No. M2019-01926-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE

AT NASHVILLE

ELIJAH "LIJ" SHAW and PATRICIA "PAT" RAYNOR,

Plaintiffs-Appellants,

v.

The METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant-Appellee.

Rule 3(a) Appeal as of Right from the Final Judgment of the Chancery Court for Davidson County, Tennessee, Twentieth Judicial District at Nashville, No. 17-1299-II

REPLY OF APPELLANTS LIJ SHAW & PAT RAYNOR

Braden H. Boucek
BEACON CENTER OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219
(615) 383-6431
braden@beacontn.org
BPR No. 021399

Paul V. Avelar
Keith E. Diggs
INSTITUTE FOR JUSTICE
398 S. Mill Ave. #301
Tempe, AZ 85281
(480) 557-8300
pavelar@ij.org; kdiggs@ij.org
Pro hac vice

Counsel for Lij Shaw & Pat Raynor

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The central dispute in this case is whether the facts matter when a city limits the rights of everyday Tennesseans to use their homes in an innocuous manner. In their opening brief, the Homeowners established that their home-based recording studio and hair salon are undisputedly harmless, meaning that Metro's Client Prohibition is unconstitutional as applied to them. In response, Metro claims that the facts about the Homeowners' businesses are "completely irrelevant" under the Tennessee rational-basis test. *See* Br. Metro 56-57.

Metro is wrong. Part I of this reply shows that facts matter under both the Tennessee and federal rational-basis tests. Parts II and III explain how the undisputed facts show that Metro's Client Prohibition violates both the equal-protection and due-process provisions of the Tennessee Constitution. Finally, Part IV shows that Metro's remaining objections—regarding their entity deposition and their claims of mootness—lack merit.

I. Metro Ignores the Tennessee Rational-Basis Test.

As the Homeowners explained in their opening brief, Tennessee's rational-basis test provides greater protection for individual rights than the federal rational-basis test. Br. Appellants 23-36. Cases like *State v. Tester*, 879 S.W.2d 823 (Tenn. 1994), and *Consolidated Waste Systems, LLC v. Metropolitan Gov't*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005), show that Tennessee courts can and do consider facts when applying rational-basis review under the Tennessee Constitution.

Metro denies this distinction and instead advocates a rational-basis test where facts do not matter and the government wins by default. But that is not how Tennessee courts do rational-basis review; indeed, it is not even how federal courts do rational-basis review.

Section I.A explains how the Tennessee rational-basis test provides greater protection than the federal test. Section I.B dispels Metro's notion that federal rational-basis review is a rubber stamp. On the contrary, federal rational-basis review, though deferential, is a real form of judicial review under which facts matter.

A. The Tennessee Rational-Basis Test Is More Searching than Its Federal Counterpart.

In their opening brief, Homeowners explained that Tennessee rational-basis cases enforce a reasonableness standard that depends on actual facts. Br. Appellants 23 (citing cases); *see, e.g.*, *Tester*, 879 S.W.2d at 829 ("'Reasonableness' varies with the facts in each case."); *Consol. Waste,* 2005 WL 1541860, at *33-36 (invalidating ordinance restricting a use proven to create "less risk to human health and the environment" than an unrestricted similar use). Both the Tennessee and U.S. Constitutions, of course, "guarantee that all persons who are similarly situated will be treated alike," and require all government action to be "rationally related to a legitimate state interest." *Consol. Waste*, 2005 WL 1541860, at *5,7. But additionally in Tennessee, "all classification[s]" must make "substantial distinctions" using "germane" characteristics. *Tester*, 879 S.W.2d at 829. And a law may not be "oppressive in its application" to a plaintiff. *Wise v. McCanless*, 191 S.W.2d 169, 172 (Tenn.

1945); *see Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d 631, 634 (Tenn. 1983) ("two-part analysis": (1) rational relation, (2) not oppressive); Br. Appellants 33-36.

This section will show how Metro ignores these Tennessee legal standards in its response. The first point Metro ignores is that Tennesseans' constitutional rights do not depend on federal caselaw. Then, Metro ignores the long line of Tennessee cases striking down irrational laws based on facts and record evidence. Last, Metro cites a handful of Tennessee cases, but those cases do not support Metro's position that the evidence in this case is irrelevant.

Metro primarily asserts that the Homeowners' rights under the Tennessee Constitution are in lockstep with their rights under federal caselaw. Br. Metro 27-29. This is not true. The Tennessee Supreme Court has warned that even its "decisions suggesting . . . synonymity" between the two Constitutions "do not relegate Tennessee citizens to the lowest levels of constitutional protection." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14-15 (Tenn. 2000), *cited in* Br. Appellants 26-27. Metro offers no response to this, and does not deny that *Tester* requires "real and substantial distinctions" for equal protection. 879 S.W.2d at 823. For substantive due process, Metro only mentions oppressiveness once, Br. Metro 46, dismissing it as "ignor[ing] the legal standard" of *DeBoer v. Snyder*, 772 F.3d 388, 404-05 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015). But even if *DeBoer* were good law (and it is not), it does not even purport to discuss *Tennessee*'s constitutional standard.

Metro has no answer for the line of Tennessee rational-basis cases holding that reasonableness "depends upon the facts in each case." Br. Appellants 23 (citing cases). In a rational-basis case, "an 'as-applied' challenge to the constitutionality of a[n ordinance] is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations." *Hughes v. Tenn. Bd. of Probation & Parole*, 514 S.W.3d 707, 712 (Tenn. 2017) (internal quotation omitted). Indeed, Tennessee courts have often cited established facts to strike down government action under rational-basis review. *See Tester*, 879 S.W.2d at 829 (emphasizing "the evidence in this record"); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993) ("the record demonstrates substantial disparities"); *Shatz v. Phillips*, 471 S.W.2d 944, 945 (Tenn. 1971) ("The facts are not in dispute. . . . The complainant's building is modern, attractive, and . . . a casual passer would not know what business was being carried on in said building."); *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) (underinclusive fuel-tank restriction struck down because it "exclude[s] certain persons from engaging in [a] business while allowing others to do so"); *Consol. Waste*, 2005 WL 1541860, at *35 ("We have reviewed the voluminous filings in the record and . . . there is no proof that a two-mile buffer . . . protect[s] parks and schools from effects such as dust, noise, and truck traffic . . . ."); *Bd. of Comm'rs of Roane Cnty. v. Parker*, 88 S.W.3d 916, 922 (Tenn. Ct. App. 2002) (recognizing "proof" that government refusal to allow tiger on private property was

irrational given rezoning to allow "dangerous animals" on other, similar parcels).

In response, Metro says nothing at all about *Shatz*, *Consumers Gasoline*, or *Roane County*. *See generally* Br. Metro. Metro cites *Tester* and *Tennessee Small Schools* only for the basic proposition that rational-basis plaintiffs must produce evidence of irrationality. *See* Br. Metro 34-35. Metro attempts to distinguish *Consolidated Waste* by suggesting that it had failed to articulate a rational basis there, *see* Br. Metro 43-44, when in reality Metro "assert[ed] . . . a rational basis" that the evidence simply disproved. *See Consol. Waste*, 2005 WL 1541860, at *35. *See also below* Parts II-III (showing that the evidence disproves Metro's asserted rational bases here).

Having ignored the difficult Tennessee cases, Metro relies on *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997) (holding that "specific evidence is not necessary" to rebut legal conclusions in pleadings)—and offers no response to the Homeowners' showing that *Riggs* is a pleading-stage case that does not preclude evidence at summary judgment. *See* Br. Appellants 45-46 (discussing *Riggs*); Br. Metro 33-34 (quoting *Riggs*'s statement that evidence is unnecessary to show a rational basis for restricting helicopter flights). Likewise, in *Brown v. Metropolitan Government*, where this Court upheld Metro's quarter-mile proximity ban on payday-lending shops, the issue was whether a regional planning study and other documents incorporated in the challenged ordinance were noticeable at the pleading stage. *Brown*, No. M2017-01207-COA-R3-CV, 2018 WL 6169251, at *3-5 (Tenn. Ct. App.

Nov. 26, 2018) (they were). Metro is not appealing the Chancellor's decision to sustain the Homeowners' case on the pleadings. *See* R.495. Moreover, *Riggs* and *Brown* both relied on legislative findings that are absent in this case. *See* R.16 (alleging lack of legislative history); R.503 (Metro "without sufficient information" on legislative history). And in any case, Metro has no evidence that the Homeowners' undisputedly quiet home businesses, R.688-89, would present issues like the helicopter noise threatened in *Riggs* or the usurious interest rates noted in *Brown*.

Finally, Metro overplays *Davidson County v. Hoover*, 364 S.W.2d 879 (Tenn. 1963), which construed beauty shops as outside the scope of Metro's early-'60s home occupation ordinance. *Id.* at 882. Metro hitches itself to *Hoover*'s dicta stating that zoning classifications are "legislative problem[s]," *id.*, but *Hoover* does not say that a zoning classification may violate the Tennessee Constitution. As the Homeowners have already explained, *Hoover* is not a constitutional case at all. Br. Appellants 25 n.4; *see Hoover*, 364 S.W.2d 879 (no mention of "constitution," "equal protection," "due process," "rational basis," "arbitrary," or "capricious"). Metro also cites the "prerogative of the Legislature" mentioned in *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 907 (Tenn. 1940), but *Howe* is about the very different matter of building a gas station on a residential street. *Id.* at 905. *Howe* and Metro's other Tennessee cases are distinguished in the Homeowners' opening brief. *See* Br. Appellants 25-26.

Tennessee precedent consistently teaches that facts matter in as-applied constitutional challenges such as this. Metro points to no

contrary case in response, relying instead on federal caselaw to support its view of the Tennessee Constitution.[1] But Tennessee law controls here. The undisputed facts establish no good reason to apply the Client Prohibition to the Homeowners' businesses, and so the judgment below should be reversed.

B. Even Under the Federal Rational-Basis Test, Facts and Evidence Matter.

Facts can overcome the presumption of constitutionality under federal rational-basis review as well. *See* Br. Appellants 37-41. As the Homeowners also explained in their opening brief, the U.S. Supreme Court created the rational-basis test with an opportunity for litigants to make "proof of facts tending to show that the statute . . . is without support in reason." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-54 (1938), *quoted in* Br. Appellants 38. The Court still "examin[es] the actual purpose and effect of a challenged law" today. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2473 (2019) (citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)). The Homeowners cited numerous U.S. Supreme Court cases in which the facts were found to establish that the law in question did not reasonably serve any legitimate

[1] The Tennessee Supreme Court recognizes the right to earn a livelihood, *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959), to use and enjoy property, *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012), and to participate in activities "of the utmost personal and intimate concern," *Sundquist*, 38 S.W.3d at 11, and even calls these rights "fundamental." *Hughes*, 387 S.W.3d at 474; *Sundquist*, 38 S.W.3d *passim*; *Livesay*, 322 S.W.2d at 213.

interest. *See* Br. Appellants 38 n.7 (citing cases). Metro simply ignores these cases.

Indeed, Metro's presentation of the federal rational-basis test is riddled with errors. As noted above, Metro's primary federal case was reversed by the U.S. Supreme Court. *See* Metro Br. 30,40,46 (citing *DeBoer*, *rev'd sub nom. Obergefell*). Next, Metro cites a string of out-of-circuit cases for the proposition that rational basis is a pure question of law. Br. Metro 31. But the Sixth Circuit has held that rational basis is a question of fact. *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"). Perhaps most tellingly, Metro cites *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002), for the proposition that Metro could prevail under rational-basis review with "rational speculation . . . unsupported by evidence or empirical data." But Metro omits the part where the Sixth Circuit rejected "Tennessee's proffered explanations" for regulating casket sellers based on evidence of as-applied irrationality that was introduced by those casket sellers. *Id.* at 225; *see also* Br. Appellants 40 (discussing *Craigmiles*). Contrary to what Metro believes, the federal rational-basis test "is not a rubber stamp." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *Tiwari v. Friedlander*, No. 3:19-CV-884-JRW-CHL, 2020 WL 4745772, at *6 (W.D. Ky. Aug. 14, 2020) (rational-basis "is not a rubber stamp"); *Bruner v. Zawacki*, 997

F.Supp.2d 691, 698 (E.D. Ky. 2014) ("The rational basis test . . . is not toothless.").

Otherwise, Metro cherry-picks a handful of federal cases involving development projects more extensive than the home businesses at issue here. *See* Br. Metro 37 n.5. The facts mattered in these cases too. In *Curto v. City of Harper Woods*, 954 F.2d 1237 (6th Cir. 1992), the Sixth Circuit remanded a rational-basis appeal "for further development of the record" as to whether a parking-space requirement would be irrational as applied to the "dimensions and configuration of Curto's lot." *Id.* at 1244. *Curto* is fatal to Metro's characterization of rational-basis review: it shows that an evidentiary record *can* prove that the Client Prohibition is irrational as applied to the Homeowners' homes. This case might have been different if the Homeowners "wanted to sell out to McDonald's," *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir. 1992), or "presented no evidence" that the Client Prohibition does not achieve its purpose as applied, *Richardson v. Twp. of Brady*, 218 F.3d 508, 516 (6th Cir. 2000). But it matters when, as here, a plaintiff shows there is "no evidence of any public safety risk." *See Craigmiles*, 312 F.3d at 226.

II. The Facts Show No Substantial Distinction Between the Homeowners and the Thousands of Favored Home Businesses.

This Part replies on the merits of the Homeowners' equal protection claim. As discussed above, the test under the Tennessee Constitution is whether the lines the ordinance draws are "based upon substantial distinctions" using "germane" characteristics. *Tester*, 879 S.W.2d at 829. As the Homeowners pointed out in their opening brief, it is undisputed

that owner-occupied short-term rentals, specific plans (SPs), historic home events, and day care homes all "fit Metro's definition of a 'home occupation.'" Br. Appellants 47-53 (citing R.658, 674-76). But unlike the Homeowners, these home-based businesses do not have to follow Metro's rules for home occupations. *Id.* The Homeowners gave substantial and unrebutted evidence, namely the testimony of Metro's Codes Director, that these exempt home-based businesses hurt residential neighborhoods in ways that the Homeowners' businesses cannot. *See id.*

Metro makes no reasonable rebuttal to the Homeowners' equal protection claim. The empty assurance that Metro's rules "appl[y] consistently to all residential properties with relatively few exceptions" is simply not true. *See* Br. Metro 44. According to the record, there are somewhere between 3,000 and 4,700 exceptions. Br. Appellants 48 (citing R.675). Besides downplaying these exceptions, Metro draws insubstantial distinctions based on irrelevant or made-up characteristics. Lot size, street standards, landscape buffers, State regulation,[2] background checks, historical significance, and hotel shortages are not germane to *whether clients affect residential neighborhoods*. *See* Br. Metro 41-44. Metro attempts to distinguish the Homeowners' businesses with Councilmember Todd's assertion that Homeowner Shaw's recording-studio clients "may come and go frequently." Br. Metro 42

[2] Even if State regulation were relevant, Homeowner Pat Raynor "holds a cosmetology license from the State" and "obtained a State license to operate a residential hair salon." Br. Appellants 16 (citing R.645). The State does not regulate recording studios, but Metro "admits that it is legal . . . to maintain a home recording studio." *Id.* (citing R.644-45).

(citing R.1225-26). The record shows that this is baseless conjecture; in fact Metro "do[es] not know" of any evidence that either Homeowners' business "caused too much traffic"—plus, the legal comings and goings of short-term rental guests cause much more traffic. *See* R.690-91, 1210-11. Metro's remaining assertions are even weaker. Metro does not even try to support its assertion that Homeowner Raynor's part-time schedule would be "tightly packed." *See* Br. Metro 42. These hypothetical facts are supposed to distinguish the Homeowners from day care homes and historic home events, but Metro says nothing in response to the undisputed fact that historic home events may "serve a potentially unlimited number of daily clients" and that day care homes may "serve up to 12 clients a day," which is more than the Homeowners. Br. Appellants 52-53. Metro argues that *historic* homeowners deserve a special opportunity "to earn income" doing something "not that different from opening a house to social guests." Br. Metro 42. That is precisely what the Homeowners want to do.[3] An old, fancy home cannot be the price of admission to enjoying the same right to earn a living as others.

This sort of counterfactual speculation represents the entirety of Metro's argument. Metro's brief ignores the evidence put forth by the Homeowners. Metro says nothing about its Director of Codes Administration's undisputed testimony that short-term rentals, historic home events, and day care homes create *more* residential concerns like

[3] Day cares, according to Metro, promote "[c]aring for children in a home." Br. Metro 41. Homeowner Shaw is a single father, and he built his home-based recording studio in no small part so that he could better care for his daughter. R.644, *cited in* Br. Appellants 16.

traffic, parking, and noise than the Homeowners' businesses. *See* Br. Appellants 47-53 (citing R.689-92). As established in the opening brief, restricting the Homeowners' businesses while allowing more harmful businesses to operate is sufficient proof that Metro's differential treatment is unconstitutional. *See* Br. Appellants 47-53 (citing *Consol. Waste*, 2005 WL 1541860, at *33-36 (striking down a zoning ordinance restricting safer landfills while leaving more dangerous landfills unregulated)).

Metro fares no better on the undisputed fact that it has exempted a residential hair salon and twelve other residential businesses from the Client Prohibition. *Compare* Br. Appellants 49-51 & n.9, *with* Br. Metro 44-45. Its main response is an argument that the Homeowners could have sued for their own SPs. But the Homeowners are claiming that *the Client Prohibition* violates their rights; the appropriate remedy is not an injunction ordering Metro to grant an SP but rather as-applied relief from the Client Prohibition. Metro's backup response is to claim there is "nothing arbitrary" about an "extensive rezoning process" that "determine[s] whether a particular property is properly suited for client visits" based on "individualized analysis" of unspecified "issues" that might otherwise be "rational bases for the client prohibition." Br. Metro 45. But the record shows that these businesses are similarly situated to the Homeowners in every material aspect: they are residential homes used for businesses that serve clients onsite. R.2157-77 (Homeowners' unrebutted expert report). In other words, Metro is "exclud[ing the Homeowners] from engaging in [a] business while allowing others to do

so." *Consumers Gasoline Stations*, 292 S.W.2d at 737. And that violates equal protection.

III. The Facts Show that No Interest Is Served by Prohibiting the Homeowners from Serving Clients.

To comply with the substantive due process requirement of the Tennessee Constitution, the Client Prohibition must be "rationally related to a legitimate state interest" and not "oppressive in its application" to the Homeowners. *Consol. Waste*, 2005 WL 1541860, at *5; *Wise*, 191 S.W.2d at 172. The Homeowners' opening brief pointed out extensive evidence showing that the Client Prohibition fails to advance any legitimate interest and is oppressive as applied to their individual businesses. *See* Br. Appellants 53-66.

In response, Metro contends that any evidence about the Homeowners' businesses is "completely irrelevant." Br. Metro 57. While crediting the Homeowners' "laborious efforts to disprove every rational basis," Br. Metro 9, Metro does not address the undisputed facts. Metro does not even deny that the Client Prohibition is oppressive. Instead, Metro repeats its Rule 30.02(6) witness's admittedly baseless speculation about other home businesses and cites a series of federal cases starting with the vacated Sixth Circuit decision in *DeBoer*. *See* Br. Metro 46-53.

Metro's federal cases do not control here because Tennessee's rational-basis test, unlike the federal test, asks whether a regulation is "oppressive" as applied to the plaintiffs. *Wise*, 191 S.W.2d at 192. Because the parties agree that the Homeowners' businesses are *in fact* harmless, applying the Client Prohibition to them is necessarily oppressive.

Even if Metro's federal cases controlled (and they do not), the Homeowners would still prevail. The Homeowners bear the burden of proof, *Ziss Bros. Constr. Co. v. City of Independence*, 439 F. App'x 467, 476 (6th Cir. 2011), *cited in* Br. Metro 47, and so they have brought proof. *See* Br. Appellants 53-65 (citing the record on the Client Prohibition as applied to the Homeowners). In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 393 (1926), the U.S. Supreme Court suggested that "a stranger would be under the ban of suspicion" in a residential neighborhood, but it also made clear that "some . . . or even many" zoning ordinances "may be found to be clearly arbitrary and unreasonable" *as applied* "to particular premises . . . or to particular conditions." *Id.* at 395; *see also Nectow v. City of Cambridge*, 277 U.S. 183, 185, 188 (1928) (invalidating residential zoning ordinance "as specifically applied to plaintiff in error"); *Shatz*, 471 S.W.2d at 945; *Roane Cnty.*, 88 S.W.3d at 922.[4]

[4] Metro cites *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), for the proposition that creating residential neighborhoods is a "permissible" interest under the U.S. Constitution. *See* Metro Br. 36-37. While this much is true, *Belle Terre* does not support a blanket rule that all residential zoning restrictions are always reasonable. *See Euclid*, 272 U.S. at 395. Moreover, the Tennessee courts have never adopted *Belle Terre*, whose holding has been rejected by the high courts of at least six states. *See H&L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 446-47 (Tenn. 1979) (quoting *Belle Terre* in dicta characterizing an unconstitutional handbill ordinance as an "attempt[] to establish a city of 'quiet seclusion' and a 'sanctuary for people'"); *McDonald v. Chaffin*, 529 S.W.2d 54, 58 (Tenn. Ct. App. 1975) (citing *Belle Terre* by analogy in affirming the enforcement of a private restrictive covenant); *see also City*

Whatever Metro can say about hypothetical home businesses, it is undisputed that the only significant effect of the Homeowners' businesses are soundproof recordings and "freshly co[i]ffed hair." *See* Br. Appellants 42-43 (citing R.654-56). The evidence shows that the Homeowners' businesses are safe and also compliant with Metro's residential traffic and parking standards; Metro allows that the Homeowners are "the two best plaintiffs" to challenge the Client Prohibition. R.682-84. They are not selling out their homes for unbridled commerce. The Homeowners live in their homes, as residents do, and were the unlucky targets of complaint-based enforcement that is used vindictively more often than not. R.653 (up to seventy percent of complaints are false); R.1490 (retired Codes inspector: "I can't see how a [home-based] tutoring service has an impact. That's just two neighbors not getting along. They're using Metro to hammer another neighbor."). Even Metro admits that client-serving home businesses that do not "bother anybody" should not be the victim of complaints. R.687-88.

It matters that the Homeowners want *home* businesses, not the commercial development at issue in *Euclid*, *Ziss Bros.*, and practically all of Metro's other cases. Home businesses retain their residential character, and it is oppressive to regulate them as if they were typical

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of Santa Barbara v. Adamson, 610 P.2d 436, 440-42 (Cal. 1980) (rejecting *Belle Terre*); *Zavala v. City & Cnty. of Denver*, 759 P.2d 664, 669 (Colo. 1988) (same); *Kirsch v. Prince George's Cnty.*, 626 A.2d 372, 380-81 (Md. 1993) (same); *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 841 (Mich. 1984) (same); *State v. Baker*, 405 A.2d 368, 374-75 (N.J. 1979) (same); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1243-44 (N.Y. 1985) (same).

commercial buildings. No reasonable homeowner would tolerate or even fail to notice their own home attracting criminals, and both Homeowners submitted uncontested declarations vouching for the lack of crime among their clientele. R.2144, 2148. Metro conceded at deposition that the Homeowners' "small scale" recording studio and hair salon would not command the attention of Metro planning staff; the study of vehicular traffic patterns has come far since 1926 and Metro does not regulate traffic at the negligible intensity a home business would yield. R.683, 1077; *cf. Fallin v. Knox Cnty. Bd. of Comm'rs*, 656 S.W.2d 338, 343 (Tenn. 1983) ("[T]he proof does indicate that, if . . . *250 apartment units are constructed as planned*, the traffic on Concord Road would heavily increase . . . ." (emphasis added)), *cited in* Br. Metro 51. And price inflation is an oppressive reason to forbid a homeowner from using his or her own full-time residence. The Homeowners cannot bid up the price of homes they already inhabit.[5]

Things like enforcement practices, sidewalks, and tax rates are not legitimate interests because they are all within Metro's control. Indeed, that is the point of *Nordlinger v. Hahn*, 505 U.S. 1 (1992), *cited in* Br. Metro 49, which upheld California's property-tax regime but is otherwise inapplicable here. Metro cannot invoke things that Metro has the power to change as reason to prohibit private conduct on private property. Even under the federal standard, "administrative convenience is not a valid

[5] It is likewise irrational to force the Homeowners into the commercial real-estate market. *See* R.681. They want to work out of their homes, as has become normal this year, and they have the right to do so.

rational basis" for an otherwise arbitrary requirement. *Brantley v. Kuntz*, 98 F.Supp.3d 884, 893 (W.D. Tex. 2015).

This is all fatal to Metro's position in this case. The evidence indisputably shows that the Homeowners can serve clients without offense to Metro's legitimate interests in traffic, parking, safety, and the like. Metro does not contend otherwise. As applied to the Homeowners, the Client Prohibition is unduly oppressive, doubly so when Metro lets thousands of other Nashville homeowners serve clients in their homes. If the decision below stands, the Homeowners will continue to suffer financial uncertainty, unhealthy amounts of stress, and the possible end of their careers. *See* R.2143-49; Decl. Elijah Shaw Supp. Mot. Consider Post-J. Facts (Aug. 24, 2020); Decl. Patricia Raynor Supp. Mot. Consider Post-J. Facts (Aug. 24, 2020). The judgment below should therefore be reversed.

IV. Metro's Remaining Arguments Lack Merit.

Metro raises two other issues that the Homeowners will address in this Part.

First, Metro renews its objection that it should not have been compelled to give Rule 30.02(6) testimony about its interests in maintaining, enforcing, and selectively defining the scope of the Client Prohibition. Br. Metro 53-57. "The applicable standard of review for pretrial discovery decisions is abuse of discretion." *West v. Schofield*, 460 S.W.3d 113, 120 (Tenn. 2015) (citing *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992)). Even an abuse of discretion should not be reversed "unless, considering the whole record, error involving a substantial right

more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); *Innerimages, Inc. v. Newman*, 579 S.W.3d 29, 39 (Tenn. Ct. App. 2019).

The Chancellor did not abuse her discretion by ordering Metro's Rule 30.02(6) testimony. Rule 30.02(6) enables "governmental agenc[ies]" such as Metro to give organizational testimony on all relevant matters known or reasonably available to the government. Tenn. R. Civ. P. 30.02(6). The government's interests are at issue in every rational-basis case and are obviously relevant. *See, e.g.*, *Craigmiles*, 312 F.3d at 225-29 (evaluating purported government interests); *Consol. Waste*, 2005 WL 1541860, at *33-36 (same). Indeed, Metro has asserted an interest in "residential nature" throughout the case. *E.g.*, R.545. And there is no such thing as "legislative immunity" from organizational testimony on a known relevant subject.[6] *Contra* Br. Metro 54. The Homeowners made clear that Metro could have designated any "non-legislative employee[]" out of "an entire division of code administrators [who] enforce the Client Prohibition" to testify how the Client Prohibition serves the public good. R.588. It was entirely Metro's decision to designate a former councilmember instead.

[6] Legislative immunity might have applied if the Homeowners had subpoenaed a councilmember who voted to enact the Client Prohibition in 1998. But such a councilmember's testimony might also have been irrelevant. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), *cited in* Br. Metro 33. In any event, the Homeowners never sought to discover the subjective motives of any councilmember.

Metro was not prejudiced by giving Rule 30.02(6) testimony. Indeed, the Homeowners would have suffered prejudice had the Chancellor *not* compelled Metro's testimony. The purpose of the deposition was to ensure that the Homeowners did not neglect any interest Metro might argue the Client Prohibition serves. While the Homeowners are ultimately responsible for proving their case, the Chancellor correctly ruled that "it is the government's obligation to identify the rational basis for the subject zoning ordinance." R.612 (citing *Consol. Waste*, 2005 WL 1541860, at *6).

Second, Metro repeats its assertion that the case is moot. Br. Metro 57-61. This issue has been fully briefed. *See* Mot. Consider Post-J. Facts (Aug. 7, 2020); Appellants' Resp. Mot. Consider Post-J. Facts (Aug. 24, 2020). The Homeowners' appeal is not moot, but if it is, the Court should "vacate the judgment [below] and remand the case with directions that it be dismissed." *McIntyre v. Traughber*, 884 S.W.2d 134, 138 (Tenn. Ct. App. 1994).

The Homeowners remind the Court that they are still not allowed to serve as many clients as the other home businesses named in their equal protection claim. Appellants Resp. Mot. Consider Post-J. Facts 4-5. Additionally, Metro's supplemental mootness briefing, Br. Metro 57-61, buries the new ordinance's impending sunset date at the very end. *See id.* at 60. This sunset provision—and Metro's continuing refusal to say how the sunset provision will operate—make it *far* from "absolutely clear" that the Client Prohibition "cannot be reasonably expected to recur." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 205 (Tenn. 2009).

CONCLUSION

The Court should REVERSE or else VACATE and REMAND the judgment of the Chancellor below.

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Respectfully submitted,

s/ Keith E. Diggs

Braden H. Boucek
BEACON CENTER OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219
(615) 383-6431
braden@beacontn.org
BPR No. 021399

Paul V. Avelar
Keith E. Diggs
INSTITUTE FOR JUSTICE
398 S. Mill Ave. #301
Tempe, AZ 85281
(480) 557-8300
pavelar@ij.org; kdiggs@ij.org
Pro hac vice

Counsel for Lij Shaw & Pat Raynor

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 5,000-word limitation contain 4,990 words.

s/ Keith E. Diggs
Keith E. Diggs
Pro hac vice

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.

s/ Keith E. Diggs
Keith E. Diggs
Pro hac vice