No. M2021-00723-COA-R3-CV
No. M2021-00824-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, JOHN COOPER, in his official capacity as Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee, and KEVIN CRUMBO, in his official capacity as Finance Director of the Metropolitan Government of Nashville and Davidson County, Tennessee,

Petitioners/Appellees,

v.

DAVIDSON COUNTY ELECTION COMMISSION,

Respondent/Appellant.

On Appeal from the Chancery Court for Davidson County,
Case No. 21-0433-IV, The Honorable Russell T. Perkins

BRIEF OF APPELLANT, DAVIDSON COUNTY ELECTION COMMISSION

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ISSUES PRESENTED

1. Whether, consistent with *City of Memphis v. Shelby County Election Commission*, a county election commission may rely on substantive constitutional issues in determining whether to place an otherwise-qualifying charter-amendment petition on a referendum ballot and whether the commission's decision not to consider substantive constitutional issues can be deemed arbitrary or capricious?

2. Whether, consistent with *City of Memphis v. Shelby County Election Commission*, a court, before a referendum election, may, as the Trial Court did, rely on "as-applied" (as distinct from "facial") substantive constitutional challenges of proposed charter amendments to stop an election that a county election commission has approved and scheduled?

3. Whether, consistent with *City of Memphis v. Shelby County Election Commission*, a court may validly characterize an "as-applied" challenge to the substantive constitutionality/validity of proposed charter amendments as a challenge to the "form" of the proposed charter amendments, when a county election commission has approved those proposed amendments for voter consideration?

4. Whether the Election Commission erred in its interpretation of the terms of and remedy for a putative violation of the "prescribe-a-date" provision of the Metro Charter?

5. Whether the Trial Court properly applied severability principles when it held that valid proposed amendments may not be presented to voters if even one of multiple, separate charter amendments proposed in a petition is invalid?

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6. Whether there is any material evidence in the record and a rational basis to support the Election Commission's decision to place the proposed Charter amendments on the ballot?

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STATEMENT OF THE CASE

This matter began in the Davidson County Election Commission ("Commission") based on a voter-initiated petition to amend the Metro Nashville Charter. The Commission voted to place the proposed Charter amendments on the ballot. Metro filed a common-law certiorari action to stop the referendum election. The Trial Court held that the Commission's decision was arbitrary, capricious and illegal; it vacated the Commission's decision. The Commission timely appealed.

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STATEMENT OF FACTS

This case arises in the context of public concern about Metro Nashville's fiscal decisions. Metro spending has increased significantly, resulting in a recent 34% annual increase in the property tax rate. (AR1 at 629.)[1] In response to these concerns, the group 4 Good Government (4GG) sponsored a petition ("Petition") to amend the Metro Charter. (AR1 at 629-31.) Over 12,000 Nashville registered voters signed the Petition, meeting Metro Charter's signature requirement. (AR1 at 5, 301.) The Petition proposes that the Nashville electorate vote on six separate Charter amendments covering property taxes, recall of elected officials, taxpayer-funded benefits for elected officials, protection of voter-sponsored Charter amendments, and protection and use of public property.[2]

Upon receiving the Petition, the Commission carefully engaged in a deliberative process, considering the positions of the Petition's proponents and opponents. (AR1 at 6-626.) The Petition's primary

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[1] The record consists of three volumes of the technical record ("TR1," "TR2," and "TR3," respectively), three volumes of the administrative record ("AR1," "AR2," and "AR3," respectively) and one volume of the transcript of the evidence ("TE") filed August 31, 2021. The record has also been supplemented by filings on June 29, 2021, July 6, 2021, July 9, 2021, and September 21, 2021.

[2] The text of the proposed amendments is in the record. (AR1 at 629, 631.) The Metro Charter is in the record. (Sept. 21, 2021, Supp. R. at 6-149.)

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opponent is Metro Nashville, an Appellee here. Because of Metro's position against the Petition, the Commission retained and received advice from independent (undersigned) counsel. The Commission concluded that a referendum election should be held on each of the six separate proposed amendments, scheduling the election for July 27, 2021. (AR1 at 5.)

This is not the first time concerns about Metro's fiscal decisions have motivated 4GG to sponsor a Charter-amendment petition. (Ex. 7 to July 9, 2021, Supp. Appx. at 2.) In 2020, 4GG submitted a petition signed by more than a sufficient number of Nashville voters to qualify for a referendum. (*Id.* at 9.)

The Commission perceived a number of significant deficiencies in the 2020 petition. For example, the 2020 petition did not identify which Metro Charter sections it would amend, and there was no separation of campaign language from amendment text. (*Id.* at 1-8.) The Commission exercised its discretion to seek court guidance through a declaratory judgment rather than voting whether the 2020 proposal should go on the ballot. (*Id.* at 10.)

In 2020, the Trial Court declared that the first 4GG petition could not go onto the ballot. (*Id.* at 4.) That was not a writ-of-certiorari proceeding. The court recognized that "Tennessee law does not give much leeway to election commissions to refuse to hold a referendum, where the required number of voters have signed a petition," and that the limited scope of authority was "[f]or good reason." But the 2020 case constituted a rare "exception[]." (*Id.*)

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The 2020 Chancery Court decision has not been appealed. 4GG learned from its mistakes and went to work on a new petition. The current (2021) Petition reflects many significant changes in response to the Chancery Court's concerns in 2020. Those changes, in part, led the Commission to approve the 2021 petition for a referendum election.

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SUMMARY OF ARGUMENT

This case appears to be the first time a Tennessee court has prohibited a county election commission from holding a referendum election on proposed charter amendments that an election commission has approved for the ballot.[3]

Tennessee has a bright-line rule for pre-election challenges to referendum measures: challenges to a proposal's substantive constitutionality are not ripe pre-election, while challenges to form or facial constitutionality are ripe. *See City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 538-39 (Tenn. 2004). This rule is firmly rooted in the separation of powers under Tennessee's Constitution and the principle that courts do not issue advisory opinions. *See id.* at 537-39. The Trial Court's order violates this rule by relying on substantive constitutionality to stop citizens from voting in an approved referendum election.

In short, there are only two avenues for a court to review, pre-election, an election commission's decision to place proposed charter amendments on the ballot for a vote. One, relating to "form," is non-substantive. The other is a "facial" challenge, the only substantive constitutional ground for pre-election challenge. "As-applied"

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[3] Neither of the parties nor the Trial Court has been able to locate a Tennessee appellate case in which an election commission voted to place a charter amendment proposal on a referendum ballot, and a court blocked that decision. (TE at 1144-45.)

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substantive constitutional challenges, which consider how a law "operates in practice against the particular litigant," *Memphis v. Hargett*, 414 S.W.3d 88, 107 (Tenn. 2013), are unavailable for pre-election challenges.

None of the Trial Court's reasons for blocking the proposed charter-amendment referendum were based on facial invalidity. Instead, the Trial Court characterized "as-applied" challenges, which are substantive and inappropriate pre-election, as defects in "form," which cannot be substantive in character. That was an inappropriate avoidance of the bright-line *City of Memphis* rule.

Trying to shoehorn its decision into the *City of Memphis* rule, the Trial Court characterized its conclusion as a decision about the proposals' form; however, "form" challenges must be non-substantive. *See* 146 S.W.3d at 539 (identifying a caption-rule challenge as a non-substantive "form" challenge, citing *Brown v. State* ex rel. *Jubilee Shops, Inc.*, 426 S.W.2d 192 (Tenn. 1968)). The Trial Court's objections, and those advocated by Metro, are substantive, focusing on the unripe question of whether these proposals, if passed, would be unconstitutional.

The Trial Court used an analytical end-run around the *City of Memphis* rule by re-casting substantive "as-applied" challenges as non-substantive defects in "form." The Trial Court thus made the same mistake that required the Supreme Court to reverse the Chancery Court in *City of Memphis*, holding that the challenge was, improperly, one of substantive constitutionality. 146 S.W.3d at 540.

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The Trial Court not only violated the *City of Memphis* rule, it also violated the restrained writ-of-certiorari standard for reviewing administrative decisions. The Tennessee Constitution's separation-of-powers principle is the basis for the certiorari standard. *See Heyne v. Metropolitan Nashville Bd. of Public Educ.*, 380 S.W.3d 715, 728 (Tenn. 2012). Under certiorari, courts review the record to determine "whether it contains any material evidence to support the decision" of the administrative agency and affirm the decision "if any possible reason can be conceived to justify it." *See In re Cumberland Bail Bonding*, 599 S.W.3d 17, 23 (Tenn. 2020); *Leonard Plating Co. v. Metropolitan Gov't,* 213 S.W.3d 898, 904 (Tenn. Ct. App. 2006) (emphases added).

The decision to place the proposals on the ballot is within the scope of the Commission's authority and must be reviewed under the deferential certiorari standard. *See McFarland v. Pemberton*, 530 S.W.3d 76, 94-95, 104 (Tenn. 2017). Material evidence and justifiable reasons support the Commission's decision. Rather than honor the constitutional separation of powers, the Trial Court improperly substituted its judgment for that of the Commission in violation of the writ-of-certiorari standard.

This Court must enforce the *City of Memphis* rule and require compliance with the certiorari standard by reversing the Trial Court's order, affirming the Commission's decision to place the proposed amendments on the ballot, and directing the Commission to schedule the referendum election.

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STANDARD OF REVIEW

This is a common-law writ-of-certiorari proceeding relating to the Commission's decision to set a referendum election on voter-initiated proposed amendments to the Metro Charter. (TR3 at 296-97.) "A common-law writ of certiorari is an extraordinary judicial remedy." *Heyne*, 380 S.W.3d at 728. "The scope of the judicial review available through a common-law writ is quite limited." *Id.* "The judicial review available under a common-law writ of certiorari is limited to determining whether the entity whose decision is being reviewed (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision." *Id.* at 729. The focus of analysis is not on the substantive components of the underlying proposed charter amendments but on whether the Commission was justified in authorizing a vote on the proposed amendments.

Under certiorari, the Commission's decision must be affirmed "if any possible reason can be conceived to justify it." *Cumberland Bail Bonding*, 599 S.W.3d at 23 (internal cite omitted). Affirmance is required "even though a reviewing court thinks a different conclusion might have been reached." *Id.* (internal brackets and cite omitted). And the justification must only be "conceivable." *Id.* at 24. This mirrors restrained rational basis review under federal law. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (allowing for conjured up, conceivable justifications, often called the "creative law clerk" approach). This restrained standard dictates that a reviewing court not

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"substitut[e]" its judgment for that of the agency if "'any possible reason' exists justifying the action" of the agency. *McCallen v. Memphis,* 786 S.W.2d 633, 641 (Tenn. 1990)(rational basis standard for legislative acts and arbitrariness standard for administrative acts "are essentially the same").

Under certiorari, courts review the record to determine "whether it contains any material evidence to support the decision" of the administrative agency. *Leonard Plating,* 213 S.W.3d at 904. "Review under a common-law writ of certiorari does not extend to a redetermination of the facts found by the board or agency whose decision is being reviewed." *Id.* at 903. That is, "courts may not (1) inquire into the intrinsic correctness of the decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the board or agency." *Id.* at 903-04.

"For the purpose of this inquiry, 'material evidence' is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion." *Heyne*, 380 S.W.3d at 738. "The amount of material evidence required to support an agency's decision 'must exceed a scintilla of evidence but may be less than a preponderance of the evidence.'" *Id.*

In sum, agency decisions reviewed under certiorari "are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." *McCallen*, 786 S.W.2d at 641 "It is hard to imagine a more difficult undertaking than that to overcome the 'any possible reason' standard." *Id.*

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ARGUMENT

I. THE TRIAL COURT RULED ON THE UNRIPE ISSUE OF THE SUBSTANTIVE CONSTITUTIONALITY OF THE PROPOSED AMENDMENTS IN VIOLATION OF THE *CITY OF MEMPHIS* RULE.

The Trial Court violated Supreme Court authority establishing that the substantive constitutionality of a proposed referendum measure cannot be used to keep the measure off the ballot.

In *City of Memphis*, the county election commission refused to place a measure on the ballot because the commission believed the measure was unconstitutional. 146 S.W.3d at 534. The Supreme Court found this to be an error. *Id.* at 540. A pre-election decision on substantive constitutionality is "premature," and both the election commission and the courts must "decline to pass upon the constitutionality of a measure that is not now the law and may never become the law." *Id.* at 538-39.

In the current case, the Trial Court did what the Supreme Court instructed against in *City of Memphis*. The Trial Court used questions about the substantive constitutionality of the Petition to stop the referendum that the Election Commission had authorized. Both Metro and Mayor Cooper, who is also a party to this litigation, have made it clear that substantive constitutionality is the basis on which the proposed charter amendments should be kept off the ballot. (AR1 at 36-37, 578, 579, 583-88; Andrea Fanta, Nashville Mayor's Office, "Comment from Mayor John Cooper on Referendum Decision by Davidson County Chancellor Russell Perkins," https://www.nashville.gov/departments/mayor/news/comment-mayor-

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john-cooper-referendum-decision-davidson-county-chancellor (June 22, 2021) ("[W]e're grateful for a ruling that prevents a small group from hijacking Nashville's future with an unconstitutional California-style referendum"). This Court must reverse the Trial Court's decision.

A. *City of Memphis* established the rule that "pre-election challenges to the substantive constitutional validity of referendum measures are not ripe while pre-election challenges to the form or facial constitutional validity of referendum measures are ripe for judicial scrutiny."

City of Memphis establishes a clear rule about the limits of authority to withhold charter amendment proposals from a vote of the people; these limits apply to both county election commissions and courts. 146 S.W.3d at 539-40 & n.7. The *City of Memphis* rule is that only two types of pre-election judicial challenges are allowed: (1) a non-substantive "form" challenge and (2) a very narrow "facial" (as distinct from an "as-applied") substantive challenge. *Id.* at 539. *City of Memphis* expressly prohibits other challenges, including broader substantive challenges. *Id.* at 539-40. The Trial Court's decision in this case clearly violates the *City of Memphis* rule by declaring (pre-election) several of the proposed amendments substantively unconstitutional.

In *City of Memphis*, a charter amendment proposed a new privilege tax. *Id.* at 534. The county election commission refused to allow a vote because the proposed amendment would be "unconstitutional unless and until the General Assembly authorizes cities to impose such a tax." *Id.* The trial court upheld that decision. *Id.*

The Supreme Court reversed, ordering the proposal on the ballot, even though the General Assembly had not authorized the proposed tax.

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Id. at 533. The Supreme Court analyzed the pre-election authority of both county election commissions and courts to withhold charter amendment proposals from the ballot; it found that, before an election, neither an election commission nor a court has authority to make broad determinations of substantive constitutionality. *Id.* at 537-40 & n.7.

An election commission's authority is limited by the Tennessee Constitution's separation-of-powers principles, and a court's authority is limited both by separation-of-powers principles and also by the principle that courts do not issue advisory opinions. *Id.* A county election commission does not even have the power "to perform an initial or cursory review of the substantive constitutionality of measures to be placed on the ballot for referendum." *Id.* at 536. "Determining the substantive constitutionality of such measures is a function reserved for the judicial branch of government." *Id.* The Court based this portion of its decision on the Tennessee Constitution's strict separation of governmental powers into legislative, executive and judicial branches. *Id.* at 537 (citing TENN. CONST., Art. II, §§1, 2).

Courts must use "caution and restraint . . . in reviewing pre-election challenges to the substantive constitutionality of referendum measures." *City of Memphis*, 146 S.W.3d at 539, n.7. Consistent with the cautious, restrained judicial approach, the Court held that, pre-election, "a challenge to the substantive constitutional validity of the [referendum proposal] is not ripe for judicial determination." *Id.* at 538. Voters may or may not approve the referendum, the General Assembly may or may not allow the tax, and any number of other future events could dictate

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the outcome without the need for court involvement. *Id.*[4] "In short, we decline to pass upon the constitutionality of a measure that is not now the law and may never become the law. For us to do so at this premature stage would violate the established rule that appellate courts will not render advisory opinions, and will not decide theoretical issues based on contingencies that may or may not arise." *Id.* at 538-39 (internal citations omitted).

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

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[4] The list of potential outcome-dictating events in the future is broad:

> Suits attacking the substantive validity of ballot measures involve a double contingency which renders any injury speculative and uncertain… [T]he measure may not pass; only a minority do…. [I]f enacted, the law may be applied in a constitutional manner. Therefore, the uncertainty about the measure's passage and the government's implementation of it creates a double contingency which makes suits attacking the substantive constitutionality of ballot measures unripe for review.

James D. Gordon III and David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 310 (1989), *cited in City of Memphis*, 146 S.W.3d at 539.

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interpreting the State constitution" and further noting that the Court did not disagree with that "holding in *City of Memphis*").

1. The "form" challenge allowed under *City of Memphis* is non-substantive and cannot apply here.

Only two types of pre-election challenges are allowed under the limited scope of *City of Memphis* judicial review. One is a "form" challenge. The other is a "facial" challenge, discussed *infra* at 17-18, which is the only substantive challenge permitted pre-election. The Trial Court did not rule on the basis of a "facial" challenge.

"Form" challenges are non-substantive challenges. *City of Memphis*, 146 S.W.3d at 536. The Supreme Court identified as issues of form "the color of ink and the proper placement of certain titles and candidate names" on the ballot. *Id.* These clearly contrast with issues of substance. *Id.*

The caption challenge in *Brown v. State* ex rel. *Jubilee Shops, Inc.*, is another example of a form challenge: "In that case, the constitutional challenge was to the form of the ordinance, not to its substance." *City of Memphis*, 146 S.W.3d at 539 (emphasis added). In *Brown*, the referendum was broader than its caption. *Id.* The *City of Memphis* Court held that *Brown* presented a "form" challenge, rather than "the hypothetical, unripe question of whether the ordinance, if passed, would be unconstitutional." *City of Memphis*, 146 S.W.3d at 539.

Resolving a "form" challenge does not require a court to determine a proposal's substantive constitutionality. *Id.* at 540. To decide the "form" challenge in *Brown*, for example, the Court was required "merely to review the ordinance to determine if its body was broader than its

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caption." *Id.* Further examples of form challenges drawn from *City of Memphis* would require a court simply to determine the color of ink used or placement of names and titles on a ballot. *Id.* at 536.

Substantive challenges, on the other hand, require a much deeper analysis. For example, the objections raised in *City of Memphis* required the Court to analyze the constitutional allocation of taxing powers. *Id.* at 540. That type of substantive pre-election challenge "is simply not ripe for judicial determination." *Id.*

This Court must apply the *City of Memphis* rule and ensure that "form" review of referendum proposals remains non-substantive. The Court must not allow such "form" challenges to be used as an end-run around the clear admonition from *City of Memphis* that substantive constitutional challenges are not ripe pre-election. Metro's claims and the Trial Court's ruling are not faithful to and do not comply with the restrictions in *City of Memphis* that "form" reviews must be non-substantive. *City of Memphis* clearly states the law in Tennessee and delimits the authority of courts to overturn election commission decisions pre-election.

2. The "facial" challenge allowed under *City of Memphis* is a very narrow substantive challenge and cannot be successfully used here.

Under the *City of Memphis* rule, the second allowed pre-election challenge to a referendum proposal is an extremely narrow "facial" challenge. 146 S.W.3d at 539. A facial challenge is the only substantive challenge allowed, pre-election, under the *City of Memphis* rule, *id.*, and it is the most difficult challenge to mount successfully. *United States v.*

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Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge… is… the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

A facial challenge requires that there be no set of circumstances under which a proposal could be found valid – that is, the challenged provision must be invalid across the board in all situations. *Fisher v. Hargett*, 604 S.W.3d 382, 396-97 (Tenn. 2020) ("In a facial challenge, the plaintiff contends that there are no circumstances under which the statute, as written, may be found valid").

A facial challenge under the "no set of circumstances" standard is distinct from an "as-applied" challenge, which is fact-specific and contextual. An "as-applied" challenge considers how a law "operates in practice against the particular litigant and under the facts of the instant case." *Hargett*, 414 S.W.3d at 107. To allow only a facial challenge, pre-election, as *City of Memphis* does, is to disallow an "as-applied" pre-election challenge.

To summarize, in *City of Memphis*, the Tennessee Supreme Court established the rule for pre-election challenges to referendum proposals. 146 S.W.3d at 540. Only two such challenges are recognized: (1) "form" challenges, which are non-substantive, and (2) facial challenges, which are a very narrow set of substantive challenges requiring the challenger to establish that there is no set of circumstances in which the proposal would be valid. *Id.* Other challenges – *e.g.*, "as-applied" contextual

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challenges – are not ripe and violate separation-of-powers principles. *See id.* at 537-39.

B. The Trial Court's decision violates the *City of Memphis* rule because it rests on broad substantive challenges to the proposed Amendments, incorrectly labeled as "form" challenges.

The Trial Court did not and could not rule on the basis of "facial" challenges. Under the label of "form" challenges, the Trial Court incorrectly relied on broad "as-applied" substantive objections to the charter-amendment proposals to block them from access to a referendum election. That violated the *City of Memphis* rule.

In its objections to the proposals, Metro parroted the "form" and "facial" challenge language from *City of Memphis*, but a closer look reveals that Metro's words hide the true nature of its objections. The Trial Court's opinion also used the word "form" to describe the objections it sustained, but the "form" objections sustained by the Trial Court are in fact substantive challenges, not "form" challenges at all.

This is not the first time a litigant has characterized its substantive constitutional challenges as "form" challenges to avoid the *City of Memphis* rule. *See, e.g. City of Memphis*, 146 S.W.3d at 540 ("Regardless of its assertions to the contrary, the Commission's challenge is to the substantive constitutional validity of the Ordinance, rather than merely to the facial or procedural legality of the measure.") This Court must do as the *City of Memphis* Court did, looking beyond the labels to recognize that the purported "form" objections sustained by the Trial Court are

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actually substantive objections that cannot be brought pre-election under the *City of Memphis* rule.

1. The objections to proposed Amendment 1 are broad substantive objections that are not allowed, pre-election, under the *City of Memphis* rule.

Metro's objection to proposed Amendment 1 presents "the hypothetical, unripe question of whether the [proposals], if passed, would be unconstitutional." *City of Memphis*, 146 S.W.3d at 539. The Trial Court's reliance on the amendment's substantive unconstitutionality to block the election violates the *City of Memphis* rule.

The Trial Court stated that, if proposed Amendment 1 were enacted, the Amendment would take action not "permitted by the Tennessee Constitution, state law, or Metropolitan Charter." (TR3 at 1093.) It is hard to imagine a more substantive challenge – the hypothetical question whether the Amendment, if passed, would be unconstitutional. *City of Memphis*, 146 S.W.3d at 539.

The substantive nature of the Trial Court's decision is further confirmed by the Trial Court's analysis of Amendment 1 based on the constitutional allocation of taxing powers. The Supreme Court has already held that determining the constitutional allocation of taxing powers is a substantive analysis. *Id.* at 540. In *City of Memphis*, the tax referendum's opponents argued that the proposed tax "is unconstitutional unless and until the General Assembly authorizes" the local governing body to enact it. *Id.* at 534. The Supreme Court held that the taxing power analysis is improper pre-election, but the Trial Court in this case engaged in that exact analysis, stating that proposed

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Amendment 1 "is an unauthorized seizure" and "usurps legislative authority." (TR3 at 1098-99.) *City of Memphis* makes abundantly clear that the substantive constitutional question of how the taxing power is allocated is not a ripe question, pre-election. 146 S.W.3d at 538.

2. The objections to proposed Amendments 3 and 6 are also as-applied substantive objections that are not allowed, pre-election, under the *City of Memphis* rule.

The Trial Court's rulings against proposed Amendments 3 and 6 are also based on the substance, not the form, of the proposals. These are not "form" challenges. They turn on Metro's claim that certain conditions attached to the non-use of facilities constitute an unconstitutional taking.

The Trial Court found that proposed Amendment 6 constituted an unconstitutional taking of private property. The constitutional takings analysis (of a "regulatory taking," not eminent domain) is a balancing test based on the totality of facts and circumstances. *Penn-Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Phillips v. Montgomery County*, 442 S.W.3d 233, 239-40 (Tenn. 2014). By its very nature, this test is substantive and has to be done "as-applied" to the facts of the case. Treating a regulatory taking claim, which involves an ad hoc, situation-specific balancing process, as a "form" violation is inappropriate; it involves substantive constitutionality considerations analyzed on an as-applied, not facial, basis. And since the regulatory takings challenge is not a facial challenge, but an as-applied challenge, the takings claim cannot be entertained by a court pre-election under *City of Memphis*.

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"Regardless of its assertion to the contrary," Metro's challenge is to the "substantive constitutional validity" of proposed Amendment 6. *City of Memphis*, 146 S.W.3d at 540. Metro's takings argument, as adopted by the Trial Court, is substantive and, thus, is not a "form" challenge. The challenge to proposed Amendment 6, in whatever way it is labeled by Metro and the Trial Court, is not ripe at this time; the Trial Court's ruling on it is improper under *City of Memphis*, 146 S.W.3d at 540.

Under the label of "form" defect, the Trial Court held that proposed Amendments 3 and 6 use undefined terms, rendering them unconstitutionally vague. (TR3 at 1091-92.) Vagueness challenges are as-applied, substantive challenges, not "form" challenges. The Trial Court's use of vagueness to withhold the proposals from the voters violates the *City of Memphis* rule.

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

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State v. Crank, 468 S.W.3d 15, 24-25 (Tenn. 2015)("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand") (internal citation omitted). *See also Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys.*, 863 S.W.2d 45, 49 (Tenn. 1993) (court must "examine the statute or standard to see whether it is vague as applied to the affected party").

Substantive vagueness analysis of proposed Amendments 3 and 6 must proceed on an "as-applied" basis, and, thus, is not currently ripe under the *City of Memphis* rule; the Trial Court erred in ruling on them. At Metro's urging, the Trial Court undertook a substantive, constitutional analysis of these provisions. In doing so, the Trial Court entered a premature opinion on the hypothetical, unripe question of whether these amendments, if enacted, would be substantively unconstitutional. This violated the *City of Memphis* rule and requires reversal by this Court.

C. Even if Metro's substantive challenges were not premature, the proposed Amendments withstand substantive scrutiny.

City of Memphis states in no uncertain terms that non-facial substantive challenges are off-limits pre-election, 146 S.W.3d at 538, and the Trial Court's decision should be reversed on that basis. Even so, the

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Commission provides the following analysis as a response to the Trial Court's substantive position on proposed Amendments 1, 3, and 6.[5]

1. Proposed Amendment 1 withstands substantive scrutiny.

Amendment 1 proposes to amend §6.07 of the Metro Charter pursuant to the amendment provisions in §19.01 of the Charter – specifically by using the voter-initiated amendment process. The substantive constitutional question presented is whether proposed Amendment 1 is a valid exercise of the Charter-amendment authority. The answer is "yes."

When addressing local authority, the first question is whether there is a legal source for the exercise of such authority. 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §10:3 (3d ed.) ("municipalities…possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred"). If the first question is answered affirmatively, the second question is whether there is a limitation on the exercise of that authority. *Id.* at §10:11 (noting that express local authority to perform an act includes "defined limits").

[5] The Trial Court's substantive discussion of proposed Amendments 1, 3, and 6 comprises fully one-third of the opinion. That extensive discussion of the substantive merits of the proposed Amendments further confirms that the Trial Court's decision violates the *City of Memphis* rule as an opinion on unripe substantive legality issues. 146 S.W.3d at 540.

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In this case, the answer to the first question is "yes" because there is an appropriate source of authority for a voter-initiated referendum. The critical issue for substantive constitutional analysis is the second question: whether there is a limitation on the authority for a voter-initiated referendum to amend the Metro Charter as proposed by Amendment 1. The answer to this second question is "no." Amendment 1 is, thus, a proper exercise of authority. Even if it were within the authority of the Trial Court to engage in a pre-election substantive analysis, the Trial Court answered the second question incorrectly.

a. Question 1: Is there is a source of authority to amend the Charter, as proposed by Amendment 1? Answer: Yes.

To determine whether there is a source of authority for proposed Amendment 1, one must start with T.C.A. §7-2-108, establishing the requirements for a metropolitan charter. A metropolitan government charter must provide for "the method and procedure by which the charter may be subsequently amended." T.C.A. §7-2-108(a)(20).

Further, popular approval of a metropolitan charter amendment through a vote of the people is a prerequisite under this state enabling legislation. *Id.* No charter amendment can become effective until "submitted to" and "approved by" the qualified voters of the metropolitan government. *Id.*

Metro Charter §19.01 implements this source of authority. It provides two methods for proposing Charter amendments: (1) by the Metro Council or (2) by petition of 10% of the number of registered voters who voted "in the preceding general election." Metro Charter §19.01. In

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either case, and in accord with state law, there must be voter approval for a proposed Charter amendment to become effective. This role for popular democracy is not foreign to Tennessee law but baked into it through the state enabling legislation and the Metro Charter.

The authority to amend the Metro Charter on the subject addressed by Amendment 1 is apparent from the Charter itself. Voter-initiated amendment of the Metro Charter's tax-levy provisions has already occurred and is currently part of the Charter. Charter §6.07, which proposed Amendment 1 would amend, was amended by voter-initiated process in 2006 to address the same subject currently before the Court.

In 2006, Metro's voters adopted an amendment to add paragraph 5 of §6.07, which states: "real property tax rates shall not exceed the maximum rates approved by the voters of the county in a referendum." Metro Charter §6.07, ¶ 5. Voters are included in the process and afforded a role in the tax-rate-setting process. Existing §6.07 also establishes a baseline rate: "The real property tax rates in effect as of November 7, 2006." *Id.* Proposed Amendment 1 is consistent with the structure and approach of existing §6.07 of the Metro Charter, which it seeks to amend; Amendment 1 merely alters the baseline rate and establishes a different trigger for a referendum to approve tax rates – a tax-rate increase of 3% above the baseline rate.

Existing §6.07 recognizes the importance of "always… consider[ing]" the "willingness and ability of citizens to bear the burden of tax increases," with the referendum process serving, through direct voter participation, as an important input and check on tax-rate increases. Metro Charter §6.07, ¶ 5.

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Although Metro perceives proposed Amendment 1 as being only about taxes, Amendment 1 is also about Metro's spending.[6]

Tennessee law recognizes the link between taxes and spending, and a constraint on the ability to raise revenue is a way of restraining the rate-of-spending growth. Under state law, the tax rate must be "sufficient" to pay for the cost of governmental services. T.C.A. §§7-2-108(a)(8) & (a)(10). This is a duty or obligation of Metro that must be provided for in the Metro charter. In conformity with Sections 7-2-108(a)(8) & (a)(10), the tax rate under Metro Charter §6.07, paragraph 2, is derivative, based on the amount of spending approved in Metro's budget. Metro Charter §6.07, ¶ 2. The tax rate "shall be such that a reasonable estimate of revenue from the levy," and from other available revenue sources, "shall at least be sufficient . . . to equal the total amount appropriated" in the approved budget. *Id.* The link between expenditures and tax rates is explicit, as "the tax levy ordinance shall be the next order of business of the council after the adoption of the operating budget." *Id.*, ¶ 1.

This link between expenditures and tax rates in the Metro Charter is required by state law, which provides that "[i]mmediately after passage of the appropriation [spending] resolution or budget ordinance,

[6] This is evident from the Petition itself, (AR1 at 629 ("Metro Government's spending has exceeded its revenues for years – and the 34-37% Property Tax Increase is just a *symptom* of the problem. These Charter Amendments will help stop Metro's fiscal irresponsibility and rein in spending.") (emphasis in original))

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the governing body shall pass a resolution or ordinance levying upon all property subject to taxation, a tax rate sufficient to produce the sum necessary to balance the budget." T.C.A. §9-21-403(b). That is, the governing body has an obligation or duty to levy taxes that are sufficient to pay for the spending so as to balance the budget.

Existing §6.07 of the Metro Charter not only contemplates a role for a popular vote in the tax-setting process but also quite explicitly recognizes that some popular input in the tax-setting process is an important tool for voters to place limits on the growth rate of government spending. Metro Charter §6.07, ¶ 5. Placing limits on the rate-of-growth in government spending is also consistent with Article II, §24 of the Tennessee Constitution, which provides for a limitation on state spending so that "the rate of growth of appropriations from state tax revenues" cannot "exceed the estimated rate of growth of the state's economy." TENN. CONST., Art. II, §24.

In sum, there is an appropriate source of authority for proposed Amendment 1, based on state law, the Metro Charter, and existing practice as reflected in Charter §6.07. The objective of Amendment 1 – establishing a constraint on the rate-of-growth of government spending – is consistent with an analogous provision of the Tennessee Constitution.

b. <u>Question 2: Is there is a limitation on the authority to amend the Charter, as proposed by Amendment 1? Answer: No.</u>

The Court should keep in mind that this substantive constitutional analysis is hypothetical and not ripe, pre-election, under the *City of*

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Memphis rule. The Commission offers this analysis simply to respond to the inappropriate substantive position taken by the Trial Court. With that understanding, the second question in the substantive analysis is whether there is a limitation on the authority to amend the Charter as proposed by Amendment 1. The answer is "no."

Limitations on authority are important, and even if local government has an appropriate source of authority – in this case to amend its Charter with voter approval – it cannot act if there is a limitation on that authority. This is true for charter cities, *see, e.g.*, T.C.A. §§5-1-210(5) & (6) (noting that charter powers are to be consistent with general law), for home rule cities, *see, e.g.*, TENN. CONST. Art. IX, §9 (noting that no home rule charter provision shall be effective if inconsistent with state law), and, at least implicitly, for consolidated governments like Metro. MCQUILLIN, *supra*, §10:11.

There is no provision in either the state enabling legislation or the Metro Charter that restricts the subject matter of a Charter amendment that would be inconsistent with proposed Amendment 1.

The Tennessee Attorney General addressed the question whether a home rule city "may amend its charter to call automatically for a

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referendum election to consider all proposed increases in city tax rates." Tenn. Att'y Gen. Op. No. 03-019. The Attorney General concluded that there was an ample source of authority for such an amendment. Consequently, "such a charter amendment would be permitted . . . unless it was otherwise in conflict with a statute." *Id.* Importantly here, the Attorney General found that the proposed charter amendment did not run afoul of general law. That is, there is no general state law limitation on a charter amendment that subjects increases in city tax rates to a vote of the people. Since there is a source of authority for a charter amendment referendum and no conflict with general law, Amendment 1 should qualify for submission to a vote of the people.

T.C.A. §2-5-151 establishes some limitations on referendum elections for a governmental entity that has a charter. However, the limitations contained in §2-5-151 expressly "do not apply" to Metro. T.C.A. §2-5-151(*l*). These limitations do not constrain Metro's Charter-amendment process.

The Trial Court relied on T.C.A. §67-5-102(a)(2) for a limitation on the authority to amend the Charter. (TR3 at 1093-94.) Section 67-5-102(a)(2) states that the property tax rate "shall be fixed by the county

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legislative body of each county." The question is whether Section 67-5-102(a)(2) serves as a limitation on the ability of Metro to amend §6.07 of its Charter as provided in proposed Amendment 1. For two independent reasons – the first procedural and the second substantive – the answer is "no."

First, the procedural reason: interpretation of T.C.A. §67-5-102(a)(2) is a substantive question beyond the scope of the Court's authority under *City of Memphis*. Interpreting T.C.A. §67-5-102(a)(2) does not qualify as a non-substantive "form" challenge under *City of Memphis*. The Trial Court applied the label of "form" defect to the substantive interpretation of §67-5-102(a)(2) and withheld Amendment 1 from the ballot for that reason. (TR3 at 1093.) However, application of §67-5-102(a)(2) to the facts of this case goes well beyond the scope of pre-election judicial review allowed under the *City of Memphis* rule. The *City of Memphis* case involved a proposed charter amendment that was deemed *ultra vires* by state and county election officials, but the Supreme Court held that neither the Election Commission nor the Court was permitted to consider that substantive constitutional issue in a pre-

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election challenge. 146 S.W.3d at 534, 538-40 & n.7. So too with proposed Amendment 1.

Second, the substantive reason: T.C.A. §67-5-102(a)(2) does not create an exclusive entitlement for the Metro Council. The Trial Court and Metro err when they interpret §67-5-102(a)(2) to create an entitlement for the Metro Council that precludes a vote on a Charter-amendment referendum. Contrary to Metro's contentions and the Trial Court's assertion, no Metro Council authority is usurped by proposed Amendment 1.

Section 67-5-102(a)(2) does not preclude a referendum on proposed Amendment 1. It does not create in the Metro Council an exclusive right but, instead, a Council obligation or duty to set a tax rate sufficient to fund government operations. Nothing in §67-5-102(a)(2) precludes modifying existing Charter §6.07, which already constrains tax-rate increases without a democratic vote of the people and sets a baseline for determining the requirement for a vote of the people.

Metro regards the tax-rate-setting power as an exclusive power and right of the Council without room for citizen involvement, but Metro and

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the Trial Court cite no Tennessee appellate decision as authority for that claim.

The Council is "required" to "impose" a tax and to "fix the rate thereof." This is the Council's "duty," T.C.A. §5-5-123, as the "governing body" for Metro, to levy taxes to raise revenue "sufficient to produce the sum necessary to balance the budget." T.C.A. §9-21-403(b); *see also* T.C.A. §67-5-510 ("It is the duty of the county legislative bod[y]" to "fix the tax rates" on property within the county) (emphasis supplied). The Trial Court regarded this obligation/duty as a form of legislative entitlement that would be "usurp[ed]" by Amendment 1, which it called, clearly substantively, "an unauthorized seizure" of Council power. (TR3 at 1098-99.)

There is a big difference between establishing a right and establishing a duty or obligation. *See*, *e.g.*, *Newsom v. Vanderbilt Univ. Hosp.*, 653 F.2d 1100, 1120-21 (6th Cir. 1981) (holding that hospital had obligation under Hill-Burton funding to provide indigent-patient care, but no "right" triggering procedural due process protections arose from that obligation); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (distinguishing clearly established rights from obligations or duties that

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create "benefits" or interests for procedural-due-process purposes). A right can be usurped, perhaps, but an obligation is a different concept.

If Metro fails to fulfill its obligations or duties, appropriate enforcement actions could be triggered, but the notion of "usurpation" or "seizure" is quite foreign to the concept of obligation and duty.[7]

The Trial Court is mistaken in its belief that the people are usurping a legislative entitlement through a limited form of direct democracy. Here, the exercise of a popular vote is mandated by both T.C.A. §7-2-108(a)(20) and Metro Charter §19.01. *Supra* at 25-26. Under Tennessee law, setting the property tax rate is not a legislative right being seized or usurped by the people through a referendum but an obligation or a duty, which can be and is constrained and shared.

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[7] The Trial Court emphasized that T.C.A. §67-5-103, authorizing municipal property taxation, "does not expressly delegate the authority to a *municipal legislative body*." (TR3 at 1095 (emphasis in original).) Section 67-5-103 is not a delegation of exclusive power but the recognition of a city's authority to tax. Counties have obligations to raise revenue; cities have authority to do so but not the same obligation or duty. Accordingly, there is no need to designate in state law a particular municipal body as having the obligation or duty to raise revenue.

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Tennessee law provides a comprehensive mechanism for state oversight and enforcement of Metro's obligations to assure that expenditures and revenues balance. These elaborate oversight and audit provisions and procedures contradict the contention that tax-rate setting is the exclusive and unfettered prerogative of the Metro Council. Further, these provisions illustrate the extent to which the tax-rate-setting duty is constrained and shared.

Oversight and enforcement responsibility rests with the Comptroller of the Treasury. *See, e.g.,* T.C.A. §4-3-304 (Comptroller's powers and duties); T.C.A. §4-3-305 (audit authority). The Comptroller has authority to secure data access and to audit to assure that Metro is adhering to its fiscal duties. T.C.A. §8-4-109(a)(2). The Comptroller must ensure that revenues and expenditures remain in balance. T.C.A. §9-21-403(a)(1). To that end, the Comptroller has authority to approve local government budgets, ensuring that the balanced-budget requirement is satisfied. *Id.* The Comptroller is empowered to "direct" local governments to "reduce expenditures" or "make additional tax levies sufficient to comply" with state law. T.C.A. §9-21-403(c).

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Under these oversight and enforcement provisions, it is clear that state law imposes obligations and duties on the Metro Council, and those obligations are overseen and enforced by the Comptroller, who has authority to alter spending and tax rates to satisfy the duty to balance spending and revenues. This is clearly a regime of duty and obligation, policed by a state official; the Metro Council has no exclusive tax-rate-setting "right."

There is a shared responsibility or duty to adjust both tax rates and government spending, with different actors having significant roles in the process. This includes a voice for the voters in the context of amending the Charter, using the Charter to constrain the Council's legislative power to tax and spend. There is no appellate court case that holds that the Metro Council has an exclusive, unfettered right to set rates, devoid of constraints by the state or the people through Charter amendment. Such would be inconsistent with the framework of shared responsibility and checks and balances found in state law.

In addition, the Trial Court's assertion that §67-5-102(a)(2) is a limitation on the Charter-amendment authority does not accord with existing reality. As discussed *supra* at 26, Amendment 1 proposes to

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amend Charter §6.07, which already provides a role for voters, stating that "real property tax rates shall not exceed the maximum rates approved by the voters of the county in a referendum." Metro Charter §6.07, ¶ 5. Section 6.07 then sets a baseline: "The real property tax rates in effect as of November 7, 2006, shall be the maximum rates allowed until the first referendum occurs." *Id.* Proposed Amendment 1 revises Charter §6.07 to set a different baseline and referendum trigger. It does not legislate, but sets parameters or constraints on legislation, as Charter provisions are designed to do. The proposed modification of §6.07 in Amendment 1 is an appropriate means of restraining spending increases and tax-rate increases through the Charter.

To label Amendment 1 as a usurpation or seizure of power – by the people as against the legislative body – turns things on their head. The Tennessee Constitution states, as a first principle, "[t]hat all power is inherent in the people." TENN. CONST., Art. I, §1. Metro's assertion that this is popular usurpation or seizure of power by the people through direct democracy is, ultimately, highly misguided (and undoubtedly substantive in character). Charter §19.01 provides for a measure of direct, popular democracy through Charter amendment, consistent with

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the state enabling statute, T.C.A. §7-2-108(a)(20). This is a mild check on representative government, subjecting decisions of elected representatives to modest constraints of popular democracy – not to legislate but to impose checks and balances on the legislative process as allowed for a Charter provision.

Using the Charter as a vehicle for cabining the rate of growth in spending, as Charter §6.07 already does, is entirely consistent with the regime of shared authority under Tennessee law. The Metro Council can legislate regarding tax rates, fulfilling its obligation or duty to fund government operations, but its power is not unfettered; the Charter can and already does place some constraints or guardrails on the Council's unfettered power regarding not only the growth in tax rates but also the growth in rates of spending growth. Metro Charter §6.07, ¶ 5. Proposed Amendment 1 is a modification and a refinement of the existing restraints; it is consistent with the nature of what a Charter provision has done before and can continue to do, albeit in modified form.

While the foregoing substantive analysis establishes the validity of proposed Amendment 1, it also reinforces the conclusion that this is not a "form" challenge. The Supreme Court cited examples of ink color, name

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and title placement on ballots and a caption rule to illustrate the concept of a "form" challenge. *City of Memphis*, 146 S.W.3d at 536, 539. The lengthy analysis of laws unrelated to elections required for a substantive determination on this proposal (and this is just one of six) is not what the Supreme Court allows county election commissions and courts to address pre-election. *Id.* at 540 ("Regardless of its assertions to the contrary, the Commission's challenge is to the substantive constitutional validity of the Ordinance, rather than *merely* to the facial or procedural legality of the measure. This challenge is unlike the challenge in *Brown* which required this Court *merely* to review the ordinance to determine if its body was broader than its caption in violation of Article II, section 17 of the Tennessee Constitution. Deciding the constitutional challenge in this case would require *not only* review of the City's existing charter to determine how broad the City's taxing powers are at present, *but also* review of the Ordinance to determine whether it would, upon adoption, actually enlarge or increase the City's taxing powers in violation of Article XI, section 9. In short, the challenge in this case strikes at the substantive constitutional validity of the Ordinance. Thus, as previously

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stated, this pre-election challenge simply is not ripe for judicial determination.") (emphasis added) (footnote omitted).

This Court must enforce the *City of Memphis* rule against pre-election substantive challenges[8] by reversing the Trial Court's decision, affirming the Commission's decision to place these proposals on the ballot, and directing the Commission to hold the election that the Trial Court blocked. Even if *City of Memphis* does not preclude the substantive objection to Amendment 1 asserted by the Trial Court, the foregoing analysis establishes that the substantive objection should be rejected.

2. <u>Substantive analysis of proposed Amendment 6 must proceed on an as-applied, not a facial, basis, and, because it provides for compensation if required, withstands substantive scrutiny.</u>

Again, a substantive analysis of the proposals is inappropriate at this time under the *City of Memphis* rule. However, proposed Amendment 6 would withstand substantive scrutiny.

Amendment 6 proposes to restrict professional sports teams' use or non-use of publicly-owned property through a new Metro Charter section. If the non-use conditions arise, *i.e.*, if a sports team leaves Nashville or

[8] The Trial Court did not and had no basis to rely on "facial" challenges, which are the only substantive challenges permitted under *City of Memphis*.

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does not play for 24 consecutive months, the facilities revert to public property. Proposed Amendment 6 provides for just payment to any affected professional sports team, if required by law. See note 2, *supra*. As with Amendment 1, discussed *supra* at 25-26, state law authorizes charter amendments, and the Trial Court did not identify any limitation on that authority that would invalidate Amendment 6.

Instead, the Trial Court focused on Metro's claim that Amendment 6 would effect a taking[9] (a substantive, as-applied challenge the Trial

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[9] The Trial Court also found, erroneously, that Amendment 6 effects a regulatory taking regarding the Sports Authority, which is "separate" from Metro. (TR3 at 1100.) That is an inappropriate, as-applied substantive challenge, also rebutted by significant authority that the Sports Authority is not separate from Metro. Under Tennessee law, the Sports Authority is under the control of Metro from its birth, through its life and even in its death. The Sports Authority could not be formed until an application was filed with Metro seeking permission to apply for its incorporation. T.C.A. §7-67-104. The Sports Authority could not be formed until the Metro Council adopted a resolution authorizing the application to proceed and approving the form of its corporate charter. *Id.* The Sports Authority is a public instrumentality of Metro. T.C.A. §§7-67-109; 7-67-114. The Sports Authority performs public functions on behalf of Metro. T.C.A. §7-67-114. The Metro Council appoints the directors of the Sports Authority. T.C.A. §7-67-108(a)(1). The Metro Council, the Mayor or other officials of the Metropolitan Government have the ability to dissolve the Sports Authority. T.C.A. §7-67-119.

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Court inappropriately labeled as a "form" challenge). (TR3 at 1100.) Under a hypothetical substantive analysis (inappropriate pre-election), Amendment 6's provision for just compensation cures any constitutional defect related to a "taking" claim.

The Trial Court contended that "eminent domain" is at issue, (TR3 at 1100), yet proposed Amendment 6 is not a physical appropriation via eminent domain but a regulatory restriction on use. Eminent domain is a red herring.

If anything, the type of taking alleged here is a (premature) claim of a regulatory taking, where a challenger asserts that conditions placed on the use of property may be excessive in relation to their overall benefits. A "different standard [other than eminent domain] applies" to claims of a regulatory taking based on a "use" restriction – the *Penn-Central* "flexible" balancing test that takes into account and weighs multiple factors in determining whether a taking exists. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071-72 (2021); *Penn-Central*, 438 U.S. at 124.

Regulatory takings are, by definition, not form or facial challenges because they are analyzed substantively on a case-by-case, as-applied, totality-of-the-circumstances basis using *Penn-Central*'s balancing test. The Tennessee Supreme Court has recognized that the *Penn-Central* standards apply to regulatory takings and require "careful examination

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Finally, even the Sports Authority's name establishes that it belongs to Metro and is not separate: "the Sports Authority of the Metropolitan Government of Nashville and Davidson County."

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and weighing of all the relevant circumstances" based on "ad hoc factual inquiries." *Phillips*, 442 S.W.3d at 240 (internal citations omitted). Tennessee law on regulatory takings follows the federal standards. *Id.* at 244 ("The Tennessee Constitution encompasses regulatory takings to the same extent as the . . . United States Constitution").

Takings and Just Compensation Analysis. As applied to state and local governments, the Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause does not forbid governmental expropriation in the public interest; it "merely requires the government to pay for it." NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 611 (20th edition 2019). Courts do not typically enjoin an alleged governmental taking, but they can require government to compensate a property owner if there is a taking.

While the Fifth Amendment "confirms the state's authority to confiscate private property," it "imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation*, 538 U.S. 216, 231-32 (2003). Proposed Amendment 6 satisfies these requirements, fulfilling a public purpose and providing just compensation if legally required.

The United States Supreme Court recognizes "*per se*" ("facial") regulatory takings in two circumstances. First, a permanent physical occupation of private property constitutes a *per se* taking, necessitating payment of just compensation for the property owner's loss. *Loretto v.*

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Teleprompter CATV Corp., 458 U.S. 419 (1982). Second, a *per se* taking arises when a regulation denies all (not just some) economically beneficial use of property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The impairment of property alleged to occur from proposed Amendment 6 does not fit into either category of *per se* taking. There is no permanent physical invasion, and there is no deprivation of all economically beneficial use if the conditions in proposed Amendment 6 are satisfied. The *Penn Central* balancing analysis controls.

A regulatory taking under *Penn Central* can trigger an obligation to compensate the property owner for its loss. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). But such regulatory takings claims are not a challenge to the facial validity of a particular regulatory restraint. Therefore, a regulatory taking claim is not a claim of facial invalidity and cannot serve as the basis for precluding ballot access for proposed Amendment 6 under *City of Memphis*. After an extensive fact-intensive balancing analysis, a regulatory taking claim can trigger, in an as-applied challenge, an obligation to pay just compensation. The 2021 proposed Charter Amendment 6 provides for such compensation as warranted.

Public Use Analysis. Metro has asserted that proposed Amendment 6 violates the Fifth Amendment, as applied to the states, because it does not further a "public use." Metro's assertion ignores that the United States Supreme Court has, as a practical matter, virtually eliminated the "public use" restriction on government confiscation of private property.

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

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

Tennessee follows the substitution, in practice, of "public purpose" for "public use." *Phillips*, 442 S.W.3d 233, 243, n.13 (Tenn. 2014) (Tennessee counterpart to the takings clause of the federal constitution "requir[es] just compensation when private property is taken for public purposes" and acknowledging statutory narrowing of eminent domain power in response to *Kelo*).

In short, Metro's reliance on a lack of "public use" under the Fifth Amendment is inconsistent with over 65 years of federal and Tennessee constitutional case law.

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Proposed Amendment 6 provides that unused facilities will revert as public property for other public purposes and benefits under certain circumstances. This quite easily satisfies the *Kelo* constitutional standards. Any claim of unconstitutionality will be situational and well off into the future, until the conditions on use specified in proposed Amendment 6 occur (leaving Nashville or not playing a game for 24 consecutive months). In any event, no taking will have occurred until and unless the non-use preconditions have been satisfied.

In sum, this issue will not arise until well into the future, if ever, and consideration of an as-applied challenge, pre-election, violates *City of Memphis*. No cause of action for a regulatory taking accrues "before the government has reached a 'final' decision" regarding the scope of the regulation. *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226, 2228 (2021)(*per curiam*)("When a plaintiff alleges a regulatory taking," a court "should not consider the claim before the government has reached a 'final decision'"; until such a "final" decision has been reached, "a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation"). At present, no team has violated or even threatened to violate the conditions that would trigger reversion. If a regulatory taking should arise and become "final," Amendment 6 provides the constitutional remedy of just compensation.

3. <u>Substantive analysis of Metro's vagueness challenges to proposed Amendments 3 and 6 is currently impossible.</u>

As discussed *supra* at 21-23, the Trial Court entered an improper, premature opinion on the purported vagueness of Amendments 3 and 6. This violated the *City of Memphis* rule against pre-election substantive

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challenges to referendum proposals. 146 S.W.3d at 540. Substantive analysis whether these proposals are impermissibly vague is currently impossible because any vagueness in the proposals can be addressed or cured in administrative enforcement or by legislation after the amendments are adopted.

Further, even if this Court could reach the vagueness issue, the Trial Court erred because it did not give deference on this matter to the Commission's decision, which could have rationally concluded that no incurable vagueness exists. *See infra* at 62-64. For example, any lack of clarity in what a Charter provision provides can be resolved in the administration or implementation of the charter provision – through administrative enforcement or legislation via ordinance. See note 4, *supra* at 15. The possibility of subsequent clarification suffices to meet the highly restrained rationality standard that governs judicial review of the Commission's action.

II. THE TRIAL COURT INCORRECTLY APPLIED THE "PRESCRIBE-A-DATE" LANGUAGE IN THE METRO CHARTER TO PREVENT VOTERS FROM CONSIDERING THE PROPOSED AMENDMENTS.

The Trial Court improperly elevated a provision of the Metro Charter over state law on the question of when a referendum election must be held. State law, not the Metro Charter or the date in a petition, determines when a referendum election will occur. T.C.A. §2-3-204(a). The Commission set the referendum election in compliance with T.C.A. §2-3-204(a).

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The Trial Court interpreted the "prescribe-a-date" provision of Metro Charter §19.01 as a jurisdictional requirement for the Commission's consideration of a referendum petition. (TR3 at 1090-91.) In so deciding, the Trial Court assumed the Petition does not strictly comply with §19.01 when, in fact, it complies with both a strict compliance standard and a substantial compliance standard.[10] The Trial Court then adopted the harsh remedy of completely invalidating the entire Petition based on purported non-compliance with the "prescribe-a-date" provision. (TR3 at 1105.)

The "prescribe-a-date" provision raises questions about the role of county election commissions in determining their authority, the scope of judicial authority, and the degree of deference that courts owe agencies and under what circumstances.

The Commission contends that the "prescribe-a-date" provision does not impose a jurisdictional requirement on Charter amendment petitions, that it is "directory, not mandatory," *Scheele v. Hartford Underwriters Ins. Co.*, 218 S.W.3d 636, 640-41 (Tenn. 2007).

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[10] The Petition complies with the "prescribe-a-date" provision, which states that a petition shall "prescribe a date not less than eighty (80) [days] subsequent to the date of its filing for the holding of a referendum election." Metro Charter §19.01. The Petition was filed March 25, 2021. (AR1 at 3.) The Petition prescribes a date that is not less than 80 days after the date the Petition was filed, and that date is June 14, 2021. Accordingly, the Petition complies with a plain reading of §19.01 of the Metro Charter.

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The Commission, the Trial Court and the text of the Metro Charter[11] agree: it is the Commission's exercise of discretion pursuant to state law, not the Metro Charter or the date in a referendum petition, that establishes when a referendum election will be held. Although the Metro Charter requires that a referendum petition propose an election date, it does not require the Commission to use the proposed date. The Commission, thus, scheduled the referendum election in accordance with state law, T.C.A. §2-3-204(a), as it was entitled to do. (TR3 at 1091) ("[T]he Election Commission has the authority under state law to set a different date for the referendum election than the date listed in the Petition").

The Trial Court's holding that the Petition failed to comply with the "prescribe-a-date" language in the Metro Charter is in error and should be reversed. In addition, the express lack of deference to the Commission, especially regarding the ambiguity and the disregarded remedy issues, is especially problematic. *Id.* (stating Election Commission decision regarding enforcement of the "prescribe-a-date" provision "is not entitled to deference upon judicial review").

[11] "The general election laws of the state shall be applicable to all metropolitan elections, except as otherwise provided in this article." Metro Charter §15.04.

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A. The Election Commission's discretion, exercised pursuant to state law, controls when a referendum election occurs; neither the Metro Charter nor a date in a petition determines when the election will occur.

State law grants authority to the Commission, not the proponent of a Charter amendment, to set the date for a referendum election. T.C.A. §2-3-204(a) (providing a window of 75 to 90 days within which a county election commission shall hold an election on questions submitted to the people). The Trial Court acknowledged this: "[T]he Election Commission has the authority under state law to set a different date for the referendum election than the date listed in the Petition." (TR3 at 1091.) In other words, the date prescribed in the Petition is merely advisory, "directory, not mandatory." *Scheele*, 218 S.W.3d at 640-41

The Trial Court overstated the importance of this advisory date based on factually and legally unsupported assumptions about parties' use of the date in a referendum petition. For example, the Trial Court erroneously stated that the date in a referendum petition "sets the governing time line." (TR3 at 1091.) Each of the Trial Court's statements is based on the incorrect assumption that the date in a petition supersedes state law when, in fact, the date in a petition is advisory.[12]

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[12] The Trial Court also stated, incorrectly, that the date in a petition permits the Commission to determine whether the petition violates the prohibition on submitting a petition to voters more than once every two years. (TR3 at 1091.) However, Metro Charter §19.01's prohibition on submitting amendments proposed by petitions to voters more than once

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B. The Petition complies with the text of the "prescribe-a-date" provision of Metro Charter §19.01.

The Petition complies with the "prescribe-a-date" provision. Section 19.01 states that a petition for a charter amendment or amendments shall "prescribe a date not less than eighty (80) [days] subsequent to the date of its filing for the holding of a referendum election." Metro Charter §19.01. The Trial Court read the provision as if the word "a" were underlined and bolded ("prescribe **a** date not less than eighty (80) [days] subsequent to the date of its filing for the holding of a referendum election"). (TR3 at 1090 (emphasis in original).) That is, the Trial Court interpreted the provision as if it prohibited petitions from mentioning more than one date. But the emphasis supplied by the Trial Court does not appear in the text.

Think of the example of the need to schedule the election so as not to interfere with distribution of the COVID-19 vaccine, a consideration that actually entered into the Commission's deliberative process when it set the referendum election. (AR1 at 338-39, 407-08.) If a petition states that the prescribed date is X but Y if date X would interfere with vaccine distribution (for parents or sports fans, analogous to a rain date), then

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every two years is based on the actual election dates, not advisory dates included in referendum petitions. (TE at 52 (citing *Nashville English First v. Davidson County Election Commission*, Davidson County Chancery Court Case No. 08-1912-I, Sept. 5, 2008 Order, at 3 ("The phrase 'submitted by petition' means submitted to the voters")).) (Sept. 21, 2021, Supp. R. at 165.)

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the petition has properly proposed alternate dates with a clear decision rule. That is what the Petition did in this appeal, when it requested a referendum election on "May 28, 2021, or June 14, 2021, whichever is earlier as permitted by Metro Charter §19.01." (AR1 at 630.) Proposing alternate dates,[13] with a clear decision rule, is the prescribing of "a" date (not multiple dates, as Metro asserts), provided that the date complies with the requirements of Metro Charter §19.01.

Only if one reads into §19.01 the imaginary underlining and bold (above) could the "prescribe-a-date" provision possibly mean prescribing a single, exclusive and inflexible date. Such an interpretation makes no sense, given that state law authorizes the Commission, not a measure's proponent, to set the date. And, under the Trial Court's reading, use of conditional, alternative dates is essentially a capital offense – the death of the Petition and the nullification of the voters' desire to vote on the Petition. Calling this fatal outcome "hypertechnical," (TR3 at 1090), is

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[13] By using the disjunctive "or," the Petition indicates that only one date is prescribed for holding the referendum election. "It is a well established rule of construction that when the disjunctive conjunction 'or' is used in a statute, the various elements are to be treated separately, with any one element sufficient to meet the objectives outlined in the statute." *State v. Cleveland*, No. W2004-02892-CCA-R3-CD, 2005 WL 1707975 at *2 (Tenn. Ct. Crim. App. July 21, 2005). "The following legal maxim succinctly describes this principle, which has been followed for many years:... In disjunctive constructions, it is sufficient if either part is true." *Id.* at *2, n. 3.

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charitable; it is Procrustean, entirely unwarranted by a plain and reasonable reading of §19.01 and the overriding provisions of state law. The Trial Court's reading of §19.01 does not recognize the essentially advisory nature of the initially proposed date in a referendum petition.

In sum, the Petition does not propose multiple dates but alternate dates, and, importantly, it sets out a clear decision rule about which of the alternative dates controls: the one (i) that is "earlier" and (ii) that is "permitted" by §19.01 of the Metro Charter. Under the circumstances, the date included in the Petition and "permitted" by the Charter was June 14; but this is much ado about nothing, as state law grants authority to the Commission, not the proponent of the charter amendment, to set the date. T.C.A. §2-3-204(a).

C. The Election Commission's interpretation of the "prescribe-a-date" provision is entitled to respect because there is "room for two opinions" about the meaning of the provision.

The "prescribe-a-date" provision is unambiguous, but not in the way the Trial Court believed, *supra* at 51-53. Even if it were susceptible to two interpretations, the Commission has a role in interpreting the provision. In such circumstances, an "interpretation" by the Commission "is entitled to consideration and respect and should be awarded appropriate weight," especially regarding "doubtful or ambiguous statutes." *Nashville Mobilphone Co., Inc. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976).

Support for the proposition that a conditional, alternative date satisfies the "prescribe-a-date" requirement of §19.01 derives from the

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approach taken by the Metro Council, in putting forth its own proposed competing Charter amendment.

The Council proposed an amendment to compete with those at issue in this appeal, and the Council's proposal included alternate dates. The Council requested a specific date for a referendum on its proposed Charter amendment, to track the June 14, 2021, date in the Petition. And then the Council stated an alternative date: "or such other date set by the Davidson [County] Election Commission for a referendum election regarding amendments to the Metropolitan Charter submitted by 4 Good Government." (TR2 at 38.) That is, the Council Resolution proposing a Charter amendment used the same conditional, alternative approach used by 4GG, with a clear decision rule as to which of the alternative dates is to be used. The Commission did not question the propriety of this conditional, alternative-date approach while reviewing the Council's proposed Charter amendment resolution.

Here, there is at minimum "room for two opinions" in the interpretation of the "prescribe-a-date" provision, so the Commission's interpretation should prevail, as it is not arbitrary and capricious. *Cumberland Bail Bonding*, 599 S.W.3d at 23. This is true, "even though" a reviewing court "think[s] a different conclusion might have been reached." *Id.* (internal citation omitted). See *McCallen*786 S.W.2d at 641 ("An invalidation of the [Commission's] action should take place only when the decision is clearly illegal, arbitrary, or capricious"). *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83, 986 (2005) (deferring to an agency's interpretation of an ambiguous statute, as long as the agency's interpretation is reasonable, and even if

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the agency's interpretation differs from a previous judicial interpretation).

The Commission's interpretation in this proceeding of the "prescribe-a-date" provision is that it is advisory, with the Commission holding ultimate discretion for the setting of the referendum election date pursuant to T.C.A. §2-3-204. In the appeal at hand, the Petition includes a date or alternate dates that comply with the "prescribe-a-date" provision, so the Petition and the Commission's action comply with any requirement that could be derived from the "prescribe-a-date" provision.

D. Even if the Petition does not comply with the "prescribe-a-date" provision, the remedy for non-compliance should not be withholding the measure from voters.

The Commission concluded that the Petition complies with the "prescribe-a-date" provision, but even if there is disagreement on whether the Petition complies, the question remains: what is the remedy for non-compliance? Although the Trial Court disagreed with the Commission and concluded that the Petition did not comply, the Trial Court did not address the question of the remedy for non-compliance or give appropriate respect to the Commission's determination.

Tennessee is a "substantial compliance" state so that "literal compliance" with all election laws is not required. *Lanier v. Revell*, 605 S.W.2d 821, 822 (Tenn. 1980). This means even if the Trial Court's interpretation of the "prescribe-a-date" provision is correct – which it is not – the question of the appropriate remedy remains. *Forbes v. Bell*, 816 S.W.2d 716, 724 (Tenn. 1991) ("[N]ot every irregularity or combination of

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irregularities will necessitate the invalidation of an election"). If the Petition does not comply with the "prescribe-a-date" provision, the question, unaddressed by the Trial Court, is whether the "prescribe-a-date" provision is a jurisdictional prerequisite for Commission action, whether it is "directory" (non-jurisdictional) or "mandatory" (jurisdictional). *Scheele*, 218 S.W.3d at 640-41.

A "jurisdictional" rule is inflexible, whereas a non-jurisdictional rule can be applied less harshly, taking into account equitable factors such as consideration of consequences. *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). As a result, courts tend to "reject[] the notion that all 'mandatory prescriptions . . . are properly typed jurisdictional.'" *Id.* at 439 (internal citation omitted).

In a "substantial compliance" state like Tennessee under *Lanier*, non-compliance with procedural requirements is non-jurisdictional, not necessarily fatal. Courts look to (i) the "extent and significance" of the alleged errors and (ii) whether an adverse party is "prejudiced" by the alleged non-compliance. *Martin v. Rolling Hills Hosp., LLC*, 600 S.W.3d 322, 332 (Tenn. 2020). "[P]rejudice is an important element in determining whether substantial compliance was met." *Shaw v. Gross*, No. W2019-01448-COA-R3-CV, 2021 WL 1388007 at *5 (Tenn. Ct. App. Jan. 19, 2021).

For a threshold filing requirement to be considered jurisdictional, there must be a "clear indication" or a "clear statement" of an intent to treat the "mandatory prescription[]" as jurisdictional. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (holding that a copyright holder's

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failure to comply with a registration requirement did not bar a court from adjudicating a copyright violation claim; the requirement was non-jurisdictional because Congress did not "clearly state[]" otherwise). There is no evidence in this case of such a clear statement of intent that "prescribe a date" is jurisdictional. *Lanier*'s non-jurisdictional substantial compliance standard controls.

Since, as the Trial Court acknowledged, (TR3 at 1091), state law authorizes the Commission to set a date other than the one proposed in the Petition, the "significance" of any technical non-compliance with Charter §19.01 is minimal or non-existent. The only basis for a finding of invalidity is non-compliance, by itself, with a harsh, jurisdictional rule that is functionally immaterial. But such a harsh, jurisdictional rule is incompatible with the non-jurisdictional, substantial compliance rule of *Lanier*.

Any claimed "prejudice" to voters under the appropriate non-jurisdictional "substantial compliance" standard does not exist. Given the supremacy of state law, which authorizes the Commission to set a date for a referendum election, any claimed technical non-compliance with Charter §19.01 as to the date of the referendum election is immaterial and surely does not "frustrate[] or interfere[] with" the ballot-access purposes of §19.01. *Martin*, 600 S.W.3d at 334. Even if there are technical violations of §19.01, which is not the case, they do not warrant the cancellation of an opportunity for voters to vote on the proposed charter amendments.

When one considers the overall equities, including the Commission's compliance with state law in setting the date for the

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referendum election, any technical violations cannot result in the invalidation of the proposed, and Commission-approved, referendum, which invalidation would "thwart the will of the electorate" to speak on the issue. *Forbes*, 816 S.W.2d at 724.

To summarize, the Election Commission properly exercised its discretion to set an election date under T.C.A. §2-3-204, and the "prescribe-a-date" provision does not serve as a basis for withholding the proposals at hand from the voters, especially when that harsh result turns on an advisory date in a petition.

III. THE TRIAL COURT ERRONEOUSLY APPLIED THE PRINCIPLE OF SEVERABILITY TO WITHHOLD THE PROPOSED AMENDMENTS FROM VOTERS.

The Trial Court improperly held that if any one of the six proposed separate amendments is invalid, all are invalid and cannot be presented to voters. (TR3 at 1110.) This holding ignores the statements in the Petition, signed by more than 12,000 registered voters, that the amendments are separate. (AR1 at 629, 631.) Each amendment, thus, rises or falls on its own. Moreover, the Petition's statement that the six proposed amendments are separate complies with Metro Charter §19.01, which allows a referendum petition to propose "[a]n amendment or amendments." Metro Charter, §19.01.

The Commission determined that the proposed Amendments are separate and should be placed on the ballot as six separate amendments to be voted on up or down separately. The Commission had a rational basis for that decision, to which the Trial Court owed, but did not accord, deference in the context of a writ-of-certiorari proceeding. *McCallen*, 786

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S.W.2d at 640-41. Severability regarding placing the proposed amendments on the ballot is simply not an issue. The Trial Court erred in concluding that none of the six proposed Amendments could be placed on the ballot because of the supposed invalidity of one proposed Amendment.

IV. PORTIONS OF AMENDMENT 1 THAT ARE NO LONGER OPERABLE ARE SEVERABLE UNDER THE SEVERABILITY PROVISION IN PROPOSED AMENDMENT 1.

Severability analysis is relevant regarding proposed Amendment 1, which contains a severability provision. There is one portion of proposed Amendment 1 that is no longer operable. Under the circumstances, the appropriate remedy is to sever the inoperable provision and submit the remainder of proposed Amendment 1 to the voters.

Proposed Amendment 1 establishes a baseline for spending and tax rates. For Fiscal Years 2021-22 and 2022-23, the proposed baseline is Fiscal Year 2019-20. (AR1 at 629.) Because this appeal was not expedited, it is no longer feasible to set a new baseline to govern Fiscal 2021-22; but it remains feasible to set the baseline for Fiscal 2022-23. Since proposed Amendment 1 specifically states that its provisions are severable, (AR1 at 629), the appropriate remedy is to delete the portion of proposed Amendment 1 that refers to Fiscal 2021-22 but to place on the ballot the remainder of proposed Amendment 1. That could put in place the proposed constraints on taxing and spending for Fiscal 2022-23, if approved in the referendum.

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(1)

Metro is obligated, each year, to adopt a tax rate sufficient to pay for projected expenditures for that year, to balance revenues and expenditures. T.C.A. §§9-21-403(b)-(c); 67-5-510; Metro Charter, §6.06. That is, the tax rate is set for a specific fiscal year so as to satisfy these balanced-budget requirements. There is no carry-over tax rate from year to year.

As it is obligated to do, Metro has adopted a tax rate for Fiscal 2021-22, (TE at 78), and tax rates cannot change after they become due on the first Monday in October of each year. T.C.A. §§67-1-701(a), -702(a); Tenn. Op. Atty. Gen. No. 04-149. Accordingly, implementation of the portion of Amendment 1 that sets a baseline tax rate for Fiscal 2021-22 is no longer feasible. That raises the question of the appropriate remedy – severability. *Alaska Airlines, Inc. v. Brook*, 480 U.S. 678, 686 (1987)(severability is a remedy issue).

(2)

The key to severability analysis is the proponents' intent. The remaining operative portion of proposed Amendment 1 remains effective (i) if the valid portions remain "fully operative" without the inoperative provision, *id*. at 684, and (ii) "when a conclusion can be reached" that the proponents of the proposed charter amendment would have preferred to retain the valid, operative provisions of the proposed amendment and have a vote on those valid provisions, rather than invalidating the entire proposed Amendment 1. *Tennessee Baptist Children's Homes, Inc. v. Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999); *accord*, *Willeford v. Klepper*,

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597 S.W.3d 454, 470-71 (Tenn. 2020)(applying *Swanson* analysis, even in absence of severability clause).

In this case, both inquiries support severability as a remedy. The remaining portions of proposed Amendment 1 are "fully operative" if reference to Fiscal 2021-22 is deleted. The tax-rate baseline under proposed Amendment 1 would apply for Fiscal 2022-23, rather than for both Fiscal 2021-22 and 2022-23, and for future years. If approved by voters, Amendment 1 as modified will remain "fully operative."

As a general matter, there is a presumption of severability. If part of a ballot proposal becomes inoperative, it is the court's duty to "elide" the inoperative provision and "not to invalidate the entire" proposed amendment. *See Waters v. Farr*, 291 S.W.3d 873, 913 (Tenn. 2009); *Barr v. Am. Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350-51(2020)(plurality opinion)(applying presumption of severability and concluding that court should not invalidate more of a law than necessary); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010)("[T]he 'normal rule' is 'that partial, rather than facial, invalidation is the required course'"). At the state level, this presumption is embodied in statute. T.C.A. §1-3-110.

When, as here, there is an express severability clause, that clause clearly manifests the proponents' intent of severability as the remedy. "[T[he judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverabilty clause," as that sets out the intent in a very clear and straightforward manner. *Barr*, 140 S. Ct. at 2349. *Accord*, *Seila Law*

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LLC v. Consumer Fin. Protection Bureau, 140 S. Ct. 2183, 2209 (2020)(plurality opinion)(giving effect to express severability clause).

Because proposed Amendment 1 remains "fully operative" even if unenforceable for Fiscal 2021-22, and because the severability clause clearly sets out the proponents' intent for severability as a remedy, the Court should direct the Commission to place proposed Amendment 1 on the ballot, as modified. *Cf. Willeford*, 597 W.W.3d at 471-72 (describing how elided statute will read going forward).

V. THE TRIAL COURT APPLIED THE WRONG STANDARD OF REVIEW.

This is a common-law writ-of-certiorari action to review the Commission's decision to place the proposed Amendments on the ballot. The Trial Court did not apply the writ-of-certiorari standard, which requires courts to review the record to determine "whether it contains any material evidence to support the decision" of the administrative agency and to affirm the decision "if any possible reason can be conceived to justify it." *Cumberland Bail Bonding*, 599 S.W.3d at 23; *Leonard Plating*, 213 S.W.3d at 904 (emphasis added).

This is an "extremely limited" scope of review, *Leonard Plating*, 213 S.W.3d at 903, as dictated by the separation-of-powers principle in the Tennessee Constitution. *Heyne*, 380 S.W.3d at 728 (citing Ben H. Cantrell, *Review of Administrative Decisions By Writ of Certiorari in Tennessee*, 4 MEM. ST. U. L. REV. 19, 21 (1973)). Under certiorari, a court will affirm administrative action unless it is illegal, arbitrary and capricious. T.C.A. §27-8-101. The "illegal, arbitrary and capricious" standard is "synonymous with the rational basis test." *Cumberland Bail*

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Bonding, 599 S.W.3d at 23; *McCallen*, 786 S.W.2d at 641 ("The 'fairly debatable, rational basis,' as applied to legislative acts, and the 'illegal, arbitrary and capricious' standard relative to administrative acts are essentially the same") (emphasis added). Thus, the Commission's decision must be affirmed "if any possible reason can be conceived to justify it." *Cumberland Bail Bonding*, 599 S.W.3d at 23 (emphasis added); *see McCallen*, 786 S.W.2d at 641 ("If 'any possible reason' exists justifying the action, it will be upheld"). The justification need only be "conceivable." *Cumberland Bail Bonding*, 599 S.W.3d at 24; *see also Williamson*, 348 U.S. at 487 (allowing for conjured up, conceivable justifications, often called the "creative law clerk" approach). The Commission's decisions easily satisfy this standard: "It is hard to imagine a more difficult undertaking than that to overcome the 'any possible reason' standard." *McCallen*, 786 S.W.2d 641.

Instead of applying the deferential writ-of-certiorari "rational basis" standard,[14] the Trial Court held the Commission to a standard it could not legally meet. Under the *City of Memphis* rule, the Commission does not have power to "review… the substantive constitutionality of

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[14] The Trial Court was "not prepared to adopt the [deferential] rational basis test," (TR3 at 1086-87), even though *McCallen* holds that the "rational basis" and arbitrariness standards are the same, 786 S.W.2d at 641, and *Cumberland Bail Bonding* holds that the "illegal, arbitrary and capricious" standard is "synonymous with the rational basis test," 599 S.W.3d at 23.

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measures to be placed on the ballot for referendum," even on an "initial or cursory" basis. 146 S.W.3d at 536. However, the Trial Court concluded that the Commission's refusal to engage in the substantive analysis advocated by Metro (and not permitted by *City of Memphis*) rendered the Commission's decision arbitrary, capricious and illegal. This was error.

The Commission's action cannot be held arbitrary, capricious and illegal since the Commission acted within its allowed scope of authority. *See McFarland*, 530 S.W.3d at 100-01, 104 (commission has power to fulfill its duties, and judicial review is under deferential writ-of-certiorari standard). The Commission's decision to place the proposed charter amendments on the ballot was supported by material evidence and a rational basis. The Trial Court expected the Commission to do what is impermissible for the Commission (or a reviewing court) under *City of Memphis*. The Commission acted appropriately when it concluded that the Petition proposes six separate amendments to be considered separately (so that severability considerations are inapplicable) and set the referendum election pursuant to T.C.A. §2-3-204. Further, the Trial Court improperly substituted its judgment for that of the Commission, *Leonard Plating*, 213 S.W.3d at 903-04, particularly on the questions of the "prescribe-a-date" provision,[15] the vagueness and substantial compliance analyses, and the severability of the proposed amendments.

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[15] The Trial Court refused to apply the deferential writ-of-certiorari standard regarding the Commission's action on the "prescribe-a-date" issue, particularly regarding ambiguity and remedy. (TR3 at 1091 (Commission's action "is not entitled to deference upon judicial review").)

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CONCLUSION

The Commission respectfully requests that the Court reverse the Memorandum and Final Order of the Trial Court, affirm and reinstate the decision of the Commission to hold a referendum election on the proposed Charter amendments, and remand the matter to the Commission with instructions to schedule a referendum election at a date in the exercise of its appropriate, statutory discretion pursuant to T.C.A. §2-3-204(a). Tenn. R. App. P. 36 (appellate courts "shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order"); *Cf. Wallace v. Metro Gov't of Nashville*, 546 S.W.3d 47, 58 n.13 (Tenn. 2018)(remanding to the discretion of the election commission to set a date for a special election); *State v. McMahan*, 614 S.W.2d 83, 86 (Tenn. Ct. Crim. App. 1981) (right is accompanied by a remedy); *State* ex rel. *Flowers v. Tennessee Coordinated Care Network*, M2003-01658-COA-R3-CV, 2005 WL 427990 at *13 (Tenn. Ct. App. July 9, 2004) ("Equity does not permit a wrong to be suffered without a remedy and will devise a remedy appropriate to the situation").

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CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Supreme Court Rule 46, Rule 3.02, and contains 14,913 words.

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