IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

No. M2022-01786-COA-R3-CV
(consolidated with No. M2022-01790-COA-R3-CV)

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY *et al.*,
Plaintiffs / Appellees,

v.

TENNESSEE DEPARTMENT OF EDUCATION *et al.*,
Defendants / Appellants,

and

NATU BAH *et al.*,
Intervenor-Defendants / Appellants.

On Appeal From the Chancery Court for the Twentieth Judicial District, Davidson County, Nos. 20-0143-II & 20-0242-II

INTERVENOR-DEFENDANTS / APPELLEES GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S RESPONSE BRIEF

M. E. BUCK DOUGHERTY III
TN B.P.R. #022474
bdougherty@ljc.org

REILLY STEPHENS
Pro Hac Vice pending
rstephens@ljc.org

LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Phone: (312) 637-2280

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

The McEwen Plaintiffs have no interest in the outcome of this litigation. Win or lose, their children will attend the same schools, and those schools will receive substantially the same funding and provide substantially the same education. Yet, they desperately seek to block other Tennessee parents from choosing where their children attend school. Other parents' choice of alternatives for their own children does not harm the McEwen Plaintiffs, any more than the McEwen Plaintiffs' decision to stick with the existing public school system harms parents who seek alternatives. The McEwen Plaintiffs have no right to deny—nor any legal interest in denying—parents such as the Greater Praise Intervenors educational freedom and school choice that the General Assembly wanted to provide them.

Nor can they rely simply on their status as taxpayers. The taxpayer standing precedents on which they rely expressly require a prior demand be made on the responsible state officials, and the McEwen Plaintiffs made none. They are forced to fall back on the argument that such a demand would be futile. But if the demand requirement can be excused in this case, then there is no demand requirement at all. Indeed, if the demand requirement were excused here, when exactly would it apply? The McEwen Plaintiffs have never had a cogent and logical answer since the beginning of this protracted litigation, and nothing has changed.

For all these reasons, this Court should affirm the decision below, hold that the McEwen Plaintiffs lack standing to bring their claims, and put this meritless ligation to bed once and for all.

STATEMENT OF FACTS

A. The ESA Pilot Program

In May 2019, the State of Tennessee enacted the Tennessee Education Savings Account Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601–2612. The pilot program is open to Kindergarten-12th grade students whose annual household income is less than or equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code Ann. § 49-6-2602(3). Eligible students must have either attended a Tennessee public school the prior school year, be entering Kindergarten for the first time, have recently moved to Tennessee, or received an ESA the prior year. Tenn. Code Ann. § 49-6-2602(3)(A).

The ESA provides each student with an individualized education savings account. Tenn. Code Ann. § 49-6-2605(a). The amount of the ESA was approximately $8,192 for the 2022-2023 school year and will automatically increase as the state increases education funding.[1] The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational programs, and college admission exams. Tenn. Code Ann. § 49-6-2603(a)(4). The McEwen Plaintiffs refer to an ESA as a "voucher," McEwen Br. 9 *et seq.* But a voucher can only be used for

[1] Tennessee ESA Program, Frequently Asked Questions for Participating Families at 5, https://www.tn.gov/content/dam/tn/education/data/acct/ESA-FAQ-for-Participating-Families_23-24_Update_Comms.pdf

private-school tuition—whereas these ESAs can be used for a variety of purposes—and an ESA is an individualized account that stays with the child, such that any unused funds roll over each year. Tenn. Code Ann. § 49-6-2603(l). After 12th grade, any accumulated ESA funds may be transferred into a college fund. Tenn. Code Ann. § 49-6-2603(g).

The statutory scheme reveals that funding for the ESA Pilot Program is built on the simple principle that the dollars follow the child. For example, each ESA is funded by the student's per-pupil expenditure of state funds from the Kindergarten-12th grade funding formula—the Basic Education Program ("BEP") in 2022-2023 and the Tennessee Investment in Student Achievement ("TISA") in subsequent years—as well as the required minimum match in local funds. Tenn. Code Ann. § 49-6-2605(a). This means that the state and county pay the same amount for these children regardless of whether they decide to participate in the program. *Id.*

In return, the ESA Pilot Program supports districts with three financial benefits that compensate them on a per-pupil basis. First, the school districts get to keep "remainder funds" of roughly $6,000 for each student who participates in the program. Tenn. Code Ann. § 49-6-2605(a). Second, the program creates a "double counting payment" 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). Third, at the end of three years, the school improvement fund disburses grants to support priority schools throughout the state, including the districts in which the program operates, which contain

over 80% of the priority schools. Tenn. Code Ann. § 49-6-2605(b)(2)(B)(ii).

This ESA is a pilot program, with caps on total students, geographic limitations, and a study on the effectiveness of the program. For example, the program is capped at 5,000 students in year one, rising by 2,500 students per year until it reaches 15,000 students in year five. Tenn. Code Ann. § 49-6-2604(c). Additionally, an eligible student must reside in either: (1) a school district with ten or more schools identified as priority schools in 2015, ten or more schools among the bottom ten percent of schools in 2017, and ten or more schools identified as priority schools in 2018; or (2) a neighborhood zoned to attend a school in the Achievement School District ("ASD"). Tenn. Code Ann. § 49-6-2602(3)(C). In practice, that means the ESA Pilot Program will begin operations in the three school districts containing over 80% of the state's failing schools: the ASD, SCS, and MNPS.[2] As the General Assembly explained, the "pilot program . . . provides funding for access to additional educational options to students who reside in local education agencies [LEAs, or school districts] that have consistently and historically had the lowest performing schools." Tenn. Code Ann. § 49-6-2611(a)(1).

In order to "assist the General Assembly in evaluating the efficacy" of the pilot program, "the office of research and education accountability

[2] *See* 2018 State Identified Priority Schools, https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/2018_sbe_meetings/september-21%2C-2018-sbe-conference-call-meeting/9-21-18%20III%20A%20State%20Identified%20Priority%20Schools%20Attachment.pdf

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

B. Legislative History

Throughout floor debates in both the House and Senate, legislators consistently echoed their desire to help impoverished families whose children were trapped in failing school districts. For example, Senator Kerry Roberts noted, "I'm thinking about the families that aren't here casting a vote, and that's who I have on my mind. I want to be able to cast a vote to help that struggling mom or dad that wants to see a better education opportunity for their child."[3] And Representative Chris Todd expressed similar sentiments during a House debate: "[W]e all have the same goal: to educate our children so that the diploma they are handed upon graduation actually means they can read, write, and do math on a 12th grade level. We don't have that right now. That

[3] Hearing on S.B. 0795/H.B. 0939, 2019 Tenn. Leg., 111th Sess. (Apr. 25, 2019). Statement of Sen. Kerry Roberts, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17308&meta_id=4

concerns me. It should concern each of us."[4] A week later, Representative Robin Smith agreed: "I applaud this governor. I applaud this bill. We have to find something different to spur innovation, to spur accountability, to spur competition, to give these kids a choice and a chance that are trapped in a school that is underperforming, and that yes, indeed, has been failing for years."[5]

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

> Facts are a stubborn thing, ladies and gentlemen. In 2009 and 2010, this body approved over 5 billion dollars for K-12 education. In this year's proposed budget, there is proposed over 6.5 billion dollars for K-12 education. So, to those who say we are cutting K-12 funding, we are reducing K-12 funding, we are somehow limiting K-12 funding, that is not true![6]

He concluded, "K-12 education has not been cut, has never been cut, and is continuing to grow in state appropriations. Teachers' salaries continue to have more money allocated to them: this year alone [to] the tune of seventy-one million dollars."[7]

---

[4] *Id.* (Apr. 23, 2019). Statement of Rep. Chris Todd, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:59:25 (last visited July 31, 2022).
[5] *Id.* (May 1, 2019). Statement of Rep. Robin Smith, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17338&meta_id=418129 at 1:35:24 (last visited July 31, 2022).
[6] *Id.* (Apr. 23, 2019). Statement of Rep. Matthew Hill, available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17272&meta_id=412485 at 2:47:10 (last visited July 31, 2022)
[7] *Id.*

Regarding public school children in the counties affected by the ESA Pilot Program, Representative Todd noted how they would fare better under the bill: "I have read through this amendment. It not only puts the focus on the students' success, it literally leaves more money in these affected districts per student than is there now."[8]

As the Senate sponsor of the legislation, Senator Dolores Gresham explained, "[T]he goal of the pilot project was to reach into the highest concentrations of poverty and priority schools, the highest concentrations. And that's why we are there, and that's why the bill carries those particular counties, those particular LEAs in those counties. The challenge is great there."[9]

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

> And while this is a pilot program and there's no set date on it, we will be evaluating the program. And if we see in the future years that it's not achieving what we want it to achieve, which is giving a better education to these students that are in these low performing districts, we can certainly stop this program in the future if we see that goal is not being met.[10]

---

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

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

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

Students in these low performing districts were targeted for help because, as House Deputy Speaker Hill stated, "Davidson County has 21 failing schools, and Shelby County [has] 27 failing schools. These are not numbers I made up. This is from the Department of Education here in Tennessee."[11] He went on to explain, "[T]his is, as amended, a pilot program that is at least giving an opportunity to those schools that need it the most. That is truly the case as you see the numbers and see the statistics."[12]

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

> When you hear the statistics, it's even more sobering. When you look at elementary schools, Shelby or Nashville, we've got schools where only 6.4% of students are on track in English in one place. Fewer than 5% are on track for English and Math. That's elementary schools. In middle schools, we see the same thing: only 5.6% on track, 5.5% on track. And in high school, we've got ACT scores where the whole average, in Shelby, Davidson County, and some of these schools, it's as low as 14.7. That's the average, so there's got to be kids that are scoring so low to bring it down that far. I just wanted to highlight and say these numbers are very sobering.[13]

---

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

Deputy Speaker Hill summed up the reason for starting the "pilot program in two counties[: they are] the two counties that represent over 90% of our, whatever you want to call it, our failing schools, disadvantaged schools, whatever you want to call it: over 90% of those schools are located in those 2 counties."[14]

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

C. The Lawsuit

The ESA Pilot Program was signed into law in May 2019. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 145 (Tenn. 2022). In February 2020, the Counties filed the initial lawsuit against it, *Id.* at 146, and in March 2020, the McEwen Plaintiffs filed their similar lawsuit, McEwen Br. 10. The Bah Intervenor-Defendants and Greater Praise Intervenor-Defendants intervened in both lawsuits. 645 S.W.3d at 146.

Greater Praise Intervenor-Defendants include Greater Praise Christian Academy, a school in the Frayser neighborhood of Memphis started by former public school teachers to help neighborhood children who are falling behind; Sensational Enlightenment Academy Independent School, a school in the Hickory Hill neighborhood of Memphis that serves largely low-income and minority children looking

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

for a quality pre-K—5 school in a safe, small, environment; Ciera Calhoun, an income-eligible mother of five in Memphis who wants to use the ESA Pilot Program for her children; Alexandria Medlin, an income-eligible Memphis mother who wants to use the program to give her elementary school daughter a better education than she was able to receive; and David Wilson, Sr., an income-eligible Nashville father of a high school son who has been forced to attend a school in the Achievement School District.[15]

In March and April 2020, the State Defendants and Intervenor-Defendants filed motions to dismiss and motions for judgment on the pleadings against all claims filed by both sets of plaintiffs. 645 S.W.3d at 146. In March 2020, the Counties filed a motion for summary judgment on what they believed was their strongest argument, the Home Rule Amendment claim, and the McEwen Plaintiffs filed a motion for temporary injunction on the Home Rule Amendment claim and their Appropriations claim. *Id*. On April 29, 2020, the Court held a hearing on these motions, and on May 4, 2020, the Court granted the Counties' summary judgment motion and held in abeyance a ruling on the remaining four claims in the two cases. *Id.* at 147. The Court of Appeals affirmed the ruling, *Id.*, and on May 18, 2022, the Supreme Court reversed it *Id.* at 154.

On July 13, 2022, the injunction was lifted, and later that day Governor Lee announced he planned to implement the program for the fall, which was the earliest he could comply with the directive in the

[15] Greater Praise Motion to Intervene Memorandum, filed Feb. 21, 2020.

statute to "begin enrolling participating students no later than the 2021-2022 school year." Tenn. Code Ann. § 49-6-2604(b). On August 3, 2022, McEwen Plaintiffs filed the first amended complaint that is the subject of this appeal. McEwen Br. 12.

On November 23, 2022, the court below granted the Defendants' and Intervenors' Motions to Dismiss, finding that neither set of Plaintiff had standing to bring their remaining claims, and this appeal followed. While the appeal was pending, Plaintiff Counties chose to voluntarily dismiss their claims, such that only the McEwen Plaintiffs' case remains before this Court.

ARGUMENT

Summary of Argument

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

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

The McEwen Plaintiffs have not suffered a concrete injury and do not have standing to assert any claims.

"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 Cnty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980) (parents had standing to challenge the closing of their child's school). But there is no special injury to the McEwen Plaintiffs here. Their children may continue to attend the public schools their parents prefer, and nothing in their Amended Complaint demonstrates 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 harm students attending some other school.

That some schools could lose total funding for the small number of students who avail themselves of the ESA program does not change this analysis. That *de minimis* funding reduction (likely less than one percent) simply reflects the fact that the school is now educating fewer children. A similar reduction in funding would occur if the ESA parents chose to homeschool their children, send them to a private school using some other source of money, send them to a charter school, or move to a different county in Tennessee to attend the public schools in some other district. The McEwen Plaintiffs argue that the child who moves to Idaho

costs the locality less money, because only the state funds leave the county, whereas the ESA diverts both county and state money. McEwen Am. Compl. ¶¶ 69-72. In fact, because of the $5,000 "remainder funds," the reduction is less than in their examples and leaves the McEwen Plaintiffs' children better off, with increased funding per pupil. *See* Tenn. Code Ann. § 49-6-2605(a). Therefore, they have no injury-in-fact. *See ACLU v. Darnell*, 195 S.W.3d 612, 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 program generates a "double counting payment" in the amount of the ESA for each student who participates in the program and sends those funds to participating school districts for three years. Tenn. Code Ann. § 49-6-2605(b)(2)(A). After three years, the "double counting payment" will continue to fund failing schools throughout the state. Tenn. Code Ann. § 49-6-2605(b)(2)(B)(ii).

"Standing often depends on the nature of the claim." *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 768 (Tenn. Ct. App. 2002). For instance, *Curve* involved a much more specific circumstance than present in this case. There, the parent-teacher association at an individual elementary school challenged the actions of their governing school board to close their school. *Curve*, 608 S.W.2d at 859. The court recognized the standing of the parents because they "and their children [are] in a position of possibly suffering damages and injustices of a different character or kind from those suffered by the citizens at large due to the

allegedly unlawful acts of the Board." *Id*. That is a small and specific group of people.

By contrast, this case involves an enormous number of people. SCS serves over 100,000 students across over 200 schools. MNPS serves 86,000 students across 166 schools. ASD serves over 10,000 students across its 29 schools. Under Plaintiffs' position, potentially 200,000 students have standing, through an even larger number of parents or legal guardians, to assert the claims brought in this case. That looks a lot more like "the public at large" than the limited parent class at an individual school in *Curve*. *See* 608 S.W.2d at 859.

This case is closer to *Moncier v. Haslam*, 1 F. Supp. 3d 854, 862 (E.D. Tenn. 2014), where the court decided that standing as a "registered voter" was more like "the public at large" than like an individualized injury, even though not every member of the public is registered to vote. Here, too, not every member of the public has a child in the public school system, but such a huge number do that they cannot all claim to have an individualized injury.

Indeed, even if these parents' schools would in fact lose a percent or two of funding, 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 occurred. States have many competing budget priorities, and reasonable minds will always disagree as to how to allocate scarce funds among them. The McEwen Plaintiffs' only real counter here is that their children's schools are "***already*** chronically underfunded." McEwen Br. 24 (emphasis in original). But if they're right about that, then they lack standing for the additional reason that their

claimed injury is not redressable: the legal right claimed in this case is the constitutional entitlement to an adequate education. Either the education a school is providing is adequate, or it is not. If the schools are already short of the funds to meet that legal duty, then whether there is an ESA program or not, their children would not receive a constitutionally adequate education either way.

II. The McEwen Plaintiffs have not met the requirements for taxpayer standing.

Perhaps realizing their claim of parental standing fails, the McEwen Plaintiffs also claim standing as taxpayers. But they have not met the requirements for taxpayer standing, so that argument also fails.

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

In *Fannon* the Tennessee Supreme Court reaffirmed these traditional principles and set forth specific limits on when taxpayers may establish standing: "our courts typically confer standing when a taxpayer (1) alleges a specific illegality in the expenditure of public funds and (2) has made a prior demand on the governmental entity asking it to correct the alleged illegality." *Fannon*, 329 S.W.3d at 427.

To be sure, the McEwen Plaintiffs did allege unconstitutional expenditure of public funds in their Complaint. *See, e.g.,* McEwen FAC

¶¶ 118, 155. But they did not allege a prior demand to correct the alleged illegality. They now assert that this should be excused because such a demand "would have been utterly futile." McEwen Br. 32. But they have established no such futility.

"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 Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 125-26 (Tenn. 1989) (plaintiffs met prior demand expectation by sending a letter to the mayor which was analyzed by the mayor's attorney who insisted on staying the course, thus prompting the lawsuit).

It is true that a plaintiff can avoid the notice requirement through a showing of futility, but the McEwen Plaintiffs have made no such showing—they have not even made an allegation in their Amended Complaint. Where a plaintiff fails to allege such futility as a necessary component of standing, their claim must be denied. *Metro. Gov't of Nashville & Davidson Cnty. Ex rel. Anderson v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985) ("There is no such allegation in the present case with respect to the Metropolitan Council. The allegations of the complaint therefore, in our opinion, are insufficient to show standing by the private individual who attempted to bring this suit.").

It is not enough that a plaintiff figures—in his or her gut—that this or that public official will disagree with him or her. Rather, the notice requirement is excused only "where the status and relation of the involved officials to the transaction in question is such that any demand would be a formality." *Badgett v. Rogers*, 436 S.W.2d 292, 293 (1968). For instance, in *Badgett*, the allegation was that local officials had created slush funds of public money for their personal use. *Id.* at 293. The Court understandably concluded that the personal financial interest of the relevant public officials rendered the notice requirement a useless formality. *Id.* at 294 ("The Mayor and Finance Director patently have interests contrary to this action."). There is no similar claim here that any public official stands to personally gain from the ESA program. And it was the McEwen Plaintiffs' burden to identify some—any—source of futility in the first place. This they did not do.

The McEwen Plaintiffs respond that they should be excused from the demand requirement because the Governor signed the law and the various other state officials took steps to implement it. McEwen Br. 32. That's it: because the state officials operated on the assumption the law was constitutional, it would have been "utterly futile" to tell them otherwise. *Id.* McEwen Plaintiffs point to *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 63 (Tenn. Ct. App. 2001). But *Ragsdale* is a contract case and inapplicable here: the city was on the hook for large sums to the NBA team if it reneged on the deal, which is different than state officials simply doing their job. As the court below pointed out, "extending the rationale of *Ragsdale* to this scenario would swallow the prior-demand

requirement entirely. Governors regularly campaign on future legislation and in most cases sign legislation before it becomes law. Agencies and their officials regularly implement new legislation. A house speaker regularly shepherds bills across the finish line. By applying the exception here, this Court would render it no exception at all." Opinion Below at 13. Precisely: if it is enough that state officials are doing their jobs, then the demand exception would completely swallow the rule.

Plaintiffs propose a vision of taxpayer standing so broad that it would permit any taxpayer to challenge any law on education policy. This is fundamentally at odds with the extremely limited scope the Supreme Court has given to taxpayer standing. "The rule in Tennessee is well established that citizens and taxpayers are without standing to maintain a lawsuit to restrain or direct governmental action unless they first allege and establish that they will suffer some special injury not common to citizens and taxpayers generally." *LaFollette Med. Ctr. v. City of LaFollette*, 115 S.W.3d 500, 503 (Tenn. Ct. App. 2003). The McEwen Plaintiffs have not shown that they are entitled to an exception to this longstanding rule.

CONCLUSION

For the forging reasons, the decision below should be affirmed.

Respectfully submitted, Dated: September 25, 2023

s/ M.E. Buck Doughtery III
M.E. Buck Doughtery III (TN B.P.R. # 022474)
bdoughtery@ljc.org
Reilly Stephens (*Pro Hac Vice*)
rstephens@ljc.org
Liberty Justice Center
440 North Wells Street, Suite 200
Chicago, Illinois 60654
(312) 263-7668

Counsel for Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; & David Wilson, Sr.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements set forth in Tenn. S. Ct. R. 46 (3.02). It fulfills the 15,000 word limit because it contains 4,736 words, excluding those sections mentioned by the rule. It has been prepared with full justification in 14 point Century Schoolbook font with 1.5-spaced lines and pagination beginning on the cover page with page 1. It was prepared in Microsoft Word and directly converted to Portable Document Format.

Dated: September 25, 2023

s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document was served via Tenn. S. Ct. R. 46 (4.01) through the e-filing system and was forwarded to the to the attorneys listed below, by agreement of the parties, via the e-mail addresses below on this 25th day of September 2023.

Robert E. Cooper, Jr., Esq., Director of Law
Lora Barkenbus Fox, Esq.
Allison L. Bussell, Esq.
Department of Law of the Metropolitan Government of Nashville and Davidson County
lora.fox@nashville.gov
allison.bussell@nashville.gov
Counsel for Appellee/Plaintiff Metropolitan Government of Nashville and Davidson County and dismissed Plaintiff Metropolitan Nashville Board of Public Education

Marlinee C. Iverson, Esq., Shelby County Attorney
E. Lee Whitwell, Esq.
Shelby County Attorney's Office
marlinee.iverson@shelbycountytn.gov
lee.whitwell@shelbycountytn.gov
Counsel for Appellee/Plaintiff Shelby County Government

Herbert H. Slatery, III, Esq., Attorney General and Reporter
Stephanie A. Bergmeyer, Esq., Senior Assistant Attorney General
James R. Newsom, III, Esq., Special Counsel
Office of Tennessee Attorney General
Stephanie.Bergmeyer@ag.tn.gov
Jim.Newsom@ag.tn.gov
Counsel for Appellants/Defendants, Tennessee Department of Education; Penny Schwinn, in her official capacity as Education Commissioner for the Tennessee Department of Education; and Bill Lee, in his official capacity as Governor for the state of Tennessee

Jason I. Coleman, Esq.
jicoleman84@gmail.com

Arif Panju, Esq.
apanju@ij.org
David Hodges, Esq.
dhodges@ij.org
Keith Neely, Esq.
kneely@ij.org
Tim Keller
tkeller@ij.org
Institute for Justice
Counsel for Appellants/Intervenor-Defendants Natu Bah and Builguissa Diallo

Braden H. Boucek
Beacon Center
braden@beacontn.org
Counsel for Appellants/Intervenor-Defendants Bria Davis and Star Brumfield

Dated: September 25, 2023 s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III