IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Ludye N. Wallace,	§	
	§	
Petitioner-Appellant,	§	M2018-00481-SC-RDM-CV
	§	
v.	§	
	§	Chancery Court No. 18-0254-I
Metropolitan Government of	§	
Nashville and Davidson County, *et al.*,	§	Chancellor Claudia Bonnyman
	§	
	§	
Respondents-Appellees.	§	

PETITIONER-APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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III. CLARIFICATION OF STANDARD OF REVIEW

The sole question presented for this Court's review—whether the Metropolitan Charter of Nashville and Davidson County requires that a special election be held to fill a vacancy in the office of mayor whenever more than twelve months remain in the unexpired term—is a question of statutory interpretation. "Statutory interpretation, of course, presents a question of law and [this Court's] review is de novo with no presumption of correctness." *Kiser v. Wolfe*, 353 S.W.3d 741, 745 (Tenn. 2011) (citing *Carter v. Quality Outdoor Prods., Inc.*, 303 S.W.3d 265, 267 (Tenn. 2010)).

In the "Standard of Review" section of Respondents' brief, Respondents assert that their interpretation of the relevant Charter provision "is entitled to great weight in determining legislative intent," although they acknowledge that an interpretation that "is inconsistent with the terms of the law" may not be upheld.[1] However, Respondents are not entitled to any deference whatsoever, for multiple reasons.

First, "an agency's interpretation of its controlling statutes remains a question of law subject to de novo review." *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 523 (Tenn. 2013).

Second, Respondents failed to raise any claim for deference before the

[1] *See* Respondents' Brief, p. 9.

trial court. As a consequence, the claim is waived. *See, e.g., Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983) ("questions not raised in the trial court will not be entertained on appeal"); *In re Taylor B.W.*, 397 S.W.3d 105, 114 (Tenn. 2013) ("It has long been the rule that this Court will not address questions not raised in the trial court."); *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991) ("issues not raised in the trial court cannot be raised for the first time on appeal").

Third, Respondents' failure to raise a timely claim for deference has deprived Mr. Wallace of the opportunity to raise any of several objections to such a claim. Had the claim been timely raised, Mr. Wallace would have argued, *inter alia*, that deference to an agency's interpretation of a given statutory provision is improper under circumstances where, as here:

1. The agency's interpretation has changed without explanation. *Compare* R. at 91 (Respondents' 2007 ballot summary conveying the amendment's meaning) *with* Respondents' Brief at p. 24 (arguing that the 2007 summary was merely "a shorthand explanation mandated by state law" that did not accurately convey Metro Charter § 15.03's meaning because the summary was "required to be 'brief.'" *But see* R. at 107, Metro Charter § 19.01 ("The ballot shall be prepared so as to set forth a brief description of the amendment worded so as to convey the meaning of said amendment")).

2. The agency does not uniformly adhere to its own interpretation. *Compare* Respondents' Brief at p. 17 (arguing that, for purposes of Metro Charter § 15.03, the term "general metropolitan election" carries a broad definition) *with* Respondents' Brief at pp. 18-20 (arguing that the same term "can be read differently within the same statute, when context requires," that "there is nothing unusual about an undefined term being used differently within a statute," and that it is "obvious" that Metro Charter § 18.06's "reference to the next general metropolitan election" carries a different meaning that the use of the same term set forth in Metro Charter §§ 15.01, 15.02, and 15.03). And:

3. The agency's interpretation necessarily means that the voters who ratified the provision at issue were affirmatively misled about its meaning prior to ratification. *Cf. George v. Hargett*, 879 F.3d 711, 727 n. 9 (6th Cir. 2018) ("If, instead, the State officials had altered or departed from the established practice prior to the 2014 election without giving adequate notice of the change to the citizenry, then a stronger due process claim would be made out.").

For all of these reasons, the appropriate standard of review is and remains "de novo with no presumption of correctness." *Kiser*, 353 S.W.3d at 745 (citing *Carter*, 303 S.W.3d at 267).

IV. INTRODUCTION

On August 2, 2007, Davidson County voters overwhelmingly approved a Charter referendum requiring a special election whenever the office of mayor becomes vacant with more than twelve months remaining in an outgoing mayor's unexpired term.[2] The Respondents' ballot summary specifically stated: "**This amendment would require that a special election be held to fill a vacancy in the office of mayor . . . whenever more than twelve (12) months remain in the unexpired term.**"[3] This summary also conforms with all of the Charter's applicable statutory text; Charter § 15.03's written legislative history; historical practice under Charter § 18.06; and longstanding Metro public policy.[4]

Despite its clarity, Respondents assiduously avoid grappling with the definition supplied by their own ballot summary, even though it is undisputed that the summary's entire purpose—indeed, its legally mandated purpose—was "to convey the meaning of said amendment" to voters.[5] In fact, Respondents submit that the ballot summary did not "convey the meaning" of the amendment at all. *Id.* To the contrary, the Respondents argue that

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[2] R. at 103.

[3] R. at 91.

[4] *See* Petitioner's Principal Brief, Section IX-A, B, C, & D.

[5] R. at 107.

the amendment carried a meaning that departed "significant[ly]" from the ballot summary provided to voters[6], and they submit that providing voters a ballot summary that conflicted with the amendment's actual meaning was a deliberate "choice."[7] Because that contention is preposterous—and because the Respondents' additional arguments are similarly meritless—the trial court's order should be reversed.

Perhaps anticipating reversal, Respondents also suggest—in the alternative—that this Court should delay its ruling until a date that permits Respondents to hold a special election on August 2, 2018 anyway.[8] To enable this outcome-oriented result, Respondents further ask this Court to hold—in unprecedented fashion—that its adjudication of the pure question of law presented in this case constitutes "notice of the facts requiring the call."[9]

Respondents' invitation is seriously unwarranted for several reasons—not the least of which is that the judiciary does not exist to massage the Government's litigation positions or to protect the Government from the predictable consequences of its clear legal errors. Instead, this Court should resolve this simple and straightforward case within the timeline necessary to

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[6] Respondents' Brief, p. 16.

[7] Respondents' Brief, p. 16.

[8] Respondents' Brief, p. 26.

[9] Respondents' Brief, p. 26.

adjudicate it. Further, because the record makes clear that a reasonably prompt decision will enable the Respondents to hold an election within 75-80 days of March 6, 2018 as required,[10] a writ of mandamus should issue.

V. ARGUMENT

In his Principal Brief, Mr. Wallace advanced the following four claims:

> (1) The plain language of the Metro Charter unambiguously defines "general metropolitan elections" as the elections held every fourth August during which the Mayor, Vice Mayor, and the Metropolitan Council are elected at once;[11]
>
> (2) The legislative history of Metro Charter § 15.03 confirms that "a special election [must] be held to fill a vacancy in the office of mayor . . . whenever more than twelve (12) months remain in the unexpired term;[12]
>
> (3) Respondents' position creates an absurd result, because if the Respondents' position were correct, then the entire Metropolitan Council was elected at the wrong time following the 1980 and 2000 censuses;[13] and
>
> (4) Metro Charter § 15.03 must be interpreted in accordance with Nashville's longstanding public policy of ensuring that its local elections are not contaminated by partisan federal and state influences.[14]

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[10] R. at 75 ("The Election Commission is prepared to hold the election whenever the Charter requires. . . ."); *see also* Respondents' Response to Petitioner Wallace's Emergency Motion to Assume Jurisdiction, pp. 10-11.

[11] Petitioner's Principal Brief, pp. 11-16.

[12] Petitioner's Principal Brief, pp. 16-22.

[13] Petitioner's Principal Brief, pp. 23-26.

[14] Petitioner's Principal Brief, pp. 26-29.

In response, Respondents offer eleven (11) arguments purporting to address Mr. Wallace's claims. For the reasons that follow, none is persuasive.

A. *Wise v. Judd* did not hold what the Respondents claim it held.

Respondents first argue that in *State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983), this Court "found that both August 1979 and August 1982 were metropolitan general elections."[15] However, that holding appears nowhere in *Wise*. Instead, the *Wise* Court expressly declined to reach the issue because doing so was unnecessary to the outcome of that case.

In support of their contention that this Court previously "found that both August 1979 and August 1982 were metropolitan general elections,"[16] the Respondents paste multiple paragraphs from *Wise* that do not support that proposition.[17] The Respondents further emphasize the following specific sentences from *Wise*: (1) "The issue is whether this reference is to a preceding Metropolitan general election (regularly held in August)," and (2) "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 clearly is to municipal elections."[18]

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[15] Respondents' Brief, p. 10.

[16] Respondents' Brief, p. 10.

[17] Respondents' Brief, p. 10.

[18] Respondents' Brief, p. 10.

Beyond the fact that these sentences similarly fail to reflect that this Court "found that both August 1979 and August 1982 were metropolitan general elections,"[19] their emphasis is noteworthy because they reflect agreement with the Petitioner's position, not the Respondents'. As detailed in Mr. Wallace's principal brief, *Wise* stands for the specific proposition that metropolitan general elections are defined by Metro Charter § 15.01. *See Wise,* 655 S.W.2d at 953 ("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 clearly is to municipal elections."). That holding also accords perfectly with Mr. Wallace's position in this case, because as Mr. Wallace has argued, the text of Metro Charter § 15.01 controls the relevant inquiry.[20]

Critically, however, with respect to whether the August 1979 or August 1982 elections (or both) were general metropolitan elections—the *Wise* Court did not rule on the matter. Instead, *Wise*'s holding that the term "general metropolitan election" referred to municipal elections rather than state elections was sufficient to resolve the case, because under the specific facts of *Wise,* both previous municipal elections satisfied the requisite

[19] Respondents' Brief, p. 10.

[20] *See* Petitioner's Principal Brief, Section IX-A-2, p. 12 (arguing that "Metro Charter § 15.01 expressly defines the term 'general metropolitan election.'").

signature threshold. *See id.* ("If [either] the August 1982 or August 1979 Metropolitan elections are meant, facially the petitions contain a sufficient number of signatures."). Consequently, determining which of those two elections was a general metropolitan election was wholly unnecessary to the case's outcome. As a result, the *Wise* Court did not rule on the matter at all—much less issue the holding that the Respondents divine from it.

Implicitly acknowledging this reality, the Respondents instead direct this Court's attention not to *Wise* itself, but to "Chancellor Kilcrease's decision in that case."[21] That decision, it should be noted, is not in the record.[22] Regardless, however, Chancellor Kilcrease's decision is irrelevant. *Wise* did not affirm the Chancellor's holding that the August 1982 election qualified as a general metropolitan election. Instead, *Wise* affirmed the Chancellor's holding on other, materially different grounds—a reality that, if anything, should signal disagreement. Regardless, because this Court affirmed on alternative grounds, Chancellor Kilcrease's decision carries no precedential value. Instead, this Court's decision alone matters, and *Wise* itself reflects that it did not hold what the Respondents claim it held.

[21] Respondents' Brief, p. 11.

[22] Respondents appear to have filed several supplementary materials with this Court that: (1) were not submitted to the trial court; (2) post-date Mr. Wallace's briefing; and (3) have not, at least to date, been filed in compliance with Tenn. R. App. P. 24(e).

B. Mr. Wallace's reading of the Charter is not "strained." It is a product of reading the Charter.

The Respondents also contend that "[t]here is no basis for giving the Charter a narrow and strained reading."[23] In support of this claim, Respondents argue—without citation—that "the Chancellor recognized that the phrase 'general metropolitan election' is not defined in the Charter."[24]

Respondents' problem, of course, is that the phrase "general metropolitan election" is absolutely defined in the Charter. Even worse—the Charter defines the phrase "general metropolitan election" *repeatedly*.

To begin, "general metropolitan elections" are specifically defined by Metro Charter § 15.01[25]—a provision that is helpfully entitled "When general metropolitan elections held."[26] This provision expressly defines "general metropolitan elections" as the elections that are "held on the first Thursday in April, 1966, and on the first Thursday in August of 1971, and each four (4) years thereafter," during which the "mayor, vice-mayor, five (5) councilmen-at-large and thirty-five (35) district councilmen" stand for election at once.[27]

Metro Charter § 15.02—which also uses the term "general metropolitan

[23] Respondents' Brief, p. 12.

[24] Respondents' Brief, p. 12.

[25] R. at 102.

[26] R. at 102.

[27] R. at 102.

election"[28]—indisputably contemplates only a single election as well. Of note, it also refers to "**the** general metropolitan election,"[29] it does so seven times, and it incontrovertibly describes only a single possible election: The election held every four years during which the mayor, vice-mayor, and Nashville's district councilmembers all stand for election at once.[30]

Given that the text of these provisions is clear and unambiguous, Mr. Wallace's claim that Metro Charter §§ 15.01 and 15.02 establish a narrow definition of the term "general metropolitan election" is not, in any sense, "strained."[31] Instead, it follows easily from simply reading the Charter. *See id; see also Wise*, 655 S.W.2d at 953 ("The charter, § 15.01, provides for Metropolitan general elections and refers to them as such."). As such, relying on general, inapposite resources like Tenn. Op. Atty. Gen. No. 98-172[32] or

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[28] R. at 102.

[29] R. at 102-03 (emphasis added).

[30] See R. at 102-03 ("In **the general metropolitan election** those qualified persons who receive a majority of the votes cast for mayor, vice-mayor and district councilman for each of the thirty-five (35) districts shall be elected to their respective offices . . . ."); ("In **the general election** if no candidate shall receive a majority . . . ."); ("the two (2) candidates who received the highest number of votes cast for such office which failed to be filled at **the general election** . . . ."); ("in **the general election** if less than five (5) candidates receive a majority . . . ."); ("those who in **the general election** received the highest vote . . . .") ("three (3) weeks subsequent to **the general election** held in that year . . . ."); ("the runoff election shall be held on the second Thursday in September, being five (5) weeks subsequent to **each general election** held after 1995.") (emphases added).

[31] Respondents' Brief, p. 12.

[32] Respondents' Brief, p. 13.

the municipal Charter of the Town of Linden[33] is not only unnecessary—it is improper. *See Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010) ("a more specific statutory provision takes precedence over a more general provision."). Accordingly, the Respondents' claim in this regard fails as well.

C. Nobody has ever argued that the phrase "general metropolitan election" is "superfluous." Mr. Wallace argues the opposite.

Next, the Respondents contend that "[t]he phrase 'general metropolitan election' is not superfluous—it is meaningful."[34] Mr. Wallace, of course, has never advanced the argument that the phrase "general metropolitan election" is superfluous or is not meaningful. Respondents' specific contention on this point is also nonsensical.

Respondents specifically claim that if Mr. Wallace's position were accurate, then Metro Charter § 15.03 would not say:

> "[T]here shall be held a special metropolitan election to fill a vacancy for the unexpired term in the office of mayor . . . whenever such vacancy shall exist more than twelve (12) months prior to the date of the next general metropolitan election."[35]

Instead, the Respondents argue, it would say:

> "[T]here shall be held a special metropolitan election to fill a vacancy for the unexpired term in the office of mayor . . . whenever such vacancy shall exist more than twelve (12)

[33] Respondents' Brief, p. 13.

[34] Respondents' Brief, p. 16.

[35] Respondents' Brief, p. 16.

months."[36]

Respondents' analysis, however, suffers from a readily apparent flaw: the alternative reading that Respondents insist Mr. Wallace's interpretation of § 15.03 "require[s]" does not produce a properly constructed sentence.[37] Respondents' proposed modification—which abruptly ends with: "whenever such vacancy shall exist more than twelve (12) months. [sic]"[38]—would be grammatically criminal. Further, such a "required" construction would not convey the interpretation that Mr. Wallace advances.

Under Mr. Wallace's reading of Metro Charter § 15.03, the concluding clause "prior to the date of the next general metropolitan election" is not rendered superfluous at all. To the contrary, this clause is essential, because it reflects the reference point necessary to trigger a special election. And because, as noted, "general metropolitan election" carries a specific meaning under the Metro Charter,[39] this provision is meaningful indeed.

D. The caption of § 15.02 "bear[s] on the meaning of the text," even if it does not "determine or restrict" it.

Respondents further argue that even though Metro Charter § 15.01 is

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[36] Respondents' Brief, p. 16.

[37] Respondents' Brief, p. 16.

[38] Respondents' Brief, p. 16.

[39] *See* Petitioner's Principal Brief, pp. 11-16.

helpfully entitled, "When general metropolitan elections held,"[40] this caption "do[es] not have any bearing on the meaning of the Charter."[41] Mr. Wallace, it should be emphasized, advances an interpretation of § 15.01 that conforms with its title, while the Respondents advance a meaning that conflicts with it. Regardless, however, in urging this Court to disregard the clarity of a title as straightforward as "When general metropolitan elections held,"[42] the Respondents rely upon Metro Charter § 18.07—a provision that also is not in the record—which states:

> It is hereby expressly declared and recognized that the titles and subtitles appearing before the articles, chapters and sections of this Charter are not part hereof and are not intended to determine or restrict the meaning of its provisions. No substantive provision of this Charter shall be construed to be unintended or ineffective because the same has not been suggested or indicated by a title or subtitle. Titles and subtitles have been placed in this Charter merely for the convenience of those who examine or index its provisions.

Metro Charter § 18.07.

Respondents are correct that, under § 18.07, the title of Metro Charter § 15.01 does not "determine or restrict" its meaning. *Id.* However, Respondents' argument that § 15.01's title, "When general metropolitan

[40] R. at 102.

[41] Respondents' Brief, p. 17.

[42] R. at 102.

elections held"[43] does not even "bear on" its meaning is a bridge too far, and it is belied by well-worn precedent to the contrary.

There is no doubt that headings are "non-codified external sources[.]" *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 528 (Tenn. 2010). Like Metro Charter § 18.07, the Tennessee Code also contains an explicit provision on the matter. *See* Tenn. Code Ann. § 1-3-109 ("Headings to sections in this code and the references at the end of such sections giving the source or history of the respective sections shall not be construed as part of the law.").

Nonetheless, this Court has held repeatedly that even though headings are not part of the law itself, they absolutely inform a statute's meaning. *See, e.g., In re Estate of Davis*, 308 S.W.3d 832, 839 (Tenn. 2010) ("Although Tennessee Code Annotated section 1–3–109 (2003) directs that headings to statutes are not part of the statutes themselves, it is permissible under widely held rules of statutory construction to consider a heading for legislative intent and purpose.") (citing *State ex rel. Rector v. Wilkes*, 436 S.W.2d 425, 428 (1968)); *Hyatt v. Taylor*, 788 S.W.2d 554, 556 (Tenn. 1990) ("In seeking legislative intent courts should look to the entire statute including the caption and policy statement."); *Knox Cty. ex rel. Kessel v. Lenoir City*, 837 S.W.2d 382, 387 (Tenn. 1992) ("[I]ntent must be derived from a reading of

[43] R. at 102.

the statute in its entirety, including the caption of the Act.").

Accordingly, the Respondents' assertion that this Court must ignore the caption of Metro Charter § 15.01 is without merit.

E. The relevant provisions of the Metropolitan Charter do not use an indefinite article. They include a specific definition of "general metropolitan election," and they refer to "**the** general metropolitan election" no fewer than eight times across multiple provisions.

Respondents also submit that: "In § 15.03, the election where the mayor is elected every four years is called 'a general metropolitan election,' not 'the metropolitan election.'"[44] This is significant, Respondents insist, because "[t]his use of an indefinite article indicates that it is referring to a generic term, not a specific term."[45] However, Respondents are mistaken for several reasons.

First, § 15.03 does use a definite article. *See* R. at 103 ("If in such special election to fill a vacancy for the unexpired term of the office of mayor or district council member, or in **the general election** at which time a vacancy in the office of vice mayor or councilmember-at-large . . . .").

Second, and more importantly, Respondents' brief conspicuously ignores both § 15.02 and § 18.06, which conclusively disproves Respondents' theory. As Mr. Wallace noted in his Principal Brief, Metro Charter § 15.02:

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[44] Respondents' Brief, p. 17.

[45] *Id.* (citing *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000).

> does not merely refer to "a" general metropolitan election. Instead, Metro Charter § 15.02 refers to "**the** general metropolitan election," it does so seven separate times, and it incontrovertibly describes only a single possible election: The election held every four years during which the mayor, vice-mayor, and Nashville's district councilmembers all stand for election at once. *See* R. at 102-03 ("In **the general metropolitan election** those qualified persons who receive a majority of the votes cast for mayor, vice-mayor and district councilman for each of the thirty-five (35) districts shall be elected to their respective offices . . . ."); ("In **the general election** if no candidate shall receive a majority . . . ."); ("the two (2) candidates who received the highest number of votes cast for such office which failed to be filled at **the general election** . . . ."); ("in **the general election** if less than five (5) candidates receive a majority . . . ."); ("those who in **the general election** received the highest vote . . . .") ("three (3) weeks subsequent to **the general election** held in that year . . . ."); ("the runoff election shall be held on the second Thursday in September, being five (5) weeks subsequent to **each general election** held after 1995.") (emphases added).[46]

A critical eighth use of the term is found in § 18.06 as well.[47]

Thus, notwithstanding the Respondents' selective analysis of the relevant Metro Charter provisions, when using the term "general metropolitan election," the Metro Charter unquestionably does use a definite article. *See id.* Mr. Wallace also agrees with the Respondents that such diction is not only significant, but outcome-determinative. *See* Respondents' Brief, p. 17 (citing *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000)

[46] Petitioner's Principal Brief, pp. 14-15.

[47] R. at 135.

for the proposition that "it is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an,'" and citing Black's Law Dictionary for the proposition that "[i]n construing a statute, [the] definite article 'the' particularizes the subject which it precedes and is [a] word of limitation . . . ."). Thus, Respondents' contention in this regard is not only without merit; instead, it proves the Petitioner's claim.

F. Metro Charter § 18.06's significance has nothing to do with redistricting. It is relevant because it reflects a definition of "general metropolitan election" that is irreconcilable with Respondents' interpretation of the term.

In his principal brief, Mr. Wallace observed an inescapable absurdity in the Respondents' position. "Specifically," Mr. Wallace noted, "if the Respondents' position were correct, then the entire Metropolitan Council was elected at the wrong time following the 1980 and 2000 censuses, and nobody appears to have noticed."[48]

In an attempt to overcome this troubling reality, Respondents make an extraordinary concession: they argue that the term "general metropolitan election" carries one meaning for purposes of § 15.03, but that it means something else entirely for purposes of § 18.06.[49] Further, they argue, there

[48] Petitioner's Principal Brief, p. 23.

[49] Respondents also attempt to claim—by footnote—that this argument was waived. *See* Respondents' Brief, p. 18, n. 8. Respondents are mistaken. Metro Charter § 18.06 is in

is nothing wrong with such a position. *See* Respondents' Brief, p. 18 ("there is nothing unusual about an undefined term being used differently within a statute"); *see also id.* at 19 ("a defined term can be read differently within the same statute, when context requires[.]").

Respondents are mistaken. There is no indication whatsoever that the "context" of § 18.06 reflects a definition of "general metropolitan election" that differs from the way that same term is used in Metro Charter §§ 15.01, 15.02, and 15.03, and the fact that § 18.06 uses the term in the context of redistricting is almost risibly irrelevant. Further, familiar tools of statutory construction require courts to read these provisions ***in harmony***, rather than adopting a construction that invites conflict. *See, e.g., Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997) ("Our goal is to adopt a reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws. Statutes relating to the same subject or sharing a common purpose shall be construed together ('in *pari materia*') in order to advance their common purpose or intent.") (internal citation omitted). Thus, because Respondents are unable to explain or advance any coherent explanation for why the term "general metropolitan election" carries a

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the record. *See* R. at 135. By contrast, the myriad supplemental materials that Respondents have attempted to add after Mr. Wallace filed his principal brief are not. *See, e.g.*, 4/02/2018 Supplemental Filing; 4/05/2018 Supplemental Filing. *See also* Appendix to Respondents' Brief.

specific meaning for purposes of § 18.06 but not §§ 15.01, 15.02, and 15.03, Respondents' claim in this regard fails as well.

G. A May election would not be prejudicial to the public interest.

Next, Respondents advance the curious argument that *special elections themselves* "seriously jeopardize the rights of Nashville voters."[50] To support this claim, Respondents assert that rapid special elections "deprive voters of the normal evaluation period to carefully consider the qualifications of the mayoral candidates by significantly reducing the time they traditionally have to convey their message to the public."[51] Voters' countervailing interest in promptly ensuring that their Mayor is someone who was actually elected to represent them as Mayor is notably unmentioned.

It is fair to submit that Respondents' position in this regard does not in fact represent "Nashville voters," because when it came time to vote on the matter, 83 percent of them decided otherwise. Indeed, the referendum calling for special elections following mayoral vacancies "carried every single precinct in the county."[52] Further, regardless of the meaning of the term

[50] Respondents' Brief, p. 20.

[51] Respondents' Brief, p. 20.

[52] Steve Cavendish, *Metro Legal Could Cost the City Money for Another Election METROPOLITIK: Why are the city's lawyers so dug-in on the issue of election dates?*, THE NASHVILLE SCENE (Mar. 26, 2018),

"general metropolitan election"—and regardless of Respondents' distaste for them—there is no doubt whatsoever that the Charter compels them. *See* R. at 103, § 15.03 ("There shall be held a special metropolitan election . . . . The special election shall be ordered . . . ."). The fact that the Metropolitan Department of Law, acting on behalf of the voters, considers the voters' will in this regard to be unsound is not a lawful basis for failing to comply with it. In other words: "This argument goes to the Merits and desirability of the statute, a matter with which this Court officially has no legitimate concern." *Nashville Mobilphone Co., Inc. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976).

H. The Circuit Court's 2016 Order does not bind this Court, it was dicta, and it resulted from the same misreading of *Wise v. Judd* that Respondents advance here.

The Respondents additionally contend that in 2016, the Circuit Court agreed with the position they advance in this case.[53] Undoubtedly, that assertion is true. There is also little doubt that it carries no significance.

It goes without saying that the Circuit Court's 2016 decision does not bind this Court. Moreover, as Respondents conceded below, the Circuit Court's 2016 analysis of the matter was pure dicta—it begins "If the Court

https://www.nashvillescene.com/news/columns/article/20998110/metro-legal-could-cost-the-city-money-for-another-election.

[53] Respondents' Brief, p. 21.

were to reach the merits . . . ." [54] Further, that decision was vacated by operation of the Court of Appeals' opinion in *Hamilton v. Metro. Gov't of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026 (Tenn. Ct. App. Oct. 25, 2016), in which the court expressly declined to reach the merits of the issue presented on appeal. *Id.* at *4.

Most importantly, though, like the trial court's opinion in this case, the Circuit Court's 2016 ruling simply got it wrong. The position advanced by the Respondents is flatly irreconcilable with applicable statutory text, written legislative history, historical practice, and longstanding Metro public policy.[55] And as this Court has noted repeatedly, the judiciary's oath "is to do justice, not to perpetuate error." *Frazier v. State*, 495 S.W.3d 246, 253 (Tenn. 2016), *cert. denied*, 137 S. Ct. 2163 (Tenn. 2017), (citing *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 599 (Tenn. 1999)).

I. The Attorney General's interpretation of generic terms has no bearing on the Metro Charter's use of specific terms.

For their ninth claim, the Respondents observe that "state law defines the terms 'election' and 'primary election.'"[56] Further, they note, "[t]he Attorney General has interpreted Tennessee's state election laws defining the

[54] Respondents' Brief, p. 21.

[55] Petitioner's Principal Brief, Section IX-A, B, C, & D.

[56] Respondents' Brief, p. 22.

term 'general election.'" [57]

If this case involved the terms "election," "primary election," or "state election laws defining the term 'general election,'" these observations might well be noteworthy. But this case does not involve generic terms used in state election statutes. Instead, it involves the specific term "general metropolitan election"—a local term of art unique to the Metro Charter—which the text of the Metro Charter both expressly and narrowly defines.[58] Because familiar tools of statutory construction counsel that "a more specific statutory provision takes precedence over a more general provision," *Graham*, 325 S.W.3d at 582, the Metro Charter's specific, narrowly defined use of the term "general metropolitan election" controls. *Id.*

J. The doctrine of legislative inaction does not apply to non-legislative action that was sold to voters under specifically defined terms that the Respondents have since repudiated.

Penultimately, Respondents argue that the "doctrine of legislative inaction" compels this Court to hold that the 2007 Charter referendum ratified by Nashville's voters "made no change to the construction of general metropolitan election, as interpreted in *Wise*."[59] Here, too, however, multiple glaring problems abound.

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[57] Respondents' Brief, p. 22.

[58] *See* Petitioner's Principal Brief, Section IX-A.

[59] *See* Respondents' Brief, p. 23.

First, the doctrine of legislative inaction applies to "the legislature's inaction." *Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 444 (Tenn. 2017). As Respondents concede, however, the provision at issue was not produced by the legislature.[60] Instead, it was produced by voters who ratified it under defined terms that conflict with the Respondents' position in this case. *See* R. at 91 ("This amendment would require that a special election be held to fill a vacancy in the office of mayor . . . whenever more than twelve (12) months remain in the unexpired term.").

Second, as detailed above, the Respondents have misinterpreted *Wise*, which does not stand for the proposition cited. Because Respondents' misreading of *Wise* is recent, and because it also conflicts with the unambiguous ballot summary that Respondents provided to voters not eleven years ago, *id.*, it strains credulity to suggest that the 2007 referendum reflects agreement with an interpretation of *Wise* that the Respondents themselves did not hold at the time of ratification.

Third, even after *Wise*, Respondents' definition of "general metropolitan election" can fairly be described as "fluid." *See, e.g.*, Respondents' Brief, p. 18 ("there is nothing unusual about an undefined term being used differently within a statute"); *see also id.* at 19 ("a defined term

[60] *See* Respondents' Brief, p. 23.

can be read differently within the same statute, when context requires[.]"). Given that Respondents now contend that "general metropolitan election" means something different depending on where one looks in the Charter, *see id.*, it is unclear how voters could be expected to guess which definition Respondents would prospectively supply, and Respondents do not say.

Fourth, and most significantly, the doctrine of legislative inaction applies only where there has been "acquiescence in a prior judicial interpretation of the statute." *Hardy*, 513 S.W.3d at 444. Thus, even if *Wise* stood for the proposition for which the Respondents have cited it (and it does not), the doctrine cannot even theoretically apply here, because voters approved an amendment that conveyed a specific, contrary definition of "general metropolitan election" after *Wise* was decided. *See* R. at 91 ("**This amendment would require that a special election be held to fill a vacancy in the office of mayor . . . whenever more than twelve (12) months remain in the unexpired term.**") (partial emphasis added).

K. The Metro Charter does indeed reflect a longstanding public policy of avoiding state and federal partisan contamination with local elections.

Eleventh, Respondents argue that although Mr. Wallace has noted Metro's longstanding public policy of preventing local elections from state and federal partisan contamination, "[t]he evidence cited by Petitioner for this interpretation is not the 1963 Metropolitan Charter itself, nor the 2007

Amendment, but rather a 2011 memorializing Resolution . . . ."[61] Further, Respondents argue, "the August 2, 2018 election is not a partisan presidential election," which Respondents submit was the only type of contamination the Metro Council's 2011 Resolution inveighed against. *Id.*

Regrettably, Respondents have misread Petitioner's briefing. *See* Petitioner's Principal Brief, p. 26 (noting that **under the Metro Charter itself**, "municipal elections are held in August every four odd-numbered years, which ensures that they never coincide with any federal or state contests."). Further, the 2011 Resolution similarly cites the primary source that Respondents are attempting to contravene. *See* R. at 34 ("the founders of the Metropolitan Government of Nashville and Davidson County chose to make local elected offices non-partisan"); *id.* ("the offices of Metropolitan Mayor, Vice Mayor, and Council have been non-partisan since the Charter became effective in 1963"). Further still, the 2011 Resolution at issue—which decries local overlap with all "November partisan elections," not merely "presidential elections," *see* R. at 34—is not as limited as Respondents seem to think it is. Instead, it embodies a policy emanating from the Charter itself that having Metropolitan elections coincide with partisan federal and state elections "would negatively impact the democratic process and destroy the

[61] *See* Respondents' Brief, p. 24.

purpose of having a non-partisan elected body."[62] Because this public policy matters, and because Respondents' distaste for it is not shared by Metro's citizens or its Council, Respondents' contrary position should be rejected.

L. This Court should reject Metro's invitation to delay its ruling to enable Respondents to do legally what they have attempted to do illegally.

Finally, if the merits of this case are resolved against them, Respondents ask this Court to grant "only prospective declaratory relief" that "would allow the residents of Davidson County to have a meaningful election, which [sic] as many voters eligible to vote as possible, as well as saving the additional cost of conducting another election."[63] Respondents' disdain for special elections—which apparently are not "meaningful" despite the Charter requiring them—has been well established. Even so, it is not a basis for non-compliance. Nor do Respondents contend that only "prospective" relief is possible due to mootness, because that claim, too, is unsupportable.[64]

Instead, Respondents urge this Court to enable "only prospective declaratory relief" by less-than-subtly inviting this Court to delay its ruling until a date that will permit them to set an August 2, 2018 election anyway.[65]

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[62] *See* R. at 34.

[63] *See* Respondents' Brief, p. 26.

[64] R. at 75 ("The Election Commission is prepared to hold the election whenever the Charter requires. . . ."). *See also* Respondents' Response to Petitioner Wallace's Emergency Motion to Assume Jurisdiction, pp. 10-11.

[65] *See* Respondents' Brief, p. 26.

To facilitate that outcome-oriented result, Respondents also ask this Court to rule that adjudicating the question of law presented in this case constitutes "notice of the facts requiring the call" under Tenn. Code Ann. § 2-14-102.[66]

Respondents' invitation should be rejected. The Government "is not the constituent of the courts, nor are they its agents." *Jones' Heirs v. Perry*, 18 Tenn. 59, 74 (1836). Here, the "fact[] requiring the call" was the notice provided by the Metro Clerk to the Davidson County Election Commission that former Mayor Megan Barry had resigned her post, thereby creating a vacancy in the office of mayor.[67] Delaying a ruling, and then distorting Tenn. Code Ann. § 2-14-102 "under the unique circumstances presented in this case" so as to enable the Respondents to escape the predictable consequences of their refusal to comply with the Metro Charter is not an appropriate exercise of this Court's "exclusive paramount sovereignty." *Jones' Heirs*, 18 Tenn. at 75. Respondents' invitation should be rejected accordingly.

VI. CONCLUSION

For the foregoing reasons, the trial court's order should be **REVERSED** and **REMANDED** with instructions to mandate that Respondents hold a special election pursuant to Tenn. Code Ann. § 2-14-102.

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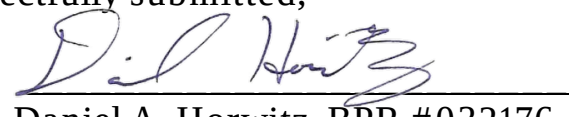
[66] *See* Respondents' Brief, p. 26. Respondents erroneously cite Tenn. Code Ann. § 2-4-102(a) as the relevant provision. The correct statute is Tenn. Code Ann. § 2-**1**4-102(a).

[67] R. at 42.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2018, a copy of the foregoing was mailed, postage prepaid, and transmitted by e-mail to the following:

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[68] Mr. Hiland is not a party to this case, but he filed a parallel action in the trial court. Mr. Hiland has not filed a notice of appeal.