IN THE TENNESSEE SUPREME COURT

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

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

v.

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

and

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

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

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

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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.

INTRODUCTION

Intervenor-Defendants / Appellants Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Greater Praise Intervenor-Defendants" or "Appellants") file this Supplemental Brief pursuant to Tenn. R. App. P. 11(f). On November 24, 2020, Greater Praise Intervenor-Defendants filed their Brief of the Appellants along with their Application for Permission to Appeal, pursuant to Tenn. R. App. P. 11(b). They incorporate into this Supplemental Brief the Statement of the Case, Statement of Facts, Standard of Review, and Section I of their Argument from that brief.

SUMMARY OF ARGUMENT

I. The Principal Brief of these Appellants argued that the Education Savings Account (ESA) Pilot Program does not violate the Home Rule Amendment because the pilot program affects children in two counties, and the amendment only governs legislation affecting one county. The home rule phrase "a particular county or municipality" means one. "Where the plain text . . . is clear," this Court applies its "plain and ordinary meaning," and that is the end of the Court's analysis. *Effler v. Purdue Pharma L.P.*, No. E2018-01994-SC-R11-CV, 2020 Tenn. LEXIS 594, at *18, 17 (Dec. 17, 2020); s*ee also State v. White*, 362 S.W.3d 559, 566 (Tenn. 2012); *Jackson v. General Motors Corp.*, 60 S.W. 3d 800, 804 (Tenn. 2001); *Shelby Cty. v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956).

This plain meaning is consistent with the intent of the drafters of the amendment at the 1953 constitutional convention. In the letter which

spurred the final change to the language, Delegate William E. Miller wrote that there was no need to hold a local referendum on home rule legislation during a general, statewide election because the local referendum would occur in only one county because the Home Rule Amendment applied to legislation affecting only "one municipality or county." Letter from Miller to Pope of 7/10/1953, at 3 ¶ 8 (App'x 014). Furthermore, the convention debated and rejected two alternative versions of the Home Rule Amendment functionally equivalent to the tests suggested in this case. One would have barred legislation not affecting at least four localities, and the other, which was erroneously adopted by the Court of Appeals, would have banned legislation not affecting all 95 counties. Thus, the convention meant what it said when it prohibited legislation affecting "a particular county or municipality". Tenn. Const. Art. XI, Sec. 9.

The plain meaning also is consistent with the case law on the Home Rule Amendment. Other interpretations offered in this case would require this Court to overturn decades of precedent, but adopting the plain meaning will require the correction of only one case, *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979).

In this Supplemental Brief, Appellants make three additional arguments.

II. The plain meaning of "a particular county or municipality" also means that the Home Rule Amendment does not prohibit legislation affecting school districts. In *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959), this Court held that the Home Rule Amendment does not apply to laws affecting special school districts. The reasoning was that special

school districts do not have taxing authority, which is true of all school districts. *Id. Perritt* relied on *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482, 484 (Tenn. 1957), which stated that *all* school districts fall outside the ambit of the Home Rule Amendment. These cases have never been overturned or questioned.

In addition, the 1953 convention amended the Home Rule Amendment to "make[ ] it more definite and sufficiently applicable only to counties, and municipalities." State of Tennessee, *Journal and Debates of the Constitutional Convention of 1953 ("Journal of 1953")* at 1121 (statement of Delegate Lewis T. Pope).

III. The county government plaintiffs (the "Counties") in this case are not financially affected positively or negatively by the ESA Pilot Program; therefore, the Home Rule Amendment does not apply to them, and they do not have standing or ripeness to challenge the program. The county governments will pay the *exact same* amount of money to their school districts both before and after implementation of the pilot program.

The Court of Appeals opinion focused on the financial effects to the county school districts, but they are not parties to this case. Shelby County Schools ("SCS") was never a plaintiff in the case, and Metro Nashville Public Schools ("MNPS") was dismissed by the chancery court and did not appeal its dismissal. Therefore, any effects on the county school districts are irrelevant.

However, even if this Court were to examine the financial effects of the ESA Pilot Program on the school districts, it would find that it actually benefits them. First, it leaves behind a "remainder fund" of

$4,400 to $5,300 for each student who participates in the program, and this fund was ignored by the Court of Appeals. Tenn. Code. Ann. § 49-6-2605(a). Second, it creates a "ghost reimbursement" fund to pay 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, it disburses "priority school improvement grants" for programs to support priority schools throughout the state. Tenn. Code. Ann. § 49-6-2605(b)(2)(B)(ii).

IV. In the alternative, even if the ESA Pilot Program were enjoined in SCS and MNPS, it should not be enjoined from operating in the Achievement School District (ASD). The ASD is entirely run by the state; therefore, it cannot be subject to a Home Rule challenge. Following her own logic, the chancellor should have severed the portion of the law she found to be unconstitutional instead of enjoining the entire law. Severing laws with "a scalpel rather than a bulldozer" is the practice of this Court, the practice of the U.S. Supreme Court, and the practice of Tennessee courts for over a century. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2210 (2020); *see also Willeford v. Klepper*, 597 S.W.3d 454, 471 (Tenn. 2020); *Reelfoot Lake Levee Dist. v. Dawson*, 36 S.W. 1041, 1048 (Tenn. 1896). It is especially the practice of courts when, as here, the statute contains a severability clause. *See* Tenn. Code. Ann. § 49-6-2611(b) and (c).

Furthermore, the plaintiffs do not even have standing to bring a claim against operating the ESA Pilot Program in the ASD because they do not run the ASD or have any financial connection to it.

The Court of Appeals erred in refusing to rule on either of these two issues. *See* Opinion at 12 n.6 (App'x 043). The Court of Appeals stated that Appellants should have presented an additional issue on appeal for consideration of this argument. But this argument is simply one in the alternative regarding the two questions presented. Had the Court of Appeals considered the argument, it would have been forced to agree with Appellants' position that, if a portion of the ESA Pilot Program be unconstitutional, that portion should be severed.

ARGUMENT

I. The Home Rule Amendment only governs legislation applicable to one specific county.[1]

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.

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

C. The plain meaning interpretation best reconciles the Home Rule Amendment case law.[2]

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[1] This argument was made in the Principal Brief of these Appellants.

[2] In their Principal Brief, these Appellants argued that Plaintiffs' theory below does not comport with the Home Rule Amendment case law. (Principal Brief at 60-61.) Plaintiffs had argued that the ESA reference to the number of failed schools in past years caused an unconstitutional error that could have been cured if the General Assembly had used open-ended population brackets "because the act could later become applicable to other counties through population growth." (R. Vol. X at 17, Transcript of Apr. 29, 2020 Proceedings.) Appellants pointed out that this Court thought so little of that theory that it did not even mention whether the

II. The Home Rule Amendment governs legislation affecting only a county or city—not a school district.

The plain meaning of the Home Rule Amendment also means it does not apply to legislation affecting school districts; it applies to legislation only "applicable to a particular *county or municipality*." Tenn. Const. Art. XI, Sec. 9 (emphasis added). The express mention of a county or municipality implies the exclusion of a school district. *See, e.g., Effler*, 2020 Tenn. LEXIS 594, at *13-14.

In *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959), this Court held that the Home Rule Amendment does not apply to laws affecting special school districts.

The reasoning used by this Court in *Perritt* also extends to the county school districts at issue in this case. This Court ruled that the school district in *Perritt* was not a municipal corporation subject to the Home Rule Amendment because it could not "impose taxes." *Id*. Neither can county school districts. *See State ex rel. Boles v. Groce*, 280 S.W. 27, 28 (1925); Tenn. Code Ann. § 49-2-203. Therefore, the holding in *Perritt* should extend to all school districts that cannot impose taxes, including SCS and MNPS.

In addition, the *Perritt* decision relies on this Court's decision in *Fountain City*, which states that *all* school districts fall outside the ambit

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population brackets were open-ended or closed in *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967) and *Leech*. Upon further research, both statutes contained open-ended population brackets, yet both were enjoined. *See* Supp. App'x 004, 006, 007, 015. Therefore, Plaintiffs' theory fails to account for two of the only three decisions of this Court ever to enjoin a law based on the Home Rule Amendment and must be rejected.

of the Home Rule Amendment: "'A school district cannot be classed as a "city" . . . .'" *Fountain City*, 308 S.W.2d at 484 (quoting *Gould v. Richmond Sch. Dist.*, 136 P.2d 864, 867 (Cal. Ct. App. 1943)). *Fountain City* holds that the Home Rule Amendment does not apply to a sanitary district and reasons that it also does not apply to a "school district," an "irrigation district," or a "soil erosion district." *Id.* at 484-485. As this Court put it in *Fountain City*, "The lead line of Section 9 of the Home Rule Amendment is 'Home rule for cities and counties'. That is, this lead line expressly designates the governmental entities for which it is intended this Section 9 to apply." 308 S.W.2d at 484. It protects cities and counties and not school districts.

This simple, plain meaning rule pronounced by this Court in *Fountain City* has never been overturned or even questioned. Because *Fountain City* was this Court's first decision interpreting the Home Rule Amendment, decided only four years after adoption of the amendment, this Court had a fresh memory of the meaning of the constitutional provision, and its interpretation should be given great weight: "A '[c]onstruction of the constitution adopted by the legislative department and long accepted and acquiesced in by the people is entitled to great weight, and in the absence of some showing of palpable error, is to be accepted as a correct interpretation.'" *ACLU v. Darnell*, 195 S.W.3d 612, 626 n.12 (Tenn. 2006).

However, the Court of Appeals opinion failed to follow *Fountain City* or *Perritt*. The opinion attempted to distinguish *Perritt* by saying the "most significant" difference between a special school district and a county school district is that "a special school district has its own board

of education." Court of Appeals Opinion, No. M2020-00683-COA-R9-CV, Sept. 29, 2020 ("Opinion") at 5 (App'x 036). But so do county school districts! Tenn. Code Ann. § 49-2-201.

In addition, SCS is particularly akin to a special school district because it does not educate all the students in the county. Shelby County maintains municipal school districts in Arlington, Bartlett, Collierville, Germantown, Lakeland, and Millington that educate tens of thousands of public school students.[3] Therefore, SCS is like a special school district in that its geographical reach is not contiguous with the county.[4] Similarly, MNPS is more akin to a special school district than a traditional county school district because it was created by a metropolitan government rather than a traditional county government, and it was given additional potential funding streams than those given to traditional county school districts. (R. Vol. III at 441-444, Charter of the Metropolitan Government of Nashville and Davidson County § 9.04).

The only real difference between a special school district and SCS and MNPS cited in the Court of Appeals opinion is that county school districts must rely for part of their funding on county governments. Opinion at 5 (App'x 036). While that is a true statement, that distinction nowhere appears in the *Perritt* decision. The Court of Appeals was bound by this Court's decision in *Perritt*, and attempting to write this distinction into the case was an error of law.

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[3] https://nces.ed.gov/ccd/districtsearch/district_list.asp?Search=1&State=47&County=Shelby+County (retrieved Nov. 12, 2020).

[4] http://www.scsk12.org/schools/boundary/2021/scs%20schools%2020-21%20school%20location%20map.pdf (retrieved Nov. 12, 2020)

Finally, Intervenor-Defendants maintain that the plain meaning of "county or municipality" is clear that the Home Rule Amendment does not apply to school districts; therefore, there is no need to resort to legislative history. Nonetheless, they once again provide background from the 1953 constitutional convention because it supports their position. The final change made to the Home Rule Amendment added the language, "applicable to a particular county or municipality." *Journal 1953*, at 1120-1121. The drafter of the final change, Chairman Pope, explained to the convention that the purpose of that change was to limit the reach of the Home Rule Amendment. Rather than applying to all local governments, the new provision "makes it more definite and sufficiently applicable only to counties, and municipalities." *Id.* at 1121. Therefore, local governments like school districts were intentionally omitted from the purview of the Amendment.

Furthermore, to solidify this change in the text of the Amendment, the convention changed the actual heading and description of the Amendment that appeared on the ratification ballot. Originally, the Amendment had been titled, "Home Rule as to Local Legislation." *Journal 1953*, at 291. As pointed out by this Court in *Fountain City*, that heading was changed to reflect the new scope of the Amendment to "Home Rule for cities and counties." 308 S.W.2d at 484. Both in its plain meaning and in its history at the constitutional convention, the Home Rule Amendment was limited in application to legislation affecting a county or municipality and not a school district.

This limitation is significant because, as shown in the next section of this brief, the ESA Pilot Program does not affect counties.

III. The county government plaintiffs are not financially harmed by the ESA Pilot Program; therefore, the Home Rule Amendment does not apply, and they do not have standing or ripeness to challenge the program.

Counsel for the county government plaintiffs in this case are trying to have their cake and eat it, too. At times, they claim to represent the interests of the county governments (Counties' Court of Appeals Br. at 21-22, 24-26), and at other times, they claim to represent the interests of the county school districts. (*Id*. at 23, 27.) On one hand, they argue that an alleged "reduction in State funding will leave the school district with less money." (*Id*. at 23.) On the other hand, they argue, the "counties will be required to fill the sizeable hole." (R. Vol. VII at 1013, Counties' Reply on Mot. for Summ. J.) Which is it? If the counties fill the alleged hole, then there is no injury to the school district. If the counties do not fill the alleged hole, then there is no injury to the county. These two interests are diametrically opposed!

The Court of Appeals, however, allowed the Counties to conflate and assert both sides of these competing interests. Its opinion stated, "The defendants claim that the ESA Act reimburses the LEA . . . ." Opinion at 6 (App'x 037). But then its conclusion misdirected the focus from the school district to the counties: "The reimbursement does not, however, make the counties whole." *Id*. This Court should correct this error, and to assist its analysis, Intervenor-Defendants will discuss these two interests separately.

A. The county government plaintiffs are not affected positively or negatively by the ESA Pilot Program.

For at least sixty years, counties have had a duty under Tennessee law to partially fund the education of every school-aged student in their jurisdiction. Tenn. Code Ann. § 49-6-3102(a)(1). Other than that sixty-year-old mandate, the ESA Pilot Program imposes absolutely no new funding requirements on the Counties—none. There is no such thing as an "ESA Mandate."[5]

The funding of the ESA is very simple: the money follows the child. When a child is educated in SCS or MNPS, the local per-pupil funding to educate the child flows to those entities. When a child is educated in a public charter school, the Achievement School District, a municipal school district (in the case of Shelby County), or now, receives an ESA, then the exact same amount of money flows to those entities.[6] No new or different expenditures by the county are created by the ESA law or any of those other laws. Therefore, the law does not affect counties at all.[7]

In their Response to the T. R. A. P. 11 Application, the Counties agree that if a law does not affect the total amount counties must spend on education, then the Home Rule Amendment does not apply. *See* Counties' T. R. A. P. 11 Response at 23. They acknowledge this in an

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[5] *Contra* Counties' Response in Opposition to Applications for Permission to Appeal ("Counties' T. R. A. P. 11 Response") at 16-17.

[6] The Counties acknowledge this fact in the Counties' T. R. A. P. 11 Response at 15 n.11, 16 n.12, and 33 n.23.

[7] This is a separate argument from that of the Bah Intervenor-Defendants that the law is not applicable to the county "in its governmental or in its proprietary capacity." Tenn. Const. Art. XI, Sec. 9.

attempt to distinguish *Perritt*, but the same argument applies to the Counties in this case: "[M]oving students . . . did not affect [the c]ounty's total education funding obligation, only the allocation of those funds among the local schools." Counties' T. R. A. P. 11 Response at 33 n.23. Because there is no new funding obligation, the Home Rule Amendment does not apply.

The Counties attempted to confuse the courts below by also pointing to the "maintenance of effort" statute. (Counties' Court of Appeals Br. at 24, 39.) Yes, counties must maintain their funding of ESA children at *exactly the same level* as before the law was enacted. This, too, is not a new funding requirement created by the ESA Pilot Program. It is also a statute that has been on the books for years. *See* Tenn. Code Ann. § 49-2-203(a)(10)(A)(ii).

Because the ESA Pilot Program does not affect county spending on education either positively or negatively, the ESA Pilot Program is not a law applicable to a "county or municipality" and, thus, is not subject to the Home Rule Amendment. *See* Section II above.

Also, because the Counties are not harmed by the program, they have no standing to bring this lawsuit. To establish standing, the Counties must show an injury-in-fact: "[A] plaintiff must show a distinct and palpable injury . . . ." *ACLU*, 195 S.W.3d at 620. "And crucially, courts must ascertain whether the *particular plaintiff* is entitled to an adjudication of the particular claims asserted." *Effler*, 2020 Tenn. LEXIS 594, at *11 (internal quotations omitted) (emphasis in original). These particular plaintiffs have not shown and cannot show any injury.

B. The county school boards are not parties to the appeal.

The Counties have attempted to get around the fact that they are not harmed by the ESA Pilot Program by asserting the interests of their county school boards. *See* Counties' Court of Appeals Br. at 23, 27. But the county school boards are not parties to this appeal. SCS was never a plaintiff in this lawsuit.[8] (R. Vol. I at 1, Complaint.) MNPS was dismissed as a plaintiff by the Chancery Court. (R. Vol. XIII at 1109-1112, Memorandum and Order.) MNPS did not appeal its dismissal. *See* Counties' Court of Appeals Br. at 13, n.2. Therefore, MNPS is not a party to this appeal either.

C. Even if they were parties to the appeal, the county school boards benefit financially from the ESA Pilot Program in three ways.

Even if the county school boards were parties to this appeal, they, too, would lack standing because they also suffered no injury-in-fact from the law. *See ACLU*, 195 S.W.3d at 619-620. Not only were they not injured, but in actuality they received three distinct financial advantages from the ESA Pilot Program.

First, the school districts get to keep "remainder funds" of $4,400 to $5,300 for each student who participates in the program. Unlike the other two financial advantages, these "remainder funds" occur every year of the

[8] The ESA Pilot Program specifically prohibited county school boards from filing suit against the law. Tenn. Code Ann. § 49-6-2611(d). The state chose not to waive its sovereign immunity in this way, and Plaintiffs made no claim that this specific provision of the law raised any constitutional issues. (R. Vol. I at 35-42, Complaint.)

program. Also, unlike the other two financial advantages, the Court of Appeals completely ignored these "remainder funds" in its opinion, failing to acknowledge or address them at all. *See* Opinion at 6 (App'x 037). This is an error of law which this Court should correct.

The "remainder funds" occur because when a student leaves the school district, he or she takes less money with him or her ($7,572) than the school district continues to receive as if he or she were still there ($11,976 for SCS and $12,895 for MNPS).[9] These "remainder funds" will significantly increase the amount of money available per-pupil to educate the remaining district school children. The "remainder funds" leave the affected school districts much better off financially than their peers, who do not have access to them when a student leaves their school district. Because they actually benefit from the law, the county school districts certainly do not suffer an injury-in-fact from it.

[9] The ESA amount cannot exceed the combined statewide average of state plus required local Basic Education Program ("BEP") allocations per pupil. Tenn. Code. Ann. § 49-6-2605(a). For fiscal year 2020, that figure was $7,572. *See* Tennessee Comptroller of the Treasury, Legislative Brief, Understanding Public Chapter 506: Education Savings Accounts, Table at Page 4 (App'x 006); also available at https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2020/ESA2020Website.pdf (updated May 2020) (retrieved May 14, 2020). 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 "remainder fund" 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 "remainder fund" of $5,323 for every student who utilizes an ESA.

Second, in addition to the "remainder funds," the ESA Pilot Program creates a "ghost reimbursement" fund to pay affected school districts the per-pupil state aid for children taking the ESA, even though they no longer receive any services from the district. This "ghost reimbursement" lasts three years to ease the transition to a lower total pupil count. In other words, each child in the program generates a double funding of the ESA for three years, one of which remains with local school district. Therefore, the school district receives the exact same amount of money as before for three years, despite thousands of children no longer in the system. Even ignoring the "remainder funds" as did the Court of Appeals, this means that, at the absolute earliest, any claim of financial injury would not be ripe for at least three years.

The "ghost reimbursement" fund is paid to school districts in the pilot program "in an amount equal to the ESA amount for participating students." Tenn. Code. Ann. § 49-6-2605(b)(2)(A). It is paid to school districts through the school improvement fund. *Id*.

The Court of Appeals found two quibbles with this "ghost reimbursement" fund, but neither creates an injury-in-fact. The Court of Appeals found issue because the use of these funds was limited to "school improvement." Opinion at 6 (App'x 037). But what does a school district spend money on that is not intended to improve schools? Neither the Court of Appeals, in its opinion, nor the Plaintiffs, in the record, provided any evidence of expenditures that would not meet the broad and undefined phrase of "school improvement."

Next, the Court of Appeals quibbled with the phrase in the ESA Pilot Program that stated the "ghost reimbursement" fund is "subject to

appropriation." Opinion at 6 (App'x 037). However, the Court of Appeals totally ignored that the statute says the department "shall disburse" the funds. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). "Shall" is the strongest language that the General Assembly can use in a statute because, constitutionally, that is the extent to which one General Assembly can direct another to act. All Tennessee laws are always subject to future appropriations, *see* Tenn. Const. Art. II, Sec. 24, so the phrase "subject to appropriation" merely recognizes the temporal limits of any General Assembly's authority.

Rather than speculate as to whether this fund will be funded, as the Court of Appeals did, this Court should look to reality. The reality is that the General Assembly *did* fund this "ghost reimbursement" fund for year one before the Chancery Court enjoined the program. *See* P.C. 651, 111th Gen. Ass., at 5.[10] If the General Assembly were ever not to fund the "ghost reimbursement" fund, then affected school districts might have standing to bring a claim on that issue alone, but such an issue is not ripe at this time and is unlikely to become ripe for the next three years.

Third, at the end of three years, the school improvement fund shall disburse "priority 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 over 90% of all priority schools, they will continue to be the beneficiaries of the school improvement fund even after the "ghost

[10] *See* $41,880,100.00 for Non-Public Education Choice Programs, available at https://publications.tnsosfiles.com/acts/111/pub/pc0651.pdf (retrieved Nov. 13, 2020).

reimbursement" three-year funding period ends. This is yet a third financial advantage given to affected school districts, and all three *increase* per-pupil expenditures.

IV. In the alternative, even if the ESA Pilot Program is enjoined in SCS and MNPS, it cannot possibly be enjoined, based on the Home Rule Amendment, in the Achievement School District because the ASD is run by the state.

If this Court does uphold the injunction against the ESA Pilot Program going forward in SCS and MNPS, the program should still be allowed to proceed in the ASD. Because the ASD is run by the state, it cannot be subject to a challenge under the Home Rule Amendment, which only governs laws applicable to cities and counties. *See* Tenn. Const. Art. XI, Sec. 9; *Fountain City*, 308 S.W.2d at 484.

When a law contains only one unconstitutional provision and a severability clause, Tennessee's longstanding case law on elision directs courts to strike only the offending section of the Tennessee Code and leave the remainder of the law intact. *See Reelfoot Lake Levee Dist.*, 36 S.W. at 1048 (Tenn. 1896).

In addition, the Counties do not even have standing to bring a claim for an injunction against operating the ESA Pilot Program in the ASD because they have no authority over the ASD.

The Court of Appeals refused to hear this issue because "[t]he ASD is not a party." Opinion at 12 n.6 (App'x 043). That is exactly the point! Only the ASD could have challenged the program operating there, and the ASD is not a party to the lawsuit. It is not a party because it is run by the state, and the state cannot sue itself, particularly under the Home

Rule Amendment.[11] Likewise, the county governments cannot sue the state on behalf of the ASD. They do not manage or administer the ASD and do not represent its interests. Therefore, the program must be upheld in the ASD, at a minimum.

Had the Court of Appeals ruled on this issue, it would have been forced to allow the program to proceed in the ASD. To avoid this outcome, it simply refused to hear the issue: "This is an analysis we are unwilling to undertake." *Id*. This refusal was an error of law that this Court should overrule.

The Court of Appeals stated that the Greater Praise Intervenor-Defendants should have presented a third issue on appeal: "Neither of the questions this Court determined to take mentioned or focused to any extent on the ASD. The question raised by the Greater Praise intervenors is not an issue this court agreed to hear." *Id*. But this argument in the alternative *does* address the two questions presented to the court; it addresses what remedy the court should impose as a result of its decision on the two questions: 1) Do the county governments have standing to bring a Home Rule Amendment claim? No. But, in the alternative, if they do, they do not have standing to bring the claim on behalf of the ASD. 2) Does the ESA Pilot Program violate the Home Rule Amendment? No. But, in the alternative, if it does, operating it in the ASD does not violate

[11] Alternatively, the ASD is not a plaintiff in this lawsuit because it is already a defendant. The executive officer responsible for the ASD, the Commissioner of Education, and the executive agency responsible for the ASD, the Department of Education, are defendants.

the amendment. No third question presented is necessary.[12]

A. The Home Rule Amendment does not apply to the state-run Achievement School District.

The Home Rule Amendment does not apply to the ASD because it is purely and wholly created and operated by the State of Tennessee: "The 'achievement school district' or 'ASD' is an organizational unit of the department of education, established and administered by the commissioner [of education] . . . ." Tenn. Code Ann. § 49-1-614(a). Only the state controls how the ASD spends its funds: "The ASD may receive, control, and expend local and state funding for schools placed under its jurisdiction . . . ." Tenn. Code Ann. § 49-1-614(d)(1). Whether the ASD chooses to spend its funds by directly running schools, by creating charter schools, or by giving ESAs is solely a state decision, which has no impact whatsoever on the Counties, and it is unequivocally not subject to the Home Rule Amendment.

Even the Chancery Court's order correctly recognized that "the 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.) As such, it has no rights under

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[12] Furthermore, this Court can exercise its own discretion to hear the issues it wants on appeal. *See, e.g., State v. Walls*, 537 S.W.3d 892, 904 n.7 (Tenn. 2017) (exercising the Court's supervisory authority). In the Greater Praise Application for Permission to Appeal, Appellants preserved the issue and asked this Court, if it felt it necessary, to accept this appeal with a third question presented sufficient to cover the alternative remedy regarding the ASD. (Application at 8 n.1.)

the Home Rule Amendment. *See* Tenn. Const. Art. XI, Sec. 9; *Fountain City*, 308 S.W.2d at 484.

This point is so self-evident that the Court of Appeals and Plaintiffs offered no argument in rejoinder. Instead, Plaintiffs offered only two arguments against the very existence of the ASD. *See* Counties' Court of Appeals Brief at 21-27, 41-44. First, the Counties objected generally to having their local BEP contributions subtracted by the state to fund the ASD. *Id*. at 25, 39 n.19.[13] That is a claim that is not made in this lawsuit and should have been brought against the creation of the ASD eleven years ago.

Second, the Counties claimed that the ASD discriminates against them because the only schools it has taken control of are located in Shelby and Davidson counties. *Id*. at 25. Again, that is a claim against the ASD statute—not a claim against the ESA statute.

Whether the state chooses to give ESAs to students who are already under their control in the ASD is purely a state decision that is not subject to the Home Rule Amendment.

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[13] Like other school districts and like the ESA Pilot Program, funding for the ASD is built on the principle that the dollars follow the child. For each student, county school districts and the ASD receive the state share of the per-pupil BEP and the full local share. For the county school district, the county pays the local portion of the BEP directly to the school district. For the ASD, that same amount is subtracted from the total funding the state sends to the county public school district, and then the state sends both the state portion and an amount equivalent to the local portion of the BEP directly to the ASD. Tenn. Code Ann. § 49-1-614(d)(1).

B. Tennessee law on elision directs courts to sever the offending provisions and leave the remainder of laws intact.

This Court's most recent pronouncement on the law of elision directs lower courts "to determine whether the unconstitutional portion of the statute may be elided to preserve the remainder of the statute." *Willeford*, 597 S.W.3d at 470. The trial and appellate courts failed to undertake this analysis, and this Court should correct that error of law.

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). *See* Trial Court Order (R. Vol. VIII at 1124), 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 lower courts, 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) and the remainder of the statute intact. 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.

1. *Willeford v. Klepper* (2020)

This Court has recently made clear its position that courts should utilize the law on elision whenever possible. *See Willeford*, 597 S.W.3d at 470-473. In *Willeford*, this Court analyzed Tenn. Code Ann. § 29-26-121(f), which required courts to grant a petition for a qualified protective order for defense attorneys to conduct an informal, *ex parte* interview of a plaintiff's physician. *Id*. at 462-464. This Court determined that mandating how a court should rule on a procedural, discovery issue was an unconstitutional violation of the separation of powers, but the Court elided that one sentence from subsection (f) of the statute and kept the remainder of the statute in force. *Id*. at 471-472. Similarly, the lower courts should have done so in this case.

The Court elided the statute in *Willeford* because "[t]he overriding purpose of the statutory scheme can survive in this instance." *Id*. at 471. Likewise, the remainder of the ESA Pilot Program can survive in the ASD alone. The second reason for elision in *Willeford* was that "the legislature would have enacted the act in question with the unconstitutional portion omitted." *Id*. We know the legislature would have enacted the ESA Pilot Program in the ASD because it was included

in the very first version of the bill, *see* House Educ. Comm. Amend. 1 to HB 939,[14] and it remained in the act as other school districts were amended out. *See also* Greater Praise Brief of the Appellants, Legislative History at 18-26 ("[T]he goal of the pilot project was to reach into the highest concentrations of poverty and priority schools [because the] challenge is great there."[15]). The third reason for elision in *Willeford* was that the legislature "approved the practice of elision through the enactment of a general severability statute." *Willeford*, 597 S.W.3d at 471. This general severability statute, passed in 1950, applies throughout the Tennessee Code and is used by courts in cases like *Willeford* analyzing statutes without a severability clause. *See* Tenn. Code. Ann. § 1-3-110. The lower courts had an even stronger reason to use elision in this case because the ESA Pilot Program does contain a severability clause. *See* Tenn. Code. Ann. § 49-6-2611(b).[16] Therefore, for all three of these reasons, the lower courts should have elided the statute.

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[14] Available at http://www.capitol.tn.gov/Bills/111/Amend/HA0188.pdf (retrieved July 30, 2020) (applying to children "zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools"). All ASD schools are among the bottom 5%.

[15] Statement of Sen. Dolores Gresham, Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (April 25, 2019), 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).

[16] Limiting applicability to the ASD further promotes the will of the legislature in this case because the statute includes a second severability clause prohibiting expansion to other students. Tenn. Code. Ann. § 49-6-2611(c).

2. Longstanding Tennessee case law

Elision is not only consistent with this Court's recent decision in *Willeford*, it is consistent with a long line of Tennessee cases on the subject: "If, notwithstanding and without such [unconstitutional] provisions, there be left enough for a complete law, capable of enforcement and fairly answering the object of its passage, the Courts will reject only the void parts and enforce the residue." *Reelfoot Lake Levee Dist.*, 36 S.W. at 1048 (Tenn. 1896) (overruled on another ground by *Arnold v. Mayor, etc., of Knoxville*, 90 S.W. 469, 477 (Tenn. 1905)). In addition, elision has been used multiple times specifically in Home Rule decisions. *See Fountain City*, 308 S.W.2d at 486, and *Perritt*, 325 S.W.2d at 234, both of which found the statutes at issue to be constitutional and severed only the portion requiring a local referendum.

3. Recent U.S. Supreme Court decisions

This Court's decision in *Willeford* also foreshadowed two recent U.S. Supreme Court decisions on severability. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). In *Seila Law*, the Court severed the unconstitutional director of the CFPB from the remainder of the statute: "We think it clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today." 140 S. Ct. at 2210-11. In *American Association of Political Consultants*, the Court severed the government-debt exception to restrictions on robocalls and left the remainder of the Telephone Consumer Protection Act in force: "When

Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause." 140 S. Ct. at 2349. The courts below also should have adhered to the text of the severability clause in this case.

4. *Farris v. Blanton* is distinguishable.

In their brief below, the Counties cited only one case in their argument against elision: *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975). *See* Counties' Court of Appeals Brief at 39 n.19. But in *Farris*, elision would have been impossible. The entire statute was only two sentences and an effective date. *Farris*, 528 S.W.2d at 551-552. It required run-off elections for county mayor in all counties with a mayor, and Shelby County was the only one. *Id*. at 550. If the provision limiting the statute to counties with mayors were removed, there would be no statute left because it governed elections for county mayors to begin with. *See Davidson County v. Elrod*, 232 S.W.2d 1, 2 (Tenn. 1950) (for elision to be used, the offending portion of the statute must be "easily separable" from the remainder). For that reason, *Farris* is different from this case, in which the pilot program could work in three school districts or just the single Achievement School District.[17] Had the lower courts applied this

[17] The ability to be severed also distinguishes the ESA Pilot Program from the reasoning of the dissenting opinion in *Willeford*, in which Justice Kirby rejected elision in part because "elision of the statute d[id] not

correct remedy, thousands of low-income students would find themselves today not in failing, virtual schools but in schools of their choice, including the children of intervenors Ciera Calhoun and David Wilson, Sr.

C. The county government plaintiffs suffer no injury from the use of ESAs in the ASD and, therefore, have no standing to bring this claim.

In Section IV.A. above, Appellants explained that the Counties have no authority over the ASD and are not affected financially if the state chooses to give its students in the ASD an ESA. Therefore, the Home Rule Amendment does not apply to the ASD. An even clearer conclusion from that argument is that the Counties do not have standing to bring a claim against giving ESAs in the state-run ASD. To establish standing, a plaintiff must show "a distinct and palpable injury." *ACLU*, 195 S.W.3d at 619-620. This the Counties cannot do for the ASD.

First, they do not represent the interests of the children in the ASD, over which they have no authority. The Court of Appeals rightly pointed out that "[t]he ASD is not a party" to this lawsuit. Opinion at 12 n.6 (App'x 043). Only the ASD would have had standing to bring a claim regarding the ASD, and it is not in the case. SCS and MNPS cannot bring a claim on its behalf.

Second, once the ASD receives its funding, the Counties can point to no evidence that how it spends its funds in any way affects them

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render it constitutional." 597 S.W.3d at 473 (Kirby, J. concurring in part and dissenting in part). In this case, it would.

financially. The only argument they have made is that the very existence of the ASD injures them financially. *See* Counties' Court of Appeals Brief at 25, 39 n.19. That is not a claim at issue in this case.

Courts use the standing doctrine to decide whether a particular plaintiff is "properly situated to prosecute the action." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). Because they do not control the ASD and are not financially affected by how it chooses to spend its funds, they are not "properly situated" to bring a claim on its behalf. The doctrine of standing precludes courts from adjudicating "an action at the instance of one whose rights have not been invaded or infringed." *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001). The Counties' rights were in no way infringed when the state chose to start its pilot program in its own state-run ASD. Therefore, they lack standing to bring this claim.

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: March 8, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements set forth in Tenn. S. Ct. R. 46 (3.02). There is no word limit listed for a Supplemental Brief, but one can deduce that it is 7,500 words because that is half the word limit for the Brief of the Appellants, which is 15,000 words. (Under the prior, hard-copy page limitations listed in T. R. A. P. 11, the Brief of the Appellants was limited to 50 pages, and the Supplemental Brief was limited to half that, or 25 pages.) This brief contains 7,460 words, based on the word count of Microsoft Word and excluding those sections mentioned in Tenn. S. Ct. R. 46 (3.02)(a)1 and the signature block.[18] 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: March 8, 2021

s/ Brian K. Kelsey
Brian K. Kelsey

[18] In the event the Court finds this brief to be in excess of the length limitations in the Rules, Greater Praise Intervenor-Defendants move this Court for leave to file this brief in excess of the limitations and, in support thereof, state the statements above.

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 8th day of March, 2021.

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