IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROSA A. QUINTEROS,

Plaintiff,

vs.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY and DAVIDSON COUNTY ELECTION COMMISSION

Defendants.

Civil Action No. 08-2535-I

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER

Before the Court is Plaintiff's Complaint for a temporary restraining order, declaratory judgment and injunctive relief to enjoin the "English-Only" Metro-Nashville Davidson County charter amendment special election from occurring on January 22, 2009 (with early voting scheduled to begin January 2, 2009). The Plaintiff seeks to enjoin an election on this ballot measure from occurring on the grounds that the proposed charter amendment is beyond the powers of the Metropolitan Government of Nashville Davidson County and that the proposed charter amendment is facially unconstitutional. Metro has been served and service has been returned and filed.

I. The Proposed Charter Amendment is *Ultra-Vires* and Therefore Properly Subject to a Pre-Election Injunction.

As a preliminary, in effect jurisdictional matter of form or procedure, the Court must consider whether the proposed amendment is within the powers of the Metropolitan Government of Nashville Davidson County. The Court should be guided by the Tennessee Supreme Court's decision in *City of Memphis v.*

Shelby County Election Commission, 146 S.W. 3d 541 (Tenn. 2004)[1] which recognized that while generally pre-election challenges to a referendum attacking substantive constitutionality are not ripe for judicial review, in the exceptional case, "preelection challenges to the *form or facial constitutional validity of referendum measures* are ripe for judicial scrutiny"(emphasis supplied).

The Plaintiff's *ultra vires* challenge in this case goes to the power of the electorate to adopt the proposal in the first instance. "The question is, in a sense, jurisdictional." *Legislature v. Deukmejian*, 34 Cal.3d 658, 667, 669 P.2d 17, 21, 194 (Cal. 1983). This is a preliminary procedural issue of form or procedure. Election officials are properly ordered not to place initiative and referendum proposals on the ballot where that the electorate does not have the power to enact them since they are not legislative in character (*e.g.*, *Simpson v. Hite*, 36 Cal.2d 125, 129-134, 222 P.2d 225 (1950); *Fishman v. City of Palo Alto*, 86 Cal.App.3d 506, 511-512, 150 Cal.Rptr. 326 (1978); where the proposed charter amendment is beyond the power of the municipality (e.g. *Asbell v. Green*, 159 Fla. 702, 32 So.2d 593 (Fla. 1947); where the subject matter is not a municipal affair (*e.g.*, *Riedman v. Brison*, 217 Cal. 383, 387, 18 P.2d 947; (1933); *Mervynne v. Acker*, 189 Cal.App.2d 558, 565-566, 11 Cal.Rptr. 340 (1961)), or the proposal amounts to a revision of the Constitution rather than an amendment thereto (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 349-351, 196 P.2d 787).

This precise issue of whether a city or municipal government *has the power* to enact an "official language" English-only amendment was considered in *Bogota v. Donovan*, 907 A.2d 433, 388 N.J. Super. 248 (N.J. Super. 2006). The Court

[1] The cases and authorities cited herein are hyperlinked and available for download at: http://www.drslawfirm.com/quinteros/quinterostrobrief.doc

held the referendum election on the "English only" ballot initiative was properly enjoined, noting:

> "If we were to conclude that Bogota could adopt English as its official language, logic would require that another municipality in the State could pass a similar ordinance adopting another language as its official language. If one municipality were to adopt English as its official language, while another adopted Spanish and yet another Japanese, the wheels of government could come to a halt. In our judgment, passage of such an ordinance is **not within the powers of a municipality.**"

The above-cited authorities are persuasive and in accordance with *City of Memphis v. Shelby County Election Commission*, 146 S.W. 3d 541 (Tenn. 2004). Thus the proposed ballot measure is procedurally/jurisdictionally defective and an injunction is appropriate.

II. The Proposed Charter Amendment is Facially Unconstitutional and Therefore Subject to Pre-Election Injunction

City of Memphis v. Shelby County Election Commission, 146 S.W. 3d 541 (Tenn. 2004) also provides that a referendum election may be enjoined on ground the measure will be wholly void and facially unconstitutional even if adopted. As an alternative ground for granting Plaintiff's request for injunctive relief, the Plaintiff avers there is a substantial likelihood of success on the merits that the proposed charter amendment is facially unconstitutional and therefore an injunction should issue.

The wide reach of the initiative chills the exercise of protected speech, and there is no construction that can cure the unconstitutionality of the proposed amendment. The proposed amendment violates Plaintiff's rights of free speech guaranteed by the First Amendment to the Constitution of the United States and by Art. I §§ 19, 23 of the Tennessee Constitution and violates the right to Equal Protection guaranteed by the Fourteenth Amendment to the Constitution

of the United States. *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska,2007); *Ruiz v. Hall*, 957 P.2d 984 (1998), cert. denied 525 U.S. 1093 (1999); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir.1995) (*en banc*), *vacated as moot sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Unlike English-only laws that are brief, non-prohibitive and symbolic measures, the challenged Charter amendment in this case prohibits speech and is thus facially unconstitutional. It may therefore be enjoined prior to submitting the measure to the electorate. In re INITIATIVE PETITION NO. 366, State Question, No. 689, 46 P.3d 123, 2002 OK 21 (Okla. 2002).

III. Plaintiff Has Standing to Sue

Plaintiff, as a municipal taxpayer and as a specially affected foreign language speaking resident of Davidson County with limited English proficiency, has standing to sue. *Cobb v. Shelby County Bd. of Commissioners*, 771 S.W.2d 124, 126 (Tenn.1989).

Plaintiff Rosa A. Quinteros also has standing to sue because she is within a special class, which on account of the charter amendment suffers a special loss or damage which is not common to all citizens affected by the amendment. *State Dept. of Human Services v. Priest Lake Community Baptist Church* 2007 WL 1828871 (Tenn.Ct.App., June 25, 2007). Ms. Quinteros is a resident of Davidson County, Tennessee. She has Department of Homeland Security authorization to live, work and reside in the United States under a grant of Temporary Protected Status for nationals of El Salvador. She speaks Spanish and has limited proficiency in English. She is legally domiciled in the United States and Davidson County and has the need to speak with and communicate with

departments and employees of Metropolitan Nashville Davidson County, Tennessee. She has sustained or is in immediate danger of sustaining direct injury as result of the proposed amendment. There is a direct relationship between alleged injury and claim sought to be adjudicated. Ms. Quinteros has personal stake in outcome of case and the challenged action has caused some injury in fact by chilled speech and, alternatively or she is an appropriate party to assert the public's interest in this matter as well as in her own interest.

IV. Conclusion

For the foregoing reasons, Plaintiff respectfully prays that the Court enter a temporary restraining order filed herewith and set this matter for a hearing for a permanent injunction.

Respectfully Submitted,

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& EDMUND J. SCHMIDT III

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon the following on this 21st day of November, 2008, via hand delivery:

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