IN THE CIRCUIT COURT OF
DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

RACHEL AND P.J. ANDERSON,	)	
	)	
	)	
Plaintiffs,	)	
	)	
	)	
v.	)	Case No. 15c3212
	)	Hon. Judge Kelvin Jones
	)	
THE METROPOLITAN	)	
GOVERNMENT OF	)	
NASHVILLE AND	)	
DAVIDSON COUNTY,	)	
	)	
Defendant.	)	

RESPONSE TO MOTION TO DISMISS

COMES NOW Rachel and P.J. Anderson, the plaintiffs in this case ("the Andersons"), to respectfully respond to the motion of the defendant ("Metro") to dismiss under Tenn. R. Civ. P. 12.02(6), and supporting memorandum ("Memorandum").

I.
Introduction

Metro initially raises a standing argument, but it fails to ask the correct question of whether the law has harmed the Andersons. They have been injured even if the law should not have been applied to them.

Most of Metro's response asserts that the various constitutional claims are reviewed for a rational basis. This is not a suitable basis to dismiss because it goes to the merits of the claims, not their sufficiency. Furthermore, the Andersons do not agree that rational basis is the test, nor that the STRP law would pass even if it were.

Metro's response to the speech claim is equally flawed. First, heightened scrutiny is the test under current law. Second, even under a more relaxed view, Metro's law leaves unregulated so much signage that presents identical harms, that it is a woefully poor fit and cannot pass muster.

II.
Legal standard

Tenn. R. Civ. P. 12.02(6) is a device for disposing of legally insufficient claims. The standard is:

> A motion to dismiss for failure to state a claim upon which relief can be granted "challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citations omitted). "The motion admits the truth of the factual allegations in the complaint but asserts that the alleged facts fail to establish a basis for relief" *Steward v. Schofield*, 368 S.W.3d 457, 462 (Tenn. 2012) (citation omitted). Resolution of the motion is determined solely by an examination of the pleadings, and when considering a motion to dismiss, "courts must construe the assertions in the complaint liberally[.]" *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010) (citations omitted). The motion should be granted only when "it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief[.]" *White v. Revco Dis. Drug Ctrs., Inc.,* 33 S.W.3d 713, 718 (Tenn. 2000) (citations omitted).

In re Conservatorship of Starnes, -- S.W.3d --, 2014 Tenn. App. LEXIS 797, *7-8 (Tenn. Ct. App. Dec. 10, 2014).

"Under Tennessee Rule of Civil Procedure 8, Tennessee follows a liberal notice pleading standard which recognizes that the primary purpose of pleading is to provide notice of the issues presented to the opposing parties and court." *Webb*, 346 S.W.3d at 427. *See also* Tenn. R. Civ. P. 8.05(1), 8.06 (2015). The likelihood of prevailing on the merits is immaterial. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (quoted with approval in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Thus, a claim should only be dismissed if, under no circumstances, would "the allegations fail to establish a cause of action." *Webb*, 346 S.W.3d at 426,

Accepting the factual allegations in the complaint is true, Metro's motion should be denied because the Andersons would be entitled to see their constitutional rights restored based on the complaint.

III.
Argument

A. The Andersons were harmed by the law so they have standing. It does not matter whether the law was correctly applied to them.

Metro first argues that the Andersons do not have standing because the STRP ordinance does not apply to them. (Memorandum, p. 4). This argument makes much of the Andersons' contention that the ordinance itself

defines STRPs (which are covered by the law) and hotels/boardinghouses/bed and breakfasts (which are exempt) so as to exempt the same properties it attempted to regulate. (Complaint, p. 20; Preliminary Injunction, pp. 7-10). Metro's standing argument accepts this as true and reasons that the Andersons lack standing because they have not been injured since the law does not apply to them. This argument misunderstands the standing question, which asks if the plaintiffs were harmed by the law, not if they should have been.

To have standing, the Andersons must have suffered an injury that is traceable to the challenged law. *See Allen v. Wright*, 468 U.S. 737, 750-51 (1984). The question is *not* whether the Andersons *should* have suffered an injury. The fact is they have. It is not even necessary in some cases for the ordinance to be enforced against a plaintiff when the regulation is clearly directed at the plaintiffs. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (pre-enforcement review available when regulation targets plaintiff's profession); *Peoples Rights Org. Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998) ("individual does not have to await the consummation of threatened injury to obtain preventative relief."); *Nat'l Rifle Ass'n of Am. v. Magow*, 132 F.3d 272, 280-84 (6th Cir. 1997) (pre-enforcement standing where plaintiffs suffer economic harm from regulation aimed at their business). For standing purposes, the sole question is whether the law impacted the Andersons, not whether the law applies.

Indeed, a person who has an inapplicable law enforced against them suffers a particularly severe harm. The courts are not helpless to remedy such an injustice. An entire body of civil rights has developed from unjustified enforcement actions. *See generally, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Sykes v. Anderson*, 425 F.3d 294, 305, 310-11 (6th Cir. 2010). Metro's theory is novel but, fortunately, lacking in support.[1]

Accepting the factual allegations in the complaint as true, the Andersons do have standing. They were required to get a permit. They paid the $50 fee. Their request to convert to a non-owner occupied permit was denied. Now their future family choices are unnecessarily burdened by this ill-conceived law. None of this is in dispute. This sufficiently demonstrates standing. (Complaint, pp. 16-18).

As a final matter, to prevail here Metro must agree that the law does not apply to the Andersons. The Court should then enter an unopposed declaratory judgment that operators of STRPs also qualify for the law's exceptions and enjoin enforcement of the STRP ordinance. The Andersons are prepared to accept this outcome. Whether Metro is should be determined.

Metro's position is otherwise non-responsive to this issue. The STRP ordinance applies to activity that it then proceeds to exempt. Metro cannot

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[1] Even if Metro properly framed the standing question, it would not matter that the Andersons contend the ordinance does not apply to them. After all, they are allowed to plead in the alternative. *See* Tenn. R. Civ. P. 8.05(2) (2015). That is, they may assert the law does not apply to them in one claim, yet still maintain that it does in another claim if that was necessary to demonstrate standing.

legally differentiate an STRP from a hotel/motel/bed and breakfast/boardinghouse.

B. Even if the law is a zoning law, the Andersons have stated a valid claim. They do not challenge the zoning aspects, which may receive strict scrutiny, and zoning measures can fail rational basis.

Metro next argues the STRP ordinance is a zoning measure that is reviewed under the rational basis test. (Memorandum, pp. 5-6). This argument is irrelevant to the question of whether the Andersons have stated a valid *claim*. Rational basis claims can and have succeeded. Further, Metro's argument is overly generalized, failing to address the specific constitutional questions involved. It is also incorrectly premised because the challenged law should not be assumed to be a zoning measure.

First, because, this does not go to the question of whether the plaintiffs have stated a valid claim under Rule 12.02(6). In *Nashville C & S. L. Ry. v. Baker,* 71 S.W.2d 678, 680 (Tenn. 1934), the Tennessee Supreme Court made the same mistake as Metro, reversing the lower court which had engaged in extensive fact finding before striking a statute as irrational. The decision observed that regulating railroads involves "matters of legislative policy," and because there could be plausible governmental interests, the trial court erroneously resorted to evidence instead of dismissal outright. *Id.* The U.S. Supreme Court reversed because an economic regulation may be dubbed irrational when its arbitrariness is proven by "the evidence." *Nashville C & S. L. Ry. v. Walters*, 294 U.S. 405, 414-15 (1935). The Tennessee Supreme

Court "obviously erred in refusing to consider [those facts]." *Id.* at 415-16. The refusal to consider evidence meant that the Tennessee court never fairly decided the question, so it was remanded to let the courts consider the question in light of the plaintiff's *evidence*. *Id.* at 415-16, 428, 432. Metro would have this Court repeat an ancient mistake by turning rational basis into exactly what the Supreme Court says it is not: "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). Rational basis is not a free pass.

By asking this Court to reject the Andersons' claim under Rule 12.02(6), Metro views the factual questions as an irrelevant, as if it is a foregone conclusion that the STRP ordinance is rational no matter what the evidence shows. The only other alternative would be that Metro is impermissibly seeking to test "the strength of the plaintiff's proof or evidence," not whether the complaint "fail[s] to establish a basis for relief." *Steward*, 368 S.W.3d at 462. By engaging in a rational basis analysis in the first place, Metro implicitly concedes that a cause of action exists, maintaining instead that the cause will ultimately fail. That is a question for another day.

And it is demonstrably the case that rational basis cases can be lost. Rational basis, although deferential, is "not toothless," and "will not be satisfied by flimsy or implausible justifications for the legislative

classification, proffered after the fact by Government attorneys." *See United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (citations omitted). Metro must make an actual showing instead of relying on unproven assertions. Metro's unproven *ipse dixit* assertion that the ordinance is supported by a legitimate interest (memorandum, pp. 5-6), is deficient of any evidence that Metro's fears were warranted or that the law furthers those interests. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014) (whether the stated interest "is rationally related to these legitimate interests is a different issue") (citing to *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) ("[T]he mere assertion of a legitimate interest has never been enough to validate a law.")). The Court must also scrutinize the fit between the law and any legitimate goal. *Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13, 17 (Tenn. Ct. App. 1982) (role of court "is to determine whether the legislation is so unconnected to its purpose as to constitute a manifest abuse of discretion") (citation omitted).

Rational basis is a test that many misguided measures fail to clear. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning ordinance restricting home use to mentally disabled fails rational basis scrutiny); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 345 (1989) (valuation that subjected property owners to discriminatory treatment by taxing them at much higher rate than similarly situated owners violated equal protection); *Craigmiles v. Giles*, 312 F.3d 220, 224-25 (6th Cir. 2002)

(law protecting casket makers from economic competition serves no legitimate government purpose). Metro has seen its zoning measures flunk rational basis test in the past. *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382, *118-19 (Tenn. Ct. App. June 30, 2005) (affirming trial court determination that zoning amendments precluding proposed landfill violates Equal Protection and Substantive Due Process under rational basis test).

Second, rational basis is not necessarily the correct test. The level of scrutiny is determined by whether the zoning measure implicates a fundamental right. *See, e.g., Renton v. Playtime Theatres*, 475 U.S. 41, 46-47 (1986) (strict scrutiny under First Amendment for zoning ordinance enacted to restricting speech based on content); *Campbell v. Nance*, 555 S.W.2d 407 (Tenn. 1976) (zoning decision deprives owner of beneficial use); *City of Cleveland v. Wade*, 206 S.W.3d 51 (Tenn. Ct. App. 2006) (applying intermediate scrutiny to content-neutral zoning restrictions on adult bookstore). It is not disputed that when a zoning measure does not, then it is reviewed under rational basis. Cities are not, however, free to burden constitutional rights and then escape rigorous court scrutiny merely because they did so under the guise of a zoning measure.

Third, this argument is also incorrectly premised because it mischaracterizes the STRP ordinance as a zoning measure. *See SNPCO, Inc. v. City of Jefferson City,* 363 S.W.3d 467, 477 (Tenn. 2012) (contours of

determining whether an ordinance is a zoning ordinance are "difficult to draw or define") (quotation and citation omitted). To qualify as a zoning law, the ordinance must satisfy a two-part test "that examines both the terms and effects of the challenged ordinance" called the "substantial effects" test. *Id.* at 478. Again, this issue is not properly resolved in a motion to dismiss for failure to state a claim.

Still, the STRP law would fail this test. As Metro correctly points out, the STRP law is actually comprised of two ordinances—BL 2014-909, which amends the zoning code to permit short-term rentals as an accessory residential use, and BL 2014-951, which involves permitting and safety measures. (Memorandum, p. 2). Yet it is only the latter that is at issue in the lawsuit. That is, the Andersons challenge no aspect of the bill having to do with zoning. So it is inaccurate to characterize the STRP law as a simple zoning measure.

In conclusion, it does not matter if the law is a zoning measure, nor is that conceded. Not every zoning law receives the same scrutiny. Not ever zoning law survives rational basis. The goal of Metro in passing the law; whether Metro's concern was legitimate, well-founded, or pretextual, and whether the law is an appropriate means to address Metro's perceived concerns are all at issue. The record must be more fully developed—a trial may be necessary—before these questions may be resolved. Suffice it to say,

the Andersons have stated a claim that can prevail under the correct set of facts.

C. The Andersons have stated a valid claim that Metro's ban of their signs is an unconstitutional infringement on their right to free speech.

Metro next contends that the Andersons have not stated a claim for a violation of constitutionally protected speech since the law only bans commercial speech. (Memorandum, p. 7). In actuality, Metro is again challenging the merits of the claim, not its sufficiency. Furthermore, because commercial speech is protected by the First Amendment, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), complete bans on it nearly always fail to satisfy the rigors of constitutional scrutiny.

Accepting the facts in the complaint as true, the restrictions placed on the Andersons' signs violate the free speech protections of both the U.S. and Tennessee Constitutions.[2] **First**, this Court should apply strict scrutiny to a content-based ban on non-misleading commercial speech. **Second**, Metro has failed to show that its ban on STRP signs satisfies even the more deferential *Central Hudson* standard. The outright prohibition on all STRP signs will fail

[2] Metro prohibited Ms. Anderson from erecting two temporary signs. The first was a yard sign advertising the property's availability on Airbnb. The second was a window sticker notifying guests they had found the correct home. (Injunction, Ex. 1, Declaration of Rachel Anderson, p. 4). The Andersons do not agree that the signs involve pure commercial speech. Nevertheless, the Andersons will concede under the most forgiving standard possible for the limited purposes of considering the injunction, and proceed as if both signs constitute pure commercial speech. This limited concession does not extend to the motion to dismiss where Metro must prevail under the most forgiving understanding of the facts in the Andersons' favor.

under any test given how severely those signs are treated when contrasted with how forgiving Metro is with other similar signs. **Third,** Metro is unable to produce any authority upholding an analogous content-based ban on truthful commercial speech.

1) *Metro's signage scheme treats STRP signs far more harshly than other signs.*

Metro begins this argument by pointing out that "Metro Code already prohibits advertisement signs at all home-based businesses." (Memorandum, p. 7). This is apropos of nothing. The existence of another law of dubious constitutionality has nothing to do with the constitutionality of the ban on STRP signage. Metro has offered no authority that this ban on home-based business signs is constitutional, even assuming that it is analogous.

It is not. The signs Ms. Anderson wished to display were temporary and small, quite unlike a continuously operated home-based business.[3] It only operated intermittently, when they were out of town anyway. Furthermore, running an STRP is not a "home occupation." The sharing economy creates economic opportunity from the ground up, unlike traditional business models, and is not easily subjected to legislation. *See* Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking*, 42 Hastings Const. L.Q. 557, 557-58 (Spr. 2015) (Sharing economy is "not a

[3] The "For Rent on Airbnb" sign was 18x12 inches and would have been up for three (3) days. The "correct home" sticker would have been 4x4 inches, and up only one (1) day. (Injunction, Ex. 1, Declaration of Rachel Anderson, p. 4).

top-down solution, meaning it will not be imposed by a set of legislated policies").

Given the temporary nature of the signs Ms. Anderson wished to display, the better analogies consist of the many types of temporary signs that *are* permitted under Metro's Code. These are outlined in full in the motion for preliminary injunction at p 13. Notably, temporary signs advertising the home is available for rent *are* permitted under Metro. Code § s17.32.060(C)(2)(a). The differential treatment is not something Metro can or has disputed. That Metro bans home-based business signs, if anything, merely highlights the arbitrary nature of Metro's signage regulations which manage to be both over and under inclusive. This tends to suggest that a broader look at Metro's signage scheme may be necessary in light of *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), discussed further below and in the motion for preliminary injunction. The difference in treatment offends constitutional free speech protections and is ultimately fatal to the ordinance.

2) *This Court should review content-based bans on non-misleading commercial speech under strict scrutiny.*

Metro argues that the ban on the Andersons' signs should be reviewed under the intermediate scrutiny standard set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). (Memorandum, p. 7). This Court should find that a non-misleading, content-based total ban on commercial speech is reviewed under strict scrutiny based on current law.

While Metro is correct that *Central Hudson* formally articulates the standard for reviewing restrictions placed on purely commercial speech, the law in question places a content-based ban on truthful commercial speech.[4] A ban does not deserve deference, as indeed *Central Hudson* itself acknowledged. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 508 (1996) ("[A]dvertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech.").

Metro fails to acknowledge the significance of *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011). The Supreme Court observed that content-based restrictions on speech warrant heightened scrutiny, writing: "Commercial speech is no exception." *Id.* When considering a law "designed to impose a specific, content-based burden on protected expression [.] [i]t follows that heightened judicial scrutiny is warranted." *Id.* The Court ultimately held that "it is all but dispositive to conclude that a law is content based" not withstanding the government's protestation that the law burdened "only commercial speech." *Id.* at 2667. The Court stopped short of actually applying heightened scrutiny because "[a]s in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.*

[4] The Andersons preserve their objection that *Central Hudson* and *Va. Pharmacy* were wrongly decided and should be overruled, to the extent this is necessary.

In sum, it is correct that *Central Hudson* has not been officially overruled. The viability of *Central Hudson*, at least with respect to non-misleading, content-based restrictions, is seriously in doubt, even prior to *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), which may have cast the fatal blow.

As an aside, the demise of *Central Hudson* would hardly be earth shattering. The Court has long stressed that its concern with deceptive information was the reason why it relegated commercial speech to a lower tier in the first place. *See Sorrell,* 131 S. Ct. at 2672. This should call into question the overall applicability of *Central Hudson* to truthful commercial speech.

And scholars have long observed that many of the Justices already express interest in overruling *Central Hudson*, if the Court has not essentially done so in everything but name only. *See* Troy L. Booher, *Scrutinizing Commercial Speech*, 15 Geo. Mason U. Civ. Rts. L.J. 69 (2004). The Court itself has recognized this. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002). And in *Lorillard v. Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001), the Court was entreated to finish off *Central Hudson*. Recognizing that various Justices seemed favorable, the Court saw "no need to do so" as the law in question, like the law in *Sorrell*, failed under *Central Hudson*. *Id.*

Central Hudson barely exists, if it exists at all. Its extirpation will not be mourned. More importantly, courts find that content-based bans on

truthful commercial speech fail even the more deferential *Central Hudson* test. Metro's reliance upon it is tenuous at best.

The Court's sweeping opinion in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015) only provides further bolsters the case for strict scrutiny. The Court unambiguously held that content-based restrictions on speech are reviewed under strict scrutiny. Metro acknowledges *Reed*, cites to unpublished cases from federal district courts and maintains *Reed* has no application to the commercial speech doctrine. (Memorandum, p. 7). *Reed*, however, lacks this qualification within its broad contours. It is true, strictly speaking, that the majority opinion in *Reed* did not address commercial speech. Rather, the sings at issue were directional signs, hardly the sort of high value speech that is readily differentiated from advertisements. Furthermore, Justice Alito in his concurrence outlined restrictions on signage that would not be content based. Seeming to contemplate the application of *Reed* to commercial speech, Justice Alito singled out time restrictions on "advertising a one-time event." 135 S. Ct. at 2233 (Alito, S. concurring). This distinctions would be completely mooted if all commercial speech was unaffected by *Reed*.

Metro accurately cites a number of district court opinions adopting the view that *Reed* has no application to commercial speech (memorandum, p. 7), but misses a contrary opinion far closer to home.[5] In *Thomas v. Schroer*, 2015

[5] In a sense though, the opinions are correct—*Reed* did not directly address commercial speech or mention *Central Hudson*. But *Sorrell* already had stated that heightened scrutiny applies to non-misleading, content-based restrictions on commercial speech. That ground had already been plowed; it is not surprising then that *Reed* did not

U.S. Dist. LEXIS 119045, *4 (W.D. Tenn. Sept. 8, 2015) (copy of opinion attached), the Tennessee Department of Transportation removed a number of Thomas' signs, including signs advertising the sale or lease of property. The court granted a preliminary injunction after it squarely rejected the DOT's contention that *Reed* had no bearing on these signs. *Id.* at *12 (The "clear instruction" of *Reed* "applies equally to the determination of whether a sign is directional; pertains to natural wonders or scenic and historical attractions; or *advertises the sale or lease of property on which it is located*") (emphasis added).

Finally, this Court should apply strict scrutiny because Tennessee's free speech protections should be considered more robust than the First Amendment. *See Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004) ("Article I, section 19 provides protection of free speech rights at least as broad as the First Amendment."). Given that federal law, at worst, teeters precipitously close to tipping over into strict scrutiny, if Tennessee's Constitution provides any additional protection to expressive activity whatsoever, then it must mean that a content-based ban on non-misleading commercial speech must survive strict scrutiny.

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repeat the chore. And *Reed* did cite to *Sorrell*, a commercial speech case, for the proposition that "[g]overnmental regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227.

3) *Metro cannot show that its total ban on STRP signs would satisfy Central Hudson. The ban fails to narrowly address the harms cited, and its more tailored regulation of similar signs show a better way.*

Metro is mistaken in its belief that *Central Hudson* guarantees it victory. When the Supreme Court uses the four (4)-part test articulated in *Central Hudson*, it often spells out the demise of the law in question. *See, e.g., Sorrell*, 131 S. Ct. at 2667; *Thompson*, 535 U.S. at 360; *Lorillard*, 533 U.S. at 561-62; 533 *Greater New Orleans Broad. Ass'n*, 527 U.S. 173, 193-94 (1999); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993); *44 Liquormart*, 517 U.S. at 508. Conspicuously absent from Metro's argument is a citation to a recent case upholding a complete content-based ban on truthful commercial speech under *Central Hudson*. This in itself is telling.

Because the Andersons' signs were non-misleading and Metro does not even attempt to argue that it serves the end of consumer protection, the law should be reviewed "with special care, mindful that speech prohibitions of this type rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504 (citations and quotations omitted). The law cannot be justified by the ordinary rationale for treating commercial speech differently: protecting consumers. *Id.* at 502 (noting "[t]he special dangers that attend complete bans"). The law is also content-based. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92-92 (1977) (ban on "For Sale" yard signs was content-based and violates First Amendment). The Court recognizes the dangers that attend governmental attempts, as in here, to single out certain

messages for suppression. *44 Liquormart*, 517 U.S. at 501. Yet, proffering no evidence whatsoever, Metro not only claims the law satisfies *Central Hudson*, but that the Andersons fail to even state a claim. This is wrong.

(a) **Metro has facially failed to meet its burden**.

At the least, the Andersons have stated a valid claim that the law fails *Central Hudson*, and even made a substantial showing that they will prevail on the merits. Under this test, the Court first asks whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, the Court next asks "whether the asserted governmental interest is substantial." *Id.* at 566. If it is, then the Court "determine[s] whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." *Id.*

Facially, Metro has failed to carry their burden because its pleading consists of mere "speculation and conjecture," both as to the existence of a harm and the efficacy of the law as a remedy. *See Endenfield v. Fane*, 507 U.S. 761, 771 (1993) (government must demonstrate real, not speculative harms, and that the restriction "will in fact alleviate them"). When the law is content-based, the burden is on the government to justify the restriction. *See Thompson*, 535 U.S. at 372. Even under the lower *Central Hudson* standard, Metro must show a reasonable fit between the ban on speech and its goal. *44*

Liquormart, 44 U.S. at 507. The requirement of actual proof of a real harm and a tailored factual solution is unmet by Metro. This can be facially determined by the pleadings themselves.

(b) **The law fails the *Central Hudson* test.**

Nevertheless, proceeding through the four-step analysis, the Andersons have not merely stated a claim, they have a substantial likelihood of prevailing on it. Regarding step one, Ms. Andersons' signs were not misleading—the house was available for rent on Airbnb; it was the correct residence. This is not disputed by Metro.

Regarding step two, the governmental interest, Metro articulates three (3) goals: 1) protecting long-term residents from seeing their neighborhoods "taken over" by non-owner occupied Airbnb operators; 2) aesthetic value of the neighborhood; and, 3) traffic dangers. (Memorandum, p. 8). Protecting long-term residents from seeing the neighborhoods overrun by short-term renters is not a legitimate goal. *See Linmark*, 431 U.S. at 94-96 (ban on "For Sale" signs justified on grounds that it would cause neighbors to move—not a legitimate justification). In *Linmark*, the Court rejected the notion that a city had an interest in restricting the free flow of truthful information like that a house was available for sale out of fear that consumers might act on it and disrupt the neighborhood composition. The Court later described this rationale as "rest[ing] on the offensive assumption that the public will respond 'irrationally' to the truth." *44 Liquormart*, 517 U.S. at 503 (citing

Linmark, 431 U.S. at 96); *see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (plurality) (government cannot suppress truthful speech "merely because it is fearful of that information's effect upon its disseminators and its recipients").

Aesthetics and traffic safety have been found legitimate by the Court. *City of Ladue v. Gilleo*, 512 U.S. 43, 49-51 (1994). The Andersons do not concede that these are legitimate concerns with respect to truthful speech on one's own home.[6] Regardless, assuming the goal is legitimate, the law will fail the third and fourth prong of *Central Hudson* as it did in *Gilleo*, 512 U.S. at 49-51.

Metro's ban on STRP signage is substantially likely to fail the third prong of *Central Hudson*, which asks whether the restriction directly advances Metro's interest. *See Greater New Orleans*, 527 U.S. at 188-190. Metro's overall signage scheme "is so pierced by exemptions and inconsistencies that [Metro] cannot hope to exonerate it." *Id.* at 190. As outlined in the motion for injunction, a broad swath of virtually identical temporary signage, including "for rent" signs, are permitted under Metro's Code. (Injunction, p. 13). Only temporary STRP signs receive the ultimate punishment.

Metro does not dispute that these signs are permissible or, evidently,

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[6] Metro's concern over traffic and aesthetics is particularly unfounded given that the signs will be located in the Andersons' yard. "It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods." *See Gilleo*, 512 U.S. at 58.

find them distinguishable. Surely signs for STRPs present "no greater an eyesore," *Discovery Network*, 507 U.S. at 425, than signs for fairs, flea markets, yard sales, for rent signs, and restaurant menu boards. These signs present at least as much of a threat to the neighborhood's aesthetics or traffic. *See N. Olmsted Chamber of Commerce v. City of N. Olmsted,* 86 F. Supp. 2d 755, 552 (N.D. Ohio 2000) ("However, this regulation neither directly and materially advances the City's asserted interests [safety and aesthetics], nor provides for a carefully calculated and reasonable fit."). Signs much larger than Ms. Anderson's sign are permitted. And signs may be left up for a longer duration. *See, e.g.,* Metro. Code §§ 17.32.040 (exempting yard sale signs up to six (6) square feet in area and up for six (6) days), 17.32.060(C)(2)(a) (exempting "For Rent" signs up to six (6) square feet, no time limit). The law provides ineffective or remote support for the goal of traffic safety and aesthetics. *See Edenfield*, 507 U.S. at 770. The "overall irrationality of" Metro's signage scheme is fatal to this prong. *Greater New Orleans*, 527 U.S. at 193 (quotation omitted).

The law also fails the fourth prong, which requires it to be "not more extensive than is necessary to serve" the stated interest. *See Discovery Network*, 507 U.S. at 416. Metro must have employed a "means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Metro must demonstrate—to date they have not tried—that it "'carefully calculated the costs and benefits imposed'

by the regulations." *Discovery Network*, 507 U.S. at 417. The "breadth and scope of the regulations, and the process by which" Metro adopted the total ban "do not demonstrate a careful calculation of the speech interest involved. *Lorillard*, 533 U.S. at 562.

"It is perfectly obvious that alternative forms of regulation," *44 Liquormart*, 517 U.S. at 507, not involving content-based speech restrictions would do far more to advance the goal of aesthetics and traffic safety. Metro's "current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts and portability." *Reed*, 135 S. Ct. at 2232. *See also N. Olmsted Chamber of Commerce,* 86 F. Supp. 2d at 772 ("[T]he City could properly regulate the size of all signs within certain districts in a content neutral fashion ….."). Other permissible, temporary residential signs are regulated based on these sorts of content-neutral aspects. *See* Metro. Code §§ 17.32.040, 060. Metro could have easily regulated the harms associated with STRP signs this way, but chose not to do so. The ban fails the fourth prong as well.

(c) **Metro provides no authority supporting upholding the law**.

Every case cited by Metro is readily distinguishable. In *Metromedia*, 453 U.S. at 507, the Supreme Court did state in a "badly splintered plurality opinion which has arguably been undermined by [*Discovery Network*]," *Rappa v. New Castel County*, 18 F.3d 1043, 1047 (3d Cir. 1994), that a total ban on all outdoor advertising satisfied *Central Hudson* because it served the

goals of aesthetics and traffic safety. But this was a plurality decision, and the governing, concurring opinion "specifically—and vehemently disagreed with that conclusion [that San Diego constitutionally regulated commercial speech]." *Discovery Network Inc. v. Cincinnati*, 946 F.2d 464, 470, n. 9 (6th Cir. 1991); *Rappa*, 18 F.3d at 1058 (concurrence employed more stringent review that the law failed because it "failed to come forward with evidence demonstrating the billboards actually impair traffic safety," or that the interest in aesthetics was substantial in the commercial and industrial areas) (quoting *Metromedia*, 453 U.S. at. 528, 530-33 (Brennan, J., concurring in the judgment)).

The concurring opinion actually supports the Anderson's position that Metro's law should not withstand constitutional scrutiny. Further, unlike the law in *Metromedia*, Metro's law does *not* ban all outdoor advertising. Many other similar signs are permitted, *see* Metro. Code §§ 17.32.040, 060, and it is that differential treatment that is fatal under the third and fourth prongs of *Central Hudson*.

Metro's other cases fare equally poorly. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 808 (1984) (memorandum p. 9) was an opinion that addressed a time, place and minor restriction, not a content-based prohibition. ("The text of the ordinance is neutral."). The same is true of *Silver Video USA, Inc. v. Summers*, M2004-00794-COA-R3-CV, 2006 Tenn. App. LEXIS 714 (Tenn. Ct. App. Nov. 1, 2006). Content-based restrictions are

subject to a different, far more rigorous test than content-neutral time, place, manner restrictions. *See Rappa*, 18 F.3d at 1053 (whether a law is content-based or content-neutral time, place and manner restriction "becomes a (if not the) crucial determination in the evaluating a particular regulation of speech") (citation omitted). This is because, unlike the challenged law, restrictions on when or where speech occurs does not prohibit speech altogether.

Metro's final case, mined from the jurisprudence of Michigan, is *City of Rochester Hills v. Schultz*, 459 N.W.2d 69 (Mich. 1999). It is, in addition to being overwhelmed by the greater weight of binding Supreme Court precedent, also readily distinguishable. There, the Michigan Supreme Court approved a total ban on home-based business signs. But it did so on the grounds that with the law was not concerned with content, but rather the visual characteristics of the signs. *Id.* at 493. The same cannot be said of Metro's law. It is very much concerned with content because it only pertains to a specific subject matter: STRPs.

While it is not clear from the *Shultz* opinion, it appears that the challenged law identified home-based business signs based on their content. In that case, *Schultz* will not survive *Sorrell* and *Reed* because it relies on the reasoning that the Supreme Court has explicitly rejected. *See Reed*, 135 S. Ct. at 2228 (governmental purpose is not relevant to a content-based

restriction on speech). The law's justification only becomes relevant if the law is content neutral, as this law is not. *See id.*

Metro finishes by arguing that abundant alternative means of communication exist to advertise on Airbnb such as emails. (Memorandum, p. 10). This would matter if the law were a mere a time, place and manner restriction. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (time, place and manner restrictions justifiable if they leave open alternative means of communication). It is not. Indisputably, it is a content-based restriction. Courts do not countenance content-based restrictions merely because other means of speaking exist. The Andersons need not accept the content of their speech on the government's terms.

This point also forgets that the Court has long insisted on "[a] special respect for individual liberty in the home… [and] that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *Gilleo*, 512 U.S. at 49 (emphasis preserved). The Court has rejected this very argument in the context of for sale signs in a person's home even though "in theory sellers remain free to employ a number of different alternatives," *Linmark*, 431 U.S. at 93, because yard signs have advantages that cannot be replicated. For instance, the emails Metro deems an adequate alternative (memorandum, p. 10), would not have any chance of reaching those consumers who were not already on Airbnb, or who Ms. Anderson

wanted to reach during Oktoberfest, who were already in and enjoying her neighborhood and are thus much better prospects. "The alternatives, then, are far from satisfactory." *Id.*

D. The Andersons have stated a valid claim for vagueness. Accepting the allegations as true, no reasonable person would know if they qualify for the exemptions.

Metro argues that the complaint fails to state a claim that the ordinance is unconstitutionally vague because no reasonable person could know if they are an STRP or one of the exempted entities (hotels, bed and breakfast, boardinghouse). (Memorandum, p. 11). Again, this argument stops short of establishing that under no set of facts could this claim exist. Assuming the complaint is correct and there is no way that is not arbitrary to separate covered conduct and exempted conduct, then the law is clearly unconstitutionally vague. Thus, the Andersons have stated a valid claim.

Although the merits of this argument itself are not presently before the Court (because it is not raised in the motion for injunction), Metro raises two objections to this argument. First, Metro contends that "it is not possible" an operator of an STRP would not know if they were exempted or not "because the ordinance, on its face, makes it clear that these terms do not overlap with the definition of an STRP." (Memorandum, p. 11). Metro then quotes the ordinance itself that defines STRPs and exempts other establishments. Metro's reasoning is circular; yes, the ordinance does but no, this stops short of explaining what differentiates STRPs and the exempted properties. Metro

does not say, and it will not do to simply redirect a reader back to the ordinance and say the ordinance says they are different.

Metro then generally contends that the complaint offers "speculation and states a legal conclusion with no factual background" in making the argument. (Memorandum, p. 11). This is perplexing. Claims for relief are supposed to be "short and plain," Tenn. R. Civ. P. 8.01, and "simple, concise and direct." Tenn. R. Civ. P. 8.05. No technical forms of pleading are required, and a complaint "need not contain detailed allegations of all the facts giving rise to the claim." Tenn. R. Civ. P. 8.05(1), 8.06; *see also Webb*, 346 S.W.3d at 427. The real question, about which there can be little doubt, is whether the complaint provided Metro with fair notice of the basis of the claims. *See Webb,* 346 S.W.3d at 426-27. Metro appropriately identifies the constitutional claims and submits argumentation, however erroneous, demonstrating that it is well aware of the constitutional jurisprudence. Metro was fairly put on notice. To insist on more exceeds the standard.

Moreover, the complaint and injunction dwell on this issue at some length. As stated in the complaint, the legal definition of the terms in question make the Andersons' home both an STRP and an exempted establishment, thus no ordinary person could know if the law applied or not, and enforcement of the law would surely be arbitrary. (Complaint, pp. 20-21).

For evidence that this argument has merit, the Court need not look any further than Metro's own argument which, as if to make the point that

enforcement is sure to be arbitrary, at one point appears to allow for the possibility that the law *does not apply* to the Andersons because of the exemptions (memorandum, p. 4), only to later argue that the ordinance makes it clear that the terms *do not* overlap. (Memorandum, p. 11). The dualism of Metro's position should underscore the plight of anyone struggling to make sense of this law.

E. The Andersons state valid claims for Equal Protection, Substantive Dupe Process and Anti-monopolies clauses. Rational basis may not be the test, but even if it is, it can be lost by Metro.

Metro argues that the Andersons have failed to state a claim on their Equal Protection, Substantive Due Process, or Anti-Monopolies claims. (Memorandum, pp. 12-16). For these issues, the sole question is whether, if the facts in the complaint are true, the Andersons are entitled to relief under these three issues. Metro does not show how these claims are deficient in any way. Rather, Metro asserts that these claims are reviewed under rational basis and, thus, they will prevail. The *merits* of the claim are not suitable for consideration in a motion to dismiss for failure to state a claim. *Webb*, 346 S.W.3d at 432 (recognizing "the well-established principle in Tennessee that a Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence"). As pointed out above, the U.S. Supreme Court long ago reversed a Tennessee Court which mistakenly cut off a proceeding from fact finding because it was economic

legislation reviewed for a rational basis. *Nashville C & S. L. Ry. v. Walters*, 294 U.S. 405, 414-15 (1935)

Also, Metro makes a number of assumptions that are in dispute. Metro's arguments presume that no fundamental rights are in play, which would elevate the standard of scrutiny. Yet, the Andersons maintain that they have had a number of fundamental rights implicated. (Complaint, pp. 22-24). Metro also asserts that the ordinance is a zoning measure, but this too is disputed. (Memorandum, p. 14). Granting the motion to dismiss would improperly endorse Metro's best case view of the facts, the very opposite of the guiding legal standard.

Furthermore, Metro also presumes that it will prevail under rational basis. This too is unfounded. As argued above, many economic regulations have failed to do so, and, more importantly, the factual record must be more fully flushed out before it can be decided if the ordinance is rational.

More importantly, Metro adduces no evidence showing how the law is rational, nor do they try. *Id.* ("[T]he mere assertion of a legitimate government interest has never been enough to validate a law.") (quotations and citations omitted). The Andersons have stated a valid, and especially well developed claim, and it is not unheard of to fail rational basis. *See, e.g., Cleburne*, 473 U.S. 432 (fails equal protection); *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (equal protection/substantive due process); *Bruner*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014) (same); *Consumers Gasoline*

Stations v. Pulaski, 292 S.W.2d 735 (Tenn. 1956) (equal protection); *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 627 (Tenn. 1948) (anti-monopolies clause).

In short, Metro would "require the trial court to scrutinize and weigh" the facts and arguments in order to make a determination that the claims are not plausible which, in turn, "raises potential concerns implicating the Tennessee constitutional mandate that 'the right of trial by jury shall remain inviolate." *Webb*, 346 S.W.3d at 432 (quoting Tenn. Const. art. I., § 6). This the Tennessee and U.S. Supreme Courts have instructed trial courts not to do.

F. The Andersons have stated a valid claim of an unreasonable search and seizure.

Metro next contends that the records requirement does not violate state and federal prohibitions against unreasonable searches and seizures, attempting to distinguish Metro's ordinance from the virtually identical one struck by the Supreme Court in *City of Los Angeles v. Patel*, -- U.S. --, 135 S. Ct. 2443 (2015). (Memorandum, p. 18).

Metro distinguishes because the Los Angeles ordinance specified that a hotel operator could be arrested for failing to provide the records. This misses the point entirely. As the Andersons submit in their complaint, they are not operating a dangerous, large commercial business. They do not qualify for an administrative search in the first place. (Complaint, pp. 25-26). They may not

even be compelled to keep records. And, whatever the merits of this position may be, it is obviously a sufficient legal claim.

Additionally, the *Patel* ruling will not allow for Metro's distinction. It was the lack of judicial review, not the punishment itself, that made the obligation to disclose records impermissible. *See Patel*, 135 S. Ct. 2452 ("[S]earches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions.").

Furthermore, this distinction is but one of degrees. A violation of Metro's Code is sanctionable. Historically, violations of municipal ordinances are civil in nature, but a sanction may be punitive in purpose or effect, even constituting a fine for constitutional purposes. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 259, 261 (Tenn. 2001). When Metro's Code is silent as to penalty, a violation of any provision of the code is punished by a fifty-dollar ($50) penalty. Metro. Code § 1.01.030(A). Each day a person violates the Code is separately punishable. Metro. Code § 1.01.030(B). So the failure to provide the police with records is punishable.

A lighter punishment will not make the search constitutional. *See Camara v. Mun. Court*, 387 U.S. 523, 527, 540 (1967) (San Francisco ordinance permitting warrantless inspections to enforce housing code punishable as a misdemeanor is unconstitutional); *Baker v. City of Portsmouth*, 2015 U.S. Dist. LEXIS 132759 (S.D. Ohio, Sept. 30, 2015) (copy

of opinion attached) (warrantless administrative inspections of homes punishable by misdemeanor violates *Patel*) (citing *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (N.Y. 1981) (warrantless inspection of rental property punishable by fine unconstitutional)).

The Andersons must provide the records to the police upon written request, absent any kind of judicial supervision. The Andersons could theoretically accept punishment and then sue, but that would be reactive. But it is equally true that an arrested person could sue after the fact. But in both cases, the person was searched prior to any judicial involvement. It was on this that *Patel* was premised. The Andersons are substantially likely to prevail on this claim as well.

Metro's argument would perversely accord the large, commercial hotel chains who sued in *Patel* more privacy protections then to the Andersons in the privacy of their own home. "A special respect for individual liberty in the home has long been part of our culture and our law." *Gilleo*, 512 U.S. at 49. Furthermore, protections against unreasonable search and seizure could only be more powerful under the Tennessee Constitution, a consideration not at issue in *Patel*, but weighing in the Anderson's favor. *State v. Doelman*, 620 S.W.2d 96, 99 (Tenn. Crim. App. 1981). These countervailing concerns are unaddressed by Metro, but overwhelm the validity of any distinction from *Patel* presented by Metro.

IV.
Conclusion

Metro's motion should be denied.

Dated: October 26, 2015

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, by the following means:

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