IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE,	)	
Petitioners/Appellants/Plaintiffs,	)	**COURT OF APPEALS OF TENNESSEE AT NASHVILLE**
v.	)	**Case No. M2018-00834-COA-R3-CV**
METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY	)	**CIRCUIT COURT FOR DAVIDSON COUNTY**
Respondent/Appellee/Defendant.	)	**Case No. 17-0386-II**

APPLICATION FOR PERMISSION TO APPEAL

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JURISDICTIONAL STATEMENT

The Home Builders Association of Middle Tennessee seeks discretionary review of a judgment of the Tennessee Court of Appeals under Tenn. R. App. P. 11(a).

On January 30, 2019, the Court of Appeals filed an opinion, resolving an appeal as of right under Tenn. R. App. P. 3. No party filed a petition for rehearing.

This Application is timely filed under Tenn. R. App. P. 11(b).

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals ruled that a facial constitutional challenge to an ordinance was moot because a superseding state law made it "unlikely" the local government would enforce the law any further. Is the question of whether the government can moot a case based on preemption without submitting any actual evidence of sufficient public importance that this Court should accept review?

STANDARD OF REVIEW

Issues of preemption are questions of law reviewed *de novo* with no deference to the conclusions of law made by the lower court. *Jordan v. Knox Cty.*, 213 S.W.3d 751, 763 (Tenn. 2007). Mootness is also a legal question reviewed *de novo*. *City of Chattanooga v. Tenn. Regulatory Auth.*, Case No. M.2008-01733-COA-R12-CV, 2010 Tenn. App. LEXIS 459 at *10 (Tenn. Ct. App. July, 21 2010) (no app. filed).

STATEMENT OF THE CASE

Home Builders Association of Middle Tennessee (HBAMT) brought this declaratory judgment action challenging the Metropolitan

Government of Nashville and Davidson County's (Metro) inclusionary zoning ordinance. (TR.I at 1.) HBAMT asserted three claims.

First, HBAMT brought a facial taking claim based on the unconstitutional conditions doctrine. It claimed that the ordinance violates the Fifth Amendment because it conditions Metro's issuing of development entitlements, like building permits or changes in zoning, on a property owner's dedication of property to be sold or rented for below-market prices or payment of a fee instead of the dedication. (*Id.* at 10-11.) HBAMT alleged that Metro's exactions subjected the challenged ordinance to heightened scrutiny under the "essential nexus" and "rough proportionality" standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (TR.I at 10:44-10:46.) Together, the nexus and rough proportionality tests prohibit the government from conditioning approval of land-use permits on a requirement that property owners dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the land use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-95 (2013).

In its two other claims, HBAMT challenged the ordinance as an invalid exercise of local law. First, it claimed that the State of Tennessee preempted Metro's ability to require inclusionary zoning for rental units when it enacted Tenn. Code Ann. § 66-35-102(b). (TR.I at 12.) Next, HBAMT claimed that the ordinance was *ultra vires* because the State of Tennessee never delegated Metro the power to address housing prices through mandatory inclusionary zoning for rental or any other type of housing. (*Id.* at 14.)

Metro moved to dismiss (*Id.* at 74) and the Chancery Court of Davidson County, the Honorable William E. Young, Chancellor, presiding (the trial court) later heard the motion. (TT.I at 320.) In October 2017, the trial court issued an order granting Metro's motion to dismiss. (TR.II at 174.) HBAMT moved to alter or amend (*I. d.* at 190) and the trial court denied that motion. (*Id.* at 266.) In May 2018, HBAMT filed a timely notice of appeal. (*Id.* at 272.)

In October 2018, Metro responded and moved the Court of Appeals to dismiss the case as moot given the State's enactment of Public Chapter 685 on April 9, 2018. (Appellee Mot. Dismiss.) The Court of Appeals heard oral arguments, requesting each party discuss mootness before continuing to the merits. (Ex. A at 1; Arg. Tr. at 1.) On January 30, 2019, the Court of Appeals issued an order dismissing the case as moot, but finding only that "the public interest exception to the mootness doctrine is not applicable to the facts of this case, as the issue presented is unlikely to arise in the future" since Public Chapter 685 had "nullified" the ordinance. *Home Builders Ass'n of Middle Tenn. v. Metro. Gov't*, Case No. M2018-00834-COA-R3-CV, 2019 Tenn. App. LEXIS 54 at *5-6 (Tenn. Ct. App. January 30, 2019) (app. filed April 1, 2019).

This application is therefore timely filed.

RELEVANT FACTS

This case began as a challenge to Metro's mandatory inclusionary zoning ordinance. Inclusionary zoning laws generally require private property owners to sell or rent houses or apartments at below-market prices as a condition to obtaining development entitlements like a building permit. It became a case about ripeness when the trial court

dismissed HBAMT's facial challenge for failure to show actual enforcement of the law. And it became a case about mootness and preemption when the Court of Appeals dismissed the appeal because a state law passed in the interim that, according to the Court, made it "unlikely" that Metro would continue to enforce the law – even though Metro never repealed the law, amended the law, or produced any admissible evidence to show it would not enforce the law.

Metro's housing laws

Metro enacted the challenged inclusionary zoning law with Metro BL2016-133. (TR.I at 44-50.) As described in the Complaint, the ordinance authorizes Metro to require private property owners seeking development entitlements related to projects of five or more units to sell or rent a predetermined number of units at a predetermined below-market price. (*Id.* at 1-3, 46.) Metro set forth both the required number of below-market units and predetermined prices in tables within Section 17.40.790 of the bill, under the heading: "Requirements for Inclusionary Housing." (*Id.* at 46-47.) The ordinance allows a homebuilder to pay what Metro calls an in-lieu "contribution" instead of selling the predetermined number of units at below-market prices. (*Id.* at 47-48.) The ordinance also allows the private property owner to build and sell the predetermined number of units at a different, specified location. (*Id.* at 47.)

Metro also passed a separate law (BL2016-342) providing incentive grants to build affordable and workforce housing. (TR.I at 57.) Neither ordinance makes these grants mandatory. *(Id.*) (Metro "may make incentive grants . . . ."). The grant amount differs for rental and owner-occupied dwellings. (*Id.*) But no one developer can receive grant amounts

greater than 50% of the difference between the annual post-development and pre-development real property ad valorem tax assessment in any given year. (*Id.*) HBAMT never challenged this separate law.

The Trial Court Proceedings

Metro argued that HBAMT's taking claim was not ripe because HBAMT had not sought compensation through state procedures like inverse condemnation. (TR.I at 74.) Metro also contended that HBAMT lacked standing because no member had yet been harmed by the law. (*Id.*) Last, Metro argued that no statutory cause of action provided standing for HBAMT to assert that state law preempted Metro's ordinance. (*Id.*) The trial court accepted these arguments. (TR.II at 174.)

Public Chapter 685 Becomes Law.

On April 9, 2018, while the appeal was pending, the Governor signed HB-1143, which prohibits local governments like Metro from mandating below-market housing. Tenn. Code. Ann. § 66-35-102(b). The bill enacting the state law specifically states that "neither Nashville nor any local government has the authority to enact" mandatory inclusionary zoning ordinances. *See id.*; 2018 Tenn. Pub. Acts 685. The same law, however, does nothing to "prohibit a local government unit from creating or implementing a purely voluntary incentive-based program." Tenn. Code Ann. § 66-35-102(b)(3).

Court of Appeals Proceedings

On October 4, 2018, Metro asked the Court of Appeals to dismiss the case as moot given the new state law. (Appellee Mot. Dismiss.) In response, HBAMT moved the Court of Appeals to consider that Metro had not repealed the ordinance since the passage of Public Chapter 685.

(Appellant Reply to Mot. Dismiss.) HBAMT also asserted that, as its claim is a facial challenge to the text of the ordinance, the controversy is live until Metro repeals the ordinance or proves it will never enforce it. (*Id.* at 2.)

The Court of Appeals asked both parties to present arguments on mootness before discussing the merits. (Ex. A at 1; Arg. Tr. at 1.) At oral argument, Metro contended the case was moot because Public Chapter 685 was aimed at Metro. (*Id.* at 2-3.) Metro, however, never conceded that the state law preempted the ordinance, that the ordinance was void on its face, or that it would never enforce the ordinance. (*Id.* at 2-5, 20.) Instead, in response to a direct question about whether the ordinance was fully unenforceable, Metro equivocated. The Court of Appeals asked: "Are you willing to make a broad declaration that this ordinance has no application to any circumstance based on the state law?" (*Id.* at 20). Metro responded: "I think the only – yes. With the caveat I think that there could be people who want to voluntarily opt-in." (*Id.* at 20-21.) Metro did not explain what it meant when it used the term, "voluntary opt-in."

HBAMT pointed out that, as it argued from the original complaint onward, the existing law already preempted the ordinance. (Ex. A at 9-10; Arg. Tr. at 9-10.) Notably, the trial court had dismissed HBAMT's original preemption challenge for lack of standing (TR.II at 180-82), leaving Metro free to enforce it. HBAMT contended that as a facial challenge to the ordinance, the controversy underlying its claim persists as long as the offending language remains, unless Metro introduces

evidence that it will never enforce the ordinance. (Ex. A at 5-10; Arg. Tr. at 5-10.)

On January 30, 2019, the Court of Appeals issued an order, agreeing with Metro's position, dismissing the case as moot and vacating the trial court's ruling. *Home Builders Ass'n of Middle Tenn.*, 2019 Tenn. App. LEXIS 54 at *6. The Court of Appeals ruled that it was "unlikely" that "the issue" would be repeated since Public Chapter 685 "nullified" the ordinance. (*Id.* at 5-6.)

SUMMARY OF ARGUMENT

This Court should accept review to resolve an issue of great public importance, specifically, whether the government can moot facial constitutional challenges without having to present any admissible evidence and without the lower courts addressing the preemption issue that supposedly moots the case.

There are well known standards for evaluating preemption and mootness. Parties seeking to moot a case have a heavy burden to overcome, and that burden becomes higher still when the moving party tries to moot a facial challenge to a law. Even more, when a plaintiff bases its mootness argument on mere promises that it will not enforce a still valid and effective ordinance, courts analyze that argument with a jaundiced eye before mooting a case. In those situations, courts require more than an unsupported promise – they require the moving party to introduce admissible evidence such as affidavits swearing that it can no longer enforce the challenged law.

Those standards were not followed here. Metro never repealed the ordinance. It introduced no evidence that it would never enforce the

ordinance and it continues to tout the ordinance's existence publicly on its website. The Court of Appeals never actually addressed mootness, turning instead to immediately find that *the plaintiff* did not meet its burden of proving it met an exception to mootness. By appearing to just assume mootness and preemption, the Court of Appeals departed from the well-established standards in two ways. First, the Court of Appeals created a new, admission of unenforceability standard that accepted the word of the party moving for mootness as true, and then assumed that the challenged law was preempted. Second, the Court of Appeals replaced the standard that the party moving for mootness show the total eradication of a controversy to the party opposing it, and then applied a weak, "unlikely to arise in the future" standard.

If the lower court had engaged in the requisite analysis, it would have seen the problems with Metro's mootness argument. Although Metro believes it can continue to enforce the voluntary portions of the challenged law, despite the new state law, the Court never confronted the fact that Metro has always maintained that its ordinance is voluntary because people do not need to ask for development entitlements. Thus, this case is right where it started and is, by definition, not moot. Moreover, Metro's unsworn statements are not evidence. If the lower court had placed the proper heavy burden on Metro before mooting the case, then it would never have accepted this as a showing.

Even though the burden entirely falls upon Metro, there are ample reasons to affirmatively believe that a case and controversy remain ongoing. Metro continues to tout the existence of the challenged ordinance as proof of its commitment to housing affordability.

Furthermore, Metro's vague statement at oral argument that it can enforce the voluntary parts of its ordinance furnish further evidence that the controversy has not been totally eradicated.

This is a question of importance to the public that this Court should accept and settle. The established standards from which the Court of Appeals deviated ensure that the government cannot so easily frustrate judicial review on matters of constitutional import. Left unaddressed, there is no reason why the government should ever let facial constitutional claims be adjudicated when they can so easily make unsworn promises not to enforce a law rather than risk a facial ruling.

INTRODUCTION AND REASONS FOR GRANTING REVIEW

This is a case that was not ripe until it was moot. In other words, it was not ready until it was too late. In such a way, a facial constitutional challenge concerning core property rights issues never received judicial consideration on the merits. The government evaded scrutiny, first based on ripeness and then on mootness, but only because first the trial court and then the Court of Appeals failed to apply the proper justiciability standards. This allowed Metro to moot HBAMT's facial challenge with no more than unsworn statements that it believes a state law made its ordinance unenforceable without ever setting the full scope of how much of the ordinance is mandatory and preempted – all while refusing to repeal, amend, or prove that it had voluntarily stopped enforcing that very ordinance.

At first glance it may appear that HBAMT got the relief it sought, although in a roundabout way. A court found the ordinance unenforceable and so, Metro can no longer enforce it. But first looks are

deceiving. Metro refuses to repeal the ordinance, refuses to amend the ordinance, and refuses to stop enforcing at least the parts of it that Metro believes constitute voluntary opt-in. Instead, Metro asks the public and the courts to trust its unsupported and contradictory statement during oral argument that it doesn't intend to enforce the non-voluntary portions of the ordinance. The public cannot and should not have to rely on these vague unsworn statements, especially when it is not apparent what parts of the law Metro deems voluntary in light of its prior position that the entire ordinance was voluntary. The law demands more. And Metro's own website which flaunts the challenged inclusionary zoning program, shows that the facts here do too.

So how is Metro still enforcing a preempted ordinance? The Court of Appeals never actually held it preempted, and thus void. Instead, it improperly presumed mootness, improperly shifted the burden to HBAMT to prove an exception, and then held that "the issue" is "unlikely to arise in the future" in light of Metro counsel's statement at argument and HBAMT did not satisfy its supposed burden. This left the ordinance in place and left Metro free to enforce it any time, against anyone. If challenged, Metro would be free to rely on the argument no future party can challenge it, an argument that prevailed below, or that its program is merely voluntary, or even that its unsworn statements at argument were non-binding.

With the ordinance still enforceable, good reasons continue to exist showing that a controversy remains. The errors below have real consequences for this case and others. The original issue here – the constitutionality of Metro's affordable housing mandate – is of great

importance to the public. But even more important is the public's faith in the court system and a belief that courts will consider and adjudicate important constitutional claims.

This Court generally considers these factors when granting review: (1) the need to secure uniformity of decisions, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority. Tenn. R. App. P. 11 (a). This Court should settle important questions of law and secure matters of intense importance to the public by clarifying when and how a state law preempts a local ordinance, and by explaining what is necessary to moot a facial constitutional claim challenging an ordinance that remains on the books.

ARGUMENT

I. This Court can settle the question of vital interest to the public over what burden the government must carry before it can moot a facial constitutional challenge.

The challenged ordinance remains in effect today. Metro refuses to repeal or amend it. And until a court declares the ordinance invalid by preemption, Metro can require a homebuilder to sell or rent houses for below-mark prices or pay the in-lieu fee to receive the building permit, development variance, certificate of occupancy, or some other "development entitlement." Despite the ordinance's continued existence and potential enforcement, the Court of Appeals declared HBAMT's facial challenge moot finding that "the public interest exception to the mootness doctrine is not applicable to the facts of this case, as the issue

presented is unlikely to arise in the future" because the state law "renders the ordinance unenforceable." *Home Builders Ass'n of Middle Tenn.*, 2019 Tenn. App. LEXIS 54 at *6. In doing so, it departed from this Court's well-settled mootness and preemption standards in several ways.

First, the Court of Appeals departed from the legal and evidentiary standards associated with the mootness doctrine. It conflated the standards for determining whether a case is moot and whether the public interest exception to mootness applies. Instead of requiring Metro to satisfy its heavy burden and show that it repealed the law or present evidence that application of the law is never capable of repetition, the Court applied an unprecedented presumption of mootness and improperly shifted the burden to HBAMT to prove a basis for not invoking mootness. Even more, the Court of Appeals required no evidentiary proof of any kind out of Metro to show that it voluntarily stopped enforcing the ordinance. Rather, it relied only on counsel's vague statements made during argument – not real or admissible evidence, and certainly not anything substantive enough to protect a future aggrieved party.

Second, even if the Court of Appeals had applied the correct mootness standards, it failed to conduct any independent preemption analysis or hold Metro's ordinance preempted and thus void. The Court should have considered the scope and the legislative intent behind both the state law and Metro's ordinance, but it considered neither. Instead, it summarily held that "Public Chapter 685 renders the ordinance *unenforceable*." *Home Builders Ass'n of Middle Tenn.*, 2019 Tenn. App. LEXIS 54 at *6 n.3 (emphasis added). Instead, the Court abrogated its

judicial responsibility to defendant's counsel, creating a new admission of unenforceability standard. Because the Court's holding does not carry the legal effect of a preemption finding, the Court's opinion left the ordinance on the books and the door open for Metro to continue to enforce it.

A. The long-established standard places a high burden on the government in mooting cases that facially challenge laws.

Mootness is a justiciability doctrine premised on the case or controversy requirement in Article III of the Federal Constitution. It limits a court's power to review questions that "affect the rights of litigants in the case before them." *De Funis v. Odegaard*, 416 U.S. 312, 316 (1974) (internal quotation marks and citation omitted). At a base level, mootness "requires that there be a live case or controversy at the time that a federal court decides the case." *Green Party v. Hargett*, 700 F.3d 816, 822 (6th Cir. 2012). Under Tennessee law, mootness is a matter of judicial prudence. Although the Tennessee Constitution contains no case or controversy requirement, Tennessee courts have long adhered to the notion that "the province of the court is to decide, not advise, and to settle rights, not to give abstract opinions." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 203 (Tenn. 2009); (quoting *State v. Wilson*, 70 Tenn. 204, 210 (1879)).

The law surrounding mootness is well known. A case is moot when a live controversy no longer exists, when the court has nothing left to decide, and when the court has no relief left to grant. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000); *Knott v. Stewart Cty.*, 207 S.W.2d 337, 338-39 (Tenn. 1948). A court's review of a

case for mootness is not a mechanical exercise. *Norma Faye Pyles Lynch*, 301 S.W.3d at 204. As the Court of Appeals noted below: "In order for a court to rule on a matter, the case must remain justiciable throughout the entire course of litigation, including appeal." *Home Builders Ass'n of Middle Tenn. v. Metro. Gov't*, 2019 Tenn. App. LEXIS 54 at *3 (citing *All. for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005); *State v. Ely*, 48 S.W.3d 710, 716, n.3 (Tenn. 2001)). "A case is not justiciable if it does not involve a genuine, continuing controversy requiring the adjudication of presently existing rights." (*Id.* at 3) (citing *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d at 193; *Ford Consumer Fin. Co., Inc. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998)). And the court must be able "to provide some sort of judicial relief to the prevailing party." (*Id.* at 3-4) (citing *Knott*, 207 S.W.2d at 338-39; *Ford Consumer Fin. Co.*, 984 S.W.2d at 616)).

The burden of mooting a case is a "heavy one" that rests solely on the moving party. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). The moving party must show that 1) "it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur," and 2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). As long as the plaintiff has "a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Clarkson v. Town of Florence*, 198 F. Supp. 2d 997, 1004 (E.D. Wis. 2002) (citing *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 443 (1984)).

For facial challenges like HBAMT's, the mootness burden is even higher because "as long as a statute is in effect, the challenged application of the statute is capable of repetition." Suzanne B. Seftel, *Waiving For the Flag: Should Informed Consent Rules Apply in the Context of Military Emergencies?*, 60 Geo. Wash. L. Rev. 1387, 1392 (1992) (citing *SEC v. Sloan*, 436 U.S. 103, 109-10 (1978)). Thus, "[a] facial challenge to a statute may not be moot even though a challenge to a particular application of the statute no longer remains a live controversy." *Id.* at 1392 (citing *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91-92 (D.C. Cir. 1986)). Until the government repeals the challenged law or the moving party presents evidence to establish that it has cured all constitutional infirmities, the alleged violation remains. *Compare Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 819-20 (W. D. Mich. 2014) (finding defendants failed to show facial challenge was moot because enacting government neither repealed nor amended the challenged law to cure the constitutional infirmity), *and Cmty. Hous. Tr. v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 219 (D.D.C. 2003) (finding defendants failed to show facial challenge moot because they "have not altered Title 11, and they have made no firm promise to do so"), *with Massachusetts v. Oakes*, 491 U.S. 576, 583-84 (1989) (finding challenged law moot because enacting government repealed it and thus it could not chill protected expression in the future). Thus, a government defendant satisfies its burden of mooting a facial challenge to a law only when it provides evidence that it has either 1) repealed the challenged law, or 2) remedied the constitutional infirmity.

If the government truly never intends to enforce the law, then repeal or amendment should not be an issue. But rather than repeal an offending law or remedy the constitutional infirmity through legislative amendment, governments (like Metro) sometimes seek to moot a case by promising that they will not enforce the challenged law. Courts greet these promises not to enforce effective laws with a necessary and healthy skepticism. And in general, "voluntary cessation of allegedly illegal conduct does not suffice to moot a case." *Norma Faye Pyles*, 301 S.W.3d at 205. Indeed, to dismiss a case as moot based on voluntary cessation, the moving party must show that it is "absolutely clear that the allegedly wrongful conduct cannot be expected to recur." *Id.*

The standard of proof "purposely places a heavy burden on the party attempting to convince a court that its voluntary cessation of allegedly illegal conduct has mooted the case." *Id.*; *see, e.g.*, *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 349 (4th Cir. 2017) (noting that "subsequent events made it absolutely clear that the allegedly wrong behavior could not reasonably be expected to recur" when the Fire Chief submitted a sworn affidavit that he intended on operating under the new policies, not the offending ones). This heavy burden is for good reason – without this high standard of proof, the potential for abuse is endless. This Court itself recognized as much when it explained that "[its] decisions reflect a jaundiced attitude about permitting a litigant to cease its wrongful conduct temporarily to frustrate judicial review and then be free to resume the same conduct after the case is dismissed as moot." *Norma Faye Pyles*, 301 S.W.3d at 205 (citing cases). Thus, although legislative repeal or amendment of the challenged statute while a case is

on appeal usually moots a case, mere unsupported promises not to enforce a law do not. *See also Green Party*, 700 F.3d at 822-23 ("Legislative repeal or amendment of [that] challenged statute while a case is pending on appeal usually eliminates th[e] requisite case-or-controversy" of the mootness doctrine, but not always) (quoting *Ky. Right to Life v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997)).

Given the high burden and evidentiary support needed to establish voluntary cessation, Metro argued that the case is moot because a new state law preempts it from enforcing the challenged ordinance. Like mootness itself, the standard for litigating preemption lays down equally well-known principles. Preemption is an issue of law for the courts to decide. Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1115, n.8 (2007) ("even when the legislature expressly preempts an area, courts must still determine the scope of this express declaration of preemption, a task which involves all of the usual difficulties of statutory interpretation."). If the court finds the local law conflicts with a state law, it holds the local law invalid. *Knoxville v. Currier*, Case No. 03A01-9801-CV-00038, 1998 Tenn. App. Lexis 410 at * 4 (Tenn. Ct. App. June 26, 1998) (citing *Southern Ry. Co. v. Knoxville*, 223 Tenn. 90, 442 S.W.2d 619 (Tenn. 1968)).

As some scholars have noted, determining whether a state law expressly preempts a local law is "a task which involves all of the usual difficulties of statutory interpretation." Diller, at 1115 n.8. The task can be so difficult that it "often generates significant disagreement within state courts." *Id.* (citing cases). For these reasons, this Court has explained that when a state law declares local laws preempted within a

certain field, the court must examine both the statutory text and legislative intent to determine the scope of the express declaration of preemption. *Capitol News Co. v. Metro Gov't of Nashville and Davidson Cty.*, 562 S.W.2d 430, 434 (Tenn. 1978) (explaining that determining whether a state law preempts an ordinance "*of course*, involves an examination of the[] statutes and a determination of legislative intent.") (emphasis added).

In reviewing the scope of allegedly conflicting laws, courts look at "whether the ordinance prohibits an act the statute permits, or permits an act which the statute forbids." *Currier*, 1998 Tenn. App. at *4 (citing *Southern Railway*, 442 S.W.2d 619; 56 Am. Jur. 2d Municipal Corporations, etc., § 374 at p.408). For example, in *Capitol News*, this Court considered whether the Tennessee obscenity statutes preempted an ordinance restricting obscene materials. 562 S.W.2d at 434-35. In finding that it did not, this Court considered the text and scope of both laws, the legislative intent of both enacting bodies, the harmonious purpose of the local law and the state law, and the traditional authority municipalities have to enact ordinances under their police power. *Id.* at 434-35. Without the requisite review of both the text and legislative intent to determine the scope of both the local and state laws, it is impossible to determine preemption.

B. The Court of Appeals departed from this Court's mootness and preemption jurisprudence.

Metro's ordinance remains. Again, Metro has offered no evidence to show that it repealed the ordinance, that it remedied the constitutional infirmity, or even that it voluntarily stopped enforcing the ordinance.

This is because it couldn't. The ordinance not only remains on the books, it is alive and enforceable – that is, at least, according to Metro's website and its counsel's statements that people could opt-in to the inclusionary zoning program. (Ex. A. at 20; Art. Tr. at 20-21.)

Despite the ordinance's continued existence and Metro's refusal to voluntarily cease enforcement, the Court of Appeals found it unreviewable. More specifically, the Court of Appeals declared HBAMT's facial challenge moot because "the public interest exception to the mootness doctrine is not applicable to the facts of this case, as the issue presented is unlikely to arise in the future." *Home Builders Ass'n of Middle Tenn.*, 2019 Tenn. App. LEXIS 54 at *6. The Court could not base mootness on repeal, amendment, or voluntary cessation so instead, it turned to Metro's preemption argument.

Only a court can declare a law preempt, and thus void – not city council, not a state legislature, not the president, and certainly not lawyers. Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1115, n.8 (2007). A state legislature can certainly express its intent to preempt a local ordinance or an entire field of law, but this expression alone does not render a local ordinance void. Instead, the court must review and compare the text and intent of both the state and local law and then make a determination about preemption. Here, the Court of Appeals abrogated its judicial duty, instead accepting Metro's counsel's unsworn assertion that it "thinks" that Public Chapter 685 renders the ordinance unenforceable as evidence that it is in fact be unenforceable. And so "the issue presented is unlikely to arise in the future." *Home Builders*, 2019 Tenn. App. LEXIS at *6.

In doing so the Court of Appeals departed from this Court's mootness and preemption jurisprudence in two key ways. First, it replaced well-established preemption standards with a newly created admission of unenforceability test and in doing so relied on inadmissible unsworn statements by Metro's counsel. Second, it departed from well-established mootness doctrine when it shifted the heavy burden of showing mootness to the non-moving party, leading to applying an "unlikely to arise in the future" standard rather than the proper "completely and irrevocably" eradication standard.

The Court of Appeals departed from traditional preemption analysis and replaced it with a newly created admission of unenforceability test. Faced with an allegation of express preemption, the Court of Appeals should have looked to the text and legislative intent of Public Chapter 685 and the ordinance to determine if the laws conflict and if the state law prohibits the ordinance. Only after this review and a finding that state law prohibited the ordinance could the Court have held the ordinance preempted and thus void. The Court of Appeals never conducted such an analysis. It never reviewed the text or legislative intent of the state law, it never reviewed the text or legislative intent of the ordinance, and it certainly never compared the two laws.

At best, the Court of Appeals simply assumed that state law preempted the local ordinance because they both dealt with inclusionary zoning – the ordinance allowing and mandating it in certain unidentified situations and the state law prohibiting it in certain potentially different and unidentified situations. This assumption has no basis in preemption law and it shouldn't. Preempting laws are not self-executing. If they were,

the trial court would have never dismissed HBAMT's original preemption claim in the first place. After all, HBAMT maintained from the beginning that the ordinance conflicted with existing state law prohibiting mandatory affordable housing for rental properties. (TR. I at 12-13.) That was long before the State enacted Public Chapter 685. Metro enacted the ordinance regardless, insisting that no one had the right to challenge the ordinance until Metro enforced it and that the already existing state law did not preempt the ordinance.[1] (TR. I at 82-83, 142-44; Mot. at 3; Metro Br. at 12.) Only a court can declare a law preempted, and Metro's prior arguments and actions show that it knows as much and will ignore any statutory express preemption until a court declares the ordinance preempted.

If the Court of Appeals had conducted the requisite analysis, it no doubt would have seen the contradictions in Metro's arguments. On one hand it argued that the state law which prohibits affordable housing mandates made the ordinance unenforceable, and on the other hand it argued that the ordinance did not mandate affordable housing, but set forth a voluntary affordable housing program. The recent "superseding" statute specifically permits "creating or implementing a purely voluntary

[1] Of course, HBAMT disagreed that facial challenges need to await actual enforcement under existing ripeness case law. The trial court disregarded HBAMT's argument, the basis of the appeal to the Court of Appeal. By finding that HBAMT's challenge was moot because of the mere existence – not enforcement – of a conflicting state law, the Court of Appeals necessarily determined that this case was an appropriate vehicle for determining whether the state law preempted the ordinance. Since that was the basis of the underlying appeal in the first place, it was, by definition, not moot.

incentive-based program." Public Chapter 685. And despite the mandatory language in Metro's ordinance, Metro has always insisted that it inclusionary zoning program was voluntary. *Compare* (Metro. Code § 17.40.780(B)(1) ("When additional residential development entitlements are gained through an amendment to the official zoning map … the rental residential units *shall be* subject to the provisions of this section…"), *with* (Metro's Mot. Dismiss) (characterizing the challenged ordinance as "incentives for building affordable housing"). This disagreement in scope brings us full circle back to the original issue – the ordinance's constitutionality. In Metro's eyes, that voluntariness may not apply to participation in an incentive scheme so much as a developer or property owner's decision to request a variance to construct residential housing with more than five units. Since no one *must* build or develop such structures, by choosing to do so, Metro may argue that they are also voluntarily participating in the inclusionary zoning scheme.

This is precisely why Metro's statement about the enforceability of the "voluntary" portions of its law is alarming. When asked directly by the Court: "Are you willing to make a broad declaration that this ordinance has no application to any circumstance based on the state law?" (Ex. A at 20; Arg. Tr. at 20) Metro succeeded only in showing exactly why a controversy remains: "I think the only – yes. With the caveat I think that there could be people who want to voluntarily opt-in." (*Id.* at 20-21.) What that means is anyone's guess since Metro *always* characterized the ordinance as voluntary, even the portions that contain the mandatory word, "shall." (Appellee Mot. Dismiss.)

The mere existence of a state law that allegedly conflicts with the challenged ordinance cannot extinguish a facial constitutional claim, especially when the plaintiff already claimed that an earlier state law preempted parts of the challenged ordinance. (TR. I at 12-13.) The entire preemption question considered on appeal was an exercise in question begging. More importantly, a future injured party cannot rely on Metro's statement at oral argument. Metro reserves the right to insist that this person cannot challenge it, the issue that prevailed below. And Metro reserves the right to contend that the entire law was "voluntary," which has been its position the entire time, and which no court has ever considered precisely because the normal rules of justiciability were not followed.

To be sure, the issue of preemption was never fully litigated. The only proof Metro offered on mootness were its counsel's unsworn statements at oral argument that she "thinks" that "the ordinance has no application to any circumstance based on state law[.]" (Ex. A. at 3; Arg. Tr. at 3.) Although unsworn statements made by counsel are a far cry from actual evidence, the Court of Appeals relied solely on those statements to reach its conclusion that the state law renders the ordinance unenforceable. *See Home Builders Ass'n of Middle Tenn.*, 2019 Tenn. App. LEXIS 54 at *6 ("our resolution of this case is based on our holding that Public Chapter 685 renders the ordinance unenforceable, a position advanced by Metro in the motion and *affirmed by its counsel at argument*").

Even if Metro had made explicit and unequivocal statements that it believed its ordinance was void, those statements could not serve as

evidence that Metro would never enforce the ordinance because unsworn statements in court simply are not evidence. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988) ("statements made by counsel during the course of a hearing, trial, or argument" are not evidence); *Trotter v. State*, 508 S.W.2d 808 (Tenn. Crim. App. 1974) ("Statements of counsel are not evidence."). Pledges to discontinue challenged conduct ought rightly to occasion judicial skepticism before mooting a case. *See Norma Faye Pyles*, 301 S.W.3d at 205. Here the Court accepted Metro's statements with no supporting proof.

The Court of Appeals departed from the legal standards for mootness as well, presuming mootness and shifting the burden to HBAMT to prove an exception to mootness. The Court of Appeals never found or held that Metro met its heavy burden of showing that intervening events "*completely and irrevocably*," *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), eradicated Metro's enactment of an allegedly unconstitutional ordinance. In fact, the Court never even addressed Metro's burden, looked to see if Metro cleared the burden, or applied any of the factors relevant to proving mootness. Instead, the Court focused on whether HBAMT proved an exception to mootness, ultimately holding it did not and finding its claims moot. In doing so, the Court held that "the issue presented was unlikely to arise again in the future." *Home Builders Ass'n of Middle Tenn.,* 2019 Tenn. App. LEXIS at *6.

The Court of Appeals relied on the Sixth Circuit *Kentucky Right to Life* case, but that case only underscores how different the standard was in this case. The Court of Appeals references the Sixth Circuit's

observation that "[l]egislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this [Art. III] requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form." *Home Builders Ass'n of Middle Tenn.*, 2019 Tenn. App. LEXIS 54 at *5 (citing *Ky. Right to Life, Inc.*, 108 F.3d at 644 (citations omitted)). In that case, the plaintiff challenged a 1974 campaign finance law. *Ky. Right to Life, Inc.*, 108 F.3d at 639. While the appeal was pending, "the Kentucky General Assembly amended the Act," directly affecting the provisions at issue. *Id.* at 643. But unlike the government in *Kentucky Right to Life,* Metro has not amended or repealed its ordinance, claiming instead that the Ordinance has been rendered ineffectual by state law. These cases are not alike, because HBAMT is not challenging a law that no longer exists. And HBAMT is not reduced to arguing that "a recalcitrant legislature clearly intends to reenact the challenged regulation." *Id.* at 645. Since Metro has declined to revisit or repeal its ordinance, the text is still available for analysis "in its present form." *Id.* at 644. If anything, the suggestion is that plaintiffs would still have a claim but for the repeal of the law. HBAMT is in that position, yet the Court of Appeals' decision draws no difference between these two very different postures.

The lower court's opinion is thus a marked departure from the existing and well-known standards for both preemption and mootness. The ordinance HBAMT wishes to challenge remains. Metro has submitted no actual evidence it will never enforce it, and its own website and statements of counsel give rise to a worry that it will. This sharp

departure from precedent requires further review because it is of vital public import.

C. Although the burden rests with Metro to show preemption, there is ample reason to believe that a justiciable controversy remains.

Although under the established standard the burden is on Metro to prove mootness, the facts show that the continued existence of the ordinance presents an ongoing case and controversy. For starters, Metro continues to advertise publicly that the challenged law exists, touting its Inclusionary Zoning scheme on its website. Metro maintains a separate webpage dedicated to "Inclusionary Housing" where, nearly 12 full months later, it continues to refer to the supposedly preempted ordinance.[2] At the very top it reads, on September 16, 2016, the Metro Council passed inclusionary housing legislation. The words, inclusionary housing legislation, are hyperlinked to the text of the full law itself, including the obviously mandatory portions. This website includes a whole history, including the stakeholders meetings that were contentious only because of its mandatory nature. No mention of the supposedly preempting state law, or that Metro considers at least part of the Inclusionary Zoning scheme unenforceable appears anywhere. Anyone arriving at this website would assume that the ordinance is valid and enforced. Metro should not be allowed to so publicly tout the existence of a law publicly, while assuring the courts that it will never enforce it.

[2]http://www.nashville.gov/Planning-Department/Inclusionary-Housing.aspx (last viewed on Apr. 1, 2019).

Furthermore, the Office of Metro's Mayor publicly listed affordable housing among the Mayor's priorities when HBAMT originally filed the complaint, and it remains a prominent part of the new Mayor's mission.[3] And its statements at oral argument suggest that it believes at least some portion of the ordinance remains enforceable. Metro's counsel's oral assurances that it believes it can enforce the portions of the law that are voluntary – whichever portions those may be – and the simple fact that it continued to enforce the law despite HBAMT claiming that an earlier state law partially preempted it, collectively furnish ample reason to believe a case and controversy may one day resume, if it does not already exist. Although HBAMT has no burden to clear, the facts show the existence of a remaining controversy.

D. <u>This case implicates important public questions regarding what burden the government must carry before it can moot a facial constitutional challenge</u>.

The government should not be allowed to so lightly brush aside facial constitutional challenges. Unquestionably, if a law is unconstitutional, it is of vital importance to the public. *Am. Freedom Def. Initiative v. Suburban, 15 Mobility for Reg. Transp.*, 698 F.3d 885, 896 (6th Cir. 2012); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995); *Jackson Women's Health Org. v. Currier*, 760b F.3d 458 n.9 (5th Cir. 2016) ("it is always in the public interest to prevent the violation of a party's constitutional rights"). Conversely, the

[3] https://www.nashville.gov/Mayors-Office/Housing.aspx (last viewed on Apr. 1, 2019) ("The Mayor's Office of Housing assists Mayor Briley in the building, funding, and preservation of affordable housing options . . .").

government has no "interest in enforcing an unconstitutional law." *United States v. U.S. Coin & Currency*, 401 U.S. 715, 728 (1971) (Brennan, J., concurring). It follows then that the public has a preeminent interest in seeing constitutional claims adjudicated, rights enforced, and the government's claims held to the most exacting of standards before judicial review is frustrated. Instead, here review was thwarted upon the slightest of evidence – the unsworn statements of counsel – and even those were hedged and ambiguous.

The Court of Appeals' decision to take Metro's word that it could not enforce the ordinance – whether it meant some or all of it – leaves the public between a rock and a hard place. This is a case where the plaintiff risks penalties for noncompliance because without a preemption ruling, Metro can still enforce the law at any time. And even if the ordinance is voluntary, there is also a risk that individuals will submit to the program because Metro suggests that compliance is still mandatory.

If this ordinance is purely voluntary and not preempted, this Court and Metro must declare it as such. Making it voluntary means that homebuilders may *choose* to build affordable homes in addition to their other projects. But it does not *require* homebuilders to build below-market housing, pay a fee, or set aside a portion of their work for government use. This is the very essence of our nation's economic principles: we are free to engage or not engage in the market as we choose, which requires limited government interference. Inclusionary zoning is hardly limited interference. It is an unconstitutional condition that prevents builders from engaging in their trade altogether when they cannot afford to comply with the ordinance or build outside city limits.

This case has departed drastically from its original litigation; plaintiffs like HBAMT's members have no resolution and have perhaps ended up even further away from where they began. It is still unclear if the ordinance is mandatory and preempted or voluntary and not preempted. The failure to answer this question affects the everyday lives of any individual property owner. The ordinance requires property owners to bear the burden of affordable housing, even though this issue affects the public as a whole and is thus a public burden. Requiring the builders to set aside a percentage of their homes, pay an in-lieu fee, or sell houses below fair rates gives them only one real choice: either suffer the costs of building in Nashville, or build elsewhere. This is too much for property owners to bear.

CONCLUSION

For these reasons, this Court should grant permission to appeal.

Dated: April 1, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Tenn. R. S. Ct. 46-3.02 that pertains to the e-filing of briefs. Excluding Title/cover page, Table of Contents, Table of Authorities, and Certificate of Compliance, this brief contains 7,779 words, with 1.5 line spacing, justified alignment, 1-inch margins, and size 14 Century Schoolbook font for the main text and footnotes.

Dated: April 1, 2019.

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