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

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

PETITIONERS' TRIAL BRIEF

This lawsuit involves the second effort in less than a year by a group known as 4 Good Government ("4GG") to promote "an impermissible form of government in Tennessee." *4 Good Government, et al. v. The Davidson Cty. Election Comm'n*, Docket No. 20-1010-III (hereinafter, "*4GG-I*"), Findings of Fact, Conclusions of Law, and Orders from 10/26 – 10/27/2020 Bench Trial at 17 (Davidson Cty. Ch. Ct. Nov. 3, 2020) (hereinafter, "Findings & Conclusions") (Attachment 1 hereto). The Davidson County Chancery Court soundly rejected last fall's petition in a 50-page opinion, issued after the Davidson County Election Commission ("Election Commission") sought judicial guidance through a declaratory judgment action.

4GG has now circulated a new petition (the "Petition") with six proposed amendments (the "Proposed Amendments") to the Metropolitan Charter—the "Nashville Taxpayer Protection Act." Despite cosmetic changes from what it proposed last fall, the Petition and

Proposed Amendments suffer from many of the same defects and more. All defects in the new Petition were timely brought to the Election Commission's attention. Yet instead of rejecting the Petition based on the prior judicial guidance or seeking new guidance, the Election Commission ignored the Petition's multiple defects and placed it on the ballot for a July 27, 2021 referendum election. That decision is now before this Court.

The Court should set aside the Election Commission's decision as arbitrary, capricious, and illegal because (1) the Petition does not satisfy the requirements of Metropolitan Charter § 19.01,[1] (2) several of the Proposed Amendments are defective in form and/or facially unconstitutional, and (3) any viable Proposed Amendments are not severable from the rest.

While the Election Commission illegally restricted its review to three narrow issues, the Tennessee Supreme Court held in *City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531 (Tenn. 2004), that "pre-election challenges to the form or facial constitutional validity of referendum measures are ripe for judicial scrutiny." *Id.* at 539. Accordingly, the Metropolitan Government requests that the Court set aside the decision of the Election Commission and conclude as a matter of law the following:

1. The Proposed Amendments are subject to pre-election review under *City of Memphis*.
2. The Petition fails to comply with Metropolitan Charter § 19.01 because it prescribes two dates—not "a date"—for the proposed referendum election.
3. The Petition fails to meet the verified signature requirement in Metropolitan Charter § 19.01 because (i) November 2020, not August 2020, is the appropriate election to set the 10% signature requirement, and (ii) the signatures between the two versions of the Petition cannot be aggregated, and neither version separately has the requisite number, regardless of which election sets the number.
4. The "Limit Property Tax Rates" and "Abolish Lifetime or Other Benefits for Elected Officials" provisions do not convey a reasonable certainty of meaning

[1] A certified copy of the Metropolitan Charter (minus its Appendices, which are not relevant here) is being filed contemporaneously herewith for the Court's convenience and use in this case.

because they neither define key terms nor address other Metropolitan Charter provisions that would be affected.

5. The "Limit Property Tax Rates" provision is defective in form because it sets property tax rates by referendum without authority under the Metropolitan Charter, state law, and Tennessee Constitution.
6. The "Protect Promises to Nashville" provision is defective in form because it attempts to effect a taking of property without following required procedures in state or local law; affects a separate legal entity without authority to do so by referendum; and threatens the Metropolitan Government's pledge to use non-tax revenues to repay bonds issued by the The Sports Authority of the Metropolitan Government of Nashville and Davidson County without authority in state law.
7. The "Limit Property Tax Rates" provision is facially unconstitutional because it impairs the vested rights of the Metropolitan Government's outstanding bondholders.
8. The "Recall Elected Officials" provision is facially unconstitutional because it retrospectively impairs the property rights of officeholders and impairs the right to vote.
9. The "Abolish Lifetime or Other Benefits for Elected Officials" provision is facially unconstitutional because it retrospectively impairs vested rights of current and former officeholders.
10. The "Protect Promises to Nashville" provision is facially unconstitutional because it retrospectively impairs contracts and takes private property without establishing a public use.

STATEMENT OF FACTS

On March 25, 2021, 4GG filed the Petition with the Metropolitan Clerk, proposing the following six amendments to the Metropolitan Charter "as written in *italics*":

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,*
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."*

(AR Ex. A at 0001-0002; AR Ex. JJ at 0624.) The Metropolitan Clerk transmitted the Petition to the Election Commission on the date of receipt for verification of the Petition's signatures. (AR Ex. A at 0001.)

There are two versions of the Petition, which both propose the same six amendments. (AR Ex. JJ at 0622, 0624.) Both versions prescribe two dates for the referendum election: "May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01." (*Id.*) Metropolitan Charter § 19.01 requires that a petition "prescribe a date" for holding the referendum election not less than eighty days after the date the petition is filed.

Section 19.01 also requires that a proposed charter-amendment petition be "signed by ten (10) percent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election." On April 17, 2021, the Election Commission voted that the election held on August 6, 2020, is the "preceding general election" to be used to determine the requisite number of signatures to satisfy this requirement. (AR Ex. Z at 0564.)

The August 6, 2020 ballot in Davidson County included federal primary elections, state primary elections, Oak Hill municipal elections, and elections for Davidson County Assessor of Property, Davidson County Trustee, and five Metropolitan school board seats. (AR Ex. E.) In that election, 121,420 voters cast ballots. (Election Commission's Answer ¶ 36.) If the August 6, 2020 election were the "preceding general election" for purposes of 4GG's signature requirement, 12,142 verified signatures are required for the Proposed Amendments to be submitted for a referendum election. Metropolitan Charter § 19.01.[2]

[2] In a complaint filed in April 2021 and later nonsuited (Chancery Court Case No. 21-300-IV), 4GG took the position that only the votes cast in the Metropolitan Assessor of Property *race* on the August 6, 2020 ballot should be used to calculate the number of verified signatures required to propose Charter amendments by referendum election. (Davidson Cty. Ch. Ct. No. 21-300-IV, Compl. ¶¶ 14-21.) This argument is premised on the mistaken belief that another *race* on the August 6, 2020 election ballot—the Metropolitan Government Trustee (following a death)—was a "special election," and it ignores the five Metropolitan school board seats on the ballot. (AR Ex. E.) The August 6, 2020 *election* was not specially set. Rather, certain races necessary to fill vacancies were placed on the regularly-set August

The ballot in Davidson County for the general election held on November 3, 2020, included federal general elections; state general elections; Belle Meade, Forest Hills, and Goodlettsville municipal elections; and an election for a Metropolitan school board seat. (AR Ex. B.) In that election, 312,113 voters cast ballots. (Election Commission's Answer ¶ 36.) If the November 3, 2020 election were the "preceding general election" for purposes of 4GG's signature requirement, 31,212 verified signatures are required for the Proposed Amendments to be submitted for a referendum election. Metropolitan Charter § 19.01.

On April 22, 2021, the Election Commission voted to certify to the Metropolitan Clerk that the Petition had 12,369 verified signatures—more than 10% of the number of voters in the "preceding general election" as measured by the August 6, 2020 election. (AR Ex. AA at 0566.) The second version of the Petition had 448 verified signatures, based on a review of the signed petitions filed with the administrative record, leaving 11,921 verified signatures on the first version of the Petition. (*Compare* AR Ex. AA at 0566 (establishing 12,369 as the total number of verified signatures between the two petitions) *with* AR Ex. QQ (establishing 448 as the number of verified signatures[3] attributable to Version 2.) Thus, neither version had more than 10% of the number of voters in the "preceding general election" as measured by the August 6, 2020 election. The Election Commission did not consider the number of

2020 election ballot. Moreover, Metropolitan Charter § 19.01's signature requirement, by its plain language, is based on how many votes were cast in *elections*, not in certain *races within elections*. And if more than one qualifying race is held within an election, there is no mechanism for determining which race would be used for the count. Accordingly, 4GG's argument strains credulity and ignores the plain text of Section 19.01. It further defies commonsense that the votes cast in *one race* on a ballot would be sufficient to amend the Metropolitan Government's charter—its founding and governing document. For all these reasons, the total number of voters who cast ballots in an election is the appropriate measure for the 10% threshold.

[3] The parties agree that a "verified" signature on a petition form is one with a check mark beside it. (Notice of Stipulations, filed June 3, 2021.) There are 448 visible check marks beside signatures on the petitions in Exhibit QQ of the administrative record.

verified signatures on each of the two versions of the Petition in its deliberations or vote. (*See generally* AR Ex. J (omitting discussion of differing versions).)

The Election Commission's verification of the Petition's signatures was certified to the Metropolitan Clerk by letter dated May 4, 2021. (AR Ex. II.) The Metropolitan Clerk certified a copy of the two versions of the Petition to the Election Commission by letter dated May 6, 2021. (AR Ex. JJ.) On May 10, 2021, the Election Commission voted to set July 27, 2021, as the date for the referendum election on the Proposed Amendments. (AR Ex. BB at 0569.) Even though multiple defects in the Petition had been brought to the Election Commission's attention before its vote,[4] the Commission limited its review of the Petition to whether it garnered the requisite number of signatures and three other narrow issues, as explained *supra* in Section III of this trial brief.

The Metropolitan Government will incur as much as $800,000 in expenses to hold a special county-wide referendum election on the Proposed Amendment. (Election Commission's Answer to Petition at 2.) Preparations for that election are already underway. (*Id.*)[5]

RELEVANT PROCEDURAL HISTORY

In the fall of 2020, the Election Commission filed a declaratory judgment action to seek a Court ruling on whether a similar petition for proposed Charter amendments, also filed by 4GG, should be placed on the ballot for a referendum election. The case was merged

[4] These defects were identified for the Election Commission in a memorandum from the Metropolitan Department of Law delivered to the Commission on April 2, 2021, a memorandum from Nashville School of Law Dean Bill Koch delivered on April 6, 2021, and the Department of Law's Legal Opinion No. 2021-01, delivered with other documents on April 16, 2021. (AR Exs. CC, DD, PP.) The Election Commission Chair dismissed the April 2 memorandum as "adversarial" at the Commission meeting on April 8, 2021. (AR Ex. G at 0089, lines 19-24.)

[5] Placing the Proposed Amendments on the ballot will also injure the Metropolitan Government by undermining public confidence in its electoral processes, Findings & Conclusions at 48-49; introducing unnecessary and harmful confusion and uncertainty in its budget process, resulting in lost revenue from its proposed Fiscal Year 2021-2022 budget; and impairing its bond covenants.

with a then-pending lawsuit filed by 4GG challenging the Election Commission's delay in putting the initiative on a ballot. The cases were collectively captioned as *4GG-I* and proceeded under Docket No. 20-1010-III.

Following a trial on the merits, Chancellor Ellen Hobbs Lyle ruled that it is proper for the Commission to seek pre-election judicial review of a ballot measure and for a court to keep the measure off the ballot if it determines that certain defects exist. Findings & Conclusions at 3. Chancellor Lyle specifically rejected then-Plaintiff 4GG's "argument that section 19.01 of the Metro Charter is the sole source of the law on ballot form." *Id.* at 13. Rather, she cited numerous standards that dictate whether a ballot is defective and thus should not be the subject of a referendum election, including the following:

- Standards governing "freedom, purity and unbiased ballot content," such as keeping balloting separate from campaign materials or solicitations containing a "position on the question." Findings & Conclusions at 13.
- A requirement that "a ballot question must 'convey a reasonable certainty of meaning so that a voter can intelligently cast a vote for or against a proposal with full knowledge of the consequences of his vote.'" *Id.* (quoting *Rodgers v. White*, 528 S.W.2d 810 (Tenn. 1975)).
- A prohibition on a referendum ballot "intrud[ing] into an area or subject that the local government does not have authority over," that is, "where the subject matter of the referendum exceeds the power of the Metro Charter." *Id.* at 15-16. This question is not answered solely based on the content of the provision itself, "as 'that requirement would elevate form over substance.'" *Id.* at 17 (quoting *Burnell v. City of Morgantown*, 558 S.E.2d 306, 314 (W.Va. 2001), *cited in City of Memphis*, 146 S.W.3d at 539).

- A prohibition on facially unconstitutional measures. *Id.*

These same standards apply equally to this pre-election challenge of 4GG's second petition. While the Election Commission claims that 4GG has eliminated the defects that the Chancellor identified in *4GG-I* in drafting the second petition, the new petition suffers from the same defects and more.

LEGAL ANALYSIS

I. THIS CASE IS PROPERLY PROCEEDING ON A WRIT OF CERTIORARI OR MANDAMUS FOR THE REVIEW OF THE ELECTION COMMISSION'S ILLEGAL DECISION TO PLACE DEFECTIVE-IN-FORM AND FACIALLY UNCONSTITUTIONAL PROPOSED CHARTER AMENDMENTS ON THE BALLOT.

This case was filed as a petition for a writ of certiorari or mandamus, with a complaint for declaratory judgment in the alternative, and the case should proceed just as in *City of Memphis v. Shelby Cty. Election Comm'n*. Like this case, *City of Memphis* included both a petition for a writ of mandamus and a declaratory judgment action. In Section III of the legal analysis, the Tennessee Supreme Court clarified that an Election Commission "has the power and duty to make an 'initial determination' whether the law authorizes the acts it is required to perform" with respect to "the Commission's ministerial duties." 146 S.W.3d at 536. That obligation does not include the ability to review a measure for its *substantive* constitutionality, as that is purely "a function reserved for the judicial branch of government." *Id.*

The *City of Memphis* opinion did not end there. In Section IV, the Court addressed the *Court's* jurisdiction to review a ballot initiative *pre-election*. It held that "pre-election challenges to the form or facial constitutional validity of referendum measures are ripe for judicial scrutiny." *Id.* at 539. The Metropolitan Government contends that *City of Memphis* can be read to imply that the scope of the Election Commission's authority is coterminous with the Court's jurisdiction to rule on a pre-election challenge to a ballot initiative. Both

Sections III and IV of the *City of Memphis* opinion explicitly exclude only *substantive constitutionality* from the Commission or Court's scope of review. Thus, all issues raised in the Petition in this case are properly proceeding on a writ of mandamus or writ of certiorari.[6] But because *City of Memphis* does not squarely address the question, the Metropolitan Government included an alternative declaratory judgment action to permit review of the entire pre-election challenge under *City of Memphis*.

Regardless of the Court's conclusion on this issue, the matters can be easily bifurcated. In *Wallace v. Metropolitan Government of Nashville & Davidson County*, the Tennessee Supreme Court recognized the difficulty that sometimes arises in determining whether the gravamen of a matter is ministerial, quasi-judicial, or legislative and thus what the appropriate mechanism for review is. 546 S.W.3d at 50 n.2. This is particularly so here, where the Tennessee Supreme Court has made clear that pre-election challenges to the form and facial constitutionality of a ballot initiative are ripe for decision but has not explicitly stated how such actions are to be brought. And this case implicates numerous defects that *City of Memphis* (and now the Findings & Conclusions in *4GG*-I) outlined and that may be addressed *pre-election*. Myriad cases have held that where a court believes a case to be proceeding under the wrong mechanism, it can convert the action and is not required to dismiss it. *E.g.*, *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983) (land use matter filed as a writ of certiorari and converted to a declaratory judgment action); *McCallen v. City of*

[6] The Metropolitan Government contends that some of the issues raised in its petitions plainly invoke ministerial duties – issues such as whether the signature requirement is satisfied and whether a ballot initiative can include two different dates for a referendum election. Whether the form defects and facially unconstitutional provisions invoke the Commission's ministerial or discretionary duties or should be decided as a matter of law in a declaratory judgment action has not been directly answered in applicable case law. In *Wallace v. Metropolitan Government of Nashville & Davidson County*, 546 S.W.3d 47 (Tenn. 2018), however, the Supreme Court made clear that merely examining whether an act is authorized by the Metropolitan Charter does not take the Commission's action outside the scope of "ministerial." *Id.* at 50 n.2.

Memphis, 786 S.W.2d 633, 640–41 (Tenn. 1990) (land use matter filed as a declaratory judgment action and converted to a writ of certiorari).

Either way, if the Court concludes that the Election Commission's authority to review the ballot initiative is not coterminous with the Court's jurisdiction, the Metropolitan Government requests that the Court bifurcate the claims. The Metropolitan Government proposes hearing oral argument on the writ of mandamus and writ of certiorari first, followed by a trial on the declaratory judgment only in the event the Court concludes that the Election Commission's authority is not coterminous with the Court's jurisdiction in a pre-election challenge. In the declaratory judgment action, the Metropolitan Government intends to introduce only the contents of the administrative record, which is already organized into exhibits, as the trial record. Because the Metropolitan Government will not introduce any evidence beyond what was presented to the Election Commission and is contained in the administrative review, this process will create no procedural issue at trial or on appeal.

For these reasons, the Court should not dismiss the declaratory judgment action but should treat it as an alternative cause of action to become relevant only if the Court concludes that it has broader jurisdiction to address issues in a pre-election challenge than the Election Commission had in its review of 4GG's ballot initiative.

II. THE ELECTION COMMISSION'S DECISION WAS ARBITRARY, CAPRICIOUS, AND ILLEGAL BECAUSE SEVERAL OF THE PROPOSED AMENDMENTS ARE DEFECTIVE IN FORM AND/OR FACIALLY UNCONSTITUTIONAL AND NOT SEVERABLE.

A. Standard of Review on a Writ of Mandamus and Writ of Certiorari.

"In discharging their statutory duties, county election commissions perform both ministerial and discretionary functions." *McFarland v. Pemberton*, 530 S.W.3d 76, 94 (Tenn. 2017).

"A writ of mandamus is an extraordinary remedy that may be issued where a right has been clearly established and 'there is no other plain, adequate, and complete method of obtaining the relief to which one is entitled.' Although most often addressed to ministerial acts, mandamus may be addressed to discretionary acts when an act is 'arbitrary and oppressive' or where there has been a 'plainly palpable' abuse of discretion." *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 479 (Tenn. 2004) (internal citations omitted). Further, "[a]lthough a ministerial act is generally one for which the law prescribes and defines the duties to be performed with precision and certainty, leaving nothing to discretion or judgment, an agency performing a ministerial act 'has the power and duty to make an 'initial determination' whether the law authorizes the acts it is required to perform.'" *Wallace*, 546 S.W.3d at n.2 (quoting *City of Memphis,* 146 S.W.3d at 536 (internal citations omitted). Thus, the review that the Election Commission should have taken was ministerial insofar as it merely asked what the law authorized and did not require factfinding.

On the other hand, a "[c]ommon law certiorari is available where the court reviews an administrative decision in which that agency is acting in a judicial or quasi-judicial capacity." *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983). Under the common-law writ of certiorari, this Court's review is limited to discerning whether the board exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Harding Academy v. Metro. Gov't of Nashville & Davidson Cty.,* 222 S.W.3d 359, 363 (Tenn. 2007).

Tenn. Code Ann. §§ 27-9-101, *et seq.*, provides the procedural framework for writs of certiorari. *See Fairhaven Corp. v. Tenn. Health Facilities Comm'n.*, 566 S.W.2d 885, 886 (Tenn. Ct. App. 1976). Review is available by anyone aggrieved by a board or commission's final order:

> Right of review. – Anyone who may be *aggrieved* by any *final order or judgment* of any board or commission functioning under the laws of this state may have the order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.

Tenn. Code Ann. § 27-9-101 (emphasis added). Here, both emphasized criteria are present.

The Metropolitan Government is "aggrieved" by the Election Commission's decision because it "interfere[s] with [the Metropolitan Government's] ability to fulfill its statutory obligations" and has "substantial, direct, and adverse effects on [the Metropolitan Government] in its corporate capacity." *The Metro. Gov't. of Nashville & Davidson Cty. v. the Bd. of Zoning Appeals of Nashville & Davidson Cty.*, 477 S.W.3d 750, 758 (Tenn. 2015) (quoting *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 57 (Tenn. Ct. App. 2004)). Specifically, the Election Commission is forcing the Metropolitan Government to bear the expense of placing defective-in-form and facially unconstitutional Proposed Amendments on the ballot and to be subjected to potential liability for those illegal provisions.

Moreover, the May 10, 2021 decision to place the Petition on the July 27, 2021 ballot is also a "final order or judgment," as that phrase has been defined by Tennessee case law. An action is "final" and reviewable by writ of certiorari when it is a "decisive governmental act authorizing or taking any specific action." *McFarland*, No. E2014-02176-COA-R3-CV, 2015 WL 7166407, at *4 (Tenn. Ct. App. Nov. 16, 2015). Here, Election Commission is the sole body charged with setting elections pursuant to Metropolitan Charter § 19.01. Accordingly, its decision to place the Petition on the July 27, 2021 ballot is a final decision subject to review for illegality, arbitrariness, and capriciousness.

B. The Petition Fails to Satisfy Metropolitan Charter § 19.01's Form Requirements.

1. The Petition Does Not Prescribe "A Date" for the Election.

The 4GG Petition prescribes two dates for the referendum election: "May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01." This practice is

expressly prohibited by the Metropolitan Charter and therefore disqualifies the Petition from placement on the ballot.

Section 19.01 creates a process to allow amendment to the Metropolitan Charter by referendum election and mandates that a valid petition to amend the Charter "*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." *Id.* (emphasis added). Because that requirement is fundamental to § 19.01's validity, it is mandatory, not discretionary. *See Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012) (citations omitted) ("[T]he use of the word 'shall' is mandatory [where] . . . the prescribed mode of action is of the essence of the thing to be accomplished."); *Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009) (citation omitted) ("When 'shall' is used in a statute or rule, the requirement is mandatory.").

The single-date requirement is fundamental to Section 19.01 because it is the only method identified by the Charter to set the date for a referendum election.[7] The single-date requirement also creates a legal deadline for amassing sufficient signatures. Thus, permitting a petition to include multiple dates would effectively generate permissive extensions to that deadline. Indeed, if a petition's initial submission is rejected for insufficient signatures, the strategic petitioner could resurrect the failed effort merely through the inclusion of a back-up, alternative date.[8] Additionally, a single date is required to determine whether a petition violates Section 19.01's rule that petition-based amendments may only be

[7] Even where the Charter allows election dates to be modified, it is explicit about the limits on such modifications. *See* Metropolitan Charter § 15.03.F. (specifying limited circumstances under which a runoff special election to fill a vacancy can be moved from five weeks after the first special election). Metropolitan Charter § 19.01 provides no such exceptions for the date of a referendum election.

[8] In fact, even assuming all of the signatures on the first version of the Petition were obtained at least 80 days before the first prescribed election date, 4GG did not have enough verified signatures on the first version to satisfy the signature requirement. *See infra* Trial Brief Section II.B.2.

submitted to voters once every two years.[9] For these reasons, the single date requirement is mandatory, and strict compliance is obligatory. *See Myers* at 309–10 (explaining that where a statutory requirement is mandatory, it warrants strict compliance); *cf. Littlefield v. Hamilton Cty. Election Comm'n*, No. E2012-00489-COA-R3-CV, 2012 WL 3987003, at *13 (Tenn. Ct. App. 2012) (holding that an election commission could not "pick and choose which of the applicable [state referendum petition] requirements were sufficient for compliance").[10]

This is not controversial, for where a law governing participation in an election requires a party to file documents by a specific date prior to the election, strict compliance with the deadline is required.[11] *See, e.g.*, *State ex rel. Cassity v. Turner*, 601 S.W.2d 710, 711 (Tenn. 1980) ("The filing deadlines in the election statutes are mandatory."); *Koella v. State ex rel. Moffett*, 405 S.W.2d 184, 189 (Tenn. 1966) (construing strictly a requirement that a nominating petition be submitted sixty days before the election date); *Lanier v. Revell*, 605 S.W.2d 821, 822 (Tenn. 1980) (construing strictly a requirement that a voter must register twenty-nine days before an election, affirming the lower court's decision to void the election). Here, the situation is the same, and the Court should strictly construe the single-date requirement and find the Petition invalid.[12] In fact, strict compliance is even more

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[9] In *Nashville English First, et al. v. Davidson County Election Commission, et al.*, Case No. 08-1912-I, Chancellor Claudia C. Bonnyman ruled that "[t]he phrase 'submitted by petition' [in Metropolitan Charter § 19.01] means submitted to the voters," *i.e.*, the election date. (Slip op. at 3, Attachment 2 hereto.)

[10] While *Littlefield* is based on the statutory requirements set forth in Tenn. Code Ann. § 2-1-151, this precedent weighs heavily in favor of strictly construing the Charter requirements applicable to this Petition, which expressly specify that a Petition "shall also prescribe a date." This decision is also in accordance with statutory guidance and case law indicating that the legal requirements to trigger ballot access and calling an election should be strictly construed.

[11] With limited exceptions, "[t]he general election laws of the state shall be applicable to all metropolitan elections." Metropolitan Charter § 15.04.

[12] Other jurisdictions construe referendum petition filing deadlines as mandatory. *See, e.g.*, *State ex rel. Byers v. Gibson*, 191 P.2d 392, 393 (Or. 1948) (collecting cases) ("It is well settled that a statutory enactment prescribing the time within which [a referendum] petition must be filed is mandatory and jurisdictional."); *Kochen v. Young*, 107 N.W.2d 81, 84 (Iowa 1961) (collecting cases) ("It is the general rule that the time limit fixed by statute for filing a referendum petition is mandatory and

critical where, as here, the referendum seeks to alter the Metropolitan Charter, the Metropolitan Government's foundational document. Chancellor Bonnyman took a similar approach in the *English First* litigation when considering the significance of "a date" identified in a Charter amendment petition: "The Plaintiff prescribed the date of November 4, 2008, and the law regulating Charter amendment frequency at [Section] 19.01 does not provide for amendments to that date. This lack of flexibility is common in election law because other interconnected deadlines set by law must also be met." (Slip op. at 3, Attachment 2 hereto.) Accordingly, the Court should strictly apply the Section 19.01 requirement that the petition prescribe "a date." And just as in *English First*, if the date in the Petition is not viable, there is no provision in Section 19.01 for 4GG to select another one or include a backup.[13]

But even if the Petition only had to substantially comply with Section 19.01 (and it does not), it still fails. To evaluate substantial compliance, "a court should determine whether the [applicable law] has been followed sufficiently so as to carry out the intent for which it was adopted." Eugene McQuillin, The Law of Municipal Corporations, § 16:49 (3d

jurisdictional."); *Borough of Eatontown v. Danskin*, 296 A.2d 81, 86 (N. J. Super. Ct. Law. Div. 1972) (collecting cases) ("It has been held in other jurisdictions that the time periods in statutes providing for referendum are mandatory.").

[13] The Election Commission likewise caused significant delay in placing the 4GG Petition on the ballot. After receiving notice of the Petition on March 25, 2021, the Commission met five times to discuss it, on April 6, 8, 17, 22 and May 10, 2021, before voting to place it on the ballot. (AR Exs. F, G, X, Y.) In fact, 4GG filed suit against the Commission on April 5, 2021 because of the Commission's delay but nonsuited approximately three weeks later. *4GG v. Davidson Cty. Election Comm'n*, No. 21-0300-III. Due to the extended period of time over which the Election Commission reviewed the Petition before certifying signatures and setting the election, the Commission delayed the referendum election date until July 27, 2021, which is neither of the dates that the Petition specifies. As federal law requires military ballots to be mailed 45 days before the election date, it is now impossible to hold the referendum on either date specified in the Petition. And while state law gives the Election Commission some discretion to move a referendum election, *see* Tenn. Code Ann. § 2-3-204 (elections on questions shall be held not less than 75 or more than 90 days after the election commission "is directed to hold the election under the law authorizing or requiring the election on the question"), neither state law nor the Metropolitan Charter contemplate delaying certification for weeks with no attempt to set an election on the date (or, in this instance, dates) designated in the petition.

ed). In addition to the purposes listed above, the single-date requirement provides a timetable for referendum election preparations. It also permits a potential signatory to know whether she will be present to vote,[14] to determine if more time should be given to find alternate solutions to the subject at issue before taking the extraordinary act of amending the Metropolitan Charter, and, as petition-based amendments may only be submitted to voters once every two years, to weigh whether she would prefer a different petition to proceed sooner. 4GG's Petition does not satisfy any of these purposes; it merely creates confusion as to when the election will proceed. Thus, the Petition does not comply or substantially comply with the single-date requirement, and the Election Commission did not even deliberate over whether this defect should preclude the Petition from the ballot. (*See generally* AR Ex. J; *see also* AR Ex. J at (Commission counsel describing the two dates as "immaterial" because too much time had already passed to satisfy the Charter's eighty-day requirement).) Accordingly, the Commission's decision to place it on the ballot is arbitrary, capricious, and illegal.

2. <u>The Signature Requirement Applies to *Each* Version of the Petition, and Neither Meets the Requirement.</u>

Metropolitan Charter § 19.01 also requires submission of "a petition"—singular—with the requisite number of signatures.[15] This is commonsense, as a petition provides relevant information, including a referendum date.

Here, the two versions of the Petition significantly varied. The first version asked that signed petitions be returned by March 5, 2021, for filing by March 8, 2021—eighty-one days before May 28, 2021, the first of two election dates prescribed in the Petition. The

[14] While a potential signatory may be able to vote absentee, that is not guaranteed, as Tennessee restricts absentee voting to certain classes of voters. *See* Tenn. Code Ann. § 2-6-201.

[15] Section 19.01 uses the singular noun "petition" a total of five times. It never references "petitions."

second version asked that signed petitions be returned by March 23, 2021, for filing by March 25, 2021—eighty-one days before June 15, 2021, the second election date prescribed in the Petition. (*Id.*) Therefore, the language of the second version listed a return date that could not comply with a May 28, 2021, referendum. As shown above, the prescribed referendum date is significant, as it informs voters' decisions about whether to sign the petition. Because the versions of the Petition espoused different filing deadlines based on different election dates, the Election Commission should not have aggregated the signatures from each version to meet the 10% requirement.

Accordingly, even using the August 2020 election date from which the Election Commission calculated the requisite number of signatures, the Petition does not meet the requirement. Because there were 121,420 votes cast in the August 2020 election, 12,142 verified signatures are required to qualify for the ballot. Neither of the two versions of the Petition garnered that many signatures. (*Compare* AR Ex. AA at 0566 (establishing 12,369 as the total number of verified ("check-marked") signatures between the two petitions) *with* AR Ex. QQ & Notice of Stipulations (establishing 448 as the number of verified signatures attributable to Version 2.) Thus, the Petition fails to satisfy Metropolitan Charter § 19.01 for placement on a referendum ballot.

3. November 2020, and Not August 2020, Is the Election Date From Which the 10% Signature Requirement Must Be Calculated.

The Election Commission utilized the August 2020 election to determine the requisite number of signatures for the initiative to be submitted to voters. This decision was illegal and should be set aside.

Metropolitan Charter § 19.01 requires that a proposed charter amendment petition filed with the Metropolitan Clerk be "signed by ten (10) percent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election."

Tennessee courts have interpreted the term "preceding general election" in Section 19.01 to be an election that was not specially set and that contains at least one municipal office on the ballot. While several previous appellate decisions have addressed the meaning of these terms in ways that provide guidance, none squarely addressed the issue raised here.

First, in *State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983), the Tennessee Supreme Court held that a "preceding general election" under Section 19.01 must be a municipal election, not a state or national election. Because the November 1982 election had no metropolitan offices on the ballot, the Court held that the previous metropolitan elections in August 1982 or August 1979 would be the relevant "general election" to determine the number of required signatures on a charter amendment petition. *Id*. at 953.

In *Wallace v. Metropolitan Government of Nashville & Davidson County*, the Court summarized *Wise* and reaffirmed that "general election" refers to any municipal general election, as opposed to the more limited category of "general metropolitan elections" at which the Mayor and Council are elected:

> That the intent of the drafters of the Charter was to draw a distinction between "general metropolitan elections" and all other "general elections" is evidenced by the use of these distinct phrases within section 15.03 to address different events. *We do not read the use of the distinct phrases "general metropolitan election" and "general election" to be merely accidental*. Rather, we view the two phrases to have been intentionally and thoughtfully employed to refer to different elections. The former phrase refers to the particular general election at which the Mayor, Vice Mayor, Councilmen-at-Large, and District Councilmen are elected in August of each fourth odd-numbered year, beginning in 1971, as called for in section 15.01 of the Charter. In contrast, *the latter phrase refers more broadly to any municipal general election, including but not limited to general metropolitan elections*.

546 S.W.3d at 55 (emphasis added).

In *Fraternal Ord. of Police v. Metro. Gov't of Nashville & Davidson Cty.*, 582 S.W.3d 212 (Tenn. Ct. App. 2019), the Court of Appeals held that the November 2016 election could not be used to determine the number of signatures needed for a Metropolitan Charter

amendment petition because "no metro offices were on the ballot." *Id.* at 219. The Court likewise held that the May 24, 2018 election "was a special election to fill vacancies" and "not a general election." *Id.* The Court held that the proper election to use was the August 4, 2016 election, which was a primary election for federal and state offices and a general election for the Metropolitan Assessor of Property, five Metropolitan school board offices, and a vacant Metropolitan district council position.[16]

While Tennessee courts have not squarely addressed the question at issue here, using the November 2020 ballot to determine the number of required signatures for the 4GG Petition to qualify for a referendum election is consistent with current case law and consistent with involving a meaningful number of involved citizens in the important act of amending the Metropolitan Government's founding document. Moreover, it is a legal question for the Court to answer, not a factual question for which the Commission decision would be entitled to any deference.

The 4GG Petition was filed after the November 2020 election, which was a general election for federal and state offices and a Metropolitan school board office. The school board election was held pursuant to Metropolitan Charter § 9.02, which provides that elections to fill school board vacancies "shall be at the first *county-wide general election*" (emphasis added); *see also* Tenn. Code Ann. §§ 49-2-201(a)(1) (successor to a school board vacancy "shall be elected at the *next general election* for which candidates have a sufficient time to qualify under the law") (emphasis added), 2-14-101 (by appearing on the November 2020 ballot, the school board election was not a special election). Although the school board election did not

[16] According to the opinion, the Election Commission determined that 47,074 voters cast their ballots in the August 2016 election, so that 4,708 signatures would constitute the required 10%. *Id.* at 214. The Election Commission did not base its determination solely on the number of voters who voted in the Assessor of Property race, which was the only county-wide municipal office on the ballot.

involve a county-wide office, there is no such requirement in the cases cited above for an election to qualify as a municipal general election. Simply stated, because the November 2020 ballot contained a Metropolitan Government contest and was not a specially-set election, it qualifies as the "preceding general election" for purposes of determining whether the Petition has sufficient signatures.

There were 312,113 votes cast in Davidson County in the November 2020 election (Election Commission's Answer ¶ 39), so a petition based on that election would need 31,212 signatures to qualify for the ballot. The 4GG Petition did not receive the requisite number of signatures to satisfy the signature requirement based on the November 2020 election. Thus, the Court should find that the Election Commission's decision to place the petition on the ballot for a referendum election is illegal.

B. Two of the Proposed Amendments Are Vague and Confusing and Thus Defective in Form.

It has been a long-standing requirement in American jurisprudence that states have an obligation to ensure that ballot questions are fairly presented to voters—both on petitions and on ballots. In states with more extensive initiative and referendum processes, there are occasionally regulatory regimes and standards in place to ensure that a ballot question is presented fairly, without sloganeering or partisanship. *See, e.g.*, *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 649-50 (Colo. 2010). Even in the absence of specific guidelines, states have long recognized the obligation to ensure that the framing and wording of a ballot question is appropriate. Indeed, these requirements have remained consistent over time: "the ballot title should be complete enough to convey an intelligible idea of and scope and import of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must

contain no partisan coloring." *Westbrook v. McDonald*, 43 S.W.2d 356, 360 (Ark. 1931) (quoting *In re Opinion of the Justices*, 171 N.E. 294, 297 (Mass. 1930)).

Tennessee courts have expressed similar concerns about whether the language used to describe a referendum is sufficient to avoid voter confusion and allow the intelligent casting of votes. In *Pidgeon-Thomas Iron Co. v. Shelby Cty.,* 397 S.W.2d 375 (Tenn. 1965), the Tennessee Supreme Court reviewed the adequacy of a referendum ballot, noting:

> The question now is whether the abbreviated notice on the voting machine, as above set out, gave the voter sufficient information to advise him of the question on which he was to cast his ballot. Did the notice on the ballot convey a reasonable certainty of meaning, or was it so drawn as to limit the information or confuse the voter in making his decision?

Id. at 378. And in *Rodgers v. White*, the Court held that the test of the sufficiency of an abbreviated form of a ballot question was "whether or not the notice on the ballot conveyed a reasonable certainty of meaning so that a voter could intelligently cast a vote for or against the proposal with full knowledge of the consequence of his vote." 528 S.W.2d at 813. Chancellor Lyle applied these same standards to 4GG's first petition in *4GG-I*. Findings & Conclusions at 13-14.

Applied here, two of the Proposed Amendments fail to satisfy this standard. First, the "Abolish Lifetime or Other Benefits for Elected Officials" provision in the Proposed Amendments states:

> **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.

Because the provision fails to define "benefits," it is unclear whether the provision refers to benefits typically provided in the employment context (*i.e.*, health insurance or a pension) or to anything of value that an elected official receives and that is publicly funded in whole or part. The provision likewise does not define "elected officials." There are

numerous elected officials throughout the Metropolitan Government. Some of those are metropolitan officials (Mayor, Vice Mayor, Council Members, and School Board Members), and some are county officials or constitutional officers (County Clerk, Register of Deeds, Trustee, Assessor, Sheriff, General Sessions Judges, Juvenile Court Judge, Circuit Court Clerk, Criminal Court Clerk, and Juvenile Court Clerk). The provision does not indicate whether it applies to all or a portion of these elected officials.

In addition, the provision does not delete or amend Metropolitan Charter § 5.07, which addresses the pension payable to the Mayor, or Metropolitan Charter § 14.08, which allows General Sessions judges to participate in the Metropolitan Government pension system. Thus, it is unclear whether these "benefits" continue if the "Abolish Lifetime or Other Benefits for Elected Officials" provision is adopted.

Second, the "Protect Promises to Nashville" provision of the Proposed Amendments states:

> **Protect Promises to Nashville – Create Article 18, § 18.09:** 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 payments shall be paid, if required by law.

This provision, like its predecessor in 4GG's first petition, fails to define key terms such as "ground lease," "facilities," "related ancillary development," "revert to public property," and "related contracts."[17] Essentially the same terms were found to be vague and confusing in *4GG-I*. Findings & Conclusions at 33 ("[T]he Proposed Act's meaning is vague

[17] For example, it is not clear whether "facilities" refers only to professional sports facilities constructed and owned by the Sports Authority of the Metropolitan Government of Nashville and Davidson County ("Sports Authority") where the professional sports teams play their home games or to some broader category of "related" facilities. Similarly, "related ancillary development" could refer to developments in which the professional teams hold a property interest or some broader category of "related" developments.

and confusing because it fails to define key terms such as 'facilities,' 'related commercial development,' and 'revert to the people,' . . . ."). Because the provision does not convey reasonable certainty of meaning as to its scope and effect through use of similar undefined terms, the provision is defective in form.

C. Two of the Proposed Amendments Involve Subject Matters Beyond the Referendum Power Permitted by Law and Thus Are Defective in Form.

The *City of Memphis* opinion does not articulate bright line rules for challenges to form or facial constitutional validity as compared to substantive challenges. Nevertheless, as noted by Chancellor Lyle in *4GG-I*, cases cited within the opinion provide guidance on how the Tennessee Supreme Court views the distinction between these types of challenges and when they should be heard.

For example, according to the Notre Dame Law Review article cited in *City of Memphis*, pre-election challenges based on "alleged failures to meet procedural or subject matter requirements should be adjudicated." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 314 (1989) (hereinafter "*Pre-Election Judicial Review*"). The facts of such cases are fully developed before the election, and no contingencies make the issue "speculative, hypothetical, or abstract." *Id.* The basis of the challenge is that the proponents "are not entitled to invoke the [referendum] process and thereby cause the expenditure of public funds. If the election is permitted, the very injury complained of will occur." *Id.*[18]

The West Virginia Supreme Court opinion in *Burnell v. City of Morgantown*, 558 S.E.2d 306, which is cited in *City of Memphis* as "explaining and applying this rule," 146

[18] In contrast, the article describes substantive prohibitions as "general constitutional or statutory restrictions that ban all laws which have a specified effect (such as laws abridging the freedom of speech)" and states that challenges based on them should be reviewed post-election. 64 Notre Dame L. Rev. at 317.

S.W.3d at 539, held that a court may undertake pre-election judicial review of a proposed voter referendum where it "either (1) violate[s] procedural or technical requirements incident to placing the measure on the ballot, or (2) involve[s] a subject matter that is beyond the scope of the initiative or referendum power." *Burnell*, 558 S.E.2d at 314.

The *Burnell* opinion also notes that the subject-matter restriction need not be contained in the provision creating the right to a referendum, "since that requirement would elevate form over substance." *Id.* at 313; *see also Pre-Election Judicial Review*, 64 Notre Dame L. Rev. at 316 (same). As explained in *State ex rel. Childress v. Anderson*, 865 S.W.2d 384 (Mo. 1993), also cited in *City of Memphis*, a limitation on referendums "may be express or may arise by implication." *Id.* at 387, 390.

Chancellor Lyle applied this legal authority in *4GG-I*, concluding that the petition before her sought to effect numerous changes to the Metropolitan Charter that the law did not permit to be accomplished by referendum. Findings & Conclusions at 15 ("Another aspect of a defective ballot identified by the Tennessee Supreme Court in *City of Memphis* . . . is where the referendum intrudes into an area or subject that the local government does not have authority over."). She ruled that the "Property Tax Rates" provision (which sought "to use the referendum process as a legislative tool"), the "Issuance of Bonds" provision (which conflicted with the state law that prescribes the only methods for issuing bonds by referendum), and the "Metro's Records Shall Be Open to the Public" provision (which sought to expand public-record claims against state instrumentalities through local referendum rather than state legislation) were defective in form. *Id.* at 22-26, 29-30, 35-36.

As explained below, the current Petition fails for the same reason: it seeks to accomplish by referendum numerous things that may not be accomplished in that manner. In fact, the "Limit Property Tax Rates" provision in the current Petition seeks to legislate by

referendum just as the first one did. Because the "Limit Property Tax Rates" and "Protect Promises to Nashville" provisions seek to accomplish that which the referendum power in state and local law does not permit, the Election Commission's decision to permit a referendum election on these provisions is arbitrary, capricious, and illegal.

1. The "Limit Property Tax Rates" Provision Illegally Seeks to Set Property Tax Rates by Referendum.

The "Limit Property Tax Rates" provision of the Proposed Amendments states:

> **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.

Last fall, the Chancellor rejected as defective in form and facially unconstitutional 4GG's efforts to use a charter amendment to nullify a property-tax increase. Findings & Conclusions at 12, 19-26, 32 n.7. With the "Limit Property Tax Rates" provision, 4GG once again seeks to "roll back" the "34%-37% Property Tax increase." (AR Ex. JJ at 0624 (Version 2).)[19] The provision would repeal an existing property-tax ordinance, set property tax rates by referendum for the next two fiscal years, and require referendum approval of subsequent property-tax increases greater than three percent. Because none of these actions is permitted by the Tennessee Constitution, state law, or Metropolitan Charter, the provision is still defective in form and should not have been placed on the ballot.

a. State law permits only the local legislative body—not the electorate—to set Metropolitan Government property tax rates.

The Tennessee Constitution has separate provisions permitting the creation of "home rule municipalities" on the one hand and "consolidated governments" on the other. It provides

[19] In fact, the provision if adopted would reduce the Fiscal Year 2021-2022 property tax rate by approximately 4%. *See* Petition ¶ 88 (admitted by Respondents).

consolidated governments, such as the Metropolitan Government, with "all of the governmental and corporate functions now or hereafter vested in" both counties and cities. *See* Tenn. Const., art. XI, § 9; *see also* Tenn. Code Ann. § 7-2-108(a)(1) (the state's Metropolitan Government Act gives metropolitan governments in Tennessee "[a]ny and all powers" that counties and cities "are, or may hereafter be, authorized or required to exercise under the Constitution and general laws of the state"). And while consolidated governments have many of the same sovereign rights as home rule municipalities, they are distinct entities—with merged city and county functions—that are distinctly addressed by state law.

In fact, state law assigns *counties*—not home rule municipalities and not the general public—primary taxation responsibilities. Article II, Section 28 of the Tennessee Constitution permits the State to tax property. Article II, Section 29 provides that counties and incorporated towns can tax property only as authorized by the General Assembly. The General Assembly extended property tax authority only to county legislative bodies, not to the public. Tenn. Code Ann. § 67-5-102(a)(2) (counties are authorized to levy an ad valorem tax on all property, and the "amount of such tax shall be fixed by the county legislative body of each county"); *id.* § 49-2-101(6) (the "county legislative body" shall "[l]evy such taxes for county . . . schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the county legislative body").

The Tennessee Attorney General has also explained that the county legislative body, not the public, determines property tax rates. According to a 1994 opinion, "[a]ll counties . . . must follow the general law concerning the setting of the county property tax rate, which does not allow for submitting a rate increase to the voters." Tenn. Op. Att'y Gen. No. 94-008, 1994 WL 88766 (Jan. 14, 1994); *see also* Tenn. Op. Att'y Gen. No. 05-027, 2005 WL 740148, at *1 (Mar. 21, 2005) ("[I]n the absence of a general law authorizing such a procedure, a

county legislative body may not hold a public referendum to establish the county property tax rate.").

Counties are required by state law to serve multiple critical functions, including support for constitutional officers, law enforcement, public education, and local courts.[20] And Tennessee courts have long recognized that the State is obliged to provide a county government with the fiscal capacity to meet these expenses. *See Baker v. Hickman Cty.*, 47 S.W.2d 1090, 1093 (Tenn. 1932) ("It is the duty of the General Assembly to levy, or authorize the counties to levy, a sufficient tax to meet the legal obligations of the counties, as well as their current expenses."); *see also* 20 C.J.S. Counties § 353.[21]

Consistent with this constitutional framework, state law delegates the property taxing authority, including setting tax rates, solely to the county's legislative body. To that end, state law specifically requires the *county legislative body* to impose sufficient property taxes to ensure the continuation of these mandatory services. Tenn. Code Ann. § 5-5-123 ("The county legislative body is required, at the first term in every year, to impose, and provide for the collection of, the tax for county purposes, and fix the rate thereof . . . ."). The

[20] The Tennessee Constitution imposes numerous requirements on counties, and the county legislative bodies are charged with meeting those requirements. For example, counties must have a courthouse, a county legislative body, a county executive, a sheriff, a register, a county clerk, a trustee, and a property assessor, each selected through a democratic election. *See* Tenn. Const., art VII, § 1. County governments also have significant responsibility for law enforcement and jailing those charged with state offenses. County governments have numerous legal and financial responsibilities pursuant to generally applicable state law. All counties, for example, bear significant responsibilities for funding a "system of free public schools," which is itself a constitutional requirement that the State must meet. *See* Tenn. Const., art. XI, § 12; Tenn. Code Ann. § 49-2-101.

[21] Since Tennessee adopted its second Constitution in 1834, the role of counties in taxation has been a central component of Tennessee government. The taxation of property by county governments is inherent to Tennessee's constitutional and statutory scheme. Tennessee's Constitution ensures that each county elects an Assessor to value property for taxation, a Trustee to collect the taxes, and a county legislative body to levy the tax and undertake any services required by the state Constitution and statutes. Tenn. Const., art. VII, § 1.

county legislative body has no discretion to choose whether to tax property but is "required" to do so. The Metropolitan Charter contains these property-tax requirements as well.

In contrast to counties, the equivalent statute authorizing incorporated towns to levy property taxes does not expressly delegate the authority to a *municipal legislative body*.[22] *See id.* § 67-5-103 ("Taxes on property for municipal purposes shall be imposed on the value of the property, as defined and determined in this chapter and as otherwise provided by law, and shall be collected by the same officers at the time and in the manner prescribed for the collection of county taxes, except as otherwise provided by law."). The General Assembly has empowered home rule municipalities to amend their charters by referendum to establish a property tax rate or to increase or reduce the rate, but the Metropolitan Government is explicitly exempted from that statute. Tenn. Code Ann. § 6-53-105(b).[23] And the legislature

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[22] Counties play a fundamentally different role than municipalities under Tennessee's constitutional scheme. Municipalities take on a wide variety of forms and functions, and indeed many Tennesseans do not live within an incorporated city or town. Their method of creation is a matter of statute rather than constitutional law. They do not in aggregate have jurisdiction over all Tennessee citizens, as counties do, so they provide only the services they choose to provide. They are incorporated and dissolved via voter referendum. By contrast, Tennessee's 95 counties occupy the entire state, and every Tennessee resident lives in one.

[23] This statute, which authorizes home rule municipalities, under certain circumstances, to consider property tax rates in referenda elections, was enacted after the 1953 adoption of the home rule provisions to the Tennessee Constitution. Tenn. Code Ann. § 6-53-105(b). The Metropolitan Government, beyond not being a "home rule" municipality as the Tennessee Constitution uses the term, is explicitly excluded from the statute's application.

Tennessee courts have never affirmed that such a delegation of legislative taxing authority to local electorates pursuant is constitutionally permissible, nor is the question presented here. An Attorney General opinion reasoned that the legislature could authorize such action in home rule charter municipalities after the 1953 constitutional amendments, which prohibit home rule charter municipalities from *expanding* their taxing authority. *See* Tenn. Op. Att'y Gen. No. 03-019, 2003 WL 912609, at *1. The opinion suggests that the absence of a converse prohibition on *restricting* taxing authority should be read as providing sufficient latitude for home rule charter municipalities to engage in legislation via referendum. *Id.* at *3. But the state's taxing power "is never presumed to be relinquished" unless the intention to relinquish "is declared in clear and unambiguous terms." *Knoxville & O.R. Co. v. Harris*, 43 S.W., 115, 117 (Tenn. 1897); *see also Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 548 (Tenn. 1985) (holding that a referendum for voters "on the question of the adoption of the law" is an unconstitutional delegation of legislative power); *accord First Util. Dist. of Carter Cty. v. Clark*, 834 S.W.2d 283, 285 (Tenn. 1992) (same) (collecting cases).

has authorized municipal school boards, not the public, to submit a school property tax to voters, but only when the county fails or refuses to levy a county school property tax. Tenn. Code Ann. § 49-2-401; *see also* Metropolitan Charter § 9.04(3).

Whatever the taxing authority possessed by municipalities, in performing the multitude of county functions assigned to it by state law and the Metropolitan Charter, the Metropolitan Government acts primarily in its capacity as a county in exercising its property taxing authority and therefore must assess property taxes as all Tennessee counties do, through its legislative body.[24] Because the Metropolitan Council is the essential legislative unit standing in the constitutional role of a county government in setting property tax rates, there is no sound constitutional, statutory, or other legal basis to suggest that its legislative decisions exercising the county taxing power delegated by the General Assembly can be made subject to a voter referendum.

In any event, the 1953 amendments include no similar language related to the taxing authority of counties. Rather, as the attorney general opinion noted, the only permissible delegation of county taxing authority is to "the county legislative body." Tenn. Op. Att'y Gen. No. 03-019 (quoting Tenn. Code Ann. § 67-5-102(a)(2)). Even Section 6-53-105(b)'s narrow (and questionable) delegation of legislative authority to the electorate in home rule charter municipalities does not and could not apply to the Metropolitan Government, which necessarily must be afforded the same treatment as counties under Article XI, Section 9. A conclusion otherwise would be to permit a direct conflict between a Metropolitan Charter provision and state law—a result that even home rule municipalities are not afforded.

[24] This primacy of the county function is evident in comparing the two components of the Metropolitan Government's property tax rate: the general services district ("GSD") embracing the total area of the county and the urban services district ("USD") consisting of areas that need urban services. Metropolitan Charter §§ 1.03, 1.04. The services provided in the GSD are "those governmental services which are now, or hereafter may be, customarily furnished by a county government in a metropolitan area." *Id*. § 1.05. A comparison of the relative property tax rates in the GSD and USD illustrates that the Metropolitan Council acts overwhelmingly as a county legislative body when it sets those rates. *See* Vivian M. Wilhoite, Assessor of Property, "Tax Rates & Calculator: History of Local Tax Rates," https://www.padctn.org/services/tax-rates-and-calculator/ (GSD property tax rate in FY 2019-2020 was $2.755, which was 87% of the total property tax rate of $3.155).

Because the Property Tax Rates provision sets property tax rates by referendum, a right reserved to the local legislative body under state law, the provision is defective in form and should not be placed on the ballot.

b. State and local law prohibit legislating, or repealing legislation, by referendum.

The proposed property tax amendment would also constitute a legislative act, which cannot be accomplished by referendum under the Metropolitan Charter or state law. A local government cannot legislate by referendum petition on any subject absent express authority. *See McPherson v. Everett*, 594 S.W.2d 677, 680 (Tenn. 1980) ("The right to hold an election does not exist absent an express grant of power by the legislature."). The Tennessee Supreme Court has defined "legislative authority" as "the authority to make, order, and repeal law." *McClay v. Airport Mgm't Servs., LLC*, 596 S.W.3d 686, 694 (Tenn. 2020). The power of direct legislation by initiative and referendum is only permissible when consistent with the Constitution and statutory authority. *See* Eugene McQuillin, The Law of Municipal Corporations § 16:48 (3d ed.) (citing *Bean v. City of Knoxville*, 175 S.W.2d 954 (Tenn. 1943)).

In *Bean v. City of Knoxville*, the Tennessee Supreme Court examined whether the City of Knoxville's power to legislate included the power to repeal an ordinance by referendum election. *Id.* at 954-55. The *Bean* plaintiffs sought to enjoin the city from holding a referendum election to adopt an ordinance that would allow motion pictures to be exhibited on Sunday. *Id.* at 954. A state statute prohibited Sunday movies except when authorized "by a majority vote of the *legislative council* of any municipality." *Id.* (emphasis added). The *Bean* plaintiffs argued that voters in a referendum election could not be considered part of "the legislative council." *Id.* The court rejected this argument, relying on the fact that the

legislature's private act establishing the Knoxville Charter[25] had extended legislative authority directly to the citizens. *Id.* at 955 ("Section 99 of the [Knoxville] Charter not only provides for the passage or adoption of ordinances by referendum, but also for the repeal of such in the same manner.").

Put another way, the City of Knoxville's delegation of legislative authority to voters via referendum was upheld because the state legislature and the municipal charter authorized the delegation. *Id.*; *see also* Francis C. Amendola, *et al.*, C.J.S. *Municipal Corporations* § 386 (database updated June 2020) ("A council of a municipal corporation, operating under a freeholders' charter, which charter has no provision for a referendum, has no power to confer such power on the electors of the corporation since such action is regarded as a delegation of the legislative power of the council.") (citing *Bean*); *see also State ex rel. Childress*, 865 S.W.2d at 387, 390 (stating that a limitation on referendums "may be express or may arise by implication" and that "where the [city] charter establishes a procedure for the adoption of certain types of ordinances, that procedure may not be circumvented by use of an initiative petition").

There is no delegation of legislative authority in the Metropolitan Charter or in state law that would allow Davidson County voters to use the referendum process to pass a new ordinance or repeal an existing one. Under the Metropolitan Charter, "[t]he council shall exercise its legislative authority *only by ordinance*, except as otherwise specifically provided by th[e] Charter or by general law." Metropolitan Charter § 3.05 (emphasis added). The Metropolitan Charter does not "otherwise specifically provide" authority to pass legislation by referendum; certainly nothing in Metropolitan Charter § 19.01 permits the use of a

[25] *Bean* pre-dates the 1953 amendment to Article XI, Section 9, Paragraph 2 of the Tennessee Constitution, which limited the legislature's authority to regulate municipal governments via private act without the local government's consent.

Charter amendment referendum to enact an ordinance. Nor does the "Limit Property Tax Rates" provision seek to convey such authority; rather, by purporting to set tax rates, it is an unauthorized seizure of such powers.

Nor does such authority exist in state law. The Metropolitan Charter was adopted pursuant to enabling legislation enacted by the General Assembly—the Metropolitan Charter Act. *See* Tenn. Code Ann. §§ 7-1-101, *et seq.* Under this generally applicable statute, all metropolitan governments must have a metropolitan council, which "shall be the *legislative body* of the metropolitan government and shall be given all the authority and functions of the governing bodies of the county and cities being consolidated." *See* Tenn. Code Ann. § 7-2-108(11) (emphasis added). The Metropolitan Charter was drafted consistently: "The *legislative authority* of the metropolitan government of Nashville and Davidson County, except as otherwise specifically provided in this Charter, shall be vested in the metropolitan county council." Metropolitan Charter § 3.01 (emphasis added); *see also Binkley v. Metro. Gov't of Nashville*, No. M2010-02477-COA-R3CV, 2011 WL 2174913, at *5 (Tenn. Ct. App. June 1, 2011) ("The Metropolitan Council is the legislative body of the metropolitan government.").

As with the Metropolitan Charter, nothing in the Metropolitan Charter Act permits metropolitan governments to pass an ordinance by referendum. In fact, the "Limit Property Tax Rates" provision usurps legislative authority from the local legislative body and gives it to the electorate in direct contravention of the statutory scheme. Tenn. Code Ann. § 7-2-108(11).

Likewise, generally applicable state law provides no support for legislating by referendum as the provision seeks to do. While the Tennessee Constitution makes clear that all governmental power is derived from the people, it "contains no reservation to the people of the powers of initiative or referendum." *Vincent v. State*, No. 01A-01-9510-CH-00482, 1996

WL 187573, at *3 (Tenn. Ct. App. Apr. 19, 1996); *see also State ex rel. Potter v. Harris*, No. E2007-00806-COA-R3-CV, 2008 WL 3067187, at *9-10 (Tenn. Ct. App. Aug. 4, 2008) ("While some states, *e.g.* Colorado and Arizona, have provided for referendum in their state constitutions, Tennessee has not done so."). Similarly, the General Assembly has not authorized broad powers of initiative or referendum at the state or local level but instead authorized the use of a referendum in only a handful of discrete subject areas with particularized requirements. *See, e.g.*, Tenn. Code Ann. § 57-3-101 (liquor retail sales); *id.* § 6-51-104 (annexation); *id.* § 67-6-706 (local sales tax); *id.* § 9-21-208 (general obligation bonds); *id.* § 7-86-104 (E911 districts).

The "Property Tax Rates" provision, if adopted, would repeal the property tax ordinance that the Council is required by state law to adopt prior to the start of Fiscal Year 2021-2022. Tenn. Code Ann. § 67-5-510 (county legislative body has duty to fix property tax rates by first Monday in July). Such a repeal by referendum is "a political process not recognized under Tennessee law," Findings & Conclusions at 12, and therefore involves a subject matter beyond the scope of the referendum power. Moreover, the provision also sets the property tax rate by referendum rather than by ordinance, which is not permitted under state or local law.[26] Because the "Property Tax Rates" provision involves a subject matter beyond the scope of referendum power, it is defective in form and should not be placed on the ballot.

[26] This is true both for 2021-2022, when the provision sets the actual property tax rate, and in subsequent years, when the provision requires referendum approval for proposed property tax increases greater than 3%. Both situations involve unauthorized legislation by referendum.

2. The "Protect Promises to Nashville" Provision Illegally Seeks to Take Private Property, Affect the Vested Rights of a Private Party, and Threaten the Metropolitan Government's Pledge of Non-Tax Revenue to Repay Bonds, All by Referendum Without Such Authority.

The "Protect Promises to Nashville" provision is another amendment to which 4GG made cosmetic changes from last fall but failed to correct its fatal defects. The provision states that "[i]f 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 payments shall be paid, if required by law."

Metropolitan Charter §§ 2.01(12) and 3.06 vest the power to take private property in the Metropolitan Council. The "Protect Promises to Nashville" provision does not amend these Charter provisions and therefore would take private property without following or amending the Charter's prescribed process for eminent domain. For this reason, the provision involves a subject matter beyond the scope of the referendum power and therefore is defective in form.

Additionally, the provision primarily affects a separate legal entity, the Sports Authority, without authority to do so by referendum. The Sports Authority is a public corporation separate from the Metropolitan Government and was created under the authority of Tenn. Code Ann. §§ 7-67-1010, *et seq.* (Sports Authorities Act of 1993). Being separate from the Metropolitan Government under state law, the Sports Authority is not subject to the Metropolitan Charter. Yet the provision purports to terminate leases that are solely between the Sports Authority and sports teams, and in doing so purports to impose "just payments" obligations on the Authority. Any such attempt to amend the Charter to affect the Authority is a subject matter beyond the scope of the referendum power and

therefore defective in form.

More specifically, the Sports Authority has executed leases with professional sports teams for them to manage and utilize sporting facilities constructed and owned by the Sports Authority (the "Sports Authority Leases"). (AR Ex. PP at 0884-0978.) The facilities covered by the Sports Authority Leases were constructed with revenue bonds issued by the Sports Authority and backed by the Metropolitan Government's pledge of non-tax revenues, evidenced by the execution and delivery of intergovernmental project agreements. (AR Ex. PP at 0832, 0858 (acknowledging the Metropolitan Government's pledge of non-tax revenues by way of intergovernmental agreement), 0860 (describing the Sports Authority's "covenant" to pay principal and interest on bonds), 0861 (describing the intergovernmental agreement with the Metropolitan Government); *see also id.* at 0884-0888, 0891 (defining "Initial Term" of lease), 0896 (requiring rent payments equal to the debt service).) The Sports Authority has pledged facility rent payments and other revenues *dependent on the Sports Authority leases being in effect* to the repayment of the bonds issued to build the facilities. The "Protect Promises to Nashville" provision, if allowed to go into effect and enforced against a Sports Authority Lease tenant while bonds for the associated facility remain outstanding, would cause the Sports Authority to violate Tenn. Code Ann. § 7-67-113(a), which requires that a pledge of revenues "shall continue in effect until the principal of and interest on the bonds for which the pledge [was] made shall have been fully paid."[27] All of these effects are outside the scope of what may be accomplished by a Metropolitan Charter amendment.

[27] In so doing, the provision threatens the Metropolitan Government's pledge of non-tax revenue to repay bonds issued by the Sports Authority without authority under state law for governing such bonds. Pursuant to Tenn. Code Ann. § 7-67-112(a), sports authority bonds must comply with the provisions of the Local Government Public Obligations Act of 1986. Pursuant to Tenn. Code Ann. §§ 7-67-112(a) and 9-21-107(9), revenue and receipts generated by a sports facility financed with revenue bonds are the primary source of funds for repayment of those bonds and may be formally pledged to such repayment.

Furthermore, the provision, if allowed to go into effect and enforced against a Sports Authority Lease tenant while bonds for the associated Sports Authority facility remain outstanding, would cause the Sports Authority to violate Tenn. Code Ann. § 9-21-125(a)(1), which requires that:

> Any pledge of, or lien on revenues, fees, rents, tolls or other charges received or receivable by any local government to secure the payment of any bonds or notes issued by a local government pursuant to this chapter, and the interest thereon, shall be valid and binding from the time that the pledge or lien is created or granted and shall inure to the benefit of the holder or holders of any such bonds or notes until the payment in full of the principal thereof and premium and interest thereon.

Termination of any of the leases would require the Sports Authority, and the Metropolitan Government as a result of its non-tax revenue pledge, to fund payments due on the revenue bonds without the primary expected rental, sales tax, and other income currently devoted to that purpose. Termination of the leases would likewise terminate the revenue stream pledged under these statutes to repayment of the underlying bonds.

By affecting the Sports Authority and Metropolitan Government in these ways, and by effectively taking property by referendum rather than through the prescribed method in state or local law, the provision involves subject matters beyond the scope of the referendum power and therefore is defective in form.

D. <u>Four of the Proposed Amendments Are Facially Unconstitutional.</u>

Several cases cited in *City of Memphis* as examples of pre-election challenges to the facial constitutional validity of a referendum measure go beyond form and subject-matter requirements. *City of Memphis*, 146 S.W.3d at 539. This approach is summarized in *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457 (Mo. Ct. App. 2000), cited in *City of Memphis*, which holds that a referendum may be enjoined on substantive grounds "**if the issue of law raised is 'so clear or settled as to constitute matters of form**.'" *State*

ex rel. Hazelwood, 35 S.W.3d at 468 (quoting *State ex rel. Trotter v. Cirtin*, 941 S.W.2d 498, 500 (Mo. 1997) (en banc)) (emphasis in original).

As the *Hazelwood* opinion elaborated, "although a court's discretion to reach such substantive questions generally should not be exercised because to do so would 'sacrifice the democratic process to the interest of judicial economy,' nevertheless, such pre-election judicial review is appropriate when the proposed measure 'is unconstitutional on its face.'" *Id.*; *see also Town of Hilton Head Island*, 415 S.E.2d at 806 (because state constitution provided that financing state roads is a governmental service that requires statewide uniformity, the Court concluded that the proposed toll-road referendum ordinance conflicted with state law and was therefore "facially defective in its entirety" and that the Town had no obligation to put it on the ballot); *Dixon*, 363 P.2d at 1116 ("[s]ince the ordinance proposed here would have presented to the electors an unsanctioned form of government, the balloting and the election . . . would be not only a waste of taxpayer time and money, but a nullity."); *see also* Findings & Conclusions at 12, 14-15.

As explained below, the unconstitutionality of several provisions of the Proposed Amendments is "so clear and settled as to constitute matters of form," and they accordingly should not be placed on the ballot.

1. <u>The "Limit Property Tax Rates" Provision Facially Violates the Constitutional Provision on Impairment of Contracts.</u>

As outlined above, the "Limit Property Tax Rates" provision sets a cap on the tax levy that the Metropolitan Government can adopt without voter approval. Because the provision impairs the Metropolitan Government's pledge to bondholders that it would adopt annual tax levies sufficient to cover the bonds' principal and interest, as required by state law, the provision is facially unconstitutional.

The Tennessee Constitution states that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const., art. 1, § 20. Tennessee courts have held that the provisions of a bond resolution constitute a contract between the municipal corporation and the bondholders. *E.g.*, *State ex rel. Barr v. Town of Selmer*, 417 S.W.2d 532, 535 (Tenn. 1967). In such cases, the bond resolution is "binding upon the governing body." *Id.* Moreover, "[a] ground for judicial interference might arise in a case of municipal bonds issued upon authority of a statute which also directs levy of a tax to meet the obligation of the bonds. In such case the statute authorizing the issuance of the bonds and directing levy of taxes to meet the obligation might inhere as a part of the subsequent contract between the municipality and those who on faith of the statute contracted for the bonds so that the contract clause of both the Federal and State Constitutions (art. 1, § 10 and art. 1, § 20) might intervene *to prevent any legislative action that would result to impair or to defeat the obligation*." *Town of Oneida v. Pearson Hardwood Flooring Co.*, 88 S.W.2d 998, 999 (Tenn. 1935) (emphasis added). When general obligation bonds are issued pursuant to the Local Government Public Obligations Act of 1986 ("LGPOA"), Tenn. Code Ann. §§ 9-21-101, *et seq.*,[28] the local government "incurs a definite and absolute obligation by pledging the full faith, credit and *unlimited taxing power* of the local government as to all taxable property in the local government or of a portion of the local government, if applicable, to the payment of the principal of and interest on such bonds." Tenn. Code Ann. § 9-21-201(a)(2) (emphasis added).

[28] The LGPOA constitutes "a uniform and comprehensive statutory framework authorizing any local government to issue general obligation bonds and revenue bonds for public works projects, general obligation bonds for certain unfunded pension obligations, general obligation refunding bonds, revenue refunding bonds, bond anticipation notes, capital outlay notes, grant anticipation notes, tax anticipation notes, and health care revenue anticipation notes, and to authorize the destruction of bonds, notes and coupons." Tenn. Code Ann. § 9-21-102.

Pursuant to the LGPOA, the Metropolitan Government issued bonds pursuant to resolutions adopted by the Metropolitan Council in which the Metropolitan Government pledged to bondholders that it would adopt annual tax levies sufficient to pay the bonds' principal and interest as the LGPOA requires. (AR Ex. PP at 0693, 0698-0699 ("AUTHORITY, PLEDGE, AND LEVY").) A charter provision limiting the Metropolitan Council's duty to adopt a sufficient tax levy would directly impair the vested contractual rights of the bondholders on the Metropolitan Government's outstanding general obligation bond issues. Accordingly, the "Limit Property Tax Rates" provision impairs vested rights in violation of Article I, Section 20 of the Tennessee Constitution and is facially unconstitutional.

2. <u>The "Recall Elected Officials" Provision Facially Violates the Constitutional Prohibition on Retrospective Laws and the Constitutional Right to Vote.</u>

The "Recall Elected Officials" provision in the Proposed Amendments states:

> **<u>Recall Elected Officials – (A) Add to Article 15, § 15.07:</u>** 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[.]" **<u>(B) Replace existing Article 15, § 15.08, Paragraph 2 with:</u>** "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."

Application of the "Recall Elected Officials" provision would impair property rights retrospectively in violation of Tennessee Constitution Article I, Section 20. It also violates the right to vote in Article I, Section 5 and Article IV, Section 1 of the Tennessee Constitution. Thus, the provision is facially unconstitutional.

a. The provision retrospectively impairs vested rights.

The Tennessee Constitution states that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const., art. 1, § 20. The constitutional guarantee against retrospective laws prohibits retrospective substantive legal changes "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999) (quoting *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978)); *Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 829 (Tenn. 2010). "A 'vested right,' although difficult to define with precision, is one 'which it is proper for the state to recognize and protect and of which [an] individual could not be deprived arbitrarily without injustice.'" *Doe*, 2 S.W.3d at 923.

"'[I]n determining whether a retroactive statute impairs or destroys vested rights, the most important inquiries are (1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of affected persons, and (3) whether the statute surprises persons who have long relied on a contrary state of the law.'" *Id.* (quoting *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993)). The court also considers "the extent to which a statute appears to be procedural or remedial." *Id.* (citing *Kuykendall v. Wheeler*, 890 S.W.2d 785, 787 (Tenn. 1994)). But "even a procedural or remedial statute may not be applied retrospectively if it impairs a vested right or contractual obligation in violation of article I, section 20." *Id.* at 923-24 (citing *Kee v. Shelter Ins.*, 852 S.W.2d 226, 228 (Tenn. 1993)).

The "Recall Elected Officials" provision if adopted would retrospectively lower the requirements for recalling an elected official and remove the elected official's name from the recall ballot altogether. Thus, it imposes a new burden on current Metropolitan Government

office holders' property interests in their elected offices. The provision can be invoked for any reason or no reason and whether it serves the public interest or not. By impairing vested rights, the provision violates the Tennessee Constitution's prohibition on retrospective laws.

b. The provision violates the right to vote.

Article I, Section 5 and Article IV, Section 1 of the Tennessee Constitution protect the right to vote. *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020). "It is beyond question that the right to vote is a 'precious' and 'fundamental' right." *Id.*

In *Fisher v. Hargett*, the Tennessee Supreme Court noted that it has not explicitly held that strict scrutiny always applies to State action that burdens the right to vote. 604 S.W.3d at 399-400. It assumed without deciding that the *Anderson-Burdick* framework applies—a standard that examines the degree of impact on the right to vote to determine the level of scrutiny that applies to the measure at issue. *Id.* at 400.

In *Tully v. Edgar*, 664 N.E.2d 43 (Ill. 1996), the Illinois Supreme Court held—in circumstances similar to those here—that a provision curtailing the term of elected trustees of a state university and effectively removing them from office before their terms concluded with no showing of cause violated the right to vote. *Id.* at 49. As the Court noted, "[t]he legislation challenged here does not simply give the votes cast by some citizens less effect than others. Rather, it establishes a mechanism for *total* disregard of *all* votes case by citizens in a particular election. . . . The Act does not simply 'impair' the vote but, rather, obliterates its effect." *Id.*

The same is true here, and this Court should order the same result. Under any constitutional standard, the "Recall Elected Officials" provision cannot pass constitutional muster. The provision does not operate like a recall at all. Rather, it outright precludes elected officials from being listed on a recall ballot and otherwise serving out their terms

under the rules that existed when the voters elected them. The provision permits these retroactive changes and effectively nullifies voters' votes, midterm, substantially burdening the right to vote. Moreover, it permits this nullification for any or no reason and without any showing of cause, rendering it not even reasonably related to a government interest.

3. The "Abolish Lifetime or Other Benefits for Elected Officials" Provision Facially Violates the Constitutional Prohibition on Retrospective Laws.

As outlined above, the "Abolish Lifetime or Other Benefits for Elected Officials" provision prohibits elected officials from receiving any benefits at taxpayer expense without a referendum. Application of the provision to current and former office holders whose rights to medical and pension benefits have vested would impair the obligation of contracts in violation of Tennessee Constitution Article I, Section 20. Thus, the provision is facially unconstitutional.

A Metropolitan mayor, for example, is eligible to receive a pension after serving two full terms in office. Metropolitan Charter § 5.07. Elected officials other than the Mayor and Council members, including constitutional officers and judges, are eligible for pension benefits administered by the Benefit Board. Metropolitan Charter §§ 13.07, 14.08; Metropolitan Code of Laws § 3.08.010.[29] Council members who have held office for eight years or more are eligible to continue participating in the Metropolitan Government's health care plan after they leave office, provided they pay contribution rates equivalent to those paid by Metropolitan Government employees. Metropolitan Code of Laws § 3.24.010(C). Elected officials other than Council members who have held office for eight years or more and those receiving a pension from the state county paid judges pension plan are eligible to continue

[29] A certified copy of the Metropolitan Code sections cites herein is being filed contemporaneously with this brief for the Court's convenience and use in this case.

participating in the Metropolitan Government's health care plan. Metropolitan Code § 3.24.010(B).

The "Abolish Lifetime or Other Benefits for Elected Officials" provision if adopted would impair these vested rights of numerous current and former Metropolitan Government office holders in violation of the Tennessee Constitution. Thus, it is facially unconstitutional and should not be placed on the ballot for a referendum election.

4. <u>The "Protect Promises to Nashville" Provision Facially Violates the Constitutional Prohibition on Impairment of Contracts and the Taking Clause.</u>

As outlined above, under the "Protect Promises to Nashville" provision, "[i]f 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 payments shall be paid, if required by law." This provision violates the Tennessee Constitution's prohibition on impairment of contracts and the takings clause.

a. The provision unconstitutionally impairs existing contracts.

Article I, Section 20 of the Tennessee Constitution prohibits retrospective laws and laws impairing the obligation of contracts. The "Protect Promises to Nashville" provision, if allowed to go into effect, would impose an onerous new restriction on each of the existing Sports Authority Leases with professional sports teams that could constitute a breach by the Metropolitan Government or entitle the other party to terminate. (AR Ex. PP at 0884-0888, 0891 (defining "Initial Term" of lease).) The provision would impair these existing leases by effectively forcing terms into the leases that the parties to the leases did not bargain for.

Accordingly, the provision facially violates the prohibition on retrospective laws and impairment of contracts. *See also* Findings & Conclusions at 33.

b. The provision violates the takings clause by taking property without establishing a public use.

Article I, Section 5 of the Tennessee Constitution provides that "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Tenn. Const., art. I, § 21. Under Tennessee law, eminent domain is to be used sparingly, and the laws of eminent domain are to be "narrowly construed so as not to enlarge, by inference or inadvertently, the power of eminent domain." Tenn. Code Ann. § 29-17-101.

Under the "Protect Promises to Nashville" provision, a professional sports team's loss of property interests and related benefits would constitute a taking of private property by the Metropolitan Government. In such an event, the provision requires that "just payment shall be paid, if required by law." The provision, however, does not establish a legitimate public use for this governmental taking of private property, as is required for a taking to be constitutional. The provision is therefore facially unconstitutional because it violates the prohibition on taking private property without establishing a legitimate public use as required by the federal and Tennessee constitutions. *See Johnson City v. Cloninger*, 372 S.W.2d 271, 284 (Tenn. 1963).

E. <u>The Defective Proposed Amendments Are Not Severable.</u>

The Petition is invalid as a whole because it failed to comply with Metropolitan Charter § 19.01. Even if it had complied with the Charter, it contains multiple amendments that are defective in form and facially unconstitutional. Nothing in the Petition, however, allows this Court to assume that the Petition would have received the requisite number of signatures if one or more of the defective amendments were removed. In such circumstances,

courts have removed the entire petition from the ballot rather than speculate whether petition signers would have signed a different proposal. The Court should do the same here.

The doctrine of elision is generally not favored under Tennessee law. *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985); *Smith v. City of Pigeon Forge*, 600 S.W.2d 231, 233 (Tenn. 1980). The Tennessee Supreme Court has applied the rule of elision to legislation sparingly and only when:

> it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable, . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage.

Gibson Cty., 691 S.W.2d at 551. The Court cautioned that the legislative intent required for elision must be "fairly clear of doubt from the face of the statute" because eliding the act without such intent would be an act of "judicial legislation." *Id.*; *see also Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020) (courts may elide unconstitutional portion of statute "in keeping with the expressed intent of a legislative body"); Findings & Conclusions at 40 (eliding without clear legislative intent would be act of "judicial legislation") (quoting *Gibson Cty.*, 691 S.W.2d at 551). The question of elision can be "extremely close" even where the legislation in question includes an express severability clause. *Id.* (noting Tennessee Supreme Court precedent against elision "despite the existence of a severability clause in the legislation that was before the Court in that case").

The Petition's language indicates that the signers intended for all of the Proposed Amendments to be submitted to the voters. The Petition asked signers to support the "Nashville Taxpayer Protection Act," which encompasses all of the Proposed Amendments. (AR Ex. JJ at 0622.) The Petition expressly conveys that the Proposed Amendments are

aimed at a collective purpose: "*These Charter Amendments* will help stop Metro's fiscal irresponsibility and rein in spending." (*Id.* (emphasis added).)

Furthermore, the Petition tells signers that voters "shall vote" on all of "the foregoing six (6) separate amendments" on election day. (AR Ex. JJ at 0622.) Indeed, the Petition provision invoking the signatories' rights to propose charter amendments expressly states that the "undersigned Davidson County voters *propose the following six (6) Amendments*." *Id.* (emphasis added).[30] Citizens reviewing this Petition were given two options: (a) sign a petition to propose all six amendments or (b) refuse to sign the petition. The signatories did not confirm their support for each Proposed Amendment independently and were given no opportunity to do so.

Tennessee law generally presumes that petitions such as this are limited to proposing a "question" that *will* be placed on the ballot, rather than a menu of options that *may* be placed on the ballot. *See* Tenn. Code Ann. §§ 2-5-151.[31] "If a voter signs a petition in a certain form, he or she should expect to see the proposed ordinance in substantially that same form on the ballot." *In re Jackson Twp. Admin. Code*, 97 A.3d 719, 728 (N.J. App. Div. 2014); *cf.* Tenn. Code Ann. §§ 2-5-102(b)(3)(stating that petition requirements "may not be altered, and a petition on which any of these items has been altered may not be accepted").

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[30] The Petition language quoted above appears in version 1 of the Petition, which is the version signed by the overwhelming majority of signers (11,921 of the 12,369 verified signatures). (AR Ex. JJ at 0622-0623; *compare* AR Ex. AA at 0566 (establishing 12,369 as the total number of verified signatures between the two petitions) *with* AR Ex. QQ & Notice of Stipulations (establishing 448 as the number of verified ("check-marked") signatures attributable to Version 2.).) Version 2 also represented that the "undersigned Davidson County voters propose the following six (6) separate Amendments." (AR Ex. JJ at 0624.)

[31] Petitions for any form of referendum, initiative, or recall "shall contain . . . [t]he full text of *the question* attached to each petition." *Id.* § 2-5-151(e) (emphasis added); *see also id.* § 2-5-151(f)(2) ("*The question* contained in a petition filed less than ninety (90) days before an upcoming general municipal or county election will be placed on the ballot of the following general municipal or county election.") (emphasis added). The form election petitions included in Tennessee Code are directed toward proposing a distinct option or question to the electorate, rather than a menu of options or questions. *See id.* §§ 2-1-151, 2-5-102, 6-1-209, 6-1-301, 9-21-207, 49-2-1206.

At the very least, this Petition would have needed clear language regarding severability and the possibility of elision that citizens reviewing the Petition could read and understand to overcome the standard application of Tennessee law against severability in this context. The Tennessee Supreme Court cited such severability language in dismissing questions about whether Davidson County citizens would have voted to approve the original Metropolitan Charter "if the particular provision in which such group is interested had not been in the charter." *Frazer v. Carr*, 360 S.W.2d 449, 457 (Tenn. 1962). Based on Metropolitan Charter Art. 21,[32] the Court concluded that "[a]ll such groups of persons who allegedly voted for this charter knew, therefore, or must be so presumed, that if the particular provision in which they were personally most interested should be invalid, it would be elided . . . ." *Id.*

The Petition contains no comparable language to inform signers that one or more Proposed Amendments could be subject to elision if legally invalid and left off the ballot entirely. The Petition only states that provisions *within* Amendment 1 are severable from each other and that provisions *within* Amendment 2 are severable from each other. In contrast, the Petition does not state that Amendments 1 through 6 are *severable from each other*.

The Petition (not the Proposed Amendments) states that the Amendments are "separate." Given that the Proposed Amendments were individually numbered and addressed different provisions of the extant Metropolitan Charter, the use of this term is little more than descriptive. The inclusion of the word "separate" does not imply, much less expressly provide, that the Proposed Amendments are severable for purposes of the Petition's

[32] Metropolitan Charter Art. 21 provides:

> The people further declare that to achieve this remedial objection and to aid in the solution of the public problems of a metropolitan area, it is their purpose and intent in its adoption that this charter shall continue in full force and effect even if any of its separable provisions or parts not essential to this remedial objective shall be held unconstitutional or void.

validity. Distinct amendments may appear separately on the ballot to allow *voters* to express their approval or disapproval for each one. Listing distinct amendments separately on a single Petition, however, provides no indication of the *signers'* support for each particular amendment independently. To justify elision, this Court must determine that the Petition would have garnered the necessary signatures if, for example, the tax provision were removed. Stating that the amendments are "separate" is irrelevant to that determination.

As the Chancery Court noted in *4GG-I*, a key factor in applying severability is the uncertainty in determining which provisions of an initiative "induced each voter to sign it. It is not the role of the courts to interfere with the legislative powers granted to [these] citizens." Findings & Conclusions at 42 (quoting *In re Jackson Twp. Admin. Code*, 97 A.3d at 725-28). Two Missouri cases cited in *City of Memphis* emphasize the difficulty of determining the intent of petition signers for purposes of elision in a judicial referendum challenge. 146 S.W.3d at 540.

In *Missourians to Protect the Initiative Process v. Blunt*, the Missouri Supreme Court declined to sever provisions of a referendum initiative that had been removed from the ballot for violating the state constitution. 799 S.W.2d at 832. The court identified several factors that would make a provision severable: "whether the provision is essential to the efficacy of the amendment, whether it is a provision without which the amendment would be incomplete and unworkable, and whether the provision is one without which the voters would not have adopted the amendment." *Id.* Because the proposed amendment had more than one subject, the court concluded that it could neither determine which provisions the petition signers intended to support nor identify the provisions essential to the amendment's efficacy.

In *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, the Missouri Court of Appeals declined to sever provisions of a proposed city charter amendment, despite the city

charter providing that if any charter provision was held void, the validity of other provisions would not be affected. 35 S.W.3d at 470-71. The court explained that it would be "impossible" to determine what the amendment framers or petition signers intended "with respect to whether they considered the unconstitutional language to be essential to the efficacy of the amendment." *Id.* at 471; *see also In re Jackson Twp. Admin. Code*, 97 A.3d at 725-28 (court declined to sever voter initiative, holding that it "cannot discern with any certainty which provisions of an initiative ordinance induced each voter to sign it. It is not the role of the courts to interfere with the legislative powers granted to [these] citizens . . . ."); *Bennett v. Drullard*, 149 P. 368, 370 (Cal. Ct. App. 1915) (redacting petition to remove invalid provisions "would be directing something to be placed on the ballot which the hundreds of voters did not petition for at all"), *cited with approval in Alexander v. Mitchell*, 260 P.2d 261, 268-69 (Cal. App. 1953).

Here, there is no express or implied language indicating that the Proposed Amendments are legally severable from one another. Nor does the language indicating that the provisions may be voted on separately provide any insight into whether the signers would have supported the Proposed Amendments *in part*. As a result, the Petition provides the Court with no guidance on what induced each signature.

As set forth above, most of the Proposed Amendments contain legal defects. Therefore, under Tennessee's doctrine of elision, as well as the multi-state case law discussed above, if the Court finds any one of the Proposed Amendments invalid, all of the Proposed Amendments must be removed from the ballot.

III. THE ELECTION COMMISSION'S DECISION IS ILLEGAL BECAUSE IT UNWARRANTEDLY AND ARBITRARILY RESTRICTED ITS REVIEW OF THE PETITION TO PARTICULAR DEFECTS WHERE THE LAW CONTAINS NO SUCH LIMITATION.

In voting to place the 4GG Proposed Amendments on the July 27, 2021 ballot, the Election Commission limited its review to whether the Petition garnered the requisite number of signatures and three other narrow issues: (1) whether the petitions identified the sections of the Metropolitan Charter to be amended, (2) whether the Proposed Amendments omitted campaign-like language, and (3) whether the Proposed Amendments omitted language suggesting retroactive intent.[33] There is no support in applicable law for this arbitrary narrowing.

The Executive Summary that the Election Commission's legal counsel distributed identified three defects from the first 4GG petition that the Chancery Court's Findings & Conclusions deemed to be "significant problems – both in form and substance – that made it inappropriate to put the proposed 2020 amendment on the ballot." (AR Ex. HH at 0618.) Those few defects and the signature requirement were all the Commission considered on the current 4GG petition. All other issues related to the Petition's validity were deemed beyond the scope of the Commission's authority, according to the Executive Summary.

Metropolitan Charter § 19.01, however, contains numerous requirements that the Election Commission ignored. As described above, the Charter requires a petition to identify "a date" for the referendum election—not two dates. The Commission did not consider this disqualifying defect. The Election Commission likewise ignored the differing versions of the Petition when determining whether the signature requirement had been satisfied. The

[33] Notably, two of the provisions impair existing vested rights and, thus, have retroactive intent. The Election Commission ignored this impact, despite its own standard requiring such a review.

Commission was notified of both Section 19.01 defects before making its decision to place the Petition on the ballot. (AR Ex. PP at 0674-0675, with attachments.)

Moreover, where a petition seeks to accomplish by referendum a matter that may not be accomplished through that means, the petition contains a defect in form that is subject to a pre-election challenge. Findings & Conclusions at 22 ("Thus, the Proposed Act involves a subject matter beyond the scope of the referendum power, and, therefore it is defective in form."), 42-49 ("[I]t is appropriate for courts to resolve legal issues regarding the form and legality of a petition *before* holding the election."). The Commission was notified of these form defects, as well, before making its decision but did not consider any of them. (AR Ex. PP at 0674-0675.) Rather, the Election Commission's counsel advised it to adopt an overly narrow scope of review inconsistent with applicable law and in conflict with the Findings & Conclusions issued in *4GG-I*. The Election Commission's action was therefore arbitrary, capricious, and illegal and should be set aside. Finally, because the Court has authority to review the defects that the Commission failed to review, it should do so now and deem them fatal to the Petition and Proposed Amendments for the reasons described in Section II above.

IV. ALTERNATIVELY, THE COURT SHOULD EXAMINE THE PETITION AND PROPOSED AMENDMENTS FOR DEFECTS IN FORM AND FACIAL UNCONSTITUTIONALITY, CONCLUDE THAT FOUR OF THEM ARE DEFECTIVE AND NOT SEVERABLE, AND ENJOIN THE ELECTION.

Should the Court conclude that the Election Commission's authority is not coterminous with the Court's jurisdiction to review a ballot initiative for form defects and facial unconstitutionality pre-election under *City of Memphis*, the Metropolitan Government requests that the Court review this case as a declaratory judgment action pursuant to Section IV of the *City of Memphis* decision. For that claim, the Metropolitan Government intends to introduce into evidence the same materials presented to the Election Commission, which are contained in the administrative record and labeled as exhibits. Moreover, for the same

reasons outlined in detail in Section III above, the Court should hold that the Petition and Proposed Amendments are defective in form and facially unconstitutional and should enjoin the July 27, 2021 referendum election from proceeding.

CONCLUSION

Despite a second effort, 4GG's Petition and Proposed Amendments suffer many of the same flaws that were fatal to the petition in *4GG-I*. Several of the Proposed Amendments in the Petition at issue here are defective in form and facially unconstitutional in numerous respects. The Metropolitan Government will continue to suffer a distinct and palpable injury if the Proposed Amendment is submitted to voters, including but not limited to the $800,000 cost of the special election itself, voter confusion and loss of confidence in the electoral process, and the substantial financial restrictions that will have to be made to account for the resulting lost tax revenue. These defects in the Petition and Proposed Amendments, and the current injury to the Metropolitan Government, establish that this case is ripe and justiciable under *City of Memphis*, whether the Court concludes the Commission acted illegally under a writ of mandamus or writ of certiorari review, or separately after trial on a declaratory judgment action. Because the Proposed Amendments are not severable, the Court should set aside the Commission's decision and keep the Proposed Amendments off the ballot for a July 27, 2021 election.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered via the CM/ECF electronic filing system and electronic mail to the following:

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on the 3rd day of June, 2021.

A courtesy copy has also been delivered via electronic mail to the following:

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/s/ Allison Bussell
Allison Bussell