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IN THE CHANCERY COURT FOR
THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

ELIJAH "LIJ" SHAW and PATRICIA "PAT" RAYNOR,	)	
Plaintiffs,	)	
v.	)	**Case No. 17-1299-II**
	)	**Hon. Anne C. Martin**
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

MEMORANDUM OF LAW AND FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
Tenn. R. Civ. P. 56.01; Local Rule § 26.04(b)

Plaintiffs Elijah "Lij" Shaw and Patricia "Pat" Raynor submit this Memorandum of Law and Facts in support of their Motion for Summary Judgment.

INTRODUCTION

This lawsuit challenges a single-sentence provision in the Metro Code as applied to Lij and Pat, whose home-based recording studio and home-based hair salon have been shut down by the Defendant Metropolitan Government of Nashville and Davidson County ("Metro" or "Nashville"). The Client Prohibition, as the subject code provision is known, states that "[n]o clients or patrons may be served on the property" of a home-based business. Metro. Code § 17.16.250(D)(1). As applied here, the Client Prohibition infringes Lij's and Pat's constitutional rights to use their property and earn a livelihood because, as Metro concedes, there is *no* evidence that either Lij or Pat negatively affect their

neighborhoods in any way by serving clients in their homes. Lij's and Pat's home businesses do not measurably increase traffic, parking, or noise. Viewed from the street, Lij's and Pat's client interactions are indiscernible from ordinary social visits. Metro—without any concrete, evidence-backed reason to prohibit Lij's and Pat's in-home client interactions—justifies its meddling on the grounds that Metro must have residential zoning and therefore may prohibit in-home client interactions as it sees fit.

But the zoning power is not limitless, and Metro's assertion of control over Lij's and Pat's private use of their homes is not authorized under the Tennessee Constitution. That is because any exercise of Metro's police power must bear a "substantial relationship to the public health, safety, morals or general welfare," *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *5 (Tenn. Ct. App. June 30, 2005), and applying the Client Prohibition to Lij and Pat has no substantial relationship to any of those goals. Moreover, the Client Prohibition is oppressive as applied to Lij and Pat, and thus violates the Tennessee Constitution's guarantee of substantive due process. *See* Tenn. Const. art. I, § 8.

Metro's enforcement of the Client Prohibition in this case also violates the Tennessee Constitution's guarantee of equal rights, privileges, and immunities. *See id.* art. I, § 8; *id.* art. XI, § 8. While Metro applies the Client Prohibition to Lij and Pat, Metro allows other homeowners to serve clients. Several times, Metro has specifically rezoned individual single-family homes to permit the service of clients in residential neighborhoods. *Countywide*, Metro has legalized owner-occupied short-term rentals, with the baffling result that client visits are illegal in Nashville only if the client fails to spend the night. Metro also grants special exception permits to day care homes and historic home events, both of which serve clients in residential homes. Measured by their negligible or nil effect on the public health, safety, morals or general welfare, Lij and Pat are not substantially different

from the thousands of other Nashville homeowners who may legally serve clients in their own homes. Metro has no rational basis for this differential treatment.

Whatever Metro may argue, Plaintiffs' exercise of their constitutional rights here is consistent with Metro's legitimate goals in residential zoning. Lij and Pat want the same thing any homeowner wants: to use their homes in peace. Below, Lij and Pat show the Court why the applicable legal standards and undisputed material facts compel a judgment in their favor.

LEGAL STANDARDS

This case can and should be decided in Plaintiffs' favor on their motion for summary judgment. "Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993) (quoting William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 451 (1992)). The material facts here are not in dispute, and the heart of the controversy is this: Is it reasonable for Metro to prohibit Lij and Pat from serving clients in their homes, when there is no evidence that enforcing the Client Prohibition against Lij and Pat advances any government interest, and Lij's and Pat's clients are indistinguishable from the legalized clients of other home businesses? Part I below discusses the standard under which summary judgment motions are decided. Part II discusses the constitutional standard for Plaintiffs' two claims.

I. Summary Judgment Standard.

When all the evidence points in one and only one direction, courts can and should enter summary judgment on the undisputed facts. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rye v. Women's Care Ctr. Of*

Memphis, MPLLC, 477 S.W.3d 235, 250 (Tenn. 2015) (quoting Tenn. R. Civ. P. 56.04). Tennessee's summary judgment standard "fully embrace[s] the standards articulated in the [federal] *Celotex* trilogy." *Id.* at 264; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 321–25 (1986) (holding summary judgment proper when movant shows there is no evidence to support nonmovant's case); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–51 (1986) (holding "substantive law" governs "which facts are material," and "genuine" disputes require "evidence" to support nonmovant's argument); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986) (requiring nonmovant to "do more than simply show that there is some metaphysical doubt as to the material facts"); *see also Byrd*, 847 S.W.2d at 211–14 (adopting *Celotex* trilogy), *limited on other grounds by Rye*, 477 S.W.3d at 257–61 (settling confusion about the meaning of *Byrd* and subsequent Tennessee caselaw, and rejecting difference between Tennessee and federal summary judgment standards). When the material facts are not in doubt, the courts should apply the law. "Tennessee courts have 'always been empowered to decide legal questions upon agreed facts.'" *Rye*, 477 S.W.2d at 262 (quoting Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After* Hannan v. Alltel Publishing Co., 77 Tenn. L. Rev. 305, 311–12 (2010)).

As at trial, an evidence-free defense cannot prevail over a valid, evidence-supported claim. So long as the undisputed facts entitle the plaintiff to judgment as a matter of law, summary judgment remains appropriate in cases where, as here, the movant bears the burden of proof at trial. *See* Tenn. R. Civ. P. 56.01 (authorizing summary judgment in favor of "part[ies] seeking to recover upon a claim . . . or to obtain a declaratory judgment"); *Suntrust Bank v. Best*, No. E2015-02122-COA-R3-CV, 2016 WL 4498401, at *10 (Tenn. Ct. App. Aug. 26, 2016). In such cases, the moving party "must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the

record is so one-sided as to rule out the prospect of the nonmovant prevailing." 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2727.1 & n.19 (4th ed. 2019) (citing cases). Below, Plaintiffs lay out the elements of their claims, and demonstrate in the argument which follows that the record in this case is so one-sided as to rule out the possibility of Metro prevailing.

II. Constitutional Standard.

This Court has already recognized that Plaintiffs have constitutional rights at stake here. *See* Order Den. Mot. Dismiss 3 (Apr. 13, 2018). The Tennessee Constitution prohibits deprivations of "liberty or property" except in accordance with the "law of the land," and further guarantees equal "rights, privileges, [and] immunitie[s]" to all of its subjects. Tenn. Const. art. I, § 8; *id.* art. XI, § 8. In modern times, the Tennessee Supreme Court refers to these constitutional protections—the bases of Plaintiffs' two claims—as substantive due process and equal protection. *See, e.g.*, *Consol. Waste*, 2005 WL 1541860, at *4–8. Depending on the right being infringed, Tennessee courts apply one of three levels of constitutional scrutiny. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). The Client Prohibition infringes on three different rights that the Tennessee appellate courts have explicitly called "fundamental" and which therefore deserve heightened or strict scrutiny. *See Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012) (right to own, use, and enjoy private property); *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (right to earn a livelihood); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (right to privacy), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008).

For purposes of this motion, however, the Court need not apply heightened or strict scrutiny because Metro cannot prevail even under the rational-basis standard by which "Tennessee courts have traditionally analyzed zoning ordinances." *Consol. Waste*, 2005 WL

1541860, at *25; *see also Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342–43 (Tenn. 1983). Plaintiffs outline the core requirement of reasonableness (which applies to both of Plaintiffs' claims), and demonstrate that under substantive due process, laws may not be "oppressive" as applied to a given plaintiff in Section II.A below. Section II.B then shows that equal protection also requires laws to be reasonable, and that legislative classifications must be based on real and substantial differences.

A. Zoning Ordinances Must Be Rationally Related to a Legitimate Interest, and May Not Be Oppressive in Their Application.

It is a bedrock requirement of Tennessee constitutional law that a zoning ordinance must bear "*a reasonable relationship to a legitimate state interest.*" *See State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (emphasis added by court) (quoting *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153). Ever since zoning was first recognized as an exercise of the police power generally, it has been 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 Co. v. City of Memphis*, 290 S.W. 608, 612–13 (Tenn. 1927) (quoting *Motlow v. State*, 145 S.W. 177, 188 (Tenn. 1912)). This inquiry can be applied to both of Plaintiffs' claims for substantive due process and equal protection. *E.g.*, *Consol. Waste*, 2005 WL 1541860, at *6–7. In sum, the Tennessee rational-basis test requires two elements: first, a legitimate interest; second, a reasonable fit.

When defending a constitutional challenge, the government must identify a legitimate interest. "The question of rational basis is a question of fact." Order Den. Mot. Dismiss 3 (Apr. 13, 2018). As such, "[i]t is not Plaintiffs' duty to guess what Metro's rational basis or bases might be." Order Granting Pls.' Mot. Compel 2 (Jan. 22, 2019). A zoning ordinance survives Tennessee rational-basis scrutiny only "if the *government* identifies a legitimate

governmental interest that the legislative body could rationally conclude was served by the legislative act." *Consol. Waste*, 2005 WL 1541860, at *6 (emphasis added) (citing *Parks Props. v. Maury Cty.*, 70 S.W.3d 735, 744–45 (Tenn. Ct. App. 2001)), *quoted in* Order 2 (Feb. 22, 2019). A legitimate interest is one that is grounded in "the public health, safety, morals or general welfare." *Consol. Waste*, 2005 WL 1541860, at *5. Economic protectionism is not a legitimate interest. *Bean v. Bredesen*, No. M2003-01665-COA-R3-CV, 2005 WL 1025767, at *5 (Tenn. Ct. App. May 2, 2005); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). Neither is aesthetics. *See City of Norris v. Bradford*, 321 S.W.2d 543, 546 (Tenn. 1958) (striking down prohibition on front yard fences in residential districts), *abrogated by State v. Smith*, 618 S.W.2d 474, 476–77 (Tenn. 1981) (finding that interests other than aesthetics justify state regulation of auto junkyards).

Even if an ordinance bears some general relation to a legitimate interest, its enforcement may not be "oppressive in its application" to the plaintiff. *Wise v. McCanless*, 191 S.W.2d 169, 172 (Tenn. 1945); *accord Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d 631, 634 (Tenn. 1983) (noting "two-part analysis" requiring (1) general relation to legitimate interest and (2) no "oppressive" application to plaintiff); *Spencer-Sturla*, 290 S.W. at 612–14 (cautioning that the breadth of the police power "cannot be an excuse for oppressive legislation"). It is the plaintiff's "burden of showing the regulation is not reasonably related to a protectable interest *or that it is oppressive in its application*." *Rivergate*, 647 S.W.2d at 634 (emphasis added); *see also Tenn. Small Sch. Sys.*, 851 S.W.2d at 153–54 (quoting *Harrison v. Schraeder*, 569 S.W.2d 822, 825–26 (Tenn. 1978)) (plaintiff's burden). In *Spencer-Sturla*, the foundational Tennessee case on zoning, the Tennessee Supreme Court upheld a state enabling statute and a municipal zoning ordinance against the constitutional affirmative defense of a Memphis undertaker who had

been convicted of maintaining a mortuary in a residential zone. 290 S.W. at 609, 613–14. After finding residential zoning facially constitutional, however, the court limited its as-applied holding to the proposition that "the exclusion of an undertaking establishment from a residence district is not subject to the criticism of unreasonableness." *Id.* at 614. Following the U.S. Supreme Court's then-recent decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Tennessee Supreme Court emphasized that lower courts should "consider the reasonableness" of *other* applications of residential zoning ordinances "when persons whose interests are affected thereby claim an unreasonable abridgment of their property rights." *Spencer-Sturla*, 290 S.W. at 614 (citing *Euclid*, 272 U.S. at 386–88 (distinguishing between facial and as-applied relief against zoning ordinances)).[1] This rule, applicable across all Tennessee rational-basis cases, has not changed: as this Court noted in denying Metro's motion to dismiss, reasonableness "depends upon the facts in each case." Order Den. Mot. Dismiss 3 (Apr. 13, 2018) (quoting *State v. Whitehead*, 43 S.W.3d 921, 926 (Tenn. Ct. App. 2000); *see also Tester*, 879 S.W.2d at 829 (" 'Reasonableness' varies with the facts in each case."); *Harrison*, 569 S.W.2d at 825–26 ("Reasonableness depends upon the facts of the case . . . .").

Because the facts matter, courts consider all the evidence in determining the reasonableness of a challenged ordinance. An ordinance survives Tennessee rational-basis scrutiny if the ordinance's reasonableness is "fairly debatable," *e.g.*, *Fallin*, 656 S.W.2d at 342, but it is the Court's role to scrutinize the government's asserted interests and give due weight to evidence that those interests are not reasonably served by the law at issue. *See*

[1] Two years after *Euclid*, the Court invalidated a residential zoning ordinance as applied to a 100-foot-wide strip of vacant property bordering an auto-assembly plant and soap factory. *Nectow v. City of Cambridge*, 277 U.S. 183, 186–88 (1928). As applied to the *Nectow* property owner, the zoning ordinance did "not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188.

Tester, 879 S.W.2d at 829–30 (finding that government's rational-basis argument "ignores the evidence in th[e] record"); *Tenn. Small Sch. Sys.*, 851 S.W.2d 154–56 (rejecting legitimacy of "local control" as justification for a funding disparity between school districts); *Spencer-Sturla*, 290 S.W. at 612–13 (holding that determination of reasonableness is a "judicial function"); *Consol. Waste*, 2005 WL 1541860, at *33–36 (striking down Metro zoning ordinance based on lack of "proof" that ordinance "meets [Metro's] stated goals").

B. Equal Protection Requires Legislative Classifications to Be Based on Real and Substantial Differences Germane to the Purpose of the Law.

Tennessee's guarantee of equal rights, privileges, and immunities imposes a similar reasonableness requirement, but with a specific view toward the reasonableness of legislative classifications. "The fundamental rule" in a Tennessee equal protection case "is that all classification[s] must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law." *Tester*, 879 S.W.2d at 829 (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). This "real and substantial" standard requires meaningful scrutiny of legislative classifications.

In *Tester*, a Washington County criminal defendant challenged the constitutionality of a statute under which he would have been eligible for work release, but for the fact that he was convicted in Washington County and not Davidson, Shelby, or Moore Counties. 879 S.W.2d at 825. The court applied Tennessee rational-basis review and held that the state's assertion of a "real and substantial distinction" with respect to overcrowding in Davidson, Shelby, and Moore Counties "ignore[d] the evidence in the 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. Because the evidence did not support the state's arguments for limiting the work-release program to three counties, the *Tester* court declared the program's limited application unconstitutional. *Id.* at 830. *Tester* was at least the tenth Tennessee opinion to require a "real and substantial" difference in order to uphold a legislative classification under rational-basis review. *See Tester*, 879 S.W.2d at 829; *Metro. Gov't of Nashville & Davidson Cty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977); *Logan's Supermarkets, Inc. v. Atkins*, 304 S.W.2d 628, 632 (Tenn. 1957); *State v. Greeson*, 124 S.W.2d 253, 256, 258 (Tenn. 1939); *Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 776; *In re T.M.G.*, 283 S.W.3d 318, 325 (Tenn. Ct. App. 2008); *State v. Whitehead*, 43 S.W.3d 921, 927 (Tenn. Crim. App. 2000); *Smith v. State*, 6 S.W.3d 512, 519 (Tenn. Crim. App. 1999); *Worley v. State*, No. 03A01-9708-JV-00366, 1998 WL 52098, at *1 (Tenn. Ct. App. Feb. 10, 1998); *Templeton v. Metro. Gov't of Nashville & Davidson Cty.*, 650 S.W.2d 743, 756–58 (Tenn. Ct. App. 1983).

A discriminatory ordinance can be invalidated under Tennessee's equal rights, privileges, and immunities provisions—even if it otherwise bears some relation to a legitimate interest—because municipalities "do[] not have the right to exclude certain persons from engaging in [a] business while allowing others to do so." *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) (citing *State v. Harris*, 6 S.E.2d 854 (N.C. 1940)). In *Consumers Gasoline Stations*, the Tennessee Supreme Court struck down a municipal ordinance that prohibited the installation of underground fuel tanks, even though the ordinance was rationally related to fire prevention as "an initial proposition." *See id.* at 736. The ordinance in question made it illegal to install more than three underground fuel-storage tanks on any property, all of which were required to have a maximum capacity of 1,100 gallons or fewer. *Id.* at 735. Because the operative word was "install," *id.*, it did not apply to several other property owners with preexisting

underground tanks "several times the maximum capacity provided for by the ordinance," with the "obvious effect" of "prohibit[ing] the construction of additional filling stations . . . which would compete with those [already] in existence." *Id.* at 736–37. This, the court found, "unquestionably denie[d] the equal protection of the laws" in violation of the Tennessee Constitution. *Id.* (citing Tenn. Const. art. I, § 8).

At least three zoning ordinances have been invalidated under the Tennessee Constitution's guarantee of equal rights, privileges, and immunities. In *Shatz v. Phillips*, 471 S.W.2d 944 (Tenn. 1971), the Tennessee Supreme Court declared it arbitrary and unreasonable to prohibit "the storage and/or salvaging of junk and other used material" in a "[l]ight [i]ndustry" district when the same was permitted in the "[h]eavy [i]ndustry" district across the street. *Id.* at 946–48. The junk-salvaging prohibition was the only difference between the two districts under the ordinance, which otherwise allowed all "industrial" uses. *Id.* at 946. The record showed that "a casual passer would not know what business was being carried on" in the plaintiff's "modern, attractive" building, and that the plaintiff's scrapping business was "free from noise, odor, fumes, and other objectionable features." *Id.* at 945. In *Consolidated Waste*, the Tennessee Court of Appeals held it arbitrary and unreasonable to require construction-and-demolition landfills, but not other, more hazardous types of landfills, to locate at least two miles away from schools and parks. 2005 WL 1541860, at *33–36. And in *Board of Commissioners of Roane County v. Parker*, 88 S.W.3d 916 (Tenn. Ct. App. 2002), the Court of Appeals held it arbitrary and capricious to rezone one semi-rural property for the keeping of large exotic animals but then deny the same rezoning to another rural property. *Id.* at 921–22. The court ruled for the plaintiffs—who kept *a tiger* on their property—even though the zoning ordinance was found to be "in the public interest, since [it was] concerned with . . . dangerous animals." *Id.* at 922. This

was because the "totality of the circumstances" allowed the plaintiffs to "carr[y] the[ir] burden of proof that the refusal of the County to rezone . . . was arbitrary and capricious." *See id.* at 922. Moreover, the concern about the potential danger of plaintiffs' tigers was mitigated by the presence of "a rigid statutory scheme" in state law with which the plaintiffs complied. *See id.* at 923–24.

ARGUMENT

As applied to Lij and Pat, the Client Prohibition serves no legitimate interest. Metro asserts that the Client Prohibition serves a wide variety of interests. *See* Pls.' Statement Undisputed Material Facts ("SUMF") ¶¶ 189–209. But as shown in Part I below, there is *no* evidence that the Client Prohibition, as applied to Lij and Pat, advances any of those interests. That should end this Court's inquiry. But if it does not, Part II addresses each of Metro's asserted interests and demonstrates, with uncontested record evidence, that each is an unreasonable, oppressive, and/or illegitimate justification for prohibiting Lij and Pat from recording musicians and styling hair in their homes. Finally, Part III establishes that Lij and Pat are similarly situated to thousands of Nashville residents who, by ordinance, *may* serve clients in their residential homes—underscoring the irrationality of the Client Prohibition.

I. Metro Has No Evidence that Its Enforcement of the Client Prohibition Against Lij and Pat Advances Any of Its Interests.

There is no evidence that shuttering Lij's and Pat's home-based businesses advances any of Metro's asserted interests in maintaining the Client Prohibition. Although Metro has offered a litany of potential interests, its entire argument for applying the Client Prohibition to Lij and Pat rests on one and *only* one fact: that two unknown somebodies turned Lij and Pat into the Codes Department. SUMF ¶ 210. Metro's Rule 30.02(6) witness, who testified on Metro's behalf "about Metro's interest in applying the Client Prohibition to

[Lij's and Pat's] recording studio and hair salon," Todd 30.02(6) Dep. 58:17–22, identified "the complaints" as the *only* evidence that Lij or Pat had harmed any of Metro's general interests in the Client Prohibition. SUMF ¶ 210; *see* Todd 30.02(6) Dep. 119:25–120:9 ("Well, the complaints [are] the evidence. I don't know of anything other than that.").

But Metro's code enforcement officials admit that, by themselves, anonymous complaints are not evidence that a homeowner had any impact on the well-being of the neighborhood. SUMF ¶ 211. In fact, Metro's code-enforcement officials deny that anonymous complaints even prove that the Client Prohibition was violated. SUMF ¶¶ 52–53. One property inspector testified that forty percent of Client Prohibition complaints are bogus; another inspector testified that sixty to seventy percent are. SUMF ¶¶ 83–85. Metro itself does not know who turned Lij and Pat into the Codes Department or why they turned them in. SUMF ¶¶ 87, 107. These anonymous complaints do not show that shutting down Lij's and Pat's home-based businesses advanced any of Metro's interests.

Beyond the mere existence of the complaints, Metro's follow-up investigations *also* found no evidence that Lij's or Pat's businesses had offended any of Metro's interests. Metro assigned both complaints to the same property-standards inspector, who observed nothing of consequence to the public interest at either property. The inspector denied finding *any* traffic, parking, noise, vibrations, smoke, dust, odor, heat, humidity, glare, or other objectionable effects at Pat's home, where the inspector's main observation was "s[eeing] a couple of ladies come out . . . with freshly co[i]ffed hair." SUMF ¶¶ 91–94; *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. SUMF ¶ 93. No objectionable effects were found at Lij's property, which the inspector did not visit *at all*. SUMF ¶¶ 109–10. Lij was found in violation only because of his website. SUMF ¶ 111. The only thing Metro found in the course of its investigations was that Lij and Pat

had clients at their homes. *See* SUMF ¶¶ 86–117. That was it. Metro can identify nothing that suggests Lij's or Pat's neighborhoods are better off for Metro's having enforced the Client Prohibition against Lij and Pat.

Metro also identifies nothing wrong with the particular activities Lij and Pat conducted with their clients. As Metro admits, home recording studios and home-based hair salons are legal in and of themselves. SUMF ¶¶ 14, 24. Under the Client Prohibition, Lij may record his friends and Pat may cut her neighbors' hair without government interference, so long as their friends and neighbors are not "clients."[2] Whatever Metro is trying to prevent with the Client Prohibition, it has nothing to do with recording music or cutting hair.

It is therefore undisputed that there is no evidence that enforcing the Client Prohibition against Lij and Pat promotes the public health, safety, morals or general welfare. Plaintiffs are entitled to judgment as a matter of law on this ground alone, and the Court need read no further. Should the Court require more evidence that the Client Prohibition is irrational as applied to Lij or Pat, however, each of Metro's hypothetical interests are addressed below in Part II.

II. All of Metro's Asserted Interests in Prohibiting Clients at Home Are Unreasonable or Illegitimate as Applied to Lij and Pat.

Not only is the rationality of enforcing the Client Prohibition in this case unsupported by any evidence; it is inconceivable. Metro contends that the Client Prohibition *might* serve several interests. SUMF ¶¶ 189–209. But based on the uncontested record, there is no reason to believe these interests are served by shutting down Lij and Pat.

[2] Jon Michael, the zoning administrator vested by the Metro zoning code with the power to interpret all of the zoning code's provisions, testified that he would "struggle" to determine whether a visitor to a home were a prohibited client "without any overt evidence or statements of fact from the individuals who are coming to the home or owners of the home." Michael Dep. 36:18–25; *see also id.* at 6:7–16, 7:17–8:11; Metro. Code § 17.40.060(A).

Plaintiffs proceed with this argument in four sections. First, enforcing the Client Prohibition against Lij and Pat is an irrational and unduly oppressive way of furthering Metro's interests in regulating traffic, parking or noise in residential zones. Second, there is no rational way to justify the Client Prohibition as protecting what Metro calls the residential nature of residential property—including Metro's claimed "order" and quality-of-life interests—when every residential homeowner in the county may obtain (and thousands have obtained) a permit to serve clients on their properties. Third, it is irrational to conclude that enforcing the Client Prohibition advances Metro's various health and safety interests. Fourth, Plaintiffs show that the rest of Metro's asserted interests are either illegitimate or unconnected to the public health, safety, morals or welfare.

A. It Is Irrational to Conclude that Enforcing the Client Prohibition Against Lij and Pat Advances Metro's Interests in Regulating Traffic, Parking, and Noise.

There is no reason to believe that a handful of clients could meaningfully impact the traffic, parking, or noise in Lij's and Pat's neighborhoods. To be sure, Metro's interests in regulating residential traffic, parking, and noise are legitimate. But these interests do not give Metro license to regulate *whom* Lij or Pat may invite into their homes. Plaintiffs have an obvious (and important) liberty interest in inviting whom they wish. *Cf.* Todd 30.02(6) Dep. 34:17–21 ("You want to give citizens as much liberty as possible. This is their home and so I want to let them use their home in as many ways as possible until it starts to bother their neighbors."). It is not the identity of Lij's and Pat's visitors that can affect Metro's interests in traffic and parking; it is their quantity. And as Metro concedes, the Client Prohibition does not serve its interest in regulating noise. Below, Plaintiffs address their clients' lack of impact on each of these three interests in turn.

1. Enforcing the Client Prohibition Is an Unduly Oppressive Way to Limit Traffic at Lij's and Pat's Homes.

If the Client Prohibition controls residential traffic (and it does not), it is an oppressive way of doing so. Metro has an interest in regulating traffic. In *Spencer-Sturla*, the Tennessee Supreme Court noted that "the principle of 'zoning' appears to be founded in an effort to so regulate the future physical development of a city that the unrestricted congestion of traffic . . . will not increase or be repeated." 290 S.W. at 614. Lij and Pat agree; neither of them wish to experience, let alone cause, a traffic jam in their neighborhoods. But again, there is *no* evidence in this case that Plaintiffs' home-based businesses generated excessive traffic. *See above* Part I. There is also no reason to believe that Lij's and Pat's businesses could.

It is inevitable that people will drive on residential streets, however, and Metro allows traffic in residential neighborhoods. SUMF ¶ 214. Metro measures traffic in "trips," and the typical home occupation client generates two "trips": one trip upon arriving and one upon leaving. SUMF ¶ 216. Metro does not typically seek a traffic impact study for proposed uses that would generate fewer than 750 daily and 100 peak-hour trips. SUMF ¶ 215. Lij's and Pat's clients would generate far less traffic than that—likely 10 and 16 trips *per day*, respectively, SUMF ¶¶ 218, 220, and at worst no more than 48 trips for twelve clients a day. *See* SUMF ¶¶ 216–17, 219 (worst-case estimate of four trips per client); Compl., Prayer ¶ B (seeking relief from Client Prohibition as applied to twelve clients a day). Metro cannot contend that this proposed volume of clients will cause traffic congestion.

Metro's own study of Plaintiffs' rezoning applications, which were made in an attempt to obtain legal status before this suit was brought, confirms that Plaintiffs' businesses would not impact neighborhood traffic. Metro planning staff's recommendation regarding traffic and parking was to *approve* both Lij's and Pat's home-based businesses. SUMF

¶ 221. To the extent Metro's enforcement of the Client Prohibition in this case succeeded in reducing traffic at Plaintiffs' homes—and there is no evidence that it has—it is an oppressive and unreasonable encroachment on Plaintiffs' right to use their homes to earn a livelihood.

2. Enforcing the Client Prohibition Is an Unduly Oppressive Way to Limit Parking at Lij's and Pat's Homes.

It is inconceivable that Lij's and Pat's businesses could offend Metro's interest in regulating parking. As with traffic, there is no evidence of a parking problem at either Plaintiff's home. SUMF ¶¶ 94, 110, 210–11. Nor could there be: Plaintiffs' driveways can easily accommodate their clients' vehicles, and Metro disclaims any interest in (and does not regulate) the consensual use of residential driveways for parking cars. SUMF ¶¶ 222–24. Indeed, the only recommendation made by Metro planning staff, in approving Plaintiffs' rezoning applications with respect to traffic and parking, was that Lij and Pat provide adequate parking on their property. SUMF ¶ 221. Lij's and Pat's driveways provide adequate parking. SUMF ¶¶ 222–23. As with traffic, it is simply not possible that Plaintiff's clients would cause any parking issues.

3. Enforcing the Client Prohibition Is an Unduly Oppressive Way to Limit Noise at Lij's and Pat's Homes.

It is likewise inconceivable that enforcing the Client Prohibition against Lij and Pat advances Metro's interest in regulating noise. Metro's Rule 30.02(6) witness expressly denied that the Client Prohibition regulates noise. SUMF ¶ 195. Even setting aside Metro's concession, both Plaintiffs' home-based businesses comply with the Nashville noise ordinance. SUMF ¶¶ 254, 257. Whatever interest Metro has in regulating noise, the Client Prohibition does not advance it as applied to Lij and Pat.

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B. It Is Irrational to Assert that Enforcing the Client Prohibition Against Lij and Pat Protects the Residential Nature of Residential Property.

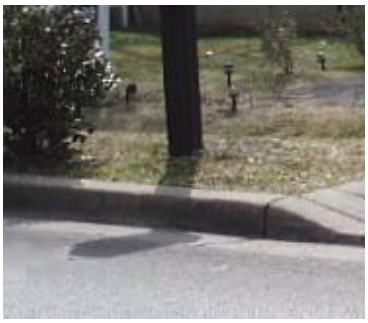
The Client Prohibition does not protect the residential nature of residential property as applied to Lij and Pat. Metro asserts this as its central, "overarching" interest in enforcing the Client Prohibition. SUMF ¶ 191. It is true that the Tennessee courts have long recognized a legitimate interest in the basic idea of residential zoning. *E.g.*, *Spencer-Sturla*, 290 S.W. at 613. Metro expresses its interest in preserving the residential nature of residential property as a judgment that commerce is repugnant to residential neighborhoods. SUMF ¶ 191 ("Without [the Client Prohibition] . . . residential would . . . become commercial. It would . . . gut the meaning of the residential portion of the zoning code."). This interest encompasses Metro's various contentions relating to order. *See* SUMF ¶¶ 190, 200–04. But it is irrational of Metro to assert that the Client Prohibition is the "lynchpin" of residential zoning, SUMF ¶ 191, when both Metro's zoning code and code-enforcement policy invite every homeowner in the county to serve clients on their property.

The Metro zoning code welcomes commerce in residential zones. Home businesses are legal. SUMF ¶¶ 25–29. Deliveries are legal. *See* Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs. ¶ 5 (maintaining that "[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's Rule 30.02(6) witness testified that if the home-based piano teacher "doesn't bother anybody, I'm not sure you have to turn her in." *Compare* SUMF ¶¶ 70–71, *with id.* ¶ 251. It is simply not Metro's goal to exclude commerce from residential neighborhoods.

The Metro zoning code also allows the widespread service of clients in residential homes, notwithstanding the Client Prohibition. *See* SUMF ¶¶ 118–88. The starkest

examples of this are the eleven specific plan ("SP") ordinances that exempt thirteen properties from the Client Prohibition, SUMF ¶¶ 123–63. Two of these ordinances allow "personal care services"—Pat's line of work—and the Metro Assessor's photograph of one of these properties shows that the home is in fact advertised as a hair salon.[3] SUMF ¶¶ 136–41. Another of these ordinances, enacted in 2016, openly acknowledges that its purpose is to exempt two homeowners from the Client Prohibition.[4] SUMF ¶ 129. Beyond the SPs,

[3] The photograph appears on the Metro Assessor's website as follows:



SUMF ¶ 137.

[4] The ordinance states, in pertinent part:

> The standards for the Home Occupation uses in this SP are similar to Metro Zoning Code Standards for Home Occupations. The home occupation use shall only be conducted in the dwelling unit. *Clients may be served on the property only between 8:00 AM and 5:00 PM, and only between Monday and*

Nashville has permitted *three to five thousand* residential homes to serve clients as owner-occupied short-term rentals. SUMF ¶¶ 164–72. Metro has legalized this form of client service in every residential district throughout the county, even though short-term rentals present greater noise, traffic, parking, trash, and even moral issues for their surrounding neighborhoods than do Lij's recording studio or Pat's hair salon. SUMF ¶¶ 262–75. And while Metro imposes special criteria restricting the number of day care homes and historic home events, those types of business are likewise allowed to serve clients in residential homes. SUMF ¶¶ 173–88. It is unthinkable that Metro's various residential-policy arguments, such as the "crowd[ing] out [of] residential purchasers" or "burden for the [homeowners' associations],"[5] SUMF ¶ 190, are not as much or more affected by these legalized client-serving home occupations than by Lij's or Pat's. If Metro's designated witness were correct that prohibiting clients is the "sine qua non" of residential zoning, *see* Todd 30.02(6) Dep. 18:23—and of the ten most populated cities in Tennessee, Nashville is the *only* one with a client prohibition[6]—the Client Prohibition is so completely

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> *Friday. This provision is not currently in the Metro Zoning Code for Home Occupations.* No more than one part-time or full-time employee not living within the dwelling may work at the home occupation.

Metro Ordinance No. BL2016–398, § 4, ¶ 4 (emphasis added), *cited in* SUMF ¶ 129.

[5] Although HOAs are private entities whose interests have no connection to the public health, safety, morals or welfare, Metro has accommodated HOAs' interests in short-term rentals by requiring short-term rental applicants to submit a statement of compliance with any applicable HOA restrictions. Metro. Code § 17.16.250(E)(2)(v). Metro could surely require other home occupations to submit a similar statement.

[6] *See* Memphis, Tenn., Unif. Dev. Code § 2.7.4 (permitting up to four clients per hour for group instructions at a home occupation); Knoxville, Tenn., Code of Ordinances app. B, art. V, § 12 (permitting traffic generated by a home occupation so long as traffic is no greater in volume than would normally be expected in a residential neighborhood and parking is available off the street and the front yard); Chattanooga, Tenn., Code of Ords. ch. 38, art. II (permitting traffic generated by a home occupation when not disruptive to the neighborhood

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

Metro's contention that the Client Prohibition guards against "neighbor against neighbor" disputes is laughable. *See* SUMF ¶ 190. *The Client Prohibition* turns neighbor against neighbor. SUMF ¶ 240. Roughly half of Client Prohibition complaints are bogus. SUMF ¶¶ 83–85. One property-standards inspector testified that over the course of eleven months, she was repeatedly called to police one neighbor-on-neighbor dispute in which, even after the neighbor in violation complied with the home occupation rules, the other neighbor "kept using th[e] codes complaint process to harass his neighbor." Jones Dep. 59:10–66:20. Another inspector testified about being unable to verify four sequential complaints about one homeowner's alleged home-based tutoring business. *See* Rice Dep. 47:21–55:18 & Exs. 2, 4, 6–7. If the Client Prohibition is intended to keep neighbors from turning against neighbors (and it is not), it has demonstrably had the opposite effect.

All record evidence indicates that Lij's and Pat's businesses operated in harmony with the residential nature of their neighborhoods. They took care that their clients would not affect neighboring properties, SUMF ¶¶ 252–57; as Metro itself recognizes, Lij and Pat are

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and does not create a nuisance or safety hazard); Clarksville, Tenn., Zoning Ord. ch. 5, § 2.7 (authorizing the Board of Zoning Appeals to establish a maximum number of clients that may be served on a property where a home occupation is based on a case-by-case basis); Murfreesboro, Tenn., Zoning Ord. app. A, § 9(D)(2)(rr) (permitting group instruction in connection with a home occupation subject to approval by the Board of Zoning Appeals); Franklin, Tenn., Zoning Ord. § 4.1.6(6) (permitting instruction or counselling services at a home occupation for up to two clients at a time); Johnson City, Tenn., Zoning Code art. IV, § 4.13.5 (permitting clients at the residence of a home occupation if customers visit the property between 9:00 a.m. and 8:00 p.m.); Bartlett, Tenn., Zoning Ordinance art. VI, § 2 (permitting traffic generated by home occupation if traffic is no greater in volume than would normally be expected in residential neighborhoods and parking is available in rear or side yards); *cf.* Jackson, Tenn., Zoning Ordinance art. VI, § 7 (prohibiting clients "with the exception of teaching"); SUMF ¶ 41 (comparable cities nationwide have no client prohibition).

"the two best plaintiffs" to challenge the Client Prohibition. SUMF ¶ 225. Because the reasonableness of applying the Client Prohibition depends on the facts of Lij's and Pat's cases, the judgment to which they are entitled will not hamstring Metro's ability to prohibit certain businesses that may well be incompatible with residential neighborhoods. *Spencer-Sturla*, to cite one example, rested its as-applied holding on a California case finding that undertaking establishments were inherently inimical to residential districts. 290 S.W. at 614 (citing *Brown v. City of Los Angeles*, 192 P. 716, 717 (Cal. 1920) (citing further cases upholding the exclusion of undertakers from residential districts)). Convenience stores, which invite the spontaneous patronage of passing motorists, are another potential example. This case is not about those uses; it is about Lij and Pat. They are not seeking to operate at odd hours, invite passing traffic to stop by, or engage in any business which—unlike undertaking—ordinary people hope to avoid contact with. Metro's interest in the residential nature of residential property has nothing to do with Lij's recording studio or Pat's hair salon.

C. It Is Irrational to Conclude that Enforcing the Client Prohibition Against Lij and Pat Advances Metro's Various Health and Safety Interests.

Metro asserts that the Client Prohibition serves a handful of health and safety interests. SUMF ¶¶ 190, 196–99. But there is no reason to believe that Lij's or Pat's home businesses would present the kind of health and safety concerns Metro expresses. First, there is no reason to believe that Lij's or Pat's businesses are inherently dangerous, or that the Client Prohibition has anything to do with any element of danger. Second, the Client Prohibition is not reasonably related to Metro's concern about stranger danger. Third, the Client Prohibition does not reasonably protect the safety of Lij's or Pat's disabled clients. And fourth, there is no reason to believe that Lij's or Pat's home-based businesses are attractive nuisances.

1. Lij's and Pat's Businesses Are Not Inherently Dangerous.

The Client Prohibition does not mitigate any inherent danger in Lij's or Pat's occupations. *Cf.* SUMF ¶ 196. Metro claims that "certain types of businesses . . . have an element of danger to them," but expressly directs its concern toward businesses *other than* those of Lij and Pat. *Id.* Metro further concedes there is no evidence that either Lij's home recording studio or Pat's hair salon is "unsafe." SUMF ¶¶ 212–13. Metro does not contend that recording music is dangerous; as for Pat's hairstyling practice, Metro's hypothetical concerns about the chemicals used in hair dye, SUMF ¶ 226, are put to rest by the state cosmetology board's inspection and approval of her hair salon. *See* SUMF ¶ 22.

In fact, the Client Prohibition does not address the inherent danger of any business. Metro's home occupation ordinance *allows* "flammable or combustible compounds" so long as they are maintained in accordance with the fire code; various forms of pollution are regulated not by the Client Prohibition but rather by a separate requirement that "[o]ffensive" emissions "shall not be permitted." Metro. Code § 17.16.250(D)(5)(d), (7). Metro directly addresses such dangers elsewhere, and it is irrational to maintain that the Client Prohibition addresses these dangers instead. The inherent danger of surgery, for example, has nothing to do with the zoning district in which the operation is performed. If the Client Prohibition serves any legitimate interest (and it does not), it is not the regulation of dangerous businesses.

2. The Client Prohibition Does Not Rationally Relate to Any Interest in Keeping Unidentified Strangers Out of Plaintiffs' Neighborhoods.

The Client Prohibition is an unreasonable way to guard against stranger danger. *Cf.* SUMF ¶ 197. Metro argues that the Client Prohibition "can reduce the amount of encroachments into the neighborhood by potential dangerous people," Todd 30.02(6) Dep. 87:16–17, but concedes that Metro's short-term rental ordinance places no restrictions on

the prior criminal history of overnight guests. *Id.* at 87:19–22, *cited in* SUMF ¶ 231. In fact, Metro does not restrict the travel of unsafe people through residential neighborhoods at all. SUMF ¶ 230. Metro prohibits no class of prior offender from either obtaining a home occupation permit or from working as the nonresident employee of someone else's home-based business, and Metro has no evidence that the employment of prior offenders by home-based businesses has led to any increase in crime. SUMF ¶¶ 232–33.

There is no reason to believe that Lij's or Pat's clientele would threaten the integrity of their neighborhoods. The Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 already accommodates the public interest in disclosing certain offenders' whereabouts to the public. Tenn. Code Ann. §§ 40-39-201 *et seq.*; *see also id.* § 40-39-206(d) (making certain offender-specific information, including license plates, public). Moreover, Lij and Pat work by appointment only, and neither of them wish to invite violent or predatory clients into their homes. SUMF ¶ 229. If Lij and Pat prevail here, their clients would enter their neighborhoods in order to record music or have their hair cut, not to go about committing crimes. The Client Prohibition prevents only the former, and not the latter.

3. The Client Prohibition Does Not Protect Disabled Clients.

The Client Prohibition does not protect the safety of disabled persons in Lij's or Pat's (or any other) case. *Cf.* SUMF ¶ 198. Metro argues the Client Prohibition "protects the clients of the business" by ensuring that disabled clients visit commercial districts; Metro claims a particular concern in a historic lack of sidewalks in Nashville neighborhoods. *Id.* Under examination, however, Metro conceded that "[t]hat's a Metro thing, building sidewalks," and that Metro is "not concerned with sidewalks" vis à vis the Client Prohibition. Todd 30.02(6) Dep. 96:14–24. When Metro was specifically asked about disabled clients, Metro could identify no evidence that Lij's or Pat's businesses would pose a danger to them. *Id.* at

93:11–94:3. There is neither a Metro ordinance nor a Tennessee statute regarding disability access that would apply to Lij's or Pat's businesses *even if they were located in a commercial district*. SUMF ¶ 234 (Metro has no disabled-persons act); *see* Tenn. Code Ann. §§ 8-50-103 to -104 (Tennessee Disability Act does not regulate disability access and also exempts private businesses with fewer than eight employees). The only applicable law is the federal Americans with Disabilities Act, which would require Lij and Pat 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). Whatever Lij or Pat might have to do in order to comply with the ADA—and Metro does not know what that might be, SUMF ¶¶ 235–36—is a moot point when the Client Prohibition drives them out of business entirely. Lij and Pat would be glad to accommodate the needs of a disabled client, if only Metro would let them serve clients in the first place.

4. The Client Prohibition Does Not Reasonably Protect Against Attractive Nuisances.

It is inconceivable that the Client Prohibition reasonably serves to prevent Lij or Pat from maintaining an attractive nuisance. *Cf.* SUMF ¶ 199. Metro claims the Client Prohibition eliminates attractive nuisances, *id.*, but does not know whether Lij's or Pat's home-based businesses fall within that category, SUMF ¶ 238. Attractive nuisances require a combination of negligence, unreasonable risk of death or serious bodily harm, and either enticement or habitual trespass. *See Metro. Gov't of Nashville & Davidson Cty. v. Counts*, 541 S.W.2d 133, 136 (Tenn. 1976) (specifying elements of attractive nuisance). These elements simply do not exist with respect to Plaintiffs' indiscernible home recording studio and hair salon. As with its concern about dangerous businesses, Metro's argument here is

directed at businesses other than Lij's and Pat's: Metro's designated witness made clear that its attractive-nuisance concern was about massage parlors and body-piercing shops. Todd 30.02(6) Dep. 21:24–22:14, 89:20–90:5. Lij and Pat do not engage in those businesses, and the businesses that Lij and Pat did operate from their homes never attracted any children. SUMF ¶ 239. Metro "d[oes not] know" how Pat's hair salon could be an attractive nuisance, and could only speculate that "band members walking around" might draw neighboring children's attention toward Lij's home (to say nothing about how those children could be harmed so as to establish an attractive nuisance). Todd 30.02(6) Dep. 90:6–21. Even if there were a risk of harm (and there is not), Lij's driveway is surrounded by a high privacy fence, and his studio is soundproof. SUMF ¶¶ 252, 254. Passing children will not see or hear it. (Pat's salon is also indistinguishable from a normal home, and cannot be heard from the street. SUMF ¶¶ 255, 257.) Metro's unsubstantiated hypothesis about attractive nuisances is not a rational basis for prohibiting Lij and Pat from serving clients behind closed doors.

D. Metro's Remaining Interests Are Either Illegitimate or Unrelated to the Public Health, Safety, Morals or Welfare.

The remainder of Metro's asserted interests are either illegitimate or else unrelated to the public health, safety, morals or welfare. Plaintiffs show Metro's slippery-slope argument to be illegitimate and irrational in Section II.D.1. Next, Plaintiffs confront Metro's argument that the Client Prohibition is necessary to protect the interests of commercial-district landlords in Section II.D.2. In Section II.D.3, Plaintiffs address Metro's various law enforcement concerns and show them to be unrelated to Metro's legitimate interests in the public health, safety, morals and welfare. Finally, Section II.D.4 deals with the few of Metro's remaining contentions and shows why they are not interests at all.

1. Metro's Slippery-Slope Argument Is Illegitimate and Irrational.

The Client Prohibition is neither rationally nor legitimately justified by Metro's "slippery slope" argument, in which Metro contends that legal recognition for Lij's and Pat's home-based businesses will entice other would-be home-based businessowners to ask for legal recognition as well. *See* SUMF ¶ 190. This contention is flawed in two respects. First and foremost, Metro has no legitimate interest in regulating whether or how frequently its residents petition the government. *See* U.S. Const. amend. I; Tenn. Const. art. I, § 23 ("[C]itizens have a right . . . to apply to those invested with the powers of government for redress of grievances . . . ."). And second, this contention is irrational because the Metro zoning code *already invites* other home occupations to seek legal recognition via specific plan, for which anyone may apply. *See* Metro. Code §§ 17.40.105–.106.

2. Protectionism for Commercial Landlords Is Not a Legitimate Interest.

The Client Prohibition also cannot be justified by the protection of commercial landlords. Metro has repeatedly committed itself to the position that the Client Prohibition protects the interests of commercial landlords by "making sure that business owners who want to serve clients have to rent space in commercial districts." SUMF ¶ 203; *see* Todd 30.02(6) Dep. 98:13–100:24. But economic protectionism is not a legitimate government interest. *Craigmiles*, 312 F.3d at 224; *Bean*, 2005 WL 1025767, at *5. Both Lij and Pat set up their home-based businesses in no small part to secure their financial independence. SUMF ¶¶ 11, 21. Metro has no legitimate interest in forcing Lij and Pat to put their entrepreneurial dreams aside in order to enrich a landlord in a commercial district.

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3. The Client Prohibition Is an Irrational Way of Advancing Metro's Law Enforcement Concerns, Which Are Unrelated to the Public Health, Safety, Morals, or Welfare.

Metro's contentions about "certainty" and the conservation of law-enforcement resources are—at most—derivative of Metro's interest in promoting the public health, safety, morals and general welfare. *See* SUMF ¶¶ 190, 205–07. These asserted interests in promoting "certainty," conserving finite resources, and preventing "unintentional and unknown consequences" could all be invoked to justify *any* law. They cannot be legitimate interests, or else laws would never be struck down under Tennessee rational-basis scrutiny. *See, e.g.*, *Tester*, 879 S.W.2d at 828–29 (rejecting prison overcrowding as justification for implementing work-release program in some counties but not others).

The evidence also shows these law-enforcement concerns to be irrational. By Metro policy, every reported violation of the Client Prohibition must be investigated. SUMF ¶ 51. Forty to seventy percent of reported violations, however, are bogus. SUMF ¶¶ 83–85. These complaints all consume Metro resources, and Metro concedes that if the Client Prohibition were *not* in Metro's home occupation ordinance, there would be "nothing to enforce." SUMF ¶¶ 248–49. It is irrational to contend that *not* enforcing a Client Prohibition could consume more law-enforcement resources than enforcing the Client Prohibition presently does.

There is also no evidence that the Client Prohibition eases any burden on the Metro tax assessor or on Metro's various utilities. Metro contends that the Client Prohibition is necessary to help the tax assessor and utilities distinguish between residential and commercial properties, which are taxed at different rates. SUMF ¶¶ 190, 204. But the assessor has no trouble characterizing existing home occupations—including that of Metro's designated witness, who "come[s] home early and practice[s] law by [him]self for four more hours"—as residential property for tax purposes. SUMF ¶ 243; *see* Todd 30.02(6) Dep. 101:7–25, 103:16–19. Metro admits that it could tax home occupations however it wanted

to, Todd 30.02(6) Dep. 102:21–103:6, and does not know whether its assessor has had any trouble characterizing short-term rentals, day care homes, or historic home events, *id.* at 103:13–25. Metro also does not know how it charges electric, water, or stormwater rates to existing home occupations, short-term rentals, day care homes, or historic home events. SUMF ¶ 244. Metro's concerns here are unfounded.

4. Metro's Remaining Contentions Are Not Actual Interests.

Metro argues that the Client Prohibition is rational because would-be entrepreneurs can meet their clients elsewhere, and because every other justification Metro has asserted could potentially be twice as strong in two-family residential zones. *See* SUMF ¶ 190. Neither of these are "interests": they do not advance the public health, safety, morals or welfare in any way that would independently justify the Client Prohibition's restriction on Plaintiffs' liberty.

Lij and Pat brought suit so that they would not *need* to rent alternative space in order to serve their clients. The Toy Box Studio is tailor-made to produce recordings of a quality Lij cannot produce elsewhere. Shaw Decl. ¶ 16. In Pat's case, her need to cover the overhead cost of commercial rent is the very reason she must continue to work full-time despite her doctor's advice to reduce stress in order to maintain her health. Raynor Decl. ¶ 19. She wants to work from home so that she may cut her hours back to part-time. SUMF ¶ 294. Coming from Metro, the hypothetical availability of alternative spaces is an excuse, not an interest; as Metro's 30.02(6) witness recognizes, the Client Prohibition itself is "unrelated" to the availability of such space. SUMF ¶ 245.

As for two-family housing, Nashville concedes that this concern does not apply in Lij's or Pat's case. SUMF ¶ 242. But even if it did, it is not an "interest" either. Like the law enforcement concerns addressed above in Section II.D.3, this concern is (at most) derivative of any health, safety, morals or welfare justification for the Client Prohibition.

* * *

The uncontested facts establish that as applied to Lij and Pat, the Client Prohibition does not advance the public health, safety, morals or general welfare. It is an oppressive infringement of their constitutional rights to use their homes and earn a livelihood, and Lij and Pat are thus entitled to judgment as a matter of law on their substantive due process claim.

But that is not the Client Prohibition's only constitutional defect as applied to Lij and Pat. In Part III below, Plaintiffs show that there is no real and substantial difference between themselves and the thousands of Nashville home businesses in which clients *may* be served. This violates the Tennessee Constitution's guarantee of equal rights, privileges, and immunities to Lij and Pat.

III. Lij and Pat Must Be Treated the Same as the Thousands of Other Nashvillians Who May Legally Serve Clients in Their Homes.

Even if enforcing the Client Prohibition against Lij and Pat served a legitimate interest (and it does not), the Tennessee Constitution requires a real and substantial difference between Lij, Pat, and the thousands other Nashville homeowners who may legally serve clients at their homes in order to justify any differential application of the Client Prohibition. *See Tester*, 879 S.W.2d at 829. But it is undisputed that these other types of home occupations that are exempt from the Client Prohibition—various specific plans, short-term rentals, day care homes, and historic home events—exhibit each of the same three elements that make Lij and Pat subject to the Client Prohibition. SUMF ¶¶ 118–22, 127, 165–67, 175–77, 183–85. There is no real and substantial difference between Lij and Pat and these thousands of other Nashville homeowners, and so Lij and Pat must be allowed to serve clients on the same terms as these other home occupations.

In Section III.A, Plaintiffs show why there is no real and substantial difference between themselves and the thirteen or more homeowners who have received the Metro Council's express approval to serve clients in the form of a Specific Plan ordinance. Section III.B shows that no real and substantial difference exists between Plaintiffs and the thousands of Nashvillians who legally host their clients overnight as short-term rental guests. In Section III.C, Plaintiffs show there to be no real and substantial difference between themselves and day care homes, which may serve clients onsite. Finally, Section III.D shows that there is no real and substantial difference between Plaintiffs and the owners of homes at which historic home events are permitted to serve clients.

A. It Is Irrational to Use Specific Plans to Exempt Other Homes from the Client Prohibition While Prohibiting Lij and Pat from Serving Any Clients at All.

Because there is no real and substantial difference between Plaitniffs and the thirteen or more properties which Metro has arbitrarily exempted from the Client Prohibition, Metro cannot maintain that the Client Prohibition is necessary to protect the public health, safety, morals or general welfare as applied to Lij and Pat. Metro has approved the in-home service of clients at these properties, which are all residential homes in residential neighborhoods, by enacting specific plan ordinances which supersede the ordinary residential zoning rules for those properties only. *See* SUMF ¶¶ 123–63. Metro's entire justification for exempting these thirteen properties from the Client Prohibition (while continuing to apply it to Lij and Pat) is that these thirteen properties "have gone through a rezoning process" and have therefore "been purposefully taken out of the residentially zoned rules." Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs. ¶ 5. Metro claims that "there *may* be plenty of parking [at the approved specific plan sites], it *may* be located near a busy road or commercial node (and inherently less residential in nature), it *may* be otherwise appropriate under the general plan and/or supported by neighbors." *Id.* (emphases added).

This is sheer speculation, and it is all that Metro could articulate—nine months after Plaintiffs first propounded their interrogatories and more than two months after Plaintiffs identified the eleven SP ordinances in disclosing their expert report to Metro, *see* Phillips Decl., Ex. A—as a reason for exempting these thirteen properties from the Client Prohibition by specific plan.

The uncontested facts contradict Metro's hypotheses as to why Metro treats Lij and Pat differently from these thirteen properties. There is plenty of parking on Lij's and Pat's driveways. SUMF ¶¶ 222–23. Pat is on a busy road, and Lij is located near an auto diesel college. SUMF ¶¶ 9–10, 17. Specific plan ordinance BL2005-816, which legalizes "personal care services" and at which the tax assessor's website shows a "HAIR SALON" being advertised by a prominent banner sign above the home's front porch, was approved *even though the Planning Commission flagged it as inconsistent with the general plan*.[7] SUMF ¶¶ 136–38. Metro simply has no rational basis for creating thirteen zoning islands where the Client Prohibition is not enforced, while applying the Client Prohibition to Lij and Pat, especially when there is no reason to believe that Lij's and Pat's clients affect the neighborhood. The Tennessee Constitution guarantees Lij and Pat equal rights, privileges, and immunities in serving clients in their homes. Tenn. Const. art. I, § 8; *id.* art. XI, § 8. Metro must be ordered to comply with that guarantee.

B. It Is Irrational to Let Over 3,000 Homeowners Host Clients Overnight While Prohibiting Lij and Pat from Serving Clients During the Day.

It is irrational for Metro to subject Lij and Pat to the Client Prohibition while permitting *over four thousand* residential homeowners to host paying clients overnight in

[7] This rebuts Metro's contention that "[a]llowing clients to visit home businesses is inconsistent with residential policy." Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs. ¶ 5. Even the SP process's "procedural safeguards," which Metro believes so important to preserving residential order, demonstrably fail to uphold Metro's purported interest in having its general plan followed.

owner-occupied short-term rentals. SUMF ¶ 170. Lij and Pat are similarly situated to these residential homeowners in that they wish to serve clients in their homes, but only overnight clients—not Lij's and Pat's daytime clients—are legal under the Metro Code. This massive exemption for short-term rentals swallows every one of Metro's justifications for the Client Prohibition.

There is no real and substantial difference between Plaintiffs and short-term rentals. Metro's purported justification for exempting short-term rentals (but not Lij and Pat) from the Client Prohibition fails the Tennessee Constitution's equal-protection guarantee, which requires that "*the characteristics which form the basis of the* [legislative] *classification must be germane to the purpose of the law*." *Tester*, 879 S.W.2d at 829 (emphasis added by court) (quoting *Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 776). In *Tester*, the Tennessee Supreme Court struck down a work-release program for second-time DUI offenders, which only applied in Shelby, Davidson, and Moore Counties, on the grounds that an asserted problem with jail overcrowding in those metropolitan counties was unsupported by the record. *Id.* at 826, 828–29. The court further found that the state's other policy rationales—keeping second offenders employed, cost savings, and supporting families involving minor children—"appl[ied] equally to all second time offenders and provide[d] no rational basis for distinguishing between the three counties to which the act is limited and all the other counties of the State." *Id.* at 829.

Like the State's argument in *Tester*, Metro's argument for classifying short-term rentals separately from Lij and Pat with respect to the Client Prohibition "ignores the evidence in this record." 879 S.W.2d at 829. Metro claims its "main overarching interest" in applying the Client Prohibition is the residential nature of residential property. SUMF ¶¶ 191–92. Although Metro officially denies knowledge of the impact of short-term rentals in comparison to home-based businesses of the type Lij or Pat wish to operate, the Director of

Metro's Codes Administration testified—based on his five years of experience overseeing Metro's handling of complaints—that short-term rentals cause *more* noise, traffic, parking, trash, and other problems than home recording studios or home-based hair salons. *Compare* Todd 30.02(6) Dep. 76:8–77:2, *with* SUMF ¶¶ 258–71. However residential nature is quantified, Director Herbert's testimony establishes that the impact of short-term rentals thereon is significantly greater than the impact of businesses like Lij's and Pat's.

Moreover, Metro's argument that short-term rentals help alleviate a "limited number of hotel rooms in Nashville," Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs. ¶ 5, is not germane to its "overarching" interest in maintaining the residential nature of residential property. *Cf.* SUMF ¶¶ 191–92. Metro *admits* that allowing short-term rentals detracts from that residential nature. Todd 30.02(6) Dep. 75:3–9. Under Metro's code, Lij could list his home on Airbnb and allow his guests to record in The Toy Box Studio, and it would only be illegal if his guests failed to sleep over. In other words, Metro's objection to Lij's proposed use of his property is that it is not intense *enough*. That makes no sense. The fact that short-term rental clients spend the night is no justification for applying the Client Prohibition to Lij and Pat while exempting short-term rental homeowners.

Indeed, given Metro's regulatory scheme for home occupations, Lij and Pat are most similar to the plaintiff construction-and-demolition landfill in *Consolidated Waste*. There, the deposition testimony of Metro's Interim Director of Public Works established that there was no rational basis for singling out the plaintiff's landfill for a more stringent buffering requirement than was applied to other, more dangerous kinds of landfills. 2005 WL 1541860, at *34–35. Here, the undisputed evidence shows short-term rentals to be more inimical to residential neighborhoods than home recording studios or home hair salons. Because Metro allows uses with a greater effect on residential neighborhoods while prohibiting Lij's and Pat's at most minimal effect, Metro's scheme violates the Tennessee

equal-rights guarantee as applied to Lij and Pat. Lij and Pat must therefore be allowed to serve up to twelve clients a day, just as short-term rental owners are.

C. It Is Irrational to Let Day Care Homes Serve Up to Twelve Clients While Prohibiting Lij and Pat from Serving Any Clients at All.

For these same reasons, it is also irrational to subject Lij and Pat to the Client Prohibition while exempting residential day care homes. There is no real or substantial difference between these uses. Lij and Pat are similarly situated to day care homes, but only day care homes may serve clients on the property. *See* SUMF ¶¶ 173–81. To justify this differential treatment, Metro contends that day care homes "*may* be appropriate to allow children to be kept close to their homes." Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs. ¶ 5 (emphasis added). But keeping children close to home is not germane to Metro's overarching interest in protecting the residential nature of residential property. Metro admits that day care homes detract from that residential nature. Todd 30.02(6) Dep. 78:5–8.

Prohibiting Lij's and Pat's less impactful businesses, while legalizing more impactful day care homes, is again similar to Metro's unconstitutional singling out of C&D landfills in *Consolidated Waste*. 2005 WL 1541860, at *33–36. Day care homes present greater traffic and parking concerns to residential neighborhoods than Lij's or Pat's businesses do. SUMF ¶¶ 276–81. Plaintiffs are sympathetic to the idea that parents want to care for children in their own neighborhood—indeed, Lij wants to work out of his home for the similar purpose of staying present for his own daughter. SUMF ¶¶ 11, 289–90. But he may not do so, even if he stays out of his neighbors' sight and hearing, unless he were to operate a day care home—which he lacks the professional experience to do—rather than a home recording studio. There is no real and substantial difference between these uses except that day care homes have a *greater* effect on residential neighborhoods. Metro has no reason for allowing

day care homes while prohibiting clients at Lij's home recording studio and Pat's home hair salon, which are invisible and inaudible from the street.

D. It Is Irrational to Let Historic Home Events Hold Lavish Parties for Pay While Prohibiting Lij and Pat from Serving Any Clients at All.

It is also irrational to prohibit Lij and Pat from serving clients at home while permitting historic homes to host large parties for pay. Historic home events are similarly situated to Lij's home recording studio and Pat's home hair salon, and yet historic home events are not subject to the Client Prohibition. *See* SUMF ¶¶ 182–88. To justify this differential treatment, Metro contends that it has an interest in incentivizing the preservation of historically significant homes. Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs. ¶ 5. But while it may be rational to incentivize the preservation of historic homes by other means, historic home *events* are at loggerheads with Metro's allegedly overarching interest in protecting the residential nature of residential property. Metro's argument that historic home events are "isolated in nature," Todd 30.02(6) Dep. 82:8–25, 84:2–4; *see also id.* at 69:4–16, also ignores the evidence in the record. Metro's top code-enforcement official testified that historic home events present greater traffic, parking, and noise concerns than Lij's or Pat's home businesses would. SUMF ¶¶ 282–88. Incentivizing the preservation of homes by allowing clients is antithetical to Metro's main interest in maintaining the Client Prohibition. This regulatory disparity therefore violates the Tennessee Constitution's equal-protection guarantee, and Lij and Pat must be allowed to serve clients in their homes.

Moreover, the greater potential of historic home events to impact residential neighborhoods is confirmed by the Tennessee Court of Appeals' opinion in *Demonbreun v. Metropolitan Board of Zoning Appeals*, No. M2009-00557-COA-R3-CV, 2011 WL 2416722 (Tenn. Ct. App. June 10, 2011), in which the court ruled that it was arbitrary to *deny* a renewed special-exception permit to a historic homeowner—even though the homeowner

admitted to several past violations including "the erection of [a] tent on his front lawn for a . . . wedding," a tour bus that parked at his house in violation of a restriction on his permit, police complaints, and a daytime rental of the house to a marketing company "for a lengthy indoor meeting . . . which involved about twelve people" and for which "the businessmen paid for three guest rooms but did not stay overnight." *Id.* at *2–3 & n.2. "It was apparent," the court found, that the homeowner "had alienated many of his neighbors" with his historic home events' loud music and "pushy and aggressive" demeanor. *Id.* at *3. The court ruled in the homeowner's favor despite Metro's assertion that the permit denial was "necessary to protect the public health, safety and welfare." *See id.* at *8, 16–18. *Demonbreun* was decided under the slightly different but still "very narrow" standard of review applicable to administrative appeals under the common law writ of certiorari.[8] *Id.* at *5. Yet both the trial and appeals courts in *Demonbreun* had little trouble finding that the government failed to "specify which violations it considered serious or a harm to the public health, safety, or welfare." *See id.* at *17. *Demonbreun* confirms that historic home events are intense uses: Metro has speculated that historic home events occur "once or twice a month," Todd 30.02(6) Dep. 71:15, but in *Demonbreun*, the court ordered Metro to grant a permit for up to six events per week, including "two large events each week over 40 guests." *Demonbreun*, 2011 WL 2416722, at *4 n.7. If historic home events are reasonable infringements on the residential nature of residential property, then so must be Lij's and Pat's home businesses.

[8] In the zoning context, the practical difference between the legal standards at issue in *Demonbreun* and this case—an administrative appeal by writ of certiorari in *Demonbreun*, and a constitutional challenge by declaratory judgment here—is so slight that the Tennessee Supreme Court has promulgated a liberal rule of construction in which courts should treat either type of challenge as the other when the procedural posture calls for it. *McCallen v. City of Memphis*, 786 S.W.2d 633, 638–40 (Tenn. 1990) (citing *Fallin*, 656 S.W.2d at 341–42).

CONCLUSION

The evidence in this case shows that Lij's and Pat's home-based businesses did *nothing* to jeopardize—much less disturb—the public health, safety, morals, or general welfare. There is simply no rational basis for Metro to prohibit Lij and Pat from serving clients in their homes, as Metro allows thousands of other residential homeowners to serve clients in *their* homes. As applied to Lij and Pat, Metro's enforcement of the Client Prohibition violates their substantive due process and equal protection rights under the Tennessee Constitution. *See* Tenn. Const. art. I, § 8; *id.* art. XI, § 8. Plaintiffs respectfully ask this Court to GRANT their motion for summary judgment.

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Respectfully submitted,

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