IN THE SUPREME COURT FOR THE STATE OF TENNESSEE AT NASHVILLE

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

v.

TENNESSEE DEPARTMENT OF EDUCATION et al.,
Defendants / Petitioners,

and

NATU BAH et al.,
Intervenor-Defendants / Petitioners.

CONSOLIDATED APPEALS PENDING BEFORE THE TENNESSEE COURT OF APPEALS

CASE NO. M2020-00682-COA-R9-CV
and
CASE NO. M2020-00683-COA-R9-CV

PARENT INTERVENOR-DEFENDANTS' / PETITIONERS' JOINT MOTION TO ASSUME JURISDICTION PURSUANT TO TENNESSEE CODE ANN. § 16-3-201(d) AND TENN. SUP. CT. R. 48

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QUESTIONS PRESENTED FOR REVIEW

Plaintiffs, two county governments and a local board of education, sued the Tennessee Department of Education and a host of state officials (the "State-Defendants"), alleging that the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601–2612 ("ESA Pilot Program" or "Pilot Program"), is unconstitutional. (App., Vol. 1, Exh. 2, Metro Compl. at 34) The ESA Pilot Program offers low- and middle-income parents in three underperforming school districts the opportunity to send their children to a private school that better fits their needs. Because the Pilot Program provides benefits to residents assigned to these school districts, Plaintiffs allege that it violates article XI, section 9 of the Tennessee Constitution (the "Home Rule Amendment").[1]

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[1] Plaintiffs also allege that the Pilot Program violates the Tennessee Constitution's Equal Protection Clauses (article I, section 8 and article XI, section 8), and Education Clause (article XI, section 12). (App., Vol. 1 Exh. 2, Metro Compl. at 34) Although these claims were included in the parties' dispositive motions filed below, the Chancery Court's decision only addressed Plaintiffs' Home Rule claim, taking under advisement arguments as to the remaining claims pending the outcome of this appeal. (App., Vol. 1., Exh. 1, Metro Mem. and Order at 31) As these claims present only questions of law requiring no further factual development, this Court may *sua sponte* assume jurisdiction over the remaining claims—and thus expediently resolve this entire case—pursuant to Tenn. Code Ann. § 16-3-201(d)(3). Assuming jurisdiction of the entirety of Metro's case would also help avoid needless, expensive,

Intervenor-Defendants/Petitioners Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents"),[2] all of whom have children eligible to participate in the ESA Pilot Program, present two questions for this Court's immediate review:

I. Does the ESA Pilot Program violate the Home Rule Amendment?

II. Should this Court stay the Chancery Court's injunction during the pendency of this appeal?

STATEMENT OF FACTS

The ESA Pilot Program is open to eligible students who are zoned to attend a school in any of the three designated local education agencies (LEAs) that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1). An LEA is "any county school system, city school system, special school district, unified

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and protracted litigation. *See* Rule 9, Tenn. R. App. P. A second case challenging the ESA Pilot Program under the Home Rule Amendment (among other claims) is also currently pending in the Chancery Court, but that case is effectively stayed pending appellate review in this case. (App., Vol. 3, Exh. 20, *McEwen* Order at 1260)

[2] The Chancery Court also permitted an additional set of Intervenor-Defendants to intervene in the case and defend the ESA Pilot Program: Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Greater Praise Intervenor-Defendants"). (App., Vol. 1, Exh. 3, Order Granting Intervention at 77)

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).

Plaintiffs are the Metropolitan Government of Nashville and Davidson County ("Metro"), Shelby County Government ("Shelby"), and Metropolitan Nashville Board of Public Education ("Metro Board"). Plaintiffs asserted in several counts that the Pilot Program violated provisions of the Tennessee Constitution (the Home Rule Amendment, Equal Protection Clauses, and the Education Clause). (App., Vol. 1, Exh. 2, Metro Compl. at 34)

The Chancery Court permitted Parents to intervene in the case to defend the constitutionality of the Pilot Program. (App., Vol. 1, Exh. 3, Order Granting Intervention at 77) Without the ESA Pilot Program, Parents will be forced to re-enroll their children in their current assigned public schools where they face verbal and emotional abuse, (App., Vol. 3, Exh. 9, Bah Aff. Supp. Mot. to Stay ¶¶ 7–8, 14–15 at 980; Davis Aff. Supp. Mot. to Stay ¶¶ 7–9 at 971), regularly encounter violence (App., Vol. 3, Exh. 9, Brumfield Aff. Supp. Mot. to Stay ¶¶ 7–9 at 984), and where their academics will continue to suffer.[3] (App., Vol. 3, Exh. 9, Bah Aff. Supp. Mot. to Stay, ¶¶4–6 at 980; Diallo Aff. Supp. Mot. to Stay, ¶¶ 4–6 at 988)

[3] For example, Intervenor-Defendant Natu Bah's sons are assigned to A. Maceo Walker Middle School, where a mere 17.4% of students are at or above grade level. *See* A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ., at https://reportcard.tnk12.gov/districts/792/schools/2740/page/SchoolAchievement.

Parents moved for judgment on the pleadings pursuant to Tennessee Rule of Civil Procedure 12.03. (App., Vol. 1, Exh. 6, Mot. J. Pleadings at 248) Parents argued, *inter alia*, that the Pilot Program did not violate the Home Rule Amendment. (*Id.*) Plaintiffs filed a partial motion for summary judgment contending that the Pilot Program violated the Home Rule Amendment as a matter of law. (App., Vol. 2, Exh. 7, Pls.' Mot. Summ. J. at 315)

On May 4, 2020, after hearing oral argument (App., Vol. 3, Exh. 8, 4/29/20 Hearing Transcript at 628), the Chancery Court entered an order in *Metro Government v. Tennessee Department of Education*, No. 20-0143-II, granting Plaintiffs' Motion for Summary Judgment on Plaintiffs' Home Rule claim (App., Vol. 1, Exh. 1, Metro Mem. and Order at 30) and denying Parents' Joint Motion for Judgment on the Pleadings and dismissing the same.[4] (*Id.*) The Chancery Court's order enjoined further implementation of the Pilot Program. (*Id.*) The Chancery Court took under advisement the parties' remaining arguments regarding Plaintiffs'

[4] The Chancery Court's order also denied the State-Defendants' Motion to Dismiss Count I of the Complaint (App., Vol. 1, Exh. 4, State's MTD at 81); denied Greater Praise Intervenor-Defendants' Motion to Dismiss Count I of the Complaint (App., Vol. 1, Exh. 5, Greater Praise MTD at 170); and took Defendants' and Intervenor-Defendants' arguments as to Plaintiffs' remaining claims under advisement pending appellate review of Plaintiffs' Home Rule claim. (App., Vol. 1, Exh.1, Metro Mem. and Order at 31)

Equal Protection and Education Clause claims pending the outcome of this appeal. (*Id*.)

To expedite the appellate process, the Chancery Court *sua sponte* granted Defendants permission to appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Specifically, 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 . . . ." (App., Vol. 1, Exh. 1, Metro Mem. and Order at 30.)

On May 5, 2020, Parents, along with the other defendants, jointly moved the Chancery Court to stay its ruling pursuant to Rule 62.03 of the Tennessee Rules of Civil Procedure. (App., Vol. 3, Exh. 9, Jt. Mot. Stay at 969; Exh. 10, Vol. 3, Carney Aff. at 998)

On May 6, 2020, Parents filed an application for interlocutory review in the Tennessee Court of Appeals pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. (App., Vol. 3, Exh. 15, TRAP 9 Application at 1147) The Metro Plaintiffs filed their response to the Rule 9 application on May 18, 2020. (App., Vol. 3, Exh. 16, Metro TRAP 9 Resp. at 1163) The State and the Greater Praise Intervenors also filed applications for interlocutory appeal pursuant to Rule 9. (App., Vol. 4, Exh. 21, State Defendants' TRAP 9 at 1262; App., Vol. 4, Exh. 22, Greater Praise Intervenor-Defendants' TRAP 9 at 1276)

On May 7, 2020, the Chancery Court held a hearing on the joint motion for stay of its injunction and denied the relief requested. (App., Vol. 3, Exh. 13, Tr. Trans. 66:13–15 at 1124; App., Vol. 3, Exh. 14, Stay Order at 1143)

On May 13, 2020, Parents filed an emergency motion to stay the Chancery Court's injunction in the Tennessee Court of Appeals pursuant to Rule 7 of the Tennessee Rules of Appellate Procedure and Rule 62.08 of the Tennessee Rules of Civil Procedure. (App., Vol. 3, Exh. 17, Rule 7 Mot. at 1190) On May 14, 2020, Parents filed an amended emergency motion to stay the Chancery Court's injunction. (App., Vol. 3, Exh. 18, Am. Rule 7 Mot. at 1210) The Metro Plaintiffs filed their response to the Rule 7 motion on May 18, 2020. (App., Vol. 3, Exh. 19, Metro Rule 7 Resp. at 1230) The State Defendants and Greater Praise Intervenors similarly filed motions to stay pursuant to Rule 7 of the Tennessee Rules of Appellate Procedure. (App., Vol. 4, Exh. 23, State Defendants' TRAP 7 at 1295; App., Vol. 4, Exh. 24, Greater Praise Intervenors' TRAP 7 at 1313)

On May 19, 2020, the Court of Appeals entered an order granting the applications for permission to appeal and denying the motions to stay the Chancery Court's Order enjoining the Pilot Program. (App., Vol. 4, Exh. 25, COA Order at 1322). The Court also consolidated the Parents' separately docketed case with the State Defendants' and Greater Praise Intervenors' case. (*Id.*)

REASONS FOR ASSUMING JURISDICTION

This Court should grant Parents' motion and assume jurisdiction over this case. Tennessee Code Annotated § 16-3-201(d) permits this Court to assume jurisdiction in a case of "unusual public importance" in which there is a "special need for expedited decision." The statute also requires that the case involve one of several significant legal issues, including "[i]ssues of constitutional law." Tenn. Code Ann. § 16-3-201(d)(2)(C). This case meets both requirements. In Part A, Parents

explain why this case presents an issue of unusual public importance that requires expedited consideration. For the reasons stated in Part A and in their amended Rule 7 motion below (App., Vol. 3, Exh. 18, Am. Rule 7 Mot. at 1210), this Court should also stay the Chancery Court's injunction pending appeal. In Part B, Parents explain why this case involves an important issue of constitutional law.

A. The fate of the ESA Pilot Program affects thousands of Tennesseans and their families.

It is difficult to imagine a more important and time-sensitive public issue. Absent this Court's expedited consideration, thousands of Tennessee families will be forced to scrap their plans to obtain a better education for their children for the 2020–21 school year—now just months away—leaving their children trapped in chronically failing schools for another year.

The thousands of affected families include those like Parents in this case. Parents are low-income residents whose children qualify for the ESA Pilot Program because they attend some of the poorest performing schools in the state. The Pilot Program was enacted so that people like Parents could have "additional educational options [aside from the] LEAs that have consistently and historically had the lowest performing schools." Tenn. Code Ann. § 49-6-2611(a)(1). For Parents and many others like them, the Pilot Program is a much-needed lifeline. But if the Chancery Court's Order stands and the Pilot Program is halted—if Parents' children are forced to stay in failing schools for another year—they will not receive an education that meets their needs, endangering the future that they deserve.

For example, Parent Natu Bah's children attend A. Maceo Walker Middle School, where the academic environment has utterly "deteriorated." (App., Vol. 3, Exh. 9, Bah Aff. Supp. Mot. to Stay ¶ 6 at 980) Her older son has been "repeatedly verbally and emotionally abused" and "told to go back to Africa where he came from." (*Id.* at ¶ 7) This bullying "is negatively affecting his learning environment, hurting his emotional well-being, and his ability to progress academically." (*Id.*) Her older son's academic progress has also been hindered as he sees the abuse inflicted on his brother. (*Id.* at ¶ 8)

These experiences are not limited to Natu Bah's children. At Macon-Hall Elementary School, Builguissa Diallo has seen her daughter's reading ability regress since enrolling in the school. She now reads at a lower level than she did when she completed preschool. (App., Vol. 3, Exh. 9, Diallo Aff. Supp. Mot. to Stay ¶ 6 at 988)

Star-Mandolyn Brumfield fears sending her son back to an "unstable and overcrowded environment" where he "regularly encounters violence." (App., Vol. 3, Exh. 9, Brumfield Aff. Supp. Mot. to Stay ¶¶ 8–9 at 986) She "dread[s] the prospect of sending him back to public school" and testified that she "would be left with no option" but to homeschool him in 2020-21 if the Pilot Program remains enjoined. (App., Vol. 3, Exh. 9, Brumfield Aff. Supp. Mot. Stay ¶¶ 7–9 at 987) But homeschooling her son will render him ineligible for the Pilot Program unless he re-enrolls in his assigned public school—where violent behavior permeates the educational setting on a regular basis—and doing that would have "permanent lasting and negative effects on him." (*Id.*)

Bria Davis also sees the negative effects that poorly performing public schools have on her children. After being bullied at school, her daughter concluded that theft was the way to survive and began stealing others' lunches. (App., Vol. 3, Exh. 9, Davis Aff. Supp. Mot. to Stay ¶ 9 at 984) Her son has become hostile toward learning and mimics bad behavior because he sees that it is tolerated by school officials. (*Id*. at ¶ 12)

Parents' experiences are not isolated or unusual. For Parents and thousands of other Tennessee families, the Pilot Program is their only hope to escape another year trapped in a failing school. For those families, another year trapped in a failing school is another year lost. It means another year of falling further behind academically. It means another year of enduring verbal abuse and being educated in an unstable atmosphere. It means another year of adopting bad habits and antisocial behavior that will threaten their futures. It means losing a year that they will never get back.

The Metro Plaintiffs suggest in their appellate responses that Parents have a duty to mitigate their harm by seeking out *other* public schools, even where their existing, residentially assigned schools have utterly failed to provide safe, conducive learning environments. (App., Vol. 3, Exh. 16, Metro TRAP 9 Resp. at 1178; App., Vol. 3, Exh. 19 Metro TRAP 7 Resp. at 1252) When a student's assigned public school fails to adequately educate even 20% of the students enrolled there, n.3 *infra*, why should they be forced to put their children on *waitlists* for adequately performing schools and pray that space opens up to permit their children to escape their current dangerous environments? (App., Vol. 3, Exh. 16,

Metro TRAP 9 Resp. at 1178; App., Vol. 3, Exh. 19 Metro TRAP 7 Resp. at 1252 (admitting that the application period to enter the lottery for better performing schools has closed and that Parents would have to put their children on waitlists)) Parents cannot simply log onto a computer or walk down the street and enroll their children in better, safer public schools. What the Metro Plaintiffs urge is not genuine parental choice. It is government rationing of good schools.

Expedited consideration by this Court, including a stay of the Chancery Court's injunction, is the only way for the Pilot Program to roll out this year as planned. As the Chancery Court stated in its Order, this is "a matter of significant public interest that is extremely time sensitive." (App., Vol. 1, Exh. 1, Metro Mem. and Order at 30) The futures of Parents' children hang in the balance. This Court should therefore stay the Chancery Court's injunction and grant Parents' motion and assume jurisdiction of this case.

B. The Chancery Court's novel interpretation of the Home Rule Amendment poses significant constitutional concerns that need immediate resolution.

The Home Rule Amendment restricts the General Assembly from enacting a law that is "applicable to a particular county or municipality" in "its governmental or its proprietary capacity," absent voter approval. Tenn. Const. art. XI, § 9. The Chancery Court applied the Home Rule Amendment to invalidate the Pilot Program. But the Pilot Program, in sharp contrast to the Amendment's text, applies to neither counties nor municipalities, but rather LEAs. And because the Pilot Program does not apply to municipalities or counties, it of course does not apply to them in

their governmental or proprietary capacities. In fact, the Pilot Program requires counties and municipalities to do *nothing*.

The Chancery Court's ruling therefore presents a radical and heretofore unprecedented expansion of the Home Rule Amendment in two ways. It is the first time that (1) the provision has ever been held to apply to LEAs, which are neither counties nor municipalities,[5] and (2) the provision has ever been applied to legislation that, on its face, does not require a county or municipality to do anything—not in any way, much less in its governmental or proprietary capacity. The Chancery Court's application of the Amendment strips away the Amendment's limiting text and ignores decades of this Court's jurisprudence.

This Court, for example, previously rejected an attempt to apply the Home Rule Amendment to school districts. *See Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959) (holding that the Amendment "is not broad enough to cover special school districts"). And virtually every other state court to have addressed the question in the context of their state's respective home-rule provision has concluded that those provisions do not apply to school districts. *See, e.g.*, *State ex rel. Harbach v. Mayor and Common Council of the Cty. of Milwaukee*, 206 N.W. 210, 213 (Wis. 1926) (holding that Home Rule Amendment "imposes no limitation upon the power of the Legislature to deal with the subject of education"); *accord Barth v. Sch. Dist. of Philadelphia*, 143 A.2d 909, 911 (Pa. 1958) ("A

[5] As explained above, "Local Education Agency" unambiguously refers to any "public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

School District is a creature or agency of the Legislature and has only the powers that are granted by statute . . . ."); *Gurba v. Cmty. High Sch. Dist. No. 155*, 18 N.E.3d 149, 156 (Ill. App. Ct. 2014) (explaining that a school district has "the somewhat lesser status of a quasi-municipality, acting for the state as its administrative arm overseeing the establishment and implementation of free schools"). Echoing the same in *Perritt*, this Court determined that school districts like LEAs are "mere instrumentalit[ies] of the State created exclusively for public purposes subject to unlimited control of the Legislature." *Perritt*, 325 S.W.2d at 234.

Even if the Chancery Court was correct in concluding that the Pilot Program was "applicable" to Plaintiffs-Respondents counties within the meaning of the Amendment—which it was not—it still egregiously erred in ruling that it applied to them "in [their] governmental or . . . proprietary capacity."[6] Tenn. Const. art. XI, § 9. This Court looks to the

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[6] Notably, the charters for Plaintiffs-Respondents Shelby and Metro prohibit the counties from controlling public education in local school districts. *See* Shelby Cty. Home Rule Charter Art. VI, § 6.02(A), at 34, https://www.shelbycountytn.gov/DocumentCenter/View/475/Shelby-County-Charter?bidId=; Charter of the Metropolitan Government of Nashville and Davidson County § 9.01, https://library.municode.com/tn/metro_government_of_nashville_and_davidson_county/codes/charter?nodeId=THCH_PTICHMEGONADACOTE_ART9PUSC. Both charters reflect what this Court has repeatedly concluded: "that public education in Tennessee rests upon the solid foundation of State authority to the exclusion of county and municipal government." *Cagle v. McCanless*, 285

face of the challenged law to determine whether it applies to a county or municipality in a governmental or proprietary capacity. *See, e.g.*, *Chattanooga-Hamilton Cty. Hosp. Auth. v. Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979) (holding that a challenged law fell within the scope of the Home Rule Amendment because the law, on its face, concerned a hospital district "acting on behalf of the County" (quotation marks omitted)). The Chancery Court, by contrast, held that the Pilot Program fell within the scope of the Home Rule Amendment *even though* the law, on its face, requires counties to do nothing—much less act in a governmental or proprietary way.

If left unchecked, this radical departure from the Home Rule Amendment's text and nearly 70 years of precedent would upend the General Assembly's ability to empower Tennesseans to exercise their pre-existing and fundamental constitutional right to direct their children's education. Only this Court can definitively and permanently correct the Chancery Court's error. This Court should therefore grant Parents' motion and assume jurisdiction of this case.

RELIEF SOUGHT

Parents respectfully ask this Court to assume jurisdiction over these consolidate appeals pursuant to Tennessee Code Ann. § 16-3-201(d) and Tennessee Supreme Court Rule 48 and to set an expedited schedule

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S.W.2d 118, 122 (Tenn. 1955) (emphasis omitted); *see also State v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) ("[T]his Court has recognized for many years that education is a State function.").

for briefing and oral argument.[7] They also request that this Court consider assuming jurisdiction over the Plaintiffs' remaining claims still pending in the Chancery Court pursuant to Tennessee Code Ann. § 16-3-201(d)(3). (App., Vol. 1, Exh. 1, Metro Mem. and Order at 31)

Parents further respectfully ask this Court, in assuming jurisdiction, to stay the Chancery Court's injunction blocking further implementation of the Pilot Program while this appeal is pending for the reasons stated in their amended emergency motion to stay the Chancery Court's injunction. (App., Vol. 3, Exh. 18, Am. Rule 7 Mot. at 1210)

[7] In the alternative, if this Court decides that this motion should not be granted for any reason, Parents ask that the Court, on its own motion, assume jurisdiction of this case pursuant to Tennessee Code Ann. § 16-3-201(d)(3), as it is a case of compelling public interest.

DATED this 20th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2020, a true and exact copy of the foregoing **PARENT INTERVENOR-DEFENDANTS' / PETITIONERS' JOINT MOTION TO ASSUME JURISDICTION PURSUANT TO TENNESSEE CODE ANN. § 16-3-201(d) AND TENN. SUP. CT. R. 48** and its supporting **APPENDIX** was served via the court's electronic filing system and forwarded via first class, postage prepaid mail to:

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