IN THE TENNESSEE SUPREME COURT

No. M2020-00683-SC-R11-CV

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Plaintiffs / Appellees,

v.

TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,

Defendants / Appellants,

and

NATU BAH, *et al.*,

Intervenor-Defendants / Appellants.

On Application for Permission to Appeal Pursuant to Tenn. R. App. P. 11 from Tennessee Court of Appeals Case No. M2020-00683-COA-R9-CV

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QUESTIONS PRESENTED

(1) Whether the county government plaintiffs have standing to challenge the constitutionality of the ESA Program under the Home Rule Amendment?

(2) Whether the ESA Program violates the Home Rule Amendment, Article XI, Section 9, of the Tennessee Constitution?

STATEMENT OF THE CASE

Plaintiffs/Appellees, Metropolitan Government of Nashville and Davidson County and Shelby County Government, along with Plaintiff Metropolitan Nashville Board of Public Education (the "Board"), filed a complaint against the Tennessee Department of Education ("TDOE"), Education Commissioner Penny Schwinn, and Governor Bill Lee in Davidson County Chancery Court on February 6, 2020, challenging the constitutionality of the ESA Act under three provisions of the Tennessee Constitution: the Home Rule Amendment, Article XI, Section 9 (Count I); the Equal Protection Clauses, Article I, Section 8, and Article XI, Section 8 (Count II); and the Education Clause, Article XI, Section 12 (Count III). (TR Vol. I at 1-44.)

The parties agreed to permissive intervention by two sets of Intervenor-Defendants.[1] (TR Vol. III at 382-85.)

[1] "Bah Appellants" (Intervenors) include Natu Bah, Builguissa Diallo, Bria Davis, and Star-Mandolyn Brumfield. On April 3, 2021, Bria Davis filed a motion to be dropped as a party. "Greater Praise Appellants" (Intervenors) include Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

Plaintiffs moved for summary judgment on the Home Rule Amendment claim (Count I). (TR Vol. III at 448-51; TR Vol. IV at 452-600; TR Vol. V at 601-51.) State Defendants and Greater Praise Intervenor-Defendants moved to dismiss the complaint. (TR Vol. III at 386-448.) Bah Intervenor-Defendants moved for judgment on the pleadings. (TR Vol. V at 673-99.)

A group of Davidson and Shelby County parents and taxpayers filed a similar lawsuit in Davidson County Chancery Court on March 2, 2020. *McEwen, et al. v. Lee, et al.*, No. 20-242-II (hereinafter, "*McEwen*"). The Chancellor presiding over this case also presides over *McEwen*. All motions filed in both cases were set for expedited briefing and argument on April 29, 2020. (TR Vol. V at 700-04.)

The Chancellor issued a Memorandum and Order on May 4, 2020, granting Plaintiffs' motion for summary judgment on Count I, holding that the ESA Act violated the Home Rule Amendment, and enjoining the Act's implementation. (TR Vol. VIII at 1097-1128.) The Chancellor granted motions to dismiss the Board for lack of standing[2] and denied the motions to dismiss and for judgment on the pleadings as they applied to Count I. (TR Vol. VIII at 1125-26.) Defendants' pending motions related to Counts II and III in this case and all motions in *McEwen* remain under advisement. The Chancellor *sua sponte* granted permission to Defendants to seek an interlocutory appeal of its order under Tenn. R. App. P. 9(a). (*Id.* at 1126-27.)

[2] The Board's dismissal has not been raised in this interlocutory appeal. Thus, this brief refers to Plaintiffs/Appellees as the "Appellee Counties."

Appellants filed Rule 9 motions for permission to appeal and Tenn. R. App. P. 7 motions for review of the Chancellor's injunction. On May 19, the Court of Appeals granted the Rule 9 motions, set an expedited briefing and argument schedule, and denied the Rule 7 motions.

Appellants filed motions under Tennessee Supreme Court Rule 48 asking this Court to assume jurisdiction and Rule 7 motions for review of the Court of Appeals' order denying a stay of the Chancellor's order. On June 4, 2020, this Court denied both motions.

The Court of Appeals held oral argument on August 5, 2020, and issued an Opinion on September 29, 2020, affirming the Chancellor's holdings that Appellee Counties had standing to bring this action and that the ESA Act is unconstitutional under the Home Rule Amendment.

Appellants filed Rule 11 motions for permission to appeal to this Court, which the Court granted on February 4, 2021.

STATEMENT OF FACTS

In 2019, the Tennessee General Assembly passed the "Tennessee Education Savings Account Pilot Program," (the "ESA Act"). *See* 2019 Tenn. Pub. Acts ch. 506, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* The Act provides "participating students" with "education savings accounts" that use public funding to pay for private school tuition, fees, and other education-related expenses. Tenn. Code Ann. §§ 49-6-2602(10), -2603(a)(4), -2607(a). The Act imposes this "education savings account" ("ESA") program in only two counties, Davidson and Shelby, without their consent.

I. THE ESA ACT ON ITS FACE APPLIES ONLY IN DAVIDSON AND SHELBY COUNTIES.

The ESA Act's text does not explicitly name Davidson and Shelby counties. Rather, the Act uses the definition of "eligible student" to limit the bill's application solely to Appellee Counties. To participate, an "eligible student" must be in a family with an annual household income not exceeding twice the federal income eligibility guidelines for free lunch and, most crucially for purposes of this dispute, be:

1. zoned to attend a school in a local education agency ("LEA")[3] with ten or more schools:
    a) identified by the State as priority schools[4] *in 2015*,
    b) identified by the State as among the bottom 10% of schools[5] *in 2017*, and
    c) identified by the State as priority schools *in 2018*, or

[3] The Tennessee Code refers to a public-school system, including a county school system, as an LEA. Tenn. Code Ann. § 49-1-103(2).

[4] At least every three years, "the commissioner of education shall recommend for approval to the state board a listing of all schools to be placed in priority . . . status." *Id.* § 49-1-602(b)(1). These "shall include the bottom five percent (5%) of schools in performance, all public high schools failing to graduate one-third (1/3) or more of their students, and schools with chronically low-performing subgroups that have not improved after receiving additional targeted support." *Id.* § 49-1-602(b)(2).

[5] "By October 1 of the year prior to the public identification of priority schools pursuant to subdivision (b)(1), the commissioner shall notify any school and its respective LEA if the school is among the bottom ten percent (10%) of schools in overall achievement as determined by the performance standards and other criteria set by the state board." *Id.* § 49-1-602(b)(3).

2. zoned to attend an ASD[6] school as of the Act's effective date.

Id. § 49-6-2602(3)(C) (emphasis added).

It is undisputed that the only LEAs that fall within the definition of "eligible student" are in Davidson and Shelby counties, namely the Metropolitan Nashville Public Schools ("MNPS") and Shelby County Schools ("SCS"). (2015 Priority List; 2017 Bottom 10% List; 2018 Priority List, TR Vol. IV at 516-28.) It is also undisputed that "as of the Act's effective date," the only schools in the ASD were in Davidson and Shelby counties. The ESA Act's limitation to only two counties will not change absent further legislative action.

II. THE ESA ACT'S LEGISLATIVE HISTORY CONFIRMS THE GENERAL ASSEMBLY'S INTENT TO APPLY THE ACT IN ONLY TWO COUNTIES ABSENT FUTURE GENERAL ASSEMBLY ACTION.

A. House Bill No. 939

The ESA Act was filed in the House of Representatives on March 19, 2019, as Amendment No. 1 (HA0188) to House Bill No. 939 and was a bill of general application. It defined "eligible student" as a student zoned to attend school in any LEA with three or more schools among the bottom 10%. (Am. No. 1, *Hearing on H.B. 939 Before the H. Subcomm. on Curriculum, Testing, & Innovation*, 111th Gen. Assemb. (Tenn. 2019).) Five school districts had three or more schools in the bottom 10% at that

[6] The Achievement School District ("ASD") is "an organizational unit of the [TDOE], established and administered by the commissioner for the purpose of providing oversight for the operation of schools assigned to or authorized by the ASD." *Id.* § 49-1-614(a). ASD schools are only in Davidson and Shelby counties. *See* Achievement School District, "Schools" (last visited Mar. 25, 2021).

time—Davidson, Hamilton, Knox, Madison, and Shelby—and districts could fall into or out of the Act based on future school performance. (*Id.*; Bottom 10% List, TR Vol. IV at 520-24.)

When the bill reached the House floor for third and final reading, the House replaced Amendment No. 1 with Amendment No. 2 (HA0445). Amendment No. 2 narrowed the definition of "eligible student" to students zoned to attend school in an LEA with three or more priority schools in 2015 and three or more bottom 10% schools in 2017. (Am. No. 2, H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 32.) This new definition encompassed only four counties—Davidson, Hamilton, Knox, and Shelby—and, importantly, used historical standards to prevent school districts from falling into or out of the Act's application in the future. (*Id.*; 2015 Priority List, TR Vol. IV at 516-19.)

House Bill No. 939 received the bare majority of votes required to pass—50 ayes and 48 nays—on April 23, 2019, after then-House Speaker Glen Casada (R-Franklin) held the House floor vote open for 40 minutes. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 32; April 23, 2019 House Floor Session Video at timestamp 3:05:37 – 3:44:24.) During that time, he promised Rep. Jason Zachary (R-Knoxville) that Knox County would be excluded and "held harmless" from the Senate version of the bill. (Video Recording, manually filed with Notice of Filing as Ex. 6 to Pls.' Stmt. Undisputed Material Facts.) Rep. Zachary then provided the fiftieth vote needed to pass the bill.

In remarks on the House floor, then-Deputy House Speaker Matthew Hill (R-Jonesborough) summarized the House majority's dual motives for imposing ESAs on two counties while protecting every other

school district from the bill: "Ladies and gentlemen, today on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education." (April 23, 2019 House Session Tr. at 27:1-5, TR Vol. IV at 568; April 23, 2019 House Floor Session Video at timestamp 2:55:15 – 2:55:31.)

B. Senate Bill No. 795

Senate Bill No. 795 followed a similar course. The first substantive amendment to the bill was Amendment No. 1, which was identical to House Amendment No. 1. (Am. No. 1, *Hearing on S.B. 795 Before the S. Comm. on Education*, 111th Gen. Assemb. (Tenn. 2019); S.B. 795, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31 (reprinting the text of Amendment No. 1).)

When the bill reached the Senate floor, the Senate substituted the House bill for the Senate bill and then replaced it with Senate Amendment No. 5. The amendment further narrowed the definition of "eligible student" by increasing from three to ten the number of priority and bottom 10% schools in 2015, 2017, and 2018. (Am. No. 5, S.B. 795, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31.) This change removed Knox County, as previously promised to Rep. Zachary, and Hamilton County from the bill's application, leaving only Davidson and Shelby counties within the "eligible student" definition. (*Id.*; 2015 Priority List; 2017 Bottom 10% List; 2018 Priority List, TR Vol. IV at 516-28.) Because the criteria were based on data from prior years, no school districts could be added to or removed from the definition of "eligible student" without future legislation. (Am. No. 5, S.B. 795, 111th

Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31.) The Senate adopted House Bill No. 939, as amended, with 20 ayes and 13 nays, on April 25, 2019. (*Id.*)

C. Conference Committee

A conference committee was appointed to resolve the differences between the two chambers' bills. (H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 33.) The committee's final report retained the Senate's "eligible student" definition. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 36; 2015 Priority List, 2017 Bottom 10% List, 2018 Priority List, TR Vol. IV at 516-28.) The committee inserted a reverse severability clause to prevent judicial expansion of the geographic limitation.[7] The committee report also contained the first statutory reference to the ESA Act as a "pilot program."

Rep. Patsy Hazelwood (R-Signal Mountain), who voted against the bill when it initially passed the House, voted for the committee report because she had "committed to vote for ESAs if the [sic] Hamilton County was excluded from the program." (May 1, 2019 House Session Tr. at 5:3-7, TR Vol. IV at 595; May 1, 2019 House Floor Session Video at timestamp 1:26:46 – 1:26:59.)

In the Senate, Sen. Joey Hensley (R-Hohenwald) asked the bill's Senate sponsor, Senate Education Committee Chair Dolores Gresham (R-Somerville), to confirm that "no other LEA will be able to grow into

[7] Tenn. Code Ann. § 49-6-2611(c) ("Notwithstanding [the severability clause in] subsection (b), if any provision of this part is held invalid, then the invalidity shall not expand the application of this part to eligible students other than those identified in § 49-6-2602(3).").

the program over the years," stating, "[I] just want it to be on the record and assured that this conference report continues to prevent any future LEAs from being included in this." (May 1, 2019 Senate Session Tr. at 2:16-18, TR Vol. V at 602; May 1, 2019 Senate Floor Session Video at timestamp 1:37:11 – 1:37:40.) Sen. Gresham responded unequivocally: "That's the intent of the General Assembly today." (May 1, 2019 Senate Session Tr. at 2:24 – 3:1, TR Vol. V at 602-03; May 1, 2019 Senate Floor Session Video at timestamp 1:37:46 – 1:37:50.)

Both the House and Senate adopted the committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 36; H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 34.)

III. THE ESA ACT WILL HAVE A PROFOUNDLY HARMFUL EFFECT ON APPELLEE COUNTIES.

The ESA Act shifts the full cost of funding education savings accounts onto Appellee Counties. A participating student's ESA will receive annual disbursements from the State equal to the per-pupil funding in the student's school district required by the State's Basic Education Program ("BEP"),[8] but not to exceed the combined statewide

[8] The BEP is a statutory formula for calculating kindergarten through grade twelve education funding "necessary for our schools to succeed." Tenn. Code Ann. § 49-3-302(3). Total BEP funding consists of separate contributions by the State and local jurisdictions. The State and local shares vary among school districts based on each local jurisdiction's ability to raise revenue from property taxes. *Id.* § 49-3-307(a)(10), -356.

average of required state and local BEP allocations per pupil. Tenn. Code Ann. § 49-6-2605(a).

For Davidson County, total BEP per-pupil funding is $8,324 ($3,618 in State funding and $4,705 in local funding). For Shelby County, total BEP funding is $7,923 ($5,562 in State funding and $2,361 in local funding). *See* Tennessee Comptroller of the Treasury Legislative Brief, "Understanding Public Chapter 506: Education Savings Accounts" (Updated May 2020) (hereinafter "Comptroller Brief"), Greater Praise Appellants' App. at 006.[9] Because per-pupil BEP funding in Appellee Counties' school districts exceeds the statewide average, participating students from both counties would receive ESA funding equal to the statewide average, which is $7,572 for 2020-21. Comptroller Brief, Greater Praise Appellants' App. at 006.

The State will deposit the full ESA disbursement (State and local BEP shares) into a participating student's account. Tenn. Code Ann. § 49-6-2605(b)(1). The State will then subtract that same amount from the BEP funds the State would otherwise pay to the LEA. *Id.* In other words, the State will break even: Whatever it deposits into an ESA, it takes away from the school district.

Because the full ESA disbursement equals the combined State *and local* BEP funding per pupil, school districts lose more State funding for an ESA student than if the student left to attend private school without

[9] The Comptroller's estimates rely on FY2019 expenditures for the required local portion of the BEP and on FY2020 allocations for the State portion. Comptroller Brief, Greater Praise Appellants' App. at 006.

an ESA. To illustrate, when a *non-participating* student leaves an MNPS school to attend private school, MNPS loses $3,618 in State BEP funding—the State share for an MNPS student. But when a *participating* student leaves an MNPS school for private school, the Metropolitan Government loses $7,572 in BEP funding—the State and local shares for an MNPS student, which is *more than twice as much money*. Id. Similarly, the State provides $5,562 in State BEP funding per pupil for SCS. Comptroller Brief, Greater Praise Appellants' App. at 006. But when a participating student leaves an SCS school for private school, Shelby County loses $7,572 in BEP funding—*an additional 36 percent*. *Id.*[10]

The ESA Act compels Appellee Counties to cover this loss of BEP funding by requiring that ESA students still be "counted as enrolled" in their public schools for local funding purposes. Tenn. Code Ann. § 49-6-2605(b)(1). Because of this "counting requirement," each Appellee County must continue to appropriate its local share of BEP funding for students in the ESA program, *even though those students no longer attend public schools*. *See* id. § 49-3-307(a)(1)(B) (describing BEP calculation as based on "enrollment"); *id.* § 49-3-307(a)(11) (BEP formula "shall be student-

[10] The General Assembly's Fiscal Review Committee estimated BEP revenue losses in its Corrected Fiscal Memorandum on the ESA Act (May 1, 2019). (TR Vol. VII at 1022-25.) According to the Memorandum, the ESA program will generate a $36,881,150 "shift in BEP funding" in Appellee Counties' school districts in the program's first year, when it has a cap of 5,000 students; $55,321,725 in year two (cap of 7,500 students); $73,762,300 in year three (cap of 10,000 students); $92,202,875 in year four (cap of 12,500 students); and $110,643,450 in year five and subsequent years (cap of 15,000 students). (*Id.*, TR Vol. VII at 1025.)

based such that each student entering or exiting an LEA shall impact generated funding"); *id.* § 49-3-356(a) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."); *id.* § 49-2-101(1), (6) (making Davidson and Shelby counties' legislative bodies responsible for adopting budgets and levying taxes for their school systems).

Based on the Comptroller's Brief, the counting requirement would force the Metropolitan Government to appropriate $4,705 in BEP funding to MNPS for each ESA student who no longer attends an MNPS school. Shelby County would be required to appropriate $2,361 for each ESA student. Comptroller Brief, Greater Praise Appellants' App. at 006.

The counting requirement also affects Appellee Counties' obligations under Tennessee's "maintenance-of-effort" statute.[11] Comptroller Brief at n.D ("Any additional local funding beyond the required BEP local match will not be included in ESA funding calculations, *but districts must continue to budget sufficient funds to meet maintenance of effort requirements set by the state*.") (emphasis added), Greater Praise Appellants' App. at 007. Local jurisdictions may choose to appropriate more education funding than the BEP requires. Appellee Counties do so, bringing their total local per-pupil spending to $9,277 in

[11] The State's "maintenance of effort" statute generally requires local governments to appropriate the same level of per-pupil local funding notwithstanding any increase in state funding in a particular year. Tenn. Code Ann. § 49-3-314(c); *see also* Tennessee Comptroller of the Treasury Legislative Brief, "Understanding Tennessee's Maintenance of Effort in Education Laws" (Sept. 2015).

Davidson County ($4,705 in local BEP and $4,571 in additional funds) and $6,414 in Shelby County ($2,361 in local BEP and $4,053 in additional funds). *Id*. Because the counting requirement leaves ESA participating students on the school districts' rolls, the maintenance-of-effort statute requires Appellee Counties to appropriate their *full* local per-pupil spending for students no longer attending their schools.

In sum, by artificially inflating the district's enrollment through the "counting requirement," the ESA Act imposes a per-pupil "ESA Mandate" on Appellee Counties to compensate their school districts for the loss of State BEP funds to the ESA program. Based on the Comptroller's numbers, the Metropolitan Government would have paid an ESA Mandate in the current school year of $9,277 for each ESA student no longer attending its public schools, and Shelby County would have paid $6,414.

The ESA Act includes a grant program—the "school improvement fund"—that if funded[12] would disburse annual grants to MNPS and SCS that in aggregate will be *less than* the total ESA disbursements to participating students. Tenn. Code Ann. § 49-6-2605(b)(2).[13] Moreover,

[12] The grant program is "subject to appropriation" and therefore not guaranteed funding under the ESA Act. Even if funded, it will supply school improvement funds to MNPS and SCS only for the first three years. Tenn. Code Ann. § 49-6-2605(b)(2).

[13] The grant program only reimburses lost funding resulting from students who attended an MNPS or SCS public school for one full school year before joining the ESA program. Tenn. Code Ann. § 49-6-2605(b)(2). Thus, school districts would receive no grant funds for ESA students who enter kindergarten or move into Appellee Counties.

this grant program does not release Appellee Counties from their financial obligations under the ESA Act's "counting requirement" and therefore does not make Appellee Counties whole. Neither the BEP nor the maintenance-of-effort statute allows the Counties to offset their education-funding obligations with grant funds received by their school districts. *Id*. § 49-3-314(c) (under State's "maintenance of effort" statute, local legislative bodies must appropriate the same level of per-pupil funding notwithstanding an increase in state funding); *see also* Comptroller Brief at n.D, Greater Praise Appellants' App. at 007. Thus, whether or not school districts receive "school improvement grants" under the ESA Act, Appellee Counties must pay the ESA Mandate for students who no longer attend their schools.

STANDARD OF REVIEW

This Court reviews rulings on motions to dismiss and for summary judgment *de novo* with no presumption of correctness. *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516-17, 524 (Tenn. 2005).

In reviewing a grant of summary judgment, this Court adheres to the familiar principal that, "[s]ummary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 244-45 (Tenn. 2015).

In reviewing the denial of State Appellants and Greater Praise Appellants' motions to dismiss for lack of standing, the Court must construe the complaint liberally, presuming all factual allegations as true

and giving Appellee Counties the benefit of all reasonable inferences. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). When a standing argument is "based solely on the pleadings," the Court "must accept the allegations of fact as true[; h]owever, inferences to be drawn from the facts or legal conclusions set forth in the complaint are not required to be taken as true." *Keller v. Estate of McRedmond*, 495 S.W.3d 852, 867 n.20 (Tenn. 2016) (citations omitted).

SUMMARY OF ARGUMENT

The ESA Act is a local bill that targets only two counties, Davidson and Shelby, now and in the future. The Act's "counting requirement" imposes a unique burden on Appellee Counties by requiring them to pay for public school students to attend private school. The Local Legislation Clause of the Home Rule Amendment—Article XI, Section 9, Paragraph 2 of the Tennessee Constitution—requires that such a local bill expressly provide for local approval by affected counties. Without such approval, the bill is "void and of no effect."

Appellee Counties have standing to challenge the ESA Act under the Local Legislation Clause, which was adopted to protect counties from such unilateral mandates from the General Assembly. The Act's "fiscal effects" on the Appellee Counties' budgets, effects that no other county will suffer, constitute direct injury sufficient to establish standing.

Appellants' arguments that the Local Legislation Clause of the Home Rule Amendment does not apply in this case are unavailing. The clause's plain language and the history of the 1953 Constitutional Convention firmly establish that an act is not exempt from the Home Rule Amendment merely because it affects two counties rather than one.

In addition, education, while a plenary power of the State, is a governmental function that the State and counties share. A law that forces two counties to budget and spend education tax dollars differently than any other county implicates the Local Legislation Clause, even though it involves education, and it must comply with the Clause's requirements.

Because the ESA Act will only ever apply in Davidson and Shelby counties absent further General Assembly action, affects Appellee Counties in their governmental capacity, and was imposed without local approval, this Court should affirm the decision below that the Act violates the Home Rule Amendment.

ARGUMENT

I. APPELLEE COUNTIES HAVE STANDING TO CHALLENGE THE ESA ACT'S CONSTITUTIONALITY.

To establish constitutional standing in Tennessee, a plaintiff must show that: (1) it has sustained a distinct and palpable injury, (2) the injury was caused by the challenged conduct, and (3) the injury is one that can be addressed by a remedy that the court is empowered to give. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001); *In re Youngblood*, 895 S.W.2d 322, 326 (Tenn. 1995). The Court of Appeals properly concluded that the ESA Act imposes a distinct and palpable injury on Appellee Counties, primarily through the financial burden of the Act's "counting requirement."

A. The ESA Act Inflicts a Distinct and Palpable Injury on Appellee Counties' Finances and Operations.

State law places significant responsibilities on Appellee Counties for funding their school systems—governmental responsibilities that the ESA Act impairs.

Under state law, a county legislative body must adopt a budget for its schools, provide the necessary funds to enable the school board to meet all obligations under the adopted budget, and levy taxes for schools. Tenn. Code Ann. § 49-2-101; *see also id.* § 5-9-401 ("All funds from whatever source . . . that are to be used in the operation . . . of county governments shall be appropriated to such use by the county legislative bodies.").

The ESA Act significantly affects these functions. It directs that "[f]or the purpose of funding calculations, each participating student must be counted in the enrollment figures for the LEA in which the participating student resides." *Id.* § 49-6-2605. Because participating students must be counted as enrolled in the county public school system despite no longer attending public schools, both Counties must continue to appropriate their full local per-pupil spending for each of these students—both the local BEP share and, due to the State's maintenance-of-effort statute, local funding above BEP requirements. *Id.* §§ 49-3-307(a)(1)(B) (BEP calculation based on enrollment), -307(a)(11) (BEP formula is "student based" and "each student entering or exiting an LEA shall impact generated funding"), -314(c) (maintenance of effort

requirement), -356(a) (local government "shall appropriate funds sufficient" to fund BEP local share).

If the ESA Act were implemented now, it would impose an "ESA Mandate," requiring the Metropolitan Government to pay $9,277 for each participating student and Shelby County to pay $6,414. If these same students left their school systems without an ESA, Appellee Counties would be free of this infringement on their sovereign rights, like the other ninety-three counties in the State. The Fiscal Review Committee's Corrected Fiscal Memorandum estimates that the financial impact on Appellee Counties of *only* the BEP-portion of the ESA Mandate will be $37 million during the program's first year, growing to $111 million in year five and subsequent years.

State Appellants' assertion that the only financial harm to Appellee Counties is "purely speculative and hypothetical" is misguided. (Br. at 22.) Appellee Counties will incur this unique financial obligation as soon as the first participating students receive their ESA funds.[14]

[14] State Appellants also argue that Appellee Counties' Home Rule Amendment claim is not ripe because "[u]ntil the ESA Pilot Program is implemented, it is impossible to know what, if any, fiscal impact it will have on Plaintiffs." (Br. at 36.) This argument fails, first, because the Court of Appeals did not grant interlocutory appeal on the issue of ripeness. In fact, State Appellants' motion to dismiss raised ripeness *only* as to Counts II (Equal Protection) and III (Education Clause) of the Complaint, not Count I (Home Rule Amendment). (Mem. L. Supporting State Defs.' Mot. to Dismiss at 9-11, TR Vol. III at 426-28.) This Court should not rule on an issue that the Court of Appeals did not address and that Appellants never raised below.

B. The ESA Act Alters Education Funding Requirements in Only Two Counties and Does Not Make Appellee Counties Financially Whole.

Greater Praise Appellants concede that the ESA Act imposes a financial obligation on Appellee Counties but argue there is no injury because the Counties "will pay the *exact same* amount of money to their school districts both before and after implementation" of the Act. (Supp. Br. at 10.) This argument misses the point. The ESA Act imposes a substantial financial burden on Appellee Counties by requiring them to fund the *non-public-school* education of students who reside in their counties, unlike any other county in the State. Appellee Counties' total appropriations remain roughly the same only because the Act artificially inflates their school districts' enrollment by treating private school students as public school students.

Appellants assert that counties are required by state law "to partially fund the education of every school-aged student in their

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State Appellants' argument is also substantively incorrect. Ripeness is a justiciability doctrine that "focuses on whether the dispute has matured to the point that it warrants a judicial decision." *B & B Enters. of Wilson Cty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010). A plaintiff in a declaratory judgment action must establish the existence of a "case or controversy" but need not show a "present *injury*." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008) (emphasis added). State Appellants' argument that the *full extent* of the ESA Act's impact is unknown fails to recognize that the Counties must pay the ESA Mandate for any student using an ESA. That payment does not turn on whether the LEA requests more money in the county budget; the payment is required by law if even one student participates in the program.

jurisdiction," citing Tenn. Code Ann. § 49-6-3102(a). (Supp. Br. at 18.) Section 49-6-3102(a) contains no such requirement; it merely says that local education boards are required "to provide for the enrollment *in a public school*" of every eligible student. *Id.* It does not mandate that counties pay for private schooling.

In a similar vein, Greater Praise Appellants mistakenly claim that "money follows the child" from public schools to private schools. (Supp. Br. at 18.) But State law bases a county's education funding obligation on the number of students enrolled *within* the public school system. *See* Tenn. Code Ann. § 49-3-307(a)(1)(B) (BEP funding calculations "shall utilize enrollment numbers"), -307(a)(11) ("each student entering or exiting an LEA shall impact generated funding" under BEP formula); *see also id.* § 49-2-203(9)(A)(ii) & (B)(i) (outlining "maintenance of effort requirement," which permits reduction in funding only for reduction in enrollment). Accordingly, a county's funding obligation rises and falls with *public school* enrollment.

The counter examples that Appellants cite also involve students who remain *within* the public-school system. Public charter schools operate "within the public school system." *Id.* §§ 49-13-102(b), -106(a), -112. The ASD is a State-operated public school district and receives county funding when a county school is placed within it. *Id.* § 49-1-614(d)(1), (k). Municipal school systems are part of the public school system and receive financial support from the county, which supports all public school systems within its borders. *Id.* § 49-3-315(a). Unlike these examples of general law requiring local funding contributions for *public*

school students, the ESA Act requires *only Appellee Counties* to pay for students who no longer attend public schools.

Greater Praise Appellants' arguments about alleged "financial advantages" for *school districts* under the ESA Act are irrelevant (Supp. Br. at 20); these advantages come at the *Appellee Counties'* expense based on the counting requirement. The Act's school improvement grants, if funded, may also provide school districts with additional financial resources, but additional state funding for school districts does not relieve *Appellee Counties* of their financial obligation to pay for ESA students no longer attending their public schools. Tenn. Code Ann. § 49-6-2605(b)(2)(A).

In sum, the ESA Act mandates significantly greater educational spending requirements on Appellee Counties than on any other city or county in the State. It deprives Appellee Counties of the sovereign right to exercise their discretion to apply these funds to any public need, including education, or to lower tax rates. Thus, Appellee Counties suffer a distinct and palpable injury under the Act.

II. THE COURT OF APPEALS PROPERLY HELD THAT THE ESA ACT VIOLATES THE TENNESSEE CONSTITUTION'S RESTRICTIONS ON LOCAL LEGISLATION.

The Local Legislation Clause in the Home Rule Amendment reads in relevant part:

> any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election

> by a majority of those voting in said election in the municipality or county affected.

Tenn. Const., art. XI, § 9 (¶ 2).

Thus, any act of the General Assembly that is "private or local in form or effect" and "applicable to a particular county or municipality either in its governmental or its proprietary capacity" must "by its terms" require approval by the local legislative body or popular referendum. Without local approval language, such legislation is "absolutely and utterly void." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975).

The ESA Act is a bill of local effect, applying only to Appellee Counties now and in the future. It affects Appellee Counties in their governmental capacities by forcing them to keep appropriations for their county school systems artificially high. It imposes this burden without approval by the counties' legislative bodies or local referendum. The Court of Appeals correctly held that the Act fails to meet the requirements of the Home Rule Amendment and therefore is void and of no effect.

A. The 1953 Constitutional Convention Adopted the Home Rule Amendment to Protect Counties and Cities From Legislative Abuse.

For much of Tennessee's history, local governments were mere "arms or instrumentalities of the state government—creatures of the Legislature, and subject to its control at will." *Grainger Cty. v. State*, 80 S.W. 750, 757 (Tenn. 1904). This one-sided balance of power between State and local governments shifted dramatically in 1953 with adoption of three amendments to Article XI, Section 9 of the Tennessee

Constitution, collectively known as the Home Rule Amendment. The Amendment was drafted by the 1953 Constitutional Convention, which during its thirty-three-day session was "rife with concern over state encroachment on local prerogatives" and "[c]oncern about the General Assembly's abuse of that power." Elijah Swiney, *John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After* Southern Constructors, 79 Tenn. L. Rev. 103, 118-19 (Fall 2011).

1. The 1953 Constitutional Convention Was Convened to Stop the General Assembly From Abusing Local Legislation.

The Convention delegates' chief concern was the General Assembly's historic abuse of local legislation. The "basic reason for the call of this Convention" was "this wicked local bill situation that has been growing in the State," according to Delegate Lewis Pope (Sumner County), a member of the Convention's Committee on Home Rule and Chair of its Editing Committee. Journal and Debates of the Constitutional Convention of 1953 at 1023 (hereinafter "Journal"), App. at APP023; *see also id.* at 919 ("the people of Tennessee are demanding that we . . . do away with this nefarious local bill system that has been in vogue in this state"), App. at APP016.

Delegate Pope was not alone in this opinion. "We came up here primarily to get the counties and the municipalities out of jail; that is what you came up here for," Delegate John Chambliss (Hamilton County) stated. *Id.* at 1031, App. at APP024. "[T]he greatest need and most unanimous demand from all parts of our great State of Tennessee is . . . [to] give to the counties protection from the pernicious local legislation

showered down on the various counties during every session of the legislature," declared Delegate Leon Easterly (Greene County). *Id.* at 937, App. at APP018.

To remedy this problem, the Convention overwhelmingly approved the "Resolution Relative to Home Rule for Cities and Counties as to Local Legislation" (the "Local Legislation Resolution") by an 85-5 vote on July 15, 1953, the next-to-last day of the convention.[15] The resolution read in full:

> Be It Resolved, That Article XI, Section 9, of the Constitution of the State of Tennessee be amended by adding at the end of said Section as it now reads, the following:
>
> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Journal at 306, App. at APP013.

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[15] The Local Legislation Resolution became the second paragraph in Tennessee Constitution Art. XI, § 9. The Convention adopted two other home rule resolutions as amendments to Art. XI, § 9: (1) "Optional Home Rule for Cities," now ¶¶ 3-8, and (2) "Consolidation of City and County Functions," now ¶ 9. Journal at 280-83, 312-13, App. at APP007-10, APP014-15.

Delegate Pope, the resolution's primary author, explained that it had two distinct purposes: (1) to prohibit a particular category of local bills called "ripper bills" and (2) to require local approval of "any other local bill affecting the county or affecting the town or city." Journal at 1024, App. at APP023. As to "ripper bills," Delegate Pope explained, "[T]he legislature cannot under any circumstances pass an act abolishing an office, changing the term of the office or altering the salary of the officer pending the term for which he was selected; that is prohibited, and that kind of an act cannot be passed." Journal at 1113, App. at APP028. Concerning "any other local bill," he explained that "*any local bill having effect* must, in order to be good, provide on its face or in the language of the act itself, one or the other, modes by which that act must be approved" locally. *Id.* (emphasis added); *see also id*. at 1023-24 ("Then, if they pass *any other local bills affecting the county or affecting the town or city*, . . . let the people say whether or not that law shall become the law . . . ."), App. at APP032-33.

Intervening Appellants erroneously assert that the Local Legislation Resolution was intended only to address the first category of local bills—ripper bills targeting local governance. (Greater Praise Appellants' Supp. Br. at 37-40; Bah Appellants' Br. at 24-25.) But Delegate Pope's remarks make clear that the Local Legislation Resolution was intended to restrict the General Assembly's sovereignty over local governments on a much broader scale. The resolution accomplished that goal through a "deprivation of legislative power" over ripper bills *and* a "limitation on legislative power" over any other local bill. Journal at 1124 (quoting Delegate Walter Chandler (Shelby County),

App. at APP033. This Court acknowledged three years later that the "second provision" in Art. XI, § 9 is a "limitation on legislative power." *Shelby County v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956).

2. The Convention Intended the Local Legislation Resolution to Apply to All Local Bills, Not Just Local Bills Covering One Jurisdiction.

Just before the Local Legislation Resolution's final adoption on July 15, Delegate Pope moved to amend the resolution by adding the words "applicable to a particular county or municipality either in its governmental or its proprietary capacity." His amendment had a simple purpose: to clarify that the resolution applied only to counties and cities. As he explained in full on the convention floor:

> Now, Mr. President, and Ladies and Gentlemen of the Convention, there have been several delegates who have spoken to me about one little phase of this resolution that probably ought to have a little explanation and a change of words, not a change, but an adding of some words, and it certainly doesn't hurt it and I am inclined to think that it improves upon it so that *it makes it more definite and sufficiently applicable only to counties, and municipalities*, and that is to add after the word "effects" in the eighth line of this paragraph, the following: now, let's read it so that we will be sure to get it right, "Applicable to a particular county or municipality, either in its governmental or its proprietary capacity."

Journal at 1120-21, App. at APP029-30 (emphasis added).

Absent from this explanation was any statement that the new language limited the resolution to local bills covering only one county or city. In fact, Pope gave the opposite answer in response to a series of

questions immediately following his motion to amend, in a colloquy with Delegate Harry T. Burn (Roane County):

> Mr. Burn: Do I understand that if there is an act pertaining to more than one municipality, that the legislature can enact that without referendum?
>
> Mr. Pope: *No, that would be a local bill if it applies to one or two.*
>
> Mr. Burn: Well, suppose it is three or four.
>
> Mr. Pope: Well, they couldn't pass it for three or four.
>
> Mr. Burn: This amendment does say one, though.
>
> Mr. Pope: Yes; I don't think it would have any effect on it one way or the other, because you will never get two counties to have the same thing.
>
> Mr. Burn: *Suppose there are three municipalities in the county and you want to enact a law –, this is a practical thought that I have in mind with reference to future legislation in our county; could you enact an act pertaining to all the municipalities in the county and not have a referendum?*
>
> Mr. Pope: *I don't think so; I think that would be a private bill.*

Id. at 1121, App. at APP030 (emphasis added). In this discussion, Delegate Burn was testing whether a bill could avoid scrutiny under the Local Legislation Resolution by adding extra cities or counties. Delegate Pope repeatedly responded no.

General Assembly practice both before and after the Convention is consistent with Delegate Pope's response. The General Assembly routinely included multiple jurisdictions within a single private act

before the Convention.[16] In the years immediately after the Convention, the General Assembly included local-approval language when it passed private acts that applied to more than one jurisdiction, as required by the new Home Rule Amendment.[17]

[16] *See, e.g.*, 1953 Tenn. Priv. Acts. Ch. 225 (creating joint hospital district for City of Copperhill, City of Ducktown, and Polk County, and authorizing cities and county to levy taxes sufficient to operate district); 1951 Tenn. Priv. Acts Ch. 17 (authorizing county and city boards of education in Davidson County to contract for joint operation of school facilities); 1949 Tenn. Priv. Acts Ch. 496 (transferring school property from Shelby County to City of Memphis); 1931 Tenn. Priv. Acts Ch. 468 (authorizing Macon and Rhea counties to levy special tax); 1929 Tenn. Priv. Acts Ch. 202 (permitting any city in Hamilton County to contract with county for lump sum payment from county school taxes in lieu of distribution of funds based on average daily attendance); 1919 Tenn. Priv. Acts. Ch. 766 (authorizing Blount, Loudon, and Roane counties to levy special road tax); *id*. Ch. 469 (authorizing Cookeville, Dickson, Jellico City, Sweetwater, and Lewisburg to levy taxes and issue bonds to improve roads).

[17] *See, e.g.*, 1959 Tenn. Priv. Acts Ch. 167 (creating special school district from parts of Gibson and Obion counties subject to approval by counties' governing bodies); *id*. Ch. 7 (creating Lexington-Henderson County General Hospital Board of Trustees subject to approval by county and city governing bodies); 1955 Tenn. Priv. Acts Ch. 351 (changing apportionment of school funds between cities and Shelby County subject to local approval by county and city governing bodies); *id*. Ch. 295 (authorizing Shelby County and incorporated cities within county to levy cigarette privilege tax subject to local approval by county and city governing bodies).

B. The ESA Act Is "Local in Form or Effect" Under the Home Rule Amendment.

1. A Bill Is "Local in Form or Effect" If It Is Not Potentially Applicable Throughout the State.

This Court held in *Farris v. Blanton* that "[t]he sole constitutional test" under the Home Rule Amendment "must be whether the legislative enactment, irrespective of its form, is local in effect and application." 528 S.W.2d at 551. To determine whether legislation is local in effect, this Court examines whether it is "potentially applicable throughout the State." *Id.* at 552. If so, it is not local in effect, even if it applies to a single county at the time of passage. *Id.* This test does not rely on self-serving language in the challenged legislation, such as labeling it a public act. *Id.* at 554. As this Court warned in *Farris*, "[t]he test is not the outward, visible, or facial indices, not the designation, description or nomenclature employed by the Legislature. Such a criterion would emasculate the purpose of the amendment." *Id.* at 551.

The legislation at issue in *Farris* provided for run-off elections in all counties with a mayor as head of the county's executive branch. *Id.* at 550. Only Shelby County had a mayor at the time of passage, but that fact was not determinative. Rather, the act was invalid because it was not "potentially applicable" to other counties, since no county but Shelby could have this form of government "except by the affirmative action of the General Assembly." *Id.* at 552. In such situations, a court "cannot conjecture what the law may be in the future" and is "not at liberty to speculate upon the future action of the General Assembly." *Id.* at 555.

Following *Farris*, this Court has consistently used the "potentially applicable" test to distinguish between local and general acts. Where the scope of a bill was frozen in time and not potentially applicable to other counties without further legislative action, this Court held the act to be local in form or effect. *See, e.g.*, *Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979) (legislation that exempted two counties from a "permanent, general provision, applicable in nearly ninety counties" was local in form and effect in violation of Art. XI, § 9).

In contrast, where an act applied to a small number of local governments upon passage but used population brackets or other provisions that could apply to other counties in the future without further legislative action, this Court held the act was not subject to the Home Rule Amendment. *See, e.g.*, *Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978) (despite applying only to two counties, legislation was not local in effect where it "can become applicable to many other counties depending on what population growth is reflected by any subsequent Federal Census"); *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371, 373 (Tenn. 1971) (despite applying only to the Metropolitan Government at passage, the act could apply to any government that became a metropolitan government in the future); *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 729-30 (Tenn. 1991) (legislation applicable to counties with a minimum population of 300,000 not local in form or effect, despite applying to only three counties at passage, because other counties could grow into compliance); *see also Cty. of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996),

perm. app. denied (Tenn. 1996) (statute that applied only to Shelby County but was "potentially applicable to numerous counties" based on population bracket of 700,000 or more was not subject to Art. XI, § 9).

2. The ESA Act Is Not Potentially Applicable to Any Counties Other Than Appellee Counties and Therefore Is "Local in Form or Effect."

It is undisputed that the ESA Act applies only to schools in Davidson and Shelby counties. The Act defines "eligible student" to include only students zoned to attend a school in an LEA with ten or more priority schools in 2015 and in 2018 and schools on the bottom 10% list in 2017. By its selective use of school rankings in prior years, the ESA Act excludes every school district except those in Appellee Counties. The Act by its terms will never apply to another school district absent future legislative action.[18] And the Act's reverse severability clause ensures that no court can ever apply the Act in any other county. Tenn. Code Ann. § 49-6-2611(c). The Court of Appeals therefore correctly determined that the Act "by its terms" operates exclusively in particular parts of the state, was not a general law, and therefore "must be considered local in effect." *Metro. Gov't of Nashville & Davidson Cty. v. Tenn. Dep't of Educ.*, No.

[18] The ESA Act's self-serving designation as a "public" rather than "private" act does not convert it into a law of general application. See *Farris*, 528 S.W.2d at 554.

M2020-00683-COA-R9-CV, 2020 WL 5807636, at *6 (Tenn. Ct. App. Sept. 29, 2020).

3. A Bill That Applies Only to Two Counties Now and in the Future Is "Local In Form or Effect."

Greater Praise Appellants urge this Court to abandon the "potentially applicable" test in *Farris* and exempt any act "designed to apply to any other county in Tennessee" from Home Rule Amendment scrutiny. The interests of *stare decisis* alone counsel against such a radical departure from Home Rule Amendment jurisprudence. But more significantly, the holding in *Farris* was correct, and there is nothing in the Amendment's language, its drafters' intent, or its subsequent implementation that contradicts the holding. Rather, such a ruling would, in the words of *Farris*, "emasculate the purpose of the amendment" by allowing the General Assembly to enact unpopular laws without local approval simply by inserting an extra county or city into a bill.

Greater Praise Appellants offer four arguments to support their claim that the Home Rule Amendment applies exclusively to local legislation affecting one and only one county: (1) the Amendment's language; (2) the Constitutional Convention's intent; (3) alternative resolutions that the Convention considered; and (4) existing case law. None of these arguments survives scrutiny.

The Amendment's language. "'While the text must always be the primary guide to the purpose of a constitutional provision,'" this Court "'should approach the text in a principled way that takes into account the history, structure, and underlying values of the document.'" *Cleveland*

Surgery Ctr., L.P. v. Bradley Cty. Mem'l Hosp., 30 S.W.3d 278, 282 (Tenn. 2000) (quoting *Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995). Even where language of the provision at issue may be "clear and unambiguous," this Court has noted that "the history of th[e] provision and the events and circumstances that precipitated the [constitutional] convention . . . are important in [the Court's] understanding of the spirit, if not the letter of provision." *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983).

There is no reasonable argument that the Home Rule Amendment's language imposes a "clear and unambiguous" one-county limit on its application. First, under common English usage, the fact that a local act may apply to "a particular county" does not logically preclude it from applying to another county. Second, "applicable to a particular county or municipality" should not be cherry-picked from the rest of the Amendment and read in isolation. When placed in full context, the phrase plainly relates to the language that *follows and modifies it*, not the language that *precedes it*. In fact, "applicable to a particular county or municipality either in its governmental or its proprietary capacity" was added to the Local Legislation Clause as a single amendment. Journal at 1121, App. at APP030. Read properly, "applicable to a particular county or municipality either in its governmental or its proprietary capacity" limits the Amendment to local acts that affect a county's governmental or proprietary capacities, not to local acts that affect only one county.

To adopt Appellants' interpretation of "applicable to a particular county or municipality" would make the phrase "local in form or effect" superfluous, since an act that applies to only one county is by definition

local. Yet this Court has made clear that "[n]o words in our constitution can properly be said to be surplusage." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14 (Tenn. 2000); *see also Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010) (noting that, in construing a constitutional provision, the Court "must consider the entire instrument and must harmonize its various provisions" (internal citation omitted)).

The General Assembly has used "a particular county" throughout the Tennessee Code in acts it deems local in effect, not to limit the act's application to one county but to clarify that each affected county exercises its own discretion to accept or reject the act. For example, the County Budgeting Law of 1957 authorizes counties to adopt certain budgeting procedures. Tenn. Code Ann. § 5-12-103. The General Assembly recognized and declared that the act's application would be "local in effect" and provided that it would not take effect "in a particular county" without a two-thirds vote of the governing body. *Id.* § 5-12-102(a). Accordingly, "a particular county" was used not to narrow the scope of the Law to one county, as Greater Praise Appellants assert, but to describe the process that any county would follow to approve the Law's application. *See also* County Fiscal Procedure Act of 1957, Tenn. Code Ann. § 5-13-102(a) (designating act as "local in effect," available to any county, and effective "in a particular county" upon local approval); County Purchasing Law of 1957, Tenn. Code Ann. § 5-14-102(a) (same); County Financial Management System of 1981, Tenn. Code Ann. § 5-21-126(a) (same); Adult-Oriented Establishment Registration Act of 1988,

Tenn. Code Ann. § 7-51-1121(a) (same); County Sheriff's Civil Service Law of 1974, Tenn. Code Ann. § 8-8-402(a) (same).

All of these acts stand for the unremarkable proposition that "a particular county" is used to instruct how a county can opt into an act that applies to multiple counties, not to limit the act's applicability to only one county, as Greater Praise Appellants argue. (Original Br. at 35).[19] The phrase plays the same role in the Home Rule Amendment.

The Constitutional Convention's intent. "When construing a constitutional provision, this Court must 'give effect to the intent of the people who adopt[ed] a constitutional provision.'" *Cleveland Surgery Ctr., L.P. v. Bradley Cty. Mem'l Hosp.*, 30 S.W.3d 278, 281 (Tenn. 2000) (quoting *Gaskin*, 661 S.W.2d at 867 (internal quotations omitted)).

[19] Greater Praise Appellants' reliance on other Tennessee Code cites to argue that "a particular county" limits the statute's application to one county is similarly unavailing. *See, e.g.*, Tenn. Code Ann. § 7-1-101(2) (defines "county governing body" as "body in a particular county that is vested with the power to levy property taxes"; definition applies to governing bodies in multiple counties); *id.* § 7-21-104(10) (defines "principal city" as municipality with largest population "in a particular county"; definition applies to principal cities in multiple counties).

Greater Praise Appellants' reference to case law and statutes discussing singular and plural forms of nouns also fails to salvage their argument. (Original Br. at 32-34.) None of the referenced cases interpret Tennessee constitutional provisions. And insofar as Appellants rely on cases interpreting statutes, they fail to recognize that in Tennessee statutes, "[s]ingular includes the plural and the plural the singular, except where the contrary intention is manifest." Tenn. Code Ann. § 1-3-104(c).

Despite all of its smoke and mirrors, Greater Praise Appellants' argument that the Convention intended the Local Legislation Resolution to apply to legislation affecting only one county or city is based solely on a letter from Delegate Miller that is not part of the Convention's proceedings, is not included in the Convention's Journal, and is nowhere referenced in the Convention's Debate.

The relevant text is one paragraph from a three-page letter:

> 8. The Resolution also requires that the referendum must be provided for by general law, but it would seem that such a requirement is unduly restrictive and might lead to serious confusion. I personally do not see any reason why there should have to be a general law when the private Act concerns only one municipality or county.

Letter at 3 (Greater Praise Appellants' App. at 014). Contrary to Appellants' repeated assertions, Delegate Miller's letter is not a clarion call to limit the Local Legislation Resolution to private acts covering one county. It is a statement intended to draw a contrast between the scope of general and private acts.

Greater Praise Appellants spin an elaborate story about how the letter "spurred the final change" to the Local Legislation Resolution, when Delegate Pope made a motion to add the words "applicable to a particular county or municipality either in its governmental or its proprietary capacity." (Supp. Brief at 9.) The Convention record establishes otherwise. When Pope offered his amendment on the next-to-last day of the convention, he did not say the new language limited the Local Legislation Resolution's scope to one county, and he never mentioned Miller's letter. Rather, he explained the amendment's sole

intent was to limit application of the resolution to counties and cities. *See* Journal at 1120-21 (Del. Pope explaining amendment as "adding of some words . . . so that it makes it more definite and sufficiently applicable only to counties, and municipalities"), App. at APP029-30.

Any impression that Pope intended the new language to incorporate a one-county limit was immediately dispelled when, just after offering this explanation, he was asked, "Do I understand that if there is an act pertaining to more than one municipality, that the legislature can enact that without referendum?" *Id.* at 1121, App. at APP030 (quoting Del. Burn). Pope responded with an unqualified "No, that would be a local bill if it applies to one or two." *Id.*

The amendment so presented and explained was approved by voice vote, and the convention adopted the amended Local Legislation Resolution by an overwhelming margin with the clear understanding that it applied to all local bills, including those covering multiple counties or cities. Journal 304-06, 1120-29, App. at APP011-13, APP029-38.[20]

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[20] Greater Praise Appellants also claim that the convention's vote to substitute the phrase "private or local in form or effect" in the Local Legislation Resolution for the phrase "hereafter affecting private and local affairs that is not applicable to every County or Municipal Corporation in the entire State" indicated an intent to limit the Resolution to local bills covering only one county. (Br. at 44-45.) This also misrepresents the convention record. Delegate Pope, who moved the substitute language, explained that his motion was intended to address Delegate Chambliss's concern that use of the phrase "private and local affairs" would be inconsistent with this Court's holding in *Hobbs v. Lawrence County*, 247 S.W.2d 73 (Tenn. 1952). Nothing in the record suggests that Pope's amendment was intended to limit the Local

Alternative resolutions. The Convention also declined at least two opportunities to limit the number of counties or cities that could be included within a local bill covered by the Home Rule Amendment. First, it did not incorporate language from Delegate John Fletcher's Resolution No. 59, which would have limited the scope of the Local Legislation Resolution to legislative acts "effective in only one county." Journal at 68-69, App. at APP002-3. A second opportunity came in an early draft of the Home Rule for Cities Resolution. Delegate Sims proposed Resolution No. 105 to require the General Assembly to act only by general law that would "apply alike to all municipalities or to all municipalities in a particular class," where a class could not have fewer than four municipalities. *Journal* at 221, App. at APP004. Sims deleted the classification requirement from the Convention's final action on municipal home rule and left the question of whether an act was private or general "to be determined by the court." *Journal* at 261, 280-83, 1010, 1014, App. at APP005, APP007-10, APP020-21.[21]

Legislation Resolution in the manner Appellants claim. *See* Journal at 277, 1065-66, App. at APP006, APP026-27.

[21] Greater Praise Appellants argue that Delegate Sims's withdrawal of his municipal-class proposal from the *Optional Home Rule for Cities* resolution "make[s] clear" the convention's intent to limit the *Local Legislation* Resolution to local bills affecting only one county. But this conclusion does not follow from the premise; the more logical conclusion is that the Convention chose to avoid numerical limits altogether. Moreover, Greater Praise Appellants misquote Delegate Pope's statement on the proposed four-municipality classification system. (*Compare* Original Br. at 44 *with* Journal at 925, App. at APP017.) In fact, Pope's statement reflects well-founded concerns about the

As these deliberations show, the Convention had no intent to limit the Local Legislation Resolution to a single local jurisdiction. The Convention delegates knew how to place limits on the number of jurisdictions within a local bill and chose not to do so.

Existing case law. Greater Praise Appellants claim that this Court held in *Burson, Bozeman*, and *City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193 (Tenn. 1984), that an act "designed to apply to any other county in Tennessee" is exempt from the Home Rule Amendment—in other words, that the Home Rule Amendment does not cover any act that applies to more than one county at passage or may so apply in the future. (Original Br. at 54.) The opinions say no such thing.

This Court upheld the statute in *Burson* not because it applied to three counties at passage, but because it applied generally to any municipality in a county with a minimum population of 300,000, so that other counties would eventually become subject to its provisions. *Burson*, 816 S.W.2d at 730. Notwithstanding Appellants' selective quotation from *Burson* (Original Br. at 54), the full quote shows the *Burson* Court reaffirming the *Farris* "potentially applicable" test, not adopting an arbitrary numerical limit:

> Specifically, the inquiry must be "whether th[e] legislation [in question] was designed to apply to any other county in Tennessee, for if it is *potentially* applicable throughout the state it is not local in effect even though at the time of its passage it might have applied to [only one county]." *Id*. at 552 (emphasis added).

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legislative gamesmanship that may occur when any arbitrary numerical limit is placed on the number of jurisdictions affected by a local bill.

Burson, 816 S.W.2d at 729 (quoting *Farris*, 528 S.W.2d at 552).

Greater Praise Appellants also misrepresent this Court's opinion in *Dossett*. (Original Br. at 56.) *Dossett* rejected a Home Rule Amendment challenge not because the challenged act applied to multiple counties at passage but because the legislation concerned "jurisdiction of criminal offenses against *the State*," which was exempt from Home Rule Amendment scrutiny. 672 S.W.2d at 195 (emphasis added).

Similarly, this Court upheld the statute in *Bozeman* not because it affected two counties at time of passage as Greater Praise Appellants assert, but because it could "become applicable to many other counties depending on subsequent population growth." 571 S.W.2d at 282. And in *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971), the Court upheld a statute applicable only to Davidson County at passage because it was potentially applicable to any county adopting a metropolitan form of government. *Id.* at 374; *see also Cty. of Shelby*, 936 S.W.2d at 935-36 (statute that "is potentially applicable to numerous counties" based on population bracket of 700,000 or more was not subject to Art. XI, § 9 despite applying only to Shelby County at passage).

This Court's ruling in *Leech v. Wayne County*, which applied the Home Rule Amendment to an act applicable in two counties, falls squarely in line with the *Farris/Burson* line of cases and completely undermines Greater Praise Appellants' argument. In *Leech*, the Court concluded that legislation exempting Wayne and Bledsoe counties from a "permanent, general provision, applicable in nearly ninety counties" was local in form and effect in violation of the Home Rule Amendment.

588 S.W.2d at 274. Unlike the statutes in *Burson* and *Bozeman*, the exceptions in *Leech* were based on population brackets drawn so narrowly that they applied only to the two counties and would effectively never apply to other counties in the future.[22] That the exceptions applied to two counties, versus only one, was of no constitutional moment. *See also* Tenn. Op. Att'y Gen. 02-020, 2002 WL 347728, at *5 (concluding that bill transferring property from *two counties* into a special school district would be "local in form or effect" under Home Rule Amendment).

Appellants acknowledge that their "only one county" theory conflicts directly with *Leech*. In response, they ask the Court to overturn *Leech* and abandon the "potentially applicable" test in *Farris*. But the "sound principle" of *stare decisis* "requires [this Court] to uphold [its] prior precedents to promote consistency in the law and to promote confidence in this Court's decisions." *Cooper v. Logistics Insight Corp.*, 395 S.W.3d 632, 639 (Tenn. 2013). This Court should overturn settled law only when there is an error in the precedent, the precedent is obsolete, adhering to precedent would cause greater harm than disregarding *stare decisis*, or the prior precedent conflicts with a constitutional provision. *Id.* None of these conditions is present here.

[22] *See* Tenn. Pub. Acts of 1978 Ch. 934, § 8 (providing for separate election requirements in any county "having a population of *not less than 7,600 nor more than 7,700*" or "*not less than 12,350 nor more than 12,400* according to the 1970 census or any subsequent federal census"), *cited in Leech*, 588 S.W.2d at 276 (emphasis added). Wayne County's population in 1970 was 12,365, and Bledsoe County's population was 7,643, according to the U.S. Bureau of the Census.

Greater Praise Appellants also mischaracterize Appellee Counties' application of the "potentially applicable" test as hinging on whether population brackets are open-ended or closed. (Original Br. at 60-61.) Rather, Appellee Counties have accurately stated that, under this Court's rulings, an act with population brackets is "potentially applicable" statewide if the bracket is broad enough to apply to other counties based on future population growth, regardless of whether the brackets are open or closed.[23]

What Greater Praise Appellants call the "fake *Farris* test" (Original Br. at 59) is the standard this Court adopted in *Farris* and has applied consistently in all Home Rule Amendment cases: a bill is local in effect unless it is potentially applicable throughout the state. The ESA Act was intentionally drafted to have no such potential applicability and therefore is subject to the Amendment's requirements.

4. There Is No "Pilot Program" Exception to the "Local In Form or Effect" Criteria.

Late in the legislative process, the ESA Act was amended to include "Pilot Program" in its name, to state an intent to establish a "pilot program" targeting the lowest performing schools, and to direct the State Office of Research and Education Accountability ("OREA") to report on the program after three years. (*See* Tenn. Code Ann. § 49-6-2611(a), Am. No. 5, S.B. 795, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31.) Based on these revisions, State Appellants make the remarkable claim

[23] The ESA Act uses historical data, not population brackets, to identify the two county school districts covered by the Act, so there is no possibility, much less potential, of the Act applying to other counties.

that the Court of Appeals erred by failing to recognize a "pilot program" exception to the Home Rule Amendment.[24]

There is no such exception in the Home Rule Amendment language. The Amendment applies to "*any act*" that is "private or local in form or effect applicable to a particular county or municipality either in its governmental or proprietary capacity." Tenn. Const., art. XI, § 9 (emphasis added).

State Appellants seek to circumvent this clear mandate in two ways. They claim that the ESA Act is "potentially applicable" throughout the state and therefore exempt from the Amendment. (Br. at 31.) And they assert that the Amendment does not apply when the legislature "chooses to test its educational innovation in a limited setting." (*Id.* at 32-33.) Both arguments fail.

The sole factual basis for State Appellants' claim that the ESA Act is "potentially applicable" throughout the state is that the General Assembly *may* expand the Act in the future based on recommendations from the OREA. *See* Tenn. Code Ann. § 49-6-2611(a)(2)(v). But this Court flatly rejected that argument in *Farris*. Appellees in that case claimed that the challenged law was not local in effect because it could apply to

[24] Unlike a "pilot program," the ESA Act creates a permanent state program with no "sunset" provision. When asked to define "pilot program," then-Deputy House Speaker Hill responded that the Act was a pilot program because it was limited to specific counties and will stay in those counties "unless the legislature were to ever choose in the future to revisit the issue." (April 17, 2019 House Committee Session Tr. at 9:13 – 10:3, TR Vol. IV at 537-38; April 17, 2019 House Committee Session Video at timestamp 51:30 – 52:19.)

counties that the legislature *might later empower* to adopt Shelby County's form of government. This Court responded that the question of the Act's scope was to be answered "under the present laws of the State of Tennessee," adding: "We cannot conjecture what the law may be in the future. *We are not at liberty to speculate upon the future action of the General Assembly*." *Farris*, 528 S.W.2d at 555 (emphasis added). Adopting the State's argument would allow the General Assembly to avoid Home Rule Amendment scrutiny simply by making vague references to potential future legislation.[25]

State Appellants alternatively argue that the Court of Appeals' opinion "perverted" the Home Rule Amendment, which they claim should not be read to prohibit the General Assembly from enacting "incremental legislative reform." (Br. at 33.) Contrary to State Appellants' rhetoric, requiring compliance with the Home Rule Amendment will not prohibit the General Assembly from using pilot programs for incremental reform. The legislature could seek local approval for such programs when required. It could draft a pilot program as general legislation and thereby avoid local approval, just as the ESA Act was drafted when initially filed. Or it could structure a pilot program so that it does not affect local government functions, such as the two pilot programs cited in State

[25] The record also contradicts State Appellants' assertion that the Act was always intended to expand. Just before the final Senate vote, when bill sponsor Sen. Gresham was asked to confirm that "no other LEA will be able to grow into the program over the years," she responded: "That's the intent of the General Assembly today." (May 1, 2019 Senate Session Tr. at 2:16 – 3:1, TR Vol. V at 602-03; May 1, 2019 Senate Floor Session Video at timestamp 1:37:11 – 1:37:50.)

Appellants' brief. *See* Tenn. Op. Att'y Gen. No. 07-60, 2007 WL 1451647 ("Tennessee STAR Scholarship Act of 2007" pilot program using *state lottery proceeds* to provide student assistance); Tenn. Op. Att'y Gen. No. 04-087, 2004 WL 1178409 (pilot program offering *state* per diem payments to retirement homes for low-income residents). (Br. at 33)

Finally, State Appellants repeatedly assert that the Court of Appeals failed to apply the presumption of constitutionality when it rejected the State's efforts to shield the ESA Act from Home Rule Amendment scrutiny. When evaluating the constitutionality of a statute, courts must begin "with the presumption that an act of the General Assembly is constitutional." *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020) (internal quotations omitted). Nothing in that presumption, however, requires or even permits the court to rewrite a constitutional provision to save a statute. Rather, "the Court must be controlled by the fact that our Legislature may enact any law *which our Constitution does not prohibit . . . .*" *Id.* (internal quotations omitted) (emphasis added).

In advocating for a pilot program exception to the Home Rule Amendment, State Appellants are not asking the Court to adopt an alternative, reasonable construction of the ESA Act. They are asking the Court to adopt a new interpretation of the Constitution. They want the Court to rewrite its holding in *Farris* and find that the ESA Act has potential statewide applicability because the legislature *might expand the statute's scope* at some point in the future. (Br. at 32.) They attack the firmly established principle in *Farris* that courts must look to the *substance* of a bill, not its *form*, to determine whether the Home Rule

Amendment applies. The Court should reject State Appellants' invitation to rewrite constitutional law to save the ESA Act.

Just as with Greater Praise Appellants' request to overturn *Leech*, the State Appellants' request to alter the holding in *Farris* violates "the sound principle of stare decisis." *Cooper*, 395 S.W.3d at 639. *Farris* was decided correctly, it has been applied consistently, and the Court should affirm its application here.

C. The ESA Act Is "Applicable" to Appellee Counties in Their "Governmental or Proprietary Capacities" Under the Home Rule Amendment.

The Home Rule Amendment's second component requires that the challenged legislation be "applicable to a particular county either in its governmental or its proprietary capacity." The ESA Act meets this criterion for the same reason Appellee Counties have standing to assert their claim. In shifting the cost of ESAs onto Appellee Counties, thereby requiring them to fund and operate their school systems differently than the State's ninety-three other counties, the Act applies to the Counties in their governmental capacity.

Appellants argue that the ESA Act does not meet this criterion for three reasons: (1) the Act addresses "LEAs," not counties; (2) education is a plenary power of the State that is not subject to the Home Rule Amendment; and (3) fiscal effects on a county do not render the Act

"applicable" under the Amendment. None of these arguments survives scrutiny.

1. The ESA Act Profoundly Affects Appellee Counties Even Though They Are Not Named in the Act.

Appellants claim that the ESA Act is exempt from Home Rule Amendment scrutiny because the Act addresses LEAs, not counties. This argument ignores the Amendment's application to acts that are "local in . . . effect" as well as form. The Court of Appeals properly declined this invitation to elevate form over substance, holding that the Act profoundly affected Appellee Counties despite not mentioning them by name.

This Court has routinely looked beyond form when applying the Home Rule Amendment to statutes not explicitly directed at a county. In *Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979), this Court reviewed a 1977 private act related to a hospital authority, not a county or city. Because the authority's actions could bind the county, this Court held that the act affected the county, thereby requiring county approval under the Amendment. *Id.* at 328.

In *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967), this Court held invalid a public act that expanded the criminal and civil jurisdiction of the Gibson County general sessions court because the act affected the county "in its governmental capacity." *Id.* at 553. The Court noted that by general law, counties must provide a courtroom, supplies, equipment, and salary for general sessions court judges. *Id.* at 552. Similarly, this Court held in *Durham v. Dismukes*, 333 S.W.2d 935 (Tenn. 1960), that a private act increasing the Sumner County general sessions judge's salary

affected the county "in its governmental capacity," thus requiring local approval. *Id.* at 939.

Appellants base their claim that LEAs are exempt from the Home Rule Amendment on the Court's holdings that the Amendment does not apply to special school districts and sanitary districts. *See Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959) (special school districts); *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482 (Tenn. 1957) (sanitary districts). Unlike county school districts, however, special school districts are self-taxing and do not rely on county or municipal governments for support or oversight.[26] Likewise, sanitary districts are standalone entities under Tennessee law and not part of county or city government. Tenn. Code Ann. § 7-81-109. The treatment of these unique entities says nothing about the Home Rule Amendment's application to county governments and their school systems.

Nor does application of the Home Rule Amendment to the ESA Act conflict with this Court's holding in *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706 (Tenn. 2001). The ESA Act falls within the Local Legislation Clause in the Amendment's

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[26] "*With the exception of Tennessee's fourteen special school districts*, all of Tennessee's school systems are dependent on a city or a county government for funding." (Report of the Tenn. Advisory Comm'n on Intergovernmental Relations: Tenn. Sch. Syst. Budgets Authority & Accountability for Funding Education & Operating Schools at 4 (Jan. 2015) (emphasis added). Moreover, the Tennessee Attorney General has opined that legislation creating a special school district can still affect counties in violation of the Home Rule Amendment where the act transfers county-owned property. *See* Tenn. Op. Att'y Gen. 02-020, 2002 WL 347728, at *5 (distinguishing *Perritt*).

second paragraph. In contrast, *Southern Constructors* interpreted the Amendment's Optional Home Rule for Cities Clause, which begins in the *third* paragraph. 58 S.W.3d at 714-16. *Southern Constructors*' discussion of "home rule" is irrelevant to the constitutional mandate at issue here.

Contrary to Appellants' arguments, the legislature cannot avoid Home Rule Amendment scrutiny by omitting the word "county" from an act that clearly and directly affects a county's governmental capacity. Consistent with this Court's instructions in *Farris*, the Court of Appeals looked beyond the ESA Act's form and correctly concluded that the Act had an extensive fiscal effect on Appellee Counties that fell within the Home Rule Amendment's scope.

2. Education Is a Governmental Function of County Government and Is Not Exempt From the Home Rule Amendment as a Plenary State Power.

According to McQuillin's treatise on municipal law, "powers of a municipal corporation that are *governmental* or public are ordinarily those that relate to *state affairs*. Powers of a municipal corporation that are *proprietary* or private are ordinarily those relating to *municipal affairs*." Eugene McQuillin, The Law of Municipal Corporations §§ 4:76, 4:77 (3d ed.), Westlaw (database updated July 2019) (emphasis added). Accordingly, the Home Rule Amendment's language captures the full scope of a county's functions, both state and local. *See Farris*, 528 S.W.2d at 551 (all local legislation affecting cities or counties "*in any capacity*" is

void under the Home Rule Amendment without local approval) (emphasis added).[27]

Tennessee courts use "governmental" and "proprietary" in the same manner as McQuillin's treatise. *See Jones v. Haynes*, 424 S.W.2d 197, 198 (Tenn. 1968) (a county in its governmental capacity "acts merely as an arm of the State"); *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409, 412 (Tenn. 1931) ("As an agency of the state, the municipality could exercise such *governmental* power as was delegated to it. As a corporate entity endowed with *proprietory* [sic] or corporate rights, it could, to a certain extent, contract.") (emphasis added); *Smiddy v. City of Memphis*, 203 S.W. 512, 513 (Tenn. 1918) ("However, in its capacity as an arm or branch of the state government, and in the exercise of its *governmental functions*, [a municipality] is to be treated as a political subdivision of the state.") (emphasis added).

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[27] Bah Appellants argue that the Home Rule Amendment must be read narrowly to apply only to laws "that act upon the form, structure, or organization of a county government." (Br. at 27.) Their argument rests on a letter from Delegate Miller to Delegate Pope dated July 11, 1953, that in fact says the opposite. The letter explicitly recognizes that the Amendment will protect counties from local acts affecting not just the "form, structure or organization" of county government but also its "powers, duties and functions." Letter at 1-2, Bah App. at 0013-14. Funding local education is one such power, duty, and function. The letter is also consistent with Delegate Pope's statement to the Convention explaining that the first clause of the Local Legislation Resolution was designed to *prohibit* the General Assembly from the most egregious forms of proprietary local legislation, while the second clause was designed to *allow* the General Assembly to pass "*any other local bills* affecting the county or affecting the town or city" subject to local approval. Journal at 1023-24, App. at APP022-23 (emphasis added).

State Appellants argue that the Home Rule Amendment cannot apply to the ESA Act because the Tennessee Constitution's Education Clause gives the State plenary authority over public education.[28] Appellee Counties do not dispute that public education is a fundamental State function. But that function must be exercised in compliance with other constitutional requirements. *See Thornton v. Carrier*, 311 S.W.2d 208, 214 (Tenn. Ct. App. 1957) ("In Tennessee, it is a settled doctrine of constitutional law that 'the legislative power of the generally assembly of this state extends to every subject, *except in so far as it is prohibited . . . by the restriction of our own constitution*.'") (citation omitted) (emphasis added).

The State has delegated a significant part of public education to counties, making education part of a county's governmental capacity. This Court recognized in *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217 (Tenn. 1988), that "a partnership has been established between the State and its political subdivisions to provide adequate educational opportunities in Tennessee." *Id.* at 221.[29] More specifically, the State requires counties to provide the "necessary funds" for their local schools and to "oversee the process of expenditure . . . with due regard for the

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[28] The Education Clause states in relevant part: "The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const., art. XI, § 12. The Court of Appeals correctly noted that this language conveys authority to support a system of free *public* schools, not to send students to *private* schools. *Metro. Gov't*, 2020 WL 5807636, at *5.

[29] This education partnership has been in place for over 100 years. *See Metro. Gov't*, 2020 WL 5807636, at *5.

essential place of education in the governmental services provided by the county." *Id.* at 223; *see also* Tenn. Code Ann. § 49-2-101. By delegating these and other education responsibilities, the General Assembly has engaged local governments in a "governmental function." *Brentwood Liquors Corp. of Williamson Cty. v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973) ("Education is a governmental function and in the exercise of that function the county acts in a governmental capacity.") (quoting *Baker v. Milam*, 231 S.W.2d 381, 383 (Tenn. 1950)). Any local act affecting that governmental function falls within the Home Rule Amendment's scope.

The Convention delegates made clear that the Home Rule Amendment was intended to restrict the General Assembly's sovereignty. *See, e.g.*, Journal at 1124 (Delegate Chandler stating that second paragraph of Home Rule Amendment is a "deprivation" and "limitation on legislative power"), App. at APP033; *id.* at 1040 (Delegate Ambrose stating that "the people of the State sent us here to impinge upon the sovereign in regard to home rule; they want it"), App. at APP025. This Court followed their lead, holding that the Home Rule Amendment is a "limitation on legislative power." *Hale*, 292 S.W.2d at 748 (quoting Del. Chandler).

Immediately following the Home Rule Amendment's adoption, the General Assembly included local approval in several private acts dealing with education. *See, e.g.*, 1961 Tenn. Priv. Acts Ch. 60 (creating Blount County board of school supervisors subject to approval by county legislative body); 1957 Tenn. Priv. Acts Ch. 153 (setting Perry County board of education members' compensation subject to approval by county

legislative body); 1955 Tenn. Priv. Acts Ch. 351 (changing apportionment of Shelby County school funds between county and cities subject to approval by county and city legislative bodies).

No Tennessee court has suggested that the General Assembly's past deference to the Home Rule Amendment in education legislation was unfounded. To the contrary, the Court of Appeals upheld the Education Improvement Act of 1992, Tenn. Code Ann. §§ 49-2-201, *et seq.*, from Home Rule Amendment challenge rather than declining to rule because the legislation addressed education. *See Cty. of Shelby*, 936 S.W.2d at 935-36; *see also Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 660 (W.D. Tenn. 2012) (striking down legislation under the Home Rule Amendment that allowed creation of municipal school districts only in Shelby County).[30]

More generally, multiple school systems successfully asserted constitutional challenges against the State arising from the statutory scheme for public school funding in *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*"), notwithstanding education being a "state function." This Court acknowledged the General Assembly's constitutional obligation to maintain and support a system of free public schools. *Id.* at 141. Nonetheless, the Court rejected the State's arguments that local school systems cannot challenge the State's education-policy decisions,

[30] The State, a party in *Bd. of Educ. of Shelby Cty.*, contended that the law in question was a general law, not that the law was beyond the scope of the Home Rule Amendment because it applied to public education. 911 F. Supp. 2d at 654.

explaining that it was the Court's "duty to consider the question of whether the legislature, in establishing the educational funding system, has 'disregarded, transgressed and defeated, either directly or indirectly,' *the provisions of the Tennessee Constitution*." *Small Schools I*, 851 S.W.2d at148 (citations omitted) (emphasis added).

This Court has applied the Home Rule Amendment in other areas in which the state exercises plenary authority, such as the structure and jurisdiction of lower state courts. *E.g.*, *Lawler*, 417 S.W.2d at 553 (striking down an act that expanded the state court jurisdiction of general sessions court only in Gibson County); *Durham*, 333 S.W.2d at 938 (holding that compliance with the Home Rule Amendment is required even though a general sessions court has jurisdiction over "many things which pertain to State matters" and has "badges of a State officer").[31] There is nothing about education legislation that warrants different treatment.

The two cases on which State Defendants rely—*State ex rel. Cheek v. Rollings*, 308 S.W.2d 393 (Tenn. 1957), and *Dossett*—are inapposite, merely holding that the General Assembly is free to abolish state courts

[31] In fact, following the Home Rule Amendment's adoption, the General Assembly routinely included local-approval language in private acts relating to the exercise of state judicial power by local officials. *E.g.*, 1965 Tenn. Priv. Acts Ch. 79 (repeal of private act giving Haywood County judge concurrent jurisdiction with state courts; local legislative approval required); 1965 Tenn. Priv. Acts Ch. 24 (repeal of private act giving Rutherford County judge power to interchange with state courts; local legislative approval required); 1957 Tenn. Priv. Acts Ch. 46 (private act giving McMinn County general sessions court exclusive probate jurisdiction; local legislative approval required).

that exercise *only* State functions without offending the Home Rule Amendment. The General Assembly could exclusively operate and fund public schools without offending the Amendment. But when the General Assembly delegates a portion of that plenary power to a local government in a legislative enactment, as it has with education, that delegation involves local government in its governmental capacity, and the Amendment applies.

3. The ESA Act's Fiscal Impact on Appellee Counties Renders the Act Applicable to Them in Their Governmental Capacities.

Bah Appellants refer to the ESA Act's financial impact on Appellee Counties as a mere "fiscal effect" that does not fall within the Home Rule Amendment. (Br. at 16-17.) But the ESA Act's financial impact on the Counties is not an incidental, second-hand effect. As discussed in detail in Section I.A. above, the "counting requirement" is essential to the ESA Act's financial viability, as it requires Appellee Counties to subsidize their school districts' participation in the program. If the Act were implemented today, the Metropolitan Government would pay an "ESA Mandate" of $9,277 for each participating student no longer attending its schools, and Shelby County would pay $6,414. (*See also* Corrected Fiscal Memo., TR Vol. VII at 1022-25 (establishing financial impact of $37 million in year one, growing to $111 million in year five and thereafter).)

This Court has acknowledged fiscal impact on counties in determining local effect under the Home Rule Amendment. *See Chattanooga-Hamilton Cty. Hosp. Auth.*, 580 S.W.2d at 328 (noting that the contested legislation declared hospital authority "a public

instrumentality acting on behalf of the County" and therefore required county approval); *Lawler*, 417 S.W.2d at 551, 553 (noting Gibson County's obligation to provide a courtroom, supplies, equipment, and compensation for its general sessions court judge, rendering the contested act applicable to Gibson County in its governmental capacity).

Bah Appellants claim that this Court's opinions in *Chattanooga-Hamilton Cty. Hosp. Auth.* and *Perritt* hold to the contrary. The facts of both cases contradict this claim. Bah Appellants assert that in *Chattanooga-Hamilton Cty. Hosp. Auth.*, the City of Chattanooga suffered fiscal harm from the hospital authority act but was not afforded Home Rule Amendment protection. But the 1977 private act being challenged was amending a 1976 act that created the authority. The "fiscal effect" on the city on which Bah Appellants rely—the transfer of city and county property to the authority—occurred under the *1976 act*, not the act at issue in the case. *See* 1976 Priv. Act Ch. 297. The 1977 act simply restated the 1976 act's transfer provisions. *See* 1977 Priv. Act Ch. 125.[32] While the 1977 act imposed new conditions on the county, most significantly declaring the authority a "public instrumentality acting on behalf of the County," it imposed no similar new conditions on the city. Thus, the Court concluded that "the City is not substantially affected by the 1977 Act" and had no basis for a Home Rule Amendment challenge. 580 S.W.2d at 328.

[32] Therefore, even if the 1977 act were invalidated, the 1976 Act still would have required the city to transfer its property to the authority. *Compare* 1977 Tenn. Priv. Acts Ch. 125, § 2 *with* 1976 Tenn. Priv. Acts Ch. 297, § 2.

Bah Appellants similarly misconstrue *Perritt v. Carter*. In *Perritt*, this Court rejected a Home Rule Amendment challenge to a 1957 private act expanding a special school district in Carroll County. 325 S.W.2d at 233. Bah Appellants assume that expanding the district would have had a "fiscal effect" on the county requiring local approval. (Br. at 31.) But the 1957 act amended a 1919 private act that created the special school district. *Compare* 1957 Tenn. Priv. Acts Ch. 286 *with* 1919 Tenn. Priv. Acts Ch. 374. The 1919 act created a funding formula under which the county supported the special school district. Moving students from the county into the special school district in 1957 did not affect the county financially under the 1919 formula.[33] Thus, expanding the school district had no local fiscal effect to trigger the Home Rule Amendment.

In contrast, the Tennessee Attorney General has recognized that legislation creating a special school district would affect counties in violation of the Home Rule Amendment where the act transfers county-owned property such as school buildings to the district. *See* Tenn. Op. Att'y Gen. 02-020, 2002 WL 347728, at *5 (distinguishing *Perritt*). The

[33] Under the 1919 private act, Carroll County was required to provide the special school district "its per capita or prorata" share of all county school funds. *See* 1919 Tenn. Priv. Acts ch. 374, § 6. Therefore, when the 1957 act moved students into the special school district, the allocation of county funds among local public schools changed, but the county's total funding obligation remained the same. State education law uses the same formula. *See* Tenn. Code Ann. § 49-3-315(a) ("All school funds for current operation and maintenance purposes collected by any county . . . shall be apportioned by the county trustee among the LEAs in the county on the basis of the WFTEADA [weighted full-time equivalent average daily attendance] maintained by each, during the current school year.").

private act in *Perritt* avoided this issue by excluding from the expanded special district the tracts of land on which two county schools were located. *See* 1957 Tenn. Priv. Acts Ch. 286, § 2 at 858-59.

The Court of Appeals correctly concluded that the ESA Act "inflates the calculation of the amount of local taxes that must be raised and appropriated by the county" and "[c]ombined with the maintenance of effort statutes," "keeps the county appropriations for the county school system artificially high." *See Metro. Gov't*, 2020 WL 5807636, at *3 n.1. No Tennessee court has held that such fiscal impact on a county falls outside the scope of the Home Rule Amendment's Local Legislation Clause. This Court should affirm.

III. THE ESA ACT INFLICTS A DISTINCT AND PALPABLE INJURY ON APPELLEE COUNTIES' SCHOOL DISTRICTS, WHICH ARE PART OF APPELLEE COUNTIES.

The financial injury that the ESA Act inflicts directly on Appellee Counties is by itself sufficient to hold that the Act violates the Home Rule Amendment. The Court need not go further to rule in Appellee Counties' favor. Nevertheless, the injury inflicted on the Counties' school districts is a separate and independent basis on which the Act contravenes the Amendment.

A. The ESA Act Applies Directly and Adversely to Appellee Counties' School Districts, Which Are Part of Appellee Counties.

The ESA Act affects Appellee Counties' school districts. It forces the districts to participate in a private-school ESA program that applies only to them and will never expand absent future legislative action. It requires the districts to count participating students as enrolled in their schools

even when they leave the district. It withholds state BEP funding from the districts to reimburse the State for money deposited into participating students' ESAs, requiring the Counties to replace the funds. It imposes millions of dollars in additional costs on the school districts to provide "equitable services" to private school students participating in federal education programs and to administer state assessments to participating students. (*See* Corrected Fiscal Memo., TR Vol. VII at 1025.) It removes students from the districts without generating a proportionate reduction in the districts' operating costs, raising the per-pupil cost of operations and interfering with key operational decisions about facilities and staffing.[34]

A local board of education's role is to "[m]anage and control" the public schools under its jurisdiction. Tenn. Code Ann. 49-2-203(a)(2). In connection with this function, county school boards by statute are considered part of county government. *See id.* § 5-9-402(a) ("The c*ounty board of education . . .* and *each of the other operating departments*, commissions, institutions, boards, offices and agencies *of county government* that expend county funds" must file annual budgets with the county mayor for study and submission to the county legislative body) (emphasis added). Long-standing judicial precedent recognizes school districts as part of county government. *See, e.g.*, *Reed v. Rhea Cty.*, 225 S.W.2d 49, 50 (Tenn. 1949) ("It follows that a County Board of Education

[34] *See generally* Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 Wake Forest L. Rev. 445, 473 (2013) (public schools "have a relatively static set of fixed costs, largely because, by design, they serve communities in their entirety").

is a county government entity exercising a governmental function in the operation and maintenance of the schools of the County."); *State ex rel. Boles v. Groce*, 280 S.W. 27, 28 (Tenn. 1926) (members of the county board of education "are county officers"); *State ex rel. Milligan v. Jones*, 224 S.W. 1041, 1042 (Tenn. 1920) (elected school director "is a county official"). More recently, the Tennessee Supreme Court reaffirmed that a county board of education is "in essence part of that local government." *S. Constructors*, 58 S.W.3d at 715.

The separation of authority among school boards, county legislative bodies, and county executive officials does not change the fundamental fact that they all act on behalf of the county. As this Court explained in *Ayers*, "the State has divided the responsibilities *allocated to the counties* between the county board of education and the county legislative body." 756 S.W.2d at 221 (emphasis added). The county board of education controls operational aspects of education policy for the county, while the county legislative body appropriates the funds needed to carry out that policy and "oversee[s] the process of expenditure . . . with due regard for the essential place of education *in the governmental services provided by the county*." *Id.* at 221-23 (emphasis added).

Given this collaborative system, county school districts cannot be carved out from the rest of county government, as Appellants suggest. The ESA Act's effect on school districts is equally attributable to Appellee Counties for purposes of the Home Rule Amendment.

B. The Metropolitan Government and Shelby County Charters Do Not Shield the ESA Act From Home Rule Amendment Review.

Bah Appellants assert that because the Metropolitan Government and Shelby County charters do not give the county governments control over their local school systems, the Home Rule Amendment does not apply. (Br. at 34-36.) Absent from Appellants' brief is any case citation establishing that such control is a precondition to the Amendment's application. This assertion is merely an extension of their argument that the ESA Act applies to LEAs, not counties, and the argument fails for the same reason.

Moreover, the Metropolitan Government Charter Act, Tenn. Code Ann. §§ 7-1-101, *et seq.*, and the Metropolitan Government Charter explicitly include the MNPS school system as part of Metropolitan Government. The Charter Act defines a "metropolitan government" as "the political entity created by consolidation of all, or substantially all, of the political and corporate functions of a county and a city or cities." *Id.* § 7-1-101(4). More specifically, the Act explicitly permits school districts to be consolidated with counties in forming a metropolitan government, stating that a proposed metropolitan charter shall provide in pertinent part:

> For the *consolidation of the existing school systems with the county* and city or cities, *including the creation of a metropolitan board of education*, which board may be vested with power to appoint a director of schools, if there are no special school districts operating in the county.

Id. § 7-2-108(a)(18) (emphasis added).

In its Metropolitan Charter, the Metropolitan Government established MNPS as its system of public schools, stating: "*A system of public schools for the Metropolitan Government of Nashville and Davidson County is hereby established*, which shall be administered and controlled by the metropolitan board of public education . . . ." Metropolitan Charter § 9.01, TR Vol. IV at 486 (emphasis added). The Charter gives the school board authority "to do all things necessary or proper for the establishment, operation and maintenance of an efficient and accredited consolidated school system *for the metropolitan government*, not inconsistent with this Charter or with general law . . . ." Metropolitan Charter § 9.03, TR Vol. VI at 806 (emphasis added). Because the Metropolitan Charter created a school system "for the Metropolitan Government" with the purpose of having consolidated functions, that school system is part of the government itself. *See also Metro. Gov't of Nashville & Davidson Cty. v. Poe*, 383 S.W.2d 265 (Tenn. 1964) (recognizing that the Metropolitan Government Charter Act permits consolidation of "all governmental and corporate functions").

Nothing in the Tennessee Constitution requires school districts to be separate from the counties that fund them. The Metropolitan Charter, and not the Tennessee Constitution or General Assembly, created MNPS. And that Charter consolidated the school system with the government itself, which it was free to do under the relevant enabling statute. Accordingly, MNPS is a system within the Metropolitan Government and not a separate legal entity. Because the ESA Act applies to MNPS, it necessarily applies to the Metropolitan Government and is subject to Home Rule Amendment limitations.

IV. WHILE THIS ISSUE IS NOT BEFORE THE COURT, THE ESA ACT INFLICTS A DISTINCT AND PALPABLE INJURY ON APPELLEE COUNTIES BY OBLIGATING THEM TO FUND SCHOOLS ASSIGNED TO THE ASD.

It is undisputed that the only schools assigned to the ASD are in Davidson and Shelby counties. *See* Achievement School District, "Schools" (last visited Mar. 31, 2021). Greater Praise Appellants assert that even if the Home Rule Amendment prohibits application of the ESA Act to students attending schools in MNPS and SCS, the program should proceed in the ASD because it is part of TDOE and therefore exempt from the Amendment. (Supp. Br. at 24-27.) The Court of Appeals declined to address this argument because it was not part of the court's grant of interlocutory appeal. *Metro. Gov't*, 2020 WL 5807636, at *8 n.6. Greater Praise Appellants will be free to raise the issue when the case returns to the trial court, so the issue need not be heard now. Nevertheless, Appellee Counties must address Appellants' mischaracterization of their substantive position on this issue.

When a school is transferred into the ASD, the ASD takes from the school district an amount equal to the "per student state and local funds" for each student in the school. Tenn. Code Ann. § 49-1-614(d)(1). To accomplish this transfer, the State withholds that full amount (state and local BEP shares, plus the per-pupil amount the county contributes above the BEP) from the total state BEP funding sent to the original district. Tennessee Comptroller of the Treasury Legislative Brief, "Charter School Facilities," at 5 (Jan. 2016). Because of the ESA Act's counting requirement, the State will continue to withhold these amounts for students who leave the ASD for private schools. These withholdings

effectively redirect Appellee Counties' education funding into the ESA program, affecting the Counties' governmental function of funding education.

Because the ESA Act is local in effect with respect to Appellee Counties' funding obligation to their school districts, including for ASD funding, that part of the Act should not escape Home Rule Amendment scrutiny on remand to the trial court.

CONCLUSION

The ESA Act imposes a unique burden on only two counties—Davidson and Shelby—by requiring them to fund the private education of students who have left the public school system, which no other counties in Tennessee must do. Multiple rulings by this Court and the Court of Appeals confirm that Article XI, Section 9, Paragraph 2 of the Tennessee Constitution prohibits the General Assembly from imposing this burden without Appellee Counties' approval. Appellee Counties have standing to challenge the Act's constitutionality. Because the Act contains no local approval option, the Court of Appeals properly held it unconstitutional under the Home Rule Amendment. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the word limit of Tenn. Sup. Ct. R. 46, Section 3.02(a)(1)(a), excluding the parts of the document exempted by that rule, in that it contains 17,224 words. This document also complies with the typeface, type-style, and the type-size requirements of Tenn. Sup. Ct. R. 46, Section 3.02(a)(2) – (4) because it was prepared using Century Schoolbook 14-point type.

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of April, 2021, a true and exact copy of the foregoing was served via the Court's filing system and forwarded by electronic mail (in lieu of U.S. mail by agreement of the parties) to the following:

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