**IN THE COURT OF APPEALS OF TENNESSEE**
**AT NASHVILLE**

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| Fraternal Order of Police *et al.*, | § | |
| | § | |
| *Petitioners-Appellants*, | § | M2018-01717-COA-R3-CV |
| | § | |
| v. | § | |
| | § | Circuit Court No. 18C-2158 |
| Metropolitan Government of Nashville and Davidson County, *et al.*, | § | |
| | § | |
| *Respondents-Appellees*, | § | |
| | § | |
| & | § | |
| | § | |
| Community Oversight Now, | § | |
| | § | |
| *Intervening Respondent-Appellee*. | § | |

# BRIEF OF INTERVENING RESPONDENT-APPELLEE COMMUNITY OVERSIGHT NOW

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Date: November 8, 2018

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## III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to Tenn. R. App. P. 3(h) and 13(a), Community Oversight Now raises the following three (3) additional issues for review:

1. Whether the Appellants have standing to initiate this action;

2. Whether the Appellants' claims are moot; and

3. Whether the November 6, 2018 election—in which a supermajority of Davidson County voters ratified a referendum establishing a police oversight board in a free and fair election—may lawfully be invalidated.

## IV. Introduction

In August 2018, the Davidson County Election Commission placed a referendum election regarding a proposed police oversight board on the November 6, 2018 ballot.[1] The Election Commission's action came after more than the requisite minimum 4,708 petition signatures that were submitted by Intervenor Community Oversight Now were formally verified.[2] Thereafter, the Appellants—the Fraternal Order of Police and several police officers who oppose the concept of civilian oversight of the police—filed a lawsuit in Davidson County Circuit Court seeking to prevent the election from taking place.[3]

In attempting to prevent Davidson County's voters from expressing their will on the proposed police oversight board, the Appellants insisted that the wrong "preceding general election" had been used to determine the requisite signature threshold under Metro Charter § 19.01.[4] Notably, however, the Appellants' claims regarding which election qualified as the "preceding general election" under Metro Charter § 19.01 were incompatible

[1] R. at 6, ¶ 24.

[2] R. at 5, ¶ 22. *See also* R. at 42-43.

[3] R. at 1-23.

[4] R. at 8-10.

with one another and lacked any unifying theory as to how the relevant Charter provision should be interpreted. *See, e.g.,* R. at 8-10 (arguing that "'the preceding general election' before August 1, 2018 . . . was the May 24, 2018 [special] election," or else "the November 8, 2016 [federal] election," or else "the August 6, 2015 general metropolitan election," but not the most recent municipal general election). Instead, for practical purposes, the Appellants contended that under Metro Charter § 19.01, "preceding general election" should be defined as whichever election prevented Nashville's voters from being able to vote on a police oversight board.

Even without regard to the merits of the Appellants' claims, however, the Appellants' lawsuit suffered from several glaring deficiencies at its outset that have only worsened since. Most prominently: The primary "injury" that the Appellants claimed they would suffer was purely hypothetical. Specifically, as the Appellants themselves acknowledged, the supposed "injury" that the proposed police oversight board would cause them had nothing to do with the requisite signature threshold, and instead, would come to pass only "if" a majority of voters approved the referendum.[5]

[5] *See* R. at 2, ¶ 8 ("Members of the FOP, along with the sworn police officers who are members of the FOP, will be distinctly and significantly affected by the referendum if it is adopted and the proposed Charter amendment becomes law."), R. at 6, ¶ 27 (claiming that civilian oversight referendum would injure the Petitioners "if it becomes law"); R. at 7, ¶ 28 (alleging that "[t]he amendment, if it becomes law, will injure the individual Petitioners . . . ."); *id.* at ¶ 29 (alleging that "[t]he amendment, if it becomes law, will injure

Hypothetical injuries, however, are categorically insufficient to confer standing, which must also exist at the time that a plaintiff's lawsuit is filed.

Alternatively, the Appellants claimed, they were "injured" because they had political opposition to the referendum and planned to campaign against it.[6] Notably, though, participating in an election—in other words, the democratic process itself—is not a legally cognizable "injury," either; much less a concrete and particularized one. The Appellants' lawsuit should be—and should have been—dismissed for lack of standing as a result.

Upon review, the Trial Court adjudicated the Appellants' claims against them on the merits. Thereafter, the Appellants appealed. Because the Appellants' appeal could not be adjudicated before the November 6, 2018 election occurred, however, Community Oversight Now moved this Court to dismiss the Appellants' appeal for lack of subject matter jurisdiction in part on the basis that the Appellants' claimed injuries were no longer redressable.[7]

Upon review, this Court denied Community Oversight Now's motion

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the individual Petitioners who are retired MNPD officers as well as retired officers who are members of the FOP . . . .").

[6] R. at 8, ¶ 30. *See also* R. at 2, ¶ 8.

[7] Community Oversight Now's September 26, 2018 Motion to Dismiss, p. 1 (noting that "The relief Appellants seek can no longer be provided, rendering this case moot.").

to dismiss "without prejudice to the parties addressing the same issues in their briefs."[8] Despite this invitation, however, the Appellants have opted not to address any mootness or redressability issues in their briefing[9]—thereby forbidding them from attempting to raise arguments regarding those matters in any Reply. *See Hughes v. Tennessee Bd. of Prob. & Parole*, 514 S.W.3d 707, 724 (Tenn. 2017) ("Issues raised for the first time in a reply brief are waived.").

Regardless, at this juncture, the Appellants' claims are moot and cannot be remedied. The November 6, 2018 election has already taken place. Accordingly, the remedy that the Appellants sought—removing the election from the November 6, 2018 ballot—can no longer be provided. Further, the campaign regarding the November 6, 2018 election having concluded, the only non-hypothetical "injury" that the Petitioners alleged—having to participate in the democratic process—has already occurred. Consequently, the Appellants' lawsuit suffered from lack of standing when it began; its claimed "injury" has already come to pass; and the remedy that the Appellants sought can no longer be provided. As a result, this Court has lost subject matter jurisdiction to adjudicate this matter, and the Appellants'

[8] October 9, 2018 Order.

[9] *See generally* Appellants' Brief.

lawsuit should be dismissed.

Attempting to avoid that inevitability, the Appellants argue—for the first time on appeal—that invalidating the November 6, 2018 election is a proper remedy instead. According to the Appellants, "the proposed amendment is invalid and cannot become law" due to supposed conflicts with the Tennessee Constitution, Tennessee statutes, and the Metro Charter. *See* Appellants' Brief at p. 26. The claim, too, is meritless for four separate reasons:

*First*, the Appellants' lawsuit never sought to invalidate the election as a remedy, and the Appellants cannot circumvent mootness by attempting to seek a new and different remedy on appeal.

*Second*, the Appellants waived any argument as to any claimed conflict with the Tennessee Constitution or Tennessee statutes by failing to present any argument on the matter to the Trial Court.

*Third*, for several reasons, the election cannot lawfully be invalidated.

*Fourth*, as the Trial Court held, the merits of the Appellants' lawsuit are baseless.

For all of these reasons, the Appellants' appeal should be **DISMISSED** both as moot and for lack of standing, and the judgment of the Trial Court should be **AFFIRMED**.

## V. Argument

### A. THE APPELLANTS DO NOT HAVE AND HAVE NEVER HAD STANDING TO BRING THIS LAWSUIT.

"Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues." *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* (cleaned up[10]).

Critically, standing must also "be determined as of the commencement of the suit . . . ." *Id.* at 570, n. 5 (emphasis added). *See also Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (noting "the longstanding principle

[10] Jason P. Steed, *Cleaning Up Quotations in Legal Writing,* AMERICAN BAR ASS'N (Dec. 7, 2017), https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2017/fall2017-cleaning-up-quotations-in-legal-writing.html.

that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'") (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L.Ed. 154 (1824)). Thus, any defect in standing at the commencement of a litigant's lawsuit is incurable. *See, e.g., Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1367, n. 3 (Fed. Cir. 2010).

Further, "standing may not be predicated on an injury to an interest that the plaintiff shares in common with all other citizens." *Hamilton v. Metro. Gov't of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026, at *3 (Tenn. Ct. App. Oct. 25, 2016). Thus, "when a plaintiff asserts that the law has not been followed, the plaintiff's 'injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government'" that the Supreme Court has refused to countenance. *Id.*, citing *Moncier v. Haslam*, 1 F. Supp. 3d 854, 859 (E.D. Tenn.), *aff'd*, 570 F. App'x 553 (6th Cir. 2014) (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)).

For the reasons that follow, all of these considerations compel the conclusion that the Appellants have never had standing to file this lawsuit in the first place. It should be dismissed for lack of standing as a result.

1. Appellants' alternately hypothetical and generalized "injuries" did not confer standing to initiate the instant action.

In the instant case, the Appellants claimed that they were injured by

Metro's approval of Community Oversight Now's referendum petition in two ways:

*First*, the Appellants insisted that "if" the referendum were adopted by voters, then civilian oversight of the police department would result in a host of injuries that the Appellants wished to avoid. *See* R. at 2, ¶ 8 ("Members of the FOP, along with the sworn police officers who are members of the FOP, will be distinctly and significantly affected by the referendum **if it is adopted and the proposed Charter amendment becomes law.**") (emphasis added); R. at 6, ¶ 27 (claiming that civilian oversight referendum would injure the Petitioners "***if it becomes law***") (emphasis the FOP's); R. at 7, ¶ 28 (alleging that "[t]he amendment, **if it becomes law**, will injure the individual Petitioners . . . .") (emphasis added); *id.* at ¶ 29 (alleging that "[t]he amendment, **if it becomes law**, will injure the individual Petitioners who are retired MNPD officers as well as retired officers who are members of the FOP . . . .") (emphasis added).

*Second*, the Appellants insisted that they were injured by the democratic process itself, claiming that "in the event the referendum election on the amendment goes forward, the FOP will participate in and be in charge of a campaign to inform the voters of Metro Nashville regarding the proposed amendment so they will vote to reject it." R. at 8, ¶ 30. *See also* R. at 2, ¶ 8

("In the event a referendum occurs based on the Petition, as defined herein, FOP will be involved in the campaign against adoption of the referendum.").

Neither one of these claimed injuries was sufficient to confer standing to initiate the instant action. The instant case should be dismissed for lack of standing as a consequence.

The Appellants' first claimed injury—that they would suffer a parade of horribles resulting from civilian oversight "if" the referendum passed—was, by definition, hypothetical in nature. Even on appeal, the Appellants themselves do not claim otherwise. *See* Appellants' Brief, p. 10 ("If the amendment becomes law it will injury Appellants . . . ."); p. 11 ("If the amendment becomes law, the Board will have the power to issue subpoenas to compel testimony and conduct hearings . . . ."); *id.* ("If the amendment becomes law it will also injure Appellants Young and Gafford . . . ."). Plainly, however, if the referendum did not become law, then the Appellants would not and could not have been injured by it in any regard.

To create a justiciable case or controversy, an injury "must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Hayes v. City of Memphis*, No. W2014-01962-COA-R3-CV, 2015 WL 5000729, at *9 (Tenn. Ct. App. Aug. 21, 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Here, however, no serious claim

can be made that the provisions of Metro's police oversight board injured the Appellants before the board even came into existence. Further, because standing must "be determined as of the commencement of the suit"—rather than at a subsequent time during litigation—the fact that the referendum ultimately did pass has no bearing whatsoever on whether the Appellants had standing to bring the instant lawsuit at its outset. *Lujan*, 504 U.S. at 570, n. 5 (emphasis added). *See also Keene Corp.* 508 U.S. at 207 (noting "the longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'") (quoting *Mollan*, 9 Wheat. at 539). The Appellants' hypothetical injuries at the time they filed suit were insufficient to confer standing as a result. *Id.*

The Appellants' second claimed injury—having to participate in the democratic process—was also insufficient to confer standing. "[S]tanding may not be predicated on an injury to an interest that the plaintiff shares in common with all other citizens." *Hamilton,* 2016 WL 6248026, at *3. Here, however, the Appellants' second asserted injury—participation in a supposedly impermissible election—was shared by all of Davidson County and every single one of its voters. Such "undifferentiated, generalized grievance[s] about the conduct of government" are similarly insufficient to confer standing to file suit. *Id.* (citations omitted). The Appellants' lawsuit

should be and should have been dismissed for lack of standing as a result.

2. The Appellants' claimed injuries are not redressable.

Due to its purely theoretical nature, the Appellants' first claimed injury—its concern about the substance of the referendum "if" it became law—was never redressable. *See, e.g., State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 192 (Tenn. 2000) ("courts are not to render advisory opinions"). The November 6, 2018 election already having taken place, however, the only non-theoretical "injury" that the Appellants' alleged—having to participate and campaign in the November 6, 2018 election—is no longer redressable, either.

In initiating this action, the Appellants claimed that "in the event the referendum election on the amendment goes forward, the FOP will participate in and be in charge of a campaign to inform the voters of Metro Nashville regarding the proposed amendment so they will vote to reject it." *See* R. at 8, ¶ 30. *See also* R. at 2, ¶ 8 ("In the event a referendum occurs based on the Petition, as defined herein, FOP will be involved in the campaign against adoption of the referendum."). To maintain standing, however, a plaintiff's claimed injury "must be capable of being redressed by a favorable decision of the court." *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). "Stated differently, 'it must be likely, as opposed to

merely speculative, that the injury will be redressed by a favorable decision.'" *Calfee v. Tennessee Dep't of Transportation*, No. M2016-01902-COA-R3-CV, 2017 WL 2954687, at *8 (Tenn. Ct. App. July 11, 2017) (quoting *Lujan*, 504 U.S. at 560).

Because the November 6, 2018 referendum election has already occurred, the FOP has already been involved—however unsuccessfully—in the campaign against it. Put differently: The injury that the Appellants sought to avoid has already come to pass. As a consequence, no judicial decision is capable of redressing their concerns about having to participate in the democratic process leading up to the November 6, 2018 election. Thus, to the extent that this claim of injury ever conferred standing to initiate this action in the first instance, the Appellants have since lost any claim to standing based on their participation in the November 6, 2018 election, and the instant appeal should be dismissed for lack of standing as a result.

### B. THE APPELLANTS' CLAIMS ARE MOOT, AND THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE THEM AS A RESULT.

The instant case should additionally be dismissed for lack of subject matter jurisdiction because the Appellants' claims have become moot. *See State ex rel. Adventist Health Care Sys./Sunbelt Health Care Corp. v. Nashville Mem'l Hosp., Inc.*, 914 S.W.2d 903, 907 (Tenn. Ct. App. 1995) ("If

by the time a controversy reaches the appellate court questions presented have been deprived of practical significance and have become academic and abstract in character, the appeal should be dismissed as moot."). In some cases—particularly in the context of elections—"'there can be no do over and no redress.'" *League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). This is such a circumstance.

1. <u>The relief that the Appellants' sought can no longer be provided.</u>

In initiating this lawsuit, the Appellants' claims for relief are set out clearly on pages 12-13 of their *Verified Petition for Writ of Certiorari and Supersedeas and Writ of Mandamus*. *See* R. at 12-13. The Appellants specifically stated that they sought the following relief:

> 1. that the Court issue a writ of certiorari to the Election Commission to review the proceedings of the Election Commission relating to the Petition and cause the Election Commission to have a record of the proceedings prepared and submitted to this Court;
>
> 2. that the Court issue a writ of supersedeas directed to the Election Commission to stay the putting into effect of the Election Commission's motion to place the proposed amendment on the ballot for the November 6, 2018, election.
>
> 3. that the Court review the Election Commission's decision relating to the Petition, reverse the decision of the Election Commission and determine that the Petition does not contain a sufficient number of verified signatures to meet the Metro Nashville Charter Section 19.01 requirement that the Petition be

> signed by 10% of the number of registered voters of Nashville-Davidson County voting in the preceding general election;
>
> 4. that the Court issue a peremptory writ of mandamus compelling the Election Commission to deny the request to place the proposed amendment on the ballot for the November 6, 2018, election;
>
> 5. that the Court act on an expedited basis to preserve the rights of the Petitioners in advance of the referendum election scheduled for November 6, 2018, by the Election Commission; and
>
> 6. that the Court grant the Petitioners such other and further relief as is just and appropriate.

*Id.*

The Appellants' initial claims for relief concerning review of their claims were promptly provided. A fiat directing a writ of certiorari to issue was entered on August 21, 2018. *See* R. at 27. An expedited scheduling order was entered on September 5, 2018. *See* R. at 53-54. And promptly thereafter, the Appellants' claims were heard and adjudicated by the Trial Court on their merits. *See* R. at 391-412.

As for the remedies that the Appellants' sought, however—(1) an order directing the Election Commission "to stay the putting into effect of the Election Commission's motion to place the proposed amendment on the ballot for the November 6, 2018, election," and (2) an order "issu[ing] a peremptory writ of mandamus compelling the Election Commission to deny

the request to place the proposed amendment on the ballot for the November 6, 2018, election"—they can no longer be provided. *See* R. at 12. The election at issue has already been held. It is also hornbook law that "a suit brought to enjoin a particular act becomes moot once the act sought to be enjoined takes place." *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994) (citing *Badgett v. Broome*, 219 Tenn. 264, 268, 409 S.W.2d 354, 356 (1966); *Malone v. Peay*, 157 Tenn. 429, 433, 7 S.W.2d 40, 41 (1928)). Thus, the remedies that the Appellants sought can no longer be provided, rendering the instant action moot. *See, e.g., James v. State*, No. M200201557COAR3CV, 2003 WL 22136840, at *4 (Tenn. Ct. App. Sept. 16, 2003) ("the fact that the election is long since over renders this appeal moot because it no longer presents a present, live controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *County of Shelby v. McWherter*, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996); *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). It no longer provides a means to grant Mr. James the relief he seeks. *Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998); *Massengill v. Massengill*, 36 Tenn. App. 385, 388-89, 255 S.W.2d 1018, 1019 (1952).").

This Court has previously explained the doctrine of mootness:

The doctrine of justiciability prompts courts to stay their hand in cases that do not involve a genuine and existing controversy requiring the present adjudication of present rights. *State ex rel. Lewis v. State*, 208 Tenn. 534, 537, 347 S.W.2d 47, 48 (1961); *Dockery v. Dockery*, 559 S.W.2d 952, 954 (Tenn. Ct. App. 1977). Thus, our courts will not render advisory opinions, *Super Flea Mkt. v. Olsen*, 677 S.W.2d 449, 461 (Tenn. 1984); *Parks v. Alexander*, 608 S.W.2d 881, 892 (Tenn. Ct. App. 1980). or decide abstract legal questions. *State ex rel. Lewis v. State*, 208 Tenn. at 538, 347 S.W.2d at 49.

**Cases must be justiciable not only when they are first filed but must also remain justiciable throughout the entire course of litigation, including the appeal.** *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990); *Kremens v. Bartley*, 431 U.S. 119, 128–29, 97 S.Ct. 1709, 1715, 52 L.Ed.2d 184 (1977); 13A Charles A. Wright et al., Federal Practice and Procedure §§ 3533, 3533.10 (2d 3d. 1984) ("Federal Practice and Procedure"). The concept of mootness deals with the circumstances that render a case no longer justiciable. *Davis v. McClaran*, App. No. 01–A–01–9304–CH–00164, slip op. at 2, 19 T.A.M. 1–3, 1993 WL 523667 (Tenn. Ct. App. Dec.10, 1993), *perm app. granted* (Tenn. Mar. 28, 1994) ("[m]ootness is a doctrine of justiciability"); Federal Practice and Procedure § 3533, at 211.

A moot case is one that has lost its character as a present, live controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *Krug v. Krug*, 838 S.W.2d 197, 204 (Tenn. Ct. App. 1992); *La Rouche v. Crowell*, 709 S.W.2d 585, 587 (Tenn. Ct. App. 1985). The central question in a mootness inquiry is whether changes in the circumstances existing at the beginning of the litigation have forestalled the need for meaningful relief. Federal Practice and Procedure § 3533.3, at 261. A case will generally be considered moot if it no longer serves as a means to provide relief to the prevailing party. *Church of Scientology v. United States* § , 506 U.S. 9, ––––, 113 S.Ct. 447, 449, 121 L.Ed.2d 313 (1992); *Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338–39 (1948); *Massengill v. Massengill*, 36 Tenn.App. 385, 388–89, 255 S.W.2d 1018, 1019 (1952).

**Thus, a suit brought to enjoin a particular act becomes moot once the act sought to be enjoined takes place.** *Badget v.*

> *Broome*, 219 Tenn. 264, 268, 409 S.W.3d 354, 354 (1966); *Malone v. Peay*, 157 Tenn. 429, 4337 S.W.2d 40. 41 (1928).

*Hatcher v. Chairman [Hatcher II]*, No. W2010-01163-COA-R3CV, 2011 WL 1639991, at *4–5 (Tenn. Ct. App. Apr. 28, 2011) (cleaned up) (emphases added).

These considerations compel dismissal of the instant action. Both this Court and our Supreme Court have held repeatedly that once a challenged election has occurred, any claim for injunctive or declaratory relief regarding whether the election should have been held becomes moot. *See, e.g., Hatcher v. Chairman [Hatcher I]*, 341 S.W.3d 258, 263 (Tenn. Ct. App. 2009) ("once the election had occurred, the trial court determined that the prayer for injunctive relief was moot, and that a declaratory judgment concerning the propriety of Ms. Halbert's candidacy would amount to an advisory opinion given the posture of the case. . . . We agree."). *Perry v. Banks*, 521 S.W.2d 549, 550 (Tenn. 1975) ("the issues in this case were rendered moot by the outcome of the General Election held on August 1, 1974. It accordingly results that, without expressing any opinion as to the correctness of the decision of the Chancellor on the issues before him, the appeal will be dismissed as moot at the cost of appellants."); *La Rouche v. Crowell*, 709 S.W.2d 585, 587 (Tenn. Ct. App. 1985) ("'The 1984 primary election has already been conducted and all questions relating to that

election are moot. Whether LaRouche will attempt to be placed on the ballot in 1988 and, indeed, whether there will even be a presidential preference primary in Tennessee in 1988, are matters of pure conjecture and speculation, not appropriate for declaratory judgment.' Thus, unless there is an exception to the "mootness bar," this case should be dismissed.") (quoting and approving the Trial Court's dismissal of the action as moot). Dismissal of this action as moot is warranted as a result.

2. The Appellants' claim does not qualify as one that is capable of repetition but evading review.

In a previous filing, the Appellants intimated that their lawsuit satisfies the mootness exception governing claims that are capable of repetition but evading review. *Appellants'* October 5, 2018 *Response to Motion to Dismiss Appeal*, pp. 11-12 ("The concept of issues that are capable of repetition yet evading review is incorporated into the mootness analysis. Several of these mootness considerations identified by the Courts provide a basis for not invoking the mootness doctrine in this case[.]"). The Appellants have since abandoned the claim, however, having failed to assert the argument in their opening brief. *See Hughes*, 514 S.W.3d at 724 ("Issues raised for the first time in a reply brief are waived.") (citing *State v. Banks*, No. W2014-02195-CCA-R3-CD, 2016 WL 369562, at *10 (Tenn. Crim. App. Jan. 29, 2016)).

Regardless, the claim is meritless. The "capable of repetition but

evading review" exception to mootness is not nearly so broad as Appellants would make it. One of its central elements is that "the same complaining party will be prejudiced by the official act when it reoccurs." *City of Chattanooga v. Tennessee Regulatory Auth.*, No. M200801733COAR12CV, 2010 WL 2867128, at *5 (Tenn. Ct. App. July 21, 2010). Thus, "there must be a reasonable expectation or a demonstrated probability that **the same controversy will recur involving the same complaining party**." *Id.* (emphasis added).

There is no basis for concluding that the Appellants can satisfy this requirement. In order to qualify for the exception, the Appellants must demonstrate that: (1) at a future date, there will (2) be a petition-based referendum—(3) the substance of which the Appellants oppose—(4) submitted to the Davidson County Election Commission based on compliance with a signature threshold yoked to a future election that (5) qualifies for ballot placement under Metro's interpretation of the Metro Charter, but (6) does not qualify for ballot placement under the Appellants' interpretation. There is nothing in the record to demonstrate anything even resembling a "reasonable expectation or a demonstrated probability" that such circumstances will recur. *City of Chattanooga*, 2010 WL 2867128 at *5. Consequently, the Appellants' lawsuit does not qualify as one that is

"capable of repetition but evading review," and dismissal is warranted as a result. *See Jaeger v. Civil Serv. Comm'n of Metro. Gov't of Nashville & Davidson Cty.*, No. M2007-02451-COA-R3-CV, 2009 WL 248266, at *6 (Tenn. Ct. App. Feb. 2, 2009) ("Where a case on appeal is determined to be moot and does not fit into one of the recognized exceptions to the mootness doctrine, the appellate court will ordinarily vacate the judgment below and remand the case to the trial court with directions that it be dismissed.").

### C. THE NOVEMBER 6, 2018 ELECTION MAY NOT BE INVALIDATED.

1. The November 6, 2018 election cured any claimed error in the petition process.

The Appellants argue that due to a supposed defect in the number of signatures submitted during the petitioning process, the results of the November 6, 2018 referendum—an election in which Davidson County voters overwhelmingly voted to ratify a police oversight board by a margin of 134,135 (58.78%) – 94,055 (41.22%)—cannot become law and should be voided. *See* Appellants' Brief, p. 27. More accurately, the Appellants' attorneys have taken this position. By contrast, the FOP itself—at least publicly—contends that the will of the voters ought to be respected. *See* Joey Garrison, *Nashville Amendment 1 for police oversight board passes overwhelmingly*, THE TENNESSEAN (Nov. 6, 2018), https://www.tennessean.com/story/news/politics/tn-

elections/2018/11/06/nashville-amendment-1-police-oversight-board-appears-track-passage/1734253002/ ("'While the Fraternal Order of Police remains firm in its belief that this board will only create a divide between law enforcement and the public, **we recognize that the voters have spoken, and we will respect the rule of law and the will of the people we serve,' James Smallwood, president of the Nashville Fraternal Order of Police, said in statement**.") (emphasis added).

Regardless, the election cannot lawfully be voided. Even assuming that there were errors in the petition process—and there were not—the voter referendum process is a legislative one, and Tennessee law has long provided that defects in the initiation of legislation are cured by subsequent codification. *See, e.g., State v. Farmer*, 675 S.W.2d 212, 214 (Tenn. Crim. App. 1984) ("the codification of the statute cured any defect in the caption"); *State v. Wyrick*, 62 S.W.3d 751, 791 (Tenn. Crim. App. 2001) ("the subsequent codification of the bill cures any defects in the caption.") (citing *State v. Chastain*, 871 S.W.2d 661, 666 (Tenn. 1994); *Howard v. State*, 569 S.W.2d 861, 863 (Tenn. Crim. App. 1978)). *See also Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13, 16 (Tenn. Ct. App. 1982) ("any analysis of the caption and body of the act as originally enacted is unnecessary because the subsequent codification cured any defect that might have existed.").

This principle also carries heightened importance with respect to measures approved by referendum. Our Supreme Court has held that "courts must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment after it has been ratified by the people." *S. Ry. Co. v. Fowler*, 497 S.W.2d 891, 895 (Tenn. 1973). With this context in mind, Tennessee law establishes that the only "grounds for voiding an election involve (1) fraud and illegality rendering the election uncertain or (2) enough illegal ballots having been cast to call the election into doubt"—neither of which has even been alleged. *See Barrett v. Giles Cty.*, No. M2010-02018-COA-R3CV, 2011 WL 4600431, at *3 (Tenn. Ct. App. Oct. 5, 2011).

Nor is Tennessee unique in this view. To the contrary, many states hold that even recognized defects in a petitioning process are cured by the ultimate passage of a measure at the ballot box. *See, e.g.*, *Carman v. Hare (State Report Title: Carman*, 185 N.W.2d 1 (Mich. 1971) (holding that a proposed constitutional amendment, approved by electors, became effective after ratification despite defective petitions); *Mapstead v. Anchundo*, 63 Cal. App. 4th 246, 272-79 (1998) (dismissing challenge alleging insufficient signatures for placement of a measure on the ballot as moot post-election after proponents argued that opponents "should not be permitted to 'destroy an otherwise valid election after it lost the referendum at the ballot box,'"

notwithstanding appellate determination that proponents "should have lost on the merits at trial"). *Cf. Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 560 (Fla. Dist. Ct. App. 2006) (noting that where fraud is not an issue, an election cures technical defects in the initiating process, such as "fail[ing] to collect an adequate number of signatures, and a state official . . . erroneously certify[ing] the number as sufficient under law.").

2. The Appellants waived any claim that the November 6, 2018 election can be invalidated by failing to present that claim for relief to the Trial Court.

Acknowledging that it is no longer possible to prevent the November 6, 2018 election from taking place, the Appellants attempt to circumvent mootness and maintain a live case and controversy by urging this Court to "order that the proposed amendment cannot become law." *See* Appellants' Brief, p. 27. The apparent basis for this demand is Appellants' newly developed theory that "allowing the proposed Charter amendment to become law when it does not comply with Section 19.01 violates the allocation of authority within Tennessee's constitutional system of government because the Tennessee Constitution authorizes only the General Assembly to establish referendum procedures." *See id.* at 26.

In initiating this lawsuit, though, the Appellants failed to seek any such

relief related to voiding the election. *Compare* R. at 12-13, *with* Appellants' Brief, p. 26. They also failed to advance any argument even resembling their claim on appeal with respect to "Tennessee's constitutional system of government" in the Trial Court. *See* R. at 1-23. As such, with respect to the Appellants' insistence that the November 6, 2018 referendum may be voided post-election due to some supposed constitutional defect, the Appellants make the argument and seek redress regarding it only "for the first time on appeal."[11] *Kinsey v. Schwarz*, No. M2016-02028-COA-R3-CV, 2017 WL 3575895, at *8 (Tenn. Ct. App. Aug. 18, 2017), *appeal denied* (Dec. 6, 2017).

Critically, however, this Court has consistently held that "'[i]ssues raised for the first time on appeal are waived.'" *Id.* (citing *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 670 (Tenn. 2013); *Brandon v. Williamson Med. Ctr.*, 343 S.W.3d 784, 791 (Tenn. Ct. App. 2010); *Johnston v. Houston*, 170 S.W.3d 573, 578 (Tenn. Ct. App. 2004)). *See also Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 146

[11] Even worse—in seeking expedited review, the Appellants themselves adopted the (accurate) position that such relief could not be provided. *See Appellants*' September 20, 2018 *Motion for an Expedited Briefing Schedule and Hearing*, p. 2. This position is conclusively binding upon the Appellants, and as such, they are forbidden from altering it now. *See, e.g., Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL 1895842, at *11 (Tenn. Ct. App. Apr. 20, 2018) ("The Court of Appeals has stated that 'a statement of counsel in pleadings or stipulation or orally in court is generally regarded as a conclusive, judicial admission ....' *Belew v. Gilmer*, No. 01–A–019010–CV–00365, 1991 WL 45396, at *6 (Tenn. Ct. App. Apr. 5, 1991); *see also Garland v. Seaboard Coastline R.R. Co.*, 658 S.W.2d 528, 531 (Tenn. 1983).").

(Tenn. 2017) ("litigants must raise their objections in the trial court or forego the opportunity to argue them on appeal."); *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").

There is no justifiable basis for departing from this longstanding rule. There are, however, extraordinarily strong reasons not to do so. Specifically: Nullifying the lawfully-cast votes of all one hundred and thirty-four thousand, one hundred and thirty-five (134,135) voters who voted in favor of ratifying Amendment 1—a supermajority of the electorate—would introduce serious new constitutional and statutory infirmities into this litigation. Those infirmities include, but are not limited to, abridgements of the right to vote protected by: (1) the Equal Protection Clause of the Fourteenth Amendment; (2) the Due Process Clause of the Fourteenth Amendment; (3) the Voting Rights Act of 1965; and (4) article IV, section 1 of the Tennessee Constitution. Given that the Appellants did not raise any claim that the November 6, 2018 election could be voided in the Trial Court, however—and

given that the Appellants previously disclaimed in this Court their current position that the November 6, 2018 election results can be voided—none of these issues has ever been briefed in any regard. The Appellants' materially modified claim for relief on appeal should be rejected as waived as a result.

## D. THE TRIAL COURT DID NOT ERR IN RULING THAT THE APPELLANTS' CLAIM FAILS ON ITS MERITS.

### 1. The August 4, 2016 Election is the preceding general election pursuant to Metro Charter § 19.01.

The Trial Court ruled that "the Preceding General Election, as contemplated by Section 19.01 of the [Metro] Charter, was the August 2016 election."[12] The Trial Court's ruling was correct, and the Appellants' contrary claims are without merit.

Metro Charter § 19.01 states:

> An amendment or amendments may be proposed . . . (2) upon petition filed with the metropolitan clerk, signed by ten (10) per cent of the number of 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.[13]

Based on this provision, the Trial Court held that:

> [V]oters elected representatives to the City Council District 1, Assessor of Property, School Board Districts 1, 3, 5, 7, and 9. **The election for**

[12] R. at 411.

[13] R. at 403 (emphasis added).

> **Assessor of Property is a municipal general election pursuant to the Charter.** Therefore, the Preceding General Election, as contemplated by Section 19.01 of the Charter, was the August 2016 Election.[14]

Because Community Oversight Now filed its petition on August 1, 2018,[15] the three (3) preceding elections at issue in this case are:

(1) The May 24, 2018 special election for office of Metropolitan Mayor and a District Council Member;[16]

(2) The November 8, 2016 federal general election for the office of president, vice president and members of congress, and a state general election for members of the Tennessee legislature, and non-Metro municipal elections for the Davidson County satellite cities of Belle Meade, Forest Hills, and Goodlettsville;[17] and

(3) The August 4, 2016 federal primary election for members of congress, state primary for members of the Tennessee legislature, and **municipal general elections for Metropolitan officers of school board, district council member, and Assessor of Property**.[18]

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[14] R. at 411 (emphasis added).

[15] R. at 42.

[16] *See* Appellant's Brief, p. 7.

[17] *Id.*

[18] *Id.* (emphasis added).

The Assessor of Property is an officer of the Metropolitan Government.[19] Until this appeal, the Appellants also have never before claimed that Assessor of Property should be considered a state office—thereby waiving the issue. *Dick Broad. Co. of Tennessee*, 395 S.W.3d at 670 ("This issue was neither raised nor argued in the trial court; the argument was made for the first time on appeal. Issues raised for the first time on appeal are waived."). That waiver accounts for Appellants' attempt to add an "addendum" into the record on the matter. *See* Appellants' Brief, p. 29.

Regardless, the authority cited in Appellants' "addendum" to the appellate record conclusively proves the opposite of what the Appellants claim. Specifically, Metro Charter § 8.113 indicates that "there shall be, as an independent agency of **the metropolitan government**, a division of tax assessment, the head of which is designated as the **metropolitan tax assessor**."[20] In other words: Assessor of Property is a Metro office—not a state or federal office—and for the reasons that follow, the August 2016 election qualifies as the "preceding general election" under Metro Charter § 19.01 as a consequence.

[19] *See* Addendum to Appellant's Brief, p. 29.

[20] *Id.* (emphasis added).

2. Tennessee Supreme Court rulings eliminate special elections, federal elections, and state elections from consideration under Metro Charter § 19.01.

The most recent election that Appellants propose to be considered was the May 24, 2018 special election for the office of Metro Mayor of Nashville and a district council member. However, because it was a "special election," this election is not and cannot be the "preceding general election" for purposes of Metro Charter § 19.01.

Pursuant to Tenn. Code Ann. § 2-14-102, special elections are distinct from general elections. Specifically, Tenn. Code Ann. § 2-14-102 establishes that special elections are held "when a vacancy in any office is required to be filled by election **at other times than those fixed for general elections**." *Id.* (emphasis added). As the Trial Court noted in its Final Order, "the Tennessee Supreme Court [has] stated 'there is no such process for a 'special general' election. This is a contradiction in terms.'" R. at 408 (quoting *McPherson v. Everett*, 594 S.W.2d 677, 680 (Tenn. 1980)). Consequently, a special election can neither be a general election nor, it follows, a "preceding" general election for purposes of Metro Charter § 19.01. *Id.* Accordingly, the May 24, 2018 special election was not the "preceding general election" under Metro Charter § 19.01.

The next election proposed by Appellants for consideration was the November 8, 2016 federal general election for the office of president, vice president, and members of congress, which also included a state general election for members of the Tennessee legislature and non-Metro municipal elections for the Davidson County satellite cities of Belle Meade, Forest Hills, and Goodlettsville.[21]

The Tennessee Supreme Court has already had occasion to consider whether a federal general election was the operative election for purposes of 19.01 in *State ex rel. Wise v. Judd,* 655 S.W.2d 952 (Tenn. 1983). There, it expressly rejected that argument that the Appellants advance now.

Notably, the Appellants forthrightly concede in their briefing that "*Wise* held that the November 1982 election—clearly a general election—was not the Section 19.01 preceding general election."[22] Nonetheless, they argued—in the alternative—both in the Trial Court[23] and contend again on appeal[24] that the November 2016 federal general election does qualify as the applicable preceding general election for purposes of Metro Charter § 19.01.

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[21] The non-Metro elections for offices in the Davidson County satellite cities have no application in this case, as those elections did not involve Metro officers.

[22] *See* Appellant's Brief, p. 14.

[23] *See* R. at 9-10.

[24] *See* Appellant's Brief, pp. 25-26.

This tortured argument—and its acknowledged conflict with *Wise*–is meritless.

The next election at issue is the proper one: The August 4, 2016 federal primary election for members of congress, state primary for members of the Tennessee legislature, and—critically—the **municipal general elections for Metropolitan officers of school board, district council member, and Assessor of Property** ("August 2016 Election").[25] Thus, as far as the merits of this action are concerned, the question presented is whether the August 2016 Election qualifies at the "preceding general election" for purposes of Metro Charter § 19.01.

The Trial Court correctly noted in its Final Order that the Tennessee Supreme Court already answered this question in *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47 (Tenn. 2018), when it indicated "that the phrase general election used in the [Metro] Charter encompasses more than the every 4 year general metropolitan election."[26] As the Trial Court observed, in *Wallace*, our Supreme Court specifically determined:

> That the intent of the drafters of the Charter was to draw a distinction between "general metropolitan elections" and all other "general elections" is evidenced by the use of these distinct phrases within section 15.03 to address different events. We do not read the use of the distinct phrases "general metropolitan

[25] *See* Appellant's Brief, p. 7.

[26] R. at 410 (summarizing *Wallace*, 546 S.W.3d at 56).

> election" and "general election" to be merely accidental. Rather, we view the two phrases to have been intentionally and thoughtfully employed to refer to different elections. The former phrase refers to the particular general election at which the Mayor, Vice Mayor, Councilmen-at-Large, and District Councilmen are elected in August of each fourth odd-numbered year, beginning in 1971, as called for in section 15.01 of the Charter. In contrast, the latter phrase refers more broadly to any municipal general election, including but not limited to general metropolitan elections. In other words, HN7 "general metropolitan elections" are one unique type of the broader category of municipal "general elections." All municipal "general elections," however, are not "general metropolitan elections."
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> * * * *
>
> Our holding in *Wise* was that the phrase "preceding general election used in section 19.01 of the Charter refers to *municipal* general elections, not to *state or federal* general elections.[27]

Because the Assessor of Property is a Metro—in other words, a *municipal*—officer of the Metropolitan Government and was elected at the August 2016 Election, the August 2016 Election is the relevant "preceding general election" under Metro Charter § 19.01. Neither the Election Commission nor the Trial Court erred in holding as much. Thus, even if this case were not moot; and even if this Court had subject matter jurisdiction to reach the merits of this action; and even if the election could lawfully be invalidated; the Trial Court's judgment should nevertheless be **AFFIRMED**.

[27] R. at 410-11 (quoting *Wallace*, 546 S.W.3d at 55-58).

## VI. Conclusion

For the foregoing reasons, the instant appeal should be **DISMISSED** as moot and for lack of standing, and the judgment of the Trial Court should be **AFFIRMED**.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2018, a copy of the foregoing was mailed, postage prepaid, transmitted by e-mail, and/or served via the Court's e-filing system to the following:

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