IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2020-00683-COA-R9-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 Appeal From the Chancery Court for the Twentieth Judicial District, Davidson County, No. 20-0143-II

APPELLEES' BRIEF

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QUESTIONS PRESENTED

(1) Whether the trial court erred in ruling that the ESA Program violates the Home Rule Amendment, Article XI, Section 9, of the Tennessee Constitution?

(2) Whether the trial court erred in ruling that the county government plaintiffs have standing to challenge the constitutionality of the ESA Program under the Home Rule Amendment?

STATEMENT OF THE CASE

Plaintiffs/Appellees, the Metropolitan Government of Nashville and Davidson County, Shelby County Government, and the Metropolitan Nashville Board of Public Education (the "Board"), filed a complaint against the Tennessee Department of Education, 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.)

Plaintiffs/Appellees 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.)

[1] "Bah Appellants" (Intervenors) include Natu Bah, Builguissa Diallo, Bria Davis, and Star-Mandolyn Brumfield. "Greater Praise Appellants" (Intervenors) include Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

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 this case and *McEwen* 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. (TR Vol. V at 700-04.)

The Chancellor issued a Memorandum and Order on May 4, 2020, granting Plaintiffs/Appellees' 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 the motion 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.) Appellants' pending motions related to Counts II and III in this case and all motions in *McEwen* remain under advisement.[3] 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.)

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

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

[3] This Court denied the *McEwen* Plaintiffs' Motion for Intervention on July 7, 2020.

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

STATEMENT OF FACTS

In 2019, the Tennessee General Assembly passed the "Tennessee Education Savings Account Pilot Program," (the "ESA Act"), with an effective date of May 24, 2019. *See* 2019 Tenn. Pub. Acts ch. 506, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* The Act imposes an "education savings account" 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 provides "participating students" with "education savings accounts" to pay for private school tuition, fees, and other education-related expenses. Tenn. Code Ann. §§ 49-6-2602(10), -2603(a)(4), -2607(a). To be eligible to participate, a student must be in a family with an annual household income not exceeding twice the federal income eligibility guidelines for free lunch and:

1. zoned to attend a school in a local education agency ("LEA")[4] with ten or more schools:
    a) identified by the State as priority schools[5] in 2015,
    b) identified by the State as among the bottom 10% of schools[6] in 2017, and
    c) identified by the State as priority schools in 2018, or
2. zoned to attend an ASD school[7] as of the Act's effective date.

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

[5] 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).

[6] "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).

[7] The ASD is "an organizational unit of the [Tennessee] department of education, 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). The commissioner has discretionary authority to assign priority schools within an LEA to the ASD. *Id.* § 49-1-614(c)(1). The only schools assigned to the ASD are in Davidson and Shelby counties. *See* Achievement School District, "Schools" (last visited July 14, 2020).

Tenn. Code Ann. § 49-6-2602(3)(C).[8]

The only LEAs that meet all requirements for an "eligible student" are Metropolitan Nashville Public Schools ("MNPS") and Shelby County Schools ("SCS"), plus the ASD. (2015 Priority List; 2017 Bottom 10% List; 2018 Priority List, TR Vol. IV at 516-28.)[9] The Tennessee State Board of Education's ESA Rules confirm this limited application, stating that an "eligible student" is one who is "zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019." (State Board Rule 0520-01-16-.02(11)(b), TR Vol. IV at 513-14.)

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

The ESA Act's legislative history illustrates the General Assembly's intent to enact a bill that applied only to school districts in Davidson and Shelby counties and could never apply to another county or municipality absent further legislative action. A fuller description of the Act's

[8] 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 only to students attending those schools. Tenn. Code Ann. § 49-6-2602(3)(C). Any income-eligible student zoned to attend a school in the subject LEA, even if attending the LEA's highest-performing school, may participate in the program.

[9] In 2015, only MNPS, SCS, and the ASD had ten or more priority schools. (2015 Priority List, TR Vol. IV at 516-19.) In 2017, only MNPS, SCS, Hamilton County Schools, and the ASD had ten or more schools on the bottom 10% list. (2017 Bottom 10% List, TR Vol. IV at 520-24.) In 2018, only MNPS, SCS, and the ASD had ten or more priority schools. (2018 Priority List, TR Vol. IV at 525-28.)

legislative history can be found in the Complaint, ¶¶ 34-89. (TR Vol. I at 9-18.)

A. House Bill No. 939

The substance of the ESA Act was filed in the House of Representatives on March 19, 2019, as Amendment No. 1 (HA0188) to House Bill No. 939. Amendment No. 1 defined "eligible student" as a student zoned to attend school in an 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), Am. No. 1.) While only five school districts had three or more schools in the bottom 10% at that time—Davidson, Hamilton, Knox, Madison, and Shelby—Amendment No. 1 was a bill of general application, as school districts could fall into or out of the Act as future school performances declined or improved. (*Id.*; Bottom 10% List, TR Vol. IV at 520-24.)

When House Bill No. 939 reached the House Floor for third and final reading, the House replaced Amendment No. 1 with Amendment No. 2 (HA0445), which placed additional limits on the number of school districts subject to the Act. The Act changed 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 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 legislation—50 ayes and 48 nays—on April 23, 2019, after the vote was held open for 40 minutes with the House deadlocked. (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.) Rep. Jason Zachary (R-Knoxville), whose district was affected by Amendment No. 2, cast the deciding vote after then-House Speaker Glen Casada promised him 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.)

In remarks on the House Floor, then-Deputy House Speaker Matthew Hill (R-Jonesborough) summarized the House majority's dual motives in passing 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 and limited the act to Davidson, Hamilton, Knox, Madison, and Shelby counties, with potential to drop or add counties based on future school performance. (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 bill passed by the House for the Senate bill and then replaced it with Senate Amendment No. 5, which further narrowed the definition of "eligible student" by increasing from three to ten the number of priority and bottom 10% schools that had to be identified in 2015, 2017, and 2018. (Am. No. 1, 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 new "eligible student" definition. (*Id.*; 2015 Priority List; 2017 Bottom 10% List; 2018 Priority List, TR Vol. IV at 516-28.) Because the criteria for defining an "eligible student" were based on data from prior years, no school districts could be added to or removed from the Act in future years. (Am. No. 1, 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.*)

The House and Senate speakers appointed a conference committee to resolve differences between the bills passed by the two chambers. (H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 33.) The conference 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 conference committee also inserted an exception to the bill's severability clause to guarantee that a court could

not undo the bill's geographic limitations. The exception provided that even if some part of the Act were held invalid, that invalidity "shall not expand the application of this part to eligible students other than those identified in § 49-6-2602(3)." Tenn. Code Ann. § 49-6-2611(c). The conference committee report also contained the first statutory reference to the ESA Act as a "pilot program."[10]

Rep. Patsy Hazelwood (R-Signal Mountain) voted against the bill when it initially passed the House but voted for the conference committee's final report. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 32; H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 36.) As she explained on the House Floor on May 1, 2019: "I committed to vote for ESAs if the [sic] Hamilton County was excluded from the program. The language that's in this conference report here today does that. As a result, I'm going to be keeping my commitment and I will vote for this bill." (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.)

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[10] In the House Finance, Ways, & Means Committee hearing on April 17, 2019, then-Deputy House Speaker Hill referred to the bill as a "four-county pilot ESA program." (April 17, 2019 House Committee Session Tr. at 4:17, TR Vol. IV at 532; April 17, 2019 House Committee Session Video at timestamp 44:42 – 44:45.) When asked by Rep. Zachary to define "pilot program," Rep. Hill responded that it was a pilot program because it "limits it down to just four counties" and "will stay in those four 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.)

Before the Senate's final vote on the same day, 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 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 conference 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.

A participating student's ESA will receive annual disbursements equal to the per-pupil state and local funds required by the State's Basic Education Program ("BEP") in the student's school district, but not to exceed the combined statewide average of required state and local BEP allocations per pupil. Tenn. Code Ann. § 49-6-2605(a).

The BEP is a statutory formula for calculating kindergarten through grade twelve (K-12) education funding "necessary for our schools

to succeed." *Id.* § 49-3-302(3). Total BEP funding in a school district consists of separate contributions by the State and the local jurisdiction. The State and local shares vary among school districts based on each local jurisdiction's ability to raise revenue from property taxes. *Id.* § 49-307(a)(10), -356.

For Davidson County, State BEP per-pupil funding is currently $3,618 and local BEP per-pupil funding is $4,705, for total BEP funding of $8,324. For Shelby County, the comparable numbers are $5,562 and $2,361, for total BEP funding of $7,923. *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.[11]

Because per-pupil State and local BEP funds in MNPS and SCS exceed the statewide average, participating students from both counties will receive ESA funding equal to the statewide average, which for 2020-21 is $7,572. Comptroller Brief, Greater Praise Appellants' App. at 006. The State will deposit the funds into a participating student's ESA. The State will then "subtract[]" that same amount "from the state BEP funds otherwise payable to the LEA." *Id.* § 49-6-2605(b)(1). As a result, the State will break even: Whatever it deposits into an ESA, it will remove from BEP funds it otherwise would have paid to the school district.

[11] The Comptroller's estimates rely on FY2019 expenditures for the required local portion of the BEP but on FY2020 allocations for the State portion. *Id.*

Appellee Counties will not break even. Because participating students receive the school district's combined state *and local* per-pupil BEP funding, the reduction in State funding will leave the school district with less money than if the student had left to attend private school without an ESA. To illustrate, when a *non-participating* student leaves an MNPS school to attend private school, Davidson County loses only $3,618 of State BEP funding—the State share for Davidson County. But when a *participating* student leaves an MNPS school for private school, Davidson County loses $7,572 in State BEP funding—*more than twice as much money*. Id. Similarly, the State provides $5,562 in State BEP funding per pupil for SCS. Id. But when a participating student leaves an SCS school for private school, Shelby County loses $7,572 in State BEP funding—*an additional 36 percent*. Id.

The ESA Act does not leave this local funding deficit unfilled. Rather, it compels Appellee Counties to close the gap by requiring that participating students be counted as *enrolled* in their public school districts "[f]or the purpose of funding calculations." Tenn. Code Ann. § 49-6-2605(b)(1). Therefore, each county must appropriate to its school district the local per-pupil BEP funding for every student in the ESA program, even though they no longer attend MNPS and SCS schools. *See id.* § 49-2-101(1), (6) (making Davidson and Shelby counties' legislative bodies responsible for adopting budgets and levying taxes for their school systems); *id.* § 49-3-356(a) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."); *id.* § 49-3-307(a)(11) (BEP formula "shall be student-based such that each student entering or

exiting an LEA shall impact generated funding"); *id.* § 49-3-307(a)(1)(B) (describing BEP calculation as based on "enrollment").

The requirement to count these ESA "ghost" students also affects the counties' obligations under the "maintenance-of-effort" statute. 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."), Greater Praise Appellants' App. at 007.[12] 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 ($4,705 in BEP and $4,571 in additional funds) in Davidson County and $6,414 ($2,361 in BEP and $4,053 in additional funds) in Shelby County. *Id*. Because the ESA Act leaves participating students on the school districts' rolls, the maintenance-of-effort statute requires both counties to appropriate the *full* local per-pupil spending (BEP and additional funding) for each participating student.[13]

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[12] 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. *Id.* § 49-3-314; *see also generally* Comptroller's Legislative Brief, "Understanding Tennessee's Maintenance of Effort in Education Laws" (Sep. 2015).

[13] Charter school students are also counted in the authorizing LEA's enrollment. *See* Tenn. Op. Att'y Gen. 13-34. But in contrast to the ESA program, charter schools are still considered part of the LEA. Tenn. Code Ann. §§ 49-13-102, -112(a).

In sum, by artificially inflating the district's enrollment, the ESA Act imposes the equivalent of a per-pupil "ESA Mandate" on Appellee Counties to compensate for the diversion of State BEP funds to the ESA program. Based on the Comptroller's numbers, Davidson County would pay an ESA Mandate this year of $9,277 for each participating student who leaves the school district, and Shelby County would pay an ESA Mandate of $6,414.

The same ESA Mandate would apply to participating students currently enrolled in ASD schools. State law provides that the ASD shall receive an "amount equal to the per student state and local funds" from the school district in which ASD schools are located. *Id.* § 49-1-614(d)(1). The only schools assigned to the ASD are in Davidson and Shelby counties. *See* Achievement School District, "Schools" (last visited July 14, 2020). Therefore, Appellee Counties will have to pay the same ESA Mandate for students who leave ASD schools for private schools under the ESA program.

This significant financial burden is mandated by the Act only in these two counties. But for the Act, the Metropolitan Council and Shelby County Commission would have the same sovereign right as any other local jurisdiction to apply these funds to any public need, including education, or to lower their tax rates.

The General Assembly's Fiscal Review Committee estimated only the *BEP* revenue losses for the two counties in its Corrected Fiscal Memorandum on the ESA Act (May 1, 2019). (TR Vol. VII at 1022-25.) According to the Memorandum, the Act will generate a $36,881,150 program-wide "shift in BEP funding" in Appellee Counties 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.)

The Fiscal Memorandum also notes that MNPS and SCS will incur increased costs, potentially totaling more than $1 million, without an offset in additional funding, to provide "equitable services" to students in private schools participating in Titles I, II, and IV of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301, *et seq.* (TR Vol. VII at 1025.) The Fiscal Memorandum further states that the two school systems will incur increased costs each year for students returning to the systems for testing, potentially surpassing $1 million over five years. (*Id.* at 1024-25.)

The ESA Act includes a three-year grant program—the "school improvement fund"—intended to disburse annual grants to MNPS and SCS in an amount roughly equal to the ESA payments to participating students. Tenn. Code Ann. § 49-6-2605(b)(2).[14] The grant program, however, is "subject to appropriation" and not a condition precedent to implementation of the Act. *Id.* Even if fully funded, the program only

[14] Grants issued under this program will not equal all ESA payments to participating students. 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. *Id.* Thus, the school districts will receive no grant funds for participating students who enter kindergarten or move into Davidson or Shelby counties and elect to use ESA funds.

provides grants to the two school systems for the first three years of the ESA program. *Id.* Moreover, funds from the grant program can only be used "for school improvement," not as general operating funds. *Id.* Most significantly, nothing in the Act allows grant funds to offset the cost of counting participating students in the school districts' enrollment figures. Therefore, the grants will not relieve Appellee Counties from the ESA Mandates' significant financial impact.

Losing students to the ESA program will adversely affect MNPS and SCS operations and financial planning. Movement of students out of the school systems does not generate a proportionate reduction in costs. Many of the school systems' costs—such as facility maintenance, technology costs, food services, transportation, facility operations, long-term contracts, and post-employment benefits such as pension and insurance—are fixed and largely unaffected by student movement between schools or out of the system. (Compl. ¶ 142, TR Vol. I at 29.) All schools, regardless of enrollment, must be staffed with a principal, librarian, bookkeeper, literacy coach, secretary, counselor, and half-time advanced academics instructor. (*Id.* ¶ 149, TR Vol. I at 30.) If enrollment decreases are spread across an entire school system, student-teacher ratios must be maintained, and buildings must continue to operate with the same amount of technology, food service staff, and administrative staff. (*Id.* ¶¶ 145-48, TR Vol. I at 30.)

STANDARD OF REVIEW

This Court reviews motion to dismiss and motion for summary judgment rulings *de novo* with no presumption of correctness. *Woodruff*

by and through Cockrell v. Walker, 542 S.W.3d 486, 494 (Tenn. Ct. App. 2017); *see also Shockley v. Mental Health Coop., Inc.*, 429 S.W.3d 582, 589 (Tenn. Ct. App. 2013). Thus, this Court will make a fresh determination about whether the requirements of the applicable rule have been met for both issues.

In reviewing the grant of Appellee Counties' motion for 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)). Appellee Counties, as the moving parties with the burden of proof at trial, have satisfied their burden at summary judgment by producing "evidence that, if uncontroverted at trial, would entitle [them] to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879,888 (Tenn. 2019).

This Court will also review the denial of State Appellants' motion to dismiss on the issue of whether Appellee Counties have constitutional standing. A Rule 12.02(6) motion tests the legal sufficiency of a complaint, not the strength of the plaintiff's proof. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). The Court must construe the complaint liberally, presuming all factual allegations as true and giving Appellee Counties the benefit of all reasonable inferences. *Moses v. Dirghangi*, 430 S.W.3d 371, 375 (Tenn. Ct. App. 2013).

In addition, "[s]tanding is a judge-made doctrine" that "is used to refuse to determine the merits of a legal controversy irrespective of its correctness where the party advancing it is not properly situated to prosecute the action." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). When a standing argument is "based solely on the pleadings," the Court "must accept the allegations of fact as true, however, 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). Every standing inquiry requires a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013).

ARGUMENT

The Court should affirm the Chancery Court's order granting summary judgment to Appellee Counties on Count I of the Complaint, holding that the ESA Act violates Article XI, Section 9 of the Tennessee Constitution (the "Home Rule Amendment") and enjoining its enforcement.

I. THE CHANCELLOR PROPERLY HELD THAT THE ESA ACT VIOLATES THE HOME RULE AMENDMENT.

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). The balance of power between the State and

local governments shifted dramatically in 1953 with the adoption of Article XI, Section 9 of the Tennessee Constitution—the Home Rule Amendment. The Amendment was drafted by a constitutional convention "that had been 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).

To remedy this concern, the Home Rule Amendment placed several restraints on the exercise of state power. These constitutional restrictions "fundamentally change[d] the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature." *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W. 3d 706, 714 (Tenn. 2001). As the Tennessee Supreme Court acknowledged, "[t]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum permissible extent." *Civil Serv. Merit Bd. of the City of Knoxville v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991).

To that end, the Home Rule Amendment's second paragraph reads in relevant part as follows:

> [A]ny 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. Thus, any act of the General Assembly that (1) is "private or local in form or effect," (2) is "applicable to a particular county or municipality," and (3) affects the county or municipality 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, any such legislation is "absolutely and utterly void." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975); *see also Shelby County v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956) (the "second provision" in Art. XI, § 9 is a "limitation on legislative power").

The Chancellor correctly held that the ESA Act 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. Because the Act met all three criteria for local legislation prohibited by the Home Rule Amendment's second paragraph yet lacked a local approval provision, the Chancellor properly held the Act was "void and of no effect."

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

The Chancellor found that the ESA Act is "local in form and effect" based upon "the particular criteria in the ESA Act, and upon the legislative history detailing the extensive tweaking of the eligibility criteria in order to eliminate certain school districts to satisfy legislators (rather than tweaking to enhance the merits of the Act)." (TR Vol. VIII at 1121.) These conclusions are supported by the law and facts.

1. The ESA Act Is "Local in Form or Effect" On Its Face.

Whether legislation is "local in form or effect" under the Home Rule Amendment is determined by whether the legislation is "potentially applicable" throughout the State. *Farris*, 528 S.W.2d at 552. "The sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application." *Id.* at 551. If legislation is "potentially applicable" throughout the State, it is not local in effect, even if it applies to only one county at the time of passage. *Id.*

This "local in form or effect" test does not rely on self-serving language used by the General Assembly: "The 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. Accordingly, the ESA Act's designation as a "public" rather than "private" act of the legislature is not determinative, nor is the legislative description of the Act as a "pilot program." *See id.* at 554 (enaction as a public act "in and of itself is of no significance" if the act is local in effect).

Without language in an act under which other counties may come within its scope, a court should find such an act "local in form or effect." *Id.* For example, the legislation at issue in *Farris*, Chapter 354 of the Public Acts of 1975, provided for run-off elections in counties with a mayor as head of the county's executive branch. *Id.* at 550. Only Shelby County had a county mayor, and no other county 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.

This test has been applied consistently in subsequent cases. Where the scope of a bill is frozen in time and thus not potentially applicable to other counties without further legislative action, courts have applied the *Farris* test to find that the act is local in form or effect. *See, e.g.*, *Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979) (legislation that exempts two counties from a "permanent, general provision, applicable in nearly ninety counties" is local in form and effect in violation of Art. XI, § 9); *Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 656 (W.D. Tenn. 2012) ("If the class created by a statute is so narrowly designed that only one county can reasonably, rationally, and pragmatically be expected to fall within that class, the statute is void unless there is a provision for local approval.").

In contrast, where an act applied only 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 amendment, the act was held not subject to the Home Rule Amendment. *See, e.g.*, *Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978) (legislation was not local in effect where it "presently applies to two populous counties" and "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); *Burson*, 816 S.W.2d at 729-30 (legislation applicable to counties with a minimum population of 300,000 was not local in form or effect, even though it applied at passage to only three counties, because other counties could grow into compliance); *Cty. of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996) (statute that applied upon passage only to Shelby County but "is potentially applicable to numerous counties" based on population bracket was not subject to Art. XI, § 9).

As the Chancellor concluded below, it is "undisputed" that the ESA Act "is only applicable to schools in Davidson and Shelby Counties." (TR Vol. VIII at 1100.) 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 2018 and schools on the bottom 10% list in 2017. By its selective use of numbers of schools in prior years, the ESA Act excludes every school district except those in Appellee Counties. The Act will never apply to another school district absent future legislative action. And the exception to the Act's severability clause ensures that no court can ever apply the Act in any other county. Tenn. Code Ann. § 49-6-2611(c). In the words of Sen. Hensley, confirmed by Sen. Gresham, "no other LEA will be able to grow into the program over the years."

2. The Legislative History Confirms That the ESA Act Is "Local in Form or Effect."

The Chancellor found that the Act's legislative history further "confirms that the Act was intended, and specifically designed, to apply to MNPS and SCS, and only MNPS and SCS." (TR Vol. VIII at 1121.) The Court held the legislative history, while not dispositive, was "relevant

and appropriate for consideration in the context of this constitutional challenge." *Id.* at 1101; *see also Farris*, 528 S.W.2d at 555 (examination of legislative proceedings confirmed that challenged statute would apply in "Shelby County alone"); *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 659 (legislative history "firmly establishe[d]" that challenged statute was "designed to apply only to Shelby County").

In passing the ESA Act, legislators explicitly intended to limit the Act's effect to two counties, thereby protecting the State's other ninety-three counties. This candor was born of necessity, as they could not otherwise garner the constitutionally required fifty votes to pass the Act in the House of Representatives.

When the substantive bill was first introduced, it applied to five counties and the ASD, with potential applicability to other counties. By the time it reached the House Finance, Ways & Means Committee, then-Deputy House Speaker Hill said the bill was limited to four counties and "will stay in those four counties unless the legislature were to ever choose in the future to revisit the issue."

When the bill reached the House floor for third and final reading, Rep. Zachary stated he could not vote for the bill "unless Knox County was taken out" and then provided the bill's fiftieth vote after then-House Speaker Casada assured him Knox County would be excluded. Then-Deputy House Speaker Hill confirmed the House majority's intent to unilaterally impose the ESA Act on Appellee Counties while excluding every other school district, stating: "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."

When the conference committee report reconciling the House and Senate versions of the bill came back to the two chambers, further statements confirmed the legislature's intent to make the ESA Act local in effect in order to win votes for final passage. Rep. Hazelwood explained that she "committed to vote for ESAs if the [sic] Hamilton County was excluded from the program." Bill sponsor and Senate Education Committee Chair Gresham confirmed that no other LEA would be able to grow into the program over the years, noting: "That's the intent of the General Assembly today."

Appellants assert that courts should rely only on the legislative intent stated in the Act, which is "to establish a pilot program" targeting "the lowest performing schools." Tenn. Code Ann. § 49-6-2611(a). Even crediting this language from the Act, the bill's purported policy goals are not part of the Home Rule Amendment analysis. Rather, the relevant question under *Farris* is whether the General Assembly intended for the Act to have a local effect. On that point, the Act's legislative history is undisputed. As the Chancellor correctly concluded, "[t]he entire process of the General Assembly, including the amendments and 'horse trading' associated with changing eligibility criteria to satisfy legislators who wanted their counties excluded, results in an act that, in form and effect, is local." (TR Vol. VIII at 1121.)

B. The ESA Act Is "Applicable" to Appellee Counties Under the Home Rule Amendment.

The Chancellor found that the ESA Act satisfied the Home Rule Amendment's second criterion because the Act is "applicable" to Appellee Counties. Shifting the cost of ESAs onto Appellee Counties through the "ESA Mandate," standing alone, satisfies the test. More broadly, the Chancellor rejected the argument that the Act applies only to LEAs. The Chancellor concluded that county school systems (which are a type of LEA[15]) are not "separate and distinct" from the local governments that fund them. (TR Vol. VIII at 1121-22.) Rather, as the Chancellor recognized, Appellee Counties and their "companion" school boards share a mutual, long-recognized responsibility—a "partnership"—to provide local public education, and "one cannot exist without the other." (*Id.* at 1113.) The facts and law show that the Chancellor properly concluded that the Act is applicable to both Appellee Counties under the Home Rule Amendment.

1. The ESA Act Applies Directly and Adversely to Appellee Counties' Legislative and Executive Functions.

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.

[15] State law defines "LEA" to include a "county school system," "public school system," and "metropolitan school system." Tenn. Code Ann. § 49-1-103(2). MNPS is a metropolitan school system, and SCS is a county school system. A "local board of education" is defined separately and "means the board of education that manages and controls the respective local public school system." *Id.* § 49-1-103(1).

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.").

Section 49-6-2605 of the ESA Act 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 provides." This requirement, which shifts the cost of ESAs from the State to Appellee Counties, directly and profoundly affects Appellee Counties' statutory obligation to fund their school districts.[16] Because participating students must be counted as enrolled in the county public school system for funding purposes, despite no longer attending public schools, both Counties are required by law to appropriate their full local per-pupil spending for each of these students. This appropriation must include not just the local share of BEP funding[17] but also, due to the State's

[16] Bah Appellants' reference to this provision as a "purely ministerial task and nothing more" ignores these significant financial repercussions. (Br. at 25.)

[17] *See* Tenn. Code Ann. § 49-3-356(a) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."); *id.* § 49-3-307(a)(11) ("The formula shall be student-based such that each student entering or exiting an LEA shall impact generated funding."); *id.* § 49-3-307(a)(1)(B) (describing BEP calculation as based on "enrollment").

maintenance-of-effort statute, the additional per-pupil funding that Appellee Counties provide above the BEP requirements.[18]

If the ESA Act were implemented now, it would impose an "ESA Mandate" of $9,277 on Davidson County and $6,414 on Shelby County for each participating student. The same "ESA Mandate" would apply to Appellee Counties for every participating student leaving an ASD school. *Id.* § 49-1-614(d)(1) (ASD shall receive an "amount equal to the per student state and local funds" from the LEA in which ASD schools are located).[19] If these same students left their school systems without an ESA, Appellee Counties would be free of this infringement of their sovereign rights, like the other 93 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. Appellants' argument that the ESA Act requires Appellee Counties "to do

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[18] *See id.* § 49-3-314 (under the State's "maintenance of effort" statute, local legislative bodies must appropriate the same level of per-pupil local funding notwithstanding an increase in state funding in a particular year).

[19] Greater Praise Appellants' brief asserts that even if the Chancellor did not err in applying the Home Rule Amendment to the ESA Act, the injunction is overbroad because Appellee Counties have no authority over the ASD. (Br. at 54-55, 57.) This argument ignores the financial burden on Appellee Counties to fund ASD schools as well. In any event, failure to satisfy the Home Rule Amendment renders the Act "absolutely and utterly void." *Farris*, 528 S.W.2d at 551.

nothing and pay nothing" is demonstrably wrong by hundreds of millions of dollars.[20] (Bah Appellants' Br. at 26.)

Relatedly, Greater Praise Appellants claim that the ESA Act creates a "windfall" for MNPS and SCS because the school systems retain local funding for participating students leaving the system. (Br. at 59.) This argument ignores who pays for the windfall. The only reason the *school systems* might be "better off financially" is because of the ESA Mandate on *Appellee Counties*. The General Assembly shifted the ESA program's financial burden from the State to Appellee Counties. This legislative strategy ensured a direct and palpable injury to Appellee Counties.

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,

[20] Nor does the Home Rule Amendment require that a challenged statute force a local jurisdiction "to do something." The test is whether the statute is "applicable" to Davidson and Shelby counties, not whether it requires them to do a particular thing. In *Lawler*, the Supreme 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." 417 S.W.2d at 553. The Court reached this conclusion even though the State, not the county, paid the general sessions judge's additional salary for performing state court duties under the act. *Id.* at 550.

including education, or to lower their tax rates. Thus, the Act is "applicable" to Appellee Counties.

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

The ESA Act undisputedly is also "applicable" to 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 as the Act is currently written. It requires the districts to continue to count participating students as enrolled in their schools. It withholds state BEP funding from the districts to reimburse the State for money the State deposits into participating students' ESAs. 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. 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.[21]

Appellants argue that the ESA Act's effect on the school districts is irrelevant in determining whether the Act is applicable to Appellee

[21] *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").

Counties. This overly narrow view of the relationship between school districts and counties ignores a century of legal precedent.

While courts have long held that providing education is a "State function," a significant part of that function has been delegated to local governments, such that counties are in "a partnership" with the State "to provide adequate educational opportunities in Tennessee." *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); *see also 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.") (emphasis added).

The local board of education's role in this partnership 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 law 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 also 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 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.[22]

State law also assigns critical roles to other county officials in fulfilling the county's obligation to provide a public education system. The county legislative body adopts the school district's budget, provides necessary funds for the adopted budget, oversees the school board's expenditure of funds, submits school-construction bond propositions to voters, and levies 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.")[23] The county mayor must approve the bond of the county director of schools and make quarterly settlements with the county trustee and board of education. *Id.* § 49-2-102. The county trustee has certain responsibilities regarding the control of public school funds. *Id.* § 49-2-103. And the county legislative body establishes the

[22] Furthermore, MNPS is a school district explicitly acting "on behalf of" the Metropolitan Government. *See* Metropolitan Charter § 9.03, TR Vol. VI at 806 (giving the 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*") (emphasis added).

[23] County legislative bodies not only control funding but also "exert considerable influence over how school boards spend their money." (Report of the Tenn. Advisory Comm'n on Intergovernmental Relations: Tenn. Sch. Syst. Budgets Authority & Accountability for Funding Education & Operating Schools at 1-2 (Jan. 2015) ("TACIR Report").)

school districts from which board of education members are elected. *Id.* § 49-2-111(e).

The separation of authority among these various officials does not change the fundamental fact that they all act on behalf of the county. As the Tennessee Supreme 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). While the county board of education controls operational aspects of education policy for the county, the county legislative body appropriates the funds needed to carry out that policy. *Id.* at 221-22. And the legislative body "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 223. In sum, "Tennessee law acknowledges that educating children is a collaboration between administrative and financial bodies." *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 645.

Given this collaborative system, county school districts cannot be carved out from the rest of county government, as Appellants suggest. The Chancellor correctly concluded that "school systems (which are the same as LEAs) cannot be viewed as separate and distinct from the local governments that fund them." (TR Vol. VIII at 1121-22.) The ESA Act's effect on school districts is equally attributable to Appellee Counties under the Home Rule Amendment.

3. The Chancellor Properly Rejected Appellants' Efforts to Escape Home Rule Amendment Scrutiny By Elevating Form Over Substance.

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). Because of this critical disjunctive language, the Tennessee Supreme Court explained in *Farris* that "[t]he sole constitutional test must be whether the legislative enactment, *irrespective of its form*, *is local in effect and application*." 528 S.W.2d at 551 (emphasis added). Sole reliance on the legislation's form, such as "the designation, description, or nomenclature employed by the Legislature," would "emasculate the purpose of the amendment." *Id.*

Appellants claim that the Home Rule Amendment does not apply because the Act on its face applies to LEAs and not counties. This argument ignores *Farris*'s admonition and would require that legislation explicitly identify counties or municipalities to fall within the Home Rule Amendment. The Chancellor properly declined this invitation to elevate form over substance, holding that the Act was local in "effect and application" despite not mentioning Appellee Counties by name.

Appellants base their argument on holdings that the Home Rule Amendment does not apply to sanitary districts and special school districts—holdings the Chancellor correctly deemed irrelevant. (TR Vol. VIII at 1117 (distinguishing *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, special school districts are self-taxing and do not rely on county

or municipal governments for support or oversight.[24] Moreover, the Tennessee Attorney General has opined that legislation creating a special school district can affect counties in violation of the Home Rule Amendment where the act transfers county-owned property from only two counties. *See* Tenn. Op. Att'y Gen. 02-020, at *5 (distinguishing *Perritt*). 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 under the Home Rule Amendment says nothing about the relationship between county governments and county school systems.

Appellants' reliance on *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706 (Tenn. 2001), is also misplaced. Appellee Counties' claim is based on the Home Rule Amendment's second paragraph, dealing with local legislation. In contrast, *Southern Constructors* interpreted unrelated language in the Amendment that allows counties and municipalities to adopt "home rule."[25] 58 S.W.3d at 714-16. The opinion held that because county school boards lack "home rule" authority, Dillon's Rule (a canon of statutory

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[24] "*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." (TACIR Report at 4) (emphasis added).

[25] "Home rule" does not appear in the Home Rule Amendment until its third paragraph, Tenn. Const., art. XI, § 9, and deals with the authority of a city to adopt and change its own charter by local referendum. *See* Municipal Technical Advisory Serv., MTAS-333. This litigation is based on the Amendment's second paragraph, which addresses "local" legislation.

construction) applied in construing a school board's authority to invoke an arbitration clause in a construction contract. *Id.* at 714-15. *Southern Constructors* did not address the constitutional mandate at issue in this case. *Southern Constructors* does, however, support Appellees' position that county school boards are part of county government. *See id.* at 715 (county boards of education are "in essence *part of that local government*") (emphasis added). Otherwise, the case is irrelevant.[26]

Even if school districts were not part of county government, the ESA Act would still be "applicable" to Appellee Counties and therefore subject to Home Rule Amendment scrutiny. In *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967), the Supreme Court held a public act that applied to general sessions courts, not county government, invalid under the Home Rule Amendment because the act was "in effect applicable to Gibson County alone." *Id.* at 553.

The Supreme Court also addressed applicability to a particular county in analyzing a Home Rule Amendment challenge to an act creating a public hospital authority. *See Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979). In holding that the act at issue did not violate the Home Rule Amendment as it applied to the City of Chattanooga, the court noted "that the City is

[26] Bah Appellants assert that because the Metropolitan Government and Shelby County charters do not give the counties control over 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.

not *substantially affected* by the 1977 Act and hence their approval was not necessary to validate the Act." *Id.* at 324-25, 328 (emphasis added). In contrast, the court noted that "several sections [of the act] *affect the County*, such as section nineteen, which declared the Hospital Authority to be a 'public instrumentality acting on behalf of the County,'" and concluded that "there could be an obvious basis for requiring the approval of the Hamilton County Council pursuant to Article XI, § 9, para. 2." *Id.* (emphasis added). This reasoning applies equally here.[27]

Appellants have not identified a single case rejecting a Home Rule Amendment challenge because the legislation did not "on its face" address a county or municipality. (Bah Appellants' Br. at 24; State Appellants' Br. at 18.) They likewise cite no authority to justify their strained definition of the term "applicable" in the Amendment's language. The legislature cannot make an end run around the Home Rule Amendment's plain meaning and intent by avoiding the word "county."

Ultimately, Appellants' attempt to drive a wedge between Appellee Counties and their school districts is irrelevant. The Act inflicts financial burdens on both, interferes in their operations, and infringes on their local government sovereignty, the very type of harm the Home Rule

[27] Bah Appellants attempt to distinguish *Chattanooga-Hamilton County Hospital Authority*, *Lawler* and other Home Rule Amendment cases on grounds that the opinions involve "expanding the jurisdiction of a county court, modifying a county's election rules, or creating a new county government entity." (Bah Appellants' Br. at 31-32.) These are contextual differences in the cases, not differences in the scope of the Amendment. Nothing in the Amendment or the case law limits the Amendment's application only to such instances.

Amendment was adopted to prevent. When the General Assembly enacts legislation singling out two counties and affecting them in their governmental or proprietary capacities, the injury is immediate and significant. The ESA Act's infringement on Appellee Counties existed from the day the Act was passed until it was enjoined.

4. The Home Rule Amendment Applies to Statutes That Affect Two Counties.

The ESA Act indisputably will only ever apply in Appellee Counties absent further action by the General Assembly.

Greater Praise Appellants assert that "applicable to a particular county or municipality" necessarily means only one county. The Chancellor rejected this argument, instead following the Tennessee Supreme Court's ruling in *Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979),[28] which applied the Amendment to an act that was applicable in two counties. (TR Vol. VIII at 1122-23.)

In *Leech*, the Tennessee Supreme 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. The

[28] A 1992 Attorney General's Opinion called *Leech* "[o]ne of the most instructive cases on the treatment of population brackets in a general law." Tenn. Op. Att'y Gen. 92-38, at *3. Former Attorney General Charles Burson identified *Leech* as one of several "important opinions on new statutory schemes" written by former Supreme Court Justice William J. Harbison that "provided needed guidance on and clarification of the law." Charles W. Burson, "William J. Harbison," 47 Vand. L. Rev. 945, 945-46 (May 1994).

exceptions 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.[29]

In subsequent Home Rule Amendment challenges to statutes applying in two or three counties, the Supreme Court did not dismiss the claims as barred on the basis that "a particular county" meant only one. Rather, the Court applied the "potentially applicable" standard from *Farris* to determine if the legislation could be more broadly applied in the future. Where the legislation had more generous population brackets than those found in *Leech*, it survived Home Rule Amendment scrutiny. *See, e.g.*, *Burson*, 816 S.W.2d at 730 (upholding statute applicable only to three counties not because it applied to more than one county but because it was potentially applicable to any county with a minimum population of 300,000); *Bozeman*, 571 S.W.2d at 280, 282 (upholding statute applicable only to two counties not because it applied to more than one county but because it was potentially applicable to any county with population between 275,000 and 600,000); *see also Doyle*, 471 S.W.2d at 374 (upholding statute applicable only to Davidson County because it was potentially applicable to any county adopting metropolitan form of government).

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[29] *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). 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.

The ESA Act, of course, does not rely on population brackets, indisputably applies only in Appellee Counties, and will never apply anywhere else. Contrary to Greater Praise Appellants' arguments, nothing in *Burson*, *Bozeman*, or *Doyle* negates *Leech*'s holding that an act applying to two counties is subject to the Home Rule Amendment. *See also* Tenn. Op. Att'y Gen. 02-020, 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).

Greater Praise Appellants' reliance on a letter from William E. Miller (Washington County), a delegate to the 1953 Tennessee Constitutional Convention, to Lewis S. Pope (Sumner County), Chairman of the Convention's Editing Committee, purporting to confirm that "a particular county" means only one county, fails to salvage Appellants' argument. (Greater Praise App. at 010-015.) There is no evidence that the letter is indicative of the convention's intent—it is not part of the formal Convention proceedings or recorded in the Convention's Journal and Proceedings.

More importantly, subsequent Convention proceedings contradict Greater Praise Appellants' position. Five days after the date of Delegate Miller's private letter, Delegate Pope stated on the floor of the convention that a bill applying to two, three, or four local jurisdictions, or to every municipality in a county, would be a local bill requiring a referendum under the Home Rule Amendment's "applicable to a particular county or municipality" language. (*J. & Proceedings: Constitutional Convention, State of Tenn.* (1953) at 1121, Appellees' App. at 03, filed contemporaneously herewith.):

> 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.

In the discussion, Delegate Harry T. Burn (Roane County) is testing whether a bill could avoid Home Rule Amendment scrutiny by adding extra cities or counties. Delegate Pope repeatedly responds no. Delegate Pope's statements show there was no intent, as Greater Praise Appellants argue, to limit the Home Rule Amendment's application to a single local jurisdiction. The constitutional language is sufficiently broad

to support the Supreme Courts' recognition in *Leech* and its progeny that a local bill can encompass more than one county.[30]

C. The ESA Act Affects Appellee Counties in Their "Governmental Capacity" Under the Home Rule Amendment.

The Home Rule Amendment's third element requires that the challenged legislation be applicable to a county either in its "governmental" or "proprietary" capacity. The Chancellor correctly noted that the State made education a "governmental function" of counties and municipalities by sharing the responsibility for public schooling with them. Having enlisted local government in this role, the Chancellor concluded that Appellants "cannot colorably argue that Metro and Shelby County Government are not engaging in government functions." (TR Vol. VIII at 1123.)

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

[30] Once the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011); *Barger v Brock*, 535 S.W.2d 337, 341 (Tenn. 1976).

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

Tennessee courts have used "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).

Therefore, when the State enlisted counties as partners in local education, the counties' participation became a governmental function. *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.").

Bah Appellants' reliance on *State ex rel. Scandlyn v. Trotter*, 281 S.W. 925 (Tenn. 1926), and related cases construing the state's equal protection clause, not the Home Rule Amendment, does not yield a different conclusion.

Before the Home Rule Amendment's adoption, it was "settled law" that "special legislation affecting particular counties or municipalities in

their governmental or political capacities" could be enacted without violating the equal protection clause in Article XI, Section 8 of the Tennessee Constitution. *Town of McMinnville v. Curtis*, 192 S.W.2d 998, 999 (Tenn. 1946). Courts applied this "settled law" if the local bill's primary purpose was governmental or political. But if the primary purpose was to benefit private citizens, the bill would be subject to equal protection scrutiny, even if it also affected the jurisdiction's governmental capacity. *See id.*; *see also Sandford v. Pearson*, 231 S.W.2d 336, 338 (Tenn. 1950) ("While it may so affect the county, as most statutes limited to a particular county do, nevertheless, if it primarily affects the rights of the citizens, without affecting others in like condition elsewhere in the state, it is invalid" under the equal protection clause) (citation omitted). *Trotter* applied this pre-Home Rule Amendment doctrine in finding that the primary purpose of an act requiring Knox County to supply free school textbooks was to provide a private benefit. As a result, the act was subject to equal protection challenge, despite also affecting the county's governmental functions. *Id.* at 926.

The Home Rule Amendment, however, incorporates no similar balancing test. Nothing in the Amendment limits its application only to local bills whose primary or predominant purpose is governmental or proprietary. Rather, the Amendment applies to any bill with a local effect. On that point, the *Trotter* decision acknowledged that the free textbook program affected governmental functions "in a limited sense." *Id.* at 927. If providing free school textbooks affected Knox County in "a limited sense," then the ESA Act, which forces Appellee Counties to fund private schooling, incur new federal program and assessment costs,

disrupt public school operations, and appropriate millions of additional dollars according to a school-funding formula applicable only to them, affects Appellee Counties substantially more so.[31] But whether an act affects private individuals less or more than it harms the local government has no bearing on the Home Rule Amendment's application. Under the Home Rule Amendment's plain terms, if an act affects a county in any capacity, then the Home Rule Amendment is at play. Tenn. Const., art. XI, § 9 ("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 . . . .") (emphasis added).

Appellants also assert that the Home Rule Amendment does not apply to the ESA Act because education is a plenary power of the State. (State Appellants' Br. at 21-23.) Once the General Assembly enlists local governments in a governmental function, however, the Home Rule Amendment applies. For example, despite the State having plenary authority over the structure and jurisdiction of lower courts, the Supreme Court held such legislation subject to the Home Rule Amendment. *See Lawler*, 417 S.W.2d at 553 (striking down as violating the Home Rule Amendment an act that expanded the state court jurisdiction of general sessions court only in Gibson County); *Durham v. Dismukes*, 333 S.W.2d 935, 938 (Tenn. 1960) (holding that compliance with the Home Rule Amendment is required even though a general sessions court has

[31] There would have been no need to amend the ESA Act "to protect LEAs," as stated by then-Deputy House Speaker Hill, if the Act did not have a significant governmental effect on Appellee Counties.

jurisdiction over "many things which pertain to State matters" and has "badges of a State officer").

The cases on which State Appellants 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 may abolish state courts that exercise only state functions without offending the Home Rule Amendment.[32] The General Assembly similarly could require the State to operate and fund local schools exclusively without offending the Home Rule 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 Home Rule Amendment applies.

No Tennessee court has held that education-related legislation is exempt from the Home Rule Amendment. To the contrary, this Court 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 of the legislature's plenary authority over education. *See McWherter*, 936 S.W.2d at 935-36; *see also Bd. of Educ. of Shelby County*, 911 F. Supp. 2d at 660 (striking down legislation under the Home Rule Amendment that allowed creation of municipal school districts only in Shelby County).

[32] The Chancellor properly distinguished *City of Knoxville ex rel. Roach* as "specific to the State's authority over the courts, and particularly courts with criminal jurisdiction." (TR Vol. VIII at 1124.)

More generally, multiple school systems successfully asserted constitutional challenges against the State arising from the statutory scheme for funding K-12 public schools in *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*"), notwithstanding education being a "state function." The Supreme Court acknowledged the General Assembly's constitutional obligation to maintain and support a system of free public schools. *Id.* at 141.[33] Nonetheless, the Court rejected the State's arguments that local school systems cannot challenge the State's education-policy decisions, explaining:

> [I]t is our 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. As the Kentucky Supreme Court observed recently in response to the same argument, "[t]o avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty."

Small Schools I, 851 S.W.2d at148 (citations omitted).

In summary, the Home Rule Amendment issue in this appeal is not resolved simply by saying that a statute involves a plenary power of the State. And for the reasons stated above, the Chancellor correctly held that the State violated the Home Rule Amendment when it enacted the ESA Act without including a provision for local approval because the Act

[33] The Tennessee Constitution's Education Clause, Art. XI, § 12, requires that the General Assembly "shall provide for the maintenance, support and eligibility standards of a system of free public schools."

is local in form and effect and applicable to only two counties in their governmental capacity. (TR Vol. VIII at 1124.)

II. THE CHANCELLOR PROPERLY HELD THAT 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).

As the Chancellor noted below, there is substantial overlap between her rulings that Appellee Counties had standing under the Home Rule Amendment and that the ESA Act satisfies the Amendment's "applicable to a particular county" requirement. State Appellants disagree, contending that the Complaint does not assert a distinct and palpable injury to Appellee Counties. This argument is based on three inaccurate assumptions: (1) the only "distinct and palpable injury" caused by the ESA Act is financial; (2) the Act's financial burden falls exclusively on the county school systems (the LEAs); and (3) the LEAs are separate from Appellee Counties. (State Appellants' Br. at 13-17.) Greater Praise Appellants argue there is no financial injury to Appellee Counties and thus no standing. (Greater Praise Appellants' Br. at 58-60.) These arguments were properly rejected below.

A. The ESA Act Inflicts a Distinct and Palpable Injury On Appellee Counties.

The Home Rule Amendment protects Appellee Counties' sovereign right to act in their governmental and proprietary capacities without improper legislative interference. Legislative encroachment on Appellee Counties' sovereignty constitutes a distinct and palpable injury. Indeed, "[t]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum permissible extent." *Burson*, 816 S.W.2d at 729.

State Appellants assert that Appellee Counties have no constitutional standing to challenge a state law that interferes in their school districts' operation, imposes new costs, and prevents them from using state and local education funding in the same way as every other county in the State. This assertion is contrary to the letter and spirit of the Home Rule Amendment. Appellee Counties have a right and duty to defend their inherent sovereignty. This distinct and palpable injury to Metropolitan Government and Shelby County Government could only be remedied through court action. Accordingly, Appellee Counties have constitutional standing to challenge this affront to their rights guaranteed by the Home Rule Amendment.

State law places significant responsibilities on Appellee Counties for monitoring and funding their school systems—"governmental" responsibilities that the ESA Act impairs. State law requires all counties to act in their governmental capacities in funding and participating in their county systems of education. *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."). Counties serve in "partnership" with the State "to provide adequate educational opportunities in Tennessee," *Ayers*, 756 S.W.2d at 221.

In *Board of Education of Shelby County v. Memphis City Board of Education*, the federal court in the Western District of Tennessee addressed Shelby County's standing to challenge the constitutionality of a state law directed at its school district.[34] The court held that Shelby County had standing based on the intertwined nature of local boards of education and local governments. 911 F. Supp. 2d at 642-46. While noting that local school systems and county governments "have separate origins and functions," the court held that "[t]he closeness between the Commissioners and Shelby County school children is 'a matter of degree *rather than of legal principle*. Although the responsibilities of boards of education and county commissions are separate, Tennessee law acknowledges that educating children is a *collaboration between administrative and financial bodies*." *Id.* at 645 (quoting *Akron Bd. of Educ. v. State Bd. of Educ. of Ohio*, 490 F.2d 1285, 1289 (6th Cir. 1974)) (emphasis added); *see also Putnam Cty. Educ. Ass'n v. Putnam Cty. Comm'n*, No. M2003-03031-COA-R3-CV, 2005 WL 1812624, at *17 (Tenn. Ct. App. Aug. 1, 2005) ("[I]nteraction between the two entities is a necessity.").

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[34] Federal standing requirements are relevant here because "[t]he justiciability doctrines recognized by Tennessee courts mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 203 (Tenn. 2009).

The responsibility for operating a local education system does not fall exclusively on the local board of education, and the county does significantly more than merely adopt a budget as State Appellants suggest. (Br. at 10, 17.) In addition to adopting the school district's budget, the county legislative body provides necessary funds for the adopted budget, oversees the school board's expenditure of funds, submits school-construction bond propositions to voters, levies taxes for schools, and establish school districts from which the board of education members are elected. Tenn. Code Ann. §§ 49-2-101, -111(3); *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.").[35] The county mayor must approve the bond of the county director of schools and make quarterly settlements with the county trustee and board of education. *Id.* § 49-2-102. The county trustee also has certain responsibilities concerning control of public school funds. *Id.* § 49-2-103.

Moreover, the ESA Act imposes a sizeable "ESA Mandate" on Appellee Counties for every student who leaves their school systems for the ESA program. By requiring ESA students to be counted in MNPS and SCS school enrollments, Appellee Counties must provide funding to their school districts for students who no longer attend their public schools. Accordingly, any argument that the financial impact of the ESA Act is

[35] County legislative bodies control funding and "exert considerable influence over how school boards spend their money." (TACIR Report at 1-2.)

limited to the county school systems is baseless. The ESA Act could not inflict a more distinct and palpable injury on Appellee Counties' exercise of their governmental capacities than by compelling them, without local approval, to raise and spend tax dollars to backfill a state funding loss being used to pay for private schooling.

Greater Praise Appellants argue that the ESA Act constitutes a windfall for MNPS and SCS, thus removing the injury-in-fact requirement for Appellee Counties' standing. The argument is not grounded in fact or law. Even if the Act makes the *school districts* whole, it does so at *Appellee Counties'* expense. Thus, the Act still distinctly and palpably injures Appellee Counties. Furthermore, Greater Praise Appellants ignore the uncompensated additional costs the Act imposes 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. Nor do they consider the disruption to the school districts' facilities and staffing from the loss of participating students.[36]

The three-year "school improvement fund" program in the Act does not offset the financial damage the ESA program causes. Tenn. Code Ann. § 49-6-2605(b)(2)(A). Grants to the *school districts* do not relieve *Appellee Counties* of their new obligation under the Act to pay for ESA students who no longer attend their public schools. Furthermore, even if fully funded, the grant program only lasts for the first three years of the

[36] And, of course, they ignore encroachment on Appellee Counties' sovereignty, an injury distinct from the financial harm the Counties will suffer.

ESA program. *Id.* Moreover, grant funds can only "be used for school improvement." *Id.* Thus, while all counties in the State have great latitude in their use of BEP dollars, the "school improvement" dollars that Appellee Counties might receive will be restricted in use and cannot be treated as general operating funds. Finally, the ESA grant program only provides funds for students who attended an MNPS or SCS 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 SCS will receive no grant funds for students who enter kindergarten or move into Davidson or Shelby County and elect to use ESA funds.

B. MNPS Is By Charter Part of the Metropolitan Government.

State law defines "LEA" to include not only "any county school system" but also "any other local public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2). Consistent with the Home Rule Amendment's language, this Court should focus on the "particular" counties and school systems the ESA Act affects, not on school systems generally. That focus shows that, as a matter of state and local law, MNPS is *part of* its county government and not a separate legal entity.

The Metropolitan Government Charter Act, Tenn. Code Ann. §§ 7-1-101, *et seq.*, 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). 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 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. The Metropolitan Charter consolidated the school system with the government itself, which it was free to do under its 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. This provides an additional basis for the Metropolitan Government's standing in this case.

CONCLUSION

The ESA Act is local in form or effect because it will never apply beyond Appellee Counties. It affects Appellee Counties in their governmental capacities by forcing them to participate in a private-school ESA program, applying a school-funding formula not used in any other city or county to backfill the funding gap the program causes, and imposing new and costly state assessment and federal program compliance obligations. The Act also affects Appellee Counties in precisely the way the Home Rule Amendment guards against, depriving them of local sovereignty and inflicting a direct and palpable injury. Appellee Counties accordingly have standing to challenge the Act's constitutionality. Because the Act contains no local approval option, the Chancellor properly held it unconstitutional under the Home Rule Amendment. This Court should affirm.