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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*	§	
Petitioners-Appellees,	§	M2021-00723-COA-R3-CV
v.	§	Trial Court Case No.: 24-0472-IV
THE DAVIDSON COUNTY ELECTION COMMISSION,	§	
Respondent-Appellant.	§	

BRIEF OF *AMICUS CURIAE* SAVE NASHVILLE NOW IN SUPPORT OF NEITHER PARTY AND URGING DISMISSAL OF THIS CASE ON MOOTNESS GROUNDS

DANIEL A. HORWITZ, BPR #032176
LINDSAY B. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
(615) 739-2888

Counsel for Amicus Curiae

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes and Rules

III. INTRODUCTION

This case concerns a July 27, 2021 referendum election that the Davidson County Election Commission voted "to cancel" and then "conditionally reset" for September 21, 2021.[1] Physical limitations regarding time travel prevent the July 27, 2021 election—which is the subject of the order that the Election Commission has appealed—from being reinstated at this juncture. The Election Commission has additionally stipulated that the "conditionally reset" September 21, 2021 election—which *already* exceeded applicable date requirements[2]—will not occur. *See* **Attachment #1**, ¶ 6 ("[T]here cannot be and will not be a referendum election on the proposed charter amendments in question on September 21, 2021.").[3] As a consequence, this case is moot.

---

[1] Exhibit #2 to Election Commission's June 29, 2021 *Motion for An Expedited Briefing Schedule* (Declaration of Jeff Roberts), p. 1, ¶ 4 ("The Election Commission held a meeting on June 25, 2021. During that meeting, the Election Commission approved a motion (i) to cancel the July 27, 2021 referendum election on the Metro Charter amendments proposed by the 4 Good Government petition submitted on March 25, 2021; (ii) to conditionally reset the referendum election for September 21, 2021 . . . .").

[2] *See* Tenn. Code Ann. § 2-3-204(a) (providing that: "Elections on questions submitted to the people shall be held on dates set by the county election commission but not less than seventy-five (75) days nor more than ninety (90) days after the county election commission is directed to hold the election under the law authorizing or requiring the election on the question."); Metro Charter § 19.01 (providing that the date "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" is the date "prescribe[d]" by the petitioners).

As detailed below, no exception to mootness applies under the circumstances, either. As a result, this case should be dismissed as moot. To date, however, no party to this litigation has moved to dismiss it as moot. Accordingly, this Court should:

(1) Order the Parties to show cause why this case should not be dismissed as moot; and, thereafter:

(2) Dismiss this case as moot.

IV. RELEVANT FACTS AND PROCEDURAL HISTORY

Following extended delay,[4] the Davidson County Election Commission voted 3–2 to schedule a July 27, 2021 election on a legally problematic Metro Charter referendum petition.[5] Because the Election Commission did not seek judicial review before doing so, however, expedited litigation followed thereafter. The Election Commission's Chairman had also specifically anticipated that it would.[6]

Upon review, the Chancery Court determined that the referendum

---

[3] This Court may take judicial notice of this and other public records. *See, e.g.*, *Ind. State Dist. Council of Laborers v. Brukardt,* No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009), *perm. to app. denied* (Tenn. Aug. 24, 2009).

[4] Corrected A.R. at Declaration of Jeff Roberts, p. 2, ¶ 7 ("The Election Commission met to discuss the 4 Good Government Petition on April 6, April, 8, April 17, April 22 and May 10, 2021.").

[5] Corrected A.R. at 329, lines 15–18 ("So we have a three to two vote. Commissioners Evans and Davis and DeLanis voting aye and Commissioners Herzfeld and Starling voting nay.").

[6] Corrected A.R. at 398, lines 9–11 ("And there is also a very good chance that none of this will come to pass because we'll be engaged in a litigation.").

petition at issue was fatally defective for multiple reasons,[7] and it held that the Election Commission's decision to schedule the July 27, 2021 election "was fraught with essential illegality" and "was arbitrary, capricious, and illegal" as a consequence.[8] The court accordingly issued an order that stated, in pertinent part, as follows:

> Based on the foregoing, the Court respectfully REVERSES and VACATES the May 10, 2021 final order of The Davidson County Election Commission directing that 4 Good Government's second Petition (filed with the Metropolitan Clerk on March 25, 2021) be scheduled for referendum election on July 27, 2021.
>
> [. . .]
>
> The Court hereby GRANTS The Metropolitan Government of Nashville and Davidson County, Tennessee's petition for writ of certiorari and hereby issues a limited writ of mandamus in aid of the Court's writ of certiorari jurisdiction directing the Davidson County Election Commission to take appropriate, timely steps to effectuate the Court's rulings memorialized in this Memorandum and Final Order—and to make sure that the July 27, 2021 referendum election is duly cancelled.[9]

Significantly, the Election Commission did not seek or obtain a stay of the above order. Instead, it voted "to cancel" the July 27, 2021 election.[10] The Election Commission then "conditionally reset" the

---

[7] R. at 324, ¶¶ 4–8.

[8] R. at 323.

[9] R. at 325.

[10] *See* Exhibit #2 to Election Commission's June 29, 2021 *Motion for An Expedited Briefing Schedule* (Declaration of Jeff Roberts), p. 1, ¶ 4 ("The

cancelled July 27, 2021 election for September 21, 2021,[11] and it filed the instant appeal thereafter.

Shortly after "conditionally reset[ting]" the challenged referendum election for September 21, 2021, though, the Election Commission formally stipulated—in a separate proceeding—that "there cannot be and will not be a referendum election on the proposed charter amendments in question on September 21, 2021[,]" either.[12] Indeed, the Election Commission itself has moved to dismiss that separate proceeding on the basis that litigation regarding the September 21, 2021 election is moot.[13] The Election Commission has maintained this appeal—regarding the cancelled July 27, 2021 election—regardless. Accordingly, *amicus curiae* Save Nashville Now has moved this Court for leave to file this Brief for the purpose of asserting that:

A. This case is moot; and

B. No exception to mootness applies.

Election Commission held a meeting on June 25, 2021. During that meeting, the Election Commission approved a motion (i) to cancel the July 27, 2021 referendum election on the Metro Charter amendments proposed by the 4 Good Government petition submitted on March 25, 2021; (ii) to conditionally reset the referendum election for September 21, 2021 . . . .").

[11] *Id.*

[12] *See* **Attachment #1**, ¶ 6 ("[T]here cannot be and will not be a referendum election on the proposed charter amendments in question on September 21, 2021.").

[13] *See* **Attachment #2** (Election Commission's Motion to Dismiss Save Nashville Now's certiorari action as moot).

V. ARGUMENT

A. THIS CASE IS MOOT.

1. The July 27, 2021 election has been cancelled; it cannot occur; and it is impossible for any court to reinstate the Election Commission's decision to hold it.

"A case will be considered moot when it no longer serves as a means to provide some sort of judicial relief to the prevailing party." *Quinteros v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2008-02674-COA-R3-CV (Order, May 6, 2009) (dismissing moot election litigation) (citations omitted). This standard contemplates "practical relief[.]" *Knott v. Stewart Cty.*, 207 S.W.2d 337, 338 (Tenn. 1948). It also requires "the adjudication of present rights." *See Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998) (citations omitted). Accordingly, "cases must remain justiciable throughout the entire course of the litigation[.]" *Id.*

Here, it is impossible for this Court to reinstate the Davidson County Election Commission's decision to schedule the July 27, 2021 referendum election that is the subject of this appeal. The Election Commission "approved a motion . . . to cancel" that election months ago.[14] Because July 27, 2021 has long since come and gone, reinstating that election is also beyond the limits of human capability. *Cf. Thompson v. DeWine*, 7 F.4th 521 (6th Cir. 2021) ("Without a time machine, we cannot go back and place plaintiffs' initiatives on the 2020 ballot. So plaintiffs' first request for injunctive relief is moot." (citing *Lawrence v. Blackwell*,

[14] *See* Exhibit #2 to Election Commission's June 29, 2021 *Motion for An Expedited Briefing Schedule* (Declaration of Jeff Roberts), p. 1, ¶ 4.

430 F.3d 368, 371 (6th Cir. 2005); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) ("The 2014 election has come and gone, so we cannot devise a remedy that will put the Green Party on the ballot for that election cycle.")).

Given this context, this Court cannot provide the Appellant any effective relief at this juncture. Simply stated: It is not possible for this Court—or any court—to reinstate "the May 10, 2021 final order of The Davidson County Election Commission directing that 4 Good Government's second Petition (filed with the Metropolitan Clerk on March 25, 2021) be scheduled for referendum election on July 27, 2021[,]"[15] which is the subject of this appeal. Accordingly, this Court should order the Parties to show cause why this case should not be dismissed as moot. Thereafter, as this Court and other courts have done on myriad previous occasions where—as here—subsequent events rendered election litigation moot, this Court should dismiss this action as moot. *See, e.g.*, *Quinteros*, No. M2008-02674-COA-R3-CV (Order, May 6, 2009) (dismissing moot election litigation); *State v. Metro. Gov't of Nashville-Davidson Cty.*, No. M2008-01978-COA-R3-CV (Order, Mar. 5, 2009) (dismissing moot election litigation), *Tenn. Black Voter Project v. Shelby Cty. Election Comm'n*, No. W2018-01964-COA-R10-CV (Order, Nov. 20, 2018) ("With the passing of the November 6, 2018 general election, most of the issues raised in the Rule 10 Application, which pertained to the trial court injunction, are now moot."); *Tenn. Democratic Party v. Hamilton Cty. Election Comm'n*, No. E2018-01721-COA-R3-CV,

[15] R. at 325.

2020 WL 865282, at *2 (Tenn. Ct. App. Feb. 21, 2020) ("The primary and general elections proceeded with Ms. Smith on the ballots. In light of these events, we agree with the trial court that the requests for injunctive relief are moot."), *no app. filed*; *Thompson*, 7 F.4th 521 (holding, post-November 2020, in election litigation concerning the November 2020 election, that: "This case is moot."); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021); *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007); *Common Sense Party v. Padilla*, 834 F. App'x 335, 336 (9th Cir. 2021) (noting in a COVID-19 election case that "the occurrence of an election moots relief sought with respect to that election cycle") (citation omitted); *Miss. Cty. v. City of Osceola*, 511 S.W.3d 330, 333 (Ark. 2017) ("Because the date for the special election has already passed and because the pertinent issues have been resolved in the companion case, we dismiss the instant appeal as moot."); *Gorciak v. Paulus*, 615 P.2d 411, 412 (Or. App. 1980) ("May 20 is long since passed, and we take judicial notice that the primary election was held on that date. ORS 41.410(2). Nothing that we might do at this time in this case could have any effect on that past event. The case is, therefore, moot, and this appeal must be dismissed."); *State v. Lake Cir. Ct.*, 201 N.E.2d 332, 332–33 (Ind. 1964) (dismissing case involving candidacy for office of county treasurer in primary election because the election date had passed and the issues were therefore moot); *Lindsey v. Holland*, 95 So. 2d 754, 755 (La. Ct. App. 1957) ("The present proceedings were filed on September 18, 1956 to enjoin the election called for September 25, 1956. On September 24, 1956, a permanent injunction was issued after trial prohibiting the holding of the election scheduled for the

following day. Insofar as the appeal lies from said judgment enjoining the election of September 25, 1956, which date is long past, it is dismissed for the matter is moot[.]"); *State v. Felger*, 877 N.E.2d 673, 674 (Ohio 2007) ("This is an appeal from a judgment granting a writ of mandamus to compel a mayor and a village council to review a petition requesting a special election on the surrender of the village's corporate powers and to fix an election date if signatures on the petition are determined to be sufficient. Because the mandamus claim was rendered moot when the election date requested for the corporate-powers issue passed before the case was resolved, we reverse the judgment of the court of appeals and deny the writ.").

2. The Election Commission has stipulated that the "conditionally reset" September 21, 2021 election will not occur.

Rather than seeking—let alone obtaining—a stay of the Chancery Court's order, the Election Commission voted "to cancel" the July 27, 2021 election and then "conditionally reset" it for September 21, 2021.[16] Significantly, there is no serious claim that that decision comported with the deadlines established by Tennessee Code Annotated § 2-3-204(a) or

[16] *See* Exhibit #2 to Election Commission's June 29, 2021 *Motion for An Expedited Briefing Schedule* (Declaration of Jeff Roberts), p. 1, ¶ 4 ("The Election Commission held a meeting on June 25, 2021. During that meeting, the Election Commission approved a motion (i) to cancel the July 27, 2021 referendum election on the Metro Charter amendments proposed by the 4 Good Government petition submitted on March 25, 2021; (ii) to conditionally reset the referendum election for September 21, 2021 . . . .").

Metro Charter § 19.01, which have long since expired. *See* Tenn. Code Ann. § 2-3-204(a) ("Elections on questions submitted to the people shall be held on dates set by the county election commission but not less than seventy-five (75) days nor more than ninety (90) days after the county election commission is directed to hold the election under the law authorizing or requiring the election on the question."); Metro Charter § 19.01 (providing that the date "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" is the date "prescribe[d]" by petitioners). Neither is there any serious claim that the September 21, 2021 election was lawfully "reset" in compliance with the limited authority to reset an election conferred by Tennessee Code Annotated § 2-3-204(c). *See id.* (providing that elections on questions may be reset "to coincide with the regular primary or general election").

Regardless of those illegalities, though, the Election Commission has since stipulated that the September 21, 2021 election will not occur at all. *See* **Attachment #1**, ¶ 6 ("[T]here cannot be and will not be a referendum election on the proposed charter amendments in question on September 21, 2021."). Consequently, in this appeal, the Election Commission cannot plausibly be seeking relief permitting that election. Indeed, the Election Commission itself has moved to dismiss separate litigation regarding the September 21, 2021 election as moot on the basis that the election will not occur. *See* **Attachment #2**. Thus, the Election Commission cannot be seeking "practical relief" through this appeal, *see Knott*, 207 S.W.2d at 338, and it cannot be seeking an "adjudication of present rights" regarding the conditionally scheduled September 21,

2021 election, either. *See Ford Consumer Fin.*, 984 S.W.2d at 616.

B. NO MOOTNESS EXCEPTION APPLIES.

Tennessee law recognizes the following four exceptions to the mootness doctrine:

> (1) when the issue is of great public importance or affects the administration of justice;
>
> (2) when the challenged conduct is capable of repetition and is of such short duration that it will evade judicial review;
>
> (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and
>
> (4) when the defendant voluntarily stops engaging in the conduct.

See Hooker v. Haslam, 437 S.W.3d 409, 417–18 (Tenn. 2014).

When present, these exceptions are "applicable in the court's discretion[.]" *Id.* at 417. Here, however, none of these exceptions applies.

1. <u>The public interest exception does not apply because the issues involved are unlikely to arise in the future.</u>

The Tennessee Supreme Court has made clear that "the public interest exception should not be invoked if the issue is unlikely to arise in the future[.]" *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 210 (Tenn. 2009) (collecting cases). This mandate precludes review of this appeal. Significantly, no litigation like this has *ever* occurred previously in the history of Metro government because it requires, at minimum, a combination of the following four exceedingly unlikely events:

(1) an assertedly defective Metro Charter referendum petition;

(2) the Davidson County Election Commission voting to approve

the assertedly defective Metro Charter referendum petition despite serious concerns about its defective nature;

(3) the Davidson County Election Commission voting to take such action without seeking advance judicial review; and

(4) a successful pre-election challenge to the Davidson County Election Commission's action undertaken on an expedited basis.

No combination of events like this has ever happened before. Nor are these events likely to happen again in the future, in no small part because (as the Chancery Court noted) the decision to hold an election on an assertedly defective referendum—over the thoughtful objections of the Davidson County Election Commission's own typical counsel—without seeking advance judicial review is inexplicable. *See* R. at 323 ("The Election Commission, therefore, committed prejudicial legal error in its May 10, 2021 final order placing 4GG's second Petition on the ballot for a referendum election on July 27, 2021 without requesting the Court for a declaratory judgment determination, given the thoughtful concerns raised by the Metropolitan Government, especially in light of the Court's rulings in *4GG-I*.").

Neither are the errors that rendered the "4 Good Government" petition defective—such as prescribing two separate dates for an election to be held, notwithstanding Metro Charter § 19.01's straightforward instruction that referendum petitioners "prescribe a date . . . at which the electorate of the metropolitan government will vote to ratify or to reject the amendments proposed[,]" *see id.*; *see also* R. at 318 ("The Petition is invalid as a whole because it failed to comply with the 'prescribe a date' requirement of the Metropolitan Charter § 19.01.")—likely to recur.

Indeed, no other referendum petitioner in Metro's multi-decade history has ever failed to comply with such a basic requirement.

In light of the foregoing, the issues presented in this case are not likely to arise again. This case does not satisfy the public interest exception to the mootness requirement as a result. *Norma Faye Pyles Lynch Family Purpose LLC*, 301 S.W.3d at 210 ("[T]he public interest exception should not be invoked if the issue is unlikely to arise in the future[.]").

2. <u>The challenged conduct is not capable of repetition but evading review.</u>

The mootness exception concerning conduct that is "capable of repetition and is of such short duration that it will evade judicial review[,]" *Hooker*, 437 S.W.3d at 417, does not plausibly apply here, either. Indeed, from the perspective of the Appellant—the party seeking further review—it will *never* apply.

To begin, for the "capable of repetition but evading review" exception to apply, the party opposing dismissal on mootness grounds bears the burden of proving that both prongs of the exception are satisfied. *See Lawrence*, 430 F.3d at 371 ("The party asserting that this exception applies bears the burden of establishing both prongs.") (collecting cases). This requires a showing that: "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Here, neither prong is met for several reasons.

First, the challenged conduct is *the Election Commission's* decision to schedule an election on a fatally defective referendum petition. The Election Commission, however, is empowered to seek judicial review on a pre-decision basis—something that it has not only done previously, but also did last year in the "*4GG-I*" litigation regarding the very same petitioner. *See* R. at 323 ("The Election Commission, therefore, committed prejudicial legal error in its May 10, 2021 final order placing 4GG's second Petition on the ballot for a referendum election on July 27, 2021 without requesting the Court for a declaratory judgment determination, given the thoughtful concerns raised by the Metropolitan Government, especially in light of the Court's rulings in *4GG-I*."). Here, by contrast, despite being fully capable of seeking and obtaining pre-decision review, the Election Commission itself chose not to.

To illustrate this point further: It bears emphasizing that *during* the actual proceedings at issue in this case, the Election Commission voted to seek pre-decision judicial review regarding a competing ballot measure.[17] Specifically, with respect to a competing referendum proposed by the Metropolitan Council, the Election Commission voted—on a partisan basis—to "direct our attorneys to seek a declaration" before scheduling an election on it.[18] The specific motivations underlying the

[17] Corrected A.R. 512, lines 7–14; Corrected A.R. 517, lines 6–7.

[18] Corrected A.R. 512, lines 7–14 ("So here's my suggestion, scratch this out here, and that is a motion that would state as follows: We direct our attorneys to seek a declaration in the existing litigation against us concerning Metro resolution 837 in order to defend the commission's authority and to provide the voter with a clear and understandable ballot,

partisan majority's conflicting choices regarding these two competing referenda do not appear in the record.

Second, a case evades judicial review only when it challenges conduct that is in its duration "too short to be fully litigated prior to its cessation or expiration[.]" *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quotation omitted). This showing is not possible here, in no small part because the matters in dispute were fully litigated below. More importantly, though, to make such a showing, a litigant must demonstrate that it made "a full attempt to prevent [its] case from becoming moot" by, for instance, diligently seeking a timely resolution. *See Empower Texans, Inc. v. Geren*, 977 F.3d 367, 371 (5th Cir. 2020) (quotation omitted); *accord United States v. Taylor*, 8 F.3d 1074, 1076–77 (6th Cir. 1993); *United States v. Cleveland Elec. Illuminating Co.*, 689 F.2d 66, 68 (6th Cir. 1982) (per curiam).

Here, the Election Commission did no such thing. To the contrary, the Election Commission actively obstructed litigation from taking place on a timely basis by taking five separate meetings spanning more than a month to make its decision on a matter that it knew was time-sensitive,[19] thereby forcing *others* to initiate litigation on an emergency basis.

Third, "challenged action . . . is not capable of repetition if it is based

---

and we request Metro and the Metro council to revise 837 to make it clear and understandable."); Corrected A.R. 517, lines 6–7 ("[W]e have three for, two against. The motion carries.").

[19] Corrected A.R. at Declaration of Jeff Roberts, p. 2, ¶ 7 ("The Election Commission met to discuss the 4 Good Government Petition on April 6, April, 8, April 17, April 22 and May 10, 2021.").

on a unique factual situation[.]" *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560 (citing *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006)). As detailed in the preceding section, the facts underlying this dispute are unprecedented in any respect; they are not at risk of recurring; and the Election Commission itself is—and was—in a position to prevent them from occurring at all simply by seeking pre-decision review.

Fourth, as the Appellant is arguing at this moment in a related case, although the time period involved—75 to 90 days—is short, it is still sufficient for litigants to obtain review. *See* **Attachment #2**, p. 13 n.2 (in which the Election Commission contends that: "[T]here is no evasion of review. When a referendum is set on 75 to 90 days' notice pursuant to Tenn. Code Ann. § 2-3-204, there is sufficient time for a judicial challenge. For all of these reasons, the issues in this case are not capable of repetition but evading review.").

For all of these reasons, the Election Commission cannot meet its burden of demonstrating that "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lawrence*, 430 F.3d at 371 (quoting *Weinstein*, 423 U.S. at 149). Accordingly, this action is not capable of repetition but evading review.

3–4. Collateral consequences do not remain, and the Election Commission did not voluntarily cease its conduct.

Neither do the third or fourth mootness exceptions—"when the

primary subject of the dispute has become moot but collateral consequences to one of the parties remain" and "when the defendant voluntarily stops engaging in the conduct"—plausibly apply here. *See Hooker*, 437 S.W.3d at 418. This is not a case where a litigant is experiencing ongoing consequences as a result of a conviction. *See May v. Carlton*, 245 S.W.3d 340, 344 & n.3 (Tenn. 2008), *State v. McClintock*, 732 S.W.2d 268, 272 (Tenn. 1987), *State v. McCraw*, 551 S.W.2d 692, 694 (Tenn. 1977); *Parton v. State*, 483 S.W.2d 753, 754 (Tenn. Crim. App. 1972). Nor is it a case where the Election Commission has voluntarily ceased the challenged conduct; indeed, to the contrary, the Election Commission is committed to maintaining it. Accordingly, these remaining mootness exceptions do not apply, either.

VI. CONCLUSION

For the foregoing reasons, this case is moot, and no exception to mootness applies. Accordingly, this Court should order the Parties to show cause why this case should not be dismissed as moot. Thereafter, because this case is moot, this Court should dismiss it.

Respectfully submitted,

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ, BPR #032176
LINDSAY B. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
(615) 739-2888

Counsel for Amicus Curiae

CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-VI) contains 4,228 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
Daniel A. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of September, 2021, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

Wallace W. Dietz
Robert E. Cooper, Jr.
Lora Barkenbus Fox
Allison Bussell
Melissa Roberge
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
Wally.Dietz@nashville.gov
cooperre57@msn.com
lora.fox@nashville.gov
allison.bussell@nashville.gov
melissa.roberge@nashville.gov

Counsel for the Metropolitan Government

James F. Blumstein
2113 Hampton Avenue
Nashville, Tennessee 37215
James.Blumstein@Vanderbilt.edu

Austin L. McMullen
BRADLEY ARANT BOULT CUMMINGS, LLP
1600 Division Street, Suite 700
P. O. Box 340025
Nashville, Tennessee 37203
AMcMullen@Bradley.com

Counsel for the Davidson County Election Commission

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

SAVE NASHVILLE NOW,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 21-0669-IV**
	)	
DAVIDSON COUNTY ELECTION COMMISSION,	)	
	)	
	)	
Respondent.	)	

STIPULATION

The Davidson County Election Commission, (the "Commission"), hereby stipulates to and admits the following facts:

1. On June 25, 2021, the Commission voted to appeal the decision of Chancery Court that blocked the referendum election on proposed charter amendments that had been set for July 27, 2021.

2. On June 25, 2021, the Commission canceled the July 27, 2021, election and conditionally reset the July 27 referendum election conditioned on authorization from an appropriate court.

3. The conditionally reset referendum election for September 21, 2021, would have to satisfy the timelines set out by law.

4. In accordance with an order from the Court of Appeals, the appeal in question of the Chancery Court decision is proceeding according to a non-expedited schedule.

5. Under the circumstances, the required time line for holding the conditionally reset election on September 21, 2021, cannot be met; therefore, the conditions for allowing the conditionally set election to take place on September 21, 2021, cannot be satisfied.

6. Accordingly, there cannot be and will not be a referendum election on the proposed charter amendments in question on September 21, 2021.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

SAVE NASHVILLE NOW,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 21-0669-IV**
	)	
DAVIDSON COUNTY ELECTION COMMISSION,	)	
	)	
	)	
Respondent.	)	

MOTION TO DISMISS OR, ALTERNATIVELY, FOR JUDGMENT ON THE PLEADINGS

Respondent, Davidson County Election Commission (the "Election Commission"), hereby moves the Court, pursuant to Rule 12.02(6), Tennessee Rules of Civil Procedure, to dismiss the Petition for Writ of Certiorari ("Petition") filed by Petitioner, the Save Nashville Now political action committee (the "PAC"), or, alternatively, for judgment on the pleadings in favor of the Election Commission under Rule 12.03, Tennessee Rules of Civil Procedure. In support of this Motion, the Election Commission hereby states as follows:

OVERVIEW

This case is not justiciable. The Court, therefore, does not have jurisdiction to adjudicate Petitioner's claims, and the case should be dismissed

The only relief the PAC seeks and, under a writ of certiorari, can seek is cancellation of the September 21, 2021, conditional referendum election. That election cannot and will not happen, as the Election Commission has already stipulated. Under a writ of certiorari, the Court reviews action taken by the Election Commission, so the focus of the Petition on the conditionally-set referendum on September 21, 2021, is not an oversight by Petitioner; it is a

focus dictated by the nature of a writ-of-certiorari proceeding. And the backward-looking nature of a writ-of-certiorari proceeding also explains why the case is moot, why there is not a live case or controversy, and why Petitioner lacks standing. Consideration of hypothetical future authority of the Election Commission to set or reset an election – once an appellate court rules in a different case – is off the table and beyond the authority of this Court to consider in the context of this writ-of-certiorari proceeding. A writ of certiorari is not a vehicle that allows courts to consider the intrinsic correctness of an agency's decision. *Heyne v. Metropolitan Nashville Bd. of Educ.*, 380 S.W.3d 715, 729 (Tenn. 2012).

In sum, this case implicates several justiciability doctrines, any of which independently mandate dismissal and deprive this Court of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is a political action committee (PAC) – a registered "single measure campaign committee" -- that allegedly spent money opposing a referendum election that was scheduled for July 27, 2021. (Petition at ¶ 1.) Pursuant to the directive in this Court's June 22, 2021, Order, (*Metropolitan Gov't v. Election Comm'n*, Davidson County Chancery Court case no. 21-0433-IV, June 22, 2021 Mem. and Final Order, at 41; Petition at ¶ 21), on June 25, 2021, the Election Commission cancelled the July 27, 2021, election that the PAC spent its money opposing, (Petition at ¶ 23; Petition at Ex. 8, p. 27 and 85-86).

On June 25, 2021, following the process it adopted in the context of litigation in 2020 involving a different set of charter-amendment proposals submitted by the group 4 Good Government, (*4 Good Government v. Davidson County Election Comm'n*, Davidson County Chancery Court case no. 20-1010-III, Nov. 3, 2020 Order at 4), the Election Commission conditionally scheduled an election on the referendum for September 21, 2021, conditioned on

authorization from an appropriate court to proceed with the election. (Petition at ¶ 23; Petition at Ex. 8, p. 27-28 and 85-86.) The PAC did not appear at the June 25 meeting. Further, the PAC did not indicate any opposition to the Election Commission's decision to cancel the July 27 election or conditionally schedule an election for September 21.

In order to hold an election, the Election Commission must complete various pre-election actions as required by law. For example, to hold an election on September 21, 2021, the Election Commission was required to mail military and overseas ballots on or before August 7, 2021. (*Metropolitan Gov't v. Election Comm'n*, Tennessee Court of Appeals case no. M2021-00723-COA-R3-CV, June 29, 2021, Motion for Expedited Briefing and Hearing, at Roberts Declaration ¶ 5.)

In an effort to meet the conditions for a September 21, 2021, conditional election, and as contemplated by the Court and the parties in *Metropolitan Gov't v. Election Comm'n*, Davidson County Chancery Court case no. 21-0433-IV, counsel for the Election Commission sought expedited appellate review in the Tennessee Supreme Court and Court of Appeals, but expedited review was denied. (Petition at Ex. 6; *Metropolitan Gov't v. Election Comm'n*, Tennessee Supreme Court case no. M2021-00723-SC-RDM-CV, July 9, 2021 Order; *Metropolitan Gov't v. Election Comm'n*, Tennessee Court of Appeals case no. M2021-00723-COA-R3-CV, July 13, 2021, Order.) The Election Commission's appeal of this Court's June 22, 2021, Order is currently proceeding in the Court of Appeals on a non-expedited schedule pursuant to the Tennessee Rules of Appellate Procedure.

Based on the denial of expedited appellate review, there cannot be and will not be an election on September 21, 2021. (July 22, 2021, Motion to Stay Proceedings at Ex. A [Stipulation].) For example, the August 7, 2021, deadline to mail military and overseas ballots

has come and gone without the ballots being mailed; as a result, an election on September 21, 2021, cannot and will not take place.

On July 13, 2021, after the July 27 election had already been canceled, the PAC initiated this writ-of-certiorari action by filing its Petition. In its Petition, the only relief that the PAC requests is for the Court to reverse and vacate the September 21, 2021, conditional election and order the Election Commission to cancel the September 21, 2021, election. (Petition at 18.) All relief that the PAC requests relates to the putative and now-foreclosed September 21, 2021, election.

This is not happenstance. Under a writ-of-certiorari proceeding, a court reviews prior decisions of the Election Commission. *Heyne*, 380 S.W.3d at 728. The focus is on specific conduct; by nature, it is a backward-focused, appellate proceeding designed to review specific actions of the Election Commission under a limited, highly deferential standard. *Id*. at 728-29. Unlike a declaratory judgment proceeding, which is unavailable to review the conduct of the Commission, *State of Tennessee* ex rel. *Moore & Assocs. v. West*, 246 S.W.3d 569, 572 (Tenn. Ct. App. 2005), a writ-of-certiorari proceeding is necessarily limited in scope. Under a writ-of-certiorari proceeding, a court reviews for arbitrariness (typically final) Commission action that has occurred. Such review does not encompass future-oriented issues, such as whether the Commission can ever, in the future, set or reset an election on the proposed charter amendments submitted by 4 Good Government if an appellate court overturns this Court's June 22, 2021, decision that blocked placing those proposed charter amendments on an election ballot.

In response to the Election Commission's July 22 Motion to Stay Proceedings, the PAC argued for the first time that the Election Commission can never hold the referendum election. However, the Petition does not include any request for relief other than reversal of the Election

Commission's June 25 decision to set a conditional election for September 21, 2021. The limited scope of relief that Petitioner seeks is dictated by the writ-of-certiorari format for this Court's review. The Petition does not seek – and under a writ-of-certiorari proceeding could not seek, *Moore & Assocs.*, 246 S.W.3d at 572 – a declaration that the Election Commission can never hold the referendum election or that the Election Commission be enjoined from scheduling a referendum election in the future, such as following an appellate court decision. This type of future-oriented relief is beyond the scope of judicial authority in a writ-of-certiorari proceeding and likely explains the Petition's laser focus on the Commission's decision to set a conditional election on September 21, 2021, on the proposed charter amendments.

Also not included in the Petition is any request for relief with respect to the July 27, 2021, election date that was cancelled by the Election Commission in compliance with this Court's Order. The PAC does not seek any relief regarding the July 27 election date, yet the PAC argues that the Election Commission's May 10, 2021, decision to schedule the referendum for July 27, 2021, was in violation of statute, (Petition at ¶ 33). The only injury cited by the PAC is its decision to spend money opposing the July 27 referendum election, (Petition at ¶ 1), and the PAC cites no purported injury resulting from the Election Commission's June 25 decision to set a September 21 conditional election.

STANDARD OF REVIEW

A Rule 12.02(6) motion tests the legal sufficiency of the complaint. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

A defendant can challenge standing or mootness "by a motion to dismiss under Rule 12.02(6) or in proper cases by a motion for judgment on the pleadings under Rule 12.03[.]" *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976); *Metropolitan Gov't v. Board of*

Zoning Appeals, 477 S.W.3d 750, 754 (Tenn. 2015) ("A respondent to a petition for writ of certiorari may file a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(6) based upon the petitioner's lack of standing."); *Alliance for Native Am. Indian Rights, Inc. v. Nicely*, 182 S.W.3d 333, 338–39 (Tenn. Ct. App. 2005) ("Determining whether a case is moot is a question of law[.]"). A Rule 12.02(6) motion can also be used to challenge ripeness and whether a case requests an improper advisory opinion. *Mills v. First Horizon Home Loan Corp.*, 363 S.W.3d 551 (Tenn. Ct. App. 2010). These all address a Court's authority to adjudicate a case.

Upon "application by any party," a motion to dismiss, including a motion under Rule 12.02(6), "shall be heard and determined before trial unless the court orders that the hearing and determination thereof be deferred until the trial." Tenn. R. Civ. P. 12.04 (emphasis supplied). A motion for judgment on the pleadings may be brought "[a]fter the pleadings are closed but within such time as not to delay the trial." Tenn. R. Civ. P. 12.03. Accordingly, this motion is timely, proper and provided for in this Court's scheduling Order, filed August 4, 2021.

A court considering a motion to dismiss may consider items subject to judicial notice, matters of public record, orders and items appearing in the record of the case without converting the motion into one for summary judgment. *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016); *see also Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004) (permitting consideration of matters outside the pleadings, such as ordinances, on a motion for judgment on the pleadings without converting it to a motion for summary judgment).

ARGUMENT

This is a case about an election setting that did not and will not cause the PAC any injury and that will not occur. The case is not justiciable. It is moot, and the PAC does not have standing. The case should be dismissed.

I. THIS ACTION SHOULD BE DISMISSED BECAUSE THE CASE IS MOOT AND THE PAC DOES NOT HAVE STANDING.

Tennessee courts are "limited to deciding issues that qualify as justiciable, meaning issues that place some real interest in dispute and are not merely theoretical or abstract[.]" *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013) (internal citations and quotations omitted). To be "justiciable," an issue must present "'a genuine, existing controversy requiring the adjudication of presently existing rights.'" *Id.* (quoting *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2007)).

An issue must be justiciable "not only at the inception of the litigation but also throughout its pendency." *Hargett*, 414 S.W.3d at 96 (citing *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203–04 (Tenn. 2009)). To ensure issues remain justiciable, courts utilize the doctrines of "standing, [mootness], ripeness, and the prohibition against advisory opinions." *Thomas v. Shelby Cnty.*, 416 S.W.3d 389, 393 (Tenn. Ct. App. 2011).

The present action implicates each doctrine – standing, mootness, ripeness and the prohibition against advisory opinions. Each doctrine independently mandates dismissal of this action.

The doctrine of "standing" ensures an issue is justiciable at a litigation's "inception," while the related doctrine of "mootness" ensures it remains justiciable "throughout its

pendency." *Hargett*, 414 S.W.3d at 96.[1] "Standing is not dispensed in gross." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Rather, a plaintiff must demonstrate standing as to each "particular issue[ ]" in a dispute. *See American Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006); *accord Davis*, 554 U.S. at 734 ("[A] plaintiff must demonstrate standing for each claim he seeks to press'" and "for each form of relief that is sought.") (quotations omitted).

The requirement of standing serves a gatekeeping function "[g]rounded upon concerns about the proper – and properly limited – role of the courts in a democratic society." *Darnell*, 195 S.S.3d at 619-20 (internal quotations omitted). It prevents courts of law from undertaking tasks assigned to the political branches." *Lewis*, 518 U.S. at 349.

The doctrine of standing includes a "concrete injury requirement" and an imminence requirement, both of which have "separation-of-powers significance." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). For that reason, courts have for about a century rejected broad citizenship and taxpayer standing to challenge government conduct, *Frothingham v. Mellon*, 262 U.S. 447 (1923), and have required that any injury not only be concrete and particularized (or individuated) but also imminent, not "some day" into the future. *Lujan*, 504 U.S. at 564. Broad citizenship or taxpayer standing would permit a breach of the separation of powers, causing a "transfer" of power from the political branches "to the courts." It would "enable" the courts "to assume a position of authority over the governmental acts of another and co-equal department." *Id*. at 577 (internal citation omitted). This implicates the distribution of

[1] Tennessee's "justiciability doctrines … mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." *Lynch Family Purpose*, 301 S.W.3d at 203. For that reason, "Tennessee courts have consistently found federal precedents to be helpful in addressing issues of justiciability and have adopted many of the significant components of federal jurisprudence." *Id.* at 203 n.3.

powers required by the Tennessee Constitution. Article II, Section 1 of the Tennessee Constitution divides governmental powers into three "distinct" departments – legislative, executive, and judicial. Tenn. Const., Art. II, §1. Article II, Section 2 expressly prohibits a person belonging to one department from exercising power of another department. Proper application of the rules of the doctrine of standing strictly curtail the risk of constitutional abuse of power by the courts.

A plaintiff citizen or taxpayer who shares an injury with and whose injury is not individuated or different from taxpayers or citizens generally does not have standing to challenge government conduct. *Darnell*, 195 S.W.3d at 620 (Standing "may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens"). These generalized grievances are insufficient to confer standing. *Frothingham*, 262 U.S. at 485. The fact that a party supports or spends money to lobby on an issue does not distinguish that party from any other opponent or proponent. Such an interest is generalized and insufficient to satisfy requirements for standing. *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013).

To have standing, the plaintiff must "ha[ve] a sufficiently personal stake in the outcome of the controversy to warrant a judicial resolution of the dispute." *SunTrust Bank v. Johnson*, 46 S.W.3d 216, 222 (Tenn. Ct. App. 2000).

Establishing standing requires that the plaintiff "show three indispensable elements by the same degree of evidence as other matters on which the plaintiff bears the burden of proof." *Darnell*, 195 S.W.3d at 620 (quotations omitted). These indispensable elements are: (1) "a distinct and palpable injury, as opposed to a conjectural or hypothetical injury"; (2) "a causal connection between the claimed injury and the challenged conduct"; and (3) "the alleged injury

is capable of being redressed by a favorable decision of the courts." *Lynch v. City of Jellico*, 205 S.W.3d 384, 395 (Tenn. 2006) (citations omitted).

As noted, part of the requirement for showing an "injury" is an imminence requirement, not a "some day" in the future potential eventuality. *Lujan*, 505 U.S. at 564. A "threatened injury" can suffice to confer standing in some circumstances, but the threat must be "*certainly* impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original). Alleging a "*possible* future injury" is not sufficient. *Id.* (emphasis in original).

"Mootness" is "the doctrine of standing set in a time frame: the requisite personal interest, or standing, that existed at the commencement of the litigation must continue throughout its existence in order for the litigation not to become moot." *Whalum v. Shelby Cnty. Election Comm'n*, 2014 WL 4919601, at *7 (Tenn. Ct. App. Sept. 30, 2014) (quoting 59 Am. Jur. 2d *Parties* § 31)); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (Standing "demands that an actual controversy persist throughout all stages of litigation.") (quotations omitted). If the "redressability" element of standing is lost during the litigation such that the case "no longer serves as a means to provide relief to the prevailing party," the case "will be considered moot[.]" *McIntrye v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994).

A. The case no longer serves as a means to provide the requested relief and, thus is moot.

This case is moot and should be dismissed because this action no longer serves as a means to provide the relief requested by the PAC. All the relief sought by the PAC in this case – and that can be sought under a writ of certiorari – is tied to the September 21, 2021, conditional election. The PAC petitioned the Court "[t]o adjudicate this Petition; reverse and vacate the Davidson County Election Commission's illegal action setting a conditional election for September 21, 2021; and to order the Election Commission to cancel its illegal September 21,

2021 election on 4 Good Government's Petition." (Petition at 18.) The Election Commission has already stipulated that there cannot be and will not be a referendum election on September 21, and there is no further relief requested from the Court, or, under certiorari, that can be granted by the Court. There is nothing left to cancel. The "redressability" element of the PAC's claim to standing has been lost. As a result, this case is moot and must be dismissed. *Id.* The suit was (and must only have been) brought to challenge a particular action of the Election Commission – the conditional resetting of an electgion for September 21. The challenge is moot now that the challenged conditional reset election will not take place. *Id*. Whether or not an election can be set or reset in the future is beyond the scope of this Court's authority in the context of a writ-of-certiorari proceeding -- and would not satisfy the imminence requirement for standing and would require an impermissible advisory opinion on future speculative events, even if permitted under certiorari review

The Election Commission's decision to schedule a September 21 conditional election was always expressly conditioned on obtaining authorization and direction from an appropriate court to proceed with the election. (Petition at ¶ 23; Petition at Ex. 8, p. 27-28 and 85-86). And that authorization would have to be obtained quickly because of pre-election deadlines, such as the August 7, 2021, deadline to mail military and overseas ballots. On June 25, the same day the Election Commission scheduled the conditional election and authorized an appeal from this Court's June 22 decision, counsel for the Election Commission filed a notice of appeal. Counsel promptly sought expedited appellate review in the Tennessee Supreme Court and Court of Appeals. But the appellate courts denied expedited review. By denying expedited review, the appellate courts made it impossible to hold an election on September 21, rendering this case moot. *Lufkin v. Board of Prof'l Responsibility of the Supreme Ct.*, 336 S.W.3d 223, 226 (Tenn.

2011) ("A case may lose its justiciability and thereby become moot as the result of a court decision … during the pendency of the case.") The appellate court decisions and the passage of time have compelled the result that there cannot be and will not be an election on September 21. The Election Commission has stipulated to this fact.

As dictated by the nature of the writ-of-certiorari proceeding, the only relief sought by the PAC in this case is cancelling the September 21 conditional election. Specifically, the PAC requests that the Court reverse and vacate the September 21 conditional election and order the Election Commission to cancel the September 21 conditional election. (Petition at 18.) There is nothing for the Court to add to what has already been done. By the passage of time and the decisions of the appellate courts, there will not be a September 21 election. There is no actual controversy in this writ-of-certiorari case. *Hollingsworth*, 570 U.S. at 705. The Court cannot grant any relief that has not already occurred. No relief sought by the PAC in its Petition or available to it in a writ-of-certiorari proceeding can be effectively granted by this Court. There is nothing left for this Court to redress. *McIntrye*, 884 S.W.2d at 137. That means the Petitioners no longer have standing because they cannot meet the redressability requirement, and the case is moot. *County of Shelby v. McWherter*, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996) ("A case will generally be considered moot when the prevailing party will be provided no meaningful relief from a judgment in its favor.")

The Sixth Circuit Court of Appeals recently faced similar claims and dismissed the case as moot. *Thompson v. DeWine*, case no. 2:20-cv-02129, 2021 WL 3464343 (6th Cir. Aug. 6, 2021). There, the plaintiffs attempted to have a referendum placed on the ballot for the November 2020 election, but they were unsuccessful. *Id.* at *1. They blamed their problems on restrictions relating to the COVID-19 pandemic. *Id.* Plaintiffs in *Thompson* sought declaratory

and injunctive relief tied specifically to the November 2020 election. *Id.* "That election has come and gone – and with it the prospect that plaintiffs can get any of the relief they asked for." *Id.* "Without a time machine, we cannot go back and place plaintiffs' initiatives on the 2020 ballot," the Court observed. *Id.* at *2. Accordingly, the Sixth Circuit found the case to be moot and ordered it be dismissed. *Id.* *1.

In *Thompson*, "[p]laintiffs sought specific relief," but the Court could not "give plaintiffs what they ask for." *Id*. at *3. The "limited nature of the relief sought" could not be granted, and so the case was moot. *Id*. [2]

[2] As in *Thompson*, the PAC's request for relief is targeted to a specific election (the September 21 conditional election), and, under a writ of certiorari, must be so targeted because the Court's jurisdiction is appellate in nature, limited to reviewing for arbitrariness the final action of the Commission. The case, therefore, is moot, and mootness exceptions do not apply. Mootness exceptions are focused on future conduct, typically beyond the scope of certiorari review. The concept of an issue being "capable of repetition yet evading review," *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972), is not at issue here, for at least three reasons. First, there is no evasion of review. When a referendum is set on 75 to 90 days' notice pursuant to Section 2-3-204, Tennessee Code Annotated, there is sufficient time for a judicial challenge. This Court in *Metropolitan Government v. Election Commission*, Davidson County Chancery Court case no. 21-0433-IV, reviewed the setting of a referendum election and ordered the election cancelled. That case is on appeal and will be adjudicated, meaning there is no lack of opportunity for judicial review, and the mootness exception does not apply. Second, cases that are capable of repetition yet evading review are typically class actions, as explained in *Sosna v. Iowa*, 419 U.S. 393, 400 (1975). In those situations, if the challenged law remains in effect, the issues may remain alive for members of the class, even if not for the named plaintiff; so, the plaintiff is allowed standing to represent the ongoing interests of the class. But the same interests are not present when there is no class action. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This is not a class action, so the mootness exception does not apply. Third, in non-class-action situations, such as this case, there must be evidence that the same party will be affected in future actions. *Id.* But there is no evidence that future petitions will affect the PAC, whose very nature is to oppose the specific referendum at issue. The PAC describes itself as a "single measure campaign committee." (Pet. at ¶ 1.) Since the PAC exists solely to oppose this referendum, it will not be adversely affected by putative future referendum petitions. The mootness exception for the "public interest" doctrine is also forward-looking, while certiorari, as a form of appellate review of administrative action, is backward-looking. "[A]s a general rule, Tennessee's . . . courts should dismiss [cases] that have become moot regardless of how appealing it may be to do otherwise." *Allen v. Lee*, No. M2020-00918-COA-R3-CV, 2021 WL 2948775 at *2 (Tenn. Ct. App. July 14, 2021). That is "[o]ur judicial heritage speaks to restraint in addressing issues when parties do not have a continuing, real, live, and substantial interest in the outcome." *Id.* The "public interest" exception relates to future matters of public policy significance. *Id.* at *2-3. If, as is the case here, the particular circumstances are unlikely to arise again in the future, then the public interest exception does not apply. *Id.* at *3. Any issue related to the referendum at issue is being litigated in the case, *Metropolitan Government v. Election Commission*,

In the instant case, the Petition seeks "specific relief," and this Court "cannot give plaintiffs what they ask for." *Id*. This is the case because of the nature of the relief sought in the Petition; this is also the case because the nature of certiorari review links the scope of permissible relief to the Election Commission's decision to set or reset a conditional election for September 21, in the aftermath of this Court's decision to block the election scheduled for July 27. The PAC has already gotten the relief it is asking for – there won't be a September 21 election. And that relief, which Petitioner has sought, is the only relief available to Petitioner under a writ-of-certiorari proceeding. As with the *Thompson* case, "because of intervening events – the passing of the election" deadlines and denial of expedited consideration by the appellate courts, the Court "cannot give plaintiff[] what [it] ask[s] for." *Id.* at *3. When the appellate courts decided against setting an expedited schedule, the potential to hold a referendum election on September 21 went away. Now that the August 7, 2021, deadline to mail military and overseas ballots has passed, it would take a time machine for a September 21 election to occur. But the calendar cannot be turned back, and the Election Commission has already stipulated that there will be no election on September 21. This case does not and cannot serve as a basis to grant the PAC the relief it seeks, which was tied (and under certiorari must have been tied) solely to the September 21, 2021, conditional election setting. As a result, as in *Thompson*, the case is moot and must be dismissed.

Tennessee Court of Appeals case no. M2021-00723-COA-R3-CV, which is currently on appeal. The PAC has not asserted or demonstrated with evidence any likelihood of future harm from a future charter amendment referendum. Its interest in the September 21 conditional referendum no longer persists. And the certiorari process is an inappropriate vehicle to focus on the potential of future injury, particularly when an appeal that encompasses these issues is currently pending. Under the circumstances, there is no basis for altering the "general rule of mootness" which is that retention of a moot case "should occur only under exceptional circumstances where the public interest clearly appears." *Allen v. Lee*, 2021 WL 2948775 at *3 (internal quotation marks omitted). That is not this case.

B. The PAC does not have standing.

The PAC does not have standing because it does not have a distinct, impending, palpable injury capable of being redressed by a favorable decision of this Court and causally connected to the Election Commission's June 25 decision to schedule a September 21 conditional election. *Lynch*, 205 S.W.3d at 395 (stating the indispensable elements of a distinct and palpable injury, causally connected to the challenge conduct and capable of being redressed by a favorable decision of the court); *see also Clapper*, 568 U.S. at 409 (injury must be certainly impending); *Lujan*, 505 U.S. at 564 (injury must be imminent).

1. The PAC does not have standing because it does not have an imminent injury.

Expenditure of funds is insufficient to confer standing on a plaintiff. The PAC – a single-measure political action committee – argues that it incurred costs advocating against the referendum election that was scheduled for July 27. Incurring costs in reaction to a risk of harm does not create standing. *Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398, 416 (2013). "If the law were otherwise, an enterprising plaintiff would be able to secure . . . standing simply by making an expenditure based on a nonparanoid fear." *Id.*

To create standing, the PAC's fear of the conditional election must be more than "nonparanoid." *Id.* The conditional election must be "certainly impending." *Id.* "In other words, [parties] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.*

If the PAC had spent any funds in response to the conditional election set for September 21 – an allegation the PAC does not even make – the PAC would have to show that the conditional election is certainly impending. The conditional election is not now and has never been certainly impending. The September 21 conditional election was always conditioned on a

favorable decision from an appropriate court directing that the election go forward. For the conditional election to have ever been certainly impending, an expedited briefing and decision schedule would have been required from an appellate court. No such decision ever came.

Even before the appellate courts decided against an expedited schedule, it would have been inappropriate to conclude that the conditional election was certainly impending. This is because the courts "have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 413. "It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990).

The PAC knew all along that the September 21 conditional election was not certainly impending, and that is why the PAC did not incur any costs opposing it. Incurring expenses alone, without the feared result being certainly impending, does not confer standing, so the PAC's argument that it incurred expenses does not give it standing to bring this action.

The PAC has nothing more than a "generalized grievance" that, "no matter how sincere, is insufficient to confer standing." *Hollingsworth*, 570 U.S. at 706. The PAC is, at most, in the position of a citizen or a taxpayer, which is insufficient to create standing. *Fannon v. City of LaFollette*, 329 S.W.3d 418, 427 (Tenn. 2010).

2. The PAC does not have standing because there is no causal connection between the PAC's claimed injury and the September 21 conditional election.

While spending to support or oppose an election is insufficient to confer standing, PAC's claim to standing is even weaker than that of an entity that spends money on an election it is challenging. The PAC claims standing based on spending for a different election setting, not the conditional setting that it is challenging in this case. Therefore, this case lacks a causal

connection between the PAC's claimed injury and the conduct at issue. Without this causal connection, there is no standing and the case must be dismissed.

This action challenges the Election Commission decision to schedule a September 21 conditional election. (Petition at 18.) However, in its Petition, the PAC claims it is aggrieved by a different, earlier Election Commission decision – scheduling the July 27 election. (Petition at ¶¶ 1-2.) The PAC alleges that it is aggrieved by this earlier May 10 decision[3] because it spent money opposing the earlier July 27 referendum election. (*Id.*) But even if spending money to oppose a referendum were sufficient to establish standing, which it is not, *Hollingsworth*, 570 U.S. at 706, the PAC does not and cannot make the allegation necessary to establish standing. The missing allegation is that the PAC's alleged "injury" was caused by the Election Commission's decision at issue – *i.e.* the June 25 decision to schedule a conditional election for September 21. Since the PAC's alleged injury is not impending and not causally connected to the Election Commission's June 25 decision, the PAC does not have standing. *Lynch*, 205 S.W.3d at 395.

The PAC must plead and prove standing as to the particular issue in dispute. *Darnell*, 195 S.W.3d at 619. Stated differently, the PAC must plead and prove standing for the relief sought in the case. *Davis*, 554 U.S. at 734. The PAC does neither. The PAC's Petition makes clear that the injury the PAC complains of is the result of a decision not at issue in this case. In its Petition, the PAC alleges that after the Election Commission's May 10 decision, the PAC

[3] It is too late for the PAC to challenge the Election Commission's May 10 decision to schedule the referendum election for July 27. Any claim relating to the May 10 decision – the only decision that the PAC alleges resulted in its purported injury – is time barred based on Section 27-9-102, Tennessee Code Annotated. A certiorari petition has to be filed within 60 days of the decision that the challenger claims is erroneous. Tenn. Code Ann. § 27-9-102. The PAC's challenge to the May 10 decision, thus, had to be filed by July 9, which is 60 days after May 10. The PAC waited until July 13 to file this action, meaning it's too late for the PAC to challenge the May 10 decision that it claims resulted in its purported injury.

"began preparing for the Election Commission's scheduled July 27, 2021 election." (Petition at ¶ 19 (emphasis added).) The PAC alleges that it "solicited campaign contributions and expended hundreds of thousands of dollars urging voters to come to the polls on July 27, 2021 and vote against 4 Good Government's proposed referendum." (Petition at ¶ 20 (emphasis added).) However, the July 27, 2021, election has already been cancelled, as directed by this Court's June 22 Order. (Petition at ¶ 23.) The Election Commission cancelled the July 27 election on June 25, almost three weeks before the PAC filed this certiorari action on July 13. The relief that the PAC seeks all relates to the Election Commission's June 25 decision to schedule a conditional election for September 21. (Petition at 18.) However, the PAC does not allege any injury caused by the June 25 decision. This disconnect between the injury the PAC complains of and the relief the PAC seeks means the PAC does not have standing, and the Court must dismiss this action.

3. The PAC does not have standing because its claimed injury is not redressable in this proceeding.

In addition to the complete absence of a certainly impending injury and a complete absence of any causal connection between the Election Commission's June 25 decision and the money that the PAC alleges it spent prior to that date, the PAC does not have standing for the additional reason that any alleged injury cannot be redressed in this proceeding.

The money the PAC has already spent is water under the bridge and is not capable of being redressed by a favorable decision of this Court in this case – even if such spending would qualify as an injury for purposes of standing, which it does not. This is for three reasons.

First, as discussed above, the PAC spent its money opposing the July 27 election. (Petition at ¶ 20.) That election was cancelled June 25 pursuant to this Court's order in another case. *Metropolitan Gov't v. Election Comm'n*, Davidson County Chancery Court case no. 21-0433-IV, June 22, 2021 Mem. and Final Order, at 41. No order from this Court in this case –

which challenges the September 21 conditional election setting – will redress the money the PAC spent challenging an earlier, different election setting.

Second, decisions by the appellate courts and the passage of time have eliminated the possibility of holding an election on September 21. As a result, the Election Commission has already stipulated that there will not be an election on September 21. There is no relief left for this Court to grant.

Third, the money that the PAC already spent is an alleged past injury that cannot be remedied or brought back by a decision from this Court. The PAC does not have an impending injury, which is a necessary requirement for the PAC to establish standing. *Clapper*, 568 U.S. at 409 (to confer standing, an injury must be "*certainly* impending" (emphasis in original)). An impending injury is one "about to happen," *Brunette v. City of Burlington*, No. 2:15-cv-00061, 2018 WL 4146598 (D. Vt. Aug. 30, 2018), or "about to occur," *Garrett v. City of Camden*, No. 20-17470 (NLH) (KMW), 2020 WL 7640566 at *2 (D.N.J. Dec. 23, 2020), but the PAC does not allege an injury about to happen. It alleges an injury that it claims already happened, based on an event that will not occur and is not the subject of this action. Moreover, this action does not, and cannot, seek damages against the Election Commission, so no favorable decision from this Court could give the PAC redress for the money it allegedly spent opposing a different election setting than the one challenged by this action.

To the extent that Petitioner seeks future-oriented relief – precluding the Election Commission from ever holding a referendum election on the 4 Good Government's proposed charter amendments – that relief is unavailable through a writ-of-certiorari proceeding. Under certiorari, courts review agency action – customarily "final" action – that has already occurred (including a final decision not to act in a certain situation). The review is highly deferential, and

focuses on whether the agency exercised a "clear error in judgment." *In re Cumberland Bail Bonding*, 599 S.W.3d 17, 23 (Tenn. 2020) (internal cite omitted). An agency action will be "invalidated only if it constitutes an abuse of discretion," and "will be upheld" if "'any possible reason' exists justifying the action." *McCallen v. Memphis*, 786 S.W.2d 633, 641 (Tenn. 1990). If an agency has acted arbitrarily, then the relief is to undo ("invalidate[]") that agency action. This is backward-looking relief, focusing, very deferentially, on the rational basis for the agency's action. *Id*. The relief the PAC seeks in its latter-day submission (a response to the Commission's Motion to Stay) – a declaration that the Election Commission can never set or reset the charter amendment referendum that this Court blocked – is not a review of agency action and is beyond the scope of this Court's authority in a writ-of-certiorari proceeding.

The Petition seeks to challenge the Election Commission's action in responding to this Court's decision to block the charter amendment referendum. The writ-of-certiorari process can be invoked for such a challenge, provided that other jurisdictional prerequisites are met, such as standing, ripeness and non-mootness. But the alleged harm the PAC now ostensibly seeks to redress (in an effort to avoid mootness) fundamentally differs from and is unavailable in this certiorari proceeding. The PAC's new request – a declaratory judgment that the Election Commission will never be able to schedule the referendum election – is future-oriented and not based on any final action of the Election Commission. Under this new request, there is no Election Commission action to be invalidated. The request for future-oriented relief is beyond the scope of a writ-of-certiorari proceeding and therefore cannot be redressed in this action. And that, in turn, means that the redressability prong of the standing requirement cannot be satisfied in this proceeding; so the Petition must be dismissed for lack of standing and, in the absence of standing, this Court lacks jurisdiction to provide the remedy sought.

In summary, taking the PAC's allegations as true, they do not establish that the PAC was aggrieved by the Election Commission's June 25 decision to schedule a September 21 conditional election. The PAC has not carried its burden of pleading, and its Petition must be dismissed.

II. THE PAC'S NEW ARGUMENT THAT THE ELECTION COMMISSION CAN NEVER HOLD THE SUBJECT REFERENDUM DOES NOT PREVENT DISMISSAL OF THIS CASE. THE PAC DID NOT REQUEST ANY RELIEF IN ITS PETITION RELATING TO THIS ARGUMENT, AND ANY SUCH RELIEF WOULD BE BEYOND THE SCOPE OF CERTIORARI REVIEW, WOULD IMPERMISSIBLY COMBINE ORIGINAL AND APPELLATE JURISDICTION, WOULD NOT BE RIPE AND WOULD BE THE SUBJECT OF AN ADVISORY OPINION IF DECIDED BY THIS COURT.

The PAC raised a new argument in response to the Election Commission's Motion to Stay Proceedings, but this new argument was not the subject of any relief sought by the PAC in its Petition. The PAC's new argument is that the Election Commission can never hold the referendum election.

The PAC did not raise this argument or seek any relief on this subject in its Petition. Instead, the PAC's only requested relief involved the September 21 conditional election setting. And this focus of the Petition was for good reason. The Petition seeks a writ of certiorari, and the relief that Petitioner now seeks in its latter-day submission is unavailable in the context of certiorari. By asking for a determination that the Election Commission will never be able to schedule the referendum election, the Petitioner does not seek to review an action of the Commission, which is what can be achieved under certiorari, but seeks to pursue a broader, future-oriented claim that is not ripe and not proper in a certiorari proceeding. Petitioner now seeks forward-looking relief, which is unavailable under certiorari, which is limited to backward-looking, appellate analysis.

The PAC raised the new, never-ever-hold-an-election argument for the first time in a motion response. (PAC's July 27, 2021, Response in Opposition to Respondent's Motion to Stay Proceedings at 8 ("[A] prompt and timely ruling that . . . no future date on the 4 Good Government petition would be lawful would accord the Petitioner essential relief").) In a certiorari proceeding, the PAC may not seek a future-oriented declaration that the Election Commission can never hold the referendum election. In conformity with the limited scope of review under a certiorari proceeding, the Petition itself does not seek to enjoin the Election Commission from scheduling a future referendum election if so authorized and directed by an appropriate court. The limited focus in the Petition is mandated by the limited scope of review of the Election Commission's action as dictated by the writ-of-certiorari process. Petitioner's new contention, which is basically for a declaratory judgment, is inappropriate as a procedure for review of the Commission's conduct and, in any event, suffers from the defects of lack of ripeness and lack of concreteness or imminence of an injury. It is, when unpacked, a request for an impermissible advisory opinion.[4]

A. The PAC's new argument that the Election Commission can never hold an election on the subject referendum is beyond the scope of certiorari review and impermissibly combines the Court's original and appellate jurisdiction.

[4] From a purely technical viewpoint, the Court should not consider the new claims in the context of resolving this motion to dismiss. Petitioners have not altered or amended their Petition, so it stands as filed. When considering a motion to dismiss, the Court is limited to an examination of the complaint alone. *PNC Multifamily Capital Institutional Fund XXVI Limited P'ship v. Bluff City Community Development Corp.*, 387 S.W.3d 525, 537 (Tenn. Ct. App. 2012). The basis for the motion is that the allegations of the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law. *Id.* The Court has no duty to create a claim that the pleader does not spell out in his complaint. *Id.* at 538. The failure to state a claim for which relief can be granted is determined from an examination of the complaint alone. *Wolcotts Fin. Svcs., Inc. v. McReynolds*, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990). The PAC is required to state its demand for the judgment for the relief it seeks in its pleading. Tenn. R. Civ. P. 8.01. The PAC's argument that the Election Commission can never schedule any future election on the subject referendum, regardless of what an appellate court decides, is a request for relief outside the complaint and outside the pleadings. Accordingly, it is not an appropriate request for relief and is not appropriately considered in response to the subject motion.

Even if the PAC had pled or could have pled a request that the Court grant the relief of declaring that the Election Commission can never hold an election on the subject referendum – which it did not and could not do since a declaratory judgment process is an alternative to not a supplement for a writ of certiorari, *Moore & Assocs.*, 246 S.W.3d at 572 – the Court could not consider that request for two related reasons. The first reason deals with the scope of certiorari review in this case. The second reason deals with the rule against exercising original and appellate jurisdiction in the same case.

1. The PAC's new argument is beyond the scope of certiorari review in this case.

The PAC's argument that the Election Commission can never hold an election on this referendum is beyond the scope of certiorari review in this case, which is limited to reviewing the Election Commission's June 25 decision to schedule a September 21 conditional election.

This is a certiorari case. (Petition at 1, ¶ 4.) By its nature, certiorari is a form of appellate jurisdiction limited to reviewing the lower tribunal's decision to determine if the lower tribunal exceeded its jurisdiction or acted illegally, arbitrarily or capriciously. *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001). In this case, that means reviewing the Election Commission's June 25 decision to schedule a September 21 conditional election. The PAC's new argument that the Election Commission could not hold an election on the subject referendum at any future date is beyond the scope of the Election Commission's June 25 decision. On certiorari, review is limited to the June 25 decision to schedule a September 21 conditional election and, specifically, the question of whether the September 21 conditional election exceeds the Election Commission's jurisdiction or is illegal, arbitrary or capricious.

In contrast, the PAC's the new argument speculates about what might happen well into the future, veering into the realm of a declaratory judgment and/or injunction. But a declaratory

judgment action is unavailable to Petititoners; a writ-of-certiorari proceeding is a process of review that is an alternative to, not a supplement to, a declaratory judgment action. As the Court of Appeals has explained, "[t]he primary consequences of a determination that a party must seek judicial review through the common law writ of certiorari procedure is that the trial court must apply a limited standard of review to decisions already made by administrative officials, rather than address the issue *de novo* as the initial decision maker." *Moore & Associates*, 246 S.W.3d at 574 (emphasis supplied). Accordingly, any pursuit of a declaratory judgment in this case would be improper and would have to be dismissed.

In cases like this one, where a writ of certiorari is the appropriate procedural mechanism for review of an administrative decision, Tennessee courts have held that a declaratory judgment action should be dismissed. This occurred in *Duracap Asphalt Paving Co. Inc. v. City of Oak Ridge*, 574 S.W.3d 859 (Tenn. Ct. App. 2018), where an unsuccessful bidder challenged a municipal contract award. The losing bidder filed a complaint that requested both review under writ of certiorari and entry of a declaratory judgment. *Id.* at 861. Writ of certiorari was the appropriate means for reviewing the decision, so the trial court dismissed the original causes of action, including the request for declaratory judgment, in compliance with the holdings of *Goodwin v. Metropolitan Board of Health*, 656 S.W.2d 383 (Tenn. Ct. App. 1983), and its progeny. *Duracap*, 574 S.W.3d at 861-63. The certiorari action was itself ultimately dismissed because the unsuccessful bidder failed to comply with certain procedural requirements for a writ of certiorari. *Id.* at 863. On appeal, the losing bidder argued that it was "entitled to sue for declaratory relief as opposed to pursuing relief by way of a writ of certiorari." *Id.* at 865 (emphasis supplied). The Court of Appeals disagreed based on its decision that certiorari review was the appropriate method of review in that case. *Id.* at 870. Because certiorari review was the

proper means to decide the unsuccessful bidder's challenge to the contract award, the Court of Appeals affirmed the trial court's decision to dismiss the bidder's original causes of action, including the request for declaratory judgment. *Id.* at 871. The trial court's decision to dismiss the declaratory judgment action stood even though the certiorari action was separately dismissed because of the losing bidder's procedural errors that applied only to the certiorari action. A writ of certiorari and a declaratory judgment action were deemed mutually exclusive alternatives under the circumstances, as is the case herein.

Similarly, in *State* ex rel. *Moore & Associates, Inc. v. West*, the Court of Appeals held that a declaratory judgment action challenging an administrative decision should be dismissed when a writ of certiorari is the proper means to review the decision. 246 S.W.3d 569 (Tenn. Ct. App. 2005). That case involved a Metro zoning decision. *Id.* at 572. Instead of filing for a writ of certiorari, the applicant brought a declaratory judgment action challenging the zoning decision. *Id.* at 573. Metro moved to dismiss the case, arguing that a declaratory judgment action does not lie to review the zoning decision. *Id.* at 573. The trial court denied the motion, but the Court of Appeals disagreed and reversed. *Id.* at 572, 573. The Court of Appeals held that certiorari was the appropriate vehicle to review the administrative decision and that the declaratory judgment action should have been dismissed. *Id.* at 576, 581-82. "Regardless of the labels assigned to the complaint or the language of the requests for relief," the Court of Appeals stated, the court must look to the nature of the claim. *Id*. at 576. This action has been filed as and is properly a certiorari case, which precludes the availability of relief under a declaratory judgment.

Whether the Election Commission might be able to schedule a future election on the subject referendum would depend on future events, such as decisions by the appellate courts.

Those future events have not happened yet. As a result, a decision as to whether the Election Commission could ever, under any circumstances, hold an election on the subject referendum is beyond the scope of certiorari review.

2. A decision on the PAC's new argument would violate the rule against exercising original and appellate jurisdiction in the same case.

The Court could not decide the PAC's new argument in this case because it would violate the rule against exercising a court's original and appellate jurisdiction in the same case. This Court has recognized that distinction in the Metro case against the Election Commission, case number 21-0433-IV. While certiorari is part of the Court's appellate jurisdiction, declaratory judgment and injunction are within the Court's original jurisdiction. Tennessee courts have condemned allowing a case to go forward with causes of action under the trial court's original jurisdiction and causes of action under the trial court's appellate jurisdiction. *See, e.g.*, *Tennessee Environmental Council v. Water Quality Control Bd.*, 250 S.W.3d 44 (Tenn. Ct. App. 2007); *Goodwin v. Metropolitan Bd. of Health,* 656 S.W.2d 383 (Tenn. Ct. App. 1983).

The Tennessee Court of Appeals has stated:

> [W]e wish to heartily condemn that which appears to us to be a growing practice, i.e., the joinder of an appeal with an original action and the simultaneous consideration of both at the trial level. This Court is of the firm opinion that such procedure is inimical to a proper review in the lower certiorari Court and creates even greater difficulties in the Court of Appeals. The necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident.

Goodwin, 656 S.W.2d at 386.

Joining an original cause of action with an appellate cause of action has been described as a "fatal flaw" that leads to "unorthodox proceedings." *Tennessee Environmental Council*, 250 S.W.3d at 58. Declaratory judgment causes of action included with certiorari causes of action should be "dismissed at the very outset." *Goodwin*, 656 S.W.2d at 387; *see also State v. Farris*,

562 S.W.3d 432, 447 (Tenn. Ct. App. 2018); *State ex rel. Byram v. City of Brentwood*, 833 S.W.2d 500, 502 (Tenn. Ct. App. 1991). "We emphasize that a litigant may not bring claims invoking the original jurisdiction of the Chancery Court when he or she has initiated the proceedings by seeking a writ of certiorari." *State v. Farris*, 562 S.W.3d 432, 447 (Tenn. Ct. App. 2018). "A direct or original action cannot be brought in conjunction with an action that is appellate in nature, such as judicial review under the APA or common law writ of certiorari." *Universal Outdoor, Inc. v. Tennessee Dep't of Transp.*, No. M2006-02212-COA-R3-CV, 2008 WL 4367555, at *9 (Tenn. Ct. App. Sept. 24, 2008). Likewise, a trial court cannot take up a claim for injunctive relief as part of a certiorari action. *See City of Murfreesboro v. Lamar Tennessee, LLC*, No. M2010-00229-COA-R3CV, 2011 WL 704412, at *3 (Tenn. Ct. App. Feb. 28, 2011)

This rule exists because of differing standards applicable to each type of relief. The Court has a very narrow scope of review on a writ of certiorari. *Leonard Plating*, 213 S.W.3d at 903. Under a writ of certiorari, the Court will affirm the administrative action unless it is illegal, arbitrary or capricious. Tenn. Code Ann. § 27-8-101. "[A] governmental body's actions will not survive scrutiny under certiorari review if they are not supported by material evidence or can otherwise be considered illegal, arbitrary, or capricious." *Duracap Asphalt Paving Co. Inc. v. City of Oak Ridge, 574 S.W.3d 859, 871 n. 7 (Tenn. Ct. App. 2018)*. "[A] common-law writ of certiorari does not authorize a reviewing court to evaluate the intrinsic correctness of a governmental entity's decision." *Heyne*, 380 S.W.3d at 729. "A common-law writ of certiorari proceeding does not empower the courts to redetermine the facts found by the entity whose decision is being reviewed." *Id.* "[R]eviewing courts may not reweigh the evidence or substitute their judgment for the judgment of the entity whose decision is being reviewed." *Id.* This

standard differs significantly from the declaratory judgment standard. The Court of Appeals summarized the difference: on a writ of certiorari "neither the Chancery Court nor [the Court of Appeals] determines any disputed question of fact or weighs any evidence," but a declaratory judgment "is tried in a real Court . . . subject to the Rules of Civil Procedure and rules of evidence." *Goodwin,* 656 S.W.2d at 387. "Like water and oil, the two will not mix." *Id.* at 386.

Any effort by the PAC to include in this case a request for injunction or declaratory judgment – such as its argument that the Election Commission can never hold the referendum election at any time in the future – would violate *Goodwin* and its progeny and must be rejected by the Court.

Moreover, since the action that the PAC challenges is administrative action by the Election Commission, certiorari is the only means of review available. When review of the administrative action of the Election Commission is at issue, the Court reviews that action under a writ of certiorari, not under a declaratory judgment. As the Court of Appeals has held, "such review [of the Commission's action] is appropriate under the common law writ of certiorari, not a direct action for declaratory judgment." *Moore & Assocs.*, 246 S.W.3d at 572. That is, a writ of certiorari review of the Election Commission's action not only cannot proceed simultaneously with a declaratory judgment action, as *Goodwin* and its progeny mandate, but a declaratory judgment action in such circumstances is inappropriate. *Duracap*, 574 S.W.3d at 871. It cannot proceed at all and would have to be dismissed.

Finally, any proposed amendment of the Petition to include claims under the Court's original jurisdiction, such as for declaratory judgment or injunction, would be futile. *Butler v. Madison County Jail*, 109 S.W.3d 360, 369 (Tenn. Ct. App. 2002).

B. The PAC's new argument that the Election Commission can never hold an election on the subject referendum is not ripe for determination and would be an advisory opinion if decided by this Court.

Under the law of justiciability, a Tennessee court will only decide "issues that place some real interest in dispute and are not merely theoretical or abstract[.]" *Hargett*, 414 S.W.3d at 96 (Tenn. 2013) (internal citations and quotations omitted). An issue must present "a genuine, existing controversy requiring the adjudication of presently existing rights." *Id.* (quoting *Vogt*, 235 S.W.3d at 119.

The doctrine of ripeness and the prohibition against advisory opinions fall within the concept of justiciability. *Thomas*, 416 S.W.3d at 393. "The ripeness doctrine focuses on whether the dispute has matured to the point that it warrants a judicial decision. The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *B&B Enterprises of Wilson County, LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010).

Whether the Election Commission could ever schedule an election on this referendum at any time in the future depends on unknown future events, likely including a decision by an appellate court in the pending appeal, *Metropolitan Gov't v. Election Comm'n*, Tennessee Court of Appeals case no. M2021-00723-COA-R3-CV. These are "uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all," *B&B Enterprises*, 318 S.W.3d at 848, making the question of whether the Election Commission could ever schedule a referendum election unripe and nonjusticiable.

Even if this Court were, inappropriately, to consider Petitioner's new argument to arise in the context of a declaratory judgment, deciding now whether the Election Commission could ever schedule an election on this referendum at any time in the future would also violate the rule

against advisory opinions. "The courts of this State have no right to render an advisory opinion." *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961). "It is well-settled that the role of the court is to adjudicate and settle legal rights, not to give abstract or advisory opinions." *Mills*, 363 S.W.3d at 554. The prohibition against advisory opinions can arise in the context of a request for a declaratory judgment, which the PAC seems to invoke (improperly) through the argument in its motion response that the Election Commission could hold an election at "no future date." In addition to being improper because this is a writ-of-certiorari proceeding, and a declaratory judgment proceeding cannot proceed in such circumstances, a declaratory decision at this time whether or not the Election Commission could ever hold an election on this referendum would be an invalid advisory opinion:

> [A] declaratory judgment action cannot be used by a court to decide a theoretical question, render an advisory opinion which may help a party in another transaction, or allay fears as to what may occur in the future[.] Thus, in order to maintain an action for a declaratory judgment, a justiciable controversy must exist. For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a legally protectable interest must be at stake. If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable. If the rule were otherwise, the courts might well be projected into the limitless field of advisory opinions.

State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000) (internal citations and quotation marks omitted). The PAC's argument that the Election Commission could never hold a referendum election presents a theoretical question that depends on future, contingent events. Since (i) the PAC has never requested any such declaratory relief in its Petition, since (ii) a declaratory judgment proceeding cannot proceed in the context of a writ-of-certiorari proceeding, which is the one currently pending, and since (iii) the PAC's argument would require the Court to issue an advisory opinion in violation of the rule against advisory

opinions, the Court must deny the request and decline the PAC's invitation as beyond this Court's jurisdiction.

WHEREFORE, the Davidson County Election Commission respectfully requests that the Court dismiss the Petition or, alternatively, enter judgment on the pleadings in the Election Commission's favor.

DATED: August 27, 2021

Respectfully submitted,

/s/ James F. Blumstein
James F. Blumstein (No. 004147)
2113 Hampton Avenue
Nashville, Tennessee 37215
Phone: (615) 385-2875
Fax: (615) 385-3342
James.Blumstein@Vanderbilt.edu

- and -

/s/ *Austin L. McMullen*
Austin L. McMullen (No. 020877)
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

Attorneys for Respondent Davidson County Election Commission

NOTICE OF HEARING

This Motion shall be heard in the Chancery Court for Davidson County, Part IV, on Friday, September 10, 2021, at 9:00 a.m. IF NO RESPONSE IS TIMELY FILED AND PERSONALLY SERVED, THE MOTION SHALL BE GRANTED AND COUNSEL OR PRO SE LITIGANT NEED NOT APPEAR IN COURT AT THE TIME AND DATE SCHEDULED FOR THE HEARING.

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of August, 2021, I have caused a true and correct copy of the foregoing to be sent electronically, by email, and by U.S. Mail, postage pre-paid, to the following:

Daniel A. Horwitz
Lindsay B. Smith
Horwitz Law, PLLC
4016 Westlawn Drive
Nashville, TN 37209
daniel@horwitz.law
lindsay@horwitz.law

/s/ *Austin L. McMullen*
Austin L. McMullen