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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON COUNTY,
METROPOLITAN NASHVILLE BOARD OF
PUBLIC EDUCATION, and SHELBY COUNTY
GOVERNMENT,

Plaintiffs,

v. No. 20-0143-II

TENNESSEE DEPARTMENT OF EDUCATION,
PENNY SCHWINN, in her official capacity as
Education Commissioner for the Tennessee
Department of Education, and BILL LEE, in his
official capacity as Governor for the state of
Tennessee,

Defendants.

REPLY IN SUPPORT OF GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S MOTION TO INTERVENE

Greater Praise Christian Academy and Sensational Enlightenment Academy Independent School (the "Schools") and Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr., on behalf of themselves and their minor children (the "Parents"), file this Reply to Plaintiffs' Response in Opposition to Motions to Intervene, filed with this Court on March 2, 2020 ("Plaintiffs' Opposition"). In support hereof, the Schools and Parents state as follows.

I. The Schools and Parents are entitled to intervention as of right.

A. The Attorney General is not an adequate representative of the Schools' and Parents' interests.

First, the Attorney General is not presumed to adequately represent the interests of every individual citizen in Tennessee simply by virtue of his public office, as Plaintiffs argue. *See* Plaintiffs' Opposition at 4-5. Nor is the Mayor of Davidson County or the Mayor of Shelby County presumed to adequately represent the interests of every individual citizen in their counties simply by virtue of their public offices. One need look no further than the Schools and Parents in this very case for proof of this principle: their mayors are acting directly against their best interests. This Court should follow the law of the Sixth Circuit on this point and allow the Schools and Parents to intervene because their interests are not being adequately represented by the parties in the case.

It is well established in the Sixth Circuit that the fourth prong required for intervention by right, that the parties to the existing lawsuit cannot adequately represent the proposed intervenors' interests, is not foreclosed automatically by the presence of the attorney general in a case. *See Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). Not only the Sixth Circuit, but also the D.C. Circuit has also held that the government's role as representative of the public interest is not presumed adequate to represent the particular interests of particular citizens. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003). *Accord Klamath Irrigation Dist. v. United States Bureau of Reclamation*, No. 1:19-cv-00451-CL, 2019 U.S. Dist. LEXIS 192741, at *8-9 (D. Or. Nov. 6, 2019). The Parents and Schools ask the Court to apply this obvious position on intervention rather than the presumption proposed by Plaintiffs with citations to court decisions in other federal circuits. Plaintiffs' Opposition at 4-5.

Even in the circuits cited by Plaintiffs, the presumption that the attorney general adequately represents all citizens is easily overcome. The federal circuit decision on intervention with the facts most similar to this case is from the Fifth Circuit. *See Brumfield v. Dodd*, 749 F.3d

339 (5th Cir. 2014). There, too, parents were allowed to intervene to uphold a school choice statute in the face of a challenge to its constitutionality. *Id*. at 340. Therefore, this Court should allow the Parents and Schools to intervene, as of right, regardless of which circuit decisions the Court is claiming to follow.

Second, the Parents and Schools have offered several reasons why the Office of the Attorney General cannot adequately represent their interests, and Plaintiffs' objections have not overcome those reasons. Two considerations are preeminent: 1) the institutional pressure on the Attorney General to respect the limits of his office's prior positions, and 2) the reluctance of politically responsible actors to fully, vigorously expose the failure of the three public school systems addressed by the Tennessee Education Savings Account ("ESA") Pilot Program, Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. *See* the Schools and Parents' Memorandum of Law and Facts in Support of Motion to Intervene at 13-15. Both constraints limit the arguments and evidence that the Defendants may offer, and this limitation is sufficient under well-established Sixth Circuit doctrine to justify intervention. *See, e.g., Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999).

Third, Plaintiffs try to artificially limit the issues before this Court to "legislative acts that are 'local in form or effect,' improperly 'suspend any general law,' or fail to fund 'a system of free public schools.'" Because of this superficially narrow categorization, they contend this Court need not consider "whether parents have a right to educate their children, and not whether vouchers are good or bad policy." Plaintiffs' Opposition at 7.

Plaintiffs' Opposition ignores the tests set forth by the Tennessee Supreme Court and other courts analyzing the constitutional provisions at the heart of Plaintiffs' claims. The Plaintiffs' second count alleges violation of the equal protection clause of the Tennessee

Constitution, which is interpreted as is the cognate clause of the Fourteenth Amendment to the U.S. Constitution, both of which utilize rational basis review to consider legislative classifications that do not touch on protected classes or rights. *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 715-16 (Tenn. 2017). Plaintiffs' Complaint acknowledges that the rational-basis test is the appropriate test in this case. Complaint ¶¶ 198-201, 203, 205-209.

If this Court is to use rational-basis review to evaluate the second claim, then it will necessarily have to consider the quality of education in the types of school districts covered by the ESA Pilot Program. This Court will be called upon to determine whether the General Assembly acted rationally in beginning the pilot program in the Achievement School District and the two other school districts with large numbers of persistently failing schools. This Court will need to consider evidence of educational outcomes in those three districts to determine whether the General Assembly acted rationally. The Defendants may demur from fully exposing the failures of these three public school systems because they themselves may be held politically accountable for their role in and responsibility for these failures.

In the same vein, the Plaintiffs' third count on the Tennessee Education Clause calls for this Court to consider, in part, "the program's merits." *Contra* Plaintiffs' Opposition at 7. The Tennessee Supreme Court has said that "[g]iven the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993). *Accord* Opinion of Attorney General Robert E. Cooper, Jr., No. 13-27, at *7-8 (March 26, 2013) (recognizing the Legislature's "constitutional flexibility in the field of education" to create a voucher program similar to the ESA program at issue here); Opinion of Attorney General Robert E. Cooper, Jr., No. 12-68, at *2 (July 6, 2012) (recognizing that the Legislature's "broad

authority" and "plenary power" granted by the Education Clause permits another innovative school choice program: charter schools). To determine whether the Legislature acted within its constitutional boundaries, this Court may consider evidence of whether ESAs are an "innovative and progressive" solution to the challenges of urban education.

In other words, the Plaintiffs, themselves, by the claims made in their Complaint, have invited this Court to scrutinize more than just "interference with local government authority." Plaintiffs' Opposition at 7. The claims will require at least minimal consideration of evidence as to the quality of both public school education and the ESA Pilot Program. The Schools and Parents are "uniquely situated" to make arguments and offer evidence on these points, *Tigrett v. Cooper*, No. 10-2724-STA-tmp, 2012 U.S. Dist. LEXIS 28638, at *15 (W.D. Tenn. Mar. 2, 2012), and the Attorney General is in a compromised position to make the same points.

B. The Schools' and Parents' motion is sufficient for intervention as of right.

Plaintiffs object that the Schools and Parents filed a Proposed Motion to Dismiss as an exhibit to their Memorandum of Law and Facts in Support of their Motion to Intervene, *see* Exhibits F and G to the Memorandum, as opposed to filing a Proposed Answer. Plaintiffs' Opposition at 8. In doing so, Plaintiffs fail to read the requirement of Tennessee Rule of Civil Procedure 24.03 in light of Tennessee Rule of Civil Procedure 12.02. Rule 24.03, for intervention by right, requires the intervening party to file a "pleading setting forth the claim or defense for which intervention is sought." However, Rule 12.02 requires that every defense shall be asserted in a responsive pleading "except that the following defenses may at the option of the pleader be made by motion in writing . . . ." It then goes on to list the two specific defenses raised by the Schools and Parents in their Proposed Motion to Dismiss: "(6) failure to state a claim upon which relief can be granted . . . and (8) specific negative averments made pursuant to

Rule 9.01." Tenn. R. Civ. P. 12.02. In fact, the rule even goes on to *require* that a motion to dismiss be filed before a responsive pleading: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted." *Id*. Therefore, when reading the two rules in conjunction, the Schools and Parents have met the requirements of the rules. It would be inequitable to prevent the proposed Intervenor-Defendants from being able to raise the same defenses in the same way as the Defendants. *See Posey v. Dryvit Sys.*, No. E2003-00392-COA-R3-CV, 2004 Tenn. App. LEXIS 174, at *17 (Ct. App. Mar. 22, 2004) ("To make its right effectual, the intervenor must necessarily have the same power as the original parties…").[1]

II. In the Alternative, the Schools and Parents are entitled to permissive intervention that respects their right to make arguments and file briefs; however, they are willing to consent to the scope of written discovery and depositions proposed by Plaintiffs.

The Schools and Parents are entitled, under the Tennessee Rules of Civil Procedure, to the make a full, vigorous defense of their interests in this case; however, they respect the time of this Court and the other parties. Limiting their briefing to arguments not made by the Office of

[1] In the alternative, if the Court concludes that a Rule 12.02 motion is not a sufficient pleading in this instance, the Schools and Parents request that the Court follow the Sixth Circuit and a majority of federal circuits and allow them time to file a Proposed Answer after their intervention motion is granted. The Sixth Circuit ruled that a district court judge abused his discretion in denying intervention to a party that failed to attach any proposed pleading to its motion to intervene, reasoning that "neither party has ever claimed that any prejudice would result from granting the motion to intervene despite the failure to attach a pleading; the parties are clearly on notice as to Hillandale Committee's position and arguments." *Providence Baptist Church v. Hillandale Comm., Ltd*., 425 F.3d 309, 314 (6th Cir. 2005) (interpreting Federal Rule of Civil Procedure 24(c), the cognate to Tennessee Rule 9.01). Thus the Sixth Circuit decided to join the majority of circuits in favor of a "permissive approach," and noted that even circuits with strict enforcement of the rule's requirements did so in those circumstances "where the parties are not on notice as to the grounds asserted for intervention, or there is some other prejudice to the parties." *Id*. at 315. *Accord League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018) (same). In this instance, the Motion to Intervene and the Proposed Motion to Dismiss put all parties on notice as to the grounds for intervention and the substantive arguments and defenses that would otherwise have been included in an answer. Because there was no prejudice and adequate notice, the Court should follow *Providence Baptist Church* and recognize the Schools and Parents' substantial compliance with the rule.

the Attorney General would unfairly prevent them from making the arguments in a more persuasive manner and using different legal citations for those arguments. It would deprive this Court of the legal authorities that best represent the interests of the Schools and Parents, and it would defeat the purpose of allowing intervention. *See* Section I.A. above.

The Schools and Parents also ask the Court to take judicial notice of *McEwen v. Lee*, Case No. 20-0242-II, filed Mar. 2, 2020 in Davidson County Chancery Court. This case features a new set of plaintiffs against some of the same defendants[2] and brings similar and overlapping claims against the ESA Pilot Program. While the case is not directly relevant to the issue before the Court, it is indirectly relevant for the following reason. If the *McEwen* case were to be consolidated with this case, then the plaintiff side will be filing two sets of briefs from four sets of lawyers. It would also allow four sets of plaintiffs' attorneys to engage in discovery. The Court should bear this in mind if it chooses to grant a circumscribed intervention to ensure that, in the future, a consolidated case does not allow Plaintiffs to have two full teams at the table while Defendants have only one team at the table and a second team that is handcuffed by an intervention order that prevents full and equal participation.

However, in the interests of judicial economy and comity among the parties, the Schools and Parents are willing to consent to the scope of written discovery and depositions proposed by the Plaintiffs.

CONCLUSION

The Schools and Parents respectfully ask the Court to grant their Motion to Intervene and to enter their Proposed Motion to Dismiss and Memorandum of Law and Facts in support thereof

[2] It keeps the governor and education commissioner as defendants but substitutes the State Board of Education members for the Department of Education. Presumably, all state defendants in both cases will be represented by the Office of the Attorney General.

as filed on Feb. 21, 2020.

Respectfully submitted,

/s/ Brian K. Kelsey
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been 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 on this 4th day of March, 2020.

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