

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

FLOYD BONNER

vs.

LINDA PHILLIPS, in her official capacity as Shelby County Administrator of Elections,
SHELBY COUNTY ELECTION COMMISSION,
And in their official capacities all Members of the SHELBY COUNTY ELECTION
COMMISSION, including MARK H. LUTTRELL, STEVE STAMSON, BENNIE SMITH,
FRANK ULHORN, VANECIA KIMBROW, and
CITY OF MEMPHIS,

Defendants.

No. CH-23-0352-2
[transferred to Part III]

CONSOLIDATED

VAN TURNER, JR.,
Plaintiff,

vs.

No. CH-23-0380-3

SHELBY COUNTY ELECTION COMMISSION, LINDA PHILLIPS,
in her official capacity as Administrator of Shelby County Election Commission,
BENNIE SMITH, MARK LUTTRELL,
STEVE STAMSON, VANECIA KIMBROW, AND
FRANK UHLHORN, in their Official Capacities
as Members of the Board of Commissioners of the Shelby County Election Commission,
Defendants.

EXPEDITED MOTION OF JB SMILEY, JR. TO INTERVENE AS A MATTER OF
RIGHT PURSUANT TO RULE 24.01 OF THE TENNESSEE RULES OF CIVIL
PROCEDURE AND INCORPORATED MEMORANDUM OF LAW

Comes now JB Smiley, Jr. individually and in his official capacity as duly elected
and acting member and Vice-Chairman of the Memphis City Council ("Smiley") to move
the Court for an expedited order granting Smiley the right to intervene in this matter as
a matter of right pursuant to Rule 24.01 of the Tennessee Rules of Civil Procedure. In
support of Smiley's Motion to Intervene, he states as follows:

Smiley is a resident of the City of Memphis who was duly elected as a member of the Memphis City Council on October 2019 to Position 8-1. Smiley qualified to serve and was sworn into office on January 1, 2020. Smiley has continuously held his office as a member of the City Council to the present date. Smiley is eligible to seek another term on the City Council. Smiley was elected Vice-Chairman of the City Council by the members of the City Council on November 2022.

As a member and officer of the City Council and as an individual who intends to seek re-election to another term on the City Council Smiley has a right and a duty (i) to see that the ordinances and provisions of the Charter are observed by the Mayor and all officer and employees under his supervision and (ii) to seek appropriate legal remedies to prevent any person from interfering with or usurping the City Council's legislative powers under the City's Charter, which are vested exclusively in the Council and its duly elected members .

Specifically, as a member and officer of the City Council and as an individual who intends to seek re-election to another term on the City Council Smiley will be aggrieved if any officer or employee of the City attempts to repeal, modify or nullify any provision of the City's Charter or Code of Ordinances, by any means other than by lawful adoption of an amendment to the City's Charter pursuant to Article XI, Section 9 of the Tennessee Constitution or by lawful adoption of an ordinance pursuant to Referendum Ordinance No. 1852, § 1 of the City's Home Rule Charter.

Referendum Ordinance No. 4346 was adopted in response to a preliminary injunction entered in the matter of *Muhammad, et al v. City of Memphis et al*, Consolidated Case Nos. 88-2899, 90-2093 and 91-2139 On July 5, 1995, in which the court

imposed an electoral plan for the 1995 general City elections that had been approved by the Memphis City Council on May 5, 1995 and expressly provided that “[f]ollowing the 1995 election, any electoral system to be implemented, including the plan proposed by the Council, will be subject to a referendum as required by the City Charter.”

On January 29, 1997 the Court entered a Permanent Injunction and Final Judgment in the *Muhammad* matter which provided in pertinent part:

The plaintiffs’ claims concerning the method of electing the Memphis City Council have been resolved by the Memphis City Charter amendment adopted by popular vote on November 5, 1996.

This order will make permanent the court’s July 26, 1991 preliminary injunction and the July 5, 1995 injunction decree against citywide runoff elections so as to fully remedy the statutory violations found by the court.

THEREFORE, IT IS HEREBY ordered, adjudged and decreed that:

....2. All remaining claims are dismissed. The entry of this order constitutes final judgment in these actions.

The parties to the action included but were not limited to:

PARTY	COUNSEL
City of Memphis	Monice M. Hagler
Shelby County Election Commission	Phillip G. Kaminsky
Richard Hackett, Mayor	Monice M. Hagler
City Council of Memphis, Tennessee and individual council members Pat Vanderschaaf, Florence H. Leffler, Oscar H. Edmonds, Jr., Barbara Sonnenburg, A.D. Alissandratos, Tom Marshal, Jimmy Moore, Mary Rose McCormick, Bill Davis, Jack Sammons,	Allan J. Wade
Individual council members James Ford, Kenneth T. Whalum, Rickey Peete	Tarik B. Sugarmon
Myron Lowery, Intervenor	Donald A. Donati

The Permanent Injunction and Final Judgment in the *Muhammad* matter was (1) rendered by a court of competent jurisdiction, (2) the City of Memphis, the then City Mayor, the Memphis City Council, including then serving individual council members or their privies were involved in the *Muhammad* matter and privies of the parties in the Muhammad matter are also parties in the present case, (3) the claim that Referendum Ordinance No. 4346, in its entirety, was a valid enactment to remedy constitutional defects in then existing Referendum Ordinance No. 1852 was asserted in the *Muhammad* matter and is being asserted in the present case, and (4) the underlying judgment in the *Muhammad* matter was final and on the merits.

No party in the *Muhammad* matter contested the validity or application of the amending language in Referendum Ordinance No. 4346 or made any claim that any part thereof would not govern Memphis City elections or the qualifications of all candidates for City of Memphis elective office after the October 1995 city elections as ordered and enjoined by the Court in the *Muhammad* matter.

Smiley, as a successor in interest, City Council members who were parties in the *Muhammad* matter and the Memphis City Council as the City's legislative body is in privity with those parties and is entitled to enforce Referendum Ordinance No. 4346 as a complete bar in this action with respect to any issue being asserted by the City of Memphis and the Election Commission in this action involving the validity or application of Referendum Ordinance No. 4346 which was litigated or which in the exercise of due diligence could have been presented for determination in the *Muhammad* matter.

The City's Home Rule Charter vests exclusive authority in the members of the City Council to adopt all ordinances, which become operative if signed by the Chairman

of the City Council and the Mayor after passage or after the second regular meeting next following adoption if not vetoed. If seasonable vetoed by the Mayor an ordinance becomes operative if majority of the Council override the veto.

Article XI, Section 9 of the Tennessee Constitution provides:

A charter or amendment may be proposed by ordinance of any home rule municipality, by a charter commission provided for by act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters of a home rule municipality not less in number than ten (10%) percent of those voting in the then most recent general municipal election.

Tenn. Const. Art. XI, § 9. Any ordinance proposing a home rule amendment to the City's Home Rule Charter must be adopted by the Memphis City Council. In addition, any ordinance proposing a home rule amendment to the City's Home Rule Charter only becomes effective and operative sixty (60) days after approval by a majority of the qualified voters in the City voting thereon.

In the present case, administrative officers of the City are seeking to interfere with and/or usurp the City Council's exclusive legislative powers under the City's Charter by requiring the Election Commission to enforce qualifications for City elective office referenced in the Meyer opinion attached to Plaintiff Bonner's Second Amended Complaint that are not found in the plain language of the City's Home Rule Charter. Indeed, the plain language of Referendum Ordinance No. 1852, sections 1 and 4 as amended by Referendum Ordinance No. 4346 reads:

The qualifications of the Mayor shall be the same as those required herein for members of the Council....

That each Council Member shall be a resident, as defined by State election laws, of the City and of the District from which he or she is elected.

Notably, the qualifications for City elective office referenced in the Meyer opinion that administrative officers of the City are seeking to reinstate and enforce were expressly repealed by Referendum Ordinance No. 4346. No person or administrative officer of the City has the authority to alter, amend or change the plain language of any charter provision, except by a clarifying or amending ordinance adopted and approved in accordance with Article XI, Section 9 of the Tennessee Constitution. The plain language of a provision of the Charter cannot be changed by administrative directive or fiat of a City officer. Moreover, under the City's Home Rule Charter the Mayor and all officer and employees under his supervision have a mandatory duty to see that the ordinances and provisions of the Charter are observed. The City's Charter is consistent with well-established Tennessee precedent which unequivocally provides:

In the almost 200 years of this State's existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved. Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes. *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988)(Citations omitted)....Moreover, "[t]he provisions of the charter are mandatory, and must be obeyed by the city and its agents...." (citing *Barnes v. Ingram*, 217 Tenn. 363, 373, 397 S.W.2d 821, 825 (1965)).

In *Lebanon v. Baird*, the Tennessee Supreme Court also observed that "...if a city charter requires that specified acts be taken through the adoption of an ordinance, the city has no authority to alter the manner of acting and reliance on a general provision of the charter cannot excuse its failure to conform to the specific or express requirements of the

charter, which are considered mandatory. “ *City of Lebanon v. Baird*, 756 S.W.2d 236, 243 (Tenn. 1988).

Similarly, the Shelby County Election Commission is a ministerial administrative body that does not possess any legislative authority whatsoever. *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531 (Tenn.2004). The Election Commission cannot through administrative pronouncement prescribe any qualifications for City elective office and especially none that contradict the express language of the City’s Charter.

Here, the Meyers Opinion through slight of hand and semantical gymnastics summarily concluded that the express repeal in Referendum Ordinance No. 4346 can be disregarded; indeed, Myers failed to acknowledge that the repeal was an **express** repeal. While Smiley disagrees with Meyers’ conclusion for reasons that will be shown at trial, the only relevant issue is that his opinion does not have the force of law and cannot be legally enforced by any administrative officer of the City, because it contradicts the plain language of the City’s Home Rule Charter, which still reads:

The qualifications of the Mayor shall be the same as those required herein for members of the Council....

Similarly, the Shelby County Election Commission is a ministerial administrative body that does not possess any legislative authority whatsoever. *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531 (Tenn.2004). The Election Commission cannot through administrative pronouncement prescribe any qualifications for City elective office and especially none that contradict the express language of the City’s Charter.

The fatal flaw in Mr. Myers’ opinion is his failure to read Referendum Ordinances Nos. 1852 and 4346 in *pari materia*. Mr. Myers concluded that

Ref. Ord. No. 4346 expressly addresses changing the residency requirement for the Council, but it is silent as to the residency requirements of the Mayor. Thus, it is apparent on the face of the referendum (Ref. Ord. No. 4346) that it only addresses the residency requirement for the Council and not for Mayor. Therefore, one could not say that the "collective intent" of the electorate was to change the residency requirement for Mayor.

This conclusion ignores the clear intention of the Council and the voters in 1966, when each approved Referendum Ordinance No. 1852, that removed any specific and independent qualifications for the Mayor that existed before home rule and simply made the qualifications for the Mayor the same as those for the Council. Using Mr. Myers' vernacular, can one not say that the collective intent of the electorate in 1966 was to make the qualifications for Mayor and Council the same, such that a change in the Council's qualifications would indisputably change the Mayor's qualifications? The law certainly presumes that in 1995, when Referendum Ordinance No. 4346 was adopted, (1) the City's legislative body knew the qualifications for Mayor in Referendum Ordinance No. 1852 § 4, and (2) the Mayor knew the qualifications for Mayor in Referendum Ordinance No. 1852 § 4 when he signed Referendum Ordinance No. 4346 making it effective and (3) in 1996, over a year later when Referendum Ordinance No. 4346 was approved by the voters, the voters knew or with reasonable diligence could have ascertained the effect of the change in the qualifications for the Council on the Mayor's qualifications. This Court should require more than just pure speculation from a lawyers' opinion to rewrite a validly adopted and approved Referendum Ordinance.

Finally, Smiley may be aggrieved if the Defendants seek to extend Myers' logic to re-write the qualifications for persons seeking to run of City Council Positions by suggesting that the five (5) year residency requirement should apply to both City Council members and the Mayor. Smiley certainly cannot be assured that the City's

administrative officers will defend Referendum Ordinance No. 4346 as he would. In light of the evolving positions of the Defendants, Smiley has a reasonable belief that his presence in this case is necessary to protect his interests and the legislative prerogatives of the City Council.

Assuming *arguendo* that the City's administrative officers reasonably believe that the Myers opinion was a reasonable and nonfrivolous argument supported by existing law, the proper approach for the City's administrative officers would have been to seek a declaratory judgment from a court of competent jurisdiction with consent from the City Council¹ rather than to allow the Election Commission to enforce the Myers Opinion as if it had the force of City law for over 63 days, from February 28, 2023 until May 1, 2023 without any clear direction about the opinion.

Since this case involves the validity of a legislative pronouncement of the City Council, Smiley contends that he, individually, and as representative of the City Council is the proper party to defend Ordinance No. 4346 or to seek declaratory relief from the Court in this case. Moreover, since Smiley, the City Council and individual City Council Members are also protected from any attempt by any party in the *Muhammad* matter to re-litigate any issues regarding the validity or application of Referendum Ordinance No. 4346 or any other issues relating thereto which in the exercise of due diligence could have been presented for determination in the *Muhammad* matter, Smiley, the City Council and individual City Council Members are all proper parties to defend Ordinance No. 4346 or to seek declaratory relief from the Court in this case.

¹ Council approval shall be required before any special attorney is employed by the city to file suit regarding any extraordinary litigation as hereinafter defined. (Ord. No. 5294, § 1, 2-17-2009).

WHEREFORE PREMISES CONSIDERED Smiley prays that the Court hear this motion on an expedited basis during the hearing on Gibson's Motion to Intervene on May 8, 2023 and grant Smiley the right to intervene in this case as a plaintiff pursuant to Rule 24.01 of the Tennessee Rules of Civil Procedure on the grounds that he has shown (1) he claims an interest relating to the enforceability of Memphis Referendum Ordinances Nos. 1852 and 4346 which is the subject of this action and (2) is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (3) that Smiley's interest in the subject matter of this suit is not adequately represented by existing parties. A copy of Smiley's proposed Intervening Complaint is attached hereto as Exhibit "A."

Respectfully submitted,

BY: /s/ Allan J. Wade
ALLAN J. WADE (4339)
BRANDY S. PARRISH (21631)
The Wade Law Firm, PLLC
5050 Poplar Avenue, Suite 1028
Memphis, Tennessee 38157
(901) 322-8005
awade@thewadefirm.com

Attorneys for JB. Smiley, Jr.

CERTIFICATE OF SERVICE

I certify that I forwarded a copy of the foregoing document to the following individuals by Hand delivery, U.S. mail, postage prepaid, electronic means of filing with this Court or electronic mail, as indicated below on this the 4th day of May, 2023:

<input type="checkbox"/>	Hand Delivery	Jacob Swatley, Esq. Edward J. McKinney, Jr. Edward Brantley 6060 Primacy Parkway, Suite 103 Memphis, Tn 38119 Attorney for Defendants
<input checked="" type="checkbox"/>	E-service	
<input checked="" type="checkbox"/>	Email	
<input type="checkbox"/>	U.S Mail	
<input type="checkbox"/>	Hand Delivery	Robert L.J. Spence, Jr. 65 Union Avenue, Suite 900. Memphis, TN 38103 Attorney for Plaintiff Bonner
<input checked="" type="checkbox"/>	E-service	
<input checked="" type="checkbox"/>	Email	
<input type="checkbox"/>	U.S Mail	

<input type="checkbox"/>	Hand Delivery	Darrell J. O'Neal 2129 Winchester Road Memphis TN 38116 Attorney for Plaintiff Turner
<input checked="" type="checkbox"/>	E-service	
<input checked="" type="checkbox"/>	Email	
<input type="checkbox"/>	U.S Mail	
<input type="checkbox"/>	Hand Delivery	Tannera Gipson Jon Lakey 130 North Court Ave. Memphis, TN 38103 Attorneys for the City of Memphis
<input checked="" type="checkbox"/>	E-service	
<input checked="" type="checkbox"/>	Email	
<input type="checkbox"/>	U.S Mail	

/s/ *Allan J. Wade*

EXHIBIT “A”

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

FLOYD BONNER

vs.

LINDA PHILLIPS, in her official capacity as Shelby County Administrator of Elections,
SHELBY COUNTY ELECTION COMMISSION,
And in their official capacities all Members of the SHELBY COUNTY ELECTION
COMMISSION, including MARK H. LUTTRELL, STEVE STAMSON, BENNIE SMITH,
FRANK ULHORN, VANECIA KIMBROW, and
CITY OF MEMPHIS,

Defendants.

No. CH-23-0352-2
[transferred to Part III]

CONSOLIDATED

VAN TURNER, JR.,
Plaintiff,

vs.

No. CH-23-0380-3

SHELBY COUNTY ELECTION COMMISSION, LINDA PHILLIPS,
in her official capacity as Administrator of Shelby County Election Commission,
BENNIE SMITH, MARK LUTTRELL,
STEVE STAMSON, VANECIA KIMBROW, AND
FRANK UHLHORN, in their Official Capacities
as Members of the Board of Commissioners of the Shelby County Election Commission,
Defendants.

JB SMILEY, JR. Individually and
In his official capacity as member and
Vice-Chairman of the Memphis City Council,
Intervening-Plaintiff

Vs.

LINDA PHILLIPS, in her official capacity as Shelby County Administrator of Elections,
SHELBY COUNTY ELECTION COMMISSION,
And in their official capacities all Members of the SHELBY COUNTY ELECTION
COMMISSION, including MARK H. LUTTRELL, STEVE STAMSON, BENNIE SMITH,
FRANK ULHORN, VANECIA KIMBROW, and
MAYOR OF CITY OF MEMPHIS, in his official capacity.

EXPEDITED MOTION OF JB SMILEY, JR. TO INTERVENE AS A MATTER OF
RIGHT PURSUANT TO RULE 24.01 OF THE TENNESSEE RULES OF CIVIL
PROCEDURE AND INCORPORATED MEMORANDUM OF LAW

COMES NOW JB SMILEY, JR. (hereinafter also referred to as the "Intervening Plaintiff" or "Smiley"), by and through undersigned counsel of record, pursuant to Tenn. Code Ann. § 29-14-101, *et seq.* and Tenn. R. Civ. P. 57, and submits this Complaint for Declaratory Judgment, against Defendants, Linda Phillips, in her official capacity as Shelby County Administrator of Elections, the Shelby County Election Commission, Mark H. Luttrell, in his official capacity, Steve Stamson, in his official capacity, Bennie Smith, in his official capacity, Frank Uhlhorn, in his official capacity, Vanecia Kimbrow, in her official capacity and the Mayor of the City of Memphis in his official capacity (collectively hereinafter referred to as the "Defendants"). In support of these causes of action, Plaintiff would show unto this Honorable Court as follows:

PARTIES

1. Plaintiff, JB Smiley, Jr. ("Smiley") is a resident of the City of Memphis who was duly elected as a member of the Memphis City Council on October 2019 to Position 8-1. Smiley qualified to serve and was sworn into office on January 1, 2020.
2. Smiley has continuously held his office as a member of the City Council to the present date. Smiley is eligible to seek another term on the City Council. Smiley was elected Vice-Chairman of the City Council by the members of the City Council in November 2022.
3. Defendant Linda Phillips is the Administrator of Elections for the Shelby County

Election Commission and, as such, is responsible for conducting and supervising the October 5, 2023 Memphis Municipal Election.

4. Defendant Shelby County Election Commission ("SCEC") is the duly organized and authorized governmental office within Shelby County Government charged with the responsibility for conducting and supervising the October 5, 2023 Memphis Municipal Election.
5. Defendant Mark H. Luttrell is Chairman of the SCEC and will be responsible for overseeing, conducting, and supervising the October 5, 2023 Memphis Municipal Election.
6. Defendant Steve Stamson is a member of the SCEC and will be responsible for overseeing, conducting, and supervising the October 5, 2023 Memphis Municipal Election.
7. Defendant Bennie Smith is Secretary of the SCEC and will be responsible for overseeing, conducting, and supervising the October 5, 2023 Memphis Municipal Election.
8. Defendant Frank Uhlhorn is a member of the SCEC and will be responsible for overseeing, conducting, and supervising the October 5, 2023 Memphis Municipal Election.
9. Defendant Vanecia Kimbrow is a member of the SCEC and will be responsible for overseeing, conducting, and supervising the October 5, 2023 Memphis Municipal Election.
10. Defendant Jim Strickland is Mayor of the City of Memphis, which is a municipal entity located in Shelby County, Tennessee, recognized by the State of Tennessee

as a properly organized and legal municipal entity that operates under a Mayor/Council home rule form of government and can be served with process through its City Attorney, Jennifer Sink, Esq., at her office located at 125 North Main, Suite 336; Memphis, Tennessee 38103. For ease of reference the Mayor is referred to hereinafter as the "City." By making this allegation Smiley does not concede that Smiley or the City Council are City of Memphis Defendants for the purposes of this lawsuit.

11. Hereinafter, whenever the term "Defendants" is used, it is meant and shall collectively refer to all of the foregoing Defendants.

JURISDICTION & VENUE

12. This Court has jurisdiction to hear this matter and declare rights, status, and other legal relations pursuant to Tenn. Code Ann. § 29-14-102, *et seq.*
13. Venue for this cause of action is, proper in Shelby County, Tennessee, pursuant to Tenn. Code Ann. § 20-4-101.

COMPLAINT ALLEGATIONS

14. As a member and officer of the City Council and as an individual who intends to seek re-election to another term on the City Council Smiley has a right and a duty (i) to see that the ordinances and provisions of the Charter are observed by the Mayor and all officer and employees under his supervision and (ii) to seek appropriate legal remedies to prevent any person from interfering with or usurping the City Council's legislative powers under the City's Charter, which are vested exclusively in the Council and its duly elected members .

15. Specifically, as a member and officer of the City Council and as an individual who intends to seek re-election to another term on the City Council Smiley will be aggrieved if any officer or employee of the City attempts to repeal, modify or nullify any provision of the City's Charter or Code of Ordinances, by any means other than by lawful adoption of an amendment to the City's Charter pursuant to Article XI, Section 9 of the Tennessee Constitution or by lawful adoption of an ordinance pursuant to Referendum Ordinance No. 1852, § 1 of the City's Home Rule Charter.
16. The City's Home Rule Charter vests exclusive authority in the members of the City Council to adopt all ordinances, which become operative if signed by the Chairman of the City Council and the Mayor after passage or after the second regular meeting next following adoption if not vetoed. If seasonably vetoed by the Mayor an ordinance becomes operative if majority of the Council overrides the veto.
17. Article XI, Section 9 of the Tennessee Constitution provides:

A charter or amendment may be proposed by ordinance of any home rule municipality, by a charter commission provided for by act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters of a home rule municipality not less in number than ten (10%) percent of those voting in the then most recent general municipal election.

Tenn. Const. Art. XI, § 9.
18. Any ordinance proposing a home rule amendment to the City's Home Rule Charter must be adopted by the Memphis City Council. In addition, any ordinance

proposing a home rule amendment to the City's Home Rule Charter only becomes effective and operative sixty (60) days after approval by a majority of the qualified voters in the City voting thereon.

19. Referendum Ordinance No. 4346 was adopted by the City Council on October 17, 1995 and was signed by the Mayor of the City on November 15, 1995. Referendum Ordinance No. 4346 became effective in accordance with its terms immediately after it was approved by a majority of Memphis voters in a general state election on November 5, 1996.
20. Referendum Ordinance No. 4346 was adopted in response to a preliminary injunction entered in the matter of *Muhammad, et al v. City of Memphis et al*, Consolidated Case Nos. 88-2899, 90-2093 and 91-2139 On July 5, 1995, in which the court imposed an electoral plan for the 1995 general City elections that had been approved by the Memphis City Council on May 5, 1995 and expressly provided that “[f]ollowing the 1995 election, any electoral system to be implemented, including the plan proposed by the Council, will be subject to a referendum as required by the City Charter.”
21. On January 29, 1997 the Court entered a Permanent Injunction and Final Judgment in the *Muhammad* matter which provided in pertinent part:

The plaintiffs' claims concerning the method of electing the Memphis City Council have been resolved by the Memphis City Charter amendment adopted by popular vote on November 5, 1996.

This order will make permanent the court's July 26, 1991 preliminary injunction and the July 5, 1995 injunction decree against citywide runoff elections so as to fully remedy the statutory violations found by the court.

THEREFORE, IT IS HEREBY ordered, adjudged and decreed that:

....2. All remaining claims are dismissed. The entry of this order constitutes final judgment in these actions.

22. The parties to the action included but were not limited to:

PARTY	COUNSEL
City of Memphis	Monice M. Hagler
Shelby County Election Commission	Phillip G. Kaminsky
Richard Hackett, Mayor	Monice M. Hagler
City Council of Memphis, Tennessee and individual council members Pat Vanderschaaf, Florence H. Leffler, Oscar H. Edmonds, Jr., Barbara Sonnenburg, A.D. Alissandratos, Tom Marshal, Jimmy Moore, Mary Rose McCormick, Bill Davis, Jack Sammons,	Allan J. Wade
Individual council members James Ford, Kenneth T. Whalum, Rickey Peete	Tarik B. Sugarmon
Myron Lowery, Intervenor	Donald A. Donati

23. The Permanent Injunction and Final Judgment in the *Muhammad* matter was (1) rendered by a court of competent jurisdiction, (2) the City of Memphis, the then City Mayor, the Memphis City Council, including then serving individual council members or their privies were involved in the *Muhammad* matter and the privies of the parties in the Muhammad matter are parties in the present case, (3) the claim that Referendum Ordinance No. 4346, in its entirety, was a valid enactment to remedy constitutional defects in then existing Referendum Ordinance No. 1852 was asserted in the *Muhammad* matter and is being asserted by Smiley in the present case, and (4) the underlying judgment in the *Muhammad* matter was final and on the merits.

24. Smiley, as a successor in interest, to City Council members who were parties in the *Muhammad* matter and the Memphis City Council as the City's legislative body are in privity with those parties and is entitled to enforce Referendum Ordinance No. 4346 as a complete bar in this action with respect to any issue being asserted by the City of Memphis and the Election Commission in this action involving the validity and application of Referendum Ordinance No. 4346 which was litigated or which in the exercise of due diligence could have been presented for determination in the *Muhammad* matter.
25. No party in the *Muhammad* matter contested the validity or application of the amending language in Referendum Ordinance No. 4346 or made any claim that any part thereof would not govern Memphis City elections or the qualifications of all candidates for City of Memphis elective office after the October 1995 city elections as ordered and enjoined by the Court in the *Muhammad* matter.
26. As of the date hereof, Section 5 of Referendum Ordinance No. 4346 approved by the voters as an amendment to the City's Charter on November 5, 1996 has not been amended, modified or repealed by the City Council pursuant to Article XI, §9 or otherwise from and after November 5, 1996 and presently remains in full force and effect.
27. Referendum Ordinance No. 4346 expressly provides that it amended Section 1 of Memphis Referendum Ordinance No. 1852 adopted November 8, 1966 by deleting the second (2nd) and fourth (4th) paragraphs of said Section 1 and by substituting in lieu thereof the language in Section 5 of Referendum Ordinance No. 4346 that was presented to and approved by the Memphis voters on November 5, 1996 .

28. No administrative officer of the City, including the Mayor, has any legal authority under the Tennessee constitution, under any Tennessee statute or under any provision of the City's Charter to amend, modify or repeal any duly adopted provision of the City's Home Rule Charter by administrative direction or action, except by order of a court of competent jurisdiction in a timely and proper legal action brought in any such court.
29. Administrative officers of the City are seeking to interfere with and/or usurp the City Council's exclusive legislative powers under the City's Charter by requiring the Election Commission to enforce qualifications that are not found in the plain language of the City's present Home Rule Charter against candidates for City elective offices.
30. The plain language of Referendum Ordinance No. 1852, sections 1 and 4 as amended by Referendum Ordinance No. 4346 presently reads in pertinent part:

The qualifications of the Mayor shall be the same as those required herein for members of the Council....

That each Council Member shall be a resident, as defined by State election laws, of the City and of the District from which he or she is elected.

31. The qualifications for City elective offices referenced in the Meyer opinion that administrative officers of the City are seeking to reinstate and enforce were expressly repealed by Referendum Ordinance No. 4346.
32. No person or administrative officer of the City has the authority to alter, amend or change the plain language of any charter provision, except by a clarifying or amending ordinance adopted and approved in accordance with Article XI, Section

9 of the Tennessee Constitution.

33. The plain language of a provision of the Charter cannot be changed by administrative directive or fiat of a City officer. Moreover, under the City's Home Rule Charter the Mayor and all officers and employees under the Mayor's supervision have a mandatory duty to see that the ordinances and provisions of the Charter are observed. The City's Charter is consistent with well-established Tennessee precedent which unequivocally provides:

In the almost 200 years of this State's existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved. Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes. *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988)(Citations omitted)....Moreover, "[t]he provisions of the charter are mandatory, and must be obeyed by the city and its agents..." (citing *Barnes v. Ingram*, 217 Tenn. 363, 373, 397 S.W.2d 821, 825 (1965)).

34. In *Lebanon v. Baird*, the Tennessee Supreme Court also observed that "...if a city charter requires that specified acts be taken through the adoption of an ordinance, the city has no authority to alter the manner of acting and reliance on a general provision of the charter cannot excuse its failure to conform to the specific or express requirements of the charter, which are considered mandatory. " *City of Lebanon v. Baird*, 756 S.W.2d 236, 243 (Tenn. 1988).
35. On information and belief, the administrative officers of the City have verbally adopted the opinion of Robert Meyers as the law of the City that will govern the qualifications that will apply to candidates for the office of City Mayor in the 2023 General City municipal elections. Such action is ultra vires and void and contrary to the Permanent Injunction in the *Muhammad* matter, which incorporated

Section 5 of Referendum Ordinance No. 4346 in its Permanent Injunction and which is binding on all parties in this action as a matter of law.

36. The Meyers Opinion through slight of hand and semantical gymnastics summarily concluded that the express repeal in Referendum Ordinance No. 4346 of the second (2nd) and fourth (4th) paragraphs of the November 8, 1966 Memphis Referendum Ordinance No. 1852 and the substitution of the language in Section 5 of Referendum Ordinance No. 4346 in lieu thereof can be disregarded by the City and the Election Commission even though Meyers does not identify any ambiguity in Referendum Ordinance No. 4346.
37. Myers failed to acknowledge that the repeal in Referendum Ordinance No. 4346 was an **express** repeal of the second (2nd) and fourth (4th) paragraphs of Memphis Referendum Ordinance No. 1852 adopted November 8, 1966.
38. Meyers' opinion does not have the force of law and cannot be legally enforced by any administrative officer of the City, because it contradicts the plain language of the City's Home Rule Charter, which still reads:

The qualifications of the Mayor shall be the same as those required herein for members of the Council....
39. The Shelby County Election Commission is a ministerial administrative body that does not possess any legislative authority whatsoever. *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531 (Tenn.2004).
40. The Election Commission cannot through administrative pronouncement prescribe any qualifications for any City elective office and especially none that contradict the express language of the City's Charter.

41. The interpretation of the City's Charter is a question of law to be decided by courts and not by election commissions.

42. Mr. Myers' opinion fails to read Referendum Ordinances Nos. 1852 and 4346 in *pari materia*. Mr. Myers concluded that

Ref. Ord. No. 4346 expressly addresses changing the residency requirement for the Council, but it is silent as to the residency requirements of the Mayor. Thus, it is apparent on the face of the referendum (Ref. Ord. No. 4346) that it only addresses the residency requirement for the Council and not for Mayor. Therefore, one could not say that the "collective intent" of the electorate was to change the residency requirement for Mayor.

This conclusion ignores the clear intention of the Council and the voters in 1966, when each approved Referendum Ordinance No. 1852, that removed any specific and independent qualifications for the Mayor that existed before home rule and simply made the qualifications for the Mayor the same as those for the Council.

43. The City's Charter does not contain any express provision after the adoption and approval of Referendum Ordinance No. 1852 that provides a separate and independent provisions applicable only to the Mayor that specifies qualifications that are different from the qualifications for the members of the City Council.

44. The constitutional doctrine of separation of powers is embedded in the organic law of Tennessee. Tenn. Const. art. II, § 2. Under the doctrine the "legislative power" is the authority to make, order, and repeal law; the "executive power" is the authority to administer and enforce law; and the "judicial power" is the authority to interpret and apply law. The Tennessee constitutional provision prohibits an encroachment by any of the departments upon the powers, functions and prerogatives of the others.

45. This Court has no authority to re-write legislation or to supply language to the City's Home Rule Charter that is not expressly provided or that is contrary to the plain meaning of the words and phrases in the Charter.
46. Using Mr. Myers' vernacular, can one not say that the collective intent of the electorate in the 1966 Home Rule Amendment was to make the qualifications for Mayor and Council the same, such that any subsequent lawfully adopted change in the Council's qualifications would also change the Mayor's qualifications?
47. The law of Tennessee presumes that in 1995, when Referendum Ordinance No. 4346 was adopted, (1) the City's legislative body knew the qualifications for Mayor in Referendum Ordinance No. 1852 § 4, and (2) the Mayor knew the qualifications for Mayor in Referendum Ordinance No. 1852 § 4 when he signed Referendum Ordinance No. 4346 making it effective and (3) in 1996, over a year later when Referendum Ordinance No. 4346 was approved by the voters, the voters knew or with reasonable diligence could have ascertained the effect of the change in the qualifications for the Council on the Mayor's qualifications.
48. This Court should require more than just pure speculation from a lawyers' opinion about what the lawyer muses is the "collective intent" of the voters as a justification to ignore a validly adopted and approved Referendum Ordinance. The flaw in this reasoning is the failure to consider also the "collective intent" of the voters who approved Home Rule Amendment No, 1852 in 1966.
49. Smiley may be aggrieved if the Defendants seek to extend Myers' logic to re-write the qualifications for persons seeking to run of City Council Positions by suggesting that the five (5) year residency requirement should apply to both City

Council members and the Mayor.

50. In light of the Defendants' prior actions, Smiley cannot be assured that the City's administrative officers will defend Referendum Ordinance No. 4346 as he would. In light of the evolving positions of the Defendants, Smiley has a reasonable belief that his presence in this case is necessary to protect his interests and the legislative prerogatives of the City Council.
51. Assuming *arguendo* that the City's administrative officers reasonably believe that the Myers opinion was a reasonable and nonfrivolous argument supported by existing law, they failed to appropriately and timely seek a declaratory judgment from a court of competent jurisdiction with consent from the City Council¹ but rather allowed the Election Commission to enforce the Myers Opinion as if it had the force of City law for over 63 days, from February 28, 2023 until May 1, 2023 without any clear direction about the opinion.
52. At no time did the City's administrative officers consult with the Memphis City Council or obtain its consent to pursue any affirmative relief in this or in any other action to invalidate Referendum Ordinance No. 4346 in whole or in part.
53. Since this case involves the validity of a legislative pronouncement of the City Council, Smiley contends that he, individually, and as representative of the City Council is the proper party to defend Ordinance No. 4346 or to seek declaratory relief from the Court in this case.
54. Since Smiley, the City Council and individual City Council Members are protected from any attempt by any party in the *Muhammad* matter to re-litigate any issues

¹ Council approval shall be required before any special attorney is employed by the city to file suit regarding any extraordinary litigation as hereinafter defined. (Ord. No. 5294, § 1, 2-17-2009).

regarding the validity or application of Referendum Ordinance No. 4346 or any other issues relating thereto which in the exercise of due diligence could have been presented for determination in the *Muhammad* matter, Smiley, the City Council and individual City Council Members are all proper parties to defend Ordinance No. 4346 or to seek declaratory relief from the Court in this case.

IV. CAUSES OF ACTION

COUNT I: REQUEST FOR DECLARATORY JUDGMENT

55. Plaintiff repeats, realleges, and incorporates all foregoing allegations as if set forth herein.

56. T.C.A. § 29-14-101, et seq., provides as follows:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

57. Pursuant to T.C.A § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that Referendum Ordinance No. 4346 was adopted by the City Council and approved by Memphis voters on November 5, 1996 in accordance with Article XI § 9 of the Tennessee Constitution and is valid and enforceable in accordance with its terms.

58. Pursuant to T.C.A § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that Referendum Ordinance No. 1852 as amended by Referendum Ordinance No. 4346 is valid and enforceable in accordance with its terms.

59. Pursuant to T.C.A § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that Smiley, as a successor in interest, City Council members who were parties in the *Muhammad* matter is in privity with those parties and is entitled to enforce Referendum Ordinance No. 4346 as a complete bar in this action with respect to any issue asserted by the City of Memphis and the Election Commission involving the validity of Referendum Ordinance No. 4346 which issue was litigated or which in the exercise of due diligence could have been presented for determination in the *Muhammad* matter.

60. Pursuant to T.C.A § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that the plain language of Referendum Ordinance No. 1852, section 1 as amended by Referendum Ordinance No. 4346 and Referendum Ordinance No. 1852, section 4, which was not amended or repealed reads in pertinent part:

The qualifications of the Mayor shall be the same as those required herein for members of the Council....

That each Council Member shall be a resident, as defined by State election laws, of the City and of the District from which he or she is elected.

61. Pursuant to T.C.A. § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that the City of Memphis Home Rule Charter, as amended by Referendum Ordinance 4346, approved by Memphis voters on November 5, 1996, deleted and repealed from the Charter the five (5) year durational residency requirement.

62. Pursuant to T.C.A. § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that the City of Memphis Home Rule Charter, as amended by Referendum Ordinance 4346 and approved by Memphis voters on November 5, 1996, does not contain a

separate durational residency requirement or any durational residency requirement to be eligible to run for any elected City Office.

63. Pursuant to T.C.A. § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that no administrative officer of the City, including the Mayor, has any legal authority under the Tennessee constitution, under any Tennessee statute or under any provision of the City's Charter to amend, modify, repeal any duly adopted provision of the City's Home Rule Charter by administrative direction or action, except by order of a court of competent jurisdiction in a timely and proper legal action brought in any such court.
64. Pursuant to T.C.A. § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that the Shelby County Election Commission is a ministerial administrative body that does not possess any legislative authority whatsoever. *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531 (Tenn.2004). The Election Commission cannot through its administrative pronouncements prescribe any qualifications for City elective offices and especially none that contradict the express language of the City's Charter.
65. Pursuant to T.C.A § 29-14-101, *et seq.*, Plaintiff seeks a judgment declaring that any requirement that candidates for elective office in the Memphis Municipal election scheduled for October 5, 2023, be a resident of the City of Memphis for five (5) years is unlawful, contrary to law and unenforceable.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Smiley hereby respectfully requests as

follows:

1. That process be issued and Defendants be made to appear and answer;
2. That the Court enter a final judgment and decree that binds the parties and their successors and assigns and that declares their respective rights and obligations as requested in paragraphs 51 through 62 of this Complaint.
3. That the Court grant Smiley such other and further relief to which he may be entitled in the premises including the award of his discretionary costs and any costs included in the bill of costs by the Clerk and Master.

Respectfully submitted,

BY: _____
ALLAN J. WADE (4339)
BRANDY S. PARRISH (21631)
The Wade Law Firm, PLLC
5050 Poplar Avenue, Suite 1028
Memphis, Tennessee 38157
(901) 322-8005
awade@thewadefirm.com

Attorneys for JB Smiley, Jr.

CERTIFICATE OF SERVICE

I certify that I forwarded a copy of the foregoing document to the following individuals by Hand delivery, U.S. mail, postage prepaid, electronic means of filing with this Court or electronic mail, as indicated below on this the ____ day of May, 2023:

	Hand Delivery	Jacob Swatley, Esq. Edward J. McKinney, Jr. 6060 Primacy Parkway, Suite 103 Memphis, Tn 38119 Attorney for Defendants
X	E-service	
X	Email	
	U.S Mail	
	Hand Delivery	Robert L.J. Spence, Jr. 65 Union Avenue, Suite 900. Memphis, TN 38103 Attorney for Plaintiff Bonner
X	E-service	
X	Email	
	U.S Mail	

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	Hand Delivery	Darrell J. O'Neal 2129 Winchester Road Memphis TN 38116 Attorney for Plaintiff Turner
X	E-service	
X	Email	
	U.S Mail	
	Hand Delivery	Tannera Gipson Jon Lakey 130 North Court Ave. Memphis, TN 38103 Attorneys for the City of Memphis
X	E-service	
X	Email	
	U.S Mail	

Allan J. Wade