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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 20-0143-II**
TENNESSEE DEPARTMENT OF EDUCATION, et al.,	)	
Defendants.	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	

MEMORANDUM AND ORDER

This case regards a challenge to the Tennessee Education Savings Account Pilot Program, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* ("the ESA Act"). The ESA Act was passed at the 2019 Session of the 111th Tennessee General Assembly as 2019 Public Acts, c. 506, § 1, and signed into law by Governor Bill Lee on May 24, 2019. The ESA Act establishes a program allowing a limited number of eligible students to directly receive the myDQGDVVRFLDWHG[SHQVHV3WK five year period, and funds are to be allocated to the participating districts for the first three years to replace the lost dollars that the State previously allocated to their public school systems, which are now redirected to private schools along with the participating students.

participating in the ESA Program need to make decisions about student enrollment on or about June 1, 2020.

Additionally, a group of Davidson and Shelby County parents and taxpayers filed a similar lawsuit, seeking the same and additional relief, on March 2, 2020. *McEwen, et al. v. Lee, et al.*, Davidson County Chancery Court Case no. 20-242-II ("the *McEwen* case"). The *McEwen* Case involves essentially the same State Defendants and Intervenor Defendants. The last status conference and motion hearing included both cases and motions pending in both cases. The *McEwen* Case Plaintiffs had filed a motion for a temporary injunction, seeking to enjoin the State Defendants from moving forward with the ESA Program for the 2020-2021 school year. The Court is entering an Order in that case simultaneously with the issuance of this Memorandum and Order.

THE PENDING MOTIONS

The Court has pending before it the following motions in this case:

- Plaintiffs' Motion for Summary Judgment on Count I of the Complaint, filed March 27, 2020
- Greater Praise Christian Academy Intervenor Defendants' Motion to Dismiss, filed March 6, 2020;
- State Defendants' Motion to Dismiss, filed March 11, 2020;
- Bah, Diallo, Davis and Brumfield Intervenor Defendants' Motion for Judgment on the Pleadings, filed April 15, 2020; and
- State Defendants' Motion to Consolidate with the *McEwen* Case, filed April 15, 2020.

their district school systems were excluded. This legislative history not dispositive to the Court's ruling, but it is relevant and appropriate for consideration in the context of this constitutional challenge.

THE ESA ACT'S APPLICABILITY

In addition to making the ESA Program available to students who are eligible to attend school in Tennessee for the first time, i.e., newly age eligible for public school or a new resident of the state, the ESA Act defines eligible student as current public school students who:

> (i) [Are] zoned to attend a school in an LEA[3] excluding the achievement school district (ASD)[4], with ten (10) or more schools:
>
> (*a*) Identified as priority schools in 2015 as defined by the state's accountability system pursuant to § 49-1-602;
>
> (*b*) Among the bottom ten percent (10%) of schools identified by the department in 2017 in accordance with § 49-1-602(b);
>
> (*c*) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602;

Tenn. Code Ann. § 49-6-2602(3)(C)(i).

In 2015, the only LEAs with ten or more schools on the priority list were Metropolitan Nashville Public Schools ("MNPS") in Nashville, Shelby County Schools ("SCS") in Memphis, and the ASD. In 2017, the only LEAs with ten or more schools on the 2017 bottom 10% list were

[3] "LEA" is a "local education agency" as defined at Tenn. Code Ann. § 49-1-302(2), which includes the state's statutory scheme for the maintenance and operation of the public school system. The statute defines LEA the same as "school system," "public school system," "local school system," "school district," or "local school district" and "means 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."

MNPS, SCS, Hamilton County Schools, and the ASD. In 2018, the only LEAs with ten or more schools on the priority list were MNPS, SCS, and the ASD.

The General Assembly's stated purpose for the ESA Act was to improve educational opportunities for children in the state who reside in LEAs that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1).

Legislative History of the ESA Act

House Bill No. 939

House Majority Leader William Lamberth filed House Bill No. 939 on February 7, 2019, as a "caption bill" to be held on the House desk. The bill proceeded to the House Curriculum, Testing, & Innovation Subcommittee on March 19, 2019, after Rep. Mark White of Memphis filed Amendment No. 1 (HA0188). Amendment No. 1 sought to place several restrictions on eligibility for an ESA, including to define "eligible student" in Section 49-6-2602(3)(C) to be a student "zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools in accordance with § 49-1-602(b)(3)." Under that definition, based upon the most recent (2017) performance numbers, eligible students would have come from Davidson, Hamilton, Knox, Madison, and Shelby Counties, or the ASD.[5]

The House Curriculum, Testing, & Innovation Subcommittee recommended the bill for passage if amended as set forth in Amendment No. 1, as did the other House committees and

[5] The State Defendants question the reliability of the 2017 Bottom 10% List relied upon by the Plaintiffs. The Tennessee Department of Education is required to track school performance and has established an accountability system, set out in Tenn. Code Ann. § 49-1-601, *et seq.*, for schools. This obligation includes identifying focus schools, or those in the bottom 10% of schools in overall achievement. Tenn. Code Ann. § 49-1-602(b). Tenn. R. Civ. P. 56.03 obligates the State Defendants to agree a proposed fact is undisputed, agree it is undisputed for purposes of summary judgment only, or demonstrate it is disputed with specific citations to the record. The Court does not take the State Defendants' objection to the reference to the Plaintiffs' copy of the 2017 Bottom 10% List, based on the best evidence rule in T.R.E. 902, seriously given that it has the statutory obligation to make public identification of focus schools on an annual basis and has not substantively challenged the factual assertion of what that list shows for 2017, that is, that the identified counties and the ASD are the only LEAs with three or more schools on the list.

subcommittees considering it at the time.[6] In the House Finance, Ways, & Means Committee hearing on April 17, 2019, then-Deputy House Speaker Matthew Hill of Jonesborough referred to the bill as a "four-county ESA pilot program," which he explained was a pilot because it "limits it down to . . . just four counties" and "because we're putting it in statute, it will stay in those four counties unless the legislature were to ever choose in the future to revisit the issue."[7]

Amendment No. 2 was introduced a few days later, on April 23, 2019, and changed the definition of "eligible student" to be a student who, among other requirements "[i]s zoned to attend a school in an LEA that had three (3) or more schools identified as priority schools in 2015 in accordance with § 49-1-602(b) and that had three (3) or more schools among the bottom ten percent (10%) of schools as identified by the department in 2017 in accordance with § 49-1-602(b)(3)." The LEAs with three or more priority schools in 2015 were the same as those included through Amendment No. 1, but excluded Madison County. The LEAs with three or more schools among the bottom 10% of schools in 2017 were the same, but included Madison County. Thus, the addition of this eligibility criteria effectively eliminated Madison County from the list, leaving it applicable to four counties and the ASD.

House Bill No. 939 received the minimum number of votes the Tennessee Constitution requires to pass legislation, with 50 ayes and 48 nays, on April 23, 2019. This passage came after the vote was held open for 40 minutes with the House deadlocked at 49 ayes and 49 nayes. Rep. Jason Zachary of Knoxville changed his vote from nay to aye to break the tie, later telling reporters on camera that he had received assurances from then-House Speaker Glen Casada that Knox

[6] Those were the House Education Committee; Government Operations Committee; Finance, Ways, & Means Subcommittee; and Finance, Ways, & Means Committee.

[7] This is confusing because, at the time, with Amendment 1 the proposed act would apply to five counties. Apparently Rep. Hill was referencing the leadership's intentions to further narrow the application of the proposed act to eliminate a county, as set out in Amendment 2.

County would be excluded from the Senate ver

three to ten the number of schools that had to be identified as priority schools in 2015 and 2018, and increased from three to ten the number of schools that had to be among the bottom 10% of schools in the state in 2017 (i.e., focus schools). This effectively removed Knox County and Hamilton County from the ESA Program because Hamilton County had five priority schools in 2015 and nine in 2018, and Knox County had four priority schools in 2015 and none in 2018. The new language also included within the definition of "eligible student" a student zoned to attend a school in the state's ASD on the act's effective date. All criteria for defining an "eligible student" in Amendment No. 5 were based on specific years; thus, the list of affected LEAs became static, as in the House version.

The Senate adopted House Bill No. 939, as amended, with 20 ayes and 13 nays, on April 25, 2019.

Conference Committee Report and Final Passage

When the Senate's version of the bill was transmitted to the House, the House non-concurred in the Senate's amendments to the bill. Both the Senate and the House remained firm in their positions. Therefore, on April 30, 2019, the House and Senate speakers appointed members to a conference committee to resolve the differences between the two bills. On May 1, 2019, the conference committee submitted its report to both chambers. The conference committee bill retained the definition of "eligible student" as adopted by the Senate, which limited the bill's application to Davidson and Shelb

County was excluded from the program. The language that's in this conference report here today does that. As a result, I'm going to be keeping my commitment and I will vote for this bill."

Both the House and Senate adopted the conference committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays. Governor Lee signed the ESA Act on May 24, 2019.

ESA Act Implementation

Ann. §§ 49-6-2605(g) and 49-6-2607. The ESA Act also allows for up to 6% of the annual ESA award to be retained for oversight and administration of the program, and allows for contracting with a non-profit organization to perform some or all of those services. Tenn. Code Ann. § 49-6-2605(h) & (i).

The ESA Program is limited to 5,000 students the first year, and increases by 2,500 students per year, for a five year maximum of 15,000 students. Tenn. Code Ann. § 49-6-2604(c). The ESA Act does not distribute the ESA fund availability between Davidson and Shelby counties, thus it is unknown until the program is implemented and students selected how many will come from each county and the amount of associated BEP funds that will be involved. *Id.* The parties dispute among them how the math will work and the significance of the impact on MNPS and SCS, with varying assertions about purported significant shortages and resulting windfalls. The Court makes no findings regarding those issues in this Memorandum and Order, and they remain for determination, if needed, at a later date.

The Plaintiffs

Metro was established by charter on April 1, 1963 as a municipal corporation consolidating the local government and corporate functions of the City of Nashville and Davidson County, pursuant to the 1957 law establishing such entities. Tenn. Code Ann. §§ 7-1-101, *et seq.*; Metro Charter. Relevant to this matter, as required by state law, the Metro Charter establishes the MNPS, the Metro School Board and the membership thereof. Metro Charter, Art. 9; Tenn. Code Ann. § 7-2-108(a)(18). It defines the powers and duties conferred upon the Metro Board therein. *Id.*

Shelby County Government was created by the Shelby County Charter, approved by the voters of Shelby County on August 2, 1984, and became effective September 1, 1986. Tenn. Code Ann. § 5-1-201, *et seq.*; Shelby County Charter.

"Constitutional Home Rule Charter" and empowers "the mayor, county commission, and elected county charter officers, except those powers reserved to the judiciary" with "all lawful powers." Shelby County Charter § 1.02. It "place[s] in the hands of the people of Shelby County the power to effectively operate its government without going to the state legislature in Nashville for changes." Shelby County Charter Intro. The Shelby County Charter explicitly prohibits its

As set out above, the Metro Charter expressly established the MNPS and the Metro School Board, while the Shelby County Charter expressly does not apply to the SCS or the Shelby County School Board. They both are established consistent with the obligations on Metro and Shelby County Government pursuant to Tenn. Code Ann. §§ 49-2-101 and 7-2-108.

LEGAL ANALYSIS

Summary Judgment Standard

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, which requires that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the nonmoving party's evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; 5\H Y :RPHQ¶V &DUH &HQWHU, 477 S.W.3d 235, 261 (Tenn. 2015); &ODVV 03//&

Federal courts construing Tennessee law have consistently found that the Metro School Board, as a subdivision of Metro, cannot itself sue or be sued because it was not granted that authority in the Metro Charter. *Wagner v. Haslam*, 112 F.Supp.3d 673, 698 (M.D.Tenn. 2015); *Blackman v. Metro Public Schools*, No. 3:14-1220, 2014 WL 4185219 (M.D.Tenn. Aug. 21, 2014); +DLQHV Y 0HWUR 6FKRROV, 32 S.Supp.2d 994 (M.D.Tenn. 1998). In all of these cases, Metro sought and obtained dismissal of the Metro School Board as a defendant because it is a political subdivision of Metro. There are two Tennessee cases -- *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706 (Tenn. 2001) and *Byrn v. Metropolitan Bd. of Public Educ.*, No. 01-A-019003CV00124, 1991 WL 7806 (Tenn. Ct. App. Jan. 30, 1991) – in which courts found that the local boards of education were proper party defendants. In both cases, however, the issues involved the enforcement of a contract the board was specifically authorized to enter based upon the express grant of powers by the General Assembly to schools boards in Tenn. Code. Ann. § 49-2-203.

In *Southern Constructors*, the school board contracted for construction of a building, and when a dispute arose, attempted to enforce the contractually-agreed-upon arbitration clause. The contractor claimed that the school board did not have the authority to arbitrate as a stand-alone entity. In finding otherwise, the Court interpreted the authority to enforce construction contracts to be inferred from Tenn. Code. Ann. § 49-2-203, and specifically subpart (a)(4), "which confers upon county school boards the authority to `[p]urchase all supplies, furniture, fixtures and material of every kind through the executive committee.'" 58 S.W.3d at 716. The Court justified inserting an unwritten right because "the General Assembly

In *Byrn*, a non-tenured teacher sued the Metro School Board for declaratory relief pursuant to his union contract, seeking a hearing before the school board about the decision not to renew his contract. The Metro School Board argued that it could not be a defendant because it did not have the capacity to be sued. 1991 WL 7806, at *2. The trial court agreed, dismissing the case. In overturning that decision, the Court of Appeals focused specifically upon the statutory authority conferred upon school boards to contract with their employees, as well as to recognize and bargain collectively with unions, the beneficiaries of which are teachers. *Id.* at *4 (citing Tenn. Code Ann. § 49

Article 11, Section 9 of the Tennessee Constitution, known as the Home Rule Amendment, was enacted in 1953 and reads, in pertinent part, as follows:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and *any 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 by 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.*

Tenn. Const. art. XI, § 9 (emphasis added). It requires the State, if the General Assembly passes an applicable private act, to obtain approval from the local legislative body or its electorate. Tenn. Code Ann. § 8-3-201 specifies that the Secretary of State be notified of such a private act and transmit a certified copy to the affected jurisdiction. The Tennessee Code then details the timing and effect of the

> declared objects and purposes of the corporation, - not simply convenient, but indispensable.

Id. at 106. Scholars have translated this to mean "a state's authority over its local governments `is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to require.'" *Id.* (quoting Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1111-12, note 4 (1980)). Dillon's Rule was discussed at length by the Supreme Court in its 2001 decision in *Southern Constructors.*

The Defendants ask the Court to construe the Home Rule Amendment as inapplicable to

The Court also does not read *City of Humboldt v. McKnight* to stand for the proposition that the Home Rule Amendment is not applicable to LEAs. Case No. M2002-02639-COA-R3-CV, 2005 WL 2051284 (Tenn. Ct. App. Feb. 21, 2006). This was an equal protection case regarding the validity of a special school district and whether the county in which it resided had an obligation to maintain a public school system. The decision is not a commentary on whether a local school system is or can be a county or municipality for application of the Home Rule Act.

These cases separately, and as a whole, do not support the Defendants' position that a county or municipal school system cannot bring a challenge under the Home Rule Amendment to a law affecting that school system.

The Defendants argue that the criteria for eligibility is neutral, and thus not locality specific – especially with the inclusion of the ASD. Further, they contend that education is a state, not local, responsibility and that the ESA Act is thus not "local" as that term is used in the Home Rule Amendment.

The Court has already analyzed the structure of the Tennessee education system, and the delegation of education responsibilities to local governments and boards of education by the General Assembly. Based on those concepts, the Court does not find education to be inherently non-local such that a law effecting it cannot be local in effect.

The Court is instructed to look at substance over form in determining whether the ESA Act is local in form *and* effect. *Board of Educ. of Shelby County,* 911 F.Supp.2d at 652; *Farris,* 528 S.W.2d at 551. This review may include a consideration of legislative history, but accords it limited w

371 (1971); *Metropolitan Gov't of Nashville and Davidson County v. Reynolds*, 512 S.W.2d 6, 9-10 (Tenn. 1974); *Bozeman v. Barker*, 571 S.W.2d 279, 280 (Tenn. 1978); *Frazer v. Carr*, 210 Tenn. 565, 360 S.W.2d 449 (1962)).

The State Defendants rely heavily on cases involving unsuccessful Home Rule Amendment challenges in which the subject statute's application could potentially broaden. For instance, in *Frazer*, the law specifying how metropolitan government charter commission members were selected only applied to counties in a certain population bracket. 360 S.W.2d 449. The only counties of that size *at that time* were Davidson, Hamilton, Knox and Shelby. *Id.* at 452. But because the law was "applicable to every county which falls within an admittedly reasonable classification," it did not violate the Home Rule Amendment. *Id.* In *Bozeman*, the law in question set minimum salaries for certain court officers in counties with populations of a certain size. 571 S.W.2d 279. The Court upheld the act as not violating the Home Rule Amendment because "[i]t presently applies to two populous counties. It can become applicable to many other counties depending on what population growth is reflected by any subsequent Federal Census." *Id.* at 282. Finally, in *Burson*, a law establishing uniform qualifications for civil service board members in counties over a certain size was unsuccessful because its limited current impact could broaden significantly as more counties grew in size and chose to have civil service systems. 816 S.W.2d at 729-730.

It is undisputed that the ESA Act, based upon the criteria for eligible students, can only *ever* apply to MNPS and SCS, because it is based upon classifications set in the past. In other words, performance data from 2015, 2017 and 2018 cannot change. Any improvements at MNPS

and SCS, or deterioration of systems in other parts of the state, will not change the fact that the ESA Act only applies to, and will continue to apply to, MNPS and SCS.[13]

Additionally, the legislative history of the General Assembly's consideration and passage of the ESA Act confirms

governments that fund them. They are truly in a partnership. The local government legislative bodies are elected to represent the people, including raising revenue and appropriating funds for local governmental purposes such as education. *Weaver*, 756 S.W.2d at 222.

Tennessee has a total of 95 counties. The ESA Act applies to, and can only ever apply to, two of those 95. In *Leech v. Wayne County*, the Supreme Court analyzed the Home Rule Amendment in relation to local election laws applicable to particular forms of local governments. 588 S.W.2d 270 (Tenn. 1979). In that instance, where the subject law would potentially affect two counties, the Court held that "[w]here . . . the General Assembly has made a permanent, general provision, applicable in nearly ninety of the counties, giving the local legislative bodies direction as to the method of election of their members, we do not think it could properly make different provisions in two of the counties." *Id.* at 274.

In *Burson*, although the challengers to the statute in question were unsuccessful in their Home Rule Amendment challenge, the Court applied the Home Rule Amendment analysis despite the fact three, and not one, county was affected by the law. 816 S.W.2d at 728-730; s*ee also*, *Bozeman*, 571 S.W.2d at 282.

Finally, as to this issue, the Court does not find the inclusion of the ASD as broadening the effect among municipalities or counties so as to defeat this prong of the challenge. The court in *City of Humboldt* found that a special school district was not the same as a municipality or county

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many counties or municipalities is too many for it to be considered a potential Home Rule Amendment violation, but the Court is confident that a law only affecting, and ever being able to affect, two counties or municipalities is potentially unconstitutional.

Involves Government or Proprietary Capacity

"`Education is a governmental function and in the exercise of that function the county acts in a governmental capacity.'" *Brentwood Liquors Corp. of Williamson County v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973) (quoting *Baker v. Milam*, 231 S.W.2d 381 (1950)). The Defendants argue that education is not a *local* government function, but rather one for the State based upon its constitutional mandate. As discussed at length in this opinion, the State has shared that responsibility with local governments and made education a governmental function of counties and/or mu

general criminal laws." *Id.* at 196. The Court understands *Dossett* to be specific to the State's authority over the courts, and particularly courts with criminal jurisdiction. This case is not applicable to locally operated school systems.

The Court finds that the State Defendants violated the Home Rule Amendment when they enacted the ESA Act because it is local in form and effect, not of general application but rather applicable and designed to be applicable to two particular counties, and involves matters of local government proprietary capacity. Metro and Shelby County Government's motion for summary judgment is granted and they are awarded a final judgment as to Count I of the complaint.

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Metro and Shelby County Government seek declaratory and injunctive relief pursuant to the Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101, *et seq.*, and Tenn. Code Ann. § 1-3-121, which creates a cause of action "for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action." The Court declares the ESA Act unconstitutional, unlawful, and unenforceable. The Court further orders a permanent injunction preventing state officials from implementing and enforcing the ESA Act. Quoting from the *Tennessee Small School Systems* case:

> With full recognition and respect … for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches. That because of limited capabilities and competences the courts might encounter great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action on the part of the Legislature or the executive is neither to be ignored on the one hand nor on the other to dictate judicial abstention in every case.

Bah, Diallo, Davis D Q G % U X P I L H O G , Q W H U Y H Q R U ' H I H Q G D Q W V ¶ Pleadings

In their motion for a judgment on the pleadings, these Intervenor Defendants ask the Court to dismiss Plaintiffs' claims and enter a judgment in their favor because the complaint fails to state a claim upon which relief can be granted. These Intervenor Defendants' motion to dismiss Count I regarding the Home Rule Amendment is denied. The Court is taking the remaining portion of the motion under advisement, declining to rule at this time pending further proceedings in this case based upon its grant of summary judgment, including declaratory and injunctive relief, on Count I.

PERMISSION GRANTED TO REQUEST INTERLOCUTORY APPEAL

Tenn. R. App. P. 9(a) sets forth the standards a trial court, and if applicable, the Court of Appeals, is to consider in considering a motion for interlocutory appeal. They are: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3)

Keith Neely
Jason Coleman
Braden H. Boucek
Arif Panju
Christopher M. Wood
Thomas H. Castelli