IN THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

JUDITH A. KINZEL, TRUSTEE,	)	
	)	**COURT OF APPEALS NO. E-19-033**
Appellee/Cross-Appellant,	)	**E-19-034**
	)	
v.	)	**APPEAL FROM THE ERIE COUNTY**
	)	**COURT OF COMMON PLEAS CASE NO.**
DOUGLASS EBNER,	)	**2017 CV 0554**
aka DOUGLAS EBNER	)	
And,	)	
2253 CEDAR POINT LLC,	)	
And,	)	
2243 CEDAR POINT LLC,	)	
	)	
Appellants/Cross-Appellees,	)	
	)	
v.	)	
	)	
RICHARD L. KINZEL	)	
And,	)	
CITY OF SANDUSKY,	)	
	)	
Appellees.	)	

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF DEFENDANTS/APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Regulations

INTEREST OF *AMICUS CURIAE*

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

Among GI's principal goals is defending the vital constitutional principle of private property rights. Protecting responsible homeowners' right to rent their homes is one of GI's top national property rights priorities. GI has successfully litigated or appeared as *amicus curiae* in courts throughout the country in cases involving efforts to prohibit homeowners from renting out their property. These include Arizona, (*Sedona Grand, LLC v. City of Sedona*, 270 P.3d 864 (Ariz. App. 2012)), Texas (*Zaatari v. City of Austin*, No. 03-17-00812-CV (Texas Civ. App. filed May 9, 2018) (pending)), Illinois (*Mendez v. City of Chi.*, 2016-CH-15489 (Cook Cnty. Cir. Ct., filed Nov. 29, 2016) (pending)), Florida (*Nichols v. City of Miami Beach*, No. 2018-021933-CA-01 (Miami-Dade Cnty. Cir. Ct., filed June 27, 2018) (pending)), California (*Hobbs v. City of Pacific Grove*, No. 18CV002411 (Monterey Cnty. Super. Ct., filed June 27, 2018) (pending)), and Washington (*Seattle Vacation Home v. City of Seattle*, No. 18-2-15979-2 (King Cnty. Super. Ct., filed June 27, 2018) (pending)). GI experts have also published important research and analysis of home-sharing bans. *See, e.g.*, Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395 (2017). GI believes its legal and policy experience with home-sharing and other property rights issues nationwide will benefit this Court in its consideration of this appeal.

INTRODUCTION

"Home-sharing" may sound like a modern invention, but in fact it is a centuries-old American tradition. For generations, people have let visitors stay in their homes, rather than in hotels, sometimes in exchange for money or for doing chores. New immigrants frequently stayed in the homes of more established immigrants. *See, e.g.*, Brian McCook, *The Borders of Integration: Polish Migrants in Germany and the United States, 1870–1924* at 31 (2011); Diana C. Vecchio, *Merchants, Midwives, And Laboring Women: Italian Migrants in Urban America* at 68 (2006). During the days of segregation, traveling businessmen or musicians would often spend nights in the homes of local residents because they were excluded from hotels. *See, e.g.*, Thomas J. Hennessey, *From Jazz to Swing: African-American Jazz Musicians and Their Music, 1890–1935* at 132 (1994); Carlotta Walls Nanier, *A Mighty Long Way: My Journey to Justice at Little Rock Central High School* at 148-50 (2009).

The only difference now is that the practice has become more efficient: the internet has enabled homeowners and travelers to connect better than ever before, and online home-sharing platforms such as Airbnb and HomeAway now help millions of homeowners rent rooms or houses to travelers. Home-sharing is not just limited to vacationers. A study by the travel-expense company Concur found that home-sharing bookings by business travelers grew fifty-six-percent in 2016 alone. *Global Business Travel and Spend Report Reveals New Sharing Economy Trends, Business Traveler Behaviors*, Concur (July 18, 2016).[1]

Home-sharing helps homeowners pay their mortgages and other bills and gives entrepreneurs an incentive to buy dilapidated houses and restore them. Most importantly, home-sharing is an

[1] https://www.concur.com/newsroom/article/global-business-travel-and-spend-report-reveals-new-sharing-economy.

important way for property owners to exercise their basic right to choose whether to let someone stay in their home—a right the United States Supreme Court has called "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Given that "Ohio has always considered the right of property to be a *fundamental* right," restrictions of this sort should be regarded with the utmost judicial skepticism. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 ¶ 38 (emphasis added).

Unfortunately, the City of Sandusky—despite being a world-renowned tourist destination—has chosen not to respect these fundamental rights, but rather to impose burdensome, confusing, and unconstitutional rules that deprive homeowners of these rights. *See* Sandusky City Ordinance Nos. 12-107 (2012) and 17-088 (2017). If the ruling below is left undisturbed, Ohio cities will be free to enact vague, unpredictable restrictions on homeowners' use of their property. This would leave them vulnerable to arbitrary enforcement, would undermine the rule of law, and would render Ohio's constitutional protections for due process hollow.[2]

I. Sandusky's anti-home-sharing ordinance is unconstitutionally vague.

A law is unconstitutionally vague if it does not "give fair notice" of what "conduct [is] proscribed," or if it fails to "convey an understandable standard capable of enforcement in the courts." *Norwood* at ¶ 81. Vague laws encourage arbitrary and discriminatory enforcement, and can "trap the innocent by not providing fair warning." *Id.* ¶ 83 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)). Sandusky's anti-home-sharing ordinances are so vague that they fail this test. Indeed, the confusing and conflicting definitions of "transient use," "non-transient use," and

[2] This case involves multiple claims between private parties. *Amicus* Goldwater Institute files this brief to address the constitutionality of Sandusky City Ordinance Nos. 12-107 and 17-088. It takes no position on the deed restrictions or other claims.

"residential use" render it impossible for homeowners to know what they may and may not lawfully do.[3]

First, Sandusky City Ordinance No. 12-107 (2012) established the following inconsistent and confusing definitions:

> "Dwelling" means "a building occupied exclusively for non-transient residential use including one-family, two-family, or multi-family buildings." City Ordinance No. 12-107 (2).
>
> "Non-transient" means occupancy for "a period of not less than 365 days." City Ordinance No. 12-107 (11).
>
> "Transient occupancy" means "occupancy when it is the intention of the parties that the occupancy will be temporary," and "there is a rebuttable presumption that, when the dwelling unit occupied is not the sole residence of the guest the occupancy is transient." City Ordinance No. 12-107 (12).

Under these definitions, "non-transient" was defined exclusively in objective terms as occupancy for more than a year, regardless of intent, whereas "transient" was based exclusively on subjective intent, without regard to duration. Sandusky City Ordinance No. 17-088 (2017), amended that 2012 ordinance, in an effort to eliminate this inconsistency, but it failed to cure the constitutional deficiencies. Ordinance 17-088(2) defines "dwelling" as "a building occupied exclusively for non-transient residential use (including one family, two family, or multi-family buildings)," but the code no longer defines the term "non-transient." Instead, it only defines "transient occupancy," which means "to use, occupy or possess, or the use, occupancy, or possession of a dwelling or other living accommodations for a period of 30 consecutive calendar days or less." City Ordinance No. 17-088(12).

[3] Defendant/Appellant Douglass Ebner's properties are located in a residential area zoned for "one-family dwellings." Sandusky City Code 1129.03. At different times in this litigation, both City Ordinance No. 12-107 (2012), and City Ordinance No. 17-088 (2017) have been used against Mr. Ebner. However, neither should be enforced against him, because both are unconstitutional for failing to provide clear notice to property owners as to what is prohibited.

Under Ordinance No. 12-107 (2012), an occupancy qualifies as "non-transient"—and thus *lawful*—if the occupancy lasts at least one year. Yet an occupancy is unlawfully "transient" if the parties' *intention* is that the occupancy will be "temporary"—even though the Ordinance does not define the word "temporary." A renter might very well sign a year-long lease with the intention—in the Ordinance's words—"that the occupancy will be temporary." Such a person would occupy the property for at least 365 days, but her intention would be to live there only for a while, and move on after one year. It is unclear whether this occupancy would be legal or illegal.

The amendments contained in Ordinance No. 17-088 (2017) do little to cure these problems. That Ordinance defines "dwelling" as a property used "exclusively for non-transient residential use," and because "non-transient" is not defined under the new ordinance, it must mean the opposite of "transient," which the Ordinance defines as "use, occup[ancy], or possession … for a period of 30 consecutive calendar days or less," regardless of intent—and also regardless of the exchange of money. As a consequence a *homeowner* would be acting unlawfully if, for example, she fails to occupy her home for at least 30 *consecutive* days. If she spends a month away on business, and hires a house-sitter or a pet-sitter to remain in the home during that time—or even allows a friend to live there *for free* during her absence to keep an eye on the property—she would be in violation of the Ordinance.

Officials in other cities have adopted similarly incoherent anti-home-sharing ordinances, which has resulted in arbitrary and unpredictable enforcement. For example, Honolulu recently adopted an ordinance that prohibits rentals that are "provided for compensation to transient occupants for less than thirty days," Honolulu Land Use Ord. § 21-10.1 (2016). City officials have at times taken the extreme position that to be in compliance with the ordinance, guests must physically occupy the rented property *every moment* of their stay—which must be more than thirty days. *See* Compl. ¶ 23, *Kokua Coal. v. Honolulu Dep't of Planning and Permitting*, Civ. No. 1:16-cv-00387-DKW-RLP (D.

Haw. Jul 11, 2016)[4]. At other times, officials have agreed that guests can come and go from the home, so long as the home is rented exclusively to those guests for at least thirty days. *Id.* Because it is unclear whether "provided for" means "rented exclusively" or "occupied continuously," officials have enforced the ordinance in an inconsistent manner, making it impossible for homeowners to know whether or not they are in violation. Worse, homeowners who are accused of violating the ordinance bear the burden of proving they are in compliance, rather than government proving that the homeowner broke the law, *see id.* ¶¶ 40–42, in the same way that Sandusky homeowners are forced to overcome a presumption of transiency under Ordinance No. 12-107(12). Consequently, Honolulu homeowners, just like Sandusky homeowners, are guilty until proven innocent, with no way to know in advance which of their actions are unlawful.

Similarly confusing anti-home-sharing ordinances have been struck down by state courts. For example, Nashville's anti-home-sharing ordinance exempted hotels, bed and breakfasts, boarding houses, and motels from its three percent rental cap on short-term rentals. However, the definitions overlap and are so confusing that it is impossible for an owner to tell she is running a "short-term rental," in which case she is subject to the rental cap, or a "hotel," "bed and breakfast," or "boarding house," in which case she is exempt. *See* Compl., *Anderson v. Nashville*, No. 15-CV-3212 (Tenn Cir. Ct. Aug. 26, 2015).[5] A Tennessee trial court enjoined these arbitrary and incoherent provisions of the Nashville ordinance. *See* Order, *Anderson v. Nashville*, No. 15-CV-3212 (Tenn. Cir Ct. Oct. 28, 2016).[6]

A law is unconstitutionally vague if it is written in terms so complicated or confusing that persons of ordinary intelligence are not given a reasonable opportunity to understand what it prohibits,

[4] https://drive.google.com/file/d/1IzjAzRqfMNLsWzBGrmeTNROSGPfDPqDO/view.

[5] https://drive.google.com/file/d/1cfnwDV2g3JXoRt342spSyfUz5yxiEX3D/view.

[6] https://drive.google.com/file/d/1HppXqqJeubjzZp8yNOv3KhtW5KSKplCD/view.

or if it authorizes arbitrary and discriminatory enforcement. *In re D.B.*, 129 Ohio St. 3d 104, 2011-Ohio-2671, 950 N.E.2d 528 ¶ 22. Vague laws are a danger to the citizenry and a boon to those in power, who can exploit that vagueness to pick winners and losers arbitrarily. Political leaders are sometimes quite open about their intent to arbitrarily enforce this "discretion." New York City officials, for example, recently tried to assure the public that they will only enforce that city's vague and extreme anti-homesharing law "against bad actors." Eric Boehm, *Airbnb Drops Lawsuit Against New York's Anti-Free-Speech Homesharing Law,* Reason (Dec. 6, 2016).[7] But who qualifies as a "bad actor"? Enforcement authorities decide that themselves, by arbitrarily and discriminatorily choosing whom to enforce the law against. But this "impermissibl[e] delegat[ion] [of] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis" is exactly the constitutional problem with vagueness. *Grayned*, 408 U.S. at 108–09. *See also In re McDaniel Motor Co.*, 116 Ohio App. 165, 171, 187 N.E.2d 418 (3rd Dist. 1962) ("Where a zoning ordinance permits officials to grant or refuse permits without the guidance of any standard, but according to their own ideas, it does not afford equal protection." (quoting *Taylor v. Moore,* 154 A. 799, 802 (1931)).

Vague ordinances like Sandusky's can also be exploited for improper purposes, such as the desires of locals to keep visitors away. Indeed, local officials have often used this excuse to target politically unpopular groups or individuals. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977). When local officials decide what a neighborhood should "look like," they frequently—sometimes unconsciously—decide that it should look like *them,* and not like a disfavored minority group. *See, e.g., Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

[7] https://reason.com/blog/2016/12/06/airbnb-wont-keep-fighting-new-yorks-anti.

That was one of the concerns that motivated the Ohio Supreme Court in *Norwood, supra,* to hold that a city's definition of "deteriorating area" in its redevelopment statute was void for vagueness. 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 10. Redevelopment through eminent domain is frequently a source of abuse, because it was "a standardless standard," *id.* ¶ 98, and one that has frequently resulted in discriminatory enforcement against individuals or groups that majorities, or politically influential residents deem "undesirable." Vague land use restrictions, no less than eminent domain statutes, foster and encourage NIMBY-ism, to the detriment of Sandusky property owners.

Vague legal definitions or enforcement standards mean that the punishable act is in the eye of the beholder, which enables officials to selectively enforce the law and subject citizens to bureaucrats' whims. The consequence is often to exclude "undesirables" either explicitly, or by picking and choosing whom to enforce the prohibitions against, in an ad hoc and often biased fashion. Failing to abide by objective, predictable standards breeds uncertainty and paves the way for special interest groups—such as competitor hotels or meddlesome neighbors—to hijack the enforcement process.

II. Upholding vague ordinances can have dire consequences for property rights.

Allowing Sandusky to enact and enforce vague restrictions not only offends due process—it also has consequences for property and privacy rights. Sandusky property owners have a constitutionally protected right to security in their homes and property under the Fourth Amendment. Private residences receive the greatest constitutional protection against unreasonable searches, *See v. City of Seattle*, 387 U.S. 541, 543 (1967) ("a search of private houses is presumptively unreasonable"), although the Supreme Court has held that the Amendment also applies to guests "in … place[s] other than [their] own home[s]." *Minnesota v. Olson*, 495 U.S. 91, 97–98 (1990) (citations omitted).[8]

[8] Indeed, the Supreme Court has categorically held that Fourth Amendment protections extend to guests in hotels. *Hoffa v. United States,* 385 U.S. 293, 301 (1966).

Yet enforcing vague and confusing restrictions against home-sharing inevitably offends these essential privacy rights, at a minimum because determining whether an occupant is a homeowner or a guest requires officials to inquire into—or invade—a person's private home. Sandusky's ordinance invites similar abuses, especially given that in some cases, homeowners who welcome guests (or who own multiple homes) must overcome a presumption of transiency. *See* City Ordinance No. 12-107(12). In order to determine whether a guest or homeowner is violating its anti-home-sharing ordinance, Sandusky officials will need to investigate who is occupying the home, for how long, and for what reason.

These investigations are already happening in cities with regulations similar to Sandusky's. For example, Honolulu's vague anti-home-sharing ordinances, referenced above, have already led local officials to intrude on the privacy rights of homeowners and guests. To enforce Honolulu's ordinance, officials have cut across beaches, climbed over closed gates, and entered private yards and homes without search warrants or the owners' permission in order to "investigate" whether a home is being rented in violation of the ordinance. *See* Compl. ¶¶ 21–22, *Kokua Coal.*. The City of Miami Beach, Florida, has sent uniformed enforcement officers armed with bodycams out into the night to barge in on tourists suspected of illegally renting private homes. Kyra Gurney and Taylor Dolven, *Huge Fines, Midnight Busts: Inside Miami Beach's War on Short-term Rentals*, Miami Herald (March 11, 2019).[9] And in Chicago, home-sharers are required to open their homes to city inspectors "at any time and in any manner," without a warrant or even a reason, and regardless of whether guests are even present in the home. Chi. Muni. Code §§ 4-6-300(e)(1), 4-16-230 (emphasis added). Each of these enforcement schemes is the subject of pending litigation.

[9] https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article226269295.html.

Enforcing these ordinances not only inevitably leads to intrusions on people's privacy rights; ironically, it can actually undermine a city's ability to tackle real nuisances. Indeed, the Nashville police department opposed having to enforce the City's anti-home-sharing laws against peaceful renters, because it prevents them from fulfilling the most important parts of their job. Police better serve the community by "proactively working to deter criminal activity," and "respond[ing] to quality of life issues such as vehicles blocking rights of way and noise complaints," not snooping on unproblematic guests. Joey Garrison, *Nashville Police Opposed to Enforcing Airbnb Rules,* The Tennessean (Sept. 26, 2016).[10] Rather than expending countless time and resources (and threatening constitutional protections) enforcing confusing and inconsistent ordinances, Sandusky could easily retool its regulations to provide clarity and focus on putting a stop to genuine bad actors.

CONCLUSION

Because Sandusky's anti-home-sharing ordinances violate due process (and deprive people of essential property and privacy rights), they should not be enforced against homeowners like Mr. Ebner, and this Court should reverse the decision below. Doing so will respect an important principle of the rule of law: ensuring that regulations are clear so that homeowners know what behavior is lawful, and officials can enforce the city code consistently and fairly. Ruling in favor of Appellant on this issue will not deprive Sandusky officials of the tools they need to protect quiet, clean, and safe neighborhoods. The City can regulate effectively—and constitutionally—by enacting and enforcing clear rules about noise, traffic, and pollution, regardless of whether those problems are caused by an overnight guest or the homeowner himself.

[10] https://www.tennessean.com/story/news/2016/09/26/nashville-police-opposed-being-airbnb-rule-enforcers/91114720/.

Respectfully submitted this 10th day of October, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following parties on October 10, 2019 via e-mail, pursuant to App. R. 13(C)(6):

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