IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CASE NO. M2020-00683-COA-R9-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 Expedited, Interlocutory Appeal Pursuant to Tenn. R. App. P. 9
Oral Argument Requested and Scheduled: August 5, 2020 at 1:00 P.M.

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

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

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

STATEMENT OF THE CASE

Plaintiffs challenge the State of Tennessee's decision to offer extra educational opportunities to low-income children through a pilot program in the state's own Achievement School District and in its two largest and most struggling school districts.

On May 24, 2019, Governor Bill Lee signed into law the signature legislative accomplishment of his first two years in office: the Tennessee Education Savings Account ("ESA") Pilot Program. Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. The ESA Pilot Program offers low-income students an individualized education savings account, which can be used for a wide variety of educational services, including private school tuition. Tenn. Code. Ann. § 49-6-2603. The pilot program begins in the Achievement School District (ASD), which runs the state's lowest performing schools, and in school districts with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code. Ann. § 49-6-2602(3)(C).

On February 6, 2020, Plaintiffs Metropolitan Government of Nashville and Davidson County, Shelby County Government, and Metropolitan Nashville Board of Public Education filed this lawsuit in Davidson County Chancery Court against the Tennessee Department of Education; Penny Schwinn, in her official capacity as Education Commissioner for the Tennessee Department of Education; and Bill Lee, in his official capacity as Governor for the state of Tennessee (the "State Defendants"). (R. Vol. I at 1.) On March 6, 2020, the Chancellor accepted the parties' agreement allowing three groups to enter the case as

Intervenor-Defendants. (R. Vol. III at 382.) Parents Natu Bah and Builguissa Diallo agreed to file joint briefs with parents Bria Davis and Star Brumfield. Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; & David Wilson, Sr. (the "Greater Praise Intervenor-Defendants") are allowed to file separate papers making their unique arguments.

Greater Praise Christian Academy (GPCA) is a small, nonprofit, private, faith-based school serving low-income, academically challenged students in the struggling Frayser neighborhood of Memphis. (R. Vol. VIII at 1151-52.) Its director, Kay Johnson, is a former public school teacher who founded the school because the public school system was not meeting the needs of her neighborhood. GPCA wants to use the ESA Pilot Program to more than double the number of children it can help each year. *Id*. Sensational Enlightenment Academy Independent School is a nonprofit, private school serving low-income students in the Hickory Hill neighborhood of Memphis. (R. Vol. II at 297-98.) It also wants to use the ESA Pilot Program to expand the number of children it can serve. (*Id*. at 298.) Ciera Calhoun is a mom who will use ESAs, so several of her children can escape the public school they attend in the Achievement School District in Memphis. (R. Vol. II at 300-01.) Alexandria Medlin is a mom in Memphis who will use an ESA to allow her daughter, who is entering Kindergarten, to avoid the large, failing, public school system and, instead, attend a small, neighborhood Christian school. (R. Vol. II at 303-04.) David Wilson, Sr. is a dad who will use an ESA to allow his son to escape the public school he attends in the Achievement School District

in Nashville. (R. Vol. III at 306-07.) These parties plead with this Court to reverse the Chancery Court order enjoining the program, for the sake of their children and the children they serve.

On March 6, 2020, the Greater Praise Intervenor-Defendants filed a Motion to Dismiss the Complaint in its entirety and a memorandum in support thereof. (R. Vol. III at 386-414; App. 064-088.) On March 11, 2020, the State Defendants also filed a Motion to Dismiss the Complaint. (R. Vol. III at 415-447.) On March 27, 2020, Plaintiffs filed a Motion for Summary Judgment on Count I of their Complaint and memorandum in support thereof, alleging the ESA Pilot Program violated the Home Rule Amendment of the Tennessee Constitution. (R. Vol. III at 448-51; R. Vol. IV at 452-600; R. Vol. V at 601-51.) On April 15, 2020, the other Intervenor-Defendants filed their Motion for Judgment on the Pleadings. (R. Vol. V at 673-99).

In the meantime, on March 2, 2020, a group of Davidson and Shelby County parents and taxpayers filed a similar lawsuit in Davidson County Chancery Court, which was assigned to the same chancellor. *McEwen, et al. v. Lee, et al.*, Davidson County Chancery Court No. 20-242-II ("*McEwen*"). Greater Praise Christian Academy and several parents also intervened in that case, and they filed a Motion to Dismiss. (App. 089-117)

On April 20, 2020, the Chancery Court ordered all dispositive motions in both cases to be heard together on April 29, 2020. (R. Vol. V at 700.) On May 4, 2020, the Chancery Court issued its Memorandum and Order, declaring the ESA Pilot Program in violation of the Home Rule Amendment, enjoining the entire program immediately, dismissing

Metropolitan Nashville Board of Public Education as a Plaintiff, and granting permission for an interlocutory appeal under Tenn. R. App. P. 9. (R. Vol. VIII at 1097-1128; App. 032-063.) The Greater Praise Intervenor-Defendants/Appellants ask this Court to apply the plain meaning of the Home Rule Amendment to this case and reverse the Chancery Court order: "a particular county" means one county, not two.

STATEMENT OF FACTS

In May 2019, the State of Tennessee enacted the Tennessee Education Savings Account Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. The pilot program is open to Kindergarten-12th grade students whose annual household income is less than or equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code. Ann. § 49-6-2602(3).[1] Eligible students must have attended a Tennessee public school

[1] The maximum eligible income is $43,966 for a household of two, and it increases with household size. (R. Vol. III at 393.) *See* Tennessee Comptroller of the Treasury, Legislative Brief, Understanding Public Chapter 506: Education Savings Accounts, Table at Page 1, available at https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2020/ESA2020Website.pdf (updated May 2020) (retrieved May 14, 2020) (App. 003.) Courts may take judicial notice of official government documents. *Hanover v. Boyd*, 121 S.W.2d 120, 121 (Tenn. 1938) (permanent official records maintained by the Secretary of State may be judicially noticed); *Scott v. Grunow*, APP. NO. 01A01-9206-CH-00228, 1993 Tenn. App. LEXIS 92, at *8 (Tenn. Ct. App. Jan. 27, 1993) (Court of Appeals upholds Chancery Court taking judicial notice of government documents from state agency). *See Bright v. State*, No. M2003-00239-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 446, at *18 (Tenn. Ct. Crim. App. May 18, 2004) (Criminal Court takes judicial notice of official

the prior school year, must be entering Kindergarten for the first time, must have recently moved to Tennessee, or must have received an ESA the prior year. Tenn. Code. Ann. § 49-6-2602(3)(A).

The ESA provides each student with an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a). The amount of the ESA will be approximately $7,100 for the school year beginning this August and will automatically increase as the state increases education funding. (Comptroller Brief, Table at Page 4, App. 006.)[2] The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational programs, and college admission exams. Tenn. Code. Ann. § 49-6-2603(a)(4). An ESA is different from a school voucher, which can only be used for private school tuition, because an ESA can be used for a variety of purposes and because it is an individualized account, in which any unused funds roll over each year and remain in the account. Tenn. Code. Ann. § 49-6-2603(l). After 12th grade, any unused ESA funds may be

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document prepared by state employees). Thus, the Greater Praise Intervenor-Defendants/Appellants ask the Court to take judicial notice of the five official government documents found in their Appendix, including this one, which was published after the chancellor issued her order; three records from the Constitutional Convention of 1953, certified from the State Library and Archives, which was closed prior to the Chancery Court hearing; and an excerpt from the Senate Journal, as well as the *Journal and Debates of the Constitutional Convention of 1953* and the official government videos found on the General Assembly website of the debates of the ESA Pilot Program.

[2] State Average, Total State + Local BEP ($7,572) - State Administration Fee (6%) ($454) = $7,118

transferred into a college fund for tuition, fees, and textbooks at eligible colleges, universities, and vocational, technical, or trade schools. Tenn. Code. Ann. § 49-6-2603(g).

The legislation was amended late in the process to become a pilot program. The pilot program is capped at 5,000 students in year one, and it rises 2,500 students a year to 15,000 students in year five. Tenn. Code. Ann. § 49-6-2604(c). An eligible student must reside in a neighborhood zoned to attend a school in the Achievement School District (ASD), which runs some of the state's lowest performing schools, or reside in a school district with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code. Ann. § 49-6-2602(3)(C). As applied, that means that the ESA Pilot Program would begin operations in three school districts: the ASD, SCS, and MNPS. Those three school districts serve children located in two counties: Shelby[3] and Davidson. The ESA Pilot Program provided the legislative rationale for beginning the pilot program in these districts within the text of the act itself: the "pilot program . . . provides funding

[3] SCS (and the ASD in Shelby County) serve children residing in Memphis and unincorporated Shelby County. The remainder of the county is served by six suburban municipal school systems. *See* http://www.scsk12.org/schools/files/2019/scs%20schools%2019-20%2042x42.pdf (retrieved May 20, 2020). The existence of these six suburban Local Education Agencies (LEAs) reinforces the State Defendants' argument that the Home Rule Amendment applies to counties but not LEAs. Do Plaintiffs propose that voters in Shelby County's municipal school districts have a right to vote in a home-rule referendum only affecting SCS?

for access to additional educational options to students who reside in local education agencies [school districts] that have consistently and historically had the lowest performing schools." Tenn. Code. Ann. § 49-6-2611(a)(1).

Funding for the ESA Pilot Program is built on the simple principle that the dollars follow the child. The ESA is funded with the student's per-pupil expenditure of state funds from the Kindergarten-12th grade funding formula, the Basic Education Program (BEP), as well as the required minimum match in local funds. Tenn. Code. Ann. § 49-6-2605(a).

The ESA Pilot Program supports school districts affected by the program with three financial windfalls that increase their per-pupil spending. First, the value of the ESA is capped in a couple of ways. To begin with, only the minimum "required" local portion of BEP funding is allocated to a student's ESA; districts that levy above the required minimum retain the excess. Tenn. Code. Ann. § 49-6-2605(a). Next, the ESA cannot exceed the combined statewide average of required state and local BEP allocations per pupil. *Id*. The difference between the actual local portion of the BEP and the local portion going toward the ESA creates a surplus left in the district of over $4,000 per pupil in Shelby County Schools (SCS) and over $5,000 per pupil in Metro Nashville Public Schools (MNPS). (Comptroller Brief, Table at Page 4, App. 006.)

Second, the program creates a ghost reimbursement for three years, in which an affected school district receives the state and minimum local portion of the BEP to educate a child who is no longer its responsibility. Tenn. Code. Ann. § 49-6-2605(b)(2)(A).

Third, at the end of three years, a school improvement fund will disburse school improvement grants for programs to support priority schools throughout the state, the vast majority of which are located in the counties represented by the Plaintiffs/Appellees. Tenn. Code. Ann. § 49-6-2605(b)(2)(B)(ii).

In order to "assist the general assembly in evaluating the efficacy" of the ESA Pilot Program, "the office of research and education accountability (OREA), in the office of the comptroller of the treasury, shall provide a report to the general assembly" at the end of the third year of the pilot program and each year thereafter. Tenn. Code. Ann. § 49-6-2611(a)(2). The report will include participating student performance, graduation rates, parental satisfaction, audit reports, and recommendations for legislative action if the list of low-performing school districts changes based on the most recent data from the Department of Education. Tenn. Code. Ann. § 49-6-2606(c); Tenn. Code. Ann. § 49-6-2611(a)(2). Armed with this information from OREA, the General Assembly can expand the ESA Pilot Program in the future if it is successful or end it if not. (Senate Floor Session Excerpt, May 1, 2019, R. Vol. V at 603.)

ARGUMENT

Summary of Argument

This case presents two issues for review: whether the ESA Pilot Program violates the Home Rule Amendment and whether the county government plaintiffs have standing to bring the lawsuit.

The ESA Pilot Program does not violate the Home Rule Amendment because the pilot program affects three school districts in two counties, and the Home Rule Amendment only governs legislation affecting one county. The Home Rule Amendment applies to laws affecting only "a particular county," and the plain meaning of that phrase is one county. Tenn. Const. Art. XI, § 9. It is unambiguously singular. Therefore, the Home Rule Amendment is inapplicable to the law, and there is no need for the Court to consult any other source.

If the Court were to consult other sources, those sources would only confirm that the Home Rule Amendment is inapplicable to laws affecting multiple counties. The proceedings of the 1953 constitutional convention, which adopted the Home Rule Amendment, reaffirm that the delegates inserted the amendment to address the issue of private or local bills affecting only one county. The strongest evidence for the interpretation comes from a letter from Delegate William E. Miller to Delegate Lewis Pope, chairman of the Editing Committee, in which Delegate Miller suggests that there is no reason to wait to hold a county-wide referendum on whether to approve targeted legislation until a statewide general election because the election will only be occurring in one county—not two or three or four. As he puts it, "the private Act concerns only one municipality or county." (Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8, App. 014.)

Further, the journal of the proceedings of the convention shows that the convention debated and rejected two of the other possible meanings of the Home Rule Amendment: allowing the legislature to classify cities by population with at least four cities in each classification or prohibiting

all laws not affecting every single county in the state. The convention clearly intended to apply the amendment to laws affecting only one county, and, through the language it chose, it did exactly that.

If the Court were also to consult the legislative history of the ESA Pilot Program, the history would show that the governor and General Assembly did not target the program at one county, *see, contra, Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 659 (W.D. Tenn. 2012), and, in fact, did not target the program at any counties at all. The ESA Pilot Program was not targeted at counties to harm them but targeted at students to help them. The legislative history also shows that the General Assembly had a "reasonable basis" for beginning the pilot program where it did, *see Frazer v. Carr*, 360 S.W.2d 449, 452 (Tenn. 1962): the affected school districts all had a large number of schools that had been failing for years.

In addition, the Chancery Court erred in extending its injunction to the Achievement School District because the Home Rule Amendment cannot possibly apply to a school district run by the state. If this Court agrees with the trial court's injunction, it should at least limit it to enjoining the program in Shelby County Schools and Metro Nashville Public Schools but not in the state-run Achievement School District.

For the same reason, the county government plaintiffs do not even have standing to bring a challenge to whether the state can implement the ESA Pilot Program in the state's own Achievement School District. The county governments do not have any authority at all over, or a financial tie to, the state-run Achievement School District.

The county governments also do not have standing to bring the lawsuit on behalf of the county school districts because those districts do not suffer any injury-in-fact from the ESA Pilot Program. In fact, they benefit financially from the law by receiving three windfalls of money. First, for every student who participates in the program, SCS gets to keep over $4,400 and MNPS gets to keep over $5,300. These resources can be used to augment the educational services provided to every student remaining in the system, and it occurs every year. Second, for the first three years, SCS and MNPS will be given the entire state and local BEP funding per student for every student receiving an ESA—even though the school district will not be responsible for educating the child. This "ghost reimbursement" will amount to over $12,000 per child in the ESA program. Third, after the first three years, the state will allocate $25 million to schools through grants to failing schools. Because the vast majority of failing schools are in the two counties affected by the law, they will receive the lion's share of those grant funds. Thus, once again, the affected county school districts will benefit from the law and will experience no injury-in-fact. Therefore, the county government plaintiffs do not have standing to maintain a lawsuit on their behalf. *See ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006).

I. The Home Rule Amendment only governs legislation targeting one specific county.

A. The plain meaning of "county" in the Home Rule Amendment is clearly and unambiguously singular, and when the language of the law is clear, Tennessee courts apply its plain meaning.

i. The text of the Home Rule Amendment is clear that it applies to laws affecting one county, and the text of the ESA Pilot Program is clear that it applies to three school districts located in two counties.

The Home Rule Amendment of the Tennessee Constitution reads in its entirety as follows:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to *a particular county* or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. Art. XI, § 9 (emphasis added).

This is one of two legal provisions at the core of this case. The other is the ESA Pilot Program, itself, which is established for a low-income student who:

> (i) Is zoned to attend a school in an LEA, 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;
>
> (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 May 24, 2019;

Tenn. Code Ann. § 49-6-2602(3)(C). It is undisputed that, by the terms of the ESA Pilot Program, it will be established for initial evaluation in three school districts: the ASD, SCS, and MNPS. (Greater Praise Resp. to Plaintiffs' Stmt. of Mat. Facts, R. Vol. 5 at 725-27.) As of the enactment date of the ESA Pilot Program on May 24, 2019, all three of those school districts operate schools located in two counties: Shelby and Davidson. *Id.*

ii. When the language of the law is clear, Tennessee courts apply its plain meaning.

"The interpretation of a constitutional provision should begin with its text." *Planned Parenthood v. Sundquist*, No. 01A01-9601-CV-00052, 1998 Tenn. App. LEXIS 562, at *62 (Tenn. Ct. App. Aug. 12, 1998). When the language of the constitution is plain, the judge's task is at an end: "The Court, in construing the Constitution must give effect to the intent of the people that are adopting it, as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to convey such intent; and where such presumption prevails nothing remains except to enforce such intent." *Shelby Cty. v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956).

Just as with constitutional provisions, the courts of Tennessee follow this same principle when construing contracts, *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566

S.W.3d 671, 676 (Tenn. 2019), statutes, *Thurmond v. Mid-Cumberland Infectious Disease Consultants*, 433 S.W.3d 512, 517 (Tenn. 2014), and rules, *Fair v. Cochran*, 418 S.W.3d 542, 544 (Tenn. 2013). The plain-meaning rule applies in all these circumstances because the subject under examination is a legal text; the type of legal text does not matter to the method employed in reading it. Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* (Princeton Univ. 1997) at 38.

This plain-meaning rule is not simple pablum the court recites every time it hears a construction case; rather, the Tennessee Supreme Court has said "to follow the plain meaning" is "the cardinal rule" of construction. *Jackson v. General Motors Corp*., 60 S.W. 3d 800, 804 (Tenn. 2001). Nor is the plain-meaning rule only for one type of judge. As Justice Elena Kagan declared five years ago, "We're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube (Nov. 25, 2015)[4]. She went on to tell the modern law students that when she graduated in 1986, judges were "pretending to be congressmen" and their approach to statutory interpretation was "what should this statute be," rather than what do "the words on the paper say." *Id*. The present case presents this Court the opportunity to simply follow the words on the page instead of making a policy judgment about where to draw an atextual line as to how many counties is too few.

[4] Available at https://www.youtube.com/watch?v=dpEtszFT0Tg (retrieved June 27, 2020).

When the "language is clear and unambiguous, we apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the [provision's] application." *State v. White*, 362 S.W.3d 559, 566 (Tenn. 2012); *accord* Opinion of Attorney General Robert E. Cooper, Jr., No. 11-45, at *3 (May 18, 2011) (same); Opinion of Attorney General Robert E. Cooper, Jr., No. 09-160, at *3 (Sept. 28, 2009) (same); Opinion of Attorney General Robert E. Cooper, Jr., No. 08-127 (July 24, 2008) (same). The Chancery Court did what this precept forbids—forcing an expanded interpretation that goes beyond the plain meaning of the words in their normal and accepted use. (Trial Court Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23; App. 057-58.) This Court cannot permit such a clear error to stand.

iii. The plain meaning of "a particular county" in the Home Rule Amendment is clearly and unambiguously singular.

The plain meaning of "a particular county" is obvious: the General Assembly may not single out one county with a law that is "private or local in form" (by name) or "in . . . effect" (by definitive reference). Tenn. Const. art. XI, § 9. The ESA Pilot Program uses criteria rather than names to designate portions of *two* counties; thus, the Home Rule Amendment does not apply.

The constitutional provision's drafters used the singular form "a particular county," and the courts are bound to respect their choice. *See Hosp. Corp. of Am. v. Shackelford*, 1984 Tenn. App. LEXIS 2976, at *5 (Tenn. Ct. App. July 6, 1984) ("It is also significant that the word, contract, is singular, not plural. The use of the singular form indicates

that only one contract was designated rather than several."). When a text uses the singular form, single means one and only one. *Five Oaks Golf & Country Club, Inc. v. Farr*, No. M2013-01896-COA-R3-CV, 2014 Tenn. App. LEXIS 159, at *6 (Tenn. Ct. App. Mar. 20, 2014) ("The [statutory] term 'prevailing party' is in the singular form, indicating that there can be only one prevailing party."); *Modern Serv. Cas. Ins. Co. v. Aetna Cas. & Sur. Co.*, No. 02A01-9401-CV-00006, 1994 Tenn. App. LEXIS 745, at *12 (Tenn. Ct. App. Dec. 19, 1994) ("The singular use of the word 'policy,' especially when the statute was amended to expand its application, is indicative of the legislature's intention to confine the statute to a single auto insurance policy."); *Am. Ins. Co. v. Allison Constr. Co.*, No. 2, 1990 Tenn. App. LEXIS 914, at *9 (Tenn. Ct. App. Dec. 28, 1990) (singular versus plural usage meaningful in contract interpretation); *accord* Tenn. Op. Att'y Gen. No. 05-004, at *3 (Jan. 5, 2005) (use of the singular form in a statute means only one); Tenn. Op. Att'y Gen. No. 96-034, at *2-3 (Mar. 7, 1996) (same); Tenn. Op. Att'y Gen. No. 77-110, at *1 (Apr. 7, 1977) (same). Courts are bound to respect the singular form as the considered choice of the text's drafter(s). *See Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 309 (Tenn. 2008).

This is a well-accepted rule. The U.S. Supreme Court, for instance, recognizes that the singular form reflects an intentional choice made by the drafters. *See Life Technologies Corp. v. Promega Corp.,* 137 S. Ct. 734, 742 (2017) ("…when Congress said 'components,' plural, it meant plural, and when it said 'component,' singular, it meant singular"); *U.S. v. Hayes*, 555 U.S. 415, 421–22 (2009) ("[the statute] uses the word 'element'

in the singular, which suggests that Congress intended to describe only one required element"); *Frisby v. Shultz*, 487 U.S. 474, 482 (1998) ("the use of the singular form of the words 'residence' and 'dwelling' suggests that the ordinance is intended to prohibit only picketing focused on […] a particular residence); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 105 (1919) ("The words are in the singular, not the plural […] Infringement of several copyrights is not put on the same level with infringement of one.").

Other federal courts and the courts of other states also respect the legislative decision to use the singular form when drafting a text. *See, e.g., United States v. Barnes*, 295 F.3d 1354, 1362–63 (D.C. Cir. 2002); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999); *United States v. Green*, 902 F.2d 1311, 1312 (8th Cir. 1990); *State v. Brown*, 80 A.3d 878, 883-84 (Conn. 2013); *State v. Trawitzki*, 628 N.W.2d 801, 813 (Wis. 2001); *Rainaldi v. City of Albuquerque*, 2014-NMCA-112, 338 P.3d 94 (N.M. Ct. App. 2014); *Black v. Ryan*, 2012-Ohio-866, ¶ 40 (Ct. App.). Specific to the text at issue in this case, courts have read statutes designating "a particular" entity as singular and not inclusive of the plural. *See, e.g., AlohaCare v. Ito*, 271 P.3d 621, 643 (Haw. 2012) (*citing Insurance Commissioners v. Mutual Medical Insurance, Inc.*, 241 N.E.2d 56, 60-61 (Ind. 1968) and *Herring v. American Bankers Insurance Co.*, 216 So. 2d 137 (La. App. 1969)).

If the framers of the Home Rule Amendment had intended what the Chancery Court contends, they should have written "particular counties" rather than "a particular county." *See, e.g., State v. Johnson*, 53 S.W.3d

628, 632 (Tenn. 2001) ("Significantly, the statute uses the plural 'parts' rather than the singular 'part.'"); *Harrison v. Shelby Cty. Bd. of Educ.*, No. W2015-01543-COA-R3-CV, 2016 Tenn. App. LEXIS 219, at *9 (Tenn. Ct. App. Mar. 30, 2016) (relying on the difference between singular "evaluation" and plural "evaluations" when interpreting a statute); *Fox v. Osterhout*, 03A01-9811-CV-00370, 1999 Tenn. App. LEXIS 694, at *2-3 (Tenn. Ct. App. Oct. 15, 1999) (relying on the difference between singular "defendant" and plural "defendants" when interpreting an order); Tenn. Op. Att'y Gen. No. 17-38, at *6 (Sept. 1, 2017) (legislative choice to use the plural rather than the singular form is assumed to be intentional and must be respected). But the framers of the constitutional text did not use the plural form, and courts should not do what the trial court did: rewrite a text from the singular to the plural by judicial fiat. *See Bates v. Dennis*, 203 S.W.2d 928, 932 (Tenn. 1946).

The plain meaning is especially obvious when the entire clause is read. The language of the Home Rule Amendment uses numerous singular nouns: "a particular county or municipality," "its governmental or its proprietary capacity," "the local legislative body of the county or municipality," and "the county or municipality affected." Tenn. Const. Art. XI, § 9. Not only did the trial court change "a particular county" to "the particular counties," but it also changed the constitution to read "in their governmental or proprietary capacities," "the local legislative bodies of the affected counties or municipalities" and "the counties or municipalities affected." The language of the provision, as a whole, demands only one conclusion: the plain meaning of the clause is singular.

The phrase "a particular county" is also used in the singular sense every time it appears in Tennessee statutes. Tenn. Code Ann. § 5-12-102(a); Tenn. Code Ann. § 5-12-216; Tenn. Code Ann. § 5-13-102(a); Tenn. Code Ann. § 5-14-102(a); Tenn. Code Ann. § 5-21-126(a); Tenn. Code Ann. §§ 7-1-101(2) & (7)(A); Tenn. Code Ann. § 7-21-104(10); Tenn. Code Ann. § 7-51-1120; Tenn. Code Ann. § 8-8-402(a); Tenn. Code Ann. § 16-15-201(e); Tenn. Code Ann. § 16-15-301(b); Tenn. Code Ann. § 36-5-402(b)(2); Tenn. Code Ann. § 49-2-1201(e)(3); Tenn. Code Ann. § 65-21-114(b); Tenn. Code Ann. § 71-1-117; Tenn. Code Ann. § 71-5-1202(a)(1). *See* Tenn. Op. Att'y Gen. No. 97-2 (Jan. 9, 1997) (phrase "a particular county" used in singular sense in previous version of Tenn. Code Ann. § 67-5-1601(a)). The same is true when the phrase is used in Tennessee's administrative code. Tenn. Comp. R. & Regs. R. 0770-01-05-.06(7)(a)(1) & (7)(e)(2); Tenn. Comp. R. & Regs. R. 1320-04-05-.28(3)(b). This consistent usage reinforces the plain meaning in the constitutional context. *See Conley v. State*, 141 S.W.3d 591, 596 (Tenn. 2004) (when a statutory term is not defined, the court looks to use of the same term in other statutes).

When the singular form is clear, no further construction by courts is necessary. Tenn. Op. Att'y Gen. No. 15-20, at *4-5 (Mar. 13, 2015) ("The consistent use of the singular when referring to the offense or charge to be included in a warrant leaves no ambiguity. Since there is no ambiguity, there is no need to look to rules of statutory construction."). "When statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, . . . without reference to the broader statutory intent, legislative history, or other sources." *Carter v. Bell,* 279 S.W.3d 560, 564 (Tenn. 2009).

iv. Tennessee courts overturn statutes using the Home Rule Amendment only when they affect only one county or use a population bracket gimmick to target one county.

Since the Home Rule Amendment was adopted in 1953, Tennessee courts have only overturned a "private or local act" when it applied to only one county or when it utilized a population bracket gimmick.

If a statute applies to only one county, whether in form or effect, it may be overturned if it did not receive local approval. For example, in the case of *Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975), the legislature passed a law requiring a run-off election for county mayor. *Id.* at 551-52. The Tennessee Supreme Court determined that because Shelby County was the only county in the state with a county mayor, the statute violated the Home Rule Amendment. *Id.* at 556. Similarly, the Supreme Court used the Home Rule Amendment to overturn a statute that applied to only one county in *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967). In that case, the legislature had passed a general law expanding the jurisdiction of General Sessions Courts but had used a population bracket to limit its application to Gibson County alone, and this it could not do. *Id.* at 553. The U.S. District Court for the Western District of Tennessee relied upon these two cases when it, too, overturned a statute that "targeted Shelby County." *Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 659 (W.D. Tenn. 2012) (discussed further in section I. C. below). Unlike the statutes in these three cases, the ESA Pilot Program does not apply to only one county in the state.

As the Supreme Court set forth in *Farris*, the test is "whether this legislation was designed to apply to any other county in Tennessee . . . ."

Farris, 528 S.W.2d at 552. It is undisputed in this case that the ESA Pilot Program was designed to apply to three school districts in two counties; therefore, under the test set forth in *Farris*, it should be upheld.

When statutes do apply to multiple counties, Tennessee courts have upheld them. *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (two counties); *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962) (four counties). The Supreme Court has even upheld statutes applying only to Davidson County when the legislature passed laws affecting only counties with metropolitan governments. *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971); *Metro. Gov't of Nashville & Davidson County v. Reynolds*, 512 S.W.2d 6 (Tenn. 1974). The Supreme Court has even said that a statute is not private or local if it affects only one county at the time of enactment but uses open-ended population brackets that could reasonably include other counties in the future. *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 730 (Tenn. 1991).

The one case that doesn't fit that otherwise consistent framework is the heart of Appellees' argument: *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979). In that case, the Tennessee Supreme Court struck down a statute affecting two counties by using a population bracket gimmick to target certain counties and not others. *Id.* at 274. Legislation by population brackets was, indeed, in need of a remedy by the 1953 constitutional convention, which adopted the Home Rule Amendment. It sought to "prevent evasion through the guise of a population classification which would have the form of a general law but would be in effect a private act." The State of Tennessee, *Journal and Debates of*

the Constitutional Convention of 1953, at 907 (1953) (statement of Delegate Cecil Sims). Ultimately, the 1953 convention decided against mentioning population classifications in its text. *See* section I. B. iii. below.

In this case, unlike in *Leech,* there was no arbitrary population classification. The classification was based on having a large number of historically failing schools, which is a "reasonable basis." *Frazer v. Carr*, 360 S.W.2d 449, 452 (Tenn. 1962). *See* section I. C. below. Therefore, the *Leech* case should be distinguished.

Furthermore, *Leech* has been superseded by *Burson*, 816 S.W.2d 725, which did uphold a statute that affected multiple counties using population brackets. *Burson* did not explicitly overrule *Leech*, but it did ignore the decision in its discussion of the Home Rule Amendment, even though the opinion cited *Leech* in a different section for a different proposition of law. In such an instance in which two Supreme Court cases appear to be in conflict, this Court should follow the most recent opinion, which is *Burson*. *See State v. Smith*, 996 S.W.2d 845, 848 (Tenn. Crim. App. 1999).

B. The proceedings of the 1953 Constitutional Convention reaffirm that the Home Rule Amendment was aimed at preventing legislation targeting one specific county.

i. The problem being solved by the convention was private or local acts affecting only one county or city.

When the delegates to the 1953 Constitutional Convention gathered, the Tennessee Constitution had stood unamended since 1870.

In the intervening eighty years, a pernicious problem had arisen—statewide legislative majorities targeted an individual county or municipality and its elected officials with "private acts" to impose their will on a politically disempowered locality. Victor C. Hobday, "An Analysis of the 1953 Tennessee Home Rule Amendment" (2nd Ed.), Univ. of Tennessee Municipal Technical Advisory Service (May 1976), at 5.[5] To prevent the persistence of private acts, the delegates adopted two amendments to the constitution: one allowed municipalities to choose to adopt their own charters. This ultimately became paragraphs three through nine of Article XI, Section 9. The first paragraph of Section 9 had already existed prior to 1953. The second amendment ultimately became paragraph two of Section 9; it applied to all other municipalities and to counties; and it is the paragraph discussed in this case as the Home Rule Amendment. It is further divided into two parts: the first part completely prohibited incumbent local officials from being removed or having their salaries cut by a "special, local or private act." Tenn. Const. Art. XI, § 9. The second part required that "any act . . . private or local in form or effect" must receive local approval either by a two-thirds vote of the local legislative body or by a local referendum. *Id.*

Delegates to the 1953 constitutional convention agreed that the primary reason for calling the convention was to address the issue of home rule and the problem of legislation aimed at one county or city. As Delegate Leon E. Easterly stated,

[5] Available online at https://trace.tennessee.edu/utk_mtaspubs/295/ (retrieved June 24, 2020).

> [T]he greatest need and most unanimous demand from all parts of our great State of Tennessee is a plan to be incorporated in our basic laws which will give to the counties protection from the pernicious local legislation showered down on the various counties during every session of the legislature.

Journal of 1953, at 937 (1953). The two Home Rule amendments were among the most debated and most contentious issues that the convention discussed. They were adopted to address "ripper bills [which] remove certain officials from public office[;] others change salaries, upward or downward, [and] abolish certain offices" to reward or punish political allies and opponents of local legislators. *Id*. Such local bills passed the legislature, often unanimously, because legislators not representing the locality gave legislative deference to their colleagues who did: "'It matters not how vicious such a bill may be, how much the members may oppose the principles it may declare, or how shamefully it may violate individual rights, or the interests of the state, if it has the support of the local members[,] its passage is generally secure.'" *Id*. (Delegate Easterly quoting Alabama Governor Emmett O'Neal).

Nashville was one of many localities that suffered under private acts from the legislature:

> On three successive occasions, the Charter of the City of Nashville was completely repealed and replaced by another Charter, resulting from a factional fight in city politics, and enacted by the means of local legislation over the protests of the people; on one occasion, the powers of our own mayor were actually lifted bodily and transferred to the chief of police, who had been appointed by the mayor's predecessor; blanket raises have been given by departments, contrary to the warnings of the people and their officials who were elected to

> carry the responsibility of fixing the compensation of our local employees.

Journal of 1953, at 911 (statement of Delegate Sims). Another city to suffer harm from private acts was Knoxville: "113 amendments to our charter were passed over here in this legislature in sixteen years. . . . [T]hey just come over and slip them through to increase somebody's salary, and to change this and that." *Journal of 1953*, at 1041 (statement of Delegate W. Leonard Ambrose).

By the 1940s the situation in some localities had reached a crisis:

> In looking at the record, the comparison of local bills as to number and quantity with bills of general character reaches a state of absurdity. Let me give you a few figures; in 1943, the Tennessee legislature passed 473 private acts, consisting of 1650 printed pages. At the same session, 158 public acts were passed, requiring 458 pages. In 1941, during the shortest session in history, so I am told, 546 private acts were passed, which required 1900 pages. At the same session, 164 public acts were passed, requiring about 600 pages.

Journal of 1953, at 940 (statement of Delegate Easterly).

In all these examples given of "this wicked, evil system of private legislation which has been the bane of this State for many years," *Journal of 1953*, at 930 (statement of Delegate William E. Miller), the evil complained of was legislation targeting one particular county or municipality.

The foregoing historical examples that were the focus of the 1953 convention are nothing like the legislation at issue in this case, which is a pilot program begun in the three worst school districts in the state to help low-income students succeed. Because the evil that the 1953 convention was trying to address was private and local acts targeting one

particular county or city, it followed that the convention ultimately prevented exactly that—private or local legislation aimed at "a particular county or municipality."

ii. Delegate William E. Miller reaffirms that the Home Rule Amendment only applies to legislation affecting "only one municipality or county."

When addressing the problem of private acts, the delegates considered a variety of different drafts, before settling on the regulation of legislation "applicable to a particular county or municipality." Tenn. Const. Art. XI, § 9. Proof that this language applies only to legislation aimed at one county or municipality comes from a letter by Delegate William E. Miller to the chairman of the Editing Committee, in which Delegate Miller states directly that "the private Act concerns only one municipality or county." (Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8, App. 014.)

In his letter, Delegate Miller proposed several changes to the Home Rule Amendment that had been passed by the convention and was being revised by the Editing Committee. He explained the changes in separately numbered paragraphs. In paragraph 8, he references the language of the amendment, which, as passed by the convention on June 4, 1953, had stated that private or local legislation must either be approved by a two-thirds vote of the local governing body or "be submitted to the voters of the county or municipal corporation affected which referendum shall have been provided for in a general statute of state-wide application." (Resolution No. 124, as amended by Amendment #2, 1953 Constitutional Convention, App. 022.) Delegate Miller saw no

need to set the referendum election by a general statute of state-wide application because the referendum would only be held in the counties or municipalities affected. He is clear in his letter that only one county or municipality would ever be affected by the legislation prohibited by the resolution:

> The Resolution also requires that the referendum must be provided for by general law, but it would seem that such a requirement is unduly restrictive and might lead to serious confusion. I personally do not see any reason why there should have to be a general law when the private Act concerns only one municipality or county.

(Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8, App. 014.) Miller made these comments regarding the version of the Amendment that had prohibited "any act of the Legislature private or local in form or effect." (Res. No. 124, App. 020-22.). He understood this language unambiguously to prohibit any act that "concerns only one municipality or county"—not two or three or four—only one.

Miller's letter was clearly influential on the Editing Committee because, after his letter was received by the chairman, the committee made only two final changes. First, the Editing Committee took Delegate Miller's advice and removed the requirement that the referendum be provided for in a general statute of statewide application. Second, the Editing Committee clarified the understanding of the convention, expressed in Miller's letter, that the Amendment prohibited only an act that "concerns only one municipality or county." Delegate Miller had proposed to do so in paragraph 4 of his letter by adding to the Amendment the phrase, "affecting a municipality or county." (Letter from Miller to

Pope of 7/10/1953, at 2 ¶ 4, App. 012.) The Editing Committee tweaked Miller's proposal slightly and, instead, added the even more clearly singular phrase, "applicable to a particular county or municipality." *Journal of 1953*, at 277. Thus, during the convention recess from June 5 to July 14, the Editing Committee made only two recommended changes to the Home Rule Amendment, both of which were later adopted by the convention. The *Journal and Debates of the Constitutional Convention of 1953* did not keep records of committee deliberations, so the only contemporaneous record we have of the changes made by the committee is the letter from Delegate Miller. And Delegate Miller tells us plainly that the Amendment prohibits only an act that "concerns only one municipality or county."

iii. The Constitutional Convention considered and rejected applying the Home Rule Amendment to all legislation not affecting four or more municipalities.

Further evidence that the convention ultimately adopted a Home Rule Amendment to prohibit only legislation affecting one county comes from two versions of the amendment that were considered and rejected. The first would have prohibited legislation targeting fewer than four municipalities, and the second would have prohibited all legislation unless it applied to every county or municipality in the state. Plaintiffs have asserted a similar position in this case, when they argued that the Home Rule Amendment applies to legislation affecting multiple counties. (R. Vol. I at 35-37; R. Vol. IV at 463-64; R. Vol. IV 471-72; R. Vol. VII at 1014-15.); however, both these alternatives were explicitly rejected by the 1953 constitutional convention.

In its first report to the convention on May 8, the Home Rule Committee presented a majority report allowing for municipal home rule. (Committee on Home Rule Report, at 1-2, May 8, 1953, App. 025.)[6] This majority report explicitly allowed the General Assembly to divide Tennessee municipalities into classifications by population and to treat them differently based on population, so long as each classification contained "not less than four municipalities." (*Id*. at 2, App. 025.)[7] Had this initial majority report been adopted, the General Assembly could have passed laws affecting four or more municipalities but would have been barred from passing laws like the ESA Pilot Program, which affected two jurisdictions.

Like the Home Rule Committee of the 1953 convention, the Chancery Court also struggled to find the number of local governments affected which would make a law a local act. Perhaps four is the number the Chancery Court had in mind when it wrote,

> 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, but the Court is confident that a law only affecting, and ever being

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[6] This majority report eventually became paragraphs three through nine of Article XI, Section 9. While the convention ultimately divided home rule into two ballot questions for voters, one for municipalities who chose to adopt their own charters and one for all other municipalities and all counties, the convention, nonetheless, discussed the questions together in one committee, and the arguments for and against one were similar to those of the other.

[7] In fact, the word, "four" is handwritten into the otherwise typed document, suggesting that other numbers were also considered and rejected.

> able to affect, two counties or municipalities is potentially unconstitutional.

(Trial Court Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23; App. 057-58.) The Chancery Court did not find a bright line established on the subject because one cannot be drawn without clear instruction from the text of the amendment.[8] The 1953 convention considered just such an approach as the chancellor took in her order, explicitly prohibiting laws that do not affect at least four municipalities in the state. But the 1953 convention intentionally rejected this approach. As Delegate Pope argued against the four-municipality classification system, "It is very different passing a law applying to one city versus passing a law applicable to three cities in a classification but not the fourth." *Journal of 1953*, at 925 (Statement of Delegate Pope). The convention agreed with Delegate Pope and substituted a new resolution, number 118, for the Home Rule Committee majority report while meeting as a Committee of the Whole on June 8, 1953. *Journal of 1953*, at 269-270.

Because the 1953 convention explicitly considered and rejected the chancellor's interpretation that the Home Rule Amendment prohibits legislation affecting a small number of municipalities and counties, the interpretation cannot stand and should be reversed.

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[8] And courts should not start drawing numerical lines based on their own guesses as to what seems right or fair. *Rossello v. Avon Prods.*, No. 14-1815 (JAG), 2015 U.S. Dist. LEXIS 133159, at *4 n.2 (D.P.R. Sep. 28, 2015); *Asset Mgmt. Holdings, LLC v. Wells Fargo Bank, N.A. (In re Wagner)*, Nos. 12-13285-BFK, 13-01159, 2013 Bankr. LEXIS 4899, at *34 (Bankr. E.D. Va. Nov. 18, 2013).

iv. The Constitutional Convention also considered and rejected applying the Home Rule Amendment to all legislation not affecting every county or municipality in the state.

After the resolution prohibiting legislation affecting fewer than four municipalities was rejected, the convention considered amendment language that would have been much broader in its application. Specifically, on June 4, the convention debated and adopted Resolution Number 124, which prohibited, without local approval, legislation "that is not applicable to every county or municipal corporation in the entire state." (Res. No. 124, App. 022.); *Journal of 1953*, at 275-276. Had this amendment been added to the constitution, it certainly would have prohibited the ESA Pilot Program. In fact, it would have prevented every pilot program. It would have prevented every piece of legislation affecting as many as 94 of the 95 Tennessee counties without local approval.

Perhaps, this, too, is the number the Chancery Court had in mind when it wrote, "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 . . ." (Trial Court Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23; App. 057-58.) If no legally defensible line can be drawn, then the amendment could be interpreted to prohibit all legislation not affecting all 95 counties.

But the convention rejected such an approach. Shortly after it was adopted, this resolution was almost immediately amended by the convention to remove such sweeping language. The expansive and controversial phrase was replaced on a mere voice vote with "private or local in form or effect" on the afternoon of June 4, and the new resolution

was adopted overwhelmingly by a vote of 86 to 6. (Amendment #2 to Res. No. 124, App. 020-22.); *Journal of 1953*, at 277-278. Thus, the convention voted overwhelmingly to reject this expansive reading of the amendment and, instead, adopted an amendment only prohibiting legislation aimed at one county or municipality.

v. The Constitutional Convention deliberated and decided that the Home Rule Amendment barred only legislation applicable to one "particular county or municipality."

To recap, the 1953 convention worked diligently every business day from April 21 to June 5. It considered and rejected language that would have barred legislation affecting fewer than four municipalities and language that would have barred legislation not affecting all counties and municipalities in the state. Then, on the afternoon of June 4, the convention overwhelmingly adopted, by a vote of 86 to 6, language that barred legislation affecting only one county or municipality: "any act of the Legislature private or local in form or effect shall be void and of no effect" without local approval. (Amendment #2 to Res. No. 124, App. 020-22.); *Journal of 1953*, at 277-278.

On June 5, the convention recessed for over a month for the Editing Committee to consider final revisions to further clarify the language the convention had adopted.[9] No written records were kept on the

[9] Before it recessed on June 5, the convention changed the name of the ballot heading from "Home Rule as to Local Legislation" to "Home Rule for cities and counties." This change further supports the interpretation of Defendants and the other Defendant-Intervenors that the Home Rule Amendment applies only to cities and counties and not to school districts. *Journal of 1953*, at 291.

deliberations of the Editing Committee. However, on July 10, Delegate Miller, who had been an integral member of the Home Rule Committee but who was not a member of the Editing Committee, sent his letter to the Delegate Pope, Chairman of the Editing Committee. In his letter, he reaffirmed the understanding of the convention as to the legislation barred by the Home Rule Amendment: "the private Act concerns only one municipality or county." (Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8, App. 014.) For further clarity on this point, he suggested that the Amendment add language specifying it be limited to local legislation "affecting a county or municipality." (Letter from Miller to Pope of 7/10/1953, at 2 ¶ 4, App. 012.)

Chairman Pope and the Editing Committee went even further to make this point evident. When the convention returned from its recess, it met for three final days from July 14-16. At that time, Chairman Pope offered an amendment further clarifying the common understanding of the amendment to apply to legislation affecting one county or municipality. This final amendment to the Home Rule Amendment added the language, "applicable to a particular county or municipality." This phrase reaffirmed, once and for all, the position of the convention that it was prohibiting legislation affecting only one particular county or municipality.[10]

[10] In addition to supporting the position of the Greater Praise Intervenor-Defendants that the Home Rule Amendment applies to legislation applicable to only one county, the final addition to the Amendment supports the position of the State Defendants and the other Defendant-Intervenors that that the Home Rule Amendment applies only to cities and counties and not to school districts. As Chairman Pope explained to

So overwhelming was the sentiment to clarify the applicability of the Amendment to one particular county or municipality that the final revision was adopted on a voice vote, and what had been a contentious debate for three months was adopted by the convention with an overwhelming vote of 85 to 5. *Journal of 1953*, at 304-306. Thus, this Court can rest assured that, when it adopts the plain meaning of the Home Rule Amendment, that plain meaning was, in fact, the meaning intended by the drafters of the 1953 constitutional convention.

C. The legislative history of the ESA Pilot Program belies the targeting of one county and supports the reasonable basis for beginning the pilot program in the three school districts with a history of the most failing schools.

The history of the 1953 convention makes clear that the Home Rule Amendment aimed to end punitive laws targeting one county. For example, in *Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631 (W.D. Tenn. 2012), the federal court overturned the statute because, "Plaintiffs contend that the legislative history demonstrates that [the law] targeted Shelby County." *Id.* at 659. In that case, the Memphis City Board of Education dissolved its charter, thereby consolidating it with Shelby County Schools. *Id.* at 636. Just months later, the Legislature passed a law regarding special school districts that give up their charters and that, when doing so, more than double the size of the county school

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the convention, "it makes it more definite and sufficiently applicable only to counties, and municipalities." *Journal of 1953*, at 1121.

district. *Id*. at 637. The timing and specificity of the law led the court to determine that it "targeted Shelby County." *Id*. at 659-60.

That is not what happened in this case. Here, students in three school districts that cover parts of two counties were given additional resources and opportunities to help them succeed. The counties that those students live in are not required by the law to take any action whatsoever. The ESA Pilot Program was not targeted at counties to harm them but targeted at students to help them.

i. The motivation behind the ESA Pilot Program was to support low-income children in underperforming school districts.

Governor Bill Lee ran on school choice as the core plank of his education agenda. He described to thousands of voters throughout the state how he met a young man named Adam through a YMCA mentoring program, and it spurred his calling to improve education for at-risk, inner-city children:

> I would drive into his very troubled neighborhood and pick him up once a week, every week. That started five years ago. We still do it. Over those five years, we've talked about everything from faith to drugs to gangs to school to girls.
>
> When we started, Adam was failing every class. It was clear that Adam was not being well served by the public school he was attending, and that leaving him there, far from helping him, would probably result in his getting into trouble. There were few educational choices for Adam, but I helped move him from his school to a different kind of public school, this one a charter school, where he had a completely different, and far more satisfactory, educational outcome . . . .
>
> It's very difficult for kids in the inner city to find their way out—in part because our education system has failed them. What I've learned through my relationship with Adam

> is that there is hope for every child, but part of that hope lies in a quality education. And because of Adam, I've become an advocate for the thousands of children who deserve that.

Bill Lee, *This Road I'm On*, 164-66 (2018).

In his first months in office, Governor Lee introduced Education Savings Accounts as his signature legislative proposal. In advocating for the program to the General Assembly, Governor Lee exhibited his passion for helping low-income children in failing school districts:

> Nearly one in three students born into poverty does not finish high school, and a student that doesn't finish high school is much more likely to stay in poverty. Low-income students deserve the same opportunities as other kids, and we need a bold plan that will help level the playing field. We need to change the status quo, increase competition, and not slow down until every student in Tennessee has access to a great education. We're not going get big results in our struggling schools by nibbling around the edges. That is why we need Education Savings Accounts in Tennessee, this year. ESAs will enable low-income students from the most under-performing school districts to attend an independent school of their choice at no cost to their family.

"2019 State of the State Address," Office of the Governor (March 4, 2019)[11].

Throughout floor debates in both the House and Senate, legislators consistently echoed their desire to help impoverished families whose children were trapped in failing school districts. Senator Kerry Roberts noted, "I'm thinking about the families that aren't here casting a vote, and that's who I have on my mind. I want to be able to cast a vote to help

[11] Available at https://www.tn.gov/governor/sots/state-of-the-state-2019-address.html (retrieved May 20, 2020).

that struggling mom or dad that wants to see a better education opportunity for their child." Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (April 25, 2019).[12] Representative Chris Todd expressed similar sentiments during a House debate: "[W]e all have the same goal: to educate our children so that the diploma they are handed upon graduation actually means they can read, write, and do math on a 12th grade level. We don't have that right now. That concerns me. It should concern each of us." *Id.* (April 23, 2019).[13] A week later, Representative Robin Smith agreed: "I applaud this governor. I applaud this bill. We have to find something different to spur innovation, to spur accountability, to spur competition, to give these kids a choice and a chance that are trapped in a school that is underperforming, and that yes, indeed, has been failing for years." *Id.* (May 1, 2019).[14]

ii. The ESA Pilot Program was not targeted toward harming certain counties or their students.

Additionally, legislators emphasized that the ESA Pilot Program would not take money away from public school children in Shelby or Davidson counties. House Deputy Speaker Matthew Hill laid out the numbers for all to see:

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[12] Statement of Sen. Kerry Roberts, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17308&meta_id=414664 at 2:01:40 (retrieved June 17, 2020).
[13] Statement of Rep. Chris Todd, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:59:25 (retrieved June 17, 2020).
[14] Statement of Rep. Robin Smith, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 1:35:24 (retrieved June 17, 2020).

> Facts are a stubborn thing, ladies and gentlemen. In 2009 and 2010, this body approved over 5 billion dollars for K-12 education. In this year's proposed budget, there is proposed over 6.5 billion dollars for K-12 education. So, to those who say we are cutting K-12 funding, we are reducing K-12 funding, we are somehow limiting K-12 funding, that is not true!

Id. (Apr. 23, 2019).[15] He concluded,

> Facts are a stubborn thing because they're true. We are not cutting funding for K-12 education. We are not reducing the amount of money that our teachers are getting in their salaries. No, ladies and gentlemen, we're doing what we have been doing for the last 8+ years. We are continuing to invest tens and hundreds and millions of dollars into K-12 education, public education in this state. So, please, please, let's no longer be disingenuous about the numbers. Please. K-12 education has not been cut, has never been cut, and is continuing to grow in state appropriations. Teachers' salaries continue to have more money allocated to them. This year alone, the tune of seventy-one million dollars.

Id.[16]

Regarding public school children in the counties affected by the ESA Pilot Program, Rep. Chris Todd noted how they would fare better under the bill: "I have read through this amendment. It not only puts the focus on the students' success, it literally leaves more money in these

[15] Statement of Rep. Matthew Hill, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:47:10 (retrieved June 17, 2020).
[16] Statement of Rep. Matthew Hill, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:48:50 (retrieved June 17, 2020).

affected districts per student than is there now." *Id*.[17] Thus, the law received bipartisan support from three legislators representing Shelby County Schools. *See* Tennessee General Assembly, HB 0939 Bill History at the Votes tab.[18]

The ESA act is not targeted to harm students; instead, it is a pilot program to help students. The creation of a pilot program, especially one to help disadvantaged students, provides a "reasonable basis" for limiting a law's initial effect to a particular class of school districts. *See* Tenn. Op. Att'y Gen. Robert E. Cooper, Jr. No. 07-60 (May 1, 2007) (a pilot program for college scholarships, available only to students graduating from low-income, Title I high schools is constitutional, even though the recipients need not be low-income themselves). As the Attorney General noted in 2004, "a legislature is allowed to attack a perceived problem piecemeal . . . ." Tenn. Op. Att'y Gen. No. 04-087 (May 5, 2004) (quoting Tenn. Op. Att'y Gen. No. 01-106 (June 27, 2001)) (quoting *Howard v. City of Garland*, 917 F.2d 898, 901 (5th Cir. 1990)) (quoting *Jackson Court Condominiums v. City of New Orleans*, 874 F. 2d 1070, 1079 (5th Cir. 1989)) (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)). *See also Opinion of the Justices*, 135 N.H. 549, 608 A.2d 874 (1992).

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[17] Statement of Rep. Chris Todd, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:59:15 (retrieved June 17, 2020).

[18] Available online at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0939 (retrieved Apr. 21, 2020).

iii. The legislative history reflects the reasonable basis for choosing to begin the ESA Pilot Program in the ASD, SCS, and MNPS: they are objectively the worst-performing school districts in the state.

When a law creates a classification that affects multiple counties, it does not run afoul of the Tennessee Constitution as long as "the classification is upon a reasonable basis." *Frazer*, 360 S.W. at 452.

In this case, the Legislature adopted a reasonable classification, choosing to start the pilot program in the three school districts with a large number of schools that have been on the failing school list for many years. The act itself names its purpose: the "pilot program . . . provides funding for access to additional educational options to students who reside in local education agencies that have consistently and historically had the lowest performing schools." Tenn. Code. Ann. § 49-6-2611(a)(1).

Counsel for Metro Government conceded to the trial court that the stated purpose of the act was, in fact, the actual purpose:

> [T]he Court can't ignore the obvious intent of the legislature as stated in its own act: "The General Assembly recognizes this state's legitimate interest" – here we go – "in the continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis." So, the legitimate interest at stake in this law is the continual improvement of Metro and Shelby County schools . . . .

(R. Vol. XI at 238 ¶ 23 – 239 ¶ 7, Statement of Allison Bussell.)

The Senate sponsor of the legislation, Senator Dolores Gresham, explained the reasonable basis for beginning the pilot program in the state's large, urban, failing school districts: "[T]he goal of the pilot project was to reach into the highest concentrations of poverty and priority

schools, the highest concentrations. And that's why we are there, and that's why the bill carries those particular counties, those particular LEAs in those counties. The challenge is great there." Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (April 25, 2019).[19]

Students in these counties were targeted for help because, as House Deputy Speaker Matthew Hill stated, "Davidson County has 21 failing schools, and Shelby County [has] 27 failing schools. These are not numbers I made up. This is from the Department of Education here in Tennessee." *Id.* (Apr. 23, 2019).[20] He went on to explain, "Ladies and gentlemen, this is, as amended, a pilot program that is at least giving an opportunity to those schools that need it the most. That is truly the case as you see the numbers and see the statistics." *Id.*[21]

The House sponsor of the legislation, Rep. Bill Dunn, gave his chamber even more shocking examples of the failures of the three affected school districts:

> When you hear the statistics, it's even more sobering. When you look at elementary schools, Shelby or Nashville, we've got schools where only 6.4% of students are on track in English in one place. Fewer than 5% are on track for English and Math. That's elementary schools. In middle schools, we see the same thing: only 5.6% on track, 5.5% on track. And in high school,

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[19] Statement of Sen. Dolores Gresham, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17308&meta_id=414660 at 1:02:20 (retrieved June 17, 2020).

[20] Statement of Rep. Matthew Hill, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:46:27 (retrieved June 17, 2020).

[21] Statement of Rep. Matthew Hill, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:54:36 (retrieved June 17, 2020).

> we've got ACT scores where the whole average, in Shelby, Davidson County, and some of these schools, it's as low as 14.7. That's the average, so there's got to be kids that are scoring so low to bring it down that far. I just wanted to highlight and say these numbers are very sobering.

Id. (May 1, 2019).[22]

The sponsor of the Conference Committee Report, Sen. Brian Kelsey, explained that the purpose of the legislation was to provide low-income students "the quality educational services that students deserve." *Tennessee Senate Journal*, May 1, 2019, at 1513, App. 028.[23] For that reason, it was begun in "school districts that clearly have a track record of failing to provide tens of thousands of students with a quality education, and they are deserving of special attention from the pilot program." *Id.* For those school districts, "Their persistent failure provides the rational basis for passing a law that is concentrated on those schools." *Id.* at 1512, App. 027.

Deputy Speaker Hill summed up the reasonable basis by stating that the legislation created, "a pilot program in two counties, the two counties that represent over 90% of our, whatever you want to call it, our

[22] Statement of Rep. Bill Dunn, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 1:36:30 (retrieved June 17, 2020).
[23] Statement of Sen. Kelsey pursuant to Rule 61, available at http://www.capitol.tn.gov/bills/111/Senate/Journals/05012019rd34.pdf (retrieved June 17, 2020).

failing schools, disadvantaged schools, whatever you want to call it. Over 90% of those schools are located in those 2 counties." *Id.*[24]

The pilot program is a reasonable starting point for this substantial education reform, and the initial classification of these three school districts is reasonable, based on their historic underperformance shown consistently through objective testing data.

D. The Chancery Court erred in extending its injunction, based on the Home Rule Amendment, to the state-run Achievement School District.

If this Court does not agree with Appellants and chooses to uphold the chancellor's decision as to the Home Rule Amendment, her order requires a small modification.

The chancellor's order enjoins the ESA Pilot Program in its entirety, based on the Home Rule Amendment arguments made by Appellees. Yet even if the Appellees are right about the Home Rule Amendment, that conclusion can apply only to Shelby County Schools and Metro Nashville Public Schools because those are the two school districts financially connected to counties and, according to Appellees, covered by the Home Rule Amendment.

The Achievement School District is different in kind from the other two districts. It is purely and wholly a creature of the State of Tennessee: "The 'achievement school district' or 'ASD' is an organizational unit of the

[24] Statement of Rep. Matthew Hill, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 2:18:00 (retrieved June 17, 2020).

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). As the Chancery Court's order correctly states, "[T]he inclusion of the ASD, a special school district that is an 'organizational unit of the [state] department of education' cannot be considered a county or municipal entity." (R. Vol. VIII at 1122; App. 057.) As such, (1) it is not represented by the Plaintiffs, (2) it is not financially connected to the Plaintiffs, and (3) it has no rights under the Home Rule Amendment as a state agency.

For a century, Tennessee courts have recognized, "A primary rule is that a statute must be construed, if possible, to save its constitutionality." *Turner v. Eslick* 240 S.W. 786, 789 (Tenn. 1921). The corollary is equally ancient and equally clear: "An act of the legislature will, of course, never be declared unconstitutional if it is possible to avoid so doing." *Knoxville Power & Light Co. v. Thompson*, 276 S.W. 1050, 1051 (Tenn. 1925).

Yet the Chancery Court in this instance has violated this fundamental precept by issuing an injunction whose scope is broader than what is required to remedy the constitutional issue it has found, striking more of the statute than is necessary or justified. The chancellor's injunction is overbroad, and this Court is empowered to modify and fix an overbroad injunction on appeal. *Miglin v. Miglin*, Appeal No. 01-A-01-9707-CH-00362, 1998 Tenn. App. LEXIS 544, at *1 (Ct. App. Aug. 5, 1998); *State ex rel. Owens v. Gilless*, No. 02C01-9108-

CR-00174, 1992 Tenn. Crim. App. LEXIS 807, at *8 (Crim. App. Oct. 21, 1992).

Specifically, the trial court enjoined enforcement of the entire ESA Pilot Program because of a constitutional violation it found in Tenn. Code. Ann. § 49-6-2602(3)(C). (Trial Court Memorandum and Order, R. Vol. VIII at 1124; App. 059) (enjoining "the ESA Act.") The relevant text of the statute at issue comes from the definition of an "eligible student," which means, in part, a resident of this state who:

> (i) Is zoned to attend a school in an LEA, 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;
> (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 May 24, 2019;

Tenn. Code Ann. § 49-6-2602(3)(C).

Instead of enjoining the entire ESA Pilot Program, this Court, if it agrees with the trial court, should limit the injunction to Tenn. Code. Ann. § 49-6-2602(3)(C)(i) and leave Tenn. Code. Ann. § 49-6-2602(3)(C)(ii) intact. That is also the remedy directed by the statute's two severability clauses, which the trial court failed to address. *See* Tenn. Code. Ann. § 49-6-2611(b) and (c). This remedy would provide relief to thousands of low-income students in the Achievement School District, including the

children of Ms. Calhoun and Mr. Wilson. Thus, the program would be enjoined from going forward in SCS and MNPS based on a Home Rule Amendment violation, but it would be allowed to go forward in the ASD, which is undoubtedly a creature of the state and not subject to the Home Rule Amendment.

II. The county government plaintiffs do not have standing because their school systems are not injured by the ESA Pilot Program.

A. The county government plaintiffs do not have standing to challenge whether the State can implement the ESA Pilot Program in the state-run Achievement School District.

In Section I. D., immediately above, Greater Praise Intervenor-Defendants/Appellants argued that the Chancery Court erred in extending its injunction to the Achievement School District because the Home Rule Amendment cannot possibly apply to a school district run not by the counties but by the state. For the same reasons stated in Section I. D., the county government plaintiffs do not have standing to challenge whether the state can implement the ESA Pilot Program in the state's own Achievement School District. The county government plaintiffs do not have any authority over the state-run district to bring a claim on its behalf.

B. The ESA Pilot Program creates three windfalls of funding to ensure that the affected school districts experience no injury-in-fact.

To establish standing, the county government plaintiffs must show an injury-in-fact to the county school systems whose interests they claim to represent: "a plaintiff must show a distinct and palpable injury: conjectural or hypothetical injuries are not sufficient." *ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Yet the county school districts will receive extra funds because of the ESA Pilot Program, which can hardly count as an injury-in-fact at all. The ESA Pilot Program gives a financial advantage to affected school districts in three distinct ways.

First, beginning in year one of the program, the affected school districts are given a financial windfall which leaves them with no injury-in-fact. That windfall occurs because the amount of the ESA is capped in a couple of ways. To begin with, only the local "required" minimum portion of BEP funding is allocated to a student's ESA; districts that levy above the required minimum retain the excess. Tenn. Code. Ann. § 49-6-2605(a). Both SCS and MNPS levy above the required minimum local BEP contribution. For fiscal year 2019, the last year for which the data is available, SCS state plus local per-pupil expenditures totaled $11,976, and MNPS totaled $12,895. *See* Comptroller Brief, Table at 4 (App. 006). However, the state plus local "required" minimum portion of BEP funding for fiscal year 2020 was only $7,923 for SCS and $8,324 for MNPS. *Id*. That difference of over $4,000 per student remains behind with the school districts. But that is not all. Next, the ESA amount cannot exceed the combined statewide average of state plus required local BEP allocations per pupil. Tenn. Code. Ann. § 49-6-2605(a). For fiscal year 2020, that figure was $7,572. Comptroller Brief, Table at 4 (App. 006). Thus, for SCS, the difference between the $11,976 state and local dollars

spent per child minus the ESA amount of $7,572 leaves the school district with a windfall of $4,404 for every student who utilizes an ESA. For MNPS, the difference between the $12,895 state and local dollars spent per child minus the ESA amount of $7,572 leaves the school district with a windfall of $5,323 for every student who utilizes an ESA. This extra $4,400 and $5,300 windfall, respectively, for every student who uses an ESA, leaves the affected school districts much better off financially than their peers, who do not have access to this windfall. Unlike the other windfalls below, this one occurs every single year of the program. Because of this windfall, the county government plaintiffs can show no injury-in-fact from implementation of the law.

Second, the ESA Pilot Program creates a school improvement fund to pay financially affected school districts for children that they no longer must educate. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). This ghost reimbursement is paid to school districts in the pilot program "in an amount equal to the ESA amount for participating students." *Id*. For three years, school districts in the pilot program will be paid fully to educate children who are no longer their responsibility. *Id*. Therefore, compared to school districts not participating in the ESA Pilot Program, the affected school districts will see their overall state support remain stable for the next three years and their per-pupil expenditures *increase*. On this ground, too, plaintiffs lack standing to bring their claim, and the case is not ripe because no possible injury-in-fact can be asserted prior to August 2023.

Third, at the end of three years, the school improvement fund will disburse school improvement grants for programs to support priority

schools throughout the state. Tenn. Code. Ann. § 49-6-2605(b)(2)(B)(ii). Because the pilot program was begun in the school districts containing the vast majority of all priority schools, they will continue to be the beneficiaries of the school improvement fund even after the ghost reimbursement period ends, thus, once again, *increasing* funding for those districts. For these three reasons, the county school districts are not injured by the law, and thus, the Plaintiffs/Appellees lack standing.

CONCLUSION

Appellants request the Court to reverse the order of the Chancery Court finding the ESA Pilot Program to be unconstitutional. In the alternative, they request the Court immediately to reverse the injunction of the ESA Pilot Program in the state-run Achievement School District.

In addition, they ask this Court to reconsider the scope of its inquiry and to grant their Motion to Dismiss the lawsuit in its entirety in this case, App. 064-88, and in the related case of *Roxanne McEwen et al. v. Bill Lee et al. and Natu Bah et al.*, No. 20-0242-II, Davidson County Chancery Court, App. 089-117.

Respectfully submitted, Dated: June 30, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements set forth in Tenn. S. Ct. R. 46 (3.02). It fulfills the 15,000 word limit because it contains 13,457 words, excluding those sections mentioned by the rule. 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: June 30, 2020

s/ Brian K. Kelsey
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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document was served via Tenn. S. Ct. R. 46 (4.01) through the e-filing system and was forwarded to the to the attorneys listed below, by agreement of the parties, via the e-mail addresses below on this 30th day of June, 2020.

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