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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

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

v.

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

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

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTRODUCTION 5

I. METRO'S BRIEF DOES NOT MEET ITS BURDEN OF DEMONSTRATING MOOTNESS. 5

A. Metro changed its position regarding sunset. 6

B. Metro cannot show that the Client Prohibition has been completely and permanently abandoned. 7

C. Metro does not address continuing discrimination. 9

D. Metro illustrates two more reasons to apply the public interest exception. 9

II. METRO CONTINUES TO IGNORE THE UNCONTESTED FACTS DEMONSTRATING ITS RESTRICTIONS ARE UNCONSTITUTIONAL AS APPLIED TO HOMEOWNERS. 10

A. Metro does not address elevated scrutiny. 11

B. Metro does not address this Court's precedents establishing Tennessee's constitutional standards. 12

C. Metro does not address precedents demonstrating that facts can overcome a presumption of constitutionality. 16

D. Metro only defends its restrictions generally, not as applied to Homeowners. 17

E. Metro bases its equal privileges argument on non-germane differences. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Banks v. Elks Club Pride of Tenn. 1102, 301 S.W.3d 214 (Tenn. 2010) 9

Brown v. Metro. Gov't of Nashville & Davidson Cty., No. M2011-01194 COA-R3-CV, 2013 Tenn. App. LEXIS 412 (Ct. App. June 21, 2013) ... 20

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 21, 22

City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013) 11

Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) 16, 17

Davidson Cty. v. Hoover, 364 S.W.2d 879 (Tenn. 1963) 7

DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) 13

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 8

Fisher v. Hargett, 604 S.W.3d 381 (Tenn. 2020) 18, 19

Hughes v. New Life Dev. Corp., 387 S.W.3d 453 (Tenn. 2012) 11

Livesay v. Tenn. Bd. of Exam'rs in Watchmaking, 322 S.W.2d 209 (Tenn. 1959) 11

Motlow v. State, 145 S.W. 177 (Tenn. 1911) 14, 15

Newton v. Cox, 878 S.W.2d 105 (Tenn. 1994) 15

Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty., 301 S.W.3d 196 (Tenn. 2009) 5, 6, 7, 8

Obergefell v. Hodges, 576 U.S. 644 (2015) 13

Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69 (Tex. 2015) 15

Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000) 15
Riggs v. Burson, 941 S.W.2d 44 (Tenn. 1997) 15, 16
Shatz v. Phillips, 471 S.W.2d 944 (Tenn. 1971) 13, 18, 19
Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608 (Tenn. 1927) 12, 18
State v. Nashville, Chattanooga & St. Louis Ry. Co., 135 S.W. 773 (Tenn. 1911) 14, 15, 16
State v. Tester, 879 S.W.2d 823 (Tenn. 1994) .... *passim*
Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993) 14, 15
United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 17
Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) 18

Codes and Rules

Metro Code § 17.04.060 7
Metro Code § 17.16.240 7
Metro Code § 17.16.250 7
Tenn. R. App. P. 27(b) 9
Tenn. R. Civ. P. 56.04 22

INTRODUCTION

Metro's brief makes two issues clear: First, either this Court's precedents matter, or they don't. Second, either facts matter, or they don't. Metro does not respond to—or even mention—multiple arguments Homeowners squarely raised, controlling precedent from this Court, or the undisputed facts of record supporting Homeowners' as-applied constitutional challenges. Ultimately, Metro fails to demonstrate that this case is moot and fails to overcome the facts and legal standards requiring judgment for Homeowners.

For the reasons set forth in Homeowners' opening brief and below, Homeowners are entitled to summary judgment. Although this Court can vacate the Chancery Court's judgment and remand with instructions to consider the facts of record, Metro's brief makes clear that these facts are uncontested—Metro only argues they are not material—so this Court can and should reverse by ordering judgment for Homeowners.

I. METRO'S BRIEF DOES NOT MEET ITS BURDEN OF DEMONSTRATING MOOTNESS.

Metro's brief does not support finding this case moot. Although Metro agrees that mootness is governed by *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196 (Tenn. 2009), it continues to argue for a presumption in its favor, Metro Br. 25-26, in the face of both *Norma Faye* and its own actions here. Ultimately, Metro cannot overcome the fact that Homeowners are still affected by Metro's restrictions on clients, meaning this case cannot be moot.

A. Metro changed its position regarding sunset.

For 17 months, Metro refused to take a position on whether the Client Prohibition will recur following sunset of its temporary ordinance. Homeowner Br. 22. But now, *for the first time*, Metro asserts that "the Client Prohibition will not return automatically upon . . . sunset." Metro Br. 30. Metro does not explain its late-changed position, even though:

1. The Metro Council and its attorney thought the effect of the sunset clause was ambiguous when adopted. *See* Homeowner Br. 22.
2. After Metro moved to dismiss Homeowners' appeal as moot and Homeowners raised this ambiguity, Metro refused to "commit to a position" whether client visits would become prohibited or unregulated after sunset. APP016.
3. In response to Homeowners' application for permission to appeal, Metro told this Court that "it is not clear what the [sunset clause] would mean." Metro Br. Opp'n 6 (Apr. 26, 2021).
4. Metro's new position contradicts one it suggested to Homeowners last summer. APP014 ("I think [the ordinance] goes back to the old [section 17.16.250](d).").

As Metro admits, *Norma Faye* never lays out the circumstances that could justify shifting the burden of demonstrating mootness away from the government. Metro Br. 28. Whatever those circumstances could be, however, they cannot include an 11th hour change in litigation position that contradicts statements made to the other party and this

Court. Moreover, Metro's new position *still* does not guarantee that Homeowners will be free from the challenged restrictions.

B. Metro cannot show that the Client Prohibition has been completely and permanently abandoned.

Even taking Metro at its (new) word, the challenged restrictions can and may still recur. If Metro is correct that the sunset provision now will operate to delete subsection D of Metro Code § 17.16.250, Metro Br. 30, then "home occupations" as a residential accessory use with land use development standards will be deleted from its code. Metro Code §§ 17.16.240, .250. But does this mean that Metro's *regulation* of home occupations or its *authorization* of them will "go away entirely"? *See* Homeowner Br. 22.[1] Metro *still* does not say[2]—and Homeowners must *still* guess—whether Metro will allow Homeowners to have client visits following sunset. This continuing ambiguity means restrictions on Homeowners' clients may recur, and thus Metro *still* fails to make the "absolutely clear" showing. *See Norma Faye*, 301 S.W.3d at 205 ("The [United States Supreme] Court's decisions reflect a jaundiced attitude about permitting a litigant to cease its wrongful conduct temporarily to

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[1] Even if home occupations "go away entirely," the privileged home-based businesses will be unaffected. *See* Homeowner Br. 23.

[2] In the absence of a specific home occupation ordinance, the answer will likely turn on whether Homeowners' home occupations otherwise qualify as an "accessory use." *See* Metro Code § 17.04.060 (defining "accessory use" as one "customarily incidental and subordinate to the principal use"). This is not clear either. *See Davidson Cty. v. Hoover*, 364 S.W.2d 879, 880-82 (Tenn. 1963) (noting sister-state splits on beauty salons as home occupations depended on "the particular facts and ordinances involved").

frustrate judicial review and then be free to resume the same conduct after the case is dismissed as moot.").

This ambiguity also suggests that Metro must further amend its home occupation provisions before sunset. And while Metro claims that "a future Council's action or inaction" is unknown, Metro Br. 36, Metro's brief emphasizes that it has, over the last twenty years, repeatedly rejected "proposals to allow clients to visit home-based businesses." Metro Br. 15-16. Uncertainty surrounding sunset of the current temporary rule thus weighs *against* declaring this case moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (explaining that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness"); *Norma Faye*, 301 S.W.3d at 207 (mootness based on voluntary cessation requires at least a "*permanent* policy change . . . that is not likely to be abandoned once the immediate threat of litigation is passed" (emphasis added)).

Moreover, Metro continues to defend the constitutionality of the Client Prohibition. Metro Br. 39-65. Metro's continued defense "reflects that . . . [Metro] ha[s] not completely and permanently abandoned the challenged practice" and could resume it again. *See Norma Faye*, 301 S.W.3d at 207. Without a ruling from this Court, nothing will *prohibit* Metro from readopting the Client Prohibition.

Given these facts, Homeowners' challenge to the Client Prohibition is not moot.

C. Metro does not address continuing discrimination.

Metro does not dispute that its current (temporary) ordinance still treats Homeowners worse than the privileged home-based businesses. Homeowners demonstrated that Metro's ordinance still discriminates against them, Homeowner Br. 23-24, and Metro does not address the issue. This Court should therefore deem Metro as having waived the issue, *see* Tenn. R. App. P. 27(b) (requiring appellee to argue the issues raised by appellant); *Banks v. Elks Club Pride of Tenn. 1102*, 301 S.W.3d 214, 227 n.16 (Tenn. 2010) (treating issue as waived because party failed to brief and argue the issue), and address the merits of Homeowners' equal rights, privileges, immunities, or exceptions claim.

D. Metro illustrates two more reasons to apply the public interest exception.

For the reasons set forth in Homeowners' opening brief and above, this case is not moot. But even if it were moot, Metro illustrates two more reasons to apply the public interest exception to mootness: (1) the parties' divergent views on the meaning of the Tennessee Constitution, and (2) the importance of the public's right to work from home.

First, the parties have starkly divergent views about the independence of the Tennessee Constitution and the standards of Tennessee constitutional review. *Compare* Homeowner Br. 30 ("Tennessee rational basis meaningfully protects rights and differs from federal rational basis."), *with* Metro Br. 39 ("An analysis of substantive due process and equal protection under the Tennessee Constitution is identical to the analysis under the United States Constitution."). This dispute affects not only the rights of the Homeowners in this case; it

implicates the rights of all Tennesseans and the limits on state and local government imposed by the Tennessee Constitution. Because these constitutional questions permeate the everyday relationship between Tennesseans and their government, they are bound to recur.

Second, Metro concedes that "working from home is an issue of great importance to the public." Metro Br. 38. As the preamble to Metro's temporary ordinance explains, "5.7% of Nashville workers aged 16 and older work from home," but home-based business restrictions "create a hardship on residents seeking additional income to survive in a city with a skyrocketing cost of living" and, among other things, "create a significant barrier for children seeking tutoring services, music lessons, and other enrichment." *Id.* 28 (citing preamble). And while Metro claims that there is "nothing in the record" to suggest the current "balance" it has struck will change, *id.* 38, its twenty-year history of selectively prohibiting home business clients, *id.* 15-16, coupled with its continued defense of its prohibition, *id.* 39-65, and the ambiguity surrounding sunset of the temporary ordinance, counsels otherwise.

For these reasons, even if Homeowners' case were moot, and it is not, the public interest exception to mootness applies.

II. METRO CONTINUES TO IGNORE THE UNCONTESTED FACTS DEMONSTRATING ITS RESTRICTIONS ARE UNCONSTITUTIONAL AS APPLIED TO HOMEOWNERS.

Metro fails to address the issues in this as-applied constitutional challenge. As explained below, Metro does not address this Court's precedents that call for elevated scrutiny, establish Tennessee's constitutional standards, and demonstrate that facts matter. Metro only

defends its restrictions generally, not as applied to Homeowners, and bases its equal privileges argument on non-germane differences. In the end, the question is whether Metro's restriction on clients at Homeowners' businesses is constitutional as applied to Homeowners. It is not, and Metro's brief does not really try to argue otherwise.

A. Metro does not address elevated scrutiny.

Metro fails to address the level of scrutiny to be applied in this case. Homeowners argued that elevated scrutiny applies because this Court has already recognized the rights at issue here—the right to own, use, and enjoy property and the right to earn a living—are fundamental in *Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (Tenn. 2012), and *Livesay v. Tennessee Board of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959). Homeowner Br. 28-30. Metro does not address this argument or discuss, distinguish, or cite either case. Metro argues only (and wrongly) that its selective Client Prohibition satisfies federal rational basis standards. Metro Br. 39-47. It asserts, without citation, that this case is not about "the right to work," Metro Br. 40, even though Homeowners squarely argued their fundamental "right to earn a living" under *Livesay*, Homeowner Br. 28-30.

This Court has assumed that elevated scrutiny applies to claims where the standard was not adequately addressed by the government. *E.g.*, *City of Memphis v. Hargett*, 414 S.W.3d 88, 102 & n.12 (Tenn. 2013) (assuming without deciding that strict scrutiny applies to voting rights under the Tennessee Constitution even though a lower standard may apply under the federal constitution). It can do so here. But because

Homeowners prevail under any level of scrutiny under the Tennessee Constitution, this Court may not need to reach the question of elevated scrutiny. Homeowner Br. 30.

B. Metro does not address this Court's precedents establishing Tennessee's constitutional standards.

Metro argues that federal rational basis should dictate this Court's legal analysis, Metro Br. 39-44, but does not address this Court's precedents demonstrating otherwise. To be sure, this Court has sometimes called Tennessee and federal constitutional protections "practically synonymous," but this Court has also recognized Tennessee law is more protective in some contexts. Homeowner Br. 30-34. More importantly, this Court has, for decades, applied due process and equal protection (or, in the language of the Tennessee Constitution, law of the land and equal rights, privileges, immunities, or exceptions) standards that *are* different than the current federal rational basis test, notwithstanding claims of synonymity. Homeowner Br. 26-27, 36-42. Metro does not discuss, distinguish, or cite these important, long-standing precedents.

First, Metro does not discuss, distinguish, or cite *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 612-13 (Tenn. 1927). *Spencer-Sturla*, which predates the creation of federal rational basis, established that Tennessee's law of the land clause requires that zoning restrictions be "reasonable," and recognized that as-applied challenges to zoning restrictions would depend on the facts of each case. Homeowner Br. 40-41. *Spencer-Sturla* remains good law, but Metro makes no effort to address it.

Second, Metro does not discuss, distinguish, or cite *Shatz v. Phillips*, 471 S.W.2d 944 (Tenn. 1971). In *Shatz*, this Court held that a zoning restriction on the location of a junk salvage operation was unreasonable as applied, based on the record evidence. 471 S.W.2d at 947-48. This Court never suggested that *all* zoning restrictions on junk salvage operations were unreasonable or that there were not good reasons for such restrictions *generally*. But record evidence demonstrated that the particular junk salvage operation would not "cause any result justifying the exercise of the police power under the municipality's zoning authority," so the zoning restriction was "void in its application to the petitioners' uses of the property." *Id.* at 947, 948. Homeowners similarly demonstrated their home-based businesses do not cause any result justifying regulation. Homeowner Br. 56-67. *Shatz* thus demonstrates the importance of facts in an as-applied challenge and remains good law, but Metro fails to address it.

Third, Metro wrongly argues that oppressiveness is not a part of the Tennessee standard. Metro Br. 58. The only case Metro cites in support of this argument is *DeBoer v. Snyder*, 772 F.3d 388, 404-05 (6th Cir. 2014), a Sixth Circuit decision attempting to explain federal rational basis. Metro Br. 58. But Metro does not disclose that *DeBoer* is not even good federal law, having been reversed in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Metro also does not discuss, distinguish, or cite the multiple precedents from this Court recognizing that oppressive ordinances are unreasonable and invalid under the Tennessee law of the land clause. *Cf.* Homeowner Br. 41-42.

Fourth, although Metro mentions the controlling equal privileges precedents of *State v. Tester*, 879 S.W.2d 823 (Tenn. 1994), and *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993), Metro Br. 47, it fails to discuss the standards set forth in those cases. Homeowners demonstrated that this Court has required, since before the creation of the federal rational basis test, that differences in treatment be based on "*substantial* distinctions which make one class *really* different from another" based on characteristics that are "*germane to the purpose of the law*." Homeowner Br. 38 (quoting *Tester*, 879 S.W.2d at 829). Metro ignores this "real and substantial" standard and the many cases in which this Court has applied it. *Cf. id*. 38-39 & n.6. As discussed below, Metro's failure to address this standard, particularly the "germane" element, leads Metro to argue that "[t]he fact that other commercial uses might also cause harm is not relevant" in this case. Metro Br. 58. Under *Tester* and the other Tennessee precedents, this assertion is incorrect.

Fifth, because it ignores these long-standing Tennessee precedents, Metro does not address whether the current federal rational basis test is consistent with the original understanding of the Tennessee Constitution. Homeowners demonstrated that the "reasonableness" and "real and substantial" tests have been law in Tennessee since at least 1911, Homeowner Br. 38-40 (citing *Motlow v. State*, 145 S.W. 177, 188 (Tenn. 1911), and *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). These standards predate the invention of federal rational basis, Homeowner Br. 36, and are consistent with the

traditional limits on the police power applied in both federal and state courts at the time. *See Motlow*, 145 S.W. at 188; *Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 775-76; Homeowner Br. 34-36. Only later, after the invention of the rational basis test, did federal standards depart from the original standards. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 84-87 (Tex. 2015) (discussing history). These "'fluctuating federal standards'" cannot have changed the meaning of the Tennessee Constitution. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14-15 (Tenn. 2000).

Since the invention of the federal rational basis test, this Court has sometimes purported to apply "rational basis," while still applying traditional "reasonableness" and "real and substantial" tests. *E.g.*, *Riggs v. Burson*, 941 S.W.2d 44, 51-53 (Tenn. 1997) ("'[R]ational basis' analysis applies . . . . Thus, the question we must address is whether the statute is reasonably related to a legitimate legislative purpose."); *Newton v. Cox*, 878 S.W.2d 105, 109-10 (Tenn. 1994) (purporting to apply "rational basis" but asking for a "reasonable basis"); *Tester*, 879 S.W.2d at 828-29 (purporting to apply "rational basis," but requiring "reasonable and substantial differences," "substantial distinctions which make one class really different from another," and distinctions that are "germane to the purpose of the law" as in *Nashville, Chattanooga & St. Louis Railway Co.*); *Tenn. Small Sch.*, 851 S.W.2d at 153-54 (applying "rational basis" but recognizing "the determinative issue is whether the facts show some reasonable basis for the disparate state action"); *see also* Metro Br. 39-40 (citing much of this same language without addressing the different

standards). But this Court has never addressed whether the lowered *federal* standard altered the original meaning of Tennessee's law of the land and equal rights, privileges, immunities, or exceptions provisions and precedents, much less explained *why* or *how* that happened. Metro does not do so either.

C. Metro does not address precedents demonstrating that facts can overcome a presumption of constitutionality.

This Court has long relied on facts to declare laws unconstitutional as applied. Homeowner Br. 38-47 (discussing, *inter alia*, *Shatz*, *Spencer-Sturla*, *Tester*, and *Tennessee Small School*). Metro does not discuss any of these cases. Instead, Metro argues "rational basis" is a question of law, not fact. Metro Br. 42-44. It relies on federal cases saying courts may use "rational speculation" to uphold a law. *Id.* 44-47. But while "rational speculation" may support a law in the absence of contrary facts, none of those cases allow speculation to justify a law when controverted by factual showings.[3] Homeowner Br. 42-49.

Even under federal law, challengers can overcome a presumption of constitutionality based on speculation by demonstrating the speculation is not true as applied. Homeowner Br. 42. Metro claims that unsupported rational speculation can support a regulation by pointing to *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). Metro Br. 46. But Metro ignores that the *Craigmiles* plaintiffs *won* their rational basis case

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[3] For example, Metro still relies on *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997), to argue that speculation prevails over actual facts. Metro Br. 45-46. Homeowners have already shown that is not what *Riggs*, or federal law, says. Homeowner Br. 47-48.

because they assembled a factual record that undermined the state's speculation as applied to the facts of their case. 312 F.3d at 225-29 (although public health and safety are legitimate interests, those interests are not served by applying challenged law to plaintiffs' actions); Homeowner Br. 42. As the U.S. Supreme Court explained in its very first rational basis case, constitutionality is presumed, "unless in the light of the facts made known or generally assumed" that presumption is rebutted. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Thus, "a statute, valid on its face," may be challenged by facts showing "that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." *Id.* at 153-54. Indeed, it would "deny due process" to "preclude[] the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." *Id.* at 152.

Here, Homeowners built a factual record demonstrating that Metro's speculated support for the Client Prohibition does not apply in Homeowners' particular circumstances. Homeowner Br. 49-67. As discussed below, Metro has no response to these facts other than to (wrongly) claim they do not matter.

D. Metro only defends its restrictions generally, not as applied to Homeowners.

Metro recognizes this is an as-applied challenge, Metro Br. 37, but fails to address this case as such. "[I]n an as-applied challenge, the plaintiff contends that the statute [even one constitutional on its face] is

unconstitutional as construed and applied in actual practice against the plaintiff under the facts and circumstances of the particular case, not under some set of hypothetical circumstances." *Fisher v. Hargett*, 604 S.W.3d 381, 396-97 (Tenn. 2020); *see Spencer-Sturla,* 290 S.W. at 613-14 (even if excluding commercial enterprises from residential zones is "generally" reasonable, it may not be reasonable to exclude specific ones); *accord Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (resolution of facial challenge to law did not "resolve future as-applied challenges"). Here, Metro argues the facial constitutionality of its regulation but makes no real effort to justify the regulation as applied to Homeowners.

Metro fails to address the as-applied facts and circumstances of this case. Instead, Metro argues general hypothetical circumstances and "conceivable" facts. Metro Br. 42-65. But Homeowners' brief demonstrated that the facts of their *particular* circumstances do not implicate Metro's *general* hypotheticals or theories. For the simplest example, Metro repeatedly says it was concerned about traffic and parking. *Id*. 22, 49, 62-63. But the evidence shows that Homeowners do not affect these concerns, much less to the degree that the privileged home-based businesses do. Homeowner Br. 51-60, 63-64. Homeowners rebutted all of Metro's assertions in this manner. *Id*. 49-67. Just as this Court ruled in *Shatz* that a zoning restriction on a junk salvaging operation was unconstitutional because facts demonstrated the operation did not implicate the government's claimed interests and was no more objectionable than other allowed uses, *Shatz,* 471 S.W.2d at 945-47, it

should rule here that Metro's restricting Homeowners' clients is unconstitutional for the same reasons, Homeowner Br. 49-67. Because Metro does not engage with the facts of this case, or with *Shatz*, it simply does not address Homeowners' as-applied rebuttal of its speculation.

Metro's refusal to engage with the as-applied facts of this case is consistent with its long-held position that "the particular facts of this case are largely" or "completely" irrelevant. *See* Homeowner Br. 43. Metro's position, however, reads as-applied challenges out of Tennessee law. To win a "facial" challenge, a plaintiff must show that there is no circumstance in which a law could be constitutionally applied. *Fisher*, 604 S.W.3d at 396-97. Metro tries to extend this rule to mean that any constitutional application negates all as-applied challenges as well. But this Court recognizes that as-applied challenges are judged precisely "under the facts and circumstances of the particular case, not under some set of hypothetical circumstances." *Id.* at 397. Metro is therefore wrong; facts are entirely relevant.

E. Metro bases its equal privileges argument on non-germane differences.

Metro ignores the central problem with its regulatory scheme: In the name of protecting residential areas, it treats Homeowners' harmless home-based businesses worse than the privileged home-based businesses that do *more harm* to residential areas. Metro argues it may discriminate against Homeowners' clients just because Homeowners are engaged in different businesses—a recording studio and single-chair hair salon—than the privileged home-based business—short-term rentals, daycares, historic home events, and various "Specific Plans," one of which is a hair

salon. Metro Br. 52-57.[4] But home recording studios and home hair salons are legal; Homeowners are restricted only as to "clients." R.644-45. Metro also argues that "[t]he fact that other commercial uses might also cause harm is not relevant." Metro Br. 58. But Metro's discriminatory treatment of Homeowners must be based on real and substantial differences that are germane to purposes that support restrictions on having clients, *i.e.*, their harm on neighborhoods. *Cf. Tester*, 879 S.W.2d at 829 ("*[T]he characteristics which form the basis of the classification must be germane to the purpose of the law."*). Because Metro does not address the *Tester* standard, particularly the "germane" element, its arguments miss the point.

Not just any difference justifies government discrimination; the difference must be germane. In *Tester*, for example, there were obvious differences between the three counties allowed to use work release and those counties that were not so allowed; Davidson and Moore Counties had metropolitan governments, and Shelby County had a particular population classification. 879 S.W.2d at 825. But the purpose of the law—to avoid jail overcrowding—had nothing to do with the metropolitan form of government. *Id.* at 829. And the facts demonstrated that the work-

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[4] Metro continues to argue that Homeowners cannot compare themselves to SPs because they did not challenge the denial of their own SP rezoning. Metro Br. 11 n.3, 16, 56-57; *cf.* Homeowner Br. 54 n.13. An SP is a spot-rezoning ordinance, which is a legislative act, not an administrative or quasi-judicial act like a variance. *Brown v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2011-01194-COA-R3-CV, 2013 Tenn. App. LEXIS 412, at *9-18 (Ct. App. June 21, 2013). Metro's refusal to adopt new legislation does not preclude Homeowners from challenging existing legislation.

release counties were not really different from the others with regard to actual overcrowding conditions. *Id*. Therefore, though there were good reasons to have a work-release program, those reasons applied to everyone, not just those who received the benefit of the program, and the limitation of the benefit violated equal privileges. *Id*.

Even federal law requires a classification to be based on relevant characteristics. Where a classification is based on real differences, but those differences are not relevant to the purpose of the challenged law, the classification fails even federal rational basis. For example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-48 (1985), the Court dealt with a zoning restriction that treated group "homes for the mentally retarded" differently than other kinds of group living, including "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, [and] nursing homes for convalescents or the aged." The Court recognized "the mentally retarded as a group are indeed different from" the other groups that could use the land. *Id.* at 448. But this difference was irrelevant unless it "would threaten legitimate interests of the city in a way that other permitted uses . . . would not." *Id*. And the record in the case did "not reveal any rational basis for believing that" the plaintiff group home "would pose any special threat to the city's legitimate interests" compared to the other uses that were allowed. *Id*. The difference was irrelevant for purposes of "a density regulation" that the other dense uses "need not observe." *Id.* at 449-50. It was irrelevant to a concern about "congestion of the streets" because all the other uses

caused traffic congestion too. *Id.* at 450. And it was irrelevant to "the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents" given all the other allowed uses presented the same potential problems. *Id.*

There are no "*substantial distinctions*" between Homeowners' clients and clients of the privileged home-based businesses, such that they are "*really different*" with regard to their effects on neighborhoods. *Tester*, 879 S.W.2d at 829. Homeowners' opening brief demonstrated that the privileged home-based businesses have greater impact on the same interests that Metro claims justify restricting Homeowners' home-based businesses. Homeowner Br. 49-56. This showing rebutted all of Metro's theoretical justifications for discrimination. *Id.* Because Metro does not engage the facts of this case or *Tester*'s germaneness requirement, it simply does not address Homeowners' as-applied rebuttal of its speculation.

* * *

This appeal comes to this Court from a Rule 56 summary judgment. Rule 56 guarantees a legal decision based on undisputed material facts. Indeed, it is only the existence of undisputed material facts that allows a court to grant summary judgment. Tenn. R. Civ. P. 56.04.

Homeowners received a summary judgment ruling untethered to the facts. The Chancery Court ignored the uncontested facts in the record about the circumstances of Homeowners' businesses and the privileged home-based businesses. *See* Homeowner Br. 42-67. Metro's argument is not that these facts are *contested*, it is that these facts are not *material*.

R.2257. Metro continues to argue these facts don't matter and fails to mention any of them. Metro Br. 47-65. This Court's precedents, and even the federal decisions, demonstrate that these facts are material. At summary judgment, Metro's defense of its law *as applied to* Homeowners fails because it has admitted of all the facts *about* Homeowners. R.2257. Given the uncontested material facts in this record, this Court should reverse.

CONCLUSION

This case is not moot and this Court should reverse judgment. Metro's temporary, ambiguous, voluntary cessation is not a complete and permanent abandonment of the Client Prohibition. Even today, Homeowners remain affected by Metro's discriminatory restrictions. And the public interest supports addressing the disputed issues of great public importance here. On the merits, Homeowners are entitled to summary judgment. The uncontested material facts show Metro's restrictions do not satisfy the Tennessee Constitution's law of the land and equal privileges standards as applied to Homeowners.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02. My word processing system indicates that the sections of the brief subject to the 5,000 word limitation contain 4,893 words.

/s/ Jason I. Coleman
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2021, a true and exact copy of the foregoing was served via the court's electronic filing system and via electronic mail to:

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