IN THE SUPREME COURT OF TENNESSEE

HEATHER SMITH, *Plaintiff/Respondent*, v. BLUECROSS BLUESHIELD OF TENNESSEE, INC., *Defendant/Applicant*.	No. E2022-01058-COA-R3-CV Docket No. 21-0938

On Appeal from the Judgment of the Court of Appeals

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to protecting the principles embodied in the state and federal Constitutions and our nation's civil rights laws. The ACLU of Tennessee is a statewide affiliate of the national ACLU and is dedicated to the same principles. Consistent with that mission, the ACLU of Tennessee often appears as counsel and *amicus curiae* in this Court and other courts to protect and defend constitutional rights. *See, e.g.*, *State v. Booker*, 656 S.W.3d 49 (Tenn. 2022); *State v. Weatherspoon*, No. W2017-00779-SC-R8-CO (Tenn. June 8, 2017). The above-styled case and controversy squarely implicates the ACLU of Tennessee's efforts to protect the right of free expression, including the right to petition the government. *See, e.g., Polidor v. Sexton*, No. CH-23-1132-II (Tenn. Ch. Aug. 23, 2023) (seeking relief under article I, section 23 of Tennessee Constitution).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that a public policy exception to the employment at-will doctrine can be evidenced by an unambiguous constitutional provision. The fundamental right of petition embodied in article I, section 23 of the Tennessee Constitution is among such clear provisions. This right—which dates back to pre-Magna Carta England—lies at the very heart of the American legal system. Colonists affirmatively incorporated the right into the Tennessee Constitution in 1796, where it has remained for over two centuries. And for this right to be meaningful, it cannot "be allowed to become a trap for the petitioner"—

citizens must be able to petition their government "without hazard" of negative consequences, including the termination of their private or public employment. *McKee v. Hughes*, 181 S.W. 930, 932 (Tenn. 1916).

At the motion-to-dismiss stage, the Court must accept as true that BlueCross BlueShield of Tennessee (BCBST) fired employee Heather Smith because she emailed her legislators with her thoughts on COVID-19 vaccine mandates. It is undisputed that these emails fall within the scope of the activity protected by article I, section 23 of the Tennessee Constitution. The question for this Court is whether section 23 of the state constitution evidences a public policy exception to at-will employment.

The court of appeals was correct to hold that it does. *Amici* submit this brief to make three key points.

First, the plain text of section 23 provides the people of Tennessee a broad, positive right to petition enforceable against interference by both public and private actors. Contrary to BCBST's contention, such positive rights are a defining feature of many state constitutions and have been recognized in sister states. In any event, even if the text of section 23 does not supply a positive right and serves only to restrain government action, state action is irrelevant for the purpose of this case because Ms. Smith is not asserting a private right of action to enforce the state constitution; instead, she seeks to use section 23 to further her non-constitutional retaliatory discharge claim.

Second, the history of section 23 and the values underlying this and other provisions in the Tennessee Constitution support finding that the right it provides is fundamental and reflects a public policy of the state.

Third, this Court's case law and the case law of other states demonstrate that section 23 supplies a public policy sufficient to constitute an exception to the at-will employment doctrine. As this Court held in *McKee v. Hughes*, section 23 "guarantees" that Tennesseans who petition the government remain "free from any penalty for" having done so. 181 S.W. at 931.

ARGUMENT

"To be liable for retaliatory discharge" in Tennessee, an "employer must violate a clear public policy." *Chism v. Mid-S. Milling Co.*, 762 S.W.2d 552, 556 (Tenn. 1988). And "[i]t is well-settled that the public policy of Tennessee is to be found in," among other sources of law, "its constitution." *Purkey v. Am. Home Assurance Co.*, 173 S.W.3d 703, 705 (Tenn. 2005) (internal citation and quotation marks omitted)).[1]

As relevant here, article I, section 23 of the Tennessee Constitution provides:

> That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance.

[1] *Accord Chism v. Mid-S. Milling Co.*, 762 S.W.2d 552, 556 (Tenn. 1988); *King v. Delfasco, LLC*, 646 S.W.3d 456, 467, 470 (Tenn. Ct. App. 2021) *Harney v. Meadowbrook Nursing Ctr.*, 784 S.W.2d 921, 923 (Tenn. 1990); *Robins v. Flagship Airlines, Inc.*, 956 S.W.2d 4, 7 (Tenn. Ct. App. 1997); *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 800 (Tenn. 2010); *Haynes v. Formac Stables, Inc.*, 463 S.W.3d 34, 36 (Tenn. 2015).

A proper interpretation of section 23 must account for the "plain and ordinary meaning" of its words, along with "the history, structure, and underlying values of the entire" constitution. *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010); *see also Davis v. Davis*, 842 S.W.2d 588, 598–600 (Tenn. 1992). Case law from other states with provisions similar to section 23 is likewise appropriate to consider. *State v. Marshall*, 859 S.W.2d 289, 291–93 (Tenn. 1993). Each of these indicia support the court of appeals' conclusion that section 23's right to petition sets forth a clear public policy that serves as an exception to the employment at-will doctrine.

I. The text of section 23 unambiguously sets a policy of granting Tennesseans a broad, positive right to petition their government.

Article I, section 23 was first adopted by the original constitutional convention in 1796. Tenn. Const. art. XI, § 22 (1796).[2] It was readopted by the constitutional conventions of 1834 and 1870, *see* Tenn. Const. art. I, § 23 (1834); Tenn. Const. art. I, § 23 (1870),[3] and remains unchanged to this day.

Although section 23 "does not use the term 'petition,' it is evident that it concerns the right to petition." *Smith v. BlueCross BlueShield of*

[2] Available at https://teva.contentdm.oclc.org/digital/collection/tfd/id/672/rec/1.

[3] The text of the constitutions of 1834 and 1870 is available at https://cdm15138.contentdm.oclc.org/digital/collection/tfd/id/489 and https://cdm15138.contentdm.oclc.org/digital/collection/tfd/id/560, respectively.

Tenn., No. E2022-01058-COA-R3-CV, 2023 WL 3903385, at *5 n.2 (Tenn. Ct. App. June 9, 2023). That connection is evident, for example, from its use of the word "address," defined around the time of adoption as: "Verbal application to any one, by way of persuasion; *petition*." *Address*, Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (emphasis added). And Tennessee law has long recognized that petitions are "addressed" to government officials. *See, e.g.*, *Tymannus v. Williams*, 26 Tenn. 80, 80 (1846) ("Williams addressed the following petition to the entry-taker . . . .").[4]

Consistent with these authorities, this Court has explicitly acknowledged that section 23 applies to and concerns the right to petition. *McKee v. Hughes*, 181 S.W. 930, 931 (Tenn. 1916) (noting that "[t]he defendants, in assembling and petitioning the village council, were proceeding in the exercise of a high constitutional privilege," that being article I, section 23, which guarantees "[t]he right of . . . petition").

[4] *See also, e.g.*, *Broyles v. Arnold*, 58 Tenn. 484, 485 (1872) (noting that the defendant "drew up a petition for the signatures of loyal citizens, addressed to the commander of the post at Greeneville"); *Hennessee v. Mills*, 60 Tenn. 38, 39 (1872) (noting the Tennessee legislature allowed individuals to "apply by petition[s] addressed" to judges in certain bankruptcy provisions); *Carriger v. Town of Morristown*, 256 S.W. 883, 883–84 (Tenn. 1923) ("Petitioner . . . signed a petition addressed to [the Town] . . . ."); *City of Fairview v. Spears*, 359 S.W.2d 824, 824–25 (Tenn. 1962) ("The statutes require a petition in writing . . . addressed to the County Election Commissioners . . . ."); *Hill v. St. Paul Fire & Marine Ins. Co.*, 512 S.W.2d 560, 563 (Tenn. 1974) (noting that certain petitions "should be addressed . . . to our legislature" (citation omitted)).

The lack of the term "petition" in the text of section 23 can likely be attributed at least in part to the fact that the Tennessee Constitution was modeled on the North Carolina Constitution of 1776, which also did not include the word "petition" in its similar clause. *See infra* page 22 & note 12. However, section 23 differs in significant ways from the North Carolina Constitution and from the First Amendment of the United States Constitution.

For instance, unlike North Carolina's provision, Tennessee's provision allows petitions not just for redress of grievances but for any "other proper purposes." Tenn. Const. art. I, § 23. And unlike North Carolina's text, section 23 allows the people to petition "those invested with the powers of government," not just the legislature. *Compare id. with* N.C. Const. XVIII (1776) ("That the people have a right . . . to apply to the Legislature . . .").[5] This expansive language evinces an intent to encompass the broadest possible concept of petitioning activity; Tennesseans need not make a specific request for redress to address their government officials and make their opinions heard, nor are they limited in which officials they may petition.

Moreover, unlike the First Amendment, which contains the right to petition only within a restriction on governmental power, the plain text of the Tennessee Constitution gives the people an affirmative "right to apply" to the government. *Compare* U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances."),

[5] Available at https://avalon.law.yale.edu/18th_century/nc07.asp.

with Tenn. Const. art. I, § 23, *see supra* page 10. Tennessee's provision is framed as a positive right (that is, an entitlement) rather than a negative right (that is, a restriction on the government, or freedom from interference). *See* Emily Zackin, Looking for Rights in All The Wrong Places: Why State Constitutions Contain America's Positive Rights 40–42, 44–45 (2013) (defining positive and negative rights).

These textual departures warrant special attention from this Court, which is "not free to discount the fact that the framers of [the] state constitution used language different from that used by the framers of the United States Constitution." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2000). "No words" in the state constitution "can properly be said to be surplusage . . . and differences in expressions of right are particularly relevant" when determining the scope of a state constitutional right. *Id.*; *see also State v. Tuttle*, 515 S.W.3d 282, 307 (Tenn. 2017) (noting that "textual differences between federal and state constitutional provisions" support interpreting "the Tennessee constitution differently than the federal constitution"). Accordingly, section 23's articulation of a positive right without reference to a limitation on state power strongly suggests that the state right to petition applies not only to address state actions, but also to some private actions that interfere with that right as well. *See* Zackin, *supra*, at 40–42, 44–45.

This principle of independent state constitutional interpretation applies with special force here, where the language of Tennessee's right to petition was ratified just five years after the First Amendment. The

Tennessee Constitution's drafters were no doubt aware of the language recently used in the federal guarantee. *See* Tenn. Const. pmbl. ("[C]onsistent with the Constitution of the United States . . ."); Wallace McClure, State Constitution Making: With Especial Reference to Tennessee 41 (1916). Yet the drafters nevertheless fashioned Tennessee's constitutional protection in a manner far more similar to the guarantees of other states whose rights to petition predated the federal Bill of Rights adopted in 1791. And in other portions of the constitution, *not* including section 23, they demonstrated that they knew how to draft limiting provisions requiring state action when they sought to.[6]

Interpreting section 23 as granting a positive right applicable not only to address state actions, but also to some private actions that interfere with that right as well, is consistent with case law in other states. For instance, the Supreme Court of Pennsylvania has held that the state constitutional right to petition "cannot lawfully be infringed, even momentarily, by individuals, any more than by the state itself." *Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen of Pottstown*, 113 A. 70, 72 (Pa. 1921). The New Jersey Supreme Court has similarly held that the affirmative "rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against

[6] *See, e.g.*, Tenn. Const. art. XI, § 19 (1796) (providing that "no law shall ever be made to restrain the right" to the printing presses); art. XI, § 20 (1796) ("[N]o retrospective law or law impairing the obligation of Contracts shall be made"); art. XI, § 11 (1796) (prohibiting the legislature from making "ex post facto" laws).

private persons as well." *State v. Schmid*, 84 N.J. 535, 559 (N.J. 1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982). And the Supreme Court of California has relied on similar textual differences as present here to apply the state free speech clause to privately owned shopping malls. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), *aff'd sub nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

In any event, this Court need not decide whether section 23 is directly enforceable against private actors as well as state officials. At minimum, the breadth of section 23's language, which omits any reference to state action, indicates that consideration of the constitutional tradition encompassed by Tennessee's right to petition is appropriate in defining the scope of state tort and contractual claims, even between private parties. Constitutional interests can be "protected against private infringement without the need to discuss 'state action,'" such as "in a state that recognizes the tort of wrongful discharge in violation of public policy." Jennifer Friesen, State Constitutional Law, § 9.07 (4th ed. 2015). This "subconstitutional practice" is distinct from permitting the assertion of a constitutional claim against a private actor. *Id.*

This Court has recognized as much. In *Chism*, after holding that public policy exceptions to the employment at-will doctrine can "be evidenced by an unambiguous constitutional" provision, the Court cited two examples from other states finding such exceptions in their state constitutions. *Chism v. Mid-S. Milling Co.*, 762 S.W.2d 552, 556 (Tenn.

1988) (citing *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) and *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978)). In *Nees v. Hocks* the Oregon Supreme Court held that the state constitutional right to a jury trial necessitated that employees could not be fired for serving on a jury. 536 P.2d 512. The Superior Court of Pennsylvania held the same in *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119. As this Court has recognized, these cases are "[e]xamples of clearly defined public policies which warrant the protection provided by" the wrongful discharge cause of action. *Chism*, 762 S.W.2d at 556.

II. The history and underlying values of the Tennessee Constitution demonstrate a commitment to democracy, self-rule, and popular sovereignty, to which the right to petition is fundamental.

Although the text of the constitutional provision is the starting point for this Court's analysis, it is not the end. This Court also looks to, among other indicia, "the history" and the "underlying values of the entire" constitution to help inform its interpretation of any given provision. *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010).

The drafters of the Tennessee Constitution included within it many individual rights and liberties. Among these was the right to petition the government—an ancient English right that American colonists brought over from England and, ultimately, expanded upon. At the time of Tennessee's first constitutional convention in 1796, the right was non-controversial—so entrenched in political life that there is little to no documented discussion of it among Tennessee lawmakers.

Nevertheless, the centrality of the right to petition in the Tennessee Constitution is supported by the right's history as it evolved in England and, most importantly, as it was adopted by American colonists drafting eighteenth-century state constitutions. The right of petition emerged from English common law and dates back to pre-Magna Carta England when individuals "petition[ed] the King for redress." *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2163–65 (1998). Early petitioning was "narrow in application," with the King generally only providing relief to petitioners "when it was in his own interests." *Id.* at 2163. However, in 1215, King John of England signed the Magna Carta, which granted his barons an explicit right of petition. *Id.* at 2164–65; Julie M. Spanbauer, *The First Amendment Right to Petition Government for A Redress of Grievances: Cut from A Different Cloth*, 21 Hastings Const. L.Q. 15, 22 (1993); William S. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 467 (2d ed. 1914). While this right was originally limited to barons, petitions began to take on greater significance and eventually became the main mechanism through which "individuals and groups suggested changes in policies." Mark, *supra*, at 2166.

The widespread use of petitions ultimately led to the formation of the English Parliament. Spanbauer, *supra*, at 23; Michael Weingartner, Comment, *The Right to Petition as Access and Information*, 169 U. Pa. L. Rev. 1235, 1251 (2021). By the early 1500s, "clear mechanisms" had been "developed for sorting petitions and referring them to different parts of

the government for resolution." Weingartner, *supra*, at 1251–52 (footnote omitted). Through this "formalization and institutionalization, the right to petition became concrete, affording petitioners real and meaningful access." *Id.* at 1252. It also became more egalitarian; no longer limited to nobility, even those with little to no formal political power petitioned the government for redress of grievances. *See id.* at 1253.

In 1624, "the right to petition was designated as an individual right by King James I," and in 1689 it was "affirmed as a constitutional right by the English Bill of Rights." *Id.* "Unlike political rights—such as voting—which were reserved to certain classes, the right to petition was a civil right which was extended to all." *Id.* (footnote omitted); Mark, *supra*, at 2169–70. "Petitioning became part of the regular political life of the English," and it was this "ancient right" that the colonists brought to America. Mark, *supra*, at 2169, 2174.

American colonists repeatedly affirmed the right to petition, both explicitly and implicitly. *Id.* at 2176 & n.90. One "content analysis of the colonial charters shows that petition appears, either specifically or as one of the 'ancient liberties' of Englishmen, in over fifty provisions." *Id.* at 2176 n.90 (citation omitted). Colonists made widespread use of petitions, particularly property-owning adult white males. *Id.* at 2178–90 (discussing the practice and pervasiveness of petitioning in colonial America). But petitioning was not limited to this group. Disenfranchised white males "also exercised" this right, and, as one scholar points out, "[w]hat is far more demonstrative of the significance of petitioning in American political culture was its use by those usually conceived of today

as having been completely outside of direct participation in the formal political culture," such as women, Black people (both free and enslaved), and Native Americans. *Id.* at 2181–82. Petitioning, then,

> provided not just a method whereby individuals within those groups might seek reversal of harsh treatments by public authority, judicial or otherwise, but also a method whereby such individuals could seek the employment of public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit. In that sense, even individual grievances embodied in petitions carried powerful political weight simply because of the individual's capacity to invoke public power. That such power might reside in the hands of those with little, or no, other formal political power greatly heightens the constitutional significance of the right.

Id. at 2182 (footnotes omitted).

The importance of the right to petition to the colonists is further demonstrated by the Declaration of Independence. After cataloguing various grievances, the declaration states: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." *Declaration of Independence: A Transcription*, National Archives: America's Founding Documents, https://www.archives.gov/founding-docs/declaration-transcript (last visited Mar. 7, 2023). This language, which was repeated in some state constitutions,[7] demonstrates "that

[7] *See* Va. Const. (1776) (discussing King George's "detestable and insupportable tyranny," which included "answering our repeated petitions for redress with a repetition of injuries"), available at

petitioning was a, if not the, key vehicle providing protection for subjects of the crown," and that the colonists placed great weight on this right. Mark, *supra*, at 2191.

After the Revolutionary War, the colonists turned their focus to drafting federal and state constitutions that encapsulated American values and principles. The right to petition was, unsurprisingly, significant in these constitutions,[8] and early states adopted provisions guaranteeing this right to the people. *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic*

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https://encyclopediavirginia.org/primary-documents/the-constitution-of-virginia-1776; Vt. Const. pmbl. (1777) ("In the several stages of the aforesaid oppressions, we have petitioned his Britannic majesty, in the most humble manner, for redress[] and have, at very great expense, received several reports in our favor; and, in other instances, wherein we have petitioned the late legislative authority of New-York, those petitions have been treated with neglect."), available at https://avalon.law.yale.edu/18th_century/vt01.asp; S.C. Const. pmbl. (1776) (noting that the colonists "petitioned for the repeal" of acts passed by the British Parliament "in vain" and describing how delegates from each of the American colonies "laid their complaints at the foot of the throne, and humbly implored their sovereign that his royal authority and interposition might be used for their relief from the grievances occasioned by those statutes," and "for redress of the many other grievances;" noting that the complaints were "disregarded"), available at https://avalon.law.yale.edu/18th_century/sc01.asp.

[8] The right to petition was so essential in early America that every state constitution written before 1855 included assembly-and-petition clauses. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 43 (2008).

Proportionality, 123 Colum. L. Rev. 1855, 1864, 1876 (2023); Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Pa. L. Rev. 853, 883 (2022). The original constitution of Maryland (1776), for example, guaranteed "every man" "a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner." Md. Const. art. XI (1776).[9] The constitutions of Pennsylvania (1776) and Vermont (1777) similarly guaranteed "the people" "a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." Pa. Const. chap. I, § XVI (1776);[10] *see* Vt. Const. chap. I, § XIX (same text and differing punctuation).[11]

Influenced by these earlier constitutions, Tennessee's 1796 constitution was modeled on North Carolina's Constitution of 1776. *See* Joshua W. Caldwell, Studies in the Constitutional History of Tennessee 81 (1895); Edward T. Sanford, The Constitutional Convention of Tennessee of 1796, at 18 (1896).[12] This constitution "was solidly grounded

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[9] Available at https://avalon.law.yale.edu/17th_century/ma02.asp.

[10] Available at https://avalon.law.yale.edu/18th_century/pa08.asp.

[11] Available at https://avalon.law.yale.edu/18th_century/vt01.asp.

[12] Tennessee's conformance with many parts of the North Carolina Constitution makes sense, as the state was made up of land ceded by North Carolina and Tennesseans had, in effect, been living under the North Carolina Constitution for the past two decades. *See* Sanford, *supra*, at 18–19 ("It was but natural then, that, in casting about for material, [Tennessee's drafters] should have seized that which lay closest at hand:

in the American revolutionary tradition," Otis H. Stephens, Jr., *The Tennessee Constitution and the Dynamics of American Federalism*, 61 Tenn. L. Rev. 707, 710 (1994), and like others of that era, it recognized many individual rights and emphasized the principles of democratic self-rule and popular control over the government. *See, e.g.*, Tenn. Const. art. XI, § 1 (1796) (declaring "[t]hat all power is inherent in the People," "all free Governments are founded on their authority," and the people "have at all times an unalienable right to alter, reform, or abolish the Government");[13] *id.* art. XI, § 2 ("[T]he doctrine of non resistance against arbitrary Power and oppression is absurd, slavish and destructive to the good and happiness of mankind."); *Sundquist*, 38 S.W.3d at 14 (the doctrine of non-resistance provision "exemplifies the strong and unique concept of liberty embodied in our constitution in that it 'clearly asserts the right of revolution'" (citation and alteration omitted)); *see also* Stephens, *supra*, at 710–11; Bulman-Pozen & Seifter, *supra*, at 1864, 1872–77.

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the Constitution which had been adopted by North Carolina in the year 1776, about five months after the Declaration of Independence, and which breathes largely the same spirit of individual liberty and of the rights of man. It was a Constitution under which they themselves had lived for the intervening fourteen years between 1776 and the creation of the Territorial Government in 1790 . . . ."); Caldwell, *supra*, at 82–83; McClure, *supra*, at 29.

[13] Available at https://teva.contentdm.oclc.org/digital/collection/tfd/id/666/rec/1.

The fact that there is no documented discussion among the drafters of the Tennessee Constitution about the inclusion of the right to petition does not mean that the right was not important. "The Journal of the convention [of 1796] is unfortunately very meagre, reporting none of the speeches, and giving the vote upon only a few of the more important questions." Sanford, *supra*, at 17. Many important constitutional provisions have no documented discussion. The fact that the right to petition is among them suggests that the right was so non-controversial that lawmakers saw no need to make record of the discussion (or even to debate its inclusion).

In fact, the drafters of the constitution received and considered petitions from citizens, highlighting how commonplace petitioning activity was at the time: during Tennessee's Constitutional Convention, at least one "[P]etition from sundry persons, suggesting several clauses which they wished to be inserted in the constitution," was "read and referred to the committee appointed to draft a constitution." Journal of The Proceedings of a Convention Begun and Held at Knoxville, January 11, 1796, at 9 (Nashville, McKennie & Brown 1852).

In 1834 the Tennessee Constitution was revised to establish this Court, *see generally* Tenn. Const. art. VI, §§ 1–3 (1834),[14] and make other changes primarily reflecting the growing population of the state. The right to petition remained intact, although it and the rest of the declaration of rights were moved to Article I. This move had the effect of

[14] Available at https://cdm15138.contentdm.oclc.org/digital/collection/tfd/id/491.

foregrounding individual rights "before turning to such matters as the structure of government." Bulman-Pozen & Seifter, *supra*, at 1864.

After the Civil War, the Tennessee Constitution was again revised, this time to abolish slavery in the state. Tenn. Const. art. I, § 33 (1870).[15] Again, the right to petition was unchanged, reflecting the fact that this right was considered fundamental to Tennessee lawmakers and the public. *Cf.* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 43 (2008) (by 1868, 94% of the American people lived in states where the rights to petition and assembly were protected by state constitutional provisions).

In sum, history and indicia of constitutional values demonstrate that "the right of petition is an ancient right and the cornerstone of the Anglo-American constitutional system." *Gentry v. Former Speaker of House Glen Casada*, No. M2019-02230-COA-R3-CV, 2020 WL 5587720, at *2 (Tenn. Ct. App. Sept. 17, 2020) (citation omitted); *see also Lozman v. City of Rivera Beach*, 585 U.S. 87, 101 (2018) (recognizing the federal right to petition "as one of the most precious of the liberties safeguarded by the Bill of Rights" (quoting *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002))); *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, 858 S.E.2d 795, 797 (N.C. 2021) (describing the expression of "one's views

[15] Available at https://cdm15138.contentdm.oclc.org/digital/collection/tfd/id/561.

to government officials" as "foundational to our political system" and a "fundamental right"); *infra* pages 26–29.

III. Precedent confirms that the right to petition is fundamental and merits an exception to the at-will employment doctrine.

Like the text and structure of section 23, this Court's precedent supports finding that section 23 is an unambiguous constitutional provision evidencing public policy. Most notably, in 1916, this Court considered section 23's "high constitutional privilege" in the case of *McKee v. Hughes*, 181 S.W. 930, 931 (Tenn. 1916). This Court explained in *McKee* that the constitutional right of petition not only "secure[s] to every person . . . the right to apply to any department of the government for the redress of grievances," but also "guarantees" that people who seek such redress remain "free from *any penalty* for having sought or obtained it." *Id.* (citation omitted and emphasis added). The Court then held that petitions under section 23 are afforded constitutional privilege unless there is proof that the signer of such acted with malice. *Id.* at 931–32.

In so holding, this Court recognized that, for the right of petition to be meaningful, it "should not be allowed to become a trap for the petitioner." *Id.* at 932. Citizens must be able to petition their government "without hazard" of negative consequences—including termination of employment. *See id.*

Other state courts have similarly recognized the importance of the right to petition in their state constitutions and the need to protect citizens' ability to exercise it without fear of harmful consequences, including termination of employment. For example, the Supreme Court

of Appeals of West Virginia, the state's highest court, has held that "[t]he rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." *McClung v. Marion Cnty. Comm'n*, 360 S.E.2d 221, 227 (W. Va. 1987) (alteration omitted) (quoting Syl., *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978)). "Certainly," the court continued, "it is in contravention of substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances." *McClung*, 360 S.E.2d at 227.

Similarly, the Supreme Court of Pennsylvania has held that the state constitutional right to petition "cannot lawfully be infringed, even momentarily, by individuals." *Spayd v. Ringing Rock Lodge No. 665, Brotherhood of R.R. Trainmen of Pottstown*, 113 A. 70, 72 (Pa. 1921). In *Spayd*, a member of the Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen (the brotherhood) was expelled from the brotherhood for signing a petition asking the Legislature to reconsider a law, which was alleged to violate an internal rule that prohibited members from "using [their] influence to defeat any action taken by national legislative representative[s]." *Id.* at 68–69. Pennsylvania's highest court invalidated the brotherhood's rule as "against public policy." *Id.* at 73. It held that the plaintiff was acting "not merely within his legal rights, but accorded with his solemn duty as a citizen, for the exercise of which he can under

no circumstances be penalized." *Id.* at 70. The court paid special attention to the role of the courts in protecting constitutional rights, noting that "it is the bounden duty of the courts to protect" them, even from interference by private actors. *Id.* at 72 (citation omitted).

The Supreme Court of North Carolina has broadly interpreted article I, section 12 of the state constitution, which Tennessee's right to petition was based on, *see supra* page 22, to protect and give meaning to the "fundamental" right. *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, 858 S.E.2d 795, 797 (N.C. 2021). In *Cheryl Lloyd*, a private investment company sued individuals for "tortious interference with prospective economic advantage" based on statements the people made to a town during public hearings about the dangers of rezoning land owned by the company. *Id.* at 797–98. The Supreme Court of North Carolina affirmed dismissal of the claim, grounding its decision in the importance of the right to petition in the state constitution. The court held that the right to petition could not be protected if citizens could face negative consequences for exercising it. *Id.* at 800. Lawsuits "that impermissibly seek to infringe on the right and thus chill petitioning activity occurring in these political contexts" could not be permitted. *Id.* "The pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the right to petition cannot survive." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964)) (alterations omitted).

As these and other courts have recognized, the state constitutional right to petition "is a basic freedom in a participatory government," which

must be protected by the courts and "cannot be abridged if a government is to continue to reflect the desires of the people." *Brock v. Thompson,* 948 P.2d 279, 289 n.37 (Okla. 1997).

Despite this precedent in Tennessee and other states, BCBST contends that this Court's decision in *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997), forecloses the possibility that the Tennessee Constitution can serve as a source of public policy for purposes of the employment at-will doctrine. This position is incorrect for two reasons.

First, *Stein* explicitly reaffirmed that constitutional provisions could provide the basis for the public policy exception:

> In Tennessee an employee-at-will generally may not be discharged for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision.

Id. at 717. That case involved a wrongful discharge claim against a private employer after the employee was fired for a positive result on a random drug test. *Id.* at 716. The Court ultimately affirmed dismissal of the claim only because Stein "failed to identify a clear public policy, evidenced by an unambiguous constitutional, statutory, or regulatory provision, that was violated." *Id.* at 719. If the Court meant to reject the very possibility that a constitutional provision could supply a public policy exception, it would not have repeatedly made the opposite point.

Second, the holding in *Stein* rested on whether the activity in question—testing positive on a random drug test—was protected by the state constitution's guarantee of privacy. It was unclear to the Court

whether firing someone for testing positive on a drug test would implicate the state constitutional protection, and the Court found "no well-defined public policy which is violated by a private employer discharging an at-will employee who tests positive for drug use on a random drug test." *Id.* at 717–19. In contrast, BCBST has not disputed that Ms. Smith's activity—emailing her legislature—was protected by section 23. *Stein* is thus inapposite to the case at bar and does not alter the "unambiguous constitutional, statutory or regulatory provision" standard for finding public policy exceptions. *Id.* at 719.

In sum, given how thoroughly ingrained section 23's right to petition is in Tennessee, and particularly considering that it is undisputed that Ms. Smith's activities fell within section 23's scope, the Court of Appeals correctly concluded that section 23 was an unambiguous constitutional provision as this Court meant that phrase in *Chism* and *Stein*. To hold otherwise would render the right to petition, "a high constitutional privilege," *McKee*, 181 S.W. at 931, meaningless in Tennessee.

CONCLUSION

For the forgoing reasons set out above, the Court should affirm the decision of the Court of Appeals.

March 20, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of *Amici Curiae* in support of the Plaintiff/Respondent Heather Smith complies with the requirements set forth in Tenn. R. App. 46 3.02. The Brief is proportionately spaced, has a typeface of 14 points, and contains 5,997 words exclusive of the Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service.

March 20th, 2024

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CERTIFICATE OF SERVICE

I certify that true and exact copies of the foregoing document were served electronically or mailed via U.S. first class mail, postage prepaid, this 20th day of March 2024, to:

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