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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*,	)	
Plaintiffs,	)	
v.	)	
TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,	)	**Case No. 20-0143-II**
	)	**Consolidated with Case No. 20-0242-II**
Defendants,	)	
and	)	
NATU BAH, *et al.*,	)	
Intervenor-Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF COUNTIES' MOTION FOR TEMPORARY INJUNCTION

Plaintiffs, the Metropolitan Government of Nashville and Davidson County and Shelby County Government ("Plaintiff Counties"), move this Honorable Court to issue a temporary injunction pursuant to Tenn. R. Civ. P. 65, enjoining Defendants, the Tennessee Department of Education ("TDOE"), Education Commissioner Penny Schwinn, and Governor Bill Lee ("State Defendants"), from implementing the "Tennessee Education Savings Account Pilot Program," Tenn. Code Ann. §§ 49-6-2601, *et seq*. ("ESA Act"), pending the Court's decision on the merits of Plaintiff Counties' claims.[1]

[1] Shortly after this lawsuit was filed in 2020, the parties agreed to permissive intervention by two sets of Intervenor-Defendants. "Bah Intervenor-Defendants" include Natu Bah, Builguissa Diallo, and Star-Mandolyn Brumfield. "Greater Praise Intervenor-Defendants" include Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

All factors weigh in favor of an injunction here. Plaintiff Counties are likely to succeed on the merits of their equal protection claim in Count II of the Complaint because the ESA Act unconstitutionally imposes a school voucher-type program in only two Tennessee school districts—at the financial expense of the counties that fund them and at the educational expense of the districts and the students that remain in them. The General Assembly intentionally and unapologetically excluded every other school district in Tennessee from the Act's application to "protect" those districts from the Act's harmful impact. And it did so without any justifiable rationale and without tailoring the program to any educational goal. The consequences of the Act go far beyond politics, and the State Defendants' haphazard, rushed rollout, a mere two weeks before the school year is set to begin, will only exacerbate the detrimental impact on school operations and educational outcomes.

The public interest also weighs in favor of an injunction. Beyond the obvious harm that will result from reducing the districts' education funding by millions of dollars with no way to fill the gap in the short term, and the monumental cost that Plaintiff Counties will exclusively bear to fund the program, the public also has an interest in government acting only as it is authorized. In the haste to implement the ESA Program, the State Defendants are abandoning the authorized "education savings accounts" in favor of direct payments to private schools with public dollars, which the ESA Act has not authorized.

The State Defendants plainly will stop at nothing to see this Act implemented. The fallout will be disastrous, and it will be irreparable. A temporary injunction is the only solution.

FACTUAL BACKGROUND

In May 2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, establishing the "Tennessee Education Savings Account Pilot Program," with an effective date of May 24, 2019. 2019 Tenn. Pub. Acts ch. 506. The Act is codified at Tenn.

Code Ann. §§ 49-6-2601, *et seq.* The Act provides "participating students" with "education savings accounts" that use public funding to pay for private school tuition, fees, and other education-related expenses. Tenn. Code Ann. §§ 49-6-2602(10), -2603(a)(4), -2607(a). The Act imposes this "education savings account" ("ESA") program in only two counties, Davidson and Shelby.

The Court lifted the injunction that prohibited implementation of the ESA program on July 13, 2022. The State Defendants intend to "reinstate the ESA program" now. (Tennessee Education Savings Account Program Website ("ESA Program Website"), *available at* https://esa.tnedu.gov/ (last visited July 21, 2022).) The ESA Program Website has been updated to include links to FAQs, an Application Checklist, an "Intent to Participate" form for private schools (called "independent" schools on the site), and an "Intent to Enroll" form for interested families, among other things. (*Id.*) The "Intent to Enroll" form tells families that the ESA Program is an available option in August 2022. (*Id.*, "Intent to Enroll Form," *available at* https://stateoftennessee.formstack.com/forms/esaintentapply.)

An injunction is necessary to prevent this discriminatory program that is not tailored to a credible State interest from being implemented in only two counties, particularly in haphazard, unauthorized fashion.

I. THE ESA ACT APPLIES ONLY IN DAVIDSON AND SHELBY COUNTIES.

The ESA Act's text does not explicitly identify Davidson and Shelby counties or the LEAs in those counties. Rather, the Act uses the definition of "eligible student" to limit the bill's application solely to Metropolitan Nashville Public Schools ("MNPS") and Shelby County Schools ("SCS"). To participate, an "eligible student" must be in a family with an annual household income not exceeding twice the federal income eligibility guidelines for free lunch and:

1. zoned to attend a school in a local education agency ("LEA")[2] with ten or more schools:
    a) identified by the State as priority schools[3] in 2015,
    b) identified by the State as among the bottom 10% of schools[4] in 2017, and
    c) identified by the State as priority schools in 2018, or
2. zoned to attend an ASD[5] school as of the Act's effective date.

Id. § 49-6-2602(3)(C).

As a result of the "eligible student" definition, the only students who qualify to participate in the ESA program are those "zoned to attend a school in Metro[politan] Nashville Public Schools, Shelby County Schools, or the Achievement School District." *Metro. Gov't of Nashville & Davidson Cty. v. Tenn. Dep't of Educ.* ("*Metro v. TDOE*"), 645 S.W.3d 141, 145 (Tenn. 2022). Indeed, "[i]t is undisputed by the parties that, absent future legislative action, only Metro Nashville Public Schools, Shelby County Schools, and the Achievement School District fall within the enumerated statutory requirements." *Id.* at 845 n.5; *see also* Tenn. Code Ann. § 49-6-2602(3)(C).

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[2] The Tennessee Code refers to a public-school system, including a county school system, as an LEA. Tenn. Code Ann. § 49-1-103(2).

[3] At least every three years, "the commissioner of education shall recommend for approval to the state board a listing of all schools to be placed in priority . . . status." *Id.* § 49-1-602(b)(1). These "shall include the bottom five percent (5%) of schools in performance, all public high schools failing to graduate one-third (1/3) or more of their students, and schools with chronically low-performing subgroups that have not improved after receiving additional targeted support." *Id.* § 49-1-602(b)(2).

[4] "By October 1 of the year prior to the public identification of priority schools pursuant to subdivision (b)(1), the commissioner shall notify any school and its respective LEA if the school is among the bottom ten percent (10%) of schools in overall achievement as determined by the performance standards and other criteria set by the state board." *Id.* § 49-1-602(b)(3).

[5] The Achievement School District ("ASD") is "an organizational unit of the [TDOE], established and administered by the commissioner for the purpose of providing oversight for the operation of schools assigned to or authorized by the ASD." Tenn. Code Ann. § 49-1-614(a). ASD schools are only in Davidson and Shelby counties, now and when the ESA Act was passed, though the official ASD website is not functional at this time to be able to see the schools that make up the district. *See* Achievement School District, "Schools," http://achievementschooldistrict.org/index.php/schools/ (last visited Mar. 25, 2021).

II. THE GENERAL ASSEMBLY LIMITED THE ESA ACT TO DAVIDSON AND SHELBY COUNTIES TO "PROTECT" SCHOOL DISTRICTS IN OTHER COUNTIES.

The ESA Act's legislative history illustrates the General Assembly's intent to limit the Act's effect to two counties. Even more to the point, it did so to "protect" LEAs in other counties from the dangers of a voucher-type program.

A. House Bill No. 939 Moves Through Committees.

House Majority Leader William Lamberth (R-Portland) filed House Bill No. 939 on February 7, 2019, as a "caption bill" to be held on the House desk. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 9 (introduced).) The bill proceeded to the House Curriculum, Testing, & Innovation Subcommittee on March 19, 2019, after Rep. Mark White (R-Memphis), who represents significant portions of the cities of Germantown and Collierville, filed Amendment No. 1 (HA0188)[6] to the bill, presenting for the first time the substance of the "Tennessee Education Savings Account Act" and beginning the trend of carving out counties from the House bill's application. (House Am. 1 (HA0188) at 1, Ex. 1 to Bussell Decl.)

In addition to adding a new part to Title 49, Chapter 6 of the Tennessee Code, the Amendment placed several restrictions on ESA eligibility. (*Id.*) The amendment defined "eligible student" in Section 49-6-2602(3)(C) to be a student "zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools in accordance with § 49-1-602(b)(3)." (*Id.* at 2.) As drafted, Amendment No. 1 left the potential to drop or add counties to the Act in the future as school performances declined or improved. (House Am. 1 (HA0188) at 2, Ex. 1 to Bussell Decl.) The House Curriculum, Testing, & Innovation Subcommittee recommended the bill for passage if amended as set forth in

[6] House Amendment 1 (HA0188) is available at http://www.capitol.tn.gov/Bills/111/Amend/HA0188.pdf. A hard copy is also attached to Bussell Declaration as Exhibit 1.

Amendment No. 1, as did the House Education Committee; Government Operations Committee; Finance, Ways, & Means Subcommittee; and Finance, Ways, & Means Committee. (Bill Tracking Summary[7]; H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 29[8].)

B. House Bill No. 939 Is Debated on the House Floor.

Rep. White withdrew Amendment No. 1 when House Bill No. 939 was considered on the House Floor for third and final reading. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 32.) The House then approved Amendment No. 2 (HA0445),[9] which Rep. Susan Lynn (R-Mt. Juliet) sponsored. (*Id.*) Amendment No. 2 placed even more limits on the number of LEAs subject to the Act, by changing the definition of "eligible student" to be a student who, among other requirements "[i]s zoned to attend a school in an LEA that had three (3) or more schools identified as priority schools in 2015 in accordance with § 49-1-602(b) and that had three (3) or more schools among the bottom ten percent (10%) of schools as identified by the department in 2017 in accordance with § 49-1-602(b)(3)." (House Am. 2 (HA0445), Ex. 2 to Bussell Decl.) This narrowed the applicable counties to only four: Davidson, Hamilton, Knox, and Shelby. (House Am. 2 (HA0445), Ex. 2 to Bussell Decl.; 2015 Priority List, Ex. 3 to Bussell Decl.; Bottom 10% List, Ex. 4 to Bussell Decl.) Importantly, the amendment also defined "eligible student" based on data from specific prior years rather than using current data. With that change, the amendment ensured that no LEAs would ever be added to or removed from the definition without General Assembly action. (House Am. 2 (HA0445), Ex.

[7] The Bill Tracking Summary is available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0939&GA=111.

[8] All references to legislative history that are not attached in hard copy form or linked to the General Assembly database are available as official legislative history in legal research platforms such as Westlaw.

[9] House Amendment 2 (HA0445) is available at http://www.capitol.tn.gov/Bills/111/Amend/HA0445.pdf. A hard copy is also attached as Ex. 2 to the Bussell Declaration.

2 to Bussell Decl.; 2015 Priority List, Ex. 3 to Bussell Decl.; Bottom 10% List, Ex. 4 to Bussell Decl.)

The intent of these restrictions was not lost on the legislators whose districts were affected. Rep. Jason Powell (D-Nashville), Rep. John Ray Clemmons (D-Nashville), and Rep. Dwayne Thompson (D-Cordova), all expressed concern about the General Assembly's clear intent to "single[ ] out Davidson County and Shelby County" without their consent.[10]

Even after being narrowed by Amendment No. 2 to LEAs in only four counties, House Bill No. 939 squeaked by with 50 ayes and 48 nays, on April 23, 2019. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 32.) This narrow passage came after the vote was held open for 40 minutes with the House deadlocked. (April 23, 2019, House Floor Session Video at timestamp 3:05:37–3:44:24, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272.) Rep. Jason Zachary (R-Knoxville), whose district was affected by Amendment No. 2, candidly admitted that he cast the deciding vote only after then-House Speaker Glen Casada promised him that Knox County would be excluded and "held harmless" from the Senate version of the bill. (Rep. Zachary Interview, Ex. 6 to Bussell Decl., filed on a thumb drive attached to contemporaneously-filed Notice of Manual Filing.)

In his closing remarks about the ESA Act on the House Floor before the vote, then-Deputy House Speaker Matthew Hill (R-Jonesborough) summarized the House majority's dual motives of unilaterally imposing the ESA Act on "deep blue" Davidson and Shelby counties while "protecting" every other school district from the bill, stating: "Ladies and gentlemen, today on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a

[10] April 23, 2019, House Session Tr. at 2:6-15, 10:11–11:14, and 15:20-23, excerpts attached as Ex. 5 to Bussell Decl.; Video at timestamps 44:01–44:26, 55:21–1:02:30, and 1:13:55–1:14:06 respectively, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272.

fighting chance at a quality education." (April 23, 2019, House Session Tr. at 27:1-5, Ex. 5 to Bussell Decl.; Video at timestamp 2:55:15–2:55:31, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272.)

C. Senate Bill No. 795 Moves Through Committees.

Senate Majority Leader Jack Johnson (R-Franklin) filed Senate Bill No. 795, the Senate companion to House Bill No. 939, on February 5, 2019. (S.B. 795, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 6 (introduced).) Legislators quickly chiseled away at the bill's application. As promised to Rep. Zachary, Knox County was excluded from the Senate's final version, along with every other Tennessee county except Davidson and Shelby.

First, Sen. Dolores Gresham (R-Somerville), then-Chair of the Senate Education Committee, proposed Amendment No. 1 (SA0312),[11] which is identical to Amendment No. 1 in the House and limited the act to five counties: Davidson, Hamilton, Knox, Madison, and Shelby, with potential to drop or add counties automatically as school performance declined or improved. (Hearing on S.B. 795 Before the S. Comm. on Education, 111th Gen. Assemb. (Tenn. 2019); S.B. 795, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31 (reprinting the text of Amendment No. 1).) The amendment did not apply to Sen. Gresham's district, including her home county of Fayette, despite Fayette County having two out of seven of its schools (28.6%) on the 2017 bottom 10% list and one out of seven of its schools (14.3%) on the 2018 list of priority schools. (Senate Am. 1 (SA0312), Ex. 7 to Bussell Decl.; 2017 Bottom 10% List, Ex. 4 to Bussell Decl.; 2018 Priority List, Ex. 8 to Bussell Decl.)

[11] Senate Amendment 1 (SA0312) is available at http://www.capitol.tn.gov/Bills/111/Amend/SA0312.pdf and is also attached in hard copy as Ex. 7 to Bussell Decl.

D. Senate Bill No. 795 Is Debated on the Senate Floor.

When Senate Bill No. 795 reached the Senate Floor, Sen. Gresham moved her amendment to the heel of the amendments, and the Senate voted to substitute House Bill No. 939 (including House Amendment No. 2) as the companion Senate bill. (H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31.) The Senate then adopted Senate Amendment No. 5 (SA0417), which Sen. Bo Watson (R-Hixson) had filed and which stripped the language from House Bill No. 939 and substituted new language. (H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31; Am. 5 (SA0417), Ex. 9 to Bussell Decl.)

Senate Amendment No. 5 further narrowed the definition of "eligible student" in Section 49-6-2602(3)(C) and limited the number of counties covered by the bill. (Am. 5 (SA0417), Ex. 9 to Bussell Decl.) It increased from three to ten the number of schools that had to be identified as priority schools in 2015 and 2018 and increased from three to ten the number of schools that had to be among the bottom 10% of schools in the state in 2017. (*Id.*) The new language also included within the definition of "eligible student" a student zoned to attend a school in the state's ASD on the act's effective date. (*Id.*) By narrowing the definition of "eligible student," Amendment No. 5 removed Knox County and Hamilton County from the bill's application. (*Id.*) Sen. Watson's amendment excluded his home county of Hamilton County, which had five priority schools in 2015 and nine in 2018. (Am. 5 (SA0417), Ex. 9 to Bussell Decl.; 2015 Priority List, Ex. 3 to Bussell Decl.; 2018 Priority List, Ex. 8 to Bussell Decl.)

The only counties with LEAs encompassed by the new definition of "eligible student" in Amendment No. 5 were Davidson and Shelby counties. (Am. 5 (SA0417), Ex. 9 to Bussell Decl.; 2015 Priority List, Ex. 3 to Bussell Decl.; 2017 Bottom 10% List, Ex. 4 to Bussell Decl.; 2018 Priority List, Ex. 8 to Bussell Decl.) Moreover, the criteria for defining an "eligible student" in Amendment No. 5 were based on specific numbers of schools in specific prior

years; therefore, no LEAs could ever be added to or removed from the definition without amendment of the law. (Am. 5 (SA0417), Ex. 9 to Bussell Decl.) Senate Amendment 5, which would later become the version recommended by the Conference Committee Report, also introduced the term "pilot" into the bill for the first time. (*Id.*) The Senate adopted House Bill No. 939, as amended, with 20 ayes and 13 nays, on April 25, 2019. (H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 31.)

E. House and Senate Adopt the Conference Committee Report.

When the Senate's version of the bill was transmitted to the House, the House non-concurred in the amendments to the bill adopted by the Senate. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 34.) The Senate refused to recede from the amendments, and the House refused to recede from its non-concurrence. (*Id.*; H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 33.) On April 30, 2019, the House and Senate speakers appointed members to a conference committee to resolve the differences between the two bills. (H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 33.) The conference committee's final version[12] retained the definition of "eligible student" in the bill as adopted by the Senate, which limited the bill's application to Davidson and Shelby counties and ensured the bill could never apply to any other county. (Conference Committee Report, Ex. 10 to Bussell Declaration; 2015 Priority List, Ex. 3 to Bussell Decl.; 2017 Bottom 10% List, Ex. 4 to Bussell Decl.; 2018 Priority List, Ex. 8 to Bussell Decl.)

Rep. Patsy Hazelwood (R-Signal Mountain) voted against the bill when it initially passed the House but voted for the conference committee's final version, which excluded her home county of Hamilton. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 32; H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 36.) She declared the

[12] The Conference Committee Report is available at https://www.capitol.tn.gov/Bills/111/CCRReports/CC0003.pdf and is also attached in hard copy as Ex. 10 to Bussell Decl.

reason for her change of heart on the House Floor on May 1, 2019: "I committed to vote for ESAs if the Hamilton County was excluded from the program. The language that's in this conference report here today does that. As a result, I'm going to be keeping my commitment and I will vote for this bill." (May 1, 2019, House Session Tr. at 5:3-7, Ex. 11 to Bussell Decl.; Video at timestamp 1:26:46–1:26:59, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338.)

Before the Senate's final vote on the same day, Sen. Joey Hensley (R-Hohenwald) asked the bill's Senate sponsor, Sen. Gresham, to confirm that "no other LEA will be able to grow into the program over the years," explaining, "[I] just want it to be on the record and assured that this conference report continues to prevent any future LEAs from being included in this." (May 1, 2019, Senate Session Tr. at 2:16-22, Ex. 11 to Bussell Decl.; Video at timestamp 1:37:11–1:37:40, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17348.) Sen. Gresham responded unequivocally: "That's the intent of the General Assembly today." (May 1, 2019, Senate Session Tr. at 2:24–3:1, Ex. 12 to Bussell Decl.; Video at timestamp 1:37:46–1:37:50, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17348.)[13]

Both the House and Senate adopted the conference committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays. (H.B. 939, 111th Gen. Assemb., Tenn. H. J., 2019 Reg. Sess. No. 36; H.B. 939, 111th Gen. Assemb., Tenn. S. J., 2019 Reg. Sess. No. 34.)

[13] To guarantee that even a court could not undo what then-Deputy House Speaker Hill and Sen. Gresham had promised their colleagues, the General Assembly included a limited exception to the severability clause so that if any portion of the Act were determined to be invalid, that invalidity "shall not expand the application of this part to eligible students other than those identified in § 49-6-2602(3)." Tenn. Code Ann. § 49-6-2611(c).

III. THE ESA ACT WILL CAUSE SIGNIFICANT, IMMEDIATE HARM ON PLAINTIFF COUNTIES AND THEIR LEAS.

The ESA Act shifts the cost of funding education savings accounts onto Plaintiff Counties. But the operational method it uses causes significant harm to MNPS and SCS. Importantly, if the State implements the ESA Act for this school year, as the Governor declared in a press release on July 13, 2022, the State will reduce MNPS and SCS's allotment of school funding by thousands of dollars for every student participating in the ESA program who are zoned to those LEAs. The ESA Act requires the State to deposit those amounts into ESAs for the participating students and then forces the LEAs to count those participating students in their enrollments. This "counting requirement" will trigger existing obligations on Plaintiff Counties to fund the LEAs for those students, even though they no longer attend public schools.

To accomplish implementation for the 2022-2023 school year, the State Defendants intend to funnel the money directly to private schools while still counting these students as "enrolled" in MNPS and SCS. But because school district budgets have already been proposed, staffing and other school operations projections and preparations have already been made, and Plaintiff Counties have already adopted budgets for this fiscal year, deducting funds from the LEAs' BEP allotments now will result in an immediate deficit for both LEAs that cannot be fully restored. As described in more detail below, a temporary injunction is necessary to stop this immediate and irreparable harm.

A. ESAs Will Be Funded By Reducing the LEAs' BEP Disbursements by the Statewide Average

ESAs are funded by diverting state and local funds from a participating student's public-school district in an amount equal to the district's per-pupil state and local funding

required by the state's Basic Education Program[14] ("BEP") or the combined (state and local) statewide average of BEP funding, whichever is lower. Tenn. Code Ann. § 49-6-2605(a). In advance of the ESA Program's 2020 launch, the Tennessee Comptroller of the Treasury issued a Legislative Brief identifying the ESA funding amount as $7,117 for the 2020-2021 school year. ("Understanding Public Chapter 506: Education Savings Accounts") (updated May 2020) (hereinafter "Comptroller Brief"), attached to Bussell Declaration as Exhibit 14.) The State does not publish the statewide BEP average as a matter of course outside the ESA context.

The Comptroller Brief identified total per-pupil BEP funding for MNPS as $8,324 ($3,618 in State funding and $4,705 in local funding) and for Shelby County as $7,923 ($5,562 in State funding and $2,361 in local funding). (Comptroller Brief at 4, Ex. 14 to Bussell Decl.) The statewide average, on the other hand, was $7,572. (*Id.*)[15] Because the statewide average was less than either MNPS or SCS's funding amounts, the Comptroller noted that ESAs would be funded at the statewide average, minus a 6% administrative fee, totaling $7,117. (*Id.*)

According to the ESA Act, the State will deposit the full ESA disbursement (State and local BEP shares) into a participating student's account. Tenn. Code Ann. § 49-6-2605(b)(1). The State will then subtract that same amount "from the state BEP funds otherwise payable

[14] The BEP is a statutory formula for calculating kindergarten through grade twelve education funding "necessary for our schools to succeed." Tenn. Code Ann. § 49-3-302(3). Total BEP funding consists of separate contributions by the State and local jurisdictions. The State and local shares vary among school districts based on each local jurisdiction's ability to raise revenue from property taxes. *Id.* § 49-3-307(a)(10), -356. The BEP will be replaced by the Tennessee Investment in Student Achievement formula ("TISA") beginning in the 2023-2024 school year. 2022 Tenn. Public Acts ch. 966 ("TISA Public Act") (attached to Bussell Declaration as Exhibit 13).

[15] According to the Comptroller Brief, the LEAs' per-pupil expenditures (both the local match and total expenditures) were based on prior year budgets (2019), while the State's per-pupil funding was based on current year funding (2020). (Comptroller Brief at 4, Ex. 14 to Bussell Decl.)

to the LEA." *Id*. In other words, the State will break even: whatever it deposits into an ESA, it takes away from the LEA.

Because the full ESA disbursement equals the combined State *and local* BEP funding per pupil (or the statewide average, which in 2020 was slightly less), MNPS and SCS lose more State funding for an ESA student than if the student left to attend private school without an ESA. To illustrate using the 2020 funding figures, when a *non-participating* student leaves MNPS to attend private school, MNPS loses $3,618 in State BEP funding—the State share for an MNPS student. (Comptroller Brief at 4.) But when a *participating* student leaves an MNPS school for private school, the Metropolitan Government loses $7,572 in BEP funding—the State and local shares for an MNPS student, which is *more than twice as much money*. (*Id.*) Similarly, SCS would lose only $5,562 in State BEP funding per pupil for a student leaving to attend private school in 2020. (*Id.*) But when a participating student leaves an SCS school for private school, Shelby County loses $7,572 in BEP funding—*an additional 36 percent*. (*Id.*)[16]

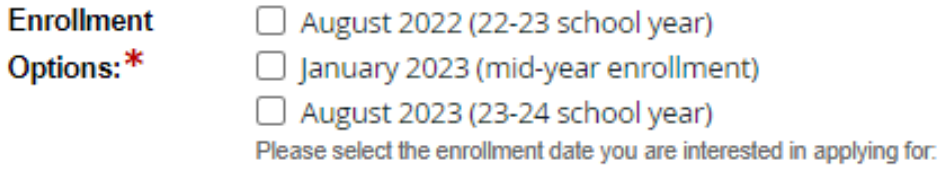
B. The State Defendants Are Attempting to Launch the ESA Program in a Rushed and Haphazard Fashion That Conflicts With the ESA Act's Plain Language.

On July 20, 2022, the State Defendants updated the ESA Program Website to make clear that they intend to provide some form of ESA funding for the upcoming 2022-2023 school year. (ESA Program Website, Landing Page, *available at* https://esa.tnedu.gov/.) The

[16] The General Assembly's Fiscal Review Committee estimated BEP revenue losses in its Corrected Fiscal Memorandum on the ESA Act (May 1, 2019) ("Fiscal Mem."). (Fiscal Mem. at 4, attached to Bussell Declaration as Ex. 15.) According to the Memorandum, the ESA program will generate a $36,881,150 "shift in BEP funding amongst LEAs" in Plaintiff Counties in the ESA program's first year, when it has a cap of 5,000 students; $55,321,725 in year two (cap of 7,500 students); $73,762,300 in year three (cap of 10,000 students); $92,202,875 in year four (cap of 12,500 students); and $110,643,450 in year five and subsequent years (cap of 15,000 students). Creating further confusion, the Memorandum based these figures on an estimate loss of $7,376.23 per pupil, which is not the same figure contained in the Comptroller's Brief.

TDOE has updated the ESA Program Website to identify the expected ESA amount per-pupil as "approximately $8,192." *Id.* Because the State has not released the statewide BEP average for years subsequent to 2020, Plaintiff Counties and their LEAs can only rely on the ESA approximation that the State posted on the site. Assuming this per-pupil figure was derived from the statewide average of BEP funding,[17] and applying the rationale from the Comptroller Brief, this means that each LEA will lose BEP funding of approximately $8,684 for every participating student—the ESA estimate of $8,192 plus a 6% administrative fee. (*See* Comptroller Br. at 4, Ex. 14 to Bussell Decl. (illustrating that the full statewide average would be deducted from the funds otherwise payable to the LEAs and that ESAs would be funded at the statewide average minus a 6% administrative fee).)

While the ESA Program Website does not provide a specific timeframe for when ESA funds will be available, the Intent to Enroll form—i.e., "the first step in the ESA application process"—lists August 2022 as an "Enrollment Option":



ESA Program Website, "Intent to Enroll Form," *available at* https://stateoftennessee.formstack.com/forms/esaintentapply. Both MNPS and SCS students will start school on August 8, 2022, just over two weeks from now.[18] So, the State Defendants are offering families an

[17] The $8,192 figure must be based on the statewide BEP average because the figure is the same for all participating students. The only other option under the ESA Act is to fund ESAs at the state and local BEP amounts for each LEA. Tenn. Code Ann. § 49-6-2605(a). Those amounts vary between MNPS and SCS and, thus, could not have both generated the $8,127 figure.

[18] MNPS District Calendar, *available at* https://cdn5-ss13.sharpschool.com/UserFiles/Servers/Server_32970243/File/District%20Calendar/2022-2023/MNPS%20District%20Calendar%202022-23%20-%20English.pdf; SCS District Calendar, *available at* http://www.scsk12.org/calendar/files/2022/2022-23_MSCS_Students_Calendar.pdf.

opportunity to enroll in a newly-launched program for the August 2022 semester, which begins in two weeks and for which the State has not even finalized details.

For instance, the ESA Program Website also states that ESA funding will be distributed via requests from the participating private schools to the TDOE as opposed to via deposits into participating students' ESAs. *Id.*, "Frequently Asked Questions: for Families," *available at* https://esa.tnedu.gov/wp-content/uploads/2022/07/ESA-FAQ-for-Participating-Families_22-23_v21.pdf. The FAQs suggest that this is because the State Defendants still must procure contracts for the operational platform that will be utilized for the ESA accounts themselves. On that point, the ESA Program Website states:

How will ESA funds be distributed in year one?

For the 2022-23 school year, participating non-public schools will be required to fund the student expenses (tuition, fees, computers, etc.) and then submit an invoice to the department for reimbursement. The department will be competitively procuring an application and wallet platform that will be operational beginning in the 2023-23 school year.

The ESA Act, however, does not contemplate direct payments to participating *private schools*. Rather, the Act sets up a statutory scheme by which ESAs—that is, actual "accounts"—are created and into which the State deposits money to be used by participating *students and families*. For example, the ESA Act states:

- "'ESA' means an education savings *account* created by this part." Tenn. Code Ann. § 49-6-2602(4) (emphasis added).
- "*The department shall remit funds to a participating student's ESA* on at least a quarterly basis." *Id.* § 49-6-2605(b)(1) (emphasis added).
- "'Eligible student' means a resident of this state who:

  (A)(i) Was previously enrolled in and attended a Tennessee public school for the one (1) full school year immediately preceding the school year for which the *student receives an education savings account*;

  (ii) Is eligible for the first time to enroll in a Tennessee school; or

  (iii) *Received an education savings account* in the previous school year.

  Id. § 49-6-2602(4) (emphasis added).

- "The maximum annual amount to which *a participating student is entitled under the program* must be equal to the amount . . . ." *Id.* § 49-6-2605(a) (emphasis added).
- "'Program' means the *education savings account program* created in this part." *Id.* § 49-6-2602(11) (emphasis added).
- "The department *shall establish and maintain separate ESAs for each participating student* and shall verify that the uses of ESA funds are permitted under § 49-6-2603(a)(4) and institute fraud protection measures." *Id.* § 49-6-2607(a).
- " . . . participating schools, providers, and eligible postsecondary institutions shall provide *parents of participating students or participating students*, as applicable, with a receipt *for all expenses paid to the participating school*, provider, or eligible postsecondary institution *using ESA funds*." *Id.* § 49-6-2607(c).

In a rush to get the program up and running as quickly as possible, the State Defendants are ignoring these statutory requirements altogether.[19]

C. Plaintiff Counties Must Fund Their LEAs as if ESA Students Had Never Left.

The ESA Act compels Plaintiff Counties to cover the LEAs' loss of BEP funding by requiring that ESA students still be "counted as enrolled" in their public schools for local funding purposes. Tenn. Code Ann. § 49-6-2605(b)(1). Because of this "counting requirement," each Plaintiff County must continue to appropriate its local share of BEP funding for students in the ESA program, *even though those students no longer attend public schools*. *See id.* § 49-3-307(a)(1)(B) (describing BEP calculation as based on "enrollment"); *id.* § 49-3-307(a)(11) (BEP formula "shall be student-based such that each student entering or exiting an LEA shall impact generated funding"); *id.* § 49-3-356(a) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."); *id*. § 49-2-101(1), (6) (making Davidson and Shelby counties' legislative bodies responsible for adopting budgets and levying taxes for their school systems).

[19] This also raises concerns about whether the State Defendants' anticipated transfer of public funds directly to private schools instead of into ESAs as authorized by the statutes would constitute *ultra vires* action necessitating inclusion in the Amended Complaint that Plaintiff Counties will file by the August 3, 2022, deadline imposed in the Court's recent order.

The counting requirement also affects Plaintiff Counties' obligations under Tennessee's "maintenance-of-effort" statute.[20] (Comptroller Brief at n.D ("Any additional local funding beyond the required BEP local match will not be included in ESA funding calculations, *but districts must continue to budget sufficient funds to meet maintenance of effort requirements set by the state*.") (emphasis added), Ex. 14 to Bussell Decl.) Local jurisdictions may choose to appropriate more education funding than the BEP requires. Plaintiff Counties do so. (Chris Henson Declaration ¶ 9, Ex. 16 to Bussell Decl.; Tutonial Williams Declaration ¶¶ 7-8, Ex. 17 to Bussell Decl.) Because the counting requirement leaves ESA participating students on the school districts' rolls, the maintenance-of-effort statute requires Plaintiff Counties to appropriate their *full* local per-pupil spending for students no longer attending their schools.

The ESA Act includes a grant program—the "school improvement fund"—that if funded[21] would disburse annual grants to MNPS and SCS that in aggregate will be *less than* the total ESA disbursements to participating students. Tenn. Code Ann. § 49-6-2605(b)(2). The grant program only reimburses lost funding resulting from students who attended an MNPS or SCS public school for one full school year before joining the ESA program. Tenn. Code Ann. § 49-6-2605(b)(2). Thus, school districts would receive no grant funds for ESA students who enter kindergarten or move into Plaintiff Counties. Moreover, this grant

[20] The State's "maintenance of effort" statute generally requires local governments to appropriate the same level of per-pupil local funding notwithstanding any increase in state funding in a particular year. Tenn. Code Ann. § 49-3-314(c); *see also* Tennessee Comptroller of the Treasury Legislative Brief, "Understanding Tennessee's Maintenance of Effort in Education Laws" (Sept. 2015), Ex. 16 to Bussell Decl.

[21] The grant program is "subject to appropriation" and therefore not guaranteed funding under the ESA Act. Even if funded, it will supply school improvement funds to MNPS and SCS only for the first three years. Tenn. Code Ann. § 49-6-2605(b)(2). While the State argued on appeal that "school improvement" can include virtually anything, they offered no tangible support for that argument, and the ESA Act itself sets no standard for how the State must interpret the grant's meaning.

program does not release Plaintiff Counties from their financial obligations under the ESA Act's "counting requirement" and therefore does not make Plaintiff Counties whole. Neither the BEP nor the maintenance-of-effort statute allows the Counties to offset their education-funding obligations with grant funds received by their school districts. *Id.* § 49-3-314(c) (under State's "maintenance of effort" statute, local legislative bodies must appropriate the same level of per-pupil funding notwithstanding an increase in state funding); *see also* Comptroller Brief at n.D, Ex. 14 to Bussell Decl. Thus, whether or not school districts receive "school improvement grants" under the ESA Act, Plaintiff Counties must fund the LEAs based on the enrollments that include those students.

D. <u>The Funding Mechanism, and Particularly Its Timing, Will Have Grave Consequences for Plaintiff Counties and Their LEAs</u>.

The Tennessee Supreme Court has already held that the Plaintiff Counties had standing to assert a claim under the Home Rule Amendment, Tenn. Const. art. XI, § 9, because the ESA Act interferes with Plaintiff Counties' local sovereignty. *Metro v. TDOE*, 645 S.W.3d at 150 ("Accordingly, having concluded that Plaintiffs satisfied their burden of establishing standing by alleging the ESA Act violates their constitutionally protected interest in local control of local affairs, we affirm the Court of Appeals' decision that Plaintiffs have standing to challenge the constitutionality of the Act under the Home Rule Amendment."). It would be axiomatic to state that the way in which the Act interferes with Plaintiff Counties' sovereignty is by forcing them to fund a school choice program that no other counties in Tennessee must fund by forcing their LEAs to count in their enrollments the students attending private schools using ESAs. All parties have essentially conceded in these proceedings—and the Tennessee law referenced in Section C above plainly establishes—that Plaintiff Counties bear the financial burden of the ESA Program. That could not plausibly be disputed at this juncture.

But the ESA Act's triggering of the Plaintiff Counties' school funding obligations for private school attendance does not alleviate the ESA Act's harm to MNPS and SCS. In fact, regardless of the "bottom line" dollars that the LEAs will ultimately receive as a result of the program, the manner in which the dollars move from entity to entity will have grave consequences on MNPS and SCS and the students remaining in them.

Both MNPS and SCS use student enrollment projections to determine where to allocate funding to benefit students. (Williams Decl. ¶¶ 3-4, Ex. 18 to Bussell Decl.; Henson Decl. ¶¶ 3-4, Ex. 17 to Bussell Decl.) Both districts have set their respective budgets for fiscal year 23 based on the anticipated BEP funding from the State and funding from the county. (Williams Decl. ¶¶ 6, 8-9; Henson Decl. ¶¶ 6, 9-10.)

MNPS expects to receive $257,743,000 from the State in BEP funding, and SCS anticipates receiving $568,692,000. (Williams Decl. ¶ 6; Henson Decl. ¶ 10.) The first BEP payment is anticipated on August 15 and every month after that until April. (Henson Decl. ¶ 11.) If the ESA program goes into effect, MNPS and SCS will unexpectedly lose millions of dollars. At $8,684 per pupil (the TDOE estimate of $8,192 plus 6%), MNPS will lose $17.8 million dollars in BEP funds if 2,050 students from MNPS attend a private school. For SCS, the funding loss would be $25.6 million dollars if 2,950 students attend a private school. Those amounts are significant and would require MNPS and SCS to make cuts to their operating budgets to absorb the loss in funding. (Williams Decl. ¶¶ 5, 10; Henson Decl. ¶ 5, 14.)

The cuts would be particularly painful because the districts' operational costs are unlikely to decrease in relation to the loss of funding. (Williams Decl. ¶ 3; Henson Decl. ¶ 3.) Last-minute adjustments to enrollment will affect teacher and other staff moves, technology services availability, transportation routes, nutrition services, and other operational services, requiring shifts at schools across the affected districts. These late operational changes will

adversely affect not only MNPS and SCS teachers and staff but also the quality of services delivered to students who remain enrolled at the affected schools. If shifts cannot be made because of the resulting ratios of students to staff or students to equipment, then various MNPS and SCS schools must operate under-enrolled, which has a direct, negative impact on the district, students, and teachers. (Williams Decl. ¶ 5; Henson Decl. ¶ 5.)

At bottom, the implementation of the ESA program, particularly on a truncated timeline, affects students by diverting significant resources away from MNPS and SCS. Even if 5,000 students participate in the ESA program, MNPS and SCS will remain responsible for educating over 150,000 students, and the State's actions threaten their educational experience by forcing the districts to provide the same level of resources with far less funding.

APPLICABLE STANDARD

Under Tennessee Rule of Civil Procedure 65, "[i]njunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment." Tenn. R. Civ. P. 65.01. Rule 65.04 sets forth the standard for issuance of a temporary injunction. The rule states, "A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual." Tenn. R. Civ. P. 65.04(2).

State and federal courts[22] in Tennessee utilize a four-factor test in determining whether to issue a temporary injunction. Courts examine "(1) the threat of irreparable harm

[22] "Federal case law interpreting rules similar to those adopted in this state are persuasive authority for purposes of construing the Tennessee rule." *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 755 (Tenn. 2006).

to plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." *S. Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (quoting Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 4-3(l) (1999)).

"The issuance of an interlocutory or preliminary injunction is a matter of legal discretion with the chancellor." *Nashville, C. & St. L. Ry. v. R.R. & Pub. Utils. Comm'n*, 32 S.W.2d 1043, 1045 (Tenn. 1930). "Where, as here, the temporary injunction is sought on the basis of an alleged constitutional violation, the third factor—likelihood of success on the merits—often is the determinative factor." *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020) (citations omitted).

LEGAL ARGUMENT

I. PLAINTIFF COUNTIES HAVE A HIGH LIKELIHOOD OF SUCCESS ON THEIR EQUAL PROTECTION CLAIM IN COUNT II.

Plaintiff Counties have two claims remaining in the current iteration of the Complaint. While both claims are likely to succeed, Plaintiff Counties' motion for temporary injunction focuses on the high likelihood of success on the equal protection claim in Count II.

A. Because Education Is a Fundamental Right Under the Tennessee Constitution, Strict Scrutiny Applies to the ESA Act.

The right to equal protection of the laws is guaranteed by Article I, Section 8 and Article XI, Section 8 in the Tennessee Constitution. *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 695 (Tenn. 2020). "The equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct" and "differ in their perspective because of their respective positions in the nation's scheme of federalism." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) ("*Small Schools I*"). Nevertheless, the Tennessee Supreme Court has recognized that the Tennessee

Constitution "confer[s] essentially the same protections as the Fourteenth Amendment to the United States Constitution, despite the[se] historical and linguistic differences." *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003) (citing *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994)); *see also Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994).[23]

As a result, the Tennessee Supreme Court "has adopted an analytical framework similar to that used by the United States Supreme Court in analyzing equal protection challenges." *Gallaher*, 104 S.W.3d at 460. "The concept of equal protection espoused by the federal and our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Norris*, 751 S.W.2d at 841 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "The core concern expressed in this constitutional provision is that legislative classification, to the extent that it exists, not be unreasonable or unfair." *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991). That is, *Small Schools I* and general equal protection principles require that similarly-situated groups of people be treated similarly. *Small Schools I*, 851 S.W.2d at 153 (citing *F.S. Royster Guano*, 253 U.S. 412).

Under the equal protection framework, one of three levels of scrutiny applies to any legislative enactment being challenged on equal protection grounds. *Gallaher*, 104 S.W.3d at 460. The highest level of scrutiny, commonly referred to as "strict scrutiny," applies to legislation that "interferes with the exercise of a fundamental right" or "operates to the peculiar disadvantage of a suspect class." *Id.* Heightened scrutiny is an intermediate level of scrutiny. *Newton*, 878 S.W.2d at 109 (citing *Small Schools I*, 851 S.W.2d at 152-54). Reduced scrutiny is the lowest level of scrutiny, applying a rational-basis standard. *Id.*; *Gallaher*, 104

[23] In its interpretation of the Tennessee Constitution, the Tennessee Supreme Court "is always free to expand the minimum level of protection mandated by the federal constitution." *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988).

S.W.3d at 460. Thus, if a legislative enactment satisfies strict scrutiny, it necessarily satisfies rational-basis scrutiny as well.

"Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a "suspect class" (e.g., alienage or race)." *Tester*, 879 S.W.2d at 828. For purposes of the Tennessee Constitution, a right is "fundamental" when it is "either implicitly or explicitly protected by a constitutional provision." *Id.* (citing *Small Schools I*, 851 S.Wd.2d at 152).

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the U.S. Supreme Court held that education is not a fundamental right under *the U.S. Constitution*. *Id.* at 37. And while that holding does not inform the question of whether education is a fundamental right under the *Tennessee Constitution*, *Rodriguez* is instructive on the issue. The Supreme Court began its analysis of the issue by referencing its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which "recognized that 'education is perhaps the most important function of state and local governments.'" *Rodriguez*, 411 U.S. at 29 (quoting *Brown*, 347 U.S. at 493). "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause" in the U.S. Constitution. *Id.* at 30. Nor is "the key to discovering whether education is 'fundamental' . . . to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing" or "by weighing whether education is as important as the right to travel." *Id.* at 33. "Rather, the answer lies in assessing *whether there is a right to education explicitly or implicitly guaranteed by the Constitution*." *Id.* (emphasis added).

Following this reasoning, the Supreme Court noted that education is not enumerated in the U.S. Constitution as a protected right. *Id.* at 35. The Supreme Court likewise did not "find any basis for saying it is implicitly so protected." *Id.* Accordingly, *Rodriguez* held that education is not a fundamental right *under the U.S. Constitution* and declined to apply strict scrutiny to the Texas school-financing system at issue. *Id.* at 37-40.

The implication of *Rodriguez*, however, is *not* that all statutes addressing education are subject to rational-basis review. Rather, *Rodriguez* provides an analytical framework for determining whether a right is fundamental for purposes of a constitutional challenge: Where the right is "explicitly or implicitly guaranteed by the Constitution," the right is fundamental. *Id.* at 33; *see also Norris*, 751 S.W.2d at 841 (examining a Tennessee equal protection claim and stating, "According to the United States Supreme Court, to determine whether a particular right is deserving of the strict scrutiny analysis, the Constitution must be examined 'to see if the right infringed has its source, explicitly or implicitly, therein.'" (quoting *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982))). Again, the same is true under Tennessee law, with rights being deemed fundamental where they are implicitly or explicitly protected by the Tennessee Constitution. *Tester*, 879 S.W.2d at 828.

Following this rationale, the Tennessee Supreme Court concluded in *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715 (Tenn. 2012), that education is a fundamental right when examining a high school student's due process claim. Citing *Rodriguez*, the court stated:

> The United States Supreme Court has declined to recognize that the right to a free public education is a fundamental right protected by the Equal Protection Clause of the Fourteenth Amendment. However, Article XI, § 12 of the Constitution of Tennessee "guarantees to all children of school age in the state the opportunity to obtain an education." To implement this constitutional imperative, the General Assembly has created a statutory right to a public education that benefits all school-age children in Tennessee.

> Accordingly, Mr. Heyne has a claim of entitlement to a public education that warrants procedural due process protection.

Heyne, 380 S.W.3d at 731-32 (citing *Rodriguez*, 411 U.S. at 35-36; *Small Schools I*, 851 S.W.2d at 140) (internal citations and footnote omitted).

Though the plaintiff in *Heyne* asserted a due process claim, the reasoning applies equally here. *See Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997) ("Here, the parties agree that the statute does not interfere with a *fundamental right* nor does it involve a suspect class; thus, *like the due process challenge*, the equal protection analysis of this state statute involves the rational basis test." *Id.* (emphasis added)). The right to an education is explicitly conferred in the Tennessee Constitution:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

Tenn. Const., art. XI, § 12. Unlike the U.S. Constitution, the right to an education is "explicitly guaranteed" by the Education Clause in the Tennessee Constitution. *See Rodriguez*, 411 U.S. at 33. Accordingly, education is a fundamental right under the Tennessee Constitution, and strict scrutiny applies to legislation affecting it. *Newton*, 878 S.W.2d at 110.[24]

[24] In the *Small Schools* litigation, the Chancellor found that the education financing system failed all three levels of equal protection scrutiny. The Tennessee Supreme Court passed over the question of whether education is a fundamental right, noting that "if the [education financing] system fails to meet the 'rational basis' test, which imposes upon those challenging the constitutionality of the system the greatest burden of proof, the plaintiffs will be found to prevail and further analysis will not be necessary." 851 S.W.2d at 153. Because the court found that the funding scheme failed rational-basis scrutiny, the court never had to address whether education was a fundamental right. *Id.* at 156. *Heyne* subsequently answered that question. 380 S.W.3d at 731-32.

B. The ESA Act Cannot Survive Strict Scrutiny.

Under the strict scrutiny test, the State has the "burden to show that the regulation is justified by a compelling state interest and narrowly tailored to achieve that interest." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 18 (Tenn. 2000). "A regulation cannot qualify as narrowly tailored if there are alternative means of achieving the state interest that would be less intrusive and comparably effective." *Hargett*, 414 S.W.3d at 102-03.

The State cannot meet this taxing burden. The ESA Act makes bold claims about the State's interest and the General Assembly's intentions, stating:

> The general assembly recognizes this state's legitimate interest in the *continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis*. Accordingly, it is the intent of this part 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) (emphasis added). There is no connection, however, between those claims and the means by which the legislature seeks to achieve them. Despite the State purportedly having a legitimate interest in *improving the performance of LEAs*, the ESA Act *removes funding* from those LEAs—in this instance, in the middle of a school year with no ability to prepare in advance. And it permits students to leave the LEA, even students in the highest-performing schools in those LEAs, to use those public funds to attend private schools. Any claim that diverting money and students away from LEAs is narrowly-tailored or even loosely-related to a desire to improve those LEAs' performance is nonsensical.

In fact, the outright refusal of legislators to vote for the Act if their own counties were included in its application emphasizes this flaw. If, as the General Assembly contends, the ESA Act was passed to improve the performance of the LEAs to which it applies, then there would have been no need to "protect" other counties from its application. The General

Assembly had no intention of improving the performance of the LEAs in Davidson and Shelby counties when it passed the ESA Act, nor does the Act have any plausible chance of doing so. Removing BEP funding from an LEA certainly is not the least restrictive means of improving school performance in *that* school district.

Importantly, the ESA Act does not provide students in *low-performing schools* with the right to use public funds to attend private school. It gives *any student* meeting the income threshold the right to do so—even students attending the highest performing schools in MNPS or SCS. Tenn. Code Ann. § § 49-6-2602(3)(C).

In addition, there is no connection between the purported "legitimate purpose" of "continued improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis" and the definition of "eligible student" under the Act. The Act did not define "eligible student" based on any data earlier than 2015, and the data used reflects multiple counties with equally-poorly performing schools as a percentage of the district. In fact, Hamilton, Fayette, and Madison counties' school performance declined during the time period on which the General Assembly relied, yet those counties were excluded from the Act's application.

To illustrate, in 2015, 15 out of 154 Davidson County schools (9.7%) and 45 out of 221 Shelby County schools (20.4%) were in a priority status. (2015 Priority Schools List, Ex. 3 to Bussell Decl.) The same year, 5 out of 79 Hamilton County schools (6.3%), 4 out of 90 Knox County schools (4.4%), and 2 out of 27 Madison County schools (7.4%) were in a priority status. (*Id.*)

In 2017, the TDOE identified 168 (later reduced to 166) schools from 14 LEAs on its list of bottom 10% schools. (2017 Bottom 10% List, Ex. 4 to Bussell Decl.) In 2017, 41 out of 163 Davidson County schools (25.2%) and 65 out of 206 Shelby County schools (31.6%) were on the bottom 10% list. The same year, 2 out of 7 Fayette County schools (28.6%), 13 out of

78 Hamilton County schools (16.7%), 7 out of 90 Knox County schools (7.8%), and 8 out of 23 Madison County schools (34.8%) were on the bottom 10% list. (*Id.*) Stated differently, Fayette County had a higher concentration of bottom 10% schools than Davidson County, and Madison County had a higher concentration than Davidson or Shelby counties. (*Id.*)

In 2018, 82 schools comprised the priority list. (2018 Priority Schools List, Ex. 8 to Bussell Decl.) Sixty-four of those schools came from seven LEAs, with the other eighteen schools in the ASD. (*Id.*) In 2018, 21 out of 163 Davidson County schools (12.9%) and 27 out of 206 Shelby County schools (13.1%) were in a priority status. (*Id.*) The same year, 1 out of 7 Fayette County Schools (14.3%), 9 out of 78 Hamilton County schools (11.5%), and 4 out of 23 Madison County schools (17.4%) were in a priority status. (*Id.*) In addition, Hamilton and Madison counties experienced a significant downgrade in 2018 from their previous priority school listings in 2015. (*Id.*) In other words, Madison and Fayette counties had a higher concentration of priority schools on the 2018 priority list than Davidson or Shelby County, and Hamilton County's concentration was only slightly lower. (*Id.*)

These counties were omitted from the ESA Act's application, not because their districts were performing well, but because the bill would not pass without removing them. In fact, as the legislative record outlined in the Factual Background above establishes, every county other than Davidson and Shelby was removed from the legislation because that was the intent of the General Assembly: to "protect" all other counties while imposing the Act's inevitable and negative consequences in the "deep blue" counties. This type of partisanship falls far short of the narrow tailoring to a compelling government interest that the strict scrutiny standard requires. Because the General Assembly could have—and should have—taken myriad other steps to help low-performing districts or low-performing students improve, the ESA Act is not narrowly-tailored to its purported interest, or any compelling state interest. Instead, the General Assembly elected to target two counties, by diverting

their BEP funding to private schools, despite those LEAs having the highest number of schools and students in the state to educate, and despite those LEAs performing no worse than three other counties that were "protected" from the bill. These political tactics hardly satisfy the rigorous strict scrutiny standard.

C. Even if Rational-Basis Scrutiny Applies, the ESA Act Is Not Rationally-Related to a Legitimate State Interest.

Even if rational-basis scrutiny applie here, the ESA Act nonetheless violates equal protection. As the Tennessee Supreme Court recognized in *Small Schools I*, "disparities in resources available" in various school districts can "result in significantly different educational opportunities for the students of the state." 851 S.W.2d at 145. Where there is no "legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated," the classification "fails to satisfy even the 'rational basis' test applied in equal protection cases." *Id.* at 156. In addition, a classification with "no reasonable or natural relation to the legislative objective" does not satisfy the rational-basis test under the equal protection clauses. *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978).

"The core concern expressed in this constitutional provision is that legislative classification, to the extent that it exists, not be unreasonable or unfair." *Burson*, 816 S.W.2d at 731. As the Tennessee Supreme Court has described:

> [A] classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against. There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification.

Tester, 879 S.W.2d at 829 (quoting *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 775 (Tenn. 1911)).

The ESA Act does not meet this standard. As outlined above, there is no logical connection between the State's purported "legitimate interest in the continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis" and the ESA Act's method of purportedly accomplishing that goal. Tenn. Code Ann. § 49-6-2611(a)(1). If the General Assembly had *any interest* in improving school performance in Davidson or Shelby counties, it would not have removed millions of dollars in funding and students from those LEAs—potentially even from their high-performing schools—via the ESA Act.

But even if the Court ignores the purported "legitimate interest" that the State claims to have in this legislation, the Act fares no better. The Tennessee Supreme Court declared unequivocally in *Small Schools I* that there was no proof of a "legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated." 851 S.W.2d at 156. This case is no different. The Fayette, Hamilton, and Madison County LEAs, and the students in them, do not risk loss of funding in their poorly-performing schools; only Davidson and Shelby counties do. Fayette, Hamilton, and Madison counties are, in the words of Representative Matthew Hill, "protected" from the Act's negative consequences.

There is no rational basis for the ESA Act's inclusion of all qualifying students in Davidson and Shelby counties, *even those attending high-performing schools in affluent neighborhoods*, while excluding qualifying students in other Tennessee counties zoned to low-performing schools. To reiterate, the ESA Program eligibility is not limited to qualifying students in *low-performing schools* across the state. Certainly Fayette, Hamilton, Madison, and myriad other counties would be included if that were the case. There is no rational

relationship between the ESA Act's exclusion of qualifying students in low-performing schools in Tennessee outside of Davidson and Shelby counties and any purported desire to provide better educational opportunity to students in low-performing school systems.

The question for equal protection purposes is not whether there is *any* difference between the groups to which the Act applies and the ones to which it does not. The question is whether there is any distinction to *justify treating the groups differently*. *Tester*, 879 S.W.2d at 829 ("[A] classification . . . must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against.") There is no justification for treating MNPS and SCS differently than other districts with school performance challenges. As explained above, other districts have concentrations of low performing schools. A simple Google search reveals multiple private schools in Hamilton and Madison counties. And Fayette County is just across the county line from Shelby County. Additionally, the ESA Act permits payment of expenses outside of Davidson and Shelby counties. The size of the districts or counties is a distinction without a difference, even if the legislature were truly addressing student performance.

The ESA Act's reference to it being a "pilot" program also does not serve as a rational basis because that reference is a fallacy. There was no mention of the term "pilot" until the very last amendment to the Senate bill (SA0417)—the bill whose "eligible student" definition (applying only in Davidson and Shelby counties) was ultimately recommended by the Conference Committee and adopted in both houses. (*Compare* Exs. 1-2, and 7 to the Bussell Decl. *with* Exs. 9, 11 to the Bussell Decl.) But unlike true pilot programs, which do not exist in perpetuity, the ESA Act will remain law and apply only in Davidson and Shelby counties unless and until the General Assembly passes new legislation. *See Easterly v. Harmon*, No.

01A01-9609-CH-00446, 1997 WL 718430, at *1 (Tenn. Ct. App. Nov. 19, 1997) ("As part of this pilot program, the state paid for an additional part-time employee to work in the County Clerk's office *for a short period of time. When the period of time for the pilot program expired*, Easterly maintains that she received the approval of the Commission's budget committee to hire the temporary part-time employee as a permanent full-time employee." (emphasis added)); *State v. Matlock*, No. M200601141CCAR3CD, 2007 WL 1364650, at *2 (Tenn. Crim. App. May 9, 2007) ("On redirect examination, Parker testified that the Defendant would have to wear his GPS monitor *as long as the pilot program is enacted*, and then it would be up to the Legislature to determine whether the program would continue." (emphasis added)); *Smith v. Bd. of Prof'l Responsibility of Sup. Ct. of Tenn.*, 551 S.W.3d 712, 715 (Tenn. 2018) ("Following this program, Attorney completed a *ten-week pilot program* involving cognitive behavior that was led by his probation officer." (emphasis added)).[25]

When the conference committee report was considered on the Senate floor, an exchange between Sen. Hensley and co-sponsor Sen. Gresham revealed the deception of the "pilot program" reference. Sen. Hensley asked for assurance on the record that "no other LEA will be able to grow into the program over the years." (May 1, 2019, Senate Session Tr. at 2:16-22, Ex. 11 to Bussell Decl.; Video at timestamp 1:37:11–1:37:40, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17348.) Sen. Gresham gave him that assurance, saying, "That's the intent of the General Assembly today." (May 1, 2019, Senate Session Tr. at 2:24–3:1, Ex. 11 to Bussell Decl.; Video at timestamp 1:37:46–1:37:50, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17348.) This guarantee was solidified in a "reverse severability clause" ensuring that no invalidity of any part of the Act could expand its application to income-eligible students other than those in Davidson

[25] As required by Local Rule 26.04(b), all unpublished decisions or decisions from other courts are attached alphabetically as Exhibit 1.

County and Shelby County. Tenn. Code Ann. § 49-6-2611(c). With this provision, the Legislature achieved the House's objective, given voice by Rep. Hill, of limiting the ESA program to "deep blue" Davidson County and Shelby County while "protect[ing]" other LEAs. (April 23, 2019, House Session Tr. at 27:1-5, Ex. 5 to Bussell Decl.; Video at timestamp 2:55:15–2:55:31, http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272.)

Regardless of whether a legislature has the right to experiment with programs on smaller scales, there must be a reasonable basis for any distinction between the groups to which the program applies. Here, the General Assembly's reference to the ESA Act as a "pilot program" was nothing but a last-ditch attempt to mask the partisanship that prevented the Act from passing unless all but two counties were dropped from its coverage. The ESA Act is not a pilot program, and there is no rational basis for excluding other counties, particularly a neighboring county, from its application.

Equal protection "guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Norris*, 751 S.W.2d at 841 (quoting *F.S. Royster Guano Co.*, 253 U.S. at 415). The ESA Act comes nowhere near that. There is no identifiable, rational basis for the ESA Act's application to only Davidson and Shelby counties. Accordingly, Plaintiff Counties are likely to succeed on the merits of this claim.

II. SIGNIFICANT IRREPARABLE HARM WILL RESULT FROM THE ESA ACT'S IMPLEMENTATION.

As established above, Plaintiff Counties are likely to succeed on the merits, which would necessarily involve the Court declaring the ESA Act unconstitutional. Courts routinely hold that a constitutional violation mandates a finding of irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (The loss of a constitutional right, "even for a minimal period[ ] of time, unquestionably constitutes irreparable injury."); *Fisher v. Hargett*, 604 S.W.3d 381, 415 (Lee, J., concurring in part and dissenting in part) (quoting *Obama for Am. v. Husted*, 697

F.3d 423, 436 (6th Cir. 2012) ("'When constitutional rights are threatened or impaired, irreparable injury is presumed,' especially where (as here) monetary damages cannot make the plaintiffs whole.")); *Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, & Kentucky, Inc. v. Cameron*, No. 3:22-CV-198-RGJ, 2022 WL 1183560, at *6 (W.D. Ky. Apr. 21, 2022) (quoting *ACLU of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd sub nom.*, *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005)) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."). Thus, this prong of the Court's temporary injunction inquiry is easily satisfied.

Even if the Court looks beyond the harm of a constitutional violation, it need not look far. Here, the harm also extends to severely affecting operations at MNPS and SCS, at the expense of students. "A party's harm is 'irreparable' when it cannot be adequately compensated by money damages." *Livingston Educ. Serv. Agency v. Becerra*, No. 22-CV-10127, 2022 WL 660793, at *10 (E.D. Mich. Mar. 4, 2022) (quoting *Eberspaecher N. Am., Inc. v. Van-Rob, Inc.*, 544 F. Supp. 2d 592, 603 (E.D. Mich. 2008)). Also, "[A]n injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *Id.* (quoting *D.T. v. Sumner Cty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019)). Without an injunction, the State Defendants' helter-skelter attempt to implement the ESA program before the commencement of the 2022-2023 school year will initiate a ripple effect across SCS and MNPS school operations. That ripple effect will ultimately harm its students the most and in consequential ways that are certain, immediate, and cannot be adequately compensated by money damages.

By the State Defendants' own admission, the ESA program will not be fully functional by the beginning of the 2022-2023 school year. (*See* ESA Program Website, "FAQ for Participating Families," *available at* https://esa.tnedu.gov/wp-content/uploads/2022/07/ESA-FAQ-for-Participating-Families_22-23_v21.pdf ("For the 2022-23 school year, participating

non-public schools will be required to fund the student expenses . . . and then submit an invoice to the department for reimbursement."). In prior proceedings in this case, the State Defendants represented that the following timeline governed implementation:

1. May 7, 2020 – deadline to submit applications to TDOE for ESA awards for the 2020-2021 school year;
2. May 13, 2020 – deadline for TDOE to confirm ESA awards for 2020-2021 school year to parents of eligible students;
3. June 1, 2020 – deadline for most private schools to assign seats for students for enrollment in 2020-2021 school year;
4. June 15, 2020 – deadline for ESA Program award recipients to confirm to TDOE their acceptance of ESA Program award and school seat assignment/acceptance;
5. July 1, 2020 – period for TDOE's hiring of approximately 20 administrative staff members to support the administration of the ESA Program during 2020-2021 school year;
6. July 20, 2020 – Deadline to set up virtual wallet; and
7. August 15, 2020 – TDOE funds ESA Program participants' class wallet accounts for Fall 2020 school semester; ESA Program award recipients make Fall 2020 semester tuition payments to the private schools they will attend for the 2020-2021 school year.

(Amity Schuyler Decl., Deputy Commissioner of Education, ¶ 4, Ex. 19 to Bussell Decl.)

Two years later, however, the State intends to launch the ESA Program after announcing that preparations began on July 13, 2022. Office of the Governor, *Injunction Lifted on Education Savings Account Program, Immediate Implementation Ahead* (July 13, 2022, 4:26 PM) ("Starting today, we will work to help eligible parents enroll [in the ESA program] this school year . . . ."), *available at* https://www.tn.gov/governor/news/2022/7/13/injunction-lifted-on-education-savings-account-program--immediate-implementation-ahead-.html.

MNPS and SCS's first day of school is August 8, 2022. Absent divine intervention, and by the State Defendants' own admission, the ESA program will not be operational by then. Instead, the State Defendants will likely rush an implementation through the fall, disrupting both the lives of students who use an ESA and those who remain in public schools. Ironically,

the program designed to "help" students in the lowest performing LEAs will have the opposite effect—especially if it is implemented haphazardly and without regard for consequences.

Further, if the State Defendants launch the ESA program and then it is declared unconstitutional, the individuals that suffer the most will again be the students. Issuing an injunction now prevents students from becoming political ping-pong balls. Without an injunction, up to 5,000 students could transition three times this school year: a student would start at an MNPS or SCS school at the beginning of the year, transfer to a private school with an ESA when the program begins, and then be forced either to unenroll in the private school or scrounge together enough money for tuition once the Court declares the ESA Act unconstitutional. Because Plaintiff Counties are likely to succeed on the merits, issuing an injunction maintains the status quo and is the prudent decision to protect all affected parties from this turmoil. In contrast, not issuing an injunction sets in motion a volatile school year for thousands of MNPS and SCS students, which cannot in turn be remedied with money.

Allowing the ESA program to spring into existence will also negatively affect MNPS and SCS by decreasing operational budgets that have already been set for this fiscal year. (Williams Decl. ¶ 8, Ex. 18 to Bussell Decl.; Henson Decl. ¶¶ 9-10, Ex. 17 to Bussell Decl.) Generally, "[m]onetary or economic harm by themselves do not constitute irreparable harm." *Montgomery v. Carr*, 848 F. Supp. 770, 775 (S.D. Ohio 1993) (citing *State of Ohio ex rel. Celebrezze v. N.C.R.*, 812 F.2d 288, 290 (6th Cir. 1987)); *see also League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer* ("*LIFFT*"), 468 F. Supp. 3d 940, 951-52 (W.D. Mich. 2020), *appeal dismissed*, 843 F. App'x 707 (6th Cir. 2021). Irreparable harm, however, may exist if a business is threatened with insolvency or its financial viability is threatened, or if an injury is not "fully compensable by monetary damages," such as where the "the nature of the plaintiff's loss would make damages difficult to calculate." *LIFFT*, 468 F. Supp. 3d at 951-52 (citing *Performance Unlimited, Inc. v. Questar Publishers Inc.*, 52 F.3d 1373, 1382 (6th

Cir. 1995) (irreparable harm established if business threatened with insolvency or financial viability threatened)); *S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 852 (6th Cir. 2017) (irreparable injury established if the nature of the monetary loss is difficult to calculate).

Here, the impact to MNPS and SCS's operating budgets is not fully compensable by monetary damages because the operational impacts are truly impacts to a student's educational experience. (Williams Decl. ¶ 5, Ex. 18 to Bussell Decl.; Henson Decl. ¶ 5, Ex. 17 to Bussell Decl.) MNPS and SCS's operating budgets have been set and approved by their respective local governing bodies and school boards. MNPS and SCS develop their operating budgets based on BEP funding from the State and local contributions. (Williams Decl. ¶¶ 6-8; Henson Decl. ¶¶ 6-10.) Operating budgets are used to cover most expenses related to educating students, including teacher and staff salaries, bus drivers, bus maintenance, facilities maintenance, and classroom materials.

Siphoning off millions of dollars after budgets have been approved and allocated will disrupt education for over 100,000 students. (*See* Henson Decl. ¶ 14.) In the first year of the program, MNPS may lose approximately $17.8 million in funding, and Shelby County may lose approximately $25.6 million. Implementing the ESA Act for the 2022-2023 school year obliterates MNPS and SCS's ability to plan for such an impact to their budgets.

Moreover, when students residing in Davidson or Shelby County elect to participate in the ESA program, the amount of money required to operate MNPS or SCS schools will not decrease by the same amount as the lost BEP funding. (Williams Decl. ¶ 4; Henson Decl. ¶ 4.) Because so many costs that comprise the MNPS and SCS operational budgets remain unchanged by a reduction in the numbers of students in the system, the anticipated loss of additional BEP funds that will result from implementation of the ESA program will detrimentally affect MNPS and SCS's ability to operate.

Last-minute adjustments to enrollment will affect teacher and other staff moves, technology services availability, transportation routes, nutrition services, and other operational services, requiring shifts at schools across the affected districts. (Williams Decl. ¶ 5; Henson Decl. ¶ 5.) These late operational changes will adversely affect not only MNPS and SCS teachers and staff but also the quality of services delivered to students who remain enrolled at the affected schools. (Williams Decl. ¶ 5; Henson Decl. ¶ 5.) If shifts cannot be made because of the resulting ratios of students to staff or students to equipment, then various MNPS and SCS schools must operate under-enrolled, which has a direct, negative impact on the district, students, and teachers. (Williams Decl. ¶ 5; Henson Decl. ¶ 5.)

The Sixth Circuit recently recognized that calculating economic harm or monetary loss to be suffered by a governmental entity is an onerous task. *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022). In *Kentucky v. Biden*, three states challenged COVID-19 vaccination guidance issued by the federal government's Safer Federal Workforce Task Force. In upholding the district court's injunction, the Sixth Circuit rejected the dissent's argument that the hypothetical possibility of monetary damages lessened the harm to the states. *Id.* at 611 n.19. The Court further noted that even if monetary damages were available, the intangible harms cannot be economically quantified and therefore cannot be redressed. All of this necessitated an injunction.

Like the states in the *Kentucky* case, neither MNPS nor SCS will recoup the lost funding, at least not from the State Defendants. Damages are not an available remedy. Once the State transfers money to an ESA account (or, as in the State Defendants' eleventh-hour plan, writes a check to a private school), there is no legal way to claw it back. There is also no conceivable way to compensate for the chaotic nature of the school year with the impending implementation of an unconstitutional program. And even if MNPS and SCS elect to request supplemental funding from their Counties to fill the gap, that only shifts the harm

to Plaintiff Counties and the public. Plaintiff Counties have a legal obligation to establish local property tax rates by July 1 of every year, Tenn. Code Ann. § 67-5-510, rates that would of course be set based on anticipated expenses. Requiring Plaintiff Counties to eliminate the financial and operational crisis to the school districts merely shifts the turmoil to another part of the government, and to taxpayers. Simply stated, Plaintiff Counties should not bear the financial burden of the State Defendants' rushed implementation of a discriminatory program.

There is, however, a legal mechanism to prevent (1) students from being trapped in uncertainty for the 2022-2023 school year, (2) MNPS and SCS from losing millions of dollars, and (3) Plaintiff Counties from having to fill the financial hole: to issue an injunction and maintain the status quo. Absent that, irreparable harm will ensue. Accordingly, Plaintiff Counties have met their burden of establishing that an injunction is warranted.

III. THE ABSENCE OF HARM TO THE STATE DEFENDANTS WEIGH AGAINST IMPLEMENTATION OF THE ESA ACT.

Any potential harm to the State is hypothetical and a consequence of its own actions. The State Defendants may argue that the ESA website went live on July 20, 2022, and that students and families are depending on these ESA funds. That argument is more unpersuasive today than it was in 2020.

First, nobody could have predicted that the State, or private schools, would be prepared to implement an ESA Program on a two-week timeline, with no infrastructure in place. TDOE's Deputy Commissioner previously testified that by June 1, most private schools have assigned seats for student enrollment. (Schuyler Decl. ¶¶ 4-5, Ex. 19 to Bussell Decl.) While that may vary from school to school, she warned that "[i]f Tennessee Department of Education is unable to confirm an ESA Program award to participating students/parents on a date in time that precedes the June 15, 2020 deadline (for the participating student to

timely receive/accept a seat assignment from a participating private school), the participating student would be in jeopardy of receiving an ESA Program award, but not being able to secure a seat assignment for the 2020-2021 school year in their chosen school." (*Id.* ¶ 6.)

Despite these assertions, local media in Nashville reports that Governor Lee announced on July 20, 2022, that several private schools have committed "to making seats available immediately" for the ESA program. *See* "Independent Tennessee schools show support for ESA program," *available at* https://www.wsmv.com/2022/07/20/independent-tennessee-schools-show-support-esa-program/ (last visited, July 22, 2022). Notably lacking from this announcement are the number of seats available and whether it might be one per school or 5,000 total. Students also must apply for these newly-opened seats. Before the July 20, 2022, announcement, potential participating students expected to begin school on August 8, 2022, at an MNPS or SCS school. Under these circumstances, it is doubtful, if not impossible, that any eligible students were relying on ESA funds to attend a private school during the 2022-2023 school year.[26] Accordingly, there is no harm to the State by issuing an injunction.

Second, the planned implementation of the ESA Program runs afoul of the statutory requirements. The ESA Act requires funds to be deposited into a participating student's account, with the student/family being reversed. Neither the ESA Act nor the State Board rules contemplate a private school requesting funding directly from the State. State Bd. of Education Rule 0520-01-16-.02 (defining account holder as either a student who has reached 18 or a parent); 0520-01-16-.05 (setting forth the account holders permitted uses of the ESA

[26] This also eliminates any potential harm to the participating schools. Their enrollments and allocations of resources were set in June for the upcoming school year, and they had no reason to anticipate that the ESA program would be operational in less than a month. Until July 20, 2022, when the first sparse details were released, the participating schools could only speculate on the ESA Program's future. Accordingly, there is no credible threat of harm to any participating schools.

funds). Despite the statutory mandate, the State Defendants now propose reimbursing private schools directly for students that enroll during the 2022-2023 school year. The only proffered rationale for this shift is the State Defendants' impatience in implementing the program. A thoughtful, appropriately-paced implementation would include obtaining the technology to facilitate account access, as Deputy Commissioner Schuyler contemplated two years ago. (Schuyler Decl. ¶ 4(6), Ex. 19 to Bussell Decl.)

The State Defendants' decision to implement the program on an unnecessarily expedited timeline, with multiple challenges pending, cannot establish harm to the State and does not warrant denying an injunction.

IV. THE PUBLIC INTEREST WEIGHS AGAINST IMPLEMENTATION OF THE ESA ACT.

The public interest also weighs in favor of an injunction. The public's interest is not served by the destruction of public schools in the two largest counties in Tennessee. Withholding millions of dollars in education funding from the districts' anticipated quarterly fund payments, with no way to fill the gap in the short term, will impose significant havoc on MNPS and SCS as they try to navigate the school's operational and educational needs on far less money than their programming needs call for and their budgets accounted for. Expecting the Plaintiff Counties to backfill that financial hole merely shifts the harm to the local government and taxpayers.

Nor is the public interest served by State government rushing implementation of what should have been a carefully-planned, complex "education savings account" program, with appropriate anti-fraud protections in place, instead through direct payments to private schools. All without any statutory authority to do so. Thus, this factor weighs in favor of an injunction, as well.

CONCLUSION

Significant consequences will follow the State Defendants' implementation of the discriminatory ESA Act. Education is a fundamental right in Tennessee. To justify this harmful program, the General Assembly must have a compelling interest that the ESA Act is narrowly tailored to address. The State Defendants cannot come close to meeting this burden. While stating on its face that the ESA Act is intended to help MNPS and SCS, the Act does the opposite, as evidenced by the Act's proponents in the General Assembly protecting their own counties from its harmful consequences. But even if the Act's stated interest weren't patently false, and even if the General Assembly wanted to improve the performance of students in LEAs with low-performing schools, the Act could not satisfy strict scrutiny. The Act is not limited to students in *low-performing schools*; it gives *any student* meeting the income threshold the right to use public money for private school, even students attending the highest performing schools in the most affluent neighborhoods in Nashville or Memphis. Further, instead of setting the students of Davidson and Shelby County up for success, the State Defendants' hurried implementation promises chaos for the students, the teachers, and the districts. And it has the potential to create an immediate funding crisis that the districts will be looking to their respective counties to fill—merely shifting the harm to the local government and taxpayers. The Court should intervene and issue a temporary injunction to prevent this irreparable harm.

Respectfully submitted,

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