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

RACHEL AND P.J. ANDERSON,

Plaintiffs,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant.

Case No. 15c3212
Hon. Judge Kelvin Jones

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Rachel and P.J. Anderson, the plaintiffs in this case ("the Andersons"), to respectfully move pursuant to Tenn. R. Civ. P. 56, *et. seq.* for entry of summary judgment declaring Metro's short-term rental property ("STRP") law, or alternatively, the three percent (3%) cap, unconstitutional, and permanently enjoining its enforcement.

I.
Introduction

Internet transactions arranging to stay in the home of a stranger may seem new or unfamiliar, but in many ways it is a return to a historical norm. The housing of transients in private residences is at least as old as biblical times. According to one reanalysis of the translation of the Gospel of Luke,

Joseph and Mary were not, contrary to the versions popularized in church plays, denied a room at an *inn,* but rather at a private home.[1] "Boarding out" was also a practice that exploded in America even before the Civil War. Historical estimates place the number of households in the nineteenth century who took in transients at anywhere between one in three and one in five. In the mid-1800s, three-fourths of the adults in Manhattan were boarders in someone else's homes.[2]

The practice has been a fixture throughout American history. Most of the delegates to the Constitutional Convention boarded in private residences during their stay in Philadelphia.[3] Lincoln stayed in a boardinghouse after he married, and again when he was elected to Congress and moved to Washington.[4] John Wilkes Booth and his coconspirators were frequent guests at the boardinghouse of Mary Surratt.[5] After he was shot at Ford's Theater, Lincoln was carried across the street to a boardinghouse run by a German tailor where he ultimately died.[6]

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[1] Stephen C. Carlson, *The Accommodations of Joseph and Mary in Bethlehem*, New Test. Stud. 56, pp. 326-342 (July 2010).
[2] Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 Hastings Const. L.Q. 557, 561-62, n. 24 (Spring, 2015).
[3] Ellis Paxson Oberholtzer, *The Literary History of Philadelphia*, p. 105 (1906).
[4] Chris Derose, *Congressman Lincoln*, pp. 9-10 (2013); David Herbert Donald, *Lincoln*, p. 119-120 (1995).
[5] Guy W. Moore, *The Case of Mrs. Surratt*, pp. 10, 13 (1954); David O. Stewart, *The Family Plot to Kill Lincoln*, The Smithsonian (Aug. 28, 2013). http://www.smithsonianmag.com/history/the-family-plot-to-kill-lincoln-2093807/ (last visited Sept. 7, 2016).
[6] Martha Hodes, *Mourning Lincoln*, p. 4 (2015). Debra Kerns Goodwin, *The Night Abraham Lincoln was Assassinated*, The Smithsonian (Apr. 8, 2015). http://www.smithsonianmag.com/history/abraham-lincoln-team-of-rivals-180954850/?all (last visited on Sept. 7, 2016).

Tennessee history features prominent examples of the practice. Andrew Jackson met his wife, Rachel, while staying at Rachel's mother's house.[7] John Overton, co-founder of the City of Memphis who went on to become one of Jackson's most intimate advisors when he was president, was a guest as well.[8] Meriwether Lewis of the famed Corps of Discovery died at a log cabin lodging house on the Natchez Trace near Hohenwald, Tennessee under a shroud of mystery that endures to this day.[9]

More than just an interesting historical relic, short-term rental has meant opportunities for those most in need of it. The practice in the nineteenth century "was widespread and crossed class boundaries."[10] In a time not noted for open-mindedness, these sorts of places "'were remarkably diverse establishments" that housed "'residents of particular class, gender, racial, occupational, political, moral, or religious identities.'"[11] Often the proprietors were themselves those who were not otherwise able to be entrepreneurs "including women, minorities and immigrants."[12] A ban on the practice would have been a cruel burden.

Staying in the homes of others while travelling proved to be a necessary solution for African-American travellers during the Jim Crow—era.

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[7] Frances Clifton, *John Overton as Andrew Jackson's Friend,* 11 Tenn. Hist. Q. 23, 33 (1952).
[8] *Id.* at p. 23.
[9] Jonathan Daniels, *The Devil's Backbone: The Story of Natchez Trace,* 173 (1962). Abigail Tucker, *Meriweather Lewis's Mysterious Death,* The Smithsonian (Oct. 8, 2009). http://www.smithsonianmag.com/history/meriwether-lewis-mysterious-death-144006713/?no-ist. (last visited Sept. 7, 2016).
[10] Jefferson-Jones, *supra.* at 563.
[11] *Id.* at 563-64.
[12] *Id.* at 564.

The "Green-Book" was a "crowd-sourced guide to navigate segregation" that listed private residences where black travellers could stay "prefigure[ing] today's residential lodging networks; like Airbnb....". [13] Not even the segregationists of the era succeeded in reaching into private homes. Far from carrying a stigma, "it was an honor to have one's home listed as a rooming house in the Green-Book." In so many ways the use of one's home to house transients is an American tradition and an important one at that.

While a mobile phone based "app" may be new, the practice of hosting travellers is anything but. The prosperity of the post-war era, with the accompanying expectation of home ownership for all, relegated it to history. It has returned, only with technological benefits that ensure that consumers and operators may make highly informed decisions. As before, it has opened up economic benefits to many who never thought that possible, including the Anderson family.

II.
Legal Standard

A movant is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Tenn.

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[13] Jacinda Townsen, *Driving While Black: African Americans used a crowd-sourced guide to navigate segregation*, The Smithsonian, pp. 52-53 (Apr. 2016). Available online as *How the Green Book Helped African-American Tourists Navigate a Segregated Nation.* http://www.smithsonianmag.com/smithsonian-institution/history-green-book-african-american-travelers-180958506/ (last viewed Sept. 7, 2016)

R. Civ. P. 56.04 (Supp. 2016). The Tennessee standard is consistent with the federal standard for summary judgment. *Rye v. Women's Care Ctr. of Memphis, MPLLC,* 477 S.W.3d 235, 238 (Tenn. 2015). "A genuine dispute of material fact exists if 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 543-44 (6th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

The evidence is viewed in the light most favorable to the non-moving party. *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn. 1993). "The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "In considering a motion for summary judgment, [the] court construes all reasonable inferences in favor of the nonmoving party." *Robertson v. Lucas*, 753 F.3d 606, 614 (6th Cir. 2014) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The duty of the court is not to weigh the evidence, *see Byrd*, 847 S.W.2d at 211, but Rule 56.04 does not require a complete absence of factual dispute between the parties. By its express terms, the Rule requires an absence of a material fact, meaning a fact that can affect the outcome of the proceeding. *See Byrd*, 847 S.W.2d at 211.

Once the moving party clears his or her burden, the burden of persuasion then shifts to the non-moving party to demonstrate a genuine, material dispute of fact. *Id.* The non-moving party may not rely upon pleadings but must set forth specific facts that demonstrate a genuine issue of material fact for trial. *Id.* As the Supreme Court has said, "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushida Electric*, 475 U.S. at 586.

III.
Argument

A. The STRP definition is so confusing that it is unconstitutionally vague. If sense could be made out of it, then the Andersons would have to be exempted from the law.

In interpreting zoning measures, "[t]he courts must also construe zoning ordinances with some deference toward a property owner's right to the free use of his or her property." *Lion's Head Ass'n v. Metro Bd. of Zoning Appeals*, 968 S.W.2d 296, 301 (Tenn. Ct. App. 1997). For this reason, "the courts should resolve ambiguities in a zoning ordinance in favor of a property owner's unrestricted use of his or her property." *Id.* Courts should construe zoning ordinances "as a whole," and in such a manner as to "further[] the ordinance's general purposes, but at the same time prevent[] the ordinance from being applied beyond its scope." *Id.* (citations omitted).

Zoning measures 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); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). Deference to local officials does not extend past "fairly debatable interpretations." *Whittemore*, 835 S.W.2d at 16. When those interpretations become "arbitrary and capricious" then courts must "not hesitate to set an interpretation aside." *Id.*

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) (citations omitted); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn. 1993). A precisely defined law provides fair notice to the citizenry and meaningful enforcement standards. *Crank*, 468 S.W.3d at 22-23; *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927, 935 (E.D. Tenn. 1998) (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995)).

The problem begins with the STRP law's effort to exempt other entities that house transients. An STRP is defined as a residential dwelling unit containing not more than four (4) 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). Metro. Code § 6.28.030(A). The STRP ordinance provides that bed and breakfast establishments, boardinghouses, hotels, and motels shall not be considered short-term rental

property, and are thus not governed by the law. *Id.* This means that it is critical to know when an STRP is an STRP and not a hotel, boardinghouse, or a bed and breakfast.

These terms are defined elsewhere to mean:

- Hotel[14]-"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 ..." Metro. Code § 5.12.10.
- Boarding house-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... Metro Code. § 17.04.060.
- Bed and breakfast-a place with four (4) to ten (10) furnished guest rooms for pay where meals may, but are not required to be, served. *Id.*

In many instances, these terms will overlap. By not clearly delineating between STRPs, hotels, bed and breakfasts, and boarding houses, the STRP law must be *either* inapplicable to the Andersons (in which case they prevail in Claim One) or unconstitutionally vague (in which case they prevail in Claim Two).

1. *The terms overlap.*

The Andersons' home fits the definition of a hotel. *See* Metro. Code § 5.12.10. Their home is a structure. They furnish accommodations to transients for a consideration. Their home is occupied and intended for occupancy by transients for dwelling, lodging or sleeping purposes. While their home is a residential dwelling unit, an element of an STRP, the hotel

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[14] "Motel" is never defined anywhere in the Code. However, the definition of "hotels" in the Occupancy Tax specifies that includes "motels." Metro. Code § 5.12.10.

definition *does not* exclude residences from the definition. And, in fact, local officials have defined STRPs in residential areas as fitting the definition. Metro sought hotel taxes even prior to the passage of the STRP law, demonstrating that it believed hotels could be in residential zones. Def.'s Resp. to Pl.'s Interrog. No. 4 Ex. C.2; Ex. C.2.E.

The Andersons may also operate a boardinghouse. They offer their residence for the temporary accommodation of persons who are in need of lodging. *See* Metro. Code § 17.04.060. The Andersons' home also may qualify as a bed and breakfast, depending on what qualifies as a "furnished guest room." They have three (3) bedrooms in their home, as well as a common living room that could be used for lodging guests. *See* Metro. Code § 17.04.060. The Andersons could fall under this exception as well.

The overlap in these terms is visualized below:

Entity	Definitional Elements	Metro Code Section	Overlap with STRP
STRP	1.Residential dwelling unit containing not more than four (4) sleeping rooms; 2.Used or advertised for rent for transient occupancy by guests, as defined in 5.12.10.	6.28.030(A).	
Hotel/Motel	1.Structure/portion of structure; 2.Designed for occupancy by transients for dwelling, lodging or sleeping purposes; 3.Within the jurisdiction of Metro government.	5.12.10	When residential, so long as under four (4) rooms.
Boarding House	1.Residential facility or a portion of a dwelling unit;	17.04.060	When under thirty (30)

	2.For the temporary accommodation of persons in a rooming unit; 3.For compensation or not; 4.Who are in need of lodging, etc.		days.
Bed and Breakfast	1.Four (4) to ten (10) furnished guest rooms; 2.For pay; 3.Under fourteen (14) days.	17.04.060	When four (4) rooms and under fourteen (14) days.

There is no clear line of demarcation between these terms. An STRP may at once be an STRP and governed by the law, or a hotel/boardinghouse/bed and breakfast, and not. The ordinance collapses into a hopeless mess that either exempts the Andersons or must be voided as vague and unenforceable.

2. *The interpretation of officials was that STRPs overlap.*

Various officials at various points in time have shared the view that STRPs fit these other categories. How officials previously interpreted zoning classifications has "great significance" to courts. *Whittemore*, 835 S.W.2d at 16. Statements after the fact, however, carry "little weight." *Id.* The prior interpretation of officials is evidence that STRPs indeed fall into these overlapping categories.

Metro officials believed that STRPs met the definition of a boardinghouse, at least when they were owner-occupied. At the December 2, 2014 council meeting, when the council debated the bill, Metro Council's attorney was asked to comment on the current legal status of owner-occupied

and non-owner occupied STRPs.[15] Mr. Cooper stated that according to the zoning administrator, STRPs could qualify as boardinghouses.[16] Ex H, 59:51-1:00:35; Ex. H.1. Councilmember Allen's emails likewise reflected the opinion of the zoning administrator that STRPs could fit the definition of a boardinghouse when they were owner-occupied. Ex. C.2.D, at 051-52, 123. So Metro officials showed they believed that owner-occupied STRPs were boardinghouses. Metro adopted an STRP definition but did not change the definition of a boardinghouse. If STRPs could be boardinghouses prior to the STRP law's passage, then they still can. These definitions overlap.

Other officials thought they fit the definition of hotels, at least when they wanted tax revenue. As mentioned above, Metro sought hotel taxes even prior to the passage of the STRP law. Def.'s Resp. to Pl.'s Interrog. No. 4 Ex. C.2. They sought it from the Andersons. Ex. C.2.E. Now that its prior interpretation poses problems for the sloppily drafted STRP ordinance, Metro scrambles to separate the terms but they are too interwoven to be untied. Metro's shifting and self-serving definition of hotel is the embodiment an arbitrary and capricious interpretation. If STRPs did not fit the definition of a *hotel*, then Metro had no business trying to levy the *hotel* tax against STRPs.

The Attorney General also concluded in an opinion that STRPs met the definition of a hotel, as defined in Tenn. Code Ann. § 67-4-1401 and Tenn.

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[15] Also available here: https://www.youtube.com/watch?v=y0jvnDnwuNQ.

[16] Specifically, he stated that owner occupied STRPs were boardinghouses.

Code Ann. § 7-4-101. Tenn. Att'y Gen. Op. No. 15-78 (Dec. 1, 2015), pp. 1-4. Metro's definition is essentially identical. *Compare* Tenn. Code Ann. § 7-4-101 *and* Metro. Code § 5-10-12. In fact, Metro admits that the hotel tax is only authorized pursuant to Tenn. Code Ann. § 7-4-110, which uses the definition found at Tenn. Code Ann. § 7-4-101. Def.'s Resp. to Pl.'s Interrog. No. 3 Ex. C.2. Councilmember Allen recognized the definitions were synonymous: "We are defining short term rentals as anything under 30 days *in the same way the hotel regulations do.*" Ex. C.2.D, at 034. Metro cannot take the position that the same definition that allows it to tax STRPs means something entirely different now.

3. *If STRPs do not meet the hotel definition, then they do not meet the STRP definition.*

To muddy the waters even further, terms in the STRP definition are defined in such a way as to require it to meet the definition of a hotel. The definition of STRP specifies that the property must be used for "transient occupancy." *See* Metro. Code § 6.28.030(A). "Transient," and "occupancy" are defined terms. Those terms are defined in Hotel Occupancy Tax ordinance found at Metro Code. § 5.12.10. Those definitions apply *only* to hotels. "'Occupancy' means the use or possession or the right to the use or possession of any room, lodgings or accommodations *in a hotel.* ..." Metro Code § 5.12.010 (emphasis added). "Transient" does as well. The definition of STRP essentially incorporates "hotels" into the definition. So, even if it were

theoretically possible to delineate between hotels and STRPs, STRPs would still fit the exception, by definition.

The zoning administrator concluded that in many cases STRPs fit none of these categories. Recognizing that the use category of an STRP was different, the zoning administrator opined that prior to the STRP law, STRPs were generally permissible in residential zoning.[17] Ex. C.2.B. He is charged with interpreting the Code and had never classified STRPs as hotels, boardinghouses, or bed and breakfasts. Def.'s Resp. to Pl.'s Interrog. Nos. 14-15, Ex. C.2. As will be shown below, Councilmember Allen repeatedly said that previously STRPs were generally unregulated and permissible in residential zoning. How a property can be an STRP *now* if it was not a hotel, boardinghouse or bed and breakfast *before*, demands an answer. For this reason as well, voiding the zoning classification would not mean the Andersons could not operate their STRP in a residential neighborhood. Instead it would restore the prior status of STRPs that allowed for the "unrestricted use" of the property that courts favor as a matter of statutory interpretation. *See Lion's Head Ass'n*, 968 S.W.2d at 301.

5. *The definitions are unconstitutionally vague.*

When an STRP is not an STRP is anyone's guess. There is no way the Code provides fair notice to the citizenry and meaningful enforcement standards. *See Crank*, 468 S.W.3d at 22-23. The highest attorneys in the

[17] Elsewhere other Metro officials reference the view of the zoning administrator that STRPs might be boardinghouses if they were owner-occupied.

state and city governments have, in one form or another, expressed their belief that the terms overlap. This shows that even persons of "[un]common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 22 (citations and internal quotation marks omitted). Persons with no legal training, therefore, have no hope of understanding the law's applicability.

This leaves no meaningful standards for enforcement. This is especially problematic because, according to the zoning administrator, "enforcement will be complaint driven," a method that carries enormous potential for abuse. Ex. C.2.D, p. 045. Such muddled definitions coupled with sporadic enforcement leave the Andersons "'at the mercy of *noblesse oblige*.'" *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2318 (2012) (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010)). Such a law is no law at all and must fall.

B. The three percent (3%) cap is a government-created monopoly with no legitimate tendency to further a permissible purpose.

The undisputed facts show that the cap upon non-owner occupied homeowners constitutes an unjustifiable government-sponsored monopoly. The monopoly has no legitimate tendency to advance a justifiable reason, because a cap on exclusively non-owner occupied STRPS simply has no correlation with public health, safety, morals, or well-being. On the contrary, the history of the law shows that this was not its stated purpose. Instead, the desire to hinder competition animated the law.

1. *The Anti-Monopolies Clause.*

Monopolies are "contrary to the genius of a free state," and are prohibited. Tenn. Const. Art. I, § 22. 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). Monopolies are permissible, but only "in so far as such monopoly has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 337 (Tenn. 1948). 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 regulatory creation of monopolies). Otherwise, a monopoly is voided as being unreasonable, oppressive, and ultra vires. *Id.* at 337.

The legitimate relation test involves meaningful court scrutiny. Courts inquire whether the law: 1) actually intended to address one of the legitimate purposes, i.e., safety, health, and morals; and, 2) actually furthers the stated public purpose. 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). Hypothetical 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 had in view." *Id.* (citation and internal quotation marks omitted). The law must actually do what it is intended to do. "[I]t is the duty of the Court to determine whether the monopoly does have any legitimate relation with the declared public purpose of the act." *Id.* The role of the court does not end once it is shown that the government has the power to regulate the field. The power to regulate does not imply the power to grant a monopoly. *Id.*

As shown in *Checker Cab*, the Court has historically cast a dim eye upon cities when they open up a particular field, but only issue a limited number of licenses. *Id.* (quoting 36 Am. Juris., 524); *see also Noe v. Mayor and Alderman of Town of Morristown*, 161 S.W. 485, 487 (Tenn. 1913) (explaining that when a city passes an ordinance providing for the licensing establishments, "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"). This is precisely what Metro has done. Metro may regulate STRPs, but Metro may not create a monopoly.

2. *The three percent (3%) cap is a monopoly.*

As a matter of law, the cap creates monopolies in census tracts, including the Andersons'. A monopoly is "'an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a

monopoly.'" *James Cable Partners, L.P. v. City of Jamestown,* 818 S.W.2d 338, 345 (Tenn. Ct. App. 1991) (quoting *City of Watauga,* 589 S.W.2d at 904). The Court recognized that a limitation on the number of liquor stores "[a]s a practical matter" was "monopolistic in that only the few to whom the permit has been issued can engage in that business in that town." *Landman v. Kizer,* 255 S.W.2d 6, 7 (Tenn. 1953) (finding liquor licenses are a permissible monopoly). The same can be said of STRP licenses.

There is no genuine dispute of fact that using one's home as an STRP was previously a common right, available to all. The zoning administrator's memorandum opinion on October 24, 2014 "summarizing the current zoning law" clearly stated that STRPs were then unregulated, and thus, "we have allowed STRPs to operate anywhere a residential use is allowed." Ex. C.2.B. This was the view of Councilmember Allen as well. At the Metro council meeting on February 3, 2016, she said that under Metro's existing Code, STRPs "seem to be fine, [be]cause it doesn't say [in the Code] they are not fine."[18] Ex. I, 1:47:38, Ex. I.1. Over and over, she told constituents that STRPs were permissible and unregulated under existing law, frequently comparing their status to long-term rentals. Ex. C.2.D, pp. 035, 043, 050-51, 053, 068-69, 071, 096, 100, 105, 109, 120. The council attorney publicly expressed the opinion that under prior law, the practice of renting the whole house as opposed to rooms in one's residence, that is, non-owner occupied,

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[18] Also available here: https://www.youtube.com/watch?v=fH6nagMVZFg&index=38&list=PLAAE32390485B37DB.

was unregulated. Ex H, 59:51-1:00:35; Ex. H.1. Finally, even Metro acknowledges, "STRPs were not a Codes violation prior to the passage of the ordinance." Def.'s Resp. to Pl.'s Interrog. No. 26, Ex. C.2. Operating an STRP was previously a common right.

Now, as a matter of law, this is an exclusive right granted to a few. Only three percent (3%) of a neighborhood can obtain a non-owner occupied permit. Metro. Code § 6.28.030(Q). In the Andersons' census tract, that means exactly 28 people. Ex. B. p. 4-6. Ex. A ¶ 11; Ex. B ¶ 18. Not only can the Andersons not get a permit, they were all gone before the Andersons planned on moving. Ex. A. ¶ 12; Ex. B ¶¶ 6, 16-19. That is, they were all gone before the Andersons even qualified. *They never had a chance.* Worse still, these permits must be renewed annually, but there is no requirement that people relinquish them and go to the back of the line, meaning the few existing permits may be held in perpetuity by those who were able to obtain them. Those who move or, like the Andersons, face life change, are effectively totally precluded. This total bar on entering a field is the essence of a monopoly.

The effect of this monopoly is to place the Anderson family in its present predicament: sell the house they love or lose the chance of a lifetime. The law no longer permits "all persons inclined to pursue such an occupation" to pursue this opportunity, making it "unreasonable and tend to oppression."

See Noe, 161 S.W. at 487. This underscores what is truly wrong about the monopolistic nature of the cap.

The concerns surrounding the creation of a legal monopoly were placed before Metro officials. An opponent to STRP laws recognized the danger in Metro's methods: "**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." Ex. C.2.D, at 056 (emphasis preserved). When Metro began issuing permits, one Nashvillian even complained that larger property managers with multiple properties would get to the permits first and "register[] 11 properties," to the exclusion of others. *Id.* at 115. Another observed that bigger, more sophisticated businesses had snatched up the valuable permits and could "undercut the whole market." *Id.* at 121.

The cap created a monopoly. The suppression of competition in favor of those with greater resources was the natural result.

3. *The three percent (3%) cap fails the legitimate relation test.*

a. **The cap does not have a legitimate goal.**

The cap was not even intended to serve one of the few, enumerated legitimate goals for a monopoly: health, safety, morals, or well-being. *See Checker Cab Co.*, 216 S.W.2d at 337. Metro has pointed to the legislative findings as evidence of the purposes of the STRP law. (Memorandum in Support of Motion to Dismiss, pp. 5-6). None even *resemble* a legitimate justification. The purposes of the law were: 1) providing for flexible housing

stock and contributing to the economy; 2) investment for homeowners; 3) increasing tax revenue; and, 4) balancing the needs of long-term and short-term residents. Metro. Ord. No. BL2014-951.

Whatever can be said of these goals, they are not related to the health, safety, or morals of the people. When asked how the cap furthered the "whereas" clauses, Metro explained that it was an effort to "balance the needs of neighborhoods to function as residential communities. ..." Def.'s Resp. to Pl.'s Interrog. No. 16 Ex. C.2. Metro does not so much as mention one of legitimate goals. Metro may have reason to regulate STRPs. This does not justify a monopoly. *See Checker Cab*, 216 S.W.2d at 337 (license to regulate does not include right to monopolize). Metro chose to allow non-owner occupied STRPs and regulate them. This it may do, but it may not create monopolies.

It bears mentioning that while aspects of the STRP law are calculated to promote the safety and well-being of the public, the health and safety features of the STRP law (fire alarms, restrictions on noise, etc.) are *not* at issue. The cap on non-owner occupied STRPs is. The cap, standing alone, does nothing to advance public safety, morals, or well-being. This is especially true given that owner occupied STRPs are potentially limitless. Def.'s Resp. to Pl.'s Req. for Admis. No. 6 Ex. C.1. If there were some conceivable safety harm presented by STRPs that a cap would solve, then there would be no reason to allow unlimited owner occupied STRPs.

It is not surprising that health and safety concerns were not justifications for the cap. No one had ever reported a health and safety violation to Codes prior to the passage of the law. In fact, virtually no STRP-related complaints were reported to the zoning administrator whatsoever. According to the zoning administrator, he had only one (1) actual complaint regarding STRPs prior to the STRP law, and it had to do with a sign. Ex. E.1, 4:28-5:30. Codes had not identified STRPs as a threat to health and safety.

Constituents may have complained to Councilmember Allen, but it is not she who investigates and *verifies* complaints. That responsibility belongs to the Codes Department, so anything directed to the Councilmember is essentially an uncorroborated gripe.

More importantly, those gripes were not related to any legitimate reason for a monopoly. They were from people who just did not like STRPs 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." Def.'s Resp. to Pl.'s Interrog. No. 26 Ex. C.2. Dislike of one's neighbor is not a reason related to health, safety, morals, or well-being. Neither is the wish of business competitors to hamstring a new form of competition. On the contrary, limiting competition is an explicitly illegitimate reason, as explained further below. The only view of the evidence is that the STRP law

was not concerned with any reason that could justify the creation of a monopoly.

The kindest explanation for the cap is that it was intended to keep residential neighborhoods from being overtaken by non-owner occupied STRPs. Ex. C.2.B, at 3 (explaining that the STRP law "ensure[s] a large number of homes used exclusively as STRPs are not located in any one area"). As a justification for a monopoly, this does not fall within the few legitimate categories. Nor has it in the past. The case of *Noe v. Morristown,* 161 S.W. 485 (Tenn. 1913) involved slaughterhouses, a business that, it goes without saying, has far more detrimental impact upon the aesthetics of a city. 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. Nuisances may be regulated, for sure, but the creation of a monopoly is an unconstitutional response.

A zoning measure relegating unattractive businesses to certain parts of the city and prohibiting them in others would be perfectly acceptable. What the anti-monopolies clause prohibits is what Metro has done—allow STRPs everywhere, but only permit a select few to benefit. That is an impermissible government-created monopoly.

Whether non-owner occupied STRPs actually do affect neighborhoods differently from other short-term or long-term renters is notably unproven,

but also, for purposes of the anti-monopolies clause, beside the point.[19] This is not a health, safety, or moral concern. There is no legitimate basis to create a monopoly, and the cap must therefore fall.

b. Even if it had a legitimate basis, the cap does not further it.

Intentions aside, the cap also fails the legitimate relation test because it does not further health, safety, morals or well-being for two reasons. First, the law permits unlimited STRPs; it just limits non-owner occupied STRPs. Def.'s Resp. to Pl.'s Req. for Admis. No. 6 Ex. C.1. Whatever threat might be to STRPs, there is simply no evidence or sensible reason why an unlimited number of overall STRPs would be allowed, but not non-owner occupied STRPs.

There is no evidence adduced that non-owner occupied STRPs pose a different type of threat to neighborhoods. The concerns expressed over STRPs pertains to their prevalence; they are not specific to non-owner occupied. The staff attorney analysis justified the cap as ensuring that neighborhoods used exclusively as STRPs are not located in one area, with no reason the differential treatment between types of STRPs. Def.'s Resp. to Pl.'s Interrog. No. 8, Ex. C.2; Ex. C.2.B, at 8. The lone complaint recalled by zoning administrator that was lodged prior to the law had nothing to do with non-owner occupied STRPs. Ex. E.1, 4:28-5:30. And finally, the council meetings all reflect a concern about STRPs overall that is also unspecific to non-owner

[19] As argued more fully later, the fear that STRPs would overtake the city is now demonstrably unfounded.

occupied STRPs. Nothing, however, justified capping one type of STRPs exclusively.

This is easy to understand. Non-owner occupied STRPs should actually pose less of an impact for an obvious reason. The owner leaves and is replaced by the guests. In an owner occupied STRP, the impact on roads, traffic, parking, and density is all aggregated because the owner remains. By allowing unlimited STRPs, Metro has undermined whatever possible justification exists for capping the number of non-owner occupied STRPs.

Second, safety concerns are otherwise addressed by the regulation itself and elsewhere by limitations in Metro's Code on noise, parking, nuisance, etc. A cap on one type of STRP is completely arbitrary and a wholly illegitimate way to protect public health, safety, and well being.

c. The actual purpose of the law was to suppress competition.

The evidence shows another purpose behind the effort to suppress the number STRPs. Economic competitors of STRPs worked hard to push the law as a way of burdening their competitors under the guise of "fairness." There was nothing fair about placing the burdens but not the benefits of hotels on STRPs. Furthermore, the suppression of STRPs inures to the direct benefit of their alternative, hotels. This, in turn, inflates prices for hotel rooms, which then provides a justification for hotels to obtain taxpayer incentives to build and subsidize more hotel rooms.

The indisputable facts reveal that this law was about hampering competition. Bed and breakfasts wanted to be "on a level playing field with STRPs." Def.'s Resp. to Pl.'s Interrog. No. 26 Ex. C.2.[20] The president of the Nashville Convention and Visitors Bureau ("CVB") said that the STRP law was passed to "level the playing field between short-term rentals like Airbnb and others in the lodging industry." Ex. F ¶ 8. "Leveling the playing field" is an explicit and euphemistic declaration of an intention to burden the advantages of the competition.

The emails tell the tale. 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. Ex. C.2.D at 001. B&Bs repeatedly complained about STRPs, in particular that they enjoyed a tax advantage. *Id.* at 007, 021, 061. This is the proximate cause of the law. According to Councilmember Allen, this is why she "got into this issue...." *Id.* at 022. She too wished "to level the playing field between historic B&B's and air B&Bs." *Id.* at 003, 022. There is not a dispute in fact that what got Councilmember Allen to begin was a disgruntled business competitor.

The rent-seeking process expanded from there. Almost immediately, the B&B began coordinating with other business competitors. After

[20] Metro explains that STRPs were "in a more advantageous tax situation th[a]n more traditional rental units, such as hotels and bed and breakfasts." Def.'s Resp. to Pl.'s Interrog. No. 16, Ex. C.2. As explained more fully below, hotels enjoy massive tax advantages that were never extended to STRPs even while hotel taxes were leveled upon STRPs in the name of tax fairness.

Councilmember Allen showed interest, one of the B&Bs sought to enlist a lobbying group representing hotels. *Id.* at 003. Councilmember Allen directly involved the group early in the process. *Id.* at 009. They openly expressed concern over the economic impact STRPs would have. According to the B&Bs, others involved with the hospitality sector were "very concerned about how these illegal businesses *are having negative influence on the hotel industry in Nashville.*" *Id.* at 008 (emphasis added). Disparate businesses that were threatened by STRPs began to coalesce around a shared political goal.

The coalition did more than talk. The hospitality industry had actual involvement, *id.* at 009, 018, expressing commitment to the issue and the desire to be involved in the drafting of the ordinance. *Id.* at 019. They "discussed options for dealing with this in a way that levels the playing field...." *Id.* at 20. The B&B that initially brought STRPs to the attention of Councilmember Allen also maintained its involvement, *id.* at 033, forwarding ominous emails, *id.* at 054, with titles like "10 incredible Airbnb horror stories." *Id.* at 024. The B&B, in coordination with others in hospitality, issued a call of action to Councilmember Allen and Convention & Visitors Bureau to "get involved with the [American Hotel Association] on this." *Id.* at 023.

The coalition reached more than merely Councilmember Allen. The hospitality industry formally endorsed the STRP law. Councilmember Allen directed copies of the endorsement to be printed and placed on every

councilmember's desk before the December 2, 2014 council meeting where the bill was heard on second reading. *Id.* at 082. It is beyond dispute that the competition took affirmative steps to implement this law.

Their concern was illegitimate protectionism. The fewer STRPs there are, the fewer beds there are to house tourists. This is to the benefit of the hospitality industry. Tourists who cannot find an STRP will stay in a hotel. 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. Ex. F ¶¶ 4-6. Hotels in Nashville are far higher than in comparable cities. *Id.* at ¶ 5. Higher prices, in turn, mean more profits, and the fewer STRPs there are, the more room rentals there are for hotels at an inflated price.

The second way the scarcity benefits the hotel and tourism industry is with tax subsidies. Vast amounts of taxpayer dollars are used 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. Ex. C.2.A; 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." E 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 $25 million in

2011 and another $103 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. Def.'s Resp. to Pl.'s Req. for Admis. No. 9 Ex. C.6.[21]

Tax dollars also continue to flow to hotels even after they are built, subsidizing the cost of rooms. Ex. F ¶ 7. CVB pays money to the hotels using tax dollars to offset the price of the rooms. *Id.* Hotels then directly benefit financially from a shortage in bed space.

STRPs alleviate this shortage. According to Councilmember Allen STRPs "filled a need; our hotels can't be built fast enough." Ex. I, 1:48:48; Ex. I.1. *See also* Ex. C.2.D at 098. Even capped, STRPs are having an impact. In fact, CVB issued a report showing that spending at the 2016 Country Music Awards Fest decreased by 1.5% to $59.5 million, and that one reason why was because stays in home rentals doubled from 4.9% to 9.2%.[22] The threat presented by STRPs to hotels is real.

For a related reason, the industry has an interest in seeing STRPs taxed. Taxes taken from STRPs go to promote hospitality and tourism. Def.'s Resp. to Pl.'s Interrog. No. 3 Ex. C.2; Ex. C.2.D at 035. In April of 2016 alone,

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[21] Joey Garrison, *Council Signs Off on Omni Hotel Financing,* Nashville City Paper (Oct. 19, 2010). Available here: http://nashvillecitypaper.com/content/city-news/council-signs-omni-hotel-financing (last viewed Sept. 9, 2016).

[22] Will Racke, *Home Rentals Put Dent in CMA Fest Visitor Spending,* Nashville Bus. J. (Jul. 12, 2016). Available here: http://www.bizjournals.com/nashville/news/2016/07/12/cvc-releases-2016-cma-fest-numbers-visitor.html (last viewed Sept. 14, 2016).

that approximated $280,000. Ex. C.5. The hospitality industry is the natural beneficiary.

In sum, taxes taken from STRPs find their way into the pockets of the hotels. For all the talk of tax fairness that motivated the STRP law, the reality is anything but fair. STRPs are taxed like hotels, but no one sends them money. As one person put it, "these hotels have had the 'level playing field' dramatically altered in the way of tax breaks already." Ex. C.2.D, at 060. One STRP 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 p. 035. Ms. Anderson also recognized the unfairness. She never got a dollar to promote her business or subsidize it. Ex. J, at 34:25-35:2. She protested that they get taxed like a hotel, yet hotels get an exemption from the law. *Id.* at 35:11-13. This is not what fairness looks like.

Tax fairness only went one way. STRPs get limited, benefitting the competition. STRPS pay, in part, their already better-financed competitors to address a shortage that the cap (applied only to STRPs) perversely exacerbates. This evinces an indisputable desire to suppress competition and create an uneven playing field advantaging the established interests.

C. Capping non-owner occupied STRPs but not other similarly situated establishments violates state and federal guarantees of equal protection under the law.

1. *Equal protection under state and federal law.*

The Fourteenth Amendment of the federal constitution guarantees all citizens the equal protection of law. U.S. Const. Amend. XIV. Article I, Section 8 of the Tennessee Constitution reads that "no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Similarly, Article XI, Section 8 of the Tennessee Constitution prohibits the passage of private laws, or laws that grant rights and privileges to some individuals that are not granted to other members of the community. *See Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). In short, Art. 1, § 8 guarantees equal treatment when the legislature seeks to impose a burden, and Art. XI, § 8 guarantees equal treatment when the legislature seeks to dispense a benefit.

When the classification interferes with a fundamental right or disadvantages a suspect class, then it is reviewed under strict scrutiny. *See State v. Smoky Mt. Secrets*, 937 S.W.2d 905, 911 (Tenn. 1996). The classification must be precisely tailored to serve a compelling state interest. *State ex rel. McCormick v. Burson*, 894 S.W.2d 739, 746 (Tenn. Ct. App. 1994). Classifications that do not interfere with a fundamental right or

disadvantage a suspect class are generally reviewed under the rational basis test, which asks whether the ordinance bears a rational relation to a legitimate state interest. *Bruner v.* Zawacki, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014).

Under Tennessee law, the classification must not be "arbitrary," but instead have "a natural and reasonable relation" to the legislative goal and a "good or valid reason" for the differential treatment. *State v. Nashville, Chattanooga & St. Louis Ry. Co.,* 135 S.W. 773, 775 (Tenn. 1910). Any classification must be based upon "substantial distinctions that make one class really different from another; and the characterizations which form the basis of the classifications must be germane to the purpose of the law." *Id.* at 776; *see Sutton v. State*, 36 S.W. 697, 700 (Tenn. 1896) ("The classifications are unnatural, arbitrary, and capricious, and, being so, the statute is, for that reason unconstitutional, null, and void.")

Under federal law, the test is determined by the binding circuit precedent of *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), a case that Metro has sedulously avoided. In *Craigmiles*, a case out of Tennessee, the government required that in order to sell caskets, a person must have a funeral director's license. 312 F.3d at 222-23. In analyzing the government's professed explanations for the law, the Sixth Circuit did not dismiss the facts as irrelevant or find itself helpless but to accept hypothetical rationales. While acknowledging the substantial deference due the legislature, the Court

reviewed the evidence to determine whether there were believable justifications for the law, dismissing them as bogus in light of the evidence and common sense. *Id.* at 224-28. The Sixth Circuit recognized that under rational basis, the Supreme Court is leery of a legislature's circuitous path to a legitimate end when a direct path is available. *Id.* at 227. Thus, there must be a plausible connection between the government's chosen means and any possible justification for the law. This the government could not do in *Craigmiles.* In words with particular resonance, the Court wrote: "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224.

This precedent directly refutes Metro's consistent effort to argue that the actual facts behind the law do not matter and the Court is helpless but to accept any farfetched explanation for the law. Economic regulations must have a legitimate rational basis that is plausible in light of the evidence. The Court has an important role to determine whether the stated concerns over STRPs are rational, as well as whether the law accomplishes those purposes. When the government cannot point to a legitimate justification or a plausible connection, all that is left is economic favoritism and the law is invalid. And, it should be added, in *Craigmiles*, there was no direct evidence of intent to suppress competition, as there was in this case.

2. *Metro does not have a rational reason to treat non-owner occupied STRPs differently by capping them.*

Only non-owner occupied STRPs face the cruel reality of a hard cap. In *Consumers Gasoline Stations v. Pulaski*, 292 S.W.2d 735 (Tenn. 1956), the Tennessee Supreme Court cast a dim eye towards a municipal ordinance that, like the STRP law, denied new businesses (in that case, gas stations) from opening when others were allowed. Even though the business was unquestionably "dangerous," thus warranting regulation, *id.* at 737, the law denied equal protection because it allowed some owners of similar property to make full use of their property but not others. In other words, if a city will allow a property use to exist, it may not grant it to some and deny it to others. If that was true with something as "dangerous" as gas stations, it is only truer with STRPs.

a. **The cap does not advance the stated goals.**

Given its stated goals, Metro has no rational reason to treat non-owner occupied STRPs differently. The purposes of the law were: 1) providing for flexible housing stock and contributing to the economy; 2) investment for homeowners; 3) increasing tax revenue; and, 4) balancing the needs of long-term and short-term residents. Metro. Ord. BL2016-951. On its face, a cap directly undercuts the first three goals; having more STRPs would provide more housing stock, contribute more to the economy, and provide more investment opportunity and tax revenue. The only goal even debatably

advanced by any kind of a cap on STRPs is the fourth one, balancing long-term and short-term residents.

There was no rational reason, however, to believe that treating non-owner STRPs differently by limiting their number would better balance those interests. To prove otherwise, there would have to be some rational reason to believe that STRPs affect neighborhoods differently than when the owner lives there. Metro claims "rentals create a different neighborhood feel." Def.'s Resp. to Pl.'s Interrog. No. 19 Ex. C.2. But that would be equally true with both types of STRPs. Nothing about this provides a reason to hone in on non-owner occupied STRPs. Def.'s Resp. to Pl.'s Interrog. No. 16 Ex. C.2. More generally, Metro gathered no objective, scientific evidence. Def.'s Resp. to Pl.'s Req. for Produc. No. 5 Ex. C.2. Few, really no, problems related to STRPs were reported before Metro took action. According to the zoning administrator, "the long and short of it is that, historically, we've had very few complaints." Ex. E.1, 5:19.[23] Metro relied purely on anecdotal and uncorroborated evidence on the problems regarding STRPs in debating the bill, and even those do not provide a reason to treat non-owner occupied STRPs differently. Def.'s Resp. to Pl.'s Interrog. No. 16 Ex. C.2.

[23] He remembered two calls asking how to get permits and one complaint about a sign. *Id.* at 4:28-5-18.

b. There is no rational reason to cap rentals of thirty days (30) while allowing an unlimited number of rentals of thirty-one (31) days.

Treating rental of a property for less than thirty days (30) differently from property rented for thirty-one (31) days was known to be nonsense at the time. A rental of thirty-one (31) days should, practically by definition, pose an equal or greater problem than a thirty-day (30) rental. Yet long-term rentals are entirely unregulated, permitted in any residential neighborhood without a cap, non-owner and owner occupied alike. Def.'s Resp. to Pl.'s Req. for Admis. Nos. 4-5, 7, Ex. C.1. Councilmember Allen repeatedly recognized that long-term rentals are not any different, possibly even worse than STRPs, because of the absence of the self-regulating online rating systems of services like Airbnb, and because short-term rentals are more frequently cleaned and maintained. Ex. C.2.D, at 096, 109. She was neighbors with both a long-term and short-term renter and, perhaps unsurprisingly, found the *longer* term renter to be a *worse* problem. *Id.* at 109. Someone with a non-owner occupied STRP must regularly clean and upgrade their property or face the immediate consequence of the ratings system. No matter how bad a short-term renter may be, they are gone within a matter of days. When it came to taxation and licensure, Councilmember Allen urged Metro to "use the same standard" as with long-term renters, *id.* at p. 031, but that did not happen. This arbitrary distinction invalidates the law.

The differential treatment makes all the difference in the world. A person renting for thirty (30) days is subjected to the onerous rates of taxation imposed on hotels. They must obtain a special license. They may be totally prohibited if the cap has been hit. Yet a rental of one more day relieves a person of all of these obligations. This savors of irrationality.

c. Current evidence shows that the fear that non-owner would overtake neighborhoods occupied STRPs to be baseless.

To the extent Metro's fear of non-owner occupied STRPs taking over neighborhoods might have been understandable at the time, the evidence now shows those fears to be baseless. This Court can look to see if fears that might have been warranted at the time are no longer evidence-based. *See United States v. Carolene Products Co.,* 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *see also Nashville C. & St. L. Ry. v. Walters,* 294 U.S. 405 (1935) (explaining that a statute that was once valid may become invalid by changed conditions). Non-owner occupied STRPs show no signs of overtaking the city. Ex. D.1; Ex. G.3. Most census tracts have not hit the cap. The updated information provides a reason to invalidate the cap.

The only places where the cap has been hit are in areas like where the Andersons live, and those are neighborhoods that are mixed into a diverse

urban setting. Def.'s Resp. to Pl.'s Req. for Admis. No. 6 Ex. C.1. Even if Metro's fear used to be rational, it is no longer.

3. *The way Metro caps STRPs is not rationally related to its goals.*

a. Allowing unlimited numbers is an irrational means.

The way Metro has chosen to balance the interests of long and short-term residents in capping only non-owner occupied STRPs is equally irrational as its classifications. Most obvious is Metro's decision to permit unlimited numbers of owner-occupied STRPs. Def.'s Resp. to Pl.'s Req. for Admis. No. 6, Ex. C.1. If the number of STRPs was a problem, then they all should have been capped. That addresses the actual perceived fear of residential homeowners. There is no rational reason to limit only non-owner occupied STRPs.

b. Making the cap apply by census tract is irrational.

Making the cap apply by census tract is also an irrational way to advance the goal of achieving balance for the simple reason that all neighborhoods are different. The residential character of some neighborhoods is very different from that of other neighborhoods. What constitutes an unacceptable burden on long-term residents varies significantly by neighborhood. Nowhere is this better illustrated than in Germantown where the Andersons live.

It is the quintessential mixed neighborhood. One need only examine the map to see this is so. Ex. G.2. The neighborhood still has areas that are blighted, Ex. G.2, at 1-5, with buildings so long ago abandoned as to return to an advanced state of nature. *Id.* at 7-8. It also has upscale, new construction homes, *id.* at 10, and trendy urban condominiums. *Id.* at 11-13. Sometimes this contrast sits literally side-by-side. The boarded up home on G.2, p. 9 has the new construction home depicted on p. 10 sitting on the next lot, clearly visible on the upper right hand corner of p. 9. The image at p. 14 shows trendy urban lofts that were fashioned from an old factory, half of which *remains* in ruin. The Germantown area also has fancy commercial shops like hair salons and fish markets, *id.* at 15-17, but also payday lenders and fast food restaurants. *Id.* at 18. It has lower income housing too, including Cheatham Place, public assistance housing, *id.* at p. 21, and the Nashville Rescue Mission. *Id.* at pp. 22-24. It has factories, *id.* at 26, major construction projects, *id.* at 25, and office parking. *Id.* at 19. The Farmer's Market and the baseball stadium are nearby, and the Nashville skyline towers over it all. *Id.* at 27-29. Germantown residents decidedly did not seek a traditional neighborhood when they moved there, forcing the question: why should that concern override the wishes of a homeowner who wants to enjoy the economic benefits of being an STRP host?

Indeed, this is the sort of neighborhood that could use re-investment. The Andersons' home is in an overlay purposed to "promote reinvestment"

into older neighborhoods. Metro. Code § 17.36.430. It would have been unthinkable as recently as five (5) years ago that tourists would flock to stay, shop, and spend money in the Germantown neighborhood. No one would call that a problem. Tourists now come in droves, primarily because of the lure of Airbnb. And when they do, they spread their wealth around in neighborhoods that typically would never see it. With so much direct benefit to a neighborhood that can sorely use it, it is irrational to expect a makeup consisting of exactly three percent (3%) non-owner occupied STRPs to unbalance this neighborhood the way it would in more traditional residential neighborhoods. It is more accurate to call a policy that directly operates to deny economic opportunity to the residents of aspiring neighborhood foolhardy, even cruel. This is especially true since "residential character" is not the concern in Germantown that it would be elsewhere.

It simply cannot be maintained that short-term renters are fatally disrupting the residential character of Germantown. What harms are tourists causing that the abandoned buildings or the payday lenders are not? Treating all neighborhoods alike, regardless of existing residential character, is an irrational way to maintain the feel of neighborhoods. And "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Janess v. Fortson*, 403 U.S. 431, 442 (1971).

Furthermore, divvying up the city by census tract results in absurd situations. Some census tracts are tiny, like tract 19500 with only seventeen

(17) overall units. Ex. D.1, p. 6. This was a matter of great concern to an STRP host who found out that the *one* permit available in his downtown neighborhood has been snapped up. Ex. C.2.D, at 122. Councilmember Allen appears to have considered this only when it was too late. She only saw the census map and how this limitation would lead to irrational situations *after* she was informed that "[t]here may be a brawl" over scarce permits in a tiny census tract. *Id.* at 107. The existence of only one permit based on the happenstance of census tract, something no one considered when purchasing a home, is the embodiment of an irrational method.

c. The selection of three percent (3%) for the cap was irrational.

The number, "3%," was entirely arbitrary. Metro took the number from another city, Austin, which had a cap of two percent (2%). Def.'s Resp. to Pl.'s Interrog. No. 16, Ex. C.2. Metro looked at present density per census tract of STRPs, decided they wanted "some room to grow," and selected the number. *Id.*

Why three percent (3%) was the right number is a mystery. How much room is too much? Four percent (4%) allows room to grow. Metro could not say why four percent (4%) would not meet its stated goals. Def.'s Resp. to Pl.'s Interrog. No. 17 Ex. C.2. This is tantamount to just picking a number at random. Metro never thought much about why Austin picked two percent (2%); it just "seemed to be working reasonably well." Def.'s Resp. to Pl.'s Interrog. No. 16 Ex. C2. Arbitrarily adding one percent, and only one percent,

appears to have gotten even less thought. Why not two percent more than Austin? Why not one percent less? The selection of three percent (3%) is the embodiment of arbitrary decision-making. If the number of STRPs was a problem, then the number of overall STRPs should have been capped. Allowing them to exist in unlimited number, while allowing only three percent (3%) of non-owner occupied STRPs is an arbitrary and unnatural categorization.

d. **The cap is illegitimate protectionism.**

With no rational reason to conclude that capping only non-owner occupied STRPs at three percent (3%) per census tract advances the goal of balancing the needs of long- and short-term residents, the actual reason comes into focus: protectionism. As shown above, the law originated at the behest of businesses that were threatened by short-term rentals and they played a pivotal role in pushing the law. The other aspects of the law, safety standards and licensure, were never their concern. Hampering their competition was. As held in *Craigmiles,* "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." 312 F.3d at 224. The harm of the law further shows its irrationality.

Millions have been spent to address the lack of beds to house tourists downtown. STRPs provide a tax-free solution. It is irrational to perpetuate such a costly problem.

The law fails Tennessee equal protection under *Consumer Gasoline* and federal equal protection under *Craigmiles*.

IV.
Conclusion

This Court should grant the plaintiffs' motion for summary judgment.

Dated: September 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

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On this date, September 14, 2016.

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