IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,
Plaintiffs / Appellees,

v.

TENNESSEE DEPARTMENT OF EDUCATION, et al.,
Defendants / Appellants,

NATU BAH, et al.,
Intervenor-Defendants / Appellants.

No. M2020-00683-COA-R9-CV

ON APPEAL FROM THE ORDER OF THE CHANCERY COURT FOR DAVIDSON COUNTY
NO. 20-0143-II

JOINT REPLY BRIEF OF INTERVENOR-DEFENDANTS / APPELLANTS BAH, DIALLO, BRUMFIELD, AND DAVIS

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INTRODUCTION

Plaintiffs' Response provides no basis for this Court to affirm, and their errors show why reversal is required. The legal theory Plaintiffs rely on to extinguish a direct benefit for Tennessee children assigned to underperforming schools suffers from two flaws. In Part I, Intervenor-Defendants / Appellants Bah, Diallo, Brumfield, and Davis ("Parents") explain why Plaintiffs' legal theory for triggering the Home Rule Amendment requires radically expanding the Amendment's scope so that counties can extinguish laws that "affect" them in "any capacity"—a result that conflicts with the text of the Amendment and binding precedent. In Part II, Parents show how Plaintiffs' expansive legal theory requires treating Tennessee children as mere conduits for directing money into school district coffers. But this treatment ignores and upends the Tennessee Supreme Court's jurisprudence confirming that Tennesseans are the direct beneficiaries of education funding, and it flouts the limits that Plaintiffs' charters impose on their governmental and proprietary powers. This Court should reject Plaintiffs' invitation to break new constitutional ground, reverse, and vacate the chancery court's injunction.

ARGUMENT

I. Plaintiffs' "*Affects* A County" Theory Is Wrong on the Law and Undermined by Binding Precedent.

Plaintiffs' entire case hinges on purging the word "applicable" from the Home Rule Amendment and replacing it with "affects." *See* Appellees' Br. ("Pls.' Resp.") 31, 38, 53, 56, 64, 66. They assert that "[t]he ESA [a]ct

[a]ffects Appellee Counties" and thus violates the Amendment's local approval requirement. *Id.* at 53 (emphasis added). There is a reason for that: Plaintiffs' legal theory only makes sense if the word *applicable* means the same thing as *affecting*. It does not. And as explained below, Plaintiffs' "affects a county" theory conflicts not only with the text of the Home Rule Amendment but also with how the Tennessee Supreme Court actually applies the provision.

The text of the Home Rule Amendment is unambiguous and concerns laws that are:

> "[P]rivate or local in form or effect *applicable* to a particular county or municipality either *in its governmental or its proprietary capacity* . . . ."

Tenn. Const. art. XI, § 9 (emphasis added). Plaintiffs' expansive theory rewrites the Amendment. Not only are they just replacing "applicable" with "affects," but they also argue that "in its governmental or . . . proprietary capacity" should be read as saying "in any capacity." *See e.g.*, Pls.' Resp. 56 ("[I]f an act *affects* a county *in any capacity*, then the Home Rule Amendment is at play.") (emphasis added). What's more, the drafters of the Home Rule Amendment used "effect" at the beginning of the text under the "local in form or effect" inquiry, Tenn. Const. art. XI, § 9, which means that they were well aware how to use that expansive term, but then chose not to use it in the second half under the "applicability" inquiry. They did not write, "and has an effect upon a particular county or municipality in any capacity," but instead wrote "applicable to a particular county or municipality either in its governmental or its proprietary capacity." *Id.* As a result, the drafters

narrowed the scope of the Home Rule Amendment so that it would not apply to a law merely because that law has some impact on a county or municipality. That is, the text of the Amendment rejects the very legal theory that Plaintiffs offer here. The chancery court's decision was based upon this rationale, (TR Vol. VIII, 1121–23) and should thus be reversed.

As Parents explained in their opening brief, the ESA Pilot Program applies only to underperforming Local Education Agencies ("LEAs") such as county school districts—it does not apply to counties or cities like Plaintiffs. *See* Parents' Br. 23–30. Thus, Plaintiffs' response brief relies heavily on their "partnerships" with school districts to argue that the Pilot Program affects Plaintiffs by association, via the school district. Pls.' Resp. 37, 42. The chancery court did the same. (TR Vol. VIII, 1121) And to trigger the Home Rule Amendment based on their partnership with school districts, Plaintiffs must replace the requirement that a law be "applicable to a particular county" in its "governmental or . . . proprietary capacity" with their more expansive "affects a county" theory. *Compare* Tenn. Const. art. XI, § 9, *with* Pls.' Resp. 56. Plaintiffs argue that the Pilot Program affects them by association with the county school district because they must make financial adjustments to make up for the state dollars that follow a child choosing an Education Savings Account.[1] Pls.' Resp. 21–27.

[1] The funds for a student's ESA come entirely from the state. *See* Tenn. Code Ann. § 49-6-2605 ("The ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA. The department shall remit funds to a participating student's ESA on at least a quarterly basis.").

But as Parents show in Part I.A., below, the Tennessee Supreme Court has repeatedly rejected claims invoking the Home Rule Amendment even when the challenged laws *affected* a city or county, including when the effect was a clear financial impact. And, as explained in Part I.B, Plaintiffs' "affects a county" theory requires ignoring not only the case law rejecting challenges under the Amendment to laws that affected cities and counties, it also requires ignoring the Supreme Court's pronouncements on the meaning of "governmental or . . . proprietary capacity" before that term of art was enshrined in Article XI, Section 9.

A. Plaintiffs' "Affects a County" Theory Conflicts With Binding Precedent.

Plaintiffs assert that there is "no authority to justify [Appellants'] strained definition of the term 'applicable' in the Amendment's language." Pls.' Resp. 48. What they are arguing, in effect, is that Parents are wrong to stick to the actual language of the Home Rule Amendment rather than stretch it. But Parents' position, in addition to being supported by the actual text of the Home Rule Amendment, is also supported by binding precedent that fatally undermines Plaintiffs' expansive "affects a county" theory.

For example, a law ratifying the creation of a hospital district to which the City of Chattanooga and Hamilton County were required to transfer ownership of real property (entire hospitals) obviously affected the allocation of their public health resources. *See Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979). Triggering the Home Rule Amendment, however, required more than establishing that the challenged law affected resources and priorities—

as Plaintiffs allege has happened here, *see* Pls.' Resp. 53–59—it had to be applicable in their governmental or proprietary capacity. The City of Chattanooga argued that because the challenged law "affects the City as well as the County," but required approval only from the county's legislative body (but not the city's), it violated the Home Rule Amendment. *Chattanooga-Hamilton Cty. Hosp. Auth.*, 580 S.W.2d at 328. But the Tennessee Supreme Court disagreed—and pointed specifically to why the Amendment applied as to the county—but not the city. The challenged law empowered the hospital district to act "on behalf of the County"—thus providing "an obvious basis" for requiring approval by Hamilton County under the Amendment. *Id.* By contrast, and despite the fact that it clearly affected the City of Chattanooga, the challenged law was not applicable to the City as required by the Home Rule Amendment. *Id*. The Court thus reversed the intermediate court and lifted the stay blocking the "transfer of realty by the City of Chattanooga and County of Hamilton to the Chattanooga-Hamilton County Hospital Authority." *Id.* at 329.

In other words, a law merely *affecting* a local entity does not render it *applicable* to that entity in its *governmental or proprietary capacity*. *Id.* at 324–28. It is not enough for a law to affect a city's or county's finances and priorities—more is required for the law to be "applicable" to a city or county for the purposes of the Home Rule Amendment. And besides revealing that affecting a city's or county's resources is insufficient to trigger the Amendment, *Chattanooga-Hamilton County Hospital Authority* also confirms that Plaintiffs cannot invoke their partnership

with their school district to trigger the Home Rule Amendment by association. If applicability-by-association was the standard, then the City of Chattanooga's relationship with Hamilton County would have brought it within the scope of the Amendment—but the Tennessee Supreme Court declared that it did not. Simply, *Chattanooga-Hamilton County Hospital Authority* is fatal to Plaintiffs' expansive theory that the Amendment allows it to extinguish the ESA Pilot Program because it *affects* Plaintiffs.

Also fatal to that theory is a case decided shortly after the Home Rule Amendment's ratification. In *Perritt v. Carter*, the Tennessee Supreme Court rejected an attempt to block the expansion of a special school district within Carroll County. 325 S.W.2d 233 (Tenn. 1959). If Plaintiffs were correct that a law's impact on their priorities and financial resources is enough to trigger the Home Rule Amendment, then the Amendment would have applied in *Perritt*—but it did not. "Special school districts . . . are partially funded by county governments"; they also "have their own taxing authority" but "do not need approval of a city or county . . . to adopt a budget."[2] (Report of the Tenn. Advisory Comm'n on Intergovernmental Relations: Tenn. Sch. Syst. Budgets Authority & Accountability for Funding Education & Operating Schools at 7 (Jan. 2015)) (emphasis added). But despite the fact that expanding a special district clearly affects a county's priorities and financial resources, the Tennessee Supreme Court held that the law expanding the special

[2] Plaintiffs also concede that laws establishing special school districts can require the transfer of county-owned property. *See* Pls.' Resp. 46.

district in Carroll County did not implicate the Home Rule Amendment. *Perritt*, 325 S.W.2d at 233–34. In fact, according to the Supreme Court, application of the Home Rule Amendment did not turn on who or what it affected at all—neither the "affected" area of the county nor the county writ large had a right to object to the expansion of the special school district within the county limits. *Id.*

The result is no different here. If the Home Rule Amendment is not triggered when legislation expands a special school district within a county, it follows that the Amendment is not triggered when legislation creates an educational option for children assigned to a school district located within a county.

The Amendment's command that laws be "applicable" to a city or county "in its governmental or its proprietary capacity," Tenn. Const. art. XI, § 9, serves to limit its scope. By contrast, Plaintiffs' theory that "the Home Rule Amendment is at play" if a law "affects a county in any capacity," Pls.' Resp. 56, has no limiting principle. If Plaintiffs' expansive theory was correct, then the above cases should have come out differently, but they did not. And for good reason: Accepting Plaintiffs' expansive theory would mean that virtually every law that the General Assembly passes would be "applicable" to a county in its governmental or proprietary capacity because it would "affect" the county. After all, it can be argued that every law has at least a minimal impact, no matter how attenuated, on every city and county. The Tennessee Supreme Court has avoided such an absurd consequence by sticking to the Constitution's plain text; this Court should do the same.

B. The Term of Art "Governmental or Proprietary Capacity" Has a Fixed Meaning. Plaintiffs Ask the Court to Ignore It.

As explained in Parents' opening brief, the chancery court's ruling conflicts with the history of the phrase "governmental or . . . proprietary capacity"—the pre-Home Rule Amendment case law confirms that this term of art does not extend to direct aid programs for Tennesseans. Parents' Br. 26–30. Plaintiffs respond by dismissing the case law animating the meaning of "governmental or . . . proprietary capacity" because those cases arose under the Tennessee Constitution's Equal Protection guarantees (which is how such disputes arose before the ratification of the Home Rule Amendment). *See* Pls.' Resp. 53–56. Plaintiffs concede that these cases involve courts discerning whether a challenged law's "primary purpose" was "governmental" versus a "benefit to citizens," but they dismiss these pronouncements by the Tennessee Supreme Court because the Amendment "incorporates no similar balancing test." *Id.* at 55. But Plaintiffs confuse the whole with its component parts. True, in the Equal Protection context, the term of art "governmental or . . . proprietary capacity" was used as part of a sort of balancing test. But that does not modify its meaning here. Stated syllogistically, if the Equal Protection Clauses were concerned with weighing A against B, and if the Home Rule Amendment is limited by its very terms to cases involving B, Parents' argument is simply that B means the same in both contexts. The logical conclusion, as Plaintiffs themselves recognize, is that the Amendment would "limit[] its

application only to local bills whose primary or predominant purpose is governmental or proprietary." Pls.' Resp. 55.

But rather than apply the fixed meeting the Tennessee Supreme Court has accorded this term of art, which is rooted in 70 years of established case law at the time of the Amendment's framing, *see* Parents' Br. 27–30, Plaintiffs invite the Court to ignore it. And they ask the Court to ignore it precisely because it undermines their attempt to radically expand the term's meaning in order to extinguish a direct benefit for Tennessee children.

Incorporating the exact phrase "governmental or . . . proprietary capacity" into the Tennessee Constitution, *see* Tenn. Const. art XI, § 9, reflects the drafters' intention to import the term as it had been defined by Tennessee courts. Simply, the drafters of the Home Rule Amendment intended to limit the General Assembly's power over county and municipal governments, *but only to the extent that the General Assembly sought to act upon them as government agencies.* Plaintiffs' expansive "affects a county" theory is thus incompatible with Tennessee courts judging whether "[t]he benefits conferred and the burdens imposed" by the ESA Pilot Program concern "individual citizens . . . rather than the [Plaintiffs] in [their] corporate capacity; that is, in the form, machinery, and instrumentalities of governmental operation and control." *See State ex rel. Scandlyn v. Trotter*, 281 S.W. 925, 927 (Tenn. 1926) (holding that law requiring free textbooks for students only in Knox County and paid for by the local school board concerned Tennesseans' private rights and not county's governmental capacity). Not once did the Court depart from

the fixed meaning it had given the phrase in the seventy years preceding the Amendment's ratification. *See* Parents' Br. 26–30.

Simply, Plaintiffs' expansive "affects a county" theory requires ignoring a "cardinal rule" of construction. When a drafter employs a term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA. v. Cooper*, 566 U.S. 284, 292 (2012) (citation omitted). This Court should reject Plaintiffs' invitation to ignore the fixed meaning of the phrase "governmental or . . . proprietary capacity" enshrined in the Amendment and uphold "the intentions of the persons who ratified the constitution." *See Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995).

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Plaintiffs' expansive "affects a county" theory is wrong on the law. Accepting it would require disregarding both the text of the Amendment and binding precedent. And it would, for the first time ever, empower cities and counties to extinguish their constituents' direct benefits. The Court should decline to do so.

II. The Home Rule Amendment Does Not Empower Counties to Extinguish A Direct Benefit for Tennesseans' Education.

Plaintiffs' "affects a county" theory is wrong not only for the reasons described above, but also because the result would be that counties would have a veto over direct benefit programs, which the Tennessee Supreme Court has not allowed. *See* Parents' Br. 32–33 n.10 (collecting cases). In the context of the ESA Pilot Program, this theory incorrectly views children as mere conduits for directing dollars into school district coffers,

rather than as the intended beneficiaries of the ESA Pilot Program and the BEP Statute used to fund educational options in this state. *See* Part II.A. Second, that theory requires a total disregard for Plaintiffs' own charters—which constrain Plaintiffs' governmental and proprietary powers by prohibiting the control of their constituents' educational options. *See* Part II.B.

A. Plaintiffs' Legal Theory Treats Tennessee Children as Mere Conduits for Money into School District Budgets.

Perhaps the most striking part of Plaintiffs' response brief is that their expansive view of the Home Rule Amendment's scope requires treating Tennessee children as mere conduits for directing money into public school districts under the Tennessee Constitution and the BEP Statute. For this additional reason, Plaintiffs' theory is wrong.

As an initial matter, Plaintiffs overstate the effect of the ESA Pilot Program on them.[3] And even assuming *arguendo* that the Pilot Program

[3] Despite Plaintiffs' "partnership" with school districts serving as the basis for how the ESA Pilot Program (negatively) *affects* them, Plaintiffs argue they are *not* (positively) *affected* when money is sent to the school district from the Pilot Program's "school improvement fund" (which happens when a child opts to leave with an ESA). *See* Pls.' Resp. 63–64; Tenn. Code Ann. § 49-6-2605(b)(2). Plaintiffs argue that those funds do not make them whole because they are sent to the school district, not them, and thus do "not offset the cost [to the county] of counting" an ESA child "in the school districts' enrollment figures." Pls.' Resp. 26–27. But Plaintiffs fail to mention that the BEP Statute allows reductions in funding from the county to be offset by unspent funds that accumulate in a school district's account. Under the BEP, "appropriations from all sources," (which includes funds from the ESA Pilot Program based on children the district no longer educates), go into

"affects" them, financially or otherwise, that does not make the program "applicable" to Plaintiffs in their "proprietary or . . . governmental capacity." *See* Tenn. Const. art. XI, § 9; *see also* Part I, *supra*. Indeed, if the Home Rule Amendment's drafters intended indirect financial effects on a county to be sufficient to trigger the Amendment, they knew how to do so. *See, e.g.*, Tenn. Const. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost."). The lack of such express language in the Home Rule Amendment, however, suggests that its drafters intended something else.[4] Moreover, if Plaintiffs are correct that they can effectively veto the ESA Pilot Program because it "affects" them as a result of their association with a school district, then they will have succeeded in elevating cities and counties above the individual Tennesseans they exist to serve.

But Plaintiffs are incorrect because the power exercised by the General Assembly to pass the ESA Pilot Program and BEP Statute is power that derives from the people, not school districts. Therefore, Plaintiffs attempt to elevate counties and school districts above the citizens they serve conflicts with both the structure and spirit of the

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the school district's "dedicated education fund," Tenn. Code Ann. § 49-3-352(a)–(b), and any funds that accumulate can "offset" any "shortfalls of budgeted revenues" (including funding for improving the chronically underperforming school district), or be spent on "unforeseen increases in operating expenses." *Id.* § 49-3-352(c).

[4] "It has long been held in this state that provisions of the constitution are to be given effect according to the drafters' intention in light of the entire document." *State v. Martin*, 940 S.W.2d 567, 570 (Tenn. 1997).

Tennessee Constitution. *See* Tenn. Const. art. I, § 1 ("That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness[.]"). That Plaintiffs invite this Court to treat children as mere conduits for directing money into local entities' coffers ignores that Tennesseans play *the central animating role* in this state's constitutional architecture. It also requires ignoring that Tennessee children, not counties or school districts, are the direct and intended beneficiaries of education funding.

Tennessee's BEP Statute was enacted in 1992 in response to years of protracted litigation challenging the constitutionality of the state's then-existing educational-funding regime, called the Tennessee Foundation Program ("TFP"). *See Tenn. Small School Sys. v. McWherter*, 91 S.W.3d 232, 235–38 (Tenn. 2002) (describing the history of the BEP); *see generally Tenn. Small School Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*"). In *Small Schools I*, the Tennessee Supreme Court held that the TFP deprived "*students*, on whose behalf the suit was filed" equal educational opportunities. 851 S.W.2d at 141 (emphasis added). The BEP was specifically designed to correct the flaws of the TFP—in short, ensuring "substantially equal educational opportunities to all students" as required by the Tennessee Constitution. *Tenn. Small School Sys. v. McWherter*, 894 S.W.2d 734, 734–35 (Tenn. 1995). In other words, the BEP Statute funds school districts as a means to an end: providing equal educational opportunities to Tennessee *students*. "The means whereby this obligation is accomplished[] is a legislative prerogative." *Small Schools I*, 851 S.W.2d at 141.

The General Assembly determined that the ESA Pilot Program could achieve that same end by distributing BEP funds directly to students using ESAs instead of indirectly to students through their assigned (and underperforming) public schools. As Parents explain more fully in their opening brief, the ESA Pilot Program empowers families and their children assigned to underperforming schools to decide for themselves *how* they want to receive their BEP-funded benefit: directly through the ESA Pilot Program or indirectly through their assigned public school. Parents' Br. 16–22. Thus, flipping the BEP Statute on its head to advance Plaintiffs' "affects a county in any capacity" theory is to lose sight of the forest for the trees.

Simply, Plaintiffs ask the Court to accept that their participation in the BEP Statute allows them to transform the Home Rule Amendment into a veto provision under the BEP Statute. No such power exists. By invoking their participation in the State's funding mechanism to trigger the Home Rule Amendment, Plaintiffs want the Court to empower counties to serve as gatekeepers to Tennesseans' educational benefits. But the Home Rule Amendment concerns municipal self-government—it is not a tool for extinguishing educational options for Tennessee children assigned to chronically underperforming schools.

B. Plaintiffs' Charters Prohibit Them from Exercising Control over Tennesseans' Educational Options.

Plaintiffs' argument that the ESA Pilot Program is triggered because it *affects* them by association with school districts they are in "partnership" with requires that this Court disregard the plain meaning of their own charters. *See* Pls.' Resp. 47 n.26. The charters of both Metro

and Shelby County confirm that their governmental and proprietary powers do not extend to controlling their constituents' education benefits.[5] The Home Rule Amendment makes unambiguously clear that a county adopts a charter to "provide for its governmental and proprietary powers, duties, and functions." Tenn. Const. art. XI, § 9, para 5. And to trigger the Home Rule Amendment, a law must be "applicable" to a county "in its governmental or its proprietary capacity." *Id.*, para 2.

Plaintiffs do not dispute that their charters prohibit control over education. Rather, they dismissively assert that no case holds "that such control is a precondition to the Amendment's application." Pls.' Resp. 47 n.26. In other words, Plaintiffs argue that the Court should empower them to extinguish their own constituents' education benefits using the Home Rule Amendment—even when their own charters prohibit them from doing exactly that. But ignoring their charters does not make the limits those charters impose go away. The Amendment confirms that charters limit the scope of Plaintiffs' governmental and proprietary powers and this Court should give full effect to those limits when applying the Home Rule Amendment. If Plaintiffs' governmental and proprietary powers do not extend to exercising control over education (and they do not), it follows that a direct education benefit like the ESA

[5] "The provisions of this charter shall not apply to county school funds or to the county board of education, or the county superintendent of education." (TR Vol. VII, 970, Shelby Cty. Home Rule Charter art. VI, § 6.02(A)); *see also* (TR Vol. III, 439, Charter of the Metropolitan Government of Nashville and Davidson County § 9.01) (assigning control of education to Metropolitan Board of Public Education).

Pilot Program cannot be held "applicable" to Plaintiffs in their "governmental or . . . proprietary capacity." Tenn. Const. art. XI, § 9.

CONCLUSION

The ESA Pilot Program fully complies with the Tennessee Constitution. It is a direct benefit to low-and-middle income Tennessee families with children assigned to chronically underperforming schools. Invoking the Home Rule Amendment to extinguish Tennesseans' direct benefits for the first time ever requires radically expanding the Amendment's scope, upending precedent, ignoring Plaintiffs' charters, and elevating local governments above their constituents. For these reasons, this Court should reverse, vacate the chancery court's injunction, and remand the case for further proceedings.

Dated: July 30, 2020.