

IN THE SUPREME COURT OF TENNESSEE

FILED
SEP 20 2018
Clerk of the Appellate Courts
Rec'd By CV

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

Petitioners,)

v.)

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

Respondents, and)

COMMUNITY OVERSIGHT NOW,)

Intervening Respondent.)

Appellate Case No: m2018-01717-SC-RDM-
CV

Trial Court No. 18C2158,
Circuit Court for Davidson County

PETITIONERS' MOTION TO ASSUME JURISDICTION
PURSUANT TO TENNESSEE SUPREME COURT RULE 48
AND TENN. CODE ANN. § 16-3-201(d)

Come now the Petitioners, 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, by and through counsel, and respectfully move this Court to assume jurisdiction over the instant appeal pursuant to Tennessee Supreme Court Rule 48 and Section 16-3-201(d), Tennessee Code Annotated. In support of this Motion, the Petitioners state as follows:

SUMMARY

This case arises directly from the Court's recent decision in *Wallace v. Metropolitan Government*, 546 S.W.3d 47 (Tenn. 2018). The Appellants ask the Court whether its holding in *Wallace* changes the long established meaning of "preceding general election" in Section 19.01 of

the Metro Nashville Charter. Section 19.01 addresses how to amend the Charter and requires that a referendum petition be signed by 10% of those who voted in the “preceding general election.” If the Court assumes jurisdiction, the Court will determine whether a Referendum Petition containing 4,800 signatures seeking to amend the Charter to establish a police review board has enough signatures to appear on the November 7, 2018, ballot.

Relying on this Court’s decision in *State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983), Metro has for 35 years consistently taken the position that the term “preceding general election” in Section 19.01 refers to a “general metropolitan election” described in Charter Section 15.01. Metro has also consistently maintained that the Section 15.01 “general metropolitan election” is a broad term referring to any county-wide election in which a municipal official is on the ballot. Metro made both arguments to this Court in the *Wallace* case.

Five months ago, this Court held in *Wallace* that Metro’s understanding of Section 15.01 was incorrect and that the term “general metropolitan election” in Section 15.01 refers only to the quadrennial elections of the Mayor, Vice Mayor and 40 Councilmen, not to any other elections.

The question now before the Court is whether the *Wallace* opinion also changes the meaning of “preceding general election” as used in Section 19.01. If, as the Court held in *Wise*, the term “preceding general election” in Section 19.01 refers to the elections described in Section 15.01, then the Court’s holding in *Wallace* necessarily means that the Section 19.01 “preceding general election” refers to the most recent quadrennial election of the Mayor, Vice Mayor and 40 Councilmen. The most recent such election was in August, 2015. Approximately 104,000 people voted.

Metro and the Trial Court disagree. The Trial Court decided that the term “preceding general election” in Section 19.01 is no longer tethered to Section 15.01. Without any mention of

Wise or Section 15.01, the Trial Court rests its decision solely upon a single sentence taken from the *Wallace* opinion. That sentence states, “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.” *Wallace*, 546 S.W.3d at 58 (emphasis in original). From that, the Trial Court concluded that Section 19.01 refers not just to the elections described in Section 15.01 but also to the August 2016 uncontested election for the office of Assessor of Property, in which about 47,000 people voted.

Appellants suggest that the Trial Court read too much into that one sentence from *Wallace*. This Court in *Wallace* had to decide the meaning of “general election” in Charter Section 15.03, and was simply distinguishing *Wise*, which was a case about Section 19.01. There is no indication that this Court in *Wallace* was overruling the *Wise* decision by severing the link between the Section 19.01 “preceding general election” and the elections described in Section 15.01. That holding remains good law and determines the outcome of this case.

More importantly, the text of the Metro Charter and resulting structure of Metro government logically compel the conclusion that the authors of Section 19.01 intended that the term “preceding general election” refer to the most recent, quadrennial election of the Mayor, Vice Mayor and 40 Councilmen – an odd year, non-partisan election that is unique to Metro. The authors of Section 19.01 did not intend to allow the Charter to be amended based on the number of people voting in an uncontested election for Assessor of Property. Moreover, the legislative history supports the conclusion that Section 19.01 is linked to Section 15.01. A statement attributed to the sponsor of the 1972 amendment to Section 19.01 that added the term “preceding general election”, indicates that “preceding general election” refers to the most recent “Metro general election.”

This Court’s clarification of its holding in *Wallace* will determine if the proposed amendment will be on the November ballot. If the Section 19.01 “preceding general election” is, as Appellants contend, the 2015 election of the Mayor, Vice Mayor and 40 Councilmen, the Referendum Petition lacks sufficient signatures. If the Section 19.01 “preceding general election” is, as the Trial Court said, the 2016 election of the Assessor of Property, the Referendum Petition has enough signatures.

Only this Court can say what it meant in *Wallace* and, by assuming jurisdiction, this Court can resolve this dispute in time for the Election Commission to take the petition off the November ballot.

STATEMENTS PURSUANT TO TENNESSEE SUPREME COURT RULE 48

A. Questions Presented for Review

Whether the Davidson County Election Commission may place on the November 6, 2018, ballot a referendum to amend the Metro Charter using a procedure other than that established by the Charter?

Whether the Referendum Petition satisfies the requirements of the Metro Charter to be placed on the ballot?

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?

B. Relevant Facts

On August 1, 2018, a Referendum Petition was filed requesting that a referendum be held to amend the Charter (“Metro Charter”) of the Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”). (See Appx.¹ at Ex. 3, p. 43.) The amendment proposes

¹ “Appx.” refers to the contemporaneously filed Petitioners’ Appendix of Exhibits in Support of Motion to Assume Jurisdiction. The Petitioners’ Appendix consists of eight exhibits and includes the (1) Judgment of the Trial Court,

to establish The Metropolitan Government of Nashville and Davidson County Community Oversight Board (“Board”). (*See* Appx. at Ex. 3, p. 43, § 11.1301.)

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

(2) Declaration of Jeff Roberts, (3) the Administrative Record, (4) certified copies of Articles 15 and 19 of the Metro Charter, (5) a transcript of proceedings in the Trial Court, (6) the Verified Petition for Writ of Certiorari and Supersedeas and Writ of Mandamus, (7) Petitioners’ Notice of Appeal, and (8) Petitioners’ Appeal Bond for Costs. Within each exhibit to the Appendix, the pages are consecutively numbered.

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. (*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.)

The Tennessee Constitution solely 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). Section 19.01 of the Metro Charter includes this provision with 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.

...

(See Appx. at Ex. 4, p. 6, § 19.01.)

The Election Commission reviewed 6,491 signatures from the Referendum Petition, verified 4,801 signatures and rejected 1,690 signatures. (See Appx. at Ex. 3, p. 5.) Approximately 1,200 signatures were not analyzed. (See Appx. at Ex. 3, p. 4.)

Several relevant elections occurred before the Referendum Petition was submitted. Those elections include:

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	Uncontested election for Assessor of Property, 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 and appellate court retention elections	47,074
Aug. 6, 2015	Mayor, Vice Mayor, five Councilmen-At-Large and 35 District Councilmen	104,757

(See Appx. at Ex. 2, ¶ 6.)

On August 15, 2018, the Election Commission passed a motion to place the proposed amendment on the ballot for the November 6, 2018, election. As part of this motion, the Election Commission found that the number of verified signatures met the requirements of Section 19.01 based on the incorrect assumption that the Section 19.01 “preceding general election” was held in August 2016. (*See* Appx. at Ex. 2, ¶ 7; Appx. at Ex. 3, p. 28-30.) Prior to the meeting, counsel for the Petitioners sent a letter to the Election Commission outlining the objections to placing the proposed amendment on the ballot. (*See* Appx. at Ex. 2, ¶ 8; Appx. at Ex. 3, p. 33-41.) Petitioners 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* Appx. at Ex. 3, p. 35-36.) Petitioners further explained that, alternatively, the elections that occurred in May 2018 or November 2016 are general elections that precede the August 2016 election. (*See* Appx. at Ex. 3, p. 34-36.) Counsel for the Petitioners also spoke at the meeting in opposition to placing the proposed amendment on the ballot. (*See* Appx. at Ex. 3, p. 13-18.)

On August 21, 2018, the Petitioners a Verified Petition for Writ of Certiorari and Supersedeas and Writ of Mandamus in the Circuit Court for Davidson County (the “Trial Court”). The proceedings in the Trial Court were as follows:

- By Agreed Order entered August 27, Community Oversight Now was permitted to intervene in the case.
- On September 4, the administrative record from the Election Commission was filed.
- Pursuant to a Scheduling Order, the parties filed briefs and supplemented the record. On September 14, the Trial Court held a final hearing on all claims, defenses and motions.

- On September 19, the Trial Court entered a Final Order affirming the decision of the Election Commission. That Final Order is the subject of this appeal. (*See* Appx. at Ex. 1.)

On September 20, the Petitioners filed a Notice of Appeal and Appeal Bond for Costs with the Tennessee Court of Appeals. (*See* Appx. at Ex. 7; Appx. at Ex. 8.)

C. Reasons for Assuming Jurisdiction

The Court should assume jurisdiction because this is a case of unusual public importance in which there is a special need for expedited decision involving issues of constitutional law. *See* Tenn. Code Ann. § 16-3-201(d)(1), (2). There is also a compelling public interest in this case. *See* Tenn. Code Ann. § 16-3-201(d)(3).

This is a case of unusual public importance involving issues of constitutional law. This case involves public, not private, interests and issues. Specifically, the case presents questions regarding the procedure for amending the Metro Charter² and whether the Election Commission may place a referendum on the November 6, 2018, ballot even though the Referendum Petition did not garner sufficient signatures to satisfy the requirements of Section 19.01 of the Metro Charter. These questions present issues regarding the allocation of authority within our constitutional system of government in Tennessee 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.

² This Court has consistently decided to review cases involving the interpretation of the Metro Charter. *See, e.g.,* *Wallace v. Metropolitan Gov't*, 546 S.W.3d 47 (Tenn. 2018); *Metropolitan Gov't v. Board of Zoning Appeals*, 477 S.W.3d 750 (Tenn. 2015); *Renteria-Villegas v. Metropolitan Gov't*, 382 S.W.3d 318 (Tenn. 2012); *Gray's Disposal Co. v. Metropolitan Gov't*, 318 S.W.3d 342 (Tenn. 2010); *Amos v. Metropolitan Gov't*, 259 S.W.3d 705 (Tenn. 2008); *State ex rel. Metropolitan Gov't v. Spicewood Creek Watershed Dist.*, 848 S.W.2d 60 (Tenn. 1993); *Metropolitan Gov't v. Allen*, 529 S.W.2d 699 (Tenn. 1975); *Winter v. Allen*, 367 S.W.2d 785 (Tenn. 1963).

§ 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 Appx. at Ex. 4, p. 6, § 19.01.)

The “preceding general election” is the August 2015 “general metropolitan election” in which more than 104,000 citizens voted. (See Appx. at Ex. 2, ¶ 6.) Using the correct standard, the Referendum Petition can only be valid if it garnered more than 10,000 signatures, which it clearly did not. Permitting the Election Commission to place an amendment referendum on the ballot when the Referendum Petition has not complied with Section 19.01 contravenes the allocation and separation of powers under the Tennessee Constitution. See *City of Memphis v. Shelby County Election Comm’n*, 146 S.W.3d 531, 533–34 (Tenn. 2004) (granting reach-down motion in case regarding validity of referendum due to public importance of constitutional separation of powers issues). Indeed, the Election Commission is exercising power in an unauthorized and unconstitutional manner by ignoring the Metro Charter’s standard for calculating signatures.

The specific amendment proposed by the Referendum Petition further presents questions of compelling public interest due to the impact of the amendment on public safety. Public safety is a foundational reason why the government of the State of Tennessee was instituted. See Tenn. Const. Art. I, § 1. This amendment impacts public safety by altering the procedures for policing in Nashville. The amendment changes the daily protocol under which MNPD officers work. The amendment introduces heightened uncertainty into their duties through Board subpoenas, investigations, monitoring programs, reviews, audits, policy advisories, resolution reports, referrals and recommendations. (See Appx. at Ex. 3, p. 43, § 11.1302.) These changes negatively affect the officers’ operations and efficiency by changing the disciplinary procedures resulting

from Board investigations, referrals and recommendations. (*See* Appx. at Ex. 6, ¶ 27.) Moreover, the amendment reduces funds available for the work of the MNPB through the Board's required annual budget of no less than \$1,500,000.00. (*See id.*) There is a compelling public interest in these public safety issues.

The Referendum Petition does not contain a sufficient number of signatures, and, therefore, the amendment cannot appear on the November 6, 2018, ballot. Allowing a procedurally invalid referendum to remain on the ballot implicates the freedom and purity of the ballot box. *See* Tenn. Const. Art. IV, § 1. Davidson County voters have the constitutional right to a pure, certain and lawful ballot. Voters should not be provided a ballot that includes a referendum that has not qualified for the ballot under by the Metro Charter.

Expedited review is needed. The referendum is set to appear on the November 6, 2018, ballot. Waiting until after the election to determine whether the Referendum Petition meets the signature requirements of the Metro Charter, or if the Election Commission may place a referendum on the ballot without meeting the requirements of the Charter, could render moot these important issues. *See Barrett v. Giles County*, M2010-02018-COA-R3-CV, 2011 WL 4600431, at *3-4 (Tenn. Ct. App. Oct. 5, 2011) (challenge to election commission's determination that candidate's qualifying petition had sufficient signatures cannot be brought as an election contest after the election occurs); *James v. State of Tennessee*, M2002-01557, COA-R3-CV, 2003 WL 22136840, at *4 (Tenn. Ct. App. Sept. 16, 2003) (appeal of decision whether to place candidate on the ballot was moot after the election occurred).

WHEREFORE, Petitioners respectfully request the following:

A. That the Court assume jurisdiction over this case pursuant to Tennessee Supreme Court Rule 48 and Section 16-3-201(d), Tennessee Code Annotated;

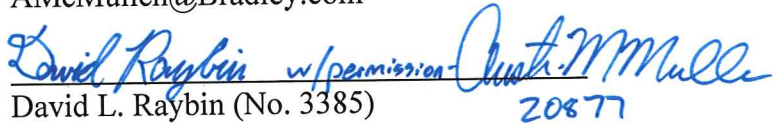
B. This the Court enter an order to expedite preparation of the record, briefing and oral argument pursuant to Tennessee Supreme Court Rule 48(d); and

C. That the Court reverse the Trial Court's Order dismissing the Petitioner's Verified Petition and remand this action to the Trial Court with instructions to mandate that the Respondents remove the proposed amendment from the November 6, 2018, ballot.

Respectfully submitted,



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



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 Petitioners

Tenn. R. App. P. 20 Certification

In accordance with Tenn. R. App. P. 20, this Motion and supporting papers have been served on the 20th day of September 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



Austin L. McMullen