

THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

4 GOOD GOVERNMENT AND THE 14,010¹ REGISTERED)
VOTERS WHO SIGNED THE NASHVILLE TAXPAYER)
PROTECTION ACT,)
Plaintiffs,)

CASE NO. 21-_____

v.)

THE DAVIDSON COUNTY ELECTION COMMISSION)
AS PART OF THE METROPOLITAN GOVERNMENT)
OF NASHVILLE-DAVIDSON COUNTY,)
Defendant.)

**EXPEDITED VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTION, WRIT OF MANDAMUS, AND REQUEST FOR A TEMPORARY
RESTRAINING ORDER (TRO) AND/OR INJUNCTION**

Come now the Plaintiffs, 4 Good Government (“4GG”) and the 14,010 Registered Voters, who signed the 2021 Nashville Taxpayer Protection Act (“2021 NTPA”), and hereby seek relief from the Defendant’s willful, calculated, and persistent refusal to place a duly-qualified petition to amend the Metropolitan Charter of Nashville-Davidson County (“Metro Charter”) on the June 14, 2021 ballot. The Davidson County Election Commission (“Election Commission”) has engaged in voter suppression. The Election Commission’s Administer of Elections has stated publicly its intention to engage in further voter disenfranchisement.

In this facial and as-applied action brought under the First and Fourteenth Amendments to the United States Constitution, Plaintiffs seek both to enjoin Defendant from refusing 1) to count and verify signatures and 2) to hold a June 14, 2021 election, and 3) to recover monetary damages from Defendant under 42 USC 1983. (See *Monell v Department of Social Services*, 436 US 658 (1978). **Plaintiffs seek an expedited hearing on this matter as *time is of the essence* in counting**

¹ 14,010 signatures were submitted to the Metro Clerk on March 25, 2021, and hundreds have since been received.

and verifying the necessary signatures and placing a duly-qualified citizen-sponsored ballot initiative on the June 14, 2021 ballot. As grounds for their Complaint, Plaintiffs would show the Court as follows:

JURISDICTION

1. This Court has proper jurisdiction and venue.

APPLICABLE LAW AND ISSUE

2. Section 19.01 of the Davidson County Charter provides, *inter alia*.

"This Charter may be amended subsequent to its adoption in the following manner:
"An amendment or amendments may be proposed ... (2) upon petition filed with the metropolitan clerk: signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the **preceding general election**, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk. . . .

"The metropolitan clerk shall immediately certify to the county commissioners of election a copy of such resolution or petition and it shall thereupon be the duty of said commissioners of election to hold a referendum election with respect thereto...

"The council shall not adopt a resolution proposing amendments to this Charter more often than twice during the term of office of members of said council, nor shall any such amendment or amendments be submitted by petition more often than once in each two years."

As articulated by the Court of Appeals “the question is, which prior election is the “preceding general election” for Metro Charter § 19.01 purposes. *Fraternal Order of Police et al v Metropolitan Government of Nashville Davidson County, Tennessee et al*, 582 S.W.3d 212, 218, 2019 Tenn.App. (“*FOP v Metro.*”). In *FOP v Metro*, the Appellate Court analyzed in detail which elections qualified as a “proceeding general election” under Metro Charter § 19.01 to determining signature requirements.

PARTIES

3. Plaintiff, **4 Good Government** (“4GG”), is the proponent of a Charter amendment ballot initiative called the “2021 Nashville Taxpayer Protection Act.” (“2021 NTPA”) (Exhibit A.) The 2021 NTPA is at issue in this proceeding. 4GG represents the interests of itself, its members, and all Davidson County registered voters who signed the initiative petition to qualify said initiative for the ballot and wish to vote for or against the initiative at the June 14, 2021 election.

4. Plaintiffs, the **14,010 Registered Voters who signed the Nashville Taxpayer Protection Act** (“14,010 Registered Voters”), are registered voters who reside in Davidson County, Tennessee, and signed the 2021 NTPA.

6. Defendant, **Davidson County Election Commission** (“Election Commission”), is the local election oversight body and is part of the Metropolitan Government of Nashville-Davidson County. It is regulated by Tennessee statute and serves as the county agency required by Charter § 19.01 to count and verify signatures and hold a referendum on the NTPA initiative.

Facts

7. In February 2021, 4GG commenced to collect signatures for the 2021 NTPA ballot petition. The Petition stated June 14, 2021 as the election day when Davidson County registered voters would cast their ballots for or against the 2021 NTPA’s Charter Amendments.

8. On March 25, 2021, 4GG submitted over 14,010 signatures to the Metropolitan Clerk’s Office. Plaintiffs’ initiative satisfied all of the procedural requirements proscribed by law, exceeded the signature threshold required by Metro Charter, and fully complied with state and local laws.

9. On March 26, 2021, various media organizations began to report that the Election Commission's Administrator of Elections, Jeff Roberts, claimed both that 4GG had not submitted a sufficient number of signatures and that the signature threshold is in excess of 33,000.

10. On information and belief, the Metropolitan Government's Department of Law ("Metro Legal") has conducted secret meetings² with the Election Commission and its Commissioners to formulate a strategy for additional voter suppression to prevent the citizens' Petition being placed on the June 14, 2021 ballot.

11. On or about Thursday, March 25, 2021, *Tennessean* reporter Yihun Jeong contacted undersigned Counsel³ and asked about Mr. Jeff Roberts' statement concerning the inflated signature requirement. Mr. Roberts stated the November 2020 election results determined the signature requirement. (Exhibit B).

12. On or about April 1, 2021, the Election Commission gave notice on its website of its next meeting set for April 6, 2021. As of April 2, 2021, no meeting agenda had been published.

13. On information and belief, the Election Commission intends to vote at the April 6, 2021 meeting to refuse to count or verify the registered voters' signatures based on the false information and erroneous advice provided to the Election Commission by Metro Legal.

14. Under Metro Charter § 19.01, the number of signatures required is "ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election."

15. The "preceding general election" for which the signatures requirement is based is the August 6, 2020, general election for the Davidson County Assessor of Property.

² It is undisputed that in Metro Legal's efforts to derail the previous NTPA in 2020 it met secretly with the Election Commission and/or its Commissioners in a non-public meeting on September 18, 2020. Metro Legal is believed to have met again days later on September 22th and 25th and possibly on numerous other dates. The "legal advice" given was never discussed in a public meeting as required by the Tennessee Open Meetings Act, § 8-44-101(a).

³ Counsel believes the date was March 25th, but may be mistaken as to the actual date.

16. On August 6, 2020, the Election Commission conducted a primary election for state and federal offices. Under Metro Charter § 19.01 a “preceding general election” excludes persons voting either in state and federal primaries, or in special elections. Metro Legal made this argument in its Appellee Brief filed in the *Fraternal Order of Police et al v Metropolitan Government of Nashville Davidson County, Tennessee et al.* (Exhibit C). The Court adopted Metro’s reasoning in its opinion. (Exhibit D).

17. On August 6, 2020, the Election Commission conducted a *special* election to elect a Chancellor for Part I of the Davidson County Chancery Courts. This *special* election was required due to the retirement of Chancellor Claudia Bonnyman in 2019. Under Metro Charter § 19.01, ballots cast in a *special* election do not count toward the number of persons voting in a “preceding general election.” (See Metro’s Appellee Brief, Ex. C).

18. On August 6, 2020, the Election Commission conducted a second *special* election to elect a Criminal Court Judge for Division 4 of the Davidson County Criminal Courts. This second *special* election was required due to Judge Seth Norman’s 2018 retirement. Under Metro Charter § 19.01, ballots cast in a *special* election do not count toward the number of persons voting in a “preceding general election.” (See Metro’s Appellee Brief, Ex. C).

19. On August 6, 2020, the Election Commission conducted a third *special* election to elect a Metro Trustee. This third *special* election was required due to the Charlie Cardwell’s 2019 death. Under Metro Charter § 19.01, ballots cast in a *special* election do not count toward the number of persons voting in a “preceding general election.” (See Metro’s Appellee Brief, Ex. C).

20. On August 6, 2020, the Election Commission also conducted a *general* election under Metro Charter § 19.01 to elect the Assessor of Property. According to the Election Commission’s certified election results published on its web site, 93,197 registered voters voted in this *general* election. (Exhibit E).

21. Pursuant to Metro Charter § 19.01, 4GG is required to submit **9,319** signatures – ten percent (10%) of registered voters who voted in this “preceding general election.”

22. Under Metro Charter § 19.01, registered voters casting ballots in either a *special* election, or in state and federal elections do not count toward the number of persons voting in a “preceding general election.” (See Metro’s Appellee Brief, Exhibit C, *FOP v Metro*, Ex. D “Our holding in *Wise* was that the phrase "preceding general election" as used in *section 19.01* of the Charter refers to *municipal* general elections, not to *state or federal* general elections,” p. 218).

COUNT I: VIOLATIONS OF SECTION 19.01, *ET SEQ*

23. Paragraphs numbered 1-22 are hereby incorporated as though set forth in their entirety.

24. Metro Charter § 19.01 places a duty on the Election Commission to count and verify the signatures of registered voters who signed a Petition advanced under this section.

25. On April 6, 2021, 4GG anticipates the Election Commission will use a false and erroneous signature requirement to justify its refusal to count and verify the 14,010 signatures of the registered voters who want the 2021 NTPA on the June 14, 2021 ballot. Such intentional and planned voter suppression is illegal, immoral, and violates the Metro Charter.

26. The Election Commission’s possible refusal directly contradicts its previous actions under similar circumstances. In *FOP v Metro*, the Court of Appeals quoted Metro’s opposition to the FOP’s motion to expedite the appeal:

Metro *expressly* stated to this [Appellate] court:

There is no harm in having the public go ahead and vote on the referendum, now that the election process has begun. If this Court decides that there were an insufficient number of signatures to place the proposed charter amendment on the ballot, there is a remedy - the results can be treated as a nullity

Petitioner's citations to cases considered moot are not relevant to this case . . . In this case, the FOP et al. have brought their case before the election is to be held and have not waited many months before asking the case to be expedited. There is no reason that this case cannot be resolved in due course by the appellate courts.

In contrast, now, post-election, when CON seeks to dismiss the case for failure to file an election contest, Metro reverses direction like a boomerang, and says, in effect, "This case is really an election contest to void the election.

FOP v. Metro, 582 S.W.3d 212, 216 (Tenn. Ct. App. 2019)(emphasis in original)

No doubt, Metro will *again* “reverse its direction like a boomerang” when convenient in an active and calculated attempt to bypass voters’ right to vote on a ballot initiative.

27. The announcement of the Election Commission's intention to refuse to discharge its § 19.01(2) duties substantially and financially injures Plaintiffs, and over 400,000 registered voters in Davidson County.

28. This injury could be remedied by declaring the signature requirement threshold lies at **9,319**, and by forcing the Election Commission to count and verify the signatures submitted by 4GG to determine if the **9,319** threshold has been met.

COUNT II: VIOLATIONS OF CONSTITUTIONAL RIGHTS

29. Paragraphs numbered 1-28 are hereby incorporated as though set forth in their entirety.

30. The First Amendment to the U.S. Constitution, incorporated against the States and their subdivisions by the Fourteenth Amendment to the U.S. Constitution, and the Equal Protection and Due Process Clauses protect the circulation and voting on initiative proposals.

31. Restrictions on such First Amendment rights are subject to strict scrutiny.

32. Restrictions on such First Amendment rights must be narrowly tailored and justified by compelling state interests, which must be clearly defined and described prior to implementation.

33. No compelling state interest exists for the Election Commission either to legally refuse to uphold its duties under § 19.01(2), or as articulated in the Commission's deliberations. Accordingly, the petition must be included on the June 14, 2021 ballot.

34. The refusal to count and verify signatures and hold a valid referendum election required by § 19.02 is unconstitutional and violates the First Amendment rights of the Plaintiffs and all Davidson County voters. Holding the referendum election remedies such violations.

35. The Election Commission's refusal to perform its ministerial duty to count and verify the signatures and to place the initiative on the ballot is arbitrary, capricious, and violates the Due Process Clause of the United States Constitution.

36. The Election Commission's refusal to deny Plaintiffs the ability to place a referendum on the ballot is arbitrary, capricious, and violates the Equal Protection Clause of the United States Constitution. Damages for such violations may be recovered under federal law.

37. The Election Commission's expected decisions both to refuse to count and verify 4GG's 14,010 signatures and to remove Plaintiffs' initiative from the June 14, 2021 election ballot is premised on its self-serving belief that 1) the required number of signatures exceeds 33,000, 2) the content and/or subject matter of Plaintiff's initiative could contradict state law, or 3) the content and/or subject matter could be unconstitutional under the State Constitution, thereby unenforceable and have no effect.

38. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place Plaintiffs' initiative for the June 14, 2021 election ballot is a content-based restriction on Plaintiffs' speech.

39. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place Plaintiffs' initiative from the June 14, 2021 election ballot is neither based on, nor governed by, content-neutral, objective standards proscribed according to law.

40. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place Plaintiffs' initiative from the June 14, 2021 election ballot is neither mandated, nor required by the Tennessee Election Commission.

41. Courts have the authority to issue mandamus when a government official fails to perform a legal duty and clearly violates state law. Under Tennessee law, a court may issue a writ of mandamus "where a plaintiff's right to the relief sought has been clearly established, the defendant has a clear duty to perform the act the plaintiff seeks to compel, and 'there is no other plain, adequate, and complete method of obtaining the relief to which one is entitled.'" *Manhattan, Inc. v. Shelby Cnty.*, No. W2006-02017-COA-R3-CV, 2008 Tenn. App. LEXIS 136, 2008 WL 639791, at *7 (Tenn. Ct. App. Mar. 11, 2008) (quoting *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 479 (Tenn. 2004)). *Gentry v. Casada*, No. M2019-02230-COA-R3-CV, 2020 Tenn. App. LEXIS 416, at *15 (Ct. App. Sep. 17, 2020).

42. Mandamus is not an adequate substitute for the de novo judicial review of executive decisions restraining speech required by the First and Fourteenth Amendments to the United States Constitution. *See Schmitt v. Husted*, 341 F.Supp.3d 784 (2018), *converted to permanent injunction*, 2019 WL 517666 (S. D. Ohio 2019) (enjoining Ohio's law authorizing only mandamus review of local election board decision to remove initiative from ballot).

43. Courts are not empowered to exercise de novo review when assessing the legality of a city's *discretionary* decision to remove an initiative from that city's ballot based on the content and/or subject matter of the proposed initiative. In the present case, the Election Commission's actions are not discretionary. ("[T]he Election Commission has only ministerial duties."); *Peeler*

v. State ex rel. Beaseley, 231 S.W.2d 321, 323 (Tenn. 1950) (holding that the duties of county election commissions are ministerial); *Curtis v. State*, 43 S.W.2d 391 (Tenn. 1931); *Taylor v. Carr*, 141 S. W. 745, 750 (Tenn. 1911) (holding that “the duties of commissioners of election are only ministerial”).

44. The Election Commission’s decision to refuse to count and verify 4GG’s 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot violates the "procedural safeguards" required by the First and Fourteenth Amendments when government uses content and/or subject matter to restrain a person's speech. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *Covenant Media of South Carolina v. City of North Charleston*, 493 F.3d 421, 431 (4th Cir. 2007) (“In *Freedman*, the Supreme Court set forth three procedural safeguards for a speech licensing scheme: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.”).

45. The Election Commission’s refusal to count and verify 4GG’s 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot fails to maintain the status quo by requiring the properly submitted and certified initiatives to remain on election ballots, pending any judicial review sought by government.

46. Tennessee law requires that when a city decides to remove an initiative from its election ballot based on subject matter and/or content "expeditious judicial review of that decision" is immediately available as required by the First and Fourteenth Amendments. *See Covenant Media of South Carolina v. City of North Charleston*, 493 F.3d 421, 431 (4th Cir. 2007).

47. The Election Commission’s decision to refuse to count and verify 4GG’s 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot is based on the content

of the initiative and subject to strict scrutiny under the First Amendment to the United States Constitution. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

48. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot cannot pass strict scrutiny, because it is not absolutely necessary to achieve a compelling state interest. *See Wyman v. Secretary of State*, 625 A.2d 307, 309 (Me. 1993) ("The potential invalidity of the subject of an initiative petition, however, is not a sufficient reason to pre-empt the petition process itself or to bar the discussion of the issues raised in the petition. ... Because the petition process is protected by the first amendment and the Secretary has advanced no compelling interest in executive oversight of the content of the petition prior to its circulation for signature, his refusal to furnish the petition form based on the content of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment.") (Emphasis added).

49. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot is an impermissible prior restraint under the First Amendment to the United States Constitution. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("This ordinance as it was written fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

50. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot without objective, content-neutral standards renders the decision an impermissible prior restraint under the First Amendment to the United States Constitution. *See, e.g., Forsyth County v. Nationalist Movement*,

505 U.S. 123, 131 (1990) ("To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* (citations omitted).

51. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot was done without prior judicial approval, and therefore constitutes an impermissible prior restraint under the First Amendment to the United States Constitution. *See Covenant Media of South Carolina v. City of North Charleston*, 493 F.3d 421, 431 (4th Cir. 2007).

52. The Election Commission's decision to refuse to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot constitutes an official policy or custom of the Metropolitan Government of Nashville-Davidson County within the meaning of 42 U.S.C. § 1983. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978).

53. The Election Commission's action at all relevant times were under color of state and local law within the meaning of 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167 (1961).

54. The Election Commission's refusal to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot will cause Plaintiffs injury-in-fact in the form of direct interference with Plaintiffs' First Amendment rights to associate and speak.

55. Plaintiffs' injury-in-fact is causally connected to and fairly traceable to Defendant's refusal to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot.

56. Plaintiffs' injury-in-fact can and will be redressed by emergency injunctive relief forcing the Election Commission to commence counting and verifying the 14,010 signatures and to place the initiative on the June 14, 2021 election ballot.

57. Plaintiffs' injury-in-fact includes financial, economic, emotional, and other injuries proximately caused by Defendant's outrageous conduct and voter suppression tactics.

58. Plaintiffs' financial, economic, emotional, and other injuries can and will be redressed by an award of nominal, compensatory, and/or presumed damages from Defendant.

A. Claim One (Facial and As-Applied First Amendment Challenges based on Defendant's Content-Based Restriction)

59. Paragraphs numbered 1-58 are hereby incorporated as though set forth in their entirety.

60. Defendant's refusal neither to count and verify 4GG's 14,010 signatures, nor to place the initiative on the June 14, 2021 election ballot, is based on content and/or subject matter.

61. Defendant's refusal to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot is subject to strict scrutiny.

62. Defendant's refusal to count and verify GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot is facially and as applied violates the First Amendment to the United States Constitution, as incorporated and applied to Defendant by the Fourteenth Amendment to the United States Constitution.

63. Defendant's unconstitutional action proximately caused Plaintiffs' injuries-in-fact.

64. Defendant is liable to Plaintiffs for preliminary and permanent injunctive relief, declaratory relief, and monetary damages.

B. Claim Two (Facial and As-Applied First Amendment Challenge Based on Impermissible Prior Restraint)

65. Paragraphs numbered 1-64 are hereby incorporated as though set forth in their entirety.

66. The Election Commission's discretionary refusal to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot is an impermissible prior restraint and therefore violates the First and Fourteenth Amendments to the United States Constitution.

67. The Election Commission's refusal to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot, which was accomplished without the procedural safeguards required of prior restraints, violates the First and Fourteenth Amendments to the United States Constitution.

68. The Election Commission's refusal to count and verify 4GG's 14,010 signatures and not to place the initiative on the June 14, 2021 election ballot both facially violates the First and Fourteenth Amendments to the United States Constitution and is unconstitutional as-applied to Plaintiffs' exercise of their First and Fourteenth Amendment rights.

69. The Election Commission's unconstitutional action proximately caused Plaintiffs' injuries-in-fact.

70. The Election Commission is liable to Plaintiffs for preliminary and permanent injunctive relief, declaratory relief, and monetary damages.

COUNT III: REQUEST FOR WRIT OF MANDAMUS

71. Paragraphs numbered 1-70 are hereby incorporated as though set forth in their entirety.

72. The Election Commission's actions clearly violate the Metro Charter, which sets out specific ministerial duties for its Commissioners. The duty to count and verify signatures and to place a duly-qualified ballot on the election ballot is not a discretionary function to allow the Election Commission the ability to "review" the same.

73. Plaintiffs have been harmed by the delay and uncertainty caused by the Election Commission's failure to do its Charter-mandated duties.

74. Plaintiffs are entitled to a Writ of Mandamus directing the Election Commission to fulfill its duty to count and verify the 14,010 signatures and to place a duly-qualified ballot on the election ballot.

RELIEF REQUESTED

NOW THEREFORE, Plaintiffs respectfully pray this Honorable Court for the following relief:

1. That the Court accept this Complaint and process issue against the Defendant;
2. That this matter be heard on an expedited basis as soon as the Court will permit;
3. That the Court set the accompanying motion for expedited trial, accelerated discovery, and enjoining the Metro Department of Law from conducting secret non-public meeting with the Election Commission in violation of the Tennessee Open Meetings Act, as requested;
4. That the Court issue a Writ of Mandamus / Order directing the Election Commission to comply with its ministerial duty both to count and verify the 14,010 signatures submitted to the Metro Clerk and to place the ballot initiative on the June 14, 2021 election ballot;
5. That the Court issue an Order declaring the Election Commission and Metro Department of Law are collaterally estopped from reversing its previous legal interpretations of § 19.01 to the detriment of Plaintiffs;
6. That the Court issue an Order declaring the Election Commission and Metro Department of Law are collaterally estopped from reversing its previous legal interpretations of § 19.01 as it related to the definition of a "previous general election" to the detriment of Plaintiffs;

7. That the Court issue an Order that enjoins and mandates the Commission to count and verify 4GG's 14,010 signatures and to place the initiative on the June 14, 2021 election ballot, and thereby hold such referendum required by § 19.01(2);

8. That the Court make a declaration under 28 U.S.C. § 2201 that the Election Commission's action was facially unconstitutional under the First and Fourteenth Amendments;

9. That the Court make a declaration under 28 U.S.C. § 2201 that the Election Commission's action are unconstitutional as-applied under the First and Fourteenth Amendments;

10. That the Court issue a temporary restraining order and/or preliminary injunction under 42 U.S.C. § 1983 prohibiting the Election Commission from denying placement and/or removing initiatives from its election ballots based on those initiatives' content and/or subject matter;

11. That the Court issue a permanent injunction under 42 U.S.C. § 1983 prohibiting the Election Commission from refusing to count and verify voter signatures and to place initiatives on the election ballot based on those initiatives' content and/or subject matter;

12. That the Court issue a temporary restraining order and/or preliminary injunction under 42 U.S.C. § 1983 directing the Election Commission to immediately count and verify the voter signatures and to place initiatives on June 14, 2021 election ballot;

13. That the Court award Plaintiffs of nominal, compensatory, and/or presumed damages from the Election Commission and Metro Government pursuant to 42 U.S.C. § 1983;

14. That the Court award Plaintiffs a reasonable attorney's fee and costs pursuant to 42 U.S.C. § 1988(b); and,

15. For such other relief to Plaintiffs, as the court deems equitable and appropriate, including reasonable attorney's fees and costs.

Respectfully submitted:

 /s/ James Roberts
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POLITICS

Group files 14K signatures to push for Nashville property tax vote. Is that enough?

Yihyun Jeong Nashville Tennessean

Published 4:25 p.m. CT Mar. 25, 2021 | Updated 5:42 p.m. CT Mar. 26, 2021

A local attorney filed about 14,000 signatures with the city clerk Thursday seeking a referendum to limit Nashville's property tax rate along with a slate of other measures that would limit Metro government.

But before any debate over the merits of the proposed Metro Charter amendments, an initial challenge is expected on how many signatures are needed to place the issue before voters.

The Metro Charter states a charter amendment may be proposed to Davidson County voters if a petition is signed by 10% of the number of voters who cast ballots in the "preceding general election."

More: Nashville chamber defends city's property tax hike amid new petition challenge

Nashville election administrator Jeff Roberts, basing the number on the November election, says 31,212 signatures are needed. But attorney Jim Roberts, who is leading the "Nashville Taxpayer Protection Act" initiative, is going off the August election when there was lower turnout. He said he needs only 12,142.

"I will absolutely challenge this," Roberts told The Tennessean.

The coming debate is reminiscent of a 2018 lawsuit when the local police union challenged Metro's verification of signatures collected by Community Oversight Now to hold a public vote for a new civilian police oversight board.

The legal challenge centered over which election should be used to determine how many signatures are needed to qualify the measure. A judge later dismissed the lawsuit.

The Davidson County Election Commission will have to verify the signatures before taking up whether the proposed charter amendments should go before voters for a requested June 14 special election. It would come just weeks before the city will have to finalize its operating budget and set a tax levy for the next fiscal year.

The decision could likely be passed, once again, to a judge.

Roberts went to court with the city in October over the legality and form of his first petition. A judge ultimately struck down that version.

He said Thursday he's confident there will be an election as he believes at least one measure will successfully get on the ballot. With no scheduled Metro election this year, it would trigger a special election estimated to cost the city more than \$800,000 to hold.

A spokesperson for Mayor John Cooper said Thursday the mayor is "focused on Nashville's rebound, not on yet another failed referendum attempt."

"This is a distraction," spokesperson Andrea Fanta said in a statement. "As a community and as a government, we are focused on the work ahead as we rebound from Nashville's most challenging year."

Metro Clerk Elizabeth Waites confirmed receiving 14,010 signatures Thursday. It's about half of what Roberts collected for his first petition, despite the 200,000 petitions he said were mailed out last month.

He attributed lower returns to a combination of cold weather, the recent snow storm and a "good bit of apathy," after how the first referendum push played out.

Roberts declined to disclose who funded the effort but estimated he collected donations from about 40 people, largely from "downtown Nashville."

He and the group dubbed "4 Good Government" want to set the city's property tax rate for the next two fiscal years to the level it was before the Metro Council approved a 34% increase. They also want to cap future increases to 3% without voter approval.

The petition also seeks to:

- Eliminate lifetime or other benefits for elected officials.

- Require any charter amendments approved by voters after Jan. 1, 2021, to be amended only by voters.

Block any transfer of publicly owned land without the support of 31 council members, and require the transfer of any property valued at \$5 million or more, and leases extending 20 years, go before voters.

Have any Nashville pro sports facilities or related commercial facilities "revert to public property" if no games are played for more than 24 months or if a team leaves Nashville. Lower the amount of signatures needed to trigger a recall election from 15% to 10% of the people who voted in the district or area of the official in the preceding Metro general election, while also extending the days to collect signatures from 30 to 75 days of the date the notice is filed. Prohibit the recalled official's name from appearing on a recall ballot, though that person may qualify as a write-in candidate.

Yihyun Jeong covers politics in Nashville for USA TODAY NETWORK - TENNESSEE. Reach her at yjeong@tennessean.com and follow her on Twitter @yihyun_jeong.

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

**FRATERNAL ORDER OF POLICE)
(ANDREW JACKSON LODGE NO. 5),)
MATTHEW DEAN BOGUSKIE,)
NOBLE TAYLOR, HAROLD MILTON)
BURKE, III, ROBERT ALAN YOUNG)
And JAMES ANTHONY GAFFORD,)**

No. M2018-01717-COA-R3-CV

Petitioners/Appellants,)

**Davidson County Circuit Court
No. 18C2158**

v.)

**THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY & DAVIDSON COUNTY)
ELECTION COMMISSION,)**

Respondents/Appellees, and)

COMMUNITY OVERSIGHT NOW,)

Intervening Respondent/Appellee.)

BRIEF OF THE METROPOLITAN GOVERNMENT

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

The question in this case is whether Community Oversight Now gathered a sufficient number of signatures to have their proposed charter amendment appear on the November 6, 2018 ballot. The Davidson County Election Commission determined that they did gather enough signatures. The Trial Court agreed. The number of signatures needed to place a proposed charter amendment on the ballot depends on how many people voted in the “preceding general election”.

The Supreme Court recently determined that the phrase “general election” as used in the Metro Charter encompasses more than the every four year “general metropolitan election”. *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 55 (Tenn. 2018). Did the Trial Court err in finding that the preceding general election did not have to be an every four-year general metropolitan election?

STATEMENT OF THE CASE

Plaintiffs (“the FOP”) filed this lawsuit on August 21, 2018. (T.R. 1). Community Oversight Now was permitted to intervene by agreed order. (T.R. 37).

The Metropolitan Government filed its brief on September 10, 2018, addressing the merits of the dispute. (T.R.342). Community Oversight Now filed a Motion to Dismiss based on standing. (T.R. 326).

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FACTS

On August 1, 2018, Community Oversight Now submitted a petition to amend the Metropolitan Charter. (A.R. 1) A statement with the petition stated that it contained an estimated 8,269 signatures. (*Id.*).

An amendment to the Metropolitan Charter may be proposed through a petition process that garners a certain number of registered voters' signatures. The number of signatures required depends on how many people voted in the "preceding general election":

This Charter may be amended subsequent to its adoption in the following manner: An amendment or amendments may be proposed ... upon petition filed with the metropolitan clerk, signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk. (Emphasis added).

Metropolitan Charter § 19.01 (T.R. 50).

On August 15, 2018, the Election Commission met and determined that the preceding general election was the August 4, 2016 election. (A.R. 30). In the August 4, 2016 General Election, 47,074 registered voters cast their ballot. (T.R. 43). Therefore, 4,708 signatures would constitute ten percent of these voters. Davidson County Election Commission determined that there were at least 4,801 valid signatures accompanying the Community Oversight Board Petition. (T.R. 30). The Commission voted at their August 15, 2018 meeting to accept these verified signatures as meeting the requirements of Metropolitan Charter § 19.01. (*Id.*).

ARGUMENT

I. STANDARD OF REVIEW.

A motion to dismiss is reviewed de novo. *West v. Schofield*, 468 S.W.3d 482, 489 (Tenn. 2015). Interpretation of the Metropolitan Charter is a question of law. *Cty. of Shelby v. Tompkins*, 241 S.W.3d 500, 505 (Tenn. Ct. App. 2007).

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A. THE SUPREME COURT HAS HELD THAT THE “PRECEDING GENERAL ELECTION” IN METRO CHARTER § 19.01 MAY BE A “GENERAL METROPOLITAN ELECTION” OR A “GENERAL ELECTION.”

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There are only two appellate decisions interpreting the phrase “general election” as used in the Metropolitan Charter – the *Wise* and *Wallace* cases. *Wallace* summarized *Wise* and noted outright that the phrase “general election” as used in the Charter encompasses more than the every four year “general metropolitan election”:

That the intent of the drafters of the Charter was to draw a distinction between “general metropolitan elections” and all other “general elections” is evidenced by the use of these distinct phrases within section 15.03 to address different events. We do not read the use of the distinct phrases “general metropolitan election” and “general election” to be merely accidental. Rather, we view the two phrases to have been intentionally and thoughtfully employed to refer to different elections. The former phrase refers to the particular general election at which the Mayor, Vice Mayor, Councilmen-at-Large, and District Councilmen are elected in August of each fourth odd-numbered year, beginning

in 1971, as called for in section 15.01 of the Charter. In contrast, the latter phrase refers more broadly to any municipal general election, including but not limited to general metropolitan elections. In other words, “general metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections.” however, are not “general metropolitan elections.”

Wallace v. Metro. Gov't of Nashville, 546 S.W.3d 47, 55 (Tenn. 2018) (emphasis added, citing *Wise v. State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983)).

B. THE FOP IS MISTAKEN WHEN IT ASSERTS THAT THE AUGUST 6, 2015 METROPOLITAN ELECTION MUST BE TREATED AS THE “PRECEDING GENERAL ELECTION.”

The FOP takes the position that the August 6, 2015 election (the general metropolitan election where the Mayor, Vice-Mayor and Council are elected) must be the “preceding general election” used to calculate the 10% figure needed.

But this interpretation ignores the holding of *Wallace*, which is that the Charter uses the term “general election” broadly to include more than just general metropolitan elections:

[G]eneral metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections,” however, are not “general metropolitan elections.” ...
Our holding in *Wise* was that the phrase “preceding general election” as used in section 19.01 of the Charter refers to *municipal* general elections....

Wallace at 55–58 (emphasis in original).

Chancellor Kilcrease was correct in *Wise* when he included both the August 1982 election (a general municipal election) and the August 1979 election (a general metropolitan election) as qualifying elections, and selected the August 1982 election, and its 9,473 signature threshold, as the most recent preceding election that would be used to determine if there were sufficient signatures.

Applying *Wise* and *Wallace*, the Charter does not treat the phrase “general election” as synonymous with “general metropolitan election.” The August 4, 2016 election (which included the

election of the Metropolitan¹ Assessor of Property²) meets the Charter's definition of "general election," and is closer in time than the August 2015 election. Therefore, it is the correct general election to use to calculate the number of signatures necessary for a Charter amendment petition.

¹ The FOP states that Nashville is the first consolidated government, but this is not correct. New Orleans (1805), Boston (1821), Philadelphia (1854), San Francisco (1856), New York (1890's), and Denver (1902) are some of the consolidated governments that preceded Nashville. <https://www.mtas.tennessee.edu/knowledgebase/consolidation-city-and-county-governments-look-history-and-outcome-based-research>.

² The FOP argues that the election of the Metropolitan Assessor of Property is a state election. However, this argument was not raised below and cannot be raised for the first time on appeal. *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009).

In addition, this argument is incorrect. The FOP's claim that a county office is a "state election" relies on a definition (T.C.A. § 2-1-104(a)(28) that is clearly drafted to distinguish it from the definition of "federal election" (T.C.A. § 2-1-104(a)(9). If Plaintiffs' logic prevailed, all "district" offices (Metro Council) would also be state elections. This would be a skewed reading of state law.

In another skewed reading of state law, the FOP refer to T.C.A. § 2-13-208(a)'s discussion of non-partisan municipal elections without mentioning 208(b), which addresses metropolitan governments and offices and states that the Charter controls certain offices.

Plaintiffs assert that the Metro Charter preserves the Office of Assessor with the duties assigned by state law, but do not recognize that the Metropolitan Assessor is a uniquely local office with unique duties created by the Metropolitan Charter. *Winter v. Allen*, 212 Tenn. 84, 95, 367 S.W.2d 785, 790 (1963) (“[W]e hold that it is the duty of Metropolitan County Tax Assessor to make assessments of merchants' ad valorem taxes and that the Metropolitan Trustee shall collect such taxes, such duties, functions and responsibilities thereof being effectively and constitutionally transferred from the office of County Court Clerk by said Charter to the said Tax Assessor and Trustee.”).

In addition to the unique duties assigned by the Metropolitan Charter, the Metropolitan Government is responsible for the Assessor's salary and legal liability. See *State ex rel. Winstead v. Moody*, 596 S.W.2d 811, 813 (Tenn.1980) & *Pharris v. Looper*, 6 F. Supp. 2d 720, 730, 1998 WL 276131 (M.D. Tenn. 1998). The Metropolitan Assessor is a uniquely local metropolitan office. There is no merit in the suggestion that it is insufficient or unworthy for use as a measurement for the number of signatures needed to amend the Metropolitan Charter.

C. THE FOP IS MISTAKEN WHEN IT ASSERTS THAT THE SPECIAL ELECTION TO FILL THE MAYORAL VACANCY (THE MAY 24, 2018 ELECTION) MUST BE TREATED AS THE “PRECEDING GENERAL ELECTION.”

The FOP takes the alternative position that the May 24, 2018 special election to fill the mayoral vacancy is the “preceding general election” that should be used for calculating the 10% number required by Charter § 19.01. (T.R. 1, ¶ 32).

The FOP attempts to define “general election” as any non-primary election. This is a colloquial definition of general election, but is not the more specific meaning of the phrase as it is used in the Metro Charter. Charter Articles 15 and 19 discuss several types of elections: general, metropolitan general, referendum elections and special elections. In *Wallace*, the Supreme Court held that the use of distinct phrases is evidence that the intent of the drafters was to draw a distinction between them. Applying this interpretation, the Supreme Court determined a special election was necessary to fill the mayoral vacancy, pursuant to §15.03³ of the Charter.

The May 24, 2018 election was a *special* election, as ordered by the *Wallace* Supreme Court in its final paragraph: “The Commission is hereby ordered to set a special election in accordance with Tennessee Code Annotated section 2-14-102(a).” *Wallace* at 58. **State law treats special elections and general elections as different types of elections:**

³ Charter §15.03 requires special elections to fill a mayoral vacancy that will exist more than 12 months prior to the next general metropolitan election and makes a distinction between special and general elections:

If in such special election to fill a vacancy for the unexpired term of the office of mayor or district council member, or in the general election at which time a vacancy in the office of vice mayor or councilmember-at-large, no candidate shall receive a majority of all the votes cast for such office, a runoff election shall be held five (5) weeks subsequent to the first special election to fill a vacancy in accordance with the provisions hereinbefore set forth in the case of a general metropolitan election. The provisions of section 15.01 hereof with respect to voting in general metropolitan elections and with respect to qualifying as a candidate shall apply to special elections and to general elections at which time a vacancy is filled. (emphasis added).

Special elections shall be held when a vacancy in any office is required to be filled by election at other times than those fixed for general election.

TENN. CODE ANN. § 2-14-101. **Therefore an election cannot be both a special election and a general election.**

The fact that an election cannot be both a special election and a general election was emphasized by the Supreme Court in *McPherson v. Everett*, a case involving when to fill a vacancy in the office of County Clerk. 594 S.W.2d 677 (Tenn. 1980). The state election administrator had instructed counties to fill any county vacancies with the May presidential primary, “as a special general election for such office for the unexpired term.” *Id.* at 679. The Supreme Court disagreed stating: “*There is no such process as a ‘special general’ election. This is a contradiction in terms.*” *Id.* at 680, fn. 8 (emphasis added).

This distinction is also commonly recognized as black letter law:

- See ELECTION, Black's Law Dictionary (10th ed. 2014) [“**general election** (16c) 1. An election that occurs at a regular interval of time. — Also termed *regular election*.”]
- See ELECTION, Black's Law Dictionary (10th ed. 2014) [“**special election** (1836) An election that occurs in an interim between general elections, usu. to fill a sudden vacancy in office.”]

Special and general elections are distinct creatures and are incompatible in the context of state law and the Metropolitan Charter. *McPherson v. Everett, supra*, TENN. CODE ANN. § 2-14-101; Metropolitan Charter Articles 15 & 19. For this reason, the special election held on May 24, 2018 cannot be the “preceding general election” to measure the signature threshold.

D. THE ELECTION COMMISSION WAS CORRECT WHEN IT DETERMINED THAT AUGUST 4, 2016 WAS THE MOST RECENT PRECEDING GENERAL ELECTION.

A review of elections discussed in the Petition shows that the Election Commission was correct when it determined that August 4, 2016 was the most recent preceding general election. The fourth

column below shows why an election is or is not the preceding general election:

Date of election	Offices on ballot	Number of votes cast	Preceding general election?
May 24, 2018	Mayor of Metropolitan Nashville & vacant Metro District Council position	82,368	No, because this was a special election. There is no such thing as a special general election. <i>McPherson v. Everett</i> , at 679.
November 8, 2016	U.S and State offices, City Commissioners for Belle Meade, Forest Hills, and Goodlettsville	252,926	<p>No, because these were state and federal elections, not Metropolitan Government elections. <i>Wallace</i> explains that state and federal elections cannot be the “preceding general election”:</p> <p>Our holding in <i>Wise</i> was that the phrase “preceding general election” as used in section 19.01 of the Charter refers to municipal general elections, not to state or federal general elections. <i>Id.</i> We did not hold, nor did we intend to hold, that the phrases “general metropolitan election” and “general election” are synonymous for purposes of section 15.03 of the Charter.</p> <p><i>Wallace</i> at 58.</p> <p>Belle Meade, Forest Hills and Goodlettsville are “smaller city” municipalities that exist within a metropolitan government.</p>
August 4, 2016	Primary election for U.S. and State offices, vacant Metro District Council position, Metro Assessor of Property, School Board	47,074	<p>Yes, because the election of the Metro Assessor of Property is a municipal general election. <i>Wallace</i> holds that the phrase “general election” includes more than just general metropolitan elections:</p> <p>[G]eneral metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections,” however, are not “general metropolitan elections.</p> <p><i>Wallace</i> at 55.</p>
August 6, 2015	Mayor of Metropolitan Nashville, Vice-Mayor,	104,757	No, because the August 4, 2016 election meets the definition of preceding general

AOP was on the August 2020 ballot! →

	5 Metro Council at Large positions and 35 District Metro Council positions		election, and is closer in time.
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III. MOOTNESS.

The Metropolitan Government relies on and incorporates by reference its filings with this Court that were made in response to Community Oversight’s Motion to Dismiss.

CONCLUSION

The FOP is attempting to narrow the definition of “general election” to mean solely “general metropolitan election.” But the *Wallace* Supreme Court has already held that general elections, as used in the Charter, are a broad category, which include (but are not limited to) general metropolitan elections.

There is no basis for defying the *Wallace* holding and creating a new definition of general election in this case. Applying the *Wallace* Court’s decision, the Election Commission correctly determined that the August 4, 2016 general election is the preceding general election that is used to measure the number of signatures required for a charter amendment petition. The Trial Court’s order upholding the Election Commission’s decision should be affirmed.

Respectfully submitted,
/s/ Lora Fox
Lora Barkenbus Fox, #17243
Catherine J. Pham, #28005
Metropolitan Attorneys
108 Metropolitan Courthouse
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Nashville, Tennessee 37219
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by agreement via email to Austin L. McMullen, Bradley Arant Boult Cummings, LLP, 1600 Drivision St., Suite 700, Nashville, TN 37201 at amcmullen@bradley.com , David L. Raybin, Raybin & Weissman, P.C., 424 Church St., Suite 2120, Nashville, TN 37219 at draybin@nashvilletnlaw.com Jamie R. Hollin, 511 Rosebank Avenue, Nashville, TN 37206 at j.hollin@me.com and Daniel A. Horwitz, 1803 Broadway, Suite #531, Nashville, TN 37203 at daniel.a.horwitz@gmail.com on this 8th day of November, 2018.

/s/ Lora Fox
Lora Barkenbus Fox

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

**FRATERNAL ORDER OF POLICE)
(ANDREW JACKSON LODGE NO. 5),)
MATTHEW DEAN BOGUSKIE,)
NOBLE TAYLOR, HAROLD MILTON)
BURKE, III, ROBERT ALAN YOUNG)
And JAMES ANTHONY GAFFORD,)**

No. M2018-01717-COA-R3-CV

Petitioners/Appellants,

**Davidson County Circuit Court
No. 18C2158**

v.

**THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY & DAVIDSON COUNTY)
ELECTION COMMISSION,)**

Respondents/Appellees, and

COMMUNITY OVERSIGHT NOW,)

Intervening Respondent/Appellee.)

BRIEF OF THE METROPOLITAN GOVERNMENT

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #23571
Director of Law
Lora Barkenbus Fox, #17243
Metropolitan Attorney
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election of the Metropolitan¹ Assessor of Property²) meets the Charter's definition of "general election," and is closer in time than the August 2015 election. Therefore, it is the correct general election to use to calculate the number of signatures necessary for a Charter amendment petition.

¹ The FOP states that Nashville is the first consolidated government, but this is not correct. New Orleans (1805), Boston (1821), Philadelphia (1854), San Francisco (1856), New York (1890's), and Denver (1902) are some of the consolidated governments that preceded Nashville. <https://www.mtas.tennessee.edu/knowledgebase/consolidation-city-and-county-governments-look-history-and-outcome-based-research>.

² The FOP argues that the election of the Metropolitan Assessor of Property is a state election. However, this argument was not raised below and cannot be raised for the first time on appeal. *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009).

In addition, this argument is incorrect. The FOP's claim that a county office is a "state election" relies on a definition (T.C.A. § 2-1-104(a)(28) that is clearly drafted to distinguish it from the definition of "federal election" (T.C.A. § 2-1-104(a)(9). If Plaintiffs' logic prevailed, all "district" offices (Metro Council) would also be state elections. This would be a skewed reading of state law.

In another skewed reading of state law, the FOP refer to T.C.A. § 2-13-208(a)'s discussion of non-partisan municipal elections without mentioning 208(b), which addresses metropolitan governments and offices and states that the Charter controls certain offices.

Plaintiffs assert that the Metro Charter preserves the Office of Assessor with the duties assigned by state law, but do not recognize that the Metropolitan Assessor is a uniquely local office with unique duties created by the Metropolitan Charter. *Winter v. Allen*, 212 Tenn. 84, 95, 367 S.W.2d 785, 790 (1963) (“[W]e hold that it is the duty of Metropolitan County Tax Assessor to make assessments of merchants' ad valorem taxes and that the Metropolitan Trustee shall collect such taxes, such duties, functions and responsibilities thereof being effectively and constitutionally transferred from the office of County Court Clerk by said Charter to the said Tax Assessor and Trustee.”).

In addition to the unique duties assigned by the Metropolitan Charter, the Metropolitan Government is responsible for the Assessor's salary and legal liability. See *State ex rel. Winstead v. Moody*, 596 S.W.2d 811, 813 (Tenn.1980) & *Pharris v. Looper*, 6 F. Supp. 2d 720, 730, 1998 WL 276131 (M.D. Tenn. 1998). The Metropolitan Assessor is a uniquely local metropolitan office. There is no merit in the suggestion that it is insufficient or unworthy for use as a measurement for the number of signatures needed to amend the Metropolitan Charter.

C. THE FOP IS MISTAKEN WHEN IT ASSERTS THAT THE SPECIAL ELECTION TO FILL THE MAYORAL VACANCY (THE MAY 24, 2018 ELECTION) MUST BE TREATED AS THE “PRECEDING GENERAL ELECTION.”

The FOP takes the alternative position that the May 24, 2018 special election to fill the mayoral vacancy is the “preceding general election” that should be used for calculating the 10% number required by Charter § 19.01. (T.R. 1, ¶ 32).

The FOP attempts to define “general election” as any non-primary election. This is a colloquial definition of general election, but is not the more specific meaning of the phrase as it is used in the Metro Charter. Charter Articles 15 and 19 discuss several types of elections: general, metropolitan general, referendum elections and special elections. In *Wallace*, the Supreme Court held that the use of distinct phrases is evidence that the intent of the drafters was to draw a distinction between them. Applying this interpretation, the Supreme Court determined a special election was necessary to fill the mayoral vacancy, pursuant to §15.03³ of the Charter.

The May 24, 2018 election was a *special* election, as ordered by the *Wallace* Supreme Court in its final paragraph: “The Commission is hereby ordered to set a special election in accordance with Tennessee Code Annotated section 2-14-102(a).” *Wallace* at 58. **State law treats special elections and general elections as different types of elections:**

³ Charter §15.03 requires special elections to fill a mayoral vacancy that will exist more than 12 months prior to the next general metropolitan election and makes a distinction between special and general elections:

If in such special election to fill a vacancy for the unexpired term of the office of mayor or district council member, or in the general election at which time a vacancy in the office of vice mayor or councilmember-at-large, no candidate shall receive a majority of all the votes cast for such office, a runoff election shall be held five (5) weeks subsequent to the first special election to fill a vacancy in accordance with the provisions hereinbefore set forth in the case of a general metropolitan election. The provisions of section 15.01 hereof with respect to voting in general metropolitan elections and with respect to qualifying as a candidate shall apply to special elections and to general elections at which time a vacancy is filled. (emphasis added).

Special elections shall be held when a vacancy in any office is required to be filled by election at other times than those fixed for general election.

TENN. CODE ANN. § 2-14-101. **Therefore an election cannot be both a special election and a general election.**

The fact that an election cannot be both a special election and a general election was emphasized by the Supreme Court in *McPherson v. Everett*, a case involving when to fill a vacancy in the office of County Clerk. 594 S.W.2d 677 (Tenn. 1980). The state election administrator had instructed counties to fill any county vacancies with the May presidential primary, “as a special general election for such office for the unexpired term.” *Id.* at 679. The Supreme Court disagreed stating: “*There is no such process as a ‘special general’ election. This is a contradiction in terms.*” *Id.* at 680, fn. 8 (emphasis added).

This distinction is also commonly recognized as black letter law:

- See ELECTION, Black's Law Dictionary (10th ed. 2014) [“**general election** (16c) 1. An election that occurs at a regular interval of time. — Also termed *regular election*.”]
- See ELECTION, Black's Law Dictionary (10th ed. 2014) [“**special election** (1836) An election that occurs in an interim between general elections, usu. to fill a sudden vacancy in office.”]

Special and general elections are distinct creatures and are incompatible in the context of state law and the Metropolitan Charter. *McPherson v. Everett, supra*, TENN. CODE ANN. § 2-14-101; Metropolitan Charter Articles 15 & 19. For this reason, the special election held on May 24, 2018 cannot be the “preceding general election” to measure the signature threshold.

D. THE ELECTION COMMISSION WAS CORRECT WHEN IT DETERMINED THAT AUGUST 4, 2016 WAS THE MOST RECENT PRECEDING GENERAL ELECTION.

A review of elections discussed in the Petition shows that the Election Commission was correct when it determined that August 4, 2016 was the most recent preceding general election. The fourth

column below shows why an election is or is not the preceding general election:

Date of election	Offices on ballot	Number of votes cast	Preceding general election?
May 24, 2018	Mayor of Metropolitan Nashville & vacant Metro District Council position	82,368	No, because this was a special election. There is no such thing as a special general election. <i>McPherson v. Everett</i> , at 679.
November 8, 2016	U.S and State offices, City Commissioners for Belle Meade, Forest Hills, and Goodlettsville	252,926	<p>No, because these were state and federal elections, not Metropolitan Government elections. <i>Wallace</i> explains that state and federal elections cannot be the “preceding general election”:</p> <p>Our holding in <i>Wise</i> was that the phrase “preceding general election” as used in section 19.01 of the Charter refers to municipal general elections, not to state or federal general elections. <i>Id.</i> We did not hold, nor did we intend to hold, that the phrases “general metropolitan election” and “general election” are synonymous for purposes of section 15.03 of the Charter.</p> <p><i>Wallace</i> at 58.</p> <p>Belle Meade, Forest Hills and Goodlettsville are “smaller city” municipalities that exist within a metropolitan government.</p>
August 4, 2016	Primary election for U.S. and State offices, vacant Metro District Council position, Metro Assessor of Property, School Board	47,074	<p>Yes, because the election of the Metro Assessor of Property is a municipal general election. <i>Wallace</i> holds that the phrase “general election” includes more than just general metropolitan elections:</p> <p>[G]eneral metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections,” however, are not “general metropolitan elections.</p> <p><i>Wallace</i> at 55.</p>
August 6, 2015	Mayor of Metropolitan Nashville, Vice-Mayor,	104,757	No, because the August 4, 2016 election meets the definition of preceding general

AOP was on the August 2020 ballot! →

	5 Metro Council at Large positions and 35 District Metro Council positions		election, and is closer in time.
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III. MOOTNESS.

The Metropolitan Government relies on and incorporates by reference its filings with this Court that were made in response to Community Oversight’s Motion to Dismiss.

CONCLUSION

The FOP is attempting to narrow the definition of “general election” to mean solely “general metropolitan election.” But the *Wallace* Supreme Court has already held that general elections, as used in the Charter, are a broad category, which include (but are not limited to) general metropolitan elections.

There is no basis for defying the *Wallace* holding and creating a new definition of general election in this case. Applying the *Wallace* Court’s decision, the Election Commission correctly determined that the August 4, 2016 general election is the preceding general election that is used to measure the number of signatures required for a charter amendment petition. The Trial Court’s order upholding the Election Commission’s decision should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by agreement via email to Austin L. McMullen, Bradley Arant Boult Cummings, LLP, 1600 Drivision St., Suite 700, Nashville, TN 37201 at amcmullen@bradley.com , David L. Raybin, Raybin & Weissman, P.C., 424 Church St., Suite 2120, Nashville, TN 37219 at draybin@nashvilletnlaw.com Jamie R. Hollin, 511 Rosebank Avenue, Nashville, TN 37206 at j.hollin@me.com and Daniel A. Horwitz, 1803 Broadway, Suite #531, Nashville, TN 37203 at daniel.a.horwitz@gmail.com on this 8th day of November, 2018.

/s/ Lora Fox
Lora Barkenbus Fox

FOP v. Metro. Gov't of Nashville & Davidson Cty.

Court of Appeals of Tennessee, At Nashville

December 5, 2018, Session; January 11, 2019, Filed

No. M2018-01717-COA-R3-CV

Reporter

582 S.W.3d 212 *; 2019 Tenn. App. LEXIS 15 **; 2019 WL 169092

FRATERNAL ORDER OF POLICE ET AL. v.
METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, TENNESSEE ET AL.

Opinion by: ANDY D. BENNETT

Opinion

Prior History: *Tenn. R. App. P. 3* [**1] Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Davidson County. No. 18C2158. Kelvin D. Jones, Judge.

Disposition: Judgment of the Circuit Court Affirmed.

Counsel: Austin Lenoy McMullen and David Louis Raybin, Nashville, Tennessee, for the appellants, Fraternal Order of Police, Matthew Dean Boguskie, Harold Milton Burke, III, James Anthony Gafford, Noble Taylor, and Robert Alan Young.

Lora Barkenbus Fox and Catherine Jane Pham, Nashville, Tennessee, for the appellees, Davidson County Election Commission and Metropolitan Government of Nashville and Davidson County.

Jamie Ray Hollin and Daniel Alexander Horwitz, Nashville, Tennessee, for the appellee, Community Oversight Now.

Judges: ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

[*214] The Election Commission of the Metropolitan Government of Nashville and Davidson County, Tennessee used the August 4, 2016 election as the proper election for determining the appropriate number of signatures needed on the petition to hold a referendum on whether to create a police oversight board. Certain individuals and the Fraternal Order of Police [**2] ("FOP") disagreed and sought a writ of certiorari. The trial court agreed with the election commission and affirmed its action. The individuals and the FOP appealed. We affirm.

OPINION

On August 1, 2018, Community Oversight Now ("CON") filed with the Metropolitan Clerk a petition for a referendum to be placed on the November 6, 2018 ballot containing a proposal to amend the Metro charter to establish a police oversight board. Pursuant to [section 19.01](#) of the Metro charter, such a petition must be "signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election." The Davidson County Election Commission staff began analyzing the 8,269 signatures on CON's petition. The commission met on August 15, 2018, and the staff reported that it had reviewed 6,491 of the signatures; 4,801 signatures were verified and 1,690 had been rejected. The commission determined that the preceding general election was the August 4, 2016 election in which 47,074 voters cast their ballots; thus, 4,708 signatures would constitute ten percent. The commission voted to accept the verified signatures as meeting the requirements of the Metro

charter.

The FOP and [**3] individual current and retired police officers filed a petition for writ of certiorari and supersedeas and writ of mandamus from the decision of the Davidson County Election Commission in circuit court¹ challenging the validity of the referendum based upon the theory that the referendum petition did not contain enough verified signatures. By agreed order, CON was permitted to intervene. The circuit court expedited the proceedings [*215] and, after a hearing on September 14, 2018, the court entered a final order on September 19, 2018, in which it agreed with the election commission's determination that the preceding general election was held on August 4, 2016, and affirmed the decision of the commission. CON filed a motion to alter or amend, which the circuit court denied on September 21, 2018. The FOP appealed. Post-appeal motions will be discussed below.

STANDARD OF REVIEW

Review of the election commission's decision is by common law writ of certiorari. [McFarland v. Pemberton, 530 S.W.3d 76, 104 \(Tenn. 2017\)](#).

Reviewing courts may grant relief only when the board or agency whose decision is being reviewed has exceeded its jurisdiction or has acted illegally, arbitrarily, or fraudulently.

Review under a common-law writ of certiorari does not extend [**4] to a redetermination of the facts found by the board or agency whose decision is being reviewed. The courts may not (1) inquire into the intrinsic correctness of the decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the board or agency. However, they may review the record solely to determine whether it contains any material evidence to support the decision because a decision without evidentiary support is an arbitrary one.

[Leonard Plating Co. v. Metro. Gov't of Nashville & Davidson Cnty., 213 S.W.3d 898, 903-04 \(Tenn. Ct. App. 2006\)](#) (internal citations and footnotes omitted).

¹ The circuit court has concurrent jurisdiction with the chancery court over petitions of certiorari concerning an order or judgment of a board or commission operating under state law. See [Tenn. Code Ann. § 27-9-103](#).

ANALYSIS

Motion to Dismiss

The FOP filed a motion to expedite the appeal and a reach-down motion in the Supreme Court in an attempt to have the case resolved prior to the November 6 election. On Sept. 26, 2018, this Court granted an expedited schedule that would set the oral argument for after the election, stating:

The election is now less than forty-five days away, and the military and overseas ballots have already been mailed. Absentee ballots must be mailed no later than October 7, 2018, and early voting begins on October 17, 2018. Moreover, Metro concedes that the appeal will not be moot after the election and that the results of the referendum can be held void if the appellants ultimately [**5] prevail on appeal. Given that ballots have already been mailed, the impracticality of obtaining a record and briefs in such a short period of time, and the availability of an adequate remedy after the election, it is not feasible for this court to render a decision prior to the November 6, 2018 election. Nevertheless, the court finds it to be in the interest of the public and the parties to shorten the schedules within which the parties and the trial court clerk are to fulfill their respective obligations so this court may render a decision as soon as is reasonably possible.

On September 27, 2018, the Supreme Court denied the reach-down motion. On October 9, 2018, this Court denied CON's motion to dismiss the appeal as moot, "without prejudice to the parties addressing the same issues in their briefs." On October 14, 2018, CON filed a *Tenn. Rule App. P. 10* motion asking the Tennessee Supreme Court:

To vacate the Court of Appeals' September 26, 2018 Order holding that "the appeal will not be moot after the election and that the results of the referendum can be held void . . . , and . . . To order the Court of Appeals to adjudicate Community Oversight Now's Motion to [*216] Dismiss the instant appeal for loss of [**6] subject matter jurisdiction before the November 6, 2018 election."

The motion was promptly denied by the Supreme Court on October 16, 2018.

On the afternoon of December 4, 2018, the day before oral argument, CON filed another motion to dismiss.

This one was based on the proposition that the instant action is an election contest which must be filed in chancery court within five days of the certification of the election results, which occurred on November 26, 2018. Oral argument was heard the next day. The Court gave Metro five days to respond to CON's motion and the FOP five days after that to respond.

Metro's response is surprising. As a matter of background, in response to the first motion to expedite referenced above, Metro argued that the case should not be expedited: "there is no value in expediting the case — it can be resolved during and even after the November 6, 2018 election without harm to Petitioners or the public. In contrast, rushing the case, and causing any disruption in the election, will cause substantial harm to the public." Metro *expressly* stated to this court:

There is no harm in having the public go ahead and vote on the referendum, now that the election process has [**7] begun. If this Court decides that there were an insufficient number of signatures to place the proposed charter amendment on the ballot, there is a remedy - the results can be treated as a nullity

Petitioner's citations to cases considered moot are not relevant to this case In this case, the FOP et al. have brought their case before the election is to be held and have not waited many months before asking the case to be expedited. There is no reason that this case cannot be resolved in due course by the appellate courts.²

For these reasons, Respondents ask that this motion to expedite be denied.

In contrast, now, post-election, when CON seeks to dismiss the case for failure to file an election contest, Metro reverses direction like a boomerang, and says, in effect, "This case is really an election contest to void the election. It should be brought under [Tenn. Code Ann. § 2-17-101\(b\)](#)!" Suddenly, mootness is relevant, and the concerns about disrupting the election have been consigned to the dustbin of history.³

In its response, the FOP argues that challenges to what should be on the ballot are properly brought before the

² Metro made the same response to the reach-down motion filed in the Supreme Court.

³ Metro's one-paragraph response was filed on December 12, 2018 and is devoid of legal citation except for the quotation from [Tenn. Code Ann. § 2-17-101\(b\)](#).

election, citing [Barrett v. Giles County, No. M2010-02018-COA-R3-CV, 2011 Tenn. App. LEXIS 548, 2011 WL 4600431 \(Tenn. Ct. App. Oct. 5, 2011\)](#). CON filed a reply [**8] to the FOP's response maintaining that the claim that the election must be invalidated "constitutes an election contest," and that it is too late to file an election contest.

The court in *Barrett* observed that:

"In [Forbes v. Bell, 816 S.W.2d 716 \(Tenn. 1991\)](#), our Supreme Court discussed at length the procedures for having an election set aside pursuant to [Tenn. Code Ann. § 2-17-101, et seq.](#) The *Forbes* Court began by observing that there are two grounds upon which an election contest can be based. The first ground involves a claim that the election was valid, but that the contestant, rather than the contestee, would be the winner if the outcome was properly determined. [*217] [Id. at 719](#). If the contestant is successful in court, the proper relief in this type of case is a judgment declaring the contestant the winner. The second ground is a claim that the election was null and void. *Id.* The proper remedy in this second situation, if the contestant is successful in court, is to order a new election."

[Barrett, 2011 Tenn. App. LEXIS 548, 2011 WL 4600431, at *2](#) (quoting *Stuart v. Anderson Cnty. Election Comm'n*, 237 S.W.3d 297, 303 (Tenn. Ct. App. 2007)). The first ground does not apply. As for the second ground, Tennessee case law is that an election may be voided by "(1) fraud and illegality rendering the election uncertain or (2) enough illegal ballots having been cast to call the election into doubt." [Barrett, 2011 Tenn. App. LEXIS 548, 2011 WL 4600431, at *3](#); see also [Forbes v. Bell, 816 S.W.2d 716, 719-20 \(Tenn. 1991\)](#) (quoting [**9] [Millar v. Thomas, 657 S.W.2d 750, 751 \(Tenn. 1983\)](#)). This case does not involve allegations of illegal ballots or fraud. This matter is not an election contest.⁴

⁴ Further support for this matter not being an election contest is found in the language of [Tenn. Code Ann. § 2-17-101\(b\)](#) itself:

The incumbent office holder and any candidate for the office may *contest the outcome of an election* for the office. Any campaign committee or individual which has charge of a campaign for the adoption or rejection of a question submitted to the people may *contest the election* on the question.

Challenges to what should be on the ballot "should ordinarily be brought before the election — preferably in time for the issue to be resolved before the ballots have to be printed and before the start of absentee and early voting." [Barrett, 2011 Tenn. App. LEXIS 548, 2011 WL 4600431, at *4](#). This case was filed before the election, going through an administrative process with the election commission, and a circuit court challenge by writ of certiorari before appealing to this Court. Even then, the FOP sought to expedite this case before this Court and the Tennessee Supreme Court. We do not know what more the FOP could have done to advance this matter. To now require them to file a new lawsuit to litigate once again what has already been decided by the election commission and the circuit court, or to hold that they failed to file such a lawsuit [**10] and therefore cannot have heard the claim that they have so earnestly pressed forward, would be an injustice and not in the public interest.

The motion to dismiss is denied.

Standing

In this case, an examination of standing begins with [Tenn. Code Ann. § 27-9-101](#): "Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have the order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter." Our Supreme Court has held:

In order to have standing to file a petition for a common-law writ of certiorari, the party filing the petition must demonstrate that it is "aggrieved" by the decision sought to be reviewed. For the purposes of [Tenn. Code Ann. § 27-9-101](#), to be "aggrieved," a party must be able to show a special interest in the agency's final decision or that it is subject to a special injury not common to the public generally. The party must also show that it was a party to the agency proceedings sought to be reviewed.

[Wood v. Metro. Nashville & Davidson Cnty. Gov't, 196 S.W.3d 152, 158 \(Tenn. Ct. App. 2005\)](#) (citations omitted). The individual appellants and the FOP participated in [*218] the proceedings before the election commission and are undoubtedly affected by

(emphasis added). This case is not a challenge to the outcome of an election. It is a challenge regarding what should be on the ballot, filed before the election.

the agency's decision to place the [**11] referendum on the ballot in a manner singularly different from the effect on the general public. They have standing.

Mootness

Metro and CON argue that this case is now moot because the election has taken place. At the risk of being repetitious, we must again point out that, in response to the first motion to expedite, Metro argued that the case should not be expedited: "there is no value in expediting the case — it can be resolved during and even after the November 6, 2018 election without harm to Petitioners or the public. In contrast, rushing the case, and causing any disruption in the election, will cause substantial harm to the public." At this juncture, Metro cannot take the opposite position.

As stated earlier, we recognized in this Court's order of September 26, 2018, that an appellate decision could not be rendered before the election. In particular, we stated:

Given that ballots have already been mailed, the impracticality of obtaining a record and briefs in such a short period of time, and the availability of an adequate remedy after the election, it is not feasible for this court to render a decision prior to the November 6, 2018 election. Nevertheless, the court finds it to [**12] be in the interest of the public and the parties to shorten the schedules within which the parties and the trial court clerk are to fulfill their respective obligations so this court may render a decision as soon as is reasonably possible.

Implicit in our order is a determination that, under the peculiar circumstances of this case, the matter would not be moot. The resolution of this matter would go forward. We adhere to this decision.⁵

Interpretation of Charter Provision

The FOP challenges the number of signatures on the

⁵ As previously noted, on October 12, 2018, CON filed a **Tenn. R. App. P. 10** application asking the Supreme Court to vacate the Court of Appeals' September 26, 2018 Order and to order the Court of Appeals to decide CON's motion to dismiss. Two days later, the Supreme Court denied the application. Based on the language of **Tenn. R. App. P. 10(a)**, one may infer that the Supreme Court determined that the Court of Appeals had not "so far departed from the accepted and usual course of judicial proceedings as to require immediate review," or that the extraordinary appeal was not necessary "for complete determination of the action on appeal."

petition. The relevant portion of the Metropolitan Charter is [§ 19.01](#), which states in pertinent part:

This Charter may be amended subsequent to its adoption in the following manner:

An amendment or amendments may be proposed . . . (2) upon petition filed with the metropolitan clerk, signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk. Such resolution or petition shall also prescribe a date not less than eighty (80) [days] subsequent to the date of its filing for the ^[**13] holding of a referendum election at which the electorate of the metropolitan government will vote to ratify or to reject the amendments proposed.

The question is, which prior election is the "preceding general election"?

The Tennessee Supreme Court has addressed the meaning of the term "general [*219] election," as used in the Metropolitan Charter. In [Wallace v. Metropolitan Government of Nashville & Davidson County, 546 S.W.3d 47, 55 \(Tenn. 2018\)](#), the Court examined the terms "general metropolitan election," and "general election," which are both found in the Metropolitan Charter:

We do not read the use of the distinct phrases "general metropolitan election" and "general election" to be merely accidental. Rather, we view the two phrases to have been intentionally and thoughtfully employed to refer to different elections. The former phrase refers to the particular general election at which the Mayor, Vice Mayor, Councilmen-at-Large, and District Councilmen are elected in August of each fourth odd-numbered year, beginning in 1971, as called for in [section 15.01](#) of the Charter. In contrast, the latter phrase refers more broadly to any municipal general election, including but not limited to general metropolitan elections. In other words, "general metropolitan elections" are one unique type of the broader ^[**14] category of municipal "general elections." All municipal "general elections," however, are not "general metropolitan elections."

The Supreme Court in *Wallace* also explained the case of [State ex rel. Wise v. Judd, 655 S.W.2d 952 \(Tenn. 1983\)](#). The *Wallace* court stated:

the issue in *Wise* was whether the phrase "preceding general election" as used in [section 19.01](#) of the Charter is limited to a municipal general election or includes a state or federal general election. There was in *Wise* no dispute that both the August 1979 "general metropolitan election" and the August 1982 "general election" were municipal general elections which would qualify for purposes of [section 19.01](#). The question was whether the November 1982 state general election also would qualify. Our holding in *Wise* was that the phrase "preceding general election" as used in [section 19.01](#) of the Charter refers to *municipal* general elections, not to *state or federal* general elections.

Id. at 57-58 (citations and footnote omitted). The *Wise* opinion determined that the term "preceding general election" in [§ 19.01](#) of the Metropolitan Charter referred to the previous metropolitan general election rather than a state general election, namely the August 1982 election. [Wise, 655 S.W.2d at 953](#).

Several elections have been proposed as the "preceding general election" in ^[**15] this case. The most recent election is the May 24, 2018 election for mayor and one district council member. This was a special election to fill vacancies, however, not a general election. See [Wallace, 546 S.W.3d at 56](#). Thus, the May 24, 2018 election cannot be used to determine the number of signatures needed for the petition.

The November 2016 election has also been suggested as being the appropriate "preceding general election." However, no metro offices were on the ballot. State and federal offices were on the ballot, as well as city commissioners for Belle Meade, Forest Hills and Goodlettsville. *Wise* held that "the phrase 'preceding general election' as used in [section 19.01](#) of the Charter refers to municipal general elections, not to state or federal general elections." [Wallace, 546 S.W.3d at 58](#) (citing [Wise, 655 S.W.2d at 953](#)). Thus, the November 2016 election cannot be used to determine the number of signatures needed for the petition.

Metro and CON contend, and the election commission and trial court found, that the August 4, 2016 election is the one to use. FOP disagrees. The issue turns on whether the election for Metropolitan Assessor [*220] of Property is a state or a municipal general election.

A metropolitan government is a consolidation of the functions vested ^[**16] in a municipal corporation and

the county in which it lies. [Tenn. Const., Art. XI, Sec. 9, Para. 9](#); [Tenn. Code Ann. § 7-2-108\(a\)\(1\), \(16\)](#). In the course of this consolidation, the charter may alter or even abolish "city and county offices, departments, boards, commissions, agencies and functions, except where otherwise provided in . . . [[Tenn. Code Ann. Title 7, Ch. 1-6](#)] or prohibited by the Constitution of Tennessee." [Tenn. Code Ann. § 7-2-108\(a\) \(16\)](#). Indeed, our Supreme Court has held that the constitutional offices found in [Article 7, Section 1 of the Tennessee Constitution](#) cannot be abolished. [Metro. Gov't of Nashville & Davidson Cnty v. Poe, 215 Tenn. 53, 383 S.W.2d 265, 268 \(Tenn. 1964\)](#). Thus, the office of assessor of property cannot be abolished.

The Metropolitan Charter retains the office of assessor of property, but calls the office the metropolitan tax assessor. Metro Charter, [§ 8.113](#). Title changes are permissible. [Tenn. Code Ann. § 7-2-108\(a\)\(14\)](#). Changes in duties are also permissible. [Winter v. Allen, 212 Tenn. 84, 367 S.W.2d 785, 789-90 \(Tenn. 1963\)](#) (upholding the transfer of the duty to assess merchants' ad valorem taxes from the county court clerk to the metropolitan tax assessor). The county official becomes a metropolitan government official. [Poe, 383 S.W.2d at 277](#) ("The Sheriff is a Metropolitan officer and as such he is bound by the functional, budgetary and purchasing provisions of the Charter . . .").

The FOP maintains that the election for assessor is a state election, based in part on the fact that in [Title 2 of the Tennessee Code Annotated](#), "state election" is defined as "an election [^{**17}] held to: . . . Choose state, county or district officers." [Tenn. Code Ann. § 2-1-104\(a\)\(28\)\(B\)](#). This definition is limited to Title 2, and even then just applies "unless a different meaning is clearly intended." [Tenn. Code Ann. § 2-1-104\(a\)](#). No definitions of "municipal election," "municipal general election," "metropolitan election," or "metropolitan general election," are found in [Tenn. Code Ann. § 2-1-104](#). In the context of Title 2, it is evident that "state election" is used to distinguish certain elections from a "federal election." See [Tenn. Code Ann. § 2-8-108\(b\)](#) ("All election documents pertaining to a federal election shall be preserved by the county election commission for twenty-two (22) months."); [Tenn. Code Ann. § 2-10-119](#) ("Transfers of funds or assets from a candidate's campaign committee or account for a federal election to a political campaign committee of or for such candidate for public office in this state is prohibited.").

If a sheriff is a "Metropolitan officer," [Poe, 383 S.W.2d at 277](#), then it follows logically that the assessor of

property is as well. Furthermore, the Metropolitan Charter designates the assessor as such. Metro Charter, [§ 8.113](#) ("The county tax assessor, elected for a term of four (4) years and provided for by general law in [Tennessee Code Annotated, sections 67-1-502 to 67-1-505](#), inclusive, shall be the metropolitan tax assessor."). Because the assessor is a metropolitan [^{**18}] officer, the general election for the assessor is a municipal general election.

The FOP also contends that the election for assessor is a partisan election and cannot be a municipal election because "municipal elections shall be nonpartisan." [Tenn. Code Ann. § 2-13-208\(a\)](#). However, [Tenn. Code Ann. § 2-13-208\(b\)](#) specifically addresses metropolitan governments, stating:

In any county having a metropolitan form of government, the election of the county mayor and the members of the [^{**21}] legislative body of such metropolitan government shall be considered to be municipal elections within the meaning of this section; *however, this section shall not be construed to require a partisan election for any other officers of the metropolitan government if the charter of such metropolitan government provides that elections for such officers shall be nonpartisan.*

(Emphasis added). We read this statute in accord with the natural and ordinary meaning of the words used. [Embraer Aircraft Maint. Servs., Inc. v. AeroCentury Corp., 538 S.W.3d 404, 410 \(Tenn. 2017\)](#). The last portion of [subsection \(b\)](#) allows a metropolitan government to have nonpartisan elections for "any other officers of the metropolitan government," by providing for such nonpartisan elections in the charter. The Metropolitan Charter of Nashville and Davidson County does not so provide as to the assessor; [^{**19}] therefore the election is partisan as provided in the general law.

We conclude, as did the trial court, that the proper election to use to calculate the number of signatures required on the referendum petition, the preceding general election, was the election held on August 4, 2016.

CONCLUSION

The judgment of the trial court is affirmed and this matter is remanded with costs of appeal assessed against the appellants, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE

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August 6, 2020 Election Results (Certified)

Registered voters

Active voters: 423,400

Inactive voters: 33,276

Total: 456,676

United States Senate (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Clifford Adkins	90	18	69	2	179
Natisha Brooks	242	132	178	10	562
Byron Bush	217	70	206	2	495
Roy Dale Cope	27	5	26	1	59
Terry Dicus	31	11	21	0	63
Tom Emerson, Jr.	27	21	43	1	92
George S. Flinn, Jr.	294	134	251	8	687
Bill Hagerty	5690	2163	7612	82	15547
Jon Henry	132	55	54	1	242
Kent A. Morrell	51	39	31	0	121
Glen L. Neal Jr.	20	5	14	0	39
John E. Osborne	70	49	81	1	201
Aaron L. Pettigrew	36	11	29	0	76
David Schuster	25	14	27	1	67
Manny Sethi	6818	1746	7217	82	15863
Write-in	36	19	32	1	88

161 of 161 Precincts Reporting

United States House of Representative 5th District (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	1256	221	1182	14	2673

161 of 161 Precincts Reporting

Tennessee Senate District 18 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Ferrell Haile	715	202	801	5	1723
Write-in	13	6	19	0	38

9 of 9 Precincts Reporting

Tennessee Senate District 20 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Steven Reid Dickerson	5337	1867	7066	75	14345
Write-in	96	35	116	0	247

55 of 55 Precincts Reporting

Tennessee House of Representative District 50 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	145	19	143	1	308

23 of 23 Precincts Reporting

Tennessee House of Representative District 51 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Write-in	83	9	79	1	172

23 of 23 Precincts Reporting

Tennessee House of Representative District 52 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Donna Tees	530	124	562	10	1226
Write-in	18	6	15	0	39

25 of 25 Precincts Reporting

Tennessee House of Representative District 53 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	124	12	76	2	214

17 of 17 Precincts Reporting

Tennessee House of Representative District 54 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	42	2	35	0	79

20 of 20 Precincts Reporting

Tennessee House of Representative District 55 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	89	16	83	0	188

23 of 23 Precincts Reporting

Tennessee House of Representative District 56 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Diane Michel Canada	1994	944	2945	35	5918
Write-in	36	17	51	0	104

20 of 20 Precincts Reporting

Tennessee House of Representative District 58 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	42	8	31	0	81

27 of 27 Precincts Reporting

Tennessee House of Representative District 59 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	48	9	44	0	101

18 of 18 Precincts Reporting

Tennessee House of Representative District 60 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	148	37	156	2	343

18 of 18 Precincts Reporting

State Executive Committeeman District 19 (R)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
David R. Birdsong	587	129	534	7	1257
Charles Montgomery	739	173	581	6	1499

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Write-in	30	2	19	0	51

53 of 53 Precincts Reporting

United States Senate (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Marquita Bradshaw	9705	4773	10964	317	25759
Gary G Davis	1252	567	1830	30	3679
Robin Kimbrough	8590	6687	13170	304	28751
James Mackler	4799	8814	7499	215	21327
Mark Pickrell	634	945	1018	16	2613
Write-in	89	63	92	2	246

161 of 161 Precincts Reporting

United States House of Representative 5th District (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Jim Cooper	11776	15468	20331	379	47954
Keeda J. Haynes	13436	6326	14577	493	34832
Joshua Rawlings	816	807	893	36	2552
Write-in	18	11	22	0	51

161 of 161 Precincts Reporting

Tennessee Senate District 18 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
No candidate qualified	0	0	0	0	0
Write-in	73	37	114	2	226

9 of 9 Precincts Reporting

Tennessee Senate District 20 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Kimi Abernathy	3309	3745	5524	145	12723
Heidi Campbell	3204	5138	4953	146	13441
Write-in	29	8	38	0	75

55 of 55 Precincts Reporting

Tennessee House of Representative District 50 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Bo Mitchell	1859	2312	3239	83	7493
Write-in	23	13	31	1	68

23 of 23 Precincts Reporting

Tennessee House of Representative District 51 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Bill Beck	3604	2477	3690	139	9910
Write-in	65	32	48	5	150

23 of 23 Precincts Reporting

Tennessee House of Representative District 52 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Mike Stewart	1490	961	1829	47	4327
James C. Turner II	807	344	1456	27	2634
Write-in	3	0	3	0	6

25 of 25 Precincts Reporting

Tennessee House of Representative District 53 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
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Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Jason L. Powell	2033	1484	2487	71	6075
Write-in	34	6	24	0	64

17 of 17 Precincts Reporting

Tennessee House of Representative District 54 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Terry Clayton	1500	662	2566	44	4772
Vincent Dixie	1861	1353	3785	61	7060
Write-in	6	7	8	0	21

20 of 20 Precincts Reporting

Tennessee House of Representative District 55 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
John Ray Clemmons	2745	3122	3025	102	8994
Write-in	24	9	30	1	64

23 of 23 Precincts Reporting

Tennessee House of Representative District 56 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Bob Freeman	2045	4069	3376	102	9592
Write-in	16	15	19	0	50

20 of 20 Precincts Reporting

Tennessee House of Representative District 58 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Harold M. Love	3047	1720	3360	76	8203
Write-in	20	15	18	1	54

27 of 27 Precincts Reporting

Tennessee House of Representative District 59 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Jason Potts	1671	710	2278	39	4698
Write-in	25	7	34	0	66

18 of 18 Precincts Reporting

Tennessee House of Representative District 60 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Darren Jernigan	1438	1730	2025	48	5241
Grant Thomas Medeiros	646	421	1043	26	2136
Write-in	6	1	5	0	12

18 of 18 Precincts Reporting

State Executive Committeewoman District 18 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Kristi Cornett	725	798	1107	23	2653
Write-in	3	1	9	0	13

9 of 9 Precincts Reporting

State Executive Committeeman District 19 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Eric Brown	8459	4681	11445	228	24813
Write-in	54	31	76	4	165

53 of 53 Precincts Reporting

State Executive Committeewoman District 19 (D)

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Katharine Heriges	8385	4451	11270	224	24330
Write-in	38	29	55	1	123

53 of 53 Precincts Reporting

Chancellor, Chancery Court Part 1 District 20 ← Special Election

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Patricia Head Moskal (D)	28303	22970	37502	848	89623
Write-in	976	193	968	9	2146

161 of 161 Precincts Reporting

Criminal Court Judge Division 4 District 20 ← Special Election

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Jennifer Smith (D)	28177	23073	37454	845	89549
Write-in	821	189	832	8	1850

161 of 161 Precincts Reporting

Assessor of Property

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Vivian Wilhoite (D)	28690	23257	38379	853	91179
Write-in	845	266	898	9	2018

161 of 161 Precincts Reporting

Trustee ← Special Election

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Erica Gilmore (D)	28541	22990	37935	846	90312
Write-in	792	326	926	7	2051

161 of 161 Precincts Reporting

School Board District 1

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Barry Barlow	344	166	441	7	958
Sharon Gentry	2814	1681	4245	43	8783
Robert Taylor	1334	535	1974	21	3864
Write-in	21	6	17	1	45

24 of 24 Precincts Reporting

School Board District 3

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Brian Hubert	1145	427	1741	25	3338
Emily Masters	2531	1391	3374	82	7378
Write-in	19	7	25	0	51

22 of 22 Precincts Reporting

School Board District 5

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Christiane Buggs	4602	2771	4104	150	11627
Write-in	53	26	55	2	136

27 of 27 Precincts Reporting

School Board District 7

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Freda Player-Peters	2922	1710	3375	81	8088
Write-in	51	15	44	0	110

30 of 30 Precincts Reporting

School Board District 9

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Russelle Ann Bradbury	1062	1086	1368	31	3547
Abigail Tylor	3152	2993	5145	94	11384
Write-in	29	14	31	0	74

20 of 20 Precincts Reporting

Oak Hill City Commissioner Oak Hill

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Zach Baldwin	246	239	225	8	718
Elizabeth (Liz) Beavers	190	258	228	10	686
John DeLuca	381	233	377	9	1000
David P. DeMarco	410	307	416	7	1140
Winston Evans	409	297	380	9	1095
Stacy Widelitz	122	199	141	5	467
Write-in	19	4	10	0	33

4 of 4 Precincts Reporting

Referendum Oak Hill Oak Hill

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
For	460	377	449	12	1298
Against	181	172	199	3	555

4 of 4 Precincts Reporting

Court of Appeals, Western Division

Candidate Name	Election Day	Absentee	Early	FS / PV	Total Votes
Retain	22455	14637	30230	599	67921
Replace	10925	6397	13801	229	31352

161 of 161 Precincts Reporting