IN THE SUPREME COURT OF THE STATE OF NEVADA

GREATER LAS VEGAS SHORT TERM RENTAL ASSOCIATION, a nonprofit Nevada corporation; and JACQUELINE FLORES, President and Director,

Appellants/Cross-Respondents,

v.

CLARK COUNTY; CLARK COUNTY BOARD OF COMMISSIONERS, a subdivision of the State of Nevada; and the STATE OF NEVADA,

Respondents/Cross-Appellants.

Docket No. 86264

APPELLANTS' OPENING BRIEF

Eighth Judicial District Court
Honorable Jessica K. Peterson, District Judge
Civil Case No. A-22-855311-P

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in Nevada Rule of Appellate Procedure (NRAP) 26.1(a) that must be disclosed. Appellant Greater Las Vegas Short Term Rental Association is a Nevada non-profit corporation; and, Appellant Jacqueline Flores is an individual (hereinafter collectively "the Rental Association"). Neither have any parent company or stock. The Rental Association was represented in the district court below, and is also represented on appeal, by the following legal counsel:

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These representations are made so that the Justices of this Court may evaluate possible disqualifications or recusals.

Dated: September 5, 2023.

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JURISDICTIONAL STATEMENT

The Greater Las Vegas Short Term Rental Association and Jacqueline Flores, its President and Director (hereinafter collectively "the Rental Association"), appeal from a district court order granting in part and denying in part a motion for preliminary injunction upon a civil complaint for declaratory and injunctive relief. *See* 2 Joint Appendix ("JA"), at 188-253, 254-312.[1] The district court issued its order on February 16, 2023. 5 JA 685-702. Notice of entry of the order was issued and served the same day. 5 JA 721-745.

The Rental Association filed its notice of appeal to this Court on March 13, 2023. 5 JA 746-748. This appeal was timely filed pursuant to NRAP 4(a)(1); and this Court has jurisdiction pursuant to NRAP 3A(b)(3).

[1] The Rental Association and Clark County were able to agree on documents for a Joint Appendix pursuant to NRAP 30(a).

ROUTING STATEMENT

This is an appeal from a district court order granting in part and denying in part a motion for preliminary injunctive relief in a civil case. This appeal raises constitutional issues of first impression that concern matters of statewide public importance. More specifically, this appeal involves a new licensing scheme set forth in Title 7, Chapter 7.100 of the Clark County Code (hereinafter "Chapter 7.100"), which was enacted by Clark County in 2022; and new statutory provisions set forth in Assembly Bill 363, and codified in NRS Chapter 244, which were enacted by the Nevada Legislature in 2021. Importantly, a violation of Chapter 7.100 caries both civil *and* criminal fines and penalties. These new laws govern the licensing and operation of short-term rental houses located in unincorporated Clark County and facially (and as-applied to the application process) violate the Nevada and United States Constitutions. Respectfully, the Rental Association submits that jurisdiction over this appeal is properly retained by the Nevada Supreme Court. NRAP 17(a)(11), (12).

I. STATEMENT OF THE CASE

Even when government officials dislike an activity, laws must still comport with and protect principles of the Nevada and United States Constitutions. This appeal is about government overreach regarding short term rentals in unincorporated Clark County. In this case, Clark County (and the State) have gone too far.

To be clear, the Rental Association is not opposed to regulation of the short-term rental industry by either Clark County or the State. Neither is it opposed to the assessment and imposition of fees and taxes upon licensees who own and operate short term rentals. It is also not inviting the judiciary to engage in a policy debate.

What this appeal does assert is that new laws governing short-term rentals, *i.e.*, Title 7, Chapter 7.100 of the Clark County Code, as well as Assembly Bill 363 (2001), as enacted by the Nevada Legislature and codified in NRS Chapter 244.35351-.35359 (hereinafter "NRS Chapter 244"), facially (and as-applied to the application process) exceed the bounds and fundamental tenets of reasonable and permissible government regulation. No resident of Nevada or interstate or international traveler should be compelled to live, or stay, in a home under an arbitrary and oppressive regulatory scheme—the price of staying in a short-term rental should not be the relinquishment of all rights.

Understandably, a difficult balancing of competing policy interests by the Board of Clark County Commissioners, as well as the Nevada Legislature, exist on this issue. It is complex. The modern post-internet short-term rental market is a hybrid and unique business model whereby home ownership and privacy interests intersect with the need to maintain peaceful neighborhood characteristics and quality of life. Neither are mutually exclusive. Yet, as the debate unfolds, adherence to constitutional proscriptions must provide the framework, not policy objectives.

Indeed, the United States is founded upon the fundamental principle that all individuals have the inalienable right of life, liberty, and the pursuit of happiness. *Declaration of Independence*, Second Continental Congress, July 4, 1776. To this end, local, state, and federal governments are expressly prohibited by the Nevada and United States Constitutions from depriving any individual of life, liberty, and property without due process. *See* Art. 1, Sec. 8, Nevada Const.; Fifth and Fourteenth Amend., United States Const. They are prohibited from unreasonably interfering with the right to speak and associate. *See* Art. 1, Secs. 9 and 10, Nevada Const.; First Amen., United States Const. Without probable cause, they cannot arbitrarily invade the right to privacy. *See* Art. 1, Sec. 18, Nev. Const.; Fourth Amend., United States Const. And they must treat everyone equally and fairly. *See* Art. 4, Sec. 21, Nev. Const.; Fourteenth Amend., United States Const. Chapter 7.100 (and limitedly NRS Chapter 244) are the antithesis of these principles.

Upon motion by the Rental Association for a preliminary injunction pursuant to an underlying compliant for declaratory and injunction relief, the district court granted partial relief. But it was not enough. As set forth below, this Court's review is both appropriate and necessary. Respectfully, the Rental Association requests that this Court find that provisions within Chapter 7.100, and NRS Chapter 244, unconstitutional on their face (and as applied in the application process) and reverse in part and remand this appeal to the district court for further proceedings.

II. STATEMENT OF THE ISSUES

1. Chapter 7.100 establishes an arbitrary licensing scheme in violation of the **Due Process Clause** in Article 1, Section 8 of the Nevada Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

2. Chapter 7.100 and NRS Chapter 244 exclude categories of homeowners from applying for a license in violation of the **Equal Protection Clause** set forth in Article 4, Section 21 of the Nevada Constitution and the Fourteenth Amendment to the United States Constitution.

3. Chapter 7.100 and NRS Chapter 244 are **vague and overbroad**, impose a restraint on commercial and individual speech**,** and the freedom to assemble and associate in violation of Article 1, Sections 9 and 10 of the Nevada Constitution and the **First Amendment** to the United States Constitution.

4. Chapter 7.100 authorizes an invasion of privacy into a rental home without adequate notice or cause in violation of Article 1, Section 18 of the Nevada Constitution and the **Fourth Amendment** to the United States Constitution.

5. Chapter 7.100 deprives the use and enjoyment of property in violation of the **Takings Clause** set forth in Article 1, Section 8 of the Nevada Constitution and the Fifth Amendment to the United States Constitution.

6. Chapter 7.100 permits liability and civil and criminal fines and penalties on individuals for acts they do not commit in violation of the **Due Process Clause** set

forth in Article 1, Section 8 of the Nevada Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

7. Chapter 7.100 violates the **Dormant Commerce Clause** set forth in Article 1, Section 8, Clause 3 of the United States Constitution.

III. INTRODUCTION

Confusion and uncertainty over a myriad of regulations and enforcement practices and policies governing short-term rentals has been ongoing in Southern Nevada, as incorporated cities and unincorporated areas of Clark County adopted different laws. Clark County refused to allow any short-term rentals to operate in its unincorporated area—a ban was effectively in place.

The Greater Las Vegas Short Term Rental Association (hereinafter "the Rental Association") was established in 2020 and registered with the Office of the Nevada Secretary of State as a non-profit Nevada organization. It is a grass-roots organization comprised of approximately 700 individuals, who are homeowners in Clark County interested in the development of fair and reasonable laws and policies to allow the safe and legal operation of short-term rentals in the greater Las Vegas area, *i.e.*, Clark County. They are dedicated to advocacy, providing information, and engaging with government officials and community policy stakeholders.

Responding to the lack of action by Clark County, the Nevada Legislature enacted Assembly Bill 363, as codified in NRS Chapter 244.35351-.35359, which

mandated that Clark County adopt laws and licenses to allow short-term rentals to begin operating in unincorporated Clark County by July 1, 2022. To comply with the Legislature directive, Clark County enacted Chapter 7.100 on June 21, 2022.

Unfortunately, Clark County's disdain for short-term rentals found its way into the law that it had to begrudgingly pass. That law—Chapter 7.100—is replete with remarkable provisions that are onerous, unreasonable, and violate the Nevada and United States Constitutions. Select provisions within AB 363, *i.e.*, NRS Chapter 244.35351-.35359, inclusive, do as well. Ironically, the difference as to whether Clark County's licensing scheme in Chapter 7.100 applies to a homeowner and guest or not is a single day: a twenty-nine (29) day rental is 'short-term' and prohibited but a thirty-one (31) day rental is allowed.[2] It is an arbitrary distinction.

Without a policy solution, the Rental Association sought declaratory and injunctive relief in the district court to address the constitutional infirmities of the new laws. Clark County filed counterclaims. The district court agreed with the Rental Association that select provisions within Chapter 7.100 were unconstitutional and granted the Rental Association partial preliminary injunctive relief. Yet, other claims raised by the Rental Association were summarily denied.

This appeal followed.

[2] *See* Section 7.100.020(r) (defining a short-term rental unit as a "residential unit or room" made available for 30 consecutive days or less).

While this appeal was pending, Clark County amended a few of the offending provisions in Chapter 7.100. Others remain. Clark County has also appealed. To date, no licenses have issued. Unconstitutional provisions in Chapter 7.100, and NRS Chapter 244, need to be acknowledged and corrected by Clark County. The Rental Association respectfully requests relief, and that the district court's decision to partially deny its request for a preliminary injunction be reversed and remanded.

IV. FACTS AND PROCEDURAL HISTORY

The below overview, facts, and procedural history are necessary to place this appeal and the issues in their proper context.

1. ABOUT THE RENTAL ASSOCIATION

The Rental Association is a grassroots non-profit organization of approximately 700 members that was established by residents of Clark County, Nevada in 2020, who are deeply concerned about newly enacted laws and policies governing short-term rentals in Southern Nevada. 2 JA 252-253, 725. It is registered with the Office of Nevada Secretary of State. *Id.* Its members are hard-working Nevadans who come from diverse educational, social-economic, occupational, and family backgrounds, who share a common interest in offering their home (or a room, 'mother-in-law quarters,' or casita within it), as a short-term rental. They love the greater Las Vegas area—it is home.

Some members of the Rental Association are interested in short-term rentals to supplement their household income due to job loss, retirement, or inflation/ economic downturn. Other members are interested because it allows them to provide care for a young, elderly, or ill family member. Some simply enjoy meeting new people and the company it brings. 5 JA 252-253. Whatever the reason, renting a room for a traveler in a house for a night or two originates from long-standing early American 'bed-and-breakfast' tradition. 2 JA 266-267. It is not new.

With the development of the internet, technology, and host platforms over the past decades, what is new is the ability and ease by which people can communicate and travelers can locate a private home (or room) to rent. Like transportation ride sharing, it has grown and is becoming a commonplace travel option. Reasons why a traveler may want a short-term rental, as opposed to a traditional hotel experience, vary. Short-term rental guests include larger families who may vacation together for a reunion or event, such as a wedding or graduation; or those with small children or pets looking for an accommodation with a full kitchen, a backyard, or a pool; or businesspeople who want a quite space to work and 'spread out' for a week or two. 2 JA 252-253. It has become part of a 'sharing economy' in the United States that generates approximately $169 billion in global economic impact. 2 JA 267. It is against this historical and economic backdrop that this legal action was initiated.

2. CLARK COUNTY SHORT-TERM RENTAL PROHIBITION (1998)

In 1998, Clark County passed amendments to the Chapter entitled "Uses Allowed in Zoning Districts" in Title 30, Chapter 30 of the Clark County Code. 5 JA 725-726. This new law mandated a blanket zoning prohibition on all short-term rentals located in unincorporated Clark County, which includes many of the resort properties located along the South portion of Las Vegas Boulevard, *i.e.*, "the Strip." *Id.* The ban became effective in 2001.[3] No short-term rentals were thereafter legally permitted to operate in unincorporated Clark County.

Yet, incorporated cities and other areas of Clark County, such as Las Vegas, Mesquite, and Henderson, enacted provisions that permitted short-term rentals to legally operate.[4] Confusion, and a patchwork of regulations and policies arose in Clark County, whereby prospective short-term rental homeowners were left to guess at the law in their geographic area and whether it applied to them. 2 JA 269.

3. NEVADA LEGISLATURE PASSAGE OF ASSEMBLY BILL 363 (2021)

The Nevada Legislature attempted to address the growing problem during the 81st Regular Legislative Session in 2021 and enacted Assembly Bill ("AB") 363,

[3] *See* Clark County Code, Title 30, Section 30.44.010(b)(7)(C)(ii).

[4] *See* City of Henderson Development Code, Title 19, Chapter 19.10 (2019); City of Las Vegas Uniform Development Code, Title 19, Chapter 19.18.070 (2015); Mesquite City Code, Title 2, Chapter 13 (2015).

which is codified in NRS Chapter 244.35351-.35359, inclusive. The new laws mandated that Clark County effectively repeal its ban on short-term rentals and implement regulations to permit short-term rentals to legally operate within unincorporated Clark County by July 1, 2022. 5 JA 726.

4. CLARK COUNTY ADOPTION OF CHAPTER 7.100 (2022)

To comply with the Nevada Legislature's mandate, the Clark County Board of Commissioners unanimously voted to adopt a new provision entitled "Short Term Rental Units" set forth in Chapter 7.100 at public meeting held on June 21, 2022. The Rental Association opposed provisions within the new laws. *Id.* Unfortunately, it was not heard.

5. REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

The Rental Association filed a civil complaint for declaratory and injunctive relief, and a motion for a preliminary injunction, against Clark County due to provisions in Chapter 7.100, and more limitedly, the State of Nevada, due to provisions in NRS Chapter 244.[5] 2 JA188-253, 254-312.

Clark County responded with counterclaims against the Rental Association, including claims that the non-profit was a criminal enterprise engaged in civil RICO

[5] The Rental Association initially sought relief in the district court on August 2, 2022. 1 JA 1-187. To alleviate objections by Clark County, those pleadings were subsequently amended.

conspiracy and racketeering. 4 JA 477-480. Clark County also sued the Rental Association's President and Director, Ms. Flores, who was a Co-Plaintiff, for the unrelated and alleged non-payment of taxes. 4 JA 472-73. The Rental Association responded to Clark County's counterclaims with an anti-SLAPP motion to dismiss them. 4 JA 552-580. Making the point clear: the Rental Association "does not assist, advocate for, or encourage anyone to violate the law regarding short term rentals in Clark County or anywhere in Nevada." 4 JA 579. Considerable fear and anxiety over retaliation spread throughout the Rental Association due to Clark County's civil RICO counterclaims, as well as its decision to personally sue Ms. Flores for speaking out against its new laws. 4 JA 579-580.

The district court permitted supplemental briefings and held hearings on November 17, 2022, December 13, 2022, and December 19, 2022, respectively. 3 JA 459-466; 4 JA 581-594, 622-673.[6] On February 16, 2023, the district court issued a written order partially granting and denying the Rental Association declaratory and injunctive relief. 5 JA 685-706. The district court found several provisions of Chapter 7.1000 unconstitutionally vague and/or overbroad on their face as drafted.[7]

[6] Of note, the State of Nevada did not separately appear or respond to any pleading.

[7] The district court found multiple Sections of Chapter 7.100 unconstitutionally vague and/or overbroad: Section 7.100.090(c)(2); Section 7.100.090(c)(7); Section 7.100.100(h); Section 7.100.170(i)(2); Section 7.100.110(a); Section 7.110.110(c); Section 7.100.160(1)(c); Section 7.100.180(b); Section 7.100.180(c); Section

Other challenges raised by the Rental Association were summarily denied with little or no explanation. 5 JA 742-743. The district court also dismissed the counterclaims filed by Clark County against the Rental Association, and Ms. Flores. 5 JA 707-720. The Rental Association appealed *part* of the district court's order to this Court. 5 JA 746-748. Clark County also appealed. 5 JA 754-755.

6. CLARK COUNTY AMENDMENTS TO THE CODE (APRIL 2023)

While this appeal was pending, on April 4, 2023, the Board of Clark County Commissioners amended some provisions of Chapter 7.100 enjoined by the district court.[8] *See* 5 JA 760-777. Other enjoined provisions it did not amend. Clark County also did not amend provisions that were not enjoined and left undisturbed by the district court—those challenged provisions remain in effect.

7. LICENSE APPLICATION PROCESS (ONGOING)

Pursuant to Section 7.100.100(b), the application period for a "preselection" process to obtain a short-term rental license began on September 13, 2022, and

7.100.230(b); and Section 7.100.230(d)(1)(i). 5 JA 742-743. Respectfully, the Renal Association requests that this Court affirm the district court with respect to these Sections.

[8] *See also* Clark County Board of Commissioners website at: https://clarklegistar.com (Board of Clark County Commissioners Meeting, April 4, 2023) Agenda Item No. 44, Attachment File No. #23-464.

remained open for approximately six months. It closed on March 13, 2023.[9] 2 JA 269-270. According to Clark County's one-percent (1%) limitation on available licenses, *see* Section 7.100.050, approximately 2,230 licenses for short-term rentals were being made available for areas in unincorporated Clark County.[10] Of the licenses being made available, on March 29, 2023, 1,306 prospective pre-applicants who met the March 13, 2023, deadline were placed into what Clark County referred to as "Random Number Selector Generator Process" and "Raffle" to determine their selection and processing order.[11] On what Clark County labeled as a "Game Sheet" and "Game Name: Short Term Rental" it published its list of qualified pre-

[9] *See* Clark County website at https://files.clarkcountynv.gov and link entitled "Short Term Rentals" and sub-link entitled "Frequently Asked Questions (FAQ)."

[10] Clark County estimated that approximately 223,077 residential homes existed in unincorporated areas of Clark County in 2022. *See* Clark County Department of Comprehensive Planning website at https://files.clarkcountynv.gov and link entitled "Historical Housing Units by Place" and document/file entitled "2022 Housing Unit Estimates" (August 2022). The Rental Association submits that this Court may take judicial notice of empirical data, information, statistics that are publicly available and generated by Clark County—a government entity. *See Caballero v. Seventh Judicial District Court*, 123 Nev. 316, 323 n.21, 167 P.3d 415, 419 n.21 (2007); NRS 47.130(2).

[11] *See* Clark County website at https://clarkcountynv.gov and link entitled "Business License Short-Term Rental Random Number Selection Pre-Application Results" and Clark County Department of Business Licenses document/file entitled "STR Random Selection Official Drawing Record" (March 29, 2023).

applicants.[12] Those selected during the government 'raffle' and who made the pre-applicant list then had to re-apply with Clark County by August 21, 2023, for their application to be reviewed for a possible license.[13] If an applicant failed to re-apply at this stage of the application process, their application would be rejected. To date, no licenses to operate a short-term rental are known to have been issued to anyone.

The Rental Association respectfully requests relief.

V. STANDARD OF REVIEW

Nevada Rule of Civil Procedure (NRCP) 65 provides that a district court may issue a preliminary injunction. It is well-settled that the issuance of a preliminary injunction is appropriate where an individual or entity is doing, *threatens to do, or is about to do* an act that violates the rights of another. *See* NRS 33.010(3).

A preliminary injunction may issue when laws or regulations have been, or will be, enacted by government entities and are challenged by individual citizens or grass root organizations. *See, e.g., Citizens for a Pub. Train Trench Vote v. City of Reno*, 118 Nev. 574, 53 P.3d 387 (2002), *overruled on other grounds by Nevadans for Protecting Private Property Rights v. Heller*, 122 Nev. 894, 141 P.3d 1235 (2006); *see also Edgar v. MITE, Corp*., 457 U.S. 624 (1982).

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[12] *See* Clark County website at https://files.clarkcountynv.gov and link entitled "Short Term Rentals" and sub-link entitled "Frequently Asked Questions (FAQ)."

[13] *Id.*

When seeking a preliminary injunction, a movant is required to demonstrate two elements. First, they must show a reasonable likelihood of success on the merits. Second, they must show a reasonable probability that the non-moving party's conduct will cause irreparable harm if it is allowed to continue. *See Elk Point County Club Homeowner's Ass'n, Inc. v. K.J. Brown, LLC*, 138 Nev. Adv. Op. __, 515 P.3d 837, 839 (2022). When considering these elements, it is appropriate for a district court to weigh the potential hardships to the relative parties, as well as the public interest. *Id.* (citing *Clark County Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996)).

The decision whether to grant a preliminary injunction resides within the sound discretion of the district court. *See Shores v. Global Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018). This Court has held that "[a]n abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determinations or it disregards controlling law." *Shores*, 134 Nev. at 505, 422 P.3d at 1241. Factual findings are reviewed for clear error. *SOC, Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001). Questions of law are reviewed by this Court on appeal *de novo*. *Boulder Oaks Cmty. Ass'n. v. B & J Andrews Entp.*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2010); *see also Educ. Freedom PAC v. Reid*, 138 Nev. Adv. Op. 47, 512 P.3d 296, 302 (2022) (providing that questions of constitutional interpretation are also reviewed on appeal *de novo*).

Here, a preliminary injunction was appropriate and necessary in this matter to protect the liberty, rights, and economic interests of short-term rental license applicants in unincorporated Clark County. The Rental Association satisfied the criteria to have a preliminary injunction issued barring the implementation of *all* challenged provisions of Chapter 7.100, and not just the ones found unconstitutional by the district court. Chapter 7.100 is so fraught with constitutional error that its individual provisions, when considered as a whole, negate its very purpose. For this reason, the entire Chapter 7.100 fails and should be enjoined.

The Rental Association respectfully submits that it properly established (1) a reasonable likelihood of success on the merits, (2) irreparable harm will ensue if an injunction does not issue, and (3) a balancing of hardships, including the use of public resources and judicial economy, favors enjoining Clark County. Analysis of these factors is interwoven throughout this Opening Brief and the arguments it contains. The Rental Association respectfully submits that reversal and remand of the district court's order is, in part, appropriate and necessary.

VI. JUSTICIABILITY

A request for declaratory relief coupled with injunctive relief may be an appropriate legal vehicle to challenge the constitutionality of government action. *See generally Heller v. State of Nev. Legislature*, 120 Nev. 456, 472, 93 P.3d 746, 757 (2014). It is foreseeable that Clark County *may* attempt to dismiss this appeal,

contending that it is either not ripe and/or the Rental Association lacks standing to raise it. Their attempt to do so would be misplaced.

Relatively recent precedent from this Court supports this type of action. While no known members of the Rental Association have yet to be formally granted a license, constructive denial of a license is ongoing by the facial prohibitions of Chapter 7.100, and their application. In other words, Chapter 7.100 sets forth unconstitutional criteria that prevent an individual from even applying for a license, let alone subject them to unconstitutional treatment once one is obtained. Accordingly, judicial review is both appropriate and necessary at this stage. Indeed, this constitutional case is ripe and the Rental Association has standing to raise it. The district court expressly found that standing existed. *See* 5 JA 728-730.

1. THE RENTAL ASSOCIATION HAS STANDING

A party has a standing where they can show an individual injury or the matter raised involves an issue of public importance. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). Standing can also be demonstrated through organizational representation. *See Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. and Inds., Div. of Ins.*, 139 Nev. Adv. Op. 3, __, 524 P.3d 470, 478 (2023). Moreover, there is always harm when unconstitutional laws are both enacted and enforced. Each standing pathway is discussed below.

A. Individual Injury

It is relevant that an individual, Jacqueline Flores, who is the President and Director of the Rental Association, is a co-plaintiff and party. Two affidavits appear in the record before the district court where she attested that the license application process itself will cause her economic harm, loss of privacy, and waiver of her constitutional rights. *See* 4 JA 576-577, 578-580. She is being injured (and threatened with future injury) in this case by the implementation of Chapter 7.100, as well as certain provisions of NRS Chapter 244, by Clark County. Thus, individual standing *via* Ms. Flores exists.

B. Public Importance Doctrine

The Rental Association satisfies the public importance doctrine for standing with more force. Under this standard, a party has standing where a Nevada citizen raises a constitutional challenge and (1) the case involves an issue of public importance, (2) the case involves a government expenditure, and (3) the party raising the challenge is in the best position to fully advocate for it. Essentially, "the question of standing concerns whether the party seeking relief has a sufficient interest in the litigation" and "will vigorously and effectively present his or her case against an adverse party." *Morency v. Nev. Dep't of Educ*., 137 Nev. Ad. Op. 63, __, 496 P.3d 584, 588 (2021) (citing *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citations omitted)). The above three criteria are satisfied.

First, this case is important to the public. Over 700 individuals are members of the Rental Association. 5 JA 725. Over 7,700 short-term rental homes are located in Clark County. *Id.* Clark County received over 5,500 responses to a survey it conducted to gauge public interest on the topic. *Id.* For two decades this matter has been a subject of debate and concern in Nevada's most populous county. The Nevada Legislature sought the need to address the topic. This appeal raises constitutional issues of first impression. It is a matter of public importance.

Second, government funds are expended. Chapter 7.100 requires the expenditure of public funds through the collection and expenditure of taxes and fees by Clark County to process license applications and engage in enforcement actions by Clark County. *See, e.g.*, Section 7.100.010(c), Section 7.100.170(k), and Section 7.100.200(c). This factor is also satisfied.

Finally, the Rental Association is in the best position to challenge the constitutionality of Chapter 7.100 and NRS Chapter 244, and advocate for the interests of short term-rental homeowners in Clark County. The Rental Association is an entity incorporated with the Office of the Nevada Secretary of State. Its mission is to advocate for the interests of current and prospective short-term rentals in Clark County, and throughout Nevada. 4 JA 579-580. With over 700 members, the Rental Association is representative of short-term rental owners. It is in the best position to bring this case. Standing exists under the public importance doctrine.

C. Organizational Representation

This Court recently recognized organizational representation standing. Even without personal injury or it being a matter of public importance, standing is proper where an organization is adequately representative of its members. *See Nat'l Ass'n of Mut. Ins. Cos.*, 139 Nev. Adv. Op. 3, __, 524 P.3d at 478. The test for representational standing is where an organization can establish that (1) its members have standing, (2) their interests are germane to the organization's purpose, and (3) the claims do not require member participation. *Id.* (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)). Here, as discussed above, Ms. Flores has standing to sue in her own right, and the objectives and purpose of this litigation align with (and are representative of) the Rental Association's members. *See generally* 5 JA 579-580. While Ms. Flores is a co-plaintiff, her participation (or that of other members) is not strictly necessary. Thus, the Rental Association also has organizational representation standing.

D. Ongoing Harm

Notwithstanding the above basis for standing, authorities from multiple jurisdictions recognize that the existence of a constitutionally invalid law is, in itself, ongoing and irreparable harm. *See Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of irreparable harm. . . ."); *Cohen v. Coahoma County, Miss.*, 805 F.Supp. 398, 406

(N.D. Miss. 1992) ("It has been repeatedly recognized by federal courts at all levels that violations of constitutional rights constitutes irreparable harm as a matter of law." Harm through deprivation of constitutional rights to short-term rental license applicants (and prospective licensees) is ongoing. It warrants redress.

2. THIS APPEAL IS RIPE FOR REVIEW

Questions of standing closely resemble those of ripeness. Yet, the concepts are distinct. *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006). Ripeness focuses on "'the timing of the action.'" *Id.* (quoting *Matter of T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279-80 (2003)). The focus of a ripeness inquiry is "'the degree to which the harm alleged . . . is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy.'" *Id.* Factors to be weighed include the hardship to the parties in withholding review and the suitability of the issues. *Id.* This case involves constitutional harm to which monetary damages are inadequate. It also involves fundamental constitutional rights. Submitting an application for a license requires acquiescence to terms and conditions that violate constitutional proscriptions and *per se* exclude and discourage prospective licensees from applying. *See, e.g.*, Section 7.100.170(u). To wait for individual citations to materialize in the future will foster piecemeal litigation and serve no meaningful interest. Notably, the purpose of a preliminary injunction is to prevent harm before it occurs.

A. Civil And Criminal Liability

Importantly, it must be recognized that Chapter 7.100 is a penal law, *i.e.*, a criminal law, and a civil law. Section 7.100.230(f)(1) provides that a violation of its provisions could subject a licensee to the "issuance of a misdemeanor citation." Section 7.100.230(d) provides that a violation could subject a licensee to "a civil administrative citation." The consequences of a violation are *both* criminal and civil in nature. This fact should inform this Court's analysis.

B. Facial And As-applied Challenges

The Rental Association is challenging the validity of Chapter 7.100, and NRS Chapter 244, on their face and 'as-applied.' Facial challenges may be raised upon enactment of a law. *See generally Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997). An 'as-applied' challenge may become ripe once the government begins to implement it. *See generally Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001). Here, NRS Chapter 244 became ripe for a facial challenge when it was signed into law on June 4, 2021.[14] Chapter 7.100 became ripe for a facial challenge when it was passed by the Board of Clark County Commissioners on June 21, 2022. 5 JA 726. It became ripe for an 'as-applied' challenge when the application process commenced on September 13, 2022. *Id.*

[14] *See* https://www.leg.state.nv.us (81st Legislative Session, Assembly Bill 363).

VII. ARGUMENT

Chapter 7.100, and portions of NRS Chapter 244, fail under the Nevada and United States Constitution when its provisions are reviewed individually, or as a whole. Reversal is necessary—our government must do better. Licensed activity cannot be based upon random chance. Chance is inherently unfair.

1. ARBITRARY AND CAPRICIOUS LICENSING SCHEME IN VIOLATION OF DUE PROCESS

Clark County, like most city or county policy making bodies, has general discretion to develop and administer licensing schemes. *See City Council of Reno v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986). However, Chapter 7.100 fails constitutional review. Under the Due Process Clauses set forth in Article 1, Section 8, Subsection 2 of the Nevada Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, the licensing scheme enacted by Clark County is unconstitutional on its face by establishing both an application process that is arbitrary and capricious *and* by an enforcement scheme that is undeniably vague. It is infirm under either or both analyses.

Licensing schemes cross the threshold of a permissible exercise of government authority where the language of regulations permit arbitrary or capricious enforcement. *Id.* When this occurs, a facial challenge to the plain text of the rules may be raised for judicial review. *See Silvar v. Eighth Judicial Dist.*

Court, 122 Nev. 289, 292-93, 129 P.3d 682, 684-85 (2006). The term 'arbitrary' is defined to mean "existing or coming about seemingly at random or by chance."[15] The term 'capricious' is defined to mean "optional" or 'open to choice' or "discretionary."[16] Here, Chapter 7.100 is arbitrary and capricious by the language in its own text. It is riddled with instances of unfettered and random discretion. Examples follow.

A. Random Licensing Process (A License Lottery)

Chapter 7.100 provides that after an individual submits a timely and fully completed application to Clark County, whether or not they receive a license depends on chance. Specifically, Section 7.100.050 provides that the number of short-term rental licenses "shall not exceed one percent (1%) of the total number of housing units located in the unincorporated area . . . ." Later, Section 7.100.100(g) provides that the license application review process is to occur in a "random order." These two Code Sections read in conjunction with Section 7.100.080(f)(2), which prohibits a short-term rental unit from being ". . . within 1,000 feet of any [other] short-term rental unit . . ." establishes a licensing system that it is entirely dependent upon chance—not objective criteria, qualifications, or the timing of the application. Due to no fault of their own, an applicant can be denied based on bad luck.

[15] Merriam-Webster Dictionary https://www.merriam-webster.com.

[16] Collins Dictionary https://www.collinsdictionary.com.

Even if fortune favors an applicant and their number is drawn in a high position, they would nevertheless be denied an application if by happenstance a neighbor who lived within 1,000 feet from their home also received a license before them. This is arbitrary and capricious. It has no evidentiary rational basis in zoning or community planning by Clark County or with ensuring public health and safety. It is governance by chance. Luck is the deciding factor. It does not comport with principles of due process and fairness.

B. Subjective Discretion Of County Officials

In addition to the structural infirmities in the haphazard and random licensing process, Clark County's review of applications submitted during that process is based upon ambiguous protocols and subjective standards in the law that leave the fate of an applicant to the personal discretion of any given reviewer.

Section 7.100.100(a) provides that Clark County itself 'determines' when licenses are available for issuance. Use of the term 'determines' is a grant of discretion without objective criteria. Given that Clark County has tied the number of licenses that may be issued to the population of unincorporated Clark County, as well as geography of home locations, a moving target exists for available licenses. The Chapter 7.100 provides no formula on how this calculation will be determined.

Section 7.100.100(h) (as amended by Clark County on April 4, 2023)[17] provides in part:

> Upon 48-hour notice of the department, the residential unit shall be subject to inspection or code compliance review by *any county agency or department* to ensure the residential unit's compliance with the provisions of this chapter *prior to the issuance of a short-term rental license*. . . .

(Emphasis added). The plain text of this Section means that an applicant must authorize "any" agency or department in Clark County to enter their home and broadly inspect it for undefined compliance items in Chapter 7.100. There are approximately fifty (50) agencies or departments within Clark County government.[18] Pursuant to Section 7.100.100(h), any one of them, and one or more of its employees (and including the Las Vegas Metropolitan Police Department), may subject an applicant to an inspection of their home for an unknown duration of time to look for unidentified Code compliance items. It is left to unmitigated and subjective

[17] The prior version of Section 7.100.100(h) contained the word "discretion" and was enjoined by the district court. Clark County's amendment does not cure the provision's unconstitutionality. The district court did not review the amended version of this Section, as Clark County did it while this appeal was pending. However, this Court reviews issues of constitutional interpretation *de novo*, *see Education Freedom PAC*, 138 Nev. Adv. Op. at ___, 512 P.3d at 302, and may entertain a constitutional challenge to a law for the first time on appeal. *See Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017). Thus, the Rental Association submits that this claim may be properly considered by this Court.

[18] *See* Clark County website at https://www.clarkcountynv.gov and link entitled "Department Directory."

discretion. This Court has stated that "[a]n arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason' . . . or 'contrary to the evidence or established rules of law." *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011). Chapter 7.100 does just that—it sets forth a licensing scheme based upon random chance and arbitrary discretion without clear standards. It is unconstitutional on this basis alone.

2. EXCLUSION OF HOMEOWNERS FROM LICENSE PROCESS AND OTHER EQUAL PROTECTION VIOLATIONS

Provisions of Chapter 7.100 violate the Equal Protection Clause, as set forth in Article 4, Section 21 of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution, because it treats some categories of homeowners differently than other categories of homeowners based upon arbitrary criteria that has no rational basis to a legitimate or valid government purpose. In other words, provisions in Chapter 7.100 on their face unreasonably deprive entire categories of homeowners the opportunity to apply for a short-term rental license in Clark County. This disparate treatment is unjustified and unfair.

When addressing an equal protection claim, this Court has held that it "must determine whether (1) the statute, either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons based on membership in that group; and (2) if it is demonstrated that

a cognizable class is being treated differently." *Doe v. State*, 133 Nev. 763, 767, 406 P.3d 482, 486 (2017) (internal citations omitted). "[U]nder a rational basis test, classifications must 'apply uniformly to all who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be reasonable, not arbitrary." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520-21, 217 P.3d 546, 558-59 (2011) (internal citations omitted). In other words, an equal protection inquiry should focus on whether "'there is a rational relationship between the disparity of treatment and some legitimate government purpose.'" *Doe*, 133 Nev. at 768, 406 P.3d at 486 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

Governments undoubtedly possess zoning authority and police powers. However, a zoning law violates equal protection and becomes unconstitutional where it is "arbitrary and unreasonable" and has "no substantial relation to the public health, safety, morals, or general welfare." *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 71-72, 128 P.3d 452, 465 (2006). This is such a case. Here, short-term rental homeowners are similarly situated as a class to other licensed businesses, including resort hotels and motels, and other homeowners in Clark County. Yet, they are being treated extraordinarily different. No rational basis exists for it. It creates the 'haves' and the 'have nots.'

A. Distance Restrictions Lacking Rational Basis

Two sets of distance restrictions set forth in NRS Chapter 244 and Chapter 7.100 arbitrarily limit and prevent certain homeowners from even applying for a short-term renal license based on geography or, as explained above, bad luck.

i. 2,500-foot distance from resort hotel

Section 7.100.080(f)(1) prohibits a short-term rental from existing within 2,500 feet from a "resort hotel." NRS 244.353545(2)(f)(2)—State law—contains an identical prohibition. This distance requirement has no rational or evidentiary basis in the record and, instead, is an arbitrary property limitation. It advances no discernable public health and safety policy for residents or visitors to Clark County, let alone a rational one. Indeed, for comparison, Nevada law provides that an adult-use cannabis establishments can operate within 1,500 feet of an establishment that holds a non-restricted gaming license.[19] Yet, a short-term rental can only operate at nearly twice the distance from a resort hotel as a cannabis establishment. Short-term rentals may offer an alternative to traditional hotel accommodations and may be viewed by some as competition. They are not. Nevertheless, "[e]conomic protectionism" is not a valid rational basis to support a zoning regulation to survive an equal protection challenge. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir.).

[19] *See* NRS 678B.250(3)(a)(2)(II); *see also* NRS 678B.210(3)(a)(2)(II).

By imposing the 2,500-foot restriction, an entire category of homeowners in unincorporated Clark County are deemed "ineligible" to even apply for a short-term rental license and excluded from the process. *See* Section 7.100.080(f)(1).

ii. 1,000-foot distance from other rentals

Similarly, Section 7.100.080(f)(2) provides that a homeowner is also ineligible to obtain a short-term rental license if their home is within 1,000 feet of another short-term rental. *See also* NRS 244.353545(2)(f)(1) (providing that the minimum distance between short-term rentals must be 660 feet). However, again, no rational or evidentiary basis in the record supports this arbitrary prohibition and limitation on applying for a short-term rental license.

Two short-term rentals have no greater or less likelihood of causing a disturbance to the health and safety of a geographic area or neighborhood than they would in isolation. Such logic fails. Rather, the premise of this distance prohibition appears to be that short-term rentals are inherently a type of nuisance *per se*. That premise is both false and unconstitutionally discriminatory. It prevents a category of homeowners from even applying for a short-term rental license due to no conduct of their own and based upon the mere chance that a neighbor may obtain a license before them. This *per se* and summary exclusion from the license application process is arbitrary and patently unfair.

B. Municipal Water Systems *Only*

Section 7.100.080(d) provides that homeowners who are "not lawfully connected to a municipal wastewater system" are ineligible to apply for a short-term rental license. The term "wastewater" means "treated effluent from any sewer treatment plant operated by a governmental or private entity." *See* Section 24.34.010(f). Under Section 7.100.080(d), a home in unincorporated Clark County that uses a septic system or well water cannot *by law* ever operate as a short-term rental.

However, use of domestic well water is lawful in Nevada, *see* NRS Chapter 534.013, and so are septic systems. *See* NRS Chapter 444; NAC Chapter 444. Indeed, septic systems are regulated for health and safety by the Nevada Division of Public and Behavioral Health. *See, e.g.*, NRS 444.402; NAC 444.804. Nevada law does not require a homeowner in Clark County to connect to a municipal wastewater system and the Nevada Legislature adopted Assembly Bill 220 and only made such connections "voluntary." *See* Assembly Bill 220, Section 1 (82nd Nevada Legislative Session (effective June 7, 2023)). Using the ability to apply for a short-term rental license as leverage to compel the expensive conversion by a homeowner to municipal water system is not rationally related to a health or safety concern regarding short-term rental operations. They are unrelated.

No evidence or findings in the record show that a home with a septic system or well water presents a health or safety risk to owners of guests of short-term rentals. Clark County may not like homes using septic systems or well water. However, imposing conversion as a requirement pursuant to Chapter 7.100 is punitive and treats this category of homeowner unfairly under the law.

C. Burden Of Proving HOA Approval

Section 7.100.090(c)(5) provides that a homeowner is not eligible to apply for a short-term rental license if they live in a "common-interest community," *i.e.*, homeowners association (HOA), and they cannot provide evidence that the "governing documents," *i.e.*, covenants conditions and restrictions (CC&Rs), do not "expressly authorize the rental of a residential unit or room." *See* Sections 7.100.080(e)(3) and 7.100.020(f) (defining "common-interest community"). However, CC&Rs establish contractual obligations between a homeowner and their HOA, not the government. S*ee U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 192, 415 P.3d 32, 42 (2018) (recognizing that CC&Rs "create contractual obligations that bind the parties subject to them"). Clark County lacks standing to enforce an agreement, *i.e.*, CC&Rs. The mandate that a CC&R 'expressly' authorize a short-term rental improperly shifts a burden on applicants. The authority of an HOA is to prohibit a use in a common-interest community: lawful uses which are not prohibited are presumed allowed. *See generally* NRS 116.3102

(setting forth powers of an HOA). Clark County has no rational basis or legitimate purpose injecting itself in the private contractual relationship between a homeowner and an HOA. No other license issued by Clark County requires proof regarding an applicant's HOA status. Again, this is unequal treatment under the law.

D. Local Representative 30-Minute Response Mandate

Section 7.100.170(d) requires each short-term rental licensee to designate a "local representative" who is able to respond to certain circumstances "within thirty (30) minutes during all times that the property is rented or used." While requiring a short-term rental licensee to designate a local representative to be available to respond to certain circumstances is reasonable, *see* NRS 244.35356(5)(c), mandating they achieve a thirty (30)-minute on-site presence and response time to the property is unreasonable. No other identified businesses in Clark County are obligated to have an individual be available to arrive at their business within thirty (30) minutes' notice at all times. It is not necessary for a business license. *See* Title 6, Chapter 6.100 Clark County Code. Depending upon the time of day (or night), it is difficult, if not impossible, to drive across Las Vegas within thirty (30) minutes due to traffic. Few matters, if any, would ever require an on-site presence by a local representative or a thirty (30)-minute response time. With availability of the internet, wi-fi, and cellphones, issues can be effectively responded to remotely. Short-term rental owners should not be singled out for this disparate treatment.

3. RESTRAINTS ON SPEECH AND ASSEMBLY/ASSOCIATION IN VIOLATION OF THE FIRST AMENDMENT

Chapter 7.100, and portions of NRS Chapter 244, violate Article 1, Section 9 of the Nevada Constitution which provides that "no law shall be passed to restrain or abridge the liberty of speech" and Article 1, Section 10 of the Nevada Constitution which provides that "[t]he people shall have the right to freely assemble together to consult for the common good." The First Amendment of the United States Constitution provides that "no law" may be passed that abridges "the freedom of speech . . . or the right of the people peaceably to assemble." The new laws are unconstitutionally vague and/or overbroad on their face in two fundamental ways. First, they place unconstitutional restraints on commercial and personal speech. Second, they constitute impermissible prohibitions on the freedoms to assemble and associate with others. Each violation is addressed below.

A. Vagueness and Overbreadth

Chapter 7.100 authorizes both civil and criminal penalties. *See supra* 23. It also implicates constitutionally protected rights. Accordingly, a heightened standard of review for vagueness is appropriate. The heightened test of First Amendment review for vagueness applies when a law "involves criminal penalties *or constitutionally protected rights*." *Flamingo Paradise Gaming*, 125 Nev. at 512, 217 P.3d at 553 (emphasis added).

The heightened test is whether the law either (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, or (2) lacks specific standards and encourages, authorizes, or fails to prevent arbitrary and discriminatory enforcement. *See Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486-87 (2002); *see also Chicago v. Morales*, 527 U.S. 41, 56 (1999). To be constitutional, a law must "delineate the boundaries of unlawful conduct . . . so individuals will know what is permissible behavior and what is not." *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 864, 59 P.3d 477, 481 (2002).[20] Additionally, a law is overbroad where it "'sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment rights, such as the right to free expression or association.'" *Silvar*, 122 Nev. at 297-98, 129 P.3d 687-88 (quoting *City of Las Vegas*, 118 Nev. at 863 n. 14, 59 P.3d at 480 n.14). This Court has recognized that "[e]ven minor intrusions on First Amendment rights will trigger the overbreadth doctrine." *Silvar*, 122 Nev. at 297-98, 129 P.3d at 688. This is because an overbroad law has a "chilling effect" on speech and assembly/association and negatively impacts the everyday "breathing space" afforded by First Amendment protections. *Id.* Here, multiple provisions of Chapter 7.100, and select portions of NRS Chapter 244, fail constitutional review—

[20] Vagueness challenges implicate Article 1, Section 8 of the Nevada Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

they are vague and overbroad.

B. Prior Restraint Of Commercial Speech

Section 7.100.090(b)(4) requires short-term rental license applicants to provide Clark County with the names of all "rental sites that will be used to advertise the short-term rental" as a condition of a license application. Moreover, Section 7.100.170(f)(8) requires a short-term rental license applicant to provide a monthly report to Clark County with the names of all advertising platforms it used. Section 7.100.170(s) simultaneously mandates and limits advertising content. These requirements are unconstitutional prior restraints on a short-term rental license applicant's speech. A blend of standards governing commercial speech, licensing, and prior restraint are at issue.

Undoubtedly, advertising is a form of commercial speech. *Republic Entertainment v. Clark County Gaming and Licensing Board*, 99 Nev. 811, 816, 672 P.2d 634, 638 (1983). While it has been held to a lower level of judicial scrutiny than non-commercial speech, it still enjoys protections under the First Amendment—a substantial basis for its prohibition must still exist. *Id.* (internal citations omitted). Yet, this Court has also held that "[t]o be constitutionally acceptable, an ordinance authorizing officials to license activity that is presumptively protected by the First Amendment must establish precise, narrowly-drawn standards to guide the officials." *N. Nev. Copy v. Menicucci*, 96 Nev. 533,

536, 611 P.2d 1068, 1069 (1980). "[A]ny system of prior restraint is burdened with a heavy presumption against its constitutional validity." *City of Las Vegas v. 1017 South Main Corp.*, 110 Nev. 1227, 1132, 885 P.2d 552, 555 (1994). A prior restraint on speech may be imposed only when "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available." *Guinion v. Terra Marketing of Nev., Inc.*, 90 Nev. 237, 240, 523 P.2d 847, 848 (1974). None of these factors are present here.

Requiring short-term rental license applicants to prospectively list all advertising sites, including internet sites, they may use at a future time as a condition of their application process is a *per se* prior restraint on speech. This restraint unfairly limits the ability of short-term rental licensees to conduct business activity and to change sites at a future date when market conditions change, or more preferable sites become available. No rational, let alone compelling, basis exists for Clark County to impose this upfront condition in order to obtain a license. Hotels or other businesses in Clark County do not have this type of advertising restraint and a pre-condition to obtaining a license. That the government mandates an individual or business provide it with the names, locations, and internet platforms it intends to advertise on is chilling and not aligned with the free market principles of a democratic society.

Additionally, even if a license is issued, a licensee is required to provide Clark County an update "any new or changed" advertising information within seven (7) days, and provide a monthly report of all internet sites used. *See* Sections 7.100.170(a), (f)(8). It is not narrow. It is chilling. It is unconstitutional.

C. Restriction On Personal Speech And Expressive Activity

Section 7.100.180(a) provides that a short-term rental may not be used for "any purpose other than for dwelling, lodging, or sleeping and for activities that are incidental to its use for dwelling, lodging or sleeping." What is meant by the undefined term "incidental" is unclear and vague. Limiting the use of a rental to only 'dwelling, lodging or sleeping' is also an overbroad prohibition on speech and expressive activity. Under this language, a short-term rental can never be used for a holiday dinner, a memorial service, a graduation celebration, a book club meeting, or even a children's birthday or pool party.

Moreover, Section 7.100.180(c)(1) (as amended April 4, 2023) prohibits "[t]he use of *any* radio receiver, stereo, musical instrument, sound amplifier or similar devise which produces, reproduces or amplifies sound *shall be permitted only within an enclosed short-term rental unit*." (Emphasis added). Pursuant to the plain language of this provision, no music of any kind is ever permitted to occur outside (whether the front or back yards) on the rental property, irrespective of the time of day or volume of the music. Meaning, listening to the radio by a backyard

rental swimming pool on a hot summer afternoon or quietly strumming an acoustic guitar on a patio deck is *per se* prohibited. The United States Supreme Court has recognized that "[m]usic, as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989). This is not a reasonable time, place or manner restriction on music and noise—it is an outright prohibition on all speech and expressive activity on private property. *See id.* at 791. It is not narrowly drawn. It is vague. It is overbroad.

D. Prohibition On Assembly/Association

It is bedrock law that individuals within the United States have the right to associate and assemble with each other. *See Tectow v. City Council of North Las Vegas*, 105 Nev. 330, 334-35, 775 P.2d 227, 230-31 (1989). Both this Court and the United States Supreme Court have held that the right of individuals to associate is "in no way diminished because the issue arises in an economic matter." *Id.*

Indeed, "[t]he United States Supreme Court has recognized the vital relationship between freedom to associate and privacy in one's association." *Id.* "Because of the importance of these tightly intertwined rights that Court has refused to draw a line excluding those 'engaged in business activities' from the reach of the First Amendment." *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). Here, multiple provisions in Chapter 7.100, and certain provisions in NRS Chapter 244, also violate the right to assembly and/or associate with other people.

i. no more than ten (10) people can ever be on property

Section 7.100.160(a) limits occupancy to a maxim of ten (10) individuals total on the property at any given time. Slightly less restrictive, NRS 244.353545(2)(g) limits the maxim rental occupancy to sixteen (16) individuals. However, both are unconstitutional.

This case is analogous to the facts in *Zaatari v. City of Austin*, 613 S.W.3d 172 (Tex. App. 2019). In *Zaatari*, the Texas Court of Appeals held that provisions in an ordinance enacted by the City of Austin were unconstitutional where, among other things, it prohibited guests of short-term rentals from being together between the hours of 10:00 p.m. and 7:00 a.m. and limited the number of occupants to ten (10) individuals total or six (6) unrelated adults. *Id.* at 199-200. The Texas Court of Appeals held in *Zaatari* that the ordinance "plainly restricts the right to assemble and does so without regard to peaceableness or content of the assembly . . . ." *Id.* (analyzing Chapter 25-2, Section 25-2-795 of the Austin City Code). It reasoned that "the right to assemble is just as strong, if not stronger, when it is exercised on private property with the permission of the owner, thereby creating a nexus with property and privacy rights." *Id.* at 200.

Here, Chapter 7.100 enacted by Clark County contains similar, and in some instances identical, provisions to those held unconstitutional by the Texas Court of Appeals in the *Zaatari* case. Like *Zaatari*, Section 7.100.160(a) limits the total

number of individuals who can be on the property to ten (10) at any given time. Section 7.100.180(c)(2) also prohibits any gatherings from 10:00 p.m. to 7:00 a.m. Also like the facts in *Zaatari*, no standards for enforcement of these prohibitions were enacted by Clark County. Rather, Chapter 7.100 is a blanket prohibition preventing individuals from associating or assembling on private property.

ii. only two (2) people per bedroom

Section 7.100.160(a) also limits the number of guests to a maximum of two (2) per bedroom. Thus, under this provision, parents of a child cannot lawfully share a room with their newborn child in a basinet by their bed. Or multiple siblings cannot share a room together. This prohibition does not account for the size or capacity of room or the overall square footage and design of the rental. Houses, like people, come in all shapes and sizes. The blanket prohibition and room occupancy limit—in a private home—set forth in Section 7.100.160(a) serves no cognizable government interest whatsoever.

iii. no gatherings or parties of any type

Both the Nevada Legislature and Clark County prohibited a guest at a short-term rental from having "[a]ny party," which they defined as "a gathering of people that exceeds the maximum occupancy of the residential unit." *See* NRS 244.353545(2)(k); Section 7.100.180(b) (as amended by Clark County on April 4,

2023);[21] Section 7.100.020(n). Under the plain language of these laws, a two (2)-bedroom rental with more than four (4) people is a *de facto* 'party' which subjects both the guests and the license holder to civil and criminal penalties under Chapter 7.100. Even if the individuals are quiet and not making any disturbance whatsoever, it is a violation of the law. For instance, a bible study group consisting of (6) six people in a two (2)-bedroom house would be violating the Code for exercising their right to freely practice their religion. Not only are these laws vague, the provisions are overbroad on their face. Again, these are laws that apply to private property. They are not narrowly tailored and violate the First Amendment.

iv. no weddings or events

NRS 244.353545(2)(k) also prohibits a guest from using a rental for "weddings, events or other large gatherings." The district court enjoined identical language in Section 7.100.180(b). However, the prohibition in NRS 244.353545(2)(k) was left undisturbed. The United States Court of Appeals for the Ninth Circuit has recognized that a 'wedding ceremony' is independently protected speech under the First Amendment. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("We have no difficultly concluding that wedding ceremonies are

[21] Section 7.100.180(b) was enjoined by the district court. However, the April 4, 2023, amendment of the provision by Clark County while this appeal was pending did not cure the constitutional defect.

protected expression under the First Amendment."). What is meant by the term "event" is undefined and left to speculation. As with the other provisions discussed, this too is unconstitutional on its face.

4. INVASION OF HOME AND PERSONAL PRIVACY IN VIOLATION OF THE FOURTH AMENDMENT

The right to privacy is protected by Article 1, Section 18 of the Nevada Constitution and the Fourth Amendment to the United States Constitution. This Court and the United States Supreme Court have recognized that a person's right to have privacy in their own home is a core and fundamental tenet of our constitutional democracy: nowhere is "'the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.'" *Howe v. State*, 112 Nev. 458, 465-66, 916 P.2d 153, 159 (1996) (quoting *Payton v. New York*, 445 U.S. 573, 589-90 (1980)). Indeed, the home is sacred constitutional space.

The fact that an individual chooses to use their home for economic activity does not *per se* erode all constitutional protections afforded to traditional privacy. Indeed, at least nineteen (19) states have determined that even a rental stay of less than thirty (30) days does not transform the character of a home from a 'residential use' to a 'commercial or business use.' *See Hawai'i Legal Short-Term Rental All. v. City & Cnty. Of Honolulu*, 2022 WL 7471682, *7 (D. Haw. October 13, 2022).

As evident throughout the COVID-19 pandemic, many Nevadans were compelled out of necessity to work and conduct daily business and economic transactions from their home. By doing so, they did not lose Fourth Amendment protections. While some short-term rental owners do not live in houses they rent, many do. Under either scenario, the right to privacy in a home still applies and cannot be invaded.

A. Random Inspections Without Cause Or Review

Sections 7.100.200(b) and 7.100.170(i)(2) (as amended by Clark County on April 4, 2023) authorizes "random" inspections and provide that upon 48-hours of notice a short-term rental owner "must" permit inspection of their home and that they have a duty "to provide access." Section 7.100.170(p) also provides that owner "must" provide all financial information involving the home to Clark County for three (3) years upon request. The sum effect of these provisions is that Clark County—a government entity—will have unfettered access to enter a private home, encounter occupants, and view belongings without explanation. The ability of the government to enter private property, *i.e.*, a home, even if it is rented in whole or part, at will and with undefined standards and unchecked discretion implicates the Fourth Amendment. *See Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 540 (1967) (recognizing that warrantless searches of private rental properties implicate the Fourth Amendment).

In the case *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015), the United States Supreme Court entertained a facial challenge to a City of Los Angeles ordinance and held that motels (and hotels) have a reasonable expectation of privacy in information of their guests and that even administrative searches must afford "an opportunity to obtain precompliance review before a neutral decision maker." In *Patel*, the United States Supreme Court held that the City of Los Angeles violated the Fourth Amendment by requiring a motel (or hotel) to disclose guest records without a warrant or precompliance review. *Id.* The *Patel* Court observed that allowing the government the ability to demand the records without a warrant or precompliance review led to the "intolerable risk" that government would use its authority as a pretext to harass the motel (or hotel) owners and guests. *Id.* at 421.

An instructive case is *Weisenberg v. Town Bd. of Shelter Island*, 404 F.Supp.3d 720, 735-36 (E.D.N.Y. 2019). In *Weisenberg*, the United States District Court for the Eastern District of New York considered whether a short-term rental ordinance that required operators to provide rental information for examination by the Town Board upon request and without cause or pre-citation review violated the Fourth Amendment. In concluding such a requirement appeared unconstitutional, the *Weisenberg* Court cited to *Patel*, denied a pre-trial motion to dismiss the claim, and reasoned that unchecked discretion of the Town Board to demand records from short-term rental operators "could be used as a pretext for harassment." *Id.* at 736.

Here, like the laws at issue in *Patel* and *Weisenberg*, Section 7.100.170(i)(2) provides that a short-term rental owner "must" permit inspection of their home and that they have a duty "to provide access." Additionally, Section 7.100.170(p) provides that all financial information involving the home "must remain open to inspection" for three (3) years upon request of Clark County. That Chapter 7.100 permits Clark County to both enter a rental for an inspection and/or to demand records with or without cause or offering precompliance review violates the Fourth Amendment on its face. Furthermore, appealing to the unchecked discretion of Clark County for review of an enforcement decision could, as the *Weisenberg* Court warned, "be used as a pretext for harassment" by the government. *Id.* Without safeguards in place, this type of unchecked and broad discretion afforded to Clark County is unconstitutional.

B. Video Surveilance And Sound Monitoring Devices

Section 7.100.170(o)(1)-(3) requires that a video surveillance camera must be installed and recording footage maintained for sixty (60) days and provided to Clark County, or a law enforcement agency, "[u]pon request." Section 7.100.170(r) requires that at least two (2) or more sound monitoring devices must be installed on the short-term rental owner's yard and pool. Section 7.100.170(r)(1)-(3) provide that "data" on sound levels must be maintained for sixty (60) days and provided to Clark County "[u]pon request."

Like the privacy violations discussed above, requiring the installation of video and sound monitoring devices and mandating that the information be given to Clark Count 'upon request' and without a reason or cause violates the Fourth Amendment. Video surveillance will broadly capture footage of the identities of all individuals who enter and exit the rental, what times they enter and exit, and their activities. Again, short-term rentals are private homes where people live—they are not businesses open to the public. These laws authorize an unconstitutional invasion of privacy.

5. IMPAIRMENT OF USE, ENJOYMENT, AND ECONOMIC BENEFIT OF THE HOME AND A TAKING BY THE GOVERNMENT

Article 1, Section 8, Subsection 3 of the Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having first been made." The Fifth Amendment of the United States Constitution provides that "private property [cannot] be taken for public use . . . without just compensation." There are two types of unconstitutional taking: physical and regulatory. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 659, 137 P.3d 1110, 1120 (2006). A physical taking occurs when the government occupies or appropriates a portion of private property. *See id.* at 662, 137 P.3d at 1122; *see* also *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007).

In contrast, a regulatory taking occurs when the government enacts a regulation that deprives an owner of economic benefit of the property. *McCarran Int'l Airport,* 122 Nev. at 659, 137 P.3d at 1120. To determine if a regulatory taking has occurred, a balancing test is applied to examine the economic impact of the regulation, its interference with investment expectations, and the character of the government action. *Penn. Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). Here, Chapter 7.100 constitutes a regulatory taking of private property by Clark County. The United States Supreme Court has recognized that an unconstitutional government taking may occur when a regulation simply goes "too far." *Cedar Point Nursery v. Hassid*, 591 U.S. ___, ___, 141 S. Ct. 2063, 2072 (2021). Unconstitutional government takings in this case may be grouped into the loss of use and enjoyment of normal home and life activities, and loss of the economic benefit of the home.

A. Oppression Of Normal Home Life And Activites

The United States Supreme Court has long guarded the sanctity of the home as being of the "'highest order in a free and civilized society.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). The Court has recognized that the "home" is different, and is conferred unique constitutional status, so that all citizens may use and enjoy their home in privacy and without intrusion. *Id.* at 484-85. Here, Chapter 7.100 strips that privacy away,

removing the ability of both a short-term rental owner, and patron, of the ability to use and enjoy their property. The prohibitions are egregious.

Section 7.100.180(c)(2) prohibits a short-term rental property owner from using "all rear and side yard outdoor lighting between the hours of 10:00 p.m. and 7:00 a.m." Section 7.100.180(c)(1) prohibits the outdoor use of "any radio, receiver, stereo, musical instrument, sound amplifier or similar device" irrespective of the sound level. Section 7.100.180(c)(2) prohibits the outdoor use of "amenities, such as pools, spas, barbecues, and firepits" between the hours of 10:00 p.m. and 7 a.m. Section 7.100.180(a) prohibits the residence from being used for "any purpose other than for dwelling, lodging, or sleeping and for activities that are incidental to its use for dwelling, lodging or sleeping." Section 7.100.180(b) prohibits the residence from being used for "[p]arties, weddings, and events" and "gatherings" that exceed ten (10) individuals.

These restrictions bar any gatherings, light, or sound from a short-term rental property between the hours of 10 p.m. and 7 a.m. every night. They are imposed by Clark County without objective standards or regard for behavior. The slightest noise, even on New Year's Eve or the Fourth of July, by anyone (homeowner and guest alike) gives rise to civil *and* criminal liability. The onerous effect of these prohibitions is to eliminate the ability of both a short-term rental owner, as well as a patron, to use and enjoy their private property, *i.e.*, their home.

B. Loss Of Economic Benefit

Not only do the above restrictions impair the ability of short-term rental owners to use and enjoy their home, they also cause short-term rental owners to suffer a loss in economic benefit of their home by preventing them from maximizing the economic value of their home.

In the case *City of Grapevine v. Muns*, 651 S.W.2d 317 (Tex. App. 2021), the Texas Court of Appeals held that an ordinance passed by the City of Grapevine restricting short-term rentals (rentals less than 30 days) constituted an unconstitutional government taking of private property in violation of the United States Constitution and the Texas Constitution. The City of Grapevine contended that the ordinance was a valid zoning regulation and that the homeowners challenging the ordinance did not have a vested right in using their homes/property as short term rentals. However, the Texas Court of Appeals rejected the City's argument. The *City of Grapevine* Court held that homeowners "have a fundamental leasing right arising from their property ownership" and that "'essential attributes of property" include "'the right to use, lease[,] and dispose of it for lawful purposes.'" *Id.* at 346-47 (quoting *Terrace v. Thompson*, 263 U.S. 197, 215 (1923)) (other citations omitted). The Texas Court of Appeals in *City of Grapevine* proceeded to conclude that the homeowners in that case "have a vested right to lease their properties." *Id.* at 347.

Here, the Rental Association does not contend it has a fundamental constitutional right to rent a home without any government regulation whatsoever. Yet, once enacted, government regulation, must comply with constitutional proscriptions—this distinction is relevant to the analysis. *See generally Lankford v. Sherman*, 451 F.3d 496, 507 (8th Cir. 2006). Here, Chapter 7.100 arbitrarily deprives a homeowner economic use and benefits of their property in three ways.

First, Section 7.100.080(f)(2) provides that homeowners in Clark County who live within 1,000 feet of another short-term rental owner are automatically ineligible for a short-term rental license. As previously discussed, this restriction is arbitrary. The determining factor as to whether one individual may be able to earn income from their home and another may not, is dependent upon chance and luck—whether a neighbor who lives within 1,000 feet of them decides to seek a license and randomly get approved by Clark County first. Whether a particular home is within 1,000 feet of another short-term rental property will logically impact its potential economic uses and its economic value. Clark County failed to establish a factual record or rational basis to support this restriction.

Second, as previously discussed, Section 7.100.160(a) arbitrarily limits the maximum occupants to a maximum of ten (10) individuals, irrespective of the number of bedrooms in the house. Thus, a six (6) or seven (7) bedroom home is subject to the same maximum occupancy limitation of a five (5) bedroom home.

Larger homes will have empty bedrooms under this occupancy limitation for which their owner will not be compensated. This arbitrary limitation will reduce the economic benefit and use of larger short-term rental properties. No rational basis exists for these, or the other, arbitrary occupancy limitations. They are unconstitutional government takings.

Third, Section 100.070(a) arbitrarily ties a short-term rental license to the individual, and not the real property they own, *i.e.*, their home. By doing so, it limits the number of licenses "any property owner" may ever hold to just one (1), regardless of the number of homes they own. This license limitation by Clark County arbitrarily takes away an economic opportunity for which an individual may use they home. It is also an unconstitutional burden on interstate economic activity.

6. LACK OF DUE PROCESS: LIABILITY FOR ACTS OF OTHERS

Chapter 7.100 violates the Due Process Clause of the Nevada Constitution and the United States Constitution. More specifically, Article 1, Section 8, Subsection 2 of the Nevada Constitution, which provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." It also violates the Due Process Clause as set forth in the Fourteenth Amendment of the United States Constitution. This Court has held that to establish a due process claim it must be shown that an individual (1) had a liberty interest that was interfered with by the government and (2) the established procedures to address it were insufficient.

Malfitano v. County of Storey, 133 Nev. 276, 282, 396 P.3d 815, 819 (2017) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1989)).

Here, Section 7.100.230(e)(2) provides that when a citation is issued involving a short-term rental property that "the property owner shall also be subject to receipt of an administrative citation . . ." Pursuant to this provision, a short-term rental owner may be cited for conduct they did not commit or had no knowledge or involvement. It makes a short-term rental owner legally responsible for the acts and behavior of others. Given that the law carries not only civil, but criminal, penalties, this provision violates bedrock constitutional principles of due process, as well as fundamental fairness.[22]

7. VIOLATION OF THE DORMANT COMMERCE CLAUSE

Chapter 7.100 violates the Dormant Commerce Clause as set forth in Article 1, Section 8, Clause 3 of the United States Constitution. Under the Dormant Commerce Clause (also known as 'the Negative Commerce Clause'), states and local government entities are constitutionally prohibited from enacting laws that unjustifiably discriminate against or burden the flow or interstate commerce. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 560, 170 P.3d 508, 514-15

[22] *Mens rea* must generally exist before a person is held criminally responsible for the acts of others. *See generally Ford v. State*, 127 Nev. 608, 618, 262 P.3d 1123, 1130 (2011).

(2007). In other words, the Dormant Commerce Clause prohibits states and local government entities "'from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'" *Id.* (quoting *Fort Gratiot Sanitary Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. 353, 359 (1992) (other citations omitted)).

The United States Supreme Court has held that a law is discriminatory and violates the Dormant Commerce Clause when it produces "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal citations omitted). A statute or ordinance may violate the Dormant Commerce Clause if it discriminates on its face or imposes an undue burden on commerce through its purpose. *Douglas Disposal, Inc.*, 123 Nev. at 552, 170 P.3d at 514-15 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). If a statute or ordinance advances a legitimate local interest and applies equally to in-state and out-of-state citizens, it may survive a constitutional challenge if the burdens it imposes on interstate commerce are not "clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). In making this evaluation, the United States Supreme Court set forth the following three criteria for courts to evaluate: (1) the nature of the local interest, (2) the extent of the burden placed upon interstate commerce, and (3) whether the

local interest could have been served by other legislation that does not impact interstate commerce. *See Pike*, 397 U.S. at 142.

Recently, the United States Court of Appeals for the Fifth Circuit issued a published opinion in the case *Hignell-Stark v. City of New Orleans*, 2022 WL 3584037 *5-9 (5th Cir. August 22, 2022), where it reversed a lower court and held that a short-term rental licensing scheme enacted by the City of New Orleans violated the Dormant Commerce Clause on its face because it required short-term rental properties to be the primary residence of a licensee and, therefore, discriminated against out-of-state residents. In reaching its decision, the Fifth Circuit rejected arguments by the City of New Orleans that the residency requirement and the scheme's burdens on interstate commerce were necessary to achieve the local interests of reducing nuisances, increasing housing, and maintaining residential neighborhood characteristics. *See id.* at *8. The Fifth Circuit stated: "The City has many options to address the problems caused by [short-term rentals] in residential neighborhoods. But it chose the one the Constitution forbids." *Id*. at *9.

While Chapter 7.100 does not contain an express residency requirement for a short-term rental license, it contains an implicit one through the local representative mandate. *See also* NRS 244.35356(5)(c). The Fifth Circuit's holding in *Hignell-Stark* is instructive and applicable.

One of Clark County's stated purposes for short-term rental limitations is to promote "permanent, affordable housing for the residents of the County." *See* Section 7.100.010(a). In doing so, however, the Chapter 7.100 discriminates against the investment in and purchase of residential properties in Nevada by out-of-state individuals who may not own or occupy a home in Clark County as their primary residence, but who may still wish to use and maintain that property as a short-term rental. It does so in three ways. First, the Section 7.100 sets forth an arbitrary one percent (1%) cap on available short-term rental licenses in Clark County, which limits supply. Second, it mandates that a short-term rental licensee designate a Clark County resident as a local representative who can be available and physically present at the property within thirty (30) minutes notice, day or night. *See* Section 7.100.170(d); *see also* NRS 244.35356(5)(c). This requirement is a *de facto* residency requirement for a licensee holder and akin to the requirement held violative of the Dormant Commerce Clause by the Fifth Circuit in *Hignell-Stark*. Third, Section 7.100.070(a) limits the number of licenses any individual may obtain to just one (1), regardless of how may homes they own.

Given these restrictive provisions, Chapter 7.100 favors and protects in-state industry to the detriment of out-of-state homeowners, investors, and visitors. It further burdens short-term rental homeowners and favors resort hotels through arbitrary distance and occupancy restrictions. The consequence is it will limit the

marketplace of available short-term rental options and opportunities in Nevada for both in-state *and* out-of-state individuals. By doing so, Chapter 7.100 places an undue and discriminatory burden on the flow of interstate commerce and economic activity in favor of protecting in-state interests and industry. It is a practice the Dormant Commerce Clause prohibits.

Certainly, the availability of affordable housing is a public policy concern. However, placing unnecessary limitations on short-term rental licensees that burden interstate commerce and the availability of options in the short-term rental marketplace in Clark County is not a constitutional mechanism to achieve this policy objective. Rather, Clark County could increase housing affordability and availability of inventory for Nevada residents by incentivizing construction and using its zoning, permitting, and other governmental powers. It does not, however, have authority to unduly limit and burden the flow of interstate commerce.

These provisions exceed the limits of lawful and reasonable prohibitions as established by the Nevada Constitution and the United States Constitution. The process for obtaining a short-term rental home license has been made difficult, onerous, and intimidating at every opportunity. Operating a short-term rental should not have to occur in an environment of uncertainty, financial exposure, and ongoing criminal jeopardy. Provisions within Chapter 7.100, and NRS Chapter 244, are unconstitutional when viewed separately, or cumulatively as a whole.

VIII. CONCLUSION

The Rental Association is not opposed to regulation of the short-term rental market by Clark County or the Nevada Legislature. It is also not opposed to paying its fair share of reasonable fees and taxes. Short-term rentals provide a valuable service to residents of and visitors to Clark County and the greater Las Vegas area. The Rental Association, and its members are committed to being good neighbors and responsible members of the Clark County community.

Yet, Chapter 7.100, and limited provisions of NRS Chapter 244, fall short of permissible government regulation under the Nevada and United States Constitutions. The relinquishment of fundamental constitutional rights should not be a prerequisite to obtaining a license to operate a short-term rental. The laws enacted by Clark County are unfair, oppressive, and unconstitutional. [23]

[23] At every turn, Clark County made Chapter 7.100 as onerous and restrictive as possible. For example, the Nevada Legislature provided a one-night minimum; Clark County imposed a two-night minimum. *Compare* NRS 244.353545(2)(e)(1), *with* Section 7.100.160(b). The Legislature provided for a maximum sixteen (16)-person occupant limitation; Clark County imposed a ten (10)-person occupant limitation. *Compare* NRS 244.353545(2)(g), *with* Section 7.100.160(a). The Legislature provided for a 660-foot distance between short term rentals; Clark County imposed a 1,000-foot distance limit. *Compare* NRS 244.353545(2)(f)(1), *with* Section 7.100.080(f)(2). The Legislature authorized an individual to obtain up to five (5) licenses; Clark County limited it to one (1) license. *Compare* NRS 244.353545(2)(i), *with* Section 7.100.070(a). The Legislature limited the total number of available licenses to ten percent (10%) of residential units; Clark County limited that to one percent (1%). *Compare* NRS 244.353545(2)(h)(1), *with* Section 7.100.050.

Accordingly, the Rental Association respectfully requests that this Court declare that Chapter 7.100, and NRS Chapter 244, are facially (and as-applied to the application process) unconstitutional and reverse the district court, in part,[24] and remand for further proceedings.

Dated: September 5, 2023.

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[24] The Rental Association requests that the district court's decision to issue a preliminary injunction be affirmed in other respects.

CERTIFICATE OF COMPLIANCE

I certify that this APPELLANTS' OPENING BRIEF complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, it is proportionally spaced, has a typeface of 14-point type, and contains 13,838 words, excluding the table of contents, table of authorities, and certifications.

I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. This brief complies with all applicable NRAPs, and in particular NRAP 28(c)(1), which requires every assertion in this brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

Dated: September 5, 2023.

HUTCHISON & STEFFEN, PLLC

By: *<u>/s/ Joseph C. Reynolds</u>*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this completed APPELLANTS' OPENING BRIEF was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Dated: September 5, 2023.

By: */s/ Madelyn Carnate-Peralta*
An Employee of Hutchison & Steffen