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' MEMORANDUM OF LAW AND FACTS IN SUPPORT OF MOTIONS TO DISMISS THE COUNTIES' AND THE MCEWEN PLAINTIFFS' AMENDED COMPLAINTS

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INTRODUCTION

Greater Praise Intervenor-Defendants[1] file this Memorandum of Law and Facts in support of their Motions to Dismiss both the Counties'[2] and the McEwen Plaintiffs'[3] Amended Complaints. Since each of the legal theories pled in the Counties' Amended Complaint are also pled in the McEwen Plaintiffs', Greater Praise Intervenor-Defendants submit this single memorandum addressing Plaintiffs' allegations together.

Two years ago, the Plaintiffs presented this Court with their strongest claim: the Home Rule Amendment claim. This summer they lost. Having failed to persuade the Tennessee Supreme Court to impose their policy preferences on parents who disagree with them, the Plaintiffs now return to this Court asking for another chance to deny low-income children in Tennessee the educational opportunities they need. But this time, their arguments have no basis in Tennessee law. They amount to policy disagreements about who should be eligible for the Education Savings Account ("ESA") Pilot Program. Also, two years later, Plaintiffs still do not understand the simple funding mechanism of the program: that the money follows the child. Finally, Plaintiffs do not have standing to bring these claims, which are

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[1] "Greater Praise Intervenor-Defendants" are Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.

[2] The "Counties" are Metropolitan Government of Nashville and Davidson County and Shelby County Government.

[3] The "McEwen Plaintiffs" are Roxanne McEwen, David P. Bichell and Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young.

unlike the Home Rule Amendment, which explicitly mentioned "counties" in the text. The Counties attempt to assert interests that are actually held by school districts and individual students, and the McEwen Plaintiffs attempt to expand taxpayer standing and to assert complaints that could only be brought by those who are in the pilot program.

For all these and other reasons, this Court should grant Greater Praise Intervenor-Defendants' Motions to Dismiss and put this meritless ligation to bed once and for all.

FACTUAL BACKGROUND

A. The ESA Pilot Program

Over three years ago, in May 2019, the State of Tennessee enacted the Tennessee Education Savings Account Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601–2612. The pilot program is open to Kindergarten-12th grade students whose annual household income is less than or equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code Ann. § 49-6-2602(3).[4] Eligible students must have attended a

[4] The maximum eligible income is $47,606 for a household of two, and it increases with household size, Tenn. Dept. of Education ESA FAQ at 9, *available at* https://esa.tnedu.gov/wp-content/uploads/2022/07/ESA-FAQ-for-Participating-Families_22-23_v2-1.pdf (last visited July 31, 2022). *See Energy Automation Sys. v. Saxton*, 618 F. Supp. 2d 807, 810 n.1 (M.D. Tenn. 2009) ("A court may take judicial notice of the contents of an Internet website.") (citing *City of Monroe Emples. Ret. Sys. v. Bridgestone Corp.*, 387 F.3d 468, 472, n.1 (6th Cir. 2004)) (citing *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003)) ("a court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records . . . ").

Tennessee public school the prior school year, must be entering Kindergarten for the first time, must have recently moved to Tennessee, or must have received an ESA the prior year. Tenn. Code Ann. § 49-6-2602(3)(A).

The ESA provides each student with an individualized education savings account. Tenn. Code Ann. § 49-6-2605(a). The amount of the ESA will be "approximately $8,192" for the current school year and will automatically increase as the state increases education funding.[5] The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational programs, and college admission exams. Tenn. Code Ann. § 49-6-2603(a)(4). The McEwen Plaintiffs refer to an ESA a school voucher, McEwen Am. Compl. *passim*, but that is incorrect, both because a voucher can only be used for private-school tuition—while an ESA can be used for a variety of purposes—and because an ESA is an individualized account in which any unused funds roll over each year. Tenn. Code Ann. § 49-6-2603(l). After 12th grade, any accumulated ESA funds may be transferred into a college fund. Tenn. Code Ann. § 49-6-2603(g).

Funding for the ESA Pilot Program is built on the simple principle that the dollars follow the child. The ESA is funded with the student's per-pupil expenditure of state funds from the Kindergarten-12th grade funding formula—the Basic

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[5] Tennessee ESA Program website, *available at* https://esa.tnedu.gov/ (last visited July 31, 2022).

Education Program ("BEP") in 2022-2023 and the Tennessee Investment in Student Achievement ("TISA") in subsequent years—as well as the required minimum match in local funds. Tenn. Code Ann. § 49-6-2605(a).[6] The state and the county are paying the same amount for these children regardless of whether they decide to participate in the program. Therefore, from the Counties' perspective, their total appropriations to the school district "remain roughly the same." Counties' S. Ct. Brief 31.

From the school districts' perspective and that of their students, the ESA Pilot Program supports districts with three financial benefits that *increase* their per-pupil spending. First, the school districts get to keep "remainder funds" of roughly $6,000 or more for each student who participates in the program. Tenn. Code Ann. § 49-6-2605(a).[7] This occurs because the ESA amount, roughly $8,000, is less than the total amount of funding the districts receive for each student, which is roughly $15,000[8] for Metropolitan Nashville Public Schools ("MNPS") and a thousand dollars less for Shelby County Schools ("SCS").[9] Second, the program creates a

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[6] Technically, the Counties do not fund any part of the ESA because the local match does not go directly to the ESA but goes to the local school district. An equivalent amount is subtracted from the funds paid from the state to the local school district and is sent, instead, to the ESA. Tenn. Code Ann. § 49-6-2605(b).

[7] Tennessee Comptroller of the Treasury, Legislative Brief, *Understanding Public Chapter 506: Education Savings Accounts*, Table at Page 4 (District Per-Pupil Expenditures minus State Average Total State + Local BEP), *available at* https://comptroller.tn.gov/content/dam/cot/orea/advanced-search/2020/ESA2020Website.pdf (updated May 2020) (last visited July 31, 2022).

[8] $15,000 is the approximate total of "$11,050" in local funding plus "$3,791.62" in state funding. Counties' Am. Compl. ¶¶ 126, 129.

[9] The Counties do not plead the figures for SCS, but the Comptroller Legislative Brief shows a $900 difference in 2019.

"double counting payment" in the amount of the ESA for each student who participates in the program and sends those funds to participating school districts for three years. Tenn. Code Ann. § 49-6-2605(b)(2)(A). The Department of Education (the "Department") "shall" disburse these funds each year. *Id*. Third, at the end of three years, the school improvement fund disburses grants to support priority schools throughout the state, including the districts in which the program operates, which contain over 80% of the priority schools and presumably will receive a roughly equivalent amount of the funding. Tenn. Code Ann. § 49-6-2605(b)(2)(B)(ii).

The ESA experiment begins as a pilot program with caps on total students, geographic limitations, and a study on the effectiveness of the program. The program is capped at 5,000 students in year one; the cap then rises by 2,500 students per year until it reaches 15,000 students in year five. Tenn. Code Ann. § 49-6-2604(c). Additionally, an eligible student must reside in a neighborhood zoned to attend a school in the Achievement School District ("ASD") or reside in a school district with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code Ann. § 49-6-2602(3)(C). As applied, that means that the ESA Pilot Program will begin operations in the three school districts containing over 80% of the state's failing schools: the ASD, SCS, and MNPS. The statute provides the legislative rationale for beginning the pilot program in these districts: the "pilot program . . . provides funding for access to additional educational options to students who reside in local education agencies [LEAs, or school districts] that have consistently and historically had the lowest

performing schools." Tenn. Code Ann. § 49-6-2611(a)(1).

In order to "assist the general assembly in evaluating the efficacy" of the pilot program, "the office of research and education accountability (OREA), in the office of the comptroller of the treasury, shall provide a report to the general assembly" at the end of the third year of the pilot program and each year thereafter. Tenn. Code Ann. § 49-6-2611(a)(2). That report must include participating student performance, graduation rates, parental satisfaction, audit reports, and recommendations for legislative action if the list of low-performing school districts changes based on the most recent data from the Department. Tenn. Code Ann. §§ 49-6-2606(c), 2611(a)(2). Armed with this information from OREA, the General Assembly can expand the ESA Pilot Program in the future if it is successful or end it if not.[10]

B. Legislative History

The motivation behind the ESA Pilot Program was to support low-income children in underperforming school districts.

Each of our state's recent governors has attempted a different fix for the persistent reality of failing public schools in our urban centers. Governor Don Sundquist signed charter schools into law. Governor Phil Bredesen created the Achievement School District. Governor Bill Haslam expanded charter schools. And Governor Bill Lee created the Education Savings Accounts at issue in this case.

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[10] Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (May 1, 2019). Statement of Sen. Joey Hensley, *available at* https://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17348 at 1:37:54 (last visited July 31, 2022).

Governor Lee ran on school choice as the core plank of his education agenda. He described to thousands of voters throughout the state how he met a young man named Adam through a YMCA mentoring program, and it spurred his calling to improve education for at-risk, inner-city children:

> When we started, Adam was failing every class. It was clear that Adam was not being well served by the public school he was attending, and that leaving him there, far from helping him, would probably result in his getting into trouble. There were few educational choices for Adam, but I helped move him from his school to a different kind of public school, this one a charter school, where he had a completely different, and far more satisfactory, educational outcome . . . . It's very difficult for kids in the inner city to find their way out—in part because our education system has failed them. What I've learned through my relationship with Adam is that there is hope for every child, but part of that hope lies in a quality education. And because of Adam, I've become an advocate for the thousands of children who deserve that.

Bill Lee, *This Road I'm On*, 164-66 (2018).

That experience motivated the governor to make Education Savings Accounts the top priority of his new administration. In his first State of the State address, he shared his passion for helping low-income children in failing school districts:

> Nearly one in three students born into poverty does not finish high school, and a student that doesn't finish high school is much more likely to stay in poverty. Low-income students deserve the same opportunities as other kids, and we need a bold plan that will help level the playing field. We need to change the status quo, increase competition, and not slow down until every student in Tennessee has access to a great education. We're not going get big results in our struggling schools by nibbling around the edges. That is why we need Education Savings Accounts in Tennessee, this year. ESAs will enable low-income students from the most under-performing school districts to attend an independent school of their choice at no cost to their family.

2019 State of the State Address, Office of the Governor (March 4, 2019).[11]

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[11] *Available at* https://www.tn.gov/governor/sots/state-of-the-state-2019-address.html (last visited July 31, 2022).

Throughout floor debates in both the House and Senate, legislators consistently echoed their desire to help impoverished families whose children were trapped in failing school districts. Senator Kerry Roberts noted, "I'm thinking about the families that aren't here casting a vote, and that's who I have on my mind. I want to be able to cast a vote to help that struggling mom or dad that wants to see a better education opportunity for their child."[12] Representative Chris Todd expressed similar sentiments during a House debate: "[W]e all have the same goal: to educate our children so that the diploma they are handed upon graduation actually means they can read, write, and do math on a 12th grade level. We don't have that right now. That concerns me. It should concern each of us."[13] A week later, Representative Robin Smith agreed: "I applaud this governor. I applaud this bill. We have to find something different to spur innovation, to spur accountability, to spur competition, to give these kids a choice and a chance that are trapped in a school that is underperforming, and that yes, indeed, has been failing for years."[14]

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[12] Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (Apr. 25, 2019). Statement of Sen. Kerry Roberts, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17308&meta_id=414664 at 2:01:40 (last visited July 31, 2022).

[13] *Id.* (Apr. 23, 2019). Statement of Rep. Chris Todd, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:59:25 (last visited July 31, 2022).

[14] *Id.* (May 1, 2019). Statement of Rep. Robin Smith, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 1:35:24 (last visited July 31, 2022).

Additionally, legislators emphasized that the ESA Pilot Program would not take money away from public school children in the ASD, SCS, or MNPS. House Deputy Speaker Matthew Hill laid out the numbers for all to see:

> Facts are a stubborn thing, ladies and gentlemen. In 2009 and 2010, this body approved over 5 billion dollars for K-12 education. In this year's proposed budget, there is proposed over 6.5 billion dollars for K-12 education. So, to those who say we are cutting K-12 funding, we are reducing K-12 funding, we are somehow limiting K-12 funding, that is not true![15]

He concluded, "K-12 education has not been cut, has never been cut, and is continuing to grow in state appropriations. Teachers' salaries continue to have more money allocated to them: this year alone [to] the tune of seventy-one million dollars."[16]

Regarding public school children in the counties affected by the ESA Pilot Program, Representative Todd noted how they would fare better under the bill: "I have read through this amendment. It not only puts the focus on the students' success, it literally leaves more money in these affected districts per student than is there now."[17] As a result, contrary to what the Plaintiffs claim, the law received bipartisan support from five legislators representing students attending Shelby County Schools: Representatives Mark White (R-Memphis), Tom

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[15] *Id*. (Apr. 23, 2019). Statement of Rep. Matthew Hill, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:47:10 (last visited July 31, 2022).
[16] *Id*. (Apr. 23, 2019). Statement of Rep. Matthew Hill, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:48:50 (last visited July 31, 2022).
[17] *Id*. (April 23, 2019). Statement of Rep. Chris Todd, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:59:15 (last visited July 31, 2022).

Leatherwood (R-Arlington), and John DeBerry (D-Memphis) and Senators Brian Kelsey (R-Germantown) and Paul Rose (R-Covington).[18]

As the Senate sponsor of the legislation, Senator Dolores Gresham explained, "[T]he goal of the pilot project was to reach into the highest concentrations of poverty and priority schools, the highest concentrations. And that's why we are there, and that's why the bill carries those particular counties, those particular LEAs in those counties. The challenge is great there."[19]

Senator Joey Hensley explained that the purpose of beginning the program as a pilot program was to help students in low performing school districts:

> And while this is a pilot program and there's no set date on it, we will be evaluating the program. And if we see in the future years that it's not achieving what we want it to achieve, which is giving a better education to these students that are in these low performing districts, we can certainly stop this program in the future if we see that goal is not being met.[20]

Students in these low performing districts were targeted for help because, as House Deputy Speaker Hill stated, "Davidson County has 21 failing schools, and Shelby County [has] 27 failing schools. These are not numbers I made up. This is

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[18] *See* Tennessee General Assembly, HB 0939 Bill History at Votes tab, *available a*t http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0939&GA=111 (last visited July 31, 2022).

[19] Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (Apr. 25, 2019). Statement of Sen. Dolores Gresham, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17308&meta_id=414660 at 1:02:20 (last visited July 31, 2022).

[20] *Id.* (May 1, 2019). Statement of Sen. Joey Hensley, *available at* https://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17348 at 1:37:54 (last visited July 31, 2022).

from the Department of Education here in Tennessee."[21] He went on to explain, "[T]his is, as amended, a pilot program that is at least giving an opportunity to those schools that need it the most. That is truly the case as you see the numbers and see the statistics."[22]

The House sponsor of the legislation, Representative Bill Dunn, gave his chamber even more shocking examples of the failures of the three affected school districts:

> When you hear the statistics, it's even more sobering. When you look at elementary schools, Shelby or Nashville, we've got schools where only 6.4% of students are on track in English in one place. Fewer than 5% are on track for English and Math. That's elementary schools. In middle schools, we see the same thing: only 5.6% on track, 5.5% on track. And in high school, we've got ACT scores where the whole average, in Shelby, Davidson County, and some of these schools, it's as low as 14.7. That's the average, so there's got to be kids that are scoring so low to bring it down that far. I just wanted to highlight and say these numbers are very sobering.[23]

The sponsor of the Conference Committee Report, Senator Brian Kelsey, explained that the purpose of the legislation was to provide low-income students "the quality educational services that students deserve." *Tennessee Senate Journal*,

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[21] *Id*. (Apr. 23, 2019). Statement of Rep. Matthew Hill, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:46:27 (last visited July 31, 2022).
[22] *Id*. Statement of Rep. Matthew Hill, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:54:36 (last visited July 31, 2022).
[23] *Id*. (May 1, 2019). Statement of Rep. Bill Dunn, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 1:36:30 (last visited July 31, 2022).

May 1, 2019, at 1513.[24] For that reason, it was begun in "school districts that clearly have a track record of failing to provide tens of thousands of students with a quality education, and they are deserving of special attention from the pilot program." *Id.* For those school districts, "[t]heir persistent failure provides the rational basis for passing a law that is concentrated on those schools." *Id.* at 1512.

Deputy Speaker Hill summed up the reason for starting the "pilot program in two counties[: they are] the two counties that represent over 90% of our, whatever you want to call it, our failing schools, disadvantaged schools, whatever you want to call it: over 90% of those schools are located in those 2 counties."[25]

Thus, the pilot program was begun in three school districts, based on their historic underperformance, shown consistently over the years through objective testing data.

C. The Lawsuit

The ESA Pilot Program was signed into law in May 2019, and the state spent months implementing the program in preparation for an August 2020 launch. In February 2020, the Counties filed this lawsuit against it, and in March 2020, the

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[24] Statement of Sen. Kelsey pursuant to Rule 61, *available at* http://www.capitol.tn.gov/bills/111/Senate/Journals/05012019rd34.pdf (last visited July 31, 2022).

[25] Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (May 1, 2019). Statement of Rep. Matthew Hill, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 2:18:00 (last visited July 31, 2022).

McEwen Plaintiffs filed their similar lawsuit. The Bah Intervenor-Defendants[26] and Greater Praise Intervenor-Defendants intervened in both lawsuits.

Greater Praise Intervenor-Defendants include Greater Praise Christian Academy, a school in the Frayser neighborhood of Memphis started by former public school teachers to help neighborhood children who are falling behind;[27] Sensational Enlightenment Academy Independent School, a school in the Hickory Hill neighborhood of Memphis that serves largely low-income and minority children looking for a quality pre-K—5 school in a safe, small, environment;[28] Ciera Calhoun, an income-eligible mother of five in Memphis who wants to use the ESA Pilot Program for her children;[29] Alexandria Medlin, an income-eligible Memphis mother who wants to use the program to give her elementary school daughter a better education than she was able to receive;[30] and David Wilson, Sr., an income-eligible Nashville father of a high school son who has been forced to attend a school in the Achievement School District.[31] As of August 19, 2022, Sensational Enlightenment Academy Independent School has been approved for the ESA Pilot Program. Greater Praise Christian Academy has applied to participate in the program and intends to satisfy the requirements for approval in less than a month. Ms. Calhoun

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[26] The "Bah Intervenor-Defendants" are Natu Bah, Builguissa Diallo, and Star Brumfield.
[27] Greater Praise Motion to Intervene Memorandum Exhibit A, filed Feb. 21, 2020.
[28] *Id*. at Ex. B.
[29] *Id*. at Ex. C.
[30] *Id*. at Ex. D.
[31] *Id*. at Ex. E.

applied for her eligible children to participate in the program, and Mr. Wilson and Ms. Medlin intended to do so soon.

In March and April 2020, the State Defendants[32] and Intervenor-Defendants filed motions to dismiss and motions for judgment on the pleadings against all claims filed by both sets of plaintiffs. In March 2020, the Counties filed a motion for summary judgment on what they believed was their strongest argument, the Home Rule Amendment claim, and the McEwen Plaintiffs filed a motion for temporary injunction on the Home Rule Amendment claim and their Appropriations claim. On April 29, 2020, the Court held a hearing on these motions, and on May 4, 2020, the Court granted the Counties' summary judgment motion and held in abeyance a ruling on the remaining four claims in the two cases. The Court of Appeals affirmed the ruling, and on May 18, 2022, the Supreme Court reversed it. The Counties filed a motion for rehearing on the last day possible, which the Supreme Court denied on June 13, 2022. Four days later, the State Defendants filed in this Court a motion to lift the injunction. On July 13, 2022, this Court lifted the injunction. Later that day, Governor Lee announced he planned to implement the program this fall, which was the earliest he could comply with the directive in the statute to "begin enrolling participating students no later than the 2021-2022 school year." Tenn. Code Ann. § 49-6-2604. On July 20, 2022, this Court scheduled a hearing on the State

[32] The "State Defendants" include the Tennessee Department of Education, Penny Schwinn, Bill Lee, Lillian Hartgrove, Robert Eby, Nick Darnell, Jordan Mollenhour, Warren Wells, Ryan Holt, Nate Morrow, Larry Jensen, Darrell Cobbing, and Emily House.

Defendants' and Intervenor-Defendants' dispositive motions for September 19, 2022. On July 22, 2022, the Counties filed a motion for temporary injunction on their equal protection claim, and the McEwen Plaintiffs filed a motion for temporary injunction on their educational clause claim. On August 3, the Counties and the McEwen Plaintiffs filed their first amended complaints that are the subject of this memorandum. On August 5, 2022, this Court held a hearing on the temporary injunction motions and the same day issued a ruling denying them based on lack of irreparable harm and failure to show likelihood of success on the merits.

D. Implementation

Meanwhile, on July 16, 2022, the state opened an "intent to enroll" form on the ESA website, which was closed by the morning of July 25, 2022. During this short nine-day window, a remarkable 2,185 families applied to participate in the program, as did 84 independent schools. As of August 19, 2022, the Department has approved 34 schools to participate in the program,[33] and the application period for students is currently open.[34] With this Court's denial of the Plaintiffs' temporary injunctions, the program is now moving forward and will provide ESA scholarships to low-income children in Tennessee this school year.

LEGAL STANDARD

A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim

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[33] Tennessee Education Savings Account Program, Schools Currently Approved, *available at* https://esa.tnedu.gov/wp-content/uploads/2022/08/Approved-Schools_8.17.22.pdf (last visited Aug. 19, 2022).

[34] Tennessee Education Savings Account Program, Application, *available at* https://esa.tnedu.gov/wp-content/uploads/2022/08/Family-Application-for-ESA.pdf (last visited Aug. 19, 2022).

> tests the legal sufficiency of the complaint itself. *Cook v. Spinnakers of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). The grounds for such a motion is that the allegations of the complaint, if considered true, are not sufficient to constitute a cause of action as a matter of law. *Id*.

Robinson v. Sundquist, No. M2001-01491-COA-R3-CV, 2003 Tenn. App. LEXIS 364, at *2-3 (Tenn. Ct. App. May 20, 2003).

ARGUMENT

I. The ESA Act does not violate the Tennessee Constitution's Equal Protection clauses because the Legislature had a rational basis for starting its pilot program in the three school districts with the most failing schools. (Counties' Counts I-II; McEwen Count I)

The McEwen Plaintiffs combine their equal protection argument with the Education Clause, McEwen Am. Compl. ¶¶ 112-18, and the Counties separate them into two claims, Counties' Am. Compl. ¶¶ 206-44, but the alleged violation of a right to an equal education is essentially the same in all three claims, and all three fail under Tennessee law.

A. No court has ever found education to be an individual, fundamental right in the Tennessee Constitution.

The Counties ask this Court to make a pronouncement that no court in Tennessee has ever made—that education is a fundamental constitutional right and that, therefore, strict scrutiny applies to their claims. Counties' Am. Compl. ¶¶ 211-14. But counsel for the Counties conceded at the August 5, 2022 hearing that no court in Tennessee has ever issued such a holding: "I'd like to talk a little bit about strict scrutiny and whether that applies to this law. I've heard lots of discussion in

the arguments about 'There is no case anywhere that holds that education is a fundamental right in Tennessee.' And that is true."[35]

In the *Small Schools* litigation, the Tennessee Supreme Court had three opportunities to declare education a fundamental right, and it declined to do so three times. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*"); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) ("*Small Schools II*"); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) ("*Small Schools III*"). The Counties conceded this point in their temporary injunction memorandum: "In the *Small Schools* litigation, . . . [t]he Tennessee Supreme Court passed over the question of whether education is a fundamental right . . . ." Counties' TI Memo 26, n.24. Yet *less than two weeks later*, they filed an Amended Complaint asserting that education *was* a fundamental constitutional right, based on quotes from *State v. Tester*, 879 S.W.2d 823 (Tenn. 1994) that cited *Small Schools I*. Counties' Am. Compl. ¶¶ 211, 213. *Tester* was a prisoner case about a right to work release and is irrelevant to whether education is a fundamental constitutional right. 879 S.W.2d at 825.

Instead, this Court should follow the holding of the Tennessee Court of Appeals that is directly on point. In *C.S.C. v. Knox County Board of Education*, the Court of Appeals stated unequivocally that education is not a fundamental constitutional right, and strict scrutiny does not apply to a claim for equal protection under the

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[35] TNCourts, Metro Gov't of Nashville et.al. [sic] v. Tennessee Dept of Ed. & Mcewen [sic] et al. v. Bill Lee, https://www.youtube.com/watch?v=RZ6l7hagfso, Aug. 5, 2022, at 46:25-46:39.

Education Clause: "[A]lthough our Supreme Court acknowledges that Article XI, Section 12 of the Tennessee Constitution guarantees the school children of this state the right to a free public education, our courts have not held, to date, that education in Tennessee is a fundamental right. *See Tennessee Small Sch. Sys*., 851 S.W.2d at 155. Strict scrutiny, therefore, does not apply." *C.S.C. v. Knox Cty. Bd. of Educ.*, No. E2006-00087-COA-R3-CV, 2006 Tenn. App. LEXIS 802, at *39-40 (Ct. App. Dec. 19, 2006).

B. Because education is not a fundamental right, the Court should apply rational basis review.

Tennessee courts apply strict scrutiny only when a fundamental right has been violated or a suspect class is disadvantaged. *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 715 (Tenn. 2017). They apply heightened scrutiny to "cases of state sponsored gender discrimination." *Id*. "Reduced scrutiny, applying a rational basis test, applies to all other equal protection inquiries . . . ." *Id*. Because the classification in this case—school districts with the most persistently failing schools—is not a suspect class, does not constitute gender discrimination, and does not implicate a fundamental right, the Court must apply rational basis review.[36]

[36] The Counties implicitly concede as much in their Amended Complaint, when they claim aspects of the ESA Pilot Program fail a "rational" basis test. Counties' Am. Compl. ¶¶ 215-33.

C. The ESA Pilot Program survives rational basis review because it begins in the three school districts containing the vast majority of the state's failing schools, so the equal protection claims must be dismissed.

Rational basis review is a highly deferential, or "generous," standard with "reduced scrutiny." *Chattanooga Metro. Airport Auth. v. Thompson*, C/A NO. 03A01-9610-CH-00319, 1997 Tenn. App. LEXIS 209, at *7 (Tenn. Ct. App. Mar. 24, 1997); *see also Hughes*, 514 S.W.3d at 715. Under rational basis review, "if some reasonable basis can be found for the classification as set out in the statute, . . . the classification will be upheld." *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994). "To uphold a statute under the rational basis test, all that is required is an articulable justification for its enactment." Tenn. Att'y. Gen. Robert Cooper Opinion No. 09-04, at *2. Courts must uphold a statute if "the classifications have a reasonable relationship to a legitimate state interest." *Hughes*, 514 S.W.3d at 715.

In this case, the ESA Act states its legitimate state interest in the statute itself: "to establish a pilot program that provides funding for access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools." Tenn. Code Ann. § 49-6-2611(a)(1). Despite Plaintiffs' policy objections that the state should not fund children to attend independent schools, providing quality education is a legitimate state interest. The Act then identifies the underperforming school systems. Tenn. Code Ann. § 49-6-2602(3)(C). The classification system exactly matches the stated goal of the pilot program, thereby easily meeting the minimal requirements of rational basis review.

The Counties take issue with the fact that the ESA Act has chosen to further its legitimate state interest "by providing students in [underperforming] LEAs funding to *leave those LEAs*." Counties' Am. Compl. ¶ 219. Yes, that is precisely the point: the state's primary interest is in *educating children,* not in supporting failing school districts. The Counties are trying to substitute their own legitimate state interest for the one chosen by the state. But the state does not have to further *every* legitimate interest that Plaintiffs can conceive—one will do: "[T]he rational basis test is satisfied if there is a 'conceivable' or 'possible' reason for the [Legislature's] decision." *Cunningham v. Bedford Cnty.*, No. M2017-00519-COA-R3-CV, 2018 Tenn. App. LEXIS 632, at *10 (Tenn. Ct. App. Oct. 29, 2018). "[I]f *any* state of facts may reasonably be conceived to justify . . . the classification[, the statute] will be upheld." *Newton*, 878 S.W.2d 105, 110 (Tenn. 1994) (emphasis added).

Plaintiffs spill much ink pointing out that some other counties also have failing public schools, including some instances of LEA's that in some years had a comparable or slightly higher percentage of failing schools. *See, e.g.*, Counties' Am. Compl. ¶¶ 33-38. But a legislature "need not address in a piece of legislation every evil identified." *Humphreys, Hutcheson & Moseley v. Donovan*, 568 F. Supp. 161, 179 (M.D. Tenn. 1983). It was entirely rational for the General Assembly to select these LEAs for the ESA pilot program: by the Counties' own figures, in 2018 Davidson and Shelby counties combined for 48 of the 64 failing schools outside the ASD—75% of the total; including the ASD, the three LEAs covered by the ESA pilot program oversaw 80% of the failing schools in Tennessee. Counties' Am. Compl.

¶ 36. It's entirely reasonable for the General Assembly to begin by trying to solve 80% of a given problem before tackling the rest.

"'The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States,' and legislatures are given considerable latitude in determining what groups are different and what groups are the same." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Beginning the pilot program in the three school districts with the vast majority of failing schools in the state rationally furthers the legitimate state interest of giving children who live in such districts more educational options.

Plaintiffs also complain that some schools in their own counties are not failing. *See, e.g.*, Counties' Am. Compl. ¶¶ 217, 221-23. But the school district is the state's standard local subunit for educational programs and their funding, and administrative convenience is a perfectly rational reason to enact the classification. *Strehlke v. Grosse Pointe Pub. Sch. Sys.*, 654 F. App'x 713, 721 (6th Cir. 2016). (finding "administrative convenience" to be a sufficient rational basis for closing a school and redrawing school zone boundaries). In addition, it is rational that dealing with school districts rather than individual schools avoids confusing parents as to whether their children would be eligible for the program. It is easier to communicate with parents based on a broad, recognized geographic classification rather than based on the zone boundaries of individual schools, which leave one side of the street eligible and not the other and often change year to year. *Id.* Further, the state may have chosen school districts over failing schools to avoid splitting up siblings. In an individual school-based system, a younger sibling may attend a

failing elementary school, while an older sibling may attend a non-failing middle school, leaving only the younger one eligible to attend a new school. In fact, this preference to keep siblings together was stated in the law. *See* Tenn. Code Ann. § 49-6-2604(e)(1).

Attorney General Robert Cooper explained the discretion given to the state when opining on a similar piece of legislation giving additional opportunities to students in troubled schools. *See* Tenn. Att'y Gen. Op., No. 07-60 (May 1, 2007). Though "this mechanism does not provide a perfect fit for the stated legislative aim of assisting economically disadvantaged students" and was "not the most precise manner in which to target economically disadvantaged students," it was nonetheless "a reasonable method to target groups of students who are more likely to be economically disadvantaged" and thus "would survive the low level of constitutional scrutiny required by a rational basis analysis, the applicable standard for legislation such as the Act." *Id*. at *3-5.

Further, the "legislature is allowed to attack a perceived problem piecemeal . . . . Underinclusivity alone is not sufficient to state an equal protection claim." Tenn. Att'y. Gen. Op. 01-106, at*14-15 (quoting *Howard v. City of Garland*, 917 F.2d 898, 901 (5th Cir. 1990) and Opinion of the Justices, 608 A.2d 874 (N.H. 1992) (implementation of pilot program in one part of the state does not violate equal protection)).

Courts in other states have agreed with this conclusion. They recognize that legislatures may create geographically targeted educational choice pilot programs to test new public policy ideas. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio

1999) (state does not violate equal protection by using a classification which enacts reforms for one urban school district); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003) (same); *Welch v. Bd. of Educ.*, 477 F. Supp. 959, 965 (D. Md. 1979) ("The need for freedom of state legislatures to experiment with different techniques and schemes is one of the rational bases for differences . . . ."). *See also Davis v. Grover*, 480 N.W.2d 460, 469 (Wis. 1992) (holding state justified in recognizing a "substantial distinction" between a single urban school district and all other districts in the state, such that reforms may apply to only that one district); *State v. Scott*, 96 Or. App. 451, 453 (1989) (citing *McGlothen v. Dept. of Motor Vehicles*, 71 Cal App 3d 1005 (1977); *Dept. of Mot. Veh. v. Superior Ct., San Mateo Cty.*, 58 Cal App 3d 936 (1976)) (stating geographically limited pilot program does not violate equal protection).

Ultimately, the Plaintiffs' equal protection claims amount to little more than a request for this the Court to go on a fishing expedition into various legislators' motives for drawing the lines embodied in the act. But that is not the role of this Court: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986).

And the Counties' complaint that Knox and Hamilton County schools were removed from the law fails to recognize the possible rational basis of their current populations in the state. As the *Tennessee Journal* put it, "Historically, Tennessee's Big Four cities have been Memphis, Nashville, Knoxville, and Chattanooga. . . . [But i]n terms of population, [because of the growth of Clarksville and

Murfreesboro,] the state arguably has a Big Two and a Next Four." *Tennessee Journal*, Vol. 43, No. 21, May 26, 2017, at 3. The journal noted that Nashville and Memphis are in a class of their own, with populations of 660,000 and 650,000, respectively, while the populations of the next four largest cities range only from 130,000 to 186,000.

Regardless of the motive, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993). In this instance, the classification of school districts which historically and persistently contained the most failing schools easily passes the rational basis test.

II. The ESA Act does not violate the General Assembly's Education Clause obligation to support a system of free public schools because the Act does not supplant the existing system of free public schools. (McEwen Count II)

The McEwen Plaintiffs do not adopt the Counties' argument as to the Education Clause, but rather invent an even less plausible one of their own: that through the ESA Act, the General Assembly is failing its obligation to provide "a system of free public schools." McEwen Am. Compl. ¶¶ 119-128. They argue that the Education Clause prohibits the General Assembly from supporting any educational initiatives outside the existing public school system. Yet the Education Clause imposes no such limitation; by its terms, it simply requires that the "General Assembly . . . provide for the maintenance, support and eligibility standards of a system of free public

schools," and there is no dispute that the General Assembly has done so and continues to do so.

The McEwen Plaintiffs insist upon a negative implication that finds no support in the plain language of the Education Clause, traditional canons of interpretation, or Tennessee case law. This Court should therefore find that McEwen's Count II fails to state a claim on the merits and dismiss the claim.

The Tennessee Constitutions of 1835 and 1870 contained a provision prohibiting the common schools fund "to be divested to any other use than the support and encouragement of common schools." 1835 Const. art. XI, § 10; 1870 Const. art. XI, § 12. In other words, previous Tennessee Constitutions explicitly barred the diversion of any public-school funds to private schools. But in 1977, Convention delegates removed this clause.

Indeed, one delegate in 1977 proposed a version of the education article that would have carried this bar forward: Delegate Ingraham proposed Resolution 116 on September 14, 1977, which read in relevant part, "No law shall be made authorizing said public school and public library fund or any part thereof to be divested to any other use than encouragement, support, and development of public schools and public libraries." Conv. J. p. 251. The Convention's Committee on Education declined to adopt Ingraham's resolution 116, and instead proposed a near-final version of the provision we have today, which does not include the bar on "any other use" of public-school funds. Conv. J. p. 328.

This fact should be dispositive about any question of original intent: the framers of the current educational article chose to remove the explicit bar on public funds

for private schools. The newspaper *The Tennessean* understood this change as such; it warned in its editorial on the 1978 ratification vote that this new education article "opens the door to legislative support for private as well as public schools." Editorial, *Constitutional Changes: Some Harmful, Destructive*, The Tennessean (March 5, 1978).

Comparison of prior versions of a provision to the current text is a highly useful tool of construction. According to law professor Cass Sunstein, "Although it is proper to look at a statute's background in the form of actually enacted and repealed provisions, the legislative history, which was never enacted, should rarely be permitted to supplant the statutory words as they are ordinarily understood." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 430 (1989). Many courts adopt this principle, "distinguish[ing] between 'statutory history' and 'legislative history,' elevating the former above the latter." *Gonzalez v. State*, 207 A.3d 147, n.49 (Del. 2019) (citing Scalia & Gardner, *Reading Law: The Interpretation of Legal Texts* 220, 256 (2012)). *Accord Kalal ex rel. Dane County Circuit Court*, 271 Wis.2d 633, ¶ 52 (2002); *United States v. Griffin*, 549 F. Supp. 3d 49, 55 (D.D.C. 2021). In this case, this Court should prioritize this iterative history as a much clearer expression of the original intent of the drafters for the reason Professor Sunstein gives: it represents a collective decision of the entire constitutional convention, not the individual commentary of any single delegate, which is what the McEwen Plaintiffs offer. *See* McEwen Plfs.' Reply in Support of Mot. for Temp. Inj. at 12-13.

Indeed, although Delegate Pleasant wanted "language that would tend to discourage the proliferation of non-public schools" in the Constitution of 1977, Delegate Rowe said that that "would be a dangerous stance to take," Delegate Smith believed that the matter of funding private as well as public schools "would be a matter left to the legislature to decide," and Delegate Bickers believed that the new Constitution should "leave the latitude broad enough so that the legislature can regulate, in this field, as necessary, and warranted for the circumstances." Conv. J. at 390-91, 394-95, 411.

The end result of this disagreement was that the provision in the 1835 and 1870 Constitutions prohibiting public funding of students in private schools was not adopted into the 1977 Constitution. Had Tennessee wanted to include such a limitation, it had plenty of models: most states have some limitation on support for private education in their constitutions. *See Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2269 (2020) (Alito, J., concurring) ("Thirty-eight States still have these 'little Blaine Amendments' today."). The McEwen Plaintiffs ask this Court to find that § 12 implies something that the vast majority of states found it necessary to say explicitly.

Because § 12 *literally* does not say what they wish it said, the McEwen Plaintiffs, in their motion for a temporary injunction, invoked a canon of interpretation: *expressio unius est exclusio alterius*, the principle that a specific provision in a text includes the negative implication that those things not mentioned are excluded. McEwen TI Memo 17. But § 12's requirement that the State provide a public school system carries no such negative implication. *Expressio*

unius means that when a street sign reads "Two-Hour Parking," one cannot park for longer. It does not mean one cannot park for less than two hours, or can park nowhere else.[37]

Applying *expressio unius* in the manner they desire would wreak havoc throughout American law. For instance, it would mean the Federal Constitution's grant of power to Congress "To coin Money" prevents Congress from making printed money legal tender—an argument the Supreme Court long ago rejected. *See Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871). It would likewise mean Article I, § 8's grant of authority "To raise and support Armies… [and] To provide and maintain a Navy" forecloses the creation of the Air Force.[38]

In Tennessee, it would invalidate charter schools, the Achievement School District, or other provisions of education outside the traditional system of public schools. Similarly, the next sentence of the Tennessee Constitution, allowing for the creation of public institutions of higher learning, would ban the use of Hope Scholarships to be used at private universities.

Properly understood, the canon creates no such problems—except the problems it creates for the McEwen Plaintiffs' argument. "The doctrine properly applies only

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[37] As Karl Llewellyn pointed out over 70 years ago, an equally persuasive canon of construction is, "The language may fairly comprehend many different cases where some only are expressly mentioned by way of example." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 405 (1950).

[38] *See generally* Ilya Somin, "Originalism's Final Frontier: Is Trump's Proposed Space Force Constitutional?", The Volokh Conspiracy, August 15, 2018, *available at* https://reason.com/volokh/2018/08/15/originalisms-final-frontier-is-trumps-sp/ (last visited August 1, 2022).

when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of all that shares in the grant or prohibition involved." Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 107 (2012). Therefore, the "sign outside a restaurant 'No dogs allowed' cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome." *Id.* Rather, "Dogs are specifically addressed because they are the animals that customers are most likely to bring in; nothing is implied about other animals." *Id.* And so too here: § 12 says the General Assembly must give parents the option to send their kids to public schools; nothing is implied about other educational initiatives.

Indeed, in their motion for a temporary injunction, the McEwen Plaintiffs were unable to cite a single Tennessee case for the proposition that the Education Clause says what they want it to say. The best they could do is cite the Court of Appeals' previous decision in the consolidated case for the proposition that "supporting private schools is not a State function." McEwen TI Memo 21-22, citing *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.,* No. M2020-00683-COA-R9-CV, 2020 Tenn. App. LEXIS 434, at *15 (Ct. App. Sep. 29, 2020). But all this proposition amounts to is a claim that the ESA Act is not affirmatively authorized by the Education Clause. The McEwen Plaintiffs cite no authority—because none exists—denying the General Assembly the discretion to adopt the ESA program.

Lacking a basis in Tennessee law, at the Temporary Injunction stage, the McEwen Plaintiffs primarily relied on a case from Florida, whose constitutional language does not match Tennessee's. Florida's Constitution requires "Adequate

provision" for a "uniform . . . system of free public schools." Fl. Const. art. IX, §1(a). So it is unsurprising that the Florida Supreme Court found that a system of "plural, nonuniform systems of education" violated "the constitutional mandate for a uniform system of free public schools." *Bush v. Holmes,* 919 So. 2d 392, 398 (Fla. 2006). No such mandate exists in Tennessee.

Moreover, no other state has followed Florida's lead. *See, e.g., Meredith v. Pence,* 984 N.E.2d 1213, 1225 (Ind. 2013); *Schwartz v. Lopez*, 132 Nev. 732, 749 (2016); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998). Even Florida courts have distinguished *Bush* as a "narrow" decision in later cases. *See, e.g.*, *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127 (Fla. 2019); *McCall v. Scott*, 199 So. 3d 359, 363 (Fla. Dist. Ct. App. 2016).

In their Motion for Temporary Injunction, the McEwen Plaintiffs also cited one recent ruling from a court in West Virginia. *See* McEwen Plaintiffs' TI Ex. 5 at 65 (Transcript of July 6, 2022 hearing in *Beaver v. Moore*). But that ruling was on the basis of Article XII, Section 4 of the West Virginia Constitution, which provides that the state's "School Fund" "shall be annually applied to the support of free schools throughout the state, *and to no other purpose whatever*" (emphasis added). Again, the McEwen Plaintiffs are relying on other states with constitutional provisions they *wish* existed in Tennessee.

There is no basis to impute the limitation the McEwen Plaintiffs ask for into the Tennessee Education Clause. This Court should therefore find that they are not likely to succeed on the merits of their claim.

III. The claim that the ESA program violates the BEP statute should be dismissed because when two statutes conflict, the one enacted later in time controls. (McEwen Count III)

In their Count III, the McEwen Plaintiffs allege that the ESA Pilot Program violates the BEP statute. McEwen Am. Compl. ¶¶ 129-132. If the pilot program were an executive order or administrative rule, this might be an argument. But the ESA Pilot Program is a statute. It comprises Part 26 of Chapter 6 of Title 49 of the Tennessee Code. Equally, the BEP is a statute. *See* Tenn. Code Ann. § 49-3-302(3) *et seq*.

It is black-letter law that a later-in-time statute supersedes an earlier statute if the two are in conflict. *Taylor v. State*, No. M2005-00560-CCA-R3-CO, 2005 Tenn. Crim. App. LEXIS 1233, at *6-7 (Crim. App. Dec. 1, 2005) (quoting 82 C.J.S. Statutes § 354 (1999)); *Matthews v. Conrad*, No. 03A01-9505-CH-00141, 1996 Tenn. App. LEXIS 109, at *5 (Tenn. Ct. App. Feb. 26, 1996). *See* Op. of Att'y General Robert E. Cooper, Jr., No. 11-36, at 3 (April 21, 2011) (same); Op. of Att'y General Robert E. Cooper, Jr., No. 09-87, at 4 (May 18, 2009) (same).

Since the ESA statute post-dates the BEP statute, any claimed conflict between the two statutes must be resolved in favor of the ESA program. Moreover, as Plaintiffs themselves acknowledge, the General Assembly has since abolished the BEP system and starting next year will allocate school funding using the new TISA system. *See* McEwen Am. Compl. ¶ 3. The McEwen plaintiffs do not plead, in Count III or any other count, that the ESA program is inconsistent with TISA, which means this claim will very soon be moot in any case and cannot be a basis for permanently enjoining the ESA program.

IV. Tennessee's implementation of the ESA program is a reasonable effort to fulfill the General Assembly's goal that ESA funding be available for students this school year. (Counties' Count III; McEwen Count IV)

The McEwen Plaintiffs' Count IV and the Counties' Count III consist of different versions of the same claim that Tennessee's decision to implement the program this school year is somehow *ultra vires*. Counties' Am. Compl. ¶¶ 245-54; McEwen Am. Compl. ¶¶ 133-39. But there is no legal right to have a government program one does not participate in implemented as slowly as possible. Tennessee's decision to do the best job it can to do right by the parents and students who need this program and were denied it for two years is a reasonable attempt to address the needs of the beneficiaries in the face of delays caused by this litigation.

The first clue that their claims of *ultra vires* implementation should fail is that the "FAQ" they cite—to support their assertion that the State is ignoring the requirement that money be allocated to individual accounts, Counties' Am. Compl. ¶¶ 49-50—is actually entitled "Account Holder Responsibilities." Rather than an admission of illegality, the document makes clear that the ESA funds will be assigned to individual student accounts—the State is simply adjusting the process for establishing them to accommodate the shorter timeline imposed on the program. But its adjustment does not run afoul of the statute. An "account" is not a physical depository of dollar bills. It is a writing on a ledger, or a "detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship." *Account*, Black's Law Dictionary (11th ed. 2019). That is exactly how the state proposes to create the account this year. It is merely a ledger of how much money is

available to each student from his or her ESA. Up to that ledger amount, the state will pay for the services—one way this year and a different way next year.

It was always the intention of the General Assembly that the program be in place for this school year. Indeed, under the statute, the program was to start *no later* than the 2021-2022 school year. So the State's decision to implement the program now is *required* by the statute, not a violation of it.

Moreover, even if the approach taken to this year's ESA program were inconsistent with the ESA statute, neither set of Plaintiffs has standing to challenge it. The technical details of how money is distributed to third parties is not a source of even alleged injury either to the Plaintiff Counties or the Plaintiff Parents—they base their standing on the idea that money is going to leave the Memphis and Nashville school systems; the administrative details of how the state spends the money makes no difference to them.

V. There is no actionable claim that the ESA program violates the Uniform Administrative Procedures Act. (McEwen Count V)

The McEwen Plaintiffs' next Count alleges that the state's efforts to help students this school year runs afoul of the rulemaking requirements of the Tennessee Uniform Administrative Procedures Act ("UAPA"). McEwen Am. Compl. ¶¶ 140-145. This claim fails for several reasons: the Plaintiffs have no standing to bring it; challenging a rulemaking at this stage is procedurally improper; and on the merits the implementation of the ESA program does not violate the statute. Moreover, at most this represents a challenge specific to this school year—the McEwen Plaintiffs do not plead that the alleged administrative defects will affect

future school years; nor could they.

First, as to standing, nowhere do the McEwen Plaintiffs plead any real injury to themselves or their children stemming from this implementation issue. Instead, they plead the interests of the *participants* in the ESA program, arguing that "it directly impacts the 'rights and privileges' afforded to participating families under the [ESA program]." McEwen Am. Compl. ¶ 144. Those rights and privileges are *not the McEwen Plaintiffs'* rights and privileges—they are the rights and privileges of current and future participants like the Greater Praise Intervenor-Defendants, who are here asking this court to sustain the program. The McEwen Plaintiffs have no standing to assert the rights and privileges of others.

Second, the UAPA claim is procedurally improper, in that the McEwen Plaintiffs added it as a fifth count to their Amended Complaint without ever engaging with the UAPA's process for challenging improper rule making. The UAPA is explicit that there is only one route to judicial review, which is after completion of an administrative challenge to the rule: "A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review." Tenn. Code Ann. § 4-5-322. The McEwen Plaintiffs fail this test at every step: They are (even by their own pleading) not the persons aggrieved by the steps taken by the Department of Education; they never received the final decision in a contested case the UAPA requires; and there is no other route under the UAPA for them to seek judicial review.

On the merits, the UAPA explicitly contemplates that state agencies can move quickly in emergency situations, including where the "agency is required by an

enactment of the general assembly to implement rules within a prescribed period of time that precludes utilization of rulemaking procedures described elsewhere in this chapter for the promulgation of permanent rules." Tenn. Code Ann. § 4-5-208(a)(5). As explained *supra*, the ESA statute *requires* the program to be in place for this school year, and the state was barred from preparing for that eventuality by the injunction in this case. This is exactly the situation the UAPA contemplates: the General Assembly has imposed a duty on the agency to provide ESA scholarships for the 2022-2023 school year, and there was not sufficient time to operationalize the normal rulemaking process.

Finally, nothing about the McEwen Plaintiffs' claim here survives the end of this school year—indeed it is arguably already moot, as the ESA funds are already being allocated under the program, and the McEwen Plaintiffs plead no basis for rescission of those ESA funds under the UAPA. It is essentially irrelevant to the future operation of the ESA program, which they never argue will be inconsistent with the statute or regulations.

VI. The ESA program does not violate the Appropriation of Moneys clause because all spending for the program was duly authorized by law. (McEwen Count VI)

A. A proper initial appropriation was made for the ESA Pilot Program.

The McEwen Plaintiffs' Sixth Count alleges that the General Assembly failed to properly appropriate funds for the estimated first year's funding of the ESA Pilot Program. McEwen Am. Compl. at 31, ¶¶ 146-155. This is factually inaccurate.

The Appropriation of Public Moneys clause of the Tennessee Constitution

provides:

> Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.

Tenn. Const. art. II, § 24. The first year's funding of the ESA Pilot Program was estimated to be $771,300. *See* Tennessee General Assembly Fiscal Review Committee 2019 Cumulative Fiscal Note at 56, Public Chapter 506 ("$771,300/FY 19-20")[39]. The amount appropriated by the General Assembly was also $771,300, as explained below.

The governor's Fiscal Year (FY) 2019-20 budget document, which was presented to the Legislature prior to passage of the ESA Pilot Program, included an appropriation for the program of $25,450,000, which was the sum of an appropriation of $25,250,000 in FY 2019-20 and recurring each year thereafter plus a one-time, nonrecurring appropriation of $200,000 for FY 2019-20. *See* State of Tennessee, The Budget Document FY 2019-20, at A-37 and B-78.[40] This $25,450,000 appropriation was incorporated into the ultimate appropriations act that was signed into law through the following language:

> From the appropriations made in this act, there hereby is appropriated a sum sufficient for implementation of any legislation cited or otherwise described by category in this act or in the Budget Document transmitted by the Governor that has an effective date prior to July 1 of the current

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[39] *Available at* http://www.capitol.tn.gov/Archives/Joint/committees/fiscal-review/reports/2019%20Cumulative%20Fiscal%20Note%20-%20111th.pdf (last visited Aug. 19, 2022).

[40] *Available at* https://www.tn.gov/content/dam/tn/finance/budget/documents/2020BudgetDocumentVol1.pdf (last visited Aug. 19, 2022).

> calendar year, provided that such legislation is funded in the Budget Document as submitted by the Governor or in the final legislative balancing schedules summarizing enacted amendments incorporated into this act or other appropriations acts of this legislative session and that the fiscal impact of implementing the legislation, as indicated in the final cumulative fiscal note of the Fiscal Review Committee on enacted legislation, is less than or equal to the amounts indicated in the Budget Document or the amendment balancing schedules.

Public Chapter 405 of the 111th General Assembly at Page 52, Sec. 12, Item 4.[41] The figure was amended, however, later in the act. $24,678,700 in nonrecurring funds was subtracted in anticipation of passage the next day of the ESA Pilot Program, or Senate Bill 795 / House Bill 939, because the legislation had already been amended to push back the earliest start date of the program until the FY 2020-21 budget. *Id*. at Page 100, Sec. 57, Item 1, Paragraph 5. When you subtract $24,678,700 from $25,450,000, that leaves the amount appropriated by Public Chapter 405 for the 2019-20 budget year: $771,300. This is the exact cost estimated by the Fiscal Review Committee to implement the program in FY 2019-20 in its 2019 Cumulative Fiscal Note. Therefore, a correct appropriation was made for the estimated first year's funding, in full satisfaction of Appropriation of Public Moneys clause.

B. All spending for the ESA Pilot Program was duly authorized by law.

The Plaintiffs also allege that when the Department of Education signed a $1.2

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[41] *Available at* https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf (last visited Aug. 19, 2022).

million contract with ClassWallet in November 2019 for administration of the ESA Pilot Program, the contract "render[ed] the Law null and void under Article II, §24, of the Tennessee Constitution and violate[d] T.C.A. §9-4-601." McEwen Am. Compl. ¶¶ 154. Such an allegation, if true, would not render the ESA Pilot Program law null and void; it would only render the ClassWallet contract null and void, and in fact that ClassWallet contract *is* now null and void, so this claim is a solution in search of a problem. Regardless, the allegation is not true because the ClassWallet contract was duly authorized by law.

Article II, Section 24 of the Tennessee Constitution, the Appropriation of Public Moneys clause, also states, "No public money shall be expended except pursuant to appropriations made by law." Appropriations made by law include both appropriations acts enacted by the General Assembly each year as well as statutes. In particular, the Plaintiffs claim the ClassWallet contract violated Tenn. Code Ann. § 9-4-601(a)(1), which states: "No money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law." But the Plaintiffs fail to read the remainder of Title 9, Chapter 4 of the Tennessee Code, which explains that the ClassWallet contract was "duly authorized by law."

In particular, Tenn. Code Ann. § 9-4-5110 explains the process by which the ClassWallet contract was "duly authorized by law":

> Not later than June 1 of each year, the governor shall require the head of each department, office, and agency of the state government to submit to the commissioner of finance and administration a work program for the ensuing fiscal year, such program to include all appropriations made by the general assembly to such department, office, or agency for its operation and maintenance and for capital projects, and to show the requested allotments of

> the appropriations by quarters for the entire fiscal year. The governor, with the assistance of the commissioner, shall review the requested allotments with respect to the work program of each department, office, or agency, and shall, if the governor deems it necessary, revise, alter, or change such allotments before approving them. The aggregate of such allotments shall not exceed the total appropriations made by the general assembly to the department, office, or agency for the fiscal year in question. The commissioner shall transmit a copy of the allotments as approved by the governor to the head of each department, office, or agency concerned. The commissioner shall thereupon authorize all expenditures to be made from the appropriations on the basis of such allotments and not otherwise.

Tenn. Code Ann. § 9-4-5110(a). In their Amended Complaint, the Plaintiffs describe this exact process but fail to realize that the process was "duly authorized by law":

> According to testimony by the Department of Education's deputy commissioner before the General Assembly's Joint Government Operations Committee on January 27, 2020, the Department of Education diverted funds appropriated by the General Assembly for the unrelated "Career Ladder" program for public school teachers to pay ClassWallet for services performed to implement the Voucher Law.

McEwen Am. Compl. ¶ 55. This process was not only authorized by statute, but it was also authorized by the 2019-20 appropriations act:

> From funds available to any department, commission, board, agency, or other entity of state government, there is earmarked a sum sufficient to fund any bill or resolution, that becomes law or is adopted, respectively, for which the Commissioner of Finance and Administration certifies in writing that the cost of implementation of the bill or resolution will be funded within existing appropriations of the entity, within the availability of revenues received by the entity, or within other existing budgetary resources.

Public Chapter 405 of the 111th General Assembly at Page 52, Sec. 12, Item 5.[42] The appropriations act goes on to clarify that intra-departmental transfers are allowed:

> [I]f the head of any department, office, commission or instrumentality of the state government finds that there is a surplus in any classification, division, or unit under such entity, and a deficiency in any other division, unit or classification, then in that event the head of such department, office, commission or instrumentality of the state government may transfer such portion of such funds as may be necessary for the one division, unit or classification where the surplus exists to the other, except as otherwise provided herein, provided such transfer is approved by the Commissioner of Finance and Administration.

Id. at Page 53, Sec. 15, Item 1.

The statutes and appropriations act contain much technical budget jargon, but their meaning, upon close reading, is clear: they authorize a state department to reallocate surplus funds from one account to another account when necessary to implement a bill or resolution, as long as the department does not exceed its total cumulative appropriation and as long as the Commissioner of Finance and Administration certifies the transfer. *See also* Tenn. Att'y Gen. Op., No. 81-662 at *1-2 (Dec. 17, 1981) ("[A]n expansion request may be accomplished through a work program revision pursuant to T.C.A. § 9-6-112 [now § 9-4-5112] as long as the aggregate quarterly allotments for the Department . . . do not exceed the total appropriations for said Department for [the] fiscal year."). Thus, the expenditure in

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[42] *Available at* https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf (last visited Aug. 19, 2022).

this case was "duly authorized by law" because it was conducted in accordance with a well-established method set forth in law to address just such a circumstance.

Because the expenditure alleged to be inappropriate in the Complaint was "duly authorized by law," as required by Tenn. Code Ann. § 9-4-601(a)(1), and was "expended . . . pursuant to appropriations made by law," as required by Tenn. Const. art. II, § 24, this count should be dismissed.

VII. Neither set of Plaintiffs has standing to assert their claims.

A. The Counties lack standing to assert the claimed injuries to their school district.

As the Supreme Court noted in its ruling in this case, "By its terms, the ESA Act does not facially apply to cities or counties such as Plaintiffs." *Metro. Gov't*, 645 S.W.3d 141, *16-17. The Court rejected the argument that "Plaintiffs are so intimately related to their respective LEAs as to render them one and the same." *Id.* at *22. "[T]he LEAs are distinct from the county or municipal governments." *Id.* The Court concluded,

> The separateness of Plaintiffs and their respective LEAs is not ameliorated by their financial connections. As another panel of the Court of Appeals noted in a decision only months before that court's decision in this case, '[c]ounties and school systems perform separate functions. The fact that there are financial connections between a local school system and local government does not detract from the essentially separate functions of these two entities.'

Id. at *23 (quoting *Young v. Stamey*, No. E2019-00907-COA-R3-CV, 2020 Tenn. App. LEXIS 118, 2020 WL 1452010, at *8 (Tenn. Ct. App. Mar. 25, 2020)).

The Counties' supposed injury occurs only *if* MNPS and SCS elect to request supplemental funding from their Counties to fill the gap. The school districts need

not request additional funding because they no longer have to educate hundreds of children and may reallocate resources where needed. And even if they did request supplemental funding from the Counties, the Counties need not give it. Thus, the supposed injury to the Counties is purely hypothetical, contingent on their own preferences. A hypothetical, potential, contingent injury is not sufficient for standing. In this case, the Supreme Court has made clear that any harm that may occur, would occur not to the counties but to the school districts. *Metro. Gov't*, 645 S.W.3d 141, *22

Even if education were a fundamental right under the Tennessee Constitution, protected by the equal protection clauses, then it would belong to individual students. *See, e.g., Norris*, 751 S.W.2d at 841 (listing the fundamental rights guaranteed by the U.S. Constitution as "rights of a uniquely private nature," the "right to vote," the "right to interstate travel," "rights guaranteed by the first amendment," and the "right of procreation"). Collective governmental bodies like school districts do not have fundamental rights, school districts do not have standing to assert the rights of their students, and the plaintiffs here are *not even* school districts—they're county governments, even further removed.

Third-party standing is narrowly circumscribed in Tennessee law. The general rule is that a litigant cannot bring a lawsuit based on the "legal rights or interests of third parties." *Gray's Disposal Co. v. Metro. Gov't of Nashville*, 122 S.W.3d 148, 158 (Tenn. Ct. App. 2002) (overruled on another ground by *Gray's Disposal Co. v. Metro. Gov't of Nashville*, 318 S.W.3d 342, 344 (Tenn. 2010)). The only exception occurs if three criteria are met: the litigant has suffered an injury in fact; the

litigant has a close relation to the third party; and the third party is hindered from protecting his or her own interests. *Id*. In this case, nothing hinders students and their parents from protecting their own interests in an equal education (as proven by the presence of the McEwen Plaintiffs in this very case); therefore, the exception to the ban on third-party standing is not met, and school districts may not assert this right.

Further, the Counties in this case assert not third-party standing but *fourth*-party standing. Their argument that a county can assert rights on behalf of its affiliated school district, which in turn has third-party standing on behalf of its students, contorts the third-party standing doctrine beyond all recognition. As the Supreme Court noted in its Home Rule Amendment decision in this case, "[T]he LEAs are distinct from the county or municipal governments[, and t]he separateness of Plaintiffs and their respective LEAs is not ameliorated by their financial connections." *Metro. Gov't*, 645 S.W.3d 141, *22.

The Supreme Court found they had standing to bring the Home Rule claim, but that does not automatically grant them standing to bring an equal protection claim based on the individual right to an education, or a similar claim under the education clause, or to complain about the technical details of its implementation. The Home Rule Amendment explicitly applies to a "county" or "municipality," so their standing was grounded in the text of the state constitution. Tenn. Const. art. XI, § 9. However, their remaining claims are about rights that belong, if to anyone, students living in Memphis and Nashville. Counties play an attenuated role at best in protecting the rights of individual students, and this Court should reject such

fourth-party standing. A political subdivision of the state "cannot merely assert the collective individual rights of its residents." *City of Memphis v. Hargett*, 414 S.W.3d 88, 100 (Tenn. 2013).

Furthermore, the Counties lack injury-in-fact to bring their claims. *See ACLU v. Darnell*, 195 S.W.3d 612, 619-620 (Tenn. 2006).[43] The finances of the ESA are very simple. For the Counties, there is no change. For the school districts, they are better off. Those results occur because most of the money from the county and state follows the child to the ESA, and the remainder stays with the school district. For the Counties, they pay to the school district the full local Basic Education Program (BEP) portion per student for the year before a child enrolls in the ESA pilot program, and they pay the exact same amount if the child enrolls in the program; therefore, there is no change. For the school district, when a child leaves with an ESA, he or she leaves behind "remainder funds" of over $5,000 with the district to educate the remaining children; therefore, the school district is better off. *See supra* at 7. Regardless, the school districts are not parties to this lawsuit—only the Counties are.

And in their brief to the Supreme Court, the Counties acknowledged that there is no change in funding from the county governments: "Appellee Counties' total appropriations remain roughly the same . . . ." Appellees' Brief 31. Therefore, the

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[43] This is also an argument on the merits as to why no entity or person is being treated unequally under the Equal Protection Clauses. If "there is no unequal treatment," then there is "no discrimination." *Rivergate Wine & Liquors, Inc. v. Goodlettsville*, 647 S.W.2d 631, 636 (Tenn. 1983).

Counties are not harmed and do not have standing.

The Counties' lack of standing prevents this Court from exercising jurisdiction over their claims. *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004). Therefore, their claims should be dismissed from this case.

B. The McEwen Plaintiffs are not injured by the decisions of other parents to send their children to private schools.

Neither the McEwen Plaintiffs, nor their children, are injured by the decisions of other parents to enroll their children in private schools with help of ESA scholarships. None of their claims grant them a legally enforceable right to deny other parents the opportunity to make other choices the General Assembly has seen fit to allow. They have no standing, either as parents or as taxpayers, to object to the free choice of others to seek a better life for their children.

"It is the settled law in this state that private citizens, as such, cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally." *Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975). "[E]ach claim must be analyzed separately," and plaintiffs must establish their standing as to each particular claim or count. *Wofford v. M.J. Edwards & Sons Funeral Home Inc.*, 528 S.W.3d 524, 542 (Tenn. Ct. App. 2017).

It is true that parents can sometimes have standing to address injuries specific to the school their child attends. *Curve Elementary Sch. Parent & Teacher's Org. v. Lauderdale Cty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980). But there is no special injury to the McEwen Plaintiffs here. Their children may continue to

attend the public schools their parents prefer, and nothing in their Amended Complaint properly alleges that the existence of alternative educational opportunities diminishes the quality of education in traditional public schools. No such allegation is made because no such allegation could be proven: an opportunity which some parents choose to use does not damage students attending some other school.

That some schools[44] *could* lose total funding for the small number of students who avail themselves of the ESA program does not change this analysis. That *de minimis* funding reduction (likely less than one percent) simply reflects the fact that the school is now educating *fewer children*. A similar reduction in funding would occur if the ESA parents chose to homeschool their children, send them to a private school using some other source of money, send them to the charter school, or move to a different county in Tennessee to attend the public schools in some other district. The McEwen Plaintiffs added several paragraphs in this amendment arguing that the child who moves to Idaho costs the locality less money, because only the state funds leave the county, whereas the ESA diverts both county and state money. McEwen Am. Compl. ¶¶ 69-72. In fact, because of the $5,000 "remainder funds," the reduction is *less than* in their examples and leaves the McEwen Plaintiffs' children *better off*, with increased funding per pupil. *See* Tenn.

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[44] The right of parents is specific to the effect on their child's *particular school*—not school district—and there is no basis for the McEwen Plaintiffs to claim, ex ante, that any particular school any of their children attend will necessarily lose funding due to the ESA program, much less that the funding loss at any of those individual schools would be material to the quality of their child's education.

Code Ann. § 49-6-2605(a). Therefore, they have no injury-in-fact. *See ACLU*, 195 S.W.3d at 619-20. Also, the Shelby County and Metro Nashville schools are in an even better position under the ESA program than they are in any of those other instances where students choose not to enroll, in that the ESA program generates a "double counting payment" in the amount of the ESA for each student who participates in the program and sends those funds to participating school districts for three years. Tenn. Code Ann. § 49-6-2605(b)(2)(A). After three years, the "double counting payment" will continue to fund failing schools throughout the state. Tenn. Code Ann. § 49-6-2605(b)(2)(B)(ii). Finally, this Court should be reluctant to recognize a theory of standing that would grant every parent a right to sue any time any reduction in funding, no matter how small, happens at their child's school district, which might incidentally in some scenario affect the funding for their child's individual classroom.

Perhaps realizing their claim of parental standing fails, the McEwen Plaintiffs also claim standing as taxpayers. It is well established in Tennessee that "where there is no injury that is not common to all citizens, a taxpayer lacks standing to file a lawsuit against a governmental entity." *Fannon v. City of Lafollette*, 329 S.W.3d 418, 427 (Tenn. 2010). *Accord Watson v. Waters*, 375 S.W.3d 282, 287 (Tenn. Ct. App. 2012). The fact that a taxpayer or citizen cares passionately about or is personally connected to a public policy issue does not grant standing as a citizen or taxpayer. *ACLU*, 195 S.W.3d at 624.

In *Fannon* the Tennessee Supreme Court reaffirmed these traditional principles and set forth specific limits on when taxpayers may establish standing: "our courts

typically confer standing when a taxpayer (1) alleges a specific illegality in the expenditure of public funds and (2) has made a prior demand on the governmental entity asking it to correct the alleged illegality." *Fannon*, 329 S.W.3d at 427.

The McEwen Plaintiffs did allege unconstitutional expenditure of public funds in their Complaint. But they did not allege a prior demand to correct the alleged illegality. They now assert that "Plaintiffs did not make a prior demand on the General Assembly or Governor to remedy this illegal statute because such a demand would have been a futile gesture and a mere formality." McEwen TI Memo 3, n.1 (citing *Badgett v. Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968)). They provide no explanation, or even description, of any reason for this claimed futility.

A single conclusory sentence is not enough. "In establishing that a prior demand has been made, a plaintiff is required to first have notified appropriate officials of the illegality and given them an opportunity to take corrective action short of litigation." *Fannon*, 329 S.W.3d at 427-28. The McEwen Plaintiffs did not do any of this. They did not even take the basic step of serving a letter or other notice on any of the relevant government officials describing the alleged unconstitutionality of the ESA program. *Cf. Cobb v. Shelby Cty. Bd. of Comm'rs*, 771 S.W.2d 124, 125-26 (Tenn. 1989) (plaintiffs met prior demand expectation by sending a letter to the mayor which was analyzed by the mayor's attorney who insisted on staying the course, thus prompting the lawsuit).

It is true that a plaintiff can avoid the notice requirement through a showing of futility, but the McEwen Plaintiffs have made no such showing—they have not even made an allegation in their Amended Complaint. Where a plaintiff fails to allege

such futility as a necessary component of standing, their claim must be denied. *Metro. Gov't of Nashville & Davidson Cnty. Ex rel. Anderson v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985) ("There is no such allegation in the present case with respect to the Metropolitan Council. The allegations of the complaint therefore, in our opinion, are insufficient to show standing by the private individual who attempted to bring this suit.").

It is not enough that a plaintiff figures—in his or her gut—that this or that public official will disagree with him or her. Rather, the notice requirement is excused only "where the status and relation of the involved officials to the transaction in question is such that any demand would be a formality." *Badgett*, 436 S.W.2d at 294. For instance, in *Badgett,* the allegation was that local officials had created slush funds of public money for their personal use. *Id.* at 293. The Court understandably concluded that the personal financial interest of the relevant public officials rendered the notice requirement a useless formality. *Id.* at 294 ("The Mayor and Finance Director patently have interests contrary to this action."). There is no similar claim here that any public official stands to personally gain from the ESA program. And it was the McEwen Plaintiffs' burden to identify some—*any*—source of futility in the first place. This they did not do.

CONCLUSON

For the reasons stated above, the Greater Praise Intervenor-Defendants respectfully request that this Court grant the Motions to Dismiss.

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 19th day of August, 2022.

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