

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

**THE METROPOLITAN GOVERNMENT OF)
NASHVILLE AND DAVIDSON COUNTY,)
TENNESSEE, JOHN COOPER, in his official)
capacity as Mayor of the Metropolitan)
Government of Nashville and Davidson County,)
Tennessee, and KEVIN CRUMBO, in his official)
capacity as Finance Director of the Metropolitan)
Government of Nashville and Davidson County,)
Tennessee,)
)
 Petitioners/Plaintiffs,)
)
vs.)
)
**THE DAVIDSON COUNTY ELECTION)
COMMISSION,**)
)
 Respondent/Defendant.)**

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CASE NO. 21-0433-IV

MEMORANDUM AND FINAL ORDER

In this pre-election common law certiorari and writ of mandamus proceeding, a consolidated city/county government is claiming that a local election commission unlawfully scheduled a referendum election. The election commission filed a Counterclaim, requesting that the Court declare a referendum resolution adopted by the consolidated government’s council to be null and void, without any legal effect. An expedited final hearing was held on June 7, 2021.

Background and Overview¹

On May 11, 2021, Petitioners, The Metropolitan Government of Nashville and Davidson County, Tennessee; John Cooper, in his official capacity as Mayor of the Metropolitan Government of Nashville and Davidson County; and Kevin Crumbo, in his

¹ Three interested non-parties, 4 Good Government, the Nashville Area Chamber of Commerce, and Tennesseans for Sensible Election Laws, filed two separate amicus briefs pursuant to Orders entered on May 20, 2021 and June 7, 2021, respectively.

official capacity as Finance Director of the Metropolitan Government of Nashville and Davidson County, Tennessee (collectively, “Metropolitan Government”), sued Respondent, The Davidson County Election Commission (“Election Commission”). On May 26, 2021, the Election Commission filed its Answer and Counterclaim.²

This case turns on the standard of judicial review and attendant questions of law. Six far-reaching, voter-initiated ballot measures seeking to amend the Charter of the Metropolitan Government are at issue which, if approved by qualified voters, would: 1) limit and establish property tax rates/increases; 2) change the procedure for recalling elected officials; 3) make elected officials’ benefits subject to voter referendum; 4) provide that voter-sponsored amendments to the City Charter may only be amended by voter-sponsored petition; 5) restrict the Metro Council’s ability to transfer publicly-owned real property, requiring voter referendum in certain instances; and 6) terminate the contracts of, and forfeit certain property of, professional sports teams if they leave Nashville.

This lawsuit involves the second effort in less than a year by a group known as 4 Good Government (“4GG”) to promote what Chancellor Ellen Hobbs Lyle of this Court characterized as “an impermissible form of government in Tennessee.” *4 Good Gov’t, et al. v. The Davidson Cty. Election Comm’n*, Docket No. 20-1010-III (hereinafter, “4GG-*P*”), Findings of Fact, Conclusions of Law, and Orders from 10/26 – 10/27/2020 Bench Trial at 17 (Davidson Cty. Ch. Ct. Nov. 3, 2020) (hereinafter, “Findings & Conclusions”). The Davidson County Chancery Court rejected last fall’s Petition in a 50-

² By Agreed Order entered June 3, 2021, this Counterclaim was severed from this writ of certiorari proceeding. After hearing oral argument at the beginning of the final hearing on June 7, 2021, the Court ruled that it was severing Petitioners’ original jurisdiction claims set forth its original May 11, 2021 Petition from Petitioners’ appellate jurisdiction claims. This ruling was memorialized in an Order entered on June 8, 2021.

page opinion, issued after the Election Commission sought judicial guidance through a declaratory judgment action.

4GG has now circulated and filed a new Petition (the “Petition”) with six proposed amendments (the “Proposed Amendments”) to the Metropolitan Charter - the “Nashville Taxpayer Protection Act.” Despite changes from what it proposed last fall, the Petition and Proposed Amendments are in many respects similar to the 2020 measures. All of the claimed defects in the new Petition were timely brought to the Election Commission’s attention. The Election Commission placed the Petition on the ballot for a July 27, 2021 referendum election.

In the fall of 2020, the Election Commission filed a declaratory judgment action seeking a ruling on whether a similar petition for proposed Charter amendments, also filed by 4GG, should be placed on the ballot for a referendum election. The case was merged with a then-pending lawsuit filed by 4GG challenging the Election Commission’s delay in putting the initiative on a ballot. The cases were collectively captioned as *4GG-I* and proceeded under Docket No. 20-1010-III.

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

- Standards governing “freedom, purity and unbiased ballot content,” such

as keeping balloting separate from campaign materials or solicitations containing a “position on the question.” Findings & Conclusions at 13.

- A requirement that “a ballot question must ‘convey a reasonable certainty of meaning so that a voter can intelligently cast a vote for or against a proposal with full knowledge of the consequences of his vote.’” *Id.* (quoting *Rodgers v. White*, 528 S.W.2d 810 (Tenn. 1975)).
- A prohibition on a referendum ballot “intruding into an area or subject that the local government does not have authority over,” that is, “where the subject matter of the referendum exceeds the power of the Metro Charter.” *Id.* at 15- 16. This question is not answered solely based on the content of the provision itself, “as ‘that requirement would elevate form over substance.’” *Id.* at 17 (quoting *Burnell v. City of Morgantown*, 558 S.E.2d 306, 314 (W.Va. 2001)).
- A prohibition of facially unconstitutional measures. *See id.*

The *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531 (Tenn. 2004), standards apply to the Court’s consideration of the Metropolitan Government’s pre-election challenge of 4GG’s second petition. The Election Commission claims that 4GG has eliminated the defects that Chancellor Lyle identified in *4GG-1* in drafting the second petition.

In the current writ of certiorari proceeding, several preliminary issues relating to scheduling, amicus briefs, intervention, the form of the writ of certiorari directing the production of the administrative record, and when a case-dispositive motion would be considered, were resolved without a hearing. After contested hearings, the Court resolved a discovery dispute and decided to defer ruling upon the question of whether the Court could exercise original and appellate jurisdiction simultaneously as the first issue to

be addressed in the final hearing. After hearing oral argument at the beginning of the June 7, 2021 final hearing, the Court severed (and deferred for later hearing) Petitioners' original jurisdiction claims seeking declaratory and injunctive relief from Petitioners' appellate jurisdiction claims seeking a common law writ of certiorari and a writ of mandamus.

The Parties' Positions

In challenging the Election Commission's decision to set the 4GG-initiated Petition for referendum election on July 27, 2021, the Metropolitan Government makes several arguments. Some of those arguments apply generally to the entire Petition while others challenge specific Proposed Amendments. The Metropolitan Government also urges that if any aspect of the Petition is legally deficient, then the remaining amendments cannot be severed and placed on the ballot.

The Metropolitan Government is claiming that the Court should vacate the Election Commission's decision to set the July 27, 2021 referendum election on the following grounds:

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

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

1. The Proposed Amendments are subject to pre-election review under *City of Memphis*.

2. The Petition fails to comply with Metropolitan Charter § 19.01 because it prescribes two dates - not “a date” - for the proposed referendum election.
3. The Petition fails to meet the verified signature requirement in Metropolitan Charter § 19.01 because (i) November 2020, not August 2020, is the appropriate election to set the 10% signature requirement, and (ii) the signatures between the two versions of the Petition cannot be aggregated, and neither version separately has the requisite number, regardless of which election sets the number.
4. The “Limit Property Tax Rates” and “Abolish Lifetime or Other Benefits for Elected Officials” provisions do not convey a reasonable certainty of meaning because they neither define key terms nor address other Metropolitan Charter provisions that would be affected.
5. The “Limit Property Tax Rates” provision is defective in form because it sets property tax rates by referendum without authority under the Metropolitan Charter, state law, and Tennessee Constitution.
6. The “Protect Promises to Nashville” provision is defective in form because it attempts to effect a taking of property without following required procedures in state or local law; affects a separate legal entity without authority to do so by referendum; and threatens the Metropolitan Government’s pledge to use non-tax revenues to repay bonds issued by The Sports Authority of the Metropolitan Government of Nashville and Davidson County without authority in state law.
7. The “Limit Property Tax Rates” provision is facially unconstitutional because it impairs the vested rights of the Metropolitan Government’s outstanding bondholders.
8. The “Recall Elected Officials” provision is facially unconstitutional because it retrospectively impairs the property rights of officeholders and impairs the right to vote.
9. The “Abolish Lifetime or Other Benefits for Elected Officials” provision is facially unconstitutional because it retrospectively impairs vested rights of current and former officeholders.
10. The “Protect Promises to Nashville” provision is facially unconstitutional because it retrospectively impairs contracts and takes private property without establishing a public use.

Petitioners’ Trial Brief, pp. 2-3.

The Election Commission counters, urging that the July 27, 2021 referendum election should go forward for a litany of reasons. In broad sweep, the Election Commission is relying on two inter-related standards of review and arguments about what this Court can properly review in the context of the Metropolitan Government's pre-election challenge. First, the Election Commission relies upon the scope of its review as an administrative commission. Secondly, it emphasizes the narrow scope of judicial review applicable to the Court in the common law certiorari context. Additionally, the Election Commission asserts that many of the pre-election challenges pressed by the Metropolitan Government are not ripe for adjudication.

Generally speaking, the Election Commission asserts the following in support of its position that its decision to set the referendum election for July 27, 2021 should be affirmed in all respects:

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

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

In 2020, the same 4 Good Government group submitted proposed Charter amendments that the Election Commission determined confronted

a number of problems. For example, there was no enumeration of any provisions of the Metro Charter that the 2020 petition specifically sought to amend, raising a question of the form or format of the proposed ballot referendum. The Election Commission also had concerns that all the proposed Charter amendments seemed to constitute a single amendment – a hodge-podge – to be voted on as one omnibus proposal, so that voters could not vote “yes” or “no” on each component. Because of these and other concerns, the Election Commission deferred its own action and exercised its discretion to seek review from the Chancery Court. The Election Commission did not have authority to reject the proposed amendments; only a court could do that. *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 535-37 (Tenn. 2004)[.]

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

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

As will be explained in further detail, the Election Commission, on advice of counsel, concluded that the 2021 proposed Charter amendments were substantially altered from those submitted in 2020. For example, (i) the proposals were clearly designated as separate amendments, to be voted on (“yes” or “no”) separately by the voters at a referendum election. That contrasted with the 2020 hodge-podge approach of lumping together all proposed changes into a single vote by qualified voters, without the ability of voters to vote “yes” for some and “no” for others. In addition, (ii) the 2021 proposal designated specific Charter provisions that were to be amended or added to. That was not the case in 2020. Moreover, (iii) concerns about retroactivity that were raised in 2020 were addressed in 2021, with certain of the provisions that had previously concerned the Chancery Court now focusing on the future, not undoing the past, (iv) concerns about a potential regulatory taking of private property were addressed by adding a provision to one of the proposed amendments for just compensation, which is all that is required to cure a regulatory takings claim. And (v) concerns about mixing advocacy language with substantive provisions were eliminated, in the judgment of the Election Commission and its counsel, by changes in the 2021 proposals. Finally, (vi) two of the 2020 provisions that had been subject to judicial criticism were omitted from the 2021 proposals, with other provisions added.

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

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

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

The procedural posture of the case currently before this Court is very different. In the careful and deliberative exercise of its authority and based on careful analysis by retained counsel, the Election Commission has in 2021 determined that the six separate proposed Charter amendments qualify for the July 27 election ballot. It is that decision by the Election Commission that Petitioners are challenging via a writ of certiorari.

Therefore, the litigation must proceed under different ground rules than those applied in 2020.

Davidson County Election Commission’s Pre-Trial Brief, pp. 6-9.

Facts

On March 25, 2021, 4GG submitted two differing forms of a petition seeking to amend the Metro Charter by referendum. (R.³ at 1-2.) The Petition proposed six amendments to the Metro Charter to be voted on separately by voters. (R. at 39-42, 67, 68, 622.) The six proposed amendments state as follows:

Amendment 1

Limit Property Tax Rates - Add to Article 6, § 6.07, Paragraph 5:

³ “(R. at __)” refers to the administrative record filed in this action, consisting of 43 exhibits and 1167 pages. Pinpoint citations are to page numbers within the administrative record.

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

Amendment 2

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.”

Amendment 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.”

Amendment 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.”

Amendment 5

Protect Publicly - Owned Parks & Lands - Create Article 18, § 18.18:

“No portion of a publicly-owned park, green way, or other real property shall be transferred or conveyed without 31 votes of Metro Council. All transfers of interest in real property shall be at fair market value based on an independent appraisal. Public referendum shall be required for transfers

of interest in such publicly-owned properties valued over \$5,000,000, and for leases exceeding twenty (20) years, unless prohibited by state law.”

Amendment 6

Protect Promises to Nashville - Create article 18, § 18.19:

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

(R. at 622).

The Election Commission received the two aggregated versions of the Petition from the Metropolitan Clerk on March 25, 2021. (Declaration of Jeff Roberts filed June 1, 2021 (“Roberts Decl.”) at ¶ 4). The Election Commission met to discuss the Petition on April 6, 8, 17, 22 and May 10, 2021. (Roberts Decl. at ¶ 7; R. at 8-570). Election Commission staff verified 12,369 signatures of registered voters on the Petition. (Roberts Decl. at ¶ 14; R. at 294). At its meeting on April 22, 2021, the Election Commission unanimously determined that the Petition contained a sufficient number of verified signatures to meet the requirements of Metro Charter Section 19.01, which states that a petition signed by voters may propose amendments to the Metro Charter if the petition is “signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk.” (Roberts Decl. at ¶ 15; R. at 294-95).

On May 4, 2021, the Election Commission conveyed its verification of Petition signatures to the Metropolitan Clerk. (Roberts Decl. at ¶ 16; R. at 620). On May 6, 2021, the Metropolitan Clerk certified the Petition to the Election Commission. (Roberts Decl.

at ¶ 17; R. at 621-24). At its meeting on May 10, 2021, the Election Commission voted to place the amendments proposed by the Petition on the ballot for July 27, 2021. (Roberts Decl. at ¶ 18; R. at 404-05).

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

- a. June 1, 2021: deadline to make all decisions concerning the ballot in order to allow adequate time for printing ballots and preparing mailings.
- b. June 12, 2021: deadline to mail military ballots.
- c. June 25, 2021: deadline to prepare absentee ballots for mailing to voters.
- d. July 2, 2021: deadline to publish notice of the election in a newspaper of general circulation and to mail sample ballot to households.
- e. July 7, 2021: early voting begins.
- f. July 22, 2021: early voting ends.
- g. July 27, 2021: election day.

(Roberts Decl. at ¶ 19). The Court will now discuss the issues presented to it.

Appellate v. Original Jurisdiction

At the beginning of the June 7, 2021 final hearing, the Court heard argument on whether it should exercise its appellate and original jurisdiction simultaneously. The Court concluded that it should not attempt to exercise its appellate and original jurisdiction simultaneously and severed the Metropolitan Government's original jurisdiction claims for declaratory and injunctive from its common law writ of certiorari

and mandamus claims.⁴ See *Tennessee Env'tl. Council v. Water Quality Control Bd.*, 250 S.W.3d 44 (Tenn. Ct. App. 2007); *Goodwin v. Metropolitan Bd. of Health*, 656 S.W.2d 383 (Tenn. Ct. App. 1983). In making this ruling, the Court concludes that the Tennessee Supreme Court in *City of Memphis* did not squarely address this issue.

Standing

The Court agrees with the ruling in *4GG-I* that the Metropolitan Government has standing here. The referendum election set for July 27, 2021 will cost the Metropolitan Government \$800,000.00. Additionally, the Metropolitan Government is aggrieved by the Election Commission's final order because that decision has substantial, direct, and adverse effects on it. See *Metropolitan Gov't of Nashville & Davidson Cty. v. Board of Zoning App.*, 477 S.W.3d 750, 758 (Tenn. 2015).

Ripeness

City of Memphis involved a tax measure which was duly enacted by the Memphis City Council, signed by the Mayor, and properly submitted to the Shelby County Election Commission for inclusion on the ballot. The Commission refused to put the measure on the ballot because the measure, which proposed a privilege/payroll tax, would be unconstitutional because the General Assembly had not yet authorized cities to impose such a tax. The City of Memphis filed a petition for a writ of mandamus challenging the Commission's refusal to place the measure on the ballot, but did not petition the trial court for a writ of certiorari. The trial court ruled that the Commission had the authority to refuse to put the measure on the ballot and went on to reach the merits, ruling that the measure itself was unconstitutional.

⁴ The Metropolitan Government's original jurisdiction claims and the Election Commission's Counterclaim were separately refiled under new case number 21-0524-IV and are to be litigated later.

The *City of Memphis* trial court held that pre-election challenges to the substantive constitutional validity of such initiatives were not ripe for judicial consideration. However, the Tennessee Supreme Court reversed the trial court's decision, concluding that: 1) the election commission did not have discretion to refuse to put a referendum initiative on the ballot because it believed the measure to be substantively unconstitutional; and 2) given that the dispute was about the substantive constitutionality of the proposed ballot measure, the dispute was not ripe for pre-election judicial determination.

While the Tennessee Supreme Court held that pre-election challenges “to the form or facial constitutional validity of referendum measures are ripe for judicial scrutiny[,]” *City of Memphis*, 146 S.W.3d at 539, the case was decided on the above-described narrow grounds and did not give detailed guidance about which pre-election challenges constituted not-yet-ripe substantive constitutional challenges and which challenges amounted to ripe pre-election challenges to the form or facial validity of referendum measures.

The *City of Memphis* dispute was clearly about the substantive constitutionality of the referendum measure. Here, despite the excellent guidance provided by Chancellor Lyle's well-reasoned and exceptionally clear decision in *4GG-1*, proper characterization of each of the Metropolitan Government's litany of grounds in support of this pre-election challenge is not as readily apparent as it was in *City of Memphis*. In discussing the grounds urged by the Metropolitan Government in support of this pre-election challenge to the July 27, 2021 referendum election, the Court will discuss below whether

the Proposed Amendments are ripe for judicial consideration on an objection-by-objection basis in light of *City of Memphis* and the writ of certiorari standard of review.⁵

Judicial Review

In the common law writ of certiorari context, courts are not authorized to re-weigh evidence or to interfere with agency discretion, but are limited to examining the essential legality of the lower proceeding. See *Willis v. Tennessee Dep't of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003). Courts reviewing certiorari requests are required to examine the law and the record to determine whether the agency's decision is legally sufficient and whether it is supported by material evidence. See *Harding Acad. v. Metropolitan Gov't of Nashville & Davidson Cty.*, 222 S.W.3d 359, 363 (Tenn. 2007); *Moore v. Metropolitan Bd. of Zoning App.*, 205 S.W.3d 429 (Tenn. Ct. App. 2006). Specifically, judicial review is limited to determining whether the administrative tribunal/body exceeded its jurisdiction, followed unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without supporting material evidence. See *McCallen v. City of Memphis*, 786 S.W.2d 633, 638 (Tenn. 1990). The Court's review is narrow; it is simply not permitted to inquire into the intrinsic correctness of the challenged decision or to substitute its judgment for that of the administrative body. See *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Hoover, Inc. v. Metropolitan Bd. of Zoning App.*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996).

Although the Election Commission has a limited measure of discretion to which it is entitled to deference, the Court is not prepared to adopt the rational basis test in wholesale fashion as intimated by the Election Commission or to adopt an approach

⁵ The Court notes that the 4GG-1 decision was not a final appealable order and did not involve a common law writ of certiorari proceeding. 4GG-1, accordingly, is still pending in the trial court. As indicated above, the Metropolitan Government has standing to bring this pre-election challenge given that it will cost it at least \$800,000.00 to pay for the referendum election and given the substantial burden the proposed Amendments will have on the Metropolitan Government if the measures pass, especially to the extent that certain measures are properly subject to pre-election challenge.

which could suggest that Tennessee courts, including appellate courts, cannot decide questions of law on a *de novo* basis in writ of certiorari cases. The rational basis test is a test primarily designed for the Court's original jurisdiction review of a statute challenged, for example, on equal protection or due process grounds. In such cases, a court may properly search outside the record for rationales never adopted, or even considered, by the Tennessee General Assembly in support of the challenged legislation. See *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). Additionally, parties seeking to overcome the rational basis test are often required to also overcome a presumption of constitutionality. See *Waters v. Farr*, 291 S.W.3d 873, 879 (Tenn. 2009). Here, the Court is simply reviewing the actual conduct and decisions of an administrative body as reflected in the administrative record under the well-settled common law writ of certiorari standard of review.

A petition for a writ of mandamus is a request for extraordinary relief, usually directed to a court's original jurisdiction and generally designed to compel a public official to perform a ministerial duty. When a trial court is exercising appellate jurisdiction, a party may seek a writ of mandamus in aid of the court's appellate jurisdiction. "In discharging their statutory duties, county election commissions perform both ministerial and discretionary functions." *McFarland v. Pemberton*, 530 S.W.3d 76, 94 (Tenn. 2017).

"A writ of mandamus is an extraordinary remedy that may be issued where a right has been clearly established and 'there is no other plain, adequate, and complete method of obtaining the relief to which one is entitled.' Although most often addressed to ministerial acts, mandamus may be addressed to discretionary acts when an act is 'arbitrary and oppressive' or where there has been a 'plainly palpable' abuse of discretion." *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 479

(Tenn. 2004) (internal citations omitted). Further, “[a]lthough a ministerial act is generally one for which the law prescribes and defines the duties to be performed with precision and certainty, leaving nothing to discretion or judgment, an agency performing a ministerial act ‘has the power and duty to make an ‘initial determination’ whether the law authorizes the acts it is required to perform.” *Wallace v. Metropolitan Gov’t of Nashville & Davidson Cty.*, 546 S.W.3d 47, 50 n.2 (Tenn. 2018)(quoting *City of Memphis*, 146 S.W.3d at 536)(internal citations omitted).

Section 19.01 of the Metropolitan Charter

Signature Requirement and Preceding General Election Issue

The Metropolitan Government is claiming that the Election Commission erred in considering “two versions” of the Petition and aggregating the signatures on those “two versions” for purposes of meeting the requisite number of signatures. 4GG’s Petition consisted of two iterations of the Petition with identical proposed Amendments, with differing details, such as the date the signed petition is to be returned for filing with appropriate officials. The Court finds that the Commission’s decision to aggregate the two iterations of the Petition, when the proposed Amendments in each iterations of the Petition are admittedly identical, falls within the Commission’s limited discretion and does not in itself violate the Section 19.01 requirement that a petition be submitted to the Election Commission. In other words, the Election Commission had discretion to treat the two versions of the Petition, with identical amendments, as one petition under the unique circumstances of this case.

The question of which preceding General Election to choose, however, is an inherently legal question that does not fall within the purview of the Election Commission’s discretion as an administrative body. The parties appear to agree that the August 2020 election was a qualifying general election; the parties disagree on whether

the November 2020 election was a qualifying general election. If the November 2020 election was a qualifying general election, then it would be the qualifying *preceding* election under Section 19.01. It is undisputed that the 4GG Petition, even with the two iterations of the Petition aggregated, does not contain enough signatures to qualify for a referendum election if the November 2020 election is the operative election.

Metropolitan Government § 19.01 requires that a proposed charter amendment petition filed with the Metropolitan Clerk be signed by 10% of the number of registered voters of Davidson County voting in the preceding general election. The “preceding general election” language in Section 19.01 applies to municipal elections. *See State ex rel. Wise v. Judd*, 655 S.W.2d 952, 953 (Tenn. 1983). Also, under Section 19.01, the election being considered must be a municipal election and a “general” election; it cannot be a “special” election. *See Fraternal Order of Police v. Metropolitan Gov’t of Nashville & Davidson Cty.*, 582 S.W.3d 212, 219 (Tenn. Ct. App. 2019) (“FOP”).

The November 2020 election was a general election for state and federal offices. Additionally, there was one Metropolitan School Board vacancy on the ballot. The school board election was held pursuant to the Metropolitan Charter § 9.02 which provides that elections to fill school board vacancies “shall be at the first county-wide general election.” Tenn. Code Ann. § 49-2-201(a)(1) requires that a successor to a school board vacancy “be elected at the next general election for which candidates have a sufficient time to qualify under the law.” *Id.*

Notwithstanding the potential implication of the foregoing paragraph, the Court agrees with the Election Commission’s analysis of the case law that the November 2020 election was not a municipal *general* election. It was a general state and federal election - with a municipal election to fill a vacancy on the Metropolitan School Board. This was not a general municipal election. It was an election where one municipal vacancy was

appended to a general state and a general federal election. *See Wallace*, 546 S.W.3d 47, 54-57. 4GG's petition, accordingly, met the signature requirement in Metropolitan Charter § 19.01 because it contained 12,369 signatures which is more than 10% of the 121,420 votes cast in the August 2020 election.

Prescribe A Date

4GG's Petition, however, did not prescribe a date as required by Section 19.01; it clearly prescribed, or listed, two alternative dates. Listing the dates in the disjunctive in the Petition did not convert the two dates listed on the Petition into one date. To illustrate, Metropolitan Government's original lawsuit here invoked the Court's original jurisdiction and appellate jurisdiction in one pleading. Using the long-standing procedural device of pleading alternatively in the disjunctive did not convert the original jurisdiction claims, for example, into one set of appellate jurisdiction claims. Simply put, two different forms of the Court's jurisdiction (original and appellate) were pled and invoked in the original lawsuit. The Court severed the original jurisdiction claims and required the Metropolitan Government to separately refile the original jurisdiction claims. The refiled original jurisdiction claims were assigned a separate case number and deferred for later consideration. It is, however, too late to cure 4GG's Petition, which is set for referendum election on July 27, 2021. The Petition simply failed to prescribe a date as required by Section 19.01 of the Metro Charter.

In the Court's view, this is not a hypertechnical ruling or some sort of strained reading of Section 19.01. The supporters of the 4GG Petition are attempting to amend the Metropolitan Charter by referendum, which they have every right to attempt to do. As a general proposition, they have a right to pursue this legal avenue to give the qualified voters of Davidson County an opportunity to be heard through the direct process of a referendum election on topics of public interest. Legal prerequisites,

however, must be met and the Election Commission's failure to insist that the "prescribe a date" legal requirement be complied with as written is not entitled to deference upon judicial review.

Further, several points made by the Metropolitan Government support the Court's ruling that the Election Commission's final order violated the "prescribe a date" requirement under Section 19.01. Prescribing a date: 1) sets the governing time line; 2) permits the Election Commission to determine whether the petition violates the prohibition on submitting a petition to voters more than once every two years; 3) prevents backdoor extensions of the deadline for obtaining signatures; 4) provides clarity for potential signatures; and 5) consistent with fairness, notifies potential opponents, in advance of the petition's filing, what the Petition prescribes as the election date for purposes of a potential counter-campaign. *See* Petitioners' Response to Amicus Brief, p. 3. Although the Election Commission has the authority under state law to set a different date for the referendum election than the date listed in the Petition, this does not mean that the "prescribe a date" requirement relating to the form of the Petition, which has not been overridden by state law, should not be enforced as written.

Proposed Amendments – Defective in Form

The Metropolitan Government is challenging two of the proposed amendments on the basis that they are vague and confusing and, thus, defective in form. Amendment 3 provides as follows:

Amendment 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."

The Metropolitan Government claims that this proposed Amendment is defective in form because it does not define “benefit” or “elected officials” and it does not make detailed reference to other charter provisions it may effect. The Court agrees. This provision is, on its face, vague and confusing. The voters are not able to ascertain what “benefits” are restricted by this provision, which elected officials are included, and, accordingly, the nature and extent of the proposed change to the Charter.

The Metropolitan Government is also asserting proposed Amendment 6, the Protect Promise to Nashville provision, is also patently vague, confusing, and, accordingly, defective in form. This Amendment provides as follows:

Amendment 6

Protect Promise 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.”

This provision fails to define “ground lease,” “facilities,” “related ancillary development,” “revert to public property,” and “related contracts.” Amendments 3 and 6, therefore, are defective in form, will confuse the electorate, and are subject to pre-election challenge under *4GG-1* and the authorities relied upon in *City of Memphis*.

Proposed Amendments – Scope of Subject Matter

The Metropolitan Government challenges two of the Proposed Amendments on the ground that they are defective in form because they involve subject matter beyond the referendum power permitted by law. In other words, the Metropolitan Government is claiming that those initiatives are essentially *ultra vires* on their face and should not have been placed on the ballot. First, the Metropolitan Government challenges Amendment 1,

the “Limit Property Tax Rates” provision on the basis that it seeks to illegally set property tax rates by referendum. This Proposed Amendment provides:

Amendment 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.”

Last fall, Chancellor Lyle rejected as defective in form and facially unconstitutional 4GG’s efforts to use a charter amendment to nullify a property-tax increase. *See Findings & Conclusions at 12, 19-26, 32 n.7.* With the “Limit Property Tax Rates” provision, 4GG once again seeks to “roll back” the “34%-37% Property Tax increase.” (R. Ex. JJ at 624 (Version 2)). The provision would repeal an existing property-tax ordinance, set property tax rates by referendum for the next two fiscal years, and require referendum approval of subsequent property tax increases greater than three percent. Because none of these actions is permitted by the Tennessee Constitution, state law, or Metropolitan Charter, the provision is still defective in form and should not have been placed on the ballot.

The Tennessee Constitution has separate provisions permitting the creation of “home rule municipalities” on the one hand and “consolidated governments” on the other. It provides consolidated governments, such as the Metropolitan Government, with “all of the governmental and corporate functions now or hereafter vested in” both counties and cities. Tenn. Const. art. XI, § 9; *see also* Tenn. Code Ann. § 7-2-108(a)(1) (the Metropolitan Government Act gives metropolitan governments in Tennessee “[a]ny and all powers” that counties and cities “are, or may hereafter be, authorized or required to exercise under the Constitution and general laws of the state”). While consolidated

governments have many of the same sovereign rights as home rule municipalities, they are distinct entities - with merged city and county functions - that are distinctly addressed by state law.

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

The Tennessee Attorney General has also explained that the county legislative body, not the public, determines property tax rates. According to a 1994 opinion, “[a]ll counties . . . must follow the general law concerning the setting of the county property tax rate, which does not allow for submitting a rate increase to the voters.” Tenn. Op. Att’y Gen. No. 94-008, 1994 WL 88766, 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 may not hold a public referendum to establish the county property tax rate.”).

Counties are required by state law to serve multiple critical functions, including support for constitutional officers, law enforcement, public education, and local courts. Tennessee courts have long recognized that the State is obliged to provide a county

government with the fiscal capacity to meet these expenses. *See Baker v. Hickman Cty.*, 47 S.W.2d 1090, 1093 (Tenn. 1932)(“It is the duty of the General Assembly to levy, or authorize the counties to levy, a sufficient tax to meet the legal obligations of the counties, as well as their current expenses.”); *see also* 20 C.J.S. *Counties* § 353.

Consistent with this constitutional framework, state law delegates the property taxing authority, including setting tax rates, solely to the county’s legislative body. To that end, state law specifically requires the *county legislative body* to impose sufficient property taxes to ensure the continuation of these mandatory services. *See* 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 county legislative body has no discretion to choose whether to tax property but is required to do so. The Metropolitan Charter contains these property-tax requirements as well.

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

refuses to levy a county school property tax. *See Tenn. Code Ann. § 49-2-401; see also Metropolitan Charter § 9.04(3).*

In performing the multitude of county functions assigned to it by state law and the Metropolitan Charter, the Metropolitan Government acts primarily in its capacity as a county in exercising its property taxing authority. Therefore, it must assess property taxes, as all Tennessee counties do, through its legislative body. Because the Metropolitan Council is the essential legislative unit standing in the constitutional role of a county government in setting property tax rates, there is no sound constitutional, statutory, or other legal basis to suggest that its legislative decisions exercising the county taxing power delegated by the General Assembly can be made subject to a voter referendum. Because the Property Tax Rates provision sets property tax rates by referendum, a right reserved to the local legislative body under state law, the provision is defective in form and should not be placed on the ballot.

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

In *Bean v. City of Knoxville*, 175 S.W.2d 954 (Tenn. 1943), the Tennessee Supreme Court examined whether the City of Knoxville's power to legislate included the power to repeal an ordinance by referendum election. *See id.* at 954-55. The *Bean* plaintiffs sought to enjoin the city from holding a referendum election to adopt an ordinance that would allow motion pictures to be exhibited on Sunday. *See id.* at 954. A state statute prohibited Sunday movies except when authorized "by a majority vote of the legislative council of any municipality." *Id.* (emphasis added). The *Bean* plaintiffs argued that voters in a referendum election could not be considered part of "the legislative council." *Id.* The court rejected this argument, relying on the fact that the legislature's private act establishing the Knoxville Charter had extended legislative authority directly to the citizens. *See id.* at 955 ("Section 99 of the [Knoxville] Charter not only provides for the passage or adoption of ordinances by referendum, but also for the repeal of such in the same manner.").

Stated differently, the City of Knoxville's delegation of legislative authority to voters via referendum was upheld because the state legislature and the municipal charter authorized the delegation. *See id.*; *see also* Francis C. Amendola, *et al.*, C.J.S. *Municipal Corporations* § 386 (database updated June 2020)("A council of a municipal corporation, operating under a freeholders' charter, which charter has no provision for a referendum, has no power to confer such power on the electors of the corporation since such action is regarded as a delegation of the legislative power of the council."); *see also* *State ex rel. Childress v. Anderson*, 865 S.W.2d 387, 390 (Mo. Ct. App. 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").

There is no delegation of legislative authority in the Metropolitan Charter or in state law that would allow Davidson County voters to use the referendum process to pass a new ordinance or repeal an existing one. Under the Metropolitan Charter, “[t]he council shall exercise its legislative authority *only by ordinance*, except as otherwise specifically provided by th[e] Charter or by general law.” Metropolitan Charter § 3.05 (emphasis added). The Metropolitan Charter does not “otherwise specifically provide” authority to pass legislation by referendum - certainly nothing in Metropolitan Charter § 19.01 permits the use of a Charter amendment referendum to enact an ordinance - nor does the “Limit Property Tax Rates” provision seek to convey such authority. Rather, by purporting to set tax rates, it is an unauthorized seizure of such powers.

Furthermore, such authority does not exist in state law. The Metropolitan Charter was adopted pursuant to enabling legislation enacted by the General Assembly - the Metropolitan Charter Act. *See* Tenn. Code Ann. §§ 7-1-101, *et seq.* Under this generally applicable statute, all metropolitan governments must have a metropolitan council, which “shall be the *legislative body* of the metropolitan government and shall be given all the authority and functions of the governing bodies of the county and cities being consolidated.” Tenn. Code Ann. § 7-2-108(11)(emphasis added). The Metropolitan Charter was drafted consistently: “The *legislative authority* of the metropolitan government of Nashville and Davidson County, except as otherwise specifically provided in this Charter, shall be vested in the metropolitan county council.” Metropolitan Charter § 3.01 (emphasis added); *see also Binkley v. Metropolitan 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.”).

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

Likewise, generally applicable state law provides no support for legislating by referendum as the provision seeks to do. While the Tennessee Constitution makes clear that all governmental power is derived from the people, it “contains no reservation to the people of the powers of initiative or referendum.” *Vincent v. State*, No. 01A-01-9510-CH-00482, 1996 WL 187573, at *3 (Tenn. Ct. App. Apr. 19, 1996); *see also State ex rel. Potter v. Harris*, No. E2007-00806-COA-R3-CV, 2008 WL 3067187, at *9-10 (Tenn. Ct. App. Aug. 4, 2008)(“While some states, *e.g.* Colorado and Arizona, have provided for referendum in their state constitutions, Tennessee has not done so.”). Similarly, the General Assembly has not authorized broad powers of initiative or referendum at the state or local level but instead authorized the use of a referendum in only a handful of discrete subject areas with particularized requirements. *See, e.g.*, Tenn. Code Ann. § 57-3-101 (liquor retail sales); Tenn. Code Ann. § 6-51-104 (annexation); Tenn. Code Ann. § 67-6-706 (local sales tax); Tenn. Code Ann. § 9-21-208 (general obligation bonds); Tenn. Code Ann. § 7-86-104 (E911 districts).

The “Property Tax Rates” provision, if adopted, would repeal the property tax ordinance that the Council is required by state law to adopt prior to the start of Fiscal Year 2021-2022. *See* Tenn. Code Ann. § 67-5-510 (county legislative body has a duty to fix property tax rates by first Monday in July). Such a repeal by referendum is “a political process not recognized under Tennessee law,” Findings & Conclusions at 12, and therefore involves a subject matter beyond the scope of the referendum power.

Moreover, the provision also sets the property tax rate by referendum rather than by ordinance, which is not permitted under state or local law. Because the “Property Tax Rates” provision involves a subject matter beyond the scope of referendum power, it is defective in form and should not be placed on the ballot.

The “Protect Promises to Nashville” provision is another amendment to which 4GG made cosmetic changes from last fall but failed to correct its defects. The provision states that “[i]f a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) consecutive months during the term of a team’s ground lease, all sports facilities and related ancillary development related to the defaulting team shall revert to public property, and all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payments shall be paid, if required by law.”

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

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

payments” obligations on the Authority. Any such attempt to amend the Charter to affect the Sports Authority is a subject matter beyond the scope of the referendum power and therefore defective in form.

The Sports Authority has executed leases with professional sports teams for them to manage and utilize sporting facilities constructed and owned by the Sports Authority (the “Sports Authority Leases”). (R., Ex. PP at 884-978). The facilities covered by the Sports Authority Leases were constructed with revenue bonds issued by the Sports Authority and backed by the Metropolitan Government’s pledge of non-tax revenues, evidenced by the execution and delivery of intergovernmental project agreements. (R., Ex. PP at 832, 858 (acknowledging the Metropolitan Government’s pledge of non-tax revenues by way of intergovernmental agreement), 860 (describing the Sports Authority’s “covenant” to pay principal and interest on bonds), 861 (describing the intergovernmental agreement with the Metropolitan Government)); *see also* (R. at 884-88, 891 (defining “Initial Term” of lease), 896 (requiring rent payments equal to the debt service)). The Sports Authority has pledged facility rent payments and other revenues dependent on the Sports Authority leases being in effect to the repayment of the bonds issued to build the facilities. The “Protect Promises to Nashville” provision, if allowed to go into effect and be enforced against a Sports Authority Lease tenant while bonds for the associated facility remain outstanding, would cause the Sports Authority to violate Tenn. Code Ann. § 7-67-113(a), which requires that a pledge of revenues “shall continue in effect until the principal of and interest on the bonds for which the pledge [was] made shall have been fully paid.” *Id.* All of these effects are outside the scope of what may be accomplished by a Metropolitan Charter amendment.

Furthermore, the provision, if allowed to go into effect and be enforced against a Sports Authority Lease tenant while bonds for the associated Sports Authority facility

remain outstanding, would cause the Sports Authority to violate Tenn. Code Ann. § 9-21-125(a)(1), which requires that:

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

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

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

Proposed Amendment – Unconstitutional In Form

Limit Property Tax Rates

The “Limited Property Tax Rates” measure caps the tax levy the Metropolitan Government can adopt without voter approval. This provision impairs the Metropolitan Government’s contractual pledge to bondholders that it would, on an annual basis, adopt sufficient annual tax levies to cover the bonds’ principal and interest, as required by state law. This is constitutionally suspect under the state constitutional mandate that “no retrospective law, or law impairing the obligation of contracts, shall be made.” Tenn. Const. art. 1, § 20. These bond resolution commitments constitute a contract between the municipal corporation and the bondholders. *See State ex rel. Barr v. Town of Selma*, 417

S.W.2d 532, 535 (Tenn. 1967). When general obligation bonds are issued under the Local Government Public Obligation Act of 1986 (“LGPOA”), Tenn. Code Ann. §§ 9-21-101, *et seq.*, the local government incurs a definite and absolute obligation, commensurate with the full faith, credit and unlimited taxing power of the local government, to repay the principal and interest on such bonds.

The administrative record demonstrates that the Metropolitan Government issued bonds and pledged to bondholders that it would adopt annual tax levies to pay the bonds’ principal and interest as required by the LGPOA. (R., Ex. PP at 693, 698-99). A charter provision that expressly and unequivocally limits the Metropolitan Government’s duty to adopt a sufficient tax levy would directly impair vested contractual rights of the bondholders on outstanding general obligation bond issues. The Court believes, however, that the *City of Memphis* holding barring pre-election consideration of whether a measure is constitutional in substance applies here. Consequently, this discrete challenge is dismissed, without prejudice, as not being ripe for pre-election adjudication.

Recall Elected Officials

The “Recall Elected Official” ballot measure in the Proposed Amendments states:

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.”

This provision is constitutionally suspect; it may retrospectively impair vested rights and violate the right to vote. The Court concludes, however, that deciding this question goes

to constitutionality in substance and is not ripe for adjudication under *City of Memphis*. This discrete challenge, accordingly, is dismissed, without prejudice.

Abolish Lifetime or Other Benefits

“Abolish Lifetime or Other Benefits for Elected Officials” bars elected officials from receiving any benefits at taxpayer expense without voter approval. This appears constitutionally suspect on the question of whether it impairs the obligation of contracts to apply this provision to current and former office holders who have vested medical, pension, or other benefits. Elected officials, such as the Mayor and Council members, including officers and judges, are eligible for pension benefits administered by the Benefit Board if they meet the vesting requirements. This measure, if adopted, could impair vested rights of a number of current and former Metropolitan Government office holders in violation of Tenn. Const. art. I, § 20. The Court, however, is persuaded by the argument of the Election Commission that this issue falls into the category of substantive constitutionally. This discrete challenge, therefore, is hereby dismissed without prejudice as moot under *City of Memphis*.

Protect Promises to Nashville

The “Protect Promises to Nashville” provision is a sweeping, self-executing forfeiture provision stating, “[I]f a professional sports team leaves Nashville, or cease 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 relating to the defaulting team shall revert to public property, all related contracts shall terminate, including land leased from the Nashville Fairgrounds, and just payments shall be paid, if required by law.” This is constitutionally suspect on the question of whether it impairs the obligation of contracts and the taking clause of the Tennessee Constitution. This provision appears to add a new restriction in the Sport Authority’s lease with

professional sports teams and could impair existing leases by imposing new terms into the parties' lease.

Additionally, Article I, Section 5 of the Tennessee Constitution provides that “no man’s particular services shall be demanded, as property taken, or applied to public use, without the consent of his representative, or without just compensation being made therefor.” Tenn. Const. art. I, § 21. This measure is constitutionally suspect as to the question of whether it has the effect of a taking of property without the establishment of a legitimate public use warranting the taking. *See Johnson City v. Cloninger* 372 S.W.2d 271, 284 (Tenn. 1963). The Court concludes, however, that these two particular challenges to the Protect Promises to Nashville ballot initiative are not subject to pre-election adjudication under *City of Memphis*. These particular discrete challenges, as set out in the preceding two paragraphs, are hereby dismissed, without prejudice, as moot.

Severability of Proposed Amendments

The Petition is invalid as a whole because it failed to comply with the “prescribe a date” requirement of the Metropolitan Charter § 19.01. Even if it had complied with the Charter, it contains multiple amendments that are either defective in form and facially unconstitutional or constitutionally suspect, but not yet ripe. Nothing in the Petition, however, allows this Court to assume that the Petition would have received the requisite number of signatures if one or more of the defective amendments were removed. In such circumstances, courts have removed the entire petition from the ballot rather than speculate whether petition signers would have signed a different proposal.

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

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

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

The Petition’s language indicates that the signers intended for all of the Proposed Amendments to be submitted to the voters. The Petition asked signers to support the “Nashville Taxpayer Protection Act,” which encompasses all of the Proposed Amendments. (R., Ex. JJ at 622). The Petition expressly conveys that the Proposed Amendments are aimed at a collective purpose: “These Charter Amendments will help stop Metro’s fiscal irresponsibility and rein in spending.” *Id.* (emphasis added).

Furthermore, the Petition tells signers that voters “shall vote” on all of “the foregoing six (6) separate amendments” on election day. (R., Ex. JJ at 622). Indeed, the Petition’s provision invoking the signatories’ rights to propose charter amendments expressly states that the “undersigned Davidson County voters propose the following six (6) Amendments.” *Id.* (emphasis added). Citizens reviewing this Petition were given

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

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

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

The Petition contains no comparable language to inform signers that one or more Proposed Amendments could be subject to elision if legally invalid and left off the ballot entirely. The Petition only states that provisions within Amendment 1 are severable from

each other and that provisions within Amendment 2 are severable from each other. In contrast, the Petition does not state that Amendments 1 through 6 are severable from each other.

The Petition (not the Proposed Amendments) states that the Amendments are “separate.” Given that the Proposed Amendments were individually numbered and addressed different provisions of the extant Metropolitan Charter, the use of this term is little more than descriptive. The inclusion of the word “separate” does not imply, much less expressly provide, that the Proposed Amendments are severable for purposes of the Petition’s validity. Distinct amendments may appear separately on the ballot to allow voters to express their approval or disapproval for each one. Listing distinct amendments separately on a single Petition, however, provides no indication of the signers’ support for each particular amendment independently. To justify elision, this Court must determine that the Petition would have garnered the necessary signatures if, for example, the tax provision were removed. Stating that the amendments are “separate” is irrelevant to that determination.

As the Chancery Court noted in *4GG-1*, a key factor in applying severability is the uncertainty in determining which provisions of an initiative “induced each voter to sign it. It is not the role of the courts to interfere with the legislative powers granted to [these] citizens.” Findings & Conclusions at 42 (quoting *In re Jackson Township Admin. Code*, 97 A.3d at 725-28). Two Missouri cases cited in *City of Memphis* emphasize the difficulty of determining the intent of petition signers for purposes of elision in a judicial referendum challenge. See *City of Memphis*, 146 S.W.3d at 540.

In *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990), the Missouri Supreme Court declined to sever provisions of a referendum initiative that had been removed from the ballot for violating the state constitution. See

id. at 832. The court identified several factors that would make a provision severable: “whether the provision is essential to the efficacy of the amendment, whether it is a provision without which the amendment would be incomplete and unworkable, and whether the provision is one without which the voters would not have adopted the amendment.” *Id.* Because the proposed amendment had more than one subject, the court concluded that it could neither determine which provisions the petition signers intended to support nor identify the provisions essential to the amendment’s efficacy.

In State ex rel. Hazelwood Yellow Ribbon Committee v. Klos, 35 S.W.3d 457 (Mo. Ct. App. 2000), the Missouri Court of Appeals declined to sever provisions of a proposed city charter amendment, despite the city charter providing that if any charter provision was held void, the validity of other provisions would not be affected. *See id.* at 470-71. The court explained that it would be “impossible” to determine what the amendment framers or petition signers intended “with respect to whether they considered the unconstitutional language to be essential to the efficacy of the amendment.” *Id.* at 471; *see also In re Jackson Township Admin. Code*, 97 A.3d at 725-28 (court declined to sever voter initiative, holding that it “cannot discern with any certainty which provisions of an initiative ordinance induced each voter to sign it. It is not the role of the courts to interfere with the legislative powers granted to [these] citizens[.]”); *Bennett v. Drullard*, 149 P. 368, 370 (Cal. Ct. App. 1915)(redacting petition to remove invalid provisions “would be directing something to be placed on the ballot which the hundreds of voters did not petition for at all”), *cited with approval in Alexander v. Mitchell*, 260 P.2d 261, 268-69 (Cal. App. 1953).

Here, there is no express or implied language indicating that the Proposed Amendments are legally severable from one another. Furthermore, the language indicating that the provisions may be voted on separately does not provide any insight

into whether the signers would have supported the Proposed Amendments *in part*. As a result, the Petition provides the Court with no guidance on what induced each signature.

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

The Court respectfully concludes that 4GG did not satisfy all of the legal prerequisites for getting the Petition it submitted to the Election Commission placed on the ballot for a referendum election. Additionally, the Petition contained other deficiencies which were brought to the Election Commission's attention, as discussed above. The Election Commission, therefore, committed prejudicial legal error in its May 10, 2021 final order placing 4GG's second Petition on the ballot for a referendum election on July 27, 2021 without requesting the Court for a declaratory judgment determination, given the thoughtful concerns raised by the Metropolitan Government, especially in light of the Court's rulings in *4GG-I*. This decision by the Election Commission was fraught with essential illegality; the Election Commission's decision was arbitrary, capricious, and illegal.

Summary of Rulings

The Court, accordingly, summarizes its rulings as follows:

1. The Metropolitan Government has standing and is an aggrieved party under common law writ of certiorari procedure.
2. The Election Commission had discretion to treat the two iterations of the Petition as one Petition for purposes of the signature requirement.

3. The Court agrees with the Election Commission that the operative “preceding general election” is the August 2020 election. 4GG met the signature requirement under § 19.01 of the Metropolitan Charter.
4. The Court agrees with the Metropolitan Government that 4GG’s Petition did not meet the “prescribe a date” requirement under § 19.01 of the Metropolitan Charter.
5. The Court agrees with the Metropolitan Government that the “Abolish Lifetime or Other Benefits for Elected Officials” measure and the “Protect Promises to Nashville” Amendments are defective in form, confusing to the electorate, and properly subject to pre-election challenge on this ground.
6. The Court agrees with the Metropolitan Government that the “Limit Property Tax Rates” Amendment and the “Protect Promise to Nashville” provision are defective in form and unconstitutional in form under *City of Memphis* and *4GG-I*.
7. The Court agrees with the Election Commission that certain of the Metropolitan Government’s specific challenges to the Limit Property Tax Rates Amendment, the Recall Elected Officials Amendment, Abolish Lifetime or Other Benefits Amendment, or Protect Promises to Nashville Amendment relate to substantive constitutionality and are, accordingly, not ripe for pre-election challenge on those specific grounds.
8. The Court agrees with the Metropolitan Government on the severability issue and concludes that none of the Amendments can properly be presented to the qualified voters of Davidson County for referendum election on July 27, 2021.

Conclusion

Based on the foregoing, the Court respectfully REVERSES and VACATES the May 10, 2021 final order of The Davidson County Election Commission directing that 4 Good Government's second Petition (filed with the Metropolitan Clerk on March 25, 2021) be scheduled for referendum election on July 27, 2021. Given that the six Proposed Amendments are not severable, none of 4 Good Government's proposed Amendments to the Metropolitan Government's Charter are permitted to be considered for referendum election on July 27, 2021. As mentioned above, certain of the Metropolitan Government's objections to the Proposed Amendments are not ripe for pre-election judicial challenge. Those particular objections, discussed at Pages 31-34 of this Memorandum and Final Order, are hereby dismissed, without prejudice, on ripeness grounds.

The Court hereby GRANTS The Metropolitan Government of Nashville and Davidson County, Tennessee's petition for a writ of certiorari and hereby issues a limited writ of mandamus in aid of the Court's writ of certiorari jurisdiction directing the Davidson County Election Commission to take appropriate, timely steps to effectuate the Court's rulings memorialized in this Memorandum and Final Order and to make sure that the July 27, 2021 referendum election is duly cancelled.

This Memorandum and Final Order is intended to be a final, appealable order. Any motion, claim, or request for relief filed in this case, which has not been specifically addressed by the Court in this Memorandum and Final Order or in other Orders of this Court, is hereby DENIED as moot. Court costs, for which execution may issue, are

hereby taxed against The Davidson County Election Commission.

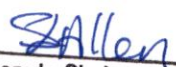
IT IS SO ORDERED.


RUSSELL T. PERKINS, CHANCELLOR

cc: Honorable Bob Cooper, Director
Department of Law, Metropolitan Government of Nashville
Lora Barkenbus Fox, Esq.
Allison Bussell, Esq.
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James D. R. Roberts, Esq.
Daniel A. Horwitz, Esq.
Lindsey B. Smith, Esq.

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail
upon all parties or their counsel named above.


Deputy Clerk and Master
Chancery Court

6/22/21
Date