IN THE TENNESSEE SUPREME COURT

CASE NO. M2020-00683-SC-R11-CV

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

v.

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

and

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

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

INTERVENOR-DEFENDANTS / APPELLANTS BAH, DIALLO, BRUMFIELD, AND DAVIS'S APPLICATION FOR PERMISSION TO APPEAL

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INTRODUCTION

The Court of Appeals' opinion is unprecedented and reflects a radical departure from Tennessee law. It re-writes Article XI, Section 9, paragraph 2 of the Tennessee Constitution ("Home Rule Amendment") to extinguish the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601–2612 ("ESA Statute"). The result: thousands of low- and middle-income Tennessee children, like those of Intervenor-Defendants / Appellants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents"), have lost a direct educational benefit from the State. But the Home Rule Amendment cannot be used to deprive Tennessee families of the ability to use education savings accounts to secure a quality education for their children. This Court should grant review, reverse, and render judgment for Parents.

The Court of Appeals struck down the ESA Statute under a novel theory. The Home Rule Amendment concerns only counties and municipalities, not school districts. Even though the ESA Statute applies only to school districts, the Court of Appeals held that it applies to Plaintiffs, Shelby County and Metro, because it has "fiscal effects" on them. In other words, it held that if a law has fiscal effects on a county, that law is "applicable" to a county "in its governmental or its proprietary capacity," Tenn. Const. art. XI, § 9, and thus requires local approval. This "fiscal effects" rationale—invented by Plaintiffs and embraced by the Court of Appeals—flouts the Amendment's text and purpose.

Allowing the appellate court's decision to stand would sow confusion about the ongoing vitality of this Court's longstanding Home Rule Amendment jurisprudence. It would upend this Court's decision in

Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga, 580 S.W.2d 322 (Tenn. 1979), which the Court of Appeals failed to distinguish or even mention. And it would also require overruling *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959), in which this Court rejected a Home Rule Amendment challenge that sought to block a law expanding a special school district. Both cases involve laws that had obvious fiscal effects on the challenging party. But the presence of those effects did not make the laws "applicable" to them in their "governmental or . . . proprietary capacity" as required by the Home Rule Amendment. Tenn. Const. art. XI, § 9, para. 2. Indeed, the term "fiscal effects" appears not once in this Court's (or any Tennessee appellate court's) jurisprudence concerning Article XI, Section 9. It is central to the ruling below, however, which marks the first time that the Amendment has ever been used to extinguish Tennesseans' direct benefits.

This Court's review is also needed to settle an important question of law: whether the "fiscal effects" of a local law are sufficient to make it "applicable" to the county or municipality in its "governmental or . . . proprietary capacity," thus requiring local approval under the Home Rule Amendment. If the lower court's "fiscal effects" theory is allowed to stand, it would dramatically restrict the State's ability to enact future pilot programs or even reallocate State resources.

This case also presents a question of great public interest: whether the Home Rule Amendment permits a county to extinguish an educational benefit provided directly to Tennesseans based on the legislation's "fiscal effects" on counties. If the appellate court's opinion is permitted to stand, the ESA Statute—which promises thousands of low-

and middle-income Tennessee families the opportunity to improve the quality of their children's education—would be permanently extinguished.

Lastly, this case provides an opportunity for this Court to exercise its supervisory authority over Tennessee courts. The Court of Appeals' expansive interpretation of the Home Rule Amendment demands that this Court definitely address the limits of Article XI, Section 9.

DATE OF JUDGMENT

The Court of Appeals entered its decision on September 29, 2020. *See* Court of Appeals Opinion, No. M2020-00683-COA-R9-CV, Sept. 29, 2020 ("Slip Op."). A copy of the decision is attached. No petition for rehearing has been filed. Parents timely request permission to appeal pursuant to Rule 11.[1]

[1] Unless otherwise indicated, all references to Rules, *infra*, are to the Tennessee Rules of Appellate Procedure.

QUESTION PRESENTED FOR REVIEW

Parents jointly present the following question for this Court's review:

I. The Tennessee Constitution's Home Rule Amendment provides, in part, that a challenged law requires local approval if it is "*applicable* to a particular county or municipality . . . *in its governmental or its proprietary capacity* . . . ." Tenn. Const. art. XI, § 9, para. 2 ("Home Rule Amendment") (emphases added). Below, the Court of Appeals greatly expanded the scope of this requirement by holding that the ESA Statute is subject to the Home Rule Amendment merely because of its "fiscal effects" on counties. The Question Presented is:

   Do the mere "fiscal effects" of laws enacted by the General Assembly satisfy the Home Rule Amendment's command that a challenged law must be "applicable to a particular county . . . in its governmental or its proprietary capacity"?

STANDARD OF REVIEW

The issue raised here is a question of law subject to de novo review, and the Court owes no presumption of correctness to the lower court's decision. *See Seals v. H & F, Inc.*, 301 S.W.3d 237, 241 (Tenn. 2010) ("Our scope of review for questions of law is de novo."). This standard applies to both statutory and constitutional interpretation. "Issues of statutory construction are reviewed de novo with no presumption of correctness attaching to the rulings of the court below." *Hayes v. Gibson Cty.*, 288 S.W.3d 334, 337 (Tenn. 2009). "Issues of constitutional interpretation are questions of law, which [courts] review de novo without any presumption of correctness given to the legal conclusions of the courts below." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

STATEMENT OF FACTS

While the opinion of the Court of Appeals correctly states the general nature of the case, it fails to address a number of facts.

I. The ESA Statute Creates ESAs to Aid Children Assigned to the State's Worst-Performing School Districts.

The ESA Statute benefits Tennessee children assigned to underperforming school districts that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1). The General Assembly enacted the ESA Statute to create education savings accounts ("ESAs") and school improvement grants.[2] Eligibility for an ESA depends on how poorly a school district ("LEA")[3] is performing.

The ESA Statute creates education savings accounts to benefit low- and middle-income[4] Tennessee children assigned to Tennessee's worst-

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[2] The ESA Statute creates school improvement grants to help improve schools across Tennessee. It "establishe[s] a school improvement fund" that disburses annual grants "to be used for school improvement." *Id.* § 49-6-2605(b)(2)(A). School improvement grants are prioritized for school districts with ESA students during the first three years, *id.*, and extend to school districts statewide after year three., *id.* § 49-6-2605(b)(2)(B).

[3] Parents use "school district" and "LEA" interchangeably in this brief. Local Education Agencies or LEAs are defined as "any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

[4] The ESA Statute requires an eligible student to be "a member of a household with an annual income . . . that does not exceed twice the

performing school districts. *Id.* § 49-6-2602(3)(C). Children assigned to a low-performing school district can opt to receive their education benefit *directly* using funds deposited into an ESA, rather than *indirectly* by attending their assigned public school. *Id.* § 49-6-2605. The funds deposited in an ESA account equal the amount the child is entitled to under Tennessee's Basic Education Program ("BEP Statute"). Parents may use ESA funds to pay for a wide array of eligible educational expenses for their child, including tuition, textbooks, and tutoring. *Id.* § 49-6-2603(a)(4)(A)–(L).

The availability of ESAs depends on a child's assigned school district's performance, as measured by the state's accountability system. *Id.* § 49-6-2602(3)(C)(i)(a). The ESA Statute creates ESAs as an option only if a child's assigned school district has: (1) ten or more schools flagged as "priority schools" in 2015 *and* 2018 (the two most recent evaluation years prior to passage of the ESA Statute) under the state's accountability system, Tenn. Code Ann. § 49-1-602 ("Priority Schools List"); and (2) ten or more schools among the bottom ten percent (10%) of schools in overall achievement in 2017 under Tenn. Code Ann. § 49-1-602(b)(3)—a statutorily required determination that takes place one year prior to a "priority schools" evaluation ("Bottom 10% List"). On top of benefitting children assigned to school districts that landed on both the Priority Schools List and Bottom 10% List, the ESA Statute also extends

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federal income eligibility guidelines for free lunch." Tenn. Code Ann. § 49-6-2602(3)(D).

ESAs to children zoned to attend a school in the Achievement School District ("ASD") as of May 24, 2019. *Id.* § 49-6-2602(3)(C)(ii).

II. The ESA Statute is a Direct Benefit to Tennesseans like Parents—Who Intervened to Defend Educational Choice.

Parents intervened in this case to defend an educational option that allows them to pick a school that meets their needs. Tennessee families with children assigned to underperforming school districts are the intended beneficiaries of the ESA Statute. And as explained below, Parents here are precisely the kind of beneficiaries that the General Assembly had in mind when it enacted the ESA Statute.

Each Parent is of modest means and has a child whose school is failing them. At A. Maceo Walker Middle School[5] in Shelby County, for example, the children of Parent Natu Bah are not progressing academically in an environment that has utterly "deteriorated." (R. Vol. VIII at 1140, Bah Aff. ¶ 6) Her older son has been "repeatedly verbally and emotionally abused" and "told to go back to Africa where he came from." (R. Vol. VIII at 1140–41, Bah Aff. ¶ 7) At Macon-Hall Elementary, Parent Builguissa Diallo has seen her daughter's reading ability regress since enrolling in the school. She reads worse now than she did when she completed pre-K. (R. Vol. VIII at 1148, Diallo Aff. ¶ 6) Parent Star-Mandolyn Brumfield fears sending her son back to an "unstable and overcrowded environment" where he "regularly encounters violence." (R.

[5] A mere 17.4% of students at this public school are at or above grade level. *See* A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ., https://reportcard.tnk12.gov/schools/792-2740/achievement (last visited Nov. 25, 2020).

Vol. VIII at 1146, Brumfield Aff. ¶¶ 8–9) And Parent Bria Davis has already seen the effects of the poorly performing public schools that both her children attend. After being bullied, her daughter concluded that violence was the way to survive and began doing things like stealing lunches. (R. Vol. VIII at 1144, Davis Aff. ¶ 9) Her son has become hostile toward learning and mimics bad behavior because he sees that it is tolerated in school. (R. Vol. VIII at 1145, Davis Aff. ¶ 12) Parents' children, and hundreds of children like them, need the educational lifeline that the ESA Statute can provide.

REASONS SUPPORTING SUPREME COURT REVIEW

This Court should grant review. All four Rule 11 factors are present in this case. As explained below in Part I, this Court's review is needed to reestablish uniformity in Tennessee case law because the Court of Appeals' decision represents a radical departure from the settled jurisprudence of this Court. In Part II, Parents explain that this Court's review is needed to settle an important question of law because the appellate court's interpretation and application of the Home Rule Amendment will drastically limit the State's ability to engage in experimental legislation. In Part III, Parents show how this case impacts the State's ability to provide direct education benefits to Tennesseans with children assigned to poorly performing school districts, a matter of great public concern. Lastly, in Part IV, Parents explain that this Court should exercise its supervisory authority so that it can definitively address the limits of the Home Rule Amendment for Tennessee courts.

I. Review is Needed to Secure Uniformity of Decision.

The ruling below—which held that the "fiscal effects" a challenged law has on counties brought it within the Home Rule Amendment's scope (Slip Op. 6, 11–12)—is unprecedented and undermines longstanding precedent. In striking down the ESA Statute, the Court of Appeals used a novel interpretation of the Amendment that parts ways with nearly 70 years of established case law interpreting Article XI, Section 9. This Court's review is needed to reverse the appellate court's radical departure from precedent and to reestablish a uniform interpretation of the Home Rule Amendment.

At the outset, Parents note that a plaintiff must satisfy three separate inquiries to trigger local approval under the Home Rule Amendment. First, a challenged law must be "private or local in form or effect." Tenn. Const. art. XI, § 9. Second, a challenged law must apply only to a "particular county or municipality." *Id.* Third, a challenged law must be "applicable [to a county or municipality] either in its governmental or its proprietary capacity." *Id.* The Court of Appeals' misplaced reliance on the "fiscal effects" of a challenged law cannot be reconciled with the third inquiry.

Two of this Court's prior decisions illustrate how the Court of Appeals' interpretation of the Home Rule Amendment is radically out of step with, and calls into question the continuing vitality of, this Court's prior precedent. Both of these prior cases would have come out the other way if the "fiscal effects" of a challenged law were a relevant factor in determining whether the Home Rule Amendment applied.

First, in *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979), this Court heard a challenge to a law ratifying the creation of a hospital district. The law required both the City of Chattanooga and Hamilton County to transfer ownership of real property—specifically, entire hospitals—to the newly created hospital district. *Id.*; *see also* 1976 Tenn. Priv. Acts ch. 297, as amended by 1977 Tenn. Priv. Acts ch. 125 (App. 0003). The City of Chattanooga argued that because the law "affect[ed] the City as well as the County," but required local approval from only the County, it violated the Home Rule Amendment. *Id.* at 328. Despite the obvious way in which the law affected the City's allocation of public health resources—*i.e.*, despite the "fiscal effects" of the law on the City of Chattanooga—this Court rejected the City's Home Rule Amendment challenge.

As a starting point, this Court held that there was "an obvious basis" for requiring Hamilton County's approval of the challenged law: The law legally empowered the hospital district to act "on behalf of the County." *Id.* By contrast, and despite the obvious "fiscal effects" the law imposed on the City of Chattanooga, the law did not empower the hospital district to act on the City's behalf. This Court found that difference determinative, holding that the law did not apply to the City in either its governmental or proprietary capacity. *Id.* Thus, the City could not invoke the Home Rule Amendment to block the law.[6] This Court

[6] The Court lifted the stay blocking the "transfer of realty by the City of Chattanooga and County of Hamilton to the Chattanooga-Hamilton County Hospital Authority." *Id.* at 329.

would have decided this case in favor of the City of Chattanooga if the "fiscal effects" of a law mattered under the Amendment. But it did not. Notably, the court below made no attempt to distinguish this case.

The second of this Court's cases which is irreconcilable with the lower court's "fiscal effects" rationale is *Perritt v. Carter*, 325 S.W. 2d 233 (Tenn. 1959). In *Perritt*, this Court rejected an attempt to block a law expanding a special school district within Carroll County because, like the ESA Statute, it did not require local approval. *Id.* If the Court of Appeals were correct that a law's fiscal effects on a county's priorities and budgets were enough for the law to be "applicable" to the county "in its governmental or its proprietary capacity," Tenn. Const. art. XI, § 9, para. 2, then the Home Rule Amendment would have required local approval in *Perritt*—but this Court held that it did not.

This is because a special school district impacts the fiscal resources of the county in which it is located.[7] *See* Tenn. Ann. Code § 49-3-1008(a) (counties must "share with special school district systems" the proceeds from the sale of bonds, notes, and other debt obligations issued by counties "for school purposes"); *see also id.* § 9-21-129. And those fiscal effects clearly grow when, as happened in *Perritt*, a special school district expands within a county. But in that case, the "fiscal effects" of the challenged law were irrelevant to the issue of whether the law was

[7] In Tennessee, "[s]pecial school districts" . . . are partially funded by county governments[.]" Report of the Tenn. Advisory Comm'n on Intergovernmental Relations: Tenn. Sch. Sys. Budgets Authority & Accountability for Funding Education & Operating Schools 7 (Jan. 2015), https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2015-january/2015Tab%203SchoolBudget.pdf.

"applicable" to the county "in its governmental or its proprietary capacity." Tenn. Const. art. XI, § 9, para. 2. Accordingly, this Court never even mentioned them. But under the appellate court's flawed understanding of the Home Rule Amendment, these "fiscal effects" should have been a crucial fact that led this Court to conclude that the law applied to the county in its governmental or proprietary capacity, thus requiring local approval. But *Perritt* says nothing of the kind. If the appellate court's decision is left unchecked, it will generate confusion that undermines both *Perritt* and *Chattanooga-Hamilton County Hospital Authority*. This Court should grant review and reject upending longstanding precedent in this way.

II. Review is Needed to Settle an Important Question of Law.

This Court's review is also needed to settle an important question of law: whether any exercise of state legislative authority that causes "fiscal effects" on individual counties requires local approval under the Home Rule Amendment. The Court of Appeals' decision, if allowed to stand, would effectively eviscerate the State's ability to use pilot programs in the future—something it does, and has done, in a wide swath of policy areas. *See, e.g.*, Tenn. Code Ann. §§ 63-10-601 (pilot program establishing tele-pharmacies in a single county in Tennessee's eastern grand division); 12-4-308 (pilot program providing reimbursements to supportive living facilities for mentally ill individuals only in designated counties). Under the Court of Appeals' unbounded reading of the Home Rule Amendment, each of these pilot programs should be or should have been declared unconstitutional due to their fiscal effects on the counties.

But the ramifications of the appellate court's decision are not limited to experimental pilot programs. Assume, for example, that the General Assembly approved a plan to expand the Memphis field office for the Tennessee Bureau of Investigation. Or assume that the General Assembly authorized a large state construction project to improve Interstate 440. Both legislative enactments would have "fiscal effects" on only Shelby County and Metro Nashville, respectively. But it would be absurd to suggest that these "fiscal effects" require the General Assembly to obtain local approval before hiring state officers or improving state highways.[8] But under the Court of Appeals' interpretation of the Home Rule Amendment, that is precisely what the State would have to do. Without this Court's review, the appellate court's interpretation of the Home Rule Amendment would radically reshape the ability of the State to exercise its powers.

III. Review is Needed to Settle a Question of Great Public Interest.

Review is also needed to settle a question of great public interest: whether the Home Rule Amendment permits a county to extinguish an educational benefit provided directly to Tennesseans based on the legislation's "fiscal effects" on counties. As discussed above in Part I, this theory amounts to a radical departure from established Tennessee case law that should be definitively addressed by this Court.

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[8] Indeed, concerns that the Home Rule Amendment might reach such indirect consequences are what led Delegate Lewis Pope to propose inserting the qualifier "applicable to a particular county or municipality, either in its governmental or its proprietary capacity" at the 1953 Constitutional Convention. *See* Parents' Br. at 24–28.

Doing so would be in keeping with this Court's long history of addressing questions of great public interest that involve education. *See, e.g.*, *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (constitutionality of the state system of funding education); *Knox Cty. v. City of Knoxville*, 786 S.W.2d 936 (Tenn. 1990) (pension rights of school employees); *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 549 (Tenn. 1985) (ability of special school districts to levy taxes); *State ex rel. Taylor v. Rasnake*, 352 S.W.2d 427 (Tenn. 1961) (employment rights of school teacher); *Davidson Cty. v. City of Nashville*, 228 S.W.2d 89 (Tenn. 1950) (allocation of school funds to a county); *Scopes v. State*, 289 S.W. 363 (Tenn. 1927) (teaching evolution in public schools).

Answering this question of great public interest also has far-reaching consequences—not only for Parents, but also for the thousands of other potential beneficiaries of the ESA Statute—under the ESAs it creates, and for the ability of the state to meet its constitutional obligation to promote education. *See* Tenn. Const. Art. XI, § 12 (The Tennessee Constitution "recognizes the inherent value of education and encourages its support."). For decades, the Tennessee General Assembly has passed legislation addressing the dismal performance of school districts in educating their students that would fail the "fiscal effects" test. *See, e.g.*, Tenn. Code Ann. §§ 49-13-112 (charter schools); 49-1-614 (Achievement School Districts); 49-6-2605 (ESAs); 49-10-1405

(Individualized Education Accounts).[9] All these vital programs are at risk if the appellate court's ruling is allowed to stand.

Indeed, if the Court of Appeals' ruling is affirmed, it will inaugurate a new era in this Court's jurisprudence and greatly expand the power of counties and municipalities to impede state education policy. It will invite challenges from third parties to statewide legislation and significantly hinder the ability of the state to deliver educational benefits to students in Tennessee's worst performing schools. Only this Court's review can reinforce the longstanding limits of the Home Rule Amendment and protect the State's ability to provide education benefits to Tennesseans.

IV. Review is Needed for the Exercise of This Court's Supervisory Authority.

Lastly, review is needed for the exercise of this Court's supervisory authority so that it can definitively address the limits of the Home Rule Amendment for Tennessee courts. This Court "is a direct creature of the [Tennessee] Constitution" whose "great dut[y]" is to keep inferior courts "within the limits of the law and the Constitution." *Barger v. Brock*,

[9] For example, when a student declines to attend a traditional public school, their school district—not their county—allocates to the charter school, ASD school, or ESA or IEA student an amount equal to the per student state and local funds that the school district would otherwise designate for the student if she attended her assigned public school. Given that the school districts in those counties must allocate "the per student state and local funds received by the LEA" (to use the language for the ASD), under the appellate court's reasoning, the ASD would presumably have an unconstitutional "fiscal effect" on the counties where the school districts sit. Tenn. Code Ann. § 49-13-112.

535 S.W.2d 337, 340–41 (Tenn. 1976). By exercising its authority, the Court helps "to prevent needless litigation and eliminate confusion" engendered by an inferior court's ruling. *Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017).

As explained above, the Court of Appeals' ruling was a radical departure from the text of the Home Rule Amendment and the case law applying it. *See also* Parents Br. 20–35. Without correction from this Court, future litigants will be unsure whether this Court has sanctioned the expansion of the Amendment to include "fiscal effects" or if its commonly understood—and historically grounded—limits still apply.

Lower courts "must follow the directives of superior courts, particularly when the superior court has given definite expression to its views" because "[t]o do otherwise invites chaos into the system of justice." *Holder v. Tenn. Jud. Selection Comm'n*, 937 S.W.2d 877, 881–82 (Tenn. 1996). Given the Court of Appeals' departure from this Court's consistent interpretations of the Tennessee Constitution, it is an appropriate exercise of this Court's supervisory authority "[t]o settle this area of law." *State v. Walls*, 537 S.W.3d 892, 904 (Tenn. 2017).

CONCLUSION

Parents ask this Court to grant their application, reverse the ruling below, and render judgment in Parents' favor.

Dated: November 25, 2020.

Respectfully submitted,

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**Pro hac vice* motions to be filed

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