IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners / Appellees,

v.

THE DAVIDSON COUNTY ELECTION COMMISSION,

Respondent / Appellant.

On Appeal From the Chancery Court for the Twentieth Judicial District, Davidson County, No. 21-0433-IV

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

QUESTIONS PRESENTED 11

STATEMENT OF THE CASE 12

STATEMENT OF FACTS 14

SUMMARY OF ARGUMENT 15

STANDARD OF REVIEW 17

ARGUMENT 21

I. ALL ISSUES THAT THE CHANCERY COURT ADDRESSED WERE RIPE FOR PRE-ELECTION REVIEW UNDER *CITY OF MEMPHIS* 21

A. Pre-Election Challenges to the Form and Facial Validity of Referendum Measures Are Ripe for Judicial Review 21

B. The Election Commission Ignores Subject-Matter Restrictions as Appropriate for a Form Challenge 25

II. THE CHANCERY COURT PROPERLY HELD THAT THE PETITION AND NUMEROUS PROPOSED AMENDMENTS ARE DEFECTIVE IN FORM UNDER *CITY OF MEMPHIS* 28

A. The Petition Is Defective in Form Because It Failed to "Prescribe a Date" as Required by Metropolitan Charter § 19.01 28

B. The "Limit Property Tax Rates" Provision Is Defective in Form Because It Repeals an Existing Tax Rate, Sets a New Tax Rate, and Caps Future Tax Rates, All Without Authority To Do So By Referendum 34

1. The "Limit Property Tax Rates" Provision Improperly Delegates Legislative Taxing Authority to Voters 36

2. The "Limit Property Tax Rates" Provision Improperly Legislates and Repeals Legislation by Referendum 41

C. The "Protect Promises to Nashville" Provision Is Defective in Form Because It Takes Property, Affects a Third-Party Entity, and Impairs Bond Obligations, All Without Authority To Do So By Referendum 44

1. The "Protect Promises to Nashville" Provision Improperly Effects Automatic Takings by Referendum 45

2. The "Protect Promises to Nashville" Provision Affects a Third-Party Entity by Referendum 49

D. The "Abolish Lifetime or Other Benefits" and "Protect Promises to Nashville" Provisions Are Defective in Form Because Their Vague and Confusing Language Prevents the Electorate From Intelligently Casting a Vote With Knowledge of Its Consequences 51

III. THE CHANCERY COURT PROPERLY HELD THAT THE DEFECTIVE PROPOSED AMENDMENTS AERE NOT SEVERABLE; THUS, THE PETITION FAILS AS A WHOLE 56

CONCLUSION 61

CERTIFICATE OF COMPLIANCE 63

CERTIFICATE OF SERVICE 64

TABLE OF AUTHORITIES

Cases

Baker v. Hickman Cty., 47 S.W.2d 1090 (Tenn. 1932) 40

Barr v. Am. Assn. of Political Consultants, Inc., 140 S. Ct. 2335 (2020) 60

Bean v. City of Knoxville, 175 S.W.2d 954 (Tenn. 1943) 42, 43

Bellamy v. Cracker Barrel Old Country Store, Inc., 302 S.W.3d 278 (Tenn. 2009) 28

Binkley v. Metro. Gov't of Nashville & Davidson Cty., No. M2010-02477-COA-R3CV, 2011 WL 2174913 (Tenn. Ct. App. June 1, 2011) 42

Borough of Eatontown v. Danskin, 296 A.2d 81 (N. J. Super. Ct. Law. Div. 1972) 29, 30

Brown v. State ex rel. Jubilee Shops, Inc., 426 S.W.2d 192 (Tenn. 1968) 23

Burnell v. City of Morgantown, 558 S.E.2d 306 (W. Va. 2001) 24, 25, 26

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) 46, 47

City of Memphis v. Shelby Cty. Election Comm'n, 146 S.W.3d 531 (Tenn. 2004) ..... *passim*

Davison v. Carr, 659 S.W.2d 361 (Tenn. 1983) 18

FCC v. Florida Power Corp., 480 U.S. 245 (1987) 46

Gray v. Howard Cty. Bd. of Elections, 98 A.3d 423 (Md. Ct. Spec. App. 2014) 54

Gibson Cty. Special Sch. Dist. v. Palmer, 691 S.W.2d 544 (Tenn. 1985) 56, 57

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 38

Harding Academy v. Metro. Gov't of Nashville & Davidson Cty., 222 S.W.3d 359 (Tenn. 2007) 18, 19

Hoover, Inc. v. Metro. Bd. of Zoning Appeals, 924 S.W.2d 900 (Tenn. Ct. App. 1996) 18, 19

In re Cumberland Bail Bonding, 599 S.W.3d 17 (Tenn. 2020) 33

In re Jackson Twp. Admin. Code, 97 A.3d 719 (N.J. App. Div. 2014) 57

Kelo v. City of New London, Conn., 545 U.S. 469 (2005) 48

Kochen v. Young, 107 N.W.2d 81 (Iowa 1961) 29

Koella v. State ex rel. Moffett, 405 S.W.2d 184 (Tenn. 1966) 29

Knoxville & O.R. Co. v. Harris, 43 S.W. 115 (Tenn. 1897) 37

Lafferty v. City of Winchester, 46 S.W.3d 752 (Tenn. Ct. App. 2000) 18

Lanier v. Revell, 605 S.W.2d 821 (Tenn. 1980) 29

Leck v. Michaelson, 491 N.E.2d 414 (Ill. 1986) 55

Littlefield v. Hamilton Cty. Election Comm'n, No. E2012-00489-COA-R3-CV, 2012 WL 3987003 (Tenn. Ct. App. 2012) 28, 29

Lipinski v. Chicago Bd. Of Elec. Comm., 500 N.E.2d 39 (Ill. 1986) 54

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 46

Markus v. Trumbull Cty. Bd. of Elections, 259 N.E.2d 501 (Ohio 1970) 54

McClay v. Airport Mgm't Servs., LLC, 596 S.W.3d 686 (Tenn. 2020) 41

McFarland v. Pemberton, 530 S.W.3d 76 (Tenn. 2017) 17, 33

McPherson v. Everett, 594 S.W.2d 677 (Tenn. 1980) 42

Metro. Gov't of Nashville & Davidson Cty. v. Allen Fam. Tr., No. M200800886COAR3CV, 2009 WL 837731 (Tenn. Ct. App. Mar. 27, 2009) 49

Miami Dolphins, LTD v. Metro. Dade Cty., 394 So. 2d 981 (Fla. 1981) 55

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990) 57

Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300 (Tenn. 2012) 28

Nashville English First, et al. v. Davidson County Election Commission, et al., Case No. 08-1912-I 30, 31

National Rifle Association of America v. Magaw, 132 F.3d 272 (6th Cir. 1997) 52, 53

Newsom v. Vanderbilt Univ. Hosp., 653 F.2d 1100 (6th Cir. 1981) 38

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 46, 47

Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys. of State of Tenn., 863 S.W.2d 45 (Tenn. 1993) 52, 53

Pidgeon-Thomas Iron Co. v. Shelby Cty., 397 S.W.2d 375 (Tenn. 1965) 53, 56

Rodgers v. White, 528 S.W.2d 810 (Tenn. 1975) 53, 54, 56

Rush v. City of Chattanooga, 182 F.3d 918 (6th Cir. 1999) 52

S. Ry. Co. v. City of Memphis, 148 S.W. 662 (Tenn. 1912) 49

Smith v. City of Pigeon Forge, 600 S.W.2d 231 (Tenn. 1980) 56, 57

StarLink Logistics Inc. v. ACC, LLC, 494 S.W.3d 659 (Tenn. 2016) 33, 34

State ex rel. Byers v. Gibson, 191 P.2d 392 (Or. 1948) 29

State ex rel. Cassity v. Turner, 601 S.W.2d 710 (Tenn. 1980) 29

State ex rel. Childress v. Anderson, 865 S.W.2d 384 (Mo. 1993) 26, 44

State ex rel. Hazelwood Yellow Ribbon Committee v. Klos, 35 S.W.3d 457 (Mo. Ct. App. 2000) 57

State ex rel. Potter v. Harris, No. E2007-00806-COA-R3-CV, 2008 WL 3067187 (Tenn. Ct. App. Aug. 4, 2008) 43

Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725 (1997) 47, 48

Vandergriff v. City of Chattanooga, 44 F. Supp. 2d 927 (E.D. Tenn. 1998) 52

Vincent v. State, No. 01A-01-9510-CH-00482, 1996 WL 187573 (Tenn. Ct. App. Apr. 19, 1996) 42, 43

Wallace v. Metro. Gov't of Nashville & Davidson Cty., 546 S.W.3d 47 (Tenn. 2018) 31, 34

Waters v. Farr, 291 S.W.3d 873 (Tenn. 2009) 60

Willeford v. Klepper, 597 S.W.3d 454 (Tenn. 2020) 60

Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 46

Constitutional Provisions

Tenn. Const., art. II, § 28 36

Tenn. Const., art. II, § 29 36

Tenn. Const., art. VII, § 1 39

Tenn. Const., art. XI, § 9 ..... 22, 23

Tenn. Const., art. XI, § 12 39

Statutes and Rules

Tenn. S. Ct. R. 48 14

Tenn. Code Ann. § 2-1-151 ..... 28, 58

Tenn. Code Ann. § 2-3-204 ..... 31, 32, 35

Tenn. Code Ann. § 2-5-102 58

Tenn. Code Ann. § 2-5-151 58

Tenn. Code Ann. § 5-5-123 40

Tenn. Code Ann. § 6-1-209 58

Tenn. Code Ann. § 6-1-301 58

Tenn. Code Ann. § 7-1-101 41

Tenn. Code Ann. § 7-2-108 42

Tenn. Code Ann. § 7-67-101 49

Tenn. Code Ann. § 7-67-103 49

Tenn. Code Ann. § 7-67-109 50

Tenn. Code Ann. § 7-67-112 ..... 50, 51

Tenn. Code Ann. § 9-21-101 50

Tenn. Code Ann. § 9-21-124 50
Tenn. Code Ann. § 9-21-207 58
Tenn. Code Ann. § 29-17-102 48
Tenn. Code Ann. § 29-17-103 48
Tenn. Code Ann. § 29-17-106 ..... 48, 49
Tenn. Code Ann. § 49-2-101 ..... 36, 39
Tenn. Code Ann. § 49-2-1206 58
Tenn. Code Ann. § 67-5-102 ..... 36, 38
Tenn. Code Ann. § 67-5-510 35
Metropolitan Charter § 1.03 37
Metropolitan Charter § 1.04 37
Metropolitan Charter § 1.05 37
Metropolitan Charter § 2.01 45
Metropolitan Charter § 3.01 42
Metropolitan Charter § 3.06 45
Metropolitan Charter § 6.07 ..... 40, 41
Metropolitan Charter § 5.07 55
Metropolitan Charter § 14.08 55
Metropolitan Charter § 15.03 34
Metropolitan Charter § 15.04 29
Metropolitan Charter § 19.01 ..... *passim*

Secondary Sources

Tenn. Op. Att'y Gen. No. 94-008, 1994 WL 88766, (Jan. 14, 1994) 37

Tenn. Op. Att'y Gen. No. 03-019 (Feb. 19, 2003) 38, 39

Tenn. Op. Att'y Gen. No. 05-027, 2005 WL 740148, (Mar. 21, 2005) 37

John Bourdeau, *et al.*, C.J.S. *Municipal Corporations* § 373 (database updated Oct. 2021) 43

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QUESTIONS PRESENTED

(1) Whether the Chancery Court correctly held that defects in 4 Good Government's petition to amend the Metropolitan Charter by referendum election were ripe for judicial review under *City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531 (Tenn. 2004).

(2) Whether the Chancery Court correctly held that the Charter amendment petition failed to "prescribe a date" for the referendum election as required by Metropolitan Charter § 19.01 and thus could not be placed on the ballot.

(3) Whether the Chancery Court correctly held that proposed Charter amendments 1 ("Limit Property Tax Rates") and 6 ("Protect Promises to Nashville") are defective in form and precluded from the ballot because they involve subject matter beyond the referendum power.

(4) Whether the Chancery Court correctly held that proposed Charter amendments 3 ("Abolish Lifetime or Other Benefits") and 6 ("Protect Promises to Nashville") are defective in form and precluded from the ballot because their language is vague and confusing such that a voter could not ascertain the amendments' meaning for purposes of casting an intelligent vote.

(5) Whether the Chancery Court correctly held that the defective proposed Charter amendments are not severable from the rest, thereby requiring the referendum election to be canceled.

STATEMENT OF THE CASE

This case arises from the second of two failed petitions filed in less than one year by a group called 4 Good Government ("4GG") proposing amendments to the Metropolitan Charter. (TR3[1] at 286.) The Chancery Court in Davidson County soundly rejected 4GG's first petition in a 50-page opinion after the Davidson County Election Commission ("Election Commission") sought judicial guidance about the petition's validity through a declaratory judgment action. (TR3 at 286-87.)

4GG's second petition—the one at issue in this appeal—is titled the "Nashville Taxpayer Protection Act" (the "Petition") and proposes six amendments to the Metropolitan Charter (the "Proposed Amendments"). (AR3 at 0622.) Despite cosmetic changes from 4GG's first petition and proposed Charter amendments, the Petition and Proposed Amendments at issue here suffer from many of the same defects. (TR3 at 287.) Instead of rejecting the Petition based on the prior judicial guidance or seeking new guidance, the Election Commission voted on May 10, 2021, to place the Petition on the ballot for a July 27, 2021 referendum election. (AR2 at 0568.)

As a result of that decision, on May 11, 2021, Petitioner/Appellee Metropolitan Government of Nashville and Davidson County ("Metropolitan Government")—the entity that would bear the cost of the

[1] The record on appeal consists of three volumes of the Technical Record (TR1, TR2, and TR3), a supplemental volume of the Technical Record (TRSupp), one volume of the Administrative Record (AR1), two volumes of the Corrected Administrative Record (AR2 & AR3), and one volume of the transcript of the evidence (TE).

referendum election—filed a petition for a writ of certiorari in Chancery Court,[2] seeking judicial review of the Election Commission's decision. (TR1 at 1-40.)

The Chancery Court heard argument on the writ of certiorari petition on June 7, 2021. (TR3 at 285.) On June 22, 2021, the Chancery Court issued a memorandum opinion, holding that the Petition could not proceed to a referendum election. The Court held that the Petition failed to satisfy petition requirements under Metropolitan Charter § 19.01 and sought to accomplish matters that could not lawfully be addressed by referendum, rendering the Petition defective in form under *City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531 (Tenn. 2004). (TR3 at 285.) The Chancery Court rejected other challenges as related to the substantive constitutionality of the Petition and therefore not ripe for pre-election review under *City of Memphis*. (TR3 at 316-318, 324.) The following day, the Chancery Court issued an "Order of Correction" that revised two paragraphs of the Memorandum Opinion to correct typographical errors. (TR3 at 327-28.)

On June 25, 2021, the Election Commission appealed the Chancery Court's ruling on the petition for a writ of certiorari. (TR3 at 329-31.) On

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[2] The petition for a writ of certiorari also included as Petitioners the Metropolitan Government Mayor and Finance Director in their official capacities. (TR1 at 1.) The filing also contained a petition for writ of mandamus and complaint for declaratory judgment in the alternative. The Chancery Court severed the declaratory judgment action and ordered the Metropolitan Government to refile it as a separate action. (TR2 at 277-78.) Therefore, this case was confined to the writ of certiorari and decided solely on that standard.

June 29, 2021, the Election Commission filed a motion for expedited briefing/hearing with this Court and a motion under Tenn. S. Ct. R. 48 asking the Tennessee Supreme Court to assume jurisdiction over the appeal. The Supreme Court denied the Rule 48 reach-down motion on July 9, 2021. This Court subsequently denied the Election Commission's motion for expedited appeal on July 13.

On July 23, 2021, the Election Commission filed an additional notice, appealing the Order of Correction. (TR3 at 335-37.) After the second notice was docketed as a new appeal, this Court entered an Order on July 28, 2021, consolidating the two appeals as a housekeeping measure. (TR3 at 338.)

STATEMENT OF FACTS

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

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

(AR3 at 0622.)

Metropolitan Charter § 19.01 requires that a petition "prescribe a date" for holding the referendum election not less than eighty days after the petition is filed. (AR3 at 0622-24.) The 4GG Petition prescribed *two dates* for the referendum election: "May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01." (AR3 at 0622, 0624.)

The Petition was filed eighty days before the second election date prescribed in the Petition. But the Election Commission did not vote to certify to the Metropolitan Clerk that the Petition had sufficient signatures until April 22, 2021, after having already met on April 6, 8, and 17 to consider it. (AR2 at 0559-0567.) The Election Commission's verification of the Petition's signatures was certified to the Metropolitan Clerk by letter dated May 4, 2021. (AR2 at 0559-0567, 0620.) The Metropolitan Clerk certified a copy of the Petition to the Election Commission by letter dated May 6, 2021. (AR2 at 0621-24.) Finally, on May 10, 2021, forty-six days after the Petition was filed, the Election Commission voted 3-2 to set the referendum election on July 27, 2021, six weeks after the Petition's second prescribed election date. (AR2 at 0568-69.)

SUMMARY OF ARGUMENT

This case arises from an unsuccessful attempt to amend the Metropolitan Charter, the governing document or "constitution" of the Metropolitan Government, by referendum election. While the Metropolitan Charter permits Charter amendments via citizen petitions, not every petition that meets the requisite signature thresholds properly invokes the limited referendum authority established by state and local

law. First, any such petitions must (1) comply with the technical requirements in Metropolitan Charter § 19.01; (2) satisfy form and procedural requirements in state law; and (3) fall within subject matters appropriate for Metropolitan Charter amendments under state and local law. Where a petition fails to meet these prerequisites, the Election Commission lacks authority to call an election to vote on the amendments. Moreover, these prerequisites are subject to pre-election judicial review according to the Tennessee Supreme Court's ruling in *City of Memphis*. 146 S.W.3d at 539-40.

The 4GG Petition failed to satisfy these requirements. First, the Petition prescribed more than one date for the referendum election in violation of Metropolitan Charter § 19.01. Second, the Petition addresses subject matters that may not be accomplished by referendum under state and local law. Third, the Proposed Amendments are so vague and confusing as to preclude a voter from casting an intelligent vote with a reasonable certainty of the amendments' meaning, in violation of Tennessee election law requirements.

At its heart, the Petition seeks to amend the Metropolitan Charter to transfer substantial authority from the Metropolitan Government's legislative body to the referendum process. The Proposed Amendments improperly seek to (1) legislate by referendum, prospectively lowering the Metropolitan Government's property tax rates; (2) transfer statutory taxing authority from the Metropolitan Council to the electorate; (3) prospectively approve the taking of privately-owned property from professional sports teams, thus requiring taxpayer funds as just

compensation, all without establishing public use; and (4) affect the property rights of a third-party entity.

Despite these flaws, the Election Commission set the Petition for a referendum vote at significant expense to the Metropolitan Government. Because of the Petition and Proposed Amendments' myriad defects in form, the Chancellor correctly concluded, on common law writ of certiorari review, that the Election Commission's decision was arbitrary, capricious, and illegal.

The Election Commission now insists that the Chancery Court applied the wrong standard to the common law writ of certiorari and did not show due deference to the Commission's decision to call an election. But whether the Petition was legally defective as defined in *City of Memphis* and thus subject to a pre-election challenge is not a question on which the Commission is entitled to deference. In *City of Memphis*, the Court rejected an election commission's refusal to call an election based on the commission's conclusion that the proposal was legally defective. Here, the Election Commission oddly claims that deference is required because the Commission reached the opposite legal conclusion. But the scope of judicial review is not subject to such manipulation, and legal questions are always reviewed *de novo*.

The Chancellor's decision should be affirmed.

STANDARD OF REVIEW

County election commissions "perform both ministerial and discretionary functions." *McFarland v. Pemberton*, 530 S.W.3d 76, 94 (Tenn. 2017). These functions are subject to judicial review by common law certiorari "where the court reviews an administrative decision in

which [an] agency is acting in a judicial or quasi-judicial capacity." *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983).

Under the common law writ of certiorari, the trial court's review is limited to discerning whether the agency exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Harding Academy v. Metro. Gov't of Nashville & Davidson Cty.,* 222 S.W.3d 359, 363 (Tenn. 2007).

The Election Commission argues at length (*e.g.*, Br. at 9, 10, 54, 62-64) that this Court's review is restricted to whether the Commission's decision was supported by material evidence. But that is not the sole standard applicable in a writ of certiorari action. *See Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996) ("The issue of whether an administrative body has acted illegally, arbitrarily, or fraudulently is *not limited to a determination of whether material evidence supported the administrative body's decision*.") (emphasis added). And while the court may not reweigh evidence when reviewing an administrative action, *see Lafferty v. City of Winchester*, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000), the Metropolitan Government did not challenge the evidentiary foundation for the Election Commission's decision. Nor did the Chancellor hold that the Election Commission's decision lacked evidentiary support.

Rather, this case involves the Election Commission's misapplication of legal standards, such as the scope of the Supreme Court's decision in *City of Memphis*, what constitutes a "form" defect

under that opinion, whether state and local law permit legislation by referendum, and whether a vagueness challenge under Tennessee election law is distinct from a constitutional vagueness challenge. These agency decisions are reviewable in a writ of certiorari proceeding as illegal, arbitrary, or fraudulent actions by the agency based on the "misrepresentation or misapplication of a legal standard." *Hoover*, 924 S.W.2d at 905 (quoting Ben H. Cantrell, Review of Administrative Decisions by Writ of Certiorari in Tennessee, 4 Mem. St. U. L. Rev. 19, 28-29 (1973)). And such legal questions must be reviewed *de novo*. *Harding Academy*, 222 S.W.3d at 363 ("Because the basis for Metro's revocation of the demolition permits involves a question of law, we review the record de novo with no presumption of correctness given to Metro's decision to uphold the revocation of the permits.").

Moreover, while the Election Commission improperly claims deference for its "decisions" on myriad issues of law, the administrative record contains no specific decisions by the Commission on many of them.[3] (AR2 at 0315-0440.) The Election Commission's legal counsel distributed an Executive Summary before the Commission's vote on the Petition that stated: "Since the 2021 petitions contain a sufficient number of valid signatures and the form of the proposed amendment

[3] For example, the administrative record contains no Election Commission decision on whether the Petition satisfies the "prescribe a date" requirement in Metropolitan Charter § 19.01, whether this deficiency in the Petition was subject to a strict or substantial compliance standard, whether certain amendments were vague and properly disqualified from the ballot, and whether the defective amendments were severable from the rest. (Br. at 64.)

language is in proper order, it is the Election Commission's duty to hold a referendum election on the six proposed amendments." (AR3 at 0618-0619.) In concluding that the Petition was in "proper order," however, the Executive Summary meant only that the Petition did not suffer from three defects that were fatal to the first 4GG petition: (1) whether the petitions identified the sections of the Metropolitan Charter to be amended, (2) whether the Proposed Amendments omitted campaign-like language, and (3) whether the Proposed Amendments omitted language suggesting retroactive intent. (*Id.*) The Executive Summary deemed all other issues concerning the Petition's validity beyond the scope of the Commission's authority. (*Id.*) In fact, the Commission's counsel, in response to questions from a Commissioner on the day of the final vote, told the Commission that it could ignore the severability issue that the Metropolitan Department of Law had raised in its legal opinion. (AR2 at 0325-0326 ("But I think that's not something really the commission would have to deal with, but that's something that's a remedy question that a court would have to deal with.").) The Commission's claim of entitlement to deference for its decision *not to decide an issue* is baseless.

In placing the Petition on the ballot without seeking Court guidance, the Election Commission implicitly reached legal conclusions about the power of local government and scope of referendum authority. The Election Commission's refrain that its decision is entitled to deference, even where that decision turned exclusively on questions of law, is incorrect and should be rejected.

ARGUMENT

I. ALL ISSUES THAT THE CHANCERY COURT ADDRESSED WERE RIPE FOR PRE-ELECTION REVIEW UNDER *CITY OF MEMPHIS*.

The parties agree on the overarching principle of law that applies here—that challenges to the form or facial validity of a ballot measure are ripe pre-election, while challenges to substantive constitutionality are not. But the Election Commission's appeal turns on a definition of "substantive constitutionality" that misconstrues the Supreme Court's *City of Memphis* decision. The Chancery Court therefore appropriately rejected the 4GG Petition on grounds that it was defective in form, and that decision should be affirmed.

A. Pre-Election Challenges to the Form and Facial Validity of Referendum Measures Are Ripe for Judicial Review.

Pursuant to the Tennessee Supreme Court's decision in *City of Memphis*, courts are authorized to review ballot referendum measures for form and facial validity before the measures appear on the ballot. 146 S.W.3d at 539.

In that case, the Court reviewed the Shelby County Election Commission's decision not to place a proposed city tax ordinance on the ballot for a referendum election. *Id.* at 533. The commission declined to place the ordinance on the ballot after receiving a letter from the state Coordinator of Elections declaring that the proposed ordinance was unconstitutional. *Id.* at 534. After the city filed suit, the Chancery Court affirmed the commission's decision, ruling that the measure would be unconstitutional if passed. *Id.*

The Supreme Court reversed, holding that the commission had "usurped the power of the judiciary to determine the substantive constitutionality of duly enacted laws." *Id.* at 533. The Court noted that executive and legislative branch officials lack authority "to determine the substantive constitutionality of duly enacted, presumptively valid ordinances," holding instead that such issues are reserved for judicial review. *Id.* at 538. The Court further held that issues of substantive constitutionality are not ripe for pre-election review, noting that the ordinance at issue, which was not self-executing, would not have been ripe even if successfully adopted by referendum because of myriad contingencies that would have had to occur before the measure went into effect:

> The City's voters may or may not approve the Ordinance. If the Ordinance is approved, the City may or may not adopt a privilege tax to which the Ordinance speaks. The City may or may not seek approval by the General Assembly for such a tax, and the General Assembly may or may not approve any such request.

Id. at 538-39.[4]

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[4] The Supreme Court also held that the Election Commission "violated the constitutional principle of separation of powers by refusing to place the Ordinance on the ballot." *Id.* at 533. The Court quoted from Tennessee's constitutional provisions dealing with home rule municipalities:

> It shall be the duty of the legislative body of such municipality to publish any proposal so made and to submit the same to its qualified voters at the first general state election which shall be held at least sixty (60) days after such publication and such

The Court then distinguished between referendum measures that are defective in "form" and those that are unlawful in "substance." *Id.* at 539. Citing *Brown v. State ex rel. Jubilee Shops, Inc.*, 426 S.W.2d 192 (Tenn. 1968), the Court noted that the question of "whether the ordinance had been passed in the *form* necessary to legitimately invoke the referendum process" was an issue ripe for pre-election adjudication, while "the question of whether the ordinance, if passed, would be unconstitutional" was "hypothetical" and "unripe." 146 S.W.3d at 539 (emphasis added). Summarizing this distinction, the Court stated: "Generally, pre-election challenges to the substantive constitutional validity of referendum measures are not ripe for determination by a court, while pre-election challenges to the form or facial constitutional validity of referendum measures are ripe for judicial scrutiny." *Id.*

The Court then clarified which types of challenges were appropriate for pre-election review, citing multiple cases and authorities that provide

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> proposal shall become effective sixty (60) days after approval by a majority of the qualified voters voting thereon.

Tenn. Const. art. XI, § 9 (para. 7). The Court held that "[b]y refusing to include the Ordinance, the Coordinator and the Commission thwarted the Memphis City Council's constitutional duty to submit the Ordinance to the qualified voters at the first general state election." *City of Memphis*, 146 S.W.3d at 537. But the state constitutional provision that authorizes the creation of metropolitan governments (as opposed to home rule municipalities such as Memphis) contains no such duty to submit an ordinance to referendum and in fact says nothing about how to amend a metropolitan government charter. Tenn. Const. art. XI, § 9 (para. 9). Put another way, a "constitutional duty" to submit an ordinance to referendum is not at issue here.

guidance on this distinction. *Id.* at 539-40. For example, *City of Memphis* cites the West Virginia Supreme Court's opinion in *Burnell v. City of Morgantown*, 558 S.E.2d 306 (2001), as "explaining and applying" the general rule that form challenges are ripe for pre-election review while substantive defects are not. 146 S.W.3d at 539. In *Burnell*, the court held that a court may undertake pre-election judicial review of a proposed voter referendum where it "either (1) violate[s] procedural or technical requirements incident to placing the measure on the ballot, or (2) involve[s] a subject matter that is beyond the scope of the initiative or referendum power." *Burnell*, 558 S.E.2d at 314. *City of Memphis* then cites seven other cases in which judicial challenges to form or facial invalidity were addressed pre-election. 146 S.W.3d at 539-40.

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

The Election Commission's brief repeatedly attempts to blur the line between form defects and substantive unconstitutionality. Despite

the Commission's attempt to avoid judicial review by characterizing nearly every issue below as a "substantive" as-applied challenge, the issues on appeal are not constitutional challenges at all. Rather, the Chancery Court's decision to enjoin the election was based exclusively on the Proposed Amendments' defective form under *City of Memphis*, state law, and the Metropolitan Charter. Thus, the Commission's arguments concerning what constitutes a "substantive unconstitutionality" challenge under *City of Memphis* are irrelevant to this appeal.

B. The Election Commission Ignores Subject-Matter Restrictions as Appropriate for a Form Challenge.

Throughout its brief, the Election Commission attempts to narrow the scope of what constitutes a form defect. It asserts that *City of Memphis* limits judicial review of a ballot measure to defects such as the color of ink and the proper placement of certain titles and candidate names. (Br. at 16-17.) In doing so, the Election Commission seeks to avoid judicial review of whether the Petition exceeds the permissible scope of a charter amendment referendum, as it plainly does. This position finds no support in *City of Memphis*, the authorities cited therein, or anywhere else in Tennessee law. *See City of Memphis*, 146 S.W.3d at 538-40.

The Election Commission's argument, for instance, fails to acknowledge the *City of Memphis* opinion's description of *Burnell v. City of Morgantown* as "explaining and applying" the rule that challenges to a referendum petition's form may be heard pre-election. The reason for this omission is clear: *Burnell* is fatal to the Election Commission's position that most of the issues here were prematurely decided. As *Burnell* explains, a pre-election challenge is appropriate where the

measure fails to comply with "procedural or technical requirements" or addresses "a subject matter that is beyond the scope of the initiative or referendum power." 558 S.E.2d at 314. *Burnell* further notes that a subject-matter restriction need not be contained in the provision creating the right to a referendum, "'since that requirement would elevate form over substance.'" *Id.* at 313 (quoting Gordon & Magleby, *supra*, at 316); *see also State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387, 390 (Mo. 1993) (noting that limitations on referendums "'may be express or may arise by implication'"), *cited in City of Memphis*, 146 S.W.3d at 539-40.

Additionally, analyzing whether the referendum power encompasses a permitted subject matter necessarily requires inquiry into the substance of the measure to some degree. *Burnell*, for example, cites the Notre Dame law review article for the proposition that "'some courts hold that zoning is not a proper subject matter for initiatives because the initiative process does not provide for notice and hearing as required by other constitutional provisions.'" *Id.* (quoting Gordon & Magleby, *supra*, at 316-17). As a result, the Election Commission is misguided in its claim that whether a challenge is substantive turns on the depth of the required legal analysis. (Br. at 17.)

The Election Commission's claim that the challenge in *City of Memphis* was substantive because it "required the Court to analyze the constitutional allocation of taxing powers" is equally baseless. (*Id.*) The measure at issue in *City of Memphis* turned on the *scope* of the city's taxing power, which is a substantive constitutionality issue. 146 S.W.3d at 534, 538. The Court did not address the form challenge at issue here—

whether the taxing power could be exercised by referendum in the first instance. Moreover, the Court was quite clear in *City of Memphis* that the challenge before it was unripe because the ordinance at issue was not self-executing. That is, even if the ordinance were approved by referendum, the city might not exercise the ordinance's taxing power, or the city might not ask the general assembly to authorize the tax. The opinion stated, "In short, we decline to pass upon the constitutionality of a measure that is not now the law and may never become the law." *Id.* at 538. By contrast, the Petition here is self-executing, and its provisions would take effect immediately upon passage.

In the end, the Election Commission's misguided analysis of *City of Memphis* does not render the challenge at issue here "substantive." As explained in more detail in Section II.B. to follow, the Petition fails because it seeks to accomplish by referendum numerous matters that cannot be accomplished through that means—rendering it a form challenge under *City of Memphis*. For example, the "Limit Property Tax Rates" provision seeks to legislate by referendum, namely, by setting and capping tax rates. The "Protect Promises to Nashville" provision seeks to effect automatic takings of property and impose payment of just compensation by referendum. Neither of these acts can be accomplished by referendum under state or local law. Because this type of subject-matter restriction is a defect in form that falls within the Chancery Court's jurisdiction for pre-election review under *City of Memphis*, the Court should affirm the Chancery Court's decision that the Petition is ripe for review.

II. THE CHANCERY COURT PROPERLY HELD THAT THE PETITION AND NUMEROUS PROPOSED AMENDMENTS ARE DEFECTIVE IN FORM UNDER *CITY OF MEMPHIS*.

A. The Petition Is Defective in Form Because It Failed to "Prescribe a Date" as Required by Metropolitan Charter § 19.01.

The 4GG Petition prescribes two dates for the referendum election: "May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01." (AR3 at 0622.) Because the Metropolitan Charter expressly requires a referendum petition to include only one election date, the Chancellor correctly held that the Petition was defective in form and disqualified from the ballot.

Section 19.01 mandates that a valid petition to amend the Metropolitan Charter "*shall* also prescribe *a date* not less than eighty (80) [days] subsequent to the date of its filing for the holding of a referendum election." *Id.* (emphasis added). This requirement is mandatory, not discretionary. *See Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012) (citations omitted) ("[T]he use of the word 'shall' is mandatory [where] . . . the prescribed mode of action is of the essence of the thing to be accomplished."); *Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009) (citation omitted) ("When 'shall' is used in a statute or rule, the requirement is mandatory."). In *Littlefield v. Hamilton Cty. Election Comm'n*, No. E2012-00489-COA-R3-CV, 2012 WL 3987003 (Tenn. Ct. App. 2012), this Court referenced the use of the term "shall" in a Tennessee statute outlining how recalls by petition must operate. *Id.* at *13 (citing Tenn. Code Ann. § 2-1-151). The Court held that the petitioners could not "pick

and choose which of the applicable [state referendum petition] requirements were sufficient for compliance." *Id.*

The Election Commission's suggestion that substantial compliance is the standard for *every* election measure in Tennessee is incorrect. Applying a strict compliance standard to Section 19.01's date requirement is consistent with a line of cases requiring strict compliance with election deadlines. *See, e.g.*, *State ex rel. Cassity v. Turner*, 601 S.W.2d 710, 711 (Tenn. 1980) ("The filing deadlines in the election statutes are mandatory."); *Koella v. State ex rel. Moffett*, 405 S.W.2d 184, 189 (Tenn. 1966) (construing strictly a requirement that a nominating petition be submitted sixty days before the election date); *Lanier v. Revell*, 605 S.W.2d 821, 822 (Tenn. 1980) (construing strictly a requirement that a voter must register twenty-nine days before an election, affirming the lower court's decision to void the election).[5]

Other jurisdictions construe referendum petition filing deadlines as mandatory, as well. *See, e.g.*, *State ex rel. Byers v. Gibson*, 191 P.2d 392, 393 (Or. 1948) (collecting cases) ("It is well settled that a statutory enactment prescribing the time within which [a referendum] petition must be filed is mandatory and jurisdictional."); *Kochen v. Young*, 107 N.W.2d 81, 84 (Iowa 1961) (collecting cases) ("It is the general rule that the time limit fixed by statute for filing a referendum petition is mandatory and jurisdictional."); *Borough of Eatontown v. Danskin*, 296

[5] With limited exceptions, "[t]he general election laws of the state shall be applicable to all metropolitan elections." (Metropolitan Charter § 15.04, TRSupp. at 122.)

A.2d 81, 86 (N. J. Super. Ct. Law. Div. 1972) (collecting cases) ("It has been held in other jurisdictions that the time periods in statutes providing for referendum are mandatory."). Strict compliance is even more critical here, where the referendum seeks to alter the Metropolitan Charter, the Metropolitan Government's foundational document.

Even if the Court were to apply a substantial compliance standard, the selection of two dates does not comport with Metropolitan Charter § 19.01. To evaluate substantial compliance, "a court should determine whether the [applicable law] has been followed sufficiently so as to carry out the intent for which it was adopted." Eugene McQuillin, The Law of Municipal Corporations, § 16:49 (3d ed). The single-date requirement is fundamental to Section 19.01 because it is the only method identified by the Charter to set the date for a referendum election. And the requirement is not without purpose. For one, it creates a legal deadline for collecting signatures. Permitting a petition to include multiple dates would effectively generate permissive extensions to that deadline. For example, if a Petition's initial submission were rejected for insufficient signatures, petitioners could back-door their failed effort by including a back-up date that had not expired. In fact, the necessary implication of the Election Commission's argument is that endless back-up dates would be permitted.

The single-date requirement is also necessary to determine whether a petition violates Section 19.01's rule that petition-based amendments may only be submitted to voters once every two years. (Metropolitan Charter § 19.01, TRSupp. at 135.) In *Nashville English First, et al. v. Davidson County Election Commission, et al.*, Case No. 08-

1912-I, Chancellor Claudia C. Bonnyman ruled that "[t]he phrase 'submitted by petition' [in Metropolitan Charter § 19.01] means submitted to the voters," *i.e.*, the election date. (TRSupp. at 165.) As a result, the date of the election as noted in the petition is how the Commission can determine if the petition should be rejected for failure to meet the two-year limitation.

The Election Commission seeks to undermine the connection between the "a date" requirement and the two-year limitation, arguing that the *Election Commission* determines the date of an election, not the date on the Petition. (Br. at 50 n.12.) But whether state law permits the Election Commission to select a different date that complies with state law does not negate the Metropolitan Charter's technical requirements. In fact, such an interpretation would effectively render the two-year requirement in Section 19.01 meaningless, violating well-established statutory interpretation principles. *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 52-53 (Tenn. 2018) (noting that charter provisions are subject to statutory interpretation principles, that courts "presume that the Legislature intended each word in a statute to have a specific purpose and meaning," and that provisions are to be read harmoniously) (internal citations omitted).[6]

[6] The Election Commission also significantly overstates its authority under Tenn. Code Ann. § 2-3-204(a). Section 2-3-204 states that "[e]lections on questions submitted to the people shall be held on dates set by the county election commission but not less than seventy-five (75) days nor more than ninety (90) days after the county election commission is directed to hold the election under the law authorizing or requiring the

The Election Commission's argument that the Petition complies with the Metropolitan Charter because the Petition's date provision is phrased in the disjunctive rather than the conjunctive (*i.e.*, "or," not "and") is equally unavailing. Again, such an interpretation ignores the purpose for having one date—the timeline and requirements for a petition are triggered by the date in the petition. Permitting what amounts to a "backup" date would undermine that purpose.

By prescribing two election dates, the Petition fails to satisfy any of the purposes behind the Metropolitan Charter's requirement to "prescribe a date." Thus, even under a substantial compliance standard, the measure fails. Voters and the Metropolitan Government are entitled to know the rules, timelines, and potential consequences governing pending referendum petitions. And the Election Commission's arguments, which would effectively permit perpetual signature

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election on the question." (emphasis added). Section 19.01 is the authorizing law, and it requires the referendum petition to prescribe an election date. Due to the Election Commission's excessive delay in processing the Petition, the Metropolitan Clerk could not certify a copy of the Petition to the Election Commission until May 6. Upon receipt of this certification, Metropolitan Charter § 19.01 provides that "it shall thereupon be the duty of said commissioners of election to hold a referendum election with respect thereto." (TRSupp. at 135.)

Whether the Petition's prescribed date or the Metropolitan Clerk's certification "directs" the Election Commission to hold the election under the Metropolitan Charter, August 4, 2021, was the latest possible date on which the election could be held in compliance with Tenn. Code Ann. § 2-3-204(a). Because an election cannot be held on the Petition in compliance with Tennessee law, this appeal is now moot.

harvesting for a single petition, are baseless.[7] Because the Petition does not strictly or substantially comply with the single-date requirement, the Chancery Court properly precluded it from the ballot.

Finally, the Election Commission's argument that its interpretation of the "prescribe a date" provision is entitled to deference is incorrect for reasons already addressed in the Standard of Review. The meaning of a Metropolitan Charter provision is a question of law, which is reviewed *de novo*. *McFarland v. Pemberton*, 530 S.W.3d 76, 91 (Tenn. 2017). Nor does *In re Cumberland Bail Bonding*, 599 S.W.3d 17, 23 (Tenn. 2020), support the Commission's position that its interpretation of the Metropolitan Charter's meaning must be affirmed if there is "room for two opinions." (Br. at 54.) The case that *In re Cumberland Bail Bonding* cites when discussing the "room for two opinions" concept did not use the phrase when addressing the standard of review applicable to *legal questions*, such as the meaning of the Metropolitan Charter. It used the phrase when addressing the standard of review applicable to a "decision with evidentiary support." *StarLink*

[7] The Election Commission's argument that the Petition had a "clear decision rule" and thus prescribed only one date should be rejected out of hand. The only reason the Petition yielded only one outcome—a June 14 election date—is because the petitioners could not collect sufficient signatures to satisfy the Metropolitan Charter's 80-day petition-filing deadline for the earlier prescribed election date of May 28. The Petition's self-fulfilling prophecy of including a backup date in case it failed to generate sufficient enthusiasm to meet its first filing deadline highlights the importance of the "a date" requirement. Potential signatories and interested citizens are entitled to clarity. Neither 4GG nor any other petitioners are entitled to unlimited, self-generated extensions of time.

Logistics Inc. v. ACC, LLC, 494 S.W.3d 659, 669 (Tenn. 2016). Legal questions, on the other hand, are always reviewed *de novo*.

Moreover, even if an *administrative agency* is entitled to deference when interpreting its own rules and regulations, such deference is not warranted where the Election Commission purports to interpret the Metropolitan Charter. The Tennessee Supreme Court's *Wallace* decision is clear on this point: "Metro and the Commission assert that the Court must afford deference to the Commission's and the State Election Coordinator's construction of section 15.03 of the Charter. We disagree. *This is not a case in which an administrative agency has construed and applied its own rules or policies.*" *Wallace*, 546 S.W.3d at 52 n.7 (emphasis added).

For these reasons, the Chancery Court properly held that the Petition did not "prescribe a date" as Metropolitan Charter § 19.01 requires. The Commission's arguments otherwise are neither entitled to deference nor correct as a matter of law.

B. The "Limit Property Tax Rates" Provision Is Defective in Form Because It Repeals an Existing Tax Rate, Sets a New Tax Rate, and Caps Future Tax Rates, All Without Authority To Do So By Referendum.

The Proposed Amendments assert and exercise legislative authority beyond the permissible scope of a charter amendment referendum under Tennessee law. Neither the Tennessee Constitution, the statutory authorization of metropolitan charters, nor the Metropolitan Charter itself permits the electorate to exercise legislative power expressly delegated to the Metropolitan Council. Indeed, the scope

of direct democracy that the Election Commission voted to place on the ballot is entirely foreign to Tennessee law.

As discussed in Section I above, *City of Memphis* permits pre-election challenges to the form of a ballot measure that seeks to use a referendum for subjects beyond the scope of referendum authority. The Chancery Court properly held that two of the Proposed Amendments—the "Limit Property Tax Rates" provision and the "Protect Promises to Nashville" provision—are defective in form for this reason.

The first of these provisions, the "Limit Property Tax Rates" provision in Proposed Amendment 1, reads as follows:

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

(AR3 at 0624.)

Under Tennessee law, county legislative bodies have an obligation to set property tax rates by the first Monday in July. Tenn. Code Ann. § 67-5-510. By scheduling the Petition for referendum election on July 27, 2021, the Election Commission submitted to the electorate a charter amendment that, if adopted, would have (1) repealed the Metropolitan Government's existing property tax ordinance, (2) set the Metropolitan Government's property tax rate[8] by referendum rather than by

[8] The Commission also mischaracterizes Proposed Amendment 1, claiming that it merely establishes a property-tax "baseline" for the

ordinance, and (3) capped property tax rate increases at 3% in the absence of an additional referendum. The Chancellor properly held that these legislative actions are not permissible subjects for a charter amendment referendum under *City of Memphis*.

1. The "Limit Property Tax Rates" Provision Improperly Delegates Legislative Taxing Authority to Voters.

State law assigns counties—not home rule municipalities or the general public—primary taxation responsibilities. Article II, Section 28 of the Tennessee Constitution permits the State to tax property. Article II, Section 29 provides that counties and incorporated towns can tax property only as the General Assembly authorizes.

Consistent with this constitutional framework, state law delegates property-tax authority, including setting tax rates, solely to a county's legislative body, not to the public. Tenn. Code Ann. § 67-5-102(a)(2) (counties are authorized to levy an ad valorem tax on all property, and the "amount of such tax shall be fixed by the county legislative body of each county"); *id.* § 49-2-101(6) (the "county legislative body" shall "[l]evy such taxes for county . . . schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the county legislative body").[9] In addition, the presumption under Tennessee law is

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Metropolitan Government but does not "set" the tax rate. The second clause in the Amendment plainly sets the property tax rate for Fiscal Years 2021-2022 and 2022-2023, stating that the rate "shall revert to Fiscal Year 2019-2020's tax rate(s), or lower if required by law." (AR3 at 0622.)

[9] The Metropolitan Government acts primarily in its capacity as a county in exercising its property taxing authority and therefore must assess

that local governments have only the taxing power granted to them, not plenary taxing authority absent some limitation. *See Knoxville & O.R. Co. v. Harris*, 43 S.W. 115, 117 (Tenn. 1897) (noting that the state's taxing power "is never presumed to be relinquished" unless the intention to relinquish "is declared in clear and unambiguous terms").

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

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property taxes, as all Tennessee counties do, through its legislative body. This primacy of the county function is evident in comparing the two components of the Metropolitan Government's property tax rate: the general services district ("GSD") embracing the total area of the county and the urban services district ("USD") consisting of areas that need urban services. (Metropolitan Charter §§ 1.03, 1.04, TRSupp. at 6-7.) The services provided in the GSD are "those governmental services which are now, or hereafter may be, customarily furnished by a county government in a metropolitan area." (*Id.* § 1.05, TR Supp. at 7.) A comparison of the relative property tax rates in the GSD and USD illustrates that the Metropolitan Council acts overwhelmingly as a county legislative body when it sets those rates. *See* Vivian M. Wilhoite, Assessor of Property, "Tax Rates & Calculator: History of Local Tax Rates," https://www.padctn.org/services/tax-rates-and-calculator/ (GSD property tax rate in FY 2019-2020 was $2.755, which was 87% of the total property tax rate of $3.155).

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

Rather than squarely address the language of Tenn. Code Ann. § 67-5-102, the Election Commission attempts to circumvent the statute's mandatory language by claiming that "[t]here is a big difference between establishing a right and establishing a duty or obligation." (Br. at 32-34.) This distinction is irrelevant here. The cases on which the Election Commission relies for this proposition, *Newsom v. Vanderbilt Univ. Hosp.*, 653 F.2d 1100 (6th Cir. 1981), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), address different legal issues than those before this Court. These include how to determine whether an *individual* has a property interest under state law that is protected by due process and whether a particular state law creates a private right of action for an *individual*. Both issues say nothing of whether the *local legislative body* has an exclusive right to set tax rates. And notably, while the Election Commission repeatedly claims that the county legislative body is not the only entity with the right to set property tax rates, the Commission cites no legal authority giving anyone *other than* the county legislative body that right.

Instead, the Election Commission cites Tennessee Attorney General Opinion 03-019 for the proposition that there is "ample authority" to use charter referendum votes to increase city tax rates. (Br. at 30.) But in discussing Tenn. Code Ann. § 67-5-102(a), the opinion draws a clear distinction between cities and counties, noting: "The property tax is one example of a [city] tax to which such a charter

amendment could apply. Even though the governing bodies of *counties* have been delegated specific taxing duties relative to the property tax, we have not located any similar statutory references to the general powers of *municipal* governing bodies." Tenn. Op. Att'y Gen. No. 03-019 (Feb. 19, 2003) (emphasis added). The Election Commission's brief also acknowledges that the law treats counties differently than municipalities because counties have an obligation to raise revenue, not merely authority to do so. (Br. at 34 n.7.)

State law's explicit delegation of taxing authority solely to county legislative bodies is necessary to ensure funding for the broad governmental responsibilities imposed on counties, while the same is not true of municipalities. The Tennessee Constitution imposes numerous requirements on counties, and county legislative bodies are charged with meeting those requirements. For example, counties must have a courthouse, a county legislative body, a county executive, a sheriff, a register, a county clerk, a trustee, and a property assessor, each selected through a democratic election. *See* Tenn. Const., art. VII, § 1. County governments have significant responsibility for law enforcement and jailing those charged with state offenses. Generally applicable state law also places on county governments numerous legal and financial responsibilities. Counties, for example, bear significant responsibilities for funding a "system of free public schools," which is itself a constitutional requirement that the State must meet. *See* Tenn. Const., art. XI, § 12; Tenn. Code Ann. § 49-2-101.

Accordingly, Tennessee courts have long recognized that the State is obliged to provide a county government with the fiscal capacity to meet

the expenses it incurs through its legal funding obligations. *See Baker v. Hickman Cty.*, 47 S.W.2d 1090, 1093 (Tenn. 1932) ("It is the duty of the General Assembly to levy, or authorize the counties to levy, a sufficient tax to meet the legal obligations of the counties, as well as their current expenses."). Thus, the distinction that the Election Commission attempts to draw between rights and obligations misunderstands the relationship between taxing and expenditures. Expenditures drive tax rates, as the Commission seems to acknowledge, not the other way around.

The inference to be drawn from this fiscal reality is not that tax rates can be set by someone other than the local legislature, as the Commission declares. Rather, this fiscal reality is precisely *why* state law requires the *county legislative body* to impose property taxes sufficient to satisfy the mandatory obligations that Tennessee law places on counties. Tenn. Code Ann. § 5-5-123 ("The county legislative body is required, at the first term in every year, to impose, and provide for the collection of, the tax for county purposes, and fix the rate thereof . . . ."). The "Limit Property Tax Rates" provision would usurp this essential grant of taxing authority from county legislative bodies and give it to voters. And the Election Commission's claim that the local government's only solution to an electorate-capped tax rate is to lower spending—even in the face of constitutional mandates to spend and no authority for the electorate to set the rate—is both unsupported and illogical.[10]

[10] The Election Commission likewise cites no authority to support its position that Metropolitan Charter § 6.07's existing language renders the "Limit Property Tax Rates" provision lawful. The fact that another

Because the Chancery Court properly concluded that the "Limit Property Tax Rates" provision falls outside the scope of a referendum permissible under state law, this Court should affirm the finding that it is defective in form.

2. The "Limit Property Tax Rates" Provision Improperly Legislates and Repeals Legislation By Referendum.

The Tennessee Supreme Court has defined "legislative authority" as "the authority to make, order, and repeal law." *McClay v. Airport Mgm't Servs., LLC*, 596 S.W.3d 686, 694 (Tenn. 2020). There is no authority in state or local law authorizing legislation to be adopted or repealed in metropolitan governments via voter referendum. Rather, legislative authority was given to metropolitan governments to be exercised through their local legislative bodies, and the Metropolitan Government, through its Charter, operates consistently with that authority.

The Metropolitan Charter was adopted pursuant to enabling legislation enacted by the General Assembly—the Metropolitan Charter Act. Tenn. Code Ann. §§ 7-1-101, *et seq.* Under this generally applicable statute, all metropolitan governments must have a metropolitan council,

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provision of the Charter was adopted by referendum in violation of state law does not somehow insulate the "Limit Property Tax Rates" provision from scrutiny. Taxing authority can only come from the General Assembly, and such authority has never been delegated to the Metropolitan Government's citizens. Furthermore, Section 6.07 only purports to cap Metropolitan Government's property tax rate, while the "Limit Property Tax Rates" provision seeks to set the property tax rate itself. Thus, nothing in Section 6.07's existing language salvages the Election Commission's position.

which "shall be the legislative body of the metropolitan government and shall be given all the authority and functions of the governing bodies of the county and cities being consolidated." *See id.* § 7-2-108(11).

The Metropolitan Charter was drafted consistently with this authority, stating: "The legislative authority of the metropolitan government of Nashville and Davidson County, except as otherwise specifically provided in this Charter, shall be vested in the metropolitan county council." (Metropolitan Charter § 3.01, TRSupp at 12.) *See also Binkley v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2010-02477-COA-R3CV, 2011 WL 2174913, at *5 (Tenn. Ct. App. June 1, 2011) ("The Metropolitan Council is the legislative body of the metropolitan government."). Nothing in the Metropolitan Charter places legislative authority in the hands of voters.

Nor does the Metropolitan Charter or state law provide voters with the virtually unlimited referendum power that the Election Commission contends they have. The power of direct legislation by initiative and referendum is only permissible when consistent with the Constitution and statutory authority. *See McPherson v. Everett*, 594 S.W.2d 677, 680 (Tenn. 1980) ("The right to hold an election does not exist absent an express grant of power by the legislature."); *see also* Eugene McQuillin, The Law of Municipal Corporations § 16:48 (3d ed.) (citing *Bean v. City of Knoxville*, 175 S.W.2d 954 (Tenn. 1943)). While the Tennessee Constitution makes clear that all governmental power is derived from the people, it "contains no reservation to the people of the powers of initiative or referendum." *Vincent v. State*, No. 01A-01-9510-CH-00482, 1996 WL

187573, at *3 (Tenn. Ct. App. Apr. 19, 1996); *see also State ex rel. Potter v. Harris*, No. E2007-00806-COA-R3-CV, 2008 WL 3067187, at *9-10 (Tenn. Ct. App. Aug. 4, 2008) ("While some states, *e.g.* Colorado and Arizona, have provided for referendum in their state constitutions, Tennessee has not done so.").

The Tennessee Supreme Court's decision in *Bean v. City of Knoxville* illustrates this limitation on the referendum power. There, the plaintiffs sought to enjoin the city from holding a referendum election to adopt an ordinance that would allow motion pictures to be exhibited on Sunday. 175 S.W.2d at 954. A state statute prohibited Sunday movies except when authorized by a majority vote of a municipality's legislative council. *Id.* The *Bean* plaintiffs argued that voters in a referendum election could not be considered part of "the legislative council." *Id.* The court rejected this argument, noting that the legislature had expressly extended legislative authority to the citizens in the private act establishing the Knoxville Charter. *Id.* at 955.

In short, the court upheld the City of Knoxville's delegation of legislative authority to voters via referendum because the state legislature and municipal charter had authorized the delegation. *Id.*; *see also* John Bourdeau, *et al.*, C.J.S. *Municipal Corporations* § 373 (database updated Oct. 2021) ("A council of a municipal corporation, operating under a freeholders' charter, which charter has no provision for a referendum, has no power to confer such power on the electors of the corporation since such action is regarded as a delegation of the legislative power of the council.") (citing *Bean*); *see also State ex rel. Childress*, 865

S.W.2d at 387, 390 (Mo. 1993) (stating that a limitation on referendums "may be express or may arise by implication" and that "where the [city] charter establishes a procedure for the adoption of certain types of ordinances, that procedure may not be circumvented by use of an initiative petition").

No such authority has been delegated here. There is no broad referendum power in Tennessee; such power must be explicitly conferred on the electorate. And nothing in state law or the Metropolitan Charter permits legislation by referendum. Rather, the Metropolitan Charter Act is highly prescriptive, vesting legislative authority *only* in the local legislative body and ensuring that the Metropolitan Government "now or hereafter" has functions previously entrusted to counties and municipalities. By purporting to set, repeal, and cap tax rates—inherently legislative acts—the "Limit Property Tax Rates" provision usurps these powers, subjecting them to popular vote in violation of state law. Accordingly, the Court should affirm the Chancery Court's ruling that the "Limit Property Tax Rates" provision exceeds the referendum power under state and local law, rendering it defective in form under *City of Memphis*.

C. The "Protect Promises to Nashville" Provision Is Defective in Form Because It Takes Property, Affects a Third-Party Entity, and Impairs Bond Obligations, All Without Authority To Do So By Referendum.

The second provision that the Chancery Court struck down as defective in form because it addresses a subject matter outside

referendum authority is the "Protect Promises to Nashville" provision in Proposed Amendment 6. (TR3 at 313-15.) It reads as follows:

> **Protect Promises to Nashville – Create Article 18, § 18.09:** *"If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) consecutive months during the term of a team's ground lease, all sports facilities and related ancillary development related to the defaulting team shall revert to public property, and all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payments shall be paid, if required by law."*

(AR3 at 0624.) As the Chancery Court properly concluded, this provision takes property, attempts to regulate a third-party entity, and threatens bond obligations protected by state law, all without authority to do so by referendum.

1. The "Protect Promises to Nashville" Provision Improperly Effects Automatic Takings by Referendum.

Metropolitan Charter §§ 2.01(12) and 3.06 vest the power to take private property in the Metropolitan Council. (TRSupp. at 10, 14.) The "Protect Promises to Nashville" provision does not follow or amend the Charter's process for eminent domain. Rather, it uses the referendum process to take property automatically upon the occurrence of specified events—without any authority to do so.

The Election Commission argues on appeal that the Chancery Court erred in determining that the exercise of eminent domain was at issue at all. Instead, the Commission contends that this Court should evaluate the Proposed Amendment as merely a "regulatory restriction on use," (Br. at 42 (emphasis in original)), despite its explicit, confiscatory

provisions. By characterizing the Proposed Amendment as a land-use regulation, the Election Commission seeks to impose judicial review of land affected by the provision on a case-by-case basis, individualized for each owner, and subject to the multi-factored, flexible balancing test set out in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). (Br. at 42.)

There is no support for the Commission's position, in law or reason. The "Protect Promises to Nashville" provision would trigger automatic conversion of private property to the Metropolitan Government when specified events occur, at which time the government would take physical possession of private sports facilities and attendant development. Indeed, the authority asserted in the provision is the right to "absolutely dispossess" private owners of their property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). Where a private owner is required "to submit" to the government's claimed right to physically invade property, the government effects a physical taking—not a regulatory taking, as the Election Commission claims. *See Yee v. City of Escondido*, Cal., 503 U.S. 519, 527 (1992) ("This element of required acquiescence is at the heart of the concept of occupation.") (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252, (1987)).

Moreover, neither the United States nor Tennessee Constitutions condition takings jurisprudence on formally seizing title or immediately possessing land. "What matters," the Supreme Court instructs, is "that the government ha[s] taken a right to physically invade the [owners'] land." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075 (2021); *id.* at

2077 ("Our cases establish that appropriations of a right to invade are per se physical takings, not use restrictions subject to *Penn Central*."). If enacted, the "Protect Promises to Nashville" provision would give the Metropolitan Government an ownership interest in these private sports facilities with a corresponding diminution of the private ownership interest. That the Metropolitan Government's exercise of that asserted ownership right is contingent on future events does not alter the ultimate diminution of the owner's property rights. And the Election Commission cites no authority in Tennessee takings law that would apply lesser scrutiny where the government establishes the legal authority to seize a particular person's private property in advance of that future event.

The Election Commission claims that there would be sufficient time in the future to engage in an as-applied, case-by-case, fact-intensive, balancing analysis for each affected property owner (Br. at 43, 46). This assertion is both irrelevant and inaccurate. The "Protect Promises to Nashville" provision is self-executing. *At its adoption*, the Proposed Amendment would alter the owner's property rights, and any future application would be automatic pursuant to the amendment's express terms. Accordingly, the general rule that eminent domain matters are not ripe until after a final, administrative decision does not apply. *See Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 738-39 (1997).[11]

[11] This exhaustion requirement is premised on the wide discretion generally available to the government in question. But here, where the Metropolitan Charter would automatically trigger a taking, the Metropolitan Government has no discretion whether to exercise eminent domain. *Suitum*, 520 U.S. at 739 ("Because the agency has no discretion

Furthermore, the "Protect Promises to Nashville" provision does not state that its confiscation of private property would be for a particular public use—or any public use. Instead, the provision's automatic forfeiture of private property to the government is triggered regardless of whether it would serve any public purpose or even run *contrary* to public purposes. And while the inclusion of "just compensation" language seemingly situates the proposal in eminent domain, the absence of any contemplated public use for the seized property is telling. More importantly, it ignores state law for how takings may be accomplished—which is not by referendum.

The Election Commission responds by claiming there is no longer a "'public use' restriction on government confiscation of private property." (Br. at 44-45.) But the right of state and local governments to exercise eminent domain authority in Tennessee is expressly conditioned on whether "the property is taken for a legitimate public use." Tenn. Code Ann. § 29-17-102(1); *id.* § 29-17-103 (eminent domain power "shall be construed to protect the private property rights of individuals and businesses, such that private property may only be condemned and taken for legitimate public use"). After the United States Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), the General Assembly enacted additional protections for private owners to protect against improper takings that do not serve public purposes. *E.g.*, Tenn. Code Ann. § 29-17-106. Indeed, where a court finds that takings

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to exercise over Suitum's right to use her land, no occasion exists for applying [the] requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel.").

are unauthorized, the owners are entitled to reimbursement "for their reasonable disbursements and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the action. *Id.* § 29-17-106(b)(2).

The "public use" question is not an irrelevant consideration entrusted to the Metropolitan Government's unbridled discretion. Nor is it entrusted to the mechanical application of the Metropolitan Charter. To the contrary, determination of "whether private property is being taken for a public use is a judicial question" for resolution by the courts. *See, e.g.*, *Metro. Gov't of Nashville & Davidson Cty. v. Allen Fam. Tr.*, No. M200800886COAR3CV, 2009 WL 837731, at *6 (Tenn. Ct. App. Mar. 27, 2009) (citing *S. Ry. Co. v. City of Memphis*, 148 S.W. 662, 665 (Tenn. 1912)).

In summary, the Metropolitan Government has been granted the sovereign authority to take private property for a public use. But it cannot exercise this extraordinary power by referendum. Accordingly, the Chancellor correctly held the "Protect Promises to Nashville" provision is defective in form.

2. The "Protect Promises to Nashville" Provision Affects a Third-Party Entity By Referendum.

The "Protect Promises to Nashville" provision also seeks to control the Sports Authority of the Metropolitan Government of Nashville and Davidson County ("Sports Authority"). The Sports Authority is a public corporation created by state statute and not governed by the Metropolitan Charter. *See* Tenn. Code Ann. §§ 7-67-101, *et seq.* (Sports Authorities Act of 1993); *id.* § 7-67-103 (defining "sports authority"). The

Election Commission has not challenged the Chancery Court's holding that the Sports Authority is not subject to the Metropolitan Charter, rendering the Proposed Amendment beyond the scope of the referendum power and defective in form. Thus, the Commission has waived that issue.

Instead, the Commission claims, though only in a footnote, that the Sports Authority is effectively controlled by the Metropolitan Government, rendering it not really a "separate" entity. (Br. at 41 n.9.) This argument also falls short. While the Sports Authority is deemed a "public instrumentality" of its organizing municipality, its powers are enumerated in the Sports Authority Act and not subject to modification by the organizing municipality, either by ordinance or charter amendment. Tenn. Code Ann. § 7-67-109. Accordingly, the Chancellor's ruling should be affirmed on this point.[12]

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[12] The Chancery Court also ruled that the "Protect Promises to Nashville" provision is defective in form because it conflicts with state laws outlining the process and authority for issuing bonds, rendering the provision beyond the scope of what is permissible through a Metropolitan Government Charter amendment. (TR3 at 314.) Again, the Election Commission does not challenge this ruling and thus has waived the issue. Nevertheless, the Chancery Court may be affirmed on this ground as well. The sports facilities that would be affected by the provision were constructed with revenue bonds issued by the Sports Authority and dependent on rent payments from the facilities. (TR3 at 314.) The Sports Authority issued those bonds pursuant to the Sports Authority Act and the Local Government Public Obligations Act of 1986 ("LGPOA"), Tenn. Code Ann. §§ 9-21-101, *et seq*. Collectively, these acts preempt conflicting local laws. *See, e.g.*, *id*. § 9-21-124(a) (the LGPOA prevails over all conflicting local law with respect to bonds issued under the Act); *id.* § 7-

In sum, the "Protect Promises to Nashville" provision involves subject matters beyond the scope of the referendum power. Therefore, it is defective in form under *City of Memphis*, and this Court should affirm the Chancellor's holding to that effect.

D. The "Abolish Lifetime or Other Benefits" and "Protect Promises to Nashville" Provisions Are Defective in Form Because Their Vague and Confusing Language Prevents the Electorate From Intelligently Casting a Vote With Knowledge of Its Consequences.

The Chancery Court struck down as defective in form two Proposed Amendments that contain undefined terms, fail to reference conflicting charter provisions, and are on their face vague and confusing: the "Abolish Lifetime or Other Benefits" provision in Amendment 3 and the "Protect Promises to Nashville" provision in Amendment 6. (TR3 at 305.) The Chancellor appropriately concluded that the Proposed Amendments "will confuse the electorate" and that such defects of form are "subject to pre-election review." (*Id.*)

The Election Commission has not appealed the *substance* of the Chancery Court's finding that terms in the Proposed Amendments were vague and confusing. Instead, the Commission challenges only the *timing* of the Chancellor's finding—arguing, as it has on virtually every issue, that the Chancery Court improperly addressed the vagueness issue *pre-election*. (Br. at 22-23.) More specifically, the Election Commission insists

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67-112 (noting that sports authority bonds "shall be issued in accordance with" the LGPOA). Thus, the Chancellor properly held that a charter amendment that would impair the assets pledged to Sports Authority bonds is beyond the scope of a permissible referendum and defective in form under *City of Memphis*.

that "vagueness" challenges may not be raised before an election or even after a provision is enacted, but only as First Amendment challenges after the amendments have been adopted and applied. The Commission's argument misapprehends Tennessee case law and the express language of the Chancery Court decision.

In support of this position, the Election Commission cites *National Rifle Association of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997), and *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927 (E.D. Tenn. 1998). Such cases note that "vagueness 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*, 44 F. Supp. 2d at 935. These cases, however, address the "void for vagueness" constitutional law doctrine, not the state law balloting requirements that the Chancellor applied here.[10] The "void for vagueness" doctrine is irrelevant here.

Vandergriff and *National Rifle Association* both address whether *already-enacted* laws could be constitutionally enforced or were void for vagueness. "The 'void for vagueness' doctrine developed as an aspect of due process jurisprudence in the context of criminal statutes because it was thought unfair to impose criminal punishment on persons for conduct of which they had no notice." *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys. of State of Tenn.*, 863 S.W.2d 45, 48-49 (Tenn. 1993).

Those due process concerns are not at issue in this writ of certiorari action. Instead, the Chancery Court properly concluded that the vague language in the Proposed Amendments relates to the validity of the referendum measure's form and therefore is subject to pre-election review and challenge under *City of Memphis*. (TR3 at 304-05.) In so doing, the Chancellor applied well-established Tennessee law, referencing precedents related to the Election Commission's duty to ensure that ballot measures "convey a reasonable certainty of meaning so that a voter can intelligently cast a vote for or against a proposal with full knowledge of the consequences of his vote." (TR3 at 288 (quoting *Rodgers v. White*, 528 S.W.2d 810 (Tenn. 1975).)

Tennessee courts have long recognized that ballot questions must provide a voter with "sufficient information to advise him of the question on which he has to cast his ballot." *See Pidgeon-Thomas Iron Co. v. Shelby Cty.*, 397 S.W.2d 375, 378 (Tenn. 1965); *see also* Marie K. Pesando, 42 Am. Jur. 2d *Initiative and Referendum* § 18 (updated Aug. 2021) ("The text of a referendum petition must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent, and informed decision by the average citizen affected."). To conduct a

[10] *See Vandergriff*, 44 F. Supp. 2d at 937-38, *aff'd sub nom.*, *Rush v. City of Chattanooga*, 182 F.3d 918 (6th Cir. 1999) (challenging constitutionality of City of Chattanooga storm water ordinance); *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys. of State of Tenn.*, 863 S.W.2d 45, 48-49 (Tenn. 1993) (challenging public employee dismissal standards adopted by the State of Tennessee); *National Rifle Association*, 132 F.3d at 277 (challenging constitutionality of U.S. statute).

legitimate ballot referendum, Tennessee law requires that voters are not "confused or misled" but rather provided sufficient information to cast a reasoned vote with an accurate understanding of its consequences. *Rodgers*, 528 S.W.2d at 813. In sum, while the "void for vagueness" cases cited by the Election Commission focus on whether a provision can be legally *enforced*, the *Rodgers/Pidgeon-Thomas* line of cases focuses on whether a proposed referendum can be legally *presented for public vote*.

This form requirement is not unique to Tennessee. Courts around the country require election commissions and courts to consider whether proposed ballot language is vague, and therefore defective in form, before an election. *See, e.g.*, *Gray v. Howard Cty. Bd. of Elections*, 98 A.3d 423, 428-30 (Md. Ct. Spec. App. 2014) (affirming Election Director's decision to withhold measure from the ballot where petition summary was not "fair and accurate" and noting that measures must be 'free from misleading tendency, amplification, or omission' to permit voters to exercise 'intelligent and enlightened judgment' as to whether to sign the referendum petition"); *Markus v. Trumbull Cty. Bd. of Elections*, 259 N.E.2d 501, 504 (Ohio 1970) (affirming trial court decision that petitions for referendum were "insufficient, ambiguous and misleading" and declaring "the form of the proposed ballot to be null and void"). If there is no way to determine the intent of signers or voters about the meaning of proposed language, the petition cannot be placed on the ballot. *Lipinski v. Chicago Bd. Of Elec. Comm.*, 500 N.E.2d 39, 42 (Ill. 1986).

None of these cases couch the issue in terms of constitutional vagueness; instead, the issue is always whether the ballot language is

sufficiently clear to permit an intelligent vote. *See also Miami Dolphins, LTD v. Metro. Dade Cty.*, 394 So. 2d 981, 987 (Fla. 1981) (asking whether the language gives a signer or voter "fair notice of the decision he must make"). If a referendum cannot "stand on its own terms," then voters "cannot be said to have approved a coherent scheme." *Leck v. Michaelson*, 491 N.E.2d 414, 417 (Ill. 1986).

Here, the Petition offers no coherent scheme to "Abolish Lifetime or Other Benefits." The provision does not define which local officials are covered or what benefits are affected (*e.g.*, pension, health, or anything of value), nor does it repeal or incorporate conflicting benefit language in the Charter. *See* Metropolitan Charter § 5.07 (addressing pension payable to mayor); *id.* § 14.08 (allowing general sessions judges to participate in Metro pension system). The "Protect Promises to Nashville" provision is similarly incoherent, failing to define key terms such as ground lease, facilities, related ancillary development, revert to public property, and related contracts. In the absence of clarity on these issues, a court cannot determine the intent of signers or voters about the meaning of the amendments.[13] The Chancellor therefore appropriately concluded the Proposed Amendments "will confuse the electorate" and that such defects in form are "subject to pre-election review." (TR3 at 305.)

[13] Nor can this defect be cured by subsequent Election Commission interpretation or legislative ordinance. *See Leck*, 491 N.E.2d at 416 (rejecting ordinance implementing referendum proposition that contained provisions not "clearly contemplated" within proposition).

In sum, courts must have a legitimate opportunity to analyze whether election officials have met their obligation to ensure that the wording of ballot questions is "precise and direct" and not "drawn as to limit the information or confuse the voter in making his decision." *See Pidgeon-Thomas*, 397 S.W.2d at 378. The Chancellor appropriately exercised that judicial authority here, pre-election. And as evidenced by the Election Commission's failure to challenge the substance of the ruling on appeal, the Chancery Court reached the correct conclusion that the language in the "Abolish Lifetime or Other Benefits" and "Protect Promises to Nashville" provisions did not "convey[ ] a reasonable certainty of meaning" and thus should not have proceeded to the ballot. *Rodgers*, 528 S.W.2d at 813. This Court should affirm.

III. THE CHANCERY COURT PROPERLY HELD THAT THE DEFECTIVE PROPOSED AMENDMENTS ARE NOT SEVERABLE; THUS, THE PETITION FAILS AS A WHOLE.

Because some but not all Proposed Amendments in the Petition are defective in form, the Chancery Court properly evaluated whether the defective amendments are severable from the rest. Nothing in the Petition allows a court to assume that the Petition would have received the requisite number of signatures if one or more of the defective amendments were removed. Rather than speculate whether petition signers would have signed a different proposal, the Chancery Court correctly held that the provisions are not severable, invalidating the entire Petition.

Elision is generally not favored under Tennessee law. *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985); *Smith v.*

City of Pigeon Forge, 600 S.W.2d 231, 233 (Tenn. 1980). The Tennessee Supreme Court applies the rule of elision to legislation only when it is apparent on the face of the statute "that the legislature would have enacted it with the objectionable features omitted." *Gibson Cty.*, 691 S.W.2d at 551. Two cases to which *City of Memphis* cites support application of this proposition to referendum measures as well. *See Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 832 (Mo. 1990) (where proposed amendment had more than one subject, court could not determine which provisions the petition signers intended to support); *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457, 471 (Mo. Ct. App. 2000) (declining to sever provisions of proposed charter amendment because it would be "impossible" to determine what petition signers intended with respect to unconstitutional language); *see also In re Jackson Twp. Admin. Code*, 97 A.3d 719, 725-28 (N.J. App. Div. 2014) (key factor in applying severability is the uncertainty in determining which initiative provisions "induced each voter to sign it").

The Petition's language indicates that its signers intended for all of the Proposed Amendments to be submitted to the voters. The Petition asked signers to support the "Nashville Taxpayer Protection Act," which encompasses all of the Proposed Amendments. (AR3 at 0622.) The Petition tells signers that voters "**shall vote**" on "**the foregoing six (6) <u>separate</u> amendments**" on election day. (*Id.* (emphasis in original).) Indeed, the Petition expressly states that the "undersigned Davidson County voters *propose the following six (6) Amendments*." *Id.* (emphasis

added). Citizens reviewing this Petition were given two options: (a) sign a petition to propose all six amendments or (b) refuse to sign the petition. The signatories did not confirm their support for each Proposed Amendment independently and were given no opportunity to do so.

In addition, Tennessee law generally presumes that petitions such as this are limited to proposing a "question" that *will* be placed on the ballot, rather than a menu of options that *may* be placed on the ballot. *See* Tenn. Code Ann. §§ 2-5-151. Petitions for any form of referendum, initiative, or recall "shall contain . . . [t]he full text of *the question* attached to each petition." *Id*. § 2-5-151(e) (emphasis added); *see also id*. § 2-5-151(f)(2) ("*The question* contained in a petition filed less than ninety (90) days before an upcoming general municipal or county election will be placed on the ballot of the following general municipal or county election.") (emphasis added). The form election petitions included in the Tennessee Code are directed toward proposing a distinct option or question to the electorate, not a menu of options or questions. *See id*. §§ 2-1-151, 2-5-102, 6-1-209, 6-1-301, 9-21-207, 49-2-1206.

The Election Commission, however, offers no legal support for its position that the Chancery Court erred in refusing to elide the defective Proposed Amendments. The Commission asserts only two arguments, in only two paragraphs of its brief, as to why the Proposed Amendments could be placed on the ballot in part: (1) the Petition says they are "separate" and should be voted on separately, and (2) the Commission is entitled to deference on its decision to place the full Petition on the ballot. Neither argument carries the day.

First, inclusion of the term "separate" in the Petition did not imply, much less expressly inform the Petition's signers, that the Proposed Amendments were severable. Distinct amendments may appear separately on the ballot to allow *voters* to express their approval or disapproval for each one. Describing the amendments as "separate" on a Petition, however, provides no indication of the *signers'* support for each amendment. As described above, to justify elision, a court must determine that the Petition would have garnered the necessary signatures if, for example, the tax provision were removed. Stating that the amendments are "separate" is irrelevant to that determination.

The Petition also included an express severability clause *within* the "Limit Property Tax Rates" provision. This drafting choice makes clear that the Petition drafters knew what severability language looks like. The absence of such language indicating that the Proposed Amendments are severable *from one another* therefore also supports the Chancery Court's conclusion that the Proposed Amendments are not severable.[14]

The Election Commission's reference to cases noting a presumption of severability under statutory interpretation principles does not alter this conclusion. (Br. at 61.) Such cases are based on the general principle that a court should uphold the constitutionality of legislation whenever

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[14] When addressing whether a now-inoperable sentence *within* the "Limit Property Tax Rates" provision could be elided from the other portions of the same provision, the Election Commission acknowledges that "[t]he key to severability analysis is the proponents' intent." (Br. at 60.) Despite the Commission's glaring omission of this principle when addressing whether the Proposed Amendments are severable *from one another*, it applies just as equally to that issue.

possible. But the Tennessee case on which the Election Commission primarily relies notes that circumstances in which courts have deemed it their "duty to elide the provision objected to rather than to strike" the entire statute "have generally involved broad, omnibus taxing statutes in which one provision is unconstitutional, but the remainder of the statute is sound." *Waters v. Farr*, 291 S.W.3d 873, 913 (Tenn. 2009). Moreover, these cases do not overturn the general principle that elision must be "in keeping with the expressed intent of a legislative body." *Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020). One of the cases to which the Election Commission cites, in fact, firmly acknowledges that where a provision contains an express severability clause reflecting the intent of the statute, "the Court should adhere to the text of the severability or nonseverability clause." *Barr v. Am. Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020).

The same principle applies here. The presence of a severability clause within the "Limit Property Tax Rates" provision reflects intent for each sentence of that provision to stand alone. But the absence of such language in the rest of Petition is fatal to the Election Commission's position. There is nothing in the Petition that would have informed petition signers that fewer than all six Proposed Amendments would appear on the ballot. Whether the Proposed Amendments are to be voted on separately is a different question that does not inform the severability analysis. Because there is no guidance in the Petition or Proposed Amendments, a court cannot speculate whether the Petition would have garnered sufficient support to appear on the ballot without all its

provisions. Accordingly, the Chancellor correctly concluded that the Petition fails as a whole.

Notwithstanding this plainly-applicable case law governing severability of referendum proposals, the Election Commission reiterates its argument that the Chancery Court applied the wrong standard of review to its decision. The Commission's deference argument fails in the severability context as well. Whether the Proposed Amendments are severable from one another is a legal question. And for the same reasons outlined in the Standard of Review section, the Election Commission's incorrect decision to place the entire Petition on the ballot is not entitled to deference.

CONCLUSION

The Chancery Court applied the proper standard of review to this common law writ of certiorari action. As it must, the Chancery Court reviewed the legal issues related to the Petition and Proposed Amendments *de novo*, and this Court should do the same.

The Court should also affirm the Chancery Court's decision precluding the Petition from the ballot for a referendum election. The Petition failed to "prescribe a date" for the election as required by the Metropolitan Charter, rendering it ineligible for the ballot. The "Limit Property Tax Rates" and "Protect Promises to Nashville" provisions are defective in form because they address matters outside the scope of referendum authority under state and local law. The "Abolish Lifetime or Other Benefits" and "Protect Promises to Nashville" provisions contain confusing and vague language that prevents the electorate from casting an intelligent vote with knowledge of its consequences. All of these form

defects were properly reviewed pre-election under *City of Memphis*. Because the Proposed Amendments are not severable from each other, each of these defective Amendments disqualified the entire Petition from the ballot. Accordingly, the Chancery Court decision should be affirmed.

Dated: November 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the word limit of Tenn. Sup. Ct. R. 46, Section 3.02(a)(1)(b), excluding the parts of the document exempted by that rule, in that it contains 13,901 words. This document also complies with the typeface, type-style, and the type-size requirements of Tenn. Sup. Ct. R. 46, Section 3.02(a)(2) – (4) because it was prepared using Century Schoolbook 14-point type.

CERTIFICATE OF SERVICE

This is to certify that on this 1st day of November, 2021, a true and exact copy of the foregoing was served via the Court's filing system and forwarded by electronic mail to the following:

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