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

THE ASSOCIATED PRESS, KIMBERLEE KRUESI, CHATTANOOGA PUBLISHING COMPANY, GANNETT GP MEDIA, INC. MICHAEL ANASTASI, GOULD ENTERPRISES, INC., MEMPHIS FOURTH ESTATE, INC., MEREDITH CORPORATION, JEREMY FINLEY, SCRIPPS MEDIA, INC., BEN HALL, TEGNA, INC., JEREMY CAMPBELL, LISA LOVELL, TENNESSEE ASSOCIATION OF BROADCASTERS, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., and TENNESSEE PRESS ASSOCIATION, Plaintiffs, v. THE TENNESSEE REGISTRY OF ELECTION FINANCE, and PAIGE BURCHAM-DENNIS, HANK FINCHER, DAVID GOLDIN, PAZ HAYNES, TOM LAWLESS, and TOM MORTON, in their official capacities as members of the Tennessee Registry of Election Finance, and BILL YOUNG, in his official capacity as Executive Director of the Bureau of Ethics and Campaign Finance, Defendants.	)	Docket No. 20-0404-III

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Resolution of this case begins and ends with the purpose of the Open Meetings Act. As articulated by the General Assembly—and reiterated by the Court of Appeals—that purpose is to ensure "that the formation of public policy and decisions is public business and shall not be conducted in secret." *See* Tenn. Code Ann. § 8-44-101(a); *Hastings v. S. Cent. Human Res. Agency*, 829 S.W.2d 679, 685 (Tenn. Ct. App. 1991). Application of that purpose here confirms that Defendants are entitled to summary judgment and that Plaintiffs' claims must be dismissed. First, because the Registry's email vote did not frustrate the Act's purpose or circumvent its requirements. And second, because the Registry's July 8 meeting satisfied the purpose of the Act.

I. The Registry's Email Vote did Not Frustrate the Act's Purpose or Circumvent its Requirements.

The Open Meetings Act recognizes that "the formation of public policy and decisions is public business and shall not be conducted in secret." Tenn. Code Ann. § 8-44-101. Implicit in that recognition are several limitations. The Act, for example, does not require that every communication between government officials be made public. Instead, it limits its application to a subset of meetings: those that involve "decisions" and the "formation of public policy." *Id.* In other words, the Act does not apply to inconsequential communications between members of government bodies. Here, the Registry's members lacked the legal authority to accept or reject Representative Towns' settlement offer. Their communications about that offer, then, were of no legal consequence and fall outside the Act's scope. Plaintiffs reject this conclusion. In doing so, they advance a range of arguments—all of which fail.

First, Plaintiffs insist that the Registry's email vote violated the Act regardless of whether the Registry had the power to accept the settlement offer. This position, however, cannot be squared with the express purpose of the Act. Imagine that the Registry met and held a vote on who the Tennessee Attorney General's Office should hire as a new Assistant Attorney General.

The Registry plainly lacks the legal authority to make this decision, *see* Tenn. Code Ann. § 8-6-103, and its vote would thus be utterly meaningless. Requiring that the Registry's communications about this issue be made public under the Act, then, would in no way further the Act's purpose of ensuring that "the formation of public policy and decisions" be conducted in public. Because the Registry lacked the legal authority to accept Representative Towns' settlement, there is no meaningful difference between this example and the reality at issue here.

Next, Plaintiffs argue that the Registry did in fact have the power to accept the settlement offer. More specifically, they argue that the Registry's independence would be undermined if the Attorney General had the unilateral authority to settle civil penalties levied by the Registry. The legislative intent behind the creation of the Registry, Plaintiffs explain, was to "vest it with the power to 'ensure enforcement' of specific campaign and financial disclosure statutes." (Pls.' Resp., 5 (quoting Tenn. Code § 2-10-202).) And Plaintiffs further note that the Attorney General has previously opined that the Registry was created to be "an independent entity of state government" that could enforce "campaign finance issues, a sensitive and potentially partisan topic." (*See id.* (quoting Tenn. Op. Att'y Gen. No. 98-122, 1998 WL 423972, at *4 (July 10, 1998).) But Defendants' position does not strip the Registry of its independence nor prevent it from enforcing campaign-finance laws in a nonpartisan way. Indeed, the Registry retains the sole authority to determine whether Tennessee's campaign-finance laws have been violated and to assess civil penalties where appropriate. The authority to *settle* those penalties, however, belongs to the Attorney General.[1] *See* Tenn. Code Ann. § 8-6-109(b) (providing that the Attorney General

[1] Plaintiffs argue that this cannot be the case because the actions of the Registry's members reveal that they believed they had the authority to settle civil penalties. (*See* Pls.' Resp., 6–9.) But true or not, that belief would be entirely irrelevant to whether the Registry actually possesses that legal authority. The words the Registry's members use to describe their votes are similarly irrelevant. Call it what you will—a vote to approve, a vote in favor of, a vote to recommend, an expression

has the duty to oversee "[t]he trial and direction of all civil litigated matters and administrative proceedings in which the state or any officer, department, agency, board, commission or instrumentality of the state may be interested").

Finally, Plaintiffs maintain that even if the email vote was not a meeting, it still violated the Act because the Registry communicated via email. This argument, however, is nothing more than a repackaged version of Plaintiffs' first argument. The Act does not independently prohibit email communications between members of a governing body. Instead, it prohibits the use of email to "decide or deliberate public business in circumvention of the spirit or requirements of [the Act]." *See* Tenn. Code Ann. § 8-44-102(c). As a result, this argument fails for the same reasons as Plaintiffs' first argument: the Registry's email communications did not involve "decisions" and the "formation of public policy," so they need not have been public. *See* Tenn. Code Ann. § 8-44-101. The fact that the Registry communicated via email does not change the analysis. An example illustrates the point. Suppose that one Registry member called two other members and recommended that they try a new restaurant. This communication between members of a governing body would not violate the Act. Now suppose that the same communication occurred via email. Does the answer change? Of course not. It does not change because the substance of the communication is outside the scope of what the Act was designed to cover—the means of communication is irrelevant.

The bottom line is that the Act exists to ensure that "that the formation of public policy and decisions is public business and shall not be conducted in secret." *See* Tenn. Code Ann. § 8-44-101(a). This necessarily means that not every communication between government officials must

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of preference—the fact remains that the power to settle the civil penalties at issue belonged to the Attorney General alone. *See* Tenn. Code Ann. § 8-6-109(b)

be public. The question thus becomes, where should the line be drawn? Plaintiffs cannot offer any answer. They insist only that the Registry's emails—legally consequential or not—fall within the scope of the Act. Plaintiffs, however, provide no support for this conclusion. Defendants, by contrast, rest their position on a principled, bright-line rule that distinguishes between legally consequential communications—those that involve the formation of public policy and legally authoritative determinations—and legally inconsequential communications—such as expressions of nonbinding preference and pre-decision discussions that do not themselves carry legal weight. Because Defendants' proposed interpretation is consistent with the express purpose of the Act and because the Registry's email communications fall into this latter category, this Court should grant Defendants' motion for summary judgment and should dismiss Plaintiffs' claims.

II. The Registry's July 8 Meeting Satisfied the Purpose of the Act.

Nowhere in their response do Plaintiffs argue that the Registry's July 8 meeting was an ineffective cure. That fact alone disposes of this case. An effective cure meeting, like the one here, properly fulfils the Act's purpose. And if the Act's purpose is fulfilled, there is no violation to remedy. Put another way, "the purpose of the act is satisfied if the ultimate decision is made in accordance with the [Act], and if it is a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue." *See Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 436 (Tenn. Ct. App. 1990) (citing *Alaska Comm. Coll. Fed. of Teachers v. University of Alaska*, 677 P.2d 886, 891 (Alaska 1984)). Because the purpose of the Act has been satisfied here, there is no longer a legal controversy and this case is moot. *See Norma Faye Pyles Lynch Family Purpose LLC*, 301 S.W.3d at 203 (recognizing that a case must remain a legal controversy "from the time it is filed until the moment of final appellate decision" and that if the controversy ceases to exist at any point

during that process—either by "court decision, acts of the parties, or some other reason occurring after commencement of the case"—the case is moot).

In an attempt to keep the legal controversy alive, Plaintiffs suggest that an effective cure only moots a suit seeking to have the government body's decision declared void. (*See* Pls.' Resp., 10–11.) Plaintiffs argue that a cure meeting is not "a 'get-out-of-jail-free' card for any governing body that has run afoul of the [Act]." (*Id.* at 11.) If it were, Plaintiffs continue, "it would render the relief provisions of Tenn. Code [Ann.] § 8-44-106 meaningless." (*Id.*) But Plaintiffs' arguments miss the mark. Defendants do not suggest that a cure meeting is a "get-out-of-jail-free" card for any governing body that has violated the Act—Defendants argue only that where the governing body promptly cures any alleged violation, the purpose of the Act has been satisfied. And this argument, contrary to Plaintiffs' position, does not render the Act's injunctive and supervisory relief provisions "meaningless." Rather, those provisions could come into play in myriad situations, such as where a governing body violates the act and fails to effectively cure or declines to even try to cure.

Defendants' interpretation would not—as Plaintiffs suggest—"encourage circumvention of the [Act]." (*Id.*) Quite the opposite: if an effective cure meeting has been held, the Act has not been circumvented at all—that is the entire purpose of permitting a cure. *See Neese*, 813 S.W.2d at 436. To illustrate this point, consider the Tennessee Court of Appeals' decision in *Person v. Board of Commissioners of Shelby County*, No. W2007-01346-COA-R3-CV, 2009 WL 3074616, at *1 (Tenn. Ct. App. Sept. 28, 2009). There, the Shelby County Board of Commissioners passed a resolution that resulted in a second juvenile court division. *Id.* at *1–2. Judge Curtis Person—then the only juvenile-court judge for the county—filed suit arguing, among other things, that the Board of Commissioners' decision violated the Open Meetings Act. *Id.* Judge Person sought

prospective injunctive relief under the Act's "enforcement-jurisdiction" provision. *See id.* at *13. The Board then rescinded their resolution, and, for that reason, the trial court determined that Judge Person's claims under the Act were moot. *Id.* at *2. Judge Person appealed. *Id.* at *3.

Like Plaintiffs here, Judge Person argued that because he sought remedies under the Act other than nullification of the government body's decision, his claim was not moot. The Court of Appeals disagreed, explaining that "the trial court was not required to proceed to hear the Open Meetings Act claim simply because relief other than nullification was requested." *Id.* at *13. "Tennessee Code Annotated § 8-4-106," the court reasoned, "provides for additional enforcement measures; it does not create or expand a cause of action." *Id.* Finally, the court observed that where "the governmental body acts quickly and decisively to correct any mistake in its procedure, the primary goal of the [Act] has been accomplished." *Id.* at *14. "We do not believe," the Court concluded, "that the legislature intended to hinder such correction of errors, but rather to encourage it." *Id.* (citing *Neese*, 813 S.W.2d at 436).

The Court of Appeals' reasoning in *Person* is controlling here. Plaintiffs, much like Judge Person did, seek to escape mootness by arguing that the Act's other remedies are available despite the governing body's cure of any violation. The Court of Appeals rejected that argument because it recognized that the Act's purpose is furthered—not frustrated or circumvented—by permitting governing bodies to cure past violations. This Court should follow suit.

CONCLUSION

Because Defendants have not violated the Open Meetings Act and because Defendants cured any possible violation at their July 8, 2020 meeting, this Court should grant Defendants' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing memorandum has been forwarded by email and by first-class, U.S. Mail, postage paid to:

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on this 23rd day of September 2020.

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