

THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, *et al.*

U.

Respondent-Appellant.

Trial Court Case No.: 24-0472-IV

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

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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 requirements²—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. The public interest exception does not apply because the issues involved are unlikely to arise in the future.

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. The challenged conduct is not capable of repetition but evading review.

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