consequences of hearing the case will be.

The City claims that Petitioners fail to address the third factor—i.e. the consequences of ruling. Resp. Br. at 39. But Petitioners addressed the lower court's consequentialism on the very first page of their Petition and their Merits Brief. Pet. Br. at 1. Petitioners did not spend time on the issue, because bare consequentialism is inappropriate in constitutional cases. Pet. Br. at 2. As this Court has explained:

> [T]he function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline.…with whatever doubt, with whatever difficulties a case may be

> attended, it must decide it….It has no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given; the one or the other would be treason to the constitution.

Morton v. Gordon & Alley, Dallam 396, 397 (Tex. 1841).

Originalist judges in other states have openly questioned whether the additional consequentialist and prudential considerations in *Baker* can be squared with our constitutional design. See, e.g., *State v. Maestas*, 244 Ariz. 9, 15 (2018) (Bolick, J., concurring) ("The textual requirement of the political question doctrine is deeply embedded in our constitutional design, but the prudential requirement is not.")

Assuming, *arguendo,* that consequentialism can play a role, the City fails to explain what would be uniquely catastrophic here that would justify ignoring a provision of the Bill of Rights.

It cannot point to the fact that ETJ regulations are old. In the past decade alone, the United States Supreme Court has struck down multiple property restrictions adopted in the 1930s. See, e.g., *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 638 (2023) (striking down law adopted in 1935); *Horne v. Dep't of Agric.*, 576 U.S. 351, 355 (2015) (striking down law adopted in 1937).

Nor can the City point to any sort of unique chaos that would be caused by enforcing the Constitution here. Whatever inconvenience might arise from telling cities they can't regulate beyond their borders pales in comparison to striking down the funding mechanism for Texas

public schools. *Neeley*, 176 S.W.3d at 800. Yet, this Court held in *Neeley* that such considerations did not render claims under Article 7, Section 1 political questions. *Id*. at 776.

Nor is there anything strange about the relief requested here. Petitioners seek a declaration that two ordinances are unlawful and therefore unenforceable. This is a run-of-the-mill request under the UDJA. The City suggests that Petitioners should have asked that they be granted voting rights in the City. Resp. Br. at 39. But that sort of relief would be bizarre under the UDJA. Courts have jurisdiction to tell a City to stop enforcing an unlawful ordinance. They lack jurisdiction to force a city to rewrite the law in a different way so that it might be constitutional. See *Neeley*, 176 S.W.3d at 799.

The City's arguments in favor of applying the political question doctrine therefore fail, and this Court should reverse and vacate the decision below.

II. CONTRARY TO THE CITY'S ASSERTIONS, PETITIONERS CLEARLY HAVE STANDING TO CHALLENGE THE REGULATION OF THEIR PROPERTIES.

The City focuses most of its fire on standing. But no court below adopted these arguments, and with good reason—they conflict with the law. As explained in Petitioners' prior briefing, "Texas's standing test parallels the federal test for Article III standing." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018). Under that

approach, it is well settled that a property owner who is the "object of a regulation" has standing to challenge it. *Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015).

That burden is met. Petitioners challenge two ordinances: (1) an ordinance restricting their ability to erect signs, and (2) an ordinance restricting their ability to install or modify their driveways. CR:8. There is no dispute that Petitioners own properties that are subject to these ordinances. Resp. Br. at 3. The City concedes that these ordinances apply to Petitioners as written. *Id.* And the City admits that nothing would prevent their enforcement against Petitioners tomorrow. CR:71. That is all standing requires. *Contender Farms*, 779 F.3d at 266.

In its response, the City suggests that Petitioners nevertheless lack sufficient injuries to bring this case, because: (1) there are allegedly exceptions to the sign ordinance that lessen—but do not eliminate—the burdens of the ordinance, (2) if Petitioners had simply asked the City, a friendly desk clerk *may* have let them build a driveway without a permit in violation of the driveway ordinance, and (3) the threat of a civil (as opposed to criminal) enforcement action is not sufficient to constitute an injury. Resp. Br. at 23–26.

But, as explained below, these objections not only ignore binding precedent and misstate the facts, but they also fundamentally misunderstand this case. Petitioners do not claim that they are injured because the City's regulations are unduly burdensome, or because the

City has regulated them unfairly. They claim that they are injured because the City restricts the use of their property when it has no lawful authority to do so *at all*. That unlawful restriction is a sufficient injury for standing.

Nor is there any authority for the proposition that the threat of a civil enforcement action is not an injury for standing. When the government threatens to drag you into court for exercising a fundamental right, that is a real harm, regardless of whether civil or criminal penalties are at stake. The City's ongoing, undisputed restriction of Petitioners' properties is all that is required for standing.

A. The Ordinances' uncontested restrictions on Petitioners' private property rights are *per se* injuries for standing purposes.

In Texas, the right "to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody" is a fundamental right. *Spann v. Dallas*, 235 S.W. 513, 515(Tex. 1921). While not every restriction on this right is unconstitutional, when the government restricts the use of property, it inflicts a real injury that is sufficient for standing. See, e.g., *Zaatari v. City of Austin*, 615 S.W.3d 172, 184 (Tex. App.—Austin, 2019) (an ordinance restricting property rights injures property owners even if it has not yet been enforced); *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 141 (3d Cir. 2009) (cleaned up) ("'the owner of an interest in real property has standing to

challenge zoning restrictions' that affect its development."); *Smithfield Concerned Citizens for Fair Zoning v. Smithfield*, 907 F.2d 239, 242 (1st Cir. 1990) (the mere "existence and maintenance of [a land-use] ordinance, in effect, constitutes a present invasion of appellee's property rights.").

The City objects to this *per se* injury approach in its response but does not attempt to distinguish any of the precedents cited. Resp. Br. at 18–23. Indeed, both in the lower court and here, Petitioners have asked that the City produce *a single case* where a property owner lacked standing to bring a facial challenge to a regulation of their property. Reply in Sup. of Pet. at 7. Tellingly, the City has been unable to find one.

Here, there is no dispute that the challenged ordinances directly regulate the use of Petitioners' properties. Resp. Br. at 3. Petitioners allege that this current and ongoing restriction is unconstitutional because the City lacks lawful authority to regulate in that area. CR:9. This is sufficient to meet the low bar of standing. *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 627 (Tex. 1996).

The City raises three arguments in response, each of which fails.

B. The City's selective quotation of an exception to its sign ordinance is misleading and irrelevant to standing.

To begin, the City claims that Petitioners are not injured by the sign ordinance, because section 7.5(E) of the ordinance exempts political signs. Resp. Br., at 25. But this is neither true, nor relevant.

First, contrary to the City's *partial* quotation of section 7.5(E), that section does not exempt all "[n]oncommercial signs on private property." Resp. Br., at 25. Rather, section 7.5(E) exempts "[n]on-commercial signs on private property … ***except as stated in the Non-Commercial and Political Signs Subsection below.***" Section 7.5(E)(5) (emphasis added). That section then regulates the size, location, content, duration, and ownership of such signs. *Id*. at 7.5(V), (1)–(4). The City's claim that political signs are exempt from regulation is therefore false.

Second, even if political signs were exempt from the ordinance, it would not affect standing. As noted above, Petitioners do not claim that the ordinance is unconstitutional because it burdens their political speech. Petitioners challenge the City's jurisdiction to regulate the signage in their yards *at all*. Here, the City concedes that its sign ordinance prohibits Petitioners from erecting certain signs on their properties. Petitioners therefore have standing to seek a declaration that this ongoing restriction on their property rights is unconstitutional.

C. Contrary to the City's unsupported assertions, Petitioners could not have resolved the injuries caused by the driveway ordinance with a visit to the city clerk.

The City next suggests that Petitioners' injuries could be resolved by simply asking someone at the City if a permit is required. Resp. Br. at 26. The City's response implies—but does not say—that a City official would tell Petitioners that, despite the plain language of the law, no permit is necessary. But, as with the sign ordinance, this is neither true nor relevant.

First, there is no reason to believe that the hypothetical City employee would do as the City's brief implies. The City's designated witness testified that the ordinance applies to Petitioners on its face, (CR:75) and that under the City Charter, he has an obligation to enforce the ordinance "as written," unless specifically directed by the City Council. CR:73. Indeed, even in its briefing here, the City tellingly does not stipulate that the hypothetical employee *would* grant Petitioners permits, or that the City would not enforce its ordinance against them. It merely claims that the City has not interpreted the ordinance that way *yet*. Pet. Br. at 26.

Second, even if the hypothetical employee told Petitioners that the City would not enforce its ordinance as written, that would not resolve Petitioners' injuries. Statements of a city official do not bar the City from enforcing the law as written. *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 774 (Tex. 2006). In such circumstances, the

property owner is assumed to know what the ordinance says and may not rely on contrary statements from city officials. *Id*. at 775.

Indeed, Courts have routinely refused to dismiss cases, even when the government has "never prosecuted" under the law, and "*promises* it *will never* prosecute...." *Seals v. McBee*, 898 F.3d 587, 598 (5th Cir. 2018) (emphasis added); *see also*, *Ex parte Mitcham,* 542 S.W.3d 561, 566 (Tex. Crim. App. 2018). As those courts have explained, a City may not avoid a challenge to an unconstitutional ordinance by "promis[ing] to use it responsibly." *State v. Johnson*, 475 S.W.3d 860, 880 (Tex. Crim. App. 2015) (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). The City certainly may not defeat standing when it does not even promise not to enforce.

Third, and most importantly, the City's argument misunderstands the nature of this case. Petitioners do not claim that they have been injured because they want permits that may be denied. Petitioners claim that they are injured because their properties are regulated by a City where they do not live, do not receive services, and cannot vote. To suggest that such injuries may be resolved by going on bended knee to that very City to ask permission to use their properties, is to require that they submit to the very injury they claim is unconstitutional. The whole point of this case is that Petitioners do not believe they should have to ask permission from the City in the first place. See *Axon Enter. v. FTC*, 598 U.S. 175, 190 (2023).

D. The City's ongoing unlawful restriction of Petitioners' properties is not minimized because the ordinance is enforced with civil penalties.

Finally, the City repeatedly suggests that the ongoing restriction of Petitioners' property rights is no big deal because the worst the City could do to them for violating the law is a civil enforcement proceeding. Pet. Br. at 5. But this Court has held that the possibility of future civil enforcement is sufficient for standing. *Severance v. Patterson*, 370 S.W.3d 705, 712 (Tex. 2012); see also *Terrace v. Thompson*, 263 U.S. 197, 214 (1923) (holding that pre-enforcement injunctions are available whether the law at issue is "civil or criminal").

This makes sense. *First*, as noted above, a government restriction on property rights, standing alone, is a sufficient injury for standing. *Barshop*, 925 S.W.2d at 627. The enforcement mechanism is secondary.

Second, the threat of civil enforcement is just as likely to discourage an ordinary person from exercising their rights as a threat of criminal charges. Under state law, a private property owner who violates the challenged ordinances would be ordered to appear in court. Tex. R. Civ. P. 99. Should the property owner elect to defend the claim, attorneys are costly. If the City were to prevail, it could force the property owner to destroy and remove any improvements built in violation of the ordinances, and perhaps pay attorneys' fees. Tex. Loc. Gov't Code § 54.018. For most ordinary Texans with ordinary incomes, this threat is

sufficient to discourage them from developing their property. The City's suggestion that this threat is not an injury would be unprecedented.

III. CONTRARY TO THE CITY'S ASSERTIONS, PETITIONERS ARE NOT REQUIRED TO VIOLATE THE LAW AND AWAIT ENFORCEMENT BEFORE BRINGING A FACIAL CONSTITUTIONAL CHALLENGE TO ORDINANCES THAT RESTRICT THE USE OF THEIR PROPERTIES.

The City's ripeness arguments also fail. In the land-use context, a claim for declaratory relief is generally ripe if (1) there is a genuine dispute over the way in which a property may be used under a contract or municipal ordinance, and (2) that dispute could be resolved through a declaration from the court. See *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 685-86 (Tex. 2020).

That burden is met here. The City claims that it has authority to regulate Petitioners' use of their properties. Pet. Br. at 3. It has exercised that alleged authority by passing ordinances which, the City admits, facially restrict what Petitioners may do with their land. Pet. Br. at 3. Petitioners claim this exercise of jurisdiction over their homes is facially unconstitutional and seek a declaration from this Court so they can use their properties without fear of enforcement. That is sufficient for a ripe claim under this Court's precedents. *Sw. Elec. Power Co.*, 595 S.W.3d at 685–86.

The City objects that Petitioners' claims are nevertheless not ripe because Petitioners have not violated the challenged ordinances or suffered an enforcement action. Pet. Br. at 12–18.

But a property owner need not violate the law and await enforcement before seeking declaratory relief on a facial challenge. *Zaatari*, 615 S.W.3d at 184. Indeed, this Court held a similar land use challenge was ripe, even though the challenged law had "never been applied to anyone." *Barshop*, 925 S.W.2d at 626–27.

This makes sense. The Declaratory Judgments Act was designed to "encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution." *Mobil Oil Corp. v. Attorney Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991). A property owner need not "bet the farm" by violating the law in order to get into court. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010).

Here, there is a live dispute about how Petitioners may use their properties. This ongoing, live dispute is sufficient to make this case ripe.

The City points to cases like *Patel*, *Garcia*, and *Zaatari*. But those cases largely support Petitioners' arguments.

In *Zaatari*, the property owners brought both facial and as-applied challenges to a local ordinance prohibiting them from using their properties as short-term rentals. 615 S.W.3d at 183. Because the challenged ordinance contained a six-year amortization period, the prohibition on short-term rentals had not yet been enforced, and indeed

could not be enforced for several more years. *Id.* The City argued that this rendered the property owners' challenge to the ban premature. *Id.* The court disagreed. *Id.* at 184. As that court explained, it is well established that a property owner raising a facial challenge to a restriction on the use of their property is not required to face enforcement before seeking declaratory relief. *Id.* In short, *Zaatari* says exactly *the opposite* of what the City suggests here.

In *Patel*, several eyebrow-threaders brought as-applied challenges to the Texas Cosmetology statutes, arguing that requiring eyebrow-threaders to receive cosmetology licenses violated the Texas Constitution. 469 S.W.3d at 78. Like the City here, the state argued that the threaders claims were not ripe because the threaders had "not faced administrative enforcement." *Id.* This Court rightly rejected that approach in little more than a paragraph. *Id.*

The City makes a big deal of the fact that some of the threaders in that case had received warning letters. Pet. Br. at 14. But the fact that warning letters were *sufficient* to establish ripeness in *Patel* does not mean that warning letters are now *necessary* in every case. As noted above, this Court dealt with ripeness in *Patel* in little more than a paragraph. The warning letters were mentioned in a single sentence without further discussion. This Court typically does not overturn a century of precedent *sub silentio*.

Finally, *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995) similarly does not help the City. In *Garcia*, the plaintiff sought to challenge the timing mechanism for bringing claims under a state disability statute, but he was not yet disabled, had never filed for disability under the statute, and the statute contained explicit waiver provisions that could apply to remedy his injuries. *Id*. at 519. Given this uncertainty, the Court held that the plaintiff's lawsuit was premature. *Id*.

Here, unlike the plaintiff in *Garcia*, Petitioners' injuries are already ongoing. Petitioners already own the property in question, they already seek to engage in the prohibited property use, and there is no statutory waiver mechanism that could potentially remedy these injuries. Moreover, as the City's witness testified at deposition, the challenged ordinances apply to Petitioners' properties on their face (CR:74–75 (Pgs. 23–27)), the city manager has an obligation to enforce ordinances as written, (CR:73 (Pg. 19–20)), and nothing prevents city officials from enforcing ordinances against Petitioners tomorrow (CR:71 (Pg. 11)). That is sufficient to establish ripeness.

IV. THE CITY'S DISCUSSION OF SB 2038 IS BOTH DISHONEST AND IRRELEVANT TO RIPENESS OR STANDING.

In a last-ditch effort to avoid review, the City claims that Petitioners' claims are not ripe because any injury may be resolved by SB 2038—a law that was adopted after this case was filed. Resp. Br., at 27–

28. According to the City, SB 2038 allows Petitioners "to remove their properties from the ETJ…without City input." *Id*. And it is therefore "entirely within the Petitioners' control as to whether the City can apply any of the challenged regulations against them." *Id*.

But this characterization of SB 2038 is deeply dishonest, and more importantly, irrelevant to ripeness and standing.

First, the City neglects to inform this Court that on March 28, 2024—a full 8 weeks *before* the City filed its brief—the City adopted an explicit resolution holding that: (1) SB 2038 is unconstitutional, (2) "landowners ***may not*** … remove their property from the City's ETJ [under SB 2038] without the City Council's consent," and (3) it is in the public interest to deny ***any request*** to reduce the size of the ETJ through the processes of SB 2038. See, e.g. College Station Resol. No. 03-28-24-9.5a https://tinyurl.com/crbsfxxe (emphasis added). Since that time, the City has refused to grant at least *six* property owners' requests under SB 2038 to remove their properties from the ETJ. College Station Resol. Nos 03-28-24-9.4a; 03-28-24-9.4b; 03-28-24-9.4c; 03-28-24-9.5a; 03-28-24-9.5b; 03-28-24-9.5c. Therefore, the City's representation to this Court that Petitioners may currently remove themselves from the City's ETJ "*without city input*" is demonstrably false..

Second, even if SB 2038 might provide Petitioners with a viable path of escape from the ETJ in the future—a fact that is still in dispute—it would not affect ripeness or standing here. Ripeness is determined by

the facts as they existed "*at the time a lawsuit [was] filed*." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000) (emphasis in original). Here, SB 2038 did not take effect until *after* the Court of Appeals issued its opinion. It cannot retroactively unripen Petitioners' claims.

Nor does SB 2038 eliminate Petitioners' standing. Petitioners' injuries for standing purposes are based on the fact that they are currently subject to regulation by a City in which they do not live, receive no services, and cannot vote. These injuries are current and ongoing.

At best, the City's argument suggests that these injuries are no longer a violation of Article 1, Section 2, because SB 2038—should it be upheld—*might* provide a mechanism by which Petitioners can vote themselves out of their current regulation without representation. But that argument goes to the merits, not to standing. See *Perez v. Turner*, 653 S.W.3d 191, 198 (Tex. 2022) ("a plaintiff does not lack standing simply because some other legal principle may prevent it from prevailing on the merits").

If the City believes that the mechanisms of SB 2038 are sufficient to render the City's regulation of property in the ETJ constitutional, then it is free to make that argument on the merits on remand. It has nothing to do with standing. *Id.*

CONCLUSION

For the foregoing reasons, the lower court's judgment should be reversed and vacated. And Petitioners should finally get their day in court.

Respectfully submitted,

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