IN THE TENNESSEE SUPREME COURT

No. M2020-00683-SC-RDM-CV

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

Plaintiffs / Appellees,

v.

TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,

Defendants / Appellants,

and

NATU BAH, *et al.*,

Intervenor-Defendants / Appellants.

On Motion for the Court to Assume Jurisdiction Over Tennessee Court of Appeals Case No. M2020-00683-COA-R9-CV Pursuant to Tenn. Sup. Ct. R. 48

PLAINTIFFS / APPELLEES' RESPONSE IN OPPOSITION TO STATE AND INTERVENOR-DEFENDANTS / APPELLANTS' MOTIONS TO ASSUME JURISDICTION

ROBERT E. COOPER, JR.
Metropolitan Director of Law

ALLISON L. BUSSELL
MELISSA ROBERGE
JEFF CAMPBELL
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341

Counsel for Metropolitan Government of Nashville and Davidson County

MARLINEE C. IVERSON
Shelby County Attorney

E. LEE WHITWELL
160 North Main Street,
Suite 950
Memphis, TN 38103
(901) 222-2100

Counsel for Shelby County Government

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PRELIMINARY STATEMENT

The Court should deny Defendants/Appellants'[1] motions to assume jurisdiction filed pursuant to Tennessee Code Annotated § 16-3-201 and Tennessee Supreme Court Rule 48. Defendants/Appellants ask this Court to assume jurisdiction of their interlocutory appeal pending in the Tennessee Court of Appeals, which challenges a Chancery Court order holding that the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601, *et seq.* ("ESA Act"), violates the "Home Rule Amendment" in Article XI, Section 9 of the Tennessee Constitution and enjoining the Act's implementation.

This Court typically assumes jurisdiction only in cases that involve time-sensitive issues that require expedited decision. This is no such case. The trial court's injunction simply *maintains the status quo* to avoid constitutional harm to the Plaintiff Counties.[2]

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[1] There are three sets of Defendants/Appellants in this case. The "State Defendants" include the Tennessee Department of Education ("TDOE"), Education Commissioner Penny Schwinn, and Governor Bill Lee. The "Bah Intervenor-Defendants" include Natu Bah, Builguissa Diallo, Bria Davis, and Star-Mandolyn Brumfield. The "Greater Praise Christian Academy Intervenor-Defendants" include Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

[2] The Complaint below was filed by the Metropolitan Government of Nashville and Davidson County, Shelby County Government, and the Metropolitan Nashville Board of Public Education (collectively the "Plaintiff Counties" or "Plaintiffs/Appellees"). The Chancellor dismissed the Metro School Board as a party for lack of standing. *Metro. Gov't of Nashville & Davidson County v. TDOE, et al.*, No. 20-0143-II, slip op. at 31 (May 4, 2020) (hereinafter, "slip op."), Bah Intervenor-Defs.' App. at

The trial court properly held, based on clear precedent, that the ESA Act—a program limited to Davidson and Shelby counties that uses public school funding to pay for private school education—is unconstitutional under the Home Rule Amendment and enjoined its implementation. The ESA Act requires the program to enroll participating students "*no later than the 2021-2022 school year*," which does not begin for another fourteen months. Tenn. Code Ann. § 49-6-2604(b) (emphasis added). Therefore, the trial court's order does not frustrate the General Assembly's intent.

The Intervenor-Defendants' claims of irreparable harm from the order are unavailing. The assertions that their clients' children are "trapped" in "failing schools" ignore the many alternatives available to those children to attend other public schools in their districts, alternatives their clients have chosen not to pursue.

Finally, the Court should deny the motions to assume jurisdiction because the trial court's carefully drafted 31-page opinion falls well within the contours of the Home Rule Amendment and the numerous decisions by this and other courts interpreting its provisions. The ESA Act's effect on the Plaintiff Counties and the school systems they fund brings the Act squarely within the Home Rule Amendment and provides the Plaintiff Counties with constitutional standing. In contrast, Defendants/Appellants' strained interpretation of the Home Rule Amendment would allow the General Assembly to "emasculate" the

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APP0031. Plaintiffs/Appellees reserve the right to raise this dismissal as an issue on appeal if the Court assumes jurisdiction.

Amendment through strategic "designation, description or nomenclature." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975). The Home Rule Amendment was adopted precisely to protect *local* government sovereignty from this type of *state* legislative gamesmanship.

For these reasons, described in more detail to follow, the Court should deny the motions to assume jurisdiction.

STATEMENT OF FACTS

The ESA Act imposes an "education savings account" program on only two counties, Davidson and Shelby, without their consent. In May 2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, with an effective date of May 24, 2019. 2019 Tenn. Pub. Acts ch. 506, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* Under the Act, a "participating" student will receive an education savings account to pay tuition, fees, and other education-related expenses at participating private schools. Tenn. Code Ann. §§ 49-6-2603(a)(4), -2607(a). The Act provides that the program shall begin enrolling participating students no later than the 2021-22 school year. *Id.* § 49-6-2604(b).

To qualify as a participating student, a student must be "eligible" under the ESA Act. 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 meet the following geographic restrictions:

(i) is zoned to attend a school in an LEA,[3] excluding the achievement school district (ASD), with ten (10) or more schools:

(*a*) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602;

(*b*) Among the bottom ten percent (10%) of schools, as identified by the department in 2017 in accordance with § 49-1-602(b)(3); and

(*c*) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602; or

(ii) Is zoned to attend a school that is in the ASD on the effective date of this act.

Tenn. Code Ann. § 49-6-2602(3)(C).[4]

The only school systems that meet all of the specifications in Section 49-6-2602(3)(C)(i) for an "eligible student" are Metropolitan Nashville Public Schools ("MNPS") in Davidson County and Shelby County Schools

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

[4] Although the "eligible student" definition is based on the number of priority and bottom 10% schools in an LEA, the ESA Act does not limit participation in the program only to students attending the LEA's low-performing schools. Tenn. Code Ann. § 49-6-2602(3)(C). Any income-eligible student zoned to attend school in one of the subject LEAs, even if attending the LEA's highest-performing school, may participate in the program.

in Shelby County. *S*lip op. at 4, Bah Intervenor-Defs.' App. at APP0004. The Act was deliberately crafted to ensure that it would only apply in Davidson and Shelby counties. As the trial court recognized:

> It is undisputed that the ESA Act, based upon the criteria for eligible students, can only ever apply to MNPS and SCS, because it is based upon classifications set in the past. In other words, performance data from 2015, 2017 and 2018 cannot change. Any improvements at MNPS and SCS, or deterioration of systems in other parts of the state, will not change the fact that the ESA Act only applies to, and will continue to apply to, MNPS and SCS.

(*Id.* at 24-25, Bah Intervenor-Defs.' App. at APP0024-25.) The court explained that these limitations were adopted as the only means to secure passage of the legislation. (*Id.* at 4, Bah Intervenor-Defs.' App. Vol. I at APP0004.)

The ESA Act funds a participating student's education savings account by diverting funds from the student's public-school district in an amount equal to the district's per-pupil state and local funding required by the state's Basic Education Program ("BEP") or equal to the combined (state and local) statewide average of BEP funding, whichever is lower. Tenn. Code Ann. § 49-6-2605(a). These funds will be subtracted from the BEP funds the State would otherwise pay to the school districts. *Id.* § 49-6-2605(b)(1).

County legislators are statutorily required to fund their school districts as part of the broad responsibilities of county mayors, legislators, and trustees to enable and oversee the operations of their county school systems. *Id.* §§ 49-2-101(1), -102, -103, -111(e). The budgetary impact of the ESA Act on these duties can be illustrated with

simple calculations based on information from the Tennessee Comptroller of the Treasury.[5]

Under the ESA Act, the State will pay $7,572 into the ESA program for each student participating in the program. Understanding Public Chapter 506 at 4. The State will take six percent of that total (approximately $454) as an "administrative fee." *Id.* The remaining $7,117 will be deposited by the State in the student's education savings account. *Id.* The State will then deduct $7,572 from the BEP funding it otherwise would have paid to the school districts. Tenn. Code Ann. § 49-6-2605(b)(1).

In Davidson County, the State currently provides $3,618 in state BEP funding per pupil. Understanding Public Chapter 506 at 4. But when a student participating in the ESA program leaves a Metro school for a private school, the County will lose $7,572 in state BEP funding—*more than twice as much money*. *Id.* The math works the same for Shelby County. *Id.* The State provides $5,562 in state BEP funding per pupil for Shelby County Schools. *Id.* But when a participating student leaves a Shelby County school for a private school, the County loses $7,572 in state BEP funding—*an additional 36 percent*. *Id.*

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[5] *See* Office of Research and Education Accountability, Tennessee Comptroller of the Treasury, "Understanding Public Chapter 506: Education Savings Accounts" (Updated May 2020) (hereinafter, "Understanding Public Chapter 506"), https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2020/ESA2020Website.pdf; Greater Praise Intervenor-Defs.' App. at 039-045.

The Tennessee General Assembly's Fiscal Review Committee estimated the cumulative impact of these revenue losses in its Corrected Fiscal Memorandum on HB 939 – SB795 (May 1, 2019). (Compl. ¶ 120, Bah Intervenor-Defs.' App. Vol. I at APP0057.) According to the Memorandum, the ESA Act will result in a program-wide "shift in BEP funding" in Davidson and Shelby counties of $36,881,150 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.*

The ESA Act includes a three-year grant program—the "school improvement fund,"—intended to disburse annual grants to Metro and Shelby County schools in an amount roughly equal to the ESA payments for participating students. Tenn. Code Ann. § 49-6-2605(b)(2)(A). The grant program, however, is "subject to appropriation" and not a condition precedent to implementation of the Act. *Id.*[6] Even if fully funded, the ESA

[6] The General Assembly appropriated funding for the first year of the school improvement fund before the legislature's March recess. https://publications.tnsosfiles.com/acts/111/pub/pc0651.pdf. Legislators are questioning whether that funding should be cut from the state budget in response to significant revenue losses caused by the COVID-19 epidemic when the General Assembly reconvenes on June 1, 2020. *See* Natalie Allison, "Tennessee lawmakers weigh school voucher money as other education initiatives face cuts," *Tennessean* (May 6, 2020), https://www.tennessean.com/story/news/politics/2020/05/06/tennessee-weighs-school-voucher-funds-other-education-programs-cut/5175339002/. Tennessee Department of Finance and Administration Commissioner Butch Eley recently stated that State revenues are far lower than

grant program only provides relief to the two school systems for the first three years of the program. *Id.* Funds from the ESA grant program can only be used "for school improvement," not as general operating funds. *Id.* Therefore, the grants will not make MNPS or Shelby County schools whole for their loss of BEP funding. Finally, the ESA grant program only reimburses lost funding resulting from students who attended an MNPS or Shelby County public school for one full school year before joining the ESA program. *Id.* Despite having to plan, budget, and prepare buildings, staff, and curriculum for new incoming students, Davidson and Shelby Counties and their school districts will receive no grant funds for students who enter kindergarten or move into Davidson or Shelby counties and elect to use ESA funds. *Id.*

LOWER COURT PROCEEDINGS

Plaintiffs/Appellees filed a complaint 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).

Plaintiffs/Appellees filed a motion for summary judgment on Count I on March 27, 2020. The State Defendants/Appellants and the Greater Praise Christian Academy Intervenor-Defendants/Appellants filed

originally budgeted. https://www.wmcactionnews5.com/2020/05/12/tennessee-tax-revenues-show-effects-coronavirus-pandemic-states-economy/.

motions to dismiss the complaint in its entirety. The Bah Intervenor-Defendants/Appellants filed a motion for judgment on the pleadings.

All motions filed in this case and in a similar lawsuit brought by a group of Davidson and Shelby County parents and taxpayers, *McEwen, et al. v. Lee, et al.*, 20th Jud. Distr. Chancery Court No. 20-242-II, were set for expedited briefing and argument on April 29, 2020, based on the State's intent to implement the ESA program in the 2020-21 school year.

The Chancellor issued a Memorandum and Order on May 4, 2020, holding that the ESA Act violated the Home Rule Amendment and enjoining its implementation and enforcement. The Chancellor's order dismissed Plaintiff/Appellee Metropolitan Nashville Board of Public Education as a party for lack of standing, granted the remaining Plaintiffs/Appellees' summary judgment motion on Count I, and denied Defendants/Appellants' motions to dismiss and motion for judgment on the pleadings as they applied to Count I. Defendants/Appellants' pending dispositive motions related to Counts II and III remain under advisement. The Chancellor *sua sponte* granted permission to Defendants/Appellants to seek an interlocutory appeal of its order pursuant to Rule 9(a) of the Tennessee Rules of Appellate Procedure.

Defendants/Appellants filed Rule 9 motions for permission to appeal with the Tennessee Court of Appeals on May 6 and 11, 2020. They also filed motions for review under Rule 7 of the Tennessee Rules of Appellate Procedure on May 13, 15, and 18, 2020, and asked the Court of Appeals to stay the injunction the Chancellor entered below. On May 19, 2020, the Court of Appeals granted the Rule 9 motions, set an expedited briefing schedule, and denied the Rule 7 motions for review. (COA Order,

Bah Intervenor-Defs.' App. Vol IV at APP1322-23.) Defendants/Appellants' motions to assume jurisdiction followed.

APPLICABLE STANDARD

Upon the motion of any party, the Tennessee Supreme Court may assume jurisdiction over a case pending before an intermediate appellate court. Tenn. Code Ann. § 16-3-201(d)(1). This authority "applies only to cases of *unusual public importance in which there is a special need for expedited decision* and that involve (A) State taxes; (B) The right to hold or retain public office; or (C) Issues of constitutional law." *Id.* § 16-3-201(d)(2) (emphasis added).

LEGAL ARGUMENT

I. THERE IS NO SPECIAL NEED FOR EXPEDITED DECISION IN THIS CASE.

A. Maintaining the Status Quo Will Result in No Irreparable Harm to Defendants.

This case does not satisfy the Section 16-3-201(d)(2) requirement of a "special need for expedited decision." In drafting and passing the ESA Act, the General Assembly made clear that there is no compelling public interest in implementing the Act before the 2021-22 school year. *See* Tenn. Code Ann. § 49-6-2604(b) ("The program shall begin enrolling participating students *no later than the 2021-2022 school year*.") (emphasis added). The Court of Appeals set this case for prompt briefing and argument on August 5, which will provide ample time for this Court to review the Court of Appeals' ruling and take appropriate action before the 2021-22 school year begins. Defendants/Appellants seek

extraordinary relief from this Court, but these are not extraordinary circumstances. There is no compelling reason to lose the benefits that would flow from intermediate appellate review. Accordingly, Defendants/Appellants' request for immediate review by this Court should be denied.

The trial court's injunction maintains the status quo and appropriately balances the parties' interests during the full appellate process. It protects the Plaintiff Counties' sovereignty and tax revenue from unconstitutional incursion by the General Assembly. It preserves the State's ability to implement the ESA Act by its legislative deadline should the Act be upheld. It does not impair the Intervenor-Defendant families' ability to pursue multiple public-school alternatives to their children's current school assignments. And the Intervenor-Defendant private schools have no reasonable expectation of an infusion of state funding this year.

The State Defendants contend that expedited review by this Court is needed to bring "certainty" to the ESA program's roll out for the upcoming school year. (State Defs.' Mot. to Assume Juris. at 10.) "Certainty" as of the 2020-21 school year, of course, is not required by the Act. And any current uncertainty arises as much from the State Defendants' hurried and controversial implementation of the Act than from this litigation.[7]

[7] *See* Marta W. Aldrich, "No-bid voucher contract with ClassWallet unleashes ire of Tennessee GOP lawmakers," *Chalkbeat Tennessee* (Feb. 12, 2020), https://tn.chalkbeat.org/2020/2/12/21178658/no-bid-voucher-contract-with-classwallet-unleashes-ire-of-tennessee-gop-lawmakers;

Additionally, the implementation timelines presented by the State below suggest that the TDOE could not successfully implement the ESA program for the 2020-21 school year under any circumstances. The affidavit of former Tennessee Department of Education Deputy Commissioner Amity Schuyler contains a July 1, 2020 deadline for "hiring of [approximately 20] administrative staff members" by TDOE, only one month before the school year begins, which raises questions about TDOE's readiness to operate the program. (Affidavit of Amity Schuyler ¶ 4, Bah Intervenor-Defs.' App. Vol. III at APP0976-77.)[8] Other deadlines in the affidavit are internally inconsistent. The June 1 deadline for "most" private schools to assign seats, for example, conflicts with the June 15 deadline for recipients to confirm acceptance of ESA dollars. (*Id.*)

As of May 7, 2020, there were 1,226 applications that remained incomplete and 222 applications for which additional documentation had to be reviewed. (Affd. of Eve Carney ¶ 6, Bah Intervenor-Defs.' App. Vol. III at APP1003.) Each application was expected to take *14 to 30 days* to

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Natalie Allison & Joel Ebert, "GOP chairman regrets voting for voucher bill, says program won't be implemented in 2020," *Tennessean* (Feb. 13, 2020), https://www.tennessean.com/story/news/politics/2020/02/12/tennessee-school-vouchers-republican-says-he-regrets-voting-yes/4740529002/.

[8] Deputy Commissioner Schuyler, who was head of the State's ESA program and charged with its implementation, has now resigned and begun work for Shelby County Schools, raising additional questions about the State Defendants' ability to implement the program this year. Marta W. Aldrich, "Memphis school superintendent hires state official overseeing Tennessee's voucher launch," *Chalkbeat Tennessee* (Apr. 22, 2020), https://tn.chalkbeat.org/2020/4/22/21231421/memphis-school-superintendent-hires-state-official-overseeing-tennessees-voucher-launch.

process (*id.* ¶ 5, Bah Intervenor-Defs.' App. Vol. III at APP1003), making it unlikely that all of these applications could have been processed by the June 1 deadline for private schools to assign seats for the 2020-21 school year or the June 15 deadline for award recipients to confirm acceptance in the program. (*See* deadlines in Schuyler Aff. ¶ 4, Bah Intervenor-Defs.' App. Vol. III at APP0976-77.) Any argument that the program can be fully implemented with expedited review or a stay of the injunction[9] lacks credibility.

In sum, the State Defendants' forced implementation of a program for which enrollment was not required until the 2021-22 school year does not justify the extraordinary relief of the highest court in the State exercising reach-down jurisdiction. The State Defendants' hurried and haphazard implementation should not be rewarded with the extraordinary relief of expedited Supreme Court review.

Intervenor-Defendants' claim that this Court's declining to assume jurisdiction will leave students "trapped in chronically failing schools for another year" is not supported by the record.[10] (Bah Intervenor-Defs.' Mot. to Assume Juris. at 13.) First, there is no indication that any of the Intervenor-Defendants' children will be accepted into the private schools

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[9] A separate response to the State Defendants' motion for review of the orders denying a stay of the injunction is filed contemporaneously with this response.

[10] The Bah Intervenor-Defendants have no standing to speak for "thousands of Tennessee families." (Mot. to Assume Juris. at 13.) They did not intervene on behalf of a class; they represent only themselves. Thus, their assertion that the ESA program "is a much-needed lifeline" for "many others like them" should be ignored.

they hope to attend. Private schools participating in the ESA program will follow their own admission criteria when determining whether to accept students and are not required to accept students merely because those students have ESAs. (*See* ESA program website, https://school.esa.tnedu.gov/faq/.) In addition, MNPS and Shelby County Schools have myriad school options available to students. (*See* Declaration of Jenai Hayes, Bah Intervenor-Defs.' App. Vol. III at APP1029-34; Declaration of Dr. Angela Hargrave, Bah Intervenor-Defs.' App. Vol. III at APP1040-41.) Both school systems have open enrollment policies that allow students to transfer to other schools in the district. (Hayes Decl. ¶¶ 3, 5-7, Bah Intervenor-Defs.' App. Vol. III at APP1029-31; Hargrave Decl. ¶¶ 4-7, Bah Intervenor-Defs.' App. Vol. III at APP1041.) Both school systems have robust charter, magnet, and alternative-instruction school options available to students that attend an underperforming public school. (Hayes Decl. ¶¶ 3, 5-7; Bah Intervenor-Defs.' App. Vol. III at APP1029-31; Hargrave Decl. ¶¶ 4-7, Bah Intervenor-Defs.' App. Vol. III at APP1041.) MNPS identifies 109 school options for the 2020-21 school year, spanning all grade levels. (Hayes Decl. ¶ 7 & Exhibit 1 thereto, Bah Intervenor-Defs.' App. Vol. III at APP1031-33.) And while the MNPS school option lottery ran on March 2, 2020, parents can apply through August 30, 2020, for seats in "optional schools" that still have vacancies, and they can be added to waitlists for optional schools that are full. (Hayes Decl. ¶ 8, Bah Intervenor-Defs.' App. Vol. III at APP1031.)[11] The

[11] The Bah Intervenor-Defendants argue that being added to waitlists for "better performing schools" does not alleviate any alleged irreparable harm. (Mot. to Assume Juris. at 16.) This argument misrepresents the

same is true in Shelby County Schools, where general choice transfer applications can be submitted up to August 2020. (Hargrave Decl. ¶ 7, Bah Intervenor-Defs.' App. Vol. III at APP1041.)

By ignoring the public school options available to their children, the Intervenor-Defendant parents have not established irreparable harm but merely shown they did not get their preferred—and speculative—opportunity to use public funds to attend private schools. This falls far short of justifying the extraordinary relief sought here.

Finally, Defendant-Appellants' claims that time is of the essence are belied by their decision not to file motions with this Court to assume jurisdiction until two weeks after seeking appellate review in the Court of Appeals. Their delay in seeking review in this Court should not be allowed to serve as a basis for their claims of urgency.

II. THE RULING BELOW IS BASED IN CLEAR PRECEDENT AND SOUND CONSTITUTIONAL PRINCIPLES.

Any case involving infringement by the General Assembly on local governments' constitutional rights is significant. Significance, however, is not sufficient to establish "reach down" jurisdiction under Tenn. Code Ann. § 16-3-201(d). Rather, a case must be of "unusual public importance." *Id.* Defendants/Appellants assert this case is unusual

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declaration of Jenai Hayes, the Director of School Choice at MNPS, which states that parents who apply now will be added to waitlists "*for the schools that have met their open enrollment seat availability*" but are eligible now through August 30 "*for a seat in any open enrollment/optional school with available capacity for the 2020-21 school year*." (Hayes Decl. ¶¶ 7-8 (emphasis added), Bah Intervenor-Defs.' App. Vol. III at APP1031.)

because the trial court's ruling allegedly exceeded the scope of the Home Rule Amendment. To the contrary, the Chancellor's carefully drafted 31-page opinion falls well within the contours of the Amendment and the numerous judicial decisions interpreting its provisions.

The Home Rule Amendment prohibits 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" unless the act requires approval by the local legislative body or referendum. Tenn. Const., art. XI, § 9. The Chancellor held the ESA Act unconstitutional, finding it was intentionally applied to school districts in only two counties and affected those counties in their governmental capacities of overseeing and funding their county school systems.

Defendants/Appellants claim the Chancellor purportedly erred in the following ways: (1) the ESA Act applies to LEAs, not to counties; (2) the General Assembly may legislate in the area of education without regard for the Home Rule Amendment; (3) the Act does not require anything of the Plaintiff Counties and, in fact, constitutes a "windfall" to them; and (4) the Act applies to more than one county, taking it outside the Home Rule Amendment's application.[12] (State Defs.' Mot. to Assume Juris. at 8-10; Bah Intervenor-Defs.' Mot. to Assume Juris. at 16-19; Greater Praise Intervenor-Defs.' Mot. to Assume Juris. at 10-11, 18-20.)

[12] Defendants/Appellants also assert that the Plaintiff Counties do not have standing. Those arguments overlap with reasons (1) and (3) and will be addressed accordingly.

None of these arguments is supported by the Home Rule Amendment's language, judicial interpretation, or the facts.

A. The ESA Act's Reference to LEAs Instead of Counties Does Not Render the Home Rule Amendment Inapplicable.

The Home Rule Amendment applies to "any act of the General Assembly private or *local in* form or *effect*." Tenn. Const., art. XI, § 9 (emphasis added). This is a critical element of the Home Rule Amendment. *See Farris*, 528 S.W.2d at 551 ("The sole constitutional test must be whether the legislative enactment, irrespective of its form, *is local in effect and application*.") (emphasis added). This Court explains that Home Rule Amendment scrutiny should not depend solely upon form, such as "the designation, description, or nomenclature employed by the Legislature," as such a criterion would "emasculate the purpose of the amendment." *Id.*

Yet Defendants/Appellants urge this Court to ignore the *Farris* opinion's admonition and require that legislation specifically identify counties or municipalities to fall within the Home Rule Amendment. The trial court declined this invitation to elevate form over substance by correctly determining that the Act was local in "effect," even though it did not mention Davidson or Shelby counties by name. There was ample support for this finding of local effect. The Act uses a peculiar combination of three historical statistics to ensure that it applies, and will forever only apply, in Davidson and Shelby counties.

Cases on which Defendants/Appellants rely relating to stand-alone sanitary and special school districts, unaffiliated with counties or

municipalities, are inapposite, as the trial court properly held. *See* slip op. at 21, Bah Intervenor-Defs.' App. Vol. I at APP0021 (citing *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959); *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482 (Tenn. 1957)). In contrast, the two school districts targeted by the Act are part of county government. *See Reed v. Rhea County*, 225 S.W.2d 49, 50 (Tenn. 1949) ("It follows that a County Board of Education 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"). And the Plaintiff Counties' legislative bodies are statutorily required to fund those school districts. *Id.* § 49-2-101(1). Indeed, county legislators, county mayors, and county trustees all play key roles in the operations of the counties' school systems, including but not limited to adopting a budget, quarterly reports, examining accounts, levying taxes, issuing certain approvals relating to school funds, and establishing school districts. Tenn. Code Ann. §§ 49-2-101, -102, -103, -111(e). So when the ESA Act diverts public school funding *from the Plaintiff Counties' school systems* to be used on private education, there is a local effect across county government. Tenn. Code Ann. § 49-6-2605(b)(1) ("The ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA."). For the same reasons, the Plaintiff Counties have a "distinct and palpable" injury sufficient to establish standing. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013).

B. Legislation Affecting Education Is Not Exempt From the Home Rule Amendment's Application.

The State Defendants/Appellants assert that the Home Rule Amendment cannot apply to the ESA Act because education is a plenary power of the State. Plaintiffs/Appellees do not dispute that education is a fundamental state function. But that is not the end of the inquiry.

The counties' role as partners with the State in local education constitutes a governmental function under the Home Rule Amendment. *See State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) ("[A] partnership has been established between the State and its political subdivisions to provide adequate educational opportunities in Tennessee."); *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."). Once the General Assembly enlists counties as an arm of the state, even in areas in which the state exercises plenary authority such as the structure and jurisdiction of lower state courts, the Home Rule Amendment applies. *See Lawler v. McCanless*, 417 S.W.2d 548, 553 (Tenn. 1967) (striking down as a violation of the Home Rule Amendment an act that expanded the state court jurisdiction of the general sessions court only in Gibson County); *see generally 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 two cases on which the State Defendants rely—*State ex rel. Cheek v. Rollings*, 308 S.W.2d 393 (Tenn. 1957), and *City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193 (Tenn. 1984)—are inapposite, merely holding that the General Assembly is free to abolish state courts that exercise only state functions without offending the Home Rule Amendment.

No Tennessee court has held that education-related legislation is exempt from the Home Rule Amendment. To the contrary, the Tennessee Court of Appeals upheld the Education Improvement Act of 1992, Tenn. Code Ann. §§ 49-2-201, *et seq.*, from a Home Rule Amendment challenge rather than declining to rule because the legislation addressed education. *County of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996); *see also Bd. of Educ. of Shelby County 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).

C. The ESA Act Affects the Plaintiff Counties, Both Financially and by Infringing on Their Sovereignty.

The Intervenor-Defendants argue that the ESA Act has no effect on Davidson and Shelby counties—it "requires counties and municipalities to do nothing," according to the Bah Intervenor-Defendants (Mot. to Assume Juris. at 17)—and therefore is not "applicable" to them in their "governmental capacities," as required by the Home Rule Amendment. This argument mischaracterizes both the law and the facts.

First, there is no requirement under the Home Rule Amendment that the challenged statute require the county "to do something." In

Lawler, for example, this Court held a public act invalid under the Home Rule Amendment that applied to the general sessions court, not county government, because the act was "in effect applicable to Gibson County alone." *Lawler*, 417 S.W.2d at 553. The Court reached this conclusion even though the general sessions judge's additional salary for performing state court duties was paid by the state, not the county. *Id.* at 345.

Yet even if such a requirement existed, the ESA Act places additional obligations and constraints on Davidson and Shelby counties. The ESA Act states that a "participating student" will receive the "per pupil state *and local funds*" required through the BEP, but not to exceed the combined statewide average of required "state *and local* BEP allocations per pupil". Tenn. Code Ann. § 49-6-2605(a) (emphasis added). The Act further provides that this full amount—the state *and local* BEP allocations—will be deducted from "the state BEP funds otherwise payable to the LEA." *Id.* § 49-6-2605(b)(1).

The diversion of school funding that the counties would otherwise receive constitutes an effect on their governmental capacity under Tennessee law. *See Brentwood Liquors*, 496 S.W.2d at 457 ("Education is a governmental function and in the exercise of that function the county acts in a governmental capacity."). This loss of BEP funding, described in greater detail in the Statement of Facts, is borne by Davidson and Shelby counties, which are charged with the statutory obligation to fund their school systems. Tenn. Code Ann. § 49-2-101(1). The Act also requires the two counties to count students participating in the ESA program in their enrollment figures for calculating local BEP funding and meeting

"maintenance of effort" school funding requirements set by the state. Understanding Public Chapter 506 at 5 n.D. Intervenor-Defendants' assertion that the Act requires Plaintiff Counties "to do nothing" is baseless.

The Greater Praise Intervenor-Defendants argue that the ESA Act creates a windfall for the Plaintiff Counties, thus removing the injury-in-fact requirement for standing. A statute that deprives the counties' school districts of $7,572 in state BEP funding for each participating student, however, is a "windfall" only in the Orwellian sense of the word. The fact that the ESA program does not withhold state BEP funding equal to *every* local dollar that the two counties spend to educate their students does not alleviate the damage caused by the funds that are withheld.

The three-year "school improvement fund" program in Section 49-6-2605(b)(2)(A) of the Act does not offset the financial damage caused by the ESA program. *Id.* Even if fully funded, the grant program only lasts for the first three years of the ESA program. *Id.* Moreover, funds from the ESA grant program can only "be used for school improvement." *Id.* Thus, while all counties in the State may use their state BEP dollars as they see fit, the "school improvement" dollars that Davidson and Shelby counties might receive are restricted in use and cannot be treated as general operating funds. Furthermore, the ESA grant program only provides funds for students who attended an MNPS or Shelby County school for one full school year before the student joins the ESA program. *Id.* Despite having to plan, budget, and prepare buildings, staff, and curriculum for new incoming students, MNPS and Shelby County

Schools will receive no grant funds for students who enter kindergarten or move into Davidson or Shelby County and elect to use ESA funds.[13]

After three years, the state can use the school improvement fund to make grants to priority schools in any county and is no longer required to support to Davidson and Shelby county schools. Tenn. Code Ann. § 49-6-2605(b)(2)(B).

Finally, and most importantly, the ESA Act's infringement on local government sovereignty constitutes a distinct and palpable injury separate from any financial impact. The ESA Act's infringement on local sovereignty has existed from the day the Act was passed until it was enjoined. That impact constitutes a distinct and palpable injury protected by the Tennessee Constitution. *Hargett*, 414 S.W.3d at 98.

D. There Is No Conflict Within Applicable Home Rule Amendment Case Law.

It is undisputed that the ESA Act applies only in Davidson and Shelby counties and will never expand further without action by the Tennessee General Assembly. On that basis, the Act is "local in form or effect" under the Tennessee Supreme Court's seminal Home Rule Amendment case, *Farris v. Blanton*. 528 S.W.2d at 552.

The Tennessee Supreme Court held in *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979), that legislation exempting two counties from a

[13] For example, if Intervenor-Defendant Alexandria Medlin were to use ESA funds to send her soon-to-be kindergartener to private school next year (Greater Praise Intervenor-Defs.' Mot. to Assume Juris. at 17), Shelby County Schools would receive no offset from the grant program for that loss of funds. Tenn. Code Ann. § 49-6-2605(b)(2)(A).

"permanent, general provision, applicable in nearly ninety counties" is local in form and effect in violation of the Home Rule Amendment. *Leech*, 588 S.W.2d at 274. The Greater Praise Defendant-Intervenors claim that the *Leech* decision conflicts with other Tennessee cases applying the Home Rule Amendment. (*See* Greater Praise Intervenor-Defs.' Mot. to Assume Juris. at 20.)

The *Leech* decision struck down a legislative provision in the challenged legislation that excepted only Wayne and Bledsoe counties from general requirements for electing members of county legislative bodies. *Leech*, 588 S.W.2d at 274. The exceptions were based on population brackets that applied only to the two counties and were drawn so narrowly that they would effectively never apply to other counties in the future.[14] The purportedly inconsistent cases cited by Intervenor-Defendants involved broad population brackets or similar standards that could reasonably be "potentially applicable" to other counties in the future. *See, e.g.*, *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 730 (Tenn. 1991) (upholding statute applicable to municipalities in counties with a minimum population of 300,000);

[14] *See* Tenn. Public Acts of 1978, Chap. 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). The population of Wayne County in 1970 was 12,365, and the population of Bledsoe County was 7,643, according to the U.S. Bureau of the Census. https://www.census.gov/population/www/censusdata/cencounts/files/tn190090.txt.

Bozeman v. Barker, 571 S.W.2d 279, 280, 282 (Tenn. 1978) (upholding statute applicable to counties having population between 275,000 and 600,000); *Doyle v. Metro. Gov't of Nashville & Davidson County*, 471 S.W.2d 371, 374 (Tenn. 1971) (upholding statute applicable to counties with metropolitan form of government). There is no inconsistency.[15] The ESA Act, of course, does not rely on population brackets, indisputably applies only in Davidson and Shelby counties, and will never apply anywhere else. Nothing in *Burson*, *Bozeman*, or *Doyle* negates *Leech*'s holding that an act applying to two counties is subject to the Home Rule Amendment.

III. This Is Not the Type of Case in Which This Court Typically Exercises Reach-Down Jurisdiction.

This Court has traditionally exercised its power to assume reach-down jurisdiction primarily in two circumstances: 1) to address the constitutionality of a ballot measure in a looming election and 2) to resolve constitutional questions pertaining to appellate judicial vacancies. The circumstances that justified review in those matters are not present here.

Ballot measure cases comprise the bulk of reach-down jurisdiction case law. For example, this Court used reach-down jurisdiction fewer than two months before an election to decide whether a ballot provision

[15] Contrary to the Greater Praise Intervenor-Defendants' description of the *Leech* opinion as an outlier (Mot. to Assume Juris. at 19-20), the decision has been identified by then-Attorney General Charles Burson as one of the "important opinions on new statutory schemes" written by former Justice William J. Harbison. Charles W. Burson, "William J. Harbison," 47 Vand. L. Rev. 945, 945-46 (May 1994).

to amend the Tennessee Constitution pertaining to the prohibition of lotteries was constitutional. *State ex rel. Cohen v. Darnell*, 885 S.W.2d 61, 62 (Tenn. 1994). In a similar situation, the Court decided to hear a challenge to the Shelby County Election Commission's refusal to place a referendum measure on the ballot for an election fewer than two months away. *City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531, 533 (Tenn. 2004). [16] In contrast, the Court declined to take jurisdiction when the election at issue was more than a year away. *Bailey v. Cty. of Shelby*, 188 S.W.3d 539, 542 (Tenn. 2006).[17]

These and similar cases share a common thread: Haste was required to decide constitutional and statutory issues related to ballots for looming elections. If the Court had not assumed jurisdiction in these cases, the electoral process would have been delayed or frustrated. *See, e.g.*, *City of Memphis*, 146 S.W.3d at 533 (without expedited decision, military personnel would not receive correct ballots in time to vote by mail). But the Court declined to exercise jurisdiction where the electoral calendar allowed time for intermediate appellate review. *See Bailey*, 188 S.W.3d at 542.

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[16] *See also Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 58 (Tenn. 2018) (holding that Metro Charter obligated Nashville to hold a special election for mayor rather than waiting until a regularly-scheduled election later that year); *ACLU of Tennessee v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006) (expediting case to decide whether constitutional amendment defining marriage as between one man and one woman could be included in upcoming election).

[17] The Court later decided this case on an expedited schedule, but by way of a Tennessee Rule of Appellate Procedure 11 appeal from the Court of Appeals rather than a Rule 48 motion. *Bailey*, 188 S.W.3d at 542.

Another situation in which the Court has often reached down to hear cases on appeal relates to vacancies on appellate courts. For example, the constitutionality of the "Tennessee Plan," the statutory scheme governing how appellate court justices are appointed by the governor and retained by popular vote, was challenged in *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 335 (Tenn. 1996), and again in *Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 423 (Tenn. 2007). The Court also ruled on the validity of a special Supreme Court's holding on residency requirements for Supreme Court justices in *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 880 (Tenn. 1996).

In these cases, the Court found a compelling need for quick action to fill judicial vacancies and vindicate litigants' right to hold public office. *Holder*, 937 S.W.2d at 880; *State ex rel. Hooker*, 249 S.W.3d at 335. While time pressure was not always as extreme as in the ballot cases described above, the solemn promise that "all courts shall be open" was implicated in disputes that challenged the constitutionality of the judicial selection process. Tenn. Const., art. I, § 17.

Greater Praise Intervenor-Defendants cite the Court's decision to exercise reach-down jurisdiction in the *Small Schools III* case as support for their petition. (*See* Greater Praise Intervenor-Defs.' Mot. to Assume Juris. at 20.) The issue before the Court in *Small Schools III* was whether the state's salary plan for public school teachers conformed to its constitutional obligation to equalize teachers' salaries. *Tennessee Small Sch. Sys. v. McWherter*, 91 S.W.3d 233 (Tenn. 2002) ("*Small Schools III*").

It was the third decision by this Court flowing from the holding that the State's funding system for local school districts was unconstitutional. *Tennessee Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 156 (Tenn. 1993) ("*Small Schools I*"). In *Small Schools I*, this Court considered the case only after customary review by the intermediate appellate court. *Id.* at 140. Plaintiffs in *Small Schools III* contended that the state had failed to comply with the Court's prior directives. The Court clearly had an interest in compelling compliance with its previous holdings and establishing a constitutional funding system for local schools. No comparable interest in the prompt enforcement of prior judicial rulings is present here.

As these cases illustrate, the Court's exercise of reach-down jurisdiction typically arises in matters of significant constitutional concern *that require expeditious ruling*. The use of jurisdiction has not turned on the political significance of the legislation at issue. (*See* Greater Praise Intervenor-Defs.' Mot. to Assume Juris. at 13-14.) Here, there are no elections at stake, no prior judicial orders to enforce, and no vacancies on courts to resolve. With the ESA Act now enjoined as unconstitutional, the trial court is maintaining the status quo, and local school operations may move forward without interruption while this issue is resolved. And as discussed above, the status quo will cause no irreparable harm to anyone.

CONCLUSION

This case does not meet the "unusual" and "special" circumstances under which this Court typically exercises reach down jurisdiction under Tennessee Supreme Court Rule 48 and Tenn. Code Ann. § 16-3-201(d)(1).

Expedited review is not required, as the trial court's ruling merely maintains the status quo and causes no irreparable harm. The trial court ruling is based on well-established Home Rule Amendment precedent and is not the "radical departure" that Defendants/Appellants contend. The motions to assume jurisdiction should be denied.[18]

[18] The Bah Intervenor-Defendants' request that the Court also assume jurisdiction over Counts II and III of the Complaint (the Equal Protection and Education Clause claims) that remain pending at the trial court should be rejected. (Bah Intervenor-Defs.' Mot. to Assume Juris. at 7-8 n.1.) The reach-down statute states that "[t]he jurisdiction of the [Tennessee Supreme] court is appellate only." Tenn. Code Ann. § 16-3-201(a); *see also* Tenn. Const., art. VI, § 2. In addition, "'the holdings of this court have been uniform to the effect that it is without original jurisdiction in any matter, and that it is beyond the power of the Legislature to confer original jurisdiction upon it.'" *Pierce v. Tharp*, 461 S.W.2d 950, 954 (Tenn. 1970) (quoting *In re Bowers*, 192 S.W. 919, 919-20 (Tenn. 1916)). Setting aside Intervenor-Defendants' conclusory mischaracterization of those claims as presenting pure questions of law, Tenn. Code Ann. § 16-3-201(d)(3) should not be construed to give the Court original jurisdiction over constitutional claims on which the Chancellor has not yet ruled. While Tenn. R. App. P. 13(a) permits a party to raise any question of law in the course of an appeal, the Advisory Commission Comments make clear that this provision applies to "appeals from final judgments of the trial court, . . . interlocutory appeals and final decisions of the intermediate appellate courts that are reviewed by the Supreme Court." *Id.* Moreover, the comments' use of the term "review" implicitly indicates that questions raised must have been addressed first in the lower court. Until the trial court rules on an issue, there is nothing to "review."