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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, JOHN COOPER, in his official capacity as Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee, and KEVIN CRUMBO, in his official capacity as Finance Director of the Metropolitan Government of Nashville and Davidson County, Tennessee,	)	
Petitioners/Plaintiffs,	)	
v.	)	**Case No. 21-0433-IV**
THE DAVIDSON COUNTY ELECTION COMMISSION,	)	
Respondent/Defendant.	)	

DAVIDSON COUNTY ELECTION COMMISSION'S PRE-TRIAL BRIEF

Respondent/Defendant, the Davidson County Election Commission (the "Election Commission"), submits this Pre-Trial Brief:

TABLE OF CONTENTS

OVERVIEW

Before the Court is a challenge by Petitioners/Plaintiffs, the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), John Cooper as Mayor of Metro and Kevin Crumbo as Finance Director of Metro (collectively, the "Petitioners"), of the Election Commission's decision to place six proposed Charter amendments on the ballot for a referendum election on July 27, 2021. There are six separate amendments that the Election Commission has approved for inclusion on the ballot, each to be voted on separately by Metro voters. These proposed Charter amendments were presented to the Election Commission by petition submitted by the group 4 Good Government. The petition was submitted pursuant to the provisions of Section 19.01 of the Metro Charter. The Election Commission determined that the signatures on the petition were valid and satisfy the number-of-signature requirements of Charter Section 19.01. Accordingly, the Election Commission determined that the six separate proposed Charter amendments should be on the July 27 ballot, to be voted up-or-down separately by the qualified voters of Metro.

The decision of the Election Commission to place the six separate amendments on the July 27 election ballot is being challenged by Petitioners, who seek review primarily via a common law writ of certiorari.

In 2020, the same 4 Good Government group submitted proposed Charter amendments that the Election Commission determined confronted a number of problems. For example, there was no enumeration of any provisions of the Metro Charter that the 2020 petition specifically sought to amend, raising a question of the form or format of the proposed ballot referendum. The Election Commission also had concerns that all the proposed Charter amendments seemed to constitute a single amendment – a hodge-podge – to be voted on as one omnibus proposal, so that voters could not vote "yes" or "no" on each component. Because of these and other

concerns, the Election Commission deferred its own action and exercised its discretion to seek review from the Chancery Court. The Election Commission did not have authority to reject the proposed amendments; only a court could do that. *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 535-37 (Tenn. 2004) ("*City of Memphis*").

While the Election Commission's authority is circumscribed, the Election Commission may transfer the matter to a court by seeking a declaratory judgment. *See McFarland v. Pemberton*, 530 S.W.3d 76, 97 (Tenn. 2017). In 2020, the Election Commission followed this route, filing for a declaratory judgment and invoking the court's authority to act in ways unavailable to the Election Commission based on *City of Memphis*. The Chancery Court in 2020 confirmed the Election Commission's concerns and ruled that the single proposed amendment – the hodge-podge – could not qualify for a referendum election.

The Election Commission considered the proposed 2021 Charter amendments using the same process that it had employed in 2020. As the Election Commission had done in 2020, it retained outside counsel to assist it in performing its responsibilities.

As will be explained in further detail, the Election Commission, on advice of counsel, concluded that the 2021 proposed Charter amendments were substantially altered from those submitted in 2020. For example, (i) the proposals were clearly designated as separate amendments, to be voted on ("yes" or "no") separately by the voters at a referendum election. That contrasted with the 2020 hodge-podge approach of lumping together all proposed changes into a single vote by qualified voters, without the ability of voters to vote "yes" for some and "no" for others. In addition, (ii) the 2021 proposal designated specific Charter provisions that were to be amended or added to. That was not the case in 2020. Moreover, (iii) concerns about retroactivity that were raised in 2020 were addressed in 2021, with certain of the provisions that

had previously concerned the Chancery Court now focusing on the future, not undoing the past. (iv) Concerns about a potential regulatory taking of private property were addressed by adding a provision to one of the proposed amendments for just compensation, which is all that is required to cure a regulatory takings claim. And (v) concerns about mixing advocacy language with substantive provisions were eliminated, in the judgment of the Election Commission and its counsel, by changes in the 2021 proposals. Finally, (vi) two of the 2020 provisions that had been subject to judicial criticism were omitted from the 2021 proposals, with other provisions added.

Based on its careful review of the 2021 petition, and the differences (improvements) from the 2020 petition, and based upon advice and analysis of counsel, the Election Commission determined to place the six separate amendments on the July 27 election ballot, with voters being able to vote "yes" or "no" for each of the six amendments separately.

In the exercise of its discretion, the Election Commission concluded that it could make the decision to place the proposed charter amendments on the ballot without having to invoke the authority of the Court.

As a result, the issues facing this Court are quite different from the issues that faced the Court in 2020. In 2020, the Election Commission sought out court review via a declaratory judgment, raising concerns about issues that were beyond the Election Commission's authority to resolve by itself under the *City of Memphis* case. In 2020, Petitioners were not seeking court review of the Election Commission's decision to request declaratory relief. They were participating in the declaratory judgment process.

The procedural posture of the case currently before this Court is very different. In the careful and deliberative exercise of its authority and based on careful analysis by retained counsel, the Election Commission has in 2021 determined that the six separate proposed Charter

amendments qualify for the July 27 election ballot. It is that decision by the Election Commission that Petitioners are challenging via a writ of certiorari.

Therefore, this litigation must proceed under different groundrules than those applied in 2020.

There are two important dimensions to these different groundrules. One focuses on factual issues; the other focuses on scope of review of the administrative or quasi-judicial aspects of the Election Commission's actions.

Groundrule 1: Review of Factual Issues Based on "Any Material Evidence" Standard

On a writ of certiorari, the Court reviews the record to determine "whether it contains any material evidence to support the decision" of the administrative agency. *See Leonard Plating Co. v. Metropolitan Gov't,* 213 S.W.3d 898, 904 (Tenn. Ct. App. 2006) (emphasis added). "Review under a common-law writ of certiorari does not extend to a redetermination of the facts found by the board or agency whose decision is being reviewed." *Id.* at 903. That is, "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." *Id.* at 903-04.

"For the purpose of this inquiry, 'material evidence' is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion." *Heyne v. Metropolitan Nashville Bd. of Public Educ,*, 380 S.W.3d 715, 738 (Tenn. 2012). "The amount of material evidence required to support an agency's decision 'must exceed a scintilla of evidence but may be less than a preponderance of the evidence.'" *Id.* Judge Cantrell summarized the Court's role in reviewing the evidence:

> [I]n reviewing this evidence the court does not engage in a reweighing of the evidence to determine whether the fact conclusion of the lower tribunal was right or not. The function of the reviewing court is limited to asking whether there was in the

> record before the fact-finding body any evidence of a material or substantial nature from which that body could have, by reasoning from that evidence, arrived at the conclusion of fact which is being reviewed. If there is such evidence in the lower record, the court must affirm the lower tribunal's fact-finding. To justify vacating a fact-finding there must be no evidence from which the lower body's finding could have been reached by reasoning from the evidence. If there was no such evidence, then the fact-finding is illegal, arbitrary, and capricious, and it is the duty of the reviewing court to vacate that finding. Note, however, that vacating the unsupported finding is the limit of the reviewing court's power under the common-law writ. The court cannot weigh the evidence in the record before the lower tribunal and make a "correct" finding of fact. The reviewing court is limited to vacating the illegal finding and remanding the cause to the lower body for the making of a legally supportable fact finding.

Ben H. Cantrell, *Review of Administrative Decisions By Writ of Certiorari in Tennessee*, 4 MEM. ST. U. L. REV. 19, 30 (1973) (hereinafter, "*Cantrell*").

To reiterate, a court may not redetermine the facts or substitute its judgment for that of the Election Commission. "[A] common-law writ of certiorari does not authorize a reviewing court to evaluate the intrinsic correctness of a governmental entity's decision." *Heyne*, 380 S.W.3d at 729. "A common-law writ of certiorari proceeding does not empower the courts to redetermine the facts found by the entity whose decision is being reviewed." *Id.* "[R]eviewing courts may not reweigh the evidence or substitute their judgment for the judgment of the entity whose decision is being reviewed." *Id.*

Groundrule 2: Scope of Administrative Review Based on "Any Possible Reason" Standard

The decision of the Election Commission to place the six separate proposed amendments on the July 27 election ballot is an administrative or quasi-judicial act, subject to court review under a common law writ of certiorari. *See McCallen v. Memphis*, 786 S.W.2d 633, 638-40 (Tenn. 1990). The Election Commission was exercising its discretion within existing law on an administrative record.

The standard of review in such a proceeding is extremely restrained, with the "scope of review" being highly "limited." *In re Cumberland Bail Bonding*, 599 S.W.3d 17, 23 (Tenn. 2020). The Election Commission's decision must be affirmed "if any possible reason can be conceived to justify it." *Id.* (internal cite omitted) (emphasis added). Affirmance is required "even though a reviewing court thinks a different conclusion might have been reached." *Id.* (internal brackets and cite omitted). And the justification must only be "conceivable." *Id.* at 24. This tracks restrained rational basis review under federal law. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (allowing for conjured up, conceivable justifications, often called the "creative law clerk" approach); *Ferguson v. Skrupa*, 372 U,S, 726 (1963). As the Tennessee Supreme Court has stated, this standard of restraint dictates that a reviewing court not "substitute" its judgment for that of the Election Commission if "any possible reason exists justifying the action" of the Election Commission. *McCallen*, 786 S.W.2d at 641.

In sum, the decisions of the Election Commission "are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." *Id.* And, to the extent that there are factual issues at stake, a reviewing court must apply the deferential "material evidence" standard, which reinforces the highly deferential "any possible reason" standard that applies for review of administrative or quasi-judicial decisions by the Election Commission.

The Tennessee Supreme Court has observed that "[i]t is hard to imagine a more difficult undertaking than that to overcome the 'any possible reason' standard." *Id.* Yet that is the burden facing the Petitioners in this litigation. And, unsurprisingly, the Petitioners cannot shoulder that "heavy burden."

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2021, the group 4 Good Government submitted a petition (the "Petition") seeking to amend the Metro Charter by referendum. (R.[1] at 1-2.) The Petition proposes six amendments to the Metro Charter to be voted on separately by voters. (R. at 39-42, 67, 68, 622.) The six proposed amendments state as follows:

Amendment 1

> Add to Article 6, § 6.07, Paragraph 5:
>
> "Property Tax Rates shall not increase more than 3% per fiscal year upon enactment without a voter referendum, pursuant to Tenn. Code Ann. § 2-3-204. For Fiscal Years 2021-2022 and 2022-2023 the property tax rate(s) shall revert to Fiscal Year 2019-2020's tax rate(s), or lower if required by law. This amendment's provisions are severable."

Amendment 2

> (A) Add to Article 15, § 15.07:
>
> "Petitions to recall elected officials filed after January 1, 2021, under this section shall contain the signatures and addresses of registered qualified voters in Davidson County equal to ten (10) percent of the citizens voting in the preceding Metro general election in the district or area from which the recalled official was elected. Such Petitions shall be filed with the metro clerk within seventy-five (75) days of the date the notice is filed. This amendment's provisions are severable"
>
> (B) Replace existing Article 15, § 15.08, Paragraph 2 with:
>
> "A recalled official's name shall not appear on the recall ballot, but such official may qualify as a write-in candidate. This amendment's provisions are severable.

Amendment 3

> Add to Article 18, § 18.05, Paragraph 1:

[1] "(R. at __)" refers to the administrative record filed in this action, consisting of 43 exhibits and 1167 pages. Pinpoint citations are to page numbers within the administrative record.

"No elected official shall receive any benefits at taxpayer expense as a result of holding such elected office without a voter referendum."

Amendment 4

Create Article 19, § 19.04:

"Voter-sponsored Charter Amendments approved after January 1, 2021, shall be amended only by voter-sponsored Petition, notwithstanding any law to the contrary."

Amendment 5

Create Article 18, § 18.18:

"No portion of a publicly-owned park, greenway, or other real property shall be transferred or conveyed without 31 votes of Metro Council. All transfers of interest in real property shall be at fair market value based on an independent appraisal. Public referendum shall be required for transfers of interest in such publicly-owned properties valued over $5,000,000, and for leases exceeding twenty (20) years, unless prohibited by state law."

Amendment 6

Create Article 18, § 18.19:

"If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) consecutive months during the term of a team's ground lease, all sports facilities and related ancillary development related to the defaulting team shall revert to public property, and all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payment shall be paid, if required by law."

(R. at 622.)

The Election Commission received the Petition from the Metropolitan Clerk on March 25, 2021. (Dec. of Jeff Roberts filed June 1, 2021 ("Roberts Dec.") at ¶ 4.) The Election Commission met to discuss the Petition on April 6, April 8, April 17, April 22 and May 10, 2021. (Roberts Dec. at ¶ 7; R. at 8-570.) Election Commission staff verified 12,369 signatures of registered voters on the Petition. (Roberts Dec. at ¶ 14; R. at 294.) At its meeting on April

22, 2021, the Election Commission unanimously determined that the Petition contained a sufficient number of verified signatures to meet the requirements of Metro Charter Section 19.01, which states that a petition signed by voters may propose amendments to the Metro Charter if the petition is "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." (Roberts Dec. at ¶ 15; R. at 294-295.)

On May 4, 2021, the Election Commission conveyed its verification of Petition signatures to the Metropolitan Clerk. (Roberts Dec. at ¶ 16; R. at 620.) On May 6, 2021, the Metropolitan Clerk certified the Petition to the Election Commission. (Roberts Dec. at ¶ 17; R. at 621-624.) At its meeting on May 10, 2021, the Election Commission voted to place the amendments proposed by the Petition on the ballot for July 27, 2021. (Roberts Dec. at ¶ 18; R. at 404-405.)

Election Deadlines

Based on the July 27, 2021, date for the referendum election on the six amendments proposed in the Petition, the Election Commission is preparing the ballot under the following schedule:

a. June 1, 2021: deadline to make all decisions concerning the ballot in order to allow adequate time for printing ballots and preparing mailings.

b. June 12, 2021: deadline to mail military ballots.

c. June 25, 2021: deadline to prepare absentee ballots for mailing to voters.

d. July 2, 2021: deadline to publish notice of the election in a newspaper of general circulation and to mail sample ballot to households.

e. July 7, 2021: early voting begins.

f. July 22, 2021: early voting ends.

g. July 27, 2021: election day.

(Roberts Dec. at ¶ 19.)

COMPARISON TO 2020 PETITION

In 2020, the group 4 Good Government submitted a petition seeking to amend the Metro Charter by referendum (the "2020 Petition"). The 2020 Petition is similar to the current Petition in some ways and different in others. When faced with the 2020 Petition, the Election Commission sought a declaratory judgment because of concerns about whether the 2020 Petition could be placed on the ballot. *See 4 Good Government v. Davidson County Election Commission*, Chancery Court for Davidson County, Tennessee, case no. 20-1010-III ("2020 Litigation"), Nov. 3, 2020, Findings of Fact, Conclusions of Law and Orders from 10/26-27/2020 Bench Trial ("2020 Litigation Findings and Conclusions Order") (copy attached) at 10.

The Petitioners make much of the 2020 Petition and the Chancery Court's decision in the 2020 Litigation. The Chancery Court's 2020 decision, which was not appealed, is entitled to respect. However, the Petition currently before this Court is significantly different from the 2020 Petition, and the role of this Court is therefore significantly different given the Election Commission's vote to place the proposed amendments in the current Petition on the election ballot.

Sections of the Metro Charter to be Amended

The 2020 Petition did not cite which sections of the Metro Charter would be amended. *See* 2020 Litigation Findings and Conclusions Order at 9, 11, 25. In the 2020 Litigation, the Chancery Court stated that this failure is a violation of Tennessee law. *See* 2020 Litigation Findings and Conclusions Order at 11.

The Petition currently before this Court, on the other hand, expressly states the sections of the Metro Charter to be amended and clearly delineates the proposed new Charter provisions, as follows:

> The undersigned Davidson County voters propose the following six (6) separate Amendments to the Metropolitan Charter, as written in *italics*, to be voted on by the citizens on May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01:
>
> 1. **Limit Property Tax Rates – Add to Article 6, § 6.07, Paragraph 5:** *"Property Tax Rates shall not increase more than 3% per fiscal year upon enactment without a voter referendum, pursuant to Tenn. Code Ann. § 2-3-204. For Fiscal Years 2021-2022 and 2022-2023 the property tax rate(s) shall revert to Fiscal Year 2019-2020's tax rate(s), or lower if required by law. This amendment's provisions are severable."*
> 2. **Recall Elected Officials – (A) Add to Article 15, § 15.07:** *"Petitions to recall elected officials filed after January 1, 2021, under this section shall contain the signatures and addresses of registered qualified voters in Davidson County equal to ten (10) percent of the citizens voting in the preceding Metro general election in the district or area from which the recalled official was elected. Such Petitions shall be filed with the metro clerk within seventy-five (75) days of the date the notice is filed. This amendment's provisions are severable"* **(B) Replace existing Article 15, § 15.08, Paragraph 2 with:** *"A recalled official's name shall not appear on the recall ballot, but such official may qualify as a write-in candidate. This amendment's provisions are severable."*
> 3. **Abolish Lifetime or Other Benefits for Elected Officials – Add to Article 18, § 18.05, Paragraph 1:** *"No elected official shall receive any benefits at taxpayer expense as a result of holding such elected office without a voter referendum."*
> 4. **Preserve Voters' Charter Amendments – Create Article 19, § 19.04:** *"Voter-sponsored Charter Amendments approved after January 1, 2021, shall be amended only by voter-sponsored Petition, notwithstanding any law to the contrary."*
> 5. **Protect Publicly-Owned Parks, Greenways & Lands – Create Article 18, § 18.18:** *"No portion of a publicly-owned park, greenway, or other real property shall be transferred or conveyed without 31 votes of Metro Council. All transfers of interest in real property shall be at fair market value based on an independent appraisal. Public referendum shall be required for transfers of interest in such publicly-owned properties valued over $5,000,000, and for leases exceeding twenty (20) years, unless prohibited by state law."*
> 6. **Protect Promises to Nashville – Create Article 18, § 18.19:** *"If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) consecutive months during the term of a team's ground lease, all sports facilities and related ancillary development related to the defaulting team shall revert to public property, and all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payment shall be paid, if required by law."*

(R. at 622-624.)

Separation of Campaign Language and Amendment Text

In the 2020 Litigation, the Chancery Court found that the actual wording proposed for addition to the Metro Charter consisted of all of the language on the signature pages signed by voters, including marketing language, words printed in bold and underlined, check marks, editorial catch phrases, slogans and symbols. *See* 2020 Litigation Findings and Conclusions Order at 5-8, 11. This raised concerns for the Court in the 2020 Litigation about the "freedom and purity of the ballot." 2020 Litigation Findings and Conclusions Order at 13 (quoting Tenn. Code Ann. § 2-1-102). That Court stated that "balloting is to be separated from campaign materials or solicitations containing a 'position on the question.'" 2020 Litigation Findings and Conclusions Order at 13 (quoting Tenn. Code Ann. § 2-7-111(b)).

The Petition currently before this Court, on the other hand, separates campaign language from the proposed amendments themselves. This is a significant difference from the 2020 Petition. (R. at 622-624.) Metro Director of Law Robert Cooper admitted to the Election Commission that the Petition's separation of campaign language from the text of the proposed amendments eliminates a source of confusion that was present with respect to the 2020 Petition. (R. at 38.)

Elimination of Retroactivity Language

Language mandating a retroactive application to existing contracts was another significant problem with the 2020 Petition. *See* 2020 Litigation Findings and Conclusions Order at 26-28. Specifically, the 2020 Petition expressly included effective dates that were in the past. *Id.* at 6. The Court in the 2020 Litigation found this language problematic. *Id.* at 45. In fact, the Court found that the proposed amendment would impair an existing lease between Metro and Belmont University. *Id.* at 27.

The current Petition omits language suggesting or requiring a retroactive intent. (R. at 622-624.)

Separation of Amendments

The 2020 Petition was a hodge-podge to be presented to voters for a single, unitary yes-or-no vote. *See* 2020 Litigation Findings and Conclusions Order at 36-38. This raised concerns for the Court about issues of severability and elision. *Id.* at 38-42.

The current Petition, on the other hand, clearly consists of six separate amendments to be voted on individually by Metro voters. (R. at 622-624.) Metro Director of Law Robert Cooper admitted to the Election Commission that a reading of the Petition is that the separate amendments will be voted on separately on the ballot. (R. at 40-42.) The proponent of the

Petition likewise informed the Election Commission that the Petition presents six separate amendments. (R. at 67.)

Differences in the Procedural Posture

In addition to the numerous textual and formatting differences between the 2020 Petition and the Petition currently before this Court, the procedural posture of this case differs significantly from that of the 2020 Litigation. The 2020 Litigation was brought as a declaratory judgment. The current action, however, consists primarily of the Petitioners' request for a writ of certiorari, although the Petitioners have also requested other forms of relief that may be inconsistent with a writ of certiorari. (*See infra* at Original and Appellate Jurisdiction.) In the 2020 Litigation, the Chancery Court issued a declaratory judgment that the matters were ripe for adjudication, that the Election Commission has the right to seek a court ruling on the validity of the 2020 Petition and that the 2020 Petition was legally deficient. *See 2020 Litigation* Findings and Conclusions Order at 4. Further, the Chancery Court enjoined the Election Commission from placing the 2020 Petition on the ballot and holding a referendum election. *See id.* No appeal was taken from the Chancery Court's Order. Since this action is one for a writ of certiorari, the scope of this Court's review and the scope of admissible evidence differs substantially from that of the 2020 Litigation.

To its credit, the group 4 Good Government recognized the problems with the 2020 Petition and declined to appeal the Chancery Court's adverse ruling. Instead, that group learned from the opinion and ruling of the Chancery Court. It modified its proposal to address the concerns that resulted in the adverse ruling from the Chancery Court. These changes sharpened the issues being presented to the voters. In so doing, 4 Good Government also presented a more understandable Petition for the consideration of the Election Commission. The differences between the 2020 Petition and the current Petition make a difference and led the Election

Commission to vote to place the six separate proposed Charter amendments on the July 27 election ballot for a decision, up-or-down, on each separate proposed amendment by the qualified voters of Metro.

THRESHOLD ISSUE: ORIGINAL AND APPELLATE JURISDICTION

As directed by the Court's May 25, 2021, Order, the Election Commission addresses the threshold issue of whether the Court should exercise original or appellate jurisdiction in this case.

This Court should dismiss or sever Petitioners' declaratory judgment and injunction causes of action. Tennessee courts have condemned allowing a case to go forward with causes of action under the trial court's original jurisdiction and causes of action under the trial court's appellate jurisdiction. *See, e.g.*, *Tennessee Environmental Council v. Water Quality Control Bd.*, 250 S.W.3d 44 (Tenn. Ct. App. 2007); *Goodwin v. Metropolitan Bd. of Health,* 656 S.W.2d 383 (Tenn. Ct. App. 1983). The Tennessee Court of Appeals has stated:

> [W]e wish to heartily condemn that which appears to us to be a growing practice, i.e., the joinder of an appeal with an original action and the simultaneous consideration of both at the trial level. This Court is of the firm opinion that such procedure is inimical to a proper review in the lower certiorari Court and creates even greater difficulties in the Court of Appeals. The necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident.

Goodwin, 656 S.W.2d at 386.

Joining an original cause of action with an appellate cause of action has been described as a "fatal flaw" that leads to "unorthodox proceedings." *Tennessee Environmental Council*, 250 S.W.3d at 58. Declaratory judgment causes of action included with certiorari causes of action should be "dismissed at the very outset." *Goodwin*, 656 S.W.2d at 387; *see also State v. Farris*, 562 S.W.3d 432, 447 (Tenn. Ct. App. 2018); *State ex rel. Byram v. City of Brentwood*, 833

S.W.2d 500, 502 (Tenn. Ct. App. 1991). "We emphasize that a litigant may not bring claims invoking the original jurisdiction of the Chancery Court when he or she has initiated the proceedings by seeking a writ of certiorari." *State v. Farris*, 562 S.W.3d 432, 447 (Tenn. Ct. App. 2018). "A direct or original action cannot be brought in conjunction with an action that is appellate in nature, such as judicial review under the APA or common law writ of certiorari." *Universal Outdoor, Inc. v. Tenn. Dep't of Transp.*, No. M2006-02212-COA-R3-CV, 2008 WL 4367555, at *9 (Tenn. Ct. App. Sept. 24, 2008). Likewise, a trial court cannot take up a claim for injunctive relief as part of a certiorari action. *See City of Murfreesboro v. Lamar Tennessee, LLC*, No. M2010-00229-COA-R3CV, 2011 WL 704412, at *3 (Tenn. Ct. App. Feb. 28, 2011)

This rule exists because of differing standards applicable to each type of relief, discussed in greater detail below. (*See infra*, Standard of Review.) The Court of Appeals summarized the difference: on a writ of certiorari "neither the Chancery Court nor [the Court of Appeals] determines any disputed question of fact or weighs any evidence," but a declaratory judgment "is tried in a real Court . . . subject to the Rules of Civil Procedure and rules of evidence." *Goodwin,* 656 S.W.2d at 387. "Like water and oil, the two will not mix." *Id.* at 386.

In the face of the uncompromising directive from Tennessee courts promptly to dismiss original actions when combined with appellate actions, Petitioners attempt to create an exception for themselves where none exists. Petitioners incorrectly assert that the case of *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531 (Tenn. 2004), was "a case also proceeding as both a petition for a writ of certiorari and a declaratory judgment action." (May 25, 2021, Order on May 21, 2021, Status Conference, at 1.) But the *City of Memphis* case did not proceed on a writ of certiorari. In that case "the City filed a petition for writ of mandamus, for injunctive relief, and for a declaratory judgment." *City of Memphis*, 146 S.W.3d at 534. The

City of Memphis opinion does not mention certiorari at all. *City of Memphis*, thus, does not suggest that a declaratory judgment claim should be allowed to remain when a writ of certiorari also has been pled. Additionally, there is no evidence that the Supreme Court in *City of Memphis* actually considered the issue presented by the Petitioners' decision to plead original and appellate action in this case. Indeed, the expedited briefing schedule in the *City of Memphis* case, *see id.* at 533, n. 1, the lack of discussion of this issue in the *City of Memphis* opinion and the failure to plead a writ of certiorari cause of action in *City of Memphis* all suggest the Supreme Court did not consider the issue this Court currently faces. In contrast, the express rejection of combining appellate jurisdiction under a writ of certiorari claim with original jurisdiction under declaratory judgment and injunction claims in *Goodwin* and its progeny require the Court to promptly dismiss or sever the Petitioners' original jurisdiction causes of action in this case. Accordingly, the Election Commission has agreed to sever its counterclaim, which seeks a declaratory judgment, and file it as a separate action. The Court should exercise appellate jurisdiction only and, thus, should dismiss or sever the Petitioners' declaratory judgment and injunction claims.

STANDARD OF REVIEW

This is an action for writ of certiorari to review the quasi-judicial administrative action of the Election Commission to place the Petition on the ballot for July 27, 2021. The Election Commission's decision will stand unless the Election Commission has acted illegally, arbitrarily or capriciously. If "any possible reason can be conceived to justify" the Election Commission's action, it must be affirmed. Further, if any material evidence exists from which the Election Commission could have, by reasoning from that evidence, arrived at its conclusion to place the Petition on the ballot for July 27, 2021, the Court must affirm the Election Commission's decision.

The nature of the Election Commission's action – whether administrative or legislative – is a threshold question because the nature of the administrative action dictates the proper method for challenging the action and the type of judicial review available. *See McFarland*, 530 S.W.3d at 103; *McCallen*, 786 S.W.2d at 638; *Duracap Asphalt Paving Co. v. City of Oak Ridge*, 574 S.W.2d 859, 864 (Tenn. Ct. App. 2018). The Petitioners seek three different types of relief – declaratory judgment, writ of certiorari and writ of mandamus. As explained below, writs of certiorari are the vehicle for challenging quasi-judicial action in which an administrative agency exercises discretion, writs of mandamus are the vehicle for challenging ministerial action in which an administrative agency exercises no discretion, and declaratory judgment actions are the vehicle for challenging legislative action.

Writ of certiorari – discretionary administrative action

When it voted to place the Petition on the ballot for July 27, 2021, the Election Commission was exercising its discretion within existing law on an evidentiary record. This is the essence of quasi-judicial administrative action.

A crucial test in distinguishing administrative action from legislative action "is whether the action taken (resolution or ordinance) makes new law or executes one already in existence." *McCallen*, 786 S.W.2d at 639 (citing McQuillin, "The Law of Municipal Corporations," § 10.06, at 995 (3rd ed. 1986).) Administrative actions are accompanied by a record of the evidence, whereas legislative actions are not ordinarily accompanied by an evidentiary record. *See Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). The terms "administrative" and "quasi-judicial" are interchangeable in this context. *See McFarland*, 530 S.W.3d at 103 n. 32. The judicial remedy for an allegedly erroneous quasi-judicial administrative action is a writ of certiorari. *See Duracap*, 574 S.W.2d at 866.

Pursuant to the Tennessee Constitution, the Court has a very narrow scope of review on a writ of certiorari. "The scope of review afforded by a common law writ of certiorari is extremely limited." *See Leonard Plating*, 213 S.W.3d at 903. The limitation on the scope of review is based in the separation of powers found in the Tennessee Constitution. *See Heyne v. Metropolitan Nashville Bd. of Public Educ.*, 380 S.W.3d 715, 728 (Tenn. 2012) (citing *Cantrell* at 21). The Tennessee Constitution provides: "The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial." Tenn. Const., Art. II, § 1. The Tennessee Constitution takes the separation of powers concept a step further by prohibiting a person from exercising the powers of more than one department: "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const., Art. II, § 2. "[T]he legislature cannot constitutionally require the judiciary to perform, nor may the judiciary on its own initiative attempt to perform an essentially administrative function." *Cantrell* at 21; *see also Heyne*, 380 S.W.3d at 728 ("The General Assembly cannot require the Judiciary to perform functions that are not essentially judicial. Likewise, the Judiciary may not, on its own initiative, undertake to perform functions that are not necessarily judicial and that have been assigned to other branches of government.") (internal citations omitted). "Thus, providing the limited sort of judicial review available under a common-law writ of certiorari will guard against the risk that the courts might undertake to exercise power that does not belong to them." *Heyne*, 380 S.W.3d at 728.

Under a writ of certiorari, the Court will affirm the administrative action unless it is illegal, arbitrary or capricious. "The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions

has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy." Tenn. Code Ann. § 27-8-101. "[A] governmental body's actions will not survive scrutiny under certiorari review if they are not supported by material evidence or can otherwise be considered illegal, arbitrary, or capricious." *Duracap*, 574 S.W.2d at 871 n. 7.

The "illegal, arbitrary and capricious" standard is "synonymous with the rational basis test." *Cumberland Bail Bonding*, 599 S.W.3d at 23; *see McCallen*, 786 S.W.2d at 641 ("The 'fairly debatable, rational basis,' as applied to legislative acts, and the 'illegal, arbitrary and capricious' standard relative to administrative acts are essentially the same") (emphasis added). Thus, the Election Commission's decision must be affirmed "if any possible reason can be conceived to justify it." *Cumberland Bail Bonding*, 599 S.W.3d at 23 (emphasis added); *see McCallen*, 786 S.W.2d at 641 ("If 'any possible reason' exists justifying the action, it will be upheld"). The justification need only be "conceivable." *Cumberland Bail Bonding*, 599 S.W.3d at 24; *see also Williamson*, 348 U.S. at 483 (allowing for conjured up, conceivable justifications, often called the "creative law clerk" approach); *Ferguson*, 372 U.S. at 726. "[T]he common law-writ [of certiorari] . . . may not be resorted to for the correction of technical or formal errors, not affecting jurisdiction or power, or for the correction of defects that are not radical, amounting to an illegality that is fundamental, as distinguished from an irregularity." *Heyne*, 380 S.W.3d at 729 (quoting *State ex rel. McMorrow v. Hunt*, 192 S.W. 931, 933 (Tenn. 1917)).

On a writ of certiorari, the Court reviews the record to determine "whether it contains any material evidence to support the decision" of the administrative agency. *Leonard Plating*, 213 S.W.3d at 904. "For the purpose of this inquiry, 'material evidence' is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion." *Heyne*, 380

S.W.3d at 738. "The amount of material evidence required to support an agency's decision 'must exceed a scintilla of evidence but may be less than a preponderance of the evidence.'" *Id.* Judge Cantrell summarized the Court's role in reviewing the evidence:

> [I]n reviewing this evidence the court does not engage in a reweighing of the evidence to determine whether the fact conclusion of the lower tribunal was right or not. The function of the reviewing court is limited to asking whether there was in the record before the fact-finding body *any* evidence of a material or substantial nature from which that body *could* have, *by reasoning from that evidence*, arrived at the conclusion of fact which is being reviewed. If there is such evidence in the lower record, the court must affirm the lower tribunal's fact-finding. To justify vacating a fact-finding there must be no evidence from which the lower body's finding could have been reached by reasoning from the evidence. If there was no such evidence, then the fact-finding is illegal, arbitrary, and capricious, and it is the duty of the reviewing court to vacate that finding. Note, however, that vacating the unsupported finding is the limit of the reviewing court's power under the common-law writ. The court cannot weigh the evidence in the record before the lower tribunal and make a "correct" finding of fact. The reviewing court is limited to vacating the illegal finding and remanding the cause to the lower body for the making of a legally supportable fact finding.

Cantrell at 30.

The Court may not redetermine the facts or substitute its judgment for that of the Election Commission. "[A] common-law writ of certiorari does not authorize a reviewing court to evaluate the intrinsic correctness of a governmental entity's decision." *Heyne*, 380 S.W.3d at 729. "A common-law writ of certiorari proceeding does not empower the courts to redetermine the facts found by the entity whose decision is being reviewed." *Id.* "[R]eviewing courts may not reweigh the evidence or substitute their judgment for the judgment of the entity whose decision is being reviewed." *Id.*

Writ of mandamus – non-discretionary administrative action

A writ of mandamus does not lie in this case because the Election Commission was required to exercise discretion in making the decision to place the Petition on the ballot. The judicial remedy for an allegedly erroneous purely ministerial action is a writ of mandamus. *See State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567, 570 (Tenn. Ct. App. 1994). The difference between a ministerial act and a quasi-judicial act is that "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion and or judgment it is not to be deemed merely ministerial." *McFarland*, 530 S.W.3d at 90 (quoting *State ex rel. Hammond v. Wimberly*, 196 S.W.2d 561, 563 (Tenn. 1946)) (ellipsis omitted).

"The extraordinary writ of Mandamus lies only to control the performance of a nondiscretionary, definite, fixed, ministerial duty." *Waters v. State*, 583 S.W.2d 756, 763 (Tenn. 1991). Mandamus issues only when there is no other adequate specific remedy available. *See Hayes v. Civil Service Comm'n*, 907 S.W.2d 826, 829 (Tenn. Ct. App. 1995). To obtain the writ of mandamus, the petitioner must show a specific and complete right which is to be enforced. *See Jackson v. State*, No. M2004-00926-COA-R3-WM, 2007 WL 1296882 at *1 (Tenn. Ct. App. May 2, 2007). "Tennessee courts will issue writs of mandamus only when the following three elements coexist: (1) the plaintiff's clear right to the relief sought, *Peerless Constr. Co. v. Bass*, 158 Tenn. 518, 520, 14 S.W.2d 732, 733 (1929); (2) the defendant's clear duty to perform the act the plaintiff seeks to compel, *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); and (3) the absence of any other specific or adequate remedy, *State ex rel. Motlow v. Clark*, 173 Tenn. 81, 87, 114 S.W.2d 800, 802-03 (1938)." *Jackson*, 2007 WL 1296882 at *1.

The Election Commission exercised discretion in voting to place the Petition on the ballot. That discretion includes the date of the election, which the Election Commission is authorized to set within its discretion pursuant to Section 2-3-204, Tennessee Code Annotated. Since the Election Commission exercised discretion, its action was not purely ministerial and a writ of mandamus is not the appropriate remedy in this case.

Declaratory judgment – legislative action

A declaratory judgment does not lie in this case for several reasons. Among those is that the Election Commission's decision to place the Petition on the ballot did not create a new law or regulation, so the decision was not "legislative." Another reason is that the Petitioners cannot combine an original action with an appellate action, as discussed above. (*Supra* at Original and Appellate Jurisdiction.)

"A governmental act is 'legislative' if it creates new laws, such as ordinances or regulations." *McFarland*, 530 S.W.3d at 89-90 (citing *Fallin*, 656 S.W.2d at 342). "[A] crucial test in distinguishing legislative from administrative acts is whether the action taken (resolution or ordinance) makes new law or executes one already in existence." *McCallen*, 786 S.W.2d at 639 (citing McQuillin, "The Law of Municipal Corporations," § 10.06, at 995 (3rd ed. 1986).) Administrative actions are accompanied by a record of the evidence, whereas legislative actions are not ordinarily accompanied by an evidentiary record. *See Fallin*, 656 S.W.2d at 342. The terms "administrative" and "quasi-judicial" are interchangeable in this context. *See McFarland*, 530 S.W.3d at 103 n. 32.

The judicial remedy for an allegedly erroneous legislative action is a suit for declaratory judgment. *McFarland*, 530 S.W.3d at 103. The Election Commission's decision to place the Petition on the ballot for July 27, 2021, clearly was not a legislative action. The Election

Commission did not create a new law when it voted to place the 4GG Petition on the ballot. As a result, Petitioners' declaratory judgment claims for relief are inapplicable to this case.

ARGUMENT

I. THE SCOPE OF THE ELECTION COMMISSION'S AUTHORITY INCLUDES MAKING DISCRETIONARY DECISIONS ON MATTERS ENTRUSTED TO IT UNDER TENNESSEE LAW BUT DOES NOT INCLUDE DECLINING TO PLACE A REFERENDUM ON THE BALLOT BASED ON CONSTITUTIONAL CONCERNS.

In their Complaint, Petitioners assert that the Election Commission, on advice of counsel, adopted "an overly narrow scope of review inconsistent with applicable law." As a result, Petitioners assert, the Election Commission's "action was . . . arbitrary, capricious, and illegal." (Complaint at ¶ 56.)

Petitioners' objections regarding the scope of the Election Commission's authority do not comport with the analysis of the Tennessee Supreme Court in the *City of Memphis* and are not on target.

Petitioners assert that the Election Commission "has discretion" to "decline to place" on the ballot "altogether" a qualifying referendum petition where certain "form" defects exist in the petition or "where the petition is facially unconstitutional." (Complaint at ¶¶ 54, 55.) Petitioners assert that the Election Commission's failure to consider alleged "form" defects or claims of facial unconstitutionality amounts to arbitrary action. Petitioners err in their assertion. There is a short and lengthier response that show the error in Petitioners' assertion.

This is the short response:

A. The Election Commission's honest decision, made upon due consideration, to place the proposed amendments on the ballot despite Petitioners' constitutional challenges is supported by Supreme Court precedent and is not arbitrary, capricious or illegal.

Under the proper, restrained standard of review of the Election Commission's action, where there is "room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached." *Cumberland Bail Bonding*, 599 S.W.3d at 23 (emphasis added). The Election Commission's retained counsel prepared an extensive analysis of the Election Commission's authority to review the issues that Petitioners raise and concluded that, based on *City of Memphis*, the Election Commission does not have authority to decline to place an otherwise qualifying referendum petition on the ballot. (R. at 604-605; R. at 618-619.) Petitioners have offered no contrary authority suggesting that the Supreme Court's holding in *City of Memphis* on this point is inapplicable.

Certainly, the Election Commission has authority, at its discretion, to seek a declaratory judgment in a court of competent jurisdiction to assist in the Election Commission's fulfilling its duties. This is done, as in the case of the 2020 Petition, when the Election Commission has substantial concerns about the validity of a petition. The decision by the Election Commission to seek a declaratory judgment is a discretionary act. Such a process was pursued regarding the 2020 Petition, and it is being pursued currently regarding the proposed Charter amendment submitted by the Metro Council.[2] However, the Election Commission has no duty to seek a declaratory judgment.

[2] A case involving the Election Commission's decision to seek a declaratory judgment on the Charter amendment proposed by the Metro Council is pending before this Court in another matter, (*see Metropolitan Gov't v. Davidson County Election Comm'n*, Chancery Court for Davidson County, Tennessee, case no. 21-0472-IV), and before the Court in this case in the Election Commission's counterclaim, although the Election Commission has agreed to sever its counterclaim and file it as a separate action.

In this case, the Election Commission properly acted within its discretion to follow the analysis and advice of its retained legal counsel; the scope of Election Commission authority in this regard is more limited than Petitioners assert, based on Tennessee law. But in any event, the appropriateness of the Election Commission's action in this case satisfies the controlling, highly restrained standard of review governing discretionary acts by the Election Commission – the "fairly debatable, rational basis" standard, *McCallen*, 786 S.W.3d at 641 – given the in-depth legal analysis of Tennessee law provided by retained counsel to the Election Commission. (R. at 593-619.) To reiterate, where there is "room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached." *Cumberland Bail Bonding*, 599 S.W.3d at 23. That standard of review and its application to this matter constitute a complete refutation of Petitioners' position on this question.

What follows is the longer answer:

B. The Election Commission may exercise discretion while carrying out the election laws assigned to it, but that discretion does not extend to making independent determinations of constitutional or legal issues outside the scope of its discretion. Only a court can make those determinations, and even a court's power to decide constitutional or legal issues is limited by justiciability doctrines such as ripeness.

(1) The scope and limits of Election Commission discretion and authority.

The Election Commission may exercise some discretion in doing its job and fulfilling its responsibilities. For example, an Election Commission has an obligation to ensure that "only qualified persons are placed on Tennessee's election ballot." *McFarland v. Pemberton*, 530 S.W.3d 76, 101 (Tenn. 2017). The Election Commission has the ability to take "reasonably necessary measures" to carry out that obligation. *See id*. at 100. This process may entail a hybrid of fact-finding and the application of legal principles to specific facts. The Tennessee

Supreme Court has described this hybrid process as a "quasi-judicial proceeding." *Id*. at 103. Determining whether or not to seek a declaratory judgment regarding a proposed Charter amendment is an example of a discretionary power of the Election Commission.

What the Election Commission may not do, on the other hand, is to act like a court, making an independent judgment on constitutional issues or legal issues outside the scope of its discretion. The critical case on this issue is *City of Memphis*, 146 S.W.3d 531 (Tenn. 2004).

In *City of Memphis*, the city council proposed a charter amendment to impose new taxes and asked the Shelby County Election Commission to place the proposed charter amendment on an election ballot for voters to consider. The proposed amendment would authorize an additional privilege tax. Based on advice it received from the Coordinator of Elections, the election commission declined to put the proposed amendment to a vote because the proposed amendment would be "unconstitutional unless and until the General Assembly authorizes cities to impose such a tax." *Id*. at 534.

The Tennessee Supreme Court in *City of Memphis* disapproved the action of the Shelby County Election Commission, holding that the proposed amendment should have been placed on the ballot for a decision by the voters, even though the proposed amendment might be facially unconstitutional. While recognizing that the election commission may perform duties necessary to fulfill its functions, the Supreme Court held that the election commission may not "refuse to include a referendum question on the ballot because the election commission believes the question to be substantively unconstitutional." *Id*. at 535 (emphasis supplied).

Not only was this result derived from an interpretation of Tennessee statutory law, but it also had an important constitutional component. Granting the election commission the authority to decline to put a charter amendment on the ballot on constitutional grounds would "usurp[] the

power of the judiciary to determine the substantive constitutionality of duly enacted laws." That is, the election commission did not have statutory authority to determine and could not (under separation-of-powers principles) be "permitted to determine the substantive constitutionality" of the proposed charter amendment. Exercise of such power of constitutional review by the election commission would intrude on "this uniquely judicial function." *Id*. at 538. Accordingly, the decision of the election commission not to put the proposed charter amendment on the ballot was held invalid; the election commission "overstepped" its authority when it declined to place the proposed charter amendment on the ballot, even though the proposed charter amendment seemed to be facially unconstitutional. *Id*.

City of Memphis, a 2004 decision, was expressly reaffirmed by the Tennessee Supreme Court in 2017. *See McFarland*, 530 S.W.3d at 94, n.21 (noting that, under *City of Memphis*, "county election commissions do not have the authority to perform a purely judicial function such as interpreting the State constitution" and further noting that the Court did not disagree with that "holding in *City of Memphis*").

(2) The scope and limits of court authority.

Having determined that the Election Commission had no power to refuse to place the proposed charter amendment on the ballot because of constitutional concerns, the Court in *City of Memphis* considered the constitutional question that only a court could address – the constitutionality of the proposed charter amendment. That is, the constitutional question was beyond the scope of the Election Commission's authority, but that issue might be proper for a court to consider in an appropriate case and under appropriate standards.

What is not appropriate for even a court to review, which is what is involved in this case, is "the hypothetical, unripe question of whether the [proposed charter amendment], if passed, would be unconstitutional." *City of Memphis*, 146 S.W.3d at 639. The "substantive

constitutionality" of the six proposed charter amendments, which may or may not mature into actual Charter provisions, depending on the outcome of the July 27 referendum vote, "is not now an issue ripe for judicial determination." *Id*. at 540.

City of Memphis concluded that a court was well advised to avoid "advisory opinions" and "decline[d] to pass upon the constitutionality of a measure [the proposed charter amendment] that is not now the law and may never become the law." 146 S.W.3d at 538-39. That conclusion should guide this Court in this case.

At the same time, the Court left open a very narrow role for a court to review a referendum ballot before an election. First, it recognized that a challenge in court to the "form" of a proposed ballot referendum might be appropriate. For example, if the body/text of a proposed measure would be broader than its caption, a challenge to the "form" of such a proposal might be entertained by a court. That might not involve a court in determining, pre-election, "the substantive constitutional validity" of the proposed charter amendments. *Id*. at 540. Second, if a proposed measure were challenged on grounds of facial constitutional invalidity, such a challenge might also be entertained pre-election by a court. *Id*. at 539. A facial constitutional challenge requires that there is no set of circumstances in which a measure could be found to be valid – that is, the challenged provision must be invalid across the board in all circumstances. *See Fisher v. Hargett*, 604 382, 396-97 (Tenn. 2020) ("In a facial challenge, the plaintiff contends that there are no circumstances under which the statute, as written, may be found valid"); *see also United States v. Salerno*, 481 U.S. 739 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

But, to reiterate, these grounds for challenge – to the "form" of a proposed action and to the facial unconstitutionality of a proposed action – can only be considered by a court and under appropriate standards and procedures, not the Election Commission. Even such a judicial determination must be ripe and not put the court in the position of addressing or making a "determination of the substantive constitutionality" of the proposed charter amendments. *City of Memphis*, 146 S.W.3d at 540, n.7.

The Petitioners' substantive constitutional criticisms of the Petition are, accordingly, not properly directed to the Election Commission, under the principles of *City of Memphis*. Those criticisms are not appropriately directed even to this Court at this time due to the ripeness requirement that exists in Tennessee jurisprudence, as expressed in cases like *City of Memphis*. The Election Commission's recognition of that interpretation of *City of Memphis* (and of the limits on the Election Commission's authority) and its reliance on the careful, reasoned legal analysis of retained counsel easily satisfies the "fairly debatable" standard.

While the Election Commission's authority is circumscribed, it may transfer the matter to a court by seeking a declaratory judgment. *See McFarland*, 530 S.W.3d at 97. That procedure is within the Election Commission's discretion, *id*. at 100, but should not be the norm. Otherwise, there is a risk of delay, an abdication of the Election Commission's duty to hold a referendum election with respect to a proposed Charter amendment, and a frustration of the interests of those who signed the Petition and those voters who wish to voice their opinions through a referendum vote. The Election Commission's previous action to file a declaratory judgment regarding the 2020 Petition was justified because of the multiple problems raised by that petition; the same is true regarding the Election Commission's decision in 2021 to seek a declaratory judgment regarding the proposed Charter amendment submitted by the Metro Council. The significant

modifications in the current Petition submitted by 4 Good Government justify the Election Commission putting the six proposed Charter amendments on the ballot for voter consideration without invoking the authority of a court through a declaratory judgment. The Election Commission's discretionary decision in that regard easily satisfies the "fairly debatable" standard and the "any possible reason" standard that govern this case. *McCallen*, 786 S.W.3d at 641.

II. THE AUGUST 2020 COUNTY GENERAL ELECTION QUALIFIES AS THE "PRECEDING GENERAL ELECTION" THAT SETS THE PETITION SIGNATURE THRESHOLD. THE 4 GOOD GOVERNMENT PETITION MEETS THE SIGNATURE THRESHOLD.

A. The Metro Charter bases the signature threshold for a referendum petition on the "preceding general election."

The Metro Charter can be amended in two ways. First, amendments may be proposed by the Metro Council and submitted for approval by a vote of the people. Second, amendments may be proposed "upon petition . . . signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election" and submitted for approval by a vote of the people. Metro Charter § 19.01. Petition signatures are to be verified by the Election Commission. *See id.*

This case involves the second way of amending the Charter – via petition. An organization called 4 Good Government solicited signatures and submitted a petition to amend the Charter. The Election Commission has verified and certified the Petition signatures. Since the Election Commission has approved and certified the Petition, the Election Commission has "the duty . . . to hold a referendum election" with respect to the Petition. (*Id*.)

The question to address here is what constitutes "the preceding general election," under Metro Charter Section 19.01. If the November 2020 election controls as the baseline, there are insufficient signatures for the Petition to qualify under Section 19.01. If the August 2020 election controls as the baseline, there are sufficient signatures to qualify under Section 19.01.

So, boiled down, the question is whether the election held in November 2020 or the election held in August 2020 is the relevant election – the "preceding general election" in the language of Section 19.01 of the Metro Charter.

B. Tennessee cases establish that the "preceding general election" is to be determined based on the subject at hand – amendment of the Metro Charter – so the preceding general election must be a Metro municipal election, not a state or federal election, and must be a general election.

(1) The preceding general election occurred in August 2020.

The appropriate analysis is shaped by Tennessee cases that have addressed these issues. (i) The Tennessee Supreme Court has interpreted the "preceding general election" language in Section 19.01 of the Metro Charter to apply to Metro municipal elections. Elections for federal and state offices do not qualify. (ii) And in order to qualify, Metro elections must be "general" elections.

The starting point is the Tennessee Supreme Court decision in *State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983) ("*Wise*"). The *Wise* Court held that "since the subject involved is the amendment of the Metropolitan charter," the reference in the Charter to a "preceding general election" must be "to the number of votes cast in a Metropolitan election rather than to the number in a state or national election." *Id*. at 953.

Wise, a 1983 case, is still the law in Tennessee.

The focus in *Wise* on Metro municipal elections was reaffirmed by the Tennessee Supreme Court thirty-five years later, in 2018, in *Wallace v. Metropolitan Government of Nashville and Davidson County*, 546 S.W.3d 47 (Tenn. 2018) ("*Wallace*"). *Wallace* stated as follows: "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 58 (emphasis in original). The Supreme Court in *Wallace* did not question and adhered to the analysis in *Wise* on this issue.[3]

The recent decision of Tennessee's intermediate Court of Appeals reaffirmed this reading of *Wise* and *Wallace* – that the term "preceding general election" in Section 19.01 of the Metro Charter refers to municipal general elections, not to state or federal general elections. *Fraternal Order of Police v. Metropolitan Gov't*, 582 S.W.3d 212, 219 (Tenn. Ct. App. 2019) ("*FOP*"). The Court in *FOP* rejected consideration of non-municipal elections as constituting a "preceding general election" and addressed whether a particular election qualified as a Metro or a state election. *FOP* is, further, definitive support for the position that the term "preceding general election" in Section 19.01 of the Metro Charter refers to municipal general elections, not state or federal elections. That position, as the law of Tennessee, is binding on the Election Commission and this Court. Further, *FOP* is particularly on point with the case currently before this Court because *FOP* established that the Assessor of Property's election in August is a general election for purposes of Metro Charter Section 19.01, and the Assessor of Property's election in August 2020 happens to be the relevant preceding general election in this case. *See FOP*, 582 S.W.3d at 221.

Not only must the preceding election under Section 19.01 of the Metro Charter be an election for municipal office, it must also be a "general" election. This means that the municipal election in question cannot be a "special" election. *See FOP*, 582 S.W.3d at 219 (an "election to

[3] Metro's Director of Law, Robert Cooper, has directed criticism to the *Wise* decision, stating that it "is not clearly mandated by the Metropolitan Charter language" and that the Charter seeks to "distinguish between special and general elections, not between different types of general elections." (R. 572-573 n. 1 ("Cooper Memorandum").) The Cooper Memorandum recognizes the contrary "conclusion" that the Tennessee Supreme Court reached in *Wise*. It is that "conclusion" of the Tennessee Supreme Court that reflects the controlling law in Tennessee and is binding on the Election Commission and on this Court, Petitioners' critique in the Cooper Memorandum to the contrary notwithstanding.

fill vacancies" is "not a general election" and "cannot be used to determine the number of signatures needed for the petition").

In *Wallace*, the Tennessee Supreme Court drew a firm distinction under Tennessee law between a "general" and a "special" election. *See* 546 S.W.3d at 54; *see also FOP*, 582 S.W.3d at 219. *Wallace* held that the vacancy in the office of Nashville Mayor had to be filled in a "special" election held in accordance with state law. 546 S.W.3d at 56. Under state law, a special election is not generically defined, but a special election is one that fills a vacant seat, *FOP*, 582 S.W.3d at 219, including a "vacancy in any municipal office." Tenn. Code Ann. § 2-14-102(b)(1). This is distinguished from a regularly scheduled general election.

The August 2020 election was a "general" election for a Metro office, Assessor of Property. The Cooper Memorandum states that "[i]f the Commission determines that the November 2020 election is not the 'preceding general election,' the August 2020 ballot would qualify as a municipal general election under the *Fraternal Ord. of Police* opinion." (R. at 574.) This position seems to be correct. The August 2020 election qualifies as a municipal general election, as it involved a general election for municipal office, Assessor of Property.

The question for analysis, then, is whether the November 2020 election, which was a general election for state and federal offices,[4] also qualifies as the "preceding general election" under Section 19.01 of the Metro Charter for municipal offices. The answer is no.

[4] *See* Tenn. Code Ann. § 2-1-104(a)(26). The "regular November election" is "the election held on the first Tuesday after the first Monday in November in every even-numbered year." *Id.* The regular November election is when the election for Senators and Representatives in the Tennessee General Assembly shall "forever" be held. Tenn. Const. Art II, § 7. The Governor is elected in the regular November election every four years. *See* Tenn. Const. Art III, §§ 2, 4. Electors for President and Vice President are also elected in the regular November election every four years. *See* Tenn. Code Ann. § 2-15-101. The November 2020 election included regularly scheduled general elections for the state and federal offices of President and Vice President, United States Senator, United States House of Representatives, and Senators and Representatives in the Tennessee General Assembly. (R. at 3.)

Under a plain reading of *Wise*, *Wallace* and *FOP*, the November election cannot be the "preceding general election" for purposes of amending the Metro Charter because the November election is the general election for state and federal offices. *See Wise*, 655 S.W.2d at 953 ("since the subject involved is the amendment of the Metropolitan charter, the intent of the Charter Commissioners was to refer to the number of votes cast in a Metropolitan election rather than to the number in a state or national election"); *Wallace*, 546 S.W.3d at 57 ("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") (emphasis in original); *FOP*, 582 S.W.3d at 219 ("*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.' Thus, the November 2016 election cannot be used to determine the number of signatures needed for the petition") (internal citations omitted). The fact that the November 2020 election was a state and federal general election that does not qualify as the "preceding general election" is confirmed in the November 2020 ballot itself, which prominently states at the top: "STATE and FEDERAL GENERAL ELECTION." (R. at 3.)

The Petitioners attempt to escape the result clearly mandated by Supreme Court and Court of Appeals authority by claiming that a non-regular, special election to fill a vacancy in one of nine school board seats converts the November 2020 state and federal general election into a "preceding general election" – the municipal election – under Metro Charter Section 19.01.

There is universal agreement that the August 2020 election is an appropriate election that meets the requirements of Metro Charter Section 19.01. *See FOP*, 582 S.W.3d at 221. (R. at 146.) The Petitioners' argument that the November 2020 election would also qualify under

Section 19.01 due to the presence of a special election for a vacancy in one of nine school board seats has never been addressed by a court and would be a case of first impression. (R. at 147.) The Election Commission has never based the signature threshold on the turnout during a November presidential election. (*Id.*) Given the clear mandate of *Wise*, *Wallace* and *FOP*, it is obvious why the Election Commission has never done what Petitioners propose in this case.

The interrelationship between "general" and "special" elections under Tennessee law is not as precise as one might prefer. A critical issue is whether the term "special" election refers to the nature of the election in question or to an event. The imprecision derives from the possibility that there can be both a "general" election and, on the same ballot and at the same time, a "special" election.

For example, state law allows for a "special" election to be held on a date that "will coincide with the regular . . . general election." Tenn. Code Ann. § 2-14-102(b)(1). That means that a special election may be held on the same date and ballot as a general election. This can blur the distinction.

But it is nevertheless clear that such a distinction – between a general and a special election – does exist, as the court recognized in *FOP*. This point is clearly reinforced in *Wallace*.

The Tennessee Supreme Court in *Wallace* carefully and at length explained why a special election was needed to fill the vacancy in the office of Mayor in Nashville. The Election Commission was "ordered to set a special election in accordance with [T.C.A. § 2-14-102(a)]." 546 S.W.3d at 58. Yet the Supreme Court authorized the Election Commission to "set the special election to coincide with the date of a regular . . . general election." *Id*. at n. 13. This means that the required special election could be set so as to coincide with a regular, scheduled general election and appear on the same ballot. Having a special election at the same time as a general

election is a timing or scheduling issue, but quite clearly from *Wallace* the timing or scheduling of the special election so as to coincide with a general election does not alter or transform the nature or character of the special election – only its timing or scheduling. Such a special election, as indicated in *Wallace*, remains a special election, even if it is held to coincide with a general election.

In their submissions, Director Cooper and Dean Koch contend that the November 2020 election can qualify as a municipal general election. Both Director Cooper and Dean Koch focus on the election to fill a vacancy in one of the nine seats on the school board for an unexpired term that was on the November 2020 ballot.

Dean Koch states: "The November 2020 election included elections for federal and state offices, but it also included an election for a Metro office – the Board of Education of the Metro Public Schools." (R. at 584-585.) The problem is that the School Board election on the ballot in November 2020 was to fill an unexpired term in School Board District 4. (R. at 3.) An election to fill a vacancy for an unexpired term would seem to be a special election, not a general election.

So two questions arise: (i) whether that election to fill the unexpired school board term is a "special" municipal election that is held to coincide with a general election for state and federal offices; (ii) whether an election to fill a vacant school board seat – one of nine – can transform the November 2020 election, which focused on state and federal offices, into a general election for municipal offices (which is required under *Wise*)? If not, it cannot qualify as a "preceding general election" as required by Metro Charter Section 19.01. The November 2020 election was a general election for some offices (state and federal offices), but was it a "general" election for municipal offices because one school board election for an unfilled seat was also on the

November 2020 ballot? The answer is no, and the Election Commission was so advised by retained counsel.

In short, the school board election to fill an unexpired term is a special election, as the Election Commission was advised by counsel. And the presence of the school board election to fill an unexpired term does not transform an election for state and federal offices into an election for municipal offices that would meet the requirements of Section 19.01 of the Metro Charter. The Election Commission was also advised to this effect by retained counsel. Under the circumstances, and given the extensive analysis of retained counsel, as presented to and considered by the Election Commission, the unanimous actions of the Election Commission, at the very least, should be deemed valid since there is quite clearly "room for two opinions" and when that is the case, "a decision [of the Commission in reliance on an opinion of retained counsel] is not arbitrary or capricious, even though a [reviewing court] think[s] a different conclusion might have been reached." *Cumberland Bail Bonding*, 599 S.W.3d at 23 [internal cite omitted]. This is consistent with the requirement that the Election Commission's action is "presumed to be valid" and "will be upheld" if "any possible reason exists justifying the action," as is the case here. *McCallen*, 786 S.W.2d at 641 (internal cite omitted).

As explained in the memorandum to the Election Commission from retained counsel, the Cooper Memorandum contends that the election to fill the school board vacancy for an unexpired term is not a special election. The Cooper Memorandum states that the school board election to fill an unexpired term "was not a special election," (R. at 573), despite the fact that filling an unexpired term is what a special election is designed to do. That was shown in the *Wallace* case, where the Tennessee Supreme Court mandated that the vacancy in the office of Mayor of

Nashville be filled in a special election in accordance with state law regarding special elections. 546 S.W.3d at 56. *See also FOP*, 582 S.W.3d at 219 (a special election is to fill vacancies).

The Cooper Memorandum supports its position with reference to Section 2-14-101, Tennessee Code Annotated, a provision that does not define the meaning of a special election but sets out when a special election "shall be held." That provision requires that a special election be held "when a vacancy in any office is required to be filled by election at other times than those fixed for general election." However, given the immediately following Code section, Section 2-14-102(b)(1), which states that the special election may be scheduled to "coincide with the regular primary or general election," it is apparent that Section 2-14-101 must be interpreted to permit "special elections" to coincide with "general elections" under certain circumstances. Under the Metro Charter (Article 9, Section 9.02), a vacancy for an unexpired term on the school board is filled in accordance with state law, Section 49-2-201, Tennessee Code Annotated. State law states that a vacancy occurring on the school board "shall be filled by" Metro Council; the successor "shall be elected at the next general election" if there is time to comply with qualification requirements. *Id*.

What the Cooper Memorandum seems to be saying is this: A school board vacancy is filled by the Council. A successor is elected at the "next general election," and that successor election is not a special election because the vacancy is filled at a regular general election.

That analysis does not address the two critical questions – (i) whether the election at which the school board vacancy is filled is a special election held to coincide with a general election or (ii) whether the general election at which the ballot includes a school board election to fill an unexpired term qualifies as a municipal general election by virtue of having a school

board election to fill an unexpired term on the ballot, even though that general election otherwise concerns only state and federal offices.

So, the answer to the question whether the election to fill an unexpired school board term is a special election turns on the nature of the school board election to fill a vacancy for an unexpired term. Such elections, by nature and function, fit the description of a special election in Section 2-14-102(b)(1), Tennessee Code Annotated. They are not regularly scheduled and only arise when a vacancy in an office occurs.

The Election Commission may set a special election on a "date which will coincide with the regular . . . general election." Tenn. Code Ann. § 2-14-102(b)(1). But setting a special election, for convenience or economy, to "coincide with the regular . . . general election" does not transform or transmogrify that special election into a general election. All that happened in the November 2020 election, as a practical matter, was that, on the same ballot, there was a general election (for state and federal offices) and a special election (to fill a vacancy for an unexpired term for school board). The timing or scheduling flexibility in state law could not and did not alter the nature of the election itself; it just allowed for two different types of elections – a general election for state and federal offices and a special election to fill an unexpired school board term – to coincide and be placed on the same ballot. Nothing in the flexible timing or scheduling provision should alter the nature of the November 2020 school board election from a "special" to a "general" election.

In sum, does the appearance on the November 2020 ballot of the school board election to fill an unexpired term transform or transmogrify the character of that election from a special to a general municipal election? Or does the appearance of the school board election on the November 2020 ballot just mean that a special election is coinciding with a general election?

Whether an election should be considered to be a "special" election should be determined by the nature, character, and function of that election. Filling of a vacancy for an unexpired term of office is the task of a special election, *see FOP*, 582 S.W.3d at 219, even if that election coincides with a general election being held at the same time. Tenn. Code Ann. § 2-14-102(b)(1). This is consistent with the Tennessee Supreme Court's approach in *Wallace*. 546 S.W.3d at 58 & n. 13. The alternative position – that the placement of the school board election on the general November 2020 ballot transforms a special election into a general election – does not comport with the distinction between a special and a general election under the Supreme Court's ruling in *Wallace*.

The Election Commission has gone to great lengths to share the analysis it received from retained counsel. For purposes of this matter now pending before this Court on a writ of certiorari, it is not up to the Court to determine whether retained Election Commission counsel or Director Cooper has the better of the argument. The Election Commission is confident that its action, based on the analysis of its retained counsel, is correct. But to prevail in this case, all that the Election Commission must show is that there is "room for two opinions" since the Election Commission prevails "if any possible reason can be conceived to justify it." *Cumberland Bail Bonding*, 599 S.W.3d at 23 (internal cites omitted). Surely, the foregoing analysis, at a minimum, satisfies this highly restrained standard of review.

This leads to the next question. Even if appearance on the November 2020 general election ballot for state and federal offices turns the school board election into a general election, does that alter the nature and character of the November 2020 election so that it becomes not an election for state and federal offices but a *municipal general election* (as required under the *Wise* case)?

The answer to that question is no. Even if the election for school board on the November 2020 ballot is a general election, it is not a general *municipal* election, as required by *Wise*. Allowing the presence of an election for an unexpired term in one school board seat to transform the entire November 2020 election into a general *municipal* election is unwarranted. The November 2020 election was about state and federal offices, not municipal offices. In *FOP*, the Court of Appeals found that a regular election for a countywide Metro office, in which all Davidson County voters were eligible to participate, was sufficient to justify a conclusion that that election was for a municipal office under *Wise* and *Wallace*. The election to fill the unexpired term of a school board member is quite different. That election has a very limited scope in terms of voter participation: it consisted of just one seat out of nine on the school board. Holding that the November 2020 election qualifies under Metro Charter Section 19.01 would make a mockery of the Supreme Court's decision in *Wise*, where the Court stated: "The Chancellor held that since the subject involved is the amendment of the Metropolitan charter, the intent of the Charter Commissioners was to refer to the number of votes cast in a Metropolitan election rather than to the number in a state or national election. We agree." *Wise*, 655 S.W.2d at 953. This holding has been relied on and reaffirmed twice in recent years. *See Wallace*, 546 S.W.3d at 57; *FOP*, 582 S.W.3d at 219. No one can honestly say that since the subject involved is the amendment of the Metro Charter, the intent of the Charter Commissioners was to refer to the number of votes cast in an election to replace one of nine school board members, held at the same time as the state and national general election in November.

The election to fill the unexpired term of a school board member is different for the additional reasons that it was not a regularly scheduled election as part of a routine municipal general election, which normally occurs in August, and its presence on the ballot is entirely

happenstance. It depends on whether a vacancy for an unexpired term on the school board exists and whether there is time for potential candidates to qualify. The filling of a school board vacancy at an election that has the elements of a special election is very different from the election considered in *FOP* – a regularly scheduled, countywide election whose focus and character were clearly municipal. Allowing such an election to transform the character of the November 2020 election from one that involves state and federal offices to one that qualifies as focusing on a *municipal* office (when only one-ninth of the county could vote for the "municipal" office on the ballot) would not be in harmony with the rationale and holding of *Wise*.[5]

The Election Commission, in fulfilling its duties, embraced that position. That decision is also subject to the highly restrained standard of review already explained. It is entitled to a presumption of validity and must be upheld if "'any possible reason' exists justifying [its] action." *McCallen*, 786 S.W.2d at 641. That includes deference if there is "room for two opinions," as there clearly is here. *Cumberland Bail Bonding*, 599 S.W.3d at 23 (internal cites omitted). As a result, the decision of the Election Commission regarding what constitutes the "preceding general election" must be affirmed by this Court, applying the appropriate standard of review.

In sum, (i) the provision in Section 19.01 of the Metro Charter regarding the "preceding general election" refers to a municipal general election, not to a general election for state or federal offices. (ii) The August 2020 election qualifies as the preceding general election under Metro Charter Section 19.01 because it included a general election for a municipal office. (iii)

[5] The *FOP* Court likewise rejected the argument that the regularly scheduled election of city commissioners in the smaller cities in Davidson County converted the November state and federal election into a municipal general election. *See* 582 S.W.3d at 219. Those smaller cities, like the one school board seat on the November 2020 ballot, represent only a fraction of the total population of Davidson County.

The November 2020 election does not qualify as a municipal general election, as it focused exclusively on state and federal offices. (iv) The election in November 2020 for filling one school board vacancy for an unexpired term should be considered to be a form of special election that does not qualify as a municipal *general election*, as provided under the *Wise* case. (v) The school board election to fill an unexpired term, as authorized by state law, appeared on the same ballot in November 2020 as the regularly scheduled general election for state and federal offices. That did not transform the nature and function of that November 2020 election into a general *municipal* election.

Overall, then, for purposes of treating the 4 Good Government Petition, the appropriate preceding municipal general election to rely on is the August 2020 election. That is what the Election Commission did and did so correctly, either as a general matter or, at the very least, under the deferential standard of review under the "room for two opinions" standard. Since a sufficient number of verified signatures was turned in and certified when the August 2020 election is used as the referent, the number of signatures on the 4 Good Government Petition satisfies the numerosity requirement under Section 19.01 of the Metro Charter.

(2) The alleged two "versions" of the Petition do not affect the number of Petition signatures.

Petitioners fault the Election Commission for not considering their claim that the signatures on two "versions" of the 4 Good Government Petition should not be counted and aggregated. (*See* Complaint at ¶ 52.) The signatures on these "versions" were counted, and upon request of a commenter at a hearing, re-counted by Election Commission staff before the Election Commission accepted the total number of signatures on the Petition as valid and qualifying. The Election Commission unanimously voted to certify 12,369 valid, verified signatures at its meeting on April 22, 2021. (Roberts Dec. at ¶ 15; R. at 294-295.)

Petitioners argue that two "versions" of the Petition exist, but all signatures submitted by 4 Good Government appear on signature pages and Petition forms that are substantively identical. That is, the specific terminology of the proposed Charter amendments that were to be put to a vote are identical in all documents submitted by 4 Good Government. (R. at 622-624.) The text of the amendments is identical, as follows:

> The undersigned Davidson County voters propose the following six (6) separate Amendments to the Metropolitan Charter, as written in *italics*, to be voted on by the citizens on May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01:
>
> 1. **Limit Property Tax Rates – Add to Article 6, § 6.07, Paragraph 5:** *"Property Tax Rates shall not increase more than 3% per fiscal year upon enactment without a voter referendum, pursuant to Tenn. Code Ann. § 2-3-204. For Fiscal Years 2021-2022 and 2022-2023 the property tax rate(s) shall revert to Fiscal Year 2019-2020's tax rate(s), or lower if required by law. This amendment's provisions are severable."*
> 2. **Recall Elected Officials – (A) Add to Article 15, § 15.07:** *"Petitions to recall elected officials filed after January 1, 2021, under this section shall contain the signatures and addresses of registered qualified voters in Davidson County equal to ten (10) percent of the citizens voting in the preceding Metro general election in the district or area from which the recalled official was elected. Such Petitions shall be filed with the metro clerk within seventy-five (75) days of the date the notice is filed. This amendment's provisions are severable"* **(B) Replace existing Article 15, § 15.08, Paragraph 2 with:** *"A recalled official's name shall not appear on the recall ballot, but such official may qualify as a write-in candidate. This amendment's provisions are severable."*
> 3. **Abolish Lifetime or Other Benefits for Elected Officials – Add to Article 18, § 18.05, Paragraph 1:** *"No elected official shall receive any benefits at taxpayer expense as a result of holding such elected office without a voter referendum."*
> 4. **Preserve Voters' Charter Amendments – Create Article 19, § 19.04:** *"Voter-sponsored Charter Amendments approved after January 1, 2021, shall be amended only by voter-sponsored Petition, notwithstanding any law to the contrary."*
> 5. **Protect Publicly-Owned Parks, Greenways & Lands – Create Article 18, § 18.18:** *"No portion of a publicly-owned park, greenway, or other real property shall be transferred or conveyed without 31 votes of Metro Council. All transfers of interest in real property shall be at fair market value based on an independent appraisal. Public referendum shall be required for transfers of interest in such publicly-owned properties valued over $5,000,000, and for leases exceeding twenty (20) years, unless prohibited by state law."*
> 6. **Protect Promises to Nashville – Create Article 18, § 18.19:** *"If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) consecutive months during the term of a team's ground lease, all sports facilities and related ancillary development related to the defaulting team shall revert to public property, and all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payment shall be paid, if required by law."*

(*Id.*) Petitioners contend that there are two "versions" of the 4 Good Government Petition, even though the text of the proposed amendments is the same throughout. Petitioners cite minor differences regarding the date when 4 Good Government asked voters to return Petition signatures and slight variations in the prefatory, non-substantive advocacy language used. (*Id.*)

The Election Commission disagrees with Petitioners' characterization of multiple "versions" when each document contains the same text of the proposed amendments. When asked about the dates that 4 Good Government asked voters to return completed signature pages, Metro Director of Law Robert Cooper admitted that there is nothing "in the law that requires that you notify the potential signatory of that referendum petition that you must return it . . . by" a

specific date. (R. at 142.) Further, Director of Law Cooper admitted that "[t]he dates that are essential are the other dates on those petitions." (R. at 150 (emphasis added).)

When it voted to certify the total number of signatures, the Election Commission deemed immaterial the differences regarding the date 4 Good Government asked voters to return their signatures and the slight variations in the prefatory advocacy language. So, Petitioners err in faulting the Election Commission for not considering their claim. The Election Commission accepted the total number of signatures on the Petition as valid and qualifying. Petitioners' harsh position – that some valid and qualifying signatures should be suppressed even though registered voters signed approving of identical language regarding the text of the proposed Charter amendments in each instance – was rejected by the Election Commission. And the Election Commission's decision to place the six proposed Charter amendments on the ballot – favoring the counting of all valid signatures in support of substantively identical Charter amendment language for the election ballot – is entitled to respect by the Court and "presumed to be valid" if "any possible reason exists justifying the action." *McCallen*, 786 S.W.3d at 641. Giving effect to all valid, qualifying signatures in support of substantively identical proposed Charter amendments is surely a "possible reason . . . justifying the action."

(3) The two "versions" issue is immaterial if the signature threshold is based on the Assessor of Property's election that occurred in August 2020. The Assessor of Property's election in August 2020 was the only Metro municipal general election on the ballot at that time.

The Election Commission's action is fully justified on the two "versions" issue for the reasons explained. But, in addition, the two "versions" issue may prove immaterial in any event and therefore disappear from this Court's consideration.

Under Section 19.01 of the Metro Charter, a petition seeking access to the ballot for a proposed Charter amendment must obtain signatures of at least 10% of the number of registered

voters voting in the "preceding general election." The Tennessee Supreme Court has interpreted the "preceding general election" language to apply to Metro municipal elections. Elections for federal and state offices do not qualify. Further, Metro municipal elections must be "general" elections to qualify. *Wise*, 655 S.W.2d at 953; *accord*, *FOP*, 582 S.W.3d at 219.

Petitioners recognize that 4 Good Government has asserted that "a petition based on the August 2020 election requires only 9,319 signatures, which is ten percent of the registered voters who cast votes" in the race for Assessor of Property, which was the only municipal general election held in August 2020. (Complaint at 15, n. 5.) Election Commission documents establish that three elections occurred in August 2020:[6] (1) a State Republican Primary Election; (2) a State Democratic Primary Election; and (3) a County General Election. (R. at 5-7, 625-637.) By definition, the State Republican and Democratic Primary Elections are not "general elections." *See* Tenn. Code Ann. § 2-1-104(7) ("'Election' means a general election for which membership in a political party in order to participate therein is not required"); Tenn. Code Ann. § 2-1-104(19) ("'Primary election' means an election held for a political party for the purpose of allowing members of that party to select a nominee or nominees to appear on the general election ballot"); *see also Comer v. Ashe*, 514 S.W.2d 730, 735 (Tenn. 1974) (stating that a general election contrasts with a primary election, which is a preliminary election for purposes of selecting party nominees with participation limited "to members of the respective political parties, whereas, the general election is the ultimate selection process").

[6] *See* Tenn. Code Ann. § 2-1-104(a)(25). The "regular August election" is "the election held on the first Thursday in August of every even-numbered year." The regular August election is when the election for "judicial and other civil officers" shall "forever" be held. Tenn. Const. Art. VII, § 5. Candidates running for these positions in the regular August election do so by political party, and these are partisan elections. *See* Tenn. Code Ann. § 2-13-203(d)(3). The regular August election also includes a primary election in which political parties choose nominees for Governor, General Assembly, United States Senator and the United States House of Representatives. *See* Tenn. Code Ann. § 2-13-202.

There is no disagreement that the County General Election held August 2020, qualifies as a municipal general election under Metro Charter Section 19.01. (R. at 146.) The Election Commission's certification of election results shows that 91,179 registered voters of Nashville-Davidson County voted in the August 2020 County General Election. (R. at 625-627.) Those voters cast votes in the regularly scheduled general election for the office of Assessor of Property, a Metro officer. *See FOP*, 582 S.W.3d at 220. The election for Trustee that was on the same ballot was to fill an unexpired term, not a general election; the same is true for Chancellor and Criminal Court Judge positions on that ballot. So, 4 Good Government is correct that the August 2020 Assessor of Property's election was the municipal general election under Charter Section 19.01; using the votes cast in that election as the appropriate baseline, as 4 Good Government has asserted, would require a much lower baseline than the 12,369 signatures that the Election Commission verified. Instead, the number would be approximately 9,118 signatures – i.e., 10% of the registered voters of Nashville-Davidson County who voted in the election of the Assessor of Property during the August 2020 County General Election. The number of signatures on one "version" of the Petition far exceeds the 9,118. This would undermine Petitioners' argument that the valid signatures on one "version" of the petition should be disregarded or suppressed.

Under the governing standard of review, the Election Commission's decision "should be deemed valid if 'any possible reason can be conceived to justify.'" *Cumberland Bail Bonding*, 599 S.W.3d at 23 (internal cite omitted). Use of the August 2020 County General Election and the votes for the office of Assessor of Property as the baseline constitute "any possible reason" that "can be conceived to justify" the Election Commission's decision to place the six separate amendments proposed by 4 Good Government on the July 27 ballot.

III. THE PETITION PRESCRIBES A DATE FOR THE ELECTION, AND THE PROVISIONS OF METRO CHARTER SECTION 19.01 REGARDING THE REFERENDUM DATE ARE SUBJECT TO STATE LAW.

The Petition meets the requirements of Metro Charter Section 19.01 regarding prescribing a date for the holding of a referendum election. The Petition uses the disjunctive word "or." As a result, the Petition prescribes only one date. The actual date of the referendum election is set by the Election Commission, acting under state law, which supersedes the Metro Charter Section 19.01.

Metro Charter Section 19.01 provides, in relevant part:

> Such resolution or petition shall also prescribe a date not less than eighty (80) [days] subsequent to the date of its filing for the holding of a referendum election at which the electorate of the metropolitan government will vote to ratify or to reject the amendments proposed.

The Petition prescribes a date that is not less than 80 days subsequent to its filing for the holding of the referendum election on the proposed amendments. The Petition was filed on March 25, 2021. (R. at 1-2.) The language of the Petition is that the proposed amendments are "to be voted on by citizens on May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01." (R. at 622.) The first date referred to in the Petition – May 28, 2021 – is 64 days after the date the Petition was filed – March 25, 2021. May 28, 2021, thus, is not a date that is at least 80 days after the filing of the Petition, and May 28, 2021, is not a date permitted by Metro Charter Section 19.01. The second date referred to in the Petition – June 14, 2021 – is 81 days after the date the Petition was filed – March 25, 2021. The Petition, thus, prescribes a date – June 14, 2021 – that is not less than 80 days subsequent to its filing for the holding of the referendum election on the proposed amendments. This comports with the "prescribe a date" requirement of Metro Charter Section 19.01.

In the face of the result compelled by the plain language of Metro Charter Section 19.01 and the text of the Petition, the Petitioners insist that the Petition fails to comply with the "prescribe a date" requirement in Metro Charter Section 19.01. (Complaint at 12.) Petitioners' argument ignores basic rules of grammar. By using the disjunctive "or," the Petition indicates that only one date is prescribed for holding the referendum election. "It is a well established rule of construction that when the disjunctive conjunction 'or' is used in a statute, the various elements are to be treated separately, with any one element sufficient to meet the objectives outlined in the statute." *State v. Cleveland*, No. W2004-02892-CCA-R3-CD, 2005 WL 1707975 at *2 (Tenn. Ct. Crim. App. July 21, 2005). "The following legal maxim succinctly describes this principle, which has been followed for many years: *In disjunctivis alteram partem esse veram*. In disjunctive constructions, it is sufficient if either part is true." *Id.* at *2, n. 3 (citing Black's Law Dictionary 1723 (8th ed.2004), Appendix B.) The Petition prescribes a date that is sufficient, meeting the requirements of Metro Charter Section 19.01.

Without regard for their inconsistent positions, the Petitioners have advocated for the inclusion on the ballot of an amendment proposed by the Metro Council that likewise uses the disjunctive "or" construction in prescribing a date for the referendum election. Metro Council Resolution 2021-837 states: "The date prescribed for holding of the referendum election at which the electorate of the Metropolitan Government will vote to ratify or reject the amendments proposed in Section 1 of this Resolution shall be June 14, 2021, or such other date set by the Davidson Election Commission for a referendum election regarding amendments to the Metropolitan Charter submitted by 4 Good Government . . ." (emphasis supplied).

Regardless of the date included in the Petition, the state election law – not Metro Charter Section 19.01 or the Petition – prescribes the allowed date for the referendum election. Metro

Charter Section 15.04 provides: "The general election laws of the state shall be applicable to all metropolitan elections, except as otherwise provided in this article." Section 19.01 is not part of "this article" – Metro Charter Article 15 – so Section 19.01 is not exempt from state election laws. State election law provides a window of 75 to 90 days within which a county election commission shall hold an election on questions submitted to the people. *See* Tenn. Code Ann. § 2-3-204(a).

Although the Petition complies with the "prescribe a date" provision of Section 19.01, the preeminence of state election law on the subject of when the referendum election must be held renders that provision of Section 19.01 irrelevant. Where, as here, "a statute imposes a mandatory duty upon a governmental agency to carry out express and specifically defined purposes and objectives, the statute carries with it by necessary implication the authority to do whatever is reasonably necessary to effectuate the legislative mandate." *McFarland*, 530 S.W.3d at 94. The Election Commission has scheduled the election date for July 27, 2021, which falls within the 75- to 90-day range that state law provides. Petitioners have identified no requirement that the Election Commission set an election on the precise date that a petition requests; and there is no such requirement. The precise date, within the parameters of state law, lies in the discretion of the Election Commission, not with either 4 Good Government or the Metro Council as proponents of proposed Charter amendments.

Although Metro Charter Section 19.01 requires that a petition propose a date for the holding of an election, it does not require the Election Commission to use the proposed date. Indeed, the Charter could not impose such a requirement because it would conflict with the discretion that state law (i.e., Tenn. Code Ann. 2-3-204(a)) gives the Election Commission to set the election date. *See, e.g., Middleton v. City of Millington*, No. W2018-00338-COA-R3-CV,

2018 WL 6505530, at *5 (Tenn. Ct. App. Dec. 11, 2018) (collecting Tennessee cases holding that state law is supreme to conflicting charters).

IV. THE PETITION PROPOSES SIX METRO CHARTER AMENDMENTS TO BE VOTED ON SEPARATELY BY QUALIFIED METRO VOTERS. SEVERABILITY BETWEEN AMENDMENTS IS NOT AN ISSUE.

The Petition proposes six Metro Charter amendments intended to be voted on separately by qualified voters. As such, the Petition does not present an omnibus proposal. The invalidity of any one proposed amendment would not automatically invalidate the other proposed amendments. Since the six proposed amendments are separate, there is no issue of severability as between the amendments. Two of the proposed amendments (Amendment 1 and Amendment 2) include severability language within the amendment that would apply to allow the severability of the internal terms within those amendments. (R. at 622-624.)

The Petition proposes six separate amendments, and Metro voters will be able to vote yes-or-no on each. The Petition identifies the proposed amendments as six amendments. (R. at 622-624.) The Petition further states that on election day, citizens will vote on "six (6) separate amendments." (R. at 622 (emphasis in original).) Counsel for the Petitioners and Metro Director of Law Robert Cooper stated to the Election Commission that a reading of the language in the Petition is that the Petition proposes separate amendments to be voted on separately by voters. (R. at 40-42.) The proponent of the Petition likewise informed the Election Commission that intent of the Petition is to present six separate amendments for voter consideration. (R. at 67.)

Petitioners argue that there is no basis to sever any allegedly defective amendment from the other amendments. (Complaint at ¶ 147.) As discussed below, the Election Commission believes there is no basis to hold that any single amendment or multiple amendments are defective for individualized reasons. However, even if it were the case that one or more single amendments are defective, severability is not an issue because the proposed amendments

themselves are separate. The Court's purpose in interpreting a Charter amendment is to effectuate the intent of the electorate based on the meaning apparent on the face of the initiative measure. *See Jordan v. Knox County*, 213 S.W.3d 751, 780-81 (Tenn. 2007) (quoting 42 Am.Jur.2d *Initiative and Referendum* § 49 (Supp. 2006)). The face of the Petition provides for six Metro Charter amendments, and Petition signers expressed their intent to "propose the following six (6) Amendments to the Metropolitan Charter" by signing the Petition. (R. at 622-624.)

The Election Commission has adopted the position, in accord with the foregoing, that there are six separate amendments. Under the controlling, restrained standard of review, the decision of the Election Commission must stand and be affirmed.

V. PETITIONERS' ARGUMENTS AGAINST FOUR SPECIFIC AMENDMENTS DO NOT ESTABLISH THAT THE ELECTION COMMISSION ACTED ILLEGALLY, ARBITRARILY OR CAPRICIOUSLY.[7]

A. Petitioners' vagueness arguments against four of the proposed amendments are as-applied challenges, not facial challenges. The court cannot adjudicate Petitioners' vagueness arguments pre-election.

Petitioners' raise vagueness challenges to proposed Amendments 1, 3 and 6. (Complaint at ¶¶ 78, 79, 104-09, 117-19.) Petitioners' vagueness challenges are not ripe for determination at this time because they are as-applied challenges, not facial challenges.

Vagueness challenges outside the First Amendment context are as-applied challenges, not facial challenges. *See State v. Burkhart*, 58 S.W.3d 694, 699 (Tenn. 2001); *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys.*, 863 S.W.2d 45, 49 (Tenn. 1993) ("In addition to determining whether the standard is vague in a general sense, it is also necessary to examine the statute or standard to see whether it is vague as applied to the affected party"); *State v.*

[7] The Election Commission relies upon and incorporates its contemporaneously filed Motion to Dismiss or, Alternatively, for Judgment on the Pleadings.

Vandenburg, No. M201701882CCAR3CD, 2019 WL 3720892, at *67 (Tenn. Ct. Crim. App. Aug. 8, 2019), appeal denied (Jan. 15, 2020).

"[V]agueness challenges to laws not threatening First Amendment interests must be brought on an as-applied basis because a pre-application facial challenge is premature." *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927, 935–36 (E.D. Tenn. 1998), *aff'd sub nom. Rush v. City of Chattanooga*, 182 F.3d 918 (6th Cir. 1999); *see also National Rifle Ass'n v. Magaw*, 132 F.3d 272, 292 (6th Cir. 1997) ("Generally, courts have found that vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand. In other words, the statute must be judged on an as-applied basis, and a facial challenge before the statute has been applied is premature." (internal quotations, citations, and alterations omitted).

Under Tennessee Supreme Court authority in *City of Memphis*, "pre-election challenges to the substantive constitutional validity of referendum measures are not ripe for determination by a court." 146 S.W.3d at 539. Under certain circumstances, facial challenges may be appropriate under *City of Memphis*. Petitioners' vagueness arguments are as-applied challenges, not facial challenges. As such, they are not ripe for the Court to determine at this time. The reason for this result is explained in a law review article that the Tennessee Supreme Court relied upon in *City of Memphis*:

> Suits attacking the substantive validity of ballot measures involve a double contingency which renders any injury speculative and uncertain. First, the measure may not pass; only a minority do. Even if public opinion polls report that a particular measure enjoys majority support, polls are sometimes flawed, and passage will depend on such variables as campaign strategies, spending, and voter turnout. In many contested initiatives a significant opinion change occurs during the campaign. Second, even if the measure passes, there may be no threat of enforcement. Prosecutors and other government officials often exercise their discretion not to

> enforce a law because of their doubts about its constitutionality, their perception of its social disutility, or their allocation of resources to other tasks. Also, there is often the possibility that if enacted, the law may be applied in a constitutional manner. Therefore, the uncertainty about the measure's passage and the government's implementation of it creates a double contingency which makes suits attacking the substantive constitutionality of ballot measures unripe for review.

James D. Gordon III and David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 310 (1989). Moreover, vagueness concerns in the context of a charter provision can be addressed or cured in administrative enforcement or by legislation. So, a potentially vague provision in a charter is not invalid in all circumstances, which is a pre-requisite for a facial challenge. *See Fisher*, 604 S.W.3d at 396-97 ("In a facial challenge, the plaintiff contends that there are no circumstances under which the statute, as written, may be found valid"); *see also Salerno*, 481 U.S. at 739 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

B. The Court cannot adjudicate, pre-election, Petitioners' specific challenges to Amendment 1 and must affirm the Election Commission's decision to place the Amendment on the ballot.

Amendment 1

Add to Article 6, § 6.07, Paragraph 5:

> *Property Tax Rates shall not increase more than 3% per fiscal year upon enactment without a voter referendum, pursuant to Tenn. Code Ann. § 2-3-204. For Fiscal Years 2021-2022 and 2022-2023 the property tax rate(s) shall revert to Fiscal Year 2019-2020's tax rate(s), or lower if required by law. This amendment's provisions are severable.*

(1) Pre-election substantive constitutional challenges to a proposed referendum measure are beyond the Court's authority.

In its Legal Opinion, No. 2021-01, Metro makes constitutional and legal arguments concerning proposed Amendment 1 that must be addressed to a court, not the Election Commission. And as the Election Commission will show, these arguments, even addressed to this Court, are beyond the scope of this Court's authority in the context of a writ of certiorari proceeding.

Under *City of Memphis*, allowing the Election Commission to address these matters of constitutionality would be allowing the Election Commission to exercise a "uniquely judicial function," thereby "usurp[ing] the power of the judiciary" to rule on constitutional matters and "violat[ing] the constitutional principle of separation of powers." 146 S.W.3d at 537-38. And, focusing on the "substantive constitutionality" of the proposed charter provision in question is inappropriate: in a writ of certiorari matter the analysis focuses on and reviews the conduct of the Election Commission in placing the proposed Charter amendment on the ballot. It is that decision, not the merits of the proposed Charter provision itself, that is the basis for the Court's review in this case.

City of Memphis did not involve a writ of certiorari. But even in the broader context of that case, the Court declined to review the substantive constitutionality of the proposed Charter amendment, which was "not now ripe for judicial determination." 146 S.W.3d at 540. "[A] challenge to the substantive constitutional validity" of the proposed Charter amendment "is not ripe for judicial determination," as the measure in question "is not the law and may never become the law." *Id.* at 538.

Petitioners attempt to fit their assertions into the narrow category of challenges allowed for in *City of Memphis*, but those claims were addressed to a court in *City of Memphis*. *Id*. at

538-40. Consideration of those claims was held not to be within the scope of authority of the election commission. *Id*. at 535-38. The same is true with respect to this component of the Petition currently before this Court. The Election Commission's decision not to review the merits of the proposed Charter amendment in question conforms to the scope of its authority under *City of Memphis*. That the Election Commission did not accept the assertions of Legal Opinion, No. 2021-01, as the Election Commission was properly advised by retained counsel, is presumptively correct, "fairly debatable" at a minimum, and satisfies the restrained standard of review applicable in this case. *McCallen*, 786 S.W.3d at 641 ("if 'any possible reason' exists justifying the action, it will be upheld").

(2) Petitioners' challenge to Amendment 1 is a substantive constitutional challenge that may not be adjudicated by the Election Commission or Court pre-election. The Election Commission's decision to place Amendment 1 on the ballot is, therefore, "fairly debatable" and meets the standard for affirmance under a writ of certiorari.

Even though it is not necessary at this point, the Election Commission will now provide a more detailed foundation for its position.

Under Tennessee law, Metro may adopt a Charter, as Metro has done. In Section 19.01 of its Charter, Metro provides for amendment of the Charter via petition "signed by ten (10) per cent of the number of registered voters . . . voting in the preceding general election."

The Charter's amendment provision does not limit the terms or scope of appropriate amendments. The subject matter of Amendment 1 – the proposed property tax rate amendment – is one that is already embedded in Section 6.07 of the Metro Charter, which is the same section of the Charter that the proposed amendment seeks to amend.

The proposed Charter amendment would be added to paragraph 5 of Section 6.07 of the existing Metro Charter. Paragraph 5 was added by referendum petition in 2006 and provides for

a referendum if property tax rates are proposed to rise above the rates in place "as of November 7, 2006."

From the perspective of its proponents, the proposed amendment is designed to make effective the provision already contained in Section 6.07 of the Charter. The proposed amendment establishes a new baseline for property tax rates and requires a referendum vote if the rates exceed an increase of 3% per year beyond the baseline. This structure is akin to the existing provisions of Metro Charter Section 6.07 in that it sets out a property tax rate baseline and requires a referendum vote if proposed rates exceed the baseline -- by more than 3% per year under the terms of the current Petition.

As noted, the Charter's amendment provision does not limit the terms or scope of appropriate amendments. And, more generally, there are no applicable restrictions in the Metro Charter regarding the scope of a proposed Charter amendment.

In *City of Memphis*, the Tennessee Supreme Court held that a charter amendment involving taxation must be placed on a voter referendum ballot. 146 S.W.3d at 540. The proposed charter amendment in *City of Memphis* would have authorized taxation of certain privileges, *id*. at 534, and the Court ruled that the election commission must place the proposed charter amendment on the referendum ballot. That the proposed charter amendment concerned taxation did not preclude consideration of the proposed amendment by voters at a referendum, even though the specific tax at issue seemed, on its face, to violate the Tennessee Constitution.

The Attorney General has addressed the issue in the context of a home rule city in Opinion No. 03-019. The question addressed in that Opinion was whether a home rule city, under Article XI, Sec. 9, "[m]ay … amend its charter to provide that all increases in city tax rates must be approved by a majority of the voters of the city at a referendum election?" The Attorney

General answered the question in the affirmative. A home rule municipality has a "great deal of latitude in amending its charter," including the power at its discretion to require that "increases in a city tax rate must be approved by a majority of the voters of the city" in a voter referendum. That is, "[r]equiring a referendum to raise a tax rate would be well within this discretion," and the "property tax rate is one example of a tax in which such a charter amendment could apply." According to the Attorney General, the rule is that a charter amendment in a home rule city that requires a voter referendum for a tax rate increase is valid under the Tennessee Constitution, provided that such a provision "does not conflict with general law." And no such conflict was found by the Attorney General.[8]

In sum, under the Attorney General's analysis in Opinion No. 03-019, there is no conflict with general state law when a Charter amendment is proposed regarding tax rates. Such a Charter amendment affecting property tax rates should therefore be permissible when authorized by and not expressly prohibited by Metro's Charter. And both those conditions are satisfied, as Metro's Charter authorizes Charter amendment via petition, and there is no express prohibition in the Metro Charter to an amendment affecting tax rates. Under the analysis of the Attorney General in its Opinion 03-019, Amendment 1 regarding tax rates and mandating voter approval does not appear to be beyond the scope of the referendum power. *Cf*. TN AG Op. No. 05-027 ("Legislation authorizing any county legislative body to increase the county property tax rate by

[8] In dicta, the Tennessee Supreme Court has stated that Metro is a "home-rule government" pursuant to the same section of the Tennessee Constitution referred to in the Attorney General's Opinion No. 03-019 – Article XI, Section 9. *Jordan*, 213 S.W.3d at 771 (internal citation omitted). Petitioners' approach to this issue in this case has been more murky, with the Petitioners objecting to a discovery request on this issue on the basis that the term "home rule municipality" is "vague and undefined."

submitting the proposed rate increase to a referendum election does not violate the Tennessee Constitution").[9]

In addition, Petitioners contend that the proposed charter amendment "would repeal the property tax ordinance that the Council is required by state law to adopt prior to the start of Fiscal Year 2021-22," Metro Legal Opinion at 9. Metro relies on the Chancery Court opinion regarding the 2020 Petition for the proposition that Metro cannot alter or repeal a tax rate mid-year. *See* 2020 Litigation Findings and Conclusions Order at 12, 22.

Under state law, property tax rates are to be set by the Council prior to the start of a new fiscal year (July 1). T.C.A. § 67-5-510. Property tax rates in Metro are set for a specific fiscal year, based on projections of expenditures and revenues. Rates are set on an annual basis and are not ongoing from year to year.

The proposed Charter amendment in question does not explicitly set a tax rate but instead establishes (i) a tax rate baseline of fiscal year 2019-20, at a rate previously set for that fiscal year by the Council and (ii) a constraint on the rate of property tax increases beyond the baseline in the absence of a referendum. If property tax assessments rise (as has typically been the case in Metro recently), then state law mandates an automatic reduction of tax rates so as to maintain the level of overall revenues derived from property taxation in Metro at a constant level. If a reassessment is to raise net property tax revenues, then the Council must first lower the property tax rates to maintain the preexisting revenue status quo and then must raise those adjusted property tax rates to secure greater revenue. This is a means of assuring visible political

[9] Metro disagrees with TN AG Op. 03-019. (R. at 684.) It cites other Attorney General opinions that would constrain the ability of a county to hold a referendum to set a tax rate. (R. at 683.) The opinions that Metro relies on are distinguishable or in error. At any rate, the issue is at least "fairly debatable" and the Election Commission's resolution of the matter is presumptively valid and not to be overturned as arbitrary when, as here, there is "room for two opinions." *Cumberland Bail Bonding*, 599 S.W.3d at 23. Moreover, the issue falls outside the Election Commission's authority to resolve under *City of Memphis*; therefore, the Election Commission's position is not arbitrary.

accountability for increasing overall tax-raised revenues. In other words, the proposed Charter amendment in question modifies existing guardrails and fiscal safeguards already in place in the Charter regarding the pace of tax rate increases.

The proposed amendment in question uses fiscal year 2019-20 as the baseline but, pretty sophisticatedly, adjusts the baseline rate downward "if required by law." This seems to be a reference to the mandated lowering of the tax rate if the overall Metro property tax assessments rise over the four-year reassessment cycle.

Once the adjusted baseline tax rate is in place, and remains in effect for fiscal years 2021-22 and 2022-23 (a "freezing" principle), the proposed charter amendment would thereafter allow for an annual 3% per year increase in the tax rate enacted by the Mayor and Council under the normal budget process. It would appear to allow for an increase in the adjusted baseline rate by up to 3% per year without a referendum. If Metro wishes to increase tax rates above the baseline by an amount that is beyond 3% per year, it could only do so with approval by the voters in a referendum. Again, it would appear that any such approval would increase the adjusted baseline for the following fiscal year.

Petitioners contend the proposed adoption of a baseline tax rate from 2019-20 (as proposed in the Charter amendment in question) cannot be implemented for fiscal year 2021-22 if the proposed Charter amendment in question is approved. Petitioners contend that that would constitute an improper repeal of a property tax rate that will have already been set for 2021-22. Even if Petitioners are correct – that a property tax rate cannot be altered mid-year – that does not indicate that the vote on the proposed amendment in question should be stopped by this Court. These concerns should not preclude voters from having a chance to voice their opinions regarding the proposed Charter amendment in question.

The response to Petitioners' contentions is straight forward. Metro can "change" an initially-adopted tax rate, provided that the "change" is effective before taxes become due (before the first Monday in October).

The Chancery Court in 2020 recognized that a change of a property tax rate that is put in place at the outset of a fiscal year is permitted "before the first Monday in October," the date that taxes become due. *See* 2020 Litigation Findings and Conclusions Order at 22. The Attorney General has adopted this position. See TN AG Op. No. 04-149 (once a tax rate has been set for a new fiscal year, it can be changed "provided the new rate is fixed before taxes become due on the first Monday in October"). *See also In re Goody's Family Clothing, Inc.*, 443 B.R. 5, 13 (Bankr. D. Del. 2010) ("Tennessee tax collectors, courts, and attorneys general have long interpreted Tennessee law to mean that property tax taxes are 'due' on the first Monday in October"). Therefore, if voters approve the proposed Charter amendment in time for it to be effective before the first Monday in October 2021, the "change" to the baseline tax rate (even if already adopted by Metro for the 2021-22 fiscal year) would be appropriate. In effect, there is no "repeal" of a tax rate as long as the new rate is effective before the first Monday in October 2021.

The Election Commission has set the date of the referendum on July 27 expressly to allow it to become effective before the first Monday in October 2021. (R. at 330, 331, 385, 393, 394, 399.)

In any event, since the Attorney General in Opinion No. 03-019 has acknowledged that a referendum on structuring and constraining tax rates is not inconsistent with Tennessee general law, and that such a referendum is not unconstitutional, the proposed Charter amendment in question qualifies for the July 27 election ballot. The proposed Charter provision in question

does what a charter does – it enacts limits and constraints on the political branches and establishes a means for voters to have a say if the political branches seek to escalate tax rates beyond the 3 per cent per year benchmark. The decision of the Election Commission is at least "fairly debatable." And, further, since so many of the details matter (such as the effective date of the referendum vote if the vote is to approve the proposed amendment in question), this is not and cannot be a facial challenge, which is the only type of appropriate challenge under *City of Memphis*. The circumstances matter, and when that is the case a facial challenge is improper under the "no set of circumstances" rule for facial challenges. *See Fisher*, 604 S.W.3d at 396-97 ("In a facial challenge, the plaintiff contends that there are no circumstances under which the statute, as written, may be found valid"); *see also Salerno*, 481 U.S. at 739 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

To reiterate, Petitioners' challenge must be understood in context as an as-applied challenge, which depends on the specific facts and circumstances of the implementation of the proposed Charter amendment in question if it is voted "yes" by the voters at the July 27 referendum election. Under *City of Memphis*, such an as-applied challenge cannot be brought pre-election in Petitioners' case in this Court. The proposed Charter amendment in question may or may not pass. Under *City of Memphis*, Petitioners' current challenge is of the "substantive constitutionality" – what can or cannot be done via a referendum – of the proposed charter amendment in question and "is not now ripe for judicial determination." 146 S.W.3d at 540. "[A] challenge to the substantive constitutional validity" of the proposed charter amendment "is

not ripe for judicial determination," as the measure in question "is not the law and may never become the law." *Id.* at 538.

Under a common law writ of certiorari, which is what this case involves, the review is of the decision of the Election Commission to place the proposed amendment in question on the ballot for a vote, which decision was proper, appropriate, and consistent with the limits of the Election Commission's authority under *City of Memphis*. Consideration of the "substantive constitutionality" of the proposed Charter amendment in question must await a proper, timely, and ripe proceeding.

C. <u>The Court must affirm the Election Commission's decision to place Amendment 3 on the ballot because Petitioners' substantive constitutional challenges are non-justiciable pre-election.</u>

<u>Language of the Metro Charter</u>

In its current form, Metro Charter Section 18.05 provides:

> **Sec. 18.05. - Change in salary of metropolitan officers.**
>
> The salary or compensation of the public defender and of administrative and professional officers or employees, including the mayor, councilmembers and other elected officials whose salary or compensation is fixed by this Charter, may be changed by the metropolitan council and established as part of the general pay plan as provided for by section 12.10 of this Charter. Provided, however, that the salaries of elected officials shall not be increased or diminished during the period for which they shall have been elected.

<u>Language of the Petition</u>

<u>Amendment 3</u>

Add to Article 18, § 18.05, Paragraph 1:

"No elected official shall receive any benefits at taxpayer expense as a result of holding such elected office without a voter referendum."

(1) Petitioners' specific challenges to Amendment 3.

In its Legal Opinion No. 2021-01, Metro asserts that proposed Amendment 3 is impermissibly vague, that it does not define "benefits" and "elected officials," and that it does not address other Metro Charter provisions relating to benefits.

Petitioners also assert that Amendment 3 is facially unconstitutional because it impairs the obligation of contracts in violation of Article I, Section 20 of the Tennessee Constitution, which provides "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made."

(2) The Election Commission does not have discretion or authority to determine Petitioners' vagueness challenge to Amendment 3.

In its Opinion, Metro makes constitutional and legal arguments that must be addressed to a court, not the Election Commission. None of Petitioners' arguments form an appropriate basis for the Election Commission to determine that Amendment 3 may not be placed on the ballot. The Election Commission is not permitted to exercise its discretion to withhold a proposed amendment from the ballot on the basis of the vagueness of the proposed amendment. The Election Commission is permitted to exercise discretion in a quasi-judicial manner only when carrying out its duties under the Election Code. *See McFarland*, 530 S.W.3d at 103; *City of Memphis*, 146 S.W.3d at 535. Determining whether a proposed referendum is impermissibly vague (and therefore unconstitutional) is not a duty assigned to the Election Commission under the Election Code. Metro cites no authority contrary to the result compelled by *McFarland* and *City of Memphis*. No valid basis exists for the Election Commission to withhold Amendment 3 from the ballot on constitutional vagueness grounds. Accordingly, the Election Commission's action on this Petition is proper and surely not arbitrary.

(3) The Election Commission and Court are not authorized to adjudicate Petitioners' pre-election challenge to Amendment 3. The Court must affirm the Election Commission's decision to place Amendment 3 on the ballot because the decision is "fairly debatable" under the writ of certiorari standard.

The Election Commission believes that Amendment 3 is understandable to an ordinary person exercising ordinary common sense, and no benefits dispute is ripe for judicial determination. A vagueness claim, a form of constitutional challenge, does not typically raise a facial challenge if an appropriate interpretation can resolve or cure any ambiguity. For example, if a provision of the charter is in need of clarification, that can be accomplished through administrative enforcement or legislation by the Council. In any event, such a vagueness claim is an as-applied challenge, since the ability to clarify through administrative interpretation or legislation means that a facial challenge is not appropriate. When a provision can be clarified so that it can be enforced appropriately in some circumstances, the case for a facial challenge disappears under the "no set of circumstances" rule for facial challenges. *See Fisher*, 604 S.W.3d at 396-97 ("In a facial challenge, the plaintiff contends that there are no circumstances under which the statute, as written, may be found valid"); *see also Salerno*, 481 U.S. at 739 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

In a pre-election context, this Court may only address constitutional claims that are facial in nature.

Even if a court were to address the vagueness contention in a pre-election proceeding, it has no authority to prohibit placing the proposed amendment on the ballot. To the extent there is any vagueness in Amendment 3, the amendment can be clarified administratively or

legislatively; and, in addition, any putative vagueness is not so substantial that the amendment can be stricken in a pre-election judicial challenge to its validity.

"The 'void for vagueness' doctrine developed as an aspect of due process jurisprudence in the context of criminal statutes because it was thought unfair to impose criminal punishment on persons for conduct of which they had no notice." *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 48-49 (Tenn. 1993). "In light of the limitations of language, some degree of common sense is necessary, and a non-criminal statute is not unconstitutionally vague if it is written 'in terms such that an ordinary person exercising ordinary common sense can sufficiently understand and comply.'" *Wayman v. Transportation Licensing Comm'n*, No. M2009–01360–COA–R3–CV, 2010 WL 1293796 (Tenn. Ct. App. Mar. 10, 2010) (quoting *Phillips*, 863 S.W.2d at 49). The void for vagueness doctrine "is not designed to convert into a constitutional dilemma the practical difficulties inherent in drafting statutes." *Phillips*, 863 S.W.2d at 49.

To the extent that courts have a role in ruling, pre-election, on vagueness issues in a referendum ballot access context – and the Election Commission believes that there is no such role under *City of Memphis* and surely not in the context of a writ of certiorari action – the standard of review would be substantially similar to the "ordinary person exercising ordinary common sense" standard employed by the Tennessee Supreme Court in *Phillips* for analyzing non-criminal statutes. For example, Tennessee courts have required that a ballot summary convey reasonable certainty of meaning so that a voter could intelligently cast a vote for or against with full knowledge of the consequence of the vote. *See Rodgers v. White*, 528 S.W.2d 810, 813 (Tenn. 1975); *Pidgeon-Thomas Iron Co. v. Shelby County*, 397 S.W.2d 375, 378 (Tenn. 1965).[10]

[10] It is not altogether clear that this standard would apply when the actual amendment text appears on the ballot, rather than an amendment summary appearing due to the length of the proposed amendment itself.

Whether the standard is that of an "ordinary person exercising ordinary common sense" or a voter's ability to intelligently cast a vote, proposed Amendment 3 would seem to satisfy the standard (again, assuming that a court would even have a role in adjudicating a constitutional vagueness claim in a ballot-access context under *City of Memphis* or in a writ-of-certiorari action). Any issues raised by Metro regarding vagueness are not and, under the controlling "no set of circumstances" standard, cannot, be facial problems since they can be addressed in administration of the proposed Charter amendment or by legislation.[11] Any dispute on those issues is not ripe for determination at this time.[12] *See City of Memphis*, 146 S.W.3d at 538-39 (summarizing potential future events that could render moot a court's pre-election advisory opinion on the constitutionality of an amendment "that is not now the law and may never become the law").

The uncertain potential for a dispute cannot serve as a basis for the Election Commission to keep proposed Amendment 3 off the ballot.

Petitioners also argue that Amendment 3 is facially unconstitutional on the assumption that it violates elected officials' health and pension benefits that have already vested. Amendment 3 does not expressly require retrospective application to affect vested rights; under controlling precedent, and when and if the issue should become ripe, a court should not interpret Amendment 3 to have retrospective application. The language of the Petition contrasts with the

[11] According to Metro, "[i]t is unclear whether the amendment refers to benefits typically provided in the employment context (i.e., health insurance, pension, or both) or to anything of value that an elected official receives and that is publicly funded in whole or part." Metro also argues that Amendment 3 is vague because it does not address other Metro Charter provisions relating to benefits. It is not certain that an actual dispute will arise from the interpretations of "benefits" offered by Metro or from any putative inconsistency among Metro Charter provisions. Administrative interpretation or legislation by the Metro Council can resolve any inconsistencies that might emerge. A facial challenge under the "no set of circumstances" rule is not available yet that is the only basis for challenge left open under *City of Memphis*.

[12] It is not certain that an actual dispute will arise from the interpretations of "benefits" offered by Metro or from any putative inconsistency among Metro Charter provisions.

2020 Petition, which included several instances of express retroactive application that the Chancery Court found constituted a basis to invalidate the 2020 Petition. *See* 2020 Litigation Findings and Conclusions Order at 26-28 (finding parks provision that included effective date in the past to impair the obligations of contracts).

It is well settled that laws are to be given prospective and not retroactive force unless retroactive force is plainly expressed or necessarily implied under the law. *See State ex rel. Hardison v. City of Columbia*, 360 S.W.2d 39, 43 (Tenn. 1962). Since the Petition does not expressly or impliedly require retroactive application, a court (when and if confronted with a concrete issue and able to adjudicate a putative claim) would be unlikely to interpret Amendment 3 so as to have retroactive effect.

In sum, the Election Commission does not have authority to withhold proposed Amendment 3 from the ballot on the bases asserted by Petitioners – impermissible constitutional vagueness and constitutional invalidity. Accordingly, the Election Commission's decision to place Amendment 3 on the July 27 ballot is correct and surely survives the "fairly debatable" standard of review that controls in this writ of certiorari proceeding. Further, the challenges raised by Petitioners to the substantive validity of Amendment 3 are based on an as-applied, not a facial, claim of invalidity; such claims cannot be brought in a court for pre-election review under *City of Memphis*.

D. <u>Neither the Election Commission nor this Court can determine Petitioners' pre-election challenges to Amendment 6. The Election Commission's decision to place Amendment 6 on the ballot is not arbitrary, capricious or illegal.</u>

<u>Amendment 6</u>

Create Article 18, § 18.19:

If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) consecutive

> *months during the terms of a team's ground lease, all sports facilities and related ancillary development related to the defaulting team shall revert to public property, and all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payment shall be paid, if required by law.*

(1) The Election Commission does not have power to adjudicate Petitioners' substantive constitutional and legal arguments challenging Amendment 6.

In its Legal Opinion, No. 2021-01, Metro makes constitutional and legal arguments (particularly related to the inappropriate "taking" of private property) that cannot properly be addressed to the Election Commission. Under *City of Memphis*, allowing the Election Commission to address these matters of constitutionality would be allowing the Election Commission to exercise a "uniquely judicial function," thereby "usurp[ing] the power of the judiciary" to rule on constitutional matters and "violat[ing] the constitutional principle of separation of powers." 146 S.W.3d at 537-38. The issues raised by Petitioners are attempts to fit its assertions into the narrow category of challenges allowed for in *City of Memphis*, but those claims were addressed in *City of Memphis* by a court (and not in the context of a writ-of-certiorari proceeding). *Id*. at 538-40. Consideration of those claims was held not to be within the scope of authority of the Election Commission. *Id*. at 535-38.

The same is true with respect to this component of the current Petition. The decision of the Election Commission was correct, not arbitrary; and it is inappropriate for Petitioners to seek a substantive review on the merits of the proposed Charter amendments in the context of this writ-of-certiorari proceeding, where the focus is on the conduct of the Election Commission, not the "substantive constitutionality," *id.* at 540, of the proposed Charter amendment in question.

(2) Petitioners' substantive constitutional challenge to Amendment 6 is without merit and is non-justiciable by this Court pre-election.

Even if it were appropriate for this Court to consider the "substantive constitutionality" of proposed Amendment 6 – and to reiterate it is not – there is no merit to Petitioners' challenges to Amendment 6.

Petitioners' challenge to Amendment 6 focuses on their assertion that there is, or could be, a "taking." Unlike the 2020 Petition, the current Petition responds to this concern about takings by providing in Amendment 6 that "just payment shall be paid, if required by law." That just compensation provision was absent from the 2020 Petition. From a constitutional perspective, the provision for just compensation cures any defect related to a claim of "taking." And, in any event, a regulatory taking claim would be as-applied challenge, since the determination of whether a taking exists depends on a case-by-case balancing process, which is an as-applied, not a facial, challenge. So, even if this Court were authorized to rule on the takings claim in a writ-of-certiorari proceeding, which it is not, the Court would be unable to reach the merits in a pre-election challenge, since a properly brought pre-election challenge can only address facial, not as-applied challenges under *City of Memphis*. And, except in certain limited circumstances not present herein, takings challenges must be as-applied, based on a consideration of the totality of case-specific circumstances. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Takings and Just Compensation Analysis. As applied to state and local governments, the Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Takings Clause does not forbid governmental expropriation in the public interest; it "merely requires the government to pay for it." NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 611 (20th edition 2019). Courts do

not typically enjoin an alleged governmental taking, but they can require government to compensate a property owner if there is a taking.

While the Fifth Amendment "confirms the state's authority to confiscate private property," it "imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation*, 538 U.S. 216, 231-32 (2003). The 2020 proposed Charter amendment did not have a provision for the payment of just compensation; if there were a taking and no provision for just compensation existed, that could constitute a constitutional violation. The existence of a just compensation provision in the 2021 proposed Charter Amendment 6 cures that deficiency.

The United States Supreme Court has recognized what it describes as "per se" takings in two circumstances. First, where there is a permanent physical occupation of private property, the Court has found that to constitute a taking, necessitating the payment of just compensation for the property owner's loss. *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982). Second, a per se taking arises when a regulation denies all (not just some) economically beneficial use of property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The impairment of property alleged to occur from the proposed charter amendment does not fit into the category of a per se taking. There is no permanent physical invasion, and there is no deprivation of all economically beneficial use if the conditions in the proposed charter amendment are satisfied.

The type of taking alleged is a form of what is called a "regulatory taking," where conditions placed on the use of property are excessive in relation to their overall benefits. This results in an *ad hoc* balancing process that takes into account many factors. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). A regulatory taking can trigger an obligation to compensate the property owner for its loss. *First English Evangelical Lutheran*

Church v. Los Angeles County, 482 U.S. 304 (1987). But such regulatory takings claims are not a challenge to the facial validity of a particular regulatory restraint. Therefore, a regulatory taking is not a form of facial invalidity and cannot serve as the basis for precluding ballot access for a referendum provision under *City of Memphis*. After an extensive balancing analysis, a regulatory taking claim can trigger, in an as-applied challenge, an obligation to pay just compensation, and the 2021 proposed Charter Amendment 6 provides for such compensation as warranted.

Public Use Analysis. Petitioners assert that the proposed provision regarding professional sports teams leaving Nashville or ceasing to play games for 24 months violates the Fifth Amendment as applied to the states because it does not further a "public use." But this claim does not recognize how the United States Supreme Court has, as a practical matter, virtually eliminated the "public use" restriction on government's ability to confiscate private property.

Since 1954, in *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court has deferred to governmental decisions regarding what constitutes a public use, in effect equating a "public use" with a "public purpose." This very narrow role for courts in determining the nature and scope of a public use was reaffirmed in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Under this line of analysis, any independent force for a public use, as distinct from a public purpose, limitation on the ability of government to confiscate private property has been vitiated.

This line of cases culminated in *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo* held that the ability of a governmental entity to confiscate private property turned on the question whether the city's plan for reusing private property, by turning ownership over to other private property owners, was for a public purpose, not whether there was a public user of the confiscated property at the end of the process. And in determining whether there is a public purpose or public

benefit, a court is highly deferential to even conjured up objectives put forth by government. Metro's reliance on a lack of "public use" under the Fifth Amendment is unavailing, inconsistent with over 65 years of constitutional case law.

In the case of the proposed Charter amendment's provisions regarding sports teams, unused facilities will revert as public property for other public purposes and benefits. This quite easily satisfies the constitutional standards set out by the United States Supreme Court in *Kelo*. In light of the insertion of the provision for payment of just compensation in the 2021 proposed Charter Amendment 6, this provision is not constitutionally invalid, and certainly facially invalid. Any claim of unconstitutionality will be situational and well off into the future, until the conditions specified in the proposed charter amendment occur (leaving Nashville or not playing a game for 24 consecutive months). In any event, no putative taking will have occurred until and unless the preconditions for such a potential taking have been satisfied. In sum, this issue will not arise until well into the future, and if it should arise, the remedy of just compensation is provided for in the proposed Charter Amendment 6.

E. <u>Petitioners' substantive constitutional challenge to Amendment 2 is beyond the authority of the Election Commission or this Court to determine pre-election and relies on the rejected theory that officeholders have property interests in their elected offices.</u>

<u>Amendment 2</u>

(A) Add to Article 15, § 15.07:

Petitions to recall elected officials filed after January 1, 2021, under this section shall contain the signatures and addresses of registered qualified voters in Davidson County equal to ten (10) percent of the citizens voting in the preceding Metro general election in the district or area from which the recalled official was elected. Such Petitions shall be filed with the metro clerk within seventy-five (75) days of the date the notice is filed. This amendment's provisions are severable.

(B) Replace existing Article 15, § 15.08, Paragraph 2 with:

> *A recalled official's name shall not appear on the recall ballot, but such official may qualify as a write-in candidate. This amendment's provisions are severable.*

Petitioners challenge proposed Amendment 2, which deals with the recall of public officials. Petitioners claim that proposed Amendment 2, if adopted, would impair vested property holders (*i.e.*, public officials) of their "property interests in their elected offices." (Complaint at ¶ 100.) This is a claim of substantive due process. Petitioners also assert that proposed Amendment 2 violates the right to vote of voters, even though there is no voter who challenges as a voter. In any event, these are not serious claims and were not part of the concerns expressed in the official opinion of the Metro Department of Law. (R. at 676-689.)

The Election Commission will not reiterate at length the reasons why the Election Commission acted, in its discretion, to place proposed Amendment 2 on the July 27 ballot. That action is justified because the Petitioners are asking the Election Commission to do what it cannot do under *City of Memphis* – decline to put a qualifying proposed amendment on the ballot on grounds of unconstitutionality. That issue was squarely addressed in *City of Memphis*, where the Shelby County Election Commission declined to place a matter on the ballot on grounds that the proposed amendment was unconstitutional. The Tennessee Supreme Court expressly found that the Shelby County Election Commission's decision was improper, because an election commission cannot adjudicate the constitutionality of proposed charter amendments. The same is true with respect to the contentions about proposed Amendment 2.

Any constitutional analysis under substantive due process necessitates a balancing process, with the outcome turning on case-specific facts and circumstances. *See Williamson*, 348 U.S. at 483; *Ferguson*, 372 U.S. at 726. That is not a facial but an as-applied challenge and cannot be the basis for a pre-election challenge under *City of Memphis*.

The same is true regarding the voting rights challenge. In their Complaint, Petitioners acknowledge this, asserting that Amendment 2 is "not narrowly tailored to achieve a compelling state interest." (Complaint at ¶ 102.) That type of scrutiny is fact-specific and requires a court to weigh many factors in reaching a judgment. This is an as-applied, not a facial challenge, and even in a proceeding (not a writ of certiorari) that would allow for consideration of a substantive facial constitutional challenge, the allegations concerning Amendment 2 just do not and cannot qualify as constituting a facial challenge under the "no set of circumstances" rule. *See Fisher*, 604 S.W.3d at 396-97 ("In a facial challenge, the plaintiff contends that there are no circumstances under which the statute, as written, may be found valid"); *see also Salerno*, 481 U.S. at 739 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

Moreover, from a substantive point of view – which this Court cannot reach in this writ-of-certiorari proceeding – the voting claim does not withstand analysis. Amendment 2 allows greater voter participation, not less. And reasonable ballot access restrictions are permitted; in any event, such restrictions are evaluated under a balancing test (not necessarily strict scrutiny as posited by Petitioners). *See Anderson v. Celebreeze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). That is the antithesis of a facial constitutional challenge under the "no set of circumstances" standard.

Petitioners' substantive due process argument fares no better, even if the merits of the claim were properly before this Court in a writ-of-certiorari proceeding.

The critical claim of Petitioners is that Metro office holders have "property interests in their elected offices." (Complaint at ¶ 100.) But, as Judge Trauger recently recognized, in

denying a claim of former Tennessee legislator Jeremy Durham, "'public office is not property' protected by due process." *Durham v. Eley*, 2020 U.S. Dist. LEXIS 236475 at *15 (Dec. 16, 2020) (internal cite omitted). Even if there were a proper plaintiff and a proper judicial forum (not present here), an officeholder cannot claim a property interest in his or her office itself. "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. [...] In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." *Taylor v. Beckham*, 178 U.S. 548, 577 (1900), cited approvingly in *Hernandez v. Or. Legislature*, 2021 WL 661897. *See also Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972) (noting that "[p]ublic office is not property within the meaning of the Fourteenth Amendment").

The long and the short of it is that Petitioners' assertions in their challenge to Amendment 2 are (very) wide of the mark.

F. <u>Petitioners do not advance arguments specifically challenging Amendments 4 and 5.</u>

<u>Amendment 4</u>

Create Article 19, § 19.04:

Voter-sponsored Charter Amendments approved after January 1, 2021, shall be amended only by voter-sponsored Petition, notwithstanding any law to the contrary.

<u>Amendment 5</u>

Create Article 18, § 18.18:

No portion of a publicly-owned park, greenway, or other real property shall be transferred or conveyed without 31 votes of Metro Council. All transfers of interest in real property shall be at fair market value based on an independent appraisal. Public referendum shall be required for transfers of interest in such publicly-owned properties valued over $5,000,000, and for leases exceeding twenty (20) years, unless prohibited by state law.

Petitioners advance no arguments specifically addressing Amendments 4 or 5. Under the circumstances, the Court should award judgment to the Election Commission with respect to Amendments 4 and 5, affirming the Election Commission's decision to place Amendments 4 and 5 on the ballot as separate amendments, to be voted up-or-down by the voters as distinct, separate proposed amendments.

The 2020 Petition did not include a proposal analogous to Amendment 4, addressing future amendment of voter-initiated Charter amendments.

The 2020 Petition contained a provision analogous to proposed Amendment 5 (addressing preservation of public property). Amendment 5 proposed by the current Petition differs from the 2020 Petition provisions in that proposed Amendment 5 does not require retroactive application, whereas the analogous provisions of the 2020 Petition did. The 2021 provision also makes it clear that a referendum regarding transfers of public property is not mandated if "prohibited by state law," a limitation not included in the 2020 Petition.

The 2020 Petition included the following provision:

> • **No Give-away of Our Parks, Greenways, or Public Lands.** No part of a **Park, Greenway, Public Land**, or other real property shall be given away or conveyed without 31 votes of the Metro Council in favor. Transfers of interest in real property shall only be at fair market value or greater based on an independent appraisal. A voter referendum shall be required for transfers of interest in real properties valued over $5,000,000,00, and for leases exceeding twenty (20) years, commencing after January 1, 2020.

The Chancery Court found this "commencing after January 1, 2020," language of the 2020 Petition to be an unconstitutional retroactive law. The Chancery Court held that "[t]his provision, which requires a voter referendum for all transfers of interest in real properties valued over $5,000,000 and for leases exceeding 20 years, commencing after January 1, 2020, violates Article 1, section 20 of the Tennessee Constitution." The Court identified a specific September

2020 ordinance authorizing a lease between Metro and Belmont University and stated that that provision of the 2020 Petition would unconstitutionally impair that existing lease. *See* 2020 Litigation Findings and Conclusions Order at 27-28.

Proposed Amendment 5 of the current Petition is quite different in this regard. Proposed Amendment 5 does not provide for retroactive application, and it acknowledges that the referendum requirement is applicable "unless prohibited by state law." Proposed Amendment 5 does not include a date in the past after which it would affect existing contracts. Courts are to give laws prospective and not retroactive force unless retroactive force is plainly expressed or necessarily implied under the law. *See Hardison*, 360 S.W.2d at 43. Since retroactive application is not expressly or impliedly included in proposed Amendment 5, the amendment has prospective application only. These differences led the Election Commission to place Amendment 5 on the July 27 ballot. That decision should be affirmed by this Court.

CONCLUSION

The decision of the Election Commission to place the amendments proposed by the Petition filed by 4 Good Government on the ballot should be affirmed by this Court, and the July 27, 2021, ballot referendum for the six separate amendments should proceed for approval or disapproval by the voters of Metro. The Metro Charter establishes a process for amending the Charter by petition and voter referendum, and that process has been adhered to by the Election Commission. The objections to the Petition improperly targeted the Election Commission, which has limited authority to reject the Petition once the signatures have been verified and the proper referent election identified. The Election Commission has voted unanimously to certify the signatures and to identify the August 2020 municipal election as the appropriate referent election.

The current Petition is quite different in form and character from the 2020 Petition filed by 4 Good Government, and the Court's role in this proceeding is quite different from that of the Court in 2020.

Under the circumstances, the Election Commission appropriately fulfilled its duty to act by placing the proposed amendments contained in the Petition on the ballot. Under a writ of certiorari proceeding, this Court also has limited scope and authority – to review under a highly restrained standard the decisions of the Election Commission to place the amendments on the ballot and not to review the substantive constitutionality of the proposed amendments, as precluded by *City of Memphis*.

WHEREFORE, the Davidson County Election Commission respectfully requests that the Court affirm the Election Commission's decision to place six separate amendments on the ballot on July 27, 2021, for a for-or-against vote on each proposed amendment by the qualified voters of Metro, and grant the Election Commission such other and further relief as is just and appropriate.

DATED: June 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of June, 2021, I have caused a true and correct copy of the foregoing to be sent electronically, by email, and by U.S. Mail, postage pre-paid, to the following:

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