IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE
THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Elijah Shaw and Patricia Raynor (individually, "Lij" and "Pat"; collectively, "Plaintiffs") respond in opposition to the Motion to Dismiss filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). In response to Metro's arguments, Plaintiffs submit as follows: First, Metro's novel argument, that a statutory cause of action is required in order to vindicate constitutional rights, is not supported by the sources Metro cites and is contrary to longstanding authority and to the Constitution itself. Second, dismissal under Rule 12.02(6) is inappropriate because, while rational-basis review presumes the constitutionality of the challenged provision, it does not entitle Metro to offer merits arguments at the pleading stage and thereby deny Plaintiffs the opportunity to develop a record and subject Metro's arguments to factual scrutiny at the merits stage. Third, the protections afforded Plaintiffs by the Tennessee Constitution are greater than those afforded by the U.S. Constitution, making dismissal based on untested assertions particularly inappropriate under Rule 12.02(6). Plaintiffs accordingly ask this Court to DENY Metro's motion.

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I.
Statement of Facts.

Plaintiffs challenge a single sentence of the Metro Code that prohibits them from serving clients or patrons in their homes as part of the operation of otherwise-legal home-based businesses. Metro. Code § 17.16.250(D)(1) [hereinafter "Client Prohibition"] ("No clients or patrons may be served on the property."). Metro's enforcement of the Client Prohibition has hampered Lij's home-based business and destroyed Pat's. Lij and Pat were the unlucky victims of an unevenly written and unevenly enforced municipal ordinance that allows hundreds of their fellow Nashvillians to serve customers at their homes, and thereby earn a living, in a way that Lij and Pat cannot.

A. Plaintiffs Operated Home-Based Businesses in Nashville.

Since 2005, Lij has operated The Toy Box Studio in his home's detached garage. Compl. ¶ 14–15. The Toy Box Studio is professionally soundproofed, which is a business necessity that ensures the quality of Lij's recordings and keeps the peace in Lij's neighborhood. Compl. ¶¶ 20, 22. Lij, a recording industry veteran, was inspired to create his home-based recording studio by the birth of his daughter Sarayah, who he now raises as a single father. Compl. ¶¶ 13–14. It is common knowledge in Nashville that home-based recording studios exist throughout the city and play an instrumental role in Nashville's renowned status as "Music City, U.S.A." *See* Compl. ¶¶ 99–102, 131; Metro. Code § 2.62.055 (outlining Metro's duties and powers regarding "Music City" certification mark).

Pat, a lifelong hairstylist, had the idea to move her practice into her home in 2011 as a way to secure her independence in the golden years of her life. Compl. ¶¶ 38, 46. Pat, then a recent widow, has had to adjust to the financial strictures of paying down her mortgage without the help of her late husband. Compl. ¶¶ 42–46, 89. She cannot afford to retire, but as she ages, she also cannot continue to work the full-time schedule required to generate

income sufficient to rent a commercial studio. Compl. ¶¶ 45, 47–48, 92. Pat renovated the room adjacent to the driveway in the back of her house, and in April 2013, following inspection and approval from the Tennessee State Board of Cosmetology, she began styling her clients'—mostly, her neighbors'—hair there. Compl. ¶¶ 59–71.

B. Plaintiffs' Businesses Were Shut Down Under Metro's Client Prohibition.

By Thanksgiving 2013, however, someone turned Pat into the Metro Department of Codes and Building Safety ("Codes"). Compl. ¶ 72. Codes sent Pat a letter accusing her of "operat[ing] a commercial business" in her home and ordering her to cease and desist or be punished. *Id.* Pat never had a neighbor complain to her and has never learned why Codes targeted her for enforcement. Compl. ¶¶ 68–71, 76. Metro does not in fact prohibit the operation of home-based businesses; rather, its Client Prohibition makes it illegal to serve clients or patrons in a residential home. Compl. ¶ 9 (citing Metro. Code § 17.16.250(D)(1)). As Pat learned, the Client Prohibition makes her business model illegal in Nashville, even though it is permitted under state law. Compl. ¶ 74. Pat obeyed Codes's order to dismantle her home-based hair salon and then, after some heel-dragging on Codes's part, obtained confirmation that she was abiding by the law. Compl. ¶¶ 77–84.

Lij opened the mail to a similar cease-and-desist letter in September 2015. Compl. ¶ 27. At first he thought nothing of it, but about three weeks later he was contacted on his phone by a Codes officer who ordered him—without any apparent basis in the Metro Code—to rein in The Toy Box Studio's online presence by removing promotional videos, his address, and his recording rates. Compl. ¶¶ 29–31. The officer warned that if Codes ever received another report about The Toy Box Studio in the future, Codes would file a warrant and take Lij to court. Compl. ¶ 32. Lij has complied with the officer's order ever since, but has had to compensate for the sharp loss of revenue from The Toy Box Studio's intended function: recording musicians. Compl. ¶ 33. Lij, who is well-liked by his neighbors, has also

never learned how Codes came to target his home-based recording studio, and lives in fear that Codes will execute a warrant against him if it ever receives another report about The Toy Box Studio. Compl. ¶¶ 20, 35.

C. Metro Allows Hundreds of Other Homeowners to Serve Clients.

Although Lij and Pat have been shut down by the Client Prohibition, many other Nashvillians are allowed to have clients in their homes. As the Complaint alleges and Defendants' Motion acknowledges, it is unclear why Metro ever enacted the Client Prohibition. Compl. ¶ 98; *cf.* MTD at 9 (hypothesizing justifications for the Client Prohibition). Metro Codes treats the Client Prohibition as a blunt instrument to be used against home-based businesses only at the request of often-anonymous tipsters. Compl. ¶ 100. Metro otherwise tolerates, and its officials speak favorably of, the ubiquitous presence of home-based businesses throughout Nashville. Compl. ¶¶ 99–103, 131. Metro's don't-ask-don't-tell enforcement policy, *id.*, means that it cannot intend or support the full legal effect of the Client Prohibition, which would be to drive every client-serving home-based business from Nashville.

Metro admits that it treats Plaintiffs' home-based businesses worse than other home-based businesses, which Metro exempts from the Client Prohibition. *See* MTD at 9. The Metro Code allows day care homes, short-term rentals, and historic home events to receive and serve business clients inside residential homes. Compl. ¶¶ 104–122. It also allows individual property owners to obtain legislative rezoning of their properties into customizable "specific plan" or "SP" districts that can be used to permit home-based businesses to receive clients. Compl. ¶¶ 124–29 & n.3. Lij and Pat applied for legislative SP rezonings before bringing suit, each with the support of over three dozen neighbors, but their applications were denied. Compl. ¶¶ 130–33. Judicial recourse to their rights under

the Tennessee Constitution is the only way Lij and Pat can hope to earn a living in their homes without committing a crime. Compl. ¶ 134.

II.
Plaintiffs May Sue Metro for Violating Their Constitutional Rights.

Metro argues that "Plaintiffs have no private right of action to enforce the Tennessee Constitution" and therefore cannot bring this case. MTD at 4. Metro attempts to support this argument with citation to a single statute and a small number of unpublished decisions. *Id.* at 3–4. But Metro is wrong; Plaintiffs invoked the Tennessee Constitution and may sue to vindicate their constitutional rights here. First, the statute on which Metro bases its argument—Tenn. Code Ann. § 1-3-119—expressly does not apply to suits to enforce constitutional rights. Second, § 1-3-119 does not apply to rights of action existing before its enactment, and the Tennessee Supreme Court has held that the Declaratory Judgments Act ("DJA")—which predates § 1-3-119—provides the right to sue. Third, the cases Metro cites do not require this court to depart from the plain language of § 1-3-119 or published Supreme Court precedent about the DJA. Fourth, even if § 1-3-119 did apply to suits to enforce constitutional rights *and* the DJA did not separately protect that right, there are other bases for Plaintiffs' right to sue to protect their constitutional rights.

Metro's argument that § 1-3-119 requires the legislature to expressly create a private right of action to enforce constitutional rights is contrary to the plain text of that statute. That statute provides, in relevant part: "In order for *legislation* enacted by the general assembly *to create or confer a private right of action*, the legislation must contain express language creating or conferring the right." Tenn. Code Ann. § 1-3-119(a) (emphasis added). Thus, on its face, the plain language of § 1-3-119 applies only to suits to enforce *legislation*. Section 1-3-119 is silent as to the enforcement of *constitutional* rights. Because this case involves constitutional rights, Section 1-3-119 does not apply here.

Second, even if § 1-3-119 did apply to suits to enforce constitutional rights—which it does not—it still preserves preexisting rights of action and the Tennessee Supreme Court has previously recognized that plaintiffs can sue to enforce constitutional rights under the DJA. Section 1-3-119 does not "impair the ability of a court to . . . [r]ecognize a private right of action that was recognized before July 1, 2012, by the courts of this state as arising under a statute[.]" Tenn. Code Ann. § 1-3-119(c)(1). Before July 1, 2012, the Tennessee Supreme Court recognized that the DJA provides a cause of action to enforce constitutional rights against infringement by a municipal ordinance. The DJA provides, in relevant part, that

> any person ... whose *rights* ... are affected by a ... *municipal ordinance* ... may have determined any question of construction *or validity* arising under the ... *ordinance* ... *and obtain a declaration of rights*, status, or other legal relations thereunder.

Tenn. Code Ann. § 29-14-103 (emphasis added). In *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008), the plaintiff "filed suit for declaratory judgment, challenging the constitutionality of specified portions of the state tax code and seeking an injunction as to the enforcement of those provisions." *Id.* at 832. The Tennessee Supreme Court held that the DJA "grant[ed] subject matter jurisdiction to the Davidson County Chancery Court to address the constitutional issues," so long as monetary damages are not sought. *Id.* at 853; *see also Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983) (declaratory action "is the proper remedy to be employed by one who seeks to invalidate an ordinance"); *Campbell v. Sundquist*, 926 S.W.2d 250, 257 (Tenn. Ct. App. 1996) ("In view of the remedial purpose of the Tennessee Declaratory Judgments Act, we view the Act as an enabling statute to allow a proper plaintiff to maintain a suit against the State challenging the constitutionality of a state statute."), *abrogated on other grounds by Colonial Pipeline*, 263 S.W.3d at 853. Accordingly, even if Plaintiffs needed an express private right of action to

enforce their constitutional rights—which they do not—the DJA, as interpreted by the Tennessee Supreme Court, expressly provides it to Plaintiffs.

Third, neither *Tennessee Firearms*, nor the other cases cited by Metro, requires this court to depart from the plain language of § 1-3-119 or published Supreme Court precedent. Metro relies most prominently on *Tennessee Firearms Ass'n v. Metro.*, No. M2016-01782, 2017 WL 2590209 (Tenn. Ct. App. June 15, 2017) (opinion attached), to argue that "even when a plaintiff requests only declaratory and/or injunctive relief, a private right of action is required to support the claim." MTD at 3 (citing *Tenn. Firearms*). But *Tennessee Firearms* did not address suits brought to enforce constitutional rights. Rather, that case involved claims that (1) a state statute preempted Metro's decision not to renew a gun show operator's lease to use Metro's Fairgrounds, and that (2) Metro's decision was contrary to the Metro Charter. *Tenn. Firearms*, 2017 WL 2590209, at **4–8. Both the Chancery Court and Court of Appeals entertained the state preemption issue on its merits, upholding Metro's decision under an exception to the preemption provision. *Id.* at **4–7. The Court of Appeals' ruling on the private right-of-action issue—that the DJA provides no such right of action for challenging the alleged violation of the Metro Charter—was confined to the Metro Charter. *Id.* at *9 ("We reject Goodman's insistence that the Declaratory Judgment Act provides an independent basis for him to allege a violation of the Metro Charter regardless of any issue regarding a private right of action."). *Tennessee Firearms* does not, and cannot, overrule Supreme Court precedent holding that the DJA authorizes suit, so long as monetary damages are not sought, to enforce *constitutional* rights. Because this case is one to enforce constitutional rights and does not seek damages, *Tennessee Firearms* does not apply.

The remaining two cases cited by Metro have even less to do with this case than does *Tennessee Firearms*. *State ex rel. Moncier v. Jones*, No. M2012-01429, 2013 WL

2492648 (Tenn. Ct. App. June 6, 2013) (opinion attached), has nothing to do with suits under the DJA to enforce constitutional rights against infringement by Metro. In *Moncier*, the plaintiff, an attorney subject to discipline, sued the Tennessee Board of Professional Responsibility's Disciplinary Counsel seeking damages and other relief. 2013 WL 2492648, at *1. The trial court found no private cause of action *for damages* based on violations of the Tennessee Constitution and the Court of Appeals affirmed, holding that the Tennessee Open Courts provision, Tenn. Const. art. 1, § 17, did not "create[] a substantive cause of action to enforce other constitutional provisions or laws." *Id.* at *6. But Article 1, Section 17 is not relied on as a basis for suit here (and, again, this case does not seek monetary damages).[1] *Morton v. State*, No. M2008-02305, 2009 WL 3295202 (Tenn. Ct. App. Oct. 13, 2009) (opinion attached), also has nothing to do with suits under the DJA to enforce constitutional rights against infringement by Metro. In *Morton*, the claimant, who had been arrested for and charged with the same crime in two counties, filed a claim for damages, seeking the return of bond money he posted, based on violations of his federal and state constitutional rights. 2009 WL 3295202, at *1. The Court of Appeals affirmed the dismissal of the case, holding that existing statutory causes of action did not cover claimant's claim for damages against the state and that "Tennessee has not recognized an implied cause of action *for damages* based upon violations of the Tennessee Constitution" and therefore that sovereign immunity had not been waived. *Id.* at **6–8. The court did not discuss the DJA, claims for other than damages, or suits against non-state entities such as Metro.

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[1] *Moncier* does contain a brief discussion of the DJA, which is not cited by Metro. This portion of *Moncier* affirmed the trial court's denial of declaratory judgment because (1) inferior courts cannot entertain challenges to the constitutionality of a Supreme Court Rule and (2) because the plaintiff's claim as to Claims Commissions procedures sought an impermissible advisory opinion. *Moncier*, 2013 WL 2492648, at **3–4. Neither of these issues is relevant to the DJA's application in this case.

Fourth, even if § 1-3-119 did apply to suits to enforce constitutional rights *and* the DJA did not separately protect that right, there are two other long-recognized sources of Plaintiffs' right to bring suit to enforce their constitutional rights.

This Court has inherent power to restrain Metro from unconstitutionally interfering with a property right. Tenn. Code Ann. § 16-11-101 ("The chancery court has all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity."), *cited in* Compl. ¶ 3. The Tennessee Supreme Court has long recognized that Chancery possesses the inherent authority to enjoin a locality from implementing an unconstitutional law. *See Patten v. City of Chattanooga*, 65 S.W. 414, 420 (Tenn. 1901) ("There is no question as to the jurisdiction of the Chancery Court to restrain municipal ordinances upon the ground that they are beyond the powers conferred upon the municipality, or that they were not passed regularly or according to the forms of law."); *Bradley v. Comm'rs*, 21 Tenn. 428, 432 (1841) (enforcement of an unconstitutional law "is a void exercise of power, which can and must be stopped by the judicial department of the State"). Entertainment of a constitutional action absent a statutory cause goes to the very purposes of Chancery in the first place. Chancery is supposed to provide remedies in equity as an alternative when none exists at law. *See* Tenn. Code Ann. § 16-11-103 (vesting Chancery with jurisdiction "of all cases of an equitable nature"). That includes all the inherent powers—that is, *beyond* statutorily expressed powers—"rightfully incident to a court of equity." Tenn. Code Ann. § 16-11-101. Thus, Chancery has "jurisdiction in cases where a plain, adequate and complete remedy at law cannot be had." 11 Tenn. Jur. Equity § 20. To dismiss a constitutional suit for the absence of a statutory right of action would undermine this Court's original purpose.

Moreover, the Tennessee Constitution itself implies a cause of action for the enforcement of constitutional rights. *See* Compl. ¶ 2 (citing Tenn. Const. art. I, § 8, and art. XI, § 8). A private right of action need not be created by statute; it can also emerge from

"some other source." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). The Constitution is such a source. This was settled long ago in federal court with the seminal case of *Ex parte Young*:

> the general doctrine ... that the Circuit Court of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to exclude it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him has never been departed from.

209 U.S. 123, 152 (1908). If the courts cannot intercede when localities violate the Tennessee Constitution, then it "is a dead letter." *Bradley*, 21 Tenn. at 432. The Tennessee Supreme Court has appropriately regarded *Ex parte Young* as "one of the three most important decisions the Supreme Court of the United States has ever handed down," "one of the cornerstones of our legal system," *Colonial Pipeline Co.*, 263 S.W.3d at 850 n. 16 (quotations omitted), and "indispensable to the establishment of constitutional government and the rule of law." *Id.* at 852 n. 18 (quotations omitted). Accordingly, Tennessee courts may also restrain officers—including Metro here—from executing unconstitutional statutes and violating rights and privileges guaranteed by either the U.S. or Tennessee Constitutions.

* * *

Metro's motion to dismiss based on the alleged lack of a private right of action to enforce the Tennessee Constitution must be denied. The statute on which Metro bases its argument expressly does not apply to suits to enforce constitutional rights. And even if it did apply, the statute expressly does not apply where a right of action existed before its enactment. Here there are three preexisting causes of action, the Declaratory Judgments Act, the inherent powers of this court, and the Constitution itself. None of the cases Metro cites to support its argument apply to cases, such as this, which seek to enforce constitutional rights without claiming damages. On the other hand, the Supreme Court of

Tennessee has ruled that plaintiffs may sue under the DJA for nonmonetary relief. *Colonial Pipeline*, 263 S.W.3d at 853. Ultimately, Metro's real argument is that it may violate the Constitution and neither this Court, nor any other, can do anything about it. This is wrong. *See Lynn v. Polk*, 76 Tenn. 121, 129 (1881) ("A legislature is the creature of the Constitution, and cannot rise above it or go beyond it.").

III.
This Court Cannot Dismiss Plaintiffs' Constitutional Challenge Without Allowing Factual Development.

Plaintiffs' complaint pleads sufficient facts to proceed to discovery and Metro's motion to dismiss does not argue otherwise. Rather, Metro makes a series of arguments—based on facts *not* in the Complaint—that this Court ought to rule that Metro's Client Prohibition satisfies a rational-basis standard. Metro's motion should be denied for three reasons. First, Metro ignores that plaintiffs can—and do—prevail against the government when challenging unreasonable laws under the rational basis test. Second, Metro's Rule 12.02(6) motion misconceives the rational-basis test as a discovery-avoidance tool, when only 1 of the 28 cases Metro cites affirmed a Rule 12.02(6) dismissal on constitutional grounds. Third, Metro's other cases do not apply to the narrow challenge Plaintiffs have brought.

A. Plaintiffs Prevail Under Rational-Basis Review When the Facts Negate the Government's Justifications.

The thrust of Metro's argument is that, under the rational-basis standard, an ordinance prohibiting the reception of business clients in residential homes can never offend the Tennessee Constitution's guarantees of substantive due process and equal protection. MTD at 6–10. But the rational-basis test is not a rubber stamp for the government. Rather, the rational-basis test is simply a rebuttable presumption of constitutionality. While, under the rational-basis test, the challenged law is presumed

constitutional, the question remains whether the law bears "*a reasonable relationship to a legitimate state interest.*" *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (emphasis added by court) (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)). Plaintiffs must be allowed to develop a factual record to rebut the presumption of constitutionality.

Plaintiffs can prevail on their claims that the Client Prohibition bears no reasonable relationship to any legitimate government interest. *See* Compl. ¶¶ 97, 143, 152–53. Plaintiffs have pled facts in support of those claims. Plaintiffs have alleged that their home-based businesses were private, generated no noise and only negligible traffic, and that their neighbors had never complained to them when their home-based businesses were in operation. Compl. ¶¶ 20–25, 67–71. They alleged that Metro knows the Client Prohibition is widely not followed and that Metro does not wish to enforce the law in most instances. Compl. ¶¶ 99–102. And Plaintiffs pointed to specific examples of other home-based businesses, all of which fit the same definition of "home occupation" that brought Lij and Pat within the scope of the Client Prohibition, that Metro expressly allows to serve clients onsite. Compl. ¶¶ 107–09, 113–15, 120–22, 129 & n.3. These facts demonstrate, as the complaint alleges,[2] that there is no rational basis for the law as applied to Plaintiffs.

The case most applicable to Plaintiffs' claims is *Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville & Davidson County*, No. M2002-02582, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005) (opinion attached), *cited in* MTD at 5, which demonstrates that Plaintiffs can prevail under rational-basis review based on an

[2] Metro appears to concede that Plaintiffs have met Rule 12.02(6)'s liberal notice pleading standard. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426, 430 (Tenn. 2011).

evidentiary record. *Consolidated Waste*, which was decided on cross-MSJs in the trial court and affirmed on appeal, struck down a Metro zoning restriction on both substantive due process and equal protection grounds under both the U.S. and Tennessee Constitutions. *Id.* at **7–8, *36. The challenged law required that construction-and-demolition ("C&D") landfills locate themselves at least two miles away from schools and parks. *Id.* at *2. Both the trial and appellate courts found that "Metro ha[d] failed to connect a rational relationship between the[] ordinances and a legitimate governmental purpose." *Id.* at *33. The "dust, noise, traffic, and other considerations associated with C&D landfills," although hazardous, also applied to several other types of landfills—solid, medical, industrial, farm, and landscaping waste—and yet no two-mile buffer was required for those landfills. *Id.* at **33–34. Record evidence showed that C&D landfills posed "less risk to human health and the environment" than the less-restricted landfills. *Id.* at *34. The irrationality of the two-mile buffer requirement was further shown by the fact that Metro did not require schools and parks to be built two miles away from existing C&D landfills. *Id.* at *33.

Consolidated Waste is no outlier. In *Shatz v. Phillips*, 471 S.W.2d 944 (Tenn. 1971), the Supreme Court of Tennessee reversed dismissal of a petition to invalidate—and struck down—a Union City zoning ordinance that prohibited "storage and/or salvaging of junk" in light industrial but not heavy industrial districts. *Id.* at 946, 948. That was the only difference between the two districts; all other "heavy industry" was in fact allowed in light industrial districts. *Id.* at 948–49 (Humphreys, J., concurring). As in *Consolidated Waste*, the court relied on record evidence showing that the plaintiffs' building, which they wanted to use for battery and radiator storage, was "modern, attractive, and ... a casual passer would not know what business was being carried on in said building" because the plaintiffs' operations were "free from noise, odor, fumes, and other objectionable features"; there had been "no complaints by the neighbors" and "no traffic problem and no fire hazard." *Id.* at

945 (majority opinion). Because the chancery court found the plaintiffs' use "no more objectionable than many other permitted uses," *id.*, the Supreme Court held that the ordinance's discrimination against junk-storage facilities was arbitrary und unreasonable in violation of Tennessee Constitution Article 1, § 8, and Article XI, § 8. *Id.* at 946–48; *id.* at 948–49 (Humphreys, J., concurring); *see also Bd. of Comm'rs v. Parker*, 88 S.W.2d 916, 922 (Tenn. Ct. App. 2002) (finding an equal protection violation under rational-basis review where county board denied rezoning to one agricultural landowner for "long-term housing of big cats" when it had granted rezoning to an adjacent landowner for "board[ing] dogs, cats and small exotics short-term").

More recent precedent from the Supreme Court of Tennessee, cited by Metro, also shows that well-pled rational-basis cases proceed to discovery[3] and can prevail on the merits.[4] In both *Tester* and *Small School Systems*, the court struck laws down using rational-basis review, based on facts developed during litigation.

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[3] While this case focuses on rational-basis review under the Tennessee Constitution, the Sixth Circuit has noted the impropriety of dismissing claims simply because they invoke rational-basis review. *See Bower v. Vill. of Mt. Sterling*, 44 Fed App'x 670, 678 (6th Cir. 2002) (reversing dismissal in part because plaintiff "sufficiently alleged a lack of a rational basis for Plaintiff's non-selection when he alleged disparate treatment in securing the full-time police officer position").

[4] At the U.S. Supreme Court, plaintiffs have prevailed against the government under rational-basis review at least twenty times since 1970. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614–15 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., W. Va.*, 488 U.S. 336, 345 (1989); *City of Cleburne, Tex.*, 473 U.S. at 447; *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 64 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141–42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77–78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970).

In *Tester*, the Supreme Court found no rational basis for a conditional work-release program that applied to some, but not all, second-time offenders in Tennessee. There, a second-time DUI convict in Washington County objected to his 50-day sentence on the grounds that state law offered conditional work-release to similarly situated offenders in Davidson, Moore, and Shelby Counties (but not Washington County or any of the other 91 Tennessee counties). 879 S.W.2d at 826–27. In support of his equal protection claim, the defendant introduced record evidence showing that the state's purported reason for limiting the work-release program to Davidson, Moore, and Shelby Counties—overcrowding in those counties' jails—was equally or more true in Washington County, whose "serious jail overcrowding ... was directly caused by the mandatory incarceration of *second time DUI offenders*." *Id.* at 829 (emphasis added by court). Crediting the plaintiff's evidence, the Supreme Court emphasized the need to inquire into the "[r]easonableness" of the relationship between the challenged classification and "a legitimate state interest," cautioning that "[r]easonableness varies with the facts in each case." *Id.* at 828–29. Classifications "must be based on substantial distinctions which make one class really different from another; and ... must be germane to the purpose of the law." *Id.* at 829 (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 775–76 (1910)). Based on the strength of the plaintiff's evidence, the *Tester* court *discredited* every argument put forth by the state. *Tester*, 823 S.W.2d at 830.

In *Small School Systems*, decided the year before, the Supreme Court affirmed that Tennessee's statewide school-funding formula violated the Tennessee Constitution's equal-protection guarantee. 851 S.W.2d at 152–56. The challenged funding formula afforded disparate educations to children in different school districts. Applying the rational-basis test, the court scrutinized the state's purported justifications for the funding disparity. Based on the record developed at trial, the Supreme Court found that the state's

actual justification was "local control of public schools"—*not* the state's alternative justification that it had discretion to "act incrementally" in funding education evenly. *Id.* at 154. The court then found the state's actual "local control" justification irrational. The voluminous evidence introduced at trial, *id.* at 143–47, did not "show[] that a discriminatory funding scheme is necessary to" the state's purported preference for "local control." *Id.* at 155.

Plaintiffs here can prevail on their constitutional claims if they are permitted to develop an evidentiary record. *Consolidated Waste*, *Shatz*, *Tester*, and *Small School Systems* all show that rational-basis review requires scrutiny of the relationship between the challenged law and a legitimate government interest. Like the prevailing plaintiff in *Consolidated Waste*, whose proposed C&D landfill was irrationally subject to a "restriction ... more arduous than that imposed on other types of even more disruptive landfills," 2005 WL 1541860, at *34, Plaintiffs here have alleged that Metro "in fact tolerates traffic, noise, and commerce in residential zones at far greater levels than were (or would be) generated by" Plaintiffs' home-based businesses. Compl. ¶ 97. Like the plaintiffs in *Shatz*, "a casual passer would not know" that Plaintiffs had a home-based recording studio and hair salon, which were "no more objectionable than many other permitted uses." 471 S.W.2d at 945; Compl. ¶¶ 20–25, 67–71, 97. Like the defendant in *Tester*, who was irrationally sent to jail for the same offense (a second-time DUI) that would have resulted in work-release elsewhere, 879 S.W.2d at 827, Plaintiffs here have had their home-based businesses shut down for the same conduct (receiving clients) that would entitle them to permits if they had operated day-care homes, short-term rentals, or historic home events. *See* Compl. ¶¶ 104–122. And like the state's "local control" justification for the funding disparity in *Small School Systems*, which was undercut by the state's "actual control" over funding, 851 S.W.2d at 155, Metro's "residential nature" justification for the Client Prohibition is

undercut by Metro's general rule allowing home-based businesses and the commerce—including employee and delivery traffic—that comes with it. Compl. ¶¶ 94–95. These inconsistencies were fatal to the laws challenged in *Consolidated Waste*, *Shatz*, *Tester*, and *Small School Systems*. This Court need not decide the Client Prohibition on its merits today, but this Court must afford Plaintiffs the same opportunity to develop their case as was afforded the parties in those cases.

B. The Rational-Basis Test Is Not a Discovery-Avoidance Tool.

Because the Tennessee Constitution plausibly affords relief to the Plaintiffs against Metro's Client Prohibition, Metro should not be allowed to hypothesize justifications in one breath and ask the Court to deny fact discovery on those justifications in the next. The most that can be said for Metro is that "specific evidence is not necessary to show the relationship between the statute and its purpose," if and only if such a relationship is plainly conceivable. *Riggs*, 941 S.W.2d at 52. But that does not mean that Plaintiffs are barred from using evidence to *disprove* such a relationship. To the contrary: as *Tester*, *Small School Systems*, *Shatz*, and *Consolidated Waste* all show, specific evidence is permissible—and useful—to contradict the government's hypothetical justifications for a challenged law. This Court must therefore permit discovery regarding Metro's far-fetched assertions to test their merits.

Not one authority cited by Metro suggests that rational-basis review precludes factual discovery here. Rather, *every case* in Part V of Metro's motion—where Metro argues that Plaintiffs' factual allegations fail to state a claim—was decided after the development of a factual record. *See Richardson v. Twp. of Brady*, 218 F.3d 508, 509 (6th Cir. 2000) (affirming district court grant of summary judgment for government on denial of requested rezoning); *Hartman & Tyner, Inc. v. Charter Twp. of W. Bloomfield*, 985 F.2d 560, at *1 (6th Cir. 1993) (unpublished per curiam) (same); *Pearson v. City of Grand Blanc*, 961 F.2d 1211,

1213 (6th Cir. 1992) (same); *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243–44 (6th Cir. 1992) (reversing district court grant of summary judgment in part and remanding as-applied substantive due process challenge for factual development); *Davidson Cty. v. Hoover*, 364 S.W.2d 879, 879–80 (Tenn. 1963) (no constitutional issue raised); *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 906 (Tenn. 1940) (evidentiary hearing held); *Gann v. City of Chattanooga*, No. E2007-01886, 2008 WL 4415583, at *1 (Tenn. Ct. App. Sept. 30, 2008) (affirming Rule 41.02(2) dismissal at close of plaintiffs' proof at trial); *City of Jackson v. Shehata*, No. W2005-01522, 2006 WL 2106005, at *1 (Tenn. Ct. App. July 31, 2006) (affirming imposition of fine for ordinance violation against void-for-vagueness defense); *see also* MTD at 10 (citing cases, all decided after factual development, in support of Metro's unchallenged denial of Plaintiffs' SP rezoning requests); *cf. Davidson Cty. v. Rogers*, 198 S.W.2d 812, 814–15 (Tenn. 1947) (upholding suit by government to enforce zoning regulation, but noting that courts "can not indulge in speculation or suspicion, but must determine the question on the evidence as it is presented in th[e] record"), *cited in* MTD at 6. Indeed, of the 28 cases Metro cites in its entire motion, only 2 were decided on a Rule 12.02(6) motion to dismiss. *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997) (affirming dismissal of challenge to state statute banning heliports within nine miles of a national park boundary); *Nat'l Gas Distribs. v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 43 (Tenn. Ct. App. 1999) (affirming dismissal of challenge to state statute authorizing county utility districts to sell propane).

The *Curto* case illustrates why a Rule 12.02(6) dismissal would be improper given the factual allegations here. In *Curto*, a service-station owner took his city to court over an ordinance that limited onsite parking of more than three cars per service bay. 954 F.2d at 1239. The Sixth Circuit recognized that traffic, parking, fumes and odors, fire hazards, emergency access, and aesthetics all constitute legitimate government interests and that

the challenged parking limitation *might* be valid. *Id.* at 1242–43. But the court took seriously the possibility that the ordinance "could be arbitrary and unreasonable as applied" to the plaintiff, since the ordinance "ma[de] no distinction with regard to the size of the physical area which a service station actually has for parking." *Id.* at 1244. In other words, the parking limitation might be rational as applied to small lots, but irrational as applied to large lots. Because the record before the district court lacked "proof of [the plaintiff's] servicing capabilities and ... exhibits in the form of photographs, drawings, and proof of the exact dimensions and configuration of [his] lot," the Sixth Circuit remanded the case for factual development. *Id.*; *see also id.* at 1241 (agreeing with plaintiff that the city could not have prevailed on a Rule 12(b)(6) motion to dismiss). Just as in *Curto*, factual development is required in this case to determine whether it is rational for Metro to ban Plaintiffs, but not other home-based business owners, from serving clients.

In their entire brief, in fact, Metro cites exactly *one case* in which a rule 12.02(6) dismissal was affirmed on constitutional grounds[5]—and that case simply does not apply here. The main holding of that case, *Riggs*, merely clarified that "the legal conclusions set forth in a complaint"—as opposed to factual allegations—"are not required to be taken as true." 941 S.W.2d at 48. And the statute at issue in *Riggs*, which banned helicopter ports within nine miles of a national park boundary, was directed at activity that self-evidently "disturb[s] the peace and enjoyment of tourists and residents" and "create[s] a safety risk." 941 S.W.2d at 51–52. But Lij's and Pat's customers are not at all like helicopters taking off and landing. The complaint specifically alleges that Lij's and Pat's customers do *not* disturb the neighborhood and that, to the contrary, 39 and 44 of their neighbors petitioned the

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[5] *National Gas Distributors*, Metro's only other case affirming a rule 12.02(6) dismissal, did so for lack of standing. 7 S.W.3d at 44–45 (finding that plaintiff's alleged injury of "having to compete for business with utility districts" was not caused by the challenged legislative classification).

Metro Council to *allow* their home-based businesses. Compl. ¶ 133. Someone standing at Lij's or Pat's property line would be unable to tell that any business was being conducted at all. Compl. ¶¶ 20–25, 67–71. The *Riggs* plaintiff, by contrast, could hardly allege that park-goers would be unable to tell that his helicopters were taking off and landing nearby. Moreover, the heliport buffer requirement was accompanied by legislative findings showing the government's actual interest. 941 S.W.2d at 50. Here, there are none. Compl. ¶ 98.

C. Metro's Other Cases Do Not Apply to Plaintiffs' As-Applied Challenge.

Although distinguishable on their procedural posture alone, *see above* Part III.B, many of Metro's cases can be further distinguished by the types of challenges they raise. Plaintiffs will briefly address why those cases do not pertain to the challenge Plaintiffs have raised.

Hoover, the case upon which Metro principally relies, does not support Metro's suggestion that home-based business restrictions are *per se* constitutional because *Hoover* did not address any constitutional issue. The single issue in *Hoover* was the proper construction of Nashville's home-occupation ordinance, as it existed in 1963. 364 S.W.2d at 879–80. The defendants raised no constitutional objections to the injunction entered against their multi-chair beauty shop, *id.*, and the Supreme Court's characterization of the ordinance's uneven application in that case, as a "legislative problem," follows naturally from the court's resolution of the statutory-construction question in the city's favor. *See id.* at 882.

Metro cites several cases that challenge residential zoning generally, but that is not the issue here. Plaintiffs do not complain, as did the plaintiffs in *Richardson*, *Hartman & Tyner*, *Pearson*, and *Howe Realty*, that their properties are not zoned for large-scale commercial use. *See Richardson*, 218 F.3d at 510–12; *Hartman & Tyner*, 985 F.2d 560, at *1; *Pearson*, 961 F.2d at 1214; *Howe Realty*, 141 S.W.2d at 905. Similarly, Plaintiffs do not

challenge the Metro Council's denial of their SP rezoning applications. *Cf.* MTD at 10. Neither do they argue that Metro lacks constitutional authority to "preserv[e] the residential nature of residential properties." *Cf.* MTD at 8. Plaintiffs simply claim that the Client Prohibition, as it applies to them given the facts, is an unreasonable way of doing so.

* * *

Plaintiffs have alleged facts showing that the Client Prohibition is irrational and are entitled to scrutinize Metro's untested assertions through discovery. For example, if Metro's actual interest were "keeping residentially zoned property from being used for commercial purposes," MTD at 8, Metro would not allow home-based businesses in the first place. But Metro allows lots of accessory commercial uses to take place in residential homes, *including the service of clients.* Compl. ¶¶ 94–122, 129. Metro asserts—without a scintilla of legal or factual support—that its Council might have wished to "focus[] on weekends" by allowing short term rentals and historic home events (both are permitted seven days per week), or that the Council might have allowed day care homes "so that children do not have to be taken too far from their homes" (the very point of Lij's home-based business is to keep himself and his daughter in close proximity during his workday). *See* MTD at 9. But Plaintiffs get to develop facts to negate the asserted relationship between Metro's legitimate interests and the Client Prohibition. This Court must not deny Plaintiffs the opportunity to prove their case and scrutinize Metro's purported rationales.

IV.
The Tennessee Constitution Affords Plaintiffs Greater Protection than Its Federal Counterpart.

For the reasons set forth above, this Court should deny Metro's rule 12.02(6) motion to dismiss even if the lower federal rational-basis standard applies in this case. But there is a further reason why dismissal is inappropriate: Plaintiffs' due process and equal protection rights under the Tennessee Constitution are, contrary to Defendants' argument, more

extensive than their corresponding rights under the U.S. Constitution. *Cf.* MTD at 4–5. While the Court need not address this issue if it denies the motion to dismiss for the reasons set forth in Part III, Plaintiffs here show that rule 12.02(6) dismissal is especially inappropriate, given that the Tennessee Constitution's enhanced protections require the courts to consider the facts.

While the Tennessee courts have a mixed record on this point, there is strong evidence that Tennessee's constitutional protections in this case extend beyond the corresponding federal constitutional protections. *See, e.g., Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14–15 (Tenn. 2000) ("[W]e remain opposed to any assertion that previous decisions suggesting that synonymity or identity of portions of our constitution and the federal constitution require[] *this* Court to interpret our constitution as coextensive ... . Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards ... ."). And although the Supreme Court of Tennessee has called the Tennessee and U.S. Constitutions "synonymous" in their protections for substantive due process, *Gallaher*, 104 S.W.3d at 463, *Newton*, 878 S.W.2d at 110, it has also held that "practical synonymity does not necessarily correspond to coextensive expressions of liberty" and refused to "relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution" when interpreting the Tennessee Constitution. *Planned Parenthood*, 38 S.W.3d at 14.

Livesay v. Tennessee Board of Examiners in Watchmaking, 322 S.W.2d 209 (Tenn. 1959), is an example of the greater protections available under the Tennessee Constitution. *Livesay* was a constitutional challenge to a state licensure scheme for watchmakers and clock repairers. *Id.* at 210. The plaintiff brought a substantive due process claim under both the Tennessee and U.S. Constitutions. *Id.* at 211. *Livesay* recognized Tennesseans' "inherent right to earn their livelihood in a private field of work." *Id.* at 213; *see also* Compl.

¶ 141 (invoking Plaintiffs' right to earn a living). And the Court recognized that it had to meaningfully review restrictions on that right, lest the police power "be exercised free from constitutional restraint." *Livesay*, 322 S.W.2d at 213 (internal quotation marks omitted). The court's decision striking down the licensure statute found no facts—and refused to "imagine" any—to support the contention that the watchmaker licensure scheme promoted public welfare, morals, health, or safety. *Id. Livesay*'s approach cannot be reconciled with the speculative, unduly deferential approach announced by the U.S. Supreme Court just four years earlier in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (holding that the U.S. Constitution permits rank speculation to uphold economic regulations).

Tennessee courts have also analyzed equal-protection claims with greater emphasis on facts than under the more lenient federal standard. The *Tester* case's extended description of rational-basis review under the Tennessee Constitution emphasizes the substantiality and germaneness of a challenged classification to the government interest purported to be served by the classification to ensure its "reasonableness." *Tester*, 879 S.W.2d at 829 (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 775–76). This is unlike the federal law cited by Defendants, which ignores substantiality and germaneness. *Cf.* MTD at 7 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). The Supreme Court of Tennessee has never adopted the federal standard argued by Defendants and *Tester* is, therefore, the proper standard in this case.

Tester and *Livesay* demonstrate the necessity of allowing Plaintiffs the opportunity to develop facts to support their case here. As *Tester* recognized, under the Tennessee rational-basis test, even though an individual challenging a statue "has the burden of

demonstrating that the legislative classification is unreasonable ... '[r]easonableness' varies with the facts in each case." 879 S.W.2d at 829. Here, Plaintiffs have alleged many facts showing the challenged regulation to be unreasonable. Compl. ¶¶ 94–122. Accordingly, Plaintiffs' must be given the opportunity to prove those facts—and disprove any asserted by Defendants—in support of their claim.

V.
Conclusion

Plaintiffs are entitled to judicial recourse for alleged violations of their constitutional rights. Metro's Client Prohibition has hamstrung Plaintiffs' ability to earn a living, even though Metro allows other Nashville homeowners to serve clients in their homes just as Plaintiffs did. Plaintiffs have fairly brought the Client Prohibition's rationality into question, and they are entitled to develop and use a factual record to contest Metro's defenses on their merits. Plaintiffs therefore pray this Court DENY Defendants' motion to dismiss.

DATED: March 7, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was served upon the following, by the following means:

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