IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

RACHEL AND P.J. ANDERSON, Appellees/Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Appellant/Defendant.	)	Court of Appeals No. M2017-00190-COA-R3-CV Appeal from the Davidson County Circuit Court, Nashville, TN, Case No. 15C3212

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

At the heart of this case is regulation that prohibits Appellees/Plaintiffs Rachel and P.J. Anderson (Andersons) from making reasonable and ordinary use of their property to support their family and lifestyle. After marrying in 2013, the Andersons moved to Nashville to develop P.J.'s burgeoning career in music. Appellee/Plaintiffs' Br. at xi. Rachel is a successful graphic designer who is able to work remotely, allowing the family to travel with P.J. when he is on tour with his music group. *Id.* at xi-xii. But travel is costly, especially with three young children. To offset their travel costs, the Andersons began renting out their home on a short-term basis while they were out of town. *Id.* at xii. Because their home is in the desirable Germantown neighborhood of Nashville, they had no trouble earning extra money through sites like airbnb.com, and did so while receiving high ratings as hosts and without generating complaints by their neighbors. *Id.* at xi-xii.

The new ordinance enacted by Appellant/Defendant Metropolitan Government of Nashville and Davidson County (Metro) would bring that all to an end, however. Due to their growing family, and a career opportunity in Chicago, the Andersons have considered moving. *Id.* But the Andersons wanted to keep their Germantown home, and both continue using it when in Nashville and renting it out to others on a short-term basis. *Id.* at xv-xvi. Pursuant to Metro's short-term rental ordinance, however, that required the Andersons to convert their short-term owner-occupied rental permit to a non-owner-occupied permit. When they applied for that permit, they were informed that their neighbors had already snatched up all of the permits allowed for their census tract. *Id.* at xvi. The Andersons were therefore put to the difficult choice of either renting out their Germantown home long-term (thus subjecting the property to increased wear and tear and losing the flexibility to stay in the home during visits) or selling the home. *Id.* Because they did not want to give up their home, they filed this lawsuit to vindicate their right to reasonably use their property. *Id.*

On appeal, the Andersons argue that Metro's ordinance creates an unconstitutional monopoly in violation of the Tennessee Constitution's Anti-Monopoly Clause. Appellee/Plaintiffs' Br. at 1-32. Tennessee courts judge such claims using the legitimate relation test, which some courts have equated to the rational basis test applied to economic regulation under the federal Constitution. *See, e.g., Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991).

Case law shows that when courts apply rational basis review, it is applied in a manner that provides meaningful review of legislation. Contrary to dicta sometimes used to describe the rational basis test as minimizing a court's role in reviewing economic legislation, *see* Appellee/Plaintiffs' Br. at 18-19, the test is not a mere rubber-stamp on legislation. Therefore, if the Court uses rational basis review while conducting the legitimate relation test, it should look to the application, not the sometimes over-deferential description, of that standard of review employed by other courts.

ARGUMENT

RATIONAL BASIS REVIEW REQUIRES MEANINGFUL JUDICIAL REVIEW OF LEGISLATION

If the Court holds that Metro's three-percent cap on non-owner-occupied short-term rental properties constitutes a monopoly, then the cap fails review under the legitimate relation test. This Court has previously described the legitimate relation test as similar to the federal rational basis test. *See, e.g., Dial-A-Page*, 823 S.W.2d at 206. While some federal courts have described the deference accorded to legislation under the rational basis test with sweeping language, *see* Appellee/Plaintiffs' Br. at 18-19, when courts actually conduct rational basis review they do so in a manner that subjects legislation to a meaningful degree of review to ensure a proper means/ends fit between the chosen legislative remedy and the alleged problem at hand.

Rational basis review is not a set of "magic words" that practically guarantee the government's success against constitutional challenges to regulations. *See Cruz v. Town of Cicero, Ill.*, 275 F.3d 579, 587 (7th Cir. 2001). In a constitutional challenge to a regulation, "the existence of facts supporting the legislative judgment is to be presumed . . . unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (emphasis added). This seminal description of the rational basis test describes a test that is deferential, but not insurmountable: it establishes, in effect, a rebuttable presumption in favor of legislation that may be overturned by evidence showing that the purpose of the regulation is illegitimate or its justification is irrational. *See, e.g., Borden's Farm Prods. v. Baldwin*, 293 U.S. 194, 209 (1934) (Rational basis is "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."). The rational basis test provides a real measure of review, requiring legislation to be sufficiently related to a legitimate government interest to be rational. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

Plaintiffs challenging regulations bear the burden of showing the law's irrationality, but rational basis review is not a rubber-stamp of government decisionmaking. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (Rational basis review is not "toothless."); *see also People Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998); *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). And courts should not apply rational basis review in a manner that is "tantamount to no review at all." *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in result); *see also, Brown v. North Carolina DMV*, 166 F.3d 698, 706 (4th Cir. 1999) ("[E]ven rational basis review places limitations on states.").

The fact that many plaintiffs have won cases under rational basis review is evidence that the presumption of constitutionality embodied by the test can be (and often is) rebutted. 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) (collecting cases); *see also generally* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 Ind. L. Rev. 357 (1999) (surveying rational basis cases in the Supreme Court from 1971 to 1996). 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. Sandefur, *supra*, at 48. Instead, courts must rely on facts introduced into evidence, and not imagine hypothetical justifications for 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; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973)).

A. The United States Supreme Court's Application of Rational Basis Review

The U.S. Supreme Court has struck down numerous laws under rational basis review where they lack a sufficient connection to the government's stated legislative goals. For example, in *Zobel v. Williams*, 457 U.S. 55, 56 (1982), the Supreme Court struck down an Alaska statute that established a program that shared oil revenue with state residents, where the payment amounts were determined by length of residence in the state. The Court held that neither of the two rationales offered by the state passed muster under the rational basis test. *Id.* at 61-63.

First, the Supreme Court held that distinguishing between residents based on length of residency was not rationally related to creating financial incentives to reside in Alaska. *Id.* at 61. While the Court acknowledged that payments based on years of residency may incentivize some people to remain in Alaska in the future, such a connection was irrational because the statute also

provided payments for the 21 years of residency prior to the statute's enactment. *Id.* at 62. Thus, even though there was some minimal connection between the law and the government's stated objectives, that was not enough to establish a means-end fit under rational basis review because the law's primary function lacked a rational connection.

Second, the Supreme Court rejected as irrational any connection between the government's stated purpose to encourage prudent management of the oil revenue fund and granting payments for 21 years of residency that predated the statute's enactment. *Id.* at 62-63. Therefore, *Zobel* shows that under rational basis review, the Supreme Court demands a logical connection between legitimate ends and the government's means of pursuing those ends.

In *Quinn v. Millsap*, 491 U.S. 95, 109 (1989), the Supreme Court addressed a provision of the Missouri Constitution granting membership on a local government board only to those who owned real property. The provision failed rational basis review because there was no logical connection between the justifications for the provision advanced by the government ("first-hand knowledge" of civic life and a "tangible interest" in the area) and the land-ownership requirement. *Id.* at 107-09. Indeed, even assuming a rational connection between owning real property and having "first-hand knowledge" or a "tangible interest," the logical connection between them was lacking because it was irrational for the state to deny that connection is also present with renters and others who live in the area. *See id.* at 108.

Similarly, in *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970), the Supreme Court held irrational, and therefore unconstitutional, a Georgia municipality's law that made real-property ownership a prerequisite for eligibility to serve on the school board. The Court determined that it could not "be seriously urged" there was a rational connection between real-property ownership and a school board member's capacity to make wise decisions—the government's proffered

justification for the law. *Id.* And a few years later, in a *per curiam*, one-sentence decision, the Court cited *Turner* to invalidate a similar land-ownership requirement in Louisiana. *See Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Continuing the theme, in *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 344-45 (1989), the Supreme Court held that a West Virginia county tax assessor's practices could not survive rational basis review. Because the assessor's practices created disparities between the assessments of similar properties by 8 to 35 times over, the Court deemed those practices—and resulting assessments—not rationally related to the county's objective of assessing all real property at its true value. *Id.* at 343-45.

In *City of Cleburne*, 473 U.S. at 447-50, the Supreme Court invalidated an ordinance that required a special use permit for a group home for the mentally disabled when it did not require the same permit for other group homes. The permit scheme was ruled unconstitutional because the special permit requirement bore no logical connection to the only justifications advanced by the city (concerns that junior high school students across the street may harass the residents; that the home was in a 500-year flood plain; and that the home was large). *Id.* at 449-50.

In *Williams v. Vermont*, 472 U.S. 14, 15 (1985), the Supreme Court reviewed a statute that gave favorable tax treatment to Vermont residents who registered vehicles purchased in other states in Vermont, while denying the same tax benefit to non-residents. The Court held that Vermont's tax scheme was irrational because the purpose of the tax—paying for maintenance and improvement of state roads—was not logically served by arbitrarily granting a credit to one group of road users, and denying the credit to another group. *Id.* at 23-26. Thus, while there was some basis to grant the credit to a single group, the overall scheme failed rational basis review because it was under-inclusive.

In *Moreno*, 413 U.S. at 529, 532-33, the Supreme Court held it was irrational for Congress to exclude households with unrelated people living together from eligibility in the federal food stamp program. According to the Court, because the Food Stamp Act was intended to "safeguard the health" of the poor, and the Act included measures to prevent fraud, Congress was "wholly without . . . rational basis" to distinguish between households solely based on whether all members were related. *Id.* at 533-38. Congress was "wholly" irrational because while its purpose was to seek to prevent waste of taxpayer dollars, it was irrational to only exclude particular households from the food stamp program in order to pursue that result.

In *Mayer v. City of Chicago*, 404 U.S. 189, 190-91 (1971), a misdemeanor defendant sought a transcript of his trial for an appeal, but an Illinois Supreme Court rule reserved that right to felony defendants only. The U.S. Supreme Court held that the rule's distinction between felony and non-felony offenses violated rational basis review, because the state could provide no logical reason for the distinction. *Id.* at 195-96. In other words, even if the distinction had a relationship to the purpose of saving the government money, the rule failed rational basis review due to the arbitrary distinction between felonies and misdemeanors in that instance.

And in *Schware v. Bd. of Bar Examiners of State of N.M.*, 353 U.S. 232, 234, 238 (1957), a law school graduate challenged the government's refusal to allow him to sit for the bar exam as a violation of his Fourteenth Amendment substantive due process right to pursue a profession. The Supreme Court held that the denial failed to satisfy rational basis review. *Id.* at 246-47. After reviewing all of the evidence offered by the plaintiff in the case, the Court determined that none of the justifications provided by the government sufficiently supported the government's conclusion that the plaintiff was morally unfit to be a member of the bar. *Id.* at 240-47.

What the above (and other) Supreme Court cases show is that the Court's application of the rational basis test, while deferential to government action, is a meaningful standard of review under which plaintiffs prevail when they adduce facts to rebut a presumption of constitutionality.[1] Thus, if a law has an insufficient logical fit between its means and ends, it fails rational basis scrutiny.

B. Rational Basis Review in the Federal Circuit Courts of Appeals

Federal Courts of Appeals have also invalidated economic legislation under rational basis review in recent times. In *Craigmiles v. Giles*, 312 F.3d 220, 222-23 (6th Cir. 2002), for instance, casket sellers challenged Tennessee's requirement that they be licensed as funeral directors. The Tennessee law had a mismatch between means and ends, because it mandated two years of training—without any guarantee of more than minimal training related to public health or safety—and successful completion of an exam which predominately tested on topics other than casket sales. *Id.* at 222-23. The court struck down the law, on the basis of evidence introduced by the plaintiffs, because it bore "no rational relationship to any of the articulated purposes of the state." *Id.* at 225-28.

Similarly, in *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217-18, 227 (5th Cir. 2013), Louisiana's requirement that intrastate casket sellers be licensed as funeral directors was held unconstitutional under rational basis review. Just like the court in *Craigmiles*, the Fifth Circuit

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[1] Since 1970, plaintiffs have won 21 cases at the Supreme Court under the rational basis test. In addition to those already discussed above, the cases are: *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614-14 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer*, 517 U.S. at 634-35; *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 623 (1985); *Metro Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972); and *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

painstakingly considered each of the government's rationales for the law, and analyzed each in relation to the evidence. *Id.* at 223-27. Because the facts belied the government's rationales, the court concluded that the licensing scheme was irrational. *See id.*

The Ninth Circuit provides yet another example. In *Merrifield v. Lockyer*, 547 F.3d 978, 990-92 (9th Cir. 2008), the court determined on the basis of the record that it was irrational to require a license for exterminators who refrained from using pesticides but trapped mice, rats, and pigeons (the three most common vertebrate pests). The government's stated purpose for the law was to ensure that exterminators most likely to be exposed to pesticides were properly trained. *Id.* Yet the court found the exterminators most likely to encounter pesticides were those who worked with the least common vertebrates. *Id.* at 990-91. Therefore, while there was a minimal connection between pesticide-related training imposed by the license requirement and the risk that exterminators of the most common vertebrates would encounter pesticides, the court nevertheless held that there was an insufficient logical relationship between the government's interests and the means it chose to advance them.

The Fourth Circuit has similarly struck down applications of land-use ordinances under the rational basis test. In *Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 310 (4th Cir. 1989), the court affirmed a reversal of a permit denial for a palm-reading business after the lower court found that City officials based their decision on "irrational neighborhood pressure." Based on the evidence presented by the plaintiffs, the court held that the City's actions amounted to "reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety." *Id.* at 311.

Thus, the above Courts of Appeals decisions faithfully engaged in rational basis scrutiny in line with the application of that test by the U.S. Supreme Court.

C. Rational Basis Review is Meaningful in Tennessee Courts

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. *Tennessee v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994). Instead, reasonableness varies based on the facts of each individual case. *Id.* Tennessee courts do not, therefore, take the government's asserted justifications for legislation at face value, but examine proffered rationales for a reasonable means/ends fit between the chosen regulatory methods and the consequences of the legislation. *Doe v. Norris*, 751 S.W.2d 834, 840 (Tenn. 1988); *Dial-A-Page, Inc. v. Bissell*, 823 S.W. 2d 202, 206 (Tenn. Ct. App. 1991) (for there to be a "reasonable basis" there must be "some foundation in fact" justifying the legislature's conclusion that regulation is needed) (citing *Chapdelaine v. Tenn. State Bd. of Examiners*, 541 S.W. 2d 786, 787 (Tenn. 1976)).

In *Checker Cab Co. v. City of Johnson City*, 216 S.W. 2d 335, 337 (Tenn. 1948), the Supreme Court held that Johnson City's taxi monopoly could not withstand rational basis review. Recognizing that it is the Court's duty to employ rational basis review to prevent the legislature from summarily announcing that a monopoly furthers some particular purpose, the Court "sought in vain" to find a rational means/ends fit between granting existing taxi certificate holders veto power over new competition, and advancing the health, safety, and well-being of the public. *Id.*

Similarly, in *Consolidated Waste Sys., LLC v. Metro. Gov. of Nashville and Davidson Cty.*, 2005 WL 1541860, at *33-36 (Tenn. Ct. App. 2005), this Court applied rational basis review to strike down a requirement that construction and demolition landfills be located two miles from any school or park. There, the Court accepted the government's rationales for the buffer as protecting schools and parks from dust, debris, and trash, but held that there was no rational means/ends fit between those rationales and the buffer requirement. *Id.* Because other, more noxious, landfills were

not subject to the buffer, and the government had no factual basis to support a two-mile requirement rather than some other distance, the buffer had no reasonable basis. *Id.* at *34-35.

In this case, the court below did not properly conduct rational basis review. Rather than engage in a meaningful analysis of the Andersons' evidence to determine whether Metro's three-percent cap was a reasonable method to address the alleged externalities of short-term rentals, the lower court conclusorily held that the cap was reasonable. TR. X, 1354. As demonstrated above, rational basis review simply requires more.

CONCLUSION

If this Court holds that Metro's three-percent cap is a monopoly, the Court should conduct rational basis review in a manner that is faithful to the test as applied by the U.S. Supreme Court and other courts noted above.

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Respectfully submitted,

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