

**IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE**

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

Petitioners / Appellants,)

v.)

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

Respondents / Appellees, and)

COMMUNITY OVERSIGHT NOW,)

**Intervening Respondent /)
Appellee.)**

**Appellate Case No:
M2018-01717-COA-R3-CV**

**On appeal from the Circuit Court for
Davidson County, Hon. Kelvin D. Jones,
III, case no. 18C2158**

BRIEF OF APPELLANTS

Austin L. McMullen (BPR No. 20877)
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, Tennessee 32703
(615) 252-2307 (phone)
(615) 252-6307 (fax)
AMcMullen@Bradley.com

and

David L. Raybin (BPR No. 3385)
RAYBIN & WEISSMAN, P.C.
424 Church Street, Suite 2120
Nashville, Tennessee 37219
Phone: 615-256-6666
Fax: 615-254-4254
DRaybin@NashvilleTnLaw.com

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ISSUES PRESENTED

This appeal concerns the proper interpretation of “preceding general election” in Section 19.01 of the Metro Nashville Charter, dealing with the number of voters who must sign a referendum petition in order to hold a referendum to amend the Charter. Under existing Supreme Court precedent, the preceding general election is the most recent municipal election. Accordingly, the issues presented are:

1. Was the uncontested election of the Davidson County Assessor in August 2016 a municipal election?

2. When was the “preceding general election” for purposes of determining how many signatures the Referendum Petition is required to contain under Metro Charter Section 19.01?

3. Whether the Referendum Petition satisfies the signature requirements of Section 19.01 of the Metro Charter?

4. Whether a proposed amendment to the Metro Charter can become law in a way that does not comply with the Metro Charter?

STATEMENT OF THE CASE

This appeal seeks a determination that the Referendum Petition is invalid because it does not contain a sufficient number of voter signatures to meet the requirement of Section 19.01 of the Metro Nashville Charter.

A. August 1: The Referendum Petition is filed.

On August 1, 2018, a Referendum Petition (“Referendum Petition”) was filed with the Metropolitan Clerk (“Metro Clerk”) of the Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”) requesting that a referendum be held on an amendment to the Metro Charter. (*See* Admin. R.¹ at 43.) Filed along with the Referendum Petition was a statement that the Referendum Petition contained an estimated 8,269 signatures. (*See id.* at 1.)

The Referendum Petition requests that the amendment be submitted to voters for ratification as part of the November 6, 2018, election. (*See id.*) The substance of the proposed amendment is addressed in the Statement of Facts. (*See infra* at 8-9.)

B. August 20: The administrative process is completed to place the referendum on the November 6 ballot.

On August 2, 2018, the Metro Clerk transmitted the Referendum Petition to the Davidson County Election Commission (“Election Commission”). (*See* R.² at Vol 1, p. 42; Admin. R. at 2.) Election Commission staff then began to analyze the signatures for verification. (*See* Admin. R. at 5.) At the Election Commission meeting on August 15, the staff announced that it had reviewed 6,491 signatures, it had verified 4,801 signatures and it had rejected 1,690 signatures. (*See id.*) Staff also announced that approximately 1,200 signatures had not been analyzed. (*See id.* at 6.) The Election Commission passed a motion to place the referendum on the ballot for the November 6, 2018, election. As part of this motion, the Election Commission found that the

¹ “Admin. R.” refers to the Administrative Record, consisting of 44 pages.

² “R.” refers to the Technical Record, consisting of 6 volumes.

number of verified signatures met the requirements of Metro Charter Section 19.01 based on their incorrect assumption that the Section 19.01 “preceding general election” was held in August 2016. (*See R. at Vol. 1, p. 43; Admin. R. at 28-30.*)

Prior to the August 15 meeting, counsel for the Appellants sent a letter to the Election Commission outlining objections to placing the proposed amendment on the ballot. (*See R. at Vol. 1, p. 43; Admin. R. at 33-41.*) Appellants explained that the “preceding general election” referred to in Section 19.01 is the August 2015 “general metropolitan election” that is described in Metro Charter Section 15.01. (*See Admin. R. at 35-36.*) Appellants further explained that, alternatively, the elections that occurred in May 2018 or November 2016 are general elections that precede the August 2016 election. (*See Admin. R. at 34-36.*) Counsel for the Appellants also spoke at the August 15 meeting in opposition to placing the proposed amendment on the ballot. (*See R. at Vol 1., p. 13-18.*)

On August 16, the Election Commission certified the verified signatures to the Metro Clerk. (*See R. at Vol. 1, p. 44; Admin. R. at 42.*) On August 20, the Metro Clerk certified to the Election Commission a copy of the Referendum Petition. (*See R. at Vol. 1, p. 44; Admin. R. at 44.*) The Metro Clerk’s certification on August 20 completed the administrative process under Metro Charter Section 19.01. (*See R. at Vol. 1, p. 50 (“it shall thereupon be the duty of said commissioners of election to hold a referendum election with respect thereto”).*)

C. August 21: Appellants initiate judicial review to challenge the validity of the referendum.

The following day, August 21, 2018, the Appellants filed a Verified Petition in the Circuit Court for Davidson County (the “Circuit Court”) to initiate judicial review based on the Referendum Petition not containing enough verified signatures. (*R. at Vol. 1, p. 1.*) Appellants moved for expedited hearing in the Circuit Court. (*R. at Vol. 1, p. 24.*) Community Oversight

Now (the “Intervenor”) was permitted to intervene by Agreed Order entered August 27. (R. at Vol. 1, p. 37.) On August 30, the Circuit Court held a status conference and set an expedited schedule. (R. at Vol. 1, p. 53.) On September 4, the administrative record from the Election Commission was filed with the Circuit Court. (R. at Vol. 1, p. 40.) After the parties filed briefs, the Circuit Court held a final hearing on all claims, defenses and motions on September 14. (R. at Vol. 1, p. 54; R. at Vol. 5.)

D. September 19: The Circuit Court enters its Final Order.

On September 19, the Circuit Court entered a Final Order affirming the decision of the Election Commission. (R. at Vol. 4, p. 391.) In its Final Order, the Circuit Court agreed that the August 2015 general metropolitan election was a preceding general election under Metro Charter Section 19.01. (R. at Vol. 4, p. 407.) However, the Circuit Court found that the May 2018 and November 2016 elections were not preceding general elections under Section 19.01. (*See* R. at Vol 4, p. 407-10.) Finally, the Circuit Court held that the election of the Assessor in August of 2016 was a preceding general election because it was a municipal election. (*See* R. at Vol. 4, p. 411.) Since 47,074 people voted in the August 2016 election, and the Referendum Petition was signed by more than 4,800 voters, the Circuit Court held that the Referendum Petition was valid and affirmed the decision of the Election Commission. (*See* R. at Vol. 4, p. 411-12.)

The Circuit Court’s Final Order is the subject of this appeal. (R. at Vol. 4, p. 414.) On September 20, the Intervenor filed with the Circuit Court a Motion to Alter or Amend, which the Circuit Court denied on September 21. (R. at Vol. 4, p. 423; R. at Vol. 4, p. 439.)

E. September 20: Appellants seek expedited appellate review.

On September 20, 2018, the Appellants filed their notice of appeal. (R. at Vol. 4, p. 414.) Simultaneously with their notice of appeal, Appellants filed with this Court a motion to expedite this appeal and in the Supreme Court a reach-down motion. Both motions requested that the

appeal be resolved before the November 6 election. In response to both motions, Metro and the Election Commission took the position that expedited review was unnecessary because the appeal could be resolved after the November 6 election.³ In both responses, Metro and the Election Commission also argued that if voters approved the amendment on November 6 but the Court later determined that the Referendum Petition did not garner sufficient signatures, the Court could treat the referendum results as a nullity.⁴

This Court granted an expedited schedule that set the appeal for decision after the November 6 election, and the Supreme Court denied the reach-down motion. This Court's Order setting the appeal for decision post-election included consideration that an adequate remedy would be available after the election. The Intervenor then filed a motion to dismiss this appeal as moot, which this Court denied. The Intervenor then filed a motion requesting that the Supreme Court vacate the portion of this Court's Order addressing whether the appeal would be moot after the November 6 election. The Supreme Court denied the Intervenor's motion.

³ (See Metro's Sept. 21, 2018, Response to Court of Appeals Motion to Expedite at 1; Metro's Sept. 26, 2018, Response to Supreme Court Reach-Down Motion at 1.)

⁴ (See Metro's Sept. 21, 2018, Response to Court of Appeals Motion to Expedite at 2; Metro's Sept. 26, 2018, Response to Supreme Court Reach-Down Motion at 2.)

STATEMENT OF FACTS

- A. The Tennessee Constitution allocates to the General Assembly the power to establish referendum procedures, and the Metro Charter establishes a Charter amendment procedure based on holding a valid referendum.**

The Tennessee Constitution authorizes the General Assembly to establish referendum procedures. *See* Tenn. Const. Art. VII, § 1. The General Assembly has provided that the charter of a metropolitan government shall set the method and procedure for amending the charter. *See* Tenn. Code Ann. § 7-2-108(a)(20). The Metro Charter includes this provision in Section 19.01, which governs amendments to the Charter and includes the following relevant referendum requirements:

This Charter may be amended subsequent to its adoption in the following manner:

An amendment or amendments may be proposed . . . upon petition filed with the metropolitan clerk, signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk. Such . . . petition shall also prescribe a date not less than eighty (80) [days] subsequent to the date of its filing for the holding of a referendum election at which the electorate of the metropolitan government will vote to ratify or to reject the amendments proposed.

The metropolitan clerk shall immediately certify to the county commissioners of election copy of such resolution or petition and it shall thereupon be the duty of said commissioners of election to hold a referendum election with respect thereto. 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, said description to be set forth in the original amendatory resolution, that the language of each amendment in full be posted conspicuously in the voting place and be published in a local newspaper, numbered as the same is numbered in the resolution of the council or in the petition, and to provide the voters a choice to vote "For Ratification" and "Against Ratification" of each proposed amendment. Each proposed amendment shall be ratified when a majority of the votes cast at the special referendum election shall be in favor of ratification and each proposed amendment shall

be rejected when a majority of said votes shall be against ratification. Notice of said referendum election shall be given as provided by Tennessee Code Annotated, section [2-12-111], and the costs of said election shall be paid out of the general funds of the metropolitan government.

...

(See R. at Vol. 1, p. 50.)

B. Based on the number of votes cast in previous elections the Referendum Petition can be valid only if the “preceding general election” is the August 2016 election.

Based on the requirement in Metro Charter Section 19.01 that a referendum petition be signed by 10% of the number of voters voting in the “preceding general election,” the Referendum Petition can only be valid if less than 48,000 votes were cast in the “preceding general election.” Which election had a voter turnout that low? Only the August 2016 uncontested election of Assessor, as shown below:

Date of Election	Offices on Ballot	Number of Votes Cast
May 24, 2018	Mayor and one District Councilman	82,368
Nov. 8, 2016	President and Vice-President, Congress, Tennessee Senate and House of Representatives, and City Commissioners for Belle Meade, Forest Hills and Goodlettsville	252,926
Aug. 4, 2016	Primary election for U.S. Congress, primary elections for Tennessee Senate and House of Representatives, Republican and Democratic Party Executive Committee positions, five Davidson County School Board positions, a District Councilman, appellate court retention elections and Assessor	47,074
Aug. 6, 2015	Mayor, Vice Mayor, five Councilmen-At-Large and 35 District Councilmen	104,757

(See R. at Vol. 1, p. 6; Admin. R. at Vol. 1, p. 43.) As these figures show, the Referendum Petition contains insufficient signatures if the “preceding general election” under Section 19.01 is any election other than the Assessor’s uncontested election on August 4, 2016. This explains why the Appellees’ argument exclusively targets the Assessor’s election.

C. The Referendum Petition proposes an amendment to the Metro Charter that would create a police review board.

The amendment proposes to establish The Metropolitan Government of Nashville and Davidson County Community Oversight Board (“Board”). (*See* Admin. R. at 43.)

The amendment empowers the Board to investigate allegations that officers of Metro Nashville Police Department (“MNPD”) have committed misconduct. (*See id.* at § 11.1302(1).) The amendment gives the Board the power to compel attendance of witnesses and production of documents. (*See id.* at § 11.1302(4).) Under the amendment the Board may issue policy advisory and resolution reports assessing allegations of MNPD misconduct, make recommendations to public safety and justice governmental agencies and establish a monitoring program for ongoing review or audit of the complaint process administered by the MNPD Office of Professional Accountability or equivalent internal affairs program in MNPD. (*See id.* at § 11.1302(1).) The amendment also empowers the Board, where it finds a basis to believe that an officer has committed misconduct in violation of MNPD policy, to refer the matter to the MNPD Office of Professional Accountability with a recommendation for discipline within the parameters of civil service rules and regulations. (*See id.* at § 11.1302(2).) In this situation, the amendment would require the MNPD to respond in writing to the Board’s disciplinary recommendations. (*See id.* at § 11.1302(2).) The amendment provides that the Board may forward to the District Attorney, the Grand Jury or the United States Attorney reports that produce factual findings of criminal misconduct and civil rights violations. (*See id.* at § 11.1302(3).)

The amendment requires the Board to submit an annual budget of at least \$1,500,000.00. (*See id.* at § 11.1302(5).) The amendment requires the following staff and personnel of the Board: an Executive Director, an Assistant Executive Director, a minimum of three investigators,

a minimum of two research analysts, a minimum of one community engagement liaison and a legal resource advisor. (*See id.* at § 11.1303.) These positions are in addition to the Board members.

The amendment states that the Board shall consist of 11 Board members who are residents of Davidson County and shall serve terms of three years each. (*See id.* at § 11.1301.) The Board members must have a demonstrated knowledge of issues pertaining to civil rights and equity and must have experience with criminal justice and policing practices. (*See id.*) However, the amendment specifically prohibits several knowledgeable and experienced classes of people from serving on or working for the Board: employees of any law enforcement agency; anyone who has served in a law enforcement capacity in the past five years; any elected official; and the spouse of any of the foregoing persons. (*See id.*) The amendment provides that seven Board members shall be persons who are nominated by community organizations or private petition signed by 50 Davidson County residents and approved by a majority vote of the Metro Council. (*See id.*) Four of these seven must reside in economically distressed communities, although the amendment does not define that term. (*See id.*) Two members of the Board shall be persons nominated and approved by a majority vote of the Metro Council. (*See id.*) The remaining two members shall be persons nominated by the Mayor and approved by a majority vote of the Metro Council. (*See id.*)

The Referendum Petition further requests that the amendment be submitted to voters for ratification as part of the November 6, 2018, election. (*See id.* at final paragraph.)

D. The Appellants are distinctly and palpably injured by the referendum appearing on the November 6 ballot and will be distinctly and palpably injured by the amendment if it becomes law.

Appellant Fraternal Order of Police (Andrew Jackson Lodge No. 5) (“FOP”) is a Tennessee public benefit corporation that has existed since at least 1954. (*See R.* at Vol. 1, p. 1.)

The FOP counts as members 1,212 sworn officers of the MNP. (*See id.*) Of those members, 698 live in Davidson County. (*See id.*) Metro, via a memorandum of understanding, has recognized the FOP as the authorized representative of the sworn members of the MNP. (*See id.* at Vol. 1, p. 1-2.) The FOP is leading a campaign requiring the expenditure of time and money to inform voters regarding the amendment and to urge voters to reject the amendment. (*See id.* at Vol. 1, p. 2.)

Appellants Matthew Dean Boguskie, Noble Taylor and Harold Milton Burke, III are active duty, sworn officers of MNP. (*See id.*) They are Metro residents, citizens, registered voters and taxpayers. (*See id.*) Appellants Robert Alan Young and James Anthony Gafford are retired officers of the MNP. (*See id.*) They are also Metro residents, citizens, registered voters and taxpayers. (*See id.*)

If the amendment becomes law it will injure Appellants Boguskie, Taylor and Burke as well as the other 1,212 active, sworn MNP officers who are members of the FOP. (*See id.* at Vol. 1, p. 6-7.) These injuries, include, without limitation: changing the daily protocol under which they work as sworn MNP officers and introducing uncertainty into their duties through Board subpoenas, investigations, monitoring programs, reviews, audits, policy advisories, resolution reports, referrals and recommendations; negatively affecting their operations and efficiency through changes in disciplinary procedures resulting from Board investigations, referrals and recommendations; prohibiting them from serving on the Board or on the staff of the Board, particularly when the Board will have such a significant impact on their job functions; and significantly reducing funds available for the work of MNP officers through the Board's required annual budget request of no less than \$1,500,000.00 beginning and after fiscal year 2019-2020 and the increased cost to the MNP resulting from Board activities. (*See id.*)

If the amendment becomes law, the Board will have the power to issue subpoenas to compel testimony and conduct hearings, but the amendment provides for no Due Process protections for sworn MNPDP officers who may be terminated only for just cause. (*See id.* at Vol. 1, p. 7.) Sworn MNPDP officers possess a property interest in their continued employment which may not be deprived without Due Process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985). (*See id.*) The amendment provides no protection from the compelled testimony of officers in violation of *Garrity v. New Jersey*, 385 U.S. 493, 496-97 (1967) (choice given to police officers between forfeiting their jobs or incriminating themselves violated the Fourteenth Amendment to the United States Constitution). (*See id.*) Moreover, recommendations for sanctions against officers emanating from the Board will affect officers' off-duty employment and impact the reputation of officers after they leave MNPDP employment. (*See id.*)

If the amendment becomes law it will also injure Appellants Young and Gafford and the other retired officers who are members of the FOP because the amendment prohibits retired MNPDP officers from serving on the Board or on the staff of the Board for a period of five years after their service as law enforcement officers ended. (*See id.* at Vol. 1, p. 7-8.)

SUMMARY OF THE ARGUMENT

This case is about whether the Referendum Petition seeking to amend the Metro Charter contained enough signatures to be on the November 6, 2018, ballot. Section 19.01 of the Charter states that a referendum petition must be signed by 10% of the number of people who voted in the “preceding general election.” The Tennessee Supreme Court recently explained that the phrase “preceding general election” in Section 19.01 “refers to *municipal* general elections not to *state or federal* general elections.”

This appeal, thus, presents the straight-forward issue of which election is the “preceding general election.” Based on Supreme Court authority, this question is answered by identifying the most recent municipal general election.

The Circuit Court erred in holding that the Assessor’s uncontested election in August 2016 was a municipal election that would qualify as the Section 19.01 “preceding general election.” The Assessor’s election is a state election, not a municipal election and, as such, cannot be the Section 19.01 “preceding general election.” Tennessee law expressly defines “state election” to include the election of county officers and sets the election of these county officers, including the Assessor, to occur at the “regular August election,” which is the state election “held on the first Thursday in August of every even-numbered year.” Consistent with state law, the Metro Charter preserves the office of Assessor and defers to state law for the Assessor’s election. There is no provision in the Metro Charter for a municipal election to elect the Assessor. Finally, state law requires that municipal elections “shall be non-partisan.” The Assessor’s election is a partisan election. It therefore cannot be a municipal election.

Because of the Circuit Court’s error, an election with an extremely low turnout (the lowest by far in recent years as shown on the chart on page 7, *supra*), and involving only one county-wide office (it uncontested) has been used to calculate the number of signatures needed

on the Referendum Petition. This illegal and nonsensical result must be reversed. Consistent with Supreme Court authority, the context of the Metro Charter, the structure of the Metro government and the legislative history of Section 19.01, the most recent municipal general election prior to the filing of the Referendum Petition was the nonpartisan election of the Mayor, Vice Mayor and 40 Metro Councilmen on August 6, 2015. The number of voters in that August 2015 general metropolitan election – more than twice the number who voted in the Assessor’s August 2016 election – determines how many signatures were needed to place the referendum on the ballot.

ARGUMENT

I. THE UNCONTESTED ELECTION OF THE ASSESSOR IN AUGUST 2016 IS NOT A MUNICIPAL ELECTION; IT CANNOT SERVE AS THE BASIS FOR DETERMINING THE NUMBER OF SIGNATURES REQUIRED UNDER SECTION 19.01 FOR THE REFERENDUM PETITION TO BE VALID.

The argument adopted by the Circuit Court and advocated by the Appellees is that the uncontested election of Assessor in August 2016 is the Section 19.01 preceding general election on the theory that it is the most recent municipal election. This conclusion is wrong because the Assessor’s election in August 2016 was a state election, not a municipal election.

Two Supreme Court cases, *Wise*⁵ and *Wallace*,⁶ have interpreted Section 19.01. Both of them have stated that the Section 19.01 preceding general election refers to the preceding municipal general election. *Wallace* expressly stated that Section 19.01 did not refer to a state election. However, the election of Assessor is not a municipal election; it is a state election. As a result, the Assessor’s election cannot be the Section 19.01 preceding general election under existing caselaw.

⁵ *State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983).

⁶ *Wallace v. Metropolitan Government*, 546 S.W.3d 47 (Tenn. 2018).

A. **The *Wise* decision limited the meaning of “preceding general election” in Section 19.01 to municipal general elections.**

Although the phrase “preceding general election” in Metro Charter Section 19.01 does not include any express qualifiers other than “preceding” and “general,” the Supreme Court in *Wise* held that a certain previous general election cannot be the “preceding general election” referred to in Section 19.01. Specifically, *Wise* held that the November 1982 election – clearly a general election – was not the Section 19.01 preceding general election. 655 S.W.2d at 953.

There has been only one case in which Metro Charter Section 19.01 was dispositive: *Wise*. In *Wise*, two petitions were filed in 1983 seeking to amend the Metro Charter by referendum. *See id.* at 952-53. A challenge arose regarding the petitions’ legal sufficiency, i.e. whether they contained enough signatures. *See id.* at 953. The Court considered three previous elections: (1) the November 1982 “regular November election,” (2) the August 1982 “regular August election,” and (3) the August 1979 “general metropolitan election.” *See id.* If the November 1982 regular November election was the Section 19.01 preceding general election, the *Wise* petitions clearly had insufficient signatures. *See id.* at 953. On the other hand, if **either** the August 1982 regular August election **or** the August 1979 general metropolitan election qualified as the Section 19.01 preceding general election, the *Wise* petitions appeared to have sufficient signatures. *See id.* at 953, n. 1. This highlights a critical difference between *Wise* and the instant case. In *Wise*, both petitions had enough signatures so that it was unnecessary for the Court to determine whether the August 1982 regular August election, the August 1979 general metropolitan election or both qualified as the Section 19.01 preceding general election. In the instant case, the Referendum Petition only has enough signatures if the Court concludes that the August 2016 regular August election qualifies as the Section 19.01 preceding general election.

In *Wise*, the Chancellor had held that the number of signatures on the petitions was sufficient, and Metro appealed. *See id.* On appeal, the Tennessee Supreme Court affirmed:

The Metropolitan charter, § 19.01, requires that a petition for a referendum on a proposed amendment be signed by “ten (10) percent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election.”

The issue is whether this reference is to a preceding Metropolitan general election (regularly held in August) or the previous state general election, which occurred in November, 1982. If the August 1982 or August 1979 Metropolitan elections are meant, facially the petitions contain a sufficient number of signatures. If the reference is to the state general election held in November 1982 (to which no Metropolitan offices were subject), the number is insufficient.

The Chancellor held that since the subject involved is the amendment of the Metropolitan charter, the intent of the Charter Commissioners was to refer to the number of votes cast in a Metropolitan election rather than to the number in a state or national election. We agree. 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. The judgment of the Chancellor with respect to that question is affirmed.

Id. at 953 (internal footnote omitted). The remainder of the Supreme Court’s opinion addressed the proper method for verifying signatures on the petitions, an issue not presented in this case. *See id.* at 953-55.

Given the facts of the *Wise* case, including the number of signatures on the petitions and the number of votes cast in the August 1982 and August 1979 elections, the parties in *Wise* did not dispute “that both the August 1979 ‘general metropolitan election’ and the August 1982 ‘general election’ were municipal general elections which would qualify for purposes of section 19.01.” *Wallace*, 546 S.W.3d at 57-58. “The question” in *Wise* “was whether the November 1982 state general election also would qualify.” *Wallace*, 546 S.W.3d at 57-58. The *Wise* Court held that the November 1982 regular November election did not qualify. 655 S.W.2d at 953.

Wise's key holding, that the November 1982 election is not the Section 19.01 preceding general election, resulted from a decision about the type of election that would qualify under Section 19.01. The *Wise* Court concluded with this statement: "We think that the reference in § 19.01 under consideration here clearly is to municipal elections." *Id.*

B. The *Wallace* decision confirmed that the *Wise* Court limited the meaning of "preceding general election" in Section 19.01 to municipal general elections.

Thirty-five years after *Wise*, a case arose in which the Supreme Court analyzed Section 19.01, although Section 19.01 was not dispositive of the case. That case was *Wallace*. *Wallace* was about when a vacancy in the office of Mayor required a Section 15.03 special Metropolitan election. 546 S.W.3d at 49.

Metro argued that the Section 15.03 issue raised in *Wallace* had been decided in *Wise*, but the *Wallace* Court disagreed and distinguished *Wise*:

The meaning of the phrase "general metropolitan election" as used in section 15.03 of the Charter and whether that phrase and the phrase "general election" as used in the Charter have the same meaning were not before the Court in *Wise*. In *Wise*, the parties did not raise or address, nor did the Court analyze, the issue which is now before us. Rather, the issue in *Wise* was whether the phrase "preceding general election" as used in section 19.01 of the Charter is limited to a municipal general election or includes a state or federal general election. There was in *Wise* no dispute that both the August 1979 "general metropolitan election" and the August 1982 "general election" were municipal general elections which would qualify for purposes of section 19.01. The question was whether the November 1982 state general election also would qualify. Our holding in *Wise* was that the phrase "preceding general election" as used in section 19.01 of the Charter refers to *municipal* general elections, not to *state or federal* general elections. We did not hold, nor did we intend to hold, that the phrases "general metropolitan election" and "general election" are synonymous for purposes of section 15.03 of the Charter.

Id. at 57-58 (internal citations and footnote omitted) (emphasis in original). The *Wallace* Court, thus, confirmed that *Wise* stands for the proposition that only a municipal election, not a state or federal election, will qualify as the Section 19.01 preceding general election.

C. **The Assessor’s election in August 2016 was a state election, not a municipal election.**

The election of the Assessor in August 2016 was a state election, not a municipal election. First, an election to choose a county officer is a state election. Since the Assessor is a county officer, the election is a state election. Second, the election of the Assessor is provided for in state law – the Tennessee Constitution and Tennessee Code – not the Metro Charter, so the election is a state election. Third, the election of Assessor is not a municipal election because the Assessor is elected on a partisan basis and, pursuant to state law, municipal elections are non-partisan.

1. **The Assessor is a county officer, so the Assessor’s election is a state election.**

A “State election” is an election to choose “state, county or district officers,” or to nominate a political party’s candidates for “state, county or district offices.” *See* Tenn. Code Ann. § 2-1-104(a)(28). The Assessor is a county officer, so the Assessor’s election is a county election. The office of Assessor is created by the Tennessee Constitution and statutes. *See* Tenn. Const. Art. VII, § 1. The State Constitution and statutes define the duties, term and election of the Assessor. *See* Tenn. Const. Art. VII, § 1; Tenn. Code Ann. § 67-1-501 *et seq.* Each county elects an Assessor for a term of four years, and the Assessor is a county officer. *See* Tenn. Const. Art. VII, § 1; Tenn. Code Ann. § 2-5-101(f)(5) (stating that offices described in Article VII, Section 1 of the Tennessee Constitution are each a “constitutional county office”); Tenn. Code Ann. § 67-1-502.

Metro was the first unified government of its kind, both in Tennessee and the nation. (See R. at Vol. 2, p. 204; R. at Vol. 2, p. 253.) The creation of a unified city-county government had been made possible when the Tennessee Constitution was amended in 1953 to permit the consolidation of city and county governments. See *Frazer v. Carr*, 360 S.W.2d 449, 451 (Tenn. 1962). (See also R. at Vol. 2, p. 204 (quoting Tenn. Const. Art. XI, § 9, last unnumbered paragraph).)

State law permits the Metro Charter to transfer certain functions and duties of county officers provided for in the Constitution, but the Metro Charter did not abolish these county offices. See Tenn. Code Ann. § 7-2-108(a)(16); *Metropolitan Government v. Poe*, 383 S.W.2d 265, 268 (Tenn. 1964); *Glasgow v. Fox*, 383 S.W.2d 9, 12 (Tenn. 1964). (See also R. at Vol. 3, p. 292-93.) Indeed, the Metro Charter specifically preserves the constitutional and statutory office of Assessor, stating that “[t]he county tax assessor, elected for a term of four (4) years and provided for by general law in Tennessee Code Annotated, sections 67-1-502 to 67-1-505, inclusive, shall be the metropolitan tax assessor.” (Metro Charter § 8.113 (copy included in Addendum).) The Metro Charter defers to state law and incorporates numerous other state law provisions regarding who is eligible to serve as Assessor, how to fill vacancies in the office and how the Assessor is to go about the job of Assessor. See Tenn. Code Ann. § 67-1-502 – § 67-1-505. As a result, the Assessor remains a county officer, and the election of the Assessor is, thus, a state election. See Tenn. Code Ann. § 2-1-104(a)(28).

2. The Assessor is elected pursuant to the provisions of State law, not the Metro Charter, so his election is a State election.

Not only is the Assessor a county officer, he is elected pursuant to state law, not the provisions of the Metro Charter. The Metro Charter cannot change the election procedures for the Assessor and does not purport to do so. Pursuant to the Constitution, the election of county

officers occurred on the first Thursday in August, beginning in 1870 and continues “forever thereafter” on the first Thursday in August next preceding the expiration of the term of office, with the terms of office ending on September 1. Tenn. Const. Art. VII, § 5. From this provision of the Constitution, the General Assembly has defined the “regular August election” to mean the state election “held on the first Thursday in August of every even-numbered year.” Tenn. Code Ann. § 2-1-104(a)(25). The General Assembly has further provided that the Assessor and other county officers shall be elected at the regular August election. *See* Tenn. Code Ann. § 2-3-202(1).

The Metro Charter establishes unique election procedures for the offices whose election Metro is allowed to control, but the Charter leaves unchanged the procedures for electing officers that are set by state law. In recognition of these binding state statutory and Constitutional provisions, the Metro Charter specifically defers to state law as to the election of the Assessor, providing that the Assessor shall be elected pursuant to the general law found in the Tennessee Code governing Assessors. (*See* Metro Charter § 8.113 (copy included in Addendum).) There is no provision in the Metro Charter for a municipal election to elect the Assessor.

While the Metro Charter does not provide procedures for the election of the Assessor, the Metro Charter includes election provisions for the municipal offices of Mayor, Vice Mayor and Councilman. These provisions confirm the conclusion that the election of the Assessor is a state election, not a municipal election. Specifically, the Metro Charter provides for two types of elections, general metropolitan elections found in Metro Charter Section 15.01 and special metropolitan elections found in Metro Charter Section 15.03. (*See* R. at Vol. 1, p. 45, 46.) By their very terms, the metropolitan elections apply only to the election of the municipal offices of Mayor, Vice Mayor and Councilman. (*See id.*) Assessor is not covered by these metropolitan

elections. In the absence of any provision in the Charter for the election of the Assessor, it is not possible to characterize the Assessor's election as a municipal election.

3. The Assessor is elected on a partisan basis, so the election cannot be a municipal election.

The Assessor's election is clearly not a municipal election because the position is elected on a partisan basis. "[M]unicipal elections shall be nonpartisan." Tenn. Code Ann. § 2-13-208(a). This means candidates may not run in municipal elections as nominees of political parties. *See id.* Only if a city charter requires partisan elections can a municipal election be partisan. *See id.* State law provides for the partisan election of the Assessor. *See* Tenn. Code Ann. § 2-13-203(d)(3); Tenn. Code Ann. § 2-3-202. (*See also* R. at Vol. 5, p. 30.) Moreover, the Metro Charter does not provide for the Assessor to be elected on a nonpartisan basis. The Assessor's election in August 2016, thus, is not a municipal election, and it cannot serve as the "preceding general election" under Metro Charter Section 19.01.

The *Wallace* Court stated that, according to *Wise*, "the phrase 'preceding general election' as used in section 19.01 of the Charter refers to *municipal* general elections, not to *state or federal* general elections." 546 S.W.3d at 58 (emphasis in original). The election of the Assessor is, by definition, a state election, not a municipal election. Accordingly, the election of the Assessor in August 2016 cannot be the Section 19.01 preceding general election for purposes of determining the number of signatures required for the Referendum Petition to be valid. The Court, thus, must answer the first issue – "Was the uncontested election of the Davidson County Assessor in August 2016 a municipal election?" – in the negative.

II. THE AUGUST 2015 GENERAL METROPOLITAN ELECTION QUALIFIES AS THE PRECEDING GENERAL ELECTION; THE REFERENDUM PETITION DOES NOT MEET THE SIGNATURE THRESHOLD.

Having answered the first issue negatively, the Court must turn to the second and third issues: “When was the ‘preceding general election’ for purposes of determining how many signatures the Referendum Petition is required to contain under Metro Charter Section 19.01?” and “Whether the Referendum Petition satisfies the signature requirements of Section 19.01 of the Metro Charter?” The answers to these issues are: the Section 15.01 general metropolitan election in August 2015 qualifies as the Section 19.01 preceding general election because it is a municipal election; and the Referendum Petition does not satisfy the signature requirements of Section 19.01 because it does not contain at least 10,476 signatures (i.e. 10% of the 104,757 votes cast in the August 2015 general metropolitan election).

There is no question that a Section 15.01 general metropolitan election qualifies as the “preceding general election” under Section 19.01. The *Wise* Court stated:

The Chancellor held that since the subject involved is the amendment of the Metropolitan charter, the intent of the Charter Commissioners was to refer to the number of votes cast in a Metropolitan election rather than to the number in a state or national election. We agree. 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.

Id.

In addition to the language of the *Wise* decision clearly stating that a Section 15.01 general metropolitan election qualifies as the Section 19.01 preceding general election, the general metropolitan election qualifies because it is a municipal election. The General Assembly has expressly provided that the election of the mayor and legislative body of a metropolitan form of government is a municipal election. *See* Tenn. Code Ann. § 2-13-208(b). Moreover, the

general Metropolitan election is nonpartisan, which is a requirement for an election to qualify as a municipal election. *See* Tenn. Code Ann. § 2-13-208(a). The Section 15.01 general metropolitan election is a municipal election and, thus, qualifies as the Section 19.01 preceding general election. Since the Referendum Petition did not include at least 10,476 signatures, the Referendum Petition is invalid.

Moreover, because Section 19.01 deals with amendment of the Metro Charter, it is logical that the Charter drafters intended to use the Section 15.01 general metropolitan election to establish the referendum petition signature threshold. *See Wise*, 655 S.W.2d at 953. The general metropolitan election, with the simultaneous election of 42 Metro officials across the county comprising Metro's executive and legislative authority in a unique, Metro-only election, sets the level of voter interest in the Metro government and in Metro issues. Critically important to the early leaders of Metro was the creation of a stand-alone, non-partisan election for Metro municipal officials. Prior to Metro's creation, Davidson County and the City of Nashville were separate governments, each with its own elected officials. *See Frazer*, 360 S.W.2d at 454. The Metro Charter did away with the previous elected officials of the City of Nashville and created in their place the positions of Mayor, Vice Mayor, five Councilmen-At-Large and 35 District Councilmen. (*See R. at Vol. 2, p. 256-62.*) Section 15.01 of the Metro Charter establishes that these 42 municipal officials shall be elected every four years at a unique, stand-alone, Metro-only election known as the "general metropolitan election."⁷ (*See R. at Vol. 1, p. 45.*) The offices of Mayor, Vice Mayor, five Councilmen-At-Large and 35 District Councilmen have been

⁷ The general metropolitan election is sometimes referred to as the metropolitan general election. *See, e.g.*, Metro Charter § 20.20 ("The metropolitan officers elected at the general metropolitan election to be held on the fourth Thursday of April, 1966, shall serve until the first day of September, 1971, or until their successors are elected and qualified. For the purpose of determining the eligibility for a pension of the mayor or mayors elected hereunder in the first and second metropolitan general elections, and for the purpose of section 5.06 of this Charter, the term of the first metropolitan mayor elected and the term of the second metropolitan mayor elected shall be deemed to be terms of four (4) years each." (emphasis added) (copy included in Addendum).)

non-partisan since the Metro Charter became effective in 1963. (*See R. at Vol. 2, p. 263.*) The Metro Charter includes additional, unique election provisions for Mayor, Vice Mayor and Councilmen, such as term-limits and run-off elections. (*See R. at Vol. 1, p. 45-46; R. at Vol. 2, p. 268-69.*) The context provided by the Metro Charter and the structure of the Metro government, thus, confirm the conclusion that since Section 19.01 deals with amendment of the Metro Charter, the Section 15.01 general metropolitan election establishes the threshold for referendum petition signatures. The legislative history also confirms that the Section 19.01 preceding general election was intended a metropolitan election, not a state election. A contemporaneous report stated:

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

(*See R. at Vol. 3, p. 297-98 (emphasis added).*) Councilman Hamilton's proposal was approved by voters and incorporated into the Section 19.01 we have today. (*See R. at Vol 3, p. 301-13.*)

The Circuit Court agreed that a Section 15.01 election qualifies under Section 19.01. (*See R. at Vol. 4, p. 407.*) However, as discussed above, the Circuit Court erred when it held that the August 2016 Assessor's election also qualified under Section 19.01 as the preceding general election. When this Court correctly excludes the August 2016 Assessor's election from the determination of the preceding general election, it is apparent that the Section 15.01 general metropolitan election in August 2015 is the preceding general election. The Referendum Petition does not contain enough valid signatures to meet the Section 19.01 threshold using the August 2015 general metropolitan election as the signature standard.

III. ALTERNATIVELY, THE MAY 2018 METROPOLITAN ELECTION QUALIFIES AS THE PRECEDING GENERAL ELECTION; THE REFERENDUM PETITION DOES NOT MEET THE SIGNATURE THRESHOLD.

Upon correctly concluding that the August 2015 Section 15.01 general metropolitan election qualifies as the Section 19.01 preceding general election and the Assessor's uncontested election in August 2016 does not, further analysis of other elections is unnecessary. But even if the Court were to conclude that the August 2016 uncontested election of the Assessor qualifies as a general election under Section 19.01, the Court nonetheless would have to find that the Referendum Petition is invalid because the most recent municipal election occurred on May 24, 2018 ("May 2018 Election"). In the May 2018 Election, in which 82,368 votes were cast, voters elected the Mayor and one District Councilman. (See R. at Vol. 1, p. 6; Admin. R. at Vol. 1, p. 43.) The Election Commission verified that only 4,801 signatures were on the Referendum Petition and that only approximately 1,200 signatures remained for review. (See Admin. R. at 5.) If the May 2018 Election was the Section 19.01 preceding general election, the Referendum Petition contains insufficient signatures.

The *Wise* Court stated that Section 19.01 referred to "municipal elections." 655 S.W.2d at 953. The *Wise* Court also stated that "the intent of the Charter Commissioners was to refer to the number of votes cast in a Metropolitan election rather than to the number in a state or national election." *Id.* The *Wallace* Court also stated "that the phrase 'preceding general election' as used in section 19.01 of the Charter refers to *municipal* general elections, not to *state or federal* general elections." 546 S.W.3d at 58 (emphasis in original).

Prior to the filing of the Referendum Petition, the most recent municipal election was the May 2018 Election. The May 2018 Election clearly involved the election of municipal officials,

i.e. the Mayor and a Councilman, and the May 2018 Election was nonpartisan. *See* Tenn. Code Ann. § 2-13-208(a) (“[m]unicipal elections shall be nonpartisan”).

Moreover, the May 2018 Election was a general election. Under State law, a general election is one in which membership in a political party is not required in order to participate. *See* Tenn. Code Ann. § 2-1-104(a)(7). A general election contrasts with a primary election, which is an election held for a political party for the purpose of allowing members of that party to select nominees for the general election ballot. *See* Tenn. Code Ann. § 2-1-104(a)(19). A primary election, thus, is a preliminary election for purposes of selecting party nominees with participation limited “to members of the respective political parties, whereas, the general election is the ultimate selection process.” *Comer v. Ashe*, 514 S.W.2d 730, 735 (Tenn. 1974). Since voters were allowed to vote in the May 2018 Election regardless of their political party, the May 2018 Election is a general election.

The May 2018 Election was the most recent municipal general election. Accordingly, the Referendum Petition is invalid due to the lack of verified signatures.

IV. ALTERNATIVELY, THE NOVEMBER 2016 GENERAL ELECTION QUALIFIES AS THE PRECEDING GENERAL ELECTION; THE REFERENDUM PETITION DOES NOT MEET THE SIGNATURE THRESHOLD.

Alternatively, even if the Court were to conclude that the August 2016 uncontested election of the Assessor qualified as a general election under Section 19.01, the Court nonetheless must find that the Referendum Petition is invalid because the most recent regularly scheduled general election occurred in November 2016.

The phrase “preceding general election” in Metro Charter Section 19.01 does not include any express qualifiers other than “preceding” and “general.” (R. at Vol. 1, p. 50.) The November 2016 Election was also a regularly scheduled “general election” in which membership

in a political party was not required to participate. In fact, the November 2016 ballot contained no primary elections whatsoever. (*See R. at Vol. 1, p. 6; Admin. R. at Vol. 1, p. 43.*) The Referendum Petition does not have the required 25,293 signatures if the November 2016 election is the preceding general election. (*See id.*)

V. **ALLOWING THE PROPOSED CHARTER AMENDMENT TO BECOME LAW WHEN IT DOES NOT COMPLY WITH SECTION 19.01 WOULD VIOLATE THE TENNESSEE CONSTITUTION, TENNESSEE STATUTES AND THE METRO CHARTER.**

Turning to the fourth and final issue – “Whether a proposed amendment to the Metro Charter can become law in a way that does not comply with the Metro Charter?” – the answer is unequivocally “No.” 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 Tenn. Const. Art. VII, § 1.* The General Assembly has exercised this authority by providing that the charter of a metropolitan government shall set the method and procedure for amending the charter. *See Tenn. Code Ann. § 7-2-108(a)(20).* The Metro Charter includes this provision in Section 19.01, which requires that a petition seeking to amend the Charter by referendum be signed by at least 10% of the number of voters who voted in the “preceding general election.” (*See R. at Vol. 1, p. 50.*) The law provides no other mechanism for a referendum amending the Metro Charter to become effective. Since the Referendum Petition does not meet the requirements of Section 19.01, the proposed amendment is invalid and cannot become law.

CONCLUSION

For these reasons, the Court should reverse the Circuit Court’s judgment. The uncontested election of Assessor in August 2016 clearly is a state election, not a municipal

election, so it cannot be the preceding general election under Section 19.01. Regardless of whether the Court finds that the preceding general election is the August 2015 general metropolitan election, the May 2018 metropolitan election or the November 2016 general election, the Referendum Petition did not garner enough signatures under Section 19.01. Accordingly, the Court should reverse the Circuit Court and order that the proposed amendment cannot become law.

Respectfully submitted,

/s/ Austin L. McMullen
Austin L. McMullen (No. 20877)
BRADLEY ARANT BOULT CUMMINGS, LLP
1600 Division Street, Suite 700
P. O. Box 340025
Nashville, Tennessee 37203
Phone: (615) 252-2307
Fax: (615) 252-6307
AMcMullen@Bradley.com

/s/ David L. Raybin
David L. Raybin (No. 3385)
RAYBIN & WEISSMAN, P.C.
424 Church Street, Suite 2120
Nashville, Tennessee 37219
Phone: 615-256-6666
Fax: 615-254-4254
DRaybin@NashvilleTnLaw.com

Attorneys for Appellants

TENN. R. APP. P. 20 CERTIFICATION

In accordance with Tenn. R. App. P. 20, this Brief has been served on the 24th day of October all other parties to the appeal, by e-mail and U.S. Mail, as follows:

Lora Barkenbus Fox
Metropolitan Dept. of Law
108 Metropolitan Courthouse
Nashville, Tennessee 37219
Lora.fox@nashville.gov

Jamie R. Hollin
511 Rosebank Avenue
Nashville, Tennessee 37206
j.hollin@icloud.com

Daniel A. Horwitz
1803 Broadway, Suite 531
Nashville, Tennessee 37203
daniel.a.horwitz@gmail.com

/s/ Austin L. McMullen
Austin L. McMullen

ADDENDUM

Sec. 8.113. - Division of tax assessment created; metropolitan tax assessor.

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. The county tax assessor, elected for a term of four (4) years and provided for by general law in Tennessee Code Annotated, sections 67-1-502 to 67-1-505, inclusive, shall be the metropolitan tax assessor. He shall have the same powers, duties and liabilities with respect to assessment of properties in the area of the metropolitan government as by general law and private act are possessed by or imposed upon county and municipal tax assessors, except as herein provided in this Charter. In ascertaining the value of property, the tax assessor shall give particular consideration to the extent to which availability or nonavailability of sewers and other governmental services affects the actual cash value of the property. The metropolitan tax assessor shall make merchants' ad valorem assessments⁸ in and for both the general services district and the urban services district. The assessments made by him shall be the assessments to which the tax levy by the council for the general services district shall apply and to which the tax levy by the urban council for the urban services district shall apply. The assessor may assess all property annually and he shall separately total the assessments in the urban services district and the general services district.

(Res. No. 88-526, § 6, 10-4-88)

Sec. 20.20. - Special metropolitan election and term of office of persons then elected.

There shall be a special metropolitan election on the first Tuesday after the first Monday in November, 1962, for the purpose of electing the first mayor, the first vice-mayor and forty (40) members of the first metropolitan council, including five (5) councilmen-at-large and thirty-five (35) district councilmen. Said special election and a run-off election thereafter to be held twenty-one (21) days later, if necessary, shall be held under the provisions of article 15 of this Charter with respect to metropolitan elections. The metropolitan officers elected at said special election shall take office on the first Monday of April, 1963, and shall serve until the first day of September, 1966, or until their successors are elected and qualified.

The metropolitan officers elected at the general metropolitan election to be held on the fourth Thursday of April, 1966, shall serve until the first day of September, 1971, or until their successors are elected and qualified.

For the purpose of determining the eligibility for a pension of the mayor or mayors elected hereunder in the first and second metropolitan general elections, and for the purpose of section 5.06 of this Charter, the term of the first metropolitan mayor elected and the term of the second metropolitan mayor elected shall be deemed to be terms of four (4) years each.

(Amended by Res. No. 65-670, § 1, 7-6-65)