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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY et al., Plaintiffs, vs. TENNESSEE DEPARTMENT OF EDUCATION et al., Defendants, and NATU BAH et al., Intervenor-Defendants.	)	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith **CONSOLIDATED**
ROXANNE McEWEN et al., Plaintiffs, vs. BILL LEE, in his official capacity as Governor of the State of Tennessee et al., Defendants, and NATU BAH et al., Intervenor-Defendants.	)	Case No. 20-0242-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith

GREATER PRAISE INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO MCEWEN PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

Greater Praise Intervenor-Defendants[1] file this Response in Opposition to the McEwen Plaintiffs' Motion for Temporary Injunction and Memo in Support thereof. ("McEwen TI Memo"). Having failed to convince the Tennessee Supreme Court to impose their policy preferences on other parents who disagree with them, the McEwen Plaintiffs now return to this Court asking for another chance to deny low-income children in Tennessee the educational opportunities they need. The McEwen Plaintiffs spend much of their argument complaining that Tennessee's efforts to get Educational Savings Accounts ("ESAs") in the hands of students this school year is inconveniently prompt for their purposes, but they have no right to object to the implementation of a program in which they do not participate, nor do they allege that the State's efforts to fulfill the promise of the program harms any interest they can rightfully claim.

Their sole substantive argument is that, when Article XI, § 12 of the Tennessee Constitution says the General Assembly must provide for public education, somewhere in that duty is an unmentioned prohibition on authorizing any other educational initiative. They identify no constitutional text supporting this novel proposition, nor any history; the canon of interpretation and many of the cases on

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

which they rely undermine rather than endorse their argument; indeed, their motion and memorandum are devoid of Tennessee case law supporting their argument on the merits, because no court in this state—and hardly any courts across the country for that matter—has ever held that the requirement to provide for public education forecloses the support of alternatives for those children that need them.

This Court should deny the Motion for Temporary Injunction and find that the General Assembly's duty to provide for public education in no way prevents it from providing alternatives, especially where all agree that duty has been fulfilled.

STATEMENT OF FACTS

To prevent needless repetition, Greater Praise Intervenor-Defendants incorporate by reference the "FACTUAL BACKGROUND" section of their concurrently filed Response in Opposition to the Counties' Motion for a Temporary Injunction.

LEGAL STANDARD

In determining whether to grant a temporary injunction, a trial court must consider four factors: (1) whether the movant has a strong likelihood of success on the merits;[2] (2) whether the movant would otherwise suffer irreparable injury; (3)

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[2] At times the McEwen Plaintiffs attempt to rely on the much lower standard that they have simply "state[d] a claim" upon which relief may be granted. McEwen TI Memo 27. That is not the standard for granting a motion for temporary injunction.

whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. *United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998); *see also Keller v. Estate of McRedmond*, 495 S.W.3d 852, 856, n.2 (Tenn. 2016). Additionally, "[c]onstitutional standing is a fundamental requirement of a justiciable controversy" and therefore must be established before a temporary injunction is issued. *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020).

ARGUMENT

I. Plaintiffs are not likely to succeed on the merits because Article IX, § 12 allows the legislature to support alternative educational choices.

On the merits, the McEwen Plaintiffs' only substantive claim is that Article XI, § 12 of the Tennessee Constitution forecloses the General Assembly from supporting any educational initiatives outside the existing public school system. Yet § 12 imposes no such limitation: by its terms, it simply requires that the "General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools," and there is no dispute that the General Assembly has done so and continues to do so. The McEwen Plaintiffs insist upon a negative implication that finds no support in the plain language of § 12, traditional canons of interpretation, or Tennessee case law. This Court should therefore find that the McEwen Plaintiffs have no likelihood of success on the merits of their claim that the ESA Pilot Program violates § 12.

The McEwen Plaintiffs are of course correct that, in interpreting the Tennessee Constitution, the plain language controls. McEwen TI Memo 18 (citing *Gaskin v. Collins*, 661 S.W.2d 865, 867 (1983); *Hatcher v. Bell*, 521 S.W.2d 799, 802 (1974)). But the plain language of § 12 imposes no limitation on the General Assembly, only a positive duty to provide a free system of public education. There is no prohibition on providing students scholarships, or funding private education in any other manner. Had Tennessee wanted to include such a limitation, it had plenty of models: most states have some form of limitation on support for private education in their constitutions. *See Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2269 (2020) (Alito, J., concurring) ("Thirty-eight States still have these 'little Blaine Amendments' today."). The McEwen Plaintiffs ask this Court to find that § 12 implies something that the vast majority of states found it necessary to say explicitly.

Because § 12 *literally* does not say what they wish it said, the McEwen Plaintiffs invoke a canon of interpretation: *expressio unius est exclusio alterius*, the principle that a specific provision in a text includes the negative implication that those things not mentioned are excluded. McEwen TI Memo 17. But § 12's requirement that the State provide a public school system carries no such negative implication. *Expressio unius* means that when a street sign reads "Two-Hour Parking," one cannot park for longer. It does not mean one cannot park for less than two hours, or can park

nowhere else.[3]

Applying *expressio unius* in the manner they desire would wreak havoc throughout American law. For instance, it would mean the Federal Constitution's grant of power to Congress "To coin Money" prevents Congress from making printed money legal tender—an argument the Supreme Court long ago rejected. *See Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871). It would likewise mean Article I, § 8's grant of authority "To raise and support Armies… [and] To provide and maintain a Navy" forecloses the creation of the Air Force.[4]

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

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

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

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

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

The McEwen Plaintiffs cite no Tennessee case for the proposition that § 12 imposes the limitation they seek—because no such case exists. They quote extensively from the *Tennessee Small Schools* line of cases, McEwen TI Memo 19, and a string of other education cases going back to 1905, *id.* at 20, but conspicuously absent from these quotations is any mention of a prohibition on non-public educational spending—again, a prohibition common in other states that Tennessee chose not to include in its own constitution. The closest they come is *Crites v. Smith,* 826 S.W.2d 459, 467 (Tenn. Ct. App. 1991), which rejected a constitutional right to forgo public schooling in favor of homeschooling. But the fact that one does not have a right to engage in activity the General Assembly prohibits says nothing about the

General Assembly's authority to authorize activity it deems desirable.[5]

The McEwen Plaintiffs also cite the Court of Appeals' previous decision in the consolidated case for the proposition that "supporting private schools is not a State function." McEwen TI Memo 21-22 (citing *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, No. M2020-00683-COA-R9-CV, 2020 Tenn. App. LEXIS 434, at *15 (Ct. App. Sep. 29, 2020)). Even assuming that holding survived the Tennessee Supreme Court's reversal, all this proposition amounts to is a claim that the ESA Pilot Program is not affirmatively authorized by § 12. The McEwen Plaintiffs cite no authority denying the General Assembly the discretion to adopt the ESA program. Their remaining citations amount to pointing out that at various times courts and other sources referred to Tennessee's public school system using singular articles such as "the" and "a." *See, e.g.,* McEwen TI Memo 21-22. But each such reference operates descriptively, identifying the school system to which it refers: none support the proposition that the maintenance of that public school system is exclusive of other policy initiatives the General Assembly might adopt.[6]

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[5] There are at least some instances where our law recognizes a right to non-public schooling. *See, e.g. Pierce v. Society of Sisters*, 268 U.S. 510 (1925). But this Court need not address the contours of such a right in this case, since here the General Assembly has affirmatively authorized the activity in question.

[6] Their theory also runs counter to their arguments on the home-rule clause, where they said a constitutional text which references laws "applicable to a county" actually means laws applicable to two counties.

Lacking any basis in Tennessee case law, the McEwen Plaintiffs' only real appellate authority comes instead from Florida. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). But Florida's constitutional language is not the same as § 12. Article IX, § 1(a) of the Florida Constitution requires "Adequate provision" for a "*uniform*, efficient, safe, secure, and high quality system of free public schools." (emphasis added). It was key to the *Bush* decision that Florida was "fostering *plural, nonuniform* systems of education in direct violation of the constitutional *mandate for a uniform system* of free public schools." *Bush*, 919 So. 2d at 398 (emphasis added). Section 12 has no such uniformity requirement, and there is no reason to impute such a requirement where the Tennessee Constitution declines to.

Moreover, the McEwen Plaintiffs ignore the weight of authority around the country, which rejects the Florida Supreme Court's approach. Indiana rejects it. *Meredith v. Pence*, 984 N.E.2d 1213, 1225 (Ind. 2013). Nevada rejects it. *Schwartz v. Lopez*, 132 Nev. 732, 749 (2016). Wisconsin rejected it twice. *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998). Even Florida courts have distinguished *Bush* as a "narrow" decision in later cases. *See, e.g.*, *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.,* 262 So. 3d 127 (Fla. 2019); *McCall v. Scott*, 199 So. 3d 359, 363 (Fla. Dist. Ct. App. 2016). Rather than joining some national trend, the McEwen Plaintiffs ask this Court to break with the consensus and become the outlier.

They also quote *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999), claiming it "supported the argument 'that implicit within this obligation is a

prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state.'" McEwen TI Memo 24. But they mislead the reader by quoting an argument the court made *arguendo* while omitting the next paragraph rejecting it—and by extension rejecting the McEwen Plaintiffs' argument. The full passage reads:

> *It can be argued* that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state. Private schools have existed in this state since before the establishment of public schools. They have in the past provided and continue to provide a valuable alternative to the public system. However, their success should not come at the expense of our public education system or our public school teachers. *We fail to see how the School Voucher Program, at the current funding level, undermines the state's obligation to public education.* The School Voucher Program *does not violate this clause* of Section 2, Article VI of the Ohio Constitution.

Id. (emphasis added). Their only other appellate authority comes in a footnote citing *Cain v. Horne*, 202 P.3d 1178, 1180 (Ariz. 2009). But *Cain* addressed Arizona's "No Aid" provision, also known as a "Blaine Amendment." As explained *supra*, that is precisely the kind of constitutional restriction Tennessee did *not* include in its Constitution, and it is not for the McEwen Plaintiffs to impose one on the State simply because they wish it had adopted one. They do cite one recent oral ruling from a state trial court in West Virginia. *See* McEwen Plaintiffs' Exhibit 5 at 65 (Transcript of July 6, 2022 hearing in *Beaver v. Moore*). But that ruling was on the basis of Article XII, Section 4 of the West Virginia Constitution, which provides that the state's "School Fund" "shall be annually applied to the support of free schools throughout the state, *and to no other purpose whatever*." (emphasis added). Again,

the McEwen Plaintiffs are relying on other states with constitutional provisions they wish existed in Tennessee.

Their remaining argument is that the State cannot fulfill its duty to provide a free public education through private schools that are not subject to the same anti-discrimination provisions as traditional public schools. McEwen TI Memo 27-28. But the ESA program does not need to fulfill the duty imposed by § 12, because Tennessee has already done so through the traditional public school system. Moreover, ESA Pilot Program does explicitly prohibit participating schools from discriminating "on the basis of race, color, or national origin." Tenn. Code Ann. § 49-6-2607(e)(2). While the McEwen Plaintiffs claim these schools can still discriminate based on "disability, religion, sexual orientation or gender identity, or family income level," McEwen TI Memo 13, the only examples of discriminatory schools they point to are two schools with Christian affiliations, who ask their students to agree with their views regarding religion and sexuality. *Id.* at 13, n.10. Nor is it a problem that the program prevents Tennessee from requiring religious schools to alter their "creed, practices, admissions policies, or curriculum in order to accept participating students, other than as is necessary to comply with the requirements of the program." Tenn. Code Ann. §49-6-2609(c). Indeed, the accommodation of religious schools is not just a choice the General Assembly should or should not have made. The Supreme Court has recently made clear such accommodation is a *requirement* of any ESA program. *See Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022); *Espinoza*,

140 S. Ct. at 2261. Non-discrimination against faith-based schools required by the Federal Constitution cannot violate the Tennessee Constitution.

There is no basis to impute the limitation the McEwen Plaintiffs ask for into § 12. This Court should therefore find that they are not likely to succeed on the merits of their claim.

II. There is no risk of irreparable harm because the McEwen Plaintiffs claim no personal right has been violated, and the only harm is a redressable monetary injury.

The McEwen Plaintiffs' main argument on irreparable harm is that constitutional injuries are irreparable. But their alleged injury is not really 'constitutional,' in that it is not a special injury specific to them that arises from some right the Constitution grants them. Moreover, the alleged injury to their interest in the quality of their children's schools is the classic example of a harm that is redressable at the end of litigation. The Court should therefore find that they do not face the kind of irreparable injury required for a Temporary Injunction.

First, they assert the traditional principle that the denial of a constitutional right is inherently an irreparable injury. But the cases they cite pled the violation of rights of individuals. *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), addressed the right of same-sex couples to marry; in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), public employees asserted their First Amendment right to free speech; *Barnes v. Ingram*, 397 S.W.2d 821 (Tenn. 1965), involved a public official who was wrongly dismissed from a position he had an entitlement to by a discriminatory mayor; *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), was a First Amendment

case about vulgar language; *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012), asserted the Equal Protection clause's guarantee of individuals' right to vote.

The McEwen Plaintiffs alleged no such injury to an individual or fundamental right. Rather, their claim is against the supposed technical unconstitutionality of a program they argue operates outside the boundaries of the General Assembly's power. Even if this Court were to believe that the program is unconstitutional, denial of a temporary injunction would not result in the loss or abridgment of a "constitutional right" in the sense their citations contemplate.

At most, denying their motion will mean their children's schools will temporarily lose some funding while this case is litigated. Even if the *de minimis* loss of funding to the schools attended by the McEwen Plaintiffs' children were a cognizable injury they had standing to assert—as explained *infra*, it is not—nothing about that injury would be irreparable. That sort of financial injury is the quintessential example of a harm that could later be redressed: if the McEwen Plaintiffs eventually succeed on the merits of their claim, the State will be required to rescind the program and allocate the appropriate funds back to the school districts. A loss of funds that can later be recovered is not irreparable injury. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury").

Nor can their taxpayer standing cases get around this basic principle. *Pope v. Dykes*, 116 Tenn. 230, 232, 93 S.W. 85, 85 (1905), examined funding for a road project where the money spent on construction might not be recoverable if the

construction was completed. *State ex rel. Baird v. Wilson County*, 371 S.W.2d 434 (Tenn. 1963), alleged that significant sums had already been spent and that more would be spent in the future without equitable relief. By contrast, here the McEwen Plaintiffs' own allegation is that, if they were to succeed in their claim on the merits later, the scholarships would be rescinded, and the money and students would be forced to return to the public school systems. McEwen TI Memo 32.

This Court should therefore deny the Motion for Temporary Injunction because there is no irreparable harm the McEwen Plaintiffs can rightfully claim.

III. The balance of harms weighs in favor of defendants.

Since the McEwen Plaintiffs face no irreparable injury, the balance of harms favor Defendants, including the Greater Praise Intervenor-Defendants, whose potential injuries the McEwen Plaintiffs ignore. Their remaining arguments amount to disapproval of the manner in which the State has chosen to implement the ESA Pilot Program; but those choices, which comply with the terms of the law, exert no harm on the Plaintiffs but simply ensure that as many schools and families as possible will experience the benefits of the ESA program as quickly as possible.

First, the Greater Praise Intervenor-Defendants face real potential harms if the program is enjoined. The McEwen Plaintiffs' entire argument here is that Greater Praise itself has not yet completed the paperwork to accept ESA scholarships. McEwen TI Memo 30. It is true that Greater Praise was still classified as a Category IV school as of July 19, 2022, but it intends to complete the process to become a Category II school by the end of the month, which will allow it to accept

ESA students this school year.[7] Both Greater Praise and Sensational Enlightenment Academy Independent School informed the state of their intention to participate in the ESA Pilot Program this year. Moreover, the McEwen Plaintiffs ignore the Intervenor-Defendant Parents, who have an interest in using these scholarships for their children. As of the filing of this motion Ciera Calhoun and David Wilson, Sr. had filled out the "intent to enroll" form for their children to participate in the program, and Alexandria Medlin expressed her strong desire to apply for her daughter and was awaiting assistance to do so. All three have identified schools at which they hope to use the ESA, and their children have received acceptance to attend. These are real and direct harms to the Greater Praise Intervenor-Defendants, who will be denied a program that would benefit them both financially and educationally—in contrast with the McEwen Plaintiffs, whose children will be able to continue to attend the schools their parents feel are best for them in any event.

The remainder of the McEwen Plaintiffs' balance of harms simply consists of different versions of the claim that Tennessee's decision to implement the program this school year is reckless, sloppy, or somehow *ultra vires*. But there is no legal right to have a government program one does not participate in implemented as

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[7] Greater Praise informed this Court that it was undergoing the process. Kay Johnson Affidavit, ¶ 11, Exhibit X to Greater Praise Opposition to McEwen Plaintiffs' earlier motion for temporary injunction, filed Apr. 23, 2020.

slowly as possible. Tennessee's decision to do the best job it can to do right by the parents and students who need this program and were denied it for two years is a reasonable attempt to address the needs of the beneficiaries in the face of delays caused by this litigation.

The first clue that their claims of *ultra vires* implementation should fail is that the "FAQ" they cite—for the fact that the State is ignoring the requirement that money be allocated to individual accounts, McEwen TI Memo 30—is actually entitled "Account Holder Responsibilities." Rather than an admission of illegality, the document makes clear that the ESA funds will be assigned to individual student accounts—the State is simply are adjusting the process for establishing them to accommodate the shorter timeline imposed on the program.

Despite the McEwen Plaintiffs' claims otherwise, it was always the intention of the General Assembly that the program be in place for this school year. The very legislative history that the McEwen Plaintiffs cite for the proposition that the program is moving too fast proves this: Rep. Hazlewood stated her recollection that the program was intended to start in the 2021-2022 school year, and it is no longer the year 2021. McEwen TI Memo 7. Indeed, under the statute, the program was to start *no later* than the 2021-2022 school year. *Id.* So the State's decision to implement the program now is *required* by the statute, not a violation of it.

The remaining balancing arguments are simply claims that implementing the ESA program in time for this school year could cause some disruptions or confusions. But the ESA program is completely voluntary—parents or schools

concerned about such risk need not participate. Many, like the Greater Praise Intervenor-Defendants, may feel that any bumps in the road are worth braving to gain the benefit the ESA program offers to those who need it. It is perfectly fine that the McEwen Plaintiffs think a different choice is right for their child; the Greater Praise Intervenor-Defendants simply ask that they not deny opportunities to those children who need an alternative.

Balancing the relevant harms therefore counsels in favor of denying the McEwen Plaintiffs' Motion.

IV. The public's interest is in providing children the benefits of the ESA program.

While it is true that the public is not served by an unconstitutional law, that simply brings one back to the fact that the ESA program violates no provision of the Constitution. And the McEwen Plaintiffs have provided nothing more than a baseless conjecture that any funds will be misappropriated. It is they who ask this Court to alter the status quo. This court should instead find that the public interest favors granting those parents who want it the possibility of ESA scholarships for their children.

The McEwen Plaintiffs' first argument is simply that the public's interest is in blocking unconstitutional laws. This simply brings the analysis back to the merits, and, as explained above, on the merits the ESA program violates no provision of the Tennessee Constitution. The McEwen Plaintiffs' second argument is that there's a public interest in preventing the wasting of public funds, but they provide no evidence that any funds will be wasted; instead, they present 1) a general guess

that in moving quickly Tennessee may hit some speed bumps and 2) the claim that money spent on an unconstitutional program is inherently wasteful. As to point 1, arbitrary guesses are not evidence, and as to point 2, this again just brings one back to the merits.

The McEwen Plaintiffs' final argument is an appeal to the status quo. But the status quo is that the General Assembly has approved the ESA Pilot Program, the Tennessee Supreme Court has found it constitutional, and if not for these desperate last-minute attempts to enjoin it, everyone understands that the program will be moving forward. They make much of the complications that might result if the program were later struck down. But the only potential for "chaos" here derives from the McEwen Plaintiffs' own demands that this Court intervene to stop the program—the civil equivalent of the patricidal defendant who throws himself on the mercy of the court, pointing out he's an orphan. *See* Leo Rosten, THE JOYS OF YIDDISH (1968) (defining 'Chutzpah').

That the McEwen Plaintiffs don't think students will benefit from the ESA program in the meantime is simply their disagreement with the policy decision of the General Assembly that many children will be better off in the schools that their parents choose for them. They are entitled to their own public policy opinion, but the state must implement the public policy that was enacted into law.

V. The McEwen Plaintiffs have not established standing for their claim, either as parents of children in public schools or as taxpayers.

Neither the McEwen Plaintiffs, nor their children, are injured by the decision of other parents to enroll their children in private schools with help of ESA scholarships. The Education Article's § 12 provides them no legally enforceable right to deny other parents the opportunity to make other choices the General Assembly has seen fit to allow. They have no standing, either as parents or as taxpayers, to object to the free choice of others to seek a better life for their children.

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

It is true that parents can sometimes have standing to address injuries specific to the school their child attends. *Curve Elementary Sch. Parent & Teacher's Org. v. Lauderdale Cty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980). But there is no special injury to the McEwen Plaintiffs here. Their children may continue to attend the public schools their parents prefer, and nothing in their Complaint alleges that the existence of alternative educational opportunities diminishes the quality of education in traditional public schools. No such allegation is made

because no such allegation could be proven: an opportunity which some parents choose to use does not damage students attending some other school.

That some schools could[8] lose some per-pupil funding for the small number of students who avail themselves of the ESA program does not change this analysis. That *de minimis* funding reduction (as shown in the response to the Counties' motion, less than one percent) simply reflects the fact that the school is now educating fewer children—it's the same reduction in funding that would occur if the ESA parents chose to homeschool their children, send them to a private school using some other source of money, send them to the charter school, or move to a different county in Tennessee to attend the public schools in some other district. In fact, because of the $5,000 "remainder funds" (explained in the response to the Counties' motion), the reduction is less than in those other examples and leaves the McEwen Plaintiffs' children better off, with increased funding per pupil. *See* Tenn. Code Ann. § 49-6-2605(a). Therefore, they have no injury-in-fact. *See ACLU v. Darnell*, 195 S.W.3d 612, 619-620 (Tenn. 2006). Also, the Shelby County and Metro Nashville schools are in an even better position under the ESA program than they are in any of those other instances where students choose not to enroll, in that the ESA

[8] The right of parents is specific to the effect on their child's particular school, and there is no basis for the McEwen Plaintiffs to claim, ex ante, that any particular school any of their children attend will necessarily lose funding due to the ESA program, much less that the funding loss at any of those individual schools would be material to the quality of their child's education.

program generates a "double counting payment" in the amount of the ESA for each student who participates in the program and sends those funds to participating school districts for three years. Tenn. Code Ann. § 49-6-2605(b)(2)(A). Tenn. Code Ann. § 49-6-2605(b)(2)(A). After three years, the "double counting payment" will continue to fund failing schools throughout the state. Tenn. Code Ann. § 49-6-2605(b)(2)(B)(ii). Finally, this Court should be reluctant to recognize a theory of standing that would grant every parent a right to sue any time any reduction in funding, no matter how small, happens at their child's school district, which might incidentally in some scenario affect the funding for their child's individual classroom.

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

In *Fannon* the Tennessee Supreme Court reaffirmed these traditional principles and set forth specific limits on when taxpayers may establish standing: "our courts typically confer standing when a taxpayer (1) alleges a specific illegality in the

expenditure of public funds and (2) has made a prior demand on the governmental entity asking it to correct the alleged illegality." *Id.*

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

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

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

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

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

Moreover, such a claim of futility, if it were to be made regarding the legislative process, would fail anyway. At one point, this bill passed by a single vote. As the Counties' accounting of the legislative history shows, this was an intense fight, with numerous changes and modifications made to the bill at every stage of consideration. In such a fluid, dynamic legislative environment, a push from the

McEwen Plaintiffs might have been meaningful. They cannot prove after the fact it would have been futile given the legislative context.

The McEwen Plaintiffs therefore lack standing, either as parents or as taxpayers, to prosecute this action, and their claims must be dismissed.

CONCLUSON

For the reasons stated above, the Greater Praise Intervenor-Defendants respectfully request that this Court deny the McEwen Plaintiffs' Motion for Temporary Injunction.

Respectfully Submitted,

s/ Brian K. Kelsey
Brian K. Kelsey (TN B.P.R. # 022874)
bkelsey@libertyjusticecenter.org
Daniel R. Suhr (WI Bar # 1056658), *Pro Hac Vice*
dsuhr@libertyjusticecenter.org
M.E. Buck Dougherty III (TN B.P.R. # 022474)
bdougherty@libertyjusticecenter.org
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Telephone: (312) 263-7668

Attorneys for Greater Praise Intervenor-Defendants

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be sent to the attorneys listed below via Davidson County Chancery Court E-filing R. 4.01 and TN S.Ct. R. 46A and via the electronic mail addresses below, by agreement of the parties, on this 1st day of August, 2022.

s/ Brian K. Kelsey

Allison L. Bussell
Lora Barkenbus Fox
Melissa Roberge
Assistant Metropolitan Attorneys
Metro Department of Law
108 Metro Courthouse
P.O. Box 196300
Nashville, TN 37219
allison.bussell@nashville.gov
lora.fox@nashville.gov
melissa.roberge@nashville.gov

Counsel for Plaintiff Metropolitan Government of Nashville and Davidson County

Marlinee C. Iverson
E. Lee Whitwell
Shelby County Attorney's Office
160 North Main Street, Suite 950
Memphis, TN 38103
marlinee.iverson@shelbycountytn.gov
lee.whitwell@shelbycountytn.gov

Counsel for Plaintiff Shelby County Government

Christopher M. Wood
Robbins Geller Rudman & Dowd LLP
414 Union Street, Suite 900
Nashville, TN 37219
cwood@rgrdlaw.com

Stella Yarbrough
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
syarbrough@aclu-tn.org

Sophia Mire Hill
Southern Poverty Law Center
111 East Capitol Street, Suite 280
Jackson, MS 39201
sophia.mire@splcenter.org

David G. Sciarra
Wendy Lecker
Jessica Levin
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
dsciarra@edlawcenter.org
wlecker@edlawcenter.org
jlevin@edlawcenter.org

Counsel for McEwen Plaintiffs

Stephanie A. Bergmeyer
Jim Newsom
E. Ashley Carter
Matthew R. Dowty
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, Tennessee 37202-0207
Stephanie.Bergmeyer@ag.tn.gov
Jim.Newsom@ag.tn.gov
Ashley.Carter@ag.tn.gov
Matthew.Dowty@ag.tn.gov
Attorneys for State Defendants

Arif Panju
Institute for Justice
816 Congress Avenue, Suite 960
Austin, TX 78701
apanju@ij.org

David Hodges
Keith Neely
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
dhodges@ij.org
kneely@ij.org

Meggan S. DeWitt
Beacon Center of Tennessee
1200 Clinton Street, #205
Nashville, TN 37203
meggan@beacontn.org

Attorneys for Bah Intervenor-Defendants