IN THE 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 D. Jones

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND BRIAN PERKINS IN SUPPORT OF PLAINTIFFS

INTRODUCTION AND SUMMARY OF ARGUMENT

The recent prevalence of renting one's home on a short-term basis to tourists via the internet has resulted in many cities rushing to implement regulatory controls. Defendant, the Metropolitan Government of Nashville and Davidson County (Metro), did not have ordinances regulating short-term residential rentals until 2015, when Metro enacted Metro Code § 6.28.030 (Ordinance). Along with provisions aimed at health and safety concerns—provisions not at issue in this case—Metro restricted permits for non-owner-occupied properties to three percent of properties within a census tract and prohibited any on-property advertising of short-term rentals.

Rachel and P.J. Anderson typically rent out their entire home via airbnb.com (Airbnb), while the family travels for P.J.'s musical performances. Complaint at 8. Seeking to alert guests that they found the correct home, and to promote their home and neighborhood during the popular

Germantown Oktoberfest, Rachel thought of placing a small temporary sticker inside the window near the home's front door and a small sign in the home's front yard. Complaint at 16-17. But when she was informed that no signs are allowed, she did not place them. *Id.* After Rachel was offered a promotion that would require the family to temporarily relocate to Chicago, they attempted to convert their owner-occupied, short-term rental permit into a non-owner-occupied permit to provide the financial means to keep the home. *Id.* However, the Andersons were informed that the three percent cap on permits for their home's census tract was already exceeded. Complaint at 17.

The Andersons argue that the cap on non-owner-occupied, short-term rentals violates their right to Equal Protection. If this Court applies rational basis review rather than heightened scrutiny, it should not treat that standard as merely a rubber-stamp for government regulation. Rational basis review is a real, meaningful standard of review that requires this Court to seriously examine Metro's Ordinance. *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998). Even under this deferential standard of review, the cap is unconstitutional under the Equal Protection Clause because it is unnecessary, arbitrary, and is not rationally related to any substantial difference between property owners. *Tenn. v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994). The Ordinance treats the Andersons differently from their neighbors without any relation to the actual impacts caused—or not caused—by offering their home via Airbnb. And any concerns about short-term rentals are overblown or already addressed through existing laws and private enforcement.

The Andersons further contend that the ban on short-term rental signs constitutes an unconstitutional restriction on speech. Content-based speech restrictions are subject to strict scrutiny—even if the speech is considered "commercial." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). This makes sense, given the importance of commercial speech to everyday life,

Va. State Bd. of Pharm. v. Va. Citizens' Consumer Council, Inc., 425 U.S. 748, 763 (1976), and recent Supreme Court precedent commands such an exacting level of scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). Metro's selective ban on advertising cannot survive. The Andersons' proposed sticker and sign offer truthful, non-misleading information that is entitled to full First Amendment protection. Accordingly, this Court should hold Metro's three percent cap and the ban on advertising to be unconstitutional.

ARGUMENT

I

THE THREE PERCENT CAP CANNOT WITHSTAND SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Although the Andersons argue that the three percent cap should be subject to strict scrutiny, Complaint at 22, this Court should invalidate the Ordinance as unconstitutional under any level of review, including rational basis review. In this case, applying rational basis review as interpreted by federal or Tennessee courts, the result is the same: The Ordinance is not rationally related to a legitimate government purpose because the three percent cap is arbitrary and is not based on any substantial difference between classes of property owners. Therefore, this Court should hold Metro's three percent cap on non-owner-occupied, short-term rentals to violate the Fourteenth Amendment.

A. Rational Basis Review Demands Meaningful Examination

Rather than a set of magic words that practically guarantee the government's success when defending legislation against constitutional challenge, "rational basis review" is a real, if deferential, measure of review. Rational basis review requires a statute be rationally related to a legitimate

government interest. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). While deferential to the government, rational basis review is not a rubber-stamp. *Peoples Rights Org.*, 152 F.3d at 532 (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) ("Rational basis review . . . is not 'toothless.'")). Courts should not apply rational basis review in a manner that is "tantamount to no review at all." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in result).

In fact, many plaintiffs have won cases under rational basis review. Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43, 44 n.8 (2014) (citing cases). When properly applied, rational basis review does not require plaintiffs to disprove every conceivable basis for a challenged law regardless of the evidence presented in the case. *Id.* at 48. Instead, courts must rely on facts introduced into evidence, rather than imagine hypothetical justifications when considering whether a challenged statute passes muster. *Id.* (citing, *e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985); *Romer*, 517 U.S. at 632-35; *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973)); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

In a local example, in *Craigmiles v. Giles*, the Sixth Circuit did not take Tennessee's explanations for its Funeral Directors and Embalmers Act, Tenn. Code Ann. § 62-5-201, at face value when the Act was challenged under the Fourteenth Amendment. *Craigmiles v. Giles*, 312 F.3d 220, 225-29 (6th Cir. 2002). Instead, the court examined each of Tennessee's explanations as

to why casket retailers were required to obtain licenses as funeral directors, and based on the evidence in the case found they all lacked a rational relationship with promoting public health and safety and consumer protection. *Id.* at 228-29. Consequently, the statutory scheme failed rational basis review. *Id.* at 229.

Tennessee state courts have generally interpreted rational basis review to require that a law have a "reasonable basis." *Tenn. Small School Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). In determining what is "reasonable," there is no bright-line rule. *Tester*, 879 S.W.2d at 829. Rather, reasonableness varies based on the facts of each individual case. *Id.* As a result, Tennessee courts do not take asserted justifications for legislation at face value, but examine the proffered rationale for a rational relation to the actual results and implications of the legislation at issue. *Doe v. Norris*, 751 S.W.2d 834, 840 (Tenn. 1988). Therefore, whether in Tennessee state court or in federal court, rational basis review provides a real, meaningful standard of review of legislation challenged under the Fourteenth Amendment.

B. Metro's Three Percent Cap Is Unnecessary and Unconstitutional

For a law challenged under the Equal Protection Clause to survive rational basis review, differential treatment of similarly situated people must be rationally related to a legitimate government interest. *Cleburne*, 473 U.S. at 439; *Tester*, 879 S.W.2d at 829. To be rationally related, differential treatment cannot be arbitrary, *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008), and "[t]here must be reasonable *and substantial* differences in the situation and circumstances of the persons placed in different classes." *Tester*, 879 S.W.2d at 829 (emphasis added); *see also, Int'l Ass'n of Firefighters Local 3858 v. City of Germantown*, 98 F. Supp. 2d 939, 947-49 (W.D. Tenn. 2000).

> If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included . . . . The fundamental rule is that all classification must be based upon *substantial distinctions* which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law. . . .

Tester, 879 S.W.2d at 829 (emphasis added).

Here, Metro's Ordinance makes two distinctions between property owners. First, the Ordinance allows for an unlimited number of permits for owner-occupied, short-term rental properties, while limiting the number of permits for non-owner-occupied properties. Metro Code § 6.28.030(Q). Second, the Ordinance discriminates among owners of non-owner-occupied properties, because only a fraction may obtain a permit for short-term rentals, and those who do obtain a permit can renew it in perpetuity. Neither of these distinctions are based on substantial differences between the property owners and, thus, cannot survive rational basis review.

Regardless of whether the Andersons operate under an owner-occupied or non-owner-occupied permit, guests' use of their property—and the potential impact on the community—is the same.[1] Consequently, non-owner-occupied use is identical to owner-occupied use, and the statutory difference between the two cannot survive rational basis review. *Tester*, 879 S.W.2d at 829. Even though the Andersons currently rent their home under an owner-occupied permit, the Andersons do

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[1] Common Airbnb users include: people who have recently moved to a new city and want to try out different neighborhoods before settling on where to live long-term; family members visiting other family members who prefer to stay near their family, but not in a hotel; new grandparents visiting and helping in the first few weeks following a birth; and people on extended stays who prefer the comfort and privacy of a home instead of a hotel. Billie Cohen, *5 Surprising Ways People Are Using Airbnb*, Conde Nast Traveler (Apr. 14, 2014), http://www.cntraveler.com/stories/2014-04-14/5-surprising-ways-people-are-using-airbnb. Owner-occupied and non-owner-occupied properties are equally appropriate for these uses.

not actually occupy the home at the time of rental, nor are they required to. Complaint at 8; Metro Code § 6.28.030(B). Instead, the Andersons rent their home when they are traveling—sometimes for extended periods. Complaint at 8. The Andersons' current owner-occupied rental use of their home is similar to how it would be used under a non-owner-occupied permit when the home is vacant while they are temporarily living in Chicago.

Furthermore, the only difference between the Andersons and the non-owner-occupied property owners who have received a permit is that the latter acted quickly enough to obtain a permit and the Andersons did not.[2] Thus, there is no functional difference—much less a "substantial" difference—between non-owner-occupied property owners who have a permit and those who do not.

Metro suggests two rationales for the Ordinance: (1) "the needs of long-term residents should be balanced with the allowance of short-term rentals;" and (2) residential neighborhoods may be "overtaken" by rental properties. Metro Br. in Support of Mot. to Dismiss at 6. But neither the Ordinance's distinction between owner-occupied and non-owner-occupied properties, nor non-owner-occupied properties with and without a permit further these rationales. *See*, *Tester*, 879 S.W.2d at 829.

First, allowing an unlimited number of permits for owner-occupied properties, while capping the number of permits for non-owner-occupied properties that can be held in perpetuity, does not advance Metro's interests in balancing residents' needs with short-term rentals or in preventing neighborhoods from being "overtaken" by rental properties. The Ordinance's criteria for an "owner-occupied" property is broad. *See* Metro Code § 6.28.030(B). As a result, owner-occupied properties

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[2] Nevertheless, the Andersons only needed a non-owner-occupied permit when their living situation changed, necessitating a switch from their owner-occupied permit.

whose owner is frequently out-of-town, or is willing to accept renters and relocate to other accommodations when requested, can effectively operate as a short-term rental with regularity comparable to non-owner-occupied properties. Owner-occupied properties with detached or separate living quarters can even function as a short-term rental every day under the Ordinance—just like permitted non-owner-occupied properties.[3] In addition, Metro does not cap the amount of long-term rental properties per census tract, thus, Metro law allows neighborhoods to be "overtaken" by rental properties so long as the rental period exceeds thirty days. *See* Metro Code § 6.28.030(A). In short, the Ordinance's distinction between owner-occupied and non-owner-occupied properties is not based on reasonable and substantial differences in the impact of short-term rentals to the community, is undercut by other rental practices allowed by Metro, and is, therefore, irrational. *See*, *Tester*, 879 S.W.2d at 829.

Second, capping the amount of non-owner-occupied permits at three percent of properties in a census tract is arbitrary, and is not rationally related to Metro's interest in balancing interests or protecting neighborhoods. Metro provides no explanation for how or why the three percent figure was established. But even if it did, unless the three percent cap is "based upon substantial distinctions which make one class really different from another," then the distinction is arbitrary and invalid. *Tester*, 879 S.W.2d at 829 (quoting *Tenn. v. Nashville, Chattanooga & St. Louis Railway Co.*, 135 S.W. 773, 775-76 (1910)). Indeed, Metro's own actions underscore the lack of a substantial distinction between properties with a permit and those without a permit. In this case, Metro issued permits in the Andersons' census tract in excess of the three percent cap, Complaint at 17, and bed-

[3] A perusal of Airbnb listings for the Nashville area on June 29, 2016, shows numerous listings for guest homes and detached garage apartments with substantial date availability.

and-breakfasts, boarding houses, hotels, and motels are exempt from permit caps. Metro Code § 6.28.030(A). If Metro's three percent cap was really based on a substantial distinction between permitted and unpermitted properties, then it would not allow its cap to be exceeded or allow the multitude of exemptions. As a result, the three percent cap is arbitrary and irrational.

C. Any Other Concerns Over Short-term Rentals Are Overblown

A common justification for limiting the number of short-term rentals stems from the perceived impact such activity has on residential neighborhoods. Metro Ordinance BL2014-909, BL2014-951 ("The needs of long-term residents should be balanced with the allowance of short-term rentals."). With two declarations, Metro cites the replacement of long-term residents with several short-term rental properties resulting in fewer friends for children in the neighborhood, and an increase in transients and noise from bachelorette parties, as evidence of negative neighborhood impacts. Metro Opp. to Pet. for Temp. Inj. at 4-7. Metro has no legitimate interest in ensuring children's play dates, and rowdy or noisy behavior is already regulated by local noise ordinances. Metro Code § 11.12.060-070. Moreover, neighbors can report problematic, short-term rental properties directly to Airbnb, which could result in the host losing the privilege of listing their property on the site. Sarah Kessler, *Airbnb's New Tool Allows You to Report Those Rowdy Neighbors*, Fast Company (May 31, 2016).[4]

Concerns over safety and transients are similarly misplaced. Airbnb guests are hardly anonymous. The reservation is paid for with a credit card, and guests must create a user profile which includes multiple options for their identity to be verified by the host. Airbnb, *What are*

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[4] http://www.fastcompany.com/3060334/most-innovative-companies/airbnb-built-a-tool-for-people-who-dont-use-airbnb.

Profile Verifications and How Do I Get Them?[5] As a result, guests are identified, and trouble-makers are charged for property damage and prohibited from renting through Airbnb in the future. Furthermore, Airbnb, guests, and property owners share incentives to prevent their guests from creating problems and antagonizing neighbors.

In sum, even under rational basis review, Metro's three percent cap violates the Equal Protection Clause because it discriminates between property owners without valid justification or sufficient connection to the stated problems targeted by the Ordinance. Indeed, the problems that do exist are either overblown or already addressed by existing measures.

II

THE SIGN BAN IS A CONTENT-BASED SPEECH RESTRICTION THAT IS SUBJECT TO STRICT SCRUTINY

Content-based restrictions on speech—commercial or otherwise—are subject to strict scrutiny. *See Reed*, 135 S. Ct. at 2228 (a court must determine "whether a law is content neutral on its face *before* turning to the law's justification or purpose") (citing *Sorrell*, 564 U.S. at 563-66) (emphasis added); *Thomas v. Schroer*, 127 F. Supp. 3d. 864, 871-73 (W.D. Tenn. 2015). Regulations of speech are content-based when they apply to speech because of "the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227 (citing *Sorrell*, 564 U.S. at 563-67). "Heightened scrutiny" is required whenever the government regulates speech because of its message.

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[5] https://www.airbnb.com/help/article/336/what-are-profile-verifications-and-how-do-i-get-them.

Sorrell, 564 U.S. at 566 (citation omitted). And "commercial speech is no exception" to this rule.[6] *Id.*

Metro's Ordinance bans "signs, advertising, or any other display" that references a property's use as a short-term rental. Metro Code § 6.28.030(E). That the speech implicates the Andersons' economic interests does not automatically mean that lesser scrutiny applies. Recent First Amendment cases affirm that content-based speech restrictions on *any* type of speech receive heightened scrutiny. *Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring) ("[T]he Court has applied the heightened 'strict scrutiny' standard even in cases where the less stringent 'commercial speech' standard was appropriate.").

In *Sorrell*, the Supreme Court clarified that where the government is protecting the public from fraudulent and misleading commercial speech, less than strict scrutiny may apply. *Sorrell*, 564 U.S. at 579. But when the government is not acting to prevent fraud or deception, the need for less than strict scrutiny disappears. *Id.* Therefore, *Sorrell*—and *Reed* by way of approval—is best understood as the rule governing content-based speech restrictions.

Metro's Ordinance is content-based because it singles out signs based solely on their reference to short-term rentals. *Reed*, 135 S. Ct. at 2227; *Sorrell*, 564 U.S. at 566. For example, signs advertising or referencing short-term rentals are banned while other residential "for rent" or

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[6] This should come as no surprise, as commercial speech is valuable. Because people spend such a substantial amount of their time engaging in commercial activity for employment, investment, and consumption, speech in this area of life carries great value. Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & Econ. 1, 6 (1964). Indeed, "in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 652 (1990); *see also Va. State Bd. of Pharm.*, 425 U.S. at 763.

"for sale" signs are allowed, Metro Code § 17.32.060(C)(2)(a), as are signs advertising yard sales, Metro Code § 17.32.040(R), and contractors performing work on a home. Metro Code § 17.32.040(S).

Because Metro's Ordinance is content-based, it must survive strict scrutiny. Metro does not claim any interest in prohibiting short-term rental advertisements out of a need to prevent fraud or deception. In fact, there is no dispute that the Andersons' two temporary signs are truthful and non-misleading. Rather, Metro defends its Ordinance on neighborhood aesthetics and traffic safety grounds. Metro Memo. ISO Mot. to Dismiss at 8-9. Therefore, Metro's Ordinance is covered by the general rule of strict scrutiny—which it fails.

CONCLUSION

This Court should hold that Metro's three percent cap on non-owner-occupied, short-term rental permits violates the Equal Protection Clause of the Fourteenth Amendment, and the sign ban violates the First Amendment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made this 6th day of July, 2016, by United States Postal Service and E-Mail:

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