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.

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

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

INTERVENOR-DEFENDANTS / APPELLANTS BAH, DIALLO, BRUMFIELD, AND DAVIS'S BRIEF ON THE MERITS

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Intervenor-Defendants / Appellants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents"), all of whom have children eligible to participate in the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601–2612 ("ESA Statute"), jointly present the following question for this Court's review:

I. The Tennessee Constitution's Home Rule Amendment provides, in part, that a challenged law requires local approval if it is "*applicable* to a particular county or municipality . . . *in its governmental or its proprietary capacity* . . . ." Tenn. Const. art. XI, § 9, para. 2 ("Home Rule Amendment") (emphases added). Below, the Court of Appeals greatly expanded the scope of this requirement by holding that the ESA Statute is subject to the Home Rule Amendment merely because of its "fiscal effects" on counties. The Question Presented is:

   Do the mere "fiscal effects" of laws enacted by the General Assembly satisfy the Home Rule Amendment's command that a challenged law must be "applicable to a particular county . . . in its governmental or its proprietary capacity"?

STATEMENT OF THE CASE

Plaintiffs, two county governments and a local board of education, sued the Tennessee Department of Education and a host of state officials ("State-Defendants"), alleging that the ESA Statute is unconstitutional. (R. Vol. I at 1, Metro Compl.) The ESA Statute offers low- and middle-income families who are assigned to school districts with chronically underperforming schools under the State's accountability statute the opportunity to send their children to a private school that better fits their children's needs. Because the ESA Statute provides benefits to parents with children assigned to underperforming school districts located in Metro and Shelby counties, Plaintiffs allege that it violates Article XI, Section 9, paragraph 2 of the Tennessee Constitution ("Home Rule Amendment") because it was not locally approved. Plaintiffs also raised two other claims, challenging the ESA Statute under the Equal Protection Clauses in Article I, Section 8 and Article XI, Section 8, and also under the Education Clause in Article XI, Section 12. (R. Vol. I at 35–42, Metro Compl.)

Parents, Intervenor-Defendants below,[1] moved for judgment on the pleadings on each of Plaintiffs' claims under Tennessee Rule of Civil Procedure 12.03. (R. Vol. V at 673, Mot. J. Pleadings) Parents argued, *inter alia*, that the ESA Statute did not violate the Home Rule

[1] The Chancery Court also permitted another set of parties to intervene in the case and defend the ESA Statute: Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Greater Praise Intervenor-Defendants"). (R. Vol. III at 382, Agreed Order)

Amendment.[2] (R. Vol. V at 685–90, Mem. of Law Supp. Mot. J. Pleadings) Plaintiffs filed a partial motion for summary judgment contending that the ESA Statute violated the Home Rule Amendment. (R. Vol. III at 448, Pls.' Mot. Summ. J.)

On May 4, 2020, after hearing oral argument on all the parties' dispositive motions (R. Vol. X–XII, XIV–XV, 4/29/20 Hearing Transcript), the Chancery Court issued its memorandum and order granting Plaintiffs' Motion for Summary Judgment on their Home Rule Amendment claim, denying in part Parents' Joint Motion for Judgment on the Pleadings as to the same claim, and dismissing the Metropolitan Nashville Board of Education as a party for lack of standing. (R. Vol. VIII at 1097, Metro Mem. and Order) In its order, the Chancery Court enjoined further implementation of the ESA Statute and took under advisement the parties' remaining arguments on Plaintiffs' Equal Protection and Education Clause claims, pending the outcome of this appeal. (R. Vol. VIII at 1127, Metro Mem. and Order)

To expedite the appellate process, the Chancery Court *sua sponte* granted all Defendants permission to appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The court found that "this is a matter appropriate for interlocutory and expedited appellate consideration. It is a matter of significant public interest that is extremely time sensitive . . . ." (R. Vol. VIII at 1126, Metro Mem. and

[2] The State-Defendants and the Greater Praise Intervenor-Defendants also filed dispositive motions. (R. Vol. III at 415, State-Defendants' Mot. Dismiss; R. Vol. III at 386, Greater Praise Intervenor-Defendants' Mot. Dismiss)

Order) On May 6, 2020, Parents applied for interlocutory review in the Tennessee Court of Appeals under Rule 9 of the Tennessee Rules of Appellate Procedure. *See* Int.-Defs.' TRAP 9 Application (filed May 6, 2020). The Plaintiffs responded to the Rule 9 application on May 18, 2020. *See* Pls.' Resp. in Opp. to State and Int.-Defs.' TRAP 9 Applications (filed May 18, 2020).

The Court of Appeals granted Parents' application for interlocutory review on May 19, 2020, along with the applications of State-Defendants and the Greater Praise Intervenor-Defendants, and declined to stay the Chancery Court's ruling. On August 5, 2020, the Court of Appeals heard oral argument on the interlocutory appeal. On September 29, 2020, the Court of Appeals affirmed.

Parents now ask this Court to reverse and hold that, under the text of the Home Rule Amendment, the ESA Statute is not "applicable to [Plaintiffs] either in [their] governmental or . . . proprietary capacity[.]" Tenn. Const. art. XI, § 9, para. 2.

STATEMENT OF FACTS

While the opinion of the Court of Appeals correctly states the general nature of the case, it fails to address a number of facts.

I. The ESA Statute Creates ESAs to Aid Children Assigned to the State's Worst-Performing School Districts.

The ESA Statute benefits Tennessee children assigned to underperforming school districts that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1). The General Assembly enacted the ESA Statute to create education savings accounts ("ESAs").[3] A student's eligibility for an ESA depends on how poorly a school district ("LEA")[4] is performing.

The statute authorizes ESAs for low- and middle-income[5] children who are assigned to Tennessee's worst-performing school districts. *Id.* § 49-6-2602(3)(C). For those children, the statute lets families opt to

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[3] The statute also creates school improvement grants to help improve schools across Tennessee. It "establishe[s] a school improvement fund" that disburses annual grants "to be used for school improvement." *Id.* § 49-6-2605(b)(2)(A). School improvement grants are prioritized for school districts with ESA students during the first three years, *id.*, and extend to school districts statewide after year three., *id.* § 49-6-2605(b)(2)(B).

[4] Parents use "school district" and "LEA" interchangeably in this brief. Local Education Agencies or LEAs are defined as "any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

[5] The ESA Statute requires an eligible student to be "a member of a household with an annual income . . . that does not exceed twice the federal income eligibility guidelines for free lunch." Tenn. Code Ann. § 49-6-2602(3)(D).

receive their education benefits *directly* using funds deposited into an ESA, rather than *indirectly* by attending their assigned public school. *Id.* § 49-6-2605. The funds deposited in an ESA account equal the amount the child is entitled to under Tennessee's Basic Education Program ("BEP Statute"). Parents may use ESA funds to pay for a wide array of eligible educational expenses for their child, including tuition, textbooks, and tutoring. *Id.* § 49-6-2603(a)(4)(A)–(L).

As mentioned, whether ESA funds are available to a family turn on their child's assigned school district's performance, as measured by the state's accountability system. *Id.* § 49-6-2602(3)(C)(i)(a). The ESA Statute authorizes ESAs only when a child's assigned school district has: (1) ten or more schools flagged as "priority schools" in 2015 *and* 2018 (the two most recent evaluation years prior to passage of the ESA Statute), Tenn. Code Ann. § 49-1-602 ("Priority Schools List"); and (2) ten or more schools among the bottom ten percent (10%) of schools in overall achievement in 2017 under Tenn. Code Ann. § 49-1-602(b)(3)—a statutorily required determination that takes place one year prior to a "priority schools" evaluation ("Bottom 10% List"). On top of authorizing ESAs for low- and middle-income children assigned to school districts that landed on both the Priority Schools List and Bottom 10% List, the ESA Statute also extends ESAs to children zoned to attend a school in the Achievement School District ("ASD") as of May 24, 2019. *Id.* § 49-6-2602(3)(C)(ii).

II. The ESA Statute Is a Direct Benefit to Tennesseans Like Parents—Who Intervened to Defend Educational Choice.

Parents intervened in this case to defend an educational option that allows them to pick a school that meets their child's needs. Tennessee families with children assigned to underperforming school districts are the intended beneficiaries of the ESA Statute. And, as explained below, Parents here are precisely the kind of beneficiaries that the General Assembly had in mind when it enacted the ESA Statute.

Each Parent is of modest means and has a child whose public school is failing them. At A. Maceo Walker Middle School[6] in Shelby County, for example, the children of Parent Natu Bah are not progressing academically in an environment that has utterly "deteriorated." (R. Vol. VIII at 1140, Bah Aff. ¶ 6) Her older son has been "repeatedly verbally and emotionally abused" and "told to go back to Africa where he came from." (R. Vol. VIII at 1140–41, Bah Aff. ¶ 7) At Macon-Hall Elementary School, Parent Builguissa Diallo has seen her daughter's reading ability regress since enrolling. She reads worse now than she did when she completed pre-K. (R. Vol. VIII at 1148, Diallo Aff. ¶ 6) Parent Star-Mandolyn Brumfield fears sending her son back to an "unstable and overcrowded environment" where he "regularly encounters violence." (R. Vol. VIII at 1146, Brumfield Aff. ¶¶ 8–9) And Parent Bria Davis has already seen the effects of the poorly performing public schools that both

[6] A mere 17.4% of students at this public school are at or above grade level. *See* A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ., https://reportcard.tnk12.gov/schools/792-2740/achievement (last visited Nov. 25, 2020).

her children attend. After being bullied, her daughter concluded that violence was the way to survive and began doing things like stealing lunches. (R. Vol. VIII at 1144, Davis Aff. ¶ 9) Her son has become hostile toward learning and mimics bad behavior because he sees that it is tolerated in school. (R. Vol. VIII at 1145, Davis Aff. ¶ 12) Parents' children, and hundreds of children like them, desperately need the educational lifeline that the ESA Statute can provide.

SUMMARY OF ARGUMENT

The Court of Appeals' opinion is unprecedented and reflects a radical departure from Tennessee law. It re-writes Article XI, Section 9 of the Tennessee Constitution to extinguish the ESA Statute, with the result that low- and middle-income Tennessee children like those of Parents lose a direct educational benefit from the State. This Court should reverse and render judgment in favor of Parents. There are three distinct arguments for overruling the Court of Appeals' ruling.

First, this Court should reverse because the Court of Appeals' striking down of the ESA Statute rests on a novel theory that has no foundation in the Tennessee Constitution's text or history. That text shows that the Home Rule Amendment concerns only counties and municipalities, not school districts. And although the ESA Statute applies only to school districts, the Court of Appeals held that it applies to the county Plaintiffs because the statute has "fiscal effects" on them. In other words, the Court of Appeals held that if a law has any fiscal effects on a county, then that law is "applicable" to a county "in its governmental or its proprietary capacity[,]" Tenn. Const. art. XI, § 9, and requires local approval. This Court should reverse because this "fiscal

effects" rationale—invented by Plaintiffs and embraced by the Court of Appeals—flouts both the Amendment's text and the original purpose for amending Article XI, Section 9 in 1953.

Second, the Court of Appeal's "fiscal effects" analysis violates longstanding precedent. Upholding that analysis would upend this Court's decision in *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979), which the Court of Appeals failed to address or cite at all. It would also require overruling *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959), in which this Court rejected a Home Rule Amendment challenge that sought to stifle the expansion of a special school district. Both cases involved laws that had obvious fiscal effects on the challenging party. But those fiscal effects made neither of the laws the plaintiffs challenged in those cases "applicable" to the challenging party in its "governmental or . . . proprietary capacity[.]" Tenn. Const. art. XI, § 9, para. 2. Indeed, the term "fiscal effects" appears not once in this Court's (or any Tennessee appellate court's) jurisprudence on the Home Rule Amendment. Yet it is central to the ruling below, which marked the first time that a court has invoked Article XI, Section 9 to extinguish Tennesseans' direct benefits.

Third, the Court of Appeals' expansive interpretation of the Home Rule Amendment required it to ignore Plaintiffs' charters—a result that runs afoul of both Article XI, Section 9 and black-letter law requiring courts to enforce county charter provisions. Plaintiffs' charters—and the limits they impose—matter because the Home Rule Amendment itself makes clear that charters "provide for [a county's] governmental and proprietary powers, duties, and functions[.]" Tenn. Const. art. XI, § 9,

para. 5. And language in Metro and Shelby County's charters bar them from controlling education, through either the school districts located in the county or county boards of education. Yet the Court of Appeals gave no effect to these limitations in Plaintiffs' charters, again relying on the ESA Statute's "fiscal effects." This was error: If a county's charter prohibits the county from controlling a school district, then a statute creating educational options for children assigned to that school district cannot be "applicable" to the county in its "governmental or its proprietary capacity." Tenn. Const. art. XI, § 9, para. 2. Plaintiffs' charters prove fatal to their claim under the Home Rule Amendment. This Court should enforce them.

STANDARD OF REVIEW

The issue raised here is a question of law subject to de novo review, and the Court owes no presumption of correctness to the lower court's decision. *See Seals v. H & F, Inc.*, 301 S.W.3d 237, 241 (Tenn. 2010) ("Our scope of review for questions of law is de novo."); *accord* Court of Appeals Opinion, No. M2020-00683-COA-R9-CV, Sept. 29, 2020 ("Slip Op.") at 4. This standard applies to both issues of statutory and constitutional interpretation. "Issues of statutory construction are reviewed de novo with no presumption of correctness attaching to the rulings of the court below." *Hayes v. Gibson Cnty.*, 288 S.W.3d 334, 337 (Tenn. 2009). "Issues of constitutional interpretation are questions of law, which [courts] review de novo without any presumption of correctness given to the legal conclusions of the courts below." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

ARGUMENT

The Court of Appeals judicially rewrote the text of Article XI, Section 9 to drastically expand the scope of the Home Rule Amendment. The ruling below extinguishes the ESA Statute, which applies to *school districts*, based on a first-of-its kind theory invoking the indirect "fiscal effects" the statute has on *counties*. Due to these effects, it incorrectly held that the ESA Statute was "applicable" to Plaintiffs Shelby County and Metro in their "governmental or . . . proprietary capacity," Tenn. Const. art. XI, § 9, para. 2, and thus required local approval. (Slip Op. at 11–12.)

In Part I, Parents show how the appellate court's rationale for expanding the scope of the Home Rule Amendment irreconcilably conflicts with the Amendment's text, original purpose, and history. In Part II, Parents explain how the Court of Appeals' "fiscal effects" rationale cannot be squared with this Court's jurisprudence and adopting it would require overruling longstanding precedent. Lastly, in Part III, Parents demonstrate how the Court of Appeals' expansive interpretation of the Amendment ignores limits on government power in Plaintiffs' own charters—limits that prohibit Plaintiffs' control of local education.

At the outset, Parents note that a plaintiff must satisfy three separate inquiries before local approval would be required under the Amendment. First, a plaintiff must show that the challenged law is "private or local in form or effect." Tenn. Const. art. XI, § 9, para. 2. Second, they must show that the challenged law applies only to a "particular county or municipality." *Id*. And third, they must demonstrate that the law is "applicable [to a county or municipality]

either in its governmental or its proprietary capacity." *Id*. Failing to satisfy any one of the three steps is fatal to Plaintiffs' claim under Article XI, Section 9. Parents' brief focuses on the Home Rule Amendment's third inquiry, a constitutional requirement Plaintiffs cannot hope to meet.

I. Invoking the "Fiscal Effects" of a Challenged Law Does Not Bring It Within the Scope of the Home Rule Amendment.

The clearest path to reversal is to reject the Court of Appeals' "fiscal effects" rationale. The appellate court's opinion did not analyze the Amendment's third inquiry by applying it to the text of the ESA Statute. (*See* Slip Op. at 11.) Instead, after invoking the "fiscal effects" of the ESA Statute to satisfy standing, (Slip Op. at 4–7), the Court of Appeals reached for its earlier "fiscal effects" analysis when addressing the merits to satisfy the Home Rule Amendment's third inquiry. (Slip Op. 11, noting "we have already found that the ESA Act is . . . applicable to Davidson and Shelby counties in their governmental capacities[.]") But prevailing on the merits of a Home Rule Amendment claim requires more than establishing standing.[7] The Amendment's third inquiry is a constitutional requirement, and it confines the Amendment's scope. *See* Tenn. Const. art. XI, § 9, para. 2.

As Parents show below, the Court of Appeals' "fiscal effects" rationale for extending the Home Rule Amendment to the ESA Statute incorrectly equates "fiscal effects" with the text of the Amendment,

[7] The State-Defendants and Greater Praise Intervenor-Defendants both raise standing arguments. Though Parents did not raise similar arguments below (consistent with the order granting Parents intervention), they do not concede that Plaintiffs have standing.

which requires that a law be "applicable [to a county] either in its governmental or its proprietary capacity." As a result, the appellate court's interpretation of the Amendment directly conflicts with the Amendment's text, *see* Part I.A., and its original purpose, *see* Part I.B.

A. The ruling below cannot be squared with the plain text of the Home Rule Amendment.

The text of Article XI, Section 9, paragraph 2 is unambiguous. Its plain text requires local approval only if a challenged law is:

> "[P]rivate or local in form or effect *applicable* to a particular county or municipality either *in its governmental or its proprietary capacity* . . . ."

Tenn. Const. art. XI, § 9, para. 2 (emphases added). The Court of Appeals' "fiscal effects" theory, however, essentially rewrites the Home Rule Amendment's plain text to read:

> "[P]rivate or local in form or effect ~~*applicable to*~~ **having fiscal effects on** a particular county or municipality ~~*either in its governmental or its proprietary capacity*~~ **in any capacity** . . . ."

In other words, the Court of Appeals' opinion fully embraces Plaintiffs' invitation to re-write Article XI, Section 9. (*See* Appellees' Br. at 56) ("[I]f an act *affects* a county *in any capacity*, then the Home Rule Amendment is at play.") (emphasis added).

The text of Article XI, Section 9 cannot be squared with the novel interpretation of the Home Rule Amendment that the appellate court used to extinguish the ESA Statute. The Amendment's framers used "effect" at the beginning of the text under the first inquiry—whether a challenged law is "local in form or effect," Tenn. Const. art. XI, § 9, which

means that they were well aware how to use that expansive term. But they intentionally chose *not* to use it in the third inquiry. They did not write, "having fiscal effects upon a particular county or municipality in *any* capacity," but instead wrote "applicable to a particular county or municipality either in its governmental or its proprietary capacity." *Id.* Thus, the plain text shows that the framers narrowed the scope of the Home Rule Amendment using the third inquiry, which confirms a law is not "applicable" to a county based merely on its fiscal effects.

What's more, if the Home Rule Amendment's framers intended indirect "fiscal effects" to be sufficient to trigger the Amendment's local approval requirement, they certainly knew how to do so. *See* Tenn. Const. art. II, § 24 ("No law of general application *shall impose increased expenditure requirements on cities or counties* unless the General Assembly shall provide that the state share in the cost."). The lack of any similar express language in the Home Rule Amendment suggests that its authors intended something else.

Next, Parents show how the Home Rule Amendment's purpose and history both confirm that the framers added the third inquiry in order to restrict, not expand, the scope of laws that require local approval.

B. The Court of Appeals' expansive interpretation of the Home Rule Amendment directly conflicts with the Amendment's purpose and history.

The purpose and history of the Home Rule Amendment supports its plain textual meaning. This Court interprets the Tennessee Constitution

through an originalist lens, as it has for over 160 years.[8] The framers of the Amendment intended its third inquiry to narrow the category of laws that require local approval—and exclude attempts to trigger the Amendment's local-approval requirement merely because a law affects a county, fiscally or otherwise.

The history of the Home Rule Amendment undermines the Court of Appeals' expansive interpretation of the local-approval requirement. The purpose for amending[9] Article XI, Section 9 by adding paragraphs 2 through 9 was to address the issue of home rule and the problem of

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[8] One of the earliest known instances arose in the 1858 case *State v. Cloksey*. 37 Tenn. (5 Sneed) 482, 486 (Tenn. 1858) ("[W]e suppose it is admissible to refer" to a constitutional convention journal to "ascertain[] the sense in which particular words or phrases may have been used in the constitution."). But it was not until the twentieth century that the Court began constructing an originalist methodology. *See State ex rel. Chesnutt v. Phillips*, 21 S.W.2d 4, 5 (Tenn. 1929) ("It is our opinion that the purpose of the constitutional provision can best and only be served and enforced by giving to its terms their ordinary and inherent meaning."). The Court strengthened its originalist methodology further in the 1956 case *Shelby County v. Hale*. 292 S.W.2d 745, 748 (Tenn. 1956) ("If there should be doubt . . . it is the first obligation of the Court to go to the proceedings of the Constitutional Convention which adopted this provision and see from these proceedings what the framers of this resolution intended it to mean."). And in 2014, the Court provided a compilation of its originalist framework in *Hooker v. Haslam*. 437 S.W.3d 409, 426 (Tenn. 2014) (providing list of originalist canons).

[9] Article XI, Section 9 contained only its opening paragraph before it was amended in 1953, which empowers the "Legislature . . . to vest such powers in the Courts of Justice, with regard to private and local affairs, as may be expedient." Tenn. Const. art. XI, § 9, para. 1.

legislation aimed at *one* county or city.[10] Below, Parents first address the motivating purpose behind amending Article XI, Section 9 in 1953, and next explain *why* the third inquiry was added: to narrow the category of laws that could trigger local approval.

First, the delegates of the Tennessee Constitutional Convention of 1953 added two amendments to Article XI, Section 9. The first amendment, which ultimately became paragraphs three through nine of Section 9, allowed municipalities to choose to adopt their own charters. The second amendment, which became paragraph two, consists of two parts: the first prohibited incumbent local officials from being removed or having their salaries cut by a "special, local or private act." Tenn. Const. art. XI, § 9, para. 2. The second is the three-part inquiry that determines whether local approval is required and that governs the analysis in this case. *Id.*

The history of Article XI, Section 9's amendment in 1953 lends no support for the idea that it requires local approval based on the ESA Statute's "fiscal effects" on counties. Delegates amended Article XI, Section 9 in 1953 to address "ripper bills [which] remove certain officials from public office[;] others change salaries, upward or downward, [and] abolish certain offices" to reward or punish political allies and opponents

[10] Victor C. Hobday, "An Analysis of the 1953 Tennessee Home Rule Amendment" (2nd Ed.), Univ. of Tennessee Municipal Technical Advisory Service (May 1976), at 5, *available at* https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1296&context=utk_mtaspubs.

of local legislators.[11] The history provides specific examples of the evils the delegates sought to remedy through the amendments, none of which support the Court of Appeals' rationale for applying the Home Rule Amendment to extinguish Tennesseans' direct education benefits. *See, e.g.*, *Journal of 1953* at 911 (citing acts by General Assembly repealing Nashville's charter, assigning powers of mayor to police chief, and giving raises to local government employees); *see also id.* at 1041 (citing acts by General Assembly amending Knoxville's charter 113 times including increasing local officials' salaries). The ESA Statute resembles none of the historical examples that served as the impetus for amending Article XI, Section 9.

Second, the Home Rule Amendment's history also confirms that the delegates sought to *narrow* the category of laws that could trigger local approval. The delegates accomplished this by insisting that a challenged law be "applicable to a particular county . . . in its governmental or its proprietary capacity." Tenn. Const. art. XI, § 9, para. 2. By contrast, the ruling below *expands* the category of laws subject to local approval under Article XI, Section 9 by invoking the indirect "fiscal effects" of the ESA Statute on a county, by way of that county's association to the school district actually subject to the ESA Statute. As explained next, avoiding such an absurd result is the precise reason for adding the third inquiry.

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[11] TENNESSEE CONSTITUTIONAL CONVENTION JOURNAL OF 1953 (hereinafter "*Journal of 1953*") at 937, *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015069624966&view=1up&seq=7.

The Court of Appeals below recognized that "[t]he final language of what would become the second paragraph of article XI, section 9 was presented by Delegate Lewis Pope[.]" (Slip Op. at 10, citing *Journal of 1953* at 1121.) Delegate Pope served as Chair of the Committee on Editing, which "made one change, inserting the words, 'applicable to a particular county or municipality, either in its governmental or its proprietary capacity.'" *Id.* But what is missing from the Court of Appeals' opinion is *why* the committee created the Amendment's third inquiry by making that one change. The answer is found in a letter sent to Delegate Pope from Delegate Miller—an integral member of the Home Rule Committee, but not a member of the Editing Committee.

That letter shows that the Editing Committee (at Delegate Miller's suggestion) added the Amendment's third inquiry to *narrowly circumscribe* the universe of laws that could trigger local approval. Delegate Miller's letter to Delegate Pope dated July 11, 1953 reveals the purpose of the Home Rule Amendment's third inquiry:

> It occurs to me that we should define private acts as being those which affect the governmental or proprietary powers, duties and functions of a county or municipality or the form, structure or organization of their government*, rather than to say any private act "affecting" any county or municipality*.

Letter from Del. William E. Miller to Del. Lewis Pope (July 11, 1953), at 1 ¶ 2 (App. 0013)[12] (emphasis added). In other words, laws that are

[12] Courts may take judicial notice of official government documents. *Hanover v. Boyd*, 121 S.W.2d 120, 121 (Tenn. 1938). Parents ask the Court to take notice of this official government document found in their Appendix ("App."), a record from the Constitutional Convention of 1953

"applicable to a particular county or municipality, either in its governmental or its proprietary capacity," Tenn. Const. art. XI, § 9, are laws that act upon the form, structure, or organization of a county government or municipality. By contrast, the ESA Statute deals not with the powers or form of a county government—it provides Tennessee children with a direct education benefit.

The Miller-Pope letter also contains an example to illustrate how the third inquiry was intended to confine the operation of Article XI, Section 9. The example strongly suggests that laws with *effects* on a county—fiscal or otherwise—*do not* trigger the Home Rule Amendment:

> . . . I am thinking about the case where, for example, a private act might authorize a city to extend its water lines out into a county. If we simply used the expression "affecting" any county or municipality, or if we said "any private act", [sic] this might require that the extension of the city water lines be approved not only by the city council but by the County Court as well. *By confining the language* to any act *concerning the powers* of a municipality or county *or the form of government*, this possibility is avoided.

Miller-Pope Letter , *supra*, at 1–2 ¶ 4 (App. 0013–14) (emphasis added). If Delegates Miller and Pope did not believe that the Amendment applied in the hypothetical, where the entry of water lines into a county would directly affect that county, it is hard to imagine they or the other framers could have intended the Amendment to apply to a law based on indirect fiscal effects a county may experience due to its connections to a school district. This Court should give full effect to the framers' attempts at

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certified from the State Library and Archives, which was closed due to COVID-19 prior to the Chancery Court hearing.

"confining the language" of the Home Rule Amendment by rejecting the Court of Appeal's unwarranted expansion of its scope. *Id*.

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The text of a constitutional provision must always be the primary guide to its meaning, and that text must be approached "in a principled way that takes into account the history, structure, and underlying values of the document." *Martin v. Beer Bd. For City of Dickson*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995). A review of that text, the historical documents and the constitutional convention proceedings that animate the original purpose for amending Article XI, Section 9 directly undermines the Court of Appeals' expansive interpretation of the Home Rule Amendment. For that reason, this Court should reverse.

II. The Court of Appeals' Use of "Fiscal Effects" to Expand the Scope of the Home Rule Amendment Cannot Be Reconciled With This Court's Jurisprudence.

Invoking the "fiscal effects" of a challenged law to expand the scope of the Home Rule Amendment is forbidden by this Court's jurisprudence. The Court of Appeals' rationale cannot be squared with cases in which this Court reviewed and rejected challenges to laws with obvious fiscal effects, none of which considered the challenged law's fiscal effects as part of the Home Rule Amendment analysis. These two cases further demonstrate that mere "fiscal effects" do not satisfy the Amendment's third inquiry—rather, a challenged law must be "applicable to a county . . . in its governmental or its proprietary capacity[.]" Tenn. Const. art. XI, § 9, para. 2.

The first of these two cases is *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979). In that case, the City of Chattanooga challenged legislation ratifying the creation of a hospital district to which the City of Chattanooga and Hamilton County were required to transfer ownership of real property in the form of entire hospitals. *Id.; see also* 1976 Tenn. Priv. Acts ch. 297, as amended by 1977 Tenn. Priv. Acts ch. 125 (App. 0003). This obviously had a "fiscal effect" on the allocation of both the City's and the County's public health resources. *See id.* Indeed, the City of Chattanooga argued that because the challenged law "affects the City as well as the County," but required approval only from the county's legislative body, it violated the Home Rule Amendment. *Id.* at 328. But this Court disagreed. It pointed specifically to why the Amendment required local approval from the county, *but not* the city. It explained that the challenged law empowered the hospital district to act "on behalf of the County"—thus providing "an obvious basis" for requiring approval by Hamilton County under the Amendment. *Id.* By contrast, although the law requiring the transfer of real property had obvious fiscal effects on the City of Chattanooga, it was not applicable to the City in its governmental or proprietary capacity. *Id.* The Court thus reversed the intermediate court and lifted the stay blocking the transfer of real property to the hospital district. *Id.* at 329.

Chattanooga-Hamilton County Hospital Authority illustrates why a law that only has "fiscal effects" on a county fails to be applicable to that entity in its governmental or proprietary capacity. *Id.* at 324–28. It

is not enough for a law to affect a city's or county's finances and priorities—it must act upon their governmental powers, their authority to govern. Here, the ESA Statute does not require school districts to act "on behalf of" Shelby County or Metro. Instead, it merely provides low- and middle-income students in those school districts with additional educational options. Just like the City of Chattanooga, Plaintiffs have failed to establish how those options mean that the statute applies to them in a "governmental or . . . proprietary capacity[.]" Tenn. Const. art. XI, § 9, para. 2.

Chattanooga-Hamilton County Hospital Authority also undermines another aspect of the ruling below. The Court of Appeals relied on Plaintiffs' "partnerships" with school districts to establish that the ESA Statute reaches Plaintiffs by association, and thus causes "fiscal effects." (Slip Op. at 8–9) (relying on Plaintiffs' "partnerships" with LEAs). But if applicability-by-association was the standard (i.e., if a law could trigger local approval under the Amendment because that law was "applicable" to a challenging party, but only because it has a relationship with the entity actually subject to the law), then the City of Chattanooga's relationship with Hamilton County would have brought the law challenged there within the scope of the Amendment. But this Court declared that it did not. Simply, *Chattanooga-Hamilton County Hospital Authority* is fatal to the expansive rationale expounded below—that the Amendment allows Plaintiff counties to extinguish the ESA Statute based on mere fiscal effects. The Court of Appeals made no attempt to distinguish this case.

Second, and also fatal to the Court of Appeals' "fiscal effects" rationale, is *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959), a case this Court decided only a few years after the Home Rule Amendment's ratification. In *Perritt*, this Court rejected an attempt to block a law that expanded a special school district within Carroll County because, like the ESA Statute, that law did not require local approval. *Id.* If Plaintiffs were correct that a law's fiscal effects on a county's priorities and budgets is enough to trigger the Home Rule Amendment, then the Amendment would have required local approval in *Perritt*—but it did not.

Indeed, *Perritt* would come out the other way had it been litigated under the Court of Appeals' "fiscal effects" rationale, since a special school district impacts the financial resources of the county in which it is located.[13] *See* Tenn. Ann. Code § 49-3-1008(a) (counties must "share with special school district systems" the proceeds from the sale of bonds, notes, and other debt obligations issued by counties "for school purposes."); *see also id.* § 9-21-129. And the expansion of a special school district within a county would clearly expand those fiscal effects. But this Court's holding in *Perritt* shows that this fact was irrelevant to the issue of whether the law was "applicable" to the county "in its governmental or its proprietary capacity." Tenn. Const. art. XI, § 9, para. 2. Accordingly, this Court never even mentioned it.

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[13] In Tennessee, "[s]pecial school districts . . . are partially funded by county governments[.]" Report of the Tenn. Advisory Comm'n on Intergovernmental Relations: Tenn. Sch. Syst. Budgets Authority & Accountability for Funding Education & Operating Schools at 7 (Jan. 2015), https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2015-january/2015Tab%203SchoolBudget.pdf.

Perritt shows the infirmity of the appellate court's (incorrect) understanding of the Home Rule Amendment. Were it correct, this Court would have held that the law was applicable to Carroll County in its governmental or proprietary capacity—and thus invalid because the law did not require local approval. But *Perritt*'s contrary holding shows the way forward here: If the Home Rule Amendment is not triggered when legislation expands a special school district within a county, then it must not be triggered when legislation expands educational options for children assigned to a school district within a county.

In its ruling below, the appellate court tried to distinguish *Perritt* because it involves special school districts as opposed to the county school districts here. (Slip Op. at 5.) It lists the various ways that special school districts and county school districts differ. *Id.* But none of those differences should matter under the logic of the Court of Appeals' "fiscal effects" rationale. After all, both county school districts and special school districts *are alike* in terms of their fiscal effects on counties. As explained above, special school districts, like county school districts, are partially funded by counties. By statute, counties must share with special school districts the proceeds from bonds and issued debt. Yet despite the obvious similarities between counties and special school districts like the one at issue in *Perritt*, the Court of Appeals' opinion does not mention them, nor the fiscal effects they cause. It distinguishes *Perritt* by concluding that "the counties in which a special school district is located have virtually no responsibilities for them." *Id.* But because special school districts *do*

have direct fiscal effects on county budgets, the Court of Appeals' attempt to distinguish *Perritt* falls flat.[14]

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The Home Rule Amendment's command that laws be "applicable" to a city or county "in its governmental or its proprietary capacity," serves to limit its scope. *See* Tenn. Const. art. XI, § 9, para. 2. By contrast, the Court of Appeals' "fiscal effects" rationale has no limiting principle. If the "fiscal effects" of a law mattered under the Home Rule Amendment, then the above cases should have come out in favor of the challenging party. But they did not. And for good reason: accepting the Court of Appeals' expansive rationale would mean that virtually every local law that the General Assembly passes would be "applicable" to a county in its

[14] That *Perritt* concerns special school districts makes no difference for another reason: neither county school districts nor special school districts are "municipalities" for purposes of the Home Rule Amendment. The distinguishing characteristic of the counties and municipalities that the Amendment contemplates is the ability to raise taxes, which neither special school districts nor county school districts possess. And in both the pre- and post-Home Rule Amendment eras, school districts were not thought of as municipal corporations. *Compare Fountain City Sanitary Dist. v. Knox Cnty. Election Comm'n*, 308 S.W.2d 482, 483 (1957) ("These statutes [that] define the entity . . . thereby created a municipality or public corporation in perpetuity but without any power to levy or collect taxes for services authorized by this Act.") and *Perritt*, 325 S.W.2d 233, 234 (1959) ("[W]hile the public school district is a public corporation, yet it was not a municipal corporation in the sense that it can be authorized to impose taxes[.]") *with Kee v. Parks*, 283 S.W. 751, 752 (Tenn. 1926) ("[The act] delegates the taxing power to the school district, which . . . was not a municipality.") and *Quinn v. Hester*, 186 S.W. 459, 460 (Tenn. 1916). Simply, *Perritt* is fatal to Plaintiffs' claim.

"governmental or its proprietary capacity," Tenn. Const. art. XI, § 9, para. 2, because it would have a "fiscal effect" on the county. After all, it can be argued that every law—including laws that, like the ESA statute, provide direct state benefits to Tennesseans—has at least some minimal fiscal impact, no matter how attenuated, on every city and county in which it operates. But until the ruling below, no Tennessee court had ever struck down Tennesseans' direct state benefits under Article XI, Section 9.[15] The

[15] *See First Util. Dist. of Carter Cty. v. Clark*, 834 S.W.2d 283 (Tenn. 1992) (applying Amendment to law modifying county utility commissioner selection process); *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725 (Tenn. 1991) (refusing to apply Amendment to law modifying municipal service board nominations); *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544 (Tenn. 1985) (refusing to apply Amendment to law modifying special school district); *City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193 (Tenn. 1984) (refusing to apply Amendment to law modifying municipal court jurisdiction); *Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979) (applying Amendment to law establishing county hospital authority but not requiring local approval by city forced to transfer hospitals); *Leech v. Wayne Cty.*, 588 S.W.2d 270 (Tenn. 1979) (applying Amendment to law prohibiting two counties from transferring judicial functions to the county executive); *State ex rel. Maner v. Leech*, 588 S.W.2d 534 (Tenn. 1979) (refusing to apply Amendment to law establishing transition process for Knox County government); *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (refusing to apply Amendment to law modifying trial court officer salary for counties over a certain population); *Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975) (applying Amendment to law modifying Shelby County mayoral election process); *Metro. Gov't of Nashville & Davidson Cty. v. Reynolds*, 512 S.W.2d 6 (Tenn. 1974) (refusing to apply Amendment to law requiring metropolitan governments to fund discretionary primary elections); *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971) (refusing to apply Amendment to law requiring defendants in

term "fiscal effects" appears in not one opinion of this Court applying *any* provision of the Tennessee Constitution. As it has done before, this Court should avoid such an absurd consequence by sticking to the Constitution's plain text.

III. The Court of Appeals Gave No Effect to Plaintiffs' Charters—Limits on Their Governmental and Proprietary Powers That Prohibit Metro and Shelby County from Controlling Education.

The Court of Appeals' expansive "fiscal effects" rationale also required turning a blind eye to Plaintiffs' charters. The charters of both Metro and Shelby County confirm that their governmental and proprietary powers do not extend to controlling or interfering with their constituents' educational options. Nor do those powers extend to administering or otherwise controlling any school districts within them: "The provisions of this charter shall not apply to county school funds or to the county board of education, or the county superintendent of

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metropolitan courts to pay court costs); *Jones v. Haynes*, 424 S.W.2d 197 (Tenn. 1968) (refusing to apply Amendment to law prohibiting fireworks in Fentress County); *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967) (applying Amendment to law modifying county court jurisdiction); *State ex rel. Ross v. Fleming*, 364 S.W.2d 892 (Tenn. 1963) (applying Amendment to law modifying county attorney salary); *Durham v. Dismukes*, 333 S.W.2d 935 (Tenn. 1960) (applying Amendment to law modifying county judge salary); *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959) (refusing to apply Amendment to law modifying school district); *Fountain City Sanitary Dist. v. Knox Cty. Election Comm'n*, 308 S.W.2d 482 (Tenn. 1957) (refusing to apply Amendment to law modifying sanitary utility district); *State ex rel. Cheek v. Rollings*, 308 S.W.2d 393 (Tenn. 1957) (refusing to apply Amendment to law discontinuing a state court); *Shelby Cty. v. Hale*, 292 S.W.2d 745 (Tenn. 1956) (applying Amendment to law modifying county commissioner salary).

education." (TR Vol. VII, 970, Shelby Cty. Home Rule Charter art. VI, § 6.02(A)); *see also* (TR Vol. III, 439, Charter of the Metropolitan Government of Nashville and Davidson County § 9.01) (vesting control of education with the Metropolitan Board of Public Education). Giving no effect to the limits on power in a county's charter is incompatible with the Home Rule Amendment's third inquiry.

First, the ruling below pits the text of Article XI, Section 9 against itself. The Home Rule Amendment makes unambiguously clear that the reason a county adopts a charter is to "provide for its *governmental* and *proprietary* powers, duties, and functions." Tenn. Const. art. XI, § 9, para. 5 (emphases added). And to trigger local approval under the Home Rule Amendment, a law must be "applicable" to a county "in its *governmental* or its *proprietary* capacity." *Id.*, para. 2 (emphases added). The Court of Appeals gave no effect to Plaintiffs' charters; rather, it invoked the "fiscal effects" of the ESA Statute once more to sidestep the limits Plaintiffs' charters impose on their governmental and proprietary powers. (Slip Op. at 6.) But if the charters do not empower the counties to exercise control or authority over education or school districts as part of their "governmental and proprietary powers, duties, and functions," a mere "fiscal effect" does not make those charters' express limitations disappear. If Plaintiffs cannot control or administer the school district, a law creating educational options for children assigned to the school district simply cannot be held to be "applicable" to a county in its "governmental or . . . proprietary capacity." Tenn. Const. art. XI, § 9.

The Court of Appeals' failure to give effect to Plaintiffs' charters is also wrong for a second reason. "Fundamental in [Tennessee] law is that

[counties] may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes." *Allmand v. Pavletic*, 292 S.W.3d 618, 625 (Tenn. 2009) (quoting *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988)). "When a municipality fails to act within its charter . . . the action is *ultra vires* and void or voidable." *Baird*, 756 S.W.2d at 241 (citing *Crocker v. Town of Manchester*, 178 Tenn. 67, 156 S.W.2d 383, 384 (1941)). There is no "fiscal effects" exception to this clear command.

Charters limit the scope of Plaintiffs' governmental and proprietary powers. *See* Tenn. Const. art. XI, § 9, para. 5. This Court's precedents require Tennessee courts to enforce those limits.

CONCLUSION

The ESA Statute does not violate the Home Rule Amendment. It is a direct benefit to parents and children that fully complies with the Tennessee Constitution. To extinguish the ESA statute, the Court of Appeals invoked its supposed "fiscal effects" on counties and, in so doing, dramatically and unjustifiably expanded the Amendment's scope. That expansive rationale conflicts with the Home Rule Amendment's plain text and the original purpose of adding the Amendment to Article XI, Section 9. Nor can it be reconciled with the decades of case law interpreting the Home Rule Amendment. Indeed, embracing the Court of Appeals' rationale would require overruling longstanding precedent and ignoring Plaintiffs' charters—which limit their governmental and proprietary powers by prohibiting them from controlling education. For these reasons, the Court should reverse and enter judgment for Parents.

Dated: November 25, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in Tenn. Sup. Ct. R. 46, § 3.02. My word processing system indicates that the sections of the brief subject to the 15,000 word limitation contain 8,239 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2020, a true and exact copy of the foregoing was served via the court's electronic filing system and via electronic mail to:

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