IN THE CHANCERY COURT FOR
THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

ELIJAH SHAW and PATRICIA RAYNOR,	)	
Plaintiffs,	)	
	)	**No. 17-1299-II**
v.	)	**Hon. Anne C. Martin**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

MEMORANDUM OF LAW AND FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
Tenn. R. Civ. P. 56.01; Local Rule § 26.04(b)

Plaintiffs Elijah "Lij" Shaw and Patricia "Pat" Raynor submit this Memorandum of Law and Facts in support of their Motion for Summary Judgment.

INTRODUCTION

When this long-pending case began, Lij and Pat were completely prohibited from having clients to their home-based businesses. Defendant Metropolitan Government of Nashville and Davidson County ("Metro") claimed this complete prohibition was the very "lynchpin [sic]" of its zoning system; that allowing clients would upset the "residential nature" of residential neighborhoods and potentially impact several other theorized interests,[1] even though thousands of privileged home-

[1] Plaintiffs' Statement of Uncontested Material Facts ("SUMF") ¶¶ 165-66.

based businesses were already allowed to have clients. Metro went so far as to claim that "[i]f you take out the client prohibition, the distinction between residential zoning and commercial zoning is meaningless."[2] When this case was last here in 2019, the Court awarded Metro summary judgment, denied Plaintiffs the same, and Plaintiffs appealed.

But while Plaintiffs' appeal was pending, Metro removed the very "lynchpin" of its argument. Metro amended the law to allow many home-based businesses—including Lij's and Pat's—to have clients. In relevant part, the law now reads:

> D. Home Occupation. A home occupation shall be considered an accessory use to a residence subject to the following:
> . . . .
> 3. Customer Visits
> a. Customer visits must occur by scheduled appointment and only between the hours of 8:00 a.m. and 7:00 p.m., Monday through Saturday.
> b. Customer visits shall be limited to no more than three visits per hour and a maximum of six total visits per day.
> c. The permit holder shall maintain and make available to the codes department a log or register of customer appointments for each calendar year.

Nashville, Tenn., Metro. Code § 17.16.250(D)(3) (the "Client Regulations"). Lij and Pat now legally operate their permitted home-based businesses under this new law.

When Plaintiffs' appeal reached the Tennessee Supreme Court, Metro argued that the amended law mooted the case. The Tennessee Supreme Court, with the benefit of post-argument briefing, disagreed. Recognizing that "[i]t may turn out that the [Client Regulations] ha[ve] the same alleged legal flaw as the Client Prohibition,"

[2] SUMF ¶ 165.

it vacated the prior judgments in the case and remanded the case to this Court "to permit the parties to amend their pleadings" and develop a record on how the Client Regulations affect Lij and Pat. *Shaw v. Metro. Gov't of Nashville & Davidson Cnty.*, 651 S.W.3d 907, 918 (Tenn. 2022). The parties have done just that.

Unfortunately, the law as amended continues to discriminate against Lij and Pat compared to the privileged home-based businesses, which are allowed more clients with fewer intrusive conditions. In the one cause of action remaining in this case, Lij and Pat assert that the Client Regulations violate the equal protection guarantee of the Tennessee Constitution because there is no "real and substantial" difference between Lij and Pat and the thousands of privileged home-based businesses that is "germane to the purpose of the law." *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (cleaned up). The uncontested material facts of this case confirm this assertion.

In this as-applied case, these facts matter. If they did not, the Tennessee Supreme Court would not have remanded this case for the parties to develop "information on whether *or how* the new [Client Regulations] . . . affect" Lij and Pat. *Shaw*, 651 S.W.3d at 918 (emphasis added); *see also Fisher v. Hargett*, 604 S.W.3d 381, 396-97 (Tenn. 2020) ("[I]n an as-applied challenge, the plaintiff contends that the statute is unconstitutional as construed and applied in actual practice against the plaintiff under the facts and circumstances of the particular case, not under some set of hypothetical circumstances."). Moreover, Rule 56 guarantees a legal decision

based on undisputed material facts; it is only the existence of undisputed material facts that allows a court to grant summary judgment. Tenn. R. Civ. P. 56.04.

This as-applied case can and should be decided in Plaintiffs' favor on their motion for summary judgment. Based on these uncontested material facts, this Court should **GRANT** Plaintiffs' Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment if she shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Thus, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015) (quoting Tenn. R. Civ. P. 56.04). Tennessee's summary judgment standard "fully embrace[s] the standards articulated in the [federal] *Celotex* trilogy." *Id*. at 264; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 321-25 (1986) (holding summary judgment proper when movant shows there is no evidence to support nonmovant's case); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-51 (1986) (holding "substantive law" governs "which facts are material," and "genuine" disputes require "evidence" to support nonmovant's argument); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986) (requiring nonmovant to "do more than simply show that there is some metaphysical doubt as to the material facts"). When

the material facts are not in doubt, the courts should apply the law. "Tennessee courts have 'always been empowered to decide legal questions upon agreed facts.'" *Rye*, 477 S.W.2d at 262 (quoting Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After* Hannan v. Alltel Publishing Co., 77 Tenn. L. Rev. 305, 311-12 (2010)).

As at trial, an evidence-free defense cannot prevail over a valid, evidence-supported claim. So long as the undisputed facts entitle the plaintiff to judgment as a matter of law, summary judgment remains appropriate in cases where, as here, the movant bears the burden of proof at trial. *See* Tenn. R. Civ. P. 56.01 (authorizing summary judgment in favor of "part[ies] seeking to recover upon a claim . . . or to obtain a declaratory judgment"); *Suntrust Bank v. Best*, No. E2015-02122-COA-R3-CV, 2016 WL 4498401, at *10 (Tenn. Ct. App. Aug. 26, 2016). In such cases, the moving party "must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing." 10A Charles Alan Wright et al., Federal Practice & Procedure § 2727.1 & n.19 (4th ed. 2019) (citing cases). Below, Plaintiffs lay out the elements of their claim, and demonstrate that the record in this case is so one-sided as to rule out the possibility of Metro prevailing.

CONSTITUTIONAL STANDARD

Plaintiffs' First Amended Complaint states (at ¶¶ 145-56) one claim for violation of equal protection as protected by the Tennessee Constitution. Two provisions of the Tennessee Constitution, Article I, § 8, and Article XI, § 8, "encompass the equal protection guarantee." *Tester*, 879 S.W.2d at 827. Article I, § 8,

prohibits deprivations of "liberty or property" except in accordance with the "law of the land." Article XI, § 8, prohibits "any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions" not generally available to others. These two provisions "together[] guarantee equal privileges and immunities for all those similarly situated." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

Depending on the right being infringed, Tennessee courts apply one of three levels of equal protection scrutiny. *Id.* at 153. The Client Regulations infringe on three different rights that the Tennessee appellate courts have explicitly called "fundamental," and which therefore deserve heightened or strict scrutiny. *See Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012) (right to own, use, and enjoy private property); *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (right to earn a livelihood); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (right to privacy), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008). For purposes of this motion, however, the Court need not apply heightened or strict scrutiny because Metro cannot prevail even under the default standard, the one by which "Tennessee courts have traditionally analyzed zoning ordinances." *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *25 (Tenn. Ct. App. June 30, 2005); *see also Fallin v. Knox Cnty. Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983).

Tennessee equal protection requires at least a "reasonable basis" for distinctions and "[r]easonableness depends upon the facts of the case and no general rule can be formulated for its determination." *Tenn. Small Sch.*, 851 S.W.2d at 153 (citation omitted). "The fundamental rule 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." *Tester*, 879 S.W.2d at 829 (emphasis omitted) (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). A discriminatory ordinance can be invalidated under Tennessee equal protection—even if it otherwise bears some relation to a legitimate interest—because municipalities "do[] not have the right to exclude certain persons from engaging in [a] business while allowing others to do so." *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) (citing *State v. Harris*, 6 S.E.2d 854 (N.C. 1940)). Where a zoning code discriminates, that discrimination must "be rested upon some reasonable basis." *Shatz v. Phillips*, 471 S.W.2d 944, 947 (Tenn. 1971) (citation omitted).

This "real and substantial" standard has been in place for more than a century and requires meaningful, fact-based scrutiny of legislative classifications. *Tester*, 879 S.W.2d at 829-30. And while government may be allowed a presumption that it has acted reasonably, *see City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001), under the real and substantial standard, when "evidence in the record" counters government claims of reasonability, plaintiffs win. *Tester*, 879 S.W.2d at 829; *accord Shatz*, 471 S.W.2d at 947 (evidence in the record overcame presumption of

constitutionality of zoning discrimination); *see also Metro. Gov't of Nashville & Davidson Cnty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977) (there must be "real and substantial reasons" for restricting the location of package liquor sales to a "segregated zone," and the record did not show a real and substantial reason).

Here, the uncontested facts demonstrate that Metro allows the privileged home-based businesses to have more clients with fewer intrusive conditions than it allows Lij's and Pat's home-based businesses. There is no real and substantial difference between the privileged and Lij's and Pat's home-based businesses, and certainly not one that is germane to the purpose of the law. Therefore, as applied, Metro's Client Regulations violate Lij's and Pat's right to equal protection under the Tennessee Constitution.

UNCONTESTED FACTS

I. Plaintiffs and their Home Occupations.

Lij and Pat are both residents of Nashville. SUMF ¶¶ 2-3. Both of them currently operate permitted "Home Occupations" in compliance with the law. *Id.* ¶¶ 28-30, 64-67. As is relevant here, Metro. Code § 17.16.250(D)(3) limits customer visits to Lij's and Pat's home-based businesses to no more than three visits per hour and a maximum of six total visits per day, only between the hours of 8:00 a.m. and 7:00 p.m., Monday through Saturday, and Lij and Pat must accept customers by appointment only, maintain a log or register of customer appointments for each calendar year, and make that log or register of customer appointments available to the Codes Department. *Id.* ¶ 7.

A. Lij Shaw and his home recording studio.

Lij is a professional record producer who built The Toy Box Studio, a professional-quality recording studio, in a detached, renovated garage on his property so that he could earn a living from home while raising his daughter. *Id.* ¶¶ 8-9, 13. Well-respected musicians have used Lij's studio, and a Grammy-winning album was mixed there. *Id.* ¶ 14. The studio is fully soundproofed. *Id.* ¶ 16. There is a long driveway, with a privacy fence along the side, that accommodates clients' vehicles such that clients do not park on the street. *Id.* ¶¶ 17-18. None of Lij's neighbors has ever complained to Lij about the Toy Box Studio, for any reason. *Id.* ¶ 19.

Between 2005 and 2015, Lij earned money by recording musicians at The Toy Box Studio. *Id.* ¶ 20. And although it was legal for Lij to *have* a home recording studio, it was illegal for Lij to have any clients or patrons to his home recording studio. *Id.* ¶¶ 21-22. Based on an anonymous complaint in 2015, Lij was forced to no longer have clients to his studio. *Id.* ¶¶ 23-24. But prior to that, Lij frequently had more than three clients at a time or in the same hour at his recording studio—such as when he was recording a band or teaching a class of students—including on Sundays or after 7 p.m. *Id.* ¶¶ 25-27.

Although Lij is now allowed some clients, the Client Regulations continue to harm his business. Lij needs and wants to be able to again have more than three clients at a time or per hour because recording sessions frequently involve multiple musicians, and some of the classes he teaches are affordable for students only if there are more than six students in the class. *Id.* ¶¶ 31-34. For the same reasons, he needs

and wants to be able to again have more than six clients per day. *Id.* ¶¶ 33-34. He also needs and wants to be able to again have clients to his home recording studio on Sundays and after 7 p.m. because many independent musicians only have time to record on weekends or evenings, and many students also only have that time available to take lessons. *Id.* ¶¶ 35-36. And although he does not accept "walk-in" clients, Lij wants the flexibility not to have to schedule appointments, maintain a log or register of all customer appointments, or make this log or register available to the Codes Department because he objects to that invasion of privacy. *Id.* ¶¶ 37-38.

B. Pat Raynor and her home salon.

Pat is a licensed professional hairstylist who has been, with rare exceptions, self-employed ever since she began her career in 1970. *Id.* ¶¶ 39-40. Pat built her home-based, single-chair salon after her husband's death because she needed to continue to work, but her advancing age meant she was not able to work as much as she used to, and the overhead costs of commercial space were difficult to meet only working part-time. *Id.* ¶¶ 43-46. Pat's home salon was inspected and approved by the state cosmetology board. *Id.* ¶ 47. Pat's shop opens to the driveway in the back of her house; there are no exterior signs; her clients park in her driveway, not the street; and no neighbor ever complained to her about her home-based hair salon while she ran it. *Id.* ¶¶ 48-50, 52.

For seven months after she received her residential shop license from the state, Pat earned money by cutting her clients' hair in her home salon. *Id.* ¶ 53. And although it was legal for Pat to *have* a home salon, it was illegal for Pat to have any

clients or patrons to it. *Id.* ¶¶ 54-55. Based on an anonymous complaint in 2013, Pat was forced to no longer have clients to her salon. *Id.* ¶¶ 56-57, 61.

Although Pat is now allowed some clients, the Client Regulations continue to harm her business. Prior to being shut down, Pat ran her business on an appointment-only basis, employing nobody but herself, and mostly receiving only one client at a time, but never more than 12 per day. She would work between 9 a.m. and 7 p.m., Tuesday through Friday. *Id.* ¶ 51. But she occasionally had more than three clients at a time or in the same hour and more than six clients a day. *Id.* ¶¶ 62-63. Pat wants the flexibility to do those things again. *Id.* ¶¶ 68-69. And although she does not accept "walk-in" clients, Pat wants the flexibility not to have to schedule appointments, maintain a log or register of all customer appointments, or make this log or register available to the Codes Department because she objects to that invasion of privacy. *Id.* ¶¶ 70-71.

II. Other Home-Based Businesses Not Subject to the Client Regulations.

Although Lij and Pat are subject to the Client Regulations, SUMF ¶ 7, there are thousands of other home-based businesses in Nashville that are not. Lij and Pat are subject to the Client Regulations because they are permitted "home occupations." Metro. Code § 17.16.250(D). The three elements of a home occupation are that they take place inside a residential home, are carried out by a resident of the home, and are a business. *Id.* ¶¶ 72-76. As set forth below, owner-occupied short-term rentals, day care homes, and historic home events all meet these three elements but are not subject to the Client Regulations. In addition, Metro has, through specific plan (SP)

spot zoning, specifically allowed additional home-based businesses—including some identical to Lij's and Pat's—to operate outside the Client Regulations.

A. Owner-Occupied Short-Term Rentals

An owner-occupied short-term rental is "an owner-occupied residential dwelling unit containing not more than four sleeping rooms that is used and/or advertised through an online marketplace for rent for transient occupancy by guests." Metro. Code § 6.28.030(A); SUMF ¶ 77. Owner-occupied short-term rentals are permitted as an accessory use in all single and one- and two-family districts and in all other zoning districts that allow residential use except for "NS" districts. *Id* ¶¶ 78-79; *see also* Metro. Code §§ 6.28.030(A)(1) (listing those zoning districts where owner-occupied short-term rentals are permitted); 17.08.010(B) (listing all residential, mixed use, office, commercial, and shopping center zoning districts that do and do not include "NS"); 17.16.250(E) (listing those zoning districts where owner-occupied short-term rentals are permitted). As of July 11, 2018, there were 4,653 permitted owner-occupied short-term rentals in Nashville, of which 3,001 were "active." SUMF ¶ 85. Owner-occupied short-term rentals meet each of the three elements of a home occupation. *Id* ¶¶ 80-82.

Owner-occupied short-term rentals are specifically exempted from the Client Regulations. *Id.* ¶ 87; Metro. Code §17.16.250(E). Instead, the number of customers at an owner-occupied short-term rental is defined by formula such that they may serve up to twelve clients at a time. SUMF ¶¶ 83-84. Owner-occupied short-term rentals can serve clients without restriction as to appointments, day of the week, or

time of day; are not limited to three client visits per hour or six total visits per day; and do not have to maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶¶ 88-90.

B. Day Care Homes

A "day care home" is a home at which "day care"—which is "the provision of care for individuals, who are not related to the primary caregiver, for less than twenty-four hours per day"—is provided for up to twelve clients at a time." *Id.* ¶ 91. Metro allows one day care home per street block—and in some cases more than one per block where the block is over 1,000 feet in length—provided that the day care home meets the requirements for and obtains a special exception permit. *Id.* ¶ 95. Metro has granted eleven special exception permits for day care homes to operate in residential districts. *Id.* ¶ 96. Day care homes meet each of the three elements of a home occupation. *Id.* ¶¶ 92-94.

Day care homes are not subject to the Client Regulations. *Id.* ¶ 97. Day care homes can accommodate up to twelve clients at a time. *Id.* ¶ 91. They can serve clients without restriction as to appointments, day of the week, or time of day. *Id.* ¶ 98. They are not limited to three client visits per hour or six total visits per day. *Id.* ¶ 99. And they do not have to maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶ 100.

C. Historic Home Events

A historic home event is "the hosting of events such as, but not limited to, weddings or parties for pay in a private home which has been judged to be historically

significant by the historical commission." *Id.* ¶ 101. Metro has granted seven permits for historic home events to operate in residential districts. *Id.* ¶ 105. Historic home events meet each of the three elements of a home occupation. *Id.* ¶¶ 102-04.

Historic home events are not subject to the Client Regulations. *Id.* ¶ 106. Historic home events can serve clients without restriction as to appointments, day of the week, or time of day. *Id.* ¶ 107. Historic home events are not limited to three client visits per hour or six total visits per day. *Id.* ¶ 108. Historic home events do not have to maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶ 109.

D. Specific Plans (SPs)

A specific plan or "SP" is "an alternative zoning process that may permit any land uses, mixture of land uses, and alternative development standards, of an individual property," for the stated purpose of "avoid[ing] monotony, promot[ing] variety, and yield[ing] a context sensitive development." *Id.* ¶ 110. Any property, including a residential property, may apply for rezoning as an SP district. *Id.* ¶ 111. Metro can approve a specific plan "to allow a resident to conduct an occupation, service, profession or enterprise inside a residential dwelling unit" and has, in fact done so on several occasions. *Id.* ¶¶ 112-14. In at least eleven ordinances, covering thirteen properties, Metro has used SP zoning to allow clients or patrons to be served at businesses in residential homes in residential neighborhoods, including restaurants, retail, offices, hair salons, and, potentially, additional hair salons and recording studios. *Id.* ¶¶ 115-61 (detailing each SP).

These SPs are not subject to the Client Regulations. In ten of these SPs, covering eleven properties, there are no restrictions on hours and days of operation; no limits on the number of clients at a time or per day; and no mandates that the businesses operate by appointment only or maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶¶ 122, 128, 133, 137, 141, 144, 148, 152, 156, 160. Only one SP has any restriction on hours and days of operation, but it has no limit on the number of clients per hour or per day and no mandate that the business operate by appointment only or maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶ 118. At least one SP operates the same business—a hair salon—as Pat, *id.* ¶¶ 124-30, and other SPs are allowed to operate hair salons or recording studios, *id.* ¶¶ 125-26, 132, 140, 151, 154-55.

ARGUMENT

Although Lij and Pat are now allowed to serve clients in their home-based businesses, they remain subject to discriminatory rules that restrict them. Under the Client Regulations, Lij and Pat are restricted as to the hours and days they may have clients; restricted as to the number of clients per day and at a time; and mandated to take customers only by appointment, maintain a log or register of those appointments, and make that log or register available to the codes department. These requirements continue to harm Lij and Pat.

But while Lij and Pat are subject to the Client Regulations, Metro lets thousands of privileged home-based businesses—owner-occupied short-term rentals,

day care homes, historic home events, and certain SPs—operate without being subject to those same restrictions and conditions.

This Court has previously said that there is a presumption that this differential treatment is reasonable. 2019 MSJ Op. 19. But that presumption is rebuttable. Here, the uncontested material facts in this case demonstrate that, like Lij and Pat, these privileged home-based businesses fit Metro's definition of a "home occupation" because they are businesses that take place inside a home and are conducted by a resident. The uncontested material facts in this case demonstrate that these privileged home-based businesses implicate the same interests that Metro claims support restrictions on Lij and Pat; indeed, implicate them to a greater extent than do Lij and Pat.

The uncontested material facts thus overcome any presumption of reasonability because they show no "real and substantial" differences between Lij and Pat and the privileged home-based businesses that are "germane" to the purpose of the Client Regulations.

Accordingly, the uncontested material facts demonstrate that Lij and Pat have shown a violation of their equal protection rights under the Tennessee Constitution. As such, Lij and Pat are entitled to judgment as a matter of law. This Court should grant their motion for summary judgment.

I. Lij and Pat are harmed by the Client Regulations.

Lij and Pat both have Home Occupation Permits for their home-based businesses and currently operate under the strictures of the Home Occupation regulations. SUMF ¶¶ 28-30, 64-67. This means that they are subject to the Client

Regulations. So, even though Lij and Pat are now allowed some clients, the Client Regulations continue to harm their businesses.

First, Lij is harmed by the Client Regulations' restrictions on the hours and days that customers are allowed in his recording studio. Prior to being shut down in 2015, Lij would frequently have clients, including musicians and students, at his home recording studio on Sundays or after 7 p.m. *Id.* ¶ 27. He needs and wants to be able to again serve clients in his home recording studio on Sundays and after 7 p.m. because many independent musicians have time to record only on weekends or evenings, and many students also only have that time to take lessons. *Id.* ¶ 35. But what Lij wants and needs to do is illegal under the Client Regulations. Metro. Code § 17.16.250(D)(3)(a).

Second, Lij and Pat are harmed by the Client Regulations' limits of six client visits per day and three client visits per hour. Prior to being shut down in 2015, Lij would frequently have more than three clients at a time at his recording studio—such as when he was recording a band—and would often have more than six clients a day at his recording studio. SUMF ¶¶ 25-26. Pat would also occasionally have more than three clients at a time or in the same hour and more than six clients a day. *Id.* ¶¶ 62-63.

Lij wants and needs again the ability to have more than three clients at a time or per hour, and more than six clients per day, because recording sessions frequently involve multiple musicians, and some of the classes he teaches are affordable for students only if there are more than six students in the class. *Id.* ¶¶ 31-34. Pat also

wants the flexibility again to occasionally have more than three clients at a time or in the same hour and more than six clients a day. *Id.* ¶¶ 68-69. But what Lij and Pat want and need to do is illegal under the Client Regulations. Metro. Code § 17.16.250(D)(3)(b).

Third, although neither Lij nor Pat accept "walk-in" clients, both are harmed by the Client Regulations' requirement that they "maintain and make available to the codes department a log or register of customer appointments for each calendar year." *Id.* § 17.16.250(D)(3)(c). Neither Lij nor Pat ever had to maintain a list of their customers and make it available to the government. Neither one of them wants to do so because they object to that invasion of privacy. SUMF ¶¶ 37-38, 70-71. Warrantless government demands for client registries runs directly into constitutional protections for people's "houses, papers, and effects." *City of Los Angeles v. Patel*, 576 U.S. 409, 419-21 (2015) (hotel owner must have an opportunity for neutral decisionmaker to review a demand to search the hotel registry for information about hotel guests). Worse, it's an unconstitutional condition that Metro imposes on *no other business* (home-based or otherwise) except certain second-hand dealers (like pawn brokers), hotels, and trailer parks. Metro. Code §§ 6.100 *et seq.*; *id.* § 6.28.010; *id.* § 10.40.160.

II. Tennessee's "real and substantial" test requires consideration of facts.

Tennessee's "real and substantial" standard requires meaningful scrutiny of legislative classifications. This is because, under this standard, "evidence in the record" can overcome any presumption that government classifications are

reasonable. *Tester*, 879 S.W.2d at 829.[3] These "real and substantial" decisions demonstrate how important facts are.

In *Tester*, a Washington County criminal 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. 879 S.W.2d at 825. The court applied the "real and substantial" standard and held that the state's assertion of a "real and substantial distinction" with respect to overcrowding in Davidson, Shelby, and Moore Counties "ignore[d] the evidence in the 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 (emphasis omitted). 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.

In *Consumers Gasoline Stations*, the Court struck down a municipal ordinance that prohibited the installation of underground fuel tanks, even though the ordinance was rationally related to fire prevention as "an initial proposition." 292 S.W.2d 735, 737 (Tenn. 1956). The ordinance in question made it illegal to install more than three underground fuel-storage tanks on any property, all of which were required to have

[3] Even under federal law, a "rational basis" is only a presumption that can be rebutted when "the facts made known or generally assumed . . . preclude the assumption." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Indeed, facts are so critical that denying the opportunity to rebut the rational-basis presumption "would deny due process." *Id.*

a maximum capacity of no more than 1,100 gallons. *Id.* at 735. Because the operative word was "install," *id.*, it did not apply to several other property owners with preexisting underground tanks "several times the maximum capacity provided for by the ordinance," with the "obvious effect" of "prohibit[ing] the construction of additional filling stations . . . which would compete with those [already] in existence." *Id.* at 736-37. This, the court found, "unquestionably denie[d] the equal protection of the laws" in violation of the Tennessee Constitution. *Id.* (citing Tenn. Const. art. I, § 8).

At least three zoning ordinances have been invalidated under Tennessee equal protection. In *Shatz v. Phillips*, 471 S.W.2d 944 (Tenn. 1971), the Supreme Court declared it arbitrary and unreasonable to prohibit "the storage and/or salvaging of junk and other used material" in a "[l]ight [i]ndustry" district when the same was permitted in the "[h]eavy [i]ndustry" district across the street. *Id.* at 946-48. The Court recognized that, ordinarily, discrimination in a zoning code "would not of itself be sufficient to justify the Court" declaring "the application of the ordinance invalid." *Id.* at 947. But the Court recognized that "nowhere in the record does it appear that the discrimination is a reasonable one—quite the contrary—it clearly appears that the petitioners' use of the property would not be such as to cause any result justifying the exercise of the police power under the municipality's zoning authority." *Id.* The record showed that the junk-salvaging prohibition was the only difference between the two districts under the ordinance, which otherwise allowed all "industrial" uses. *Id.* at 946. The record also showed that "a casual passer would not know what

business was being carried on" in the petitioners' "modern, attractive" building, and that the plaintiff's scrapping business was "free from noise, odor, fumes, and other objectionable features." *Id.* at 945. Those facts therefore overcame the rebuttable presumption of constitutionality.

In *Consolidated Waste*, the Court of Appeals held it arbitrary and unreasonable to require construction-and-demolition ("C & D") landfills, but not other, more hazardous types of landfills, to locate at least two miles away from schools and parks. No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *33-36 (Tenn. Ct. App. June 30, 2005). The court recognized that "dust, noise, traffic, and other considerations associated with C & D landfills" were hazardous but were also characteristic of several other types of landfills to which Metro did not apply the two-mile 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.

And in *Board of Commissioners of Roane County v. Parker*, 88 S.W.3d 916 (Tenn. Ct. App. 2002), the Court of Appeals held it arbitrary and capricious to rezone one semi-rural property for the keeping of large exotic animals but then deny the same rezoning to another rural property. *Id.* at 921-22. The court ruled for the plaintiffs—who kept a tiger on their property—even though the zoning ordinance was found to be "in the public interest, since [it was] concerned with . . . dangerous animals." *Id.* at 922. This was because the "totality of the circumstances" allowed the plaintiffs to "carr[y] [their] burden of proof that the refusal of the County to rezone

. . . was arbitrary and capricious." *Id*. Moreover, the concern about the potential danger of plaintiffs' tiger was mitigated by the presence of "a rigid statutory scheme" in state law with which the plaintiffs complied. *Id*. at 923-24.

In all these cases, not just any difference could justify government discrimination; the difference had to be germane to the purpose of the regulation. In *Tester*, for example, there were obvious differences between the three counties allowed to use work release and those counties that were not so allowed; Davidson and Moore Counties had metropolitan governments, and Shelby County had a particular population classification. 879 S.W.2d at 825. But the purpose of the law—to avoid jail overcrowding—had nothing to do with the form of government or population. *Id*. at 829. And the facts demonstrated that the work-release counties were not actually different from the others with regard to overcrowding conditions. *Id*. Therefore, though there were good reasons to have a work-release program, those reasons applied to everyone, not just those who received the benefit of the program, and the limitation of the benefit violated equal privileges. *Id*. In *Shatz*, there was a difference between allowed and unallowed businesses ("storage and/or salvaging of junk" vs. other uses), but the facts showed that that difference did not impact the government's interest. 471 S.W.2d at 945-46. And in *Consolidated Waste*, the differently regulated landfills took different kinds of debris (C & D vs. other), but that difference did not impact the "dust, noise, traffic, and other considerations" that Metro claimed. 2005 WL 1541860, at *33-34.

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

II. The uncontested material facts demonstrate that there are no "real and substantial" differences between Lij and Pat and the privileged home-based businesses that are "germane" to the purposes of the Client Regulations.

Whatever presumption in favor of Metro's discriminatory regulation of home-based businesses might exist, it is overcome by the uncontested material facts here. Owner-occupied short-term rentals, day care homes, historic home events, and certain SPs all meet the elements of being home occupations but are not subject to

the Client Regulations. Instead, these privileged home-based businesses are allowed more clients, with fewer intrusive conditions. This differential treatment is not based on any "real and substantial" differences that are "germane" to the purposes of the Client Regulations.

The flaw in metro's regulation is exposed by the earlier position it took in this case. Previously, Metro argued it could prohibit Lij and Pat from seeing clients to protect residential areas. In Metro's view, because they engaged in different businesses—a recording studio and single-chair hair salon—than the privileged home-based businesses,[4] they presented unique harms that justified prohibiting them from seeing clients. Metro's purported justification was weak then, but it's even *weaker* now that Metro has amended its Home Occupation regulations to *permit* people like Lij and Pat to see clients in their homes, so long as they have a Home Occupation permit. Metro. Code § 17.16.250(D)(3); SUMF ¶¶ 28-30, 64-67. Today, the only practical difference between Lij and Pat and the privileged home-based businesses is that Metro permits Lij and Pat to see fewer clients, at more restrictive times, and with more onerous conditions. But there is no "real and substantial" difference between clients visits to Lij and Pat and client visits to the privileged home-based businesses serve that is "germane" to the purposes of the Client Regulation. In other words, the central problem with Metro's regulatory scheme is that, in the name of protecting residential areas, SUMF ¶¶ 162-63, it treats Lij and Pat's home-based

[4] Even though at least one of the privileged SPs is a hair salon, SUMF ¶¶ 124-30, and others are allowed to have a hair salon or recording studio, *id.* at ¶¶ 125-26, 132, 140, 151, 154-55.

businesses worse than the privileged home-based businesses, even though the privileged home-based businesses do just as much (if not more) "harm" to residential areas.

A. Owner-Occupied Short-Term Rentals.

Unlike Lij and Pat, there are thousands of owner-occupied short-term rentals operating as an accessory use across Nashville residential neighborhoods that are allowed up to twelve clients at a time, without restriction as to appointments, day of the week, or time of day, and that do not have to maintain and make available to the Codes Department a log or register of customer appointments. SUMF ¶¶ 77-90.

Owner-occupied short-term rentals are the source of daily complaints because they cause noise, traffic, parking, trash, and "general lewdness" problems. *Id.* ¶¶ 188-92. Indeed, they all cause these impacts in residential neighborhoods to a greater degree than home recording studios or salons. *Id.* ¶¶ 193-202. No surprise then that Metro admitted that short-term rental guests detract from the residential nature of residential neighborhoods. *Id.* ¶ 188. Indeed, Metro determined that short-term rentals are "more 'commercial' in nature and not suited for residentially zoned areas," but nevertheless continued to allow them. *Id.* ¶¶ 203-04. Metro even took the position, when it adopted the Client Regulations, that the "consequences" of short-term rentals were such that they should be further restricted, but they are not. *Id* ¶ 163. In other words, Metro claims that restrictions on "the number of client visits" for Lij and Pat mean they "will not cause too much traffic," *id.*, all while continuing to allow owner-occupied short-term rentals (which cause more problems) *more* clients, without

restrictions on days or times, *id.* ¶¶ 77-90. And none of these concerns justify warrantless access to a registry of Lij's and Pat's clients but not of short-term rental clients.

The uncontested material facts show that this case is like *Tester*, *Consolidated Waste*, and *Cleburne*. As in *Tester*, where record evidence showed a program claimed to be justified based on jail overcrowding was not applied to other jails that were overcrowded, 879 S.W.2d at 829, the record here shows that Metro tries to justify applying the Client Regulations to Lij and Pat because Metro presumes their clients will affect their residential neighborhoods,[5] but does not apply the Client Regulations to owner-occupied short-term rentals that have the same (if not greater) affects. As in *Consolidated Waste*, it is unreasonable to regulate Lij and Pat more strictly than owner-occupied short-term rentals when owner-occupied short-term rentals cause at least the same (and likely more) of the same claimed affects. 2005 WL 1541860, at *33-34. And as in *Cleburne*, though there are differences between Lij and Pat and owner-occupied short-term rentals—Lij and Pat don't have overnight guests—the facts show those differences don't mean that Lij and Pat "threaten" Metro's claimed interests in a way that owner-occupied short-term rentals do not. 473 U.S. at 448. As in *Tester*, *Consolidated Waste*, and *Cleburne*, Metro's preference for more harmful home-based businesses violates Lij's and Pat's equal protection rights under the Tennessee Constitution.

[5] This presumption is not borne out by the record. SUMF ¶¶ 16-19 (Lij's studio does not affect his neighbors), ¶¶ 49-52 (Pat's salon does not affect her neighbors).

B. Day Care Homes

Unlike Lij and Pat, Metro permits day care homes to serve up to 12 clients a day (indeed, at a time). *Id.* ¶ 91. Day care homes meet each of the three elements of a home occupation, *id.* ¶¶ 92-94, and yet are not subject to the Client Regulations. *Id.* ¶¶ 97-100. Day care homes can affect the residential character of a neighborhood, especially with regard to traffic and parking; indeed, they affect neighbors to a greater degree than to Lij and Pat. *Id.* ¶¶ 205-10. For example, even though Metro cites too much "traffic" as a reason to restrict Lij and Pat, *id.* ¶ 164, day care homes cause more traffic, *id.* ¶¶ 208, 210, again without restriction on days or times.

Metro previously argued that the reason to treat Lij and Pat differently than day care homes is that "[c]aring for children in a home is entirely consistent with residential use." Metro 2019 MSJ 15-16. Caring for children *is* entirely consistent with residential use. That fact justifies allowing home-based businesses involving caring for children[6] even if uses that are inconsistent with residential use, such as "outdoor storage of construction, scrap, or salvage materials" are prohibited. *Compare* Metro. Code § 17.16.250(D)(5)(b) (setting out permitted Home Occupations that are allowed customer visits), *with id.* § 17.16.250(D)(5)(c) (setting out non-permitted home occupations, regardless of client visits, including "outdoor storage of construction, scrap, or salvage materials"). But Lij's recording studio and Pat's salon

[6] Indeed, that fact may *require* allowing home-based businesses involving caring for children. *See Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 613-14 (Tenn. 1927) (suggesting that residential prohibition of "commercial enterprises" such as "boarding houses, sewing women, registered nurses, and the like" may be unreasonable).

are also consistent with residential use; that is why they are permitted Home Occupations with clients. SUMF ¶¶ 28-30, 64-67. The only difference here is the number and conditions on client visits, and so the proper inquiry is whether there is a real and substantial difference between client visits to home day cares compared to client visits to Lij's studio and Pat's salon that is germane to the Client Regulations. As set forth above, Lij's and Pat's clients affect residential neighborhoods less than do day care homes' clients. So, as with owner-occupied short terms rentals (and as in *Tester*, *Consolidated Waste*, and *Cleburne*), Metro's choice to regulate Lij and Pat more than day care homes even though they have the same or less effect on their neighborhoods violates Lij's and Pat's equal protection rights under the Tennessee Constitution.

C. Historic Home Events

Unlike Lij and Pat, Metro permits historic home events to serve a potentially unlimited number of daily clients, without restriction as to day of the week, or time of day. *Id.* ¶¶ 106-08.[7] And historic home events do not have to maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶ 109. All this, even though historic home events meet all the elements of Home Occupations, *id.* ¶¶ 102-04, and present noise, traffic, and parking issues in residential areas to a greater extent than Lij's and Pat's businesses, *id.* ¶¶ 211-17.

[7] The Court of Appeals ruled that that a historic home could not be denied a permit for up to six events per week, including "two large events each week over 40 guests" because this did not threaten "the public health, safety and welfare." *Demonbreun v. Metro. Bd. of Zoning Appeals*, No. M2009-00557-COA-R3-CV, 2011 WL 2416722, at *4 n.7, *17-18 (Tenn. Ct. App. June 10, 2011).

As with home day cares, Metro previously argued that it may treat Lij's and Pat's Home Occupations worse than historic home events for reasons that have nothing to do with the Client Regulations. Metro argued that allowing guests of historic home events is necessary to incentivize the preservation of historically significant homes. In addition, Metro asserted that a historic home hosting events is similar to having social guests, notwithstanding the commercial nature of such events. Metro 2019 MSJ 16-17. For starters, both of these are reasons to *allow* historic home events, not rationales for *restricting* other home occupations. Moreover, the age of a house has nothing to do with the interests Metro has claimed: preserving the "residential nature of residential neighborhoods." And the commercial/non-commercial visit distinction is no longer material now that Home Occupations are allowed *some* clients. Regardless, the record shows that Lij's and Pat's clients are also like social guests: Lij records clients and friends (and himself) at his studio and Metro's own inspector could not distinguish between Pat's clients and a "regular social visit." SUMF ¶¶ 15, 60. And again, the record evidence demonstrates that historic home events pose more severe traffic, parking, and noise concerns—issues that actually go to a neighborhood's "residential nature"—than Lij's and Pat's businesses do. *Id.* ¶¶ 211-17. Accordingly, as in *Tester*, *Consolidated Waste*, and *Cleburne*, Metro's Client Regulations violate Lij's and Pat's equal protection rights under the Tennessee Constitution.

D. Specific Plans.

Finally, eleven SPs are similarly situated to Lij and Pat, but Metro privileges them over Lij and Pat without a real and substantial reason that is germane to the purpose of the Client Regulations. Any property, including a residential property, can be approved a specific plan "to allow a resident to conduct an occupation, service, profession or enterprise inside a residential dwelling unit" and Metro has done so on several occasions. SUMF ¶¶ 111-14. In fact, Metro has allowed clients or patrons to be served in residential homes in residential neighborhoods on at least eleven ordinances, covering thirteen properties. *Id.* ¶¶ 115-61. Several of these specifically allow the same businesses—a recording studio and hair salon—as Lij and Pat operate. *Id.* ¶¶ 125-26, 132, 151, 154-55. None of these SPs are subject to the Client Regulations—i.e., they have no restrictions on the number of clients per hour or per day and no mandate that they operate by appointment only or maintain and make available to the Codes Department a log or register of customer appointments. *Id.* ¶¶ 118, 122, 128, 133, 137, 141, 144, 148, 152, 156, 160. Only one has any restriction on hours and days of operation, *id.* ¶ 118, but the remaining ten do not. *Id.* ¶¶ 122, 128, 133, 137, 141, 144, 148, 152, 156, 160.

The sole basis Metro has for exempting these SPs from rules governing Home Occupations, including the Client Regulations, is that the subject properties had "gone through a rezoning process" and had therefore "been purposefully taken out of the residentially zoned rules." *Id.* ¶ 219. But that ignores the fact that all these properties remain in residential neighborhoods. *Id.* ¶¶ 119, 123, 130, 134, 138, 142,

145, 149, 153, 157, 161. Metro could not identify any facts that distinguished these businesses from those operated by homeowners like Lij and Pat, instead speculating that "there *may* be plenty of parking [at the SPs], it *may* be located near a busy road or commercial node . . . [or] it *may* be otherwise appropriate under the general plan and/or supported by neighbors." *Id.* ¶ 218 (emphasis added). But this fact-free speculation is contradicted by undisputed evidence: Lij and Pat have plenty of parking, *id.* ¶¶ 17, 49; Pat lives on a busy road, *id.* ¶¶ 41, 49; Lij lives by an auto diesel college and busy train track, *id.* ¶ 11; at least one of the SPs (ironically, the one specifically allowing a hair salon in a residential neighborhood) was enacted despite Metro's planning staff finding it was inappropriate under the general plan, *id.* ¶ 129; and no neighbor complained to Lij or Pat about their home-based businesses. *Id.* ¶¶ 19, 52. Even though Metro allows Lij and Pat to serve clients in their homes today, the relevant question is why they are allowed fewer clients under more onerous conditions than these SPs when the facts show no reasonable distinctions between them pertaining to effects on residential neighborhoods. There is no "real and substantial" difference "germane" to the purposes of the Client Restrictions between Lij and Pat and these SPs. Accordingly the Client Restrictions violate equal protection as applied to Lij and Pat.

CONCLUSION

As the Tennessee Supreme Court made clear when it remanded this case, facts matter. Rule 56 guarantees a legal decision based on undisputed material facts; it is only the existence of undisputed material facts that allow a court to grant summary

judgment. Here, the uncontested material facts allow Lij and Pat to overcome any presumption in favor of Metro's Client Regulations in Metro. Code § 17.16.250(D)(3). Those uncontested material facts demonstrate that Metro, in enacting and enforcing the Client Regulations, imposes on Lij and Pat restrictions and conditions on clients to their permitted home-based businesses that it does not impose on similarly situated home-based businesses. There are, of course, some differences between those privileged home-based businesses and the businesses run by Lij and Pat. But these are not "real and substantial" differences that are "germane" to the purposes Metro claims justifies its Client Regulations. Metro's discrimination therefore violates Lij's and Pat's equal protection rights under the Tennessee Constitution, and they are entitled to judgment as a matter of law.

Respectfully submitted this 19th day of May, 2023.

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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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