IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CASE NO. M2020-00683-COA-R9-CV

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

v.

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

and

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

On Expedited, Interlocutory Appeal Pursuant to Tenn. R. App. P. 9
Oral Argument Requested and Scheduled: August 5, 2020 at 1:00 P.M.

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

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I. Even if the ESA Pilot Program is enjoined in SCS and MNPS, it should not be enjoined, based on the Home Rule Amendment, in the state-run Achievement School District.

If this Court agrees with the Chancery Court in enjoining the Tennessee Education Savings Account ("ESA") Pilot Program from going forward in Shelby County Schools ("SCS") and in Metropolitan Nashville Public Schools ("MNPS"), the program still should be allowed to proceed in the Achievement School District ("ASD"). The state-run entity cannot be subject to a challenge under the Home Rule Amendment, which is intended to apply only to cities and counties, not the state. *See Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482, 484 (Tenn. 1957). The only argument offered by the Counties in favor of enjoining the ASD from utilizing the ESA Pilot Program is, in actuality, just an argument against the existence of the ASD, which is a claim not made in this lawsuit. (Counties' Brief 21-27, 41-44.) For this same reason, the Counties lack standing to bring a claim against operating the pilot program in the ASD. In addition, 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.

A. The Counties have failed to show any specific injury resulting from the use of ESAs in the ASD.

The alleged Home Rule Amendment injuries that the Counties claim to suffer are nothing but general objections to having their local

Basic Education Program ("BEP") contributions subtracted by the state to fund the ASD. (Counties' Brief at 25, 39 n.19.) Funding for the ASD is accomplished similar to funding for the county school district. For each student, each school district receives the state share of the per-pupil BEP and the local share.[1] If the Counties suffer injury from this funding mechanism, that is a claim they should have brought against the creation of the ASD ten years ago.

The Counties also claim that the ASD discriminates against them because the only schools it has taken control of are located in Shelby and Davidson counties. (Counties' Brief at 25.) Again, that is a claim against the ASD statute, not a claim against the ESA statute.

The Counties have no Home Rule Amendment claim against the ESA Pilot Program operating in the ASD because it is entirely a state-run entity: "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). Once the ASD receives its funding, the Counties can point to no evidence that they have any control whatsoever over how the ASD spends it funds. Only the state may do so: "The ASD may receive, control, and expend local and state funding for schools placed under its

[1] The only slight difference is that 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 simply subtracted from the total funding the state sends to the county public school district. 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). Thus, the ASD is 100% funded through state dollars.

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.

In other words, the students receiving the ESA in the ASD have already left the county school district, so any perceived injury suffered by the Counties would have occurred when they left—at the creation of the ASD. What happens to those students beyond that point has no effect on the Counties; therefore, they can bring no Home Rule Amendment claim regarding them.

B. The Counties do not even have standing to bring a Home Rule claim based on giving an ESA to students in the state-run ASD.

An even clearer conclusion from the argument above is that the Counties do not have standing to bring a claim regarding giving an ESA to students in the state-run ASD. To establish standing, a plaintiff must show "a distinct and palpable injury." *ACLU v. Darnell*, 195 S.W.3d 612, 619-620 (Tenn. 2006). This the Counties failed to do for the ASD, other than to argue that the very existence of the ASD injures them financially, which is not a claim at issue in the case. (Counties' Brief at 25, 39 n.19.)

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). The Counties do not represent the ASD and are not financially affected by how the ASD

chooses to use its funds; therefore, they are not "properly situated" to bring a claim based on how those funds are spent. 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), *perm. app. denied* (Tenn. April 30, 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.

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

Tennessee's longstanding case law on elision directs courts to overturn statutes on the narrowest grounds possible. *See Reelfoot Lake Levee Dist. v. Dawson*, 36 S.W. 1041, 1048 (1896) (overruled on another ground by *Arnold v. Mayor, etc., of Knoxville*, 90 S.W. 469, 477 (1905)). Therefore, if this Court decides to uphold the trial court's injunction, it should limit its application to enjoining Tenn. Code Ann. § 49-6-2602(3)(C)(i) rather than the entirety of the ESA Pilot Program (Tenn. Code Ann. § 49-6-2601 – § 49-6-2612).

The rule on elision states, "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. Without Tenn. Code Ann. § 49-6-2602(3)(C)(i) in place, there would remain a complete ESA law, capable

of enforcement in the ASD and furthering the object of its passage: to help low-income students in failing school districts. Therefore, the rule on elision should apply.

This rule on elision has been bolstered even further with the passage, in 1950, of the law on severability, which is applicable throughout the Tennessee Code: "If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof . . . ." Tenn. Code. Ann. § 1-3-110; *see also Willeford v. Klepper*, 597 S.W.3d 454, 471 (Tenn. 2020) (using the general law on severability when the statute did not contain its own).

Further evidence that the Court should apply the rule of elision comes from the two severability clauses contained in the ESA statute. The first states, "If any provision of this part or this part's application to any person or circumstance is held invalid, then the invalidity must not affect other provisions or applications of this part that can be given effect without the invalid provision." Tenn. Code. Ann. § 49-6-2611(b). If this Court deems the act's applicability to persons in SCS and MNPS to be invalid, the application of the law to the ASD can still be given effect. The statute's severability clause shows that the legislature intended "to have the valid parts of the statute in force if some other provision of the statute has been declared unconstitutional." *Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985). (citing *Catlett v. State*, 336 S.W.2d 8 (Tenn. 1960)).

As recently as this month, the U.S. Supreme Court also indicated the importance of applying severability principles. It noted, "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." *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 207 L.Ed.2d 784, 797 (2020) (severing the government-debt exception to restrictions on robocalls and leaving the remainder of the Telephone Consumer Protection Act in force).

The Counties cite only one case in their argument against elision: *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975). (Counties' Brief at 39 n.19.) However, *Farris* contains many of the characteristics of cases in which elision is not applied because of circumstances that do not exist in this case.

First, Tennessee courts do not use elision if doing so would expand the statute beyond its current scope. In *Farris*, the statute held unconstitutional required a run-off election for county mayor in all counties with a mayor as chief executive. *Id*. Shelby County was the only such county. Therefore, any attempt to elide the statute and apply run-off elections to other offices would expand the statute in a way uncontemplated by the legislature. In this case, however, the ESA Pilot Program specifically includes a second severability clause to prevent such a result from elision: "[I]f any provision of this part is held invalid, then the 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). In other words, a court is directed not to utilize a constitutional flaw to expand eligibility in the program to more students. Thus, properly eliding the statute in this case will not expand its reach but will restrict it to the Achievement School District.

Second, Tennessee courts consider whether the remaining portions of a statute conform to the purpose of the original statute such that they can be enforced in their "new" form. *Davidson County v. Elrod*, 232 S.W.2d 1 (Tenn. 1950). In *Farris*, removing the limiting principle of the statute would not leave a remaining portion of the statute to be enforced. The statute was limited to counties with a county mayor form of government, but if it were applied to all counties, there would be no statute left because it governed elections for county mayors to begin with. This trap of circular reasoning does not apply to the ESA Pilot Program. The statute is not dependent on any particular school district participating in it. The pilot program could work in 30 school districts, three, or just the single Achievement School District. And the overall purpose of the statute will be maintained if the statute is elided: students in the Achievement School District will receive the opportunity for the quality education they deserve. *Elrod* directs elision to be used if the offending portion of the statute may be "easily separable" from the remainder. *Elrod*, 232 S.W.2d at 2. In *Farris*, the entire statute was only two sentences and an effective date. *Farris*, 528 S.W.2d at 551-552. There was no practical way to easily separate an unconstitutional portion of the statute from the remainder. In this case, however, Tenn. Code Ann. § 49-6-2602(3)(C)(i) is "easily separable" from the remainder of the statute,

and thousands of students, including two Intervenor-Defendants, will receive the benefit the legislature intended to provide them.

Third, the statute in *Farris* would not have passed without its limitation to counties with a mayor form of government. *Farris v. Blanton,* 528 S.W. at 556. On the other hand, if "the Legislature would have enacted [the statute] with the objectionable features omitted, then those portions of the statute which are not objectionable will be held valid and enforceable . . . ." *Elrod*, 232 S.W.2d at 2. The legislative history of the ESA Pilot Program makes clear that the General Assembly always wanted it to apply to the children in the ASD. The very first committee to recommend passage of the act included a provision allowing for application in the ASD. (House Educ. Comm. Amend. 1 to HB 939) (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").[2] All of the ASD schools are among the bottom 5% of schools. Tenn. Code. Ann. § 49-1-602(b)(2). While other school districts were amended out of the final version of the bill, application to the ASD remained. Therefore, it is clear that the General Assembly intended for the program to operate in the ASD and would have passed the law if those children had been the only ones in the state to benefit from the program.

Finally, specifically in Home Rule Amendment cases, Tennessee courts have followed the rule on elision since the amendment was passed. In two of the earliest known cases to interpret the clause at issue in this

[2] Available at http://www.capitol.tn.gov/Bills/111/Amend/HA0188.pdf (retrieved July 30, 2020).

case, the Tennessee Supreme Court followed the rule on elision to sever the statute and leave the remainder in force. *See Fountain City Sanitary Dist.*, 308 S.W.2d at 486 (Tenn. 1957); *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959).

If this Court finds it necessary to remove SCS and MNPS from the ESA Pilot Program, it should follow the rule on elision and limit its decision to Tenn. Code. Ann. § 49-6-2611(c). Eliding the statute so that it applies to the Achievement School District would further the purpose of the legislature and provide relief to thousands of low-income students.

II. The proceedings of the 1953 Constitutional Convention support the plain meaning that the Home Rule Amendment prohibits legislation affecting one particular county.

The ESA Pilot Program does not violate the Home Rule Amendment by operating in SCS and MNPS because the plain meaning of the Home Rule Amendment only prohibits legislation affecting one particular county—not two. This Court need not resort to the history of the 1953 Constitutional Convention to interpret the plain meaning, but if it does, the overwhelming weight of evidence supports the interpretation offered by the Greater Praise Intervenor-Defendants and is not contradicted by the one passage cited by the Counties from the State of Tennessee *Journal and Debates of the Constitutional Convention of 1953* (*"Journal of 1953"*).

It's an oft-quoted aphorism that finding legislative history to support your case is like "looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568

(2005). Here, the Counties have cherry-picked one passage out of the entire historical record and tie their case to this single mast. Yet it cannot bear the weight they assign it.

First, this Court should not turn to the legislative history at all when the text is plain, as it is here. *Hamblen Cty. Educ. Ass'n v. Hamblen Cty. Bd. of Educ.*, 892 S.W.2d 428, 434 (Tenn. Ct. App. 1994). To support their position that "a particular county" means multiple counties, the Counties recite an exchange between 1953 Constitutional Convention Delegates Lewis S. Pope and Harry T. Burn. (Counties' Brief at 52.) However, the statements of drafters, even influential ones like Delegate Pope, "are not effective to change the clear meaning of the language of the act." *D. Canale & Co. v. Celauro*, 765 S.W.2d 736, 738 (Tenn. 1989). When text is clear, "there appears nothing doubtful or uncertain about the Act in question and such history or policy of legislation is not of determinative materiality for the reason there exists no ambiguity in the Act that needs explanation." *Bozeman v. Barker*, 571 S.W.2d 279, 281 (Tenn. 1978). Here the clear meaning is simple: "a particular county" means one county.

Second, if the Court does turn to the historical record of the convention, it finds much more support for the Greater Praise Intervenor-Defendants' position than the Counties'. The Counties' own evidence shows as much that Delegate Burn reads the provision one way ("This amendment does say one, though.") as that Delegate Pope reads it another way (one, two, three, perhaps four). (Counties' Brief at 52.) When pressed to explain his position, it's clear that Delegate Pope is not intending the Home Rule Amendment to apply to a statute like the ESA

Pilot Program, which the Counties claim affects two counties: "[Y]ou'll never get two counties to have the same thing." *Id*. Delegate Pope is still discussing private acts, which cannot be the same in two counties, and not legislation with reasonable classifications, which may apply the same in multiple counties. He even goes on to use the phrase "private bill" in his explanation that an act affecting three municipalities in one county is a "private bill" because it affects only one county. *Id*.

Most importantly, this one exchange must be put in light of the rest of the historical record, as shown in the Greater Praise Intervenor-Defendants' principal brief, which has three other examples of the convention's action on this point. (Greater Praise Intervenor-Defendants' Opening Brief at 37-43.) In the letter from Delegate William E. Miller to Delegate Pope cited in the principal brief, Delegate Miller also envisions the Home Rule Amendment to prohibit private acts pertaining to one county: "[T]he private Act concerns only one municipality or county." (Letter from Miller to Pope of 7/10/1953, at 3 ¶8, App. 014.) Moreover, the actions of the convention delegates speak louder than their words. The two amendments the convention rejected show the intention of the whole convention and not just the views of an individual delegate. Rejecting language prohibiting legislation affecting fewer than four municipalities and legislation affecting fewer than 94 counties shows that the convention was intentional in selecting language prohibiting legislation affecting "a particular county." (Greater Praise Intervenor-Defendants' Opening Brief at 39-43.)

Third, Delegate Burn's line of questioning exposes the fundamental flaw in the Counties' argument and the trial court's ruling: there is no

way to draw a line other than one based on the text. Delegate Pope essentially offers a gut reaction to his question, "How few municipalities is too few?" "One or two?" "Three or four?" We have no guide besides Delegate Pope's snap judgment as to his own feelings: yea or nay. The trial court cannot engage in this sort of arbitrary line-drawing, untethered from the text. A federal judge, when rejecting a similar invitation, asked rhetorically: "When does a discount become a windfall? At fifteen percent? Twenty percent? Anything less than one hundred percent? The Court is not aware of any principled basis on which to make such a decision." *Asset Mgmt. Holdings, LLC v. Wells Fargo Bank, N.A.* (*In re Wagner*), Nos. 12-13285-BFK, 13-01159, 2013 Bankr. LEXIS 4899, at *34 (Bankr. E.D. Va. Nov. 18, 2013). In another case, a different federal judge posed the same questions as Delegate Burn: "If the Court were to adopt Defendant's rule, this would require a court to determine how much interest is sufficient to warrant conditional certification. This would force courts to draw an arbitrary numerical line. Would two interested plaintiffs be sufficient to satisfy this requirement? Three? Four? The Court cannot fathom an objective standard by which courts could make this determination." *Rossello v. Avon Prods.*, No. 14-1815 (JAG), 2015 U.S. Dist. LEXIS 133159, at *4 n.2 (D.P.R. Sep. 28, 2015). The same is true here: there is no principled basis or objective standard by which to draw the line the Counties need. As the chancellor admitted in her order, "There has not been a bright line established regarding how many counties or municipalities is too many for it to be considered a potential Home Rule Amendment violation . . . ." (Trial Court Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23; App. 057-

58.) This Court should reject the trial court's attempt to rewrite the Constitution by establishing a bright line of its own making.

Fourth, we should not lose sight of the fact that, though Delegates Miller, Pope, and Burn were present when the provision was drafted, ultimately it was the people of Tennessee who adopted the Home Rule Amendment in the voting booth. As one Supreme Court Justice noted while analyzing another ballot proposition, "inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters." *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting). In such an instance, "There is no meaningful way to determine the intent of those voters who vote for the adoption of an enactment. The motivations and mental processes of the voter cannot be determined -- except from the words of the enactment itself." *State v. $223,405.86*, 203 So. 3d 816, 833 (Ala. 2016) (quoting *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269, 279 (1986)). As stated by the Tennessee Supreme Court in its first case interpreting the Home Rule Amendment, the text--and the text alone--is the best indicator of the people's intention when amending the constitution: "The Court, in construing the Constitution must give effect to the intent of the people that are adopting it, as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to convey such intent; and where such presumption prevails nothing remains except to enforce such intent." *Shelby Cty. v. Hale*, 200 Tenn. 503, 510, 292 S.W.2d 745, 748 (1956). In this case, the language is clear: "a particular county" means one and only one.

III. The Counties are wrong that Home Rule Amendment cases turn on whether another county or municipality can grow into the program.

A. The Counties' interpretation of the Home Rule Amendment case law is belied by the facts in *Leech* and *Board of Education*.

The Counties' interpretation of the Home Rule Amendment case law cannot be reconciled with the facts of the cases. The Counties assert that the cases turn on whether another local government can grow into the program in the future. (Counties' Brief at 32-34.) However, the two cases they rely on for following this proposition belie their argument: *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979) and *Bd. of Educ. of Shelby County v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631 (W.D. Tenn. 2012). In *Leech*, the population bracket utilized by the General Assembly to target counties was open-ended, and future counties could have fallen within its terms. The statute applied to Wayne and Roane counties by population brackets determined "by the federal census of 1970 *or any subsequent federal census*." *Leech*, 588 S.W.2d at 277 (emphasis added).

In *Board of Education*, the law applied to all eight counties with special school districts, 911 F. Supp. 2d at 648; thus, other counties could have been affected in the future. Nonetheless, the federal district court found that the statute was "targeted" at one particular county and overturned it on that ground. *Id*. at 656-660.

B. The better interpretation of the case law is that the Home Rule Amendment prohibits laws that "target" one particular county, *Bd. of Educ.*, 911 F. Supp. 2d at 656-59, and are not "designed to apply to any other county in Tennessee." *Farris*, 528 S.W.2d at 552.

In *Board of Education*, the court made clear that its decision rested on the facts of the case: the law at issue had "targeted" one county only and "was tailored to address unique circumstances that had arisen in Shelby County." 911 F. Supp. 2d at 660. To ignore that the statute was passed in response to the local referendum giving up the charter of Memphis City Schools would be to "close our eyes to reality." *Id*. The Counties claim that the decision did not rest on its applicability to one county, but the court expressly stated otherwise: "If the class created by a statute is so narrowly designed that only one county can reasonably, rationally, and pragmatically be expected to fall within that class, the statute is void unless there is a provision for local approval." *Id*. at 656.

In its reasoning, *Board of Education* cites the test for local applicability which is common throughout Tennessee Home Rule cases: Is the law targeted at one county or is it "designed to apply to any other county in Tennessee?" *Id*. at 652, quoting *Farris*, 528 S.W.2d at 552. In *Farris*, the Supreme Court determined that the law was not designed to apply to any county other than Shelby and overturned the law. *Id*. at 556. Contrary to the Counties' assertion, this test turns on whether the Home Rule Amendment applies to laws applicable to one county or more than one. In *Bozeman,* the Supreme Court distinguished *Farris* precisely because the statute in that case had applied to only one county. 571 S.W.2d at 282. The court quoted from *Farris* its applicability only to

Shelby County, or to "[i]t, and it alone." *Id*. In contrast to *Farris*, the court in *Bozeman* upheld the statute because it applied to "two populous counties." *Id*.

Similarly, the seminal Supreme Court case interpreting the Home Rule Amendment also followed this rule from *Farris*. In *Civil Service Merit Bd. v. Burson*, 816 S.W.2d 725 (Tenn. 1991), the Court examined whether the law "was designed to apply to any other county in Tennessee" and determined that it applied to "the three most populous counties of the state." 816 S.W.2d at 729. Because "civil service commissions in the other two counties . . . will have to maintain compliance with" the statute at issue, the court upheld the statute.

The Counties ignore this first test from *Farris* and harp on the second test: "if it is potentially applicable throughout the state." (Counties' Brief at 32-34, 50.) As the court notes in *Board of Education*, "There is tension between 'any other county' and 'throughout the state.'" 911 F. Supp. 2d at 656. But *Burson* resolves this tension in favor of the first test: "The plaintiffs argue that legislation . . . is 'special, local, or private' unless, by its terms, it necessarily applies to every municipality in the state. This Court has repeatedly held to the contrary." 816 S.W.2d at 729. The test is not whether the law can apply "throughout the state" but whether it applies to only one county or to "any other county." *Id*.

IV. The County Government Plaintiffs do yet not have standing to bring this case because they will be paid double for each ESA student for three years.

The Counties attempted to muddy the waters on the funding of the ESA Pilot Program by calling their perceived harm an "ESA mandate," but in fact the funding of the ESA is very simple: the money follows the child. The only mandate that the Counties are objecting to, in reality, is the "education mandate": they have 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). Beyond that sixty-year-old mandate, the ESA Pilot Program imposes absolutely no new funding requirements on the Counties—none.

On top of this reality, the Counties will be paid double by the state for every ESA student for the first three years of the program. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). The first payment pays for the ESA, and the second is supplemental funding to the county school systems. This second payment is the "ghost reimbursement," a term which the Counties attempted to steal from Intervenor-Defendants and repurpose. (Counties' Brief at 24.) Under the "ghost reimbursement," the state will pay the county school systems a second time for a child who is not there. For this second payment, the state will pay both the state portion of the BEP and the local portion. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). Because of this extra funding, the Counties will suffer no injury-in-fact and, therefore, do not have standing to bring a ripe claim for at least three years.

CONCLUSION

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

Respectfully submitted, Dated: July 30, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements set forth in Tenn. S. Ct. R. 46 (3.02). It fulfills the 5,000 word limit because it contains 4,835 words, excluding those sections mentioned by the rule. It has been prepared with full justification in 14 point Century Schoolbook font with 1.5-spaced lines and pagination beginning on the cover page with page 1. It was prepared in Microsoft Word and directly converted to Portable Document Format.

Dated: July 30, 2020

s/ Brian K. Kelsey
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CERTIFICATE OF SERVICE

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

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