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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.	)	

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
METRO'S MOTION FOR SUMMARY JUDGMENT
Tenn. R. Civ. P. 56.04; Local Rule § 26.04(d)–(e)**

Plaintiffs Elijah "Lij" Shaw and Patricia "Pat" Raynor oppose Metro's motion for summary judgment. This Court should deny Metro's motion for three reasons. First, Metro has failed to support its motion with any material facts. Second, Metro misunderstands Tennessee rational-basis review. And third, Metro ignores several material facts which preclude judgment as a matter of law for Metro.

I. METRO'S MOTION IS NOT SUPPORTED BY ITS STATEMENT OF FACTS.

Metro's legal brief is not supported by Metro's statement of facts. First, Metro has designated only six undisputed facts, and none of them are material. Second, Metro's interrogatory responses and organizational deposition testimony, upon which Metro relies despite having omitted the same responses and testimony from its statement, do not address the as-applied nature of Plaintiffs' claims.

A. The Six Facts Metro Has Designated Are Not Material.

Metro has failed to support its motion for summary judgment with any material facts. Tennessee Rule of Civil Procedure 56.03 requires movants to support their motion with a statement of undisputed material facts. Metro has designated only six such facts in its statement. None of these six facts bear on whether any legitimate government interest is served by Metro's applying the Client Prohibition against Lij and Pat. These facts do not (and cannot) show that Metro is entitled to judgment as a matter of law.

In Tennessee, a party moving for summary judgment must support the motion with a "statement of the material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. The standard for granting summary judgment, which Metro does not provide in its brief, requires—"[s]ubject to the moving party's compliance with Rule 56.03"—that the moving party "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "[W]hen the moving party does not bear the burden of proof at trial," as here, the party seeking summary judgment bears an initial burden of production that it may satisfy "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence . . . is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). Metro cannot obtain summary judgment based on "conclusory assertion[s]"; rather, Metro must "support its motion with 'a separate concise statement of material facts as to which [Metro] contends there is no genuine issue for trial.' " *Id.* (quoting Tenn. R. Civ. P. 56.03). Each fact must be "supported by a specific citation to the record." *Rye*, 477 S.W.3d at 265 (quoting Tenn. R. Civ. P. 56.03). Plaintiffs can defeat Metro's motion for

summary judgment by "demonstrat[ing] the existence of specific facts in the record which could lead a rational trier of fact to find in [Plaintiffs'] favor." *Id.*[1]

The six facts which Metro designates as material and undisputed have no bearing on the rationality of the Client Prohibition. Plaintiffs do not dispute those six facts. *See* Metro. Gov't's Statement Undisputed Facts (June 14, 2019); *accord* Pls.' Resp. Metro. Gov't's Statement Undisputed Facts (Aug. 2, 2019). It is true that Plaintiffs wish to serve clients in their homes, and that they are not allowed to do so under Metro's Client Prohibition. *Id.* ¶¶ 1–2. It is not material that Plaintiffs applied for and were denied specific plans for their home-based businesses, but Plaintiffs agree that it happened.[2] *Id.* ¶¶ 3–6. None of these six facts are inconsistent with those designated in the Plaintiffs' own Rule 56.03 statement. *Cf.* Pls.' Statement Undisputed Material Facts ("Pls.' SUMF") (June 14, 2019). And none of these six facts have to do with whether the public health, safety, morals, or welfare have been rationally served by applying the Client Prohibition against Lij and Pat.

B. Metro's Other Factual Assertions (Made Outside Its Statement) Do Not Address Plaintiffs' As-Applied Claims.

Rather than tie its designated facts to its legal argument, Metro restates its interrogatory responses and organizational deposition testimony in the opening pages of its brief in support of its motion. Metro cites none of these responses or testimony in its Rule 56.03 statement of

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[1] On Metro's motion for summary judgment, the Court "must accept the nonmoving party's evidence as true, and view both the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the nonmoving party." *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 752 (Tenn. 2015) (quoting *Shipley v. Williams*, 350 S.W.3d 527, 551 (Tenn. 2011)). It is true that Plaintiffs bear the burden of proof in this case. *Accord* Mem. Law Supp. Mot. Summ. J. ("Metro. Mem.") 12 (June 14, 2019). In opposing Metro's motion, however, Plaintiffs need only show "*the existence* of specific facts in the record which *could* lead [the Court] to find in [Plaintiffs'] favor." *Rye*, 477 S.W.3d at 265 (emphases added).

[2] Plaintiffs likewise do not consider it material, but also do not dispute, that the Metro Council has previously considered and rejected proposals to modify and/or repeal the Client Prohibition. *See* Metro. Mem. 2–3.

facts. Even if that failure to designate is excused, Metro's reliance on those responses and testimony fail to support Metro's motion because the responses and testimony do not concern the application of the Client Prohibition against Plaintiffs. In other words, Metro cannot and does not cite record evidence that helps it meet its summary judgment burden regarding Plaintiffs' claims, which are only as-applied claims.

Metro's brief tries to connect almost none of its responses and testimony to the facts of Lij's and Pat's as-applied claims. There are two such attempts in Metro's entire brief. First, Metro muses that "[t]here must have been someone in Lij's or Pat's neighborhoods who objected to their receiving clients in their homes," and that this means that Lij's and Pat's home businesses were harming or would harm the quality of life in their neighborhoods. *See* Metro. Mem. 8. This conclusory assertion is not based upon any evidence in the record about Lij and Pat. In fact, the record shows that the two anonymous complaints "are evidence of neither a Client Prohibition violation nor harm to the neighborhood." Pls.' SUMF ¶ 211. Second, Metro supposes that Pat's (and by possible implication, Lij's) clients "may come and go frequently" on a "tightly packed" schedule, perhaps causing different harms than would the clients of home-based businesses exempt from the Client Prohibition. *See* Metro. Mem. 16–17. But there is no evidence in the record to support this conclusory assertion either. To the contrary, the record shows that both Lij's and Pat's home-based businesses, in the real-world experience of Metro's own Codes Director, would present traffic, parking, noise, and other complaints *less* frequently than other legal client-serving home-based businesses do. *E.g.*, Pls.' SUMF ¶¶ 258–88.

In sum, Metro cannot and has not cited *any* record evidence concerning its application of the Client Prohibition to Lij and Pat's home-based businesses. Even if Metro had properly designated the facts on which it bases its argument (and it did not), those facts do not support Metro's motion. The motion thus fails.

* * *

As explained above, Metro is not entitled to summary judgment because its motion is not supported by its statement of material facts. For this defect alone, Metro's motion should be denied. And as explained below, Metro's motion should also be denied because its legal arguments are rooted in a flawed understanding of the Tennessee rational-basis test.

II. METRO MISUNDERSTANDS THE TENNESSEE RATIONAL-BASIS TEST.

Metro's motion suffers from two pervasive mistakes about Tennessee rational-basis review. First, contrary to Metro's assumption, the Tennessee Constitution is *not* in lockstep with federal zoning jurisprudence. Second, Metro fails to understand that the facts and evidence actually matter under Tennessee rational-basis review. And so in an as-applied challenge to a zoning restriction—such as this case—the facts and evidence regarding Lij's and Pat's potential to harm a legitimate government interest matter.

A. The Tennessee Constitution Is Not in Lockstep with Federal Zoning Jurisprudence.

Metro wrongly assumes that under the Tennessee Constitution, this Court should give Metro complete deference when it excludes a home-based business from a residential zone. *See* Metro Mem. 9–11, 13–14 & n.7, 18. In support of Metro's assumption that the "[r]ational [b]asis [t]est is [m]et" here, Metro chiefly relies on *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which (as explained below) renounced most federal constitutional limits on the extent to which a residential zoning ordinance could regulate the private use of a single-family home. *See* Metro Mem. 13–14 (citing *Belle Terre*, 416 U.S. at 9). (Metro also block-quotes two Tennessee Supreme Court cases for the proposition that "prohibit[ing] home businesses . . . [i]s a matter of legislative discretion," *see* Metro. Mem. 12–13, but neither case

mentions the Tennessee (or U.S.) Constitution *at all*.)[3] Metro thus implies that residential zoning is always a valid reason for the government to shut down a home-based business and that courts must always defer to the government when it does so.

Metro suggests that *Belle Terre* is dispositive because the U.S. and Tennessee Constitutions are "the same" on substantive due process and equal protection. Metro Mem. 9–10. But the two constitutions are not coextensive here. Tennessee rational-basis review may resemble its federal counterpart, but the Tennessee Supreme Court has stressed that its "previous decisions suggesting . . . synonymity or identity of portions of our constitution and the federal constitution" do not mean that Tennessee follows "uncertain and fluctuating federal standards" of constitutional protection. *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)). And the Tennessee courts are not (and have never been) in lockstep with the federal decision in *Belle Terre*.

For as long as the zoning power has been upheld, Tennessee courts have observed the traditional standard of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The *Euclid* standard requires zoning ordinances to show a "substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. *Euclid* expressly holds that an otherwise constitutional zoning ordinance "may be found to be clearly arbitrary and unreasonable" as "applied to particular premises . . . or to particular conditions." *Id.* The Supreme Court of

[3] *See Davidson Cty. v. Hoover*, 364 S.W.2d 879 (Tenn. 1963) (statutory construction case); *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904 (Tenn. 1940) (deciding whether an erroneously issued permit had created a vested right such that permit could not be recalled). These cases' facts are also distinguishable. *Hoover*, which determined that a home-based hair salon was in fact prohibited by the language of the residential zoning ordinance in question, weighed no allegation (as exists here) that the city had *permitted* a home-based hair salon in another residential home. *Compare* 364 S.W.2d 879 *with* Pls.' SUMF ¶¶ 136–38. *Howe Realty* found that a gas station could not be built on a residential block. *See* 141 S.W.2d at 905.

Tennessee adopted the *Euclid* standard the year after it was announced, and the Tennessee courts have never departed from it. *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 613–14 (Tenn. 1927) (adopting *Euclid*); *see Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582, 2005 WL 1541860, at *5 (Tenn. Ct. App. June 30, 2005) (citing *Euclid*); *see* Mem. Law & Facts Supp. Pls.' Mot. Summ. J. ("Pls.' Mem.") 7–8 (June 14, 2019) (discussing *Spencer-Sturla*'s adoption of *Euclid*); Dep. Carter Todd ("Todd 30.02(6) Dep.") 17:10–18 & Ex. 6 ("That's the standard."), *filed as* 1–2 Notice Filing Exs. Supp. Pls.' Mot. Summ. J. ("Pls.' Ex.") 2 (June 17, 2019). For governments, the upshot of *Euclid* and *Spencer-Sturla* is that residential zoning is presumptively constitutional. *See Euclid*, 272 U.S. at 386–89; *Spencer-Sturla*, 290 S.W. at 613. For property owners, the upshot of *Euclid* and *Spencer-Sturla* is that this presumption is rebuttable in as-applied challenges. *Euclid*, 272 U.S. at 395 ("[W]hen, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises . . . or to particular conditions, . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."); *Spencer-Sturla*, 290 S.W. at 614 (noting that in another case, a plaintiff with standing would be able to challenge the reasonableness of excluding his or her business from a residential zone).

Belle Terre departed from the *Euclid* standard in the federal courts. In *Belle Terre*, the U.S. Supreme Court upheld a municipal ordinance that prohibited unrelated individuals from living together as housemates. 416 U.S. at 2–3, 7–9. As the *Belle Terre* Court itself recognized, *Euclid* did not uphold such regulation of home life in permitting industrial uses to be zoned out of residential neighborhoods. *See id.* at 3 (distinguishing *Euclid*); *accord Boraas v. Vill. of Belle Terre*, 476 F.2d 806, 810 (2d Cir. 1973) (noting ordinance "could not be upheld on traditional grounds" as described in *Euclid*), *rev'd*, 416 U.S. 1. Indeed, the Second

Circuit "fail[ed] to find a shred of rational support" in the *Belle Terre* record to suggest that the plaintiff housemates had ever "endanger[ed] the health, safety, morals or welfare of existing residents of the community," noting, among other irrationalities, an "absence of evidence to support the [village's] suggestion that the ordinance might constitute a means of controlling traffic, parking or noise." 476 F.2d at 816–17. On certiorari, the *Belle Terre* Court took no issue with those findings of fact, asserting instead that no fundamental right had been infringed and concluding therefore that the municipality could regulate the plaintiffs' home lives however it pleased. *See* 416 U.S. at 7–9. So while *Belle Terre* vaunts "the blessings of quiet seclusion" in a passage quoted here by Metro, the opinion never considers whether regulating how people relate inside residential homes actually secures those blessings. *See id.* at 9, *quoted in* Metro Mem. 14.

Unlike *Euclid*, *Belle Terre* has never been adopted by the Tennessee courts. This illustrates how the Tennessee Constitution does not follow the "uncertain and fluctuating" standards of the federal courts when their opinions reduce federal constitutional protections. *See Planned Parenthood*, 38 S.W.3d at 14–15. In forty-five years, the Tennessee appellate courts have only cited *Belle Terre* twice, and never for the proposition that governments may police any transaction in a resident's home. *Cf. H&L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 446–47 (Tenn. 1979) (quoting *Belle Terre* in dicta characterizing an unconstitutional handbill ordinance as an "attempt[] to establish a city of 'quiet seclusion' and a 'sanctuary for people' "); *McDonald v. Chaffin*, 529 S.W.2d 54, 58 (Tenn. Ct. App. 1975) (citing *Belle Terre* by analogy in affirming the enforcement of a private restrictive covenant).[4]

[4] *Belle Terre* has also been rejected by the high courts of at least six states, including the state (New York) from which it arose. *See City of Santa Barbara v. Adamson*, 610 P.2d 436, 440–42 (Cal. 1980); *Zavala v. City & Cty. of Denver*, 759 P.2d 664, 669 (Colo. 1988); *Kirsch v. Prince George's Cty.*, 626 A.2d 372, 380–81 (Md. 1993); *Charter Twp. of Delta v. Dinolfo*,

In sum, Metro is wrong that the Tennessee Constitution is in lockstep with federal zoning jurisprudence. *Belle Terre* suggests that courts must give governments complete deference in regulating who a resident may have in his or her home in a residential area. But even if the Client Prohibition could be upheld under *Belle Terre*, *Belle Terre* is not the law in Tennessee. In judging zoning ordinances against as-applied challenges such as this, Tennessee courts follow the *Euclid* standard, which requires consideration of facts in an as-applied challenge. Plaintiffs will now turn to the importance of the evidentiary record in Section II.B.

B. Facts and Evidence Matter to the Tennessee Rational-Basis Test.

The facts matter. Metro assumes the contrary in emphasizing that the Client Prohibition must pass this Court's review if "any reasonable justification for the law may be conceived." *See* Metro. Mem. 12 (quoting *Riggs v. Burson*, 941 S.W.2d 44, 48 (Tenn. 1997)). But the touchstone of rational-basis review is reasonableness, and "'[r]easonableness' varies with the facts in each case." *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994). So when there is evidentiary support for finding "an unreasonable abridgment of [a resident's] property rights" as applied to the affected property owner, it is the Court's duty to consider that evidentiary support. *Spencer-Sturla*, 290 S.W. at 614; *see, e.g.*, *Consol. Waste*, 2005 WL 1541860, at *33–36. Tennessee caselaw frequently reveals courts doing just that.

The determination of reasonableness is a "judicial function." *Spencer-Sturla*, 290 S.W. at 612. Reasons are, by definition, grounded in facts, so when the government conceives of a justification that "ignores the evidence in th[e] record," Tennessee courts have the power to say so. *See, e.g.*, *Tester*, 879 S.W.2d at 829–30. Even Metro's cases warning against policy judgments support this: they, too, empower the courts to invalidate laws which are "shown

351 N.W.2d 831, 841 (Mich. 1984); *State v. Baker*, 405 A.2d 368, 374–75 (N.J. 1979); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1243–44 (N.Y. 1985); *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758–59 (N.Y. 1974).

to be clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare." *E.g.*, *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983), *quoted in McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990), *quoted in* Metro. Mem. 11–12. That is why Tennessee courts routinely engage the facts even when they uphold exercises of the zoning power against property owners. *See Davidson Cty. v. Rogers*, 198 S.W.2d 812, 815–17 (Tenn. 1947) (discussing affidavit testimony that residentially zoned land in question lay within the path of residential development, and finding it reasonable to prohibit the operation of a quarry on that land); *City of Jackson v. Shehata*, No. W2005-01522, 2006 WL 2106005, at *1, 3 (Tenn. Ct. App. July 31, 2006) (rejecting the void-for-vagueness and statutory-construction defenses of a man who had been cited for using the driveway of a home *he did not live in* as a parking lot for his "lawn-care and parking lot sweeping businesses"); *Varner v. City of Knoxville*, No. E2001-00329, 2001 WL 1560530, at *1, 3 (Tenn. Ct. App. Nov. 29, 2001) (upholding denial of commercial rezoning such that used-car lot could not be built adjacent to residences near congested intersection). Courts also engage the facts when they strike down exercises of the zoning power. *See Shatz v. Phillips*, 471 S.W.2d 944, 946–48 (Tenn. 1971) (finding it irrational to prohibit indoor junk storage on one side of a street but not another); *Consol. Waste*, 2005 WL 1541860, at *33–36 (finding it irrational to prohibit construction-and-demolition landfills, but not other, more dangerous kinds of landfills, within two miles of schools and parks); *Bd. of Comm'rs of Roane Cty. v. Parker*, 88 S.W.3d 916 (Tenn. Ct. App. 2002) (finding it arbitrary to rezone one rural property to allow the keeping of large exotic animals but not another). Several of the Tennessee zoning cases cited by Metro have rejected not-in-my-backyard lawsuits against municipal decisions to *allow* more intense uses; the courts engage the facts in those decisions too. *See McCallen*, 786 S.W.2d at 636–38, 641 (finding it reasonable to allow a multifamily

development near another multifamily development); *Fallin*, 656 S.W.2d at 343 (finding "evidence that a need exists in the particular area" for apartments and therefore upholding rezoning to allow multifamily development in formerly single-family zone); *Fielding v. Metro. Gov't of Lynchburg*, No. M2011-00417, 2012 WL 327908, at *1–2, 6–7 (Tenn. Ct. App. Jan. 31, 2012) (finding it reasonable to rezone a portion of an agricultural property to commercial in order to permit a towing-storage lot); *Gann v. City of Chattanooga*, No. E2007-01886, 2008 WL 4415583, at *3–5 (Tenn. Ct. App. Sept. 30, 2008) (finding it reasonable to rezone a residential tract to accommodate a grocery store when city had declined to rezone four years prior). This Court has already and rightly recognized that reasonableness varies with the facts of each case, Ord. Denying Mot. Dismiss 3 (Apr. 13, 2018), and it may not disregard Plaintiffs' evidence that the Client Prohibition does not serve a given interest in the public health, safety, morals, or general welfare as applied here.

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Metro's burden of production at summary judgment is to "affirmatively negate[] an essential element" of Plaintiffs' claims or else show that Plaintiffs have insufficient evidence to establish those claims. *Rye*, 477 S.W.3d at 264. Metro cannot meet that burden by insisting that it gets complete deference and that facts and evidence do not matter. Thus, its motion must fail. Next, Plaintiffs show the Court the facts and evidence in the record which could lead this Court to rule for Plaintiffs and which therefore preclude Metro's motion for summary judgment.

III. METRO IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Even if Metro's motion is not defeated by the defects described in Parts I and II, the record precludes summary judgment for Metro on either of Plaintiffs' claims. In Part III.A, Plaintiffs show why Metro's motion fails as to their substantive due process claim. In Part III.B, Plaintiffs show why Metro's motion fails as to their equal protection claim.

A. Metro Is Not Entitled to Judgment on Plaintiffs' Substantive Due Process Claim.

Plaintiffs' first cause of action pleads that Metro has unreasonably interfered with Plaintiffs' lawful exercise of their substantive due process rights under Article I, Section 8 of the Tennessee Constitution. The Tennessee courts have recognized the rights to earn a livelihood, to use and enjoy one's home, and to privacy. *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (right to earn a livelihood); *see also Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012) (right to own, use, and enjoy private property); *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).[5] In order to prevail at summary judgment, Metro must affirmatively negate an element of Plaintiffs' claim or else show that Plaintiffs have insufficient evidence that could establish that Metro's application of the Client Prohibition is unreasonable or oppressive as applied to Lij or Pat—in other words, that such application has "no substantial relation to the public health, safety, morals or general welfare." *E.g.*, *Consol. Waste*, 2005 WL 1541860, at *5. Metro's motion ignores the extensive evidence of irrationality in the record, which Plaintiffs offered in support of their own motion for summary judgment. *See generally* Pls.' Mem. Plaintiffs' presentation of this evidence forecloses Metro's motion.

Metro tries to meet its burden of production for summary judgment against Plaintiffs' as-applied substantive due process claim by reciting a laundry list of purported interests in maintaining the Client Prohibition. Because Metro's list is lengthy and often redundant,

[5] Each of these Tennessee cases refer to those rights as "fundamental." Metro is thus incorrect in asserting that no "fundamental" right is at issue here. *Cf.* Metro. Mem. 10–11. That the Client Prohibition infringes fundamental rights does not affect the outcome of this case, however, because as shown in this Part, Metro's enforcement of the Client Prohibition curtails Lij's and Pat's use of their homes to earn a living without any rational basis in the public health, safety, morals, or general welfare.

Plaintiffs sort through this list in Sections III.A.1–2 below. Section III.A.1 points out that the residential nature of residential property is the only interest Metro discusses at any length in its legal argument. In Section III.A.2, Plaintiffs identify seven categories into which Metro's many nominal interests (including residential nature) fit. And in Section III.A.3, Plaintiffs identify specific facts in the record showing that each of these purported interests are either not served by applying the Client Prohibition to Lij and Pat, or are illegitimate. Against these facts, Metro cannot obtain summary judgment.

1. The *Only* Interest Metro Describes at Any Length is Preserving the Residential Nature of Residential Property.

There is only one interest that Metro has consistently asserted throughout this case: "protect[ing] the residential nature of residentially-zoned property." Metro. Gov't's Resps. Pls.' Interrogs ¶ 5 (Aug. 2, 2018), *filed as* 4 Pls.' Ex. 10; *accord* Metro. Gov't's Supp. Resps. Pls.' Interrogs ¶ 5 (Mar. 28, 2019), *filed as* 4 Pls.' Ex. 11; Metro. Gov't's 2d Supp. Resps. Pls.' Interrogs ¶ 5 (Apr. 4, 2019), *filed as* 4 Pls.' Ex. 12. Metro identifies residential nature as its "main overarching interest" in enforcing the Client Prohibition. *See* Pls.' SUMF ¶ 191. It is the *only* interest that Metro describes at any length in its legal analysis. *See* Metro Mem. 9–19.

There is a legitimate government interest in maintaining the residential character of neighborhoods. *Spencer-Sturla*, 290 S.W. at 613–14. Residential zoning "may be *reasonably* exercised" to advance "the public health, safety, morals, and welfare." *Id.* at 613 (emphasis added). The question is whether the particular application of the zoning power "has any real tendency to carry into effect the purposes designed . . . and whether that is really the end had in view." *Id.*

Before showing that the residential interest is not served by enforcing the Client Prohibition against them, Plaintiffs will show that Metro's other purported interests—many

of which are just other ways of describing the interest in preserving residential character—fit into seven categories. And further below in Section III.A.3, Plaintiffs will show that neither preserving residential nature, nor any other legitimate interest asserted by Metro, are reasonably served by applying the Client Prohibition against Plaintiffs.

2. Metro's 35-Odd Asserted Interests Fit Into Seven Categories.

Although Metro's principal interest is residential nature, Metro identifies several other purported interests in enforcing the Client Prohibition against Lij and Pat. Metro claims that there are "dozens" of these interests. Metro. Mem. 14. Plaintiffs identify thirty-five or more of Metro's purported interests—culled from Metro's 31-point list and its four "categories" of ostensible rational bases "for why the client prohibition exists," restating the testimony of Metro's Rule 30.02(6) designee—in an appendix to this memorandum. *See* Metro. Mem. 3–9; *below* App. Metro designates none of these purported interests as material undisputed facts. Because many of these 35-odd items overlap, Plaintiffs have grouped and organized them into the following seven categories of interests:

Residential nature. As noted above, Metro has been clear that the preservation of residential neighborhoods "is really the end had in view" by Metro for enforcing the Client Prohibition against Lij and Pat. *Cf. Spencer-Sturla*, 209 S.W. at 613 (encouraging judicial determination of whether an asserted interest is genuine). It is not a surprise, then, that many of Metro's "other legitimate governmental interests," Metro. Mem. 3–9, 14, are functionally indistinguishable variations on the preservation of residential character. Appendix items 1, 4, 7–10, 13, 25–27, 29, 32(a), 32(d)–(e), and 34 all speak to residential nature.[6]

[6] "Some homeowners selected residential areas because they did not want businesses near their house"; "Would turn neighbor against neighbor"; "Allowing clients to visit home businesses is inconsistent with residential policy"; "This would create de facto mixed use all

Traffic and parking. Appendix items 15–18 and 35(c) describe an interest in regulating traffic and parking.[7]

Health and safety. Appendix items 11–12, 19, 23, and 35(a)–(b) describe an interest in the health and safety of clients and neighbors.[8]

Administrative concerns. Appendix items 2–3, 5, 21–22, 24, 28, 32(c), and 33 describe various administrative concerns about Metro's ability to enforce various ordinances in the absence of the Client Prohibition.[9] Although Metro is not a private HOA, Metro also asserts an administrative concern on behalf of private HOAs in appendix item 31.[10]

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over the county"; "It is a mass rezoning without procedural safeguards"; "Neighborhoods have different goals, expectations, histories"; "Smaller steps toward allowing clients to visit home businesses in certain areas of town would be more appropriate"; "Some businesses might be more appropriate for having in residential areas"; "Some neighborhoods are historically more used to home businesses with clients visiting"; "Some neighborhoods are transitional"; "People may buy . . . in order to use for a home-business and . . . crowd out residential purchasers"; "reliance on the residential zoning"; "crowds out potential homeowners"; "Neighborhoods have different goals, histories, and expectations"; "Quality of life." *See* Metro. Mem. 4–7.

[7] "[M]ore than one at a time parking"; "inadequate parking"; "additional traffic"; "Neighborhood streets are often not wide enough"; "Traffic and parking." *See* Metro. Mem. 5, 9.

[8] "Clients would have no identification"; "unidentified strangers"; "clients cannot walk to businesses"; "different ADA standards"; "Homes are typically not built with a view toward accommodating the general public"; "certain businesses that have an element of danger, potentially dangerous clients, or might be attractive nuisances." *See* Metro. Mem. 4–5, 8–9.

[9] "Enforcement resources are already stretched very thin"; "The police department does not have resources"; "Codes Dept. does not traditionally work on weekends or evenings"; "Home business spaces are not taxed at a commercial rate"; "Commercial electric, water and stormwater rates are also different"; "Determining whether a home business is primarily a residence or a business would be a new burden on the Metro Assessor"; "Worried about unintentional and unknown consequences"; "different tax rate . . . different water and storm water rates"; "certainty of outcome." *See* Metro. Mem. 4–5, 7–8.

[10] "It creates burden for the HOAs to enforce their covenants." *See* Metro. Mem. 5.

Discouraging the public from petitioning Metro. Appendix item 14 fears a "slippery slope" in which other homeowners may seek legal recognition (from whom is unclear) for client-serving home occupations.[11]

Protectionism for commercial landlords. Appendix items 20 and 32(b) describe an interest in protecting commercial landlords by using the Client Prohibition to drive demand for leasable commercial space.[12]

Non-interests. Appendix items 6, 30, and 32(f) do not describe actual interests. Items 6 and 32(f) assert that the Client Prohibition is not so onerous because would-be home-based businessowners can rent space elsewhere. Item 30 states that each one of Metro's concerns would go double if there were "two home businesses in [a] house" as opposed to one. *See* Metro. Mem. 4–5, 7.

* * *

Plaintiffs will now show that enforcement of the Client Prohibition against Lij and Pat is not reasonably related to any of Metro's asserted interests.

3. The Record Evidence Shows that the Client Prohibition Does Not Protect the Residential Nature of Residential Property (or Any Other Legitimate Interest) As Applied to Lij or Pat.

Metro has failed to show the Court that Plaintiffs cannot establish their substantive due process claim with record evidence. As explained below, Plaintiffs have presented evidence that each of Metro's legitimate interests is not advanced by enforcing the Client Prohibition

[11] "If start [sic] allowing one home occupation to have clients, other occupations will quickly ask to be included also." *See* Metro. Mem. 4–5.

[12] "Commercial properties . . . need tenants. Takes part of the market away from commercially owned properties"; "If the client prohibition is removed, it will hurt . . . investments in commercial businesses, shopping centers and the central business district." *See* Metro. Mem. 4–5, 7.

against Pat and Lij. At a minimum, this evidence is such that a rational trier of fact could find in Plaintiffs' favor on their substantive due process claim.

Residential nature. As Plaintiffs showed the Court in their own motion for summary judgment, the residential nature of property is not reasonably conserved by the Client Prohibition as applied to Lij and Pat. *See* Pls.' Mem. 18–22. Metro cannot rationally assert that recording or hairstyling affect the residential nature of neighborhoods, because recording and hairstyling are both legal in residential homes. *See* Pls.' SUMF ¶¶ 14, 24. Neither is it rational to assert that Metro's goal is to "prevent commercial intrusion." Commerce, deliveries, and even in-home client service (at the client's home) are all legal county-wide, regardless of the neighbors' opinions. *See* Pls.' SUMF ¶¶ 25–29, 70–71, 251; *see also* Pls.' Mem. 18. Metro allows that a client-serving home business that "doesn't bother anybody" need not be turned in. Pls.' SUMF ¶ 251. It is the Client Prohibition—not its absence—that turns neighbor against neighbor. Pls.' SUMF ¶¶ 83–85, 240. The "procedural safeguards" of Metro's rezoning process—even if they were more important than Lij's and Pat's civil right to be free from arbitrary, oppressive, or irrational ordinances (and they are not)—do not actually safeguard Metro's "residential policy," as evidenced by the hair salon that was legalized via specific plan over the Metro Planning Commission's objection that the use would be inconsistent with that policy. SUMF ¶¶ 136–38. And if *Lij or Pat* are "crowd[ing] out residential purchasers" by seeking to "use [their homes] for a home-business"—which they may already do, so long as they do not serve clients—then Metro is really asserting an interest in *dislodging* Lij and Pat from the homes they already own. Metro has no legitimate interest in forcing Lij or Pat to sell. Finally, Plaintiffs were able to obtain Metro's concession that there is no evidence of harm to *any* of Metro's government interests from Plaintiffs' home businesses unless it is the fact that each business drew an anonymous complaint. Pls.' SUMF

¶ 210, *cited in* Pls.' Mem. 12–13. And regarding those complaints, Metro's code enforcement officials deny that they are evidence of harm to residential neighborhoods. Pls.' SUMF ¶ 211; *see also id.* ¶¶ 52–53, 83–85, 87, 107. Metro found no traffic, parking, noise, vibrations, smoke, dust, odor, heat, humidity, glare, or other objectionable effects at either Plaintiff's home. Pls.' SUMF ¶¶ 91–94, 109–111. There is *no* evidence in the record that Metro's enforcement of the Client Prohibition, as applied to Lij and Pat, advances the residential nature of their neighborhoods.

Traffic and parking. Although Metro has a legitimate interest in regulating traffic and parking in residential neighborhoods, this interest does not justify prohibiting Lij and Pat from serving clients. *See* Pls.' Mem. 15–17. Metro's conclusory assertions about traffic and parking are disconnected from what Metro regulates. Metro concedes it has no interest in regulating parking on residential driveways with the owner's consent—which is exactly where and how Lij's and Pat's customers would (and did) park. Pls.' SUMF ¶¶ 221–24. As for traffic, Lij and Pat want to serve the same number of daily clients—twelve—as a short-term rental[13] or a day care home may serve (and fewer than historic home events may serve). A client visiting a home business generates zero to four "trips," as Metro measures it. Pls.' SUMF ¶ 216. When a rezoning is proposed, Metro rarely seeks a traffic impact study unless the proposed use is estimated to generate 750 daily or 100 peak-hour trips. Pls.' SUMF ¶ 215. Lij's and Pat's 12 clients (if they actually served that many) would generate 48 trips *at most*; it is far more likely that they would serve a lower volume of clients who, if they drove their own cars, would generate 10 and 16 trips *per day*. Pls.' SUMF ¶¶ 216–20. Lij and Pat both sought rezoning in 2017 to legalize their client service; the Metro planning staff raised no

[13] Unless otherwise noted, all mentions of short-term rentals in this brief refer to owner-occupied short-term rentals.

objection as to traffic or parking and recommended approval (for traffic and parking purposes) with the single condition that adequate parking be available. Pls.' SUMF ¶ 221. Metro found no evidence of traffic or parking problems when it enforced the Client Prohibition against Lij and Pat. Pls.' SUMF ¶¶ 94, 110, 210–11. Metro's assertions that the Client Prohibition reasonably controls traffic or parking are utterly conclusory as applied to Lij and Pat, who have presented more than sufficient evidence that Metro's interest is not served by applying the Client Prohibition to them.

Health and safety. The Client Prohibition does not protect the public health and safety as applied to Lij and Pat. *See* Pls.' Mem. 22–26. Metro concedes that its concern about inherently dangerous businesses is directed at home-based businesses other than those of Lij and Pat, whom Metro characterizes as "the two best plaintiffs" to challenge the rationality of the Client Prohibition. Pls.' SUMF ¶ 225. Plaintiffs have shown that there is no evidence that Lij's or Pat's home-based businesses were "unsafe." Pls.' SUMF ¶¶ 212–13. If "unidentified strangers" were a real concern, *cf.* Metro. Mem. 4, it would obviously be presented by short-term rental guests—who stay overnight—and yet Metro does not restrict the prior criminal history of short-term rental guests, or for that matter the travel of unsafe people through residential neighborhoods, at all. Pls.' SUMF ¶¶ 230–31. Home occupations, which are legal in all residential zones, may also have an employee (just not a client), and Metro does not restrict the prior criminal history of those employees. Pls.' SUMF ¶ 232. There is no evidence that this lack of regulation has led to crime in residential neighborhoods. Pls.' SUMF ¶ 233. Metro next asserts that there are "different standards" for buildings in commercial and residential zones, but does not say what those differences are or how they relate to client safety. *See* Metro. Mem. 8–9. It is inconceivable that Metro's residential building standards are so lax that it is safe to sleep in a residential home at night (which residents and their short-term rental clients may do) but not play music or have one's hair cut in the same home

during the day (which Lij's and Pat's clients were willing to do). Metro also conceded in its deposition that sidewalks are Metro's responsibility, Todd 30.02(6) Dep. 96:14–24, and Metro could not say whether or how the federal Americans with Disabilities Act might apply to Lij's or Pat's homes. Pls.' SUMF ¶¶ 235–36. Lij and Pat have never had trouble accommodating disabled clients, and would make any reasonable accommodation required by federal law to accommodate such a client in their homes. Decl. Shaw Supp. Pls.' Mot. Summ. J. ("Shaw Decl.") ¶ 11, *filed as* 4 Pls.' Ex. 15; Decl. Raynor Supp. Pls.' Mot. Summ. J. ("Raynor Decl.") ¶ 14, *filed as* 4 Pls.' Ex. 16. Metro raises a final safety concern about home occupations being attractive nuisances for children, Metro. Mem. 9, but has no knowledge of whether Lij's or Pat's businesses would implicate this concern. Pls.' SUMF ¶ 238. Lij's and Pat's businesses do not. Pls.' SUMF ¶ 239. Their home-based businesses are invisible and inaudible even during operation, Pls.' SUMF ¶¶ 252–57, and even if a stray child wandered onto their properties uninvited, Lij or Pat would notify the child's parent, guardian, and/or appropriate authorities. Shaw Decl. ¶ 12; Raynor Decl. ¶ 15. Metro's brief offers nothing to negate the record evidence that no health or safety concern is served by enforcing the Client Prohibition against them.

Administrative concerns. Enforcing the Client Prohibition against Lij and Pat does not serve Metro's administrative concerns. *See* Pls.' Mem. 28–29. As an initial matter, Metro's administrative concerns regarding enforcement of the Client Prohibition are legitimate only if enforcing that prohibition against Pat and Lij serves another legitimate interest. Otherwise, enforcement of any interest, no matter how illegitimate, would always pass the rational basis test. Moreover, Metro's administrative concerns regarding enforcement are aggravated, rather than served, here. This is evidenced by the undisputed fact that forty to seventy percent of the complaints Metro receives about the Client Prohibition are bogus. Pls.' SUMF ¶¶ 83–85. Metro admits the obvious fact that *enforcing* the Client Prohibition

consumes Metro's enforcement resources, *compare* Metro. Mem. 4 *with* Pls.' SUMF ¶ 248, and further concedes that if there were no Client Prohibition,[14] there would be "nothing to enforce." Pls.' SUMF ¶ 249. Turning to Metro's purported tax- and utility-assessment concerns, Metro admits that its tax assessor has had no trouble classifying *existing* home occupations for tax purposes. Pls.' SUMF ¶ 243. The mere presence of clients could not possibly complicate that task; Metro admits that it can tax home occupations however it likes. Todd 30.02(6) Dep. 102:21–103:6. Metro could not say whether its assessor has had trouble characterizing short-term rentals, day care homes, or historic home events for tax purposes, and could neither say how it currently assesses electric, water, or stormwater rates to existing home occupations, short-term rentals, day care homes, or historic home events. Pls' SUMF ¶ 244; Todd 30.02(6) Dep. 103:13–25. It is inconceivable that clients might affect the rates at which utility services are charged. Metro's administrative concerns have no bearing on the Client Prohibition's connection to the public health, safety, morals, or general welfare, and Metro's conclusory assertion of "unintentional and unknown consequences" does not entitle it to summary judgment on Plaintiffs' substantive due process claim. *Cf.* Metro. Mem. 5.

Discouraging the public from petitioning Metro. It is no defense of the Client Prohibition that "[i]f start [sic] allowing one home occupation to have clients, other occupations will quickly ask to be included also (slippery slope)." *Cf.* Metro. Mem. 4–5. Discouraging the public from petitioning Metro—i.e., exercising a constitutional right—is not a legitimate interest. *See* U.S. Const. amdt. I; Tenn. Const. art. I, § 23.

[14] Moreover, even if the administrative concerns of private HOAs were a *government* interest (and they are not), Metro has accommodated those interests in the short-term rental context by requiring short-term rentals to certify their compliance with HOA bylaws. Metro. Code § 17.16.250(E)(2)(v); *cf.* Metro. Mem. 5. Metro could easily require the same for home-occupation permits.

Protectionism for commercial landlords. It is also not a legitimate interest to preserve "[i]nvestments in commercial businesses, shopping centers and the central business district" by forcing would-be home-based businessowners to pay rent to the commercial landlords who made those investments. *Cf.* Metro. Mem. 5, 7. Economic protectionism is not a legitimate interest. *Gentry v. Memphis Fed'n of Musicians*, 151 S.W.2d 1081, 1082 (Tenn. 1940) ("It could hardly be contended that a law was valid which forbade a citizen to render his neighbor a service merely because there was an artisan in the same county whose avocation it was to perform such services for compensation."); *Bean v. Bredesen*, No. M2003-01665, 2005 WL 1025767, at *5 (Tenn. Ct. App. May 2, 2005); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

Non-interests. It is immaterial to the public health, safety, morals, or general welfare that shared workspaces are available for lease elsewhere in Nashville. Even if it were material, Metro recognizes that the Client Prohibition is "unrelated" to the availability of these spaces. Pls.' SUMF ¶ 245. It is also immaterial that two businesses in a home might "double" the magnitude of a legitimate concern. *Cf.* Metro. Mem. 5. The facts show that there are no legitimate concerns as applied to Lij or Pat. Two times zero equals zero.

* * *

For the foregoing reasons, Metro is not entitled to summary judgment on Plaintiffs' substantive due process claim. (As demonstrated in their own motion for summary judgment, it is instead Plaintiffs who are entitled to summary judgment on this claim.) Plaintiffs will now show that Metro also lacks support for summary judgment on Plaintiffs' second claim for equal rights, privileges, and immunities.

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B. Metro Is Not Entitled to Judgment on Plaintiffs' Equal Protection Claim.

Just as Metro cannot prevail on summary judgment on Plaintiffs' substantive due process claim, it cannot prevail at summary judgment on Plaintiffs' equal protection claim. Plaintiffs' second cause of action pleads that Metro unreasonably prohibits Lij and Pat from serving clients in their residential homes while permitting other resident homeowners to do so. The Tennessee Constitution "guarantee[s] that all persons who are similarly situated will be treated alike by the government and by the law." *Consol. Waste*, 2005 WL 1541860, at *7. In order to prevail at summary judgment, Metro must affirmatively negate an element of Plaintiffs' claim or else show that Plaintiffs have insufficient evidence that Metro's differential treatment of Lij and Pat, as compared to any of the thousands of homeowners who have Metro's blessing to serve clients in residential homes, is irrational. *E.g.*, *Tester*, 879 S.W.2d at 828. The Tennessee rational-basis test for such classifications is as follows:

> *There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety of and necessity of the classification. . . . [A]ll 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 added by court) (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 733, 775–76 (Tenn. 1910)). As with Plaintiffs' substantive due process claim, Metro's motion as to equal protection ignores the extensive evidence of irrationality in the record, which Plaintiffs offered in support of their own motion for summary judgment. *See generally* Pls.' Mem.

Metro tries to justify its differential application of the Client Prohibition to Lij and Pat while exempting other client-serving home-based businesses. But it fails to do so because, as explained below in Section III.B.1, Metro identifies *no* justification for the undisputed and

material fact that it treats Lij and Pat differently from the owners of thirteen specially rezoned residential homes for whom Metro has enacted specific-plan ordinances to suspend the Client Prohibition. Metro's motion fails for the additional reason that, as demonstrated in Section III.B.2, Plaintiffs can show specific facts in the record which establish that Metro's differential treatment of Plaintiffs is irrational. This evidence could allow a rational trier of fact to find in their favor on their equal protection claim. Thus, Metro's motion fails as to that claim too.

1. Metro Describes No Basis *At All* for Treating Lij and Pat Differently than the Client-Serving Home Occupations Metro Has Legalized in Specific Plans.

Metro has failed to meet its "obligation to identify the rational basis" for treating Lij and Pat differently from the thirteen residential homes from which Metro has exempted from the Client Prohibition. *See* Order 2 (Feb. 22, 2019) (specifying Metro's obligation). The record shows that Metro has enacted at least eleven "specific plan" ordinances that allow clients or patrons to be served in at least thirteen residential homes throughout Nashville. Pls.' SUMF ¶ 127; *see id.* ¶¶ 118–163. Metro meanwhile prohibits Lij and Pat from serving clients in their homes, and Metro's brief does not attempt to justify this differential treatment at all. *See generally* Metro Mem. "It is not Plaintiffs' duty to guess what Metro's rational basis or bases might be." Order Granting Pls.' Mot. Compel 2 (Jan. 22, 2019). For this reason alone, Metro is not entitled to judgment as a matter of law on Plaintiffs' equal protection claim.

But even if the Court were to excuse Metro's failure to identify a rational basis for exempting thirteen residential homeowners from the Client Prohibition while applying it to Lij and Pat (and the Court should not excuse Metro), Metro's motion would still fail. That is because the uncontested record shows that Metro allows residential homeowners, who are similar to Lij and Pat, to serve clients in ways that pose greater threats to the public health,

safety, morals, and general welfare than could be conceived at Lij's or Pat's home-based businesses. Plaintiffs show that evidence to the Court in Section III.B.2 below.

2. The Record Evidence Shows There Is No Real and Substantial Difference Between Lij and Pat and the Thousands of Home Businesses Metro Exempts from the Client Prohibition.

Metro asserts that there are "important distinctions between allowing these [client-serving] accessory uses [short-term rentals, day care homes, and historic home events] in residential areas and allowing clients to visit home-based businesses." Metro. Mem. 18; *see id.* at 15–19. They are all distinctions without a difference. The evidentiary record shows that short-term rentals, day care homes, and historic home events[15] pose *greater* concerns than Lij or Pat would in several germane respects. Plaintiffs, who noted this evidence in support of their own motion for summary judgment, *see* Pls.' Mem. 30–37, now demonstrate "the existence of specific facts in the record" which foreclose Metro's motion for summary judgment. *Rye*, 477 S.W.3d at 264.

Short-term rentals. Metro testified that short-term rentals exhibit each of the three elements that made Lij's and Pat's home occupations subject to the Client Prohibition: they take place inside a home, are conducted by a resident, and are a business. Pls.' SUMF ¶¶ 165–167. As Metro's Codes Director testified, short-term rentals create noise, traffic, parking, trash, and other problems, all to a greater extent than home recording studios or hair salons could. Pls.' SUMF ¶¶ 258–75. As justification for exempting short-term rentals from the Client Prohibition, Metro asserts that they help alleviate a hotel shortage. Metro. Mem. 17. That distinction is not germane to Metro's asserted interests in enforcing the Client

[15] As to specific plans, the record also shows that Metro has used this rezoning process to allow at least one home-based hair salon even though its own staff recommended against the rezoning because it was inconsistent with the general plan. Pls.' SUMF ¶¶ 136–38. This undermines Metro's contention (appendix item 7) that "[a]llowing clients to visit home businesses is inconsistent with residential policy." *See* Metro. Mem. 4.

Prohibition. *Cf. Tester*, 879 S.W.2d at 828 (legislative classifications must rest on bases germane to the purpose of the law in question). Metro concedes in its brief that short-term rentals are "more 'commercial' in nature and not suited for residentially zoned areas," and that they are perceived to "detract[] from the residential nature of the neighborhood." Metro. Mem. 17 & n.9. By comparison, there is no evidence that Lij or Pat's businesses ever did so. *See above* Section III.A. Metro has failed to show that Plaintiffs cannot establish that it is irrational to treat Lij and Pat differently from short-term rentals.

Day care homes. Day care homes exhibit the same three elements that made Lij and Pat subject to the Client Prohibition, but unlike Lij and Pat, day care homes may serve up to twelve clients a day. Pls.' SUMF ¶¶ 174–77. The record shows that day care homes cause more traffic and parking issues than recording studios or hair salons do. Pls.' SUMF ¶¶ 276–81. It is irrelevant to Plaintiffs' equal protection claim that the state licenses day cares over four people or that Metro imposes certain lot-size, street, and landscape requirements; the relevant fact is that day care homes may serve clients but Lij and Pat may not. *See* Metro. Mem. 15–16. Metro asserts, with no support other than its Rule 30.02(6) designee's testimony, that "[c]aring for children in a home is . . . consistent with residential use," that that day cares are "a traditional residential use," that "parents drop off children in the morning and do not come back until the end of the day," and that "children [should be] near their home for daycare." *Id.* But Metro states, in the same deposition it uses to support these assertions, that day care homes "hurt the residential nature of a residentially-zoned area." Todd 30.02(6) Dep. 78:5–8. It is irrational to argue that day cares can be exempted from the Client Prohibition because they are "residential" while at the same time saying that day cares "hurt the residential nature" of neighborhoods. Plaintiffs have shown that their home-based businesses do *not* affect residential nature, and Metro cannot negate this evidence at summary judgment.

Historic home events. The record shows that historic home events bear each element that made Lij and Pat subject to the Client Prohibition. Pls.' SUMF ¶¶ 182–88. Historic home events also cause more traffic, parking, and noise concerns than Lij's or Pat's home businesses would. Pls.' SUMF ¶¶ 282–88. Metro justifies its special treatment of historic home events by asserting an interest in "preserving [historic] homes" by allowing their owners "to earn income." Metro. Mem. 16. Lij and Pat wish to earn income as well; Metro is essentially arguing that Lij and Pat must move into more valuable homes in order to secure the privilege of earning a livelihood there. If visiting clients are as detrimental to residential character as Metro contends they are, selectively exempting historic homes from the Client Prohibition is an irrational way to promote residential character. *See also Demonbreun v. Metro. Bd. of Zoning Appeals*, No. M2009-00557, 2011 WL 2416722, at *2–3 (Tenn. Ct. App. June 10, 2011) (detailing long history of complaints at historic home that was permitted to host events six nights per week). Plaintiffs' evidence is more than sufficient to establish an equal-protection violation with respect to historic home events.

* * *

Plaintiffs have asked this Court to protect their rights under the Tennessee Constitution. As shown above, Metro is not entitled to summary judgment on either Plaintiffs' substantive due process or equal protection claim. Accordingly, Metro's motion must be denied.

CONCLUSION

Metro's motion is unsupported by any material undisputed facts, misunderstands Tennessee's rational basis test, and fails to show it is entitled to judgment as a matter of law on either of Plaintiffs' claims. For these reasons, Plaintiffs ask the Court to DENY Metro's motion for summary judgment.

Dated: August 2, 2019

Respectfully submitted,

s/ Keith E. Diggs