No. M2017-00190-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

RACHEL AND P.J. ANDERSON

Appellee/Plaintiffs

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY

Appellant/Defendant

On Appeal from the Davidson County Circuit Court,
Nashville, TN
Kelvin D. Jones III, Case No. 15C3212

REPLY BRIEF OF THE APPELLEE/PLAINTIFFS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

This brief is filed under Tenn. R. App. P. 27(c), which permits an appellee requesting relief from the judgment to file a brief in reply to the response of the appellant on the issues presented by appellee's request for relief. The Andersons have requested relief from the judgment of the trial court, asking for both a reversal of the finding of summary judgment in Metro's favor on the Anti-monopolies claim and for an award of attorney's fees for prevailing on the claims contained in their preliminary injunction. Metro's responses to those issues were contained in its reply brief, dated June 29, 2017. This reply will address Metro's responses to the issues presented by the Andersons.

INTRODUCTION

Scholars from Adam Smith to Sir Edward Coke identified legally enacted monopolies as a threat to liberty itself (Pls.' Br. at 3-8), an understanding so common during the Founding-era that Tennessee has, from its inception, included an Anti-monopolies Clause in its Declaration of Rights. Tennessee's Constitution recognizes that monopolies are "contrary to the genius of a free state and shall not be allowed." Tenn. Const. art. I., § 22. The language is as clear as its intent. No one – Metro included – disputes that the Andersons, like all Nashville homeowners, were once free to share their home with guests on a short-term basis, but now, as a result of Metro's cap of 3% on non-owner occupied homesharing, only a privileged few may. The evidence showing the overwhelming influence of the hospitality sector that viewed homesharing as an emergent threat in making sure Metro's Ordinance artificially suppressed competition has never been rebutted. The Andersons argued in their principal brief that:

A. The trial court incorrectly ruled that exclusive privileges over homesharing were not a monopoly because it was not a constitutional right. Metro did consider homesharing a right. Also, the correct definition only asks whether a person was at liberty to do the act, not if it was a right, an understanding that renders the Anti-monopolies Clause superfluous, (Pls.' Br. at 8-15);

B. In using the rational basis test and not the legitimate relation test, the trial court used the wrong test to determine that the monopoly was legitimate, (Pls.' Br. at 17-20);

C. The legitimate relation test requires a monopoly promote public moral or physical well being. The goal of protecting residential character goes perhaps to public welfare, but does not clear the higher bar, (Pls.' Br. at 20-23);

D. The legitimate relation test requires the stated goal to be the actual end in view. The unrebutted evidence showed that the end in view with the cap was not protecting neighborhoods, but was protecting hotels from competition, (Pls.' Br. at 23-28);

E. No evidence showed that the cap on only one type of homesharing had a real tendency to promote residential character. (Pls.' Br. at 28-32).

The Andersons thus challenged both the **definition** and the **justification** used by the trial court. Metro warped the definition of a monopoly in its response, providing a definition that would allow it to monopolize anything but that which is already constitutionally protected, making the right meaningless. Metro's effort to make a redundancy out of Tennessee's prohibition on monopolies is not supported by the original, historical understanding of the term or the case law. Monopolies are created over trade practices – that was the original problem. The abundant, unrebutted evidence demonstrated that Metro considered homesharing a right – incidental to homeownership – meaning that it would meet even Metro's contrived definition. No evidence supported Metro's newly found argument that homesharing was actually illegal this whole time.

Metro's effort to lower the bar on an acceptable justification to "residential character" failed as well. The test Metro propounded, which cannot be found in the jurisprudence of the Tennessee Supreme Court, would permit anything save for those actions where Metro has exceeded its police powers in the first place. Metro's understanding of acceptable justifications is so vast that it renders the Anti-monopolies Clause a nullity. Metro scarcely addresses the evidence tending to show that the cap was enacted to protect hotels. Metro's evidence only showed antagonism toward homesharing, not that the cap had an actual tendency to protect neighborhoods.

Regarding further attorney's fees, Metro argues no appellate court has permitted fees based on a preliminary injunction. Yet the Sixth Circuit did exactly that in *McQueary v. Conway*, 614 F.3d 591, 598 (6th Cir. 2010).

ARGUMENT

I. THE CAP ON HOMESHARING IS A LEGALLY DEFINED MONOPOLY BECAUSE IT TOOK A COMMON RIGHT AND MADE IT EXCLUSIVE.

A. Metro did not demonstrate that common rights would not include trade. It must to address the historic problem and to make the right meaningful.

Metro did not dispute that it previously allowed the Andersons, along with the rest of Nashville, to engage in homesharing without a cap. Rather, it continued to quibble that because homesharing was a mere business activity, not a "legal right," it could make this right exclusive all it wanted without creating monopolies. (Metro's Reply, at 2). There are four reasons why this was incorrect.

First, Metro's interpretation contravened the original meaning of monopolies. Metro never disputed the Andersons' point (Pls.' Br. at 2) that the correct understanding of the term "monopoly" was the original understanding at the time the Anti-monopolies Clause was adopted. *See Barrett v. Tenn. Occupational Safety & Health Review Comm'n*, 284 S.W.3d 784, 787 (Tenn. 2009). The Andersons went to great lengths in demonstrating the historical circumstances that undergird worries over monopolies. To the Enlightenment mind, it involved granting the likes of royal patents (exclusive licenses) for practices such as making playing cards or tailoring, or undertaking apprenticeships for common trades. (Pls. Br. at 3-4) (relying on Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003)). No dispensation was made for monopolizing trades; on the contrary, that was the heart of the problem. In other words, monopolies, properly understood, concerned activities that were no more a "legal right" – whatever Metro takes this to mean – than homesharing.

A monopoly means an exclusive privilege to engage in a particular trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 51-52 (1911) (defining "monopoly" as an allowance to particular persons "of the sole buying, selling, making, working" etc.). Blackstone, in his seminal *Commentaries on the Laws of England*, even included monopolies in the chapter entitled "Of Offenses against Public Trade:"

> being a license or privilege allowed by the king for the sole buying and selling, making, working or using any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing and trading which he had before.

4 William Blackstone, *Commentaries on the Laws of England* 159 (1769).[1] Justice Steven Field in his dissent in *The Slaughter-House Cases*, 83 U.S. 36, 83 (1872), provided tremendous insight into the meaning of the term: "the definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade." *Id.* at 102 (Field, S. dissenting). The definition must include exclusive privileges to engage in trade practices to be in any way faithful to the original meaning. Justice Field lost the argument that monopolies are prohibited under the U.S Constitution. There is no argument that monopolies are prohibited under the Tennessee Constitution.

The second problem with this argument was that it rested on the incorrect factual premise that homesharing was not a right before. As pointed out previously, (Pls.' Br. at 9). Metro's own zoning administrator issued a memorandum "summarizing the current zoning law" regarding homesharing, which explicitly concluded that it was "incidental

[1] Viewed online here: http://avalon.law.yale.edu/18th_century/blackstone_bk4ch12.asp (last viewed July 11, 2017).

subordinate use to a principal residential use." (TR. VII, 919). Because Metro had no laws regarding homesharing, and zoning ordinances are "construed in favor of a property owner's *right* to the free use of his or her property," Metro had no authority to regulate homesharing. *Id.* That word – right – was the word *Metro* used before it became concerned over beating back a challenge to its monopoly. This piece of evidence was prominently relied upon in the Andersons' brief (Pls.' Br. at 9, 11, 15, 41-42) so Metro ought to have addressed it if it was to argue that homesharing was not a right. Instead, Metro simply ignored it, not mentioning it once in their reply. The zoning administrator was hardly alone in this understanding in Metro government. As extensively related in the Andersons' brief (Pls.' Br. at 9-10), the evidence was entirely unrebutted and so overwhelming that Metro correctly deemed homesharing to be legal *because* it was unregulated. Homesharing, then, met even Metro's contrived and ahistorical definition.

The third problem with Metro's attempt to re-work the definition was that it would reduce the Anti-Monopolies Clause to a useless redundancy. This, too, was argued at length previously (Pls.' Br. at 14-15) - the Anti-monopolies Clause is not compatible with an understanding that would allow governments to freely monopolize trades as long as they do not interfere with other legally recognized rights. *Any* burden on the exercise of another right would trigger judicial protections. Naturally, the Anti-monopolies Clause reflects distinct concerns. A racially discriminatory burden on the ability to work would violate a constitutional right. *See City of Memphis v. Winfield*, 27 Tenn. 707, 708 (1848). It would not make it any better or worse if there was an exclusive exception for the first 3% to ask for it, but that is the role left for the Anti-monopolies Clause under Metro's understanding. This Clause, so unambiguous in its prohibition of monopolies, would be

diluted to only apply to prohibit that which was already prohibited. Stated bluntly, it would be a useless appendage. This presented the fourth problem with Metro's definition.

Metro urged a definition that was flatly at odds with the one used in Tennessee. The Tennessee Supreme Court has long defined monopolies more broadly than just making a legal right exclusive. From its earliest cases, the Court ruled that it was not a common right if the person "had not the common right, *or liberty before, to do the act, or possess or enjoy the privilege or franchise granted as a common right.*" *Memphis v. Memphis Water Co.*, 52 Tenn. 495, 529 (1871) (emphasis added). From the beginning, monopolies meant an exclusive right in trade, not legal rights. The Andersons, like every other Nashville homeowner, had the *liberty and privilege* before to homeshare. It is not in dispute that the Andersons were perfectly free to homeshare previously. No authority, by contrast, supported Metro's cramped and nonsensical definition. Nor was this the only time the Court used a definition that included acts that were not "legal rights." After all, the two leading cases striking down laws under the Anti-monopolies Clause involve slaughterhouses, *see Noe v. Mayor and Alderman of Town of Morristown*, 161 S.W. 485, 487 (Tenn. 1913), and taxicabs. *See Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 336-37 (Tenn. 1948). Neither activity can plausibly be described as "legal rights." Metro certainly did not try to do so or make sense of how slaughterhouses or taxicabs could not be monopolized if its definition was correct. It was, rather, without legal foundation.

In sum, the proper original definition must include trades. This does not devitalize the right and accords with the jurisprudence of the Tennessee Supreme Court.

B. Metro did not demonstrate that homesharing was previously illegal.

1. Metro waived the argument that homesharing used to be illegal.

Because Metro never argued in its summary judgment motion that homesharing was illegal previously (Metro's Reply, at 4), it has waived this issue. A party may not raise issues on appeal that were not raised in the trial court. *Chadwell v. Knox Cty.*, 980 S.W.2d 378, 384 (Tenn. Ct. App. 1998) (declining to consider new theory on appeal). Metro filed a motion for summary judgment. (TR. VIII, 1157-1181). Nothing even hinted that homesharing was more than just unregulated, but illegal. Metro's Anti-monopolies motion argued along the lines of the issue addressed above – that homesharing was not a right, not that it was illegal. Still more, the Andersons devoted great attention to showing that homesharing previously was legal. (TR. VI, 849-850). Metro responded only that, even though they may have been unregulated, the question of whether homesharing was a common right was a "legal question for the Court to answer, not a question of fact as Plaintiffs contend." (TR. IX, 1293). Consequently, in granting Metro's motion, the trial court never addressed the prior, legal status of homesharing. This is a late developing argument that should be deemed waived.

This argument that homesharing was illegal is also waived for lack of citation. This Court has "routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as described by Rule 27(a)(7) constitutes a waiver of the issue." *Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000). Metro's newfound position also suffers from the conspicuous lack of any proof that *anyone* ever considered homesharing to be illegal. (Metro's Reply, at 2). Metro did nothing more than argue that homesharing was not a use contemplated previously by its code. *Id.* at 3. That stopped short of proving that anyone deemed it illegal, let alone anything to counter the extensive evidence proving the very opposite.

2. Metro presented no evidence that anyone thought homesharing was illegal.

Metro wrongly contended that the Andersons merely showed that Metro officials considered homesharing unregulated, not legal. (Metro's Reply, at 2). The evidence showed that Metro considered it legal *because* it was unregulated. In the words of Councilmember Burkley Allen, the architect of the homesharing cap, homesharing "seem[ed] to be fine [be]cause it doesn't say [in the Code] they are not fine." (Pls.' Br. at 9-10). This same reasoning appeared in the memorandum of the zoning administrator – never directly addressed by Metro – that explicitly concluded that it was an "incidental subordinate use to a principal residential use" because it was unaddressed by zoning. (TR. VII, 919). This appeared to be the unanimous view of Metro at that time. Consider the bill explainer – also never mentioned by Metro – that homesharing was "allowed in residential areas without condition." (TR. VII, 921). No proof goes the other way.

Metro brushed aside these comments as suggesting merely that homesharing was unregulated. (Metro's Reply, at 2). Of course, that undersells it – these comments indicate that homesharing was permissible, again, because it was unregulated. But, if indeed anyone in Metro government ever believed that "the use was not legally permissible" because, until specifically authorized, a particular use is illegal, *id.* at 2-3, Metro never produced any evidence of it. Indeed, the zoning administrator's memorandum had precisely the opposite view of how land use worked. (TR. VII, 919). The entire weight of the evidence went only one way. And this was dispositive because a common right is anything that a person had the "liberty before, to do the act." *Memphis Water Co.*, 52 Tenn. at 529.

3. Metro misapplied *Wade v. Patterson*, 2009 WL 211878 (Tenn. Ct. App. 2009).

Metro purported to rely on legal authority, *Wade v. Patterson*, 2009 WL 211878, *5, 2009 Tenn. App. LEXIS 34 (Tenn. Ct. App. Jan. 29, 2009), for the proposition that "[i]f a use is not listed as a permitted use, then that use is not permitted within that zoning district." (Metro's Reply, at 3). This is a misleading quotation. *Wade* was indeed the *very case* relied upon by Metro's own zoning administrator when he concluded that homesharing was legal precisely because Metro had not specifically outlawed it: "Based upon this decision, this office has not required a permit to operate an STRP because we currently have no authority under the zoning code to do so." (TR. VII, 920). He was not wrong.

This Court did not hold in *Wade* (in what would make it a remarkably major holding for an unpublished case) that if a land use was not listed then that use is not permitted. Metro's quote came from the opinion of the lower court, not this Court, based on the testimony of a witness for Chattanooga on how Chattanooga's zoning ordinances worked. 2009 Tenn. App. LEXIS 34, at *14. This presents two problems. First, Chattanooga's zoning laws are not Nashville's. Here, Nashville's own zoning administrator took the exact opposite position regarding how Nashville's zoning laws work. (TR. VII, 919-920). Second, the lower court's opinion, which contained the language Metro quoted, was reversed. This Court held that Chattanooga's effort to bar short-term rentals under its zoning laws was unconstitutionally vague precisely because it did not have a use category prohibiting them. *Wade*, 2009 Tenn. App. LEXIS 34, at *26-30. In sum, Metro had no support – legal or factual – to argue that homesharing was illegal because it was unregulated.

C. Metro did not show that the cap in the Andersons' census tract was not exclusive just because the cap had not been reached in other tracts.

Metro next responded that, even though the cap had been reached in the Andersons' census tract, the cap was not exclusive because it had not been reached in other census tracts. (Metro's Reply, at 6). In other words, because the Andersons could move, they were not in a monopoly. Metro cited no authority for this definition, waiving it. *Bean*, 40 S.W.3d at 55. Further, this logic was inconsistent with the rulings of the Supreme Court. It was not even consistent with the rules of Monopoly™. "A player must own all of a color group (have a monopoly) in order to build houses or hotels."[2] Under Metro's understanding, a player who owns Park Place and Boardwalk does not have a monopoly just because Marvin Gardens is available. This is an elementary misunderstanding of what a monopoly is, one that is not endorsed by the courts (or Hasbro).

The law itself sets the relevant market. For instance, in this Court's most recent Anti-monopolies case, *Trails End Campground, LLC v. Brimstone Rec.* LLC., 2015 Tenn. App. LEXIS 39, *23 (Tenn. Ct. App. Jan. 29, 2015), this Court's "modern definition" of a monopoly recognizes that monopolies are "*within a community or district.*" The relevant community or district was where Metro made the caps apply: by census tract. The Anti-monopolies Clause does not allow monopolies in some places, so long as they are not everywhere. After all, Checker Cab could always operate cabs in a city other than Johnson City. The King of England could tell someone to manufacture something other than playing cards. The existence of a free maket elsewhere has nothing to do with whether Metro created a monopoly in the Andersons' census tract.

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[2] Description of rules viewed online at: http://monopoly.wikia.com/wiki/Monopoly (last viewed on July 11, 2017).

This is fully consistent with the approach federal courts take towards monopolies under antitrust law. Markets are defined narrowly because "each [product] has its own attraction for buyers; each is unique, however trifling the basis for preferring it may be." *Fashion Originators Guild of America v. Federal Trade Commission*, 114 F.2d 80, 85 (2nd Cir. 1940). This is doubly so in terms of geographic market definition for housing accommodation – a buyer specifically chooses a location amongst the various neighborhoods based on varying preferences. It will not do to deny that an exclusive cap reached only in the most desirable markets does not create a monopoly because the Andersons can simply move to a less desirable one. The FTC itself uses this same approach when they release guidelines dealing with the concepts of monopolies. As the FTC highlights, "when a hypothetical monopolist could discriminate based on customer location, agencies… define geographic markets based on location of targeted customers."[3] The ability to discriminate between customers with ready access to homesharing and those forced to seek out hotel accommodations because of the cap is readily apparent. Hotels in those areas would have no trouble discerning where to inflate prices, perversely, in the very places where homesharing legally could not compete. Markets should be examined narrowly, following federal jurisprudence and guidelines, as it is the commodity and its readily available substitutes that have the greatest impact on economic behavior. *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956).

Metro failed to distinguish either *Checker Cab* or *Noe*, nor attempt to explain how taxi cabs or slaughterhouses could be common rights, but not homesharing. (Metro's Reply, at 5). Metro argued that *Checker Cab* only found the monpoly over taxi cabs

[3] Available here: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (last viewed July 11, 2017).

impermissible because the existing cab companies had a right of first refusal over new cabs. *Id.* There was nothing in *Checker Cab* to support the notion that the right of first refusal was in any way significant. Likewise with *Noe*, Metro alights upon another distinction without a difference, arguing that the problem with the law in question was that it reduced the number of slaughterhouses to one, as if the scale of the monopoly was pertinent. *Id.* at 6. In both cases, the problem was that cities, much as Metro has done here, made a common practice exclusive. *See Noe*, 161 S.W. at 487 ("The ordinance should be framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of all such business."). Neither case provided any support for the idea that Metro can create a monopoly so long as there is no right of first refusal for existing martket participants, or as long as a few other people can participate. Metro's inability to distinguish these cases in any convincing fashion demonstrates precisely why they dictate the outcome here.

As part of this irrelevant "right of first refusal" argument, Metro explained how it chose the 3% number, incorrectly stating that "every residential property owner, including the Andersons had the ability to apply for a non-owner occupied STRP permit at the same time and in the same manner." (Metro's Reply, 6). This is all irrelevant. Just because someone once had a chance to become the monopolizer does not mean this is not a monopoly. Metro was also factually incorrect. Metro cited to the declaration of Jon Michael, chief zoning administrator, to argue that the Andersons had the ability to apply for a non-owner occupied STRP permit before they were all gone. *Id.* Michael, however, stated that "[a]ny property owner whose property complied with the requirements for an STRP *set out in the Metropolitan Code* was allowed to apply at that time." (TR. IX,

1239) (emphasis added). The Code then defined owner occupied as meaning "the owner of the property permanently resides" in the principal residential unit. (TR. I, at 103). It is not disputed that when Metro began issuing permits, the Andersons lived in the principal residential unit, they were not considering moving and thus, the owner occupied permit P.J. obtained was "proper." (TR. IX, 1306: Metro's Resp. to Pls.' Statement of Undisputed Material Fact, ¶ 32-33). So they did not qualify for a non-owner occupied permit. And when P.J. tried to get a non-owner permit promptly once they did qualify, the cap had already been hit. *Id.* at 1309-10. With respect to the suggestion that the 3% cap was formulated so as to allow all existing operators to continue (Metro's Reply, at 5), Metro provided no proof other than its own statement that this was what it *intended* to do, not that it in fact allowed all existing operators to continue. Burkley Allen's emails showed that she had no awareness of how census tracts worked. Some were so small that 3% of the tract meant that there was only one permit available (TR. VIII, 1052), a fact that became all too real when she realized that "[t]here may be a brawl" in one census tract precisely because there were two operators and only one permit. (TR. VII, 1037). The stubborn fact remained that not everyone, including the Anderons, *ever* had a chance to get these permits even if this somehow mattered.

Metro's assertion that the "mere limitation on the number of permits cannot create a monopoly" (Metro's Reply, at 7) relied on *Ketner v. Clabo*, 189 Tenn. 260, 266 (Tenn. 1949). Metro misapplied this precedent. That case concerned beer permits, a special case, with the Supreme Court ruling that control of beer sales is subject to the "absolute discretion" of the governing body. *Ketner,* 189 Tenn. at 264. Naturally, the business of alcohol sales is very different from homesharing. Selling beer "is not a natural and

inherent or statute [sic] given right but a permissive right." *McHugh v. Morristown*, 208 S.W.2d 1021, 1023 (Tenn. 1948). It only exists by privilege; a privilege that was once taken by the government altogether but then reinstated with the Twenty-First Amendment, which "gave back to the states the power to regulate" alcohol. *Dixon v. Lawrenceburg Beer Bd.*, 1999 Tenn. App. LEXIS 465, at *2 (Tenn. Ct. App. July 16, 1999). As such, the beer business "is subject to unlimited restrictions." *Ketner*, 189 Tenn. at 266. To extrapolate from this precedent a right to monopolize permits of all businesses as if they were all the same as alcohol sales stretches this reasoning past the breaking point. *Ketner's* reach is limited to that which it has "absolute discretion," 189 Tenn. at 264, and, fortunately, no one has ever claimed Metro has unlimited discretion over the homes of its citizens. Metro can produce no authority that would offer cities "unlimited restrictions" on any business other than alcohol sales.

In closing on this point, a city's zoning authority is not called into question by this case because Metro's cap does not involve zoning. In many ways, it is the very opposite. While in many instances, "[t]he precise contours of determining when an ordinance is a zoning ordinance . . . are difficult to draw or define," *SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 477 (Tenn. 2012) (citation and internal quotation marks omitted), this was not one of them. A zoning ordinance "involves the territorial division of land into districts according to the character of the land and buildings, their suitability for particular uses, and the uniformity of these uses." *Family Golf v. Metro. Gov't of Nashville*, 964 S.W.2d 254, 258 (Tenn. Ct. App. 1997). This is not what the cap did. It allowed non-owner occupied homesharing in all zones, but limited them to 3% per census tract. A zoning scheme would do the opposite; it would *limit* the zones where non-owner

occupied homesharing could operate but *allow* them to all, whereas this cap *allowed* them in all zones, but *limited* them to some. There was demonstrably no "uniformity of these uses," even within zones; nor was homesharing suitable for a particular use in particular zones under Metro's scheme. *Family Golf*, 964 S.W.2d at 258. This was flatly foreign to zoning concepts and can safely be undone without any impact on general zoning law.

Metro set up a strawman argument contending "there is no constitutional right to run a particular commercial business in every part of town." (Metro's Reply, at 4-5). The Andersons do not assert a right to operate a commercial business wherever they please. Metro has already allowed homesharing in their neighborhood. The Andersons have been doing it for years without Metro receiving a formal complaint. They merely ask to be allowed to continue doing so in a part of town where Metro already allows homesharing, among other far more visible businesses. Nothing about this request would preclude Metro from using its zoning authority to keep commercial businesses out of zones designated residential.

II. METRO DID NOT SHOW THAT THE CAP SATISFIED THE LEGIMATE RELATION TEST.

A. Metro's argument facially failed to satisfy the legitimate relation test because of what Metro's response failed to address.

At the outset, Metro's response regarding the legitimacy of this monopoly was notable for what it failed to do. First, Metro did not identify a single instance when a monopoly has passed constitutional muster because it serves a goal remotely resembling anything like "residential character." Second, Metro undermined its own argument that the cap was a legitimate exercise of its police powers reviewable under the rational basis test (Metro's Reply, at 7), by acknowledging (as it had to) that the *Checker Cab* case held

that the police powers would not justify a monopoly. *Id.* at 9. Metro never reconciled the considerable differences between how the Tennessee Supreme Court has actually reviewed monopolies claims and rational basis scrutiny. Finally, Metro failed to show how the cap had any "real tendency," *Checker Cab*, 216 S.W.2d 337, to accomplish the stated goal of protecting neighborhoods. (Pls.' Br. at 28). Metro continued to propound generalized complaints of residents who did not like homesharing (Metro's Reply, at 10-13), showing only the existence of a concern, but not that the solution addressed it.

B. Regulations and monopolies are not the same and are reviewed under very different standards.

Monopolies and regulations are two very different creatures, though Metro tried to treat them as if they were not. For regulations, cities have considerable leeway under their police powers. The boundaries of police powers are broad and have "never been definitively determined." *Knoxville v. Knoxville Water Co.*, 64 S.W. 1075, 1085 (Tenn. 1901). As Metro correctly argued (Metro's Reply, at 8), federal law recognizes that cities have broad authority under their police powers to enact measures that promote health, safety, morals, *or welfare* of the community. *See Knoxville Water Co.*, 64 S.W. at 1085. Legislative bodies are generally given authority to reasonably regulate economic activity when the subject is "related to health, safety, morals *or welfare* of the public generally." *State v. Spann*, 623 S.W.2d 272, 273 (Tenn. 1983) (emphasis added). So welfare, not merely health, safety, or morals, will justify a regulation. Such laws are judged under the rational basis standard and are generally afforded deference from the judiciary. *Estrin v. Moss*, 430 S.W.2d 345, 348 (Tenn. 1968).

This is the standard applicable for reviewing regulations that do not impact enumerated rights. Since the infamous Footnote Four in *U.S. v. Carolene Products Co.*,

304 U.S. 144, 152 n.4 (1938), the U.S. Supreme Court has applied different analytical standards to different constitutional rights. Rational basis, the lowest level of review, would be inappropriate for "a specific, enumerated right." *D.C. v. Heller*, 554 U.S. 570, 634, 638 (2008) (Regarding Second Amendment, "we know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

The right to be free from monopolies *is* enumerated in the Tennessee Constitution so no case exists for rational basis as an analytical standard. A monopoly is far more restrictive than a mere regulation and so, correspondingly, requires a far more searching form of inquiry. The Andersons explained at length in their principal brief (Pls.' Br. at 20-24), that monopolies, unlike regulations, are not legitimate extensions of the police powers. *Checker Cab*, 216 S.W.2d at 337. The list of acceptable justifications for a monopoly is nowhere near as broad as for a regulation: monopolies must "aid in the promotion of health, safety, morals and well being of the people." *Id.* Conspicuously absent from this list is one highly general category – welfare. That is a significant omission.

The omission of welfare as a justification elevates the bar. "Welfare" embraces such broad and nebulous concepts as "convenience, comfort, prosperity, and financial security". 6A Eugene McQuillin, *The Law of Municipal Corporations* § 24:13 (3d ed. West. 2017). Moral well being, by contrast, concerned items such as liquor licenses. *Landman v. Kizer*, 255 S.W.2d 6, 7 (Tenn. 1953). Physical well being meant things like selling "unwholesome fish or flesh." *Leeper v. State*, 53 S.W. 962, 965 (Tenn. 1899). Promotion of the public's welfare, on the other hand, is a simple application of the police

powers. *See Motlow v. State*, 145 S.W. 177, 182 (Tenn. 1911) (the police power is a legislative function "for the protection or advancement of the public welfare"). But given that the Supreme Court has squarely held that the police powers will not justify a monopoly, *Checker Cab*, 216 S.W.2d at 337, it makes sense that welfare would not be a legitimate justification. It is hardly surprising, then, that not even *slaughterhouses* could be monopolized without offending the Anti-monopolies Clause, because surely gauzy invocations of public welfare would have sufficed as a justification.

The Anti-monopolies Clause, so crystal clear in its prohibition of monopolies, would be an effective nullity if monopolies were reviewed under the rational basis test. If monopolies were only impermissible when they failed to promote public welfare, or health, safety or morals, then the only measures that would fail would already be unlawful because they exceeded the police powers. *See Bd. of Dispensing Opticians v. Eyear Corp.*, 400 S.W.2d 734, 742 (Tenn. 1996) ("[W]here the Legislature seeks to regulate a business or profession that has no connection with public health, morals, comfort or welfare of the people, it is not subject to regulation by the application of the State's police power."); *Spencer-Sturla Co. v. Memphis* , 290 S.W. 608, 611 (Tenn. 1926) (law invalid "[i]f the powers conferred upon municipalities by the statute do not fall within the police power"). The Anti-monopolies Clause would have no meaning at all. It would only forbid government from doing that which it already may not do. Constitutional rights cannot be reduced to a nullity. *See, e.g., Johnson v. U.S.*, 333 U.S. 10, 14 (1948). Like all restraints in the Declaration of Rights, it was intended to be a limitation on, not redundant with, governmental power. *See Motlow*, 145 S.W. at 182 (Tenn. 1911) (legislature has "all the power that the people themselves have ...except in

the particulars in which that power is restrained by the constitution of the State or of the United States").

Metro seized upon dicta from this Court in describing the Anti-monopolies test as "rational basis." (Metro's Reply, at 7-8). Though this Court has twice described the test in a similar vein, as the Andersons pointed out (Pls.' Br. at 17): 1) the Tennessee Supreme Court never used the term, and its test in *Checker Cab* was quite different from traditional, deferential rational basis, *id.* at 17-19; 2) this Court was citing to a substantive due process case from the Supreme Court, not to a monopoly case, when it first determined rational basis review was the proper test, *id.* at 17; and, 3) even in the decisions where this Court used the term, "rational basis," the form of review was substantively different and far more rigorous than conventional rational basis because this Court looked to the actual policy behind an act and required "some foundation in fact to justify the legislature's conclusion." *See Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991). With no effort to grapple with these substantive distinctions, Metro attached undue significance to what appears to be mere syntax. Finally, if it were the case that this Court's Anti-monopolies jurisprudence is in tension with the test as set forth by the Supreme Court in *Checker Cab*, 216 S.W.2d at 337, then this case affords an opportunity for correction. Regardless, the Anti-monopolies Clause cannot allow for review as Metro envisioned that scrutiny to be.

C. Metro did not show that residential character was a legally sufficient goal.

The proper understanding of the applicable test has tremendous bearing upon the legal sufficiency of the stated goal of the cap: protecting neighborhoods. The Andersons have consistently argued that, as a monopoly, the cap must promote the moral or physical

well being of the people, not just the public welfare. (Pls.' Br. at 20-21). Metro has consistently blurred the line between acceptable justifications for a regulation like "general welfare" but not a monopoly. (TR. VIII, 1177: citing *Town of Smyrna v. Bell*, 2011 Tenn. App. LEXIS 592, at *4 (Tenn. Ct. App. Oct. 31, 2011)). At one point Metro even argued, "welfare and well-being are synonymous terms." (X, 1348). That trend continued less explicitly in Metro's reply where all of Metro's legal authority was federal law sanctioning regulations over land use. (Metro's Reply, at 8). None of these involved monopolies. None concerned the Anti-monopolies Clause. None are even Tennessee cases. Not surprisingly then, none concluded that a monopoly aimed at protecting residential character promotes the moral or physical well being of the public. They merely showed that land use regulations are a legitimate exercise of a city's police powers and nothing more. Metro's use of the police powers was beside the point because, again, monopolies "cannot be validly created merely by connecting such creation with the exercise of a police power." *Checker Cab*, 216 S.W.2d at 337. Acceptable justifications for regulations are not necessarily acceptable for monopolies.

Metro has never explained if or how protecting residential character goes to the moral or physical well being of the public. The Andersons invited a response (Pls.' Br. at 20-21): is this a question of moral or physical well being? How are non-owner occupied homesharers more of a threat to health and safety than owner occupied? Metro responded only by cherry-picking a bunch of complaints from people over homesharing. (Metro's Reply, at 8-13). Metro missed the last chance to explain if this is a question of moral or physical well being. All of Metro's evidence showed only that homesharing might concern some neighbors. A legislative response might be in order. But without showing

how this is an issue of moral or physical well being, only regulations are a suitable exercise of the police powers, not monopolies.

Protecting residential character is not a legitimate justification for a monopoly. There seems to be some doubt, in fact, as to whether an aesthetic consideration is an acceptable justification even to exercise police powers in the first place. Tennessee courts used to hold that it was not, *see City of Norris v. Bradford*, 321 S.W.2d 543 (Tenn. 1958); *Hagaman v. Slaughter*, 354 S.W.2d 818 (Tenn. Ct. App. 1961), only to later rule that "in modern society aesthetic considerations may well constitute a legitimate basis for the exercise of police power, depending upon the facts and circumstances." *State v. Smith*, 618 S.W.2d 474, 477 (Tenn. 1981) (upholding junkyard restrictions based on, among other things, environmental concerns). So it is far from conclusive whether aesthetics would allow cities to exercise their police powers over even junkyards. Note that *Smith* was not a case that reviewed the measure under the more searching legitimate relation test. Still, it nevertheless provided a useful bar for the legitimacy of residential character for a monopoly. Because it is not clear whether aesthetics will meet even that permissive test, it certainly does not rise to the heights of an acceptable justification for a monopoly.

D. Metro did not show that the end in view was anything but protectionism.

Metro tried to avoid the fact the trial court never properly asked whether the real "end [] in view," *Checker Cab*, 216 S.W.2d at 337, with the cap was protecting entrenched incumbents, not the public, by addressing this argument with nothing more than a footnote. (Metro's Reply, at 14 n. 3). It was too late; arguments not raised until appeal are waived. *See Chadwell,* 980 S.W.2d at 384. The Andersons prominently raised this issue in their summary judgment motion. (VI, 856-861). Metro never addressed it in

their response (IX, 1293-1296), or even their reply. (X, 1348). Metro cannot respond now.

In any event, the evidence did not merely show that the traditional hospitality industry was one of many voices involved in the bill crafting process. (Metro's Reply, at 14 n. 3). At a high level of generality, this is true. But the lone voice in favor of taking an anti-competitive action, or "leveling the playing field," was the traditional hospitality sector, as the Andersons proved. (Pls.' Br. at 23-25). Metro undoubtedly showed that other parties had input, but none of those parties were lobbying for monopolies and it was the cap - not the other aspects of the homesharing ordinance - that was the subject of this challenge. Citizens might not have liked homesharing, but Metro presented no evidence they ever wanted a cap only on the one form of homesharing that was in direct competition with the hospitality industry. Only those with a vested economic interest were worried about the "negative influence on the hotel industry in Nashville." (TR. VII, 938) and so they wanted to "level the playing field." (TR. VII, 911). The evidence showed that the hospitality industry had a tremendous financial stake in maintaining an artificial scarcity in the housing of transients. (Pls.' Br. at 26-27). Whereas the cap on only one type of homesharing was ill-designed to do what neighborhood advocates wanted – limiting them over all – it was perfectly designed to maintain the artificial scarcity that so benefitted the hotels and hamstring an emergent form of competition. The evidence equally showed the hospitality industry wielded tremendous influence over both the crafting and passage of the bill, *id.* at 25, in ways that Metro never showed were enjoyed by regular citizens. The trial court was obligated to ask if this was truly the end in view. The only evidence that would explain the cap showed that it was.

E. Metro never showed that the cap had a real tendency to protect neighborhoods.

The final step in the legitimate relation test asked whether the monopoly had any "real tendency," *Checker Cab*, 216 S.W.2d 337, to advance its stated goal of protecting neighborhoods. On this front, the Andersons presented a great deal of evidence that it did not.

Metro countered only with evidence that did not show how the cap on one type of homesharing had any "real tendency," *Checker Cab*, 216 S.W.2d 337, to protect neighborhoods. Metro's evidence merely showed that a lot of people had concerns about homesharing. Metro conflated legitimate *ends* with legitimate *means*. *C.f.*, *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) ("the mere assertion of a legitimate interest has never been enough to validate a law."). To justify monopolies as an approach, Metro needed to do more than show a basis for action. It needed to show the cap on only one type of homesharing had a "real tendency to carry into effect" its goal of protecting neighborhoods. *Id.* at 337. No proof showed that allowing unlimited homesharing, just capping only one type, furthered that goal. Metro never showed how the two types affected neighborhoods differently. Metro never showed whether 3% keeps neighborhoods from tipping too far. This has particular relevancy in neighborhoods like the Andersons that are already diverse. (Pls.' Br. at 31). Neighborhood concerns would not justify every approach, especially one lacking in actual evidence.

Nor was "[s]imple common sense" enough to justify a monopoly, especially in the face of the evidence to the contrary. (Metro's Reply, at 10). Common sense, as Metro means it, was tantamount to baseless speculation about effects. For instance, common sense would also dictate that a renter of thirty-one (31) days would take an even greater

toll on a neighborhood than someone who leaves after a weekend. Yet long term renters go wholly unregulated, even though Councilmember Allen recognized the short term rental that lived near her "has had no[] more impact than the long term rental, and problem tenants are not around a year at a time." (TR. VII, 1026). "Common sense" did not rebut actual, objective evidence.

Metro tried to rely on Rachel's deposition as a justification for the cap. (Metro's Reply, at 13). This is another instance of conflating concerns over homesharing generally with a justification for a cap on one type of homesharing specifically. She said she did not "want to be in a neighborhood that's all *short-term rentals* either," (Dep. at 18:23-24). but was otherwise clear that "what [she] had a problem with," *id.* at 18: 25, was that the cap never gave her a chance because it "does create something like a monopoly." *Id.* at 18:25-19:11. She also called into question the rationality of the fear that neighborhoods actually would get overrun. *Id.* at 30:4-17. Metro also attributed to Rachel a concern about driving up home prices. Metro misunderstood her testimony; again, she was alluding to the effect the cap had on prices. *Id.* at 29:7-25, 37:11-22. Regardless, the effect of homesharing on home prices is a question for an expert witness, *see* Tenn. R. Evid. 702, not Rachel, a lay witness. In any event, she ultimately disavowed knowing how the cap affected prices. (Dep. at 37:23-38:23).

III. METRO FAILED TO SHOW THAT THE ANDERSONS DID NOT PREVAIL AT THE INJUNCTION STAGE.

Metro addressed the Andersons claim that they were the prevailing party at the injunction stage for attorney's fees purposes by contending, "there is no case where an appellate court has permitted fees under those circumstances." (Metro's Reply, at 20). The Sixth Circuit did exactly that in the case of *McQueary v. Conway*, 614 F.3d 591, 598

(6th Cir. 2010). *See also Occupy Nashville v. Haslam*, 2015 U.S. Dist. LEXIS 104550, *15 (M.D. Tenn. Aug. 10, 2015) ("The Sixth Circuit explicitly rejected a bright-line rule that procuring injunctive relief alone *never* suffices under § 1988.").

The Andersons do not argue that they catalyzed a *voluntary* change in Metro's conduct. *See Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601, 605 (2001). They *forced* Metro to change, as Metro essentially admitted. (TR. XII, 1644, 1646). As they argued (Pls.' Br. at 35), the Andersons injunction claims relied on two newly released Supreme Court cases: *Reed v. Town of Gilbert*, 135 S. Ct. 2443 (2015) and *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). Metro adamantly maintained that they changed nothing. (TT. I, 10, 42). They lost. Only then did Metro decide to amend its laws, explicitly citing both *Reed* and *Patel* as applicable. (TR. XII, 1644, 1646). There is a difference between plaintiffs who win an injunction only to lose on the merits as in *Sole v. Wyner*, 551 U.S. 74, 86 (2007), and plaintiffs who win an injunction and see their claims mooted because the injunction forced legislative correction. To call Metro's amending of the laws insubstantial "would be the epitome of form over substance" because Metro only "agreed" to change its law "in response to this lawsuit and the court at the [injunction] hearing … made clear that the … claims were meritorious." *Occupy Nashville,* 2015 U.S. Dist. LEXIS 104550, at *22. This was prevailing in any sense.

CONCLUSION

This Court should reverse the order **granting** summary judgment on the Anti-monopolies claim, and this Court should **grant** the Andersons' request for full attorney's fees.

Braden Boucek