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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,	)	
vs.	)	Case No. 20-0143-II
	)	Chancellor Anne C. Martin, Chief Judge
TENNESSEE DEPARTMENT OF EDUCATION et al.,	)	Judge Tammy M. Harrington Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH et al.,	)	
Intervenor-Defendants.	)	**CONSOLIDATED**

ROXANNE McEWEN et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. 20-0242-II
	)	Chancellor Anne C. Martin, Chief Judge
BILL LEE, in his official capacity as Governor of the State of Tennessee et al.,	)	Judge Tammy M. Harrington Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH et al.,	)	
Intervenor-Defendants.	)	

GREATER PRAISE INTERVENOR-DEFENDANTS' MOTION TO STRIKE A PORTION OF THE McEWEN PLAINTIFFS' REPLY BRIEF AND EXHIBIT C

MOTION

Greater Praise Intervenors move to strike pages 9 – 13 of the McEwen Plaintiffs' reply brief and Exhibit C to the Wood Declaration which accompanies it (they would suggest striking all of Section II.B, but the penultimate paragraph bridging pages 13-14 is a reply to an argument advanced in a response brief and therefore not a new argument).

ARGUMENT

I. The McEwen Plaintiffs may not raise new arguments and offer new evidence in a reply brief.

It is a foundational rule of fundamental fairness that parties may not introduce new arguments and evidence in a reply brief. "It would be fundamentally unfair to permit an appellant to advance new arguments in the reply brief, as the appellee may not respond to a reply brief." *Douglas v. State*, No. W2014-00831-COA-R3-CV, 2015 Tenn. App. LEXIS 550, at *11 (Ct. App. July 14, 2015). Numerous decisions are in accord: "A reply brief is a response to the arguments of the appellee. It is not a vehicle for raising new issues." *Owens v. Owens*, 241 S.W.3d 478, 499 (Tenn. Ct. App. 2007). "A reply brief is limited in scope to a rebuttal of the argument advanced in the appellee's brief." *Denver Area Meat Cutters & Emp'rs Pension Plan v. Clayton*, 209 S.W.3d 584, 594 (Tenn. Ct. App. 2006).

This is precisely what the McEwen Plaintiffs have done in this instance. They have raised a new argument—that the framers of the Tennessee Constitution in 1978 had a particular intention for the education provision regarding public education and segregation. And they have adduced new evidence for it: hand-picked excerpts of 48 pages of a convention journal that is 973 pages in total, so perhaps five percent. The Defendants have no opportunity to respond to this new argument, no opportunity to critique this new evidence, and no time to dig through the other 900 pages of the convention journal or additional resources to find other language which supports a different interpretation. They do not make any citation to any page or point to which this evidence responds from the Defendants' briefs, nor could they—it all comes out of left field given the arguments made so far.

The McEwen Plaintiffs could and should have included all of this argumentation as to the legislative intent of the drafters of the provision in their opening brief, which would have allowed the Defendants time to read, research, and respond. They did not, and it is fundamentally unfair to allow them to truck all of this into consideration of the temporary injunction at this late hour. They can still raise these issues properly in a motion for summary judgment, but not at this point.

When a party files a reply brief containing new arguments not previously raised, the appropriate remedy is to strike it from the record. *Tiger Lily LLC v.*

United States HUD, No. 2:20-cv-2692-MSN-atc, 2020 U.S. Dist. LEXIS 243792, at *9-11 (W.D. Tenn. Oct. 26, 2020); *Butler v. Rue 21, Inc.*, No. 1:11-CV-09, 2011 U.S. Dist. LEXIS 25127, at *3-4 (E.D. Tenn. Mar. 11, 2011).

Some other authorities say that "[w]hen a new argument is raised in a reply brief, the proper procedure is to strike the reply or, alternatively, to allow the opposing party to file a surreply." *Holmes v. Sullinger*, 2019-Ohio-2653, ¶ 20 (Ct. App. 2019). However, in this instance, there is no time to file a surreply—the hearing is on Friday. Thus, striking these portions of the brief and they argument and evidence they embody is the only possible answer.

II. The McEwen Plaintiffs may not rely on inadmissible hearsay.

It is also an elemental rule of fundamental fairness that parties must lay a proper foundation for the evidence on which they rely. *Brown v. Daly*, 884 S.W.2d 121, 125 (Tenn. Ct. App. 1994) ("The party relying upon a document must still lay a foundation as to its relevancy, and have such properly admitted into evidence."). The McEwen Plaintiffs' brief includes a quotation from a column from Forbes.com written by the president of the Southern Education Foundation, Raymond Pierce. Reply Br. 10-11 (quoting Raymond Pierce, *The Racist History of "School Choice,"* Forbes.com (May 6, 2021)). They next quote from a report by a left-wing Washington, D.C. think tank. Reply Br. 11 (quoting Chris Ford et al., *The Racist Origins of Private School Vouchers*, Ctr. for Am. Progress (July 12, 2017)). Next

they quote from a book, *Overturning Brown: The Segregationist Legacy of the Modern School Choice Movement*, by Steve Suitts, whom google indicates is a left-wing cause lawyer.[1] Then they cite a student note from a law journal. Reply Br. 12. All of this material is used to lay out a theory of history regarding education policy in the South over the course of several decades.

Tennessee follows a stricter rule of evidence for learned treatises than federal courts: "Tennessee has never adopted Federal Rule of Evidence 803(18)." *Godbee v. Dimick*, 213 S.W.3d 865, 874 (Tenn. Ct. App. 2006). *Accord Garmon v. Cincinnati, Inc*., No. 02A01-9203-CV-00033, 1993 Tenn. App. LEXIS 390, at *5 (Ct. App. June 4, 1993) ("unlike the Federal Rules of Evidence, the Tennessee Rules of Evidence did not adopt the Federal counterpart that could have allowed the consideration of learned treatises.").

Instead, an advisory commission comment to Tennessee Rule of Evidence 803 provides, "Learned treatises . . . are not themselves admissible to prove the truth of their contents. No good reason exists to permit hearsay to be taken as true just because it is written in books." *See State v. McRee*, No. W2013-00194-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 254, at *31 (Crim. App. Mar. 21, 2014). The same rule is represented in another form in "Rule 618 of the Tennessee Rules of Evidence, which states that learned treatises may be used for impeachment

[1] Apparently he founded the Alabama chapter of the American Civil Liberties Union.

purposes, but not as substantive evidence." *Frakes v. Cardiology Consultants, P.C.*, Appeal No. 01-A-01-9702-CV-00069, 1997 Tenn. App. LEXIS 597, at *8 (Ct. App. Aug. 29, 1997).

Under the Tennessee Rules of Evidence, the correct answer is for the McEwen Plaintiffs to recruit Mr. Pierce, Mr. Ford, or Mr. Suitts, all of whom published their materials relatively recently and thus are presumably living, as expert witnesses. They can testify, be deposed and cross-examined, and rebuttal witnesses introduced, all for summary judgment. But the McEwen Plaintiffs may not build a record for this case relying on inadmissible expert non-testimony, which is essentially what they attempt to do in their brief.

Again, the appropriate response to inadmissible material is to strike it from the brief. *Story v. Meadows*, No. M2019-01011-COA-R3-CV, 2020 Tenn. App. LEXIS 591, at *34 n.3 (Ct. App. Dec. 22, 2020). The McEwen Plaintiffs did not ask the Court to take judicial notice of this material, and regardless, the Court should not do so, because it fails one of the essential prongs of the test: "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). The sources cited by the McEwen Plaintiffs are describing not so much facts as an interpretation of historical facts, and this interpretation is not one that can be easily verified or determined.

CONCLUSION

Much of the Plaintiffs' attack on the ESA Program in this motion for a temporary injunction is that things have been rushed. Apparently the McEwen Plaintiffs' brief-writing was equally rushed, because they discovered a whole new argument they wish they had included in their opening brief after further digging into the matter. But rules of fair play and due process do not permit parties to raise new arguments and introduce new evidence in reply briefs. They also do not permit parties to introduce new evidence that is inadmissible hearsay. The proper response is for this Court to strike pages 9 – 13 and Exhibit C.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be sent to the attorneys listed below via Davidson County Chancery Court E-filing R. 4.01 and TN S.Ct. R. 46A and via the electronic mail addresses below, by agreement of the parties, on this 3rd day of August, 2022.

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