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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHORT TERM RENTAL ALLIANCE
OF SAN DIEGO,

Plaintiff,

v.

CITY OF SAN DIEGO,

Defendant.

Case No.: 22cv1831-L-BGS

**ORDER GRANTING IN PART
MOTION TO DISMISS AND
REMANDING ACTION TO STATE
COURT**

[ECF NO. 3]

Pending before the Court is a motion filed by the City of San Diego (“City”) to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). (ECF No. 3.) Plaintiff Short Term Rental Alliance of San Diego (“Alliance”) filed an opposition and the City replied. For the reasons which follow, the City’s motion is granted insofar as it seeks dismissal of claims alleged under federal law. the balance of the action is remanded to State Court.

I. Background

In its operative first amended complaint (ECF No. 2, “Compl.”) Alliance seeks to declare void and enjoin enforcement of the City’s Ordinances O-21305 and O-21464 insofar as they regulate short-term residential rentals not occupied by the host. Alliance is an advocacy and education organization whose members include landlords and hosts

1 with at least one single-family short-term rental property located in the “San Diego
2 Coastal Overlay.” (Compl. ¶¶ 2-3.)

3 On April 14, 2021, the City adopted Ordinance No. O-21305. (Compl. ¶ 7; *see*
4 *also* ECF No. 3-2 through 7, “City RJN,” Ex. 1 (“O-21305”).)¹ Among other things, O-
5 21305 regulates short-term rentals by means of a four-tier license system. (Compl. ¶ 20;
6 O-21305 at San Diego Municipal Code (“SDMC”) §§ 510.0103 and 510.0104.) The City
7 provides an unlimited number of Tier One and Tier Two licenses, which apply when the
8 rental is in the host’s primary residence. (Compl. ¶ 20; O-21305 at SDMC § 510.0104(b)
9 and (c).) On the other hand, the number of available Tier Three and Tier Four licenses is
10 limited. These licenses apply to whole-home short-term rentals with no host present.
11 (Compl. ¶ 20; O-21305 at SDMC § 510.0104(d) and (e).) Tier Four licenses are required
12 within the Mission Beach Community Planning Area, while Tier Three licenses are
13 required in other areas. (Compl. ¶ 20; O-21305 at SDMC § 510.0104(d) and (e).)

14 In part, O-21305 amended the City’s certified Local Coastal Program.
15 Accordingly, review by the Coastal Commission (“Commission”) was required to certify
16 whether the amendments were consistent with the Coastal Act. (Compl. ¶¶ 7-8; City RJN
17 Ex. 2 (“O-21464”).) The Commission approved the amendments with changes. These
18 changes were adopted on June 27, 2022, as Ordinance No. O-21464. (Compl. ¶¶ 7-8; O-
19 21464.)

20 Alliance alleges that O-21305, as amended for the Coastal Overlay Zone by O-
21 21464 (collectively “Ordinance”), violates the United States and California Constitutions,
22 the Fair Housing Act, 42 U.S.C. § 3604, and California corporation statutes. The Court
23 has federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction
24 under 28 U.S.C. § 1367.

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28 ¹ The Court takes judicial notice of the ordinances found at City’s RJN Exs. 1 and 2.
Fed. R. Evid. 201.

1 The City filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) for lack
2 of Article III standing and Rule 12(b)(6) for failure to state a claim.² For the reasons
3 which follow, the City’s motion is granted insofar as the City seeks dismissal of federal
4 claims.

5 **II. Discussion**

6 **A. Article III Standing**

7 “[L]ack of Article III standing requires dismissal for lack of subject matter
8 jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” *Maya v. Centex Corp.*, 658
9 F.3d 1060, 1068 (9th Cir. 2011).³ Article III requires federal courts to satisfy themselves
10 that the plaintiff has such a personal stake in the outcome of the controversy as to warrant
11 federal jurisdiction. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

12 To establish Article III standing a plaintiff must show three elements:

- 13 (1) [the plaintiff] has suffered an “injury in fact” that is (a) concrete and
- 14 particularized and (b) actual or imminent, not conjectural or hypothetical; (2)
- 15 the injury is fairly traceable to the challenged action of the defendant; and
- 16 (3) it is likely, as opposed to merely speculative, that the injury will be
redressed by a favorable decision.

17 *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000); *see*
18 *also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Lujan v. Defenders of Wildlife*,
19 504 U.S. 555, 560-61 (1992). Since the elements of standing

20 are not mere pleading requirements but rather an indispensable part of the
21 plaintiff’s case, each element must be supported in the same way as any
22 other matter on which the plaintiff bears the burden of proof, i.e., with the

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26 ² All references to Rule or Rules are to the Federal Rules of Civil Procedure.

27 ³ Unless otherwise noted, internal quotation marks, ellipses, brackets, citations, and
28 footnotes are omitted from citations.

1 manner and degree of evidence required at the successive stages of the
2 litigation.

3 *Lujan*, 504 U.S. at 561; *see also Spokeo*, 578 U.S. at 338; *Maya*, 658 F.3d at 1068.

4 The moving party can make either a “facial” or “factual” attack on jurisdictional
5 allegations. *Harris v. KM Indus., Inc.*, 980 F.3d 694, 699 (9th Cir. 2020); *Salter v.*
6 *Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020). A facial attack accepts the
7 truth of the pleading allegations but asserts that they are insufficient on their face to
8 invoke federal jurisdiction, while a factual attack contests the truth of the allegations
9 themselves. *See, e.g., Harris*, 980 F.3d at 699. By relying on evidence rather than
10 pleadings in support of its arguments (*see City RJN Exs. 3, 4*), the City has mounted a
11 factual rather than a facial attack. Consistently, Alliance relies on evidence in its
12 opposition. (*See ECF No. 7-2, “Tavares Decl.”*)

13 The City argues that Alliance lacks organizational standing to sue on its own
14 behalf or associational⁴ standing to sue on behalf of its members. Alliance does not
15 dispute that it lacks organizational standing. It opposes only on the ground that it
16 possesses associational standing. (*See ECF No. 7, “Opp’n.”* at 10-11.)

17 An organization has standing to sue on behalf of its members where: (a) its
18 members would otherwise have standing to sue in their own right; (b) the
19 interests it seeks to protect are germane to the organization's purposes; and
20 (c) neither the claim asserted nor the relief requested requires the
participation of individual members in the lawsuit.

21 *Am. Diabetes Ass’n v. U.S. Dep’t of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019). The
22 City argues that the interests Alliance seeks to protect with some of the claims alleged in
23 this action are not germane to its corporate purpose, and that Alliance members would
24 lack Article III standing because none has suffered an injury-in-fact.

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27 ⁴ The case law often refers to “representational” standing rather than “associational”
28 standing used in the City’s brief. (*Cf., e.g., Am. Diabetes Ass’n v. U.S. Dep’t of the Army*,
938 F.3d 1147, 1155-56 (9th Cir. 2019), *with ECF No. 3-1, “Mot.”* at 12.)

1 The Court first turns to the issue whether the claims asserted in the Complaint are
2 germane to Alliance’s corporate purpose. Alliance was incorporated as a nonprofit
3 corporation under California Nonprofit Mutual Benefit Corporation Law. (City RJN Ex.
4 4, “Am. Articles.”)⁵ Its Certificate of Amendment of Articles of Incorporation, dated
5 April 7, 2021, states that Alliance’s purpose is to “Educate & Advocate for short term
6 rental owners & operators [*sic*].” (Am. Articles.)

7 All causes of action alleged in the Complaint, apart from the second cause of
8 action, are based on the contention that the Ordinance unconstitutionally discriminates
9 among different groups of property owners. In this regard, Alliance seeks to protect
10 interests that are germane to its corporate purpose of advocating for short-term rental
11 owners and operators.

12 The City argues that Alliance lacks standing to bring its second cause of action
13 alleging racial discrimination on behalf of guests and tenants, as their interests are not
14 “germane” to the corporate purpose of educating and advocating for short-term owners
15 and operators. Alliance counters that on September 23, 2022, a few days before filing
16 this action, it amended its bylaws sufficiently to render germane the interests of guests
17 and tenants. The amended bylaws read in pertinent part as follows:

18 Whereas, the purposes for which the Corporation is formed are as set forth
19 in the Articles of Incorporation, and

20 Whereas, these purposes shall be construed broadly, and consistent with the
21 foundational goals of the Corporation, its founding members, and its
22 members,

23 Accordingly, ... the Board hereby resolves and further clarifies that the
24 purposes of the Corporation include (but are not limited to) preservation,
25 protection, and enforcement of the Constitutional ... and other legal rights of
26 its members and similarly situated individuals, particularly regarding
27 affordable access to San Diego beaches and to prevent discrimination and
28 or disparate impact upon guests and or renters desiring short term (and

5 The Court takes judicial notice of the articles of incorporation. Fed. R. Evid. 201.

1 longer term) accommodations arising from or based upon their state or
2 country of permanent residence, their race/ethnicity/national origin/sexual
3 orientation, or any other factor.

4 (Tavares Decl. Ex. 1.)

5 Alliance has alleged no facts showing that guests and tenants are “similarly
6 situated” to owner- and operator-members as required by the amended bylaws.

7 Moreover, the amended bylaws are inconsistent with the statement of purpose in
8 Alliance’s articles of incorporation.

9 Under California Nonprofit Corporation Law, “[t]he bylaws may contain any
10 provision[] not in conflict with ... the articles.” Cal. Corp. Code § 7151(c). The amended
11 bylaws seek to broaden Alliance’s purpose to advocacy on behalf of tenants and guests.

12 This contradicts the articles, which state in pertinent part as follows:

13 The specific purpose of this corporation is to Educate & Advocate for short
14 term rental owners & operators. [*sic*]

15 Notwithstanding any of the above statements of purposes and powers, this
16 corporation shall not, except to an insubstantial degree, engage in any
17 activities or exercise any powers that are not in furtherance of the specific
18 purposes of this corporation.

19 (Am. Articles.)

20 Alliance has not shown that advocating on behalf of guests and tenants is germane
21 to its corporate purposes. It therefore lacks associational standing for its second cause of
22 action alleging disparate impact on “Hispanics and African Americans.” (Compl. ¶¶ 32-
23 36.) The second cause of action is therefore dismissed without prejudice for lack of
24 subject matter jurisdiction.

25 Rule 15 advises leave to amend shall be freely given when justice so requires. Fed.
26 R. Civ. P. 15(a)(2). “This policy is to be applied with extreme liberality.” *Eminence*
27 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

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1 In the absence of any apparent or declared reason – such as undue delay, bad
2 faith or dilatory motive on the part of the movant, repeated failure to cure
3 deficiencies by amendments previously allowed, undue prejudice to the
4 opposing party by virtue of allowance of the amendment, futility of the
5 amendment, etc. – the leave sought should, as the rules require, be freely
6 given.

6 *Foman v. Davis*, 371 U.S. 178, 182 (1962).

7 Article III standing must be present from the inception of the action, *Gonzalez v.*
8 *U.S. Immigration and Customs Enforcement*, 975 F.3d 788, 803 (9th Cir. 2020), until the
9 end, *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016). Because it is apparent from
10 Alliance’s own corporate records that it lacked standing when it filed this lawsuit,
11 granting leave to amend the complaint to allege standing for the second cause of action
12 would be futile.

13 As to the remaining causes of action, the City further argues that none of the
14 owner- and operator-members would have standing to assert them in their own right
15 because Alliance has not shown that any have suffered an injury-in-fact.

16 To establish injury in fact, a plaintiff must show that he or she suffered an
17 invasion of a legally protected interest that is concrete and particularized and
18 actual or imminent, not conjectural or hypothetical.

19 For an injury to be particularized, it must affect the plaintiff in a personal
20 and individual way.

21 *Spokeo*, 578 U.S. at 339.

22 When, as here, the plaintiff seeks to invalidate and forestall enforcement of a
23 statute through injunctive and declaratory relief, he or she must “assert an injury that is
24 the result of a statute’s actual or threatened *enforcement*, whether today or in the future.”
25 *California v. Texas*, 141 S.Ct. 2104, 2114 (2021) (emphasis in original); *see also Babbitt*
26 *v. Farm Workers*, 442 U.S. 289, 298 (1979) (“A plaintiff who challenges a statute must
27 demonstrate a realistic danger or sustaining a direct injury as a result of the statute’s
28 operation or enforcement.”). “In the absence of contemporary enforcement, ... a plaintiff

1 ... must show that the likelihood of future enforcement is substantial.” *California*, 141
2 S.Ct. at 2114. He or she “must be able to show, not only that the statute is invalid, but
3 that he [or she] has sustained or is immediately in danger of sustaining some direct injury
4 as the result of its enforcement.” *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)
5 (quoted in *California*, 141 S.Ct. at 2114). When the plaintiff himself is an “object” of a
6 challenged government action, “there is ordinarily little question that the action ... has
7 caused him injury, and that the judgment preventing ... the action will redress it.” *Lujan*,
8 504 U.S. at 561-62.

9 Here, one of the objects of the Ordinance are short-term rental properties in the
10 Coastal Overlay Zone. The Ordinance requires that short-term rentals not occupied by a
11 host apply for a limited number of Tier Three or Four licenses which are awarded
12 according to a lottery if the number of applications exceeds the number of licenses. (O-
13 21305 at SDMC § 510.0106(c); O-21464 at SDMC § 510.0104.) Furthermore, a host
14 may hold only one license at a time. (O-21305 at SDMC §§ 510.0104(a), 510.0106(a).)
15 Alliance argues that the Ordinance injures those short-term rental owners who own more
16 than one short-term rental property in the City, as well as those who previously were not
17 subjected to a license lottery and fail to secure a license under the new lottery system.
18 According to Alliance, at least thirty of its members were denied a license after the initial
19 lottery. (Tavares Decl. ¶ 4.)

20 Alliance has sufficiently shown that its owner- and operator-members will be
21 directly affected by the Ordinance. Furthermore, “[i]ndividualized proof from the
22 members is not required where, as here, declaratory and injunctive relief is sought rather
23 than monetary damages.” *Ass. General Contractors of Am. v. Metropolitan Water Distr.*
24 *of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir. 1998). Alliance has sufficiently established
25 Article III standing at this stage of the case for purposes of all its claims except the
26 second cause of action.

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1 **B. Failure to State a Claim**

2 The City argues that none of the claims alleged in the Complaint are sufficient
3 under Rule 12(b)(6) to survive the pleading stage. A motion under Rule 12(b)(6) tests the
4 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

5 Dismissal is warranted where the complaint lacks a cognizable legal theory.
6 *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).
7 Alternatively, a complaint may be dismissed if it presents a cognizable legal theory yet
8 fails to plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.*,
9 749 F.2d 530, 534 (9th Cir. 1984).

10 Generally, to plead essential facts a plaintiff must allege only “a short and plain
11 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. Proc.
12 8(a)(2); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiff
13 must “plead[] factual content that allows the court to draw the reasonable inference that
14 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009). Plaintiff’s allegations must provide “fair notice” of the claim being asserted and
16 the “grounds upon which it rests.” *Bell Atl. Corp.*, 550 U.S. at 555.

17 In reviewing a Rule 12(b)(6) motion, the Court must assume the truth of all factual
18 allegations and construe them most favorably to the nonmoving party. *Huynh v. Chase*
19 *Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006). Legal conclusions need not
20 be taken as true merely because they are couched as factual allegations. *Bell Atl. Corp.*,
21 550 U.S. at 555. Similarly, “conclusory allegations of law and unwarranted inferences
22 are not sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139
23 F.3d 696, 699 (9th Cir. 1998).

24 The City moves to dismiss all of Alliance’s remaining claims. In all instances,
25 Alliance attacks the Ordinance only with respect to the Coastal Overlay. (*See, e.g.*,
26 Compl. at 15.) Alliance requests a declaration that the Ordinance is void and
27 unconstitutional on its face and as applied and seeks an injunction against enforcement.
28 (*Id.*)

1 1. Dormant Commerce Clause

2 Alliance alleges that the Ordinance discriminates between Tier One and Two
3 licenses for owner-occupied rentals and Tier Three and Four licenses for not owner-
4 occupied rentals. (Compl. ¶¶ 38, 39.) Alliance claims that this “constitutes prima facie
5 discrimination against out-of-state property owners” in violation of the dormant
6 Commerce Clause of the United States Constitution. (*Id.* ¶¶ 40, 43.) Alliance contends
7 the Ordinance violates the dormant Commerce Clause on its face and as applied. (*Id.* ¶
8 45.)

9 A facial challenge requires the plaintiff to meet a high burden of establishing “that
10 no set of circumstances exists under which the Ordinance would be valid.” *Rosenblatt v.*
11 *City of Santa Monica*, 940 F.3d 439, 444 (9th Cir. 2019). Conversely, an as-applied
12 attack does not necessarily challenge the entire statute, focusing instead on a subset of its
13 applications or application to a specific factual circumstance, “under the assumption that
14 the court can separate valid from invalid subrules or applications.” *Hoye v. City of*
15 *Oakland*, 653 F.3d 835, 857 (9th Cir. 2011).

16 Because the difference between an as-applied and a facial challenge lies only
17 in whether all or only some of the statute's subrules (or fact-specific
18 applications) are being challenged, the substantive legal tests used in the two
19 challenges are invariant.

20 *Id.*

21 Alliance’s theory of the case is that Tier One and Two licenses are granted
22 automatically “for homes where the owner also uses the property as their primary
23 residence.” (Compl. ¶ 39.) On the other hand, Tier Three and Four licenses for not
24 owner-occupied short-term rentals are limited in number, are awarded by lottery, and are
25 limited to one license per owner. (*Id.* ¶ 38.) Attempts by owners to license more than
26 one property were rejected. (*Id.* ¶ 41.) Alliance claims that the difference between Tier
27 One and Two licenses on one hand, and Tier Three and Four licenses on the other hand,
28 more than incidentally benefits in-state owners while burdening out-of-state owners

1 because “by definition no out-of-state short-term rental owners can avail themselves of
2 TIER I or TIER II license [*sic*].” (*Id.* ¶ 43.) Alliance contends that there is no legitimate
3 local purpose for the distinction and that non-discriminatory alternatives exist to achieve
4 the same goals. (*Id.* ¶ 44.)

5 In support of dismissal, the City relies on *Rosenblatt v. City of Santa Monica*, 940
6 F.3d 439 (9th Cir. 2019). *Rosenblatt* upheld a more restrictive ordinance against a
7 dormant Commerce Clause challenge and affirmed a Rule 12(b)(6) dismissal. The Court
8 finds it controlling.

9 *Rosenblatt* “prohibit[ed] property rentals of 30 days or less (vacation rentals) with
10 an exception for rentals where a primary resident remained in the dwelling[.]”
11 *Rosenblatt*, 940 F.3d at 442. Unlike the Ordinance here, which restricts the number of
12 Tier Three and Four licenses (*see* SDMC §§ 510.0104(d)-(e)), the *Rosenblatt* ordinance
13 prohibited such rentals outright. Alliance argues that the ordinances are “not identical.”
14 (Opp’n at 15.) The distinction, however, does not favor Alliance.

15 A two-step review applies to dormant Commerce Clause challenges to local
16 regulations:

17 [1] When a state statute directly regulates or discriminates against interstate
18 commerce, or when its effect is to favor in-state economic interests over out-
19 of-state interests, we have generally struck down the statute without further
20 inquiry. [2] When, however, a statute has only indirect effects on interstate
21 commerce and regulates evenhandedly, we have examined whether the
22 State's interest is legitimate and whether the burden on interstate commerce
23 clearly exceeds the local benefits.

23 *Rosenblatt*, 940 F.3d at 444.

24 The *Rosenblatt* ordinance did not fall within the first step of the inquiry because it
25 did not on its face regulate interstate commerce. Its only effect on interstate commerce
26 was to “make[] travel lodging in Santa Monica less accessible, available, and affordable.”
27 *Rosenblatt*, 940 F.3d at 445. The ordinance did not prohibit vacation rentals for Santa
28 Monica homes and penalized only conduct within Santa Monica. *Id.* at 445. Its

1 “vacation-rental ban” was therefore not a direct regulation of interstate commerce.” *Id.* at
2 446. The same is true here. Although the Ordinance has the potential through lottery to
3 restrict certain short-term rentals in San Diego, it does not directly regulate interstate
4 commerce.

5 The *Rosenblatt* ordinance also did not on its face discriminate against interstate
6 commerce. *Rosenblatt*, 940 F.3d at 448, 451. As Alliance here, *Rosenblatt* argued that
7 the ordinance discriminated against out-of-state property owners by “allowing only Santa
8 Monica residents to engage in short-term rentals.” *See id.* at 450. As here, the argument
9 was based on the exception for those short-term rentals where a primary resident was
10 present. *See id.* The argument was rejected because the *Rosenblatt* ordinance did not
11 require the primary resident to be the property owner; instead, the owner could authorize
12 or instruct a long-term tenant to remain on the property while a part of it is let out to a
13 short-term tenant. *Id.* at 450-51. Aside from not requiring that the property *owner*
14 occupy the property during short-term rental, the same requirement applied to all owners
15 equally, whether in-state or out-of-state. *Id.* at 451.

16 Much of Alliance’s Complaint is based on the same misconception as the
17 complaint in *Rosenblatt*. Contrary to Alliance’s contention, the Ordinance does not target
18 *owners*, whether they occupy the rental property or not. Instead, it distinguishes between
19 short-term rentals based on whether they are occupied by a *host*. A host is defined as “a
20 natural person who has the legal right to occupy the dwelling unit and to allow short-term
21 residential occupancy.” (SDMC § 510.0102.) As in *Rosenblatt*, the Ordinance does not
22 require that the property owner act as the host. While an owner may reside at the
23 property and act as the host, the owner may also authorize a long-term tenant to fulfill
24 that role.

25 Alliance’s remaining allegation that the Ordinance discriminates against interstate
26 commerce because it limits out-of-state owners to only one license application regardless
27 of how many properties they own (Compl. ¶ 41) is equally unavailing. The one license
28 limitation applies to *hosts* rather than owners. (SDMC § 510.0104(a) (“A host may only

1 hold one license at a time.”) (emphases omitted.) Furthermore, the same limitation
2 applies to all license applicants, including in-state property owners who own more than
3 one property they wish to rent. (*See id.* (“A license is required for all short-term
4 residential occupancy.” (emphases omitted).))

5 Alliance urges the Court to disregard *Rosenblatt* in favor of *Highnell-Stark v. City*
6 *of New Orleans*, 46 F.4th 317 (5th Cir. 2022), which declined to follow *Rosenblatt*. *Id.* at
7 326 n.16. *Highnell* held that the city’s residency requirement for short-term rentals
8 discriminated against interstate commerce. *Id.* at 326. It distinguished *Rosenblatt* by
9 noting that although the Santa Monica short-term rental ordinance “requir[ed] someone to
10 live on the property full time, ... that person did not need to be the owner of the property.”
11 *Id.* n.16 (citing *Rosenblatt*, 940 F.3d at 450-51). As discussed above, the Ordinance here
12 also does not require that the property owner act as the host and does not impose a
13 residency requirement on the property owners. *Highnell* is therefore not persuasive. For
14 the foregoing reasons, the Ordinance does not discriminate against interstate commerce.

15 Finally, the *Rosenblatt* ordinance did not on its face fall within the second step of
16 the dormant Commerce Clause inquiry. *Rosenblatt*, 940 F.3d at 451-53. At the second
17 step, the Court considers whether an ordinance with indirect effects on interstate
18 commerce is based on legitimate local interest and whether the burden on interstate
19 commerce clearly exceeds local benefits. *Id.* at 444, 451. An ordinance is upheld if “it
20 effectuates a legitimate local public interest unless the burden imposed on interstate
21 commerce is *clearly excessive* in relation to the putative local benefits.” *Id.* at 451
22 (emphasis in orig.). At the pleading stage, “the plaintiffs need to plead specific facts to
23 support a plausible claim that the ordinance has a discriminatory effect on interstate
24 commerce.” *Id.* at 452.

25 The Ordinance includes extensive legislative findings and a detailed statement of
26 purpose. One stated purpose is to preserve the available housing inventory. In this
27 regard the City found that “[a]pproximately 16,000 dwelling units [were] being used for
28 short-term residential occupancy (‘STRO’), *i.e.*, ‘occupancy of less than a month,’

1 preventing the use of those units for permanent housing[.]” (O-21305 at 2.) “[T]he City
2 desire[d] to preserve its available housing stock[.]” (*Id.*) It found that there was a
3 difference when the dwelling unit offered for short-term rental was occupied by the host
4 because “home sharing,” *i.e.*, STRO in the host’s primary residence, “does not displace
5 the primary resident from the premises and does not cause as significant a removal of
6 existing housing stock from the market and negatively impact the vacancy rate.” (*Id.* at
7 3.) Preservation of housing stock is a proper exercise of the City’s police power in
8 regulating land use. *See Rosenblatt*, 940 F.3d 442, 443.

9 Another stated reason for distinguishing between host-occupied and not host-
10 occupied short-term rentals is “to preserve ... the quality of life in residential
11 neighborhoods and to alleviate the impacts to residential neighborhoods caused by STRO
12 [¶] such as those relating to noise, trash collection, and parking.” (O-21305 at 2.) The
13 City “determined that most negative impacts to neighborhood communities arise from
14 whole-home STRO [but] the impacts are less when the STRO occurs within the primary
15 residence of the host.” (*Id.* at 3.) Preservation of the neighborhood character and quality
16 of life are legitimate purposes for government regulation. *See Rosenblatt*, 940 F.3d at
17 443; *see also Nelson v. City of Selma*, 881 F2d 836, 839 (9th Cir. 1989).

18 Alliance’s allegation that these are not legitimate local purposes (Compl. ¶ 44) are
19 unsupported by law, and its conclusory claims that “ample” non-discriminatory
20 alternatives exist (*id.* ¶¶ 44, 28) are insufficient. “Courts may not assess the benefits of a
21 state law or the wisdom in adopting it” and must “presume the law serves the city’s
22 legitimate interests” unless the plaintiff plausibly alleges that the law imposes a
23 significant burden on interstate commerce. *Rosenblatt*, 940 F.3d at 452.

24 For the foregoing reasons, Alliance has not alleged that the Ordinance on its face
25 violates the dormant Commerce Clause.

26 //

1 Alliance also challenges the Ordinance as applied in the license application
2 process:

3 [T]he online [license] application portal opened ... on or around October 3rd,
4 2022, and applicants were only permitted to submit a single license
5 application for a single property. Any applicant seeking licenses for more
6 than one property, including out of state [*sic*] owners, ... by operation of the
7 facial terms of the ordinance [*sic*], and by the actual implementation of the
8 application system, had any attempt to procure licenses for multiple
9 properties rejected and or refused.

10 (Compl. ¶ 41; *see also id.* ¶ 9.) The City’s application of the Ordinance through the
11 license application process does not deviate from its written provisions. Alliance
12 concedes this. (*See id.* ¶ 9 (“pursuant to the express provisions of the ORDINANCE”).)
13 Alliance’s claim that the Ordinance as applied violates the dormant Commerce Clause
14 therefore fails on the same grounds as its facial challenge.

15 Accordingly, Alliance has not stated a claim for violation of the dormant
16 Commerce Clause of the United States Constitution. Based on the language of the
17 Ordinance and its application through the license lottery process, any amendment of this
18 claim is rendered futile by *Rosenblatt*. The claim is therefore dismissed without leave to
19 amend.

20 2. Inverse Condemnation

21 Alliance alleges that the Ordinance interferes with the owners’ right to use their
22 property as short-term rentals and “deprive[s them] of their ability to secure a reasonable
23 rate of return” without any compensation in violation of the Takings Clause of the Fifth
24 Amendment of the United States Constitution. (Compl. ¶¶ 54-56.) Alliance’s theory is
25 that the Ordinance effectuates a non-categorical taking. (*Id.* ¶ 56.) The City argues that
26 the claim should be dismissed because Alliance cannot allege the facts necessary to state
27 the claim.

28 The text of the Fifth Amendment ... requires the payment of compensation
whenever the government acquires private property for a public purpose,

1 whether the acquisition is the result of a condemnation proceeding or a
2 physical appropriation. But the Constitution contains no comparable
3 reference to regulations that prohibit a property owner from making certain
4 uses of her private property.

5 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S.
6 302, 321-22 (2002). Nevertheless, “when a regulation deprives an owner of *all*
7 economically beneficial uses of his land” the taking is referred to as “categorical” and
8 compensation is mandatory. *Id.* at 330 (2002); *see also id.* at 322-23.

9 “But a government regulation that merely prohibits ... certain private uses ... does
10 not constitute a categorical taking.” *Tahoe-Sierra Preservation Council*, 535 U.S. at 322-
11 23. When a regulatory taking is “[a]nything less than a complete elimination of value, or
12 a total loss,” *i.e.*, non-categorical, the analysis “entails complex factual assessments of the
13 purposes and economic effects of government actions” as set forth in *Penn Central*
14 *Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *Id.* at 323, 330.

15 Alliance argues that this makes the *Penn Central* inquiry an “evidentiary” matter
16 improper for disposition at the pleading stage. This argument is unavailing in light of
17 Ninth Circuit authority to the contrary. *See Hotel & Motel Ass’n of Oakland v. City of*
18 *Oakland*, 344 F.3d 959, 966 (9th Cir. 2003) (affirming dismissal on the pleadings);
19 *Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1399 (9th Cir. 1993) (affirming dismissal
20 for failure to state a claim).

21 *Penn Central* instructs the courts to consider “[1] the regulation's economic impact
22 on the claimant, [2] the extent to which the regulation interferes with distinct investment-
23 backed expectations, and [3] the character of the government action.” *Colony Cove*
24 *Properties, LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018). “[T]he first two
25 *Penn Central* factors are the most important.” *Id.* at 454 n.9 (citing *Lingle v. Chevron*
26 *U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005)).

27 As relevant to the first *Penn Central* factor, Alliance alleges that the Ordinance
28 deprives property owners “of their ability to secure a reasonable rate of return” on their

1 property. (Compl. ¶ 55.) It argues that that a loss of income or profits is sufficient to
2 meet the economic impact factor under *Penn Central*.

3 Although a property owner may rely on lost income or profits to show that a
4 regulation diminished property value, an allegation (or even proof) of income loss alone
5 is not sufficient. *Colony Cove Properties*, 888 F.3d at 451. “[T]he mere loss of some
6 income because of regulation does not itself establish a taking. Rather, economic impact
7 is determined by comparing the total value of the affected property before and after the
8 government action.” *Id.* Alliance does not allege that any of the affected properties have
9 diminished in value. This alone is sufficient to find that Alliance has failed to allege the
10 requisite economic impact.

11 Moreover, “[n]ot every diminution in property value caused by a government
12 regulation rises to the level of an unconstitutional taking.” *Colony Cove Properties*, 888
13 F.3d at 451. Courts “start from the premise that the *Penn Central* factors seek to identify
14 regulatory actions that are functionally equivalent to the classic taking in which
15 government directly appropriates private property or ousts the owner from his domain[,]”
16 and focus on “the extent of the interference with rights in the parcel as a whole.” *Id.* at
17 451, 450. If “an owner possesses a full ‘bundle’ of property rights, the destruction of one
18 ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its
19 entirety.”⁶ *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). The Ordinance
20 diminishes less than one “strand” of property rights. It does not take away the owners’
21 right to rent out the property but merely imposes conditions on short-term rentals.
22 Accordingly, the first *Penn Central* factor weighs against finding that Alliance has stated
23 a takings claim.

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27 ⁶ “Although no litmus test determines whether a taking occurred, ... diminution in
28 property value because of governmental regulation ranging from 75% to 92.5% does not
constitute a taking.” *Colony Cove Properties*, 888 F.3d at 451.

1 As to the second *Penn Central* factor, Alliance alleged that historically many
2 homes in the Coastal Overlay area of San Diego have been used as short-term rentals and
3 that many owners purchased property in the area with the expectation of earnings from
4 short-term rental. (Compl. ¶¶ 50, 52.)

5 “To form the basis for a taking claim, a purported distinct investment-backed
6 expectation must be objectively reasonable.” *Colony Cove Properties*, 888 F.3d at 452.
7 Even reliance on prior experience and court decisions may not amount to an objectively
8 reasonable expectation. *See id.* (finding no objectively reasonable investment-backed
9 expectations despite two decades of experience in the same municipality and favorable
10 appellate case citations). Furthermore, “[u]nilateral expectations ... cannot form the basis
11 of a claim that the government had interfered with property rights.” *Bridge Aina Le’A,*
12 *LLC v. Hi. Land Use Comm’n*, 950 F.3d 610, 633-34 (9th Cir. 2020). “[W]hat is relevant
13 and important in judging reasonable expectations is the regulatory environment at the
14 time of the acquisition of the property.” *Id.* at 634.

15 The City argues that before the Ordinance short-term rentals were prohibited. As a
16 “permissive zoning ordinance,” the municipal code prohibited any use that was not
17 expressly allowed, and because the municipal code did not address short-term rentals,
18 they were prohibited. (ECF No. 3, Mot. at 19, 22.) This argument is entirely based on a
19 memorandum prepared by the City Attorney for the City Council in 2018. (City RJN Ex.
20 5 (“Memorandum”).) The City requests the Court to take judicial notice of the
21 Memorandum (City RJN at 5) and Alliance objects. Although the Memorandum is a
22 public record, and the Court can take judicial notice of its existence, the Court “cannot
23 take judicial notice of disputed facts [it] containe[s],” *Khoja v. Orexigen Therapeutics,*
24 *Inc.*, 899 F.3d 988, 999 (9th Cir. 2018), much less can the Court adopt as fact the City
25 Attorney’s opinions expressed therein.

26 The City also argues that the alleged investment-backed expectations were not
27 objectively reasonable because short-term rental regulation is not uncommon. Alliance
28 ignores the fact that other California municipalities have even more restrictive short-term

1 rental regulations including prohibition of short-term rentals. *See, e.g., Rosenblatt*, 940
2 F.3d 439; *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3rd 1579 (1991). A
3 reasonable investor would have adjusted his or her expectations considering the
4 possibility of same regulation in San Diego. *Cf. Colony Cove Properties*, 888 F.3d at 453
5 (investors must reasonably adjust their expectations).

6 Alliance does not address this authority but argues that the right to rent one’s
7 property by itself forms the basis of a reasonable investment-backed expectation. This
8 argument does not address the relevant regulatory environment and does not apply to the
9 Ordinance at issue, which is limited to short-term rentals. Accordingly, Alliance has not
10 alleged that its members had objectively reasonable investment-backed expectations
11 relative to short-term rentals when they purchased their properties.

12 Moreover, the second *Penn Central* factor does not only consider investment-
13 backed expectations but, assuming the expectations were objectively reasonable, *the*
14 *extent* to which regulation interfered with them. *Colony Cove Properties*, 888 F.3d at
15 450; *see also Bridge Aina Le’a*, 950 F.3d at 643 (limited duration of interference weighed
16 against finding a taking). The Ordinance does not prohibit short-term rentals but imposes
17 a requirement that a host be present or, alternatively, that the host obtain a license.
18 Assuming *arguendo* that Alliance members’ investment-backed expectations were
19 objectively reasonable, the extent to which the Ordinance interferes with them is limited.
20 Accordingly, the second *Penn Central* factor also weighs against finding that Alliance
21 has stated a takings claim.

22 Finally, the third *Penn Central* factor considers “the character of the government
23 action” at issue. *Colony Cove Properties*, 888 F.3d at 450. In this regard,

24 a taking may more readily be found when the interference with property can
25 be characterized as a physical invasion by government than when
26 interference arises from some public program adjusting the benefits and
27 burdens of economic life to promote the common good.

28 *Id.* at 454.

1 The short-term rental requirements imposed by the Ordinance cannot be
2 characterized as a physical invasion but a program adjusting the benefits and burdens of
3 economic life. As previously noted, the stated purpose of the Ordinance is to preserve
4 the housing stock and the quality of life in residential neighborhoods. (O-21305 at 2.)
5 Alliance argues that the Ordinance does not promote the common good because it applies
6 in any area, whether residential or commercial, and the impact of short-term renters is
7 similar to that of customers of commercial establishments. Although the Ordinance does
8 not state that it applies only to areas zoned for residential use, it is apparent that it does.
9 It is titled “Short-Term Residential Occupancy Regulations” (O-21305 at 2) and defines
10 “residential occupancy” as the use or possession of a “dwelling unit.” (SDMC §
11 510.0102.) A “dwelling unit” is used for “living purposes.” (*Id.* § 113.0103.)
12 Furthermore, Alliance does not address the additional purpose of preserving the existing
13 housing inventory. For the foregoing reasons, the third *Penn Central* factor weighs
14 against finding that Alliance has stated a takings claim.

15 Based on the foregoing, Alliance has not alleged sufficient facts under *Penn*
16 *Central* to state a takings claim on the face of the Ordinance. As previously discussed,
17 Alliance’s as-applied challenge is based on the application of the Ordinance in the
18 licensing lottery process, which operates “pursuant to the express provisions of the
19 ORDINANCE. [*sic*].” (Compl. ¶ 19.) Accordingly, Alliance’s as-applied challenge fails
20 for the same reason as its facial challenge.

21 Because the Ordinance imposes a hosting or license conditions on short-term
22 rentals rather than prohibiting them outright, leave to amend to state a takings claim
23 would be futile.

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1 3. Equal Protection and Substantive Due Process

2 Alliance claims that the Ordinance violates federal substantive due process rights
3 of hosts and non-natural persons because it is arbitrary and discriminatory⁷ (Compl. ¶
4 47), and the Equal Protection Clause of the United States Constitution because it
5 discriminates between owner-occupied and non-owner-occupied short-term rentals, and
6 between short-term rentals and hotels and motels in commercial zones (*id.* ¶¶ 26-30).
7 The City argues these claims should be dismissed.

8 Alliance did not respond to the City’s substantive due process argument.
9 Accordingly, this claim is dismissed as abandoned. *See Jenkins v. Riverside*, 398 F.3d
10 1093, 1095 n.4 (9th Cir. 2005). Alternatively, both claims are dismissed on the merits.

11 Alliance does not contend that its members are being discriminated against as a
12 part of a suspect or quasi-suspect class and admits that the rational basis scrutiny applies
13 to the Ordinance. (Opp’n at 17.) Because Alliance’s substantive due process and equal
14 protection claims are based neither on discrimination against a suspect or quasi-suspect
15 class nor on the deprivation of a fundamental right, the test for determining whether
16 Alliance members were denied their equal protection or substantive due process rights is
17 the same. *See Nelson v. City of Selma*, 881 F.2d 836, 838-39 (9th Cir. 1989); *see also id.*
18 at 839 (“interchangeable” standards). Accordingly, the Ordinance “should be upheld if it
19 bears a rational relationship to a legitimate state interest.” *Id.*; *see also San Francisco*
20 *Taxi Coalition v. City and County of San Francisco*, 979 F.3d 1220, 1224 (9th Cir. 2020).

21 Under rational basis scrutiny, “we ask whether the regulation bears a rational
22 relationship to a to a legitimate state interest.” *San Francisco Taxi Coalition*, 979 F.3d at
23 1224; *see also Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005).

24 When, as here, a regulation “affects only economic interests, ... the state is free to create
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27 ⁷ To the extent the Complaint also alleges that the Ordinance violates the guests’
28 substantive due process rights (*see* Compl. ¶ 47), the claim is dismissed for lack of
Article III standing. (*See* Section A *supra.*)

1 any classification scheme that does not invidiously discriminate.” *San Francisco Taxi*
2 *Coalition*, 979 F.3d at 1224. The Court “must uphold the law if there are plausible,
3 arguable, or conceivable reasons which may have been the reason for the distinction.” *Id.*
4 (quoting *Armour v. Indianapolis*, 566 U.S. 673, 681 (2012)). Accordingly, the burden is
5 on the party challenging a regulation “to negative every conceivable basis which might
6 support it.” *Id.* at 1225. If the relationship is “at least fairly debatable, the [Ordinance]
7 must be upheld.” *Nelson*, 881 F.2d at 839. Finally, the Court need not determine
8 whether the same government purpose “can be better served by other means.” *Ariz.*
9 *Libertarian Party v. Reagan*, 798 F.3d 723, 732 (9th Cir. 2015).

10 As discussed in the context of the dormant Commerce Clause, the stated purpose
11 of the Ordinance, preservation of existing housing inventory and quality of neighborhood
12 life, are legitimate government purposes. (*See* Section B.1. *supra* (citing O-21305 at 2.)
13 These purposes are sufficient to show that the Ordinance has a substantial relation to the
14 public health, safety, or welfare and is not clearly arbitrary and unreasonable. Even if
15 regulations “benefit some groups and burden others,” as Alliance complains here (*see*
16 Compl. ¶ 43), they must be upheld as long as there are legitimate reasons for the
17 economic distinction. *San Francisco Taxi Coalition*, 979 F.3d at 1225. Furthermore,
18 based on the legislative findings stated in the Ordinance (*see* Section B.1 *supra* (citing O-
19 21305 at 2)), it bears a rational relationship to these purposes.

20 The Ordinance on its face passes the rational scrutiny standard. Alliance’s as-
21 applied challenge, based on the application of the Ordinance to the licensing lottery,
22 operates as stated in the Ordinance. (*See* Opp’n at 19.) Accordingly, as-applied
23 challenge fails for the same reason as the facial challenge.

24 Alliance has failed to state claims for violation of substantive due process and
25 equal protection under the United States Constitution. Because it is apparent on the face
26 of the Ordinance and Alliance’s as-applied challenge that leave to amend would not in
27 the end aid in stating a claim, leave to amend is denied as futile. *See Fields*, 427 F.3d at
28 1209.

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4. State Law Claims


All federal claims in this action have been dismissed without leave to amend. The only basis for subject matter jurisdiction alleged in the notice of removal was federal question under 28 U.S.C. § 1331. (ECF No. 1, Notice of Removal of Civil Action at 2.) Plaintiff does not allege any other grounds for federal jurisdiction. The Court therefore declines to exercise supplemental jurisdiction over the remaining state law claim. See 28 U.S.C. § 1367(c)(3). Accordingly, the remained of this action is remanded to State court.

III. Conclusion

For the reasons stated above, the City’s motion is granted insofar as it seeks dismissal of claims alleged under federal law, the balance of the action is remanded to State Court.

IT IS SO ORDERED.

Dated: June 12, 2023


Hon. M. James Lorenz
United States District Judge