IN THE TENNESSEE SUPREME COURT

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

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

v.

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

and

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

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

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

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether the Court of Appeals erred in ruling that the ESA Pilot Program, which applies to three local education agencies in two counties, violates the Home Rule Amendment, which prohibits laws applicable to "a particular county."

2) Whether the Court of Appeals erred in ruling that the ESA Pilot Program financially harms the county government plaintiffs, such that they have standing and ripeness to challenge it.[1]

[1] This issue will be addressed in the forthcoming Greater Praise Intervenor-Defendants' Supplemental Brief.

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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: Shelby County Schools (SCS) and Metro Nashville Public Schools (MNPS).

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), a state agency which runs the lowest performing schools, and in school districts with consistently failing schools, as defined by certain neutral criteria. 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; Education Commissioner Penny Schwinn; and Governor Bill Lee (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

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Bria Davis and Star Brumfield. Appellants Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. (the "Greater Praise Intervenor-Defendants") were allowed to file separate briefs.

Greater Praise Christian Academy (GPCA) is a small, nonprofit, 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 for several of her children to 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 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.

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In March and April 2020, all three sets of defendants filed motions to end the case in its entirety. (R. Vol. III at 386-414; R. Vol. III at 415-447; R. Vol. V at 673-99). Meanwhile, Plaintiffs filed a Motion for Summary Judgment on Count I of their Complaint, alleging the ESA Pilot Program violated the Home Rule Amendment. (R. Vol. III at 448-51; R. Vol. IV at 452-600; R. Vol. V at 601-51.)

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 filed a Motion to Dismiss.

On April 29, 2020, the Chancery Court heard all dispositive motions in both cases together. (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.)

On May 19, 2020, the Court of Appeals granted the Defendants' Tenn. R. App. P. 9 applications for permission to appeal. On August 5, 2020, the Court of Appeals heard oral argument on the interlocutory appeal. On September 29, 2020, the Court of Appeals issued its Opinion affirming the judgment of the Chancery Court. Court of Appeals Opinion, No. M2020-00683-COA-R9-CV, Sept. 29, 2020 ("Opinion") (App'x 032).

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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 courts below because "a particular county" means one county, not two or more.

STATEMENT OF FACTS

I. The ESA Pilot Program

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).[2] Eligible students must have attended a Tennessee public school

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[2] 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'x 003).

Courts may take judicial notice of official government documents. *Hanover v. Boyd*, 121 S.W.2d 120, 121 (Tenn. 1938); *see also Scott v. Grunow*, APP. NO. 01A01-9206-CH-00228, 1993 Tenn. App. LEXIS 92, at *8 (Tenn. Ct. App. Jan. 27, 1993).

Intervenor-Defendants ask the Court to take 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

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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 current school year and will automatically increase as the state increases education funding. Comptroller Brief, Table at Page 4 (App'x 006).[3] 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, both 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. Tenn. Code. Ann. § 49-6-2603(l). After 12th grade, any accumulated ESA funds may be transferred into a college fund. Tenn. Code. Ann. § 49-6-2603(g).

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

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from the Constitutional Convention of 1953, certified from the State Library and Archives, which was closed for COVID-19 prior to the Chancery Court hearing; and an excerpt from the Senate Journal, as well as the other government documents cited in this brief.

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

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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).[4]

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 ASD 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 will begin operations in three school districts: the ASD, SCS, and MNPS. Those three school districts serve children located in two counties: Shelby[5] 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 for access to

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[4] Technically, the local match does not go directly to the ESA but goes to the local school district. An equivalent amount is subtracted from the funds paid from the state to the local school district and is sent, instead, to the ESA. Tenn. Code. Ann. § 49-6-2605(b).

[5] 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* Shelby County Schools School Location Map, available at http://www.scsk12.org/schools/boundary/2021/scs%20schools%2020-21%20school%20location%20map.pdf (retrieved Nov. 12, 2020).

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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).

The ESA Pilot Program supports the school districts in which the program operates with three financial benefits that increase their per-pupil spending. First, the school districts get to keep "remainder funds" of $4,400 to $5,300 for each student who participates in the program. Tenn. Code. Ann. § 49-6-2605(a); Comptroller Brief, Table at 4 (App'x 006). Second, the program creates a "ghost reimbursement," or double payment, to affected school districts for three years to educate children who are no longer their responsibility. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). Third, at the end of three years, the school improvement fund will disburse "priority school improvement grants" for programs to support priority schools throughout the state. Tenn. Code. Ann. § 49-6-2605(b)(2)(B)(ii).

The ESA Pilot Program is a real pilot program with studies, a timeline, and recommendations. In order to "assist the general assembly in evaluating the efficacy" of the 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-

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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.)

II. Legislative History

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

Each of our state's recent governors has attempted a different fix for the persistent reality of failing public schools in our urban centers. Governor Don Sundquist signed charter schools into law. Governor Phil Bredesen created the Achievement School District. Governor Bill Haslam expanded charter schools. And Governor Bill Lee created the Education Savings Accounts at issue in this case.

Governor 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

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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).

That experience motivated the governor to make Education Savings Accounts the top priority of his new administration. In his first State of the State address, he shared 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

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> 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).[6]

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 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).[7] 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

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

[7] 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).

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concern each of us." *Id.* (April 23, 2019).[8] 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).[9]

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:

> 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!

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[8] 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).

[9] 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).

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Id. (Apr. 23, 2019).[10] 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.[11]

Regarding public school children in the counties affected by the ESA Pilot Program, Representative 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

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[10] 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).

[11] 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).

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these affected districts per student than is there now." *Id.*[12] Thus, the law received bipartisan support from five legislators representing Shelby County Schools: Representatives Mark White (R-Memphis), Tom Leatherwood (R-Arlington) and John DeBerry (D-Memphis) and Senators Brian Kelsey (R-Germantown) and Paul Rose (R-Covington). *See* Tennessee General Assembly, HB 0939 Bill History at the Votes tab.[13]

All parties in this case agree that the pilot program was begun in the ASD, SCS, and MNPS to "provide[ ] 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 chancery 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

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[12] 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).

[13] Available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0939&GA=111 (retrieved Nov. 20, 2020).

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law is the continual improvement of Metro and Shelby County schools . . . .

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

As the Senate sponsor of the legislation, Senator Dolores Gresham, explained, "[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).[14]

Students in these counties were targeted for help because, as House Deputy Speaker 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).[15] He went on to explain, "[T]his 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

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[14] 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).

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

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statistics." *Id.*[16]

The House sponsor of the legislation, Representative 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, 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).[17]

The sponsor of the Conference Committee Report, Senator Brian Kelsey, explained that the purpose of the legislation was to provide low-income students "the quality educational services that students deserve."

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

[17] 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).

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Tennessee Senate Journal, May 1, 2019, at 1513 (App'x 028).[18] 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, "[t]heir persistent failure provides the rational basis for passing a law that is concentrated on those schools." *Id.* at 1512 (App'x 027).

Deputy Speaker Hill summed up the reason for starting the "pilot program in two counties, the two counties that represent over 90% of our, whatever you want to call it, our failing schools, disadvantaged schools, whatever you want to call it: over 90% of those schools are located in those 2 counties." Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (May 1, 2019).[19]

Thus, the pilot program was begun in three school districts in two counties, based on their historic underperformance, shown consistently over the years through objective testing data.

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[18] 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).

[19] 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).

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STANDARD OF REVIEW

As the Court of Appeals correctly ruled, the interpretation of statutes and constitutional provisions are questions of law reviewed *de novo* with no presumption of correctness. Opinion at 4 (App'x 035).

As the Court of Appeals correctly ruled, standing is a question of law reviewed *de novo* with no presumption of correctness. *Id.*

ARGUMENT

I. The Home Rule Amendment only governs legislation applicable to 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 first two Home Rule Amendments of the Tennessee Constitution read:

> 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

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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).[20]

The Home Rule Amendment 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;

[20] The Home Rule Amendments comprise three different amendments. The first half of this second paragraph of Article XI, Section 9 prohibits incumbent local officials from being removed or having their salaries cut. The second half of the paragraph is the one at issue in this case. The third is paragraphs three through nine, which allows a municipality to adopt a home rule charter. In this brief, we use "Home Rule Amendment" to refer only to the second one.

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(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, in addition to the ASD, the only two districts that fit those neutral criteria are 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

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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, *see Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 676 (Tenn. 2019); statutes, *see Thurmond v. Mid-Cumberland Infectious Disease Consultants*, 433 S.W.3d 512, 517 (Tenn. 2014); and rules, *see 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, this 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)[21]. 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,

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

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"[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.

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 Court of Appeals did what this precept forbids—forcing an expanded interpretation that goes beyond the plain meaning of the words in their normal and accepted use. Opinion at 9-11 (App'x 040-42). When the meaning is clear, "the judiciary should not give it another meaning." *Hale*, 292 S.W.2d at 748. 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 or effect." Tenn. Const. Art. XI, § 9. The ESA Pilot Program uses criteria to designate portions of *two* counties; thus, the Home Rule Amendment does not apply.

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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

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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 (Ohio Ct. App. 2012).

Not only did the drafters of the Home Rule Amendment use the singular form "county," they modified it with "particular." If there were any question as to whether they meant to use the term in the singular, the addition of this definitive adjective answered the question in the affirmative. The plain meaning of "a particular" can only mean "one."

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Thus, courts 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 Court of Appeals 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 Court of Appeals 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

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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 Court of Appeals 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.

In addition, 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

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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).

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

When the language of the Constitution "clearly means one thing," the Court should not look to legislative history or the drafters' intent. *Hale*, 292 S.W.2d at 748. "If there should be doubt though[,] it is the first obligation of the Court to go to the proceedings of the Constitutional Convention which adopted this provision and see from these proceedings what the framers of this resolution intended it to mean." *Id.*

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.

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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.[22] 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. 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,

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

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> [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.

State of Tennessee, *Journal and Debates of the Constitutional Convention of 1953* (*"Journal of 1953"*) at 937.[23] 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 deferred 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:

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[23] Available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015069624966&view=1up&seq=1.

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> 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 Cecil 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,

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> 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 Miller reaffirmed that the Home Rule Amendment only applies to legislation applicable to "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

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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'x 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'x 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.

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Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8 (App'x 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'x 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.

Delegate 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 his 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'x 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 and both of which originated with Miller's letter. 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.

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And he 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.

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'x 025).[24] 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'x 025).[25] 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 schools in two jurisdictions.

But the 1953 convention intentionally rejected this approach. As Delegate Lewis T. Pope argued against the four-municipality

[24] 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, it, nonetheless, discussed the questions together in one committee, and the arguments for and against one were similar to those of the other.

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

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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. The convention agreed 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.

This history continues to make clear that the convention drafted the language finally enacted to achieve its goal: banning acts targeting one single county or municipality.

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 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'x 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.

But the convention rejected such an approach. Shortly after it was adopted, this resolution was almost immediately amended by the

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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'x 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 without local approval. Amendment #2 to Res. No. 124 (App'x 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. No written records were kept on the deliberations of the Editing Committee. However, on July 10, Delegate Miller, who had been an integral member of the Home Rule Committee

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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: "[T]he private Act concerns only one municipality or county." Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8 (App'x 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'x 012).

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.

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.

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vi. The full exchange between Delegates Pope and Burn is indeterminate and shows the need for a clear, text-based rule.

While all this legislative history of the 1953 convention was briefed to the Court of Appeals, the court decided to ignore it and cite, instead, to only part of an exchange between Delegates Pope and Harry T. Burn. Opinion at 11 (App'x 042). When recited in full, the exchange does not stand for the proposition claimed by the Court of Appeals but is indeterminate at best:

> Mr. Burn: Do I understand that if there is an act pertaining to more than one municipality, that the legislature can enact that without referendum?
>
> Mr. Pope: No, that would be a local bill if it applies to one or two.
>
> Mr. Burn: Well, suppose it is three or four.
>
> Mr. Pope: Well, they couldn't pass it for three or four.
>
> Mr. Burn: This amendment does say one, though.

Journal of 1953, at 1121. Quoting only the first two sentences, the Court of Appeals claims Delegate Pope says the Home Rule Amendment is applicable to one or two counties. Opinion at 11 (App'x 042). But the full exchange shows that Delegate Burn reads the provision one way and that Delegate Pope reads it another way.

Furthermore, when pressed later to explain his position, it's clear that Delegate Pope is not intending the Home Rule Amendment to apply to a statute like the ESA Pilot Program, which affects two counties: "[Y]ou'll never get two counties to have the

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same thing." *Journal of 1953*, at 1121. Delegate Pope is still discussing "a private bill," such as one removing an individual official or setting a particular officer's salary, which cannot be the same in two counties. He is not envisioning legislation with reasonable classifications, which may apply the same in multiple counties. Therefore, the entire exchange is indeterminate as to the meaning of the text.

Finally, Delegate Burn's line of questioning and Delegate Pope's struggle to answer it exposes the fundamental flaw in the Plaintiffs' argument and the opinions of the courts below: there is no way to draw a line other than one based on the text.

Courts are not empowered to engage in this sort of arbitrary line-drawing, untethered from the text. In another case, a federal judge rejected a similar request "to draw an arbitrary numerical line. Would two interested plaintiffs be sufficient to satisfy this requirement? Three? Four? The Court cannot fathom an objective standard by which courts could make this determination." *Rossello v. Avon Prods.*, No. 14-1815 (JAG), 2015 U.S. Dist. LEXIS 133159, at *4 n.2 (D.P.R. Sep. 28, 2015). *See 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).

The same is true here: there is no principled basis or objective standard by which to draw the line the Plaintiffs need. Even the trial judge in this case acknowledged the judicial struggle: "There has not been a bright line established regarding how many counties

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or municipalities is too many for it to be considered a potential Home Rule Amendment violation . . . . " Nashville Chancery Court Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23. This Court should establish the bright line by adopting the plain, singular meaning of the text.

C. The plain meaning interpretation best reconciles the Home Rule Amendment case law.

An overall review of the Home Rule Amendment case law is helpful before analyzing each case. There are fourteen cases in which state courts have issued decisions applying the amendment. In eleven of those cases, the courts ruled in favor of legislative authority to pass laws affecting local governments. Many times, the courts did so in part because the law at issue applied to more than one county. Other times the courts even upheld a statute when it unquestionably applied to only one county. Only three times prior to this case has a Tennessee court ruled that the legislature overstepped its authority. In two of those three cases, the law at issue applied to only one particular county and should have been enjoined according to the plain meaning of the Constitution. Only once in its history has this Court ruled against a statute that applied to more than one county, and this Court should reexamine that decision.[26]

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[26] Tennessee case law on the Home Rule Amendment is confusing because many cases utilize reasoning from cases examining one of the other two portions of the Home Rule Amendment or Article XI, Section 8, and many cases have claims on multiple of these issues. This argument focuses on the fourteen state cases known to counsel to rule on this particular portion of the Home Rule Amendment.

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Again, eleven out of fourteen times, the court upheld the statute. The first two Supreme Court cases in the 1950s followed the plain meaning of the Home Rule Amendment and ruled that it applies only to counties and municipalities and not to other local governmental bodies. *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482 (Tenn. 1957); *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959). In *Fountain City*, this Court ruled that legislation affecting one sanitary district in the state did not run afoul of the Home Rule Amendment because it did not apply to a "county" or "municipality." 308 S.W.2d at 484. In *Perritt*, this Court followed the same logic to conclude that legislation affecting one special school district did not run afoul of the Home Rule Amendment. 325 S.W.2d at 234.[27]

In the 1960s, in *Durham v. Dismukes*, 333 S.W.2d 935 (Tenn. 1960), this Court upheld a legislative act because it was styled as a private act affecting only Sumner County, was sent to the people for a referendum, and was voted down; therefore, it did not go into effect. *Id*. at 937, 939.

In a series of three cases in the early 1970s, this Court and the Court of Appeals upheld statutes even though they were unquestionably aimed at only one county, Davidson. *See Boone v. Torrence*, 470 S.W.2d 356 (Tenn. Ct. App. 1971); *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971); *Metro. Gov't of Nashville & Davidson*

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[27] Both *Fountain City* and *Perritt* ruled in favor of expanded legislative authority, but procedurally they did so by ruling unconstitutional a portion of the statutes at issue; however, that portion was the one that required a local referendum. This Court "elided," or severed, that provision and left the remainder of the statute in place.

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Cty. v. Reynolds, 512 S.W.2d 6 (Tenn. 1974). If this Court upheld a statute aimed only at Davidson County, surely it should uphold the ESA statute that affects three school districts and students in two counties, Davidson and Shelby.

In 1978, this Court followed the plain meaning of the constitution in *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978). The *Bozeman* Court upheld a statute that had given salary increases in Knox and Davidson counties because it applied to two counties. 571 S.W.2d at 282. This Court should follow the same reasoning in this case.

For 40 years from 1979 until this year, no Tennessee state court struck down a statute based on the Home Rule Amendment. In *Chattanooga-Hamilton County Hospital Authority v. Chattanooga*, 580 S.W.2d 322 (Tenn. 1979), this Court upheld a private act that called for local approval and analyzed only whether both the city and the county should have approved the law. In *City of Knoxville v. Dossett*, 672 S.W.2d 193 (Tenn. 1984), this Court upheld a law removing jurisdiction over state criminal offenses from municipal courts in Knox County. It did so primarily because state crimes are not subject to the Home Rule Amendment but also in part because the law affected other large counties. 672 S.W.2d at 195-196.

This Court made its final pronouncement on the Home Rule Amendment in *Civil Service Merit Board v. Burson*, 816 S.W.2d 725 (Tenn. 1991). There, the legislature had enacted a statute to "make uniform the qualifications and procedures for the nomination of members serving on the municipal civil service boards in Tennessee's most populous counties." 816 S.W.2d at 727. Although Plaintiffs claimed that

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only the City of Knoxville would have to change its qualifications, this Court determined that the statute applied to "the three most populous counties of the state," *id*. at 729, because "civil service commissions in the other two counties . . . will have to maintain compliance with" the statute at issue. *Id*. at 730. Therefore, this Court followed the plain meaning of the constitution and upheld the statute. *Burson* is this Court's seminal pronouncement on the Home Rule Amendment, yet the Court of Appeals in this case gave it only one threadbare "see also" citation in its opinion. Opinion at 9 (App'x 040).

Finally, in 1996, the Court of Appeals upheld another statute that affected only one county in *County of Shelby v. McWherter*, 936 S.W.2d 923 (Tenn. Ct. App. 1996). In Shelby County, the county school board, like a special school district, does not serve the entire county but only a portion of it. *See* n.5 above. The legislature passed a law that only residents of the area served by the school district could serve on the board. This provision was obviously aimed at only one county, Shelby County, by a population bracket gimmick, but the Court of Appeals upheld the statute anyway. Again, surely the ESA statute affecting Shelby and Davidson counties should be upheld if a statute affecting just Shelby County was upheld.

Since the Home Rule Amendment was adopted in 1953, Tennessee courts have utilized it to enjoin a statute only three times. All three times, the statute at issue was an egregious trampling of local authority of exactly the type envisioned by the drafters of the amendment and was not, as in this case, merely a benefit given to citizens in certain counties.

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The first case to enjoin a statute that had used a population bracket gimmick to target one county, Gibson, was *Lawler v. McCanless*, 417 S.W.2d 548 at 550, 553 (Tenn. 1967). In that case, the Gibson County Court "had ceased to hear divorce cases." *Id.* at 550. In response, the legislature passed a law giving the General Sessions Court jurisdiction over such cases but only in Gibson County. The Court found the statute to be a private or local act because it applied to only one county. *Id.* at 551-553.

The second case to enjoin a statute also did so because it was aimed at one county. *See Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975). The statute required run-off elections for mayor only in Shelby County. The statute had been styled as applying to all counties with a mayoral form of government, but the Court held that it applied only to Shelby County because it was the only county that had a mayoral form of government at the time. *Id.* at 556. Therefore, the Court applied the plain meaning of the Home Rule Amendment and enjoined it.

The third and final case from the 1970s that enjoined a statute is the only case, prior to this one, that enjoined a statute that applied to two counties. *See Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979). The General Assembly had passed a law transferring county legislative authority from quarterly courts to county legislative bodies. *Id.* at 273. It gave those bodies discretion whether to have candidates run by designated position in multi-member districts, except in two counties designated by population bracket, Wayne and Roane. *Id.* at 274. The Court found this exception to be a violation of the Home Rule Amendment. No other state court has done so in the last 40 years.

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i. The plain meaning interpretation explains the Home Rule Amendment case law and its one outlier case.

The plain meaning interpretation reconciles 13 of the 14 state court decisions on the Home Rule Amendment and does so in a manner consistent with the constitutional language. As this Court said when first interpreting the first half of Home Rule Amendment, "When the words are free from ambiguity and doubt, and express plainly and clearly the sense of the framers of the Constitution[,] there is no occasion to resort to other means of interpretation." *Hale*, 292 S.W.2d at 749.

This plain meaning reading of the constitution explains why this Court on three occasions upheld statutes like the ESA Pilot Program that affected multiple counties. *See Burson*, *Bozeman*, and *Dossett*.

This Court in *Burson* relied on the plain meaning of the Home Rule Amendment to establish the test that the Court should apply again in this case: does the statute affect one county or was it "designed to apply to any other county"? 816 S.W.2d at 729. In *Burson*, this Court made clear that a statute like the ESA Pilot Program does not have to apply to every county in the state to be constitutional: "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." *Id.* at 729. In *Burson*, the case turned on whether the statute applied in only one county or in three: "The plaintiffs in this case contend that the provisions of T.C.A. § 6-54-114 are local in form and effect and are thus unconstitutional, because they apply only to the City of Knoxville." *Id.* at 729. The Court, however, sided with

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the defendants: "In its effect, the statute currently applies to municipal civil service boards in the three most populous counties of the state -- Shelby County, Davidson County, and Knox County." *Id.* at 730. The Court cited the *Bozeman* decision favorably, in part, because the statute in that case also had affected multiple counties: "[W]e noted that the legislation was 'public and general' both in form and effect, because it 'applied to two populous counties' . . . ." *Id.* at 730. We know this reasoning was pivotal to the Court's decision in *Burson* because the Court reiterated it and explained it fully just two sentences prior to reaching its conclusion:

> It is true in this case that because existing civil service commissions in Davidson County and Shelby County are already in compliance with the provisions of T.C.A. § 6-54-114, only the Knoxville board will be required to take affirmative steps to comply with the statute. On the other hand, civil service commissions in the other two counties are certainly affected by the statute, because they will have to maintain compliance with § 6-54-114 in the future.

Id. (emphasis in original). Two sentences later, the Court concluded, "We therefore hold that T.C.A. § 6-54-114 is not constitutionally invalid . . . ." *Id.* Thus, the *Burson* Court determined that the statute affected multiple counties instead of one, and that finding was determinative in upholding the statute. For the same reason, this Court should also uphold the ESA Pilot Program.

Likewise, in *Bozeman*, this Court upheld the statute at issue, in part, because it applied to two counties: "The questioned act is certainly

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public and general in form. We hold it is also public in effect and application, not private or local in effect. It presently applies to two populous counties." *Id.* at 282. The Court went on to distinguish *Farris* because the statute in that case had applied to only one county: "Shelby County stands unique among counties in Tennessee. It, and it alone, has a county mayor. . . . Thus, [the statute] relates to Shelby County alone." *Id.* (quoting *Farris*). Therefore, the plain meaning interpretation is consistent with *Bozeman*, too.[28]

Finally, *Dossett* is also consistent with the plain meaning of the Home Rule Amendment. In that case, this Court also upheld the statute at issue in part because it applied to multiple counties: "By Tennessee Public Acts 1970, Chapter 464, the General Assembly undertook to remove jurisdiction over state criminal offenses from the municipal courts of Knox *and certain other counties* falling within a specified population bracket." *Id.* at 194 (emphasis added).

The plain meaning interpretation also explains why the Court enjoined statutes that had applied to only one county in *Farris* and *Lawler*. In *Farris*, while the statute was styled as applying to all counties with a mayoral form of government, the Court found that "it applie[d] to

[28] *Bozeman* also decries the Plaintiffs' attempt in this case to distract the Court with its cherry-picked version of legislative history of the ESA Pilot Program: "Defendants stress the foregoing 'legislative history' of the questioned Act as reflected by the various amendatory acts to Chapter 53, Private Acts 1963, as just listed. However, there appears nothing doubtful or uncertain about the Act in question and such history or policy of legislation is not of determinative materiality for the reason there exists no ambiguity in the Act that needs explanation." *Id.* at 281.

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Shelby County alone in its governmental capacity." *Id.* at 556. Therefore, the Court applied the plain meaning of the Constitution and enjoined it. *Id.* at 556. The Court reached a similar conclusion in *Lawler*: "[W]e conclude that the amendatory Act of 1965 is an Act local in effect applicable to Gibson County alone and violates Article XI, Section 9, of the Constitution . . . ." *Id.* at 553.

The U.S. District Court for the Western District of Tennessee came to a similar conclusion regarding a statute it found to apply only to Shelby County: "If the class created by a statute is so narrowly designed that only one county can reasonably, rationally, and pragmatically be expected to fall within that class, the statute is void unless there is a provision for local approval." *Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631 (W.D. Tenn. 2012). In *Farris* this Court first established the *Burson* test that intervenor-defendants urge the Court to adopt in this case: "[W]e must determine whether this legislation was designed to apply to any other county in Tennessee." *Id.* at 552. In *Farris*, *Lawler*, and *Board of Education*, the legislation was not so designed and was enjoined. In this case, it was and should be upheld.

In several cases, even when the statute at issue did apply to only one county, Tennessee courts still upheld the statute for other reasons. *See Fountain City*, *Perritt*, *Boone*, *Doyle*, *Reynolds*, *Chattanooga-Hamilton County Hospital Authority*, and *County of Shelby*. If those statutes were upheld, then surely the Court should uphold the ESA Pilot Program, which is aimed at students in three school districts in two counties. These cases are all consistent with the plain meaning interpretation of the Home Rule Amendment.

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The only case which is not consistent with this Court's reasoning throughout seven decades is *Leech*. The holding in *Leech* is directly contradictory to the holding of *Burson*, but the *Burson* Court failed to overturn *Leech* and, instead, intentionally ignored it. We know the justices made an intentional choice to ignore *Leech's* home-rule holding because they cited the case for a different proposition of law in a different section of the *Burson* opinion that analyzed Article XI, Section 8. *Id.* at 731. Because the *Burson* Court failed to overturn *Leech*, the Court of Appeals was unable to adopt the plain meaning interpretation in this case. *Leech* continues to wreak havoc in cases like this one where the General Assembly has created a multicounty program. This Court should enforce the plain meaning of the Home Rule Amendment and explicitly overrule *Leech*.

ii. The Court of Appeals opinion fails to address the entirety of the Home Rule Amendment case law.

Even though *Burson* is this Court's most recent and authoritative pronouncement on the Home Rule Amendment, and even though Judge Bennett had served as an attorney of record for the state in the case prior to joining the bench, it receives only one minimal "see also" citation in his opinion. Opinion at 9 (App'x 040). This Court's decision in *Bozeman* receives no mention at all. And *County of Shelby*, which is the Court of Appeals' most recent on-point decision, also receives zero mention.

Instead, the court focuses on *Farris* and *Leech*. The opinion favorably cites the second half of the test from *Farris*, requiring a statute to be "potentially applicable throughout the state." Opinion at 9 (App'x

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040). This means the Court of Appeals actually ascribed to the amendment a meaning that was explicitly rejected by the 1953 Convention, as discussed above. *Supra* I.B.iv.

Judge Bennett's opinion selectively quotes a portion of the *Farris* test to suggest a rule so broad it would be impossible to follow, which is doubtless why the convention rejected adopting just such a rule. A rule requiring universal applicability to all 95 counties ignores the full language of the *Farris* test, has never been implemented in any later decisions, and is directly contrary to this Court's later holdings in *Burson* and *Bozeman*.[29] Indeed, when they applied the test, the courts in *County of Shelby* and *Board of Education* consciously reworded it. *See Cty. of Shelby*, 936 S.W.2d at 936 ("potentially applicable to numerous counties in the state"); *Bd. of Educ.* 911 F. Supp. 2d at 656 ("'Throughout the state'" is more appropriately understood as throughout the class created by the Tennessee General Assembly."). Thus, this Court should overrule the Court of Appeals and insist that future courts read the *Farris* test fully and fairly and not craft a fake *Farris* test by creatively cutting a single phrase from the key paragraph in the opinion.[30]

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[29] The full language reads, "Within the framework of the test hereinabove announced we must determine whether this legislation was designed to apply to any other county in Tennessee, for if it is potentially applicable throughout the state it is not local in effect even though at the time of its passage it might have applied to Shelby County only." *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975).

[30] Practically, this fake *Farris* test would also entirely prohibit pilot programs in Tennessee. But, as the Attorney General noted in 2004, "a legislature is allowed to attack a perceived problem piecemeal . . . ." Tenn.

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Furthermore, *Leech* is the heart of the Court of Appeals holding below on home rule. Opinion at 9-10 (App'x 040-41). Rather than treating *Leech* as the doctrinal black sheep it is and following more recent and authoritative precedents like *Burson* and *County of Shelby*, the Court of Appeals, insisted that it had no choice but to apply *Leech* as governing precedent. *Id*. at 10 (App'x 041). This Court does have a choice and should overrule *Leech*.

iii. The Plaintiffs' attempt also fails to reconcile the Home Rule Amendment case law.

Plaintiffs, in their briefs below, invented a rule that Home Rule Amendment cases turn on whether the population bracket used is open-ended or closed. (Court of Appeals Counties' Brief at 32-34.) That is false.

In *Lawler*, this Court thought so little of that theory that it did not even mention whether the population bracket was open-ended or closed.

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). Indeed, Attorney General Robert E. Cooper, Jr., opined that the creation of another pilot program to help disadvantaged students provided a "reasonable basis" for limiting a law's initial effect to a particular class of school districts. *See* Tenn. Op. Att'y Gen. 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).

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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. *Id.* at 280. Therefore, other large counties could not grow into that exemption from the statute, and the case cannot be squared with Plaintiffs' interpretation.

In *Leech*, once again, this Court made no mention of whether the population bracket was open-ended or closed.

Therefore, Plaintiffs' theory, while it may receive passing mentions in dicta in other cases, does not encapsulate the entirety of this Court's Home Rule Amendment jurisprudence.

In fact, Plaintiffs' theory directly conflicts with the purpose of the amendment, which was 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." *Journal of 1953*, at 907 (statement of Delegate Sims).[31]

[31] Also, as a practical matter, Plaintiffs' theory is untenable. According to Plaintiffs, the General Assembly can target any county it wants to for any law or policy whatsoever merely by using the gimmick of an unreasonably narrow and arbitrary population bracket and then attaching the magic words at the end, "or any subsequent federal census." Surely, the Home Rule Amendment does not allow for such gamesmanship, and this Court should not either.

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iv. The explanation from *Board of Education* that the Home Rule Amendment prohibits laws that "target" counties is results-based and is not a principle of law.

Board of Education does offer a "practical" theory for deciding Home Rule Amendment cases, but it is not a theory of law, has never been adopted by a Tennessee court, and should not be adopted now. 911 F. Supp. 2d at 655. According to the federal court, Home Rule Amendment cases should turn on whether the General Assembly "targeted" a particular county to "address unique circumstances that had arisen" there. 911 F. Supp. 2d at 660.

In that case, the Memphis City Board of Education had dissolved its charter, thereby consolidating it with Shelby County Schools. *Id*. at 636. Just weeks later, the legislature passed a law allowing for the creation of municipal school districts but only in counties in which a special school district had dissolved its charter and more than doubled the size of the receiving county school district. *Id*. 637-639. The court found that while eight counties contained special school districts, it was "virtually impossible" that any county other than Shelby would ever be subject to the law. *Id*. 657-659. For the court to ignore that the statute was passed in response to giving up the charter of Memphis City Schools would be to "close our eyes to reality." *Id*. at 660.

This theory has a certain appeal. All four times that a court has enjoined a law based on the Home Rule Amendment, the law was passed in response to "unique circumstances that had arisen" in localities. *See Board of Education* at 660. *Lawler* is another example: the statute was passed because the Gibson County Court "had ceased to hear divorce

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cases." *Id.* at 550. Also, this theory addresses the main concern of the drafters of the Home Rule Amendment, who, in the first half of the amendment, placed a flat prohibition on laws dealing with incumbent officeholders and their elections. Tenn. Const. Art. XI, Sec. 9. Thus, the theory explains *Farris*, in which the statute was passed to affect the outcome of the Shelby County mayor's race. And it explains *Leech*, in which the exception for Wayne and Roane counties was passed to affect the outcome of county commission races. *Id.* at 274.

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 law was not passed in response to any local action, and it does not affect any incumbent officeholder or local election. In fact, the counties at issue are not required by the law to take any action whatsoever. The ESA Pilot Program was not "targeted" at certain counties to harm them but was focused on certain students to help them.

Even though this theory would lead this Court to uphold the ESA Pilot Program, the Court should, nonetheless, reject the theory because it is not a theory of law. When courts adopt theories like, "I know it when I see it," they do not pronounce a rule of law that can be followed by the people, that provide stability and predictability for legislators, or that guide lower courts. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring). For this reason, intervenor-defendants request that the Court reject this theory, too, and adopt, instead, the plain meaning of the Constitution's text.

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CONCLUSION

Appellants ask this Court to reverse the opinion of the Court of Appeals finding the ESA Pilot Program unconstitutional and to remand the case to the Chancery Court for proceedings consistent with this ruling.

Respectfully submitted, Dated: November 24, 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 contains 13,924 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.

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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. 46A through the e-filing system and was forwarded to the attorneys listed below via the e-mail addresses below on this 24th day of November, 2020.

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