IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

4GOODGOVERNMENT, FMR. METRO COUNCILMAN DUANE DOMINY AND THE 27,273 REGISTERED VOTERS WHO SIGNED THE NASHVILLE TAXPAYER PROTECTION ACT,	)	
Plaintiffs,	)	
v.	)	**Case No. 20-1010-III**
DAVIDSON COUNTY ELECTION COMMISSION, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, JOHN COOPER, in his official capacity as Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee, and KEVIN CRUMBO, in his official capacity as Finance Director of the Metropolitan Government of Nashville and Davidson County, Tennessee,	)	
Defendants.	)	

MOTION FOR LEAVE OF COURT FOR APPOINTMENT AS AMICUS CURIAE OF AMERICANS FOR PROSPERITY TENNESSEE AND MEMORANDUM IN SUPPORT

Americans for Prosperity Tennessee ("AFP-TN") moves this Court for leave for Appointment as *Amicus Curiae* to assist the Court with novel points of law in Tennessee and provide a resource for additional authority. AFP-TN respectfully requests an order permitting it to submit the Brief Amicus Curiae attached as Exhibit A to this Motion, but AFP-TN is not asking either to participate in the trial or to present oral argument on its Motion unless the Court deems that helpful.

IDENTITY AND INTEREST OF AMICUS CURIAE

Americans for Prosperity is a nonprofit organization, operating a state chapter in Tennessee ("AFP-TN") that advocates for long-term solutions to the country's biggest challenges. *Amicus Curiae* AFP-TN and its activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit where people succeed by helping each other. AFP-TN believes limited government, fiscal responsibility and greater economic prosperity are critical components to solving these problems.

After the Davidson County Metropolitan Council ("Metro Council") voted to raise property taxes by at least 34%, AFP-TN engaged grassroots activists who helped 4GoodGovernment gather more than 27,000 signatures of Davidson County residents to support placing the Nashville Taxpayer Protection Act on the December ballot.

Accordingly, AFP-TN has an interest in this matter. Both its activists and the remaining citizens of Nashville, Davidson County, Tennessee deserve to be heard on their own tax rates, particularly given the large number of voters–well beyond the numbers required by law–who have signed a petition to place limits on their property taxes.

AFP-TN has reviewed the pleadings to date in this matter and wishes to assist the Court by bringing to this Court's attention additional, important points of law, particularly arguments in favor of the "Property Tax Rates" portion of the Petition.

ARGUMENT AND AUTHORITY

While the Tennessee Rules of Civil Procedure do not address the manner in which a person or entity may request permission to submit a brief as an *amicus curiae*, "the courts have inherent authority to appoint an amicus even in the absence of a rule or statute." *State ex rel. Comm'r of Transp. v. Eagle*, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001) (citations omitted).

> The role of an amicus is to provide timely and useful information that will assist the court in reaching the proper resolution of the issues it is being called upon to decide. As a general matter, appointing an amicus is reserved for rare and unusual cases that involve questions of general or public interest. An amicus can assist the court by (1) providing adversarial presentations when neither side is represented, (2) providing an adversarial presentation when only one point of view is represented, (3) supplementing the efforts of counsel even when both sides are represented, and (4) drawing the court's attention to broader legal or policy implications that might otherwise escape the court's consideration. Amicus curiae are drawn from the ranks of persons who care about the legal principles that apply in the suit before the court but who do not have the right to appear in the suit as a party. They need not be completely disinterested in the outcome of the case.

Id. (citations omitted); *see also Animal Prot. Inst. v. Martin*, No. CV-06-128-B-W, 2007 U.S. Dist. LEXIS 13378, at *6 (D. Me. Feb. 23, 2007).[1]

As evidenced by the thousands of signatures supporting this Petition, far more than legally required to place the Petition on the ballot, this matter involves questions of significant public interest. It further contains broader legal and policy implications that warrant an *amicus curiae's* involvement. AFP-TN wishes to supplement the efforts of counsel for the parties by bringing to the Court's attention additional, important points of law not previously raised as of this filing.[2]

Accordingly, AFP-TN respectfully requests the Court accept the attached brief and consider it with regard to the issues raised in this matter.

NOTICE OF REQUEST FOR COURT TO EXCEPT ORAL ARGUMENT

PURSUANT TO THE NATURE OF THIS MOTION, SECTION A(2) OF THE 20TH JUDICIAL DISTRICT, DAVIDSON COUNTY, CHANCERY COURT'S "COVID-19 PROCEDURES AND PLAN TO BEGIN IN-PERSON HEARINGS," AND LOCAL RULE 26.11 AFP-TN RESPECTFULLY REQUESTS THAT THE COURT DISPENSE WITH ORAL ARGUMENT ON THIS MOTION. IN THE ALTERNATIVE, AFP-TN REQUESTS AN EXPEDITED HEARING AT THE COURT'S EARLIEST CONVENIENCE GIVEN THE IMPENDING TRIAL.

[1] Unreported and out-of-state case attached as Exhibit B.

[2] The Brief Amicus Curiae includes persuasive, out of state authority and precedent related to charter amendments.

Respectfully submitted,

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EXHIBIT A

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DAVIDSON COUNTY, TENNESSEE

4GOODGOVERNMENT, FMR. METRO COUNCILMAN DUANE DOMINY AND THE 27,273 REGISTERED VOTERS WHO SIGNED THE NASHVILLE TAXPAYER PROTECTION ACT,	)	
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BRIEF OF AMICUS CURIAE OF AMERICANS FOR PROSPERITY TENNESSEE

IDENTITY AND INTEREST OF AMICUS CURIAE

Americans for Prosperity is a nonprofit organization, operating a state chapter in Tennessee ("AFP-TN") that advocates for long-term solutions to the country's biggest challenges. *Amicus Curiae* AFP-TN and its activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit where people succeed by helping each other. AFP-TN believes limited government, fiscal responsibility and greater economic prosperity are critical components to solving these problems.

After the Davidson County Metropolitan Council ("Metro Council") voted to raise property taxes by at least 34%, AFP-TN engaged grassroots activists who helped 4GoodGovernment gather more than 27,000 signatures of Davidson County residents to support placing the Nashville Taxpayer Protection Act on the December ballot. The Metro Council's decision to raise property taxes by such a significant amount was met with a public outcry. Nashville must not continue to pay for its unsustainable spending habits by forcing higher taxes on the backs of Nashville families and small businesses. Government should have to live within its means, just as families and businesses across the city must do, especially at this time.

Accordingly, AFP-TN has an interest in this matter. Both its activists and the remaining citizens of Nashville, Davidson County, Tennessee deserve to be heard on their own tax rates, particularly given the large number of voters–well beyond the numbers required by law–who have signed a petition to place limits on their property taxes. When governments, such as the Metropolitan Government of Nashville and Davidson County ("Metro"), act to limit the voice of their citizens, society suffers. Put as simply as possible, the citizens have met their legal obligation for a referendum and that vote should take place.

AFP-TN has reviewed the pleadings to date in this matter and wishes to assist the Court by bringing to this Court's attention additional, important points of law, particularly arguments in favor of the "Property Tax Rates" portion of the Petition.

SUMMARY OF POINTS OF LAW AND AUTHORITY

4GoodGovernment ("4GG") has fulfilled the requirements to trigger a public referendum on the amendments proposed in its "Nashville Taxpayer Protection Act" Petition (the "Petition"), including submitting far more than the number of signatures required by law. AFP-TN believes the Davidson County Election Commission ("Election Commission") should, in turn, perform its

duty and hold the referendum on the Petition conditionally set for December 15, 2020. There is no need at this stage, prior to any vote, for the Court to analyze the constitutionality of any of the Petition's provisions.

Should the Court determine it is obligated to preliminarily opine on any constitutional and/or statutory issues, however, AFP-TN respectfully asserts that the "Property Tax Rates" amendment to the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee (the "Charter") is consistent with the general law. That conclusion is consistent with rulings in other states on similar proposals.

Finally, should the Court find any of the other referendum items in conflict with the general law and find that the conflict merits striking those items from the ballot, then the law dictates that the valid items be severed from any invalid items and that the vote on the referendum proceed on the valid portions.

POINTS OF LAW AND AUTHORITY

A. The vote on the Petition conditionally set for December 15 should proceed.

As 4GG has already explained in its briefing, the Election Commission performs a ministerial function.[1] When a petition is filed with the Metropolitan Clerk to amend the Charter, the Election Commission's sole tasks are: (1) to verify the requisite signatures and (2) conduct the referendum election. (Charter § 19.01).

As the Tennessee Supreme Court has already ruled in *City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531 (Tenn. 2004), a county election commission may not refuse to place a referendum on the ballot when the procedural requirements have been met. If the Election Commission refuses to place the referendum items on the ballot, it will "thwart[] the [Nashville]

[1] 4GoodGovernment's Motion to Dismiss pp. 5-6.

City Council's duty to submit the [charter amendment] to the qualified voters." *See id.* at 537. Importantly, the Tennessee Supreme Court stated that the constitutionality of the law at issue in City of Memphis was "not ripe for judicial determination" because "[t]he City's voters may or may not approve the [law]." *Id.* at 538.[2]

The Election Commission has certified the required signatures. The only task remaining is to carry out the vote as required.

B. The "Property Tax Rates" referendum item does not conflict with the general law.

Even if an inquiry into the constitutionality (or legality) of the Petition were ripe–and it is not–AFP-TN believes prevailing arguments exist regarding the "Property Tax Rates" provision. Metro's counter-claim makes three arguments against the "Property Tax Rates" amendment: (1) that it illegally sets rates in violation of state law; (2) that it impermissibly repeals an existing ordinance; and (3) that it seeks to adjust tax rates mid-year.[3] All three arguments are addressed below.

1. The 2% annual limitation on property tax increases does not usurp legislative authority.

Metro incorrectly asserts that the Property Tax Rates amendment usurps the legislative authority delegated to the Metro Council by the Tennessee Constitution and the General Assembly.[4] The amendment instead merely imposes a limit to the Council's taxing authority; it does not impermissibly set a rate. Courts have found that counties retain legislative authority to

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[2] In *Brown v. State,* 426 S.W.2d 192 (Tenn. 1968), the court reviewed the language of a petition to determine if it complied on its face with requirements that a paragraph substantially meet the description of a heading. The *City of Memphis* court distinguished *Brown* from the request to consider whether the substance of a proposed amendment would ultimately withstand constitutional scrutiny if ultimately passed. *City of Memphis*, 146 S.W.3d at 539 ("*Brown* did not present the hypothetical, unripe question of whether the ordinance, if passed, would be unconstitutional. Rather, *Brown* presented the concrete and ripe question of whether the ordinance had been passed in the *form* necessary to legitimately invoke the referendum process.").

[3] *See* Answer, Counter-Complaint and Cross-Complaint of Metropolitan Government of Nashville and Davidson County and John Cooper and Kevin Crumbo ("Metro Counter-Complaint") ¶¶ 39-67.

[4] Metro Counter-Complaint ¶¶ 39-44.

levy property taxes despite annual limitations.[5]

A charter is equivalent to a constitution. *Bd. of Supervisors of Elections v. Smallwood*, 327 Md. 220, 240, 608 A.2d 1222, 1232 (1992).[6] Its primary function is to protect the rights and liberties of the people by setting limits on what the local legislative body can and cannot do. Any ordinance passed by the legislative body that is repugnant to the charter is invalid, just like any law passed by Congress that violates the U.S. Constitution is invalid. *See Lebanon v. Baird,* 766 S.W.2d 236, 241 (Tenn. 1988) ("The charter is the organic law of the municipality to which all its actions are subordinate."). Foundational documents, such as charters and constitutions, do not commandeer the legislative prerogative from the legislative body, but merely operate to limit government power. Indeed, "Limitations imposed by the people on their government are fundamental elements of a constitution." *Smallwood*, 608 A.2d at 1230.

The Maryland Court of Special Appeals upheld a charter amendment placing a cap on the city's ability to increase property taxes in *Bd. of Supervisors of Elections v. Smallwood.* Specifically, petitions in Baltimore County and Anne Arundel County would have "placed a percentage cap on the amount of local property tax revenues to be raised each year."[7] *Id.* Both

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[5] In fact, the Charter already contains such a limitation on certain tax rates that was approved by the voters in 2006. (Charter § 6.07).

[6] A copy of the unreported and out of state cases are attached as Collective Exhibit 1.

[7] The petition proposed that the following language be added to § 710 of the Baltimore County Charter:
"(d) Property Tax. Notwithstanding any other provision of this Charter, commencing on July 1, 1991, and for the tax year 1991-1992, the County property tax may not exceed the property tax realized by the County for the tax year 1989-1990, except as provided in subparagraph (1) and (2) herein:
(1) For the tax year 1992-1993, and for succeeding years the County property tax may be increased, but by no more than 2 percent per year.
(2) In any tax year subsequent to tax year 1991-1992, the county may increase the property taxes by no more than 2 percent provided such increase is put to referendum by the County and is approved by not less than two thirds of the qualified registered voters in the County.
(3) The limitation provided for in subparagraph (d) above shall not apply to property taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.
(4) If any paragraph, part, clause or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining portions of the law shall not be affected but will remain in full force and effect." *Id.* n. 2.
The petition proposed that the following language be added to § 710 of the Anne Arundel County Charter:
"[d] Property Tax

petitions would likewise have tied the rate for the tax year 1992-1993 to rates in prior tax years. *Id.*

Regarding the cap, the local governments made a similar argument to the argument proffered by Metro in this case; namely, that the charter amendment improperly appropriated legislative authority. Maryland's statutes, like Tennessee's, provided that "the government body of a county shall set the tax rate on property for the next taxable year." *Id.* at 1233; MD TAX-PROPERTY Code Ann. § 6-3.2; *see also* Tenn. Code Ann. § 67-5-102(a)(2)("The amount of such tax shall be fixed by the county legislative body of each county.").

Nonetheless, the *Smallwood* court held that the proposed property tax limitation did not conflict with the Maryland Constitution or the general law of Maryland, as "the legislative body in each county would continue to set the tax rate on property. There [was] no language in the statute indicating that reasonable limits [could not] be placed on the legislative power to set the tax rate." *Id.*[8]

The tax cap in 4GG's Petition is like the one at issue in *Smallwood.* Just as the cap in Maryland was facially valid because it "constituted proper charter material and did not conflict

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"(1) Notwithstanding any other provision of this article, commencing on 1 July 1991 (tax year 1991-1992), the County Council may not establish property tax rates which would provide more property tax revenues than were raised during the 1988-1989 tax year, except as provided in subparagraphs [a] and [b] below:
"[a] The Constant Yield Tax Rate, as currently specified by the Tax-Property Article of the Annotated Code of Maryland, shall continue as the method of assurance that revenue derived from the property tax remains at a constant level from one year to the next. The provisions of the Tax-Property Article of the Annotated Code of Maryland which permit local taxing authorities to increase property tax rates above the Constant Yield Tax Rate shall be used by the Anne Arundel County Council in the following manner: Commencing 1 July 1992, and applicable to subsequent tax years, the Council may set an annual tax rate which exceeds the Constant Yield Tax Rate by a value which will permit property tax revenues to increase by (1) a percentage corresponding to the immediately previous January Consumer Price Index, U.S. City Average, percentage of change from the preceding January, as computed by the Department of Labor (or other widely accepted index that measures from time to time the rate of inflation), or (2) by 4.5 percent, whichever is the lesser amount.
"[b] In any tax year subsequent to 1992, the County Council may increase property tax revenues for that year by an amount greater than that stated in paragraph (d) herein by referring a specific revenue increase to a referendum of the qualified voters of the County." *Id.* n. 5.

[8] Wherever reasonably possible, courts will construe enactments so that there is no conflict. *Smallwood,* 608 A.2d at 1233; *see also Brown v. Jordan,* 563 S.W.3d 196, 198 (Tenn. 2018).

with public general law," the "Property Tax Rates" amendment in this matter is valid.

In fact, this is not the first time a limitation or cap on Metropolitan Davidson County property taxes has been proposed and adopted. In 2006, citizens obtained a vote and approved a Charter amendment placing a maximum rate on property taxes. That amendment is now part of the Charter as Section 6.07. In other words, a limitation or cap on property taxes is neither unprecedented nor inconsistent with the current Charter.

2. Application of the limitation to rates post January 1, 2020 does not illegally repeal legislation.

The Property Tax Rates amendment applies the 2% cap to increases occurring after January 1, 2020. Metro alleges in its Counter-Complaint and Cross-Complaint, with respect to Ordinance BL 2020-287 passed earlier this year, that "[t]here is no delegation of legislative authority in the Metropolitan Charter Act, Tenn. Code Ann. §§ 7-1-101, *et seq.*, the Metropolitan Charter, or other state law that allows the Metropolitan Council or Davidson County voters to use the referendum process to repeal an existing ordinance."[9] Respectfully, Metro's assertion contradicts the language of the Charter itself. Section 20.01 of the Charter provided upon its passage that,

> All city ordinances, resolutions and by-laws in force in the former City of Nashville, the Charter of which is repealed and abolished by this Charter, shall continue in force and effect, ***when not inconsistent with the provisions of this Charter***, and shall have the legal effect of ordinances of the metropolitan government operative within the urban services district until repealed, modified or amended by subsequent action of the metropolitan government. All resolutions of the quarterly county court of Davidson County and regulations pertaining to said county established by Private Act, when not inconsistent with the provisions of this Charter, shall continue in force and effect and shall have the legal effect of ordinances of the metropolitan government until repealed, modified or amended by subsequent action of the metropolitan government. (emphasis added).

In other words, the Charter recognized at its inception that ordinances in conflict with the Charter have no force or effect. It is an elementary principle that ordinances of a city are subordinate to

[9] *See* Metro Counter-Complaint ¶ 53.

charter provisions. *Wilgus v. Murfreesboro*, 532 S.W.2d 50, 52 (Tenn. Ct. App. 1975). The Charter provides a mechanism whereby **either** the council **or** the voters may amend the Charter. (Charter § 19.01). Consequently, rather than prohibit any effect on existing ordinances by adoption or amendment of the Charter (by whatever means), the Charter itself contemplates that an amendment to the Charter could impact existing legislation, to the point of invalidation if appropriate.

Accordingly, despite the issues raised by Metro related to the introductory language appearing in the Property Tax Rates amendment, the amendment simply places a limit on property tax increases effective January 1, 2020. The effect of the amendment will no doubt be to limit the total impact of Ordinance BL 2020-287, but it does not act as a direct repeal. The provision instead acts to impose a proper limit on a tax increase, a "fundamental element" of a charter.

Notably, the amendment differs materially from the amendments at issue in *Smallwood* in one important way. The Maryland amendments "would have limited the amount of property tax revenues for the tax year 1991-1992 to no more than the amount collected in the tax year 1989-1990 for Baltimore County, and no more than that collected in the tax year 1988-1989 for Anne Arundel County." *Smallwood,* 608 A.2d at 1234. The *Smallwood* court found those provisions violated Maryland law because they improperly set the tax rates for the tax year 1991-1992. *Id.* The Property Tax Rate referendum in this matter, however, suffers no such defect. It does not set a specific tax rate for any given year. Instead, it places a reasonable limitation on property tax rate increases, effective January 1, 2020. Again, such a provision limits, rather than usurps, legislative power.

Regardless, Metro's argument fails for another reason. As explained above, the voters of Nashville have already had the opportunity once to vote on an amendment that purported to set a maximum property tax rate. Section 6.07 of the Charter, which was the result of a voter-initiated

amendment, provides,

> The willingness and ability of citizens to bear the burden of tax increases should always be considered. Therefore, notwithstanding any provisions above, real property tax rates shall not exceed the maximum rates approved by the voters of the county in a referendum. Such referendum may be authorized either by the mayor or by a majority vote of the council no more than once each calendar year pursuant to Tennessee Code Annotated section 2-3-204. The referendum shall read "The maximum real property tax rates for Davidson County shall be increased to:" followed by a list of rates. Voters shall be provided the two choices of FOR and AGAINST. **The real property tax rates in effect as of November 7, 2006, shall be the maximum rates allowed until the first referendum occurs.** (emphasis added).

In other words, an amendment put before the voters in 2006 set maximum rates until such time as a subsequent vote took place. Again, the Charter contemplates amendments affecting tax rates. At a minimum, voters today should have the same opportunity to vote on such a provision as the voters did in 2006.

3. The Property Tax Rates amendment does not impermissibly adjust tax rates mid-year.

Finally, contrary to Metro's arguments, the Property Tax Rate amendment does not conflict with Tennessee law providing that property taxes "are due and payable on the first Monday in October of each year" or the statute stating that unpaid property taxes become delinquent on March 1. Tenn. Code Ann. § 67-1-701, -702; Tenn. Code Ann. § 67-5-2010. To reach this inaccurate conclusion, Metro relies on a Tennessee Attorney General's Opinion contending that a "county body lack[s] the authority to alter the county's property tax rates mid-fiscal year." Tenn. Op. Att'y Gen. No. 04-149, at p. 2 (October 1, 2004).

The issue most squarely before the Tennessee Attorney General in that opinion, however, related to a property tax increase, or an increase in one fund with a corresponding decrease in another fund. Such increase, in the opinion of the Attorney General, violated Tennessee law if done after October 1 because it "could lead to taxes becoming delinquent as soon as they are levied,

an untenable result." *Id.*, at p. 2.

Unlike the mid-year property tax increase considered by the Attorney General, a mid-year decrease (such as would result from the Petition) does not improperly punish or disadvantage citizens and therefore operate as a quasi *ex post facto* enactment. The decrease will not result in taxes becoming delinquent as soon as they are levied and therefore will not create the untenable result of improperly punishing the citizens of Davidson County. Thus, it does not conflict with the March 1, 2021 date when property taxes become delinquent or impact the October 1, 2020 date when taxes become due, other than decreasing the amount due.[10] At worst, to the extent Metro has already sent out tax bills and received payments, it will be required to issue refunds. But this result, and this amendment, in no way conflicts with the general law of Tennessee. Indeed, Tennessee law specifically empowers county clerks to direct the refunding of taxes. Tenn. Code Ann. § 67-1-707(a).[11]

C. A vote on the "Property Tax Rates" provision does not depend on the validity of any other provision.

4GG has complied with all requirements necessary to have the Petition submitted for referendum without a substantive review of the constitutionality or legality of any individual provision. In the event the Court does rule on such issues prior to a vote and determines that any provisions of the Petition fail in form, the Court should sever those provisions from the "Property Tax Rates" provision.

As referenced above, the Property Tax Rate amendment is constitutional and does not

[10] The statutes expressly contemplate one scenario under which the amount due could decrease after October 1. Tenn. Code Ann. § 67-1-702 notes that "County trustees may begin accepting tax relief applications on the same date on which the trustee accepts property tax payments."

[11] "The county clerks of the various counties are also authorized and empowered to settle and adjust with taxpayers all errors and double assessments of county taxes erroneously or illegally collected by them and to direct the refunding of the taxes. Any claim for such refund by the county of taxes or revenue alleged to have been erroneously or illegally paid shall be filed with the county clerk, supported by proper proof within one (1) year from the date of payment; otherwise, the taxpayer shall not be entitled to a refund and the claim for refund shall be barred."

violate the general law. Accordingly, in the event the Court finds any other amendments invalid, the Court should sever that provision and proceed with the vote on the valid portions. The five proposed charter amendments are completely independent of one another, and thus severable. *See AME, INC. v. Bd. OF ZONING APPEALS OF THE Metro. Govt OF NASHVILLE*, 1985 Tenn. App. LEXIS 2798, at *11 (Tenn. Ct. App. Apr. 9, 1985) (holding that two restrictions were "independent" and accordingly were severable).

CONCLUSION

It is beyond question that the right to vote is a precious and fundamental right. *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020). Respectfully, this Court should let the citizens of Nashville, Davidson County, Tennessee, exercise their fundamental right. The proposed Charter amendment is a valid enactment and does not violate the general law of Tennessee.

Respectfully submitted,

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COLLECTIVE EXHIBIT 1

Bd. of Supervisors of Elections v. Smallwood

Court of Appeals of Maryland

July 17, 1992, Filed

Nos. 71, 72, September Term, 1990

Reporter
327 Md. 220 *; 608 A.2d 1222 **; 1992 Md. LEXIS 124 ***

BOARD OF SUPERVISORS OF ELECTIONS OF ANNE ARUNDEL COUNTY et al. v. Rayburn H. SMALLWOOD et al.; BALTIMORE COUNTY CITIZENS FOR REPRESENTATIVE GOVERNMENT, et al. v. BALTIMORE COUNTY, Maryland, et al.

Subsequent History: [*1]** As Corrected July 22, 1992. Second Correction August 17, 1992. Reported at *327 Md. 220, at 228*.

Prior History: Appeal from the Circuit Court for Anne Arundel County pursuant to certiorari to Court of Special Appeals. Bruce C. Williams, JUDGE for No. 71.

Appeal from the Circuit Court for Baltimore County pursuant to certiorari to Court of Special Appeals. John F. Fader, II, JUDGE, for No. 72.

Core Terms

charter, invalid, voters, election, ballot, delete, roll, fiscal, referendum, budget, mislead, rewrite, ordinance, remainder, constant, deceive, enjoin, void

Case Summary

Procedural Posture

The Circuit Court for Anne Arundel County (Maryland) and the Circuit Court for Baltimore County (Maryland) held that ballot initiatives to place proposed "property tax limitation" charter amendments on the ballot in both counties, and a "ballot initiative amendment" on the ballot in Anne Arundel county, were unconstitutional in violation of *Md. Const. art. XI-A, § 5*. Appellants, voters in both counties, appealed from the rulings.

Overview

The court held that because the voters of a charter county could not reserve to themselves the power to initiate legislation, since such initiative conflicted with the terms of *Md. Const. art. XI-A, § 3*, the proposed "ballot initiative" amendment was unconstitutional. However, the court found that the proposed "property tax limitation" charter amendments were facially valid and did not conflict with public general law. Those amendments would not have divested the county councils of the ability to set the property tax rates, but merely would have prohibited collection above a specified cap. The court found that the "roll back" provision and "escape clause" provisions of the amendments, although invalid, were severable from the valid portions of the "property tax limitation" amendments. Thus, the "property tax limitation" proposed amendments, following the severance of the invalid provisions, was properly submitted to the voters of Baltimore and Ann Arundel counties.

Outcome

The court affirmed that portion of the judgment prohibiting the placement of the proposed "ballot initiative amendment" on the ballot. The court reversed the judgments on the "property tax limitation" charter amendments after the court severed the invalid roll back

and escape clause provisions.

LexisNexis® Headnotes

Constitutional Law > State Constitutional Operation

HN1[] Constitutional Law, State Constitutional Operation

See Md. Const. art. XI-A, § 3.

Governments > Local Governments > Elections

Governments > Legislation > General Overview

Governments > Legislation > Initiative & Referendum

HN2[] Local Governments, Elections

The powers of referendum and initiative, though each may affect the form or structure of local government, are otherwise distinctly different. Under the referendum power, the elective legislative body, consistent with Md. Const. art. XI-A, § 3, continues to be the primary legislative organ, for it has formulated and approved the legislative enactment referred to the people. The exercise of the legislative initiative power, however, completely circumvents the legislative body, thereby totally undermining its status as the primary legislative organ. Thus, the power to initiate legislation, unlike the referendum power, cannot be reconciled with Md. Const. art. XI-A, § 3.

Governments > Local Governments > Charters

Governments > Legislation > Initiative & Referendum

Governments > Local Governments > Administrative Boards

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN3[] Local Governments, Charters

The voters of a charter county cannot reserve to themselves the power to initiate legislation because such initiative conflicts with the terms of Md. Const. art. XI-A, § 3.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Governments > Local Governments > Charters

HN4[] Separation of Powers, Constitutional Controls

A county charter is equivalent to a constitution. The basic function of a constitution or a charter is to distribute power among the various agencies of government, and between the government and the people who have delegated that power to their government. A charter is the organic, the fundamental law, establishing basic principles governing relationships between the government and the people.

Governments > Local Governments > Charters

Governments > Legislation > Types of Statutes

HN5[] Local Governments, Charters

It is common for constitutions or charters to authorize, or preclude, specified types of enactments by legislative bodies. This is quite different from a charter itself containing all of the detailed provisions concerning the subject.

Governments > Local Governments > Charters

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Types of Statutes

Governments > Local Governments > Duties & Powers

HN6 **Local Governments, Charters**

A provision in a county charter placing restrictions upon the county council's revenue raising authority is a fundamental aspect of the form and structure of government and thus is proper charter material.

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN7 **State & Local Taxes, Real Property Taxes**

See Md. Code Ann., *Tax-Prop. § 6-302(a)*.

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN8 **State & Local Taxes, Real Property Taxes**

See Md. Code Ann., *Tax-Prop. § 6-308*.

Governments > Local
Governments > Administrative Boards

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

Governments > Local Governments > Charters

HN9 **Local Governments, Administrative Boards**

When a provision in a county charter conflicts with a public general law, the public general law prevails under *Md. Const. art. XI-A, § 1*. Nevertheless, wherever reasonably possible, courts will construe enactments so that there is no conflict. This principle avoids the need to invalidate one law or the other.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Severability

HN10 **Legislation, Expiration, Repeal & Suspension**

There is a strong presumption that if a portion of an enactment is found to be invalid, the intent is that such portion be severed. This presumption has never been limited solely to bills enacted by the General Assembly, but has been applied to local ordinances, charter amendments, and provisions of the state constitution invalidated under the federal constitution. This presumption applies even in the absence of an express clause declaring the drafters' intent that the enactment be severed if a portion is found to be invalid. Inclusion of a severability clause, reinforces the presumption.

Governments > Legislation > Expiration, Repeal & Suspension

HN11 **Legislation, Expiration, Repeal & Suspension**

When the dominant purpose of an enactment may largely be carried out notwithstanding the enactment's partial invalidity, courts will generally hold the valid portions severable and enforce them.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Local
Governments > Administrative Boards

Governments > Local Governments > Elections

HN12 **Legislation, Expiration, Repeal & Suspension**

The submission to the voters of a proposed charter amendment, in conflict with public general law, should be enjoined. Similarly, if a portion of a proposed charter amendment is invalid and severable, the appellate court has a duty to sever those portions when they are challenged.

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Goldman, Baltimore, amicus curiae, for Talbot County Taxpayers' Ass'n and the Tax Reform Initiative by Marylanders.

Roger D. Redden (Kurt J. Fischer, both on brief), Baltimore, David A. Plymyer, Deputy County Atty. (Stephen R. Beard, County Atty., both on brief), Annapolis, for respondents Smallwood, Roger D. Redden (Kurt J. Fischer, both on brief), Baltimore, Arnold Jablon, Co. Atty. (Stanley J. Schapiro, Deputy Co. Atty., Michael J. McMahon, Asst. Co. Atty., all on brief), Towson, for respondents **[***2]** Baltimore County.

Judges: Murphy, C.J., Eldridge, Cole, * Rodowsky, McAuliffe and Chasanow, JJ., and Charles E. Orth, Jr., Judge of the Court of Appeals (retired), Specially Assigned. Murphy, Chief Judge, dissenting. Chasanow, Judge, concurring in part and dissenting in part.

Opinion by: ELDRIDGE

Opinion

[*228] OPINION

ELDRIDGE, Judge.

These cases involve the validity of charter amendments proposed, pursuant to the *Maryland Constitution, Art. XI-A, § 5*, [1] by petitions of the voters of Baltimore and Anne Arundel Counties respectively. This opinion sets forth the reasons underlying the Court's order requiring each county's Board of Election Supervisors to place proposed "Property Tax Limitation" charter amendments on the ballots for the 1990 general election. Also addressed is this Court's order prohibiting the Anne Arundel County Board of Supervisors of Elections from placing a "Ballot Initiative Amendment" on the ballot.

[*3]** I.

As this opinion encompasses two distinct appeals, the facts and procedural history of each case will be addressed separately.

A.

On July 5, 1990, the Baltimore County Citizens for Representative Government (BCCRG) submitted a petition to place a Property Tax Limitation charter amendment on the **[*229]** 1990 general election ballot. [2] **[***5]** The Board of Election Supervisors reviewed the

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* Cole, J., now retired, participated in the hearing, conference and decision of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the adoption of this opinion.

[1] Section 5 of Art. XI-A provides in relevant part as follows:

> "Section 5. Amendments to charters.
>
> Amendments to any charter adopted by the City of Baltimore or by any County of this State under the provisions of this Article may be proposed by a resolution of the Mayor of Baltimore and the City Council of the City of Baltimore, or the Council of the County, or by a petition signed by not less than 20% of the registered voters of the City or County, provided, however, that in any case 10,000 signatures shall be sufficient to complete a petition. * * *."

[2] The petition proposed that the following language be added to § 710 of the Baltimore County Charter:

> "(d) Property Tax. Notwithstanding any other provision of this Charter, commencing on July 1, 1991, and for the tax year 1991-1992, the County property tax may not exceed the property tax realized by the County for the tax year 1989-1990, except as provided in subparagraph (1) and (2) herein:
>
> (1) For the tax year 1992-1993, and for succeeding years the County property tax may be increased, but by no more than 2 percent per year.
>
> (2) In any tax year subsequent to tax year 1991-1992, the county may increase the property taxes by no more than 2 percent provided such increase is put to referendum by the County and is approved by not less than two thirds of the qualified registered voters in the County.
>
> (3) The limitation provided for in subparagraph (d) above shall not apply to property taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.
>
> (4) If any paragraph, part, clause or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining portions of the law shall not be affected but will

petition and found that it contained the requisite number of signatures. [3] The proposed charter amendment would have altered § 710 of the Baltimore County charter. Section 710 of the charter provides that when the county budget has been finally adopted, the county council shall levy and raise the amount of taxes required by the budget. The proposed amendment would have required the property tax revenues for the tax year 1991-1992 to be limited to the amount of property tax revenues realized for the tax year 1989-1990; it would not have allowed the tax revenues to be raised by more than 2% per year, beginning with tax year 1992-1993. An "escape clause" would have permitted the county council to increase property taxes by more than the 2% maximum when at least two-thirds of the qualified registered **[***4]** voters in the county approved the increase by referendum. The proposed amendment to § 710 of the Baltimore County charter also **[*230]** contained a severability provision in the event that any portion of the proposed amendment were found to be invalid.

On August 16, 1990, Baltimore County and nine individual taxpayers filed a complaint in the Circuit Court for Baltimore County. The plaintiffs sought a declaration that the proposed amendment to the **[**1227]** charter of Baltimore County was void because it violated Art. XI-A of the Maryland Constitution and/or because it conflicted with Maryland Code (1986), *§ 6-302(a)* and *§ 6-308 of the Tax-Property Article.* The plaintiffs also requested an injunction prohibiting the placement of the amendment on the general election ballot.

On August 31, 1990, the circuit court declared that the proposed amendment violated both the Maryland Constitution and the Tax-Property Article of the Maryland Code and therefore could not be on the ballot. Nevertheless, the court directed the Board of Supervisors of Elections of Baltimore County not to remove the proposed tax limitation amendment from the ballot until the earlier of October 5, 1990, [4] or a decision as to the **[***6]** validity of the amendment by this Court. On the same day, the BCCRG noted an appeal to the Court of Special Appeals. Prior to any proceedings in the Court of Special Appeals, Baltimore County filed in this Court a petition for writ of certiorari which we granted on September 6, 1990.

B.

The facts and procedural history surrounding the Anne Arundel County case are similar. On July 20, 1990, the Anne Arundel Taxpayers for Responsive Government (AATRG) submitted petitions to place a Property Tax Limitation **[*231]** charter amendment [5] and a Ballot Initiative charter amendment on the 1990 general election ballot.

[*7]** Section 710 of the Anne Arundel County charter requires the County Council to maintain a balanced budget. The section also exempts from executive veto

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remain in full force and effect."

[3] The requisite number of signatures required 20% of the registered voters of the County, or 10,000, whichever is less. *See* note 1, *supra.*

[4] October 5, 1990, was the latest date by which the Board of Supervisors of Elections must have been informed of all items which would be placed on the November 6, 1990, election ballot.

[5] The petition proposed that the following language be added to § 710 of the Anne Arundel County Charter:

"[d] Property Tax

"(1) Notwithstanding any other provision of this article, commencing on 1 July 1991 (tax year 1991-1992), the County Council may not establish property tax rates which would provide more property tax revenues than were raised during the 1988-1989 tax year, except as provided in subparagraphs [a] and [b] below:

"[a] The Constant Yield Tax Rate, as currently specified by the Tax-Property Article of the Annotated Code of Maryland, shall continue as the method of assurance that revenue derived from the property tax remains at a constant level from one year to the next. The provisions of the Tax-Property Article of the Annotated Code of Maryland which permit local taxing authorities to increase property tax rates above the Constant Yield Tax Rate shall be used by the Anne Arundel County Council in the following manner: Commencing 1 July 1992, and applicable to subsequent tax years, the Council may set an annual tax rate which exceeds the Constant Yield Tax Rate by a value which will permit property tax revenues to increase by (1) a percentage corresponding to the immediately previous January Consumer Price Index, U.S. City Average, percentage of change from the preceding January, as computed by the Department of Labor (or other widely accepted index that measures from time to time the rate of inflation), or (2) by 4.5 percent, whichever is the lesser amount.

"[b] In any tax year subsequent to 1992, the County Council may increase property tax revenues for that year by an amount greater than that stated in paragraph (d) herein by referring a specific revenue increase to a referendum of the qualified voters of the County."

any ordinance that levies taxes required to balance the budget. The proposed amendment to § 710 of the Anne Arundel County charter would have limited property tax revenues for the tax year 1991-1992 to the amount of property revenues raised during the 1988-1989 tax year. The proposal would have placed the tax cap provision of the amendment in the context of the constant yield tax rate provided for in the Tax-Property Article of the Annotated Code of Maryland. Specifically, beginning with tax year 1992-1993, the Anne **[*232]** Arundel County Council could not have allowed property tax revenues to exceed the constant yield rate by a value greater than the increase in the Consumer Price Index from the preceding January, or by 4.5%, whichever would be less. The proposed Anne Arundel County amendment also contained an "escape clause" that would have allowed the county council to exceed the cap upon approval by **[**1228]** the qualified voters of the county in a referendum.

The second Anne Arundel County proposed charter amendment would **[***8]** have amended § 308 of the county charter. Section 308 reserves to the voters of Anne Arundel County the right of referendum regarding legislation passed by the county council. The proposed amendment would have given the voters of Anne Arundel County the power to initiate legislation which would not be subject to the veto power of the County Executive, and which could only be amended or repealed by an affirmative vote of all seven members of the county council. [6]

[*9]** On August 6, 1990, four individual taxpayers and Anne Arundel County filed in the Circuit Court for Anne Arundel County a complaint and motion for summary judgment. The plaintiffs sought injunctive and declaratory relief, alleging that both of the proposed amendments were invalid because they violated the Maryland Constitution. The plaintiffs further contended that the Property Tax Limitation amendment was in conflict with *§§ 6-302(a)* and *6-308* of the Tax-Property Article of the Maryland Code.

On August 30, 1990, the Circuit Court for Anne Arundel County declared that both proposed amendments were unconstitutional. **[*233]** The court entered an injunction prohibiting the Board of Supervisors of Elections of Anne Arundel County from placing either proposed amendment on the 1990 general election ballot. The same day, AATRG filed a notice of appeal to the Court of Special Appeals. Before any proceedings in the Court of Special Appeals, Anne Arundel County and the individual taxpayers filed a petition for a writ of certiorari which was granted by this Court on September 6, 1990.

C.

The oral arguments for the Baltimore County and Anne Arundel County appeals were advanced to September **[***10]** 19, 1990. On appeal, the parties addressed the standing of the plaintiffs, the constitutionality of the charter amendments, the potential conflict of the charter amendments with public general law, and the possibility of severing any portions found to be invalid. [7]

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[6] Initiative refers to the process by which the electorate petitions for and votes on a proposed law. Referendum is the process by which legislation passed by the governing body is submitted to the electorate for approval or disapproval. O.M. Reynolds, Jr., *Handbook of Local Government Law*, §§ 203, 204 (1982). *See also* Cheeks v. Cedlair Corp., 287 Md. 595, 613 n. 9, 415 A.2d 255, 264 n. 9 (1980) (defining initiative); Ritchmount Partnership v. Board, 283 Md. 48, 60, 388 A.2d 523, 531 (1978) (defining referendum). *See generally* Bd. of Election Laws v. Talbot County, 316 Md. 332, 347-351, 558 A.2d 724, 731-733 (1989).

[7] The defendants in both cases contested the standing of Baltimore County and Anne Arundel County to challenge the validity of the proposed charter amendments. As previously stated, however, individual taxpayers in each county also contested the proposed amendments' validity. Individual taxpayers have standing to sue for an injunction against submitting a proposal to the electorate; otherwise, they would be "put to wrongful expense for the publication of the referendum and the printing of it on the ballots of the next general election." Sun Cab Company v. Cloud, 162 Md. 419, 422, 159 A. 922, 923 (1932). *See also* Bd. of Election Laws v. Talbot County, supra, 316 Md. at 341-342, 558 A.2d at 728-729; State v. Burning Tree Club, Inc., 315 Md. 254, 292, 554 A.2d 366, 385, *cert. denied*, ***493 U.S. 816, 110 S.Ct. 66, 107 L.Ed.2d 33 (1989)***; Inlet Associates v. Assateague House, 313 Md. 413, 441, 545 A.2d 1296, 1310 (1988); Citizens P. & H. Ass'n v. County Exec., 273 Md. 333, 338-343, 329 A.2d 681, 684-687 (1974).

It is a long established rule that "[w]here there exists a party having standing to bring an action or take an appeal, we shall not ordinarily inquire as to whether another party on the same side also has standing." Board v. Haberlin, 320 Md. 399, 404, 578 A.2d 215, 217 (1990). *See also* Sugarloaf v. Waste Disposal, 323 Md. 641, 650 n. 6, 594 A.2d 1115, 1119 n. 6 (1991); State v. Burning Tree Club, Inc., supra, 315 Md. at 291, 554 A.2d at 385; ***Montgomery County v. Board of Elections, 311 Md. 512, 516 n. 3, 536 A.2d 641, 643 n. 3 (1988)***; State's Atty v. City of Balto., 274 Md. 597, 602, 337

[***11] [*234] At the conclusion of oral arguments, we affirmed the portion of the judgment of the Circuit Court for Anne Arundel County which prohibited the Board of Election Supervisors of Anne Arundel County from placing the proposed Ballot Initiative [**1229] amendment on the ballot. Otherwise, we reversed the judgments of the circuit courts and required the Boards of Supervisors of Elections of Baltimore County and Anne Arundel County to place the respective proposed Property Tax Limitation charter amendments, with certain invalid portions severed, on the 1990 general election ballot. [8]

II.

The proposed Anne Arundel County Ballot Initiative charter amendment attempted to reserve to the voters of that county "the power to propose public local laws in the same manner as provided for the County Council . . . and to adopt or reject [***12] the same, at the [next county-wide election]." The effect of the proposed amendment would have been to allow voter-initiated legislation in Anne Arundel County. Anne Arundel County and the individual plaintiffs argued that the amendment violated *Art. XI-A, § 3, of the Maryland Constitution*, and thus was invalid. [9]

[***13] [*235] In *Bd. of Election Laws v. Talbot County, 316 Md. 332, 348-350, 558 A.2d 724, 732-733 (1989)*, this Court flatly held that § 216 of the Talbot County charter, authorizing voter-initiated legislation, was "manifestly repugnant" to *Art. XI-A, § 3, of the Maryland Constitution.* Quoting from the opinion in *Cheeks v. Cedlair Corp., 287 Md. 595, 613, 415 A.2d 255, 264 (1980)*, we stated (*316 Md. at 349, 558 A.2d at 732*):

> *HN2*[↑]
>
> "'The powers of referendum and initiative, though each may affect the form or structure of local government, are otherwise distinctly different. Under the referendum power, the elective legislative body, consistent with § 3, continues to be the primary legislative organ, for it has formulated and approved the legislative enactment referred to the people. The exercise of the legislative initiative power, however, completely circumvents the legislative body, thereby totally undermining its status as the primary legislative organ.' Thus, we held that 'the power to initiate legislation, unlike the referendum power, cannot be reconciled with § [***14] 3.'"

[*236] *Talbot County* is precisely on point, and is determinative of the ballot initiative issue here. *See also*

A.2d 92, 96 (1975), and cases there cited.

[8] We note that both of the proposed Property Tax Limitation charter amendments were rejected by the voters of Anne Arundel and Baltimore Counties at the November 1990 general election.

[9] *HN1*[↑] *Art. XI-A, § 3, of the Maryland Constitution* provides in relevant part as follows:

> **"Section 3. Legislative bodies; chief executive officers; enactment, publication and interpretation of local laws.**
>
> "Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any county shall be known as the County Council of the County. The chief executive officer, if any such charter shall provide for the election of such executive officer, or the presiding officer of said legislative body, if such charter shall not provide for the election of a chief executive officer, shall be known in the City of Baltimore as Mayor of Baltimore, and in any County as the President or Chairman of the County Council of the County, and all references in the Constitution and laws of this State to the Mayor of Baltimore and City Council of the City of Baltimore or to the County Commissioners of the Counties, shall be construed to refer to the Mayor of Baltimore and City Council of the City of Baltimore and to the President or Chairman and County Council herein provided for whenever such construction would be reasonable. From and after the adoption of a charter by the City of Baltimore, or any County of this State, as hereinbefore provided, the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said City or County enacted by the General Assembly, upon all matters covered by the express powers granted as above provided; provided that nothing herein contained shall be construed to authorize or empower the County Council of any County in this State to enact laws or regulations for any incorporated town, village, or municipality in said County, on any matter covered by the powers granted to said town, village, or municipality by the Act incorporating it, or any subsequent Act or Acts amendatory thereto. * * *"

Griffith v. Wakefield, 298 Md. 381, 470 A.2d 345 (1984); *Ritchmount Partnership v. Board, 283 Md. 48, 388 A.2d 523 (1978)*; *Rowe v. Chesapeake & [**1230] Potomac Tel. Co., 56 Md.App. 23, 466 A.2d 538 (1983)*.

We reiterate that ***HN3***[↑] the voters of a charter county cannot reserve to themselves the power to initiate legislation because such initiative conflicts with the terms of *Art. XI-A, § 3, of the Maryland Constitution.* Therefore, the proposed Ballot Initiative amendment was unconstitutional, and the injunction prohibiting the Board of Election Supervisors of Anne Arundel County from placing it on the general election ballot was proper.

III.

The proposed Property Tax Limitation charter amendments in Baltimore and Anne Arundel Counties would have placed a percentage cap on the amount of local property tax revenues to be raised each year. The plaintiffs in both cases attacked the proposed Property Tax Limitation amendments **[***15]** on two grounds. First, they asserted that a limitation on the taxing power of the county councils is not proper charter material, and thus is repugnant to Art. XI-A of the Maryland Constitution. Relying on *Griffith v. Wakefield, supra, 298 Md. at 385, 388, 470 A.2d at 348-349*, and *Cheeks v. Cedlair Corp., supra, 287 Md. at 606-607, 415 A.2d at 261*, the plaintiffs argued that a charter is intended to establish "the form and structure of government" and that the proposed amendments would not have changed "the form and structure" of the counties' governments. Second, the plaintiffs claimed that the proposed tax limitation amendments conflicted with public general law, namely *§§ 6-302(a)* and *6-308* of the Tax-Property Article of the Maryland Code.

A.

The tax cap portion of the proposed tax limitation amendments constituted proper charter material. We have **[*237]** repeatedly explained that ***HN4***[↑] a county charter is equivalent to a constitution. *Bd. of Elections Laws v. Talbot County, supra, 316 Md. at 341, 558 A.2d at 728*; *County Exec., Prince Geo's Co. v. Doe, 291 Md. 676, 680, 436 A.2d 459, 461 (1981)*; **[***16]** *Cheeks v. Cedlair Corp., supra, 287 Md. at 606, 415 A.2d at 261*; *Ritchmount Partnership v. Board, supra, 283 Md. at 58, 388 A.2d at 530*; *Harford County v. Schultz, 280 Md. 77, 85, 371 A.2d 428, 432 (1977)*; *Anne Arundel County v. Moushabek, 269 Md. 419, 422, 306 A.2d 517, 519 (1973)*. The basic function of a constitution or a charter is to distribute power among the various agencies of government, and between the government and the people who have delegated that power to their government. As Chief Judge Murphy stated for the Court in *Cheeks v. Cedlair Corp., supra, 287 Md. at 607, 415 A.2d at 261*:

> "A charter . . . is the organic, the fundamental law, establishing basic principles governing relationships between the government and the people."

The proposed Property Tax Limitation amendments directly involved the relationship between the people and the government by limiting the power of the government to tax.

Limitations imposed by the people on their **[***17]** government are fundamental elements of a constitution. *See, e.g., Marbury v. Madison, 1 Cranch 137, 176-177, 2 L.Ed. 60, 73 (1803)*; *The Federalist*, Nos. 78, 81, 84 (1788) (Alexander Hamilton). [10] **[***19]** **[**1231]** The Maryland Declaration of Rights and the **[*238]** *Bill of Rights to the United States Constitution* largely represent limitations on governmental power. In fact, the desire of the people to limit the government's ability to tax was a major cause of the American Revolution. "There was no colony of English America, in which the claim of the inhabitants, to exemption from all taxation not sanctioned by their assent, was more familiar than in Maryland." [11] The Constitution of the United States, [12]

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[10] Thus, even those who are particularly known for having favored broad constructions of the federal constitution have recognized that an essential -- perhaps the essential -- function of a constitution is to limit government power.

In *Marbury v. Madison, supra, 1 Cranch at 176, 2 L.Ed. at 73*, Chief Justice John Marshall, after pointing out that the government of the United States is one with "certain limits not to be transcended," went on to say: "that those limits may not be mistaken, or forgotten, the constitution is written." Later the Chief Justice emphatically stated that if constitutional limitations on legislative power are not enforceable, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." *1 Cranch at 177, 2 L.Ed. at 73*.

In No. 84 of *The Federalist*, Alexander Hamilton argued extensively that the federal constitution, by only delegating certain powers to the federal government, represented essentially a limitation upon governmental powers. He stated "that the constitution is itself, in every rational sense, and to every useful purpose, *a bill of rights*." (Emphasis in original).

[11] J. McMahon, *Historical View of the Government of Maryland*, 326 (1831).

the Constitution of Maryland, [13] and the charters of Anne Arundel and Baltimore counties, [14] are replete with provisions limiting the power of governments to raise and appropriate revenue. Thus, a limitation on the power of a legislative body to raise revenue is at the heart of the form and structure of our government and thus is proper charter material. *See* Bd. of Election Laws v. Talbot County, supra, 316 Md. at 347-348, 558 A.2d at 731-732; **[***18]** Griffith v. Wakefield, supra, 298 Md. at 389, 470 A.2d at 350; Cheeks v. Cedlair Corp., supra, 287 Md. at 606-608, 415 A.2d at 261-262; Ritchmount Partnership v. Board, supra, 283 Md. at 58, 388 A.2d at 530.

Neither Griffith v. Wakefield, supra, nor Cheeks v. Cedlair Corp., supra, upon which the plaintiffs rely, are to the contrary. As Judge Rodowsky noted in his dissent in **[*239]** Griffith v. Wakefield, supra, 298 Md. at 390-391, 470 A.2d at 350-351, "the majority opinion does not conflict" with the conclusion that taking fiscal power away from the county council is "bedrock charter material" that "alters the form and structure of government . . . in a **[***20]** most fundamental way." Instead both *Griffith v. Wakefield* and *Cheeks v. Cedlair Corp.* were concerned with attempts by the voters to initiate detailed legislation through the guise of charter amendments.

In *Cheeks v. Cedlair Corp.*, this Court invalidated a proposed amendment to the Baltimore City charter which would have created a tenant-landlord commission and would have imposed a comprehensive system of rent control. We held that the proposed amendment was an attempt to "divest the [City] Council of its acknowledged . . . power to legislate on the subject of rent control." 287 Md. at 609, 415 A.2d at 262. Thus, the proposed amendment was essentially legislative in nature and not valid charter material.

The proposed charter amendment in *Griffith v. Wakefield* sought to create a system of binding arbitration for Baltimore County and the fire fighters' union. The proposal set forth in detail the entire system of arbitration and left "nothing for the determination of the County Executive or the County Council." 298 Md. at 386, 470 A.2d at 348. The Court held that the amendment was invalid **[***21]** because it was "'essentially legislative in character;' [and] it [was] a complete and specifically detailed legislative scheme." 298 Md. at 388, 470 A.2d at 349. In distinguishing Maryland Cl. Emp. Ass'n v. Anderson, 281 Md. 496, 380 A.2d 1032 (1977), the Court stated (298 Md. at 389, 470 A.2d at 350):

> HN5[↑]
>
> "It is common for constitutions or charters to authorize, or preclude, specified types of enactments by legislative bodies. This is quite different from a charter itself containing all of the detailed provisions concerning the subject."

See also Harford County v. Board, 272 Md. 33, 39, 321 A.2d 151, 154 (1974) ("It is not uncommon for people to **[*240]** write into their basic charter a restriction upon the powers of their legislative body"); Bell v. Arel, 123 N.H. 311, 316, 461 A.2d 108, 110-111 (1983) (citizens may require limits on taxation as long as no impairment of the city's ability to carry out its mandatory obligations will occur); E. McQuillin, *The Law* **[**1232]** **[***22]** *of Municipal Corporations*, § 44.26 (3rd ed. 1984) ("A common express restriction upon the municipal power to tax is one limiting the amount or the rate that may be imposed in any one year. The validity of such a provision generally is sustained").

The proposed Property Tax Limitation amendments at issue here did not suffer from the same weakness as was presented by the proposed amendments in *Cheeks* and *Griffith*. These proposed tax limitation amendments were not back-door attempts by the voters of Baltimore and Anne Arundel Counties to enact detailed legislation. Nor did they divest the county councils of the ability to set the property tax rates. Rather, each would have merely precluded a particular type of enactment by the legislative body, namely the power to collect property taxes above the specified cap.

There are also practical difficulties with the plaintiffs' position that the proposed Property Tax Limitation amendments would have impermissibly infringed on the legislative power conferred on the county councils by Art. XI-A and thus were not proper charter material. Acceptance of the plaintiffs' arguments that limits cannot

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[12] Article I, § 7, cl. 1; Article I, § 8, cl. 1; Article I, § 9, cls. 1, 4, 5, 6; Article I, § 10, cls. 2, 3.

[13] Declaration of Rights: Articles 14, 15; Constitution: Article II, § 17; Article III, §§ 32, 34, 51, 52, 54; Article VIII, § 3; Article XI, § 7; Article XI-E, § 5; Article XI-F, §§ 8, 9.

[14] Anne Arundel County Charter, §§ 608, 704, 709, 710, 718 and 719; Baltimore County Charter, §§ 704, 709, 710, 716 and 717.

be placed on the budgetary and fiscal **[***23]** authority of county councils would result in the invalidation of many existing provisions in county charters which, as previously noted, limit the power of the county councils in these areas. For example, the executive budget system, in effect in several counties, places a greater restriction on the fiscal power of the county councils than these proposed Property Tax Limitation amendments would have. Under the executive budget system, the county executive prepares and submits a budget for each fiscal year. *See* Baltimore County Charter, § 706; Anne Arundel County Charter, § 706. The county **[*241]** council has "no power to change the form of the budget as submitted by the county executive, to alter the revenue estimates except to correct mathematical errors, or to increase any expenditure recommended by the county executive for current or capital purposes." Baltimore County Charter, § 709; Anne Arundel County Charter, § 709. Various other limitations on the fiscal powers of the two county councils are contained in their charters. *See* note 14, *supra*.

Consequently, we hold that ***HN6***[↑] a provision in a county charter placing restrictions upon the county council's revenue raising **[***24]** authority is a fundamental aspect of the form and structure of government and thus is proper charter material.

B.

The proposed Property Tax Limitation amendments also were challenged on the ground that they conflicted with public general law, Code, §§ 6-302(a) and 6-308 of the Tax-Property Article. [15]

[*25]** **[*242]** **[**1233]** We have on numerous occasions pointed out that ***HN9***[↑] "[w]hen a provision in a county charter conflicts with a public general law, the public general law prevails under Art. XI-A, § 1." *Rosecroft Trotting & Pacing v. P.G. County, 298 Md. 580, 599, 471 A.2d 719, 729 (1984)*. *See also Montgomery County v. Board of Elections, 311 Md. 512, 514, 536 A.2d 641, 642 (1988)*; *East v. Gilchrist, 296 Md. 368, 374, 463 A.2d 285, 288 (1983)*; *Wilson v. Bd. of Sup. of Elections, 273 Md. 296, 301, 328 A.2d 305, 308 (1974)*; *Schneider v. Lansdale, 191 Md. 317, 61 A.2d 671 (1948)*. Nevertheless, "[w]herever reasonably possible, courts will construe enactments so that there is no conflict. This principle avoids the need to invalidate one law or the other." *Town of Forest Heights v. Frank, 291 Md. 331, 337, 435 A.2d 425, 428 (1981)*; *Wilson v. Bd. of Sup. of Elections, supra, 273 Md. at 301, 328 A.2d at 308*. **[***26]**

Section 6-302(a) of the Tax-Property Article provides that the government body of a county shall set the tax rate on property for the next taxable year. The proposed tax limitation amendments would not have conflicted with this provision. If the proposed amendments had been adopted, the county councils of Baltimore and Anne Arundel Counties could still have exercised discretion to determine the tax rates on property for the next taxable year. A limitation would

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[15] ***HN7***[↑] *Section 6-302(a)* provides:

> "(a) *In general.* -- Except as otherwise provided in this section and after complying with § 6-305 of this subtitle, in each year after the date of finality and before the following July 1, the Mayor and City Council of Baltimore City or the governing body of each county annually shall set the tax rate for the next taxable year on all assessments of property subject to that county's property tax."

HN8[↑]

Section 6-308 provides in relevant part as follows:

> "*§ 6-308*. Constant yield tax rate.
>
> "(b) *In general.* -- (1) Unless the requirements of this section are met, a taxing authority may not set a county or municipal corporation property tax rate that exceeds the constant yield tax rate in any taxable year excluding revenue from property appearing for the first time on the assessment roll . . . .
>
> "(c) *Notice of rate change.* -- If a taxing authority intends to set a county or municipal corporation property tax rate that exceeds the constant yield tax rate, it shall advertise to the public . . . .
>
> * * *
>
> "(e) *Contents of notice.* -- The notice shall state:
>
> (1) that the meeting is being held to hear comments regarding an increase in the county or municipal corporation property tax rate that will make the rate exceed the consent [sic] yield tax rate; and
>
> (2) the day, time, and location of the meeting.
>
> * * *
>
> "(g) *Adoption of tax rate.* -- After the meeting, the taxing authority may adopt by law an increase in the county or municipal corporation property tax rate that exceeds the constant yield tax rate . . . ."

simply have been placed on this power, so that the increase in property tax revenue for the next tax year could not have exceeded 2% in Baltimore County or 4.5% in Anne Arundel County. The proposed tax limitations would not have had the effect of allowing the electorate of the two counties to set the tax rates. As required by *§ 6-302(a)*, the legislative body in each county would continue to set the **[*243]** tax rate on property. There is no language in the statute indicating that reasonable limits cannot be placed on the legislative power to set the tax rate.

Nor do we agree with the plaintiffs' argument that the proposed Property Tax Limitation amendments conflicted with *§ 6-308 of the Tax-Property Article.* Both Baltimore **[***27]** and Anne Arundel Counties contended that *§ 6-308(g)* constitutes an affirmative grant of power authorizing the county councils to adopt an increase in the property tax rate which exceeds the constant yield rate. We have previously held, however, that *§ 6-308(g)* represents a *limitation* on the taxing power of a county. *Garrett County v. Bolden, 287 Md. 440, 446-447, 413 A.2d 190, 193 (1980)*. We stated that the purpose of *§ 6-308* "is to focus public attention from one year to the next on the interrelationship between the rate of property tax and the assessable basis in a period of rising property values." *Ibid.* Contrary to the plaintiffs' interpretation, *§ 6-308* specifies detailed procedural requirements with which a county governing body must comply before it will be permitted to increase the tax rate above the constant yield rate. The proposed tax limitation amendments would have also limited the power of the county councils to raise the tax rate above the constant yield rate. Since *§ 6-308* is a procedural provision limiting a county's authority, rather than an affirmative grant of power, it does not conflict with the proposed **[***28]** Property Tax Limitation amendments.

C.

We hold that the tax cap portions of the proposed Property Tax Limitation amendments were facially valid because they constituted proper charter material and did not conflict with public general law. Nevertheless, we render no opinion as to the validity of the tax caps as they might have been applied in practice. County governments are required by state law to provide many public services such as public education, police and fire protection services, **[*244]** water and sewage services, etc. If it is subsequently demonstrated in a particular case that a local limitation on property tax revenues so hampers a county government that it cannot perform the duties required under state law, a tax limitation charter provision may well be found to be invalid as applied. *See* E. McQuillin, *The Law of Municipal Corporations, supra*, at § 44.26.

[1234]** IV.

While the tax cap portion of the proposed Property Tax Limitation amendments were valid, there were two aspects of the amendments that were inconsistent with public general law and thus were invalid. Those portions of the amendments, however, were severable.

A.

The "roll back" provisions **[***29]** of the proposed amendments would have limited the amount of property tax revenues for the tax year 1991-1992 to no more than the amount collected in the tax year 1989-1990 for Baltimore County, and no more than that collected in the tax year 1988-1989 for Anne Arundel County. These provisions violated *§ 6-302(a) of the Tax-Property Article* which mandates that the governing body of each county is to set the property tax rate for the next tax year. Unlike the tax cap provisions that would have simply placed a limit on the taxing power of each county council, the roll back provisions would have transferred the county councils' *§ 6-302(a)* powers to the voters. Instead of the councils setting the tax rates, the roll back provisions would have allowed the voters of Baltimore and Anne Arundel Counties to set the property tax rates for the tax year 1991-1992.

In addition, each county's proposed amendment included an escape clause that would have allowed the county councils to increase the property tax rates in any given tax year above the rate specified in the tax cap by referring the proposed increase to the voters for approval. The escape **[*245]** clause provisions were invalid for **[***30]** the same reason that the roll back provisions were invalid. *Section 6-302(a) of the Tax-Property Article* requires that a county's tax rate be set by the governing body of the county. The effect of the escape clause provisions would have been that, even if a county council would determine in any given year that it is necessary to raise the tax rate above the limit specified by the cap, the voters of the county would have decided whether the rate would be raised to particular levels above the caps or would remain at cap levels. Thus, in essence, the voters would be setting the tax rate for that year.

In light of our conclusion that the escape clause provisions violated public general law, we need not deal with other issues that were raised concerning the validity of the escape clauses.

B.

Both the invalid roll back and the invalid escape clause provisions were severable from the valid portions of the proposed Property Tax Limitation amendments. ***HN10***[↑] There is a strong presumption that if a portion of an enactment is found to be invalid, the intent is that such portion be severed. *Sugarloaf Citizens Assoc. v. Gudis, 319 Md. 558, 574, 573 A.2d 1325, 1333 (1990)*; **[***31]** *Porten Sullivan Corp. v. State, 318 Md. 387, 410, 568 A.2d 1111, 1122 (1990)*; *State v. Burning Tree Club, Inc., 315 Md. 254, 297, 554 A.2d 366, 387 (1989)*; *O.C. Taxpayers v. Ocean City, 280 Md. 585, 600, 375 A.2d 541, 550 (1977)*. This presumption has never been limited solely to bills enacted by the General Assembly, but has been applied to local ordinances, *Anne Arundel County v. Moushabek, supra, 269 Md. at 430, 306 A.2d at 523*, charter amendments, *O.C. Taxpayers v. Ocean City, supra, 280 Md. at 601-603, 375 A.2d at 550-551*, and provisions of the state constitution invalidated under the federal constitution, *Davidson v. Miller, 276 Md. 54, 83, 344 A.2d 422, 439 (1975)*. This presumption applies even in the absence of an express clause declaring the drafters' intent that the enactment be severed if a portion is found to be **[*246]** invalid. *Cities Service Co. v. Governor, 290 Md. 553, 575, 431 A.2d 663, 676 (1981)*; **[***32]** *O.C. Taxpayers v. Ocean City, supra, 280 Md. at 600, 375 A.2d at 550*. Inclusion of a severability clause, like the clause inserted in the proposed charter amendment in Baltimore County, reinforces the presumption. *Cities Service Co. v. Governor, supra, 290 Md. at 576, 431 A.2d at 676*; *O.C. Taxpayers v. Ocean City, supra, 280 Md. at 601, 375 A.2d at 550*.

[1235]** In addition to this general presumption, it is a settled principle that ***HN11***[↑] "[w]hen the dominant purpose of an enactment may largely be carried out notwithstanding the [enactment's] partial invalidity, courts will generally hold the valid portions severable and enforce them." *O.C. Taxpayers v. Ocean City, supra, 280 Md. at 601, 375 A.2d at 550*. *See also State v. Burning Tree Club, Inc., supra, 315 Md. at 297, 554 A.2d at 387-388*; *Cities Service Co. v. Governor, supra, 290 Md. at 576, 431 A.2d at 676*.

The dominant purpose of the proposed Property Tax Limitation **[***33]** amendments was to place a cap on property tax revenues. We have upheld the facial validity of these tax cap provisions. The purpose of the tax cap could have been carried out without the invalid roll back or escape clause provisions. Thus, under the principles set forth in the above-cited cases, we had a duty to sever the invalid provisions and allow the tax cap provisions to be submitted to the electorate at the November 1990 general election. [16]

[*34]** Despite these well established principles of severability, the plaintiffs argued that any invalid provisions should not be severed and that if any portion of the proposed **[*247]** amendment was invalid, the entire amendment should not be submitted to the electorate. In essence their argument was that severability principles did not apply to a proposed charter amendment. The severability principles discussed above are a fundamental part of the determination of validity. This court has "consistently taken the position that ***HN12***[↑] the submission to the voters of a proposed charter amendment, in conflict with public general law, should be enjoined." *Montgomery County v. Board of Elections, supra, 311 Md. at 518, 536 A.2d at 644*; *Wilson v. Bd. of Sup. of Elections, supra, 273 Md. at 300, 328 A.2d at 308*; *Planning Commission v. Randall, 209 Md. 18, 23-24, 120 A.2d 195, 198 (1956)*; *Schneider v. Lansdale, supra, 191 Md. at 322, 61 A.2d at 673*. Similarly, if a portion of a proposed charter amendment is invalid **[***35]** and severable, this Court has a duty to sever those portions when they are challenged. *See O.C. Taxpayers v. Ocean City, supra, 280 Md. at 600, 375 A.2d at 550*; *Shell Oil Co. v. Supervisor, 276 Md. 36, 48, 343 A.2d 521, 528 (1975)*; *Bringe v. Collins, 274 Md. 338, 351, 335 A.2d 670, 678 (1975)*.

This Court in *Schneider v. Lansdale, supra*, was confronted with the issue of whether portions of the proposed Montgomery County Charter conflicted with the Maryland Constitution. The Court held that the challenged portions of the Charter under consideration were valid and, therefore, did not need to reach the issue of whether and when to sever portions found to be invalid. The Court, however, did infer that this determination would be based upon whether any invalid portion was "so inseparable from the remainder that its invalidity makes the whole invalid." *Schneider v.*

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[16] We wish to point out that the Court did not rewrite, to suit itself, the proposed amendments in our Order of September 20, 1990. Instead, applying the principles set forth in the above-cited cases, we simply deleted the portions of the amendments which we found to be invalid. This necessitated changing some of the dates specified in the proposed amendments in order to eliminate the invalid roll back provisions. *But cf. The Sun*, October 9, 1990, editorial, p. 6A ("The Court of Appeals . . . took the unprecedented step of rewriting the referendum questions to suit the court's fancy.")

Lansdale, supra, 191 Md. at 323, 61 A.2d at 673.

Other language in *Schneider* arguably supports **[***36]** the idea that even if portions of a proposed charter amendment are invalid and capable of being severed, they should not be severed until after the election. Such language in *Schneider* was dicta. Moreover, to the extent that it could be interpreted to allow voters to vote on invalid portions of a charter amendment, it is inconsistent with subsequent decisions **[*248]** of this Court and is erroneous. *See, e.g., Montgomery County v. Board of Elections, supra, 311 Md. at 520, 536 A.2d at 645* ("Allowing a vote on proposed charter amendments which, if approved by the electorate, cannot go into effect because they conflict with higher law, would be to sanction 'straw votes' on a multitude of **[**1236]** public issues or potential issues"). Furthermore, submission of an amendment with invalid and severable portions intact would mislead the public during the election by asking them to vote on an amendment which, in its present form, was incapable of becoming part of their charter. We do not believe that it is appropriate to deceive the voters in this fashion.

We have determined in this case that severance of the invalid portions does **[***37]** not destroy the dominant purpose of the amendments and that they were not "so inseparable from the remainder that [their] invalidity makes the whole invalid." *Schneider, 191 Md. at 323, 61 A.2d at 673*. Thus, the invalid roll back provisions and the invalid escape clause provisions of the Property Tax Limitation amendments were severed. The tax cap provisions were properly submitted to the voters of Baltimore and Anne Arundel Counties at the November 6, 1990, general election.

Concur by: CHASANOW (In Part)

Dissent by: MURPHY; CHASANOW (In Part)

Dissent

Murphy, C. J., dissenting:

While I am in full accord with Part II of the Court's opinion, I disagree with the holding in Part III that the proposed "property tax limitations" charter amendments constitute a fundamental aspect of the "form and structure of government" and are, therefore, proper charter material. I share the view of the two circuit courts below, each of which held that the proposed amendments violated Art. XI-A of the Maryland Constitution. I, therefore, respectfully dissent from the Court's determination that the proposed charter amendments were valid and were properly submitted to the voters at the 1990 general election.

Art. XI-A, § 2 of the Maryland Constitution requires the General Assembly, by public general law, to provide a grant of express powers to counties which adopt a charter form of **[*249]** government. Pursuant to this constitutional provision, the Express Powers Act, Maryland Code (1990 Repl. Vol.), Art. 25A, § 5, was enacted and enumerated the express powers granted to the charter counties. Under § 3 of Art. XI-A, a county charter must provide for an elective legislative body, to be known as the county council; vested in it by this section is "full power to enact local laws" for the county upon all matters covered by the express powers granted under Art. 25A. Section 5(0) of Art. 25A authorizes the county council to assess; levy, and collect taxes through the enactment of local laws "as may be necessary for the support and maintenance of the county government."

Section 5 of Art. XI-A permits voter-initiated petitions to amend a county charter which, if adopted, become part of the charter. It is clear from our cases that a charter amendment authorized by this section "is necessarily limited in substance to amending the form or structure of government initially established by adoption of the charter." *Cheeks v. Cedlair Corp., 287 Md. 595, 607, 415 A.2d 255 (1980)*. A charter amendment, therefore, "differs in its fundamental character from a simple legislative enactment"; its content, we have said, "cannot transcend its limited office and be made to serve or function as a vehicle through which to adopt local legislation." *Id.* Thus, under § 3 of Art. XI-A, the elected county council, and not the electorate, is given the power to enact local laws upon "all matters covered by the express powers granted" to the county in Art. 25A. Consequently, the voters cannot by charter amendment divest the county council of its granted power to make laws governing the imposition of taxes by placing a property tax limitation in the county charter. As we said in *Cheeks, 287 Md. at 610*, "to allow the voters, through the charter initiative, rather than the legislative process, to exercise the full range of the [county's] express powers would plainly involve an excessive exercise of those precisely limited powers

granted to the [county], and specifically to the [county council] in its representative capacity." The exercise of the charter initiative **[*250]** power to limit the amount of taxes that may be collected to support the county government preempts the county council's law-making power in its determination of the tax imposition necessary to maintain and operate the county government.

[1237]** A charter form of government establishes the agencies of local government and provides for the allocation of powers among them. *Cheeks, 287 Md. at 606*. We there explained that a charter is a permanent document providing a broad organizational framework establishing the form and structure of government in pursuance of which the political subdivision is to be governed and local laws enacted. *Id. at 607*. It establishes basic principles governing relations between the government and the people and among the various governmental branches and bodies. *Id.*

As I see it, the proposed amendments are not addressed to the form or structure of the county government in any fundamental sense and are not, therefore, charter material within the contemplation of *§ 5 of Art. XI-A of the Maryland Constitution.* The substance of what is now before us, under the guise of charter amendments, constitutes nothing more than local laws, which the charter properly entrusts to the law-making body of the county, and not to the voters through a charter initiative; in other words, it is to the law-making body, and only to that body, which the charter commits the power, in that body's representative capacity, to determine the amounts essential to support and maintain the county government. *See also Griffith v. Wakefield, 298 Md. 381, 470 A.2d 345 (1984)*. If the electorate is dissatisfied with the performance of members of the legislative body, the remedy is through the ballot box at the next ensuing popular election.

CHASANOW, Judge, concurring in part and dissenting in part.

The issue decided by the trial courts in the instant case was whether the proposed cap amendments violate Article XI-A of the Maryland Constitution. **[*251]** The courts below answered that question in the affirmative, and this Court reverses that determination. I concur in Parts I through III of the court's opinion.

In Part IV, the majority coins the pejorative phrases -- "roll backs" and "escape clauses" -- and decides that roll backs as well as escape clauses violate a section of the Tax-Property Article and are therefore void. The majority goes on to rewrite the amendments petitioned for by over 20,000 registered voters, replaces them with the Court's cap amendments, and incidentally performs the county councils' function of drafting the form in which the amendments will be placed on the ballot. I respectfully dissent from this part of the Court's opinion.

ROLL BACK

The majority holds that "roll backs" conflict with Maryland Code (1986, 1991 Cum.Supp.), *Tax-Property Article, § 6-302(a)* and are therefore invalid. *Section 6-302(a)* provides:

> "(a) *In general.* -- Except as otherwise provided in this section and after complying with § 6-305 of this subtitle, in each year after the date of finality and before the following July 1, the Mayor and City Council of Baltimore City or the governing body of each county annually shall set the tax rate for the next taxable year on all assessments of property subject to that county's property tax."

The majority states: "*Section 6-302(a) of the Tax-Property Article* requires that a county's tax rate be set by the governing body of the county." Majority Op. at 22. Obviously, the majority does not mean that *§ 6-302(a)* grants a county council unlimited discretion to set the tax rate -- if so the entire cap amendment would be in conflict with this public general law and, therefore, invalid. The majority must then recognize that the right of the governing body to set the tax rate can be limited through a charter amendment.

[*252] None of the cap provisions, including the roll back, purport to deprive the governing body of authority to set property tax rates; however, they do establish a ceiling on the governing body's authority to set the property tax rates. If the right of taxpayers to establish a ceiling does not violate *§ 6-302(a)*, it is unclear why some ceilings (e.g., a rate based on revenues 2% over the 1990-91 fiscal year) are held permissible under *§ 6-302(a)* and some ceilings (e.g., a rate **[**1238]** based on revenues of the 1989-90 fiscal year or revenues of the 1988-89 fiscal year) are held impermissible under that section. I am sure the majority had the laudable purpose of assuring that the cap, if it went into effect, would not have too drastic an initial impact on tax revenues, but that benevolent purpose does not seem to be codified in *§ 6-302(a)*.

By implication, one vice of the "roll back" is the failure, in the first year that the cap would go into effect (tax year 1991-92), to allow the county councils the discretion to

increase property tax revenues up to 2% in Baltimore County and up to 4.5% in Anne Arundel County. Although the petitioned amendments provide this discretion commencing the tax year 1992-93 and for all subsequent years, the majority's order changes the petitioned amendments and inserts this discretion in the first year the cap amendments would go into effect. [1]

The second vice of the "roll back" is apparently the choice of the tax base year. The Baltimore County tax base year in the proposed charter amendment was 1989-90. The **[*253]** Anne Arundel County proposed charter amendment chose the tax base year of 1988-89. The majority strikes both of these chosen years, and substitutes in both Anne Arundel County and Baltimore County the tax base year 1990-91.

The majority does not explain why freezing the property tax revenues at those of the prior year violates *§ 6-302(a)*, "which mandates that the governing body of each county is to set the property tax rate for the next tax year," Majority Op. at 22, but simply giving the council authority to increase those fixed property tax revenues by up to 2% makes the provision valid. 2 Without any explanation of its reasoning, the majority also holds that it is improper under *§ 6-302(a)* to freeze the 1991-92 property tax revenues, and all future tax revenues at no more than 2% per year above the 1989-90 tax year (1988-89 in Anne Arundel County), but it is perfectly all right to simply substitute 1990-91 for 1989-90 and freeze the 1991-92 property tax revenues and all future property tax revenues at no more than 2% per year above the 1990-91 tax year. This, the majority tells us, was the intent of the legislature when they enacted S 6-302(a). I respectfully am unable to read these complex distinctions into that very simple statute.

I hope that the majority is not, without any opportunity for briefing or argument on the point, inadvertently voiding existing cap provisions. See Article VI, § 614 of the Talbot County Charter, as amended in 1978, which provides in part:

> "[T]he Council may not establish property tax rates which would provide more property tax revenues than were raised during the 1978-79 tax year, unless such additional revenues are the result of assessments on newly constructed property or other property not previously assessed." See also Article VIII, § 817B of the Prince George's County Charter, as amended in 1984, which provides in part:
> "(a) (1) Except as provided in this Section 817B, the Council shall not levy a real property tax which would result in a total collection of real property taxes greater than the amount collected in fiscal year 1979;
> (2) The council may levy a real property tax which would result in a total collection of real property taxes greater than the amount collected in fiscal year 1979 if the real property tax rate does not exceed Two Dollars and Forty Cents ($ 2.40) for each One Hundred Dollars ($ 100.00) of assessed value."

[*254]

ESCAPE CLAUSE

The majority holds that the "escape clause" which allows the county council to increase the property tax revenues above the cap in any given year by referring the increase to the voters for approval is invalid. **[**1239]** The reason why the "escape clause" is invalid, we are told by the majority, is again because "*§ 6-302(a) of the Tax-Property Article* requires that a county's tax rate be set by the governing body of the county." Majority Op. at 22. The Court reasons that, if we allow voters the authority to ratify a council's action in setting a tax rate above the cap in any given year, then "in essence, the voters would be setting the tax rate for that year." Majority Op. at 23. Thus, the majority holds the voters can vote to establish a cap by charter amendment and, in doing so, they *are not* setting the tax rate, but the voters cannot vote to remove the cap in any given year because, in doing so, they *are* setting the tax rate. That could not be the General Assembly's intent.

I believe that, if *§ 6-302(a)* allows the voters to establish a cap, then *§ 6-302(a)* allows the voters to remove the cap either permanently or for any given year by ratifying the council's action in setting a rate above the cap. Interestingly enough, the majority recognizes that there

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[1] The Baltimore County petitioned amendment had provided that "for the tax year 1992-1993, and for succeeding years the county property tax may be increased, but by no more than 2 percent per year." The majority changed the date the County Council could begin its 2 percent increase from tax year 1992-93 to tax year 1991-92, the date the act would have gone into effect. The Anne Arundel petitioned amendment had provided that, "commencing 1 July 1992, and applicable to subsequent tax years," the Council may increase the tax rate by up to the consumer price index or 4.5 percent whichever is the lesser. The majority changed the date the Council may begin the increase from 1 July 1992 to 1 July 1991, the date the amendment would have gone into effect.

are times when the cap might hamper the basic functioning of government, but instead of allowing the voters to grant relief in such a situation, the majority says, we *the courts,* not the voters, can abrogate the cap. The majority states:

> "If it is subsequently demonstrated in a particular case that a local limitation on property tax revenues so hampers a county government that it cannot perform the duties required under state law, a tax limitation charter provision may well be found to be invalid as applied."

Majority Op. at 21. If the courts have the power to abrogate the tax cap when it so "hampers a county government that it cannot perform the duties required under state law," surely the voters should have the same power. In enacting § 6-302(a), the legislature could not have intended that although the voters have the power to establish a cap, **[*255]** only the courts, not the voters, have the power to abrogate the cap if it is necessary in any given year.

The Court interprets the simple language of § 6-302(a) that "the governing body of each county annually shall set the, tax rate" as 1) allowing the voters to establish a cap; 2) requiring that the cap be based on revenues from the most recent tax year; 3) requiring that the cap authorize at least a 2% per year increase; and 4) prohibiting the voters from granting temporary relief from the cap through on an escape clause. The Court reads all this into the statute without the benefit of a single word of legislative history and without any explanation of its interpretive reasoning. In interpreting a statute, courts should use a magnifying glass, not a shoehorn. I am afraid that the Court is not *reading from* § 6-302(a) the cap requirements created by the *General Assembly*; it is instead *reading into* § 6-302(a) the cap requirements created by the *Court*.

REWRITING THE PROPOSED CHARTER AMENDMENTS

The majority states, "We wish to point out that the Court did not rewrite, to suit itself, the proposed amendments ... we simply deleted the portions of the amendments which we found to be invalid (which) ... necessitated changing some of the dates specified in the proposed amendments...." Majority Op. at 24-25 n.16. The Court apparently acknowledges rewriting the proposed amendments, but denies doing so "to suit itself." The changes made by the Court were so substantial that it felt compelled to order that the Court's rewritten amendments be placed on the ballot in substitution for the petitioned amendments endorsed by over 20,000 voters in Anne Arundel County and Baltimore County. What the majority is in effect saying is that they know over 20,000 voters in two counties wanted some tax cap amendment. The amendments petitioned for had invalid provisions, used a wrong tax base year, and failed to provide for county council discretion the first year of operation. The majority did not simply say the petitions were invalid; it **[*256]** drafted new statutorily permissible cap amendments acknowledging they were substantially different from the petitioned amendments, and ordered the Court's amendments be placed on the ballot. This benevolent paternalistic **[**1240]** assumption of judicial authority is, to say the least, unprecedented.

The fiscal effect of the Court's changes is substantial. The Baltimore County Charter Amendment petition signed by over 10,000 voters used the known previously determined property tax revenues realized for the tax year 1989-90 as the property tax base. The Court's amendment used the unascertained 1990-91 property tax revenues as a base. For the tax year 1991-92, instead of the property tax revenues being no more than the 1989-90 revenues, the property tax revenues can be as high as 2% above the 1990-91 revenues. The estimated difference is over 53 million dollars per year in increased property taxes.

In Anne Arundel County, the Charter Amendment petition signed by over 10,000 voters used the known previously determined 1988-89 property tax revenues as the property tax base. The Court's amendment used the unascertained 1990-91 property tax revenues as a base. For the tax year 1991-92, instead of the property tax revenues being no more than the 1988-89 revenues, the property tax revenues can be as high as 4.5% above the 1990-91 revenues. The estimated difference is over 30 million dollars per year in increased property taxes. Consequently, "changing some of the dates" substantially alters the proposed amendments in that each county could collect significantly more property taxes.

Even if the majority had only ordered deletions from the petitioned form of the charter amendments and had not ordered its other changes, the Court would still be totally disregarding its carefully reasoned analysis in *Schneider v. Lansdale, 191 Md. 317, 61 A.2d 671 (1948)*, the seminal case in Maryland on enjoining submission of petitioned amendments. In *Schneider*, there was a suit to enjoin the Board of Supervisors of Elections from submitting to the voters **[*257]** the proposed Montgomery County Charter. The circuit court had

determined that two provisions were invalid "but not so inseparable from the other part of the charter as to prevent the remainder from being submitted to the voters." *Id. at 321, 61 A.2d at 672*. The circuit court filed a decree deleting the invalidated provisions and directing the President of the County Commissioners to publish the charter as deleted and the Supervisors of Elections to submit it as deleted at the November election. This Court began its analysis by admonishing circuit court chancellors against doing the same thing the majority does in the instant case -- deleting part of an amendment and ordering only the valid portions be submitted to the voters. This Court was emphatic when Chief Judge Marbury, writing for a unanimous Court, stated:

> "The charter, as they have ordered it submitted to the voters, is emasculated, and is not the charter submitted by the Charter Board. We have been referred to no case which authorizes the courts to strike out, before submission, part of a proposed enactment which the people are to vote upon. *If they find such proposal partly invalid they may so hold but they cannot delete the invalid part and submit the remainder*. The only charter which can be submitted, if any, is the one drafted by the Charter Board without deletions." (Emphasis added).

Id. at 323, 61 A.2d at 673. The Court also made it clear that, where parts of a petitioned charter or charter amendment are invalid, a court's task is to determine whether the invalid parts are "so inseparable from the remainder that its invalidity makes the whole invalid." Id. If the invalid part makes the whole amendment invalid, nothing is submitted to the voters. If the invalid part does not invalidate the entire amendment, the proposed amendment as drafted by the petitioners, not as drafted by the judiciary, is to be submitted to the voters.

In *Rivergate Restaurant Corp. v. Metro Dade Cty., 369 So.2d 679 (Fla. App. 1979)*, a Florida circuit court had deleted an invalid provision of a petitioned ordinance. In holding **[*258]** that the lower court had no power to delete even invalid provisions, the District Court of Appeals stated:

> "An individual piecemeal attack upon a portion of the proposal, as opposed to an **[**1241]** attack on the proposal in toto, was not sufficient to enable the circuit court to enjoin the election or to delete the language of the proposed ordinance that the court found to be unconstitutionally vague. ...
>
> In short, the circuit court's authority was restricted to an overall examination of the constitutionality of the proposed ordinance on its face. It fell into error when it went beyond that and determined that a portion thereof was unconstitutionally vague and should be deleted prior to consideration by the electorate." (Footnote omitted).

Id. at 683.

Our function in the instant case should be limited to determining whether the proposed amendments could be, if adopted by the voters, legally operative. We should not, at this stage, attempt to determine whether the proposed amendments may have severable but invalid aspects or applications. We certainly should not insert into, delete from, or rewrite the amendments and place the Court's rather than the petitioners' amendments on the ballot. By analogy, the Court may invalidate severable provisions of an enacted statute, but the Court cannot substitute provisions in a statute and cannot order that the statute be republished in the Annotated Code omitting the provisions invalidated by the Court or order republishing of the statute as modified by the Court.

In passing on the validity of the amendments, we should consider them in their entirety. Whether specific segments of the proposal are void should not be considered as long as any potentially invalid provisions are severable and do not invalidate the whole. *See* 5 *McQuillin Mun Corp*§ 16.69 (3rd ed. 1989). If the Court does examine individual segments, it is improper for the Court to delete even invalid provisions or insert new and different provisions in their **[*259]** place. The Court should either submit the petitioned amendments as petitioned or enjoin their submission. The amendments as petitioned by the voters, not as interpreted by the courts, should be what is placed on the ballot.

It is ironic that in *Ficker v. Denny, 326 Md. 626, 606 A.2d 1060 (1992)*, this Court would not let the people who drafted, circulated, and collected over 10,000 signatures on a charter amendment to elect to substitute for their petitioned amendment a county council amendment which they claimed equally or better met the goals of the signers. This court refused to allow that substitution quoting with approval from *Monplaisir v. Katz, 26 A.D.2d 804, 805, 273 N.Y.S.2d 839, 841, aff'd sub nom. Cassese v. City Clerk of New York, 18 N.Y.2d 813, 275 N.Y.S.2d 523, 222 N.E.2d 389 (1966)* that: "Electors have the right to vote on validly submitted propositions even if confusion may be a consequence."

Id. at 630 n.2, 606 A.2d at 1062 n.2. Yet in the instant case, the Court does not allow the voters to vote on the "validly submitted propositions;" instead, it substitutes its own formulation of the amendments apparently to avoid voter confusion.

In directing that each county's Board of Supervisors of Elections submit the cap amendments to the voters "in the following form," this Court also usurped a legislative function and violated a statutory mandate. It is quite clear that the county councils, *not* the courts, prepare and certify the form that charter amendments appear on the ballot. Md. Code (1957, 1990 Repl. Vol.), Art. 33, § 16-6(a) is clear and direct. It provides:

> "The county commissioners, county councils, or treasurer of Baltimore City, as the case may be, shall prepare and certify to the boards the form in which local questions shall appear on the ballots."

See also Md. Code (1957, 1990 Repl. Vol.), Article 33, § 23-1(a) and *Anne Arundel Co. v. McDonough, 277 Md. 271, 354 A.2d 788 (1976)*.

[*260]

AMENDMENT PETITIONS

The reason given for the Court's deleting from and rewriting the cap amendments in the instant cases is

> "submission of an amendment with invalid and severable portions intact would mislead the public during the election by asking them to vote on an amendment **[**1242]** which, in its present form, was incapable of becoming part of their charter. We do not believe that it is appropriate to deceive the voters in this fashion."

Majority Op. at 26. The Court implies that its interpretive changes do not substantially change the petitioned amendments, yet acknowledges that the amendments as petitioned would mislead and deceive the voters. If the cap amendments in the exact form petitioned would mislead and deceive the voters, then the 20,000 plus voters who signed those petitions were also misled and deceived and the Court should have found the petitions invalid. *See, e.g., Takoma Pk. v. Citizens for decent Gov't, 301 Md. 439, 449-50, 483 A.2d 348, 354 (1984)* holding the referendum petition at issue did not describe the statute under consideration in sufficient detail to advise petition signers, therefore the referendum should not be placed on the ballot. If the amendment petitions in the form in which they were signed are not being substantially modified by the Court, then all of the voters should be able to vote on it in the form that 20,000 voters signed them. If the original amendment petitions signed by over 20,000 voters are in fact misleading and deceptive, then they are obviously invalid. The Court cannot make misleading and deceptive petitions, which were endorsed by over 20,000 voters, valid by rewriting the signed petitions. The cap amendments as modified by the Court clearly were not petitioned for by the voters -- they signed amendment petitions which, according to the Court, were misleading and deceptive. This Court has no authority, no matter how good its intentions, to draft and place its own charter amendments on the ballot. The cap, charter amendments the majority has ordered placed on the ballot were not petitioned for by the voters; they were constructed by this Court.

This Court had before it two decisions holding that the cap amendments violated Article XI-A of the Maryland Constitution. This Court quite properly reversed those decisions. The judges below made no attempt to determine whether *§ 6-302(a) of the Tax-Property Article* voided the "roll backs" and "escape clauses." This Court should not have decided those issues or rewritten the amendments. I dissent from Part IV of this Court's opinion.

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AME, INC. v. BOARD OF ZONING APPEALS OF THE METRO. GOVT. OF NASHVILLE

Court of Appeals of Tennessee, Middle Section At Nashville

April 9, 1985

No Number in Original

Reporter
1985 Tenn. App. LEXIS 2798 *

AME, INC. Plaintiff-Appellant VS THE BOARD OF ZONING APPEALS OF THE METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, and THE DEPARTMENT OF CODES ADMINISTRATION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE Defendants-Appellees

Prior History: [*1] DAVIDSON LAW

APPEALED FROM THE FIFTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

THE HONORABLE WALTER C. KURTZ, JUDGE

Disposition: AFFIRMED AND REMANDED

Core Terms

Ordinance, adult, entertainment, Zoning, void, classified, dispersal, churches, variance

Case Summary

Procedural Posture
Appellant sought review of a judgment from the Circuit Court for Davidson County (Tennessee), which elided the parts of Metro. Gov't Nashville & Davidson County, Tenn., Ordinance 77-649 that it held to be unconstitutional. The trial court held unconstitutional that part of the ordinance which limited adult entertainment to certain districts but applied the elision doctrine and held that the 1,000 foot dispersal restriction was constitutional.

Overview
Under Metro. Gov't Nashville & Davidson County, Tenn., Ordinance 77-649, adult entertainment was limited to certain districts, and a 1,000 foot dispersal restriction prevented adult entertainment in the proximity of churches and schools. After appellant filed an action challenging the ordinance's constitutionality, the trial court held unconstitutional that part of the ordinance which restricted adult entertainment to certain districts. However, the trial court applied the elision doctrine and found the ordinance's 1,000 foot dispersal restriction to be constitutional. Thereafter, appellant sought review, claiming that the trial court erred in applying the elision doctrine. Upon review, the court held that the ordinance's unconstitutional provisions could be elided in the absence of a severability clause. In upholding the elision doctrine's applicability, the court held that the 1,000-foot dispersal restriction was not dependent upon and inter-related with the unconstitutional provision. Consequently, the court held that it could not presume that the city council would not have enacted the ordinance's constitutional provision in the absence of the unconstitutional provision.

Outcome
The court affirmed the judgment and remanded to the trial court for the collection of costs and any further necessary proceedings.

LexisNexis® Headnotes

Real Property Law > Zoning > General Overview

HN1[] **Real Property Law, Zoning**

See Metro. Gov't Nashville & Davidson County, Tenn., Ordinance 77-649.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Severability

HN2[] **Case or Controversy, Constitutionality of Legislation**

The doctrine of elision is not favored in the law. There is also a presumption arising from the absence of a severability clause that the legislature would not have passed an enactment without the objectionable matter. In order for the court to elide, the court must be able to say that the statute would have been passed without the omitted provision.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Severability

Governments > Local Governments > Ordinances & Regulations

HN3[] **Zoning, Ordinances**

Simply because an ordinance has the same subject matter and amends the zoning code does not give it the benefit of a prior enacted severability clause.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Severability

HN4[] **Case or Controversy, Constitutionality of Legislation**

Unconstitutional provisions of a statute or ordinance may be elided in the absence of a severability clause.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Interpretation

HN5[] **Case or Controversy, Constitutionality of Legislation**

The doctrine of elision is not favored. In order, however, to avoid defeat of apparent legislative intent in the enactment of a statute, the courts consistently apply the doctrine in cases where the statute upon its face discloses a fact situation which brings it within the rule. The rule of elision applies where the valid portion of the statute is not so dependent upon the portion said to be void that the court cannot presume that the legislature would not have enacted the valid portion in the absence of the inclusion within the enactment of that portion which is said to be void. Differently stated, where it appears from the face of an act that the void portion is not the inducement to the passage of the act and may be easily separable from it the rule applies. After such elision of the void portion there must be left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. When that is true the court will reject only the void parts, and enforce the residue.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Severability

HN6[] Case or Controversy, Constitutionality of Legislation

If it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted then those portions of the statute which are not objectionable will be held valid and enforceable, provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Real Property Law > Zoning > General Overview

HN7[] Case or Controversy, Constitutionality of Legislation

The geographical restrictions and the 1,000-foot dispersal restriction of Metro. Gov't Nashville & Davidson County, Tenn., Ordinance 77-649 are not so inter-related that it is impossible for the court to select constitutionally and lawfully one limitation over the other.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Severability

HN8[] Case or Controversy, Constitutionality of Legislation

Unless the valid provision of a statute is dependent upon the provision said to be void, then the court cannot presume that the legislature would not have enacted the valid portion in the absence of the portion said to be void, and the doctrine of elision will apply. When a statute contains one or more unconstitutional provisions, the obnoxious provisions will be eliminated and the statute sustained as to the rest, unless the invalid provisions are deemed so essential and are so interwoven with others, that it cannot be reasonably presumed that the legislature intends the statute to operate otherwise than as a whole.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Real Property Law > Zoning > General Overview

HN9[] Case or Controversy, Constitutionality of Legislation

The geographical and the 1,000-foot dispersal restrictions of Metro. Gov't Nashville & Davidson County, Tenn., Ordinance 77-649 are not so interwoven and so essential one to the other that one cannot reasonably presume that the Metropolitan Council would not have intended the ordinance to operate otherwise than as a whole. The two restrictions are independent and that each, in its own right, forms the basis of a regulatory scheme aimed at controlling adult entertainment establishments.

Counsel: JOEL H. MOSELEY, MOSELEY & MOSELEY, P.O. Box 79, 21st Floor, First American Center, Nashville, Tennessee 37238, ATTORNEY FOR PLAINTIFF-APPELLANT

EARL W. ROBERTS, Metropolitan Department of Law, 204 Metropolitan Courthouse, Nashville, Tennessee 37201, ATTORNEY FOR DEFENDANTS-APPELLEES

Judges: Lewis, Judge wrote the opinion. CONCUR: HENRY F. TODD, Presiding Judge, M.S., BEN H. CANTRELL, Judge

Opinion by: Lewis

Opinion

SAMUEL L. LEWIS, JUDGE

The question presented by this appeal is whether the Trial Court properly elided provisions of Substitute Ordinance 77-649 (Ordinance) of the Metropolitan Government of Nashville and Davidson County, Tennessee, which it found to be unconstitutional.

The Ordinance defines adult entertainment and regulates the location of adult entertainment establishments in Metropolitan Nashville and Davidson County.

The Trial Judge held unconstitutional "that part of the ordinance which restricts adult entertainment to the CF and CC districts," but applied the doctrine of elision and found "the 1,000 foot dispersal **[*2]** ordinance . . . to be constitutional."

The Ordinance provides that adult entertainment establishments are confined to the CC (Core Commercial) district or CF (Commercial Frame) district. The CF and CC districts are approximately two square miles located in downtown Metropolitan Nashville. The CC district is a small district of only several blocks located within the CF district.

Prior to the passage of the Ordinance, the appellant had operated an establishment known as the Classic Cat II within an area zoned CF. The Classic Cat II featured nude dancing and became classified as an "adult entertainment establishment" upon the passage of the Ordinance.

The Ordinance, in addition to confining adult entertainment establishments to the CC or CF districts, provides a 1,000-foot limitation as follows:

HN1[↑] No establishment classified under adult entertainment shall be located within one thousand feet of any church, school ground, college campus, residence, dwelling or rooming unit, or branch of the Metropolitan Public Library or any other place of business classified under the category "Adult Entertainment." In determining the distance from a church, school ground, college campus, residence, **[*3]** dwelling or rooming unit, or any branch of the Metropolitan Public Library, or any other place of business classified under the category "Adult Entertainment," the distance shall be measured from the center of the nearest permanent entrance of the above mentioned buildings following the usual and customary path of pedestrian travel to the center of the main entrance of the establishment classified under the category of "Adult Entertainment." However, a variance may be obtained upon presentment to the Board of Zoning Appeals of a proper application requesting such variance in accordance with the regulations found in Article X, Chapter 2 of Appendix A of the Metropolitan Code.

The Ordinance "grandfathered" adult entertainment establishments which were doing business at the time of the passage of the Ordinance. These "grandfathered" establishments were allowed to continue operation at their then locations as a nonconforming use.

Prior to the passage of the Ordinance, appellant operated the Classic Cat II, an adult entertainment establishment which featured nude dancing. Classic Cat II was located in the CF district and was within 1,000 feet of other adult entertainment establishments **[*4]** and of a school and churches. It was "grandfathered" and allowed to continue operation as a nonconforming use.

On December 20, 1982, appellant was notified by the Metropolitan Development and Housing Agency that the building it was renting would be condemned as part of the Capitol Mall redevelopment project. The condemnation proceedings were completed in March, 1983, and appellant was forced to move the business on May 16, 1983. Prior to moving, appellant searched for other locations in an attempt to relocate within the CF and CC districts. It was unable to find a location within the CF and CC districts which complied with the Ordinance. Appellant subsequently rented property in the CF district within 1,000 feet of Hume Fogg High School and also within 1,000 feet of several churches. Because of the location, Classic Cat II could no longer operate as an "adult establishment" and could not offer nude dancing. The Trial Court found that the Classic Cat II's manager "had to reluctantly dress its dancers in 'pasties' and bikini bottoms."

Appellant sought a variance from the Metropolitan Board of Zoning Appeals. This variance was denied after a hearing on May 23, 1983.

Appellant **[*5]** then filed its petition for writ of certiorari in the Circuit Court questioning the legality of the Board of Zoning Appeals' action and also the constitutionality of the zoning Ordinance.

By agreement of the parties, the issue of the legality of

the Board of Zoning Appeals' action and the constitutionality of the zoning Ordinance were bifurcated. The legality of the Board of Zoning Appeals' action was first heard, and, in an order dated December 15, 1984, the Trial Court upheld the legality of the Board's action.

Following a hearing, the Trial Court, on May 21, 1984, entered its order finding that the Ordinance was unconstitutional insofar as it restricted adult entertainment to the CF and CC districts, but by applying the doctrine of elision found that the 1,000-foot dispersal section of the Ordinance was constitutional. The Trial Court sustained the decision of the Board of Zoning Appeals in refusing to grant a variance. Appellant argues that while the Trial Court correctly held that the Ordinance in unconstitutional, it erred in holding that the doctrine of elision should be applied to the 1,000-foot dispersal portion of the Ordinance.

Appellant would have this Court declare **[*6]** the Ordinance unconstitutional in its entirety or, in the alternative, apply the elision doctrine by striking the 1,000-foot portion of the Ordinance instead of that portion which limits adult entertainment to the CF and CC districts.

The doctrine of elision is well established in Tennessee, but it does have its limitations.

We note, upon examination of Chapter 5 of the Acts of 1919, that it contains no severability clause. In the absence of such a clause the unconstitutional death penalty provision may not be elided from the Act. ***HN2***[↑] The doctrine of elision is not favored in the law, *Armistead v. Karsch, 192 Tenn. 137, 237 S.W.2d 960 (1951)*. There is also a presumption arising from the absence of a severability clause that the Legislature would not have passed the enactment without the objectionable matter. *Maury County v. Porter, 195 Tenn. 116, 257 S.W.2d 16 (1953)*. In order for the Court to elide, we must be able to say that the statute would have been passed without the omitted provision. *Phillips v. West, 187 Tenn. 57, 213 S.W.2d 3 (1952)*. The brevity of the statute and the fact that the penal provisions are so closely related and interdependent make it unwise **[*7]** and untenable for us to speculate that the Legislature would have passed one provision without the other.

Miller v. State, 584 S.W.2d 758, 765 (Tenn. 1969).

The parties disagree as to whether a severability clause applies in this case. The Ordinance itself does not contain a severability clause. However, the appellee argues that this Court "should consider the severability clause set forth in Section 106.10 of the Metropolitan Zoning Code." In essence, they argue that since the Ordinance in question amends the Metropolitan Zoning Code, the severability clause of the Zoning Code applies to the Ordinance.

We find this to be an untenable argument. The Metropolitan Zoning Code was enacted long before the Ordinance. ***HN3***[↑] Simply because the Ordinance has the same subject matter and amends the Zoning Code does not give it the benefit of a prior enacted severability clause.

We hold that there is not a severability clause applicable to the Ordinance. However, this is not fatal. ***HN4***[↑] Unconstitutional provisions of a statute or ordinance may be elided in the absence of a severability clause. *See, e.g., Jones v. City of Jackson, 195 Tenn. 329, 259 S.W.2d 649 (1953)*; *Helms **[*8]** v. Richardson, 191 Tenn. 280, 231 S.W.2d 1019 (1950)*.

In *Davidson County v. Elrod, 191 Tenn. 109, 232 S.W.2d 1 (1950)*, a case involving Chapter 806, Public Acts of 1949, an act without a severability clause, our Supreme Court stated:

HN5[↑] The doctrine of elision is not favored. *Edwards v. Davis, 146 Tenn. 615, 623, 244 S.W. 359*. In order, however, to avoid defeat of apparent legislative intent in the enactment of a statute, the Courts have consistently applied the doctrine in cases where the statute upon its face discloses a fact situation which brings it within the rule.

The rule of elision applies where the valid portion of the statute is not so dependent upon the portion said to be void that the Court cannot presume that the Legislature would not have enacted the valid portion in the absence of the inclusion within the enactment of that portion which is said to be void. *Franklin County v. Nashville, C. & St. L. Ry., 80 Tenn. 521, 531*. Differently stated, where it appears from the face of the Act that the void portion was not the inducement to the passage of the Act and may be "easily separable from it" the rule applies. *Dugger v. Mechanics' & Traders Insurance Co., 95 **[*9]** Tenn. 245, 260, 261, 32 S.W. 5, 28 L.R.A. 796*. After such elision of the void portion there must be left enough of the Act for a complete law capable of enforcement "and fairly answering the object of its passage." When that is true the Court will reject "only

the void parts, and enforce the residue". *Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 154, 179, 36 S.W. 1041, 1048, 34 L.R.A. 725*.

HN6[↑] Perhaps the clearest statement of the rule is that if it is made to appear from the face of the statute that the Legislature would have enacted it with the objectionable features omitted then those portions of the statute which are not objectionable will be held valid and enforceable, *State ex rel. Bond v. Taylor, 119 Tenn. 229, 257, 104 S.W. 242*, provided, of course, there is left enough of the Act for a complete law capable of enforcement and fairly answering the object of its passage. *Reelfoot Lake Levee District v. Dawson, supra.*

However, a conclusion by the Court that the Legislature would have enacted the Act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, **[*10]** its decree may be judicial legislation. Probably that may be a reason why the doctrine of elision is not favored.

Id. at 111-12, 232 S.W.2d at 2.

HN7[↑] Appellant argues that the geographical restrictions and the 1,000-foot dispersal restriction are so inter-related that it is impossible for the Court to "select constitutionally and lawfully one limitation over the other." We disagree.

HN8[↑] Unless the valid provision of a statute is dependent upon the provision said to be void, then the court "cannot presume that the Legislature would not have enacted the valid portion" in the absence of the portion said to be void, and the doctrine of elision will apply. *Id. at 111-12, 232 S.W.2d at 2*.

When a statute contains one or more unconstitutional provisions, the obnoxious provisions will be eliminated and the statute sustained as to the rest, unless the invalid provisions are deemed so essential and are so interwoven with others, that it cannot be reasonably presumed that the legislature intended the statute to operate otherwise than as a whole.

Moore v. Fowinkle, 512 F.2d 629, 632 (6th Cir. 1975).

HN9[↑] We do not believe the geographical and the 1,000-foot dispersal restrictions are **[*11]** so interwoven and so essential one to the other that one cannot reasonably presume that the Metropolitan Council would not have intended the Ordinance to operate otherwise than as a whole.

We hold that the two restrictions are independent and that each, in its own right, forms the basis of a regulatory scheme aimed at controlling adult entertainment establishments.

James Spencer, Professor of City and Regional Planning, University of Tennessee, testified regarding the Ordinance as follows:

The two kinds of restrictions operate at different scales and for different purposes. The restriction of adult entertainment itself to the central area of the city operates in the broad sense at the scale of the city as a whole and as a way of restricting those activities to the central core of the city.

The 1,000-foot restriction is a provision that operates within the central core and in effect prevents the concentration of those activities close together into a solidified district and protects those particular uses such as churches and schools, which would be particularly sensitive to their influence.

The geographical restriction was aimed at concentrating adult entertainment activities **[*12]** in a relatively small area in the center of the city. The 1,000-foot restriction was intended to prevent the concentration of adult entertainment businesses in close proximity to each other and in close proximity to uses which would be particularly sensitive to adult entertainment establishments.

We find no error in the Trial Court's judgment. The judgment is, therefore, affirmed with costs assessed against the appellant and the cause remanded to the Trial Court for the collection of costs and any further necessary proceedings.

CONCUR: HENRY F. TODD, Presiding Judge, M.S., BEN H. CANTRELL, Judge

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EXHIBIT B

Neutral
As of: October 22, 2020 4:55 PM Z

Animal Prot. Inst. v. Martin

United States District Court for the District of Maine

February 23, 2007, Decided ; February 23, 2007, Filed

CV-06-128-B-W

Reporter
2007 U.S. Dist. LEXIS 13378 *

ANIMAL PROTECTION INSTITUTE, Plaintiff v. ROLAND D. MARTIN, Commissioner of the Maine Department of Inland Fisheries and Wildlife, Defendant.

Subsequent History: Motion granted by *Animal Prot. Inst. v. Martin, 241 F.R.D. 71, 2007 U.S. Dist. LEXIS 83774 (D. Me., 2007)*

Motion denied by *Animal Prot. Inst. v. Martin, 511 F. Supp. 2d 196, 2007 U.S. Dist. LEXIS 70783 (D. Me., 2007)*

Prior History: *Animal Prot. Inst. v. Martin, 241 F.R.D. 66, 2007 U.S. Dist. LEXIS 13377 (D. Me., 2007)*

Core Terms

amicus, curiae, amici, trapping

Case Summary

Procedural Posture

Plaintiff anti-trapping group sued defendant Commissioner of the Maine Department of Inland Fisheries and Wildlife, in his official capacity, seeking declaratory and injunctive relief for his alleged violation of the Endangered Species Act, *16 U.S.C.S. § 1531 et seq.*, for authorizing and allowing trapping activities that took protected species. Movants, an association and a related foundation, sought to participate as amici curiae.

Overview

The movants requested a limited form of the amicus-plus status recognized by the court. They sought: (1) to present briefs on motions without the direction of the state of Maine; (2) to participate separately in oral argument on dispositive motions; and, (3) to serve and receive documents and notice of events as if a party. The anti-trapping group claimed that the motion was a companion to a motion to intervene filed by organizations and individuals who supported trapping and complained that the cumulative impact of the motions, if granted, would maximize the volume of participation by trapping interests in the litigation. Because a self-acknowledged interest group had initiated the proceeding, the court found it only proper to counterbalance its advocacy with the advocacy of opposing interest groups. Granting the motion, the court concluded that the movants' participation could be beneficial to the court, given the likely difference in perspective between pro-hunting/trapping organizations and the state government. The court sought to strike a balance between controlling possible abuses, while not unduly delimiting the best purposes served by a legitimate amicus.

Outcome

The court granted the motion for leave to participate as amici curiae.

LexisNexis® Headnotes

Civil Procedure > Appeals > Amicus Curiae

Governments > Courts > Authority to Adjudicate

Civil Procedure > Parties > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN1 **Appeals, Amicus Curiae**

Although there are rules governing the participation of amicus curiae on appeal, there is no provision in the Federal Rules of Civil Procedure as to the conditions under which a trial court should permit amicus appearances and the restrictions, if any, that should attend its appearance. Nevertheless, the district court retains "the inherent authority" to appoint amicus curiae to assist it in a proceeding. An amicus is not a party and does not represent the parties but participates only for the benefit of the court. Granting amicus status remains within the sound discretion of the court.

Civil Procedure > Parties > General Overview

HN2 **Civil Procedure, Parties**

Generally, amicus status is granted only when there is an issue of general public interest, the amicus provides supplemental assistance to existing counsel, or the amicus insures a complete and plenary presentation of difficult issues so that the court may reach a proper decision.

Civil Procedure > Appeals > Amicus Curiae

Civil Procedure > Appeals > Appellate Briefs

HN3 **Appeals, Amicus Curiae**

In Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, now Justice Alito set out an eminently practical approach to a motion for leave to participate as amicus curiae. At the time of the motion, the court can rarely assess the potential benefit of an amicus brief, since the brief has not yet been filed. If denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. If beneficial, the court will be edified; if not, the brief will be disregarded. Thus, it is preferable to err on the side of granting leave.

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Judges: JOHN A. WOODCOCK, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN A. WOODCOCK, JR.

Opinion

ORDER ON MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

Concluding that Safari Club International and Safari Club International Foundation's participation as *amici curiae* in this law suit may be beneficial to the Court by providing a countervailing and distinct perspective, the Court grants their motion to participate as *amici curiae.*

I. BACKGROUND

Animal Protection Institute (API) filed an action against Roland D. Martin, in his official capacity as Commissioner of the Maine Department of Inland Fisheries and Wildlife (DIFW), seeking declaratory and injunctive relief for his alleged violation of the Endangered Species Act (ESA), *16 U.S.C. §§ 1531 et seq.*, for "authorizing and allowing trapping activities that 'take' Bald Eagles, Canada Lynx and Gray Wolves -- species listed as protected from take under the ESA." [1] *Compl.* P 1 (Docket # 1). Commissioner Martin is represented by the Maine State Attorney General's Office. By this motion, Safari Club International and Safari Club International Foundation (Safari) **[*3]** seek to participate as *amid curiae;* API objects. *Mot. of Safari Club Int'l and Safari Club Int'l Found, for Leave to Participate as Amici Curiae and Mem. of Law in Supp.* (Docket # 10) (*Safari Mot.*); *Pl.'s Opp'n to Mot. to Participate as Amici Curiae* (Docket # 33) (*API Opp'n*); *Reply in Supp. of Mot. of Safari Club Int'l and Safari Club Int'l Found, for Leave to Participate as Amici Curiae* (Docket # 34) (*Safari Reply*).

According to its motion, Safari is a nonprofit corporation with approximately 50,000 members from the United States and worldwide. *Safari Mot.* Ex. A, *Decl. of Kevin Anderson* P 3. Its mission is "conservation of wildlife, protection of the hunter, and education **[*4]** of the public concerning hunting and its use as a conservation tool." [2] *Id.* P 4. Safari Club has about 200 members in Maine. *Id.* P 13. Safari asks for a "limited form of the *amicus*-plus status recognized by this Court." *Safari Mot.* at 1-2. It seeks: (1) to present briefs on motions without the direction of the state of Maine; (2) to participate separately in oral argument on dispositive motions; and, (3) to serve and receive documents and notice of events as if a party. *Id.* at 6.

API opposes the motion on a variety of grounds. It claims that Safari's motion is a companion to a motion to intervene filed by four other organizations and three individuals -- each of whom supports trapping -- and complains that the cumulative impact of these motions, if granted, will "maximize the volume of participation by trapping interests in this litigation." *API Opp'n* at **[*5]** 2. API argues that the effect would be to "allow two functional interventions, when either group would ordinarily be adequately represented by the other." *Id.* API also opposes the motion because it is premature, since no motions or memoranda have been filed. [3] *Id.* at 3.

[*6] II. DISCUSSION

[1] *16 U.S.C. § 1538(a)(1)(B)* provides: "[W]ith respect to any endangered species offish or wildlife . . . , it is unlawful for any person subject to the jurisdiction of the United States to take any such species within the United States or the territorial sea of the United States."

[2] Safari Foundation is similarly organized and shares a similar mission. *Safari Mot.* Ex. A, *Decl. of Kevin Anderson* 16.

[3] API cites *Forest Service Employees for Environmental Ethics v. U.S. Forest Service,* CV-03-165-M-DWM, slip op. (D. Mont. Feb. 11, 2004) for the proposition that a motion for leave to participate as *amicus* should wait until the briefs are filed. *Forest Service* denied the motion "subject to renewal at the appropriate time." *Id.* at 3. In *Forest Service,* Judge Malloy correctly perceives the difficulty in granting leave to participate when it is unclear how helpful and necessary the *amicus's* participation will turn out to be. But, as Chief Magistrate Judge Erickson stated in *Animal Prot. Inst. v. Merriam, Civ. No. 06-3776 (MJD/RLE), 2006 U.S. Dist. LEXIS 95724, *7 (D. Minn., Nov. 16, 2006)*, to delay is only to "defer the inevitable." The approach suggested by now Justice Alito in *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 132-33 (3d Cir. 2002)*, to err on the side of granting the motion and accepting the brief for what it is worth, seems more practical.

HN1[↑] Although there are rules governing the participation of *amicus curiae* on appeal, there is no provision in the Federal Rules of Civil Procedure "as to the conditions under which a trial court should permit *amicus* appearances and the restrictions, if any, that should attend its appearance." Alliance of Auto. Mfrs. v. Gwadowsky, 297 F. Supp. 2d 305, 306 (D. Me. 2003). Nevertheless, "the district court retains 'the inherent authority' to appoint amicus curiae 'to assist it in a proceeding.'" *Id.* (quoting Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1500-01 (D. Me. 1991)). An amicus is not a party and "does not represent the parties but participates only for the benefit of the court." Resort Timeshare, 764 F. Supp. at 1501 (quoting News and Sun-Sentinel Co. v. Cox, 700 F. Supp. 30, 31 (S.D. Fla. 1988)).

Granting *amicus* status remains "within the sound discretion of the court." Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). However, *Strasser* cautioned:

> [W]e believe a district court lacking joint consent of the parties should **[*7]** go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.

Id. Here, Safari does not claim that the Attorney General's representation of the Commissioner will be inadequate. *See* Daggett v. Webster, 190 F.R.D. 12, 13 n.1 (D. Me. 1990) ("Maine's Attorney General's Office typically performs in the highest professional manner, equal to the skill and performance of private lawyers."). Instead, Safari asserts it will bring a new and necessary perspective to the law suit, offering the Court "an essential voice of the affected interest groups because the State Defendant does not represent the hunting, trapping, and recreational community or those whose recreational and commercial activities are threatened by the potential loss of wildlife management opportunities." *Safari Mot.* at 5.

HN2[↑] Generally, *amicus* status is granted "only when there is an issue of general public interest, the *amicus* provides supplemental assistance to existing counsel, **[*8]** or the *amicus* insures a complete and plenary presentation of difficult issues so that the court may reach a proper decision." Alliance, 297 F. Supp. 2d at 307 (internal punctuation and citation omitted). Against amici participation is Judge Posner's admonition in Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003):

> The reasons for the policy [of denying or limiting amici status] are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Id. (citing Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000)).

The tone of the API response and Safari's reply gives the Court unease about whether the inclusion of Safari as *amici* will increase only the **[*9]** heat, not the light. API charges that there is a "game afoot" among Safari and other organizations to maximize the hunter viewpoint during this litigation by seeking actual intervention or *amicus* status. *API Opp'n* at 2. Safari rises to the bait and accuses API of attempting to "bar the courtroom doors;" it denies these "unfounded allegations," urging the Court to reject "pure speculation, unfounded beliefs, and innuendo." *Safari Reply* at 1-2. This does not bode well. Hyperbole rarely convinces, but it inevitably invites an in kind response. If Safari's presence only sharpens the rhetoric, its usefulness as a friend of the court will be minimal and the Court may rue and revisit its order.

Nevertheless, API itself acknowledges that it and Safari are "at opposite ends of the spectrum of the 'interest group politics' that Judge Posner advises should not be injected into judicial [proceedings]." *API Opp'n* at 7. Since a self-acknowledged interest group has initiated this proceeding, it is only proper to counterbalance its advocacy with the advocacy of opposing interest groups. The Court concludes that Safari's participation may be "beneficial to the Court in this matter, **[*10]** given the likely difference in perspective" between pro-hunting/trapping organizations and the state Government. Verizon New Eng., Inc. v. Me. PUC, 229 F.R.D. 335, 338 (D. Me. 2005).

HN3[↑] In *Neonatology Associates,* now Justice Alito set out an eminently practical approach to a motion for leave to participate as *amicus curiae.* 293 F.3d at 132-33. At the time of the motion, the court can rarely assess the potential benefit of an *amicus* brief, since the

brief has not yet been filed. If denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. If beneficial, the court will be edified; if not, the brief will be disregarded. Thus, it is "preferable to err on the side of granting leave." [4] *Id. at 133*.

[*11] The Court seeks to strike a balance between controlling "the abuses enumerated by Judge Posner in [*Voices for Choices*], while not unduly delimiting the best purposes served by a legitimate *amicus,* as recognized by now Justice Alito in [*Neonatology Associates*]." *Animal Protection Institute, Civ. No. 06-3776 (MJD/RLE), 2006 U.S. Dist. LEXIS 95724, at *7 n.4 (D. Minn. Nov. 16, 2006)*. Here, the balance favors the motion. The Court allows Safari *amid curiae* status; Safari shall receive service of documents and notice of events, may file memoranda and briefs on motions before the Court, and may participate separately in oral argument on dispositive motions. Accordingly, the Court GRANTS Safari Club International and Safari Club International Foundation's Motion for Leave to Participate as *Amici Curiae* (Docket # 10).

SO ORDERED.

/s/ John A. Woodcock, Jr.

UNITED STATES DISTRICT JUDGE

Dated this 23rd day of February, 2007

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[4] Justice Alito's approach answers the difficulty of winnowing the chaff during the more controlled appellate deliberative process, but writing for an appellate court, Justice Alito does not address other factors that discourage a trial court from adopting such an expansive view of *amicus* status, including the potential burden on other litigating parties, the risk of loading one side of the case against the other, and the danger of infusing interest group politics and rhetoric into trial court motion practice.