

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE**

THE METROPOLITAN	§	
GOVERNMENT OF NASHVILLE	§	
AND DAVIDSON COUNTY, <i>et al.</i> ,	§	
	§	
<i>Petitioners-Appellees,</i>	§	M2021-00723-COA-R3-CV
	§	
<i>v.</i>	§	Trial Court Case No.: 21-0472-IV
	§	
THE DAVIDSON COUNTY	§	
ELECTION COMMISSION,	§	
	§	
<i>Respondent-Appellant.</i>	§	

**BRIEF OF AMICUS CURIAE NASHVILLE AREA CHAMBER OF
COMMERCE IN SUPPORT OF APPELLEES AND URGING
AFFIRMANCE**

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III. INTRODUCTION

Metro Charter § 19.01 requires petitioners to “prescribe a date” for the election on a proposed referendum. *Id.* Among other things, the election date prescribed by a petition: (1) establishes the relevant deadline to gather signatures, and (2) notifies the electorate of the date when a proposed referendum election will occur.¹ Thus, § 19.01’s “prescribe a date” requirement enables proponents and opponents alike to advocate their respective causes based on a single defined timeline.

4 Good Government violated Metro Charter § 19.01’s “prescribe a date” requirement by prescribing multiple election dates on its petition. Violating Metro Charter § 19.01 in this manner also unfairly advantaged 4 Good Government by preventing opponents from ascertaining critical dates—including 4 Good Government’s signature-gathering deadline—and advocating accordingly. Prescribing multiple election dates on its petition additionally enabled 4 Good Government to grant itself an illicit “backdoor extension[]”² when it failed to meet the signature deadline associated with the first date that its petition had prescribed.

No other petitioner in Metro’s history has ever attempted to violate Metro Charter § 19.01 in this manner. When other petitioners failed to turn in enough signatures before the date prescribed by their petitions,

¹ See R. at 304 (noting, *inter alia*, that Metro Charter § 19.01’s “prescribe a date” requirement “sets the governing time line” for signature gathering and, “consistent with fairness, notifies potential opponents, in advance of the petition’s filing, what the Petition prescribes as the election date for purposes of a potential counter-campaign.”).

² *Id.*

their proposed referenda also did not reach the ballot. Based on the Election Commission’s longstanding position that § 19.01’s requirements—including its date requirements—are strictly enforced, the Election Commission has denied other petitioners who failed to comply with § 19.01 the opportunity to reach the ballot, too.³

Thus, until this case, the Election Commission consistently maintained the position that Metro Charter § 19.01’s requirements must be strictly enforced. Indeed, the Election Commission maintained that position *successfully* in contested litigation. *See Nashville English First*, Davidson County Chancery Court No. 08-1912-I (Sep. 5, 2008) (“The Plaintiff prescribed the [unlawful] date of November 4, 2008 and the law regulating Charter amendment frequency at § 19.01 does not provide for amendments to that date.”). With respect to 4 Good Government, though,

³ Metro Charter § 19.01 has two date requirements. The first is that petitioners must “prescribe a date” for the election that is “not less than eighty (80) [days] subsequent to the date of its filing” *Id.* The second is that the date prescribed by a petition may not result in an “amendment or amendments be[ing] submitted by petition more often than once in each two years.” *Id.* The latter date requirement was the central issue in *Nashville English First, et al. v. Davidson County Election Commission, et al.*, Davidson County Chancery Court No. 08-1912-I (Sep. 5, 2008) (Attach. 1 to Mot. for Leave), which resulted a petition being kept off the ballot because “§ 19.01 does not provide for amendments to [the] date” prescribed by a petition. *Id.* Similarly, with respect to § 19.01’s other requirements, never before has the Election Commission suggested that substantially complying with § 19.01’s signature threshold would be sufficient, and all of the litigation regarding that requirement confirms the Election Commission’s position that it is not. *See FOP v. Metro. Gov’t of Nashville & Davidson Cnty.*, 582 S.W.3d 212 (Tenn. Ct. App. 2019), *appeal denied* (May 20, 2019); *State ex rel. Wise v. Judd*, 655 S.W.2d 952, 953 (Tenn. 1983).

a partisan majority of the Election Commission “pulled a surprise switcheroo by doing the opposite of” what it had done historically. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810 (2019) (cleaned up). Accordingly, in an effort to privilege a favored petitioner, the Election Commission has advanced the unprecedented position that § 19.01’s “prescribe a date” requirement may be disregarded as “merely advisory.”⁴

The Election Commission’s newfangled position is wrong. 4 Good Government also should not be privileged over previous petitioners who were held to § 19.01’s rules. Put simply, as the Election Commission itself once did:

The charter . . . doesn’t say [its date requirements apply] unless you come close.

And I don’t mean to be a stickler, but that’s how legal statutory election laws work. . . . [T]hat’s just how election laws are. They’re very strict.

.

These dates mean something. And what they mean is that everyone out here knows what the rules are, and they know how to follow them. There’s no secrets. There’s no special exceptions for anyone just because you know someone or just because you’ve been around a long time. We all have the same rules, and we all have to follow them.

And frankly, that’s the most important reason this needs to be enforced in this situation, for the fairness of anyone else who wants to file a petition.⁵

⁴ *See* Appellant’s Principal Br. at 50. *See also id.* at 53.

⁵ Tr. of Proceedings, 74:11–75:2, *Nashville English First*, No. 08-1912-I (Attach. 2 to Amicus’ Mot. for Leave). The Court may take judicial notice of this and other public records. *See Ind. State Dist. Council of Laborers*

IV. FACTS

In early 2021, “4 Good Government” began circulating a petition to amend the Metro Charter. 4 Good Government’s petition did not “prescribe a date” for its proposed referendum election, however, as Metro Charter § 19.01 requires. Instead, 4 Good Government’s petition prescribed *two* potential election dates by stating that its proposed amendments “would be voted on by the citizens on May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01.”⁶

4 Good Government filed its petition and signatures with the Metro Clerk on March 25, 2021.⁷ Thus, 4 Good Government’s first prescribed election date ran afoul of § 19.01’s 80-day deadline.

Before approving 4 Good Government’s petition, the Election Commission neither sought nor obtained counsel regarding whether the multiple election dates prescribed by 4 Good Government’s petition rendered the petition defective.⁸ According to the Election Commission’s specially retained counsel, that issue was “outside the scope” of counsel’s “limited” engagement.⁹ The Election Commission’s counsel eventually characterized the issue as “kind of immaterial at this point.”¹⁰

v. Brukardt, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. 2009), *perm. to app. denied* (Tenn. Aug. 24, 2009).

⁶ Corrected A.R. 624.

⁷ Corrected A.R. 621.

⁸ Corrected A.R. 122, lines 20–25.

⁹ *Id.*

¹⁰ Corrected A.R. 323, lines 20–21.

The Election Commission voted 3–2 to approve 4 Good Government’s petition and set an election for July 27, 2021¹¹—a date that was *neither* May 28, 2021 *nor* June 14, 2021. The vote was partisan. Specifically, all of the Election Commission’s Republican members voted to hold a July 27, 2021 election on 4 Good Government’s petition, while all of the Election Commission’s Democratic members voted not to do so.¹²

Upon review, the Chancery Court noted that § 19.01’s “prescribe a date” requirement serves several essential purposes. *See* R. at 304. Among them, it “sets the governing time line” for signature gathering and, “consistent with fairness, notifies potential opponents, in advance of the petition’s filing, what the Petition prescribes as the election date for purposes of a potential counter-campaign.” *Id.* The Chancery Court accordingly determined that by prescribing multiple election dates, 4 Good Government’s petition failed to comply with § 19.01’s “prescribe a date” requirement. *Id.* at 303. Thus, the Chancery Court held that 4 Good Government’s petition was facially defective.

V. LEGAL STANDARDS AND STANDARD OF REVIEW

When interpreting the Metro Charter, familiar “principles of statutory construction” guide this Court’s analysis. *Wallace v. Metro. Gov’t of Nashville*, 546 S.W.3d 47, 52–53 (Tenn. 2018) (citing *Renteria-Villegas v. Metro. Gov’t of Nashville & Davidson Cnty.*, 382 S.W.3d 318, 321 (Tenn. 2012); *Jordan v. Knox Cnty.*, 213 S.W.3d 751, 763 (Tenn. 2007)). “The overriding purpose of a court in construing a statute is to

¹¹ Corrected A.R. 569.

¹² *Id.*

ascertain and effectuate the legislative intent, without either expanding or contracting the statute’s intended scope.” *Id.* (citing *Ray v. Madison Cnty., Tenn.*, 536 S.W.3d 824, 831 (Tenn. 2017); *Tenn. Dep’t of Corr. v. Pressley*, 528 S.W.3d 506, 512 (Tenn. 2017). “Legislative intent is first and foremost reflected in the language of the statute.” *Id.* (citing *Lee Med. Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010)). Accordingly, when the Metro Charter’s text “is clear and unambiguous, [courts] need look no further than the language of the [Charter] itself.” *Id.* at 53.

If the Metro Charter’s text presents genuine ambiguity, though, a reviewing court may consult external sources, including history and public policy. *See Wallace*, 546 S.W.3d at 53. Further, when the Metropolitan Government—“the body responsible for the promulgation of” the Metro Charter—“has construed and applied its own rules or policies,” *id.* at 52, n.7, “considerable deference will be granted to [its] interpretation of its own regulation unless the interpretation is inconsistent with the terms of the regulation.” *Gay v. City of Somerville*, 878 S.W.2d 124, 127 (Tenn. Ct. App. 1994).

VI. ARGUMENT

A. METRO CHARTER § 19.01’S “PRESCRIBE A DATE” REQUIREMENT IS MANDATORY AND ESSENTIAL TO PROVIDE FAIR NOTICE TO OPPONENTS OF A PROPOSED REFERENDUM.

1. Metro Charter § 19.01 requires petitioners to “prescribe a date” for the election, which establishes both the deadline for signature gathering and the date of a proposed election.

To amend the Charter by “petition and popular vote,” Metro Charter § 19.01 mandates compliance with three requirements:

First, “an amendment or amendments may be proposed . . . upon petition[.]” *Id.*

Second, petitioners must convince “ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election” to sign their petition, and they must file their petition and signatures “with the metropolitan clerk[.]” *Id.*

Third, the 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.” *Id.*

Given this context, Metro Charter § 19.01’s “prescribe a date” requirement establishes two critical dates for campaigning:

1. The deadline for gathering signatures (80 days before a prescribed election date); and
2. The date of the proposed referendum election (the date prescribed by a petition).

The first date establishes the timeline for campaigning regarding a petition itself. The second date establishes the timeline for campaigning regarding a proposed referendum election. As detailed below, allowing only proponents to know these dates in advance of filing would also afford petitioners a seriously unfair advantage over their opponents regarding both the petition process and the resulting referendum election itself.

2. **Opponents of a proposed referendum must be able to ascertain—with certainty—the relevant signature deadline and proposed election date.**

Based on the date prescribed by a petition, both proponents and opponents of a proposed referendum know that the deadline for filing

signatures with the Clerk is 80 days before the election date that a petition prescribes. *See* Metro Charter § 19.01. Thus, leading up to that signature deadline, proponents of a referendum may advocate for voters to sign their petition. *See, e.g.,* Daniel A. Horwitz, *Vote to ‘ban the box’ in Nashville, support job seekers*, THE TENNESSEAN (May 12, 2015), <https://www.tennessean.com/story/opinion/contributors/2015/05/12/ban-box/27177043/> (encouraging voters to sign “Ban the Box” Charter referendum petition). At the same time, opponents of a referendum may encourage voters *not* to sign a petition in an effort to prevent the proposal from reaching the ballot. *See, e.g.,* Ron Miller, *‘Ban the Box’ a bad idea*, THE TENNESSEAN (May 22, 2015), <https://www.tennessean.com/story/opinion/readers/2015/05/23/letters-editor-nashville-politics/27790999/> (“‘Ban the Box’ a bad idea”). Thereafter, once the relevant signature deadline expires, if a petition has not obtained sufficient signatures, then the proposed referendum does not reach the ballot, and the effort fails. *See, e.g.,* Joey Garrison, *‘Ban the Box’ referendum falls short for August ballot*, THE TENNESSEAN (June 12, 2015) <https://www.tennessean.com/story/insession/2015/06/12/ban-the-box-referendum-falls-short-for-august-ballot/71117328/>.

Until 4 Good Government’s petition was approved, both proponents and opponents of a referendum alike knew and were expected to play by these rules, because the Election Commission could be counted on to enforce them evenhandedly. For several reasons, allowing proponents of a referendum to prescribe *multiple* dates on a petition would also afford proponents an unfair advantage that impairs the entire petition process from the outset. For one thing, prescribing multiple election dates on a

petition prevents opponents from ascertaining the period during which they need to encourage voters not to sign it. *But see* R. at 304 (finding that a purpose of § 19.01’s “prescribe a date” requirement is that it “sets the governing time line” for signature gathering). For another, allowing petitioners to prescribe multiple election dates on a petition means that there is no actual deadline for gathering signatures at all, because if petitioners can simply reserve multiple backup election dates, then petitioners may unilaterally extend their signature deadline and rely on backup dates indefinitely until a sufficient number of signatures has been secured. *But see id.* (finding that a purpose of § 19.01’s “prescribe a date” requirement is that it “prevents backdoor extensions of the deadline for obtaining signatures”).

To be sure, any number of previous petitioners who came up short of signatures 80 days before the one lawful date prescribed by their petitions would have appreciated such a liberal rule. *See, e.g.,* Joey Garrison, ‘*Ban the Box*’ referendum falls short for August ballot, THE TENNESSEAN (June 12, 2015) <https://www.tennessean.com/story/in-session/2015/06/12/ban-the-box-referendum-falls-short-for-august-ballot/71117328/>; Joey Garrison, *Marijuana push falls short, but 3 other referendums likely*, THE TENNESSEAN, <https://www.tennessean.com/story/news/politics/2015/05/18/vote-local-hires-metro-projects-surpasses-petition-mark/27531155/>. None of those petitioners ever enjoyed such a benefit, though, because the Election Commission’s newfangled position that a multirate referendum petition

that includes a “clear decision rule”¹³—something that the text of Metro Charter § 19.01 does not plausibly authorize—was invented for the first time during this litigation for the benefit of 4 Good Government alone. As the Election Commission itself once correctly understood, though, “[t]here’s no special exceptions for anyone just because you know someone or just because you’ve been around a long time. We all have the same rules, and we all have to follow them.”¹⁴

Permitting petitioners to prescribe multiple election dates on a petition not only denies opponents a fair opportunity to advocate during the signature-gathering process, though. It also deprives opponents of the ability to know—in advance of a petition being filed with the Metro Clerk—when a proposed election will take place and to prepare accordingly. *But see* R. at 304 (finding that a purpose of § 19.01’s “prescribe a date” requirement is that, “consistent with fairness, [it] notifies potential opponents, in advance of the petition’s filing, what the Petition prescribes as the election date for purposes of a potential counter-campaign.”). The fact that petitioners may force a referendum election a mere “eighty (80) [days] subsequent to the date of [a petition’s] filing” also renders that lack of notice unusually prejudicial. *See* Metro Charter § 19.01.

Permitting petitioners to prescribe and reserve multiple potential election dates would also give proponents of a petition a seriously unfair

¹³ *See* Appellant’s Principal Br. at 52.

¹⁴ Transcript of Proceedings at 74:11–75:2, *Nashville English First*, No. 08-1912-I.

advantage over their opponents regarding an election itself, given that it would enable petitioners—and only petitioners—to know when an election will be held. Petitioners alone control when their signatures are filed with the Metro Clerk. Thus, by prescribing two or more election dates on a petition—the Election Commission’s “clear decision rule” proposal would allow petitioners to prescribe *hundreds* of potential dates if they wished—and then indicating that the election will be held on “whichever [date] is earlier as permitted by Metro Charter § 19.01,”¹⁵ petitioners alone can control the date of a referendum election based strictly upon the date when they file their signatures.

Thus, regardless of how many dates a petition prescribes, petitioners (and petitioners alone) will know—in advance of filing—when an election will be held, because petitioners alone will know when they intend to file their petition with the Metro Clerk. By contrast, *opponents* of a petition—who have no way of knowing or controlling when a petition will be filed—will necessarily be left to guess the date of the election until the moment that petitioners file their signatures with the Metro Clerk.

The unfair advantage that such superior knowledge affords petitioners cannot be overstated. For example, it would allow petitioners—and only petitioners—to buy, in advance of filing their signatures with the Metro Clerk, the bulk of prime advertising spots “during the pivotal final days before the election,” *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *20 (Tenn. Ct. App.

¹⁵ Corrected A.R. at 624.

Dec. 12, 2019)—or even the critical “weeks immediately before” an election, *see Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 334 (2010)—because only they will know in advance of filing when Election Day will be. *Id.* (“It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence.”). Further, with a potential campaign period as short as 80 days, *see* Metro Charter § 19.01, such an unfair advantage may be—and frequently will be—insurmountable.

3. The Election Commission’s novel position that it may violate Metro Charter § 19.01 is wrong.

By prescribing multiple potential election dates, 4 Good Government’s petition unmistakably failed to comport with § 19.01’s “prescribe a date” requirement. As detailed above, this defect impaired the entire petition process. Accordingly, to enable 4 Good Government’s defective petition to reach the ballot, the Election Commission now proposes not only to dispense with Metro Charter § 19.01’s “prescribe a date” requirement *for petitioners*; it also insists that Election Commission may disregard as “advisory” its *own* obligation to adhere to the election date that a petition prescribes.

This position, too, is unprecedented. It also conflicts with the Election Commission’s longstanding public position that petitioners set their own election dates.¹⁶ As noted above, the Election Commission even

¹⁶ *See* Davidson County Election Commission’s Responses to Chancellor’s Questions at 1, #2, *Nashville English First*, No. 08-1912-I (Sep. 4, 2008) (Attach. 3 to Mot. for Leave) (expressing agreement that petitioners are

advocated that position *successfully* in recent, contested litigation, winning a ruling that “[t]he Charter . . . states that the petition shall prescribe the date for the election at which voters will ratify or reject the proposed Charter amendment. . . . **§ 19.01 does not provide for amendments to that date.**” *See Nashville English First, et al.*, Davidson County Chancery Court No. 08-1912-I (emphasis added). When interpreting a statute, such history matters. *See, e.g., McCord v. S.R. Co.*, 187 Tenn. 247, 266, 213 S.W.2d 184, 192 (1948) (“this conclusion is forcefully substantiated by historical interpretation and practice.”).

The text of the Metro Charter is also makes clear that petitioners themselves prescribe the date of a referendum election. *See* Metro Charter § 19.01 (providing that the date prescribed by a petition is the date “at which the electorate of the metropolitan government will vote to ratify or to reject the amendments proposed.”). And since that is the only interpretation of Metro Charter § 19.01 that is faithful to its text, that position—which was recently shared by the Election Commission—remains correct today. Thus, in addition to being the first and only time that the Election Commission has excused a petitioner’s compliance with a mandatory requirement of § 19.01, this case also presents the first and only time in the history of the Metropolitan Government that the Election Commission has violated Metro Charter § 19.01 itself by setting a referendum election on a date other than the date that a petitioner prescribed.

not limited in their ability “to set the election date (so long as it is at least 80 days after the date of filing the petition)”).

To be clear: There is no source of authority that permitted the Election Commission to disregard the election dates that 4 Good Government prescribed in an effort to cure an otherwise invalid petition. Metro Charter § 19.01 does not allow it. *See id.*; *see also Nashville English First, et al.*, Davidson County Chancery Court No. 08-1912-I (“The Charter . . . states that the petition shall prescribe the date for the election at which voters will ratify or reject the proposed Charter amendment. . . . **§ 19.01 does not provide for amendments to that date.**”) (emphasis added). No provision of state law allowed the Election Commission to modify a prescribed date under these circumstances, either. *See* R. at 304 (holding that “the ‘prescribe a date’ requirement relating to the form of the Petition, which has not been overridden by state law,” should “be enforced as written.”). Indeed, where—as here—a petition has been filed between 80 and 90 days before a prescribed election date, there is not even a *potential* conflict with state law, *see* Tenn. Code Ann. § 2-3-204(a), because under such circumstances, the Election Commission will always be able to comply with both Metro Charter § 19.01 and Tenn. Code Ann. § 2-3-204(a) simultaneously.

It is true that—as the Chancery Court held—there is a circumstance in which “the Election Commission has the authority under state law to set a different date for the referendum election than the date listed in the Petition[.]” R. at 304. However, the one and only circumstance when the Election Commission may do so is when it “reset[s]” the prescribed election date to coincide with another upcoming election under Tenn. Code Ann. § 2-3-204(c). *See id.* (“If the date for an election on a question, as set by a county election commission or by two

(2) or more commissions jointly, falls within ninety (90) days of an upcoming regular primary or general election being held in the jurisdiction voting on the question, the commission or commissions may reset the date of the election on a question to coincide with the regular primary or general election, even though this may be outside of the time period established herein.”). That is not what happened here, though.

Here, notwithstanding § 19.01, the Election Commission set an election on 4 Good Government’s proposed referendum for July 27, 2021—a date that was *neither* of the two dates prescribed by 4 Good Government’s petition. July 27, 2021 was not the date of “an upcoming regular primary or general election being held in the jurisdiction voting on the question,” either. *See* Tenn. Code Ann. § 2-3-204(c). Instead, it was a date that three members of the Election Commission selected unilaterally in an unprecedented violation of Metro Charter § 19.01.

Significantly, that illegality was also one that 4 Good Government noted itself. Indeed, 4 Good Government—and all of the signatories to its petition—went so far as to sue the Election Commission and demand an order “directing the Election Commission to comply with its ministerial duty to place the ballot initiative on the June 14, 2021 election ballot.”¹⁷ That lawsuit also emphasized the importance of a “June 14, 2021” election date more than thirty times.¹⁸

¹⁷ *See* Am. Expedited Verified Compl. at 20, ¶ 4, *4 Good Government et al.*, No. 21-300-IV (Apr. 15, 2021) (Attach. 4 to Mot. for Leave).

¹⁸ *See id.* at 1; *id.* at 2; *id.* at ¶ 3; ¶ 7; ¶ 10; ¶ 40; ¶ 48; ¶ 52; ¶ 53; ¶ 54; ¶ 55; ¶ 59; ¶ 60; ¶ 62; ¶ 63; ¶ 64; ¶ 65; ¶ 66; ¶ 67; ¶ 69; ¶ 70; ¶ 71; ¶ 75; ¶ 76; ¶ 77; ¶ 81; ¶ 82; ¶ 83; *id.* at 20, ¶ 4; *id.* at 20, ¶ 7; *id.* at 21, ¶ 12.

Accordingly, it is fair to say that *not even the signatories to 4 Good Government's petition* signed up for a July 27, 2021 election or believed that the Election Commission had any lawful authority to set one. As noted, Metro Charter § 19.01 also unmistakably prohibited the Election Commission from doing so. The “conditional” fourth election date selected by the Election Commission after the Chancery Court ruled that the Election Commission had acted illegally was impermissible for the same reason. This Court, for its part, cannot accept the Election Commission’s invitation to join it in violating the law by ordering a fifth non-compliant election date, either.¹⁹

B. 4 GOOD GOVERNMENT FAILED TO COMPLY WITH METRO CHARTER § 19.01’S MANDATORY “PRESCRIBE A DATE” REQUIREMENT.

The Metropolitan Charter is “the organic law of the municipality to which all its actions are subordinate.” *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988) (citing *Marshall & Bruce Co. v. City of Nashville*, 109 Tenn. 495, 512, 71 S.W. 815, 819 (1902)); *Wilgus v. City of Murfreesboro*, 532 S.W.2d 50, 52 (Tenn. App. 1975). Accordingly, the Tennessee Supreme Court has held—repeatedly—that “[t]he provisions of the charter are mandatory, and must be obeyed by the city and its agents.”” *Id.* (quoting *Barnes v. Ingram*, 217 Tenn. 363, 373, 397 S.W.2d 821, 825 (1965) (in turn quoting *Marshall & Bruce Co.*, 109 Tenn. 495, 71

¹⁹ See Appellant’s Reply Br. at 16, n.1 (disputing mootness in this lawsuit about a July 2021 election that cannot occur on the asserted basis that “[t]his Court can undo the order of the Trial Court and order a referendum-election,” even though no future election date would comply with Tenn. Code Ann. § 2-3-204 or Metro Charter § 19.01, either).

S.W. at 819. “When a municipality fails to act within its charter or under applicable statutory authority, the action is ultra vires and void or voidable.” *Baird*, 756 S.W.2d at 241 (citing *Crocker v. Town of Manchester*, 178 Tenn. 67, 70, 156 S.W.2d 383, 384 (1941)).

Given this context, the Election Commission’s claim that Metro Charter § 19.01’s date requirements may be ignored as “advisory” by both petitioners and the Election Commission alike is curious. As noted, it is also irreconcilable with the Election Commission’s own recent, *successful* litigation position that § 19.01’s date requirements are “very strict and are enforced,” and thus, that “Metropolitan Charter 19.01 is akin to another statutory time deadline—a statute of limitation” that “courts cannot simply ‘suspend’ or waive . . . where a Plaintiff has incorrectly filed.”²⁰ For the reasons detailed below, though, the Election Commission was right before, and it is wrong now.

1. “A date” means one date, not multiple dates.

Metro Charter § 19.01 provides, in pertinent part, that a 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.” *Id.* (emphasis added). This requirement is not ambiguous. “A” is singular, not plural, and “date” does not mean “dates.” Several reasons support this inescapable conclusion.

²⁰ See Davidson County Election Commission’s Mot. to Dismiss at 13, n.9, *Nashville English First*, No. 08-1912-I (Sep. 3, 2008) (Attach. 5 to Mot. for Leave).

First, in its ordinary and usual use, the word “a” is singular, not plural. Several courts have held as much under similar circumstances. *See, e.g., Dulaney v. Nat’l Pizza Co.*, 733 So. 2d 301, 305 (Miss. Ct. App. 1998) (“It is necessary to interpret statutes consistent with reason and common sense. The word ‘a’ is singular, not plural.”); *Piburn v. SAIF Corp.*, 199 Or. App. 494, 497 (2005) (“the article ‘a’ is singular”); *State v. Fowler*, 311 Kan. 136, 150 (2020) (“‘A’ is singular but nonspecific.”) (citing Webster’s New World College Dictionary 1 (5th ed. 2014)); *Douglas Press, Inc. v. Arrow Int’l, Inc.*, No. 95-CV-3863, 1999 WL 35110172, at *8 (N.D. Ill. Feb. 4, 1999) (“it remains that the ordinary meaning of ‘a’ is singular. There is no reason, either in the claim language or the specifications, to ignore that meaning.”).

Second, in context, the phrase “a date” in Metro Charter § 19.01 means one election date, not multiple election dates. *Cf. Chehardy v. Democratic Exec. Comm. for Jefferson Par.*, 259 La. 45, 50, 249 So. 2d 196, 198 (1971) (“‘A’ in its ordinary and usual use means ‘one’ unless the words preceding or following are indicative of a contrary meaning.”); *Pleasants Invs. Ltd. P’ship v. State Dep’t of Assessments & Tax’n*, 141 Md. App. 481, 498 (2001) (“we conclude that ‘a ... plan’ in the context of TP § 822 means one approved plan”); *Holladay Duplex Mgmt. Co. v. Howells*, 2002 UT App 125, ¶ 7 (“we conclude that in the context it is used, ‘a’ means one.”); *Banuelos v. Barr*, 953 F.3d 1176, 1181 (10th Cir. 2020) (“in most contexts, the singular article ‘a’ refers to only one item.”). The sentence in which the phrase “a date” appears within Metro Charter § 19.01—“[s]uch resolution or 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”—uses the article “a” coupled with a singular noun. *See id. Cf. Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1483 (2021) (“Here again we encounter an article coupled with a singular noun (‘the Notice’), a combination that once more seems to suggest a discrete document.”). Thus, § 19.01 contemplates exactly one date on which the electorate “will vote to ratify or to reject the amendments proposed.” *Id.*

Most revealingly, though, when the drafters of Metro Charter § 19.01 wanted to specify that either a singular or a plural meaning was intended, they did so. *See* Metro Charter § 19.01 (“an amendment or amendments”); *id.* (“it or them”). By contrast, § 19.01’s “prescribe a date” requirement mandates that petitioners prescribe “a date” only, *id.*—not “a date or dates.” These textual differences—which appear within the same provision—carry meaning. *See, e.g., Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 560 (Tenn. 2013) (“If the legislature had intended to punish a plaintiff’s failure to comply with the requirements of Tenn. Code Ann. § 29–26–121(a)(2)(E) by requiring courts to dismiss all such cases with prejudice, the legislature could easily have done so, as it did in Tenn. Code Ann. § 29–26–122.”). For all of these reasons, the Metro Charter § 19.01 “prescribe a date” requirement means one date, not multiple dates.

2. **4 Good Government’s petition did not “prescribe a date,” and overwhelming authority reflects that petitioners must strictly comply with Metro Charter § 19.01.**

4 Good Government’s petition did not “prescribe a date” as Metro

Charter § 19.01 requires. Instead, it prescribed two dates, stating that its proposed amendments would “be voted on by the citizens on May 28, 2021 or June 14, 2021, whichever is earlier as permitted by Metro Charter § 19.01.”²¹

This attempted end-run around § 19.01’s “prescribe a date” requirement was impermissible. Until now, no petition in Metro’s history has ever attempted to prescribe multiple potential dates for a referendum election, either. Other petitioners have also been prohibited from reaching the ballot due to comparable non-compliance with § 19.01’s date requirements.²²

Thus, 4 Good Government’s petition is the first petition in Metro’s history to have its non-compliance with § 19.01’s date requirement excused. And beyond the fact that amending the Metropolitan Charter—a constitutional document—is a serious matter generally, though, *cf. Stovall v. Gartrell*, 332 S.W.2d 256, 263 (Ky. 1960) (“Strict compliance with constitutional provisions pertaining to amendments is required.”) (citing 11 Am. Jur., Const. Law, Sect. 28), abundant authority instructs that petitioners must strictly comply with the requirements of Metro Charter § 19.01, specifically. Several reasons compel this conclusion.

a. “[S]hall” is mandatory, not directory.

The plain text of Metro Charter § 19.01’s “prescribe a date” requirement instructs that compliance with § 19.01 is mandatory. §

²¹ Corrected A.R. at 624.

²² See, e.g., Order at 3, *Nashville English First*, No. 08-1912-I (Sep. 5, 2008).

19.01 provides, in straightforward terms, that a petition “shall” prescribe a date for an election on the proposed amendments. *Id.* (emphasis added). As the Tennessee Supreme Court has explained, “[i]n general, use of the word ‘shall’ in a statute indicates that the statutory provision is mandatory, not discretionary.” *Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 144, n.11 (Tenn. 2017) (emphasis added). “To determine whether the use of the word ‘shall’ in a statute is mandatory or merely directory, [courts] look to see ‘whether the prescribed mode of action is of the essence of the thing to be accomplished.’” *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012) (quoting 3 Norman J. Singer & J.D. Singer, *Sutherland Statutes and Statutory Construction* § 57:2 (7th ed. 2008)).

With respect to Metro Charter § 19.01’s “prescribe a date” requirement, the “essence of the thing to be accomplished” is to provide notice of the date when a referendum election will be held and the preceding signature deadline. *See* R. at 304. The point, then, is “to inform the voters of the time, place, and purpose of the election.” *See Nelson v. Haywood Cty.*, 87 Tenn. 781, 11 S.W. 885, 892 (1889). *See also Opinion of the Justs.*, 251 Ala. 78, 87 (1948) (“The purpose of having the notice of the election published is only to bring to the attention of the electorate the fact that the election is to be held on a certain date and to apprise the electorate of the nature of the proposed constitutional amendment.”). Consequently, compliance with § 19.01’s “prescribe a date” requirement is essential to provide fair notice to opponents and the electorate generally regarding both the applicable signature deadline and when a proposed referendum election will occur.

There is no plausible reading of § 19.01 that suggests that strict compliance with its requirements was excused by § 19.01's drafters, either. *Cf. Littlefield v. Hamilton Cnty. Election Comm'n*, No. E2012-00489-COA-R3-CV, 2012 WL 3987003, at *13 (Tenn. Ct. App. Sept. 12, 2012) ("Despite outdated case law to the contrary, the legislature has not allowed for 'substantial compliance' regarding the matter before us."). Legislators know how to permit substantial compliance in the context of referendum petitions when that is their intention. *See, e.g.*, Tenn. Code Ann. § 2-1-107(c) ("A person's regular signature shall be accepted just as such person's legal signature would be accepted. For example, for the purposes of this section 'Joe Public' shall be accepted just as 'Joseph Q. Public' would be accepted."). The drafters of Metro Charter § 19.01 did not do so. As a result, the Election Commission lacks authority to invent a substantial compliance standard that the text of Metro Charter § 19.01 itself does not support.

- b. *Anything less than strict compliance ensures expedited pre-election litigation; guarantees partisan outcomes regarding what is supposed to be the neutral process of election administration; and interferes with long-established reliance interests.*

Excusing non-compliance with § 19.01's "prescribe a date" requirement also invites serious and inevitable adverse public policy consequences. In particular, it creates a need for expedited pre-election litigation and guarantees partisan outcomes regarding what is supposed to be the neutral process of administering elections. When it comes to the circumstances of this specific case, it materially interferes with long-established reliance interests, too.

With respect to ensuring pre-election litigation: Permitting anything less than strict compliance with the requirements of § 19.01 requires “impossible line-drawing” and invites lawsuits over whether the requisite level of compliance has been achieved. *Cf. Nevadans for Nevada v. Beers*, 122 Nev. 930, 949, 142 P.3d 339, 351 (2006) (“anything less than strict compliance would require courts to assume an impossible line-drawing function, weighing or measuring differences between a circulated and filed petition in order to determine whether the circulated petition was properly certified for the ballot.”). As a result, departing from a strict compliance standard “is almost certain to be followed sooner or later by trouble of some kind.” *See Bullitt v. City of Philadelphia*, 230 Pa. 544, 549, 79 A. 752 (1911). The fact that that is precisely what has happened in this case—the first and only time that the Election Commission has departed from § 19.01’s strict compliance standard—is thus unsurprising.

Given Metro Charter § 19.01’s 80-day timeline, litigation over § 19.01 compliance must also be expedited to enable it to conclude on a pre-election basis. Again, this case itself illustrates the problem. Expedited litigation of the sort that transpired below should not be routine. It creates enormous burdens for courts and interested litigants, and it risks confusing the public about the status of a forthcoming election. As a consequence, courts *strongly* disfavor such litigation—even when constitutional rights are at stake. *See, e.g., Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). Under a substantial compliance standard, though, such expedited pre-election litigation is all but guaranteed.

Further, with respect to promoting partisan outcomes regarding

election administration: Because Tennessee has partisan election commissions, *see* Tenn. Code Ann. § 2-12-103(a), affording the Appellant discretion to excuse defects in § 19.01 petitions enables partisan election commissioners to find substantial compliance with § 19.01 when they agree with the substance of a petition and to find otherwise when they do not. By contrast, limiting the Election Commission's role to evaluating whether a petition strictly complies with Metro Charter § 19.01 prevents partisan influence from contaminating what is supposed to be the neutral process of election administration.

Once again, the partisan outcome in this case—one that is not plausibly attributable to a neutral dispute over 4 Good Government's compliance with § 19.01's requirements—powerfully illustrates the point. Regrettably, this case gives rise to overwhelming public perception that partisanship not only affected but *saturated* the Election Commission's decisions. *See, e.g.,* Steve Cavendish, *Election Commission Puts Anti-Tax Measure on Ballot, Declines to Do the Same for Council; Metropolitik: Says Councilmember Bob Mendes, 'Jim DeLanis has been running a circus over here'*, THE NASHVILLE SCENE (May 18, 2021), <https://www.nashvillescene.com/news/columns/article/21147388/election-commission-puts-antitax-measure-on-ballot-declines-to-do-the-same-for-council> (“It would be naive to say that politics have never played a part in the election commission's work, but it's hard to point to an instance where they've been this naked. At least now, with everything in litigation, we can quit pretending that this was about anything else.”).

This is not merely a problem of optics, either. Instead, because the Election Commission uniformly maintained a strict compliance standard

with respect to Metro Charter § 19.01's requirements—including its date requirements—until 4 Good Government's petition came along, the Election Commission's established practice created substantial reliance interests that opponents of the petition were entitled to rely upon. In particular, given that 4 Good Government's multirate petition was facially invalid under the Election Commission's longstanding standards, opponents of 4 Good Government's petition had no reason to advocate against it. Accordingly, the Election Commission's abrupt and unannounced departure from its established practice presented serious due process concerns. *See George v. Hargett*, 879 F.3d 711, 727 n. 9 (6th Cir. 2018) ("If, instead, the State officials had altered or departed from the established practice prior to the 2014 election without giving adequate notice of the change to the citizenry, then a stronger due process claim would be made out.").

Put another way: The Election Commission's established practice dictated that it would invalidate facially non-compliant petitions like 4 Good Government's. Consequently, as a matter of due process, opponents of 4 Good Government's petition were entitled to rely upon the Election Commission's established practice, *see id.*, which obviated the need to advocate against 4 Good Government's defective petition by encouraging people not to sign it. Without notice, though, the Election Commission departed from its established practice regarding § 19.01's strictly enforced date requirements with respect to 4 Good Government's petition alone.

This was error. The Election Commission illicitly afforded 4 Good Government valuable legal benefits that no other petitioner has ever

received. The Election Commission's illicit action also gives rise to serious concerns that its disparate treatment was driven by three partisan Commissioners' support for the content of and viewpoint expressed by 4 Good Government's proposed referendum. *But see Rosenberg v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination.") (citation omitted). At the same time, the Election Commission prejudiced opponents of 4 Good Government's petition who were entitled to rely upon the Election Commission's established practice. Thus, the Election Commission acted illegally, and the Chancery Court's judgment should be affirmed as a result.

- c. *Metro is entitled to deference with respect to its reasonable, pre-litigation interpretation of § 19.01's "prescribe a date" requirement.*

This Court should hold that Metro Charter § 19.01's "prescribe a date" requirement carries a strict compliance standard for yet another reason: It is the standard that Metro indicated applied in advance of the Election Commission's decision. Unlike the Election Commission's contrary interpretation of § 19.01, Metro's pre-decision interpretation of § 19.01 is also entitled to deference.

The Tennessee Supreme Court recently addressed this issue in *Wallace*, 546 S.W.3d at 52, n.7. There, the *Wallace* court indicated that when it comes to interpreting the Metro Charter, only "the body

responsible for the promulgation of the provision” is entitled to deference regarding its interpretation. *Id.* By contrast, interpretations furnished by the Election Commission and others who are not the Metropolitan Government are “not entitled to deference.” *Id.*

The instant dispute may be resolved on that basis alone. While the Election Commission’s interpretation of § 19.01’s “prescribe a date” requirement is “not entitled to deference,” *id.*, because Metro is “the body responsible for the promulgation of the provision,” Metro’s contrary interpretation is. *Id.* Here, prior to the Election Commission’s vote, Metro also made clear in a thorough, reasonable, and detailed opinion that § 19.01’s “prescribe a date” requirement must be strictly enforced.²³ As a result, this Court should defer to Metro’s interpretation of § 19.01, and the Chancery Court’s judgment should be affirmed.

C. 4 GOOD GOVERNMENT’S PETITION DID NOT EVEN SUBSTANTIALLY COMPLY WITH § 19.01’S “PRESCRIBE A DATE” REQUIREMENT.

Even if substantial compliance with Metro Charter § 19.01’s “prescribe a date” requirement were permitted, 4 Good Government’s petition failed to achieve substantial compliance with § 19.01’s “prescribe a date” requirement, either. “Substantial compliance’ has been defined as ‘actual compliance in respect to the substance essential to every reasonable objective of the statute.’” *Myers v. Hidden Valley Lakes Trustees, Inc.*, No. M2008-01677-COA-R3-CV, 2009 WL 1704419, at *5 (Tenn. Ct. App. June 16, 2009) (cleaned up). As detailed above, Metro Charter § 19.01’s “prescribe a date” requirement serves to apprise the

²³ See Corrected A.R. 679–80.

electorate of both when an election will occur and when the relevant signature deadline will be, and it enables proponents and opponents alike to advocate accordingly. Prescribing two dates on a petition, however, does not achieve either of these objectives.

In other words: Rather than complying with “the substance essential to every reasonable objective of” Metro Charter § 19.01’s “prescribe a date” requirement, *Myers*, 2009 WL 1704419, at *5, 4 Good Government’s petition complied with *none* of them. It also unfairly disadvantaged opponents in the process. *See supra* at 15–20. *See also* Corrected A.R. 679–80 (noting that: “Failure to provide a specific date on a referendum election petition is not a mere technicality. Section 19.01 prescribes a process by which the petitioner selects an election date, discloses that date on the petition to potential signers, and then has until 80 days before the election date to file the petition. The process is simple, clear, and understandable. 4GG improperly seeks to ‘game the system’ by listing multiple election dates on the petition, violating the Charter and creating confusion and ambiguity.”).

This failure was fatal. *See, e.g., Matter of Referendum Petition No. 94-1*, 1996 OK CIV APP 50, 920 P.2d 531, 532 (“The rule of substantial compliance was intended to save a referendum petition from challenges grounded on technical and clerical defects, but cannot be invoked to excuse non-compliance with the critical requirement of notice to the electorate of the specific legislative act they are called upon to approve or repeal.”). Thus, even if Metro Charter § 19.01’s “prescribe a date” requirement had been subject to a substantial compliance standard, that standard was not achieved, either.

VII. CONCLUSION

For the foregoing reasons, the Election Commission acted illegally by approving a multirate Metro Charter petition. The Election Commission then compounded that illegality by selecting an unpermitted *third* election date without authority to do so. Accordingly, the Chancery Court correctly ruled that the Election Commission acted illegally, and its judgment should be **AFFIRMED**.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-VI) contains 7,495 words pursuant to § 3.02(a)(1)(c), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

By: /s/ Daniel A. Horwitz
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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of December, 2021, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

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