IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CASE NO. M2019-01926-SC-R11-CV

ELIJAH "LIJ" SHAW, **ET AL.**, Plaintiffs/Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant/Appellee.

On Application Pursuant to Tenn. R. App. P. 11

Tennessee Court of Appeals Case No. M2019-01926-COA-R3-CV

Chancery Court for Davidson County Case No. 17-1299-II

PLAINTIFFS/APPELLANTS' BRIEF ON THE MERITS

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellants Elijah "Lij" Shaw and Patricia "Pat" Raynor (the "Homeowners") timely applied, pursuant to Tenn. R. App. P. 11, for permission to appeal the judgment of the Tennessee Court of Appeals. This Court granted the application on July 12, 2021.

ISSUES PRESENTED FOR REVIEW

1. Did the Metropolitan Government of Nashville & Davidson County ("Metro") make it "absolutely clear" that its unequal prohibition of home-business client visits "cannot be reasonably expected to recur" when (a) Metro replaced the challenged prohibition after the Homeowners filed their appellate brief with a temporary ordinance that continues to restrict home-business client visits unequally, and (b) Metro has not disavowed enforcing the challenged prohibition again when the temporary ordinance expires? *See Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 205 (Tenn. 2009).

2. Does the Tennessee Constitution allow Metro to prohibit the Homeowners' home-business clients, when an undisputed record shows that thousands of other Metro homeowners may host noise-, traffic-, parking-, trash-, and lewdness-generating home-business clients while the Homeowners' clients cause no harm at all? *See, e.g., State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) ("*There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification*.") (citation omitted).

STATEMENT OF THE CASE

Homeowners have lived and worked in their Nashville homes for years. Lij Shaw, a record producer, has a home-based recording studio which yielded a Grammy Award.[1] Pat Raynor, a licensed cosmetologist, had a single-chair, state-licensed, residential hair salon. Both were cited by Metro for violating its "Client Prohibition." R. 644-45, 647-48, 653-57. Under the Client Prohibition, "home occupations," which include any "occupation, service, profession or enterprise" conducted inside a home by its resident, R.646, 657, were prohibited from serving any clients at the home. R.643-45, 647. But the Client Prohibition never applied to thousands of other home-based businesses, which Metro privileged to serve twelve or more clients a day. R.674-77.

Homeowners filed suit against Metro in the Chancery Court for Davidson County on December 5, 2017, seeking declaratory and injunctive relief and challenging the constitutionality of the Client Prohibition as applied to them. R.25. Homeowners' Complaint states substantive due process and equal protection claims under the Tennessee Constitution. Tenn. Const. art. I, § 8 (prohibiting deprivations of "liberty or property" except in accordance with the "law of the land"); *id.* art. XI, § 8 (guaranteeing equal "rights, privileges, immunitie[s], or exemptions"). Homeowners' substantive due process claim asserts that the Client Prohibition does not reasonably serve the public health, safety, morals, or welfare as applied to their businesses. Homeowners' equal protection

[1] Mike Farris, *Shine for All the People* (Compass Records 2014), *mixed at* The Toy Box Studio.

claim asserts that there is no real and substantial difference between Homeowners' businesses and the thousands of privileged home-based businesses that Metro allows to serve clients.

Following discovery, Homeowners and Metro cross-moved for summary judgment. R.618, 640-42. The Chancellor granted summary judgment for Metro and denied it to Homeowners in an opinion that does not cite the "voluminous materials" in the record, yet found that the Client Prohibition "has a rational relationship to the public safety, health, morals, comfort, and welfare" as applied to Homeowners. R.2309-34.

Homeowners timely filed their notice of appeal on October 28, 2019. R.2335. After Homeowners filed their opening brief in the Court of Appeals, Metro enacted Ordinance No. BL2019-48, which amended the Client Prohibition with a temporary ordinance that sunsets on January 7, 2023. APP017-28. Metro moved to dismiss the appeal as moot, and Homeowners opposed the motion.

On February 11, 2021, the Court of Appeals dismissed the appeal as moot and remanded to the Chancery Court to vacate the judgment and dismiss the case. APP001-10. Accordingly, the court did not address the merits of Homeowners' claims.

Homeowners timely applied for permission to appeal pursuant to Tenn. R. App. P. 11. This Court granted Homeowners' application on July 12, 2021.

STATEMENT OF FACTS

Homeowners are long-time Nashville residents who ran successful businesses from their homes until Metro ordered them to stop.

Since 2005, Lij, a single father and record producer, has had a professional-quality recording studio in his renovated, detached garage called The Toy Box Studio. R.644. His purpose in building his studio was to earn a living from home while raising his daughter. *Id.* For ten years, Lij earned a living by recording musicians in his studio. *Id.*

In 2013, Pat, an elderly widow and licensed cosmetologist, secured a state license to operate a single-chair residential salon in her renovated garage. R.645. Her purpose in building her home salon was to earn a living without needing to commute or pay commercial rent as she got older. *Id.* For seven months, Pat earned a living by cutting her clients' hair in her licensed residential shop. *Id.*

It is legal for Homeowners to have a home recording studio or home hair salon. R.644-45. But as discussed below, Metro ordered Homeowners to close their home-based businesses because they had clients at their businesses. R.643-44.

I. The Client Prohibition.

The Client Prohibition was one of several provisions in the Metro Code governing "home occupations."[2] Metro defines a "home occupation" as any "occupation, service, profession or enterprise carried on by a

[2] Because this is an as-applied challenge, this brief first sets out how Metro applied the Client Prohibition to Homeowners, then discusses recent amendments to the regulations.

resident member of a family within a dwelling unit." Metro Code § 17.04.060(B); R.646. Three elements define a home occupation: (1) takes place inside a home, (2) is conducted by a resident, and (3) includes any "business." R.657. Home occupations are legal "as an accessory use to a residence," subject to several restrictions. R.646, 657; Metro Code § 17.16.250(D). Homeowners have always met all the home occupation requirements except for the Client Prohibition. R.646-47.

When Homeowners filed their Complaint, the Client Prohibition provided that "[n]o clients or patrons may be served on the property" of a home occupation. R.647. The Client Prohibition applied only to the property where the home occupation is based; Metro residents may serve clients at the clients' homes. *Id*.

II. Enforcement of the Client Prohibition Against Homeowners.

The Client Prohibition is only enforced in response to complaints, of which 99% are anonymous. R.648, 652-53. Metro officials testified that complaints are not evidence that the Client Prohibition has been violated. R.649. In Metro's experience, 40-70% of complaints are false. R.653. Neighbors often report complaints purely out of spite. R.653, 686.

Metro received an anonymous complaint about Pat in 2013. R.653. Metro does not know who submitted the complaint or why. *Id*. Metro's inspector only observed two women in Pat's driveway with "freshly co[i]ffed hair." R.653-54. The inspector 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 nevertheless ordered Pat to stop seeing clients at her home salon, and Pat complied. R.654-55.

Metro received an anonymous complaint about Lij in 2015. R.655. Metro does not know who submitted the complaint or why. R.656. No inspector ever visited Lij's property or observed any traffic, parking, noise, vibration, smoke, dust, odor, heat, humidity, glare, or any other objectionable effects at the property. *Id*. Metro nevertheless ordered Lij to stop recording musicians at his home studio, and Lij complied. R.656-57.

III. Homeowners Do Not Harm Their Neighborhoods.

The undisputed record demonstrated that no link existed between enforcing the Client Prohibition against Homeowners and any legitimate interest identified by Metro. Metro testified that the only potential evidence of such a link is the two anonymous complaints. R.682. But the complaints alleged no harm; they reported only that Homeowners' businesses existed, R.653-57. Metro officials also testified that the complaints evince no harm to the neighborhood. R.649, 682.

The record further demonstrated that:

- There was no evidence that Homeowners' businesses were unsafe. R.682.
- Metro's public works department evaluated the traffic and parking impact of Homeowners' businesses and recommended their approval with the sole condition that adequate parking be provided onsite. R.683.

- Homeowners' private driveways accommodate their clients' cars. R.684.
- Metro denied that the Client Prohibition is related to noise control, R.680; regardless, both Homeowners' businesses comply with Metro's noise ordinance. R.688-89.
- Metro concedes that low-impact businesses that violate the Client Prohibition—like Homeowners'—should not be turned in. 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*.

IV. Exceptions to the Client Prohibition.

While Homeowners were prohibited from having any clients, thousands of privileged home-based businesses had (and still have) the right to have twelve or more clients daily. R.657-77. Among the privileged home-based businesses are (1) thousands of owner-occupied short-term rentals; (2) at least thirteen residential homes spot-zoned into "specific plan" ("SP") districts to allow client-serving home occupations on an ad hoc basis; (3) commercial events at "historic" residential homes; and (4) residential day cares. Each of these businesses fit Metro's definition of a "home occupation," R.658, 674-77, but Metro does not subject them to the Client Prohibition because it applies different ordinances to them.

First, Metro allows owner-occupied short-term rentals such as Airbnb as an accessory use. R.675. Short-term rentals may serve up to

twelve clients at a time. R.674-75. Any homeowner within Metro's jurisdiction can obtain such a permit, and as of 2018, there were 4,653 permitted owner-occupied short-term rentals in Nashville, of which 3,001 were active. R.675. The uncontested record shows that these short-term rentals detract from the residential nature of their neighborhoods and cause noise, traffic, parking, trash, and "general lewdness" problems, all to a greater degree than home recording studios or salons. R.690-91.

Metro also enacts SPs as "an alternative zoning process that may permit any land use[]." R.657. In at least eleven ordinances, covering thirteen properties, Metro has used SPs to allow clients or patrons to be served in residential homes. *See* R.658-74. One such SP property is a residential hair salon. R.662.

Similarly, Metro allows historic home events as a use by special exception. R.677. Metro has granted seven permits for historic home events to operate by serving clients in residential districts. R.676-77. The uncontested record shows that 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 may serve up to twelve clients a day. R.675-76. Metro has granted eleven special exception permits for day care homes to operate in residential districts. R.676. Day care homes cause traffic and parking issues, both to a greater degree than home recording studios or home hair salons. R.691.

V. The Client Prohibition As Amended.

After Homeowners filed their opening brief in the Court of Appeals, Metro enacted Ordinance No. BL2019-48. APP017-28. This ordinance temporarily amended the Client Prohibition and other parts of the home occupation ordinance, which remains codified at Metro Code § 17.16.250(D). Metro now allows certain additional kinds of home occupations—including Homeowners'—limited customer visits. *Id*. at § 17.16.250(D)(3); APP024-25. Homeowners may now have "no more than three [client] visits per hour and a maximum of six total visits per day" (the "Six-Visit Rule") only by scheduled appointment between the hours of 8:00 a.m. and 7:00 p.m., Monday through Saturday, and must "maintain and make available to [Metro] a log or register of customer appointments for each calendar year." *Id*. at § 17.16.250(D)(3); APP024.

Following adoption of Ordinance No. BL2019-48, two legal detriments continue to exist for Homeowners, as is more fully discussed below. First, Ordinance No. BL2019-48 did not affect client limits at owner-occupied short-term rentals, SPs, historic home events, or residential day cares, all of which can continue to have more than six clients per day. Second, the new ordinance, including the Six-Visit Rule, "expire[s]" on January 7, 2023. APP017. It is not clear what the effect of this expiration will be on the Client Prohibition and, pointedly, Metro refuses to say whether Homeowners will be allowed to serve clients after that.

SUMMARY OF ARGUMENT

The Court of Appeals erred in determining that this case is moot. Metro's temporary amendment of the challenged ordinance, adopted while this case was on appeal, cannot moot Homeowners' claims. As Metro effectively concedes, it is not "absolutely clear" that the Client Prohibition will not be enforced when the amendment expires. Moreover, the amendment still discriminates against Homeowners compared to the privileged home-based businesses. Regardless, the public has an interest in knowing how its constitutional rights are affected by the Client Prohibition. Accordingly, this Court should address the merits of Homeowners' case.

On the merits, this Court should grant summary judgment to Homeowners. Homeowners built a substantial factual record—293 uncontested material facts with supporting materials—demonstrating the unconstitutionality of Metro's restrictions on clients at Homeowners' businesses. Rather than consider these facts, the Chancery Court followed Metro's assertion that "the particular facts of this case are largely irrelevant," R.2309, and granted summary judgment to Metro. Under the Tennessee Constitution's due process and equal protection guarantees, restrictions on Homeowners' rights must be determined with regard to the facts of the case. The uncontested facts ignored by the Chancery Court below demonstrate the unconstitutionality of the Client Prohibition.

For these reasons, this Court should REVERSE and grant summary judgment to Homeowners. At a minimum, this Court should VACATE and REMAND with instructions to consider these facts.

STANDARD OF REVIEW

The issues raised here are questions of law, which are subject to de novo review, and the Court owes no presumption of correctness to the lower courts' decisions. *Seals v. H & F, Inc.*, 301 S.W.3d 237, 241 (Tenn. 2010). "[W]hether a case is moot is a question of law." *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 338-39 (Tenn. Ct. App. 2005). 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). Moreover, "[i]ssues of constitutional interpretation are questions of law, which [this Court] review[s] de novo without any presumption of correctness given to the legal conclusions of the courts below." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

ARGUMENT

I. METRO'S TEMPORARY, INCOMPLETE AMENDMENT TO THE CLIENT PROHIBITION HAS NOT MOOTED HOMEOWNERS' CASE.

Metro's amendment of the Client Prohibition, made during the pendency of this litigation, does not save Metro's regulation from judicial scrutiny. First, Metro's amendment provides, at best, only temporary relief with no guarantee that it won't enforce the Client Prohibition against Homeowners in the future. Second, Metro continues to

discriminate against Homeowners relative to the similarly-situated-but-privileged home-based businesses. Third, the public interest exception to mootness demands the exercise of jurisdiction here.[3]

A. It is not absolutely clear that Metro will not enforce the Client Prohibition against Homeowners once the temporary ordinance expires.

Metro's sunsetting amendment cannot moot this case because it is just a temporary pause in enforcement of the Client Prohibition. A temporary amendment does not moot a challenge to the amended provision because, if the legislature "takes no further action," the challenged provision "will again be the law," meaning the amendment is just a "temporary halt." *Renee v. Duncan*, 686 F.3d 1002, 1015-16 (9th Cir. 2012) (holding that challenge to a statutory provision was not mooted by Congressional amendment of the provision because the amendment had an expiration date). Metro has repeatedly refused to say that Homeowners can continue to operate free of the Client Prohibition once its temporary ordinance expires in January 2023. Metro's amendment is just a temporary halt—voluntary cessation—that does not moot Homeowner's case.

Where a defendant asserts mootness based on voluntary cessation, dismissal is appropriate only "when it is absolutely clear that the allegedly wrongful conduct cannot be reasonably expected to recur."

[3] Mootness is not a constitutional standard in Tennessee. *Norma Faye*, 301 S.W.3d at 202. Instead, Tennessee courts observe mootness only as a "self-imposed rule[] to promote judicial restraint and to provide criteria for determining whether the courts should hear and decide a particular case." *Id.*

Norma Faye, 301 S.W.3d at 205. "This standard purposely places a heavy burden on the party attempting to convince a court that its voluntary cessation of allegedly illegal conduct has mooted the case." *Id.* This "heavy burden" applies to all parties who claim mootness by voluntary cessation, both the government and private parties, because this Court, "wary of adopting an approach to mootness through voluntary cessation that treats government litigants and private litigants differently," has rejected applying a less stringent standard to government voluntary cessation. *Id.* at 206 (citing and rejecting various cases that have viewed voluntary cessation by governmental actors with "more solicitude" than by private parties). Instead, this Court has made clear that "the burden of persuading a court that a case has become moot as a result of the voluntary cessation of the challenged conduct is and remains on the party asserting that the case is moot." *Id.* But where the party asserting mootness by voluntary cessation is a government actor, the Court may, "if justified by the circumstances of the case," shift the burden of proof to the party opposing mootness. *Id.*

The Court of Appeals below ignored this Court's rule. The court determined that *Norma Faye* "does not provide guidance as to what circumstances would justify shifting the burden" to the party opposing mootness and instead adopted the government privilege this Court rejected in *Norma Faye*. APP006-07 (citing federal decisions that treat government voluntary cessation with "more solicitude"). Instead of following *Norma Faye*, the court shifted the burden to Homeowners without any justification under the circumstances of the case. Pointing to

the temporary ordinance, the court concluded that Metro was "entitled to a presumption that it acted in good faith unless 'there are clear contraindications that the change is not genuine.'" APP009 (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019)). But as this Court explained in *Norma Faye*, voluntary cessation alone is not sufficient to shift the burden to the party opposing mootness. It must be accompanied by some *additional* statement or pattern of behavior that makes it "absolutely clear that the allegedly wrongful conduct cannot be reasonably expected to recur." 301 S.W.3d at 205. The Court of Appeals' failure to apply *Norma Faye* allows the burden-shifting exception to swallow this Court's rule, essentially always shifting the burden of proof to the opposing party, even where the government voluntarily, temporarily, ceases, but does not disclaim, its allegedly wrongful conduct.

The facts of *Norma Faye* illustrate the Court of Appeals' error. In *Norma Faye*, governments sought to condemn an owner's interest in land targeted for development. *Id.* at 200. When the governments filed the condemnation petition, they had yet to obtain a certificate of public purpose and necessity, which the owner argued violated state law. *Id.* at 200-01. While the case was on appeal, both governments voted to excise the owner's parcel from the development project and moved to dismiss the appeal as moot. *Id.* at 202. But the governments refused to "abandon[] their belief" that they had not violated state law and maintained at argument that they could file such actions "without first obtaining the certificate." *Id.* at 207. Despite finding that it was "clear that the [governments] will not try again to acquire the disputed property . . .

without first obtaining a certificate," this Court held the case was not moot because the governments had not "completely and permanently abandoned the challenged practice." *Id.* at 207.

As in *Norma Faye*, Metro has not "completely and permanently abandoned" the Client Prohibition because Metro refuses to make "absolutely clear" that it will not enforce the Client Prohibition against Homeowners once the temporary amendment expires. Indeed, at every opportunity, Metro has refused to say that Homeowners' businesses will be legal upon expiration:

- When the temporary ordinance was adopted, a Metro Council attorney stated that the sunset provision could cause "what was in place at the time this bill passed"—the original Client Prohibition—to go back into effect, but also that there may need to be "some kind of new legislative action, or otherwise home occupations would just go away entirely," MetroNashville, 07/07/20 Metro Council Meeting, https://youtu.be/wPJXMTu9dbE?t=23615 at 6:33:35-6:34:12 (Metro Council attorney Jon Cooper answering question from Councilmember Burkley Allen);
- In an email exchange with Homeowners' counsel, a Metro attorney refused to "bind Metro on this subject" but hypothesized that the original Client Prohibition would go back into effect, APP011-16;
- In Metro's opposition to Homeowners' Rule 11 Application, Metro admitted that "it is not clear what the possible [operation of the sunset provision] would mean – does it mean that the previous prohibition on client visits returns? Or, more likely, is the ordinance then silent as to client visits?" Metro Br. Opp'n 6.

Because Metro continues to hold open the possibility of enforcing the Client Prohibition against Homeowners once the temporary

ordinance expires, it cannot be absolutely clear that the Client Prohibition has been completely and permanently abandoned. *See also Renee*, 686 F.3d at 1015-16 (sunsetting amendment does not moot case). This case is, therefore, not moot.

B. Metro still discriminates against Homeowners.

Not only does this new ordinance shortly expire, it still treats Homeowners worse than the privileged home-based businesses. Homeowners are now permitted to see up to six clients per day at their home-based business. Metro Code § 17.16.250(D)(3); APP024. But owner-occupied short-term rentals, SPs, historic home events, and day care homes were not affected by the amendment and are still permitted to serve twelve or more clients per day. R.675. To be sure, Metro's temporary ordinance treats Homeowners better than the Client Prohibition did. But even in federal court, mootness is "justified only if it were absolutely clear that the litigant no longer had *any need* of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (emphasis added). "As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added) (quotation marks omitted). Tennessee courts follow this same rule. *Norma Faye*, 301 S.W.3d at 203 & n.3 (Tennessee courts generally follow federal justiciability doctrines, even though not constitutionally required).

The Court of Appeals confused Metro's partial (and temporary) change in enforcement with complete cessation. But just as a defendant

in a breach-of-contract action cannot moot the case by providing the plaintiff with half of the agreed-upon goods, services, or payments, Metro cannot moot this case by treating Homeowners half as well as is constitutionally required. Six clients is not twelve clients. Homeowners still seek to be treated the same as the similarly-situated-but-privileged home-based businesses, and Metro's ordinance still fails to treat them equally. Because an order from this Court can still provide Homeowners the relief they seek, this case is not moot.

C. The public interest exception applies because property rights are an important public interest.

The public interest exception to mootness also applies to this case because property rights are an important public interest. As explained in *Norma Faye*, invoking the public-interest exception first requires overcoming four threshold considerations:

> (1) the public interest exception should not be invoked in cases affecting only private rights and claims personal to the parties; (2) the public interest exception should be invoked only with regard to 'issues of great importance to the public and the administration of justice'; (3) the public interest exception should not be invoked if the issue is unlikely to arise in the future; and (4) the public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in the earlier proceedings.

Id. at 210-11 (internal citations omitted). Where these threshold considerations recommend application of the public interest exception, courts then "balance the interests of the parties, the public, and the courts to determine whether the issues in the case are exceptional enough

to address." *Id.* at 211. In making this determination, courts are to consider the following:

> (1) the assistance that a decision on the merits will provide to public officials in the exercise of their duties, (2) the likelihood that the issue will recur under similar conditions regardless of whether the same parties are involved, (3) the degree of urgency in resolving the issue, (4) the costs and difficulties in litigating the issue again, and (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependent.

Id. (internal citations omitted). This Court analyzed the threshold considerations and the balancing factors together in *Norma Faye*, so Homeowners will do the same. *See id.* at 211-12.

First, this case "transcends the private concerns of the parties and implicates important public rights" because Homeowners seek to exercise their right to practice common, harmless businesses on their own property. These property rights are "woven into the fabric of our law" and "also recognized and protected by Article I, Section 8 of the Constitution of Tennessee." *Id.* at 212.

Second, Metro's Client Prohibition has never been subject to constitutional review. Determining whether the Client Prohibition is constitutional as applied to Homeowners will therefore "assist the public officials in the discharge of their statutory duties and will eliminate . . . continuing uncertainty regarding this issue." *Id.*

Third, there is "substantial probability that conduct similar to that which gave rise to the dispute in this case will recur." *Id.* Metro has held open the possibility of enforcing the Client Prohibition against Homeowners once the temporary ordinance sunsets in 2023. *See* Part

I.A., *supra*. Indeed, certain home-based businesses remain privileged over Homeowners. *See* Part I.B., *supra*.

Finally, the constitutionality of the Client Prohibition is a mixed question of law and fact. Homeowners assembled a thorough and robust record in the trial court, and that record "contains all that is required to address the issue fully and definitively." *Norma Faye*, 301 S.W.3d at 212.

For these reasons, even if this case would ordinarily be mooted—and it has not been—the public interest exception to mootness applies.

* * *

For the foregoing reasons, the Court of Appeals erred in ruling that Homeowners' case was moot. Homeowners' claims are not moot because it is not "absolutely clear" that Metro has "completely and permanently abandoned" the Client Prohibition given its repeated refusal to deny that the Client Prohibition will be enforced against Homeowners once the new ordinance sunsets. Metro also continues to discriminate against Homeowners compared to the privileged home-based businesses. Finally, the public has an important interest in the resolution of Homeowners' claims. Accordingly, this Court should address the merits of Homeowners' case.

II. METRO'S RESTRICTIONS ON CLIENTS AT HOMEOWNERS' BUSINESSES VIOLATE THE TENNESSEE CONSTITUTION.

Metro's restrictions on clients at Homeowners' businesses violate both the due process and equal protection guarantees of the Tennessee Constitution. Tennessee's "law of the land" provision, Tenn. Const. art. I, § 8, protects Tennesseans' rights to due process under law. *Burford v.*

State, 845 S.W.2d 204, 207 (Tenn. 1992). This includes "substantive due process," which "bars oppressive government action regardless of the fairness of the procedures used to implement the action." *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 409 (Tenn. 2013). Two provisions of the Tennessee Constitution, Article I, § 8 and Article XI, § 8, "encompass the equal protection guarantee." *Tester*, 879 S.W.2d at 827. These two provisions "together[] guarantee equal privileges and immunities for all those similarly situated." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

First, elevated scrutiny should apply here because this Court has recognized that the rights to earn a living and to use and enjoy their property are fundamental. Second, even if elevated scrutiny does not apply, Tennessee due process and equal protection scrutiny are more protective of individual rights than their federal equivalents, and this Court's standards predate the minimal protections of federal rational basis. Third, facts have always mattered under Tennessee standards, Metro's argument that facts don't matter would upend these long-time standards, and the Chancery Court erred by ignoring the substantial factual record built by Homeowners. Finally, Homeowners' uncontested record demonstrates that they are entitled to summary judgment under this Court's long-time standards because their clients do not harm Homeowners' neighborhoods, do not implicate any of the claimed interests alleged to support the Client Prohibition, and affect those interests—if at all—to a lesser extent than the similarly-situated businesses, which are nevertheless privileged to have double, or more, the number of clients that Homeowners are allowed.

Given these uncontested facts, this Court should reverse and award summary judgment to Homeowners. At a minimum, this Court should remand with instructions to consider these facts.

A. Elevated scrutiny applies to Homeowners' fundamental rights to earn a living and to use and enjoy their property.

This Court should apply elevated scrutiny to the Client Prohibition. Under both substantive due process and equal protection analysis, this Court applies elevated scrutiny when fundamental rights are implicated. *E.g.*, *Mansell*, 417 S.W.3d at 409, *Tenn. Small Sch.*, 851 S.W.2d at 152. A form of elevated scrutiny—strict or intermediate—is appropriate here because Metro's Client Prohibition (both originally and as amended) intrudes on two rights recognized as fundamental by this Court.[4]

First, this Court recognized the right to earn a living as fundamental in *Livesay v. Tennessee Board of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959). In *Livesay*, this Court declared unconstitutional a restriction on repairing watches and clocks because it infringed on the "inherent property right" to pursue an occupation. 322 S.W.2d at 211. This Court recognized that "[t]he right to engage in work of one's own choosing is a fundamental one," *id.* at 213

[4] Zoning laws that infringe on fundamental rights are also subjected to elevated scrutiny by the federal courts. *E.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (zoning laws infringing on the fundamental right of family privacy are subject to elevated scrutiny); *Drummond v. Robinson Twp.*, No. 20-1722, __ F.4th __, __, 2021 U.S. App. LEXIS 24511, at **16-19 (3d Cir. Aug. 17, 2021) (zoning laws limiting exercise of Second Amendment rights, such as restrictions on gun stores and shooting ranges, require elevated scrutiny).

(quoting 34 A.L.R.2d 1326), and that watchmaking was an "old and 'innocuous' occupation," *id.* Because there was no evidence that restricting the occupation "promote[d] the general welfare or protect[ed] the public morals, health or safety, or [had] any real tendency to those ends," the restriction deprived the challenger "of a valuable property right without due process of law," and it was this Court's "plain duty . . . to adjudge [it] unconstitutional." *Id.* (citation omitted).

Second, this Court recognized that the right to own, use, and enjoy property is fundamental in *Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (Tenn. 2012). In *Hughes*, this Court determined that "[a] property owner's right to own, use, and enjoy private property is a fundamental right" such that restrictions on use—even private restrictions—are "not favor[ed] . . . because they are in derogation of the rights of free use and enjoyment of property." *Id.* at 474-75. This Court recognized the long-standing rule that a landowner "'may use his land according to his own judgment, without being answerable for the consequences to an adjoining owner, unless by such occupation he either intentionally or for want of reasonable care and diligence inflicts upon him an injury.'" *Id.* at 474 (quoting *Humes v. Mayor of Knoxville*, 20 Tenn. (1 Hum.) 403, 407 (1839)).[5]

Here, Metro's code infringes on Homeowners' fundamental rights to earn a livelihood and to use and enjoy their property. Homeowners use

[5] This Court allowed the restrictive covenants in *Hughes* because they arose from contractual transactions and, under contract law, the Court would not allow a party to escape contractual restrictions even if they restricted property rights. 387 S.W.3d at 475-76.

their property—their homes—to make their livings. Lij makes his living as a record producer in his home recording studio. R.644. Working from home allows Lij to both earn a living and raise his daughter. *Id.* Pat makes a living from her home as a state-licensed cosmetologist with a state-licensed, single-chair residential salon. R.645. Working from home allows Pat, an elderly widow, to earn a living without the need to commute or pay commercial rent as she ages. *Id.* Although these occupations are harmless and legal, Metro forced Homeowners to shutter their home-based businesses because they had clients. R.644-45.

Because Metro's Client Prohibition implicates Homeowners' fundamental constitutional rights, this Court should apply elevated scrutiny. For the reasons set out below, however, Metro's Client Prohibition fails even the lowest level of constitutional scrutiny this Court applies. Accordingly, Homeowners should "be found to prevail" and this Court may not need to engage in "further analysis" under an elevated standard. *Tenn. Small Sch.*, 851 S.W.2d at 153.

B. Tennessee rational basis meaningfully protects rights and differs from federal rational basis.

Even if elevated scrutiny does not apply here, the Tennessee Constitution still mandates meaningful judicial scrutiny. This Court has recognized significant textual and historic differences between the Tennessee and federal constitutions and insisted that the state constitution is more protective than the federal one in some respects. Other state supreme courts, interpreting constitutional provisions similar to Tennessee's, have said their due process and equal protection guarantees are more protective than federal law. Even though this Court

has called Tennessee due process and equal protection practically synonymous with their federal counterparts, this Court has long applied different "rational basis" standards than the federal courts do because the Tennessee standards predate the adoption of federal rational basis.

1. The Tennessee Constitution does not relegate Tennessee citizens to the lowest levels of constitutional protection.

The Tennessee Constitution's distinct history and text differ in application from the federal constitution in some respects. Although this Court has said that some Tennessee constitutional provisions are practically synonymous with their federal counterparts, this Court has also recognized that those Tennessee provisions are more protective in some contexts. For example, this Court has said that Article 1, section 3 of the Tennessee Constitution and the First Amendment are "practically synonymous" with regard to religious liberty, but it also recognized that Tennessee's Constitution is "broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience." *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956). Additionally, this Court has recognized that Article 1, section 19 of the Tennessee Constitution likely offers greater protections than the First Amendment regarding the freedoms of speech and press. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993) (noting that coextensive protection in obscenity context does not mean provisions are identical for all purposes); *State v. Marshall*, 859 S.W.2d 289, 295 (Tenn. 1993) (same); *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979) (holding Art. I, § 19 "should be construed to have a scope at least as broad as that

afforded those freedoms by the first amendment of the United States Constitution"). And this Court has rejected the "open fields" doctrine of the Fourth Amendment of the federal constitution as inconsistent with the Article 1, section 7, of the Tennessee Constitution. *State v. Lakin*, 588 S.W.2d 544, 548 (Tenn. 1979) (recognizing "the decisions in this state may be somewhat more restrictive [of government power] than those in other states or than federal decisions").

This Court has also recognized that the Tennessee Constitution may provide greater due process and equal protection guarantees. This Court has said the state and federal guarantees provide essentially the same protections. *E.g.*, *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 715 (Tenn. 2017). But this Court has long recognized that the federal due process and equal protection clauses "only establish a minimum level of protection" and this Court "is always free to expand the minimum level of protection mandated by the federal constitution." *Burford*, 845 S.W.2d at 207. This Court has rejected a "'lock step'" approach to Tennessee constitutional standards given the "'uncertain and fluctuating federal standards.'" *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)). As other state supreme courts have also recognized, state constitutions are not "balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail." *State v. Ingram*, 914 N.W.2d 794, 797 (Iowa 2018) (quoting *Penick v. State*, 440 So. 2d 547, 552 (Miss. 1983)); *accord* Jeffrey

S. Sutton, 51 Imperfect Solutions, States and the Making of American Constitutional Law 174 (Oxford Univ. 2018) (lockstep interpretation is "[a] grave threat to independent state constitutions") Thus, even previous caselaw calling Tennessee due process and equal protection "practically synonymous" with their federal counterparts does not reduce the protections under the Tennessee Constitution. *Planned Parenthood*, 38 S.W.3d at 14-15*; accord Carden*, 288 S.W.2d at 721 ("practically synonymous" religious liberty protections, but the Tennessee Constitution is still "broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience").

The unique history and text of the Tennessee Constitution indicate its due process and equal protection guarantees can be more protective. *Tenn. Small Sch.*, 851 S.W.2d at 152 ("The equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct."). Tennessee's equal rights, privileges, immunities, or exceptions clause was adopted in 1835, three decades *before* the Fourteenth Amendment. Similarly, Tennessee's "law of the land" clause is distinct from the Fourteenth and Fifth Amendments' "due process" language, finding its roots in pre-federal-constitution sources such as Magna Carta and the 1776 North Carolina constitution. Moreover, Tennessee's uniquely strong prohibitions "against arbitrary power and oppression" demonstrate this Court is to be particularly attentive when called upon to protect individual liberty from such measures. Tenn. Const. art. I, § 2 ("[G]overnment being instituted for the common benefit, the doctrine of nonresistance against arbitrary

power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.").

2. Other state constitutions with clauses similar to Tennessee's are more protective of rights than the federal constitution.

This Court's recognition that Tennessee due process and equal protection can be more protective than the federal constitution is supported by recent decisions from other state supreme courts. These courts, interpreting state constitutional provisions similar to Tennessee's, all determined that their constitutions are more protective of rights and demand more meaningful scrutiny than the "minimum level of protection" provided by current federal jurisprudence.

The North Carolina Supreme Court has recognized that whether an exercise of the police power is a "violation of [its] Law of the Land Clause . . . is a question of degree and of reasonableness in relation to the public good likely to result from it." *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729, 735 (N.C. 1973). This inquiry can be more protective of rights than is the federal constitution in certain circumstances. *Lowe v. Tarble*, 329 S.E.2d 648, 650 (N.C. 1985) ("[W]e reserve the right to grant relief against unreasonable and arbitrary state statutes under [the law of the land clause] in circumstances under which no relief might be granted by the due process clause of the fourteenth amendment." (citing *Aston Park*)). One of those circumstances is when "[t]he right to work and to earn a livelihood" is at stake because that "is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety,

morals, or public welfare." *Aston Park*, 193 S.E.2d at 735 (citation omitted). Under North Carolina law, a deprivation of the right to "engage in a business, otherwise lawful," is a significant enough restriction on liberty that "a substantially greater likelihood of benefit to the public" is necessary to uphold it. *Id.*

Pennsylvania also has a law of the land clause, and its Supreme Court has recognized that "[t]he rational basis test under Pennsylvania law is less deferential to the legislature than its federal counterpart." *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1108 (Pa. 2020*); accord Shoul v. Commonwealth*, 173 A.3d 669, 677 (Pa. 2017) ("Notably, the federal rational basis test differs significantly from our own in terms of the degree of deference it affords to legislative judgment."). Unlike the federal test, Pennsylvania's "more restrictive" test looks to whether an exercise of the police power is "unreasonable, unduly oppressive or patently beyond the necessities of the case;" "the means which it employs must have a real and substantial relation to the objects sought to be attained;" and "unusual and unnecessary restrictions upon lawful occupations" are prohibited. *Id.* at 1109 (citations omitted).

And the Texas Supreme Court, reviewing its decisions under its "due course of the law of the land" provision, has recognized that its constitution also differs from the Fourteenth Amendment. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). In *Patel*, the court recognized its long history of calling the state and federal provisions "nearly, if not exactly, coextensive." *Id.* at 84. But the court also noted that federal decisions gradually made federal law less protective of

rights, culminating in the adoption of the current federal rational basis test. *Id.* at 86 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), and *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)). Meanwhile, Texas courts began to confuse the diminishing federal test with the long-standing Texas test. *Id.* The court therefore clarified that, while the Texas constitution mostly aligned with the Fourteenth Amendment, the Texas equivalent of "rational basis" remained more protective of individual rights. *Id.* at 86-87. The Texas standard requires further consideration of a statute's "actual, real-world effect as applied to the challenging party" to determine whether it is rationally related to a legitimate government interest in that case and also whether, as applied, the statute is "so burdensome as to be oppressive." *Id.* at 87. And although constitutionality "is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties." *Id.*

As explained below, although this Court has said Tennessee due process and equal protection are practically synonymous with their federal counterparts, this Court has consistently applied different, more protective, standards under Tennessee law. As in North Carolina, Pennsylvania, and Texas, Tennessee's standards are rooted in pre-federal-rational-basis caselaw—*i.e.*, decisions that predate *Carolene Products* and *Williamson*—that is more protective of individual rights than is the current federal rational basis test. This Court should adhere to its longstanding precedents and continue to apply the more protective Tennessee standard.

3. Tennessee scrutiny differs from federal rational basis.

This Court's decisions demonstrate that Tennessee scrutiny differs from federal rational basis in at least five ways. First, Tennessee courts do not hypothesize interests on the government's behalf. Second, the Tennessee standard requires "real and substantial" distinctions that are "germane to the purpose of the law," rather than simply federal rational basis. Third, the Tennessee substantive due process standard is "reasonableness," not federal rational basis. Fourth, Tennessee laws may not be "oppressive" in their application. Finally, to make these determinations, facts are particularly important under Tennessee law. These long-time Tennessee standards resemble those in North Carolina, Pennsylvania, and Texas more than the federal rational basis test.

a. Refusal to hypothesize interests.

Tennessee law does not allow courts to hypothesize interests on the government's behalf. Tennessee courts look to determine whether public health, safety, or morals "is really the end had in view" for police power regulations. *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 613 (Tenn. 1927) (citation omitted). Therefore, government action survives rational basis review "if the *government* identifies a legitimate governmental interest" that supports the action. *Parks Props. v. Maury Cty.*, 70 S.W.3d 735, 744 (Tenn. Ct. App. 2001) (emphasis added). Metro has claimed that the courts have responsibility for identifying any interest supporting the Client Prohibition. *E.g.*, R.735. In support of this assertion, Metro cites a U.S. Supreme Court statement that "it is entirely irrelevant 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). Even under federal law, this argument misunderstands *Beach Communications*, which only excuses legislatures from "articulating [their] reasons for enacting a statute," 508 U.S. at 315, but does not excuse the government from defending the constitutionality of its actions when challenged in court. Regardless, *Beach Communications* is not Tennessee law, and no Tennessee case presses judges into service as backstop counsel for the government.

b. Real and substantial differences.

Tennessee law has long required a higher showing than just federal rational basis in equal protection cases. Although sometimes called "rational basis," *e.g.*, *Tester*, 879 S.W.2d at 829, the substance of the Tennessee rule is different than the federal version because it predates federal rational basis. "'The fundamental rule'" in a Tennessee equal protection case "'is that all classification must be based upon *substantial* distinctions which make one class *really* different from another; and the characteristics which form the basis of the classification must be *germane to the purpose of the law*.'" *Id.* (emphasis modified) (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). This "real and substantial" standard[6] requires meaningful, fact-

[6] At least four other decisions from this Court require a "real and substantial" difference in order to uphold a legislative classification under Tennessee rational-basis review. *Metro. Gov't of Nashville & Davidson Cty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977) (requiring that municipalities have "real and substantial reasons" for establishing

based scrutiny of legislative classifications. *Id.* Relatedly, this Court has said Tennessee equal protection requires at least a "reasonable basis" for distinctions and "[r]easonableness depends upon the facts of the case and no general rule can be formulated for its determination." *Tenn. Small Sch.*, 851 S.W.2d at 153 (citation omitted).

Tester illustrates the real and substantial standard. There, a DUI defendant challenged the constitutionality of a statute under which he was not eligible for work release because he was convicted in Washington County, rather than in Davidson, Shelby, or Moore counties. 879 S.W.2d at 825. This Court 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 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 (emphasis removed). Because the evidence did not support the state's asserted basis for limiting the work-release program to three counties, this Court declared the program's limited application unconstitutional. *Id.* at 830.

"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); *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"); *Nashville, Chattanooga & St. Louis Ry.*, 135 S.W. at 776 (invalidating a labor-relations provision that applied to corporations but not to partnerships).

c. Reasonable regulation.

Rather than "rational" regulation under the police powers, Tennessee law requires "reasonable" regulation. This Court's first zoning case, *Spencer-Sturla*, predates the federal rational basis test and established the reasonableness standard. 290 S.W. at 612-13. That standard continues to be applied to zoning laws. *E.g.*, *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382, at *18 (Tenn. Ct. App. June 30, 2005) (citing *Spencer-Sturla* for the standard). The reasonableness standard recognizes that it is a "judicial function" to determine whether the application of a zoning ordinance has "any *real tendency* to carry into effect the purposes designed—that is, the protection of the public safety, the public health, or the public morals—and whether that is *really* the end had in view." *Spencer-Sturla*, 290 S.W. at 613 (emphasis added) (quoting *Motlow v. State*, 145 S.W. 177, 188 (Tenn. 1911)). And as subsequent cases like *Shatz v. Phillips*, 471 S.W.2d 944 (Tenn. 1971) (holding that zoning restrictions on a junk salvage operation were unreasonable), *Board of Commissioners of Roane County v. Parker*, 88 S.W.3d 922 (Tenn. Ct. App. 2002) (holding that zoning restrictions on keeping tigers were unreasonable), and *Consolidated Waste*, 2005 Tenn. App. LEXIS 382 (holding that zoning restrictions on landfills were unreasonable), demonstrate, reasonableness requires consideration of the facts.

Spencer-Sturla recognized that the reasonableness standard meant restrictions on commercial activity in residential areas would depend on

the facts of each case. In that case, an undertaking establishment was operating in a residential zone. 290 S.W. at 613. Although this Court determined it was "generally" reasonable to exclude commercial enterprises from residential zones and specifically reasonable to exclude undertaking establishments from residential zones, it left open the possibility that other excluded commercial establishments—"boarding houses, sewing women, registered nurses, and the like"—and those engaged in other prohibited activities—"the placing of signs or name plates, and billboards"—could bring reasonableness challenges in future as-applied cases. *Id.* at 613-14; *accord Tester*, 879 S.W.2d at 829 ("'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 . . . .").

d. Oppressive regulation.

Tennessee law also requires consideration of "oppressiveness" of regulation in as-applied cases. An oppressive regulation violates the Tennessee Constitution's "limitation of reasonableness," and even if a 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, 171-72 (Tenn. 1945). This constitutional requirement thus 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 a legitimate interest and (2) no "oppressive" application to plaintiff). Oppressiveness

review has even been applied to the regulation of alcohol, where general authority to regulate is unquestioned. *E.g.*, *Sparks v. Beer Comm. of Blount Cty.*, 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). Oppressiveness review also applies to zoning. *Spencer-Sturla*, 290 S.W. at 612 (observing that the police power "cannot be an excuse for oppressive legislation" in the zoning context (cleaned up)).

e. Consideration of record evidence.

A fifth hallmark of Tennessee law is that courts must consider the facts of each case. To be sure, federal courts also consider facts in rational basis cases. *E.g.*, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (concluding that a Tennessee law limiting the sale of caskets to licensed funeral directors failed rational basis based on facts showing the restriction did not serve any legitimate interest).[7] But as discussed below in Part II.C., Tennessee courts must be particularly attentive to the facts of each case.

C. Facts matter under the Tennessee Constitution, and the Chancery Court erred by ignoring the facts of this case.

At a minimum, the Chancery Court erred by ignoring the facts of this case. Because the Chancery Court did not consider Homeowners' 293 uncontested material facts at summary judgment, *compare* R.643-94,

[7] 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. 312 F.3d at 224, 228-29.

with R.2309-34, this Court should, at a minimum, vacate the judgment and remand with instructions to consider those facts.[8]

As the Chancery Court noted, the central dispute in this litigation has been whether the facts matter to the merits of the case. R.2309. Metro has repeatedly insisted that facts don't matter. First, Metro moved to dismiss, arguing that courts had upheld zoning in other contexts so Homeowners should lose here. R.71-75. Metro then resisted discovery regarding facts relevant to Homeowners' as-applied constitutional challenges, R.524-26, 545-46, 575-83, 597-601, 735-39, 748-49, including by initially denying almost all knowledge of its own interests and deferring to the Chancellor to "sua sponte adopt its own interest." R.545. Metro also resisted an entity deposition regarding the interests supporting enforcement of the Client Prohibition and provided such discovery only when ordered. R.611-13, 735-38, 740-866. At summary judgment, Metro argued that "the particular facts of this case are largely irrelevant." R.2257.[9] And in support of its summary judgment motion, Metro relied on only six facts, none of which addressed Homeowners' (lack of) impact on their neighborhoods or their treatment compared to the privileged home-based businesses, much less the purpose, reasonability, and oppressiveness of the Client Prohibition. R.638-39.

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[8] As noted below, because the standard of review from summary judgment is "de novo, without a presumption of correctness," *Rye*, 477 S.W.3d at 250, this Court can also consider those facts in the first instance.

[9] Metro intensified its argument on appeal, claiming that facts about Homeowners' businesses were "completely irrelevant." Metro Court of Appeals Appellee Br. 56-57.

Although the Chancery Court initially rejected Metro's "facts don't matter" position in denying its motion to dismiss, R.483, the court embraced Metro's position at summary judgment. The court recognized both Metro's "argu[ment] that the Court does not need to consider the facts" and Homeowners' "significant efforts to . . . develop facts they believe are relevant." R.2309. The court also noted Homeowners' submission of "voluminous materials" in the record. R.2310; *see* R.643-94, 1057-2219. But the court cited none of Homeowners' undisputed facts in determining that the Client Prohibition "has a rational relationship to the public safety, health, morals, comfort, and welfare," even as applied to Homeowners. R.2333.

The court's decision cannot be squared with Tennessee precedents that consider record evidence in substantive due process and equal protection cases. As noted above, the Tennessee Constitution requires a zoning law be, at a minimum, "reasonable," both generally and as applied in any particular case. *Spencer-Sturla*, 290 S.W. at 612-14. Because the Tennessee Constitution also requires a "real and substantial" basis in equal protection cases, this Court has always recognized that outcomes will "var[y] with the facts in each case." *Tester*, 879 S.W.2d at 829. This Court has also looked at the facts of each case to determine whether a regulation is, in effect, oppressive. *Wise*, 191 S.W.2d at 172 (granting exception because, although regulation was in public interest, its application to plaintiff would effectively destroy his business). This Court has also declared laws unconstitutional under Tennessee rational basis based on the facts in the record. *E.g.*, *Tester*, 879 S.W.2d at 829 (striking down limited-scope work-release program because the government's

asserted justifications "ignore[d] th[e] evidence in the record"); *Tenn. Small Sch.*, 851 S.W.2d at 154 (sustaining challenge to school-funding scheme because "the record demonstrates substantial disparities" in funding).

In the zoning context, this Court's decision in *Shatz* demonstrates the importance of facts. There, a zoning code prohibited a junk-salvaging operation from operating in a "Light Industry" district. 471 S.W.2d at 945. Noting that the "facts are not in dispute," this Court reversed the lower courts and declared the restriction to be unconstitutional given the facts in the record. *Id.* Those facts showed that "[t]he storage and/or salvaging of junk and other used material" was illegal in a "Light Industry" district but was legal in the "Heavy Industry" district across the street. *Id.* at 946. The junk-salvaging operation was conducted entirely inside a "modern, attractive" building and, "other than the sign thereon, a casual passer would not know what business was being carried on in said building." *Id.* at 945. Relatedly, the business was "free from noise, odor, fumes, and other objectionable features"; there was "no machinery in [the] building; there have been no complaints by the neighbors; [and] they create no traffic problem and no fire hazard." *Id.* Moreover, the use of the property for junk salvaging was "no more objectionable than many other permitted uses" in the Light Industry district. *Id.* Based on these facts, the junk-salvaging operation's use of the property "would not be such as to cause any result justifying the exercise of the police power under the municipality's zoning authority." *Id.* at 947.

The Court of Appeals has followed this Court's lead in recognizing the importance of facts in challenges to zoning restrictions. In *Roane County*, the court found it unconstitutional to refuse to rezone one semi-rural property for the keeping of a tiger after approving the same rezoning for another property. 88 S.W.3d at 921-22. Even though the zoning ordinance prohibiting such dangerous animals was generally in the public interest, the "totality of the circumstances" demonstrated the refusal to rezone "was arbitrary and capricious." *Id*. at 922-24. And in *Consolidated Waste*, the court applied "voluminous" record evidence to declare Metro's zoning restrictions on construction-and-demolition ("C&D") landfills unconstitutional under both substantive due process and equal protection "[b]ased on the record." 2005 Tenn. App. LEXIS 382, at *118, *167. The court recognized Metro could generally regulate landfills under the zoning power, but the record demonstrated that C&D landfills were more strictly regulated than other kinds of landfills presenting the same potential public risks. *Id.* at **110-11. Indeed, the record showed Metro more strictly regulated C&D landfills even though they posed less risk to the public than less-regulated landfills. *Id*. at *111, *114, *116. The record also demonstrated that Metro had no basis for choosing the restrictions that it did and no evidence that its restrictions met the stated goals (protecting parks and schools from effects such as dust, noise, and truck traffic). *Id.* at **111-12, *118.

As in these other cases, Homeowners submitted a substantial, uncontested, factual record demonstrating their home businesses did not implicate the exercise of the police power and were more strictly

regulated for no good reason. *See* Part II.D., below. The Chancery Court erred because it failed to consider the facts of this case, as required by *Shatz*, *Spencer-Sturla*, *Tester*, *Tennessee Small Schools*, and *Wise*. The court below recognized that Metro lost in *Consolidated Waste* "because Metro could not show a rational relationship between the ordinance and the asserted public interest" and that "this is the argument the [Homeowners] make in this case." R.2327-28. But rather than consider the record as in *Consolidated Waste*, the court erroneously ignored the record based on two cases not relevant here. R.2328.

First, the court cited *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997), for the proposition that "specific evidence is not necessary to show the relationship between the statute and its purpose." Instead of looking at the facts, the court asked "only whether the law is reasonably related to proper legislative interests." R.2328 (citing 941 S.W.2d at 52). *Riggs* does not, however, command the courts to ignore record evidence.

In *Riggs*, this Court dismissed a challenge to a statute banning heliports within nine miles of a national park. 941 S.W.2d at 54. *Riggs* holds that "*legal conclusions* set forth in a complaint are not required to be taken as true." *Id.* at 47-48 (emphasis added). The *Riggs* complaint failed to state anything beyond "legal conclusions" that the heliport ban "violated due process and equal protection." *Id.* at 48. The failure to support the legal conclusion of unconstitutionality with sufficient factual allegations is why the *Riggs* court wrote that "specific evidence is not

necessary" to presume a rational basis. *See id*. at 52.[10] But *Riggs* does not require the dismissal of well-pleaded rational-basis challenges, much less demand that evidence rebutting the presumption of a rational basis be *disregarded* at summary judgment. If it had, then *Shatz*, *Tennessee Small Schools*, *Tester*, and *Wise* were all wrongly decided because they all considered record evidence, and *Spencer-Sturla* was wrong to recognize that as-applied challenges to zoning laws could be brought depending on the particular facts.

The court also erroneously relied on *Davidson County v. Hoover*, 364 S.W.2d 879 (Tenn. 1963), to ignore the facts here. The court cited *Hoover* for the proposition that "whether or not a beauty shop should be a barred home occupation under a particular ordinance 'must be left to the judgment of the local municipal legislative body based on its knowledge of conditions peculiar to a locality.'" R.2328 (quoting 364 S.W.2d at 882). But the "question presented" in *Hoover* was one of pure statutory construction: "whether or not a beauty parlor [wa]s permitted" in a residential district under the Nashville Zoning Ordinance as it then existed. 364 S.W.2d at 882. *Hoover* did not address any constitutional

[10] *Accord Andrews v. City of Mentor*, No. 20-cv-00058, __ F.4th __, __, 2021 U.S. App. LEXIS 25609, at *32 (6th Cir. Aug. 25, 2021) ("[T]o overcome the presumption of rationality that applies to the government's disparate treatment in the rational-basis context, a plaintiff must plead facts that plausibly negate the defendant's likely non-discriminatory reasons for the disparate treatment.") (citation omitted).

challenge to the ordinance and is, therefore, irrelevant to whether courts consider record evidence at summary judgment in constitutional cases.[11]

Because the Chancery Court erred in ignoring Homeowners' voluminous record evidence at summary judgment, this Court should, at a minimum, vacate the court's decision and remand with instructions to consider those facts as required by Tennessee law. But because the court's ruling on summary judgment is reviewed "de novo, without a presumption of correctness," *Rye*, 477 S.W.3d at 250, this Court can consider the uncontested material facts and rule on the merits of this case. It should do so and hold for Homeowners, as explained below.

D. The facts of this case demonstrate that Metro's restrictions on clients at Homeowners' businesses are unconstitutional.

The undisputed facts in the record demonstrate that Metro's restrictions on clients at Homeowners' businesses fail Tennessee constitutional review. By allowing other home-based businesses with greater effects on their neighbors to have clients, Metro discriminates against Homeowners without a real and substantial reason germane to the purpose of the Client Prohibition. Moreover, as applied to Homeowners, the facts demonstrate that the Client Prohibition is not reasonably related to any legitimate interest in public health, safety,

[11] And unlike in *Hoover*, Metro has privileged a salon to exist in a residential area, R.662, while denying Pat the same privilege, R.653-55.

morals, or general welfare[12] and is also oppressive. Homeowners are therefore entitled to summary judgment.

[12] The Chancery Court summarized Metro's claimed interests as follows:

- 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 an inappropriate inconsistency from what commercial businesses pay operating on commercial properties.
- Disability accessibility standards are different for residential and commercial properties.
- 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.

1. Metro's restrictions on clients at Homeowners' businesses violate Tennessee's equal protection guarantee.

Metro lets thousands of privileged home-based businesses serve many clients inside residential homes while prohibiting Homeowners from serving any, or, temporarily, limiting them to fewer clients. These privileged home-based businesses include owner-occupied short-term rentals, certain SPs, historic home events, and day care homes. The record demonstrates that, like Homeowners, these privileged home-based businesses fit Metro's definition of a "home occupation" because they are businesses that take place inside a home and are conducted by a resident. R.658, 674-77. These businesses implicate the same interests that Metro claims support restrictions on Homeowners' clients; indeed, implicate them to a greater extent than do Homeowners. R.689-92. Nevertheless, Metro has privileged these home-based businesses over Homeowners by allowing them to serve clients. The Chancellor erred in assuming, in the face of uncontested record evidence, that Metro has a valid reason for treating Homeowners worse.

a. Owner-Occupied Short-Term Rentals.

Unlike Homeowners, Metro permits any owner-occupied short-term rental to serve up to 12 clients every day. R.674-75. 3,001 Nashvillians hold "active" short-term rental permits; when "inactive" permits are included, the total rises to 4,653. *Id.*

The Chancellor recognized that short-term rentals are a "problematic exception" to the Client Prohibition. R.2332. But because the Chancellor did not consider record evidence, the Chancellor did not

consider that Metro admitted short-term rental guests "detract from . . . residential nature," R.814, and are the source of daily complaints, R.689, because they cause noise, traffic, parking, trash, and "general lewdness" problems, all to a greater degree than home recording studios or salons. R.690-91. Metro, too, ignored this evidence, arguing only that "renting a space to sleep" is a typical use in residential zones. R.635. But Metro also admitted that short-term rentals are "commercial" and "not suited for residentially zoned areas." *Id.*

The facts show there is no real and substantial difference between Homeowners and short-term rentals that is germane to the claimed purposes of the Client Prohibition. That short-term rental guests also sleep, Metro's only asserted distinction, R.635, is not germane to the interests Metro claimed support the Client Prohibition, *i.e.*, the negative effects that clients may have on a neighborhood. *See* n.12, *supra.* Nor can this distinction justify heavier restrictions on clients at Homeowners' legal home-based businesses when short-term rental clients have *greater* negative effects on neighborhoods. R.644-45, 689-91. As in *Tester*, where record evidence showed a program claimed to be justified based on jail overcrowding was not applied to other jails that were overcrowded, 879 S.W.2d at 829, the record here shows that Metro's Client Prohibition is not applied to short-term rental clients that affect neighborhoods more than Homeowners' clients, R.689-91. As in *Consolidated Waste*, Metro is more onerously regulating lower-impact businesses and privileging higher-impact businesses. 2005 Tenn. App. LEXIS 382, at **110-19. Like in *Tester* and *Consolidated Waste*, Metro's preference for more harmful

home-based businesses violates Homeowners' equal protection rights under the Tennessee Constitution.

b. SP Spot Rezoning.

Eleven SPs are similarly situated to Homeowners, but Metro privileges them over Homeowners without a real and substantial reason that is germane to the purpose of the Client Prohibition. Metro can approve SPs for uses that fit Metro's definition of a "home occupation." R.658. Homeowners showed that Metro has enacted eleven SPs, covering thirteen properties, to allow home occupations to serve clients. R.658-74. Two of those SPs are particularly relevant here: one expressly acknowledges that its purpose is to spot-zone the subject properties out of the Client Prohibition, R.658-59, and the other legalized a residential hair salon, R.662. Unlike the temporary Six-Visit Rule, these SPs do not expire.

The only difference between Homeowners and these SPs is Metro's caprice. Each SP identified is allowed to serve clients in a residential area. R.658-74. The sole basis Metro has for exempting these SPs 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. Metro could not identify any facts that distinguished these businesses from Homeowners', instead speculating that "there *may* be plenty of parking [at the approved SPs], 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).[13] Homeowners, however, developed undisputed evidence contradicting Metro's fact-free speculation about the distinctions between the privileged SPs and Homeowners: Homeowners have plenty of parking, R.683-84; Pat lives on a busy road, R.645; Lij lives by an auto diesel college, R.644; the SP allowing the hair salon was enacted despite Metro's planning staff finding it was inappropriate under the general plan, R.662; and no neighbor has complained to Pat or Lij about their businesses, R.688.

c. Historic Home Events.

Unlike Homeowners, Metro permits historic home events to serve a potentially unlimited number of daily clients. R.676-77. Historic home events present noise, traffic, and parking issues in residential areas, all to a greater extent than Homeowners' businesses. R.691-92. Nevertheless, Metro claims its discrimination against Homeowners is constitutional because historic home events are necessary to incentivize the preservation of historically significant homes and their hosting events is similar to having social guests, notwithstanding the commercial nature of such events. R.634-35.

Metro's claims are not grounded in a real and substantial difference germane to the purpose of the restriction on Homeowners' clients. While Metro claims the social-visit/commercial-visit similarities justify

[13] Metro also argued, without support, that Homeowners could not invoke SPs because they did not appeal Metro's denials of their SP applications. R.2273. Metro's argument misses the point: as the Chancellor noted, Homeowners' suit is "an as-applied constitutional challenge to the Client Prohibition itself." R.2324

exempting historic home events from the Client Prohibition, Homeowners' clients are also similar to their social guests. *See* R.654 (Metro inspector could not distinguish Pat's clients from ordinary social visitors). Home recording studios and home-based hair salons are legal, so Lij could record his friends and Pat could cut her neighbors' hair, but only if those friends and neighbors are not "clients." R.644-45. As opposed to historic home events, the social/commercial visit distinction is the *only* reason for restricting Homeowners. In addition, the age of the house in which a client is served is not related to the interests that Metro claims support the restriction on clients: "residential nature of residentially-zoned neighborhoods," noise, traffic, parking, enforcement, etc. *See* n.12, *supra*. And again, the record evidence demonstrates that historic home events pose more severe traffic, parking, and noise concerns than Homeowners' businesses do. R.691-92.[14]

d. Day Care Homes.

Unlike Homeowners, Metro permits day care homes to serve up to 12 clients a day. R.675-76. Day care homes can affect the residential character of a neighborhood, especially with regard to traffic and parking. R.691. Indeed, they do so to a greater extent than Homeowners' businesses. *Id.* Nevertheless, Metro argues that "[c]aring for children in a home is entirely consistent with residential use." R.633-34.

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[14] The Court of Appeals ruled that that a historic home could not be denied a permit for up to six events per week, including "two large events each week over 40 guests" because this did not threaten "the public health, safety and welfare." *Demonbreun v. Metro. Bd. of Zoning Appeals*, No. M2009-00557-COA-R3-CV, 2011 Tenn. App. LEXIS 314, at *15 n.7, *48-55 (Tenn. Ct. App. June 10, 2011).

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. *See* n.12, *supra*. Home recording studios and salons are also entirely consistent with residential use—that is why they are legal—except, allegedly, for having clients. R.644-45. Moreover, as in *Consolidated Waste*, the record establishes that day care homes pose greater traffic and parking concerns than Homeowners' businesses. R.691.

* * *

Given the interests asserted to support the Client Prohibition, there is no real and substantial difference between Homeowners and the privileged home-based businesses that Metro allows to have (still more) clients. To the contrary, the record shows that privileged home-based businesses are more disruptive than Homeowners' businesses. Based on the undisputed record, Homeowners are entitled to summary judgment on their equal protection claim.

2. Metro's restrictions on clients at Homeowners' businesses violate Tennessee's substantive due process guarantee.

Although the Chancery Court noted ten potential interests supporting the Client Prohibition, *see* n.12, *supra*, Metro concedes there is no evidence that its enforcement of the Client Prohibition against Homeowners served any of these interests. Moreover, Homeowners introduced affirmative evidence that there is no reasonable relationship between the Client Prohibition and public health, safety, morals, or general welfare as applied to Homeowners. Instead, enforcement of the

Client Prohibition has resulted in oppression—the loss of Homeowners' livelihoods and loss of their right to harmlessly use their property. R.692-93. The Chancellor erred in assuming, in the face of that uncontested record evidence, that Metro had a valid reason for prohibiting Homeowners from having clients.

Metro's argument that applying the Client Prohibition to Homeowners advances its interests rests on only one fact: Metro received two anonymous tips that Homeowners were violating the Client Prohibition. R.682. Metro identified these complaints as the only evidence that Homeowners had harmed any of the interests claimed to support the Client Prohibition. *Id.*; *see* R.859 ("Well, the complaints [are] the evidence. I don't know of anything other than that."). But these complaints do not support the assumption that the public was harmed by Homeowners. Metro's officials admitted that, by themselves, anonymous complaints are not evidence that a homeowner had any impact on the well-being of the neighborhood. R.682. Those officials denied that anonymous complaints even prove that the Client Prohibition was violated. R.649. One inspector testified that 40% of Client Prohibition complaints are false; another testified that 60-70% are. R.653. Metro does not know who complained about Homeowners or why they did so. R.653, 656. In comparison, no neighbor has ever complained to Lij or Pat. R.688. These anonymous complaints do not show that shutting down Homeowners' businesses advanced any of Metro's interests.

Follow-up investigations also found no evidence that Homeowners' businesses offended any of Metro's interests, only that Homeowners had clients at their homes. *See* R.653-57. The official who inspected Pat's

home found no traffic, parking, noise, vibrations, smoke, dust, odor, heat, humidity, glare, or other objectionable effects; her main observation was only "s[eeing] a couple of ladies come out . . . with freshly co[i]ffed hair." R.654; *cf.* Metro Code § 17.16.250(D)(7) (listing offensive effects prohibited by home occupation ordinance). The inspector could not otherwise distinguish Pat's clients from ordinary social visitors. R.654. No objectionable effects were found at Lij's property either, as the inspector did not visit it. R.656. Lij was found in violation only because of his website. *Id.* Home recording studios and home-based hair salons are legal, so Lij and Pat can provide their services to anyone except "clients." R.644-45. Whatever public effects Metro is trying to prevent with the Client Prohibition, it has nothing to do with the nature of Homeowners' businesses.

Moreover, Homeowners adduced record evidence affirmatively demonstrating that, even if Metro's interests may support restrictions on some kinds of home occupations, they do not support the Client Prohibition as applied to Homeowners. *See Spencer-Sturla*, 290 S.W. at 613-14 (recognizing that the reasonableness of restrictions on "commercial enterprises" in residential districts would depend on the kinds of establishments and the facts of each case).

a. Residential Nature of Residential Property.

Metro has repeatedly claimed an interest in preserving "the residential nature of residentially-zoned property." Residential zoning is a common and presumptively legitimate exercise of the police power. *Spencer-Sturla*, 290 S.W. at 613. But the reasonableness of residential restrictions "varies with the facts in each case." *Tester*, 879 S.W.2d at 829.

The interest in residential zoning may justify separating an undertaking business from a residential district but may not justify separating other businesses. *Spencer-Sturla*, 290 S.W. at 613-14.[15] It does not justify excluding Homeowners' businesses.

Metro claimed that prohibiting commerce and clients is the "sine qua non" of residential zoning, *see* R.757, but this claim is flatly contradicted by Metro's own code. Metro welcomes commerce and clients in residential zones: home businesses, including those with employees, are legal, R.646-47, as are deliveries and commercial services. *See* R.2135 ("[d]elivery trucks and lawn care businesses" are 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 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. And of course, Metro allows thousands of privileged home-based businesses to have clients. *See* Part II.D.1., *supra*.

As in *Shatz*, the record demonstrates that Homeowners' use of their property does not "cause any result justifying the exercise of the police power under the municipality's zoning authority." *Shatz*, 471 S.W.2d at 945-48 (basing conclusion on facts that a "casual passer" would not know what kind of business was carried on; the business was free from noise,

[15] A used car lot, for example, can be excluded from a residential area due to increased traffic, noise, and lighting; extended hours of operation; and potential safety problems. *Varner v. City of Knoxville*, No. E2001-00329-COA-R3-CV, 2001 Tenn. App. LEXIS 963, at *8 (Tenn. Ct. App. Nov. 29, 2001). But Homeowners' small, quiet, and safe indoor businesses are not like used car lots.

odor, fumes, traffic problems, fire hazards, and other objectionable features; and was "no more objectionable than many other permitted uses" in the area). As Metro conceded, Homeowners are "the two best plaintiffs" to challenge the Client Prohibition. R.684. Homeowners' businesses are safe, legal, cannot be seen or heard from the street, are small and conducted only by appointment, and have no outward appearances, noises, smells, etc., inconsistent with residential areas. R.644-45, 653-57, 680-82, 684, 688-89. Homeowners' clients are not dangerous and do not affect neighboring properties, including with regard to traffic or street parking. R.653-57, 682-86, 688-89. Homeowners 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. R.684. And what they do is no more objectionable than many other permitted businesses in their neighborhoods. Part II.D.1, *supra*.

b. Enforcement Certainty.

Metro asserted that the Client Prohibition promotes "certainty" and conserves finite law-enforcement resources. R.681-82. 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 Client Prohibition might serve. R.2321. Even assuming this is an interest, the record demonstrates the Client Prohibition does not serve it.

The Client Prohibition creates an enforcement *problem*. Every reported violation of the Client Prohibition must be investigated. R.649. 40-70% of reported violations, however, are false. R.653. These

complaints 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. Moreover, the thousands of exceptions to the Client Prohibition, *see* Part II.D.1., also undermine this "certainty"; complaints about short term rentals alone are a "daily occurrence." R.698.

c. Crimes by Nonresident Clients.

The Chancellor speculated about a "potential for additional criminal activity in neighborhoods with non-resident patrons coming to home-based businesses." R.2321. But the Client Prohibition does not guard against criminal activity. Metro prohibits no class of prior offender from obtaining a home occupation permit or 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. Metro also concedes that its short-term rental ordinance places no restrictions on the prior criminal history of overnight guests. *Id.* Metro does not restrict the travel of unsafe people through residential neighborhoods at all. *Id.* There are other laws, such as the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004, that already accommodate the public interest in disclosing certain offenders' whereabouts to the public. Tenn. Code Ann. §§ 40-39-201 *et seq*. As in *Roane County*, which involved restrictions on dangerous animals, the Client Prohibition is not justified because there is a separate "rigid statutory scheme" to address the danger and the government unevenly restricts the potentially dangerous elements. 88 S.W.3d at 923-24.

Regardless, Homeowners work by appointment only and do not invite violent or predatory clients into their homes. R.684.

d. Opportunities for Commercial Tenancy.

There is no legal significance to the Chancellor'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 statement may refer to either of two assertions by Metro: that "[t]here are alternatives (e.g.[,] Weworks or rental of conference spaces) so that most home businesses can meet clients elsewhere" or that "[c]ommercial properties have or will have vacancies. They need tenants. Takes part of the market away from commercially zoned properties. Creates an unlevel playing field." R.678. Homeowners address these assertions in turn.

The availability of alternative spaces is not an interest at all; it is an inadequate consolation. Homeowners seek to avoid renting alternative space in order to earn a living. R.2145, 2148-49. Even Metro conceded that the Client Prohibition is "unrelated" to the availability of alternative space. R.686.

Moreover, filling commercial vacancies by forcing would-be entrepreneurs into the rental market is not a legitimate interest. Metro claimed 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 "protecting a discrete economic group from economic competition is not a legitimate governmental purpose." *Craigmiles*, 312 F.3d at 224. Homeowners set up

their home-based businesses to secure financial independence. R.644-45. Metro has no legitimate interest in making them pay rent to a commercial landlord.

e. Traffic and Parking.

The Chancellor and Metro both speculated that "[i]ncreased parking and traffic congestion in areas not designed for commercial use will create problems for residents," R.2321, and therefore might support the Client Prohibition. That might be true generally, but not as applied to Homeowners. The Chancellor said, contrary to evidence in the record, that Homeowners' clients "in any number" will "affect parking and traffic." R.2330. But there is an impact threshold below which traffic and parking do *not* affect the neighborhood, and it is undisputed that Homeowners' clients fall below that threshold. Metro's own studies of Homeowners' SP zoning applications, which were made in an attempt to obtain legal status before this suit was brought, confirm that Homeowners' businesses would not impact neighborhood traffic or parking. Metro planning staff's recommendations on traffic and parking was to *approve* both Lij's and Pat's home-based businesses. R.683.

As for traffic, 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. Metro does not seek a traffic impact study unless the proposed use is estimated to generate 750 daily or 100 peak-hour trips. R.683. Homeowners' clients would only actually generate between 10 or 16 trips per day, *id.*, and even their theoretical maximum number of trips (32) is

less than the maximum number of trips (48) that short-term rentals and day care homes generate, *see id.*

As for street parking, Homeowners' businesses require none at all. R.654, 656, 684. Homeowners' driveways 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 Homeowners' rezoning applications with respect to traffic and parking, was that Homeowners provide adequate parking on their property. R.683. Both Homeowners' driveways provide adequate parking. R.684. As with traffic, it is not possible that Homeowners' clients will cause parking issues.

f. Pedestrians and Sidewalks.

There is no reason to believe, as the Chancellor may have assumed, that the Client Prohibition is justified by the condition of Metro's sidewalks. *See* R.2321. 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.

g. Administration of Tax and Utility Rates.

The Chancellor speculated that "[r]esidential properties with home-based businesses are not taxed, nor are their utility rates set, at commercial rates, which is an 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 Metro concedes that its assessor has no trouble characterizing existing home occupations as residential property for tax purposes, R.686; it could modify taxes for home occupations, R.841-42; it does not know whether its assessor has had any trouble characterizing short-term rentals, day care homes, or historic home events, R.842; and it does not know how it charges electric, water, or stormwater rates to existing home occupations or the privileged home-based businesses, R.686.

h. Access by the Disabled.

The Chancellor wrote that "[d]isability accessibility standards are different for residential and commercial properties" and speculated the Client Prohibition "ensur[es] that businesses who invite the public onto their property comply with accessibility requirements." R.2321, 2331. But Homeowners' businesses do not pose a danger to Homeowners' clients, whether disabled or not. R.832-33. Metro has no ordinance and Tennessee has no statute regarding disability access that would apply to 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, -104 (Tennessee Disability Act does not regulate disability access and also exempts private businesses with fewer than eight employees). Even the federal Americans with Disabilities Act, would merely require 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). And of course, this interest cannot support the Client Prohibition when thousands of other home-based businesses are exempt from it.

i. Property Price Inflation.

The Chancellor speculated that "[p]roperty rates may escalate inappropriately because of the influence of commercial opportunities in residential areas." R.2321-22. There is no evidence in the record to support this, nor any reason to believe it to be true. Homeowners' businesses are accessory uses, subordinate to their primary use of residing there. R.646. It is oppressive to enforce the Client Prohibition for this reason when Metro gives thousands of other home-based businesses the "commercial opportunities" it denies to Homeowners. Part II.D.1., *supra.* And while Metro claims a need to alleviate the "crowd[ing] out [of] residential purchasers," R.679, 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.

j. Enforcement by HOAs.

Finally, the Chancellor noted 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 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 simply require a

statement of compliance with HOA restrictions, as it has done with short-term rentals, *see* Metro Code § 6.28.030(A)(3)(b)(v), and now does for home occupations, *id*. § 17.16.250(D)(6)(b)(i).

* * *

The undisputed record demonstrates that the Client Prohibition has no real tendency to protect public health, safety, morals, or welfare when applied to Homeowners. Homeowners' businesses do not affect residential nature of their neighborhoods, traffic, parking, noise, etc. They are safe, unobtrusive, and no more objectionable than many other home-based businesses Metro allows. As such, Homeowners do not cause any result justifying the exercise of the police power under Metro's zoning authority. The Client Prohibition therefore violates Homeowners' substantive due process rights.

CONCLUSION

The Court of Appeals erred in determining that this case is moot. The new ordinance expires shortly, and Metro refuses to "completely and permanently" abandon enforcement of the challenged law once the new ordinance expires. Homeowners are still discriminated against under the temporary rules. Regardless, the public-interest exception to mootness would apply. Accordingly, this Court should address the merits of Homeowners' case. On the merits, the Chancery Court erred by not considering the voluminous record evidence on summary judgment and this Court should, at a minimum, VACATE and REMAND with instructions to consider those facts. But because this Court reviews this case de novo, this Court should consider those uncontested facts itself

and REVERSE by granting summary judgment to Homeowners on their Tennessee due process and equal protection claims.

Dated: September 10, 2021.

Respectfully submitted,

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CERTIFICATE OF 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 14,999 words.

/s/ Jason I. Coleman
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2021, a true and exact copy of the foregoing was served via the Court's electronic filing system and forwarded by electronic mail to the following:

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