IN THE TENNESSEE SUPREME COURT

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

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

v.

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

and

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

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

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

BRIAN K. KELSEY
TN B.P.R. #022874
bkelsey@libertyjusticecenter.org

DANIEL R. SUHR
Pro Hac Vice
dsuhr@libertyjusticecenter.org

LIBERTY JUSTICE CENTER
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668

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INTRODUCTION

Tennessee case law on the Home Rule Amendment is a conflicting, jumbled mess. A main line of cases upholding statutes is based on *Civil Service Merit Board v. Burson*, 816 S.W.2d 725 (Tenn. 1991). A minority line of cases striking down statutes is based on *Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975). The two lines of cases are hopelessly irreconcilable.

This conflict leads to judicial activism, in which lower court judges are not constrained by the law pronounced by this Court. If a judge wants to uphold a law, he or she cites *Burson*. If a judge wants to strike down a law, he or she cites *Farris*. The latter is exactly what happened in this case in the opinion by Judge Bennett, who ignored the *Burson* case even though he had served as an attorney of record for the state in the case prior to joining the bench.

This Court should accept this application to appeal to secure, once and for all, uniformity of decision in Home Rule Amendment cases.

DATE OF JUDGMENT

Judgment in this case was entered by the Court of Appeals on September 29, 2020. No petition for rehearing was filed.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that the ESA Pilot Program, which applies to three local education agencies in two counties, violates the Home Rule Amendment, which prohibits laws applicable to "a particular county."[1]
2. Whether the Court of Appeals erred in ruling that the ESA Pilot Program financially harms the county government plaintiffs, such that they have standing and ripeness to challenge it.

STANDARD OF REVIEW

As the Court of Appeals correctly ruled, the interpretation of statutes and constitutional provisions are questions of law reviewed *de novo* with no presumption of correctness. Court of Appeals Opinion, No. M2020-00683-COA-R9-CV, Sept. 29, 2020 ("Opinion") at 4 (App'x 035).

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

[1] The Court of Appeals stated that the Greater Praise Intervenor-Defendants should have presented a third issue on appeal for consideration of its argument in the alternative that operating the ESA Pilot Program in the state-run Achievement School District cannot possibly violate the Home Rule Amendment. Opinion at 12 n.6 (App'x 043). Intervenor-Defendants maintain this argument is simply one in the alternative regarding this first question presented. However, to the extent this Court disagrees, they ask this Court to accept this appeal with a third question presented sufficient to cover the alternative remedy they seek.

STATEMENT OF FACTS

The facts relevant to the questions presented are correctly stated in the opinion of the Court of Appeals. Opinion at 2 (App'x 033).

STATEMENT OF REASONS

This Court grants review of a case when there is "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority." Tenn. R. App. P. 11(a). This case presents the first three needs: 1) the Court's precedent on the Home Rule Amendment is inconsistent; 2) this is an important question of constitutional law; and 3) the Education Savings Account (ESA) Pilot Program is of significant public interest. In addition, the Court of Appeals failed to consider evidence in its analysis on standing and ripeness that this Court should consider.

I. The case law on the Home Rule Amendment is not uniform.

The Home Rule Amendment at issue constitutes the second half of the second paragraph of Article XI, Section 9 of the Tennessee Constitution:

> [A]ny 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 of 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.

First passed in 1953, this clause has been the subject of doctrinal chaos almost from its enactment.

The case law on the Home Rule Amendment is desperately in need of clarity. This Court's last pronouncement on the clause, *Burson*, caps a series of eleven cases that have ruled in favor of legislative authority to pass laws that are "designed to apply to any other county in Tennessee." 816 S.W.2d at 729. However, *Burson* failed to overrule another line of three cases led by *Farris*, which had ruled that a law may be upheld only "if it is potentially applicable throughout the state." 528 S.W.2d at 552.[2]

As federal Judge Hardy Mays put it mildly in *Board of Education of Shelby County v. Memphis City Board of Education*, "There is tension between 'any other county' [from *Burson*] and 'throughout the state' [from *Farris*]." 911 F. Supp. 2d 631, 656 (W.D. Tenn. 2012). This Court should take this case to resolve the tension.

[2] In this brief, Intervenor-Defendants review the only 14 state law cases known to counsel to construe the provision of the Home Rule Amendment at issue in this case. As the Court of Appeals correctly points out in its decision, the Home Rule Amendments were proposed as three separate amendments by the 1953 Constitutional Convention. Opinion at 7 (App'x 038). However, the case law at times confusingly cites to analysis of the other two Home Rule Amendments and, worse still, to Article XI, Section 8.

A. The history of Home Rule Amendment cases is conflicting.

The first two Supreme Court cases in the 1950s followed the plain meaning of the Home Rule Amendment and ruled that it applies only to counties and municipalities and not to other local governmental bodies. *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482 (Tenn. 1957); *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959). In *Fountain City*, this Court ruled that legislation affecting one sanitary district in the state did not run afoul of the Home Rule Amendment because it did not apply to a "county" or "municipality." 308 S.W.2d at 484. In *Perritt*, this Court followed the same logic to conclude that legislation affecting one special school district did not run afoul of the Home Rule Amendment. 325 S.W.2d at 234.[3]

In the 1960s, the Court went a different direction and held the Home Rule Amendment does apply to laws aimed at General Sessions courts in one county. *Durham v. Dismukes*, 333 S.W.2d 935 (Tenn. 1960); *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967). While these cases were potentially in conflict with the 1950s cases, the Court did not overrule them, distinguish them, or even bother to mention them at all. In *Durham*, this Court upheld a legislative act that was styled as a private act affecting only Sumner County, was sent to the people for a referendum, and was voted down. 333 S.W.2d at 937, 939. In *Lawler*, the

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

Court struck down a law that had used a population bracket to aim at one county, Gibson. 417 S.W.2d at 550, 553.

In a series of three cases in the early 1970s, this Court and the Court of Appeals reversed course again and upheld statutes aimed at only one county, Davidson, because they were styled as applying to counties with a metropolitan government. *Boone v. Torrence*, 470 S.W.2d 356 (Tenn. Ct. App. 1971); *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971); *Metro. Gov't of Nashville & Davidson County v. Reynolds*, 512 S.W.2d 6 (Tenn. 1974).

Then, in 1975, the Court reversed course 180 degrees in *Farris*. It overturned a statute requiring run-off elections for mayor in only one county, Shelby, even though the statute had been styled as applying to all counties with a mayoral form of government. 528 S.W.2d at 556. This ruling was seemingly in direct conflict with the Davidson County cases, but the Court did not overrule them. Instead, the Court announced its internally inconsistent rule:

> [W]e must determine whether this legislation was designed to apply to any other county in Tennessee, for if it is potentially applicable throughout the state it is not local in effect even though at the time of its passage it might have applied to Shelby County only.

Id. at 552. Before this rule, every statute challenged had applied to only one county. But the careless drafting of the *Farris* test created a new question of what happens to laws that apply to more than one county but not to all 95 counties throughout the state.

In 1978, this Court answered the question in *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978). The *Bozeman* Court upheld a statute that had given salary increases in Knox and Davidson counties because it applied to two counties. 571 S.W.2d at 282. This Court distinguished *Farris* because the statute in *Farris* had applied to only one county. *Id.*

Then, abruptly, the Court did a 180 again the very next year and struck down a statute that applied to two counties. *Leech v. Wayne County*, 588 S.W.2d 270 (Tenn. 1979). The General Assembly had passed a law transferring county legislative authority from quarterly courts to county legislative bodies. 588 S.W.2d at 273. It gave those bodies discretion whether or not to have candidates run by designated position in multi-member districts, except in two counties designated by population bracket, Wayne and Roane. 588 S.W.2d at 274. Until the present case, this black sheep case was the only time a Tennessee court had ever struck down a statute aimed at two or more counties.

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

This Court made its final pronouncement on the Home Rule Amendment in *Burson*. There, the legislature had enacted a statute to "make uniform the qualifications and procedures for the nomination of members serving on the municipal civil service boards in Tennessee's most populous counties." 816 S.W.2d at 727. Although Plaintiffs claimed that only the City of Knoxville would have to change its qualifications, this Court determined that the statute applied to "the three most populous counties of the state," *id.* at 729, because "civil service commissions in the other two counties . . . will have to maintain compliance with" the statute at issue. *Id.* at 730. Therefore, this Court upheld the statute. This Court quoted the first half of the test from *Farris*: "Specifically, the inquiry must be 'whether the legislation [in question] was designed to apply to any other county in Tennessee . . . .'" *Id.* at 729. The Court seemed to repudiate the second, conflicting half of the *Farris* 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." *Id.* But instead of overturning the second half of the *Farris* test, the Court quoted it. *Id.* And instead of overturning *Leech*, which is directly contradictory to the holding of *Burson*, the Court intentionally ignored it.[4] These two glaring omissions left the law on the Home Rule Amendment unknowable.

[4] We know the justices made an intentional choice to ignore *Leech's* home-rule holding because they cited the case for a different proposition of law in a different section of the *Burson* opinion that analyzed Article XI, Section 8. *Id.* at 731.

Finally, the Court of Appeals upheld another statute that affected only one county in *County of Shelby v. McWherter*, 936 S.W.2d 923 (Tenn. Ct. App. 1996). In Shelby County, the county school board, like a special school district, does not serve the entire county but only a portion of it. The legislature passed a law that only residents of the area served by the school district could serve on the board. This provision was limited to counties with more than 700,000 residents; therefore, it applied only to Shelby County. Because *Burson* did not overturn the second half of the *Farris* test, the Court of Appeals felt compelled to follow it, but because it is impossible to follow, it simply rewrote it. Instead of requiring a statute to be "potentially applicable throughout the state," it said the statute must be "potentially applicable to numerous counties in the state." *Id*. at 936.

County of Shelby reveals the problem with Supreme Court case law on the Home Rule Amendment. It is so conflicting and contradictory that it allows lower courts to pick and choose which cases they want to follow based on how they want the case to be decided. This Court should not permit "the clear rule of law [to] be stunted in this state as legal practitioners and judges will be able to pick and choose between competing and inconsistent precedents." *Petersen v. Magna Corp*., 773 N.W.2d 564, 613-14 (Mich. 2009) (Markman, J., dissenting).

B. Three attempts to reconcile the Home Rule case law in the current case all fall short.

1. The Court of Appeals opinion

The Court of Appeals opinion does not even attempt to reconcile

Burson and *Bozeman* with *Farris* and *Leech* but, instead, just ignores the *Burson* line of cases.

Even though *Burson* is this Court's most recent and authoritative pronouncement on the Home Rule Amendment, it receives only one threadbare "see also" citation in the opinion. Opinion at 9 (App'x 040). This Court's decision in *Bozeman* receives no mention at all. And *County of Shelby*, which is the Court of Appeals' most recent on-point decision, also receives zero mention.

Instead, the court focuses on *Farris* and *Leech*. The opinion favorably cites the second half of the *Farris* test, requiring a statute to be "potentially applicable throughout the state" and makes no mention of its tension with the first half of the test, which is totally absent from the opinion. Opinion at 9 (App'x 040).

Leech is the heart of the court below's holding on home rule. Opinion at 9-10 (App'x 040-41). Rather than treating *Leech* as the doctrinal black sheep it is, as did the *Burson* and *County of Shelby* courts, which made no mention of it, the Court of Appeals, instead, insisted that it had no other choice but to apply *Leech* as governing precedent. Opinion at 10 (App'x 041).

2. The Plaintiffs' position

Plaintiffs, in their briefs below, attempted to make sense of the conflicting opinions by inventing a rule that cases turn on whether the population bracket used is open-ended or closed. (Court of Appeals Counties' Brief at 32-34.) That is false.

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

In *Bozeman*, the statute was upheld even though the population bracket was partially closed: it did not apply to counties with populations over 600,000 according to the 1970 census only. Therefore, other large counties could not grow into that exemption from the statute, and the case cannot be squared with other cases based on that fact.

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

Therefore, statements in later cases that imply this fact may be controlling do nothing but provide further confusion to the law.

3. The Greater Praise Intervenor-Defendants' position

The Greater Praise Intervenor-Defendants present the best argument to unify the Home Rule case law. Their argument reconciles 13 of the 14 cases and does so in a manner consistent with the constitutional language.

They implore the Court to follow the plain meaning of the Home Rule Amendment, which prohibits only laws "applicable to a particular county or municipality." Tenn. Const. Art. XI, Sec. 9. "A particular county" means one—not two or three or four.

This plain meaning reading of the constitution is consistent with *Burson*, *Bozeman*, and *Dossett*, all of which upheld statutes applicable to more than one county. It is also consistent with *Farris* and *Lawler*, both

of which overturned statutes that were aimed at one county. It reconciles both line of cases.

However, Intervenor-Defendants admit that this argument fails to account for this Court's *Leech* decision; therefore, the Court of Appeals was unable to adopt the argument. Because *Leech* was not explicitly overruled in *Burson* but was only tacitly ignored, it wreaks havoc in cases like this one where the General Assembly has created a multicounty program. This Court should enforce the plain meaning of the Home Rule Amendment and explicitly overrule *Leech*.[5]

C. This Court's precedents favor taking the case.

The decision by the Court of Appeals ignored governing precedents from this Court and from a prior panel of the Court of Appeals. This Court's review is necessary when a decision of a panel of the Court of Appeals is out of step with this Court's own cases or another panel of the Court of Appeals. *See, e.g., State v. Keese*, 591 S.W.3d 75, 82 (Tenn. 2019); *Bryant v. State*, 460 S.W.3d 513, 527 (Tenn. 2015); *Estate of French v. Stratford House*, 333 S.W.3d 546, 553 (Tenn. 2011).

Another appropriate use of T. R. A. P. 11 review is to revisit past cases to consider whether they were correctly decided, especially in light of subsequent doctrinal developments. *See, e.g., State v. Pruitt*, 510 S.W.3d 398, 408 (Tenn. 2016); *State v. McCormick*, 494 S.W.3d 673, 678 (Tenn. 2016); *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d

[5] For further explanation, see the accompanying Greater Praise Brief of the Appellants at 58.

235, 250 (Tenn. 2015). The Court should take this case to revisit the past case of *Leech* and consider whether it was correctly decided.

Yet another appropriate use of Supreme Court review is to revisit areas of doctrine that have been neglected for lengthy periods of time. W. Mark Ward, *Launch Your Appeal: How to get your case before the state's highest court*, 41 Tenn. B.J. 16, 18 (2005) ("The Supreme Court may also be more likely to closely examine an issue presented in an application for permission to appeal that it has not addressed in a published opinion in several years . . . "). This Court should also revisit this issue because its most recent precedent is 30 years old, and the General Assembly, the attorney general, and the courts below all need a fresh reminder of the *Burson* rule.

II. This Court's review is necessary to settle an important question of law to guide policymakers as to the scope of the Home Rule Amendment.

This case presents a question of law that is important because it is necessary to guide the General Assembly in its future lawmaking. It is a well-recognized principle of equal-protection law that "a legislature is allowed to attack a perceived problem piecemeal. . . ." Tenn. Op. Att'y Gen. No. 04-087 (May 5, 2004) (quoting Tenn. Op. Att'y Gen. No. 01-106 (June 27, 2001), itself quoting *Howard v. City of Garland*, 917 F.2d 898, 901 (5th Cir. 1990)). *See also Opinion of the Justices*, 135 N.H. 549, 608 A.2d 874 (1992). In the education context, for instance, a state or district may choose a limited subset of schools "to experiment with a pilot program to assess whether such a policy makes a difference in student

discipline [and] academic performance . . . " *Derry v. Marion Cmty. Schs.*, 790 F. Supp. 2d 839, 851 (N.D. Ind. 2008). The Attorney General of Tennessee adopted this analysis when he opined in 2007 that the creation of another pilot program to help disadvantaged students maintained a rational basis for limiting the law's initial effect. Tenn. Op. Att'y Gen. No. 07-60 (May 1, 2007). Here, the General Assembly has created a pilot program for disadvantaged students starting in three districts with the most significant historical track record for underperforming schools. Such experimentation was allowed under the prior understanding of Tennessee law.

However, the Court of Appeals' interpretation of the Home Rule Amendment in this case prohibits not only the ESA Pilot Program, but it handcuffs the General Assembly from adopting *any* pilot program that affects only a small number of counties on *any* subject. If left in place, it would stop the General Assembly from prioritizing relief or resources to the most highly challenged counties, localities, or school districts in *any* particular area of policy. There is seemingly no end to its scope. Therefore, this Court should take this appeal to settle this important question of law.

Moreover, as explained at greater length in the accompanying merits brief, the decisions below provide no clear rule for how few counties is too few to transgress *Leech*'s line. Two? Three? Four? *See* Greater Praise Brief of the Appellants at 48-49. Even the trial judge in this case recognized that this is an important question of law that is in need of attention from this Court: "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 . . . . " Nashville Chancery Court Memorandum and Order, May 4, 2020, R. Vol. VIII at 1122-23. The General Assembly is legislating blind, without clear guidance from the courts as to how it can structure its policies and programs within constitutional bounds.

This Court's review is appropriate when "there are consequences beyond that case for consequences in a lot of different cases." Jeffrey Usman, *Judicial Perspectives*, 3 Belmont L. Rev. 147, 159 (2015) (transcript of statement by Justice Kirby). That is the case here, where this Court's decision will shape the scope of legislative activity for years to come, in both education and numerous other realms of public policy.

III. This Court's review is necessary because this case presents a question of great public interest. The ESA Pilot Program will improve the lives of thousands of students currently trapped in failing schools.

This case presents a question of great public interest. This Court regularly grants Rule 11 applications to review constitutional challenges to legislation. *See, e.g., City of Memphis v. Hargett*, 414 S.W.3d 88, 95 (Tenn. 2013) (voter photo ID law); *Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 825 (Tenn. 2010) (the extent of the Governmental Tort Liability Act); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 835 (Tenn. 2008) (property tax provisions). This manifests an appropriate, healthy respect for the separation of powers, where the state's highest court does not leave it to lower courts to have the final say

on bills passed by the state's legislature and signed into law by the state's highest executive officer.

Each of our state's recent governors has attempted a different fix for the persistent reality of failing public schools in our urban centers. Governor Don Sundquist signed charter schools into law. Governor Phil Bredesen created the Achievement School District. Governor Bill Haslam expanded charter schools. And Governor Bill Lee created the Education Savings Accounts at issue in this case. Governor Lee ran on this program as the core plank of his education agenda;[6] he highlighted it in his State of the State addresses;[7] it passed the General Assembly on a bipartisan basis;[8] and its implementation and this litigation has drawn substantial media attention.[9] All of these facts point to the high profile of this issue across the state.

Moreover, this case is one instance where the courts' decisions "will have far-reaching consequences" because it affects thousands of

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[6] Bill Lee, *This Road I'm On*, 163-66 (2018).

[7] "2019 State of the State Address," Office of the Governor (March 4, 2019), available at https://www.tn.gov/governor/sots/state-of-the-state-2019-address.html; "2020 State of the State Address," Office of the Governor (February 3, 2020), available at https://www.tn.gov/governor/sots/2020-state-of-the-state-address.html.

[8] Vote tally on 2019 Senate Bill 795 available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0795.

[9] Mariah Timms, Duane W. Gang and Natalie Allison, "Judge rules Gov. Bill Lee's education savings account program unconstitutional," Tennessean (May 4, 2020), available at https://www.tennessean.com/story/news/education/2020/05/04/judge-rules-gov-bill-lees-education-savings-account-program-unconstitutional/3068998001/.

children's futures. Usman, 3 Belmont L. Rev. at 159 (transcript of statement by Justice Kirby). "It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954). Yet right now thousands of children are cheated of their ability to succeed in life because they are utterly failed by school districts in urban Shelby and Davidson counties. As Supreme Court Justice Clarence Thomas put it, "[U]rban children have been forced into a system that continually fails them." *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). These "failing urban public schools disproportionately affect minority children most in need of educational opportunity." *Id*. at 681. "[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts." *Id*. at 682.

The three school districts identified for eligibility in the ESA Pilot Program run schools that have persisted for decades at the bottom of the state list for achievement test results.[10] For children and families such as those of Intervenor-Defendant parents, the ESA Pilot Program is a lifeline out of failing public schools and into high-quality schools like Intervenor-Defendants Greater Praise Christian Academy and Sensational Enlightenment Academy. Therefore, the question at issue in this case is of great interest not only to the public officials like the governor and the legislators who enacted the ESA Pilot Program, but also

[10] For further explanation, see the accompanying Greater Praise Brief of the Appellants at 16-17, 24-26.

to the members of the public with children who stand to benefit from the program.

IV. This Court's review is also needed to address whether the evidence presented is sufficient to uphold the lower court decision on standing and ripeness.

Though this Court is not an error-correction court, there are times when the Court will examine the "sufficiency of the evidence" underlying a decision of a lower court. *State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992). In this case, the Court of Appeals, in its standing and ripeness analysis, completely ignored evidence offered by the Greater Praise Intervenor-Defendants. In their opening brief to the Court of Appeals, Intervenor-Defendants identified three ways the ESA Pilot Program actually increased per pupil spending in the affected school districts. (Greater Praise Court of Appeals Opening Brief at 57-60.) The court below focused on the "ghost reimbursement" and the "school improvement fund" but made no mention of the first financial advantage: the remainder funds. Opinion at 5-6 (App'x 036-37).

Intervenor-Defendants presented evidence to the Court of Appeals of a report from the Comptroller of the Treasury that was released after the trial court decision that calculated that Shelby County Schools would receive a remainder amount of $4,404 for every student who utilized an ESA, and Metropolitan Nashville Public Schools would receive a remainder amount of $5,323 for every student who utilized an ESA. (Greater Praise Court of Appeals Opening Brief at 58-59.) In its decision, the Court of Appeals ignored this evidence. This Court should accept this

appeal to address whether that evidence is sufficient to uphold the Court of Appeals decision on standing and ripeness.

CONCLUSION

In order to ensure uniformity in Tennessee law on the Home Rule Amendment, to secure settlement of the important question of law of the constitutionality of the ESA Pilot Program, and to secure settlement of this question of great public interest, this application should be granted.

Respectfully submitted, Dated: November 24, 2020

s/ Brian K. Kelsey
Brian K. Kelsey (TN B.P.R. # 022874)
Senior Attorney
bkelsey@libertyjusticecenter.org
Daniel R. Suhr (WI Bar No. 1056658) *Pro Hac Vice*
Senior Attorney
dsuhr@libertyjusticecenter.org
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668

Counsel for Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; & David Wilson, Sr.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements set forth in Tenn. S. Ct. R. 46 (3.02). It contains 4,806 words, based on the word count of Microsoft Word and excluding those sections mentioned in Tenn. S. Ct. R. 46 (3.02)(a)1. It has been prepared with full justification in 14 point Century Schoolbook font with 1.5-spaced lines and pagination beginning on the cover page with page 1. It was prepared in Microsoft Word and directly converted to Portable Document Format.

Dated: November 24, 2020

s/ Brian K. Kelsey
Brian K. Kelsey

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document was served via Tenn. S. Ct. R. 46A through the e-filing system and was forwarded to the attorneys listed below via the e-mail addresses below on this 24th day of November, 2020.

Robert E. Cooper, Jr., Esq., Director of Law
Lora Barkenbus Fox, Esq.
Allison L. Bussell, Esq.
Department of Law of the Metropolitan Government of Nashville and Davidson County
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
lora.fox@nashville.gov
allison.bussell@nashville.gov
Counsel for Appellee/Plaintiff Metropolitan Government of Nashville and Davidson County and dismissed Plaintiff Metropolitan Nashville Board of Public Education

Marlinee C. Iverson, Esq., Shelby County Attorney
E. Lee Whitwell, Esq.
Shelby County Attorney's Office
160 North Main Street, Suite 950
Memphis, Tennessee 38103
marlinee.iverson@shelbycountytn.gov
lee.whitwell@shelbycountytn.gov
Counsel for Appellee/Plaintiff Shelby County Government

Herbert H. Slatery, III, Esq., Attorney General and Reporter
Andrée Sophia Blumstein, Esq., Solicitor General
Stephanie A. Bergmeyer, Esq., Senior Assistant Attorney General
James R. Newsom, III, Esq., Special Counsel
Matt R. Dowty, Esq. Assistant Attorney General
Office of Tennessee Attorney General

P.O. Box 20207
Nashville, Tennessee 37202
andree.blumstein@ag.tn.gov
stephanie.bergmeyer@ag.tn.gov
jim.newsom@ag.tn.gov
matthew.dowty@ag.tn.gov
Counsel for Appellants/Defendants, Tennessee Department of Education; Penny Schwinn, in her official capacity as Education Commissioner for the Tennessee Department of Education; and Bill Lee, in his official capacity as Governor for the state of Tennessee

Jason I. Coleman, Esq.
7808 Oakfield Grove
Brentwood, Tennessee 37027
jicoleman84@gmail.com

Arif Panju, Esq.
816 Congress Avenue, Suite 960
Austin, Texas 78701
apanju@ij.org
David Hodges, Esq.
Keith Neely, Esq.
901 N. Glebe Road, Suite 900
Arlington, VA 22203
dhodges@ij.org
kneely@ij.org
Tim Keller, Esq.
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
tkeller@ij.org
Institute for Justice
Counsel for Appellants/Intervenor-Defendants Natu Bah and Builguissa Diallo

Braden H. Boucek
Beacon Center
P.O. Box 198646
Nashville, Tennessee 37219

braden@beacontn.org
Counsel for Appellants/Intervenor-Defendants Bria Davis and Star Brumfield

/s/ Brian K. Kelsey
Brian K. Kelsey