APPEAL

1. Common law writ of certiorari - The only issue to be reviewed in a common law writ of certiorari is whether the administrative agency exceeded its jurisdiction or act illegally, arbitrarily, or fraudulently - The issue to invalidate the zoning ordinance is not before the court - BZA granted a special exception pursuant to the zoning code, so BZA did not exceed its authority - Plaintiff did not have standing to challenge certain design standards imposed on the solar farm by the BZA - To have standing in a common law writ of certiorari, the party filing the petition must demonstrate that it is aggrieved by the decision sought to be reviewed - To be aggrieved, the party must show: (1) a special interest in the agency's final decision or that it is subject to a special injury not common to the public generally; and (2) that it was a party to the agency proceedings sought to be reviewed

KATRINA GREER ET AL. v. FAYETTE COUNTY, TENNESSEE BOARD OF ZONING APPEALS ET AL.
COURT OF APPEALS No. W2022-00783-COA-R3-CV Filed May 8, 2023

"Appellants filed a petition for common law writ of certiorari, seeking judicial review of Appellee Fayette County Board of Zoning Appeals' grant of a special exception to other Appellees for the construction of a solar farm. The trial court denied the writ of certiorari. Discerning no error, we affirm."

"This is the second appeal concerning the construction of a solar farm in Fayette County, Tennessee. In our previous opinion, ***Tapp v. Fayette County, Tennessee et al.***, No. W2021-00856-COA-R3-CV, 2022 WL 2658872 (Tenn. Ct. App. July 11, 2022) *perm. app. denied* (Tenn. Nov. 17, 2022),2 we explained that,

> Invenergy, LLC, Invenergy Solar Project Development, LLC, and Yum Yum Solar, LLC [] petitioned the Fayette County Board of Zoning Appeals (the 'Zoning Board') to approve their request to construct a solar farm in an area designated as 'rural' under the Fayette County Growth Plan (the 'Growth Plan'). Such request was premised on Section 13 of the Fayette County Zoning Resolution ('Section 13 [of the Zoning Resolution]'), which authorizes the Zoning Board to issue a special exception permit for construction of 'solar photovoltaic facilities' in an area designated as 'rural.'The Zoning Board granted the . . . request, issued a special exception, and approved construction of the solar farm.

Id. at *1. On January 14, 2021, the ***Tapp*** plaintiffs/appellants filed a declaratory judgment action in the Chancery Court for Fayette County ('trial court') alleging that Tennessee Code Annotated sections 6-58-106(c) and 6-58-107 prohibited Fayette County from 'approving an industrial activity [such as solar farms] in an area designated as 'Rural' in the Fayette County Growth Plan.' The ***Tapp*** plaintiffs/appellants asked the trial court to 'enter an order declaring Section 13 of the Fayette County Zoning Resolution null and void as violative of State Law.' On July 1, 2021, the trial court dismissed the declaratory judgment action, which the plaintiffs/appellants timely appealed."

"While the ***Tapp*** appeal was pending in this Court, on July 20, 2021, the Zoning Board conducted a hearing concerning the site design for the solar farm. A representative for Yum Yum Solar explained that the solar farm met all applicable design criteria, including criteria for grading, drainage, minimum setbacks, and noise level. The representative also confirmed that the solar farm would comply with all 26 design conditions that the Zoning Board placed on the solar farm's construction. At this hearing, the Zoning Board also heard from members of the public concerning the solar farm. Thereafter, the Zoning Board voted to approve the solar farm's design plan."

"On September 16, 2021, Katrina Greer, Gary Bullwinkel, Joseph Tapp, Theophilus Middlebrook, Willie Porter (together, 'Appellants'), William Hendry, and Dave Rhea filed a verified petition for writ of certiorari in the trial court asking the trial court to nullify the Zoning Board's grant of Yum Yum Solar's request for a special exception permit for a solar farm. In this lawsuit, Appellants sued the Zoning Board as well as Yum Yum Solar, LLC, Invenergy, LLC, Invenergy Solar Project Development, LLC, Invenergy Solar Project North America, LLC, and Invenergy Solar Development, LLC (the 'Invenergy Defendants')." …

"On March 24, 2022, the trial court heard the petition for writ of certiorari. At the conclusion of the hearing, the trial court announced its findings of facts and conclusions of law and denied the petition for writ of certiorari. The trial court found that the question of whether there was 'a reasonable basis, a rational basis, a fairly debatable reason' for the Zoning Board's actions was not at issue, as conceded by Appellants. …"

"On May 12, 2022, the trial court entered its final order, wherein it found that: (1) the certified record contained numerous relevant facts, evidence, and documents to materially support the findings and decision of the Zoning Board to grant the special exception; and (2) Fayette County acted appropriately in its legislative powers and in the powers delegated to the Zoning Board by Article III, Section 13 of the zoning resolution and the Zoning Board acted legally in granting the application for a special exception. The trial court's March 24, 2022 oral ruling was incorporated and made part of the trial court's final order. Appellants filed a timely appeal."

"A court's review of a common law writ of certiorari is extremely limited. '[R]ather than address the issue *de novo* as the initial decision maker,' the trial court applies 'a limited standard of review to decisions already made by administrative officials.' ***State ex rel. Moore & Assocs., Inc. v. West***, 246 S.W.3d 569, 574 (Tenn. Ct. App. 2005). 'The scope of review of the appellate courts 'is no broader or more comprehensive than that of the trial court with respect to evidence presented before the [administrative agency].'' ***Griffin v. Bd. of Zoning Appeals for Rutherford Cnty.***, No. M2019-02043-COA-R3-CV, 2020 WL 5666711, at *4 (Tenn. Ct. App. Sept. 23, 2020) (quoting ***Whitson v. City of La Vergne Bd. of Zoning Appeals***, No. M2019-00384-COA-R3-CV, 2020 WL 2745420, at *2 (Tenn. Ct. App. May 27, 2020) (quoting ***Watts v. Civil Serv. Bd. for Columbia***, 606 S.W.2d 274, 277 (Tenn. 1980))). The only issue to be reviewed in a common law writ of certiorari is whether an administrative agency 'exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently.' ***Hoover, Inc. v. Metro. Bd. of Zoning Appeals***, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996); *see also* Tenn. Code Ann. § 27-8-101 ('The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.') In their appellate brief, Appellants state that

> [f]or purposes of this [a]ppeal, Appellants do NOT contend that the action of the [Zoning Board] was arbitrary, fraudulent, or without evidence. Rather, Appellants contend that the action of the [Zoning Board] exceeded its jurisdiction and resulted in an unlawful outcome.

(Emphasis in original). Accordingly, the issue before this Court is limited to whether the Zoning Board exceeded its jurisdiction when it granted the Invenergy Defendants' request for a special exception permit for a solar farm."

"Appellants argue that the Zoning Board's issuance of the special exception was, in effect, a rezoning of the land, and that the power to rezone land is reserved exclusively to the Planning Commission and the Board of Commissioners. As such, Appellants argue that the Zoning Board exceeded its jurisdiction and 'usurp[ed] the authority of the County Commission and the Planning Commission[.]' Fatal to Appellants' argument is the fact that the Fayette County Board of Commissioners enacted Section 13 of the Zoning Resolution, and, in doing so, bestowed, on the Zoning Board, the power to do exactly what it did here. 'Boards of zoning appeals generally engage in enforcing, applying, or executing laws already in existence.' ***Griffin***, 2020 WL 5666711, at *3 (quoting ***Whitson***, 2020 WL 2745420, at *1 (citing ***Weaver v. Knox Cnty. Bd. of Zoning Appeals***, 122 S.W.3d 781, 784 (Tenn. Ct. App. 2003); ***Wilson Cnty. Youth Emergency Shelter, Inc. v. Wilson Cnty.***, 13 S.W.3d 338, 342 (Tenn. Ct. App. 1999))). The record shows that the Zoning Board acted within its authority as authorized by Tennessee Code Annotated section 13-7-109(2), and Section 13 of the Zoning Resolution. Tennessee Code Annotated section 13-7-109(2) provides that a board of zoning appeals has the power to '[h]ear and decide, ***in accordance with the provisions of any such ordinance, requests for special exceptions*** . . . .' Tenn. Code Ann. § 13-7-109(2) (emphasis added). As discussed in ***Tapp***, Section 13 of the Zoning Resolution 'authorizes the Zoning Board to issue a special exception permit for construction of 'solar photovoltaic facilities' in an area designated as 'rural.'' ***Tapp***, 2022 WL 2658872, at *1. Accordingly, the Zoning Board acted within its jurisdiction when it issued a special exception permit for a solar farm to the Invenergy Defendants."

"Appellants also argue that the trial court's 'refusal to nullify Section 13 of the Fayette County Zoning [Resolution,] which directly contradicts and is antithetical to a specific state statute[,] constitutes clear error by the [t]rial [c]ourt.' In this portion of their briefing, Appellants argue that the authorization of a solar farm in an area designated as 'rural' conflicts with state statutes and is unenforceable. We note that Appellants' briefing on this issue is almost identical to the ***Tapp*** plaintiffs'/appellants' briefing in the declaratory judgment action. Regardless, Appellants' argument here is, in essence, a challenge to *the legality of Section 13 of the Zoning Resolution*—a challenge that is wholly unrelated to the gravamen of this appeal, *i.e.*, whether the Zoning Board exceeded its authority. As explained above, the Zoning Board did not enact Section 13 of the Zoning Resolution. At the trial court hearing, Appellants' counsel acknowledged that the County Commission, *i.e.*, the Board of Commissioners, enacted Section 13. Notably, Appellants did not sue the Board of Commissioners concerning the enactment of Section 13 in this lawsuit. Furthermore, as Appellees discuss in their brief, 'challenges to the legality of a zoning ordinance itself are properly brought under declaratory judgment actions.' Indeed, this Court has explained that '[a]n action for declaratory judgment . . . rather than a petition for [writ of] certiorari, 'is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action' of an authority enacting or amending zoning legislation.' ***Benson v. Knox Cnty.***, No. E2015-01357-COA-R3-CV,

2016 WL 2866534, at *5 (Tenn. Ct. App. May 12, 2016) (quoting ***Fallin v. Knox Cnty. Bd. Of Comm'rs***, 656 S.W.2d 338, 342 (Tenn. 1983)). Having limited the issue in this appeal to whether the Zoning Board exceeded its jurisdiction, to the extent Appellants now attempt to challenge the legality of Section 13, by filing a writ of certiorari, that issue is not before this Court in this appeal."

"… As discussed in ***Wood***, to have standing in a common law writ of certiorari, 'the party filing the petition must demonstrate that it is 'aggrieved' by the decision sought to be reviewed.' ***Id***. (citing Tenn. Code Ann. § 27-9-101 ('Anyone who may be aggrieved by any final order or judgment of any board of commission functioning under the laws of this state may have the order or judgment reviewed by the courts[.]')). To be 'aggrieved,' the party must show: (1) 'a special interest in the agency's final decision or that it is subject to a special injury not common to the public generally'; and (2) 'that it was a party to the agency proceedings sought to be reviewed.' ***Wood***, 196 S.W.3d at 158 (internal citations omitted). Appellants failed to prove that they are 'aggrieved' by the design conditions the Zoning Board imposed on the solar farm. In other words, Appellants did not show that they are subject to a special injury not common to the general public by virtue of the Zoning Board's decision to impose certain design conditions on the solar farm. Rather, as Appellees discussed in their brief, Appellants and the general public would likely benefit from these conditions. Accordingly, we conclude that Appellants do not have standing to raise an issue regarding the design conditions the Zoning Board imposed on the solar farm."

2. Common law writ of certiorari – Expert's opinion constituted material evidence to support the decision of the administrative body and the trial court improperly reweighed the evidence - Considering that the expert had decades of experience with the ERate program and other school districts in numerous states, her opinion constitutes material evidence even in the absence of supporting documentation - It was not the role of the chancery court to reweigh the evidence before the Committee – A common law writ of certiorari is not a vehicle which allows the courts to consider the intrinsic correctness of the conclusions of the administrative decision maker

CHARTER COMMUNICATIONS OPERATING, LLC v. MADISON COUNTY, TENNESSEE, ET AL.
COURT OF APPEALS No. W2022-01025-COA-R3-CV Filed June 26, 2023

"This appeal involves a bid awarded by a county finance department and upheld by the county's finance committee after a bid protest hearing. One of the service providers whose bid was not selected filed a petition for common law writ of certiorari in chancery court. After reviewing the administrative record, the chancery court concluded that the finance committee's decision was arbitrary and capricious and unsupported by material evidence and remanded for the county to rebid the contract. We reverse and remand for further proceedings."

"In December 2020, the Finance Department for Madison County, Tennessee, issued an 'Invitation to Bid' for a multi-year contract to provide wide area network digital transmission circuits and internet access service for the Jackson-Madison County School System. The competitive bid was for a three-year contract, to begin on July 1, 2021, with two possible twelve-month extensions. Four service providers submitted proposals in response to the competitive bid: Jackson Energy Authority ('JEA'); Charter Communications; WANRack, and Thomas Consultants. JEA was the current provider of such services for the School System pursuant to an existing contract that began in 2016 and was set to end on June 30, 2021. JEA bid $30,350 for the wide area network connection and $10,000 per month for the internet access service. Charter bid $26,000 for the wide area network connection and $4,800 per month for the internet access service."

"Madison County operates under the County Financial Management System Act of 1981, codified at Tenn. Code Ann. § 5-21-101, *et seq.*, and it has adopted purchasing policies and procedures pursuant thereto." …

"In addition, the County's purchasing system must provide that '[p]urchases and contracts shall be awarded based on the lowest and best bid[.]' Tenn. Code Ann. § 5-21-119(b)(3). The County's policies and procedures state that 'diligence must be given to securing the lowest price possible.'"

"On March 7, 2021, the Director of Technology for Jackson-Madison County School System, Christopher Sueing, sent an email to the Purchasing Director for Madison County with the subject line, 'Internet and Circuits, WAN Decision.' Within this email, Mr. Sueing first apologized for the length of time it had taken 'to send you an answer to wh[y] we choose JEA as our provider.' He then included four bullet points in his email:

- JEA has had a 100% uptime other than a couple times that people have knocked down utility poles that also had a school fiber line connected.
- JEA has a fiber termination at each school allowing for 10 GIG connectivity if needed.

• JEA is currently providing access to a concrete secured bunker that houses several of our mission critical servers.
• Being local JEA provides a level of personalized service to the district that cannot be matched.

In closing, Mr. Sueing stated, 'While JEA is not the cheapest they are certainly the best choice for JMCSS.' The Purchasing Director, Ms. Rankin, responded by asking Mr. Sueing to '[p]lease forward the information we discussed on the 4 submitted proposals for which you have chosen JEA. I cannot submit the award without the information.'"

"Two weeks later, on March 23, 2021, the School System executed a contract with JEA for the services beginning July 1, 2021. On March 24, 2021, the School System submitted a federal funding request for participation in the 'E-Rate' program, which enables eligible school systems to obtain affordable broadband internet service at discounted rates. The deadline for applications for E-Rate funding was March 25, 2021. However, at that point, the Finance Department had not awarded a formal bid. Upon learning this information, Charter notified the Finance Department of its intent to protest the bid award and requested a bid protest hearing."

"On April 15, 2021, the Finance Department issued a 'Bid Award Notification' to the four service providers who submitted bids, notifying each of them that the bid had been awarded to JEA '[b]ased on the information received from consultant, Rosemary Enos.' The bid award notification stated that JEA's bid met Madison County's requirements and specifications and that the award was made 'based on the lowest and/or best proposals received.' Later that afternoon, a bid protest hearing was held before the Madison County Finance Committee. At the beginning of the hearing, the attorney for Madison County explained the bidding process to the members of the Finance Committee. Counsel explained that the school system had utilized the services of 'an E-Rate consultant' for evaluating the bids. He explained that the School System had communicated to the Finance Department its desire for the bid to be awarded to JEA, but the Finance Department had requested additional information prior to awarding the bid. Thus, counsel conceded that a 'misstep' had occurred on March 23 when the School System communicated an acceptance of the bid to JEA before the Finance Department had issued an award letter, but he claimed that this occurred because of the March 25 deadline for participating in the E-Rate program. The county attorney stated that the Finance Department had received supporting information from the E-Rate consultant and from the School System regarding its preference for JEA's bid, and after the Finance Department took all of this into account, it issued a bid award letter to JEA."

"Next, Madison County's attorney summarized the order of events that would occur at the bid protest hearing. He explained that Charter would present its position first, followed by JEA, and then a representative of the Finance Department would explain its decision to award the bid to JEA, with the assistance of the E-Rate consultant, Ms. Enos. He noted, however, that the hearing was 'informal.' He explained that members of the Committee could ask questions at any time but participants could not question one another. Counsel informed the Committee members that at the conclusion of the hearing, they could vote to uphold the bid award to JEA, to set aside the award and award the bid to another vendor, or to withdraw the bid completely."

"Charter's attorney began with an opening statement summarizing its position. First, counsel argued that there was a 'fatal flaw[]' in the competitive bid process because the formal bid award from the Finance Department had not occurred at the time when the School System signed the contract with JEA and submitted its funding request. Next, counsel emphasized that applicable laws required selection of the 'lowest and best' bid, and he contended that Charter's bid was both the lowest and the best."

"Charter's attorney and one of its sales managers for state and local education then presented a slideshow about Charter and its services. The sales manager, Lee Brones, stated that he had a lot of experience with the E-Rate program and considered himself an expert on it, as he had received annual training on the subject for the last twenty years. In the course of his presentation, Mr. Brones discussed some documents that Charter had obtained from Madison County pursuant to an Open Records Act request. The first document was an 'E-Rate Evaluation Worksheet' from the School System, which compared and scored each provider's proposals for both the internet access service and wide area network. For the wide area network bid, JEA received an overall score of 99 out of 100 points, Charter received 67, WANRack received 55, and Thomas Consultants received 46. For the internet access service bids, of which there were only three, JEA received 98 out of 100 points, Charter received 67, and WANRack received 57. Mr. Brones was critical of this scoring. For example, he pointed out that JEA's monthly fee for internet access service was $10,000, while Charter's was only $4,800. However, Charter received 25 out of 25 possible points in the category for the price of E-Rate eligible service, while JEA received only two points less, with a score of 23 out of 25 points. In all other categories, JEA received perfect scores. Thus, Mr. Brones suggested that the scoring was arbitrary. He claimed that Charter's bid was $343,800 less over the life of the contract and that Charter's service 'would have cost you nothing to implement except of internal time of staff having to make some changes, the cost of change, soft costs that could have been employees[.]'"

"Next, Mr. Brones analyzed the March 7 email from the School System's Director of Technology to the Purchasing Director for Madison County, in which he had stated that JEA was 'not the cheapest' but was 'certainly the best choice for JMCSS,' with four bullet points regarding why the School System had chosen JEA. Regarding three of those reasons, 'uptime' in service, fiber termination and connectivity, and localized service, Mr. Brones claimed that Charter's service was equal with JEA's service on each point. The fourth reason listed by the Director of Schools was that JEA was 'currently providing access to a concrete secured bunker that houses several of our mission critical servers.' Mr. Brones suggested that this fact was totally irrelevant because 'in E-rate there are very rigid rules that you can't give something free in order to get a bid on something that's Erate eligible. That's a big no-no, you can't do that, you can't do quid pro quo, we'll give you this if you give us that[.]' Thus, Mr. Brones said 'the fact that you all house that –that you all are able to house some servers for free in [JEA's] warehouse, [that's] against the law.'"

"In conclusion, Mr. Brones suggested that there was a real danger of E-Rate funding being denied once the School System's application was reviewed at the federal level because the School System had not chosen the 'lowest and best' bid, *i.e.*, Charter." …

"Next, the Committee heard from a representative of JEA who explained that JEA had been providing service to the School System for over fifteen years. Thus, he noted that JEA's bid did not address construction because its network had already been built. He said JEA had established a great working relationship with the School System and each of the schools as well, and he noted that JEA had been recognized by the Tennessee Department of Education in connection with the district's connectivity. In response to questions by a Committee member, the JEA representative also described JEA's local presence and the advantage of having network engineers working in the bunker alongside the School System. To the extent that Charter had insinuated some illegality regarding the servers, the JEA representative stated that there were 'absolutely' charges for that equipment storage."

"Next, the Committee heard from Madison County's Finance Director. She explained that the Finance Department had awarded the bid to JEA after hearing input from a consultant. Thus, the consultant, Ms. Enos, made a presentation as well. Ms. Enos said that she had been working as an E-Rate consultant for 24 years, since the beginning of the E-Rate program in 1997. Ms. Enos opined that Madison County's bid process was open and fair, with full competition. She explained that the bid scoring matrix was included in the invitation to bid so that service providers would know what factors would be used in evaluating the bid responses. Ms. Enos explained that the matrix is found on the government-operated website for E-Rate funding, which contains examples on how to evaluate a bid with a bid matrix. Although multiple factors can be included within the matrix, she said the one 'hard and fast' rule is that price must be the most heavily weighted factor in the matrix. However, she explained that this primary factor only relates to the price of 'E-Rate eligible services.' Ms. Enos noted that the bid matrix used by the School System weighted the price of E-Rate eligible services at the highest level of all the factors, which was 25 possible points. The second-most weighted factor on the School System's matrix, at 20 points, was entitled, 'Other Cost Factors (including price of ineligible goods and services, price of changing providers, price for breaking contract, contract terms and conditions, etc.).' Ms. Enos noted that this factor would include the costs related to the network operation center being located offsite. She explained that the so-called bunker is actually a 'network operation center.' Ms. Enos said that having the network operation center off-site is 'the best practice in the world of school districts' due to threats such as lightning or tornadoes. She said that having the equipment offsite 'preserves the integrity of the school district.' Ms. Enos explained the considerations relevant to the network operation center and also answered questions from Committee members:

> Ms. Enos: Probably the number one factor that came up after[,] which is listed second[,] is the other cost factors because of the network operating center being offsite, we know that if we were to change to a new provider and it doesn't matter whether it's [Charter] or WANRack or Thomas Consultant Incorporated who also bid, if we switch to anyone other than JEA we knew that we had an outright cost right now that the school district would be paying within the next 30 to 60 days between 600 and $750,000 to move that equipment out of that bunker/network operating center, that that will be a fee that the school district will be required to pay tomorrow, if we move out of the JEA network operation center.
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> [Committee member] Mr. Walls: Who would that fee be paid to?
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> Ms. Enos: Whoever, that fee would be paid to whoever we choose to move the equipment, the down time that the equipment is turned off, the possibility of having to replicate the equipment because you can't, for instance, we couldn't turn off the security in the school district we would have to build a new network and then transfer it over and turn off the old equipment. So there's the possibility would you buy a piece of equipment or would you turn it off and have the down

> time, what's absolutely essential to run, that 600 minimum is the essential pieces of equipment that the school cannot turn off for day to day activity.

Ms. Enos said this estimated cost would be incurred if the School System changes to any other provider."

"In sum, Ms. Enos explained to the Committee that if the School System makes a change in providers, it will have to ask for 'more money to make these changes' for the equipment in the network operation center. She also noted that this cost is not funded by the E-Rate program. Ms. Enos acknowledged that this was 'one of the main factors behind choosing the JEA network to stay in place.' She explained that the JEA bid was more, 'but overall you're still saving quite a bit of money to leave that equipment where it is and not having [to] rebuild that connection or rebuild it offsite.' She emphasized that the 'lowest and best doesn't mean lowest price.' Ms. Enos added, '[D]o you want to take out of your pocket 600,000 [or] $700,000 to change[,] to save $350,000 possibly in your fees[?]'"

"… Various members of the Committee then questioned Ms. Enos directly about her calculations and opinions:

> Mr. Deaton: And how did you establish the $650,000 cost?
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> Ms. Enos: So we took the equipment that exists within the network operation center and we factored in what were those items, what would have to happen to them, which ones were essential that we could move right away, which ones were not essential so we left that price out and then we talked about what that cost would be, how many people would have to be involved to move it, how many people would have to be involved to set it back up.
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> And we also just had another discussion about what's the rental fee leaving where the network operation center is, could we find the same kind of rental fee that we pay today so you would have an ongoing cost which right now you pay like around – I am not even sure what that is today maybe like $2500 a month but we were thinking we could find probably something similar to $3000 that 3600 a month additionally you would pay, but we didn't – that's not really another cost factor because you're paying it today. The other cost factor really comes into play about moving and having to recreate the essentials without dropping the service." …

"With no further questions from Committee members, this concluded the presentation by Ms. Enos. The six Committee members then voted unanimously to uphold the bid award to JEA."

"Charter subsequently filed a petition for common law writ of certiorari in chancery court, seeking review of the decision of the Finance Committee." …

"The chancery court granted the writ and directed that the administrative record of the proceedings before the Finance Committee be filed with the court. After reviewing the administrative record and considering the parties' briefs,1 the chancery court entered an order reversing the decision of the Finance Committee and remanding for the contract to be rebid. In its order, the chancery court began by reciting the history and timeline regarding the bid process, the signing of the contract, and the official bid award. Within this discussion of the procedural history, the order stated that the School System had entered into the contract 'even though the Finance Department had not made a recommendation to award the bid to JEA as required.' However, this fact was not discussed further or analyzed as providing a basis for reversal. Instead, the chancery court focused on the evidentiary basis for the Finance Committee's decision."

"'… The court recognized that '[t]he proof before the Finance Committee really seemed to turn on the report of the consultant, Ms. Enos, who told the Committee that it would cost $600,000 to $750,000 to move their equipment from the concrete bunker owned by JEA.' It also noted her statement that 'it would take 20 hours to change the IP address for 111 servers, which she estimated would cost $150,000.' Still, the chancery court found that the Committee did not hear 'the basis for these conclusions by Ms. Enos.' … In conclusion, the chancery court stated that '[t]he decision of the Finance Committee to award the contract to JEA was arbitrary and capricious based upon the scoring of the bid matrix.' It further found that 'there was no material evidence to support the conclusions given by the Committee's expert that the 'other costs' to move the equipment would amount to an additional $600,000 to $750,000 and an additional $150,000 to change the IP addresses.' The order stated that '[t]he Committee needs to be provided with the basis for these conclusions and the documentation to support these conclusions.' The chancery court remanded the matter to the Finance Committee 'to rebid the contract.'"

"Courts reviewing a decision under a common law writ of certiorari are employing a 'limited and deferential standard.' *Sporting Club of Tenn., Inc. v. Marshall Cnty. Tenn. Bd. of Zoning Appeals*, No. M2021-01361-COA-R3-

CV, 2022 WL 4349796, at *5 (Tenn. Ct. App. Sept. 20, 2022). The Tennessee Supreme Court has described the common law writ of certiorari and its scope of review as follows:

> A common-law writ of certiorari is an extraordinary judicial remedy. *State v. Lane*, 254 S.W.3d 349, 355 (Tenn. 2008) (quoting *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001)). The scope of the judicial review available through a common-law writ is quite limited. *Harding Acad. v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d 359, 363 (Tenn. 2007); *Leonard Plating Co. v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 213 S.W.3d 898, 903 (Tenn. Ct. App. 2006). The reasons for the writ's limitations on the court's ability to review an agency's decision are particularly important in cases such as this one. These limitations are grounded in the doctrine of separation of powers found in Article II, Sections 1 and 2 of the Tennessee Constitution. *See* Ben H. Cantrell, *Review of Administrative Decisions By Writ of Certiorari in Tennessee*, 4 Mem. St. U. L. Rev. 19, 21 (1973). The General Assembly cannot require the Judiciary to perform functions that are not essentially judicial. *In re Cumberland Power Co.*, 147 Tenn. 504, 508, 249 S.W. 818, 819 (1923) (quoting *Muskrat v. United States*, 219 U.S. 346, 352, 31 S.Ct. 250, 55 L.Ed. 246 (1911)). Likewise, the Judiciary may not, on its own initiative, undertake to perform functions that are not necessarily judicial and that have been assigned to other branches of government. *See Hoover Motor Exp. Co. v. Railroad & Pub. Utils. Comm'n*, 195 Tenn. 593, 602, 605-06, 261 S.W.2d 233, 237-38 (1953). Thus, providing the limited sort of judicial review available under a common-law writ of certiorari will guard against the risk that the courts might undertake to exercise power that does not belong to them.
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> The judicial review available under a common-law writ of certiorari is limited to determining whether the entity whose decision is being reviewed (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision. *Harding Acad. v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d at 363; *see also Stewart v. Schofield*, 368 S.W.3d 457, 463 (Tenn. 2012). We have explicitly approved the use of the common-law writ of certiorari to provide judicial relief from (1) fundamentally illegal rulings, (2) proceedings inconsistent with essential legal requirements, (3) proceedings that effectively deny parties their day in court, (4) decisions that are beyond the decision-maker's authority, and (5) decisions that involve plain and palpable abuses of discretion. *State v. Lane*, 254 S.W.3d at 355 (quoting *Willis v. Tennessee Dep't of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003)). However, we have also held that:
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> > the common law-writ [of certiorari] ... may not be resorted to for the correction of technical or formal errors, not affecting jurisdiction or power, or for the correction of defects that are not radical, amounting to an illegality that is fundamental, as distinguished from an irregularity.
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> *State ex rel. McMorrow v. Hunt*, 137 Tenn. 243, 249, 192 S.W. 931, 933 (1917).
>
> A common-law writ of certiorari proceeding does not empower the courts to redetermine the facts found by the entity whose decision is being reviewed. *Tennessee Waste Movers, Inc. v. Loudon Cnty.*, 160 S.W.3d 517, 520 n.2 (Tenn. 2005); *Cooper v. Williamson Cnty. Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn. 1987). Accordingly, we have repeatedly cautioned that a common-law writ of certiorari does not authorize a reviewing court to evaluate the intrinsic correctness of a governmental entity's decision. *See, e.g., Stewart v. Schofield*, 368 S.W.3d at 465; *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997). Similarly, we have noted that reviewing courts may not reweigh the evidence or substitute their judgment for the judgment of the entity whose decision is being reviewed. *See, e.g., State v. Lane*, 254 S.W.3d at 355 (quoting Robinson v. Clement, 65 S.W.3d at 635); *Harding Acad. v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d at 363.

Heyne v. Metro. Nashville Bd. of Pub. Educ., 380 S.W.3d 715, 728-29 (Tenn. 2012)."

"In the case at bar, the chancery court was tasked with reviewing the decision of the Finance Committee to determine whether it (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision. *See id.* After reviewing the record, the chancery court concluded that '[t]he decision of the Finance Committee to award the contract to JEA was arbitrary and capricious based upon the scoring of the bid matrix.' It also found that 'there was no material evidence to support the conclusions given by the Committee's expert that the 'other costs' to move the equipment would amount to an additional $600,000 to $750,000 and an additional $150,000 to change the IP

addresses,' and the Committee 'needs to be provided with the basis for these conclusions and the documentation to support these conclusions.'"

"Madison County and JEA argue that the trial court exceeded the limited scope of review that is permissible pursuant to a common law writ of certiorari. They argue that the chancery court reweighed the evidence before the Finance Committee and substituted its judgment for that of the Finance Committee. JEA further argues that it was not the role of the chancery court to rewrite the bid request. We agree with these contentions."

"For review under a common law writ of certiorari, the court 'may review the record solely to determine whether it contains any material evidence to support the decision because a decision without evidentiary support is an arbitrary one.' *Leonard Plating Co.*, 213 S.W.3d at 904. This limited review of the evidence has been described as follows:

> The function of the reviewing court is limited to asking whether there was in the record before the fact-finding body *any* evidence of a material or substantial nature from which that body *could* have, *by reasoning from that evidence*, arrived at the conclusion of fact which is being reviewed. If there is such evidence in the lower record, the court must affirm the lower tribunal's fact-finding. To justify vacating a fact-finding there must be no evidence from which the lower body's finding could have been reached by reasoning from the evidence. If there was no such evidence, then the factfinding is illegal, arbitrary, and capricious, and it is the duty of the reviewing court to vacate that finding.

Massey v. Shelby Cnty. Ret. Bd., 813 S.W.2d 462, 465 (Tenn. Ct. App. 1991) (quoting B. Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 Mem. St. U. L. Rev. 19, 29-30 (1973)). In this context, 'material evidence' means 'relevant evidence that a reasonable person would accept as adequate to support a rational conclusion.' *Leonard Plating Co.*, 213 S.W.3d at 904 (citing *Lafferty*, 46 S.W.3d at 759; *Hedgepath v. Norton*, 839 S.W.2d 416, 421 (Tenn. Ct. App. 1992); *Pace v. Garbage Disposal Dist.*, 54 Tenn. App. 263, 267, 390 S.W.2d 461, 463 (1965))." …

"Here, the Finance Committee heard from an E-Rate consultant, Rosemary Enos, who had worked in connection with the E-Rate program for 24 years, across the East Coast and central United States, since the program began. She stated that if the School System changed service providers, it would lead to 'an outright cost' of $600,000 to $750,000 to move the School System's equipment out of the JEA network operation center. She also calculated 20 hours of work that would be required for changing each of the School System's 111 servers, which exceeded 2,000 hours and was estimated to cost $150,000. Thus, she explained that even though Charter's price of E-Rate eligible services was lower, 'overall you're still saving quite a bit of money to leave that equipment where it is and not having [to] rebuild that connection or rebuild it offsite.' She said the 'other item' that was discussed and considered in the decision-making process was the timeframe for the change. Ms. Enos said that if the School System's scheduled start date for service was not met, then it may be responsible for the full cost of the services in the interim, which would be 'out-of-pocket' without any E-Rate funding. Ms. Enos's explanation was consistent with the 'Notes from the evaluation conversation' regarding all four proposals, which noted that changing IP addresses would be costly both financially and in terms of time; JEA's network operation center was located in downtown Jackson; and JEA stated that service could be achieved by July 1 while Charter did not guarantee that its service would be up and running by then. This constitutes 'relevant evidence that a reasonable person would accept as adequate to support a rational conclusion.' *See Leonard Plating Co.*, 213 S.W.3d at 904. Therefore, 'it is material evidence, of which there is more than a scintilla.' *Sporting Club of Tenn.*, 2022 WL 4349796, at *6."

"We cannot agree with the trial court's determination that 'there was no material evidence to support the conclusions given by the Committee's expert' and that the Committee 'needs to be provided with the basis for these conclusions and the documentation to support these conclusions.' When questioned by various Committee members at the end of the hearing, Ms. Enos provided further explanations for her calculations, as set forth in detail earlier in this opinion. She said her opinion was based on her experience with other districts and businesses and also her conversations with 'all of the IT folks' in the IT department. She said they had considered which equipment would have to be moved right away and what would not, the cost of moving the equipment, the number of people that would be required to move it and set it back up, the number of hours it would take 'of their time and outside time,' and 'having to recreate the essentials without dropping the service.' Considering that Ms. Enos has decades of experience with the ERate program and other school districts in numerous states, her opinion constitutes material evidence even in the absence of supporting documentation. It was not the role of the chancery court to reweigh the evidence before the Committee. *See Heyne*, 380 S.W.3d at 729."

"… The chancery court was heavily focused on the bid scoring matrix completed by the School System and comparing the scores to the information provided by Charter, proceeding with the apparent misconception that

the matrix was completed by the Finance Committee and part of its decision. It was not. It was a document obtained by Charter pursuant to an Open Records Act request, which Charter submitted as an exhibit at the hearing before the Committee. The chancery court was not tasked with weighing this evidence, recalculating the scores awarded by the School System, or making a fresh determination of which was the lowest and best bid. *See, e.g., Sporting Club of Tenn., Inc.*, 2022 WL 4349796, at *6 ('Our standard of review in this matter is narrow. … [T]he chancery court was to decide whether material evidence existed to support the decision of the Committee. Charter continues to argue on appeal that '[t]he Finance Committee *incorrectly* affirmed the Competitive Bid award to JEA as [Charter] had t[he] lowest and best bid.' (emphasis added). Thus, '[i]t bears repeating that common law writ of certiorari is simply not a vehicle which allows the courts to consider the intrinsic correctness of the conclusions of the administrative decision maker.' *Walker v. Metro. Bd. Of Parks And Recreation*, No. M2007-01701-COA-R3-CV, 2009 WL 5178435, at *12 (Tenn. Ct. App. Dec. 30, 2009); *see, e.g., Powell v. Parole Eligibility Rev. Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994) ('[T]he plaintiff's complaint merely alleges that the Board made a mistake in calculating his release eligibility date. Thus, he attacks the *intrinsic correctness* of the decision, a question beyond the scope of review under the common law writ.')."

"For similar reasons, we disagree with the chancery court's conclusion that the costs for moving the equipment, changing the IP addresses, and the equipment storage rental fee 'should have been part of the competitive bid process so that all of the other competitors could submit bids and address this issue,' and the School System could be 'better informed' and 'evaluate with much better exactitude what these costs would be.' In connection with this issue, Charter insists that the evidence regarding the network operation center 'was an improper consideration in evaluating the bids' and that the Finance Committee 'improperly relied heavily' on the costs related to changing providers when this was not 'part of the competitive bid process.' Again, however, our standard of review is narrow and extremely limited. ''[T]he trial court must apply a limited standard of review to decisions already made by administrative officials, rather than address the issue de novo as the initial decision maker.'' *Butler v. Tenn. Bd. of Nursing*, No. M2016-00113-COAR3-CV, 2016 WL 6248028, at *9 (Tenn. Ct. App. Oct. 25, 2016) (quoting *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 574 (Tenn. Ct. App. 2005)). In the absence of any showing that the Finance Committee (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision, we discern no basis for the chancery court's imposition of these additional restrictions on the bidding process so that the School System could be 'better informed.' *See Heyne*, 380 S.W.3d at 729. The bid plainly stated that 'Other Cost Factors' would be considered, which specifically included the 'price of ineligible goods and services' and the 'price of changing providers.' Charter has not shown that this was illegal, nor did the chancery court find that it was."

"In support of its position that the equipment storage rental fee had to be included in the competitive bid process or else it was an 'improper consideration,' Charter relies on the following county purchasing policy that is generally applicable for all agencies and departments:

> All 'like items', those items or services that are able to be combined and purchased from a single source shall be *considered as* a single purchase. No effort to circumvent this will be allowed. Example: The dividing of what should be a single purchase, as per the above definition of 'like items' onto two or more purchase orders in an attempt to keep each under the bid and quotes limitations as stated in section A.
> Anticipated purchases of 'like items or services' from a single supplier which would exceed the established bid and quote limitations for the current budget year are also to be *considered as* a single purchase for audit purposes.

(emphasis added). This policy regarding what the County would 'consider as' a single purchase for purposes of its bid and quote limitations for purchase orders simply does not support Charter's position regarding what was required to be set forth in the competitive bid. Moreover, the County contends that an equipment storage rental contract and a contract for internet access service and wide area network connectivity are not 'like items' when one is eligible for E-Rate funding and the other is not. In any event, Charter has not shown that *the Committee* acted illegally or arbitrarily by considering the evidence related to the network operation center."

"As an alternative argument on appeal, Charter maintains that the Finance Committee improperly upheld the competitive bid award even though the School System did not follow the proper procedure for the bid. Charter contends that the School System signed the contract 'before formal approval and award of the bid' by the Finance Department and submitted the E-Rate form with related 'procedural irregularities.' Charter notes that the chancery court did not address its arguments related to the School System's alleged failure to follow the proper procedures. However, Charter claims that this error in procedure provides an alternative basis for reversing the decision of the Finance Committee. The County argues that the School System's premature execution of the contract simply meant that the contract was not binding on the County until the bid was formally awarded by the

Finance Department. To briefly recap the timeline, the School System signed the contract with JEA on March 23 and submitted its application for E-Rate funding ahead of the March 25 deadline. At that time, the Finance Department had not formally approved the bid. However, the Finance Department did formally approve the bid on April 15, prior to the hearing before the Finance Committee."

"'Not every procedural defect provides a basis for judicial relief under the common law writ of certiorari.' *Waste Servs. of Decatur, LLC v. Cnty. of Lawrence*, No. M2011-01947-COA-R3-CV, 2012 WL 3329621, at *4 (Tenn. Ct. App. Aug. 14, 2012). According to the Tennessee Supreme Court,

> We have explicitly approved the use of the common-law writ of certiorari to provide judicial relief from (1) fundamentally illegal rulings, (2) proceedings inconsistent with essential legal requirements, (3) proceedings that effectively deny parties their day in court, (4) decisions that are beyond the decision-maker's authority, and (5) decisions that involve plain and palpable abuses of discretion. *State v. Lane*, 254 S.W.3d at 355 (quoting *Willis v. Tennessee Dep't of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003)). However, we have also held that:
>
> > the common law-writ [of certiorari] ... may not be resorted to for the correction of technical or formal errors, not affecting jurisdiction or power, or for the correction of defects that are not radical, amounting to an illegality that is fundamental, as distinguished from an irregularity.
>
> *State ex rel. McMorrow v. Hunt*, 137 Tenn. 243, 249, 192 S.W. 931, 933 (1917).

Heyne, 380 S.W.3d at 729. Thus, the common law writ of certiorari is not designed to correct mere errors of procedure; '[i]t contemplates only 'fundamental illegalit[ies].'' *Kaplow v. City of Gatlinburg Bd. of Adjustments & Appeals*, No. E2014-00347-COA-R3-CV, 2015 WL 3964212, at *3 (Tenn. Ct. App. June 30, 2015) (quoting *McGee v. State*, 340 S.W.2d 904, 906 (Tenn. 1960))." …

"Here, the County attorney conceded at the hearing before the Finance Committee that a 'misstep' had occurred with the timing of the School System's contract. However, by the time of the hearing before the Finance Committee, the Finance Department had issued its formal bid award to JEA. Notably, then, the alleged procedural error occurred earlier in the process and was not committed by the Finance Committee whose decision is under review. Thus, we conclude that this procedural misstep by the School System is among the class of errors that the common law writ of certiorari is not designed to correct, including 'technical or formal errors, not affecting jurisdiction or power,' or 'defects that are not radical, amounting to an illegality that is fundamental, as distinguished from an irregularity.' *Heyne*, 380 S.W.3d at 729."

"Next, Charter raises an additional issue that was argued for the first time in chancery court but not addressed in the chancery court's order.8 Charter argues that 'due to the illegal arrangement with JEA, JEA is not a qualified bidder.' Specifically, Charter suggests that 'state, local, and federal law restrict[] applicants from receiving anything of value outside the services contained in a bid *in exchange for* awarding a contract.' (emphasis added). According to Charter, 'if JEA has effectively tied its offer of server storage to its selection as E-Rate provider, that would constitute an unlawful condition under federal E-Rate rules as well as under state and local law and disqualify JEA.' At the same time, however, Charter concedes that '[i]t is unclear, based on the record, what the [School System's] contractual relationship with JEA is as it relates to the equipment storage.' Charter also admits that 'Ms. Enos failed to explain why [the School System] would have to move the servers at all.' Thus, Charter recognizes that 'there was no explanation for why [the School System] could not continue to use the existing bunker.' Notably, the separate equipment storage rental contract is not in the record before this Court. Charter's counsel was in possession of the rental contract and referred to it during the hearing in chancery court, but it was not admitted into evidence. It was Charter's burden to establish any alleged illegality. *See McCallen*, 786 S.W.2d at 641. Based on the record before us, Charter simply has not shown that anything was wrongfully received 'in exchange for' the awarding of the contract. More importantly, the legality of any separate equipment storage rental contract between JEA and the County is not the issue before this Court. We are reviewing the decision of *the Finance Committee* to uphold the bid award for wide area network and internet access services to JEA, in light of Charter's allegation that the bid award was illegal because JEA was disqualified."

"… Thus, the record does not support Charter's continued suggestion that JEA was giving the School System an illegal 'freebie.' The facts presented to the Committee show that the School System was paying rent for the equipment storage."

3. Common Law Writ of Certiorari - Although Petitioners raised various issues below, they state in their brief that they base this appeal solely on the issue of whether the underlying zoning for one of the parcels was legally valid - In the declaratory judgment action, this court that the underlying zoning is valid, which is dispositive of this appeal - The Commission did not act illegally, arbitrarily, fraudulently, or capriciously in approving the site plan

WILLIAM FOEHRING, ET AL. v. MONTEAGLE REGIONAL PLANNING COMMISSION, ET AL.
COURT OF APPEALS No. M2022-00916-COA-R3-CV May 11, 2023

"This appeal concerns the approval of a site plan. William Foehring, Janice Foehring, William Best, Mary Beth Best, Ron Terrill, and Sandra Terrill ('Petitioners') filed a petition for common law writ of certiorari against the Monteagle Regional Planning Commission ('the Commission') and RBT Enterprises, LLC ('RBT')1 (collectively, 'Respondents') in the Chancery Court for Marion County ('the Trial Court'). Petitioners alleged that the Commission acted illegally, arbitrarily, and capriciously in approving the site plan at issue because the underlying zoning for one of the parcels is invalid. The Trial Court ruled in favor of Respondents. Petitioners appeal. In a parallel declaratory judgment action case arising out of the same facts, we determined that the underlying zoning is valid, which is dispositive of this appeal. We affirm the Trial Court."

"In August 2021, Petitioners filed a petition for common law writ of certiorari against Respondents in the Trial Court. The petition arose out of the same factual background as did Petitioners' suit for declaratory judgment against the Town of Monteagle and RBT in the case of *William Foehring, et al. v. Town of Monteagle, Tennessee, et al.*, Marion County Chancery Court No. 8197, No. M2022-00917-COA-R3-CV, in which Petitioners challenged the validity of certain zoning ordinance amendments in an effort to prevent a truck stop from being built near their homes. In this separate case, Petitioners sought review of 'the final decision of [the Commission] on July 6, 2021, conditionally approving the site plan for the proposed TA-Petro Truck Plaza located on Dixie Lee Avenue and Sampley Street in Monteagle, Tennessee on property owned by [RBT].' Petitioners alleged that the Commission acted illegally, arbitrarily, and capriciously in approving the site plan."

"In April 2022, the Trial Court heard the petition. In June 2022, the Trial Court entered its final order. The Trial Court stated, as relevant:

> 5. Petitioners argue the Disputed Parcel is not properly zoned for an truck stop because amendments to the zoning ordinance rezoning the Disputed Parcel from R-3 to C-3 are invalid. In the Declaratory Judgment Action, the Court has found that the amendments to the zoning ordinance are valid. Accordingly, the Petitioners' argument fails based on the findings the Court has made in the Declaratory Judgment Action."

"In *William Foehring, et al. v. Town of Monteagle, Tennessee, et al.*, Marion County Chancery Court No. 8197, No. M2022-00917-COA-R3-CV, Petitioners filed suit against the Town of Monteagle and RBT seeking declaratory judgment as to the validity of certain zoning ordinance amendments. Although Petitioners raised various issues below, they state in their brief that they base this appeal 'solely on the issue of whether the underlying zoning for one of the parcels was legally valid.' In the declaratory judgment action, we held that the underlying zoning is valid, which is dispositive of this appeal. We conclude that the Commission did not act illegally, arbitrarily, fraudulently, or capriciously in approving the site plan. We affirm the judgment of the Trial Court."

4. Recusal of judge – Party had 21 days to file an interlocutory appeal on entry of order denying recusal and the time limit is jurisdictional and cannot be extended by the court

N.H. ET AL. v. SHELBY COUNTY SCHOOLS
COURT OF APPEALS No. W2022-01761-COA-T10B-CV Filed January 11, 2023

"This is an interlocutory appeal as of right, pursuant to Rule 10B of the Rules of the Supreme Court of Tennessee, filed by N.R.H. ('Petitioner'), seeking to recuse the trial court judge. Having reviewed the petition for recusal appeal filed by Petitioner, and finding it fatally deficient, we dismiss the appeal."

"Petitioner, as the parent of N.H., filed suit against the Shelby County Schools. In May of 2022, Petitioner filed a motion seeking to recuse Chancellor Jim Kyle of the Chancery Court for Shelby County ('the Trial Court'). After a hearing, Chancellor Kyle denied recusal by order entered August 31, 2022. Petitioner asserted that she received service of the August 31, 2022 order on September 16, 2022. Petitioner then filed a motion in the Trial Court seeking to have the August 31, 2022 order re-entered arguing that she was prejudiced by the delay in receiving the

August 31, 2022 order. By order entered November 22, 2022, the Trial Court denied Petitioner's motion to re-enter the August 31, 2022 order. Petitioner filed her petition for recusal appeal in this Court on December 16, 2022."

"We begin by noting that: '***Pro se* litigants who invoke the complex and sometimes** technical procedures of the courts assume a very heavy burden.' *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). Parties proceeding without benefit of counsel are 'entitled to fair and equal treatment by the courts,' but we 'must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.' *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003)."

"Rule 10B of the Rules of the Tennessee Supreme Court provides for two alternative methods for appealing a trial court's denial of a recusal motion, either 'the accelerated interlocutory appeal or an appeal as of right following entry of the trial court's judgment.' Tenn. R. Sup. Ct. 10B, § 2.01. If an accelerated interlocutory appeal is chosen, the 'petition for recusal appeal shall be filed in the appropriate appellate court within twenty-one days of the trial court's entry of the order.' Tenn. R. Sup. Ct. 10B § 2.02. 'The time periods for filing a petition for recusal appeal pursuant to section 2.02 . . . are jurisdictional and cannot be extended by the court.' Tenn. R. Sup. Ct. 10B § 2.08."

"The Trial Court entered its order denying recusal on August 31, 2022. Petitioner filed her petition for recusal appeal on December 16, 2022, which is more than one hundred days after entry of the order denying recusal. As Petitioner failed to file her petition for an accelerated interlocutory appeal within twenty-one days of the date of entry of the order denying recusal, this Court lacks jurisdiction to consider the petition and must dismiss the appeal as untimely. *See, e.g., In re Allie A.*, No. M2018-00326-COA-T10B-CV, 2018 WL 1124517 (Tenn. Ct. App. February 28, 2018) (dismissing accelerated interlocutory appeal filed twenty-four days after entry of order denying recusal), *no appl. perm. appeal filed*."

"Petitioner's motion seeking to have the Trial Court re-enter its August 31, 2022 order did not toll the time for taking an interlocutory appeal of the order denying recusal. Furthermore, even if the motion had tolled the time, the Trial Court entered its order enying re-entry of the August 31, 2022 order on November 22, 2022. Twenty-one days from November 22, 2022 was December 13, 2022. Petitioner placed her petition for recusal appeal with a commercial delivery service with computer tracking on December 14, 2022, which is twenty-two days after entry of the November 22, 2022 order."

5. Uniform Procedures Act – Timeshare units were properly classified as commercial property and not residential property for property tax purposes

SEVIER COUNTY, TENNESSEE, ET AL. v. TENNESSEE STATE BOARD OF EQUALIZATION, ET AL.
COURT OF APPEALS No. E2022-00773-COA-R3-CV Filed May 8, 2023

"This is an administrative property tax appeal concerning the classification of real property for ad valorem tax purposes. This action originated with a taxpayer appeal of the property valuation by the Sevier County property assessor. On appeal, the administrative law judge re-classified the property as commercial, resulting in a tax assessment of 40% of the fair market property value. The Assessment Appeals Commission reversed the classification. The trial court affirmed the reversal. We now reinstate the commercial classification."

"The property at issue is located at the Laurel Crest Resort ('Resort') in Pigeon Forge, Tennessee. The Resort is comprised of 283 condominium units contained within 10 buildings that are owned as timeshare fractional interests under the TennesseenTimeshare Act. The Laurel Crest Resort Condominium Association ('Taxpayer') serves as the agent for all timeshare owners by paying taxes, utilities, and other expenses for the property. Taxpayer collects resort maintenance fees from the timeshare owners to pay these expenditures for the property. Timeshare fractional interests are recognized in Tennessee as a separate estate or interest in real property except for 'real property tax purposes.' Tenn. Code Ann. § 66-32-103(b). Timeshare properties are valued as a whole unit or entire fee simple interest for tax purposes, thereby allowing an agent to represent the multiple fractional interest owners and pay taxes in one lump sum on their behalf. Properties like the Resort have been classified as residential property in Tennessee and assessed at a rate of 25% for ad valorem tax purposes. In setting the value of these properties, assessors rely on commercial listing procedure manuals published by the Division of Property Assessment ('DPA') and promulgated by the State Board of Equalization ('State Board').1 *See generally* Tenn. Code Ann. § 67-5-602(a) ('[I]n determining the value of all property of every kind, the assessor shall be guided by, and follow the instructions of, the appropriate assessment manuals issued by the division of property assessments and approved by the state board of equalization.'). The State Board maintains the duty to promulgate and publish such manuals 'for the appraisal, classification and assessment of property for use by local assessors in making their assessments of particular classes and parcels of property.' Tenn. Code Ann. § 4-3-5103(a). However, the

classification of such properties is governed by the Tennessee Code, which provides that 'for the purposes of taxation, all real property . . . shall be classified according to use.' Tenn. Code Ann. § 67-5-801(a).

Residential property 'includes all real property that is used, or held for use, for dwelling purposes and that contains not more than one (1) rental unit.' Tenn. Code Ann. § 67-5-501(11). Whereas, commercial property

> includes all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club whether public or private, nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property that is used, or held for use, for dwelling purposes that contains two (2) or more rental units is hereby defined and shall be classified as industrial and commercial property[.]

Tenn. Code Ann. § 67-5-501(4)."

"As pertinent to this appeal, the Sevier County Assessor of Property ('Assessor') assessed the Resort at the rate for property subclassified as residential for tax years 2016 through 2018. Taxpayer appealed the valuation to the State Board. Sevier County, Tennessee ('County'), along with Assessor (collectively 'Appellants'), then filed a counter-complaint, asserting that the Resort's classification should be changed to that of commercial and assessed at the commercial ad valorem tax rate of 40%, instead of 25%. During the pendency of the appeal, Assessor subclassified the parcels as commercial property for the 2019 tax year. The Sevier County Board of Equalization affirmed the assessment, and Taxpayer appealed the determination to the State Board. Taxpayer argued, inter alia, that the commercial listing procedure manuals published by the DPA provided that timeshare properties like the Resort should be classified and assessed as residential properties."

"The case was heard before an Administrative Law Judge ('ALJ') on the issue of subclassification for tax years 2016 through 2019 on October 24, 2019.2 The ALJ found that the Resort should be classified as commercial, finding that Taxpayer and its affiliated business entities 'used the [R]esort 'directly or indirectly' for the commercial purpose of producing income by providing transient vacation accommodations to thousands of guests each year' pursuant to Section 67-5-501(4)."

"Taxpayer appealed to the State Board's Assessment Appeals Commission ('the Commission'), which reversed the ALJ and re-classified the property as residential, finding that the Assessor did not follow the State's guidance provided by the commercial listing procedure manuals as required by Section 67-5-602(a)." …

"Appellants appealed to the Sevier County Chancery Court, where the court accepted additional testimony from Assessor Thomas King and Justin Vermuth of the American Resort Development Community. The court ultimately held as follows:

> This court agrees in principle with Sevier County and the [ALJ]. [T]hese resorts look to be commercial operations. For all the world they look like commercial resort operations. However, back to the standard of review, this case comes to me with a limited standard of review . . . . [I]t is this Court's duty not to substitute its judgment for that of the [C]omission but rather to affirm the [C]omission unless the Court finds [that] one of the five reasons for reversal exists here[.]
> * * *
> [I]f this Court could, consistent with the legal standard of review and the case law that the proerty should be classified as commercial, it would do it, but given the limited standard of review and the case law, I cannot. I cannot and accordingly am constrained to dismiss the petition."

"This timely appeal followed."

"'[T]he standard of review in this court is the same as it is in the chancery court.' *Terminix Int'l Co., L.P. v. Tennessee Dep't of Labor*, 77 S.W.3d 185, 191 (Tenn. Ct. App. 2001) (citation omitted). Judicial review of decisions by administrative agencies following contested case hearings is generally governed by the Uniform Administrative Procedures Act ('UAPA'). Tenn. Code Ann. § 4-5-322(a)(1). The UAPA restricts the scope of the review to the record, with limited exception. Tenn. Code Ann. § 4-5-322(g) ('The review shall be conducted by the court without a jury and shall be confined to the record.'). However, a growing body of case law has clarified that the review applicable in real estate tax classification matters decided by the State Board of Equalization permits 'a new hearing in the chancery court based upon the administrative record *and* any additional or supplemental evidence which either party wishes to adduce relevant to any issue.' Tenn. Code Annotated § 67-5-1511(b) (emphasis added); *see generally Cress v. Tennessee State Bd. of Equalization*, No. E2021-00093-COA-R3-CV, 2021

WL 5148088, at *4-5 (Tenn. Ct. App. Nov. 5, 2021) (providing that a court may consider additional evidence, along with the administrative record, in its review of a State Board of Equalization decision)."

"Regardless of whether new evidence is adduced at the hearing, the reviewing court must then make its determination within the parameters of Section 4-5-322(h) of the UAPA, which provides as follows:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A)(i) . . . unsupported by evidence that is both substantial and material in the light of the entire record[.]

Each ground for reversal or modification carries its own independent standard of review that will be discussed further in our analysis as applicable."

"Appellants argue that the Commission's classification of the property as residential was in violation of constitutional and statutory provisions when the property is put to use for commercial purposes." …

"Taxpayer argued at the hearing before the Commission that timeshares have traditionally been classified as residential based, in part, upon the DPA's commercial listing manuals that provided:

> Tennessee Code Annotated Chapter 32, known as the 'Tennessee Time-Share Act of 1981,' provides this method of ownership in real property. Section 66-32-103(b) states that 'each time-share estate constitutes for purposes of title a separate estate or interest in property except for real property tax purposes.' Time-share properties are typically condominium developments. Property that is owned under this act should be classified as residential and valued according to other comparable properties.

Taxpayer claimed that Section 67-5-602(a) required adherence to this guidance on the issue of classification. The Commission relied upon this argument in making its decision, or failed to follow the required guidance and that the ALJ acted in violation of statutory provisions by upholding the classification. This decision was erroneous and in violation of statutory provisions."

"As stated previously, Section 67-5-602(a) instructs assessors to follow the guidance provided by the commercial listing manuals in determining the *value* of all property. The same direction to follow the manuals is not provided by statute for determining the *classification* of such property. The classification of all property is governed by the Tennessee Code, which provides that 'for the purposes of taxation, all real property . . . shall be classified according to use.' Tenn. Code Ann. § 67-5-801(a)."

"A brief discussion of the history of the use of the Resort is necessary in determining the proper classification of the property pursuant to statutory provisions. Subsequent to the original development of the Resort, Bluegreen Vacations Unlimited ('Successor Developer'), began selling timeshare interests to persons ('Owners'), who receive an undivided fractional interest as a tenant in common for a specified unit at the Resort. … Approximately 20% of purchasers are Legacy Owners, who are limited to a one-week stay at the Resort per calendar year. The remaining 80% of Owners transfer their deeded interest to the Bluegreen Vacation Club, Inc., which is a Florida nonprofit corporation that holds the deeded interest as part of the Bluegreen Vacation Club Trust. In exchange for their deeded interests, Owners receive point values that are determined based upon unit size, location, and the season in which the interest was purchased. Owners may then use their points to swap usage of the Resort for usage of other properties. Timeshare interests from multiple resorts have been transferred into the Trust for use by Owners."

"Successor Developer's remaining unsold timeshare inventory is rented out through Bluegreen Resorts Management. Bluegreen Vacations Club is also permitted to rent available units, namely deeded timeshare interests that are unoccupied, to third persons. Likewise, Taxpayer is permitted to rent units owned by those who are delinquent in their maintenance fees. Owners are contractually prohibited from renting their timeshare interests to third-parties; however, Taxpayer admitted that this type of rental activity likely occurs on occasion.

For the years 2014 through 2018, Taxpayer agreed that third-party rental income between $170,000 and $205,000 was generated each year at the Resort. Hotel occupancy tax is remitted on such rental activity. This rental activity does not include stays facilitated through the Bluegreen Vacations Club Trust."

"The system in place allows the majority of those who purchase a timeshare interest at the Resort for a specified unit to never actually stay at the Resort or even in Sevier County. Meanwhile, unsold timeshare fractional interests and unoccupied units are rented out to third-parties for financial benefit. These undisputed facts establish that the Resort is used for commercial purposes as a single income producing property that contains multiple rental units and that the Resort should be classified as such in accordance with the pertinent statutory provisions. Tenn. Code Ann. §§ 67-5-501(4), (11)." …

"… Having found that the Commission's decision was in violation of statutory provisions, we must also conclude that the classification was made in excess of the Commission's statutory authority."

"Appellants argue that the Commission's classification of the property as residential was made upon unlawful procedure. The Commission is limited to the procedure and standard of review set forth in Tennessee Code Annotated section 67-5-1506(c)[.] … Having found that the Commission's decision was in violation of statutory provisions, we must also conclude that the Commission's decision was made upon unlawful procedure."

"Appellants argue that the Commission's classification of the property as residential was arbitrary and capricious. … Having found that the Commission's decision was in violation of statutory provisions and that the facts presented necessitated a commercial classification, we must also conclude that the Commission's decision was arbitrary and capricious."

"Appellants argue that the Commission's classification of the property as residential was unsupported by evidence. … Having found that the Commission's decision was in violation of statutory provisions and that the facts presented necessitated a commercial classification, we must also conclude that the Commission's decision was unsupported by evidence. With all of the above considerations in mind, we vacate the trial court's decision affirming the Commission's decision."

6. Uniform Procedure Act - Line of duty disability pension – Administrative law judge's decision was arbitrary and capricious - The direct and proximate causal relationship of the 2016 injury to plaintiff's retirement is clear - Plaintiff went from working normally as a police officer without any medical restrictions to being disabled and having to retire – Even doctors found that the disability was not job related, the Court of Appeals found otherwise - The plainly identifiable turning point was his 2016 on-the-job injury - A reasonable person could reach no other conclusion based on this evidence - ALJ's conclusion that plaintiff's disability was not the result of his employment as a police officer was a clear error of judgment

TORRANCE TAYLOR v. BOARD OF ADMINISTRATION, CITY OF MEMPHIS RETIREMENT SYSTEM
COURT OF APPEALS No. W2022-00896-COA-R3-CV Filed May 4, 2023

"This appeal concerns a Memphis police officer's application for a line-of-duty disability pension. Torrance Taylor ('Taylor') filed a petition in the Chancery Court for Shelby County ('the Trial Court') seeking judicial review of a decision by the Administrative Law Judge ('the ALJ') for the Board of Administration of the City of Memphis Retirement System denying his application for a line-of-duty disability pension. In 2016, Taylor injured his left knee in the course of his duty while detaining a suspect. Afterwards, Taylor retired from the police force and was recommended for ordinary disability benefits. The ALJ ruled that, based on the opinions of physicians, Taylor's disability stemmed from a chronic condition in his left knee and not from his employment. Thus, the ALJ denied Taylor's application for a line-of-duty disability pension. The Trial Court upheld the ALJ's decision. Taylor appeals to this Court. He argues among other things that, but for his 2016 injury in the line of duty, he would not be disabled. The evidence reflects that Taylor worked without restriction before the injury in 2016, which ended his police career. We find that the ALJ's decision was unsupported by substantial and material evidence. We further find that the ALJ's decision was arbitrary and capricious. Taylor is entitled to a line-of-duty disability pension. We reverse the judgment of the Trial Court."

"Taylor served as a Memphis police officer for approximately twenty years. Over the years, Taylor dealt with several injuries. In 2003, he underwent surgery on his right knee for repair of the medial and lateral anterior cruciate ligament ('ACL'). Taylor testified before the ALJ that this 2003 injury was job-related. In 2006, Taylor was injured in an off-duty motorcycle accident in which he tore his posterior cruciate ligament, or PCL, in his left knee. In 2012, Taylor was involved in a car accident that resulted in, as pertinent, an injury to his left knee. As

found by the ALJ, Taylor's left ACL was torn by 2012. Taylor testified that he was on duty at the time of the 2012 accident.1 The evidence is uncontested that Taylor's 2012 injury was on-duty. Finally, on July 23, 2016, Taylor injured his left knee yet again, this time while detaining a suspect. Taylor's left ACL was torn. The timing of the tear in Taylor's left ACL is a key point of dispute in this case. A document from 2006 states that Taylor's left knee ACL was 'unremarkable' at that time. Dr. Harold Knight ('Knight') was Taylor's treating physician following the 2016 injury. It was Knight's view that Taylor was not permanently and totally disabled from his job. Knight also opined that Taylor's employment with Memphis was not the primary cause of Taylor's diagnosis."

"Following treatment for his 2016 injury, Taylor reached maximum medical improvement. He was released on permanent physical restrictions that left him unable to continue working as a police officer. In October 2016, Taylor filed an application for a line-of-duty disability pension, which Memphis denied. He was recommended for ordinary disability benefits. Taylor appealed to the ALJ."

"Physicians Dr. Michael Hood ('Hood') and Dr. Jeffrey Dlabach ('Dlabach') performed independent medical examinations of Taylor. Contrary to Knight's view, it was the view of both Hood and Dlabach that Taylor was permanently and totally disabled from working as a police officer. However, both physicians opined that his disability was not job-related." …

"Hood also was deposed in this matter. At one point in his testimony, Hood was asked whether Taylor's previous knee injuries had kept him from working. Hood stated, in part:

> Q. Okay. Now, pardon me if I sound redundant, but I just want to summarize so I know it's all one place.
> So the under -- prior to the date of the injury, the underlying conditions, the ACL tear and the medial meniscus -- excuse me -- the ACL injury and the medial meniscus tear, they did not prevent him from working?
> A. Correct.
> Q. Okay. The increased symptoms of these underlying conditions did prevent him from working once the injury occurred?
> A. Yes, subjectively.
> Q. Yes. And then the [on-the-job injury] was the primary cause of those increased symptoms?
> A. Yes."

"Dlabach also was deposed. In his deposition, Dlabach was asked about Taylor's medical history and the cause of his knee instability. Dlabach testified, in part:

> … Q. Would you please indicate the significance of the injury sustained by Mr. Taylor in the motorcycle accident in 2006, vis-a-vis, his current medical pathology and/or diagnosis as it relates to the injury he sustained 7/3/2016.
> A. The injury as detailed by the MRI of October 20, 2006 reveal an injury to the ACL as well as the medial meniscus tear. Those were acute findings with edema or fluid around those structures at the time of the MRI that tells us that was an acute injury related somewhere around the time of that MRI. The MRI of 2016 did not show any edema around those structures telling us that that was a chronic injury. There was no bone contusion, which you would see with an acute injury around that time. And again, the medial meniscus was torn and the ACL was torn. Those are structures that don't heal. Once it's torn it's torn. It can't heal and then retear. The ACL has to be reconstructed. There are a small percentage of meniscus tears that you can repair surgically that may heal, but in my opinion the MRI of 2016 showed injuries that had been present since the 2006 MRI.
> Q. Similarly, please indicate the significance of the injury sustained by Mr. Taylor in the motor vehicle accident in 2012, vis-à-vis his current medical pathology and/or diagnosis as it relates to the injury sustained 7/23/2016.
> A. Very similar to the MRI of April 13, 2012, revealed an ACL tear and a medial meniscus tear and those were chronic at that time as well.
> Q. So that I can understand what you're saying, the injury in 2016 – excuse me -- 2006 was a chronic injury and any subsequent injuries would not -- strike that. So once that injury occurred in 2006, it was there?
> A. Correct.
> Q. In layman's terms. It wasn't going away?
> A. Wasn't going away.

> Q. Within a reasonable degree of medical certainty would you state for the record whether the primary cause of Mr. Taylor's left chronic ACL deficient knee and chronic medial meniscus tear is related to his employment and the injury on 7/23/16?
> A. In my opinion it is not related to the injury of 7/23/2016.
> Q. Would that be because of your explanation that the injury in 2006 was a chronic injury and was not going away?
> A. It was preexisting.
> …
> Q. And once again, as far as you can tell from the records you reviewed, the underlying conditions themselves, the ACL tear and the medial meniscus tear, they did not prevent him from working at any time?
> A. Not that I saw.
> Q. Prior to the injury of July 23, 2016?
> A. Correct.
> Q. If the OJI had not occurred on 7/23/2016, is there any objective medical evidence that those underlying conditions would have kept him from continuing to work at that time?
> A. At that time? Not that I can think of?
> Q. I think you said, they may have eventually rendered him unable to work, but as far as when that would have happened --
> A. Who knows.
> Q. -- you couldn't tell."

"In August 2019, the ALJ conducted a hearing on Taylor's appeal. In June 2020, the ALJ entered its findings of fact and conclusions of law in which it upheld the pension administration's decision to deny Taylor a line-of-duty disability pension.The ALJ stated, in part:

> … 3. The Court finds based on the evidence adduced during the hearing and on the record that Petitioner sustained an injury to his left knee during the course and scope of his employment as a City of Memphis police officer on July 23, 2016[.]
> 4. According to the two qualified physician's opinions, Dr[.] [Hood] and Dr. Dlabach, Petitioner is totally and permanently disabled and unable to perform his employment as a Memphis Police Officer. However, bothphysicians further opine that the disability is not based on Petitioner's employment with the City of Memphis.
> 5. Both qualified physicians agree and the Court finds that Petitioner's disability, the ACL tear and medial meniscus tear of the left knee, is chronic as documented by MRIs prior to the date of work-related injury.
> 6[.] The Court finds that Petitioner's disability did not result from his job as a City of Memphis Police Officer as defined by City of Memphis Code of Ordinances, as a direct and proximate result of his July 23, 2016 workrelated injuries while in the actual performance of his duties, without willful negligence on his part, and while a participant in the City of Memphis Pension Plan[.]
> 7[.] Therefore, Petitioner's disability is not work-related and his application for Line of Duty Disability benefits pursuant to the City of Memphis Pension Ordinance should be denied[.]
> 8[.] The decision of the City of Memphis Pension Administration denying Line of Duty disability benefits to Petitioner is upheld[.]

In July 2020, Taylor filed a petition in the Trial Court seeking judicial review of the ALJ's decision pursuant to Tenn. Code Ann. §§ 4-5-322 and 27-9-114. In May 2022, the Trial Court heard Taylor's petition. In June 2022, the Trial Court entered its final order in which it affirmed the ALJ's decision. The Trial Court attached its oral ruling to its final order. In its oral ruling, the Trial Court explained its reasoning as follows:

> All right. I, as a matter of common sense, as a nonmedical professional, side completely with Mr. Taylor. I will tell you that right now. When I read these papers, as a nonmedical -- as a nonmedical person – and perhaps were I reviewing this evidence in the first instance, I would side with him.
> But I think the standard at issue here is, is there substantial and material evidence in the record to go the other way? I think there is. I don't like some of it, right? I don't like Dr. Knight's opinion. I don't like it, but I'm not a medical professional, and I don't think, in this posture, I can reweigh it.
> I think weighed against the testimony from Dr. Dlabach and Dr. Hood, both of whom raise -- the testimony of whom raises some question as to causation -- and I'll highlight specifically Dr. Dlabach's testimony -- that the instability that Mr. Taylor's currently experiencing in his left knee could eventually have happened anyway -- which, again, I -- it could've happened anyway,

> right? And so perhaps the instability doesn't happen on July 23, 2016, but maybe it happened on July 23, 2017, or 2018 or 2019, all of which would've been before Mr. Taylor was eligible for the full retirement.
> And even if I would weigh that evidence differently in the first instance, I think I'm constrained here by the statute to say, is there substantial and material evidence going the other way? I think there is. And I – given that there is substantial and material evidence going the other way, I cannot find that there is clear error in deciding it that way, even, again, if I -- were I reviewing this information in the first instance -- even if I would decide it differently.
> And so I think the petition has to be rejected, no matter how I might feel about it personally or how I might have decided it in the first instance, because I don't think either of those things is the appropriate standard of review."

"We review the ALJ's decision under the Uniform Administrative Procedures Act. Tenn. Code Ann. § 4-5-101, *et seq.*; *see Marino v. Bd. of Admin. City of Memphis Ret. Sys.*, No. W2015-00283-COA-R9-CV, 2015 WL 7169796, at *4-5 (Tenn. Ct. App. Nov. 16, 2015), *no appl. perm. appeal filed*. Tenn. Code Ann. § 4-5-322 provided:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h)."

"When reviewing a trial court's review of an administrative agency's decision, this Court essentially is to determine 'whether or not the trial court properly applied the ... standard of review' found at Tenn. Code Ann. § 4-5-322(h). *Papachristou*, 29 S.W.3d at 490 (citations omitted). This Court addressed its judicial review of evidence contained in the administrative record as follows: 'While this Court may consider evidence in the record that detracts from its weight, [this] [C]ourt is not allowed to substitute its judgment for that of the agency concerning the weight of the evidence....' *Gluck*, 15 S.W.3d at 490 (citations omitted); *see also McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996) (holding that this Court 'is not at liberty to reevaluate the evidence or substitute our judgment for that of the factfinder') (citation omitted). In short, the applicable standard is quite limited. However, courts reviewing administrative decisions are not utterly passive in their deference. Our Supreme Court has discussed:

> *In Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106 (Tenn. Ct. App. 1993), the Court of Appeals confirmed the limited nature of review under the Uniform Administrative Procedures Act. That court observed that only those agency decisions not supported by substantial and material evidence qualified as arbitrary and capricious but determined that even those decisions with adequate evidentiary support might still be arbitrary and capricious if caused by a clear error in judgment. *Id.* at 110. Our Court of Appeals warned against a mechanical application of the standard of review under subsections (4) or (5):
>
> > In its broadest sense, the standard requires the court to determine whether the administrative agency has made a clear error in judgment. An arbitrary [or capricious] decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.
> >
> > Likewise, a reviewing court should not apply Tenn. Code Ann. § 4-[5]-322(h)(5)'s 'substantial and material evidence' test mechanically. Instead, the

> court should review the record carefully to determine whether the administrative agency's decision is supported by 'such relevant evidence as a rational mind might accept to support a rational conclusion.' ... The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed.

Id. at 110-111 (citations omitted). …

City of Memphis v. Civ. Serv. Comm'n, 216 S.W.3d 311, 316-17 (Tenn. 2007). In addition, regarding a board's responsibility to ultimately make the decision on whether to award a pension based upon the medical evidence before it, this Court has stated:

> As to petitioner's contention that the last sentence of section 25-1(27) dictates that both the diagnosis and the award of a line-of-duty disability should be left solely to the discretion of the two examining physicians, we find this contention to be without merit. It is the responsibility of the board to make the decision whether to award a pension based upon the medical evidence presented.

Splain v. City of Memphis, No. 02A01-9511-CH-00259, 1996 WL 383297, at *3 (Tenn. Ct. App. July 10, 1996), *no appl. perm. appeal filed.*"

"Taylor makes several arguments in support of his contention that the Trial Court erred in upholding the ALJ's decision to deny him a line-of-duty disability pension, to wit: that it was only after his 2016 injury that he no longer could work as a police officer; that his previous injuries did not in and of themselves render him disabled; that a tear in the ACL of his left knee is the underlying basis of his disability but the evidence shows that the earliest such tear stemmed from his 2012 on-duty injury, not his 2006 off-duty injury; and that the only rational conclusion is that his 2016 injury caused his disability. Taylor asserts that the ALJ's decision was unsupported by substantial and material evidence and was arbitrary and capricious. For its part, Memphis states that the physicians' opinions constitute substantial and material evidence sufficient to uphold the ALJ's decision. Memphis also observes that, under the applicable standard, courts may not substitute their judgment for that of the ALJ."

"As pointed out by Taylor, there is a contradiction in the evidence concerning when he first tore the ACL in his left knee, the timing of which was a major pillar of the physicians' opinions and the ALJ's ultimate decision. A medical document from 2006, when Taylor was injured in an off-duty motorcycle accident, reflects that Taylor's left knee ACL was 'unremarkable.' A torn ACL would warrant more of an observation than 'unremarkable.' The ALJ specifically found that Taylor's 2006 injuries consisted of 'fractures of C6 through 7 transverse process fractures, Sternal fracture, right 2nd rib fracture, left 1-7 rib fracture…, left pneumothorax/hemothorax, grade III splenic laceration and *a posterior cruciate injury to the left knee*[.]'. (Emphasis in original). Despite the medical documentary evidence showing no sign of an ACL tear in his left knee before 2012 when Taylor testified that he was injured in an on-the-job accident, Hood and Dlabach concluded that Taylor tore his left ACL sometime before 2012. It is not entirely clear in each instance whether the physicians' opinions as to the origin of Taylor's left ACL tear were based upon their review of written MRI reports or from their independent examination of MRI images. Dlabach testified, for instance, that '[t]he injury as detailed by the MRI of October 20, 2006 reveal an injury to the ACL as well as the medial meniscus tear.' In any event, the MRI images themselves are not in the record. Meanwhile, the medical documentary evidence in the record shows that Taylor's left knee ACL was 'unremarkable' in 2006, seemingly contradicting Hood's and Dlabach's statements. This contradiction is significant because the ALJ characterized Taylor's disability as 'the ACL tear and medial meniscus tear of the left knee, is chronic as documented by MRIs prior to the date of work-related injury.' (Emphasis added). We are unable to determine from their testimony whether the physicians simply made a mistake in their timeline of the medical history or whether they independently concluded, despite the medical documents, that Taylor tore his left ACL in 2006. The medical documentary evidence does not support the latter and tends to fairly detract from the weight of the physicians' accounts. Additionally, the ALJ ignored that the 2012 injury occurred on the job. The physicians also ignored or never were informed that the 2012 injury was on the job. To the extent that the 2012 injury contributed to Taylor's disability, then it too must be regarded as in the line of duty, further undercutting the ALJ's decision. In view of these inherent contradictions concerning when Taylor first tore his left ACL, we find that the ALJ's decision lacks substantial and material evidence in the light of the entire record. In so finding, we do not substitute our judgment for that of the ALJ. However, the relevant evidence upon which the ALJ based its decision was less than a scintilla or glimmer."

"Taylor argues further that the ALJ's decision was arbitrary and capricious. We agree. Even if we err and the ALJ's decision had sufficient evidentiary support, the fact remains that Taylor was working normally until he was injured while detaining a suspect in 2016. After his 2016 injury, Taylor was recommended for an ordinary disability pension

and had to retire. In other words, there was a distinct before and after. Hood testified that Taylor's 2016 injury had the effect of aggravating damage already done to his left knee. Even still, whether couched as 'aggravating' or a totally new injury, Taylor's 2016 injury was the seminal turning point beyond which he no longer could work as a police officer. It was a sharp dividing line. Before the 2016 injury, he was working normally. Even if Taylor tore his left ACL in 2006, he still worked as a police officer for another decade. In his deposition testimony, Dlabach stated that he could not say exactly when Taylor's knee instability would have reached a point where he no longer could do his job. Asked if it might have been another ten years, Dlabach said that this was possible but unlikely. We need not rely on hypotheticals. Regardless of whether Taylor eventually would have had to retire because of instability in his left knee at some indeterminate future point, he indisputably injured his knee in 2016, and that injury abruptly marked the end of his police career. The direct and proximate causal relationship of the 2016 injury to Taylor's retirement is clear. Taylor went from working normally as a police officer without any medical restrictions to being disabled and having to retire. The plainly identifiable turning point was his 2016 on-the-job injury. A reasonable person could reach no other conclusion based on this evidence. Accepting Memphis' argument would mean accepting that Taylor was working normally as a police officer as he had for years, injured his left knee in 2016, and then coincidentally had to retire due to instability in his left knee right after the injury. That defies common sense. Under Tenn. Code Ann. § 4-5-322(h), the standard of review is very narrow, but it does not totally insulate the ALJ's decision. Respectfully, the ALJ's conclusion that Taylor's disability was not the result of his employment as a police officer was a clear error of judgment. We find that the ALJ's decision was arbitrary and capricious."

CIVIL PROCEDURE - TENNESSEE

1. Plaintiff initiated a healthcare liability action against a physician, a hospital, and two other defendants - Before any responsive pleading was filed by any defendant, the plaintiff filed an amended complaint, naming only the physician as a defendant - The plaintiff subsequently filed a notice of voluntary dismissal that dismissed all of the defendants except the physician, and the trial court entered an order of voluntary dismissal the following day - Physician argued that the lawsuit should be dismissed under the GTLA, since he was an employee of a governmental entity covered by the GTLA - It has long been the rule in Tennessee that an original complaint is superseded, and its effect as a pleading destroyed, by filing an amended complaint complete in itself, which does not refer to or adopt the original as a part of it - Because Erlanger was removed from the lawsuit the moment plaintiff filed his amended complaint, Erlanger was no longer a defendant when plaintiff filed his notice of voluntary dismissal nor when the trial court entered its order of voluntary dismissal - As such, both the notice and order of voluntary dismissal were of no legal effect

GEORGE GARY INGRAM v. DR. MICHAEL GALLAGHER ET AL.
SUPREME COURT OF TENNESSEE No. E2020-01222-SC-R11-CV Filed May 17, 2023

"The issue before us is whether the voluntary dismissal of a defendant in a multi-defendant case that is governed by the Governmental Tort Liability Act ('GTLA') may be set aside and the claim against the dismissed defendant reinstated on the motion of a plaintiff pursuant to Tennessee Rule of Civil Procedure 54.02. The plaintiff in this case initiated a healthcare liability action against a physician, a hospital, and two other defendants. Before any responsive pleading was filed by any defendant, the plaintiff filed an amended complaint, naming only the physician as a defendant. The plaintiff subsequently filed a notice of voluntary dismissal that dismissed all of the defendants except the physician, and the trial court entered an order of voluntary dismissal the following day. In his answer to the amended complaint, the physician argued that the lawsuit should be dismissed under the GTLA because the hospital, which was his employer and a governmental entity, was not a defendant. The plaintiff subsequently filed a motion to alter or amend in which he sought to set aside the trial court's order voluntarily dismissing the hospital from the action. The trial court denied the motion to alter or amend. The trial court later dismissed the hospital from the action with prejudice and granted a motion for summary judgment filed by the physician. The Court of Appeals reversed, concluding that the trial court erred in denying the plaintiff's motion to alter or amend the order of voluntary dismissal. Upon our review of this case, we do not reach the question of whether the voluntary dismissal order could be altered or amended pursuant to Rule 54.02. Because the plaintiff removed the hospital from the lawsuit when he filed his amended complaint, the plaintiff's notice of voluntary dismissal and the trial court's order of voluntary dismissal were of no legal effect. Accordingly, there was no valid order of voluntary dismissal to alter or amend. As a result, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for consideration of the issues it deemed pretermitted as moot."

"In July 2017, George Gary Ingram ('Mr. Ingram') suffered from medical complications following a procedure performed by Dr. Michael Gallagher ('Dr. Gallagher') while Mr. Ingram was a patient at the Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System ('Erlanger'). Mr. Ingram initiated a healthcare liability action in the Hamilton County Circuit Court on November 14, 2018, and named as defendants Dr. Gallagher, Dr. Mac Worthington, the Chattanooga Neurosurgery and Spine Group, and Erlanger. In accordance with sections 121 and 122 of the Health Care Liability Act ('HCLA'), Mr. Ingram filed a certificate of good faith with his complaint and stated in his complaint that he had given pre-suit notice to the defendants. Tenn. Code Ann. §§ 29-26-121 to 122."

"On November 26, 2018, Mr. Ingram filed an amended complaint pursuant to Tennessee Rule of Civil Procedure 15.01 in which he named Dr. Gallagher as the sole defendant. Five minutes after filing the amended complaint, Mr. Ingram filed a Tennessee Rule of Civil Procedure 41 notice of voluntary dismissal of his claims against the Chattanooga Neurosurgery and Spine Group, Dr. Worthington, and Erlanger. The following day, the trial court entered an order dismissing without prejudice the Chattanooga Neurosurgery and Spine Group, Dr. Worthington, and Erlanger."

"On January 10, 2019, Dr. Gallagher filed his answer to the amended complaint. Among the six defenses Dr. Gallagher raised in his answer was a defense that the complaint should be dismissed pursuant to the GTLA—specifically, Tennessee Code Annotated section 29-20-310(b)—because Dr. Gallagher was an employee of a governmental entity, Erlanger, and, contrary to that statutory provision's requirement that 'the governmental entity is also made a party defendant to the action,' Erlanger was no longer a party defendant."

"On January 31, 2019, Mr. Ingram filed a motion to amend his complaint in an effort to reinstate Erlanger as a defendant. Dr. Gallagher filed a response in opposition to the motion, arguing that the proposed amendment would be futile because it would not relate back pursuant to Tennessee Rule of Civil Procedure 15.03, a rule that permits an amendment to relate back to the date of the original filing of the complaint when there is a 'mistake concerning the identity of the proper party.' Dr. Gallagher also argued that Tennessee Code Annotated section 28-1-105 (the 'Savings Statute') does not apply to Erlanger because it is a governmental entity."

"On February 27, 2019, before the trial court ruled on his motion to amend the complaint, Mr. Ingram filed a motion to alter or amend the order dismissing Erlanger as a defendant on the grounds that 'Erlanger was inadvertently dismissed in light of the affirmative defense assertion by a co-defendant, Dr. Michael Gallagher, that Erlanger is a necessary party to this action.' In his brief in support of his motion to alter or amend, Mr. Ingram argued that, pursuant to Tennessee Rule of Civil Procedure 54.02, the order voluntarily dismissing Erlanger as a defendant could be amended to rescind the dismissal because it was not a final order. Mr. Ingram also argued that, because he was 'not entirely sure whether Erlanger was an employer of Dr. Gallagher' nor whether the statute Dr. Gallagher relied on—Tennessee Code Annotated section 310(b)—applied to the case, relief could be granted pursuant to Tennessee Rule of Civil Procedure 60, which provides relief 'from an order due to oversight or omission.'"

"Dr. Gallagher filed a response in opposition to the motion to alter or amend, arguing that the motion should be denied because: (1) the voluntary dismissal of Erlanger was 'complete and effective' because it placed Erlanger in the same position as if it had never been a party to the suit; (2) Tennessee Rule of Civil Procedure 54.02 does not apply to voluntary nonsuits; (3) Tennessee Rule of Civil Procedure Rule 60 provides no relief to Mr. Ingram because Dr. Gallagher's employment with Erlanger was 'neither new nor unknown;' and (4) the nonsuit as to Erlanger was final and Erlanger was not subject to reinstatement as a defendant pursuant to the Savings Statute. According to Dr. Gallagher, Mr. Ingram's attempts to amend the complaint and the order of voluntary dismissal to reinitiate an action against Erlanger were futile, as such an action would not relate back to the date of the filing of the original complaint and 'any refiling against Erlanger . . . would be barred by the [GTLA].'"

"On April 9, 2019, the trial court entered an order denying Mr. Ingram's motion to amend the complaint and his motion to alter or amend the order voluntarily dismissing Erlanger from the action. With regard to the motion to amend the complaint, the trial court first concluded that Dr. Gallagher had standing to object to the amendment of the complaint, as granting the motion would result in the addition of Erlanger as a defendant and, therefore, have a direct effect on Dr. Gallagher's case. The trial court also concluded that the Savings Statute did not apply because it cannot be applied in GTLA cases. The trial court noted that Mr. Ingram's original complaint was timely filed but stated that Mr. Ingram's 'dismissal of his claims against Erlanger ended the matter' because the statute of limitations ran before he filed his proposed amended complaint. The trial court also held that the proposed amended complaint would not relate back to the date of the original complaint pursuant to Tennessee Rule of Civil Procedure 15.03 because 'there was no confusion as to Erlanger's identity.' The trial court, therefore, determined that the proposed amendment would be futile and denied the motion to amend the complaint."

"Approximately three weeks before the trial court entered the order denying Mr. Ingram's motions, Mr. Ingram filed another motion to amend the complaint, a brief in support of his motion, and a copy of the amended complaint.4 In this amended complaint, Mr. Ingram asserted a cause of action of fraudulent concealment against Dr. Gallagher and Erlanger. Specifically, Mr. Ingram alleged that Dr. Gallagher and Erlanger had concealed certain information regarding Mr. Ingram's medical care, which prevented him from discovering the nature of his injuries. According to Mr. Ingram, because of the concealment, the statute of limitations did not begin to run until his medical records were reviewed in detail in July 2018. Mr. Ingram stated in his amended complaint that he had complied with the pre-suit notice requirements of Tennessee Code Annotated section 29-26-121(a) and had filed a certificate of good faith with the original complaint. However, Mr. Ingram did not provide documentation of his compliance with the pre-suit notice requirements nor did he file a certificate of good faith with the amended complaint. On May 17, 2019, the trial court granted the motion to amend the complaint. Dr. Gallagher and Erlanger subsequently each filed their answers to the amended complaint."

"On February 19, 2020, Erlanger filed a motion to dismiss Mr. Ingram's amended complaint as to Erlanger and a memorandum in support of its motion. Erlanger argued that the complaint failed to state a claim upon which relief could be granted because Mr. Ingram had failed to provide new pre-suit notice prior to filing his amended complaint, file with his amended complaint proof of service of pre-suit notice, and file a new certificate of good faith with the amended complaint."

"On March 18, 2020, the trial court entered an order dismissing with prejudice Mr. Ingram's claims against Erlanger. The trial court determined that the allegations against Erlanger—other than the allegation that Erlanger concealed Dr. Gallagher's negligence—involved vicarious liability, not comparative fault. The court found that the plain language of Tennessee Code Annotated section 29-26-101(a)(1)—the section of the HCLA that defines a 'health care liability action'—mandated that a claim against an employer whose liability is vicarious is a healthcare liability claim and that, as a result, the pre-suit notice and certificate of good faith requirements applied in this case. Lastly, the court held that Mr. Ingram's amended complaint constituted a new action against Erlanger and that, consequently, Mr. Ingram was required to provide new pre-suit notice and a new certificate of good faith. The court stated that even if it were found that Erlanger fraudulently concealed Dr. Gallagher's negligence, that would only extend the statute of limitations and would not relieve Mr. Ingram of the statutory pre-suit notice and certificate of good faith requirements."

"After the trial court dismissed the claims against Erlanger with prejudice, Dr. Gallagher filed a motion for summary judgment asking the court to dismiss all claims against him as a matter of law. Dr. Gallagher argued that he was entitled to judgment as a matter of law because there was no genuine issue of material fact regarding his employment with Erlanger and Erlanger was required to be a party pursuant to Tennessee Code Annotated section 29-20-310(b) but could not be following its dismissal from the action. Dr. Gallagher asserted that, because Erlanger was not and could not be a party to the action, Mr. Ingram could not proceed with his health care liability action against Dr. Gallagher alone. Along with his motion, Dr. Gallagher also filed a memorandum in support of the motion, an affidavit by him, and a statement of undisputed material facts."

"On August 19, 2020, the trial court entered an order granting Dr. Gallagher's motion for summary judgment and dismissing Mr. Ingram's claims against Dr. Gallagher with prejudice. The trial court found that Dr. Gallagher treated Mr. Ingram in the course and scope of his employment with Erlanger, a 'governmental entity governed by the [GTLA].' The court concluded that, under the plain meaning and legislative intent of Tennessee Code Annotated section 29-20-310(b), Mr. Ingram could not bring any claim against Dr. Gallagher without Erlanger being a party to the action, and Erlanger was not and could not be a party."

"Mr. Ingram appealed the trial court's decision to the Court of Appeals[.] … The Court of Appeals first considered Mr. Ingram's argument that the trial court erred by declining to set aside the order voluntarily dismissing Erlanger from the action. Id. Mr. Ingram characterized the order of dismissal as an interlocutory order and argued that his motion to set aside the order of dismissal should have been granted pursuant to Tennessee Rule of Civil Procedure 54.02." …

"The Court of Appeals agreed with Mr. Ingram's position that the order was an interlocutory order subject to revision. Id. The court reasoned that the order was not a final order because at the time Erlanger was dismissed from the action, there was no final judgment in the case, as the order did not adjudicate the claims against Dr. Gallagher. *Id.* The court concluded that the trial court erred by treating Mr. Ingram's motion to set aside the order as a Rule 60 motion, because Rule 60 motions only apply when there is a final judgment. Id. Instead, the intermediate appellate court explained, the trial court should have treated Mr. Ingram's motion as a Rule 54.02 motion to revise. *Id.*"

"The Court of Appeals then considered whether the trial court erred in denying Mr. Ingram's motion to revise the voluntary dismissal order. Id. Citing 'Erlanger's knowledge of the existence of the lawsuit, the short timeframe between the voluntary dismissal of Erlanger and subsequent motion to set aside the dismissal, the courts' preference for resolving actions on the merits, and the clear language of Rule 54.02,' the court concluded that the trial court erred in denying Mr. Ingram's motion to revise the dismissal order. *Id*. As a result, the court reversed the judgment of the trial court and vacated the orders granting Erlanger's motion to dismiss and Dr. Gallagher's motion for summary judgment. *Id*. at *6."

"On appeal, Dr. Gallagher and Erlanger have raised the issue of whether the Tennessee Rule of Civil Procedure 41.01(1) voluntary dismissal of one of multiple defendants in a GTLA case may be set aside and the claim against the dismissed defendant reinstated on the motion of a plaintiff pursuant to Tennessee Rule of Civil Procedure 54.02. In addition, Dr. Gallagher and Erlanger have raised five issues that were pretermitted as moot by the Court of Appeals' decision:

> (1) Whether [Mr. Ingram's] Proposed Amendment Related Back Under T.R.C.P. 15.03; (2) Whether the Savings Statute, T.C.A. [Section] 28-1-105 Applies to Actions Against Governmental Entities Brought Pursuant to the [GTLA]; (3) Whether [Mr. Ingram] Was Required to Comply with T.C.A. [Sections] 29-26-121 and -122 in Connection with the May 23, 2019 Amended Complaint; (4) Whether T.C.A. [Section] 29-20-310(b) Permits Claims to Be Brought, or Judgment to Be Entered Against, a Health Care Practitioner for Damages for Which a Governmental Entity Is Liable If the Governmental Entity Is Not Made a Party Defendant to the Action; and (5) Whether [Mr. Ingram] Is Entitled to Relief Under T.C.A. [Section] 20-1-119

Pursuant to *Bidwell v. Strait*, 618 S.W.3d 309 (Tenn. 2021)."

"Tennessee Rule of Civil Procedure 41.01(1) provides that a plaintiff has the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal. In order for the dismissal to be effective, the notice must be followed by an order of voluntary dismissal. Tenn. R. Civ. Proc. 41.01(3). In this case, Mr. Ingram filed his initial complaint against Dr. Gallagher, Erlanger, Dr. Worthington, and the Chattanooga Neurosurgery and Spine Group. He subsequently filed an amended complaint on November 26, 2018 pursuant to Tennessee Rule of Civil Procedure 15.017 that named Dr. Gallagher as the sole defendant. Also on November 26, 2018, five minutes after filing his amended complaint, Mr. Ingram filed a Tennessee Rule of Civil Procedure 41.01 notice of voluntary dismissal of his claims against Erlanger, Dr. Worthington, and the Chattanooga Neurosurgery and Spine Group. The next day, the trial court entered an order of voluntary dismissal regarding those parties. Mr. Ingram's position is that this order was the only effective dismissal of Erlanger. Because an amended complaint may also serve to remove a party from a lawsuit, we disagree."

"It has long been the rule in Tennessee that an 'original complaint is superseded, and its effect as a pleading destroyed, by filing an amended complaint complete in itself, [] which does not refer to or adopt the original as a part of it.' *Louisville & N.R. Co. v. House*, 56 S.W. 836, 836 (Tenn. 1900); see also *Baker v. Louisville & N. Terminal Co.*, 61 S.W. 1029, 1031 (Tenn. 1901); McBurney v. Aldrich, 816 S.W.2d 30, 33 (Tenn. Ct. App. 1991) perm. app. denied (Tenn. Sept. 3, 1991); *Hanson v. Levan*, 647 S.W.3d 85, 90 (Tenn. Ct. App. 2021), perm. app. denied (Tenn. Jan. 13, 2022). In this case, Mr. Ingram's original complaint alleged wrongdoing on the part of Dr. Gallagher, Erlanger, Dr. Worthington, and the Chattanooga Neurosurgery and Spine Group, and it named each of them as defendants. The amended complaint, however, only made allegations against Dr. Gallagher and named only Dr. Gallagher as a defendant. The amended complaint was complete in itself and did not refer to or adopt the original as a part of it. Thus, the amended complaint superseded and destroyed the effectiveness of the original complaint. This means that after the amended complaint was filed, only Dr. Gallagher remained a defendant in the action. Erlanger, Dr. Worthington, and the Chattanooga Neurosurgery and Spine Group had been removed from the action by virtue of the filing of the amended complaint, and no order was required to effectuate their removal." …

"The removal of Erlanger as a defendant at this point in the proceedings becomes determinative of our decision in this case. Because Erlanger was removed from the lawsuit the moment Mr. Ingram filed his amended complaint, Erlanger was no longer a defendant when Mr. Ingram filed his notice of voluntary dismissal nor when the trial court entered its order of voluntary dismissal. As such, both the notice and order of voluntary dismissal were of no legal effect."

"In light of this procedural background, we need not answer the central question of whether the Tennessee Rule of Civil Procedure 41.01(1) voluntary dismissal of one of multiple defendants in a GTLA case may be set aside and the claim against the dismissed defendant reinstated on the motion of a plaintiff pursuant to Tennessee Rule of Civil Procedure 54.02. Because the trial court's order of voluntary dismissal was of no legal effect due to Mr. Ingram's

November 26, 2018 amended complaint, there was no valid order of voluntary dismissal to alter or amend. As a result, the trial court correctly denied Mr. Ingram's motion to alter or amend, albeit for different reasons. The decision of the Court of Appeals is reversed, and we remand to the Court of Appeals to address the issues it deemed pretermitted as moot."

2. Nonsuit – Tennessee Public Participation Act - Plaintiff has an absolute right to nonsuit even though a counterclaim was filed - A pleaded counterclaim may be maintained after a voluntary dismissal of the original action, and the counterclaimant may proceed as a plaintiff – However, the court in this case was not persuaded that a Tennessee Public Participation Act TPPA petition constitutes a counterclaim within the meaning of Rule 41.01 - The court disagreed with the *dicta* in the *Adamson v. Grove*, No. M2020-01651-COA-R3-CV, 2002 WL 17334223, at *12 (Tenn. Ct. App. Nov. 30, 2022) opinion suggesting that a petition for dismissal under the Act may be maintained as a counterclaim following dismissal pursuant to Rule 41.01 – TPPA action does not create a vested right - A TPPA petition does not provide an automatic right to recovery or to dismissal with prejudice - There is no right to recovery under the TPPA - The recovery of attorney's fees and costs is predicated on the successful adjudication of the petition - A potential award of sanctions under the Act is at the discretion of the trial court- Accordingly, the TPPA does not fall within the ambit of the vested rights exception to Rule 41.01

ROBERT E. LEE FLADE v. CITY OF SHELBYVILLE, TENNESSEE ET AL.
COURT OF APPEALS No. M2022-00553-COA-R3-CV Filed February 24, 2023

"This appeal involves application of the Tennessee Public Participation Act (TPPA). Plaintiff filed multiple causes of action against the City of Shelbyville, the Bedford County Listening Project, and several individuals – one of whom is a member of the Shelbyville City Council. Defendants filed motions to dismiss for failure to state a claim under Tennessee Rules of Civil Procedure 12.06, and two of the non-governmental Defendants also filed petitions for dismissal and relief under the TPPA. The non-governmental Defendants also moved the trial court to stay its discovery order with respect to Plaintiff's action against the City. The trial court denied the motion. The non-governmental Defendants filed applications for permission for extraordinary appeal to this Court and to the Tennessee Supreme Court; those applications were denied. Upon remand to the trial court, Plaintiff voluntarily non-suited his action pursuant to Tennessee Rule of Civil Procedure 41.01. The non-governmental Defendants filed motions to hear their TPPA petitions notwithstanding Plaintiff's nonsuit. The trial court determined that Defendants' TPPA petitions to dismiss were not justiciable following Plaintiff's nonsuit under Rule 41.01. The Bedford County Listening Project and one individual Defendant, who is also a member of the Shelbyville City Council, appeal. We affirm the judgment of the trial court."

"This appeal requires us to construe the Tennessee Public Participation Act ('the TPPA' or the 'Act'). The relevant facts are largely undisputed."

Plaintiff/Appellee Robert E. Lee Flade is a Bedford County resident who purchased a duplex in Shelbyville, Tennessee, in December 2020. According to Mr. Flade, he purchased the duplex with the intent to repair and resell it. Defendant/Appellant Stephanie Isaacs is a member of the Shelbyville City Council. Ms. Isaacs is also associated with Defendant/Appellant Bedford County Listening Project ('the BCLP,' and together with Ms. Isaacs, 'Appellants'). The BCLP is a non-profit organization that, according to its TPPA petition, 'provides, among other things, resources to and advocacy on behalf of tenants in Bedford County, Tennessee[.]' From the record, Ms. Isaacs' association with the BCLP is unclear.

"In July 2021, Mr. Flade filed an action against the City of Shelbyville (the 'City'), Ms. Isaacs, and the BCLP. In his complaint, Mr. Flade asserted that Ms. Issacs contacted him by text in January 2021 stating: 'My name is Stephanie, I'm with the Bedford County Listening Project and on the Shelbyville City Council. I need to speak with you about a major issue with one of your tenants.' Mr. Flade asserted that he contacted Ms. Isaacs, who informed him that 'he had tenants with a water leak and that he had to fix it for them.' In his complaint, Mr. Flade asserted that, when he purchased the duplex, he informed the tenants that they needed to vacate the property, and that he was unaware that anyone was residing in the property when Ms. Isaacs contacted him. He asserted that he informed Ms. Isaacs that, to the best of his knowledge, no tenants were occupying the duplex."

"Mr. Flade asserted that he began to receive 'unknown calls and texts demanding he make repairs for his tenants, threatening him and calling him names.' He asserted that Ms. Isaacs and the BCLP had published his personal information on social media, including his address and telephone number, and had 'encouraged others to contact

[him] and demand that he make repairs.' He asserted, 'specifically, Defendants Isaacs and BCLP falsely claimed that [Mr. Flade] was the reason for a child going with[out] heat and water.' He asserted:

> Defendants Isaacs, BCLP and [Kelly Sue] Waller placed a video on their social media page in which Isaacs claims she is acting as a city council person, that [Mr. Flade] is a slum lord and that people like Robert Flade are just messing with people's lives, among other numerous defamatory and libelous per se statements. That said statements were harmful to [Mr. Flade], demeaning and false in every manner. Defendant Isaacs begged people watching her video to contact him and pressure him to make repairs and be a good neighbor."

"Mr. Flade also asserted in his complaint that Ms. Isaacs at all times identified herself as a City Council member and a member of BLCP and that her comments 'were not made in a public meeting as an act of government sufficient to remove her conduct from immunity under the [Governmental Tort Liability Act ('GTLA')].'" …

"Mr. Flade asserted causes of action against Ms. Isaacs and the BCLP for: (1) 'libel per se'; (2) intentional interference with business; (3) intentional infliction of emotional distress; (4) stalking; and (5) harassment. He sought compensatory damages in the amount of $1,000,000 and an additional $1,000,000 in punitive damages. Mr. Flade asserted that 'as an agent of the City of Shelbyville, Isaacs conduct should be related to the city making the city liable for all damages caused by her conduct.' He also sought damages against Ms. Isaacs in her personal capacity should her conduct be determined to be 'not part of her employment and responsibility to the City.'"

"Mr. Flade sent written discovery requests to the City on August 12, 2021, and the City agreed to respond to his discovery requests no later than October 26, 2021. In the meantime, on August 25, 2021, the City filed a motion to dismiss pursuant to Tennessee Rule of Civil Procedure Rule 12.02(6), along with a memorandum of law in support of its motion. The City asserted that under the GTLA, Tennessee Code Annotated section 29-20-101, *et seq.*, it was immune from liability for Mr. Flade's intentional tort claims. The City's motion was set to be heard on October 28, 2021 but was reset for December 9, 2021 by agreement of the parties. In its October 9, 2021 order resetting the matter, the trial court stated that Ms. Isaacs and the BCLP would have until December 17, 2021, 'to answer, move, or otherwise respond to [Mr. Flade's] complaint.'"

"On November 8, 2021, Ms. Isaacs filed a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(6) and pursuant to the TPPA. In her November 23, 2021 memorandum of law in support of her Rule 12.02(6) motion to dismiss, Ms. Isaacs asserted, 'Councilwoman Isaac's alleged actions are categorically barred from suit based on her absolute legislative immunity.' She also asserted that Mr. Flade's claims were 'inactionable as a matter of law[.]' Ms. Isaacs adopted the City's arguments concerning Mr. Flade's 'GTLA claims . . . by virtue of her role as a city official.'"

"In her memorandum, Ms. Isaacs argued that the TPPA governed Mr. Flade's claims against her in her personal capacity. She asserted that her statements were within the purview of speech protected by the Act because it concerned a 'matter of public concern[.]'" …

"On November 30, 2021, Mr. Flade filed a motion to compel the City to respond to his August discovery requests. He asserted that: (1) at the request of the City's legal counsel, he had emailed his requests to the City on September 10; (2) counsel had advised him that she had been away from the office for a family emergency and was unable to respond to Mr. Flade's discovery requests by October 26, as initially agreed; and (3) he had agreed to reschedule the hearing to December 9 in order to allow the City additional time to respond. Ms. Isaacs filed a motion in opposition to Mr. Flade's motion to compel on the same day. In her motion, she asserted that discovery was not relevant to either the City's motion to dismiss or to her motion to dismiss under Rule 12.02(6). She additionally asserted that all discovery in the matter was automatically stayed pursuant to section 104(d) of the TPPA."

"On December 1, 2021, the BCLP filed a motion to dismiss pursuant to Rule 12.02(6) and the TPPA."

"The trial court heard the matter on December 9, 2021. By order of December 20, 2021, the trial court found that: (1) Mr. Flade had proffered his first discovery requests on August 12; (2) Mr. Flade had agreed to afford the City an extension of time to respond; (3) Ms. Isaacs filed her TPPA petition before the City responded to Mr. Flade's request; and (4) the City subsequently refused to respond in light of the 'apparent automatic stay' imposed by section 104 of the Act. The trial court further found that there was good cause to compel the City to respond in light of the parties' earlier agreement and because the City's response could result in Mr. Flade amending his complaint 'to clear up some of the facts, allegations, or causes of action.' The trial court also found that the TPPA did not preclude the City from responding to discovery as a 'non-petitioning party[.]' The court granted Mr. Flade's motion to compel and for an extension of time to respond to the City's motion. The trial court ordered the

City to respond to Mr. Flade's discovery requests no later than December 20, 2021. It declined to hear arguments on the remaining motions and petitions and continued the matter until February 24, 2022."

"On February 18, 2022, Mr. Flade filed a notice of voluntary dismissal pursuant to Tennessee Rules of Civil Procedure 41.01. The trial court dismissed the matter without prejudice, and Ms. Isaacs filed a 'notice of intent to proceed' with the hearing of her TPPA petition set for February 24, 2022. The BCLP filed a similar notice of intent on February 22, 2022. Mr. Flade filed his response on February 23, 2022, wherein he asserted that the trial court was without subject-matter jurisdiction to adjudicate the TPPA petitions because the TPPA is not excepted from his right to a nonsuit under Rule 41.01."

"Following a hearing on February 24, 2022, the trial court engaged in a thorough and detailed analysis and determined that the TPPA was not excepted from the right to a dismissal without prejudice under Rule 41.01. The trial court entered its final order on April 25, 2022, and Appellants filed timely notices of appeal to this Court."

"The issue presented by this appeal involves the interpretation and applicability of the TPPA as codified at Tennessee Code Annotated section 20-17-101, *et seq*." …

"We begin our discussion by observing that none of the parties' motions to dismiss under Tennessee Rule of Civil Procedure Rule 12.02 or the TPPA comply with Tennessee Rule of Civil Procedure 7.02(1), which requires that motions 'state with particularity the grounds therefore.' *See, e.g.*, ***Jennings v. Sewell-Allen Piggly Wiggly***, 173 S.W.3d 710, 711 (Tenn. 2005). As we have often stated, it is not sufficient that the grounds for dismissal be set-forth in a memorandum of law accompanying or supplementing the motion. *See, e.g.*, ***Justice v. Nelson***, No. E2018-02020-COA-R3-CV, 2019 WL 6716300, at *3 (Tenn. Ct. App. Dec. 10, 2019) (citing ***Willis v. Tenn. Dept. of Corr.***, 113 S.W.3d 706, 709 n. 2 (Tenn. 2003)). ''The party moving for dismissal must state the particular grounds for the motion in the motion itself. Merely moving for dismissal based on the failure to state a claim and stating the grounds in an accompanying memorandum does not fulfill the requirement.'' ***Shomo v. City of Franklin***, No. M200600319COAR3CV, 2008 WL 490646, at *4 (Tenn. Ct. App. Feb. 22, 2008) (quoting ***Ralph v. Pipkin***, 183 S.W.3d 362, 366 n.1 (Tenn. Ct. App. 2005)). However, because the memoranda of law are included in the appellate record, and because the issue of insufficiency of the motions was not raised by Mr. Flade in either the trial court or in this Court, we will consider the motions despite the fact that they do not comport with Rule 7.02(1). *See* ***Allen v. Ozment***, No. W2017-00887-COA-R3-CV, 2018 WL 6169238, at *6 (Tenn. Ct. App. Nov. 26, 2018); ***Shomo***, 2008 WL 490646, at *5."

"Turning to the TPPA, which was enacted in 2019, we note that it has been characterized as Tennessee's 'anti-SLAPP' statute. ***Doe v. Roe***, 638 S.W.3d 614, 617 Tenn. Ct. App. 2021); ***Nandigam Neurology***, 639 S.W.3d at 660 ('[T]he [TPPA] is, on its face, consistent with the anti-SLAPP legislation of many other states.')."

"Tenn. Code Ann. § 20-17-102. The General Assembly enacted the TPPA as 'necessary to implement the rights protected by the Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution[.]' ***Id.*** The Act is 'intended to provide an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available to those parties under common law, statutory law, or constitutional law or under the Tennessee Rules of Civil Procedure.' ***Id.*** § 20-17-109. The TPPA is to 'be construed broadly to effectuate its purposes and intent.' Tenn. Code Ann. § 20-17-102."

"The TPPA provides that '[i]f a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action.' ***Id.*** § 20-17-104(a). The Act defines the '[e]xercise of the right of free speech' as 'a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution[.]' ***Id.*** § 20-17-103. A 'matter of public concern' is defined as including an issue related to:

> (A) Health or safety;
> (B) Environmental, economic, or community well-being;
> (C) The government;
> (D) A public official or public figure;
> (E) A good, product, or service in the marketplace;
> (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or
> (G) Any other matter deemed by a court to involve a matter of public concern[.]

Id. § 20-17-103(6). The TPPA defines a 'legal action' as a claim, cause of action, petition, cross-claim, or counterclaim or any request for legal or equitable relief initiated against a private party[,]' and it provides that 'party does not include a governmental entity agency, or employee.' ***Id.*** § 20-17-103(5) & (7). The TPPA provides

that '[a]ll discovery in the legal action is stayed upon the filing of a petition under this section. The stay of discovery remains in effect until the entry of an order ruling on the petition.' Tenn. Code Ann. § 20-17-104(d). However, '[t]he court may allow specified and limited discovery relevant to the petition upon a showing of good cause.' ***Id***."

"A party petitioning for dismissal pursuant to the TPPA 'has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association.' ***Id***. § 20-17-105(a). Once the petitioning party has met his or her burden, the burden shifts to responding party to 'establishe[] a prima facie case for each essential element of the claim in the legal action.' ***Id***. § 20-17-105(b). 'If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice.' ***Id***. § 20-15-105(e). Additionally, if the trial court

> dismisses a legal action pursuant to a petition filed under the chapter, the court shall award to the petitioning party:
> (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; and
> (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.'

Id. § 20-17-107(a)(1)&(2). However, '[i]f the court finds that a petition filed under this chapter was frivolous or was filed solely for the purpose of unnecessary delay, and makes specific written findings and conclusions establishing such finding, the court may award to the responding party court costs and reasonable attorney's fees incurred in opposing the petition.' ***Id***. § 20-17-107(b)."

"A 'trial court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to' this Court. ***Id***. § 20-17-106." …

"We turn first to whether a petition for relief under the TPPA precludes a plaintiff from taking a nonsuit without prejudice pursuant Rule 41.01(1) of the Tennessee Rules of Civil Procedure ('Rule 41.01'). This issue requires us to consider the interplay between Rule 41.01 and the TPPA."

"Rule 41.01(1) provides:

> Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or of any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff."

"Under Rule 41.01(1), a plaintiff may take ''a voluntary non-suit . . . **as a matter of right**.'' ***Ewan v. Hardison Law Firm***, 465 S.W.3d 124, 130 (Tenn. Ct. App. 2014) (quoting ***Clevenger v. Baptist Health Sys.***, 974 S.W.2d 699, 700 (Tenn. Ct. App. 1997)) (emphasis in original). In the absence of the exceptions and limitations contained in Rule 41.01 or 'an implied exception which prohibits a nonsuit when it would deprive the defendant of some vested right[,]' a plaintiff's right to a voluntary dismissal without prejudice under Rule 41.01 is 'free and unrestricted[.]' ***Lacy v. Cox***, 152 S.W.3d 480, 484 (Tenn. 2004) (citation omitted). Although a case does not become final for the purposes of appeal until the trial court enters its final written order dismissing the matter, the right to a nonsuit under Rule 41.01 does not require the permission of, or an adjudication by, the trial court. ***Green v. Moore***, 101 S.W.3d 415, 420 (Tenn. 2003). Subject to the constraints contained in Rule 41.01 or another statute, or the implied exemption for a defendant's vested right, Rule 41.01 'permits liberal use of voluntary nonsuits at any time prior to 'final submission' to the trial court for decision in a bench trial or in a jury trial before the jury retires to deliberate.' ***Himmelfarb v. Allain***, 380 S.W.3d 35, 40 (Tenn. 2012) (citations omitted). Rule 41.01 permits a voluntary nonsuit notwithstanding the amount of time or expense that may have been expended by the parties. ***Adamson v. Grove***, No. M2020-01651-COA-R3-CV, 2002 WL 17334223, at *12 (Tenn. Ct. App. Nov. 30, 2022) (quoting ***Douglas v. Lowe***, No. M2012-02276-COA-R3-CV, 2013 WL 6040347, at *7 (Tenn. Ct. App. Nov. 12, 2013)).

Tennessee courts have long observed that 'the Tennessee rule on voluntary dismissal . . . is much more liberal than that obtaining [*sic*] in federal courts and in many other jurisdictions.' ***Weedman v. Searcy***, 781 S.W.2d 856-57 (Tenn. 1989)."

"In their brief to this Court, Appellants maintain that the remedies provided by the TPPA are substantive and that Rule 41.01 'cannot be interpreted in a manner that nullifies a defendant's affirmative statutory rights under the TPPA, which supplement[s] any remedies which are otherwise available . . . under the Tennessee Rules of Civil Procedure.' Appellants assert that their right to seek a dismissal with prejudice, attorney's fees, costs and sanctions 'vested' when they filed their TPPA petitions." …

"A plaintiff's right to a nonsuit under Rule 41.01 is expressly '[s]ubject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or of any statute.' Tennessee Rules of Civil Procedure 41.01(1). Appellants rely on Tennessee Code Annotated section 20-17-109 for the proposition that the TPPA 'states explicitly that it was not intended to be subservient to the Tennessee Rules of Civil Procedure.'" …

"In ***Adamson v. Grove***, another panel of this Court held that the TPPA does not fall within the 'statutory exception' provided by Rule 41.01 in the context of a TPPA motion filed after the trial court entered an order on plaintiff's notice of nonsuit. ***Adamson***, 2002 WL 17334223, at *18. The issue in ***Adamson*** involved the trial court's jurisdiction over the defendants' combined motion to alter or amend and petition to dismiss with prejudice pursuant to the TPPA. ***Id.*** at *1. The defendants in ***Adamson*** had filed neither an answer nor any 'other pleading of any sort' before the plaintiff filed his notice of nonsuit under Rule 41.01. ***Id.*** We acknowledge that, in the present case, Appellants' TPPA petitions were pending when the trial court entered its order dismissing Mr. Flade's case without prejudice pursuant to Rule 41.01. Nevertheless, the ***Adamson*** court's analysis of whether the TPPA provides a statutory exception to Rule 41.01 is instructive here."

"… [T]he TPPA does not specifically or implicitly alter the right to a nonsuit provided by Rule 41.01. ***Adamson***, 2022 WL 17334223, at *18. In ***Adamson***, this Court held that the TPPA provides no statutory exemption to Rule 41.01 that would allow a court to exercise jurisdiction over a TPPA petition filed after the plaintiff avails him/herself of the right to a nonsuit under Rule 41.01. ***Id***. Notwithstanding the distinguishable procedural posture of ***Adamson*** to the current case, we agree with the ***Adamson*** Court that the TPPA 'is not the type of 'statute' contemplated by the exception stated in Rule 41.01.' ***Id***."

"As noted above, there is 'an implied exception' to Rule 41.01 'which prohibits nonsuit when it would deprive the defendant of some vested right.' ***Lacy v. Cox***, 152 S.W.3d 480, 484 (Tenn. 2004) (footnotes omitted) (citing ***Anderson v. Smith***, 521 S.W.2d 787, 790 (Tenn. 1975))."

"The ***Adamson*** Court addressed whether the TPPA provides an implied 'vested right' for the purposes of precluding a voluntary nonsuit under Rule 41.01. The court observed that, although 'it is hard to pin down the definition of a 'vested right[,]'' it has been characterized 'as a right 'which it is proper for the state to recognize and protect and of which [an] individual could not be deprived of arbitrarily without injustice.'' ***Adamson***, 2022 WL 17334223, at *19 (quoting ***State ex rel. Stanley v. Hooper***, No. M2000-00916-COA-R3-CV, 2001 WL 27378, at *2 (Tenn. Ct. App. Jan. 11, 2001) (quoting ***Morris v. Gross***, 572 S.W.2d 902, 907 (Tenn. 1978))). After reviewing and comparing the applicable case law, the ***Adamson*** Court determined that the plaintiff's nonsuit did not deprive the TPPA petitioners of any right that had vested during the pendency of the action because their petition was not filed prior to the nonsuit. ***Id.*** The ***Adamson*** Court held that the trial court did not have jurisdiction to adjudicate the defendants' TPPA petition because it was filed after the action was dismissed. ***Id.*** at *21."

"Unlike the defendant in ***Adamson***, Appellants in this case filed their TPPA petitions well before Mr. Flade filed his Rule 41.01 notice of voluntary dismissal. Thus, Appellants' TPPA petitions were within the jurisdiction of the trial court when Mr. Flade nonsuited his action. As such, we turn to the question of whether any implied right vests that would require adjudication of a TPPA petition filed prior to plaintiff's nonsuit."

"A vested right has been defined as:

> something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of a demand, or a legal exemption from a demand made by another; and if before such rights become vested in particular individuals, the convenience of the state induces amendment or repeal of certain laws, these individuals have no cause to complain.

Id. at *19 (quoting 16B Am.Jur.2d Constitutional Law § 703). Vested rights include ''legal or equitable title to enforcement of a demand,' and 'exemption from new obligations created after the right has vested.'' ***Morris v. Gross***, 572 S.W.2d 902, 905 (Tenn. 1978) (quoting 16 AM.Jur.2d Constitutional Law § 421 (1964)).”

“With respect to the right to a cause of action, The Tennessee Supreme Court has opined that 'a vested right of action is as much property as are tangible things and is protected from arbitrary legislation, whether such right of action be based upon the law of contracts or upon other principles of the common law.' ***Morris v. Gross***, 572 S.W.2d 902, 905 (Tenn. 1978).” …

“The filing of a TPPA petition does not provide an automatic right to recovery or to dismissal with prejudice. Rather, it provides a dismissal procedure with a burden-shifting mechanism that differs from Rule 12.02. There is no 'right' to recovery under the TPPA. Rather, the recovery of attorney's fees and costs is predicated on the successful adjudication of the petition. A potential award of sanctions under the Act is at the discretion of the trial court. Accordingly, the TPPA does not fall within the ambit of the 'vested rights' exception to Rule 41.01.”

“We next turn to address whether the trial court erred by not adjudicating Appellants' TPPA petition notwithstanding Mr. Flade's nonsuit. Appellants argument, as we summarize it, is that to allow a voluntary dismissal without prejudice under Rule 41.01 notwithstanding their pending TPPA petitions works an end run around substantive protections afforded by the TPPA.” …

“Appellants' argument on this issue largely mirrors their argument concerning whether the TPPA provides a statutory exception to Rule 41.01. As discussed above, we reject this argument.” …

“We do not find the Texas or California authority to be particularly persuasive to our discussion of the interplay between the TPPA and the right to a nonsuit provided by Rule 41.01. Because the TPPA is silent with respect to this interplay, any exception to the rights afforded by Rule 41.01 must be found within the rule itself. The final sentence of Rule 41.01(1) provides:

> If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.”

“The ***Adamson*** court determined that, because the plaintiff nonsuited the action before the defendant filed 'any type of pleading[,]' the TPPA petition filed with defendant's motion to alter or amend the judgment could not be maintained as a counterclaim in that case. ***Adamson***, 2022 WL 17334223, at *15.” …

“As the ***Adamson*** court reiterated, a pleaded counterclaim may be maintained after a voluntary dismissal of the original action, and the counterclaimant may proceed as a plaintiff. ***Adamson***, 2022 WL 17334223, at *14. However, we are not persuaded that a TPPA petition constitutes a counterclaim within the meaning of Rule 41.01.”

“Although Rule 41.01 disallows the taking of a nonsuit when a motion for summary judgment is pending, a TPPA petition is not, by its terms, a motion for summary judgment. Rule 41.01 also explicitly disallows a voluntary nonsuit when the matter has been submitted to a jury and after a court's ruling granting a motion for directed verdict. It explicitly excepts class actions, derivative actions by shareholders, and actions in which a receiver has been appointed.” …

“… [W]e presume the General Assembly was aware of the broad right to a voluntary dismissal afforded by Rule 41.01 and of the exceptions to the Rule. Additionally, the General Assembly's purpose in enacting the TPPA was two-fold: 'to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law *and*, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury.' Tenn. Code Ann. § 20-17-102 (emphasis added). Had the General Assembly intended to permit a petitioner to counterclaim for relief pursuant to the Act, to move for summary judgment under the Act, or to otherwise except the expedited motion to dismiss provided by the Act from the well-settled provisions of Rule 41.01, it could have done so. There is nothing in the text of the TPPA that suggests legislative intent to except the Act from the mandates of Rule 41.01. As such, we respectfully disagree with the *dicta* in the ***Adamson*** opinion suggesting that a petition for dismissal under the Act may be maintained as a counterclaim following dismissal pursuant to Rule 41.01.”

CIVIL PROCEDURE – FEDERAL

1. Sanctions - Rule 11 of the Federal Rules of Civil Procedure imposes an implied duty of candor, which attorneys violate whenever they misrepresent the evidence supporting their claim - Thus, a court may sanction attorneys under Rule 11(b)(3) for factual assertions they know—or after reasonable investigation should have known—are false or wholly unsupported - A reasonable prefiling investigation would have shown counsel that their allegations about Dominion were baseless, so those allegations were therefore sanctionable under Rule 11(b)(3) - A reasonable prefiling investigation would have shown counsel that their allegations about Dominion were baseless. Those allegations were therefore sanctionable under Rule 11(b)(3) - Reliance on expert witnesses without the attorney reviewing them to ensure they support the allegations is sanctionable, including award of attorney fees to the other party

TIMOTHY KING, et al. v. GRETCHEN WHITMER; JOCELYN BENSON; CITY OF DETROIT, MICHIGAN
SIXTH CIRCUIT COURT OF APPEALS Nos. 21-1785/1786/1787/22-1010 Decided and Filed June 23, 2023

"Three voters and three Republican nominees to the electoral college in Michigan brought this suit in a bid to overturn the results of the state's 2020 presidential election. The complaint plausibly alleged that Republican election challengers had been harassed and mistreated during vote counting at the TCF Center in Detroit, in violation of Michigan law. But the complaint also alleged that an international 'collaboration'—with origins in Venezuela, extending to China and Iran, and including state actors in Michigan itself—had succeeded in generating hundreds of thousands of fraudulent votes in Michigan, thereby swinging the state's electoral votes to Joseph Biden. Many of those allegations—particularly the ones concerning Dominion voting machines—were refuted by the plaintiffs' own exhibits to their complaint. Other allegations arose from facially unreliable expert reports; still others were simply baseless. The district court found the entirety of the plaintiffs' complaint sanctionable, and ordered all of plaintiffs' attorneys, jointly and severally, to pay the defendants' and the City of Detroit's reasonable attorney's fees. We find only part of the complaint sanctionable, and thus reverse in part and affirm in part."

"On November 3, 2020, Michigan voters cast their ballots in the presidential election. As soon as the polls closed, teams of state election officials began 'canvassing' the results—a public process in which officials and observers verify that the number of votes cast in each precinct matches the number of voters listed on the poll lists. *See* M.C.L § 168.801. This canvass concluded on November 17. By the next day, every county in Michigan had reported its official election results to the Secretary of State and the Board of State Canvassers."

"Michigan law allows any candidate with a 'good-faith belief' that he lost the election due to 'fraud or mistake' to request a recount within 48 hours of the canvass's conclusion. *See* M.C.L § 168.879(1)(b), (c). No candidate did so. As a result, on November 23, the bipartisan Board of State Canvassers unanimously certified results indicating that Joseph Biden had won the State of Michigan by 154,188 votes. That same day, Michigan's Governor transmitted those results to the United States Archivist. Michigan's electors for the Democratic Party were thereafter 'considered elected.' M.C.L. § 168.42. That ended the involvement of the Board and the Governor in the election."

"This case began two days later, on November 25, 2020. Plaintiffs sued Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and the Board of State Canvassers (together, the 'state defendants'), asserting that they had 'fraudulently manipulat[ed] the vote' through 'a wide-ranging interstate—and international—collaboration' to ensure that Biden would win the election. Compl. ¶1-3. Plaintiffs alleged that unspecified 'foreign adversaries' and 'hostile foreign governments' had accessed Dominion voting machines; that Detroit election officials had participated in countless violations of state election law, including an 'illegal vote dump' of 'tens of thousands' of votes; and that expert analysis showed that the election results were fraudulent. Compl. ¶84, 162, 224. As a result, plaintiffs argued, they were entitled to 'the elimination of the mail ballots from counting in the 2020 election'—meaning all of them—and an order directing 'the electors of the State of Michigan . . . to vote for President Donald Trump.' Compl. ¶229-233. Sidney Powell, Scott Hagerstrom, and Gregory Rohl signed this complaint as the plaintiffs' attorneys, and five other lawyers—Emily Newman, Julia Haller, Brandon Johnson, Lin Wood, and Howard Kleinhendler—were listed as 'Of Counsel.'"

"On November 29, plaintiffs filed an emergency motion for injunctive relief, which repeated the arguments and requests of the complaint. The Democratic National Committee, the City of Detroit, and Robert Davis (an individual voter with no particular stake in the matter) each filed motions to intervene as defendants, which the court granted. On December 7, the court denied plaintiffs' motion for emergency relief. *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020)."

"Plaintiffs thereafter hired a ninth attorney, Stephanie Junttila, to file an appeal with this court. Meanwhile, Michigan's electors were set to vote on December 14. Junttila and Powell filed a petition for certiorari with the Supreme Court, urging immediate intervention—because, they said, the case would become moot after the December 14 electoral-college vote. But the Supreme Court did not intervene, and on December 14 Michigan's electors cast their votes for Joseph Biden."

"On December 15, the City served plaintiffs and their attorneys with a 'safe-harbor' letter, warning that the City would seek sanctions under Civil Rule 11 if plaintiffs did not voluntarily dismiss their complaint. Plaintiffs' counsel did not respond. On December 22, the state defendants e-mailed plaintiffs' counsel to seek their concurrence in upcoming motions to dismiss; Junttila responded and declined. That same day, the City, the DNC, and the state defendants filed separate motions to dismiss, and intervenor Davis filed a motion to sanction plaintiffs' counsel under 28 U.S.C. § 1927 and the court's inherent authority."

"On January 5, 2021—three weeks after sending the safe-harbor letter without any response—the City moved for Rule 11 sanctions against plaintiffs and their attorneys, asking the court to impose a fine, to require plaintiffs' counsel to pay defendants' attorney's fees, and to refer them to their respective state bar associations for disciplinary proceedings. The state defendants joined the City's motion in full. On January 11 and 12, plaintiffs filed motions to extend the time to respond to the pending motions to dismiss; the court extended that time until January 21. On January 14, however, plaintiffs filed a response announcing that they would voluntarily dismiss the complaint. The state defendants thereafter filed a separate motion for sanctions under 28 U.S.C. § 1927 against Powell, Junttila, Rohl, and Hagerstrom."

"In July 2021, the district court held a lengthy hearing on the sanctions motions, during which it questioned plaintiffs' attorneys about the suit. Lin Wood said that, before he heard about the sanctions hearing, he had no idea his name had been on any filings in the suit. But he admitted he had offered to help Powell with the lawsuit, and Powell herself said she had 'specifically ask[ed]' Wood for his permission before including his name on the filings. Emily Newman and Stephanie Junttila, for their parts, each said their involvement in the case was minimal. The remaining attorneys did not contest their roles in the case. The court also discussed 15 of the plaintiffs' affidavits, to determine whether the attorneys had conducted a prefiling investigation as to the plausibility of their allegations. In response, counsel repeatedly argued that they could rely on affidavits without conducting any inquiry."

"The district court thereafter held that plaintiffs' counsel had violated Rule 11 by filing their suit for an improper purpose and by failing to conduct an adequate prefiling inquiry into the legal and factual merits of their claims. The court further found that counsel had needlessly prolonged the proceedings, in violation of 28 U.S.C. § 1927, and that counsel had acted in bad faith, warranting sanctions under the court's inherent authority. The court therefore ordered all nine of plaintiffs' attorneys, jointly and severally, to pay the reasonable legal fees of the City and the moving state defendants. The court also ordered those attorneys to attend 12 hours of non-partisan legal education on election law and federal pleading standards, and directed the clerk to send disciplinary referrals to counsel's respective bar associations—which the clerk did the next day. The court denied Davis's motion for sanctions and declined to impose sanctions on plaintiffs themselves."

"In a separate order, the court considered objections to the amount of the City's request. (No attorney had objected to the moving state defendants' request of $21,964.75.) Of the $182,192 the City requested, the court awarded $153,285.62."

"These four appeals followed. Lin Wood, Emily Newman, and Stephanie Junttila each appeal individually, arguing that their involvement in this case was too minimal to warrant sanctions. Gregory Rohl, Brandon Johnson, Howard Kleinhendler, Sidney Powell, Julia Haller, and Scott Hagerstrom appeal together, arguing primarily that none of their conduct was sanctionable."

"As an initial matter, the district court held that the attorneys filed their suit for an improper purpose, in violation of Rule 11(b)(1). Specifically, the court asserted that 'what very clearly reflects bad faith is that Plaintiffs' attorneys are trying to use the judicial process to frame a public 'narrative.'' But another word for 'framing a public narrative' is speech; and Rule 11 cannot proscribe conduct protected by the First Amendment. True, an attorney may not say whatever she likes inside a courtroom. *See Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005). But an attorney's political speech outside a courtroom—including political speech about a lawsuit—is irrelevant to a Rule 11 inquiry about the suit itself. To the contrary, parties and their attorneys are free to use litigation 'as a vehicle for effective political expression and association[.]' *In re Primus*, 436 U.S. 412, 431 (1978). That is as true in election cases as in any other case."

"Speech outside the courtroom is what the district court apparently found objectionable here. But that speech did not show that counsel were 'motivated by improper purposes such as harassment or delay,' which means it was irrelevant to the district court's inquiry. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 519 (6th Cir. 2002). And contesting election results is not itself an improper purpose for litigation. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *Moss v. Bush*, 828 N.E.2d 994 (Ohio 2005); *Coleman v. Ritchie*, 762 N.W.2d 218 (Minn. 2009). Nor does the record show that counsel were otherwise motivated by improper purposes. *First Bank*, 307 F.3d at 519. Thus, the district court did not identify any improper purpose supporting the imposition of sanctions under Rule 11(b)(1)."

"The district court also sanctioned plaintiffs' counsel under Rule 11(b)(3), which mandates that attorneys engage in a reasonable prefiling inquiry to ensure that a pleading or motion is 'well grounded in fact[.]' *Merritt v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d 609, 626 (6th Cir. 2010). Rule 11 also imposes an implied 'duty of candor,' which attorneys violate whenever they misrepresent the evidence supporting their claims. *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 395 (6th Cir. 2009). Thus, a court may sanction attorneys under Rule 11(b)(3) for factual assertions they know—or after reasonable investigation should have known—are false or wholly unsupported."

"The complaint said the following about Dominion's origins:

> Smartmatic and Dominion were founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election. *See* Ex. 1 Redacted Declaration of Dominion Venezuela Whistleblower ('Dominion Whistleblower Report'). Notably, Chavez 'won' every election thereafter.

Compl. ¶5. The plaintiffs' sole evidentiary support for these allegations was the so-called 'Dominion Whistleblower Report'—allegedly authored by an unnamed 'adult of sound mine [*sic*]' who purported to be a former member of Chavez's national guard. Yet the whistleblower report itself says nothing about Dominion's founding; instead, it describes a conspiracy 'between a company known as Smartmatic' and 'the Venezuelan government.' Smartmatic is not Dominion, just as General Motors is not Ford. The report otherwise says that Dominion 'relies upon software that is a descendant of the Smartmatic Election Management System.' But the complaint's allegation that Dominion was founded as part of a Venezuelan conspiracy to commit election fraud was entirely baseless. The district court rightly concluded that this whole raft of allegations was sanctionable."

"The problem with the complaint's allegations regarding Michigan's voting system, simply enough, is that they concerned different kinds of systems than the one Michigan used. As any Michigan voter could have told counsel, Michigan used a hand-marked ballot system—which one of the plaintiff's own exhibits, an article by Dr. Andrew Appel, said is 'the only practical technology for contestable, strongly defensible voting systems.'" …

"Plaintiffs' own exhibits thus refuted rather than supported the complaint's allegations about the Dominion system used in Michigan. And an adequate prefiling inquiry under Rule 11 includes reading every document one plans to file. *See, e.g.*, *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278, 1281 (3d Cir. 1994) (observing that '[w]e are at a total loss to understand how attorneys can urge that they have made a reasonable inquiry into the facts and law of a case when their complaint is predicated on allegedly false statements in documents which they have not bothered to read.'). Plaintiffs' inquiry as to these allegations was patently inadequate."

"Plaintiffs' counsel sought to bolster their theories about Dominion with two putative expert reports." …

"Here, as to the alleged international conspiracy, the complaint alleged that 'Dominion software was accessed by agents acting on behalf of China and Iran in order to monitor and manipulate elections.' Compl. ¶17. The sole basis for that allegation was the report of what the complaint called a 'former electronic intelligence analyst with 305th Military Intelligence with experience gathering SAM missile system electronic intelligence.' Compl. ¶17. But that 'intelligence analyst' turned out to be a Dallas IT consultant who dropped out of an entry-level intelligence course after seven months' training. And even a cursory review of his putative report shows that it concerned the integrity of Dominion's public website, not its voting machines. That distinction should not have been hard for counsel to keep straight. And the complaint further misrepresented the report when the complaint alleged that 'Dominion allowed foreign adversaries to access data and *intentionally provided access* to their infrastructure' (emphasis added). Compl. ¶161-162. That allegation was utterly baseless."

"The attorneys also presented an affidavit from Russell Ramsland to substantiate their suspicion that foreign powers had hacked into Dominion's machines. Ramsland said that his background included 'advanced converged telecom, highly advanced semiconductor materials, hospitality, commercial real estate development & operation,'

as well as running 'Europe's highest grossing Tex-Mex restaurant.' His specialized knowledge as to foreign election-interference was thus questionable on its face. More to the point, Ramsland claimed that Dominion machines had been 'manipulated' in 'four precincts/townships' in four Michigan counties (Wayne, Oakland, Macomb, and Kent), which he said resulted in '289,866 illegal votes.' Ramsland's theory was that the Dominion machines used in those counties—which he said were 'Model DRM16011'—lacked the 'processing capacity' to count as many ballots as were counted in the relevant precincts on election night. But Ramsland likewise assumed that those counties used a ballot-marking system nowhere used in Michigan, which showed that he did not know which machines were used in Michigan—meaning that his assumptions about 'processing capacity' were baseless. Moreover, a simple internet search would have shown that Macomb and Oakland counties did not use Dominion systems at all."

"A reasonable prefiling investigation would have shown counsel that their allegations about Dominion were baseless. Those allegations were therefore sanctionable under Rule 11(b)(3)."

"In another part of the complaint—covering about 19 paragraphs—counsel relied upon several putative expert reports to allege that Michigan's election results were statistically anomalous or impossible. The complaint alleged that 'evidence compiled by Matt Braynard using the National Change Address Database' showed that 13,248 voters who had moved to another state had nonetheless illegally voted in Michigan. Compl. ¶119. But Braynard's opinion came in the form of four tweets, each 280 characters or less, which said nothing about his qualifications or the data he supposedly employed. That opinion was unreliable on its face; counsel violated Rule 11 by relying upon it."

"The complaint likewise cited Dr. Stanley Young, who asserted that Biden's gains over Trump among new voters in nine large, metropolitan counties (*e.g.*, Oakland, Washtenaw, Wayne, Kent, Kalamazoo) were 'unexpected.' According to Young, Biden received 190,000 'excess' votes in those counties because Biden's margin of victory there was 190,000 votes greater than Clinton's margin had been in 2016. Every one of those counties has a large suburban population, which suggests a simpler explanation than an international conspiracy for that shift in votes. And by Young's logic, Trump received an 'excess' of 29,000 votes in the rest of Michigan. Still, counsel could have reasonably relied on Young's opinion that this shift was unexpected. What the complaint actually said, however, was that 'Dr. Young's analysis indicates that, when the entire State of Michigan is concerned, there were likely over 190,000 'excess' and *likely fraudulent* votes, which once again is significantly larger than Biden's 154,188 margin in Michigan.' Compl. ¶118 (emphasis added). An 'unexpected' shift in suburban votes in Young's report thus became, in the complaint, 190,000 fraudulent votes that swung the election. That allegation misrepresented Young's report and was sanctionable. *See Rentz*, 556 F.3d at 395."

"The complaint's most provocative allegation as to these boards was that they 'fraudulently added tens of thousands of new ballots and new voters in the early morning and evening of November 4.' Compl. ¶82 (capitalization removed). 'Perhaps the most probative evidence' in support of this allegation, according to the complaint, came from the affidavit of Dominion employee Melissa Carone. Compl. ¶84. She wrote:

> There was two vans that pulled into the garage of the counting room, one on day shift and one on night shift. These vans were apparently bringing food into the building because they only had enough food for not even 1/3 of the workers. I never saw any food coming out of these vans, coincidentally it was announced on the news that Michigan had discovered over 100,000 more ballots—not even two hours after the last van left.

On the basis of this affidavit, the complaint alleged that Carone had 'witnessed' an 'illegal vote dump, as well as several other violations.' Compl. ¶84. That allegation illustrates the complaint's pattern of embellishment to the point of misrepresentation. The only thing that Carone said she witnessed was the arrival of 'two vans'—period. Powell and her co-appellants now concede that 'Carone made it clear she had seen no ballots.' *Reply* at 24. That means it was sanctionable to allege that she did. *Rentz*, 556 F.3d at 395."

"A reasonable prefiling investigation would have shown counsel that their allegations about Dominion were baseless. Those allegations were therefore sanctionable under Rule 11(b)(3). For instance, the complaint includes 11 paragraphs of allegations about problems with verification of signatures and birthdates on absentee ballots at the TCF Center. But Michigan law does not require birthdate verification for absentee voters. *See* M.C.L. § 168.765a. Nor do the counting boards verify any signatures for the absentee ballots; instead, by the terms of the same statute, the city clerk's office would have already done that before the ballots reached the TCF Center. *See* M.C.L. § 168.765a(6) (absentee ballots delivered to absent-voter counting boards 'must be' accompanied by 'a statement by the clerk that the signatures of the absent voters on the envelopes have been checked and found to agree with the signatures of the voters on the registration cards'). The complaint did not allege otherwise; its allegations about improper verification at the TCF Center were therefore baseless."

"Counsel similarly alleged that voters who had requested absentee ballots later illegally voted in person. But the same statute specifies that Michigan law 'does not prohibit an absent voter from voting in person within the voter's precinct at an election, notwithstanding that the voter may have applied for an absent voter ballot and the ballot may have been mailed or otherwise delivered to the voter.' M.C.L. § 168.765a(7). And where the complaint did specifically allege double voting—as in paragraph 93—it misrepresented the supporting affidavit, which said only that some people who voted in person 'had already *applied* for an absentee ballot.' (Emphasis added)."

"Of a piece was the complaint's allegation that election challengers had been improperly barred from observing the 'ballot-duplication' process (meaning the process by which ballots that cannot be read by a machine are hand-copied onto ballots that can be scanned). *See* Compl. ¶13, 76-77, 189. For the same statute says that 'at least 1 election *inspector* from each major political party' must witness the duplication. M.C.L. § 168.765a(10) (emphasis added). Under Michigan law, 'challenger' and 'inspector' mean two different things: election challengers are party volunteers with no official training in election procedure, whereas election inspectors are officials appointed by the Board of Election Commissioners. M.C.L. § 168.765a(2). The complaint unwittingly used those terms interchangeably; and nowhere does it suggest that anyone barred an election inspector from observing the ballot-duplication process."

"The statute at issue here ran three pages; a reasonable prefiling inquiry as to all these allegations would have included reading it."

"The district court next held that the entire complaint was independently sanctionable under Rule 11(b)(2). That rule requires attorneys to certify that 'the claims, defenses, and other legal contentions' in their filings 'are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.' Fed. R. Civ. P. 11(b)(2). Thus, in short, frivolous 'legal contentions' are sanctionable under Rule 11(b)(2)."

"The defendants argue that the plaintiffs' remaining claims rested on frivolous legal contentions. A legal contention is frivolous if it is 'obviously without merit' under existing law and unsupported by a good-faith argument to change or extend the law. Fed. R. Civ. P. 11(b)(2); *Waldman v. Stone*, 854 F.3d 853, 855 (6th Cir. 2017) (discussing frivolous claims under Appellate Rule 38)."

"As an initial matter, counsel never should have asserted any claims against the Board of Canvassers in this case. The Board is a state agency; and unless the state waives Eleventh Amendment immunity or Congress abrogates it, state agencies are immune from federal suit. *Boler v. Earley*, 865 F.3d 391, 410 (6th Cir. 2017). Here, the state did not waive immunity and Congress did not abrogate it, and plaintiffs have never argued otherwise. Hence the Board was indisputably entitled to sovereign immunity. *Id.* Moreover, the Board had already certified the election results by the time of plaintiffs' suit, and thus lacked power to redress any of plaintiffs' alleged harms. Hence the plaintiffs also lacked standing to sue the Board. *See Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 715-16 (6th Cir. 2015). The legal contentions in support of these claims, therefore, were frivolous. *See Waldman*, 854 F.3d at 855."

"That leaves two federal claims against Governor Whitmer and Secretary Benson and a handful of state claims. The first federal claim was one under 42 U.S.C. § 1983 for alleged violations of the Elections and Electors Clauses of the Constitution. The theory behind that claim, as set forth in the complaint, was that the Governor and the Secretary of State 'unilaterally' chose to 'deviate from the requirements of the Michigan Election Code.' Compl. ¶23, 179. That this claim was one of 'unilateral' action means it depended on actions specific to the Governor and Secretary themselves. Yet the complaint alleged no such actions, apart from a conclusory allegation in the complaint's introduction (¶3) about 'multifaceted schemes and artifices implemented by Defendants and their collaborators[.]' And that allegation itself obviously could not support this claim. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This claim was therefore both legally and factually frivolous."

"The defendants argue that even the complaint's nonfrivolous claims were sanctionable because the complaint's requests for relief were frivolous. But parties can tailor those requests as the case proceeds, and the complaint here included a request for any 'relief as is just and proper.' Compl. ¶233. That means counsel could have filed this lawsuit without any of the requests for relief that defendants say were frivolous. Those requests alone therefore do not render the nonfrivolous legal claims sanctionable. Nor did the district court identify any other ground to support a determination that the entirety of this complaint was frivolous."

"Plaintiffs, for their part, defend the inadequacy of their complaint by pointing to the time constraints inherent in election contests. But Rule 11 imposes a safe-harbor period to protect attorneys from sanctions for hasty mistakes. A party may seek sanctions only after providing notice of the alleged violations, which the opposing party then has 21 days to cure. Fed. R. Civ. P. 11(c); *see also* advisory committee's note to 1993 amendment ('[T]he timely withdrawal of a contention will protect a party against a motion for sanctions.'). Here, the City sent plaintiffs a

detailed letter specifying the allegedly sanctionable material. Plaintiffs could have avoided sanctions by abandoning frivolous claims and allegations and concentrating the attention of the court on what remained. They did not do so, and that is why we uphold much of their Rule 11 sanctions today."

"In sum, therefore, the complaint stated two claims that were nonfrivolous: a selective-enforcement claim under 42 U.S.C. § 1983, and a state-law claim under M.C.L. § 168.733. Neither claim was sanctionable under Rule 11. We agree with the district court, however, that plaintiffs' other claims were all sanctionable under that rule."

"The defendants also argue, and the district court agreed, that counsel are liable for the entirety of the defendants' reasonable attorney's fees after December 14—because the plaintiffs failed to dismiss their case after it had concededly become moot. Under 28 U.S.C. § 1927, courts may award sanctions against an attorney who 'multiplies the proceedings in any case unreasonably and vexatiously.' Courts may award sanctions under this section 'when an attorney knows or reasonably should know that a claim pursued is frivolous' and yet continues to litigate it. *Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012)."

"Here, plaintiffs themselves asserted in a petition to the Supreme Court that this case would become moot on December 14, 2020—the date Michigan's certified electors would cast their votes. Yet on December 15—when defendants sought plaintiffs' consent to a voluntary dismissal—counsel declined on the ground that the district court lacked jurisdiction to dismiss the case while it was on appeal. That excuse was makeweight: plaintiffs obviously could have voluntarily dismissed their appeal and complaint alike. Hence they unreasonably multiplied the proceedings by declining to dismiss their suit. *See Lemaster v. United States*, 891 F.2d 115, 118 (6th Cir. 1989)."

"The sanctioned attorneys now argue that the case gained 'new life' when 'an alternative slate of electors for Michigan was advanced in early January.' That formulation is passive for a reason: what actually occurred in January is that the 'alternative slate of electors' purported to elect themselves for the purpose of casting Michigan's electoral votes. And counsel do not explain why any competent attorney would take that self-election seriously for purposes of persisting in this lawsuit. Moreover, plaintiff's refusal to dismiss their suit had concrete consequences for defendants, who were forced to research and brief motions to dismiss that they should not have needed to file. The district court was right to impose sanctions under § 1927."

"Some of the attorneys argue they were not responsible for the sanctionable filings in this case. Upon finding a violation of Rule 11, the court may sanction any attorney who 'violated the rule or is responsible for the violation.' Fed. R. Civ. P. 11(c). An attorney violates the rule directly by 'presenting' an offending pleading to the court, such as 'by signing, filing, submitting, or later advocating it.' Fed. R. Civ. P. 11(b)."

"Separately, under 28 U.S.C. § 1927, the court may impose sanctions on attorneys whose conduct 'falls short of the obligations owed by a member of the bar to the court.' *Salkil*, 458 F.3d at 532. Here, the attorneys who appealed individually—Emily Newman, Stephanie Junttila, and Lin Wood, respectively—each argue they were not responsible for any frivolous filing under either standard."

"… The district court awarded the City and the state defendants their full reasonable attorney's fees, required each attorney to take 12 hours of continuing legal education, and sent a referral for disciplinary proceedings to each attorney's respective bar association."

"Courts must limit any award of attorney's fees to only 'those expenses directly caused' by the sanctionable conduct. *Cooter & Gell v. Hartmarx Corp*, 496 U.S. 384, 406-07 (1990). When a filing is entirely baseless, sanctionable conduct causes every expense reasonably incurred in responding to it. *Id.* But when, as here, a filing is partially non-sanctionable, courts may award only fees incurred in responding to the sanctionable parts. *Id.*; *see also* Fed. R. Civ. P. 11(c)(4); *Garner v. Cuyahoga Cnty. Juv. Ct.*, 554 F.3d 624, 635-47 (2009)."

"Here—given the district court's finding that the entire complaint was sanctionable—the court did not distinguish between fees generated in response to sanctionable and non-sanctionable parts of the complaint. But courts are loath to prolong satellite litigation about fees, and here the record allows us to sort out those fees for ourselves."

"We reverse the district court's imposition of sanctions against Emily Newman and Stephanie Junttila, respectively; we reverse the state defendants' fee award as to Lin Wood; we reduce the City's award to $132,810.62; and we reduce the state defendants' fee award to $19,639.75. Otherwise, the district court's imposition of sanctions in its August 25, 2021 order is affirmed."

CIVIL RIGHTS

1. Deliberate indifference claim to medical needs of pretrial detainee - Plaintiff must show (1) that pretrial detainee had a sufficiently serious medical need and (2) that each defendant acted deliberately (not accidentally), and also recklessly in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known - Immunity denied to some jailers because they did not seek adequate medical care for pretrial detainee - Municipal liability - A municipality cannot be liable under a theory of respondeat superior; it can only be held liable for its own wrongdoing - This requires plaintiff to demonstrate that the alleged federal violation occurred because of a municipal policy or custom - A municipality may be held liable under one of four recognized theories: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations - Failure to train - There are two ways to support a claim that a failure to train or supervise is the result of a municipality's deliberate indifference - Plaintiff may prove (1) a pattern of similar constitutional violations by untrained employees or (2) a single violation of federal rights, accompanied by a showing that the municipality has failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation - County was deliberately indifferent - With no medical professionals on site, the County effectively asked the jailers to make determinations about what constituted a medical emergency—a requirement well outside their area of expertise, and the County did not supervise the jailers or the doctor at all - A reasonable jury could easily conclude that these policies were the result of the County's deliberate indifference to inmate health and safety

JULIE HELPHENSTINE, Administratrix of the Estate of Christopher Dale Helphenstine and Guardian of B.D.H., the minor son of Christopher Dale Helphenstine v. LEWIS COUNTY, KENTUCKY; JEFF LYKINS, ANTHONY RUARK, ANDY LUCAS, BEN CARVER, AMANDA MCGINNIS, SANDY BLOOMFIELD, MARK RILEY, MELINDA MONROE, JEFFERY THOROUGHMAN, TOMMY VON LUHRTE, D.O., JOHNNY BIVENS, and JOHN BYARD, individually
SIXTH CIRCUIT COURT OF APPEALS No. 22-5407 Decided and Filed: February 9, 2023

"Christopher Helphenstine was arrested and charged with drug crimes in Lewis County, Kentucky. While detained, he began to withdraw from alcohol or drugs. Despite severe vomiting and diarrhea, the only medical care he received was two doses of antiemetics, prescribed via fax machine by a doctor who never saw him. He died five days after his arrest. His estate sued several jail employees, the doctor contracted to provide medical care at the jail, and Lewis County for deliberate indifference to his serious medical needs in violation of the Fourteenth Amendment, and for negligence in violation of state law. The district court ruled that no defendant violated Helphenstine's constitutional rights, declined to exercise jurisdiction over the state-law negligence claim, and granted summary judgment in favor of all defendants. We affirm in part, reverse in part, and remand for further proceedings."

"Until recently, we analyzed both pretrial detainees' and prisoners' claims of deliberate indifference 'under the same rubric.' *Brawner v. Scott Cnty.*, 14 F.4th 585, 591 (6th Cir. 2021) (citation omitted). A prisoner's deliberate indifference claim arises from the Eighth Amendment and has objective and subjective components. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The 'objective component' addresses the conditions leading to the alleged violation: it 'requires a plaintiff to prove that the alleged deprivation of medical care was serious enough to violate the Constitution.' *Griffith v. Franklin Cnty.*, 975 F.3d 554, 567 (6th Cir. 2020) (citation and brackets omitted). The 'subjective' component, meanwhile, addresses the officials' state of mind and requires a plaintiff to show that a defendant 'kn[ew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' *Farmer*, 550 U.S. at 837."

"But in *Brawner*, we considered whether the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), required 'modification of the subjective prong of the deliberate-indifference test for pretrial detainees,' like Helphenstine. 14 F.4th at 596. In *Kingsley*, the Court addressed the standard for excessive force claims brought by both pretrial detainees and convicted prisoners. 576 U.S. at 400–02. The Court concluded that a pretrial detainee need demonstrate 'only that the force purposely or knowingly used against him was objectively unreasonable,' rather than *both* objectively and subjectively unreasonable, like a prisoner must. *Id.* at 396–97, 400–02. It based its decision largely on the difference between the Due Process Clause of the Fourteenth Amendment (from which a pretrial detainee's claim arises) and the Cruel and Unusual Punishments Clause of the Eighth Amendment (from which a prisoner's claim arises). *Id.* at 398–402. The Court did not, however, address whether an objective-only standard applies to other pretrial-detainee claims, such as deliberate indifference. *See Brawner*, 14 F.4th at 592."

"*Brawner* answered the question left open by *Kingsley*, holding that *Kingsley* required modification of the subjective component of a pretrial detainee's deliberate indifference claim: 'Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable.' *Id.* at 596. We modified the subjective prong as follows: 'A pretrial detainee must prove more than negligence but less than subjective intent—something akin to reckless disregard.' *Id.* (internal quotation marks omitted). In other words, a plaintiff must prove that a defendant 'acted deliberately (not accidentally), [and] also recklessly 'in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'' *Id.* (quoting *Farmer*, 511 U.S. at 836)."

"Recently, however, a panel of this court called this reading of *Brawner* into question. *See Trozzi v. Lake Cnty.*, 29 F.4th 745 (6th Cir. 2022). In *Trozzi*, the panel agreed that *Brawner* modified the subjective element. *Id.* at 753–54. But based on the *Brawner* opinion itself, 'post-*Brawner* decisions, and background principles,' *id.* at 754, it concluded that the subjective inquiry 'still requires consideration of an official's actual knowledge of the relevant circumstances.' *Id.* at 755. It then framed the test this way: 'Reading *Farmer*, *Kingsley*, *Brawner*, and *Greene* [*v. Crawford Cnty.*, 22 F.4th 593 (6th Cir. 2022)] together, a plaintiff must satisfy three elements for an inadequate-medical-care claim under the Fourteenth Amendment: (1) the plaintiff had an objectively serious medical need; (2) a reasonable officer at the scene (knowing what the particular jail official knew at the time of the incident) would have understood that the detainee's medical needs subjected the detainee to an excessive risk of harm; and (3) the prison official *knew* that his failure to respond would pose a serious risk to the pretrial detainee and *ignored* that risk.' *Id.* at 757–58 (emphasis added)."

"We hold that this framing of the elements is irreconcilable with *Brawner*." …

"Because *Brawner* was decided before *Trozzi*, *Brawner* controls. *Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017); *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Accordingly, plaintiff must show (1) that Helphenstine had a sufficiently serious medical need and (2) that each defendant 'acted deliberately (not accidentally), [and] also recklessly 'in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'' *Brawner*, 14 F.4th at 596 (quoting *Farmer*, 511 U.S. at 836)."

"Defendants do not challenge the district court's finding that Helphenstine suffered an objectively serious medical need. Thus, our focus rests exclusively on the subjective prong."

"Mark Riley. Riley moved Helphenstine from general population to the detox cell on April 16, knew that Helphenstine was 'dope sick,' and knew that he vomited at least once. Riley admitted that 'somebody needed to call Dr. [v]on Luhrte' at that time. Because he neither placed that call nor asked another defendant to call Dr. von Luhrte on April 16, a reasonable jury could find that Riley acted with deliberate indifference."

"Riley resists, arguing that during his shift, no reasonable officer would understand that Helphenstine was experiencing an objectively serious medical need. 'A sufficiently serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.' *Griffith*, 975 F.3d at 567 (internal quotation marks removed). Vomiting is 'a clear manifestation of internal physical disorder.' *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 899 (6th Cir. 2004). Further, that jailers 'deem[] [a detainee]'s condition sufficiently serious to place him in an observation cell' tends to show a sufficiently serious medical need. *Id.*"

"When Helphenstine began to fall ill on April 16, Riley knew he needed medical attention: Riley knew he had vomited, moved him to an observation cell, and testified that someone needed to call a doctor. Thus, a reasonable jury could conclude that Helphenstine's medical need was, at this point, so obvious that a lay person like Riley should—and did—recognize the need for medical attention. *See id.*"

"Because Riley, a lay person, recognized that Helphenstine's condition was serious enough that he needed medical attention, a jury could also reasonably conclude that Riley recklessly disregarded that known risk to Helphenstine's health via his inaction. Accordingly, we reverse the district court's grant of summary judgment in favor of Riley."

"Amanda McGinnis. Defendant McGinnis had, comparatively, a large amount of contact with Helphenstine. Late in the evening on April 17, she knew he was going through withdrawal, and she sent the initial fax to Dr. von Luhrte early on April 18, noting that Helphenstine was vomiting and soiling himself, refusing to eat or drink, and had not gotten out of bed for 24 hours. She knew that other deputies cleaned Helphenstine's cell of vomit and feces while he showered that morning and that he was not feeling well at that point. In the early morning hours of April 19, another jailer had to help McGinnis hold Helphenstine's head up for him to drink. McGinnis even admitted that she

consciously treated Helphenstine's medical needs differently on account of his being detained[.] … A reasonable jury could find that McGinnis acted with deliberate indifference."

"Despite McGinnis's admission that she would have taken 'a family member or a loved one' in Helphenstine's condition to the hospital, she took no action to help him beyond faxing Dr. von Luhrte—which she knew would not result in a response for at least several hours. … A jury could conclude that McGinnis's choice to send a fax in the middle of the night, when no one would be present at Dr. von Luhrte's office and no one would respond for several hours, was deliberately indifferent to Helphenstine's medical needs."

"Moreover, McGinnis was with Helphenstine shortly before his death and observed that he was effectively unresponsive. Around 3 a.m. on April 19, Helphenstine could not even lift his head to drink. McGinnis knew that Helphenstine had not received any medical attention or care beyond two doses of antiemetics. Despite this personal observation and knowledge, she did not seek medical attention for him."

"We have held that similar facts were enough to establish a constitutional violation under the pre-*Brawner* standard, so they are certainly enough to defeat summary judgment now. *See Smith v. Cnty. of Lenawee*, 505 F. App'x 526 (6th Cir. 2012)." …

"Anthony Ruark and Sandy Bloomfield. The *Smith*/*Greene* analysis is equally applicable to Ruark and Bloomfield, and a reasonable jury could conclude that they acted with deliberate indifference."

"Ruark knew that Helphenstine was in withdrawal and observed him vomiting at least twice in the early morning hours of April 17. Ruark testified that he could not recall if Helphenstine could 'hold[] anything down' at the time. And a jury could conclude that around 3 a.m. on April 19, Ruark saw Helphenstine lying face down, barely moving, and had to physically lift his head for McGinnis to help him to drink. But Ruark did not seek medical attention for Helphenstine."

"Similarly, Bloomfield knew Helphenstine was in the observation cell because he was 'dope sick,' and she knew he was going through withdrawal. Bloomfield was aware that he had diarrhea and had been vomiting and sweating. She saw Helphenstine lie face-down on his mat via the jail cameras on the morning of April 19. And she watched McGinnis and the other officer try to get Helphenstine to drink some liquid, but instead observed him lying down without moving. Yet Bloomfield did not seek medical attention for Helphenstine."

"As in *Smith* and *Greene*, these defendants observed Helphenstine in a near-lifeless state after days of illness. A jury could reasonably conclude that they recklessly failed to act reasonably by not seeking medical assistance for Helphenstine."

"… Plaintiff also seeks to impose municipal liability on Lewis County. 'A municipality is a 'person' under 42 U.S.C. § 1983, and so can be held liable for constitutional injuries for which it is responsible.' *Morgan v. Fairfield Cnty.*, 903 F.3d 553, 565 (6th Cir. 2018) (citing *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978)). A municipality cannot be liable under a theory of respondeat superior; it can only be held liable for 'its own wrongdoing.' *Id.* This requires plaintiff to demonstrate that the alleged federal violation occurred because of a municipal 'policy or custom.' *Monell*, 436 U.S. at 694. A municipality may be held liable under one of four recognized theories: '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.' *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). Plaintiff argues that Lewis County failed to adequately train and supervise its jailers regarding medical emergencies. We agree."

"'A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.' *Connick v. Thompson*, 563 U.S. 51, 61 (2011). There are two ways to support a claim that a failure to train or supervise is the result of a municipality's deliberate indifference. Plaintiff may prove (1) a 'pattern of similar constitutional violations by untrained employees' or (2) 'a single violation of federal rights, accompanied by a showing that [the municipality] has failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation.' *Shadrick v. Hopkins Cnty.*, 805 F.3d 724, 738–39 (6th Cir. 2015) (internal quotation marks omitted). Plaintiff has not identified any other constitutional violations, so she must demonstrate that the single violation (Helphenstine's death) was accompanied by Lewis County's failure to train the jailers to handle this potentially recurring situation. This sort of claim is available only 'in a narrow range of circumstances,' where a federal rights violation 'may be a highly predictable consequence of a failure to equip [employees] with specific tools to handle recurring situations.' *Board of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)."

"The question here is whether the County's failure to train its employees amounted to deliberate indifference, on behalf of the County, to the rights of detainees. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Such a claim has three elements. Plaintiff must show (1) that the County's 'training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.' *Winkler*, 893 F.3d at 902 (citation omitted). Here, a reasonable jury could conclude that she has met her burden."

"First, the adequacy of the training program. Drug and alcohol withdrawal was common among people housed at the jail. The jail's written policies stated that '[d]rug or alcohol withdrawal' constituted an emergency. But the written policies contained no instructions or guidelines for how staff should care for an inmate in withdrawal beyond contacting the 'Jail Medical Coordinator and the Facility Physician[.]'"

"The record is mixed on whether the jailers ever received any training or instruction regarding withdrawal or medical emergencies. McGinnis testified that she had received training on what constituted an alcohol-withdrawal-related medical emergency, identifying uncontrollable vomiting, diarrhea, or unresponsiveness. Most jailers agreed that an inmate experiencing a medical emergency should be sent to the hospital, but the deputy jailers also testified that they had not received any training regarding withdrawal or how to identify medical emergencies. Indeed, Lykins agreed that no one at the jail had specific 'training to determine whether someone going through alcohol or drug withdrawal was experiencing signs or symptoms that indicated that their withdrawal was about to be fatal.'" …

"At bottom, it appears that defendants were not trained on how to identify or address a medical emergency. A jury could easily conclude that this training program, to the extent that it existed, was insufficient."

"Second, Lewis County's deliberate indifference. 'Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.' *Connick*, 563 U.S. at 61 (brackets and quotation marks omitted)." …

"The inadequacy of the training and supervision at the jail demonstrates that it results from the County's deliberate indifference to the rights of its inmates because the possible unconstitutional consequences are patently obvious. This is particularly palpable when viewing Lewis County's woeful training policy against the backdrop of Dr. von Luhrte's performance and the County's lack of supervision."

"Begin with the written policies: The County hired Dr. von Luhrte to provide medical care to inmates, but required him to visit the jail only once a week. This violates Kentucky's administrative regulations, which mandate that a jail conduct at least two sick calls per week. 501 Ky. Admin. Regs. 3:090(10)(a), 3:170. And the County had a policy that the elected jailer, Lykins, was to publish a quarterly report on the jail's medical services. But Lykins did not do so. Indeed, Lykins had *never actually seen* Dr. von Luhrte visit the jail, and explicitly testified that the County did not supervise Dr. von Luhrte's performance in any way."

"The jail doctor was unable to deal with common medical conditions at the jail, and he was rarely present at the jail. The deputy jailers did not have any medical training or medical knowledge, so often, no one at the jail could recognize or treat a medical emergency. But with no medical professionals on site, the County effectively asked the jailers to make determinations about what constituted a medical emergency—a requirement well outside their area of expertise. And the County did not supervise the jailers or Dr. von Luhrte at all. A reasonable jury could easily conclude that these policies were the result of the County's deliberate indifference to inmate health and safety. *See Shadrick*, 805 F.3d at 742 ('Because it is so highly predictable that a poorly trained [County employee] working in the jail setting 'utterly lacks an ability to cope with constitutional situations,' a jury reasonably could find that [the County]'s failure to train reflects 'deliberate indifference to the highly predictable consequence, namely, violations of constitutional rights.'' (quoting *Connick*, 563 U.S. at 64, 67 (brackets omitted)))."

"In sum, a jury could conclude that Helphenstine's death was the result of the County's deliberate indifference. Helphenstine fell ill on April 16 and received no medical attention or care until his death three days later. No Lewis County defendant tried to effect Dr. von Luhrte's advice that Helphenstine be provided with rehydrating food or drink. County employees gave him two doses of antiemetics, but no County employee ever checked his vitals; provided him with rehydration beyond sips of Mountain Dew, water, Ensure, or juice; or sought hospital-level care. The County offered little more to Helphenstine than observation, and '[a]t a certain point, bare minimum observation ceases to be constitutionally adequate.' *Greene*, 22 F.4th at 609. Plaintiff has demonstrated that a reasonable jury could conclude that the County's training and supervision was inadequate, that the inadequacy was caused by Lewis County's indifference, and that the inadequacy caused Helphenstine's death. The district court improperly granted summary judgment in favor of Lewis County."

2. CIVIL RIGHTS – Fourth Amendment - Qualified immunity granted – Officers shot and killed an individual – Officers' actions were reasonable under the circumstances- Summary judgment granted to officers - In deciding whether the force used was excessive, the court balances the government's interests in protecting others (including the police) and curbing crime against a suspect's right to not to be injured - Three factors are particularly relevant: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether suspect was actively resisting arrest or attempting to evade arrest by flight Video footage shows what happened, so inconsistent accounts by the officers do not create a genuine issue of material fact – The Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances - Release of canine on victim was reasonable under the circumstances

PUSKAS v. DELWARE COUNTY, OHIO, ZACHARY SWICK, TROY GIBSON, ROBERT SPRING, ROBERT BUTLER
SIXTH CIRCUIT COURT OF APPEALS No. 22-3390 Decided and Filed January 5, 2023

"This § 1983 action involves the shooting death of Brian Puskas after police officers responded to a 911 domestic disturbance call from Brian's wife, Plaintiff Deanna L. Puskas. The district court found that the defendant officers' actions were nonetheless reasonable under the circumstances. The camera footage confirms that conclusion. We therefore affirm the court's decision."

"The police body cameras tell much of the story here. Plaintiff's version of events fills in the rest for summary judgment purposes. *See Ashford v. Raby*, 951 F.3d 798, 800 (6th Cir. 2020) (citing *Scott v. Harris*, 550 U.S. 372, 378–80 (2007))."

"Around 11:14 a.m. on June 6, 2018, Deanna called 911 from her home in Delaware County, Ohio, frantically claiming that her husband was threatening her and that she feared for her life. She told the 911 dispatcher that when Puskas came home from work he was 'not normal,' was tearing up the house, and was 'threatening [her] with guns and knives.' Deanna stated that Puskas had 'never acted like this before,' and explained that he had high blood pressure and depression and was on 'new medication from the doctor' for 'inflammatories.' Deanna also indicated that there were lots of guns and knives in the house, and that Puskas 'threatened to turn [her] into an ashtray.' He also cut open a window screen after she locked him out and he was tossing items across the front yard. During the call, Deanna stated 'I know what he's going to do, he's going to kill me.'"

"Deanna ran to the neighbors' and hid behind a truck. She told the dispatcher that Puskas had 'tremendous guns' in their house."

"Several officers from the Delaware County Sheriff's Office and the Sunbury Police Department responded to an incident that dispatch 'described as a domestic disturbance involving firearms and knives.' Defendant Deputy Zachary Swick was the first to arrive at 11:25 a.m., knowing that Puskas had weapons and was 'not acting right.' As he drove up, Swick observed stuff scattered across the lawn and Puskas holding a rifle. Puskas put the rifle down before Swick got out of the cruiser."

"Swick told Puskas multiple times to put his hands up and to get on the ground. Puskas walked toward the house instead. He stopped near a tree close to the front door, picked up a bag, and pulled out a shotgun. Swick, who was about six feet from Puskas, fled for cover. His body camera fell off in the process. Puskas told Swick that he had 'better run.' From the safety of his vehicle, Swick reported to dispatch that Puskas had a shotgun and that there were other weapons in the yard. Puskas then dropped the shotgun."

"From behind the cruiser, Swick reengaged with Puskas, asking 'what's going on,' and broaching the topic of Puskas's mental state. Officer Keith Brown from the Sunbury Police Department arrived next, at 11:30 a.m. He joined Swick behind Swick's cruiser. Brown also instructed Puskas to approach, and repeatedly beckoned to Puskas: 'Let's talk about this, let's figure out what's going on'; 'Come on partner, come out here and talk to me,' 'I understand you're having a rough day, why don't we talk about it?'; 'I understand, I've got plenty of time—plenty of time'; and 'Walk out this way partner, come on.' Puskas did not obey. When the next officer, Sgt. Robert Curren, arrived at 11:32 a.m., he asked dispatch to send a negotiator. Dispatch notified Curren that a negotiator was on the way."

"More officers arrived, including Defendants Sergeant Robert Spring and Deputy Troy Gibson. Gibson parked his cruiser on the west side of the residence (Swick's was on the east). Gibson, a canine officer for the Sheriff's

Office, brought his canine partner, Cash, along. Cash is certified as a narcotics and patrol dog. Cash has been his canine partner since 2017. Relevant here is Delaware County Sheriff's Office Canine Policy, which states that '[t]he canine officer shall, if possible, verbally warn the suspect(s) that if they do not stop, the canine will be released.' The County also has Response to Resistance and Less Lethal Force policies."

"Gibson joined the other officers in trying to persuade Puskas to engage with them. Gibson told Puskas to 'come to the sound of my voice, and we won't have any problems,' and 'come out to us and you won't have any problems.' Gibson was also preparing Cash 'for an apprehension,' repeatedly giving Cash the bite command. Puskas ignored Gibson's commands and continued to meander around the yard picking up various items off the ground, including a t-shirt. When told to drop the shirt, Puskas tossed it at the officers."

"Gibson released Cash shortly thereafter. Deanna maintains that neither Spring nor Gibson warned Puskas to surrender or that the Cash would be released, and that Puskas did not turn and run until *after* Gibson discharged Cash. This is the basis of her first excessive force challenge. The officers maintain that they did not violate the Fourth Amendment because Gibson did not release Cash until *after* Puskas started to run towards the house."

"The camera footage further establishes that Cash initially targeted the t-shirt, not Puskas. Gibson refocused Cash on Puskas and followed Cash as Cash followed Puskas. Swick and Spring followed behind Gibson and Cash. All had their guns drawn."

"Puskas pivoted away from the house and darted behind the tree near the front door. Gibson moved to the other side of the tree. Cash still did not bite or apprehend Puskas. Puskas then reached down and picked up a black pistol case. Someone yelled, 'he's got a pistol'; Swick yelled 'drop it'; and Spring yelled 'get off that.' Puskas pulled out a silver revolver, and the officers shot him at 11:38 a.m. Puskas fell to the ground."

"Swick kicked the pistol away and secured Puskas with handcuffs. Puskas was transported to the hospital. He died there."

"Deanna alleges that the officers violated Puskas's Fourth Amendment rights by first deploying Cash and then shooting Puskas. A seizure is 'unreasonable' under the Fourth Amendment if officers used excessive force. *Gambrel v. Knox Cnty.*, 25 F.4th 391, 400 (6th Cir. 2022) (citing *Graham v. Connor*, 490 U.S. 386, 394–97 (1989)). In deciding whether the force used was excessive, we balance the government's interests in protecting others (including the police) and curbing crime against a suspect's right to not to be injured. *Id.* Three factors are particularly relevant: (1) 'the severity of the crime at issue,' (2) 'whether the suspect pose[d] an immediate threat to the safety of the officers or others,' and (3) 'whether he [wa]s actively resisting arrest or attempting to evade arrest by flight.' *Graham*, 490 U.S. at 396; *Gambrel*, 25 F.4th at 400. We do so from the perspective of a reasonable officer at the scene, and not from 'the 20/20 vision of hindsight.' *Graham*, 490 U.S. at 396. And we 'view excessive force claims in segments.' *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (citations omitted)."

"Deployment of a well-trained police dog is '[a]mong the various forms of force available to law enforcement, that is a comparatively measured application of force, which 'does not carry with it a substantial risk of causing death or serious bodily harm.'' *Jarvela v. Washtenaw Cnty.*, 40 F.4th 761, 764 (6th Cir. 2022) (dog bite) (quoting *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988)). But only if it's reasonable under the circumstances as measured by the *Graham* factors. *See Ashford*, 951 F.3d at 801–03; *Zuress v. City of Newark*, 815 F. App'x 1, 5–6 (6th Cir. 2020). … [S]he claims that the officers did not warn Puskas before releasing Cash—and Gibson's own testimony bolsters her argument. But the video establishes otherwise. Gibson said, 'You're gonna get bit.' Spring also clearly said, 'You're gonna get bit if you don't . . . .' The word 'comply' is fairly inaudible but still fairly inferable. *See Matthews v. Jones*, 35 F.3d 1046, 1048 (6th Cir. 1994) (officers 'called out orders for [the suspect] to surrender' and 'warned that the dog would be released if he did not' before releasing canine); *Robinette*, 854 F.2d at 911–12 (same). *Scott* dictates that the video controls. *See Scott*, 550 U.S. at 380–81; *see also Hayden v. Green*, 640 F.3d 150, 152 (6th Cir. 2011) (rejecting the plaintiff's allegations 'to the extent they are clearly contradicted 'by a videotape capturing the events in question'' (quoting *Scott*, 550 U.S. at 378))."

"Deanna also alleges that Puskas was not an imminent threat because he did not begin to flee until *after* the canine was deployed. Again, the camera footage tells a different story, from two perspectives, Gibson's and Brown's body cameras. Admittedly, the videos are not of the highest resolution and some scenes are blurry, but the parties' movements are discernible. Brown's body camera provides the clearer picture. It shows Puskas, after tossing the shirt in the officers' direction, back up, turn and run towards the house, despite the officers' warnings that he was 'gonna get bit.'"

"Gibson's body camera's depiction mirrors Brown's. Gibson repeatedly asked Puskas to 'come to the sound of my voice,' 'come out to us and you won't get hurt,' and 'don't pick anything up.' Puskas nonetheless bent down, picked up the shirt, and threw it towards the officers. Both Gibson and Spring warned Puskas that he was going to get bit. Gibson held Cash tightly by the collar. Although not pellucid, the video shows Gibson release his grip on Cash *after* Puskas had turned and started to run towards the house. Therefore, the inconsistent accounts by the officers, including the dog's handler, do not create a genuine issue of material fact for trial. *See Scott*, 550 U.S. at 380–81; *Hayden*, 640 F.3d at 154."

"Deanna posits that Swick or Gibson should have tased Puskas instead of releasing Cash. She argues that Swick could have tased Puskas when he was within six feet of Puskas (a taser can fire up to 21 feet). Furthermore, the taser policy in effect encouraged its use. Maybe so. But 'the Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances.' *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008) (cleaned up); *Ashford*, 951 F.3d at 801 (same). Thus, whether using a taser would have been a better technique is not a question that is before us; we are asked only whether the techniques used were reasonable under the circumstances. Swick testified that he decided not to deploy the taser because there were other, lethal weapons in the yard. And, as noted above, deploying Cash was an accepted police tactic. Furthermore, the video clearly shows that the defendant officers were trying to deescalate the situation by calmly entreating Puskas to come to them. In short, the officers' decisions here are paradigmatic judgment calls, which we do not second guess. *See Graham*, 490 U.S. at 396. Thus, as the district court noted, 'the decision to forgo tasering for the possibility of nonviolent resolution was far from 'plainly incompetent.'' We therefore hold that, under the circumstances the officers faced here, the decision to release Cash did not violate the Constitution."

"'When an officer uses *deadly* force, that force is unreasonable unless 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'' *Palma*, 27 F.4th at 432 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). The officers' use of deadly force is also examined for objective reasonableness, using the *Graham* factors. *Graham*, 490 U.S. at 396–97. However, the threat of immediate harm is a 'minimum requirement for the use of deadly force.' *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir. 2005); *see also Palma*, 27 F.4th at 432."

"The first (severity of the crime) and third (resisting arrest or fleeing) *Graham* factors support the use of deadly force. Again, the crime was severe—the officers knew that Puskas had threatened Deanna with weapons and had access to them. Puskas repeatedly disobeyed the officers' orders to come to them and to leave everything on the ground, and he attempted to flee to his house, where more weapons were stored."

"What Puskas did next, made the danger to the officers imminent (the second *Graham* factor). The video footage confirms that as Puskas was heading towards the house, he pivoted towards the tree, picked up a black case, pulled out a pistol (or revolver), and appeared to draw the gun. At this point, the officers, who were in pursuit of Puskas, became easy targets—and Puskas's prior behavior could reasonably be perceived as raising those odds." …

"… [T]he 'tense, uncertain, and rapidly evolving' circumstances justified the shooting. *Graham*, 490 U.S. at 397. We do not second guess such split-second decisions. *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (per curiam)."

"Next, Deanna contends that because Puskas did not 'brandish' the silver revolver at the officers, their reaction was unreasonable. It's true that officers cannot shoot a suspect merely because he has a gun. *Campbell*, 47 F.4th at 480; *Thomas*, 854 F.3d at 366. But they do not necessarily need to wait until he points it at them. *Thornton*, 727 F. App'x at 838; *see also Wilkerson v. City of Akron*, 906 F.3d 477, 482–83 (6th Cir. 2018) (officers who shot fleeing suspect could have reasonably believed that suspect could turn and fire upon them). Here the officers had other factors that flipped the switch from 'unreasonable' to 'reasonable.' *See Thomas*, 854 F.3d at 366 ('Whether a suspect has a weapon constitutes just one consideration in assessing the totality of the circumstances.'). As the district court noted, Puskas had just threatened to shoot his wife, had the means to carry the threat out, repeatedly disobeyed the officers for over twenty minutes, and was acting erratically. Clearly, there were 'additional indicia that the safety of the officer[s] . . . [wa]s at risk.' *Campbell*, 47 F.4th at 480; *cf. Bouggess v. Mattingly*, 482 F.3d 886, 890–92 (6th Cir. 2017) (holding that officer who shot suspect for resisting arrest and fleeing was not entitled to qualified immunity where there was no evidence that the suspect had a gun)."

"Nor can it be said that Cash's deployment proximately caused the shooting, because it was not foreseeable that Puskas would stop to pick up a gun while fleeing from Cash. *See Mendez*, 137 S. Ct. at 1548–49 (recognizing proximate cause theory and holding that courts must find some direct relation between the injury asserted and the alleged relevant constitutional violation)."

"Here, the officers were responding to a *live* crime scene, with a noncompliant, erratic, and most important, *armed* suspect. As the *Palma* majority recognized, 'an officer is not absolutely barred from using lethal force on

mentally ill individuals.' *Id.* at 437 (stating that 'only in extreme cases have we found that an officer reasonably used lethal force against a mentally ill person'). Given these additional factors, the officers' actions were not unreasonable. *Id.* (collecting cases where officers reasonably 'used lethal force against a mentally ill person who was *armed* and *threatening* officers'). That is why Deanna's argument that the officers should have waited for the negotiator is also a nonstarter—Puskas had a gun in his hand and the situation was 'tense, uncertain, and rapidly evolving.' *Graham*, 490 U.S. at 397."

"Although Spring and Swick both testified that they did not know that Puskas had mental health issues it is obvious from their comments and commands that Defendants were aware of, *and sensitive to*, Puskas's precarious mental state. At a minimum, they felt that his behavior was 'abnormal' as defined by the Delaware County's standard operating policy. Puskas himself told Swick that he was 'just not having a good day.' Indeed, Puskas's odd behavior made it clear that he was 'off.' But, as stated above, this does not transform the officers' behavior from 'reasonable' to 'unreasonable' under the circumstances presented here."

"Because we conclude that the officers did not violate Puskas's constitutional rights, there is no need to address the clearly established prong of the qualified immunity analysis."

"Deanna also challenges the district court's dismissal of her *Monell* failure-to-train-or-supervise claim and grant of summary judgment as to her county policies claim. An underlying constitutional violation is the *sine qua non* of municipal liability, which requires that the constitutional violation was caused by a municipal policy or custom. *Monell*, 436 U.S. at 694; *Baker v. City of Trenton*, 936 F.3d 523, 535 (6th Cir. 2019); *Thomas*, 854 F.3d at 367 ('No constitutional violation means no municipal liability.'). As explained above, Deanna has not established any constitutional violation. The district court properly granted summary judgment to the County."

3. Tennessee Board of Professional Responsibility is entitled to absolute immunity for monetary damages for termination of disciplinary counsel – Board's chief disciplinary counsel is not entitled to immunity in her individual capacity for the termination of disciplinary counsel in part for tweets made by plaintiff prior to employment – The Court should look to the nature of the challenged act itself and whether the party bringing the § 1983 claim dealt with the state actor in her judicial capacity - *Guercio* concluded that the acts of hiring and firing are essentially executive in nature, even if they fall within the proper scope of duties of a judge - As in *Guercio*, the action of the state actor complained of here—defendant's firing of plaintiff—took place in the workplace, not the courtroom, setting - Defendant argues that her duties require her to ensure that her staff handles cases without bias - That fact, no doubt, will be relevant as to whether platiniff is entitled to prevail on his First Amendment claim under the balancing analysis of *Pickering* - Those considerations do not change the central point that defendant's decision to terminate plaintiff's employment, like the judge's decision to fire his secretary in *Guercio*, was not a decision that is unique to a judge's duties in the courtroom such that absolute judicial immunity applies - Courts reaffirm time and again that hiring and firing is administrative or executive in nature, not judicial - Judicial immunity, though absolute and firm, is something to be applied carefully and should not be extended further than its justification warrants

GERALD DEAN MORGAN v. BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE; SANDRA GARRETT, in her individual capacity
SIXTH CIRCUIT COURT OF APPEALS No. 22-5200 Decided and Filed March 20, 2023

"This case involves a lawyer, Gerald Morgan, whose alleged anti-Muslim tweets led to termination of his employment as Disciplinary Counsel for the Board of Professional Responsibility of the Supreme Court of Tennessee (the Board). The tweets occurred before Morgan took the job, but they came back to haunt him in that position. In a state-court appeal of a disciplinary order of the Board, a litigant cited the tweets as grounds to disqualify Morgan from appearing as the Board's counsel in the appeal. Following Morgan's withdrawal from that appeal, an internal investigation ended with the Board firing him."

"Morgan then sued the Board and Sandra Garrett, the Board's Chief Disciplinary Counsel, for injunctive relief based on alleged violation of his First Amendment right to free speech and for damages under 42 U.S.C. § 1983 based on alleged wrongful termination. The district court dismissed without prejudice Morgan's request for injunctive relief against the Board as barred by Eleventh Amendment sovereign immunity and because part of that request was moot. As for the request for damages, the district court also dismissed based on the Board's sovereign immunity, as well as a determination that Garrett was entitled to absolute quasi-judicial immunity. For reasons set forth below, we AFFIRM the district court's dismissal of Morgan's claims against the Board. But we REVERSE the

district court's dismissal of Morgan's request for monetary relief against Garrett based on absolute quasi-judicial immunity and REMAND for further proceedings consistent with this opinion."

"On February 1, 2019, Gerald Morgan began employment as Disciplinary Counsel with the Board. His troubles began during the appeal of a disciplinary proceeding involving Brian Manookian, who had been handed a two-year suspension of his law license by a hearing panel on May 20, 2020. Following an unsuccessful motion for a stay of his state-court appeal of the license suspension, Manookian moved on November 24, 2020, to disqualify and replace Morgan as the Board's counsel in the appeal, claiming that Morgan was 'an anti-Muslim bigot.' Manookian's court filing attached tweets posted by Morgan from 2015 and 2016 that allegedly demonstrated Morgan's bias toward Muslims. Though Manookian himself is not Muslim, he claimed that his wife was of the Islamic faith and that his children were being raised in a Muslim household. Based on these alleged facts, Manookian argued that Morgan's tweets demonstrated substantial bias against Muslims and that Morgan should be disqualified from handling the appeal and replaced with special counsel. Morgan responded by claiming that the tweets were political in nature and related to the 2015–2016 presidential campaign between Donald Trump and Hillary Clinton. Morgan also disavowed having any knowledge of the religious faith and practices of Manookian's family, having never met or communicated with him or his family."

"Nonetheless, in response to Manookian's motion to disqualify, the Board moved for Morgan to withdraw as Board counsel in the appeal, which the court allowed. But that was not the end of it. About a week later, on December 11, 2020, Garrett, on behalf of the Board, called Morgan to inform him that his employment would be terminated. Garrett cited several reasons for the firing: '(1) [Morgan's] duty to protect the public by investigating and prosecuting cases 'without discrimination or bias'; (2) Manookian's motion to disqualify [Morgan] for bias; (3) a separate, unnamed attorney's misconduct complaint against [Morgan]; and (4) [Morgan's] Twitter posts.' Appellee's Br. at 4–5. After Morgan lost his job, the Board then responded to Manookian's motion, stating that his motion to disqualify Morgan was moot because Morgan was no longer employed by the Board."

"Several months later, on March 1, 2021, Garrett sent Morgan a letter notifying him that the Board had opened a disciplinary file against him. Morgan claims that this disciplinary file stemmed from Manookian's motion to disqualify. On March 29, Morgan was informed that the disciplinary matter against him had been dismissed."

"On April 5, 2021, Morgan filed a complaint, stating in the case caption that it was against the Board and Garrett 'in her individual capacity.' Compl. at PageID.1. There is no mention in the case caption or body of the complaint that any claim is brought against Garrett in her official capacity. Morgan alleges that the Board and Garrett wrongfully terminated his employment and violated his constitutional rights when he was fired based on tweets featured in Manookian's motion to disqualify. Morgan sued for injunctive relief and for money damages. As for the injunctive relief, Morgan sought for the district court to enjoin the Board and Garrett from 'taking any adverse action as a result of his protected speech, including any action against Plaintiff through the means of any disciplinary file opened against him premised on his speech.' Compl. at PageID.9. He also requested a 'mandatory permanent injunction' against the Board to 'expunge all reference to any disciplinary file premised on Mr. Morgan's speech from its internal computer tracking systems, and removing any indication that Mr. Morgan was terminated for cause.' *Id.* at PageID.9–10."

"The Board and Garrett moved to dismiss Morgan's complaint, citing several reasons. Both defendants argued that claims against them should be dismissed for lack of subject-matter jurisdiction based on the Eleventh Amendment. Garrett also sought dismissal of the claims against her on the grounds of absolute quasi-judicial immunity, qualified immunity, and failure of the complaint to state a claim for injunctive relief."

"The district court granted dismissal. It dismissed Morgan's claims against the Board without prejudice for lack of subject-matter jurisdiction based on Eleventh Amendment sovereign immunity." …

"Before considering a suit against a state, a federal court must determine whether the Eleventh Amendment bars jurisdiction. That constitutional provision reads: 'The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.' U.S. Const. amend. XI. This amendment grants sovereign immunity to the states in most cases, which prevents federal courts from having jurisdiction in lawsuits brought by private plaintiffs where the state is a defendant. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)). Such immunity also extends to departments and agencies that are arms of the state, as well as state officers acting in their official capacity. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978)[.]" …

"That said, courts maintain jurisdiction in some circumstances despite sovereign immunity. States may waive their immunity or Congress may remove it by statute. *Id.* Also, a court has subject-matter jurisdiction to hear a

constitutional claim against an official acting under color of state law if the claim fits within the exception of *Ex parte Young*, 209 U.S. 123 (1908). Under *Ex parte Young*, 'suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment.' *Mich. Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000) (citing *Ex parte Young*, 209 U.S. at 159–60). This doctrine applies only when the plaintiff sues for 'prospective [injunctive] relief to end a continuing violation of federal law.' *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013). If the complaint fails to 'make clear what those ongoing violations are,' the exception does not apply. *Boler v. Earley*, 865 F.3d 391, 412 (6th Cir. 2017). Nor does the exception exist for injunctive relief 'based entirely upon past acts and not continuing conduct that, if stopped would provide a remedy to' the plaintiff. *Gean v. Hattaway*, 330 F.3d 758, 776 (6th Cir. 2003)."

"Morgan appeals the dismissal of his request for injunctive relief, arguing that the district court has subject-matter jurisdiction to grant the requested remedy based on *Ex parte Young*. The district court held that *Ex parte Young* did not apply and therefore held it lacked subject-matter jurisdiction to hear Morgan's request for injunctive relief. We agree with the district court's conclusion that the court lacks subject-matter jurisdiction to grant the injunctive relief as alleged in the complaint, but we affirm the dismissal without prejudice for a different reason than that relied upon below. *See Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999) (stating that this court 'can affirm the district court on alternate grounds supported by the record') (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970))."

"The district court held that *Ex parte Young* does not apply because Morgan failed to 'allege any ongoing violation of federal law.' According to the district court, 'Morgan's allegations are based entirely on his termination.' The complaint, however, can be plausibly read to extend to post-termination conduct of the Board that he pleads as an ongoing constitutional violation. Morgan alleges that the Board opened a disciplinary file related to him. Compl., at PageID.7. True, the disciplinary proceeding was dismissed, *id.*, but Morgan's prayer for relief also indicates that the Board continues to maintain records related to the disciplinary proceeding, *id.* at PageID.9, and Morgan seeks, among other things, to obtain a permanent injunction (1) 'restraining and enjoining the Board and Ms. Garrett from taking any adverse action' against him 'through the means of any disciplinary file opened against him premised on his speech,' and (2) 'requiring the Board to expunge all reference to any disciplinary file premised on Mr. Morgan's speech from its internal computer tracking systems, and removing any indication that Mr. Morgan was terminated for cause.' *Id.* In other words, Morgan posits that he is and will be harmed by the Board's continued maintenance of disciplinary records against him and other internal records that pertain to his alleged unconstitutional firing."

"We have held in analogous contexts that expungement of negative government records pertaining to an aggrieved individual may qualify as prospective relief to remedy a constitutional violation. For example, in *Doe v. Cummins*, 662 F. App'x 437, 444 (6th Cir. 2016), we recognized that where a university student sought removal of a negative notation from his school record that resulted from an allegedly unconstitutional disciplinary process, the relief sought was available under *Ex parte Young*. *Doe*, in turn, relied on *Thomson v. Harmony*, 65 F.3d 1314, 1321 (6th Cir. 1995), which held that the Eleventh Amendment did not bar an injunction requesting the removal of negative entries from a plaintiff's personnel record that resulted from an alleged due-process violation."

"Given this authority, the district court was in error to hold that it lacked subject-matter jurisdiction on the grounds that Morgan had not pleaded facts establishing a form of requested relief that is available under *Ex parte Young*. And, contrary to the district court's additional holding, none of the requested injunctive relief is moot because, even though the disciplinary proceeding was dismissed, Morgan sought injunctive relief for any future action in which a 'disciplinary file [is] opened against him premised on his speech.' Compl., at PageID.9."

"Even so, we affirm the district court's dismissal without prejudice for a different reason. As an initial matter, the Board cannot be sued for injunctive relief here because it is an arm of the state and the state has not waived the Board's sovereign immunity, nor has Congress removed it. *Thiokol Corp.*, 987 F.2d at 381; Tenn. Code Ann. § 20-13-102(a). Therefore, the only issue is whether the *Ex parte Young* exception applies to Morgan's suit against Garrett."

"One prerequisite for the *Ex parte Young* exception to apply is that the claimant must explicitly allege that a state official acted in her official capacity. *See Long v. Tennessee*, 744 F. App'x 945, 946 (6th Cir. 2018) (noting that claimant's 'failure to allege an official-capacity claim against a state official prevents him from availing himself of the *Ex parte Young* exception'); *City of Austin v. Paxton*, 943 F.3d 993, 1003 (5th Cir. 2019) ('[I]n order '[t]o fall within the *Ex parte Young* exception to sovereign immunity . . . a plaintiff must name individual state officials as defendants in their official capacities.'' (quoting *Raj v La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013))). *Ex parte Young* is a limited exception to the state's sovereign immunity. *See Mixon v. Ohio*, 193 F.3d 389, 397 (6th Cir. 1999). The Eleventh Amendment is an important protection for the states. A state's immunity, therefore,

cannot be abrogated by the plaintiff's simply leaving the capacity of the state actor unsaid in the complaint, to be guessed by the court and defendant."

"But Morgan's complaint not only omitted mention of any claim against Garrett in her official capacity—he affirmatively indicated that the *sole* basis on which she is being sued is in her individual capacity. … In the absence of any explicit statement in the caption or body of the complaint that Garrett acted in her official capacity, the court lacks subject-matter jurisdiction to hear any claim for injunctive relief under *Ex parte Young*. Therefore, we affirm the dismissal without prejudice of the request for such relief."

"Morgan alleges under 42 U.S.C. § 1983 that he was wrongfully terminated in violation of his First Amendment right to free speech and, for relief, seeks money damages against the Board and Garrett. The Board argues that it was entitled to sovereign immunity for § 1983 suits involving money damages; Garrett argues, among other things, that she is entitled to absolute quasi-judicial immunity. The district court agreed on those grounds for dismissal without reaching Garrett's other arguments. We affirm the district court's ruling concerning the Board but reverse the ruling concerning Morgan's claim against Garrett and remand for further proceedings that may include consideration of Garrett's other arguments."

"As stated earlier, Eleventh Amendment sovereign immunity generally shields states from individuals suing them in federal court unless states waive their immunity or Congress removes it by statute. *Thiokol Corp.*, 987 F.2d at 381. … The district court therefore properly dismissed Morgan's action against the Board for monetary relief under § 1983."

"Morgan also sought damages against Garrett under 42 U.S.C. § 1983, alleging that she wrongfully terminated him in violation of his First Amendment right to free speech. The district court dismissed this claim on the ground that Garrett was entitled to absolute quasi-judicial immunity."

"Judicial immunity is a long-recognized common-law doctrine shielding judges from collateral attacks challenging a judge's actions taken in her official judicial capacity. *See Forrester v. White*, 484 U.S. 219, 225 (1988) (noting that the doctrine originated in 'medieval times.'). This immunity is absolute: all of a judge's actions taken in an official judicial capacity are immune from suit. And not just judges are protected by this immunity. Absolute quasi-judicial immunity extends the doctrine to 'those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune.' *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (citing *Scruggs v. Moellering*, 870 F.2d 376 (7th Cir. 1989))."

"Though Morgan and Garrett disagree about what is and is not a judicial act, both recognize *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), as an important case for this inquiry. In *Guercio*, a confidential secretary to a bankruptcy judge sued for wrongful termination after she was discharged allegedly in violation of her constitutional right to free speech. *See id.* at 1115. The court held that judicial immunity does not extend to administrative acts, such as certain personnel decisions. *Id.* at 1116–17. In determining whether an act was administrative, *Guercio* applied a two-pronged test: first, the court must determine the 'nature of the act itself, *i.e.*, whether it is a function normally performed by a judge'; second, the court must determine the 'expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.' *Id.* at 1116 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). The court held that the bankruptcy judge could not invoke judicial immunity for the firing, noting that terminating 'a confidential and personal secretary is hardly the 'type of act normally performed *only* by judges.'' *Id.* at 1119 (quoting *Stump*, 435 U.S. at 362). The court determined that the 'crucial mistake' of the district court in that case was that it 'conflates official acts of judges into judicial acts and seeks to extend judicial immunity to this broader class of official acts.' *Id.* at 1117." …

"Garrett attempts to distinguish *Guercio* by arguing that all of Garrett's actions were well within the scope of the duties delegated to her by the Tennessee Supreme Court. Those duties include employing and supervising staff needed to carry out the Disciplinary Counsel's functions. She also argues that her immunity from civil suit is expressly provided for in Tennessee Supreme Court Rule 9, § 17: 'Members of the Board, district committee members, Disciplinary Counsel, staff, and practice monitors shall be immune from civil suit for any conduct in the course of their official duties.' Garrett contends that, unlike in *Guercio*, where the judge fired his secretary simply so that the bankruptcy court could 'function more effectively and harmoniously,' *Guercio*, 814 F.2d at 1118, here Garrett acted squarely within duties the Tennessee Supreme Court delegated to her. Further, Garrett maintains that her reasons for terminating Morgan's employment—including Manookian's motion to disqualify Morgan for bias, other misconduct complaints against Morgan, and Morgan's duty to perform his job without discrimination or bias—were 'intertwined' with the judicial process. *See Barrett v. Harrington*, 130 F.3d 246, 258–59 (6th Cir. 1997) (finding that acts protecting the integrity of the judicial process are adjudicatory in nature)."

"We remain unpersuaded. Though it is true that Garrett is entitled to absolute quasi-judicial immunity for her official *judicial* acts, it does not mean that she is entitled to immunity for *all* official acts. After all, quasi-judicial immunity only extends the same immunity a judge would enjoy to nonjudicial officials performing tasks intertwined with the judicial process. Because judges can commit official acts that are still considered nonjudicial in nature, so too can their agents commit acts that are nonjudicial."

"Thus, it is of little consequence in this inquiry that there is a promulgated Tennessee Supreme Court rule extending immunity to the Disciplinary Counsel for *any* conduct in the course of their duties. Judicial immunity from § 1983 claims is governed by federal, not state, law. *See Barrett*, 130 F.3d at 254–57 (explaining how judicial immunity, *as recognized and developed by the Supreme Court*, protects state judges from certain § 1983 claims). And the relevant federal law is set forth in the Supreme Court's two-prong test articulated in *Stump*, which we applied in *Guercio*. *See Stump*, 435 U.S. at 362; *Guercio*, 814 F.2d at 1116–19. This Court should look to the nature of the challenged act itself and whether the party bringing the § 1983 claim dealt with the state actor in her *judicial* capacity. *Guercio* concluded that the acts of hiring and firing are essentially executive in nature, even if they fall within the proper scope of duties of a judge. 814 F.2d at 1119."

That brings us to Morgan's case. As in *Guercio*, the action of the state actor complained of here—Garrett's firing of Morgan—took place in the workplace, not the courtroom, setting. Garrett argues that her duties require her to ensure that her staff handles cases without bias. That fact, no doubt, will be relevant as to whether Morgan is entitled to prevail on his First Amendment claim under the balancing analysis of *Pickering*. *See Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968) (asking whether the plaintiff's 'interests . . . as a citizen, in commenting upon matters of public concern,' outweighs 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees'). But those considerations do not change the central point that Garrett's decision to terminate Morgan's employment, like the judge's decision to fire his secretary in *Guercio*, was not a decision that is unique to a judge's duties in the courtroom such that absolute judicial immunity applies."

"Indeed, as the *Guercio* court concluded, under the standard Garrett argues for, it is hard to see a principled limit for judicial immunity, *id.* at 1118, let alone (as in this case) quasi-judicial immunity. Rather, courts reaffirm time and again that hiring and firing is administrative or executive in nature, not judicial. *See generally Forrester*, 484 U.S. at 229–30; *Guercio*, 814 F.2d at 1116–19; *Barrett*, 130 F.3d at 255–56. Judicial immunity, though absolute and firm, is something to be applied carefully and should not be extended further than its justification warrants. *See Barrett*, 130 F.3d at 254 (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991)); *Guercio*, 814 F.2d at 1120 ('The integrity and independence of judicial decisionmaking is in no way impaired if judges are called to account for their personal decisions.') Extending judicial immunity in this case would extend its reach to areas previously denied—namely administrative acts like hiring and firing employees. We therefore hold that the district court erred in holding that Garrett is entitled to absolute quasi-judicial immunity."

4. Fourth Amendment – Qualified immunity granted – No Fourth Amendment violation force used by police officer was reasonable under the circumstances, so there was no constitutional vioation – Arrestee tried to escape and the officer tackled him to the ground, which broke plaintiff's hip – No municipal liability under because without a constitutional violation, there can be no liability under *Monell*

DARRIN VANPELT v. CITY OF DETROIT, MICHIGAN; AARON LAYNE, Police Officer
SIXTH CIRCUIT COURT OF APPEALS No. 22-1680 Decided and Filed June 6, 2023

"Darrin VanPelt tried to escape while under arrest. So Officer Aaron Layne tackled him and physically tried to lift him up. Now, VanPelt claims that he was tackled and then lifted and dropped in violation of the Fourth Amendment. The district court granted summary judgment, concluding Officer Layne was entitled to qualified immunity. We affirm."

"Officer Layne pulled VanPelt over for driving a car with an illegal window tint. While running information on VanPelt and the vehicle, he called for backup. When Officer Darryl Bennett responded, Layne informed him that 'the plate doesn't come back to the car' and the 'car smells like weed.' R. 46-8, 4:42–4:58. The two officers approached either side of the vehicle and asked VanPelt and his passenger to step out. Both complied."

"To search VanPelt, Officer Layne placed him in handcuffs, informing him that he was 'just being detained' for the search. While patting VanPelt down, Officer Layne found several baggies of marijuana and one baggie of crack cocaine in VanPelt's jacket. Although he'd admitted to having weed on him, VanPelt disclaimed knowledge of the crack cocaine. He also insisted—five times in a row—that he had nothing more on him."

"With VanPelt still in handcuffs, Officer Layne led him by his right arm towards the back seat of the police car. Reaching to open the rear car door, Officer Layne momentarily released his grasp on VanPelt's arm. VanPelt took off running, and Officer Layne gave chase. Four seconds later, Officer Layne tackled VanPelt to the ground."

"After the tackle, Officer Layne stood up and attempted to pull VanPelt to his feet, briefly grabbing VanPelt's hair in the process. Officer Layne ordered VanPelt to stand, but VanPelt replied that he couldn't stand because his hip was broken. So Officer Layne released his grip, and VanPelt fell back to the ground. From there, he kept yelling that his hip was broken, and Officer Layne ceased trying to lift him."

"Following VanPelt's continued complaints of pain in his left hip, Officer Layne flipped him onto his right side. VanPelt continued to cry out. After about twenty seconds, he admitted: 'I got something else on me.' *Id.* at 8:51. So Officer Layne searched VanPelt again. This time, he uncovered a baggie in VanPelt's underpants containing more crack cocaine."

"VanPelt sued Officer Layne for using excessive force in violation of the Fourth Amendment and the City of Detroit for failing to adequately train and supervise Officer Layne. *See* 42 U.S.C. § 1983; *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978). The district court granted summary judgment to the defendants, holding that Officer Layne didn't violate VanPelt's constitutional rights and was thus entitled to qualified immunity. VanPelt timely appealed."

"To overcome qualified immunity, VanPelt must show that Officer Layne (1) violated a constitutional right that was (2) clearly established. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The right at issue here comes from the Fourth Amendment, which prohibits police from using 'unreasonable' force. U.S. Const. amend. IV; *see Ashford v. Raby*, 951 F.3d 798, 801 (6th Cir. 2020) (citing *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). Here, Officer Layne's tackle and subsequent attempt to lift VanPelt off the ground didn't violate the Fourth Amendment."

"Because police officers making split-second decisions usually 'face a range of acceptable options,' we must defer to the officer's 'on-the-spot judgment' in deciding what was reasonable. *Ashford*, 951 F.3d at 801 (quoting *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002)). That means judges, from the comfort of their chambers, don't critique don't critique police officers' actions 'with the 20/20 vision of hindsight.' *Graham*, 490 U.S. at 396. Instead, we consider what a reasonable officer on the scene would've done and look to all the circumstances, including 'the severity of the crime,' whether the suspect posed an immediate threat, and whether he was 'attempting to evade arrest by flight.' *Id.*"

"VanPelt argues Officer Layne used excessive force both by tackling him and trying to lift him off the ground. But Officer Layne's use of force throughout the encounter was objectively reasonable under the circumstances."

"First, it was objectively reasonable for Officer Layne to tackle VanPelt. Video footage confirms that VanPelt actively resisted arrest by fleeing from Officer Layne. And when a suspect flees, police may use force to subdue him. *See Rudlaff v. Gillispie*, 791 F.3d 638, 641-42 (6th Cir. 2015)." …

"VanPelt suggests it was 'unnecessary' for Layne to tackle him, and that the officer could have subdued him using a different method. Appellant Br. at 25. But reasonableness doesn't 'turn on the existence of alternative 'less intrusive' means.' *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). After all, officers making split-second judgments don't always have the luxury to select 'only the best technique available at the time.' *Ashford*, 951 F.3d at 801. Here, even assuming Officer Layne could've stopped VanPelt using a less severe technique, tackling VanPelt was reasonable."

"Second, because VanPelt had just tried to flee, it was objectively reasonable for Officer Layne to restrain VanPelt after tackling him. Immediately after tackling VanPelt, Officer Layne attempted to pick him up off the ground, briefly grabbing VanPelt's hair. Officer Layne agreed that, by this point, VanPelt 'no longer was a threat. He was no longer resisting or fleeing arrest.' But at that point, a reasonable officer wouldn't have known that VanPelt was injured, because he hadn't said anything yet. … But the record and video do not establish any indication of excessive force after the tackling, only an effort to get VanPelt to his feet and then lowering him to the ground when VanPelt complained that he could not stand."

"VanPelt also argues Officer Layne yanked him around in 'a malicious manner plainly designed to inflict pain onto [his] already injured left hip.' Appellant Br. at 33–34. Again, the video contradicts this account. After VanPelt fell back to the ground, Officer Layne only moved him twice: once at VanPelt's request so he could rest on his uninjured side, and once to retrieve the bag of crack cocaine from VanPelt's underpants. *See* R. 46-8, 7:52–9:30. Regardless, our excessive-force analysis 'is an objective one: the question is whether the officers' actions are

objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' *Graham*, 490 U.S. at 397 (cleaned up). The record presents no evidence that Layne had 'evil intentions,' but even if he did, any such evidence would 'not make a Fourth Amendment violation out of an objectively reasonable use of force.' *Id.*"

"Vanpelt also sued the City of Detroit under *Monell*, which imposes municipal liability when a city's employees, acting pursuant to official policy or custom, commit constitutional violations. *See* 436 U.S. at 694–65. But without a constitutional violation, '[t]here can be no liability under *Monell*.' *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014). Because Vanpelt has not demonstrated that Officer Layne violated the Constitution, his *Monell* claim against the City of Detroit fails too."

5. Qualified immunity granted - Prosecutor redacted exculpatory information from a public records request thereby denying access to the courts according to the plaintiff – Redacting the information was permitted by Ohio law, but he Ohio Supreme Court had ruled that after the conclusion of the trial the convicted individual could use the open records act to obtain investigative files for the purpose of seeking post-conviction relief – Prosecutor did not have immunity for this act – However, the Sixth Circuit had never considered an access-to-courts claim based on redaction in a response to a public-records request, and a reasonable official, considering the legal landscape at the time, could conclude that they would not be violating constitutional or statutory law by redacting exculpatory information from a response to a public-records request – Court could not say that every reasonable official would have apprehended that they were violating plaintiff's constitutional right of access to the courts by redacting exculpatory information when responding to a public-records request, even if they did so purposefully - Defendant was protected by qualified immunity because in 2016 it was not clearly established that redacting exculpatory information from a response to a public-records request constituted actions that effectively cover-up evidence and thus actions that violate the right of access to the courts

CHARLES JACKSON v. CITY OF CLEVELAND, et al., BARBARA RHODES MARBURGER
SIXTH CIRCUIT COURT OF APPEALS No. 22-3253 Decided and Filed: April 6, 2023

"Charles Jackson filed a 42 U.S.C. § 1983 lawsuit, claiming that Barbara Rhodes Marburger, an assistant prosecutor at the Cuyahoga County Prosecutor's Office, denied him access to the courts by redacting exculpatory information from his investigative file, which had been requested from her office under the Ohio Public Records Act. The district court found that she was protected by neither absolute immunity nor qualified immunity and denied her motion to dismiss. Although we agree with the district court that Marburger is not entitled to absolute immunity, for the reasons stated below we **REVERSE** the district court's denial of qualified immunity."

"In 1991, Charles Jackson was wrongfully convicted of murder and was sentenced to twenty years to life in prison. R. 1 (Compl. ¶¶ 56–57, 79–81) (Page ID #10, 13). The Ohio Eighth District Court of Appeals upheld his conviction on appeal. *Id.* ¶ 58 (Page ID #10). Between 1996 and 2013, Jackson made multiple attempts to have his conviction set aside and his sentence vacated, but each time he was denied relief. *Id.* ¶¶ 59–61 (Page ID #10). Eventually, the Ohio Innocence Project became involved in his case. *Id.* ¶ 62 (Page ID #10)."

"In February 2016, pursuant to the Ohio Public Records Act, the Ohio Innocence Project requested from the Cleveland Division of Police (CDP) documents relating to the investigation of Joe Travis's murder and the arrest of Charles Jackson. *Id.* ¶ 63 (Page ID #11). It received no response. In June 2016, the Innocence Project renewed its request to CDP and filed a new records request with the Cleveland Law Department. *Id.* ¶¶ 63–65. In August 2016, the Innocence Project sent another records request, this time to the Cuyahoga County Prosecutor's Office. *Id.* ¶ 66 (Page ID #11). Assistant Prosecuting Attorney Barbara Marburger responded and produced a heavily redacted file. *Id.* ¶¶ 66–68, 70 (Page ID #11)."

"The Ohio Public Records Act exempts 'investigatory work product' and '[t]rial preparation record[s]' from production as public records. Ohio Rev. Code § 149.43(A)(1)(g), (h); (A)(2)(c); (A)(4). At the time the Ohio Innocence Project filed its public-records request, the exemption from production for investigatory work product and trial preparation records extended until all ''trials,' 'actions' and/or 'proceedings' have been fully completed,' including postconviction proceedings. *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 92, 94 (Ohio 1994); *State ex rel. WLWT-TV5 v. Leis*, 673 N.E.2d 1365, 1369 (Ohio 1997). These precedents remained in force until December 2016, several months after Marburger produced the redacted documents to the Ohio Innocence Project, when the Ohio Supreme Court overturned the cases and ruled that the investigatory-work-product exception did not extend beyond the conclusion of trial, and that as a result, convicted individuals could use the Ohio Public Records Act to obtain investigative files for the purpose of seeking post-conviction relief. *State ex rel. Caster v. City of Columbus*, 89 N.E.3d 598, 609 (Ohio 2016)."

"In May 2017, nine months after Marburger's production of redacted records, the City of Cleveland responded to the Innocence Project's initial request and produced the unredacted file. R. 1 (Compl. ¶ 69) (Page ID #11)." …

"In May 2018, the Ohio Innocence Project filed a Petition for Post-Conviction Relief and a Motion for Leave to File a Motion for New Trial on Jackson's behalf. *Id.* ¶ 79 (Page ID #13). In these materials, Jackson relied upon the exculpatory information that Marburger had redacted from the investigative file in the Cuyahoga County Prosecutor's Office's initial production. In November 2018, a state-court judge vacated Jackson's conviction and released Jackson from custody on bond. *Id.* ¶ 80 (Page ID #13). In August 2019, the State moved to dismiss the charges against him, and he was finally exonerated. *Id.* ¶ 81 (Page ID #13)."

"Jackson filed a lawsuit in the U.S. District Court for the Northern District of Ohio in August 2021 against the City of Cleveland, a number of CDP officers and supervisors, Cuyahoga County, and Assistant Prosecuting Attorney Barbara Marburger. R. 1 (Compl. ¶¶ 7–14) (Page ID #3–5). He made claims under 42 U.S.C. § 1983 for *Brady* violations, fabrication of false evidence, unconstitutional identification procedures, false arrest, malicious prosecution, and failure to intervene, in addition to *Monell* claims against the City of Cleveland and Cuyahoga County. *Id.* ¶¶ 260–362 (Page ID #45–61). Against Barbara Marburger, Jackson alleged a claim of denial of access to courts. *Id.* ¶¶ 315–30 (Page ID #54–56). Specifically, he claimed that her actions in redacting exculpatory information from the Cuyahoga County Prosecutor's Office's file before turning it over to the Ohio Innocence Project denied him access to the courts."

"Marburger filed a motion to dismiss in the district court. R. 11 (Marburger Mot. to Dismiss at 1) (Page ID #126). She argued that she was entitled to absolute immunity for her role in redacting the exculpatory information. *Id.* at 6–8 (Page ID #136–38). She further argued that she was entitled to qualified immunity. *Id.* at 8–20 (Page ID #138–50). Finally, she argued that Jackson's claim was barred by the statute of limitations. *Id.* at 20 (Page ID #150). The district court denied her motion to dismiss. *Jackson v. City of Cleveland*, 586 F. Supp. 3d 737, 754 (N.D. Ohio 2022)." …

"Prosecutors receive absolute immunity from suit for conduct in initiating and pursuing criminal prosecutions. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)." …

"In our circuit, '[t]he critical inquiry is how closely related is the prosecutor's challenged activity to [their] role as an advocate intimately associated with the judicial phase of the criminal process.' *Howell v. Sanders*, 668 F.3d 344, 349–50 (6th Cir. 2012) (quoting *Ireland v. Tunis*, 113 F.3d 1435, 1443 (6th Cir. 1997)); *see also Prince v. Hicks*, 198 F.3d 607, 611 (6th Cir. 1999). When a prosecutor performs administrative or investigatory functions that 'do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings,' they are 'not entitled to absolute immunity.' *Prince*, 198 F.3d at 611 (quoting *Buckley*, 509 U.S. at 273). But administrative actions that are 'directly connected with the conduct of a trial' are protected by absolute immunity. *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009). Therefore, 'we must identify precisely the wrongful acts' that a prosecutor has taken and 'classify those acts according to their function.' *Adams v. Hanson*, 656 F.3d 397, 403 (6th Cir. 2011). We must also take into consideration the timing of the actions taken: '[W]here the [prosecutor's] role as advocate has not yet begun, namely prior to indictment, or where it has concluded, absolute immunity does not apply.' *Spurlock*, 330 F.3d at 799. Functions that are administrative or investigative in nature include ''giving legal advice to police,' making 'out-of-court statements' at a press conference, making statements 'in an affidavit supporting an application for an arrest warrant,' and 'authorizing warrantless wiretaps in the interest of national security.'' *Koubriti v. Convertino*, 593 F.3d 459, 467 (6th Cir. 2010) (citations omitted) (first quoting *Spurlock*, 330 F.3 at 798; then quoting *Fitzsimmons*, 509 U.S. at 277–78; then quoting *Kalina v. Fletcher*, 522 U.S. 118, 119 (1997); and then quoting *Mitchell*, 472 U.S. at 520)."

"The act in question here is Barbara Marburger's response to the Ohio Innocence Project's public-records request and her redaction of exculpatory information in the Cuyahoga County Prosecutor's Office's file on Jackson. This is an administrative task that is not closely related to 'an advocate's preparation for the initiation of a prosecution or for judicial proceedings.' *Prince*, 198 F.3d at 611 (quoting *Buckley*, 509 U.S. at 273)." …

"Marburger contends that absolute immunity shields prosecutors from liability for failure to disclose exculpatory evidence 'in connection with a criminal proceeding,' Appellant Br. at 46, and that under state law at the time, such a proceeding extended until the completion of a defendant's sentence, *id.* at 48. Notwithstanding any provisions of Ohio law, Marburger fails to cite any case indicating that a criminal proceeding in the federal courts extends from the moment of indictment to the moment an individual is released from incarceration. She also misstates the law in our circuit; we have held that 'absolute immunity protects a prosecutor from civil liability for the non-disclosure of material exculpatory evidence *at trial*.' *Koubriti*, 593 F.3d at 470 (emphasis added). The Sixth Circuit has extended absolute immunity for adversarial acts of prosecutors past the trial context in some

circumstances, but those circumstances are limited to 'post-conviction proceedings, including direct appeals, habeas corpus proceedings, and parole proceedings, *where the prosecutor is personally involved in the subsequent proceedings and continues [their] role as an advocate*.' *Spurlock*, 330 F.3d at 799 (emphasis added). To be protected by absolute immunity in both the trial and postconviction contexts, a prosecutor must be acting as an advocate in a judicial proceeding. Marburger was not acting as an advocate when she responded to the Innocence Project's records request." …

"We next consider Marburger's claim of qualified immunity." …

"Plaintiffs with nonfrivolous legal claims have a constitutional right to access the courts to bring those claims. *Christopher v. Harbury*, 536 U.S. 403, 414–15 & n.12 (2002). Jackson brought a backward-looking access-to-courts claim, in which he alleged that Marburger barred his access to the courts by concealing exculpatory evidence so that he could not obtain an adequate remedy for his underlying postconviction or habeas relief claims in state and federal courts. R. 1 (Compl. at ¶¶ 315–30) (Page ID #54–55). This claim has four elements: '(1) a non-frivolous underlying claim; (2) obstructive actions by state actors; (3) 'substantial[ ] prejudice' to the underlying claim that cannot be remedied by the state court; and (4) a request for relief which . . . is now otherwise unattainable.' *Flagg v. City of Detroit*, 715 F.3d 165, 174 (6th Cir. 2013) (citations and quotations omitted). On appeal, Marburger argues that Jackson has not satisfied only the final two elements. Appellant Br. at 31."

"… [B]y seeking to hold Marburger responsible for redacting the exculpatory information in the Cuyahoga County Prosecutor's Office's possession, Jackson is effectively bringing a claim that would conflict with the Supreme Court's holding in *District Attorney's Off. For Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009). Crucially, Marburger does not contest that she engaged in obstructive actions."

"Marburger redacted the investigative file and delivered the redacted file to the Innocence Project in August 2016. Jackson ultimately received the unredacted file from the City of Cleveland in May 2017—nine months later—and then filed a petition for a new trial, after which his conviction was vacated and he was released from prison in November 2018. Had Marburger sent Jackson an unredacted file, he could have applied for postconviction relief and been released approximately nine months earlier. Marburger's actions 'effectively cover[ed]-up evidence' and temporarily 'foreclosed [Jackson] from filing suit in state court,' because her concealment 'render[ed] [his] state court remedy ineffective.' *Swekel*, 119 F.3d at 1262, 1264. Marburger thus caused Jackson substantial prejudice on his postconviction relief claims."

"To be sure, a previous panel of the Sixth Circuit suggested in a brief unpublished and nonbinding decision that delay *alone* does not substantially prejudice an underlying claim, *Winburn v. Howe*, 43 F. App'x 731, 734 (6th Cir. 2002). But Jackson did not suffer *only* delay—he also suffered the injury of prolonged wrongful incarceration as a result of delay." …

"Finally, Jackson has requested 'a remedy that could not be obtained on an existing claim.' *Harbury*, 536 U.S. at 421." …

"… His claim against Marburger seeks recompense for his inability to file a petition for postconviction relief for nine additional months as a result of her obstructive actions in 2016. His claims against the city and its officers seek compensation for the officers' wrongdoing in 1991 and of course for Jackson's resultant twenty-seven years of wrongful imprisonment. If Jackson's claims were ultimately vindicated, Marburger and the defendant officers would each be held responsible for damages for the final nine months of his imprisonment--the defendant officers for obtaining his wrongful conviction and imprisonment in the first instance, and Marburger for *prolonging* his imprisonment by obstructing his access to the courts. Third, Harbury could obtain the same single payment from the federal government for the harms caused by her husband's death through either her access-to-courts claim or her intentional-infliction claim. Jackson, on the other hand, could not obtain payment at all from Marburger without his access-to-courts claim, and the Court in *Harbury* explicitly contemplated that a plaintiff could bring an access-to-courts claim in which the underlying cause of action might even be 'timely and subject to trial, but for a different remedy than the one sought under the access claim, *or against different defendants*.' *Harbury*, 536 U.S. at 416 n.13 (emphasis added). The requirement that a plaintiff request 'relief unobtainable in other suits,' *id.* at 416, is therefore best read to require that a plaintiff request relief unobtainable *from this entity* in any other suits. Harbury was still able to obtain relief from the federal government. But as previously stated, Jackson cannot obtain relief from Marburger in any other way. Jackson has therefore satisfied the fourth prong by requesting relief from Marburger that is unavailable to him in any other action."

"We next consider the second prong of qualified immunity, which asks whether the right that has been violated was clearly established, meaning that 'every 'reasonable official would [have understood] that what he is doing

violates that right.'' *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (alteration in *Anderson*); *see also Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015)." …

"The rule set out in *Swekel* and *Spurlock*, that a violation of the right of access to the courts occurs when an official 'engages in actions that effectively cover-up evidence, thereby rendering a plaintiff's court remedy ineffective,' *Spurlock*, 330 F.3d at 801 n.3, is too general. '[T]he unlawfulness of [Marburger's] conduct 'does not follow immediately from the conclusion that [the rule is] firmly established.'' *Wesby*, 138 S. Ct. at 590 (quoting *Anderson*, 483 U.S. at 641). We do not believe that every reasonable official would conclude that redacting exculpatory information included in a response to a public-records request constitutes 'actions that effectively cover-up evidence' on par with coercion of witnesses or concealment of a murder. The Sixth Circuit had never considered an access-to-courts claim based on redaction in a response to a public-records request, and a reasonable official, considering the legal landscape at the time, could conclude that they would not be violating constitutional or statutory law by redacting exculpatory information from a response to a public-records request. Marburger did not interfere or coerce witnesses or conceal evidence of a murder, as detailed in *Swekel* and *Spurlock*. Ohio state law at the time expressly classified all investigatory work product and trial preparation material as not public records for the purposes of public-records requests, which would arguably allow the refusal to disclose exculpatory information contained in those records. Ohio Rev. Code § 149.43(A)(1)(g), (h); (A)(2)(c); (A)(4). State law also created an alternative method for defendants to access investigative records and any exculpatory information therein. Ohio Rev. Code § 149.43(B)(8). Furthermore, the Supreme Court has held that defendants do not have a *Brady* right to exculpatory evidence in the postconviction context and must show instead that 'consideration of [the] claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'' *District Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009) (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). A reasonable official could conclude that, in light of *Osborne*, they had no special obligation to provide exculpatory information outside of ordinary state procedures for obtaining postconviction relief, provided that those procedures are adequate. We cannot say that every reasonable official would have apprehended that they were violating Jackson's constitutional right of access to the courts by redacting exculpatory information when responding to a public-records request, even if they did so purposefully. We hold that Marburger is protected by qualified immunity because in 2016 it was not clearly established that redacting exculpatory information from a response to a public-records request constituted 'actions that effectively cover-up evidence' and thus actions that violate the right of access to the courts."

6. Qualified immunity denied to most officers because a reasonable jury could find the officer failed to properly investigate whether a crime was committed prior to the arrest of the plaintiff - Officers did not believe the story told by plaintiff and arrested him for false reporting before a reasonable investigation - Although not involved in the arrest decision, other officers are equally liable because they both failed to intervene when they had reason to question whether probable cause existed and physically arrested plaintiff - There is no line in the liability sand separating subordinate officers who should have known probable cause did not exist from the decision-maker - City is dismissed as a failure to train was not shown - Failure to train is not measured by information retention or whether better or more training would have avoided the incident - Failure to train is measured by inquiring if the City completely disregarde its duty to train its officers on probable cause determinations -Chief testified that the department trained officers on 4th Amendment standards and probable cause standard and this was unrebutted

LATHERIAN HARRIS v. CITY OF SAGINAW, MICHIGAN, et al., MEGAN NELSON; JORDAN LADOUCE; TYLER CECE; STEVE LAUTNER
SIXTH CIRCUIT COURT OF APPEALS No. 22-1504/1505 Decided and Filed: March 20, 2023

"After Latherian Harris called 911 to report that a store clerk had pulled a gun on him, four officers arrived on scene. Believing Harris lied about the assault, the officers arrested Harris for allegedly filing a false felony report. Harris spent 18 days in jail as a result. Harris later sued the officers, the detective who submitted the police report, and the City of Saginaw for false arrest and imprisonment. He also sued the City for failure to train and supervise the arresting officers. On cross-motions for summary judgment, the district court denied Harris's motion in full, denied qualified immunity to the officers, granted qualified immunity to Detective Busch, and dismissed Harris's failure-to-train and failure-to-supervise claims. Because there is a genuine dispute of material fact regarding whether the on-scene officers arrested Harris without probable cause, but no dispute as to Detective Busch or the City of Saginaw's actions, we affirm."

"On November 10, 2018, Latherian Harris went to Liquor Valley ('the store') to purchase beer for a friend. Harris and one of the store clerks got into a verbal dispute after the clerk asked him to turn his music down, and Harris

offered to fight the clerk outside. Harris left the store—purchaseless—and made his way to Warwick Cleaners, the laundromat next door where his friend, Donald Henderson, worked. Harris asserts that while he was walking between the store and the laundromat, the 'tall' clerk came out the back door near a white van, pointed and cocked a gun at him, and taunted him with racial slurs. He recounted this altercation to Henderson, who suggested he call 911."

"Following Harris's 911 call, four officers—Officers Tyler Cece, Jordan LaDouce, Steve Lautner, and Megan Nelson (collectively, the 'Officers')—were dispatched to the store. Harris described his encounter with the store clerks, beginning with the music dispute and ending with the gun being pulled on him. … Notably, at least one officer expressed disbelief in Harris's report before even hearing his recitation of what occurred, and others expressed their doubt during and following his initial description of the altercation. (Nelson Body Cam 1, R. 32, Ex. 8, at 0:32 ('This guy's a f*cking liar.'); LaDouce Bodycam 1, R. 32, Ex. 5, at 3:02–04 (laughing and saying 'you realize how ridiculous this sounds, right?'), 4:07–09 ('Yeah there is definitely more to this story.'), 4:32–40 ('It's a little bit hard to believe.'), 5:17–20 ('Bull sh*t' and then recording ends).)."

"After Harris finished his first description, Nelson entered the store and spoke with the store clerks. The taller of the two clerks denied having a gun, pulling a gun on Harris, or going outside of the store. Nelson told the other officers that 'it sounds like exactly what [Harris] said but opposite,' and asked to see security footage. Though the store had at least three surveillance cameras, the Officers requested and watched only one surveillance camera's footage: the camera showing 'right outside the store' by 'this door that you guys were at,' referring to the front door, because they 'don't care about what happened [inside].' (LaDouce Bodycam 2, R. 32, Ex. 6, at 1:23–37, 2:23–27.) Based on the understanding that the clerk neither exited nor pulled a gun out by the front door, Nelson announced, 'let's go arrest him' because 'that's good enough for [them].' (Nelson Bodycam 1, R. 32, Ex. 8, at 18:30–38.) Lautner separately decided to arrest Harris if he insisted on filing his police report, a decision with which LaDouce agreed. (LaDouce Bodycam 2, R. 32, Ex. 6, at 12:34–39.)"

"Harris confirmed his desire to move forward with his report, believing the footage the Officers watched would have corroborated his account. The Officers indicated that the video revealed Harris had lied, and proceeded to arrest Harris while he insisted that he was telling the truth. Nelson, Cece, and LaDouce physically restrained and handcuffed Harris. While being placed in the police car, Harris became increasingly emotional, began crying, and continued to attest to his truthfulness."

"Nelson's body camera also showed the other officers talking to Harris's friend, Henderson. Henderson confirmed that he suggested Harris call 911 based on what relayed to him and explained that Harris told him the clerk pulled the gun by the back door. Despite confirming they took Henderson's information, no officer took Henderson's statement."

"Harris continued to sob and repeatedly attempted to persuade Nelson that he was telling the truth as she drove him to jail. During the drive, Nelson called Lautner to ask for 'a favor': to record the surveillance footage they had watched earlier—specifically, the footage 'showing that [the clerk] never even went out after [Harris].' (Nelson Bodycam, R. 34, Ex. 27, at 2:01–18.) LaDouce and Lautner returned to the store to request the footage, informing the clerk that they arrested Harris and that '[Harris] is trying to get [the clerks] in trouble.' (LaDouce Bodycam 3, R. 32, Ex. 7, at 1:01–18.) The two officers also asked about the store's back door, which they proceeded to go to, look at, and open, thereafter concluding that 'this guy's f*cking lying [because] you guys aren't gonna go through all that,' referring to the path they took to get to the back door. (*Id.* at 1:22–2:24.) Despite Harris asserting the altercation occurred by a white van near the back door, neither officer confirmed if a white van was visible from the back door that they had just looked out. The two officers and the store clerk then went to record the surveillance footage viewed earlier. Again, the two officers requested only the front door footage, which they knew would show 'when [Harris] is outside and [the clerk] coming out the two times that [he] did . . . with nothing in [his] hand.' (*Id.* at 3:30–58.)"

"Detective Patrick Busch reviewed Nelson's police report of Harris's arrest and passed the report on to the prosecutor for charging. Harris subsequently spent 18 days in the Saginaw County Jail before being released on bond. A few weeks later, the state court dropped Harris's false felony report charge and dismissed the case after the witnesses, understood to be the store clerks, failed to appear."

"Harris then filed suit against the City of Saginaw, the Officers, and Detective Busch. The parties filed cross-motions for summary judgment. The district court granted in part and denied in part the defendants' motion: denying qualified immunity to the Officers, granting qualified immunity to Detective Busch, and dismissing Harris's failure to train or supervise claim against the City. The district court denied Harris's motion in full."

"The Fourth Amendment protects individuals from unreasonable searches or seizures. *Gardenhire v. Schubert*, 205 F.3d 303, 312–13 (6th Cir. 2000). Without ex ante authorization, a search or seizure—such as an arrest—is unreasonable unless it falls under 'a few specifically established and well-delineated exceptions.' *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Here, the relevant exception is if the arresting officer had 'probable cause to believe that an offense had been committed, was being committed, or was about to be committed[.]' *Est. of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999)."

"A probable cause determination must rest on 'reasonably reliable information that the suspect has committed a crime,' based on 'the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence.' *Parsons v. City of Pontiac*, 533 F.3d 492, 500 (6th Cir. 2008) (quoting *Gardenhire*, 205 F.3d at 318) (emphasis removed). In retroactively considering whether probable cause existed, we look only to 'the information possessed by the arresting officer at the time of the arrest.' *Id.* at 501 (quoting *Harris v. Bornhorst*, 513 F.3d 503, 511 (6th Cir. 2008))."

"Individuals generally have the right to be free from arrest without probable cause. *Jones v. City of Elyria*, 947 F.3d 905, 914 (6th Cir. 2020); *Courtright v. City of Battlecreek*, 839 F.3d 513, 520 (6th Cir. 2016)." …

"Two critical questions remain. First, did the Officers lack probable cause to arrest Harris? And if so, were any or all of the defendants personally involved in Harris's arrest? 'If a reasonable jury could answer 'yes' to both questions, this case must proceed to trial.' *Gardenhire*, 205 F.3d at 313."

"To start, we determine whether a jury could conclude that a reasonable officer could have believed there was a 'fair probability' that Harris had committed a crime. *United States v. Sokolow*, 490 U.S. 1, 7 (1989)." …

"Officer Nelson, who made the decision to arrest Harris 'based on his statements,' called him a 'f*cking liar' before he even spoke. (Nelson Body Cam 1, R. 32, Ex. 8, at 0:32.) And Officer LaDouce interrupted Harris's statement to ask if he 'realize[d] how ridiculous' his story sounded, calling the story 'bull sh*t' before going to speak with the clerks. (*Id.* at 2:04–3:06, 5:17–20.) In short, a jury could conclude that the Officers decided Harris was lying at the outset and made a 'hasty, unsubstantiated arrest' accompanied only by what was, at most, a farce of an investigation."

"The Officers generally assert that they had probable cause for Harris's arrest based on the clerk's statements, Harris's inconsistent stories, and the security footage. But their assertions are belied by evidence that the Officers had seemingly made up their minds prior to speaking to the clerks, viewing the security footage, or hearing Harris's later clarifications. A reasonable jury could conclude as much, finding that the Officers merely sought out whatever would support their decision after Harris's initial description." …

"Take the Officers' limited review of security footage for example. Seemingly based in part on their understanding that Harris alleged the clerk pulled on a gun on him at the front door, the Officers declined to review the potentially exculpatory security footage of the areas where Harris actually asserted the altercations happened: (1) inside the store and (2) in the alley, near the van and back door. Later, the Officers argued that 'on surveillance, when the [clerk] gets to the [front] door, there is no gun in his hands' as evidence that Harris was lying about the alleged assault. (Defs.' Mot. Summ. J., R. 32, PageID 151, 153.) But the 'surveillance' in question is only that of the front door, a place Harris did not say the clerk pulled the gun on him. Such 'surveillance,' then, cannot be expected to confirm what happened inside the store or by the back door."

"Additionally, Harris does not deny that the clerk first looked out the front door after he left. Rather, Harris asserts the clerk pulled a gun on him after this—once Harris was already in the alley between Liquor Valley and Warwick Cleaners which, according to Harris, is around the corner after one exits the store's front door and directly outside the back door. Whether the clerk proceeded to go out the back door after checking that Harris had left the front of the store would have presumably been confirmed by security footage of that area. But in avoiding any potential confirmation of Harris's story, the Officers requested and viewed only footage of the front door."

"The Officers were required to 'consider the totality of the circumstances, recognizing both the inculpatory *and exculpatory* evidence, before determining if [they have] probable cause to make an arrest.' *Gardenhire*, 205 F.3d at 318 (emphasis added) (citing *Dietrich*, 167 F.3d at 1012). Nelson agreed that whether it was possible for an employee to have exited the back door would be relevant to the totality of the circumstances—the analysis required for probable cause. But while Nelson told Harris that '[the clerk] never even came to this back,' the only evidence supporting this statement is the clerk's own retelling of the interaction, as the Officers did not watch footage that may have revealed otherwise—the footage of inside the store or by the back door."

"Separate from the security footage, the Officers also neglected to get a statement from Henderson, who was understood to have the closest-in-time fact recitation of the altercation, as he was the one who encouraged Harris to call 911. In his deposition, Henderson provided multiple insights relevant to disputed questions of fact: that Harris consistently said the clerk pulled a gun on him near the back door, that there was a white van near the store's back door, and that he saw the store clerks use the back door, such as to get to the dumpster, 'on regular occasion.' (Henderson Dep., R. 34, Ex. 8, PageID 505–07.) Henderson even attempted to give a statement to that effect, but was told the Officers 'd[id]n't want to hear no more of this stuff' because they thought Harris was 'just lying' and wanted to 'just take him to jail.' (*Id.* at 506.)"

"In sum, when accepting the facts as alleged by Harris, he consistently told the Officers that the altercations happened inside the store and near its back door, the Officers were publicly dismissive of Harris and his story, and the Officers failed to review any of the readily available allegedly exculpatory evidence—notably, security footage of the areas where Harris alleged the altercation occurred. Therefore, a reasonable juror could conclude that Harris's arrest was preordained from the moment the Officers took his statement, dissolving the Officers' argument for probable cause. *See Parsons*, 533 F.3d at 500–01 (citing *Gardenhire*, 205 F.3d at 317). For this reason, a reasonable juror could conclude that none of the Officers had probable cause to arrest him, which would be a violation of Harris's Fourth Amendment rights. With such fact-specific questions at the heart of this inquiry, whether a reasonable officer would have believed they had probable cause to arrest Harris is better left for the jury."

"Having established that Harris's retelling of his arrest depicts a violation of his clearly established constitutional right, we evaluate whether each officer was individually involved in the arrest. An arrest is a 'deprivation of liberty under the authority of law.' *Manning v. Jarnigan*, 501 F.2d 408, 410 (6th Cir. 1974) (quoting *United States v. Baxter*, 361 F.2d 116, 118–19 (6th Cir. 1966)). Both Nelson and Lautner were directly involved in the decision to arrest Harris. Nelson claimed the arrest decision as her own, confirming that she had 'discretion in this case as to whether [she] should arrest [] Harris or not,' and indicating that the arrest was 'based on his statements.' (Nelson Dep. Tr., R. 32, Ex. 12, PageID 246, 259.) Also, after seeing video footage, she admitted that she 'helped put the handcuffs on' Harris. (*Id.* at PageID 261.) Lautner affirmed the arrest decision, agreeing it was a 'good arrest'—and one based on probable cause. (Lautner Dep. Tr., R. 32, Ex. 13, PageID 275.)"

"Although not involved in the arrest decision, Cece and LaDouce are equally liable because they both failed to intervene when they had reason to question whether probable cause existed and physically arrested Harris. There is no line in the liability sand separating subordinate officers who should have known probable cause did not exist from the decision-maker." …

"Moreover, both Cece and LaDouce appeared to voluntarily—meaning, without direction from Nelson—assist with the arrest by both physically restraining and putting the handcuffs on Harris. And no party contends that LaDouce's liability for the arrest is changed by his trainee status. *See, e.g.*, *Hopper v. Montgomery Cnty. Sheriff*, 310 F. Supp. 3d 911, 920–21, 933 (S.D. Ohio 2017) (denying qualified immunity for a first-day deputy trainee). As such, all four Officers were personally involved in Harris's arrest. And because there is reason to believe that this arrest violated Harris's clearly established constitutional right, none of the Officers are entitled to qualified immunity."

"The Officers' involvement is distinct from Detective Busch's post-hoc review of Nelson's police report. There is no evidence to suggest that Busch had knowledge beyond the police report, which included the Officers'—specifically, Nelson's—adopted justification for Harris's arrest. While there are reasons to question this perspective, those reasons are not applicable to Busch's review of the four corners of the report, which, if true as written, would have provided no reason for him to doubt that the Officers had probable cause. So, as Busch was not personally involved in the incident alleged to have resulted in a violation of Harris's constitutional rights, qualified immunity is appropriate. *See Robertson*, 753 F.3d at 618 (citing *Gregory*, 444 F.3d at 758–59)."

"The Officers assert that even if their arrest of Harris lacked probable cause, they are nonetheless protected by qualified immunity because the arrest was based on a reasonable mistake of fact—that they believed Harris originally described having a gun pulled on him near the front door. To them, Harris changed this story once in handcuffs when he later said the clerk pulled a gun on him near the back door. Paired with the store clerk's rejection of Harris's view of the facts, the Officers claim that such a change in story gave rise to probable cause that Harris had filed a false felony report. On this ground, the Officers assert that summary judgment in their favor is appropriate."

"The Officers are correct that an arrest without probable cause due to a mistake of fact is not per se unreasonable. *Heien v. North Carolina*, 574 U.S. 54, 61 (2014) (quoting *Riley v. California*, 573 U.S. 373, 381 (2014)). But '[t]he limit is that 'the mistakes [of fact] must be those of reasonable men.'' *Id.* (quoting *Brinegar v.*

United States, 338 U.S. 160, 176 (1949)). So, a warrantless arrest is constitutionally unreasonable if the mistake of fact relied on to justify the arrest was unreasonable."

"Whether a reasonable officer would have interpreted Harris's accounts as inconsistent is a question of fact. In our circuit, if 'there is some evidence—more than a mere scintilla of evidence—that [Harris], through his conduct, judged from the perspective of reasonable officers on the scene, did not give the officers probable cause . . . , a genuine fact dispute is created.' *Chappell v. City of Cleveland*, 585 F.3d 901, 909 (6th Cir. 2009). And Harris and the Officers interpret Harris's initial description in conflicting ways. *See id.* at 914–15. Because the answer to this question is central to the qualified immunity analysis, the Officers put the cart before the horse by claiming qualified immunity on the grounds of a reasonable mistake of fact. The genuine dispute of material fact on this issue precludes summary judgment and warrants submission to a jury."

"And even if the mistake were reasonable, the district court concluded that a reasonable jury could find that the Officers relied *only* on the store clerk's counterstatement in arresting Harris—a counterstatement separate and distinct from Harris's retellings. If accepted, whether that jury would find it reasonable to have mistaken Harris's stories as inconsistent would be irrelevant to the probable cause analysis. This question, then, may ultimately be unnecessary, as even a reasonable mistake would not save the Officers."

"Combined with the probable cause analysis, then, genuine disputes of material fact remain regarding whether a reasonable officer could believe they had probable cause to arrest Harris and whether the Officers relied on a reasonable mistake of fact in arresting him. So, qualified immunity as to the Officers is inappropriate, and both parties' motions for summary should be denied. To the contrary, because Busch was not personally involved in Harris's arrest, he is entitled to qualified immunity."

"While the City of Saginaw, as a local government, cannot shield itself from all liability by claiming qualified immunity, the City can shield itself from liability 'under § 1983 for an injury inflicted solely by its employees or agents.' *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). In order to hold 'the [City] as an entity . . . responsible,' Harris needs to show that 'execution of a government's policy or custom . . . inflict[ed] the injury.' *Id.* Here, Harris asserts that the City of Saginaw maintains a policy or custom of inadequate training and supervision on probable cause determinations for constitutional arrests. *See Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006) (citing *City of Canton v. Harris*, 489 U.S. 378, 387 (1989))."

"'The failure to provide any training on probable cause determinations . . . is constitutionally inadequate.' *Ouza*, 969 F.3d at 289. The City's police chief swore that all officers 'are trained on the Fourth Amendment and the probable cause standard.' (Robert Ruth Aff., R. 43, Ex. 2, PageID 884.) Distinct from providing evidence to the contrary, Harris attempted to undermine the sufficiency of training by testing the Officers' knowledge of the Fourth Amendment and questioning the Officers' understanding of the basis for Harris's arrest. In so doing, Harris attributes the individual Officers' inability to recall any Fourth Amendment training or recite what the Fourth Amendment 'stands for' to the City's purportedly 'nonexistent training' on the applicable arrest standards."

"This claim is unsuccessful for two related reasons. First, failure to train is not measured by information retention or whether 'better or more training' would have avoided the incident. Failure to train is measured by inquiring if the City 'completely disregarded' its duty to train its officers on probable cause determinations. *See Canton*, 489 U.S. at 390–91 ('That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program.'). And here, the record contains undisputed evidence of training per the police chief. (*See* Robert Ruth Aff., R. 43, Ex. 2, PageID 884.) What is more, when asked in a different manner—not being asked what the Fourth Amendment stands for in general—one of the Officers correctly articulated the probable cause standard and the appropriate considerations when evaluating the evidence. (*See* Nelson Dep. Tr., R. 32, Ex. 12, PageID 233–34.)"

"Harris also takes issue with the City's policy memo regarding Michigan state law governing warrantless arrests. But substance of the memo aside and accepting Harris's view of its flaws, the memo alone is not in the 'narrow range of circumstances' that establishes single-incident failure-to-train liability. *See Shadrick v. Hopkins Cnty.*, 805 F.3d 724, 739 (6th Cir. 2015). This narrow range of circumstances includes situations where a constitutional violation is 'the 'obvious' consequence of failing to provide specific [] training, and that this showing of 'obviousness' [] substitute[s] for the pattern of violations ordinarily necessary[.]' *Connick v. Thompson*, 563 U.S. 51, 63 (2011). But where it is understood that an actor receives *some* training on the constitutional subject matter—even training outside the workplace—that actor 'does not present the same 'highly predictable' constitutional danger.' *See id.* at 64–67. As in *Connick*, '[w]e do not assume that [on-scene officers] will always make correct [probable cause] decisions[.] But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.' *Id.* at 68."

"We conduct a similar analysis for the City's potential liability for failure to supervise, which also turns on whether the City exhibited deliberate indifference to its citizens' constitutional rights. *See Shadrick*, 805 F.3d at 736–741 (citing *Canton*, 498 U.S. at 379, 390–91). We have found the failure to supervise when all of the relevant parties disclaimed responsibility." …

"Here, it is not the case that the Officers lacked supervision. The City identifies the known supervisors—the police chief and lieutenant. Instead, Harris mistakenly attributed supervisory responsibilities to the wrong person: Detective Busch. And as discussed above, Busch did not personally arrest Harris and his involvement occurred only after the arrest had been effectuated. So, Harris is unable to establish City liability for failure to supervise the Officers."

7. 14th Amendment – Plaintiff alleged violation of familial integrity for the wrongful conviction of their father – The right to family integrity is not implicated when the state deprives child of routine interaction with a parent through wrongful incarnation – Even if plaintiffs have identified a liberty interest protected by the Fourteenth Amendment, it would not be violated here because plaintiffs have not alleged that any state actor intruded on that right with the culpability required to state a due process violation - Substantive due process claims based on the right to family integrity require that the state official act with a culpable state of mind directed at the family relationship - The due process right of familial association does not protect against all forms of state action that impact parent-child relationships

DANNY LAMONT CHAMBERS; DONTELL RAYVON-EDDIE SMITH v. RONALD SANDERS; CITY OF DETROIT, MICHIGAN SIXTH CIRCUIT COURT OF APPEALS No. 22-1446 Decided and Filed: April 3, 2023

"Danny Lamont Chambers and Dontell Rayvon-Eddie Smith allege that Detective Ronald Sanders and his employer, the City of Detroit, violated their Fourteenth Amendment right to familial integrity by procuring the wrongful conviction and incarceration of their father, Danny Burton. Even assuming that the plaintiffs have identified a substantive right protected by the Due Process Clause, their claim cannot succeed because they have not alleged that defendants acted with a culpable state of mind, directed toward them or their family unit. We affirm."

"In 1987, a Michigan state court jury convicted Danny Burton of first-degree murder and a firearm charge. He was sentenced to life in prison without the possibility of parole. The complaint in this case alleges that the conviction primarily rested on witness testimony from individuals who were present at the home where the shooting had allegedly occurred. In December 2019, Burton was released from prison and his conviction was vacated on the prosecutor's motion, after key witnesses recanted and details of witness manipulation and intimidation were revealed. Detective Ronald Sanders's investigative tactics allegedly included threats and physical violence against witnesses, including minors, to secure their testimony against Burton. Plaintiffs allege that, as a result, Burton spent thirty-two years in prison."

"In July 2020, Burton filed claims under §§ 1983 and 1988 against Sanders and the City of Detroit for Brady violations, malicious prosecution, and fabrication of evidence. The district court granted the city's motion to dismiss Burton's claims, finding that Burton's claims were barred by the city's Chapter 9 bankruptcy which occurred after Burton's claims arose. Detective Sanders did not move to dismiss and Burton's claims against him were still pending in the district court as of the time of this appeal."

"Several months after the city was dismissed from Burton's suit, Burton's sons filed the instant suit against Sanders and the city. His sons, Danny Lamont Chambers and Dontell Rayvon-Eddie Smith, allege that the wrongful conviction and incarceration of their father throughout their childhood and into adulthood violated their constitutional right to family integrity. They do not assert that Sanders's actions were directed at the family unit or intended to break up the family; rather, they claim that their 'rights were violated when defendants violated Mr. Burton's rights.' DE 1, Compl., Page ID 11."

"The district court granted Sanders' motion to dismiss the § 1983 claim against him, finding no cognizable due process right for 'interference with family integrity' when a party is indirectly harmed by a constitutional tort against a family member. The district court further granted the city's motion to dismiss Chambers and Smith's Monell claim because it relied on the same theory of due-process parental interference that the court dismissed against Sanders." …

"On appeal, Chambers and Smith reassert their argument that the substantive due process right of familial association extends to cases where the state has wrongfully incarcerated a parent for a significant period and argue that the district court erred in dismissing their federal claims under Rule 12(b)(6)."

"The Due Process Clause has historically protected some rights that are grounded in family integrity and autonomy. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ('The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.'); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ('We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.'). However, this longstanding liberty interest has traditionally applied to either state actions directed at the family relationship, such as visitation or child custody, or state regulation of decisions within the ambit of parental control, such as educational decisions, the choice of living arrangements, and the choice to have children. See *Troxel v. Granville*, 530 U.S. 57, 66-69 (2000) (custodial rights of fit parents); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right of parents to make educational decisions); *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (plurality opinion) (right of extended family members to live together); *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children). The contours of these rights are guided by history and tradition, and they are not absolute; 'the family is not beyond regulation.' *Moore*, 431 U.S. at 499."

"This circuit has not previously decided whether the right to family integrity is implicated whenever the state deprives a child of routine interaction with a parent through wrongful incarceration. *Cf. Purnell v. City of Akron*, 925 F.2d 941, 948 n.6 (6th Cir. 1991) (declining to decide the issue of whether the children of a man wrongfully killed by state police could bring a § 1983 claim for deprivation of the parent-child relationship). We address the issue now and hold that it is not."

"We may assume for purposes of this case that plaintiffs have identified a liberty interest protected by the Fourteenth Amendment. Even so, it would not be violated here because plaintiffs have not alleged that any state actor intruded on that right *with the culpability required to state a due process violation*. *Daniels, 474 U.S. at 331;* Lewis, 523 U.S. at 848. This conclusion is supported by the majority of our sibling circuits and our own precedent."

"The Supreme Court has explained that '[h]istorically, the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.' *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (collecting cases). The 'Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' *Lewis*, 523 U.S. at 847 (internal quotation marks and citation omitted). Negligent behavior categorically fails to shock the conscience, while conduct intended to injure is 'most likely to rise to the conscience-shocking level.' *Id.* at 849. Accordingly, the majority of circuits have recognized that 'not every . . . act that results in an interference with the rights of familial association is actionable.' *Lowery v. County of Riley*, 522 F.3d 1086, 1092 (10th Cir. 2008) (cleaned up and internal quotation marks and citations omitted). As with every substantive violation of the Due Process Clause, the state must have acted toward the plaintiff with a culpable state of mind. See id. ('The conduct or statement must be directed at the familial relationship with knowledge that the statements or conduct will adversely affect that relationship.'); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986) ('We decline, on this record, to make the leap ourselves from the realm of governmental action directly aimed at the relationship between a parent and a young child to an incidental deprivation of the relationship between appellants and their adult relative.'); *Gorman v. Rensselaer County*, 910 F.3d 40, 48 (2d Cir. 2018) ('[A] claim under the Due Process Clause for infringement of the right to familial associations requires the allegation that state action was specifically intended to interfere with the family relationship.'); *McCurdy v. Dodd*, 352 F.3d 820, 827-28 (3d Cir. 2003) ('In the context of parental liberty interests . . . the Due Process Clause only protects against deliberate violations of a parent's fundamental rights—that is, where the state action at issue was specifically aimed at interfering with protected aspects of the parent-child relationship.'); *Russ v. Watts*, 414 F.3d 783, 790 (7th Cir. 2005) ('[F]inding a constitutional violation based on official actions that were not directed at the parent-child relationship would stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court.'); *Partridge v. City of Benton*, 929 F.3d 562, 568 (8th Cir. 2019) ('Pleading a plausible familial-relationship claim under § 1983 requires an allegation that the state action was intentionally directed at the familial relationship . . . Partridge and Schweikle did not allege in their complaint, or argue on appeal, that Ellison's shooting was directed at their relationship with Keagan. This forecloses their claims.'); *Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994)."

"Plaintiffs, by contrast, seek to state a claim for violation of their own Due Process rights without any showing of a culpable mental state directed toward them. Plaintiffs claim that defendants violated their father's constitutional rights through Brady violations, malicious prosecution, and fabrication of evidence and that the City is liable to their father under *Monell*. As to their own constitutional claims, they say simply that they have a 'constitutional

right to have their family unit protected,' which was necessarily 'violated when defendants violated Mr. Burton's rights, which caused Mr. Burton to be falsely convicted and imprisoned.' DE 1, Compl., Page ID 11. But holding a government actor automatically responsible for incidental harms flowing from his actions imposes strict liability—a result directly contrary to Daniels, which clarifies that the Due Process Clause 'serves to prevent governmental power from being used for purposes of oppression.' *Daniels*, 474 U.S. at 331 (internal quotation marks and citation omitted). In *Daniels*, the Supreme Court held that the 'Due Process Clause is simply not implicated' by an act 'causing unintended loss of injury to life, liberty, or property,' even when a government official acts *negligently* with respect to the plaintiff's constitutionally protected interests. Id. at 328. Nor can it be implicated when a government official unintentionally harms those interests with no culpable state of mind directed toward them at all."

"Analogous cases from this circuit confirm that no constitutional violation of the right to family association exists without a state action directed at the family relationship. In § 1983 cases where family members of those wrongfully killed by police claim infringement of the right to familial association, we have rejected such claims as collateral." …

"In unpublished cases, we have consistently rejected § 1983 claims of family members explicitly seeking to vindicate their own constitutional right to family integrity and not the rights of their deceased family member. See *LeFever v. Ferguson*, 645 F. App'x 438, 447 (6th Cir. 2016); *Foos v. City of Delaware*, 492 F. App'x 582, 593 (6th Cir. 2012)." …

"Our precedent and that of most other circuits lead us to conclude that substantive due process claims based on the right to family integrity require that the state official act with a culpable state of mind directed at the family relationship. The due process right of familial association does not protect against all forms of state action that impact parent-child relationships."

"… The government official must have, at a minimum, acted with a culpable state of mind directed at the plaintiff's family relationship or a decision traditionally within the ambit of the family. Thus, many state actions with collateral effects on families are not constitutional violations. See *Halley v. Huckaby*, 902 F.3d 1136, 1155 (10th Cir. 2018)."

"To clarify this rule, two points must be made. First, the standard we adopt today will not be met simply because a government official acted intentionally. A government official can make a wrongful, intentional decision, as the alleged facts here demonstrate, without that intent or the decision itself being aimed at the family relationship. Instead, as with any due process violation, stating a claim in this context requires that the state actor act with a culpable state of mind with respect to the plaintiffs themselves and their own alleged constitutional rights. This rule aligns with precedent. As a baseline, the Supreme Court has held that merely negligent conduct cannot give rise to a due process violation. *Daniels v. Williams*, 474 U.S. 327, 333 (1986). *A fortiori*, a mere incidental harm cannot give rise to due process violation. '[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.' *Lewis*, 523 U.S. at 848. To rise to the level of a 'conscience shocking' violation of rights in the constitutional sense, the harm suffered by a family member must be more than a collateral consequence of other wrongful state action. See generally *Range v. Douglas*, 763 F.3d 573, 591 (6th Cir. 2014) (citing *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001)) ('A government actor who has time to deliberate shocks the conscience if the actions 'were taken with deliberate indifference towards the *plaintiff's* federally protected rights.'') (emphasis added). It is not enough that some wrongful intent existed at some point in the chain of events."

"Second, it will admittedly be a rare case in the wrongful incarceration context that meets this standard. That rarity is appropriate in light of both the narrow scope of substantive due process generally and our case law and that of other circuits consistently rejecting such claims in the Fourteenth Amendment context. On the other hand, were we to dispense with the requirement that the government action at issue target the family relationship, then every close family member of a wrongfully incarcerated individual would have a constitutional claim based on the incidental, even unknowing, impact of that individual's incarceration on the family relationship. As discussed above, that conclusion cannot be squared with the Supreme Court's case law, or that of this circuit and nearly all of our sister circuits."

"Applying this framework to the instant case, Chambers and Smith have not pled facts to state a claim that Sanders's conduct was directed at interfering with their parent-child relationship. We cannot conclude that Sanders's investigative misconduct and deliberate indifference toward *Burton's* federally protected rights also amounts to 'conscience shocking' treatment of *his children's* federally protected rights. *See also* DE 1, Compl., Page ID 7 ('Defendant [Sanders] . . . conspired to knowingly deprive Mr. Burton of his constitutional rights under the 4th Amendment, and to thereby deprive Plaintiffs of their constitutional right to be with their father.')

(emphasis added). Chambers and Smith do not allege that their rights were targeted by Sanders, but instead that violations of their rights were an inevitable byproduct of Sanders's violation of their father's constitutional rights. These allegations do not state a due process claim. Therefore, we affirm the district court's dismissal of Chambers and Smith's § 1983 claim against Sanders in his individual capacity."

8. Conspiracy - A civil conspiracy is an agreement between two or more persons to injure another by unlawful action - To prove conspiracy, plaintiffs must show (1) that there was a single plan, (2) that the alleged coconspirator shared in the general conspiratorial objective, and (3) that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant - Liability for § 1983 conspiracy can attach even where parties decide to act interdependently, each actor deciding to act only because he was aware that the others would act similarly

JAMES SWAIN RIEVES v. TOWN OF SMYRNA, TENNESSEE, et al., RUTHERFORD COUNTY, TENNESSEE; MIKE FITZHUGH, in his official and individual capacities
SIXTH CIRCUIT COURT OF APPEALS No. 23-5106 Decided and Filed May 16, 2023

"Local law enforcement officials in Rutherford County, Tennessee raided twenty-three stores selling cannabidiol ('CBD') products because they falsely believed that such products were illegal under state drug laws. The charges were dropped, as the products were legal under both state and federal law. The shop owners then sued the responsible law enforcement agencies, asserting violations of their constitutional rights and conspiracy to violate those rights. All but one of the shop owners ultimately settled. The sole remaining plaintiff, James Rieves, sought to progress to trial on his claims against the City of Smyrna and its police chief as well as Rutherford County and its sheriff. However, the district court granted summary judgment to the County and sheriff and certified the decision for interlocutory appeal."

"We granted interlocutory appeal to clarify the scope of our civil conspiracy doctrine. Because the plaintiff presented evidence to support a claim of § 1983 civil conspiracy, we reverse the district court's judgment and remand for further proceedings."

"This case concerns 'Operation Candy Crush,' a joint operation by the Rutherford County District Attorney's ('DA's') office, the Rutherford County Sheriff's Office ('RCSO'), and the Smyrna Police Department ('SPD'). It began in February 2017, when an RCSO officer opened an investigation into cannabidiol ('CBD') products being advertised on Facebook by a local store. An undercover officer purchased a selection of CBD products from the store and submitted the products to the Tennessee Bureau of Investigation ('TBI') for lab testing. The resulting TBI laboratory report noted that the products contained CBD and categorized CBD as a Schedule VI drug. Several RCSO detectives met with Assistant DA John Zimmerman to 'seek prosecutorial direction' because the detectives could not find a legal source to indicate that CBD was in fact a Schedule VI drug. DE 122-3, RCSO Summary, Page ID 1284. Over the coming months, RCSO detectives were repeatedly assured by members of the DA's office that CBD was illegal."

"Independently of the RCSO investigation, SPD learned of shops selling CBD products and began investigating. One of these shops was Platinum Vapor, LLC, d/b/a Cloud 9 Hemp ('Cloud 9'), which SPD Sergeant Eric Elstran began investigating in August 2017. On September 15, 2017, SPD became aware that RCSO was conducting its own investigation into CBD products in the area and Elstran contacted RCSO for more information. RCSO also asked SPD if it would assist in future raids of businesses being investigated. On September 26, 2017, Elstran executed a search warrant at Cloud 9 and seized products labelled as CBD. In response, James Swain Rieves, the owner of Cloud 9, emailed Elstran and detailed exactly how all of the store's CBD products were legal. No criminal charges were brought against Rieves at that time."

"In the following months, Operation Candy Crush continued to move forward, despite concerns from RCSO officials that the CBD products might be legal. On January 11, 2018, two assistant DAs, RCSO Detective Curtis Beane, Elstran, and members of TBI met at the TBI headquarters in Nashville. At the meeting, TBI agents informed the other agencies that their tests could not conclude whether the products contained illegal substances and that 'under no circumstances' would TBI agree to testify that the CBD products were illegal or qualified as Schedule VI drugs. DE 122-14, TBI Report, Page ID 1393. Members of the RCSO, particularly Major Bill Sharp, continued to express reservations about moving forward with the operation. Sharp briefed RCSO Sheriff Mike Fitzhugh about the case on January 22, 2018, and met with five other RCSO members on January 30, 2018, where consensus was that 'no one [was] comfortable moving ahead at [that] time.' DE 122-13, Sharp Report, Page ID 1389. Sharp explicitly shared those concerns with Fitzhugh. Sharp further attempted to stop the search warrants associated with Operation Candy Crush."

"Rather than pausing and fully addressing these concerns, members of the DA's office escalated the case directly to Fitzhugh, the head of RCSO. According to one RCSO officer, 'Sheriff Fitzhugh ignored [the officers'] concerns and decided to move forward anyway.' DE 142-2, Mathis Decl., Page ID 1815. Fitzhugh then directed Sharp and other detectives to attend another meeting with the DA's office. That meeting, on February 2, 2018, was 'contentious' as the RCSO detectives continued to express concerns. In the meeting, Sharp raised concerns about 'civil action' by the store owners, to which Zimmerman responded: 'We will put off the court dates, attorneys will get tired of coming to court and settle.' DE 122-13, Sharp Report, Page ID 1389."

"Once again, despite the concerns raised, the operation moved forward and a simultaneous raid of twenty-three stores selling CBD products in Rutherford County was set for February 12, 2018. Although it had previously been searched by SPD, Cloud 9 was included on the list of stores to be raided. RCSO hosted a meeting about procedures for the raids, protocols for collection of evidence, and assignment of teams. RCSO was assigned to twenty-one locations. SPD was assigned to Cloud 9 and one other location."

"On February 12 at 11:50 a.m., the operation took place as planned. Law enforcement officials from RCSO, SPD, and other agencies simultaneously executed raids on twenty-three stores selling CBD products in Rutherford County, including Cloud 9. The stores were padlocked, their inventory was seized, and the owners were arrested and charged with violating the Tennessee Drug Control Act and creating a public nuisance."

"That same day, the DA's office organized a press conference led by Fitzhugh. Fitzhugh explained Operation Candy Crush to reporters and stated that the seized products contained an illegal marijuana derivative that was dangerous to children. Fitzhugh then stated that the products were created by taking real candy products, spraying them with 'this illegal substance' and then repackaging them. DE 122-20, Press Conference Tr., Page ID 1445. He finally claimed that 'some of the synthetic products' had caused two deaths in the United States. *Id.* at Page ID 1447. RCSO issued a press release about the raids and created a Facebook post celebrating the operation. Local newspapers reported the story, which named the raided stores and their owners, including Rieves."

"All charges were eventually dismissed because the CBD products were legal under both federal and state law. When the DA's office realized that the cases against the store owners were falling apart, DA Jennings Jones called Sharp at home to inform him. Sharp once again raised concerns about civil action by the store owners and Jones assured him that RCSO would be fine because they could rely on 'good faith' and 'throw T.B.I. under the bus.' *See* DE 122-13, Sharp Report, Page ID 1389-90."

"Seventeen store owners sued the various agencies and law enforcement officials involved in the operation under 42 U.S.C. §§ 1983 and 1985 for violating their constitutional rights to be free from false arrest, unlawful seizure, and unlawful prosecution, as well as their right to equal protection. They also claimed that officials leading the agencies—SPD Police Chief Arnold, Jones, Zimmerman, and Fitzhugh—engaged in a conspiracy to deprive the owners of their constitutional rights."

"After the case was remanded, sixteen of the seventeen plaintiffs reached agreement with all defendants on all claims and jointly moved for partial dismissal with prejudice, which the district court granted. The only remaining plaintiff, Rieves, reached agreements with Jones and Zimmerman, leading to their dismissal from the case. After these settlements, only Rieves's § 1983 claims against the 'Smyrna Defendants' (the Town of Smyrna and Arnold) and the 'County Defendants' (Rutherford County and Fitzhugh) remain. While the claims against the Smyrna defendants were set for trial, the County defendants moved for summary judgment on all claims. They further asserted that Rieves lacked standing in his claims against them."

"The district court granted summary judgment to the County defendants. While the district court determined that Rieves did have standing to bring his claims, it held that Fitzhugh and the County could not be at fault for the violations of Rieves's Fourth Amendment rights, as the search, seizure, and arrest were all conducted solely by members of SPD. It also held that the conspiracy claims could not stand against Fitzhugh because of language from our opinion in *Webb v. United States*, 789 F.3d 647 (6th Cir. 2015). That latter holding is the subject of the instant interlocutory appeal by Rieves, which we granted to clarify the scope of our civil conspiracy doctrine."

"We begin by briefly addressing the standing argument raised by the County defendants both before the district court and on appeal. 'To have standing, a plaintiff must allege (1) an injury in fact (2) that's traceable to the defendant's conduct and (3) that the courts can redress.' *Gerber v. Herskovitz*, 14 F.4th 500, 505 (6th Cir. 2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-61 (1992)). There is no dispute that Rieves alleges a redressable injury by asserting claims that his constitutional rights were violated by Operation Candy Crush; rather, the County defendants challenge whether his injury is traceable to them."

"Here, Rieves alleges that RCSO contributed to the furtherance of Operation Candy Crush and the accompanying violation of his constitutional rights. He asserts that RCSO and Fitzhugh asked the Town of Smyrna to assist in future raids, ignored repeated concerns about the legality of the CBD products at issue, and assigned roles for the operation. The RCSO's role assisted the Smyrna defendants in executing their role in the operation and the resultant injury to Rieves was a predictable outcome of their aid. The defendants dispute their role in targeting Cloud 9, which is relevant to the merits question whether Rieves has established causation under the applicable legal standard; however, 'Article III 'requires no more than *de facto* causality[.]'' *Dep't of Com.*, 139 S. Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Because Rieves has alleged such causality, the traceability requirement is satisfied."

"With standing established, we analyze whether the district court properly granted summary judgment to the County defendants on Rieves' 42 U.S.C. § 1983 civil conspiracy claim. Summary judgment determinations are reviewed de novo. *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 490 (6th Cir. 2002)." …

"'A civil conspiracy is an agreement between two or more persons to injure another by unlawful action.' *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985). To prove conspiracy, plaintiffs must show (1) 'that there was a single plan,' (2) 'that the alleged coconspirator shared in the general conspiratorial objective,' and (3) 'that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.' *Id.* at 944 (citations omitted)."

"… In order to survive summary judgment, plaintiffs asserting a civil conspiracy can 'rely on circumstantial evidence to establish an agreement among the conspirators,' *id.* (citing *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012)), as long as the conspiracy claims are 'pled with some degree of specificity' and do not rely on 'vague and conclusory allegations,' *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987)."

" [T]he district court concluded that the 'broad conspiracy' of Operation Candy Crush was insufficiently personal to Rieves to make out a conspiracy claim. DE 162, Op. and Order, Page ID 2044. That is, the district court found Fitzhugh's general awareness of the operation inadequate because he was not 'personally involved' in the investigation of Cloud 9, the determination that Cloud 9 was selling illegal products, the indictment of Rieves, or the physical raid and padlocking of Cloud 9. *Id.* at Page ID 2045. For that reason, the district court granted summary judgment to the County defendants."

"Section 1983 civil conspiracy claims do not contain a 'personal involvement' requirement. Such a standard would defeat the purpose of permitting a civil conspiracy claim because, at its core, 'section 1983 permits a jury to hold co-conspirators liable for the damages flowing from a constitutional deprivation that all of the co-conspirators may not have personally carried out.' *Sánchez v. Foley*, 972 F.3d 1, 11 (1st Cir. 2020); *see also Webb*, 789 F.3d at 671 ('[T]he overt-act element requires only that at least one of the alleged conspirators committed an overt act or omission in furtherance of the conspiracy.'); *Simpson v. Weeks*, 570 F.2d 240, 243 (8th Cir. 1978) ('The charge of conspiracy in a [§ 1983] civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts.') (quoting *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956)). Liability for § 1983 conspiracy can attach even where 'parties decide to act 'interdependently,' each actor deciding to act only because he was aware that the others would act similarly[.]' *Aubin v. Fudala*, 782 F.2d 280, 286 (1st Cir. 1983)."

"Here, Fitzhugh's alleged behavior reflects interdependent decision-making with SPD and the DA's office through the planning and execution of Operation Candy Crush, all calculated to achieve an unconstitutional outcome. Although SPD's raid of Cloud 9 was the overt act that directly caused Rieves's alleged injury, holding the County defendants liable for their alleged involvement in the overall plan that led to that raid is not only proper but exactly the kind of conspiratorial behavior at the heart of § 1983 civil conspiracy claims."

"The district court's conclusion to the contrary was based on language from our decision in *Webb*." …

"… *Webb* held, an officer's participation in the overarching (legitimate) operation was insufficient to show that the officer had shared the conspiratorial objective to frame plaintiffs. 789 F.3d at 670-71. That holding did no more than restate the familiar requirement that an alleged coconspirator must have 'shared in the general conspiratorial objective.' *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012) (quoting *Hooks*, 771 F.2d at 943-44)."

"Here, several factors indicate that a jury could reasonably conclude that Operation Candy Crush constituted a 'single plan' in which Fitzhugh participated."

"First, Operation Candy Crush had an obviously illegitimate purpose, known by the conspirators, prior to the overt act. The evidence supports Rieves's contention that Sharp shared his concerns with others in the RCSO about the legality of the operation, but that the DA's office went over his head and contacted Fitzhugh in order to get RCSO to proceed with the operation. A jury could reasonably conclude that Fitzhugh knew that the CBD products were legal but encouraged his officers to go forward with the operation anyway. Unlike Operation Turnaround, which had a facially legitimate purpose, Operation Candy Crush was illegitimate from the outset and leadership knew that the raids lacked probable cause prior to their execution."

"Next, the scope of the operation was known and defined before the raids. The twenty-three stores (including Rieves's) were listed in an email circulated among the law enforcement agencies in the week prior to the raids as they divided up responsibility for executing those raids." …

"Third, the simultaneous nature of the raids indicates that they should be treated as parts of a single plan. Although different agencies took responsibility for different locations, Fitzhugh himself explained that the agencies coordinated to execute those raids at the exact same time. Unlike the individualized drug buys of Operation Turnaround that occurred over a series of months, Operation Candy Crush is reasonably treated as a single plan to violate the shop owners' constitutional rights because the raids were coordinated and carried out simultaneously, with the knowledge of all parties."

"The County makes two additional arguments: first, even if Fitzhugh engaged in a civil conspiracy, the County is not liable, and second, Fitzhugh is entitled to qualified immunity. The district court reached neither of these arguments."

"To begin, the County is generally liable for the acts and decisions made by Fitzhugh in his capacity as the final decisionmaker for RCSO. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *Flagg v. City of Detroit*, 715 F.3d 165, 174-75 (6th Cir. 2013); Tenn. Code. Ann. § 38-3-102(b) (endowing sheriffs, in their respective counties, with the duty to 'ferret out crimes, to secure evidence of crimes, and to apprehend and arrest criminals'). The County does not contest that Fitzhugh is the final decisionmaker of RCSO. Instead, it reiterates its argument that Fitzhugh was not adequately involved in the raid of Cloud 9 to confer liability. It further asserts that there are special limitations for conspiracy claims which require the plaintiff in such a case to connect the conspiracy to a policy or custom of the county."

"Neither of these arguments against *Monell* liability is valid. As discussed above, Fitzhugh's alleged involvement in Operation Candy Crush sufficiently supports a claim of civil conspiracy. And no case law exists to suggest that the standard for *Monell* liability in the conspiracy context differs from the general standard pursuant to which the act of a final decisionmaker is enough to constitute a municipal policy."

"Similarly meritless is the County defendants' argument that Fitzhugh is entitled to qualified immunity. Qualified immunity protects governments officials from personal civil liability as long as their conduct does not violate an individual's clearly established rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). At the motion to dismiss stage, we held that Fitzhugh was not entitled to qualified immunity with respect to the store owners' Fourth Amendment claims because he 'knew or reasonably should have known that the plaintiffs' arrests were being effected without probable cause.' *Rieves I*, 959 F.3d at 698 (quoting DE 59, Mem. Order, Page ID 442)." …

"Because the record evidence creates a genuine dispute about whether Fitzhugh either 1) knew that probable cause did not support Operation Candy Crush; or 2) held an objectively unreasonable belief that probable cause existed for all of the store owners, which he had reason to know included Rieves, and overrode his officers' concerns about the legality of the CBD products to move forward with the operation, he is not entitled to qualified immunity on the claim that he conspired to deprive Rieves of his constitutional rights."

9. Claim of the plaintiffs directed at the environmental court for the county is prohibited by federal law because it did not involve the overturning of the court decision – Plaintiffs did not appeal the court ruling – Plaintiffs sought damages for due process violation by the court - Because the Environmental Court is not a person and because it is instead an arm of the State, plaintiffs' § 1983 action against it fails

SARAH HOHENBERG; JOSEPH HANSON v. SHELBY COUNTY, TENNESSEE; DIVISION 14 OF THE SHELBY COUNTY, TENNESSEE GENERAL SESSIONS COURT, CRIMINAL DIVISION
SIXTH CIRCUIT COURT OF APPEALS No. 22-5783 Decided and Filed May 19, 2023

"Sarah Hohenberg and Joseph Hanson did not maintain their homes or keep them up to code. Unhappy neighbors set the enforcement wheels in motion for actions in the Shelby County Environmental Court, proceedings that eventually cost them their homes and more. Hohenberg and Hanson sued Shelby County and the Environmental Court for violating their due process rights. The district court dismissed their case for lack of jurisdiction under 28 U.S.C. § 1257(a), *see Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and for failing to state a claim. We reverse the jurisdictional ruling, affirm the failure-to-state-a-claim ruling in part, and remand."

"Hohenberg and Hanson owned homes in Memphis, Tennessee. They did not maintain them. Hohenberg failed to make repairs after a tree struck her roof. Hanson let the grass, weeds, and other plants grow wild and allowed trash, debris, and personal property to pile up in his yard."

"Neighbors complained. A nearby homeowner, a neighborhood association, and the State of Tennessee sued Hohenberg in the Environmental Court, a local court that hears 'cases involving alleged violations of county ordinances, including . . . environmental ordinances.' Shelby Cnty. Ord. Code § 10-605. They requested damages plus an order compelling her to make repairs. One of Hanson's neighbors emailed Memphis officials, who charged him with code violations and brought enforcement actions in the Environmental Court."

"Things did not go smoothly. The Court declared Hohenberg's home a public nuisance and ordered her to submit a remediation plan. When that didn't work, it appointed a receiver. When Hohenberg did not pay the receiver's expenses, the Court ordered her home sold at auction. Hohenberg refused to leave and kept her belongings in the house, prompting the Court to issue a warrant for her arrest. She left for Mississippi and declared bankruptcy. A bankruptcy trustee auctioned off her house, mooting the enforcement action."

"Meanwhile, the Court found Hanson guilty of code violations and ordered him to clean up his yard. The violations recurred, and the Court held him in contempt. Hanson went to jail. The City of Memphis bulldozed his house, and the Court dismissed his case as moot as well."

"Hohenberg and Hanson filed this § 1983 action against the Court and the County. They claimed that the Court's procedures—including its failure to use Tennessee's Civil and Evidence Rules, failure to keep complete records of its proceedings, and failure to consider constitutional claims or defenses—kneecapped their appeals and prolonged their cases, violating their rights under the Fourteenth Amendment's Due Process Clause. The County contributed to the violations when it created, funded, and 'fail[ed] to oversee' the Court. R.16 ¶¶ 98, 152. The duo sought damages and declaratory relief."

"The district court dismissed their complaint. It ruled that it lacked jurisdiction over most of their claims because they amounted to improper appeals of state court judgments to a district court under 28 U.S.C. § 1257(a). As for the remaining claims, which concerned lost case files, the court held that they came up short (1) against the Environmental Court because it could not be sued under § 1983 in federal court and (2) against the County because the claims failed as a matter of law. Hohenberg and Hanson appeal."

"Hohenberg and Hanson sued the Environmental Court and the County, claiming both violated their rights under the Due Process Clause of the Fourteenth Amendment. Congress has granted the federal courts jurisdiction to resolve federal questions of this sort. 28 U.S.C. § 1331."

"Does an exception to this grant of jurisdiction apply? Only the Supreme Court, not an inferior federal court, has jurisdiction to resolve appeals from '[f]inal judgments or decrees rendered by the highest court[s] of a State.' *Id.* § 1257(a). *Rooker* holds that this grant of jurisdiction is exclusive, that 'no court of the United States other than [the Supreme] [C]ourt' may 'entertain a proceeding to reverse or modify' a state court's final judgment. 263 U.S. at 416. *Feldman* follows suit. 460 U.S. at 482 & n.16."

"All told, § 1257(a)'s negative implication requires two unusual things. It requires a challenged 'judgment' in the new action. *Exxon*, 544 U.S. at 284. And it requires an effort to 'review' that judgment, namely to 'undo' or 'overturn' it in the new action. *Id.* at 287 & n.2, 293."

"Today's lawsuit does not satisfy either requirement. Claimants' injuries do not stem from state-court 'judgments.'" …

"Putting the points differently, § 1257 deals with appeals of state-court judgments, and Hohenberg and Hanson have not appealed anything. They seek monetary damages and declaratory relief under § 1983, a demand they did not make in the Environmental Court. *See* Tenn. Code Ann. § 16-15-501(a), (d)(1); 17 Tenn. Juris. §§ 13–14, 16 (2022). Their complaint seeks relief against the County and the Court, not the plaintiffs who instigated their

Environmental Court litigation. An action seeking new relief against new parties does not have any of the characteristics of an 'appeal' and does not seek to 'reject' a prior state-court judgment. *See, e.g.*, *Payne v. Niles*, 61 U.S. 219, 221 (1857) ('[I]t is very well settled in all common-law courts, that no one . . . [can] be made a defendant in [a] writ of error, who was not a party to the judgment in the inferior court.')."

"Defendants say that claimants' legal theories call the Environmental Court's orders into question. True or false, that is not the test. Section 1257(a) does not create a jurisdictional preclusion doctrine. It applies only when a state-court loser seeks 'review and rejection' of a specific prior judgment, not when his victory would undermine a judgment's legal underpinnings. *Exxon*, 544 U.S. at 284. At any rate, much of claimants' case does not question specific court orders. Proving an entitlement to nominal damages or declaratory relief would not require review or rejection of any particular judgment or decree. As for compensatory damages, claimants' contention that the Court's processes harmed them—perhaps by prolonging their proceedings or adding to their legal bills—does not require them to complain about, let alone appeal, a judgment."

"… [T]oday's claimants seek damages from the Court and the County, neither of which were parties to claimants' litigation in the Environmental Court. An action seeking damages from a third party does not 'reverse or 'undo'' a prior judgment any more than an action for contribution or indemnification does. *Id.* (quotation omitted)."

"That brings us to the Environmental Court's alternative defense: that, as an arm of the State of Tennessee, it may not be sued under § 1983. Section 1983 creates liability for 'persons' who deprive others of federal rights under color of law. Only a 'person' faces liability under the statute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989)."

"In a related setting, *Will* held that States and state agencies are not 'persons' within the meaning of § 1983 for several reasons. One, the text of the statute favored this interpretation. Congress did not treat States or state agencies as 'persons' when it enacted § 1983. *Id.* The 1871 Dictionary Act, passed months before § 1983, defined 'person' to include natural persons and 'bodies politic and corporate.' Act of Feb. 25, 1871, § 2, 16 Stat. 431. The latter phrase refers to private corporations and at most municipal governments, entities that exercise powers under corporate or municipal charters but not as constitutional sovereigns. *Will*, 491 U.S. at 69 & n.9; *see id.* at 64. Two, the federalism canon favored this interpretation because the Court does not casually construe statutes to alter the balance between national and state power. *Id.* at 65; *see Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Lawsuits against States do just that by undermining their autonomy and authority. *Alden v. Maine*, 527 U.S. 706, 750 (1999). Three, § 1983 does not displace sovereign immunity or other traditional common-law immunities. *Quern v. Jordan*, 440 U.S. 332, 342–43 (1979); *Will*, 491 U.S. at 66. Because sovereign immunity shields States from being sued in federal court, it would be odd for § 1983 to create a right that sovereign immunity immediately takes away. *See Will*, 491 U.S. at 66–67."

"Under these same principles, the Environmental Court is not a 'person' under § 1983. For one, 'person's' semantic content suggests as much. The Environmental Court is not a natural person, and it is not a 'bod[y] politic [or] corporate.' Act of Feb. 25, 1871, § 2, 16 Stat. 431. Even if 'person' extends to 'corporations, both private and public,' as *Will* held, 491 U.S. at 69 & n.9, courts are not private or public corporations. They 'exercise . . . judicial power, by the proper officer or officers, at a time and place appointed by law.' *United States v. Clark*, 25 F. Cas. 441, 442 (C.C.D. Mass. 1813) (Story, J.); *Todd v. United States*, 158 U.S. 278, 284 (1895) (quoting *Clark*). All of this explains why we have held that 'a court'—in that case the Akron municipal court—'is not a 'person' within the meaning of § 1983.' *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (per curiam)."

"The Environmental Court also operates as an organ of the State of Tennessee rather than of a 'body politic or corporate.' Its powers and responsibilities flow from Tennessee's Constitution and laws, not from a corporate or municipal charter. As part of the General Sessions court, the Environmental Court exercises the Volunteer State's 'judicial power.' Tenn. Const. art. VI, § 1; *see State ex rel. Boone v. Torrence*, 470 S.W.2d 356, 364 (Tenn. Ct. App. 1971); *Duncan v. Rhea Cnty.*, 287 S.W.2d 26, 30 (Tenn. 1955). State statutes delimit the Court's jurisdiction and many of its procedures. *See, e.g.*, Tenn. Code Ann. § 16-15-501(a), (c)(1), (d)(1) (jurisdiction); *id.* § 16-15-721 (rules of evidence). And superior Tennessee courts, up to the Tennessee Supreme Court, hear appeals from its judgments. *Id.* § 27-5-108(a); *State ex rel. Gibbons v. Club Universe*, No. W2004-02761, 2005 WL 1750358, at *2 (Tenn. Ct. App. July 26, 2005)."

"Turn to traditional federalism and immunity principles, 'presuppositions of our . . . history' that § 1983 honors. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *see Will*, 491 U.S. at 65–67. Lawsuits against state courts, like laws regulating state judges, strike at the heart of state sovereignty. *Gregory*, 501 U.S. at 460. Only a clear indication of statutory meaning warrants subjecting state courts to such lawsuits."

"Section 1983 actions against the Environmental Court also would clash with core sovereign immunity principles. '[C]ase after case' describes state courts, including local courts like this one in Michigan and Ohio, as arms of the State and beneficiaries of their State's sovereign immunity. *Laborers' Int'l Union of N. Am. v. Neff*, 29 F.4th 325, 331 (6th Cir. 2022) (citing cases); *see Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 764 (6th Cir. 2010) (Michigan); *Mumford v. Basinski*, 105 F.3d 264, 268 (6th Cir. 1997) (Ohio); *Ward v. City of Norwalk*, 640 F. App'x 462, 465–66 (6th Cir. 2012) (Ohio). We know of no case charting a different course. As No. 22-5783 *Hohenberg, et al. v. Shelby Cnty., Tenn., et al.* the Court observed in *Will*, it is difficult to understand why § 1983 would create a right to sue an entity that could always assert immunity from suit. 491 U.S. at 66–67."

"Hohenberg and Hanson push back. They say that the Environmental Court is an arm of Shelby County, not the State of Tennessee, making it a § 1983 'person.' *See Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978). But we rejected a similar argument in *Walsh*, 864 F.2d at 418–19, and it has no more force today."

"It does not matter that Tennessee law sometimes treats the Environmental Court as a county entity. For one thing, it sometimes doesn't." …' *See, e.g.*, *Hancock v. Davidson Cnty.*, 104 S.W.2d 824, 826 (Tenn. 1937) ('[A] justice of the peace, in the exercise of strictly judicial functions, is a state officer . . . . [T]he same must be said of [municipal court judges] who succeed to [their] jurisdiction and authority.'). For another, the meaning of 'person' under § 1983 turns on federal, not state, law. *See, e.g.*, *Will*, 491 U.S. at 95–98."

"It does not matter that Shelby County funds the Court. It does so in accordance with a state statute requiring as much, *see* Tenn. Code Ann. § 16-15-102(a), and at any rate the Court's receipt of County funds does not outweigh the other factors making it a State entity, *Neff*, 29 F.4th at 330 (explaining as much in the sovereign-immunity context)."

"It does not matter that Shelby County's voters, rather than the State of Tennessee's voters, pick the Environmental Court's judges. A similar reality holds for every Tennessee inferior court judge, who 'shall be elected by the qualified voters of the district or circuit to which they are to be assigned.' Tenn. Const. art. VI, § 4. Once again, local elections do not counterbalance the other factors that paint the Court as an instrumentality of the State. *See Pucci*, 628 F.3d at 763."

"All told, because the Environmental Court is not a 'person' and because it is instead an arm of the State, claimants' § 1983 action against it fails."

"The County separately argues that the claimants have not pleaded a plausible § 1983 claim against it. It contends that the Environmental Court did not violate anyone's rights and that, even if it did, County policy had nothing to do with it. *See Monell*, 436 U.S. at 692. But the district court did not consider these arguments, and we decline to take a first swing at them on appeal. *Harrison v. Montgomery Cnty.*, 977 F.3d 643, 652 (6th Cir. 2021). While the district court held that the claimants had not pleaded a plausible case that County policy caused the loss of their case files, it did so on the assumption that it lacked jurisdiction over the rest of their complaint."

"We close with two observations about the merits of the federal claim against the County. Due process requires fair proceedings, not formal ones. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). In view of that principle, it remains unclear whether Hohenberg and Hanson have pleaded violations of their Due Process rights. They object, for example, that the Environmental Court failed to follow Tennessee's Civil and Evidence Rules, but the Fourteenth Amendment does not necessarily require compliance with specific rules of procedure or evidence in all settings. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 485–89 (1972); *Williams v. New York*, 337 U.S. 241, 249–51 (1949); *Lawton v. Steele*, 152 U.S. 133, 139–41 (1894). To hold the *County* liable for violations of their rights, moreover, Hohenberg and Hanson must trace those violations to a County policy or practice. *Monell*, 436 U.S. at 692. Whether they can do so also remains unclear. The County created and funded the Environmental Court, but those decisions sit a fair distance from the Court's alleged procedural deficits."

CIVIL SERVICE

1. Uniform Administrative Procedure Act - Court held that the board did not act arbitrarily or capriciously by declining to consider evidence of discipline imposed on other employees - Evidence that is not relevant is inadmissible - To be relevant, evidence must tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence - The essential facts of consequence to the board's decision involved Mr. Moss's conduct - Evidence about discipline that may have been imposed on employees in other situations did not tend to make the facts about Mr. Moss's conduct more or less probable - Plaintiff does not claim an equal protection violation based on membership in a protected class; his only claim is that other, similarly situated individuals before him have

received more lenient discipline - Tennessee courts have rejected this class-of-one equal protection argument in the public employment context by noting that the relevance of disparate discipline evidence is especially limited in cases like this, where a terminated employee is not claiming a constitutional equal protection violation

PAUL ZACHARY MOSS v. SHELBY COUNTY CIVIL SERVICE MERIT BOARD
SUPREME COURT OF TENNESSEE No. W2017-01813-SC-R11-CV Filed March 21, 2023

"The issue presented is whether a civil service merit board acts arbitrarily or capriciously by not allowing an employee to ask questions in a termination hearing about more lenient discipline imposed on other civil service employees. A Shelby County Fire Department employee was fired based on his participation in an altercation involving a firearm at a political rally and his dishonesty during the subsequent investigation. He appealed his termination to the Shelby County Civil Service Merit Board. During the hearing, the Board did not allow the employee's counsel to ask questions about discipline imposed on other Fire Department employees. The Board affirmed the employee's termination for just cause. The employee appealed, and the trial court affirmed. The Court of Appeals reversed, holding that the Board's decision to exclude the questions about other discipline was arbitrary and unreasonable, and remanded the case for consideration of such evidence. Under the narrow standard of review provided in the Uniform Administrative Procedures Act, we hold that the Board did not act arbitrarily or capriciously by declining to consider evidence of discipline imposed on other employees. We reverse the Court of Appeals' judgment and affirm the judgment of the trial court."

"On November 1, 2013, several individuals held a political rally on an interstate overpass in Memphis. Rally participants held signs that advocated for the impeachment of then-President Barack Obama, and at least one individual wore a plastic mask depicting President Obama. Passing motorists reacted negatively to the demonstration. Fearful of the possibility of violence, participants called the Memphis Police Department ('MPD') for assistance."

"Paul Zachary Moss arrived at the overpass after his wife, a rally attendee, said she feared for her safety. Mr. Moss approached the scene armed with a .38 caliber handgun. Upon learning that an attendee, Thomas Mason Ezzell, Jr., wore the 'Obama mask,' Mr. Moss became angry. The situation escalated into a physical altercation between Mr. Moss, Mr. Ezzell, and another rally attendee, Earl Mayfield. Mr. Moss pointed his handgun at both men, threatening to kill them. Mr. Ezzell and Mr. Mayfield relented, and Mr. Moss returned to his truck where he was disarmed and arrested by MPD officers. Mr. Moss informed the Fire Department about the incident."

"Later, a grand jury indicted Mr. Moss on two counts of aggravated assault. He entered an *Alford* plea to one count of aggravated assault. After successfully completing three years of judicial diversion, the diverted charge was dismissed. *See* Tenn. Code Ann. § 40-35-313(a)(2) (2010 & Supp. 2013)."

"After Mr. Moss entered the plea, Fire Department Deputy Chief Dale Burress sent Mr. Moss a *Loudermill* notice, advising him of the possibility of major discipline, including termination, on two grounds: conviction of a felony and conduct 'in violation of Shelby County Policies, procedures or regulations.' Fire Department Chief Alvin Benson and Deputy Chief Burress held a *Loudermill* hearing with Mr. Moss to discuss the charges and possible discipline. Mr. Moss told them that during the November 2013 altercation, Mr. Ezzell confronted him first, but Mr. Moss had continued the conversation after Mr. Ezzell walked away. Mr. Moss denied he had been drinking but admitted to pointing his gun at Mr. Ezzell and Mr. Mayfield. Mr. Moss admitted he had previously been arrested for possession of a firearm but denied alcohol had been involved. Mr. Moss denied he had assaulted a woman. However, police records showed that in March 2011, Mr. Moss was arrested on charges of public intoxication and possession of a firearm while under the influence of alcohol. Police records also showed that in October 2012, a police officer responded to a domestic violence call during which Mrs. Moss stated Mr. Moss had assaulted her."

"After the *Loudermill* hearing, Chief Benson notified Mr. Moss by letter that his employment was terminated. The letter cited Mr. Moss's actions at the November 2013 rally and subsequent legal proceedings, as well as his 'vague and in some cases deceptive and/or untrue' statements made at the *Loudermill* hearing[.] … Chief Benson ended his letter by summarizing the bases for his decision and notifying Mr. Moss that his employment was terminated because he had violated the applicable standards of personal conduct and behavior of Fire Department employees."

"Mr. Moss appealed his termination to the Shelby County Civil Service Merit Board ('Board'). The Board conducted a hearing, and witnesses included Mr. Mayfield, Chief Benson, Deputy Chief Burress, and Mr. Moss."

"Mr. Mayfield testified that on November 1, 2013, he and six or eight acquaintances gathered at the interstate overpass, displaying 'an anti-Obama banner' and waving American flags to the motorists below. He noted that

various passersby voiced their opinions at rally participants, including one woman who stopped her car 'in the middle of the road and began haranguing [them] and insulting [them].' After the woman began takingpictures of rally participants and making phone calls, Mr. Ezzell, concerned about the possibility of violence, called the MPD and asked them to 'send somebody over to provide some safety while [they] ended the rally.' Mr. Mayfield and Mr. Ezzell then returned to the parking lot near the overpass where their vehicles were parked. Mr. Mayfield testified that Mr. Moss began walking toward them 'yelling that [they] were stupid and [they] were racists' and demanding to know who wore the Obama mask. When Mr. Ezzell told Mr. Moss he had been wearing the mask, Mr. Moss continued to yell at the two men. Mr. Mayfield observed that Mr. Moss appeared to be under the influence of alcohol or drugs. Eventually, Mr. Moss lunged at Mr. Ezzell, leading Mr. Mayfield to grab Mr. Moss from behind. Mr. Moss broke loose from Mr. Mayfield's grasp before 'pointing a gun in [Mr. Mayfield's] face and threatening to kill [him].' Mr. Moss then walked away from the two men. Another rally attendee quickly notified the arriving MPD officers of Mr. Moss's actions, and Mr. Moss was arrested without incident. All three men were taken to the police station where Mr. Mayfield gave a written statement about the incident."

"Chief Benson testified that after the *Loudermill* hearing and based on a preponderance of the evidence, he concluded Mr. Moss was the primary aggressor in the November 2013 altercation, that he had threatened to use a firearm, and that he appeared to have been under the influence of alcohol. Chief Benson detailed Mr. Moss's prior behaviors, including a 2011 charge for public intoxication and possession of a firearm while under the influence of alcohol and his involvement in a 2012 domestic assault incident. The Fire Department had no record of Mr. Moss reporting either incident to his superiors."

"Chief Benson explained he had a uniform policy for handling discipline. He stated he would terminate a firefighter who was under the influence and had a weapon to be used against a citizen. Chief Benson also noted he handled the incident involving Mr. Moss in the same way he would have responded to a similar instance involving another employee."

"During cross-examination, counsel for Mr. Moss attempted to question Chief Benson about whether he had uniformly applied this policy to prior disciplinary incidents, specifically asking about a firefighter who had committed sexual assault. Chief Benson testified that 'a firefighter who committed sexual battery would likely be terminated.' *Moss v. Shelby Cnty. Civ. Serv. Merit Bd.*, No. W2017-01813-COA-R3-CV, 2021 WL 4786370, at *4 (Tenn. Ct. App. Oct. 14, 2021), *perm. app. granted* (Tenn. Mar. 25, 2022). When Mr. Moss's attorney asked Chief Benson why he had not terminated that particular firefighter, counsel for the Fire Department objected to the line of questioning as irrelevant. The Board sustained the objection and declined to hear evidence relating to the prior discipline."

"Deputy Chief Burress testified that Mr. Moss had pleaded guilty to a felony charge and been granted diversion. Thus, under Shelby County government rules, he could not continue his employment after pleading guilty to a felony. Deputy Chief Burress also described Mr. Moss's untruthful answers to questions during the *Loudermill* hearing about the 2011 and 2012 incidents and his failure to report these incidents to his superiors."

"Finally, Mr. Moss testified about his employment with the Fire Department, his prior encounters with law enforcement, and the November 2013 incident[.]" …

"Based on this evidence, the Board found that Mr. Moss had been untruthful during the *Loudermill* hearing and had 'exhibited conduct unbecoming of a Shelby County Firefighter or Shelby County employee while off duty.' Further, the Board considered Mr. Moss's completion of judicial diversion immaterial because 'the fact is that the incident occurred and is an egregious violation of the General Rules of Conduct' that 'reflected adversely on all firefighters.' Thus, the Board determined the Fire Department had met its burden of proof in showing Mr. Moss was fired for just cause."

…[T]he Court of Appeals found the Board's decision to exclude evidence of past discipline during Chief Benson's cross-examination to be arbitrary and unreasonable because this evidence was not 'clearly irrelevant' when counsel's stated purpose was impeaching the testimony of Chief Benson about his uniform application of his termination policy. *Id.* at *17. The case was remanded to the Board for consideration of Mr. Moss's disparate discipline evidence with respect to the one specific employee Chief Benson was asked about, as well as other past disciplinary instances Mr. Moss intended to introduce. *Id.*"

"We granted the Board's application for permission to appeal to consider the only remaining issue: Whether a civil service merit board acts arbitrarily or capriciously by declining to consider evidence of more lenient discipline previously imposed on other employees."

"Reviewing courts may only reverse, remand, or modify civil service merit board decisions 'for errors that affect the merits of such decision.' *Id.* § -322(i). '[A]s opposed to the broader standard of review applied in other appeals,' the UAPA's standard of review 'reflects the general principle that courts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise.' *StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 669 (Tenn. 2016) (citing *Tenn. Env't Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 401–02 (Tenn. Ct. App. 2007); *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988); *CF Indus. v. Tenn. Pub. Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn. 1980); *Metro. Gov't of Nashville & Davidson Cnty. v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977))."

"Mr. Moss asserts that the Board's decision to uphold his termination was arbitrary or capricious because the Board excluded evidence of past discipline of Fire Department employees. *See id.* § -322(h)(4)."

"'A decision of an administrative agency is arbitrary or capricious when there is no substantial and material evidence supporting the decision.' *StarLink Logistics*, 494 S.W.3d at 669 (citing *Pittman v. City of Memphis*, 360 S.W.3d 382, 389 (Tenn. Ct. App. 2011); *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993)); *see also Watts v. Civ. Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980) ('Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency.'). '[S]ubstantial and material evidence' is 'less than a preponderance of the evidence and more than a 'scintilla or glimmer' of evidence.' *StarLink Logistics*, 494 S.W.3d at 669 (citation omitted) (quoting *Wayne Cnty.*, 756 S.W.2d at 280). 'A decision with evidentiary support can be arbitrary or capricious if it amounts to a clear error in judgment,' *id.* at 669 (citing *City of Memphis v. Civ. Serv. Comm'n of Memphis*, 216 S.W.3d 311, 316 (Tenn. 2007)), and 'is not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion,' *id.* at 669–70 (alteration in original) (quoting *Civ. Serv. Comm'n of Memphis*, 216 S.W.3d at 316). But as this Court noted in *StarLink Logistics*:

> If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached. The 'arbitrary or capricious' standard is a limited scope of review, and a court will not overturn a decision of an agency acting within its area of expertise and within the exercise of its judgment solely because the court disagrees with an agency's ultimate conclusion.

Id. at 670 (alterations in original) (internal citations and quotation marks omitted) (quoting *Bowers v. Pollution Control Hearings Bd.*, 13 P.3d 1076, 1083 (Wash. Ct. App. 2000))."

"Civil service employees may be subject to dismissal '[f]or unsatisfactory performance of duties or other just cause.'5 § 22, 1971 Tenn. Priv. Acts at 504–05; *Davis*, 278 S.W.3d at 265 n.19. In the context of civil service employee terminations, civil service merit boards seek to determine whether those terminations are supported by evidence establishing 'just cause.' § 23, 1971 Tenn. Priv. Acts at 505–06 ('The board shall . . . commence a hearing thereon, and shall thereupon fully hear and determine the matter and shall either affirm, modify or revoke such order of discipline.'); *cf. Lamarr v. City of Memphis*, No. W2002-02087-COA-R3-CV, 2004 WL 370298, at *4 (Tenn. Ct. App. Feb. 27, 2004) (Kirby, J., concurring) ('LaMarr's defense regarding the new zero tolerance policy appears to be that no one had told him that [the policy] would really be enforced. This is smokescreen. The real issue is whether there was sufficient evidence to support the Commission's conclusion that LaMarr violated [the policy] . . . .')."

"We accord significant deference to a merit board's just cause determination. Thus, as a reviewing court, we 'will not overturn a decision of an agency acting within its area of expertise and within the exercise of its judgment solely because the court disagrees with an agency's ultimate conclusion.' *StarLink Logistics*, 494 S.W.3d at 670 (citing *Bowers*, 13 P.3d at 1083)."

"The operative question is whether the Board's decision to disallow questions about more lenient discipline imposed on other Fire Department employees was a 'clear error in judgment' that rendered the decision arbitrary or capricious. *See id.* at 669–70. Our analysis begins with the issue the Board had to decide—whether there was evidence of Mr. Moss's unsatisfactory performance of duties or other just cause for termination. To determine whether the Board acted arbitrarily or capriciously by excluding Mr. Moss's proposed questioning, we must examine the relevance of that questioning to the Board's ultimate determination of whether just cause existed to terminate Mr. Moss. Evidence that is not relevant is inadmissible. Tenn. R. Evid. 402; *see Hayes v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 01-A-019108CH00291, 1992 WL 40194, at *5 (Tenn. Ct. App. Mar. 4, 1992) ('While the rules of evidence are relaxed in administrative hearings in comparison to judicial proceedings, even in

administrative hearings, there must be some relevancy to the issue before the administrative body.'). To be relevant, evidence must tend 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Tenn. R. Evid. 401. The essential facts 'of consequence' to the Board's decision involved Mr. Moss's conduct. Evidence about discipline that may have been imposed on employees in other situations did not tend to make the facts about Mr. Moss's conduct more or less probable."

"Mr. Moss argues that Tennessee courts have consistently allowed civil service employees to introduce disparate discipline evidence8 during merit board hearings. We disagree. Mr. Moss does not claim an equal protection violation based on membership in a protected class; his only claim is that other, similarly situated individuals before him have received more lenient discipline. Tennessee courts have rejected this 'class-of-one' equal protection argument in the public employment context by noting that the relevance of disparate discipline evidence is especially limited in cases like this, where a terminated employee is not claiming a constitutional equal protection violation. In *Echols v. City of Memphis*, a police officer was terminated after he lied about violating department policy by working a second job. No. W2013-00410-COA-R3-CV, 2013 WL 5230251, at *1 (Tenn. Ct. App. Sept. 16, 2013). The employee argued that his termination should be reversed because others violating the same policy only received verbal reprimands, and he unsuccessfully attempted to introduce evidence of this before the City of Memphis Civil Service Commission. *Id.* The Court of Appeals held that the so-called 'class-of-one' equal protection claim was not cognizable in the context of public employment and that evidence of disparate discipline was not material. *Id.* at *3–4. The *Echols* court relied on the United States Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, which rejected a similar claim by noting that '[t]o treat employees differently is not to classify them in a way that raises equal protection concerns.' *Id.* at *3 (quoting 553 U.S. 591, 605 (2008)); *see also* Robert C. Farrell, *The Equal Protection Class of One Claim:* Olech, Engquist, *and the Supreme Court's Misadventure*, 61 S.C. L. Rev. 107, 127 (2009) ('The [*Engquist*] Court noted that while 'government employees do not lose their constitutional rights when they accept their positions,' the government maintains 'significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.' Because government employees interact with the government in this proprietary context, their class of one equal protection claims are correspondingly limited.' (footnotes omitted) (quoting *Engquist*, 553 U.S. at 599–600)). Thus, *Echols* held that the Commission did not err by refusing to allow the disparate discipline evidence. *Echols*, 2013 WL 5230251, at *4; *see also Holmes v. City of Memphis Civ. Serv. Comm'n*, No. W2016-00590-COA-R3-CV, 2017 WL 129113, at *8 (Tenn. Ct. App. Jan. 13, 2017) ('[I]t makes sense to consider evidence intended to show disparate treatment violating equal protection only insofar as it is based on discrimination against a suspect class.')."

"In contending he should have been able to introduce his disparate discipline evidence, Mr. Moss relies on several Court of Appeals cases. None are persuasive. For instance, in *Mack v. Civil Service Commission of City of Memphis*, a public employee was terminated for failing to follow orders, and termination was affirmed by both the administrative agency and the trial court. No. 02A01-9807-CH-00215, 1999 WL 250180, at *1–2 (Tenn. Ct. App. Apr. 28, 1999). The Court of Appeals remanded the case to the trial court to consider the plaintiff's disparate treatment evidence. *Id.* at *6. But the plaintiff in *Mack*, unlike Mr. Moss, was seeking to prove discrimination based on protected class status. *Id.* at *5–6; *see Engquist*, 553 U.S. at 605 ('[T]he Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. . . . But we have never found the Equal Protection Clause implicated . . . where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.'). Because the UAPA provides grounds for reversal where an agency decision is '[i]n violation of constitutional or statutory provisions,' the *Mack* court properly remanded the case to the trial court for consideration of the employee's evidence. Tenn. Code Ann. § 4-5-322(h)(1)."

"*Barrom v. City of Memphis Civil Service Commission* is distinguishable for similar reasons. No. W2011-01248-COA-R3-CV, 2011 WL 5420365 (Tenn. Ct. App. Nov. 9, 2011). In that case, a Memphis police officer was terminated after a physical altercation with a parking lot attendant. *Id.* at *1. The City of Memphis Civil Service Commission refused to consider the officer's equal protection claim and affirmed his termination. *Id.* at *1, *3–4. On appeal, the chancery court affirmed the termination, declining to consider the officer's contention that his equal protection rights had been violated by disparate application of disciplinary rules. *Id.* at *1–2. The Court of Appeals reversed and remanded for consideration of the disparate treatment evidence. *Id.* at *5. The *Barrom* court's reversal was predicated on the fact that the officer 'sufficiently asserted an *equal protection claim* when he asserted disparate application of the disciplinary rules.' *Id.* (emphasis added). Thus, unlike Mr. Moss, the officer advanced a constitutional equal protection argument which was not considered, and the chancery court erred by failing to consider it. *See id. Barrom* should not be read to support requiring merit boards to consider evidence of disparate discipline when the terminated employee does not sufficiently assert a constitutional equal protection violation based on protected class status."

"In requiring the Board to hear Mr. Moss's evidence regarding disparate discipline of other employees, the Court of Appeals failed to adhere to the narrow standard of review required by the UAPA and primarily relied on *City of Memphis v. Cattron*, No. W2010-01659-COA-R3-CV, 2011 WL 1902167 (Tenn. Ct. App. May 13, 2011). … The Court of Appeals' reliance on *Cattron* is misplaced. The *Cattron* court explicitly noted that the City had not raised the issue of whether past discipline should have been considered at all; rather, the City sought review on whether the merit board improperly accorded significant weight to the other cases. *Id.* at *6 ('While the City raised evidentiary issues related to these other cases at the Commission hearing, it has not raised these issues on appeal. Rather, the City's argument goes to the weight that should be placed on such incidents. . . .'). While *Cattron* might tacitly approve of one merit board's consideration of disparate discipline evidence, nothing in the decision *requires* merit boards to hear such evidence."

"If allowed to stand, the Court of Appeals decision would confine civil service agencies to a level of imposed discipline in line with previous instances. For example, if a civil service agency wants to 'crack down' on particularly troubling behavior within the agency, it would be limited to whatever discipline was previously meted out in the past, essentially nullifying any deterrent effect. There is also the issue of pragmatism. If Mr. Moss's argument carries the day, merit boards (and the courts to which their decisions are appealed) will sift through instances of past discipline to determine whether the prior instances are analogous to the cases before them. And, at the very least, Mr. Moss's position does not fit within the 'limited scope of review' utilized by this Court in reviewing administrative agency decisions and would undermine the deference we have traditionally given to agencies with regard to personnel matters. *StarLink Logistics*, 494 S.W.3d at 670."

"In sum, the Board's decision to exclude Mr. Moss's disparate discipline evidence was not a clear error in judgment. *See id.* at 669. The Board did not abuse its discretion in determining that the evidence was irrelevant to the issue of whether there was just cause to terminate Mr. Moss's employment."

"We hold that a civil service merit board does not act arbitrarily or capriciously by declining to allow an employee challenging his termination for just cause to inquire about more lenient discipline imposed on other employees." …

2. Termination of employee due to failed drug test - Case was remanded to the Civil Service Commission because it was unclear what was the basis of the decision to terminate the employee

KARL S. JACKSON v. CITY OF MEMPHIS, ET AL.
COURT OF APPEALS No. W2022-00362-COA-R3-CV Filed May 24, 2023

"This appeal arises from an employment termination case in which an employee of the Division of Fire Services for the City of Memphis was terminated for a second positive drug test. After receiving notice of his termination, the employee requested an appeal hearing with the City of Memphis Civil Service Commission. Following the hearing, the Civil Service Commission issued a decision affirming the termination of his employment. The employee filed a petition for the trial court to review the decision of the Civil Service Commission. The trial court found that substantial and material evidence did not support the decision and that the decision was arbitrary and capricious. Accordingly, the trial court granted the employee's petition and remanded the matter to the Civil Service Commission. The City of Memphis appeals. We vacate the decision of the trial court and remand to the trial court for entry of an order to remand to the Civil Service Commission with instructions to issue a decision addressing certain deficiencies."

"This matter involves a decision to terminate the employment of Mr. Karl S. Jackson, who was a lieutenant with the Division of Fire Services ('the DFS') for the City of Memphis ('the City'). Mr. Jackson was hired by the City as a private EMT in 1995. He was later promoted to lieutenant with the DFS and served in that capacity for approximately 12 years prior to his termination. At the time of his termination in 2019, he had been with the DFS for 24 years and 2 months and only needed 10 more months to retire."

"In May 2014, Mr. Jackson tested positive for marijuana after submitting to a reasonable suspicion drug screen. Consequently, he was suspended for 360 hours without pay lasting from June 6, 2014, until July 17, 2014. In the meantime, Mr. Jackson was required to participate in an employee assistance program ('EAP'), which he successfully completed. In August 2014, he entered into an Employee Return to Duty Agreement with the City and agreed to, among other things, submit to follow-up alcohol and drug testing for a period of four years, which he complied with. Sometime in early 2019, he sought treatment after the death of his mother. He used his sick leave to voluntarily enter into treatment at Lakeside Behavioral Health System ('Lakeside') and stayed there until the end of March 2019. During his time there, he submitted to regular drug testing, which occurred about twice a week.

"On April 18, 2019, after returning to work, Mr. Jackson purportedly tested positive for marijuana again after submitting to a random drug and alcohol screen while on duty at one of the City's fire stations. The report for this drug test was included in the record as Exhibit 11 and was attached to the affidavit of a laboratory operations officer for Quest Diagnostics, Inc. ('Quest Diagnostics'), which was the laboratory that performed the drug test. The report set forth the 'initial' and 'confirmatory' cutoff concentrations for marijuana metabolites, which were 50 ng/mL and 15 ng/mL respectively. The report indicated a positive result for marijuana metabolites and a urine quantitative result of 15 ng/mL for marijuana metabolite, but it did not specify whether this urine quantitative result was the concentration detected in the initial or confirmatory test. As a result of this second positive drug screen, the DFS informed Mr. Jackson that he was relieved of his employment duties with pay, pending an administrative investigation and hearing. The DFS also informed Mr. Jackson that he was being investigated for possible violations of the DFS's Operations Manual and the City's Personnel Manual. Thereafter, Mr. Jackson requested and paid for a retest of his split specimen on April 26, 2019, which was the second half of his urine specimen collected on April 18, 2019. The retest purportedly reconfirmed that Mr. Jackson tested positive for marijuana."

"An administrative hearing and investigation were held at the end of April 2019. At the administrative hearing, Mr. Jackson was given an opportunity to respond to his charges. Afterward, Mr. Jackson received a letter from the DFS dated May 3, 2019, notifying him of the decision to terminate his employment. He then filed a request for an appeal hearing with the Civil Service Commission ('the Commission') and retained counsel."

"The matter was assigned to Commissioner Laurice E. Smith, and a hearing was held in November 2019. Mr. Dale Hill, who was an employee with Magtech Drug Testing ('Magtech'), was brought to testify for the purpose of resolving any chain of custody issues regarding Mr. Jackson's urine specimen. Magtech was responsible for collecting Mr. Jackson's urine specimen during his random drug and alcohol screen on April 18, 2019. During Mr. Hill's testimony, Mr. Jackson stipulated to the chain of custody. Mr. Earnest Gray, who was a lieutenant and OSHA coordinator for the DFS, then testified about the drug testing process. He explained that he coordinated the administration of the drug testing for the DFS and that the City followed the U.S. Department of Transportation's ('the DOT') regulations regarding cutoff concentrations for drug testing. … In his closing statement, counsel for Mr. Jackson took issue with Exhibit 11, arguing that the report only showed Mr. Jackson had 15 ng/mL in his system, which was less than 50 ng/mL. He further argued, 'And because there's no one here to explain all of this stuff, the plain documents in which you have in front of you, [the City] can call it positive.'"

"In March 2020, the City filed its proposed findings of fact and conclusions of law. Additionally, almost four months after the hearing, the City filed a post-trial submission and a notice of submission of an affidavit of a records custodian for ClearStar, Inc. ('ClearStar'), which was a medical review office that reviewed and interpreted the results of drug tests. In its post-trial submission, the City reiterated that the cutoff concentrations followed by the City were those established by the DOT's regulations. As an exhibit to the post-trial submission, the City included the DOT's regulation establishing cutoff concentrations for drug tests, i.e., 49 C.F.R. § 40.87. The post-trial submission also included an online article from Quest Diagnostics, which explained the relevance of the cutoff concentrations used in drug testing, and an article from the Journal of Medical Toxicology titled, 'Interpretation of Workplace Tests for Cannabinoids.' The notice of submission of the affidavit of the records custodian for ClearStar noted that both ClearStar and Quest Diagnostics were employed by the City for drug testing services. The affidavit of the records custodian for ClearStar included two medical review officer ('MRO') reports verifying the results of Mr. Jackson's drug test and retest as positive. The MRO reports did not include Mr. Jackson's urine quantitative results for these two tests. Counsel for Mr. Jackson objected to the consideration of these additional materials. He stated, 'The hearing is closed and I have no opportunity to cross examine this new evidence.'"

"The Commission issued its decision in April 2020, but it is unclear whether the Commission ever addressed the objections because they were not mentioned in its written decision. It is also unclear whether the Commission reviewed or considered the posthearing filings from the City because it did not reference them in its decision. While the Commission referenced the DOT's regulations, it did not cite to 49 C.F.R. § 40.87, which was the specific DOT regulation provided by the City in its post-trial submission. Instead, the Commission cited to and relied on 49 C.F.R. § 40.95 without any explanation as to why it applied a different section. As part of its findings of facts, the Commission stated the following:

> 26. [Mr. Gray], one of the OSHA Coordinators with the City, testified that he was familiar with Mr. Jackson's case and explained that OSHA is responsible for the overall administration and coordination of the drug testing procedure for the City. . . .
> 27. Mr. Gray testified that the City does have cutoff levels for prohibited drugs, including Marijuana. The City follows the federal cutoff levels established by the [DOT] and that most, if not all, jurisdictions follow [the] DOT guidelines, including the Tennessee Department of

> Transportation. Mr. Gray referred Commissioner Smith to the DOT . . . guidelines for drug testing and specific cutoff levels. . . .
> 28. The DOT . . . guidelines governing adulterant cutoff concentrations for initial and confirmation tests for Marijuana Metabolites (THCA) are as follows:
> ▫ the initial test cutoff [concentration] is 50 ng/ml and the confirmatory test cutoff concentration is 15 ng/ml.
> This means that on an initial drug test, a result below the cutoff concentration is reported as negative. And if the result is at or above the cutoff concentration, a confirmation test must be conducted. For a confirmation drug test, a result below the cutoff concentration must be reported as negative and a result at or above the cutoff concentration must be confirmed as positive. (49 C.F.R. Section. 40.95)"

"The Commission then made its conclusions of law, which provided in pertinent part as follows:

> 4. The City of Memphis, Fire Services Division had just cause to terminate Mr. Jackson's employment as a Fire Lieutenant with the City of Memphis, Fire Services Division based on the findings that he tested positive for Marijuana on April 18, 2019, which followed his first positive test for Marijuana determined by May 29, 2014. …
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> 9. 49 C.F.R. Section 40.95 of the [DOT] Rules governing cutoff levels (both initial and confirming) for drug testing are used by the City of Memphis under its Drug Free Workplace Policy.

Accordingly, the Commission affirmed the DFS's decision terminating Mr. Jackson's employment."

"After reviewing the administrative record and holding a hearing on the matter, the trial court entered its order in February 2022. The trial court found as follows:

> Mr. Jackson was terminated based solely on his positive result. Mr. Jackson argues that no substantial and material evidence supports the Commission's decision and his test result of 15 ng/mL does not violate the City's policy. No party contests the fact that Mr. Jackson supplied the urine specimen. Nor does either party contest the chain of custody offered by the City. The parties do contest whether Mr. Jackson's test result violates the City's policies.
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> The City did not offer any evidence related to the analysis and interpretation of Mr. Jackson's results as related to the City's policies. …
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> … Based on the transcripts of the hearing, . . . Commissioner [Smith] apparently used an internet search engine to establish the finding in her decision that the initial test cutoff is 50 ng/mL and the secondary confirmatory test cutoff concentration is 15 ng/mL. . . . But, no evidence in the Record shows that Mr. Jackson ever had an initial test result of 50 ng/mL. The test results contained in Exhibit 11 show a 15 ng/mL level of marijuana metabolites, not a 50 ng/mL result. There is a huge gap in reasoning here.
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> Furthermore, the City assumes that the test was analyzed correctly, but does not offer sufficient evidence to support this assumption. It is unknown to the Court why the City did not offer such evidence, but the City's decision should not bind [Mr. Jackson] from receiving his retirement benefits and remaining pay. There is insufficient evidence in the Record to support the Commission's decision.

For these reasons, the trial court concluded that substantial and material evidence did not support the Commission's decision. The trial court further concluded that the Commission's decision to uphold the termination of Mr. Jackson was arbitrary and capricious because the only evidence to support his termination was the test result showing marijuana metabolite in the amount of 15 ng/mL, which was below the amount of 50 ng/mL required to violate the City's policy." …

"…[W]e begin by observing that 'a reviewing court must have sufficient information regarding the agency action to determine whether the action comports with the law and to avoid substituting its judgment for that of the administrative tribunal.' *Thacker v. City of Greenville*, No. E2020-01106-COA-R3-CV, 2021 WL 3124309, at *5 (Tenn. Ct. App. July 23, 2021) (quoting *Macon v. Shelby Cnty. Gov't Civ. Serv. Merit Bd.*, 209 S.W.3d 504, 511 (Tenn. Ct. App. 2009)) (footnote omitted). Similar to our decision in *Thacker*, we have determined that '[w]e are unable to proceed in our review because we are missing necessary information.' *Id.*"

"The City's drug-free workplace policy provided that the City's drug and alcohol test collections must be performed in accordance with the DOT's regulations found in 49 C.F.R. Parts 40 and 382. At the hearing before the Commission, Mr. Gray explained that the City followed the DOT's regulations regarding cutoff concentrations for drug testing. Yet, the City did not provide the specific DOT regulation establishing cutoff concentrations, i.e., 49 C.F.R. § 40.87, until after the hearing."

"As previously noted, the City submitted post-hearing filings in March 2020. Particularly, the City submitted 49 C.F.R. § 40.87 as an exhibit. While the Commission's decision stated that it considered 'the documentary evidence,' it failed to mention whether it reviewed or considered any of the post-hearing filings from the City. Furthermore, counsel for Mr. Jackson objected to the post-hearing filings, and the Commission stated that it would address his objections. However, there is nothing in the record indicating that the objections were ever addressed. Consequently, while the post-hearing filings from the City are included in the appellate record, it is not clear to this Court whether the posthearing filings are part of the administrative record that the Commission considered in making its decision. Thus, it is also unclear whether we, as the reviewing court, may consider the post-hearing filings. *See Marshall v. Civ. Serv. Comm'n of State*, No. M2011-02157-COA-R3-CV, 2012 WL 5494615, at *5 (Tenn. Ct. App. Nov. 9, 2012) (explaining that this Court's review of an agency's decision is 'narrow, statutorily prescribed, and *confined to the administrative record*') (emphasis added); Tenn. Code Ann. § 4-5-322(g) ('The review . . . shall be confined to the record.')."

"We also point out that the Commission's decision ultimately did not rely on 49 C.F.R. § 40.87, which was provided by the City in its post-trial submission; rather, the Commission's decision cited to and relied on 49 C.F.R. § 40.95. As previously noted, section 40.95 governs the adulterant cutoff concentrations for initial and confirmatory tests. *See* 49 C.F.R. § 40.95. Yet, the results of Mr. Jackson's drug test did not indicate that his urine specimen was adulterated. *See id.* § 40.3 (defining adulterated specimen and oxidizing adulterant). The Commission failed to provide an explanation of why it relied on section 40.95 instead of section 40.87.7"

"Because of these issues surrounding the applicable regulation, this Court is 'left to speculate' as to whether the Commission's decision comports with the City's policies. *Thacker*, 2021 WL 3124309, at *8 (quoting *Swift Roofing, Inc. v. State*, No. M2010-02544-COA-R3-CV, 2011 WL 2732263, at *7 (Tenn. Ct. App. July 13, 2011)). Under similar circumstances, we have found the best remedy is to vacate the decision and remand this matter to the Commission. *Id.*; *see Smith v. Amerisure Ins. Co.*, No. 03A01-9406-CV-00223, 1994 WL 679066, at *1 (Tenn. Ct. App. Dec. 5, 1994) ('We have made a thorough review of the record and are of the opinion complete justice cannot be had by reason of defects in the record.')."

CONSTITUTIONAL LAW – U.S.

1. First Amendment – Qualified immunity denied - To make out a First Amendment retaliation claim, plaintiff must show: (1) that she engaged in First Amendment protected activity; (2) that defendant undertook an adverse action that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) that there is a causal connection between plaintiff's protected activity and defendant's adverse action - Government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right - Because nothing justifies harassing people for exercising their constitutional rights, a deterrent effect on speech need not be great to be actionable - On multiple occasions, the court has held that when an official responds to speech with threats of physical harm, that response constitutes an adverse action that would deter a person of ordinary firmness from speaking - A threat to shoot a person because of her protected speech is an adverse action sufficient to support a First Amendment retaliation claim - Defendant was not exercising his First Amendment right when he brandished a firearm in response to the plaintiff's comments- Right was clearly established so that an official would understand that what he was doing violates the First Amendment free speech rights of the plaintiff - Although public officials have the right to respond publicly to criticism lodged against them, they are not permitted to do so with the intent of injuring the complainant and chilling such a person from continuing to exercise his or her constitutional rights

PATRICIA MACINTOSH v. RON CLOUS, Grand Traverse County Commissioner, in his individual capacity
SIXTH CIRCUIT COURT OF APPEALS No. 22-1015 Decided and Filed May 31, 2023

"During the public comment period in a Zoom meeting of the Grand Traverse County Commission, Patricia MacIntosh expressed her concern about the Commission's prior invitation to and endorsement of the Proud Boys, a group that has been designated an extremist group and a hate group. She requested that the Commissioners make a public statement condemning the group's violent behavior. In response, Commissioner Ron Clous produced a high-powered rifle and displayed it to MacIntosh and the viewing audience. MacIntosh sued Clous and the County,

alleging that Clous unconstitutionally retaliated against her for exercising her First Amendment rights and that the County had an unconstitutional policy or practice of allowing this kind of First Amendment retaliation. Defendant Clous appeals the district court's denial of his motion to dismiss based on qualified immunity. Because MacIntosh plausibly alleged that Clous violated MacIntosh's free speech rights and Sixth Circuit caselaw put him on clear notice that his actions were unconstitutional, we affirm the denial of Clous's motion to dismiss."

"In this appeal challenging the denial of a motion to dismiss, we accept as true the well-pleaded facts in the complaint. *See Rudd v. City of Norton Shores*, 977 F.3d 503, 507 (6th Cir. 2020). The Defendants also attached the full video of the meeting in question as an exhibit to their motion to dismiss. '[A] court ruling on a motion to dismiss 'may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice.'' *Bailey v. City of Ann Arbor*, 860 F.3d 382, 386 (6th Cir. 2017) (quoting *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003)) (emphasis omitted). We take judicial notice of the video recording of the public government meeting and consider it along with the complaint and its exhibits, which provide the following facts."

"Around March 4, 2020, the Grand Traverse County Commission held a Board meeting to which it invited at least two members of the Proud Boys, a group that has been designated an extremist and hate group: For instance, the group was notorious for organizing a 2017 white supremacist rally in Charlottesville, Virginia, at which a woman was killed. At that Commission meeting, the Proud Boys members spoke in favor of a resolution that would designate the county a 'Second Amendment Sanctuary' and at least one of them carried a firearm. The Commission passed the resolution and praised the Proud Boys, despite their known violence and support of white supremacy."

"On January 20, 2021, fourteen days after the January insurrection, the Grand Traverse County Board of Commissioners held a public meeting on Zoom (due to the ongoing pandemic) that included a public comment portion. Many citizen attendees dialed in by phone, but the Commissioners, including Clous, were visible on video. Directly before MacIntosh gave public comment, a County citizen identified as Kate Dahlstrom spoke. Dahlstrom criticized the Commission for allowing the Proud Boys to speak at the earlier County Commission meeting, noted that the Proud Boys have been labeled a hate group and an extremist group, and asked the Board members to publicly state that they did not belong to 'this hate, extremist, and white supremacist group, or any similar group.' In response, the Board Chairman chastised her in an aggressive outburst and defended the Proud Boys, arguing that they were not a hate group. He ended by telling her that her opinions and political speech were not welcome in the meeting, specifically stating that 'I don't really appreciate this forum being used to spread misinformation about me or groups; you can do that in your magazines or editorials.' The Complaint alleges that it was unusual for Commissioners to respond to public comment rather than listening; another Commissioner questioned the Chair's actions, asking whether it was appropriate to be responding to public comment in that manner. In response to that Commissioner's question, the Chairman again responded in an irritated tone, accusing Dahlstrom of 'spreading lies.'"

"MacIntosh was the next to speak during the public comment period. She criticized the Commission's actions supporting the Proud Boys, expressing concern about the Proud Boys' participation in the violent insurrection at the nation's Capitol building, which she compared to political violence in their own state—such as the occupation of the Michigan Capitol building by people with assault rifles and the plot to kidnap and murder Michigan's governor. MacIntosh then asked the Commission to 'please make some sort of a public statement for the community that you do not accept the behaviors' of the Proud Boys and similar violent groups. In response, Clous stood up and briefly left the frame, returning with a high-powered rifle that he displayed to the camera with a smirk. The Board Chairman laughed. Clous admits that he got his rifle in response to MacIntosh's public comment."

"MacIntosh alleges that Clous's actions made her feel fearful, intimidated, and physically threatened. Fear and concern for her safety have deterred MacIntosh from speaking at subsequent public governmental meetings, including at meetings held to address Clous's conduct toward her. And MacIntosh also alleges that due to Clous's actions, she began to receive threatening, anonymous communications late at night and has felt compelled to make a report to the police for her own protection."

"Publicly elected officials and other community members also expressed concern and fear. At a special meeting held to address Clous's actions, about 100 community members made comments over four hours, 'the great majority' of which 'expressed shock, fear, and anger' at Clous's behavior. Some people making public comment at this meeting said that they were afraid to give their names—more simply refused to give their names when asked. Another Commissioner felt that the incident was serious enough to merit proposing a resolution to censure Clous, which the Commission voted down. The local newspaper published an editorial characterizing Clous's behavior as intimidating conduct designed to discourage MacIntosh from speaking freely."

"Qualified immunity protects governmental officials from suit as long 'as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The ultimate question is 'whether a reasonable [official] could have believed [the challenged action] to be lawful, in light of clearly established law and the information [he] possessed.' *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). A qualified immunity analysis requires a two-pronged inquiry. The first prong addresses whether the facts, 'when taken in the light most favorable to the party asserting the injury, show the [defendant's] conduct violated a constitutional right.' *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015). The second prong asks whether the right was 'clearly established such 'that a reasonable official would understand that what he is doing violates that right.'' *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001))."

"Although the plaintiff ultimately bears the burden of showing that a defendant is not entitled to qualified immunity, that burden is not high at the 12(b)(6) stage: Reading the complaint in the light most favorable to the plaintiff, it need only be 'plausible' that an official's acts violated a clearly established constitutional right. *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (quoting *Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 562 (6th Cir. 2011)). And although qualified immunity is available at the motion to dismiss stage, 'it is generally inappropriate . . . to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.' *Anders v. Cuevas*, 984 F.3d 1166, 1175 (6th Cir. 2021) (quoting *Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015))." …

"To make out a First Amendment retaliation claim, MacIntosh must show: (1) that she engaged in First Amendment protected activity; (2) that Clous undertook 'an adverse action' that would deter 'a person of ordinary firmness from continuing to engage in that conduct'; and (3) that there is a 'causal connection' between MacIntosh's protected activity and Clous's adverse action. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (per curiam). The parties do not dispute that Clous acted in response to MacIntosh's public comment, which was protected speech."

"Instead, the parties' dispute centers on the second element. Clous argues that his display of the rifle was not an 'adverse action' that would deter a 'person of ordinary firmness' from exercising her First Amendment rights, component (2). *Thaddeus-X*, 175 F.3d at 394. We explained in *Thaddeus-X* that 'government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right.' *Id.* at 386. An official action is adverse only if it could ''deter a person of ordinary firmness' from the exercise of the right at stake.' *Id.* at 396 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982))."

"Whether an action is severe enough to deter a person of ordinary firmness is a question of fact. *Id.* at 398-99. Because 'nothing justifies 'harassing people for exercising their constitutional rights,'' a deterrent effect on speech 'need not be great' to be actionable. *Anders*, 984 F.3d at 1175 (quoting *Thaddeus-X*, 175 F.3d at 397). Even at the summary judgment stage, '[the adverse action] threshold is intended to weed out only inconsequential actions, and is not a means whereby solely egregious retaliatory acts are allowed to proceed.' *Thaddeus-X*, 175 F.3d at 398. Based on this standard, at issue here is whether Clous's 'threats or deprivations' qualify as 'so de minimis that they do not rise to the level of being constitutional violations.' *Id.*"

"On multiple occasions, we have held that when an official responds to speech with threats of physical harm, that response constitutes an adverse action that would deter a person of ordinary firmness from speaking. In *Thaddeus-X*, the prison officials' actions were adverse when they responded to prisoners' complaints with 'physical threats' of assault, along with other harassment and threatened transfer to an undesirable area of the prison. *Id.* at 398-399. And in *Zilich v. Longo*, we held that city officials acted adversely when they threatened to physically harm the plaintiff during a meeting, along with other actions. 34 F.3d 359, 365 (6th Cir. 1994)."

"The key statements in *Zilich* are particularly relevant here. Zilich, a city council member, made himself 'a thorn in the side of the mayor and his administration' by challenging various city policies and actions. *Id.* at 361. During that time, Zilich's home and car were anonymously vandalized, and he and his wife received anonymous, threatening phone calls. *Id.* Contemporaneously, a witness reported to Zilich that he had attended meetings in which the mayor and others discussed silencing Zilich and harming Zilich and his family, including by 'shooting him.' *Id.* We allowed Zilich to proceed with his First Amendment retaliation claim, reasoning that the defendants were not entitled to qualified immunity because '[no] reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment and vandalism.' *Id.* at 365. *Zilich*, moreover, was decided on the more demanding summary judgment standard. Here, on a motion to dismiss standard, MacIntosh need only allege facts that, construed in her favor, make it 'plausible' that Clous's acts violated her clearly established constitutional rights. Under the more demanding summary judgment standard, the *Zilich* court found the adverse nature of the defendants' actions 'clearly established' for qualified immunity purposes—despite the defendants' claim that their threats had been meant as jokes and even though Zilich himself was not present at the meeting when the defendants made the threats. *Id.*"

"MacIntosh alleges that she exercised her right to speak before the Commission, requesting that the Commission disavow the Proud Boys' political violence. Clous responded to her protected speech by displaying a high-powered firearm to the camera—a threat with a deadly weapon that MacIntosh interpreted as 'a symbolic message to say 'stop or else'' he would use that weapon against her—and the Board Chairman laughed. That action was followed by late night, anonymous, phone calls threatening MacIntosh. *Zilich* applies here: A threat to shoot a person because of her protected speech is an adverse action sufficient to support a First Amendment retaliation claim."

"In this world of virtual communication, a message can be conveyed through a live image that, in earlier times, might have required a verbal or written exchange. Virtually smirking and displaying a high-powered rifle at someone during a tension-filled public meeting is pregnant with dangerous meaning in the same way as the verbal expression of intent to harm made outside Zilich's presence. Finally, MacIntosh received threatening late-night phone calls, which, like those received in *Zilich* were anonymous and occurred following Clous's threatening behavior. Based on these factual parallels, Clous was on notice that he was accountable for communicating a threat against a citizen who was exercising her right to speak in the public square."

"The facts alleged in the Complaint also demonstrate that Clous's threat would deter a person of ordinary firmness from speaking at future meetings. MacIntosh plausibly alleges that she was deterred from speaking at—or even attending—later meetings. And other community members were chilled in their speech, as demonstrated by the fact that those who did speak in opposition to Clous's actions at later meetings were afraid to or refused to give their names. The impact of Clous's conduct on multiple community members proves MacIntosh's point—people of ordinary firmness would be deterred or chilled from fully exercising their speech rights." …

"Clous argues that his action in wielding the rifle was protected as his own 'expressive conduct', and that MacIntosh cannot 'infringe upon [his] rights by suing him for his expressions of opinion on public matters.' But '[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for a different reason, would have been proper.' *Bloch*, 156 F.3d at 682 (quoting *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984)). We specifically confronted this question in *Bloch* and rejected the claim that a public official's disclosure of humiliating details of the plaintiff's rape could not be adverse action because it was the official's own First Amendment speech. *Id.* at 681. We held that '[the official's] right to respond to [the plaintiff's] criticism is not unlimited.' *Id.* Although public officials have 'the right to respond public[ly] to[] criticism lodged against them,' they are not permitted to do so 'with the intent of injuring the complainant and chilling such a person from continuing to exercise his or her constitutional rights.' *Id.* Here, MacIntosh has met her burden to allege that Clous's conduct was motivated by such impermissible intent. Clous's argument is unavailing: under *Bloch*, his conduct constitutes adverse action whether or not it was his own speech."

"… *Bloch*, however, does address this situation and it tells us that a public official may not speak in response to a private person with the intent to injure her and chill her from exercising her First Amendment rights. 156 F.3d at 682."

"Taking her well pleaded facts as true and construing them in her favor, as we must, MacIntosh has met her burden at the motion to dismiss stage to allege an adverse action. She therefore adequately alleges a violation of her First Amendment rights."

"The second prong of the qualified immunity analysis asks whether the right was 'clearly established such 'that a reasonable official would understand that what he is doing violates that right.'' *Mullins*, 805 F.3d at 765 (quoting *Saucier*, 533 U.S. at 202)." …

"We have answered this question before under analogous circumstances. When confronted with actions that included defendants' discussion of harming the plaintiff by 'shooting him,' the *Zilich* court concluded that 'no reasonable official could possibly believe that it was constitutionally permissible to retaliate against a political opponent' with 'physical threats.' 34 F.3d at 365. *Zilich* presents a useful parallel to the Zoom meeting here, as Zilich was not present at the meeting during which those defendants made threats; instead, a meeting attendee later told him about the threats. *Id.* at 361. Even though Zilich was not present to hear the threats, and defendants claimed that the threats were 'jokes,' we concluded that no official of reasonable competence could disagree that the purported physical threats were in fact unconstitutional adverse actions. *Id.* at 364-65 (quoting *Mumford v. Zieba*, 4 F.3d 429, 423 (6th Cir. 1993))."

"Like the *Zilich* defendants' verbal threat to shoot the plaintiff, moreover, Clous responded to MacIntosh's request to condemn violence by displaying a high-powered rifle—a visceral threat of harm made clear by the context of the parties' discussion of political violence. The remote nature of the Zoom meeting makes no difference, as *Zilich* made clear that a threat to shoot a person is a qualifying adverse action regardless of whether the targeted person

witnesses the threat or whether the threatened harm is likely to occur immediately. 34 F.3d at 364-65. *Zilich* established that threatening gun violence to silence a political opponent constitutes unconstitutional adverse action. Clous had fair warning that it was impermissible to brandish a firearm in response to a citizen's request that he condemn violence."

"And in *Thaddeus-X*, as explained earlier, we concluded that an adverse action 'is not static across contexts,' and that '[p]risoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse.' 175 F.3d at 398; *see also Rudd*, 977 F.3d at 514 ('We have calibrated the person-of-ordinary-firmness test to the plaintiff'). The *Thaddeus-X* plaintiff was a prisoner, and we concluded there that the plaintiff's allegations, 'if true, certainly meet the standard' for adverse treatment because '[h]arassment, *physical threats*, and transfer' within the prison 'would likely have a strong deterrent effect' on the plaintiff's protected speech. *Id.* at 398 (emphasis added). Here, Clous's conduct in brandishing a weapon was proscribed by our conclusion in *Thaddeus-X* that physical threats constitute adverse action—especially because MacIntosh was neither a prisoner nor a public employee. She was instead an average citizen exercising her right to speak during a public comment period at a Commission meeting, the most protected category in determining whether an action is adverse. Here, '[t]he standard is reduced even more. . . because of the plaintiff before the court—an ordinary citizen.' *Rudd*, 977 F.3d at 514."

"No reasonable official could believe that it was permissible to brandish a deadly weapon in response to MacIntosh's public comment asking the official to condemn violence. Taken as true, MacIntosh's allegations plausibly show that Clous is not entitled to qualified immunity because it was clearly established that Clous's conduct violated MacIntosh's First Amendment rights. The district court properly denied him qualified immunity."

2. First Amendment – Plaintiff was removecartd from the county's towing list because he criticized the county executive in a Facebook post – Plaintiff must prove: (1) that plaintiff engaged in speech protected by the First Amendment; (2) that county executive took an adverse action against him; and (3) that a causal connection exists between the speech and action – Criticism of public officials falls at the First Amendment's core –). For a First Amendment plaintiff to recover under § 1983, protected speech must be a but-for cause of a harmful action - This test is met if a plaintiff would not have suffered the harm but for the speech, but is not met if the plaintiff would have suffered the harm even if the plaintiff had stayed silent - When public employees or contractors allege that the government has retaliated against them because of their speech, the Court has implemented the required but-for test using a burden-shifting approach - A plaintiff must first show that speech was a substantial or motivating factor of a harmful action - If the plaintiff meets this lower causation standard, the burden shifts to the government defendants, and they can avoid liability by proving that they would have taken the same action even if the plaintiff had not spoken - Although the plaintiffs have offered enough evidence to create a jury question over whether county executive violated the First Amendment, that fact alone does not suffice to seek damages from County - The County may face liability under § 1983 only for its own actions, not for the actions of county executive on a respondeat superior theory - To make the County liable for county executive's conduct, plaintiffs must show that this conduct arose from a county policy or custom - County is not liable for county executive's actions because plaintiffs did not tie the actions to any county policy

BILLY LEMASTER and AMANDA LEMASTER dba Lemaster Towing and Recovery v. Lawrence County, Kentucky: Phillip L. Carter, Lawrence County Judge Executive, in his individual and official capacities
SIXTH CIRCUIT COURT OF APPEALS No. 22-5135 Filed and Decided April 11, 2023

"Billy and Amanda Lemaster run a towing business in Lawrence County, Kentucky. The County placed their business on its 'rotation list' of companies to call when it needed to order a tow. Soon after Phillip Carter began managing the County, Billy Lemaster criticized his decision to fire an employee. According to the Lemasters, this criticism led Carter to orchestrate their removal from the County's rotation list in violation of the First Amendment. But the district court held that the Lemasters did not produce enough evidence to get a jury trial over whether Lemaster's criticism motivated Carter's actions. We disagree and clarify the relevant causation rules in the process. Yet we agree with the district court's other conclusion that the Lemasters could not hold the County liable for Carter's actions because they did not tie the actions to any county policy. We thus reverse the court's grant of summary judgment to Carter but affirm its grant of summary judgment to Lawrence County."

"The Lemasters live in Lawrence County, a rural Kentucky county bordering West Virginia. In 2018, they operated a small towing business, Lemaster Towing & Recovery. Billy (whom we will call Lemaster from here on) also served as the fire chief of the all-volunteer Cherryville Fire Department. Amanda, his wife, served as its treasurer."

"Both in his role as fire chief and in his towing business, Lemaster sparred with Lawrence County's incumbent 'judge executive,' the elected head of its executive branch. As fire chief, Lemaster believed that the fire department's crumbling building needed substantial repairs. But the judge executive would not commit to help."

"As a tow-business operator, Lemaster disagreed with the County's management of its 'rotation list.' The County's E-911 Center had several companies on a list to call when the center needed to order a tow (say, because of an accident). Under the County's official policy, dispatchers needed to rotate through the companies on the list so that the companies received an equal share of the work. If the company at the top did not respond, dispatchers would notify the next company on the list until they reached one that could report to the scene. The Lemasters managed to get Lemaster Towing on this list, and Lemaster estimated that their business earned 90% of its income from these calls. But Lemaster believed that the E-911 Center had not been 'properly' rotating between companies. Lemaster Dep., R.41-1, PageID 232."

"The judge executive was up for reelection in 2018. Phillip Carter, who had served in that role before, decided to run against the incumbent. Leading up to the election, Lemaster supported Carter by putting up yard signs and persuading citizens to vote for him. According to Lemaster, he did so because Carter promised to fix the rotation list and help repair the fire-department building."

"Carter won the election and took office in January 2019. He quickly fired the County's emergency management assistance (EMA) director. This decision hurt Carter's relationship with Lemaster. Lemaster believed that Carter had fired the EMA director because of Carter's ongoing feud with the director's father. In April, Lemaster wrote a Facebook post criticizing the decision and calling for the County to reinstate the director."

"Although this Facebook post did not mention Carter by name, it did not sit well with him. The next day, Carter called Lemaster 'cursing' about the post. *Id.*, PageID 246. Lemaster began to record the call and threatened to post it on Facebook too. They discussed two things. Carter complained about Lemaster's post. He reiterated that he had been the judge executive for just three months. He added: 'don't be putting that stuff on there and giving me a black eye, because it reflects on me.' Tr., R.41-2, PageID 297. Lemaster agreed to take the post down. Yet he complained that the rotation list still had not improved. Carter admitted that he had forgotten about the issue and promised to 'go in the morning and tell 911 to make sure that they rotate everybody.' *Id.*, PageID 299. After this conversation, Lemaster deleted his post. Carter then appeared to fix the rotation list. According to Lemaster, his business received a 'steady volume' of calls from the E-911 Center over the next few months. Lemaster Dep., R.41-1, PageID 248. Lemaster estimated that his company went from receiving no more than one call per month up to receiving six per month."

"But Carter soon took other actions against Lemaster. By June, Carter began to disparage the Lemasters' management of the Cherryville Fire Department. The Lemasters had spent public funds repairing a truck that they called the 'dozer.' *Id.*, PageID 250. Carter did not think that the department owned a bulldozer. So he reported the Lemasters to the state fire commission, accusing them of fraud. After an audit, the fire commission told Lemaster that it did not 'find anything' concerning. *Id.*, PageID 255, 269."

"Around the same time, Wilma McKenzie, a county resident who had once worked at the fire department, started to spread gossip about the Lemasters. Lemaster believed that McKenzie was doing Carter's 'dirty work' by telling everyone in their community that Lemaster was stealing from the fire department and had been indicted. *Id.*, PageID 249. Lemaster also believed that McKenzie was circulating a 'petition' to 'remove [him] as fire chief and to build a new fire department[.]' *Id.* McKenzie later told Lemaster's friend over the phone that she had been circulating a petition 'for Phil Carter' to 'get signers to build a new fire department.' Tr., R.41-11, PageID 334, 337."

"Concluding that Carter was conspiring with McKenzie to incite the community against him, Lemaster again took to Facebook. On August 29, 2019, he posted: 'Is Phillip L. Carter and Wilma Mckezie [sic] a couple now? Asking for a friend[.]' Post, R.42-2, PageID 572. According to Lemaster, he meant to humorously imply that the pair were 'politically,' not 'romantically,' involved. Lemaster Dep., R.41-1, PageID 260."

"Five days later, the E-911 Center sent a terse email to dispatchers. The email's subject identified Lemaster Towing and the Cherryville Fire Department. Its body stated in all caps: 'Per Judge Carter do not tone them out on any fire calls[;] use nearest department[;] . . . Lemaster Towing is no longer on the rotation list[.]' Email, R.19-5, PageID 96. Lemaster learned that Carter had told dispatchers not to call his fire department and had removed Lemaster Towing from the rotation list. On September 7, he confronted Carter over the phone. During their conversation, Carter complained about the Cherryville Fire Department's failure to respond to emergency calls. But Carter denied telling the E-911 Center to ignore the department or to take Lemaster Towing off the rotation list. Carter alleged that the center must have misunderstood his instructions and promised to clear things up."

"The same day, the center emailed the dispatchers again. The email explained that, at the direction of Carter, dispatchers should call the Cherryville Fire Department first and rely on other fire districts only if it did not respond. Yet the email said nothing about reinstating Lemaster to the rotation list. The E-911 Center's calls to Lemaster Towing thus 'dropped off tremendously.' Lemaster Dep., R.41-1, PageID 256."

"The Lemasters sued Carter and Lawrence County under 42 U.S.C. § 1983 and state law. They alleged that Carter violated the First Amendment by removing Lemaster Towing from the rotation list in retaliation for Lemaster's criticisms. They sought to hold the County liable for Carter's unconstitutional conduct under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Lemasters also raised, among other state-law causes of action, a claim for tortious interference with economic relations against Carter."

"The Lemasters' First Amendment claim against Carter under 42 U.S.C. § 1983 requires them to prove: (1) that Lemaster engaged in speech protected by the First Amendment; (2) that Carter took an adverse action against him; and (3) that a causal connection exists between the speech and action. *See DeCrane v. Eckart*, 12 F.4th 586, 593 (6th Cir. 2021); *Anders v. Cuevas*, 984 F.3d 1166, 1175 (6th Cir. 2021). As their 'protected speech,' the Lemasters rely on two of Lemaster's Facebook posts: his post from April 2019 criticizing the County for firing an employee and his post from August 2019 asking if Carter and McKenzie were a couple. As their 'adverse action,' they allege that Carter took business away from Lemaster Towing. They lastly assert that plenty of evidence connects Carter's decision to injure their business to the Facebook posts."

"… We start with the easiest element at this stage: Could a reasonable jury find that Carter took an 'adverse action' against the Lemasters? *DeCrane*, 12 F.4th at 593. The First Amendment protects against only those retaliatory actions that might silence an ordinary person. *See Rudd v. City of Norton Shores*, 977 F.3d 503, 514 (6th Cir. 2020). Under this test, we have long held that the removal of a tow company from a public 'tow call list' would likely deter the ordinary company from speaking in order to avoid losing this government-generated business. *Lucas v. Monroe County*, 203 F.3d 964, 974 (6th Cir. 2000); *see Anders*, 984 F.3d at 1176–77; *cf. O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715–16, 720 (1996)."

"Carter objects that he never removed Lemaster Towing from the rotation list and that the employee who sent this email 'misunderstood' his directions. Carter Dep., R.42-1, PageID 443–44. Carter allegedly intended for the email to convey only that the dispatchers should call another fire department if the Cherryville Fire Department did not respond. He did not mean for the email to remove the Lemasters' business from the rotation list."

"Yet a rational jury could disbelieve this 'misunderstanding' defense. For instance, Carter asserts that he tried to fix the problem by instructing an employee to send a clarifying email. But this follow-up email referred only to the fire department. The email did not mention Lemaster Towing, let alone restore it to the rotation list. Other parties have also contradicted Carter's claim." …

"… The next element presents a harder question (at least in part): Did the First Amendment protect Lemaster's speech? *See DeCrane*, 12 F.4th at 593. The First Amendment applies differently to a claim that the government has denied a party a benefit due to the party's speech as compared to a claim that the government has criminally punished the party for this speech. *See Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 675–76 (1996). Plaintiffs who allege that their speech has deprived them of a benefit (like the placement on a tow rotation list) must show that the speech addressed 'a matter of public concern.' *Lucas*, 203 F.3d at 973 (citation omitted). And their interest in speaking must outweigh the government's interest in limiting their speech under the 'balancing test' from *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968). *Umbehr*, 518 U.S. at 678."

"Applying this test, Carter does not dispute that the First Amendment protected Lemaster's April 2019 Facebook post. *See Lemaster*, 2022 WL 257067, at *5; Appellees' Br. 15. Speech addresses a matter of public concern if it relates to a 'matter of political, social, or other concern to the community.' *Marquardt v. Carlton*, 971 F.3d 546, 549 (6th Cir. 2020) (citation omitted). And speech that criticizes an elected official's operation of the government relates to a matter of political and social concern. *See Anders*, 984 F.3d at 1176; *Lucas*, 203 F.3d at 973–74. Indeed, criticism of public officials falls at the First Amendment's core. *See Rudd*, 977 F.3d at 513–14. Lemaster's post engaged in this type of speech because he criticized Carter's decision to terminate the County's EMA director. Carter also does not even try to suggest that he had any valid reason to restrict this speech under *Pickering*'s balancing test."

"At the same time, the Lemasters disagree with Carter (and the district court) over whether the First Amendment protected Lemaster's August 2019 Facebook post asking whether Carter and McKenzie were a 'couple.' Post, R.42-2, PageID 572. Whether the First Amendment protects this rhetorical question raises a tougher issue. On the one

hand, the district court took the post merely to pry into Carter's and McKenzie's 'personal lives,' not into government operations. *Lemaster*, 2022 WL 257067, at *5. On the other hand, we must consider the post in 'context' and against the 'whole record.' *Marquardt*, 971 F.3d at 549 (citation omitted). Lemaster meant to convey that the pair had a 'political[]' connection and that Carter had been using McKenzie as a private-citizen front to conceal government-engineered criticism. Lemaster Dep., R.41-1, PageID 249, 260. The small community in which Carter and Lemaster lived also may well have known of their disagreements and understood Lemaster's innuendo."

"But we need not resolve this difficult question. The Lemasters ask us to address it 'only' if we reject their factual allegation that Lemaster's earlier post in April caused Carter to remove Lemaster Towing from the rotation list. Reply Br. 1. As explained below, a jury must resolve that causation issue. And Carter testified that he had not even seen the later August post until his deposition in this lawsuit. Carter Dep., R.42-1, PageID 495. He thus could not claim at trial that he harmed the Lemasters' towing business because of this second post rather than the first one. Our choice to avoid this question thus should not cause any undue trial complications."

" … That resolution leads us to the final element: Could a reasonable jury find an adequate 'causal connection' between Lemaster's Facebook post in April and Carter's removal of Lemaster Towing from the rotation list in September? *DeCrane*, 12 F.4th at 593. Because the district court highlighted confusion in our caselaw on the governing causation rules, we take this opportunity to clarify things. *See Lemaster*, 2022 WL 257067, at *8; *see also Spithaler v. Smith*, 803 F. App'x 826, 829–30 (6th Cir. 2020). For a First Amendment plaintiff to recover under § 1983, protected speech 'must be a 'but-for' cause' of a harmful action. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 260 (2006)). This test is met if a plaintiff would not have suffered the harm 'but for' the speech. *Id.* It is not met if the plaintiff would have suffered the harm even if the plaintiff had stayed silent. *See id.*; *see also Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020)."

"When public employees or contractors allege that the government has retaliated against them because of their speech, the Court has implemented the required but-for test using a burden-shifting approach. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977); *see also Umbehr*, 518 U.S. at 675–78. A plaintiff must first show that 'speech was 'a substantial or motivating factor' of' a harmful action. *Anders*, 984 F.3d at 1177 (quoting *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 400 (6th Cir. 2010)). Some statements in our cases have (wrongly) equated this motivating-factor test with but-for causation. *See Spithaler*, 803 F. App'x at 829. But this test does not require a but-for relationship. *See Comcast*, 140 S. Ct. at 1017; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013). After all, speech sometimes may motivate a defendant's harmful action even if the defendant would have taken the same action for another reason without the speech. *See Hartman*, 547 U.S. at 260."

"If the plaintiff meets this lower causation standard, the burden shifts to the government defendants. *See Nieves*, 139 S. Ct. at 1722. They can avoid liability by proving that they would have taken the same action even if the plaintiff had not spoken. *See Mt. Healthy*, 429 U.S. at 287. In other words, they must prove the *absence* of but-for causation. *See Massey v. Johnson*, 457 F.3d 711, 717 & n.2 (7th Cir. 2006); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993)."

"The Court's burden-shifting approach adds complexity to our usual summary-judgment rules. When a defendant moves for summary judgment on an issue, the standard that the defendant must meet depends on who will bear the burden of proof at trial. *See Pineda v. Hamilton County*, 977 F.3d 483, 491 (6th Cir. 2020). If the plaintiff will bear this burden, the defendant's summary-judgment briefing need only show that the record lacks evidence from which 'a rational trier of fact' could find for the plaintiff on the issue. *See Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020) (citation omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Since a free-speech plaintiff must prove the motivating-factor test, *see Mt. Healthy*, 429 U.S. at 287, this standard applies to the defendant's claim that speech did not even motivate a harmful action."

"If, by contrast, the defendant will bear the burden of proof (as when it seeks summary judgment on an affirmative defense), 'its burden of production is greater' at the summary-judgment stage. 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2727.1, at 492 (4th ed. 2016). The defendant must affirmatively introduce evidence of such weight that no rational jury could disagree with it. *See Surles v. Andison*, 678 F.3d 452, 455–56 (6th Cir. 2012); *see also Leone v. Owsley*, 810 F.3d 1149, 1153–54 (10th Cir. 2015) (citing cases). Since a free-speech defendant must prove the lack of but-for causation, *see Mt. Healthy*, 429 U.S. at 287, this standard applies to any claim that it would have taken the same harmful action even if the plaintiff had not spoken, *see Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1056–57 (6th Cir. 2001)."

"… Carter seeks to show that Lemaster's April Facebook post did not even partially motivate his decision to remove Lemaster Towing from the rotation list. We thus must consider whether the record would allow 'a rational trier of fact' to find the contrary. *Viet*, 951 F.3d at 823 (citation omitted)."

"To answer this causation question in the free-speech context, our cases typically start by looking at the time gap between the protected speech and the harmful action. *See, e.g.*, *Anders*, 984 F.3d at 1177; *Vereecke*, 609 F.3d at 400. As a common-sense matter, the more time that passes between the two, the more evidence that a plaintiff must offer to show that the speech motivated the action. *See Vereecke*, 609 F.3d at 400. And vice versa. *See id.* at 401. So a total 'lack of temporal proximity alone can' doom a claim that a plaintiff's speech motivated a defendant's act unless the plaintiff uncovers smoking-gun evidence of this motivation. *Anders*, 984 F.3d at 1177 (citation omitted). At the other extreme, if the act occurs within 'days or weeks' of the speech, the close proximity can sometimes (if rarely) permit an inference that the one motivated the other. *George v. Youngstown State Univ.*, 966 F.3d 446, 460 (6th Cir. 2020); *cf. Sensabaugh v. Halliburton*, 937 F.3d 621, 630 (6th Cir. 2019); *Vereecke*, 609 F.3d at 401."

"In most cases, though, a plaintiff will show some moderate time gap—say, a matter of months. *See Anders*, 984 F.3d at 1177–78; *Benison v. Ross*, 765 F.3d 649, 661–63 (6th Cir. 2014). Our summary-judgment inquiry then asks whether the plaintiff has offered enough 'other evidence of retaliatory conduct' apart from this temporal proximity. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008); *see also, e.g.*, *Bluegrass Dutch Tr. Morehead, LLC v. Rowan Cnty. Fiscal Ct.*, 734 F. App'x 322, 329 (6th Cir. 2018)."

"Here, about four and a half months separate Lemaster's Facebook post and Carter's order to remove Lemaster Towing from the rotation list. This time difference does not permit Lemaster to rely on temporal proximity alone. *Cf. Sensabaugh*, 937 F.3d at 629–30. But the difference is not so large that it presumptively forecloses the Lemasters' claim. *Cf. Benison*, 765 F.3d at 661. Indeed, in another case involving a tow company, we held that a four-month gap could show that the company's speech motivated its removal from a 'towing list' if the company unearthed other evidence of a retaliatory motive in discovery. *See Anders*, 984 F.3d at 1177–78."

"The Lemasters have unearthed this evidence. To begin with, they have shown that Carter was upset by Lemaster's speech. On the day after Lemaster criticized Lawrence County for firing its EMA director, Carter called Lemaster up 'cursing [him]' about this criticism and generally 'being disrespectful[.]' Lemaster Dep., R.41-1, PageID 246. Far from 'affirm[ing]' Lemaster's right to criticize the government, *Sensabaugh*, 937 F.3d at 630, Carter all but asked Lemaster to stay quiet because his criticism made Carter 'look bad,' Tr., R.41-2, PageID 301."

"And while Carter appeared to fix the problems with the rotation list after Lemaster agreed to delete his post, the Lemasters offered evidence that Carter engaged in a 'pattern of retaliatory mistreatment' from then on. *Benison*, 765 F.3d at 662." …

"For another thing, a reasonable jury also could find that Carter convinced McKenzie to spread gossip about the Lemasters to try to force them out of the fire department." …

"The way that Carter removed Lemaster Towing from the rotation list also could lead a jury to find that he did so for an improper reason. According to the director of the E-911 Center, a county board must decide whether to add or remove a tow company from the rotation list. Ellis Dep., R.57, PageID 794. But Carter did not ask the board to remove Lemaster Towing. *Id.*, PageID 794, 796. Nor did he publicly announce that he had done so himself. Instead, he instructed the E-911 Center to send an internal email stating—without explanation—that the County had removed Lemaster Towing from the list. Email, R.19-5, PageID 96. And Carter did not correct this notice even after it became public and Lemaster confronted him about it. Most telling, Carter continued to privately tell dispatchers like Barbara Howard that they should not call Lemaster Towing—again, without explanation—even after the E-911 Center director contradicted him and instructed dispatchers to 'call [Lemaster].' Howard Dep., R.43-1, PageID 589–92. As Howard noted, the director 'would say, call him; the judge would say don't.' *Id.*, PageID 591–92. Howard added that Carter was 'upset' with Lemaster but did not give a 'reason' why. *Id.*, PageID 589, 592."

"Even during this litigation, moreover, Carter has not offered evidence of a valid reason why he would have told dispatchers to avoid Lemaster Towing. He has instead doubled down on his claim that he did not do so. Carter Dep., R.42-1, PageID 443–44; Appellees' Br. 5–6. But a fact dispute exists on that question. And his failure to introduce evidence of a neutral reason for his removal of Lemaster Towing provides further proof that he harbored an improper motive. Indeed, under the well-known test for resolving Title VII claims, employers must articulate a 'legitimate, nondiscriminatory reason' precisely because the absence of such a reason often permits an inference of invidious discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 509–11 (1993); *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253–56 (1981)."

"Carter next suggests that this fire-department dispute (not Lemaster's Facebook post) could have led him to remove Lemaster Towing from the rotation list. Appellees' Br. 18–19. But Carter did not testify that the dispute undergirded his rotation-list decision. He only raises this speculation in briefing. And again, the Lemasters produced evidence that Carter's fire-department accusations 'had no basis in fact.' *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 879 (6th Cir. 2001). These accusations thus may instead represent additional retaliatory acts. Besides, the Lemasters needed to show only that Lemaster's Facebook post motivated Carter's actions; Carter bore the burden to prove that he would have taken the same actions anyway. *See Mt. Healthy*, 429 U.S. at 287. And he did not introduce the 'powerful' evidence required to obtain summary judgment over whether this fire-department dispute would have led him to remove Lemaster Towing from the County's rotation list even without Lemaster's post. *Cockrel*, 270 F.3d at 1056 (citation omitted)."

"In short, this record would allow a rational jury to find that Lemaster's April Facebook post motivated Carter's decision to remove Lemaster Towing from the rotation list." …

"Although the Lemasters have offered enough evidence to create a jury question over whether Carter violated the First Amendment, that fact alone does not suffice to seek damages from Lawrence County. The County may face liability under § 1983 only for its own actions, not for the actions of Carter on a respondeat superior theory. *See Monell*, 436 U.S. at 691. To make the County liable for Carter's conduct, they must show that this conduct arose from a county ''policy' or 'custom.'' *Gambrel*, 25 F.4th at 408 (citation omitted). Yet the district court held that the Lemasters could not tie Carter's 'rogue' actions (unilaterally removing Lemaster Towing from the rotation list) to any such policy or custom. *Lemaster*, 2022 WL 257067, at *10."

"The Lemasters argue on appeal that Carter's actions *automatically* qualified as the County's own policies given his high-level rank. They correctly note that a plaintiff may hold a municipality liable for an official's decision if the municipality has delegated 'authority' to make the decision to that official. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005); *see Bible Believers v. Wayne County*, 805 F.3d 228, 260–61 (6th Cir. 2015) (en banc). But this route to establishing *Monell* liability requires proof that the employee exercised policymaking authority and that the employee's decision was 'final and unreviewable' and so unconstrained 'by the official policies of superior officials.' *Miller v. Calhoun County*, 408 F.3d 803, 814 (6th Cir. 2005) (quoting *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993)); *see Tlapanco v. Elges*, 969 F.3d 638, 658 (6th Cir. 2020)."

"And here, Carter lacked any final say over the rotation list. A county board instead had the 'final authority' over whether to remove a tow company from the E-911 Center's rotation list. *Adair v. Charter County of Wayne*, 452 F.3d 482, 493 (6th Cir. 2006). So the choice to remove Lemaster Towing 'was not the judge's decision to make.' Ellis Dep., R.57, PageID 796."

"… The director of the E-911 Center declared that Carter could not unilaterally remove tow companies from the rotation list. Ellis Dep., R.57, PageID 794. When he learned of Carter's actions, then, he told dispatchers that they must continue to call Lemaster Towing. *Id.*, PageID 797–98. The Lemasters thus did not present enough evidence that Carter lacked oversight from the board. *See Miller*, 408 F.3d at 814."

3. Fifth Amendment – Takings Clause – Ordinance requiring construction of sidewalks – Ordinance created a taking of property - The Court has developed a three-step unconstitutional-conditions test for permit conditions - At the first step, a court asks whether the condition would qualify as a taking if the government had directly required it - no takings problem exists - If so, the government must show a nexus between the condition and the project's social costs; that is, the government must impose the condition because of those costs and not for other reasons - The government next must show a rough proportionality between the condition and the project; that is, the condition's burdens on the owner must approximate the project's burdens on society - Court held that Nollan's unconstitutional-conditions test applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones

KNIGHT v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE
SIXTH CIRCUIT COURT OF APPEALS No. 21-6179 Decided and Filed May 10, 2023

"The Metropolitan Government of Nashville and Davidson County ('Nashville') passed a 'sidewalk ordinance' that imposes sidewalk-related conditions on landowners who seek building permits. To obtain a permit, owners must grant an easement across their land and agree to build a sidewalk on the easement or pay an 'in-lieu' fee that Nashville will use to build sidewalks elsewhere. This ordinance implicates a question about the Fifth Amendment's

Takings Clause that has divided state courts. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari)."

"In particular, the parties here disagree over the 'test' that we should use to judge whether the sidewalk ordinance commits a taking. The landowner plaintiffs ask us to apply the 'unconstitutional-conditions' test that the Supreme Court adopted to assess conditions on building permits in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Nashville responds that the Court has applied *Nollan*'s test only to ad hoc administrative conditions that zoning officials impose on specific permit applicants—not generally applicable legislative conditions that city councils impose on all permit applicants. For legislative conditions, Nashville says, we should turn to the deferential 'balancing' test that the Court adopted to assess zoning restrictions in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)."

"We side with the landowner plaintiffs. Nothing in the relevant constitutional text, history, or precedent supports Nashville's distinction between administrative and legislative conditions. *Nollan*'s test thus should apply to both types, including those imposed by the sidewalk ordinance. Because the district court reached a contrary conclusion, we reverse its grant of summary judgment to Nashville and remand for proceedings consistent with this opinion."

"As every parent can attest, sidewalks serve many beneficial purposes. The legislative council in Nashville, Tennessee, identified some of these purposes when passing its sidewalk ordinance. Children and adults alike can use sidewalks as a safe transportation option for many things, ranging from the daily stroll to school or work to a strenuous exercise on a sunny day. Ordinance, R.1-2, PageID 28. By reducing the number of people who must drive on the streets, sidewalks also relieve traffic congestion. *Id.*, PageID 29. And a network of sidewalks generally increases the value of the surrounding properties, which allows homeowners to resell their homes at higher prices. *Id.*, PageID 28."

"For years, however, Nashville has not invested enough in public sidewalks, especially when considering the city's large population growth. Forced to walk next to fast-moving cars on the city streets, Nashville's pedestrians have felt the effects of these missing walkways. In 2018, 23 pedestrians died in the Nashville area. *Id.* The next year, the area's 'pedestrian death index' reached 99.2—almost double the national average of 55.3. *Id.* To alleviate these dangers, Nashville calculated that it would need to build some 1,900 miles of new sidewalks. *Id.*"

"In 2019, Nashville's council sought to speed up this sidewalk construction by adding the sidewalk ordinance to its zoning code. *Id.*, PageID 28–35; *see* Code of Metro. Gov't of Nashville & Davidson Cnty. ('Nashville Code') § 17.20.120 (2019). The ordinance applies to landowners who seek to build a single- or two-family home in designated areas of the city and its surrounding county. *See* Nashville Code § 17.20.120(A)(2). It also applies to landowners who seek to develop or redevelop multi-family homes and nonresidential buildings in the designated areas. *See id.* § 17.20.120(A)(1); FAQs, R.20-4, PageID 138–39. The owners of covered properties must comply with the sidewalk ordinance as a condition of obtaining a building permit for their proposed development. *See* Nashville Code §§ 16.28.010, 16.28.190."

"The sidewalk ordinance sets different rules for different types of covered properties. It gives the owners of certain properties just one option to obtain a permit: build a sidewalk on their lots that meets the city's design standards. *Id.* § 17.20.120(C). For example, an owner has no choice but to build a sidewalk when a lot sits on the side of a street with existing sidewalks. *Id.* § 17.20.120(C)(1)(c). Likewise, an owner must build a sidewalk on a lot when it would expand the sidewalk network from an 'abutting development' and the city's development plan calls for the expansion. *Id.* § 17.20.120(C)(1)(b); *see also* FAQs, R.20-4, PageID 140."

"If, however, a property falls outside one of the specified categories, the ordinance gives a landowner who seeks a permit an alternative to building a sidewalk. The owner may 'make a financial contribution' to a fund that Nashville will use to build sidewalks in the property's 'pedestrian benefit zone[.]' *Id.* § 17.20.120(D)(1), (3). To help determine the amount of this 'in lieu' fee, Nashville's public-works department must announce each July its 'average' 'cost' to construct a 'linear foot' of sidewalk. *Id.* § 17.20.120(D)(1). For the period from July 2020 to June 2021, the department calculated this cost as $186 per linear foot. Hammond Decl., R.28, PageID 428. Nashville will then rely on this cost-per-linear-foot amount to calculate a landowner's total fee based on the size of what would have been the owner's sidewalk. But the ordinance caps the total fee at three percent of the 'total construction value' of the planned development. Nashville Code § 17.20.120(D)(1)."

"Whether a landowner builds a sidewalk or pays an in-lieu fee, the ordinance imposes another requirement. All landowners must dedicate a 'right-of-way and/or public pedestrian easement' across their property. *Id.* § 17.20.120(E). This dedication will allow the public to use the sidewalk whether it gets built immediately or at some future point. *Id.*"

"Nashville's zoning administrator may grant a full or partial waiver of the ordinance's requirements in various circumstances. *Id.* § 17.20.120(A)(3). Most notably, the administrator may grant a waiver if some 'hardship' (such as utilities or a drainage ditch) will make it difficult for a property owner to build the sidewalk. *Id.* § 17.20.120(A)(3)(a). Separately, if a property does not qualify for the in-lieu fee, the administrator in 'unique' circumstances may grant a waiver that would allow the owner to pay this fee rather than build a sidewalk. *Id.* § 17.20.120(A)(3)(b)."

"If the zoning administrator denies a requested waiver, a property owner may lastly seek a variance from the Board of Zoning Appeals. *Id.* § 17.20.125. The board may grant this variance outright or require the property owner to pay the in-lieu fee or make other design changes as a condition of the board's granting the variance. *Id.*"

"In 2019, James Knight and Jason Mayes both wanted to build homes on properties covered by Nashville's sidewalk ordinance. Knight sought to construct a single-family home on a vacant lot on Acklen Park Drive[.] Knight Decl., R.20-1, PageID 125–26. Because Acklen Park Drive lacks sidewalks, Knight could either build a sidewalk on his lot (which would connect to nothing) or pay the in-lieu fee. *Id.*, PageID 125. But Nashville's public-works department allegedly told Knight's construction manager that a sidewalk would cause stormwater problems and that Knight should not build one. *Id.*, PageID 127; Stevenhagan Aff., R.20-4, PageID 170–71."

"Knight thus asked the zoning administrator for a waiver that would exempt him from any requirement to build a sidewalk or pay a fee. Knight Decl., R.20-1, PageID 127. The administrator denied his request. *Id.* Knight appealed this denial to the Board of Zoning Appeals. *Id.* It rejected his request for a variance and required him to pay the fee or construct a sidewalk under an alternative design that Nashville proposed. *Id.* Nashville officials later calculated Knight's total in-lieu fee for this property as $7,600. *Id.*, PageID 128. Because Knight refused to pay this amount or build the redesigned sidewalk, his permit expired. *Id.* If Nashville would exempt him from the sidewalk ordinance, he would seek another permit for the property. *Id.*"

"Mayes, by comparison, sought to construct a single-family home on his lot on McCall Street. Mayes Decl., R.20-2, PageID 129. The side of McCall Street on which Mayes's property sits also lacks sidewalks (but the other side has them)[.] *Id., PageID 130.*"

"Mayes sought a waiver from the zoning administrator. *Id.*, PageID 130–31. He suggested that Nashville should not make him build 'a sidewalk to nowhere.' *Id.*, PageID 131. The administrator denied Mayes's request because he could pay the in-lieu fee. *Id.* The administrator calculated this fee as $8,883.21. *Id.* Not wanting to delay construction, Mayes opted to pay the fee while he sought a variance from the Board of Zoning Appeals and a refund of the fee. *Id.* The board rejected the variance. *Id.*, PageID 132. Individual members reasoned that the Nashville council had made a policy choice to require the fee and that the board lacked discretion to waive it unless the owner identified a concrete hardship other than the cost. *Id.* Nashville ultimately used Mayes's funds to improve sidewalks located some 2.5 miles away from his property. *Id.*"

"The record leaves unclear whether Nashville sought an easement across Knight's lot and whether it took an easement across Mayes's lot—as the sidewalk ordinance's language requires. *See Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 572 F. Supp. 3d 428, 432 n.3 (M.D. Tenn. 2021). For purposes of this case, then, we will generally assume that the ordinance requires the easement in all circumstances."

"The district court granted summary judgment to Nashville. *Knight*, 572 F. Supp. 3d at 431. The parties spent much of their briefing debating the test to apply to Knight's and Mayes's takings claims. According to Nashville, the court should apply, at most, *Penn Central*'s balancing test governing land-use restrictions. According to Knight and Mayes, it should apply *Nollan*'s unconstitutional-conditions test governing conditions on building permits. The court picked *Penn Central*'s test. *See id.* at 439–43. It reasoned that the unconstitutional-conditions test applies only to 'adjudicative' decisions in which zoning officials, acting on an ad hoc basis, choose the specific conditions to impose on a specific landowner's project. *See id.* at 439–42. The court viewed the sidewalk ordinance as a broadly applicable 'legislative' mandate to require all permit applicants to pay a fee or construct a sidewalk. *See id.* at 442–43. It next held that the ordinance 'easily' met *Penn Central*'s test—a conclusion that Knight and Mayes did not even dispute. *See id.* at 444–45. We review the district court's decision de novo. *See F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 203 (6th Cir. 2021)."

"On appeal, the parties renew their debate about the governing test for Knight's and Mayes's takings claims. To frame this debate, we begin with two basic takings questions: When does direct government interference with private property qualify as a 'taking' of the property? And when may the government nevertheless require an uncompensated taking of an owner's property as a condition of granting the owner a discretionary 'benefit' like a building permit?"

"The Fifth Amendment's Takings Clause, as incorporated against the states by the Fourteenth Amendment, provides: 'nor shall private property be taken for public use, without just compensation.' U.S. Const. amend. V; *see Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897)." …

"Some interferences qualify as '*per se*' or automatic takings that require proper compensation whenever the government engages in them. *See Horne v. Dep't of Agr.*, 576 U.S. 350, 358, 360 (2015). This automatic-taking rule most obviously covers the classic appropriation in which a government seizes every stick in the bundle of rights using its eminent-domain powers. If, for instance, a government confiscates a party's real or personal property to build a park or supply an army, it always must provide fair value for the land or goods. *See Cedar Point*, 141 S. Ct. at 2071; *Horne*, 576 U.S. at 357–59."

"Yet this automatic-taking rule extends beyond classic takings. The rule also applies when the government appropriates only some of the sticks in the bundle of property rights—most notably, the right to exclude others. *See Cedar Point*, 141 S. Ct. at 2072–73. In a long line of cases, the Supreme Court has held that the government 'takes' property if it grants an 'easement' that allows strangers to enter it—whether by land, air, or sea. *Nollan*, 483 U.S. at 831; *see Cedar Point*, 141 S. Ct. at 2073–74. The government thus committed a taking when it allowed union organizers to enter an employer's property for unionizing activities. *See Cedar Point*, 141 S. Ct. at 2074. It committed a taking when it allowed airplanes to fly at low altitudes over the property near its airport. *See United States v. Causby*, 328 U.S. 256, 261–65 (1946). And it committed a taking when it gave the public access to a private marina. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979). This principle has deep roots. As Blackstone opined, the government should pay a landowner if it builds a 'road' through the owner's 'grounds' and allows the public to travel across it. 1 William Blackstone, *Commentaries on the Laws of England* 135 (1765)."

"But the automatic-taking rule has its limits. The Supreme Court has treated government interference with other 'sticks' in the bundle of property rights (most notably, the right to *use* property) differently from interference with the right to *exclude* others. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323–24 (2002). A restriction on the right to use property rarely triggers the automatic-taking rule. The rule applies only if a use restriction bars a landowner from engaging in 'all economically beneficial or productive use of land.' *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The Court has found this criterion met only once, when a government's land-use regulations rendered beachfront properties 'valueless' by barring their owner from building anything on them. *Id.* at 1020."

"Most land-use regulations, by contrast, leave open some uses. Even if a use restriction bars an owner from building a factory, it might allow the owner to build an apartment complex. *Cf. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926). The Court subjects these less severe restrictions to a case-by-case test that asks whether they go 'too far' (with the courts subjectively judging how far is 'too far'). *Cedar Point*, 141 S. Ct. at 2072 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Since *Penn Central*, the Court has balanced several recurring factors to decide whether a use restriction goes too far. *See id.*; *Tahoe-Sierra*, 535 U.S. at 326. *Penn Central*'s balancing test requires courts to ask questions like: What economic impact does the regulation have on the property owner? *See* 438 U.S. at 124. Did the regulation come as a surprise and so interfere with the owner's 'investment-backed expectations'? *Id.* And does the government have an adequate justification for the use restriction? *Id.* at 124–25."

"The government does not always directly interfere with constitutional rights. It sometimes indirectly interferes with them by offering a benefit that it has no duty to provide on the condition that a party waive a right. The government, for example, might not try to bar disfavored speech through a criminal law; it might instead dole out public funds to people only if they agree not to say the disfavored words. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Under its 'unconstitutional-conditions doctrine,' the Supreme Court has placed limits on the government's power to extract waivers of constitutional rights in this way. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013)."

"But what rules divide constitutional from unconstitutional conditions on these otherwise discretionary benefits? One generic rule is clear: If the Constitution allows the government to directly compel a private party to undertake conduct on threat of criminal punishment, the government may indirectly compel that conduct as a condition on a benefit. *See Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 59–60 (2006); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914–15 (6th Cir. 2019) (en banc). The Free Speech Clause thus allowed Congress to require law schools to grant military recruiters access to their campuses as a condition of public funding because Congress could have directly compelled this access without any constitutional problem. *See Rumsfeld*, 547 U.S. at 59–60."

"For the most part, however, no general principles regulate these conditions because the Constitution contains no all-encompassing 'Unconstitutional Conditions Clause.' *Hodges*, 917 F.3d at 911. Courts instead must look to a specific constitutional right to identify the specific rules. *Id.* at 913. This fact brings *Nollan* to the fore. It created a 'special' unconstitutional-conditions framework for an 'exaction' in the takings context. *Koontz*, 570 U.S. at 604–05 (citation omitted)."

"In this context, the typical 'benefit' consists of a permit that allows an owner to develop a property for a specific use (such as a residence or store). *See id.* at 601–02; *Dolan v. City of Tigard*, 512 U.S. 374, 379–80 (1994); *Nollan*, 483 U.S. at 828. Suppose that the government could directly bar the owner's requested use and deny a permit without violating the Takings Clause under *Penn Central*'s balancing test for use restrictions. *See Nollan*, 483 U.S. at 836. Suppose further that the government offers to grant this permit but only on the 'condition' that the owner deed over a part of the land. *See Dolan*, 512 U.S. at 380 & n.2. If the government had directly ordered this conveyance, it would have committed a classic taking. *See id.* at 384. When may the government nevertheless require what would be an uncompensated 'taking' as a condition of a permit?"

"The Court's answer has tried to reconcile two dueling 'realities' of permitting decisions. *Koontz*, 570 U.S. at 604. On the one hand, a condition on a permit can serve important purposes by forcing an owner to internalize the costs (the 'negative externalities') that a development will impose on others. *Id.* at 605; *see Cedar Point*, 141 S. Ct. at 2079. Say that a proposed retail store will increase 'traffic congestion' in the area. *Koontz*, 570 U.S. at 605. The government might require the owner to give it the strip of land required 'to widen a public road.' *Id.*"

"On the other hand, the government might try to leverage its monopoly permit power to pay for unrelated public programs on the cheap. *Id.* at 604–05. If the expected value of an owner's proposed project exceeds the condition's expected costs, the owner has an incentive to give in to this 'demand' even when the demand has no connection to the project's harmful social effects. *Id.* at 605. Yet this type of coercion falls near the core of the Takings Clause, which bars the government from forcing a few people to bear the full cost of public programs that 'the public as a whole' should pay for. *Armstrong v. United States*, 364 U.S. 40, 49 (1960)."

"In response to the push and pull of these concerns, the Court has developed a three-step unconstitutional-conditions test for permit conditions. At the 'first step,' a court asks whether the condition would qualify as a taking if the government had directly required it. *Koontz*, 570 U.S. at 612. If not, no takings problem exists. *Id.* If so, the government must show a 'nexus' between the condition and the project's social costs; that is, the government must impose the condition because of those costs and not for other reasons. *Nollan*, 483 U.S. at 837. The government next must show a 'rough proportionality' between the condition and the project; that is, the condition's burdens on the owner must approximate the project's burdens on society. *Dolan*, 512 U.S. at 391. (While this test comes from several cases, we will refer to it as *Nollan*'s test for simplicity.)"

"The Court's three cases on this topic demonstrate these elements. The Court created the 'nexus' element in *Nollan*. There, the Nollans applied for a permit with the California Coastal Commission to replace the bungalow on their beachfront property with a larger home. 483 U.S. at 827–28. The Commission approved the permit on the condition that the Nollans grant the public an easement to travel across their beach, which sat between two nearby public beaches. *Id.* at 827–29. To justify this easement, the Commission reasoned that the larger home would harm the public by limiting its view of the ocean. *See id.* at 828. The Court held that this demand qualified as an unconstitutional condition. It noted that the Commission would have committed an automatic taking if it had compelled the Nollans to grant the easement. *Id.* at 831–32. It next assumed that the Commission could have barred the Nollans from building the home under *Penn Central*'s balancing test for use restrictions given the home's social costs, including a reduction in 'the public's ability to see the beach[.]' *Id.* at 835. The Court also assumed that the Commission could have imposed hypothetical conditions (such as a height limit) to alleviate this harm. *Id.* at 836. But it held that the Commission's actual condition—an easement to walk across the beach—lacked any 'nexus' to the concern with viewing the beach from afar. *Id.* at 837–39. In truth, the Commission sought to give the public a benefit unrelated to the home's costs. *Id.* at 841. But the Takings Clause required it to pay for the easement that it took to serve this purpose. *Id.* at 841–42."

"The Court added the 'rough proportionality' element in *Dolan*. In that case, Florence Dolan sought to double the size of her store in Tigard, Oregon. 512 U.S. at 379. As permit conditions, the city required Dolan to dedicate 10% of her land for public green space and a bike and walking path. *Id.* at 380. The city justified these conditions on the ground that the larger store would increase traffic and stormwater runoff. *Id.* at 381–82. As in *Nollan*, the Court recognized that the city would have committed a taking if it had confiscated Dolan's property, but that the city could have barred the store expansion under *Penn Central*'s balancing test. *Id.* at 384–85 & n.6. Unlike in *Nollan*, it found a 'nexus' between the development and the conditions because the latter would alleviate the traffic and stormwater problems that the former would exacerbate. *Id.* at 387–88. Yet the Court still held that the conditions were unconstitutional. *Id.* at 388–96. Apart from *Nollan*'s nexus requirement, the Court concluded, a

'rough proportionality' must exist between the size of a condition and a development's social costs. *Id.* at 391. The city's conditions flunked this test. Although the city could require Dolan to keep *private* green space to protect against stormwater runoff, the Court reasoned, the city failed to explain why she had to make that space *public*. *Id.* at 392–93. And although the city could require Dolan to give some land for 'public ways' to reduce traffic, the city failed to explain how the requirement for a bike and walking path matched the increased congestion that Dolan's store would cause. *Id.* at 395–96."

"In *Koontz*, the Court clarified two more things. Coy Koontz owned 14.9 acres near Orlando, Florida. 570 U.S. at 599. He proposed to build on 3.7 acres of his land and to dedicate the rest to a conservation easement. *Id.* at 601. Finding his proposal inadequate, a state agency gave Koontz a choice between two alternatives: reduce the project's size to 1 acre and grant 2.7 more acres to the easement *or* proceed with the proposal and pay for improvements on the agency's land miles away. *Id.* at 601–02. The Court agreed with the Florida Supreme Court that only one of these alternatives needed to survive *Nollan*'s unconstitutional-conditions test. *Id.* at 612. But it held that the state court committed two errors when rejecting Koontz's claim. *Id.* at 604–19."

"The Court first reversed the Florida Supreme Court's holding that an unconstitutional condition arises only if the state *approves* a permit with the condition that the owner give property, not if the state *denies* a permit until the owner consents to the grant. *Id.* at 606–07. Just as a speech condition on public funds could violate the Free Speech Clause even if speakers choose to speak and forgo the funds, so too a property condition on a permit could violate the Takings Clause even if owners choose to keep their property and forgo the project. *Id.* At the same time, the denial of a permit (which rests on an attempted taking) triggers a different remedy than the grant of a permit (which commits an actual taking). An actual taking's remedy is 'just compensation' but an attempted taking's remedy turns on the cause of action that an owner invokes. *Id.* at 609."

"The Court next reversed the Florida Supreme Court's holding that the state agency's second alternative (that Koontz pay money) could not qualify as an unconstitutional condition. *Id.* at 611–19. The Court recognized that no unconstitutional-conditions problem arises if the government may directly compel what it makes a condition on a permit. *Id.* at 612. It also recognized that the government could directly compel ordinary taxes without a takings concern. *Id.* at 615. But the Court held that the agency's conditional demand for Koontz's money would qualify as a taking if the agency had directly imposed it outside the permitting process. *Id.* at 613–15. The Court reasoned that it would nullify the Takings Clause if it allowed a government to compel a landowner to either dedicate an easement or pay an amount 'equal to the easement's value.' *Id.* at 612."

"At first blush, Nashville's enforcement of its sidewalk ordinance looks like a clear case for *Nollan*'s unconstitutional-conditions test. As its name suggests, this test gets triggered when the government imposes 'a *condition* for the grant of a building permit[.]' *Dolan*, 512 U.S. at 386 (emphasis added). And this case is about conditions on building permits. Unlike a land-use law that regulates all property owners (including those who do not seek permits), the sidewalk ordinance does not compel all owners to build a sidewalk or pay a fee. It reaches only those who seek permits. Nashville Code § 17.20.120(A)(1)–(2); *see id.* § 16.28.010. It thus applied to Knight and Mayes not because they owned lots in Nashville; it applied to them because they sought to build family homes on those lots. As a condition for Knight to build on Acklen Park Drive, Nashville required him to construct a sidewalk or pay $7,600. Knight Decl., R.20-1, PageID 125–28. And as a condition for Mayes to build on McCall Street, Nashville required him to construct a sidewalk or pay $8,883.21 for one some 2.5 miles away. Mayes Decl., R.20-2, PageID 129–32."

"Indeed, one of the ordinance's specific conditions leaves no doubt that *Nollan* applies. As Nashville conceded on appeal, *see* Arg. 23:50–25:44, the ordinance requires all permit applicants (whether they build a sidewalk or pay a fee) to grant an easement: 'Dedication of right-of-way and/or public pedestrian easement is required to permit present or future installation of a public sidewalk built to the current standards of the metropolitan government.' Nashville Code § 17.20.120(E). Suppose Nashville required a 'conveyance of [this] easement outright' rather than as a condition on a permit. *Nollan*, 483 U.S. at 834. That direct interference with the property owner's right to exclude would fall under the Court's automatic-taking rule, not *Penn Central*'s balancing test. *See Cedar Point*, 141 S. Ct. at 2072. Perhaps Nashville could require this taking as a condition on a permit (even if it could not directly compel it), but *Nollan*'s nexus and rough-proportionality elements supply the tools for deciding whether it may do so. *See id.* at 2079."

"Language in *Dolan* confirms this point. That case noted that governments often validly impose conditions on permits that require owners to dedicate a portion of their land for public ways: 'Dedications for streets, *sidewalks*, and other public ways are generally reasonable *exactions* to avoid excessive congestion from a proposed property use.' 512 U.S. at 395 (emphases added). In other words, *Dolan* suggested that these dedications would commonly *satisfy Nollan*'s test; it did not suggest, as Nashville does here, that they would *fall outside* that test." …

"*Koontz* next shows that Nashville cannot avoid *Nollan*'s unconstitutional-conditions test for various procedural reasons. Does it matter that Knight refused to yield to the city's conditions and chose not to develop his property? No. *Koontz* holds that *Nollan* applies whenever the government gives a landowner the choice between the owner's right to just compensation and a building permit. 570 U.S. at 606–08. Nashville thus cannot evade *Nollan* simply because Knight did not succumb to the city's 'coercive pressure' to waive his constitutional right. *Id.* at 607."

"Does it matter that the sidewalk ordinance allowed Knight and Mayes to pay fees rather than build sidewalks? No again. Because these 'commonplace' in-lieu fees resemble 'other types of land use exactions,' *Koontz* held that they trigger *Nollan*'s test all the same. *Id.* at 612. There was nothing special about the requested fee in *Koontz* that drove the Court to apply that test."

"Does it matter that the record leaves unclear whether Nashville required Knight and Mayes to grant an easement across their properties if they chose the option to pay the in-lieu fees? *See Knight*, 572 F. Supp. 3d at 432 n.3. No, for a third time." …

"One final point. Assume that Nashville *already* held an easement on Knight's and Mayes's properties and had required them only to build sidewalks across its existing easement as a permit condition. Under *Nollan*'s first step, we would have to consider whether Nashville could directly compel all landowners to pay to build sidewalks on their properties. *See Koontz*, 570 U.S. at 612; *cf.* Tenn. Code. Ann. § 6-19-101(16)–(17); Henry E. Mills & Augustus L. Abbott, *Mills on the Law of Eminent Domain* § 216, at 416–17 & n.8 (2d ed. 1888) (citing *Lewis v. City of New Britain*, 52 Conn. 568 (1885)). Would this command to pay for improvements fall under *Penn Central*'s balancing test? Or something else? If the former, *Nollan*'s test may well collapse into *Penn Central*'s whenever a permit condition is *itself* a use restriction. Yet we can leave these questions unanswered in this case. It involves the kind of permit condition (the dedication of an easement) that triggers the automatic-taking rule (not *Penn Central*'s rule) when directly imposed."

"As its main response, Nashville says that *Nollan*'s unconstitutional-conditions test does not apply to the sidewalk ordinance because of who imposed its conditions. The city agrees that *Nollan* might have applied if *zoning administrators*, acting on a discretionary basis, had required Knight and Mayes to build sidewalks or pay fees as an 'administrative' condition for their specific permits. But *Nashville's council* passed the ordinance as a 'legislative' condition for all permits. This legislative source, according to Nashville, should lead us to apply *Penn Central*'s test."

"Nashville's claim requires us to wade into a broad judicial debate. *See Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring in the denial of certiorari). Adopting Nashville's legislative-vs.-administrative divide, many state courts have refused to apply *Nollan* to legislatively compelled permit conditions." …

"This case requires us to answer that question. We now hold that *Nollan*'s unconstitutional-conditions test applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones. Nothing in the text or original understanding of the Takings Clause justifies Nashville's requested distinction. Its requested distinction also conflicts both with the Supreme Court's unconstitutional-conditions precedent and with its takings precedent."

"Our conclusion that *Nollan*'s unconstitutional-conditions test applies leaves two questions. *Question One*: Does Nashville's application of its sidewalk ordinance to Knight and Mayes satisfy this test? In other words, has Nashville shown a 'nexus' and 'rough proportionality' between the conditions that it imposed on Knight and Mayes and the social costs of their homes? *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. The answer is not obvious. *Dolan* opined in dicta that 'dedications' for 'sidewalks' are often 'reasonable' conditions on permits. 512 U.S. at 395. Yet *Dolan* likely had in mind conditions requiring the dedication of a sidewalk on the owner's own property as part of an existing sidewalk network in the area. Here, by contrast, Nashville required Knight and Mayes to either build useless 'sidewalks to nowhere' or pay for sidewalks miles away. These conditions do not look all that proportional to any specific harms from their homes, so the district court concluded that Nashville likely could not meet *Dolan*'s rough-proportionality element. *See Knight*, 572 F. Supp. 3d at 443–44."

"In the end, though, we need not decide this question because Nashville has waived any argument that it can satisfy this unconstitutional-conditions test. Knight and Mayes spent pages of their brief arguing that the city could not meet *Nollan*'s and *Dolan*'s elements. *See* Appellants' Br. 27–35. But Nashville did not even try to respond, opting to rely exclusively on its claim that *Penn Central*'s test applied. *See* Appellees' Br. 10–43. In prior cases, we have treated this type of omission as a waiver, not just a forfeiture. *See United States v. Noble*, 762 F.3d 509, 528 (6th Cir. 2014). And when questioned at oral argument about this noticeable omission, Nashville's counsel conceded that the city abandoned any defense under *Nollan*'s test. He reasoned that the test is 'an extremely

difficult standard to meet, and the sidewalk ordinance likely doesn't meet that standard.' Arg. 31:22–30. We thus may save this issue for a case in which Nashville seeks to satisfy *Nollan*'s test as against other permit applicants."

"What is the proper remedy for the violation of Knight's and Mayes's rights under the Fifth Amendment? Is Mayes entitled to the reimbursement of his in-lieu fee as 'just compensation' for the condition that Nashville imposed on him? Would this relief fall under § 1983 or the state-law restitution claim that Mayes also brought? *Cf. Koontz*, 570 U.S. at 608–09. Is Knight entitled to an injunction (or at least a declaratory judgment) against the ordinance's application to him? Or is 'injunctive relief' 'foreclosed' because he has 'available' 'just compensation remedies' if he reapplies for a permit? *Knick*, 139 S. Ct. at 2179; *cf. D.M. Osborne & Co. v. Mo. Pac. Ry. Co.*, 147 U.S. 248, 258–59 (1893). Given the parties' limited briefing on the proper remedy, we will leave that issue to the district court. *See Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481, 501–02 (6th Cir. 2020)."

4. Fifth Amendment – Takings Clause – Statute of Limitations – Court held that the statute of limitations in this case began to run when the redemption period ended on January 21, 2020 - County could not have made a final decision to take the property, until the redemption period concluded – If plaintiff paid its delinquent taxes during the redemption period, the County would have been prohibited from taking the property - It did not become clear the County would seize the plaintiff's property by transferring title until after the redemption period ended - County was prohibited from transferring title until after the redemption period ended; until that time, whether the County would transfer title was unclear - Until the redemption period ended, the County had not taken plaintiff's 'property without paying for it - So long as plaintiff still had the opportunity to retain title to its property, there was no event which gives rise to the claim for compensation

BEAVER STREET INVESTMENTS, LLC v. SUMMIT COUNTY, OHIO
SIXTH CIRCUIT COURT OF APPEALS No. 22-3600 Decided and Filed April 21, 2023

"Plaintiff Beaver Street Investments, LLC ('BSI') commenced this action under 42 U.S.C. § 1983, alleging that Defendant Summit County, Ohio ('County') violated the Fifth Amendment's Takings Clause. The district court granted the County's motion to dismiss, holding that BSI's complaint was barred by the statute of limitations. We **REVERSE** and **REMAND** for the reasons set forth below."

"The facts of this case are undisputed. On November 1, 2017, the County Fiscal Officer initiated an administrative tax foreclosure action against BSI before the County Board of Revision ('BOR'). Those proceedings concerned unpaid taxes on parcels of land that BSI owned. *See Scalise v. Beaver Street Investments, LLC*, Case No. CV-2017-11-4588. The County initiated the foreclosure action under Ohio Revised Code §§ 323.65 through 323.79. Through that action, the County opted for the alternative right of redemption, which allowed BSI to pay the taxes it allegedly owed before the County took title to BSI's property."

"The BOR issued its final adjudication of foreclosure on June 3, 2019. Because the County had opted for the alternative right of redemption, BSI had 28 days to pay the taxes it owed before the County took title to the property. Later that month, on June 27, 2019, BSI filed a Petition for Chapter 11 bankruptcy. That petition automatically stayed the implementation of the BOR's final judgment and the 28-day redemption period."

"The County filed a motion for relief from the stay, which the bankruptcy court granted on January 17, 2020. Then, the BOR issued an order finding that the statutory period of redemption had expired as of January 21, 2020. BSI never made the necessary redemption payments."

"On January 30, 2020, rather than sell the property, the County transferred it to its land bank pursuant to Ohio Rev. Code § 323.78. When an Ohio county sells a foreclosed property at auction, it may not keep proceeds beyond what the former owner owed on the taxes. Ohio Rev. Code § 5721.20. However, if the county transfers the foreclosed property to the county's land bank, 'the land becomes 'free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged.'' *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643, 646 (6th Cir. 2021) (quoting Ohio Rev. Code § 323.78(B))."

"On January 3, 2022, BSI commenced this action under 42 U.S.C. § 1983. Through its complaint, BSI alleged that '[t]here was significant difference between the appraised value of the BSI Property and the total amount' that the County alleged BSI owed. Compl., R. 1, Page ID #6. Accordingly, BSI asserted that the County's action violated the

Fifth Amendment's Takings Clause. The County responded by filing a motion to dismiss, arguing that BSI's claim was barred by the applicable statute of limitations."

"The parties agreed that the statute of limitations was two years. *See Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007). They disputed, however, when the two-year statute of limitations began to run. The County argued that the case became ripe for adjudication and that the statute of limitations began to run on June 3, 2019, the day that it issued its final adjudication of foreclosure. BSI, by contrast, contended that the statute of limitations did not begin to run until the statutory redemption period ended on January 21, 2020. In the County's view, the statute of limitations expired on June 3, 2021, and BSI's January 3, 2022 complaint was untimely. In BSI's view, the statute of limitations did not expire until January 21, 2022, and its complaint was timely."

"The district court adopted the County's argument, determining that 'the instant case became ripe when the taking occurred on the final adjudication on June 3, 2019,' and that the 'adjudication was final because the BOR's adjudication clearly ordered that the County would not sell the land but to transfer the land to the land bank.'"

"The 'standard rule' is that the statute of limitations for § 1983 claims begins to run when a 'plaintiff has a complete and present cause of action . . . .' *Id.* (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). A complete cause of action arises 'when the plaintiff knows or has reason to know of the injury which is the basis of his action.' *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)). To determine when a statute of limitations begins to toll in a § 1983 action, therefore, this Court looks 'to what event should have alerted the typical lay person to protect his or her rights.' *Id.* (quotation and citation omitted)."

"With respect to takings claims, '[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.' *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019). The Supreme Court has 'explained that 'the act of taking' is the 'event which gives rise to the claim for compensation.'' *Id.* at 2170 (quoting *United States v. Dow*, 357 U.S. 17, 22 (1957))."

"The dispositive issue in this appeal is what constituted the 'act of taking.' *See id.* In other words, the Court must determine when, as a matter of law, the County took BSI's property without paying for it. *See id.*" …

"We hold that the statute of limitations in this case began to run when the redemption period ended on January 21, 2020. First, the County could not have made a ''final decision' to take the property,' *Harrison*, 997 F.3d at 649 (quoting *Knick*, 139 S. Ct. at 2169), until the redemption period concluded. After all, if BSI paid its delinquent taxes during the redemption period, the County would have been *prohibited* from taking the property. Ohio Rev. Code § 323.65. Second, it did not become 'clear the [County] would seize [the plaintiff's property] by transferring title,' *Harrison*, 997 F.3d at 651, until after the redemption period ended. The County was *prohibited* from transferring title until after the redemption period ended; until that time, whether the County would transfer title was unclear. Third, until the redemption period ended, the County had not taken BSI's 'property without paying for it.' *Knick*, 139 S. Ct. at 2167. Fourth, so long as BSI still had the opportunity to retain title to its property, there was no 'event which gives rise to the claim for compensation.' *Id.* at 2170 (quoting *Dow*, 357 U.S. at 22)."

5. Fourteenth Amendment – Due process and equal protection claim – There was no property interest in the issuance or denial of a permit to operate a business at a certain location, so there was no denial of due process - How is property defined, for Due Process Clause purposes? - It does not protect everything that might be described as a benefit - Rather, one must have a legitimate claim of entitlement to the purported property interest, as opposed to an abstract need or desire - Applying this understanding to the setting before us, a government benefit, such as a permit, is not a protected entitlement if officials may grant or deny it in their discretion – A plaintiff may not assert a property right in government procedures themselves

See also – CONSITUTIONAL LAW – U.S. - Fourteenth Amendment - Equal Protection – Class of one claim - The Fourteenth Amendment's guarantee of the equal protection of the laws bars governmental discrimination that either (1) burdens a fundamental right, (2) targets a suspect class, or (3) intentionally treats one differently from others similarly situated without any rational basis for the difference - Plaintiff hitches its claim to the third wagon, framing its argument as a class-of-one claim - To prevail on that claim, plaintiff must show that (1) the city intentionally treated plaintiff differently from others similarly situated and (2) there is no rational basis for the difference in treatment - A bedrock background principle of equal protection law: the unequal application of a facially neutral law is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination - Sometimes, a plaintiff can present direct evidence of discrimination, but the more common approach, as here, is to attempt to demonstrate intentional discrimination through

circumstantial evidence - For plaintiff's class-of-one claim, it must demonstrate an inference of intentional discrimination arising from the fact' that the adverse treatment of plaintiff was such a stark outlier from an otherwise consistent pattern of favorable treatment in similarly situated cases - For summary judgment purposes a bare assertion that a plaintiff was treated one way and everyone else another has never been thought to raise an equal protection claim - At best, plaintiff's evidence raises the inference that the city was aware that it was favoring other businesses at the expense of others - But the discriminatory purpose necessary to establish an equal protection violation implies more than intent as volition or intent as awareness of consequences; it requires evidence that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group - Whether the city favored other businesses by letting them continue to operate, in other words, does not demonstrate a genuine issue of material fact over whether the city intentionally treated plaintiff differently from all comparators

GREEN GENIE, INC.; ALVIN ALOSACHI v. CITY OF DETROIT, MICHIGAN; CITY OF DETROIT BOARD OF ZONING APPEALS; CITY OF DETROIT BUILDINGS, SAFETY ENGINEERING AND ENVIRONMENTAL DEPARTMENT
SIXTH CIRCUIT COURT OF APPEALS No. 22-1441 Decided and Filed: March 21, 2023

"Following changes to Michigan's marijuana law, Green Genie sought to operate a medical marijuana distribution facility in the City of Detroit. The City denied Green Genie's request because its proposed facility fell within a 'drug-free zone,' a term of art defined by the City's code. Green Genie challenged the City's determination through state and local channels. Failing on those fronts, Green Genie filed this suit, alleging that the City violated the Constitution in the course of denying the permit. The district court granted summary judgment to the City, leading to this appeal. In view of the legal flaws in basic elements of each of Green Genie's constitutional claims, we affirm."

"… Following a 2008 initiative that decriminalized marijuana for medical purposes under state law and a 2016 law affording legal status to medical marijuana dispensaries in Michigan, the industry began taking hold around the Great Lakes State, including in Detroit. *See* Seth Quidachay-Swan, *Researching Marijuana Law*, 100 Mich. Bar J. 52 (2021)."

"Those who wish to operate a medical marijuana facility in Detroit must satisfy the City's permit process. *See* Detroit, Mich., Code § 50-3-535. (All cites to the Detroit City Code are to the 2023 version of the code unless otherwise specified). The process in place at the time of the events at issue worked as follows. Upon receiving an application to operate such a facility, the City's Buildings, Safety Engineering, and Environmental Department (BSEED) would screen the application to determine whether the applicant complies with 'locational specifications' set forth in the City code. *Id.* § 50-3-536(b). To that end, the code imposes several restrictions on where a medical marijuana facility may operate. *Id.* § 50-3-535(b). One prohibits locating a medical marijuana facility in a drug-free zone, that is, an area 'within 1,000 radial feet of the zoning lot' containing any one of a number of sensitive places, including a school. *See id.* §§ 50-3-535(b)(1), 50-16-172. If an application complied with the code's locational requirements, the application 'shall transfer' to the City's Medical Marihuana Facility Review Committee. *Id.* § 50-3-536(c) (2018). The Committee, in turn, would make a recommendation back to BSEED regarding a host of discretionary zoning considerations specific to the project at issue. *Id.* §§ 50-3-536(d), 50-3-281. From there, BSEED would review the application for final approval or denial. *Id.* §§ 50-3-536(e); 50-3-203. (Following the events at issue here, the City eliminated the Review Committee, along with the mandate to transfer applications that complied with locational specification requirements to that committee, leaving all review within the discretion of BSEED. *See* Ordinance No. 2021-9; *see also* Detroit, Mich., Code § 50-3-536(c).)"

"This regulatory framework sets the stage for today's case. Green Genie is a Michigan corporation that owns medical marijuana provisioning centers in the Detroit metro area. In 2018, it applied to run a medical marijuana distribution facility at 16711 Mack Avenue in the City of Detroit. BSEED denied the application at the initial screening stage on the grounds that the proposed facility site was located in a drug-free zone. Relevant to the City's assessment was a tax lot (in the neighboring community of Grosse Point Park) on which St. Clare of Montefalco Catholic School sits. The lot, the City determined, was less than 1,000 radial feet to the west of the site where Green Genie proposed to build its distribution facility."

"Green Genie was not the only applicant to run up against the City's proximity restrictions. A handful of other applicants also had their applications denied because their proposed sites were determined to be within 1,000 radial feet of a location—including a tax lot for a school—subject to the City's drug-free zone definition. Two other applicants, however, fared better."

"One is Detroit Roots. It applied to establish a medical marijuana provisioning facility at 12604 East Jefferson in Detroit. Measuring from that address to the nearest tax lot containing a school building, the City determined that the proposed facility was over 1,000 radial feet from the parcel and thus sent the application along for eventual

approval. A year later, however, a tax parcel containing Detroit Roots was combined with two other tax parcels into one new tax parcel, resulting in Detroit Roots being less than 1,000 feet from the closest edge of the school. Nonetheless, the City seemingly has not revoked Detroit Roots's permit."

"The other is Mack Wellness. Mack Wellness applied for a permit to run a medical marijuana facility at 16001 Mack, in Detroit, a location west of St. Clare of Montefalco (the school that was the basis for Green Genie's application denial). The City, calculating from what it believed was the closest part of St. Clare of Montefalco's tax parcel to the proposed site, determined that Mack Wellness's proposed site was more than 1,000 feet from the parcel. That computation, however, overlooked a patch of grass within 1,000 feet of the proposed site that the City mistakenly assumed was owned by Grosse Pointe Park. In truth, the land was used by St. Clare of Montefalco students. The City did not learn of this error until this litigation, and the City approved the application (and has never revoked Mack Wellness's permit)."

"Green Genie challenged the City's determination through state administrative and judicial channels. *See Green Genie, Inc. v. City of Detroit*, 599 F. Supp. 3d 544, 548–49 (E.D. Mich. 2022)." …

"Green Genie (along with its owner Alvin Alosachi) filed a complaint in federal court against the City, its Board of Zoning Appeals, and BSEED. (For simplicity, we refer to plaintiffs as Green Genie and defendants as the City). The thrust of Green Genie's complaint was that the City erred in measuring the distance between the proposed Green Genie site and St. Clare of Montefalco's, yet approved the Detroit Roots and Mack Wellness sites. Those practices, Green Genie alleged, violated the Fourteenth Amendment's equal protection and due process guarantees. Following discovery, the City moved for summary judgment, which the district court granted and then accordingly entered judgment for the City."

"The Fourteenth Amendment's Due Process Clause prohibits governmental deprivations of 'life, liberty, or property, without due process of law.' *See* U.S. CONST. amend. XIV, § 1. The Clause has been construed to include not only a procedural component, but also (although not obvious from its text) a substantive one. That latter right hazily protects against 'certain government actions regardless of the fairness of the procedures used to implement them.' *See Daniels v. Williams*, 474 U.S. 327, 331 (1986). No matter the nature of the due-process theory asserted, Green Genie must show a deprivation of a constitutionally protected right—in this case, a deprivation of property. *See Prater v. City of Burnside*, 289 F.3d 417, 431 (6th Cir. 2002)."

"How is 'property' defined, for Due Process Clause purposes? Narrowly, in some respects. It 'does not protect everything that might be described as a 'benefit.'' *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (citation omitted). Rather, one must have a 'legitimate claim of entitlement to' the purported property interest, as opposed to an abstract need or desire. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Applying this understanding to the setting before us, a government benefit, such as a permit, is not a protected entitlement if officials 'may grant or deny it in their discretion.' *Town of Castle Rock*, 545 U.S. at 756."

"That rule helps shape Green Genie's claim. All appear to agree that permit approval is a decision left to the City's discretion, meaning obtaining a permit is not a protected entitlement. Instead, Green Genie contends that it had a 'protected property interest' in having its application transferred to the Review Committee as a matter of course. The heart of Green Genie's argument, it seems, is that the City code's former use of mandatory language—'shall'—entitles applicants that otherwise complied with locational specifications to consideration by that special committee."

"That contention too runs headlong into unfavorable precedent. As we have said before, a plaintiff may not 'assert a property right in government procedures themselves.' *Janosek v. City of Cleveland*, 718 F.3d 578, 582 (6th Cir. 2013); *see also Richardson v. Twp. of Brady*, 218 F.3d 508, 517–19 (6th Cir. 2000) (same); *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1110 (6th Cir. 1995) (same). At bottom, Green Genie's request to be heard by a special committee is little more than an interest in 'a procedure itself, without more.' *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) (citation omitted). In response, Green Genie emphasizes the decision in *Ritz v. City of Findlay*, No. 3:07-CV-3716, 2009 WL 1954635 (N.D. Ohio July 6, 2009). That the distributor's lead authority is an unpublished, district court case suggests the case law is not in its favor. Nor, in any event, is *Ritz* analogous. Instead, that case concerned a property interest in obtaining ultimate approval of a site plan proposal for an apartment complex. *Id.* at *6. It has nothing to do with an interest in the procedures at issue themselves. With no property interest at stake, there is no need to entertain Green Genie's remaining arguments about the inadequacy of the City's procedures or that the City more generally engaged in an arbitrary and irrational decision making. *See Prater*, 289 F.3d at 431–32."

"That leaves Green Genie's equal protection claim. The Fourteenth Amendment's guarantee of the 'equal protection of the laws' bars governmental discrimination that either (1) burdens a fundamental right, (2) targets a

suspect class, or (3) intentionally treats one differently from others similarly situated without any rational basis for the difference. *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005). Green Genie hitches its claim to the third wagon, framing its argument as a class-of-one claim. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 441 (6th Cir. 2012). To prevail on that claim, Green Genie must show that (1) the City 'intentionally treated' Green Genie 'differently from others similarly situated' and (2) 'there is no rational basis for the difference in treatment.' *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)."

"We can begin and end with *Olech's* first prong. Does the evidence create a genuine dispute as to whether the City, in denying Green Genie's application, 'intentionally treated' Green Genie 'differently from others similarly situated'? *Id.* To our eye, no. Begin with a bedrock background principle of equal protection law: the 'unequal application' of a facially neutral law is 'not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.' *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Sometimes, a plaintiff can present direct evidence of discrimination. But the more common approach, as here, is to attempt to demonstrate intentional discrimination through circumstantial evidence. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977). For Green Genie's class-of-one claim, it must demonstrate 'an inference' of intentional discrimination 'arising from the fact' that the adverse treatment of Green Genie 'was such a stark outlier from an otherwise consistent pattern of favorable treatment in similarly situated cases.' *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 689 (10th Cir. 2012) (Gorsuch, J.); *see also TriHealth*, 430 F.3d at 788 (requiring proof that the plaintiff was 'intentionally singled out by the government for discriminatory adverse treatment'). The notion of 'similarly situated individuals' is thus 'simply a way' to gauge whether the 'plaintiff failed at the first step to prove intentional discrimination.' *See SECSYS*, 666 F.3d at 689. To make that assessment, we look to 'relevant similarity,' which is a product of the specific 'facts and context of the case.' *Loesel v. City of Frankenmuth*, 692 F.3d 452, 463 (6th Cir. 2012)."

"Turning to the facts and context here, Green Genie claims it was treated relatively worse by the City than other medical marijuana facility applicants. In its complaint, Green Genie suggested that the City's approval of Detroit Roots and Mack Wellness—notwithstanding their location in a drug-free zone—meant that the City purposely used a different method of measurement when evaluating Green Genie's application. Put another way, Green Genie targets the City's process for determining whether an applicant's proposed medical marijuana facility was in a drug-free zone. For 'relevant' comparator purposes, then, we look to other medical marijuana facilities that submitted applications around the time of Green Genie's application. *See United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011) (analyzing who is 'similarly situated' at the appropriate 'time frame' of the alleged violation)."

"At summary judgment, the City submitted evidence that it applied the same test to all applicants. Rather than the applicable test, it was idiosyncrasies in Detroit Roots's and Mack Wellness's requests that resulted in their approval. Detroit Roots obtained City approval because the underlying comparator tax lot had not yet been merged with others to extend the reach of the drug-free zone. And Mack Wellness received approval because officials overlooked a patch of grass owned by a school that would have placed the proposed site within the drug-free zone."

"But the relevant comparators do not end there. At summary judgment, the City expanded the universe of comparators: it presented evidence that four other medical marijuana facility applicants were subjected to the same tax-lot-based measurement as was Green Genie. And, like Green Genie, their applications were rejected as being within a drug-free zone. Green Genie, for its part, failed to present evidence to contest the City's method of measurement in those cases."

"Even viewing the evidence in a light most favorable to Green Genie, the distributor fails to satisfy the first prong of the *Olech* test. The City applied the same method of measurement to each comparable applicant. Many applications were rejected on that basis. True, Detroit Roots and Mack Wellness fared better. But that was due to an arguably improper application of the test, not the test itself. On balance, Green Genie fails to show that its application was a 'stark outlier' from the others. *See SECSYS*, 666 F.3d at 689. Indeed, in many respects, granting Green Genie's wish seemingly would flip a class-of-one claim on its head—it would turn on the fact that two manufacturers were erroneously singled out for *beneficial* treatment. *TriHealth*, 430 F.3d at 788. And, again, any favorable treatment of Detroit Roots and Mack Wellness was due to simple misunderstandings about those particular applications, not an effort to 'single[] out' Green Genie. *Id.* The City's arguably 'sloppy administration' of its permitting system and 'misapplication of . . . local law' is insufficient to show an equal protection violation. *Charles v. Baesler*, 910 F.2d 1349, 1357 (6th Cir. 1990); *see also Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 905 (6th Cir. 2019)."

"Green Genie has three responses. First, it says that the district court at summary judgment inappropriately weighed the evidence. But the evidence was one-sided, leaving nothing favoring Green Genie. Green Genie chiefly relied on the purported favorable treatment of Detroit Roots and Mack Wellness, which, it says, suggested an

inference that the City intended to single out Green Genie. For summary judgment purposes, however, a bare assertion that a plaintiff 'was treated one way and everyone else another . . . has never been thought to raise an equal protection claim.' *See Charles*, 910 F.2d at 1357 (citation omitted); *see also Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995) ('[M]ere disparate impact is insufficient to demonstrate [at summary judgment] an equal protection violation.'). In other words, there is simply no evidence to weigh here; we have only the City's evidence defeating summary judgment on the state-of-mind element. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (recognizing that even when state of mind is at issue, a nonmoving party must 'present affirmative evidence . . . to defeat a properly supported motion for summary judgment')."

"Lastly, Green Genie turns our attention back to Detroit Roots and Mack Wellness. Green Genie asserts that the City's apparent failure to revoke permits awarded to those two applicants allows for the reasonable inference that Green Genie's denial was intentional. That contention suffers from numerous flaws. For one, it does nothing to discount the evidence of other comparators, meaning Green Genie's treatment was not a 'stark outlier,' the standard it must meet to show it was intentionally treated differently from others similarly situated. *See SECSYS*, 666 F.3d at 689; *see also Olech*, 528 U.S. at 564. Even taking Green Genie's argument on its face, there is a disconnect in timing between the alleged equal protection violation (i.e., the rejection of Green Genie's application) and the City's later learning of the mistakes in Detroit Roots's and Mack Wellness's applications. We fail to see how the City's subsequent decision to not try to put the genie back in the bottle and shut down Detroit Roots and Mack Wellness makes it more likely than not that the City intentionally treated Green Genie differently from all relevant comparators in reviewing initial applications. *See EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 866 (6th Cir. 2012) ('Gaps in time and context may suggest a change in policy rather than differential treatment.'). At best, Green Genie's evidence raises the inference that the City was aware that it was favoring Detroit Roots and Mack Wellness at the expense of others. But the 'discriminatory purpose' necessary to establish an equal protection violation 'implies more than intent as volition or intent as awareness of consequences'; it requires evidence that 'the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.' *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). Whether the City favored Detroit Roots and Mack Wellness by letting them continue to operate, in other words, does not demonstrate a genuine issue of material fact over whether the City intentionally treated Green Genie differently from all comparators. *See TriHealth*, 430 F.3d at 788; *see also Wiley*, 36 F.4th at 667 (requiring 'significant probative evidence' to rebut summary judgment once established by the movant)."

6. Fourteenth Amendment - Equal Protection - Class of one claim - The Fourteenth Amendment's guarantee of the equal protection of the laws bars governmental discrimination that either (1) burdens a fundamental right, (2) targets a suspect class, or (3) intentionally treats one differently from others similarly situated without any rational basis for the difference - Plaintiff hitches its claim to the third wagon, framing its argument as a class-of-one claim - To prevail on that claim, plaintiff must show that (1) the city intentionally treated plaintiff differently from others similarly situated and (2) there is no rational basis for the difference in treatment - A bedrock background principle of equal protection law: the unequal application of a facially neutral law is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination - Sometimes, a plaintiff can present direct evidence of discrimination, but the more common approach, as here, is to attempt to demonstrate intentional discrimination through circumstantial evidence - For plaintiff's class-of-one claim, it must demonstrate an inference of intentional discrimination arising from the fact' that the adverse treatment of plaintiff was such a stark outlier from an otherwise consistent pattern of favorable treatment in similarly situated cases - For summary judgment purposes a bare assertion that a plaintiff was treated one way and everyone else another has never been thought to raise an equal protection claim - At best, plaintiff's evidence raises the inference that the city was aware that it was favoring other businesses at the expense of others - But the discriminatory purpose necessary to establish an equal protection violation implies more than intent as volition or intent as awareness of consequences; it requires evidence that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group - Whether the city favored other businesses by letting them continue to operate, in other words, does not demonstrate a genuine issue of material fact over whether the city intentionally treated plaintiff differently from all comparators

GREEN GENIE, INC.; ALVIN ALOSACHI v. CITY OF DETROIT, MICHIGAN; CITY OF DETROIT BOARD OF ZONING APPEALS; CITY OF DETROIT BUILDINGS, SAFETY ENGINEERING AND ENVIRONMENTAL DEPARTMENT

SIXTH CIRCUIT COURT OF APPEALS No. 22-1441 Decided and Filed: March 21, 2023

See CONSITUTIONAL LAW – U.S. - Fourteenth Amendment – Due process and equal protection claim – There was no property interest in the issuance or denial of a permit to operate a business at a certain location, so there was no denial of due process - How is property defined, for Due Process Clause purposes? - It does not protect everything that might be described as a benefit - Rather, one must have a legitimate claim of entitlement to the purported property interest, as opposed to an abstract need or desire - Applying this understanding to the setting before us, a government benefit, such as a permit, is not a protected entitlement if officials may grant or deny it in their discretion – A plaintiff may not assert a property right in government procedures themselves – page 91.

7. Article III standing – Class action – Plaintiff had no standing to sue defendants who had not injured plaintiff even though defendants may have injured absent class members - The Supreme Court's standing test has three familiar requirements (1) Plaintiffs must have suffered an injury; (2) they must trace this injury to the defendant; and (3) they must show that a court can redress it - Like all plaintiffs, class representatives must prove their own case or controversy with the defendants in order to seek relief for any other member of the class - Plaintiffs must have standing at the outset of the litigation

THOMAS A. FOX, and all those similarly situated v. SAGINAW COUNTY, MICHIGAN, et al.; ALCONA COUNTY, MICHIGAN, et al.
SIXTH CIRCUIT COURT OF APPEALS Nos. 22-1265/1272 Decided and Filed: April 28, 2023

"In this appeal, we must address how Article III's 'standing' requirements apply to class-action lawsuits. In individual litigation, a plaintiff lacks standing to sue a defendant if the plaintiff's injuries are not 'fairly traceable' to that defendant. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (citation omitted). Yet some courts have relied on the 'juridical link' doctrine to jettison this standing element in the class setting. *See, e.g.*, *Payton v. County of Kane*, 308 F.3d 673, 678–79 (7th Cir. 2002). According to these courts, that doctrine allows a named plaintiff in a putative class action to sue defendants who have not injured the plaintiff if these defendants have injured absent class members."

"This case shows how the doctrine is supposed to work. When a Michigan county forecloses on a property because its owner has failed to pay property taxes, Michigan law permits the county to obtain ownership of the property outright—even if its value exceeds the taxes owed. That fate befell Thomas Fox. After he racked up some $3,000 in unpaid taxes, Gratiot County took his land. He valued the property at over $50,000, and the county treasurer sold it for over $25,000. But Fox did not see any of the surplus. We have held that similar conduct amounted to an unconstitutional 'taking.' *Hall v. Meisner*, 51 F.4th 185, 187–88 (6th Cir. 2022). Fox thus filed a class action against Gratiot County on behalf of himself and similar landowners. But Fox did not stop there. He also sued 26 other counties that did not injure him, arguing that they engaged in the same conduct against other delinquent taxpayers. The district court certified a class, holding that Fox had standing to sue these other counties under the juridical link doctrine."

"We cannot agree. This oddly named doctrine conflicts with the Supreme Court's precedent holding that a class-action request 'adds nothing to the question of standing[.]' *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976). And Fox lacks standing to sue the 26 other counties under normal rules. Nor has he justified the doctrine with historical evidence." …

"Since 1893, the Michigan General Property Tax Act has set the process that state actors must follow to collect overdue property taxes. *See generally* Mich. Comp. Laws §§ 211.1–.155; Act of June 1, 1893, No. 206, 1893 Mich. Pub. Acts 354. Historically, the Act permitted government officials to place tax liens on the properties of delinquent taxpayers and to auction off these liens. *See Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 443 n.10 (Mich. 2020). But this process took years and left the titles of affected properties in disarray. *See id.* In 1999, the Michigan legislature overhauled the Act to promote the speedy 'return' of delinquent properties to 'productive' uses. Mich. Comp. Laws § 211.78(1); *see* Act of July 22, 1999, No. 123, 1999 Mich. Pub. Acts 732. Today, the Act permits a 'foreclosing governmental unit' to obtain ownership of these properties. Mich. Comp. Laws §§ 211.78(8)(a), 211.78k(6). Because the county treasurer is the 'foreclosing governmental unit' in most counties, we will refer to this unit as the 'county treasurer.' *See Rafaeli*, 952 N.W.2d at 443 n.11."

"A county treasurer must treat property taxes as 'delinquent' if a property owner has not paid them by the March after a tax year. Mich. Comp. Laws § 211.78a(2). The treasurer must send a series of notices to the taxpayer. *See id.* §§ 211.78b–211.78c, 211.78f. If, by the next March, the taxpayer still has not paid the taxes (along with any interest, penalties, and fees), the treasurer may treat the property as 'forfeited.' *Id.* § 211.78g(1). Within three

months of the forfeiture, the treasurer must petition a state court for a judgment that provides the treasurer with 'absolute title' to the property. *Id.* § 211.78h(1); *see Rafaeli*, 952 N.W.2d at 444. The treasurer must give notice of this suit to all parties with a legal interest in the property. Mich. Comp. Laws § 211.78i(2), (5). The court then must hold a hearing and grant the treasurer 'fee simple title' if the taxpayer has not justified the failure to pay the taxes. *Id.* §§ 211.78h(5), 211.78k(5)–(6)."

"After obtaining a property, a county treasurer must give the state and the relevant city or township an option to buy it. *Id.* § 211.78m(1). If these entities decline, the treasurer may sell the property at a foreclosure auction. *Id.* § 211.78m(1)–(2). The Act requires the treasurer to deposit the proceeds from all of a year's sales into one account and to disburse these proceeds 'in a specific order of priority.' *Rafaeli*, 952 N.W.2d at 445. The treasurer must first reimburse the relevant tax fund for the unpaid taxes. Mich. Comp. Laws § 211.78m(8)(a). Sometimes, though, a property sale will produce more money than the amount that a property owner owes. In that circumstance, the 1999 amendments to the Act did not originally 'provide for any disbursement of the surplus proceeds to the former property owner[.]' *Rafaeli*, 952 N.W.2d at 446. Instead, the amendments directed the treasurer to use the proceeds to pay for the costs of all foreclosure suits and to subsidize the county's general fund. *Id.*"

"This scheme—which allows a treasurer to seize more of a landowner's property than the amount that the landowner owed—has generated substantial litigation in state and federal court." …

"Apart from state-court litigation, landowners have sued in federal court under the Fifth Amendment's Takings Clause. Their efforts have taken a winding path. Before *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the Supreme Court held that takings plaintiffs must exhaust their claims in state court. *Id.* at 2167. We dismissed some landowners on this ground. *See Wayside Church v. Van Buren County*, 847 F.3d 812, 817–22 (6th Cir. 2017). In *Knick*, however, the Court overruled this exhaustion mandate. 139 S. Ct. at 2167. Since then, we have held that neither exhaustion nor the Tax Injunction Act nor any other comity principle stands in the way of federal courts entertaining these claims. *Freed v. Thomas*, 976 F.3d 729, 734–41 (6th Cir. 2020)."

"We thus recently reached the merits in *Hall*. There, a county treasurer foreclosed on the properties of three landowners but did not auction them off as in *Rafaeli*. 51 F.4th at 189. Instead, the treasurer exchanged the properties to a city for amounts that the landowners owed. *Id.* The city then transferred the three properties to a private entity. *Id.* That entity kept one of the properties and sold the other two for prices well above the landowners' liabilities. *Id.* We held that the treasurer violated the Takings Clause by confiscating properties whose fair market value exceeded the landowners' tax obligations. *Id.* at 189–96. In the process, we disagreed with the 'dictum' in *Rafaeli* that landowners had a property interest only in the surplus proceeds that a treasurer received at a foreclosure sale. *Id.* at 189. The sale in *Hall* had not generated any surplus because the treasurer had obtained from the city only the amounts that the landowners owed. *Id.* We found this fact irrelevant. Summarizing centuries-old principles, we concluded that landowners have a property interest in their 'equitable title' to real estate and that the government may not transform private equity into public property merely by passing a law. *Id.* at 190–96."

"In June 2019, as this state and federal litigation progressed, Fox brought this putative class action. He failed to pay taxes on property that he owned in Gratiot County. By February 2017, the amount that Fox owed had reached $3,091.23. That month, the Gratiot County treasurer took Fox's property using the Act's processes. Months later, the treasurer sold it at an auction for $25,500. Yet Fox claims that his property had a fair market value of at least $50,400. He thus suggests that his equitable title in the property reached at least $47,308.77—the difference between his tax delinquency and the fair market value. The county treasurer did not pay him that surplus. Nor did the treasurer even pay him $22,408.77—the difference between his tax delinquency and the sale price at the auction."

"Although Fox claimed that only Gratiot County and its treasurer had harmed him, he named 26 other counties and their treasurers as defendants. (We will generically refer to the defendants as the 'Counties.') Fox alleged that the Counties' common practice of keeping all surplus equity in the properties of delinquent taxpayers amounted to an uncompensated taking in violation of the U.S. and Michigan Constitutions. He also alleged that this practice qualified as an excessive fine, that it violated procedural and substantive due process, and that the Counties had been unjustly enriched."

"The district court granted Fox's motion and certified a class. *Fox v. County of Saginaw*, 2020 WL 6118487, at *1 (E.D. Mich. Oct. 16, 2020). The court recognized that Fox's efforts to certify a class faced standing and discovery obstacles separate from Rule 23's normal requirements. To begin with, Fox sought to certify a class of landowners from dozens of Counties that had not injured him, so he lacked standing to sue them under traditional principles. *See id.* at *4–5. The court overcame this problem using the 'juridical link doctrine.' *See id.* It reasoned that Fox

could sue all 27 Counties because they had all kept surplus proceeds pursuant to the Act and because the class members had all suffered the same type of injury. *Id.* at *6."

"The Counties first assert that the district court could not certify the class because Fox lacks standing to sue all Counties other than Gratiot County. We review this standing question de novo. *See Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019)."

"… The Constitution permits federal courts to hear only 'Cases' or 'Controversies.' U.S. Const. art. III, § 2, cl. 1. To bring a case or controversy within the meaning of Article III, a plaintiff must have 'standing' to sue. *See Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 536–37 (6th Cir. 2021). The Supreme Court's standing test has three familiar requirements. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs must have suffered an injury. They must trace this injury to the defendant. And they must show that a court can redress it. *See id.*"

"If Fox had brought an individual suit, he would lack standing to sue most of the Counties under this test. Undoubtedly, when Fox's property was foreclosed on and his equitable title taken, he suffered 'tangible harms' that satisfy Article III's injury element. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). But a plaintiff who meets the 'actual-injury requirement' does not thereby obtain a license to sue anyone over anything. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). The plaintiff must show that the injury is 'fairly traceable' to the defendant. *Cuno*, 547 U.S. at 342 (citation omitted). And Fox can trace his injury only to Gratiot County; he does not attempt to connect it to the other Counties." …

"How does Fox seek to overcome this problem? He turns to his class-action allegations. Under the juridical link doctrine, Fox says, he has standing to sue the 26 other Counties as a representative of the class. If 26 landowners with property in each of the 26 other Counties had joined Fox's suit, each landowner would likely have standing to sue his or her respective County in the same way that Fox has standing to sue Gratiot County. *See Daves*, 22 F.4th at 542. So whether these 27 plaintiffs could litigate as a group would raise a joinder question under Federal Rule of Civil Procedure 20(a), not a standing question under Article III. In the same way, Fox argues, whether he may sue the other Counties turns on Rule 23, not Article III."

"The juridical link doctrine conflicts with Supreme Court precedent in at least three ways. *First*, and most obviously, the Court has held that its usual three-part test for standing applies with full force in the class-action context. As the Court has said, a decision to assert class allegations in a complaint 'adds nothing to the question of standing[.]' *Simon*, 426 U.S. at 40 n.20. Like all plaintiffs, class representatives must prove their own 'case or controversy with the defendants' in order to seek relief for 'any other member of the class.' *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam). The representatives thus must allege an individual injury; they cannot piggyback off the injuries 'suffered by other, unidentified members of the class[.]' *Warth v. Seldin*, 422 U.S. 490, 502 (1975). And even when they have incurred an injury, they lack standing to seek class-wide relief that would go beyond remedying that injury. *See Lewis*, 518 U.S. at 357–58. That is, they may not seek relief against different conduct that has harmed other class members even when it is 'similar' to the conduct that harmed the representatives. *Blum v. Yaretsky*, 457 U.S. 991, 999–1001 & 1001 n.13 (1982)."

"The juridical link doctrine departs from these rules. Fox himself has not alleged 'a case or controversy' with the 26 non-Gratiot Counties. *O'Shea*, 414 U.S. at 494. And even if these Counties committed actions 'similar' to Gratiot County's 'injurious conduct' against Fox, he still lacks standing to challenge their conduct because it did not affect him. *Blum*, 457 U.S. at 999. Fox also cannot rely on the claim that the other Counties harmed the 'members of the class' that he seeks to represent. *Id.* at 1001 n.13. He must show that they injured him 'personally' to have standing to sue them. *Id.* (quoting *Warth*, 422 U.S. at 502). He cannot do so."

"… [A]side from Fox's mistaken reliance on the class members' injuries, his theory conflicts with Supreme Court precedent identifying the critical time for standing. Plaintiffs must have standing 'at the outset of the litigation.' *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *see Davis v. FEC*, 554 U.S. 724, 734–35 (2008). Why? Because a failure of the plaintiff's standing is a failure of the court's subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 102–04." …

"… Fox's theory conflicts with more general principles. The Court's three-part standing test represents the 'irreducible constitutional minimum' to assert a case or controversy in federal court. *Lujan*, 504 U.S. at 560. It is a key component of the Constitution's separation of powers designed to protect defendants from that portion of the federal government's coercive power vested in the judiciary. *See TransUnion*, 141 S. Ct. at 2203; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Given the test's constitutional roots, the Court has required 'strict compliance' from plaintiffs and has rebuffed all efforts to create exceptions. *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)." …

CONTRACTS

1. City residents sued the City of Memphis for breach of contract, breach of implied contract, unjust enrichment, and promissory estoppel related to inadequate garbage collection services provided by the city - Garbage collection performed by city is a government function not a contractual function - Charging a fee for the service does not create a contract between city and its citizens - As a government service the court could not conclude that it bestows any rights on residents that may be enforced via a breach of contract action - Tennessee law is clear that municipalities are generally immune from suit for actions arising from their government functions - Unjust enrichment, implied contract, and promissory estoppel claims against the city for garbage collection it performs are barred by sovereign immunity - Plaintiffs pleading failed to make a claim for a constructive trust

ROBERT L. WHITWORTH ET AL. v. CITY OF MEMPHIS ET AL.
COURT OF APPEALS No. W2021-01304-COA-R3-CV Filed April 3, 2023

"Appellant city residents sued the City of Memphis for breach of contract, breach of implied contract, unjust enrichment, and promissory estoppel related to inadequate garbage collection services provided by the City. Residents also sought a constructive trust and a declaratory judgment. The trial court dismissed the breach of contract action upon its conclusion that the provision of garbage collection services was a government function that did not create an enforceable contract between the city and its residents. The trial court dismissed the residents' other contractual claims on the basis that they were barred by sovereign immunity. Finally, the trial court dismissed the claims for constructive trust and declaratory judgment upon its conclusion that they did not state a claim for relief under the circumstances. We affirm."

"On March 21, 2021, Appellant Robert L. Whitworth filed a complaint for damages against Appellee the City of Memphis ('the City') in Shelby County Chancery Court ('the trial court'). A day later, an amended complaint was filed to add four additional plaintiffs, Patricia A. Possel, Robert E. Possel, Sue G. Ward, and Denson Ward, III (together with Mr. Whitworth, 'Appellants') and to include class action allegations. Appellants thereafter sought leave to amend their complaint a second time, which was granted by consent. The second amended complaint is therefore the operative complaint for purposes of the appeal."

"Appellants' complaint related to substandard garbage services provided to Memphis residents in a particular area of the city referred to as 'Area E.' According to Appellants, following the annexation of Area E, the City chose to employ a third-party vendor for trash pick up services in that area, unlike other areas of the city. Despite Area E residents paying the monthly line item fee required for trash services mandated by Memphis ordinance, the complaint alleged that the third-party vendors 'have failed and refused to provide weekly garbage, recycling and bi-weekly bulk and yard waste pick up, leaving trash literally piling up in Area E.' As a result, Area E residents have 'not receive[d] the services for which they contracted and for which they have paid.' The complaint further detailed numerous media pieces indicating that the failures were systemic and well-known. Based on these facts, Appellants asserted five claims against the City: (1) breach of contract; (2) breach of the implied duty of good faith and fair dealing; (3) unjust enrichment, breach of implied contract, and promissory estoppel; (4) constructive trust; and (5) declaratory judgment."

"Appellants' first cause of action is for breach of contract. 'In order to make a prima facie case for a breach of contract claim, a plaintiff must allege: '(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.'' ***Tolliver v. Tellico Vill. Prop. Owners Ass'n***, 579 S.W.3d 8, 25 (Tenn. Ct. App. 2019) (quoting ***C & W Asset Acquisition, LLC v. Oggs***, 230 S.W.3d 671, 676–77 (Tenn. Ct. App. 2007)). The central question here involves whether a contract exists upon which a breach of contract action may lie."

"In order to establish a contract, Appellants made the following allegations in their complaint:

> By virtue of imposing trash collection fees upon [Appellants] and the Class Members and informing them of the weekly and bi-weekly trash collection dates that their trash would be collected, a contract was formed between the City [] and the [Appellants] and Class Members for the weekly collection of solid waste and the bi-weekly collection of bulk/yard waste, based upon the rates billed by MLGW at the City's direction."

"The trial court ruled that no contract existed between Appellants and the City for trash collection services because the City was performing 'an ordinary government function. Appellants counter that such may be the case for other types of government services, such as the services of the police or fire department, but the collection of fees for trash services is indicative of a contractual relationship." …

"In contrast, the City contends that the trial court correctly determined that the trash services at issue stemmed from a government service, rather than a contract. In support, the City notes that municipalities are authorized by statute to impose and collect fees for trash services. *See* Tenn. Code Ann. § 68-211-835(g)(1) (authorizing a municipality 'to impose and collect a solid waste disposal fee' for the purposes of 'establish[ing] and maintain[ing] solid waste collection and disposal services'). Under the auspices of this statute, the City adopted ordinances governing the collection of fees for trash disposal within its borders. The City further points out that it is generally accepted that garbage removal services are government functions. *See, e.g.*, ***Town of Carthage, Tennessee v. Smith Cnty.***, No. 01-A-01-9308-CH00391, 1995 WL 92266, at *6 (Tenn. Ct. App. Mar. 8, 1995) ('Providing for the expeditious removal and disposal of solid waste is certainly a governmental function.'); 7 *McQuillin Mun. Corp.* § 24:250 (3d ed. 2022) ('The gathering of garbage is not a trade, business, or occupation, but it is a public duty, to be performed by a city in a manner that will best promote the health of the inhabitants.')."

"The City also notes that Appellants cite no legal authority of any kind for their assertion that the collection of a fee transforms this government service into a contractual obligation. Indeed, the City points out that the Tennessee Supreme Court has previously held that a city may impose a fee to defray the costs of even its police powers—the very powers Appellants admit are non-contractual. *See* ***Memphis Natural Gas Co. v. McManless***, 194 S.W.2d 476, 483 (Tenn. 1946) (holding, in a case involving inspection fees imposed by a public utility, that '[e]ven if the purpose of the assessment was limited to the exercise of the police power, fees imposed to defray the expenses of that exercise are not objectionable'); *cf.* 7 *McQuillin Mun. Corp.* § 24:250 (explaining that governmental entities provide garbage services under either their general or police powers)."

"Moreover, the City points out that at least one case has concluded that the payment of a fee for a government service does not create an enforceable contract between the governmental entity and its residents. *See* ***Skyrise Apartments, Inc. v. City of Rockford***, 83 Ill. App. 3d 447, 403 N.E.2d 1334 (1980). In ***Skyrise Apartments***, the City of Rockford contracted with a private garbage collection company to provide garbage services to its residents pursuant to an ordinance allowing such a contract. ***Id.*** at 448. This contract, however, did not provide for garbage services for hotels, motels, or apartment buildings containing five or more units. ***Id.*** The owners of an apartment building sued the city, arguing that the new contract violated the then-in-effect ordinance providing for garbage collection. The trial court dismissed the complaint, and the owners appealed."

"As relevant to this case, the owners of the apartment building argued on appeal that '[t]he moneys expended by the plaintiffs for garbage collection are recoverable as moneys had and received by the city, which saved that money by wrongfully withholding garbage collection service from the plaintiffs.' In resolving this issue, the Court first held that because 'the function [i.e., trash collection] was a governmental one[,] . . . the failure to perform it is not the basis for an action in damages.' ***Id.*** at 732."

"The Court also rejected the owners' contention that they had a contract with the city obligating the city to perform garbage collection services:

> Inasmuch as the plaintiffs had no contract with the city whereby the city agreed to provide them refuse services, there is no basis for the contention that the city should reimburse the plaintiffs for the amounts the plaintiffs have expended for private refuse collection. The expectations of the plaintiffs, as a particular group of persons, do not create a contract and it would indeed set an unfortunate precedent if private expenditures could be turned into public obligations without more basis of right than appears here.
> . . . The basis of this claim is neither a private contract nor a public obligation and we see no basis for money damages.
> . . . [R]ecovery of damages under these circumstances would seem to us to set a most unfortunate precedent in measuring civic responsibility. Whether the city properly amended its ordinance or not, the city is not answerable in damages since there was never any contract between it and the plaintiffs . . . .

Id. at 733."

"Appellants appear to assert that that ***Skyrise Apartments*** is not reflective of Tennessee law, 5 citing ***Ussery v. City of Columbia***, 316 S.W.3d 570 (Tenn. Ct. App. 2009), which Appellants characterize as holding that a city's violation of ordinances may serve as a basis for a breach of implied contract action. Appellants' argument

misapprehends ***Ussery*** in two significant respects. First, even setting aside the distinction between the breach of an express contract and the breach of an implied contract,6 Appellants are incorrect that the ***Ussery*** court held that the city's ordinances created an implied contract. While the ***Ussery*** panel did affirm the underlying judgment on the basis that the city had violated its own ordinances promising pay raises to its employees, it specifically held that the evidence was insufficient to create a contract implied at law. ***Id***. at 583 ('[T]he ordinances do not reach the level of a contract implied in law.'). Only because the issue of the violation of the ordinances, outside of any contractual action, was tried by consent, was this Court able to affirm the underlying judgment. ***Id***. at 583–84. Here, Appellants have framed their claims solely as contractual or quasi-contractual in nature, not as a violation of an ordinance or a statute by the City. Neither do Appellants assert that such a claim was tried by consent."

"Second, and perhaps most importantly, the plaintiffs in ***Ussery*** were employees of the city and their claims were related to employment. ***Id***. at 573. Because 'the employer-employee relationship is contractual in nature[,]' it was not unreasonable to apply contract principles to that particular situation. ***Id***. at 578 (quoting ***Hamby v. Genesco, Inc.***, 627 S.W.2d 373, 375 (Tenn. Ct. App. 1981)). The same is simply not true in this case."

"Here, like the plaintiffs in ***Skyrise Apartments***, Appellants are seeking damages related to subpar government services provided to them. But, unlike the employeremployee relationship, government functions are typically not characterized as contractual in nature under Tennessee law. As an initial matter, to the extent that Appellants rely on various ordinances and statutes, we begin with the 'presumption that ordinances and statutes are not contractual in nature.' ***Id***. at 581 (citing ***Dodge v. Bd. of Educ. of Chicago***, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937)). Other law confirms the correctness of that presumption in this situation. Indeed, like in Illinois, Tennessee law confirms that garbage collection performed by a municipality is a government function. *See* Tenn. Code Ann. § 68-211-835(g)(1); ***Town of Carthage***, 1995 WL 92266, at *6. This is illustrated by the fact that a municipality may charge a fee for garbage collection services that are not utilized by a resident. *See* ***City of Bolivar v. Goodrum***, 49 S.W.3d 290, 294 (Tenn. Ct. App. 2000) (holding that waste disposal 'fees may be legally imposed on residents regardless of whether the services are actually utilized'); ***Horton v. Carroll Cnty.***, 968 S.W.2d 841, 846 (Tenn. Ct. App. 1997) (holding that a county 'may legally impose a monthly fee on all its rural residents for solid waste disposal services regardless of whether the services are actually utilized'). And the Tennessee Supreme Court has previously made clear that 'the mere collection of fees from a given service does not per se transform an otherwise public function into a private one.' ***City of Memphis v. Bettis***, 512 S.W.2d 270, 273 (Tenn. 1974) (citing ***Nashville Trust Co. v. City of Nashville***, 182 Tenn. 545, 188 S.W.2d 342 (Tenn. 1944); ***McMahon v. Baroness Erlanger Hospital***, 43 Tenn. App. 128, 306 S.W.2d 41 (Tenn. Ct. App. 1957)) (stating that this rule is 'long held')."

"Given that the garbage collection at issue here is a government service, we cannot conclude that it bestows any rights on residents that may be enforced via a breach of contract action. Importantly, Tennessee law is clear that municipalities are generally immune from suit for actions arising from their government functions. ***Bettis***, 512 S.W.2d at 272–73 ('The rule in Tennessee is that a municipality is immune from liability arising from the acts of its agent while carrying out a governmental function[.]'); ***Vaughn v. City of Alcoa***, 194 Tenn. 449, 453, 251 S.W.2d 304, 305 (Tenn. 1952) ('In this State a municipality is liable in damages for tort to its citizens only if it was negligent in the operation of one of its proprietary functions as distinguished from its governmental functions or if it created or maintained a nuisance in the performance of one of its governmental functions.'); *cf*. Tenn. Code Ann. § 29-20-201(a) ('Except as may be otherwise provided in this chapter [involving governmental tort liability], all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.'). Appellants' attempt to frame this action as a breach of contract cannot alter the fundamental truth that their claim relates the performance of a government function by the City. Simply put, the City collected fees as authorized by statute and ordinance to perform a government function. That the City did not perform this function up to par does not transform a government function into a contractual one, nor does it rebut the presumption that the relevant statutes and ordinances do not create a contractual relationship for which a breach of contract action may lie. Thus, we conclude that Appellants can prove no set of facts demonstrating the existence of an enforceable contract between themselves and the City. As such, their breach of contract action must fail. *See* ***Tolliver***, 579 S.W.3d at 25."

"Appellants next argue that the trial court erred in dismissing their claim for breach of the implied duty of good faith and fair dealing. The duty of good faith and fair dealing is implied in every Tennessee contract. *See* ***Dick Broad. Co. of Tennessee v. Oak Ridge FM, Inc.***, 395 S.W.3d 653, 660 (Tenn. 2013). However, 'a claim based on the implied covenant of good faith and fair dealing is not a stand alone claim; rather, it is part of an overall breach of contract claim.' ***Jones v. LeMoyne-Owen Coll.***, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citing ***Lyons v. Farmers Ins. Exch.***, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)). Thus, 'there must be a contract to contain the covenant.' ***Id***. Because there was no contract between Appellants and the City, there was no duty of good faith and fair dealing for the City to breach. As such, the trial court did not err in dismissing this claim."

"Appellants next assert that the trial court was incorrect to dismiss their equitable claims—that is, their claims for unjust enrichment, implied contract, and promissory estoppel. The City asserts that these claims are barred by the doctrine of sovereign immunity. In the alternative, the City contends that each claim was properly dismissed for failure to make out a prima facie case."

"'The doctrine of sovereign immunity is a principle of the common law as old as the law itself, that the king is not bound by any statute, if he be not expressly named to be so bound.' ***Colonial Pipeline Co. v. Morgan***, 263 S.W.3d 827, 848 (Tenn. 2008) (quotation marks and citations omitted). In Tennessee, the concept of sovereign immunity is enshrined in our constitution: 'Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.' Tenn. Const. art. I, § 17. 'The traditional construction of the clause is that suits cannot be brought against the State unless explicitlyauthorized by statute.' ***Colonial Pipeline***, 263 S.W.3d at 849. The Tennessee General Assembly essentially adopted this traditional construction when it enacted Tennessee Code Annotated section 20-13-102, which states as follows: 'No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property. . . .' *See* ***Colonial Pipeline***, 263 S.W.3d at 849 (stating that the Tennessee General Assembly 'adopted a comparable position' to the common law rule in enacting this statute). For purposes of our immunity statutes, 'the state' refers to not only the State of Tennessee, but also 'its departments, commissions, boards, institutions and municipalities[.]' ***Davidson v. Lewis Bros. Bakery***, 227 S.W.3d 17, 19 (Tenn. 2007)."

"'Thus, in order to entertain a suit against the State or one of its municipalities, we must first determine if the governmental entity has consented to being sued by looking to legislation waiving sovereign immunity. '[C]ourts will interpret a statute as waiving [] sovereign immunity only if the legislation waives sovereign immunity in plain, clear, and unmistakable terms.' ***Smith v. Tennessee Nat'l Guard***, 551 S.W.3d 702, 709 (Tenn. 2018) (quotation marks omitted) (quoting ***Mullins v. State***, 320 S.W.3d 273, 283 (Tenn. 2010)). In other words, 'waiver of sovereign immunity must be explicit, not implicit.' ***Colonial Pipeline***, 263 S.W.3d at 853. As the Tennessee Supreme Court has explained:

> In determining whether a statute satisfies this standard, we focus 'on the actual words chosen and enacted by the legislature.' ***Mullins***, 320 S.W.3d at 283. Courts lack authority to abrogate the State's sovereign immunity and must avoid inadvertently broadening the scope of legislation authorizing suits or claims against the State. ***Hill v. Beeler***, 199 Tenn. 325, 286 S.W.2d 868, 869 (1956).

Tennessee Nat'l Guard, 551 S.W.3d at 709."

"The City argues that the trial court correctly dismissed Appellants' claims for unjust enrichment, implied contract, and promissory estoppel on the basis of the City's sovereign immunity, citing ***Harakas Constr., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.***, 561 S.W.3d 910 (Tenn. Ct. App. 2018). In ***Harakas Construction***, a construction company sued the metropolitan government of Nashville and Davidson County ('Metro') for, inter alia, unjust enrichment, implied contract, and promissory estoppel. ***Id.*** at 926. The city responded by arguing that these claims were barred by sovereign immunity. The trial court agreed, finding that there was 'no statute or ordinance that allows [the plaintiff's] equitable claims against Metro.' ***Id.*** at 922. The construction company thereafter appealed to this Court. ***Id.***"

"… ***Harakas*** stands for the proposition that unless the plaintiff can show a legislative enactment in which the defendant city unmistakably consents to be sued, claims of implied contract, unjust enrichment, and promissory estoppel may be barred by sovereign immunity. And other courts have come to similar conclusions. For example, in ***Greenhill v. Carpenter***, 718 S.W.2d 268 (Tenn. Ct. App. 1986), the plaintiff attempted to sue the state under the theory of an implied contract claim. We rejected the claim on the basis of sovereign immunity:

> A determination that plaintiff is not suing on an express contract leaves her with no authority upon which to sue the state. As already noted, Article I, § 17, of the Tennessee Constitution provides that suits against the state may only be brought 'in such manner and in such courts as the Legislature may by law direct.' The above-cited Code section grants permission to bring suit only on express contracts.[10] Plaintiff has cited no statute authorizing a suit against the state on an implied contract, and our research has found none. *See* ***Carlson v. Highter***, 612 F. Supp. 603 (E.D. Tenn. 1985). We conclude that the trial court properly dismissed plaintiff's suit on the grounds of sovereign immunity.

Greenhill, 718 S.W.2d at 273; *see also* ***Woolsey v. Hunt***, 932 F.2d 555, 567 (6th Cir. 1991) (citing ***Greenhill***, 718 S.W.2d at 273) ('Tennessee does not recognize the enforcement of implied contract claims against the state.'); *cf.*

Wells v. State, No. M2002-01958-COAR3-CV, 2003 WL 21849730, at *2 (Tenn. Ct. App. Aug. 8, 2003) (describing ***Greenhill*** as holding that a claim 'was on an implied contract rather than an express contract and therefore not within the court's jurisdiction')."

"In their attempt to reverse the trial court's application of immunity, Appellants have pointed to a handful of cases in which they assert equitable claims against municipalities have been countenanced by Tennessee courts. For example, in ***City of Lebanon v. Baird***, 756 S.W.2d 236 (Tenn. 1988), the Tennessee Supreme Court stated that 'the concepts of estoppel or of implied contract have been used to remedy the unjust enrichment of a city.' ***Id***. at 245. Later, in ***EnGenius Ent., Inc. v. Herenton***, 971 S.W.2d 12 (Tenn. Ct. App. 1997), this Court held that a trial court erred in dismissing a promissory estoppel claim against a city. ***Id***. at 20. The problem with Appellants' reliance on these cases, however, is that none of the cited cases discuss sovereign immunity in any fashion. *See* ***Baird***, 756 S.W.2d at 245–46 (involving a claim that the city entered into a written contract with the defendant, then failed to enact the ordinance that authorized the contract; affirming the trial court's finding that there was no estoppel or implied contract claim based on the facts of the case); ***EnGenius***, 971 S.W.2d at 18–21 (reversing the trial court's judgment that the plaintiff failed to make out a prima facie claim of unjust enrichment and promissory estoppel); *see also* ***London & N.Y. Land Co. v. City of Jellico***, 103 Tenn. 320, 52 S.W. 995 (Tenn. 1899) (allowing third-party contractor to obtain the benefit of an invalid contract without any discussion of immunity); ***Memphis Gaslight Co. v. City of Memphis***, 93 Tenn. 612, 30 S.W. 25 (Tenn. 1894) (allowing the plaintiff to recover against the City even though no written contract was at issue for earlier years without any discussion of sovereign immunity); ***Trull v. City of Lobelville***, 554 S.W.2d 638 (Tenn. Ct. App. 1976) (holding that a city could be held to its implied promise without any discussion of sovereign immunity). As such, it is entirely unclear whether immunity was raised as a defense to the actions against the cities at issue. And '[i]t is axiomatic that judicial decisions do not stand for propositions that were neither raised by the parties nor actually addressed by the court.' ***Staats v. McKinnon***, 206 S.W.3d 532, 550 (Tenn. Ct. App. 2006) (citing ***Shousha v. Matthews Drivurself Serv., Inc.***, 210 Tenn. 384, 390, 358 S.W.2d 471, 473 (Tenn. 1962)). So these cases are inapposite to the question of whether claims of unjust enrichment, implied contract, and promissory estoppel are barred by sovereign immunity."

"Moreover, even if these cases could provide the authorization for suit that is necessary to waive sovereign immunity, none of the cases involve the situation presented here, where citizens are suing a municipality under the theory that the payment of fees for government services creates an implied contract or other quasi-contractual right to recover against a municipality. Instead, the cited cases typically involve municipalities ostensibly contracting with third-parties to provide a benefit to the city, but the contracts being invalidated due to some infirmity." …

"In sum, unlike the plaintiff in ***Harakas***, Appellants have made no effort in their appellate brief to point to a single statute or ordinance that they assert explicitly evinces the City's consent to be sued for unjust enrichment, implied contract, and/or promissory estoppel. As previously discussed, it is these legislative enactments that we must look to in order to determine whether sovereign immunity has been waived. ***Colonial Pipeline***, 263 S.W.3d at 849; ***Bratcher***, 508 S.W.3d at 210. Under these circumstances, we conclude that sovereign immunity applies to bar Appellants' claims for unjust enrichment, implied contract, and promissory estoppel. The trial court therefore did not err in dismissing these claims. All other arguments relative to these claims are pretermitted."

"Appellants next assert that the trial court erred in dismissing their claim for a constructive trust. Neither party disputes the requirements of this claim. As we have previously explained,

> 'A constructive trust may only be imposed against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment or questionable means, has obtained an interest in property which he ought not in equity or in good conscience retain.'

Story v. Lanier, 166 S.W.3d 167, 185 (Tenn. Ct. App. 2004) (quoting ***Intersparex Leddin KG v. Al-Haddad***, 852 S.W.2d 245, 249 (Tenn. Ct. App. 1992)). There are four types of cases where Tennessee have imposed constructive trusts:

> (1) where a person procures the legal title to property in violation of some duty, express or implied, to the true owner; (2) where the title to property is obtained by fraud, duress or other inequitable means; (3) where a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained; and (4) where a person acquires property with notice that another is entitled to its benefits.

Myers v. Myers, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994) (citations omitted). When the trial court determines that a trust should be imposed, 'the court, in equity, removes the property from the person holding title, the trustee, and puts the property in trust for the benefit of the person harmed, the beneficiary.' ***Findley v. Hubbard***, No. M2017-01850-COA-R3-CV, 2018 WL 3217717, at *8 (Tenn. Ct. App. July 2, 2018) (citing ***Tanner v. Tanner***, 698 S.W.2d 342, 346–47 (Tenn. 1985); ***Browder v. Hite***, 602 S.W.2d 489, 492–93 (Tenn. Ct. App. 1980))."

"On appeal, Appellants' argument is also limited. Specifically, their argument as to how the facts of this case warrant a constructive trust is confined to the following:

> [I]t is entirely inequitable for the City to represent to its residents that it will provide trash collection services and to use its influence as a municipality to obtain fees for these services without providing the promised services. The City has thus procured legal title to the fees paid by [Appellants] and putative class in violation of their duty to provide trash collection services, inequitably, and on favorable terms to it through the exercise of its influence as a municipality. [Appellants] have sufficiently stated a claim for constructive trust.

Respectfully, Appellants' allegations and their arguments on appeal are insufficient to make out a prima facie claim for a constructive trust. Here, Appellants' allegations essentially amount to a claim that the City required residents to pay a fee for a service that was substandard. Certainly, we share the trial court's concern that the City's residents were not provided with the services that they were both paying for and desperately needed. But these allegations simply do not indicate that the City utilized anything amounting to fraud, duress, abuse of confidence, artifice, or concealment in their dealings with residents on this issue. ***Intersparex Leddin***, 852 S.W.2d at 249. Instead, the City imposed fees on residents for services as authorized by both statute and ordinance. The City allegedly failed to provide these services in an appropriate manner. Appellants have cited no analogous caselaw to suggest that this situation falls within one of the recognized situations where a constructive trust may be imposed. As such, the trial court did not err in dismissing this claim."

"Appellants finally assert that the trial court erred in dismissing their declaratory judgment claim. The Tennessee Declaratory Judgment Act 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.

Tenn. Code Ann. § 29-14-103. This statute 'permits persons interested in a written contract to obtain a declaratory judgment concerning their rights, status, or other legal relations under the contract.' ***Dobbs v. Guenther***, 846 S.W.2d 270, 275 (Tenn. Ct. App. 1992). The statute is to be construed liberally, but the statute will only grant relief 'to parties who have a real interest in the litigation . . . and when the case involves present rights that have accrued under presently existing facts.' ***Id.*** (citations omitted)."

"In dismissing this claim, the trial court ruled that Appellants could not obtain a declaratory judgment because there was no 'private contractual rights' created by the offering of trash services by the City. On appeal, the City further argues that Appellants' declaratory judgment claim is merely duplicative of its other claims, which have been dismissed on other grounds. *See* ***Miami Yacht Charters, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh***, No. 11-21163-CIV-GOODMAN, 2012 U.S. Dist. LEXIS 57041, at *2, 2012 WL 10100125 (S.D. Fla. 2012) (noting that '[a] court must dismiss a claim for declaratory judgment if it is duplicative of a claim for breach of contract and, in effect, seeks adjudication on the merits of the breach of contract claim'); ***Narvaez v. Wilshire Credit Corp.***, 757 F. Supp. 2d 621, 636 (N.D. Tex. 2010) (dismissing as 'redundant' a declaratory judgment claim that was asserted in addition to a claim for of breach of contract); ***Camofi Master LDC v. Coll. P'ship.***, 452 F. Supp. 2d 462, 480 (S.D.N.Y. 2006) (emphasizing that the declaration sought would 'already be addressed in the breach of contract claim' and, thus, that 'a declaratory judgment would not further clarify legal relations among the parties'). We agree that this claim was properly dismissed."

"In their brief, Appellants clearly articulate the purpose of their declaratory judgment claim: to resolve a dispute 'over the existence of the contractual relationship between the City and Area E residents.' Thus, Appellants essentially seek a declaration that they have a contract with the City and for the Court to explain the 'rights, status, and legal relationship with the City under the contract[.]' But this claim has been resolved by our holding that no such contract was in fact created, as discussed *supra*. As such, there is no contract to construe or explain in this case. So Appellants' claim for a declaratory judgment concerning the enforceability and parameters of such a contract must also fail."

DECLARATORY JUDGMENT

1. Case was dismissed - No justiciable controversy as plaintiff was asking for an impermissible advisory opinion because there was no justiciable controversy

VONDELL RICHMOND v. CITY OF CLARKSVILLE, TENNESSEE
COURT OF APPEALS No. M2022-00974-COA-R3-CV Filed June 7, 2023

This case involves a declaratory judgment action to determine whether the plaintiff, then a member of the Clarksville City Council, was entitled to a declaration of rights concerning alleged communications between the Clarksville City Attorney and the local District Attorney General potentially pertaining to plaintiff. The trial court dismissed the action, concluding that the plaintiff was seeking. Having reviewed the record, we affirm."

MEMORANDUM OPINION

Please note this is a Memorandum Opinion. Pursuant to Rule 10 of the Rules of the Court of Appeals of Tennessee, "When a case is decided by memorandum opinion it shall be designated 'MEMORANDUM OPINION', shall not be published, and shall not be cited or relied on for any reason in any unrelated case."

"Vondell Richmond was formerly a duly-elected member of the Clarksville City Council ('the City Council').2 According to the City of Clarksville's ('the City') official charter, a council member must reside in the specific ward he or she was elected to serve. While Mr. Richmond was serving as a council member, private citizens submitted written complaints to the City alleging that Mr. Richmond was in violation of this charter requirement. According to Mr. Richmond, when issues arose concerning the residency requirement, he consulted with the City Attorney, Lance Baker. Later, as a result of the aforementioned complaints, a proceeding was initiated against Mr. Richmond before the City's Ethics Committee. According to Mr. Richmond, he was 'informed that the factual allegations made against him related to the City issues [had] . . . been forwarded for investigation by law enforcement.' Mr. Richmond then became concerned that the City Attorney had provided information to the local District Attorney General that Mr. Richmond had discussed with him concerning his residency-related issues, and Mr. Richmond believed that these discussions were covered by the attorney-client privilege. Mr. Richmond subsequently retained a private attorney who requested that the district attorney provide him with any information he may have received from the City Attorney regarding conversations pertaining to Mr. Richmond's residency-related issues."

"When he failed to receive a response to his request, Mr. Richmond filed a complaint for declaratory judgment. According to his complaint, Mr. Richmond sought a declaration of rights concerning '[i]nformation and [c]ommunication by and between [Mr. Richmond]' and the City Attorney and any communication between any employee of the City Attorney's office and the district attorney's office. Specifically, Mr. Richmond alleged that he was seeking a declaratory judgment 'to determine if specific records and communication, **to the extent they exist**, are protected by attorney client privilege[.]' (emphasis added). On April 18, 2022, the City filed a motion to dismiss Mr. Richmond's complaint, arguing that there was no justiciable controversy between the parties, among other things, and that Mr. Richmond's complaint sought an impermissible advisory opinion from the trial court."

"At the outset of our analysis, we note that, 'in order to sustain an action for a declaratory judgment, a justiciable controversy must exist.' *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2007) (citing *Jared v. Fitzgerald*, 195 S.W.2d 1, 4 (Tenn. 1946)). For a matter to be considered 'justiciable' as it pertains to a declaratory judgment action, 'a case must involve presently existing rights, live issues that are within a court's jurisdiction, and parties who have a legally cognizable interest in the issues.' *Id.* (citing *Brown & Williamson Tobacco Corp.*, 18 S.W.3d at 193)."

"In the appeal before us, Mr. Richmond maintains that the trial court erred in dismissing his declaratory judgment action against the City. At the core of Mr. Richmond's argument is that, contrary to the trial court's order dismissing the case, there is in fact a justiciable controversy present in his action. Specifically, he argues that there are multiple issues here which may be adjudicated by a declaratory judgment. We find Mr. Richmond's argument unavailing and without merit. As noted earlier, a justiciable controversy is one where a real question rather than a theoretical one is presented and a legally protectable interest is at stake. Here, the rights with which Mr. Richmond is concerned are his rights to attorney-client privilege and his right to alleged information. Mr. Richmond argues that a declaratory judgment action is the appropriate vehicle to determine the aforementioned rights. We disagree. The declaration sought by Mr. Richmond in his declaratory judgment action is purely hypothetical. Indeed, as outlined earlier, Mr. Richmond states in his complaint that he is seeking a declaratory

judgment 'to determine if specific records and communication, **to the extent they exist**, are protected by attorney client privilege[.]' (emphasis added). As such, it does not appear that there is even an allegation in the complaint as to the *actual* existence of any communications at issue. Courts are not permitted to render an advisory opinion based on hypothetical facts. *Colonial Pipeline Co.*, 263 S.W.3d 827, 838 (Tenn. 2008) (citing *Third Nat'l Bank v. Carver*, 218 S.W.2d 66, 69 (Tenn. 1948)). Here, the existence of any purported communications between the City Attorney and the district attorney is purely hypothetical and speculative, and therefore, cannot be the basis for a declaratory judgment."

EMPLOYMENT

1. Termination or voluntary resignation - A public employee with a property interest in continued employment is deprived of that interest by her employer if the employer constructively discharges her by forcing her to resign involuntarily - In the event that an employee resigns of his or her own volition, however, even as a result of the employer's actions, then he or she voluntarily relinquishes his or her property interest in continued employment, and the employer cannot be found to have deprived him or her of that interest without due process of law - Thus, a voluntary resignation does not constitute an adverse employment action - In general, employee resignations are presumed to be voluntary, but an employee may rebut this presumption by producing evidence indicating that the resignation was involuntarily procured - When considering whether an employee's resignation was involuntary, courts consider whether an objectively reasonable person would, under the totality of the circumstances, feel compelled to resign if he or she were in the employee's position - This inquiry includes the following factors: (1) whether the employee was given an alternative to resignation, (2) whether the employee understood the nature of the choice [she] was given, (3) whether the employee was given a reasonable time in which to choose, and (4) whether the employee could select the effective date of resignation

See also TENNESSEE DISABILITY ACT - TENNESSEE DISABILITY ACT – The TDA, unlike the ADA, contains no reasonable accommodation requirement - As a result, an employer does not violate the TDA by failing to provide a reasonable accommodation to assist an employee in performing the duties of his or her job - If a claimant needs an accommodation to be capable of performing the essential functions of the position, the claimant is not considered to be qualified for the job and may not look to the TDA for protection - To succeed under the TDA, an individual alleging discrimination must demonstrate(1) that the individual was qualified for the position; (2) that the individual was disabled; and (3) that the individual suffered an adverse employment action because of that disability

KIMBERLY BLACK v. CITY OF CLARKSVILLE, TENNESSEE
COURT OF APPEALS No. M2020-01580-COA-R3-CV Filed January 13, 2023

"An employee sought a reasonable accommodation from her employer when she began experiencing increased difficulties with her debilitating rheumatoid arthritis. The employer was unable to provide a reasonable accommodation and, after concluding that the employee's disability rendered her physically unable to perform the essential functions of her job, the employer removed the employee from her position and placed her on paid sick leave. The employee then resigned and sued the employer for discriminatory discharge under the Tennessee Disability Act. The trial court granted summary judgment to the employer after determining that the employee was not qualified for the position and that the employee did not suffer an adverse employment action due to her voluntary resignation. Finding no error, we affirm."

"In November 2011, the city of Clarksville, Tennessee ('the City') hired Kimberly Black on an at-will basis as a meter reader in the Water and Gas Department. The written job description for Ms. Black's position listed the following physical requirements: 'reaching, standing, walking, fingering, grasping, feeling, talking, hearing, seeing, and repetitive motions.' Additionally, the job description provided that a meter reader's work required 'exerting up to 50 pounds of force occasionally, and/or up to 10 pounds of force constantly to move objects' and that the work presented exposure 'to electrical currents, extreme temperatures, inadequate lighting, work space restrictions, and travel.'"

"Ms. Black was diagnosed with rheumatoid arthritis ('RA') in 2007, years before being employed as a meter reader, and the condition affected both her hands and feet. When she began working as meter reader in 2011, the City employed a total of eleven meter readers. By 2016, several meter readers had resigned and the City allowed two of those positions to remain vacant, causing an increase in the number of meters Ms. Black was expected to read. The increased workload made it harder for Ms. Black to do her job because it made her RA worse. Ms. Black

approached her supervisors about seeking other jobs within the Gas and Water Department and was informed that she needed to receive additional education and training. Her supervisors further informed her that the Gas and Water Department offered training classes she could attend to increase her qualifications for future positions that may become available. Ms. Black did not attend any of the training classes, nor did she receive any additional educational or vocational training."

"In December 2016, Ms. Black sent an email to Denise Johnson, who worked in the City's human resources office, seeking assistance due to the increased difficulties she was experiencing with her RA. Ms. Johnson met with Ms. Black to discuss possible assistance and gave her an accommodation request form to complete which Ms. Black completed and returned on February 13, 2017."

"The accommodation request form included a question asking what specific accommodation was being sought. Ms. Black answered, 'Something that will prevent me from being outside all day and not lifting something with my hands constantly, all day or having a tight grip in both hands.' She then stated that the City could explore the following accommodation: 'Maybe some type of office work, or anything else to keep me from doing the above constantly all day without a rest, and to keep me out of the weather all day, esp[ecially] the cold weather.' In response to a question asking what, if any, job function she was having difficulty performing, Ms. Black wrote, 'Being fast enough for their liking, the more meters I read the worse my pain is. Two positions weren't filled, and those routes were split with the rest of us, so that's even more to read.' She also wrote on the form that '[r]ight now it hurts to work because I hurt so bad' and 'I hurt all the time, too tired to take care of things.' Finally, Ms. Black identified the following as a limitation that was interfering with her ability to perform her job or access an employment benefit: 'My RA, the weather, they want us to read more and be as fast as can be and keep that pace up day after day. I'm having trouble doing that, esp[ecially] in bad weather. I don't know of any employment benefit. I never take a lunch.'"

"After receiving Ms. Black's accommodation request form, Ms. Johnson sent Ms. Black a copy of the job description for the meter reader position and a medical inquiry form for Ms. Black's doctor to complete. Dr. Kishorkumar A. Desai, Ms. Black's RA doctor, completed the medical inquiry form on March 15, 2017. He indicated that Ms. Black had a physical impairment, stating that she has RA and deformities in her hand and foot joints which prevented her from being able to lift, walk, and use her hands repetitively. Dr. Desai requested that the City help her find a job that did not require repeated hand usage."

"Ms. Black submitted the completed medical inquiry form to Ms. Johnson on March 24, 2017. Ms. Johnson then sent a memorandum to Pat Hickey, the general manager of the Gas and Water Department, Will Wyatt, the human resources director, and John Eskew, the risk manager, on March 27, 2017[.] … After receiving the March 27, 2017 memorandum, Mr. Hickey looked to see if there were any open positions in the Gas and Water Department that Ms. Black was qualified for and physically capable of doing based on her limitations as detailed by Dr. Desai in the medical inquiry form. Mr. Hickey ultimately concluded that there were not any."

"While waiting for a decision about her accommodation request, Ms. Black's difficulties continued. She sent an email to Ms. Johnson on April 2, 2017, stating, 'To be honest with you Denise, I dont [sic] know how well I can preform [sic] another type job. I can try if that's what will happen to me. . . . I'm trying to do my best with my job right now. I'm hurting and it's getting more difficult each day.' Ms. Black sent another email to Ms. Johnson several days later informing Ms. Johnson that what 'it will come down to, [is] I can't take it anymore and go out on my own because it's taking a while to hear anything' about the accommodation request."

"On April 10, 2017, Mr. Hickey discussed with Ms. Johnson the medical inquiry form completed by Dr. Desai, and the decision was made to stop Ms. Black from reading meters based on what Dr. Desai wrote on the form. Mr. Hickey and Ms. Black's manager, Krystal Richardson, met with Ms. Black on April 11, 2017, to inform her that they were pulling her from reading meters and that she needed to meet with Ms. Johnson to see what options were available to her. Following the meeting, Mr. Hickey sent Ms. Black an email summarizing what had been discussed during the meeting and informing her that, in the interim, she would be using her paid sick leave."

"Ms. Black met with Ms. Johnson on April 13, 2017, to review other job openings with the City that might be available. That afternoon, Ms. Johnson sent an email to Mr. Hickey stating that she and Ms. Black agreed that, based on Ms. Black's qualifications and medical restrictions, Ms. Black was not qualified for any of the City's open positions. Also that same afternoon, Ms. Johnson received an email from Ms. Black asking whether she should resign rather than being terminated and whether she should 'give a letter to Bob [Frazier, Ms. Black's supervisor] saying when my last day will be?' Ms. Black then stated in this email that her sick leave would end on April 28, 2017, and asked if the City would extend her last day of employment to May 1, 2017, so her health insurance would remain in effect through the end of May, to cover medical expenses associated with a surgery she had scheduled for May 1, 2017. The City agreed to the extension."

"The following day, on April 14, 2017, Mr. Frazier went to Ms. Black's home and presented her with a resignation letter with that day's date on it. The letter provided that Ms. Black's last day of employment would be May 2, 2017. Mr. Frazier told Ms. Black that it was better to resign than to be terminated and asked her to sign the letter because he needed to post her meter reader position. Ms. Black signed the resignation letter and remained on paid sick leave from April 11, 2017 through May 2, 2017, at which point, her employment ceased."

"On April 28, 2017, Ms. Black applied for long-term disability benefits. The longterm disability claim form included a question asking Ms. Black to provide the date she was first unable to work due to her medical condition; Ms. Black wrote, '4-12-17.' In response to the question 'What specific duties of your occupation are you unable to perform due to your medical condition,' Ms. Black wrote, 'Steady Repetive [sic] Work, being with outside elements all day.' Dr. Desai also completed part of the form and, in response to the question 'If your patient has CURRENT PHYSICAL RESTRICTION (activities patient should not do) and/or PHYSICAL LIMITATIONS (activities patient cannot do), list below,' he wrote, 'No repeated hand use like reading meter, car wash, etc. No walking due to feet pain. Cannot do any work like repeated hand use like reading meter.' He then wrote that the duration of these restrictions and limitations would be 'indefinite.'"

"After Ms. Black's employment with the City ended on May 2, 2017, she filed a complaint against the City asserting a claim for discriminatory discharge under the Tennessee Disability Act ('TDA'), Tenn. Code Ann. § 8-50-103 to -104." …

"… To succeed under the TDA, an individual alleging discrimination must demonstrate ''(1) that the individual was qualified for the position; (2) that the individual was disabled; and (3) that the individual suffered an adverse employment action because of that disability.'' *Bennett v. Nissan N. Am., Inc.*, 315 S.W.3d 832, 841 (Tenn. Ct. App. 2009) (quoting *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000)); *see also Hilliard v. Dolgencorp, LLC*, No. E2018-00312-COA-R3-CV, 2019 WL 1377263, at *9 (Tenn. Ct. App. Mar. 26, 2019)."

"'Under the TDA, an employer will not be considered to have unlawfully discriminated against an individual with a disability if the individual's disability 'to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.'' *Id.* at 852 (quoting Tenn. Code Ann. § 8-50-103(b)). Courts have interpreted the 'to some degree' language in the TDA as requiring 'a claimant under the TDA to show that he or she 'was qualified for the position' in addition to the other two elements . . . .' *Id.* at 852-53 (quoting *Barnes*, 48 S.W.3d at 705)."

"What is required for a claimant to be considered 'qualified' for a position? Under the federal Americans with Disabilities Act, 'this inquiry has two prongs: the individual must (1) possess the requisite skill, education, experience, and training for the position; and (2) be able to perform the essential job functions, with or without reasonable accommodation.' *Id.* at 853 (citing 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m)). The TDA, unlike the ADA, contains no reasonable accommodation requirement. *Hilliard*, 2019 WL 1377263, at *11 (citing *Jones*, 2014 WL 806131, at *3); *see also Bennett*, 315 S.W.3d at 841-42. As a result, an employer does not violate the TDA by failing to provide a reasonable accommodation to assist an employee in performing the duties of his or her job. *Id.* If a claimant needs an accommodation to be capable of performing the essential functions of the position, the claimant is not considered to be qualified for the job and may not look to the TDA for protection. *See Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 468 n.9 (6th Cir. 1999) ('A determination that an accommodation is required for the employee to perform the functions of the job ends the inquiry under Tennessee law . . . .'). Therefore, if a claimant filing under the TDA has a disability that renders him or her physically incapable of performing the essential functions of the position 'to some degree,' his or her claim fails as a matter of law."

"Here, there is no dispute that Ms. Black 'possess[ed] the requisite skill, education, experience, and training' for the meter reader position. *Bennett*, 315 S.W.3d at 853. The parties' disagreement concerns whether she was capable of performing the essential functions of the position. 'Essential functions generally are those that the employer's 'judgment' and 'written [job] description' prior to litigation deem essential.' *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761-62 (6th Cir. 2015) (quoting 42 U.S.C. § 12111(8)). Prior to litigation, the written job description4 for the meter reader position identified several physical requirements of the position, including 'walking,' 'fingering,' 'grasping,' and 'repetitive motions.' The written job description also provided that a meter reader would be required to 'exert[] up to 50 pounds of force occasionally, and/or up to 10 pounds of force constantly to move objects' and presented exposure to extreme temperatures."

"Ms. Black's doctor unequivocally stated several times that she could not perform these essential functions." …

"In making its decision to pull Ms. Black from her meter reading duties because she could no longer perform the essential functions of the job, the City relied heavily upon Dr. Desai's statements on the medical inquiry form

regarding Ms. Black's physical limitations. Ms. Black contends that the City should not have relied upon Dr. Desai's statements. Essentially, Ms. Black's argument is that she desired to continue working for the City and, when no accommodation was available for her, the City should have returned her to her meter reader position because she had been able to perform her job duties in the past despite the pain caused by her RA. Contrary to Ms. Black's contention, however, 'where a plaintiff's 'own doctor,' not the defendant, 'has concluded she could not perform her job . . . [that plaintiff] cannot establish that she is a 'qualified individual with a disability' under the ADA.'' *Dietelbach v. Ohio Edison Co.*, 1 F. App'x 435, 437 (6th Cir. 2001) (quoting *Weigel v. Target Stores*, 122 F.3d 461, 467 (7th Cir. 1997)). An employer is ''entitled to take'' an employee's physician at his or her word and ''may rely'' upon the physician's words to determine that the employee cannot perform the essential functions of the employee's job. *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 383 (6th Cir. 1998) (quoting *Weigel*, 122 F.3d at 467-68). In fact, a 'doctor's restrictions must be taken at face value,' and an employer is 'reasonable . . . to assume that [an employee] could not perform a task that her doctors indicated she was incapable of safely performing.' *Johnson v. Cleveland City Sch. Dist.*, 443 F. App'x 974, 986 (6th Cir. 2011); *see also Mathis v. City of Red Bank*, 657 F. App'x 557, 562 (6th Cir. 2016) ('The City rightly assumed that the parameters established in [the doctor's] 2013 letter were accurate, and on that basis it properly understood its choice: give [plaintiff] a job with exclusively indoor work or lay him off.'). Thus, the City acted reasonably in relying on Dr. Desai's statements on the medical inquiry form to determine that Ms. Black was no longer able to perform the essential functions of her job."

"Nonetheless, Ms. Black contends that a genuine issue of material fact exists regarding whether she was qualified for the meter reader position because she had worked through the pain in the past and could continue to do so. We respectfully disagree. ''[A] plaintiff's uncorroborated belief in his physical prowess is not enough to counter affirmative evidence to the contrary.'' *Johnson*, 443 F. App'x at 986 (quoting *Boback v. Gen. Motors Corp.*, 107 F.3d 870, No. 95-3836, 1997 WL 3613, at *3 (6th Cir. 1997))." …

"In addition to being irrelevant, Ms. Black's after-the-fact belief that she could still do the job is entirely discredited by her own prior statements because she admitted several times that her RA, to some degree, prevented or impaired her performance of the essential functions of the meter reader position." …

"Ms. Black next asserts that the trial court erred in concluding that the City was entitled to summary judgment even if she had been qualified under the TDA because she did not suffer an adverse employment action due to her voluntary resignation from her position. According to Ms. Black, she signed the resignation letter involuntarily. 'A public employee with a property interest in continued employment is deprived of that interest by her employer if the employer constructively discharges her by forcing her to resign involuntarily.' *Rhoads v. Bd. of Educ. of Mad River Local Sch. Dist.*, 103 F. App'x 888, 894 (6th Cir. 2004) (citing *Parker v. Bd. of Regents*, 981 F.2d 1159, 1162 (10th Cir. 1992)). In the event that an employee resigns of his or her own volition, however, 'even as a result of the [employer's] actions, then [he or] she voluntarily relinquishes [his] or her property interest in continued employment, and the [employer] cannot be found to have deprived [him or] her of that interest without due process of law.' *Id.* (citing *Yearous v. Niobrara Cnty. Mem'l Hosp.*, 128 F.3d 1351, 1356 (10th Cir. 1997)). Thus, a voluntary resignation does not constitute an adverse employment action. *See Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999) (citing *Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998))."

"'In general, employee resignations are presumed to be voluntary,' but '[a]n employee may rebut this presumption by producing evidence indicating that the resignation was involuntarily procured.' *Rhoads*, 103 F. App'x at 895 (citing *Leheny v. City of Pittsburgh*, 183 F.3d 220, 227 (3d Cir. 1999)). When considering whether an employee's resignation was involuntary, courts consider 'whether an objectively reasonable person would, under the totality of the circumstances, feel compelled to resign if he [or she] were in the employee's position.' *Id.* (citing *Yearous* 128 F.3d at 1356). This inquiry includes the following factors: ''(1) whether the employee was given an alternative to resignation, (2) whether the employee understood the nature of the choice [she] was given, (3) whether the employee was given a reasonable time in which to choose, and (4) whether the employee could select the effective date of resignation.'' *Id.* (quoting *Lenz v. Dewey*, 64 F.3d 547, 552 (10th Cir. 1995))."

"… The Court of Appeals for the Sixth Circuit has held that '[t]he mere fact that an employee is forced to choose between resignation and termination does not alone establish that a subsequent choice to resign is involuntary, provided that the employer had good cause to believe there were grounds for termination.' *Rhoads*, 103 F. App'x at 895 (citing *Parker*, 981 F.2d at 1162). The City had good cause to terminate Ms. Black—she could not perform the essential functions of the meter reader position. Therefore, the fact that Ms. Black had to choose between two unfavorable options does not mean she made her choice to resign involuntarily. *See Graehling v. Village of Lombard, Ill.*, 58 F.3d 295, 298 (7th Cir. 1995) (stating that 'one who elects between lawful alternatives cannot later cry 'coercion'')."

"Ms. Black next asserts that she neither understood the choice she was given (factor 2) nor had a reasonable time in which to make her choice (factor 3) because she was not able to consult with an attorney prior to signing the resignation letter. This argument would have been more persuasive had the City not allowed Ms. Black time to consult with an attorney or if Ms. Black had actually requested that she be able to consult with an attorney prior to signing the resignation letter; neither of those happened. Furthermore, evidence in the record shows that Ms. Black knew exactly what she was doing in resigning from her position. In an email sent to Ms. Johnson the day before signing the resignation letter, Ms. Black requested that May 1, 2017 be the effective date of her resignation so she would be covered by the City's health insurance plan when she had surgery that month."

"The following day, Mr. Frazier, unaware of Ms. Black's email to Ms. Johnson, called Ms. Black and asked her if she would sign a resignation letter stating that her resignation would be effective April 28, 2017. Mr. Frazier testified that Ms. Black asked him if the City 'would extend it to the 2nd of May so she could be covered on her insurance.' When the City agreed to the extension, Mr. Frazier presented Ms. Black with a copy of the letter that stated the effective date of her resignation would be May 2, 2017, and Ms. Black signed it. Pertinent to the fourth factor, the email to Ms. Johnson and Mr. Frazier's testimony show that Ms. Black selected the effective date of her resignation prior to signing the resignation letter. Based on the foregoing, we conclude that the trial court did not err in concluding that Ms. Black's resignation was voluntary."

"Finally, recognizing how damning the resignation letter is to her case, Ms. Black makes a last-ditch effort to circumvent it by arguing that the City actually terminated her when it stopped her from reading meters on April 11, 2017. She further argues that her subsequent resignation letter 'does not obviate, unwind or cure the prior adverse employment action undertaken at the April 11, 2017 meeting.' We disagree. 'Termination of employment' means '[t]he complete severance of an employer-employee relationship.' BLACK'S LAW DICTIONARY (11th ed. 2019). The employment relationship between Ms. Black and the City was not completely severed when Ms. Black was pulled from reading meters on April 11, 2017. Indeed, the relationship continued until May 2, 2017, because Ms. Black remained on the City's payroll receiving paid sick leave."

GOVERNMENTAL TORT LIABILITY ACT (GTLA)

1. Plaintiff failed to carry the burden of proof – Plaintiff had only circumstantial evidence - Plaintiff fell due to a water meter line giving way when she stepped on it – Trial court found for the city – Trial court credited city's witness and there was no error Both parties acknowledged that plaintiff does not have to eliminate all possible causes or inferences other than defendant's negligence, but she must show that the evidence for her case makes defendant's alleged or inferred negligence more probable than any other cause

WANDA DENISE WARE v. METRO WATER SERVICES, A DIVISION/AGENCY OF METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE
COURT OF APPEALS No. M2022-01114-COA-R3-CV Filed May 30, 2023

"Plaintiff sued for personal injuries under the Tennessee Governmental Tort Liability Act, alleging she had experienced a fall due to an unsecure water meter valve cover located in her sister's yard. Following a bench trial, the trial court entered an order finding that Plaintiff had not met her burden of proof. Although Plaintiff appeals the dismissal of her case, we affirm the trial court's judgment."

"Plaintiff Wanda Ware ('Ms. Ware') filed the present case under the Tennessee Governmental Tort Liability Act to recover for injuries allegedly caused by the water services department of the Metropolitan Government of Nashville, Davidson County, Tennessee ('Metro'). In her complaint, which was filed in the Davidson County Circuit Court, Ms. Ware specifically alleged that she was injured on September 7, 2019, when she visited her sister's residence and 'stepped in a hole in the yard which should have been covered by . . . [a water meter] valve cover.' Ms. Ware averred that Metro had previously performed work on this water meter '[j]ust prior' to the September 7, 2019, accident and had 'failed to properly install the cover back.' She further submitted that, '[b]ut for Metro's negligence in failing to properly secure the valve cover, this accident would not have happened.'"

"When the matter was eventually tried, the trial court heard the testimony of multiple witnesses, including Ms. Ware. For her part, Ms. Ware testified to her experience of the September 7, 2019, accident and the injuries she claimed to suffer from in its wake. Regarding the accident specifically, Ms. Ware described how she had suffered a fall as she had walked across the yard upon the conclusion of a visit at her sister's residence, stating: 'I just dropped into something and fell. I didn't even see it coming and didn't -- and I'm looking straight ahead just like right here.' According to her, the water meter cover (or 'lid' as it has also frequently been referred to) flipped up when she stepped on it."

"The trial court also heard testimony from multiple Metro employees. The first Metro employee to testify was Jason Johnson ('Mr. Johnson'), Metro's designated corporate representative. At the time of trial, Mr. Johnson was an 'area lead.' He previously had been a meter reader. According to his testimony, after a Metro worker has taken a lid off of a water meter to make a repair, they have to make sure the lid goes back on, and they are supposed to step on it and make sure it is secure. Mr. Johnson testified that the process of lifting a water meter lid and putting it back was not complicated. He testified that the iron lid covers fit into recessed lips of the water meter boxes and noted that, if the lids are put back correctly, they are not supposed to pop off. He agreed that it is 'standard' to make sure the lids are flush and fit squarely within the rims, and he further agreed that Metro employees are trained and know to put a foot on a lid to make sure it is secure before leaving. He testified that Metro trains its workers how to put valve covers back on for safety purposes. As indicated from our overview of other trial proof below, this standard routine practice for Metro workers was echoed by other witnesses in the case."

"Larry McClanahan ('Mr. McClanahan'), a utility field specialist with Metro, provided similar testimony concerning the proper placement of water meter lids upon the conclusion of a work order. He testified that a meter box cover, if applied correctly, will sit inside the recessed lip so that it will not just pop off. He also testified that Metro workers are trained to put lids back on securely and step on them."

"When asked whether simply pushing grass back to try to set a lid down would work, Mr. McClanahan responded, 'It could if you got all the grass out of the frame.' Indeed, as evidenced by the following colloquy, Mr. McClanahan provided similar testimony to that offered by Mr. Johnson, namely that it was not a violation of Metro policy to seat a lid if that can be accomplished by just pushing grass out of the way[.]"

"… During the course of Mr. McClanahan's testimony, he was asked the following question: 'So if that's the way it looked on the date of the accident, then there's no way that lid could go down and seat properly inside the recessed lip because of the grass and soil buildup preventing it from doing so, correct?' Mr. McClanahan agreed with this statement, and he also suggested that, if Mr. Long had taken certain actions to repair the meter site during his visit prior to Ms. Ware's accident, the site would not have looked like it did on the date of the accident. Yet, notwithstanding his testimony that the meter site would not have looked like it did on the date of the accident had repairs previously benn mane, cross-examination readily revealed that he had no knowledge concerning what Mr. Long actually needed to do on his July 11, 2019, service call to ensure that the lid fit securely per Metro policy. Notably, Mr. McClanahan agreed that he did not have any knowledge of the conditions that Mr. Long would have encountered in July 2019. Moreover, Mr. McClanahan testified that he had never talked to Mr. Long about what Mr. Long did in July 2019 and that he had not seen any photographs of what the yard looked like on July 11, 2019. When asked for his agreement that he had 'no way of knowing what William Long did or didn't do to be able to get that lid back in the frame on that day,' Mr. McClanahan responded, 'Correct.' Further, when asked if he could say 'whether or not [Mr. Long] had to push any grass out of the way to get the lid back in the frame,' Mr. McClanahan stated, 'I cannot.'"

"Mr. McClanahan also provided testimony concerning an October 2021 visit he made to the site at issue. According to him, the lid was not fully seated in the frame at that time due to grass and soil buildup around it. Mr. McClanahan testified that the lid was not defective in any way, however, and he asserted that he was able to get the lid to seat inside the frame correctly by simply digging out soil and grass from around it. Mr. McClanahan testified that he could not say whether the conditions he encountered in October 2021 were the same as what Mr. Long had encountered on July 11, 2019."

"As emphasized by Metro on appeal, another Metro employee had actually been to the site and worked at the meter in between the date of Ms. Ware's September 2019 accident and Mr. McClanahan's October 2021 visit. This employee, Prentice Reagon ('Mr. Reagon'), also testified at trial. Mr. Reagon, a utility technician with Metro, testified in part concerning work he did at the meter for Ms. Ware's sister's residence in May 2020. The associated work order noted as follows for his service call: '[U]pon arrival meterbox was full of water, pumped out meterbox, dug out meterbox, found leak on OCL, repaired OCL leak in box, informed customer of OCL leak.' Mr. Reagon stated that he learned during his service call that there had been a previous accident at the meter box and that he therefore felt like it was his duty 'to make sure . . . that the meter box lid was secure and nobody else could step on it and fall in.' He testified that he had placed the lid back on properly."

"Mr. Reagon's testimony indicated that it was normal to stand on a lid to make sure it is properly seated." …

"Mr. Reagon noted that water meter boxes can be accessed by anybody, and he further testified that meter covers can be damaged or jarred from their seating by cars, lawnmowers, and simple vandalism. He testified that Metro would not know if a lid had been moved or dislodged if no complaint or notice was given. When asked if he had found a shoe when working on the meter at issue, Mr. Reagon said, '[I]t sounds familiar, it does.'"

"Mr. Long, who had serviced the meter at the residence of Ms. Ware's sister in July 2019, testified that he had been employed by Metro for over nineteen years. He testified that, in his current position as a senior field representative, he does troubleshooting for meters that do not read. His testimony indicated that he typically averages about twenty or twenty-two work orders per day and over 4,000 in a given year."

"When explaining how a water meter cover fits into the water meter box, Mr. Long stated, 'There's like . . . a little groove around the meter frame that sits inside the frame, so the lid sits inside the frame.' He testified that he often encounters meters that have grass growing over them or dirt or mud around the frame. Regarding the policy of Metro and his responsibility to dig dirt back, Mr. Long's testimony was consistent with that of other witnesses. He stated, 'Well, we just make sure that the meter lid is set back in that frame.' According to him, he has to get his shovel or dig bar out '[a] couple of times a week.' He testified that it is acceptable to simply scrape some dirt out around the recessed portion of the frame if that was all that was needed to get the cover to seat properly. When asked whether it is acceptable to put a lid back if you can do so by pushing grass out of the way, Mr. Long responded, 'That's what I'm going to do, yes.' He testified that Metro does not furnish its employees with weed eaters or lawnmowers and, further, that Metro does not take responsibility for yard maintenance in a customer's yard. When testifying as to his standard practice of what he does to make sure a water meter cover is put back on at the completion of a work order, Mr. Long testified as follows: 'I've always been trained to put my foot on that lid when I place it down. I stomp on it, and I usually walk away from the lid with my foot on the meter lid. It's just something I was taught.' Mr. Long stated that this is what he did '[a]ll day, every day' and that it was something he had done 'thousands' of times." …

"Mr. Long testified that, if he had encountered anything unusual, he could have made a note of it in the work order system. When asked whether the absence of any note on his work order indicated to him that there was not anything unusual when he went to the site, Mr. Long testified, 'That's what it tells me.' He testified the same regarding the absence of a note in relation to any problem concerning the meter box itself. Mr. Long further stated that it would '[n]ot necessarily' make it into his notes or comments if he had to get his shovel or dig bar out for any reason."

"When asked if there was anything that stood out in his mind regarding the July 2019 work order as anything other than routine, Mr. Long responded, 'No.' He agreed that it was not unlike the thousands of other work orders he had done over the course of his career, and when asked if there was any doubt in his mind that he failed to put the water meter cover back on its frame, Mr. Long stated that he had no doubt."

"When asked if he had an independent recollection of his work from July 2019, Mr. Long testified that he did not have an independent recollection but stated: '[T]his is what I do every day. I open that lid. I close it. . . . I know I opened that lid and I closed it correctly.' When revisiting this topic later in his testimony, Mr. Long specifically testified as follows: 'It's just a routine. It's how I was taught. It's how everybody is taught. You make sure you lift that lid correctly in order not to hurt yourself, number one, and then you put it down correctly; put your foot on it.' Upon being shown a photograph that was represented to have been taken on the date of Ms. Ware's accident, Mr. Long testified that he 'would not have left that meter lid looking like that.'"

"Just as other witnesses had explained at trial, Mr. Long testified that there was not anything that prevented someone from opening a water meter cover. Mr. Long testified that he encountered situations 'all the time' where someone had accessed the water meter and removed or opened the cover. He further testified that it was 'pretty common' to find things inside water meter boxes, such as toys and beer cans, indicating that someone else had been inside the box. Moreover, according to his testimony, water meter covers can become damaged or dislodged from cars or lawnmowers driving over them."

"Following the conclusion of trial, the trial court entered an order in which it determined that Ms. Ware had not sufficiently proven her case." …

"On appeal, Ms. Ware raises several issues in an effort to get this Court 'to reverse the trial court's finding as to liability.' She contends that the trial court's conclusion in this case is contrary to the weight of the evidence and specifically argues that the evidence presented at trial preponderates in favor of a determination that the water meter lid was not placed securely when Mr. Long serviced the meter. She argues that the trial court erred in accepting Mr. Long's testimony, erred in failing to appreciate and apply the testimony of Mr. McClanahan, and erred in failing to apply a prior decision from this Court, *Morrow v. Town of Madisonville*, 737 S.W.2d 547 (Tenn. Ct. App. 1987)." …

"Ms. Ware and Metro both acknowledge in their appellate briefing that this is a case involving Ms. Ware's reliance on circumstantial evidence. Both parties also acknowledge that the following standard applies as it relates to Ms.

Ware's reliance on circumstantial evidence: Ms. Ware does not have to eliminate all possible causes or inferences other than Metro's negligence, but she must show that the evidence for her case makes Metro's alleged or inferred negligence more probable than any other cause. *See, e.g.*, *Roberts v. Ray*, 322 S.W.2d 435, 437 (Tenn. Ct. App. 1958) ('The general rule for all cases of circumstantial evidence . . . is that to make out his case, plaintiff does not have to eliminate all other possible causes or inferences than that of defendant's negligence; but it is enough if the evidence for him makes such negligence more probable than any other cause.')." …

"As referenced earlier, Ms. Ware appears to reason that the trial court's finding as to liability should be reversed because the court failed to follow the aforementioned *Morrow* decision, while also failing to properly account for Mr. McClanahan's testimony. Indeed, in the conclusion section of her principal appellate brief, Ms. Ware specifically requests this Court to reverse the trial court's finding as to liability 'in that the trial court erred in failing to apply *Morrow* and erred in failing to apply the testimony of [Mr. McClanahan].' To address Ms. Ware's invocation of the *Morrow* decision, we note that Ms. Ware appears to rely on the *Morrow* case given general similarities between the fact pattern involved in that litigation and the fact pattern involved here. In *Morrow*, the plaintiff sued a municipality for damages after she fell into a water meter box located on the street in front of her store. *Morrow*, 737 S.W.2d at 548. It was undisputed that 'shortly before plaintiff fell a city employee who read the meter had removed the iron cover and replaced it.' *Id.* Although the appellate decision is rather brief in length and sparse as to certain details regarding the case, it goes on to state in pertinent part that, '[g]iven the short lapse of time between the reading of the meter and plaintiff's fall, the trial court properly inferred defendant's employee was negligent in replacing the cover.' *Id.*"

"It is apparent that Ms. Ware's criticism of the trial court relative to *Morrow* is that the trial court indicated in its ruling in this case that it did not regard Mr. Long's July 11, 2019, visit to the meter site as occurring 'shortly' before Ms. Ware's September 7, 2019, fall. Indeed, her presented issue on appeal concerning *Morrow* asks whether the trial court erred in finding that fifty-eight days did not qualify as 'shortly' in the context of the *Morrow* decision. Ms. Ware answers her raised issue by submitting that the July 11, 2019, visit qualifies as 'shortly' before September 7, 2019, and she appears to suggest that, like in *Morrow*, where negligence was inferred due to the short lapse of time between the reading of a meter and a plaintiff's fall, negligence connected to Mr. Long's visit should be inferred here." …

"Regardless, of course, the negligence that Ms. Ware attempts to attach to Metro by way of Mr. Long must be proven in light of the evidence in this case. It is in light of that evidence and the trial court's accrediting of Mr. Long's testimony (and other testimony concerning the routine practice of Metro water service employees) that we discern no error in the trial court's determination. As we noted earlier, the trial court emphasized the evidence in this case pertaining to the routine practice of Metro water service employees stepping on water meter lids to ensure that they are secure upon the conclusion of repair work. Moreover, the trial court noted that Mr. Long had no doubt in his mind that he had put the meter cover back during his visit to the site because of his routine and practice. Although Ms. Ware's brief recites in passing that 'courts recognize the danger of evidence regarding custom or habit and do not look on it with favor' and further states that, '[t]o be admissible, its relevancy and probative value must clearly apply,' her brief does not indicate that she actually raised any issue concerning the admission of such evidence in the trial court. This evidence was admitted, and Rule 406 of the Tennessee Rules of Evidence provides that evidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Tenn. R. Evid. 406. There was also the testimony from multiple witnesses that water meter boxes can be accessed by anyone and that items are frequently found in them, and there was evidence before the trial court suggestive of the fact that the particular meter at issue here was being unseated by persons or causes other than Metro."

"It appears that Ms. Ware's chief objection is that the trial court did not rely on Mr. McClanahan's testimony to find Metro liable. She asserts that Mr. McClanahan proved her case and argues that, '[h]ad [Mr. Long] dug it out the way . . . Mr. McClanahan did, the accident photos would not have shown the significant soil and grass build-up within 60 days of Mr. Long's repair.' According to a statement in her brief, Mr. McClanahan offered testimony 'that there was 'no way' the lid could have been securely placed by Mr. Long' in light of what the box looked like on the day of her accident. Of note, however, the 'no way' testimony that Mr. McClanahan provided was not in specific relation to whether Mr. Long could have properly secured the lid in July 2019. As was properly and accurately related by Ms. Ware in other sections of her brief, and as detailed in our overview of Mr. McClanahan's testimony, his 'no way' testimony was as to whether the lid could seat properly given depicted conditions represented to have been *as of the date of the accident*. Respectfully, there is a missing link in the picture that Ms. Ware attempts to paint. As mentioned earlier when discussing Mr. McClanahan's testimony, cross-examination of Mr. McClanahan revealed that he had no knowledge concerning what Mr. Long needed to do during his July 2019 visit to secure the lid. After all, he expressly agreed that he did not have any knowledge of the conditions that Mr. Long would have encountered. Based on the evidence offered at trial, knowledge of such conditions would be vital to providing any

assessment of whether any digging at the meter site would have been required during Mr. Long's visit to secure the lid. As even Mr. McClanahan acknowledged, Metro policy is simply to get the lid back in the frame any way possible. He confirmed that workers are not required to get the shovel out and dig just because dirt or grass may be present, and he indicated it was not a violation of any policy if a worker can get a lid back in the frame by simply pushing grass out of the way. Obviously, conditions dictate the work that is required. Thus, although Ms. Ware seems to suggest that Mr. McClanahan's testimony dictates a reversal of the trial court's judgment, we fail to see how this is the case."

2. Jury trial – In cases involving both non-governmental and governmental entities, when a jury is demanded, the entire case against both non-governmental and governmental entities shall be tried to a jury without severance

ALYSSA VANDYKE v. LILLY CHEEK ET AL.
COURT OF APPEALS No. M2022-00938-COA-R10-CV Filed May 3, 2023

"We granted this extraordinary appeal to determine whether the Governmental Tort Liability Act, Tennessee Code Annotated sections 29-20-307 and 29-20-313(b), requires severance in cases involving both non-governmental and governmental entities. Following the legislature's amendment of these statutes in 1994, we conclude that, when a jury is demanded, the entire case against both non-governmental and governmental entities shall be tried to a jury without severance."

"The case arises from an automobile accident. Appellant Alyssa Vandyke was a passenger in a vehicle driven by her mother, Melissa Vandyke. Due to a malfunctioning traffic light, the Vandyke vehicle collided with a vehicle owned by Larry and Lilly Cheek."

"On September 14, 2018, Appellant filed suit against Montgomery County, Tennessee, Montgomery County Sheriff, Montgomery County Highway Department (together, 'Montgomery County,' and with the Cheeks and Melissa Vandyke, 'Appellees'). In her complaint, Appellant prayed for a jury trial."

"On August 31, 2021, the Cheeks filed a motion for scheduling order. On January 14, 2022, Appellant filed a response to the motion for scheduling order, to which she attached a memorandum in support of a jury trial. Specifically, Appellant argued that under the relevant sections of the Governmental Tort Liability Act ('GTLA'), Tennessee Code Annotated sections 29-20-307 and 29-20-313(b), a jury should hear her claims against all defendants. Montgomery County countered that the GTLA required any claims against them to be tried by the court, not a jury."

"On February 11, 2022, the trial court heard arguments on the question of severing the trial. By order of February 28, 2022, the trial court ruled in favor of Montgomery County." …

"The issue involves interpretation of two GTLA provisions, *i.e.*, Tennessee Code Annotated sections 29-20-307 and 29-20-313(b)." …

"The current version of Tennessee Code Annotated section 29-20-307 is applicable here; it provides, in relevant part:

> The circuit courts shall have exclusive original jurisdiction over any action brought under this chapter and shall hear and decide such suits without the intervention of a jury, **except as otherwise provided in § 29-20-313(b)**. . . .

Tenn. Code Ann. § 29-20-307 (emphasis added). As referenced in Tennessee Code Annotated section 29-20-307, Tennessee Code Annotated section 29-20-313(b) provides:

> (b) When suit is brought in circuit court in a case in which there are multiple defendants, one (1) or more of which are a governmental entity or entities or governmental entity employee or employees whose liability or lack thereof is to be determined based upon this chapter and one (1) or more of which are not such governmental entity or entities or governmental entity employee or employees, the case shall be heard and decided by a jury upon the demand of any party. Nothing in this section shall be construed to abridge the right of any party to a trial by jury otherwise granted by the state or federal constitution or any statute.

Tenn. Code Ann. § 29-20-313(b)."

"… The current version of section 29-20-313(b) states that 'the **case** shall be heard and decided by a jury upon the demand of any party.' (Emphasis added). The legislature included no limiting language to indicate an intent that any part of the case should be heard by the court as opposed to the jury. Rather, the legislature stated that the 'case' shall be heard by the jury; we read this to mean the entire case against all parties.

"A portion of the transcript from the House Ways and Means Committee meeting of March 29, 1994, is included in the record. The following portion of the discussion makes clear the legislative intent in amending section 29-20-313:

> So, all of us have agreed and TML drafted the amendment here. They agree in those circumstances where there are multiple defendants and the governmental entity is one of those defendants, that in fact, you just have one trial and that's the end of the matter, and it is subject to a jury trial if they ask for it.

From the plain language of the amended statute, and in view of Mr. Buck's comments concerning the need for the 1994 amendment, we conclude that Tennessee Code Annotated section 29-20-313(b) allows for a trial by jury where the case involves both governmental entities and non-governmental entities, and where a jury trial is requested. Both of these criteria are met in the instant case."

"… As discussed above, section 29-20-313(b) clearly provides that, where nongovernmental and governmental entities are involved, the entire case will be tried to a jury, when a jury trial is demanded. Furthermore, in holding that Appellant is 'entitled to a trial by jury only involving those claims not involving the governmental entity,' the trial court relied on the case of ***Austin v. Cnty. of Shelby***, 640 S.W.2d 852 (Tenn. Ct. App. 1982), *perm. app. denied* (Tenn. Oct. 25, 1982). Although the ***Austin*** Court held that severance was mandatory under the GTLA, the case was decided before sections 29-20-307 and 29-20-313(b) were amended in 1994. In view of the 1994 amendment, to the extent ***Austin*** holds that the GTLA requires severance of the jury trial for non-governmental entities from the bench trial for governmental entities, it is no longer good law. As such, the trial court's reliance on the case was error."

MOOTNESS

1. Plaintiff allege defendant violate the open meetings law - Defendant asserted in the appeal that any violation of the open meetings law was cured at a later meeting Plaintiff waived any challenge to the mootness issue raised by defendant by failing to address the issue – Election Commission presented a well-developed argument regarding mootness and supported it with multiple relevant citations to legal authority - Plaintiffs were on notice that a well-developed argument had been presented to the court, but they failed to respond - Additionally, the Plaintiffs were alerted at oral argument to concerns regarding their reply brief having noted but not having actually addressed the Election Commission's argument regarding mootness - Nevertheless, the Plaintiffs have not sought permission for supplemental briefing to address this matter

DUANE DOMINY ET AL. v. DAVIDSON COUNTY ELECTION COMMISSION
COURT OF APPEALS **No. M2022-00427-COA-R3-CV Filed May 31, 2023**

"Plaintiffs brought an action against the Davidson County Election Commission, asserting that the Election Commission violated the Tennessee Open Meetings Act and Metro Code 2.68.020. The chancery court granted judgment on the pleadings to the Election Commission, concluding no violation occurred and that even if there had been a violation it was cured by a subsequent public meeting. Plaintiffs appealed. Defending the chancery court's judgment, the Election Commission argues that the trial court's ruling was correct on the merits and that the Plaintiffs are also not entitled to relief because they lack standing and because the matter has become moot. Because the Election Commission presented a well-developed and well-supported argument in favor of mootness and because the Plaintiffs have failed to respond to that argument, we conclude that opposition to the Election Commission's mootness argument has been waived. Accordingly, we dismiss this appeal."

"This appeal has its origins in a petition to amend the charter of the Metropolitan Government of Nashville and Davidson County ('Metro'). In August 2020, the group 4 Good Government filed a petition seeking to hold a referendum to amend the Metro Charter by repealing tax increases, putting a cap on the issuance of bonds, and

limiting transfers of public lands. The petition included the requisite number of signatures, but concerns arose regarding the validity of the petition."

"Presented with a petition which raised questions regarding potential deficiencies and the responsibility of the Election Commission, the Election Commission participated in two meetings with the Department of Law of the Metropolitan Government of Nashville and Davidson County ('Metro Legal'). These meetings took place on September 18, 2020, and September 22, 2020. They were not open to the public."

"The Plaintiffs allege that the Election Commission violated Metro Code 2.68.020 and the Open Meetings Act, found at Tennessee Code Annotated section 8-44-101 *et seq.*, by holding these meetings. The Election Commission subsequently held a public meeting on September 25, 2020. During this public meeting, there was an extensive discussion about whether the Election Commission should proceed with a referendum on the proposed amendments to the Metro Charter. The discussion, however, regarding the September 18 and 22 meetings was more limited in nature. After listening to public comments, the Election Commission voted to file for declaratory judgment to place before a court the question of the validity of the proposed charter amendment. The Election Commission also set a conditional date for the referendum."

"The Plaintiffs subsequently filed a complaint alleging a violation of the Open Meetings Act and Metro Code 2.68.020, seeking declaratory judgment, an injunction, damages, attorney's fees, and costs. The complaint alleged that the Election Commission conducted two secret, non-public meetings with Metro Legal, that Metro Legal was not actually the Election Commission's legal counsel because of its adverse interests, that third parties were present, that the Election Commission 'began to engage in the formation of public policy and decisions' during the meetings, and that the substance of these meetings was not made public during the subsequent meeting held September 25, 2020. The Election Commission filed an answer in opposition and moved for judgment on the pleadings."

"The chancery court granted judgment on the pleadings to the Election Commission, dismissing the complaint. The chancery court found that declaratory judgment was inappropriate because there was an adequate remedy under the Open Meetings Act. The chancery court determined that the Plaintiffs had standing to challenge the proceedings as a violation of the Open Meetings Act, that the pending litigation exception applied to render the meeting non-violative thereof, and that the meeting on September 25, 2020, cured any Open Meetings violation. The chancery court also found that the Metro Code merely provided logistics for implementing the Open Meetings Act but not a basis for a right of action. The Plaintiffs appealed."

"On appeal, the parties contest whether the chancery court erred in its judgment, with the Plaintiffs arguing that the Election Commission held secret meetings and that the pending litigation exception did not apply because of the presence of third parties, because of Metro Legal's adverse interests, and because the complaint alleged that policy was formulated at the meetings. The Plaintiffs further assert that any cure was ineffective because the substance of the discussions at the prior meetings was never revealed."

"The Election Commission argues that the chancery court was correct in its substantive rulings. The Election Commission also asserts that the claims are not justiciable because the Plaintiffs do not have standing and because any claims for relief are moot. In advancing its mootness argument, the Election Commission notes that a case must remain justiciable until its disposition and that a moot case 'has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case.' *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 204 (Tenn. 2009); *see City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013) ('This Court must first consider questions pertaining to justiciability before proceeding to the merits of any remaining claims.'). The Election Commission cites to four cases in which this court dismissed claims alleging Open Meetings Act violations based upon mootness, arguing they mirror the circumstances of the present case. *See Turnbull Pres. Grp., L.L.C. v. Dickson Cnty.*, No. M2021-00542-COA-R3-CV, 2022 WL 1711706, at *1 (Tenn. Ct. App. May 27, 2022) (an action seeking to void the approval of a site for a fuel terminal due to a violation of Open Meetings Act was moot when the approval was subsequently overturned); *Person v. Bd. of Comm'rs of Shelby Cnty.*, No. W2007-01346-COA-R3-CV, 2009 WL 3074616, at *13-14. (Tenn. Ct. App. Sept. 28, 2009) (where the actions taken at a meeting held in violation of the Open Meetings Act were quickly rescinded, the issue was moot even though the plaintiff requested 'additional remedies' other than invalidation of the governing body's act); *Cathey v. City of Dickson*, No. M2001-02425-COA-R3-CV, 2002 WL 970429 (Tenn. Ct. App. May 10, 2002) (when the plaintiff's statutory remedy would have been the repeal of an annexation ordinance allegedly made in violation of the Open Meetings Act, repeal of the ordinance operated to moot the appeal); *Hicks v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 86-49-II, 1986 WL 10885, at *1 (Tenn. Ct. App. Oct. 3, 1986) (any Open Meetings Act violation was moot when the governmental act challenged resulted in a lease which had already expired)."

"The Election Commission also notes that, after the challenged meetings, it held public discussion and debate and took public action on the petition, electing to set a conditional date for the referendum, voting to hire counsel, and obtaining a court decision regarding the validity of the petition. It further notes that 4 Good Government subsequently, in the spring of 2021, filed a second petition to amend the charter and that the time limit set by statute for holding the election on the first petition has long expired. It argues that these facts have rendered any claim regarding a violation of the Open Meetings Act moot."

"In their reply brief, Plaintiffs observe that the Election Commission has raised several issues, including the mootness argument. The Plaintiffs designate the mootness argument with Roman numeral IV in the outline of their reply argument, but while they address other arguments raised by the Election Commission, the Plaintiffs note the Election Commission's mootness argument but do not provide any response thereto. The extent of the discussion of the mootness argument in the Plaintiffs' brief consists of the following statement: 'Appellee claims its violation of the Open Meeting Act is moot be [sic] because ruling on Appellants' declaratory claims is 'meaningless and provides no tangible relief.' (Response at 9).' At oral argument, a concern that the reply brief referenced but did not respond to the mootness argument was noted in the questions from the court. Having reviewed the Plaintiffs' appellate briefing, there is no argument therein addressing the mootness argument raised by the Election Commission or even an assertion that the Election Commission's argument is without validity."

"Here, the Election Commission presented a well-developed argument regarding mootness and supported it with multiple relevant citations to legal authority. The Plaintiffs were on notice that a well-developed argument had been presented to the court, but they failed to respond. Additionally, the Plaintiffs were alerted at oral argument to concerns regarding their reply brief having noted but not having actually addressed the Election Commission's argument regarding mootness. Nevertheless, the Plaintiffs have not sought permission for supplemental briefing to address this matter. 'It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her.' *Sneed v. Bd. of Prof'l Responsibility of Sup. Ct*, 301 S.W.3d 603, 615 (Tenn. 2010). Accordingly, we conclude that the Plaintiffs have waived any challenge to the Election Commission's mootness argument, and we dismiss their appeal."

2. Parties reached a settlement of the traffic violation so the appeal was dismiss as moot

CITY OF COVINGTON v. TERRELL TOOTEN
COURT OF APPEALS No. W2021-00946-COA-R3-CV February 23, 2023

'Appellant was found guilty of violating Tennessee Code Annotated section 55-8-199 for alleged use of a handheld wireless telecommunication device while driving. The trial court later dismissed the judgment against Appellant. Appellee City of Covington reached a settlement with Appellant, Appellant's driver's license was reinstated, and the violation was removed from his record. Accordingly, the legal controversy at the center of this case has been extinguished, and this Court can offer no meaningful relief to the Appellant. As such, the appeal is dismissed as moot.'

MEMORANDUM OPINION

Please note this is a Memorandum Opinion. Pursuant to Rule 10 of the Rules of the Court of Appeals of Tennessee, 'When a case is decided by memorandum opinion it shall be designated 'MEMORANDUM OPINION', shall not be published, and shall not be cited or relied on for any reason in any unrelated case.'

"The relevant facts are not in dispute. On April 20, 2021, Appellant Terrell Tooten was driving on Highway 51 in Covington, when he was stopped by Officer Lee Smith of the City of Covington ('City,' or 'Appellee') Police Department. Officer Smith testified that he observed Mr. Tooten holding an orange device up to his head and talking. Officer Smith believed that the device was a cell phone and initiated a stop. Although Mr. Tooten did not deny that he was talking on the device, he stated that it was a wireless speaker not a cell phone." …

"The City of Covington Municipal Court found Mr. Tooten in violation of Tennessee Code Annotated section 55-8-199, and he was fined $30 plus court costs. Mr. Tooten appealed that decision to the Circuit Court of Tipton County (the 'trial court'). Following a *de novo* hearing, the trial court entered an order on July 16, 2021. Based on the trial court's finding that Mr. Tooten violated Tennessee Code Annotated section 55-8-109, he was charged a $50 fine plus costs, or, in the alternative, he could complete a driver education course."

"After Mr. Tooten filed his appeal to this Court, we entered an order remanding the case to the trial court for consideration of Mr. Tooten's pending Tennessee Rule of Civil Procedure 60.02 motion to dismiss the July 16, 2021 judgment. On November 1, 2022, the trial court entered an order, setting aside the July 16, 2021 order with

prejudice and charging costs to the City. On November 22, 2022, the City filed a motion to dismiss the appeal as moot. Mr. Tooten opposed the motion. By order of December 1, 2022, this Court deferred the City's motion to dismiss to the assigned panel."

"On December 16, 2022, the City filed a motion to consider post-judgment facts, including an August 1, 2022 settlement agreement and release, a payment of $5,000 to Mr. Tooten, and proof that the traffic violation had been removed from Mr. Tooten's record. The City also cited the trial court's order setting aside the judgment against Mr. Tooten. On January 17, 2022, Mr. Tooten filed a response to the City's motion to consider postjudgment facts, wherein he stated that he 'ha[d] no opposition to any of the post-judgment facts, submitted by either of the parties, being reviewed or considered by this Court.' By order of January 19, 2023, we reserved ruling on the motion to consider post-judgment facts. Based on the fact that Mr. Tooten does not oppose the City's motion, and in view of the fact that the post-judgment facts bear on the question of whether the instant appeal is moot, we grant the City's motion and consider the post-judgment filings as part of our appellate record. We now take up the question of whether these post-judgment facts render Mr. Tooten's appeal moot."

"In ***City of Memphis v. Hargett***, 414 S.W.3d 88, 96 (Tenn. 2013), the Tennessee Supreme Court explained:

> The role of our courts is limited to deciding issues that qualify as justiciable, meaning issues that place some real interest in dispute, ***Colonial Pipeline Co. v. Morgan***, 263 S.W.3d 827, 838 (Tenn. 2008), and are not merely 'theoretical or abstract,' ***Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.***, 301 S.W.3d 196, 203 (Tenn. 2009). A justiciable issue is one that gives rise to 'a genuine, existing controversy requiring the adjudication of presently existing rights.' [***UT Med. Grp., Inc. v.***] ***Vogt***, 235 S.W.3d [110,] at 119 [(Tenn. 2007)]. . . .
> ***
> To be justiciable, an issue must be cognizable not only at the inception of the litigation but also throughout its pendency. ***Norma Faye Pyles Lynch Family Purpose LLC***, 301 S.W.3d at 203-04. An issue becomes moot if an event occurring after the commencement of the case extinguishes the legal controversy attached to the issue, ***Lufkin v. Bd. of Prof'l Responsibility***, 336 S.W.3d 223, 226 (Tenn. 2011), or otherwise prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment, *see* ***Knott v. Stewart Cnty.***, 185 Tenn. 623, 207 S.W.2d 337, 338 (1948); ***Cnty. of Shelby v. McWherter***, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996).

Id. In other words,

> [a] moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. ***McCanless v. Klein***, 188 S.W.2d 745, 747 (Tenn. 1945); ***County of Shelby v. McWherter***, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. ***Knott v. Stewart County***, 207 S.W.2d 337, 338-39 (Tenn. 1948***); Ford Consumer Fin. Co. v. Clay***, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998). In other words, '[m]ootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief.' ***Carras v. Williams***, 807 F.2d 1286, 1289 (6th Cir. 1986).

Tennessee Democratic Party v. Hamilton County Election Commission, No. E2018-01721-COA-R3-CV, 2020 WL 865282, *2 (Tenn. Ct. App. Feb. 21, 2020)."

"However, the Tennessee Supreme Court has recognized

> a limited number of exceptional circumstances that make it appropriate to address the merits of an issue notwithstanding its ostensible mootness: (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 evades judicial review; (3) when the primary dispute is moot but collateral consequences persist; and (4) when a litigant has voluntarily ceased the challenged conduct. ***Lufkin***, 336 S.W.3d at 226 n. 5 (citing ***Norma Faye Pyles Lynch Family Purpose LLC***, 301 S.W.3d at 204).

City of Memphis v. Hargett, 414 S.W.3d at 96"

"The following documents are relevant to the question of whether this case is moot: (1) the trial court's November 1, 2022 order setting aside the July 16, 2021 judgment against Mr. Tooten and dismissing the City's case against him; (2) a settlement agreement between Mr. Tooten and the City, under which Mr. Tooten agreed to hold the City harmless, and the City agreed not to dispute the trial court's November 1, 2022 order dismissing its case

against Mr. Tooten and setting aside the judgment against him; (3) a copy of the $5,000 check Mr. Tooten received from the City in settlement; (4) proof that Mr. Tooten's driver's license was reinstated and the violation of Tennessee Code Annotated section 55-8-199 removed from his driving record."

"… Mr. Tooten asserts that exceptions to the mootness doctrine apply, which exceptions would allow this Court to proceed with its review. Specifically, Mr. Tooten asserts that the case involves issues of 'great public importance' and 'is capable of repetition and evades judicial review.' ***City of Memphis v. Hargett***, 414 S.W.3d at 96 (citation omitted). We disagree. Mr. Tooten's arguments do not persuade us that exceptional circumstances warrant application of any of the exceptions to the mootness doctrine."

OPEN MEETINGS

1. Adequate public notice - Plaintiff claimed the notice of a special called meeting was inadequate - Meeting was called to consider exceeding the certified tax rate - Adequate public notice means adequate public notice under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public - In order to qualify as adequate public notice under T.C.A. 8-44-103(b), the notice of a special called meeting must satisfy a three-prong test, (1) the notice must be posted in a location where a member of the community could become aware of such notice; (2) the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken; and (3) the notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting

PAULINE MADRON v. CITY OF MORRISTOWN, ET AL.
COURT OF APPEALS No. E2021-01514-COA-R3-CV January 12, 2023

"This appeal concerns an alleged violation of the Open Meetings Act, Tenn. Code Ann. § 8-44-101, *et seq*. Pauline Madron ('Plaintiff') sued the City of Morristown, Mayor Gary Chesney, as well as Councilmembers Al A'Hearn, Chris Bivens, Robert Garrett, Tommy Pedigo, Kay Senter, and Ken Smith ('Defendants,' collectively) in the Circuit Court for Hamblen County ('the Trial Court').1 Plaintiff alleged that the city's public notice of a July 12, 2019 special meeting to exceed the certified tax rate was inadequate. Plaintiff and Defendants filed crossing motions for summary judgment. The Trial Court granted Defendants' motion for summary judgment with respect to Plaintiff's Open Meetings Act claim. Plaintiff appeals, arguing that the city's notice that it intended to exceed the certified tax rate was mere jargon that did not reasonably inform the public of the purpose of the special meeting or the action to be taken. In response, Defendants argue that Plaintiff's Open Meetings Act claim is moot as it arises out of a property tax rate that was passed in fiscal year 2019-2020, which lapsed before this matter was heard. Alternatively, Defendants contend that, while most people may not understand the intricacies of city finances, most people do understand what 'exceed' and 'tax rate' mean. While Plaintiff's claim is moot, it warrants resolution nevertheless. We hold that the city's public notice of the July 12, 2019 special meeting was adequate. We affirm."

"In July 2019, Plaintiff sued Defendants in the Trial Court alleging that the City of Morristown's public notice of a July 12, 2019 special meeting of the city council was inadequate. In August 2019, Defendants filed an answer in opposition. In September 2019, Defendants filed a motion for summary judgment. In August 2020, Plaintiff filed a motion for leave to amend her complaint. The Trial Court granted Plaintiff's motion. In her amended complaint, Plaintiff reasserted her earlier allegations regarding the alleged deficiency of notice and asserted that Defendants violated their regular order of business in failing to allow citizen comment on agenda items at the July 12, 2019 special meeting in violation of city ordinance 1-206. In October 2020, Defendants filed an answer in opposition to Plaintiff's amended complaint."

"In March 2021, Plaintiff filed a motion for summary judgment, in addition to her response to Defendants' motion for summary judgment. In July 2021, Plaintiff and Defendants filed their joint stipulated statement of undisputed facts for purposes of the Trial Court ruling on their crossing motions for summary judgment. The parties agreed on the following facts:

> 1. The City of Morristown passed its annual budget ordinance (Ordinance No. 3633) on second reading on June 18, 2019 in which a property tax rate of $1.50 per $100 assessed property value was set.
> 2. The Tennessee Comptroller of the Treasury sent a letter to the Mayor of the City of Morristown in late May of 2019 for tax year 2019 notifying the City of the certified (equalized)

property tax rate. In this letter, the Tennessee Comptroller of the Treasury explained that the City may choose to exceed the certified (equalized) property tax rate.
3. The Defendants were not made aware of the letter from the Tennessee Comptroller of the Treasury until early July of 2019.
4. Until discovering the letter from the Tennessee Comptroller of the Treasury in early July of 2019, no one at the City of Morristown was aware of the reappraisal of properties located in the City of Morristown that are part of Jefferson County and the certified or equalized tax rate as determined by the State for those properties.
5. On July 2, 2019, Connie Sands with the Tennessee Comptroller of the Treasury sent an email to Assistant City Administrator Joey Barnard stating, in part, 'Attached is a sample of notice of intent to exceed the tax rate and the documentation mailed earlier to the Mayor.'
6. The Notice of Intent attached to Ms. Sands July 2, 2019, email and provided to Mr. Barnard stated 'NOTICE OF INTENT TO EXCEED CERTIFIED TAX RATE' and the body of the Notice stated 'The Town of Kenton will conduct a public hearing on ____ at _____ p.m. on the city's intent to exceed the certified (tax neutral) property tax rate following a recent property reappraisal. This public hearing will be held at ____. [*Optional*: The certified tax rate as defined by T.C.A. § 67-5-1701 is $1.07 (Obion)/$1.17 (Gibson) per $100 of assessed valuation. The City's proposed FY 2003 budget. If adopted, will require a proposed tax levy of $_____ per $100 of assessed valuation.]
7. On July 3, 2019, Assistant City Administrator Joey Barnard sent an email reply to Ms. Sands asking: 'To clarify, in the advertisement the statement of the rate is optional, correct?'
8. On July 3, 2019, Ms. Sands responded, 'Correct, as long as it is stated your intent to exceed the certified tax rate.'
9. The Mayor and City Council decided to hold a special called meeting on July 12, 2019 for the purpose of voting on an ordinance, establishing a property tax rate exceeding the certified property tax rate.
10. Notices were submitted to the *Citizen Tribune* newspaper on July 3, 2019 to be published in the *Citizen Tribune* on July 5, 2019.
11. One such notice stated 'the City Council of the City of Morristown, Tennessee will hold a 'Special Called' Meeting on Friday, July 12th at 9:00 am in the City Council chambers at the City Center, 100 West First North Street, Morristown, TN. Agenda: The City's intent to exceed the certified (tax neutral) property tax rate following recent property reappraisal.'
12. The other pertinent notice appearing in the *Citizen Tribune* newspaper on July 5, 2019 stated: 'NOTICE OF INTENT TO EXCEED CERTIFIED TAX RATE The City of Morristown will conduct a public hearing on Tuesday, July 16, 2019 at 5:00 pm on the city's intent to exceed the certified (tax neutral) property tax rate following a recent property reappraisal. This public hearing will be held at _in the City Council Chambers at the City Center, 100 West First North Street, Morristown, TN.'
13. On July 5, 2019, the notice of the July 12, 2019 special called City Council Meeting was also posted on the City events calendar.
14. The detail of the posting on the City Events Calendar of the July 12, 2019 special called City Council Meeting provided: 'A Special Called Council meeting will be held July 12th at 9 am in the Council Chambers. Agenda item to be addressed will be the Adopted Tax Rate on 1st Reading. A second reading and public hearing will be held at the regularly scheduled council meeting on July 16th at 5 pm.'
15. The notice of the July 12, 2019 special called City Council Meeting was also posted on the bulletin board in the rotunda of the City Center on July 5, 2019.
16. The notice of the July 12, 2019 special called City Council meeting on the bulletin board set forth: 'The City Council of the City of Morristown, Tennessee will hold a 'Special Called Meeting on Friday, July 12th at 9:00 a.m. in the City Council chambers at the City Center, 100 West First North Street, Morristown, TN. Agenda: Adopting the Tax Rate on Frist [sic] Reading.'
17. A notice of the public hearing to take place on July 16, 2019 on the city's intent to exceed the certified (tax neutral) property tax rate was also posted on the bulletin board in the rotunda of the City Center on July 5, 2019.
18. The notice on the bulletin board provided: 'NOTICE OF INTENT TO EXCEED CERTIFIED TAX RATE The City of Morristown will conduct a public hearing on Tuesday, July 16, 2019 at 5:00 pm on the city's intent to exceed the certified (tax neutral) property tax rate following a recent property reappraisal. This public hearing will be held at _in the City Council Chambers at the City Center, 100 West First North Street, Morristown, TN.' 19. The agenda for the July 12, 2019 special called meeting set forth as follows:

1. CALL TO ORDER
Mayor Gary Chesney
2. ROLL CALL

3. NEW BUSINESS
3-a. Introduction and First Reading of Ordinances
1.Ordinance No. ___
An Ordinance Setting the Tax Rate At $1.50 for the Fiscal Year 2019-2020
{Public Hearing July 16, 2019}
4. ADJOURN

20. During the July 12, 2019 special called meeting, City Administrator and City Recorder Tony Cox explained why City Council needed to consider the tax rate for fiscal year 2019-2020 again. City Administrator and City Recorder Tony Cox explained that the proposed City tax rate of $1.50 exceeded the certified or equalized rate for the properties located in the City that are part of Jefferson County that were recently reappraised[.]
21. The Mayor and City Council considered and voted on Ordinance No. 3639, establishing a tax rate of $1.50, exceeding the certified (equalized)tax rate on first reading during the July 12, 2019 special called meeting.
22. The minutes of the July 12, 2019, special called meeting reflect that a motion was made to approve Ordinance No. 3639 on the first reading of such Ordinance, which set the tax rate at $1.50 for the fiscal year 2019-2020, and such motion was seconded. The minutes also reflect that a public hearing was to be held as to this Ordinance on July 16, 2019.
23. The time and dates of the regularly scheduled City Council meetings are posted on the City events calendar no later than December of the previous year.
24. The times and dates of the regularly scheduled City Council meetings are also posted in the *Citizen Tribune* newspaper in December of the previous calendar year.
25. The 2019 regularly scheduled City Council meeting dates were advertised in the *Citizen Tribune* on December 9, 2018.
26. The agenda package for the July 16, 2019 regularly scheduled City Council meeting was posted on the City website on Friday, July 12th.
27. A printed copy of the agenda for the July 16, 2019 meeting was placed on a table outside of Council Chambers prior to the meeting.
28. The agenda for the July 16, 2019 City Council meeting included 'Section 8-a Public Hearings & Adoption of Ordinances/Resolutions...7. Ordinance No. 3639 An Ordinance setting the Tax Rate at $1.50 for the Fiscal Year 2019-2020.'
29. The proposed Ordinance No. 3639 itself was included in the agenda packet online for the July 16, 2019 City Council meeting.
30. Ordinance No. 3639 provides that the tax rate for fiscal year 2019-2020 'exceeded the equalized property tax rates as presented by the State of Tennessee, Board of Equalization.'
31. At the July 16, 2019 regularly scheduled City Council meeting, Mayor Gary Chesney announced there would be a public hearing on Ordinance 3639 'that sets the tax rate at a dollar and half for fiscal year 2019-2020.'
32. Mayor Chesney opened the floor to the public 'for anyone who wished to be heard.'
33. The public hearing on Ordinance 3639 occurred.
34. The Mayor and City Council voted on Ordinance No. 3639 on second and final reading following the public hearing on July 16, 2019.
35. The City's Ordinance 1-206 states that 'At each meeting of the city council, the following regular order of business shall be observed, unless dispensed with by a majority vote of the members present:' [Emphasis added]. The Ordinance then lists 13 items comprising the regular order of business, including' (7) Citizen comments about agenda items only. City Council is required to hold regular meetings on the first and third Tuesdays of each month.
36. City Council may hold 'special meetings at the call of the mayor or two of the aldermen.'
37. The City adheres to ROBERT'S RULES OF ORDER.
38. The City has consistently only dealt with specific items of business at special called meetings and not followed its regular order of business at specially called meetings of City Council, as seen in the minutes of these special called meetings over the last ten years on June 17, 2010, July 8, 2010, August 10, 2010, May 31, 2011, February 13, 2012, March 25, 2013, November 24, 2015, June 26, 2015, and July 12, 2019.
39. The fiscal year for 2019-2020 for the City of Morristown began on July 1, 2019 and ended on June 30, 2020.

(Internal record citations omitted)."

"In July 2021, the Trial Court heard the parties' crossing motions for summary judgment. The Trial Court granted Defendants' motion for summary judgment as to the alleged violation of the Open Meetings Act in connection with the July 12, 2019 special meeting. However, the Trial Court denied Defendants' motion for summary judgment as

to whether the city council violated Ordinance 1-206 by failing to follow its regular order of business at the July 12, 2019 special meeting. In turn, the Trial Court denied Plaintiff's motion for summary judgment related to Plaintiff's Open Meetings Act claim. The Trial Court did, however, grant Plaintiff's motion for summary judgment with respect to her claim regarding Ordinance 1-206." …

"We begin with Defendants' issue of whether Plaintiff's Open Meetings Act claim is moot. Tenn. Code Ann. § 8-44-105 (2016) provides: 'Any action taken at a meeting in violation of this part shall be void and of no effect; provided, that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned.' Defendants argue that Plaintiff's Open Meetings Act claim is moot because it arises out of a property tax rate that was passed in fiscal year 2019-2020, which lapsed before this matter was heard.3 For her part, Plaintiff stated at oral argument that she is not seeking to have the tax rate voided. Rather, she wants an injunction and court order subjecting Morristown to judicial supervision for a period of one year so as to prevent any more alleged violations of the Open Meetings Act."

"Given that the 2019-2020 fiscal year lapsed before this matter was heard, Plaintiff's Open Meetings Act claim is indeed moot. The tax rate could not be voided at this stage even if the city's public notice was inadequate, as doing so would affect the public debt of the entity concerned. *See* Tenn. Code Ann. § 8-44-105 (2016). However, Plaintiff acknowledges as much and is not seeking to void the tax rate. She instead seeks injunctive relief going forward. As set out above, even a moot claim may be adjudicated under certain circumstances. Of the four exceptional circumstances set out in *City of Memphis v. Hargett*, exceptions (3) concerning whether collateral consequences persist and (4) concerning whether a litigant has voluntarily ceased the challenged conduct are not of particular moment here. On the other hand, exceptional circumstances (1) concerning whether the matter is of great public importance and (2) concerning whether the challenged conduct is capable of repetition and evades judicial review are both applicable."

"To begin with, the Open Meetings Act itself reflects the General Assembly's position that adequate notice of public meetings is of great public importance. Plaintiff alleged that, contrary to the Open Meetings Act, public notice of a specially called city council meeting was inadequate. There are evident, and important, public implications stemming from citizens not being informed in advance about a meeting wherein a decision will be made concerning their tax rate, as is alleged here. In addition, the challenged conduct is capable of repetition and evading judicial review. As this case demonstrates, lawsuits take time to unfold. The challenged conduct at issue could occur again and again with the fiscal year lapsing before the matter can be resolved in court. In light of these considerations, we hold that Plaintiff's Open Meetings Act claim warrants resolution notwithstanding its mootness."

"… Plaintiff contends that the city's public notice of the July 12, 2019 special meeting was inadequate. To determine whether Plaintiff is correct, we review the pertinent law. The Open Meetings Act states, in part:

> (a) **NOTICE OF REGULAR MEETINGS.** Any such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution shall give adequate public notice of such meeting.
> (b) **NOTICE OF SPECIAL MEETINGS.** Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.
> (c) The notice requirements of this part are in addition to, and not in substitution of, any other notice required by law.

Tenn. Code Ann. § 8-44-103 (2016)."

"The statute does not specify with precision what constitutes 'adequate' public notice. Our Supreme Court has addressed the meaning of adequate public notice as follows:

> We think it is impossible to formulate a general rule in regard to what the phrase 'adequate public notice' means. However, we agree with the Chancellor that adequate public notice means adequate public notice under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public. In the abstract this is a vague concept. But when applied in a real situation or a given set of facts and circumstances, we doubt that such a variation of opinion would exist as to promote confusion. If we were dealing with a penal statute the Act might require more specificity to be constitutional. But since we are required to resolve any doubts in favor of, rather than against, the constitutionality of the Act, *Black v. Wilson*, 182 Tenn. 623, 188 S.W.2d 609 (1945), and because we are dealing with a remedial statute, we find the phrase 'adequate public notice' not unconstitutionally vague.

Memphis Publ'g Co. v. City of Memphis, 513 S.W.2d 511, 513 (Tenn. 1974)."

"In *Englewood Citizens For Alternate B v. Town of Englewood*, No. 03A01-9803-CH-00098, 1999 WL 419710 (Tenn. Ct. App. June 24, 1999), *no appl. perm. appeal filed*, we considered whether a town's public notice of a special meeting was adequate where the meeting concerned which route among competing alternatives a highway should take. We articulated a three-pronged test:

> In order to qualify as adequate public notice under T.C.A. 8-44-103(b), this Court finds that the notice given by the Town of Englewood must satisfy a three-prong test. First, the notice must be posted in a location where a member of the community could become aware of such notice. Second, the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken. And, third, the notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting.

Englewood, 1999 WL 419710, at *2. In the instant case, Plaintiff argues that the Trial Court erred in its analysis specifically as to the second prong of the *Englewood* test. Plaintiff contends that the public notice of the July 12, 2019 meeting 'did not reasonably describe the purpose of the meeting nor did it describe the known action proposed to be taken.'" …

"In a more recent opinion, *Fisher v. Rutherford Cnty. Reg'l Planning Comm'n*, No. M2012-01397-COA-R3-CV, 2013 WL 2382300 (Tenn. Ct. App. May 29, 2013), *cert. denied*, 134 S. Ct. 2707 (2014), we further explained adequate public notice, this time discussing the difference in the level of detail required for notice of special meetings as opposed to that required for notice of regular meetings:

> "Under the 'totality of the circumstances' in the present case, was the notice provided by the county sufficient to 'fairly inform the public'? *Memphis Pub'g*, at 513. In light of the available precedents and the language of the OMA itself, we conclude that the notice in this case was adequate. Tennessee Code Annotated section 8-44-103 requires notice of the meeting itself and does not speak to notice of the content of the meeting. Cases requiring notice of items to be discussed at a meeting have all involved special meetings. We decline to adopt the trial court's reasoning that issues of public importance require notice of meeting content, even for regular meetings. Such requirements have been imposed only with regard to special meetings. *See Englewood*, 1999 WL 419710, at *3; *Neese*, 813 S.W.2d at 435. In this case, the county provided notice of its regular meeting in the same manner used with respect to all other site plans. At that meeting, the planning commission considered a number of agenda items and voted on multiple issues.

Fisher, 2013 WL 2382300, at *5-6 (footnotes in original but renumbered)."

"The aforementioned court decisions show that adequate public notice means, at bottom, that the notice at issue fairly informs the public under the totality of the circumstances. We emphasize that the Open Meetings Act requires 'adequate' public notice. It does not require perfect or utterly exhaustive notice, even for special meetings. Here, Plaintiff asserts that the public notice of the July 12, 2019 special meeting should have included the optional language furnished by the Tennessee Comptroller to the Defendants. However, Plaintiff does not cite to any provision of the Open Meetings Act or any Tennessee caselaw demanding that level of specificity. As counsel for Defendants stated at oral arguments, while many people do not understand the intricacies of city finances, they do know what 'exceed' and 'tax rate' mean. That was the purpose of the special meeting. Any member of the public concerned about, or interested in, a question concerning their tax rate was placed on alert. Adequate notice is just that—adequate, as opposed to perfect or even just better notice. That the city opted to not use optional additional language furnished by the Tennessee Comptroller does not make the notice any less adequate. Optional connotes available, but not vital. Indeed, the public was fairly informed as to the purpose of or action to be taken at the July 12, 2019 special meeting without this optional language."

"While Plaintiff asks for an injunction to monitor the city, it is unclear what there would be for a court to monitor. The city relied upon adequate language furnished by the Tennessee Comptroller. Although Plaintiff calls the language furnished by the Tennessee Comptroller mere jargon, that characterization does not render the language inaccurate or incomprehensible. What was outlined in the Tennessee Comptroller's notice language was, in fact, what the city intended to do which was to take action to exceed the certified (tax neutral) property tax rate. That it was couched in so-called jargon does not *ipso facto* render it inadequate or misleading. The essential elements of what was to take place at the special meeting were stated. What is more, the city already had passed a $1.50

tax rate in June 2019. The issue in July 2019 concerned exceeding the certified tax rate following a reappraisal. Thus, new figures were not sprung on the public. We hold that the city's public notice of the July 12, 2019 special meeting was adequate under the totality of the circumstances. There is no genuine dispute of material fact necessitating trial. Upon our *de novo* review, the Trial Court did not err in granting summary judgment to Defendants with respect to Plaintiff's Open Meetings Act claim. We affirm the judgment of the Trial Court."

RECUSAL OF FEDERAL JUDGE

1. Plaintiffs argue that Judge's wife's store, which sells flags to and has licensing agreements with many entities, including Ohio State, gives the judge or his wife a financial interest in Ohio State - They also suggest that Judge's salary as an adjunct professor at Ohio State's law school gives him a financial interest in the university - Neither claim is correct. Neither Mrs. Watson's ownership of the store nor Judge Watson's adjunct professorship gave Judge or his wife ownership of a legal or equitable interest in Ohio State; nor did they establish either of them as a director, adviser, or other active participant in the affairs of the university - Disqualification is not required on the basis of remote, contingent, indirect or speculative financial interests - Plaintiffs argue that the district court erred in denying their motions for recusal based on § 455(a) - Under that section, a judge must recuse in any proceeding in which his impartiality might reasonably be questioned - As these plaintiffs point out, the question is whether, given the facts, an objective reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits - Recusal is not required just because a judge serves as an adjunct professor at the law school of a party-university

See also SCHOOLS – Title IX – Statute of limitations - The clock starts only once the plaintiff knows or should have known that Ohio State administrators with authority to take corrective action knew of Strauss's conduct and failed to respond appropriately – Plaintiff failed to properly plead a retaliation claim – A funding recipient may be liable for retaliating against a person because he complained of sex discrimination – Plaintiffs failed to allege that the funding recipient, Ohio State, retaliated against the plaintiffs

BRAIN GARRETT, NICHOLAS NUTTER v. EDWARD GONZALES, JOHN ANTOGNOLI, KENT KILGORE, ROGER BEEDON, ADAM PLOUSE, DANIEL RITCHIE, MICHAEL SCHYCK, DR. MARK CHRYSTAL, JOEL DAVIS, and JOHN DOES 1-2, 4-6, 8, 10-15, 17, 19, 21-25, 27, 29-33, 35-46, 48, 50-51, 53, 56-59, 61, 62, 64, 69, 75, 77, 85-86, and 88-92, individually and on behalf of all others similarly situated (21-3972); ROCKY RATLIFF (21-3974); ERIC SMITH, MARK COLEMAN, WILLIAM KNIGHT, JACK CAHILL, SCOTT OVERHOLT, ELMER LONG, RYAN HENRY, MICHAEL GLANE, CHRISTOPHER PERKINS, MICHAEL CALDWELL, THOMAS ROEHLIG, BRIAN ROSKOVICH, RICK MONGE, THOMAS LISY, ANASTACIO TITO VAZQUEZ, JR., JOHN MACDONALD, JR.; MAROON MONDALEK, LEO DISABATO, PETER NATHANSON, JEFFREY LADROW, ANTHONY SENTIERI, and JOHN DOES 1-15 and 17-19 (21-3982); MICHAEL ALF, GARY TILL, ALLEN NOVAKOWSKI; CHRIS ARMSTRONG, and JOHN DOES 93-97 and 99-101, individually and on behalf of all others similarly situated (21-4070); MICHAEL CANALES and JOHN DOE 20 (21-4128),
SIXTH CIRCUIT COURT OF APPEALS Nos. 21-3972/3974/3982/4070/4128 Decided and Filed February 15, 2023

"From the late 1970s to the late 1990s, Dr. Richard Strauss sexually abused hundreds of students at The Ohio State University. In 2018, former Ohio State student-athletes came forward alleging that Strauss had abused them and that Ohio State had covered it up. Hundreds of survivors sued Ohio State under Title IX, including the two groups of plaintiffs before us. The district court dismissed the claims as time-barred. Before we heard this appeal, another panel of this court reversed the district court's order as it pertained to two other groups of plaintiffs. *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022). The holding in *Snyder-Hill* applies equally to these plaintiffs' claims, so we VACATE the district court's dismissal of plaintiffs' claims as untimely. Plaintiffs before us also bring two other claims: one group of plaintiffs appeals the dismissal of their Title IX retaliation claims, and all plaintiffs appeal the district court's denial of their motions for recusal. On those claims we AFFIRM. We REMAND to the district court for further proceedings consistent with this opinion."

"The disturbing facts of these cases began in 1978 when Ohio State hired Dr. Richard Strauss, M.D., as an assistant professor of medicine. From 1978 to 1996, Strauss treated students and student-athletes in various capacities, including as the 'official team doctor for as many as fourteen sports' and as an on-campus student health center physician. Strauss was also a tenured professor at Ohio State. When Strauss voluntarily and 'quietly' retired in 1998, the university designated him as an Emeritus Professor even though he had been 'quietly placed on administrative leave' in January 1996 following multiple reports of abuse. While Strauss was employed by Ohio State '[p]laintiffs, as well as hundreds of other former students, suffered unspeakable sexual abuse by Strauss.'"

"In April 2018, former student-athletes publicly accused Ohio State of covering-up Strauss's abuse. On April 5, 2018, Ohio State hired the law firm Perkins Coie, LLP to investigate Strauss's conduct and the extent to which Ohio State knew about it. Ohio State released Perkins Coie's report in May 2019; the report concluded that Strauss had sexually abused at least 177 male student-patients, the majority of whom were student-athletes. *See* Caryn Trombino & Markus Funk, Perkins Coie LLP, *Report of the Independent Investigation: Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University* (Perkins Coie Report) at 1, 43 (May 15, 2019)."

"Plaintiffs allege that, as documented in the Perkins Coie Report, Ohio State knew about Strauss's abuse and, at minimum, failed to meaningfully investigate it. Ohio State 'legitimized Strauss's conduct as ordinary medical care,' as various university officials ignored student complaints—including one as early Strauss's first year as team physician in 1979—and continued to employ and promote Strauss, failed to investigate numerous complaints about Strauss's sexual abuse, hid or failed to maintain records of abuse complaints and failed to inform students and some Ohio State staff of the abuse until 2018. Plaintiffs allege that Ohio State played a 'key and active role' in 'normalizing and perpetuating' Strauss's abuse over the course of decades and that there was a 'widespread and intentional culture of silence, cover-up, and deliberate indifference to sex crimes' within the university. Plaintiffs say that they now know that Strauss's harassment and abuse was reported to the head coaches of multiple sports, university administrators, university physicians and medical directors, and to the head of the Athletic Department—only for each of those officials to 'turn[] a blind eye to the abuse.' But some plaintiffs allege that they did not and could not have known about Ohio State's knowledge, and cover-up, of their abuse until the release of the Perkins Coie Report in 2019. Others allege that the earliest they could have known about Ohio State's role was in 2018, but that they did not know the full extent of the university's involvement until the release of the Perkins Coie Report in 2019."

"In all, 532 plaintiffs brought 37 separate cases against Ohio State relating to Strauss's abuse and the university's response." …

"Judge Michael Watson handled all cases relating to Strauss in the Southern District of Ohio. Judge Watson told the parties at a status conference in January 2019 that he was teaching a class at The Ohio State University Moritz College of Law, and he thought 'every member of this bench probably, have at one time or another served as an adjunct professor of Ohio State.' At the same status conference, Judge Watson also told the parties, 'I say that only because if you want to take shots, you can take shots. I'm thinking that my intention is to stay on the case and, nonetheless, I'm letting you know in case you want to raise something.' At the same hearing, Judge Watson told the parties that he knew the chairman of the Ohio State Board of Trustees and that the president was 'a man of his word.' No party brought a recusal motion at that time."

"On September 9, 2021, Judge Watson called an emergency status conference after a reporter contacted the court's public information specialist, inquiring about a business relationship between Ohio State and a store Judge Watson's wife owns. Judge Watson explained that 'ethical considerations are the utmost importance to me personally, to the parties and to the public, as well as the federal judiciary as a whole.' He explained that his wife owns a store that sells and manufactures flags, including Ohio State flags; the business has a licensing agreement with Ohio State; and the business pays a 12% royalty to Ohio State for every Ohio State trademarked product the business sells. Judge Watson told the parties that he had not disclosed the licensing agreement previously—and he still did not believe disclosure was required—but that neither he nor his wife had a financial interest in Ohio State as defined by the Code of Conduct for judges or relevant advisory ethics opinions. Nonetheless, because 'a member of the public' had inquired about the store, he 'believe[d] that Canon 3 of the Code of Ethics, the appearance of impropriety may be implicated' so he wanted to formally disclose the fact on the record and give parties a chance to move for recusal."

"All plaintiffs before us filed motions for recusal and to transfer venue based on the above and Judge Watson's other connections to Ohio State (namely, his participation in the 'annual Buckeye Cruise for Cancer'). The district court denied the motions in a detailed opinion. *See Garrett v. Ohio State Univ.*, No. 2:18-CV-692, 2021 WL 7186381 (S.D. Ohio Sept. 22, 2021)."

"Ohio State filed motions to dismiss in each case. The district court granted the motions, concluding that all plaintiffs' Title IX claims were time-barred by Ohio's two-year statute of limitations, whether measured by a discovery rule or an occurrence rule."

"We review de novo the grant of a motion to dismiss on statute of limitations grounds. *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 461 (6th Cir. 2016). Ohio law supplies the statute of limitations, but federal law governs when the claims accrue, that is, 'when the statute begins to run.' *Snyder-Hill*, 48 F.4th at 698 (quoting *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003))."

"The accrual question was the centerpiece of these appeals. But before we heard this appeal, another panel of this court heard the appeal of a different group of Ohio State plaintiffs, whose cases had been consolidated with these cases in the district court and whose cases were dismissed by the same order from which the current plaintiffs appeal. *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022). That panel held that the discovery rule applies to Title IX claims, meaning that a plaintiff's claim accrues when he 'knows or has reason to know' not only that he was injured but also that 'the defendant caused' his injury. *Id.* at 704. For a Title IX case like this one, a plaintiff's claim does not accrue until he 'knows or has reason to know that the defendant institution,' here Ohio State, injured him. *Id.* (emphasis omitted). So 'the clock starts only once the plaintiff knows or should have known that Ohio State administrators 'with authority to take corrective action' knew of Strauss's conduct and failed to respond appropriately.' *Id.* at 705 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). In addressing claims substantially similar to those presented here, *Snyder-Hill* held that 'the plaintiffs' claims survive Ohio State's motion to dismiss for three independent' reasons: until 2018, when the allegations of abuse became public, (1) 'plaintiffs plausibly allege that they did not know and lacked reason to know that Ohio State caused their injury,' (2) 'they plausibly allege that even if they had investigated further, they could not have learned of Ohio State's conduct,' and (3) some 'plaintiffs plausibly allege that they did not know that they were abused.' *Id.* at 706–07."

"The district court found that the *Ratliff*, *Nutter*, and *Canales* plaintiffs had failed to state a Title IX retaliation claim. Reviewing that decision de novo, *see Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018), we agree. The Supreme Court has held that a 'funding recipient' may be liable for retaliating 'against a person because he complains of sex discrimination.' *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (emphasis omitted). But plaintiffs have failed to plead a retaliation claim. At a minimum, they have failed to allege that the funding recipient, Ohio State, retaliated against them. They broadly claim retaliation by 'OSU employees, faculty, staff, former employees of OSU, friends and/or benefactors of OSU' in the form of public interviews, emails, texts and calls to some plaintiffs. But there is neither individual liability nor respondeat superior liability under Title IX; instead 'an educational institution is responsible under Title IX only for its 'own official decision[s].'' *Bose v. Bea*, 947 F.3d 983, 991 (6th Cir. 2020) (quoting *Gebser*, 524 U.S. at 290–91). So the *Ratliff*, *Nutter*, and *Canales* plaintiffs must adequately allege a claim against Ohio State as an institution. They have not done so."

"The plaintiffs attempt to avoid this conclusion by stating that Ohio State has not taken any action against the Ohio State-affiliated individuals, so Ohio State has ratified their actions. But we have not recognized a claim for deliberate indifference to retaliation, *see Bose*, 947 F.3d at 993; and, even if we were to do so, plaintiffs have not adequately pleaded that anyone within Ohio State, with power to stop the alleged retaliatory actions, had any knowledge of them, *see id.* at 989–90 (citing *Gebser*, 524 U.S. at 290)." …

"*Recusal Standard*. Federal judges are bound by the recusal standard in 28 U.S.C. § 455(a): 'Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' And a judge 'shall also disqualify himself' when '[h]e knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.' *Id.* § 455(b)(4). We cannot say that Judge Watson abused his discretion in determining that § 455 did not require his recusal."

"*Section 455(b)—Financial Interest*. Both sets of plaintiffs argue that Judge Watson was subject to automatic recusal because he and/or his wife has a financial interest in Ohio State. A 'financial interest' is 'ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.' *Id.* § 455(d)(4). Plaintiffs argue that Judge Watson's wife's store, which sells flags to and has licensing agreements with many entities, including Ohio State, gives the judge or his wife a financial interest in Ohio State. They also suggest that Judge Watson's salary as an adjunct professor at Ohio State's law school gives him a financial interest in the university. Neither claim is correct. Neither Mrs. Watson's ownership of the store nor Judge Watson's adjunct professorship gave Judge Watson or his wife 'ownership of a legal or equitable interest' in Ohio State; nor did they establish either of them as a 'director, adviser, or other active participant in the affairs of' the university. *Id.* And neither position entailed an 'interest that could be substantially affected by the outcome of the proceeding.' *Id.* § 455(b)(4)."

"The district court found that '[n]either the [s]tore, Defendant's licensing agreements, nor Defendant's vendor relationships are at issue in the underlying lawsuits or implicated in Plaintiffs' allegations of wrongdoing.' *Garrett*, 2021 WL 7186381, at *2. It also found that in the time the cases had been pending before the court, the store's sales to Ohio State made up at most 0.89% of its total sales in a given year, and that the combination of these direct sales and sales of Ohio State 'licensed products to the public . . . never exceeded 2.4% of the [s]tore's total sales.' *Id.* at *6. And the court concluded that the store will not be 'affected by the outcome of these proceedings.' *Id.* at *2; 28 U.S.C. § 455(b)(4). Based on these findings, the district judge did not abuse his

discretion in declining to recuse. *See Scott*, 234 F. App'x at 357 ('[D]isqualification is not required on the basis of . . . remote, contingent, indirect or speculative [financial] interests.' (quoting *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000))).'"

"*Section 455(a)—Reasonable Grounds to Question Impartiality.* The *Ratliff*, *Nutter*, and *Canales* plaintiffs also argue that the district court erred in denying their motions for recusal based on § 455(a). Under that section, a judge must recuse 'in any proceeding in which his impartiality might reasonably be questioned.' 28 U.S.C. § 455(a). As these plaintiffs point out, the question is whether, given the facts, an objective 'reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits.' Ratliff Br. at 22 (quoting *Hook* v. *McDade*, 89 F.3d 350, 354 (7th Cir. 1996)); *see also Ragozzine v. Youngstown State Univ.*, 783 F.3d 1077, 1079 (6th Cir. 2015) ('[A] judge [must] recuse 'if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality.'' (quoting *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990))). 'The standard is an objective one; hence, the judge need not recuse himself based on the 'subjective view of a party' no matter how strongly that view is held.' *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990) (citation omitted)."

"First, the plaintiffs argue that Judge Watson's role as an adjunct professor leads to reasonable questions about his impartiality. In his detailed opinion denying the recusal motions, Judge Watson relied on the Guide to Judiciary Policy, Vol. 2, Ch. 3, Compendium of Selected Opinions, § 3.4-3(a), which provides guidance to judges on recusal matters. That guidance says that a judge who teaches at a law school need not recuse from every case involving the university as a whole. Instead, a judge should consider 'the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case, and related factors.' *Id.* This kind of 'opinion' is not binding, but here we think the factors it directs judges to consider are sound. In line with that guidance, Judge Watson determined that his adjunct professorship at Moritz College of Law did not require his recusal from these cases involving the university. He reasonably explained that Ohio State 'is one of the largest universities in the country, and Moritz is 'one small and virtually autonomous part.'' *Garrett*, 2021 WL 7186381, at *5 (quoting *Meng Huang v. Ohio State Univ.*, No. 2:19-CV-1976, 2020 WL 8461547, at *2 (S.D. Ohio Oct. 26, 2020), *aff'd*, 2020 WL 8461560 (S.D. Ohio Nov. 4, 2020)). And Moritz 'is not involved in any of the allegations at issue in these cases.' *Id.* We join our sister circuits in concluding that recusal is not required just because a judge serves as an adjunct professor at the law school of a party-university. *See, e.g.*, *Sessoms v. Trs. of Univ. of Penn.*, 739 F. App'x 84, 90 (3d Cir. 2018) (concluding that the district court judge who served as an adjunct professor at the defendant university's law school did not abuse its discretion in declining to recuse in a case against the university); *Roe v. St. Louis Univ.*, 746 F.3d 874, 887 (8th Cir. 2014) (affirming decision not to recuse in a case against the university where district judge was an alumnus of the undergraduate school and law school, taught at the law school, and made 'positive comments about the school'); *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993) (holding that district judge's 'status as an adjunct professor [at law school] and his past contributions to the [u]niversity' did not require recusal in a case against the university). The district court did not abuse its discretion by denying the motions for recusal on this basis."

"The *Ratliff*, *Nutter*, and *Canales* plaintiffs also suggest that Mrs. Watson's ownership of the flag store creates a reasonable ground to question the judge's impartiality. It is true that the flag store has a licensing agreement to sell Ohio State-branded merchandise; that it prominently advertises that merchandise; and that it even sells some of that merchandise to Ohio State. *See Garrett*, 2021 WL 7186381, at *2. But, as noted above, the flag store does not create a financial interest either in the university or in the outcome of this lawsuit, that would require Judge Watson's recusal under § 455(b). And the store's financial relationships with Ohio State are too de minimis to raise reasonable questions concerning impartiality under § 455(a). The *Ratliff*, *Nutter*, and *Canales* plaintiffs' only other argument—that the store advertises its long history of supplying flags to the Ohio State football cheerleaders—is insufficient. The store's advertising would not cause a reasonable, informed observer to believe that Judge Watson would resolve this case on a basis other than the merits. *See Hook*, 89 F.3d at 354 (citing *In re Mason*, 916 F.2d 384, 385–86 (7th Cir. 1990))."

"The *Ratliff*, *Nutter*, and *Canales* plaintiffs also point to Judge Watson's and his wife's involvement with the 'Buckeye Cruise for Cancer,' a fundraising event for the Ohio State University Comprehensive Cancer Center. *Garrett*, 2021 WL 7186381, at *2. The district court found that the cruise raises money to support the Cancer Center, which is an 'independent entity;' and that the event is not organized by the university and raises no funds for the university itself. *Id.* at *2, *7. Plaintiffs do not challenge these findings on appeal. And, as Judge Watson pointed out, *id.* at *7, Canon 4 of the Code of Conduct for United States Judges, which provides guidance on 'extrajudicial activities,' expressly permits judges to 'participate in . . . [a] charitable . . . organization.' *Available at* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#e. Plaintiffs seem to concede this point, repeatedly calling the couple's fundraising efforts 'noble.'"

"Lastly, the *Ratliff*, *Nutter*, and *Canales* plaintiffs suggest either that Judge Watson's 'full involvement' with Ohio State, or his failure to timely disclose it, creates an objective basis to question the judge's impartiality. We don't doubt that 'the whole is sometimes greater than the sum of [its] parts.' *In re Martinez-Catala*, 129 F.3d at 221. 'The cumulative effect of a judge's individual actions, comments and past associations could raise some question about impartiality, even though none (taken alone) would require recusal.' *Id.* But considered against the backdrop of this court's caselaw, we cannot say that such is the case here. *See Easley v. Univ. of Mich. Bd. of Regents*, 906 F.2d 1143, 1145–46 (6th Cir. 1990) (concluding that the judge, presiding over a case involving the law school, was not required to recuse where he was 'an alumnus of the Law School,' a past 'volunteer fundraiser for the Law School Fund,' a 'member of the [Law School's] Committee of Visitors . . . the purposes of which are essentially social and informational,' and a 'member of The University of Michigan Club of Detroit through which he participates in athletics-related social events'). Just as we determined that it was not abuse of discretion for Judge Watson to deny plaintiffs' motions for recusal on any of the above grounds, we also conclude that he did not abuse his discretion when considering these factors in combination."

"Judge Watson, who sits in Columbus, Ohio, undoubtedly had a number of points of contact with Ohio State, its affiliates, and hangers-on. That is neither surprising, nor necessarily undesirable. The Judicial Code of Conduct counsels that the 'complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.' Code of Conduct for United States Judges, Commentary, Canon 4. The question under § 455(a) is whether the judge's personal or community associations are of such a character that they would cause an informed, reasonable observer to believe that the judge 'could not set [them] aside when judging the dispute.' *Liteky v. United States*, 510 U.S. 540, 557–58 (1994) (Kennedy, J., concurring). An impartial judiciary—and the appearance of an impartial judiciary—is of the utmost importance. At the same time, 'needless recusals exact a significant toll'; 'a change of umpire mid-contest may require a great deal of work to be redone . . . and facilitate judge-shopping.' *In re U.S.*, 572 F.3d 301, 308 (7th Cir. 2009) (quoting *Matter of Nat'l Union Fire Ins. Co. of Pitt.*, 839 F.2d 1226, 1229 (7th Cir. 1988)). So, '[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is.' *Easley v. Univ. of Mich. Bd. of Regents*, 853 F.2d 1351, 1356 (6th Cir. 1988) (quoting *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961))."

"We may reverse the denial of a recusal motion 'only where [we are] left with a 'definite and firm conviction that the trial court committed a clear error of judgment.'' *United States v. Angelus*, 258 F. App'x 840, 842 (6th Cir. 2007) (quoting *In re Triple S Rests., Inc.*, 422 F.3d 405, 418 (6th Cir. 2005)). We have no such conviction here. And because we conclude that Judge Watson did not abuse his discretion in denying the motion for recusal, we also conclude that he did not abuse his discretion in denying the motions for transfer. *See Liteky*, 510 U.S. at 551 ('It has long been regarded as normal and proper for a judge to sit in the same case upon its remand . . . .')."* * *

SCHOOLS

1. First Amendment - Off campus and out of school speech by students – Students created faked Instagram pages impersonating some teachers as students' school with lewd comments purportedly posted by the teachers - The student speech at issue here involves serious or severe harassment of three teachers and a Freeland student -Therefore, defendants could regulate the speech and discipline H.K. so long as he bore some responsibility for the speech and the speech substantially disrupted classwork (or Defendants reasonably believed the speech would disrupt classwork) - A school's policy is unconstitutionally vague when it either (1) fails to inform ordinary people what conduct is prohibited, or (2) allows for arbitrary and discriminatory enforcement – Policy in this case was clear

JASON KUTCHINSKI, as parent and next friend to H.K., a minor v. FREELAND COMMUNITY SCHOOL DISTRICT; MATTHEW A. CAIRY and TRACI L. SMITH, in their official and individual capacities
SIXTH CIRCUIT COURT OF APPEALS No. 22-1748 Decided and Filed June 2, 2023

"H.K., a high-school student at Freeland Community School District, created a fake Instagram account impersonating one of his teachers. The account was benign at first, but soon became graphic, harassing, and threatening when two of his friends added their own posts to the account. News of the account spread fast, fueled by the students' own efforts. They accepted requests to follow the account and H.K.'s friends tagged teachers in their posts. H.K. eventually decided that the attention was too much and he deleted the account."

"The school traced the account to H.K. and the other two students and imposed an immediate five-day suspension pending further investigation. After concluding the investigation and providing H.K. with an administrative hearing on the matter, the school suspended him for ten days."

"H.K.'s father, Jason Kutchinski, then sued the school district, the principal, and the superintendent under 42 U.S.C. § 1983, claiming that the ten-day suspension violated H.K.'s free-speech and due-process rights. The district court denied Kutchinski's motion for partial summary judgment and granted summary judgment to Defendants. Because Defendants had the authority to regulate H.K.'s off-campus speech and because the rule Defendants relied on to discipline H.K. was sufficiently definite, we affirm."

"H.K. was at his home as Friday night bled into Saturday morning when he created a fake Instagram account to impersonate his biology teacher, Steven M. Schmidt. He wrote the account's first post—a photograph of a gas pump with a hypodermic needle embedded in it with the caption '[w]atch out guys, I am concerned for everyone's safety!' R. 51-3, PageID 1000; R. 51-16, PageID 1063. Later that night, while H.K. played online games with his two friends, K.L. and L.F., he told them about the account and shared the log-in information with them. According to H.K., K.L. or L.F. later added the following biography to the account:

Steven Schmidt
Biology teacher at Freeland High School
1 Loving Wife #lovers married in 2016
Father of 2 beautiful twins #blessed and one 1 girl
#growingup

R. 51-16, PageID 1063; R. 51-3, PageID 1001."

"Soon after receiving the log-in information, K.L. and L.F. wrote several posts about Schmidt, English teacher Chelsea Howson, substitute teacher/football coach Trey Anderson, and an unnamed disabled student. The posts displayed:

- A photo of the disabled student with the caption '[g]lad this sicko is out of our school #ass[a]ult #Blessed'
- A photo of Schmidt and his wife and child with the caption '[j]ust #gangbanged my wife with 4 other men in the back of an Arby's #notmykid #14inches'
- A photo of Schmidt and his wife with the caption '[h]appy 3rd Anniversary to my beautiful wife! #loving #anniversary #STDs'
- A photo of Howson with the caption '[b]est sex in a Pet Smart #big #throbbing #14inches #raw'
- A graphic video with the caption '[m]ight have to cheat on my wife [two winking emojis] #big #14inches'
- A photo of Anderson with two unknown students with the caption 'I will find and kill @_treyanderson__ [I'm] going to strangle him with my barehands [sic] until he is barely conscious, then let go. Once he is awake again [I'm] gonna run him over with my fucking car and crush [h]is skull into a million pieces. #lol @elite_edge'
- A photo of Anderson with his cat with the caption 'I could beat up @_treyanderson__ and anyone else in @elite_edge and then curb stomp his cat. #gains @peta'

R. 51-3, PageID 997–1005."

"K.L. and L.F. tagged Howson and Anderson in the posts referencing them. K.L. told H.K. about the posts that he had made to the account, and H.K. monitored the account and viewed the posts himself. H.K. did not delete them. Instead, he joked with K.L. and L.F. about the posts and the three accepted 18 requests to follow the account."

"By Sunday, Schmidt and Howson learned about the account and contacted the school's principal, Traci L. Smith ('Principal Smith'), to let her know about the account's existence. Schmidt told Principal Smith[.]" …

"The account remained active when school commenced on Monday morning. By this time, Schmidt's and Howson's students had learned about the account. According to Howson, 'students were whispering about the incident, mainly in the afternoon after it had . . . spread around.' R. 49-3, PageID 924. This made her feel 'incredibly humiliated the entire day' because she 'knew that students knew about it . . . [and she] was humiliated to even bring the topic up.' *Id.* at 926. A student reported to another teacher that Howson was crying in one of her classes."

"H.K. grew concerned that the account was getting out of control. He deleted the account during his lunch period after several friends urged him to do so."

"Principal Smith investigated the account's origins throughout the day. She spoke with teachers, who told her about several 'classroom disruptions going on in their rooms,' and called 'multiple students out of the classroom,' one of whom identified H.K., K.L., and L.F. as the students involved with the account. R. 49-1, PageID 894, 897."

"Principal Smith put H.K. on an immediate five-day suspension. According to the notice letter sent to H.K.'s parents, the basis of his suspension was 'impersonating a staff member by creating a fake on line [sic] account, posting to it, and sharing online log in [sic] information with others who posted additional inappropriate material.' R. 51-6, PageID 1010. The letter also notified H.K.'s parents that further investigation could result in additional punishment. And that is exactly what happened."

"On May 30, 2019, Freeland's superintendent, Matthew A. Cairy ('Superintendent Cairy'), notified H.K.'s parents that Principal Smith had recommended H.K.'s expulsion and that Freeland would conduct a disciplinary hearing."

"H.K., his parents, his legal counsel, Principal Smith, and Superintendent Cairy attended the hearing. On August 6, 2019, Superintendent Cairy notified H.K. that he would receive a ten-day suspension 'for his actions on May 11–13, 2019, including: gross misbehavior for his posting a fake Instagram account impersonating a teacher (under an assumed name), posting to that account as the teacher, and sharing the username and password with other students.' R. 51-15, PageID 1053."

"Kutchinski sued Defendants on H.K.'s behalf, alleging that H.K.'s ten-day suspension violated his First Amendment and Fourteenth Amendment rights. The case proceeded to discovery, after which the parties filed competing motions for summary judgment. The district court ultimately granted Defendants' summary judgment motion and denied Kutchinski's summary judgment motion."

"This appeal involves two questions. First, whether Defendants could punish H.K. for his involvement with the Instagram account. And second, whether one of the school rules that Defendants relied on to suspend H.K. was unconstitutionally vague. The First Amendment's Free Speech Clause controls the first question. The Fourteenth Amendment's Due Process Clause controls the second. We address each question in turn."

"… Though broadly phrased, the freedom of speech is not unlimited. For example, '[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.' *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The schoolhouse is one such restriction. Although students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), their First Amendment rights 'are not automatically coextensive with the rights of adults in other settings,' *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). As such, students' free-speech rights apply 'in light of the special characteristics of the school environment.' *Tinker*, 393 U.S. at 506."

"The Supreme Court has outlined four categories of student speech that schools may regulate: (1) indecent, offensively lewd, or vulgar speech uttered during a school assembly on school grounds, *see Fraser*, 478 U.S. at 683–85; (2) speech during school or at a school-sponsored event that schools 'reasonably regard as promoting illegal drug use,' *see Morse v. Frederick*, 551 U.S. 393, 408 (2007); (3) 'speech in school-sponsored expressive activities' if the schools' 'actions are reasonably related to legitimate pedagogical concerns,' *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); and (4) on-campus and some off-campus speech that 'materially disrupts classwork or involves substantial disorder or invasions of the rights of others,' *see Tinker*, 393 U.S. at 513; *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021). Because this case involves off-campus speech, it implicates the fourth category." …

"*Mahanoy* guides our analysis. In *Mahanoy*, a high-school student who was passed over for her school's varsity cheerleading team reacted by posting on Snapchat with a caption that contained 'vulgar language and gestures criticizing both the school and the school's cheerleading team.' *Id.* at 2042–43. The student made the post over the weekend while she was not at school. *Id.* at 2043. The school later discovered the post and suspended her from the junior varsity cheerleading squad. *See id.* The Court found that the suspension violated the student's free-speech rights. *See id.*"

"Although a 'school's regulatory interests remain significant in some off-campus circumstances,' such as 'serious or severe bullying or harassment targeting particular individuals [or] threats aimed at teachers or other students,' schools do not have the same authority to regulate off-campus speech as they do on-campus speech. *Id.* at 2045.

Mahanoy identified three features of off-campus speech that 'diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.' *Id.* at 2046."

"First, for off-campus speech, the school rarely stands *in loco parentis*. *Id.* 'The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them.' *Id.* Thus, 'off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.' *Id.* Second, off-campus regulations, coupled with on-campus regulations, cover 'all the speech a student utters during the full 24-hour day.' *Id.* 'That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.' *Id.* Third, 'the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus.' *Id.* American democracy works only if we protect the 'marketplace of ideas.' *Id.* 'That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.' *Id.* '[T]hese three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished.' *Id.*"

"The student speech at issue here involves serious or severe harassment of three teachers and a Freeland student. *See id.* at 2045 (majority opinion). Therefore, Defendants could regulate the speech and discipline H.K. so long as he bore some responsibility for the speech and the speech substantially disrupted classwork (or Defendants reasonably believed the speech would disrupt classwork). *See id.* at 2052 (Alito, J., concurring) ('[A] school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech.')."

"*Whether H.K. was responsible for the subject speech.* To recap, H.K. created an Instagram account mimicking Schmidt and made one innocuous post on the account. Hours after creating the account, H.K. provided the account's log-in information to K.L. and L.F. so that they could post on the account. K.L. and L.F. made the incendiary posts and, in fact, K.L. told H.K. when K.L. was posting on the account. H.K. joked with K.L. and L.F. about their posts and accepted requests to follow the account."

"Like the First, Fourth, and Ninth Circuits, we hold that when a student causes, contributes to, or affirmatively participates in harmful speech, the student bears responsibility for the harmful speech. And because H.K. contributed to the harmful speech by creating the Instagram account, granting K.L. and L.F. access to the account, joking with K.L. and L.F. about their posts, and accepting followers, he bears responsibility for the speech related to the Instagram account."

"*Substantial disruption*. Having determined that H.K. bears responsibility for the harmful speech, we next consider whether the subject speech caused, or had the potential to cause, substantial disruption at Freeland. Substantial disruption is a 'demanding standard.' *Mahanoy*, 141 S. Ct. at 2047–48. To justify barring speech, a school must 'show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.' *Tinker*, 393 U.S. at 509. '[U]ndifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression.' *Id.* at 508."

"That said, '*Tinker* does not require disruption to have actually occurred.' *Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007). 'Nor does *Tinker* 'require certainty that disruption will occur.'' *Id.* at 592 (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 n.17 (9th Cir. 2006)). Instead, we must decide whether Defendants reasonably forecast that the posts from the Instagram account 'would cause material and substantial disruption to schoolwork and school discipline.' *See Barr v. Lafon*, 538 F.3d 554, 565 (6th Cir. 2008)." …

"Defendants reasonably forecasted that a fake Instagram account that impersonated a Freeland teacher and directed sexual and violent posts at three Freeland teachers and a student would substantially disrupt normal school proceedings. When school resumed after the weekend, Principal Smith tried to get out ahead of the anticipated disruptions by investigating the account's origins throughout the school day. And, in fact, one could reasonably argue that actual disruption occurred. A student saw one of the targeted teachers crying in one of her classes. Students whispered about the posts during the day with each other. Multiple teachers reported disruptions in their classes. *See Mahanoy*, 141 S. Ct. at 2052–53 (Alito, J., concurring) ('An effective instructional atmosphere could not be maintained in a school, and good teachers would be hard to recruit and retain, if students were free to abuse or disrespect them.')."

"Interestingly, Kutchinski suggests that Principal Smith's investigation of the Instagram account during the school day caused the disruption. But because Principal Smith reasonably believed that disruption would take place, she was permitted to take steps to thwart the disruption. *See Barr*, 538 F.3d at 565."

"'[S]chool officials need a degree of flexible authority to respond to disciplinary challenges.' *Morse*, 551 U.S. at 428 (Breyer, J. concurring in the judgment in part and dissenting in part). Courts thus provide educators a high degree of deference in the exercise of their professional judgment lest they 'substitute their own notions of sound educational policy for those of the school authorities which they review.' *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982); *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009)."

"Defendants did not violate H.K.'s free-speech rights by disciplining him. The district court properly granted summary judgment to Defendants on Kutchinski's First Amendment claim."

"Kutchinski also asserts that even if H.K.'s suspension did not violate H.K.'s free-speech rights, the suspension was still improper because Defendants relied on an unconstitutionally vague rule in the Freeland Middle/High School Student Handbook as the basis for the suspension. … 'Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.' *Fraser*, 478 U.S. at 686."

"A school's policy is unconstitutionally vague 'when it either (1) fails to inform ordinary people what conduct is prohibited, or (2) allows for arbitrary and discriminatory enforcement.' *Meriwether v. Hartop*, 992 F.3d 492, 517–18 (6th Cir. 2021) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The analysis depends on the context. For example, '[t]here is substantially more room for imprecision in regulations bearing only civil, or employment, consequences, than would be tolerated in a criminal code.' *Id.* at 518 (citation and quotation marks omitted). Moreover, 'a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.' *Id.* (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18–19 (2010))."

"Kutchinski challenges Rule 10 of the Handbook, which states that '[s]tudents guilty of gross misbehavior, persistent disobedience or having habits detrimental to the school will be suspended or excluded from [the school].' R. 51-17, PageID 1082. According to Kutchinski, Rule 10 is unconstitutionally vague because a prohibition on 'gross misbehavior fails to give students of ordinary intelligence the reasonable opportunity to know what is prohibited.'"

"The Oxford English Dictionary defines misbehavior as 'improper conduct.' *Misbehavior*, OXFORD ENGLISH DICTIONARY (3d ed. 2022). The same dictionary defines gross as 'flagrant' and '[g]laring.' *Gross*, OXFORD ENGLISH DICTIONARY (3d ed. 2022). Thus, a student engages in gross misbehavior when his actions constitute flagrant or glaring improper conduct. The conduct at issue fits the bill."

"'The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing [school policies.]' *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *see Green Party of Tenn. v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012). There is certainly some imprecision or subjectivity as to what constitutes 'gross misbehavior.' But schools are not held to the utmost specificity in drafting their disciplinary rules. *See Fraser*, 478 U.S. at 686 (finding that a school rule barring 'obscene' language did not violate a student's due-process rights); *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (noting that 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity'). More imprecise or subjective prohibitions have survived our review. *See Fowler v. Bd. of Educ. of Lincoln Cnty.*, 819 F.2d 657, 665–66 (6th Cir. 1987) (finding a statute proscribing 'conduct unbecoming a teacher' was not unconstitutionally vague). Given this latitude, Rule 10 is not unconstitutionally vague and the district court did not err in granting Defendants' motion for summary judgment and denying Kutchinski's motion for partial summary judgment on the due-process claim."

2. ADA and IDEA – Exhaustion of remedies under the IDEA does not require plaintiff to pursue ADA and Rehabilitation Act case – Court held that Doe's parents did not need to proceed through the IDEA's administrative process because their complaint did not request (or suggest that Doe needed) any instructional changes – The crux of this request is not a free appropriate public education as the IDEA defines that phrase – A ban on eating and chewing is neither special education nor a related service (the two items that make up a free appropriate public education) - Preliminary injunction denied to plaintiff as county offered significant justification for its policy of allowing children to eat in class at a magnet school designed to function like a college - Doe's parents must show that a switch from a policy allowing food in the classroom to a policy prohibiting food qualifies as a moderate (rather than a significant) change in the relevant policy - And they

must confront the suggestion from L&N's principal that this change could require the college-like school to alter its entire schedule because it does not have a designated cafeteria

JANE DOE, a student, by her next friends and parents, K.M. and A.M. v. KNOX COUNTY BOARD OF EDUCATION SIXTH CIRCUIT COURT OF APPEALS No. 22-5317 Decided and Filed: January 4, 2023

"Jane Doe, a high-school student, suffers from a condition that makes her hypersensitive to the everyday sounds of eating food and chewing gum. Doe's parents asked her school to ban students from eating or chewing in her classes. It refused. So they sought this ban by suing the Knox County Board of Education under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. While considering their preliminaryinjunction motion, the district court decided to dismiss the suit. It reasoned that Doe's parents could obtain the requested relief in administrative proceedings under the Individuals with Disabilities Education Act (IDEA). Until they exhaust this administrative process, the IDEA bars Doe's parents from using the ADA or Rehabilitation Act to seek 'relief that is also available' under that law. 20 U.S.C. § 1415(l). Doe's parents now argue both that they need not exhaust their claims under the IDEA and that we should grant Doe a preliminary injunction under the ADA and Rehabilitation Act on appeal."

"We agree with their first argument but not their second. The IDEA provides relief only to students who need 'specially designed instruction.' Because no ordinary English speaker would describe a ban on eating and chewing as 'instruction,' her parents did not need to go through the IDEA's review process to attempt to seek this ban under the ADA and Rehabilitation Act. But just because Doe's parents need not exhaust their claims does not mean that Doe is entitled to a preliminary injunction under those laws. Knox County has offered significant justification for its policy allowing students to eat in class at the magnet school that Doe chose to attend—a school designed to operate like a college. Ultimately, though, we leave this issue for the district court to consider in the first instance. We thus reverse the district court's dismissal of the complaint, reject Doe's request that we grant a preliminary injunction, and remand for further proceedings."

"This case reaches us at the motion-to-dismiss stage. We thus must accept the complaint's well-pleaded factual allegations as true. See *Ass'n of Am. Physicians & Surgeons v. F*DA, 13 F.4th 531, 543–44 (6th Cir. 2021); *Mattox v. Edelman*, 851 F.3d 583, 590 (6th Cir. 2017)."

"Jane Doe, who lives with her parents near Knoxville, Tennessee, has a condition known as 'misophonia.' Compl., R.27, PageID 251. The complaint describes misophonia as 'a disorder of decreased tolerance to specific sounds or their associated stimuli.' *Id*. According to Doe, the normal sounds of eating food or chewing gum cause her to suffer 'great fear and anxiety.' *Id.*, PageID 252. These common noises trigger a 'fight or flight' sensation, forcing Doe to escape from areas in which she hears them. Id. They also exacerbate her recurring migraines. *Id*."

"According to Doe's complaint, most of Knox County's public high schools likewise bar students from eating food and chewing gum outside the cafeteria. Compl., R.27, PageID 255. Yet Doe decided to attend L&N STEM Academy. *Id.*, PageID 250. This high school's policy allegedly allows each teacher to decide whether students may eat food and chew gum on a classby-class basis. Id., PageID 255–56. Some teachers, like Doe's ninth-grade math teacher, prohibit food and gum, so she has flourished in this class. *Id.*, PageID 256. The high school also prohibits eating food or chewing gum in areas with 'expensive equipment,' such as digital-art classrooms. Doe Decl., R.27-2, PageID 266. But other teachers, like Doe's ninth-grade history teacher, allegedly allow 'rampant' eating and chewing. Compl., R.27, PageID 256. The high school also allows students to eat throughout an 80-minute elective ('Genius Hour') that Doe would like to take. Id., PageID 257. L&N's permissive policies have forced Doe to avoid this elective and to leave her regular classes about 50% of the time, rendering her 'physically and emotionally exhausted' at day's end. *Id.*, PageID 256."

"Doe's parents repeatedly asked Doe's teachers to ban eating and chewing during her classes. *Id*. But some teachers allegedly have refused on the ground that L&N's official policy permits this conduct. *Id.*, PageID 257. Doe's parents thus turned to the school's administrators, asking them for this accommodation about halfway through her ninth-grade year in December 2021. *Id*. The administrators denied the request. *Id.*, PageID 258–59. But they noted that Doe's parents could appeal this decision administratively. *Id.*, PageID 259 n.8."

"The next month, her parents instead brought this suit on Doe's behalf against Knox County. They alleged that the county's refusal to grant Doe the requested accommodation—a classroom ban on eating and chewing for all students except those with medical needs—violated the ADA and Rehabilitation Act. *I*d., PageID 255, 259–60. They requested a permanent injunction that would require L&N to implement the accommodation for Doe. *Id.*, PageID 260–61."

"Along with their complaint, Doe's parents filed a motion for a preliminary injunction. During the injunction briefing, Knox County explained its rationale for refusing to ban eating and chewing in Doe's classrooms. L&N, a public 'magnet' school, offers a curriculum tailored to the study of science, technology, engineering, and math for over 500 students from nine counties in and around Knoxville. Allen Decl., R.44-1, PageID 445–46, 448. Students must apply to attend this school and maintain certain standards to stay there. *Id.*, PageID 449. According to L&N's principal, the school seeks to develop a 'unique' culture that gives the students more independence than a typical high school and allows their teachers to develop 'individualized teaching methods' for them. Id., PageID 449. Because L&N operates more like a college, it has gathering spaces that can hold only 70 to 90 students and lacks a designated 'cafeteria.' *Id.*, PageID 447. L&N also has only two scheduled lunch periods during the school day because of the nature of its curriculum. Id. If students could eat only at specified times, the school would have to change its 'entire schedule[.]' Id. Some students also travel from hours away to attend L&N and stay for extracurricular activities. *Id.*, PageID 448. They may remain on campus for over 12 hours and often need to eat more than at a designated lunch time. *Id.* The school thus allows teachers to permit snacking during class. *Id.*, PageID 447."

"Knox County also described the accommodations that L&N had provided to Doe. Since her arrival at the school as a ninth grader, Doe has had a '504 plan' (a plan under § 504 of the Rehabilitation Act). Odom Decl., R.44-2, PageID 451. Among other things, this plan gives Doe preferential seating near the teacher and allows her to wear noise-cancelling headphones. *Id.* It also gives her additional time to complete assignments and permits her to take tests in isolation. *Id.* Under a ''break' system' that administrators developed with Doe's parents, moreover, she could signal to a teacher that she needed a break of a specified length and obtain a new seat on her return to class. Id. But administrators allege that Doe stopped using this 'collaborative' system and started leaving class without attempting to return. *Id.*, PageID 452."

"Doe's parents raise two arguments on appeal. They argue that they did not seek IDEAavailable relief and so did not need to exhaust its administrative process before litigating their ADA and Rehabilitation Act claims. They argue further that we should grant Doe a preliminary injunction because they likely will succeed on these claims."

"The IDEA's exhaustion requirement grew out of the reality that three laws potentially allow children with disabilities to seek relief for difficulties that they encounter at school: the ADA, the Rehabilitation Act, and the IDEA. See *Fry ex rel. E.F. v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748–50 (2017). The first two laws protect all individuals with disabilities." …

"… The IDEA now allows parents to pursue overlapping claims under the ADA or Rehabilitation Act, but they must complete the IDEA's administrative process if they are 'seeking relief that is also available under' that law[.] …When does a suit under the ADA or Rehabilitation Act seek 'relief' that the IDEA also makes 'available'?"

"Our answer begins with the Supreme Court's decision in *Fry*." …

"… *Fry* first identified the 'relief' that the IDEA makes 'available' to students (in other words, the 'benefit' that they may receive from a 'favorable judgment'). *Id.* at 753 (citation omitted). The Court held that the IDEA allows parents to seek relief only for one injury: the denial of a 'free appropriate public education.' *Id.* at 753–55. The Court added that parents need not exhaust if they seek some other benefit that an IDEA hearing officer could not provide. *Id.* at 754."

"*Fry* next clarified how courts should decide whether a lawsuit requests a 'free appropriate public education,' the IDEA's sole remedy. *Id.* at 755–57. Because the exhaustion provision focuses on the relief that parents seek, the Court adopted a complaint-centered approach. *Id.* at 755. It held that parents seek a free appropriate public education if the 'crux' of their complaint requests that relief, notwithstanding 'attempts at artful pleading' on their part. *Id.* at 755. Yet parents, as the 'masters' of their complaint, must exhaust the IDEA's process only if they plead factual allegations that raise this remedy. See id. The parents need not exhaust if they seek other relief that the IDEA does not permit—even if they could have sought relief that it does. See *id.*"

"*Fry* provided three questions to guide this inquiry into whether a complaint seeks a 'free appropriate public education' as the remedy. The Court started with a pair of hypotheticals: Could a student's parents have sought the relief if the challenged conduct had arisen outside school in, say, a 'public theater or library'? *Id.* at 756. And could a teacher or guest at the school (rather than a student) have requested the same relief? Id. If the court answers 'no' to these questions—for example, if a student with a learning disability seeks a tutor—the parents likely seek a free appropriate public education. Id. at 756–57. But if the court answers 'yes'—for example, if a student in a wheelchair requests an access ramp—the student likely does not. *Id.* at 756. The Court ended with a third, real-world question: Were the parents using the IDEA's administrative process before they sued? Id. at 757.

If so, their conduct would suggest that they themselves believed that they were seeking an education-related remedy available under the IDEA. *Id.*"

"Although Fry directs us to ask whether a complaint seeks a 'free appropriate public education' as the relief, it did not offer much input into what this term of art means. *Id.* at 754–55. The IDEA's text and circuit precedent both show what it requires: Parents seek 'relief' that is 'available' under the IDEA only if a child needs an instructional change, not just a noninstructional accommodation to some school rule or policy. 20 U.S.C. § 1415(l)."

"… The IDEA requires states to give only a certain benefit (a 'free appropriate public education') only to certain students ('children with disabilities'). Id.§ 1412(a)(1)(A). The law connects both phrases to special education. It defines 'free appropriate public education' as 'special education and related services' that, among other elements, 'are provided in conformity with' a child's IEP. Id. § 1401(9)(D). It defines 'child with a disability' as a child with certain impairments 'who, by reason thereof, needs special education and related services.' Id. § 1401(3)(A)(ii), (B)(ii). In other words, 'free appropriate public education' is 'special education,' and a 'child with a disability' is a student who 'needs' that type of education."

"The definition of 'special education' next shows that a request for a 'free appropriate public education' is a request for uniquely tailored teaching. 'Special education' means 'specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability,' including 'instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and' 'instruction in physical education.' Id. § 1401(29)(A)–(B). To request a 'free appropriate public education,' then, parents must seek 'instruction' that is 'specially designed.' Id. That is, they must seek relief about the 'action of instructing or teaching' their child or the 'imparting of knowledge or skill' to him or her. 7 *Oxford English Dictionary* 1049 (2d ed. 1989); see also *Webster's Third New International Dictionary of the English Language* 1172 (1986); The *American Heritage Dictionary of the English Languag*e 681 (1973). The requested teaching also must exceed 'what is usual or customary,' 16 Oxford English Dictionary, supra, at 153, and be 'formed' 'according to' an intended plan, 4 Oxford English Dictionary, supra, at 521; see also Webster's Third, supra, at 612, 2186. Or, as a regulation puts it, parents must seek a change to 'the content, methodology, or delivery of' the teaching '[t]o address the unique needs of [a] child' and 'ensure access of the child to the general curriculum[.]' 34 C.F.R. § 300.39(b)(3)."

"To be sure, the IDEA also allows parents to seek 'related services' as part of their child's 'free appropriate public education.' 20 U.S.C. § 1401(9). But the definition of 'related services' confirms that a child must need teaching changes to receive the services. The phrase includes 'transportation' and 'developmental, corrective, and other supportive services' that 'may be required to assist a child with a disability to benefit from special education.' *Id.*§ 1401(26)(A) (emphasis added). It thus expands the available relief to cover items 'required' for a child to obtain specially designed instruction. Id. A school, for instance, might have to provide nursing care to a student who needs it to obtain the specially designed instruction. See Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 73–75 (1999); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890–91 (1984). Or the school might have to provide a student in a wheelchair with 'ramps' if the student needs them to receive that kind of instruction. 34 C.F.R. § 300.34(c)(16)."

"The IDEA, by contrast, does not allow parents to seek these services independent of specially designed instruction. Services cannot be 'related' to special education (or 'required' for a child to 'benefit' from it) if the child does not need special education. 20 U.S.C. § 1401(26)(A). As a regulation explains, a child does not qualify for the IDEA's benefits if the child needs only noninstructional accommodations (like the wheelchair ramp). 34 C.F.R. § 300.8(a)(2)(i)[.]" …

"[C]ourts generally hold that parents need not exhaust claims challenging noninstructional harms. When, for example, parents challenged a school's refusal to allow their child to bring his service dog to school, a court held that the parents did not need to exhaust because the claim did not request uniquely tailored teaching. See *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 24–27 (1st Cir. 2019)." …

"… [W]e hold that Doe's parents did not need to proceed through the IDEA's administrative process because their complaint did not request (or suggest that Doe needed) any instructional changes. Recall that, according to the complaint, Doe's misophonia has forced her to leave her classes over 50% of the time because she cannot tolerate eating or chewing sounds. Compl., R.27, PageID 252, 256. To remedy this problem, Doe's parents ask for a single remedy: 'a ban on eating and chewing in all of her academic classrooms (with a reasonable exception for other students with medical needs).' *Id.*, PageID 255."

"The 'crux' of this request is not a 'free appropriate public education' as the IDEA defines that phrase. *Fry*, 137 S. Ct. at 755. A ban on eating and chewing is neither 'special education' nor a 'related service' (the two items that make up a free appropriate public education). 20 U.S.C. § 1401(9). No ordinary speaker would describe this ban as

'specially designed instruction' (the key phrase in the 'special education' definition) because there is nothing innately instructional about the ban. Id. § 1401(29). Doe's parents do not ask for a single change to the way that her teachers 'impart[] . . . knowledge' to her. 7 *Oxford English Dictionary*, *supra*, at 1049. And her teachers could offer identical 'instruction' (the 'action of' 'teaching' her) with or without the ban. Id. Or, phrased in the language of the regulation, the ban would not change the 'content, methodology, or delivery of [Doe's] instruction[.]' 34 C.F.R. § 300.39(b)(3). Instead, the ordinary speaker would more naturally describe this ban as a change to the physical school environment—like, say, a request by a wheelchair-bound student for an automatic door opener to enter the classroom, a request by an allergic student for a peanut ban in the classroom, or a request by a diabetic student to use an insulin pump or glucose monitor there. Cf. *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 525–26, 529 (7th Cir. 2014); *Barney v. Akron Bd. of Educ.*, 2017 WL 4226875, at *12 (N.D. Ohio Sep. 22, 2017), aff'd 763 F. App'x 528 (6th Cir. 2019)."

"… [The complaint alleges that she excelled at her educational endeavors when the problematic sounds have not pervaded her classroom. Compl., R.27, PageID 253–54. And it alleges that she has no problem with the 'content of the instruction' or the way that her teachers deliver it. *Id.*, PageID 254. Given these allegations, Doe does not request an eating and chewing ban to gain access to 'special education.' 20 U.S.C. § 1401(26)(A). She requests it to gain access to regular education."

"*Fry*'s real-world question confirms that the gravamen of Doe's claim is not the denial of special education. See id. at 757. According to the complaint, Doe's parents have never sought (and Knox County has never proposed) an IEP for Doe under the IDEA. Compl., R.27, PageID 252. Thus, even though the IDEA requires school districts to locate eligible children with disabilities, 20 U.S.C. § 1412(a)(3)(A), the complaint suggests that Knox County has determined that Doe falls outside this category. The county instead has provided her with only a '504 plan' under the Rehabilitation Act. See Compl., R.27, PageID 252. The parties' prelitigation treatment of Doe as IDEA-ineligible bolsters her claim that she does not qualify. *Fry*, 137 S. Ct. at 757."

"Doe's parents next ask us to grant her a preliminary injunction requiring Knox County to implement her requested eating and chewing ban under the ADA or Rehabilitation Act. To evaluate this request, we must ask, among other questions, whether Doe's parents have shown that they will likely succeed on their claims. See *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995). They argue that they will likely succeed because the ADA and Rehabilitation Act require schools to make 'reasonable accommodations' for the disabled, and they describe their requested eating and chewing ban as 'reasonable.' But their cursory briefing on appeal falls well short of justifying a preliminary injunction at this time."

"Consider their ADA claim. Title II provides: '[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.' 42 U.S.C. § 12132. Doe's parents do not argue that Knox County's neutral policy of giving teachers the power to allow students to eat in class engages in intentional 'discrimination' against Doe. Unlike the ADA's other two titles, Title II also does not define the word 'discriminate' to cover the refusal to make a reasonable modification to neutral policies on behalf of the disabled. See *Madej v. Maiden*, 951 F.3d 364, 372 (6th Cir. 2020); *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 750 & n.8 (7th Cir. 2006) (en banc)."

"… So Doe's parents must show that a switch from a policy allowing food in the classroom to a policy prohibiting food qualifies as a moderate (rather than a significant) change in the relevant policy. See id. And they must confront the suggestion from L&N's principal that this change could require the college-like school to alter its 'entire schedule' because it does not have a designated cafeteria. Allen Decl., R.44-1, PageID 447; *cf. Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 491–92 (6th Cir. 2019)."

"Or consider their Rehabilitation Act claim. It similarly provides: 'No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]' 29 U.S.C. § 794(a). The Supreme Court has likewise read this text to require governments sometimes to make 'reasonable accommodations' to covered benefits programs to ensure that disabled individuals have 'meaningful access' to them. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). In the educational context, moreover, a regulation has interpreted this mandate to require 'the provision of regular or special education and related aids and services' 'designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met[.]' 34 C.F.R. § 104.33(b)(1)(i); see *CTL*, 743 F.3d at 529–30. When a school has provided such aids and services to a disabled student, courts have held that parents must show not just that their preferred accommodation was reasonable but also that the providedaccommodation was unreasonable. See *Campbell ex rel. Campbell v. Bd. of Educ. of Centerline Sch. Dist.*, 58 F. App'x 162, 166 (6th Cir. 2003); see also *T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App'x 594, 599–600 (3d Cir. 2014). This law suggests that Doe's

parents would have to show that the § 504 plan that Knox County provided to her (including the allowance to wear headphones and take breaks) was unreasonable, giving due regard to the 'professional judgment' of school administrators. *Campbell*, 58 F. App'x at 166–67 (citation omitted); see also *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985))."

"At day's end, we opt not to decide any interpretive issues about these two laws because the parties have not adequately briefed the merits. Rather, we will simply deny the request of Doe's parents that we grant a preliminary injunction on appeal and remand for the district court to consider the merits in the first instance. *Cf. Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019). We reverse the dismissal of the complaint, deny the request that we issue a preliminary injunction on appeal, and remand for proceedings consistent with this opinion."

3. IDEA – Child Find Mandate - With respect to an alleged violation of the child-find mandate, 'the claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate - If the LEA does not suspect that the child has a disability, it is permitted to deny a request for an evaluation - Additionally, a school does not violate its child-find responsibilities by first attempting other interventions for a student instead of immediately referring for an evaluation - This is not a license for school districts to delay identification or evaluation of students, or otherwise drag their feet with respect to their IDEA obligations when presented with clear signs that a student—even one who is enrolled for only a short time—may have a disability - Rather, the court determined only that on these facts, especially given Ja. B.'s general education background and recent move, the school district did not violate its statutory child-find responsibility

JA. B., Student; M. B. and JO. B., in their own capacities and as parents of Ja. B. v. WILSON COUNTY BOARD OF EDUCATION dba Wilson County Schools
SIXTH CIRCUIT COURT OF APPEALS No. 22-5417 Decided and Filed January 11, 2023

"Ja. B. and his parents Jo. B. and M. B. brought an administrative due process complaint against Wilson County Board of Education, d/b/a Wilson County Schools ('WCS'), alleging that the school district violated its responsibilities under the Individuals with Disabilities Education Act ('IDEA') by failing to identify and evaluate Ja. B. for special education services. After a hearing, a state administrative law judge determined that the district did not violate its responsibilities under the IDEA. A magistrate judge issued a report and recommendation to affirm this ruling, which the district court adopted. We affirm."

"Prior to 2017, Ja. B. lived in Illinois with his adoptive parents, Ja. B. and M. B. While in Illinois, Ja. B. had no formal mental health diagnoses, but he struggled to regulate his emotions from an early age. As early as age two, Ja. B. exhibited 'rage behaviors,' and in elementary school, Ja. B. began seeing a therapist to assist with his emotional regulation. Though his parents were aware of some behavioral issues with Ja. B. at school in Illinois, most of Ja. B.'s concerning behaviors occurred at home. Indeed, Ja. B.'s Illinois school records reflected that he was meeting both academic and behavioral expectations. While in Illinois, he had no safety plan, individualized education program ('IEP'), or section 504 plan, but his parents maintained a close, collaborative relationship with his teachers."

"In late July 2017, Ja. B. and his family moved to Tennessee. As the family prepared for the move, M. B. requested a tour of Ja. B.'s new school, Mount Juliet Middle School ('MJMS'), explaining Ja. B.'s anxiety and hoping that seeing the school might ease the transition. Though initially told that a tour was not possible, M. B. stopped by anyways and was able to see the school briefly. Then, just before the school year began, M. B. met Jade Bowman, MJMS's eighth-grade counselor, and discussed Ja. B.'s background and needs with her."

"The first two weeks of school passed uneventfully, but on August 16, Ja. B. received his first disciplinary referral of the year and served an in-school suspension after he 'argued with other students, was [disrespectful] to his teacher, refused to complete assignments, and would not re-enter the classroom when told to do so.' (Hr'g Ex. 36, R. 16-5, PageID 2085.) M. B. and Ja. B. determined it was time to write to Ja. B.'s teachers to explain Ja. B.'s adoption history and behavioral history at home and at school, as well as to suggest strategies that had been helpful in the past."

"Throughout August and September, Ja. B. and M. B. communicated back and forth with Ja. B.'s teachers and school administrators. On September 8, M. B. reached out to Ja. B.'s teachers requesting assistance and

intervention from the school, noting her concern that Ja. B. was refusing to complete his homework, and describing his grades as 'terrible.'"

"On September 11, Alaina Hatfield, one of Ja. B.'s teachers, reached out to M. B. and Ja. B., explaining that Ja. B. 'had a rough day with behavior in [her] class,' refused to complete his work, and received a 12% on a recent test 'because he did not try at all.' (Hr'g Ex. 16, R. 16-4, PageID 1962.) In response, M. B. expressed her disappointment and indicated that she had not received a reply to her September 8 email seeking assistance. Late that evening, Bowman replied to the emails, providing information about upcoming parent-teacher conferences and tutoring resources."

"On September 19, Ja. B. and M. B. met with several of Ja. B.'s teachers, Bowman, and assistant principal Chareda Sims to discuss their concerns. At the meeting, Ja. B. and M. B. shared more about Ja. B., and school personnel suggested additional supports for him at school. The primary intervention discussed at this meeting was the use of an agenda that teachers would fill out after every class. After the meeting, Bowman emailed Ja. B. and M. B., confirming that she reviewed the agenda expectations with Ja. B. and providing a list of local tutoring resources."

"The next day, Ja. B. received another in-school suspension after he was disruptive and rude in class and '[r]ipped a folder up and threw it on the ground.' (Hr'g Ex. 36, R. 16-5, PageID 2084.) At home that evening, Ja. B.'s behaviors escalated again. As a result, Ja. B. was admitted to Vanderbilt University Medical Center, where he remained until September 27." …

"Following his discharge from Vanderbilt, Ja. B.'s parents met with Bowman again. The team discussed Ja. B.'s discharge, his new medications, and a series of other topics based on information from Vanderbilt, including the possibility of exploring an IEP or section 504 plan. Bowman informed Ja. B. and M. B. that the section 504 process would come first and the possibility of an IEP would come later, depending on the section 504 plan's efficacy, because school officials believed a tiered intervention system was most appropriate. Given the school's two-week fall break and the two-week observation period required for the section 504 process, the meeting to discuss the section 504 plan was scheduled for October 30."

"After fall break, on October 19, Ja. B. received two additional disciplinary referrals in one day: one for disobeying a teacher's directions and being disrespectful and a second for cursing at a librarian. The first resulted in an in-school suspension, and the second in an out-of-school suspension."

"Then, around dismissal on October 27, Ja. B. was involved in a series of events that ended with his arrest by a school resource officer. The altercation began when Ja. B. witnessed a fight between two other students." …

"Ja. B.'s parents met with the school team as previously scheduled on October 30 and learned more about the SDHA hearing and MAP Academy. Concerned that a transfer to MAP Academy would impact their ability to enroll Ja. B. in a private school, Ja. B. and M. B. withdrew Ja. B. from the district before the hearing occurred and proceeded to homeschool Ja. B. for the remainder of the 2017–2018 school year. At the time of his withdrawal, Ja. B.'s report card showed one A, one B, three Cs, and one incomplete."

"Ja. B.'s parents met with district employees three more times during the 2017–2018 school year." …

"Later that summer, Ja. B. and M. B. enrolled Ja. B. in Cates Academy, a local private school, for the 2018–2019 school year. While attending Cates, Ja. B. was re-admitted to the hospital in November 2018 and January 2019 due to his behavior at home. Then, between January and March 2019, Ja. B. attended Meridell, a residential treatment center in Texas, primarily 'for emotional regulation, medication, [and] stabilization.' (*Id.* at PageID 1099.) Ja. B. returned to Cates for the remainder of the 2018–2019 school year and the entire 2019–2020 school year."

"On May 1, 2019, Ja. B.'s parents filed an administrative due process complaint alleging that WCS denied Ja. B. a free appropriate public education ('FAPE') by failing to identify and evaluate him for special education services and failing to design and implement an IEP for the 2017–2018 and 2018–2019 school years." …

"An administrative law judge from the Tennessee Department of Education Division of Special Education held a four-day hearing during which the parties presented testimony from many fact and expert witnesses."

"Several school employees who knew Ja. B. testified about his behavior. Ava Cozart, one of Ja. B.'s teachers at MJMS, indicated that while Ja. B.'s behaviors were 'beyond what [she] dealt with with any other child,' she also did not see the need to request a special education referral based on what she was seeing from Ja. B. (Hr'g Tr., R. 16-3, PageID 1376, 1383–84.) Jeremy Willis, an assistant principal at MJMS, explained that while some of the

behaviors he saw from Ja. B. were worrisome, Ja. B.'s behavior was not out of the ordinary for a middle school student."

"Dr. Eboni Webb, who worked with Ja. B. and his family after he withdrew from WCS, testified as an expert in developmental trauma. She expressed her opinion that Ja. B.'s behavior was likely the result of developmental trauma, and it was 'not uncommon for children like [Ja. B.] to need highly structured education settings to regulate his emotions and manage stressors in order to facilitate optimum learning.' (*Id.* at PageID 926.)" …

"Angela Barnes, WCS's Exceptional Education Supervisor, served as an 'expert in the field of educational curriculum and instructional development, specifically for special education in students with disabilities.' (*Id.* at 1670–71.) Based on her expertise and review of Ja. B.'s Illinois records, it was her opinion that nothing indicated Ja. B. needed special education services or other interventions at the time of his transfer to MJMS."

"Dr. Clovis Stair, a school psychologist supervisor, testified 'as an expert in the field of school psychology, educational testing[,] and educational development[,] with an emphasis in special education, specifically determining student eligibility for special education services[.]' (*Id.* at PageID 1822.) Dr. Stair stressed the importance of avoiding rushing to judgment about a child's possible disability. According to Dr. Stair, WCS's plan to implement interventions, observe their efficacy, and adjust course as needed before referring for an IEP evaluation was appropriate, particularly in light of Ja. B.'s general education background and recent move."

"In September 2020, the ALJ issued a final order determining that WCS did not deny Ja. B. a FAPE because the district did not violate its obligation to identify and evaluate Ja. B. for special education services either during or after Ja. B.'s enrollment at MJMS. In doing so, the ALJ determined that Plaintiffs were not entitled to reimbursement for Ja. B.'s private school education and accordingly did not address the appropriateness of the private placements."

"The IDEA was created 'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]' 20 U.S.C. § 1400(d)(1)(A)." …

"Relevant here, the IDEA imposes a 'child-find mandate' on all local education agencies ('LEAs'). This mandate requires all LEAs, such as WCS, to identify, locate, and evaluate '[a]ll children with disabilities residing in the State . . . who are in need of special education and related services[.]' *Id.* § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1)(i). This obligation extends beyond students enrolled in public schools, reaching any student residing in the state and all '[c]hildren who are *suspected* of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade[.]' 34 C.F.R. § 300.111(c)(1) (emphasis added); *id.* § 300.111(a)(1)(i)."

"A parent, state educational agency, other state agency, or LEA may request an initial evaluation to determine if a student qualifies as a child with a disability. 20 U.S.C. § 1414(a)(1)(B). If requested, a state or local agency 'shall conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability[.]' *Id.* § 1414(a)(1)(A). If the child is determined to be a child with a disability under the IDEA, then the LEA must create an IEP, which must include 'a specific statement of the child's current performance levels, the child's short-term and long-term goals, the educational and other services to be provided, and criteria for evaluating the child's progress.' *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir. 2001); 20 U.S.C. § 1414(d)."

"With respect to an alleged violation of the child-find mandate, 'the claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.' *L.M.*, 478 F.3d at 313 (internal quotation marks and citation omitted)." …

"Plaintiffs allege that MJMS violated its child-find obligation by failing to identify and evaluate Ja. B. while he was enrolled in MJMS. Specifically, Plaintiffs cite Ja. B. and M. B.'s frequent communication explaining Ja. B.'s history and home behavior and seeking interventions and assistance from school; Ja. B.'s behaviors at school that resulted in repeated in-school and out-of-school suspensions; his admission to Vanderbilt University Medical Center for his mental health; and his arrest following a series of behavioral escalations at school."

"… [W]hen Ja. B. returned to school following his hospitalization, the school began the section 504 process. This process involved a two-week data collection period to determine which interventions would be best. Once the plan was created, the process required additional observation and data collection to determine the efficacy of the interventions and whether modification of the interventions or eventual referral under the IDEA was necessary.

Principal Leigh Anne Rainey and District Section 504 Coordinator Tammy Crane explained that WCS used a tiered 'response-to-intervention' approach so that students are not over-identified or improperly referred for special education services. Dr. Stair, WCS's expert in eligibility determinations, also noted that it was appropriate for the school to give a student like Ja. B., who had not previously received special education services and who had recently experienced a major life event, time to adjust to his new environment. Even Ja. B.'s parents attributed some of his concerning behavior to the move."

"It is true that a response-to-intervention framework 'cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 C.F.R §§ 300.304–300.311, to a child suspected of having a disability under 34 C.F.R. § 300.8.' U.S. Dep't of Educ., Off. of Special Educ. & Rehab. Servs., OSEP 11-07, A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation of Eligibility under the Individuals with Disabilities Education Act (IDEA) (2011) at 2–3. But when the section 504 process began, WCS teachers did not suspect that Ja. B.'s behaviors were a result of a disability that required special education services. If 'the LEA does not suspect that the child has a disability,' it is permitted to deny a request for an evaluation. *Id.* at 3. Additionally, we previously have acknowledged that a school did not violate its child-find responsibilities by first attempting other interventions for a student instead of immediately referring for an evaluation. *See L.M.*, 478 F.3d at 313–14; *see also D.K.*, 696 F.3d at 249, 252."

"Additionally, Ja. B. only attended MJMS between August and November 2017. In cases that have found child-find violations, the observed behaviors that indicated a possible disability occurred over a longer time-frame—usually multiple years." …

"In sum, Ja. B. had no history of receiving special education services, attended WCS for a very brief time, and had recently moved across state lines—a move that his parents acknowledged likely contributed to his behavior. And it is contested whether the school was aware of Ja. B.'s formal diagnoses. Expert witnesses testified that based on their review of the records, they did not believe a special education referral was necessary yet. WCS moved forward with the section 504 process following Ja. B.'s discharge from Vanderbilt and did not foreclose the possibility of a special education referral should the section 504 plan prove unsuccessful. It is true that WCS was neither as communicative, nor responsive, nor proactive as it could have been to meet Ja. B.'s needs and to respond to his parents' concerns. Still, on this record, we cannot say that WCS officials 'overlooked clear signs of disability and were negligent in failing to order testing, or [had] no rational justification for not deciding to evaluate.' *L.M.*, 478 F.3d at 313. To be sure, this is not a license for school districts to delay identification or evaluation of students, or otherwise drag their feet with respect to their IDEA obligations when presented with clear signs that a student—even one who is enrolled for only a short time—may have a disability. Rather, we conclude only that on these facts, especially given Ja. B.'s general education background and recent move, the school district did not violate its statutory child-find responsibility."

"Plaintiffs also failed to demonstrate that WCS violated its child-find obligation after Ja. B. withdrew from WCS. *See id.*; 34 C.F.R. § 300.111(a)(1)(i). While homeschooling Ja. B., Ja. B. and M. B. met with MJMS and district officials in November 2017, February 2018, and June 2018. In November, the group finalized the section 504 plan. In June 2018, Ja. B. and M. B. met with Tammy Crane, a meeting that Ja. B.'s testimony indicates was meant to make another district official aware of the experience Ja. B. and his family had with WCS, rather than to provide additional information that may have indicated an evaluation was necessary."

"This leaves the February 2018 meeting between Ja. B. and Rainey. Though Ja. B. testified that he presented Rainey with Dr. Klaver's report and diagnoses, and that Rainey told him that Ja. B. would have qualified for an IEP based on this information, Rainey did not recall this particular exchange. During the hearing, the full report was not entered into evidence, nor did the parties call the doctor who performed the evaluation to testify. Thus, the ALJ determined that the record did not provide enough evidence to establish that Ja. B. would have qualified for special education services or that WCS should have initiated the referral process based on this information. Additionally, testimony presented during the hearing indicated that not every mental health diagnosis would qualify a student for special education and related services, particularly if the diagnosis does not have an educational impact. Thus, on this record, it cannot be said that WCS failed to meet its statutory duty when it did not evaluate Ja. B. after his disenrollment. *See L.M.*, 478 F.3d at 313"

4. Title IX – Retaliation claim – Summary judgment for defendant upheld - Because plaintiff relies on only indirect evidence, she may bring a prima facie retaliation claim under Title IX by showing that: (1) she engaged in protected activity, (2) the funding recipient knew of the protected activity, (3) she suffered an adverse employment-related action, and (4) a causal connection exists between the protected activity and the adverse action - Plaintiff did not show the reason for her termination was pretextual - Defendant claims two nonretaliatory reasons for

asking plaintiff to resign - First, she was insubordinate: she violated a direct order from Marshall when she sent the letter - Second, she failed to abide by defendant's standard of acceptable behavior: she justified her insubordination to her staff, criticized her colleagues in front of her staff, interrupted her staff's work, routinely ignored Title IX complaints, and missed many of her own reporting deadlines - Defendant's Conduct Policy permits immediate termination for both insubordination and any other deviation from standard and acceptable behavior - Thus, defendant identified at least two ways in which plaintiff violated its policies, either of which provides for immediate termination - Our precedent also supports that conclusion- We have previously held that an employee's insubordination and her failure to follow company policies constitute legitimate, nonretaliatory reasons to terminate employment - Plaintiffs typically show pretext by establishing one of three things: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that [the proffered reasons were insufficient to motivate the employer's action - These are not the only ways that a plaintiff can establish pretext - As a result, a plaintiff may also proffer some other cognizable explanation of how the evidence she has put forth establishes pretext - Here plaintiff has not produced sufficient evidence from which a jury could reasonably reject defendant's proffered reasons for firing her - Though the failure to uniformly apply a progressive discipline policy can be evidence of pretext, plaintiff has not identified no similarly situated employee who received a more lenient reprimand despite engaging in substantially identical conduct - To constitute similarly situated employees, the individuals with whom plaintiff seeks to compare her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them - To be protected by Title IX, a complaint must specifically accuse a recipient of engaging in intentional sex discrimination—a vague charge of discrimination isn't enough, and it must provide notice to an official authorized to address the complaint and institute corrective measures on the recipient's behalf

ANDREA GOLDBLUM v. UNIVERSITY OF CINCINNATI
SIXTH CIRCUIT COURT OF APPEALS No. 22-3289 Decided and Filed March 10, 2023

"Citing her insubordination and other infractions, the University of Cincinnati ('UC' or the 'University') requested that Andrea Goldblum resign as its Title IX Coordinator. Because Goldblum believes that UC retaliated against her for engaging in activity protected under Title IX, she sued for unlawful retaliation. The district court granted summary judgment for UC and denied Goldblum's motions for additional discovery. We affirm."

"In January 2019, UC's College of Arts and Sciences awarded 'triumph cords' to graduating students who had overcome some form of adversity. R. 73-1, Pg. ID 3252. The College awarded these cords based on nominations by faculty and staff—it didn't vet the nominees. As a result, the College unintentionally awarded a cord to a convicted sex offender who had also been suspended for sexual misconduct at one university and investigated for the same at another. When members of the UC community discovered this student's criminal record, they became upset, 'venting and sharing their frustrations' on social media. R. 55, Pg. ID 1212."

"Once Goldblum learned of the College's oversight, she told her direct supervisor, Dr. Bleuzette Marshall, and other UC officials that: (1) she planned to investigate how UC evaluated admissions applications from convicted sex offenders, and (2) she believed that UC could be considered deliberately indifferent toward potential sex discrimination unless it provided resources to students who 'didn't feel safe on campus.' R. 54, Pg. ID 858. Goldblum also passed the news along to M.B. Reilly, UC's Executive Director of Public Relations, and expressed her intention to formally address the controversy in a letter published by the University's student newspaper. That letter reads as follows:

> Dear Editor:
>
> I am writing in response to the feedback and concerns expressed by members of our community regarding the award to and article about [the student]. I understand that members of our community are being impacted by this situation and are hurting. Please be assured that I hear you. We are looking into various processes at work so that we can improve them. In the meantime, we have resources on campus for your support. . . .

> We must do better; we *will* do better, continuing to work to make the environment safe and equitable. Please don't give up on us, as we are not giving up on you. We are here and we hear you.

R. 66-1, Pg. ID 2534. The letter also included the phone numbers for several counseling services."

"In response, Reilly directed Goldblum to check with her direct supervisor before submitting anything. So Goldblum forwarded the letter to Marshall."

"After reading the letter during the afternoon of February 12, Marshall ordered Goldblum not to submit anything until Marshall obtained permission and coordinated with other University officials. While discussing the letter with her colleagues, Marshall discovered that the UC administration had authorized Ken Petren, the Dean of the College of Arts and Sciences, to formally address the controversy. Marshall then informed Goldblum of her discovery, reminding her that Dean Petren, not Goldblum, had been 'tasked with issuing [the] University response[].' R. 55, Pg. ID 1246. Marshall also identified problems with the content of Goldblum's letter. For one, the letter included the offending student's name. For another, it made vague promises—like 'we will do better'—which Goldblum lacked the power to both make and keep. *Id.*"

"Marshall also identified a procedural concern: before issuing any official communications, the University would typically develop an FAQ, anticipating and answering questions potentially arising from such communications. But there was no FAQ accompanying Goldblum's letter. Nevertheless, Marshall promised to continue discussing the letter with her colleagues and ordered Goldblum not to submit anything unless and until Marshall obtained approval."

"Goldblum didn't wait. Mere hours after their conversation, she texted Marshall that she intended 'to send in the letter to the editor,' that she would accept 'any repercussions' for her actions, and that she just wanted 'to be done and go home.' R. 64-1, Pg. ID 2302. In response, Marshall texted: 'I'm on a call regarding the matter. Please do not send.' *Id.* Goldblum sent the letter to the newspaper anyway."

"Early the next morning, Goldblum asked the student newspaper to replace her initial letter with an updated draft. The newer draft was nearly identical to the earlier one, except it expressly mentioned the University's Title IX office. Goldblum didn't tell Marshall about the revised letter, much less obtain permission to send it. For reasons not evident in the record, Goldblum's letter was never published."

"Following these incidents, Marshall reported Goldblum's insubordination to UC's human-resources department. During the internal investigation that followed, the University discovered additional infractions, namely that Goldblum repeatedly ignored Title IX complaints, justified her insubordination to her staff, repeatedly criticized her colleagues in front of her staff, routinely interrupted her staff's work, and missed many of her own reporting deadlines."

"At the conclusion of its investigation, UC allowed Goldblum to resign in lieu of termination for her insubordination and unacceptable work behavior in violation of UC's Conduct Policy. *See* R. 66-1, Pg. ID 2428, 2430 (establishing UC's right to 'immediately terminat[e]' Goldblum for 'insubordination,' Policy No. 15.02 §§ 2, 3(c), or for deviating from 'standard and acceptable behavior,' *id.* § 3(ff)). After Goldblum resigned on March 15, 2019, UC discovered that she hadn't followed up on a February 9 email accusing the sex offender of assaulting other persons on UC's campus. Nor had she performed any further investigations into UC's admissions practices."

"Though Goldblum had said that she'd accept 'any repercussions' for her actions, Goldblum sued UC for unlawful termination under Title VII and Title IX. The district court dismissed Goldblum's Title VII claim and subsequently granted UC summary judgment on Goldblum's Title IX claim. Goldblum now appeals the ruling on her Title IX claim, as well as the district court's orders denying her motions for additional discovery. Addressing Goldblum's Title IX claim and discovery motions in turn, we affirm."

"Title IX provides: 'No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). While this statute doesn't expressly provide a cause of action, the Supreme Court has told us that Title IX is enforceable through an implied right of action. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688–89 (1979). And particularly relevant here, the Court has held that 'when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex, in violation of Title IX.' *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (cleaned up)."

"Under our precedent, we review Goldblum's Title IX claim under the analogous test for Title VII retaliation claims. *Bose*, 947 F.3d at 988–89. Because Goldblum relies on only indirect evidence, she may bring a prima facie retaliation claim under Title IX by showing that: '(1) she engaged in protected activity, (2) the funding recipient knew of the protected activity, (3) she suffered an adverse [employment]-related action, and (4) a causal connection exists between the protected activity and the adverse action.' *Id.* (cleaned up)."

"If Goldblum establishes a prima facie case, UC must articulate a legitimate, nonretaliatory reason for her termination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Should UC meet its burden, Goldblum may then refute UC's proffered reason by showing that it's really a pretext for unlawful retaliation. *Flowers v. WestRock Servs., Inc.*, 979 F.3d 1127, 1132–33 (6th Cir. 2020)."

"Because UC presented legitimate reasons for seeking Goldblum's resignation, we proceed to pretext without deciding whether Goldblum established a prima facie case."

"UC claims two nonretaliatory reasons for asking Goldblum to resign. First, she was insubordinate: she 'violated a direct order' from Marshall when she sent the letter. R. 64-1, Pg. ID 2307. Second, she failed to abide by UC's standard of acceptable behavior: she justified her insubordination to her staff, criticized her colleagues in front of her staff, interrupted her staff's work, routinely ignored Title IX complaints, and missed many of her own reporting deadlines. And UC's Conduct Policy permits 'immediate termination' for both '[i]nsubordination' and '[a]ny other deviation from standard and acceptable behavior.' R. 66-1, Pg. ID 2428, 2430. Thus, UC has identified at least two ways in which Goldblum violated its policies, either of which provides for immediate termination."

"Our precedent also supports that conclusion. We have previously held that an employee's insubordination and her failure to follow company policies constitute legitimate, nonretaliatory reasons to terminate employment. *See Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 651 (6th Cir. 2015); *see also Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998) (Congress didn't 'intend[] to immunize insubordinate, disruptive, or nonproductive behavior at work.' (quotation omitted)). So what logic compels, precedent confirms: UC had legitimate nonretaliatory reasons to fire Goldblum."

"Because UC has proffered two legitimate reasons for seeking her resignation, Goldblum must accordingly demonstrate pretext to succeed on her retaliation claim."

"Plaintiffs typically show pretext by establishing one of three things: '(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that [the proffered reasons] were insufficient to motivate the employer's action.' *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009). These are not the only ways that a plaintiff can establish pretext. Rather, these three categories are simply a 'convenient way of marshaling evidence and focusing it on the ultimate inquiry: 'did the employer fire the employee for the stated reason or not?'' *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 530 (6th Cir. 2012) (quoting *Chen*, 580 F.3d at 400 n.4). As a result, a plaintiff may also proffer some other 'cognizable explanation of how the evidence she has put forth establishes pretext.' *Miles v. S. Cent. Hum. Res. Agency, Inc.*, 946 F.3d 883, 888 (6th Cir. 2020). But here, Goldblum has not produced 'sufficient evidence from which a jury could reasonably reject' UC's proffered reasons for firing her. *Id.*"

"Goldblum argues she wasn't insubordinate for two reasons: (1) her letter was protected activity under Title IX, so it couldn't have constituted insubordination, and (2) 'a Title IX Coordinator cannot be insubordinate.' Appellant's Br. 26 (cleaned up). We reject each in turn."

"First, Goldblum's letter wasn't protected activity because it didn't complain of sex discrimination. *See Jackson*, 544 U.S. at 174. To be protected by Title IX, a complaint must specifically accuse a recipient of engaging in intentional sex discrimination—a 'vague charge of discrimination' isn't enough. *Yazdian*, 793 F.3d at 645 (cleaned up). And it must provide notice to an official authorized to address the complaint and 'institute corrective measures on the recipient's behalf.' *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *Jackson*, 544 U.S. at 181."

"Goldblum's letter fails to satisfy either requirement."

"For one thing, the letter didn't specifically accuse UC of intentionally discriminating based on sex. Instead, it merely promised to make unspecified policy changes, expressed sympathy to UC students, provided telephone numbers for various counseling services, and defended UC's efforts to 'make the environment safe and equitable.' R. 66-1, Pg. ID 2534." …

"For another, Goldblum didn't send her letter to an official authorized to both address the controversy and 'institute corrective measures on the [University's] behalf.' *Gebser*, 524 U.S. at 290. Instead, she sent it to the editor of the student newspaper. So her letter failed to notify the proper UC officials."

"Thus, Goldblum's letter isn't protected by Title IX because it neither complained of sex discrimination nor was sent to an official authorized to do something about it."

"Second, Goldblum's argument that 'a Title IX Coordinator cannot be insubordinate' fails because she cites no authority for such a consequential assertion, *see* Appellant's Br. 26–29, nor can we find one." …

"Goldblum next argues that UC's second proffered reason had no basis in fact because UC contrived evidence of her poor work performance after asking her to resign. Because UC had another legitimate reason—insubordination—for firing Goldblum, this argument is ultimately inconsequential. But even taking the argument straight on, it fails."

"Specifically, Goldblum claims UC couldn't have truly fired her for her poor work performance because its only contemporary source supporting that conclusion came from a flawed and self-interested report from one of Goldblum's employees, Morgan Shaw." …

"But even assuming Goldblum's allegations about Shaw were true, they wouldn't matter for two independent reasons. First, Shaw's report wasn't UC's only evidence of Goldblum's poor work performance. Rather, two other employees also complained of her 'unprofessional' and even 'disrespectful' behavior towards her colleagues. R. 55, Pg. ID 1189, 1193–94."

"Second, even if these complaints failed to establish Goldblum's poor work performance before she resigned, reliable corroborating evidence was discovered shortly thereafter. Indeed, Goldblum's own files and correspondence confirm that she failed to meet many of her reporting deadlines." …

"… UC may rely on newly discovered evidence so long as it fits within one of the reasons it gave for terminating Goldblum 'at the time of discharge' and during litigation. *Miles*, 946 F.3d at 891; *Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 592 (6th Cir. 2002)." …

"Moreover, because Goldblum's own files and correspondence confirmed that she failed to meet many of her reporting deadlines, UC had a factual basis to terminate her for poor work performance."

"Therefore, even if Shaw's report were unreliable, no reasonable juror could conclude that UC's work-performance rationale wasn't based in fact."

"Goldblum also contends that even if she was insubordinate and unprofessional, such misconduct didn't sufficiently warrant termination. Specifically, she claims that because these were her first infractions, UC should've given her a less severe reprimand under its 'progressive discipline' policy. Appellant's Br. 42. We disagree."

"To begin, UC's policies permit 'immediate termination' for 'conduct and rule violations.' R. 66-1, Pg. ID 2428. And though these policies also subscribe to the principle of progressive corrective discipline for first-time infractions, Goldblum wasn't entitled to the most lenient reprimand possible. To the contrary, UC's policies expressly 'reserve[] the right to impose an appropriate level of corrective action, including termination, depending upon the severity of the violation.' R. 55-1, Pg. ID 1354. And while she ultimately disagreed with the termination, Goldblum's own expert acknowledges that Goldblum's 'behavior may have been deemed 'severe' because she 'defied a direct order.'' R. 69-2, Pg. ID 2864."

"Moreover, though the failure to *uniformly* apply a progressive discipline policy can be evidence of pretext, Goldblum has identified no similarly situated employee who received a more lenient reprimand despite engaging in 'substantially identical conduct.' *Miles*, 946 F.3d at 893."

"To constitute similarly situated employees, the individuals with whom Goldblum seeks to compare her treatment 'must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them.' *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 364 (6th Cir. 2010) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)). Though Goldblum needn't show an exact correlation between herself and the proposed comparators, she must show similarities in 'all relevant respects.' *Bobo v.*

United Parcel Serv., Inc., 665 F.3d 741, 751 (6th Cir. 2012), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)."

"Here, Goldblum identifies two director-level employees who were reprimanded—rather than terminated—for their insubordination. But for two independent reasons, these employees fail as comparators. First, neither reported to Marshall. *See Younis*, 610 F.3d at 364.**3** Second, these potential comparators were reprimanded for different conduct: in one case, taking University equipment off campus; and in the other, sharing confidential information with a co-worker. Thus, since they aren't similarly situated comparators, Goldblum fails to show that UC didn't uniformly apply its progressive discipline policy."

"Therefore, no reasonable juror could find that Goldblum's insubordination and unprofessional behavior was insufficient to warrant termination."

5. Title IX – Statute of limitations - The clock starts only once the plaintiff knows or should have known that Ohio State administrators with authority to take corrective action knew of Strauss's conduct and failed to respond appropriately – Plaintiff failed to properly plead a retaliation claim – A funding recipient may be liable for retaliating against a person because he complained of sex discrimination – Plaintiffs failed to allege that the funding recipient, Ohio State, retaliated against the plaintiffs

BRAIN GARRETT, NICHOLAS NUTTER v. EDWARD GONZALES, JOHN ANTOGNOLI, KENT KILGORE, ROGER BEEDON, ADAM PLOUSE, DANIEL RITCHIE, MICHAEL SCHYCK, DR. MARK CHRYSTAL, JOEL DAVIS, and JOHN DOES 1-2, 4-6, 8, 10-15, 17, 19, 21-25, 27, 29-33, 35-46, 48, 50-51, 53, 56-59, 61, 62, 64, 69, 75, 77, 85-86, and 88-92, individually and on behalf of all others similarly situated (21-3972); ROCKY RATLIFF (21-3974); ERIC SMITH, MARK COLEMAN, WILLIAM KNIGHT, JACK CAHILL, SCOTT OVERHOLT, ELMER LONG, RYAN HENRY, MICHAEL GLANE, CHRISTOPHER PERKINS, MICHAEL CALDWELL, THOMAS ROEHLIG, BRIAN ROSKOVICH, RICK MONGE, THOMAS LISY, ANASTACIO TITO VAZQUEZ, JR., JOHN MACDONALD, JR.; MAROON MONDALEK, LEO DISABATO, PETER NATHANSON, JEFFREY LADROW, ANTHONY SENTIERI, and JOHN DOES 1-15 and 17-19 (21-3982); MICHAEL ALF, GARY TILL, ALLEN NOVAKOWSKI; CHRIS ARMSTRONG, and JOHN DOES 93-97 and 99-101, individually and on behalf of all others similarly situated (21-4070); MICHAEL CANALES and JOHN DOE 20 (21-4128),
SIXTH CIRCUIT COURT OF APPEALS Nos. 21-3972/3974/3982/4070/4128 Decided and Filed February 15, 2023

See - **Recusal of federal judge - Plaintiffs argue that Judge's wife's store, which sells flags to and has licensing agreements with many entities, including Ohio State, gives the judge or his wife a financial interest in Ohio State - They also suggest that Judge's salary as an adjunct professor at Ohio State's law school gives him a financial interest in the university - Neither claim is correct. Neither Mrs. Watson's ownership of the store nor Judge Watson's adjunct professorship gave Judge or his wife ownership of a legal or equitable interest in Ohio State; nor did they establish either of them as a 'director, adviser, or other active participant in the affairs of' the university - Disqualification is not required on the basis of remote, contingent, indirect or speculative financial interests - Plaintiffs argue that the district court erred in denying their motions for recusal based on § 455(a) - Under that section, a judge must recuse in any proceeding in which his impartiality might reasonably be questioned - As these plaintiffs point out, the question is whether, given the facts, an objective reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits - Recusal is not required just because a judge serves as an adjunct professor at the law school of a party-university, page 124.**

6. Termination of tenured teacher – Trial court erred when it ruled that Board failed to show tenured teacher was guilty of inefficiency - The chancery court erred in determining that plaintiff was terminated without two evaluations below expectations

KIM BROWN v. SHELBY COUNTY SCHOOLS
COURT OF APPEALS No. W2022-00123-COA-R3-CV Filed May 8, 2023

"This appeal involves the termination of a tenured teacher for the cause of inefficiency. After receiving a written charge recommending his dismissal, the teacher requested a tenure hearing before a hearing officer, who found that there was substantial evidence to support the charge of inefficiency and that there was just cause for termination. The teacher appealed, the board of education voted to sustain the decision of the hearing officer, and the teacher was terminated. The teacher petitioned for judicial review of the decision in the chancery court. The chancery court reversed and reinstated the teacher with back pay.The school system appeals. We reverse."

"This case arises out of the termination of Mr. Kim Brown as a tenured teacher by the Shelby County Board of Education ('the Board'). In 2001, Mr. Brown was hired as a substitute teacher by Memphis City Schools ('MCS'), which is now Shelby County Schools ('SCS'). He began working as a full-time teacher in 2002 and obtained tenure in 2006. He taught at several different schools during his time with MCS. He taught 4th grade at Treadwell Elementary School ('Treadwell') during the 2011-12 school year. He then taught 2nd grade at Charjean Elementary School ('Charjean') during the 2012-13 school year, which was the school year preceding his termination."

"During the 2011-12 and 2012-13 school years, teachers were evaluated under an evaluation rubric known as the Teacher Effectiveness Measure ('TEM') in accordance with Tennessee Code Annotated section 49-1-302. As part of this evaluation rubric, a teacher was evaluated based on the following weighted components: (1) Student Growth; (2) Student Achievement; (3) Observation of Practice; (4) Stakeholder Perceptions; and (5) Teacher Knowledge. At the end of the school year, each teacher received a preliminary evaluation with a TEM score utilizing these components. However, the TEM score was subject to change based upon the Tennessee Value-Added Assessment System ('TVAAS') data released during the summer after the school year, which affected the student growth component. After factoring in these changes based on the TVAAS data, each teacher received a final evaluation with a TEM score. For both the preliminary and final evaluations, the TEM score was applied to the Effectiveness Scale, and the teacher would be given one of the following ratings:

1. 'Significantly below expectations';
2. 'Below expectations';
3. 'Meeting expectations';
4. 'Above expectations'; or
5. 'Significantly above expectations.'

For the 2011-12 school year at Treadwell, Mr. Brown received a preliminary evaluation with a TEM score of 295.60, which was a 3 or 'meeting expectations.' However, he received a final evaluation with a TEM score of 260.60, which was a 2 or 'below expectations.' For the 2012-13 school year at Charjean, he received a preliminary evaluation with a TEM score of 300.20, which was a 3 or 'meeting expectations.' However, he received a final evaluation with a TEM score of 181.50, which was a 1 orn'significantly below expectations.'"

"Given that Mr. Brown received a 2 or 'below expectations' on his final evaluation for the 2011-12 school year, many efforts were made to provide him support during the 2012-13 school year. Ms. Tameka Allen, who was Charjean's principal, met with Mr. Brown before the school year to discuss what was expected of him. Mr. Brown was permitted to observe other teachers at Charjean, such as Ms. Brandy Murrell, in order to get ideas and strategies to use in his classroom. He received assistance from a mentor, who was a retired principal assigned to teachers that were having problems in the classroom. The mentor conducted informal observations of Mr. Brown in his classroom and provided feedback. In addition to the mentor, Mr. Brown received assistance from an instructional facilitator, Ms. Elaine Wherry, who also conducted informal observations of Mr. Brown in his classroom and provided feedback. In February 2013, he agreed to participate in the peer assistance review ('PAR') program where he was offered additional support in hopes that his performance would improve. The PAR program was described as an 'individualized support plan,' but it was also considered a last-ditch effort to save the teacher. As part of the PAR program, Mr. Brown received assistance from an instructional facilitator, Ms. Kecia Helminski, who provided him with informal observations, walkthroughs, collaborative meetings, and written resources and videos. Ms. Helminski worked with Mr. Brown from February 2013 to May 2013. During her time with Mr. Brown, she found that there were extreme needs, he did not act on the things they discussed, and there was no evidence of growth at all. At the end of the school year, she met with Ms. Allen, and both of them agreed that Mr. Brown should be 'non-reelected.'"

"On May 10, 2013, Ms. Allen made her recommendation to the Superintendent that Mr. Brown be 'non-reelected,' indicating incompetence, inefficiency, and neglect of duty as reasons for her recommendation. His final evaluation for the 2012-13 school year was not yet available when this recommendation was made. On June 11, 2013, Ms. Chantay Branch, who was a coordinator with the Office of Labor and Employee Relations, notified Mr. Brown that charges and a recommendation for dismissal would be made to the Board and that he would be placed on suspension without pay effective July 29, 2013. Thereafter, termination proceedings were initiated pursuant to the Board's Dismissal Policy for tenured teachers and in accordance with the Teacher Tenure Act, codified at Tennessee Code Annotated section 49-5-501, *et seq*. On October 15, 2013, the Superintendent issued a written charge to the Board recommending Mr. Brown's dismissal for the cause of inefficiency. As examples of actions to support the charge of inefficiency, the written charge included Mr. Brown's TEM scores from his final evaluations for the 2011-12 and 2012-13 school years, which were both subpar. However, the written charge also provided that examples of actions to support the charge of inefficiency were 'not limited to' just the TEM scores. On October 28, 2013, the Board issued a decision finding that the charge warranted the dismissal of Mr. Brown as tenured teacher.

The following day, the Superintendent notified Mr. Brown in writing of the Board's decision recommending his dismissal and provided him with a copy of the charge and the form advising him of his legal duties, rights, and recourse."

"Afterward, Mr. Brown requested a tenure hearing before an impartial hearing officer which was conducted by Ms. Tannera Gibson in January 2014.4 In addition to Mr. Brown, those who testified at the tenure hearing were Ms. Branch, Ms. Allen, Ms. Helminski, Ms. Wherry, and Ms. Murrell. Ms. Kenia Coleman, who was the principal at Treadwell during the 2011-12 school year, also provided testimony. In March 2014, the hearing officer issued a decision finding that there was 'substantial evidence in the record to support the charge of 'Inefficiency' against Mr. Brown' and that 'SCS carried its burden to prove that it had just cause to terminate [his] employment as a tenured teacher.' In her findings of fact and conclusions of law, the hearing officer set forth two bases supporting the termination of Mr. Brown's employment: (1) two subpar evaluations; and (2) wanting in effective performance of duties. Mr. Brown appealed the hearing officer's decision to the Board. However, he failed to appear at the hearing, and the Board conducted the hearing without him.5 On April 29, 2014, the Board voted to sustain the decision of the hearing officer. The Board notified Mr. Brown that it had reached a decision and that his employment had officially been terminated."

"Pursuant to Tennessee Code Annotated section 49-5-513, a tenured teacher whose employment has been terminated by a school board is afforded the right to judicial review of the school board's decision. *Emory v. Memphis City Schs. Bd. of Educ.*, 514 S.W.3d 129, 139-40 (Tenn. 2017). In *Emory*, the Tennessee Supreme Court set forth the standard of review for the chancery court in a Teacher Tenure Act case as follows:

> [T]he standard of review specified in the statute is intended to permit the chancery court to address the intrinsic correctness of the school board's decision. The appellate court . . . aptly described this standard of review: The chancery court's review, as contemplated by [section 49-5-513], is a de novo review wherein the chancery court does not attach a presumption of correctness to the school board's findings of fact, nor is it confined to deciding whether the evidence preponderates in favor of the school board's determination. The teacher does not have the ability to present new evidence on the merits of the charges; the chancery court's de novo review is limited to the record of the school board proceedings. New evidence is only admissible to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.

Id. at 141-42 (internal citations and quotation marks omitted). If the chancery court's decision is appealed, this Court reviews the decision in accordance with Tennessee Rule of Appellate Procedure 13(d) 'to determine whether the evidence preponderates in favor of the chancery court's findings of fact.' *Id.* at 142 (citing *Ripley v. Anderson Co. Bd. of Educ.*, 293 S.W.3d 154, 156 (Tenn. Ct. App. 2008)). However, '[i]ssues of law, of course, are reviewed *de novo*, with no presumption of correctness in the chancery court's conclusions.' *Id.* (citing *Ripley*, 293 S.W.3d at 156)."

"SCS's first issue on appeal concerns whether the standard of review on appeal requires an independent assessment of the administrative record with no deference to the chancery court's findings. SCS suggests that 'this Court must undertake its own independent review of the administrative record to form its own factual assessment, giving deference to no previous factual findings of the Chancery Court.' We reiterate that our 'review of the chancery court's decision is under the familiar Rule 13(d) of the Tennessee Rules of Appellate Procedure.' *Id.* In accordance with Rule 13(d), our review is de novo on the record *with a presumption that the chancery court's factual findings are correct*, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d) (emphasis added). Therefore, to the extent that SCS is arguing that the chancery court's factual findings are not entitled to a presumption of correctness on appeal, it is mistaken."

"As for credibility assessments, however, it is well-settled that 'we must afford strict deference only to the trial court's credibility assessments of the witnesses it actually observed, and not to its findings with regard to the administrative record it considered, of which we may make our own independent review.' *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 784 (Tenn. 1999)." …

"Given that the chancery court's review is limited to the administrative record in a Teacher Tenure Act case, it does not hear any witnesses or consider any evidence outside of the administrative record. *See* Tenn. Code Ann. § 49-5-513(g) (providing that the chancery court's review is 'limited to the written record of the hearing before the board and any evidence and exhibits submitted at the hearing'). Still, the chancery court could make its own credibility determinations based on the record. *See Finney*, 576 S.W.3d at 680 (finding that the chancellor could still make his own credibility determinations based on the record, which included the transcript of the evidence, video recordings of the tenured teacher's interactions with students, and exhibits for which the chancellor had the

same ability to observe as did the hearing officer). This Court is 'in just as good a position as the trial court to judge the credibility of witnesses who provided the proof.' *Wells*, 9 S.W.3d at 784; *see Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992). Therefore, 'we are not required to give strict deference to the [chancery court's] assessment of the testimony contained in a 'cold' record.' *Id.* at 785. With that being said, SCS does not point to any credibility assessments made by the chancery court. Accordingly, the holdings from *Wells* and *Finney* regarding our review of credibility assessments of documentary proof made by the chancery court are not applicable in this case."

"SCS's second and third issues essentially concern whether the chancery court erred in determining that the Board lacked just cause to terminate Mr. Brown for the cause of inefficiency. 'A teacher may only be dismissed or suspended on the basis of incompetence, *inefficiency*, neglect of duty, unprofessional conduct, or insubordination.' *Elmi v. Cheatham Cnty. Bd. of Educ.*, 546 S.W.3d 630, 644 (Tenn. Ct. App. 2017) (citing Tenn. Code Ann. § 49-5-511(a)(2)). The term 'inefficiency' is defined in the Teacher Tenure Act as follows:

> 'Inefficiency' means being below the standards of efficiency maintained by others currently employed by the board for similar work, or habitually tardy, inaccurate or wanting in effective performance of duties. The definition of inefficiency includes, *but is not limited to*, having evaluations demonstrating an overall performance effectiveness level that is 'below expectations' or 'significantly below expectations' as provided in the evaluation guidelines adopted by the state board of education pursuant to § 49-1-302[.]

Tenn. Code Ann. § 49-5-501(6) (emphasis added). This definition 'uses the plural term 'evaluations' rather than the singular 'evaluation.'' *Harrison*, 2016 WL 1250782, at *4. Therefore, it 'indicate[s] that evidence of more than one unsatisfactory evaluation is *one* way to show that a teacher is inefficient.' *Harper v. Shelby Cnty. Schs.*, No. W2018-01100-COA-R3-CV, 2019 WL 1453092, at *6 n.9 (Tenn. Ct. App. Apr. 1, 2019). However, '[a]s is apparent from the definition and as this Court has noted, '[t]he definition is not exclusively limited to having poor evaluations[.]'' *Id.* at *4 (quoting *Harrison*, 2016 WL 1250782, at *4)."

"SCS presents an issue regarding whether the chancery court erred in determining that Mr. Brown was terminated without two evaluations below expectations. SCS argues, '[t]he administrative record was filled with evidence, including the actual TEM scores themselves, to support the contention that Mr. Brown had two final TEM scores that were below expectations prior to a termination charge and decision by the Board on October 29, 2013.' Mr. Brown argues that it is undisputed SCS decided to non-reelect him and initiate termination proceedings against him before he received his final evaluation for the 2012-13 school year. The crux of this issue is whether the termination proceedings against Mr. Brown were premature."

"The hearing officer found that 'Mr. Brown's final TEM scores for two consecutive school years were a TEM 1 and a TEM 2, and thus satisfies the plural 'evaluations' requirement set forth in the statute.' Mr. Brown sought judicial review of the decision in the chancery court. … We respectfully disagree with the chancery court's analysis. First, we observe that Mr. Brown did not receive a 1 on his final evaluation for the 2011-12 school year; he received a 2. Regardless, this was still a subpar evaluation. Second, the date of May 10, 2013, was merely when Ms. Allen, the principal at Charjean, made her recommendation for nonreelection to the Superintendent. While termination proceedings eventually resulted from Ms. Allen's recommendation made on May 10, 2013, SCS did not decide to non-reelect Mr. Brown on this date. As explained by Ms. Branch, the Office of Labor and Employee Relations, which was responsible for the review process as the Superintendent's designee, conducted a review of the recommendation for non-reelection. After this review was completed, Mr. Brown was notified that charges and a recommendation for dismissal would be made to the Board and that he would be placed on suspension without pay effective July 29, 2013. On October 15, 2013, the Superintendent issued a written charge recommending Mr. Brown's dismissal for the cause of inefficiency. The written charge indicated that examples of actions in support of the charge included, but were not limited to, his subpar final evaluations for the 2011-12 and 2012-13 school years:

> a. 2011-12 TEM 2 (260.60) Level 2
> b. 2012-13 TEM 1 (181.50) Level 1

Therefore, as the written charge indicates, Mr. Brown's final evaluation for the 2012-13 school year was available at this point. On October 28, 2013, the Board issued a decision finding that the charge warranted the dismissal of Mr. Brown as tenured teacher, and Mr. Brown was notified of the Board's decision the following day."

"The Teacher Tenure Act provides, 'When charges are made to the board of education against a teacher, charging the teacher with offenses that would justify dismissal of the teacher under the terms of this part, the charges shall be made in writing, specifically stating the offenses that are charged . . . .' Tenn. Code Ann. § 49-5-511(a)(4).

Thus, the decisive point occurred when the Superintendent issued the written charge to the Board on October 15, 2013, because the particular charge for the cause of inefficiency could not have been made without specifically stating the offenses that were charged. This is when termination proceedings were initiated against Mr. Brown. *See Emory*, 514 S.W.3d at 132-34 (stating that the Superintendent 'initiated termination proceedings' when it issued a letter to the board of education setting forth the reasons for her recommendation). As explained by this Court, '[t]he first step is the presentation of written charges to the Board of Education, 'specifically stating the offenses charged.'' *Hubbard v. Claiborne Cnty. Bd. of Educ.*, No. E2020-00517-COA-R3-CV, 2021 WL 4775952, at *3 (Tenn. Ct. App. Oct. 13, 2021) (quoting Tenn. Code Ann. § 49-5-511(a)(4)); *see Thompson v. Memphis City Schs. Bd. of Educ.*, 395 S.W.3d 616, 623 (Tenn. 2012) ('First, written charges must be presented to the board of education specifically stating an offense that would amount to cause for the teacher's dismissal . . . .'). The written charge indicated Mr. Brown's final evaluation for the 2012-13 school year was available at this point. As justification for the charge of inefficiency, it included Mr. Brown's final evaluations for the 2011-12 and 2012-13 school years, which were both subpar. Accordingly, Mr. Brown had more than one subpar evaluation at the time termination proceedings were initiated against him."

"Moreover, there does not necessarily need to be more than one subpar evaluation for a finding of inefficiency, nor any subpar evaluation for that matter, because inefficiency is not exclusively limited to having subpar evaluations. *Harper*, 2019 WL 1453092, at *4 (quoting *Harrison*, 2016 WL 1250782, at *4). '[E]vidence of more than one unsatisfactory evaluation is *one* way to show that a teacher is inefficient.' *Id.* at *6 n.9." …

"As previously stated, the written charge indicated that Mr. Brown's final evaluation for the 2012-13 school year was available at the time the written charge was made. Mr. Brown received a TEM score of 181.50, which was a 1 or 'significantly below expectations.' This was his second subpar evaluation because, for the 2011-12 school year, he received a TEM score of 260.60, which was a 2 or 'below expectations.' As a result, the Board issued a decision finding that the charge warranted the dismissal of Mr. Brown as tenured teacher. Thus, we agree with the hearing officer in that SCS carried its burden to prove that it had just cause to terminate Mr. Brown's employment as a tenured teacher. We conclude that the chancery court erred in determining that Mr. Brown was terminated without two evaluations below expectations. We therefore reverse the decision of the chancery court and reinstate the Board's decision terminating Mr. Brown as a tenured teacher."

7. Termination of tenured teacher – In dismissal of a tenured teacher when a teacher request a hearing before a hearing officer once the hearing is completed the board of education must hear the appeal on the evidence submitted to the hearing officer - At that point under the Tenure Act the teacher may appear in person or by counsel and argue why the decision should be modified or reversed - The board may sustain the decision, send the record back if additional evidence is necessary, revise the penalty or reverse the decision - Before any findings and decision are sustained or punishment inflicted, a majority of the membership of the board shall concur in sustaining the charges and decision - The board shall render its decision on the appeal within ten working days after the conclusion of the hearing - In this case the board conducted a third hearing, after having voted to reject the hearing officer decision and in so doing, the board broadened the scope of the Tenure Act beyond what the Legislature intended and committed a clear error of law

FRED WHITLEY, JR. v. METROPOLITAN NASHVILLE BOARD OF EDUCATION
COURT OF APPEALS No. M2022-01079-COA-R3-CV Filed June 22, 2023

"Appellant, a tenured teacher employed by Metropolitan Nashville Public Schools, was involved in an altercation with students at an alternative high school. Subsequently, Appellee Metropolitan Nashville Board of Education (the 'Board') terminated Appellant's employment. After exhausting his administrative remedies, Appellant filed an action with the trial court arguing that the Board exceeded its authority under the Teachers' Tenure Act. The trial court vacated the Board's decision on the ground that the Board violated the Open Meetings Act. We affirm the trial court's decision on different grounds, *i.e.*, that the Board committed a clear error of law when it conducted a third hearing concerning the termination of Appellant's employment. We also conclude that Appellant is entitled to reinstatement and back pay. There is nothing further for the Board to do; accordingly, we reverse the trial court's order of remand."

"At the time of the incident giving rise to this appeal, Appellant Fred Whitley, Jr. was a tenured teacher with Metropolitan Nashville Public Schools ('MNPS'). Mr. Whitley taught at an 'alternative school' for students who had been removed from traditional schools primarily for behavioral reasons. On October 11, 2018, a group of students entered Mr. Whitley's classroom and refused to leave. An altercation ensued when the students blocked Mr. Whitley from leaving the classroom, knocked the classroom telephone from Mr. Whitley's hand, and made

profanity-laced threats. One of the students threw a book at Mr. Whitley. Mr. Whitley pulled at his belt and verbally threatened the students stating that he was not the only person who would get hurt. Mr. Whitley also used profanity."

"On November 13, 2018, Dr. Shawn Joseph, the Director of Schools for MNPS, charged Mr. Whitley with unprofessional conduct, inefficiency, insubordination, and neglect of duty stemming from the October 11 incident. Mr. Whitley was suspended without pay pending final disposition of the matter. On November 27, 2018, Dr. Joseph presented the charges against Mr. Whitley to the Board, which voted that the charges against Mr. Whitley, if true, would warrant his dismissal."

"On December 7, 2018, Mr. Whitley requested a hearing before an impartial hearing officer as provided in Tennessee Code Annotated section 49-5-512(a)(1), discussed further *infra*. Dr. Joseph selected Stephen W. Elliott as the hearing officer. On February 19 and 20, 2019, Mr. Elliott conducted the dismissal hearing. On April 8, 2019, Mr. Elliott found Mr. Whitley guilty of ineffectiveness,1 insubordination, neglect of duty, and unprofessional conduct; Mr. Elliott further concluded that the evidence supported Mr. Whitley's dismissal. Under Tennessee Code Annotated section 49-5-512(c)(1), discussed further *infra*, Mr. Whitley appealed Mr. Elliott's decision to the Board."

"On May 14, 2019, the Board met in regular session. Although the agenda for the Board's meeting did not list Mr. Whitley's appeal, the Board considered it, and a motion was made to terminate Mr. Whitley's employment. The motion failed, and the Board requested a second hearing before Mr. Elliott to ascertain proof concerning what, if any, training Mr. Whitley received regarding engagement with difficult students. On July 30, 2019, Mr. Elliott conducted a second hearing and again concluded that termination of Mr. Whitley's employment was warranted. Mr. Whitley appealed to the Board."

"On October 22, 2019, the Board met in regular session. As in the first appeal, although the agenda for the Board's meeting did not list Mr. Whitley's appeal, the Board considered it. After presentation of the appeal, a motion was made to dismiss Mr. Whitley, but that motion failed. Unlike the first meeting, the Board did not send the case back to the hearing officer for additional findings. On October 30, 2019, the Board met and considered Mr. Whitley's dismissal for a third time. As with the previous meetings, the agenda for the Board's meeting did not mention Mr. Whitley's appeal. The makeup of the quorum for the third hearing before the Board was comprised of individuals who were not part of the quorum for the previous two meetings. During the third hearing, a motion was made to dismiss Mr. Whitley, and this time it passed."

"On November 26, 2019, Mr. Whitley filed a complaint and petition for *writ of certiorari* in the Chancery Court for Davidson County (the 'trial court')." …

"On October 5, 2021, the trial court heard Mr. Whitley's petition. On June 8, 2022, the trial court entered a memorandum and final judgment. The trial court found that Mr. Whitley failed to raise the issue of whether the Board acted arbitrarily and capriciously when it conducted additional votes after the original motion to terminate his employment failed. Specifically, the trial court found that Mr. Whitley not only failed to raise the issue, but he also acquiesced in the Board's remand and second hearing before Mr. Elliott. However, the trial court found that: (1) the Board violated the Open Meetings Act because it failed to provide adequate public notice of the special meeting on October 30, 2019;2 and (2) because the Board violated the Open Meetings Act at the October 30, 2019 meeting, the Board's decision to terminate Mr. Whitley from employment was 'void and of no effect' under Tennessee Code Annotated section 8-44-105. Although Mr. Whitley requested reversal of the Board's decision and reinstatement of his employment with back pay, the trial court found that such relief was not available for violations of the Open Meetings Act. Because the trial court concluded that the Board's October 30, 2019 decision was 'void and of no effect,' it also concluded that it was precluded from reviewing the merits of the Board's decision. Accordingly, the trial court vacated the Board's decision and remanded the case 'for a 'new and substantial consideration' of these issues involved in accordance with the Open Meetings Act.'"

"This appeal involves the Teachers' Tenure Act (the 'Tenure Act'). *See generally* Tenn. Code Ann. § 49-5-501, *et. seq*. As the Tennessee Supreme Court stated in ***Emory v. Memphis City Schools Board of Education***,

> it is apparent that the standard of review under the Tenure Act is not the standard applicable to a common law writ of certiorari. Instead, the standard of review specified in the statute is intended to permit the chancery court to address the intrinsic correctness of the school board's decision. The appellate court in ***Ripley*** [***v. Anderson Co. Bd. of Educ.***, 293 S.W.3d 154 (Tenn. Ct. App. 2008)] aptly described this standard of review: 'The chancery court's review, as contemplated by [section 49-5-513], is a *de novo* review wherein the chancery court does not attach a presumption of correctness to the school board's findings of fact, nor is it confined to deciding whether the

> evidence preponderates in favor of the school board's determination.' The teacher does not have the ability to present new evidence on the merits of the charges; the chancery court's *de novo* review is limited to the record of the school board proceedings.

Emory v. Memphis City Schools Bd. of Educ., 514 S.W.3d 129, 141-42 (Tenn. 2017) (internal citations omitted)." …

"'The primary purpose of the Tenure Act is 'to protect school teachers from arbitrary demotions and dismissals.' ***Thompson v. Memphis City Sch. Bd. of Educ.***, 395 S.W.3d 616, 623 (Tenn. 2012) (quoting ***Cooper v. Williamson Cnty. Bd. of Educ.***, 746 S.W.2d 176, 179 (Tenn. 1987)). Furthermore, the Act 'affords 'a measure of job security to those educators who have attained tenure status.'' ***Thompson***, 395 S.W.3d at 623 (quoting ***Ryan v. Anderson***, 481 S.W.2d 371, 374 (Tenn. 1972)). The Tenure Act provides the procedure to be followed when a tenured teacher is charged with offenses that would justify dismissal under the Act. Under Tennessee Code Annotated section 49-5-512, a tenured teacher who is notified of charges under section 49-5-511, may demand, within 30 days of receipt of the notice, a full and complete hearing on the charges before an impartial hearing officer. Tenn. Code Ann § 49-5-512(a). After the hearing, the hearing officer shall 'decide what disposition to make of the case and shall immediately thereafter give the [B]oard and the teacher written findings of fact, conclusions of law and a concise and explicit statement of the outcome of the decision.' Tenn. Code Ann § 49-5-512(a)(9). If the tenured teacher is dissatisfied with the hearing officer's decision, 'the teacher shall first exhaust the administrative remedy [by] appealing the decision to the [Board] within ten (10) working days of the hearing officer's delivery of the written findings of fact, conclusions and decision to the affected employee.' Tenn. Code Ann. § 49-5-512(c)(1). Under section 49-5-512(c)(3), the Board is then required to hear the teacher's appeal on the evidence submitted to the hearing officer, with no new evidence being introduced. Tenn. Code Ann. § 49-5-512(c)(3). Under the Act, the teacher may

> appear in person or by counsel and argue why the decision should be modified or reversed. ***The [B]oard may sustain the decision, send the record back if additional evidence is necessary, revise the penalty or reverse the decision***. Before any findings and decision are sustained or punishment inflicted, a majority of the membership of the board shall concur in sustaining the charges and decision. The board shall render its decision on the appeal within ten (10) working days after the conclusion of the hearing.

Tenn. Code Ann. § 49-5-512(c)(3) (emphasis added)."

"On appeal, Mr. Whitley makes the same argument to this Court that he made to the trial court, *i.e.*, that the Board acted arbitrarily when it conducted the third hearing because there is no provision in the Tenure Act that allows for the third hearing. The trial court, relying on ***Emory***, held that 'Mr. Whitley waived the issue of arbitrariness based on the Board's allegedly defective motion procedures by failing to raise those issues in the first instance before the Board, and, further, by acquiescing in the Board's subsequent remand and appeal hearings without objection.'" …

"In this case, the distinction between substantive law and procedural law is important. Generally, substantive law 'creates, defines, and regulates the rights, duties, and powers of parties' whereas procedural law concerns '[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.' *Black's Law Dictionary* (11th ed. 2019); *see also* ***Willeford v. Klepper***, 597 S.W.3d 454, 475 n.5 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part) (citing 20 Am. Jur. 2d Courts § 47 (2018); ***Broussard v. St. Edward Mercy Health Sys., Inc.***, 386 S.W.3d 385, 389 (Ark. 2012)). In this regard, ***Emory*** is distinguishable from this case. ***Emory*** involved a board conducting a hearing outside the statutory procedural time constraints. As discussed below, in this case, the Board awarded itself a power, *i.e.*, a rehearing. The Board's action goes directly to Mr. Whitley's due process rights and, thus, involves a substantive law. Because the question of whether the Board acted arbitrarily when it held the third hearing invokes due process considerations, we conclude that Mr. Whitley did not waive the issue and reverse the trial court's ruling in this regard."

"Turning to the question of whether the Board erred in conducting a third hearing, at oral argument before this Court, the panel asked where the Board derived its authority to conduct that hearing. The Board's counsel answered that the Board followed *Robert's Rules of Order* for its meetings. Although *Robert's Rules of Order* may provide authority for how to conduct the third hearing and vote, these parliamentary procedures cannot operate to grant the Board powers beyond those imparted by statute. Indeed, '[t]he powers of [an administrative agency] must be found in the statutes. If they are not there, they are non-existent.' ***Tennessee-Carolina Transp., Inc. v. Pentecost***, 334 S.W.2d 950, 953 (Tenn. 1960). Furthermore, '[a]dministrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity.' ***Gen. Portland, Inc.***

v. Chattanooga-Hamilton Cnty. Air Pollution Control Bd., 560 S.W.2d 910, 913 (Tenn. Ct. App. 1976) (internal citations omitted). Moreover, '[i]t is generally held that administrative and procedural rules and regulations promulgated under a grant of legislative authority may not be inconsistent with the purpose and the intent of the legislative [a]ct nor may they remove or limit substantive rights granted in the enabling [a]ct.' ***Knox Cnty. ex rel. Kessel v. Knox Cnty. Pers. Bd.***, 753 S.W.2d 357, 360 (Tenn. Ct. App. 1988) (internal citation omitted). Accordingly, when applying a statute, a court's duty is to ascertain and fully effectuate the 'legislative intent [of the statute], taking care not to broaden [it] beyond its intended scope . . . .' ***Womack v. Corr. Corp. of Am.***, 448 S.W.3d 362, 366 (Tenn. 2014) (citing ***Shore v. Maple Lane Farms, LLC***, 411 S.W.3d 405, 420 (Tenn. 2013); ***Carter v. Bell***, 279 S.W.3d 560, 564 (Tenn. 2009))."

"As discussed above, under Tennessee Code Annotated section 49-5-512(c)(3), the Board had four options after hearing Mr. Whitley's appeal. It could: (1) sustain the hearing officer's decision to terminate Mr. Whitley's employment; (2) send the record back for additional evidence; (3) revise the penalty against Mr. Whitley; or (4) reverse the decision to terminate his employment. Tenn. Code Ann. § 49-5-512(c)(3). After the first appeal hearing, the Board sent the record back for additional evidence, which was proper under the statute. After the second appeal hearing, the motion to terminate Mr. Whitley's employment failed. The failure of the motion necessarily resulted in the following: (1) the effective reinstatement of Mr. Whitley to his previous teaching position; and (2) the end of Mr. Whitley's appeal to the Board. After the motion to dismiss Mr. Whitley failed at the second Board hearing, the Board was limited to the options enumerated in section 49-5-512(c)(3). A rehearing is not one of the statutory options. Therefore, in conducting the third hearing, the Board ostensibly created a fifth option for how to proceed after a termination hearing. In so doing, the Board broadened the scope of the Tenure Act beyond what the Legislature intended and committed a clear error of law. *See* ***Womack***, 448 S.W.3d at 366 (citing ***Shore***, 411 S.W.3d at 420; ***Carter***, 279 S.W.3d at 564). Having acted outside the scope of the Tenure Act in conducting a rehearing, the Board's decision from that rehearing, *i.e.*, to terminate Mr. Whitley's employment, is null, void and of no effect as a matter of law. ***Gen. Portland, Inc.***, 560 S.W.2d at 913. Because the Board's actions in the third meeting have no legal effect, the Board's action in the second meeting, i.e., reversal of Mr. Elliott's decision to terminate Mr. Whitley's employment, stands as the Board's final decision."

8. Nonrenewal of non-tenured teacher – Director of Schools must make the decision whether to nonrenew a non-tenured teacher – The director cannot delegate this duty to another individual - The decision to nonrenew requires the principal to exercise judgment and discretion, however, the ultimate decision is not the principal's; it is the director's - While principals can and should exercise judgment and discretion in the role they play in the nonrenewal process, the onus is on the director to exercise his or her independent judgment and discretion in making the ultimate nonrenewal decision - In Tennessee, the general rule is that municipal authorities may delegate ministerial or administrative duties, but they may not delegate their legislative duties, duties that require the exercise of discretion and judgment - If there is no express language granting a local government certain powers, courts inquire into 'whether that power is fairly implied from the powers expressly granted - If the power is neither expressly granted nor fairly implied, the question becomes whether the power is essential to the entity's declared objects and purposes - Courts resolve any doubt regarding the power against the local government

BRENDA LEE-PEERY v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY
COURT OF APPEALS No. M2022-00551-COA-R3-CV Filed April 19, 2023

"This is a breach of contract action brought by a nontenured teacher against the Metropolitan Government of Nashville and Davidson County ('Metro') for nonrenewal of her teaching contract for the 2018–2019 school year. The teacher alleges that the nonrenewal of her yearly teaching contract was ineffective because the decision to nonrenew was improperly delegated by the Director of Schools to the principal. The school district contends that the decision to nonrenew is delegable and that the teacher lacks a private cause of action because the school district provided her with timely notice of her nonrenewal. The trial court summarily ruled in favor of the teacher, awarding her damages for breach of contract. The school district appeals, reiterating its same arguments. For the nonrenewal of a nontenured teacher to be effective, the proper authority must make the decision to nonrenew, and the school district must provide timely notice to the teacher. Because the decision to nonrenew requires the Director of Schools to exercise his or her independent judgment and discretion, the Director of Schools may not delegate this authority. In this case, the Director of Schools did not exercise his independent judgment and discretion in the decision to not renew the teacher's contract; thus, the purported nonrenewal was ineffective. Accordingly, we affirm."

"… For the 2015–2016 school year, MNPS employed Lee-Peery in interim positions as a substitute teacher then as a full-time teacher. From 2016–2018, MNPS placed Lee-Peery as a regular, full-time teacher at Haywood Elementary School."

"During the spring of 2018, the MNPS human resources manager met with the principals in the district to determine budgets and staffing levels for the following school year. Once these determinations were made, the principals were responsible for making staffing recommendations for their respective schools."

"On May 17, 2018, the Principal of Haywood Elementary School, Megan Galloway ('Principal Galloway'), informed Lee-Peery that her position had been cut from the 2018–2019 budget. Principal Galloway told Lee-Peery that she was welcome to apply for any open positions within MNPS. On May 30, 2018, Lee-Peery received a letter signed by Sharon Pertiller, the Executive Director of Human Resources, stating that Lee-Peery's contract would not be renewed for the 2018–2019 school year. At the time of nonrenewal, Lee-Peery did not have tenure."

"The decision to nonrenew Lee-Peery's contract was made solely by Principal Galloway. Dr. Shawn Joseph—the Director of Schools for MNPS—was involved in the nonrenewal only to the extent that he reported to the Board of Education that nonrenewal letters had been mailed to employees."

"Following the 2018–2019 school year, MNPS rehired Lee-Peery to teach during the 2019–2020 school year. Lee-Peery has remained employed with MNPS since that time."

"In October of 2019, Lee-Peery commenced this breach of contract action against Metro for the nonrenewal of her teaching contract for the 2018–2019 school year. Lee-Peery contended that her nonrenewal was not effective because the decision was not made by either the Director of Schools or the Board of Education. After the initial pleadings, both parties filed motions for summary judgment. The trial court granted Lee-Peery's Motion for Summary Judgment and denied Metro's Motion for Summary Judgment."

"Tennessee Code Annotated § 49-5-409(a) ('Continuing Contract Law') governs contracts for nontenured public school teachers. The statute reads:

> Teachers in service and under the control of the public elementary or high schools of this state may continue in such service unless written notice is sent to the teacher from the teacher's board of education or director of schools, as appropriate, of the teacher's dismissal or failure of reelection.

Id. The statute further directs that written notice of a decision to dismiss or failure to reelect must be sent to the teacher within five days 'following the last instruction day for the school year.' Tenn. Code Ann. § 49-5-409(b)(1)."

"Pursuant to the Continuing Contract Law, Tennessee employs nontenured public school teachers on annual contracts that renew automatically unless the teacher receives proper notice of nonrenewal. *Snell v. Brothers*, 527 S.W.2d 114, 115–16 (Tenn. 1975). Failure to give proper written notice of nonrenewal to a teacher results in that teacher's 'contract being continued one more year' and entitles the teacher to damages for breach of contract. *Id.* at 119; *see also Arwine v. Union Cnty. Bd. of Educ.*, 120 S.W.3d 804, 808 (Tenn. 2003) (citations omitted) (holding that legislative intent indicates that teacher employment is accomplished on a 'year-to-year basis,' not with multi-year contacts)."

"Tennessee Code Annotated § 49-2-301 provides that:

> (b)(1) It is the duty of the board of education to assign to its director of schools the duty to:
>
> (CC) Within the approved budget and consistent with existing state laws and board policies, employ, transfer, suspend, nonrenew and dismiss all personnel, licensed or otherwise, except as provided in § 49-2-203(a)(1) and in chapter 5, part 5 of this title.

Notably, Tennessee Code Annotated § 49-2-301(b)(1)(FF) states, 'All actions of the directors or their designees shall be consistent with the existing board policies, rules, contracts and regulations.'"

"The key issue that guides our discussion is whether the Director of Schools can delegate his or her authority to nonrenew a nontenured teacher's contract."

"We find that the Director of Schools may not delegate his or her power to nonrenew nontenured teachers. Tennessee Code Annotated § 49-2-301 neither expressly grants nor fairly implies that the Director of Schools has

the authority to delegate the responsibility to exercise his or her independent judgment and discretion in deciding whether to nonrenew a nontenured teacher's contract. The Director of Schools may delegate only the ministerial duties listed in the statute. The decision to nonrenew is non-ministerial because it requires the director to exercise his or her independent discretion and judgment. Relevant caselaw governing a municipal authority's power to delegate and the structure of the pertinent statutory schemes evidence the General Assembly's intent to require a director to exercise the requisite discretion and judgment when nonrenewing a nontenured teacher in Tennessee."

"First, the statute does not clearly state whether the director may delegate his or her nonrenewal power to a principal. Accordingly, to guide our decision, we turn to Dillon's Rule, a canon of statutory construction that narrowly and strictly construes a local government's authority. *See S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). Dillon's Rule in Tennessee establishes that 'absent some indication to the contrary, the General Assembly must be presumed to have endowed local governments with only as much authority as it has granted through the language of its delegation.' *Id.* at 712. If there is no express language granting a local government certain powers, courts inquire into 'whether that power is fairly implied from the powers expressly granted.' *Id.* at 716. If the power is 'neither expressly granted nor fairly implied,' the question becomes whether the power is 'essential' to the entity's 'declared objects and purposes.' *Id.* at 711 (citations omitted). Courts resolve any doubt regarding the power against the local government. *Id.* (citations omitted)."

"Tennessee Code Annotated § 49-2-301 does not expressly grant the Director of Schools the power to delegate his or her nonrenewal duty to a principal. Thus, in the absence of this express grant, we consider whether this delegation of authority is fairly implied. *See S. Constructors, Inc.*, 58 S.W.3d at 716."

"Any fair implications of delegation can be found in the distinction between the kinds of duties listed in the statute. The duties listed in the statute can be categorized as ministerial or non-ministerial. The dividing line between the two is that the non-ministerial duties require the Director of Schools to exercise judgment and discretion. The exercise of judgment and discretion renders the nonrenewal authority nondelegable. 'In Tennessee, the general rule is that municipal authorities may delegate ministerial or administrative duties, but they may not delegate their legislative duties, duties that require the exercise of discretion and judgment.' *Kelley v. Shelby Cnty. Bd. of Educ.*, 751 F. App'x 650, 654–55 (6th Cir. 2018) (citing *City of Rockwood v. Cincinnati, N.O. & T.P. Ry. Co.*, 22 S.W.2d 237, 240 (Tenn. 1929))[.]" …

"Tennessee Code Annotated § 49-2-301 fairly implies, and the parties agreed at oral argument, that directors may delegate ministerial6 functions to other personnel. However, deciding whether to nonrenew a nontenured teacher's contract requires the exercise of judgment and discretion.7 Metro did not dispute this for purposes of summary judgment. Likewise, in their depositions, both Kay Stafford, a human resources manager with MNPS, and Melissa Bryant, the executive assistant to the directors of schools, agreed that the decision to nonrenew requires judgment and discretion."

"These inquiries clearly establish that the decision to nonrenew is a complex one, requiring the evaluation of many substantive factors. The trial court highlights that the decision to nonrenew requires the principal to exercise judgment and discretion, and we agree. However, we wish to clarify that the ultimate decision is not the principal's; it is the director's. While principals can and should exercise judgment and discretion in the role they play in the nonrenewal process, the onus is on the director to exercise his or her independent judgment and discretion in making the ultimate nonrenewal decision."

"The power to delegate the nonrenewal function is neither expressly granted nor fairly implied, and neither party argues that it is 'essential' to achieving the object and purpose of the statute. Thus, the director cannot delegate the ultimate decision to nonrenew under Tennessee law."

"… Tennessee Code Annotated § 49-2-303(b)(3) authorizes principals to '[s]ubmit recommendations to the director of schools regarding the appointment and dismissal of all personnel assigned to the school.' Read in conjunction with Tennessee Code Annotated § 49-2-301(b)(1)(CC), which is reproduced above, the principal's role in dealing with appointing and dismissing is confined to recommendations, whereas the director has the authority to nonrenew, suspend, dismiss, etc. These two statutes, taken together, evidence the purpose of the statute: It is the director's responsibility to nonrenew. Disregarding the principal's enumerated duty to make recommendations regarding a teacher's employment status in favor of letting the principal nonrenew a teacher would render Tennessee Code Annotated § 49-2-303(b)(3) superfluous. *See Tidwell v. Collins*, 522 S.W.2d 674, 676–77 (Tenn. 1975) (explaining that statutes should be construed so that no part of it will be superfluous). Further, it can be adduced that because the General Assembly expressly included 'recommending,' they purposefully excluded other responsibilities. *See Amos v. Metro. Gov't of Nashville and Davidson Cnty.*, 259 S.W.3d 705, 715 (Tenn. 2008) (applying *expressio unius est exclusion alterius*)."

"Tennessee Code Annotated § 49-2-303(b)(5) does authorize the principal to '[p]erform such other duties as may be assigned by the director of schools pursuant to the written policies of the local board of education.' However, the director cannot assign the nonrenewal duty because that duty requires that the director exercise his or her independent judgment and discretion."

"Here, Principal Galloway independently made the decision to nonrenew Lee-Peery, and it is undisputed that the then Director of Schools, Dr. Joseph, was not involved in the decision-making process. The extent of Dr. Joseph's involvement was informing the board that nonrenewal letters had been sent out. This minuscule and ministerial function taken after the nonrenewal decision had been made cannot be seen as Dr. Joseph having exercised his independent judgment and discretion to nonrenew under Tennessee Code Annotated § 49-2-301."

"To be sure, the director does not need to be the sole person involved in making the decision to nonrenew, and the director can have a minimal role in the process. Directors may even be well-advised to solicit the advice and recommendations of the principal in making the decision to nonrenew. However, the director must exercise his or her independent judgment and discretion in making the ultimate decision to nonrenew."

"Even if the duty to nonrenew is nondelegable, Metro insists that the Continuing Contract Law does not provide Lee-Peery with an implied private cause of action because the notice of nonrenewal was timely. Lee-Peery counters that she 'did not assert an implied private right of action under the Continuing Contract Law,' but rather, she premises her breach of contract claim on the ground that she was not 'lawfully dismissed.'"

"We are cognizant that 'timely notice of nonrenewal is the 'essence of the thing to be accomplished' by the Continuing Contract Law.' *Dallas v. Shelby Cnty. Bd. of Educ.*, 603 S.W.3d 32, 50 (Tenn. Ct. App. 2019) (quoting *Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 144 n.11 (Tenn. 2017)). Nonetheless, as this court noted, timing is '*nearly* the sole protection offered to nontenured teachers.' *Id.* at 51 (emphasis added). The other protection offered to nontenured teachers in decisions to nonrenew is that the decision to nonrenew cannot otherwise be prohibited by law. *Cannon Cnty. Bd. of Educ. v. Wade*, No. M2006-02001-COA-R3-CV, 2008 WL 3069466, at *11 n.15 (Tenn. Ct. App. July 31, 2008) (recognizing that a teacher could challenge a nonrenewal on the basis that it violated state statutes). Ultimately, the five-day cutoff in Tennessee Code Annotated § 49-5-409(b) is 'mandatory,' *see Dallas*, 514 S.W.3d at 52, but it is not the exclusive requirement for notice to be effective under the Continuing Contact Law. For a nonrenewal notice to be effective, the proper authority must make the decision to nonrenew, and under Tennessee Code Annotated § 49-2-301(b)(1)(CC), the director is the proper authority. Timeliness of notice cannot validate an otherwise invalid nonrenewal."

"The parties do not dispute that the 'notice of nonrenewal' was timely. However, as outlined above, timeliness is just one element of effective nonrenewal. Because the decision to nonrenew was not made by the Director of Schools, the timeliness of the notice is irrelevant for the purposes of this appeal."

STATUTE OF LIMITATIONS

1. Statute did not contain a statute of limitations - A statute of limitations defense is appropriately addressed in a motion to dismiss under Rule 12.02(6) of the Tennessee Rules of Civil Procedure - When ruling on a motion to dismiss, courts must construe the complaint liberally, presume all alleged facts are true, and give the plaintiff the benefit of all reasonable inferences - When a specific statute of limitations is not clearly set forth in a statute, courts must determine the applicable statute of limitations period by considering the gravamen of the complaint - To determine the gravamen of a claim, a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought

BRANDON K. ANDERSON v. LAUDERDALE COUNTY, TENNESSEE
COURT OF APPEALS No. W2022-00332-COA-R3-CV Filed February 21, 2023

"Plaintiff filed an action against Lauderdale County under Tenn. Code Ann. § 8-8-301 to - 303, more than one year after his cause of action accrued. The trial court examined the gravamen of the complaint and determined a one-year statute of limitations applied rather than the two or six-year limitations periods advocated for by the plaintiff. Discerning no error in the court's analysis of the issues, we affirm."

"This appeal requires us to examine Tenn. Code Ann. §§ 8-8-301 to -303 and the applicable statute of limitations associated with causes of action arising thereunder. This lawsuit was first initiated on August 9, 2021, when

Brandon K. Anderson ('Plaintiff') filed a 'Complaint on Sheriff Bond Pursuant to Tennessee Code Annotated § 8-8-301, et[] seq.' against Lauderdale County, Tennessee and Lauderdale County Deputy Sherriff Robert Wenzler ('Deputy Wenzler'). In his Complaint, Plaintiff alleged, among other things, that on February 18, 2020, Deputy Wenzler approached his vehicle while he was parked on a gravel road at night, pointed a gun at him, and when Plaintiff moved his car forwardrequesting to meet the deputy at a more public location, Deputy Wenzler fired his gun. Plaintiff asserted that he sped away from the scene toward his home and that Deputy Wenzler 'radioed for other officers to assist in stopping [him] claiming that [Plaintiff] had tried to run over [Deputy Wenzler].' Plaintiff further averred that he 'tried to get home but officers shot [him] with a taser incapacitating him when [he] got out of his car.' On February 19, 2020, Deputy Wenzler charged Plaintiff with 'attempted vehicular homicide, felony evading arrest, nine counts of disobeying traffic controls and simple possession of schedule VI drugs.' Plaintiff averred that Deputy Wenzler made false representations in the 'narrative of the factual basis for the charges.' Plaintiff further averred that, '[w]hen it was determined by law enforcement that [Deputy] Wenzler swore under oath to the false representations against [Plaintiff], the District Attorney General voluntarily dismissed all charges against [Plaintiff].' Plaintiff alleged that a grand jury returned an indictment against Deputy Wenzler and asserted that Lauderdale County is liable for Deputy Wenzler's actions under Tenn. Code Ann. § 8-8-302 and -303 for 'intentional tortious assault,' 'false imprisonment,' 'malicious prosecution,' 'abuse of process,' and 'invasion of privacy.' Lauderdale County and Deputy Wenzler filed motions to dismiss the Complaint."

"Plaintiff filed an Amended Complaint on November 30, 2021, articulating the same factual basis for his lawsuit. However, in the Amended Complaint, Plaintiff removed any reference to intentional torts and continued to assert that his cause of action arose under Tenn. Code Ann. §§ 8-8-302 and -303. Plaintiff asserted broadly that '[a]s a proximate result of the conduct of [Deputy] Wenzler as alleged herein, [Plaintiff] suffered damages.' Lauderdale County filed a motion to dismiss the Amended Complaint on December 9, 2021, arguing that a one-year statute of limitations applied barring Plaintiff's claims. Plaintiff voluntarily dismissed his claims against Deputy Wenzler. Plaintiff filed a response to the motion to dismiss asserting that either a six-year or two-year statute of limitations applied pursuant to Tenn. Code Ann. § 28-3-109 or Tenn. Code Ann. § 28-3-104(a)(2), respectively."

"A statute of limitations defense is appropriately addressed in a motion to dismiss under Rule 12.02(6) of the Tennessee Rules of Civil Procedure. *See Martin v. Rolling Hills Hosp., LLC*, 600 S.W.3d 322, 330 (Tenn. 2020). A motion filed under Tenn. R. Civ. P. 12.02(6) 'tests only the legal sufficiency of the plaintiff's complaint, not the strength of the plaintiff's proof.' *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 455 (Tenn. 2012) (citing *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009)). When ruling on a motion to dismiss, 'courts 'must construe the complaint liberally,' presume all alleged facts are true, and 'giv[e] the plaintiff the benefit of all reasonable inferences.'' *Cooper v. Mandy*, 639 S.W.3d 29, 33 (Tenn. 2022) (quoting *Ellithorpe v. Weismark*, 479 S.W.3d 818, 824 (Tenn. 2015)). A trial court's determination of 'the applicable statute of limitations is an issue of law that we review de novo.' *Bates v. Greene*, 544 S.W.3d 345, 347 (Tenn. Ct. App. 2017) (citing *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 638 (Tenn. 2003)); *see also Benz-Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 147 (Tenn. 2015)."

"Plaintiff brought his claim pursuant to Tenn. Code Ann. § 8-8-3022 and -303, neither of which contains a statute of limitations period.3 *See Cross v. Shelby Cty.*, No. W2005-01231-COA-R3-CV, 2006 WL 1005168, at *5 (Tenn. Ct. App. Apr. 18, 2006) (noting the absence of a limitations period in Tenn. Code Ann. § 8-8-302 and inviting the General Assembly to consider the applicable limitations period). When a specific statute of limitations is not clearly set forth in a statute, courts must determine the applicable statute of limitations period by 'considering the ''gravamen of the complaint.'' *Redwing*, 363 S.W.3d at 457 (quoting *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006)); *see also Pera v. Kroger Co.*, 674 S.W.2d 715, 719 (Tenn. 1984) ('It is well settled in this state that the gravamen of an action, rather than its designation . . . determines the applicable statute of limitations.'); *Blalock v. Preston Law Grp., P.C.*, No.M2011-00351-COA-R3-CV, 2012 WL 4503187, at *5 (Tenn. Ct. App. Sept. 28, 2012) ('When determining which of several possible statutes of limitations applies to a particular claim, the court must look to the gravamen of the complaint.'). Where a complaint has multiple claims, courts look to the gravamen of each claim. *Benz-Elliott*, 456 S.W.3d at 148-49, 151. To determine the gravamen of a claim, 'a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought.' *Id.* at 151."

"First, we look to the allegations in the complaint to determine the gravamen of the claims including the legal basis of the claims and the types of injuries alleged. The Amended Complaint is not a model of clarity in outlining the specific claims asserted or the injuries alleged; however, Plaintiff avers that he was 'surprised and fearful' when he saw Deputy Wenzler pointing a gun at him, and he 'feared for his safety.' Plaintiff states that Deputy Wenzler made 'false representations' against him and quotes extensively from excerpts from a grand jury indictment against Deputy Wenzler[.]" …

"These averments in the Amended Complaint suggest claims for intentional torts of assault, false imprisonment, malicious prosecution, abuse of process, and perhaps intentional infliction of emotional distress. The trial court correctly held that these causes of actions are governed by the one-year statute of limitations period outlined in Tenn. Code Ann. § 28-3-104(a)(1). *See Warwick v. Warwick*, No. E2011-01969-COA-R3-CV, 2012 WL 5960850, at *17 (Tenn. Ct. App. Nov. 29, 2012) (concluding that one-year statute of limitations period applicable to tort actions for personal injury applies to claims for abuse of process and intentional infliction of emotional distress)." …

"… Plaintiff's claims brought against Lauderdale County are predicated on personal injury tort claims; therefore, pursuant to Tenn. Code Ann. § 28-3-104(a)(1), the claims are time-barred because they were brought more than one year after the cause of action accrued."

"… Plaintiff asserts that the six-year limitations period provided in Tenn. Code Ann. § 28-3-109 applies to his cause of action. Tennessee Code Annotated section 28-3-109(a)(2) provides a six-year limitations period for '[a]ctions against the *sureties* of . . . sheriffs.' (emphasis added). As the trial court noted, Tenn. Code Ann. § 28-3-109(a)(2) governs actions against 'sureties' not actions against sheriff's deputies or municipalities. Here, Plaintiff has not sued a surety; instead, he has sued Lauderdale County. The case of *State v. Head*, 253 S.W.2d 756 (Tenn. 1952) is instructive.6 In *Head*, the plaintiff sued both the sheriff and Globe Indemnity Company of New York, as surety on the sheriff's bond, for injuries inflicted by a deputy sheriff more than four years prior to institution of the suit. *Head*, 253 S.W.2d at 756. The trial court determined that the one-year statute of limitations for personal injuries applied to the suit rather than the six-year statute of limitations applicable to a suit against a surety, because 'the one year statute of limitations applies to a suit for personal injuries, no matter in what guise or form the suit may be brought.' *Id.* at 757. Similarly, in this case, the gravamen of the underlying suit is one for personal injuries against the deputy sheriff and not based on any contractual relationship between Plaintiff and a surety. Therefore, the six-year statute of limitations in Tenn. Code Ann. § 28-3-109 does not apply to enlarge the statute of limitations period in this case."

"Next, Plaintiff asserts that the two-year limitations period from Tenn. Code Ann. § 28-3-104(a)(2) controls. Tennessee Code Annotated section 28-3-104(a)(2) extends the statute of limitations period for certain causes of actions, including 'injuries to the person, false imprisonment, [and] malicious prosecution' to two-years where: (1) '[c]riminal charges are brought against any person alleged to have caused or contributed to the injury;' (2) '[t]he conduct, transaction, or occurrence that gives rise to the cause of action for civil damages is the subject of a criminal prosecution commenced within one (1) year' by a law enforcement officer, district attorney general, or a grand jury; and (3) '[t]he cause of action is brought by the person injured by the criminal conduct against the party prosecuted for such conduct.' Importantly, the statute states it 'shall be strictly construed.' Tenn. Code Ann. § 28-3-104(a)(3). Plaintiff contends that the statute applies because Deputy Wenzler was criminally charged for his actions during the episode with Plaintiff. The trial court, determined that the extension of the statute of limitations applies 'to the prosecuted defendant whom the claim is brought, not against non-prosecuted co-defendants, such as Lauderdale County.' We agree with the trial court."

"… The plain language of Tenn. Code Ann. § 28-3-104(a)(2)(C) dictates that the statute of limitations is extended only where 'the cause of action *is brought by the person injured by the criminal conduct against the party prosecuted* for such conduct.' Here, there is no dispute that Deputy Wenzler was indicted for the criminal conduct, not Lauderdale County, and Plaintiff has sued Lauderdale County in this action, not Deputy Wenzler. We see no reason to employ the expansive interpretation advocated for by Plaintiff to extend the statute of limitations where the suit is against a governmental entity that was not 'criminally prosecuted.' Plaintiff's argument to extend the statute of limitations fails, and his claim is time-barred by the applicable one-year statute of litmiations [sic]."

TAX SALE

1. Service of process on property owner – This case provides a good summary of the requirements for personal service of process and process by publication and the delinquent tax attorney's obligations to obtain proper service of process – Metro attempted personal service of process on plaintiff at the property, which was listed as the address for the responsible taxpayer in the warranty deed to the property - The sheriff's deputy return on service of summons stated: "Appellant not to be found in my county, tax auction notice posted at property posted 4/8/14, and other – no response, appears vacant" - The trial court entered an order of publication upon affidavit from Metro averring, among other things, that the sheriff's return, upon attempted service of process, came back not to be found - The order of publication provided that a copy of the same be published for four consecutive weeks in The Tennessean - In addition, the record

shows that prior to the tax sale on November 9, 2014, Metro sent notice of the tax sale via certified mail to three potential addresses for plaintiff identified through a title search - The certified mail to one of these addresses was returned delivered, and the certified mail to the other two addresses were returned unclaimed - Under these circumstances, the court concluded that Metro took reasonable steps to give plaintiff notice of both the underlying delinquent tax lawsuit and the subsequent tax sale of the property, and that Metro properly served process on Appellant by publication - Plaintiff's alleged circumstances do not appear on the face of the default judgment or within the record in the underlying tax lawsuit so the allegations are extrinsic to the underlying proceedings making the challenged default judgment is merely voidable, not void - As such, the default judgment is absolutely proof against collateral attack, and no parol proof is admissible on such an attack to show any defect in the proceedings, or in the decree, and the court's review of plaintiff's challenge to service of process is limited to the record of the underlying tax lawsuit

CONNIE MUNN MACCAUGHELTY v. JOHN R. SHERROD, III
COURT OF APPEALS No. M2020-00403-COA-R3-CV Filed April 13, 2023

"Buyer of property at delinquent tax sale filed suit against the property's former owner to quiet title. The former owner filed an answer and counterclaim, alleging, lack of notice concerning the underlying delinquent tax lawsuit and violation of her due process rights. The trial court dismissed the counterclaim with prejudice, concluding the counterclaim was time-barred by the applicable statute of limitations for invalidating tax sales, and ruled for the buyer in the quiet title action. We hold that the former owner failed to institute a legal challenge to the tax sale within the limitations period despite having adequate notice of the sale. Accordingly, we affirm the judgment of the trial court in all respects."

"Connie Munn MacCaughelty ('Appellant') is the former owner of the property located at 4113 Aberdeen Road in Nashville (the 'Property'). She failed to pay property taxes for 2012 and 2013. The Metropolitan Government of Nashville & Davidson County ('Metro') initiated delinquent tax sale proceedings against Appellant in the Chancery Court for Davidson County ('the trial court'). In September 2014, the trial court entered an order directing the Clerk and Master to sell the Property at public auction."

"John Sherrod, III ('Buyer') purchased the Property at the November 9, 2014 tax sale conducted by Metro. The trial court entered a final decree confirming the sale on February 9, 2015. One year later, Buyer received a letter from Appellant's counsel, dated February 9, 2016, asserting that there were 'serious defects in the prosecution of the Delinquent Tax Suit' involving the Property and advising that Appellant 'does not give permission, express or implied[,] to any ingress or egress' to the Property. No further action was taken by Appellant or her counsel thereafter. Subsequently, the trial court issued a writ of possession in favor of Buyer on October 17, 2016, decreeing that he had the right to full possession of the Property."

"On January 4, 2017, Buyer filed a complaint in the trial court to quiet title to the Property. In his complaint, Buyer asserted that (1) the statutory period of redemption ended on February 9, 2016, one year after the trial court had entered a final decree confirming the tax sale; (2) Appellant failed to exercise such right of redemption; and (3) the statutory limitations period to invalidate the sale also ended on February 9, 2016. Accordingly, Buyer requested an order quieting title to the Property. Appellant answered the complaint and filed a counterclaim against Buyer on May 15, 2017, alleging conversion, lack of notice concerning the underlying delinquent tax lawsuit, and violation of her due process rights. She requested that the trial court void the November 2014 tax sale, restore to her 'perfect ownership' of the Property, and award her damages associated with her loss of the Property. Appellant later amended her answer and counterclaim to provide more complete answers and correct typographical errors."

"On July 13, 2017, Appellant filed a third-party complaint against Metro, alleging that her due process rights were violated because Metro failed to serve her with process in the underlying delinquent tax lawsuit despite having knowledge of her correct address. This failure, she asserted, resulted in a default judgment against her and, ultimately, in the tax sale of the Property. Appellant claimed that notice by publication is only permissible when the taxpayer's location is unknown and that Metro had her correct address in Ashland City, Tennessee, because of Appellant's active utility services with Metro. She asked the Court to invalidate several orders associated with the tax sale of the Property. In its answer to the third-party complaint, Metro asserted that Appellant's claim was time-barred by two separate statutes. First, Appellant did not exercise her right to redeem the Property within one year of entry of the final decree confirming the sale of the Property, as required under Tennessee Code Annotated section 67-5-2701(a). Second, Appellant did not file a claim to invalidate the tax sale within a year of the date her claim accrued, as provided under Tennessee Code Annotated section 67-5-2504(d)(1). Metro also

averred that Appellant's claim was barred by her failure to tender to the clerk of the court the amounts required under Tennessee Code Annotated section 67-5-2504(c)."

"On May 17, 2018, Buyer answered Appellant's counterclaim and filed a motion for judgment on the pleadings." …

"Buyer's motion for judgment on the pleadings was not heard until January 17, 2020. … In a memorandum and order entered on February 10, 2020, the trial court found that Appellant's claims could not be established without evidence extrinsic to the judgment and the court record and, therefore, under Tennessee law, the orders challenged by Appellant were only 'voidable' as opposed to 'void.' Accordingly, the trial court concluded that Appellant's claim was subject to the one-year statute of limitations for challenging tax sales and barred by it. Nonetheless, the trial court explicitly found that, based on 'the face of the record,'"

> Metro acted with a reasonable level of due diligence in attempting to serve, and to provide proper notice to, [Appellant] and did properly serve upon Buyer's motion to set aside the dismissal under Tennessee Rule of Civil Procedure 60.

[Appellant] by publication and did properly provide [Appellant] with notice of the tax sale. Thus, [Appellant's] claims seeking to invalidate the underlying tax sale fail to state a claim upon which relief may be granted, and must be dismissed with prejudice."

"The trial court also determined that it was unnecessary to reach Appellant's constitutional claims given that Appellant's counterclaim was subject to dismissal on other grounds."

"Based on the trial court's ruling, Metro then filed its own motion for judgment on the pleadings as to the third-party complaint filed by Appellant. … [T]he trial court entered an order granting Metro's motion and dismissing Appellant's claims against Metro on July 29, 2020. The trial court explained that its previous conclusion that Appellant did not challenge the tax sale within the limitations period was also dispositive of her claims against Metro. The trial court also made clear that this order dismissing Appellant's claims against Metro was still nonfinal, inasmuch as Buyer's original complaint to quiet title remained pending."

"On May 19, 2021, Buyer filed a motion for judgment on the pleadings as to the original quiet title action. The trial court granted the motion on July 8, 2021, concluding that Buyer had 'perfect' title and owned the Property free and clear because the tax sale at which he bought the Property was valid."

"Appellant contends that the trial court erred in granting Buyer's motion for judgment on the pleadings as to her counterclaim because (1) Metro did not comply with the requirements of Tennessee Code Annotated section 67-5-2502 for service of process in the underlying delinquent tax lawsuit; and (2) Metro did not provide her with notice of the subsequent tax sale in accordance with the provisions of Tennessee Code Annotated section 67-5-2415(b)." …

"The statutory scheme governing the sale of real estate for delinquent taxes provides that '[a] tax deed of conveyance or an order confirming the sale shall be an assurance of perfect title to the purchaser of such land.' Tenn. Code Ann. § 67-5-2504(b) (2013). 'No suit shall be commenced in any court of the state to invalidate any tax title to land until the party suing shall have paid or tendered to the clerk of the court where the suit is brought the amount of the bid and all taxes subsequently accrued, with interest and charges as provided in this part.' *Id.* § 67-5-2504(c). Moreover, such suit 'shall be commenced within one (1) year from the date the cause of action accrued, which is the date of the entry of the order confirming the tax sale.' *Id.* § 67-5-2504(d)(1). However, this limitations period 'may be extended to one (1) year after the plaintiff discovered or with the exercise of reasonable due diligence should have discovered the existence of such cause of action.' *Id.* § 67-5-2504(d)(2)."

"Here, the trial court confirmed the tax sale of the Property by order dated February 9, 2015. Accordingly, the limitations period to challenge the tax title conferred upon Buyer expired one year later on February 9, 2016.6 Appellant did not initiate an action seeking to invalidate the tax title within the limitations period. Indeed, Appellant's allegations of defective notice and service of process were first brought before a court in her answer to Buyer's complaint to quiet title and her counterclaim, filed on May 15, 2017. She does not dispute these facts or contend that the statute's tolling provision is applicable.7 Consequently, we affirm the trial court's conclusion that under section 67-5-2504(d)(1), Appellant was barred from seeking to invalidate Buyer's tax title to the Property."

"But this ruling does not automatically extinguish this appeal. 'Where the taxpayer is not properly before the court[,] the resulting decree and sale is a nullity as to him and may be assailed *at any time*.' *Rast v. Terry*, 532 S.W.2d 552, 555 (Tenn. 1976) (citing *Tenn. Marble & Brick Co. v. Young*, 163 S.W.2d 71 (1942); *Naylor v.*

Billington, 378 S.W.2d 737 (Tenn. 1964)) (emphasis added). Consequently, if Appellant can establish that the default judgment in the underlying delinquent tax lawsuit and the trial court's order confirming the sale of the Property are void because of defective service of process, then the limitations period found in section 67-5-2504(d)(1) does not apply to bar her counterclaim. *See Tenn. Marble & Brick Co.*, 163 S.W.2d at 75 ('A decree may be assailed because of invalidity at any time. A void decree is in the same plight as though it never existed.')."

"Our Supreme Court has set forth the legal principles applicable to determine whether a judgment is void. ''[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final.'' *Turner v. Turner*, 473 S.W.3d 257, 270 (Tenn. 2015). Specifically, '[a] judgment rendered by a court lacking either personal or subject matter jurisdiction is void.' *Id.* (citing *Ins. Corp. of Ireland*, 456 U.S. 694, 694 (1982); *Hood v. Jenkins*, 432 S.W.3d 814, 825 (Tenn. 2013); *Gentry v. Gentry*, 924 S.W.2d 678, 680 (Tenn. 1996))."

"Nonetheless, a judgment 'will be held void only when 'its invalidity is disclosed by the face of that judgment, or in the record of the case in which that judgment was rendered.'' *Id.* (quoting *Giles v. State ex rel. Giles*, 235 S.W.2d 24, 28 (1950); *Hood*, 432 S.W.3d at 825). Consequently, '[a]ll decrees not thus appearing on their face to be void are absolutely proof against collateral attack, and no parol proof is admissible on such an attack to show any defect in the proceedings, or in the decree.' *Gentry*, 924 S.W.2d at 680 (quoting William H. Inman, *Gibson's Suits in Chancery* § 228 at 219-20 (7th ed. 1988)). Stated differently, '[i]f the defect allegedly rendering the challenged judgment void is not apparent from the face of the judgment or the record of the proceeding from which the challenged judgment emanated and must instead be established by additional proof, the judgment is merely voidable, not void.' *Turner*, 473 S.W.3d at 271 (citing *Hood*, 432 S.W.3d at 825). As a result, in determining whether a judgment is void, we 'must confine [our] review to the record of the proceeding from which the judgment emanated.' *Id.* at 275 (citing *Hood*, 432 S.W.3d at 825)."

"… The trial court accurately described the relevant proceedings in the underlying delinquent tax lawsuit, as reflected in the record, as follows:

> [Appellant] has alleged that Metro attempted unsuccessfully to serve her in person in the underlying delinquent tax suit at the address of the Subject Property [that is, 4113 Aberdeen Road], resulting in a Sheriff's return of 'not to be found' and 'appears vacant.' Based on the Sheriff's return of service, and a supporting affidavit, Metro served [Appellant] by publication pursuant to Tenn. Code Ann. § 21-1-203(a). In reviewing the record in the underlying delinquent tax suit, the Court further finds that notices of the tax sale were mailed by certified mail, return requested, to [Appellant] at 3728 Sweethome Road, Ashland City, TN 37015 and delivered on October 30, 2014; at P.O. Box 757, Pleasant View, TN 37145, and returned 'unclaimed' on November 18, 2014; and to the address of the Subject Property a[nd] returned 'unclaimed' on November 8, 2014. The Court finds that such allegations, accepted as true, do not establish a violation of due process *on the face of the judgment or the record*, but instead show that Metro acted with reasonable due diligence in attempting to serve [Appellant], did properly obtain service on [Appellant] by publication, and did provide additional notice to [Appellant] of the tax sale.

(Emphasis added) (internal citations omitted). The trial court also summarized Appellant's specific allegations in her counterclaim concerning defective service of process in the underlying tax lawsuit:

> However, [Appellant] also alleges she was actually living at 3281 Sweethome Road, Ashland City, TN 37015 at the time. [Appellant] alleges that this address was on file with Metro Water Services, Nashville Electric Service, and Piedmont Natural Gas. Further, [Appellant] alleges, the Subject Property was not actually vacant at the time.

(Internal citations omitted). In short, Appellant asserted that Metro knew or should have known her correct address because it was on file with certain utility providers, did not attempt to serve her with process at her current address, and improperly obtained an order to serve by publication. These allegations, she argues, constitute improper service of process and constitutional due process violations."

"As the trial court determined, these alleged circumstances do not appear on the face of the default judgment or within the record in the underlying tax lawsuit; that is, Appellant's allegations are extrinsic to the underlying proceedings. Accordingly, the challenged default judgment is merely voidable, not void. *Turner*, 473 S.W.3d at 271. As such, the default judgment is 'absolutely proof against collateral attack, and no parol proof is admissible on such an attack to show any defect in the proceedings, or in the decree.' *Gentry*, 924 S.W.2d at 680. Our review

of Appellant's challenge to service of process is limited to the record of the underlying tax lawsuit. *Turner*, 473 S.W.3d at 271."

"Upon careful review, we agree with the trial court's conclusion that nothing 'on the face of the judgment or the record' in the underlying proceedings, as presented to this Court by the parties, reveals deficiencies in service of process. To the contrary, the record shows that Metro complied with the statutory requirements for service of process in the delinquent tax lawsuit and for notice of the tax sale."

"Tennessee Code Annotated section 67-5-2415 provides, in relevant part:

> (a) The court shall have jurisdiction to award personal judgment against an owner upon the claim for the debt upon determining that proper process has been served upon such owner. The court shall have jurisdiction to award a judgment enforcing the lien by a sale of the parcel upon determining that any the following actions have occurred as to each owner:
> (1) That proper process has been served upon an owner;
> (2) That the owner has actual notice of the proceedings by mail or otherwise; or
> (3) That constructive notice by publication pursuant to §§ 21-1-203 and 21-1-204, except as modified in this section, utilizing a description of the parcel in accord with § 67-5-2502(a)(1), has been given to unborn, unfound and unknown owners and that the plaintiff has made or will make a diligent effort prior to the confirmation of the sale of the parcel to give actual notice of the proceedings to persons owning an interest in the parcel, as identified by the searches described in § 67-5-2502(c)(2).
> . . . .
> (c) Notice of the pendency of the proceedings as to a parcel constitutes notice of the pending sale of the parcel and vice versa.
> . . . .
> (f) Process may be served either by an authorized process server or forwarded by certified or registered mail, return receipt requested, or by any alternative delivery service as authorized by Section 7502 of the Internal Revenue Code, codified in 26 U.S.C. § 7502.
> (g) The return of the receipt signed by the defendant, spouse, or other person deemed appropriate to receive summons or notice as provided for in the Rules of Civil Procedure, or its return marked 'refused', 'unclaimed', or other similar notation, as evidenced by appropriate notation of such fact by the postal authorities, and filed as a part of the record by the clerk shall be evidence of actual notice.
> (h) Prior to confirming the sale of a parcel, the court shall determine that a diligent effort has been made to give actual notice of the proceedings to all interested persons, as identified by the searches described in § 67-5-2502(c)(2).

Tenn. Code Ann. § 67-5-2415 (Supp. 2014). In turn, Tennessee Code Annotated section 67-5-2502 states, in relevant part:

> [(a)](3) Notice to parties or others in delinquent tax suits and sales shall be governed by the Tennessee Rules of Civil Procedure, and may be forwarded to the address of an owner of the property that is on record in the office of the assessor of property.
> . . . .
> (b) It is the responsibility of the property owner to register the property owner's name and address with the assessor of property of the county in which the land lies.
> (c)(1) For the purposes of this chapter, unless the context requires otherwise:
> (A) 'Diligent effort to give actual notice of the proceedings' means a reasonable effort to give notice which is reasonably calculated, under all the circumstances and conditions, to apprise interested persons of the pendency of the proceedings in time to afford them an opportunity to prevent the loss of their interest in the parcel. Such effort shall be such as one desirous of actually informing the persons might reasonably adopt to accomplish it. Such effort does not, however, require that an interested person receive actual notice. Nor does it require the plaintiff to search records or sources of information in addition to that information available in the specific offices listed in subdivision (c)(2);
> . . . .
> (2) The delinquent tax attorney shall make a reasonable search of the public records in the offices of the assessor of property, trustee, the register of deeds and the local office where wills are recorded, seeking to identify and locate all persons owning an interest in a parcel.

> (3) The delinquent tax attorney shall make a diligent effort to give actual notice of the proceedings to all interested persons, as identified by the searches described in subdivision (c)(2).

Tenn. Code Ann. § 67-5-2502 (2013 & Supp. 2014)). Section 21-1-203, however, allows personal service of process on a defendant in chancery court cases to be dispensed with under certain circumstances, including:

> (2) When, upon inquiry at his usual place of abode, he cannot be found, so as to be served with process, and there is just ground to believe that he is gone beyond the limits of the state; [and]
> (3) When the sheriff shall make return upon any leading process, that he is not to be found;

Tenn. Code Ann. § 21-1-203(a) (2021). 'To dispense with process in any of the cases listed in subsection (a), the facts shall be stated under oath in the bill, or by separate affidavit, or appear by the return.' *Id.* § 21-1-203(b). When these circumstances are present, service by publication is authorized, and 'the clerk, as soon as the necessary affidavit is made, shall enter upon the rule docket an order requiring the defendant to appear at a certain day named in the order, being a rule day, and defend, or otherwise the bill will be taken for confessed.' *Id.* § 21-1-204(a). A copy of the order must be published for four (4) consecutive weeks in the newspaper mentioned in the order or designated by the general rules of the court. *Id.* § 21-1-204(b). Such procedure establishes constructive notice."

"Here, Metro attempted personal service of process on Appellant at the Property, which was listed as the address for the responsible taxpayer in the warranty deed to the Property. The sheriff's deputy return on service of summons stated: Appellant 'not to be found in my county,' 'tax auction notice posted at property posted 4/8/14,' and 'other – no response, appears vacant.' Subsequently, the trial court entered an order of publication upon affidavit from Metro averring, among other things, that the sheriff's return, upon attempted service of process, came back 'not to be found.' *See id.* §§ 21-1-203, -204(a). The order of publication provided that a copy of the same be published for four consecutive weeks in *The Tennessean*. In addition, the record shows that prior to the tax sale on November 9, 2014, Metro sent notice of the tax sale via certified mail to three potential addresses for Appellant identified through a title search. The certified mail to one of these addresses was returned 'delivered,' and the certified mail to the other two addresses were returned 'unclaimed.' Under these circumstances, we conclude that Metro took reasonable steps to give Appellant notice of both the underlying delinquent tax lawsuit and the subsequent tax sale of the Property. Moreover, we conclude that Metro properly served process on Appellant by publication."

"Having found no service or notice infirmities in the underlying delinquent tax lawsuit and tax sale of the Property that would render the order challenged by Appellant void, Appellant is subject to the statute of limitations for invalidating a tax sale, Tennessee Code Annotated section 67-5-2504(d)(1). Inasmuch as Appellant did not seek to invalidate the tax sale of the Property within one year of the order confirming the same, her counterclaim is time-barred. We affirm the trial court's judgment on the pleadings in favor of Buyer with respect to Appellant's counterclaim. For the same reasons, we affirm the trial court's judgments on the pleadings in favor of Metro concerning Appellant's third-party complaint and in favor of Buyer concerning the original action to quiet title."

TENNESSEE DISABILITY ACT

1. The TDA, unlike the ADA, contains no reasonable accommodation requirement - As a result, an employer does not violate the TDA by failing to provide a reasonable accommodation to assist an employee in performing the duties of his or her job - If a claimant needs an accommodation to be capable of performing the essential functions of the position, the claimant is not considered to be qualified for the job and may not look to the TDA for protection - To succeed under the TDA, an individual alleging discrimination must demonstrate(1) that the individual was qualified for the position; (2) that the individual was disabled; and (3) that the individual suffered an adverse employment action because of that disability

KIMBERLY BLACK v. CITY OF CLARKSVILLE, TENNESSEE
COURT OF APPEALS No. M2020-01580-COA-R3-CV Filed January 13, 2023

See EMPLOYMENT – Termination or voluntary resignation - A public employee with a property interest in continued employment is deprived of that interest by her employer if the employer constructively discharges her by forcing her to resign involuntarily - In the event that an employee resigns of his or her own volition, however, even as a result of the employer's actions, then he or she voluntarily relinquishes his or her property interest in continued

employment, and the employer cannot be found to have deprived him or her of that interest without due process of law - Thus, a voluntary resignation does not constitute an adverse employment action - In general, employee resignations are presumed to be voluntary, but an employee may rebut this presumption by producing evidence indicating that the resignation was involuntarily procured - When considering whether an employee's resignation was involuntary, courts consider whether an objectively reasonable person would, under the totality of the circumstances, feel compelled to resign if he or she were in the employee's position - This inquiry includes the following factors: (1) whether the employee was given an alternative to resignation, (2) whether the employee understood the nature of the choice [she] was given, (3) whether the employee was given a reasonable time in which to choose, and (4) whether the employee could select the effective date of resignation, page 106.

TENNESSEE HUMAN RIGHTS ACT

1. Sex discrimination claim – Good review of who is and is not a similarly situated employee - To establish a prima facie claim of sex discrimination, the plaintiff must establish the following four elements: (1) the plaintiff is a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for the job position at issue, and (4) she was either replaced by a person outside of the protected class *or* was treated less favorably than a similarly situated employee who is not a member of the protected class – While there is no precise formula for determining whether two employees are sufficiently comparable, courts focus primarily on whether the employees: (1) share the same supervisor; (2) are subject to the same standards; and (3) have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it - Plaintiff must make meaningful comparisons between himself and other employees who are similarly situated in all material respects - It is not necessary to show that the compared employee's situation was identical to that of the plaintiff - Plaintiff was not similarly situated to other employees who were treated differently – Plaintiff was an at will employee while teacher was tenured and was not subject to the same standard so the employee was not similarly situated, so different treatment of these employees was not discrimination - Additionally, in the end both plaintiff and comparable employee were terminated

SHIRLEY V. QUINN v. SHELBY COUNTY SCHOOLS
COURT OF APPEALS No. W2022-00104-COA-R3-CV Filed March 31, 2023

"This is an employment discrimination case. The plaintiff, a female secretary at a high school, sued the county school board for discrimination alleging that she was terminated because of her sex in violation of the Tennessee Human Rights Act. Following a bench trial, the trial court held in favor of the plaintiff and awarded damages. The school board appeals, asserting that the plaintiff failed to make out a prima facie case of discrimination. We have determined that the plaintiff failed to identify a 'similarly situated' employee and therefore failed to make out a prima facie case of sex discrimination. We reverse the judgment of the trial court."

"This is an employment discrimination case that centers on a grading scandal at Trezevant High School ('Trezevant High') in Memphis, Tennessee. Plaintiff, Shirley Quinn ('Plaintiff' or 'Ms. Quinn'), was employed by Defendant, Shelby County Board of Education ('SCBE'), for approximately twenty-two years as a general office secretary and records secretary at Trezevant High. Ms. Quinn was responsible for, among other things, maintaining accurate transcript data for Trezevant High students. Ms. Quinn alleges she was terminated from her employment because of her sex in violation of the Tennessee Human Rights Act. The circumstances surrounding her termination are discussed below and are derived from testimony and exhibits introduced during a bench trial before the Shelby County Circuit Court."

"In 2016, the Trezevant High leadership team performed an internal transcript audit and discovered discrepancies between report card grades and grades on student transcripts. It was noted that many, but not all, of the discrepancies were found in the student records of members of the Trezevant High football team. The Trezevant High leadership team reported the discrepancies to the SCBE, and the SCBE commenced an investigation, including an electronic audit, of grade entry and grade adjustment data from SCBE's electronic grading database known as SMS PowerSchool ('SMS'). The SMS electronic audit revealed that Ms. Quinn's SMS username was used to make 'inappropriate transcript edits' to approximately thirty-three transcripts during the 2016-2017 school year."

"In late September and early October 2016, the SCBE Department of Labor and Employee Relations identified four main individuals to interview regarding the transcript discrepancies: 1) Plaintiff; 2) Teli White ('Coach White'), a

tenured Physical Education and Lifetime Wellness teacher and football coach; 3) Brandon Hill, a special education teacher and assistant football coach; and 4) Gregory Howard, a world history teacher and athletic director. All four of the individuals who were interviewed were placed on administrative leave with pay pending the investigation led by Chantay Branch, SCBE Director of Employee Relations."

"During Ms. Quinn's final interview on October 5, 2016, she was presented with and signed the following 'Garrity Warning':

GARRITY WARNING

> I wish to advise you are being questioned as part of an official investigation of your employer. You will be asked questions specifically, directly and narrowly related to performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the law and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you could be subject to discharge. If you do answer, neither your statement, nor any information or evidence which is gained by reason of such statement, can be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent discipline.

Ms. Quinn testified that during the course of her third interview she refused to provide names of the teachers who requested her to change grades. Ms. Quinn testified that during the course of the interview, she was threatened with criminal prosecution." …

"As a result of the investigation, Ms. Quinn was terminated by letter sent certified mail on October 6, 2016 ('termination letter'). The letter was signed by Ms. Branch, and stated:

> … During the conferences, you acknowledged that you made the changes to the transcript grades, but refused to identify who directed you to make the changes. You also inferred that you were careless with your SMS login (user id and password), which may have given staff members and students unauthorized access to the transcripts. …
>
> Based on the foregoing, the preponderance of evidence indicates that you engaged in inappropriate conduct and violated the abovementioned policies. Therefore, I have recommended to the Superintendent that your employment be terminated. Enclosed you will find a letter signed by Superintendent Dorsey E. Hopson, II."

"Coach White also received a disciplinary letter from Ms. Branch dated October 28, 2016. The letter described Coach White's infractions and discipline as follows:

> … You emphatically denied ever requesting or directly falsifying a student's academic record. However, at least three (3) out of ten (10) transcripts found on your desktop computer had been altered at some point while the affected students were enrolled at Trezevant High School, despite your claim that you routinely monitor the football players' grades by asking for weekly progress reports. Additionally, evidence collected by the investigative team shows that you possessed altered transcripts on your desktop computer for at least eight (8) football players dating back to 2013 graduates. …
>
> I find that discipline is warranted in this case. Therefore, on behalf of the Superintendent, you are to be suspended without pay for five (5) days. The dates of your suspension are October 24 - 28, 2016." …

"In June 2017, the SCBE retained a law firm to further investigate the transcript discrepancies. When gathering information during the continuing investigation, the SCBE discovered additional information on Coach White's SCBE-issued computer showing that he not only possessed altered transcripts, but also that he either made the changes himself or facilitated the changes to those transcripts. At the conclusion of the second investigation, and in light of the newly discovered evidence, the SCBE terminated Coach White on the grounds that he violated Board Policy No. 4002, 'Staff Ethics'; Board Policy No. 5015, 'Grading System for Grades 6-12'; and Board Policy No. 6051, 'Interscholastic Athletics.' The SCBE also determined that Coach White engaged in 'conduct unbecoming to a member of the teaching profession' and 'neglect of duty.'"

"Ms. Quinn filed suit against the SCBE on August 22, 2017, alleging the SCBE's actions in terminating her violated the Tennessee Human Rights Act.3 She asserted that she suffered lost wages and benefits, emotional distress, and damages to both her personal and vocational reputation as a result of SCBE's discriminatory conduct. The trial court denied SCBE's motion for summary judgment, and the case proceeded to a bench trial on September 17-23, 2019." …

"On October 12, 2020, the trial court issued an oral verdict finding in favor of Ms. Quinn. On November 12, 2021, the trial court entered an Order on Compensatory Damages and Attorney Fees holding that 'while there is no mathematical formula to determine noneconomic damages, the Court believes that based upon the proof and testimony adduced at trial, the amount of $125,000 represents a fair measurement of Plaintiff's damages.'" …

"On January 11, 2022, the trial court entered a one-paragraph Order on Trial Verdict that incorporated the 122-page transcript of the court's October 12, 2020 oral ruling. The court's verdict can be summarized from this excerpt from the transcript:

> this is what it boils down to, Mr. White was treated more favorably, because he was a man. Mr. [Teli] White was not spoken to harshly by Mr. [Bill] White and Mr. Woods, because they wouldn't have been able to get away with that, talking to Teli White that way. They knew better. …
>
> …So the Court does find that there is an inference here of discrimination based on Ms. Quinn's sex, that Ms. Quinn has met her burden to demonstrate that there is an inference -- a reasonable inference to be drawn that she was treated more harshly, because she was a female, a secretary. Just happened to be a secretary; but, the first and foremost, that she was a female and that Mr. White was a male."

"In this case, Ms. Quinn alleges she has been discriminated against because of her sex. 'Disparate treatment cases of discrimination occur 'where an employer has treated a particular person less favorably than others because of a protected trait.'' *Goree*, 490 S.W.3d at 426 (quoting *Maddox v. Tenn. Student Assistance Corp.*, No. M2009-02171-COA-R3-CV, 2010 WL 2943279, at *6 (Tenn. Ct. App. July 27, 2010)). 'A plaintiff asserting a claim of . . . discrimination based on [sex], can proceed to trial either by offering direct evidence that the employer's action was motivated by [her sex], or by presenting circumstantial evidence sufficient to raise an inference of discrimination.' *Paschall v. Henry Cty. Bd. of Educ.*, No. W1999-00070-COA-R3-CV, 2000 WL 33774557, at *4 (Tenn. Ct. App. June 2, 2000). Because it is difficult to provide direct evidence of an employer's discriminatory conduct, 'most plaintiffs must proceed by offering circumstantial evidence that creates an inference of discrimination, under the shifting burden of production framework developed by the Supreme Court in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).' *Id.* Here, Ms. Quinn relies on circumstantial evidence to establish her disparate-treatment claim; thus, we apply the burden-shifting framework articulated in *McDonnell Douglas*."

"The *McDonnell Douglas* framework is ''an allocation of the burden of production and an order for the presentation of proof.'' *Williams*, 465 S.W.3d at 112 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). The framework can be summarized as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for [its actions.]' [*McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*[] at 804[.]

Versa v. Pol'y Stud., Inc., 45 S.W.3d 575, 580 (Tenn. Ct. App. 2000) (footnote omitted) (quoting *Tex. Dep't of Cmty. Affs.*, 450 U.S. at 252-53)."

"We turn to the first element of the *McDonnell Douglas* framework, the prima facie case. To establish a prima facie claim of sex discrimination, the plaintiff must establish the following four elements:

> (1) the plaintiff is a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for the job position at issue, and (4) she was either replaced by a person outside of the protected class *or* was treated less favorably than a similarly situated employee who is not a member of the protected class.

Pierce v. City of Humboldt, No. W2012-00217-COA-R3CV, 2013 WL 1190823, at (Tenn. Ct. App. Mar. 25, 2013) (citing *Hartman v. Tenn. Bd. of Regents*, No. M2010-02084-COA-R3-CV, 2011 WL 3849848, at *7 (Tenn. Ct. App. Aug. 31, 2011)). The parties do not dispute that the first three factors of the prima facie case have been satisfied: 1) Ms. Quinn, a female, is in a protected class,6 2) she suffered an adverse employment action when she was terminated, and 3) she was qualified for her role. The SCBE argues that factor number four has not be met in this case because Ms. Quinn has failed to show that a similarly situated employee outside her protected class received more favorable treatment."

"What does it mean for two employees to be 'similarly situated' for purposes of the prima facie case? We have previously considered this question and have explained the analysis as follows:

> A plaintiff who seeks to rely on a similarly situated employee to establish a claim of discrimination is not required to show 'an exact correlation' between the compared employee's situation and his own, but he is required o show that their situations ''were similar in all relevant respects.'' *Pierce*, 2013 WL 1190823, at *11 (quoting *Bobo v. UPS*, 665 F.3d 741, 751 (6th Cir. 2012)). To meet this element of proof, the plaintiff ''must make meaningful comparisons between [him]self and other employees who are similarly situated in all material respects.'' *Id.* (quoting *Spann*, 36 S.W.3d at 468). '[I]t is not necessary to show that the compared employee's situation was identical to that of the plaintiff.' *Id.* However, '[t]he comparable employees should have held similar positions, dealt with the same level of supervision, and been subject to the same general employer-imposed work rules and requirements.' *Id.* Also, the 'similarly situated' individuals must have 'engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.' *Castro*, 2013 WL 684785, at *6; *Versa*, 45 S.W.3d at 581.

Goree, 490 S.W.3d at 450. While there is no precise formula for determining whether two employees are sufficiently comparable, courts focus primarily on whether the employees: '(1) share the same supervisor; (2) are subject to the same standards; and (3) have engaged in the same conduct 'without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'' *Barry v. Noble Metal Processing, Inc.*, 276 F. App'x 477, 480-81 (6th Cir. 2008) (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)); *see also Pertiller v. City of Murfreesboro*, No. 3:19-CV-00832, 2020 WL 7055553, at *16 (M.D. Tenn. Dec. 2, 2020) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)) (reviewing the considerations for determining similarly situated employees in cases alleging differential disciplinary action). In addition, courts consider ''differences in job title and responsibilities, experience, and disciplinary history'' as 'mitigating circumstances that may establish that two employees are not similarly situated.' *Woods v. QuickFuel Fleet Servs.*, No. 2:05-CV-02964-JTF-dkv, 2013 WL 3966946, at *7 (W.D. Tenn. July 31, 2013) (quoting *Campbell v. Hamilton Cty.*, 23 F. App'x 318, 325 (6th Cir. 2001)); *see also Hartman v. Tenn. Bd. of Regents*, No. M2010-02084-COA-R3-CV, 2011 WL 3849848, at *8 (Tenn. Ct. App. Aug. 31, 2011) (finding that employees were not similarly situated 'because they have substantially different job titles and responsibilities')."

"Ms. Quinn compares her employment at Trezevant High with Coach White's employment and argues he is a similarly situated employee who was treated more favorably (*i.e.*, initially given a five-day suspension rather than termination) for conduct that was similar to hers. The SCBE counters that, unlike Ms. Quinn who was an 'at-will' employee, Coach White was a tenured teacher subject to different employment standards and procedures, he had different job responsibilities,7 he had a different disciplinary history, and he engaged in different conduct than Ms. Quinn; therefore, the SCBE argues, he was not similarly situated for purposes of the prima facie case."

"We begin our analysis by applying the evidence adduced at trial to the three-step formula articulated in *Barry v. Noble Metal Processing, Inc.*, 276 F. App'x 477, 480-81 (6th Cir. 2008), mentioned above. First, the parties agree that Ms. Quinn and Coach White shared the same supervisor because they were both disciplined by Ms. Branch and ultimately terminated by the superintendent. Thus, the first factor is met."

"Next, we consider whether Ms. Quinn and Coach White were 'subject to the same standards.' Ms. Quinn was terminated for violation of Board Policy Nos. 4002 and 5004, entitled 'Staff Ethics' and 'Graduation Requirements,'9 respectively. All individuals employed by the SCBE, including Coach White, were subject to Board Policy No. 4002; however, in his initial disciplinary letter from Ms. Branch, Coach White was disciplined for violation of Board Policy No. 6051, 'Interscholastic Athletics.' It is unclear from the record whether Ms. Quinn was also subject to Board Policy No. 6051. Coach White's status as a tenured teacher is also relevant to our analysis.10 *See Hammons v. George C. Wallace State Cmty. Coll.*, 174 F. App'x 459, 462-463 (11th Cir. 2006) (considering tenure status as one factor in finding two employees were not similarly situated); *Vargas v. Globetrotters Eng'g Corp.*, 4 F. Supp. 2d 780, 785 (N.D. Ill. 1998) (finding employees were not similarly situated where one employee 'had a form of 'tenure' while the other was an employee-at-will'). Indeed, in *Russell v. Drabik*, 24 F. App'x 408,

413 (6th Cir. 2001), the plaintiff was a 'classified state employee' and two of her alleged comparators were 'unclassified state employees' with different job titles. The *Russell* court held, '[a]s a matter of law, classified (tenured) and unclassified (untenured) employees are not similarly-situated.' *Russell*, 24 F. App'x at 413 (citing *Vargas*, 4 F. Supp. 2d at 785). We cannot ignore this strongly worded precedent. While Ms. Quinn and Coach White were both subject to Board Policy 4002, Coach White was subject to additional policies, procedures, and statutes as a tenured employee with different job responsibilities than Ms. Quinn. For example, the 'causes for which a teacher may be dismissed or suspended' are outlined in the Teachers' Tenure Act, in Tenn. Code Ann. § 49-5-511(a)(2). Ms. Quinn was not subject to the requisites of Tenn. Code Ann. § 49-5-511 because she was an 'at will' office secretary. Under these circumstances, Ms. Quinn was not 'subject to the same standards' as Coach White. Furthermore, some federal courts have considered a difference in tenured status to be dispositive of the similarly situated analysis; nevertheless, we will continue to consider the third factor, whether Ms. Quinn and Coach White engaged in the same conduct."

"With regard to whether a plaintiff and a purported comparator engaged in the same conduct, 'courts are instructed to focus on whether [the plaintiff and comparator] engaged in conduct of 'comparable seriousness,' not whether their actions were identical.' *Pertiller*, 2020 WL 7055553 at *16 (quoting *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 777 (6th Cir. 2016)). '[A] plaintiff cannot establish a reasonable inference of discriminatory motive based on her 'employer's more severe treatment of more egregious circumstances.'' *Id.* (quoting *Clayton v. Meijer, Inc.*, 281 F.3d 605, 612 (6th Cir. 2002)). Regarding the conduct that warranted Ms. Quinn's termination, Ms. Branch testified as follows:

> Q. Now, with regard to your findings with Ms. Quinn, can you tell me what they are, based on the report that you have in front of you?
> A. There were falsified student records by making unauthorized changes to student transcripts, failing to secure her PowerSchool SMS login information for -- from use by unauthorized users, allowing unauthorized access to PowerSchool and failing to follow procedures or protocols related to the grade changes.
> Q. Now, the falsifying student records by making unauthorized changes, tell me what that was about.
> A. It was determined through the audit of our SMS records that the grade changes were made utilizing Ms. Quinn's login access and so that basically connected her to making the changes to the grades.
> Q. And unauthorized changes, what does that mean?
> A. That she did not have permission to make the grade changes nor did she have documentation to support the changes.
> Q. And if the teacher directed a change then what should Ms. Quinn have done?
> A. Asked for the appropriate documentation to support the change."

"Therefore, based on this testimony and the termination letter Ms. Quinn received, Ms. Quinn was terminated for 1) changing or falsifying transcript grades and courses resulting in students receiving diplomas who did not meet graduation requirements; 2) refusing to identify the teacher(s) who directed her to make the changes;13 and 3) being careless with her SMS login credentials which could have allowed unauthorized access to the transcripts. In contrast, Coach White's initial disciplinary letter described infractions related to 1) recruitment of Trezevant High student-athletes; 2) harboring altered transcripts but denying he altered them or requested them to be altered;14 and 3) using an unauthorized email account to conduct football-related business. Coach White, a tenured teacher, was initially disciplined for different conduct than Ms. Quinn. Specifically, Ms. Quinn admitted to changing grades for unnamed teachers without documentation, and Coach White denied that he altered transcripts or requested transcripts to be altered. Notably, when further information came to light that implicated Coach White in falsifying or improperly requesting changes to transcripts, Coach White was terminated. Based on the information known to the SCBE at the time of Ms. Quinn's termination, her conduct differed in kind and severity from the conduct for which Coach White was initially disciplined; however, when it became clear that Coach White engaged in similar conduct to Ms. Quinn, he was likewise terminated."

"After reviewing the evidence and circumstances surrounding Ms. Quinn's termination, we conclude that she has failed to demonstrate that she was treated less favorably than a similarly situated employee who engaged in similar conduct. Specifically, Coach White was not a similarly situated employee for purposes of the prima facie case because he was subject to different standards and was initially disciplined for dissimilar conduct. Moreover, Coach White had a different job title and job responsibilities than Ms. Quinn. In sum, Ms. Quinn's attempt to show that Coach White was a similarly situated employee fails; therefore, she has not made out a prima facie case, and her claim of discrimination under the THRA must also fail."

ZONING

1. Spot zoning claim – City claimed county zoning was spot zoning - City had standing to challenge county zoning of property just outside the city limits – Under these facts the court found that the city's rights, status, or other legal relations were affected by the rezoning at issue, and that the city's interest in the case was within the zone of interests to be protected, so the City had standing to pursue the declaratory judgment – Court found that the property owners were not beneficiaries of the rezoning and that the local community will also benefit from the market, as well as local farmers who may sell their own agricultural products to citizens who frequent the store – Court found a rational basis for the rezoning resolution, so it was not illegal spot zoning

CITY OF ORLINDA, TENNESSEE v. ROBERTSON COUNTY, TENNESSEE ET AL.
COURT OF APPEALS No. M2021-01505-COA-R3-CV February 3, 2023

"The City of Orlinda filed a declaratory judgment action seeking to invalidate the Robertson County Planning Commission's rezoning of property from 'Agricultural Residential' to 'Neighborhood Commercial,' alleging the rezoning was 'illegal spot zoning' and was also procedurally deficient. The trial court affirmed the rezoning. Finding no error, we affirm the trial court."

"In September 2020, Julie and Steven Bernard ('the Bernards') filed an 'Application for Zoning Map Amendment' with the Robertson County Regional Planning Commission ('the County Planning Commission') seeking to build and operate a market and deli on their property in Robertson County. The property at issue was a 6.982-acre parcel just outside the City of Orlinda's city limits on Clay Gregory Road, near Tennessee Highway 49. The Bernards sought to rezone the property from 'Agricultural Residential (AG-2)'to 'Neighborhood Commercial (C-2)'2 in order to build a retail space to sell agricultural items from their own farm as well as items from other local farmers."

"On October 1, 2020, the County Planning Commission recommended approval of the proposed rezoning of the Bernards' property by a vote of 5 to 4. The County Planning Director placed the Bernards' rezoning request on the Robertson County Commission's Agenda and provided the commission members with additional information relating to the Bernards' request, including a proposed 'Resolution to Rezone', a copy of a current survey, the relevant tax map, and a letter from Ms. Bernard[.] … On November 16, 2020, the County Commission voted to approve the rezoning request with 21 commissioners voting for rezoning, 1 voting against rezoning, and 2 absent. That same day, the Robertson County Mayor and Robertson County Clerk signed Resolution No. 111620120 'A Resolution to Rezone a Tract of Land from AG-2 to C-2' approving the Bernards' request."

"On December 18, 2020, the City of Orlinda ('the City') filed a Complaint for Declaratory Judgment in the Chancery Court for Robertson County against Robertson County ('the County') and the Bernards (collectively, 'Defendants'), urging the court to declare that the County Commission's rezoning of the Bernards' property constituted illegal 'spot zoning' and was 'otherwise invalid and not a rational exercise of the zoning power.' The City also sought a ruling that the Planning Commission and County Commission 'failed to follow the procedural rules for enacting a map amendment' and that their amendment was 'void *ab initio*.' Specifically, the City argued that the notice of the zone change given to the public was deficient and that the County Planning Commission failed to give a detailed report to the County Commissioners prior to the commissioner's vote to approve the zone change. The City asserted the rezoning of the Bernards' property 'interferes with the City's land use plan and the goals and purposes of its zoning ordinance . . . and generally will impair the health, safety, and welfare of the residents of the City.' In February 2021, the County and the Bernards answered the City's complaint. On March 18, 2021, Robertson County issued a commercial building permit to the Bernards for the construction of the market."

"On July 26, 2021, the City filed a Motion for Temporary Injunction, moving the court to enjoin the Bernards from operating the retail market pending the trial on the merits. The case proceeded to trial on September 23, 2021, at which Kevin Breeding, City Manager of the City of Orlinda;3 Lawrence Hoge, Robertson County Planner; Terry Douglas Vann, Robertson County Planning Director; Jerry Hoover, Robertson County Commissioner; Bart Glover, Robertson County Commissioner; and the Bernards testified. The court entered its Memorandum Opinion and Order on November 18, 2021, dismissing the City's complaint, ultimately holding that 'the rezoning at issue was not arbitrary and capricious, and that there were no procedural defects prior to the county's action.'"

"Tennessee Code Annotated section 13-7-201(a)(1) authorizes local governments to enact zoning ordinances 'for the purpose of promoting the public health, safety, morals, convenience, order, prosperity and general welfare.' When a party seeks to challenge the 'validity, including the constitutionality, of an ordinance, or to determine whether an ordinance applies[,]' an 'action for declaratory judgment is available and appropriate.' *State ex rel.*

Moore & Assocs., Inc. v. West, 246 S.W.3d 569, 581 (Tenn. Ct. App. 2005). When reviewing a municipality's zoning decisions, our Supreme Court has explained the limited nature of our review as follows:

> In as much as zoning laws are in derogation of the common law and operate to deprive a property owner of a use of land that would otherwise be lawful, such laws are to be strictly construed in favor of the property owner. *State ex rel. Wright v. City of Oak Hill*, 321 S.W.2d 557, 559 ([Tenn.] 1959). 'Legislative classification in a zoning law, ordinance or resolution is valid if any possible reason can be conceived to justify it.' *State ex rel. SCA Chem. Waste Servs., Inc. v. Konigsberg*, 636 S.W.2d 430, 437 (Tenn. 1982). As we found in *McCallen v. City of Memphis*, 'the court's primary resolve is to refrain from substituting its judgment for that of the local governmental body. An action will be invalidated only if it constitutes an abuse of discretion. If 'any possible reason' exists justifying the action, it will be upheld.' 786 S.W.2d 633, 641 (Tenn. 1990).

Edwards v. Allen, 216 S.W.3d 278, 284-85 (Tenn. 2007). Stated another way, ''in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority.'' *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983) (quoting 82 AM. JUR. 2d *Zoning and Planning* § 338 (1976) at 913-14); *see also Keeton v. City of Gatlinburg*, 684 S.W.2d 97, 98 (Tenn. Ct. App. 1984) (holding that where a municipal body acts in zoning matters, the 'court's inquiry is limited as to whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand as valid . . .'). We must favor 'permitting the community decision-makers closest to the events to make the decision.' *Lafferty v. City of Winchester*, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000). Therefore, 'the exercise of zoning power should not be subjected to judicial interference unless clearly necessary.'*Fallin*, 656 S.W.2d at 342 (quoting 82 AM. JUR. 2d *Zoning and Planning* § 338 (1976) at 913-14)."

"The City notes in its brief that neither the Bernards nor the County briefed or argued the issue of standing at trial or in their post-trial submission; however, the City raised the issue on appeal because 'both appellees contested the City's standing in their answers.' The City asserts it has standing because the rezoning of the Bernards' property 'interferes with the City's land use plan' and 'conflicts with the land uses in the area' among other reasons. In response, the Defendants agree that they 'did not brief or argue the issue at trial' but assert the issue is still relevant on appeal and that the City lacks standing to attack the County's zoning decision."

"This Court has observed that, '[s]tanding is a threshold requirement for actions seeking declaratory relief[.]' *Reguli v. Guffee*, No. M2015-00188-COA-R3-CV, 2016 WL 6427860, at *2 (Tenn. Ct. App. Oct. 28, 2016). Therefore, we will address the issue of standing despite the fact that the trial court did not rule upon the issue in the case below.

"In paragraph nine of its complaint, the City asserted it had standing:

> The City has standing because the rezoning of a portion of the Bernards' property, part of which [is] within the County and the rest within the City interferes with the City's land use plan and the goals and purposes of its zoning ordinance, conflicts with the land uses in the area, damages property values in the City, and generally will impair the health, safety, and welfare of the residents of the City.

In its appellate brief, the City acknowledges that it 'has not adopted a general plan pursuant to Tenn. Code Ann. §§13-4-101 *et seq.*, but in October 2002, the City Commission approved a document entitled 'Development Priority Guidelines.'' This document was accepted by vote of the City Council in October 2002. The document includes the following policy statement:

> A ½ mile radius from Orlinda's downtown serves as a boundary within which to strive to keep new development. This sort of development should be appropriate for the Village Center function and character . . . . The Surrounding Rural area and the corridors into Orlinda, particularly along Highways 52 and 49, should be preserved for their functional and scenic qualities. Concentrated development should not occur in these areas."

"To determine whether the City had standing to bring this declaratory judgment action, we turn to this Court's opinion in *City of Brentwood v. Metropolitan Board of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004) for guidance. Although that case examined standing through the lens of a common law writ of certiorari, which authorizes persons who are 'aggrieved' to appeal the decision of a board of zoning appeals, we find 'aggrieved' persons and 'affected' persons to be sufficiently similar for the case to be instructive. *Id.* at 57. In *City of Brentwood*, the city sought judicial review of a metropolitan board of zoning appeals decision to approve a

building permit for construction of a billboard on property in Davidson County at an intersection located near the City of Brentwood. *Id.* at 53. The billboard was not inside the city limits but was in a location characterized as a 'gateway to Brentwood from the north.' *Id.* The court noted, ''municipal boundary lines are not Chinese walls separating one municipality from the other.'' *Id.* at 58 (quoting *Borough of Roselle Park v. Twp. of Union*, 272 A.2d 762, 767 (N.J. 1970)). The City of Brentwood asserted that the billboard would 'do great damage to the otherwise aesthetically appealing entrance to Brentwood, thereby hurting the image of the City and its attractiveness to future residents, businesses, tourists and other visitors.' *Id.* at 59. This Court held that the billboard 'could be viewed as inconsistent with the use of property in the surrounding area, an interference with Brentwood's Franklin Road corridor program, and an impairment to the welfare of Brentwood residents.' *Id.* Thus, we held the City of Brentwood was 'aggrieved' for the purposes of seeking judicial review of the approval of the billboard. *Id.* Furthermore, we held that the city's interest in the case was within in the zone of interests protected by Nashville's zoning ordinance. *Id.*"

"As in the *City of Brentwood* case, the property at issue in this case is not within the City of Orlinda's city limits, but it is in the corridor leading to the city's downtown area. In addition, the property was zoned inconsistently with the City's Development Priority Guidelines which sought to preserve the Bernards' property as 'agricultural' and 'scenic.' Keeping in mind the preference that 'land use matters be resolved on their merits rather than on preclusive, restrictive standing rules[,]' we find that the City's rights, status, or other legal relations were 'affected' by the rezoning at issue, and that the City's interest in the case was within the 'zone of interests' to be protected. *Id.* at 57. Thus, the City had standing to pursue the declaratory judgment."

"The City asserts that judicial relief is justified in this case because the rezoning of the Bernards' property constituted 'illegal spot zoning.' As will be explained below, we disagree."

"This Court has previously explained what constitutes illegal spot zoning:

> Spot zoning is the 'process of singling out [a] small parcel of land for use classification totally different from that of [the] surrounding area, for [the] benefit of an owner of such property and to [the] detriment of other owners, and, as such, is [the] very antithesis of planned zoning.' *Grant v. McCullough*, 270 S.W.2d 317 (Tenn. 1954); *Crockett v. Rutherford Cty.*, 2002 WL 1677725 (Tenn. Ct. App. July 25, 2002); *Crown Colony Homeowners Ass'n v. Ramsey*, 1991 WL 148058, at *6 (Tenn. Ct. App. Aug. 7, 1991); *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 343 (Tenn. 1983); *Rains v. Knox Cty. Bd. of Comm'rs*, 1987 WL 18065, at *7 (Tenn. Ct. App. Oct. 9, 1987). The Supreme Court of Tennessee explained why the practice of spot zoning is disfavored:
>
> > The law is well settled that 'spot zoning,' as properly known and understood, and 'spot zoning' ordinances, as properly identified, are invalid on the general ground that they do not bear a substantial relationship to the public health, safety, morals and general welfare and are out of harmony and in conflict with the comprehensive zoning ordinance of the particular municipality.
>
> *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 343 (Tenn. 1983) (quoting 2 Yokley *Zoning Law and Practice* § 13-3 (1978)).
>
> > It is, therefore, universally held that a 'spot zoning' ordinance, which singles out a parcel of land within the limits of a use district and marks it off into a separate district for the benefit of the owner, thereby permitting a use of that parcel inconsistent with the use permitted in the rest of the district, is invalid if it is not in accordance with the comprehensive zoning plan and is merely for private gain.
>
> *Grant v. McCullough*, 270 S.W.2d 317, 319 (Tenn. 1954) (quoting *Cassel v. Mayor & City Counsel of Baltimore*, 73 A.2d 486, 489 (Md. Ct. App. 1950)).

Phillips v. Tenn. Dep't of Transp., No. M2006-00912-COA-R3-CV, 2007 WL 1237695, at *4-5 (Tenn. Ct. App. Apr. 26, 2007). Not every instance of 'spot zoning' is illegal, however. *Fielding v. Metro. Gov't of Lynchburg, Moore Cty.*, No. M2011-00417-COAR3-CV, 2012 WL 327908, at *3 (Tenn. Ct. App. Jan. 31, 2012). ''In addressing a claim of spot zoning, the most important factor is whether the rezoned land is being treated *unjustifiably different* from the surrounding land, thereby creating an island having no relevant differences from its neighboring property.'' *Id.* (quoting *Quoc Tu Pham v. City of Chattanooga*, No. E2008-02410-COA-R3-CV, 2009 WL 2144127, at *3 (Tenn. Ct. App. July 20, 2009))."

"The City argues that 'only the Bernards benefitted from the rezoning' and that the Bernards' property 'would be a commercial island in the midst of a sea of residential and agricultural use.' The trial court considered this argument and held:

> Because the individual Defendants have been selling their meats and produce to the surrounding population of northeast Robertson County for years, and because there are no retail food stores currently in the City of Orlinda or surrounding area, this court is of the opinion that the action of the Robertson County Commission to rezone a small portion of Plaintiffs' property lying outside of the City of Orlinda to C-2 Neighborhood Commercial District to allow a retail food market was not an arbitrary or capricious use of zoning authority.

The evidence does not preponderate against the trial court's finding. Ms. Bernard testified that the City lacked a local food market that allowed local farmers to sell their agricultural products[.] … We find that the Bernards are not the only beneficiaries of the rezoning of their property. The local community will also benefit from the market, as well as local farmers who may sell their own agricultural products to citizens who frequent the store. In light of our quite limited standard of review applicable to these decisions, we find a rational basis for the rezoning resolution. Therefore, we do not find the rezoning of the Bernards' property to be illegal spot zoning."

"The City argues that because customers may travel from different areas other than the 'neighborhood' to shop at the Bernards' store, the Bernards' rezoning request was improper and should be invalidated by this Court. The Defendants assert that the City's interpretation of the Neighborhood Commercial zoning district is too narrow and does not warrant invalidation of the rezoning resolution. We agree with the Defendants."

"The Bernards' property was rezoned to C-2 Neighborhood Commercial, which is defined as:

> The C-2, Neighborhood Commercial District is primarily intended to accommodate very low intensity office, convenience retail, and personal service uses within residential areas. The district is established to provide convenient locations for businesses that serve the needs of surrounding residents without disrupting the character of the neighborhood. This district is not intended to accommodate retail uses that primarily attract passing motorists. Compatibility with nearby residences is reflected in design standards for both site layout and buildings.

The City focuses on a section of the Bernards' application for rezoning that states the market would be a 'destination for farm fresh meats and produce for the people of northern middle Tennessee and southern Kentucky.' The City argues that attracting customers from this geographic area would violate the Neighborhood Commercial zoning requisites. However, there was no evidence or testimony that the rezoning would 'primarily' attract 'passing motorists.' Moreover, the record shows that the Bernards' property is approximately three miles from the Kentucky border. There is no testimony or interpretation to suggest that people who live three miles from the store would not be 'surrounding residents' for purposes of the Neighborhood Commercial district. Finally, the City does not take issue with the design or site layout of the market and does not argue that it aesthetically disrupts the character of the neighborhood. In our view, the record shows that the Bernards' market will 'serve the needs of the surrounding residents without disrupting the character of the neighborhood.' Therefore, we do not disturb the decision of the Robertson County Commission to rezone the Bernards' property to Neighborhood Commercial."

ATTORNEY GENERAL OPINIONS

Opinion No. 23-001
January 19, 2023

Elected School Board Member Serving as Board Member and/or Executive Director of Affiliate Professional Employees' Organization

Question
May an elected board member of a county school system, or local education agency (LEA), simultaneously serve as a board member and/or executive director of an affiliate professional employees' organization as defined in the Professional Educators Collaborative Conferencing Act, Tenn. Code Ann. § 49-5-602(9), and adhere to school board member expectations and fulfill obligations set forth in Tenn. Code Ann. § 49-2-202 and Tenn. Code Ann. § 49-2-203?

Opinion

Because the Professional Educators Collaborative Conferencing Act (PECCA) provides a process for a local board of education and professional employees to enter a binding memorandum of understanding (MOU) regarding terms and conditions of professional employee service and envisions that professional employees' organizations will participate in this process, it is foreseeable—and indeed likely—that an elected school board member who also serves as a board member or as the executive director of an affiliate professional employees' organization will have conflicting interests and conflicting fiduciary duties to the parties on both sides of the collaborative conferencing process. A board member of a county school system is, by virtue of that position, a public officeholder. Under common law principles, when a public officeholder has such a conflict of interests, recusal of the officeholder from participation in the matter in which the conflict arises is appropriate. If the officeholder has a conflict of interests but nevertheless participates in the matter, the action taken by that public officeholder is considered tainted and must be invalidated.

Furthermore, Tenn. Code Ann. § 12-4-101 makes it unlawful for a public official to be directly or indirectly financially interested in a contract that the official has a duty "to vote for, let out, overlook, or in any manner to superintend." Whether an official has an impermissible pecuniary interest will depend on the particular facts and circumstances of any given case, but if the official is "directly or unlawfully indirectly interested" in a contract, that official would be subject to a financial penalty and "shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years." Tenn. Code Ann. § 12-4-102.

Finally, Tenn. Code Ann. § 2-10-124(a) makes it an offense for elected county officials to receive a fee, commission, or any other compensation for "consulting services" from any entity other than the State, a county, or a municipality. It appears that an elected county school board member who receives any compensation from an affiliate professional **employees' organization for "consulting services" would be in violation of this statute.**

Opinion No. 23-003
February 15, 2023

Dismissal of Director of Schools under Tenn. Code Ann. § 49-2-301(c)

Question 1
Assuming that a director of schools has been duly found to be in violation of subsection (c) of Tenn. Code Ann. § 49-2-301, does Tenn. Code Ann. § 49-2-301(c) require that the director be dismissed from the director's position?

Opinion 1
Yes, the word "shall" in subsection (c) of Tenn. Code Ann. § 49-2-301 should be regarded as mandatory so that if a director of schools has been duly found to be in violation of subsection (c) the school board has no discretion as to the consequences of the violation and is required to dismiss that director.

Opinion No. 23-004
February 28, 2023

Enhanced Handgun Carry Permit Holder Carrying Handgun with Intent to Go Armed Following Conviction for Driving Under the Influence of an Intoxicant

Question
If a person is prohibited under Tenn. Code Ann. § 39-17-1307(h)(1)(B) from carrying a firearm with the intent to go armed as a result of one or more convictions for driving under the influence of an intoxicant but the person possesses an enhanced handgun carry permit and does not have a disqualification under Tenn. Code Ann. § 39-17-1351(c)(11), may that person be charged or convicted under Tenn. Code Ann. § 39-17-1307(h)(1)(B)?

Opinion
A person who possesses an enhanced handgun carry permit does not commit an offense under Tenn. Code Ann. § 39-17-1307(h)(1)(B) when that person carries his or her handgun with the intent to go armed, assuming that the person is not disqualified from holding an enhanced handgun carry permit under Tenn. Code Ann. § 39-17-1351(c)(11).

Opinion No. 23-006
March 16, 2023

Removal of Member of Regional Planning Commission

Question 1

If a member of a regional planning commission fails to attend the required training pursuant to Tenn. Code Ann. § 13-3-101(j)(1) or file a written statement with the commission secretary certifying such attendance pursuant to Tenn. Code Ann. § 13-3-101(j)(3), may the member be removed from the commission?

Opinion 1
Yes. A member of a regional planning commission may be removed for cause for failing to meet either of these requirements.

Question 2
If the answer to Question 1 is "yes," what is the process for removing the member?

Opinion 2
In regional planning commissions in which the Commissioner for the Department of Economic and Community Development designates planning commission members, the Commissioner "may remove a member . . . for cause specified in writing served on the member and after hearing, of which such member shall be given not less than fifteen (15) days' written notice." Tenn. Code Ann. § 13-3-101(f). In regional planning commissions in which planning commission members are appointed by the county mayor, subject to confirmation by the county legislative body, the county legislative body may remove a member for cause by following the same notice and hearing process. Id. § 13-3-101(i)(5).

Question 3
If a member is removed from the commission, what is the process for filling the vacancy?

Opinion 3
A vacancy in the membership of a regional planning commission that consists of a single county is filled through appointment by the county mayor, subject to confirmation by the county legislative body. Tenn. Code Ann. § 13-3-101(i)(4). And when there is a vacancy in the membership of a regional planning commission that contains territory in more than one county or a regional planning commission that consists of a single county that participates jointly in the planning region with a municipality or municipalities lying within that county, nominations to fill the vacancy must be submitted "within thirty (30) days after [the] position is vacated" by "the chief elected officer of any county having a metropolitan form of government, the county mayor of any other county, or the chief elected officer of any municipality lying inside of the boundary of the planning region." Id. §§ 13-3-101(b), (c)(3) & (4), (i)(7). The Commissioner of the Department of Economic and Community Development may then designate a nominee as a member of the regional planning commission. Id. §§ 13-3-101(b), (c), (i)(7).

Opinion No. 23-008
May 22, 2023

Authority of Court Clerk to Require a Deposit to Bid at a Delinquent Tax Sale

Question 1
Is a court clerk authorized to require a deposit as a condition of bidding at a delinquent tax sale?

Opinion 1
No. As a public officer a court clerk has and can exercise only the authority that is expressly conferred on the clerk by statute or necessarily implied from the powers granted by statute. But no Tennessee statute expressly—or by necessary implication—authorizes a court clerk to require a deposit as a condition to bidding at a delinquent tax sale.

Question 2
If a court clerk is authorized to require a deposit as a condition of bidding at a delinquent tax sale, is there a limitation on the amount the court clerk is authorized to require?

Opinion 2
In light of Opinion 1 this question is moot.