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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.	)	

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
Tenn. R. Civ. P. 56.04; Local Rule § 26.04(f)**

In their opening brief, Plaintiffs Elijah "Lij" Shaw and Patricia "Pat" Raynor showed that the record in this case is so one-sided as to rule out the possibility of Metro prevailing. As explained below, Metro has offered nothing in its response to contradict this showing.

Plaintiffs respond to Metro's arguments in Parts I–IV below. In Part I, Plaintiffs show that this case is ripe for summary judgment. In Part II, Plaintiffs show that Metro is wrong that evidence is irrelevant under Tennessee rational-basis review, and further reply that constitutional litigants can (and do) prevail under this standard by using record evidence. In Part III, Plaintiffs note that Metro's facial defense of the Client Prohibition is irrelevant because Plaintiffs only seek as-applied relief. And in Part IV, Plaintiffs reply to Metro's arguments against Plaintiffs' as-applied claims. Metro's arguments fail to overcome Plaintiffs' showing, based on the undisputed record, that Plaintiffs are entitled to judgment as a matter of law.

I. THIS CASE IS RIPE FOR SUMMARY JUDGMENT BECAUSE THE MATERIAL FACTS ARE NOT IN DISPUTE.

This case is ripe for summary judgment because "there is no genuine issue as to any material fact." Tenn. R. Civ. P. 56.04. Metro accepts, for summary judgment purposes, all but two of the facts designated in Plaintiffs' Rule 56.03 statement. *See generally* Pls.' Statement Undisputed Material Facts ("Pls.' SUMF") (June 14, 2019); Metro. Gov't's Resp. Pls.' SUMF ("Metro. Resp. SUMF") (Aug. 2, 2019). Those two facts have to do with future harm to Ms. Raynor. Metro disputes that the Client Prohibition's application to Ms. Raynor "has endangered [her] ability to support herself in the future," and also disputes that "[b]ut for Nashville's enforcement . . . [she] would be able to earn an honest living—and stay in her home—for the rest of her life." *Compare* Pls.' SUMF ¶¶ 293, 295, *with* Metro. Resp. SUMF 1.

There is "no genuine issue" as to these two facts. *See* Tenn. R. Civ. P. 56.04. For Metro to place a fact in genuine dispute, "[e]ach disputed fact *must* be supported by specific citation to the record." *Id.* 56.03 (emphasis added). Ms. Raynor substantiated these two facts about future harm with a duly submitted declaration, based on her personal knowledge, that her present business location is "subleased," that her "clients are extremely sensitive to location," that she may not find "another adequate space to rent if the landlord decided to sell," and that she "do[es] not know how long [she] will be physically able" to withstand the "full-time schedule" she must work in order to afford her $135/week commercial rent—and that none of this would be a concern to her if the Client Prohibition did not apply and she could "work on [her] own terms" at home. *See* Raynor Decl. ¶¶ 18–21, *cited in* Pls.' SUMF ¶¶ 293, 295. In response to these well-supported factual statements, Metro objects only "that they are speculative." Metro. Resp. SUMF 1. That is not enough. In opposition to Plaintiffs' motion for summary judgment, Metro "must do more than simply show that there is some metaphysical doubt as to the material facts." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d

235, 265 (Tenn. 2015) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Metro's unsupported objections to these two facts do not create a genuine issue.[1]

Because there is "no genuine issue as to any material fact," the only question for this Court is whether the moving Plaintiffs are "entitled to a judgment as a matter of law." *See* Tenn. R. Civ. P. 56.04. As explained below, they are.

II. THE RATIONAL-BASIS TEST ALLOWS PLAINTIFFS TO ESTABLISH IRRATIONALITY USING RECORD EVIDENCE.

Metro attacks Plaintiffs' motion for summary judgment with an argument that Tennessee rational-basis review does not require evidence. *See* Resp. Pls.' Mot. Summ. J. ("Metro. Resp.") 1–4 (Aug. 2, 2019) ("[E]vidence is not required to support a rational basis."). But this argument elides the parties' different rational-basis burdens: while the *government* presumptively does not need to show that a challenged law is rational, the challenger must show that the law is *irrational*. *See, e.g.*, *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993) ("The burden of showing that a classification is unreasonable . . . is placed upon the individual challenging the statute . . . ."). Tennessee courts routinely allow challengers to rebut the government's asserted rational basis with record evidence. *See, e.g.*, *State v. Tester*, 879 S.W.2d 823, 829–30 (Tenn. 1994) (rejecting state's rational-basis argument as "ignor[ing] the evidence in th[e] record"); *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582, 2005 WL 1541860, at *33–36 (Tenn. Ct. App. June 30, 2005) (striking down Metro zoning ordinance upon lack of "proof" that ordinance "meets [Metro's] stated goals"). What is more, the courts *strike down* these laws based on the record evidence. *Tester*, 879 S.W.2d at 829–30; *Consol. Waste*, 2005 WL 1541860, at *33–36. Plaintiffs have developed and presented evidence that the Client Prohibition is

[1] Moreover, Metro does not argue that this case cannot be resolved at summary judgment.

not rationally related to a legitimate government interest as applied to them. It is telling that Metro's response to Plaintiffs' presentation is a general objection that "evidence is not required." *See* Metro. Resp. 3.

Metro cites one (and only one) Tennessee case[2] for the proposition that record evidence does not matter under rational-basis review. *See id.* (citing *Riggs v. Burson*, 941 S.W.2d 44, 52–53 (Tenn. 1997)). In *Riggs*, the Tennessee Supreme Court upheld a state statute banning heliports within nine miles of a national park. 941 S.W.2d at 54. *Riggs* was decided under the different posture of a Rule 12.02(6) motion to dismiss, and its chief contribution to Tennessee caselaw was its holding that "legal conclusions set forth in a complaint are not required to be taken as true." *Id.* at 47–48. The *Riggs* plaintiffs could not proceed to discovery based solely on their complaint's "legal conclusions" that the heliport ban "violated due process and equal protection," and the Tennessee Court of Appeals was reversed for ruling otherwise. *Id.* at 48. That is why the *Riggs* court wrote that "specific evidence is not necessary" to establish a rational basis. *See id.* at 52, *quoted in* Metro. Resp. 12. In other words, the government has no affirmative obligation to introduce evidence of rationality. But *Riggs* does not stand for the proposition that a rational-basis challenger may not introduce evidence of irrationality to support a well-pleaded complaint such as Plaintiffs' here. This case is past the pleading stage. This Court recognized over a year ago that Plaintiffs'

[2] Metro bookends its description of rational-basis review with a pair of Sixth Circuit cases that do not support Metro's argument, even as persuasive authority. *See* Metro. Resp. 1–4 (quoting *DeBoer v. Snyder*, 772 F.3d 388, 404–05 (6th Cir. 2014), and *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002)). One case, *DeBoer*, was reversed by the U.S. Supreme Court. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (reversing *DeBoer*). And the other case, *Craigmiles*, expressly discredited the government's "proffered explanations" for the challenged law using rational-basis review. 312 F.3d at 225 ("Tennessee's justifications . . . come close to striking us with the force of a five-week-old, unrefrigerated dead fish." (internal quotation marks omitted)). Metro could hardly have identified worse cases for the proposition that courts must believe whatever the government says in defense of infringements upon recognized constitutional rights.

complaint "alleges with great specificity that the [Client Prohibition] is not rational." Order Den. Mot. Dismiss, Tr. at 10:19–20 (Apr. 13, 2018). Plaintiffs have since taken discovery and are now presenting the proof of their allegations. It is no answer at this stage for Metro to say that Plaintiffs' proof must be disregarded.

Metro's argument also contradicts this Court's prior rulings that the facts matter under Tennessee rational-basis review. This Court has held, more than once, that "[t]he question of rational basis is a question of fact." Order Den. Mot. Dismiss 3; *accord* Order Granting Pls.' Mot. Compel 2 (Jan. 22, 2019); *see also* Order 2–3 (Feb. 22, 2019) (denying Metro's motion to revise the January 22 order). But Metro asserts that Tennessee rational-basis review "presents a question of law for a court, not a question of fact." *See* Metro. Resp. 2. Metro offers no Tennessee caselaw in support of this point. Metro relies instead on nonbinding federal precedent stating, for example, that "rational basis . . . is a legal issue for the court and not a factual issue for jury determination." *E.g.*, *Myers v. Cty. of Orange*, 157 F.3d 66, 74 n.3 (2d Cir. 1998); *see* Metro. Resp. 2 (citing cases).[3] Even then, Metro offers no Sixth Circuit authority on this point—and fails to note that the Sixth Circuit has held *the opposite* of what Metro's sister-circuit cases suggest. *See Loesel v. City of Frankenmuth*, 692 F.3d 452, 463 (6th Cir. 2012) ("[D]etermining whether individuals are similarly situated is generally a factual issue for the jury."); *id.* at 465–66 (upholding jury's factual finding that "ordinance lacked a rational basis"). Metro cannot avoid the rule that "'[r]easonableness' varies with the facts in each case." *Tester*, 879 S.W.2d at 829.

To conclude, there is nothing wrong with Plaintiffs' use of record evidence to make their case. Metro has no initial obligation to introduce evidence of rationality, but Plaintiffs must

[3] These cases do not dismiss the relevance of facts. *Myers*, for example, considers the evidentiary record at great length in ruling against the government under federal rational-basis review. *See* 157 F.3d at 73–76.

be allowed to introduce evidence to show irrationality (as plenty of Tennessee rational-basis challengers have been allowed to do before). Plaintiffs have introduced a great deal of such evidence here, and that evidence is uncontested. *See generally* Pls.' SUMF; Metro. Resp. SUMF. Consistent with Tennessee law, this Court must consider that uncontested evidence in adjudicating Plaintiffs' claims.

III. PLAINTIFFS ONLY CHALLENGE THE CLIENT PROHIBITION AS APPLIED TO THEMSELVES, AND NOT IN ANY OTHER APPLICATIONS.

Metro's response offers four pages of argument that the Client Prohibition is facially constitutional. Metro. Resp. 4–8. But Plaintiffs do not seek facial relief. Metro's defense that the Client Prohibition is facially constitutional is therefore irrelevant, and the Court can ignore it. *See id.*

This is an as-applied challenge to the Client Prohibition. Plaintiffs' motion for summary judgment requests declaratory relief "as applied to Plaintiffs," declaratory relief again "to the extent that the Client Prohibition prohibits Plaintiffs from serving up to twelve clients per day," and an injunction prohibiting Metro "from enforcing the Client Prohibition against Plaintiffs' home-based businesses." Pls.' Mot. Summ. J. 2 (June 14, 2019). "[A]n 'as applied' challenge only requires the challenger to demonstrate that the [ordinance] operates unconstitutionally when applied to the challenger's particular circumstances." *Waters v. Farr*, 291 S.W.3d 873, 923 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part).

IV. THE UNDISPUTED RECORD SHOWS THAT PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON BOTH OF THEIR AS-APPLIED CLAIMS.

Metro cannot oppose something with nothing at summary judgment. *TWB Architects, Inc. v. Braxton, LLC*, No. M2017-00423, ___ S.W.3d ___, 2019 WL 3491467, at *8 (Tenn. July 22, 2019). "Whether the nonmoving party is a plaintiff or a defendant—and *whether or not the nonmoving party bears the burden of proof at trial on the challenged claim* or defense—at the

summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *Id.* (quoting *Rye*, 477 S.W.3d at 265) (emphasis added). In other words, Plaintiffs' ultimate burden of proof under Tennessee rational-basis review does not excuse Metro from opposing Plaintiffs' evidence-backed showing of irrationality with evidence negating Plaintiffs' showing. Metro's response fails to appreciate this. In their opening brief, Plaintiffs "produce[d] . . . evidence that, if uncontroverted at trial, would entitle" them to judgment as a matter of law. *Id.* at *7; *see* Mem. Law & Facts Supp. Pls.' Mot. Summ. J. ("Pls.' Mem.") 12–37 (June 14, 2019). Metro recognizes that "Plaintiffs submitted [295] statements of undisputed material fact with their motion for summary judgment," and Metro concedes all but two of those statements. Metro. Resp. SUMF 1; *see above* Part I (discussing the two nominally disputed facts). Rather, Metro essentially abandons the record[4] in favor of an assertion that "the particular facts of this case are largely irrelevant." Metro. Resp. SUMF 1. This is false. Metro's fact-free arguments cannot overcome Plaintiffs' fact-based showing that Metro's application of the Client Prohibition in this case is unreasonable.

Contrary to Metro's take, Plaintiffs have marshalled both the evidence and the authority to prevail as a matter of law. This Part replies to Metro's arguments on the legal merits of Plaintiffs' claims: in section IV.A, their substantive due process claim; in section IV.B, their equal protection claim.

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[4] In all sixteen pages of Metro's response brief, there are three (and only three) citations to the record: one to an irrelevant amendment to Metro's short-term rental ordinance, and two to the deposition testimony of Metro's designated Rule 30.02(6) witness. *See* Metro. Resp. 11–12 (citing Todd 30.02(6) Dep. 85); *id.* at 12 (citing Metro. Ord. No. BL2017-608); *id.* at 14 (citing Todd 30.02(6) Dep. 99–100).

A. The Undisputed Record Shows that Plaintiffs Are Entitled to Judgment as a Matter of Law on Their As-Applied Substantive Due Process Claim.

To survive Plaintiffs' as-applied substantive due process claim, Metro's application of the Client Prohibition to Lij and Pat must have a "substantial relationship to the public health, safety, morals or general welfare." *Consol. Waste*, 2005 WL 1541860, at *5 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). Additionally, the Client Prohibition must not be "oppressive in its application" to Lij and Pat. *Wise v. McCanless*, 191 S.W.2d 169, 172 (Tenn. 1945). In their opening brief, Plaintiffs demonstrated, using undisputed record evidence, that Metro's application of the Client Prohibition in this case does not reasonably relate to any legitimate government interest identified by Metro. Pls.' Mem. 12–30 (addressing the evidentiary nonvalue of anonymous complaints; the Client Prohibition's nonrelation to traffic, parking, noise, residential nature, health, safety, or administrative concerns; and the illegitimacy of discouraging civic engagement and of economic protectionism). Metro's response brief explicitly declines to engage Plaintiffs' as-applied disproofs until page ten of sixteen. Even then, Metro offers no response to Plaintiffs' as-applied showing that the Client Prohibition has no reasonable relation to parking, noise, health, or administrative concerns. That leaves little ground on which Metro asserts that applying the Client Prohibition here could reasonably be applied to Pat and Lij.

This section replies to Metro's five (and only five) arguments in response to Plaintiffs' motion for summary judgment on their as-applied substantive due process claim. Metro's arguments are that applying the Client Prohibition in this case reasonably relates to (1) traffic control, (2) harm to Plaintiffs' neighbors, (3) excluding strangers from Plaintiffs' neighborhoods, (4) preserving residential districts, and (5) preserving commercial districts. The undisputed record does not support any of these arguments in this as-applied case. Plaintiffs will now reply to each of these arguments in turn.

1. The Undisputed Record Shows that Applying the Client Prohibition to Plaintiffs Does Not Reasonably Relate to Traffic Control.

Metro's first counterargument concerns traffic. Metro. Resp. 10–11 ("[A] house that receives clients each day will necessarily create more traffic in the neighborhood."). The premise of this counterargument is that Plaintiffs request the freedom to receive twelve clients per day. *See* Metro. Resp. 10 (citing Compl., Prayer ¶ B). From that premise, Metro makes a series of progressively more illogical assumptions about the traffic impact of allowing Lij and Pat to host the same number of clients as any residential homeowner in Nashville may already receive with a short-term rental permit. First, Metro assumes (without evidence) that Lij and Pat would each work 6 days a week and host the maximum 12 clients every day. Metro. Resp. 10. Then, Metro multiplies that product—72 clients per week—by an extra (and arbitrary) multiple of 5, for the bald assertion that *this as-applied lawsuit* will lead to an extra *360 weekly visitors* on *a hypothetical street*. *Id.* Metro then quotes caselaw to the effect that traffic control is a legitimate interest (Plaintiffs have never denied that it is). *Id.* at 11 (quoting *Euclid*, 272 U.S. at 394). Finally, Metro cites more caselaw for the proposition that "residential streets do not have the same infrastructure as commercial districts for supporting traffic." *Id.* (citing *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 343 (Tenn. 1983), and *MC Props., Inc. v. City of Chattanooga*, 994 S.W.2d 132, 135 (Tenn. Ct. App. 1999)).

Nowhere in its traffic counterargument does Metro address the undisputed record evidence that Plaintiffs put forward in their opening brief. *See* Pls.' Mem. 16–17. When Plaintiffs applied for SP rezoning before bringing this lawsuit, the Metro planning staff reviewed the traffic and parking consequences of their proposed uses, and recommended *approval* as to traffic and parking. Pls.' SUMF ¶ 221. The undisputed record also shows that Metro does not normally seek a traffic impact study for proposed uses that generate fewer than 750 trips *per day*. Pls.' SUMF ¶ 215. Metro responded in discovery, and does not here

dispute, that Lij's and Pat's clients would likely generate 10 and 16 trips per day, respectively. Pls.' SUMF ¶¶ 218, 220. That is about 1–2% of 750: a minuscule fraction of the threshold at which Metro's traffic engineers would devote any attention to whether there *might* be a need for traffic mitigation. Even Metro's evidence-free assertion that a judgment in Plaintiffs' favor would generate 360 visitors (720 trips)[5] *per week*—never mind that the judgment would apply only to Lij and Pat—would not meet this threshold. The undisputed record shows that applying the Client Prohibition to Plaintiffs has no rational relation to traffic control. Metro's response gives no evidence (and no reason) to find otherwise.

2. The Undisputed Record Shows that Applying the Client Prohibition to Plaintiffs Does Not Reasonably Relate to Harm to Plaintiffs' Neighbors.

Metro's second counterargument concerns Lij's and Pat's neighbors—one of whom, Metro asserts, was "self-evident[ly] . . . disturbed" because "someone reported their business to the Metro Codes Department." Metro. Resp. 11. Acknowledging Plaintiffs' evidence-backed and *still undisputed* statement that "complaints are evidence of neither a Client Prohibition violation nor harm to the neighborhood," Pls.' SUMF ¶ 211, Metro simply offers that "in this case the reports [that Plaintiffs were operating home-based businesses] were accurate." Metro. Resp. 11. It is critical to note what Metro does *not* assert here. Metro does not assert that these anonymous complaints *alleged harm to Plaintiffs' neighborhoods*. Neither does Metro explicitly counsel the Court to infer that the complaints "were accurate" *in documenting harm to Plaintiffs' neighborhoods*. Nor could Metro make such an assertion or argue for such an inference: it is undisputed that Metro does not know who turned Lij and Pat into the Codes Department or why they turned them in. Pls.' SUMF ¶¶ 87, 107; *accord* Metro. Resp. SUMF.

[5] It is undisputed that the typical home occupation client generates two 'trips.' Pls.' SUMF ¶ 216.

Nowhere in its counterargument about Lij's and Pat's neighbors does Metro address the undisputed record evidence that Plaintiffs put forward in their opening brief. *See* Pls.' Mem. 12–14. Metro concedes that, without more, an anonymous complaint is not evidence that a homeowner had any impact on the neighborhood. Pls.' SUMF ¶ 211; *accord* Metro. Resp. SUMF 1. And Metro also concedes that its follow-up investigations of both Plaintiffs revealed nothing—no traffic, no noise, no other objectionable effects—other than the simple fact that Plaintiffs were operating client-serving home occupations in violation of the Client Prohibition. *See* Pls.' SUMF ¶¶ 86–117. The undisputed record shows that Lij's and Pat's anonymous complainants could have been *literally anyone*, and that the *only* thing Lij and Pat were ever found to be doing was inviting clients to their homes. Metro's response gives no evidence (and no reason) to find otherwise.

3. The Undisputed Record Shows that Applying the Client Prohibition to Plaintiffs Does Not Reasonably Relate to Stranger Danger.

Metro's third counterargument concerns stranger danger. Metro. Resp. 11–12. This counterargument rests on the unstated implication that Lij's and Pat's clients are strangers who will commit something nefarious if Lij and Pat are permitted to serve the clients inside Lij's and Pat's homes. The only explicit assertion of fact Metro makes as to these "unknown persons" is that "the business furnishes an excuse for unknown persons to enter a neighborhood." *Id.* at 11. Metro cites the record testimony of its Rule 30.02(6) witness in support of this assertion, and indeed, the deponent made this assertion. Todd 30.02(6) Dep. 85:16–17 ("Like the—you know, just unknown people coming into the neighborhood."), *cited in* Metro. Resp. 11–12. Metro does *not* say which nefarious act Lij's or Pat's clients might commit, what or whom they might commit it against, or why it might be reasonable to expect the nefarious act to occur with any substantial frequency.

Nowhere in its counterargument about stranger danger does Metro address the undisputed record evidence that Plaintiffs put forward in their opening brief. *See* Pls.' Mem. 23–24. Metro does not restrict any kind of person, known or unknown, from entering residential neighborhoods. Pls.' SUMF ¶ 230. Metro also does not restrict any kind of person, known or unknown, from paying a residential homeowner to spend the night as a short-term rental guest. Pls.' SUMF ¶ 231. Any home occupation may *employ* an unknown person, and there is no evidence that the unknown nonresident employees of these home occupations have inflicted crime upon their employers' neighborhoods. Pls.' SUMF ¶ 233. And to be clear, whichever safety interest Metro implies Lij's and Pat's clients might affect—Metro does not say which interest it is, *see* Metro. Resp. 11—the undisputed record shows Metro testifying that the concern is *really* directed at *other* home-based businesses, not those of Lij and Pat. Pls.' SUMF ¶ 225 (quoting Todd 30.02(6) Dep. 88:23–89:15) ("Metro characterizes Lij and Pat as 'the two best plaintiffs' possible."). The undisputed record shows that applying the Client Prohibition to Plaintiffs has no rational relation to stranger danger. Metro's response gives no evidence (and no reason) to find otherwise.

4. The Undisputed Record Shows that Applying the Client Prohibition to Plaintiffs Does Not Reasonably Relate to Residential Character.

Metro's fourth counterargument concerns residential character. *See* Metro. Resp. 13–14. Metro asserts that "[i]n this case, the client prohibition . . . is carrying out the important governmental interest in preserving a healthy residential area." Metro. Resp. 13–14. Metro relates this concern to an asserted "interest in [the] stability of a community and in investment backed expectations"; here, Metro says that "it is appropriate for a government . . . to honor the wishes of homeowners who chose not to buy a home in a mixed-use neighborhood and do not expect or desire commercial visitors in their residential

neighborhoods." *Id.* at 14. Metro repeats that there are "legitimate expectations of [Plaintiffs'] neighbors to the continuation of their homes' residential zoning." *Id.*

Nowhere in its counterargument about residential character does Metro address the undisputed record evidence that Plaintiffs put forward in their opening brief. *See* Pls.' Mem. 18–22. Recording music and cutting hair are not inimical to residential character; both activities are undisputedly legal in Plaintiffs' homes. Pls.' SUMF ¶¶ 14, 24. Both Plaintiffs' operations would comply with Metro's noise ordinance, and Plaintiffs' homes look like ordinary residential homes from the outside. *See* Pls.' SUMF ¶¶ 252–257. The anonymous complaints against Plaintiffs did not allege, and Metro's investigations did not find, that Plaintiffs' home-based businesses generated any traffic, parking, noise, vibrations, smoke, dust, odor, heat, humidity, glare, or other objectionable effects of the sort that a reasonable homeowner would expect to be insulated from in a "residential" neighborhood. *See* Pls.' SUMF ¶¶ 87, 94, 107, 110. Client service cannot be the problem either, with thousands of client-serving home occupations operating legally in residential neighborhoods. *See* Pls.' Mem. 18–22. And Metro's unsupported assertions about honoring homeowners' expectations fall apart in the face of undisputed record evidence that Metro has disregarded its own general plan in order to rezone a residential home into a hair salon. Pls.' SUMF ¶¶ 136–138. Even Metro admits that an elderly woman teaching piano lessons at home should not be reported to Metro code enforcement, even though she would clearly be violating the Client Prohibition. Pls.' SUMF ¶ 251. Metro's invocation of residential character in this case is a shibboleth. Metro's response gives no evidence (and no reason) to find that applying the Client Prohibition against Plaintiffs has accomplished anything for residential character.

5. Applying the Client Prohibition to Home-Based Businesses in Order to Preserve Commercial Districts Is Illegitimate Protectionism.

Metro's fifth counterargument is, as Metro puts it, "that commercial spaces will be vacant if residential businesses may receive customers." *See* Metro. Resp. 13–14. Metro asserts that "[i]n this case, the client prohibition . . . is carrying out the important governmental interest in preserving a . . . healthy commercial district." *Id.* Metro relates this concern to an asserted "interest in [the] stability of a community and in investment backed expectations"; Metro further says that "it is appropriate for a government to want investments in commercial areas to be stable." *Id.* at 14.[6]

This counterargument, although Metro denies it, expresses an illegitimate interest in economic protectionism under the guise of promoting vibrant commercial districts. Metro was explicit in its Rule 30.02(6) deposition that it believes the Client Prohibition improves the fortunes of commercial districts by driving would-be home businessowners, including Lij and Pat, into landlord-tenant relationships with the owners of the buildings in the commercial districts. Pls.' SUMF ¶ 203; *see above* note 6. This is blatant economic protectionism for commercial landlords, and Metro gives only its say-so to the contrary. (It is also grossly

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[6] Metro cites its own deposition testimony in support these assertions. The exchange supports Plaintiffs' characterization of Metro's counterargument as illegitimate protectionism:

> Q. And you testified that one of those interests that the client prohibition serves is in protecting the commercial rental market—
> A. Yes.
> Q. —correct?
> A. Exactly.
> . . . .
> Q. Okay. And the client prohibition furthers that interest by making sure that business owners who want to serve clients have to rent space in commercial districts?
> A. Right. Commercial's done in the commercial. Residential's done in the residential.

Todd 30.02(6) Dep. 99:10–15, 100:19–24, *cited in* Metro. Resp. 14.

underinclusive: why not prohibit all home occupations?) Even the way Metro casts the interest as "preserving . . . a healthy commercial district" reinforces that the purpose of applying the Client Prohibition to Plaintiffs is to restrain the economic freedom of some in order to bestow an economic rent on others. *See* Metro. Mem. 13–14. Protectionism has been widely recognized as an illegitimate government interest.[7] *E.g.*, *Craigmiles*, 312 F.3d at 224. Metro's response offers no authority to the contrary.

* * *

Metro has failed to overcome Plaintiffs' showing, using the undisputed record, that Metro's application of the Client Prohibition to Pat and Lij bears no reasonable relationship to any legitimate government interest. Plaintiffs are therefore entitled to judgment on their substantive due process claim as a matter of law.

B. The Undisputed Record Shows that Plaintiffs Are Entitled to Judgment as a Matter of Law on Their As-Applied Equal Protection Claim.

To survive Plaintiffs' as-applied equal protection claim, the Client Prohibition's selective scope "must be based upon substantial distinctions which make [Plaintiffs] really different from [similarly situated specific plans, short-term rentals, day care homes, and historic home events]; and the characteristics which form the basis of the classification must be germane to the purpose of the [Client Prohibition]." *Tester*, 879 S.W.2d at 829 (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1910)). At least ten

[7] Metro attempts to distinguish *Bean v. Bredesen*, No. M2003-01665, 2005 WL 1025767 (Tenn. Ct. App. May 2, 2005), on the grounds that it noted the illegitimacy of economic protectionism under the Federal Commerce Clause. *See* Metro. Resp. 13 (citing *Bean*). And indeed, protectionism *is* illegitimate under the Commerce Clause. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459–61 (2019). But Metro neither asserts that protectionism is legitimate under Tennessee rational-basis review, nor explains why it might be legitimate under that standard. Metro asserts only that its interest in protecting the investment-backed expectations of commercial landlords, as applied to entrepreneurs whom Metro would force to rent from those landlords, is not protectionism. As shown above, Metro's assertion is incorrect.

appellate decisions in Tennessee have required a "real and substantial" difference in order to uphold a legislative classification under rational-basis review. *See* Pls.' Mem. 10 (citing cases). In their opening brief, Plaintiffs demonstrated, using undisputed record evidence, that there is no real and substantial difference between Plaintiffs' client-serving home-based businesses and the thousands of legalized client-serving home-based businesses that exist throughout Metro's jurisdiction. Pls.' Mem. 30–37 (addressing the irrationality of treating Lij and Pat differently from similarly situated specific plans, short-term rentals, day care homes, and historic home events).

Metro offers no response as to day care homes or historic home events. *See generally* Metro. Resp. Metro's lack of response as to these two uses effectively concedes Plaintiffs' affirmative evidentiary showing that there is no real, substantial difference between those uses and Plaintiffs' proposed home occupations.

This section replies to Metro's two (and only two) arguments in response to Plaintiffs' motion for summary judgment on their as-applied equal protection claim. Contrary to Metro's first argument, there is no real, substantial difference between Plaintiffs' proposed home occupations and those legalized by specific plan. And contrary to Metro's second argument, there is no real, substantial difference between Plaintiffs' proposed home occupations and those legalized as short-term rentals.

1. The Undisputed Record Shows that There Is No Real, Substantial Difference Between Plaintiffs' Proposed Home Occupations and Those Legalized by Specific Plan.

Metro offers a counterargument about specific plans. Metro. Resp. 15. The ostensible premise of this counterargument is that Plaintiffs "do[] not challenge the Metropolitan Council's denial of [Plaintiffs' own] SP rezoning applications." *Id.* Metro cites no authority to the effect that Plaintiffs' equal-protection claim as to SPs is somehow precluded by this. Then, Metro asserts that Plaintiffs' SP rezoning applications "were disapproved by the Planning

Commission . . . because they were inconsistent with the neighborhood maintenance policy and because Ms. Raynor's was an inappropriate use of the SP process because they did not allow for context sensitive design." *Id.* From this (and from no other factual assertions), Metro concludes that "[u]nder these circumstances, there is no basis for any kind of equal protection analysis comparing the Plaintiffs' situation (residing in a residential district) with properties that are zoned SP (a different zoning classification)." *Id.*

Nowhere in its specific-plan counterargument does Metro address the undisputed record evidence that there is no real and substantial difference between Plaintiffs' proposed home occupations and those legalized by specific plan. *See* Pls.' Mem. 31–32. *That*, and not the denial of Plaintiffs' SP applications (as Metro seems to believe), is the basis of Plaintiffs' as-applied equal protection claim. Metro concedes Plaintiffs' expert witness's testimony that "[i]n at least eleven ordinances, covering thirteen properties, Metro has used SP zoning to allow clients or patrons to be served in residential homes." Pls.' SUMF ¶ 127 (citing Phillips Decl. ¶ 7); *accord* Metro. Resp. SUMF 1. The record photographs of these homes, which were retrieved from the Metro tax assessor's website and whose authenticity Metro does not dispute, plainly show that the homes look just like any other residential home. Pls.' SUMF ¶¶ 130–32, 134–35, 137, 140–41, 143–44, 146–47, 149–50, 152–53, 155–56, 158–60, 162–63. And Metro also concedes that it has broken its planning policy in order to enact an SP legalizing a home-based business. Pls.' SUMF ¶¶ 136–138. This shatters Metro's implied argument that Plaintiffs have no equal-protection claim about SPs because Plaintiffs' SP applications were inconsistent with planning policy. The undisputed record shows there is no real, substantial difference between SP-legalized home occupations and Plaintiffs' proposed home occupations. Metro's response gives no evidence (and no reason) to find that there is any such difference.

2. The Undisputed Record Shows that There Is No Real, Substantial Difference Between Plaintiffs' Proposed Home Occupations and Those Legalized as Short-Term Rentals.

Metro offers a counterargument about short-term rentals. Metro. Resp. 12–13. Metro makes two factual assertions in this counterargument. First, Metro states that "renting a room for someone to sleep in is a quintessential residential use that has long taken place in residential areas." *Id.* at 12. Second, Metro states that "the Metropolitan Council has now determined that short term rentals are not ideally suited for residentially zoned areas—so it has attempted to greatly restrict non-owner occupied short-term rental use."[8] *Id.* From these two (and only these two) asserted facts, Metro concludes that there is "not a justification for now allowing up to 72 additional visitors per week to visit each home-business in a residential area." *Id.* at 12–13.

Nowhere in its short-term rental counterargument does Metro address the undisputed record evidence that there is no real and substantial difference between Plaintiffs' proposed home occupations and those legalized as owner-occupied short-term rentals. *See* Pls.' Mem. 32–35. Metro concedes that there are over four thousand residential homeowners with permits to host paying clients overnight in residential homes. Pls.' SUMF ¶ 170. Metro also concedes the testimony of its chief code-enforcement officer that short-term rentals cause *more* noise, parking, trash, and other problems than home recording studios or home-based hair salons. Pls.' SUMF ¶¶ 258–275. Yet Metro allows short-term rentals in any home. Just as in *Consolidated Waste*, Metro "does not disagree that [short-term rentals] pose greater

[8] *Non-owner-occupied* short-term rentals have nothing to do with this case. The undisputed record shows that the Client Prohibition applies to home-based businesses "carried out by a resident of the home." Pls.' SUMF ¶ 120. In this respect, Plaintiffs are similarly situated to *owner-occupied* short-term rentals, which remain legal in all residential zones. *See* Pls.' SUMF ¶¶ 164–172. The record now before the Court, including Metro's Rule 30.02(6) deposition, was developed specifically about owner-occupied short-term rentals. *See, e.g.*, Todd 30.02(6) Dep. 65:4–20; Metro. Gov't's Resps. Pls.' Interrogs. ¶ 9.

health and safety risks and/or disruption than" Lij's studio or Pat's salon, but Metro "cannot explain why only" Lij and Pat may not invite clients into their homes. *Cf. Consol. Waste*, 2005 WL 1541860, at *35 (rejecting Metro's justifications for treating C&D landfills worse than more dangerous types of landfills). Metro has dropped all pretense about short-term rentals alleviating a hotel shortage, *see* Pls.' Mem. 34, and now relies on the bare assertion that "renting a room for someone to sleep in is a quintessential residential use." Metro. Resp. 12. This hardly distinguishes short-term rentals, as it is undisputed that cutting hair and recording music are also permissible uses of a residential home. Pls.' SUMF ¶¶ 14, 24. Rather, Metro's assertion undermines its argument that the Client Prohibition is needed to keep strangers out of neighborhoods. *See above* section IV.A.3. Metro is arguing that it is somehow too dangerous to allow strangers to record music in Lij's studio or have their hair cut in Pat's, but that this undefined danger would not be presented by the same strangers spending the night in any of the thousands of short-term rental homes throughout Nashville. This is irrational. The undisputed record shows there is no real, substantial difference between Plaintiffs' home occupations and owner-occupied short-term rentals. Metro's response gives no evidence (and no reason) to find that there is any such difference.

* * *

Metro has failed to overcome Plaintiffs' showing, using the undisputed record, that Metro's application of the Client Prohibition to Lij and Pat, but not to specific plans, short-term rentals, day care homes, or historic home events—is based on no real, substantial difference that would be germane to any of Metro's asserted interests in enforcing the Client Prohibition. Plaintiffs are therefore entitled to judgment on their equal protection claim as a matter of law.

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