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DISTRICT COURT
CLARK COUNTY, NEVADA

GREATER LAS VEGAS SHORT TERM RENTAL ASSOCATION, a non-profit Nevada corporation; JACQUELINE FLORES, President and Director, Plaintiffs, vs. CLARK COUNTY and the BOARD OF CLARK COUNTY COMMISSIONERS, a political subdivision of the State of Nevada; and the STATE OF NEVADA, Defendants,	Case No: A-22-856311-P Dept No: 8

CLARK COUNTY'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date of Hearing: November 17, 2022
Time of Hearing: 10:00 A.M.

Defendant Clark County, by its attorney STEVEN B. WOLFSON, District Attorney, through Deputy District Attorneys Robert Warhola, Jeffrey S. Rogan, Joel Browning, and Timothy Allen, and files this *Opposition to Plaintiffs' Motion for a Preliminary Injunction*.

This *Opposition* is made and based upon the arguments raised in the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument permitted by the Court at a hearing on the matter.

Dated this 4th day of November, 2022.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: */s/ Timothy Allen*
TIMOTHY ALLEN
Deputy District Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

It is easy to talk about the rights of persons wanting to rent their homes for short periods of time while forgetting about the concerns of the quiet multitude of existing homeowners who permanently live in Clark County, pay their property taxes and hope to enjoy their home (often their principal investment) free from unruly visitors who couldn't care less about the neighborhood. Thus, perhaps one of the most important purposes of local government is to protect residential neighborhoods from incompatible uses. As early as 1926, the United States Supreme Court upheld a municipal ordinance designed to separate residential uses from other incompatible uses. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). The Supreme Court in *Euclid* framed the issue before it as follows:

> This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, *from which business and trade of every sort, including hotels . . . are excluded.*

Id. at 386 (emphasis added). Since then, Courts from all states and federal jurisdictions have long recognized that maintaining the character of residential neighborhoods is a proper local governmental purpose. *See, e.g., Village of Euclid*, supra; *Miller v. Bd. of Pub. Works of City of Los Angeles*, 195 Cal. 477, 234 P. 381 (1925).

The reasons for protecting residential neighborhoods are clear. In *Miller*, the California Supreme Court long ago recognized that residential neighborhoods are the foundation to a community as a whole. *Miller*, 195 Cal. at 493. The Court noted that with permanent residency comes stability, the increased interest in public agencies, such as government, church and school, and a recognition of the individual's responsibility in safe-guarding the community in which he or she lives. *Id.*

The same cannot be said for the short-term tenants. Courts have expressly found that the short-term rental of residential property adversely affects the essential character of a neighborhood and the stability of a community in general. *Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App. 3d 1579, 286 Cal. Rptr. 382 (Ct. App. 1991). Persons staying in a neighborhood for short periods of time have little interest in public agencies or in contributing to the long-term

welfare of a neighborhood or community as a whole. *Id.* Short-term tenants do not invest time or effort in local government or community activities. *Id.* "Literally, they are here today and gone tomorrow -- without engaging in the sort of activities that weld and strengthen a community." *Id.*

For years, Clark County has been dealing with the problem of short-term rentals in residential neighborhoods. Short-term rentals are commonly referred to as "vacation homes" and "party houses" for good reason as they often interfere with permanent residents' use and enjoyment of their homes. Clark County received, and still receives, complaints from homeowners with grievances ranging from loud late-night parties, shootings, inebriated guests, and inappropriate language and behavior towards existing homeowners, among other things, that is, the kind of conduct one would expect from persons only visiting for a few days and here for the purpose of revelry.

In August of 1998, Clark County addressed the problem by adopting an ordinance prohibiting the use of short-term rentals in residential neighborhoods. *See* Clark County Code § 30.44.010(b)(7)(C). The 1998 ordinance was modeled after an ordinance adopted by the City of Carmel-By-The-Sea, California and upheld by a California appellate Court. *See Ewing*, 234 Cal. App. 3d 1579 Through the years, Clark County successfully pursued multiple enforcement actions against problem vacation homes that had violated Clark County business license, zoning, building and fire codes and whose guests acted in blatant disregard of neighboring homeowners' rights to use and enjoy their homes free from interference from unruly short-term guests.

During the last Legislative session, however, the Nevada Legislature adopted AB 363 which requires Clark County to adopt an ordinance that allows some short-term rentals and provides that any ordinance which is inconsistent with AB 363 is null and void. NRS 244.353545(2)(b), (4). On June 21, 2022, Clark County adopted Ordinance 4959 as required by AB 363. In doing so, Clark County attempted to strike a balance between allowing the short-term rentals in areas where they were previously not allowed and protecting existing homeowners from the short-term guests' disruptive behavior and nuisance level activity that is commonly associated with short-term rentals.

II. FACTS

JACQUELINE FLORES is the owner of 8493 Moondance Cellars Ct. in unincorporated Clark County. On September 5, 2018, Clark County received a complaint that 8493 Moondance Cellars Ct. was operating as an illegal short-term rental. On September 6, 2018, Clark County sent a Rehabilitation Notice, that informed Ms. FLORES that she was a violation of the Clark County Code by short-term renting her property and that $1,000.00 per day fines would issue if she did not stop. Around October 12, 2018, Ms. FLORES agreed to follow the code and only rent her property for 31 days or more. However, Clark County discovered Ms. FLORES was still renting out her property as a short-term rental when code enforcement officers spoke with guests at the property. Clark County then started imposing civil penalties of $1,000.00 under Clark County Code § 11.14 for each night a guest confirmed they had rented the property for less than 31 days. Eventually, Clark County obtained a warrant for the booking records attached to Ms. FLORES' online advertisements for VRBO.com and HOMEAWAY.com. The records obtained from the warrant showed that Ms. FLORES had violated the Clark County Code on 58 occasions from December 2018 to August 2019. On November 23, 2019, Clark County issued an administrative citation under Clark County Code § 1.14 for $28,350.00 for these 58 violations. With the civil penalties and the administrative citation Ms. FLORES owes $31,350.00.

Since, the passage of Clark County's new ordinance in June of 2021, that allows short-term rentals to operate with a license, Ms. FLORES has not been cited for any violations using the new ordinance. Ms. FLORES also has not applied for a short-term rental license or been denied a short-term rental license to Clark County's knowledge. Similarly, the Greater Las Vegas Short Term Rental Association has not been cited for any violations using the new Ordinance. Further, the Greater Las Vegas Short Term Rental Association does not appear to own any property in unincorporated Clark County and has applied for a short-term rental license. However, on August 2, 2022, Plaintiffs initiated the instant case by filing a petition. On October, 3, 2022, Plaintiffs filed a *Second Amended Complaint* and the instant *Motion for Preliminary Injunction*. The Second Amended Complaint contains twenty-one causes of action for constitutional violations related to Clark County's new short-term rental ordinance. Plaintiffs' *Motion* for

preliminary injunction claims that they are likely to be successful on all twenty-one causes of actions that are contained in their Second Amended Complaint and asks the Court to declare the Ordinance unconstitutional and enjoin its implementation.

III. STANDARD OF REVIEW

A preliminary injunction is appropriate where the moving party can demonstrate that (1) "it has a reasonable likelihood of success on the merits"; and (2) "absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice." *Elk Point Country Club Homeowners' Ass'n, Inc. v. K.J. Brown, LLC*, 138 Nev. Adv. Op. 60, 515 P.3d 837, 839 (2022). "While the moving party need not establish certain victory on the merits, [it] must make a prima facie showing through substantial evidence that [it] is entitled to the preliminary relief requested." *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018); *see Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968) (observing that in the absence of testimony, exhibits, or documentary material to support a request for preliminary injunctive relief, such relief should be denied); *see also Kuban v. McGimsey*, 96 Nev. 105, 605 P.2d 623 (1980) (court upheld dismissal of brothel owners' complaint for injunctive relief when the city limited the number of brothel licenses that were issued because there is no deprivation of property where a business is regulated for health and safety reasons and even the added costs of having to regulate many businesses is a sufficient basis to limit licenses).

In considering a preliminary injunction, courts also "weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Preliminary injunction is the strong arm of equity, which should not be extended to cases that are doubtful or do not come within well-established principles of law. *City of Boulder City v. BFE, LLC*, 510 P.3d 814 (Nev. 2022) (unpublished), citing *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972). Preliminary injunctions that go beyond the preservation of the then existing status quo should not be lightly issued. *City of Boulder City v. BFE, LLC*, 510 P.3d 814 (Nev. 2022) (unpublished) (holding the district court abused discretion by issuing a preliminary injunction that allowed the applicant to

operate a fuel tanker in violation of the fire department's interpretation of the fire code), citing *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970) (explaining that the district court abused its discretion because it decreed that the school applicants should be permitted to register in violation of the school's dress code regulation prior to a determination of the regulation's validity).

In considering a constitutional challenge, the court must start with the presumption in favor of constitutionality and should only interfere only when the Constitution is clearly violated. *Schwartz v. Lopez*, 132 Nev. 732, 745, 382 P.3d 886, 895 (2016). When making a facial challenge, the challenger bears the burden of "demonstrating that there is no set of circumstance under which the statute would be valid." *Id.* at 745. The rules of statutory construction apply and the court must look to the plain language of the provision if it is unambiguous. *Id.* at 745. Only if there is more than one reasonable interpretation, should the court look beyond the plain language and consider the history, public policy and reason in order to ascertain the intent of the drafters and then the court must interpret the ordinance to avoid absurd results. *Id.* at 745.

IV. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS AS THEY LACK A PERSONAL INJURY OR JUSTICIABLE CASE OR CONTROVERSY SUFFICIENT TO CONVEY STANDING TO EVEN CHALLENGE THE ORDINANCE

In Plaintiffs' Second Amended Complaint, they assert that "Plaintiff GREATER LAS VEGAS SHORT TERM RENTAL ASSOCIATION ("Rental Association") is a non-profit Nevada corporation, with its principal place of business in and registered against in Clark County, Nevada" and that "Plaintiff JACQUELINE FLORES ("Jacqueline") is the President and Director of the Rental Association and is [a homeowner and] an individual residing in Clark County, Nevada. *See* Plaintiffs' *Sec. Am. Compl.* at 2. Plaintiffs contend that the "Rental Association is a grassroots non-profit organization established by concerned residents of Clark County, Nevada in 2020. They are hard-working Nevadans who come from diverse backgrounds and love the greater Las Vegas area." *Id.* at 3. Notably, this description of Plaintiffs' interest in the subject action applies equally to most Clark County residents and fails to identify any specific or unique

injury suffered by the Plaintiffs or a case and controversy between Plaintiffs and Clark County sufficient to convey standing for the instant lawsuit.

Plaintiffs do not allege that any member of the organization, including Ms. Flores, has applied for a short-term rental license in unincorporated Clark County. *See generally* Plaintiffs' *Sec. Am. Compl.* They do not allege that they have been accepted or rejected as licensees to operate a short-term rental in Clark County under the new ordinance. *Id*. They do not allege that they have received citations for violations of the current short-term rental ordinance. *Id*. In short, Plaintiffs have identified no facts supporting an injury or case and controversy sufficient to convey standing to challenge the instant ordinance.

The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). Generally, a party must show a personal injury and not merely a general interest that is common to all members of the public. *Id.* at 743; *see also Doe v. Bryan*, 102 Nev. 523, 525–26, 728 P.2d 443, 444–45 (1986) (requiring plaintiffs, who sought to have criminal statute declared unconstitutional, to first demonstrate a personal injury, i.e., that they were arrested or threatened with prosecution under the statute); *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929) (requiring property owner to show that he would suffer a special or peculiar injury different from that sustained by the general public in order to maintain complaint for injunctive relief).

Under *Schwartz v. Lopez*, the court recognized a limited exception to the injury requirement in certain cases involving issues of significant public importance. 132 Nev. at 743. The court may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditure or appropriations without a showing of a special or personal injury. *Id.* at 743. This public-importance exception is narrow and only available if (1) the case involves an issue of significant public importance, (2) the case involves a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution, and (3) the plaintiff must be an "appropriate" party, meaning that there is no one else in a better position who will likely bring an action and that the plaintiff is capable of fully advocating his or her position in court. *Id.* at 743.

"Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem." *Doe*, 102 Nev. at 525. To have standing to challenge the constitutionality of a business license ordinance and its criminal citation provisions, a party must demonstrate that they were personally aggrieved, cited or threatened with citations. *Id.* at 525–26 (upholding a district court's dismissal of a complaint for lack of standing because "[the plaintiffs] had never been arrested, prosecuted or threatened with prosecution" under a statute). In this case, Plaintiffs have alleged no facts or injury arising from the Ordinance including no allegations of citations or threats to cite. Plaintiffs have also failed to demonstrate how they suffered a unique or particularized injury from the general public. *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929). In fact, Plaintiffs' basis for challenging the ordinance rests solely on their contention that they are Clark County residents who love Las Vegas—but such allegations are not unique to Plaintiffs and are better characterized as a general interest that is common to all members of the public.

Plaintiffs also do not qualify for the limited public-importance exception to Nevada's standing requirements as, even if one were to concede that this issue dealt with an issue of significant public importance or that Plaintiffs were the property entity to bring the action, which the County does not, Plaintiffs still could not demonstrate how the instant ordinance relates to unconstitutional legislative expenditures. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

As Plaintiffs' only interest in the subject litigation is the same interest held by the public at large, Plaintiffs have alleged no concrete injury or controversy, and Plaintiffs fail to qualify for any exceptions to the standing requirements for bringing an action before the Court, the Court should find that Plaintiffs do not have standing to bring this action and, accordingly, are unlikely to even reach the merits of their complaint—let alone prevail on them.

V. NO IRREPARABLE HARM

A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the nonmoving party's conduct, if

allowed to continue, will cause the moving party irreparable harm from which compensatory relief is inadequate. *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013). Plaintiffs claim that "the existence of a constitutional violation in itself has been held" by the Supreme Court of Nevada in *City of Sparks* to constitute sufficient irreparable harm to support a preliminary injunction. However, the *City of Sparks* court held the exact opposite. The court held that there was a constitutional violation, but that "the district court's issuance of a preliminary injunction was overboard and premature." *Id.* at 370. What the Court wrote in the standard of review § is that "a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm." *Id.* at 357 (emphasis added). Thus, there is no automatic assumption that monetary damages would be an inadequate remedy in this specific case even if the Court believes a part of the ordinance does violate the constitution. Plaintiffs have cited no cases which show that the inability to receive short term rental payments would constitute irreparable harm.

"[A]cts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury." *State, Dep't of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. 362, 370, 294 P.3d 1223, 1228 (2012). This includes the revocation of a business license without the opportunity for a notice and a hearing. *Id.* at 1228. However, in this case, Plaintiffs do not have a business license and Clark County has just cause and it is reasonable for it to interfere with businesses that violate the Clark County Code. Even if Plaintiffs received a citation under the new ordinance, which they have not, they would be provided notice and an opportunity to appeal that citation. Clark County Code 7.100.240. There is no valid claim of irreparable harm if the damages are the destruction of an illegal business. There is no valid claim of irreparable harm if they will receive a chance to appeal anything that will burden their business. Further, any damages are the value of the rent monies, which are easily calculated and are not irreparable.

Plaintiffs claim that with Clark County ordinance they will be unable to "supplement their income" and they will lose the "financial flexibility to continue working from home…" Plaintiffs say that obtaining a short term rental license is the difference between "financially surviving

during retirement." JAQUELINE FLORES affidavit states that if she is denied a license, which is still undecided, she will be required to endure "economic exposure." It is clear that this case is only about money and it is only brought under the guise of constitutional protections.

Plaintiffs claim that they will be irreparably harmed because if they apply for a short-term rental license they will be "forced" to turn over where they are advertising their rental properties. They claim this is a violation of the 1st Amendment right to free speech. They also claim they are having the privacy of their homes invaded and want to continue their current lifestyles. However, even if providing the location of their commercial advertisements was a violation of the 1st Amendment, no one is requiring them to apply for a license. Plaintiffs can ensure the privacy of their homes by choosing not to turn their homes into a hotel. Plaintiffs can rent their properties out for 31 days or more without a short-term rental license. However, Plaintiffs do not want to do that because they make more money by violating the law, annoying their neighbors and turning their residential properties into hotels and party houses. Thus, there is no irreparable harm and all claims for preliminary injunction must fail.

VI. BALANCING OF HARDSHIPS AND PUBLIC INTEREST

Plaintiffs have misinterpreted the balancing of the hardships test and have not cited a single case to support their argument. It is not a test to balance the costs of litigation, the financial holdings of each party, or how inconvenient it will be to properly litigate the issues after they are ripe for adjudication. After reviewing the likelihood of success and irreparable harm, a "district court may also weigh the public interest and the relative hardships of the parties in deciding whether to grant a preliminary injunction." *Clark Cnty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). The granting or refusing or an injunction is a matter of discretion and probably the most important consideration of the district court in deciding how to exercise that discretion is the relative interests of the parties and how much damage each party will suffer if the restraint is denied or granted. *Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 442 P.2d 901 (1968); *Home Fin. Co. v. Balcom*, 61 Nev. 301, 127 P.2d 389 (1942). It is the hardships caused by the ordinance or caused by the restraint of the ordinance that the Court must balance. The

ordinance will cause little hardship for the Plaintiffs and its restraint will cause great hardship for the County and public.

Previously, short-term rentals were totally banned in Clark County and now they are being allowed if certain conditions of licensing can be met. This change is a benefit to the Plaintiffs who now have the opportunity to operate a short term rental legally. Plaintiffs cannot ignore the previous total ban and claim that this new ordinance is the first law that restricted their business activities. The ordinance will require the Plaintiffs follow the requirements of licensing, but those burdens are outweighed by the benefits of finally have the chance to operate legally. Thus, this ordinance causes no net hardship for the Plaintiffs because the ordinance provides more benefits than burdens.

Conversely, Clark County will be forced to endure great hardship if this Court enjoins the enforcement of the ordinance. Clark County would effectively have its zoning authority and other legislatively delegated authority to regulate short term rentals stripped by the court. Clark County would be unable to protect the public from the many nuisances caused by short term rentals. Clark County would lose its ability to act on behalf of the public who mostly wanted this short term rental regulation. Further, the public would also be forced to endure great hardship if this Court enjoins the enforcement of this ordinance. The public would effectively lose their property right to quiet enjoyment of their property. They would be forced to go from a residential zone to a commercial hotel zone and endure all the public nuisance that come along with that. Thus, if the Court finds a probability of success and irreparable harm, it should still use its discretion to deny the motion for preliminary injunction in accordance with the balancing of hardships.

Further, keeping with the status quo, which is a prohibition on short term rentals, would benefit the public by keeping the laws predictable. Making a drastic change by allowing all short term rentals to operate without regulation would cause chaos and increase party shootings and domestic disputes throughout many neighborhoods. The Court should allow the full litigation to take place and allow the County time to make any required changes to the ordinance before granting an injunction that could have drastic consequences.

Next, even if the Court finds that the balancing of hardships weighs in favor of the Plaintiffs, the Court can still choose to not exercise its discretion to issue a preliminary injunction because it would be against the public interest. "The public interest analysis for the issuance of [injunctive relief] requires [courts] to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). Plaintiffs fail to address that some critical public interest would not be injured by the grant of preliminary relief. In *Alliance of the Wild Rockies*, the court held that there was a critical public interest in protecting a federal forest from logging. *Id.* at 1138. The public interest in favor of the logging was the providing of jobs that would benefit the local economy. *Id.* at 1138. The Court found that the public interest injured by not providing the jobs did not outweigh the public interest in protecting the forest. *Id.* at 1138.

The majority of the public in Clark County live in residential zones and do not operate short term rentals. They relied on the Clark County Zoning laws that prohibit commercial businesses and hotels from their neighborhoods when they purchased their houses. There is also an affordable housing problem in Nevada that affects a large amount of individuals who rent housing or are looking to buy housing. A relatively small amount of the public operates short term rentals illegally in Clark County. The illegal short term rental operators make more money by renting out their properties as short-term rentals, so there would be a small financial benefit for a small portion of the public. But, the harm caused by illegal short term rentals include public nuisances for a far larger amount of the public. This is why the general public was generally in support of a short term rental ban and petitioned the County to totally ban them. Thus, the public interests weighs in favor of denying the motion for a preliminary injunction. The Court should not cut down the peaceful communities that exist throughout Clark County to benefit a few bad faith business owners.

VII. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. CLARK COUNTY CODE § 7.100.050, *ET SEQ.*, IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD

1. Facial Challenges to the Constitutionality of an Ordinance based on Vagueness and Overbreadth are highly Disfavored because they Rely on Speculation, are contrary to the Doctrine of Judicial Restraint, and Frustrate and Circumvent the Intent of the Duly Elected Representatives of the People

Plaintiffs' *Motion* for Preliminary Injunction asserted disfavored facial challenges to the constitutionality of Clark County Code § 7.100.050, *et seq.* under both the Nevada State Constitution and the United States Constitution. *See* Plaintiffs' *Motion* at 26-30. The basis of Plaintiffs' arguments turn on the speculative contention that the ordinance "leave[s] an ordinary reasonable person to simply guess at [the vague terms'] meaning and what conduct is illegal." *Id.* at 27. Notably, as the ordinance only recently went into effect, Plaintiffs can point to no instance, in their own experiences or otherwise, that shows that the Ordinance is too vague or overbroad to be constitutionally understood or enforced. *See generally id*. Accordingly, their arguments in this regard are based on nothing but speculation. *Id*.

Facial challenges like those being raised by Plaintiffs here "are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008). Facial challenges frequently rely on speculation or interpretation of statutes "on the basis of factually barebones records." *See Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941 (2004) (internal quotation marks and brackets omitted). "*Facial challenges ... are especially to be discouraged*" because "not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing, *to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand*." *Sabri*, 541 U.S. at 609–10 (emphasis added). Courts "*have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings*, and, generally, on the strength of specific reasons weighty enough to overcome [the courts'] well-founded reticence." *Sabri*, 541 U.S. at 609–10 (emphasis added)**;** *see also Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908 (1973).

Declaring statutes unconstitutional "frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262 (1984) (plurality opinion); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31, 126 S. Ct. 961, 967–69 (2006). The constitutional mandate to the courts encourages judicial restraint such that the courts refrain from "rewrit[ing] state law to conform it to constitutional requirements…." *Ayotte*, 546 U.S. at 329–31 (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397, 108 S. Ct. 636 (1988)). Invalidating a statute, without taking into consideration the intent and desire of the legislature, circumvents the intent of the legislature. *See Califano v. Westcott*, 443 U.S. 76, 94, 99 S. Ct. 2655 (1979) (Powell, J., concurring in part and dissenting in part); *see also Dorchy v. State of Kansas*, 264 U.S. 286, 289–290, 44 S. Ct. 323 (1924) (opinion for the Court by Brandeis, J.); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S. Ct. 1187 (1999).

Here the Plaintiffs can point to no instance where the terms they claim are vague or ambiguous have led to issues in the enforcement of the subject Clark County ordinance. They can similarly point to no instance where enforcement was inconsistent or exceeded the scope of the ordinance because of some purported overbreadth inherent in the language of the ordinance. In fact, given that the ordinance only recently came into effect, it is exceedingly unlikely that any individual has even been cited under the current ordinance. Despite the lack of any articulable facts supporting their assertions, Plaintiffs seek to have the court supplant its wisdom with that of the legislature based on nothing more than conjecture and Plaintiffs' unilateral and selective interpretation of the County's ordinance.

The relief Plaintiffs seek is speculative, not based on an actual injury, and pushes the bounds of traditional standing; thereby highlighting why these sorts of "facial challenges" are disfavored. As Plaintiffs' facial challenges to the constitutionality of the Clark County ordinance are both disfavored and lacking in substantive support, they are not likely to prevail on the merits of their motion and, accordingly, the Court should deny the preliminary injunction sought therein.

2. The Terms "Family" or "Group" in the § 7.100.160(c)(1) are not Ambiguous when Viewed in Context and Plaintiffs' Attempts to Characterize them as Such are Disingenuous

Plaintiffs contend in their motion and without providing context for the court that the terms "family" and "group" used in Clark County Code § 7.100.160(c)(1)[1] are ambiguous and that this purported ambiguity puts short-term rental owners in jeopardy of unknowingly committing a crime. *See* Plaintiffs' *Motion* at 27.

Clark County Code § 7.100.160(c)(1) provides:

> (c) Multiple Bookings Prohibited.
>
> (1) The Short-Term Rental Unit may only be made available to persons within the same family or group during the same booking period.
>
> (2) The licensee may not accept more than one booking for the residential unit for the same booking period.

Clark County Code § 7.100.160(c)(1).

As the Court can see from the plain language of the ordinance, § 7.100.160(c)(1) is a prohibition on short-term rental operators accepting multiple bookings on a single property during the same period. The terms "family" or "group" in the context of this § are coextensive with separate and unrelated bookings and, regardless of the relatedness of the guests under a single booking, the conduct prohibited is obvious. Whether guests covered under a single booking are related by marriage or blood or completely unrelated is irrelevant. The only factor that matters is whether the short-term rental operator has accepted two separate reservations for the same space at the same time.

As the terms "family" and "group" are not ambiguous when viewed in context and have almost zero relationship to the enforcement of § 7.100.160(c)(1), the Court should find that the Plaintiffs are unlikely to succeed on the merits of their facial challenge to the constitutionality of the Ordinance and deny their motion for preliminary injunction.

[1] Notably, Plaintiffs allege that "§ 7.100.160(1)(c)" is vague and ambiguous. However, given that no such § exists in the Ordinance, Defendant will construe Plaintiffs' arguments as being directed towards § 7.100.160(c)(1).

3. The terms "Gathering" or "Event" in § 7.100.180 are not Ambiguous as the Ordinance Clearly Limits the Number of People who may be on the Property of a Short-Term Rental to the Maximum Occupancy Defined therein

Plaintiffs contend that § 7.100.180(b), which prohibits "parties, weddings[,] events or other gatherings which exceed the maximum occupancy of the residential unit", is ambiguous because the terms "event" and "gathering" are not defined. *See* Plaintiffs' *Motion* at 27-28. Again Plaintiffs have misrepresented the context of the ordinance to claim that some purported ambiguity exists by cherry picking only portions of the ordinance for inclusion in their motion. *Id*.

Clark County Code § 7.100.180 provides in relevant part:

> **7.100.180. Prohibited Conduct**
>
> (a) No Short-Term Rental Unit may 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.
>
> (b) Parties, weddings, and events are prohibited. Gatherings which exceed the maximum occupancy established by this Chapter are also prohibited.

Clark County Code § 7.100.180.

§ 7.100.160(a), which defines the maximum occupancy for the purposes of the chapter provides:

> **7.100.160. Restrictions on Rentals**
>
> (a) Maximum Occupancy. *The maximum occupancy of the residential rental unit must be limited to the lesser of two (2) persons per bedroom or ten (10) persons per residential unit.* The number of bedrooms in the Short-Term Rental Unit shall be fixed at the number of bedrooms enumerated in the records of the County Assessor's Office as of the date of application of the Short-Term Rental License.

Clark County Code § 7.100.160(a) (emphasis added).

As the ordinance makes clear, the short-term rental units may only be used for activities incidental to "dwelling, lodging, or sleeping." Clark County Code § 7.100.180. At no time may the number of people in the home exceed the maximum occupancy. *Id*.

Plaintiffs raise a few hypothetical scenarios to purportedly demonstrate that some ambiguity exists in the ordinance[2]; but in reality, these scenarios, which demonstrate no ambiguity, are better characterized as Plaintiffs' improper attempt to conflate conduct that one may be entitled to do in their private homes with conduct prohibited in short-term rental units licensed as businesses.

First, Plaintiffs ask if having three guests over to a four-bedroom rental unit for dinner is prohibited when there are already eight people renting the unit. Because no gathering may exceed the maximum occupancy of a unit, which is the lesser of two people per room or ten people total, the answer is that dinner for eleven people in a four-bedroom unit is prohibited. In fact, eleven people gathering would be prohibited in ALL short-term rental units because no short-term rental may have more than ten people gathered. The rule is clear. Plaintiffs undoubtedly dislike the rule, but the ordinance constitutes a valid business regulation and contains zero ambiguity.

Plaintiffs then pose the question of whether a birthday party for five children in a two-bedroom rental unit is prohibited. It's unclear why these five children are having a party unsupervised, but regardless, maximum occupancy for a two-bedroom unit is four people and, accordingly, any gathering over four people is prohibited. The rule is clear and unambiguous.

Notably, both scenarios put forth by Plaintiffs also constitute a prohibited "Party" within the meaning of the ordinance as "Party" is defined as "a *gathering of people that exceeds the maximum occupancy of the residential unit* established by this Chapter." Clark County Code § 7.100.020(n) (emphasis added).

The conduct prohibited in § 7.100.180 is unambiguous on the face of the ordinance. The scenarios raised by Plaintiffs demonstrate no genuine ambiguity and are easily resolved through basic arithmetic. Accordingly, the Court should find that Plaintiffs are unlikely to prevail on the merits of their claims regarding § 7.100.180 because no ambiguity exists and deny their motion for preliminary injunction.

[2] Notably, Plaintiffs' scenarios do not apparently address owner-occupied residential units for which the short-term rental units are defined as "rooms" rather than residential units. In owner-occupied residential units, only the occupancy of the space rented, i.e., the rooms, may be regulated under this ordinance and a separate analysis would be required because full-time residents are not included in calculations of maximum occupancy. *See, e.g.*, Clark County Code § 7.100.200(r).

4. "Annoy" and "Disturb" Contained in § 7.100.180(c) are not Ambiguous because they are tied to Quantitative Measurements and Standards

Plaintiffs' assertions that the terms "annoy" and "disturb" are ambiguous in § 7.100.180(c) of the ordinance are a particularly egregious example of Plaintiffs' deliberate curation of the language of the ordinance for the Court. Plaintiffs intentionally include only the first part of the ordinance which prohibits "noise, light, smoke, particulate matter, odors, and hazardous materials from the short-term rental unit which unreasonably annoys or disturbs the quiet, comfort, or repose of any persons of ordinary sensibilities" while excluding the second portion of the § that advises which objective "standards to apply" when determining whether something is annoying or disturbing. *See* Plaintiffs' *Motion* at 28; Clark County Code § 7.100.180(c).

Clark County Code § 7.100.180(c) provides in relevant part:

> (c) The emission of noise, light, smoke, particulate matter, odors, and hazardous materials from the short-term rental residential unit which unreasonably annoys or disturbs the quiet, comfort, or repose of any persons of ordinary sensibilities, is prohibited. *For purposes of this Section, the following standards apply*:
>
> > (1) Noise Standards. The noise standards *established in Title 30.68.020* of this Code shall be applied to all Short-Term Rental Units and furthermore:
> >
> > > (I) the use of any radio receiver, stereo. musical instrument. Sound amplifier or similar device which produces, reproduces or amplifies sound shall be permitted only within an enclosed Short-term Rental Unit;
> > >
> > > (II) during the hours of 10 P.M. to 7 A.M., the use of outdoor amenities, such as pools, spas, barbecues, and firepits is prohibited.
> >
> > (2) Lighting Standards. The licensee shall ensure compliance with County lighting standards *established in Title 30.68.030* of this code and shall prohibit the use of all rear and side yard outdoor lighting between the hours of 10:00 PM and 7:00 AM. with the exception of motion-sensitive outdoor security lighting for Noise and Lights.

Clark County Code § 7.100.180(c) (emphasis added).

Rather than address how the ordinance clearly provides objective standards for determining whether something is an annoyance or a disturbance, Plaintiffs instead try to conflate

the Ordinance with laws overturned as unconstitutional which criminalized "annoying" law enforcement officers—a standard strictly limited to the subjective opinions of each individual officer. *See* Plaintiffs' *Motion* at 28-29.

By way of contrast, the Ordinance, both directly and through incorporation of site environmental standards and air quality standards in other chapters of the Clark County Code, provides clear standards for how noise, lighting, odors, smoke and particulate matter, and hazardous materials are supposed to be measured and what constitutes an annoyance or a disturbance for the purposes of enforcing the ordinance. *See* Clark County Code § 7.100.180(c); Clark County Code §§ 30.68.020—070; Clark County Code § 9.08, *et seq.*

Therefore, Plaintiffs' contentions that this ordinance is somehow coextensive with laws based on individual police officers' subjective annoyance thresholds are unavailing and the ordinance itself, which provides clear objective standards, is clear and unambiguous. Accordingly, Defendant humbly requests the Court deny Plaintiffs' *Motion* for Preliminary Injunction because they do not have a substantial likelihood of prevailing on the merits.

5. Discretion in the Application of Sentencing Guidelines and Consideration of Mitigating Factors does not Create Unconstitutional Ambiguity or Arbitrary Enforcement

In support of their untenable position that the Ordinance is unconstitutionally vague and ambiguous, Plaintiffs contend that the "enforcement provisions" of the Ordinance "are equally vague and arbitrary." *See* Plaintiffs' *Motion* at 29. Notably, Plaintiffs' arguments, which closely mirror those raised in their due process claims, cite to no case law in support of their contention that the enforcement provisions are unconstitutionally ambiguous or arbitrary. *Id*.

While the ordinance is clear regarding the maximum punishment allowable for each violation, Plaintiffs contend that because § 7.100.230 allows for application of only a portion of a penalty or a reduction in fines based on consideration of mitigating factors like the severity of the violation, the good faith intent of the violator, and history of previous violations, that the ordinance is somehow unconstitutionally vague and arbitrary. *See* Plaintiffs' *Motion* at 29.

While there are instances where courts have held that it is unconstitutional *not* to consider mitigating factors when sentencing a criminal defendant, it is upon information and belief that no

statute or ordinance has ever been found unconstitutional for discretionary reductions in penalties and/or fines by a court or enforcing entity. *Lockett v. Ohio*, 438 U.S. 586, 608, 98 S. Ct. 2954, 2967 (1978) ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."). In fact, the case law indicates that consideration of mitigating factors is entirely within the discretion of the sentencing entity. *See, e.g.*, *Archuleta v. State*, 135 Nev. 606, 443 P.3d 549 (2019); *McKinnon v. State*, 417 P.3d 1120 (Nev. 2018) (unpublished).

It is nonsensical to believe that discretionary reductions of penalties or fines constitutes unconstitutional ambiguity. A violator of the Ordinance is clearly placed on notice of the maximum penalty available for each offense and any reduction thereof is neither guaranteed nor obligatory. Accordingly, a violator of the ordinance, who receives discretionary consideration based on mitigating factors, may find themselves subject to less severe penalties than the maximum penalties proscribed—an outcome that is neither unconstitutional nor unwelcome. As Plaintiffs demonstrate no constitutional ambiguity in their arguments regarding the enforcement of penalties for the Ordinance, the Court should find that Plaintiffs are not likely to succeed on the merits of the case and deny their motion for preliminary injunction.

B. THE LICENSING SCHEME IS NOT ARBITRARY AND CAPRICIOUS OR VAGUE AS TO VIOLATE DUE PROCESS

In their first claim, Plaintiffs assert a facial challenge to the Ordinance by alleging that it violates the due process guarantees of the federal and state constitutions in two ways. First, they claim that the "application process" created by the Ordinance "is arbitrary and capricious" and, second, that the "enforcement scheme" established by the Ordinance "is undeniably vague." *Mot.* at 22.

Plaintiffs allege that certain provisions of the Ordinance related to the review of applications are so "undeniably vague" that the provisions are ambiguous and subjective and therefore violate due process: (1) Section 7.100.090(c)(7), which allows the director of the Department of Business License to require applicants to submit other "documentation or information…" not specifically identified in the Ordinance; (2) Section 7.100.100(a), which

provides that the Department of Business Licensing must open an application period for licenses on an annual basis "unless the Department determines that no licenses are available for issuance"; (3) Section 7.100.100(h), which allows the County to spot-check residential units prior to licensure; (4) Section 7.100.110(a)(3), which allows the Department to deny issuance of a license to any applicant who "fails or refuses to cooperate fully with any inspection"; and, lastly, (5) Section 7.100.100(c)(2), which requires an applicant to agree to any conditions of approval "necessary for the health and safety of the residents of the County…" in order to obtain a license.

Plaintiffs do not assert a valid claim for relief on due process grounds and, as such, Plaintiffs' claims are unlikely to succeed on the merits.

1. Plaintiffs Failed to Assert a Plausible Due Process Claim

Plaintiffs' Due Process claim is unlikely to succeed because they have failed to set forth a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681, 129 S. Ct. 1937 (2009). Plaintiffs fail to state a claim in this matter in two respects: (1) Plaintiffs fail to assert that the Ordinance causes the deprivation of any procted interest, and (2) even if there were a deprivation of a protected interest, Plaintiffs analyze their due process claims using an incorrect standard, insofar as they profess a legislative enactment violates due process "where the language of the regulation permit[s] arbitrary or capricious enforcement" or because the application review process is comprised of "ambiguous protocols and subjective standards." *Sec. Am. Compl.* at 13, 14; *Mot.* at 22, 24.

a. Plaintiffs have not Asserted any Protected Interest

The Due Process Clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Nevada Supreme Court reads the state clause as coextensive with the federal clause. *See, e.g., Wyman v. State*, 125 Nev. 592, 217 P.3d 572 (2009). Facial challenges to a legislative action can take the form of either a violation of a person's substantive or procedural due process rights. *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101 (1987).

The "substantive component" of due process precludes government action which infringes upon certain "fundamental rights," regardless of the fairness of the procedures provided that

resulted in the infringement. *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447 (1993). "To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). "Substantive due process rights are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507 (1985) (J. Powell, concurring). A substantive due process claim, then, cannot be predicated on a deprivation of a state-created property interest, but can be predicated on the deprivation of a protected interest provided by the Constitution. *See Id.*

Plaintiffs first cause of action, which purports to set forth their due process claim, does not identified a viable interest protected by substantive due process. As such, the Complaint itself fails to state a claim that the Ordinance effectuates a deprivation of such an interest without due process.

In addition to a substantive due process claim, Plaintiffs could have brought a facial *procedural* due process challenge to the Ordinance. To do so, Plaintiffs must have asserted that under no set of circumstances could short-term rental owners receive a fair process if deprived of some protected liberty or property interest by the County. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 868 (9th Cir. 2009); *see also Nelson v. Diversified Collection Servs. Inc.*, 961 F. Supp. 863, 868 (D. Md. 1997). Property interests "include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1191 (9th Cir. 2015) (*quoting Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576–77, 92 S. Ct. 2701 (1972)). The deprivation of a "unilateral expectation" of a property or liberty interest, however, is insufficient to establish a claim. *Board of Regents of State Colleges*, 408 U.S. at 577.

b. Even if Plaintiffs alleged that the County's Ordinance Causes a Deprivation of a Protected Interest for Purpose of Both Substantive and Procedural Due Process, Plaintiffs' Complaint does not Allege the Correct Legal Standard

Plaintiffs here have not asserted a substantive or procedural due process claim in accordance with the foregoing case law. Instead, they have invented their own standard for determining when

an ordinance, on its face, generally violates due process. According to their standard, if the text of the Ordinance *could invite County officials to make arbitrary or capricious decisions in the future*, then the Ordinance is constitutionally infirm and may be facially attacked. *Mot.* at 23 ("the Ordinance is arbitrary and capricious by the language in its own text. It is riddled with instances of unfettered and random discretion.") But as set forth above, a substantive or procedural due process claim cannot be asserted on the basis that the legislation may allow for "arbitrary and capricious enforcement" or because the standards for issuance of a license are "undeniably vague."

These generalized standards are found nowhere in due process jurisprudence but derive instead from Plaintiffs' erroneous commingling of three Nevada cases that do not challenge the constitutionality of an ordinance or statute on substantive or procedural due process grounds. Plaintiffs' reliance on these cases is inappropriate.

Even if Plaintiffs here properly asserted that the Ordinance causes the deprivation of a protected interest, to succeed on a substantive due process claim, Plaintiffs must establish that the Ordinance regulating short-term rental businesses is "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'" *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989). Legislative enactments which "[do] not impinge on fundamental rights" are presumptively valid, which may only be overcome upon "a clear showing of arbitrariness and irrationality." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012). Ordinances survive a substantive due process challenge if they were designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinance." *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988) (*quoting Scott v. City of Sioux City, Iowa*, 736 F.2d 1207, 1216 (8th Cir. 1984)). The government need only show that the challenged statute could conceivably further a state interest, while the plaintiff must bear the high burden to "negate 'every conceivable basis'" which might justify the challenged provisions in the Ordinance. *See Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015) ("On rational basis review, the burden is on plaintiffs to negate every conceivable

basis... [for the statute"); *see also Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 132 S. Ct. 2073, 2080–81 (2012) ("Because the classification is presumed constitutional, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

The first two of the cases relied upon by Plaintiffs are *City Council of City of Reno v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) and *Gragson v. Toco*, 90 Nev. 131, 520 P.2d 616, 616 (1974). Plaintiffs state that these cases stand for the proposition that "[l]icensing schemes cross the threshold of a permissible exercise of government authority where the language of regulations permit arbitrary or capricious enforcement." *Mot.* at 22. But those cases did not challenge an ordinance or statute on due process grounds; rather, both were challenges to a municipality's discretionary denial of a permit or a license via a writ of mandamus. *City Council of City of Reno* concerned the City of Reno's denial of an application for a cabaret business license, 102 Nev. 277, while *Gragson* concerned the City of Las Vegas's denial of an application for a permit to move a tavern's location. *Gragson*, 90 Nev. at 132–33. Upon denial, the applicants in both cases did not bring a facial or as-applied due process challenge to challenge the constitutionality of the cities' business license ordinances, but rather both sought a writ of mandamus to compel the issuance of the license or permit *under the existing ordinances*. *Gragson*, 90 Nev. at 132–33; *see City Council of City of Reno*, 102 Nev. at 277–78. The standard applied in such challenges is whether the cities, in denying the applications, acted "arbitrarily or through mere caprice" in exercising their discretionary authority under the ordinances. *Id.*

Plaintiffs also wrongly rely on *Silvar v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 122 Nev. 289, 129 P.3d 682 (2006) for the proposition that "a facial challenge to the plain text of the rules [*sic*] may be raised for judicial review" when "the language of regulations permit arbitrary or capricious enforcement." *Mot.* at 22; 122 Nev. 289. *Silvar* was a case in which a criminal defendant successfully challenged a Clark County ordinance that criminalized loitering for the purpose of prostitution as unconstitutionally vague and overbroad. *Id.* The challenge was brought during the criminal prosecution of Silvar for the offense, not in a separate civil action seeking

declaratory relief. *Id.* The Supreme Court reviewed the decision of the district court pursuant to NRS 34.020(3).

These cases are irrelevant to a facial attack on the County's Ordinance on due process grounds. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (a facial challenge "is not limited to plaintiff[s'] particular case, but challenges application of the law more broadly...") A facial due process claim seeks to invalidate an unconstitutional statute or ordinance, or an unconstitutional provision in statute or ordinance. *See Salerno*, 481 U.S. at 746. In contrast, a challenge to a decision of a city council, whether by writ of mandamus or judicial review, seeks to establish that "the decision was arbitrary or capricious and was thus an abuse of ... discretion." *Consol. Municipality of Carson City v. Lepire*, 112 Nev. 363, 914 P.2d 631, 633 (1996). In other words, a facial due process claim is brought in a civil action to challenge the *constitutionality of an ordinance* adopted by a city council or county commission acting in their legislative capacity; a claim seeking judicial review or the issuance of a writ of mandamus challenges the *propriety of a decision* of the city council or county commission acting in its administrative capacity, under an otherwise constitutional ordinance. Plaintiffs here have mistakenly conflated the applicable standards. This misunderstanding dooms Plaintiffs' due process claim.

2. Even if Plaintiffs stated the Correct Standard for Evaluating a Facial Challenge to a Substantive or Procedural Due Process Claim, Plaintiff's Allegations would Still not be Meritorious

a. The Ordinance's Application Process is not "Arbitrary and Capricious"

Plaintiffs allege that the Ordinance's application process is "arbitrary and capricious" because whether an applicant who "submits a timely and fully completed application" receives a license "depends on chance." *Mot.* at 23. This results, they contend, from the interaction of provisions of the Ordinance which: (1) limit the number of available licenses to 1% of the total number of housing units in the unincorporated areas of Clark County; (2) provide that, upon the close of the application period, the order in which the applications will be reviewed for licensure will be randomly generated; and (3) impose 1,000 foot distance separation between licensed short-term rental units. *Mot.* at 22-23. Plaintiffs apparently believe that due process requires the

County to issue a business license to any applicant who "submits a timely and fully completed application," irrespective of the County Commission's legislative preferences. *See id.*

Plaintiffs never sufficiently explain how these provisions, operating independently or in tandem, render the Ordinance's application process "arbitrary and capricious." They simply conclude, without explication, that "an applicant could be randomly denied" a license based upon chance, rather than merit. *See Mot.* at 24.

Contrary to Plaintiffs' allegation that the issuance of licensees will be at random, the Ordinance clearly sets forth objective eligibility criteria for licensure and an impartial selection process. Clark County Code §§ 7.100.060 through 7.100.080 delineate the eligibility criteria by providing that licenses may only be issued to eligible property owners (§ 7.100.060), that licenses must be withheld from ineligible property owners (§ 7.100.070), and that certain specific residential housing units may not operate as short-term rental units (§ 7.100.080). Further, § 7.100.110 unambiguously provides specific additional conditions or circumstances governing the issuance or denial of a license. Lastly, § 7.100.100 plainly provides an equitable application procedure that ensures that each applicant will be equally eligible to obtain one of the limited number of short-term licenses that will be available.

These Sections eviscerate Plaintiffs' complaints that licensure is not dependent upon "qualifications" or a "timely" and "complete" application. Licensure is indeed dependent upon the applicant meeting the qualifications as set forth in §§ 7.100.060 through 7.100.080 of the Ordinance. Applicants will not be "randomly denied" but will rather be evaluated for licensure based upon those criteria set forth in the ordinance and in conformance with the equitable procedures established by the Ordinance.

Plaintiffs' *true* complaint is not that the Ordinance provides unclear criteria or standards for licensure that render the application process arbitrary or capricious. Rather, Plaintiffs abhor that the County, in the exercise of its legislative power, has limited the number of short-term rental licenses available for issuance, imposed distance separations between licensed short-term rental units in accordance with State law, and established a method for reviewing applications for licensure in a manner which Plaintiff dislikes.

While Plaintiffs may certainly prefer different regulations on short-term rental businesses, these policy choices fall well within the County Commission's broad grant of authority to regulate businesses in the County. Pursuant to NRS 244.355(1)(a),

> … a board of county commissioners may… regulate all manner of lawful trades, callings, industries, occupations, professions and business conducted in its county outside of the limits of incorporated cities and towns.

This statute authorizes the County to regulate businesses such as short-term rental units to promote the health, safety, and general welfare of its citizens. *See Viale v. Foley*, 76 Nev. 149, 350 P.2d 721 (1960). The County, by ordinance, may even *prohibit* a business activity or *legally limit the number of available* business licenses under its police powers as long as the ordinance is not prohibited by the Constitutions of the United States or Nevada. *See Primm v. City of Reno*, 70 Nev. 7, 13, 252 P.2d 835, 838 (1953) (finding that a city council "may suppress gambling entirely, or may limit the number of establishments engaging in such business or the area within which they may operate…"); *State ex rel. List v. AAA Auto Leasing & Rental, Inc.*, 93 Nev. 483, 486, 568 P.2d 1230, 1232 (1977). But for AB363, it is without question that the County could outlaw short-term rentals in all residential and miscellaneous zoning districts—as it did until the passage of the Ordinance. *See Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App. 3d 1579, 1593, 286 Cal. Rptr. 382, 390 (Ct. App. 1991) (city may prohibit the operation of short-term rental units in residential zoning districts under its police powers). The imposition of the distance restriction provided in § 7.100.080(f)(2) is also a valid exercise of the County's broad authority to regulate businesses within its jurisdiction; as Plaintiffs point out, numerous types of businesses are subject to similar distance separations. *See, e.g.*, Clark County Code 8.20.295 (establishing distance restrictions between taverns).

Plaintiffs also misconstrue the plain language of the ordinance in order to characterize the application process as a random "license lottery." Plaintiffs highlight the fact that § 7.100.100(g) provides that, upon the close of the application period, the applications will be placed in a "random order to determine *the order in which the applications will be considered* for a Short-Term Rental License." This provision is not ambiguous; plaintiffs' characterization that licenses

will be awarded by drawing lots is unmistakably wrong. Rather, the random number generator will simply be utilized to determine the order in which the applications are reviewed by County staff according to the standards for licensure set forth in the Ordinance. Plaintiffs cite no authority for the proposition that this random ordering of applications prior to the review of the applications somehow renders the Ordinance constitutionally infirm.

b. The Ordinance's Application Process does not Grant Unfettered and Random Discretion to County Officials

Plaintiffs also complain that the County personnel responsible for reviewing applications for licenses have been granted unfettered discretion due to "ambiguous protocols and subjective standards in the Ordinance…" *Mot.* at 24. This is untrue.

First, Plaintiffs contend that sub§ 7.100.090(c)(7), which allows the director of the Department of Business License to require other "documentation or information…" not specifically identified in the Ordinance to be submitted with "each application," invites discriminatory abuse. In Plaintiffs' telling, this sub§ may allow for a County employee to require one applicant to submit certain documentation, but not require another applicant to submit the same documentation. However, when read in context of the entire § of the Ordinance, Plaintiffs allegation is without merit. The sub§ clearly does not give County employees the authority to treat applicants disparately, as it is found in that portion of the ordinance that states what documents and information must accompany *all* applications. The sub§ is merely a grant of authority from the Board of County Commissioners to expand the list of documents and information that must accompany an application as the director sees fit without amending the Ordinance. The sub§ does not permit the director to single out one applicant over another.

Next, Plaintiffs take issue with § 7.100.100(a), which provides that the Department of Business Licensing must open an application period for licenses on an annual basis "unless the Department determines that no licenses are available for issuance." *Mot.* at 24-25. Plaintiffs argue that the Ordinance should have included objective criteria to guide the Department's determination that no licenses are available for issuance because the Ordinance "tie[s] the number of licenses to the population of unincorporated Clark County as well as the geography of home

locations...” and “provides no algorithm or formula on how this calculation will be determined. *Id.*

These assertions are not true, and since they are not accompanied by citations to the Ordinance, it is unclear on what basis Plaintiffs make these claims. The Ordinance does not tie the number of licenses to the population of unincorporated Clark County but, however, *does* establish a formula on how the calculation will be determined. § 7.100.050 provides that the number of licenses is limited to 1% of the total number of housing units located in each unincorporated area of Clark County, rounded down to the nearest whole number. The § further provides that the Department must calculate the number of licenses that may be issued annually based upon the County’s “most recent estimate of the total number of housing units in the unincorporated area…” (At present, this estimate is calculated and published annually by the Clark County Department of Comprehensive Planning).

Next, Plaintiffs argue that § 7.100.100(h), which allows the County to inspect residential units prior to licensure at the Department’s discretion, fail to set forth “standards or objective criteria” to determine which applicant will be subjected to an inspection. Such standards, however, need not be included in an ordinance. The Ninth Circuit has held that random inspections are not “arbitrary and capricious” because

> [it] goes without saying that the government does not have the resources to find every violation of every health and safety law. Scarcity of resources does not and cannot mean, however, that some of the laws cannot be enforced. A random selection method insures more fairness than some other methods that could be devised.

Carnation Co. v. Sec’y of Lab., 641 F.2d 801, 805 (9th Cir. 1981).

Fourth, Plaintiffs contend that § 7.100.110(a)(3), which allows the Department to deny issuance of a license to any applicant who “fails or refuses to cooperate fully with any inspection,” may invite abuse because the phrase “cooperate fully” is ambiguous. *Mot.* at 25. But a statute is not required to be drafted with “mathematical precision.” *City of Las Vegas v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 118 Nev. 859, 864, 59 P.3d 477, 481 (2002). A statute is not subject to invalidation simply because it requires a person to conform “to an imprecise but comprehensible normative standard.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971).

Here, to "fully cooperate" is a comprehensible normative standard that indicates that the applicant must willing acquiesce to the inspection and be compliant with the inspector's requests. *See* cooperate, *The American Heritage Dictionary* (3rd ed. 1996).

Lastly, Plaintiffs attack § 7.100.100(c)(2), which requires an applicant to agree to any conditions of approval "necessary for the health and safety of the residents of the County…" in order to obtain a license. *Mot.* at 25-26. Plaintiffs believe that the provision is vague because "no standards or criteria are set forth in the Ordinance defining what circumstances or conditions may trigger" the imposition of conditions. *Id.* But this provision simply delegates to the Department the Board's authority, through the County's police powers, to issue limited licenses; limited licenses are a species of business licenses "issued to allow a licensee to engage in business temporarily, as a testing period" while specific conditions regarding their business operations are resolved. *See Kraft v. Jacka*, 872 F.2d 862, 867 (9th Cir. 1989). Under Nevada law, a County may allow, through Board action, the imposition of conditions on a license. *See, e.g., Nevada Rest. Servs., Inc. v. Clark Cnty.*, No. 2:11-CV-00795-KJD, 2012 WL 4355549, at *4 (D. Nev. Sept. 21, 2012).

C. CLARK COUNTY CODE § 7.100.050, *ET SEQ.*, DOES NOT VIOLATE THE FIRST AMENDMENT

1. Requirements that Licensees Identify Rental Sites and Facilitators is not a Prior Restraint on Speech because it is a Valid Economic Regulation that does not Restrict a Significant Expressive Element and which may Updated at any Time

Plaintiffs contend that the Ordinance constitutes a prior restraint on speech because it "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 unit' as a condition of licensing." Plaintiffs' *Motion* at 30 (citing Clark County Code § 7.100.090(b)(4)). They allege that it constitutes a prior restraint on speech because it "**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." Plaintiffs' *Motion* at 31 (emphasis added). Plaintiffs' arguments in this regard are an egregious misrepresentation of the Ordinance

as the ordinance does not prospectively lock licensees into a fixed list of advertisers and provides for continuous updates of such information.

While § 7.100.090(b)(4) does require that an applicant provide "the name(s) of all Accommodation Facilitators and rental sites that will be used to advertise the Short-Term Rental Unit", subsequent Sections of the ordinance provide that updates to this list are possible and that, after being granted a license, a licensee must update the list whenever new rental sites are engaged. Accordingly, the "prior restraint" alleged by Plaintiffs isn't even a restraint at all.

Clark County Code § 7.100.170 provides in relevant part:

> Every licensee must comply with all duties. obligations, and requirements imposed by this Chapter. Such duties, obligations. and requirements include:
>
> (a) Duty to Update Information. *Each licensee must provide the Department with any new or changed information as the Department may deem necessary within seven (7) days, including* without limitation any changes to the contact information for the licensee and local representative, and *the name(s) of all Accommodation Facilitators and rental sites that will be used to advertise the Short-Term Rental Unit.*

Clark County Code § 7.100.170 (emphasis added).

When a First Amendment challenge to an ordinance is raised, the initial inquiry requires a determination of whether the ordinance "primarily targets speech or speakers, or is better construed as an economic regulation." *Airbnb, Inc. v. City & Cnty. of San Francisco*, 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016); *see also Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07, 106 S. Ct. 3172 (1986). "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct," and "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653 (2011).

Placing a short-term rental for rent through an Accommodation Facilitator or rental site is not speech with a "significant expressive element" as the primary purpose of the listing is to secure a commercial transaction in the form of a rental. *Airbnb, Inc. v. City & Cnty. of San Francisco*, 217 F. Supp. 3d 1066, 1076–77 (N.D. Cal. 2016); *International Franchise Ass'n, Inc.*, 803 F.3d at

408. The requirement that a list of facilitators or rental sites be provided to the County does not result in disparate or unfavorable treatment to speakers and Plaintiffs have not established that requiring licensees to provide a list was motivated by a desire to suppress speech. *International Franchise Ass'n, Inc.*, 803 F.3d at 409. Accordingly, the Court can only find that the Ordinance is directed at specific commercial transactions and not to any expressive speech on the part of the business. *Id.*

As Plaintiffs cannot demonstrate that the Ordinance restrains speech, as licensees are free to update or change the rental sites they use at their own discretion, nor can they demonstrate that the ordinance requiring disclosure of postings for commercial transactions on rental sites targets expressive speech or speakers, Plaintiffs cannot demonstrate a likelihood of succeeding on the merits of their First Amendment claims and the Court should deny their motion.

2. Maximum Occupancy Restrictions for Short-Term Rentals do not Infringe on the Right to Assemble or Associate because the Ordinance is Content Neutral and Rationally Related to the Legitimate Government Interest of Safeguarding the Quality of Life in Residential Neighborhoods

Plaintiffs' *Motion* asserted that the maximum occupancy restrictions provided for in § 7.100.180(b) of the Ordinance constitute a violation of the First Amendment right to associate and assemble. *See* Plaintiffs' *Motion* at 32. Relying heavily on a an 80-page opinion from the Texas Court of Appeals in *Zaatari v. City of Austin*, Plaintiffs contended that restrictions on the total number of individuals who can be on a short-term rental unit and restrictions on gatherings between 10:00 p.m. to 7:00 a.m. are "a blanket prohibition against individuals from associating or assembling on private property without regard to the content or purpose of the gathering." Plaintiffs' *Motion* at 33; *Zaatari v. City of Austin*, 613 S.W.3d 172, 199-200 (Tex. App. 2019). Both the Texas Court of Appeals in *Zaatari* and Plaintiffs' analysis in their *Motion* fail to accurately articulate what constitutes an unconstitutional restriction on the right to assemble or associate and why the subject Clark County ordinance should be construed as such a restriction.

Plaintiffs' *Motion*, while loudly banging the drum of purported constitutional violations, largely glosses over the fact that the Ordinance only applies to homeowners who willingly and voluntarily apply for licenses to operate short-term rentals for their own pecuniary benefit or who

violate local ordinances to do the same. The operating restrictions for licensees do not apply to homeowners generally and, if a homeowner wishes to avoid the restrictions attendant to the ordinance, they may simply not apply for a license. Short-term rental operators seek to operate business in residential neighborhoods, placing their own pecuniary interests above the rights and interests of their fellow neighbors and homeowners. The County, as an entity charged with safeguarding the public health and safety, has a duty to regulate these businesses, now compelled by statute, in neighborhoods where no businesses were ever intended to operate.

In *Vill. of Belle Terre v. Boraas*, the United States Supreme Court acknowledged that maintaining "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate" government zoning interests. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541 (1974). "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.*

Government action that unconstitutionally infringes on the Freedom of Association protected under the First Amendment is conduct which compels an organization to associate with members it has intentionally excluded or penalizes members or organizations association with each other. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23, 104 S. Ct. 3244, 3252 (1984) (recognizing a freedom not to associate); *Healy v. James*, 408 U.S. 169, 180–184, 92 S. Ct. 2338, 2345–2347 (1972) (imposition of penalties or withholding benefits from individuals because of their membership in a disfavored group); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91–92, 103 S. Ct. 416, 419–421 (1982) (requiring disclosure of the fact of membership in a group seeking anonymity); *Cousins v. Wigoda*, 419 U.S. 477, 487–488, 95 S.Ct. 541, 547 (1975) (interfering with the internal organization or affairs of a private group); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 12, 106 S. Ct. 903, 910 (1986) ("forced associations that burden protected speech are impermissible").

The Clark County "ordinance places no ban on other forms of association" because the homeowners may rent to, and the renters may share the short-term rental unit with whomever they choose. *Village of Belle Terre*, 416 U.S. at 9. The Ordinance does not "prescribe what shall

be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178 (1943); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

Under the Ordinance, homeowners may rent to whomever they like—regardless of those people's religion, creed, gender, sexual orientation, race, political ideology, or any other identifiable characteristic. People, regardless of their relationship with each other, may be part of a single booking to rent a short-term rental together. The Ordinance does not compel renters to associate with people against their will, nor does it restrict what types of renters may use a short-term rental or stay in a short-term rental together. The Ordinance does not inquire after the characteristics of renters nor require disclosure of the same.

Plaintiffs concede that the County's regulation on the number of renters who may occupy a rental unit at any given time is made "*without regard to the content or purpose of the gathering*." Plaintiffs' *Motion* at 33 (emphasis added). Accordingly, Plaintiffs have conceded that the Ordinance is content neutral and not directed at any specific expressive conduct. In fact, the maximum occupancy for a short-term rental unit is not directed at expression or association at all, as it is expressly tied to the number of rooms available for rent—a figure which relates to the burden the associated vehicles, noise, traffic, and renters will have on the quality and nature of the neighborhood and the local utilities and infrastructure. *See* Clark County Code § 7.100.160(a). Other courts have found such ordinances and restrictions both constitutional and appropriate and have reviewed them under a rational basis standard. *See, e.g., Murphy v. Walworth Cnty.*, 383 F. Supp. 3d 843, 851 (E.D. Wis. 2019) (holding a restriction on the number of short-term renters which tied maximum occupancy to septic tank size constitutional under a rational basis standard of review).

As the County's desire to ensure the quality and nature of its residential neighborhoods are a legitimate government interest and the maximum occupancy standards for short-term rentals are content neutral and rationally related to achieving this interest, the Court should find that the

Plaintiffs are not likely to prevail on their freedom of association arguments and deny their motion for preliminary injunction.

D. PLAINTIFFS HAVE NOT SHOWN A TAKING

The Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured." Nev. Const. art. I, § 8(6). Similarly, the Takings Clause of the Fifth Amendment of the United States Constitution proscribes the government from taking "private property ... for public use, without just compensation." U.S. Const. amend. V. "A taking can arise when the government regulates or physically appropriates an individual's private property." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). Whether a taking has occurred is a question of law that this court reviews de novo. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006).

1. The Plaintiffs have no Property Interest in a Future Business License

To bring a takings claim, the party must have "a legitimate interest in property that is affected by the government's activity" at the time of the alleged taking. *McCarran Intern. Airport*, 137 P.3d at 1119. Thus, a court must first determine whether the plaintiff possessed a "stick in the bundle of property rights" before proceeding to determine whether the governmental action at issue constitutes a taking. *Board of Regents of State Colleges*, 408 U.S. at 577; *McCarran Intern. Airport*, 137 P.3d at 1119. *ASAP Storage, Inc.*, 173 P.3d at 740.

The Plaintiffs' claimed property interest consists of a forward-looking opportunity to operate short-term rental businesses in Clark County.[3] The issue then is whether the Plaintiffs have a property interest in a business activity for which they are presently not licensed. Contrary to the Plaintiffs' assertion, the ability to engage in a future business does not constitute a protected property interest. While the *assets* of a business (of which Plaintiffs presently have none) are property, the *activity* of doing business, or the *activity* of making a profit is not property in the ordinary sense – and it is only *that*, and not any business asset." *College Savings Bank v. Florida*

[3]The Ordinance does not regulate an owner's ability to use a property as a residence or to lease residential property to tenants for periods of 30-days or longer.

Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 675 (1999); *see also Antietam Battlefield KOA v. Hogan*, 501 F. Supp. 3d 339 (D. Md. 2020) (inability to conduct business is not a taking); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 541 (E.D.N.C. 2020) ("the assertion of a 'general right to do business' has not been recognized as a constitutionally protected right"); *Tuchman v. Connecticut*, 185 F. Supp. 2d 169, 174–75 (D. Conn. 2002) (ability to engage in a business is not a protected property interest).

Additionally, the Plaintiffs cannot legally claim a vested property right in a future business license that is subject to the discretionary approval of the Clark County Board of County Commissioners. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2805 (2005). Where the government has any discretion to approve or deny, the right is not "mandatory" and there exists no property right. *Id.* at 750; *see also Bowers v. Whitman*, 671 F.3d 905, 913 (9th Cir. 2012) (stating if the "alleged interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification or removal of the interest will not constitute a constitutional taking.") Stated alternatively, there is no property right as a matter of law if "government officials may grant or deny it in their discretion." *Town of Castle Rock, Colo.*, 545 U.S. at 760.

Under the Ordinance, the Plaintiffs do not have a vested property right to a future short-term rental business license because the Board of County Commissioners have broad discretion to approve or deny an application. The Ordinance accords the Board broad authority to consider a wide range of factors in deciding whether to grant a short-term rental business license to an applicant. The factors an applicant must meet to the Board's satisfaction include the eligibility of the prospective licensee, suitable location of the property, whether a proposed residential property is in a "safe, habitable and hazard-free condition," whether the applicant has multiple violations of the Clark County Code within the preceding thirty-six months that were not satisfactorily remediated; and whether the applicant has satisfied all application requirements, amongst other factors.

Since there is no deprivation of a property right at issue here, there is no need for the Court to consider Plaintiffs' takings claims further. The lack of a constitutionally protected property interest in and of itself warrants the denial of Plaintiffs' takings claim.

2. A Regulatory Taking Has Not Occurred

The issue of whether a regulatory taking has occurred is academic since the Plaintiffs cannot have a constitutionally protected property interest in a future short-term rental business license. Therefore, the Court need not bother itself with considering whether a regulatory taking has occurred since there is no property interest that can be taken. Nevertheless, Clark County will address Plaintiffs claim of a regulatory taking in detail below.

In their *Motion* (and complaint) the Plaintiffs claim the Ordinance has "gone too far" and amounts to a regulatory taking. There are two types of regulatory takings: (1) takings *per se,* or total takings, where the regulation denies all beneficial productive use of the property, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886 (1992); and (2) partial takings that, though not rendering the property idle, require compensation under the test set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

a. <u>A Total Takings has Not Occurred: The Plaintiffs have not Lost All Economically Beneficial Use of their Properties.</u>

Total takings or takings per se are those that deny the property owner all economically beneficial use of the property. *See Murr v. Wisconsin*, 198 L. Ed. 2d 497, 137 S. Ct. 1933, 1942–43 (2017); *Lucas*, 505 U.S. at 1030. "In deciding whether a particular governmental action has effected a taking, a court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Cent. Transp. Co.*, 438 U.S. at 130–31. A total taking does not exist where the government seizes only one strand of the "bundle" of property rights. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318 (1979). If "an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus*, 444 U.S. 51. This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or

impose any physical invasion or restraint upon them, was not a taking. *Id.* A taking does not occur simply because a plaintiff has been denied the most profitable use of the property. *See Andrus*, 444 U.S. 51. Rather, a total taking is one that renders the entire property essentially idle. *See Lucas*, 505 U.S. at 1030.

The Plaintiffs have not, as a result of the Ordinance, lost all beneficial use of their properties. Even without a short-term rental license, single-family homes still stand on their parcels, uses to which they are expressly entitled under the Clark County Zoning Code and whose economic value the U.S. Supreme Court explicitly found will defeat a claim of total worthlessness. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 632, 121 S. Ct. 2448 (2001). The Plaintiffs can live at their properties, sell their properties, retain it for investment purposes and lease their properties on a month-to-month or longer basis. In other words, while the Plaintiffs may not be able to realize the speculative profits from a short-term rental business (assuming they do not obtain a license), they may still make economically viable use of the properties by other means. Thus, a total regulatory takings has not occurred.

b. A *Penn Central* Taking has not Occurred.

One whose property has not been deprived of all economically beneficial use may still be entitled to compensation if the government action constitutes a taking under the *Penn Central* factors. The factors are: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Penn Cent. Transp. Co.*, 438 U.S. at 124. Nevada courts adhere to the *Penn Central* taking analysis for state law claims under the Nevada Constitution as well. *See McCarran Intern. Airport*, 122 Nev. at 663–64.

The function of the *Penn Central* test is to "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain. "Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights .... the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron*

U.S.A. Inc., 544 U.S. 528, 539, 125 S. Ct. 2074 (2005). A regulatory limitation on the right to use and receive profits from property will not necessarily or even usually establish that there has been a taking. *Andrus*, 444 U.S. at 66. "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Cent. Transp. Co.*, 438 U.S. at 130. A *Penn Central*-type regulatory taking requires compensation only if "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *McCarran Intern. Airport*, 137 P.3d at 1123. Courts reject takings claims where a law imposes restrictions "substantially related to the promotion of the general welfare" and which, while ruling out some uses, nevertheless "permit reasonable beneficial use." *See, e.g., Rogin v. Bensalem Twp.*, 616 F.2d 680, 691 (3d Cir. 1980). In particular, local governmental entities are afforded "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 528–29, 112 S. Ct. 1522 (1992).

(1) Economic Impact: The Plaintiffs Fail to Address the First* Penn Central *Factor

In considering the economic impact of an alleged taking, courts "compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232 (1987). Not every diminution in property value caused by a government regulation rises to the level of an unconstitutional taking. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018), *citing Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158 (1922). Although no litmus test determines whether a taking occurs, courts seek "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private

property or ousts the owner from his domain." *See Lingle*, 544 U.S. at 539. Thus, courts have held that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking. *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 – 1128 (9th Cir. 2013).[4]

In their *Motion*, Plaintiffs fail to address the economic impact of the County's short-term rental Ordinance on their properties. Plaintiffs present no evidence that allows a comparison of the pre-deprivation and post-deprivation values of their properties assuming they are unable to operate short-term rental businesses in the future. The truth is that no deprivation and thus no economic impact has occurred since the Plaintiffs had no right to operate a short-term rental business when the Ordinance was enacted and it is undisputed that the Plaintiffs retain other beneficial uses of their properties (as a residence or for long-term rentals). Thus, on the first *Penn Central* prong, Plaintiffs do not present sufficient evidence (in fact, none at all) regarding the economic impact caused by the adoption of the County's short-term rental Ordinance.

(2) The Second* Penn Central *Factor Conclusively Favors Clark County: Plaintiffs Do Not Have a Reasonable Investment Backed Expectation to a Short-Term Rental License

The second factor is "the extent to which the regulation has interfered with distinct investment-backed expectations," that Plaintiff had at the time of its acquisition of the property in question. *Penn Cent. Transp. Co.*, 438 U.S. at 124; *Colony Cove Properties, LLC*, 888 F.3d at 452. Courts must use "an objective analysis to determine the reasonable investment-backed expectations of the [o]wners." *Colony Cove Properties, LLC*, 888 F.3d at 452. "Distinct investment-backed expectations' implies reasonable probability, ... not starry-eyed hope of winning the jackpot if the law changes." *Guggenheim v. City of Goleta*, 638 F.3d 111, 1120 (9th

[4] *See, e.g., Village of Euclid, Ohio*, 272 U.S. at 384 (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S. Ct. 143 (1915) (92.5% diminution); *MHC Financing Ltd. Partnership*, 714 F.3d at 1127 (reasoning that an "81% diminution in value ... would not have been sufficient economic loss or interference with [the plaintiffs] reasonable investment-backed expectations to constitute a taking"); *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012) ("A small decrease in value ... falls comfortably within the range of permissible land-use regulations that fall far short of a constitutional taking."); *William C. Haas & Co. v. City & Cnty. of San Francisco, Cal.*, 605 F.2d 1117, 1120–21 (9th Cir. 1979) (holding that the economic impact-a decrease in affected property's value from $2 million to $100,000-standing alone is not sufficient to state a taking).

Cir. 2010). Thus, "unilateral expectation[s]" or "abstract need[s]" cannot form the basis of interference with property rights. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862 (1984). "[W]hat is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634 (9th Cir. 2020). Regulations at the time of purchase should be considered in determining whether the later, challenged regulation interferes with investment-backed expectations. Sitting *en banc* in *Guggenheim,* the Ninth Circuit held that the "primary factor" (the extent to which the regulation has interfered with distinct investment-backed expectations) was "fatal" to a takings claim, where the owner purchased property with the ordinance that adversely impacted profitability already in place. *Guggenheim*, 638 F.3d at 1120. There is absolutely no validity to the proposition that "where the government . . . merely refuses to enhance the value of real property[] a compensable taking has occurred. *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 285–286 (4th Cir. 1998).

Here, all of Plaintiffs investment-backed expectation claims are predicated on Plaintiffs having an entitlement to a future short-term rental license. They do not. The Plaintiffs admit to the existence of Clark County's prior ban of short-term rental businesses. *Mot.* at 15. The Plaintiffs cite the Clark County Zoning Code and acknowledge that in 1998 Clark County "mandated a blanket zoning prohibition on all short-term rentals located in unincorporated Clark County" and that "[n]o short-term rentals were legally permitted to operate in unincorporated Clark County." *Mot.* at 15. Therefore, Plaintiffs could not have had a reasonable investment-backed expectation to a short-term rental license at the time they purchased their properties because there was a ban on short-term rentals in place. There is no "taking" here as the Ordinance in question does not take away an existing right to operate an on-going business. Instead, the Ordinance will allow private short-term rental businesses to operate where none were previously permitted. Thus, the challenged Ordinance is more akin to a "granting" than a "taking," subject to reasonable business operating conditions designed to minimize impacts on neighboring homeowners. The second Penn Central factor therefore weighs conclusively in Clark County's favor.

c. The Third Factor, Character of the Government Action, Favors Clark County Since the Ordinance Promotes the Public Good by Striving to Mitigate the Impacts Caused by Short-Term Rental Businesses on Neighboring Properties

The third *Penn Central* consideration is the character of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co.*, 438 U.S. at 124. The Supreme Court has upheld regulations that adversely affected recognized real property interests when, as here, the relevant government entity "reasonably concluded that 'the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land." *Penn Cent. Transp. Co.*, 438 U.S. at 125.

In *Village of Belle Terre*, 416 U.S. at 9, the U.S. Supreme Court upheld an ordinance which limited the use of land to one-family dwellings. The Court held that the police power is "ample" to create "[a] quiet place where yards are wide, people few, and motor vehicles restricted" and thereby preserve "the blessing of quiet seclusion and clean air." *Id.* Regulations that control development based on density and other traditional concerns are the paradigm of the *Penn Central* public program. *Henry v. Jefferson Cnty. Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011). This takes into consideration the fact that "[l]ocal governments need to be able to control the density of development to prevent the overburdening of public services, environmental damage, and other harms." *Quinn v. Bd. of Cnty. Commissioners for Queen Anne's Cnty., Maryland*, 862 F.3d 433, 443 (4th Cir. 2017).

The County's short-term rental Ordinance is precisely such a program, striving to protect neighboring homeowners from the adverse impacts caused by short-term rental businesses. The Ordinance seeks to regulate excessive noise, boisterous conduct, overcrowding and disproportionate traffic, amongst other concerns, normally associated with short-term rental businesses located in residential neighborhoods. Thus, the central purpose of Ordinance is designed to promote the public good. The third *Penn Central* factor is therefore not satisfied.

d. Conclusion: No Regulatory Taking has Occurred.

The Plaintiffs have failed to satisfy the factors required to establish a regulatory taking. In fact, the Plaintiffs have offered no evidence to support a finding that the functional equivalent of a direct appropriation of their properties has occurred. Accordingly, the Court must conclude that the Plaintiffs have failed to meet their burden of satisfying each of the *Penn Central* factors and rule in Clark County's favor.

3. A Physical Taking has not Occurred

"A taking can arise when the government regulates or physically appropriates an individual's private property. Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property." *ASAP Storage, Inc.*, 173 P.3d at 740.

The Plaintiffs cite *Cedar Point Nursery v. Hassid*[5] and *Loretto v. Teleprompter Manhattan CATV Corp.*[6] in arguing the Ordinance will cause a physical taking. "The government commits a physical taking when it uses its power of eminent domain to formally condemn property." *Cedar Point Nursery*, 141 S. Ct. at 2071. The government also commits a physical taking where it "takes possession of property without acquiring title to it." In *Cedar Point*, a California regulation allowed a labor organization to "take access" to an agricultural employer's property "for up to four 30-day periods for the purpose of meeting and talking with employees and soliciting their support." *Id.* at 2069. The Court held that this regulation "appropriate[d] a right to invade the growers' property and therefore constitute[d] a per se physical taking." *Id.* at 2072. "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* at 2072.

But the facts of this case differ from the *Cedar Point* case. In our case, the Ordinance does not appropriate the property a short-term rental property for the use and enjoyment of third parties. Instead, the Ordinance places reasonable restraints on the short-term rental business itself in order to preserve the character of residential neighborhoods. Unlike *Cedar Point*, nothing in the County's short-term rental Ordinance requires the future short-term rental business to grant labor

[5] *Cedar Point Nursery v. Hassid*, 210 L. Ed. 2d 369, 141 S. Ct. 2063, 2071 (2021).
[6] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982)

organizations or any other group of persons a right to possess or access their property. Nor does the Ordinance allow Clark County to appropriate the property for its own use or impose an easement over Plaintiffs' property for the general public's use (such as for roadway or park purposes). Those short-term rental operators receiving business licenses in the future will be able to operate their business on property they possess to the exclusion of uninvited third parties, through short-term rental lease agreements with tenants and invited guests of their own choosing and with the right to have improvements made and equipment installed by contractors they employ.

The Plaintiffs complain that a taking will occur because future short-term rental businesses will be subject to business license inspections. *Mot.* at 35. Under *Cedar Point*, however, inspections of businesses do not constitute a taking. The Supreme Court specifically distinguished the *Cedar Point* case from situations where conditions are attached to a license or permit approval. *Cedar Point Nursery*, 141 S. Ct. at 2079. The Supreme Court in *Cedar Point* declared that "government health and safety inspection regimes will generally not constitute takings" and explained that "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy." *Cedar Point Nursery*, 141 S. Ct. at 2079.

Finally, the Plaintiffs' citation to *Loretto v. Teleprompter Manhattan CATV Corp.* is similarly misplaced. In *Loretto*, a *per se* takings case, the U.S. Supreme Court considered a challenge to a New York statute requiring landlords to permit a cable television company to install television facilities on their properties. The Supreme Court concluded a taking had occurred because the statute mandated the permanent physical occupation of the landlord's property by a third party. *Id.* at 423. Here, the Plaintiffs appear to argue that a taking under *Loretto* has occurred because the short-term rental Ordinance requires *the short-term rental licensee* to install noise monitors and street-facing, Ring doorbell-like cameras as a condition of the granting of the business license for the short-term rental. *Mot.* at 37. The Plaintiffs argument is fundamentally flawed because they misconstrue the central premise of *Loretto* which holds a taking occurs when

a landowner's property is appropriated for a third-party's use. *Id.* at 427. In *Loretto*, the third party was a cable company. *Loretto* does not apply to the present case because the short-term rental Ordinance does not mandate the permanent physical occupation of a short-term rental owner's property by third parties. Instead, the Ordinance simply requires the short-term rental licensee to install equipment on his own property as a condition of being granted a business license. The Supreme Court in *Loretto* recognized this distinction, stating its holding:

> [i]n no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.

Loretto, 458 U.S. at 440; *See also, Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 524, 217 P.3d 546, 561 (2009). Otherwise, smoke detectors, fire alarms, exit signage, fire sprinkler systems and other health and safety equipment could not be required to be installed in businesses without paying just compensation.

In sum, neither the *Cedar Point* or *Loretto* cases apply here because the Ordinance does not require a short-term rental owner to submit to physical occupation or invasion of their land and does not appropriate the short-term rental owner's right to exclude.

4. A Taking does not Occur for an Invasion of Privacy; Nonetheless, No Invasion of Privacy has Occurred

The Plaintiffs also base their takings claim on an invasion of privacy. A takings claim falls under the Fifth Amendment of the U.S. Constitution and Article 1, § 8 of the Nevada Constitution. In contrast, an invasion of privacy falls under the Fourth Amendment of the U.S. Constitution and Article 1, § 18 of the Nevada Constitution. *Hiibel v. Sixth Jud. Dist. Ct. ex rel. Cnty. of Humboldt*, 118 Nev. 868, 873, 59 P.3d 1201, 1205 (2002). Therefore, the Plaintiffs' invasion of privacy arguments are not relevant to Plaintiffs' takings claims.

Notwithstanding, the Ordinance does not invade the Plaintiffs' right to privacy. Plaintiffs claim an infringement of their right to privacy because the Ordinance requires short-term rental

business licensees to install noise monitoring devices and street-facing Ring-like cameras on their property. The noise monitoring devices will not record conversations but simply measure outdoor sound levels in decibels. The data from the noise monitoring device will be available to County Public Response or Business License enforcement officers in the event complaints are received to determine whether the short-term rental business exceeded maximum permitted sound levels set forth in the Clark County Code. *See* Clark County Code § 30.68.020. Similarly, the street-facing cameras will not view into the inside of the residential structure, or into the side or back yard of the residential structure. The required camera is expressly described in the Ordinance as "street-facing." Clark County Code § 7.100.170(o). Nor will the Ring-like, street-facing camera send a live feed to the County. Instead, recordings from the street-facing cameras will be available to County enforcement officers in the event complaints are received about disruptive activity or boisterous behavior on the street and front yard of the short-term rental property that interferes with the quiet enjoyment of neighboring homes. Without the noise monitoring devices and street-facing cameras, County enforcement officers will be left to relying on neighbors' subjective opinions that noise from a short-term rental was "loud," or that the short-term rental guests were disruptive, when trying to assess whether the short-term rental business is a nuisance to neighboring properties. The noise monitoring devices and street-facing cameras will provide objective evidence of a problem rental should one exist.

Additionally, the noise monitoring devices and street-facing cameras do not violate a persons' right to privacy because there is no expectation of privacy in the front yard of a person's home or in sound emitted outdoors. *See, e.g., United States v. Gonzalez,* 328 F.3d 543, 548 (9th Cir. 2003) (where the Ninth Circuit recognized that "video surveillance does not in itself violate a reasonable expectation of privacy ... the police may record what they normally may view with the naked eye."); *See also State v. Holden*, 964 P.2d 318 (Utah Ct. App. 1998) (use of secret video camera placed inside neighbor's home to record comings and goings in the front yard of defendant's home did not violate the Fourth Amendment).

Finally, the Plaintiffs claim an expectation of privacy in the business records of future short-term rentals. Under the Ordinance, a review or audit of the business records may be

periodically required for the purpose of ascertaining compliance with the County Code, including but not limited to the payment of licensing fees and taxes. Clark County Code § 7.100.200(c). The information received from a licensee will be deemed confidential and only available to County officials for compliance and audit purposes. *Id.* But Plaintiffs will have no expectation of privacy from the inspection of records of a short-term rental business. *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619 (1976). It is clear that "the modern businessman has little or no expectation of privacy in his business records, especially those documents prepared in compliance with regulatory requirements." *I. C. C. v. Gould*, 629 F.2d 847, 858 (3d Cir. 1980). Where records pertain to a business and are relevant to a licensing authority's regulatory task, inspection of the business records is not unreasonable. As a result, a licensing authority is typically free to obtain such information from the recipient without triggering Fourth Amendment protections. *Miller*, 425 U.S. at 443; *Glenwood TV, Inc. v. Ratner*, 103 A.D.2d 322, 480 N.Y.S.2d 98 (1984). Numerous authorities demonstrate this principle *See, e.g., Sec. & Exch. Comm'n v. Olsen*, 354 F.2d 166, 170 (2d Cir. 1965) (records required to be kept by investment advisors); *Cooper's Exp., Inc. v. I. C. C.*, 330 F.2d 338, 340–341 (1st Cir. 1964) (records required to be kept by interstate motor carrier).

E. PLAINTIFFS WERE NOT DEPRIVED OF DUE PROCESS

The Due Process Clauses of the United States and Nevada Constitutions prohibit the State from depriving any person "of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. I, § 8(5). "There are two steps to analyzing a procedural due process claim: first, it must be determined 'whether there exists a liberty or property interest which has been interfered with by the State, … [and second] whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Malfitano v. Cnty. of Storey By & Through Storey Cnty. Bd. of Cnty. Commissioners*, 133 Nev. 276, 282, 396 P.3d 815, 819 (2017) (quoting *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

Plaintiffs claim that the short-term rental Ordinance violates their due process rights by (1) not requiring the County to notify applicants if their license application is incomplete, (2)

allowing the County to impose cumulative and unpredictable fines, (3) allowing the County to decide the fine amount based on the severity of the violation, good faith and history of violations and (4) allows property owners to be criminally punished for the violations of others.

However, these four issues are not due process violations because Plaintiffs have no liberty or property interest in operating a short-term rental or in possessing a short-term rental license which they have yet to receive. Where a County does not revoke an existing license, there is no property interest in which due process could apply. *Id.* at 284 (a temporary liquor license holder was denied a permanent license but could not challenge the denial for a due process violation because he had no property interest in a permanent license). Further, the types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited. *Kentucky Dept. of Corrections*, 490 U.S. at 460. The interests must rise to more than "an abstract need or desire" and must be based on more than "a unilateral hope." *Id.* at 460. An individual must have a legitimate claim of entitlement that arises from the Due Process Clause or state law. *Id.* at 460. Here, Plaintiffs cite no law which entitles them the right to operate a short-term rental on their residential properties. In fact, state law prohibits the operation of a short-term rental on residential property without a license. NRS 268.09796.

Even assuming that Plaintiffs have a legal entitlement to operate a short-term rental on their property, Plaintiffs have not shown the County's procedures caused a deprivation or that those procedures were not constitutionally sufficient. Clark County has not cited Plaintiffs for any violations under the new ordinance. Thus, the procedures of the new ordinance could not have deprived Plaintiffs of any constitutional right. Even assuming that Plaintiffs had been cited for a violation of the new ordinance, the procedures of the new ordinance are constitutionally sufficient. If Plaintiffs apply for a license and are denied in the future, they will be provided a written notice of that denial which clearly sets forth the reasons for the denial and allows an administrative hearing to appeal that denial. Clark County Code § 7.100.110(b). These administrative hearings are also subject to a procedure that allows judicial review in District Court. Clark County Code § 6.04.090(j). Any administrative citations and fines that Plaintiffs may receive in the future are also subject to sufficient notice, administrative appeal and judicial

review. Clark County Code § 1.14.070; Clark County Code § 1.14.130. Plaintiffs' due process rights have not been violated.

1. Due Process does not Require Clark County to Immediately Provide Notice of Incomplete Applications

Plaintiffs claim that Due Process requires that Clark County notify them if their future applications are incomplete. To support this assertion, Plaintiffs cite *Burgess v. Storey Cnty. Bd. of Comm'rs*, 116 Nev. 121, 125, 992 P.2d 856, 858–59 (2000). However, in *Burgess* a brothel license holder had his license revoked at an administrative hearing for being associated with the Hell's Angels. *Id.* at 125. The notice for the administrative hearing did not inform the licensee that his association with the Hell's Angels would be a subject at the hearing. *Id.* at 125. *Burgess* does not require the County to give notice to applicants that they have submitted an incomplete application. Further, the County will provide timely notice and a chance to appeal if any application is denied for being incomplete. Clark County Code § 7.100.110(a) (the Department shall deny an application if the application is incomplete). Lastly, due process claims related to the failure to immediately process an incomplete application are unripe for adjudication. *See Nenninger v. Vill. of Port Jefferson*, 509 F. App'x 36, 38 (2d Cir. 2013) (due process cannot be violated without having a final decision and a final decision cannot be reached without a complete application).

2. Clark County's Fines and Penalties do not Violate Due Process by being "Unpredictable" or "Cumulative"

Plaintiffs fail to cite any legal authority to support their claim that due process is violated when fines and citations may be cumulatively assessed or assessed in any order. Further, the Plaintiffs misinterpret the plain language of the Clark County Code. What the Code actually says is:

> The penalties and remedies shall be cumulative and may be exercised in any order or combination and at any time.

Clark County Code 7.100.230(b). Under the law, Clark County has many remedies available to it, including assessing fines, suspending licenses, and filing lawsuits. This Code is simply stating

that Clark County is not limiting its remedies to only administrative citations. This is not a due process violation. This provision simply makes it clear for the public that all legally authorized enforcement methods can be used. When a specific violation is found, Clark County has the discretion to use any enforcement method it determines is appropriate. Most importantly, whichever enforcement mechanism is used has the required due processes protections.

3. A Fine does not Violate Due Process by Taking into Account the Requirements of the Nevada Revised Statutes

NRS 268.09795(3) provides in part that, any ordinance adopted by Clark County must establish standards for determining the amount of the civil penalty which takes into account (a) the severity of the violation; (b) whether the person who committed the violation acted in good faith; and (c) any history of previous violations. Clark County Code § 7.100.230(d)(1)(I) simply adopts the statutory language. If Plaintiffs receive a fine, it will be based on those standards as set forth by the Nevada Legislature and Plaintiffs will get notice and opportunity to appeal. Plaintiffs contend that this legislative requirement violates their due process even without ever receiving a fine pursuant to this section. However, Plaintiffs again cite no laws in support and only make conclusive statements. The standards set forth by the legislature do not violate due process because they do not allow a county employee to have standardless discretion to impose any fine amount.

4. Due Process is not Violated by the Clark County Code for Holding Property Owners Responsible for Illegal Conditions that they Allow to be Maintained on their Property

Plaintiffs also claims that the Clark County Code is going to put Plaintiffs in jail for the violations of others. However, Clark County Code § 7.100.230(e)(2) makes it clear that this provision only applies to administrative citations, which are not criminal and only impose fines. Further, property owners must be responsible for public nuisances and code violations on their property because they are the ones with the authority to control the use of the property. Without being able to hold the owner responsible a government would never be able to record a lien on the property or force an owner to abate a property that is hazardous to the community. In this case, short-term rental owners could simply avoid all responsibility by allowing a third party to

operate a short-term rental on their property. This is why a Notice of Violation, a warning without any civil penalties, is sent to the property owner. Clark County Code § 7.100.230(c). If a property owner allows another individual to utilize their property for an illegal purpose, they must be held responsible. Plaintiffs cite *Ford v. State*, 127 Nev. 608, 618, 262 P.3d 1123, 1130 (2011) to stand for the assertion that the County ordinance violates due process because an individual must possess a level of *mens rea* before being held criminally responsible. However, as stated before the County ordinance only is holding property owners civilly responsible for their own violations. Plaintiffs again fail to cite any law that allows them to challenge a civil ordinance on the basis of due process before they have even been cited for a violation.

5. Nothing in Clark County's Ordinance Violates Plaintiffs' Due Process

Plaintiffs have not shown any liberty or property interest that has been interfered with by the County and have not received a citation under the County's new ordinance. Plaintiffs cite no law that provides that they have a right to any license or a right to operate a short-term rental. Further, the County's procedures are constitutionally sufficient, and the code provides accused violators with notice of their violations and opportunities to appeal. Thus, Plaintiffs are unlikely to succeed on the merits of their due process claim and a preliminary injunction should not be granted.

F. THE ORDINANCE DOES NOT DENY PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS

Plaintiffs next claim that the Ordinance violates the right to equal protection guaranteed by both the Nevada and United States Constitutions. *Mot.* at 42. "The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." *Barrett v. Baird*, 111 Nev. 1496, 1509, 908 P.2d 689, 698 (1995).

A plaintiff making a challenge to an equal protection challenge bears a heavy burden. *Hodel v. Indiana*, 452 U.S. 314, 332, 101 S. Ct. 2376, 2387 (1981). To successfully prove that the Ordinance here violates equal protection on its face, Plaintiffs must prove that the Ordinance results in short-term rental owners being treated differently from other similarly situated persons and that the different treatment is unjustified. *See Doe v. State ex rel. Legislature of 77th Session*,

133 Nev. 763, 767, 406 P.3d 482, 486 (2017) (quotations omitted). As Plaintiffs concede, because the Ordinance does not target a suspect class or burden a fundamental right, the Ordinance is presumptively valid and subject to rational basis review. *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642 (1993). The Ordinance will only be invalidated under rational basis review if the disparate treatment of groups "is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 943 (1979); *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559 (2009) ("the statute is constitutional if there is a rational basis related to a legitimate government interest for treating businesses differently.") "[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it…" *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–16, 113 S. Ct. 2096, 2101-02 (1993) (citations omitted).

1. 'Plaintiffs have not Established that they are Similarly Situated to Another Class of Persons

Plaintiffs' equal protection claim fails at the outset. "The threshold question in equal protection analysis is whether a statute effectuates dissimilar treatment of similarly situated persons." *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). The first "heavy burden" that a plaintiff must bear in any equal protection claim, then, is to establish that they are similarly situated to another class of persons. *See id.*

Plaintiffs skirt this critical initial inquiry. They only allege, in a conclusory fashion, that short-term rental owners are similarly situated to *all* licensed businesses and *all* residents of Clark County. *Mot.* at 43 ("short-term rental homeowners are similarly situated as a class to other licensed businesses, including hotels and motels, and residents in Clark County.") Notably, in their equal protection analysis, Plaintiffs only compare themselves to one specific business—cannabis dispensaries—while generally claiming to be similarly situated to "other" unidentified types of businesses and to homeowners. *Mot.* at 43-45.

Plaintiffs' position that they are similarly situated to a class of persons consisting of *all* licensed businesses and *all* residents of Clark County is untenantable. Under equal protection

jurisprudence, "similarly situated individuals must be *very similar* indeed." *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (emphasis added).

Multiple examples demonstrate how exacting this standard can be. The Nevada Supreme Court has found persons to be similarly situated when their employment duties are similar or when persons have the same job. *Edwards v. City of Reno*, 103 Nev. 347, 351, 742 P.2d 486, 488–89 (1987) (door-to-door solicitors and door-to-door peddlers); *Starlets Int'l, Inc. v. Christensen*, 106 Nev. 732, 735–36, 801 P.2d 1343, 1344–45 (1990) ("outcall promoters" called to hotels and "outcall promoters" called to other locations are similarly situated).

In contrast, in *Reel v. Harrison*, the Nevada Supreme Court rejected an equal protection claim because it held that custodial parents and noncustodial parents—while both parents to the same minor child—are not similarly situated for the reason that "the responsibilities and obligations of custodial and noncustodial parents are so different…" *Reel v. Harrison*, 118 Nev. 881, 887, 60 P.3d 480 (2002). And in the context of short-term rentals, at least two courts have that owners of property who lease their homes as short-term rentals are not similarly situated to property owners who lease their properties long-term. *See Draper v. City of Arlington*, 629 S.W.3d 777, 792 (Tex. App. 2021) (persons who lease their properties short-term are not similarly situated to persons who lease their properties long-term); *see also Murphy v. Walworth Cnty.*, 383 F. Supp. 3d 843, 851 (E.D. Wis. 2019) ("single-family homes used for short-term rentals are not similarly situated as single-family homes used for long-term use.")

These cases demonstrate that, to show a likelihood of success on the merits, Plaintiffs must do more than allege that they are similarly situated to generic businesses or persons. Here, Plaintiffs fail to identify specific types of businesses—other than *cannabis dispensaries*—to which they believe they are similarly situated. They simply make no argument, offer no authority, and make no factual analysis to establish why short-term rental owners are *very* similarly situated to any another class of persons to entitle them to an equal protection claim.

For that reason, their equal protection claim will likely fail.

2. Even if the Ordinance Treats Short-Term Rental Owners Differently from Other Cognizable Classes of Persons, the Distinction is Justified

Equal protection "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293 (1997). When enacting an ordinance, equal protection does not prohibit the government from "engag[ing] in a process of line-drawing." *F.C.C.*, 508 U.S. at 314–16. The Supreme Court has stated that "it is a practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627 (1996). However, when a government does draw these distinctions between groups, the disparate treatment must be justified.

"On rational-basis review, a classification in a statute…bear[s] a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C.*, 508 U.S. at 314–16. The Court must find the Ordinance here constitutional "if there is a rational basis related to a legitimate government interest for treating businesses differently." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559 (2009). The Ordinance may only be overturned if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance*, 440 U.S. at 97.

Here, each of the provisions of the Ordinance which Plaintiffs believe violates equal protection survive rational basis review because each provision is rationally related to a legitimate government purpose.

a. <u>The 2,500-Foot Distance Separation is Rationally Related to a Legitimate Government Purpose</u>

First, Plaintiffs challenge on equal protection grounds the provision found in Clark County Code § 7.100.080(f)(1), which prohibits the issuance of a license for short-term rental unit located within 2,500 feet of a resort hotel. *Mot.* at 43. Plaintiffs state that they cannot conceive why the Ordinance would require this distance separation for short-term rentals but not for "other licensed Clark County businesses" such as cannabis dispensaries. *Id.*

Contrary to Plaintiffs' position, the inclusion of this provision in the Ordinance was not irrational because state law *required* the County to include the 2,500 foot distance separation in the Ordinance. NRS 244.353545(2)(f)(2). The inclusion of the provision is therefore rationally related to Clark County's legitimate government interest in complying with a requirement of state law. *See United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 163, 97 S. Ct. 996, 1009 (1977) (state government's redistricting plan was "reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength"); *see also Shaw v. Reno*, 509 U.S. 630, 654, 113 S. Ct. 2816, 2830 (1993) (States "have a very strong interest in complying with" the requirements of federal laws).

b. Plaintiffs do not Articulate a Cognizable Equal Protection Challenge to the Requirement that a Local Representative Respond to the Short-Term Rental Unit within 30 Minutes of Receipt of a Complaint

Next, Plaintiffs take issue with Clark County Code § 7.100.170(d) which requires that each licensee designate a "local representative" who is able to respond to the short-term rental unit within 30 minutes of a complaint. Plaintiffs contend that this requirement is unreasonable because meeting the 30-minute time frame will be difficult and, moreover, few complaints "would require the on-site presence by a local representative." *Mot.* at 44.

This argument is unavailing. To successfully challenge an ordinance on equal protection grounds, a plaintiff must "negative every conceivable basis" supporting the legislative enactment. *F.C.C.*, 508 U.S. at 314–16. Plaintiffs here, however, do not even argue that the provision is "irrational" in that it is "so unrelated to the achievement of any combination of legitimate purposes…" *Vance*, 440 U.S. at 97. Instead, they simply complain that compliance with this provision may be burdensome or unnecessary in some circumstances. *Mot.* at 44. This do not set forth an equal protection challenge, but rather is merely an articulation that Plaintiffs would prefer a different policy.

Additionally, it is worth noting that Clark County has a legitimate government purpose in requiring local representatives to respond to the short-term rental to resolve complaints. *See* Clark County Code § 7.100.190 (setting forth complaint resolution procedures). Clark County has an

interest in maintaining peaceful residential neighborhoods free from disturbances and public nuisances caused by transient lodgers. Clark County Code § 7.100.010(b). This interest has been recognized by courts in other jurisdictions. *See Stone River Lodge, LLC v. Vill. of N. Utica*, No. 20 C 3590, 2020 WL 6717729, at *4 (N.D. Ill. Nov. 15, 2020) (finding ordinance regulating short term rentals was rationally related to the village's interests in protecting "life-safety concerns, quality of neighborhood and related life concerns, security concerns, fire safety concerns, and tax revenue concerns"); *Calvey v. Town Bd. of N. Elba*, No. 820CV711TJMCFH, 2021 WL 1146283, at *12 (N.D.N.Y. Mar. 25, 2021) (dismissing substantive due process claim because a short-term rental ordinance was "rationally related to the Defendants' interest in planning how to use land in a way that balances the interests of homeowners, renters, and short term visitors"). The quick resolution of complaints lodged against short-term rental owners or tenants is reasonably related to those purposes.

c. Clark County has a Legitimate Interest in Levying Fines to Compel Compliance with its Regulations

'Lastly, Plaintiffs argument also fails to negative the obviously legitimate government purpose behind the penalty provisions of the Ordinance. Fines assessed for violations of the law deter future potential violations and serve to advance voluntary compliance with the Ordinance. *See United States v. Emerson*, 107 F.3d 77, 81 (1st Cir. 1997) (holding that the imposition of a $185,000 civil penalty upon a pilot "is a sobering reality that should discourage [the pilot] (and deter others) from committing future violations.")

d. Plaintiffs Failed to Sufficiently set forth a Claim that "Numerous" yet Unidentified Provisions within the Ordinance Violate Equal Protection

'Plaintiffs bear the burden to establish that provisions of the Ordinance violate equal protection. *Hodel*, 452 U.S. at 332. It is incumbent upon them to "cogently argue, and present relevant authority, in support of [their] concerns." *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006). Bare allegations unsupported by any argument must not be considered by this Court. *Id.*; *see also* EJCDR 2.20(c) (absence of a memorandum of points

and authorities in support of a motion "may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported.")

G. THE ORDINANCE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

An "ordinance may be struck down under the dormant aspect of the Commerce Clause if it discriminates "on its face[,] in practical effect," or through its purpose." *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 561, 170 P.3d 508, 515 (2007). First a court must consider whether the ordinances "facially discriminate against interstate commerce." *Id.* at 561. "If they do not facially discriminate against interstate commerce, the court must determine whether, in application, they unduly burden interstate commerce." *Id.* at 561. Ordinances advancing a legitimate local interest and applying equally to in-state and out-of-state (interstate) commerce will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 561–62. To decide this the Court should consider (1) the nature of the County's interest in enacting the legislation, (2) the extent of the burden on interstate commerce created by the legislation, and (3) whether the interest in enacting the legislation could have been served by other legislation that does not impact interstate commerce as much. *Id.* at 562. "The dormant Commerce Clause does not protect any particular interstate business interest; it protects the flow of commerce between the states so that no single business interest, intrastate or interstate, unduly burdens that flow." *Id.* at 563.

Plaintiffs claim that Clark County Code §§ 7.100.010(a), 7.100.050 and 7.100.170(d) violate the dormant commerce clause. Plaintiffs cite to *Hignell-Stark v. City of New Orleans*, where a city banned all out of state residents from operating short-term rentals and only permitted individuals located within the state to operate a short-term rental business. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022). Plaintiffs admit that Clark County's Ordinance does not prohibit out of state residents from operating short-term rentals in Nevada. However, they nonetheless claim that Ordinance discriminates against out of state residents by capping short-term rentals to 1% of available housing and by requiring a local representative who can respond to the property within 30 minutes. Plaintiffs claim that these two requirements are a *de*

facto residency requirement. However, Plaintiffs do not explain how it is a *de facto* residency requirement or how the ordinance burdens the flow of interstate commerce.

First, one purpose listed in the ordinance states that it is to provide affordable housing for the residents of Clark County. Clark County Code § 7.100.010(a). This does not facially or practically burden interstate commerce. In-state and out-of-state businesses can provide that housing, and anyone can buy that housing. This code is just pointing out that as residential houses are converted into short-term rentals, the supply of available permanent housing decreases and house prices go up if demand does not decrease.

Second, the 1% requirement applies equally to both Nevada residents and out of state residents and is intended to keep housing affordable. Clark County Code § 7.100.050. Nowhere in the code does Clark County differentiate between out of state residents and Nevada residents, it is not a distinction the ordinance makes. There is no way this provision could discriminate against out of state residents or burden the flow of interstate commerce.

Third, all licensees must have a local representative if they wish to obtain a business license. Clark County Code § 7.100.170(d). This requirement applies to all equally. A licensee need not be a Nevada resident to provide a local representative and local representatives are required to respond to the property within 30 minutes for the safety of the guests and to correct any public nuisances caused by the guests. Nothing in this requirement facially or practically burdens interstate commerce.

There simply is no distinction between in state and out of state residents in the short-term rental ordinance. Claiming that provision of the Ordinance will discriminate against out of state residents and burden the flow of interstate commerce without reason or legal support is not enough to obtain a preliminary injunction. Certainly, in general, the short-term rental business is being burdened by this ordinance, but the flow of short term rental business between states is not burdened at all. Burdening the flow would require Clark County to make it harder for out of state businesses to operate when compared to in state business. Thus, the motion for a preliminary injunction based on the dormant commerce clause should be denied.

H. CLARK COUNTY'S ORDINANCE DOES NOT VIOLATE STATE LAW AND PLAINTIFFS' ARGUMENTS IN THIS REGARD ARE BASED ON EGREGIOUS MISINTERPRETATIONS OF THE STATUE

1. The "Minimum Night Stay" is Fully Compliant and with State law and Plaintiffs' Arguments are based on a Misreading of NRS 244.353545

Plaintiffs contended in their Complaint that the Ordinance is "infirm because it violates provisions of Nevada law." Plaintiffs' *Sec. Am. Compl.* at 56; *see also* Plaintiffs' *Motion* at 49. Plaintiffs contend "Section 7, Subsection 2(e)(1) of AB 363 provides that a short-term rental home may be rented for a minimum of '1 night' if the home is owner-occupied." *Id.* at 57. Plaintiffs' interpretation of Section 7 of AB 363, now codified as NRS 244.353545, is based on a misreading and misstatement of the statute and, accordingly, their assertions that the Ordinance fails to conform with state law are unavailing. Further, NRS 244.35358 grants authority to Clark County to enact an ordinance with additional requirements and more restrictive requirements for operators of short-term rentals. Thus, the only way Clark County could violate state law is by making its short-term rental ordinance *less restrictive* than the statute requires. However, as explained below, even without NRS 244.35358, the statutory language clearly does not prohibit Clark County's restrictions.

NRS 244.353545(2) provides in relevant part:

> 2. *The ordinance* adopted pursuant to subsection 1 *must*, without limitation:
>
> […]
>
> (e) *Prohibit the rental of a residential unit or a room within a residential unit for less than the minimum period* for the residential unit. If the residential unit:
>
> > (1) Is owner-occupied, the minimum period for the rental is 1 night.
> >
> > (2) Is not owner-occupied, the minimum period for the rental is 2 nights.

See NRS 244.353545(2) (emphasis added).

As the Court can see from the plain language of the statute, Clark County is not *required* to allow owner-occupied units to rent rooms in their home for a period of "1 night." *See* NRS 244.353545(2). Rather, Clark County has been imputed with a mandatory obligation to ensure

that owner-occupied rentals ***do not rent for less than*** "1 night." Id. This means that Clark County has a mandatory obligation only to prevent half-day, quarter-day, or hourly rentals in owner-occupied units. Id. Plaintiffs' misreading of the statute attempts to create a statutory right for "1 night" rentals in owner-occupied units where none exists.

The relevant section of the Ordinance, Clark County Code §7.100.160(b), provides:

> Minimum Night Stay. The licensee must not accept bookings of fewer than two (2) nights per booking.

Clark County Code § 7.100.160(b).

As Clark County has restricted all short-term rental units to minimum bookings of at least "two (2) nights per booking[,]" which complies with the County's obligations as provided in NRS 244.353545(2)(e)(1)—(2), the Ordinance is not infirm and the Plaintiffs are not reasonably likely to prevail on the merits of their motion for preliminary injunction.

2. State Law Established Minimum Distance Separation Requirements for Short-Term Rentals and the Ordinance's 1,000-Foot Separation Requirement is Fully Compliant with State Law

Plaintiffs' misreading of NRS 244.353545(2)(f) is similarly egregious and unfounded. Plaintiffs contend that "Section 7, Subsection 2(f)(1) of AB 363 provides that a minimum of 660 feet must be maintained between houses that are offered as short-term rentals." Plaintiffs' *Motion* at 49. Plaintiffs then argue that the County's establishment of a minimum separation of 1,000 feet, which is more than the required minimum 660 feet, somehow violated the associated statute. *Id*. In doing so Plaintiffs have conflated the meaning of "minimum" with "maximum" and again attempted to create some statutory right where none exists.

NRS 244.353545(2)(f) provides:

> 2. *The ordinance* adopted pursuant to subsection 1 *must*, without limitation:
>
> […]
>
> (f) *Establish requirements to ensure a minimum distance:*
>
> (1) *Of 660 feet between any residential units offered for rent for the purposes of transient lodging*, except for residential units in a multifamily dwelling, and any other minimum separation requirement the board determines is necessary; and

> (2) Of 2,500 feet between any residential units offered for rent for the purposes of transient lodging and a resort hotel, as defined in NRS 463.01865.

See NRS 244.353545(2)(f) (emphasis added).

The statute is unambiguous. It requires that Clark County prohibit short-term rentals from being less than 660 feet apart. Id. It does not require that Clark County allow short-term rental units to be as close as 660 feet apart as Plaintiffs here contend. Here, Clark County Code § 7.100.080(f)(2) lawfully prohibits the business license department from issuing a Short-Term Rental License where the residential unit is situated "within 1,000 feet of any Short-Term Rental Unit, as measured from the nearest property line of the residential unit to the nearest property line of any licensed Short-term Rental Unit." *See* Clark County Code § 7.100.080(f)(2). As 1,000 feet is farther apart than the minimum required 660 feet, Clark County's ordinance is fully compliant with state law and the Court should deny Plaintiffs' *Motion for Preliminary Injunction*.

3. Regulatory Laws and their Enforcement are Criminal Processes and the Statute Permitting Civil Penalties is a Grant of Discretionary Authority to Lessen Punishment, not a Prohibition on Criminal Penalties

Plaintiffs argue that "Section 7, Subsections 2(n) and 3 of AB 363 provide that a framework of 'civil' penalties may be established" but contend that the statute "does not authorize Clark County to impose criminal penalties for a violation." *See* Plaintiffs' *Mot.* at 50. Plaintiffs acknowledge the language of the statute which provides that civil penalties may be enacted "in addition to any other penalty provided by law," but contend that this does not constitute "permissive authorization for Clark County to criminalize what the Nevada legislature intended to be a civil infraction." *Id* at 50. Plaintiffs, as they have done in all their claims that the Ordinance purportedly violates state law, have attempted to conflate discretionary grants of authority in the authorizing statute as a prohibition on all other conduct not expressly authorized. These contentions lack merit and signify a distinct lack of understanding of the legislative process and statutory interpretation in general.

In Nevada, like most jurisdiction, "most regulatory laws […] are enforced by criminal processes." *Palmieri v. Clark Cnty.*, 131 Nev. 1028, 1048, 367 P.3d 442, 456 (Nev. App. 2015) (citing *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 531, 87 S. Ct. 1727,

1732 (1967)) (emphasis added). This power to enforce ordinances via criminal prosecution is explicitly granted by NRS 193.050:

> NRS 193.050 Conduct constituting crime; prohibited or unlawful acts; common law.
>
> 1. No conduct constitutes a crime unless prohibited by some statute of this State or by some ordinance or like enactment of a political subdivision of this State.
>
> 2. An act which is declared to be unlawful by any statute, ordinance or like enactment is prohibited within the meaning of this § and of NRS 193.151.
>
> […]

See also Lyons v. State, 105 Nev. 317, 322, 775 P.2d 219, 222 (1989) ("Public offenses are defined by statute, ordinance or the common law.") Where there is "the promulgation of regulations relating to licensing and for their criminal enforcement," a regulation is deemed to be validly enacted. *Republic Ent., Inc. v. Clark Cnty. Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 815, 672 P.2d 634, 637 (1983).

Plaintiffs, in other words, have things completely backwards. NRS 193.050, which allows the County to enforce their ordinances by criminal prosecution, is the default enforcement mechanism for the County; the County can only issue civil penalties when the Legislature authorizes the County to do so. NRS ch. 244 is replete with examples of this authority. *See, e.g.*, NRS 244.189(3) (County may impose civil penalties in lieu of criminal penalties for violations of an ordinance governing the development of affordable housing, animal control, and the rehabilitation of rental and abandoned property); NRS 244.33509 (County may impose civil penalties in lieu of criminal penalties for violations of business license ordinances); NRS 244.3575 (County may impose civil penalties in lieu of criminal penalties for violations of parking ordinances); NRS 244.3603 (County may impose civil penalties in lieu of criminal penalties for violations of ordinances governing chronic nuisances); NRS 244.3603 (County may impose civil penalties in lieu of criminal penalties for violations of ordinances governing public nuisances); NRS 244.367 (County may impose civil penalties in lieu of criminal penalties for violations of

fireworks ordinances); NRS 244.3693 (providing for civil penalties for violations of graffiti ordinances).

Contemplating the default criminal process for enforcing ordinances, both NRS 244.33509, which governs the imposition of penalties for ordinances concerning licensing or regulations of businesses, and NRS 244.353545(3), which governs penalties for violations of the Ordinance, grants discretion to the County to assert civil penalties *in lieu of or in addition to criminal penalties authorized by NRS 193.050*. *See, e.g.*, NRS 244.33509; NRS 244.353545(3). As criminal penalties are contemplated both under NRS 244.33509 and NRS 244.353545(3) and the regulations in the Ordinance comply with the authorizing language of AB 363, Clark County's criminal and civil penalties associated with the Ordinance are validly enacted. *See, e.g.*, NRS 244.33509; NRS 244.353545(3).

Furthermore, in the Senate Committee on Revenue and Economic Development on or about May 29, 2021, Assemblywoman Nguyen acknowledged that local ordinances enacted under AB 363 would cover both "enforcement" of short-term rental provisions and the institution of minimum "guardrails" in local short-term rental laws. Assemblywoman Nguyen, who was one of the sponsors of AB 363 along with Assemblyman Tom Roberts, indicated that:

> Enforcement cannot be mandated on a State level. *Criminal laws can be enacted, but it is up to law enforcement and prosecutors in local jurisdictions to determine how and what to investigate and refer for prosecution. Assembly Bill 363 provides enabling language to come up with ordinances and impose those.* There are tools to enforce ordinances if a jurisdiction chooses to provide the resources.[7]

Accordingly, even the legislative history strongly supports that local jurisdictions are already authorized to enforce the provisions of their short-term rental laws as Clark County has done in its ordinance, and furthermore, that AB 363 did not explicitly or implicitly revoke the County's criminal enforcement powers.

Plaintiffs, unsurprisingly, do not cite to NRS 193.050. They also do not cite any other statute, case law, or evidence in support of their contention that the Ordinance cannot contain criminal penalties or prohibit Clark County from prosecuting persons for violations of the Ordinance.

[7] Minutes of The Senate Committee on Revenue and Economic Development on AB 363, p. 9, May 29, 2021, https://www.leg.state.nv.us/Session/81st2021/Minutes/Senate/RED/Final/1434.pdf (last accessed November 3, 2022).

Accordingly, Plaintiffs are unlikely to prevail on their allegations that the Ordinance violations state law and the Court must deny their *Motion* for Preliminary Injunction.

I. CONSTITUTIONALITY OF AB 363

Plaintiffs claim that various provisions within AB 363 violate the Constitution. Plaintiffs do not provide any details about how these provisions violate the Constitution, other than citing to other parts of their motion that directly challenge the Clark County Code. Thus, the County likewise points to its other arguments contained herein. However, to the extent new challenges are raised and challenges are focused on the requirements of AB 363, Clark County is not the proper party to respond. AB 363 was adopted by the state and is now statute. Clark County believes that the State or the Nevada Legislature are the entities which must respond to claims that a state statute violates the Constitution. Clark County is unaware if the State or Nevada Legislature has been properly served with the operative *Second Amended Complaint* and this *Motion*.

Further, Clark County need not defend the constitutionality of AB 363 because, even if AB 363 were found to be unconstitutional, Clark County's Ordinance would not be automatically invalidated. The power to enact the Ordinance rested on the authority granted to the County by NRS 244.335(1)(a) to "regulate all character of lawful… business conducted in its county," to address matters of local concern, *see* NRS 244.146, and to regulate land use, *see generally* NRS ch. 278. AB 363, in other words, did not grant powers to the County to that previously did not exist. Clark County already had the delegated power to enact the Ordinance; AB 363 simply mandated that the County use its already-existent powers to repeal its a laws prohibiting transient lodging establishments like short-term rentals in residential zoning districts. NRS 244.353545(4) (precluding counties from "enact[ing] or enforce[ing] a complete prohibition on the rental of a residential unit or a room within a residential unit for the purposes of transient lodging[,]" declaring an such prohibition "null and void[,]" and requiring counties to "repeal any such ordinance or regulation…")

J. CUMULATIVE CONSTITUTIONAL VIOLATIONS

Plaintiffs have cited no law that stands for or explains "cumulative constitution violations" as contained in their twenty-second cause of action. Clark County is unaware of any law that provides that "cumulative constitutional violations" is a cause of action or a standard that can be used in a civil context. Even so, as detailed above, no part of the Ordinance violates the Constitution, so even if there was such a standard or cause of action it would not apply to this case.

VIII. CONCLUSION

For the reasons stated herein, Clark County asks that this Court deny Plaintiffs' *Motion for Preliminary Injunction*.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: */s/ Timothy Allen*
TIMOTHY ALLEN
Deputy District Attorney

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 4th day of November, 2022, I served a true and correct copy of the foregoing *Clark County's Opposition to Plaintiffs' Motion for a Preliminary Injunction* (United States District Court Pacer System or the Eighth Judicial District Wiznet), by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

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