QUESTION PRESENTED

The Metropolitan Code authorizes short-term rentals as long as the applicant obtains a permit and pays hotel taxes. "Non-owner occupied permits" (or permits for property owners that do not live on the premises) are limited in number such that no more than three-percent of the residences within each census tract could be issued non-owner occupied permits.

The Andersons sued the Metropolitan Government and challenged the three-percent cap as violating the Tennessee Constitution's anti-monopoly clause. The Court of Appeals held that the three-percent cap creates a monopoly but that under the standard set forth by this Court in *Checker Cab Co., v. City of Johnson City*, 216 S.W.2d 335, 337 (Tenn. 1948), it is a constitutional monopoly because it has a reasonable tendency to promote the public's welfare by protecting the residential character of neighborhoods.

Should this Court deny the application for permission to appeal to address whether the Court of Appeals correctly applied the *Checker Cab* standard for reviewing monopolies?

STATEMENT OF THE CASE AND RELEVANT FACTS

The Andersons brought this 42 U.S.C. § 1983 lawsuit seeking to invalidate two Metropolitan ordinances. (T.R. 1-29, 98-108.) The ordinances governed short-term rental properties (STRPs), colloquially known as "Airbnbs." (T.R. 98-108.) The ordinances do not ban short-term rentals. *Id.* The Metropolitan Council authorized short term rentals so long as two primary conditions are met: (1) the applicant obtains a permit, and (2) pays taxes. *Id.*

The ordinances at issue are BL 2014-909 (allowing short term rental as an accessory use for property zoned residential) and BL 2014-951 (requiring a permit, putting a limit of the amount of permits issued, requiring proof of insurance, smoke detectors, and creating a process for revoking a permit due to complaints). *Id.*

BL 2014-909 was introduced and passed first reading before the Metropolitan Council on October 7, 2014. (T.R. 98-101.) It was referred to the Planning Commission and the Planning & Zoning Committee of the Metropolitan Council. *Id.* After a few deferrals and the introduction of a substitute ordinance, it passed second reading on February 3, 2015. *Id.* BL 2014-951 was introduced and passed first reading on November 8, 2014. (T.R. 102-108.) It was deferred and then amended on second reading on February 3, 2015. *Id.* Both bills passed third reading on February 24, 2015. (T.R. 98-108.) They were signed by then-Mayor Karl Deal on February 26, 2015 and became effective on March 6, 2015. *Id.*

Pursuant to these ordinances, there were two kinds of STRP permits for single-family homes, based on whether the owner occupies the premises. The first permit type allowed "owner occupied" units. (T.R. 115-118.) There was no limit on the number of "owner occupied" permits that can be issued. *Id.* The second permit type was available for property owners that do not live on the premises. These "non-owner occupied permits" were limited in number. No

more than three-percent of the residences within each census tract could be issued non-owner occupied STRP permits. *Id.*

The Andersons own a three-bedroom home at 1623 5th Avenue North, Nashville, Tennessee in an R6 zoned district. (T.R. 7, 9.) They began renting out their home on a short-term basis in November 2013. (T.R. 8; Anderson Depo., p. 10, l. 13-18.) They applied for a permit in 2015, after the permitting process went into effect, and based on their application, the Metropolitan Codes Department issued them an owner occupied STRP permit. (T.R. 16; Anderson Depo., p. 13, l. 20 through p. 14, l. 4.)

In August 2015, the Andersons applied to convert their permit to a non-owner occupied STRP permit. (T.R. 17; Anderson Depo., p. 15, l. 13-21.) Their request for a non-owner occupied permit was not granted because the three-percent cap had already been reached for their census tract. *Id.*

The Trial Court's granted summary judgment in favor of Metro on Plaintiffs' monopoly claim. First, the Trial Court concluded "that a residential property owner's ability to operate a non-owner-occupied STRP was not a common right before the passage of the ordinance in question." (T.R. 1354.) Second, the Trial Court concluded "that, even if the three percent cap constitutes a monopoly, the monopoly created would be a permissible monopoly" because it "furthers the well-being of Metro citizens because it balances the interest between citizens who want to achieve benefits from renting their property on a short term basis against the interest of citizens who want to protect the residential character of their neighborhoods." *Id.*

On appeal, the Court of Appeals determined that the three-percent cap "enacts a monopoly within each census district." (Ct. App. Op., p. 11.) However, the Court also recognized that not all monopolies are unlawful, and "'if the actual and real tendency of [the]

ordinance … is to effect the purpose of protecting the safety, health and morals of the public,'" such a monopoly would be constitutional. (Ct. App. Op., p. 12., citing *Landman v. Kizer,* 255 S.W2d 6, 7 (Tenn. 1953).) The Court of Appeals held that "the protection of residential character … implicate[s] a matter of the public's well-being." (Ct. App. Op., p. 13.) Here, "by limiting the number of one- and two-family residential units that may be used as non-owner-occupied short-term rentals, the cap clearly bears a legitimate relation to a valid end. By virtue of the cap, only a small percentage of these residential units may be used for non-owner-occupied short-term rentals. This ensures the overwhelming majority of single-family and two-family residential units are not occupied by transient occupants." (Ct. App. Op., p. 14.)

The Andersons have applied for permission to appeal pursuant to Tenn. R. App. P. 11.

REVIEW BY THE SUPREME COURT IS NOT WARRANTED

This Answer will show that this case meets none of the four criteria that warrant review by the Supreme Court:

> In determining whether to grant permission to appeal, the following…indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Tenn. R. App. P. 11. The Anderson's Application for Permission to Appeal asserts that review is merited to settle important questions of law, settle uniformity in decisions and settle a question of public interest.

I. THIS CASE DOES NOT PRESENT A NEED TO SETTLE AN IMPORTANT QUESTION OF LAW.

The Andersons argue that "This Court should *settle important questions of law* by providing a constitutional standard for an enumerated right that has not been addressed substantively since 1948, including how important the government's interest must be before it may enact monopolies." (R. 11 App., p. 8.)

However, this Court has explained that the standard for reviewing a monopoly under the Tennessee Constitution is already well-settled:

> It is settled law that the anti monopoly clause of our constitution does not prohibit the legislature from granting a monopoly, in so far as such monopoly has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people. *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962, 48 L.R.A. 167, and *Noe v. Mayor and Aldermen of Town of Morristown*, 128 Tenn. 350, 161 S.W. 485, Ann.Cas.1915C, 241, are illustrations of this rule.
> ...
> Of course, if the monopoly created has a legitimate relation to the public purpose sought to be accomplished in the exercise of the police power, then a Court is without authority to determine such monopoly invalid on the theory that it things some other method would have accomplished the purpose sought. In such a situation the matter is exclusively a legislative prerogative. On the other hand, it is the duty of the Court to determine whether the monopoly does have any legitimate relation with the declared public purpose of the act. Otherwise,

> legislative bodies could violate the anti monopoly provision of the constitution with impunity by the simple process of declaring the creation of the monopoly an act done in furtherance of the exercise of a police power.

Checker Cab Co. v. City of Johnson City, 216 S.W.2d 335, 337 (Tenn. 1948).

The standard set out in *Checker Cab* has been applied consistently by this Court and the Court of Appeals. *See Esquinance v. Polk County Educ. Ass'n,* 195 S.W.3d 35, 47 (Tenn. Ct. App. 2005), perm. app. denied Jan. 30, 2006 (upholding the Educational Professional Negotiations Act's recognition of a single professional employee organization as the representative of all professional employees in the school system for the purposes of collective bargaining); *Dial-A-Page, Inc. v. Bissell,* 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991), perm. app. denied Sep. 23, 1991 (upholding a limit on the number of applicants who can obtain authority to operate as a radio common carrier in a given market at one time); *Nashville Mobilephone Co., Inc. v. Atkins,* 536 S.W.2d 335, 340 (Tenn. 1976) (holding that the Tennessee State Radio Common Carrier Act does not violate the anti-monopoly clause of the Tennessee Constitution); *Landman v. Kizer,* 255 S.W.2d 6, 7 (Tenn. 1953) (upholding a limitation on the number of liquor stores which may be maintained in a municipality).

Because the standard for reviewing monopolies is already well-settled law, there is no reason for this Court to review the Court of Appeals' decision for the purposes of settling an important question of law as requested by the Andersons.

II. THIS CASE DOES NOT PRESENT A NEED TO SECURE UNIFORMITY IN DECISIONS.

The Andersons argue that this case presents a need to secure uniformity in decisions "by deciding whether the courts should examine whether a monopoly was enacted to protect private economic interests and not the public." (R.11 App., p. 8.) However, no Tennessee case has ever indicated that a court must entertain evidence related to a plaintiff's claim that an ordinance

unfairly protects an economic sector of the market (here, the hotel industry) when the monopoly created by that ordinance benefits an entirely different set of individuals (here, those with non-owner occupied permits in each census district).

The cases cited by the Andersons suggesting that the Court should look at the true intent behind the legislative enactment all warn against monopolies enacted to benefit the private party who has been granted the monopoly. *See Leeper v. State*, 53 S.W. 962, 965 (Tenn. 1899) ("The monopoly prohibited by the constitution is a privilege farmed out to the highest bidder, or conferred because of favoritism to the done, and not one awarded to the lowest bidder, and for the convenience and benefit of the public."); *Checker Cab Co.*, 216 S.W.2d at 628 ("We have sought in vain to discover some legitimate relation between the public purpose sought by this act to be accomplished and its provision that only those who were in taxi business in Johnson City at the time of the enactment of this act or those in business at a given time shall be permitted to engage in that city in this business so long as those favored few desire to prevent the entry of another.").

Here, the Court of Appeals properly found that the "although courts are certainly required to determine whether a monopoly bears a legitimate relation to valid end goals, or public purpose, this does not require a review of a legislature's actual subjective motivations, assuming such motivations could actually be divined." (Ct. App. Op., p. 10-11.) This determination is consistent with the case law cited above, and, therefore, this case does not present a need to secure uniformity of decisions.

III. THIS CASE DOES NOT PRESENT A NEED TO SETTLE A QUESTION OF PUBLIC INTEREST.

The Andersons argue that this case presents a need to settle a question of public interest – specifically, "whether homesharing is a privilege or a right." (R.11 App., p. 35.) But as stated

in the previous sections, the questions presented by the Andersons in its application for permission to appeal are well-settled. As to this case, the Court of Appeals has already determined that the three-percent cap on non-owner occupied STRPs constitutes "an exclusive right that has been granted to a few" for purposes of its monopoly analysis. (Ct. App. Op., p. 11-12.)

CONCLUSION

The Court of Appeals applied well-settled case law on the anti-monopoly clause of the Tennessee Constitution. The Court correctly found that the three-percent cap on non-owner occupied STRPs has a reasonable tendency to aid in the promotion of the health, safety, morals and well-being of the public, and therefore, while it creates a monopoly, it is not an unconstitutional monopoly.

This case does not meet the criteria of Rule 11 and does not warrant review by this Court. For these reasons, the Metropolitan Government asks that this application be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, via United States mail postage prepaid to Braden H. Boucek, Beacon Center of Tennessee, [redacted].

Catherine J. Pham