

In the Chancery Court for Davidson County, Tennessee

**NASHVILLE ENGLISH FIRST and  
ERIC CRAFTON,**

Plaintiffs,

v.

**DAVIDSON COUNTY ELECTION  
COMMISSION and A.J. STARLING,  
EDDIE BRYAN, ANA ESCOBAR  
BURCHWELL, LYNN GREER, and  
PATRICIA HEIM, in their official  
capacities as Davidson County  
Election Commissioners,**

Defendants,

No. 08-1912-I

and

**NASHVILLE AREA CHAMBER OF  
COMMERCE, AMERICAN CIVIL  
LIBERTIES UNION OF TENNESSEE,  
SERVICE EMPLOYEES  
INTERNATIONAL UNION LOCAL  
205, TENNESSEE IMMIGRANT  
AND REFUGEE RIGHTS  
COALITION, MIKE JAMESON, and  
JAMES ZRALEK,**

Intervenors.

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**Intervenors' Memorandum of Law in Opposition to Mandamus**

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The Nashville Area Chamber of Commerce, the American Civil Liberties Union of Tennessee, the Service Employees International Union Local 205, the Tennessee Immigrant and Refugee Rights Coalition, Councilman Mike Jameson, and Mr. James Zralek ("Intervenors") come before this Honorable Court representing a broad coalition

of civic groups, employees of Nashville's Metropolitan Government ("Metro"), members of the public, and an elected Metro official, who share as citizens "an interest in the procedure by which" they are governed and under which the Plaintiffs' proposed referendum petition may be enacted. See, *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 781 (6th Cir. 2007) (internal citations omitted); see also, Plead. in Intervention ¶¶ 1-6. The Metro employee members of Service Employees International Union Local 205, who provide essential government services in English and other languages, also know that this lawsuit places at issue their "official status and future responsibilities." See, *Jordan v. Knox County*, 213 S.W.3d 751, 764 (Tenn. 2007) (internal citations omitted); Plead. in Intervention ¶ 3.<sup>1</sup>

Pending adjudication of their motion for leave to intervene, Intervenors respectfully submit this Memorandum of Law in Opposition to Mandamus, which argues as follows:

- Under the Metro Charter and binding Tennessee Supreme Court authority, the Davidson County Election Commission has not only the discretion but also the duty to decide issues of timeliness when reviewing a referendum petition.
- The Plaintiffs misrepresented the legal effect of their referendum petition when they sought signatures from the voters of Davidson County. English is already the State's official language under state law, and the

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<sup>1</sup> See also, *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (internal citations omitted) (an intervenor need not possess the standing necessary to initiate a lawsuit).

small print of the petition mandates the use of "English Only" by Metro employees, not "English First." The Court should not validate Plaintiffs' misrepresentations by issuing a mandamus order against the Election Commission.

- To the extent that the Court weighs factors such the public interest and Plaintiffs' ultimate likelihood of success on the merits in deciding this case, the Court should consider that Plaintiffs' English-only petition is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

Intervenors also adopt and incorporate by reference the legal arguments set forth by the Davidson County Election Commission in Sections I.A., C., D(1) and D(2) of its Motion to Dismiss.

### FACTS

Many background facts in this matter have been set forth by the Plaintiffs and the Davidson County Election Commission and are known to the Court.

In addition, when the Plaintiffs described the English-only petition to voters being asked to sign it, they did not convey the true meaning of the proposed charter amendment. The titles used on signature cards for the petition were "Let the People VOTE on Making ENGLISH Nashville's Government's OFFICIAL LANGUAGE" and "Let the People Vote on English as Official Language." *See*, Compl. Exs. A & B-1; Plead. in Intervention ¶ 12.

Plaintiffs called their English-only petition and "English First" petition on the website and in the mailer that was sent out to registered voters in Nashville. See, Compl. Ex. A; Plead. in Intervention ¶ 13. On one side the petition has a large, bolded heading that reads "[l]et the people vote on English as official language." <http://kaybrooks.blogspot.com/2008/06/did-you-get-your-petition.html>. On the other side the mailer reads "do you think the official language of all the meetings of Metro's boards and commissions and the Metro Council should be English? If your answer is YES then please sign the petition." *Id.*

## ARGUMENT

### **I. The Duty of the Davidson County Election Commission Is to Decide Issues of Timeliness When Reviewing a Referendum Petition**

Under the Metro Charter and binding Tennessee Supreme Court authority, the Davidson County Election Commission has not only the discretion but also the duty to decide issues of timeliness when reviewing a referendum petition.

In a decision by the Tennessee Supreme Court concerning a petition for a referendum election under the Metro Charter, the Court found it to be well settled that Metro officers (at that time, the Metro Clerk) "receiving petitions such as those involved here are required to exercise quasi-judicial functions in passing upon their sufficiency" and that "[t]heir decisions ordinarily cannot be reviewed in mandamus proceedings like these, provided that the officials have not acted in bad faith or arbitrarily." *State ex rel. Wise v. Judd*, 655 S.W.2d 952, 954 (Tenn. 1983). The *Wise* decision has never been

expressly overruled, and Plaintiffs offer no proof whatsoever that the relevant county officers in this case, the Davidson County Election Commission, acted arbitrarily or in bad faith in rejecting the English-only petition.

Although the Supreme Court used somewhat different language in *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531 (Tenn. 2004), to describe the duties of county election commissions when examining referenda petitions, the implication for this case is the same: the Davidson County Election Commission had a duty to apply any timeliness requirements in the Metro Charter. “Without question, the [Election] Commission and the Coordinator have certain statutorily prescribed duties that allow - indeed require - them to ... determine whether signature requirements are met, [and] determine whether submissions are timely ....” *City of Memphis*, 146 S.W.3d at 535 (emphasis added). Indeed, Plaintiffs assume that the Election Commission must interpret and follow the signature requirements of Article 19 of the Metro Charter, while disputing the Election Commission’s duty to interpret and seek to follow all of Article 19.

The general rule regarding the issuance of a writ of mandamus is that the writ is not issued to control or coerce discretionary power by an officer, but will lie to enforce the performance of an official duty and to compel the exercise of power. *Jones v. Anderson*, 250 S.W.3d 894, 897 (Tenn. Ct. App. 2007) (citing *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); *State ex rel. Ragsdale v. Sandefur*, 215 Tenn. 690, 389 S.W.2d 266, 269 (1965); *State ex rel. Veal v. Mayor & Aldermen of Dyersburg*, 184 Tenn. 1, 195 S.W.2d 11, 13 (1946); *Hackett v. Smith County*, 807 S.W.2d 695, 698 (Tenn. Ct. App.

1990)). In this case, the Plaintiffs wrongly seek mandamus despite the Election Commission's clear duty to decide issues of timeliness when reviewing charter referenda.

In particular, the Davidson County Election Commission exercised its authority to ensure compliance with the Metro Charter. Implicit in Article 19 of the Charter, which mandates specific procedures be followed to ensure fair and appropriate elections, is a corresponding duty on the part of the Election Commission to enforce those provisions. The Commission had the authority to determine whether the English-only initiative met the Charter's procedural requirements to be placed on the November ballot. The Commission based its decision on Charter provisions and exercised its authority to ensure that the proper procedures were followed. It did not abuse its discretion or act in an arbitrary or oppressive way.

**II. The Underlying Petition Was Misleading and Thus the Court Should Refuse to Issue the Requested Mandamus**

The Plaintiffs misrepresented the legal effect of their referendum petition when they sought signatures from the voters of Davidson County. English is already the State's official language under state law, T.C.A. § 4-1-404, and the small print of the petition mandates the use of "English Only" by Metro employees, not "English First." The Court should not validate Plaintiffs' misrepresentations by issuing a mandamus order against the Davidson County Election Commission.

Although neither the state of Tennessee, nor the Sixth Circuit, appear to have ruled on misleading ballot titles or petitions, other jurisdictions have ruled on the issue and provide persuasive authority on this novel question of Tennessee law.

For example, in a 2000 case related to the placement of a constitutional amendment on the death penalty, the Florida Supreme Court read in similar requirements to the controlling constitutional provision:

[Article XI, section 5, Florida Constitution states:] (a) *A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourth of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.*

Art. XI, § 5, Fla. Const. (emphasis added). Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.

*Armstrong v. Harris*, 773 So.2d 7, 12 (Fla. 2000) (copy attached).

Some states have struck down ballot *petitions* for misleading summaries. For example, the Alaskan Supreme Court found:

The signature-gathering requirement ensures that only propositions with significant public support are included on the ballot. But when a petition, including its title and summary, is confusing or misleading, petition signers may not understand what they are signing. Signatures on a confusing or misleading petition therefore may or may not indicate support for the measure. Under such circumstances, it cannot be known whether the signature-gathering requirement has served its screening function. Moreover, the municipality correctly points out that a "biased

and partisan" title was a factor in our determination that the citizens challenging the petition in *Faipeas v. Municipality of Anchorage* had shown a likelihood of success on the merits of their contention that the petition was legally insufficient. Similarly, confusing and misleading titles and summaries are valid grounds for refusing to certify a petition.

*Citizens for Implementing Med. Marijuana v. Municipality of Anchorage*, 129 P.3d 898, (Alaska, 2006). See also, *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1221 (Alaska 1993) (ordering stay of an election because citizen-plaintiffs showed probable success on the merits that the ballot petition was misleading); *Burgess v. Miller*, 654 P.2d 273 (Alaska 1982) (finding, on first impression, that Alaska's statutory requirement that ballot summaries be "impartial," meant that ballot summaries must not be misleading; citing similar cases from Arkansas and Colorado)(copies of cases attached).

Similarly, Section 19.01 of the Metro Charter provides, "The ballot shall be prepared so as to set forth a brief description of the amendment worded so as to convey the meaning of said amendment." The Court should read Section 19.01, like the Alaska court, to imply that the ballot and petition creating such should not be misleading. The charter requirement that the ballot "convey the meaning" implies that the petition must convey the meaning of the amendment as well.

**III. Plaintiffs' English-only Petition is Unconstitutional Under the First and Fourteenth Amendments of the United States Constitution**

To the extent that the Court weighs factors such the public interest and Plaintiffs' ultimate likelihood of success on the merits in deciding on Plaintiffs' request for extraordinary relief, the Court should consider that Plaintiffs' English-only petition is



unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

Similar measures in other jurisdictions have been found to violate the First Amendment and the Equal Protection Clause and have been struck down for infringing upon the free speech rights of both government workers and the electorate as a whole. The courts have dealt with these types of English Only laws in a variety of contexts.

For example, when confronted with a similarly restrictive "English Only" initiative in Arizona, the Supreme Court of Arizona held the measure to be unconstitutional. That amendment, like the language at issue here, made it mandatory that English be the only language used when conducting government business and, like the initiative here, provided no exceptions for health, safety, or welfare. The court held that such an amendment violated the First Amendment and Equal Protection Clause of the United States Constitution. *Ruiz v. Hull*, 191 Ariz. 441 (1998)(copy attached).

In fact, courts have found other English as the Official Language measures --less restrictive than the one at issue here--to violate the First Amendment and Equal Protection rights of the public. *See, In re Initiative Petition No. 366*, 46 P.3d 123 (Okla. 2002) (copy attached) (holding pre-ballot, English-only measure was unconstitutional); *Alaskans for a Common Language v. Kritz*, 170 P.3d 183 (Alaska 2007)(copy attached) (striking down portions of an English as the Official Language ballot measure for violating the First Amendment and Equal Protection rights of the electorate).

The Court should weigh these constitutional concerns when it weighs the public interest and Plaintiffs' likelihood of success on the merits.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Intervenors respectfully request that the Court deny all relief requested by Plaintiffs; that the Court refuse to issue a Peremptory Writ of Mandamus against the Defendants; that the Court enjoin any party to this action from taking actions to place Plaintiffs' English-only initiative on the November 4, 2008 ballot; that the Court grant an expedited hearing to Intervenors; and award Intervenors' costs and expenses and grant such other relief as deemed just and equitable.

Respectfully submitted:

*Paul Ambrosius (with permission  
Kenny Byrd)*

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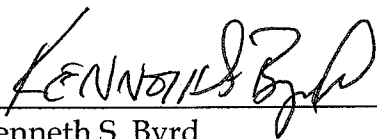
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### CERTIFICATE OF SERVICE

I certify that the foregoing document was served by hand delivery today, September 4, 2008, on Plaintiffs' counsel James D.R. Roberts, Esq., Roberts & Layman, The Customs House, Suite 401, 701 Broadway, Nashville, TN 37203 and Defendants' counsel Sue B. Cain, Esq., Metropolitan Department of Law, Metropolitan Courthouse, Suite 108, Nashville, TN 37219-6300.

  
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