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

MRB DEVELOPERS, APRIL KHOURY, HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE, OLD SOUTH CONSTRUCTION LLC, ASPEN CONSTRUCTION, and GREEN EGGS & HOMES,	)	**Case No. 19-534-I**
Plaintiffs,	)	
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

METRO'S REPLY
IN SUPPORT OF ITS MOTION TO DISMISS

The Metropolitan Government hereby files this Reply in support of its Motion to Dismiss.

"Generally, when an ordinance is repealed any challenges to the constitutionality of that ordinance become moot." *Tini Bikinis-Saginaw, LLC v. Saginaw Charter Tp.*, 836 F.Supp.2d 504, 519 (E.D.Mich. 2011) (quoting *Coal. For the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301 (1310 (11th Cir. 2000). Plaintiffs' Complaint does not challenge the current sidewalk ordinance. Rather, it challenges an ordinance that has been repealed and amended.

"Legislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates [the] requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form." *Kentucky Right to Life, Inc. v. Terry,* 108 F.3d 637, 644 (6th Cir. 1997); *see also, Brandywine, Inc. v. City of Richmond, Kentucky,* 359 F.3d 830, 836 (6th Cir. 2004) ("Plaintiffs ask this court to declare unconstitutional the zoning scheme as it existed when their license was revoked and to enjoin Richmond from enforcing that scheme. We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in

effect."); *Home Builders Assoc. of Middle Tenn. v. Metro. Gov't of Nashville and Davidson Cnty.*, 2019 WL 369271, *3-4) (dismissing appeal as moot due to General Assembly's enactment of a statute that would prohibit the enforcement of the ordinance challenged by the plaintiffs).[1]

Despite the fact that the ordinance expressly challenged by Plaintiffs has been repealed and amended, Plaintiffs argue that Metro's claim of "voluntary cessation" is insufficient to moot its claims for declaratory judgment and injunctive relief. Plaintiffs are correct that "where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, 'the case remains alive and suitable for judicial determination.'" *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't,* 460 F.3d 717, 720 (6th Cir. 2006).

But in the cases cited by Plaintiffs in opposition to Metro's Motion, the plaintiffs themselves continued to be harmed. *See Sullivan v. Benningfield,* 920 F.3d 401 (6th Cir. 2019) ("But the new law had no impact on Plaintiffs, as the statute impacts only sentences imposed *after* the effective date of the statute. Thus, the statute fails to stop the differential treatment Plaintiffs continue to suffer: not receiving the sentencing credit that was awarded to inmates who forfeited their fundamental right to procreate. Thus, neither of the changes to the law has ceased the allegedly unconstitutional differential treatment that any of the Plaintiffs faced, and they do not moot Plaintiffs' claims.") (emphasis added); *Cam I,* 460 F.3d at 719-720 ("The amendments to Chapter 111 do not render the issues in this case moot. A case is only moot when a live controversy no longer exists such that a court is no longer able to affect the legal relations between the parties.") (emphasis added); *Hamilton County Educ. Ass'n v. Hamilton County Bd. of Educ.*, 822 F.3d 831, 836 (6th Cir. 2016) ("The substance of the relevant EPNA provisions

[1] While Plaintiffs' claims seeking declaratory and injunctive relief are moot, their claims for monetary relief related to how the former ordinance was applied to their property are not. *Saginaw,* 836 F.Supp.2d at 520 ("Generally, however, courts distinguish between claims seeking declaratory and injunctive relief, which may be mooted by the repeal of a statute, and claims seeking monetary relief, which generally are not mooted.").

was not repealed or even altered, but, rather, reenacted in duplicate form in PECCA, thereby preserving the controversy between HCEA and the Board over whether Stewart's letter interfered with the exercise of employees' § 603 rights, interfered with the administration of HCEA, and assisted a rival organization. HCEA's EPNA claims are not moot.") (emphasis added).

Here, in contrast to the cases cited in their Response, Plaintiffs simply have no standing to bring a facial constitutional challenge to the new sidewalk ordinance because at this point the ordinance has not been applied to any of the Plaintiffs (or to anyone else, for that matter). "A declaratory judgment is not a ticket to bypass standing." *Massengale v. City of East Ridge*, 399 S.W.3d 118, 127 (Tenn. Ct. App. 2012). "Although a plaintiff in a declaratory judgment action need not show a present injury, an actual 'case' or 'controversy' is still required. A bona fide disagreement must exist; that is, some real interest must be in dispute. Courts still may not render advisory opinions based on hypothetical facts." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837–38 (Tenn. 2008) (internal citations omitted). Plaintiffs should not be permitted to use this lawsuit challenging the repealed ordinance to force pre-enforcement review of the new ordinance, in which they have not demonstrated any real interest.

Further, Plaintiffs have failed to demonstrate how the remaining claims for monetary relief are properly joined:

> The Supreme Court has encouraged the joinder of claims and remedies. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The *Gibbs* Court stated: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Id.* Consistent with this policy, the requirements prescribed by Rule 20(a) are to be liberally construed in the interest of convenience and judicial economy. *Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002). Nevertheless, a plaintiff or plaintiffs are not granted free license to join multiple defendants into a single lawsuit where the claims against the defendants are unrelated. *See, e.g., Pruden v. SCI Camp Hill*, 252 Fed.Appx. 436, 437 (3d Cir. 2007) (per curiam); *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007); *Coughlin*, 130 F.3d at 1350. Nor can multiple plaintiffs pass the two-part test of Rule 20(a)(1) where each plaintiff provides a different factual background, giving rise to their "mutual" cause of action.

> *Coughlin*, 130 F.3d at 1350; *Abdelkarim v. Gonzales*, No. 06–14436, 2007 WL 1284924, *4–5 (E.D. Mich. Apr. 30, 2007).
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> The question of "[w]hether 'a particular factual situation constitutes a single transaction or occurrence' is a case-specific inquiry." *State Farm Fire & Cas. Co. v. Allied & Assoc.*, 860 F.Supp.2d 432, 444–45 (E.D. Mich.2012) (quoting *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)) (additional citation omitted). Some courts have adopted the "logical-relationship" test used in the context of Federal Rule of Civil Procedure 13 to determine whether the plaintiffs' claims arise out of "the same series of transactions or occurrences" for purposes of satisfying Rule 20's requirements. *See, e.g., Allied Assoc.*, 860 F.Supp.2d at 445 (citing *Mosley*, 497 F.2d at 1333) (citing *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610, 46 S.Ct. 367, 70 L.Ed. 750 (1926)); *In re EMC Corp.*, 677 F.3d 1351, 1357–58 (Fed.Cir. 2012). Under this test, "'Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding.'" *Allied Assoc.*, 860 F.Supp.2d at 445 (citing *Mosley*, 497 F.3d at 1333); *In re EMC Corp.*, 677 F.3d at 1358. To satisfy the logical-relationship test, there must be "substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant." *In re EMC Corp.*, 677 F.3d at 1358. Stated differently, the plaintiffs' claims "must *share* an aggregate of operative facts." *Id.* (emphasis in original) (citing *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 882 (5th Cir. 1998) and *Iglesias v. Mut. Life Ins. Co.*, 156 F.3d 237, 242 (1st Cir. 1998)).

Stojcevski v. County of Macomb, 143 F.Supp.3d 675, 682–83 (E.D. Mich. 2015) (emphasis added).

Here, the Plaintiffs do not "share an aggregate of operative facts," and while consolidation under Tenn. R. Civ. P. 42.01 might be appropriate, joinder under Tenn. R. Civ. P. 20.01 is not.

Importantly, whether these matters are joined or consolidated could have very different effects on the outcome of this lawsuit, which cannot be predicted at this juncture:

> To understand the requirements for and the consequences of permissive joinder of parties under Rule 20.01, it is useful to distinguish joinder of parties from consolidation of actions under Rule 42.01. Plaintiffs and defendants properly joined under Rule 20 .01 are *all parties to the same civil action*, even when the claims by or against them are several, as opposed to joint. Consolidation of separate actions under Rule 42.01, on the other hand, *does not create one action or make those who are parties in one suit parties in another*. Consolidation simply allows a single trial of common issues and permits joint discovery for purposes of judicial economy.

> Several consequences may follow from the distinction between joinder and consolidation. *When parties are joined in an action, they and the claims by or against them must be taken into account for a number of important purposes such as determining whether ... a judgment is a final appealable order.... When actions are consolidated, on the other hand, a party or a claim in only one of the actions may not be taken into account for these purposes in the other consolidated actions*.
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> The prerequisites for joinder and consolidation also differ. Consolidation is proper when there are "actions involving a common question of law or fact pending before a court." For joinder of parties in one action, on the other hand, the additional "transaction or occurrence" test must be satisfied. The claims by or against the parties must be "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences." When, therefore, multiple claims that will entail decisions on common issues of law or fact cannot be joined because of limitations on joinder, consolidation may provide a beneficial alternative for achieving judicial economy.

City of New Johnsonville v. Handley, 2005 WL 1981810, *9 (Tenn. Ct. App. Aug. 16, 2005) (quoting Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 6-5(b) (1999)).

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
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