

IN THE EIGHTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

SEP 19 11 3: 37
H. BEZEL ROCKWELL CLERK
V. Walsh

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

Petitioners,)

v.)

Docket No. 18C2158

METROPOLITAN GOVERNMENT OF)
NASHVILLE AND DAVIDSON COUNTY,)
DAVIDSON COUNTY ELECTION)
COMMISSION,)

Respondents, and)

COMMUNITY OVERSIGHT NOW,)

Intervening Respondent.)

R. B. [Signature]
CLERK

2018 SEP 19 PM 4: 04

FILED

FINAL ORDER

This matter came before this Court on September 14, 2018 for extraordinary relief and an expedited hearing on Petitioner’s Petition for a Writ of Certiorari and Supersedeas and Writ of Mandamus. Also pending before this Court is a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12.02(6) filed by Intervening Respondent, Community Oversight Now. This action challenges the Davidson County Election Commission’s decision to place a Referendum on the November 6, 2018 Ballot. This Court reviews this action pursuant to Tenn. Code Ann. §§ 27-9-101 et seq. (2018), as a Writ of Certiorari and Supersedeas.

A scheduling conference was held on August 30, 2018 and all parties were ordered to submit briefs on the following issues:

1. Whether the August 1, 2018 petition filed by Community Oversight Now with the Metropolitan Clerk requesting that a referendum be held on an amendment to the Metropolitan Nashville Charter satisfies the requirements of Section 19.01 of the Metropolitan Charter to be placed on the November 6, 2018 ballot as determined by the Davidson County Election Commission?
2. For the purpose of determining the number of signatures necessary on this Petition to place the referendum on the ballot, when was the preceding general election (the "Preceding General Election") as contemplated by Section 19.01 of the Metropolitan Charter?

Based upon the briefs filed, the arguments of counsel, and the entire record as a whole, this Court makes the following findings of fact and conclusions of law:

On August 1, 2018, Community Oversight Now¹ filed a petition (the "Petition") with the Metropolitan Clerk to include a referendum (the "Referendum") on the November 2018 ballot to amend the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee (the "Charter" and "Metro", respectively) to create a community oversight board of the Metropolitan Nashville Police Department (the "MNPD"). Community Oversight Now obtained an estimated 8,269 signatures on the petition. The Metropolitan Clerk sent the Petition to the Davidson County Election Commission (the "Election Commission") on August 2, 2018. Staff members of the Election Commission analyzed a total of 6,491 signatures and determined that 4,801 signatures were valid and 1,690 signatures were invalid. The staff members did not

¹ Community Oversight Now is a coalition of 10 committees and organizations including Gideon's Army, No Exceptions Prison Collective, Davidson County Chapter of the National Association for the Advancement of Colored People (NAACP), Tennessee State Conference of the NAACP, Black Lives Matter Nashville, Showing Up for Racial Justice (Nashville), Democracy Nashville & Democratic Communities, Workers' Dignity/Music City Riders United, Nashville Peacemakers, and Justice for Jocques Coalition.

analyze the remaining 1,200 signatures. At the Election Commission meeting on August 15, 2018, the Election Commission passed a motion to place the proposed amendment on the November 6, 2018 ballot. On August 16, 2018, the Election Commission certified the verified signatures to the Metropolitan Clerk. On August 20, 2018, the Metropolitan Clerk certified a copy of the Petition to the Election Commission. On August 21, 2018, the Fraternal Order of Police, Andrew Jackson Lodge No. 5 (the "FOP"), Matthew Boguskie, Noble Taylor, Harold Burke, III, Robert Young, and James Gafford (collectively, hereinafter referred to as the "Petitioners") filed for a petition for a Writ of Certiorari and Supersedeas and Writ of Mandamus challenging the number of signatures on the petition.

Community Oversight Now filed a Motion to Intervene on August 22, 2018. Upon an Agreed Order entered August 27, 2018, Community Oversight Now was added as an Intervening Respondent to this cause with Metropolitan Government of Nashville and Davidson County and the Election Commission.

The Referendum calls for the creation of the Metropolitan Government of Nashville and Davidson County Community Oversight Board (the "Board") to review allegations of police misconduct against members of the public. Pet'r Br. 3 (Sept. 6, 2018). The Referendum calls for the Board to be created and operational by January 31, 2019. *Id.* at 2. The Board will consist of 11 members who are residents of Davidson County. *Id.* "The Board members must have a demonstrated knowledge of issues pertaining to civil rights and equity and must have experience with criminal justice and policing practices." *Id.* The Referendum prohibits employees of any law enforcement agency, anyone who has served in a law enforcement capacity in the past 5 years, any elected official, and the spouse of any of the foregoing persons from serving on the Board. *Id.* at 2-3.

The Referendum empowers the Board to review and investigate allegations that MNPD Officers have committed misconduct against members of the public. The Board would have the powers to: (1) compel attendance of witnesses and production of documents; (2) issue policy advisory and resolution reports assessing allegations of misconduct; (3) recommend monitoring programs for ongoing review and audit of complaint processes of the MNPD; (4) refer a matter to the MNPD Office of Professional Accountability or an equivalent internal affairs program with a recommendation for discipline; (5) require the MNPD to respond in writing to the Board's disciplinary recommendations; and (6) refer factual findings and civil rights violations to the District Attorney, a grand jury, or the United States Attorney. *Id.*

Petitioners have asked this Court to determine which election is the Preceding General Election as required by § 19.01 of the Charter. Petitioners argue that the Preceding General Election was the election held on August 6, 2015 (the "August 2015 Election"). Alternatively, Petitioners argue that if the last Preceding General Election was not the August 2015 Election, it was the May 24, 2018 election (the "May 2018 Election") or the November 8, 2016 Election (the "November 2016 Election"). Petitioners assert that with the August 2015 Election, May 2018 Election, or the November 2016 Election, the Petition filed on August 1, 2018 did not contain the requisite number of signatures to be placed on the November 6, 2018 ballot (the "November 2018 Election"). Respondent Metro argues the Preceding General Election was the August 4, 2016 Election and that the Election Commission was correct in certifying the Petition and placing the Referendum on the ballot for the November 2018 Election.

Respondent Community Oversight Now has filed a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12.02(6), alleging that Petitioners' Complaint failed to state a claim upon which relief can be granted because Petitioners' lack standing as individuals, Petitioner FOP has not met the

requirements for organizational standing, and the alleged harm is merely speculative and not ripe for adjudication.

I. WHETHER PETITIONERS HAVE STANDING TO CHALLENGE THE ELECTION COMMISSION'S DETERMINATION TO PLACE THE REFERENDUM ON THE BALLOT FOR THE NOVEMBER 6, 2018 ELECTION.

This Court first considers whether Petitioners have standing to challenge the number of signatures necessary to place the Referendum on the November 6, 2018 election ballot.

Respondent Community Oversight Now has filed a Motion to Dismiss under Tenn. R. Civ. Pro. 12.02(6) based upon failure to state a claim upon which relief may be granted as the Petitioners lack standing to challenge the Board. The issue this Court examines is whether the Petitioners have standing to challenge the decision of the Election Commission pursuant to T.C.A. § 27-9-101.

Intervening Respondent Community Oversight Now alleges that the Petitioners lack standing to challenge the Election Commission's decision to place the Referendum on the ballot. Respondent Metro subsequently adopted all arguments set forth in Respondent Community Oversight Now's Motion to Dismiss.

When considering a motion to dismiss, "courts must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007). A trial court will grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

Standing is the judicial doctrine based upon the idea that "[a] court may and properly should refuse to entertain an action at the instance of one whose rights have not been invaded or

infringed.” *Hamilton v. Metro. Gov't of Nashville*, 2016 Tenn. App. Lexis 791 *5 (Tenn. Ct. App. 2016) (citing *Mayhew v. Wilder*, 46 S.E.3d 760, 766-67 (Tenn. Ct. App. 2001)). “In determining whether a plaintiff has a personal stake sufficient to confer standing, the focus should be on whether the complaining party has alleged an injury in fact, economic or otherwise, which distinguishes that party, in relation to the alleged violations, from the undifferentiated mass of the public.” *Mayhew*, 46 S.E.3d at 767.

1. WHETHER THE INDIVIDUAL PETITIONERS HAVE STANDING TO CHALLENGE THE NUMBER OF SIGNATURES REQUIRED TO PLACE THE REFERENDUM ON THE NOVEMBER 6, 2018 BALLOT PURSUANT TO T.C.A. §§ 27-9-101 ET SEQ.

In this case, Petitioners assert individual standing for Matthew Dean Boguskie, Noble Taylor, Harold Milton Burke, III², Robert Alan Young, and James Anthony Gafford³ (the “Individual Petitioners”). Pet. Writ Cert. ¶ 2-4 (Aug. 21, 2018). The Individual Petitioners are members of the FOP and residents, citizens, registered voters, and taxpayers of Metro. *Id.* at ¶ 2-6, 27.

These Individual Petitioners all assert distinct and palpable injuries if the amendment becomes law as a result of the Referendum. *Id.* at ¶ 26. The Individual Petitioners allege injuries by:

changing the daily protocol under which they work as sworn officers of MNPD and introducing uncertainty into their duties through Board subpoenas, investigations, monitoring programs, reviews, audits, policy advisories, resolution reports, referrals and recommendations; by negatively impacting their operations and efficiency through changes in disciplinary procedures resulting from Board investigations; referrals and recommendations; by prohibiting them from serving on the Board or on the staff of the Board, particularly when the Board will have such significant impact on their job functions; and by reducing funds available for

² Matthew Dean Boguskie, Noble Taylor and Harold Milton Burke, III are current members of the MNPD.

³ Robert Alan Young and James Anthony Gafford are retired members of the MNPD.

the work of the MNPDP through the Board's required annual budget request of no less than \$1,500,000.00 beginning and after fiscal year 2019-2020.

Id. at ¶ 27. The Individual Petitioners also allege that the amendment would not provide Due Process protections for sworn MNPDP officers who may only be terminated for just cause. *Id.* at ¶ 28. Petitioners allege sworn MNPDP officers possess a property interest in their continued employment which may not be deprived without Due Process. *Id.* (citing *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985)). Petitioners also allege that “the amendment provides no protection in the compelled testimony of officers in violation of *Garrity v. New Jersey*, 385 U.S. 493, 496-97 (1967) (choice given to police officers between forfeiting their jobs or incriminating themselves violated the Fourteenth Amendment).” *Id.* The amendment will also “injure the individual Petitioners who are retired MNPDP officers as well as retired officers who are members of the FOP including, without limitation, by prohibiting them from serving on the Board or on the staff of the Board for a period of five years.” *Id.* at ¶ 29.

Respondent Community Oversight Now alleges the Current Officer Petitioners do not have standing to challenge the Petition because the Petition for Writ of Certiorari does not raise “an allegation that [they] suffer[s] from any injury in fact—economic or otherwise—that distinguishes him, in relation to the allegations, from the undifferentiated mass of the public. And, no allegation has been made that [the Individual Petitioners are] member[s] of the Fraternal Order of Police.” Resp’t Mem. Supp. Mot. Dismiss. at 4-5. Respondent Community Oversight Now asserts that “being a ‘citizen, registered voter, taxpayer, and sworn office[r] of the MNPDP’ does not confer standing. The mere status as a taxpayer or voter is not enough [to confer standing].” *Id.* (citing *Mayhew*, 46 S.E.3d at 767). “The plaintiff must not allege that the effect of the statute will impose burdens on him’ ‘not common to the body of the citizens.’” *Id.* (citing

Patton v. Mayor of Chattanooga, 108 Tenn. 197, 65 S.W. 414 (1901); *Bennett v. Stutts*, 521 S.W.2d 575 (Tenn. 1975); *Sachs v. Shelby Cnty. Election Comm'n*, 525 S.W.2d 672 (Tenn. 1975)).

Respondent Community Oversight Now alleges the same arguments apply to the Retired Officer Petitioners. Resp't Mem. Supp. Mot. Dismiss. at 4-6. Respondent Community Oversight Now also alleges that the Retired Officer Petitioners will not have standing even if the Referendum passed as the amendment only applies to active-duty officers. *Id.* at 5, fn. p. 5.

All parties fail to address standing as it relates to this case. The issue is whether Petitioners have standing to challenge the number of signatures required to place the Referendum on the ballot; not whether Petitioners have standing to challenge the Board itself. T.C.A. § 27-9-101 provides that “[a]nyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have the order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.” In *McFarland v. Pemberton*, the Tennessee Supreme Court determined the meaning of the phrase “anyone who may be aggrieved,” 530 S.W.3d 76, 105-07 (Tenn. 2017). The Tennessee Supreme Court stated:

A party with standing to file a petition for writ of certiorari under section 27-9-101 is “anyone who may be aggrieved” by the administrative decision at issue. We have recognized:

The doctrine of standing is used to determine whether a particular plaintiff is entitled to judicial relief. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). It is the principle that courts use to determine whether a party has a sufficiently personal stake in a matter at issue to warrant a judicial resolution of the dispute. *Suntrust Bank, Nashville v. Johnson*, 46 S.W.3d 216, 222 (Tenn. Ct. App. 2000). Persons whose rights or interests have not been affected have no standing and are, therefore, not entitled to judicial relief. *Lynch v. City of Jellico*, 205 S.W.3d 384, 395 (Tenn. 2006).

‘The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.’ *Wood v. Metro. Gov’t of Nashville and Davidson Cnty.*, 196 S.W.3d 152, 158 (Tenn. Ct. App. 2005). Such a legal right or interest may, but not must, be created or defined by statute.

Metro. Gov’t of Nashville [and Davidson Cnty. v. Bd of Zoning Appeals], 477 S.W.3d [750] at 755[(Tenn. 2015)] (quoting *State v. Harrison*, 270 S.W.3d 21, 27-28 (Tenn. 2008)). “Extending the authority to appeal or to seek judicial review to all persons who are ‘aggrieved’ [under section 27-9-101] reflects an intention to ease the strict application of the customary standing principles.” *City of Brentwood v. Metro. Bd. Of Zoning Appeals*, 149 S.W.3d 49, 57 (Tenn. Ct. App. 2004) (quoting *Federal Election Comm’n v. Akins*, 524 U.S. 11, 19, 118 S.Ct. 1777, 141 L.Ed.2d 10(1998)); see *Roten v. City of Spring Hill*, No. M2008-02087-COA-R3-CV, 2009 WL 2632778, at *3 (Tenn. Ct. App. Aug. 26, 2009). ...

McFarland, 530 S.W.3d at 105-07. As in *McFarland*, “we are not aware of any authority limiting the definition of the term “anyone” as used in section 27-9-101 to exclude” the Individual Petitioners. *Id.* at 108. Thus, this Court finds the “Individual Petitioners,” have standing to challenge the number of signatures necessary to place the Referendum on the ballot.

2. WHETHER THE FRATERNAL ORDER OF POLICE HAS STANDING TO CHALLENGE THE DECISION OF THE ELECTION COMMISSION IN CIRCUIT COURT PURSUANT TO T.C.A. § 27-9-101.

Petitioners allege organizational standing for the FOP as the organization advocating on behalf of the MNPDP officers. Petitioners also allege standing in that “the FOP will participate in and be in charge of a campaign to inform the voters of Metro Nashville regarding the proposed amendment so they will vote to reject it.” Pet. at ¶ 30. Petitioner FOP cites several cases for the proposition that an individual or organization in charge of a campaign for rejection of a referendum has standing to challenge the Referendum. See *Brackin v. Sumner Cnty. By and Through Sumner Cnty. Bd. Of Cnty. Comm’rs*, 814 S.W.2d 57 (Tenn. 1991); *Rodgers v. White*, 528 S.W.2d 810, 811 (Tenn. 1975); cf. Tenn. Code Ann. § 2-17-101(b) (2018).

Petitioner FOP alleges standing based upon T.C.A. § 2-17-101. T.C.A. § 2-17-101 is captioned “Chancery court; standing” and provides “[a]ny campaign committee or individual which has charge of a campaign for the adoption or rejection of a question submitted to the people may contest the election on the question.” The series of cases Petitioner relies upon are all chancery court cases as well. *Brackin*, 814 S.W.2d at 57; *Rodgers*, 528 S.W.2d at 810. We cannot find jurisdiction for Petitioner FOP based upon T.C.A. § 2-17-101 as this statute only confers jurisdiction upon Petitioner FOP in chancery court.

Respondent Community Oversight Now alleges the FOP does not have standing as the FOP has not alleged a distinct or palpable injury to itself. Resp’t Mem. Supp. Mot. Dismiss. at 6-7. Further, they allege the FOP lacks standing as the individual members of the FOP lack standing. *Id.* at 6. Respondents also argue that the FOP has not alleged a distinct and palpable injury to itself as it must do. *Id.* at 7.

However, as this Court is determining the issue based upon T.C.A. §§ 27-9-101 et seq., this Court find Petitioner FOP has standing as “anyone who may be aggrieved.” As in *McFarland*, “we are not aware of any authority limiting the definition of the term “anyone” as used in section 27-9-101 to exclude” Petitioner FOP, 530 S.W.3d at 108. There is a lack of case law to suggest that “anyone,” given its statutory interpretation, does not include the organization advocating on behalf of the Individual Petitioners. Therefore, this Court finds Petitioner FOP has standing to challenge the decision of the Election Commission pursuant to T.C.A. § 27-9-101.

II. WHETHER PETITIONERS' CHALLENGE TO PLACING THE REFERENDUM ON THE NOVEMBER 6, 2018 BALLOT IS RIPE FOR CONSIDERATION.

Respondents Metro and Community Oversight Now argue that the issue is not ripe for challenge at this time as Petitioners allege future injuries if the Referendum is passed. If an issue is not ripe, the court will not consider it.

Respondents argue the issue is not ripe because the Petitioners allege future injuries if the Referendum is passed. Resp't Mem. Supp. Mot. Dismiss. at 7-8. Respondents rely upon Petitioner's statements that the FOP will be involved in the campaign to persuade voters not to adopt the Referendum. *Id.* Being involved in a future campaign is not sufficient to establish ripeness at this time. Campaigning against the Referendum is exactly the type of "uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479-80 (1990). Petitioners may not rely upon some future effect the amendment would have on Petitioners if it becomes law. Resp't Mem. Supp. Mot. Dismiss. at 9. This conclusory allegation should not be given any weight by the Court as it is based upon some unknown and speculative special injury, but only if the Referendum is adopted. *Id.*

Petitioners argue that waiting until after the election would render the challenge to the number of signatures on the Petition moot. Petitioners rely upon a series of cases in which the Tennessee Court of Appeals held that a challenge to the measure being placed on the ballot brought after the election is moot. See *Barrett v. Giles Cnty*, M2010-02018-COA-R3-CV 2011 WL 4600431 at *3-4 (Tenn. Ct. App. Oct. 5, 2011); *James v. State of Tennessee*, M2002-01557-COA-R3-CV, 2003 WL 22136840 at *4 (Tenn. Ct. App. Sept. 16, 2003).

The central concept of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or may not occur at all. *Lewis*, 494 U.S. at 479-80. To determine whether a particular dispute is ripe, the court considers (1) whether the issues in the case are ones appropriate for judicial resolution and (2) whether the court's refusal to act will cause hardship to the parties. *B&B Enter. Of Wilson Cnty., LLC., v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010). The court will decline to act "where there is no need for the court to act or where the refusal to act will not prevent the parties from raising the issue at a more appropriate time." *Id.* at 849 (citing *AmSouth Erectors, LLC. v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 Tenn. App. LEXIS 511 (Tenn. Ct. App. Aug. 5, 2003)). As ripeness applies to pre-election challenges, "[g]enerally, 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." *City of Memphis v. Shelby Cnty Election Comm'n*, 146 S.W.3d 531, 539 (Tenn. 2004 (citing James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L.Rev. 298, 314 (1989); see also *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119, 122 (1996); *Burnell v. City of Morgantown*, 210 W.Va. 506, 558 S.E.2d 306, 313-14 (2001) (explaining and applying this rule)). Thus, a pre-election challenge to the sufficiency of the signatures on a petition referendum is ripe to a challenge to the form of the Referendum.

As Petitioners are challenging the number of signatures on the Petition, not the substance of the Referendum, this issue is ripe for judicial determination. If this Court were to wait until after the election, the injury to Petitioners would have already occurred in that the Referendum will be placed on the ballot and voted on without the requisite number of signatures required.

III. WHAT IS THE PRECEDING GENERAL ELECTION AS DEFINED IN SECTION 19.01 OF THE CHARTER?

1. TO AMEND THE CHARTER THROUGH A REFERENDUM, SECTION 19.01 REQUIRES A PETITION TO BE FILED WITH SIGNATURES EQUAL TO TEN PERCENT OF THE VOTES CAST IN THE PRECEDING GENERAL ELECTION.

This Court has been asked to determine what the Preceding General Election is as stated in Section 19.01 of the Charter. Section 19.01 of the Charter states:

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

In determining when the Preceding General Election was, this court reviews the decision of the Election Commission to determine if the decision to place the Petition on the November 2018 Election ballot was illegal, arbitrary, capricious, or beyond its jurisdiction. *Armstrong v. Bd. of Dirs. of Fayette Cnty. Gen. Hosp.*, 553 S.W.2d 77, 80 (Tenn. Ct. App. 1976), *State ex rel. Potter v. Harris*, No. E2007-00806-COA-R3-CV, 2008 WL 3067187 at *2 (Tenn. Ct. App. Aug. 4, 2008). This Court does not afford the Election Commission's interpretation of the law any deference or presumption of correctness. *McFarland*, 530 S.W.3d at 91. This Court interprets the law de novo. *Id.*

2. WHETHER THE AUGUST 2015 ELECTION IS THE PRECEDING GENERAL ELECTION AS CONTEMPLATED BY SECTION 19.01 OF THE CHARTER.

Petitioners argue that the Preceding General Election was the August 2015 Election. Pet'r's Br. at 23-24. Petitioner relies upon the Tennessee Supreme Court's decision in *Wallace v. Metro Gov't of Nashville and Davidson Cnty.*, to state that the Preceding General Election was the August 2015 Election, 546 S.W.3d 47, 55 (Tenn. 2018). Petitioners argue that the August

2016 Election was not a Charter Section 15.01 general metropolitan election and it, therefore, cannot be the Preceding General Election. Petitioners contend that the Tennessee Supreme Court:

concluded that a regular August election is not a Section 15.01 general metropolitan election, stating that the term 'general metropolitan election' is limited to the particular general election at which the Mayor, Vice Mayor, Councilman-at-Large, and District Councilman are elected in August of each fourth odd-numbered year, beginning in 1971, as called for in section 15.01 of the Charter.

Pet'r Br. at 19 (citing *Wallace*, 546 S.W.3d at 55). According to Petitioners in *Wallace*, the "Supreme Court expressly rejected the argument that a regular August election, occurring in August of even-numbered years, was a Section 15.01 general metropolitan election." Pet'r Br. at 19 (citing *Wallace*, 546 S.W.3d at 55). Petitioners argue that *Wallace* and *Wise*, when read together, leave no room for doubt that the Preceding General Election was the August 2015 Election. *Id.* (citing *Wallace*, 546 S.W.3d at 55 and *State ex rel. Wise v. Judd*, 655 S.W.2d 952, 953 (Tenn. 1983)). Petitioners contend that the Tennessee Supreme Court addressed the issue of whether the even-year regular August election was a general metropolitan election in *Wallace*, and that the Tennessee Supreme Court expressly rejected the argument that an even-year regular August election is a Section 15.01 general metropolitan election. *Id.* (citing *Wallace*, 546 S.W.3d at 54-56). Read together, Petitioners contend that *Wise* and *Wallace* mean the Preceding General Election was the August 2015 Election. *Id.*

Petitioners contend the decisions in *Wise* and *Wallace* compel the conclusion that the Section 19.01 Preceding General Election refers to a Section 15.01 general metropolitan election. *Id.* at 20. Petitioners argue the legislative history supports this conclusion as the Metro government was the first fully unified city-county government of its kind in both Tennessee and

the country. *Id.* at 21. When created, the Charter did away with previous elected officials for the City of Nashville and created the positions of Mayor, Vice-Mayor, Councilmen-at-Large, and District Councilmen. *Id.* The Charter established that these municipal officials would be elected at a Metro-only election known as the general metropolitan election. *Id.* (citing Charter § 20.20). This election is the election held every four years beginning in August 1971, resulting in the last election in August 2015. *Id.* Positions other than the Mayor, etc. are referred to as “county constitutional officers,” including sheriff, trustee, register, etc.” *Id.* The Metro Charter cannot abolish these county officers, *Id.* (citing Tenn. Const. Art. VII, § 1, T.C.A. § 7-2-108(a)(16) (2018), and *Metro. Gov’t v. Poe*, 383 S.W.2d 265, 274 (Tenn. 1964)), nor can the Charter change the election procedures for these officers. *Id.* The county constitutional officers are elected during the “regular August election” which is the “election held on the first Thursday in August of every even-numbered year.” *Id.* (citing Tenn. Const. Art. VII, § 5, T.C.A. § 7-2-104(a)(25) (2018)). Candidates running in these even-numbered year elections are elected by political party, so these elections are partisan elections. T.C.A. § 2-13-203(d)(3) (2018).

The legislative history of Section 19.01 also suggests that the Preceding General Election was the last preceding Metro election. *Id.* at 22. Petitioners cite Councilman James Hamilton’s statements when proposing to change the number of signatures required under Section 19.01 from 20% as initially proposed to 10% for petitions to change the Charter. *Id.* A Tennesseean article from August 16, 1972 states:

[i]n order to initiate charter amendments by referendum, a petition must be obtained bearing the signatures of at least 20% of the registered voters. Councilman James Hamilton has proposed that the number of signatures be changed to 10% of the total number of voter in the last previous Metro general election.

Wayne Whitt, *Council Changes Blue Law on 1st Reading*, *The Tennessean*, Aug. 16, 1972, at A1. This suggests the Metro Council intended for the amendment to refer to the last previous Metro general election, which would be the elections held every four odd-numbered years beginning in August 1971. Pet'r Br. at 22.

Petitioners argue that if the Preceding General Election was the August 2015 Election, then the Petition did not have enough verified signature to qualify to be placed on the ballot. *Id.* The August 2015 Election had 104,757 voters, so 10,475 verified signatures were required. *Id.*

Respondent Metro agrees that the August 2015 Election was a preceding general election, but it was not *the* Preceding General Election. Resp't Br. 3-5. Respondent Metro argues the Preceding General Election was the August 2016 Election as discussed below. Respondent Metro recognizes that in *Wise*, the Tennessee Supreme Court refers to both the August 1979 election (a general metropolitan election) and the August 1982 election (a general municipal election) and selects the August 1982 election as the Preceding General Election that is to be used. *Id.* at 5 (citing Exhibit 3, pg. 3; Exhibit 4, pg. 2).

Respondent Metro also contends that this Court does not need to refer to legislative history to determine the phrase Preceding General Election as there is no ambiguity that requires reaching legislative history. *Id.* The newspaper article Petitioners reference uses the phrase "last previous Metro general election." *Id.* There is no indication that the newspaper reporter's phrase was a term of art as the Charter uses the phrase Preceding General Election. *Id.*

In *Wise*, the appellant "filed two petitions for a referendum election on proposed amendments to the charter of the Metropolitan Government of Nashville and Davidson County, Tennessee," 655 S.W.2d. at 952-53. Local officials challenged the number of signatures on the petitions as insufficient based upon the Charter. *Id.* The issue in *Wise* was "whether this

reference [is] to a preceding Metropolitan general election (regularly held in August) or the preceding state general election, which occurred in November, 1982.” *Id.* The Tennessee Supreme Court affirmed the judgment of the Chancellor stating “the charter, § 15.01, provides for Metropolitan general elections and refers to them as such. We think that the reference in § 19.01 under consideration here is clearly to municipal elections.” *Id.* In *Wise*, the Tennessee Supreme Court stated that the Preceding General Election refers to a county general election, not a state or national general election. *Id.*

The August 2015 Election was a general election as contemplated by the Charter based upon dicta in both *Wise* and *Wallace*. In *Wallace*, the Tennessee Supreme Court determined that “the next regularly scheduled general metropolitan election for Mayor is to be held on August 1, 2019.” *Wallace*, 546 S.W.3d at 54. The Supreme Court continued on to state:

Article 15 of the Charter deals exclusively with elections for the offices of Mayor, Vice Mayor, Councilmen-At-Large, and District Councilmen. As noted, section 15.01 provides that the Mayor, Vice Mayor, Councilmen-At-Large, and District Councilmen are elected in a particular type of municipal general election, referred to as a “general municipal election.” The general municipal election for these enumerated offices is held every fourth odd-numbered year beginning in 1971.

Id. Using basic math, the preceding general municipal election by which the Mayor, Vice Mayor, Councilmen-At-Large, and District Councilmen were elected was the August 2015 Election.

3. WHETHER THE PRECEDING GENERAL ELECTION WAS THE MAY 2018 ELECTION AS CONTEMPLATED BY SECTION 19.01 OF THE CHARTER.

Petitioners next contend that if the Preceding General Election was not the August 2015 Election, the Preceding General Election was the May 2018 Election. This conclusion is true if this Court concludes that Section 19.01 refers to any general election in which a Metro office was on the ballot. *Id.* at 23. Prior to Community Oversight Now filing the Petition on August 1,

2018, the May 2018 Election was the most recent election in which Metro officials were elected. *Id.* This election was a general election under state law. *Id.* (citing T.C.A. § 2-1-104(7) (2018)).

Respondent Metro contends that Petitioners are incorrect in their definition of a “general election” as any non-primary election. Resp’t Br. 6. While this is the colloquial definition of a general election, the Charter contemplates several forms of elections: general, metropolitan general, referendum elections, and special elections. *Id.* In *Wallace*, the Tennessee “Supreme Court held that the use of distinct phrases is evidence that the intent of the drafters was to draw a distinction between them. Applying this interpretation, the Supreme Court determined a special election was necessary to fill the mayoral vacancy, pursuant to § 15.03 of the Charter.” *Id.* (citing *Wallace*, 546 S.W.3d at 58). Respondent Metro argues that the May 2018 Election cannot be the Preceding General Election as the Supreme Court ordered a special election in *Wallace* to replace the Mayor. *Id.* (citing *Wallace*, 546 S.W.3d at 58).

Respondent Metro argues that a special election cannot be a general election. *Id.* at 7. Special elections are “held when a vacancy in any office is required to be filled by election at other times than those fixed for general elections.” T.C.A. § 2-14-102 (2018). This was emphasized by the Tennessee Supreme Court in *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980). In *McPherson*, the Tennessee Supreme Court stated “there is no such process as a ‘special general’ election. This is a contradiction in terms.” *Id.* at 680, fn. 8. This distinction is also recognized as black letter law. A general election is “[a]n election that occurs at a regular interval of time.” Black’s Law Dictionary 631 (10th ed. 2014). A special election is “[a]n election that occurs in an interim between general elections and, usu. [t]o fill a sudden vacancy in office.” Black’s Law Dictionary 632 (10th ed. 2014). As a special election cannot be a general election, the May 2018 Election cannot be the Preceding General Election.

In *Wallace*, the Tennessee Supreme Court held that a special election must be held to replace Former Mayor Megan Barry after she stepped down, 546 S.W.3d at 49. The issue in *Wallace* was “whether the vacancy in the Office of Mayor of Metropolitan Nashville and Davidson County may be filled at the August 2, 2018 election, or whether it must be filled at a special election pursuant to section 15.03 of the Metropolitan Charter.” *Id.* The Tennessee Supreme Court looked at Section 15.03 that requires a special election to elect a mayor if a “general municipal election” is not scheduled to be held within one year from the vacancy. *Id.* at 53. The Tennessee Supreme Court looked at the difference between a Section 15.03 that states “general municipal election” and other “general elections” in sections. See Section 19.01. *Id.* at 54. The Tennessee Supreme Court concluded that “‘general metropolitan elections’ are one unique type of the broader category of municipal ‘general elections.’ All municipal ‘general elections,’ however, are not ‘general metropolitan elections.’” *Id.* at 55. The Tennessee Supreme Court ordered the Davidson County Election Commission to “set a special election.” *Id.* at 58. As the Tennessee Supreme Court ordered a special election for the May 2018 Election, a special election cannot be the Preceding General Election. Thus, this Court cannot use the May 2018 Election to determine the number of signatures required for the Petition.

4. WHETHER THE NOVEMBER 2016 ELECTION IS THE PRECEDING GENERAL ELECTION AS CONTEMPLATED BY SECTION 19.01 OF THE CHARTER.

Petitioners contend that, alternatively, the Preceding General Election was the November 2016 Election. *Id.* at 24. The November 2016 Election was a general election at which party membership was not required to participate.

The Tennessee Supreme Court expressly rejected the argument that a state or federal election was the Preceding General Election in Section 19.01 of the Charter. See *Wise*, 655

S.W.2d. at 952-53. The Tennessee Supreme Court held that a Preceding General Election must be a municipal general election. *Id.* Thus, the November 2016 Election cannot be the Preceding General Election.

5. WHETHER THE AUGUST 2016 ELECTION IS THE PRECEDING GENERAL ELECTION AS CONTEMPLATED BY SECTION 19.01 OF THE CHARTER.

Petitioners argue that the “August 2016 Election” cannot be the Preceding General Election as it was not an election at which Metro officials were elected as argued above.

Respondent Metro argues that the Preceding General Election is the August 2016 Election as the Tennessee Supreme Court “has told us that the Charter uses the terms general election and general metropolitan election to mean different things, and that the phrase ‘general election’ in the Charter encompasses more than just general metropolitan elections.” Resp’t Br. at 2. Respondent Metro contends that the Tennessee Supreme Court has held that the Preceding General Election may be a general metropolitan election or a municipal general election. *Id.* at 3. In *Wallace*, the Supreme Court summarized its intentions and stated that the phrase general election used in the Charter encompasses more than the every 4 year general metropolitan election:

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

Our holding in *Wise* was that the phrase “preceding general election” used in section 19.01 of the Charter refers to *municipal* general elections...


Wallace, 546 S.W.3d 55, 57-58 (citing *Wise*, 655 S.W.2d at 952). As the August 2016 Election was a municipal general election since the Metro Assessor of Property was elected, the August 2016 Election is *the* Preceding General Election.

Since there was a municipal general election on August 4, 2016, the Preceding General Election cannot be the August 2015 Election as Petitioners contend. An election for the municipal position of Assessor of Property occurred on August 4, 2016. Davidson County Election Commission, *August 4, 2016 Election Results (Unofficial)*, <https://www.nashville.gov/Election-Commission/About/Historical-Information/Election>Returns/160804.aspx> (last visited Sept. 19, 2018). In the “August 2016 Election,” voters selected candidates in the primaries for representatives to the US House of Representatives 5th District, Tennessee Senate Districts 18 and 20, and Tennessee House of Representatives Districts 50 – 56 and 58 – 60. *Id.* Voters also choose to either retain or replace several judiciary positions including 3 seats on the Tennessee Supreme Court, 3 seats on the Tennessee Court of Appeals, and 4 seats on the Tennessee Court of Criminal Appeals. *Id.* In addition to the primaries, voters elected representatives to City Council District 1, Assessor of Property, School Board Member Districts 1, 3, 5, 7, and 9. *Id.* The election for Assessor of Property is a municipal general election pursuant to the Charter. Therefore, the Preceding General Election, as contemplated by Section 19.01 of the Charter, was the August 2016 Election.

IT IS THEREFORE ORDERED, ADJUGDED, AND DECREED that the Preceding General Election, as contemplated by § 19.01 of the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee, was held on August 4, 2016. As 47,074 people

voted in the general election held on August 4, 2016, ten percent of the vote count is 4,707. Therefore, this Court AFFIRMS the decision of the Davidson County Election Commission to place the Referendum upon the ballot for the November 2018 Election.

Court costs are taxed to the Petitioners for which execution may issue, if necessary.

ENTERED THIS 19th DAY OF SEPTEMBER, 2018. 

JUDGE KELVIN JONES

CERTIFICATE OF SERVICE


I hereby certify that a copy of the foregoing was provided to the following parties on this
the 19th day of September, 2018.

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By: 
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