

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

June 16, 2023

Lyle W. Cayce  
Clerk

---

No. 22-50908

---

RAFAEL MARFIL; VERGE PRODUCTIONS, L.L.C.;  
ENRICO MARFIL; NAOMI MARFIL; KOREY A. RHOLACK;  
DANIEL OLVEDA; DOUGLAS WAYNE MATHES,

*Plaintiffs—Appellants,*

*versus*

CITY OF NEW BRAUNFELS, TEXAS,

*Defendant—Appellee.*

---

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 6:20-CV-248

---

Before JONES, CLEMENT, and HAYNES, *Circuit Judges*.<sup>1</sup>

EDITH H. JONES, *Circuit Judge*:

Plaintiffs here appeal the Rule 12(b)(6) dismissal of their complaint alleging that the City of New Braunfels’s zoning regulation banning short-term rentals of residential properties in certain areas of the city is unconstitutional. The district court ordered dismissal by approving a few

---

<sup>1</sup> Judge Haynes dissents. She would affirm for the reasons stated by the district court.

No. 22-50908

conclusory paragraphs in a magistrate judge's recommendation. This court's relevant case law, however, indicates that some factual development may often occur in these cases, and that summary judgment may often follow. *See, e.g., Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 935-37 (5th Cir. 1988). We make no prediction on the future course of this case, but based on the complaint's well-pled allegations, plaintiffs are entitled to engage in discovery in an attempt to surmount the currently high bar for challenging local zoning ordinances under the Constitution.

VACATED and REMANDED.

*United States Court of Appeals*

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

June 16, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing  
or Rehearing En Banc

No. 22-50908 Marfil v. City of New Braunfels  
USDC No. 6:20-CV-248

Enclosed is a copy of the court's decision. The court has entered judgment under **FED. R. APP. P. 36**. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

**FED. R. APP. P. 39** through **41**, and **5TH CIR. R. 35**, **39**, and **41** govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following **FED. R. APP. P. 40** and **5TH CIR. R. 35** for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. **5TH CIR. R. 41** provides that a motion for a stay of mandate under **FED. R. APP. P. 41** will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **FED. R. APP. P. 41**. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that defendant-appellee pay to plaintiffs-appellants the costs on appeal. A bill of cost form is available on the court's website [www.ca5.uscourts.gov](http://www.ca5.uscourts.gov).

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Nancy F. Dolly", written in black ink.

By: \_\_\_\_\_  
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Ryan D. V. Greene  
Mr. Robert E. Henneke  
Mr. Manuel Stuart Klausner  
Mr. Arif Panju  
Mrs. Elizabeth Sanz  
Mr. Jay Remington Schweikert  
Mr. Ilya Shapiro  
Mr. Sam Spiegelman  
Mr. James Patrick Sutton  
Mr. Christian G. Townsend  
Mr. Chance Weldon

**From:** [cmecf\\_caseprocessing@ca5.uscourts.gov](mailto:cmecf_caseprocessing@ca5.uscourts.gov)  
**To:** [Incoming Lit](#)  
**Subject:** 22-50908 Marfil v. City of New Braunfels "Published Opinion" (6:20-CV-248)  
**Date:** Friday, June 16, 2023 10:57:06 AM

---

\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

PLEASE DO NOT REPLY TO THIS EMAIL AS IT ORIGINATES FROM AN UNATTENDED EMAIL ADDRESS.

United States Court of Appeals for the Fifth Circuit

Notice of Docket Activity

The following transaction was entered on 06/16/2023 at 9:54:59 AM Central Daylight Time and filed on 06/16/2023

Case Name: Marfil v. City of New Braunfels

Case Number: [22-50908](#)

Document(s): [Document\(s\)](#)

Docket Text:

PUBLISHED OPINION FILED. [22-50908 Vacated and Remanded | Judge: EHJ , Judge: EBC , Judge: CH. Mandate issue date is 07/10/2023 [22-50908] (NFD)

Notice will be electronically mailed to:

Mr. Ryan D. V. Greene: [rgreene@terillwaldrop.com](mailto:rgreene@terillwaldrop.com), [bfigg@terillwaldrop.com](mailto:bfigg@terillwaldrop.com)  
Mr. Robert E. Henneke: [rhenneke@texaspolicy.com](mailto:rhenneke@texaspolicy.com), [ysimental@texaspolicy.com](mailto:ysimental@texaspolicy.com)  
Mr. Manuel Stuart Klausner: [mklausner@mac.com](mailto:mklausner@mac.com), [kturnbill@pacificlegal.org](mailto:kturnbill@pacificlegal.org)  
Mr. Arif Panju: [apanju@ij.org](mailto:apanju@ij.org), [awild@ij.org](mailto:awild@ij.org)  
Mrs. Elizabeth Sanz, Attorney: [bsanz@ij.org](mailto:bsanz@ij.org), [awild@ij.org](mailto:awild@ij.org)  
Mr. Jay Remington Schweikert: [jschweikert@cato.org](mailto:jschweikert@cato.org)  
Mr. Ilya Shapiro: [ishapiro@manhattan.institute](mailto:ishapiro@manhattan.institute)  
Mr. Sam Spiegelman: [sspiegelman@pacificlegal.org](mailto:sspiegelman@pacificlegal.org), [kturnbill@pacificlegal.org](mailto:kturnbill@pacificlegal.org), [incominglit@pacificlegal.org](mailto:incominglit@pacificlegal.org)  
Mr. James Patrick Sutton: [jpatrickssutton@jpatrickssuttonlaw.com](mailto:jpatrickssutton@jpatrickssuttonlaw.com)  
Mr. Christian G. Townsend: [ctownsend@texaspolicy.com](mailto:ctownsend@texaspolicy.com), [slucas@texaspolicy.com](mailto:slucas@texaspolicy.com)  
Mr. Chance Weldon: [cweldon@texaspolicy.com](mailto:cweldon@texaspolicy.com), [ysimental@texaspolicy.com](mailto:ysimental@texaspolicy.com)

The following document(s) are associated with this transaction:

Document Description: Published Opinion

Original Filename: 22-50908-CV0.pdf

Electronic Document Stamp:

[STAMP acecfStamp\_ID=1105048708 [Date=06/16/2023] [FileNumber=10131659-0]

[ab3e2cb2ebe5c99316f4301cd13a2518cf75069e97ee854b344a7d526a4065ef864c8f21b435ef5c9801ec9244c5bc1ea1bc0cd499267da4f402d33480f1e704]]

Document Description: OPJDT-2 Letter

Original Filename: /opt/ACECF/live/forms/NancyDolly\_2250908\_10131659\_MemoRePetforReh-OPJDT2\_404.pdf

Electronic Document Stamp:

[STAMP acecfStamp\_ID=1105048708 [Date=06/16/2023] [FileNumber=10131659-1]

[3f74bc457181561b5eaf79f932d803b2cde4fef6555ba70f5f395c357d835d51c38e85c921043adfd9b06967d86a1b245964ea6dc6a4909f542bfdb62e1f8708]]

Recipients:

- [Mr. Ryan D. V. Greene](#)
- [Mr. Robert E. Henneke](#)
- [Mr. Manuel Stuart Klausner](#)
- [Mr. Arif Panju](#)
- [Mrs. Elizabeth Sanz, Attorney](#)
- [Mr. Jay Remington Schweikert](#)
- [Mr. Ilya Shapiro](#)
- [Mr. Sam Spiegelman](#)
- [Mr. James Patrick Sutton](#)
- [Mr. Christian G. Townsend](#)
- [Mr. Chance Weldon](#)