IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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CITY OF MEMPHIS, TENNESSEE, DAPHNE TURNER-GOLDEN, AND SULLISTINE BELL, Citizens And Residents Of Memphis, Tennessee,	**Appeal No.**
Appellants, Plaintiffs Below	**Below Court of Appeals Appeal No. M2012-02141-COA-R3-CV**
v.	**From the Chancery Court of Davidson County DOCKET NO: 12-1269-II**
TRE HARGETT, Secretary of State; ROBERT COOPER, JR., Attorney General; MARK GOINS, Director of Elections, all in their official capacity,	
Appellees, Defendants Below	

ANSWER TO APPLICATION OF THE DEFENDANTS-APPELLEES FOR PERMISSION TO APPEAL AND/OR MOTION TO STAY JUDGMENT AND ORDER

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I. INTRODUCTION

Pursuant to Tennessee Rule of Appellate Procedure 11(d), the City of Memphis, Tennessee; Daphne Turner-Golden; and Sullistine Bell; Appellants and Plaintiffs in the action below, (hereinafter "Plaintiffs") submit this answer to Defendants' application for permission to appeal. As explained more fully below, Plaintiffs oppose Defendants' petition for a stay of the Court of Appeals' Judgment and Order and respectfully request that the Court exercise its authority under Tenn. R. App. P. 42(b) and order that defendants comply with the Court of Appeals' order pending the final ruling of this Court.

Furthermore, in light of the fast-approaching Presidential Election, and the need to ensure that constitutionally qualified voters are not disenfranchised, the Court is faced with a number of choices: First, deny the Application and reissue the order of the Court of Appeals; or second, accept the Application on the narrow issues submitted by the State on an expedited basis with a view toward resolving the issue on the validity of the Memphis library cards before November 6th.

However, any decision other than denying the State's request to stay the Judgment and Order may well result in the disenfranchisement of up to 1,977 constitutionally qualified voters in Shelby County who hold such library cards.[1]

Plaintiffs' respectfully urge the Court to deny the application.

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[1] Plaintiffs expect to seek a Rule 11 application on the facial and as applied unconstitutionality of the photo ID requirement for voting, but believe that there is simply not enough time remaining before the November 6, 2012 Election to fully brief and argue these issues. Plaintiffs also note that although Defendants seek to place the blame for the current timing entirely with the Plaintiffs, Defendants and the trial court allowed two full weeks to pass between the hearing and the entry of an appealable order. Even more time may have been lost but for the fact that Plaintiffs first sought an emergency appeal, then submitted their own proposed order to the trial court, and finally sought a writ of mandamus from the court of appeals requiring the trial court to enter an order.

II. ARGUMENT

A. The Court of Appeals Correctly Determined that the Doctrine of Sovereign Immunity Did not Apply

In its opinion, the Court of Appeals specifically held that Tennessee's Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101 *et seq.*, allows "a proper plaintiff to challenge the constitutionality of a statute or seek a construction of a statute when the plaintiff does not seek to reach state funds." (*City of Memphis*, at 7) (citing *Colonial Pipeline Co. v. Morgan*, 263 S.W. 3d 827, 853 (Tenn. 2008). This finding is fully consistent with the express language of the Declaratory Judgment Act and the weight of judicial authority, and should accordingly not be disturbed.

Accordingly, as the Court of Appeals correctly noted, sovereign immunity is simply not an issue in this case. In pursuing declaratory judgment, Plaintiffs have not and are not seeking to reach the State's treasury, funds or property. Instead, Plaintiffs have simply asked for a judicial determination of their constitutional rights, and the State's obligations with respect to voting and implementation of the photo ID statute. Therefore, the question of sovereign immunity in this case does give rise to any "need to secure settlement of important questions of law" that might justify this Court granting Defendant's Application for Permission to Appeal. Tenn. R. App. P. 11(a).

B. The Court of Appeals Correctly Determined that the Plaintiffs Have Standing to Seek Declaratory Relief

1. Plaintiff Bell and Plaintiff Turner-Golden both Satisfy the Requirements of Standing

At the outset it should be noted that the State's discussion on this issue sets up a straw-man. They argue that the individual Plaintiffs cannot show the requisite harm because they have not yet been denied the right to vote on November 6, 2012. This completely ignores the distinct

and palpable injury they incurred when they were denied the right to vote in August, 2012 solely because their only form of photo identification was their respective Memphis library cards.

Tennessee courts have long recognized that private citizens "cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally." *Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975). Accordingly, the plaintiff must demonstrate that he or she has standing to pursue the desired relief. This requirement, in turn, has three distinct prongs. The plaintiff must show (1) that the plaintiff has "sustained a distinct and palpable injury;" (2) that the injury "was caused by the challenged conduct;" and (3) that the injury "is apt to be redressed by a remedy that the court is prepared to give." *City of Chattanooga v. Davis*, 54, S.W.3d 248, 280 (Tenn. 2011).

Defendants have argued that Plaintiffs Bell and Turner-Golden failed to show distinct or palpable injury, as neither of them were actually denied the right to vote. (*See* Hearing Transcript and Court Ruling, Sept. 26, 2012 at 9:5-9:20). This conclusion, however, is clearly mistaken.

The timeline submitted by defendants and accepted by both the trial court and the Court of Appeals does not dispute Plaintiffs' claim that Ms. Turner-Golden and Ms. Bell attempted to vote using Memphis photo library cards, were denied, and never had their ballots counted. This is ***precisely*** the type of discrete, particularized injury courts look for in determining whether a plaintiff has standing. *Wood v. Metro. Nashville & Davidson County Gov't*, 196 S.W.3d 152, 158 (Tenn. Ct. App. 2005) ("The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.").

Here, there is no dispute that the right to vote, and to have one's vote counted, are recognized legal rights and interests, and are, in fact, ***fundamental*** rights *May v. Carlton*, 245 S.W.3d 340, 346 (Tenn. 2008) ("Our federal courts have described 'the right to vote [a]s . . . a fundamental right — indeed, the most fundamental right of all.'") (quoting *Blumstein v. Ellington*, 337 F.Supp. 323, 329 (M.D. Tenn. 1970). There is similarly no dispute that Tennessee's photo ID requirement creates ***some*** burden upon that right, one that injured Plaintiffs Bell and Turner-Golden by preventing them from having their ballots counted in the August 2012 election.

While the parties obviously disagree about whether the photo ID requirement violates Plaintiffs' constitutional rights, there is no question that the statute has negatively impacted those rights, creating a distinct and palpable injury sufficient to confer standing. Nor is there any question that the claimed injury — denial of the right to vote — is real, and not just "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Plaintiffs, after all, are not relying on their status as voters, but on the fact that they were ***personally*** prevented from having their votes counted. *See, e.g., Walker v. Dunn*, 498 S.W.2d 102, 104-105 (Tenn. 1972) (finding a plaintiff had standing based on his claim that an emergency session of the General Assembly deprived him of his right to "indirectly" vote on a U.S. Constitutional amendment through a vote for state legislator); *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 624 (Tenn. 2006) ("[S]tanding in *Walker* was predicated upon a distinct, concrete injury in fact—denial of the right to vote. Standing was not predicated upon the *Walker* plaintiffs' status as voters.").

Once injury is established, the second prong of standing — causation — becomes obvious. As courts have noted, the basic question under this prong is whether "the line of

causation between the illegal conduct and injury [is] too attenuated?" *Allen v. Wright*, 468 U.S. 737, 752 (1984). With respect to Ms. Bell and Ms. Turner-Golden, the answer is clearly no.

The undisputed facts in the record show that on July 23, 2012, Plaintiff Turner-Golden attempted to vote early in the August Tennessee election. (Turner-Golden Depo. at 29:23-30:4). The facts show that Ms. Turner-Golden possessed no photo ID at that time other than her Memphis photo library card. (*Id.* at 17:17-23, 31:8-11). The facts show that Ms. Turner-Golden was only permitted to cast a provisional ballot, because she had no "acceptable" proof of identity. (*Id.* at 18:15-20). And the facts show that that her provisional ballot was never counted.

Similarly, with respect to Ms. Bell, the facts show that she attempted to vote in person on July 28, 2012, possessing no photo ID but her Memphis photo library card, but was prevented from doing so, for lack of "acceptable" voter identification. (White Depo. at 29:19-24). As with Ms. Turner-Golden, and 160 other constitutionally qualified and registered voters, her ballot was not counted.

Defendants have never disputed that Plaintiffs Bell and Turner-Golden are constitutionally qualified voters under TENN. CONST. art. IV § 1. Accordingly, if there had not been a photo ID requirement in place for voting, or if Defendants had been willing to accept Plaintiffs' photo library cards as proof of identity, then Plaintiffs' ballots would have been counted. That makes Plaintiffs' experiences clear-cut examples of traditional, but-for causation. *See Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005) (explaining that under but-for causation, "we must ask whether the plaintiff's injury would have happened "but-for" the defendants' act. If not, then the defendants' conduct is a cause in fact of the plaintiff's injury").

Finally, with regard to the third prong of standing, Plaintiffs Bell and Turner-Golden satisfy the requirement that their injury be redressible.

The U.S. Supreme Court addressed redressibility at some length in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see also Marceaux v. Sundquist*, 107 S.W.3d 527, 531-32 (Tenn. Ct. App. 2002) (specifically citing and employing *Lujan*'s formulation of standing). Specifically, the *Lujan* Court noted that

> [w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, ***there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.***

Id. at 561-62 (emphasis supplied). Here, Plaintiffs Bell and Turner-Golden were clearly the objects of defendants' actions — namely, the enactment and enforcement of the photo ID requirement for voting. Accordingly, the declaration from the Court of Appeals redresses that injury.

Therefore, having satisfied the requirements of (1) particularized injury, (2) causation, and (3) redressibility, Plaintiffs Bell and Turner-Golden have standing to pursue the declaratory and injunctive relief they seek. The Court of Appeals correctly so found.

2. Plaintiff City of Memphis has Standing to Seek a Declaratory Judgment

The City of Memphis clearly has standing to seek declaratory judgment with respect to its own right to ***issue*** photo identification cards for voting pursuant to Tenn. Code Ann. § 2-7-112(c)(2)(A).

Under Tenn. Code Ann. § 29-14-107(b), "in any proceeding which involves the validity of a municipal ordinance or franchise, such municipality ***shall*** be made a party, and shall be entitled to be heard" (emphasis supplied). Tennessee law further states that the Declaratory Judgment Act's purpose "is to settle and afford relief from uncertainty and insecurity with respect to rights; status; and other legal relations; ***and is to be liberally construed and administered.***" *Id.* § 29-14-113 (emphasis supplied); *see also Tennessee Farmers Mut. Ins. Co. v. Hammond*, 290 S.W.2d 860, 862 (Tenn. 1956) (noting that the Declaratory Judgment Act "should be liberally construed in favor of the person seeking relief in a proper case to the end that rights and interests be expeditiously determined").

Here, the State's denial that the City of Memphis is a "branch, department, agency, or entity of this state" capable of issuing photo ID for voting under Tenn. Code Ann. § 2-7-112(c)(2)(B), despite clear Tennessee case law, is more than sufficient to create standing for the City to seek declaratory judgment. The Tennessee Supreme Court has dealt with this very issue before and has ruled that public entities do have standing to determine their particular rights and responsibilities under an election statute.

Specifically, in *Wallace v. Lewallen*, residents of Anderson County sued three members of the Board of the County Elections Commission to prevent the Board from certifying results from a local election. 210 S.W.2d 684, 685 (Tenn. 1948). The plaintiffs in that case asserted that the election was invalid, as one district within the county had kept polls open until 7:00pm, pursuant to a Private Act, but in seeming defiance of the general law, which stated that polls must close at 4:00pm. *Id.* In response, one of the election commissioners filed suit for declaratory judgment, to determine whether it was the Private Act or the general law that set forth his duties with respect to voting hours on Election Day. The chancery court initially

refused to hear the Commissioner's claim, but the Tennessee Supreme Court reversed, specifically holding that "the right of J. M. Underwood, as an Election Commissioner, ***to seek a declaratory decree is unquestioned.*** His right to such a decree under Code § 8845 [now, Tenn. Code Ann. § 29-14-107] is of vital importance to him as a guide to his official conduct in holding future elections in Anderson County." *Id.*

Here, the City of Memphis is in a similar position to the Anderson County Election Commissioner, and is similarly entitled to pursue declaratory judgment. The City believes that it is an entity or "agency of this State," capable of issuing its residents photo ID cards for voting – through a franchise the City has granted to the Memphis Public Library System. Furthermore, because of its commitment to helping its residents participate in the electoral process, the City has a strong interest in advertising and publicizing the fact that Memphis photo library cards can be used for voting. Defendant Goins, in contrast, has opined and disseminated his opinion that the Memphis photo library cards are ***not*** an acceptable form of identification for voting, and has ordered the Shelby County Election Commission not to accept them at the polls. The statute itself does not define the terms "branch, department, agency or entity of this state." Accordingly, the City of Memphis, like the Commissioner in *Wallace*, has standing to bring a declaratory judgment action to determine the proper scope of its rights and responsibilities with respect to helping its residents to vote.[2] Again, the Court of Appeals was correct.

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[2] Though not directly related to the question of standing, Plaintiffs also note that the *Wallace* court specifically noted that unusual circumstances can warrant a departure from the general law in order to facilitate full participation in an election. Specifically, the Court concluded that "the Legislature was aware of the fact, due to the heavy increase in population, as well as the nature of the work in 'Atomic research,' that many citizens in the town of Oak Ridge would be deprived of voting unless the time was extended to seven o'clock p.m." *Wallace v. Lewallen*, 210 S.W.2d 684, 686 (Tenn. 1948). Similarly, since Tennessee's photo ID statute is likely to disenfranchise a greater number of Memphis residents than residents of other Tennessee counties, it is proper to resolve any doubt in the legislature's intention with respect to "an agency

C. The Court of Appeals Correctly Determined that the Photo Library Cards Issued by the City of Memphis Meet the Definition of "Evidence of Identification" Pursuant to Tenn. Code Ann. § 2-7-112(c)(2)(A)

Tenn. Code Ann. § 2-7-112(c)(2)(A) lays out three criteria for appropriate "evidence of identification:"

1. The identification card must include a photograph of the holder;
2. The card must be issued by an entity that is authorized by law to issue personal identification; and,
3. The card must be issued by one of the enumerated entities.

There is no dispute that the Memphis library cards include a photograph of the holder. Nor is there any real dispute that the Memphis library is authorized by law to issue personal identification. Despite the State's position, the statute does not require that the entity be authorized "by the State" to issue personal identification. Since time immemorial, public libraries in the United States have operated by issuing identification cards to their patrons for use in accessing the library's books and other services. It is highly unlikely that one could find a public library operating in the United States that did not issue some type of card identifying the patron/holder. It is part and parcel of how libraries work and is universal.

More specifically, Tenn. Code Ann. § 10-3-103 provides authority for the establishment of a library board for a county, city or town. Tenn. Code Ann. § 10-3-104 provides for the "Powers and Duties of library board." That section reads as follows:

> The members of the library board shall organize by electing officers and adopting bylaws and regulations. The board has the power to direct all the affairs of the library, including appointment of a librarian who shall direct the internal affairs of the library, and such assistants or employees as may be necessary. It may make and enforce rules and regulations and establish branches of travel

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or entity of this State" in favor of the reading that helps to maximize voter participation as required by Tennessee law.

> service at its discretion. It may expend funds for the special training and formal education of library personnel; provided, that such personnel shall agree to work in the library for at least two (2) years after completion of such training and education. It may receive donations, devises and bequests to be used by it directly for library purposes. It may hold and convey realty and personal property and negotiate leases for and on behalf of such library. The library board shall furnish to the state library agency such statistics and information as may be required, and shall make annual reports to the county legislative board and/or city governing body. [Acts 1963, ch. 370, §4; impl. Am. Acts 1978, ch. 934 §§ 7, 36; T.C.A., § 10-304].

Among the many powers and duties enumerated in that section is the power to "make and enforce rules and regulations." Pursuant to these grants of authority, a board governing the Memphis Public Library has been created. That board has made rules and regulations regarding the issuance and use of library cards identifying the individual patron/holder. These rules and regulations are contained in the library's Policies and Procedures Manual.

Generally, rules and regulations which have been promulgated pursuant to a statutory grant of authority and which are not inconsistent with such statute have the force and effect of law in the agency's area of operation. *Bean v. McWherter,* 953 S.W.2d 197, 197-199 (Tenn. 1997).

Thus, since the issuance of library cards identifying the patron/holder in Memphis was done in accord with rules promulgated by the board of the Memphis library in accord with the statutory grant of authority to do so, those rules – or policies and procedures – have the force and effect of law. Accordingly, the Memphis Public Library is an agency authorized by law to issue personal identification.

The second straw man set up by Defendants is whether or not a municipality is an "entity of this State." The real question is whether a municipality is an "***agency*** of this State."

Two points definitively answer this question in the affirmative. First, in *Corporation of Collierville v. Fayette County Election Commission,* 539 S.W.2d 334, 336 (Tenn. 1976), the Tennessee Supreme Court held that "[it] is beyond question that a Tennessee municipality is an *agency of the state* exercising a portion of the sovereign power of the state for the public good." (emphasis added).

Collierville involved a dispute over municipal boundaries which arose when the neighboring community of Piperton sought to incorporate. Collierville objected on the grounds that there was a statutory requirement that any such incorporation be held in abeyance due to the proximity of Piperton's boundaries to Collierville. When the statute was ignored, Collierville brought a quo warranto action, which must be brought in the name of the state. The question before the court was whether Collierville had standing to sue. The court determined that Collierville did have standing because, as a municipality it was "an agency of the state."

Regarding the case at bar, the significance is that the court expressly held that a municipality was (and is) an "agency of the state." Thus, in accord with *Collierville*, an identity card issued by a municipality is one issued by an "agency . . . of this state."

The legislature is presumed to have knowledge of the state of the law on the subject matter under consideration at the time it enacts legislation. *Neff v. Cherokee Ins. Co.,* 704 S.W.2d 1, 4 (Tenn. 1986) (quoting *Equitable Life Assurance Co. v. Odle,* 574 S.W.2d 939, 941 (Tenn. 1977)). Because this is so, where language in a statute is very similar to the language of existing case law, courts will not be inclined to concede the extreme similarity in language to mere coincidence. Here, the similarity between the language in the relevant case law and the relevant statute is so great that the legislature could easily have taken the language of Tenn. Code Ann. § 2-7-112(c)(2)(A) directly from the decision in *Collierville.*

Because the General Assembly is deemed to know that the Tennessee Supreme Court held that a municipality is an agency of the state at the time it enacted Tenn. Code Ann. § 2-7-112(c)(2)(A), and, so knowing, used the phrase "agency . . . of this state:" it must have intended to include municipalities in its list of approved issuers of photo identification cards.

Even if that were not enough, there is a second equally dispositive point. The statute itself contains an express exclusion. Tenn. Code Ann. § 2-7-112(c)(2)(B) states:

> An identification card issued to a student by an institution of higher education containing a photograph of a student shall not be evidence of identification of purposes of verifying the person's identification on the application for ballot.

Student identifications are the only type of identity cards which are excluded. The subsection does not include any language which could conceivably encompass municipalities in general, or the City of Memphis' library system in particular.

When considering the meaning of a statute courts may employ the Latin maxim, *express unius est exclusio alterius*, which translates as "the expression of one thing implies the exclusion of things not expressly mentioned." *Wells v. Tennessee Bd. Of Regents,* 231 S.W.3d 912, 917 (Tenn. 2007).

Applying the maxim of express mention implied exclusion to Tenn. Code Ann. § 2-7-112(c)(2)(B) it is clear that because the legislature did not expressly incorporate municipalities within its statutory exclusion it intended that where municipalities issue photo identification cards, those cards would be valid evidence of identification in accord with Tenn. Code Ann. § 2-7-112(c)(2)(A).

But there is still more. The Memphis Public Library is governed in part by Tenn. Code Ann. § 10-1-101 et seq., entitled "Public Libraries, Archives and Records." The Memphis library system receives a number of grants from the State of Tennessee and is, thus, answerable

to the Tennessee State Library and Archives, which is a division of the office of Defendant Tre Hargett.

One of those contracts is entitled "Grant Contract Between the State of Tennessee, Department of State, Tennessee State Library and Archives and Memphis Public Library and Information Center." This contract was executed by Memphis Mayor AC Wharton, Jr. and Defendant Tre Hargett.

Section D-9 of the contract establishes that the Memphis Library is providing services to citizens *on behalf* of the State. This is evidenced by the signs paragraph D-9 requires entities to post, and which are posted in accord with this provision by the Memphis library.

Even more telling is Section D-19 which declares that the Memphis public library is a political subdivision of the State. Thus, even if the city were not an "agency . . . of this state," the Memphis library system, as a political subdivision of Tennessee is an "entity of this state."

Plaintiffs respectfully suggest that any one of the above points is determinative of the question. All three in combination simply cannot be rebutted, and the State has not done so. Plaintiffs requested the Court of Appeals to declare that the City of Memphis, acting by and through its library system is an agency or entity of this state in accord with Tenn. Code Ann. § 2-7-112(c)(2)(A) and that, therefore, the photographic library card being issued by the library system meets the criteria for "evidence of identification." The court did so, and its declaration was correct.

D. Summary of Issues Upon Which the State Applies for Review

In essence, the narrow issues for which the State applies for review at this time are standing, sovereign immunity and whether municipalities are state entities/agencies. Tennessee law on standing and sovereign immunity is well-established and settled, and such law has not

been misapplied by the Court of Appeals in the case at bar. The State has made no showing that the law on either subject is unsettled, nor is any showing made that there is not uniformity of decision on those issues. Thus the granting of the State's Application by this Court on the narrow issues for which appeal is sought is not necessitated to secure uniformity of decision, nor to settle any issues of law, and neither is the supervisory authority or guidance of this Court necessitated on the narrow issues of law sought to be appealed at this time. As to the third issue raised as to whether municipalities are state agencies, the Court of Appeals accepted as precedent the prior ruling of this Court in the *Collierville* decision, wherein this Court relied on its opinion in an even earlier case. It is clear that this Court has already settled the subject legal issue and it would have been a deviation from precedent for the Court of Appeals to have ruled otherwise.

E. Defendants are Not Entitled to a Stay of the Court of Appeals Judgment and Order Pending Final Resolution of the Case

In the alternative, if this Court decides to grant Defendants' Application for Permission to Appeal, then Plaintiffs request that the Court deny Defendants' request for a stay of the Court of Appeals' Judgment and Order pending a final resolution of this dispute.

Under Rule 42(b) of the Tennessee Rules of Appellate Procedure, the timely filing of an application for permission to appeal in the Supreme Court will typically "stay the issuance of the mandate of the Court of Appeals or Court of Criminal Appeals." However, Rule 42(b) also makes clear that such a stay will only go into effect ***"[u]nless otherwise ordered*** by the Supreme Court, Court of Appeals, or a judge thereof" (emphasis supplied). Here, the Court of Appeals did in fact order otherwise. In its Judgment and Order, the court specifically stated that "Defendants Hargett and Goins are hereby ORDERED to immediately advise the Shelby County Election Commission to accept photo library cards issued by the City of Memphis Public Library as acceptable "evidence of identification" as provided at Tenn. Code Ann. § 2-7-112(c)(2)(A)."

Similarly, at the end of its decision, the court emphasized that "an appropriate order will be entered simultaneously with this Opinion requiring the defendants to ***take immediate action*** to appropriately notify the Shelby County Election Commission in accordance with this decision." *City of Memphis*, at 18) (emphasis supplied). In light of the Court of Appeals' clear order, Defendants' argument that they are automatically entitled to a stay pursuant to Rule 42(b) is unavailing.

Furthermore, even if this Court concludes that the Court of Appeals' order was not explicit enough to constitute a denial of stay, this Court has express authority of its own to deny or retract of a stay pending resolution of the matter before it. And, as the Court noted in *Brooks v. Carter*, the issuance of an immediate mandate can be appropriate "if the context warrants such and order." 993 S.W.2d 603, 610 n.6 (Tenn. 1999). Given the balance of equities in this case, and danger of Memphis residents being disenfranchised if a stay is maintained through November 6, the context here weighs strongly in favor of the Court exercising its authority and holding the Court of Appeals' Judgment and Order fully enforceable pending the final resolution of this appeal.

According to its own express language, the Court of Appeals' Order applies ***only*** to photo library cards issued by the City of Memphis. (*See City of Memphis*, Judgment and Order, Oct. 25, 2012) ("Defendants Hargett and Goins are hereby ORDERED to immediately advise the ***Shelby County Election Commission*** to accept photo library cards. . . .") (emphasis supplied). At the time Plaintiffs filed their appellate brief with the court below, the Memphis Public Library had issued about 1854 of these photo library cards. (*See* Brief of Appellants at 8-9) (citing McCloy Depo. at 39:16-23)). To date, the library has issued approximately 1,977 such cards. Even if every one of these card-holders attempts to vote using the photo library card, which is

unlikely, that would still represent a tiny fraction — roughly three tenths of a percent — of Shelby County registered voters.[3]

Furthermore, as Plaintiffs have explained in detail during the course of this litigation, the Memphis Public Library has implemented controls to ensure that photo library cards are only issued to qualified Tennessee residents. (*See* Brief of Appellants at 39) (citing Newman Affidavit ¶ 9)). In fact, these photo library cards are ***far more secure*** than many out-of-state identity cards that election officials currently accept under Tenn. Code Ann. § 2-7-112(c). (*Id.*)

Accordingly, in light of (1) the narrow scope of the Court of Appeals' Judgment, (2) the limited number of Memphis residents holding photo library cards, and (3) the controls in place to ensure that such cards are issued only to qualified Tennessee residents, there is no risk that the Court of Appeals' Judgment will give rise to confusion or prevent the Shelby County Election Commission from performing its duties.

In contrast, if the Court of Appeals' Judgment is stayed pending appeal, the resulting confusion may prevent Memphis residents holding these photo library cards from having their ballots counted. Newspapers and television stations throughout the State have already reported on the Court of Appeals' decision and have specifically stated to the public that Memphis photo library cards are valid IDs for voting. *See, e.g.*, Richard Locker, *Court OKs Memphis Library Photo Cards for Voting*, MEMPHIS COMMERCIAL APPEAL, Oct. 25, 2012, *available at* http://www.commercialappeal.com/news/2012/oct/25/court-oks-memphis-library-photo-cards-voting/. Based on that information, some Memphis residents — who might otherwise obtain state-issued identity cards or vote absentee between now and November 6 — are likely to show

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[3] According to the State's own voter registration data, there were 584,443 registered voters in Shelby County in August of 2012. *See* http://www.tn.gov/sos/election/data/turnout/2012_08%20Turnout.pdf

up at the polls with only their photo library cards, earnestly believing such cards to be acceptable proof of identity. If the Judgment of the Court of Appeals is stayed, those voters will only be permitted to cast provisional ballots. Furthermore, since Tenn. Code Ann. § 2-7-114(e)(1) only gives the voter two days after Election Day to come forward with acceptable photo ID, it is highly unlikely that these voters will be able to obtain acceptable ID in time to have their provisional ballots counted.

Therefore, since Defendants will not suffer any harm in the absence of a stay — *see* Oct. 25, 2012 Email of Shelby County Election Commission Chairman, indicating the Commission's ability and willingness to immediately implement the Court of Appeals' Order (attached hereto as Exhibit A) — while dozens or hundreds of qualified Memphis voters may be disenfranchised as the result of a stay, Plaintiffs again request that the Court exercise its authority and Order Defendants to adhere to the Court of Appeals' Judgment pending the issuance of a final decision by this Court.

III. CONCLUSION

On the narrow issues presented in the State's application for permission to appeal, the Court of Appeals properly applied the law. The Court correctly determined that Plaintiffs' claims do not seek to reach the State's treasury, funds, or property. The Court properly found that the denial of the Plaintiffs rights to vote in the August election was a distinct and particularized injury caused by the Defendants cramped interpretation of the statute and that such injury is redressable.

Finally, the Court correctly decided that where the Supreme Court declared that a municipality is an agency of the state, and the legislature used virtually the identical phrase in Tenn. Code Ann. § 2-7-112(c)(2)(A), they intended to do so.

There is simply no reason for this Court to grant the Defendant's application. If the Court disagrees, the Plaintiffs respectfully request the Court to do so on an extremely expedited basis so that the 1,977 holders of photo library cards in Memphis are not disenfranchised.

Dated: October 29, 2012

Respectfully Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Answer to Application of the Defendants-Appellees for Permission to Appeal and/or Motion to Stay Judgment and Order* has been sent to the following via Electronic & U.S. Mail, first class postage prepaid, on this the 29th day of October, 2012:

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EXHIBIT A

Newman, Regina

From: Robert Meyers <rmeyers@fordharrison.com>
Sent: Thursday, October 25, 2012 3:19 PM
To: Newman, Regina
Subject: Shelby County Election Commission re: Memphis Library Card Photo ID

Regina, congratulations. We are communicating to the early voting sites that the Memphis Library Card is now an acceptable Photo ID. We will also add that fact to our election day training. Please let me know if you have any questions or comments.

Robert Meyers
Chairman
Shelby County Election Commission