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 Appeal from Court of Appeals Case No. M2020-00683-COA-R9-CV
Pursuant to Tenn. R. App. Proc. 11
Oral Argument Requested

INTERVENOR-DEFENDANTS / APPELLANTS GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S REPLY BRIEF

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INTRODUCTION

Intervenor-Defendants / Appellants Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Greater Praise Appellants") file this Reply Brief pursuant to Tennessee Rule of Appellate Procedure 11(f). In their Brief of the Appellants and their Supplemental Brief, the Greater Praise Appellants made four principal arguments, which they reiterate in this reply to Appellees' Brief: 1) "A particular county" means one county. 2) "A particular county or municipality" does not mean a school district. 3) Davidson and Shelby counties suffered no financial harm and, therefore, have no standing. 4) In the alternative, the Education Savings Account (ESA) Pilot Program should begin in the Achievement School District (ASD).

ARGUMENT

I. The plain meaning of "a particular county" in the Home Rule Amendment means one county.

A. The Counties offer no answer to how many counties must be subject to a law to avoid violating the Home Rule Amendment.

As the Chancellor pointed out in her order in this case, "There has not been a bright line established regarding how many counties or municipalities is too many for it to be considered a potential Home Rule Amendment violation . . . . " Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23. In their brief, the Counties fail to answer this question for the Court.

Greater Praise Appellants answer that the plain meaning of the Home Rule Amendment provides the answer. "A particular county" means one county, and any law that applies to more than one county is not subject to the amendment. The strongest evidence the Counties offer to rebut this proposition, in actuality, shows that no other line can be drawn. The Counties recite an exchange in the 1953 Constitutional Convention, in which Delegate Burn presses Delegate Pope to answer the question, and Delegate Pope cannot do so. Appellees' Brief at 39. Neither can the Counties.

On the other hand, Delegate Burn rightly points out that the text says it applies to laws applicable to one county only: "This amendment does say one, though." *Id.*, quoting State of Tennessee, *Journal and Debates of the Constitutional Convention of 1953 ("Journal of 1953")* at 1121 (Counties' App'x at APP030). Furthermore, when voters ratified the amendment, they did not read this exchange from the convention; they ratified the text of the amendment, which said, "a particular county." *See United States Term Limits v. Thornton*, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting) (explaining that attempting to divine a supposedly atextual meaning is "even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters" who ratified a constitutional amendment). Because the text of the amendment is clear and because the Counties offer no other number at which to draw the line, this Court should adopt the plain meaning of the Home Rule Amendment and clarify that it only governs laws that apply to one county or municipality.

B. The Home Rule case law does not support the Court of Appeals opinion or the Counties' interpretation.

The interpretation of the Home Rule Amendment the Counties adopt in their brief is not the same as that of the Court of Appeals opinion. The Court of Appeals creates a fake *Farris* test by pulling out of context one phrase from *Farris* and making it the sole arbiter of a Home Rule violation: Is the law "potentially applicable throughout the state"? *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975). This interpretation was explicitly considered and rejected by the 1953 Constitutional Convention. When the convention initially adopted Resolution Number 124, it prohibited legislation "that is not applicable to every county or municipal corporation in the entire state." Res. No. 124 (Greater Praise App'x 022); *Journal of 1953*, at 275-276. However, this language was amended, instead, to prohibit only legislation "private or local in form or effect." Amendment #2 to Res. No. 124 (Greater Praise App'x 020); *Journal of 1953*, at 277-278. Thus, the Court of Appeals opinion has no basis in the text or history of the Home Rule Amendment. Additionally, this Court already rejected the Court of Appeals interpretation in *Burson*: "The plaintiffs argue that legislation . . . is 'special, local, or private' unless, by its terms, it necessarily applies to every municipality in the state. This Court has repeatedly held to the contrary." *Civil Service Merit Board v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991).

The Counties tacitly acknowledge that the Court of Appeals interpretation conflicts with the Home Rule cases decided after *Farris*, many of which the Court of Appeals ignored. The Counties do so by shortening the phrase and calling it merely the "potentially applicable"

test. Appellees' Brief at 42-44, 51-54. In this way, the Counties abandon the requirement that a law apply in all 95 counties and insist only that it be "potentially applicable" to *some* other counties. Thus, they quote three Home Rule decisions that cannot be squared with the fake *Farris* test of the Court of Appeals. They say the statute was upheld in *Bozeman* "because it could 'become applicable to *many* other counties depending on subsequent population growth.'" Appellees' Brief at 52, quoting *Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978) (emphasis added). They claim the statute was upheld in *Doyle* "because it was potentially applicable to any county adopting a metropolitan form of government." Appellees' Brief at 52, citing *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371, 374 (Tenn. 1971). Finally, they claim the statute was upheld in *County of Shelby* because it was "'potentially applicable to *numerous* counties' based on population bracket of 700,000 or more . . . ." Appellees' Brief at 52, quoting *County of Shelby v. McWherter*, 936 S.W.2d 923, 935-936 (Tenn. Ct. App. 1996) (emphasis added). Thus, the Counties impliedly acknowledge that adopting the Court of Appeals fake *Farris* test would require this Court to overturn numerous cases that it decided after *Farris*.

However, the Home Rule interpretation offered by the Counties also would require this Court to overturn numerous cases. In particular, *Lawler*, *Leech*, and *Bozeman* cannot be reconciled with the "potentially applicable to other counties" test that the Counties present to this Court. In *Lawler*, the statute was potentially applicable to other counties because it applied "in all counties of this State having a population of not

less than 44,000 nor more than 50,000 according to the Federal Census of 1960 or any subsequent Federal Census." 1965 Tenn. Pub. Acts Ch. 122 (Supp. App'x 004, 006, 007); *see also Lawler v. McCanless*, 417 S.W.2d 548, 551-553 (Tenn. 1967). Likewise, in *Leech* the statute was potentially applicable to other counties because it applied "in any county having a population of not less than 7,600 nor more than 7,700 according to the 1970 federal census or any subsequent federal census" and "in any county having a population of not less than 12,350 nor more than 12,400 according to the 1970 federal census or any subsequent federal census." 1978 Tenn. Pub. Acts Ch. 934 (Supp. App'x 015); *see also Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979). Yet in both instances, this Court enjoined the statutes. Furthermore, in *Bozeman*, the statute was upheld even though the population bracket was partially closed: it did not apply to counties with populations over 600,000 according to the 1970 census only. 571 S.W.2d at 280. Therefore, adopting the Counties' interpretation would require this Court to overturn *Lawler*, *Leech*, and *Bozeman*.

By contrast, adopting the plain meaning interpretation offered by the Greater Praise Appellants would require this Court to overturn only *Leech*. Greater Praise does not ask this Court to "abandon" *Farris*, *contra* Appellees' Brief at 44, but merely asks this Court to read the passage from *Farris* in its full context, including its question of whether the statute is "designed to apply to any other county in Tennessee." 528 S.W.2d at 552. For, as this Court explained further in its seminal decision on the matter, *Burson*, a statute is not subject to the Home Rule

Amendment when it applies to not one county but "civil service commissions in the other two counties" 816 S.W.2d at 730. The ESA Pilot Program also applies to school districts in two counties, and for the same reason, this Court should uphold the statute.[1]

C. Under the Home Rule Amendment, the state can enact a law that applies to more than one county.

Even if this Court were to adopt the flawed Court of Appeals interpretation that a law must be potentially applicable to all 95 counties, the ESA Pilot Program still should be upheld. Tennessee Code Annotated § 49-6-2605(b)(2)(B)(ii) potentially applies to all counties in the state. Under that provision, after the first three years the school improvement fund will disburse grants to priority schools throughout the state. Thus, the ESA Pilot Program gives ESAs to students in SCS, MNPS, and the ASD and provides extra resources to students in struggling schools in all 95 counties. *See* Statement of Sen. Brian Kelsey pursuant to Rule 61,

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[1] Most of the private acts cited by the Counties as applying to "more than one jurisdiction" in fact applied to only one county. *See* Appellees' Brief at 40 n.17. For instance, 1959 Tenn. Priv. Acts Ch. 7 created a "Lexington-Henderson County General Hospital in Henderson County, Tennessee." *Id.* Section 1. 1955 Tenn. Priv. Acts Chs. 351 and 295, likewise, operated within Shelby County alone.

Nor do the statutes cited by the Counties support their reading. *See* Appellees' Brief at 46. Each of these examples simply provide that "a particular county" can adopt the scheme at issue. Rules "shall become effective in a particular county" when that county's legislative body adopts them. Rather than supporting Appellees' contention that "a particular county" can be many counties, these statutes support the basic proposition that "a particular county" means a single county.

Tennessee Senate Journal, May 1, 2019, at 1513 (Greater Praise App'x 028).

If this Court, instead, adopts the plain meaning that the Home Rule Amendment applies to laws applicable to one county only, then there is no question that the ESA Pilot Program is exempt from the amendment. The ESA Pilot Program gives ESAs to two county school districts because they are the largest school districts by far and contain almost all the state's failing schools. As the *Tennessee Journal* recently put it, "Historically, Tennessee's Big Four cities have been Memphis, Nashville, Knoxville, and Chattanooga. . . . [But i]n terms of population, [due to the growth of Clarksville and Murfreesboro,] the state arguably has a Big Two and a Next Four." *Tennessee Journal*, Vol. 43, No. 21, May 26, 2017 at 3. Memphis and Nashville truly are in a class of their own.[2]

That the two largest school systems should be treated differently was most evident during the COVID-19 pandemic, when all other school districts returned to in-person learning by January 2021, but SCS and MNPS continued to insist upon all-virtual learning. While defending this practice, one lawmaker representing SCS made an important admission that these two school districts are different and should be treated differently by the state: "And the reason why Shelby County Schools and Metro Schools are different is because those are incredibly large school districts. Shelby County Schools' budget is larger than the budget of Memphis. It's like running a small city of sorts." Statement of Sen.

[2] The journal noted the Nashville and Memphis populations were 660,000 and 650,000, respectively, while the populations of the next four largest cities ranged from 130,000 to 186,000.

Raumesh Akbari, Hearing on S.B. 0103, 2021 Tenn. Leg., 112th Sess. (Feb. 10, 2021).[3] Thus, the ESA Pilot Program treats the two school districts with the most failing schools differently, but it potentially applies to all school districts in the state.

II. The plain meaning of "a particular county or municipality" in the Home Rule Amendment does not mean a school district.

In Appellees' Brief, the Counties offer no argument to refute that "a particular county or municipality" should be interpreted by its plain meaning. Appellees' Brief at 60. It means "county or municipality" and not "school district." *See, e.g., Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959).[4] Therefore, the Home Rule Amendment does not apply to the ESA Pilot Program, which applies to school districts.

Throughout their brief, the Counties refer to the Home Rule Amendment as the "Local Legislation Clause." (Appellees' Brief at 27, 28, 33, 45, 60, 70.) However, they fail to respond to this Court's reasoning in *Fountain City* that recognized the 1953 Constitutional Convention intentionally changed the name of the Local Legislation Clause. After it

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[3] Available at http://tnga.granicus.com/MediaPlayer.php?view_id=610&clip_id=23870 at 31:55 (retrieved April 14, 2021).

[4] The Counties attempt to distinguish *Perritt* because it involved a special school district, and special school districts are not always funded by the county. Appellees' Brief at 60. However, the Counties admit that the special school district in *Perritt* was funded by the county, Appellee's Brief at 69 n.33; therefore, their reason for distinguishing *Perritt* from this case fails.

added language limiting the clause to a county or municipality, the convention changed the name to "Home Rule for cities and counties." *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482, 484 (Tenn. 1957). For that reason and others, this Court determined in *Fountain City* that the Home Rule Amendment does not apply to a "school district," an "irrigation district," or a "soil erosion district." *Id.* at 484-485.

In other portions of their brief, the Counties explicitly acknowledge that the 1953 convention limited the applicability of the Home Rule Amendment to laws that apply to "only counties and cities": "[Delegate Pope's] amendment had a simple purpose: to clarify that the resolution applied only to counties and cities." Appellees' Brief at 38. The Counties go on to quote the passage in full from the *Journal of 1953*, in which Delegate Pope makes it abundantly clear that he is limiting the Home Rule Amendment to cities and counties only. *Id.*; *Journal of 1953* at 1120-21 (Counties' App'x at APP029-30.) As Delegate Pope and the Counties explain, the whole purpose of this final change to the language of the Home Rule Amendment was to "make[ ] it more definite and sufficiently applicable only to counties, and municipalities." *Id.* In their brief, the Counties even italicize this language to emphasize its importance. Appellees' Brief at 38. Greater Praise Appellants agree. The final change to the language of the Home Rule Amendment was added for the express purpose of limiting its applicability to laws that apply to a county or municipality and not to laws that apply to another local governmental body like a "school district," an "irrigation district," or a "soil erosion district." *Fountain City*, 308 S.W.2d at 484-485. As the Counties admit

later in their brief, the limitation to laws that apply to a county or municipality was the "sole intent" of Delegate Pope's amendment. Appellees' Brief at 48-49. This Court should agree with that conclusion.

In addition, this Court should acknowledge the obvious fact that "local school systems are separate from the county governments." *Putnam Cty. Educ. Ass'n v. Putnam Cty. Comm'n*, No. M2003-03031-COA-R3-CV, 2005 Tenn. App. LEXIS 450, at *15 (Tenn. Ct. App. Aug. 1, 2005); *see also Young v. Stamey*, No. E2019-00907-COA-R3-CV, 2020 Tenn. App. LEXIS 118, at *27 (Tenn. Ct. App. Mar. 25, 2020).

The Counties' own citations support this fact. *See* Appellee's Brief at 71-72. In *Reed v. Rhea County*, 225 S.W.2d 49, 50 (Tenn. 1949), this Court explained that rather than being simply a department of county government, a "County Board of Education 'is a part of the state's educational system' and is 'endowed with county . . . functions.'" (quoting *Boswell v. Powell*, 43 S.W.2d 495, 496 (1931)). In that case, there would have been no need to consider whether the school district was entitled to the same governmental immunity as the county unless the school board was a distinct, separate entity. In *State ex rel. Boles v. Groce*, 280 S.W. 27, 28 (Tenn. 1925), this Court ruled, "The county board of education is a separate and distinct entity from that of the county court, created by the State, with well defined powers and duties, over which the county court has no supervisory jurisdiction." In *State ex rel. Milligan v. Jones*, 224 S.W. 1041, 1045 (Tenn. 1920), it did not matter whether the school director was a school district or county official for purposes of the removal statute because he was subject to it either way: "He is a district official

in one sense and a county and State official in the larger sense… the word 'municipal,' as employed in that act, would embrace school directors whether they should be considered district, county, or State officials." Finally, the Counties' quotation from *Southern Constructors, Inc. v. Loudon County. Board of Education*, 58 S.W.3d 706, 715 (Tenn. 2001) omits crucial context. There, this Court emphasized that "county boards of education are not part of the general county government." *Id.* These cases are all consistent with this Court's reasoning in *Fountain City* that a "school district" is an entity distinct from the county and, therefore, not subject to the Home Rule Amendment. 308 S.W.2d at 484.

III. Shelby and Davidson counties suffer no financial harm from the ESA Pilot Program; therefore, they do not have standing.

The finances of the ESA are very simple. For the Counties, there is no change. For the school districts, they are better off. Those results occur because most of the money from the county and state follows the child to the ESA, and the remainder stays with the school district. For the Counties, they pay to the school district the full local Basic Education Program (BEP) portion per student for the year before a child enrolls in the ESA pilot program, and they pay the *exact same amount* if the child enrolls in the program; therefore, there is no change. For the school district, when a child leaves with an ESA, he or she leaves "remainder funds" of $4,400 to $5,300 behind with the district to educate the remaining children; therefore, the school district is better off.

In their brief, the Counties acknowledge that there is no change in funding from the county governments: "Appellee Counties' total appropriations remain roughly the same . . . ." Appellees' Brief at 31. They disagree only with the policy of "pay[ing] for private schooling." Appellees' Brief at 32. This policy disagreement does not constitute harm for standing purposes.

A. The ESA Pilot Program causes no change in funding from the Counties to their school district.

The Counties have a mandate to pay the local BEP portion for eligible students, regardless of whether they participate in the ESA Pilot Program. There is no such thing as a new "ESA Mandate" on the Counties, *contra* Appellees' Brief at 30, 67, because they were already under a mandate to pay for these children. The two mandates which create the funding requirement for these children have existed for years. First, counties have a general duty to pay the local BEP portion for "each student who is eligible for enrollment within the schools of the local school system." Tenn. Code Ann. § 49-6-3102(a)(1). Second, they have a "maintenance of effort" statute requiring them to fund such students at the same level as the year before. *See* Tenn. Code Ann. § 49-2-203(a)(10)(A)(ii). These two statutes—not the ESA statute—create the funding mandate for counties to pay for their students.

What the Counties really complain of is the policy decision that they must *continue* to pay the local portion of the BEP when these students enroll in the ESA Pilot Program and attend an independent school.[5] In

[5] The Court of Appeals opinion characterizes this requirement as "keep[ing] the county appropriations for the county school system

their brief, they repeatedly complain that they are required to pay the "*non-public-school* education," Appellees' Brief at 31, of children "no longer attending public schools." Appellees' Brief at 29; *see also id.* at 25-26. This is a policy dispute—not a change in funding and certainly not a constitutional violation. As the Counties concede, this policy dispute results in *no change to their finances*: "Appellee Counties' total appropriations remain roughly the same . . . ." Appellees' Brief at 31. Both the Counties and Greater Praise Appellants agree on this point.

One might wonder, then, why the two parties seem to disagree as to how the funding works. The answer is one of baselines. For Greater Praise Appellants, the baseline is that the Counties have a current duty to fund the local BEP portion to educate these students. When they receive an ESA, nothing changes. For the Counties, they attempt to shift the baseline elsewhere and say they have no current duty to educate children in private schools. Their baseline is the wrong starting point because the ESA Pilot Program does not require them to fund children who are *already* in private schools. It only requires them to fund children who were enrolled in a public school last year or are entering the public school system anew, either because they moved or because they became eligible for Kindergarten. Tenn. Code Ann. § 49-6-2602(3)(A). Therefore, the ESA Pilot Program requires the Counties to fund only the children

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artificially high." *Metro. Gov't of Nashville & Davidson Cty. v. Tenn. Dep't of Educ.,* No. M2020-00683-COA-R9-CV, 2020 WL 5807636, at *3 n.1 (Tenn. Ct. App. Sept. 29, 2020) (Greater Praise App'x 037). Despite this negative characterization, this description, too, acknowledges it is not a new appropriation; it is simply keeping the old appropriation at the same level.

that it already had a duty to fund. That is why, as they admit, "Appellee Counties' total appropriations remain roughly the same . . . ." Appellees' Brief at 31.

The Counties also admit in their brief that when the funding requirement remains the same but there is simply a shift in where the funding goes, there is no violation of the Home Rule Amendment. The Counties make this admission in their discussion of the *Perritt* case. As they correctly describe in that case, "Moving students from the county into the special school district in 1957 did not affect the county financially under the 1919 formula." Appellees' Brief at 69. In *Perritt* and in this case, *where* the money went changed, but the total amount of money spent remained the same. As the Counties accurately describe in their brief, the allocation of county funds in *Perritt* "changed, but the county's total funding obligation remained the same." Appellees' Brief at 69, n.33. Similarly, in this case the Counties admit the Fiscal Memorandum is correct in describing not new funding from the Counties but rather a "shift in BEP funding" from the school district as recipient to the independent school as the ultimate recipient of most of the funds. Appellees' Brief at 23, n.10, quoting Corrected Fiscal Memorandum (R. Vol. VII at 1025.)[6] Thus, when discussing *Perritt*, the Counties ultimately

[6] Technically, the way the funding works is that the Counties pay the money directly to the school districts, regardless of whether they receive an ESA. Then, on the back end, the state subtracts from the money that they pay the school district both the state share of the BEP per pupil funding and an amount equal to a portion of the local share of the BEP per pupil. Tenn. Code Ann. § 49-6-2605(b). The policy reason for doing so

agree with the Greater Praise Appellants that when "the county's total funding obligation remain[s] the same," then there is "no local fiscal effect to trigger the Home Rule Amendment." Appellees' Brief at 69.

B. County school districts benefit financially from the ESA Pilot Program.

An analysis of the Counties' brief regarding the financial effects on their school districts shows why their baseline is the wrong starting point and why their dispute is really one of policy. They attempt to compare an ESA student with a "student [who] left to attend private school without an ESA." Appellees' Brief at 22-23. Obviously, they have no duty to fund a student in private school without an ESA, so that is the wrong baseline for comparison, and it reveals the error in their logic. They claim that when this hypothetical "*non-participating* student" leaves MNPS, "MNPS loses $3,618 in State BEP funding," but when a "*participating* student" leaves, "the Metropolitan Government loses $7,572 in BEP funding." That is, of course, nonsense. When a non-participating student leaves the school district, MNPS loses both the state *and the local* BEP funding. To imply otherwise to this Court by failing to mention the loss in local BEP funding is a misrepresentation of the facts. In reality, MNPS loses the entire $12,895 in per-pupil funding because the pupil is no longer there. By contrast, the Counties are correct that a participating student takes only $7,572 with him or her. This leaves a "remainder fund" with each school district of $4,400 for SCS and $5,300 for MNPS. Thus, the school districts are better off.

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is that it avoids trusting the Counties to send their funding directly to a state-run program.

For the school districts, as they did with the Counties themselves, the Counties ultimately agree in their brief with the facts as presented by the Greater Praise Appellants. Unlike the Court of Appeals, the Counties acknowledge these "remainder funds," but they do so in a backhanded way intended to make them appear to be bad for the school districts. They decry that the ESA Pilot Program "rais[es] per pupil costs of operations" for the remaining children in the school district. Appellees' Brief at 71. Let's examine that. That means they get *more* money per pupil to operate their school district, yet they claim that is an injury. Obviously, that is a benefit to the local school districts to continue to receive partial funding for children that they no longer have to educate. Because of this financial benefit that occurs *every year* of the program, the school districts also suffer no injury and have no standing to bring a claim in this case.

IV. In the alternative, the ESA Pilot Program should begin in the Achievement School District.

The Counties acknowledge that the ASD is "State-operated." Appellees' Brief at 32. Because it is state-operated, the ASD should be severed from the Chancery Court's injunction based on the Home Rule Amendment, and the ESA Pilot Program should proceed for the students governed by it.

Moreover, the Counties do not have standing to assert an injury on behalf of the ASD because it is a state agency. The Counties suffer no harm from providing ESAs in the ASD. They do not represent the ASD.

In fact, in this case they have sued the Secretary of Education, who administers the ASD.

The only argument the Counties offer to the contrary is that an amount equal to their "per student state and local funds" goes to the ASD. Appellees' Brief at 75, quoting Tenn. Code Ann. § 49-1-614(d)(1). The ASD statute they rely on for this supposedly new harm was enacted over ten years ago. That statute has not changed, and they suffer no new harm from extending the ESA to the ASD. Again, what the Counties really suffer from is a policy disagreement. They disfavor "students who leave the ASD for private schools." Appellees' Brief at 75. But once the funding has left the county government to go to the ASD, how the ASD spends it does not cause harm to the counties. A policy disagreement does not constitute a constitutional violation. The state can do as it pleases with the children entirely under its own control.

Additionally, standing is a jurisdictional doctrine that this Court can address even if the Greater Praise Appellants had not raised the issue themselves. *See State v. Harrison*, 270 S.W.3d 21, 27 (Tenn. 2008) ("The State did not question Mr. Harrison's standing . . . The trial court raised this question on its own motion").

In addition to standing, this Court has discretion to hear whether the Home Rule Amendment applies to the ASD. This Court's jurisdiction is not limited by the particular ground upon which the Court of Appeals based its decision. Rather, Tennessee Rule of Appellate Procedure 11(a) provides that this Court has "discretion" regarding the issues it addresses in an appeal by permission. *See, e.g., State v. Walls*, 537 S.W.3d 892, 904 n.7 (Tenn. 2017) (exercising the Court's supervisory authority). That the

Greater Praise Appellants raised this argument below is demonstrated by the Court of Appeals mentioning it when declining to rule on it. *See Metro. Gov't*, 2020 WL 5807636, at *8 n.6 (Greater Praise App'x 043). Greater Praise Appellants also raised the issue in their petition to this Court, as required by Tennessee Rule of Appellate Procedure 11(b)(3). *See* Greater Praise Application at 8 n.1; *cf. SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 471 n.4 (Tenn. 2012). Therefore, the argument was preserved and represents a valid and independent basis for this Court to reverse the decision below.

CONCLUSION

Greater Praise Appellants ask this Court to declare the ESA Pilot Program constitutional, to reverse the opinion of the Court of Appeals, to vacate the permanent injunction, and to either dismiss the case for lack of standing or ripeness or remand the case to the Chancery Court for proceedings consistent with this ruling.

Respectfully submitted, Dated: April 21, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements set forth in Tenn. S. Ct. R. 46 (3.02), including the 5,000-word limit for Reply briefs. This brief contains 4,977 words, based on the word count of Microsoft Word and excluding those sections mentioned in Tenn. S. Ct. R. 46 (3.02)(a)1. It has been prepared with full justification in 14-point Century Schoolbook font with 1.5-spaced lines and pagination beginning on the cover page with page 1. It was prepared in Microsoft Word and directly converted to Portable Document Format.

Dated: April 21, 2021

s/ Brian K. Kelsey
Brian K. Kelsey

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document was served via Tenn. S. Ct. R. 46A through the e-filing system and was forwarded to the attorneys listed below via the e-mail addresses below on this 21st day of April, 2021.

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