**IN THE COURT OF APPEALS OF TENNESSEE**
**AT NASHVILLE**

**No. M2020-00683-R9-CV**

**THE METROPOLITAN GOVERNMENT OF NASHVILLE**

**AND DAVIDSON COUNTY, *et al.*,**

**Plaintiffs-Appellees,**

**v.**

**TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,**

**Defendants-Appellants,**

**NATU BAH, *et al.*,**

**Intervenor-Defendants.**

**ON APPLICATION FOR PERMISSION TO APPEAL UNDER TENN. R. APP. P. 9 FROM THE ORDER OF THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

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# PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE AND INTERVENOR-DEFENDANTS' APPLICATIONS FOR PERMISSION TO APPEAL

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## PRELIMINARY STATEMENT

The Court should deny the application for permission to appeal filed by the State Defendants[1] and Intervenor-Defendants[2] because they cannot establish irreparable injury, the matters addressed in the trial court's order can be more efficiently resolved after final judgment, and there is no inconsistency in applicable law that this Court needs to resolve.

The trial court properly held, based on clear precedent, that the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601, *et seq.* ("ESA Act"), is unconstitutional under the Tennessee Constitution's Home Rule Amendment and enjoined its implementation. The Act requires that the ESA program—a voucher program limited to Davidson and Shelby counties that uses public school funding to pay for private school education—enroll participating students "no later than the 2021-2022 school year," which does not begin for another fourteen months. Tenn. Code Ann. § 49-6-2604(b) (emphasis added). Therefore, the trial court's order does not frustrate the General Assembly's intent or otherwise irreparably harm the State Defendants' interests.

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[1] The "State Defendants" include the Tennessee Department of Education ("TDOE"), Education Commissioner Penny Schwinn, and Governor Bill Lee.

[2] There are two groups of Intervenor-Defendants: Natu Bah, Builguissa Diallo, Bria Davis, Star-Mandolyn Brumfield (collectively, the "Bah Intervenor-Defendants") and Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. (collectively "Greater Praise Intervenor-Defendants").

The Intervenor-Defendants' claims of irreparable harm from the order are also unavailing. Any claims that the Intervenor-Defendants' children will be forced to attend "failing schools" ignores the many alternatives available to those children to attend other public schools in their districts. In addition, Intervenor-Defendants have not yet been approved to participate in the ESA program, so any harm they claim is speculative, not probable. Insofar as Intervenor-Defendant Greater Praise Christian Academy and similar private schools are expending significant resources to take advantage of this new pool of government funding, their actions are based on limited data about the number of students who might participate in the ESA program and choose to attend their schools and reflect poor planning, not irreparable harm resulting from the order.

Finally, reversal of the trial court's order will not "result in a net reduction in the duration and expense of the litigation" as provided in Tennessee Rule of Appellate Procedure 9(a)(3). To the contrary, upon reversal, the case would be remanded for further proceedings on the remaining Equal Protection and Education Clause claims currently under advisement in the trial court and would likely come before this Court again.

For these reasons, described in more detail to follow, the Court should deny the applications for permission to file an interlocutory appeal.

## STATEMENT OF FACTS AND PROCEEDINGS BELOW

The ESA Act imposes an "education savings account" program on only two counties, Davidson and Shelby, without their consent. In May

2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, with an effective date of May 24, 2019. 2019 Tenn. Pub. Acts ch. 506, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* Under the Act, a "participating" student will receive an education savings account to pay for tuition, fees, and other education-related expenses at participating private schools. Tenn. Code Ann. §§ 49-6-2603(a)(4), -2607(a). A participating student's account is funded by diverting funds from the student's public-school district in an amount equal to the district's per-pupil state and local funding required by the state's Basic Education Program ("BEP") or the combined (state and local) statewide average of BEP funding, whichever is lower. Tenn. Code Ann. § 49-6-2605(a).

To qualify as a "participating student," a student must be "eligible" under the ESA Act. An "eligible student" must be in a family with an annual household income not exceeding twice the federal income eligibility guidelines for free lunch and meet the following geographic restrictions:

> (i) is zoned to attend a school in an LEA,[3] excluding the achievement school district (ASD), with ten (10) or more schools:
>
> (*a*) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602;

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

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

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

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

Tenn. Code Ann. § 49-6-2602(3)(C).[4]

The "priority" and "bottom ten percent" schools referenced in Section 49-6-2602(3)(C)(i) are defined under Tennessee law. With respect to priority schools, 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, focus or reward status*." Tenn. Code Ann. § 49-1-602(b)(1) (emphasis added). "Schools identified as *priority schools* 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) (emphasis added).

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

With respect to bottom ten percent schools, "[b]y 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) (emphasis added).

The "achievement school district (ASD)" referenced in Section 49-6-2602(3)(C)(ii) is a special school district administered by the TDOE. More specifically, state law defines the ASD as "an organizational unit of the 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." Tenn. Code Ann. § 49-1-614(a). Schools assigned to the ASD after June 1, 2017, are limited to "priority schools." *Id.* § 49-1-614(c)(1).

The only LEAs that meet all of the specifications in Section 49-6-2602(3)(C)(i) for an "eligible student" are Metropolitan Nashville Public Schools ("MNPS") in Davidson County and Shelby County Schools in Shelby County. *Metro. Gov't of Nashville & Davidson County v. TDOE, et al.*, No. 20-0143-II, slip op. at 4 (May 4, 2020) (hereinafter, "slip op."), Pls.' App. at APP01-32. As the trial court recognized:

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

> deterioration of systems in other parts of the state, will not change the fact that the ESA Act only applies to, and will continue to apply to, MNPS and SCS.

(*Id.* at 24-25, Pls.' App. at APP24-25.)

Plaintiffs, the Metropolitan Government of Nashville and Davidson County, Shelby County Government, and the Metropolitan Nashville Board of Public Education, filed a complaint in Davidson County Chancery Court on February 6, 2020, challenging the constitutionality of the ESA Act under three provisions of the Tennessee Constitution: the "Home Rule Amendment," Article XI, Section 9 (Count I); the Equal Protection Clauses, Article I, Section 8, and Article XI, Section 8 (Count II); and the Education Clause, Article XI, Section 12 (Count III).

Plaintiffs filed a motion for summary judgment on Count I on March 27, 2020. The State Defendants and the Greater Praise Christian Academy Intervenor-Defendants filed motions to dismiss the complaint in its entirety. The Bah Intervenor-Defendants filed a motion for judgment on the pleadings.

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

The Chancellor issued a Memorandum and Order on May 4, 2020, holding that the ESA Act violated the Home Rule Amendment and enjoining its implementation and enforcement. The trial court's order dismissed Plaintiff Metropolitan Nashville Board of Public Education as

a party for lack of standing, granted Plaintiffs' summary judgment motion on Count I, and denied the motions to dismiss and motion for judgment on the pleadings as they applied to Count I. State Defendants and Intervenor-Defendants' pending dispositive motions related to Counts II and III remain under advisement. The Court *sua sponte* granted permission to Defendants to seek an interlocutory appeal of its order pursuant to Tenn. R. App. P. 9(a).

## STANDARD OF REVIEW

The question of whether to grant an application for permission to appeal under Tennessee Rule of Appellate Procedure 9 is within the Court's discretion. Tenn. R. App. P. 9(a). Factors that the court may consider include "(1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment." *Id.*

## REASONS WHY INTERLOCUTORY APPEAL SHOULD BE DENIED

The trial court expedited its ruling on Plaintiffs' summary judgment motion solely "because the State Defendants intend to implement the ESA program for the 2020-2021 school year," slip op. at 2, Pls.' App. at APP02. The court certified the ruling for interlocutory and expedited appellate review for the same reason. *Id*. at 30.

The State's decision to implement the ESA program in the upcoming school year, however, was a self-imposed deadline, not a requirement under the ESA Act. The Act provides only that "[t]he program shall begin enrolling participating students *no later than* the 2021-2022 school year." Tenn. Code Ann. § 49-6-2604(b) (emphasis added). The State's decision to start the program a year early required prompt action by the trial court to prevent the State from diverting students and funding from MNPS and Shelby County schools. But now that the status quo has been preserved, this Court can allow the normal judicial process to continue while respecting the implementation schedule adopted by the General Assembly in the Act.

The Intervenor-Defendants' claims of irreparable harm are likewise unavailing. Any claims that the Intervenor-Defendants' children are forced to attend failing schools ignores the many options available to them to attend other public schools in their school districts and assumes they will be accepted into the ESA program and into any private school to which they apply. Insofar as Intervenor-Defendants Greater Praise Christian Academy and other private schools are expending resources

based on speculative assessments of ESA participation, that is poor financial planning, not irreparable harm resulting from an injunction.

Defendants cannot satisfy the other factors under Rule 9. An immediate appeal will not prevent needless, expensive, and protracted litigation; rather, if Defendants prevail on the Home Rule Amendment, the trial court will proceed to consider Plaintiffs' challenges to the ESA Act under the Equal Protection and Education clauses, and the resulting rulings will generate additional appeals. Finally, there is no lack of uniformity in the case law related to the Home Rule Amendment, only a dispute over application of the law to these facts. Defendants' applications for interlocutory appeal should be denied.

## I. Interlocutory Appeal Is Not Necessary To Prevent Irreparable Harm.

### A. The State Defendants Will Not Suffer Irreparable Harm Absent Interlocutory Appeal.

Any alleged harm to the State Defendants is harm of the State's own creation. The State Defendants elected to proceed with implementation of the ESA Act a full school year before the deadline set by the General Assembly for enrolling participating students. Tenn. Code Ann. § 49-6-2604(b). Delaying implementation of the Act therefore will not frustrate the "will of the people" as expressed in the legislation.[5]

[5] In fact, state legislators are questioning whether implementation of the ESA Act for the 2020-2021 school year will be funded when the General Assembly reconvenes on June 1, 2020, to revise the state budget in response to significant revenue losses caused by the COVID-19 epidemic. *See* Natalie Allison, "Tennessee lawmakers weigh school voucher money as other education initiatives face cuts," *Tennessean* (May 6, 2020), https://www.tennessean.com/story/news/politics/2020/05/06/tennessee-

Based on the ESA Act's legislative history and language, the State should have reasonably expected a legal challenge to its constitutionality. The State's decision to implement the program before the Act was properly tested in court was a strategic choice with consequences that the State should bear.

The affidavit of former Tennessee Department of Education Deputy Commissioner Amity Schuyler fails to establish irreparable harm. The timeline for implementation in the affidavit is premised upon the State's decision to roll out the program in 2020-21, not on the Act's 2021-22 school year implementation schedule. The timeline contains a July 1, 2020 deadline for "hiring of [approximately 20] administrative staff members" by TDOE, only one month before the school year begins, which raises questions about TDOE's readiness to operate the program. (Affidavit of Amity Schuyler ¶ 4, Int-Defs Bah, *et al.*'s App. at APP101-02.)[6] Other deadlines in the affidavit are internally inconsistent. The June 1 deadline for "most" private schools to assign seats, for example, conflicts with the June 15 deadline for recipients to confirm acceptance of ESA dollars. (*Id.*) The June 1 deadline for private schools to "assign seats" is likewise questionable (*id.*), given that Lighthouse Christian

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weighs-school-voucher-funds-other-education-programs-cut/5175339002/.

[6] These implementation questions are magnified by Deputy Commissioner Schuyler's resignation from the TDOE, where she served as head of the State's ESA program, to work for Shelby County Schools. https://tn.chalkbeat.org/2020/4/22/21231421/memphis-school-superintendent-hires-state-official-overseeing-tennessees-voucher-launch.

School, a school in which Intervenor-Defendants Brumfield and Davis have expressed interest, accepts applications after June 1, with the new student registration fee increasing from $300 to $350. (Lighthouse Christian School, "Additional Fees," https://www.golcslions.org/files/uploads/ExtraFees-1.pdf.) In fact, as of the filing of this response, Lighthouse Christian School does not have its 2020-21 application available on its website.

The State Defendants' assertion that the State is irreparably harmed when its legislative enactments are enjoined is more applicable to the Plaintiff Counties whose local sovereignty was usurped by the ESA Act in violation of the Home Rule Amendment. The residents of Davidson and Shelby counties were not afforded their constitutional right to decide whether to participate in the ESA program, either through referendum or by vote of their elected county legislatures. The State Defendants' request for interlocutory appeal not only fails to acknowledge this infringement as a relevant interest but seeks to elevate "the will of the people" as purportedly reflected in a now-unconstitutional statute above the Tennessee constitutional guarantee of local citizens' rights and local governments' sovereignty. The Court should reject the argument out of hand.

### B. Intervenor-Defendant Parents Will Not Be Irreparably Harmed If Interlocutory Appeal Is Not Permitted.

The Defendants' arguments that participating students and parents will be irreparably harmed absent an interlocutory appeal likewise fail. The arguments are based on the false premise that the ESA program is the only alternative available to Intervenor-Defendant

families who want to remove their children from the public schools they currently attend. As established in the trial court and reiterated below, that is not the case.

MNPS and Shelby County Schools have myriad school options available to students. (*See* Declaration of Jenai Hayes, Pls.' App. at APP33-38; Declaration of Dr. Angela Hargrave, Pls.' App. at APP39-40.) Both MNPS and Shelby County Schools have open enrollment policies that allow students to transfer to other schools in the district. (Hayes Decl. ¶¶ 3, 5-7, Pls.' App. at APP33, 34-35; Hargrave Decl. ¶¶ 4-7, Pls.' App. at APP40.) In addition, both MNPS and Shelby County Schools have robust charter, magnet, and alternative-instruction school options available to students that attend an underperforming public school. (Hayes Decl. ¶¶ 3, 5-7; Pls.' App. at APP33, APP34-35; Hargrave Decl. ¶¶ 4-7, Pls.' App. at APP40.) MNPS identifies 109 optional schools for the 2020-21 school year, spanning all grade levels. (Hayes Decl. ¶ 7 & Exhibit 1 thereto, Pls.' App. at APP35, APP36-38.) And while the MNPS school option lottery ran on March 2, 2020, parents who apply now can be added to waitlists for the schools that have met their open-enrollment seat availability. (Hayes Decl. ¶ 8, Pls.' App. at APP35.) MNPS offers students a seat from the waitlist as parents decline seats or receive an offer to accept a higher placement. The same is true in Shelby County Schools, where general choice transfer applications can be submitted up to August 2020. (Hargrave Decl. ¶ 7, Pls.' App. at APP40.)

There is nothing in the record concerning any attempt by Intervenor-Defendants to relocate their children to other schools through any of these alternatives. The ESA Act was passed only last year with an

initially projected implementation a year from now. Yet the affiant parents provide no explanation for why their children have remained in schools that they contend are not serving their children's needs, when so many other public school options are available.

Intervenor-Defendants' assurances about the private-school opportunities that "will happen" for them if the ESA program moves forward are highly speculative and inadmissible. (Affidavit of Bria Davis ¶¶ 7, 11, 13; Affidavit of Star-Mandolyn Brumfield ¶¶ 7- 9; Affidavit of Natu Bah ¶¶ 15-17; Affidavit of Builguissa Diallo ¶¶ 13, Int-Defs Bah, *et al.*'s App. at APP107, APP109-12, APP114.) First, there is no indication that any of the affiants' children will be accepted into the private schools they identified in their affidavits. Private schools participating in the ESA program will follow their own admission criteria when determining whether to accept students and are not required to accept students merely because those students have ESAs. (*See* ESA program website, https://school.esa.tnedu.gov/faq/.) Furthermore, there is no assurance that prospective ESA recipients who leave public schools will attend private schools with equal or better academic outcomes. There is no testing data available for useful comparisons, and there are no state quality requirements beyond basic private-school accreditation standards. In addition, Intervenor-Defendant Natu Bah offers no explanation for how the family plans to pay the 50% shortfall (approximately $7,000) *per child* for tuition to Christian Brothers that the ESA program will not cover. (Bah Aff. ¶¶ 11-13, Int-Defs Bah, *et al.*'s App. at APP106-07.) Intervenor-Defendant Bria Davis's statements about her child's future success if she attends Lighthouse Christian

School are likewise conclusory, speculative, and not based on admissible evidence. (Davis Aff. ¶ 10, Int-Defs Bah, *et al.*'s App. at APP109.)

The question of irreparable harm should be examined by considering "the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective." Tenn. R. App. P. 9(a). These considerations do not establish irreparable harm here. Even accepting Intervenor-Defendants' claims that their children's schools are not serving their children's needs, any predicted injury resulting therefrom flows from their own decisions not to apply for other readily available school options, not from enjoining the ESA program. Other options are available even now, and their decision not to take advantage of those options is not irreparable harm that would justify the extraordinary relief of an interlocutory appeal.

### C. Intervenor-Defendant Schools Will Not Be Irreparably Harmed If Interlocutory Appeal Is Not Permitted.

In support of its argument concerning irreparable harm, Intervenor-Defendant Greater Praise Christian Academy ("Greater Praise") asserts that schools have made hiring decisions and expended resources in anticipation of enrolling children through the ESA program. Greater Praise asserts that if the program does not move forward, these expenses will have been wasted and cannot be recovered. These claims are speculative, based in poor planning, and insufficient to establish irreparable harm.

First, any decision on the part of schools to make significant financial commitments based on potential participation in a newly created ESA program would be poor planning, not irreparable harm. To

date, there has been limited interest by families in enrolling in the ESA program. Despite a 5,000-student cap on participation in the program's first year, Tenn. Code Ann. § 49-6-2604(c)(1), only 683 applications had been completed and "deemed complete for an award" as of May 7, 2020. (Affidavit of Eve Carney ¶ 7, Pls.' App. at APP42.) In addition, basing school expansion and hiring plans on a program with no prior record for enrollment would not be consistent with standard practices in the education field. Public school districts spend money on infrastructure (building new classrooms or schools, for example) or administration (hiring staff, educators, and principals) based on student enrollment projections. (Declaration of Chris Henson ¶ 3, Pls.' App. at APP47.) Similarly, BEP funding for LEAs is based on prior-year attendance (*id.* ¶ 4), which helps generate enrollment projections. The affidavit of Greater Praise Director Kay Johnson provides no information concerning how Greater Praise will increase its enrollment numbers or any explanation of how it would calculate such enrollment projections. (Johnson Aff., Int-Defs Bah, *et al.*'s App. at APP116-19.) Ms. Johnson's decision to base expenditures on a blind hope for substantial enrollment increases through the ESA program reflects poor planning, not irreparable harm.[7]

[7] According to Ms. Johnson, the ESA Act will enable Greater Praise to add 84 students, increasing its total enrollment to 144. (Johnson Aff. ¶ 10, Int-Defs Bah, *et al.*'s App. at APP117.) In other words, Greater Praise currently has only 60 students and plans to use the ESA Act to increase its enrollment by 240%. While this may appear financially lucrative for Greater Praise, these numbers do not reflect projections based on facts. They are merely Ms. Johnson's description of what Greater Praise could hypothetically accommodate if that many students applied and were accepted.

Equally problematic is Greater Praise's classification as a Category IV private school, which does not meet the eligibility requirement for a "participating school" under the ESA Act. Tenn. Code Ann. § 49-6-2602(9) (defining "participating school" to mean "a private school, as defined by § 49-6-3001(c)(3)(A)(iii), that meets the requirements established by the department of education and the state board of education for a Category I, II, or III private school, and that seeks to enroll eligible students"); *see also* TDOE, "Nonpublic Schools: Current List of Nonpublic Schools," https://www.tn.gov/education/school-options/non-public-schools.html. In other words, Greater Praise is not eligible to accept ESA participants; whether and how it may become eligible before the upcoming school year is speculative.

## II. Granting Interlocutory Appeal Will Not Prevent and Could Promote Needless, Expensive, and Protracted Litigation.

Plaintiffs' Complaint asserts three claims against the ESA Act under 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). The Chancellor granted summary judgment only on the Home Rule Amendment claim.

Granting interlocutory appeal from the Chancellor's summary judgment order would "prevent needless, expensive, and protracted litigation" only if the summary judgment order is affirmed, in which case the remaining claims would provide no relief beyond that already awarded. In contrast, a reversal on appeal, which is what State Defendants are advocating in their Rule 9 application, will do nothing to

resolve this litigation. Instead, the case would be remanded for further proceedings on the other two claims, including discovery, as well as any issues that might remain under the Home Rule Amendment. Because the relief that Defendants and Intervenor-Defendants seek through this appeal will not prevent needless, expensive, and protracted litigation but instead increases the likelihood of piecemeal litigation, the Rule 9 application should be denied. *State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005).

## III. Interlocutory Appeal Is Not Necessary To Develop a Uniform Body of Law.

The Home Rule Amendment in the Tennessee Constitution mandates that any General Assembly act "local in form or effect" and "applicable to a particular county . . . in its governmental or its proprietary capacity" is "void and of no effect" unless the act, by its terms, requires approval by a two-thirds vote of the county's legislative body or a majority of the county's voters. Tenn. Const., art. XI, § 9.

Contrary to Defendants' arguments, the Chancellor's application of the Home Rule Amendment to the ESA Act is based in sound reasoning, correctly interprets Tennessee law, and will likely be upheld on appeal. Because there is already a considerable body of law on the Home Rule Amendment, which the trial court correctly applied, interlocutory appeal is not necessary to develop a uniform body of law. *See* Tenn. R. App. P. 9(a)(3).

It is beyond dispute that the ESA Act applies only in Davidson and Shelby counties and will never expand further without action by the Tennessee General Assembly. Thus, the Act is "local in form or effect"

under the Tennessee Supreme Court's seminal Home Rule Amendment case, *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975). The Tennessee Supreme Court held in *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979), that legislation exempting two counties, by population bracket, from a "permanent, general provision, applicable in nearly ninety counties" is local in form and effect in violation of Art. XI, § 9. *Leech*, 588 S.W.2d at 274. The *Leech* holding is consistent with the reasoning in other cases upholding population brackets: The decision was based on the inability of any other counties to come within the act's parameters, while legislation in other cases was "potentially applicable" to other counties. *E.g.*, *Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978); *Doyle v. Metro. Gov't of Nashville & Davidson County*, 471 S.W.2d 371 (Tenn. 1971).

The ESA Act's reference to LEAs instead of counties does not undermine the trial court's holding that the Act is "applicable" to Davidson and Shelby county governments as contemplated by the Home Rule Amendment. The Tennessee Supreme Court recognizes that counties serve as partners with the State in local education. *See 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."). County legislators, county mayors, and county trustees all play key roles in the operations of a county's school system, including but not limited to adopting a budget, receiving quarterly reports, examining accounts,

levying taxes, issuing certain approvals relating to school funds, and establishing school districts. Tenn. Code Ann. §§ 49-2-101, -102, -103, -111(e). The ESA Act's diversion of students and funding only from Davidson and Shelby County school systems makes the Act applicable to both counties. The cases on which the State Defendants rely relating to stand-alone sanitary and special school districts are inapposite, as the trial court properly held. *See* slip op. at 21, Pls.' App. at APP21; *see also Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959); *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482 (Tenn. 1957).

Finally, Tennessee case law makes clear that the ESA Act affects Davidson and Shelby counties in their "governmental capacities." Local governments share responsibility for education with the State, making education a governmental function of counties and municipalities. *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."). Because the ESA Act affects this governmental capacity only in Davidson and Shelby counties, it must comply with the Home Rule Amendment.

No court has held that education-related legislation is exempt from the Home Rule Amendment, as argued by the State Defendants.[8] In fact, courts have applied the Home Rule Amendment to General Assembly

[8] State Defendants rely on the Tennessee Supreme Court decision in *City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193 (Tenn. 1984), which the trial court easily distinguished as "specific to the State's authority over the courts, and particularly courts with criminal jurisdiction." Slip op. at 28, Pls.' App. at APP28.

action on education. In *County of Shelby v. McWherter*, 936 S.W.2d 923 (Tenn. Ct. App. 1996), the Tennessee Court of Appeals sustained the Education Improvement Act of 1992, Tenn. Code Ann. §§ 49-2-201, *et seq.*, from a Home Rule Amendment challenge because the law was "potentially applicable to numerous counties in the state." *McWherter*, 936 S.W.2d at 935-36; *see also Bd. of Educ. of Shelby County v Memphis City Bd. of Educ.*, 911 F. Supp 2d 631, 660 (W.D. Tenn. 2012) (striking down legislation under the Home Rule Amendment that allowed creation of municipal school districts only in Shelby County).

Finally, "the question presented by the challenged order" is "reviewable upon entry of final judgment." Tenn. R. App. P. 9(a)(3). All of the State and Intervenor-Defendants' arguments are equally reviewable upon entry of final judgment in this case.

## CONCLUSION

State and Intervenor-Defendants' applications for permission to appeal should be denied. All relevant factors weigh against interlocutory appeal. First, any purported harm to the State from enjoining the ESA Act arises from its own premature and hurried implementation of the law contrary to legislative intent. The claims of irreparable harm to the Intervenor-Defendant parents and schools likewise fail. Second, interlocutory appeal will not cause a net reduction in the duration and expense of litigation if the summary judgment order is reversed, as the matter will return to the trial court for proceedings on the two remaining counts in this case, including discovery and a near certain second appeal. Finally, there are no inconsistent orders from other courts requiring development of a uniform body of law on the Home Rule Amendment,

and the questions presented by the trial court's order will be reviewable upon entry of final judgment. For these reasons, the Court should deny the application for permission to appeal.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
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NASHVILLE AND DAVIDSON COUNTY

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