No. M2023-01568-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE

AT NASHVILLE

ELIJAH SHAW and PATRICIA RAYNOR,

Plaintiffs-Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant-Appellee.

On Appeal from the Final Judgment of the Chancery Court for Davidson County, Tennessee, Twentieth Judicial District at Nashville, No. 17-1299-II

BRIEF OF APPELLANTS ELIJAH SHAW AND PATRICIA RAYNOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Codes and Rules

STATEMENT OF THE ISSUES

1. Was it error to grant summary judgment to Metro on the Homeowners' Tennessee Constitution equal protection challenge to the "keep and turn over a customer register" requirement?

2. Was it error to grant summary judgment to Metro on the Homeowners' Tennessee Constitution equal protection challenge to the "three-per-hour and six-per-day" customer visit limits?

3. Was it error to grant summary judgment to Metro on the Homeowners' Tennessee Constitution equal protection challenge to the "customer visit hours and days" restriction?

STATEMENT OF THE CASE

I. Nature of the Case

This is an as-applied equal protection challenge, arising under Tenn. Const. art. I, § 8, and art. XI, § 8, to portions of an ordinance that differentially regulates home-based businesses who serve clients in their homes. When Plaintiffs-Appellants, Elijah "Lij" Shaw and Patricia "Pat" Raynor (the "Homeowners") originally filed this case, Defendant-Appellee, the Metropolitan Government of Nashville and Davidson County ("Metro"), completely prohibited them from having clients to their

home-based businesses but allowed thousands of other home-based businesses to have clients. R.1-27; *Shaw v. Metro. Gov't of Nashville & Davidson Cnty.*, 651 S.W.3d 907, 909 (Tenn. 2022). Homeowners have owned and occupied residential homes within Metro's jurisdiction for many years. Since 2005, Lij has had a professional-quality recording studio in a detached accessory unit on his property. R.2759. And in 2013, Pat, a licensed cosmetologist, secured a state license to operate a single-chair salon in her renovated garage. R.2763-65. Homeowners unknowingly violated Metro's selective client prohibition until Metro enforced it against them. R.2761, R.2765-66. Homeowners then sued to have Metro's regulation declared a violation of the Tennessee Constitution and sought injunctive relief. R.1-27.

While the challenge to the original regulation was being litigated, Metro changed its law. *Shaw*, 651 S.W.3d at 909. The new regulation, now found at Nashville, Tenn., Metro. Code § 17.16.250(D)(3), allows the Homeowners to have *some* "customer visits" to their home-based businesses, but continues to allow the privileged home-based businesses to have more customers on better terms. The Tennessee Supreme Court held that Homeowners' case was not moot and remanded to the Chancery

Court for further proceedings regarding Metro's new home-based business regulation. *Shaw*, 651 S.W.3d at 918.

On remand, the Homeowners filed an amended complaint that addressed the amended regulatory scheme as an equal protection violation. R.2032. The basis of the Homeowners' claim is that three "customer visit" provisions of the new regulatory scheme adversely affect the Homeowners, but do not apply to certain privileged home-based businesses. The three challenged provisions are (1) that 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," (2) that customer visits "shall be limited to no more than three visits per hour and a maximum of six total visits per day," and (3) that a permitted home occupation "shall maintain and make available to the codes department a log or register of customer appointments for each calendar year." Metro. Code § 17.16.250(D)(3)(a, b, c). And the four categories of home-based businesses that are exempt from the three provisions are: (1) the thousands of owner-occupied short-term rentals, (2) home daycares, (3) historic home events, and (4) at least thirteen residential homes that have been spot-zoned into a "specific plan" ("SP") that allow customer-

serving businesses. R.2045-50. Even though all these categories fit Metro's definition of a "home occupation," none of them are subject to the three customer visit regulations. R.2767-72, R.2773-81. Homeowners seek only as-applied prospective relief. R.2055-56.

II. Course of Proceedings

The Homeowners originally filed this lawsuit in the Chancery Court for Davidson County on December 5, 2017. R.1-27. The Chancellor denied Metro's motion to dismiss on April 13, 2018. R.114-17. The written order noted that the Homeowners had "pled with great specificity in alleging [the Client Prohibition] to be unconstitutionally arbitrary, and violative of their equal protection[] rights" and that such a claim must be resolved based on the facts. R.116. Metro answered the Homeowners' complaint on May 21, 2018. R.134-39.

Discovery revealed a dispute between the parties about the relevance of facts under Tennessee rational-basis review. Homeowners "made significant efforts to discover information from Metro and develop facts they believe are relevant to their as-applied constitutional challenge." R.1889. Metro objected to the Homeowners' efforts to discover

Metro's interests in maintaining, enforcing, and differentially applying its regulations to Homeowners. *See* R.150-52, R.155-58, R.169-71.

Homeowners and Metro initially cross-moved for summary judgment on June 14, 2019. R.176, R.198. The dispute centered again on the relevance of facts. The Homeowners submitted 295 facts in their Tenn. R. Civ. P. 56.03 statement. R.201-51. Metro admitted 293 of those facts with an assertion that "the particular facts of this case are largely irrelevant." R.1837. For its part, Metro submitted six facts in its Rule 56.03 statement, all of which the Homeowners admitted. R.196-97, R.1834-35. Following the completion of briefing and oral argument, the Chancellor entered final judgment for Metro in an opinion that made no citation to the record, see R.1889-1914, despite the submission of "voluminous materials" in the record. R.1890. The Homeowners timely appealed. R.1915.

As noted, while that appeal was pending, Metro changed its law to allow Homeowners to have *some* "customer visits" to their home-based businesses but continued to treat Homeowners worse than other home-based businesses. The Court of Appeals held that this mooted Homeowners' case. The Tennessee Supreme Court, however, "vacate[d]

the judgments of the lower courts and remand[ed] the case to the trial court, to permit the parties to amend their pleadings, and for any further proceedings," because "the record contain[ed] no information" about the affect of the amended regulatory scheme on Homeowners or its "alleged legal flaw." *Shaw*, 651 S.W.3d at 918.

Consistent with the Supreme Court's remand, the Homeowners filed an amended complaint to address the amended regulatory scheme, its harms to Homeowners, and asserted a Tennessee Constitution equal protection challenge to the customer visit provisions set forth at Metro. Code § 17.16.250(D)(3). R.2032-56. The equal protection claim again asserts that there is no real and substantial difference between Homeowners' businesses and the thousands of home-based businesses that Metro allows to serve customers in residential homes on more favorable conditions. *See* R.2053-55. Metro answered. R.2064-67.

Primarily relying on the "voluminous materials" already in the record, R.1890, the parties engaged in limited discovery regarding Metro's interests in maintaining, enforcing, and differentially applying its new home occupation regulations to Homeowners.

Homeowners and Metro again cross-moved for summary judgment on May 19, 2023. R.2068, R.2721. The dispute again centered on the relevance of facts. Homeowners submitted 218 facts in their Tenn. R. Civ. P. 56.03 statement. R.2757-92. Metro admitted 201 of those facts. R.3494-3507. For its part, Metro submitted only four facts in its Rule 56.03 statement, all of which the Homeowners admitted. R.2086, R.3387-88. Following completion of briefing, the Chancellor heard oral argument on September 21, 2023. *See* R.3567.

III. Disposition in the Court Below

The Chancellor granted summary judgment to Metro and denied summary judgment to Homeowners on October 10, 2023. R.3535-57. Relying on a "very deferential standard" of review, R.3553, the court rejected the equal protection challenge. The court, however, never determined if the privileged home-based businesses are similarly situated. Rather, conflating substantive due process with equal protection, the court found that "Metro has proffered real, rational and appropriately related reasons for the restriction on Plaintiffs' home-based businesses." R.3556. But the court did not explain any justification for differently regulating Homeowners from the privileged home-based

businesses. According to the court, "the fact that the Metro Code selectively exempts a few categories of businesses from the Client Visit Restrictions, or that some real properties have been rezoned as SP so they could serve the public, is not a basis to invalidate the law." R.3554. But on this issue, all the court said was that:

> Metro Council members and citizens have expressed genuine concern about the commercialization of their neighborhoods and the need to put guardrails in place if customers were allowed to visit home-businesses. Limited exceptions to the Client Visit Restrictions exist in the Metro Code for daycares and historic home events. STRPs are a more problematic exception and the Court does not dismiss their interference with the residential nature of Nashville's residential neighborhoods. The Metro Council and Metro government generally are clearly grappling with that issue, which is not before the Court today. Just because they are allowed, however, does not invalidate the logic behind the Client Visit Restrictions or persuade the Court that they are arbitrary or otherwise unreasonable.

R.3555.

The Homeowners timely filed their notice of appeal on November 7, 2023. R.3559. The record was filed on March 8, 2024. The Homeowners now submit this Brief.

STATEMENT OF FACTS

Homeowners are both residents of Nashville who currently operate permitted "Home Occupations" in compliance with the law. R.2758,

R.2761, R.2766. As is relevant here, Metro regulates customer visits to "Home Occupations," including Homeowners', R.2758-59, as follows:

> 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.

Metro. Code § 17.16.250(D)(3). Yet Metro does not impose these customer visit regulations on the thousands of privileged home-based businesses. R.2769, R.2770-72, R.2773-81.

I. Lij Shaw and his home recording studio.

Lij Shaw 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. R.2759. Well-respected musicians have used Lij's studio, and a Grammy-winning album was mixed there. R.2760. The

studio is fully soundproofed. *Id*. 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*. None of Lij's neighbors has ever complained to Lij about the Toy Box Studio, for any reason. *Id*.

Between 2005 and 2015, Lij earned money by recording musicians at The Toy Box Studio. *Id*. And although it was legal for Lij to have a home recording studio, it was illegal for Lij to have any clients or patrons at his home recording studio. R.2760-61. Based on an anonymous complaint in 2015, Metro began to enforce this prohibition against Lij. R.2761. But before 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*.

Lij is now allowed some clients, but the customer visit 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. R.2762. For the same reasons, he needs and wants

to be able to again have more than six clients per day. *Id*. 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.* And although he does not accept "walk-in" clients, he 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. R.2762-63.

II. Pat Raynor and her home salon.

Pat Raynor is a licensed professional hairstylist who has been, with rare exceptions, self-employed ever since she began her career in 1970. R.2763. 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 only working part-time made it difficult to meet the overhead costs of commercial space. R.2763-64. Pat's home salon was inspected and approved by the state cosmetology board. R.2764. 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. R.2764-65.

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. R.2765. And although it was legal for Pat to have a home salon, it was illegal for Pat to have any clients or patrons at it. *Id.* Based on an anonymous complaint in 2013, Metro began to enforce this prohibition against Pat. R.2765-66.

Pat is now allowed some clients, but the customer visit 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. R.2764-65. But she occasionally had more than three clients at a time or in the same hour and more than six clients a day. R.2766. Pat wants the flexibility to return to occasionally having more than three clients at a time or in the same hour and more than six clients a day. R.2766-67. 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. R.2767.

III. Privileged home-based businesses are not subject to the customer visit regulations.

There are thousands of home-based businesses in Nashville that are not subject to the customer visit regulations. The thousands of owner-occupied short-term rentals are specifically exempted from the customer visit regulations. R.2769; Metro. Code § 17.16.250(E). Day care homes are not subject to the customer visit regulations. R.2770. Historic home events are not subject to the customer visit regulations. R.2771. Finally, through "specific plan" (SP) spot zoning, Metro has allowed at least thirteen properties (across eleven ordinances) to have customer visits to businesses in residential homes in residential neighborhoods—including restaurants, retail, offices, hair salons, and, potentially, additional hair salons and recording studios—not subject to the customer visit regulations in Metro. Code § 17.16.250(D)(3). R.2773-81 (detailing SPs).

As is explained in Part II of the Argument below, these privileged home-based businesses are similarly situated to the Homeowners' "home occupations." 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. R.2767. Owner-occupied short-term rentals, day care homes, and historic home events meet each of the three elements necessary to be a home occupation, R.2768, R.2770, R.2771, and yet are regulated more favorably. And the identified SPs—which are residential homes in residential neighborhoods—are also similarly situated to Homeowners' home occupations and yet are regulated more favorably.

The Chancellor found that Metro's unequal treatment of Homeowners and the privileged home-based businesses was justified because the customer visit regulations further a legitimate interest in protecting the residential character of Nashville neighborhoods. R.3554, R.3557. But the undisputed record reflects that each of the privileged home-based businesses affects a neighborhood's residential character to the same or greater degree as do Homeowners:

- Metro admits that owner-occupied short-term rentals detract from the residential nature of residential neighborhoods and cause issues with noise, traffic, parking, trash, and "general lewdness." R.2788.
- Metro admits that it receives more complaints—they are a "daily occurrence"—about owner-occupied short-term rentals—involving issues of over-occupancy, noise, traffic, parking, trash, and lewd behavior—than it does home recording studios or home hair salons. R.2788-90.

- Metro admits that owner-occupied short-term rentals are "more 'commercial' in nature and not suited for residentially zoned areas," but nonetheless regulates them less harshly than it does Homeowners. R.2790.

- Metro admits that day care homes can affect the residential character of a neighborhood, including by presenting issues of traffic and parking. *Id.*

- Metro admits that day care homes generate more parking and traffic complaints than do home recording studios and salons. R.2791.

- Metro admits that historic home events present noise, traffic, and parking issues. *Id.*

- Metro admits that historic home events generate more complaints about noise, traffic, and parking than do home recording studios and salons. R.2791-92.

- Metro has enacted at least eleven ordinances to rezone specific residential properties as SPs to allow customers to be served in residential homes within a residential area. R.2772-73.

- These specifically identified ordinances do not limit the number of clients per hour, or per day, generally do not restrict client visit hours, or mandate the business operate by appointment only or maintain and make available to the Codes Department a log or register of customer appointments. R.2773-81.

- Because they are not limited, SPs logically cause greater traffic, parking, and other identified impacts on residential neighborhoods. Metro speculates that this may not be true, R.2792, but the reasons for its speculation—plenty of parking or location near a busy road or commercial node—are also true of Homeowners. R.2759-60, R.2763-64.

The Chancellor neither mentioned nor engaged with any of these undisputed facts in its opinion below.

ARGUMENT

The Chancery Court erred in denying summary judgment to Homeowners and also in granting summary judgment to Metro. As explained below, the Chancellor erred by disregarding Tennessee's equal protection analysis. Under that analysis, the undisputed material facts demonstrate that Homeowners are similarly situated to the privileged home-based businesses. The undisputed material facts also demonstrate that there are no real and substantial differences between Homeowners and the privileged home-based businesses that are germane to the purposes of each of the three customer visit regulations to justify Metro's worse treatment of Homeowners compared to the privileged home-based businesses. Finally, Metro's uncontested material facts did not entitle it to judgment as a matter of law.

This Court "review[s] a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness." *Rye v. Women's Health Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015).

For the reasons set forth below, this Court should REVERSE the Chancery Court and REMAND for judgment in Homeowners' favor.

I. The Chancellor Erred in Disregarding Tennessee Equal Protection Analysis.

A. Tennessee equal protection requires consideration of the facts.

Two provisions of the Tennessee Constitution, Article I, § 8, and Article XI, § 8, "encompass the equal protection guarantee." *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994). 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. Thus, 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 customer visit restrictions 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 is fundamental); *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (right to earn a livelihood is fundamental); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (right to privacy is fundamental), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008). But here, Homeowners are entitled to judgment as a matter of law 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). As the Supreme Court recognized, the longstanding standard under the Tennessee Constitution is that:

> [T]he classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against. *There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the* classification . . . . *The fundamental rule is that all classification 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 in original) (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 775-76 (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), plaintiffs win under the real and substantial standard when "evidence in the record" counters the presumption. *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).

B. The Chancellor collapsed substantive due process and equal protection and never conducted the required equal protection analysis.

The Chancellor did not analyze Homeowners' equal protection claim. Instead, the Chancellor conducted the analysis for a substantive due process claim that was not at issue. Though their analyses sometimes converge, equal protection and substantive due process protect distinctly

different interests. "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609 (1974); *accord Taylor v. Miriam's Promise*, No. M2020-01509-COA-R3-CV, 2022 WL 1040371, at *6 (Tenn. Ct. App. Apr. 7, 2022) ("Generally, due process and equal protection analyses merit separate consideration.").

Thus, laws violate equal protection when they regulate similarly situated people differently, *even if* there is a basis for some regulation. In other words, a law that is reasonable under due process and would perhaps be upheld if applied to all may nonetheless violate equal protection when applied unequally and arbitrarily. In *Tester*, for example, the Tennessee Supreme Court considered a jail work release program that only applied to three counties. 879 S.W.2d at 825. The Court recognized that there were good reasons for having a work release program. *Id.* at 829. But the record showed that "no rational basis exists for limiting the application of the statute to three counties." *Id.* at 826.

To the extent the program was meant to address jail overcrowding, other county jails—excluded from the program—were also overcrowded; thus "there [was] no evidence in the record to support the State's claim that the counties included within the law have, in fact, experienced jail overcrowding . . . to a greater extent than the other 92 counties." *Id.* at 829. And though there were some differences between the included and excluded counties—a metropolitan form of government, for example—these differences were not germane to the jail overcrowding issue. *Id.* The program therefore violated equal protection. *Id.* at 830. Similarly, 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 at 736. The Court did so because the law left others able to maintain similar or larger tanks, which undermined the asserted purpose of the regulation, and "unquestionably denie[d] the equal protection of the laws." *Id.* at 736-37.

This Court's equal protection and zoning cases are in accord. In *Consolidated Waste*, this Court recognized that "dust, noise, traffic, and other considerations associated with C&D landfills" were hazardous and

a reason to regulate C&D landfills. 2005 WL 1541860, at *33-34. But these same considerations were also characteristic of several other types of landfills, which were regulated differently. *Id*. Accordingly, this Court held that it was arbitrary and unreasonable to require C&D landfills, but not the other landfills, to be located at least two miles away from schools and parks. *Id*. at *33-36. And in *Board of Commissioners of Roane County v. Parker*, this Court recognized that a zoning ordinance was "in the public interest, since [it was] concerned with [the keeping of] dangerous animals." 88 S.W.3d 916, 922 (Tenn. Ct. App. 2002). Nevertheless, the court held it arbitrary and capricious to rezone one semi-rural property for the keeping of large exotic animals but deny the same rezoning to another rural property. *Id*. at 921-22. That finding was based on the "totality of the circumstances" which allowed the plaintiffs to "carr[y] the[ir] burden of proof" that the differential treatment was not based on sufficient reasons. *Id*. at 922.

Federal equal protection is in accord. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the U.S. Supreme Court recognized that a regulated land use—a group homes for people with intellectual disabilities—did threaten legitimate interests such as "fire

hazards, the serenity of the neighborhood, and the avoidance of danger to other residents." *Id.* at 450. But the group home was regulated differently than other kinds of group living such as apartments, dormitories, and "nursing homes for convalescents or the aged." *Id.* at 447. Under equal protection, the question was whether the group home "would threaten legitimate interests of the city in a way that other permitted uses . . . would not." *Id.* at 448. Because the record did not reveal "any special threat to the city's legitimate interests," from the group home compared to the others, the differential treatment was unconstitutional. *Id.* at 448-51.

Here, the Chancellor did not determine whether Homeowners were similarly situated to the privileged groups, much less whether that difference in treatment was justified. Instead, the Chancellor found only that regulations of home-based businesses were allowed. R.3554-56. More specifically, the Chancellor concluded that the regulation of home-based businesses, including the challenged customer-visit restrictions, "represent[] a balance between the rights of homeowners like Homeowners who want to operate home-businesses, and neighbors who

are concerned about preserving the residential natures of their neighborhoods." R.3557.

But this conclusion does not justify drawing *different* balances for *similarly situated* home-based businesses. As explained below, the undisputed material facts demonstrate that Plaintiffs are similarly situated to the privileged home-based businesses but are arbitrarily and unreasonably treated worse. The Chancery Court therefore erred and this Court should reverse.

II. The Undisputed Material Facts Demonstrate that Homeowners are Similarly Situated to the Privileged Home-Based Businesses.

Though the Chancellor did not determine whether the Homeowners were similarly situated to the privileged home-based businesses, the undisputed material facts demonstrate that they are similarly situated. As discussed below, Homeowners are similarly situated to the privileged home-based businesses with regard to the purpose of "balancing" home-based business and the residential nature of residential neighborhoods. *See Tester*, 879 S.W.2d at 829 ("The fundamental rule is that all classification must be based upon substantial distinctions . . . and the

characteristics which form the basis of the classification must be germane to the purpose of the law." (cleaned up)).

A. Owner-Occupied Short-Term Rentals

Unlike Homeowners, 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. 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); R.2768. 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. R.2768; *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." R.2769.

While owner-occupied short-term rentals meet each of the three elements of a home occupation, R.2768, they are not subject to the customer visit regulations. R.2769; 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. R.2769. 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.*

It is irrational to treat Homeowners worse than owner-occupied short-term rentals if Homeowners have no more effect on the nature of residential neighborhoods than do short-term rentals. *Tester*, 879 S.W.2d at 829; *Consolidated Waste*, 2005 WL 1541860, at *33-34; *accord Cleburne*, 473 U.S. at 448. Metro admitted that short-term rental guests

detract from the residential nature of residential neighborhoods. R.2788. Even the Chancery Court could "not dismiss their interference with the residential nature of Nashville's residential neighborhoods." R.3555. Owner-occupied short-term rentals are the source of daily complaints because they cause noise, traffic, parking, trash, and "general lewdness" problems. R.2788. Indeed, they all cause these impacts in residential neighborhoods to a greater degree than home recording studios or salons. R.2789-90. Metro itself determined that short-term rentals are "more 'commercial' in nature and not suited for residentially zoned areas," but nevertheless continued to allow them. R.2790. Metro even took the position, when it adopted the customer visit restrictions challenged here, that the "consequences" of short-term rentals were such that they should be further restricted, but they are not. R.2781. In other words, Metro claims that restrictions on "the number of client visits" for Homeowners mean they "will not cause too much traffic," *id.*, while continuing to allow owner-occupied short-term rentals (which cause more problems) more clients, without restrictions on days or times.

Indeed, the Chancellor never found—or even suggested—that Homeowners were not similarly situated to owner-occupied short-term

rentals. R.3554-56. And the only argument Metro raised to distinguish its treatment of short-term rentals from Plaintiffs was that:

> Short-term renters are basically renting a space to sleep, eat, and rest, which are activities that typically occur in a residential district. Allowing short-term rentals across Nashville was determined to be in the public interest because of the shortage of hotel rooms. Later, the Metropolitan Council determined that this use was more "commercial" in nature and not suited for residentially-zoned areas – so it restricted non-owner occupied short-term rental use in one and two-family residential neighborhoods.

R.2080 (ordinance citations omitted). But this argument fails to identify a single factual difference that is germane to the claimed purpose of the customer visit restrictions—to protect the residential character of Nashville neighborhoods.

Moreover, Metro's assertion finds no support in the undisputed record of this case. Metro admits that short-term rentals are "'commercial' in nature and not suited for residentially zoned areas." R.2790. The record evidence about noise, traffic, parking, trash, and general lewdness show that owner-occupied short-term rentals involve far more than just sleeping, eating, and resting. R.2788-90. Homeowners are restricted as to clients because of allegedly negative effects that their clients may have on the neighborhood, R.2077-79, R.3554-57, but Metro's

asserted difference between short-term rentals and Homeowners—sleeping, eating, and resting versus recording music and cutting hair——is not a real and substantial difference that is germane to the purpose of the client visit regulations because that difference does not address the effects that clients may have on a neighborhood when visiting. Similarly, a claimed "shortage of hotel rooms" is also not "real and substantial" or "germane" to the preservation of residential neighborhoods.

The uncontested material facts show that this case is like *Tester*, *Consolidated Waste*, and *Cleburne*. As in *Tester*, where the Court rejected jail overcrowding as a justification for limiting a prisoner work-release program to some counties with overcrowded jails but not others, 879 S.W.2d at 829, Metro cannot rely on "preserving residential neighborhoods" to justify strict customer visit restrictions on Homeowners, but not owner-occupied short-term rentals, when the record reflects that customer visits to owner-occupied short-term rentals affect a neighborhood's residential character to a *greater degree* than do customer visits to Homeowners. *Consolidated Waste* says the same thing; Metro cannot regulate one group strictly and another group more leniently when the justification for strict regulation applies to both

groups, and indeed applies more forcefully to the leniently-regulated group. 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 Homeowners' equal protection rights under the Tennessee Constitution. And, as explained below, there is no justification for this differential treatment with regard to any of the three specific customer visit regulations at issue here.

B. Day Care Homes

Unlike Homeowners, Metro allows day care homes to serve up to 12 clients a day—even all at the same time—without restriction as to appointments, day of the week, or time of day, and without being required to maintain and make available to the Codes Department a log or register of customer appointments. 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. R.2770. Metro allows one day care home per street block—and in some cases more—provided that the day care home meets the requirements for and obtains a special exception permit. *Id.* Metro has granted eleven special exception permits for day care homes to operate in residential districts. *Id.*

While day care homes meet each of the three elements of a home occupation, they are not subject to the customer visit regulations. R.2770-71. Day care homes can accommodate up to twelve clients at a time. R.2770. They can serve clients without restriction as to appointments, day of the week, or time of day. *Id.* They are not limited to three client visits per hour or six total visits per day. R.2771. And they do not have to maintain and make available to the Codes Department a log or register of customer appointments. *Id.*

It is irrational to treat Homeowners worse than day care homes if Homeowners have no more effect on the nature of residential neighborhoods—if they no more upset the "balance"—than do day care homes. *Tester*, 879 S.W.2d at 829; *Consolidated Waste*, 2005 WL 1541860, at *33-34; *accord Cleburne*, 473 U.S. at 448. Metro admits that day care

homes affect the residential character of a neighborhood, especially with regard to traffic and parking; and indeed, they affect neighbors to a greater degree than do Homeowners. R.2790-91. For example, even though Metro cites too much "traffic" as a reason to restrict Homeowners, R.2783, day care homes cause more traffic, R.2790-91, again without restriction on days or times. Indeed, under Metro's own trip generation calculations, Homeowners' clients generate, at most, the same number of "trips" (and even fewer trips if they drive themselves or carpool) as parents dropping off and picking up children at a home daycare. R.3389.

Again, the Chancellor never found—or even suggested—that Homeowners were not similarly situated to day care homes. R.3554-56. The only argument Metro raised to distinguish its treatment of day care homes from Plaintiffs was that "[c]aring for children in a home is entirely consistent with residential use of a home," that state licensing, including inspections and background checks also applied to home daycares, and that "a special exception permit" is required for home daycares "which means only certain size lots are eligible, street standards must be met, and landscape buffers are required." R.2081. But, as with its argument regarding short-term rentals, Metro's asserted differences between

Homeowners and day care homes are not "germane to the purpose" of the customer visit restrictions. *Tester*, 879 S.W.2d at 829 (cleaned up). First, while "[c]aring for children in a home is entirely consistent with residential use of a home," R.2081, the relevant question here is the effect that clients to a home-based business have on the neighborhood. The uncontested record evidence shows that Homeowners' clients have the same or less impact. Second, that home daycares may be subject to state licensing, inspections, and employee background checks—all done for the benefit of the children in the daycare—is not relevant to the effects that clients of those home daycares have on neighborhoods. Third, Metro's special exception permit is also not germane to the customer visit regulations because lot sizes, street standards, and landscape buffers are not related to the effects that clients have on a residential neighborhood and, regardless, the facts show that Homeowners *still* have less effect on neighborhoods than do day care homes. R.2790-91. Moreover, this Court rejected this same argument in *Consolidated Waste*. There, Metro argued that a two-mile buffer for C&D landfills, which did not apply to sanitary landfills, was justified because "construction of C&D landfills can be permitted without Council approval, while sanitary landfills must secure

such approval" and therefore "an additional buffer requirement was only necessary for C&D landfills." *Consol. Waste*, 2005 WL 1541860, at *35. But this Court held that "the requirement of Council approval for sanitary landfills" was not "relevant to the question of whether there is a rational basis for an ordinance establishing the two-mile buffer on C&D landfills only." *Id*. Similarly here, the question is whether there is "a rational basis for an ordinance" that restricts client visits to Homeowners' home-based businesses differently than to home daycares.

In short, the facts show that, while there may be reason to regulate Homeowners' home-based businesses, there is no reason to regulate them more harshly than home day cares because Homeowners don't upset the "balance" in residential neighborhoods more than home day cares. And, as explained below, there is no justification for this differential treatment with regard to any of the three specific customer visit regulations at issue here.

C. Historic Home Events

Unlike Homeowners, Metro allows historic home events to serve clients without restriction as to numbers, 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. 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." R.2771. Metro has granted seven permits for historic home events to operate in residential districts. *Id.* Historic home events meet each of the three elements of a home occupation. *Id.* Historic home events are not subject to the customer visit regulations. *Id.* Historic home events can serve clients without restriction as to appointments, day of the week, or time of day. *Id.* Historic home events are not limited to three client visits per hour or six total visits per day. R.2772. Historic home events do not have to maintain and make available to the Codes Department a log or register of customer appointments. *Id.*

As with the other privileged home-based businesses, it is irrational to treat Homeowners worse than historic home events if Homeowners have no more effect on the nature of residential neighborhoods—if they no more upset the "balance"—than do historic home events. *Tester*, 879 S.W.2d at 829; *Consolidated Waste*, 2005 WL 1541860, at *33-34; *accord Cleburne*, 473 U.S. at 448. And the uncontested record again

demonstrates that historic home events present noise, traffic, and parking issues in residential areas to a greater extent than Homeowners' businesses. R.2791-92.

Again, the Chancellor never found or suggested that Homeowners were not similarly situated to historic home events. R.3554-56. Metro only argued that historic home events were different because:

> Historic home events require a special exception permit from the BZA, which may impose conditions, including limits on the number and frequency of events. The general public is not invited into the home – it is open for special events. The owner of the property must reside in the home, and the home must be a historically significant structure, as determined by the Historic Zoning Commission.

R.2081 (ordinance citations omitted). Again, Metro's asserted differences between Homeowners and historic home events are not "germane to the purpose" of the client visit restrictions. Whether a home is a "historically significant structure" is not germane to the potential effects that clients to that home may have on neighborhoods. Metro claimed that historic home events *might* be subject to discretionary limits on the number and frequency of events, but there is no evidence that a single historic home event is actually subject to similar restrictions on the hours for clients visits as Homeowners—only that it might be "possible." R.3495. *Cf.*

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) (historic home could not be denied a permit for up to six events per week, including "two large events each week over 40 guests"). And as with home day cares and *Consolidated Waste*, *potential* administrative conditions that Metro might apply are not relevant to the regulatory distinctions it makes in ordinances. *Consol. Waste*, 2005 WL 1541860, at *35.

Again, the facts show that, while there may be reason to regulate Homeowners' home-based businesses, there is no reason to regulate them more harshly than historic home events because Homeowners don't upset the "balance" in residential neighborhoods more than historic home events. And, as explained below, there is no justification for this differential treatment with regard to any of the three specific customer visit regulations at issue here.

D. Specific Plans

Metro has created a number of identified "specific plan" properties that are residential homes in residential neighborhoods that are allowed to serve clients without restriction as to numbers, 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. 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." R.2772. Any property, including a residential property, may apply for rezoning as an SP district. *Id.* 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.* 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. R.2773-81 (detailing each SP).

These SPs are governed by their own ordinances and are, therefore, not subject to the customer visit 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. R.2774-81. 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. R.2773. At least one SP operates the same business—a hair salon—as Pat, R.2774-75, and other SPs are allowed to operate hair salons or recording studios, R.2774, R.2776, R.2777, R.2779-80.

Given these obvious similarities, the Chancellor never found or suggested that Homeowners were not similarly situated to these specifically identified SPs. R.3554-56. Metro claimed[1]—based on unauthenticated, undated, unverified, and cropped screenshots from

[1] Metro's primary argument was that, notwithstanding the obvious similarities, Homeowners could not compare themselves to SPs because Homeowners did not appeal the denial of their own SP applications. R.2082. The Chancellor rejected this same argument in 2019. R.1904. Specific Plan rezoning is a legislative, not administrative, action. *Brown v. Metro. Gov't of Nashville*, No. M2011-01194-COA-R3-CV, 2013 WL 3227568, at *5-6 (Tenn. Ct. App. June 21, 2013). There is no exhaustion requirement to bring a constitutional challenge involving an SP. *See id.*

Google Maps—that some of the SPs were not single-family houses in a residential neighborhood because they were on busy roads or near commercial areas. R.3496-3505. *Cf. Meyers v. First Tenn. Bank, N.A.*, 503 S.W.3d 365, 379 (Tenn. Ct. App. 2016) ("To consider facts at the summary judgment stage, they 'must be included in the record . . . and they must be admissible in evidence.'") Regardless, the uncontested facts show that Pat also lives on a busy road, R.2763-64, and that Lij lives near a commercial area—by an auto diesel college and busy train track, R.2759. Therefore, even if Metro's unauthenticated, undated, unverified, and cropped screenshots from Google Maps are accepted as true, they are not a basis for distinguishing Homeowners from the privileged SPs.

The facts show that there is no reason to regulate Homeowners more harshly than these SPs because Homeowners don't upset the "balance" in residential neighborhoods more than these SPs. And, as explained below, there is no justification for this differential treatment with regard to any of the three specific customer visit regulations at issue here.

III. The Undisputed Material Facts Demonstrate There is No Real and Substantial Difference That is Germane to the Law's Purpose to Justify Discrimination against Homeowners.

The Chancery Court's failure to engage in the proper constitutional analysis is made all the more stark considering the three client visit restrictions at issue here. As explained in Part II, Homeowners are similarly situated to the privileged home-based businesses. As discussed below, there is no basis on which to discriminate against Homeowners regarding the three customer visit regulations at issue here. Metro. Code § 17.16.250(D)(3).

A. Metro's discriminatory "keep and turn over a customer register" requirement lacks a real and substantial difference that is germane to the law's purpose.

Section 17.16.250(D)(3)(c) requires Homeowners to "maintain and make available to the codes department a log or register of customer appointments for each calendar year," but the privileged home-based businesses do not have to do the same. R.2769, R.2771, R.2772, R.2773-81. Below, Metro's only defense of this provision was that it comports with Fourth Amendment law under *City of Los Angeles v. Patel*, 576 U.S. 409 (2015). R.3491-92. Whether or not this is true—and it is likely not

true[2]—this argument does not address the equal protection challenge that Homeowners brought. As explained above, that challenge asks whether there is a "real and substantial" basis for applying that requirement to Homeowners but not the privileged home-based businesses.

The Chancellor made no findings as to the purpose of this requirement, separate and apart from its general finding that regulations of home-based businesses were allowed to "balance" client visits with effects on neighborhoods. R.3557. Metro never briefed a particular purpose of the registry either. At argument Metro claimed—contrary to the plain language of the ordinance—that "a daily number of customer visits rather than a detail of customer identities" would suffice. R.3546. But the Chancellor was "unclear" how that would be useful from a "compliance standpoint." *Id.*

Regardless, there is no reason that Homeowners are "differently situated" from the privileged home-based businesses. If the purpose

[2] *See Anderson v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2017-00190-COAR3-CV, 2018 WL 527104, at *2 (Tenn. Ct. App. Jan. 23, 2018) (noting a similar requirement for short-term rentals was enjoined and repealed).

really is just to track the number of customer visits to ensure compliance with the customer visit limits as Metro suggested, then owner-occupied short-term rentals and day care homes both have express (but higher) limits on clients per day, R.2769-70, and yet have no customer register requirement. There is no basis for this distinction; instead, the record shows that complaints about over occupancy and having too many people and too many cars at short-term rentals are common. R.2788. And given that clients to Homeowners' home-based businesses are generally *less* impactful on neighborhoods than clients to the privileged home-based businesses, *see supra* Part II, the undisputed facts disprove the existence of a "substantial" distinction Homeowners and the privileged home-based businesses that is "germane" to the purpose of Section 17.16.250(D)(3)(c)'s requirement to "maintain and make available to the codes department a log or register of customer appointments for each calendar year." Homeowners should therefore be treated the same as the privileged home-based businesses with regard to the customer register—Homeowners should not have to maintain one or make it available to Metro.

B. Metro's discriminatory "three-per-hour and six-per-day" customer visit limits lack a real and substantial difference that is germane to the law's purpose.

Section 17.16.250(D)(3)(b) limits Homeowners to having "no more than three [customer] visits per hour and a maximum of six total [customer] visits per day," but none of the privileged home-based businesses are so limited. R.2769, R.2771, R.2772, R.2773-81. Neither Metro nor the Chancellor ever addressed Homeowners' equal protection argument or the many facts supporting it.[3] If Homeowners are limited to three customers per hour and six customers per day in the name of

[3] Below, Metro argued for the first time at summary judgment that Homeowners are not limited to one customer per "customer visit"; that they may have multiple customers per "customer visit," and therefore that Homeowners are not really harmed by this provision. R.3489. The Chancellor noted this contested interpretation but did not address it. R.3546 (noting Metro's argument as a concession). Metro's non-binding "concession" leaves numerous unanswered questions. If Lij recorded a 15-member band in his studio, would that qualify as a single customer visit? Can Pat bring in a busload of customers and have that count as only one visit? And can Metro's regulatory scheme reasonably further an interest the sanctity of residential neighborhoods without limiting the number of customers per day given Metro's prior insistence that allowing *any* customers per day would upset the sanctity of residential neighborhoods? R.2784-85. But if Metro is correct in its interpretation of Section 17.16.250(D)(3)(b), this Court should so declare so that Homeowners can know their rights and comply with the law and so that Metro cannot later change its mind regarding Homeowners' customer visits. *See* Tenn. Code Ann. § 29-14-103.

maintaining a "balance" in residential neighborhoods, the uncontested facts showed there was no reason to allow the privileged home-based businesses to have *more* customers. Customers to those privileged home-based businesses are, as shown above, *more* upsetting of that balance than are customers to Homeowners' home-based businesses. Again, there may or may not be a legitimate reason to limit customers to home-based businesses generally, but the question here is whether there is reason to limit customers to some home-based businesses *differently* than customers to other home-based businesses. The uncontested facts disprove the existence of a "substantial" distinction between Homeowners and the privileged home-based businesses that is "germane" to the purpose of Section 17.16.250(D)(3)(c)'s limit on customer visits. Homeowners should therefore be treated the same as the privileged home-based businesses with regard to customer limits. Homeowners should be allowed at least the twelve customers per day—without restriction as to any particular number at a time—that owner-occupied short-term rentals and home daycares are allowed.

C. Metro's discriminatory "customer visit hours and days" restriction lacks a real and substantial difference that is germane to the law's purpose.

Section 17.16.250(D)(3)(a) limits Homeowners to having customer visits "only between the hours of 8:00 a.m. and 7:00 p.m., Monday through Saturday," but with the exception of just one SP, the privileged home-based businesses are not so limited. R.2769, R.2770, R.2771, R.2774-81; *cf*. R.2773 (one SP is limited to only having clients between 8:00 AM and 5:00 PM, and only between Monday and Friday). Below, neither Metro nor the Chancellor squarely addressed the equal protection issues related to this restriction or the many facts supporting it.

Again, the hours and days that Homeowners may have clients to their home-based businesses are limited in the name of maintaining a "balance" in residential neighborhoods. But the uncontested facts showed there was no reason to exempt the privileged home-based businesses from these restrictions. Customers to those privileged home-based businesses are, as shown above, *more* upsetting of that balance than are customers to Homeowners' home-based businesses. Again, there may be reason to limit the days and hours of customer visits to home-based

businesses, but the question here is whether there is reason to limit the days and hours of customer visits for some home-based businesses but not others. The undisputed facts disprove the existence of a "substantial" distinction between Homeowners and the privileged home-based businesses that is "germane" to the purpose of Section 17.16.250(D)(3)(a)'s limit on customer visits to "only between the hours of 8:00 a.m. and 7:00 p.m., Monday through Saturday." Homeowners should therefore be treated the same as the privileged home-based businesses with regard to customer visit hours and days. Homeowners should not be so limited because the privileged home-based businesses are not.

IV. Metro's Uncontested Material Facts Did Not Entitle it to Judgment as a Matter of Law.

In comparison to the numerous undisputed facts that supported Homeowners, Metro submitted just four facts, none of which went to the elements of a Tennessee equal protection claim. Those four facts were:

1. Plaintiffs operate a beauty shop and a recording studio in their respective homes.

2. Plaintiffs have home occupation permits.

3. Plaintiffs ask that the Court invalidate the Metropolitan Code provision limiting customer visits to no more than

three visits per hour and a maximum of six total visits per day.

4. Plaintiffs seek to serve up to 12 clients per day with no restrictions on the number of clients per hour or times and days of the week these visits may occur, and without being required to accept clients only by scheduled appointment and maintain a log of their customer visits.

R.2086.

None of these facts bore on the constitutional question presented: Whether Metro's differential treatment of Homeowners, compared to the privileged home-based businesses, meets the Tennessee equal protection standard set forth in *Tester*. Metro put forth no facts regarding—indeed, even mentioning—the privileged home-based businesses; addressing whether there are "substantial distinctions which make" the privileged home-based businesses "really different from" Homeowners' home-based businesses; or addressing whether the "characteristics which form the basis" of the differing treatment are "germane to the purpose" of the customer visit regulations. *Tester*, 879 S.W.2d at 829 (emphasis omitted).

Because Metro would not have borne the burden of proof at trial, it "may satisfy its burden" under Rule 56 "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary

judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264 (emphasis omitted). Metro failed to do so.[4] Metro's facts do not meet its burden because they neither "negate" Homeowners' claims nor demonstrate that Homeowners' evidence is "insufficient" to carry their burden.

To defeat Metro's summary judgment motion, Homeowners need only show "the existence of specific facts in the record which could lead [the Court] to find in [their] favor." *Id.* at 265. Courts "must accept" Homeowners' "evidence as true and view both the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the nonmoving party." *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 752 (Tenn. 2015) (quoting *Shipley v. Williams*, 350

[4] Metro also failed to do follow Tenn. R. Civ. P. 56.03, which required its motion to be supported by "'a separate concise statement of material facts as to which [Metro] contends there is no genuine issue for trial.'" *See also Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 774 (Tenn. App. 2001) (Rule 56.03 statements "are not merely superfluous abstracts of the evidence. Rather, they are intended to alert the court to precisely what factual questions are in dispute and point the court to the specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information from the record on its own." (quoting *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 923 (7th Cir. 1994))).

S.W.3d 527, 551 (Tenn. 2011)). For the reasons set forth in Parts II and III, Homeowners did show "specific facts in the record" that could (and should) lead a court to find in their favor; to wit, they are similarly situated to the privileged home-based businesses and there are no "real and substantial" differences between Homeowners and the privileged home-based businesses that are "germane" to Metro's claimed interests. Accordingly, at a minimum, the Chancery Court should have denied summary judgment to Metro and its decision should be vacated. But for the reasons stated in Parts II and III, this Court should reverse and grant summary judgment to Homeowners.

* * *

Ultimately, Metro's "four facts summary judgment" confirms its long-held position that the facts of this case just don't matter. But as explained in Part I, *supra*, facts do matter under Tennessee equal protection. *Tenn. Small Sch.*, 851 S.W.2d at 153 (the reasonableness of the differential treatment "depends upon the facts of the case" (citation omitted)). And because facts matter, Metro's failure to address the uncontested facts of this case demonstrates that Plaintiffs have met their burden to rebut any presumption in favor of Metro's ordinance.

CONCLUSION

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

Respectfully submitted this 8th day of April, 2024.

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CERTIFICATE OF E-FILING COMPLIANCE

I certify that this brief complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02. My word processing system indicates that the sections of the brief subject to the 15,000 word limitation contain 10,212 words.

/s/ Justin D. Owen
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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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