

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III**

**THE ASSOCIATED PRESS,)
KIMBERLEE KRUESI,)
CHATTANOOGA PUBLISHING)
COMPANY, GANNETT GP MEDIA,)
INC., MICHAEL ANASTASI, GOULD)
ENTERPRISES, INC., MEMPHIS)
FOURTH ESTATE, INC., MEREDITH)
CORPORATION, JEREMY FINLEY,)
SCRIPPS MEDIA, INC., BEN HALL,)
TEGNA, INC., JEREMY CAMPBELL,)
LISA LOVELL, TENNESSEE)
ASSOCIATION OF BROADCASTERS,)
TENNESSEE COALITION FOR OPEN)
GOVERNMENT, INC., and)
TENNESSEE PRESS ASSOCIATION,)**

Plaintiffs,)

vs.)

No. 20-404-III

**THE TENNESSEE REGISTRY OF)
ELECTION FINANCE, and PAIGE)
BURCHAM-DENNIS, HANK)
FINCHER, DAVID GOLDIN, PAZ)
HAYNES, TOM LAWLESS, and TOM)
MORTON, in their Official Capacities as)
Members of the Tennessee Registry of)
Election Finance, and BILL YOUNG, in)
his Official Capacity as Executive)
Director of the Bureau of Ethics and)
Campaign Finance,)**

Defendants.)

**MEMORANDUM AND ORDER GRANTING FINAL JUDGMENT
FOR THE PLAINTIFFS**

This lawsuit was commenced by the filing of a “Complaint to Enforce the Tennessee Open Meetings Act.” The *Complaint* was filed by various media associations, directors and reporters, and a nonprofit organization. They seek an order finding that the Defendants, the Tennessee Registry of Election Finance (the “Registry”), and its members (the “Registry Members”), and the Executive Director of the Bureau of Ethics and Campaign Finance (“Executive Director”), (collectively, “Defendants”), violated the Tennessee Open Meetings Act (the “OMA”) by taking an email vote on April 1, 2020. The Plaintiffs also seek an injunction prohibiting such future conduct and Court monitoring.

The Plaintiffs allege that a majority of the Registry voted by sending emails to the Executive Director to approve a \$22,000 settlement offer from State House Representative Joe Towns, Jr. The \$22,000 was offered to settle fines of \$65,000 owed to the Registry and \$1,100 owed to the Tennessee Ethics Commission. Pursuant to the agreement, the Ethics Commission is to be paid the entire amount owed it, whereas the Registry will receive \$44,100 less than it was owed for the civil penalties it levied against Representative Towns. Exhibit 2 attached to the *Complaint* is an email from the Executive Director stating that he “polled each member of the Registry Board regarding whether to accept the settlement offer” from Representative Towns and that “[t]he Registry Board has now voted via email 4-2 to accept Representative Towns’ counsel’s settlement proposal.”

Although the Defendants do not dispute the timeline, events and contents of exhibits to the *Complaint*, they do dispute the legal implications of those. The Defendants' position is that their April 2020 vote did not violate the OMA because of the following.

- The April 2020 vote does not fit the definition found in section 8-44-102(b)(2) of the OMA of “the convening of a governing body . . . to make a decision or deliberate toward a decision on any matter.” The Defendants assert that only the Attorney General can accept or reject a settlement offer in this circumstance, so while the Defendants “could express their desire to accept the offer, they could not actually make that decision.” *Defendants' Response to Plaintiffs' Motion for Judgment on the Pleadings*, August 13, 2020 at 6.
- Any violation of the OMA is moot because a subsequent July 8, 2020 meeting was held which complied with the OMA and ratified the April 2020 vote.

The foregoing positions of the parties were presented to the Court for entry of a final order by a motion for judgment on the pleadings filed by the Plaintiffs on July 31, 2020, and a motion for summary judgment filed by the Defendants on August 13, 2020.

After conducting oral argument on September 25, 2020, the Court ruled from the bench granting the Plaintiffs' motion for judgment on the pleadings and denying Defendants' motion for summary judgment. At the conclusion of the ruling from the bench, the Court requested Plaintiffs' Counsel to prepare the order because the Court was in the midst of conducting a 4-week bench trial by Zoom. Plaintiffs' Counsel did so, which has been of great assistance to the Court, much of which is included herein, along with supplementary reasoning and citation to law not stated from the bench, but taken from the filings, on which the Court also bases its decision.

In addition, upon further reflection, the Court has concluded that while facts outside the pleadings are not necessary to grant the motion for judgment on the pleadings, undisputed facts outside the record are necessary to state in denying Defendants' motion for summary judgment, in particular that a July 8, 2020 ratification meeting was conducted. Under these circumstances, to avoid the appearance, if there is an appeal, that matters outside the pleadings, although undisputed are nevertheless viewed as part of the ruling on the motion for judgment on the pleadings, the Court converts the Plaintiffs' motion for judgment on the pleadings to a motion for summary judgment. *See Cored, LLC v. Steve Hatcher*, No. M2020 00083 COAR3CV, 2020 WL 5944067, at *3-4 (Tenn. Ct. App. Oct. 6, 2020); *Stifuentes v. D.E.C., LLC*, No. M2018 02183 COAR3CV, 2020 WL 4760329, at *2 (Tenn. Ct. App. Aug. 17, 2020). There is no prejudice to either party in doing this as none of the facts listed below as considered by the Court are disputed, and it will avoid a procedural conundrum if the case is appealed.

It is therefore ORDERED that the Plaintiffs' motion for judgment on the pleadings, which is decided under the same standard as a motion to dismiss under Tennessee Civil Procedure Rule 12.06, is converted under Rule 12.02 to a motion for summary judgment, and is granted as to the part that the Defendants' April 2020 email vote violated the Open Meetings Act. It is further ORDERED, however, that the Court declines to order the relief sought in the motion for judgment on the pleadings of an injunction to prevent future violations and/or Court supervision on the grounds that such relief is unnecessary under the circumstances of this case.

As to the Defendants' motion for summary judgment, it is ORDERED that it is denied. The Court concludes that the April 2020 vote does come within the coverage of the Open Meetings Act, and the subsequent July 2020 ratification meeting's compliance with the Act did not render this lawsuit moot.

Court costs are taxed to the Defendants.

The undisputed facts established by the pleadings and application of the law on which this decision is based are as follows.

Legal Standard

Under the Tennessee Rules of Civil Procedure, any party may move for judgment on the pleadings “[a]fter the pleadings are closed but within such time as not to delay the trial.” TENN. R. CIV. P. 12.03. The pleadings are “closed” when the complaint and answer have been filed so long as no party has asserted counterclaims or cross-claims. *See Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004) (concluding that the pleadings were “closed” after the complaint and answer were filed because “no other pleading[s]” were permitted at that point). When considering a motion for judgment on the pleadings, courts must “accept all well pleaded allegations of the opposing party’s pleading as true, and all allegations denied by the moving party [must be] construed as false.” *City of Alcoa v. Tennessee Local Gov’t Planning Advisory Comm.*, 123 S.W.3d 351, 355 (Tenn. Ct. App. 2003). Conclusions of law, however, “are not admitted” and “[w]here a statement posits a legal conclusion, the trial court may not rely

upon it as a basis for granting the motion.” *See id.* (concluding that a trial court erred in relying on a party’s conclusions of law in granting judgment on the pleadings).

“If matters outside the pleadings are presented in conjunction with either a Rule 12.02(6) motion or a Rule 12.03 motion and the trial court does not exclude those matters, the court must treat such motions as motions for summary judgment and dispute them as provided in Rule 56. Tennessee case law on this issues views the matters outside the pleadings as ‘extraneous evidence.’ *Pac. Eastern Corp.*, 902 S.W.2d 952; *D.T. McCall & Sons v. Seagraves*, 796 S.W.2d 457, 459 (Tenn. Ct. App. 1990). . . . Matters outside the pleadings may include affidavits, judgments and transcripts from a prior cause of action and correspondence between the parties.” *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 786-87 (Tenn. Ct. App. 2007) (footnotes omitted).

This is the standard the Court has applied in ruling herein.

Facts Upon Which the Court’s Ruling is Based

For purposes of deciding the parties’ cross-motions, the Court relied upon the following admissions from Defendants’ Pleading/Answer.

- “It is admitted that on or about April 1, 2020, Director Young contacted the six members of the Registry by email and/or telephone, asking each Registry Member for his or her vote on whether to recommend a settlement offer made by State Representative Joe Towns to resolve outstanding civil penalties levied by the Registry.” (Answer ¶ 31.)

- “It is admitted that a majority of members of the Registry voted to recommend the settlement offer from Representative Towns. (*Id.* ¶ 32.)
- “It is admitted that Registry Members Paz Haynes, Paige Burcham-Dennis, Hank Fincher, and David Goldin voted, via email, in favor of recommending the approved settlement with Representative Towns. (*Id.* ¶ 33.)

In addition, the Defendants did not dispute the contents of Exhibits 1 and 2 to the *Complaint*, stating in their Answer, “28. Defendants submit that the quoted Executive Order speaks for itself and deny Plaintiffs’ characterizations and interpretations,” and “35. Defendants submit that the quoted exhibit speak for itself and deny Plaintiffs’ characterizations and interpretations.” Thus, the Court has considered in its ruling the contents of Exhibits 1 and 2 to the *Complaint* (an executive order of the Governor, and an email sent to Registry Members and the Tennessee Ethic Commission Board from the Executive Director), as either part of the *Complaint*/pleadings under Rule 10.03 and a public record for purposes of a motion for judgment on the pleadings, or as undisputed content/facts under the summary judgment standard.

Plaintiffs’ contend that the email vote was an approval or acceptance of the settlement with Representative Towns, but also contend that it is not material whether the email vote was to recommend, approve, or accept the settlement. (Pls.’ Resp. to Defs.’ Statement of Undisputed Facts ¶¶ 3-6.) Defendants agree that it is immaterial whether the email vote is characterized as a vote to recommend, approve, or accept the settlement. The Court therefore has not factored in in its decision any characterization of the vote.

The Court finds that it is not material whether the email vote was to recommend, approve, or accept the settlement.

Defendants also allege that they held a cure meeting on July 8, 2020 at which “the Registry discussed anew and fully considered Representative Towns’ settlement offer for nearly an hour” and then held another vote on the proposed settlement with Representative Towns, which was approved by a 4-2 vote. (Defs.’ Statement of Undisputed Facts ¶¶ 7, 9-10.) Plaintiffs do not dispute the allegations regarding the July 8, 2020 Registry meeting. (Pls.’ Resp. to Defs.’ Statement of Undisputed Facts ¶¶ 7, 9-10.) To the extent that this undisputed fact which is a constituent of the Defendants’ denied summary judgment mootness argument is deemed on appeal to require this Court to convert the judgment on the pleadings to a summary judgment, it has done so above under the authority of Tennessee Civil Procedure Rules 12.02 and 12.03.

**Pertinent Law and Application to Allegations of the Pleadings Admitted
by the Defendants and to Undisputed Facts on Summary Judgment**

The Legislature has stated with respect to the purpose of the Open Meetings Act that it is “the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret.” TENN. CODE ANN. § 8-44-101(a). To implement this principle, “[a]ll meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of

Tennessee.” *Id.* § 8-44-102(a). The Registry is such a governing body, which is required to comply with the OMA’s provisions.

A governing body under the OMA is defined as “[t]he members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration...” TENN. CODE ANN. § 8-44-102(b)(1)(A). While the OMA does not define “public body,” the Tennessee Supreme Court has:

It is clear that for the purpose of [the OMA], the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.

Dorrier, 537 S.W.2d at 892.

In this case, there is no question that the Registry is a body “whose origin and authority may be traced to State . . . legislative action” The Registry was created by the General Assembly pursuant to Tennessee Code Annotated sections 2-10-202 and 2-10-203, to ensure enforcement of Tennessee’s financial disclosure laws for public officials and candidates for public office, among others. Therefore, the Registry is a public body under the OMA.

The Registry is comprised of six members appointed pursuant to statutory requirements, and “[n]o action shall be taken without a quorum present” at Registry meetings. *Id.* § 2-10-203(a), (f). Thus, the Registry is a public body “which consists of two

(2) or more members with the authority to make decisions for ... a public body on policy and administration...,” meaning that it is a governing body. Accordingly, the Registry, its members, and its executive director are subject to the OMA’s open government requirements.

The OMA requires that “[a]ll votes of any such governmental body shall be by public vote or public ballot or public roll call. No secret votes, or secret ballots, or secret roll calls shall be allowed.” TENN. CODE ANN. § 8-44-104(b). Simply put, “secret votes are prohibited . . .” *Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 145 (Tenn. Ct. App. 1998) (citation omitted); *see also Zselvay*, 986 S.W.2d at 583–84 (citing TENN. CODE ANN. § 8-44-104(b) (explaining that the OMA requires “that all votes of governmental bodies be public”). Here, the facts are undisputed that the vote was via emails sent to the Executive Director.

A meeting is defined in the OMA as “the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter” TENN. CODE ANN. § 8-44-102(b)(2). Then sitting on the Court of Appeals, now-Justice Kirby explained that the convening necessary to constitute a meeting under the OMA may be either “intentional or inadvertent.” *Johnston*, 320 S.W.3d at 310.

In this case, “[i]t is admitted that on or about April 1, 2020, the [Executive] Director . . . contacted the six members of the Registry by email and/or telephone, asking each Registry Member for his or her vote on whether to recommend a settlement offer made by

State Representative Joe Towns to resolve outstanding civil penalties levied by the Registry.” (Answer ¶ 31.) Similarly, the Executive Director stated in an email that he had “polled each member of the Registry Board regarding whether to accept the settlement offer of \$22,000 from Representative Towns’ counsel to resolve outstanding civil penalties owed by Representative Towns of \$65,000 to the Registry Board” (Compl. Ex. 2 at 1.) The Executive Director “also spoke by phone with each Registry Board member on this matter” (*Id.*) After these communications through and with the Executive Director, the Registry “voted via email 4-2 to accept Representative Towns’ counsel’s settlement proposal.” (*Id.*)

The OMA specifically prohibits the use of informal assemblages or electronic communication “to decide or deliberate public business in circumvention of the spirit or requirements” of the OMA. TENN. CODE ANN. § 8-44-102(c). “The purpose of this section . . . is to prevent public officials from deciding or deliberating public business in chance meetings, informal assemblages, or by electronic communication. In evaluating chance meetings, informal assemblages or electronic communication the courts look to the substance of the meeting rather than its form, keeping in mind that the statute is to be construed so as to frustrate all evasive devices.”¹ *Shelby Cty. Bd. of Comm’rs*, 1990 WL 29276, at *5 (citation omitted). “In enacting [Section 8-44-102(c)] as a loophole closer, the General Assembly recognized that public officials could evade the literal ‘quorum’ and

¹ The Court of Appeals in *Shelby County Board of Commissioners* was discussing the same statutory provision, which was then found in Tenn. Code. 8-44-102(d).

‘meeting’ requirements of the Act. The provision permits the courts to grant relief when the challenged conduct, though violating the purposes of the Act, does not squarely fall within the literal definitions of the Act.” *Id.*; see also *Johnston*, 320 S.W.3d at 312 (quoting Tenn. Code § 8-44-102(c)) (“A violation of the [OMA] can occur inadvertently if the electronic communication has the effect of circumventing ‘the spirit or requirements’ of the [OMA].”)

Here, the Registry Members used email, a form of electronic communication, to vote as to whether to recommend the settlement offer of Representative Towns to resolve outstanding civil penalties levied against him by the Registry. This falls squarely within Section 8-44-102(c)’s prohibitions and is a violation of the OMA. While email is an efficient means of communication, courts must guard against its use by governing bodies to circumvent the OMA’s requirements, as the Registry did here. In *Johnston*, the Court of Appeals explained that emails between City Council members in which the members “are clearly weighing arguments for and against [an issue]” was deliberation because the emails “mirror[ed] the type of debate and reciprocal attempts at persuasion that would be expected to take place at a Council meeting, in the presence of the public and the Council as a whole.” 320 S.W.3d at 312. As in that case, the use of email by the Registry Members to convey their vote on a settlement with Representative Towns to the Executive Director likewise mirrors the type of action that one would expect to take place at a Registry meeting, which would be open to the public.

In the *Shelby County* case, the Court of Appeals interpreted and applied Section 8-44-102(c)'s identical predecessor, Section 8-44-102(d). 1990 WL 29276, at *5–6. In that case it was alleged that Shelby County Commissioners engaged “in secret telephone conversations and/or meetings outside the public view and chambers of the Commission and deliberating on and deciding their vote for the person to fill a vacancy on said Commission prior to” a properly noticed public meeting of the Commission. *Id.* at *1. The court held that “[w]hether or not the alleged conduct falls within the [OMA’s] definition of ‘meeting,’ . . . the alleged conduct constitutes informal assemblages of a governing body at which public business was privately deliberated and decided, without public notice, in contravention of the spirit and requirements of the [OMA] all of which is proscribed by [Section 8-44-102(c)]...” *Id.* at *6.

The Defendants violated the spirit and requirements of the OMA by deciding via an email vote whether to recommend settlement with Representative Towns. This conclusion is supported by both the wording of Section 8-44-102(c) and the case law interpreting that provision.

On March 20, 2020, Governor Lee issued Executive Order No. 16 (“Order No. 16”), which suspended certain specified—and inapplicable here—portions of the OMA as part of the Governor’s COVID-19 response. (Compl. Ex. 1.) Specifically, Order No. 16, in limited circumstances, suspended the OMA’s requirement that a quorum of a governing body be physically present in the same location and permitted governing bodies to use electronic means to conduct their meetings. (*Id.* at 4.) Order No. 16 “does not in any

way limit existing quorum, meeting notice, or voting requirements under the law” (*Id.*). This emergency order did not contemplate or authorize the use of email to conduct a governing body’s business. Rather, if governing bodies did not meet in person, they were still required to provide public notice of their meetings, and were required to use video and/or audio means of opening those properly noticed meetings to the public, either via livestreams or by posting “a clear audio or video recording of the meeting available to the public as soon as practicable following the meeting, and in no event more than two business days after the meeting.” (*Id.*) Finally, there is nothing in Order No. 16 that permits governing bodies to circumvent Section 8-44-102(c)’s requirement to avoid the use of electronic communication “to decide or deliberate public business in circumvention of the spirit or requirements” of the OMA. Contrary to all these mandates, the Registry’s email vote was not taken in a properly noticed public meeting, was not public, and violated Section 8-44-102(c).

Thus, acting with the Executive Director as a conduit, and at his behest, a quorum of the Registry Members was convened in order to make a decision—whether to recommend Representative Towns’ settlement offer. This convening, though in a non-traditional format, is nevertheless a meeting under the OMA.

The OMA “requires public notice of all regular or special meetings of a governmental body.” *Souder*, 997 S.W.2d at 145 (citing Tenn. Code § 8-44-103). Because, as concluded above that the Registry’s email vote was a meeting under the OMA,

the Registry was required to provide public notice of the email vote, but did not do so. This was a violation of the OMA.

In sum, then, the Defendants violated the OMA as a matter of law by voting by email to recommend a settlement offer for outstanding civil penalties from State Representative Joe Towns on or about April 1, 2020. The email vote was not taken during a properly noticed public meeting, and thus was a secret vote, in violation of Tenn. Code Ann. § 8-44-104(b). Moreover, the email vote itself constituted a meeting under the OMA because it was a convening of the Registry with the Executive Director as the conduit. That meeting was not properly noticed or open to the public, in violation of Tenn. Code Ann. §§ 8-44-102(a), 8-44-103. The email vote also violated Tenn. Code Ann. § 8-44-102(c), which prohibits the use of electronic communication or informal assemblages to “decide or deliberate public business in circumvention of the spirit or requirements of” the OMA.

As to the Defendants’ argument that their “email vote could not have been a ‘meeting’ under the [OMA] because Defendants lacked the authority to accept or reject the settlement offer” because “[t]hat authority instead rests with the Attorney General,” (Defs.’ Resp. to Pls.’ Motion for J. on the Pleadings at 5 (citing Tenn. Code Ann. § 8-6-109(b))), the Defendants asked the Court to find that there is a bright-line rule that distinguishes between the types of decisions that make a convening of a governing body subject to the OMA and those that do not. Specifically, Defendants advocate “a bright-line rule that distinguishes between legally consequential communications—those that involve the

formation of public policy and legally authoritative determinations—and legally inconsequential communications—such as expressions of nonbinding preference and pre-decision discussions that do not themselves carry legal weight.” (Defs.’ Reply in Supp. of Defs.’ Mot. For Summary J. at 5.) The Court declines to adopt Defendants’ proposed bright-line rule as semantics and that there is no “bright line.” An analysis of the types of decisions that must be made in public at a publicly noticed meeting should be made on a case-by-case basis. These decision are dependent upon the particular circumstances of the case as in this case.

Here, the Court concludes that the Registry has a weighty role with respect to settlement, even though the Attorney General has the authority as the litigating attorney to decide whether to accept or reject a settlement. In particular the Legislative intent behind the creation of the Registry was to vest it with the power to “ensure enforcement” of specific campaign and financial disclosure statutes. TENN. CODE ANN. § 2-10-202. The Attorney General has even opined that the statutes that created the Registry “reflect the intent of the General Assembly to create ‘an independent entity of state government’” and “to entrust enforcement of campaign finance issues, a sensitive and potentially partisan topic, to a panel of members forbidden from participating in partisan politics during their membership.” Tenn. Op. Att’y Gen. No. 98-122, 1998 WL 423972, at *4 (July 10, 1998); *see also id.* at *3 (“The duty to interpret and enforce this statute has been given to the Registry in legislation approved by the legislative and executive branches.”). This

independent role of the Registry would be undermined if the Attorney General possessed the sole decisive input to accept settlement offers for civil penalties levied by the Registry.

The Registry's enabling statutes vest it with specific authority to impose civil penalties for violation of the State's financial disclosure laws, and no provision transfers the power to settle such civil penalties to the Attorney General, or any other official or entity. TENN. CODE ANN. §§ 2-10-110(a), 2-10-207, 2-10-308(a). Though the Registry "has the authority to petition the chancery court through the attorney general and reporter for enforcement of any order it has issued," Tennessee Code Annotated section 2-10-209, this provision does not transfer the power to settle a civil penalty levied by the Registry to the Attorney General. Likewise, while the Attorney General has a specific duty to "[r]epresent the registry of election finance in any action or lawsuit in any court of this state," TENN. CODE ANN. § 2-10-109(a)(3), this provision does not transfer the power to settle a civil penalty levied by the Registry to the Attorney General.²

Prior campaign finance disclosure laws reinforce this position. For example, under the Campaign Financial Disclosure Act of 1975, "the duty and authority to enforce" it was expressly "vested solely in the Attorney General of the State of Tennessee." *Dobbins v. Crowell*, 577 S.W.2d 190, 192 (Tenn. 1979) (citations omitted). As discussed above, that authority now statutorily resides with the Registry. To permit the Attorney General to

² In private practice it would be an ethical violation for an attorney representing a client to unilaterally settle a case. Tennessee Rule of Professional Conduct 1.2(a) provides that "[a] lawyer shall abide by a client's decision whether to settle a matter." The comments to Rule 1.2 further explain that "The decisions specified in paragraph (a), such as whether to settle a civil matter, also must be made by the client."

unilaterally control the settlement of civil penalties levied by the Registry without their participation would conflict with the Registry's statutory powers of enforcement and the General Assembly's intent to make the Registry an independent entity.

Moreover, the Defendants' argument that it is the Attorney General who has the sole authority to settle civil penalties levied by the Registry is at odds with Defendants' actions in this case. Exhibit 2 to the *Complaint*, the Executive Director's email, indicates this. The Executive Director explained in his April 2, 2020 email that "[t]he Registry Board has now voted via email 4-2 to accept Representative Towns' counsel's settlement proposal," (Compl. Ex. 2 at 2) and "this matter is now resolved, meaning that Joe Towns is no longer disqualified from running for re-election to his Tennessee House seat." (*Id.*)

A vote was taken in this case that the Executive Director said resolved the matter. In addition, the statutory scheme described above of the Registry's watchdog role and independence is a testament that the Registry's input on settlement was weighty if not critical. Given the Registry's duty under the law and its independent role to enforce Tennessee's campaign finance laws that the public relies upon, the Court concludes that, when the undisputed facts in this case are filtered through the language of the OMA, and the well-established rules of construction for the OMA,³ the email vote constituted a

³ The OMA should "be construed broadly to promote openness and accountability in government..." *Metro. Air Research Testing Auth., Inc. v. Metro Gov't*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992); *see also State v. Shelby Cnty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (holding that the OMA "is to be construed so as to frustrate all evasive devices").

consequential decision by the Registry. As such, the email vote was a meeting under the OMA that was required to be publicly noticed and open to the public.

The Court of Appeals decision in *State ex rel. Akin v. Town of Kingston Springs*, No. 01-A-01-9209-CH00360, 1993 WL 339305 (Tenn. Ct. App. Sept. 8, 1993) supports this conclusion. In that case, the Court of Appeals instructed courts that the definition of “meeting” under the OMA “should not be narrowed by literal parsing of its terms since [Section 8-44-102(c)] warns that ‘chance meetings, informal assemblages, or electronic communication shall not be used to decide or deliberate public business in circumvention of the spirit or the requirements of [the OMA].’” *Id.* at *3.

With respect to the Defendants’ mootness argument in support of their motion for summary judgment, is it denied as follows.

“An issue becomes moot if an event occurring after the commencement of the case extinguishes the legal controversy attached to the issues, or otherwise prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment.” *Scripps Media, Inc. v. Tenn. Dep’t of Mental Health & Substance Abuse Servs.*, No. M2018-02011-COA-R3- CV, 2019 WL 3854298, at *4 (Tenn. Ct. App. Aug. 16, 2019) (citations omitted). Defendants argue that this case is moot because the Registry held a cure meeting. (Mem. at 6–7.)

Defendants rely primarily upon the Court of Appeals’ decision in *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990), to support their mootness argument, but *Neese’s* cure holding is not as broad as Defendants argue. Defendants

selectively quote from *Neese* to argue that “[t]he Act is not intended . . . ‘to bar a governing body from properly ratifying its decision made in a prior violative manner.’” (Mem. at 6 (quoting *Neese*, 813 S.W.2d at 436).) But this quotation is divorced from its context:

T.C.A. § 8-44-105 provides that “[a]ny action taken at a meeting in violation of this part shall be void and of no effect” We do not believe that the legislative intent of *this statute* was forever to bar a governing body from properly ratifying its decision made in a prior violative manner.

Neese, 813 S.W.2d at 436 (emphasis added); *see also Akin*, 1993 WL 339305, at *4 (explaining that the purpose of the cure doctrine is to prevent “mistakes by public officials” from “forever frustrat[ing] the conduct of public business”) (citations omitted). In other words, a proper cure meeting simply permits a governing body to avoid the nullification remedy in Tennessee Code Annotated section 8-44-105.

Neese does not address at all how a remedial action, like a cure meeting, impacts the remedies the General Assembly provided for in Tennessee Code Annotated section 8-44-106, which are the only remedies sought in this case. The Court of Appeals’ decision in *Zselvay v. Metropolitan Government of Nashville*, 986 S.W.2d 581 (Tenn. Ct. App. 1998), does, however, address how the OMA’s two remedies provisions should be applied when a governing body has taken a remedial action. In that case, the governing body in question “performed a valid and necessary remedial action,” and, as a result, the court found no reason to void the action. *Id.* at 585. Nevertheless, the court did not find the case to be moot and ordered the same injunctive relief and court supervision sought by Plaintiffs here. *Id.* In doing so, the court noted that “[t]he Legislature obviously felt that

the use of injunction and the application of judicial oversight to the activities of a governmental body in violation of the Act was the best guarantee of subsequent compliance.” *Id.*

“[S]trict compliance with the Act is a necessity if it is to be effective” *Id.* A cure meeting, even an effective one, is not, as Defendants’ contend, a “get-out-of-jail-free” card for any governing body that has run afoul of the OMA; were that the case, it would render the relief provisions of Tennessee Code Annotated section 8-44-106 meaningless. Governing bodies could violate the OMA with impunity and simply hold a cure meeting to end any suit brought to enforce the OMA. Such a result would encourage circumvention of the OMA. *Shelby Cty. Bd. of Comm’rs*, 1990 WL 29276, at *5 (“It is our responsibility to construe all legislation as it is written, and unless it violates our state constitution or our federal constitution, do so in a manner to prevent its circumvention.”). And it would make the OMA a useless statute with no real enforcement mechanism—a result which would be contrary to Tennessee law. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (citations omitted) (“The courts may . . . presume that the General Assembly did not intend to enact a useless statute and that the General Assembly ‘did not intend an absurdity.’”). Cure does not moot a case where, as here, relief is sought pursuant to Tenn. Code 8-44-106.

The Court therefore concludes that a cure meeting does not render an OMA case moot as a matter of law. Instead, the Court should consider the issue on a case-by-case basis because in some cases there may still be need for a judicial remedy. In this case, it

was important for Plaintiffs to come forward to file this lawsuit because, even though there was an effective cure meeting after the lawsuit was filed, there were questions about the interplay between the authority of the Registry and the Attorney General and its impact on the Registry's OMA obligations.

Finally, Plaintiffs sought, among other things, injunctive relief and Court supervision based on the provisions of Tenn. Code Ann. § 8-44-106(c)-(d). The Court concludes that the relief provided for in those provisions is not compulsory, but instead is discretionary. *Forbes v. Wilson Cnty. Emergency Dist. 911 Bd.*, 966 S.W.2d 417, 421 (Tenn. 1988) (finding that the OMA's remedies provisions "incorporate some degree of judicial discretion in fashioning an appropriate remedy to further the purposes of [the OMA]"). As such, when there are violations of the OMA, the Court should decide on a case-by-case basis what relief is appropriate. The Court finds that this is not a case that warrants an injunction or ongoing court supervision, but the Court does find that it is necessary to issue a declaration that the OMA was violated by the Defendants' email vote.

s/ Ellen Hobbs Lyle

ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the COVID-19 Plan of the Twentieth Judicial District of the State of Tennessee, as approved by the Tennessee Supreme Court, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

