IN THE TENNESSEE COURT OF APPEALS

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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Plaintiffs / Appellants,

v.

TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,

Defendants / Appellees,

and

NATU BAH, *et al.*,

Intervenor-Defendants / Appellees.

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

[CORRECTED] APPELLANTS' (McEWEN PLAINTIFFS) REPLY BRIEF IN RESPONSE TO: (I) DEFENDANTS-APPELLEES; AND (II) GREATER PRAISE CHRISTIAN ACADEMY, SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL, CIERA CALHOUN, ALEXANDRIA MEDLIN, AND DAVID WILSON, SR.

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I. INTRODUCTION

Defendants' contentions mirror the Chancery Court's errors – refusing to provide McEwen Plaintiffs with the benefit of all reasonable inferences and refusing to accept their allegations as true. By failing to apply the correct legal standards, Defendants' assertions provide no basis for affirming the Chancery Court's erroneous dismissal.

McEwen Plaintiffs plainly established their standing; indeed, with respect to taxpayer standing, State Defendants' exact contentions were rejected by the Court of Appeals just weeks ago in *Rutan-Ram v. Tenn. Dep't of Children's Servs.*, 2023 WL 5441029 (Tenn. Ct. App. Aug. 24, 2023). Each of McEwen Plaintiffs' claims are ripe as the harms they allege are occurring now, and withholding adjudication will cause those harms to continue.

The Chancery Court's dismissal should be reversed.

II. ARGUMENT

A. McEwen Plaintiffs Have Established Standing as Parents

1. McEwen Plaintiffs Have Sufficiently Pled a Distinct and Palpable Injury as Parents that Gives Rise to Violation of the Tennessee Education and Equal Protection Clauses (Claims I and II)

McEwen Plaintiffs have sufficiently pled a distinct and palpable injury as parents in their Amended Complaint. The Tennessee Constitution's Education and Equal Protection Clauses require the State to maintain and support a system of public schools that provides ***adequate and substantially equal educational opportunities to all Tennessee children***. Tenn. Const. art. I, §8; art. XI, §§8, 12 (emphasis added) (Count I) (Appellants' McEwen Plaintiffs Opening Brief ("AOB") at 23-25). However, those rights are violated because the Voucher Law diverts public education funding from McEwen Plaintiffs' already chronically underfunded districts in a manner that leaves less funding and fewer educational resources for their respective students. *Id.* This results in inadequate and unequal educational opportunities for McEwen Plaintiffs' children. *Id.* McEwen Plaintiffs allege that a court order finding the Voucher Law violates the Tennessee Constitution would redress McEwen Parents' injuries. *Id.* As discussed *supra*, the

Chancery Court failed to apply the correct legal standard and accept Plaintiff's allegations of harm as true.

Additionally, McEwen Plaintiffs alleged in their Amended Complaint that the Tennessee Constitution's Education Clause requires the General Assembly to provide for the maintenance, support, and eligibility standard of "***a system*** of free public schools." Tenn. Const., art. XI, §12 (emphasis added) (Count II) (AOB at 36-39). That is, McEwen Parents are harmed by the illegal diversion of funds to support private schools outside a system of free public schools. *Id.* McEwen Plaintiffs' claimed injuries are unique. Other school districts are not bleeding a disproportionate amount of funds as a result of the Voucher Law, but McEwen Plaintiffs' districts are. *Id.*

2. State Defendants' and Greater Praise Defendants/Intervenors' Arguments Fail

In its opposition to both claims, State Defendants rely on a single argument, no case law, and no cites to the record: that McEwen Plaintiffs' injury is speculative because the school improvement grant will remedy any alleged injury suffered by McEwen Plaintiffs. State Br. at 18.[1]

[1] "State Br." refers to the Brief of Defendants-Appellees. "Greater Praise Br." refers to Intervenor-Defendants/Appellees Greater Praise Christian Academy; Sensational

However, McEwen Plaintiffs' Amended Complaint alleges the various ways in which the school improvement fund, even if allocated, will nevertheless create a financial loss and thus an inadequate and unequal opportunity for their students' schools. AOB at 13-16. McEwen Plaintiffs' allegations of harm must be taken as true, which the Chancery Court failed to do.

The Greater Praise Intervenors' argument fares no better.[2] Greater Praise disingenuously attempts to reframe McEwen Plaintiffs' case and appeal about the free choice of school parents to choose vouchers for their children, claiming that McEwen Plaintiffs suffer no injury by the decisions of other parents to send their children to private school. *See* Greater Praise Br. at 16. This is a misstatement of McEwen Plaintiffs' argument. Indeed, McEwen Plaintiffs' claims are not about the personal decisions of families electing to attend private school. Rather, McEwen

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Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.'s Response Brief.

[2] The Greater Praise brief violates Rule 6 of the Tennessee Court of Appeals by failing to contain a single cite to the record. It should be stricken or disregarded for this reason. *Breeden v. Garlan*d, 2020 WL 6285300, at *2 (Tenn. Ct. App. Oct. 27, 2020) ("'No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.'"). Internal citations and footnotes are omitted and emphasis is added throughout unless otherwise indicated.

Plaintiffs' claims are about their unequal treatment by the State under the Voucher law – where their students' districts lose money, but other districts do not.

Greater Praise then discusses "double counting" remainder funds" and "*de minimis"* funding loss to McEwen Plaintiffs. Greater Praise Br. at 16-17. Again, these allegations, implying that the districts are not losing funding, conflict with Plaintiffs' allegations and, at most, raise an issue of fact improper for resolution on a motion to dismiss. The chancery court erred when it failed to provide McEwen Plaintiffs with the benefit of all reasonable inferences.

In the *Small Schools Systems* rulings, students and parents of students were proper parties to challenge the state's school funding formula on the ground that it violated their children's education rights under the Tennessee state Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W. 3d 232 (Tenn. 2002). Similarly, McEwen Plaintiffs are challenging a state action that violates their children's education

rights under the Tennessee Constitution. Thus, the instant case is no different.

Greater Praise's reliance on *Curve* only bolsters McEwen Plaintiffs' claim. In *Curve,* parents of school children challenged the governing school board's action that directly impacted their specific schools in a way that was different from those suffered by the citizens at large. There, the chancery court dismissed the parents' complaint based on standing. On appeal, the Court found that "[t]he allegations of the complaint place these parents and their children 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," and the case was reversed and remanded. *Curve Elementary Sch. Parent & Tchrs.' Org. v. Lauderdale Cnty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980)

The same is true here. The Amended Complaint describes how McEwen Plaintiffs suffer injury of a different kind from parents of public schools in unaffected districts and from non-public school parents. R. at 2050-52¶¶68-80. Where the State is draining state education funds from McEwen Plaintiffs' children's schools to private schools – and draining

more per pupil than it provides in state education funds – it is not inflicting this harm on parents in Knox County, Sullivan County, and elsewhere.

Greater Praise makes a lot of hay that McEwen Plaintiffs' districts serve a high number of students, so that necessarily equates to the public at large. This is not true. McEwen Plaintiffs are not the public at large. They are parents from the targeted districts. That is hardly the "public at large," cautioned against in *Moncier v. Haslam*, 1 F. Supp. 3d 854, 863 (E.D. Tenn. 2014) (finding voting rights injury was common to all voters in Tennessee in a suit brought under the First and Fourteenth Amendments of the U.S. Constitution), *aff'd*, 570 F. App'x 553 (6th Cir. 2014).

B. McEwen Plaintiffs Established Taxpayer Standing

McEwen Plaintiffs established taxpayer standing based on two grounds. First, for Counts I and II, they properly alleged special injury that was fairly traceable to the Voucher Law and that could be redressed by a court order (AOB at 26-29, 39). Second, for Counts I, II, and VI, they properly alleged a specific illegality for which a demand would have been futile (*id.* at 29-32, 40-43).

State Defendants claim McEwen Plaintiffs suffered no injury as taxpayers.[3] (State Br. at 15-16). State Defendants also contend McEwen Plaintiffs did not allege a specific illegality for Counts I and II; however, State Defendants have previously conceded that McEwen Plaintiffs have established standing for Count VI (State Br. at 16-19; R., 2408). Greater Praise Intervenors concede that McEwen Plaintiffs established a specific illegality for all three counts (Greater Praise Br. at 19). State Defendants and Greater Praise Intervenors argue that there was no demand futility (State Br. at 17-19; Greater Praise Br. at 20-22). In making these claims, the appellees disregard the legal standard on a motion to dismiss and misinterpret the precedent on the specific illegality exception.

1. McEwen Plaintiffs Properly Alleged Taxpayer Special Injury

As discussed in McEwen Plaintiffs' opening brief, the Voucher Law imposes a unique tax burden on them as taxpayers from Davidson and Shelby Counties, distinct from taxpayers in all other counties in Tennessee. AOB at 27-28, 39. Thus, McEwen Plaintiffs established the first prong of traditional taxpayer status for Counts I and II of their

[3] Greater Praise Intervenors failed to address McEwen Appellants' first ground for taxpayer status.

Amended Complaint: special injury. Greater Praise Intervenors failed to address McEwen Plaintiffs' argument regarding their special injury at all. They merely state the legal principle articulated in *Fannon v. City of Lafollette*, 329 S.W.3d 418, 427 (Tenn. 2010), that a taxpayer must have an injury not common to all citizens. Greater Praise Br. at 19.

Tennessee law mandates: "[o]n a motion to dismiss, the Court presumes all factual allegations to be true and construes them in favor of the plaintiff." *Metro. Gov't of Nashville and Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 147-48 (Tenn. 2022) (citing *Foster v. Chiles*, 467 S.W.3d 911, 914 (Tenn. 2015)). However, State Defendants' attempt to defeat McEwen Plaintiffs' special injury improperly depends solely on allegations that conflict with those alleged in McEwen Plaintiffs' Amended Complaint. As discussed in their opening brief, McEwen Plaintiffs alleged that the Voucher Law imposes an increased tax burden on them as taxpayers only in Davidson and Shelby Counties because it calls for the diversion of per-pupil State BEP/TISA funds – an amount representing the state and local share of BEP/TISA funds, for each voucher student, in an amount greater than the counties receive per pupil from the State – which is only the state share of BEP/TISA funds.

AOB at 27-28. McEwen Plaintiffs further alleged in their complaint the various ways in which the "school improvement fund" grants do not compensate for the loss of state funding caused by the Voucher Law. *See* AOB at 23, 49-50; R. at 2054-56¶¶83-88. In their response brief, State Defendants repeat the same mistake made by the Chancery Court in its decision dismissing the case. State Defendants ignore the allegations and instead put forth their own conflicting allegations, *i.e.*, that the school improvement fund grants do compensate for the loss of state funding caused by the Voucher Law. State Br. at 16. Because they refused to accept McEwen Plaintiffs' allegations as true, State Defendants violated the cardinal rule of a motion to dismiss; thus their argument must be rejected.

2. McEwen Plaintiffs Satisfied the "Specific Illegality" Exception to the Taxpayer Standing Rule

As argued in their opening brief, McEwen Plaintiffs have established taxpayer standing for Counts I, II, and VI because the Amended Complaint alleges a "specific illegality" in the expenditure of public funds. For Counts I and II, McEwen Plaintiffs allege that the Voucher Law calls for the diversion of funds in violation of the Tennessee

Constitution (AOB at 30-32, 40); for Count VI, McEwen Plaintiffs allege that the Voucher Law calls for the diversion of funds in violation of the Tennessee Constitution and Tennessee statute. AOB at 41-43. The trial court acknowledged that McEwen Plaintiffs alleged a specific illegality for Count VI. R. at 3632. In attempting to defeat McEwen Plaintiffs' assertion of taxpayer standing based on a specific illegality, State Defendants recycle two erroneous arguments their counsel unsuccessfully raised before this Court recently in *Rutan-Ram*, 2023 WL 5441029: that McEwen Plaintiffs' allegation that the Voucher Law mandates the diversion of funds in violation of the Tennessee constitution is insufficient to establish a specific illegality; and that a specific illegality only applies to the misuse of local dollars by local officials. State Defendants' position was rejected by this Court in *Rutan-Ram* and must be rejected here.

In *Rutan-Ram,* taxpayers sued a state agency, a state official, and others, challenging the constitutionality of Tenn. Code Ann. §36-1-14, which allows private child-placing agencies that receive state funding to deny services to prospective foster or adoptive parents based upon the agencies' religious beliefs. *Rutan-Ram*, 2023 WL 5441029, at*1. The

plaintiffs contended that the statute violated several provisions of the state constitution, specifically the guarantees of religious freedom and equal protection, by funding a child-placing agency that discriminates in state-funded programming and services against prospective and current foster parents based on the religious beliefs of the parents. *Id.* at *21 The plaintiffs in *Rutan-Ram* thus argued that the statute called for an illegal expenditure of funds. The State defendants argued that since the statute did not itself appropriate funds, direct the use of any state funds, or levy taxes, it had no fiscal impact and therefore did not qualify as a "specific illegality" in the expenditure of public funds. The Court of Appeals flatly rejected this argument, observing: "Defendants suggest that the challenged act itself must have some fiscal impact in order to support an allegation of misuse of funds. But, they have not cited any authority for this proposition." *Id.* The Court instead concluded that the plaintiffs established the "specific illegality" based on the allegations in the complaint that the statute calls for the expenditure of funds in violation of religious freedom and equal protection guarantees of the Tennessee Constitution. *Id.*

McEwen Plaintiffs' allegations mirror those of the *Rutan-Ram* plaintiffs. McEwen Plaintiffs allege that the Voucher Law mandates the expenditure of public funds in violation of the Education and Equal Protection clauses of the Tennessee Constitution, as well as the Appropriations provisions in both the Tennessee Constitution and statutes. R. at 2062-64¶¶112-118, 121; R. at 2070¶154. The mere fact that the Voucher Law itself may not have a fiscal impact, *i.e.*, does not appropriate money or levy taxes, is immaterial. Contrary to the State Defendants' specious argument, the "specific illegality" allegation need not mean anything more. State Br. at 17. Taking McEwen Plaintiffs' allegations as true, the court must find that McEwen Plaintiffs properly alleged the illegal expenditure of public funds, as Greater Praise Intervenors concede. *See* Greater Praise Br. at 19 ("To be sure, the McEwen Plaintiffs did allege unconstitutional expenditure of public funds in their Complaint.").

State Defendants also put forth the faulty argument, rejected in *Rutan-Ram*, that the "specific illegality" exception only applies to the misuse of local funds by local officials. The defendants in *Rutan-Ram*, a state agency and a state official, argued that the specific illegality

exception applies only to a misuse or diversion of local funds, not to state funds. *Rutan-Ram*, 2023 WL 5441029, at *21. This Court disagreed, ruling: "[w]e find no support for the limitations proposed by Defendants and conclude that the taxpayer standing requirements are the same for state and local taxpayers." *Id.* Thus State Defendants' argument must fail. Moreover, State Defendants themselves already conceded that the specific illegality exception applied to state officials and state funds in the instant case. In their motion to dismiss, they acknowledged that McEwen Plaintiffs successfully alleged illegality in the expenditure of ***state*** funds by the ***State*** Defendants in Count VI, McEwen Plaintiffs' appropriations claim. R. at 2408. Since State Defendants' argument relies on a faulty interpretation of the legal precedent on what constitutes a misuse of public funds – one that was rejected by this Court less than two months ago – it cannot be credited. Accordingly, the Court should find that McEwen Plaintiffs established a "specific illegality" for the purposes of taxpayer standing.

Appellees' demand futility contentions fare no better. First, *Fulton* confirms that a demand is excused where, like here: "it appears that one of the accused public officers would have had to take the corrective action

or would have been intimately involved in doing so, or would have been seriously embarrassed by the action." *Metro. Gov't of Nashville & Davidson Cnty. v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985). In *Fulton*, however, demand was not excused because the Metropolitan Council, on whose behalf the action was purportedly brought, was not involved in approving the attorney's fees sought to be recouped through the litigation. On the contrary: "[i]t was alleged in the complaint that the attorney's fees were ***not*** approved by the Council as required by the Metropolitan Charter, and it was also alleged that the settlement agreements were ***not*** approved by the Council and therefore were not binding on the Metropolitan Government." *Id.* at 598. *Fulton* therefore provides no support for Defendants' contentions. *See also Burns v. Nashville*, 221 S.W. 828, 837 (1920) ("we think it would have been a useless formality for the complainants to have made a demand on the commissioners of the city to bring suit, when one of the principal reliefs sought by the complainants was against the commissioners themselves").

Second, the State Defendants contend that their "'zealous and steadfast efforts to defend[] and implement'" the Voucher Law cannot be considered "because they were not set forth in Plaintiffs' complaint."

State Br. at 18 n.8. However, these facts were clearly part of the record before the Chancery Court at the time of its decision, and State Defendants provide no authority for why such facts cannot be considered.

Finally, the Greater Praise Defendants contend: "[i]t is not enough that a plaintiff figures – in his or her gut – that this or that public official will disagree with him or her." Greater Praise Br. at 21. However, courts examining demand futility allegations in other contexts recognize that such an analysis "requires a 'practical' and 'common sense' inquiry into the issue of whether a demand . . . would be futile." *Grill v. Hoblitzell*, 771 F. Supp. 709, 711 (D. Md. 1991). Defendants cannot credibly contend that there is a basis to believe that they would have abandoned their herculean efforts to establish a voucher program in Tennessee had a demand been made.

C. McEwen Plaintiffs' Claims Are Ripe

Each of the claims pursued on appeal by McEwen Plaintiffs is ripe for judicial review. In determining ripeness, courts must consider: (1) whether a claim is "based 'on hypothetical and contingent future events that may never occur'"; and (2) "'whether withholding adjudication . . . will impose any meaningful hardship on the parties.'"

State v. Price, 579 S.W.3d 332, 338-39 (Tenn. 2019). A claim is ripe either if harm has occurred or if it is imminent. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). McEwen Plaintiffs have pled in detail that the harms they allege are occurring now and that withholding adjudication will cause those harms to continue. The cursory response offered by State Defendants simply re-raises factual disputes that are not grounds to rule against plaintiffs on a motion to dismiss, and it utterly fails to address the detailed factual allegations in the complaint that explain why Defendants are incorrect when they assert the Voucher Law causes no injury. When those allegations are taken as true, as they must be on a motion to dismiss, *Metro. Gov't*, 645 S.W.3d at 147-48, it is clear McEwen Plaintiffs' claims are ripe.

1. McEwen Plaintiffs' First Cause of Action Is Ripe

McEwen Plaintiffs' First Cause of Action, that the Voucher Law violates the Education and Equal Protection Clauses because it further deprives their children's under-resourced school districts of the funding required for a constitutionally adequate education, is ripe because the harms alleged are occurring now; and even if they could not occur until

three years into the voucher program, they would be sufficiently imminent to meet the ripeness standard. The State Defendants make two arguments to support their claim that McEwen Plaintiffs' schools will not actually experience a funding loss. Both are incorrect, and in any case, on a motion to dismiss, a court should not evaluate the merits of the dispute.

State Defendants argue that the districts will keep some TISA funds associated with voucher students they are not obligated to educate. However, McEwen Plaintiffs have alleged in detail why the Voucher Law will cause funding shortfalls in the districts, R. at 2050-52¶¶68-72, 76, so at most this raises a question of fact that must be construed in favor of McEwen Plaintiffs at this stage. State Defendants also argue that school improvement grants allocated to the districts during the first three years of the voucher program will create a windfall for the districts. The Chancery Court also relied on these grants in ruling Plaintiffs' claims were unripe. However, as relevant to each of the arguments State Defendants advance here, both State Defendants and the Chancery Court failed to address the multiple reasons these grants do not compensate for the districts' loss of BEP/TISA funding diverted to the

voucher program, meaning harm occurs immediately upon implementation of the program, *see* AOB at 47-52, and that even if no harm could occur until the grants are end after three years, the harms alleged would be sufficiently imminent to satisfy ripeness, *see id.* at 52-54. These reasons include: (1) the grants are expressly subject to appropriation, T.C.A. §49-6-2605(b)(2); R. at 2054¶83; (2) the Voucher Law restricts their use to "school improvement," meaning they cannot be used for general operating funds and thus cannot replace the BEP/TISA funds diverted to vouchers, *id.*, ¶84; (3) even if maximally funded, the grants will not compensate the districts for each student who uses a voucher because they only cover students who were enrolled in the district the previous year, T.C.A. §49-6-2605(b)(2)(A)(i); R. at 2055¶85; (4) when a voucher account is closed, including midyear, the funds are returned to the State's BEP/TISA account rather than to the district, although the district is responsible for the student's education, T.C.A. §§49-6-2603(e), 49-6-2608(e); R. at 2055¶86; (5) school districts bear substantial fixed and variable costs that cannot be reduced proportionally when students leave the district to use a voucher, R. at 2055-56¶¶87-88; and (6) the Voucher Law permits participating private

schools to refuse to serve high-need students, which will likely concentrate more-expensive-to-educate students in the districts' schools, R. at 2056¶89. State Defendants' arguments do not provide any reason that McEwen Plaintiffs' allegations, when taken as true, fail to allege injury that is occurring now or will imminently occur.

Moreover, the Amended Complaint alleges the harm to taxpayers of increased tax burden and illegal diversion of tax funds due to the Voucher Law. This made the First Cause of Action ripe when the Voucher Law passed, given the imminence of the harm to taxpayers; at the latest, it was ripe as soon as the State began implementing the voucher program. Both the Chancery Court and Defendants completely ignored this separate reason that the First Cause of Action is ripe.

On the second prong of the ripeness injury, State Defendants arguments are inapposite. They assert that withholding judgment will not harm plaintiffs because they are "not required to 'immediately comply[] with a burdensome law' or 'risk serious criminal and civil penalties,'" State Br. at 24 (quoting *Price*, 579 S.W.3d at 338), as the Voucher Law "'regulates and governs only the conduct'" of districts, *id.* (quoting *Metro. Gov't*, 645 S.W.3d at 152-53). To start, a risk of criminal

or civil penalties is, of course, not the only injury that makes a claim ripe. Although *Price* calls this the "prototypical case of hardship," 579 S.W.3d at 338, there is no implication that it is the ***only*** type of harm that makes a case ripe. *See id.* at 341-43. To hold that it were would mean that huge swaths of civil litigation, including cases challenging violations of core constitutional rights, could never be ripe. Additionally, even if the Voucher Law only ***regulates and governs*** the districts, it can and does ***affect and injure*** McEwen Plaintiffs. McEwen Plaintiffs have sufficiently alleged delaying resolution of their claims will result in their children's schools – which are already underfunded – being further deprived of educational resources. R. at 2052-54¶¶79-82. They have satisfied both prongs of the ripeness inquiry.

2. McEwen Plaintiffs' Second Cause of Action is Ripe

McEwen Plaintiffs' Second Cause of Action, alleging the voucher program violates the Education Clause because that clause prohibits any funding of private schools, is also ripe. This violation was sufficiently imminent to be ripe for judicial intervention as soon as the Voucher Law was enacted in 2019, and any doubt about ripeness disappeared when the

State began operating the voucher program during the 2022-2023 school year.

As explained in the prior section, McEwen Plaintiffs allege in detail how the diversion of funds to the voucher program will harm them as parents and taxpayers. Moreover, because the plain text of the Education Clause permits the State to fund ***only*** a system of public education, ***any*** public funds used on private education – no matter the amount, the source, or whether they are made up from another revenue stream – is a violation of the Tennessee Constitution. State Defendants fail to address this argument, which is unaffected by their factual arguments that complex funding mechanisms mean the districts will actually experience a financial windfall.

There is not a "'more appropriate time'" to bring the claim, *Price*, 579 S.W.3d at 339, as these harms are occurring now and will continue to occur if adjudication is withheld. State Defendants' arguments about the second prong of the ripeness inquiry are unpersuasive for the reasons stated above. The second cause of action is therefore ripe for judicial review.

3. McEwen Plaintiffs' Sixth Cause of Action Is Ripe

Finally, State Defendants expressly conceded the ripeness of McEwen Plaintiffs' Sixth Cause of Action, violation of the Appropriation of Public Moneys provision of the state constitution and relevant statutes. The claim is ripe because all facts relevant to it – the lack of a first year appropriation in 2019 and the expenditure of public funds on the ClassWallet contract in the same year – occurred in the past. Thus, the claim cannot depend on "'hypothetical and contingent future events,'" and there cannot be any developments that make it more appropriate to raise the claim in the future. *Price*, 579 S.W.3d at 338-39. State Defendants agree with McEwen Plaintiffs that the Chancery Court's ripeness analysis "cannot fairly be construed to extend to Plaintiffs' sixth claim," and therefore they "do not seek affirmance on this alternative basis" with respect to this cause of action. State Br. at 23 n.10.

III. CONCLUSION

The Chancery Court's dismissal should be reversed and the action should be remanded for further proceedings.

DATED: October 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 30(e) of the Tennessee Rules of Appellate Procedure, **[CORRECTED] APPELLANTS' (McEWEN PLAINTIFFS) REPLY BRIEF IN RESPONSE TO: (I) DEFENDANTS-APPELLEES; AND (II) GREATER PRAISE CHRISTIAN ACADEMY, SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL, CIERA CALHOUN, ALEXANDRIA MEDLIN, AND DAVID WILSON, SR.** is produced using 14-point Century Schoolbook typeface and contains 4,463 words. Counsel relies on the word count provided by Microsoft Word word-processing software.

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City of Nashville, Tennessee, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 200 31st Avenue N., Nashville, TN 37203.

2. I hereby certify that on October 10, 2023, I electronically filed the foregoing document: **[CORRECTED] APPELLANTS' (McEWEN PLAINTIFFS) REPLY BRIEF IN RESPONSE TO: (I) DEFENDANTS-APPELLEES; AND (II) GREATER PRAISE CHRISTIAN ACADEMY, SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL, CIERA CALHOUN, ALEXANDRIA MEDLIN, AND DAVID WILSON, SR.** with the Clerk of the Court for the Tennessee Court of Appeals by using the TrueFiling Electronic Case Filing (ECF) system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 10, 2023, at Nashville, Tennessee.

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

ADDENDUM

2023 WL 5441029
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT NASHVILLE.

Elizabeth RUTAN-RAM et al.
v.
TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES et al.

No. M2022-00998-COA-R3-CV
|
March 3, 2023 Session
|
FILED August 24, 2023

Appeal from the Chancery Court for Davidson County, No. 22-80-III, Ellen Hobbs Lyle, Chancellor, Carter S. Moore, Judge, Roy B. Morgan, Judge

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Jonathan Skrmetti, Attorney General and Reporter, Andrée Blumstein, Solicitor General, Reed N. Smith, Assistant Attorney General, and Trenton Michael Meriwether, Assistant Attorney General, for the appellees, Tennessee Department of Children's Services and Commissioner of Tennessee Department of Children's Services.

Andy D. Bennett, J., delivered the opinion of the Court, in which Frank G. Clement, Jr., P.J., M.S., and Jeffrey Usman, J., joined.

OPINION

Andy D. Bennett, J.

***1** The plaintiffs, a prospective adoptive couple and six other Tennessee taxpayers, brought this declaratory judgment action challenging the constitutionality of Tenn. Code Ann. § 36-1-147, which allows private child-placing agencies that receive state funding to deny services to prospective foster or adoptive parents based upon the agencies' religious beliefs. A three-judge panel concluded that the plaintiffs lacked standing to challenge the statute. We have determined that the plaintiffs have standing and reverse the decision of the three-judge panel.

In Tennessee, as in many other states, the State contracts with private child-placing agencies ("CPAs") to provide child placement services (including placement, training, supervision, and support services) to prospective and current foster and adoptive parents. In January 2020, the Tennessee General Assembly enacted Tenn. Code Ann. § 36-1-147,[1] which permits private CPAs that receive state funding to deny services to prospective foster or adoptive parents based on the agencies' "religious or moral convictions or policies."

Gabriel and Elizabeth Rutan-Ram ("the Couple") are a married Jewish couple who live in Knox County, Tennessee. In January 2021, the Couple began efforts to foster and then adopt a child. They identified a child in Florida whom they were interested in fostering and adopting. To be eligible to foster the Florida child, the Couple was required to obtain foster training and a home study from a CPA licensed in Tennessee. The Couple contacted Holston United Methodist Home for Children ("Holston"), a private CPA that receives funding from the Tennessee Department of Children's Services ("DCS" or "the Department") to perform child placement services.

On January 21, 2021, Holston informed the Couple that the agency refused to serve them because the Couple did not share the agency's religious beliefs. Pursuant to Holston's guidelines, the agency will serve only prospective or adoptive parents who agree with Holston's statement of faith. Because they were unable to find another CPA in their area that would provide the services needed for an out-of-state adoption, the Couple was not able to adopt the child in Florida.

***2** The Couple subsequently decided to seek approval as foster parents for children in the State of Tennessee, rather than considering children in other states. The Couple did not contact Holston again because Holston had already informed the Couple that the agency would not provide child placement services to them due to their Jewish faith. The Department itself provided the Couple with the required training and home study, and the Department approved the Couple as foster

parents in June 2021. Since then, the Couple has acted as foster parents for a teenage girl, whom they hope to adopt. The Couple also intends to serve as foster parents for at least one additional child and to pursue adoption of that child.

On January 19, 2022, the Couple and six Tennessee taxpayer residents (collectively, "Plaintiffs") filed this lawsuit against DCS and its commissioner (collectively, "Defendants") alleging that Tenn. Code Ann. § 36-1-147 and DCS's funding of Holston violate the Tennessee Constitution, specifically article I, sections 3 and 8, and article XI, section 8. In accordance with Tenn. Code Ann. § 20-18-101(a)(1)(A), the matter was assigned to a three-judge panel appointed by the Tennessee Supreme Court.

Plaintiffs filed an amended complaint on April 8, 2022. In the amended complaint, Plaintiffs alleged, in part:

> 50. Ms. Rutan-Ram was deeply hurt and shocked when she received [the email from a Holston employee informing the Couple that Holston would not provide them with services]. Holston's refusal to serve her felt like a punch in the gut or a slap in the face. Ms. Rutan-Ram did not expect that a state-funded agency would reject a loving family simply because the family did not share the agency's preferred religious beliefs. She felt sad that Holston would not help her provide a loving home to the child whom she and her husband had hoped to welcome into their family.
>
> 51. Mr. Rutan-Ram similarly was hurt, frustrated, and disappointed to learn that his family had been discriminated against because of their religious beliefs.
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> ...
>
> 62. State funds that the Department provides to Holston and other child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents come from the State's general fund.
>
> 63. The General Assembly annually appropriates funds from the State's general fund to the Department that the Department then pays to private child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents.
>
> 64. For example, the General Assembly appropriated $382,748,900 from the State's general fund to the Department for the 2021-22 fiscal year, of which $39,717,200 was designated for "Family Support Services," $105,924,800 was designated for "Custody Services," $69,961,600 was designated for "Adoption Services," and $105,819,700 was designated for "Child and Family Management."
>
> 65. The plaintiffs are informed and believe that the funds that the Department provides to private child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents come from one or more of these four line items.
>
> ...
>
> 80. When a government-funded child-placing agency serves only foster parents of a particular faith, that inherently advances that faith, including by directing public funds exclusively to the benefit of members of the faith, and by increasing the likelihood that children served by the agency will be taught or raised in that faith.
>
> ...
>
> 93. The fact that Holston's refusal to serve them because of their Jewish faith rendered Holston unavailable as an option for obtaining the foster-parent training and home-study needed for approval to serve as foster parents for children in the custody of the State of Tennessee perpetuated the feelings of hurt, sadness, disappointment, and frustration that the Rutan-Rams initially felt when Holston informed them that it would not serve them.
>
> ***3** ...
>
> 105. The Rutan-Rams understand that many private child-placing agencies have reputations of being more efficient and easier to work with than the Department is and of providing better experiences and services to foster parents than the Department does.
>
> 106. In addition, a private child-placing agency that operates a facility referred to as a "Group Care Facility" by the Department—a residential facility for children whom the Department classifies as temporarily unable to live at home or with a foster family—will often place those children with foster parents affiliated with that agency once the children are deemed ready to be placed in a foster home.
>
> 107. Children who reside in Group Care Facilities are particularly likely to have had their parental rights terminated or to be close to having those rights terminated, and are therefore particularly likely to be or soon become available for adoption.

108. A child-placing agency that operates a Group Care Facility is also particularly likely to have detailed knowledge about the characteristics and needs of children from its Group Care Facility whom the agency places with foster parents affiliated with the agency, which the agency can then share with the foster parents to ease the children's transition to the foster home.

109. Thus, partnering with a child-placing facility that also runs a Group Care Facility can be especially beneficial to couples, like the Rutan-Rams, who are interested in eventually adopting a child whom they foster.

110. For these reasons, once their service as the long-term foster parents of the teenage girl is concluded, and in conjunction with commencing the process of serving as the long-term foster parents of another child, the Rutan-Rams will give serious consideration to partnering with and serving as the foster parents for a private child-placing agency instead of continuing to work directly with the Department.

...

112. If state-funded private child-placing agencies were not permitted to discriminate against foster parents based on religion, the Rutan-Rams would likely choose to work with a private child-placing agency when they commence the process of serving as the long-term foster parents of another child.

113. Indeed, if Holston itself were to end its practice of discriminating against foster parents based on religion, and Holston turned out to be the best fit for the Rutan-Rams based on neutral criteria unrelated to religion, the Rutan-Rams would seriously consider partnering with Holston.

...

116. In addition to Holston, which has made clear that is does not serve non-Christian foster parents, there are at least two other religiously affiliated private child-placing agencies in the Knoxville area—Smoky Mountain Children's Home and Free Will Baptist Family Ministries—whose websites contain statements that suggest that they might serve only Christian foster parents....

117. Holston and Smoky Mountain Children's Home are, to the plaintiffs' knowledge, the only child-placing agencies that both serve the Knoxville area and operate a Group Care Facility in Eastern Tennessee. Plaintiffs are informed and believe that Smoky Mountain Children's Home, like Holston, receives funding from the Department for placement, training, supervision, and support services that it provides to current and prospective foster parents.

***4** ...

119. The fact that Holston's refusal to serve them because of their Jewish faith renders Holston unavailable as an option for obtaining current or future foster-care placement, training, supervision, and support services has continued and will continue to perpetuate the feelings of hurt, sadness, disappointment, and frustration that the Rutan-Rams initially felt when Holston informed them that it would not serve them, and these feelings will be exacerbated if the Rutan-Rams seek services from private child-placing agencies in the future.

...

121. The requirement in Tenn. Code Ann. § 36-1-147 that the Department fund child-placing agencies even if they discriminate based on religion, and the Department's concomitant willingness to fund private child-placing agencies such as Holston that do discriminate based on religion, force the Rutan-Rams to consider and assess the risk of suffering religious discrimination in the future when deciding whether to continue to partner with the Department or work with a private child-placing agency, and, if they choose the latter, when selecting a private child-placing agency.

122. Having to do so in itself inflicts harm on the Rutan-Rams. Instead of being able to decide whether to work with the Department or a private agency—and if the latter, which private agency—based on neutral criteria unrelated to religion, the Rutan-Rams must take into account the risk of being rejected because they are Jews.

The amended complaint contains causes of action for violation of article I, section 3 of the Tennessee Constitution and for violation of article I, section 8 and article XI, section 8 of the Tennessee Constitution. Plaintiffs requested that the court declare Tenn. Code Ann. § 36-1-147 facially unconstitutional under the cited provisions of the Tennessee Constitution. Plaintiffs further requested that Defendants be enjoined "from continuing to fund or contract with Holston as long as Holston continued to discriminate, in services or programs funded by the Department, based on the religious beliefs of prospective or current foster parents."

Defendants filed a motion to dismiss the amended complaint pursuant to Tenn. R. Civ. P. 12.02(1) for lack of subject matter jurisdiction on standing grounds. On June 27, 2022, the panel majority entered a memorandum and final order granting Defendants' motion to dismiss. Two of the three judges held that none of Plaintiffs had standing to bring their claims. The third judge agreed with the majority that the six taxpayers lacked standing, but dissented as to the Couple, concluding that the Couple had standing to bring their claims. Thus, Plaintiffs' case was dismissed. Plaintiffs appealed.

On appeal, Plaintiffs assert that the three-judge panel erred in dismissing the claims of the Couple for lack of standing. Plaintiffs further assert that the panel erred in dismissing their claims as taxpayers for lack of standing.

STANDARD OF REVIEW

The issue of whether the court has subject matter jurisdiction is a question of law, which we review de novo with no presumption of correctness. *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712-13 (Tenn. 2012); *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). In ruling on a facial challenge to the court's subject matter jurisdiction, the court considers only the pleadings. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011); *Midwestern Gas Transmission Co. v. Dunn*, No. M2005-00824-COA-R3-CV, 2006 WL 464113, at *12 (Tenn. Ct. App. Feb. 24, 2006). The factual allegations of the complaint are to be taken as true and are viewed in the light most favorable to the non-moving party. *Webb*, 346 S.W.3d at 426. The plaintiff bears the burden of proving that the court has jurisdiction over the claims. *Midwestern Gas*, 2006 WL 464113, at *13.

ANALYSIS

***5** Plaintiffs brought suit pursuant to the Declaratory Judgment Act ("DJA"), Tenn. Code Ann. §§ 29-14-101 to -113, seeking a determination of the constitutionality of Tenn. Code Ann. § 36-1-147 under the Tennessee Constitution. They assert that Tenn. Code Ann. § 36-1-147 violates the following provisions: (1) Article I, section 3 [2] which includes a provision similar to the Establishment Clause of the U.S. Constitution; and (2) Article I, section 8, [3] and article XI, section 8, [4] which provide protections analogous to the equal protection provisions of the Fourteenth Amendment to the U.S. Constitution. [5]

This case is before the Court on the issue of standing. Addressing the constitutional basis for such justiciability limitations on the authority of state courts under the Tennessee Constitution, the Tennessee Supreme Court has observed the following:

> The Constitution of Tennessee does not expressly define the powers of the Legislative, Executive, or Judicial Branches of government. *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664, 668 (1909). Thus, while Article III, Section 2 of the United States Constitution confines the jurisdiction of the federal courts to "cases" and "controversies," the Constitution of Tennessee contains no such direct, express limitation on Tennessee's courts' exercise of their judicial power. U.S. Const. art. III, § 2; Tenn. Const. art. I, §§ 1–2; *Miller v. Miller*, 149 Tenn. 463, 484, 261 S.W. 965, 971 (1924) (noting that the Constitution of Tennessee does not contain limitations similar to those in Article III, Section 2).

***6** Despite the absence of express constitutional limitations on the exercise of their judicial power, Tennessee's courts have, since the earliest days of statehood, recognized and followed self-imposed rules to promote judicial restraint and to provide criteria for determining whether the courts should hear and decide a particular case. These rules, commonly referred to as justiciability doctrines, are based on the judiciary's understanding of the intrinsic role of judicial power, as well as its respect for the separation of powers doctrine in Article II, Sections 1 and 2 of the Constitution of Tennessee.

Tennessee's courts believed that "the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions." *State v. Wilson*, 70 Tenn. 204, 210 (1879); *see also Gilreath v. Gilliland*, 95 Tenn. 383, 385-86, 32 S.W. 250, 251 (1895); *Prichitt v. Kirkman*, 2 Tenn. Ch. 390, 393 (1875). Accordingly, they limited their role to deciding "legal controversies." *White v. Kelton*, 144 Tenn. 327, 335, 232 S.W. 668, 670 (1921). A proceeding qualifies as a "legal controversy" when the disputed issue is real and existing, *see State ex rel. Lewis v. State*, 208 Tenn. 534, 536-37, 347 S.W.2d 47, 48 (1961), and not theoretical or abstract, *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 192 (Tenn. 2000); *Miller v. Miller*, 149 Tenn. at 474, 261 S.W. at 968; *State ex rel. Lewis v. State*, 208

Tenn. at 538, 347 S.W.2d at 48-49, and when the dispute is between parties with real and adverse interests. *Memphis Publ'g Co. v. City of Memphis*, 513 S.W.2d 511, 512 (Tenn. 1974).

Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 202-03 (Tenn. 2009)

Standing is one of the justiciability doctrines employed by courts to determine "whether a particular case presents a legal controversy." *Id.* at 203. Tennessee's justiciability doctrines mirror those employed by the federal courts, and Tennessee courts find guidance in federal jurisprudence when considering justiciability questions. *Id.* at 203 n.3. [6]

***7** To establish constitutional standing in Tennessee courts, a plaintiff must establish three elements:

> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Fisher v. Hargett, 604 S.W.3d 381, 396 (Tenn. 2020). To determine whether Plaintiffs have standing to bring this case, we must examine the particular allegations of their complaint and evaluate whether they are entitled to adjudicate the claims. *Id.*; *Howe v. Haslam*, No. M2013-01790-COA-R3-CV, 2014 WL 5698877, at *6 (Tenn. Ct. App. Nov. 4, 2014) (citing *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 768 (Tenn. Ct. App. 2002)).

The question of whether a party has standing should not be confused with the merits of the claim; accordingly, a weak claim does not equate to a lack of standing. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 148-49 (Tenn. 2022). Tennessee courts' standing analysis is instead directed towards determining " 'whether a party has a sufficiently personal stake in a matter at issue to warrant a judicial resolution of the dispute,' " barring those whose rights or interests have not been affected from bringing suit. *Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 755 (Tenn. 2015) (quoting *State v. Harrison*, 270 S.W.3d 21, 27–28 (Tenn. 2008)). The stage of the proceedings impacts the extent of the burden imposed upon a plaintiff to establish injury, causation, and redressability. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d at 149. Where standing is raised via a motion to dismiss, as in the present case, the plaintiffs' "factual allegations are presumed to be true and are construed in their favor." *Id.* Furthermore, the Tennessee Supreme Court rejected the heightened federal plausibility pleading standard of *Twombly* [7] and *Iqbal*, [8] preserving the requirement that parties need only satisfy Tennessee's traditional liberal notice pleading standard. *Webb*, 346 S.W.3d at 426.

A. Standing of the Couple

We must now consider whether the Couple established the three elements of standing: (1) a distinct and palpable injury, (2) a causal connection between the alleged injury and the challenged conduct, and (3) whether the injury is capable of being redressed by a favorable court decision. *See Fisher*, 604 S.W.3d at 396. We note that, in litigating over the issues of injury, causation, and redressability, the parties focused on federal precedents. Outside of the context of taxpayer standing, addressed below, the parties do not engage with the question of whether variances exist under the Tennessee Constitution when applying any of these core standing requirements. As noted above, Tennessee courts are not bound by federal court precedents interpreting Article III when applying justiciability doctrines under the Tennessee Constitution. We, nevertheless, find the federal precedents referenced by the parties instructive in considering the issue of the Couple's standing.

1. Distinct and palpable injury.

***8** In their complaint, the Couple alleges several injuries, which we summarize as follows: First, they assert a practical injury—namely, that Tenn. Code Ann. § 36-1-147 and the Department's implementation of the statute deny them "the opportunity to participate in a governmental program on the same footing as those who satisfy the religious litmus tests" of Holston and similar CPAs. Thus, the Couple argues, due to the statute and the Department's actions, they have fewer options for state-funded placement, training, supervision, and support services than do Christians who share the CPA's religious beliefs. Second, the Couple asserts a stigmatic injury —namely, that the statute and its implementation by the

Department place them in the position of second-class citizens who can be denied state-funded child-placing services due to their religious beliefs. The Couple alleges that this environment has caused them to feel humiliation, sadness, disappointment, and frustration.

A majority of the three-judge panel concluded that the Couple failed to allege a practical or a stigmatic injury sufficient to constitute injury in fact for standing purposes. We will examine the panel's reasoning with respect to both alleged injuries.

a. Practical injury

In finding no practical injury, the court relied upon the points now emphasized by the Defendants on appeal: (1) that the Couple had not requested or been denied state-funded adoption services from Holston, (2) that the Couple had received services directly from the Department to enable them to act as foster parents, and (3) that the Couple was not currently seeking and being denied state-funded adoption services. This reasoning mistakes the type of injury required for standing.

In *Maddonna v. United States Department of Health & Human Services*, 567 F. Supp. 3d 688 (D.S.C. 2020), a suit filed under the Establishment and Equal Protection clauses of the U.S. Constitution, the court found injury in fact under similar facts. The plaintiff in *Maddonna*, a prospective foster parent, asserted that the defendants, including the United States Department of Health and Humans Services ("HHS"), the Governor of South Carolina, and the director of the state's Department of Social Services ("DSS"), violated her constitutional rights "based on her inability to volunteer with foster children and serve as a foster parent through a non-governmental child-placement agency, [Miracle Hill], because of her Catholic faith." *Maddonna*, 567 F. Supp. 3d at 697. Miracle Hill received government funding. *Id.* The plaintiff alleged that the state defendants enabled and sanctioned Miracle Hill's discrimination by seeking a waiver from HHS and by issuing an executive order directing DSS to permit the discrimination. *Id.* The injuries alleged in *Madonna* were described as follows:

> (1) the erection and maintenance of a religious barrier to her ability to participate in publicly funded governmental foster-care services, and (2) the stigma of discrimination flowing from that religious barrier and different treatment.

Id. at 706. Taking the plaintiff's allegations as true for purposes of ruling on the defendants' motions to dismiss, the court found the allegations sufficient to establish injury in fact, the first element for standing. *Id.* at 708.

In the present case, the panel majority reasoned that the Couple had not alleged a sufficient injury because they received the same services from the Department. But, constitutional principles regarding injury in fact do not require a complete denial of services. Rather, as the court explained in *Maddonna*:

> Plaintiff need not allege that she has been excluded entirely from participation in the state foster care program or even that she has been rejected by a majority of CPAs. On the contrary, it is well-established that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."

***9** *Id.* (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993)).

The Couple alleged that Defendants erected practical barriers making it more difficult for them to compete for the right to adopt on the same footing as others. *See Dumont v. Lyon*, 341 F. Supp. 3d. 706, 722 (E.D. Mich. 2018) (finding that the plaintiffs alleged an injury in fact in "the unequal treatment they received as a result of being turned away based upon their status as a same-sex couple, a barrier that makes 'it more difficult for [same-sex couples to adopt] than it is for [heterosexual couples]' " (quoting *City of Jacksonville*, 508 U.S. at 666)). The Couple asserted that state-funded CPAs are able to provide better services than the Department. In *Rogers v. U.S. Department of Health & Human Services*, 466 F. Supp. 3d 625, 641 (D.S.C. 2020), the court found injury in fact based upon the plaintiffs' allegations of denial of access to well-resourced agencies that provided superior services to foster families. In their complaint, the Couple also alleged that other state-funded CPAs advertised similar religious restrictions on

their websites and that, absent the discrimination permitted by the statute, the Couple would likely choose the services of private CPAs in their efforts to adopt a second child. The Couple alleged sufficient facts from which to infer that the existence of the statute and the state funding of these CPAs "creates a substantial barrier" to their ability to foster and adopt a child in Tennessee. *Maddonna*, 567 F. Supp. 3d at 708.

On appeal, Defendants argue that there is no injury in fact because the Couple alleged "only hypothetical future denials of service." It is true that, to establish injury in fact, a party must show injuries that are not hypothetical or conjectural. *City of Memphis*, 414 S.W.3d at 98. The panel majority reasoned that the Couple's alleged injuries were based upon "future, speculative events that are not ripe and therefore not redressable for adjudication." We cannot agree.

The panel majority cited one case, *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), to support its conclusion that the Couple's alleged injuries were too speculative to establish standing. In *Clapper*, attorneys and various organizations challenged the constitutionality of a provision of the Foreign Intelligence Surveillance Act ("FISA") allowing surveillance of certain persons. *Clapper*, 568 U.S. at 406. One of the injuries alleged by the plaintiffs was "an objectively reasonable likelihood that their communications" would be surveilled under the challenged provision. *Id.* at 401. As emphasized by the Defendants in the present case, the court in *Clapper* stated the principle that " 'threatened injury must be *certainly impending* to constitute injury in fact.' " *Id.* at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As noted by the Court in *Clapper*, however, the Court has also found injury in fact "based on a 'substantial risk' that the harm will occur." *Id.* at 414 n.5; *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The Court recognized that " 'imminence is concededly a somewhat elastic concept' " whose purpose is " 'to ensure that the alleged injury is not too speculative.' " *Clapper*, 568 U.S. at 409 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992)).

***10** What were the facts upon which the *Clapper* case relied in concluding that the plaintiffs' asserted injury was insufficiently imminent to constitute injury in fact? The Court cited the following "highly attenuated chain of possibilities":

> [R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.

Id. at 410. These five events, over which the plaintiffs in *Clapper* had no control, would have to occur before the plaintiffs would sustain the asserted injury. In the present case, the Couple has a need of continuing services and has alleged that they plan to foster in hopes of adopting a second child and that, if possible, they prefer to work with a state-funded CPA. Holston has already notified the Couple that the agency will not provide services to them because of their Jewish faith. There is no attenuated chain of speculative events over which the plaintiffs have no control. We find *Clapper* distinguishable.

To establish injury in fact from the application of a challenged statute, the plaintiff "must demonstrate a realistic danger of sustaining a direct injury" but the plaintiff " 'does not have to await the consummation of threatened injury.' " *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). In *Maddonna*, the plaintiff alleged that, in response to her inquiry about being a volunteer or foster parent, Miracle Hill informed her that the agency would not serve her because of her religious beliefs. *Maddonna*, 567 F. Supp. 3d at 706. The plaintiff never actually applied for services with Miracle Hill. *Id.* at 706-07. The court rejected the defendants' argument that the plaintiffs had not established injury in fact, stating in follows:

> Thus, while Plaintiff did not officially apply to foster children through Miracle Hill, the court considers that, taking the facts of the Complaint as true, such application would likely have been futile, as Miracle Hill explicitly notified Plaintiff of her inability to foster notwithstanding her not filing a formal application.

Id. The same is true in the present case.

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), is another instructive case. There, parents challenged a school district's student assignment plans, which relied upon race in allocating students to oversubscribed public schools. *Parents Involved*, 551 U.S. at 709-10. The City of Seattle argued that the parents had not alleged imminent injury and that the harm alleged was too speculative because the parents would "only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive." *Id.* at 718. The Court rejected this argument:

> ***11** The fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions."

Id. at 718-19.

In the case before us, Holston has refused to provide services to the Couple because of their Jewish faith. While the denial came in the context of services requested for an out-of-state child, Holston explained to the Couple that the agency's policies would not allow Holston to provide any services to them. The Couple has further alleged that, as a result of the statute, they are disadvantaged in the adoption process. The facts alleged by the Couple, which at this stage we must take as true and from which we must draw all reasonable inferences, indicate that Holston has refused to provide services to the Couple based solely on their religion and that there is a substantial risk that they will face the same discrimination and disadvantage when they proceed with the process to adopt a second child.

We conclude that the Couple's allegations are sufficient to establish the asserted practical injury for standing purposes.

b. Stigmatic injury

The panel rejected the Couple's asserted stigmatic injury on the basis that "the statute shows no sectarian preference."[9] For the reasons outlined below, we find this conclusion erroneous.

With respect to an assertion of stigmatic injury, the United States Supreme Court has stated:

> [D]iscrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090 (1982), can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. Mathews, 465 U.S. 728, 739-40 (1984). Thus, to establish injury in fact, a plaintiff must show that he or she has been denied equal treatment because of his or her membership in a disfavored group. In the present case, the allegations of the complaint assert that the Couple has been denied and are being denied equal access to stated-funded foster and adoption services because of their Jewish faith. In finding that the Couple lacked standing, the three-judge panel again emphasized that the State was providing the Couple with child placement services. However, when the state makes it more difficult for members of one group than for members of another group to obtain services, the injury in fact "is the

denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *City of Jacksonville*, 508 U.S. at 666.

In its opinion, the panel majority also asserted that the Couple failed to show that "the Defendants would not contract with a Jewish agency similarly situated to Holston; therefore, the Act does not single out people of the Jewish faith as a disfavored, innately inferior group." The majority seems to believe that discrimination is permissible as long as multiple groups are subjected to unequal treatment. Neither the panel majority nor Defendants have cited any authority for this rationale, and the reasoning does not comport with constitutional principles. When a statute subjects a group of people to unequal treatment based upon their religious beliefs, the fact that the statute may allow discrimination against other religious groups does not negate a disfavored group's standing to challenge the statute.

***12** As noted above, to establish standing in Tennessee courts the plaintiff must have "a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public." *Fisher*, 604 S.W.3d at 396. A distinct injury is marked by separation between a plaintiff and the public at large, for a plaintiff with a distinct injury is not advancing a generalized grievance common among all citizens. *See id.*; *Mayhew v. Wilder*, 46 S.W.3d 760, 768 (Tenn. Ct. App. 2001); *see also*, *e.g.*, *Calfee v. Tenn. Dep't of Transp.*, No. M2016-01902-COA-R3-CV, 2017 WL 2954687, at *7 (Tenn. Ct. App. July 11, 2017); *Hamilton v. Metro. Gov't of Nashville*, No. M2016-00446-COA-R3-CV, 2016 WL 6248026, at *4 (Tenn. Ct. App. Oct. 25, 2016); *Durham v. Haslam*, No. M2014-02404-COA-R3-CV, 2016 WL 1301035, at *6 (Tenn. Ct. App. Apr. 1, 2016). Considered in accordance with the existing stage of the proceedings, the Couple's complaint has alleged an injury that is distinct, rather than a generalized grievance shared commonly by all citizens. The alleged injuries are also palpable; they are neither conjectural nor hypothetical. *See Fisher*, 604 S.W.3d at 396. To the contrary, the Couple has alleged a present, practical injury in that the services they continue to need are either inferior and more difficult to access than the services they are denied. The Couple has also alleged a present stigmatic injury in terms of the State authorizing religious discrimination against them by a private actor who is providing services that it denies to them while being paid by the State for those services. Without considering the merits of the Couple's claims, we find that they have alleged distinct and palpable injuries in the form of violations of state constitutional rights, which certainly qualify as recognized legal rights and interests. *See Metro. Gov't of Nashville*, 477 S.W.3d at 755. We conclude that the Couple has asserted practical and stigmatic injuries sufficient to give them standing to challenge the constitutionality of Tenn. Code Ann. § 36-1-147.

2. Causation.

The panel majority concluded that there was no causal connection between any injury alleged by the Couple and the actions of the Department. Defendants argue that "Holston's decision not to provide services based on its own religious convictions was not even remotely related to the Act or to its contract with the Department."

a. Applicable standard

To establish standing, a plaintiff must establish that the injury is " 'fairly traceable' to the conduct of the adverse party." *Hargett*, 414 S.W.3d at 98 (quoting *Darnell*, 195 S.W.3d at 620 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006))). The causation "need not be proximate," and "the fact that an injury is indirect does not destroy standing as a matter of course." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 713 (6th Cir. 2015). In cases where the injury is indirect, "the allegation that a defendant's conduct was a motivating factor in the third party's injurious actions" is sufficient to establish traceability. *Id.* at 714.

An injury resulting from a third party's independent action does not satisfy the traceability requirement. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Defendants assert that, to establish causation, the Couple was required to show that the Department's actions "had a 'determinative or coercive effect' " on Holston. *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). In *Turaani v. Wray*, the case relied upon by Defendants, a prospective gun purchaser asserted that he was injured when he was unable to purchase a gun at a gun show. *Turaani*, 988 F.3d at 315. The court found that the alleged injury was not traceable to the actions of the FBI defendants. *Id.* at 316. In reaching this conclusion, the court reasoned that the independent gun dealer "exercised his discretion" and that "no compulsion" occurred between the FBI agents and the gun dealer. *Id.* at 317.

In the *Turaani* decision, the Sixth Circuit discussed and reaffirmed its decision in *Parsons*. *Id.* The plaintiffs in the *Parsons* case challenged a Department of Justice decision to label fans of a musical group as a "gang." *Parsons*, 801 F.3d at 706-09. The fans brought suit arguing that the Department's actions caused them to be harassed by state and local law enforcement. *Id.* The court found that constitutional standing existed, reasoning that it is "possible to motivate harmful conduct without giving a direct order to engage in such conduct." *Id.* at 714. In *Turaani*, the court distinguished *Parsons*, emphasizing the "cooperative relationship between local and national law enforcement," a relationship the court considered different from the relationship between independent firearms dealers and FBI agents. *Turaani*, 988 F.3d at 317.

***13** The Sixth Circuit set forth the following standard in *Parsons*:

> In the nebulous land of "fairly traceable," where causation means more than speculative but less than but-for, the allegation that a defendant's conduct was a motivating factor in the third party's injurious actions satisfies the requisite standard.

Parsons, 801 F.3d 714. The result reached by the court in *Turaani* turned upon the plaintiff's failure to establish that the defendants' actions were a motivating factor in the gun seller's decision. We will apply this rule in our analysis (below) of the present case.

b. Third party theory

The panel majority interpreted *Allen v. Wright*, 468 U.S. 737, 758 (1984), as "specifically rejecting standing of the type of third-party injury the Plaintiffs assert in this case."

It is important to examine the facts before the Court in *Allen* as well as the Court's analysis. In *Allen*, the parents of black students attending public schools in districts undergoing desegregation alleged that the Internal Revenue Service had failed to adopt adequate standards and procedures to enforce its obligation to deny tax exempt status to racially discriminatory private schools. *Allen*, 468 U.S. at 739. The parents did not allege "that their children have ever applied or would ever apply to any private school." *Id.* at 746. The Court cited caselaw stating that "such [stigmatizing] injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.* at 755 (quoting *Heckler*, 465 U.S. at 740). Because the parents did not allege that their children had personally been denied equal treatment, the Court found that they did not allege a stigmatic injury sufficient to afford them standing. *Id.* The Court pointed out that, if these parents' "abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups" against which the government was alleged to have discriminated. *Id.* at 755-56.

The facts in the present case are not analogous to those before the Court in *Allen*. Here, the Couple alleged that they themselves have been subjected to a stigmatic injury as a result of unequal treatment pursuant to a discriminatory statute.

The Couple relies upon several cases with facts similar to those at issue here. In one of those cases, *Marouf v. Azar*, 391 F. Supp. 3d 23, 25 (D.D.C. 2019), a same sex couple and a non-profit advocacy association challenged the constitutionality of federal grant money awards to religiously affiliated organizations to provide foster care and adoption services for unaccompanied refugee children. The defendants argued that the plaintiffs' injuries were not fairly traceable to the defendants because a third party "caused the alleged injury by application of its own criteria for foster parents." *Marouf*, 391 F. Supp. 3d at 33-34. In rejecting this position, the court made the following statements:

> The troubling consequence of Defendants' position, if accepted, is apparent on its face. According to the Federal Defendants, a federal agency cannot be held to account for a grantee's known exclusion of persons from a federally funded program on a prohibited ground. That is an astonishing outcome. Surely, the government would not take this position if, say, Plaintiffs here were excluded from fostering a child based on their gender (both are women), national origin (Marouf is the daughter of Egyptian and Turkish immigrants), or religious faith (Marouf was raised a Muslim, Esplin a Mormon). Yet, despite conceding that there is no agency policy that prevents child placement with same sex couples, *see* Hr'g Tr. (draft), Nov. 30, 2018, at 5-6, the Federal Defendants in this case wish to avoid the responsibility that comes with being good stewards of federal funds. They cannot do so.

> ***14** The D.C. Circuit has recognized that a "federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004); *see also Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (en banc) ("Both the Supreme Court and this circuit have repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal. Neither court has ever stated that the challenged law must *compel* the third party to act in the allegedly injurious way.").

Id. at 34. Like the present case, *Marouf* was before the court on a motion to dismiss, and the court found the plaintiffs' allegations sufficient to establish the causation requirement for constitutional standing. *Id.* at 35.

In the *Maddonna* case (discussed above), which was before the South Carolina federal district court on a motion to dismiss, the court rejected a similar argument by the defendants that a governmental agency could not be held accountable "for a grantee's known, and *explicitly permitted*, exclusion of persons from a government-funded program based on religious criteria." *Maddonna*, 567 F. Supp. 3d at 709. The court applied the standard that " 'a "challenged agency action *authorizing* the conduct that allegedly caused" [Plaintiff's] injuries' is sufficient to establish causation and traceability for purposes of standing." *Id.* at 709 (quoting *Mathis v. Geo Grp., Inc.*, No. 2:08-CT-21-D, 2010 WL 3835141, at *6 (E.D.N.C. Sept. 29, 2010) (quoting *Animal Legal Defense Fund, Inc.*, 154 F.3d at 440)). After reviewing the allegations of the complaint, the court concluded that they were sufficient to "establish that Defendants are 'at least in part responsible' for Plaintiff's alleged injuries." *Id.* at 711 (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013)).

In the present case, Defendants point to the *Maddonna* court's conclusion that causation was lacking with respect to some of the harm claimed by the plaintiff in that case. *See Maddonna*, 567 F. Supp. 3d at 709. The asserted injury at issue related to the federal defendants' notice of nonenforcement and announcement of proposed rulemaking, which had not taken place at the time when the plaintiffs was allegedly denied services by Miracle Hill. *Id.* The court therefore concluded that the plaintiff could not "fairly trace" her injury to those actions and could not challenge them. *Id.* With respect to all of the other alleged injuries, however, the court found that the plaintiff had met the traceability requirement. *Id.* at 711.

Here, Defendants cite *Maddonna* in support of their position on causation. Defendants emphasize that, according to the January 2021 email denying services to the Couple, Holston's executive team "made the decision *several years ago* to only provide adoption services to prospective adoptive families that share our belief system." (Emphasis added). Defendants reason that Holston's decision to discriminate was made "several years" before the challenged statute was enacted in January 2020. This argument is flawed for a number of reasons. Even were we to accept the timeline suggested by Defendants based upon the vague term "several years," the quoted email does not establish when Holston decided to begin implementing its policy. Moreover, even if this line of reasoning called into question the Couple's standing with respect to the actual denial of services, it would not have any effect upon their standing with respect to the stigmatic injury.

***15** In all four federal foster care cases relied upon by the Couple, the courts determined that the causation element was satisfied even though the agencies commenced their discrimination before the governmental actions that authorized them to do so. *See Maddonna*, 567 F. Supp. 3d at 708-11; *Rogers*, 466 F. Supp. 3d at 625; *Marouf*, 391 F. Supp. 3d at 34-36; *Dumont*, 341 F. Supp. 3d at 722-24. In the present case, the Couple's complaint creates a reasonable inference that the denial of service occurred after the enactment of Tenn. Code Ann. § 36-1-147. The statute was passed in January 2020 and took effect on January 24, 2020. 2020 TENN. PUB. ACTS ch. 514. The Couple's interactions with Holston began in January 2021. At this stage of the proceedings, the plaintiff's "factual allegations are presumed to be true and are construed in their favor." *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d at 149. Under the facts as pled, Holston agreed by contract not to discriminate on the basis of religion, the General Assembly authorized such action as a form of religious accommodation, and then Holston discriminated against the Couple. At a minimum, under the pleadings, the enactment of the statute and the Department's implementation of the statute authorized and enabled Holston's discrimination. [10]

In ruling on Defendants' motion to dismiss, the panel was required to determine whether the well-pled allegations in the complaint, viewed most favorably to Plaintiffs, established that the Couple's injuries were fairly traceable

to the Department's actions. *See*, *e.g.*, *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (noting that to establish causation for purposes of standing in Tennessee courts "require[s] a showing that the injury to a plaintiff is 'fairly traceable' to the conduct of the adverse party," which the Court observed is not an onerous requirement). When considering causation, courts reflect upon whether the causal link between the alleged illegal activity and the injury has become too attenuated, a result of independent action that breaks the causal link. *See*, *e.g.*, *Calfee v. Tenn. Dep't of Transp.*, No. M2016-01902-COA-R3-CV, 2017 WL 2954687, at *7 (Tenn. Ct. App. July 11, 2017). As in *Calfee*, wherein this court found causation to be satisfied, the action of the third party was allegedly illegally authorized by the governmental actor, not an independent action separate from the governmental actor that breaks the chain of causation. *See id.* We conclude that the allegations of the complaint are sufficient to demonstrate that Tenn. Code Ann. § 36-1-147 and the Department's actions authorized and enabled Holston's discrimination against the Couple based upon their religion. Accordingly, the Couple's pleadings sufficiently meet the requirement of establishing causation for standing in Tennessee courts at this stage of the proceedings.

3. Redressability

***16** This prong of the standing inquiry requires a showing that the relief sought is likely to redress the plaintiff's injury. It is not necessary that the plaintiff's harm "will be *entirely* redressed, as partial redress can also satisfy the standing requirement." *Parsons*, 801 F.3d at 716.

In the present case, the Couple seeks a declaratory judgment that Tenn. Code Ann. § 36-1-147 facially violates the Tennessee Constitution, and declaratory and injunctive relief prohibiting the Department from continuing to fund or contract with Holston as long as the agency continues to deny services to foster parents based upon their religious beliefs. There are two possible outcomes of the requested relief: (1) Holston will stop discriminating based upon religion or (2) Holston will continue to use religious criteria in selecting foster parents and will not receive state funding.

The Supreme Court has found redressability where the relief granted would provide the plaintiffs with the benefits which they had been denied or would eliminate the statutory support for the discrimination. *See Heckler*, 465 U.S. at 740. In *Maddonna*, the court held that injunctive relief prohibiting the state from continuing to fund discriminatory CPAs was sufficient to satisfy the redressability requirement. *Maddonna*, 567 F. Supp. 3d at 711. The court stated:

> The Supreme Court has recognized that, "[w]hen the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740, 104 S. Ct. 1387 (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247, 52 S. Ct. 133, 76 L. Ed. 265 (1931)) (emphasis in original).

Id.; *see also Rogers*, 466 F. Supp. 3d at 644-45; *Dumont*, 341 F. Supp. 3d at 724-25. The only case cited by the panel majority, *Clapper*, 568 U.S. at 398, did not address redressability.

We agree with the Couple that the requested remedies would provide redress for their asserted injuries. If Holston and other CPAs decided to cease discriminatory practices, this result would reduce or eliminate the Couple's risk of facing religious barriers in child placement services. Further, such a result would reduce or eliminate the chilling effect of Tenn. Code Ann. § 36-1-147 and the Department's implementation thereof. If Holston or other CPAs decided instead to stop accepting state funds, this result would eliminate the stigmatic injury of the Couple because they would no longer feel that they were being treated as second class citizens by the State. We conclude that the Couple's pleadings sufficiently meet the requirement of establishing redressability for standing in Tennessee courts at this stage of the proceedings.

Having concluded that all three elements of constitutional standing are satisfied, we reverse the majority's decision on the issue of the Couple's standing. [11]

B. Taxpayer standing

***17** In their complaint, Plaintiffs assert that they have taxpayer standing. Plaintiffs allege that they pay sales taxes, gasoline taxes, and motor vehicle taxes in Tennessee. They further assert that they have alleged specific illegality in the expenditure of public funds and that they made a prior demand on the government asking it to correct the illegality. The three-judge panel unanimously concluded that Plaintiffs lacked taxpayer standing. On appeal, Plaintiffs assert that they have taxpayer standing. Defendants contend that the taxpayer standing is inapplicable in the present case.

We begin by discussing the standards for taxpayer standing in Tennessee. The longstanding approach of Tennessee courts to taxpayer standing diverges significantly from the federal courts' approach. With regard to standing to maintain an action in federal court, the United States Supreme Court has, as a general rule, rejected taxpayer or citizen standing as a basis for suit since at least its 1923 decision in *Frothingham v. Mellon*, 262 U.S. 447 (1923), a companion case to *Commonwealth of Massachusetts v. Mellon*. This general rule in federal courts is subject only to a narrow exception, the *Flast v. Cohen* exception, [12] which has been sharply circumscribed in a series of subsequent decisions by the United States Supreme Court. *See*, *e.g.*, *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138, 141-44 (2011) (noting that "*Flast*'s holding provides a 'narrow exception' to 'the general rule against taxpayer standing' " and rejecting the application of the exception to Arizona's tax credits on state taxes for contributions to school scholarship funds) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)). State courts, however, take a dramatically different approach to taxpayer standing than their federal counterparts. *See*, *e.g.*, Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After* Cuno *and* Winn, 40 HASTINGS CONST. L.Q. 1, 46 (Fall 2012) (stating that "the majority rule is that ... state taxpayers generally have standing to challenge state taxes and expenditures in the state courts even if such taxpayers lack the kind of individualized harm necessary for standing in the federal courts").

Tennessee courts diverge from the federal courts' approach with regard to taxpayer standing. As a general rule, "[t]he mere status of a taxpayer or voter is not sufficient to bring an action in and of itself." *Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn. Ct. App. 1980). There are, however, essentially two routes for taxpayers seeking to establish standing in Tennessee. One route hews more closely to the conventional standing analysis delineated above in addressing the Couple's standing. When traversing this route to establish standing, a taxpayer must assert a " 'special interest or a special injury not common to the public generally.' " *Fannon v. City of LaFollette*, 329 S.W.3d 418, 427 (Tenn. 2010) (quoting *Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975)); *see also Patten v. City of Chattanooga*, 65 S.W. 414, 420 (Tenn. 1901). The second route, which has been long recognized by Tennessee courts, significantly departs from conventional federal taxpayer standing, providing an "exception" to the rule that a special interest or injury is necessary to establish standing. *See Fannon*, 329 S.W.3d at 427; *Badgett v. Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968); *Lewis v. Cleveland Mun. Airport Auth.*, 289 S.W.3d 808, 816 (Tenn. Ct. App. 2008); *City of New Johnsonville v. Handley*, No. M2003-00549-COA-R3-CV, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 62-63 (Tenn. Ct. App. 2001). When traversing this second route, Tennessee 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; *see also*, *e.g.*, *Lewis*, 289 S.W.3d at 817 (indicating that "this Court in *City of New Johnsonville* acknowledged that the Supreme Court in *Cobb* required three elements to establish taxpayer standing: (1) taxpayer status; (2) specific illegality in the expenditure of public funds; and (3) the taxpayer has made a prior demand on the governmental entity asking it to correct the claimed illegality"); *Ragsdale*, 70 S.W.3d at 62 (stating that, "[i]n order for Plaintiffs to have standing to challenge the legality of the expenditure of public funds, the Plaintiffs must satisfy three requirements: (1) taxpayer status; (2) an allegation of a specific illegality in the expenditure of public funds; and (3) prior demand").

***18** The Defendants challenge the sufficiency of Plaintiffs' pleadings to establish taxpayer standing pursuant to the exception. [13] Plaintiffs rely on the case of *Badgett v. Rogers*, 436 S.W.2d at 292. In that case, our Supreme Court recognized an exception to the special injury rule in cases involving the misuse of public funds. *Badgett*, 436 S.W.2d at 294. William Badgett brought suit as a citizen and taxpayer of the City of Knoxville against the city's mayor and finance director asserting that the finance director was paying the mayor $3,000 each year in addition to his salary and that this payment constituted a misappropriation of city funds. *Id.* at 293. In support of his position, Mr. Badgett argued that the expenditures violated the applicable salary provisions of the city charter. *Id.* The chancellor ruled that Mr. Badgett lacked standing. The Supreme Court set forth the competing policy considerations:

> On the one hand, it is undeniably the right of a taxpayer to know that his taxes are expended properly and are not unlawfully diverted or misused. On the other hand, the courts have long recognized the necessity of allowing municipal officials to perform their duties without interference from frequent

> and possibly frivolous litigation and the inexpedience of putting municipal officers at hazard to defend their acts whenever any member of the community sees fit to make the assault, whether for honorable motives or not. The courts have been commensurately reluctant to usurp or supersede the discretion of municipal authorities to determine which municipal undertakings are necessary and appropriate.

Id. at 293-94.

After discussing the general rule (as set out above), the Court in *Badgett* stated that, "the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes." *Id.* at 294. In analyzing the case before it, the Court stated:

> It would be impossible for complainant to maintain that his injury is more individually grievous than that of any other citizen and taxpayer. The original bill alleges that complainant sues for himself and all other citizens and taxpayers of the City of Knoxville. The subject matter of this case is the alleged wrongful disposition of tax funds. We thus have a situation which embodies the alleged misuse of tax funds which is asserted to be an injury to all taxpayers; that is, a public injury.

Id. at 295. The Court noted the requirement of "a demand upon public authorities to rectify the alleged wrong prior to the initiation of such action by the citizen and taxpayer." *Id.* In the case before the Court, however, demand was excused because it "would have been a vain formality." *Id.* The Court found that Mr. Badgett had standing and then determined that the complaint did not allege sufficient facts to make out a cause of action and affirmed the chancellor's ruling on that basis. [14] *Id.*

***19** In recognizing an exception to the special injury rule, the *Badgett* court cited several cases, including *Kennedey v. Montgomery County*, 38 S.W. 1075, 1076 (Tenn. 1897), in which taxpayers in Montgomery County filed suit against the county and its agents to enjoin the collection of a special tax assessed for railroad purposes. [15] The General Assembly had passed legislation authorizing the county to issue bonds for railroads and, if necessary, levy a railroad tax to pay off the bond indebtedness. *Kennedey*, 38 S.W. at 1076. The plaintiffs alleged that, although the county had sufficient bond revenues to pay off the bond debt, the county court levied another railroad tax in 1894. *Id.* According to the plaintiffs, the county judge had "applied large amounts of such railroad taxes to other debts without authority, and in violation of law." *Id.* The defendants asserted that the 1894 tax funds had been used for three purposes outside of the railroad debt (to purchase a courthouse lot, to pay judgments against the county, and to pay part of the cost of a bridge) because the ordinary county revenues were insufficient. *Id.* at 1077. The Court concluded that the county's use of the railroad tax revenues for other purposes was unauthorized and illegal. *Id.* at 1079.

In *Pope v. Dykes*, 93 S.W. 85, 86 (Tenn. 1905), another case cited in the *Badgett* decision, taxpayers of Marion County brought suit to enjoin county officials from paying for further improvement on certain county roads. The county court had authorized the county to issue bonds for the purpose of improving a list of county roads, and the roads at issue did not appear on the list. *Pope*, 93 S.W. at 86-87. In analyzing whether the plaintiffs had standing to maintain the case, the Court distinguished the case before it from the case of *Patten v. City of Chattanooga*, 65 S.W. at 414: [16]

> But the case made in the present bill is altogether different. It is alleged herein that defendants are acting outside of the authority conferred upon them by the act of 1903, in that they are diverting public funds to the building of a road not authorized by the act, which will result in irreparable injury to the county and taxpayers. The effect of the misappropriation of these funds would of course be the imposition

> of additional tax burdens upon the complainants.

Pope, 93 S.W. at 88. The Court, therefore, concluded that the plaintiffs had standing to bring suit to enjoin the building of the unauthorized road. *Id.*

Cases decided after *Badgett* have applied the exception recognized by that case. In *Cobb v. Shelby County Board of Commissioners*, 771 S.W.2d 124 (Tenn. 1989), the plaintiffs were taxpayers and citizens of Shelby County and brought suit against the county's board of commissioners, mayor, and financial officers. *Cobb*, 771 S.W.2d at 124. The plaintiffs challenged the legality of an ordinance providing for new salaries for the commissioners. *Id.* According to the complaint, the increase was prohibited by the Shelby County Home Rule Charter [17] and Tenn. Code Ann. § 5-5-107. [18] *Id.* In addressing the plaintiffs' standing to bring the case, the Court stated:

> ***20** The complaint must allege a specific legal prohibition on the disputed use of funds or demonstrate that it is outside the grant of authority to the local government. It has always been recognized that a taxpayer/citizen has standing to challenge "illegal" uses of public funds but not "improvident" ones—"the wisdom, policy, injurious tendency, or mischievous consequences of a statute or ordinance are not open to inquiry." *Soukup v. Sell*, 171 Tenn. 437, 441, 104 S.W.2d 830, 831 (1937).

Id. at 126. After discussing the *Badgett* case, the Court determined that the stipulated facts included all three elements required for taxpayer standing in such cases: "1) taxpayer status, 2) specific illegality in the expenditure of public funds, and 3) prior demand." *Id.* The Court went on to conclude that the ordinance was valid. *Id.* at 128.

In *Fannon v. City of LaFollette*, 329 S.W.3d at 420, a member of the LaFollette city council filed a declaratory judgment action alleging that three other members had violated the Open Meetings Act in the process of passing a resolution increasing the compensation of certain city employees. The Court of Appeals held that the plaintiff had standing as a taxpayer, rather than as a city official. *Fannon*, 329 S.W.3d at 420. The Supreme Court reversed the Court of Appeals on the issue of taxpayer standing, but found that the plaintiff had standing under the Open Meetings Act. *Id.* In discussing the issue of taxpayer standing, the Court cited the exception recognized in *Cobb* conferring standing when a taxpayer alleges " 'a specific illegality in the expenditure of public funds' " and has made a prior demand on the governmental entity. *Id.* at 427 (quoting *Cobb*, 771 S.W.2d at 126). The Court reiterated the requirement that the taxpayer complaint " 'must allege a specific legal prohibition on the disputed use of funds or demonstrate that it is outside the grant of authority to the local government.' " *Id.* (quoting *Cobb*, 771 S.W.2d at 126).

The *Fannon* Court recognized that "the misuse or diversion of public funds may entitle the taxpayer standing to sue." *Id.* at 428. The Court noted that the plaintiff had claimed the misuse of public funds, citing allegations from the complaint to the effect that the salary increases and new position at issue were made hastily and "at the expense of the taxpayers of the City." *Id.* However, the Court decided that the plaintiff lacked standing as a taxpayer because he had failed to make prior demand on the city council to correct the problem. *Id.* at 428-29*; see also Ragsdale v. City of Memphis*, 70 S.W.3d 56, 62-63 (Tenn. Ct. App. 2001) (citing *Badgett* and concluding that the plaintiff-taxpayers had standing to file an action to challenge the expenditure of public funds to finance a new sports arena); *Phillips v. Cnty. of Anderson*, No. E2000-01204-COA-R3-CV, 2001 WL 456065, at *3-4 (Tenn. Ct. App. Apr. 30, 2001) (citing *Badgett* and concluding that the plaintiff lacked standing to challenge an agreement between the city and county to finance the development of an industrial park because the plaintiff failed to make a prior demand and failed to show that a demand on city officials would have been futile).

***21** Defendants argue that the *Badgett* exception applies only to cases involving the misuse or diversion of local funds, not to state funds. Plaintiffs cite several cases where the Tennessee Supreme Court found that taxpayers had standing to challenge state laws establishing new counties. *See Lynn v. Polk*, 76 Tenn. 121, 123-26 (1881); *Bridgenor v. Rogers*, 41 Tenn. 259, 260-61 (1860); *Ford v. Farmer*, 28 Tenn. 152, 159-61 (1848). Defendants argue that these cases are distinguishable because they "involved the first exception to the general prohibition against taxpayer challenges" due to the fact that "the state law would have illegally increased their tax burden." [19] In *Badgett*, the court recognized an exception to the specific injury rule "where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes." *Badgett*, 436 S.W.2d at 294. The caselaw has not delineated different requirements for the two broad types

of cases covered by the exception—the assessment of a tax or the misuse of public funds. We find no support for the limitations proposed by Defendants and conclude that the taxpayer standing requirements are the same for state and local taxpayers.

Applying the exception recognized in *Badgett* and other cases, we must conclude that Plaintiffs meet the applicable three-part test for taxpayer standing set forth in *Cobb. Cobb*, 771 S.W.2d at 126. Plaintiffs have alleged that they pay sales, gasoline, and motor vehicle taxes to the State of Tennessee. They have alleged that they presented a demand letter to the Department requesting that the Department stop providing funding to Holston as long as Holston discriminates based upon religion. Defendants argue that Plaintiffs have not alleged an illegal expenditure of public funds. We cannot agree.

In their complaint, Plaintiffs make the following pertinent allegations:

> 61. The tax payments made by the plaintiffs to the State of Tennessee flow into the State's general fund.
>
> 62. State funds that the Department provides to Holston and other child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents come from the State's general fund.
>
> 63. The General Assembly annually appropriates funds from the State's general fund to the Department that the Department then pays to private child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents.
>
> 64. For example, the General Assembly appropriated $382,748,900 from the State's general fund to the Department for the 2021-22 fiscal year, of which $39,717,200 was designated for "Family Support Services," $105,924,800 was designated for "Custody Services," $69,961,600 was designated for "Adoption Services," and $105,819,700 was designated for "Child and Family Management."
>
> 65. The plaintiffs are informed and believe that the funds that the Department provides to private child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents come from one or more of these four line items.

Defendants suggest that the challenged act itself must have some fiscal impact in order to support an allegation of misuse of funds. But, they have not cited any authority for this proposition.

Plaintiffs allege that Defendants "are violating the religious-freedom and equal-protection guarantees of the Tennessee Constitution by funding a child-placing agency that discriminates in state-funded programming against prospective and current foster parents based on the parents' religious beliefs." Based upon the allegations of the complaint, which we must take as true and construe in favor of Plaintiffs at this stage, we conclude that Plaintiffs have standing as taxpayers to challenge the constitutionality of Tenn. Code Ann. § 36-1-147.

CONCLUSION

***22** The judgment of the trial court is reversed, and the matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed against the appellees, Tennessee Department of Children's Services and the Commissioner of the Department of Children's Services, and execution may issue if necessary.

All Citations

Slip Copy, 2023 WL 5441029

Footnotes

1 Tennessee Code Annotated section 36-1-147 provides:

> (a) To the extent allowed by federal law, no private licensed child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for

foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies.

(b) To the extent allowed by federal law, the department of children's services shall not deny an application for an initial license or renewal of a license or revoke the license of a private child-placing agency because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.

(c) To the extent allowed by federal law, a state or local government entity shall not deny to a private licensed child-placing agency any grant, contract, or participation in a government program because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.

(d) Refusal of a private licensed child-placing agency to perform, assist, counsel, recommend, consent to, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies shall not form the basis of a civil action for either damages or injunctive relief.

2 Article I, section 3 of the Tennessee Constitution provides:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

3 Article I, section 8 of the Tennessee Constitution provides:

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

4 Article XI, section 8 of the Tennessee Constitution provides:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested.

5 For purposes of this appeal, in which the sole issue is Plaintiffs' standing, we need not consider whether and how the relevant protections afforded by the Tennessee Constitution differ from those afforded by the United States Constitution.

6 While federal precedent has been helpful in addressing questions of justiciability, Tennessee courts are not bound by this precedent, and the entirety of the doctrines as applied by federal courts has never been adopted wholesale into Tennessee law root and branch. To the contrary, the Tennessee Supreme Court has, more than once, interpreted the Tennessee Constitution in a manner that varies from the federal courts' interpretation of justiciability doctrines under Article III of the United States Constitution. Two notable examples of such variances are the public interest exception to mootness, *see Norma Faye Pyles Lynch*

Fam. Purpose LLC, 301 S.W.3d at 208-12, and taxpayer standing, which is discussed in more detail below. Variances also can be more granular in nature. For example, in *Norma Faye Pyles Lynch Family Purpose LLC*, in applying the voluntary cessation exception to mootness, a shared exception in federal courts and Tennessee courts, the Tennessee Supreme Court observed that federal courts appeared to be applying an analysis based on recurrences as to the same plaintiff. *Norma Faye Pyles Lynch Fam. Purpose* LLC, 301 S.W.3d at 207-08. The Tennessee Supreme Court, however, rejected such an approach: "Regardless of the current status of federal law, we share the concern of the Montana Supreme Court regarding defendants rendering a claim moot through voluntary cessation as to a particular plaintiff in litigation while planning on proceeding to engage in the same conduct as to others." *Id.*

7 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

9 This rationale is more attuned to an assessment of the merits of the Couple's constitutional claims in connection with considerations of legislative accommodation than to the Couple's standing to present their claims that they have suffered a stigmatic injury.

10 Defendants also make the argument that, under the terms of Holston's contract with the Department, the Couple was not a beneficiary of the contract and, therefore, the Department had no legal obligation to serve them. The contract between DCS and Holston provides that:

> The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of handicap or disability, age, race, creed, color, religion, sex, national origin, or any other classification protected by federal or state law.

Defendants point to the contract's provision on the scope of services, which states that: "Services provided under this contract are delivered to children/youth placed into the custody of the state." According to Defendants, this provision indicates that the contract's beneficiaries are children in state custody and not potential foster parents. The fact that the contract's intended beneficiaries are children in state custody does not eliminate Holston's contractual obligation under the discrimination clause, which provides that "*no person* shall be excluded from participation in, be denied benefits or, or be otherwise subjected to discrimination *in the performance*" of the contract. (Emphasis added). Under the contract, the deliverable services include services to foster parents. We find no merit in Defendants' argument that the nondiscrimination provision did not apply to prospective foster parents.

11 In addition to their primary argument that they satisfy the requirements for standing as conventionally applied, Plaintiffs also argue that Tenn. Code Ann. § 1-3-121 provides for a more "liberal construction of standing rules when a plaintiff seeks equitable relief against a governmental body." Because we conclude that the Plaintiffs have satisfied the degree of injury, causation, and redressability conventionally required to establish standing in Tennessee courts, we decline to consider whether Tenn. Code Ann. § 1-3-121 lowers these hurdles when establishing standing in cases in which equitable relief is being sought against governmental bodies.

12 *Flast v. Cohen*, 392 U.S. 83 (1968).

13 The Defendants also contend that the Plaintiffs have not established any special injury. While the Plaintiffs assert that they need not do so as they fall within the ambit of the taxpayer standing exception, they argue they have set forth a special injury, noting their claims of violation of their constitutional religious liberty rights under the Tennessee Constitution. The Defendants insist that embracing this argument would mean that Tennessee courts would be adopting the *Flast v. Cohen* exception, which has been subject to significant criticism. As

we conclude that the taxpayer standing exception is applicable in the present case, it is unnecessary for this court to reach a decision as to the parties' arguments on this point of contention.

14 The complaint contained only "certain allegations that the action of the City Council of Knoxville, in authorizing the expense account, is 'unlawful' and 'unconstitutional.' " *Badgett*, 436 S.W.2d at 295.

15 In 1854, the General Assembly passed an act authorizing the county to issue bonds to finance railroads and, if necessary, to levy a railroad tax to retire the bonds. *Kennedey*, 38 S.W. at 1076. After a Supreme Court ruling enjoined the county from applying revenues from the railroad tax to any other purpose than retiring the railroad debt, the General Assembly passed legislation which, according to the plaintiffs, was procured "to avoid the force" of the Supreme Court's decree. *Id.* When the bonds matured in 1886, there remained an outstanding sum, and the General Assembly passed legislation allowing the remaining debt to be "funded into new bonds." *Id.*

16 The plaintiffs in *Patten* brought suit on behalf of themselves and all other taxpayers, voters, and property owners against the City of Chattanooga to challenge an ordinance granting T.S. Wilcox and associates a franchise to construct an electrical plant and a telephone, telegraph, and electrical exchange. *Patten*, 65 S.W. at 415, 419. The Court determined that the plaintiffs lacked standing because they had not alleged that they would "suffer any injury which is not common to the body of the citizens." *Id.* at 420. The ordinance at issue did not "deal with the question of taxation, and hence cannot affect [the plaintiffs'] tax burdens." *Id.* at 422.

17 The charter stated, in pertinent part:

> The salary of the first Board of County Commissioners elected under this Charter shall be as prescribed by State general law for Boards of County Commissioners; the expenses or any other form of remuneration provided for the first Board of County Commissioners elected shall be that as provided on June 15, 1984.

Cobb, 771 S.w.2d at 127 (emphasis omitted).

18 At the time, Tenn. Code Ann. § 5-5-107 authorized the county legislative bodies in counties in the first class (including Shelby County) to fix the compensation of their members.

19 We acknowledge the concern expressed in *Parks* that, absent a requirement of specific injury, public corporations would be subject to "a profusion of suits." *Parks*, 608 S.W.2d at 885. Nevertheless, we find no such limitation in the exception set forth in *Badgett* and related cases.