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

BRIEF OF THE APPELLEE/PLAINTIFFS

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ORAL ARGUMENT REQUESTED

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EXPLANATION OF THE TERMS

In this brief, the following intelligible abbreviations will be used to refer to the record. *See* Tenn. R. App. P. 27(g) (2016). References to the technical record shall be by (TR.) followed by the appropriate volume and page number as marked by the court clerk. All exhibits, except the declaration of Rachel Anderson, which was submitted at the motion for preliminary injunction, refer to exhibits attached to the Andersons' motion for summary judgment. When further precision is necessary to identify part of a collective exhibit, a description or the page number will be denoted. The deposition of Rachel Anderson, attached as Exhibit J to the Andersons' motion for summary judgment, is the only deposition in this case so shall be referred to as (Dep.) followed by page and line number. References to the transcript of the trial court proceedings shall be by (TT.) followed by the appropriate volume as marked by the court clerk and page number as denoted on the transcript.

STATEMENT OF THE ISSUES

I. Anti-monopolies Clause-Metro exclusively permitted only three percent (3%) of homes in a census tract to engage in homesharing when the owner does not occupy the home.

1) Did Metro take a common right and make it exclusive in imposing the cap, when factually there is no dispute that Metro had no limits on homesharing before imposing this cap thus creating a monopoly?

2) Does Metro's monopoly nevertheless have a legitimate tendency to protect the public's moral or physical well being or was it illegitimate protectionism?

II. Attorney's fees-The Andersons won a preliminary injunction on First and Fourth Amendment claims, before winning summary judgment on a vagueness claim.

1) Did the trial court use the incorrect legal standard when he ruled the Andersons were the prevailing party only on the vagueness claims and not the claims that prevailed at the injunction stage?

2) Did the trial court abuse his discretion in awarding attorney's fees on the vagueness claim when the ruling meant that the Andersons no longer had to comply with the ordinance and served a significant public purpose, forcing Metro to rewrite its homesharing ordinance?

III. Vagueness-Metro defined homesharing, hotels, motels, bed and breakfasts, and boardinghouses all as places where transients stay overnight for under 30 days. The homesharing ordinance applied to homesharing but exempted the others. Did the trial court correctly rule that persons of common intelligence could not understand when the ordinance or the exceptions applied, thus making the ordinance unconstitutionally vague?

STATEMENT OF THE CASE

On February 26, 2015, Metropolitan Nashville & Davidson County ("Metro") passed two bills, BL2014-909 and 951, pertaining to homesharing, and began enforcement of those ordinances on July 1, 2015. (TR I, 98-107). The first bill was a change to the zoning code and allowed homesharing as an accessory use for residential property. *Id.* at 98. The second one defined homesharing (referred to in the bill as "short term rental"), imposed a cap on non-owner occupied homesharing, and imposed safety requirements. *Id.* at 103. The challenged portions were exclusively found in the second bill, 951, codified at Metro. Code § 6.28.030. *Id.*

The plaintiffs in this case, Rachel and P.J. Anderson, filed suit on August 26, 2015. (TR. I, 1). Their complaint expressly did not question the safety measures contained in the ordinance. *Id.* at 12. The complaint challenged the constitutionality of the cap and the vagueness of the definitions used in the ordinance to apply to homesharers, or short term rental properties ("STRPs"), while exempting hotels, bed and breakfasts, and boardinghouses. *Id.* at 20-21. The Andersons' complaint also argued that as those terms were all defined, they met the definition of each term. Given that the law applied to homesharers while exempting the others, *id.* at 20, either (a) they met the exception, in which case the homesharing ordinance did not apply, or (b) the ordinance was impossibly vague, in which case they should prevail in claim two. *Id.* at 19-20. Furthermore, the ordinance also placed a cap of three percent (3%) on the number of non-owner occupied homesharers in a particular census tract. *Id.* at 11-12. The complaint also alleged that the ordinance's signage ban violated their First Amendment rights, *id.* at 21,

while the requirement to keep and provide records to the police upon written request violated their Fourth Amendment rights. *Id.* at 25.

Metro filed a motion to dismiss for failure to state a claim on October 13, 2015. (TR. I, 75). The Eighth Circuit Court of Davidson County, the Honorable Kelvin D. Jones III presiding ("the trial court"), denied this motion with respect to all claims but the substantive due process count. (TR. IV, 462). Metro next filed a formal answer on November 23, 2015. *Id.* at 465.

The Andersons successfully obtained a preliminary injunction on two of their claims. (TR. IV, 459-460). One pertained to Metro's signage ban for homesharers. The trial court ruled that the Andersons demonstrated a substantial likelihood of success in proving that the ban violated their First Amendment rights. *Id.* at 459. Further, the trial court found a substantial likelihood of prevailing on the claim that the records keeping requirement imposed by Metro on homesharers violated their Fourth Amendment rights. *Id.* Metro later amended its ordinances with regard to both issues. (TR. XII, 1641-45). The parties then entered an agreed order that dissolved the injunction and dismissed these two claims in the complaint. (TR. VI, 828-29).

The parties filed cross-motions for summary judgment. (TR. X, 1350). On October 28, 2016, the trial court entered an order granting the Andersons' motion for summary judgment with respect to their vagueness claim. *Id.* at 1354. The trial court granted Metro's motion for summary judgment on the claims related to the Anti-monopolies and Equal Protection Clauses. *Id.* The trial court denied summary judgment to both parties on one of the arguments – namely, if the definitions of the exempted

hotels, bed and breakfasts, and boardinghouses were not unconstitutionally vague, then they met the definition(s) and were exempt from the law. *Id.*

After prevailing on vagueness, the Andersons moved for a permanent injunction against the continued enforcement of the ordinance on November 4, 2016. *Id.* at 1356. That same day, Metro moved to amend the judgment by reversing the vagueness finding, or to make it only apply to the Andersons, or for a stay in the alternative. *Id* at 1366. On December 16, 2016, the trial court denied the requests to reverse the vagueness finding, or to enter a permanent injunction, or to stay the proceeding. The trial court did clarify that his prior finding regarding vagueness only applied to the Andersons. (TR. XI, 1594).

The Andersons then moved for attorney's fees under 42 U.S.C. § 1988. They contended that they were the prevailing party both because they won at summary judgment on vagueness and because they obtained an injunction on the First and Fourth Amendment claims, thus forcing Metro to change the ordinances to comply with that ruling. (TR. X, at 1457). The trial court granted the motion on January 13, 2017 because the Andersons prevailed on the vagueness claim. (TT. at 36). He did not address the claims that succeeded in getting an injunction, but entered an order granting a total award of $104,604.36 on January 23, 2017, less than the final amount sought by the Andersons. (TR. XII, 1680-81).

Both parties filed timely notices of appeal on January 13, 2017. (TR. XII, 1670, 1676).

STATEMENT OF FACTS

This case is about the sharing economy — homesharing specifically, as on websites like Airbnb.com — and the limits to the powers of Tennessee's localities. Metro's approach was to *monopolize* one method of homesharing by issuing a small number of exclusive permits to some people and banning homesharing for everyone else, like the Anderson family. This case is not about the ability of Metro to *regulate* homesharing, an unremarkable application of a city's existing police powers never questioned by the Andersons.

- *The Anderson Family*

Rachel and P.J. Anderson married and moved from Chicago to the Germantown neighborhood of Nashville in August of 2013. (Dep. at 6: 7-9). They now have three children. *Id.* at 6:3-6, 9:3-10. The Germantown neighborhood is a dynamic, multi-purpose, urban neighborhood located proximate to Nashville's downtown. A map of the area gives a sense for the sorts of establishments in their Germantown neighborhood. (TR. VIII, 1155).

Both Rachel and P.J. have non-traditional jobs that do not provide many routine employee benefits, such as health benefits. (TR. I, 60: Ex. A, ¶ 17; VII, 901: Ex. B, ¶ 12). For their family of five (5), Rachel and P.J. estimated that health benefits cost them an additional $1,000 a month. (TR. I, 60-61: Ex. A ¶ 17; VII, 901: Ex. B ¶ 12). They moved to Nashville from Chicago because of P.J.'s career as an aspiring musician. (TR. I, 59: Ex. A, ¶¶ 3, 27; VII, 901: Ex. B, ¶¶ 12, 14; Dep. at 7:10-8:25). Rachel's employer (she works as a graphic designer for a small company) agreed she could keep her job and work remotely. She has done so since that time. (TR. I, 59: Ex. A, ¶ 3; Dep. at 7:20-8:5).

- *The Andersons start homesharing*

Long before it became an issue, the Andersons began listing their home on Airbnb, a homesharing website that uses a peer reviewed format to connect homeowners with those seeking to stay in their homes short term. (TR. I, 59: Ex. A , ¶¶ 3-5; VII, 900: Ex. B, ¶¶ 3-4). Rachel estimated that they could rent their home for $200-450 a night. During CMAFest, the house fetches upwards of $600 a night. (Dep. at 11:5-11:15). Homesharing gives this young family tremendous breathing room, thus allowing the family to travel when P.J. is playing on the road. (Dep.at 10:13-11:4).

The Andersons were great hosts. Metro never received a formal complaint against them. (TR. I, 59: Ex. A, ¶ 6; VII, 906: Def.'s Resp. to Pl.s' Req. for Admis. No. 3, Ex. C.1). They had the highest customer satisfaction ratings on the Airbnb.com website. (TR. VII, 900).

Before the ordinance and before Metro's concerted actions like the cap, when homesharing was unregulated, homesharing had not overrun the Andersons' neighborhood. (Dep. at 30:4-17).

- *Metro's homesharing ordinance and the cap*

Metro passed the homesharing ordinance at issue on February 26, 2015. (TR. I, 107). The bill's principal sponsor was Metro Councilmember Burkley Allen. *Id.* at 106. The stated purpose of Metro's homesharing law was four-fold: 1) to provide a flexible and safe housing stock for tourists; 2) to assist homeowners in difficult economic times; 3) to generate hotel occupancy taxes to be used to promote tourism; and 4) to balance the needs of long term residents and short term rentals. *Id.* at 103.

The ordinance applied to short term rentals of residences, that is, rentals of thirty (30) days or less. *Id.* at Metro. Code § 6.28.030. Homesharing hosts must get a permit, install smoke alarms, and maintain insurance. *Id.* at Metro. Code § 6.28.030(B), (D)(2), (G). Metro otherwise has noise and garbage nuisance measures. Homesharers were not only obligated to obey them, *id.* at Metro. Code § 6.28.030(F), but hosts also had to be available to respond to a complaint, at any hour. *Id.* at Metro. Code § 6.28.030(M). Code § 6.28.030(M).

The ordinance also then singled out one type of homesharing for sharply different treatment. It imposed a hard cap on the number of permits for non-owner occupied homesharing of no more than three percent (3%) per census tract. *Id* at Metro. Code § 6.28.030. The permit could be renewed annually upon payment of a fifty dollar renewal fee. *Id.* at Metro. Code § 6.28.030(N). A permit holder had no obligation to remit the permit and go to the back of the queue. *Id.*

The ordinance did not place any limitation on the overall number of owner occupied homesharing. (TR. VII, 906: Def.'s Resp. to Pl.'s Req. for Admis. No. 6, Ex. C.1). Long term rentals, defined as rentals of more than thirty days, were exempt. (TR. I. 103). Metro otherwise had no limitations upon long term rentals. Long term rentals were allowed in residential zoning, did not require a permit, nor were they capped. (TR. VII, 906-7: Def.'s Resp. to Pl.'s Req. for Admis. No. 5, 7, Ex. C.1). Other entities that house transients overnight for less than thirty (30) days – hotels, bed and breakfast establishments, and boardinghouses – were also exempt from the ordinance altogether, and thus no limit, or cap, on them was applicable. (TR. IV, 466: Answer, at 2, ¶ 51).

- *Metro's classifications of homesharing, hotels, bed & breakfasts, and boardinghouses*

Metro defined STRP as "a residential dwelling unit containing not more than four sleeping rooms that is used and/or advertised for rent for transient occupancy by guests as those terms are defined in Section 5.12.010 of the metropolitan code. (TR. I, 103: Metro. Code § 6.28.030(A). "Transient" in Section 5.12.010 "means any person who exercises occupancy or is entitled to occupancy for any rooms, lodgings or accommodations in a hotel for a period of less than thirty days." *Id.* at 110. "'Occupancy' means the use or possession, or the right to use or possess, any room, lodgings or accommodations in a hotel for a period of less than thirty continuous days." *Id.* at 109.

"Hotels" are defined in Section 5.12.010 to mean "any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes within the area of the jurisdiction of the metropolitan government, and includes any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in which rooms, lodgings or accommodations are furnished to transients for a consideration." (TR. I, 109). Hotels are not defined elsewhere, including in the zoning title. (TR. II, 216).

The zoning title defined boardinghouse as "a residential facility or a portion of a dwelling unit for the temporary accommodation of persons or families in a rooming unit, whether for compensation or not, who are in need of lodging, personal services, supervision, or rehabilitative services." *Id.* at 209, Metro. Code § 17.04.060(B). "Bed and breakfast establishments" were not separately defined but a "bed and breakfast inn" was defined as "four to ten furnished guest rooms for pay," with a maximum stay of fourteen days. *Id.*

- *The homesharing law affects the Andersons*

In November 2014, prior to the passage of the ordinance, Metro began notifying homesharers that they owed the same taxes paid by hotels, codified at Metro. Code § 5.12. (TR. VII, 909: Def.'s Resp. to Pl.'s Interrog. No. 4, Ex. C.2). On November 7, 2014, Metro notified the Andersons that they owed the tax. (TR. VIII, 1055: Ex. C.2.E).

Before the homesharing law became effective in June of 2015, P.J. obtained the proper permit for owner occupied homesharing. (Dep. at 9:3-10, 13:25, 14:1-4). At that time, the Andersons were not considering moving. (TR. I, 60: Ex. A, ¶ 12; Dep. at 31:11-14).

Shortly thereafter, and due to the sudden changes in life that are inevitable at their stage of life, the Andersons started to seriously contemplate moving. It began when Rachel's employer proposed promoting her and moving her to Chicago. (TR. I, 60: Ex. A, ¶ 13; Dep. at 8:5-10:5). The job opportunity did not even exist at the time they obtained their original permit. (Dep. at 31:4-10). This was also about the time that Rachel learned she was expecting their third child. (TR. I, 60: Ex. A, ¶¶ 16-17; Dep. at 9:6-10). The problem with these two happy developments is that both brought the prospect of moving. (Dep. at 10:2-5). The house does not suit this growing family. *Id.* at 32:20-33:20. Additionally, Rachel expressed concerns over the schools in her current neighborhood; one was sixteen miles from her house and the other was so poor she was not "comfortable sending my children." *Id.* at 33:6-11. Thus, one way or the other, they wanted to move and also keep the Germantown home.[1] *Id.* at 32:2-9, 33:21-34:1, 39:1-22.

[1] The Andersons have since welcomed a baby girl into their family. As expected, they needed a new house. They are currently awaiting closing on a second home in Nashville. They expect to have to resort to long

Logically, the Andersons would need to hold onto their Germantown home to fulfill their dream of retiring there. (TR. I, 62: Ex. A, ¶ 24). The family views the house as part of their "retirement plan," important because they were both 1099 employees. (Dep. at 34:13-16). The Andersons do not want to rent it long term because it would create more wear and tear on the house where they hope to retire. (TR. I, 62: Ex. A, ¶ 28).

Continuing to homeshare once they moved would mean that the house would pay for itself, and they could continue to use it at their own convenience. (TR. I, 63: Ex. A, ¶ 29). It seemed a perfect solution, so the Andersons decided to convert their permit to a non-owner occupied permit. (TR. I. 62-63: Ex. A, ¶¶ 25, 29).

P.J. promptly attempted to get the non-owner occupied permit on August 19, 2015, right after Rachel learned of the opportunity. (Dep. at 31:15-21). A Metro official curtly told him that it was "not going to happen." (TR. 901: Ex. B, ¶ 16). The reason was because the cap had been hit in their census tract. *Id.* at ¶ 17. P.J. received an email from the permits office: "At the given address all non-owner occupied units are taken leaving no availability at this time. 08-19-15 @ 10:21 am." (TR. VII, 905: Ex. B, ¶ 19).

So they could move on to the next phase of their life and continue to homeshare, the Andersons challenged Metro's ordinance. Ultimately they obtained a preliminary injunction (TR. IV, 459-460), before winning summary judgment on vagueness. (TR. X, 1350).

Once the trial court declared the ordinance unconstitutional, *id.*, Metro passed a new ordinance in an effort to address the problems with the definitions and, in the words of Councilmember Allen, "get Metro out of the legal limbo that Judge Jone's [sic.] ruling

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term rental of the Germantown home, a suboptimal situation from their perspective, for the reasons explained below.

has put us into." (TR. XII, 1636). In addition to changing the definitions going forward, the substantive provisions of Metro's homesharing ordinance – including the cap – were moved from Metro. Code § 6.2.8.030 into Title 17, the zoning title. *Id.* at 1639.

SUMMARY OF THE ARGUMENT

Tennessee's constitutional prohibition against monopolies is a freedom dearly won after centuries of struggle to overcome the threats posed when governments award certain people legal immunity from competition. Metro's three percent (3%) cap is a legally enacted monopoly with no legitimate relation to protecting the public. The trial court made **four** legal errors in finding that this did not violate the Anti-monopolies Clause of the Tennessee Constitution, which prohibits monopolies. **First**, homesharing was a common right that Metro made exclusive. Metro called it a right and viewed it as permissible. Further, the trial court also had the legal definition wrong. According to the case law, a common right is that which persons had the liberty to do, not just that which was a constitutional right, and that is what happened here. **Second**, Metro's monopoly has no legitimate relationship to the public's moral or physical well being. Protecting residential character — Metro's proffered goal — is an insufficient justification. It may promote public wel*fare*. But it is not an issue of public well *being*. This means that Metro can *regulate*, but not *monopolize*, a means that requires a far greater interest. **Third**, the trial court failed to address the evidence that showed the real aim of the cap: protection of traditional hotels from competition. **Fourth**, the cap had no real tendency to protect residential character. The trial court ignored that Metro presented no evidence showing that non-owner occupied homesharing presented a unique harm to neighborhoods, just offering inchoate complaints about homesharing. The evidence showed that Metro allows all sorts of more unattractive and commercial entities to perpetuate in urban areas like Germantown, and thus the cap had no real tendency to promote residential character.

The Andersons are also entitled to a full award of attorney's fees, not a partial one. They prevailed on both First and Fourth Amendment grounds, not just vagueness. The trial court used an incorrect legal standard because he did not account for their victory at the injunction stage. When the trial court ruled that they were substantially likely to prevail, it changed the relationship of the parties, and Metro later changed the ordinances as a result. That made them prevailing under Sixth Circuit law.

The trial court did not abuse his discretion in awarding attorney's fees once the Andersons prevailed on their claim that the law was unconstitutionally vague. They were not "symbolic victors." Their legal relationship with Metro changed because they were no longer susceptible to a vague ordinance. Metro's argument incorrectly focuses on whether the Andersons may continue to homeshare as a result of the ruling, and not whether the relationship between the parties changed. Besides, the Andersons may continue to homeshare. The undisputed facts are that homesharing was previously legal so voiding the law restored that status quo.

The trial court did not err in declaring Metro's ordinance unconstitutionally vague. It applied to homesharers, but exempted hotels, bed and breakfasts, and boardinghouses. A method of differentiating between these terms, while essential, did not exist. The definitions substantially overlap; a person who houses people overnight for compensation meets multiple definitions. Thus, the Andersons lacked notice about whether they were exempt or not. Metro confounded it further by trying to tax their homeshare as a hotel when it wanted revenue. Metro seems to have given up trying to articulate a standard, abandoning the arguments it made below and instead nitpicking about standards and the sufficiency of findings, resulting in waiver of this issue.

ARGUMENT

I. METRO'S CAP IS A MONOPOLY OVER WHAT WAS BEFORE A COMMON RIGHT. WITH NO LEGITIMATE RELATION TO PUBLIC WELL BEING, METRO FORMED AN UNCONSTITUTIONAL MONOPOLY.

Metro's cap is exactly the sort of thing the Anti-monopolies Clause was designed to stop. The cap is a monopoly. Everyone in Nashville was perfectly free to homeshare, as Metro admitted. Legally, that made it a common right that Metro then made exclusive when the cap became effective, rendering it a legal monopoly. The trial court used the wrong legal standard in finding it justifiable. The stated goal of preserving residential character goes not to the health, safety, morals, or well being of the public, so the cap is not even theoretically justifiable. Furthermore, the evidence showed that the real aim of the cap was to protect the hospitality sector, not the public. Finally, Metro presented no evidence that singling out non-owner occupied homesharing, specifically, had a real tendency to protect residential character. The evidence only showed they were not a unique threat. Metro allowed commercial entities, a range of housing options, and flat-out eyesores to persist, undermining Metro's stated goal of protecting residential character.

A. Standard of Review.

Summary judgment enjoys no presumption of correctness, "the trial court's decisions being purely a question of law." *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003) (citations and quotations omitted). That requires the reviewing court to make a "fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied." (citation omitted).

B. History of the Anti-monopolies Clause.

❖ *That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed.* Tenn. Const. art I, § 22. ❖

The Anti-monopolies Clause is as old as the State, having been deemed important enough for inclusion in Tennessee's first constitution and ever since, much like other states formed around the same time. *See generally* Steven Calabresi & Larissa Leibowitz, *Monopolies and the Constitution: a History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 973, 985 (Summer, 2013). Our neighbor, Arkansas, observed of its similar provision: "This language is too clear to need elucidation, and no amount of judicial interpretation should ever be permitted to cause the slightest deviation from the clear language of the constitutional inhibition." *North Little Rock Transp. Co. v. North Little Rock*, 184 S.W.2d 52, 54 (Ark. 1944).

Monopolies may summon to mind the boardrooms of Standard Oil or the board games of childhood. These are distinctly modern associations. The meaning of the term in the modern age, or even the gilded age, is inconsequential. In determining what is "contrary to the genius of a free State, and shall not be allowed," Tenn. Const. art. I, § 22, all that matters is what the term, "monopolies," meant in the Enlightenment age – the era in which 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 fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent and purpose of those who adopted it.") (quotation omitted). "[T]he founding generations immediate source of the concept," can be understood by looking at the terms as used in the common law and Anglo-American tradition. *See Crawford v. Washington*, 541 U.S. 36, 43 (2004).

Tennessee's Anti-monopolies Clause is deeply enmeshed with the very struggle for liberty and freedom that long predated and indeed animated the very founding of the nation; yet it is mostly forgotten today. The term originates in the common law and was well understood at the time of the founding. *See Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911). The Tennessee Supreme Court has long looked to renown English scholar Sir Edward Coke's history of the common law in considering the definition of a monopoly. *See Memphis v. Memphis Water Co.*, 52 Tenn. 495, 529 (1871) ("We know of no better definition of a monopoly, than that given by Lord Coke. ...").

Coke's exhaustive history of the struggle against monopolies traced all the way back to 1377 and the case of John Peechie, who had a royal monopoly on the sale of wine in London. A common law court struck down his monopoly as a violation of the right to free trade. Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 210, n. 13 (2003). "The monopolizer engrosseth to himself what should be free for all men," said Sir Coke. *Id.* at 207. Coke was a leading voice asserting "supremacy of the law over the king." *Id.* at 210. Coke used precedents like the Peechie matter to successfully argue on behalf of the plaintiff in the famous case of Dr. Bonham who practiced medicine without a royal patent. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 600, 604-05 (2009). "Coke argued that the Royal College's licensing authority was a monopoly that violated the freedom of English subjects to practice lawful trades and professions without interference by the crown." *Id.* at 604. A monopoly that interfered with the right to earn a living tested the limits, even for a king.

This went on. The case of *Darcy v. Allen*, 77 ER 1260 – where, ironically, Coke represented the Crown as the Attorney General – involved a royal monopoly on playing cards. This too was struck. The case is more commonly known, in point of fact, as the Case of the Monopolies. *Id.* at 605; Sandefur, 6 Chap. L. Rev. at 210-11. Wrote the court, "the Common Law doth abhor all Monopolies, which forbid any one to work in any Lawful Trade ...." Gedicks, 58 Emory L.J. at 605. In 1615, the Case of the Tailors, Coke proclaimed, "the law abhors idleness," and thus "the common law abhors all monopolies, which prohibit any from working in any lawful trade. ..." Sandefur, 6 Chap. L. Rev. at 215.

The significance of these cases must not be overlooked as these are some of the first cases where the power of the sovereign was challenged and limited in the interest of protecting an inalienable right. They are an important step in the development in Anglo-American liberties. They mark the beginnings of judicially-imposed limitations on the state sovereignty premised on the notion that rights naturally flowed to each person by dint of mere existence and not by royal prerogative. It is not a far travel from the theory gathering force here to the Declaration of Independence and Bill of Rights. Note that in these cases, Coke described them as "monopolies," and also note what he meant when he used the term — the legal right to exclude others from competing in a trade that others freely enjoy.

Coke was not the only important historical figure who called the legal exclusion of competition a monopoly. Adam Smith decried trade guilds and long statutes of apprenticeships before a person could ply a trade as "a sort of enlarged monopolies". Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 26

(Edward Cannon, ed., William Benton 1952). Blackstone outlined the case for and against mandatory apprenticeships before entering a trade, describing them as creating a monopoly. 1 William Blackstone, *Commentaries on the Laws of England*, 422, 427 (1771).

The founders, classically trained lawyers nearly all, drank at the fount of Coke, Blackstone, and Smith. Coke, in particular, "exerted a strong influence on colonial law. ... [C]onsequently American lawyers [at the time of the Revolution] were well-informed about English constitutional principles, including ... Bonham's case." Gedicks, 58 Emory L.J. at 614. Coke's writings were "to be the training books for generations of lawyers, including Thomas Jefferson, John Adams, and John Marshall." Sandefur, 6 Chap. L. Rev. at 216. Smith in particular was a key figure in the Scottish Enlightenment that deeply influenced the principal author of the Bill of Rights, James Madison. *See* Iain McLean & Scott Peterson, *Adam Smith at the Constitutional Convention*, 56 Loy. L. Rev. 95, 120 (Spr. 2010). Indeed, England's continuing practice of granting monopolies was an ongoing rub with the Colonists and "was a direct cause of the American Revolution." Calabresi, 36 Harv. J.L. & Pol'y at 1007.

The writings of the Founders naturally reflect this concern. Indeed, they refer to monopolies in much the same way as highlighted by Madison:

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions and *monopolies* deny to part of its citizens the free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

James Madison, *Property* (Mar. 29, 1792) (emphasis added) (reprinted in *50 Core American Documents* (Christopher Burkett ed., Ashcroft Press, 2015)). Jefferson and

George Mason actually argued (with Madison) for an Anti-monopolies Clause in the U.S. Constitution. Calabresi, 36 Harv. J.L. & Pol'y at 1009. Six of the original states pushed for an Anti-monopolies provision in the U.S. Constitution. *Id.* at 1013. While Madison agreed that monopolies are "justly classed among the greatest nuisances in Government," he thought they might be warranted "as encouragements to literary works and ingenious discoveries," i.e., copyrights and patents for intellectual property. *Id.* at 1011.

Madison's perspective won out, "probably in large part due to Madison's view that representational government at the federal level would prevent a repeat of the English Experience with monopolies." *Id.* at 1015-16 Madison otherwise made clear his view that "the right to be free of monopolies was of vital importance," as evidenced from the quote above. *Id.* Jefferson wrote that the right to be free from monopolies ranked among the rights that were later included in the Bill of Rights such as free speech, complaining of the absence of an Anti-Monopolies Clause. *Id.* at 1010. Some states adopted their own version. Interestingly, the only state that wanted a federal Anti-monopoly provision and adopted one of its own was North Carolina, Tennessee's progenitor. *Id.* at 1015.

In 1796, when Tennessee drafted its first ratified constitution containing the Anti-monopolies Clause — no doubt cribbed from North Carolina's, verbatim, along with much of the rest of the Declaration of Rights, *see In re Estate of Trigg*, 368 S.W.3d 483, 491 (Tenn. 2012) — the Nation's Founders were still around to comment. No less than Thomas Jefferson was reported to remark of Tennessee's Constitution that it was "the least imperfect and most republican of the state constitutions." 7 Lewis L. Laska, *The Tennessee State Constitution: A Reference Guide* (1990).

At the time Tennessee adopted its first constitution, "monopoly," accurately understood, meant the use of the law to exclude rivals from competition. Modern associations with the word probably venture from inaccurate to incorrect.

> The founding generation probably understood monopoly in a way we do not. To them, the term monopoly meant a company insulated from competition by a special legal privilege, which barred others from competing, and thereby earning a living. It was not what we mean by the term today – simply a large and successful company, often one which has succeeded in spite of the law.

Sandefur, 6 Chap. L. Rev. at 219-220. While we think of a monopoly as a private company that has succeeded in essentially controlling a particular market, the original understanding was of a private company that has legal protection over a particular market.

Nothing about the Anti-monopolies Clause prevents measures designed to protect health and safety. That is, it permits *regulations*, not monopolies. The right to *regulate* does not imply the right to *monopolize*, and Tennessee courts have long been keen to the distinction. *See Noe v. Mayor and Alderman of Town of Morristown*, 161 S.W. 485, 487 (Tenn. 1913) ("the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of all such business"); *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 336-37 (Tenn. 1948) (operation of taxi cabs "materially concerns the safety and welfare of all its people" so it may be regulated, but not monopolized); *c.f., Farmer v. Nashville*, 156 S.W. 189, 190 (Tenn. 1912) ("Ordinances must be consistent with public legislative policy, may regulate, not restrain, trade, and must not contravene a common right."). Monopolies are highly disfavored, and few will be the instances where a monopoly is necessary to protect the public. The government and industry insiders "might protect consumers by regulating

the quality of products and services, but they should not be able to pervert this power for their own benefit." 21 Timothy Sandefur, *The Right to Earn a Living* (2010).

It is at precisely this sort of abuse at which Tennessee's Anti-monopolies Clause was aimed; abuses that were at work here, as shown below.

C. The trial court's ruling.

The trial court ruled, *see* Tenn. R. App. P. 6(a)(1), that Metro's cap on non-owner occupied rentals was not a monopoly, and, even if it was, it was a justifiable one. (TR. X, 1354). The Andersons seasonably argued against this, Tenn. R. App. P. 6(a)(2), (TR. IX, 1321-23), with the prejudice being that the cap remains *id.* at 6(a)(3). (TR. X, 1354).

D. Metro allowed homesharing previously before making it exclusive for exactly three percent (3%) of Nashvillians in a census tract to engage in non-owner occupied homesharing. It was a common right later made exclusive.

The trial court erred when he ruled that homesharing was not a common right, (TR. X, 1354), taking no issue with the indisputable record demonstrating that homesharing was considered a right, and was freely practiced throughout Nashville without interference by Metro. Rather, the ruling contained an unspoken assumption that homesharing did not rise to the level of a legal right, thus Metro could take it away and make it exclusive at its pleasure. This was factually incorrect about the prior status of homesharing and involved a legally erroneous definition. A common right simply means that anyone was free to do it, as they were with homesharing, not that the activity itself was constitutionally protected, an interpretation that is not supported by the case law and makes nonsense of this valuable constitutional right.

A monopoly is defined as an exclusive right, granted to a few, of something that was before a common right. *City of Watauga v. City of Johnson City*, 589 S.W.2d 901,

904 (Tenn. 1979). "In a modern sense," a monopoly also exists "when all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one person or set of persons, as practically to bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein." *Trails End Campground. LLC v. Brimstone Rec.*, LLC, 2015 Tenn. App. LEXIS 39, *23-24 (Tenn. Ct. App. Jan. 29, 2015) (copy of opinion attached) ("If there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a monopoly'").

All of the evidence indicated that homesharing was once open for all Nashvillians. On this, no dispute exists at all. Metro officials *expressly* called it incidental to an owner's "*right* to the free use of his or her property." (TR. VII, 919; Ex. C.2.B). Metro, in a sworn interrogatory, acknowledged that homesharing was "not a Codes violation prior to the passage of the ordinance." (TR. VII, 913; Def.'s Resp. to Pl.'s Interrog. No. 26, Ex. C.2). Before the ordinance, "Metro did not categorize this use in the zoning code." (TR. VII, at 909: Def's Resp. To Pl.'s Interrog. No. 7, Ex. C.2). The bill explained that "the zoning administrator has determined that [homesharing is] allowed in residential areas *without condition. ...*" (TR VII, 921: Ex. C.2.B, at 8) (emphasis added). At the Metro council meeting on February 3, 2016, Councilmember Allen, again, the sponsor for the bill, said that under Metro's existing Code, homesharing "seem[s] to be fine, [be]cause it doesn't say [in the Code] they are not fine." (Ex. I, 1:47:38; Ex. I.1). Over and over, she instructed constituents that homesharing was permissible and unregulated under existing law, frequently comparing the unregulated status of short term and long term rentals. (TR. VII, 965, 973, 980-81, 982, 998-99, 1001, 1026, 1030, 1035;

VIII, 1039, 1050: Ex. C.2.D). The Metro council attorney stated his legal opinion on the council floor that the practice of renting the whole house as opposed to rooms in a residence, that is, non-owner occupied, was unregulated. (Ex. H, 59:51-1:00:35; Ex. H.1).

Metro introduced *no* evidence that anyone considered homesharing illegal or undertook an enforcement action against the practice. Metro even knew the Andersons were homesharing. Instead of sending them a cease-and-desist letter, Metro asked them to remit taxes. (TR. VIII, 1055: Ex. C.2.E). All of the proof showed that homesharing was a right, widely practiced, known to Metro but never interfered with, because Metro understood it to be a legally permissible activity.

Equally incontrovertible, the cap now made this right exclusive. No more than three percent (3%) of a census tract could homeshare if they were not presently occupying their home. Everyone else, that is, *ninety-seven percent* (97%) were legally barred. Metro. Code § 6.28.030(Q). In the Anderson family's neighborhood, this meant exactly twenty-eight (28) people could do it and not one more. (TR. I, 60: Ex. A, ¶ 11; TR. VII, 902: Ex. B, ¶ 18). It was "about as exclusive and complete as may be conceived." *Checker Cab*, 216 S.W.2d at 336. All the permits were gone by the time P.J. even needed one. (TR. I, 60: Ex. A, ¶ 12; TR. VII, 901: Ex. B, ¶ 17). They literally never had a chance. This was the quintessence of exclusivity.

Here was where the problem laid. Things changed, but the permits were eternal, renewable annually with a simple $50 fee. (TR. I, 104: Metro. Code § 6.28.030(N)). A permit holder could retain one in perpetuity because they aren't required to ever surrender it. Sadly enough, people like the Andersons — pioneers in homesharing with a perfect track record as hosts — whose lives change, or people who move to Nashville, or

people not even born, never have a chance to benefit while others enrich themselves, protected from competition by the law itself. All of the trade in non-owner occupied homesharing now resides in the hands of a "set of persons" so as to bring it "within such single control to the exclusion of competition," *Trails End Campground, LLC.*, 2015 Tenn. App. LEXIS 39 at *23-24, from the likes of the Anderson family who just did not desire or qualify for a non-owner occupied permit before they were all taken. As one Nashvillian said, **"I don't believe one person should get a monopoly on my neighborhood.** If you are going to allow one to do this, then you should allow it for everyone." (TR. VII, 986: Ex. C.2.D, at 056) (emphasis preserved). Coke would have related. The effect of this monopoly placed the Anderson family in their predicament: sell the house they love or freeze their lives in amber.

Metro no longer permitted "all persons inclined to pursue such an occupation" to participate. *See Noe*, 161 S.W. at 487. For the Anderson family, this severe cap and the attendant hardship has certainly "tend[ed] to oppression." *Id.*

E. The "common right" analysis was wrong, factually and legally.

The trial court factually and legally erred in ruling that even though Nashvillians were indisputably previously free to homeshare, legally, homesharing was not a "right" so Metro was free to take it away. (TR. X, 1354). That is, the trial court appeared to believe that the legal definition of a common right meant something other than that which everyone was free to do, and meant instead only those things that were constitutional rights, standing alone. Factually and legally, this was error.

Factually, it ignored the legal opinion of Metro that homesharing was an incidental subordinate right to the "*right* to the free use of his or her property." (TR. VII,

919; Ex. C.2.B). This doesn't merely demonstrate a factual dispute because Metro never introduced proof to the contrary. Legally, the trial court erred in requiring the exclusion be of a constitutionally protected right. The definition of a monopoly involves a legally imposed restraint in trade, not constitutionally protected activity. It is not a common right "if the subject 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). Thus a legal restraint on a right, *liberty, act, privilege, or franchise* – not just the exercise of a constitutional right – creates a monopoly. The question involves a relatively simple inquiry: did people have the liberty to do it before? That answer is readily discernible here.

What Metro did was exactly like what happened in *Noe* and *Checker Cab*. It took activities that were previously open for all – slaughterhouses and taxi cabs – and legally barred competition. Under the understanding used by the trial court here, the cities would have been within their powers to create these monopolies because it did not concern a right. There isn't a constitutional right to slaughterhouses or cabs, certainly not more of one than having people stay in one's home. When Metro, like the cities in *Noe* and *Checker Cab*, "undertakes to take charge of a business, which before was a common right, declaring that this should be conducted at only a single place and by a single person, and thereby debar all of us from engaging in that business," it presents "a different question altogether." *Noe*, 161 S.W. at 486. If cities can't make *slaughterhouses* exclusive without taking away a common right – a property use that, suffice to say, has far more public impact than homesharing – then making homesharing an exclusive permit must involve a common right.

This Court, in *Trails End Campground, LLC.*, made a salient distinction. In approving the Town of Huntsville's selection of Brimstone Rec. to use an open area in the town for a certain period of time to throw events, including the right to erect tents, and sell merchandise and such, this Court distinguished what was and was not a common right. 2015 Tenn. App. LEXIS 39 at *27-30, "The citizens of Huntsville likely had a prior common right to walk on and occupy the open grassy area ... but there is no showing that they had the common right, for example, to set up 'temporary tents or other nonpermanent facilities' to conduct business there without license or permission from the Town." *Id.* at 28. Huntsville had not allowed everyone to operate businesses in the area and then taken it away. This Court contrasted this with what the town had allowed everyone to do – walk and occupy the area. Thus, it was the former that was not a common right but the latter that this Court at least strongly implied was. The focus was on what Huntsville allowed and did not allow in common, not on whether the activity was constitutionally protected.

In the examples of what are *not* common rights, the courts have never characterized a widely practiced private activity, suddenly taken away and made exclusive, as not a common right. These include: annexation of territories (because annexation authority is granted by the legislature in the first place), *City of Watauga*, 589 S.W.2d at 904; franchises to public utilities, *Memphis Water Co.*, 52 Tenn. at 529; permits to sell beer, *Ketner v. Clabo*, 225 S.W.2d 54 (Tenn. 1949); classes concerning upon the public character of the railroad, telegraph companies, or a cable communication company granted a franchise to erect communication systems on public streets, *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338, 345 (Tenn. Ct. App. 1991);

when the state acts as a market participant on behalf of a public institution, *Leeper v. State*, 53 S.W. 962, 965 (Tenn. 1899); or the privilege to be the exclusive event sponsor on a public space, *Trails End Campground, LLC.*, 2015 Tenn. App. LEXIS 39 at *27-30. None of these were activities ever openly enjoyed by the broad public, suddenly taken away and given to a select few.

The notion that the Anti-monopolies Clause permits monopolies of anything that is not a constitutionally protected right makes this right entirely superfluous. After all, it is supposed to protect distinct interests, not to only prohibit exclusive privileges to engage in practices that were constitutionally protected in the first place. If Metro had taken away a constitutional right, then it would have already acted unconstitutionally. For instance, if Metro's law regulated homesharing by making the cap apply only to persons of a specified race, then the Equal Protection Clause would prohibit it all together. *C.f. Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (statute regulating Chinese laundries in San Francisco violated equal protection). The problem would not be the monopoly but the discrimination, and interference with a person's right to work on the basis of race is itself illegal. *See Cty of Memphis v. Winfield*, 27 Tenn. 707, 709 (1848) (Memphis law prohibiting black laborers from working after 10 p.m. unconstitutional). So if Metro also made the restriction monopolistic by, say, making an exception for three percent (3%), it would have no independent significance. It wouldn't matter that the monopoly somehow bore a legitimate relation to the public's well being; the courts would never reach the question. Such an understanding reduces the Anti-monopolies Clause to second, weaker layer of review for a law that was *already* improper. This Court should reject an

interpretation that renders Tennessee's constitutional prohibition on monopolies to a nullity.

To the extent the trial court may have thought that homesharing was impermissible and not a common right because Metro had not expressly allowed it, it would reflect a flawed understanding of property rights as a matter of Tennessee law. Courts construe zoning ordinances with a presumption of the property owner's free use of his or her property. *See Lion's Head Ass'n v. Metro Bd. of Zoning Appeals*, 968 S.W.2d 296, 301 (Tenn. Ct. App. 1997). In other words, homesharing was permitted until expressly outlawed. Even an ambiguity is construed "in favor of the property owner's unrestricted free use of his or her property." *Id.* When, as in this case, Metro has nothing in the Code directly speaking to property use, the owner is at liberty to enjoy that use. As Metro's own zoning administrator correctly understood: because the Code did not explicitly outlaw homesharing, "we have allowed STRPs to operate anywhere a residential use is allowed." (TR. VII, 919: Ex. C.2.B). Even if the Code was ambiguous as to homesharing, the Andersons had a right to engage in homesharing. If the trial court's unstated belief was otherwise, it was erroneous.

In conclusion, homesharing was common in Nashville and open prior to the law. The cap took that away. Now it is a valuable privilege available to only a very few. This meets any legal definition of a monopoly.

F. The cap, instead of having real tendency to promote public well being, protects entrenched hospitality providers. It fails the legitimate relation test.

The next step of the analysis asks if this monopoly was a permissible one because it had a legitimate relation to the protection of the public's well being, either physical or moral. The stated interest here was to protect the residential character of neighborhoods.

However: 1) that is not a constitutionally acceptable justification for a monopoly because residential character does not promote the moral or physical well being of the public; 2) Metro never contested the evidences showing that the real aim was to provide protection to entrenched hospitality purveyors, an illegitimate goal; 3) no evidence supported the notion that the cap on one type of homesharing had a real tendency to protect residential character. The trial court failed to even address any of these points, accepting instead Metro's unproven statements.

1. The Legitimate Relation Test.

Monopolies are acceptable in limited cases. When the monopoly has an actual, legitimate tendency "to aid in the promotion of the health, safety, morals and well being of the people," it is acceptable. *Checker Cab*, 216 S.W.2d at 337. Under the "legitimate relation" test, a monopoly must have a legitimate relation to the public purpose to be achieved. *Id.* at 337-38 (distinguishing regulation and taxation of public carriers from the regulatory creation of monopolies). Otherwise, a monopoly is void as being unreasonable, oppressive, and ultra vires. *Id.* at 337.

Under the Anti-monopolies test, courts inquire whether the law: 1) actually intended to address one of the legitimate purposes, i.e., safety, health, and morals; 2) the public's well being was really the end in view; and 3) actually has a real tendency to the stated public purpose. *See id.* In *Checker Cab*, 216 S.W.2d at 337, the Court struck down a measure as violating the Anti-monopoly Clause because there was no legitimate relation between the monopoly in question (taxi cabs in Johnson City) and the public purpose (the regulation of the operation of taxicabs). Post-hoc justifications will not suffice; the rationale proffered in support of the challenged monopoly must have been the

actual goal. "The courts decide ... whether that is really the end [they] had in view." *Id.* (citation and internal quotation marks omitted). The ordinance must actually have a "real tendency" to accomplish its stated purpose. *Id.* The role of the court does not end once it is shown that the government has the power to regulate the field. Again, the municipal power to regulate a useful trade does not imply the power to grant a monopoly. *See id.*

This Court has described the test under the Anti-monopolies Clause as a form of rational basis review. *See, e.g., Dial-A-Page, Inc. v. Bissell,* 823 S.W.2d 202, 206-07 (Tenn. Ct. App. 1991); *Esquinance v. Polk County Education Ass'n*, 195 S.W.3d 35, 47 (Tenn. Ct. App. 2005). For its part, the Supreme Court has never described its test as a form of rational basis review. While the decision in *Dial-A-Page, Inc.*, 823 S.W.2d at 206-07 (and *Esquinance*, which cites to *Dial-A-Page, Inc.*), cited to the Tennessee Supreme Court decision in *Chapdelaine v. Tennessee State Bd. of Examiners*, 541 S.W.2d 786 (Tenn. 1976), that case does not suggest the rational basis is the appropriate test in reviewing a monopoly. The claim in *Chapdelaine* did involve the right to work, but it did not raise an Anti-monopolies claim. It does not so much as refer to art I, § 22. The word, monopoly, appears nowhere therein. The claim relied upon the case of *Livesay v. Tennessee Bd. of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959) – a Law of the Land case – that ruled on substantive due process grounds, mimicking federal rational basis review for economic liberty issues. But nothing in that opinion suggests that the same test would be applicable for review under the Anti-monopolies Clause, which can *only* concern economic liberty by its very nature and has always been far more rigorous.

Indeed, in all its Anti-monopolies cases, the Supreme Court has either ruled that the challenged law was not a monopoly in the first place because it did not concern a common right, *see, e.g., City of Watauga*, 589 S.W.2d at 904, or, if it was, the Court asked if the monopoly had "any legitimate relation" to the protection of the public's health, safety, morals, or well being. *Id.* Importantly, every time the Tennessee Supreme Court has explicitly used this test, it has struck down the law as an impermissible monopoly. *See, e.g., Checker Cab*, 216 S.W.2d at 337; *Noe*, 161 S.W. 485. The only exception proves the rule. *Nashville Mobilephone Co. v. Atkins*, 536 S.W.2d 335 (Tenn. 1976) involved the operation of a common radio carrier. The Anti-monopolies claim was "not briefed but appear[ed] only as a conclusory statement in appellee's reply brief," so the Court barely discussed it other than to point out that public utilities are always monopolies, and that monopolies are acceptable when they actually aid in the public's moral or physical well being. *Id.* at 340. In sum: the Tennessee Supreme Court uses the legitimate relationship test in assessing a monopoly; the test is typically fatal in fact; and that, not the rational basis test, should guide this Court's review.

The legitimate relation test differs sharply from federal rational basis scrutiny. A monopoly cannot be justified by a connection to the police powers. *Checker Cab,* 216 S.W.2d at 337 (police powers permit licensing or regulation, but not the implied authority to monopolize). But under rational basis review, economic rights are within the police powers and largely above judicial review. *See Estrin v. Moss*, 430 S.W.2d 345, 348 (Tenn. 1968). There are a limited number of acceptable justifications for a monopoly: health, safety, morals or well being. Rational basis review merely requires the challenged law be rationally related to *any* conceivable, legitimate government interests. *Craigmiles*

v. Giles, 312 F.3d 220, 223-24 (6th Cir. 2002). The courts are called to decide whether the stated goal of a monopoly was also the "end in view," and the means of achieving that goal must have a real tendency to advance the stated goal. *Checker Cab*, 216 S.W.2d at 337. Further, there must have been a "foundation in fact." *Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991). In contrast, under rational basis the government may make up rationalizations post-hoc, and the courts do not ask if the means have a real tendency to advance the stated goal. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014); *accord FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) ("it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" or whether any genuine facts supported the action). Plausible justifications can "even [be] hypothesized by the court . . . ." *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 699 (6th Cir. 2011).

The contrast between the two tests is vivid. The Tennessee Supreme Court does not employ the *Beach* standard when reviewing monopolies. Instead, it: 1) allows for only a limited number of justifications; 2) requires that be the actual end in view; and 3) the means must have a real tendency to advance the stated goal.

Moreover, even the two times this Court has reviewed Anti-monopolies claims explicitly using rational basis review, the form of review substantively differed from federal rational basis. Rather than merely allowing the government to invent possible justifications post-hoc (or doing so on its behalf), *see Bruner*, 997 F. Supp. 2d at 698, this Court "look[ed] to the policy behind the Act." *Dial-A-Page, Inc.*, 823 S.W.2d at 207. Furthermore, this Court required "some foundation in fact to justify the legislature's

conclusion." *Id.* at 206. So even using rational basis, this court did not weakly defer to legislative assessments. This Court should not use the rational basis test, but if it does, the form of review is more searching than the rational basis test used by federal courts.

To conclude, the legitimate relation test is the proper test for a monopoly. Again, for *regulations*, Metro has a much freer hand. *See generally Estrin*, 430 S.W.2d at 348 (regulations constitute a "reasonable exercise of the police powers" and are not subject to judicial review so long as reasonable). But when Metro enacts legal immunity from competition, that means this Court should review whether: **first**, the cap promotes the health, safety, morals or well being of the public; **second**, the real end in view is to protect the public, not entrenched businesses; and **third**, whether the cap has a real tendency to promote the legitimate goal. The cap fails all three questions.

2. Residential character does not legally rise to the level of an acceptable justification for a monopoly because it does not protect moral or physical well being.

The trial court first erred by accepting the protection of residential character as an even facially justifiable ground for a monopoly. The trial court ruled that the cap had a tendency to advance the moral or physical well being of the people "because it balances the interest between the citizens who want to achieve benefits from renting their property on a short term basis against the interest of citizens who want to protect the residential character of their neighborhoods." (TR. X, at 1354). That will not justify a monopoly even if that was what it was intended to do, or had a real tendency to do, because monopolies are only justified if it protects public physical or moral well being.

Residential character legally does not amount to promoting the health, safety, morals or well being of the public. Is this a moral issue? In what way would homesharing

be immoral? Why is it more immoral to do so when the owner is not an occupant? Is this a question of safety? What is dangerous about homesharing? Why is only non-owner occupied homesharing dangerous enough to be capped? Homesharing when the occupant leaves would seem to be *less* dangerous because there would be no chance of an encounter between guest and host. The ruling leaves all of this unexplained. As a matter of law, residential character is just not a question of the public's moral or physical well being.

A monopoly requires a higher degree of justification than an impulse towards beautification. The sorts of monopolies that promote moral or physical well being involve things such as liquor licenses, *Landman v. Kizer*, 255 S.W.2d 6, 7 (Tenn. 1953) (finding liquor licenses are a permissible monopoly), or the selling of "unwholesome fish or flesh, or bred, or adulterated liquors, or poisonous drugs, without a label," or educating children. *Leeper*, 53 S.W. at 965. Something as nebulous as "neighborhood feel" cannot sufficiently justify monopolies, else little would be left of Tennessee's constitutional pronouncement that monopolies are "contrary to the genius of a free State and shall not be allowed," art. I, § 22. A monopoly in slaughterhouses, a business that has far more detrimental impact upon the aesthetics of a city than homesharing, was not acceptable. *Noe,* 161 S.W. 485. Yet the Court determined that "to confine it to one building or to give it to one individual" violated the Anti-monopolies clause. *Id.* at 487. Residential character is quite different from moral or physical well being. It is an insufficient justification for overcoming Tennessee's prohibition of monopolies.

Certainly Metro could regulate homesharing to protect the perceived impact on residential character, but the creation of a monopoly is an unconstitutional response.

Metro can use its police powers to regulate homesharing and has. Homesharers have to obey noise and garbage regulations to protect the neighborhoods. The hosts must be available, and on call at all times to address any problems. (TR. I, 103: Metro. Code § 6.28.030(F)(M)). Metro appears to believe these measures sufficient to allow potentially unlimited numbers of homesharers of the owner occupied variety, as well as long term renters, and still preserve the character of residential areas. But to monopolize requires far more. *See Checker Cab*, 216 S.W.2d at 337 ("a monopoly cannot be validly created merely by connecting such creation with the exercise of police powers"). The cap on non-owner occupied homesharing is what is at issue and it, standing alone, does nothing to advance public health, safety, morals, or well being.

This is not to say that bad hosts don't exist, just that a monopoly is an unconstitutional and excessive solution. Just like the problem of bad neighbors, the harms can be properly addressed by regulations and enforcement. Bad neighbors are a risk. Yet Metro does not cap the number of SEC tailgates just because a few get rowdy. Metro can't limit the number of Cub Scouts selling popcorn door-to-door even if some parents do park on the street. Metro cites them for noise or parking violations. Monopolies are not only a heavy-handed response, totally unwarranted based on the evidence, but they are also unnecessary. The age-old challenges of managing noise and traffic in residential areas have always been competently managed by cities with effective regulations.

In conclusion, to justify the monopoly, the interest would have to be much more compelling than simply preserving a particular aesthetic. Metro has never purported to justify the cap as even intending to advance a goal that goes to the public's moral or physical well being. Accepting this rationale as true, it still fails.

3. The real end in view of the cap was to protect the entrenched hospitality sector from an emergent threat, not the public.

The trial court erred a second time by not asking whether the end the cap had in view was unrelated to public well being. Under the legitimate relation test, "the courts decide ... whether that is really the end had in view." *Checker Cab*, 216 S.W.2d at 337 (citation and internal quotation marks omitted). That means the cap must have been intended to protect residential character, assuming that was a legitimate goal in the first place. It didn't; the evidence showed only one reason exists to single out non-owner occupied homesharers – they represented a much more direct threat to the traditional hospitality sector. Metro never rebutted the abundant evidence that protectionism was the real end in view, yet the trial court never addressed it.

Protectionism does not promote the public's moral or physical well being. Moreover, it is an explicitly illegitimate motivation, even under rational basis scrutiny so it surely doesn't pass the legitimate relation test. "Protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). "[T]he singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety." *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008). Only one explanation having nothing to do with protecting the public existed to single out only non-owner occupied homesharers: hampering competition.

Evidence abounded that this was the actual purpose of the cap. Metro admitted as much. According to Metro's own sworn statement, bed and breakfasts sought taxation "on a level playing field with STRPs." (TR. VII, 913: Def.'s Resp. to Pl.'s Interrog. No.

26 Ex. C.2). One bed and breakfast owner in an email exclaimed that the hotel industry, represented by Greg Adkins, CEO of the Tennessee Hospitality Association ("THA") (TR. VII, 939: Ex. C.2.D at 009) and Butch Spyridon, the president of Convention and Visitors Bureau ("CVB") (TR VIII, 1106: Ex. F ¶ 2), were "very concerned about how these illegal businesses *are having negative influence on the hotel industry in Nashville*." (TR. VII, 938: Ex. C.2.D. at 008) (emphasis added). Spyridon himself said that the law was passed to "level the playing field between short-term rentals like Airbnb and others in the lodging industry." (TR VIII, 1108: Ex. F ¶ 8). Metro was candid about what it was doing: the cap's purpose was "to *level the playing field* so that STRPs are not in a more advantageous tax situation th[a]n more traditional rental units, such as hotels and bed and breakfasts." (TR. VII, 911: Def.'s Resp. to Pl.s' Interrog. No. 16, Ex. C.2) (emphasis added). This phrase lurks throughout. "Leveling the playing field" is an explicit declaration of an intention to handicap the competition. The trial court never accounted for this undisputed evidence of the *actual* end in view.

Greg Adkins and Butch Spyrdon have requested this same information... They are very concerned about how these illegal businesses are having negative influence on the hotel industry in Nashville. Butch has stated that unregulated vacation rentals and illegal B&B's are not necessary for the success of the convention and vacation visitors travel dollars to Nashville due to the loss of tax dollar revenues.

The emails show that the cap was about protectionism. Councilmember Allen began working on this issue when an operator of a traditional bed and breakfast ("B&B") complained in August of 2012 about the business advantages enjoyed by STRP. (TR. VII, 931: Ex. C.2.D at 001). B&Bs repeatedly complained about the allegedly unfair advantages homesharing enjoyed in taxation. *Id.* at 937, 951, 991. This animated her to act. According to Councilmember Allen, this was why she "got into this issue...." *Id.* at 952. She too wished "to level the playing field between historic B&B's and air B&Bs."

Id. at 933, 953. No factual dispute existed that a disgruntled business competitor enlisted the help of the bill's sponsor. "Leveling the playing field," then is the dark euphemism she used throughout her communications as she colluded with hotels and bed and breakfasts, *id.* at 933, 935, 942, 945, 950-952, 974, 990, 991.

The coalition of threatened businesses coalesced around a shared political goal: tie a legal millstone around the neck of homesharing. Almost immediately, the aforementioned B&B began coordinating with other business competitors. After Councilmember Allen showed interest, one of the B&Bs offered to enlist THA to assist to "level the playing field." *Id.* at 933. Councilmember Allen directly collaborated with THA at the outset. *Id.* at 939. The coalition did more than talk. THA had actual involvement, *id.* at 939, 948, expressing commitment to the issue and the desire to be involved in the drafting of the ordinance. *Id.* at 949. They "discussed options for dealing with this in a way that levels the playing field...." *Id.* at 950. The B&B that initially brought homesharing to the attention of Councilmember Allen also maintained its involvement, *id.* at 963, forwarding ominous emails, *id.* at 984, with titles like "10 incredible Airbnb horror stories." *Id.* at 954. The B&B, in coordination with others in hospitality, issued a call to Councilmember Allen and Convention & Visitors Bureau to "get involved with the [American Hotel Association] on this." *Id.* at 953. The coalition reached more than Councilmember Allen. THA formally endorsed the proposed ordinance. Councilmember Allen made sure copies of the endorsement were placed on every councilmember's desk before the December 2, 2014 council meeting where the bill was heard on second reading. *Id.* at 1012. It is beyond dispute that the competition took affirmative steps to collude *with* the Metro official who authored the bill to implement

this law, and that their intentions were something other than public safety. Clearly evidence abounded that "leveling the playing field," or raw protectionism, is what explains the cap.

The cap contributes to a scarcity of bed space that pushes business to the traditional providers of hospitality. This benefitted the hospitality industry, not the public. The shrinkage in supply naturally causes an increase in hotel prices. According to the CVB president, Nashville has outrageously high hotel prices due a hotel shortage to begin with. (TR.VIII, 1107: Ex. F, ¶¶ 4-6). Hotels in Nashville are costlier than in comparable cities. *Id.* at ¶ 5. Higher prices, in turn, mean more profits, and the fewer homeshares there are, the more room rentals there are for hotels at an inflated price. The cap generates artificial scarcity and removes a business threat. That is not a legitimate goal, even for a regulation. *See Craigmiles*, 312 F.3d at 227. It certainly is not for a monopoly.

The cap provides a second benefit to the traditional hospitality sector because the scarcity in bed space the cap exacerbates results in tax subsidies to address it. Vast amounts of taxpayer dollars are used in Nashville to incent hotels to build in the downtown area so as to address the shortage that is especially painful in light of the new convention center. (TR. VII, 917: Ex. C.2.A; TR VIII, 1107: Ex. F, ¶ 6). On July 11, 2013, while explaining the expenditure of two $3 million tax incentive packages to two downtown hotels from the Metropolitan Development and Housing Authority, then-Mayor Karl Dean explained that with the new convention center "there is a tremendous need for more hotel capacity." (TR VIII, 1072-73: Def.'s Resp. to Pl.s' Req. for Admis. No. 8, Ex. C.6). Metro agreed to help the Omni Hotel with tax-increment financing worth a reported $128 million over 20 years because, according to Metro Finance Director Rich

Riebeling, "everyone knows that we needed a hotel" to ensure the success of the Music City Center. *Id.* Tax dollars also continue to flow to hotels even after they are built, subsidizing the cost of rooms. (TR. VIII, 1107: Ex. F, ¶ 7). CVB pays money to the hotels using tax dollars to offset the price of the rooms for convention hosts. *Id.* Taxes from homesharing go to promote hospitality and tourism in the form of tax subsidies to hotels. (TR. VII, 965: Ex. C.2.D at 035). Homesharing, non-owner occupied especially, alleviates this shortage. As Allen recognized, they "filled a need; our hotels can't be built fast enough." (Ex. I, 1:48:48; Ex. I.1). *See also* (TR. VII, 1028: Ex. C.2.D at 098). Hotels then directly benefit financially from a shortage in bed space, one that they now have a hand in causing.

Tax fairness does not explain the cap. First, Metro can level taxes on homesharers without enacting a cap. If anything, the cap limits the number of taxable entities available for Metro. Second, for all the talk of tax fairness that motivated the homesharing law, the reality was anything but fair. Homesharers were taxed like hotels, but no one sends them free tax money like they do hotels. As one person put it, "these hotels have had the 'level playing field' dramatically altered in the way of tax breaks already." (TR. VII, 990: Ex. C.2.D, at 060). One homesharer echoed this concern:

> [I]f the tax money is used to promote hotels and services, then as a host I want AirBnb to be included in that promotion. If the rich hoteliers [] are so upset about STRPs (despite the fact that room reservations are breaking records and occupancy is maxed out) and want to 'level the playing field' as they love to say in the newspaper, then fine, we will level the playing field.

Id. at 965. Rachel protested as well that she never got a dollar to promote or subsidize her homeshare. (Dep. at 34:25-35:2). While she was taxed like a hotel, hotels got an exemption from the ordinance. *Id.* at 35:11-13. Fairness was wielded like a sword that

only swung one way. The perverse result of the cap was to force non-owner occupied homesharers to pay, in part, their already better-financed competitors to address a shortage that the cap itself exacerbates. This evinced an indisputable desire to suppress competition, with the intended purpose of creating an *un*even playing field that tilted sharply towards the established interests.

The trial court never addressed the abundant evidence of the actual end in view of the cap. Since the legitimate relation test requires the court to inquire whether the end in view really was public well being, *see Checker Cab*, 216 S.W.2d, the trial court erred by leaving this reality unnoticed. Given the historical background regarding monopolies and the attendant problem of political insiders using the law to thwart competition, this concern is especially pressing and should not have been overlooked.

> 4. The cap on only one type of homesharing had no real tendency to protect neighborhoods. The evidence showed a concern over all types of homesharing overtaking neighborhoods, and the only objective evidence showed non-owner occupied homesharing did not overtake residential neighborhoods.

The third error of the trial court was that he did not address the evidence demonstrating that the cap only on one type of homesharing had no "real tendency," *Checker Cab*, 216 S.W.2d at 337, to advance the stated goal of protecting neighborhoods. The record did not show that homesharing presented an actual threat, just a perceived one. The record did show that the fears that neighborhoods would be overrun were not borne out. Mostly, the expressed fears were of homesharing generally, leaving no reason to single out non-owner occupied homesharing except to serve the interest of hampering competition. Finally, capping them had no real tendency to serve even that goal because

Metro allowed a range of housing options, commercial entities, and urban blight where the Andersons live.

The record overwhelmingly showed no real reason to fear that homesharing did actually disrupt neighborhoods. The Metro Council, commissions, and committees certainly did not consider any documents, including studies or surveys, that would have provided an objective basis for fearing non-owner occupied homesharing in particular. (TR. VII, 914: Def's Resp. to Pl.s' Req. for Prod. No. 6, Ex. C.2). Somewhat remarkably, prior to the ordinance, *no* homesharing-related complaints were reported to the zoning administrator whatsoever. According to the zoning administrator, he had only one actual complaint, and it had to do with a sign. (Ex. E.1, 4:28-5:30). Constituents may have complained to Councilmember Allen (TR. VII, 913: Def's Resp. To Pl.s' Req. For Interrog. No. 26, Ex. C.2) — of that, evidence abounds — but it is not she who investigates and *verifies* complaints. (TR. VII, 906: Def's Resp. To Pl.s' Req. For Admis. Nos. 1, 2, Ex. C.2). These complaints might have had to do with hosts who didn't obey the noise restrictions, or owner occupied homesharers, or been bogus altogether. Enforcement responsibility belongs to the Codes Department supervised by the zoning administrator who said there weren't any substantiated complaints. (Ex. E.1, 4:28-5:30). Anything directed to the Councilmember is essentially an uncorroborated gripe that surely cannot provide the sole foundation for overcoming Tennessee's constitutional prohibition against monopolies.

Evidence showed that the fear that non-owner occupied homesharers presented a unique threat to overtake the city was unfounded and was never rebutted. Hard numbers placed into a spreadsheet and a map by census tract showed that non-owner occupied

homesharers were no more likely to overtake a neighborhood than owner occupied. (TR. VIII, 1098-1103, 1156). The only places where the cap was hit were in areas that were almost all adjacent to the downtown corridor where the interest in residential character was decidedly lower, and the need to show a legitimate relation to that goal correspondingly higher. *Id.* Metro, in contrast, presented nothing to rebut the showing that the city wasn't in danger of being overtaken.

Even the gripes to Councilmember Allen were not legitimate reasons to make only one *type* of homesharing exclusive. They were from people who just did not like homesharing generally (giving no reason to single out one type) or who wanted to prevent competition therefrom. They told her that they "lived next to STRPs and did not like them ... and [she also heard] from historic bed and breakfasts who wanted to be on a level playing field with STRPs." (TR VII, 913: Def.'s Resp. to Pl.s' Interrog. No. 26 Ex. C.2). Dislike of one's neighbor doesn't explain why the cap only applies to one type of homesharing and, besides, was not related to health, safety, morals, or well being. By allowing unlimited homesharing, Metro undermined the stated goal of protecting neighborhoods. The cap truly was "at once too narrow and too broad," *Romer v. Evans*, 517 U.S. 620, 621, 633 (1996), and would fail even the rational basis test. The wish of business competitors to hamstring a new form of competition does at least explain why one type of homesharing was singled out, but limiting competition is an explicitly *illegitimate* reason, as explained above. The evidence abundantly established that concerns expressed over homesharing pertained to their prevalence. Nothing, however, justified capping one type of homesharing.

Furthermore, the evidence demonstrated the cap had no real tendency to preserve the residential character where the Andersons live because of what was already allowed. A refusal to rezone properties for business use when other properties are already zoned for such a purpose violated Arkansas's Anti-monopolies Clause. *See Blytheville v. Thompson*, 491 S.W.2d 769, 773 (Ark. 1973). The transitioning neighborhood of Germantown had blighted areas, (TR. VIII, 1126-29), with buildings so long ago abandoned as to return to an advanced state of nature. *Id.* at 1130-31. It also had upscale, new construction homes, *id.* at 1134, and trendy urban condominiums. *Id.* at 1135-37. It had lower income housing too, including Cheatham Place, public assistance housing, *id.* at p. 1145, and the Nashville Rescue Mission. *Id.* at pp. 1146-48. Sometimes this contrast sat literally side-by-side. The boarded up home, *id.* at 1133, had the new construction home depicted, *id.* at 1134. The Germantown area also had payday lenders and fast food restaurants. *Id.* at 1142. It had factories, *id.* at 1151, major construction projects, *id.* at 1150, and office parking. *Id.* at 1143. The Farmer's Market and the baseball stadium were nearby, and the Nashville skyline towered over it all. *Id.* at 1152-59. It's these sorts things that made Germantown vibrant and bustling, but how was residential character marred by homesharing? How would capping non-owner occupied homesharing have a real tendency to protect residential character? The ruling fails to address this.

Metro never submitted any evidence on this front either, so summary judgment was improper. Summary judgment should have been entered in the Andersons' favor on this issue. They propounded unrebutted evidence, not airy generalizations or unsubstantiated hysteria. Metro never demonstrated how a cap on non-owner occupied homesharing had a *real* tendency to preserve residential character in Germantown when it

is otherwise a free-for-all that undermined the stated goal. Tennessee's *constitutional* prohibition on monopolies demands far more than unproven assumptions before it can be overcome.

If monopolies are contrary to the genius of a free state and shall be prohibited, Tenn. Const. art. I, § 22 then Metro's flimsy and unsubstantiated legitimate justification for its cap cannot withstand scrutiny. Metro can regulate, but not impose a cap that accomplishes only the illegitimate protection of the hospitality sector.

II. THE ANDERSONS WERE THE PREVAILING PARTY FOR ATTORNEY'S FEES PURPOSES BOTH AT THE INJUNCTION STAGE AND SUMMARY JUDGMENT.

The Andersons ought to have been considered the prevailing party on the claims that won an injunction, as well as at summary judgment, entitled to full compensation for attorney's fees. The trial court did not otherwise abuse his discretion awarding attorney's fees. The victory substantially changed the relationship between the parties because the Andersons were no longer were subject to vague laws or arbitrary enforcement. Liberation from an unconstitutionally vague law is anything other than symbolic. Further, and importantly, the public benefitted from the victory.

A. Standard of review.

"The trial court's determination of a reasonable attorney's fee is a subjective judgment based on evidence and the experience of the trier of facts." *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011) (citation and quotation omitted). Review is under an abuse of discretion standard. *Id.* An abuse of discretion occurs when the trial court "applied an incorrect legal standard, reached an illogical conclusion, based

its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party." *Id.* (citation and quotation omitted).

B. The Civil Rights Act and Attorney's Fees under Section 1988.

Under the Civil Rights Act, the court may allow recoupment of reasonable attorneys fees as part of the recoverable costs of the prevailing party. 42 U.S.C. § 1988 (LexisNexis 2016); *see also King v. Betts*, 354 S.W.3d 691, 706 (Tenn. 2011) (Tennessee courts can adjudicate Civil Rights Act cases). The purpose of awarding attorney's fees is to incentive the robust enforcement of constitutional rights through litigation. Thus, a court "not merely 'may' but *must* award fees to the prevailing plaintiff." *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989). A local government like Metro that violates a federal right should thus pay fees in a successful Section 1983 action. *See Maine v. Thiboutot*, 448 U.S. 1, 9-10 (1980). When awarding attorney's fees in Tennessee, "ordinarily" the prevailing party is "entitled to full compensation for time and effort expended in the representation." *Keith v. Howerton*, 165 S.W.3d 248, 252 (Tenn. Ct. App. 2004). In special cases, such as a symbolic victory, Section 1988 "does not compensate." *McQueary v. Conway*, 614 F.3d 591, 598 (6th Cir. 2010). But the Sixth Circuit has "never (to our knowledge) found a 'special circumstance' justifying the denial of fees" for a prevailing party. *Id.*

The term, "prevailing party," is a term of art. "A party is considered 'prevailing' for purposes of the civil rights statutes upon proving any constitutional violation, even one entitling the party to only nominal damages or minimal relief." *Keith*, 165 S.W.3d at 251 (citing *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)). A prevailing party is "one who

has succeeded on any significant claim affording it some of the relief sought. ..." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989).

Here, the trial court declared the Andersons prevailing, but only because they won on vagueness (TR. XII, 1680), not accounting for their success at the injunction stage. The Andersons did raise this argument (TR. X, 1467), preserving it under Tenn. Ct. App. R. 6(a)(2). They did not receive the "full compensation" to which they were entitled. *see Keith*, 165 S.W.3d at 252, and were thus prejudiced. *See* Tenn. Ct App. R. 6(a)(3).

C. The Andersons were the prevailing party at the injunction stage and should receive attorney's fees on that basis as well.

Under the circumstances here, the Andersons were the "prevailing party." The trial court ruled they were clearly likely to win on their First and Fourth Amendment claims. It altered the relationship of the parties. Metro rewrote the ordinance as a result.

The Supreme Court has never actually addressed whether a plaintiff who obtains an injunction resulting in an intervening change in the law is "prevailing" for purposes of fees. It has only ruled that a plaintiff who prevails in obtaining a preliminary injunction only to later lose on the merits is not entitled to fees. *See Sole v. Wyner*, 551 U.S. 74, 86 (2007). A "catalyst theory" of prevailing is generally unavailing. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 603, 605 (2001). The *Sole* decision, however, "expressed no view on whether, in the absence of a final decision on the merits ..., success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.* at 86. An injunction resulting in a change in the law presents a question not resolved by the U.S. Supreme Court.

Not so in the Sixth Circuit. The Sixth Circuit ruled that the case-specific instances where a plaintiff who is the prevailing party are those where "the injunction represents an

unambiguous indication of probable success on the merits, and not merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff." *McQueary*, 614 F.3d at 598 (citations and quotations omitted). There has to be a "material" change between the parties. *Id.*; *see also* (TR. XI, 1578: *Occupy Nashville v. Haslam*. 2015 U.S. Dist. 104550 (M.D. Tenn. Aug. 25, 2015)).

Under this standard, the Andersons are the prevailing party on the First and Fourth Amendment claims. This Court ruled that the Andersons were substantially likely to prevail. (TR. IV, 459). The relationship materially changed. They could erect a sign and the police could not ask them for records. As pointed out in the brief, the Andersons actually put up a sign adverting their rental that was posted online. (TR. XII, 1623). While ordinarily the courts should avoid "speculative inquiries about why government bodies altered the conduct," *McQueary*, 614 F.3d at 598, here it is perfectly evident that Metro only changed the law because of the Andersons' injunction. In fact, Metro admitted as much. (TR. XII, 1644). The bill changing the law explicitly recognized the need based on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). (TR. XII, 1646). *Reed* was propounded by the Andersons as dispositive; Metro derided it as inapplicable throughout (TT. I, 10). The same can be said on the Fourth Amendment claim, based on *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). Whereas Metro first argued that the holding was not "relevant to this issue at all," (TT. I, 42), once the trial court ruled, Metro acknowledged that the *Patel* decision required it to change the records law. (TR. XII, 1644). Again, speculation is not called for. Metro changed its view because of the injunction. The Andersons should be considered the prevailing party on the First and Fourth Amendment claims as well.

The trial court employed the wrong legal standard because he did not consider them prevailing on the injunction. This Court is able to make that award without a remand. *See Cartwright v. Stamper*, 7 F.3d 106, 109 (7th Cir. 1993).

D. The trial court did not abuse his discretion in determining that the Andersons were the prevailing party on the vagueness claim.

Even though they obtained summary judgment on vagueness, Metro says that the Andersons were not "prevailing parties," or the amount awarded was too high, largely because they cannot do what they really wanted: to homeshare. (Metro's br. at 14). However: 1) Metro has mischaracterized the standard and the Andersons' goals; 2) they did prevail – not having to obey a vague law changed the relationship between the parties and is valuable to them and the public; 3) the award was reasonable – the extent of the victory at least warrants the award they got; and, 4) they can continue to homeshare.

1. Metro has the wrong standard and mischaracterized the Andersons' goals.

Metro says the "entire purpose" of the lawsuit was to allow the family to homeshare. (Metro's br. at 17). True or not, "a plaintiff's *subjective* motives are not relevant to the determination of the extent of the plaintiff's success." *Layman Lessons, Inc. v. Cty of Millersville*, 550 F. Supp. 754, 762 (M.D. Tenn. 2008) (emphasis preserved). Citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), Metro argues the Andersons lost on most of their claims and should not be deemed prevailing. (Metro's br. at 15-16). But "[t]he *Hensley* Court said *nothing* about denying attorneys' fees where plaintiffs prevail on some claims but lose on others." *Hescott v. Cty of Saginaw*, 757 F.3d 518, 524 (6th Cir. 2014). It doesn't matter even if Metro has correctly diagnosed the "primary focus" of the Andersons. (Metro's br. at 18). "A plaintiff crosses the threshold

to 'prevailing party status by succeeding on a single claim, even if he loses on several others and even if that limited success *does not grant him the 'primary relief' he sought.*" *McQueary*, 614 F.3d at 603 (emphasis added). Metro flatly has the legal standard wrong.

Also, Metro has the Andersons' goals wrong. Four of the seven claims, in fact, did not pertain to their actual right to share their home. Claim one had to do with whether the law applied, (TR. I, 20), claim two was vagueness, *id.*, claim three was free speech, *id.* at 21, and claim seven was search and seizure. *Id.* at 25. Parenthetically, by hook or by crook, they achieved *all* of these goals. Metro's characterization of the case is made still more puzzling upon examining the introduction of the complaint – the first paragraph, on the first page, in the first document in the case – where the Andersons announced their goal was to "list their home on Airbnb.com free from *vague*, arbitrary and irrational government regulation." (TR I, 1) (emphasis added). Vagueness was literally their first concern and one of many unrelated to homesharing *per se*, not some throwaway issue. Even if it mattered, the Andersons did get most of what they asked for.

2. The Andersons prevailed. Their victory changed the relationship between the parties and the public benefitted.

The trial court did not abuse his discretion in finding the Andersons prevailed. Winning on vagueness alone "materially altered the relationship between the parties." *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam). A vagueness ruling frees the plaintiffs from the enforcement of an unconstitutional law. *Mosley v. Cty of Wickliffe*, 2017 U.S. Dist. LEXIS 17853, at *3 (N.D. Ohio, Feb. 8, 2017) (copy of opinion attached). Plaintiffs who win on vagueness are prevailing for purposes of awarding attorney's fees. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1192 (6th Cir. 1995); *accord Mosley*, 2017 U.S. Dist. LEXIS 17853, at *3 (awarding fees to plaintiffs

prevailing on vagueness). Metro may no longer enforce the ordinance against the Andersons and that does "directly benefit the plaintiff[s]." *Farrar*, 506 U.S. at 111-112. Metro's focus on the material benefits delivered by the victory misses that the "recovery sought and achieved," *Dambrot*, 55 F.3d at 1193, is the negation of an action, that is, the enforcement of an unconstitutional law. *See also DiLaura v. Twp of Ann Arbor*, 471 F.3d 666, 671 (6th Cir. 2006) (defendants' bed and breakfast ordinance unconstitutional and cannot prevent plaintiff from providing complementary overnight accommodations). Like DiLaura, the Andersons may now homeshare free of the constraints of a vague ordinance.

This victory is not one of the "symbolic" or "special circumstances" undeserving a fee. "[S]pecial circumstances should not be easily found." *Cleveland v. Ibrahim*, 2005 U.S. App. LEXIS 1372, at *90 (6th Cir. Jan. 26, 2005) (copy attached). Again, the Sixth Circuit has never found "a 'special circumstance' justifying the denial of fees" for a prevailing party. *McQueary*, 614 F.3d at 598. The "special circumstances" exception routinely fails. *See e.g., Hescott,* 757 F.3d at 525; *Hall v. Hall*, 738 F.2d 718, 721 (6th Cir. 1984); *Ibrahim*, 2005 U.S. App. LEXIS 1372, at *91-92. The whole purpose of awarding attorneys fees is so plaintiffs have the ability to protect their rights when the prospect of recovery is low. Courts typically only scrutinize the theory of the prevailing party in the context of the prevailing *defendant*, *Hensley,* 461 U.S. at 429, who does not enjoy the presumption that a court "must" award fees. *Zipes*, 491 U.S. at 761. Examples of special circumstances usually involve circumstances that made the case moot or remedy unavailing. *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (plaintiff prisoner "could not get redress" from change in prison policy because he had been paroled); *Bly v. McLeod*, 605 F.2d 134, 195 (4th Cir. 1981) (relief obtained by prejudgment legislative enactment

not shown to have related from the judicial proceeding). This is very different from the case here, where the plaintiffs do get the benefit of the changed law, and "the lawsuit and the benefits obtained are causally related." *Young v. Kenley*, 641 F.2d 192, 195 (4th Cir. 1981).

Metro seems to not recognize any inherent value in prevailing on a vagueness claim, as if the Andersons must something else, or can provide "evidence of actual harm." (Metro's br. at 19). Not having to comply with a vague law is the most immediate thing they won and, mercifully, the courts agree that this mattered. "The vindication of rights" involved in prevailing on vagueness is a worthy goal in and of itself. *Dambrot*, 55 F.3d 1192; *accord Mosley*, 2017 U.S. Dist. LEXIS 17853, at *3 (awarding fees to plaintiffs prevailing on vagueness). This constitutes relief that warrants fees "whether or not such rights had been infringed upon." *Dambrot*, 55 F.3d at 1192. Metro flatly misses the interest protected by the vagueness doctrine. Clear laws provide notice to the citizenry and guidance so that enforcement is not arbitrary. *Grayned v. Cty of Rockford*, 408 U.S. 104, 108 (1972); *Cty of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 655 (Tenn. 2005). That's what the Andersons won. Now, they don't have to wonder what the ordinance means, nor are they susceptible to arbitrary enforcement. Clear laws are valuable, period, and this very case shows how. The protection of this interest is worthy of protection, and not just for symbolic reasons.

3. The victory was important, not *de minimis*. The trial court did not abuse his discretion with the amount.

The trial court did not abuse his discretion by supposedly failing to determine the fee based on "the extent of success." (Metro's br. at 21). But the trial court awarded less than the full amount, (TR. XII, 1680-81), so Metro has failed to show that he didn't do

exactly that. Moreover, "the fee awards should not be reduced by the ratio of successful claims to the total claims advanced." *See Keith*, 165 S.W.3d at 252 (citing cases). All of the claims "were based on a common core of facts" and "[t]he claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail." *Hensley*, 461 U.S. at 435. In the Sixth Circuit, "[t]he most critical factor in determining the reasonableness of an attorney's fees award is the degree of success obtained." *Pouillon v. Little*, 326 F.3d 713, 717 (6th Cir. 2003). The relief requested in this case *exclusively* requested declaratory and injunctive relief, not monetary damages. (TR. I, 27-28). The primary goal was "the vindication of its rights." *Laymon Lessons, Inc.*, 550 F. Supp. 2d at 763. That's what they achieved so awarding fees was proper.

Also supporting the award, this victory had a strong public purpose. *See McClindon v. Ru*ssell, 108 F. Supp. 2d 842, 846 (S.D. Ohio, 1999) (gauging degree of success on public purpose served by victory). The ruling forced Metro to re-write the law. Metro explicitly stated that the ruling was the reason why (TR. XII, 1636), thus providing the entire city with a better law. To characterize this as "at best, a symbolic victory" (Metro's br. at 17) or a "moral victory," takes a dim view of the benefits *all* Nashvillians obtained from the trial court's insistence on clear laws and objective enforcement. The Fourteenth Amendment is, after all, part of the Constitution.

4. Factually, they can continue to homeshare even if they move because that was the law before.

Metro argues that the Andersons really lost because they "could not legally operate" before the ordinance and now still cannot. (Metro's br. at 17). Metro waived this issue by failing to make appropriate citations to the record. Also, the facts showed the Andersons could homeshare before the ordinance and so now can.

Metro contends that prior to the ordinance homesharing "was not a permitted use" (Metro's br. at 19) and that previously, the Andersons "could not legally operate." Yet Metro does not cite to the record. Tenn. R. App. P. 27(a)(7) and Tenn. Ct. App. R. 6(a)(4) both require it. This results in waiver. *Chiozza v. Chiozza*, 315 S.W.3d 482, 489 (Tenn. Ct. App. 2009). Above, the Andersons proved *with* citations that homesharing was previously permissible. Metro should not be allowed to base arguments on unverifiable (and hotly contested) assertions.

As more fully argued above, homesharing was allowed before the ordinance. The zoning administrator wrote a memorandum stating they were permissible based on the "property owner's right to the free use of his or her property." (TR. VII, 919; Ex. C.2.B) Metro swore in an interrogatory that homesharing was "not a Codes violation prior to the passage of the ordinance." (TR. VII, 913; Def.'s Resp. to Pl.'s Interrog. No. 26, Ex. C.2). The legislative explanation for the bill was that "the zoning administrator has determined that they are allowed in residential areas *without condition.* ..." (TR VII, 921: Ex. C.2.B, at 8) (emphasis added). Again, the Andersons could homeshare in the absence of permission; property rights are held in high regard so zoning ordinances are construed so as to favor "the free use of his or her property." *Lion's Head Ass'n.*, 968 S.W.2d at 301. It was permissible until forbidden, not the other way around. It is simply untenable for Metro to argue homesharing was illegal before.

Metro even contradicts itself *in this very case* when it states that homesharing was previously illegal. (Metro's br. at 17). That does not square up with Metro's sworn interrogatory that homesharing was "not a Codes violation prior to the passage of the ordinance." (TR. VII, 913; Def.'s Resp. to Pl.'s Interrog. No. 26, Ex. C.2). Even after it

lost at summary judgment, on November 29, 2016, Metro described their prior legal status as "ambiguous," and acknowledged that the Zoning Administrator certainly considered them legal but that unnamed (and uncited) "others" in the Metro government disagreed. (TR. XI, 1533). Yet even in this totally unsupported assertion Metro was not, as it is now, saying that homesharing was "illegal." It shouldn't be allowed to re-write history in an effort to punish the Andersons for asserting their rights.

E. The trial court's findings do not warrant reversal.

Metro closes by critiquing the sufficiency of the trial court's findings. (Metro's br. at 21). Metro waives this argument by not explaining how it was prejudiced and the order is readily discernible.

Metro's argument is devoid of an explanation as to how more sufficient findings would have altered the outcome, *id.*, thus failing to identify how it was prejudiced. *See* Tenn. R. App. P. 6(a)(3) (LexisNexis 2016). Failure to adhere to essential briefing requirements results in waiver. *See Chiozza*, 315 S.W.3d at 489. Tellingly, Metro made no request for additional findings, failing "to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a) (LexisNexis 2016). Metro waived the right to complain about the findings.

Trying to avoid the consequence of not requesting additional findings, Metro cites Tenn. R. Civ. P. 52.01, which requires special findings of fact and conclusions of law (Metro's br. at 22), regardless of whether a party requests them. *See Poole v. Union Planters Bank*, 337 S.W.3d 771, 791 n. 12 (Tenn. Ct. App. 2010). But that rule, by its very terms, does not apply to motions under "Rule 12 or 56 *or any other motion* except as provided in Rules 41.02 [involuntary dismissal] or 65.04 [temporary injunction]."

(emphasis added). Civil rights attorney's fees motions are part of recoverable costs. 42 U.S.C. § 1988 (LexisNexis 2016). Costs are recovered under Rule 54.04, plainly among the "other motions," and so findings of fact and conclusions of law were not required. *See PNC Multifamily Capital Investment Fund v. Mabry*, 402 S.W.3d 654, 660 (Tenn. Ct. App. 2012).

Finally, the trial court's findings are readily discernable. He proceeded through all of the relevant factors and the arguments and made a specific award amount. (TR. XII, 1680-81). He obviously gave consideration to the degree of success and the fees because he awarded less than the full amount. This issue has no merit.

III. THE TRIAL COURT CORRECTLY DETERMINED THE HOMESHARING SCHEME WAS VAGUE BECAUSE PERSONS OF COMMON INTELLIGENCE COULDN'T KNOW IF THE HOMESHARING ORDINANCE OR ITS EXCEPTIONS APPLY.

Metro argues that the trial court erred in ruling that its homesharing scheme was unconstitutionally vague. Metro criticizes the standard used and the lack of deference, yet Metro never gets to the heart of the question and explains how someone is supposed to know if they fall under the law or the law's exceptions since they are all substantially defined to mean a place where people stay overnight. It is not explained because the definitions cannot be untangled, regardless of the standard. The failure to try results in waiver.

A. Standard of review

Review of vagueness decisions are *de novo* with a presumption of correction attaching to the trial court's findings. *City of Cleveland v. Wade*, 206 S.W.3d 51. 56 (Tenn. Ct. App. 2006).

B. Metro's law must have the exactitude of a criminal law because it carries criminal penalties.

Metro argues for a more lenient standard because the challenged law isn't criminal or doesn't involve the First Amendment. (Metro's br. at 6). But the penalty in this case is criminal. According to Metro. Code § 17.40.610, a violation is, like all violations of the zoning title, a misdemeanor "punishable by law." (TR. III, 435). This is punitive. A misdemeanor is not civil. It is explicitly about punishment. Violations punished with jail time are criminal.

Metro cannot get a more forgiving standard because this case involves a municipal violation of an economic law. (Metro's br. at 7). The leading case on vagueness actually involved a violation of a municipal, economic ordinance. At issue in *Village of Hoffman Estates v. Flipside, Hoffman, Estates, Inc.*, 455 U.S. 489, 500 (1982) was an ordinance requiring a license before a vendor could sell products "designed or marketed for use with illegal cannabis or drugs." Even though it was an economic regulation that carried "only civil penalties," it was "quasi-criminal" and "may warrant a relatively strict test." *Id.* at 499. Metro shouldn't get any less scrutiny, at a minimum.

Metro cites to bad case law. (Metro's br. at 7) (citing *City of Chattanooga v. Davis*, 54 S.W.3d 248, 259-260 (Tenn. 2001)). In *Davis*, the Supreme Court squarely rejected the idea that municipal ordinances are civil when the punishments are, as they are here, punitive in nature. *Id.* at 260-262. This is true even if the city calls the penalty civil. *Id.* The question is whether the sanction is "predominantly punitive or remedial in nature." *Id.* at 263. Municipal ordinance remain civil in terms of *procedure*. *See id.* at 260 (recognizing they are civil "at least in terms of technical application of procedure and for pursuing avenues of appeal"); *see also City of Chattanooga v. Myers*, 787 S.W.2d 921, 922, n.1 (Tenn. 1990)

("Procedurally, cases involving violations of city ordinances continue to be civil in nature."). This remains good law, and it is to this legal point that Metro's viable cases refer. Procedure, however, is very different from substance. The substantive nature of the penalties is what determines if the case is civil or criminal. If a city punishes a person for violating an ordinance, it is a crime not matter what it is called. Metro never even tries to explain how something it has made "punishable by law" could ever be civil.

Metro has been losing this argument for a long time. The Supreme Court (in a case involving Metro) stated that the cases holding that municipal violations are civil "have been, at least impliedly, overruled by the decision of this Court in *State v. Jackson*, 503 S.W.2d 185 (Tenn. 1973)." *Metro Gov't of Nashville & Davidson Cty. v. Miles*, 524 S.W.2d 656, 659 (Tenn. 1975). Metro's unpublished case of *Smith v. Metro Gov't of Nashville & Davidson Cty.*, 2015 Tenn. App. LEXIS 219, at *3 (Tenn. Ct. App. Apr. 13, 2015) (copy of opinion attached) acknowledged that violations of municipal ordinances were [h]istorically and traditionally" treated as civil, but the decision then recognized that, based on *Miles* and *Davis*, sanctions may be criminally "punitive in purpose or effect." *Id.* Metro in particular should know this issue is settled.

This case is only more clearly criminal than the "quasi" criminal law in *Flipside*. 455 U.S. at 499. While the nature of the penalties was in question there, here Metro has made it a criminal misdemeanor. This Court should utilize "a relatively strict test" that tolerates very little vagueness. *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 533, 533 (6th Cir. 1998).

C. The trial court's ruling that the ordinance was vague was correct under any standard.

Local measures intruding on the use of property must not be vague or imprecise "because of the importance of the property interests involved." *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992). When possible, courts should uphold the constitutionality of legislation. *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990). While doubts should be resolved in favor of constitutionality, *State v. Prater*, 137 S.W.3d 25, 31 (Tenn. Crim. App. 2003), prohibitions must be clearly defined such that persons must not need to guess at its meaning. *State v. Crank*, 468 S.W.3d 15, 22 (Tenn. 2015). An ordinance is unconstitutionally vague when persons of common intelligence "must necessarily guess at its meaning." *Wade*, 206 S.W.3d at 58.

The fundamental problem was that Metro exempted hotels, bed and breakfasts, and boardinghouses from the homesharing ordinance, only those terms all meant substantially the same thing. A homeshare was a residential dwelling unit containing not more than four sleeping rooms that is used and advertised for rent for transient occupancy by guests as those terms are defined in the Hotel Occupancy Tax ordinance (Section 5.12.010). (TR. I, 115: Metro. Code § 6.28.030(A)). Hotels, bed and breakfasts, and boardinghouses were all exempted, but the ordinance does not specify definitions. *Id.* Hotels were only defined once in Metro's Code. It meant "any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes ..." (TR. I, 109: Metro. Code § 5.12.10). A boardinghouse was a residential facility or a portion of a dwelling unit for the temporary accommodation of persons...in a rooming unit, whether for compensation or not, who are in need of lodging. (TR. II, 209: Metro. Code. § 17.04.060). A bed and breakfast "inn"

was a place with four to ten furnished guest rooms for pay where meals may, but were not required to be, served. *Id.* If people stayed overnight for short periods of time, the place appeared to meet several or all definitions.

Metro argued at one point (TR IX, 1292, n. 1), that the dictionary definition of hotel, not the Code, was correct. The trial court correctly discounted this because: 1) the ordinance appeared to contemplate the Code definition, and 2) the dictionary definition did not provide a viable distinction either. (TR. XI, 1592, n. 3). Now Metro offers up no definitions at all, presumably because the Andersons met any standard Metro has proffered thus far. Metro should not be allowed to enunciate one for the first time in its reply brief. *See State v. Cornelieus Banks*, 2016 Tenn. Crim. App. LEXIS 69, at *31 (Tenn. Crim. App. Jan. 29, 2016) (copy of opinion attached).

The trial court correctly recognized the dilemma involved in the overlapping definitions: "The definitions of STRP, bed and breakfast, boarding house, and hotel overlap such that a single property could fall into one, several, or all of the aforementioned property classifications." (TR. X, 1352). Metro misattributes significance to the fact that the Andersons obtained a homesharing permit, as if that showed they were clear on the distinctions. (Metro's br. at 8). That just showed they knew they were homesharing. The problem was that they could *also* do something else, yet the law says it's one or the other. As the trial court stated:

> The fundamental problem in this case is not whether any of the four definitions listed above are vague standing alone; the issue — given that the STRP ordinance specifically exempts hotels, bed and breakfasts, and boarding houses — is whether these definitions are reconcilable in such a way that a person of "ordinary," "common," or "average" intelligence has sufficient notice of whether they are an STRP or exempted as one of the other categories to the degree of certainty necessary to satisfy due process.

(XI, 1592). Besides, the Andersons also owed the tax expected of hotels (TR. VIII, 1055: Ex. C.2.E), and therein laid the issue. It's not figuring out what they *were*, but what they were *not*.

Compounding the problem hopelessly, the definitions of "transient occupancy" used in the definition of homesharing incorporated the hotel definition. (TR. I, 115: Metro. Code § 6.28.030(A)). As defined in Hotel Tax ordinance found at Metro Code. § 5.12.10, transient occupancy explicitly applied *only* to hotels. "'Occupancy' meant the use or possession or the right to the use or possession of any room, lodgings or accommodations *in a hotel*. ..." (TR. I, 109: Metro Code § 5.12.010) (emphasis added). "Transient" did as well. *Id.* at 110. The definition of homesharing essentially required that it be in a hotel. So even if it were theoretically possible to delineate between the definition of hotels and a homeshares, homeshares wouldn't meet the definition of homeshare because they must be a hotel to be a homeshare. This presents nothing less than a logistic paradox that no person, let alone one of common intelligence, could solve.

The statements and actions of various officials showed how confusing they all were because of these definitions. Notably, Metro tried to tax the Andersons as a hotel, even before it had a law specific to homesharing. (TR. VIII, 1055). Metro swore in discovery that homesharers "had always fallen under the definition of those required to collect and pay hotel taxes," meaning they fit the definition of a hotel. (TR. VII, 909: Def.'s Resp. to Pl.'s Interrog. No. 4, Ex. C.2). Councilmember Allen acknowledged that homesharers would be defined "in the same way the hotel regulations do." (TR. VII, 964). The Tennessee Attorney General wrote an opinion that defined homesharing as falling under the substantially identical state definition of hotels. *See* Tenn. Att'y Gen.

Op. No. 15-78 (Dec. 1, 2015). The council attorney even stated on the council floor that homesharers were running boardinghouses when they were not in residence. (Ex. H.1). Such muddled definitions, overlapping even in the *un*common minds of state and local officials, leave the person of common intelligence without a chance.

Metro addresses its effort to tax the Andersons as a hotel, arguing that this is not evidence of arbitrariness because the homesharing law had not yet come into effect and questioning why this matters. (Metro's br. at 9-10, n. 2). It matters because it shows that homesharers met Metro's definition of a hotel, yet Metro contends the terms don't overlap. This shows the concerns are anything but theoretical. The only definition of hotel in the Code was used against the Andersons because they homeshared, and it remained effective once the homesharing law came online. A homesharer should rightly fear that she could be deemed a hotel one day and something else the next because Metro already construed homesharing as meeting the definition of a hotel.

Metro has simply been unable to explain when someone housing transients falls under the ordinance, though it tried many times in the lower court to proffer standards. Now it seems to have given up, resorting instead to nitpicking. Metro faults the trial court for failing to give a reasonable construction without saying what a reasonable construction would be. (Metro's br. at 13-14). Likewise Metro criticizes the lack of deference or the standard. Yet Metro fails to state how it was prejudiced with citations, *see* Tenn. Ct. App. R. 6(a)(3), because it doesn't say how under *any* standard a person could know when they are homesharing or not. It's impossible for the Andersons to respond. This incomplete argument must be deemed waived as well. *See Chiozza*, 315

S.W.3d at 489. Again, Metro shouldn't be allowed to include this critical portion of its argument in its reply brief. *Banks*, 2016 Tenn. Crim. App. LEXIS 69, at *31.

Making the criticism of standards doubly unavailing, the trial court did try to give Metro's scheme a reasonable construction before concluding it couldn't be done. (XI, 1593-94). Metro's demand for deference to local officials interpretation forgets that no local officials ever opined on when a homesharer is not a hotel, etc. Metro certainly never cites to where this interpretation can be found in the record (Metro's br. at 10-12) as required by Tenn. R. App. P. 27(a)(7)(A), also waiving this point. *Chiozza*, 315 S.W.3d at 489. Metro alludes to the issuance of the homesharing permit (Metro's br. at 10), as if that presented a determination over when a homeshare is not a hotel, etc. But that just meant they applied for a homesharing permit and got one. It wasn't an agency determination over whether the ordinance or its exceptions applied or whether they also have a hotel any more than Metro's demand for hotel taxes was a determination over whether they were homesharing.

If Metro cannot find a reasonable construction, it's because there is none. Metro repeatedly tried and failed below to show how the trial court was anything other than correct. Metro waived the issue by not trying to articulate a standard in this brief.

CONCLUSION

This Court should reverse the ruling of the trial court and grant summary judgment on the Anti-monopolies claim for the Andersons. This Court should also rule that the Andersons were the prevailing party for attorney's fees purposes on their First and Fourth Amendment claims, not just vagueness, and award full attorney's fees, as well as the cost of this appeal. This Court should affirm the trial court's ruling on vagueness.

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Respectfully submitted,

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