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IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*,	)	
Plaintiffs,	)	
v.	)	
TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,	)	**Case No. 20-0143-II**
Defendants,	)	
and	)	
NATU BAH, *et al.*,	)	
Intervenor-Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT I OF THE COMPLAINT

Article XI, Section 9 of the Tennessee Constitution (the "Home Rule Amendment") mandates that any General Assembly act "local in form or effect" and "applicable to a particular county . . . in its governmental or its proprietary capacity" is "void and of no effect" unless the act, by its terms, requires approval by a two-thirds vote of the county's legislative body or a majority of the county's voters.

The "Tennessee Education Savings Account Pilot Program," codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* ("ESA Act"), applies only in Davidson and Shelby counties. It will never expand further without action by the Tennessee General Assembly. It radically alters the counties' local administration of public education and requires them to use local tax revenue to send their students to private schools. Yet the Act does not contain the local-approval language required by the Home Rule Amendment.

Count I of the Complaint alleges the ESA Act violates the Home Rule Amendment. There are no genuine issues of material fact related to Count I. Because the General Assembly cannot impose its will on the governmental functions of only two counties without their approval, the Court should grant summary judgment on Count I, enter a declaratory judgment that the ESA Act violates the Home Rule Amendment and is void and of no effect, and enjoin the Act's implementation and enforcement.

FACTUAL AND LEGISLATIVE BACKGROUND

I. THE ESA ACT'S PLAIN LANGUAGE

In May 2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, establishing the "Tennessee Education Savings Account Pilot Program," with an effective date of May 24, 2019. 2019 Tenn. Pub. Acts ch. 506. The Act is codified at Tenn. Code Ann. §§ 49-6-2601, *et seq*. Under the Act, a "participating" student will receive an education savings account to pay for tuition, fees, and other education-related expenses at participating private schools. Tenn. Code Ann. §§ 49-6-2603(a)(4), -2607(a). The student's account is funded by diverting state and local funds from the student's public-school district in an amount equal to the district's per-pupil state and local funding required by the state's Basic Education Program ("BEP") or the combined (state and local) statewide average of BEP funding, whichever is lower. Tenn. Code Ann. § 49-6-2605(a).

To qualify as a "participating student," a student must be an "eligible student" under the ESA Act. An "eligible student" must be in a family with an annual household income not exceeding twice the federal income eligibility guidelines for free lunch and meet the following geographic restrictions:

(i) is zoned to attend a school in an LEA,[1] 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 the effective date of this act.

Tenn. Code Ann. § 49-6-2602(3)(C).

The "priority" and "bottom ten percent" schools addressed in Section 49-6-2602(3)(C)(i) are defined under Tennessee law. With respect to priority schools, at least every three years, "the commissioner of education shall recommend for approval to the state board a listing of all schools to be placed in *priority, focus or reward status*." Tenn. Code Ann. § 49-1-602(b)(1) (emphasis added). "Schools identified as *priority schools* shall include the bottom five percent (5%) of schools in performance, all public high schools failing to graduate one-third (1/3) or more of their students, and schools with chronically low-performing subgroups that have not improved after receiving additional targeted support." *Id.* § 49-1-602(b)(2) (emphasis added).

With respect to bottom ten percent schools, "[b]y October 1 of the year prior to the public identification of priority schools pursuant to subdivision (b)(1), the commissioner shall notify any school and its respective LEA if the school is among the *bottom ten percent (10%) of schools* in overall achievement as determined by the performance standards and other criteria set by the state board." *Id.* § 49-1-602(b)(3) (emphasis added).

The "achievement school district (ASD)" addressed in Section 49-6-2602(3)(C)(ii) is a special school district administered by the Tennessee Department of Education. More

[1] The Tennessee Code refers to a public-school system, including a county school system, as a "local education agency" or "LEA." Tenn. Code Ann. § 49-1-103(2).

specifically, state law defines the ASD as "an organizational unit of the department of education, established and administered by the commissioner for the purpose of providing oversight for the operation of schools assigned to or authorized by the ASD." Tenn. Code Ann. § 49-1-614(a). Schools assigned to the ASD after June 1, 2017, are limited to "priority schools." *Id.* § 49-1-614(c)(1).

In 2015, the only local education agencies ("LEAs") that had ten or more schools on the priority list were Metropolitan Nashville Public Schools ("MNPS") in Nashville, Shelby County Schools in Memphis, and the ASD. (Statement of Undisputed Material Facts ("SUMF") Nos. 1-2, filed contemporaneously herewith.) In 2017, the only LEAs that had ten or more schools on the bottom 10% list were MNPS, Shelby County Schools, Hamilton County Schools, and the ASD. (SUMF Nos. 3-4.) In 2018, the only LEAs that had ten or more schools on the priority list were MNPS, Shelby County Schools, and the ASD. (SUMF Nos. 5-6.)

Therefore, the only LEAs that meet all of the specifications in Section 49-6-2602(3)(C)(i) for an "eligible student" are MNPS, Shelby County Schools, and the ASD. (SUMF No. 7.)[2]

II. LEGISLATIVE HISTORY

The ESA Act's legislative history illustrates the General Assembly's intent to limit the Act's effect to two counties without local approval and over their objections. During discussion of the ESA Act in the House and Senate, multiple legislators confirmed the General Assembly's intent to apply the ESA Act only in Davidson and Shelby counties. As described below, the General Assembly amended the definition of "eligible student" repeatedly to exclude from the Act school districts represented by legislators whose votes

[2] An "eligible student" need not attend or be zoned to attend a school on the priority list or the bottom 10% list to receive public dollars for private school tuition through an education savings account. Tenn. Code Ann. § 49-6-2602(3)(C).

were needed to pass the bill. The General Assembly accomplished this goal by increasing the number of schools in the "priority" or "bottom ten percent" categories required to meet the definition of "eligible student" and tying those numbers to past years. In this way, the General Assembly narrowed the Act's scope and converted it from a bill of general application to a local bill that applies only to school districts in Davidson and Shelby counties and will never apply to another county absent further legislative action.

A. House Bill No. 939 Moves Through Committees.

House Majority Leader William Lamberth (R-Portland) filed House Bill No. 939 on February 7, 2019, as a "caption bill" to be held on the House desk. (SUMF No. 8.) The bill proceeded to the House Curriculum, Testing, & Innovation Subcommittee on March 19, 2019, after Rep. Mark White (R-Memphis), who represents significant portions of the cities of Germantown and Collierville, filed Amendment No. 1 (HA0188) to the bill, presenting for the first time the substance of the "Tennessee Education Savings Account Act" and beginning the trend of carving out counties from the House bill's application. (SUMF Nos. 9-10.)

In addition to adding a new part to Title 49, Chapter 6 of the Tennessee Code, the Amendment placed several restrictions on eligibility for an ESA. (SUMF Nos. 10-11.) Specifically, the amendment defined "eligible student" in Section 49-6-2602(3)(C) to be a student "zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools in accordance with § 49-1-602(b)(3)." (SUMF No. 11.) At that time, the most recently compiled bottom 10% list from 2017 contained five counties with three or more schools in the bottom 10%: Davidson, Hamilton, Knox, Madison, and Shelby. (SUMF No. 12.) But as drafted, Amendment No. 1 left the potential to drop or add counties to the Act in the future as school performances declined or improved. (SUMF No. 11.) The House Curriculum, Testing, & Innovation Subcommittee recommended the bill for passage if amended as set forth in Amendment No. 1, as did the House Education Committee;

Government Operations Committee; Finance, Ways, & Means Subcommittee; and Finance, Ways, & Means Committee. (SUMF No. 13.)

B. House Bill No. 939 Is Debated on the House Floor.

Rep. White withdrew Amendment No. 1 when House Bill No. 939 was considered on the House Floor for third and final reading. (SUMF No. 15.) The House then approved Amendment No. 2 (HA0445), which Rep. Susan Lynn (R-Mt. Juliet) sponsored. (*Id.*) Amendment No. 2 placed even more limits on the number of LEAs subject to the Act, by changing the definition of "eligible student" to be a student who, among other requirements "[i]s zoned to attend a school in an LEA that had three (3) or more schools identified as priority schools in 2015 in accordance with § 49-1-602(b) and that had three (3) or more schools among the bottom ten percent (10%) of schools as identified by the department in 2017 in accordance with § 49-1-602(b)(3)." (SUMF Nos. 16-17.) This narrowed the applicable counties to only four: Davidson, Hamilton, Knox, and Shelby. (SUMF Nos. 18-20.) Importantly, the amendment also defined "eligible student" based on data from specific prior years rather than using current data. With that fundamental definition change, the amendment ensured that no new LEAs would ever be added to or removed from the definition without General Assembly action. (SUMF No. 21.)

The intent of these restrictions was not lost on the legislators whose districts were affected. Rep. Jason Powell (D-Nashville), Rep. John Ray Clemmons (D-Nashville), and Rep. Dwayne Thompson (D-Cordova), all expressed concern about the clear intent of the General Assembly to "single[ ] out Davidson County and Shelby County" without their consent. (SUMF Nos. 22-24.)

Even after being narrowed by Amendment No. 2 to LEAs in only four counties, House Bill No. 939 received the bare majority of votes the Tennessee Constitution requires to pass legislation, with 50 ayes and 48 nays, on April 23, 2019. (SUMF No. 26.) This narrow passage

came after the vote was held open for 40 minutes with the House deadlocked. (SUMF No. 27.) Rep. Jason Zachary (R-Knoxville), whose district was affected by Amendment No. 2, cast the deciding vote only after then-House Speaker Glen Casada promised him that Knox County would be excluded and "held harmless" from the Senate version of the bill. (SUMF Nos. 28-29.)

In his closing remarks about the ESA Act on the House Floor before the vote was taken, then-Deputy House Speaker Matthew Hill (R-Jonesborough) summarized the House majority's dual motives of unilaterally imposing the ESA Act on "deep blue" Davidson and Shelby counties while "protecting" every other school district from the bill, stating: "Ladies and gentlemen, today on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education." (SUMF No. 30.)

C. Senate Bill No. 795 Moves Through Committees

Senate Majority Leader Jack Johnson (R-Franklin) filed Senate Bill No. 795, the Senate companion to House Bill No. 939, on February 5, 2019. (SUMF No. 31.) Legislators quickly chiseled away at the bill's application. As promised to Rep. Zachary, Knox County was excluded from the Senate's final version, along with every other Tennessee county except Davidson and Shelby.

First, Sen. Dolores Gresham (R-Somerville), Chair of the Senate Education Committee, proposed Amendment No. 1 (identical to Amendment No. 1 in the House), which limited the act to five counties: Davidson, Hamilton, Knox, Madison, and Shelby, with potential to drop or add counties automatically as school performance declined or improved. (SUMF Nos. 32-33.) The amendment did not apply to Sen. Gresham's district, including her home county of Fayette, despite Fayette County having two out of seven schools (28.6%) on

the 2017 bottom 10% list and one out of seven schools (14.3%) on the 2018 list of priority schools. (SUMF No. 34.)

D. Senate Bill No. 795 Is Debated on the Senate Floor

When Senate Bill No. 795 reached the Senate Floor, Sen. Gresham moved her amendment to the heel of the amendments, and the Senate voted to substitute House Bill No. 939 (including House Amendment No. 2) as the companion Senate bill. (SUMF No. 35.) The Senate then adopted Senate Amendment No. 5, which Sen. Bo Watson (R-Hixson) filed and which stripped the language from House Bill No. 939 and substituted new language. (SUMF No. 36.) Sen. Gresham then withdrew Amendment No. 1. (*Id.*)

Senate Amendment No. 5 further narrowed the definition of "eligible student" in Section 49-6-2602(3)(C) and further limited the number of counties covered by the bill. (SUMF No. 37.) The amendment increased from three to ten the number of schools that had to be identified as priority schools in 2015 and 2018 and increased from three to ten the number of schools that had to be among the bottom 10% of schools in the state in 2017. (SUMF No. 38.) The new language also included within the definition of "eligible student" a student zoned to attend a school in the state's ASD on the act's effective date. (SUMF No. 39.) By narrowing the definition of "eligible student," Amendment No. 5 removed Knox County and Hamilton County from the bill's application. (SUMF No. 40.) Sen. Watson's amendment excluded his home county of Hamilton County, which had five priority schools in 2015 and nine in 2018. (*Id.*)

The only counties with LEAs encompassed by the new definition of "eligible student" in Amendment No. 5 were Davidson and Shelby counties. (SUMF No. 41.) Moreover, the criteria for defining an "eligible student" in Amendment No. 5 were based on specific numbers of schools in specific prior years; therefore, no LEAs could ever be added to or removed from

the definition without amendment of the law. (SUMF No. 42.) The Senate adopted House Bill No. 939, as amended, with 20 ayes and 13 nays, on April 25, 2019. (SUMF No. 47.)

E. House and Senate Adopt the Conference Committee Report.

When the Senate's version of the bill was transmitted to the House, the House non-concurred in the amendments to the bill adopted by the Senate. (SUMF No. 48.) The Senate refused to recede from the amendments, and the House refused to recede from its non-concurrence. (*Id.*) On April 30, 2019, the House and Senate speakers appointed members to a conference committee to resolve the differences between the two bills. (SUMF No. 49.) The conference committee's final version retained the definition of "eligible student" in the bill as adopted by the Senate, which limited the bill's application to Davidson and Shelby counties and ensured the bill could never apply to any other county. (SUMF No. 50.)

Rep. Patsy Hazelwood (R-Signal Mountain) voted against the bill when it initially passed the House but voted for the conference committee's final version, which excluded her home county of Hamilton. (SUMF Nos. 51-52.) She declared the reason for her change of heart on the House Floor on May 1, 2019: "I committed to vote for ESAs if the Hamilton County was excluded from the program. The language that's in this conference report here today does that. As a result, I'm going to be keeping my commitment and I will vote for this bill." (SUMF No. 52.)

Before the Senate's final vote on the same day, Sen. Joey Hensley (R-Hohenwald) asked the bill's Senate sponsor, Sen. Gresham, to confirm that "no other LEA will be able to grow into the program over the years," explaining, "[I] just want it to be on the record and assured that this conference report continues to prevent any future LEAs from being included

in this." (SUMF Nos. 53-54.) Sen. Gresham responded unequivocally: "That's the intent of the General Assembly today." (SUMF No. 55.)[3]

Both the House and Senate adopted the conference committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays. (SUMF No. 56.)

SUMMARY JUDGMENT STANDARD

Summary judgment on Count I of the Complaint is proper because the Count "can be resolved on the basis of legal issues alone." *Great S. Homes, Inc. v. Eaton's Creek Park Real Estate Inv'rs Fund, LLC*, 207 S.W.3d 242, 244 (Tenn. Ct. App. 2006). "Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law." *Id.* at 244-45.

As addressed below, Plaintiffs, as the moving parties with the burden of proof at trial, have satisfied their burden at summary judgment by producing "evidence that, if uncontroverted at trial, would entitle [them] to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (clarifying the burden of production at summary judgment for a moving party with the burden of proof at trial following *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235 (Tenn. 2015)) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting)). Thus, the burden now shifts to Defendants, the non-moving parties, to produce evidence showing that there is a genuine issue of fact for trial. *Id.*

[3] To guarantee that even a court could not undo what then-Deputy House Speaker Hill and Sen. Gresham had promised their colleagues, the General Assembly included a limited exception to the severability clause so that even if any portion of the Act is determined to be invalid, that invalidity "shall not expand the application of this part to eligible students other than those identified in § 49-6-2602(3)." Tenn. Code Ann. § 49-6-2611(c).

The only facts relevant to this motion are the ESA Act's language, the Act's legislative history, and statistics on priority and bottom 10% schools on specified historical dates. None of these facts is disputed. These undisputed facts establish that Plaintiffs are entitled to judgment on the legal issue of whether the ESA Act meets the criteria for application of the Home Rule Amendment. Because the Act meets these criteria, yet contains no local-approval option, Plaintiffs are entitled to summary judgment on Count I.

LEGAL ARGUMENT

In 1953, Tennessee experienced a sea change in the relationship between state and local governments. "[T]he balance of power between local governments and the General Assembly during the period [prior to 1953] was weighted heavily against the local governments." Elijah Swiney, *John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After* Southern Constructors, 79 Tenn. L. Rev. 103, 118 (Fall 2011).

But the power balance shifted dramatically with the adoption of Article XI, Section 9 of the Tennessee Constitution, commonly referred to as the Home Rule Amendment. The Amendment was drafted by a constitutional convention "that had been rife with concern over state encroachment on local prerogatives" and "[c]oncern about the General Assembly's abuse of [ ] power." Swiney, *supra*, at 118-19. To remedy this concern, the Home Rule Amendment placed several significant affirmative restraints on the exercise of state power: banning some private acts and requiring that other private acts receive local approval (paragraph 2), authorizing municipalities to adopt home rule, giving them greater local control (paragraphs 3-8), and authorizing creation of consolidated city-county governments (paragraph 9). Tenn. Const. art. XI, § 9.

This was no small shift in the balance of power between state and local government. As the Tennessee Supreme Court acknowledged, "[t]he possibility of truly independent municipal self-government, free from continuing legislative intervention and control, did not

come into existence in this state until the constitution was amended in 1953 to establish the right to home rule." *Civil Serv. Merit Bd. of the City of Knoxville v. Burson*, 816 S.W.2d 725, 726 (Tenn. 1991). Indeed, "[t]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum permissible extent." *Id.* at 729 (quoting *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975)).

To that end, the second paragraph of Article XI, Section 9 reads as follows:

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

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

Thus, any act of the General Assembly that is:

(1) "private or local in form or effect";

(2) "applicable to a particular county or municipality"; and

(3) affecting "its governmental or its proprietary capacity";

must "by its terms" require approval by the local legislative body or popular referendum. *See Shelby County v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956) (the second provision in Art. XI, § 9 is a "limitation on legislative power"). "[A]ny and all legislation 'private and local in form or effect' affecting Tennessee counties or municipalities, *in any capacity*, is absolutely and utterly void unless the Act requires approval of the appropriate governing body or of the affected citizenry." *Farris*, 528 S.W.2d at 551 (emphasis added).

The ESA Act meets all three criteria for prohibited local legislation: (1) The Act is local in effect; despite being dressed as a law of general application, the Act as written can only

ever apply to two counties. (2) The Act is applicable to a particular county; it applies only to Davidson and Shelby counties, and the Tennessee Supreme Court has recognized that acts limited to a small number of counties violate the Home Rule Amendment. (3) The Act affects the counties' governmental capacity; public education and its funding are major governmental functions of counties, comprising the single largest part of local government budgets, and the act requires Davidson and Shelby counties to divert local tax revenue from public schools to private-school tuition and other private expenses. The ESA Act does not contain a local-approval provision. Therefore, it "shall be void and of no effect."

"While there is a strong presumption that an Act of the Legislature is valid, such presumption must necessarily yield in the face of any constitutional provision to the contrary." *Bd. of Educ. of the Memphis City Schs. v. Shelby County*, 339 S.W.2d 569, 575 (Tenn. 1960). The ESA Act must yield here.

I. THE ESA ACT IS "LOCAL IN FORM OR EFFECT" UNDER THE HOME RULE AMENDMENT.

A. The ESA Act on Its Face Is "Local in Form or Effect."

The Tennessee Supreme Court adopted a test in *Farris v. Blanton* to determine whether an act is "private or local in form or effect." 528 S.W.2d at 551-56. This "local in form or effect" test does not rely on self-serving language used by the General Assembly: "The test is not the outward, visible, or facial indices, not the designation, description or nomenclature employed by the Legislature. Such a criterion would emasculate the purpose of the amendment."[4] *Id.* at 551; *see also id.* at 554 (enaction as a public act "in and of itself is of no significance" if the act is local in effect) (quoting Mem. Op'n by Justice William

[4] The act challenged in *Farris* was styled a public act designed, according to its caption, "to provide for a run-off election in counties with a mayor as head of the executive or administrative branch of the county government." 528 S.W.2d at 550 (citing 1975 Pub. Acts 866). Shelby County was the only county meeting that description. *Id.* at 552.

Harbison, sitting as Special Chancellor (citing and reaffirming *Lawler v. McCanless*, 417 S.W.2d 548, 550 (Tenn. 1967))).

Accordingly, the ESA Act's designation as a "public" rather than "private" act of the legislature is not determinative, nor is the legislative description of the Act as a "pilot program." Rather, "[t]he sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application." *Id*. at 551.

The *Farris* Court explained that to apply this test, a court must determine whether the legislation is "potentially applicable" throughout the state. *Id*. at 552. If so, it is not local in effect, even if it applies to only one county at the time of passage. *Id.* But in determining potential applicability, the Court cautioned against reliance on legislative legerdemain, saying, "we must apply reasonable, rational and pragmatic rules as opposed to theoretical, illusory or merely possible considerations." *Id*.

For example, the act at issue in *Farris*, Chapter 354 of the Public Acts of 1975, provided for run-off elections in counties with a mayor as the head of the county's executive branch. *Id.* at 550. Only Shelby County had a county mayor, and no other county could have this form of government "except by the affirmative action of the General Assembly." *Id.* at 552. In such situations, a court "cannot conjecture what the law may be in the future" and is "not at liberty to speculate upon the future action of the General Assembly." *Id.* at 555. Without language in an act under which other counties may come within its scope, the court should find such an act "local in form or effect." *Id.*

This test has been applied consistently in subsequent cases. In cases where the act upon passage applied only to a small number of local governments but was drafted with population brackets or other provisions so that "[i]t can become applicable to many other counties" without further amendment, the act was held not to fall within the Home Rule

Amendment. *E.g.*, *Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978) (legislation was not local in effect where it "presently applie[d] to two populous counties" and "can become applicable to many other counties depending on what population growth is reflected by any subsequent Federal Census); *see also Doyle v. Metro. Gov't of Nashville & Davidson County*, 471 S.W.2d 371 (Tenn. 1971) (despite applying only to the Metropolitan Government at the time, the "Act applie[d] throughout the State to all those who desire to come within its purview"—that is, to any government that became a metropolitan government in the future); *Burson*, 816 S.W.2d at 729-30 (legislation that applies generally to counties with a minimum population of 300,000 is not local in form or effect, even though it applies to only three counties, because other counties could grow into compliance); *County of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996) (statute that applies upon passage to only to Shelby County but "is potentially applicable to numerous counties" based on population bracket is not subject to Art. XI, § 9).

But where the scope of a bill is frozen in time, like the ESA Act, so that it is not potentially applicable to other counties without further legislative action, the act is local in form or effect, even if applicable to two counties. *See, e.g.*, *Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979) (legislation that exempts two counties from a "permanent, general provision, applicable in nearly ninety counties" is local in form and effect in violation of Art. XI, § 9); *see also Farris*, 528 S.W.2d at 554 ("'The Court is of the opinion that the subject statute is such a local Act. At the time of its passage, only two counties of the state were affected by the population classification set out therein.'") (quoting Mem. Op'n by Justice

William Harbison, sitting as Special Chancellor (declaring as "local in effect" 1968 Public Acts ch. 530, which contained a 250,000 – 400,000 population bracket), 1968 Pub. Acts 424).[5]

In *Leech v. Wayne County*, the Tennessee Supreme Court examined a 1978 statutory scheme that restructured county governments across the state. 588 S.W.2d at 270-71, 273. The court examined the scheme under both Article XI, Section 9 and Article XI, Section 8. *Id.* at 273. As to Article XI, Section 8, the court noted that some "special temporary provisions made in a number of counties" were "necessary" and that the provisions did not "violate any general mandatory statewide scheme existing prior to the 1978 legislation or created within it." *Id.* at 273. That said, a "somewhat different problem" was presented by provisions of the statute relating to Wayne County's legislative body. *Id.* The act created a county legislative body with certain discretionary authority, but separate language "purport[ed] to except from th[is] provision . . . two counties by population bracket, one of these being Wayne County." *Id.* at 274. That exception violated the Home Rule Amendment, with the Tennessee Supreme Court holding as follows:

> Where, however, the General Assembly has made a permanent, general provision, applicable in nearly ninety of the counties, giving the local legislative bodies discretion as to the method of election of their members, ***we do not think it could properly make different provisions in two of the counties, by population bracket, in the manner attempted here***. Insofar as Wayne County is concerned, this amounted to nothing more than a private act relating to the composition of its county legislative body, without any statement of reasons and without requirement of a local referendum. In our opinion, neither Article VII nor Article XI, s 9 authorizes this type of legislation, nor can it be justified as being a transitional part of a general restructuring scheme.

Id. (emphasis added).

[5] Notably, the Tennessee Supreme Court in *Bozeman* and *Burson* did not dismiss the Art. XI, § 9 claims because the challenged statutes applied to more than one county but because the statutes were potentially applicable to additional counties. *Bozeman*, 571 S.W.2d at 282; *Burson*, 816 S.W.2d at 730.

This is precisely what the Tennessee General Assembly did with the ESA Act. The Act left ninety-three counties empowered to use local education public funds for the general good of their public school students, but in two counties, and only two counties, local education public funds may be diverted to pay private school tuition for particular students. There is no Tennessee authority holding that legislation applying to one or two counties *with no potential to apply to any others* is anything other than "local in form or effect" under the Home Rule Amendment. In fact, *Leech* unequivocally establishes otherwise.

The ESA Act attempts to disguise its local effect by basing its application on the number of low-performing schools in a district during specified years. The Act defines "eligible student" to include only students zoned to attend a school in an LEA with ten or more schools listed (1) as priority schools in 2015, (2) on the bottom 10% list in 2017, *and* (3) as priority schools in 2018. By its selective use of numbers of schools in particular years, the ESA Act excludes every school district except Davidson and Shelby counties.[6] The Act will never apply to any other county's LEA absent future legislative action. (SUMF Nos. 1-7.) The Act's exception to its severability clause ensures that it will never apply in its current form in any other county. Tenn. Code Ann. § 49-6-2611(c). In the words of Sen. Hensley, as confirmed by Sen. Gresham, "no other LEA will be able to grow into the program over the years." (SUMF Nos. 54-55.)

[6] The Tennessee State Board of Education's rules for ESAs, on the other hand, are explicit: they state on their face that an "eligible student" is one who, among other requirements, is "zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019." State Board Rule 0520-01-16-.02(11)(b). (SUMF Nos. 58-59.) The Tennessee Department of Education's website is more explicit. (*See* TDOE, "Education Savings Account (ESA) Program," https://www.tn.gov/education/school-options/esa-program.html ("Tennessee's Education Savings Account (ESA) program is planned to launch for the 2020-21 school year in Davidson and Shelby counties.").) (SUMF No. 57.)

B. The ESA Act's Legislative History Confirms the General Assembly's Intent That the Act Will Only Ever Apply in Two Counties: Davidson and Shelby.

The ESA Act's plain language leaves no doubt that the Act only applies to two counties and will never apply to other counties absent future legislative action. "Courts must also presume that the legislature says in a statute what it means and means in a statute what it says there." *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Accordingly, reliance on legislative history is unnecessary to determine whether or not the ESA Act "was designed" to apply to any other county, as there are no doubts about the Act's applications or ambiguities in its text. *See Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.*, 911 F. Supp 2d 631, 653 (W.D. Tenn. 2012) ("[Article XI,] Section 9 also requires courts to consider whether legislation 'was designed' to apply to any other county.") (quoting *Farris,* 528 S.W.2d at 552); *see also ATS S.E., Inc. v. Carrier Corp.*, 18 S.W3d 626, 630 (Tenn. 2000) (If "the language of the statute is clear on its face," courts "need not reach the question of the legislature's intent in enacting the law."). In fact, courts should be cautious in relying on legislative history, which "has a tendency to include 'self-serving statements favorable to particular interest groups prepared and included . . . to influence the courts' interpretation of the statute." *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 653.

The ESA Act, however, is the unexpected counterexample, in which legislators were explicit about their intent to limit the Act's effect to two counties and thereby protect the state's other ninety-three counties. This candor was born of necessity, as it was the only way to garner the constitutionally required fifty votes to pass the Act in the House of Representatives.

When the substantive bill was first introduced as Amendment No. 1 in the House Curriculum, Testing & Innovation Subcommittee on March 19, 2019, it applied to five counties and the ASD, with potential applicability to other counties. (SUMF Nos. 9-12.) By

the time it reached the House Finance, Ways & Means Committee on April 17, then-Deputy House Speaker Hill said the bill was limited to four counties and "will stay in those four counties unless the legislature were to ever choose in the future to revisit the issue." (SUMF No. 14.)

When the bill reached the House floor for third and final reading on April 23, representatives from Davidson and Shelby counties unsuccessfully sought to exclude their counties from the bill. (SUMF Nos. 22-25.) In contrast, Rep. Zachary stated he could not vote for the bill "unless Knox County was taken out." Zachary changed his vote from nay to aye to provide the bill with its fiftieth vote after then-House Speaker Casada (R-Franklin) assured him Knox County would be excluded and "held harmless" from the Senate version of the bill. (SUMF Nos. 28-29) Then-Deputy House Speaker Hill, speaking on the House floor, confirmed the House majority's intent to unilaterally impose the ESA Act on Davidson and Shelby counties while excluding every other county when he stated: "Today, on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education." (SUMF No. 30.)

A similar record can be found in the Senate's proceedings. The Senate bill initially covered four counties but was amended on the Senate floor on April 25th to cover only Davidson and Shelby counties. (SUMF Nos. 31-41.) Sen. Dickerson stated on the Senate floor that when the bill was first proposed, it "was more expansive, covered more counties, and in order to keep it alive and it keep votes going, it shrunk down in scope." (SUMF No. 43.)

When the conference committee report reconciling the House and Senate versions of the bill came back to the two chambers, further legislative statements confirmed the intent to make the ESA Act local in effect in order to win votes for final passage. Despite voting against the bill in the House, Rep. Hazelwood of Hamilton County voted for the conference

committee report, explaining that she "committed to vote for ESAs if the Hamilton County was excluded from the program" and because the "conference report here today does that," she could "keep[ ] her commitment and . . . vote for this bill." (SUMF Nos. 51-52.) Similarly, Sen. Hensley asked the bill's sponsor to confirm that the bill only applied to two counties now and in the future, with no exceptions: "[I] just want it to be on the record and assured that this conference reports continues to prevent any future LEAs from being included in this" and that "no other LEA will be able to grow into the program over the years." (SUMF Nos. 53-54.) Bill sponsor Sen. Dolores Gresham (R-Somerville) responded: "That's the intent of the General Assembly today." (SUMF No. 55.)

II. THE ESA ACT IS "APPLICABLE TO A PARTICULAR COUNTY."

A. "A Particular County" Is Not Limited to Only One County.

As discussed above, the ESA Act is not a statute of general applicability. It applies exclusively to two counties: Davidson and Shelby. As the Tennessee Supreme Court has explained, where an act applies to a small number of "particular" counties, even if more than one, and has no potential to apply more generally, the bill must satisfy the Home Rule Amendment. *E.g.*, *Farris*, 528 S.W.2d at 552; *Leech*, 588 S.W.2d at 274.

In other cases, where a bill applied to a small number of local governments (but more than one) and was potentially applicable to a larger number, either through future population growth or changes in the form of local government, courts have held the bill not "applicable to a particular county" and therefore not subject to the Home Rule Amendment. *See, e.g.*, *Burson*, 816 S.W.2d at 730 (statute applicable to only three counties not in violation of Home Rule Amendment because it covered all counties with population greater than 300,000 and could "become applicable to many other counties depending on subsequent population growth"); *Bozeman*, 571 S.W.2d at 280, 282 (upholding statute applicable to all counties having population between 275,000 and 600,000, which affected only two counties at time of

passage but could apply to more depending on population growth); *see also Doyle*, 471 S.W.2d at 501-02 (legislation applicable to any city having a metropolitan form of government not prohibited by Home Rule Amendment even though only one county was a metropolitan government at time of passage). The Courts in *Burson* and *Bozeman* did not dismiss the Home Rule Amendment claims because the statute at issue applied to more than one county but only because the statute was potentially applicable to other counties. *Bozeman*, 571 S.W.2d at 282; *Burson*, 816 S.W.2d at 730.

Here, the ESA Act applies to two particular counties, not to counties with a particular type of government or to counties within a population bracket that other counties could enter or leave over time. Thus, the Act is "applicable to a particular county" under the Home Rule Amendment.

B. There Is No Relevant Distinction Between an LEA and a County in This Case.

The ESA Act defines an "eligible student" by whether that student is zoned to particular "LEAs." Tenn. Code Ann. § 49-6-2602(3)(C). But the ESA Act's reference to students zoned to "LEAs" as opposed to "counties" does not take the Act outside the Home Rule Amendment's scope. Whether the ESA Act identifies Davidson County or Shelby County by name, or their school systems, is of no consequence because the Act substantially affects both counties.

1. The ESA Act Substantially Affects Davidson and Shelby Counties.

The relevant question under the Home Rule Amendment is whether the act at issue is "*applicable* to a particular county or municipality," not whether it speaks in terms of counties. Tenn. Const. art. XI, § 9 (emphasis added). The Tennessee Supreme Court highlighted the importance of the effect on the county in analyzing a Home Rule Amendment challenge in *Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322

(Tenn. 1979). In holding that the act at issue did not violate the Home Rule Amendment despite not being subject to a local referendum to city voters, the court noted "that the City is not *substantially affected* by the 1977 Act and hence their approval was not necessary to validate the Act." *Id.* at 324-25, 328 (emphasis added). Rather, the court held, the act "was a more detailed catalogue of the duties, powers and operation of the Hospital Authority." *Id.* at 328.

The court contrasted its conclusion about the *City's* right to local approval with its conclusion that a provision for a *County* vote was required. *Id.* Noting that "several sections [of the act] *affect the County*, such as section nineteen, which declared the Hospital Authority to be a 'public instrumentality acting on behalf of the County,'" the court felt that "there could be an obvious basis for requiring the approval of the Hamilton *County* Council pursuant to Article XI, § 9, para. 2." *Id.* (emphasis added); *see also Burson*, 816 S.W.2d at 730 (upholding legislation under the Home Rule Amendment without discussion of the fact that the statute applied "[i]n its effect" "to municipal civil service boards" as opposed to the counties explicitly).

A federal district court in the Western District of Tennessee applied similar reasoning in a Home Rule Amendment challenge in *Board of Education of Shelby County, Tennessee v. Memphis City Board of Education*. There, the Shelby County Board of Commissioners (Shelby County Government's legislative body) filed a third-party suit against state officials alleging that state legislation permitting municipalities to separate from Shelby County Schools and form municipal school districts violated the Home Rule Amendment. 911 F. Supp. 2d 631 at 635-36. The court first addressed the Shelby County Commission's standing to sue, as the statutes at issue were directed at Shelby County Schools, not the Commission. The court held that the Commission had standing, noting:

> The Commissioners are elected to represent Shelby County as a whole. The Tennessee General Assembly has vested them with the authority to appropriate county education funds. Facilitating and funding allegedly unconstitutional school districts could subject plaintiffs to being defendants in a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional.

Id. at 643. The court further explained that "'[t]he closeness between the Commissioners and Shelby County school children is a matter of degree *rather than of legal principle*. Although the responsibilities of boards of education and county commissions are separate, Tennessee law acknowledges that educating children is a *collaboration between administrative and financial bodies*." *Id.* at 645 (citing *Akron Bd. of Educ. v. State Bd. of Educ. of Ohio*, 490 F.2d 1285, 1289 (6th Cir. 1974); *Putnam Cty. Educ. Ass'n v. Putnam Cty. Comm'n*, No. M2003-03031-COA-R3-CV, 2005 WL 1812624, at *17 (Tenn. Ct. App. Aug. 1, 2005)) (emphasis added).

This reasoning applies as equally to the question of whether the Home Rule Amendment governs the ESA Act as it did to the issue of standing in *Board of Education of Shelby County*. Whether the ESA Act identifies Shelby County or Davidson County by name, or their school systems, is of no consequence. As described below, counties bear significant responsibility by law for the LEAs that are directly affected by the ESA Act; thus, the legislation "substantially affects" the counties, as well. *See Chattanooga-Hamilton Cty. Hosp. Auth.*, 580 S.W.2d at 328.

State law defines "LEA" to include a "county school system," "public school system," and "metropolitan school system." Tenn. Code Ann. § 49-1-103(2). MNPS is a metropolitan school system, and Shelby County Schools is a county school system. A "local board of education" is defined separately and "means the board of education that manages and controls the respective local public school system." *Id.* § 49-1-103(1). As the Tennessee Supreme Court recognized in *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217 (Tenn. 1988), the

responsibility for operating a local education system does not fall exclusively to the local board of education: the State has "divided" those responsibilities between boards of education and counties, specifically, county legislative bodies. *Ayers*, 756 S.W.2d at 221.

Tennessee law explicitly requires counties, including Davidson and Shelby, to fund their school districts. The duties of a county legislative body include adopting a budget for the operation of county schools and levying taxes necessary to meet the budgets. Tenn. Code Ann. § 49-2-101; *see also id.* § 5-9-401 ("All funds from whatever source . . . that are to be used in the operation . . . of county governments shall be appropriated to such use by the county legislative bodies."); *cf. Davidson Cty. v. City of Nashville*, 228 S.W.2d 89, 90 (Tenn. 1950) ("The Private Act of 1929 affected Shelby County in its *governmental capacity* since it was dealing with schools and a division of school funds." (emphasis added)). And in connection with this fundamental governmental function, county school boards by law are considered agencies of the county. *See* Tenn. Code Ann. § 5-9-402(a) ("The county board of education . . . and each of the other operating departments, commissions, institutions, boards, offices and agencies of county government that expend county funds" must file annual budgets with the county mayor for study and submission to the county legislative body); *see also Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 645 ("The Commissioners' funding obligations under Tennessee law make them an immediate object of the creation of municipal school districts.").

Because of this required partnership between boards of education and counties, Davidson and Shelby counties bear significant responsibility for the LEAs that are directly affected by the ESA Act. In fact, it is that partnership, and the funds that flow from it, that the legislature targeted to fund the ESA program. The ESA Act directly affects how local funds appropriated by Davidson and Shelby counties for education purposes may be used. Because the ESA Act "substantially affects" Davidson and Shelby counties, the Act's

reference to LEAs is a distinction without a difference. *Chattanooga-Hamilton Cty. Hosp. Auth.*, 580 S.W.2d at 328.

2. Davidson County's LEA, MNPS, Is Not Legally Distinguishable From the Metropolitan Government.

The LEA/county distinction is even less relevant as applied to MNPS because MNPS is not legally distinguishable from the Metropolitan Government. The Charter of the Metropolitan Government established MNPS to administer and control the Metropolitan Government's system of public schools. Metro Charter §§ 9.01, 9.02 (certified copies attached hereto).[7] "Political subdivisions of a state or local government have legal capacity only if the law creating them recognizes them as separate legal entities having capacity to sue or be sued." *Blackman v. Metro. Nashville Pub. Schs.*, No. 3:14-1220, 2014 WL 4185219, at *2 (M.D. Tenn. Aug. 21, 2014), *report and recommendation adopted*, No. 3:14-1220, 2014 WL 4446951 (M.D. Tenn. Sept. 10, 2014) (citing *Haines v. Metro. Gov' of Davidson Cty.*, 32 F. Supp. 2d 991, 994 (M.D. Tenn. 1998)) (emphasis added). "Courts have routinely found that the charter creating the Metropolitan Government provides that only the Metropolitan Government itself can sue or be sued *and that internal departments or subdivisions are not legal entities capable of being sued*." *Id.* (citing *Gant v. Metro. Police Dep't*, No. 3:10-cv-557, 2010 WL 3341882, at *3 (M.D. Tenn. Aug. 24, 2010); *Johnson v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, Nos. 3:07-0979, 3:08-0031, 2008 WL 2066475, at *8 n.5 (M.D. Tenn. May 13, 2008)) (emphasis added). Because MNPS, an LEA, is not legally distinguishable from the

[7] The City of Nashville and Davidson County were combined to become a "metropolitan government" for the purpose of consolidating "all, or substantially all, of the governmental and corporate functions of Davidson County . . . and of Nashville, its principal city." *Frazer v. Carr*, 360 S.W.2d 449, 450 (Tenn. 1962); *see id.* at 456 ("The metropolitan government is but a consolidation of the county and city government"). This consolidation included the governments' school systems as required by Tenn. Code Ann. § 7-2-108(a)(18).

Metropolitan Government itself, the ESA Act's reference to MNPS as an LEA applies equally to the Metropolitan Government.

In sum, whether the ESA Act speaks in terms of the LEA or the county is a distinction without a difference: the counties bear the financial burden of funding their school districts, now including the cost of educational savings accounts for participating students. This infringement on the governmental capacities of Davidson and Shelby counties through their LEAs brings the ESA Act within the scope of Article XI, Section 9.

C. The ESA Act's Inclusion of the ASD Does Not Avoid the "Applicable to a Particular County" Requirement.

The ESA Act's inclusion of schools in the ASD within the definition of "eligible student" likewise does not save the Act from the Home Rule Amendment. The ASD is a separate school district, an "organizational unit of the department of education," which is administered by the state. Tenn. Code Ann. § 49-1-614(a). It is not a county or municipality. The Home Rule Amendment applies to "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" and makes no exception for acts that *also* apply to a state entity. Thus, the ESA Act's application to a separate state entity *in addition to* "a county or municipality" does not diminish the Act's substantial effect on the two counties. In fact, any other conclusion would undermine the intent of the Home Rule Amendment by permitting the State to insulate itself from challenge merely by including one of its own agencies in the bill. Because the ESA Act directly affects Davidson and Shelby counties, that "effect" falls within the Home Rule Amendment's protection notwithstanding the Act's application to a non-local entity.

III. THE ESA ACT AFFECTS COUNTIES IN THEIR "GOVERNMENTAL CAPACITY."

A. "Governmental Capacity" Relates to Municipal Functions as Arms of the State.

The concepts of "governmental" and "proprietary" functions pre-date the Home Rule Amendment's adoption in 1953. Municipal law principles have historically distinguished between these two categories as "state affairs" and "municipal affairs." Eugene McQuillin, The Law of Municipal Corporations § 4:76 (3d ed.), Westlaw (database updated July 2019). In the "state affairs" category, courts have interchangeably used terms including "general concerns" and "governmental matters". *Id.* "Municipal affairs," on the other hand, are referred to as "local affairs," "local municipal functions," "internal business affairs of the municipality," and "municipal concerns." *Id.* As McQuillin aptly summarizes, "powers of a municipal corporation that are *governmental* or public are ordinarily those that relate to state affairs. Powers of a municipal corporation that are *proprietary* or private are ordinarily those relating to municipal affairs." McQuillin, *supra*, § 4:77 (emphasis added).

Tennessee courts followed a similar approach in the years before the 1953 constitutional convention that would have been familiar to the Home Rule Amendment drafters. In *Smiddy v. City of Memphis*, 203 S.W. 512 (Tenn. 1918), the Tennessee Supreme Court declared the following about a municipality's functions: "However, in its capacity as an arm or branch of the state government, and in the exercise of its *governmental functions*, it is to be treated as a political subdivision of the state, and its governing, or political rights, are all to be regulated by those provisions of the Constitution which refer to it in that capacity, and by the Legislature in its unrestricted sovereign capacity." *Id.* at 513 (emphasis added).

Similarly, in *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (Tenn. 1931), the Supreme Court described the "dual" nature of local governments, noting that "[a]s an agency

of the state, the municipality could exercise such *governmental* power as was delegated to it. As a corporate entity endowed with *proprietory* [sic] or corporate rights, it could, to a certain extent, contract." *Id.* at 412 (emphasis added); *see also Memphis Power & Light Co. v. City of Memphis*, 112 S.W.2d 817, 820 (Tenn. 1937) ("In one of these dual capacities, considered as an agency of the state, the corporation exercises functions and powers, possesses rights, and has imposed upon it duties variously designated as public, legislative, political, or *governmental*, and acting in this capacity a municipality acts as a sovereignty.") (emphasis added). Tennessee cases post-dating the Home Rule Amendment's adoption also use this governmental/proprietary distinction. *E.g.*, *Thornton v. Carrier*, 311 S.W.2d 208, 213 (Tenn. Ct. App. 1957) (noting that "the operation of a municipal lighting plant is a corporate or *proprietary* function rather than a *governmental* function") (emphasis added).

The drafters of the Home Rule Amendment knew what they were doing when they wrote "applicable to a particular county or municipality *in its governmental or its proprietary capacity*," thereby covering the full scope of local governmental functions. Tenn. Const. art. XI, § 9 (emphasis added). By incorporating both terms, the drafters provided broad protection from General Assembly interference and accomplished their goal to "vest control of local affairs in local governments, or in the people, *to the maximum permissible extent*." *Farris*, 528 S.W.2d at 551 (emphasis added).

B. The "Governmental Function" at Issue Is Subject to the Home Rule Amendment.

The State asserts that because education is a state function, the General Assembly can legislate without regard to the constitutional restrictions of the Home Rule Amendment. (Mem. L. Support State Defs.' Mot. to Dismiss at 12-14.) Tennessee law provides no support for this position.

The State of Tennessee, of course, is free to delegate to a local government its own State functions, or a portion of its State functions. *Lewis*, 40 S.W.2d at 412. When it does, those functions are, by definition, "government functions." *Id.* Importantly, however, those delegated functions are then constrained by any constitutional provision that protects local government "in that capacity." *Smiddy*, 203 S.W. at 513. This outcome is consistent with the later-adopted Home Rule Amendment itself, which proscribes legislation that is "local in form or effect applicable to a particular county or municipality *either in its governmental or its proprietary capacity*" absent local approval. Tenn. Const. art. XI, § 9 (emphasis added). In fact, to read *Smiddy* otherwise would render this constitutional language meaningless.

Myriad Tennessee cases post-dating the Home Rule Amendment support this conclusion. The Tennessee Supreme Court rejected a similar argument regarding the state judicial system in *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967). There, defendants argued that 1962 Public Acts Chapter 122 violated Article XI, Section 9. The Act, which expanded the General Sessions Court's criminal and civil jurisdiction, applied by population bracket only to Gibson County. Plaintiff urged that the act was not private or local in form or effect because it was intended to relieve docket congestion in the state court in Gibson County, and "the decision as to how this purpose should be accomplished was a matter for the Legislature and should not be delegated to a local county governing body or local electorate." *Id.* at 551.

The Supreme Court agreed that the creation and maintenance of a judicial system is a state function but nonetheless found a violation of the Home Rule Amendment. *Id.* at 553. In so holding, the Court made clear that the legislature does not have *carte blanche* to rearrange the governmental functions of a single county to accomplish a state function. *See also Durham v. Dismukes*, 333 S.W.2d 935, 938 (Tenn. 1960) (holding that compliance with

Art. XI, § 9 is required even though a General Sessions Court has jurisdiction over "many things which pertain to State matters" and has "badges of a State officer").

Multiple school systems successfully asserted state constitutional claims against the State seeking relief from the statutory scheme for funding the kindergarden-through-12th grade public school system in *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993), notwithstanding that education is a "state function." The Court acknowledged at the outset that the General Assembly has a constitutional obligation to maintain and support a system of free public schools. *Id.* at 141.[8] Nonetheless, the Court dismissed the State's arguments that local school systems cannot challenge the State's education policy decisions, explaining:

> it is our duty to consider the question of whether the legislature, in establishing the educational funding system, has "disregarded, transgressed and defeated, either directly or indirectly," the provisions of the Tennessee Constitution. As the Kentucky Supreme Court observed recently in response to the same argument, "[t]o avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty."

Id. at 148 (citations omitted).

More recently, in *Board of Education of Shelby County, Tennessee v. Memphis City Board of Education*, the District Court determined that legislation intended to allow the creation of municipal school districts violated the Home Rule Amendment because it applied only to Shelby County and was written with "a series of conditions that have no reasonable application, present or potential, to any other county." 911 F. Supp. 2d at 660. That the Tennessee Constitution imposes upon the state the responsibility for establishing a system of free public schools was no barrier to the Court's invalidation of this legislation, local in effect, under the Home Rule Amendment.

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[8] Article XI, Section 12 of the Tennessee Constitution requires that the General Assembly "shall provide for the maintenance, support and eligibility standards of a system of free public schools."

Plaintiffs here do not dispute that education is a fundamental state function. But that is not the end of the inquiry. Counties play a critical role in administering the system of education—a role the State enlists them to play. *See Brentwood Liquors Corp. of Williamson Cty. v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973) ("Education is a governmental function and in the exercise of that function the county acts in a governmental capacity."). This is particularly true when the General Assembly requires counties to pay for schools. The State cannot delegate a portion of the education function to local governments and compel local governments to pay part of the cost of that function while attempting to avoid the constitutional requirements of the Home Rule Amendment. The General Assembly is certainly free to require the State of Tennessee to operate and fund local schools, exclusively, without offending the Home Rule Amendment. *See, e.g.*, *City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193, 194 (Tenn. 1984) (removing jurisdiction over state criminal offenses from certain local municipal courts). But when the General Assembly delegates a "governmental function" to local governments, as here, the act must comply with the Home Rule Amendment.

The Tennessee Supreme Court recognized this dichotomy in *State ex rel. Weaver v. Ayers*, acknowledging that education is a state function *in which counties participate as sovereign partners*. 756 S.W.2d at 221-22. As the Court explained, the comprehensive and detailed statutory scheme concerning education in Tennessee "clearly reveals that a *partnership* has been established between the State and its political subdivisions to provide adequate educational opportunities in Tennessee." *Id*. at 221 (emphasis added). This partnership relies on the fiscal well-being of the county, which "is entrusted to the board of commissioners, as that body is ultimately responsible for maintaining the necessary revenue to fund the county board of education's programs as well as the other services provided by

the county." *Id.* at 223; *see also Davidson Cty.*, 228 S.W.2d at 90 ("The Private Act of 1929 affected Shelby County in its governmental capacity since it was dealing with schools and a division of school funds."). Moreover, the responsibility for operating a local education system does not fall exclusively to the local board of education: the State has "divided" those responsibilities between boards of education and counties, specifically, county legislative bodies. *Ayers*, 756 S.W.2d at 221.

There can be no more fundamental governmental responsibility of a county than serving as a partner, particularly a funding partner, in its local school system. Because the ESA Act substantially affects this governmental function of Davidson and Shelby counties, the Act affects the counties in their "governmental capacity" as the Home Rule Amendment defines that term.

IV. THE ESA ACT VIOLATES THE HOME RULE AMENDMENT BECAUSE IT CONTAINS NO LOCAL APPROVAL OPTION LANGUAGE.

The Home Rule Amendment states unequivocally that local legislation falling within its scope "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). The ESA Act falls within the scope of the Amendment but contains no local option approval language. It is therefore void and of no effect.

CONCLUSION

The Court should grant summary judgment in favor of Plaintiffs on Count I of the Complaint. The ESA Act, by its plain terms, only applies in Davidson and Shelby counties, absent an amendment or repeal by the Tennessee General Assembly. Whether the Act speaks in terms of LEAs or counties is of no consequence: the Act substantially affects Davidson

County and Shelby County. Moreover, the Act infringes upon the governmental capacity of these counties in the manner that the Home Rule Amendment was designed to protect.

The very purpose of the Home Rule Amendment is to ensure that local voters have a voice in legislation that is unique to their county. Where legislation is local in form or effect and applicable to a particular county in its governmental capacity, the Home Rule Amendment mandates the legislation, by its terms, require approval by the local legislature or electorate. The ESA Act contains no such language.

Because the ESA Act contains no local approval option language and imposes the will of a bare majority of the General Assembly on Davidson County and Shelby County without their consent, the Act violates the Home Rule Amendment. Accordingly, the Court should grant summary judgment in Plaintiffs' favor on Count I of the Complaint, declare the Act unconstitutional under Article XI, Section 9 of the Tennessee Constitution, and enjoin its implementation and enforcement.

Respectfully submitted,

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