No. M2019-01926-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE

AT NASHVILLE

ELIJAH "LIJ" SHAW and PATRICIA "PAT" RAYNOR,

Plaintiffs-Appellants,

v.

The METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant-Appellee.

Rule 3(a) Appeal as of Right from the Final Judgment of the Chancery Court for Davidson County, Tennessee, Twentieth Judicial District at Nashville, No. 17-1299-II

BRIEF OF APPELLANTS LIJ SHAW & PAT RAYNOR

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STATEMENT OF THE ISSUES

1. Was it error to disregard every fact tending to show the Client Prohibition's irrationality as applied to the Homeowners?
2. Was it error to grant summary judgment to Metro on the Homeowners' equal protection claim?
3. Was it error to grant summary judgment to Metro on the Homeowners' substantive due process claim?

STATEMENT OF THE CASE

I. Nature of the Case

This is an as-applied constitutional challenge to a regulation that prohibits owners of home-based businesses from serving clients in their home ("the Client Prohibition"). Defendant-Appellee, the Metropolitan Government of Nashville and Davidson County ("Metro"), maintains the Client Prohibition in its zoning code. R.643-44. The Client Prohibition is unevenly applied: Metro exempts thousands of home-based businesses from the Client Prohibition for the arbitrary reason that those businesses' clients stay overnight as short-term rental guests, and allows other favored home businesses to legally serve clients onsite as well. R.674-75; *see also* R.657-77.

The Client Prohibition injures the Plaintiffs-Appellants, Elijah "Lij" Shaw and Patricia "Pat" Raynor (the "Homeowners"). The Homeowners own and occupy residential homes within Metro's jurisdiction. They also want to work where they live. Since 2005, Lij has had a professional-quality recording studio in a detached accessory unit on his property. And in 2013, Pat, a licensed cosmetologist, secured a state

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license to operate a single-chair salon in her renovated garage. As the record shows and this brief will explain, it is undisputed that the Homeowners' businesses were harmless to their surrounding neighborhoods. But Metro enforced the Client Prohibition against both Homeowners. The Homeowners have struggled to earn a living as a result.

As mentioned above, Metro does not enforce the Client Prohibition against every residential home occupation. The zoning code contains four noteworthy exemptions.[1] First and foremost, Metro allows owner-occupied short-term rentals to serve up to twelve overnight clients per day. Any homeowner within Metro's jurisdiction can obtain such a permit; Metro has issued thousands of them. Second, Metro has spot-zoned at least thirteen residential homes into "specific plan" ("SP") districts to allow client-serving home occupations on an ad hoc basis. Third, Metro allows client service at residential homes that Metro deems historic. And fourth, Metro allows some residential homeowners to operate day cares with up to twelve clients per day. Even though these businesses all fit Metro's definition of a "home occupation," none of them is subject to the Client Prohibition.

II. Course of Proceedings

The Homeowners filed this lawsuit in the Chancery Court for Davidson County on December 5, 2017. R.1-27. The Homeowners'

[1] In addition, the court below observed that "admittedly, there are likely many home-based businesses operating in Nashville illegally in relation to the Client Prohibition." R.2310-11.

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complaint stated two as-applied claims for relief: a substantive due process claim under Tenn. Const. art. I, § 8; and an equal protection claim under Tenn. Const. art. I, § 8, and art. XI, § 8. R.22-25. The substantive due process claim asserts that the Client Prohibition does not serve the public health, safety, morals, or welfare as applied to the Homeowners' businesses. The equal protection claim asserts that there is no real and substantial difference between the Homeowners' businesses and the thousands of home-based businesses that Metro allows to serve clients in residential homes. Both claims were brought exclusively under the Tennessee Constitution, and sought prospective declaratory and injunctive relief against the Client Prohibition, as applied by Metro against the Homeowners. R.25. The Homeowners sought neither facial nor retrospective relief.

The Chancellor denied Metro's motion to dismiss in a bench ruling on March 16, 2018, R.486-500, and memorialized the order in writing on April 13, 2018. R.481-84. The Chancellor's written order noted that the Homeowners had "pled with great specificity in alleging [the Client Prohibition] to be unconstitutionally arbitrary, and violative of their equal protection rights." R.483. Citing caselaw from this Court, the Chancellor held that "[t]he question of rational basis is a question of fact," that "[w]hether a classification is reasonable depends upon the facts in each case," and that "it is inappropriate to resolve questions about whether the [Client Prohibition] is rational or arbitrary on a motion to dismiss." *Id.* (quoting *State v. Whitehead*, 43 S.W.3d 921, 926 (Tenn. Ct. App. 2000)). Metro answered the Homeowners' complaint on May 21, 2018. R.501-06.

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The course of discovery revealed a dispute between the parties about the relevance of facts under Tennessee rational-basis review. Over the next year, the Homeowners "made significant efforts to discover information from Metro and develop facts they believe are relevant to their as-applied constitutional challenge." R.2309. Metro consistently objected to the Homeowners' efforts to discover Metro's interests in maintaining, enforcing, and differentially applying the Client Prohibition to the Homeowners. R.524-26, 545-46, 575-83, 597-601, 735-39, 748-49. Metro initially denied almost all knowledge of its own interests and deferred to the Chancellor to "*sua sponte* adopt its own interest," save for Metro's "likely . . . position that the client prohibition serves to protect the residential nature of residentially-zoned property." R.545. Metro also resisted an entity deposition on its interests in the Client Prohibition. The Homeowners moved to compel the entity deposition, which the Chancellor granted on January 22, 2019. *See* R.592-94. Metro moved to reconsider and revise the order granting the Homeowners' motion to compel, which the Chancellor denied on February 22, 2019. *See* R.611-13. On the morning of its entity deposition on April 4–5, 2019, Metro produced (for the first time) a 31-point list of purported interests. R.736-37. Metro testified about that list at length in its entity deposition. *See* R.740-866.

The Homeowners and Metro cross-moved for summary judgment on June 14, 2019. R.618, 640-42. The dispute centered again on the relevance of facts. The Homeowners submitted 295 facts in their Tenn.

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R. Civ. P. 56.03 statement. R.643-93. Metro admitted 293 of those facts[2] with an assertion that "the particular facts of this case are largely irrelevant." R.2257-58. For its part, Metro submitted six facts in its Rule 56.03 statement, all of which the Homeowners admitted. R.638-39, 2254-55.

The record evidence establishes that the Client Prohibition does not serve any legitimate interest as applied to the Homeowners. Metro conceded in its entity deposition that the only potential evidence of harm from the Homeowners' businesses consisted of two anonymous complaints that the Homeowners were seeing clients at their homes. R.859. But those complaints did not specify any harm that serving these clients caused, and Metro's code enforcement officers testified both that anonymous complaints are *not* evidence of harm to residential neighborhoods and that Metro never found any harm in the Homeowners' cases. R.653-57, 1399-400, 1413, 1417, 1427, 1437-39, 1442, 1490-91, 1506-07, 1884, 1899. The Homeowners also produced undisputed evidence that their businesses did not and would not impact their surrounding neighborhoods. *See* R.683, 2143-49, 2184-97.

[2] The only two disputed facts concern future harm to Homeowner Pat Raynor. R.693, 2257. First, Metro disputes the possibility that Pat could not "find a comparable space [to rent] if her landlord were to terminate her lease or sell the property." *Id.* Second, Metro disputes whether "Pat would be able to earn an honest living—and stay in her home—for the rest of her life" if the Client Prohibition were not enforced against her. *Id.*

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The parties filed their response memoranda on August 2, 2019, and their replies on August 30, 2019. R.2259-97. The Chancellor heard oral argument on September 13, 2019. *See* Tr.

III. Disposition in the Court Below

The Chancellor entered final judgment for Metro in an opinion that makes no citation to the record. *See* R.2309-34. The Chancellor frames the nature of the dispute on page one: Metro's "argu[ment] that the Court does not need to consider the facts" versus the Homeowners' "significant efforts to discover information from Metro and develop facts they believe are relevant." R.2309. The Chancellor also notes the parties' submission of "voluminous materials" in the record. R.2310. But the Chancellor's opinion cites none of the undisputed facts in the record. In conflict with and without reference to the undisputed record evidence, the opinion below concludes that, as applied to the Homeowners, the Client Prohibition "has a rational relationship to the public safety, health, morals, comfort, and welfare." R.2333. The Chancellor granted Metro's motion for summary judgment and denied that of the Homeowners. R.2334. The opinion, which included a Tenn. R. Civ. P. 58 certification making the order of final disposition effective, was entered on October 1, 2019. *Id.*

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The Homeowners timely filed their notice of appeal on October 28, 2019. The record was filed on February 25, 2020. The Homeowners now submit this Brief.[3]

STATEMENT OF FACTS

The Homeowners simply want to mind their own business. They own and occupy homes within Metro's jurisdiction. R.643. Metro's zoning ordinance prohibits serving any "clients or patrons" from residential homes. *Id.* The parties call this rule the "Client Prohibition." *Id.*

Homeowner Lij Shaw is a record producer. R.644. He maintains The Toy Box Studio, a professional-quality recording studio, in a detached and renovated garage on his property. *Id.* His purpose in building The Toy Box Studio was to earn a living from home while raising his daughter. *Id.* For ten years, Lij earned a living by recording musicians at The Toy Box Studio. *Id.*

Homeowner Pat Raynor is a professional hairstylist. R.645. She holds a cosmetology license from the State. *Id.* Pat has renovated her garage and obtained a State license to operate a residential hair salon there. *Id.* Her purpose in doing so was to earn a living without the need to commute or pay commercial rent. *Id.* For seven months, Pat earned a living by cutting her clients' hair in her licensed residential shop. *Id.*

Nashville admits that it is legal for the Homeowners to maintain a home recording studio and home hair salon. R.644-45. The Client

[3] In response to the pandemic, the Tennessee Supreme Court extended most March court deadlines, including the one for this brief, to April 30. *In re COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 31, 2020).

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Prohibition merely prohibits the Homeowners from serving clients inside. *Id.*

The Client Prohibition is one of several provisions in the Metro Code governing home occupations. As a general rule, home occupations are permitted. R.646. Metro defines a "home occupation" as any "occupation, service, profession or enterprise carried on by a resident member of a family within a dwelling unit." *Id.* Home occupations are legal so long as the homeowner meets certain eligibility criteria. *Id.* The only eligibility criterion that the Homeowners challenge in this suit is the Client Prohibition. R.647.

The Client Prohibition provides that "[n]o clients or patrons may be served on the property." R.647. The Client Prohibition applies only to the property where the home occupation is based; Metro residents may serve clients at the clients' houses. *Id.* Metro is the only large city in the United States with such a strict client prohibition. R.647-48.

Except for those businesses Metro has exempted, the Client Prohibition applies to any "home occupation," which is defined by three elements: (1) home occupations take place inside a home, (2) home occupations are conducted by a resident, and (3) home occupations include any "business." R.657. Nothing else is important in identifying a "home occupation." *Id.*

The Metro Department of Codes and Building Safety ("Codes") administers and enforces the Client Prohibition. R.648. The Client Prohibition is only enforced in response to complaints. *Id.* Ninety-nine percent of complaints are anonymous. *Id.*

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Codes officials testified that complaints are not evidence that the Client Prohibition has been violated. R.649. Even "several complaints" at the same property require more proof in order to confirm a violation. *Id.* In Codes' experience, 40–70% of complaints are false. R.653. Neighbors often report complaints purely out of spite. R.653, 686.

Codes received an anonymous complaint about Homeowner Pat Raynor in 2013. R.653. Metro does not know who submitted the complaint or why. *Id.* When Codes went to investigate, the only thing it observed was two women in Pat's driveway with "freshly co[i]ffed hair." R.653-54. Codes could not distinguish Pat's clients from a "regular social visit," and did not observe any traffic, parking, noise, vibrations, smoke, dust, odors, heat, humidity, glare, or other objectionable effects at the property. R.654. Metro ordered Pat to stop seeing clients at her home salon, and Pat complied. R.654-55.

Codes received an anonymous complaint about Homeowner Lij Shaw in 2015. R.655. Metro does not know who submitted the complaint or why. R.656. Codes never visited Lij's property at all. *Id.* Codes therefore never observed any traffic, parking, noise, vibration, smoke, dust, odor, heat, humidity, glare, or any other objectionable effects at the property. *Id.* Metro ordered Lij to stop recording musicians at his home studio, and Lij complied. R.656-57.

While the Homeowners were forced to stop seeing clients despite no evidence of harm to their communities, thousands of other home businesses in Nashville continue to do so under exemptions in the zoning code. Most notably, Metro allows owner-occupied short-term rentals such as Airbnb as an accessory use. R.675. Owner-occupied short-term rentals

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meet all three elements of a "home occupation"—and may serve up to twelve clients at a time. R.674-75. As of 2018, there were 4,653 permitted owner-occupied short-term rentals in Nashville, of which 3,001 were active. R.675. Yet according to Metro's own Codes Director, and as Metro admitted, these owner-occupied short-term rentals cause noise, traffic, parking, trash, and general lewdness issues, all to a greater degree than home recording studios or home hair salons. R.690-91.

Metro also enacts "specific plans" as "an alternative zoning process that may permit any land use[]." R.657. Specific plans can be enacted to allow activity that fits Metro's definition of "home occupation." *See* R.658. And in at least eleven ordinances, covering thirteen properties, Metro has used specific plan zoning to allow clients or patrons to be served in residential homes. *See* R.658-74. One such property now appears on the Metro Tax Assessor's website with a large sign advertising a "HAIR SALON." R.662.

Similarly, Metro allows historic home events as a use by special exception. R.677. Historic home events meet all three elements of a "home occupation"—yet they may serve clients. R.676-77. Metro has granted seven special exception permits for historic home events to operate in residential districts. R.677. According to Metro's Codes Director—and, again, as Metro admitted—historic home events cause noise, traffic, and parking issues, all to a greater degree than home recording studios or home hair salons. R.692.

Finally, Metro allows "day care homes" as a use by special exception. R.676. Day care homes meet all three elements of a "home occupation"—and may serve up to twelve clients a day. R.675-76. Metro has granted

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eleven special exception permits for day care homes to operate in residential districts. R.676. And once again, according to Metro's Codes Director, day care homes cause traffic and parking issues, both to a greater degree than home recording studios or home hair salons. R.691.

Apart from establishing that thousands of home businesses in Nashville serve clients on their property, the record also shows no link between enforcing the Client Prohibition against the Homeowners and any Metro interest. Metro testified that the only potential evidence of such a link is two anonymous complaints. R.682. But the complaints alleged no harm; they reported only that the Homeowners' businesses existed. Codes officials also testified that the complaints evince no harm to the neighborhood. *Id.*

Indeed, the record shows that Metro's enforcement against the Homeowners advances none of Metro's 31 purported interests. *See* R.682-89. To single out the more obvious potential concerns:

- There is no evidence that the Homeowners' businesses were unsafe. R.682.
- Metro's public works department evaluated the traffic and parking impact of the Homeowners' businesses and recommended approval with the sole condition that adequate parking be provided onsite. R.683.
- The Homeowners' private driveways can accommodate their clients' cars. R.684.

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- Metro denies that the Client Prohibition is related to noise control, R.680, and in any event, both Homeowners' businesses comply with Metro's noise ordinance. R.688-89.

Finally, Metro itself openly acknowledges that low-impact businesses that violate the Client Prohibition—like the Homeowners'—should not be turned in. *See* R.687-88 ("[S]ay you have a 70-year-old woman who teaches piano lessons in her home, doesn't bother anybody. I'm not sure you have to turn her in."). But they are turned in, routinely, because Metro outsources its enforcement judgment to private complainants. *Id.*

ARGUMENT

The facts should matter when residents assert their constitutional right to use their homes. The Chancellor below held that they do not. Instead, purporting to apply the Tennessee Constitution's rational basis test, the Chancellor upheld Nashville's Client Prohibition while citing *none* of the 299 undisputed facts that were submitted by the parties. Those facts show that enforcing the Client Prohibition against the Homeowners has no link to any legitimate government interest.

The Homeowners raise three issues on appeal. In Part I, the Homeowners show that the Chancellor erred in treating the undisputed facts as immaterial. Turning to the Homeowners' claims, Part II shows that the Chancellor erred in granting summary judgment to Metro on the Homeowners' equal protection claim. Finally, Part III shows that the Chancellor erred in granting summary judgment to Metro on the Homeowners' substantive due process claim. This Court should hold that courts must consider the facts under Tennessee rational basis review,

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hold that the facts in this case establish that the Client Prohibition is unconstitutional, and REVERSE the Chancellor's opinion.

I. The Chancellor Erred in Disregarding Every Fact Tending to Show the Client Prohibition's Irrationality As Applied to the Homeowners.

The standard of review at summary judgment has much to do with undisputed facts. This Court "review[s] a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness." *Rye v. Women's Health Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). To obtain summary judgment, the moving party must "support its motion with 'a separate concise statement of material facts,'" with each fact "'supported by a specific citation to the record.'" *Id.* at 264–65 (quoting Tenn. R. Civ. P. 56.03). And to survive summary judgment, "the nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (internal quotation marks omitted). "This is the standard Tennessee courts must apply when ruling on summary judgment motions regardless of which party bears the burden of proof at trial." *Id.* The factual record, which the Chancellor failed to cite in ruling on the parties' cross-motions for summary judgment, is critical.

This Part will show that the Chancellor erred by failing to base her decision on the facts developed by the parties. Section I.A shows that undisputed facts are critical under Tennessee's rational basis test, and that review under the Tennessee Constitution is more searching than in

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federal court. Then, Section I.B shows that the undisputed facts matter even under the federal standard. Finally, Section I.C shows that the Chancellor erroneously disregarded the facts of the Homeowners' case.

A. Under Tennessee Rational Basis Review, Facts Are Critical.

To invalidate the Client Prohibition under the rational basis test, "[t]he Court must find that the provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare" as applied to the Homeowners. *Consol. Waste Sys. LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *5 (Tenn. Ct. App. June 30, 2005) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *see* R.756 (Metro's Rule 30.02(6) designee understands "[t]hat's the standard"); R.2229 (noting understanding for Chancellor). And, as the Chancellor correctly held, reasonableness "depends upon the facts in each case." R.483 (quoting *Whitehead*, 43 S.W.3d at 926); *see also State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (" 'Reasonableness' varies with the facts in each case."); *Harrison v. Schrader*, 569 S.W.2d 822, 825–26 (Tenn. 1978) ("Reasonableness depends upon the facts of the case . . . .").

This Section shows how rational basis review applies in Tennessee courts. To begin, Section I.A.1 shows that Tennessee courts applying rational basis routinely cite the facts. Then, the Homeowners will highlight three ways in which rational basis review under the Tennessee Constitution is more searching than the federal test. In Section I.A.2, the Homeowners show that Tennessee courts do not hypothesize government interests, which are a factual question, on the government's behalf. In

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Section I.A.3, the Homeowners show that Tennessee equal protection doctrine requires all legal classifications to be based on "real and substantial" differences that are "germane" to the purpose of treating the regulated class differently. And in Section I.A.4, the Homeowners will show that Tennessee substantive due process doctrine, besides requiring government enforcement to serve a legitimate interest, prohibits laws that are "oppressive in their application."

1. Tennessee Rational Basis Cases Routinely Cite the Facts.

Tennessee rational basis decisions routinely cite the facts. Take *Consolidated Waste*, the case most applicable to the Homeowners' claims here. 2005 WL 1541860. *Consolidated* Waste, and other Tennessee rational basis cases, all rely on record evidence.

In *Consolidated Waste*, this Court struck down a Metro zoning ordinance on both substantive due process and equal protection grounds under the U.S. and Tennessee Constitutions. *Id.* at *7–8, *36. The ordinance required that construction-and-demolition ("C&D") landfills locate themselves at least two miles away from schools and parks. *Id.* at *2. This Court found that "Metro ha[d] failed to connect a rational relationship between the[] ordinances and a legitimate governmental purpose." *Id.* at *33. The "dust, noise, traffic, and other considerations associated with C&D landfills," while hazardous, were also characteristic of several other types of landfills to which Metro did *not* apply the buffer requirement. *Id.* at *33–34. Indeed, the record in *Consolidated Waste* showed that C&D landfills posed "less risk to human health and the environment" than the unrestricted landfills. *Id.* at *34. The irrationality

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of the two-mile buffer requirement was further shown by the fact that Metro did not require schools and parks to be built two miles away from existing C&D landfills. *Id.* at *33. *Consolidated Waste* is one in a long line of Tennessee cases recognizing the need to consider record evidence in a rational basis case. *See Tester*, 879 S.W.2d at 829 (striking down limited-scope work-release program because the government's asserted justifications "ignore[d] the evidence in the record"); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993) (sustaining rational basis challenge to school-funding scheme because "the record demonstrates substantial disparities" in funding); *Shatz v. Phillips*, 471 S.W.2d 944, 945 (Tenn. 1971) (noting undisputed record on which plaintiffs' rational basis challenge to zoning ordinance was sustained); *Bd. of Comm'rs of Roane Cty. v. Parker*, 88 S.W.3d 916, 922 (Tenn. Ct. App. 2002) (sustaining rational basis challenge to zoning ordinance where plaintiffs had "carried the burden of proof").

None of the Tennessee rational basis cases[4] cited in the Chancellor's opinion compel this Court to break from established practice and ignore the facts here. In *Varner v. City of Knoxville*, No. E2001-00329-COA-R3-CV, 2001 WL 1560530 (Tenn. Ct. App. Nov. 29, 2001), for example, this Court upheld the rejection of a used car lot in a

[4] One case cited below has similar facts but an entirely different underlying claim. In *Davidson County v. Hoover*, 364 S.W.2d 879, 879 (Tenn. 1963), the "question presented" was "whether or not a beauty parlor [wa]s permitted under the Nashville Zoning Ordinance" in the early 1960s. Unlike this case, *Hoover* does not address constitutional issues. *See id.*

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residential zone where, unlike here, city planning staff found negative traffic consequences from rezoning. Similarly, *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904 (Tenn. 1940), dealt not with an "at-home business restriction" as the Chancellor put it, but with a proposal to build a gas station on a residential block. The facts of *Varner* and *Howe* have no bearing on the Homeowners' quiet, indoor home businesses. *See* R.688-89 (undisputed that Homeowners' businesses are noise-compliant, concealed from view, and far below traffic-impact study threshold). And in *McCallen v. City of Memphis*, 786 S.W.2d 633 (Tenn. 1990), and *Gann v. City of Chattanooga*, No. E2007-01886-COA-R3-CV, 2008 WL 4415583 (Tenn. Ct. App. Sept. 30, 2008), both courts rejected not-in-my-backyard challenges to municipal decisions to *allow* development. If anything, *McCallen* and *Gann* show that it would be rational to let the Homeowners use their homes as they have asked. But all of these cases' facts are different than what the Homeowners face here—a prohibition on private and otherwise lawful transactions inside residential homes. At most, these cases show that different facts may lead to different outcomes in zoning challenges under the Tennessee rational basis test.

* * *

The Tennessee Constitution also does more to protect Tennesseans' rights than the U.S. Constitution does. Referring to Tenn. Const. art. I, § 8—the "Law of the Land" clause underlying each of the Homeowners' claims here—the Tennessee Supreme Court has emphasized that even caselaw calling the Tennessee and U.S. Constitutions "practically synonymous" does not "relegate Tennessee citizens to the lowest levels of

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constitutional protection, those guaranteed by the national constitution." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14–15 (Tenn. 2000) (quoting *State v. Black*, 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, C.J., concurring in part and dissenting in part)); *see* Tenn. Const. art. I, § 8; *see also id.* art. XI, § 8. The following three Sections discuss three ways in which the Tennessee Constitution provides greater protections above that minimum standard.

2. Tennessee Courts Do Not Hypothesize Interests on the Government's Behalf.

Tennessee courts are not backstop counsel for the government. In Tennessee, government action survives rational basis review "if *the government* identifies a legitimate governmental interest." *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *6 (Tenn. Ct. App. June 30, 2005) (emphasis added) (citing *Parks Props. v. Maury Cty.*, 70 S.W.3d 735, 744–45 (Tenn. Ct. App. 2001)), *quoted in* R.613. This is an important difference between the rational basis test in Tennessee and the version of the test sometimes applied in federal court.

In a rational basis challenge, the government's reason for exercising the police power is a relevant fact that is subject to discovery. *See* Tenn. R. Civ. P. 26.02(1). In the proceedings below, however, Metro asserted that identifying a government interest for the Client Prohibition is the courts' responsibility, and that Metro "cannot identify" those interests on a court's behalf. *E.g.*, R.735. In support of this assertion, Metro routinely cited the U.S. Supreme Court's statement that "it is entirely irrelevant

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for constitutional purposes" whether an asserted justification for government action "actually motivated" the government. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), *cited in* R.72, 577, 597-98, 630. But this overreads *Beach Communications*. That decision only excuses *legislatures* from "articulating [their] reasons for enacting a statute." *Beach Commc'ns*, 508 U.S. at 315. It does not excuse the government from defending the constitutionality of its actions when challenged in federal court. And even if it did, it would not excuse Metro from disclosing its rational bases in Tennessee court, because *Beach Communications* is not Tennessee law.

Under Tennessee law, identifying the government interest underlying the Client Prohibition is Metro's responsibility, and a court cannot identify an interest on Metro's behalf. As the Chancellor correctly noted, this Court "specifically state[d]" in *Consolidated Waste* and its earlier finding in *Parks Properties* that "it is the government's obligation to identify the rational basis for the subject zoning ordinance." R.612. Legislation survives Tennessee rational basis review "if the government identifies a legitimate governmental interest" rationally served by the legislation. *Consol. Waste*, 2005 WL 1541860, at *6, *quoted in* R.612.; *see also Parks Props.*, 70 S.W.3d at 744. Metro is well aware of this. Metro has been forthcoming about its interests in previous litigation before this Court, which saw no need to draw up interests on Metro's behalf. *See Consol. Waste*, 2005 WL 1541860, at *33–36; *see also Tenn. Commercial Roe Fishermen's Ass'n v. Tenn. Wildlife Res. Comm'n*, No. M2015-01944-COA-R3-CV, 2016 WL 4567198, at *15–16 (Tenn. Ct. App.

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Aug. 30, 2016) (noting government obligation to identify interests, and evaluating advisory agency representatives' testimony "about the basis for its recommendations" to the defendant commission). The Chancellor was right to compel Metro to disclose its asserted interests in applying the Client Prohibition to the Homeowners, and in refusing to hypothesize additional interests on behalf of the government.

3. Legislative Classifications in Tennessee Require a Real and Substantial Interest that Is Germane to the Law's Purpose.

"The fundamental rule" in a Tennessee equal protection case "is that all classification[s] 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 (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). This "real and substantial" standard requires meaningful, fact-based scrutiny of legislative classifications.

Tester is illustrative. There, a Washington County DUI defendant challenged the constitutionality of a statute under which he would have been eligible for work release, but for the fact that he was convicted in Washington County and not Davidson, Shelby, or Moore Counties. *Tester*, 879 S.W.2d at 825. The court applied Tennessee rational-basis review and held that the state's assertion of a "real and substantial distinction" with respect to overcrowding in Davidson, Shelby, and Moore Counties "ignore[d] the evidence in th[e] record, which indicate[d] that *Washington*

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County ha[d] experienced serious jail overcrowding that was directly caused by the mandatory incarceration of *second time DUI offenders*" such as the defendant. *Id.* at 829. Because the evidence did not support the state's arguments for limiting the work-release program to three counties, the *Tester* court declared the program's limited application unconstitutional. *Id.* at 830. *Tester* was at least the sixth Tennessee opinion to require a "real and substantial" difference in order to uphold a legislative classification under rational-basis review.[5]

This principle applies with full force to cases in which the government tries to "exclude certain persons from engaging in [a] business while allowing others to do so." *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) (citing *State v. Harris*, 6 S.E.2d 854

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[5] *See Tester*, 879 S.W.2d at 829; *Metro. Gov't of Nashville & Davidson Cty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977) (holding that municipalities must have "real and substantial reasons" for establishing "segregated zone[s]" outside which package liquor sales can be made illegal); *Logan's Supermarkets, Inc. v. Atkins*, 304 S.W.2d 628, 632 (Tenn. 1957) (invalidating tax imposed on merchants who hire third parties to redeem trading stamps but not on merchants who redeem their own trading stamps); *Nashville, Chattanooga & St. Louis Ry.*, 135 S.W. at 776 (invalidating a labor-relations provision that applied to corporations but not to partnerships); *Whitehead*, 43 S.W.3d at 927 (invalidating state law making the same conduct a felony in some counties and a misdemeanor in others); *Templeton v. Metro. Gov't of Nashville & Davidson Cty.*, 650 S.W.2d 743, 756–58 (Tenn. Ct. App. 1983) (relying on substantial record evidence to uphold differential regulation of package liquor sales in general and urban services districts); *cf. State v. Greeson*, 124 S.W.2d 253, 256, 258 (Tenn. 1939) (invalidating minimum-price law for haircuts as lacking any "real or substantial relation to the public health, safety, or welfare").

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(N.C. 1940)). In *Consumers Gasoline*, the Tennessee Supreme Court struck down a municipal ordinance that restricted the installation of underground fuel tanks, even though the ordinance was rationally related to fire prevention as "an initial proposition." *See* 292 S.W.2d at 736. That ordinance made it illegal for gas stations to install more than three underground fuel-storage tanks on any property, all of which were required to have a maximum capacity of no more than 1,100 gallons. *Id.* at 735. Because the operative word was "install," *id.*, it did not apply to gas stations with preexisting underground tanks "several times the maximum capacity provided for by the ordinance," even though such tanks posed the same threat to the public. *Id.* Because of this underinclusiveness, the court found the ordinance had no real and substantial relationship with the government's purported interest, and, instead, had the "obvious effect" of "prohibit[ing] the construction of additional filling stations . . . which would compete with those [already] in existence." *Id.* at 736–37. This, the court found, "unquestionably denie[d] the equal protection of the laws" in violation of the Tennessee Constitution. *Id.* (citing Tenn. Const. art. I, § 8).

The Tennessee courts have repeatedly found this same sort of underinclusiveness fatal in challenges to zoning ordinance under the Tennessee Constitution's guarantee of equal rights, privileges, and immunities. Three cases in particular are illustrative:

First, in *Shatz*, 471 S.W.2d 944, the Tennessee Supreme Court declared it arbitrary and unreasonable to prohibit "the storage and/or salvaging of junk and other used material" in a "[l]ight [i]ndustry" district

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when the same was permitted in the "[h]eavy [i]ndustry" district across the street. *Id.* at 946–48. The junk-salvaging prohibition was the only difference between the two districts under the ordinance, which otherwise allowed all "industrial" uses. *Id.* at 946. The record showed that "a casual passer would not know what business was being carried on" in the plaintiff's "modern, attractive" building, and that the plaintiff's scrapping business was "free from noise, odor, fumes, and other objectionable features." *Id.* at 945.

Similarly, in *Consolidated Waste*, the Tennessee Court of Appeals held it arbitrary and unreasonable to require construction-and-demolition landfills, but not other, more hazardous types of landfills, to locate at least two miles away from schools and parks. 2005 WL 1541860, at *33–36.

Finally, in *Roane County*, 88 S.W.3d 916, the Court of Appeals held it arbitrary and capricious to rezone one semi-rural property for the keeping of large exotic animals but then deny the same rezoning to another rural property. *Id.* at 921–22. The court ruled for the plaintiffs—who kept *a tiger* on their property—even though the zoning ordinance was found to be "in the public interest, since [it was] concerned with . . . dangerous animals." *Id.* at 922. This was because the "totality of the circumstances" allowed the plaintiffs to "carr[y] the[ir] burden of proof that the refusal of the County to rezone . . . was arbitrary and capricious." *See id.* Moreover, the concern about the potential danger of plaintiffs' tigers was mitigated by "a rigid statutory scheme" in state law with which the plaintiffs complied. *See id.* at 923–24.

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In sum, the Tennessee Constitution requires a fact-basedinquiry into whether "all persons who are similarly situated [are] treated alike by the government and by the law." *Cf.* R.2327 (quoting *Consol. Waste*, 2005 WL 1541860, at *7). Legislative classifications must hinge on real and substantial differences between the regulated classes. *Tester*, 879 S.W.2d at 829. And those differences must be germane to the purpose of the regulation. *Id.*

As the next subsection will show, even where this standard has been met, the Tennessee Constitution's substantive due process protections also prohibit regulations that are oppressive in their application..

4. Tennessee Laws May Not Be Oppressive in Their Application.

Even if a Tennessee law bears some general relation to a legitimate interest, its enforcement may not be "oppressive in its application" to the plaintiff. *Wise v. McCanless*, 191 S.W.2d 169, 172 (Tenn. 1945). This constitutional requirement operates in cases where the general authority to exercise the police power is established. *See, e.g.*, *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d 631, 634 (Tenn. 1983) (noting "two-part analysis" requiring (1) general relation to legitimate interest and (2) no "oppressive" application to plaintiff). This includes zoning. *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 612–14 (Tenn. 1927) (cautioning that the breadth of the police power "cannot be an excuse for oppressive legislation" in the zoning context).

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Oppression is a form of unreasonableness. *See Wise*, 191 S.W.2d at 171 ("[O]ur municipal ordinance cases hold that if unreasonable and oppressive such regulations will be stricken down."). An oppressive regulation violates the Tennessee Constitution's "implied limitation of reasonableness—however absolute the police power of the State . . . may be." *Wise*, 191 S.W.2d at 171; *see also Rivergate*, 647 S.W.2d at 634.

A regulation or enforcement action can be oppressive even when "conceived to be in the public interest." *Wise*, 191 S.W.2d at 172; *see also Rivergate*, 647 S.W.2d at 634. Alcohol, for example, is infamous for its impact on public health and safety, and yet Tennessee beer vendors have prevailed in constitutional challenges to oppressive regulation and enforcement. *See Sparks v. Beer Comm.*, 339 S.W.2d 23, 26 (Tenn. 1960) (invalidating 2,000-foot proximity ban as applied to beer vendor who obtained permit before nearby church was established); *Wise*, 191 S.W.2d at 114 (invalidating 100-foot proximity ban as applied to beer vendor who obtained permit before regulation was enacted).[6]

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[6] Oppressed beer vendors have also obtained relief against local ordinances by writ of certiorari, a statutory standard that is strikingly similar to rational basis review under the Tennessee Constitution. *See The Pantry, Inc. v. City of Pigeon Forge*, 681 S.W.2d 23, 24 (Tenn. 1984) ("The record in this case fails to disclose that the requirement of 3,500 sq. ft. of enclosed, heated floor space bears any reasonable relation to the public health, morals and safety of the people of Pigeon Forge . . . ."); *City of Chattanooga v. Tenn. Alcoholic Beverages Comm'n*, 525 S.W.2d 470, 481 (Tenn. 1975) (plurality opinion) ("[T]here is no reasonable relation between the location of one's business and his good moral character."); *id.* at 481 (Brock, J., concurring in result) ("[I]t is wholly arbitrary for a city to refuse to issue a certificate of good moral character to a person who admittedly possesses such character.").

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Oppression may exist where a marginal regulation poses an existential threat to a lawful activity. In *The Pantry*, for example, the Tennessee Supreme Court struck down a local ordinance that precluded small businesses from obtaining a beer-sales permit without at least 3,500 square feet of heated, enclosed floorspace. 681 S.W.2d at 24. The record contained no evidence that the plaintiff business's 2,400 square feet of heated, enclosed floorspace "would in any manner be inimical to the public health, morals and safety." *Id.* Oppression goes to the burden on the regulated party. *See Sparks*, 339 S.W.2d at 24 (newly built church cannot trigger buffer requirement that would completely shutter a preexisting business). "No strict property right . . . need be involved" in order to claim oppression. *Wise*, 191 S.W.2d at 172.

The Tennessee Supreme Court's decision in *Spencer-Sturla* makes clear that "oppressive legislation" is prohibited in zoning. 290 S.W. at 612. There, the court upheld a state enabling statute and a municipal zoning ordinance against the constitutional affirmative defense of a Memphis undertaker who had been convicted of maintaining a mortuary in a residential zone. *Id.* at 609, 613–14. After finding residential zoning facially constitutional, the court specifically inquired as to whether the law was unduly burdensome as applied to the undertaker's business, ultimately concluding that "the exclusion of an undertaking establishment from a residence district is not subject to the criticism of unreasonableness." *Id.* at 614. Thus, although the property owner lost his case on the merits, the Tennessee Supreme Court's decision emphasized that lower courts must "consider the reasonableness" of *other*

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applications of residential zoning ordinances "when persons whose interests are affected thereby claim an unreasonable abridgment of their property rights." *Id.* (citing *Euclid*, 272 U.S. at 386–88 (distinguishing between facial and as-applied relief against zoning ordinances)).

Consolidated Waste, the case most on point here, can also be read as an oppressiveness case. In *Consolidated Waste*, this Court recognized that Metro had "a viable interest" in zoning landfills to limit the generation of "dust, debris, and trash." *Consol. Waste*, 2005 WL 1541860, at *33; *cf. Wise*, 191 S.W.2d at 172 (noting unconstitutional provision "conceived to be in the public interest"). Despite Metro's general power to zone landfills, this Court struck down the zoning ordinance because the "voluminous filings in the record" disclosed "no proof that a two-mile buffer [around schools and parks] meets the stated goals" of pollution control. *Consol. Waste*, 2005 WL 1541860, at *35. As in the alcohol-regulation cases, then, a conceivably rational ordinance was invalidated by evidence showing that the ordinance was oppressive in its application to the plaintiff. *Compare id.* at *33–36, *with Wise*, 191 S.W.2d at 171–72.

* * *

In sum, the undisputed facts are critical in deciding whether a zoning ordinance violates the Tennessee Constitution. But judicial review of the facts is not unique to Tennessee rational basis review. In Section I.B below, the Homeowners will show that the facts matter under the federal rational basis standard as well.

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B. Even Under the Federal Rational Basis Standard, Facts Matter.

In both the federal and Tennessee courts, facts matter in as-applied constitutional challenges to irrational laws. In the federal courts, from the birth of the rational-basis test until today, the courts have recognized the necessity of considering facts when evaluating whether a purported exercise of the police power has the actual purpose and *effect* of protecting the public health, safety, or morals. The Tennessee courts have recognized the same.

The United States Supreme Court has long recognized that facts matter in constitutional challenges to irrational laws. In its seminal decision on zoning in *Euclid*, 272 U.S. at 387, the Court recognized that the constitutionality of zoning laws "varies with circumstances and conditions." *Euclid* thus required that zoning ordinances show a "substantial relation to the public health, safety, morals, or general welfare" and recognized that an otherwise constitutional zoning ordinance "may be found to be clearly arbitrary and unreasonable" as "applied to particular premises . . . or to particular conditions." *Id.* at 395. Two years later the Supreme Court demonstrated *Euclid's* focus on facts when it held a different zoning regulation was unconstitutional "as specifically applied to plaintiff in error" because the findings of fact demonstrated "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected" were not furthered by applying the zoning law to the property at issue. *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928).

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The Court has also shown that facts matter in its other rational basis cases. When it first announced the rational basis test in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court made clear that litigants have the right to introduce evidence disproving the rationality of legislation and to challenge regulations "by proof of facts tending to show that the statute . . . is without support in reason." *Id.* at 152–54. Indeed, *Carolene Products* recognized that denial of the opportunity to disprove presumed facts in a rational-basis case "would deny due process." *Id*. at 152. Later, in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), the Court arguably downplayed the importance of facts when challenging rationality. But just two years after *Williamson*, the Court was back to considering evidence to determine whether a regulatory scheme rationally advanced the claimed government interests in as applied cases. *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 246-47 (1957) (though a state has a legitimate interest in high standards of qualification for lawyers, the weight of the evidentiary record did not "rationally justif[y] a finding that Schware was morally unfit to practice law"). And the Court has, on many instances in the intervening decades, struck down regulations under rational basis review—even where the government had a legitimate state interest—where the facts demonstrated the regulation was not adequately connected to that purpose.[7]

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[7] *See, e.g.*, *Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va*, 488 U.S. 336, 345 (1989)

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Most recently, in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), the Court again stressed the importance of facts in considering whether state action was a legitimate exercise of the police powers. As the Court noted, "'mere pretences'" have never been enough to sustain an exercise of the police powers. *Id.* at 2464 (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)). Rather, "the Court's police-power precedents require[] an examination of the actual purpose *and effect* of a challenged law." *Id*. at 2473 (emphasis added) (citing *Mugler*, 123 U.S. at 661). Not "every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion of the police powers of the State." *Id.* (quoting *Mugler*, 123 U.S. at 661) (cleaned up). Looking at the facts of *Tennessee Wine &*

(disparities in tax rates so enormous as to be illogical); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (group home being too big not logical basis for permit denial when identical homes routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident purchased out-of-state before becoming Vermont resident); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (no rational relationship between program that distributed Alaska's oil money to residents in 1980 based on length of state residency since 1959 and state's purported objectives); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to property ownership); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stimulating agricultural economy not logically connected to whether people in household are related); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then it is no basis for denying transcript to misdemeanant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (no rational interest in underlying property-ownership requirement for political office).

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Spirits, the Court set out to determine "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate . . . ground," but it could not, and struck the law down. *Id.* at 2474. *See also* Braden H. Boucek, *That's Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause*, 2019 Cato Sup. Ct. Rev. 119, 149 (discussing effects of decision on limits on police powers).

The recognition that facts matter is also reflected in the Sixth Circuit's decision in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), which held that a Tennessee economic regulation was unconstitutionally irrational. In *Craigmiles*, a group of casket sellers challenged a Tennessee law permitting only licensed funeral directors to sell caskets. *Id.* at 222. The state claimed this restriction protected public health and safety, but when the court considered the evidence the casket-sellers had introduced, the court recognized the state's proffered interests were not served by the restriction. *Id.* at 225-28. The court was therefore left to conclude that the restriction had "no rational relationship to any of the articulated purposes." *Id.* at 228.[8] As such, the restriction failed the rational basis test. *Accord St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (analyzing evidence of irrationality to hold that Louisiana law permitting only licensed funeral directors to sell caskets did not rationally relate to any articulated legitimate interest).

[8] Separately, the *Craigmiles* court observed that the restriction instead was "very well tailored" to the "obvious illegitimate purpose" of protecting funeral directors from economic competition, which is not a legitimate interest. 312 F.3d at 224, 228-29.

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In short, regardless of the standard of review this Court applies, the facts matter in this case, just as they do in any other case. The Homeowners will discuss those facts, and the Chancellor's failure to engage those facts, in the Section I.C below.

C. The Chancellor Disregarded Critical Undisputed Facts Establishing the Client Prohibition's Irrationality As Applied to the Homeowners.

As the Chancery Court noted, the central dispute in this case is whether facts matter in this or any other constitutional challenge to the rationality of a government regulation. R.2309. Tennessee case law is clear that, under the Tennessee Constitution, courts are to consider the record evidence demonstrating irrationality. The Chancellor erred in disregarding that record evidence. In Section I.C.1, the Homeowners will turn to the record and show that there is *no* evidence connecting Metro's enforcement of the Client Prohibition against the Homeowners to any of Metro's asserted government interests. And in Section I.C.2, the Homeowners will show that the Chancellor failed to cite or otherwise engage that undisputed record at all.

1. In This Case, Metro Concedes There Is No Evidence that Applying the Client Prohibition to the Homeowners Serves Any of Metro's Interests.

There is no evidence that prohibiting the Homeowners from serving clients advances any of Metro's asserted interests in maintaining the Client Prohibition. Instead, Metro's entire argument for why applying the Client Prohibition to the Homeowners advances Metro's interests

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rests on one and *only* one fact: Metro received two anonymous tips that the Homeowners were violating the Client Prohibition. R.682. In its entity deposition, Metro identified "the complaints" as the *only* evidence that Lij or Pat had harmed any of Metro's general interests in the Client Prohibition. R.682; *see* R.859 ("Well, the complaints [are] the evidence. I don't know of anything other than that.").

But Metro's code enforcement officials admit that, by themselves, anonymous complaints are not evidence that a homeowner had any impact on the well-being of the neighborhood. R.682. In fact, Metro's code-enforcement officials deny that anonymous complaints even prove that the Client Prohibition was violated. R.649. One property inspector testified that forty percent of Client Prohibition complaints are false; another inspector testified that sixty to seventy percent are. R.653. Metro does not know who turned the Homeowners into the Codes Department or why they turned them in. R.653, 656. These anonymous complaints do not show that shutting down the Homeowners' businesses advanced any of Metro's interests.

Beyond the mere existence of the complaints, Metro's follow-up investigations *also* found no evidence that the Homeowners' businesses had offended any of Metro's interests. Metro assigned both complaints to the same property-standards inspector, who observed nothing of consequence to the public interest at either property. The inspector denied finding *any* traffic, parking, noise, vibrations, smoke, dust, odor, heat, humidity, glare, or other objectionable effects at Homeowner Raynor's home, where the inspector's main observation was "s[eeing] a couple of ladies come out . . . with freshly co[i]ffed hair." R.654; *cf.* Metro.

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Code § 17.16.250(D)(7) (listing offensive effects prohibited by home occupation ordinance). The inspector could not otherwise distinguish Homeowner Raynor's clients from ordinary social visitors. R.654. No objectionable effects were found at Homeowner Shaw's property, which the inspector did not visit *at all*. R.656. Homeowner Shaw was found in violation only because of his website. *Id.*

The only thing Metro found in its investigations was that the Homeowners had clients at their homes. *See* R.653-57. That was it. Metro can identify nothing that suggests the Homeowners' neighborhoods are better off for Metro's having enforced the Client Prohibition against the Homeowners.

Metro also identifies nothing wrong with the actual services the Homeowners performed. As Metro admits, home recording studios and home-based hair salons are legal in and of themselves. R.644-45. Under the Client Prohibition, Homeowner Shaw may record his friends and Homeowner Raynor may cut her neighbors' hair without government interference, so long as their friends and neighbors are not "clients." Whatever Metro is trying to prevent with the Client Prohibition, it has nothing to do with recording music or cutting hair.

It is thus undisputed that there is no evidence that enforcing the Client Prohibition against the Homeowners promotes the public health, safety, morals, or general welfare. Plaintiffs are entitled to judgment as a matter of law on this ground alone. The Chancellor, however, dismissed the undisputed record as irrelevant under *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997). The next section will point out the Chancellor's failure to address the record evidence in more detail.

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2. The Chancellor's Opinion Fails to Discuss Any of the Evidence that the Homeowners' Clients Would Have No Impact on Homeowners' Neighborhoods.

The Chancellor erred by failing to cite the record at all. *See* R.2309-34. The heart of the Homeowners' factual case, as described in the previous subsection, is that the Homeowners' businesses have no discernible negative effects on their community, and so it is irrational to prohibit them from seeing clients. But the opinion does not discuss that evidence at all. Indeed, the Chancellor's findings of fact do not even *allude* to the evidence about the Homeowners' impact on their neighborhoods. *See* R.2310-22. Instead, the Chancellor's findings cover only the Homeowners' background, the Metro Zoning Code, past proposals to amend the Client Prohibition, a list of the specific plans granted for other client-serving home occupations, a summary of Metro's asserted interests in enforcing the Client Prohibition, and Metro's denial of the Homeowners' specific plan applications in 2017. *Id.* The only citations given are to Metro ordinances and code provisions. *See id.* There is no mention whatsoever of the undisputed evidence the Homeowners put forth regarding the Homeowners' lack of impact on Metro's asserted interests. *See id.*

The Chancellor's legal analysis similarly eschews any mention of the undisputed facts. *See* R.2323-33. The Chancellor's discussion focuses almost exclusively on general observations about the government's presumptive power to enforce residential zoning. To be sure, the Chancellor is correct in noting that exercises of the zoning power are

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presumptively constitutional. *See* R.2327 (citing *Consol. Waste*, 2005 WL 1541860, at *7). But as explained above, that presumption is not an excuse to disregard undisputed facts that rebut the presumption. *See above* Section I.B.

The error in the Chancellor's reasoning is encapsulated in the Chancellor's discussion of the *Consolidated Waste* case, the case mentioned previously, in which Metro's imposition of a two-mile buffer requirement between C&D landfills and schools and parks was found to have no rational basis. *See* R.2325-28 (discussing *Consolidated Waste*). As the Chancellor recognized, Metro lost in *Consolidated Waste* "because Metro could not show a rational relationship between the ordinance and the asserted public interest." R.2327. The Chancellor also recognized, referring to *Consolidated Waste*, that "this is the argument the [Homeowners] make in this case." R.2328. But unlike in *Consolidated Waste*, in which the court "reviewed the voluminous filings in the record" and found "no proof that a two-mile buffer meets [Metro's] stated goals" in enforcing a landfill ordinance, 2005 WL 1541860, at *35, the Chancellor below dismissed the Homeowners' evidence out-of-hand.

Rather than consider the Homeowners' evidence, the Chancellor's opinion relies on *Riggs* for the false proposition that the Homeowners' evidence does not matter. *See* R.2328 (citing *Riggs*, 941 S.W.2d at 53). But *Riggs* does not apply for the simple reason that the *Riggs* plaintiffs failed to state a valid claim. As the Chancellor recognized in denying Metro's motion to dismiss in this case, the Homeowners' complaint "alleges with great specificity that the [Client Prohibition] is not

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rational." R.495. In *Riggs*, by contrast, the Tennessee Supreme Court dismissed an ill-stated challenge to a state statute banning heliports within nine miles of a national park. 941 S.W.2d at 54. *Riggs*'s contribution to Tennessee caselaw was its holding that "*legal conclusions* set forth in a complaint are not required to be taken as true." *Id.* at 47–48 (emphasis added). The *Riggs* plaintiffs were denied discovery based on their complaint's failure to state anything beyond "legal conclusions" that the heliport ban "violated due process and equal protection." *Id.* at 48. That is why the *Riggs* court wrote that "specific evidence is not necessary" in order to presume a rational basis. *See id.* at 52. *Riggs* does not preordain the rejection of well-stated claims such as the Homeowners', and *Riggs* does not hold that evidence rebutting the presumption of a rational basis may be summarily disregarded. *See also St. Joseph Abbey*, 712 F.3d at 223 ("[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.").

* * *

As shown in this Part, the Chancellor committed an error by recognizing the "voluminous materials" in the record and then failing to consider the record. The record refutes all of Metro's defenses, and this Court can (and should) reverse the Chancellor's judgment. In Part II, the Homeowners show that they are entitled to judgment on their equal protection claim. And in Part III, the Homeowners show that they are entitled to judgment on their substantive due process claim.

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II. The Chancellor Erred in Granting Summary Judgment to Metro on the Homeowners' Equal Protection Claim.

Had the Chancellor engaged with the facts, she would have found that the undisputed facts prove the Homeowners' equal protection claim. Metro lets thousands of its residents serve clients inside their homes while prohibiting the Homeowners from doing the same. The record discloses nothing about the Homeowners' clients that is really different, so far as the public could be affected, from any other Metro resident's clients. The Chancellor erred in assuming, against and without reference to the evidence, that Metro has a valid reason for treating the Homeowners differently.

There are four types of uses within Metro's jurisdiction that all fit Metro's definition of "home occupation" but, unlike the Homeowners, are *not* subject to the Client Prohibition. Those uses are owner-occupied short-term rentals, certain specific plans, historic home events, and day care homes. As discussed in the following sections, because each of these uses meets the definition of a home occupation to which the Client Prohibition would otherwise apply, they are similarly situated to the Homeowners. Yet, in violation of Tennessee's equal protection guarantee, these home businesses may serve clients, while the Homeowners may not.

A. Owner-Occupied Short-Term Rentals.

The undisputed record proves that owner-occupied short-term rentals are similarly situated to the Homeowners, and that Metro treats owner-occupied short-term rentals differently than the Homeowners. It

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is undisputed that owner-occupied short-term rentals fit Metro's definition of a "home occupation." R.674-75. It is further undisputed that Metro permits *any* residential homeowner to serve up to 12 paying clients, every day, as a matter of right. R.675. Metro relates that 3,001 Nashvillians hold "active" short-term rental permits; when "inactive" permits are included, the total rises to 4,653. *Id.*

The fact that short-term rental guests stay overnight is not a real and substantial difference justifying the selective prohibition of the Homeowners' clients, who do not stay overnight. Even the Chancellor noted that short-term rentals are a "problematic exception" to the Client Prohibition. R.2332. Metro admitted in its entity deposition that short-term rental guests "detract from . . . residential nature." R.814. Moreover, Metro concedes the testimony of its own Director of Codes Administration that owner-occupied short-term rentals cause *more* noise, parking, trash, and other problems than the Homeowners' businesses. R.689-91. This evidence flies in the face of Metro's assertion in its summary judgment briefing that "renting a space to sleep" is a typical use in residential zones—even there, Metro admitted two sentences later that short-term rentals are "commercial" and "not suited for residentially zoned areas." R.635.

The record evidence about owner-occupied short-term rentals shows that the Homeowners are in the same position as the construction and demolition landfill in *Consolidated Waste*. There, Metro's Interim Director of Public Works testified that there was no rational basis for applying a more stringent buffering requirement to C&D landfills than to other, more harmful kinds of landfills. 2005 WL 1541860, at *34–35.

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Here, the record shows that short-term rentals hurt residential nature in ways that the Homeowners' businesses do not. R.689-91. As in *Consolidated Waste*, Metro's irrational preference for more harmful businesses violates the Homeowners' equal protection rights under the Tennessee Constitution.

B. Specific Plans.

The undisputed record also proves that the eleven specific plans identified by the Homeowners' land use expert are similarly situated to the Homeowners, and that Metro treats the residents of those specific plans differently than the Homeowners. It is undisputed that the Metro Council can approve specific plans for uses that fit Metro's definition of a "home occupation." *See* R.658. It is also undisputed that Metro has enacted eleven specific plan ordinances, covering thirteen properties, to allow the service of clients in connection with a home occupation. *Id.* The Homeowners would highlight two of those specific plans here. The first, Metro. Ord. No. BL 2016-398, acknowledges in its text that its purpose is to spot-zone the two subject properties out of the Client Prohibition's scope. R.658-59. The other, Metro. Ord. No. BL 2005-816, legalized the residential hair salon pictured in the margin.[9]

[9] This record photograph was taken from the Metro Assessor's website:

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The only difference between the Homeowners and these eleven specific plans is Metro's caprice. The only basis Metro ever gave for exempting thirteen properties from the Client Prohibition was that the subject properties had "gone through a rezoning process" and had therefore "been purposefully taken out of the residentially zoned rules." R.736. *At no point* in its summary judgment briefing did Metro argue for exempting these properties from the Client Prohibition.[10] Nor did Metro identify any

R.662.

[10] Rather than defend the specific plans on the merits, Metro argued below that the Homeowners were precluded from invoking the specific plans by the Homeowners' decision not to challenge Metro's denial of the

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facts that distinguished these businesses from the Homeowners', instead simply speculating that "there *may* be plenty of parking [at the approved specific plan sites], it *may* be located near a busy road or commercial node . . . [or] it *may* be otherwise appropriate under the general plan and/or supported by neighbors." R.736 (emphasis added). But this speculation, even if correct, would not be enough, because the undisputed evidence shows that the Homeowners have plenty of parking, R.684, that Homeowner Raynor lives on a busy road, R.645, that Homeowner Shaw lives by an auto diesel college, R.644, and that the specific plan for the hair salon was enacted despite Metro planning staff's finding that it was *inappropriate* under the general plan. R.662. The evidence simply does not support Metro's assertions about the specific plans Metro has enacted to suspend the Client Prohibition.

C. Historic Home Events.

The undisputed record also proves that historic home events are similarly situated to the Homeowners, and that Metro treats historic home events differently than the Homeowners. It is undisputed that historic home events fit Metro's definition of a "home occupation." *See* R.676-77. It is also undisputed that Metro permits historic home events

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Homeowners' own specific plan applications in 2017. *See* R.2273. As the Homeowners replied below, R.2292, Metro cited no authority in support of this preclusion argument. In any event, Metro's preclusion argument misses the point: as the Chancellor noted, the Homeowners' suit is "an as-applied constitutional challenge to the Client Prohibition itself." R.2324.

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to serve a potentially unlimited number of daily clients. R.677. Metro argues that historic home events are necessary to incentivize the preservation of historically significant homes. R.634-35.

The age of the house in which a client is served is not a real and substantial difference justifying the selective prohibition of the Homeowners' clients. It is not germane to Metro's asserted reasons for prohibiting clients. Metro's argument ignores the undisputed evidence that historic home events pose traffic, parking, and noise concerns that the Homeowners' businesses do not. R.692.

This Court has ruled that historic home events—which have a greater neighborhood impact than the Homeowners' businesses—do not threaten "the public health, safety and welfare." *See Demonbreun v. Metropolitan Board of Zoning Appeals*, No. M2009-00557-COA-R3-CV, 2011 WL 2416722, at *8, 16–18 (Tenn. Ct. App. June 10, 2011). In *Demonbreun*, this Court ordered Metro to issue an event permit to a historic homeowner for up to six events per week, including "two large events each week over 40 guests." *Id.* at *4 n.7. This Court held that it was arbitrary for Metro to *deny* the permit, even though the homeowner's long history of violations included a daytime rental of the home "for a lengthy indoor meeting . . . which involved about twelve people." *Id.* at *2–3 & n.2.

D. Day Care Homes.

The undisputed record also proves that day care homes are similarly situated to the Homeowners, and that Metro treats day care homes differently than the Homeowners. It is undisputed that day care homes

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fit Metro's definition of a "home occupation." *See* R.675-76. It is also undisputed that Metro permits day care homes to serve up to 12 clients a day. R.676. Metro argues that "[c]aring for children in a home is entirely consistent with residential use." R.633-34.

The fact that day care homes serve children, rather than adults, is not a real and substantial difference germane to Metro's asserted reasons for prohibiting clients. The record establishes that day care homes pose greater traffic and parking concerns than the Homeowners' businesses. R.691. There is no rational basis for prohibiting the Homeowners from serving clients quietly when day cares may serve them openly.

* * *

From the public's perspective, there is no real and substantial difference between the Homeowners' clients and those of any of the four uses described in this Part—in fact, the record shows that the legalized uses are more disruptive than the Homeowners'. R.689-92. Based on the undisputed record, the Homeowners are entitled to summary judgment on their equal protection claim.

III. The Chancellor Erred in Granting Summary Judgment to Metro on the Homeowners' Substantive Due Process Claim.

The undisputed facts also prove the Homeowners' substantive due process claim. To survive, Metro's enforcement of the Client Prohibition must serve a legitimate interest—the public health, safety, morals or general welfare—and must not be oppressive. *Spencer-Sturla*, 290 S.W. at 612; *Consol. Waste*, 2005 WL 1541860, at *5 (quoting *Euclid*, 272 U.S. at 395). As shown above in Section I.C.1, Metro concedes there is no

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evidence that any legitimate interest is served by Metro's enforcement of the Client Prohibition against the Homeowners. Not only is such evidence absent, the Homeowners introduced affirmative evidence that their businesses do not threaten Metro's legitimate interests. The Homeowners therefore not only survive Metro's motion for summary judgment, they are entitled to summary judgment themselves.

The Chancellor "summarized" ten potential interests from the long list of assertions that Metro produced.[11] R.2321-22; *see also* R.677-79. The

[11] Those interests, as enumerated by the Chancellor, are:

- Protection and maintenance of the residential nature of residentially-zoned neighborhoods, with the tool of SP zoning to allow for limited exceptions.
- The difficulty of enforcing specific restrictions if the Client Prohibition were relaxed to allow some clients and patrons, including on evenings and weekends.
- The potential for additional criminal activity in neighborhoods with non-resident patrons coming to home-based businesses.
- Home-based business owners have options such as co-working spaces to meet with clients and there are plenty of opportunities for commercial tenancy in properties that are in commercially zoned areas.
- Increased parking and traffic congestion in areas not designed for commercial use will create problems for residents.
- Residential sidewalks are not designed for commercial foot traffic.
- Residential properties with home-based businesses are not taxed, nor are their utility rates set, at commercial rates, which is in inappropriate inconsistency from what commercial businesses pay operating on commercial properties.
- Disability accessibility standards are different for residential and commercial properties.

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Homeowners will address the record as it pertains to each of those ten interests in Sections III.A to III.J below.

A. Residential Nature of Residential Property.

Preserving the residential nature of neighborhoods is the only interest that Metro has consistently asserted throughout the course of this litigation. R.2127, 2131, 2134. Metro has struggled to articulate a basis for enforcing the Client Prohibition beyond "the residential nature of residentially-zoned property." *Id.*

The Homeowners do not doubt that residential zoning is a common and presumptively legitimate exercise of the police power. *See Euclid*, 272 U.S. at 386–89; *Spencer-Sturla*, 290 S.W. at 613. For example, Metro's interest in preserving residential nature would justify excluding a used-car lot from the midst of the Homeowners' neighborhoods. *See Varner*, 2001 WL 1560530, at *4. But it is a case-by-case inquiry. *E.g.*, *Tester*, 879 S.W.2d at 829 ("'Reasonableness' varies with the facts in each case.").

There is no rational relationship, however, between Metro's interest in residential nature and enforcing the Client Prohibition against the Homeowners. The Metro zoning code welcomes commerce in residential zones. Home businesses are legal. R.646. Deliveries are legal. *See* R.2135 (maintaining that "[d]elivery trucks and lawn care businesses" are

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- Property rates may escalate inappropriately because of the influence of commercial opportunities in residential areas.
- Residential communities with homeowner associations may have more difficulty enforcing their contracted for restrictions.

R.2321-22.

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welcome in residential neighborhoods). Piano lessons are illegal only at the piano teacher's home, not at the student's home—and even then, Metro's Rule 30.02(6) witness testified that if the home-based piano teacher "doesn't bother anybody, I'm not sure you have to turn her in." *Compare* R.651 *with* R.687-88. It is simply not Metro's goal to exclude commerce from residential neighborhoods.

The Metro zoning code also allows the widespread service of clients in residential homes, notwithstanding the Client Prohibition. *See above* Part II. If Metro's designated witness were correct that prohibiting clients is the "sine qua non" of residential zoning, *see* R.757—and of the ten most populated cities in Tennessee, Nashville is the *only* one with a client prohibition[12]—the Client Prohibition is so undercut by the rest of

[12] *See* Memphis, Tenn., Unif. Dev. Code § 2.7.4 (permitting up to four clients per hour for group instructions at a home occupation); Knoxville, Tenn., Code of Ordinances app. B, § 10.3(R) (permitting traffic generated by a home occupation so long as traffic is no greater in volume than would normally be expected in a residential neighborhood and parking is available off the street and the front yard); Chattanooga, Tenn., Code of Ordinances § 38-2 (permitting traffic generated by a home occupation when not disruptive to the neighborhood and does not create a nuisance or safety hazard); Clarksville, Tenn., Zoning Ordinance § 5.2.7 (authorizing the Board of Zoning Appeals to establish a maximum number of clients that may be served on a property where a home occupation is based on a case-by-case basis); Murfreesboro, Tenn., Zoning Ordinance app. A, § 9(D)(2)(rr) (permitting group instruction in connection with a home occupation subject to approval by the Board of Zoning Appeals); Franklin, Tenn., Zoning Ordinance § 4.1.6(6) (permitting instruction or counselling services at a home occupation for up to two clients at a time); Johnson City, Tenn., Zoning Code art. IV, § 4.13.5 (permitting clients at the residence of a home occupation if

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the Metro zoning code that it is an irrational way of accomplishing that goal.

Finally, destroying the Homeowners' businesses in the name of improving residential nature, when the Homeowners' underlying conduct is lawful—and indistinguishable to the senses from widely legalized short-term rental clients—is oppressive. All record evidence indicates that the Homeowners' businesses operated in harmony with the residential nature of their neighborhoods. They took care that their clients would not affect neighboring properties, R.688, as Metro conceded in its deposition, the Homeowners are "the two best plaintiffs" to challenge the Client Prohibition. R.684. They are not seeking to operate at odd hours, invite passing traffic to stop by, or engage in any business that would be incompatible with a residential neighborhood. Metro's interest in the residential nature of residential property has nothing to do with Lij's recording studio or Pat's hair salon.

B. Enforcement by Metro Codes.

Next, the Chancellor identified "[t]he difficulty of enforcing specific restrictions if the Client Prohibition were relaxed to allow some clients and patrons, including on evenings and weekends" as an interest the

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customers visit the property between 9:00 a.m. and 8:00 p.m.); Bartlett, Tenn., Zoning Ordinance art. VI, § 2 (permitting traffic generated by home occupation if traffic is no greater in volume than would normally be expected in residential neighborhoods and parking is available in rear or side yards); *cf.* Jackson, Tenn., Zoning Ordinance art. VI, § 7 (prohibiting clients "with the exception of teaching"); *see also* R.647-48 (comparable cities nationwide have no client prohibition).

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Client Prohibition might serve. R.2321. Below, Metro asserted that the Client Prohibition promotes "certainty" and conserves finite law-enforcement resources. R.681-82. Assuming that is an interest, the record shows that the Client Prohibition does not serve it. Rather, the Client Prohibition creates an enforcement problem that would not otherwise exist. By Metro policy, every reported violation of the Client Prohibition must be investigated. R.649. Forty to seventy percent of reported violations, however, are false. R.653. These complaints all consume Metro resources, and Metro concedes that if the Client Prohibition were *not* in Metro's home occupation ordinance, there would be "nothing to enforce." R.687. The Client Prohibition simply does not make Metro Codes' job easier. It is oppressive to enforce a law for the sake of having a law to enforce.

C. Crimes by Nonresident Clients.

The Chancellor then speculated about a "potential for additional criminal activity in neighborhoods with non-resident patrons coming to home-based businesses." R.2321. But the record shows that the Client Prohibition does not guard against criminal activity. *Cf.* R.680. Metro prohibits no class of prior offender from either obtaining a home occupation permit or from working as the nonresident employee of someone else's home-based business, and Metro has no evidence that the employment of prior offenders by home-based businesses has led to any increase in crime. R.685. Moreover, Metro concedes that its short-term rental ordinance places no restrictions on the prior criminal history of

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overnight guests. *Id.* In fact, Metro does not restrict the travel of unsafe people through residential neighborhoods at all. *Id.*

There is no reason to believe that the Homeowners' clients would threaten the safety of their neighborhoods. The Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 already accommodates the public interest in disclosing certain offenders' whereabouts to the public. Tenn. Code Ann. §§ 40-39-201 *et seq.*; *see also id.* § 40-39-206(d) (making certain offender-specific information, including license plates, public). The Homeowners also work by appointment only, and neither of them wish to invite violent or predatory clients into their homes. R.684. If the Homeowners prevail here, their clients would enter their neighborhoods to record music or have their hair cut—not to go about committing crimes. The Client Prohibition prevents only the former, and not the latter.

D. Opportunities for Commercial Tenancy.

There is no rational-basis significance to the Chancellor's (and Metro's) notion that "[h]ome-based business owners have options such as co-working spaces to meet with clients and there are plenty of opportunities for commercial tenancy in properties that are in commercially zoned areas." R.2321. The Chancellor's language here may refer to either of two assertions on Metro's list. The first is that "[t]here are alternatives (e.g. Weworks or rental of conference spaces) so that most home businesses can meet clients elsewhere." R.678. The second is that "[c]ommercial properties have or will have vacancies. They need tenants. Takes part of the market away from commercially zoned

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properties. Creates an unlevel playing field." *Id.* The homeowners will address these in turn.

The availability of alternative spaces is not an interest at all. It is a consolation, and an inadequate one at that. The Homeowners brought suit so that they would not *need* to rent alternative space in order to earn a living. R.2145, 2148-49. Even Metro conceded in its entity deposition that the Client Prohibition is "unrelated" to the availability of alternative space. R.686. Simply put, the government cannot justify a restriction on liberty by pointing to the fact that people remain free to do things that aren't prohibited.

Filling commercial vacancies by channeling would-be entrepreneurs into the rental market, meanwhile, constitutes an illegitimate interest in economic protectionism. Metro has repeatedly committed itself to the position that the Client Prohibition protects the interests of commercial landlords by "making sure that business owners who want to serve clients have to rent space in commercial districts." R.681. But economic protectionism is not a legitimate government interest. *Craigmiles*, 312 F.3d at 224 ("[P]rotecting a discrete economic group from economic competition is not a legitimate governmental purpose."); *Bean v. Bredesen*, No. M2003-01665-COA-R3-CV, 2005 WL 1025767, at *5 (Tenn. Ct. App. June 2, 2005). Both Homeowners set up their home-based businesses in order to secure their financial independence. R.644-45. Metro has no legitimate interest in making them pay rent to a commercial landlord.

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E. Traffic and Parking.

The Chancellor then noted Metro's position that "[i]ncreased parking and traffic congestion in areas not designed for commercial use will create problems for residents." R.2321. But traffic and parking concerns do not justify the Client Prohibition as applied to the Homeowners. The Chancellor found, against and without reference to the evidence in the record, that the Homeowners' clients "in any number" will "affect parking and traffic." R.2330. But as with residential nature, there is an impact threshold below which traffic and parking do *not* affect the neighborhood, and it is undisputed that the Homeowners' clients fall below that threshold in Nashville. Metro's own study of the Homeowners' rezoning applications, which were made in an attempt to obtain legal status before this suit was brought, confirms that the Homeowners' businesses would not impact neighborhood traffic. Metro planning staff's recommendation on traffic and parking was to *approve* both Lij's and Pat's home-based businesses. R.683.

As for traffic, the Homeowners want to serve the same number of daily clients—twelve—as a short-term rental or a day care home may serve (and fewer than historic home events may serve). This is well below the threshold at which Metro deems it necessary to conduct a traffic impact study. A client visiting a home business in her own car generates two "trips," as Metro measures it. R.683. But when a rezoning is proposed, Metro does not seek a traffic impact study unless the proposed use is estimated to generate 750 daily or 100 peak-hour trips. *Id.* Twelve home business clients, if Lij or Pat served that many and every client traveled

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by rideshare, would generate 48 trips *at most*; based on the lower volume of self-driving clients that Lij and Pat actually anticipate serving, Metro estimates that the clients would generate 10 and 16 trips per day. *Id.* That is a minuscule 1–2% of the 750-trip threshold at which Metro traffic policy would *ask for a study* of the clients' impact.

As for additional parking, the Homeowners' businesses require none at all. R.654, 656, 682. The Homeowners' driveways can accommodate their clients' vehicles, and Metro disclaims any interest in (and does not regulate) the consensual use of residential driveways for parking cars. R.684. Indeed, the only recommendation made by Metro planning staff, in approving the Homeowners' rezoning applications with respect to traffic and parking, was that the Homeowners provide adequate parking on their property. R.683. Both Lij's and Pat's driveways provide adequate parking. R.684. As with traffic, it is not possible that the Homeowners' clients will cause parking issues.

F. Pedestrians and Sidewalks.

Next, the Chancellor stated that "[r]esidential sidewalks are not designed for commercial foot traffic." R.2321. There is no reason to believe that the Client Prohibition is justified by the condition of Metro's sidewalks. In its entity deposition, Metro conceded that it is "not concerned with sidewalks" vis à vis the Client Prohibition. R.835. Other than to identify the potential interest, the Chancellor's opinion does not mention sidewalks. *See* R.2309-33.

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G. Administration of Tax and Utility Rates.

The Chancellor then speculated that "[r]esidential properties with home-based businesses are not taxed, nor are their utility rates set, at commercial rates, which is in inappropriate inconsistency from what commercial businesses pay operating on commercial properties." R.2321. This is wholly within Metro's control, and an oppressive justification for banning home-based business clients. The Chancellor found, against and without reference to the evidence, that these "are very valid legislative concerns." R.2331. But there is no evidence that the Client Prohibition eases any burden on the Metro tax assessor or on Metro's various utilities. Metro concedes that its assessor has no trouble characterizing existing home occupations as residential property for tax purposes. R.686. Metro also concedes that it could modify taxes for home occupations, R.841-42, and does not know whether its assessor has had any trouble characterizing short-term rentals, day care homes, or historic home events, R.842. Metro also does not know how it charges electric, water, or stormwater rates to existing home occupations, short-term rentals, day care homes, or historic home events. R.686. Metro's concerns here are unfounded.

H. Access by the Disabled.

Next, the Chancellor wrote that "[d]isability accessibility standards are different for residential and commercial properties." R.2321. This too is an oppressive justification for prohibiting home-based business clients, and unsupported by the record. There is neither a Metro ordinance nor a Tennessee statute regarding disability access that would apply to the

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Homeowners' businesses *even if they were located in a commercial district*. R.685 (Metro has no disabled-persons act); *see* Tenn. Code Ann. §§ 8-50-103 to -104 (Tennessee Disability Act does not regulate disability access and also exempts private businesses with fewer than eight employees). The only applicable law is the federal Americans with Disabilities Act, which would require the Homeowners to do whatever is "readily achievable" or does not impose an "undue burden" in order to accommodate disabled clients. *See* 42 U.S.C. § 12182(a) (prohibition on discrimination); *id.* § 12182(b)(2)(A) (specific prohibitions); 28 C.F.R. § 36.104 (defining "readily achievable" and "undue burden" similarly); 28 C.F.R. § 36.207 (clarifying that home occupations are subject to the ADA). But Metro plays no role in enforcing the ADA. Metro cannot justify the Client Prohibition as enforcing a standard that Metro does not actually enforce.[13]

I. Property Price Inflation.

The Chancellor then speculated that "[p]roperty rates may escalate inappropriately because of the influence of commercial opportunities in residential areas." R.2321-22. But there is no evidence in the record to support this, nor any reason to believe it to be true. The Homeowners'

[13] Even if the Homeowners *were* subject to a disability-access requirement that Metro enforced, Metro could identify no evidence that the Homeowners' businesses would pose a danger to the Homeowners' clients, whether disabled or not. R.832-33; *see* R.718-19 (citing this fact). The Chancellor failed to note this fact when she implied, without reference to the evidence in the record, that the Client Prohibition "ensur[es] that businesses who invite the public onto their property comply with accessibility requirements." R.2331.

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businesses are accessory uses, subordinate to their primary use of residing there, and it is oppressive for Metro to cite it as a justification for enforcing the Client Prohibition when Metro gives thousands of other businesses the "commercial opportunities" it denies to the Homeowners. *See above* Part II. Moreover, Metro has no legitimate interest in forcing the Homeowners to sell. Metro claims a need to alleviate the "crowd[ing] out [of] residential purchasers," R.679, but the Homeowners *are* residential purchasers. They want to stay in their homes, and the Client Prohibition is a barrier to their doing so. R.692-93. The Client Prohibition is oppressive in crowding the Homeowners out of their own homes.

J. Enforcement by HOAs.

The last item noted by the Chancellor was that "[r]esidential communities with homeowner associations may have more difficulty enforcing their contracted for restrictions." R.2322. But the private concerns of HOAs—to which neither Homeowner belongs—are an oppressive justification for prohibiting the Homeowners from having clients. HOAs are private entities whose interests are independent from the *public* health, safety, morals, or welfare. Even if the enforcement priorities of HOAs *did* implicate the public health, safety, morals, or welfare, Metro could require client-serving home occupations to submit a statement of compliance with any applicable HOA restrictions. Metro already requires such a statement from short-term rental applicants. Metro. Code § 17.16.250(E)(2)(v). The Client Prohibition does not reasonably help HOAs enforce their private agreements when thousands

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of residents have a right to disregard the Client Prohibition by hosting their clients overnight and submitting a simple statement.

CONCLUSION

The facts matter, and the Chancellor erred by disregarding them. As applied to the Homeowners, the Client Prohibition is oppressive, not reasonably related to any legitimate interest, and is based on no real and substantial difference between the Homeowners and the thousands of Metro residents whom Metro permits to serve clients in their homes. The Homeowners respectfully ask this court to REVERSE, or alternatively to VACATE and REMAND, the judgment of the Chancellor.

Dated: April 30, 2020

Respectfully submitted,

s/ Keith E. Diggs

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CERTIFICATE OF E-FILING COMPLIANCE

I certify that this brief complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02. My word processing system indicates that the sections of the brief subject to the 15,000-word limitation contain 14,176 words.

s/ Keith E. Diggs
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PROOF OF E-SERVICE

I certify that by filing this brief through the Court's e-filing system, I caused automatic e-service on Metro counsel, who is a registered user. *See* Tenn. Sup. Ct. R. 46, §§ 1.01, 3.02, 4.01.

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