

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

ERIKA SUGARMON, JOHN MAREK,
SAMUEL GOFF, BRITNEY THORNTON, and
RANKED CHOICE TENNESSEE

Petitioners,

v.

Case No.: _____

MARK GOINS, in his capacity as
Coordinator of Elections, Tennessee Division
of Elections, and TENNESSEE ELECTION
COMMISSION

Respondents.

VERIFIED PETITION FOR JUDICIAL REVIEW

Petitioners Erika Sugarmon, John Marek, Samuel Goff, Britney Thornton, and Ranked Choice Tennessee (“RCTN”) (collectively, “Petitioners”), by and through counsel, file this, their Joint Petition for Judicial Review and in support thereof states as follows:

INTRODUCTION

1. Petitioners come to this court for a third time in the same administrative proceeding (and the fourth time overall), seeking judicial review of the arbitrary and capricious decision of Mark Goins, the Coordinator of Elections, Tennessee Division of Elections (the “Coordinator”) finding instant runoff voting (“IRV”; sometimes also called ranked choice voting or RCV) unlawful under Tennessee state law.

2. IRV is a good government reform that permits voters to rank candidates in their order of preference, rather than selecting only one candidate. IRV promotes good government and less ideologically fractious candidates because candidates need to compete not only for a vote but

also for rankings that might not be the first ranking in order to secure victory. This encourages candidates to communicate with and appeal to a broader swath of voters than they might otherwise. IRV also saves governments and candidates money by eliminating the need to hold runoff elections if no candidate receives a majority (i.e., 50% plus one) of the votes cast. It provides more opportunity for less-well-known, less-well-funded candidates who might otherwise be dismissed by voters as “throwing away their vote.” It thus makes elections more competitive and boosts turnout.

3. In November 2008, the voters of Memphis, Tennessee decided to be first movers in adopting this method for tabulating votes, adopting an amendment to the Memphis City Charter (the “Charter Amendment”), which mandated the use of IRV in the next municipal election unless the Shelby County Election Commission (the “SCEC”) “certifies that voting machine limitations make its implementation in time for that election unfeasible.” Despite never making such a certification, the SCEC never implemented IRV.

4. That changed in 2017, when the new Shelby County Administrator of Elections, Linda Phillips (the “Administrator”), announced that she had developed a method to implement IRV using Shelby County’s existing voting machines, and intended to so implement in the upcoming 2019 Memphis City Council elections.

5. Apparently alarmed by Shelby County’s attempts to implement the will of its citizens, the Coordinator promptly reached out to the Administrator in September 2017 and informed her that IRV was unlawful and could not be implemented in Tennessee based on strained readings and invented limitations in several Tennessee statutes.

6. Thus began this multi-year saga whereby the Coordinator has attempted to thwart all attempts at judicial review of his arbitrary and capricious decision to deny Tennessee citizens

their preferred method of election tabulation. But the Coordinator has run out of excuses and delay tactics. Petitioners respectfully request that the Court review the Coordinator's final order and reverse it as the arbitrary and capricious decision it is.

PARTIES AND JURISDICTION

7. Erika Sugarmon is a Memphis resident and taxpayer, is registered to vote in Memphis, and ran for Memphis City Council District 9 in a 2018 special election and in the regular election of October 2019. Sugarmon intends to run for Memphis City Council in the next election.

8. John Marek is a Memphis resident and taxpayer, is registered to vote in Memphis, and ran for a Memphis City Council seat in 2015 and 2019. He intends to run again for Memphis City Council in the next election.

9. Samuel Goff is a Memphis resident and taxpayer, is registered to vote in Memphis, ran for a Shelby County Commission seat in 2018, and planned on running for a Memphis City Council seat in 2019 under IRV. He decided not to run because IRV was not used in that election. He intends to run again in the next Memphis City Council election.

10. Brittney Thornton is a Memphis resident and taxpayer, is registered to vote in Memphis, and ran for a Memphis City Council seat in 2019. Ms. Thornton was not an original petitioner at the administrative level, but was permitted to intervene. She intends to run for Memphis City Council in the next election.

11. RCTN is a non-profit corporation organized under the laws of the State of Tennessee, whose mission is to educate citizens about the civic benefits of using a ranked choice voting process, also known as IRV. RCTN was not an original petitioner at the administrative level, but was permitted to intervene.

12. The individual Petitioners believe that as candidates with less name recognition and fewer resources than incumbents, they would benefit greatly from the use of IRV. IRV would eliminate the Petitioners' need to reserve campaign funds for a potential runoff election (of particular importance to candidates with less resources) and would minimize the possibility that voters would decline to support them for fear of "wasting their vote" on lesser-known candidates.¹ RCTN similarly has an interest in seeing the voters' intent to institute IRV be implemented in Memphis municipal elections.

13. Mark Goins is the Coordinator of Elections for the Tennessee Division of Elections, a division of the Tennessee Election Commission.

14. This Court has jurisdiction to hear this matter pursuant to Tenn. Code Ann. § 4-5-322(a)(1). Venue is appropriate pursuant to Tenn. Code Ann. § 4-5-322(b)(1)(A).

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

15. The complex factual and procedural history of this case have been set out in great detail in Petitioners' past petitions to this court, which Petitioners hereby incorporate by reference. *See Sugarmon v. Goins*, No. 18-1253-II (Tenn. Ch.) ("*Sugarmon P*"); *Sugarmon v. Tenn. Election Comm'n*, No. 19-655-III (Tenn. Ch.) ("*Sugarmon IF*"); *Sugarmon v. Tenn. Election Comm'n*, No. 20-328-I (Tenn. Ch.) ("*Sugarmon III*"). Petitioners reiterate selected portions of the facts here and add additional developments since those cases.

¹ Under a first-past-the-post system, voters often view votes for candidates who are not the frontrunners or who are less well-known as votes that are "wasted" because those candidates are likely to lose. Voters may believe that any vote not for a frontrunner will contribute to an opposing candidate they do not prefer winning. An IRV system eliminates this possibility because a voter can vote for a lesser-known but voter-preferred candidate without worrying about whether they are "wasting" their vote since they can rank a frontrunner as a second preference, ensuring their hierarchy of preferences is respected.

16. In November 2008, voters in Memphis, Tennessee passed a ballot initiative—with 71% in favor—amending the Memphis City Charter to require the use of IRV in municipal elections.² 2008 Referendum No. 5, 8-21-2008, election of 11-4-2008.

17. The amendment required that IRV be implemented in the next municipal election unless the SCEC certified that voting machine limitations made implementation infeasible. Memphis City Charter, Art. II § 7(3).

18. For almost a decade thereafter, the SCEC deemed the implementation of IRV infeasible using Shelby County’s voting equipment and declined to use IRV, as the City Charter requires, even though it never made a formal certification to that effect as required by the Charter.

19. In July 2017, however, the SCEC convened a public meeting where the Administrator stated that IRV was technically feasible using Shelby County’s voting equipment, and that the SCEC planned to implement IRV for the first time in the 2019 Memphis municipal elections using the example format below. *See also* Jackson Baker, City Voters in 2019 Will Rank Candidates 1-2-3- and Avoid Runoffs, MEMPHIS FLYER (July 24, 2017), *available at* <https://www.memphisflyer.com/JacksonBaker/archives/2017/07/24/>.

² As referenced further herein, Memphis voters overwhelmingly reaffirmed their support for IRV in 2018 by rejecting a ballot initiative seeking to repeal the IRV provisions in the Memphis City Charter, with 62.6% of voters rejecting repeal. *See* Shelby County Election Commission, *Statement of Votes Cast Shelby County, TN in State and Federal General, and Municipal Elections November 6, 2018*, 1116 (Nov. 26, 2018), <https://www.shelbyvote.com/sites/default/files/documents/elections/2018/11.06%20State%20General/2018%20Nov%206%20Certified%20SOVC.pdf>. Guide to reading Statement of Votes available at <https://www.shelbyvote.com/elections/state-and-federal-general-and-municipal-1162018>.

Mayor Rank your first, second and third choices in the columns below. One to be elected.

<p>Make your first choice in this column</p> <p>↓</p> <p>1st Choice</p> <p>1</p> <p>Select one</p> <p><input type="radio"/> THEODORE WIRTH PARK Parks Party</p> <p><input type="radio"/> MINNEHAHA PARK & FALLS Parks Uninc</p> <p><input type="radio"/> NORTH MISSISSIPPI PARK Parks Party</p> <p><input type="radio"/> CHAIN OF LAKES Parks Party</p> <p><input type="radio"/> DOWNTOWN RIVERFRONT Parks Party</p> <p><input type="text" value="Other"/></p>	<p>Make your second choice in this column</p> <p>↓</p> <p>2nd Choice, if any. Must be DIFFERENT from your first choice</p> <p>2</p> <p>Select one</p> <p><input type="radio"/> THEODORE WIRTH PARK Parks Party</p> <p><input type="radio"/> MINNEHAHA PARK & FALLS Parks Uninc</p> <p><input type="radio"/> NORTH MISSISSIPPI PARK Parks Party</p> <p><input type="radio"/> CHAIN OF LAKES Parks Party</p> <p><input type="radio"/> DOWNTOWN RIVERFRONT Parks Party</p> <p><input type="text" value="Other"/></p>	<p>Make your third choice in this column</p> <p>↓</p> <p>3rd Choice, if any. Must be DIFFERENT from your 1st and 2nd choice</p> <p>3</p> <p>Select one</p> <p><input type="radio"/> THEODORE WIRTH PARK Parks Party</p> <p><input type="radio"/> MINNEHAHA PARK & FALLS Parks Uninc</p> <p><input type="radio"/> NORTH MISSISSIPPI PARK Parks Party</p> <p><input type="radio"/> CHAIN OF LAKES Parks Party</p> <p><input type="radio"/> DOWNTOWN RIVERFRONT Parks Party</p> <p><input type="text" value="Other"/></p>
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Once you've selected your top 3 choices press vote:

20. On September 26, 2017, Mark Goins, the Coordinator sent a letter to the SCEC purporting to identify several legal arguments against implementing IRV (the “2017 Letter”).

21. Based on the proposed ballot layout announced by Administrator Phillips, the Coordinator raised a number of objections to the implementation of an IRV system. He opined that the proposed ballot was inconsistent with Tenn. Code Ann. §§ 2-3-206 (municipal primary runoff elections)³; 2-5-206 (arrangement of voting machine ballots); 2-5-207 (arrangement of paper ballots); 2-5-208 (arrangement of names and instructions on ballots); 2-7-133 (process for counting ballots); and 2-8-101 (certification of vote and recounts). The Coordinator stated that the ballot was inconsistent with Tenn. R. & Regs. 1360-2-13-.07 (regulation of electronic voting machines). The Coordinator also interpreted Memphis City Charter Ordinance No. 1794 as inconsistent with Memphis City Charter Art. 2, § 7. The 2017 Letter concluded by stating that “it is my opinion that ranked-choice voting is not currently permitted in Tennessee.”

22. On April 9, 2018, the SCEC filed an Amended Petition for Declaratory Order with the Coordinator. *Shelby County Election Commission v. Tennessee Coordinator of Elections*, Case

³ The Coordinator later withdrew this particular legal objection to IRV in an administrative opinion.

No. 20.04-152916A. This petition sought clarification as to whether IRV was permissible under Tennessee state law.

23. Upon learning shortly before the scheduled contested case hearing that the SCEC did not intend to offer a defense of IRV, one of the Petitioners moved to intervene to defend IRV. The ALJ appointed to hear the case, at the Coordinator's direction, denied the motion to intervene as untimely despite granting a similar motion to intervene by the Memphis City Council (the "City Council"), which was opposed to IRV and which was filed several days *after* Petitioners' motion to intervene. The Coordinator was already demonstrating an arbitrary bias against IRV in his early decision-making.

24. Petitioners then sought judicial review, believing the Coordinator's denial of their motion to intervene was tantamount to denying a petition for a declaratory order, meeting the prerequisites of Tenn. Code Ann. 4-5-225 for a declaratory judgment. The court disagreed and dismissed the case in January 2019, instructing Petitioners to file their own petition for a declaratory order if they wished to have standing to pursue a declaratory judgment.

25. Petitioners did just that. In February 2019, mere days after the Coordinator entered a Final Order upholding the 2017 Letter, Petitioners filed their own petition for a declaratory order reversing the Coordinator's prior Final Order as arbitrary and capricious and seeking to bolster the administrative record with an actual defense of IRV.

26. The Coordinator, in an effort to prevent implementation of IRV in the next election, dragged out the clock, waiting the maximum amount of time to make decisions on Petitioners' petition for a declaratory order and then setting a contested case hearing mere weeks before the next election. The Coordinator's hostility to IRV was apparent once again—while he took only a

month between setting a contested case hearing and holding the hearing for the SCEC, he scheduled Petitioners' contested case hearing *five months* after his decision to take the case.

27. Petitioners appealed to this court, arguing that the decision to schedule the hearing so close to the next election was a de facto denial of their petition. The Court, while sympathizing with the Petitioners position, dismissed the case, finding that constructive denial was too novel a theory and that the better solution was to go through the hearing as regularly scheduled for September 2019 and, if the Coordinator raised mootness as a defense, rely on well-settled mootness exceptions. *See Sugarmon II*.

28. The Coordinator then promptly delayed the contested case hearing until after the election to December 2019.

29. Not content with simply doing what everyone knew he would do – say he had not changed his previous opinions – the Coordinator attempted to block Petitioners from getting their day in court by advancing several strained readings of the law to ask the ALJ to dismiss the case for lack of standing. The ALJ adopted the Coordinator's strained reading and dismissed the case in January 2020, finding Petitioners, who were declared candidates for office, lacked standing because their interests were no different than those of average citizens or taxpayers.

30. Petitioners appealed to this Court in June 2020, seeking judicial review of this obviously incorrect decision. *Sugarmon III*. The Court agreed with Petitioners, finding in March 2021 that candidates for office have standing to challenge decisions relating to how elections are run and the method of tabulation. *Id.* The Court remanded the case to the agency to proceed to the merits.

31. Not finished attempting to prevent any hearing on the merits, the Coordinator then attempted to move for summary judgment a second time, arguing Petitioners lacked standing (a

position already soundly rejected by this Court, but which the Coordinator claimed he was “preserving”) and that the case was moot. The ALJ rejected these arguments and set the contested case hearing for August 5, 2021.

32. The August 5, 2021 contested case hearing lasted all day and included testimony by Petitioners and by Petitioners’ expert, George Gilbert, a former North Carolina election administrator with experience in administering RCV elections and the head of the Ranked Choice Voting Resource Center, a national resource for technical assistance to jurisdictions implementing RCV elections. Petitioners introduced several exhibits. The Coordinator did not introduce any affirmative evidence or call any witnesses.

33. Throughout the hearing, the Coordinator clearly indicated hostility to IRV, including asking leading questions like whether witnesses would think election results would be fair if they were conducted using “illegal” voting systems. The Coordinator’s questions routinely took on the tone of cross-examination of Petitioners’ witnesses.

34. The administrative record was closed following submission of post-hearing briefs and proposed orders on September 20, 2021.

35. On December 10, 2021, the Coordinator entered a Final Order (the “Final Order”) entirely discounting Petitioners’ un rebutted fact and expert testimony and holding that, with supposedly no new evidence presented, he would not change his mind regarding the legality of IRV.

COUNT ONE
VIOLATION OF TENNESSEE CODE SECTION 4-5-322(h)

36. Petitioners hereby incorporate the allegations in the preceding paragraphs as if set forth fully herein.

37. Petitioners may challenge state agency orders that are (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence that is both substantial and material in the light of the entire record are reversible by the Court pursuant to Section 4-5-322(h) of the Tennessee Code.

38. The Coordinator's Final Order violated Tennessee Code Section 4-5-322 because it was unsupported in fact and law, was the result of reversible legal error, and was arbitrary and capricious. It was also in excess of the statutory authority of the agency in that it was took on assertions of judicial power beyond the proper scope of an executive branch official. Pursuant to Davidson County Local Rules, Petitioners shall timely submit a brief in support of judicial review after submission of the administrative record.

39. Had the Coordinator not dismissed out of hand the only testimony provided to him and had the Coordinator properly interpreted the law, he would not have concluded that IRV is unlawful under Tennessee law in all instances.

40. By finding IRV unlawful as a matter of Tennessee state law, the Coordinator made a decision which was unsupported by the law, unsupported by the evidence, and was arbitrary, capricious, or a clearly unwarranted exercise of discretion under Tennessee Code Section 4-5-322. Such errors warrant reversal and a finding that, contrary to the Coordinator's previous orders, IRV is lawful under Tennessee state law. Moreover, the Coordinator's decision exceeds his statutory

and constitutional authority as his decision regarding the lawfulness of IRV is an improper assertion of judicial power by a member of an executive branch agency, which is a separate and independent reason for the Coordinator's decision to be reversed. This Court should reverse the Coordinator's decision, find that IRV is legal under Tennessee law, and order the Coordinator and the SCEC to facilitate implementation of IRV in the next Memphis City Council election, in accordance with Tennessee law and the Memphis City Charter.

Respectfully submitted,

/s/ Taylor A. Cates

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