BARBARA N. VINCENT,	)	
	)	
Petitioner/Appellant,	)	
	)	Davidson Chancery
	)	No. 94-2823-III
VS.	)	
	)	Appeal No.
	)	01-A-01-9510-CH-00482
STATE OF TENNESSEE and	)	
NED McWHERTER, Governor,	)	
RILEY DARNELL, Secretary of State,	)	
CHARLES BURSON, Attorney General,	)	
JOHN WILDER, Speaker of Senate,	)	
JIMMY NAIFEH, Speaker of House,	)	
WILL BURNS, Coordinator of Elections,	)	
	)	
Respondents/Appellees.	)	

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

HONORABLE ROBERT S. BRANDT, CHANCELLOR

BARBARA N. VINCENT
P.O. Box 11351
Memphis, Tennessee 38111-0351
PETITIONER/APPELLANT, PRO SE

CHARLES W. BURSON
Attorney General and Reporter

JOHN H. REINBOLD
Assistant Attorney General
Civil Litigation and State Services Division
450 James Robertson Parkway
Nashville, Tennessee 37243-0490
FOR RESPONDENTS/APPELLEES

AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE
BEN H. CANTRELL, JUDGE

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	)	
Respondents/Appellees.	)	

O P I N I O N

The petitioner, Barbara N. Vincent, brought this suit to force the captioned state officials to include on the ballot for the November, 1994, state-wide election, a question concerning the process of "initiation and referendum" (I&R) and to delay the printing of said ballots until the question of the contents of said ballot was judicially resolved.

The Trial Court sustained the motion of the respondents to dismiss for failure to state a claim for which relief can be granted, and the petitioner appealed presenting a single issue for review as follows:

> [W]hether the lower court erred in refusing to hear appellant's lawsuit without trial since a cause of action was stated.

A motion to dismiss for failure to state a claim for which relief can be granted admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. *Cornpropst v. Sloan,* Tenn. 1975, 528 S.W.2d 188; *League Cent. Credit Union v. Mottern,* Tenn. App. 1983, 660 S.W.2d 787.

In scrutinizing a complaint in the face of a T.R.C.P. Rule 12.02(6) motion, the Court should construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. *Fuerst v. Methodist Hospital,* 5 Tenn. 1978, 566 S.W.2d 847; *Holloway*

v. Putnam County, Tenn. 1976, 534 S.W.2d 292; *Huckeby v. Spangler*, Tenn. 1975, 521 S.W.2d 568, *Sullivant v. Americana Homes, Inc.*, Tenn. App. 1980, 605 S.W.2d 246.

Dismissal under Rule 12.02(6) is warranted only when it appears beyond doubt that no set of facts could be proved in support of the allegations of the complaint which would entitle plaintiff to the requested relief, or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, Tenn. App. 1992, 846 S.W.2d 270; *Sullivant v. Americana Homes, Inc.*, Tenn. App. 1980, 605 S.W.2d 246.

The failure to state a claim for which relief can be granted is determined from an examination of the complaint alone. *Woolcotts Fin. Servs., Inc. v. McReynolds*, Tenn. App. 1990, 807 S.W.2d 708.

Although some liberality is required in judging the scope of the factual allegations of the complaint, the issue of whether the complaint states a claim for which relief is available is a question of law which must be reviewed and determined *de novo* on appeal. *Union Carbide Co. v. Huddleston*, Tenn. 1993, 854 S.W.2d 87.

Mandamus may be granted only upon a showing of a duty to perform a ministerial, non-discretionary, act. *State, ex rel, Weaver v. Ayers*, Tenn. 1988, 756 S.W.2d 217.

By providing in the Constitution the methods of its amendment, the people have limited their power to initiate alterations in the form of government. *Metropolitan Government of Nashville and Davidson County v. Poe*, 215 Tenn. 53, 383 S.W.2d 265 (1964); *West v. Carr*, 212 Tenn. 367, 370 S.W.2d 469 (1963).

The only power reserved by the people of Tennessee in regard to change in their government is the power to vote on proposals of the legislature or a constitutional convention. *Wright v. Cunningham*, 115 Tenn. 445, 91 S.W. 293 (1905).

The petition contains the following relevant statements of fact:

> 1. On January 14, 1991, the State advised, through Coordinator of Elections Will Burns, that this official did "not have the authority to approve the placement of I&R on the statewide ballot in 1992," despite sovereign instructions, via petition, to do so. . . . Petitioner and the other citizens had not wished to *call* an election; they had attempted, instead, to place a legitimate question on the ballot during an election *already* called by government.
>
> . . . .
>
> 4. On September 30, 1992, Mr. Burns said by telephone that he would refuse to comply, even if presented a petition signed by 25 citizens, including plaintiff, requesting that an issue be placed on the November 1994 ballot. . . .
>
> . . . .
>
> 6. On August 16, 1994, petitioner delivered to Secretary of State Riley Darnell petitions, signed by 25 registered voters, including herself, instructing this constitutional officer to place a question on the November 1994 ballot. . . .
>
> There was no way for the people to use the petition in Tennessee, the Secretary told plaintiff. "You can talk until you're blue in the face," he said, "and I still can't put an issue on the ballot (through the petition process)." . . .
>
> 7. For three consecutive years, legislation has been introduced, but not passed, by the Tennessee Legislature that called for I&R to be addressed in a constitutional convention.

An affidavit mentioned in the petition is not included in the record on appeal.

Appellant's brief cites no provision of the state or federal constitution or state or federal statute which authorizes any citizen or group of citizens to require that a particular issue be placed on any ballot submitted to the voters.

Appellant cites Article I, §1 of the Tennessee Constitution which states generally that governmental power is inherent in the people who have the authority to found, alter, reform or abolish government "in such manner as they think proper." This provision is not interpreted to empower twenty-five citizens to compel a public official to place a particular question on a ballot.

Appellant also cites Article I §23 of the Tennessee Constitution which guarantees the right of peaceable assembly, to "instruct" representatives, to "apply" to officials for redress of grievances, or other purposes "by address or remonstrance." This provision is not interpreted to empower twenty-five citizens to compel a public official to place a particular question on the ballot.

Appellant cites 82 C.J.S. Statutes §115, p.193, which defines the terms, initiative and referendum, as follows:

> Initiative is the power reserved to the people to propose bills and laws and to enact or reject them at the polls independent of the legislature. Referendum is the right reserved by the Constitution to the people of a state or local subdivision thereof to have submitted for their approval or rejection any act, or part of an act, item, section or parts of any bill passed by the legislature, and which, in most cases, would without action on the part of the electors become law.

It is noteworthy that the definition of both terms includes the expression, "reserved to (or by) the people."

The Constitution of Tennessee conveys to the three designated departments all governmental power of the state. It contains no reservation to the people of the powers of initiative or referendum.

Appellant cites Article XI §16 of the Constitution of Tennessee which declares that all rights stated in the Bill of Rights are excepted from the powers granted to the state

government. However, nothing is found in the Bill of Rights to empower twenty-five citizens to compel a state official to place a particular question on a ballot.

Appellant cites *Illustration Design Group, Inc. v. McCanless*, 224 Tenn. 284, 454 S.W.2d 115 (1970). In that case, the controversy arose after the Legislature had submitted to the people five questions as to calling a constitutional convention to amend the Constitution in five particulars. Only one of the proposals was approved by the electorate. The suit was brought to invalidate the legislation and enjoin any further official action thereunder. After reviewing pertinent provisions of the Constitution, the Supreme Court upheld the validity of the Act, denied the injunction and said:

> Thus, it is seen that "*all* power is inherent in the people," and they have a "*right* to alter, reform or abolish" their Constitution *in such manner as they may think proper,* subject only to any restraints imposed in the Constitution of the United States or by the people themselves in the Constitution of Tennessee. *Cummings, Sec. of State v. Beeler, supra,* 189 Tenn. 175-176, 223 S.W.2d 913. And the only limitations placed by them upon the manner of their exercise of this right, are the provisions for amendment above referred to (Art. 11, Sec. 3). *West v. Carr,* 212 Tenn. 367, 375, 370 S.W.2d 469, 472, App. Dismissed, 378 U.S. 557, 84 S.C. 1908, 12 L.Ed.2d 1034.
>
> It is clear that, by these provisions, the people, as the reservoir of all sovereign power of the State, have delegated to the Legislature the authority and power to initiate change in their Constitution, subject to their final adoption or rejection by popular vote. . . .

Illustration, 224 Tenn. at 293-94.

By vesting the Legislature with power to initiate amendments of the Constitution, the people have relinquished the power to initiate change while retaining the power to reject or approve any change proposed by the Legislature.

Nothing is found in the cited opinion to recognize the power of twenty-five citizens to compel a state official to place a particular question on a ballot.

Appellant cites 82 C.J.S. §114, but quotes from 82 C.J.S. Statutes §116. The quoted text relates only to jurisdictions wherein the people in their constitutions have expressly reserved the power of initiative and referendum.

Appellant cites *Gatewood v. Matthews*, Ky. App. 1966, 403 S.W.2d 716, which was a suit to restrain the submission to the voters of the question of reforming the constitution as recommended by the General Assembly. Nothing is found in that decision to empower twenty-five citizens to compel a public official to place a particular question on a ballot.

Appellant next insists that I&R is constitutional. This is not the question in the present case. The mere fact that a proposal if enacted would be constitutional does not make it the law of the land until it is enacted.

Appellant insists that her civil rights have been violated. The petition asserts no fact which would constitute violation of civil rights. There is no showing of any denial of the right or power to alter, reform, etc. "in such manner as the people think proper" or in the manner provided by the people in their constitution. Neither is there any showing of any denial of the right to apply for redress.

In addition to the failure to assert facts to justify any relief, the complaint fails to demonstrate that the captioned defendants or any of them has a ministerial duty to place a question on a state-wide ballot upon the request of twenty-five citizens. Thus, no grounds of mandamus are shown.

For the reasons stated, the judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the petitioner-appellant. The cause is remanded to the Trial Court for appropriate further proceedings.

Affirmed and Remanded.

_____
HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____
SAMUEL L. LEWIS, JUDGE

_____
BEN H. CANTRELL, JUDGE