IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, TENNESSEE AT FRANKLIN

TRE HARGETT, Secretary of State of the State of Tennessee, MARK GOINS, Coordinator of Elections of the State of Tennessee,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 44460**
TRACY E. GEORGE, ELLEN WRIGHT CLAYTON, DEBORAH WEBSTER-CLAIR, KENNETH T. WHALUM JR., MERYL RICE, JAN LIFF, TERESA M. HALLORAN, MARY HOWARD HAYES,	)	
Defendants.		

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs, the Secretary of State and Coordinator of Elections for the State of Tennessee, submit this Memorandum in support of their Motion for Summary Judgment. Summary judgment for the Plaintiffs is warranted because, as the record shows, there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04.

This declaratory judgment action arises from a dispute regarding the proper interpretation of article XI, section 3, of the Tennessee Constitution, which requires that constitutional amendments proposed through the legislative method be "approve[d] and ratif[ied] . . . by a majority of all the citizens of the State voting for Governor, voting in their favor." Plaintiffs interpret this provision, as it has consistently been interpreted in the past, to mean that an amendment must be both (i) "approve[d]," by receiving a majority of the total votes cast on the amendment; and (ii) "ratif[ied], by receiving a majority of the total votes cast in the gubernatorial election, and that all votes cast on an amendment count toward ratification, regardless of whether the voter also voted for Governor. Defendants, eight individuals who filed an action in federal court alleging that Plaintiffs improperly tabulated the votes on Amendment 1 during the November 2014 general election, interpret this provision to mean that a majority of those voters actually voting for Governor must vote in favor of the amendment. In other words, Defendants interpret article XI, section 3, to mean that a voter must first vote for Governor in order to have his or her vote on an amendment counted.

Plaintiffs are entitled to summary judgment on this important issue of constitutional interpretation. The plain language and history of the ratification provision of article XI, section 3, make clear that an amendment proposed through the legislative method is ratified if the total number of votes cast in favor of the amendment constitutes a majority of the total number of votes cast in the gubernatorial election, without regard to whether the votes in favor of the amendment were cast by voters who also voted for Governor. The legislative and executive branches of the State have long interpreted and applied the provision in precisely this manner, and that longstanding practice further confirms that Plaintiffs' reading is correct. Defendants' interpretation, which would make voting for Governor a prerequisite for voting on a constitutional amendment, is utterly lacking textual or historical support and would amount to an unconstitutional qualification on voting. This Court should reject Defendants' flawed interpretation and enter summary judgment in Plaintiffs' favor.

BACKGROUND

I. Legal Background

Article XI, section 3, of the Tennessee Constitution establishes two methods for amending the Tennessee Constitution: the legislative method and the convention method. The first paragraph of article XI, section 3, governs the legislative method, while the second paragraph governs the convention method. This action concerns only the legislative method, which provides that

> [a]ny amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the general assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if in the general assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people at the next general election in which a Governor is to be chosen. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house.

Tenn. Const. art. XI, § 3.

This method for amending the Tennessee Constitution begins in the legislature when either the Senate or the House of Representatives proposes an amendment. An amendment proposed by either the Senate or the House must be approved by the General Assembly during two consecutive legislative sessions. During the first legislative session, the amendment must be approved by a majority of the members of each house of the General Assembly. During the next legislative session, the amendment must be approved by two-thirds of the members of each house. As the final step of the legislative method, the General Assembly must then "submit such proposed amendment . . . to the people at the next general election in which a Governor is to be chosen." *Id.* Of particular relevance here, the amendment "shall become a part of [the] Constitution" if the people "approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor." *Id.*

The requirement in article XI, section 3, that the people "approve and ratify" an amendment "by a majority of all the citizens of the State voting for Governor, voting in their favor," has never been authoritatively construed by Tennessee courts.[1] As explained in more detail below, the plain language of this provision is most naturally read to mean that, in order to pass, an amendment must be both (i) approved, by receiving a majority of the total votes cast on the amendment; and (ii) ratified, by receiving a majority of the total votes cast in the gubernatorial election, and that a voter is not required to vote for Governor in order have his or her vote on the constitutional amendment counted. This interpretation is confirmed by the legislative history of the current version of article XI, section 3, as well as by the legislative history of the original version of article XI, section 3, that was adopted in 1834. Importantly, moreover, both the legislative and executive branches of the State have long and consistently interpreted and applied the requirement in exactly this manner.

II. Factual Background

On November 4, 2014, the State of Tennessee held a general election that included a gubernatorial race. During the same election, four proposed constitutional amendments were submitted to the people for approval and for ratification pursuant to the legislative method for

[1] As discussed more fully at pp. 30-31, *infra*, the Tennessee Supreme Court briefly mentioned this ratification requirement in the background section of an opinion concerning the interpretation of the second paragraph of article XI, section 3, which governs the convention method. *See Snow v. City of Memphis*, 527 S.W.2d 55, 59 (Tenn. 1975).

amending the Tennessee Constitution. Pls.' Concise Statement of Undisputed Facts ¶¶ 11-12 (hereinafter "Pls.' Statement"). The first of the four proposed amendments, Amendment 1, appeared on the ballot as follows:

> Shall Article I of the Constitution of Tennessee be amended by adding the following language as a new appropriately designated section:
>
> Nothing in this Constitution secures or protects a right or requires the funding of an abortion. The people retain the right through their elected state representatives and senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

Id. ¶ 14. A total of 1,386,355 votes were cast on Amendment 1. Of those votes, 729,163 were "yes" votes cast in favor of adoption of Amendment 1, while 657,192 were "no" votes cast against adoption of Amendment 1. *Id.* ¶¶ 15-17. A total of 1,353,728 votes were cast in the gubernatorial election. *Id.* ¶ 16.

Tennessee's Secretary of State, Tre Hargett, and Coordinator of Elections, Mark Goins, were responsible for determining whether Amendment 1 had been approved and ratified by the people as required under article XI, section 3, of the Tennessee Constitution. *See id.* ¶¶ 1-4, 21-25. Secretary Hargett and Coordinator Goins, like their predecessors, interpreted article XI, section 3, to mean that an amendment must be both (i) approved, by receiving "yes" votes constituting a majority of the total votes cast on the amendment; and (ii) ratified, by receiving "yes" votes constituting a majority of the total votes cast in the gubernatorial election, and that all votes cast in favor of an amendment count toward ratification, regardless of whether the vote was cast by a voter who also voted for Governor. *See id.* ¶¶ 18-19. Because the number of "yes" votes in favor of Amendment 1 exceeded a majority of the total votes cast on Amendment 1, Secretary Hargett and Coordinator Goins determined that Amendment 1 had been approved. *Id.* ¶ 21-22.

And because the number of "yes" votes in favor of Amendment 1 also exceeded a majority of the total votes cast in the gubernatorial election, Secretary Hargett and Coordinator Goins likewise determined that Amendment 1 had been ratified. *Id.* ¶ 23.

On November 7, 2014, Defendants brought suit against Secretary Hargett, Coordinator Goins, and several other state officials in federal court alleging that the method used to tabulate votes on Amendment 1 failed to comply with article XI, section 3, of the Tennessee Constitution. *Id.* ¶¶ 26-27. Defendants alleged in their federal court action that the only votes that should count toward ratification under article XI, section 3, are those cast by voters who also voted for Governor. *Id.* ¶ 28. In other words, Defendants claim that article XI, section 3, makes voting for Governor a prerequisite for having one's vote on a constitutional amendment counted. Their federal lawsuit seeks to have the election results for Amendment 1 declared void and to force Secretary Hargett and Coordinator Goins to recount the votes on Amendment 1 by correlating votes for Governor with votes on the amendment. *Id.* ¶ 31.

III. Procedural Background

On September 1, 2015, Secretary Hargett and Coordinator Goins filed this declaratory judgment action to obtain a definitive interpretation of article XI, section 3, of the Tennessee Constitution—specifically, the requirement that constitutional amendments proposed through the legislative method be "approve[d] and ratif[ied] . . . by a majority of all citizens of the State voting for Governor, voting in their favor." On October 1, 2015, Defendants filed a motion to stay, or, in the alternative, to dismiss this action on various grounds. Defendants principally argued that this Court was required to stay this action in deference to their pending federal court action or, in the alternative, to dismiss this action because Secretary Hargett and Coordinator Goins had failed to present a justiciable controversy. Defendants also argued that Williamson County is not the proper venue for this action. *See generally* Defs.' Mot. to Stay or, in the Alternative, to Dismiss.

On December 9, 2015, this Court issued an order denying Defendants' motion in its entirety. Among other things, this Court ruled that Plaintiffs are "entitled to a ruling under the declaratory judgments statute" because "they have a real interest in the outcome of [this action]" and have established that "a justiciable controversy exists between Plaintiffs and Defendants." Mem. and Order at 24-25. This Court also ruled that venue is proper in Williamson County since some of the Defendants reside in Williamson County and the cause of action arose in every county in Tennessee. *Id.* at 26.

APPLICABLE LEGAL STANDARD

Summary judgment is judicially welcomed as "a rapid and inexpensive means of resolving issues and cases about which there is no genuine issue regarding material fact." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, ___ S.W.3d ___, 2015 WL 6457768, at *19 (Tenn. Oct. 26, 2015). Accordingly, summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. Summary judgment is appropriate "in virtually any civil case that can be resolved solely on issues of law." *Estate of Brown*, 402 S.W.3d 193, 197 (Tenn. 2013); *see also Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn. 2010) ("[A] motion for summary judgment provides a proper vehicle for addressing the dispositive legal issues presented by the parties."); *Teter v. Republic Parking Sys.*, 181 S.W.3d 330, 337 (Tenn. 2005) ("The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact."); *Campora v. Ford*, 124 S.W.3d 624, 628 (Tenn. Ct. App. 2003) ("Summary judgment is a preferred vehicle for disposing of purely legal issues.").

In its recent opinion in *Rye,* the Tennessee Supreme Court overruled *Hannan v. Alltel Pub. Co.*, 270 S.W. 3d 1 (Tenn. 2008) and, in its place, "fully embrace[d]" the summary judgment standard established by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[2] *Rye*, 2015 WL 6457768, at *22. Under that standard, a party moving for summary judgment on a claim on which it would bear the burden of proof at trial must present credible evidence showing that "on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party." *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir. 1991) (citing Celotex, 477 U.S. at 331 (Brennan, J., dissenting)).[3] If the party makes that showing, "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Four Parcels*, 941 F.2d at 1438 (alterations and internal quotation marks omitted).

ARGUMENT

I. THE ONLY ISSUES REMAINING IN THIS DECLARATORY JUDGMENT ACTION ARE PURE QUESTIONS OF LAW.

In Tennessee, the plaintiff in a declaratory judgment action bears the burden of proving that "conditions exist to justify the court in exercising its discretionary powers to grant declaratory

[2] Pursuant to Local Rule 5.02, Plaintiffs have attached an appendix containing copies of legal authorities on which Plaintiffs rely other than published decisions by Tennessee appellate courts.

[3] The majority opinion in *Celotex* did not specifically discuss the initial showing required of a moving party that bears the burden of proof at trial. However, Justice Brennan, who agreed with the majority as to the appropriate standard for summary judgment and disagreed only as to its application in that case, explained in his dissenting opinion that "[i]f the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Celotex*, 377 U.S. at 333 (Brennan, J., dissenting) (emphasis in original).

relief pursuant to the declaratory judgment statute." *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 417 (Tenn. 1997) (internal quotation marks omitted); *see also Worrell v. Worrell*, 59 S.W.3d 106, 110 (Tenn. Ct. App. 2000). That is, the plaintiff bears the burden of "showing that a present justiciable controversy exists." *Blake*, 952 S.W.2d at 417 (internal quotation marks omitted). This Court has already ruled that a "justiciable controversy exists between Plaintiffs and Defendants" and that the parties are therefore "entitled to a ruling under the declaratory judgments statute." Mem. and Order at 24; *see also id.* at 26.[4]

The sole issue remaining in this case is the proper interpretation of the first paragraph of article XI, section 3, of the Tennessee Constitution—specifically, the requirement that amendments proposed pursuant to the legislative method be "approve[d] and ratif[ied] . . . by a majority of all the citizens of the State voting for Governor, voting in their favor." This issue of constitutional interpretation is a "question[] of law" that is properly decided on a motion for summary judgment. *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013).

Subsidiary issues related to the interpretation of a constitutional provision, such as the provision's history and purpose, are also "legal issues that may be resolved by summary judgment." *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993); *see also U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1374 (2d Cir. 1988) ("[T]he interpretation of legislative history was not an issue of fact for the jury[.]"); *Oklahoma ex rel. Dep't of Human Servs. v. Weinberger*, 741 F.2d 290, 291 (10th Cir. 1983) ("[T]he questions of statutory construction and legislative history raised herein present legal questions properly resolved by

[4] Plaintiffs previously submitted an affidavit from Coordinator Goins in support of their argument that a justiciable controversy exists. That affidavit was attached as an exhibit to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Stay or Dismiss that was filed on October 26, 2015. The affidavit of Secretary Hargett that is attached as an exhibit to Plaintiffs' Motion for Summary Judgment provides further support for that argument.

summary judgment."); *Gen. Care Corp. v. Mid-South Found. for Medical Care, Inc.*, 778 F. Supp. 405, 407 (W.D. Tenn. 1991) ("The issues in this case are essentially ones of statutory construction and legislative history, which are questions of law properly resolved by summary judgment."); *Quiban v. U.S. Veterans Admin.*, 724 F. Supp. 993, 1001 n.16 (D.D.C. 1989) ("[T]he interpretation of legislative history materials is a question of law for the court."). Consequently, disputes over such issues are also properly resolved by the Court as a matter of law at the summary judgment stage. *See, e.g., Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) ("[T]rials are to determine facts, not law.").

Similarly, any disputes concerning historical or background facts that are relevant to a court's determination of legislative history or legislative intent would not preclude summary judgment because such facts are not adjudicative facts to be decided by the jury, but rather non-adjudicative facts to be decided by the Court. Adjudicative facts are "simply the facts of the particular case" to which law is applied—that is, they are facts relating to "the parties, their activities, their properties, their businesses" that "normally go to the jury in a jury case." Fed. R. Evid. 201 advisory committee's note. Non-adjudicative, or "legislative" facts, on the other hand, "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court in the enactment of a legislative body." *Id.* Disputes over non-adjudicative facts are "not submitted to the jury" but instead resolved by the judge. Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 Minn. L. Rev. 1, 41 (1988).

The distinction between adjudicative and non-adjudicative facts is critical for purposes of summary judgment. Disputes over material adjudicative facts generally preclude summary judgment because such disputes must be resolved by the jury. But disputes over non-adjudicative facts do not at all preclude summary judgment because the court must resolve those disputes in any event. *See, e.g.*, *Bio-Medical Applications of Lewiston, Inc. v. Bowen*, 677 F. Supp. 51, 53 (D. Mass. 1987) (noting that Federal Rule of Civil Procedure 56 "does not apply to nonadjudicative facts" because, if those facts are "genuinely disputed, courts in any event may proceed to resolve them outside the constraints that apply to genuinely disputed and material adjudicative facts").

II. PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT CONFIRMING THEIR INTERPRETATION OF ARTICLE XI, SECTION 3, OF THE TENNESSEE CONSTITUTION.

A. In Construing Article XI, Section 3, this Court Must Consider that Provision's Plain Language, History, and Interpretation by the Legislative and Executive Branches.

The primary goal when interpreting a constitutional provision is to construe it "in a way that gives the fullest possible effect to the intent of the Tennesseans who adopted it." *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010); *see also Cleveland Surgery Ctr., L.P. v. Bradley Cnty. Mem'l Hosp.*, 30 S.W.3d 278, 281 (Tenn. 2000); *State v. Martin*, 940 S.W.2d 567, 570 (Tenn. 1997); *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983). The best indicator of a provision's purpose is its text. *See, e.g.*, *Estate of Bell*, 318 S.W.3d at 835. The text must be interpreted "in a principled way that attributes plain and ordinary meaning to [its] words," *id.*, and that takes into account "what the people who ratified the provision thought [those words] meant," *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995). The text must also be construed in a manner that "will render every word operative rather than one which would make some words idle and meaningless." *Shelby Cnty. v. Hale*, 292 S.W.2d 745, 749 (Tenn. 1956). "When called upon to construe a particular provision," moreover, "the Court must consider the entire instrument . . . and must harmonize its various provisions in order to give effect to them all." *Estate of Bell*, 318 S.W. 3d at 835. "No constitutional provision should be construed to impair or destroy another provision." *Id.*

In determining the meaning of a constitutional provision, a court should also take into account the provision's "history, structure, and underlying values of the entire document." *Id.* Constitutional provisions must be construed "reasonably in light of the practices and usages that were well-known when the provision was passed." *Cleveland Surgery Ctr.*, 30 S.W.3d at 282 (internal quotation marks omitted). To that end, courts may rely on "historical documents, constitutional convention proceedings, the proposed constitution of the State of Franklin, other similar state and federal constitutional provisions, and decisions from other jurisdictions construing similar provisions." *Id.* (internal quotation marks omitted).[5]

In addition to considering the text and history of a constitutional provision, a court must also consider how the provision has been interpreted by the legislative and executive branches of the State. As the Tennessee Supreme Court has held, "[a] construction of a statute or the Constitution, not emanating from judicial decision, but adopted by the legislative or executive departments of the state, and long accepted by the various agencies of government and the people,

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[5] Historical or other documents containing legislative facts that are consulted in construing a constitutional or statutory provision are generally considered legal materials rather than evidentiary materials and therefore may be considered without regard to the rules of evidence, including Tennessee Rule of Evidence 201, which "governs only judicial notice of adjudicative facts." *Cf. Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (Posner, J., in chambers) (noting that "background facts (sometimes called 'legislative' facts) . . . lie outside the domain of rules of evidence"); *Daggett v. Comm'n on Governmental Ethics & Elections Practices*, 172 F.3d 104, 112 (1st Cir. 1999) ("'[L]egislative facts' . . . usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts."); *Quiban*, 724 F. Supp. at 1001 n. 16 (treating "internal executive memoranda" as "traditional legislative history materials" because they were relevant "only to the extent they [were] probative of congressional intent"); *Hannah v. Sibcy Cline Realtors*, 769 N.E.2d 876, 886 (Ohio Ct. App. 2001) (concluding that letter from administrative agency was "not hearsay, but was more analogous to an opinion letter of an attorney general, legislative history of a statute, or any number of aids used by courts to resolve various legal questions"); Keeton, *supra*, at 31 ("[B]oth trial and appellate courts, in making premise-fact decisions, are free to draw upon sources of knowledge not admissible under the formal rules of evidence that apply to adjudicative-fact finding.").

will usually be accepted as correct by the courts." *State v. Nashville Baseball Club*, 154 S.W. 1151, 1154 (Tenn. 1913); *see also Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 626 n.12 (Tenn. 2006); *Williams v. Carr*, 404 S.W.2d 522, 529 (Tenn. 1966), *LaFever v. Ware*, 365 S.W.2d 44, 47 (Tenn. 1963); *New England Mut. Life Ins. Co. v. Reece*, 83 S.W.2d 238, 241 (Tenn. 1935). Indeed, the Court has frequently applied this rule when interpreting the very constitutional provision at issue here—article XI, section 3, of the Tennessee Constitution. *See Southern Ry. Co. v. Dunn*, 483 S.W.2d 101, 103 (Tenn. 1972) (accepting General Assembly's construction of requirement in article XI, section 3, that a constitutional convention be held no "oftener than once in six years"); *Derryberry v. State Bd. of Election Comm'rs*, 266 S.W. 102, 105 (Tenn. 1924) (accepting General Assembly's interpretation of article XI, section 3, with respect to timing of electing convention delegates).

Here, all of these considerations weigh in favor of Plaintiffs' interpretation of the ratification requirement of article XI, section 3. *First*, the plain language of the ratification requirement makes clear that, in order for an amendment to pass, it must be (i) approved, by receiving a majority of the total votes cast on the amendment, and (ii) ratified, by receiving a majority of the total votes cast for Governor, and that voting for Governor is not a prerequisite for having one's vote on the amendment counted. *Second*, the history of the current version of the ratification requirement, as well as its predecessor, confirms that the requirement was not intended to make voting for Governor a precondition for voting on an amendment. *Third*, both the General Assembly and the Secretary of State have consistently interpreted and applied the ratification requirement in this manner since the legislative method was first adopted in 1834. Defendants' contrary interpretation, by contrast, lacks any textual or historical support and would directly conflict with both the Tennessee and U.S. Constitutions.

B. The Plain Language of the Ratification Provision Makes Clear That Ratification Is Determined by Comparing the Total Votes Cast for the Amendment with Total Votes Cast for Governor.

Plaintiffs' interpretation of the ratification provision of the first paragraph of article XI, section 3, is compelled by the plain language of that provision. The relevant language provides that, after a proposed constitutional amendment is submitted to the people, "if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor, such amendment or amendments shall become part of th[e] Constitution." Tenn. Const. art. XI, § 3. By its plain terms, this provision requires that the General Assembly submit proposed constitutional amendments to "the people" for approval and ratification—not to a subset of the people consisting of individuals who voted for Governor, as Defendants' interpretation would require. The term "the people," as used in this provision, plainly refers to the general electorate.

The provision also requires that the people both "approve and ratify" an amendment. A constitutional provision should be construed so as to "render every word operative rather than . . . [to] make some words idle and meaningless." *Hale*, 292 S.W.2d at 749. Although the terms "approve" and "ratify" are both commonly understood to connote formal sanction or adoption, the term "ratify" is often used to refer specifically to "the last in a series of necessary steps or consents." Black's Law Dictionary 1376 (9th ed. 2009); *see also id.* at 118 (defining "approve" to mean "[t]o give formal sanction to; to confirm authoritatively"). The provision's use of both terms signals that approval and ratification are two separate steps, with ratification being the final step. To conclude otherwise would render the term "approve" meaningless, contrary to well-settled principles of constitutional interpretation.

The most natural reading of the requirement that the people "approve" a constitutional amendment is that it receive more than half of the votes cast on the amendment—*i.e.*, more "yes" votes than "no" votes. That reading is consistent with the common law rule that a simple majority of the votes cast on a proposition is sufficient to carry it. *See* 67A C.J.S. *Parliamentary Law* § 7 (2015) ("Where a legal quorum is present, the general rule, in the absence of a provision to the contrary, is that a proposition is carried by a majority of the legal votes cast.") (hereinafter *Parliamentary Law*).

Article XI, section 3, requires that the amendment also be ratified "by a majority of all the citizens of the State voting for Governor, voting in their favor." The term "majority," of course, means "a number greater than half the total." *Parliamentary Law* § 7. And the phrase "of all the citizens of the State voting for Governor" leaves no doubt as to what "total" should be used to calculate the majority. For an amendment to be ratified "by a majority of all the citizens of the State voting for Governor," it must receive a number of votes that is greater than half of the total number of votes cast in the gubernatorial election. The final clause of the provision, "voting in their favor," simply makes clear that the majority of votes cast must be votes cast in favor of the amendment.

In sum, the plain language of article XI, section 3, requires that a constitutional amendment proposed through the legislative method be both approved *and* ratified by the people. An amendment is approved if the votes in favor of the amendment constitute a majority of the total votes cast on the amendment—*i.e.*, if the number of "yes" votes is more than half of the total votes cast on the amendment. An amendment is ratified if the votes in favor of the amendment constitute a majority of the total votes cast in the gubernatorial election—*i.e.*, if the number of "yes" votes is more than half of the total votes cast for Governor. Nothing in the text of article XI, section 3, suggests an intent to make voting for Governor a prerequisite for voting on an amendment; to the contrary, the provision requires the General Assembly to submit amendments to "the people" for their approval and ratification. And, as explained below, both the history of the ratification provision and as its consistent interpretation by the legislative and executive branches over the years provide additional and unequivocal support for this interpretation.

C. The Legislative History of the Ratification Provision Further Confirms Plaintiffs' Interpretation.

Since 1834, when the legislative method was first adopted, article XI, section 3, has required that constitutional amendments proposed through the legislative method be approved and ratified by the people. Article XI, section 3, originally required ratification by "a majority of all the citizens of the State, *voting for representatives*, voting in their favor." Tenn. Const. art. XI, § 3 (1834) (emphasis added). In 1953, that language was amended merely to substitute "Governor" for "representatives," so that the current version now requires ratification by "a majority of all the citizens of the State *voting for Governor*, voting in their favor." Tenn. Const. art. XI, § 3 (emphasis added). The history surrounding the adoption of the original ratification requirement and its amendment in 1953 confirms that Plaintiffs' interpretation of article XI, section 3, is correct. That history shows that both the drafters of article XI, section 3, and the Tennesseans who ultimately ratified that provision meant for an amendment to be ratified if the "yes" votes on the amendment constituted a majority of the total votes cast in the other election.

1. <u>History of Original Ratification Provision Adopted in 1834</u>

The legislative method for amending the Tennessee Constitution was originally adopted during the Constitutional Convention of 1834. As originally adopted, the legislative method required the General Assembly ultimately to "submit such amendment or amendments to the people, in such manner and at such times as the General Assembly shall prescribe" and provided that "if the people shall approve and ratify such amendment or amendments, by a majority of all the citizens of the State, voting for representatives, voting in their favor, such amendment or amendments shall become part of this constitution." Tenn. Const. art. XI, § 3 (1834).

The Journal of Proceedings for the Constitutional Convention of 1834 reveals that that a delegate named John J. White proposed the plan that was ultimately adopted as Tennessee's legislative method. *See Journal of the Convention of the State of Tennessee Convened for the Purpose of Revising and Amending the Constitution Thereof* 10-13 (1834) (Dodd Aff., Ex. 1). The Journal of Proceedings for the 1834 Convention did not record any substantive debate or discussion by the delegates on the proposal by Delegate White, but a newspaper article published contemporaneously with the convention recounted the debate in some detail. *See* "The Convention," *Nashville Republican & State Gazette*, Jul. 29, 1834 (Dodd Aff., Ex. 2).[6] Delegate White's statements concerning the ratification requirement simply parroted the language of his proposal. He explained that, under his plan, an amendment must be "sanctioned by a majority of all the voters in the State, voting for representatives" and would pass `"if a majority of all the citizens of the State voting for Representatives, have voted in favor of the amendment." *Id.* Nothing that was said during the debate suggests that either Delegate White or any other delegate intended the ratification requirement to make voting for representatives a prerequisite for voting

[6] Courts consider newspaper articles published "contemporaneously with the deliberations of the legislative bodies" as reliable evidence of legislative intent and the common understanding of a provision, particularly when other recorded history is lacking. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1149 (N.D. Miss. 1980) (concluding that such items were "trustworthy and can be accepted as correct accounts of events occurring in the legislative halls"); *see also Morse v. Republican Party of Va.*, 517 U.S. 186, 206 n.22 (1996) (consulting "contemporary news accounts" to determine legislative intent where Virginia "maintain[ed] limited legislative history records"); *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 652 n.8 (E.D. La. 1961) (considering newspaper accounts of legislative history where there was no official recording of "legislative debates, committee proceedings, [or] committee reports"); *Adams v. City of Boston*, 963 N.E.2d 694, 702 n.17 (Mass. 2012) (considering a newspaper article "published two days before the bill was signed" as "a source of valuable contest as to the public dialogue animating the statute's passage"); *Mich. United Conservation Clubs v. Sec'y of State*, 630 N.W.2d 297, 378 (Mich. 2001) (reviewing "contemporaneous news articles" to determine "common understanding" of constitutional provision).

on a proposed amendment, or that the public would have understood the requirement in that manner.

2. Amendments to the Legislative Method in 1953

The legislative method of amending the Tennessee Constitution remained largely unchanged until 1953, when a limited constitutional convention was convened to address six provisions of the Constitution, including article XI, section 3. *See* 1951 Tenn. Pub. Acts, ch. 130. There was significant debate among the convention delegates as to what majority should be required for a proposed amendment to be ratified. That debate is reflected in a Majority Report, a Minority Report, and a Substitute Minority Report of the Committee on Amending Process. The Majority Report proposed leaving the original 1834 language "majority of all the citizens of the State, voting for representatives" unchanged. The Minority Report would have changed the language to require ratification by a majority of those voting on the amendment. The Substitute Minority Report would have required ratification by a two-thirds majority of those voting on the amendment. *See Journal and Proceedings of the Limited Constitutional Convention, State of Tennessee* 197-99 (1953) (Dodd. Aff., Ex. 24).

The debate among the delegates concerning these various proposals confirms that Plaintiffs' interpretation of Article XI, Section 3, is entirely consistent with the delegates' understanding of the ratification requirement that existed at the time of the convention. In introducing the Majority Report, the Chair of the Committee on Amending Process, Delegate Gilreath, noted that

> [a]n overwhelming majority of that committee felt that something more than a mere majority of those voting should be required. We discussed this question, that is by what percentage of the votes cast should the proposal be carried, we discussed hinging it on the voting in the presidential election; we discussed hinging it on the vote in the Governor's race; we discussed hinging it and making it depend

> on the vote for congressional representatives, and one, by one, for reasons which seems sufficient to the committee, each of these was rejected by a majority.

Id. at 736.

Delegate Gilreath further discussed how the amending process had been applied in the past, and none of his comments suggested that a voter must first vote for representatives in order to have his or her vote on an amendment counted or that election officials were required to correlate votes cast for representatives with those cast on the amendment. To the contrary, his comments indicate that a calculation of the total number of votes cast for representatives was all that was required. For example, in responding to a question about whether any previous amendments had come close to passing, Delegate Gilreath simply reported the total number of votes for and against each amendment, as well as the total number of votes cast for representatives in that election. *See id.* at 741-42.

Comments from other delegates, including opponents of the Majority Report, reflect a similar intent and understanding that the ratification requirement under article XI, section 3, required only a comparison of the number of votes cast in favor of the amendment to the total number of votes cast for representatives. *See, e.g.*, *id.* at 757 (statement by Delegate Chandler explaining that the provision "requires a majority of votes cast in a different election to be the measure of public will on the question of separately amending the Constitution"); *id.* at 807 (statement by Delegate Todd pointing out that the requirement "t[ied] the vote on amendments . . . to the number voting for representatives, which allow[ed] those not voting on a question to defeat it"); *id.* at 854 (statement by Delegate Sims explaining that, when he had favored an amendment, he "advised [his] friends not to vote in uncontested legislative races because it would give the amendment a better chance").[7] Delegate McGinness also clearly took the existing ratification requirement to mean that

> [T]his legislatively proposed amendment must be submitted to the people at an election in which representatives in the General Assembly are being elected, and then in order to have it ratified it shall receive *a vote equal to a majority of all the votes cast in that particular election for representatives*.
>
> ....
>
> The majority on this Committee seem adamant in their position that *ratification must be by a majority of all the votes cast for representatives, that is to say, must be by a vote equal to a majority of all the votes cast for representatives*.

Id. at 765-66 (emphasis added).

In the end, the delegates decided to leave the ratification requirement of the legislative method unchanged, except that ratification would now be "hinged" on the total number of votes cast in the gubernatorial election instead of in the election for representatives. This change was prompted by multiple complaints about the difficulty and uncertainty in ascertaining the total number of votes cast on representatives, particularly in districts that were entitled to more than one representative.[8] To cure that problem, Delegate Tipton proposed "that an amendment to carry, instead of receiving a majority of the votes cast for representatives, shall receive a majority of the votes cast for Governor." *Id.* at 893. That proposal was adopted as part of the Majority Report

[7] This advice, of course, would have made little sense if a voter was required to first vote for representatives in order to vote in favor of an amendment.

[8] For example, Delegate McGinnis argued that it was "impossible to ascertain[] how many votes are cast for representatives in an election in counties where more than one representative is elected. Gallup and all his staff couldn't figure it out to save their lives, how many votes are cast for representatives in the county of Davidson in any election." Journal of Proceedings of 1953 Constitutional Convention at 766. Concerns were also expressed that the real election for representatives actually occurred during August primaries, not during the November general election when many representatives ran unopposed. *See, e.g.*, *id.* at 792 ("[T]he November vote is not a true picture because that is only a token vote. We elect the representatives in August.").

that was ultimately adopted by the entire Convention and then approved by the voters in a referendum election held in November 1953.

The intent of the delegates in replacing "representatives" with "Governor" was made known to the voters through newspaper reports. For example, one delegate explained that the Convention had agreed "to make the vote for governor the yardstick for amendment ratification rather than that for state representative." "Vote for Governor May Be Key to Amending Charter," *Kingsport News*, May 27, 1953 (Dodd. Aff., Ex. 24). Two other delegates, in speaking to a group of voters in advance of the referendum election, explained that the amendment would require an amendment to "pass two successive legislatures and then be ratified in a general referendum by a vote equal to a majority of votes cast for governor in the general election." "League Hears Todd, Smith on Constitutional Changes," *Kingsport News*, June 23, 1953 (Dodd Aff., Ex. 26).[9]

Nothing in the history of the current version of article XI, section 3, suggests that the drafters of that provision intended to make voting for Governor a precondition for voting on an amendment, or that the voters that ultimately ratified the provision would have understood it in that manner. Rather, the history shows that article XI, section 3, means precisely what Secretary Hargett and Coordinator Goins say it means: that, in order to pass, a proposed constitutional

[9] Other newspaper articles published in the months leading up to the referendum election show that voters would have understood the ratification provision to require an amendment to receive a majority of the total votes cast for representatives (under the old version) or for Governor (under the amended version). *See, e.g.*, "Oldest Constitution Hardest to Amend," *Tennessean*, Oct. 15, 1953 (Dodd. Aff., Ex. 28) ("Under the present constitution, such amendments . . . must be ratified, not by a majority of those voting on the amendments, but by a majority of the total vote cast for state representatives."); "Amending Clause in State Constitution Has Defeated All Attempts at Change," *Kingsport News*, Oct. 8, 1953 (Dodd. Aff., Ex. 27) (noting that past amendments "were defeated because of a requirement that a proposal receive a vote equal to the majority of the total vote cast for state representatives"); "Constitutional Convention Nears Completion of Duty," *Kingsport News*, June 7, 1953 (Dodd. Aff., Ex. 25) (noting that the Convention "changed the requirement for popular vote ratification from a majority equal to a majority of those voting for state representative to a majority equal to a majority of those voting for governor"); "Amending Process Stalls Delegates to Convention," *Kingsport News*, May 23, 1953 (Dodd Aff., Ex. 23) ("Under the present constitution, ratification requires a majority of the total vote cast for state representatives – a requirement never yet met.").

amendment must be ratified by receiving enough "yes" votes to constitute a majority of the total votes cast in the gubernatorial election.

C. The Legislative and Executive Branches and the Public Have Long Construed the Ratification Requirement in the Same Manner as Plaintiffs.

From the time the legislative method of amending the Constitution was originally adopted in 1834 to the present, both the General Assembly and the Secretary of State have consistently interpreted and applied the ratification provision of article XI, section 3, to require only a comparison of the total votes cast in favor of an amendment with the total votes cast for representatives or (after 1953) for Governor—not a voter-by-voter correlation of votes cast for representatives or Governor with votes cast on the amendment. This interpretation, "long accepted by the various agencies of government and the people," should be accepted as correct by this Court. *Nashville Baseball Club*, 154 S.W. at 1154.

1. <u>Interpretation of Original Ratification Requirement</u>

An amendment proposed through the legislative method first appeared on the general election ballot in 1845. The year before that election was held, the General Assembly passed an act "to submit to a vote of the people, amendments of the Constitution." 1844 Tenn. Pub. Acts, ch. 175 (Dodd Aff., Ex. 3). That act instructed sheriffs, at the next general election in 1845, to "open and hold an election in each and every county in this State, when and where all persons *entitled to vote for Representatives*, may vote for the amendments proposed to the constitution." *Id.* § 1 (emphasis added). It further instructed that "all persons entitled to vote as aforesaid, approving said amendment, shall put on their ticket the word 'approved,' and if the people shall approve and ratify said amendment by a majority of all the citizens of the State voting for Representatives, voting in its favor, said amendments shall become part of the Constitution of the State." *Id.* The sheriffs were required to prepare a certified statement of "the number of votes given in their respective counties for Representatives . . . and also the number of votes given in their respective counties for the approval of the amendments to the constitution," and to submit that statement to the General Assembly. *Id.* § 2.

The General Assembly's instructions leave no doubt that it understood article XI, section 3, to mean that an amendment must receive "yes" votes constituting a majority of the total votes cast for representatives—not that voting for representative was a precondition for voting on an amendment. The General Assembly did not instruct sheriffs to allow only those voters who voted for representatives to vote on the amendment, or to correlate the votes cast for representatives with those cast on the amendment, or to report only the number of votes in favor of the amendments that were cast by voters who also voted for representatives. Rather, the General Assembly instructed sheriffs to allow all voters who were *entitled* to vote for representatives to vote on the amendments, and to report the total votes cast for representatives and the total votes cast in favor of the amendment.

Perhaps the most persuasive evidence that article XI, section 3, was understood *not* to make voting for representatives a precondition to voting on a constitutional amendment is that, in 1887, the General Assembly scheduled an election on a proposed amendment to be held *when there was no election for representatives*. The amendment at issue would have prohibited the manufacture and sale of "any intoxicating liquors." 1885 Tenn. Public Acts, Senate Joint Resolution No. 2 (Dodd Aff., Ex. 6); 1887 Tenn. Public Acts, Senate Joint Resolution No. 7 (Dodd Aff., Ex. 7). In 1887, after the General Assembly had passed the amendment by the required majority in two consecutive legislative sessions, it also passed an act to establish the "mode of submitting the proposed amendment to the Constitution to the vote of the people." 1887 Tenn. Public Acts ch. 86 (Dodd Aff., Ex. 8). That act scheduled the election for "the last Thursday of September, 1887," *id.*, even though the next election for representatives would not be held until the first Tuesday in November of the following year, *see* Tenn. Const. art. II, § 7 (1870). Clearly, had the Tennessee General Assembly interpreted article XI, section 3, as requiring a voter to first vote for representatives before being allowed to vote on a proposed amendment, it would not have scheduled an election on a proposed amendment at a time when no election for representatives could be held.[10]

Further evidence of this historical understanding is found in certified election results for proposed amendments that appeared in the ballot in the years between the adoption of the legislative method in 1834 and its amendment in 1953. The county election commissioners that certified these results consistently reported only three figures: the total number of votes cast in the county for representatives; the total number of votes cast in the county in favor of the constitutional amendment; and the total number of votes cast in the county against the constitutional amendment. *See* Roane County Certified Election Results for 1853 (Dodd Aff., Ex. 6); Sample Certification Documents and Statewide Totals for 1904 (Dodd Aff., Ex. 11); Bedford County Certified Election Results for 1940 (Dodd Aff., Ex. 14). They did not report the number of votes cast in favor the constitutional amendment by voters who also voted for representatives, or otherwise correlate votes for representatives with votes on the amendment as Defendants' interpretation would require.

[10] Not surprisingly, there was considerable confusion and discussion regarding what vote would be necessary for ratification in this special election. *See* "The Amendment: What Vote Will It Require to Become a Law," *Daily American*, Jul. 14, 1887 (Dodd Aff., Ex. 10). Some suggested that the amendment need only receive a majority of the votes cast on the amendment, while others suggested a majority of the votes cast for representative in the previous general election, or a majority of the number of voters qualified to elect representatives. That debate was never resolved because there were more votes against the amendment than for it. *See* Official Statewide Tally Sheet from the Secretary of State for the Sept. 29, 1887 Election (Dodd. Aff., Ex. 11). Significantly, though, no one argued that only voters who actually voted for representatives in the previous general election should be permitted to vote, or that the election would be improper because only voters who first vote for representative are allowed to vote on amendments.

Indeed, a newspaper article that was published shortly before the 1904 election noted that the Secretary of State was mailing "[a] blank certificate" to county election commissioners "for use in certifying the vote of their county to the Secretary of State." "Election Returns," *Nashville American*, Oct. 11, 1904 (Dodd Aff., Ex. 13). That form required the commissioners "to show the total vote cast for Representatives in the General Assembly." *Id.* That figure would "have to be known," the article explained, because "the constitutional amendments, to be adopted, must be approved by a majority of all the voters voting for Representative." *Id.* In a letter to the editor, a member of the General Assembly similarly instructed that, "[t]o adopt an amendment to the Constitution requires a positive majority of *all votes cast* for Representatives in the General Assembly." "Constitutional Amendments," *Nashville American*, Aug. 18, 1904 (emphasis added) (Dodd Aff., Ex. 12).

Other historical documents from this time period confirm that the Secretary of State in fact determined whether an amendment was ratified by simply comparing the total number of votes cast in favor of the amendment to the total number of votes cast for representatives. An article published shortly after the 1853 election, which was the second time an amendment proposed through the legislative method appeared on the ballot, noted that the Secretary of State had "made a report to the Senate of the vote cast for the proposed amendments to the constitution, and the vote cast for representatives." "The Election of Judges and Attorneys General by the People," *Daily Union & American*, Oct. 12, 1853 (Dodd Aff., Ex. 5). According to his report, an amendment to allow the people to elect judges and the Attorney General was "adopted by a majority" where there were 68,676 votes in favor of the amendment and 118,270 votes cast for representative. *Id.*

After the 1940 election, the Governor, Secretary of State, and Attorney General certified the results for the two constitutional amendments that appeared on the ballot that year. *See* Certification of 1940 Results (Dodd Aff., Ex. 15). The certification reported the total number of votes cast for and against each amendment, as well as the total number of votes cast for representatives. *See id.* The certification concluded that "since neither of said amendments was approved by a majority of all the citizens of the State voting for representatives . . . , as shown by the foregoing vote and as required by Article XI, Section 3 . . . , both of said amendments were accordingly defeated." *Id.* The same three officials certified the results of the 1950 election and again concluded that the proposed amendment on the ballot that year did not pass because "[t]he favorable vote was not a majority of the *total vote* . . . for representatives." "Amendment Failed in November Vote, Board Certifies," *Nashville Banner*, Nov. 21, 1950 (emphasis added) (Dodd Aff., Ex. 19); *see also* "Amendment Defeated, Official Count Shows," *Tennessean*, Nov. 21, 1950 (Dodd Aff., Ex. 20).[11]

2. <u>Interpretation of Current Ratification Requirement</u>

The current version of article XI, section 3, has been interpreted and applied in the same manner as its predecessor, except that ratification is now hinged on the total votes for governor instead of the total votes for representatives. In the years following the amendment of article XI,

[11] Other newspaper articles published shortly before the 1950 election confirm that the Attorney General also interpreted article XI, section 3, to mean that an amendment must receive a majority of the total votes cast for representatives (not that a majority of the individuals who in fact voted for representative must vote in favor of the amendment). *See* "Machines Legal in Referendum," *Tennessean*, Oct. 13, 1950 (Dodd Aff., Ex. 17) (reporting that the Attorney General said the "highest number of votes cast for representatives would be used in tabulating the referendum returns to determine whether or not a majority of voters approved the amendment"); "Beeler Expects Satisfactory Constitution Vote," *Nashville Banner*, Oct. 13, 1950 (Dodd Aff., Ex. 16) (similar). And still other articles show that the public shared that understanding. *See* "Voters Approve Constitution Change, But Too Few Voted," *Tennessean*, Nov. 8, 1950 (Dodd Aff., Ex. 18) (noting that "[*m*]*ost* persons who voted for the amendment yesterday also voted in the legislative election, but all those who voted in the legislative races did not vote for the amendment" (emphasis added)).

section 3, to change "voting for representatives," to "voting for Governor," the Secretary of State and Coordinator of Elections have consistently interpreted that provision to require that an amendment receive "yes" votes constituting a majority of the total votes cast for Governor. For example, the certified election results from the 1966 election, which included nine proposed constitutional amendments, show that the Secretary of State tabulated the votes by comparing the total votes cast in favor of the amendment to the total number of votes cast for Governor, without correlating the votes in any manner. *See* Certified Election Results for 1966 (Dodd Aff., Ex. 31). The same was true for constitutional amendments that appeared on the ballot in the elections of 1970, 1982, 1998, 2002, 2006, 2010, and, of course, 2014. *See* Certified Election Results for 1970 (Dodd Aff., Ex. 33); Certified Election Results for 1982 (Dodd Aff., Ex. 34); Certified Election Results for 1998 (Thompson Aff., Ex. 1); Certified Election Results for 2002 (Thompson Aff., Ex. 3); Certified Election Results for 2006 (Dodd Aff., Ex. 5); Certified Election Results for 2010 (Goins Aff., Jan. 26, 2016, Ex. 2); Certified Election Results for 2014 (Goins Aff., Jan. 26, 2016, Ex. 3).

The Secretary of State's consistent interpretation of article XI, section 3, is reflected in other contemporaneous documents as well. In 2002—the year when a proposed amendment to establish a state lottery appeared on the ballot—the Secretary of State published an information sheet on its website explaining in no uncertain terms what is required for a constitutional amendment to pass. *See* Thompson Aff. ¶ 9 (attached as Ex. B to Pls.' Mot. for Summ. J.). That document included the following explanation:

> **Counting the votes**
>
> In order for an amendment to pass and become part of the Constitution, two things must happen:
>
> 1) The amendment must get more "yes" votes than "no" votes; and

> 2) The number of "yes" votes must be a majority of the votes cast in the gubernatorial election.
>
> To determine the votes needed, all votes for all candidates are added together. This number is divided by two or halved. The number of "yes" votes must exceed that number. If the number of "yes" votes exceeds that number, the Constitutional amendment passes and becomes part of the Constitution.

"Constitutional Amendment Issues" (Thompson Aff., Ex. 2). The document further explained that "*it is not necessary to vote in the governor's race in order to vote on the Constitutional amendment*." *Id.* (emphasis added). A similar document appeared on the Secretary of State's website before the 2006 general election, when two proposed constitutional amendments appeared on the ballot. *See* Thompson Aff. ¶ 12; Thompson Aff., Ex. 4 to Thompson Aff., Ex. 4. And Coordinator Goins prepared yet another similar document before the 2010 general election, when one proposed amendment was on the ballot. *See* Goins Aff., Jan. 26, 2016 ¶ 7 (attached as Ex. C to Pls.' Mot. for Summ. J.); Goins Aff., Jan. 26, 2016, Ex. 1.

Newspaper articles published during this time period demonstrate that the public would have had a similar understanding of article XI, section 3, even before the Secretary of State published these information sheets making its interpretation clear. For example, an article about a controversial amendment concerning highway funding that appeared on the ballot in 1953 explained that, in order to pass, the amendment "must get 'yes' votes equal to a majority of the votes cast in the gubernatorial election." "Group Favoring Passage of Roads Amendment Waging Strong Battle," *Kingsport Times*, Oct. 30, 1958 (Dodd Aff., Ex. 29). Other articles explained the requirement in similar terms. *See, e.g.*, "Constitutional Amendment Vote," *Kingsport Times*, Apr. 15, 1966 (Dodd Aff., Ex. 30) ("To be ratified by the voters . . . it will require a favorable vote equal to one more than half of the total votes cast for gubernatorial candidates."); "Sheriff Term on

Ballot," *Kingsport Times*, Oct. 13, 1970 (Dodd Aff., Ex. 32) ("If a proposal should receive 10,000 favorable votes and 8,000 unfavorable votes it would not be ratified unless that 10,000 was a majority of the number voting for governor."); "Victims' Rights May Make State Constitution," *Tennessean*, Apr. 29, 1998 (Dodd. Aff., Ex. 35) ("To become part of the constitution, the amendment must be approved by one more vote than half of the total number of votes cast in the race for governor."). The public's understanding of the requirement is highly relevant to the legal question before the Court given the Supreme Court's instruction that "an interpretation long accepted by the various agencies of government *and the people*, will usually be accepted as correct." *Nashville Baseball Club*, 154 S.W. at 1154.

D. Defendants' Interpretation of the Ratification Requirement Is Untenable.

Defendants interpret the ratification provision of article XI, section 3, to mean that an amendment is ratified if a majority of the voters who vote for Governor also vote in favor of the amendment. In other words, Defendants interpret the ratification provision to make voting for Governor a precondition to voting on an amendment. But that interpretation is untenable. It is (i) irreconcilable with the plain language of the article XI, section 3; (ii) contrary to the longstanding and consistent legislative and executive interpretation of that provision; and (3) violative of the Tennessee and U.S. and Constitutions.

1. <u>There Is No Textual Support for Defendants' Interpretation.</u>

The plain language of article XI, section 3, offers no support for Defendants' interpretation. Defendants apparently read the phrase, "voting in their favor," to modify the entire clause, "a majority of all the citizens of the State voting for Governor," such that more than half of all voters who voted for Governor would be required to vote "yes" on an amendment in order for it to be ratified. The more natural reading, however, is that the phrase, "voting in their favor," modifies only the term "majority." That is, the amendment must receive a majority of votes in favor of the amendment, and the required majority is a majority of the total number of votes cast in the gubernatorial election.

2. There Is No Historical Support for Defendants' Interpretation.

Nothing in the history of the original adoption of article XI, section 3, in 1834, or in the history of its amendment in 1953, supports Defendants' strained interpretation. Nor is there any evidence that either the legislative or executive branch has ever construed the ratification provision in the manner Defendants urge. To the contrary, both the General Assembly and the Secretary of State have consistently interpreted and applied the ratification provision precisely as Plaintiffs read it.

In their federal court action, Defendants have argued that the Tennessee Supreme Court's decision in *Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn. 1975), supports their interpretation, but that could not be farther from the truth. The issue of the proper interpretation of the ratification provision was not even remotely before the Court in *Snow*. The Court's only mention of the ratification provision occurred in the background section of that opinion, which concerned a completely separate issue. That discussion is therefore pure dictum, not binding on this Court or any other court. *See Metro. Gov't of Nashville and Davidson Cnty. v. Reynolds*, 512 S.W.2d 6, 10 (Tenn. 1974); *Willard v. Golden Gallon-TN, LLC*, 154 S.W.3d 571, 576 (Tenn. Ct. App. 2004). The primary issue before the Court in *Snow* was the proper interpretation of the *second paragraph* of article XI, section 3, dealing with the *convention method*—specifically, the phrase "proscribing that no amendment shall become effective, 'unless within the limitations of the call of the convention.'" *Id.* at 59 (quoting Tenn. Const. art. XI, § 3). The only time the Court even referred to the ratification requirement in the first paragraph of article XI, section 3, was during its "brief review of the background and events" that led to the amendment of the second paragraph at issue in the case. *Id.* at 61.

That non-binding discussion, moreover, does not even support Defendants' interpretation. The Court simply noted that previous efforts to amend the Tennessee Constitution under the legislative method had failed "because of the obstacle of obtaining voter ratification by a majority of all those voting for representatives." *Snow*, 527 S.W.2d at 61. This reference to ratification by "a majority of all those voting for representatives" was not an endorsement of Defendants' interpretation. Rather, it was just another way of saying that an amendment must receive a majority of the total votes cast for representatives, and it supports Plaintiffs' interpretation. The Court "judicially note[d], that in said efforts to amend by that process, only a small percentage of the voters who voted for representatives cast their ballots either for or against constitutional amendments, leaving the required majority of those voting for representatives, unattainable." *Id.* The difficulty identified by the Court is hardly unique to Defendants' interpretation of the ratification provision. The Court was merely noting the reality that, in most cases, more votes would be cast for representatives than on the amendment, making it difficult for an amendment to receive the required majority of votes cast for representatives.

3. <u>Defendants' Interpretation Would Violate Both the Tennessee and U.S. Constitutions.</u>

Even if Defendants' interpretation of article XI, section 3, were a plausible one—and it is not—it should be rejected for this reason alone: it would squarely conflict with another provision of the Tennessee Constitution and violate the U.S. Constitution. It is well settled that Tennessee courts are to avoid construing constitutional provisions in a manner that would "impair or destroy another provision." *Estate of Bell*, 318 S.W. at 835. Because "[a]ll constitutional provisions are entitled to equal respect," a court "called to construe a particular provision . . . must consider the entire instrument . . . and must harmonize its various provisions in order to give effect to them all." *Id.*

Defendants' interpretation of article XI, section 3, would directly conflict with article IV, section 1, of the Tennessee Constitution, which establishes the right to vote. That provision clearly states that every person meeting the enumerated qualifications "shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides." Tenn. Const. art. IV, § 1. It further states, in no uncertain terms, that "there shall be no other qualification attached to the right of suffrage." *Id.*; *see also City of Memphis v. Hargett*, 414 S.W.3d at 108 (explaining that the enumerated qualifications "constitute the exclusive criteria for the right to vote"). Defendants' interpretation of article XI, section 3, however, would do exactly what is prohibited: it would impose an additional qualification on the right to vote on constitutional amendments by compelling a voter to vote for Governor in order to have his or vote on a constitutional amendment counted.[12]

Defendants' interpretation would not only conflict with another provision of the Tennessee Constitution, but it would also violate the voting rights of Tennesseans under the U.S. Constitution. Federal courts have repeatedly invalidated state laws imposing conditions precedent on voting because they impose a severe burden on voters' First and Fourteenth Amendment rights without furthering any compelling state interest.

In *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 727 (1st Cir. 1994), for example, the First Circuit considered "whether a state may condition the right to vote in one election on whether that right was exercised in a preceding election." The court was unable to "conceive of a governmental

[12] To the extent Defendants' interpretation would require election officials to correlate each vote cast on amendment with a corresponding vote for Governor, it could also impinge onTennesseans' "right to a secret vote in elections." *Mooney v. Phillips*, 118 S.W.2d 224, 226 (Tenn. 1938).

interest sufficiently strong to limit the right to vote to only a portion of the qualified electorate" and invalidated the condition as an unconstitutional burden on the right to vote. *Id.* at 730-31.

In *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Ca. 2003), a case involving the recall election of California Governor Gray Davis, the district court for the Southern District of California considered a state election law providing that "[n]o vote cast in the recall election shall be counted for any candidate unless the voter also voted for or against the recall of the officer sought to be recalled." *Id.* at 1071 (internal quotation marks omitted). The court explained that any "restriction on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack." *Id.* at 1076 (internal quotation marks omitted). The court concluded that the law at issue, by conditioning the right to vote on a successor governor on casting a vote on the recall issue, had substantially burdened the right to vote without a sufficiently compelling state interest. *Id.* at 1078. It further concluded that the law violated the First Amendment by forcing voters to take a position on the question of recall. *Id.* The Colorado Supreme Court recently invalidated a provision of the Colorado Constitution that was similar to the statute at issue in *Partnoy*, similarly concluding that the provision violated the First and Fourteenth Amendments to the U.S. Constitution. *See In re Hickenlooper*, 312 P.3d 153, 155 (Colo. 2013).

In sum, there is no reason to adopt Defendants' interpretation of the ratification requirement of article XI, section 3. Quite the contrary, there are compelling reasons to reject that interpretation since it would directly conflict with at least one other provision of the Tennessee Constitution and would violate the U.S. Constitution to boot.

CONCLUSION

Summary judgment for the Plaintiffs is warranted because there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment as a matter of law. The requirement in article XI, section 3, that amendments proposed through the legislative method be "ratified by a majority of all the citizens of the State voting for Governor, voting in their favor" means, simply, that an amendment must receive "yes" votes constituting a majority of the total votes cast for Governor in that election. The plain language of article XI, section 3, its history, and its long and unbroken interpretation and application by the legislative and executive branches all compel this interpretation and undermine Defendants' flawed, and unconstitutional, view that voting for Governor is a precondition to voting on an amendment. Plaintiffs respectfully request that the Court enter summary judgment in Plaintiffs' favor on this important issue of constitutional interpretation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Memorandum in Support of Motion for Summary Judgment was sent by first class U.S. mail, postage prepaid, to:

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This 27th day of January, 2016.

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