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M2019-01926-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ELIJAH SHAW and	**§**	
PATRICIA RAYNOR,	**§**	**Case No. _____**
Appellants,	**§**	
v.	**§**	**Tennessee Court of Appeals**
The METROPOLITAN	**§**	**No. M2019-01926-COA-R3-CV**
GOVERNMENT OF	**§**	
NASHVILLE & DAVIDSON	**§**	**Davidson County**
COUNTY,	**§**	**Chancery Court**
Appellee.	**§**	**No. 17-1299-II**

RULE 11 APPLICATION FOR PERMISSION TO APPEAL BY APPELLANTS LIJ SHAW & PAT RAYNOR

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JURISDICTIONAL STATEMENT

Appellants Elijah "Lij" Shaw and Patricia "Pat" Raynor (the "Homeowners") seek permission to appeal the February 11, 2021, judgment of the Tennessee Court of Appeals. No party filed a petition for rehearing. This application is timely under Tenn. R. App. P. 11(b).

QUESTIONS PRESENTED FOR REVIEW

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

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

STATEMENT OF FACTS

Long before this lawsuit began in 2017, the Homeowners renovated their Nashville homes, where they intend to keep living, to accommodate recording and hairstyling clients. R. 2144, 2147. Lij Shaw's home recording studio yielded a Grammy Award[1] before it was cited by the Metro Department of Codes and Building Safety ("Codes"). R. 644, 655–57. Pat Raynor's home hairstyling studio was inspected and licensed by the State, but later cited by Codes. R. 645, 653–55. The only law either Homeowner had broken was a Metro ordinance stating that "[n]o clients or patrons may be served on the property" where a home business is based. R. 643–45, 647. That provision, called the "Client Prohibition," is the subject of this case.

A. Metro Regulates Home-Business Client Service Unequally.

Metro maintains one set of rules for the Appellant Homeowners and a different set of rules for thousands of other Nashville homeowners. The Appellant Homeowners have always been subject to Metro's rules for "home occupations," which, until last summer, included the Client Prohibition. Definitionally, a "home occupation" is any "occupation, service, profession or enterprise" conducted inside a home by its resident. R. 646, 657.

Under Metro's home-occupation ordinance as it existed until August 2020, the Homeowners were prohibited from serving any clients at their home businesses. Metro temporarily amended this ordinance after the

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

Homeowners' appellate brief was filed below. Under the amended ordinance, until January 2023, the Homeowners may serve six clients per day. *See below* Section C (discussing amendment).

But Metro still applies different rules to owner-occupied short-term rentals, day care homes, and historic home events, even though those businesses fit Metro's definition of a "home occupation" (as Metro admits). R. 674–77. These privileged home-based businesses may serve twelve or more clients a day. *Id.* Additionally, Metro has spot-zoned at least thirteen residential homes to be exempt from the home occupation rules.[2] One of these spot-zoned homes is even used as a hair salon:

[2] Before this lawsuit, both Homeowners applied to legalize their home studios under this so-called "specific plan" procedure. Metro rejected their applications after an organized opposition group threatened to sue Metro over what its leader called "illegal spot zoning." MetroNashville, *Metro Council Meeting*, YouTube (Aug. 1, 2017), https://youtu.be/JtJOKTB02bM?t=2885; *see* R. 2142 (admitting authenticity of videos posted to Metro's YouTube channel).

R. 662.

Metro only enforces the Client Prohibition in response to complaints. But, recognizing that not all home businesses affect their neighborhoods, Metro disapproves of its residents turning in client-serving home businesses that "do[]n't bother anybody." R. 648, 687–88. Nevertheless, Metro's code inspectors testify that the Client Prohibition was frequently invoked out of spite, generating 40–70% false (and 99% anonymous) complaints. R. 648, 653, 686. For this reason, even "several complaints" at the same property are not considered evidence of harm to the neighborhood. R. 649, 682.

B. The Homeowners' Businesses Are Harmless, While the Privileged Home Businesses Disturb Neighborhoods.

Recording music and cutting hair are legal in residential homes. Even under the Client Prohibition, those activities were legal so long as the music was recorded or hair was cut as a complimentary service rather than a business exchange. R. 644–45, 1728 (Metro zoning administrator[3] would "struggle" to determine whether a visitor to a home was a prohibited client "without any overt evidence or statements of fact from the individuals who are coming to the home or owners of the home").

There is no evidence that either Homeowner's business was in any way unsafe. R. 682. Moreover, Lij Shaw's soundproof home studio complies with the residential noise ordinance, and Pat Raynor's home hair salon was inspected and approved by the State. R. 682, 688–89. To this day,

[3] The zoning administrator has the codified power and duty to interpret all the zoning code's provisions. R. 1698–1700.

Metro does not know who reported either Homeowner to its Codes Department, or why. R. 653–56.

Metro admits there were no traffic, parking, noise, vibrations, smoke, dust, odors, heat, humidity, glare, or other objectionable effects at either Homeowner's property. *Id.* In fact, Metro's public works department evaluated the traffic and parking impact of both Homeowners' businesses and recommended approval. R. 683–84. In the department's view, the only relevant consideration was that the Homeowners' private driveways can accommodate their clients' cars, which they did. *Id.*

By contrast, the record shows that the privileged home businesses detract from neighborhood quality of life. Metro has issued between 3,001 and 4,653 owner-occupied short-term rental permits. R. 675. In the experience of Metro's Codes Director, short-term rental clients generate noise, traffic, parking, trash, and lewdness to an extent he has never observed from home recording studios or home hair salons. R. 690–91. The Codes Director further testified that legalized historic home events and day care homes generate noise, traffic, and parking issues to a greater degree than home recording studios or home hair salons. R. 691–92.

C. The Court of Appeals Found the Case Moot Because of a Temporary Modification to the Client Prohibition.

After trying Metro's spot-zoning process to no avail, the Homeowners filed suit challenging the validity of the Client Prohibition under the Tennessee Constitution. The Homeowners' equal protection and substantive due process claims both survived a motion to dismiss, and the Homeowners took "significant" discovery from Metro. R. 2309. The

record that developed was abundant and undisputed: In their Rule 56.03 statements, the Homeowners set forth 295 material facts and Metro admitted 293. *Compare* R. 643–93 (Homeowners' Rule 56.03 statement), *with* R. 2257–58 (Metro's admissions).[4] These facts established, among other things, that:

- There is no evidence that the Homeowners' businesses were in any way unsafe. R. 682.
- Metro's public works department evaluated the traffic and parking impact of the Homeowners' businesses, and recommended approval with the understanding that adequate parking be provided onsite. R. 683.
- The Homeowners' private driveways can accommodate their clients' cars. R. 684.
- Metro denies that the Client Prohibition is related to noise control. R. 680.
- The Homeowners' businesses also comply with Metro's noise ordinance. R. 688–89.
- The privileged home businesses have an equal or greater real-world impact on neighborhoods than the Homeowners' home studios did or would. R. 689–92.

Even though Metro admitted substantially all of Homeowners' proposed findings of fact, Homeowners lost at summary judgment. R. 2309. The trial court opinion, which cited none of the evidence in the record, instead endorsed "Metro['s] argu[ment] that the Court does not

[4] The only two disputed facts concern future harm to Homeowner Pat Raynor. R. 693, 2257. First, Metro disputes the possibility that Pat could not "find a comparable space" to rent if she gave up her one-chair commercial sublease (as she has, now that she may serve clients from her home). *See id.* Second, Metro disputes whether "Pat would be able to earn an honest living—and stay in her home—for the rest of her life" (as she now is) if the Client Prohibition were not enforced against her. *See id.*

need to consider the facts." *See* R. 2309–43. On appeal, the Homeowners asked the Court of Appeals to reverse or else vacate and remand the judgment of the trial court to consider the undisputed facts. Br. Appellants 22, 66 (Apr. 30, 2020); Reply Br. Appellants 25 (Oct. 14, 2020).

During appellate briefing, Metro amended the Client Prohibition with a temporary ordinance that sunsets on January 7, 2023. Mot. Consider Post-J. Facts (Aug. 6, 2020), Ex. A at 1 (cert. ordinance, amdt. 5).[5] Under this temporary ordinance, the Homeowners are eligible for home occupation permits to serve up to six clients a day. *See id.*, Ex. A at 8 (2d substitute ordinance, § 3.b). The privileged home businesses may still serve twelve or more.

What happens after the impending sunset is ambiguous. It is certain that the new rules allowing six clients a day "shall expire and become null and void," but Metro refuses to say whether home occupations would then become unregulated (allowing any number of clients per day) or revert to the old rules (reinstating the Client Prohibition).[6] *See*

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[5] The renewal of this temporary ordinance will almost certainly be opposed by an influential interest group in 2023. The same organization that threatened to sue Metro in 2017, had Metro legalized the Homeowners' studios individually, publicly opposed the current temporary ordinance by urging that Metro could instead "fix [the Homeowners'] problem" by "us[ing] an SP"—the very rezoning procedure over which the interest group threatened suit in 2017. *See* MetroNashville, *Metro Council Meeting*, YouTube (Mar. 5, 2020), https://youtu.be/mOJ5BH3KKvM?t=7559; *see also above* note 2.

[6] On the night the temporary ordinance passed, one councilmember posed this issue to the Metro Council attorney, who stated he had "never gotten that question before" and offered both interpretations:

Appellants' Resp. Mot. Consider Post-J. Facts 5 & Diggs Decl., Exs. A–B (Aug. 24, 2020) (Metro counsel "think[s] it goes back to the old" Client Prohibition on sunset, but ultimately declines to "commit [Metro] to a position").

The Court of Appeals held the case moot, finding that *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196 (Tenn. 2009)—this Court's leading opinion on governmental voluntary cessation—"does not provide guidance" as to the circumstances of this case. Op. 6. The court below also found that Metro had "repealed" the Client Prohibition but did not discuss the continuing differential treatment under its amended ordinance. The court likewise did not discuss the new ordinance's sunset clause or evaluate its relation to mootness except to note that Metro's "actions in 2023 will depend upon the new 'ordinance's effects on residential neighborhoods.'" *See* Op. 9. The appellate court vacated the trial court's ruling, as the Homeowners had asked, but remanded with instructions to dismiss. Op. 10.

REASONS FOR GRANTING REVIEW

This Court should grant review on each of the issues the Homeowners raise. *See above* Questions Presented for Review. First, review should be

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> I think you could make an argument that what was in place at the time this bill passed [the Client Prohibition] *could* go back [into effect upon execution of the sunset clause], but I think the better argument is . . . that there would have to be *some* kind of new legislative action, or otherwise [regulation of] home occupations would just go away entirely.

MetroNashville, *Metro Council Meeting*, YouTube (July 7, 2020), https://www.youtube.com/watch?v=wPJXMTu9dbE&t=23615.

granted on the issue of mootness because the court below failed to hold Metro to its burden of proving that it was "absolutely clear" that the challenged conduct would not recur, in conflict with this Court's ruling in *Norma Faye*. *See below* Part I. Second, because the record in this case supports a judgment requiring Metro to treat the Homeowners equally to all other Nashville homeowners, the Court should grant review to reaffirm that real facts merit real consideration when applying Tennessee rational basis review. *See below* Part II.

I. The Court of Appeals Explicitly Departed from This Court's *Norma Faye* Standard for Governmental Voluntary Cessation.

Tennessee courts *always* have the power "to settle rights . . . when the dispute is between parties with real and adverse interests." *Norma Faye*, 301 S.W.3d at 203. "[W]hen the question of mootness is raised, [courts] consider . . . the reason the case is alleged to be moot, the stage of the proceeding, the importance of the issue to the public, and the probability that the issue will recur." *Id.* at 204. These concerns all inform the "voluntary cessation" exception to mootness. And, as the court below recognized, "[t]he key Tennessee Supreme Court case on voluntary cessation is *Norma Faye*." Op. 3. The court below explicitly called for further guidance from this Court in applying *Norma Faye*. Op. 6–7 ("The *Norma Faye* opinion does not provide guidance as to what circumstances would justify shifting the burden of persuasion to the opposing party to demonstrate that 'the allegedly wrongful conduct cannot be reasonably expected to recur.'").

The general rule is that when the government asserts mootness "based on the voluntary cessation of [unconstitutional] conduct," the government

must show that "it is *absolutely clear* that the allegedly wrongful conduct cannot be reasonably expected to recur." *Norma Faye*, 301 S.W.3d at 205 (emphasis added). This is not a formalistic inquiry, but a practical one, which "require[s] the exercise of judgment based on the facts and circumstances of [a] case." *Id.* at 204.

In *Norma Faye*, for example, a city and county sought to condemn a family LLC's interest in land targeted for an eminent-domain-backed "mixed-use business park." *Id.* at 200. When the governments filed the condemnation action, they had yet to obtain the certificate of public purpose and necessity required by Tenn. Code Ann. § 13-16-207. *Id.* at 200–01. This misstep led to a flurry of competing motions that included a voluntary dismissal by the governments, a fees motion by the family LLC "on the ground that the [governments] had abandoned the condemnation," and then a government motion to set aside the voluntary dismissal as it denied the LLC's allegation that it had abandoned pursuit of the condemnation. *Id.* at 201.

After this Court granted an appeal on the issue of whether the governments' filing for condemnation without the required certificate violated the family LLC's constitutional rights, both governments voted to excise the LLC's parcel from the development project and moved to dismiss the appeal as moot. *Id.* at 202. But the governments refused to "abandon[] their belief that state law permits them to file a [condemnation] petition . . . without first obtaining the certificate," and maintained at argument "that cities and counties could, in fact, file petitions . . . without first obtaining the certificate." *Id.* at 207.

This Court found that the governments' continued defense of the same practice that initially brought the parties to court demonstrated that "they ha[d] *not completely and permanently abandoned* the challenged practice." *Id.* at 207 (emphasis added). Holding that "the burden of persuading a court that a case has become moot" due to "voluntary cessation . . . is and remains on the party asserting that the case is moot," the Court ruled that the governments "failed to demonstrate that the issues in th[e] case had become moot." *Id.* at 206–07.

Here, Metro failed to make it "absolutely clear that the allegedly [unequal restrictions on home-based business clients] cannot be reasonably expected to recur." *See id.* at 205. As the court below recognized, Metro:

- continues to regulate home-business client service unequally;
- will sunset its amended ordinance in 2023; *and*
- refuses to deny that the ostensibly repealed Client Prohibition will take renewed effect upon said sunset.

Op. 2, 9. At argument below, moreover, Metro counsel continued to defend Metro's unequal rules for home-business client service on their merits under the Tennessee Constitution. *See* Tenn. Cts., *Shaw v. Metro* (Jan. 6, 2021 livestream), at 15:54–18:54 (YouTube timestamp), https://youtu.be/QSWTJZwsdKw?t=954.

Despite these signs that the controversy between the parties is likely to recur—and indeed continues to occur—the court below stated that *Norma Faye* "does not provide guidance" as to whose burden it was to show the legal effect of Metro's voluntary cessation in this case. Op. 6–7. The court expressly "conclude[d] that the burden of persuasion *remains on Metro*," but departed from *Norma Faye* by shifting the burden to the

Homeowners, citing "a presumption of good faith" that applies only to governments. Op. 7 (emphasis added). But as *Norma Faye* itself recognizes, this good-faith presumption depends on the government representing that it has "completely and permanently abandoned the challenged practice." 301 S.W.3d at 206–07. And here, as in *Norma Faye*, Metro has made no such representation.

The court below cited Sixth Circuit dicta for the proposition that in cases of *legislative* voluntary cessation, the burden shifts away from the government (and presumably onto the Homeowners). *See* Op. 9–10 (citing *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019)). But in *Speech First*—in which a public university's post-lawsuit deregulation of campus speech *failed* to moot a First Amendment challenge—the Sixth Circuit held that even in cases of legislative voluntary cessation, "the government [must at least] represent that it would not return to the challenged policies." *See* 939 F.3d at 768–69. The Sixth Circuit ruled against the university in part because the university "continue[d] to defend its use of the challenged [campus-speech] definitions" on appeal. *Id.* at 770.

Here, Metro has never represented that it will not resume enforcing unequal regulations on home business clients. For one thing, Metro still enforces unequal regulations on home business clients, even after the passage of the amended home occupation ordinance. *Compare* Metro Code § 17.16.250(D)(3)(b) (allowing the Homeowners six clients per day), *with id.* §§ 6.28.030(A)(5)(f), 17.16.160(B), 17.16.170(D), 17.40.105–.106 (continuing to allow the privileged home businesses twelve or more

clients per day). For another thing, Metro takes no position on how its existing zoning code will apply to the Homeowners on January 8, 2023, the day after the ordinance sunsets. *See* Metro Mot. Consider Post-J. Facts (Aug. 7, 2020); Metro Br. 57–61 (Sept. 30, 2020). When Homeowners' counsel asked Metro counsel how the existing zoning code would apply after sunset, Metro counsel declined to "commit to a position on that issue." Appellants' Resp. Mot. Consider Post-J. Facts, Diggs Decl., Ex. B. Metro's refusal to say that the Client Prohibition repeal is permanent—along with its continued defense of unequal home-business client rules under the Tennessee Constitution—makes this case just like *Norma Faye* and *Speech First*, where the governments' refusals to commit to their voluntary cessations were found *not* to render their cases moot. *See Speech First*, 939 F.3d at 770; *Norma Faye*, 301 S.W.3d at 207.

The Court of Appeals thus misapplied *Norma Faye* by failing to hold Metro to its burden of showing that it was "absolutely clear" that its challenged conduct was unlikely to recur. After calling for more "guidance" from this Court on *Norma Faye*, the court below nominally held that proving voluntary cessation was Metro's burden. Op. 6–7 ("[W]e conclude that the burden of persuasion remains on Metro . . . ."). But then the court shifted the burden to Homeowners to show "clear contraindications that the change [in Metro's unequal regulation of home business clients] is not genuine." Op. 9 (quoting *Speech First*, 939 F.3d at 768).

The court reached this conclusion even while acknowledging the Homeowners' having "point[ed] to the sunset provision." *See id.* The

opinion even notes that "the [post-appeal] timing of Metro's passage of BL2019-48 does not bolster its case." *Id.* And the Court of Appeals' opinion duly acknowledges that "Metro has not unequivocally stated that no [client] prohibition will be enacted in the future" and that the Homeowners had raised Metro's "continuing refusal to say how the sunset provision will operate." *Id.* Yet, in conflict with *Norma Faye* and *Speech First*, the court still dismissed this case as moot. *See Norma Faye*, 301 S.W.3d at 207 (finding live controversy where government avoided commitment not to pursue certificateless condemnations); Op. 9 n.2 (noting *Speech First*'s finding live controversy where university refused to commit to not reenact challenged campus-speech restrictions). This error is so clear-cut that it could merit summary reversal.

Even if Metro had committed never to enforce unequal home-business client restrictions again, this case, with its fully developed record, would still present an important issue of public interest: the level of protection afforded by the Tennessee Constitution to private property rights. This Court in *Norma Faye* recognized the public interest, in addition to governmental voluntary cessation, as another reason not to apply the prudential mootness doctrine. *See* 301 S.W.3d at 211–12 ("The recognition of the right of property is woven into the fabric of our law."). *Norma Faye* surveyed nearly a century of this Court's previous opinions and found that every instance in which the public interest exception to mootness was granted "involved a constitutional challenge." *Id.* at 208–12 (collecting cases); *see Walker v. Dunn*, 498 S.W.2d 102, 104 (Tenn. 1972) (recognizing public interest exception where a state constitutional

challenge to the State Assembly's power to ratify the Twenty-Sixth Amendment to the U.S. Constitution involved a "determination of public rights or interests under conditions which may be repeated in the future"); *New Riviera Arts Theatre v. State ex rel. Davis*, 412 S.W.2d 890, 892–93 (Tenn. 1967) (same standard—constitutional challenge to an injunction against operation of an adult movie theater); *McCanless v. Klein*, 188 S.W.2d 745, 747 (Tenn. 1945) (same standard—constitutional challenge to a monopolistic liquor-license regulation); *State ex rel. Scandlyn v. Trotter*, 281 S.W. 925, 926 (Tenn. 1926) (same standard—constitutional challenge to a law singling out Knox County schools for a free-textbook mandate).

Continuing to exercise jurisdiction is particularly important when, as here, the government's voluntary cessation merely alleviates rather than eliminates the injury. Having disregarded the inequality between Metro's rules allowing six clients and twelve clients—and having shifted the burden onto the Homeowners—the court below failed to hold Metro to the *Norma Faye* standard for governmental voluntary cessation. By failing to do so, the court leaves governments in this state free to strategically moot constitutional challenges by temporarily changing their behavior, only to resume the challenged conduct after the case is dismissed. This undermines the very purpose of *Norma Faye*'s voluntary cessation doctrine. Moreover, persistent public debate over home businesses in Nashville shows the public interest in clarifying constitutional protections for owner-occupant homeowners in Tennessee. This Court should thus grant review to secure uniformity of decision with

Norma Faye and supply the "guidance" that the Court of Appeals found missing from *Norma Faye*. *See* Op. 6.

II. The Merits of This Case Present Important Questions About Tennessee's Rational Basis Standard and Constitutional Protections for the Use and Enjoyment of Private Homes.

While this Court can reverse and remand on the simple ground that the case is not moot, the Court can additionally grant review on the merits of the Homeowners' case. The merits present the important question of whether undisputed facts are ever material under Tennessee rational-basis review.

The record is well developed as to the Homeowners' lack of impact on their community as well as on the relatively greater impact of the privileged home businesses. *See above* Statement of Facts, Sections A–B. This record should have informed the trial court's evaluation of the Homeowners' asserted right to use their homes. Indeed, this Court has recognized the right to earn a livelihood, *Livesay v. Tennessee Board of Examiners in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959), and to use and enjoy property, *Hughes v. New Life Development Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012). As explained above in Part I, moreover, the protection afforded constitutional rights is a quintessential matter of public interest.

But the trial court's decision, whose merits the Court of Appeals did not reach after dismissing the appeal, credited Metro's argument that "the particular facts of this case are largely irrelevant." *See* R. 2309. Following Metro's logic, the trial court upheld the Client Prohibition while citing *none* of the 293 undisputed facts from the Homeowners' Rule

56.03 statement. *See* R. 2309–34. Those facts show that enforcing the Client Prohibition against the Homeowners is unequal compared to the privileged home businesses, and has no link to any legitimate government interest. This Court should grant review to reaffirm that facts matter under rational basis review.

Contrary to the trial court opinion, Tennessee rational basis decisions routinely cite the facts. *See, e.g.*, *Consol. Waste Sys. LLC v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *33–36 (Tenn. Ct. App. June 30, 2005). In *Consolidated Waste*, which is directly on point for the Homeowners' claims in this case, the Court of Appeals struck down a Metro zoning ordinance on substantive due process and equal protection grounds under the U.S. and Tennessee Constitutions. *Id.* at *7–8, *36. The zoning ordinance required that construction-and-demolition ("C&D") landfills locate at least two miles away from schools and parks. *Id.* at *2. The court found that "Metro ha[d] failed to connect a rational relationship between the[] ordinances and a legitimate governmental purpose." *Id.* at *33. The "dust, noise, traffic, and other considerations associated with C&D landfills," while hazardous, were also characteristic of several other types of landfills to which Metro did *not* apply the buffer requirement. *Id.* at *33–34. Indeed, the record in *Consolidated Waste* showed that C&D landfills posed "less risk to human health and the environment" than the unrestricted landfills. *Id.* at *34. The irrationality of the two-mile buffer requirement was further shown by the fact that Metro did not require schools and parks to be built two miles away from existing C&D landfills. *Id.* at *33.

Consolidated Waste belongs to a long line of Tennessee rational basis cases recognizing the need to consider record evidence. *See Tester*, 879 S.W.2d at 829 (striking down limited-scope work-release program because the government's asserted justifications "ignore[d] the evidence in the record"); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993) (sustaining rational basis challenge to school-funding scheme because "the record demonstrates substantial disparities" in funding); *Shatz v. Phillips*, 471 S.W.2d 944, 945 (Tenn. 1971) (noting undisputed record on which plaintiffs' rational basis challenge to zoning ordinance was sustained); *Bd. of Comm'rs of Roane Cnty. v. Parker*, 88 S.W.3d 916, 922 (Tenn. Ct. App. 2002) (sustaining rational basis challenge to zoning ordinance where plaintiffs had "carried the burden of proof").

None of the Tennessee rational basis cases[7] cited in the trial court opinion require courts to break from established practice by ignoring the facts. In *Varner v. City of Knoxville*, No. E2001-00329-COA-R3-CV, 2001 WL 1560530 (Tenn. Ct. App. Nov. 29, 2001), for example, the court upheld the rejection of a used car lot in a residential zone where, unlike here, city planning staff found negative traffic consequences from rezoning. Similarly, *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904

[7] One case cited by the trial court has similar facts but an entirely different underlying claim. In *Davidson County v. Hoover*, 364 S.W.2d 879, 879 (Tenn. 1963), the "question presented" was "whether or not a beauty parlor [wa]s permitted under the Nashville Zoning Ordinance" in the early 1960s. Unlike this case, *Hoover* does not address constitutional issues. *See id.*

(Tenn. 1940), dealt not with an "at-home business restriction" as the Chancellor put it, but with a proposal to build a gas station on a residential block. The facts of *Varner* and *Howe* have no bearing on the Homeowners' quiet, indoor home businesses. *See* R. 688–89 (undisputed that Homeowners' businesses are noise-compliant, concealed from view, and far below traffic-impact study threshold).

Proper attention to facts would also distinguish two cases cited by the trial court in support of judicial deference to government upzoning decisions. *See McCallen v. City of Memphis*, 786 S.W.2d 633 (Tenn. 1990), *cited in* R. 2325; *Gann v. City of Chattanooga*, No. E2007-01886-COA-R3-CV, 2008 WL 4415583 (Tenn. Ct. App. Sept. 30, 2008), *cited in* R. 2331–32. These cases rejected not-in-my-backyard challenges to government-approved development projects, not constitutional challenges to government prohibitions on private and otherwise lawful transactions inside residential homes. If anything, *McCallen* and *Gann* show that it would be rational to let the Homeowners use their homes as they want.

Close consideration of facts under rational basis review is also consistent with the greater protection afforded under the Tennessee Constitution than under the U.S. Constitution. Referring to Tenn. Const. art. I, § 8—the "Law of the Land" clause underlying the Homeowners' claims here—this Court has emphasized that even caselaw calling the Tennessee and U.S. Constitutions "practically synonymous" does not "relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution." *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)); *see* Tenn. Const. art. I, § 8; *see also id.* art. XI, § 8.

"The fundamental rule" in a Tennessee equal protection case "is that all classification[s] must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law." *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). This "real and substantial" standard requires meaningful, fact-based scrutiny of legislative classifications.[8]

Tester is illustrative. There, a Washington County DUI defendant challenged the constitutionality of a statute under which he would have been eligible for work release, but for the fact that he was convicted in Washington County and not Davidson, Shelby, or Moore Counties. *Tester*, 879 S.W.2d at 825. The court applied Tennessee rational-basis review and held that the state's assertion of a "real and substantial distinction" with respect to overcrowding in Davidson, Shelby, and Moore Counties

[8] Other state supreme courts have recently emphasized the importance of real-world facts in conducting rational basis review. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015) (using rational basis review to strike down state law requiring eyebrow threaders to obtain thousands of hours of cosmetology training unrelated to the eyebrow threaders' practice), *cited with approval in Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1111–12 (Pa. 2020) (reversing and remanding from dismissal of rational basis claim against state real-estate licensing scheme as applied to short-term rental broker).

"ignore[d] the evidence in th[e] record, which indicate[d] that *Washington County* ha[d] experienced serious jail overcrowding that was directly caused by the mandatory incarceration of *second time DUI offenders*" such as the defendant. *Id.* at 829. Because the evidence did not support the state's arguments for limiting the work-release program to three counties, the *Tester* court declared the program's limited application unconstitutional. *Id.* at 830. *Tester* was at least the sixth Tennessee opinion to require a "real and substantial" difference in order to uphold a legislative classification under rational-basis review.[9]

Similarly, the Tennessee courts have repeatedly found factual evidence of under-inclusiveness fatal to zoning ordinances under the Tennessee Constitution's guarantee of equal rights, privileges, and

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[9] *See Tester*, 879 S.W.2d at 829; *Metro. Gov't of Nashville & Davidson Cnty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977) (holding that municipalities must have "real and substantial reasons" for establishing "segregated zone[s]" outside which package liquor sales can be made illegal); *Logan's Supermarkets, Inc. v. Atkins*, 304 S.W.2d 628, 632 (Tenn. 1957) (invalidating tax imposed on merchants who hire third parties to redeem trading stamps but not on merchants who redeem their own trading stamps); *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911) (invalidating a labor-relations provision that applied to corporations but not to partnerships); *State v. Whitehead*, 43 S.W.3d 921, 927 (Tenn. Crim. App. 2000) (invalidating state law making the same conduct a felony in some counties and a misdemeanor in others); *Templeton v. Metro. Gov't of Nashville & Davidson Cnty.*, 650 S.W.2d 743, 756–58 (Tenn. Ct. App. 1983) (relying on substantial record evidence to uphold differential regulation of package liquor sales in general and urban services districts); *cf. State v. Greeson*, 124 S.W.2d 253, 256, 258 (Tenn. 1939) (invalidating minimum-price law for haircuts as lacking any "real or substantial relation to the public health, safety, or welfare").

immunities. In *Shatz v. Phillips*, for example, this Court invalidated an industrial zoning ordinance as applied to an indoor junk storage and processing facility based on factual findings that "a casual passer would not know what business was being carried on" in the plaintiff's "modern, attractive" building and that the facility was "free from noise, odor, fumes, and other objectionable features." 471 S.W.2d at 945–48. In *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956), this Court found a fuel-storage ordinance unconstitutional because its selective application would "exclude certain persons from engaging in [a] business while allowing others to do so." In *Consolidated Waste*, of course, both the trial and intermediate courts held it arbitrary and unreasonable for Metro to require construction-and-demolition landfills, but not other, more hazardous types of landfills, to locate at least two miles away from schools and parks. 2005 WL 1541860, at *33–36. And in *Board of Commissioners of Roane County v. Parker*, the court *ordered* rezoning of plaintiffs' property to *allow* keeping of "dangerous animals," including a tiger, when the county board had rezoned a similar property for keeping of similar animals. 88 S.W.3d at 921–24. Taken together, these cases make clear that, under the Tennessee Constitution, courts must consider the record evidence demonstrating irrationality. But the trial court disregarded the record in this case, and the court below did not reach the merits of the Homeowners' claim.

Rather than consider the Homeowners' evidence in this case, the trial court cited *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997), for the false proposition that the Homeowners' evidence did not matter. *See* R. 2328

(citing *Riggs*, 941 S.W.2d at 53). But *Riggs* should not have applied because the *Riggs* plaintiffs, unlike the Homeowners here, failed to state a valid claim. As the Chancellor recognized in denying Metro's motion to dismiss in this case, the Homeowners' complaint "alleges with great specificity that the [Client Prohibition] is not rational." R. 495. In *Riggs*, by contrast, this Court dismissed a challenge to a state statute banning heliports within nine miles of a national park that had no similarly specific allegations. 941 S.W.2d at 54.

Riggs's 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 (emphasis added). The *Riggs* plaintiffs were denied discovery based on their complaint's failure to state anything beyond "legal conclusions" that the heliport ban "violated due process and equal protection." *Id.* at 48. That is why the *Riggs* court wrote that "specific evidence is not necessary" in order to presume a rational basis. *See id.* at 52. *Riggs* does not hold that evidence rebutting the presumption of a rational basis in a properly stated claim may be summarily disregarded. That is not even true under the federal rational-basis test, let alone Tennessee's more searching test. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[A]lthough [federal] rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.").

Below, the Court of Appeals did not reach the merits of the Homeowners' claims because it ordered the appeal dismissed as moot.

See above Part I. But the Homeowners' claims are not moot, *see id.*, and if this Court grants review, the well-developed record would enable this Court to affirm for the lower courts that the facts matter under Tennessee rational basis review.

CONCLUSION

For the reasons stated, the application for permission to appeal should be granted.

Dated: April 12, 2021

Respectfully submitted,

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CERTIFICATE OF E-FILING COMPLIANCE

I certify that this brief complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02. My word processing system indicates that the sections of the brief subject to the 15,000-word limitation contain 6,093 words.

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PROOF OF E-SERVICE

I certify that by filing this brief through the Court's e-filing system, I caused automatic e-service on Metro counsel, who is a registered user. *See* Tenn. Sup. Ct. R. 46, §§ 1.01, 3.02, 4.01.

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