IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

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

v.

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

and

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

ON APPLICATION FOR PERMISSION TO APPEAL UNDER TENN. R. APP. PRO. 9 FROM THE ORDER OF THE DAVIDSON COUNTY CHANCERY COURT

INTERVENOR-DEFENDANTS / APPELLANTS GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S APPLICATION FOR PERMISSION TO APPEAL

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TABLE OF CONTENTS

Table of Authorities ... 3

Application ... 5

Questions Presented ... 6

Statement of Facts ... 7

Statement of Reasons ... 10

(1) The Greater Praise Intervenor-Defendants will suffer irreparable injury if an interlocutory appeal is not granted ... 11

(2) Prompt appellate resolution of the Home Rule claim will save this Court and the Chancery Court time in the future ... 13

(3) An appellate decision on the Home Rule clause will help develop a uniform body of law. ... 15

Conclusion ... 16

Certificate of Service ... 18

Document received by the TN Court of Appeals.

TABLE OF AUTHORITIES

Constitution

Tenn. Const. Art. XI, Sec. 9 11

Cases

Bd. of Educ. v. Memphis City Bd. of Educ.,
911 F. Supp. 2d 631 (W.D. Tenn. 2012) 15

Civil Service Merit Bd. v. Burson, 816 S.W.2d 725 (Tenn. 1991) ... 15, 16

Cty. of Shelby v. McWherter, 936 S.W.2d 923 (Tenn. Ct. App. 1996) ... 15

Doyle v. Metro. Gov't of Nashville & Davidson Cty.,
471 S.W.2d 371 (Tenn. 1971) 15

Farris v. Blanton, 528 S.W.2d 549 (Tenn. 1975) 15

Lawler v. McCanless, 417 S.W.2d 548, 553 (Tenn. 1967) 15

Leech v. Wayne County, 588 S.W.2d 270 (Tenn. 1979) 15, 16

Martinez v. Malloy, 350 F. Supp. 3d 74 (D. Conn. 2018) 12

Metro. Gov't of Nashville & Davidson County v. Reynolds,
512 S.W.2d 6 (Tenn. 1974) 15

State v. Gilley, 173 S.W.3d 1 (Tenn. 2005) 14

State v. McKim, 215 S.W.3d 781 (Tenn. 2007) 13

State v. Tuttle, No. M2013-01535-CCA-R9-CD,
2013 Tenn. Crim. App. LEXIS 1161 (Aug. 26, 2013) 11

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 12

Statutes

Tenn. Code Ann. § 49-6-2601 7

Document received by the TN Court of Appeals.

Tenn. Code Ann. § 49-6-2602 .... 7, 9
Tenn. Code Ann. § 49-6-2603 .... 7, 8
Tenn. Code Ann. § 49-6-2604 9
Tenn. Code Ann. § 49-6-2605 7-9
Tenn. Code Ann. § 49-6-2606 10
Tenn. Code Ann. § 49-6-2611 10

Rules

Tenn. R. App. Pro. 9 .... 5, 10, 11, 14, 16
Tenn. R. Ct. App. 12(b) 11

Other Authorities

Tennessee Comptroller of the Treasury, Legislative Brief,
Understanding Public Chapter 506: Education Savings Accounts 8-9

Document received by the TN Court of Appeals.

APPLICATION FOR INTERLOCUTORY APPEAL

The Appellants, Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr. ("Greater Praise Intervenor-Defendants" or "Appellants") are Intervenor-Defendants in *Metro. Gov't of Nashville and Davidson Co. v. Tenn. Dep't of Education*, No. 20-0143-II, ("*Metro Gov't*"), Davidson County Chancery Court (Chancellor Anne C. Martin). On May 4, 2020, the Chancery Court entered an Order in *Metro Gov't* granting Plaintiffs' Motion for Summary Judgment on Count I of the Complaint (filed March 27, 2020) and denying the Greater Praise Intervenor-Defendants' Motion to Dismiss Count I of the Complaint (filed March 6, 2020).[1] APP551-52. The Chancery Court order also granted, *sua sponte*, permission to appeal pursuant to Tenn. R. App. Pro. 9. APP553. The Greater Praise Intervenor-Defendants, therefore, file this application for interlocutory appeal and, in support of their application, state the following.

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[1] The order also denied a motion to dismiss Count I of the Complaint from the Defendants/Appellants ("State Defendants") and a motion for judgment on the pleadings to dismiss Count I of the Complaint from Intervenor-Defendants/Appellants Bah, Diallo, Brumfield, and Davis ("Natu Bah Intervenor-Defendants"). On May 6, 2020, the State Defendants and the Natu-Bah Intervenor-Defendants, separately, filed with this Court applications to appeal, pursuant to Tenn. R. App. Pro. 9. This application was filed under the same case no. as that of the State Defendants: M2020-00683-COA-R9-CV.

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QUESTIONS PRESENTED

1. Did the Chancery Court err by failing to rule on Appellants' argument that the Education Savings Account (ESA) Pilot Program does not financially harm the county government Plaintiffs, such that they do not meet the standards for injury-in-fact for standing to sue or ripeness? *See* APP552.

2. Did the Chancery Court err by finding that the Home Rule clause of the state constitution, which prohibits, without local approval, acts applicable to "a particular county", was violated by the ESA Pilot Program, which is applicable to three local education agencies in two counties? *See* APP549-50; APP552.

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STATEMENT OF FACTS

In May 2019, the State of Tennessee enacted the Tennessee Education Savings Account ("ESA") Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. The pilot program is open to Kindergarten-12th grade students whose annual household income is less than or equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code. Ann. § 49-6-2602(3).[2] Eligible students must have attended a Tennessee public school the prior school year, must be entering Kindergarten for the first time, must have recently moved to Tennessee, or must have received an ESA the prior year. Tenn. Code. Ann. § 49-6-2602(3)(A).

The ESA provides each student with an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a). The amount of the ESA will be approximately $7,100 for the school year beginning in August. APP052; APP094; APP264. The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational programs, and college admission exams. Tenn. Code. Ann. § 49-6-2603(a)(4). An ESA is different from a school voucher, which can only be used for private school tuition, because an ESA can be used for a variety of purposes and because it is an individualized account, in which any unused funds roll over each year and remain in the account. Tenn. Code. Ann. § 49-6-

[2] The maximum eligible income is $43,966 for a household of two, and it increases with household size. APP052, APP094, APP264.

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2603(l). After 12th grade, any unused ESA funds may be rolled into a college fund for tuition, fees, and textbooks at eligible colleges and universities, vocational, technical, or trade schools. Tenn. Code. Ann. § 49-6-2603(g).

Funding for the ESA Pilot Program is built on the simple principle that the dollars follow the child. The ESA is funded with the student's per pupil expenditure of state funds from the Basic Education Program (BEP), as well as the required minimum match in local funds. Tenn. Code. Ann. § 49-6-2605(a). The ESA Pilot Program rewards school districts affected by the program with three windfalls that increase their per-pupil spending. First, the program creates a ghost reimbursement for three years, in which an affected school district is paid the state and minimum local portion of the BEP to educate a child who is no longer in the system. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). Second, a windfall occurs because the amount of the ESA is capped in two ways. Not all of the local portion of the BEP funds the ESA—only the minimum "required" local portion. Tenn. Code. Ann. § 49-6-2605(a). The ESA is also capped in another way: it "must not exceed the combined statewide average of required state and local BEP allocations per pupil." *Id.* Because Plaintiffs/Appellees fund their school districts beyond the minimum required portion of the BEP, and per-pupil expenditures are higher than the statewide average, the difference between the actual local portion of the BEP and the amount going toward the ESA creates a windfall of roughly $2,000 per pupil that will be used to increase the per pupil expenditures of students remaining in the school district. *See* Tennessee Comptroller of the Treasury, Legislative Brief, Understanding

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Public Chapter 506: Education Savings Accounts, Table at top of page 4.[3] Third, at the end of three years, a school improvement fund will disburse school improvement grants for programs to support priority schools throughout the state, the vast majority of which are located in the counties represented by the Plaintiffs/Appellees. Tenn. Code. Ann. § 49-6-2605(b)(2)(B)(ii).

The legislation was amended late in the process to become a pilot program. The pilot program is capped at five thousand students in year one, rising to fifteen thousand students in year five. Tenn. Code. Ann. § 49-6-2604(c). An eligible student must reside in a neighborhood zoned to attend a school in the Achievement School District (ASD), which runs the state's lowest performing schools, or reside in a school district with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code. Ann. § 49-6-2602(3)(C). As applied, that means that the ESA Pilot Program will begin operations this August in three school districts: the ASD, Shelby County Schools (SCS), and Metro Nashville Public Schools (MNPS). Those three school districts serve children located in two counties: Shelby and Davidson. The ESA Pilot Program provided the reasoning for beginning the pilot program in these districts within the text of the act itself: the "pilot program . . . provides funding for access to additional

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[3] Available at https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2019/ESA_Legislative_Brief_8.8.19.pdf (retrieved Apr. 28, 2020).

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

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

STATEMENT OF REASONS

Tenn. R. App. Pro. 9 lays out three familiar criteria to guide the Court's discretion for whether to grant an interlocutory appeal:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective;
>
> (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final

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> judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and
>
> (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

The Greater Praise Intervenor-Defendants will suffer an irreparable injury if their application is not granted; the pressing statewide nature of this constitutional challenge lends itself to efficient resolution on appeal; and the Court needs to develop a uniform body of law on the issue of how many counties must be affected by Tenn. Const. Art. XI, § 9.

(1) The Greater Praise Intervenor-Defendants will suffer irreparable injury if an interlocutory appeal is not granted.

Intervenor-Defendants Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. are all parents of children enrolled in ESA-eligible school systems. They will suffer irreparable injury if their children are forced to stay in failing schools for another year. Tenn. R. App. Pro. 9 appeals are appropriate when "an important right will be lost if review is delayed until a final judgment has been entered." *State v. Tuttle*, No. M2013-01535-CCA-R9-CD, 2013 Tenn. Crim. App. LEXIS 1161, *2 (Aug. 26, 2013).[4] In this case, the Intervenor-Defendants' children will lose an

[4] The cited opinion is limited to consideration of the merits of taking an interlocutory appeal. *See* Tenn. R. Ct. App. 12(b). The appeal was heard

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entire year trapped in failing schools, which is an actual, individual injury to a student. *See Martinez v. Malloy*, 350 F. Supp. 3d 74, 87 (D. Conn. 2018). Otherwise, Intervenor-Defendants' children and thousands of others will be "forced into a system that continually fails them" and denied a quality education for another whole school year. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring).

Similarly, Greater Praise Christian Academy and Sensational Enlightenment Academy schools have a strong interest in seeing the program commence as currently scheduled. In the affidavit of Kay Johnson, Director of Greater Praise Christian Academy (GPCA), she explains that, since January, she has been working diligently on days, nights, and weekends to ensure that GPCA will participate in the ESA Pilot Program this August. APP581, ¶ 18. Enjoining the program now would not preserve the status quo but would upend the status quo for her. APP580, ¶ 12. GPCA serves academically challenged students from low-income, minority parents. APP578-79, ¶¶ 4-5. Johnson has relied on the enactment of the ESA Pilot Program last May to take many steps to more than double the size of her school from 60 to 144 students by August. *A*PP578, ¶ 10. She has worked to switch from a Category IV to a Category I private school to participate in the program. APP579, ¶ 11. She has paid fees to the state fire marshal to approve her facilities for the expanded number of students. APP580, ¶ 13. She has told her landlord

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on the merits at *State v. Tuttle*, No. M2014-00566-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 725, at *1 (Crim. App. Sep. 8, 2015), which was subsequently reversed on the merits at *State v. Tuttle*, 515 S.W.3d 282, 289 (Tenn. 2017).

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that she will need full use of a currently shared second building. *Id*. She has hired a specialist to help her with all the administrative duties necessary to participate in the program. APP580, ¶ 14. She has begun the process of hiring at least ten new teachers. APP580, ¶ 15. She has notified the U.S. Department of Education Title I program of her intention to greatly expand the size of the school and, thus, of the need for more free lunches for her students, all of whom qualify. APP580, ¶ 16; APP579, ¶ 6. She has researched and chosen a new school-wide assessment tool to help prepare for the TCAP end-of-year test. APP581, ¶ 17. Permitting the Chancery Court's order to go forward without immediate appellate review would "cause a major hardship to GPCA" because it would "stop us in our tracks at a critical moment in our school's history in which we need to be moving full-steam ahead toward the 2020-2021 school year. Coronavirus has not stopped us. We ask this Court not to stop us either." APP580, ¶ 12.

As the Chancery Court said in its order granting the filing of this Tenn. R. App. Pro. 9 application, this is "a matter of significant public interest that is extremely time sensitive" APP553.

(2) Prompt appellate resolution of the Home Rule claim will save this Court and the Chancery Court time in the future.

Prompt appellate resolution of the Home Rule claim will also save this Court and the Chancery Court substantial time in the future. "An interlocutory appeal should be granted where it will 'result in a net reduction in the duration and expense of the litigation if the challenged order is reversed.'" *State v. McKim*, 215 S.W.3d 781, 790 (Tenn. 2007)

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(quoting Tenn. R. App. Pro. 9(a)(2)). In this case, if this Court determines that the Chancery Court erred on its determination regarding the county Plaintiffs' standing, then it would potentially remove their standing on all future claims, such that no further litigation in this case would be appropriate. Resolution on these threshold standing questions could, at minimum, clarify which particular claims are appropriate for resolution on the merits.

This is also not a case where an interlocutory appeal would be inappropriate. The goal of the rule is to prevent "piecemeal litigation," in which a case bounces back and forth between the two levels over and over. *State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005). Thus, interlocutory appeal is inappropriate when immediate appellate review would "(a) hinder the trial court's flexibility to revise its rulings depending on the evidence presented at trial or (b) result in another requested appeal should the trial court depart from the appellate court's decision based on the evidence presented at trial." *Id.* No factual development is necessary for resolution of the questions presented. The second question presented, regarding how many counties the Home Rule clause applies to, is purely a question of law, and it was, therefore, resolved on a motion for summary judgment. The first question presented, regarding standing or ripeness, can be resolved based on review of a limited number of public records available on official government websites.[5]

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[5] From Appellants' perspective, the only documents necessary to resolve this question are the ESA statute itself, the BEP statute, a report from the Tennessee Comptroller of the Treasury, a single page from the budgets of Metro Nashville Public Schools and Shelby County Schools,

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Nor would an appeal result in "an advisory ruling [that] would not be necessary to achieve uniformity in the law." *Id*. To the contrary, an appeal would help achieve uniformity in the law.

(3) An appellate decision on the Home Rule clause will help develop a uniform body of law.

Tennessee law on the Home Rule clause is in need of uniformity. The three cases Appellees primarily relied on in Chancery Court all involved laws affecting only one county or municipality: *Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975); *Lawler v. McCanless*, 417 S.W.2d 548, 553 (Tenn. 1967); and *Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 656 (W.D. Tenn. 2012). Many other cases in which the clause has been invoked also involved laws affecting only one county or municipality. *See Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 728 (Tenn. 1991); *Metro. Gov't of Nashville & Davidson County v. Reynolds*, 512 S.W.2d 6, 9-10 (Tenn. 1974); *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371, 373 (Tenn. 1971); *Cty. of Shelby v. McWherter*, 936 S.W.2d 923 (Tenn. Ct. App. 1996).

However, Appellees did point the chancellor to the case of *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979). In that case, the Court struck down a statute affecting two counties by using arbitrary population brackets. *Id*. at 274. At times, Tennessee courts have upheld laws utilizing population brackets, *e.g., Burson*, and at times, they have

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and the recently enacted 2020-2021 state appropriations act, all of which were referenced in the record below.

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not, *e.g., Leech*. However, none of the later cases explicitly overruled the prior decisions. *Burson* simply ignored *Leech* in its discussion of the Home Rule clause, even though the opinion went on to cite *Leech* in another section. The current case is a worthwhile vehicle to bring clarity to a caselaw in conflict.

Additionally, the Tennessee Supreme Court has not published a decision on the Home Rule clause in almost thirty years—since *Burson* in 1991—and this Court has not addressed it in 25 years—since *County of Shelby v. McWherter* in 1996. This body of law is in need of additional attention at this time, and this case, with an important constitutional right at issue before the impending school year, is the perfect vehicle through which the Court of Appeals should address the meaning of the Home Rule clause.

CONCLUSION

This case is appropriate for an interlocutory appeal. This is a pressing issue of importance to the governor and legislature. More importantly, it is important to thousands of Tennessee school children. Even a slight delay in resolution will prevent the program's operation for their entire upcoming school year. Expeditious resolution of an interlocutory appeal is the only way that the parent and school Appellants can secure clarity in time for the program to move forward this August. Given that they have a strong case on all the factors identified in Tenn. R. App. Pro. 9, they respectfully request that the Court accept their application.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2020, a true and exact copy of the foregoing was served via the Court's electronic filing system and forwarded by electronic mail to:

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