

**METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON
COUNTY, TENNESSEE, JOHN
COOPER, in his official capacity as
Mayor of the Metropolitan Government
of Nashville and Davidson County,
Tennessee, and KEVIN CRUMBO, in
his official capacity as Finance Director
of the Metropolitan Government of
Nashville and Davidson County,
Tennessee,**

V.

Respondent/Appellant.

**APPELLANT’S RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT
OF APPELLEES**

This Court should deny the Motion for Leave because (i) an *amicus* filing at this time is inconsistent with the briefing timing and structure provided for in the appellate rules and (ii) an *amicus* filing at this time would undermine this Court’s gate-keeping role in setting the time for filing an *amicus* brief and its authority to set conditions on *amici* filings.

(1)

The Motion for Leave should be denied. The Proposed Amicus filing undermines this Court's ability to "fix the time" for filing an *amicus* brief, Rule 31(b), Tennessee Rules of Appellate Procedure (TRAP) , while maintaining the overall scheme of briefing as provided for by TRAP Rule 29. Under TRAP Rule 31(a), an *amicus* brief "may be filed only by leave of court." That is, there is no inherent authority for the Proposed Amicus to file an *amicus* brief; this Court plays an important gate-keeping role, see Attachment 1, especially with respect to timing and conditions of filing: "The court shall fix the time and conditions for the filing of the *amicus curiae* brief." TRAP Rule 31(b). The authority to "fix the time" for filing an *amicus* brief allows the appellate court to assure fairness to the parties and that the overall scheme of briefing, TRAP 29, is adhered to. Granting the Motion for Leave at this point in the appeal will compromise this Court's ability to perform its gate-keeping role, as contemplated by TRAP Rules 31(a) and 31 (b).

The Motion for Leave was filed *after* the Appellant and Appellees had completed briefing in this appeal; the Proposed Amicus was aware of this litigation and the pending appeal. As provided under TRAP Rule 29, this appeal was filed in June, and Appellant and Appellees filed their briefs from September to November. However, Proposed Amicus waited until December to file its Motion for Leave and Proposed Brief. Other *amici*, including an *amicus* represented by the same counsel that represents the Proposed Amicus, filed motions for leave with this Court in September and October that the Election Commission did not oppose and that the Court granted.

The timing of those *amici* filings was consistent with the time frames set out in the appellate rules for the parties' briefing schedule. Not so with the Motion for Leave. This Court

(not the Proposed *Amicus*) has the authority under TRAP Rule 31(b) to “fix the time and conditions for the filing of the [proposed] amicus curiae brief.” Under the circumstances, this Court has not been presented with a proposed time for the Proposed *Amicus* filing that is consistent with the overall parties’ briefing program, as provided under the appellate rules (TRAP Rule 29). As a result, this Court should deny its “leave,” TRAP Rule 31(a), to file the Proposed Brief. That this Court has ultimate authority, in its discretion, to determine whether or not to allow for an *amicus* filing is clear. For example, in *Hooker v. Haslam*, 437 S.W.3d 409 (Tenn. 2014), the Supreme Court declined to allow two proposed *amicus* briefs to be filed in an important pending case. See attached exhibit (orders denying leave to file *amicus* briefs).

Under the appellate rules, TRAP Rule 29 is designed to permit an appellant to have the last word in briefing. By waiting to file the Motion for Leave “in support of Appellees” until after Appellant and Appellees completed briefing in this appeal, the Proposed *Amicus* is attempting to give the Appellees the last word. TRAP Rule 31(b) empowers this Court to “fix the time” and set the “conditions for the filing of an amicus curiae brief.” Where a Proposed *Amicus* puts the Court in the position of not being able to enforce the normal briefing timetable and not complying with the norms regarding safeguarding the last word for Appellant, the Court can and should exercise its discretion to deny leave to file in the absence of special circumstances not present here. Allowing an *amicus* filing at this point not only compromises the gate-keeping role and authority of this Court but also allows for and encourages strategic gaming of an *amicus* filing, timed so as to reverse the last-word-for-Appellant structure provided for under TRAP 29.

In sum, TRAP Rule 31 (i) provides for an important gate-keeping role for this Court; (ii) gives the Court discretion whether to permit the filing of an *amicus* brief; and (iii) assigns

authority to this Court to “fix the time” and generally to set “conditions” on an *amicus* filing consistent with the overall timing and structure of briefing under TRAP 29(a). Here, the Motion for Leave seeks to flip the TRAP Rule 29(a) sequence by giving the Appellees the last word. The Proposed *Amicus*, which previously participated in this litigation and was aware of this appeal, does not put forward special circumstances and does not address why it strategically waited until after the parties completed briefing to file its Motion for Leave. Timeliness is a consideration in deciding whether to permit an *amicus*’ participation. *State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001). Under the circumstances -- the Proposed Amicus’ knowing delay, the sequence of briefing established by TRAP Rule 29(a), and the undermining of this Court’s institutional gate-keeping role under TRAP Rules 31(a) & (b) -- the Court should deny the filing of the Proposed Brief.

(2)

In addition, there are practical and important institutional reasons to disallow the Proposed *Amicus* filing. There are a number of assertions regarding past practice, characterizations of the Trial Court’s opinion, and omissions regarding the role of state law (T.C.A. §2-3-204(a)) that blur or adumbrate the issues on appeal. TRAP Rule 29 is designed to disallow such filings after the conclusion of briefing; Appellant is to have the last word on these matters. The Proposed *Amicus* filing compromises that structure.

A particular illustration is numbered paragraph 2 in the Motion for Leave, at Page 2. That paragraph calls into question the legality of the July 27, 2021, date the Election Commission set for the referendum election that the Trial Court blocked.¹ Appellees have not

¹ It is unclear whether the Proposed Brief submitted by the Proposed *Amicus* actually develops this point.

challenged the legality of the July 27 election date, either in the trial court or on appeal; and that issue is not part of the pending appeal in this matter. Since this is a common law writ-of-certiorari proceeding, a challenge to the Election Commission's action must be filed within 60 days of the Election Commission's decision. T.C.A. §27-9-102. No such challenge was filed and is now time-barred. *McFarland v. Pemberton*, 530 S.W.3d 76, 108, 111 (Tenn. 2017); *Thandiwe v. Traughber*, 909 S.W.2d 802, 804 (Tenn. Ct. App. 1994). The issue has not been contested by the parties and is not in the case on appeal, but the Proposed *Amicus* seeks to inject that non-issue into these proceedings through its strategic use of an *amicus* filing that does not accord Appellant Election Commission the last word.

This should be discountenanced; this Court should use its discretion under TRAP Rule 31(a) to deny the Motion for Leave so as preserve its own gate-keeping role under TRAP Rule 31(b) and to preserve the integrity of the TRAP Rule 29(a) briefing schedule structure.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of December, 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:

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Document received by the TN Court of Appeals.