IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROXANNE McEWEN, et al., Plaintiffs, v. BILL LEE, in his official capacity as Governor of the State of Tennessee, et al., Defendants, and NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0242-II Hon. Anne C. Martin

JOINT BRIEF OF INTERVENOR-DEFENDANTS NATU BAH, BUILGUISSA DIALLO, BRIA DAVIS, AND STAR BRUMFIELD IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION PURSUANT TO TENN. R. CIV. P. 65.04

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INTRODUCTION

Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents") file this joint brief in opposition to Plaintiffs' motion for a temporary injunction. Plaintiffs seek to halt Tennessee's Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 ("ESA Pilot Program" or "Pilot Program"). The Pilot Program expands educational options for elementary and secondary aged children trapped in Tennessee public schools that have failed to meet their needs. Plaintiffs' motion fails because they are unlikely to succeed on the merits of their claims. Parents support the brief of Governor Lee and the other Defendants ("State Defendants") in opposition to Plaintiffs' motion for a temporary injunction. Pursuant to the Agreed Order granting them full-party status as intervenor-defendants, Parents conferred with State Defendants and (for the sake of avoiding redundancy), they incorporate the State-Defendants' arguments challenging Plaintiffs' claims under Tenn. Const. Art. II, § 24 ("Appropriations of Public Moneys Provision"), Tenn. Code Ann. § 9-4-601, and Tenn. Const. Art. XI, § 9 ("Home Rule Amendment"). Parents will focus on Plaintiffs' claim under the Home Rule Amendment.

In addition, a temporary injunction would also disrupt the status quo and substantially harm the intended beneficiaries of the ESA Pilot Program—parents and their children. Tennessee families, including Parents here, are now enrolling in the Pilot Program for the 2020-21 academic year. The ESA Pilot Program makes it possible for Parents to remove their children from some of the state's most poorly performing public schools that are failing to meet their needs and enroll them instead in private schools that will. Though the Pilot Program was signed into law in May 2019, Plaintiffs waited until April 2020 to seek a temporary injunction, in the midst of a pandemic that forced Tennessee

schools to close.[1] Thus, far from preserving the status quo, a temporary injunction will throw thousands of families' educational plans into chaos at the worst possible time and plunge into disarray the arrangements they have made in reliance upon the ESA Pilot Program. Nor does the balance of harms weigh in Plaintiffs' favor. A temporary injunction will substantially harm *Parents* by leaving them with no choice but to remain in public schools that have failed their children.

STANDARD OF REVIEW

A temporary injunction is an "extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citation omitted). Courts applying Tenn. R. Civ. P. 65.04(2) weigh the same four factors applied in federal cases involving preliminary injunctive relief: (1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on defendants; (3) the probability that the plaintiff will succeed on the merits; and (4) the public interest. *Moody v. Hutchison*, 247 S.W.3d 187, 199–200 (Tenn. Ct. App. 2007); *see also S. Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (describing this test as "[t]he most common description of the standard for preliminary injunction in federal and state courts"). Courts balance the

[1] Plaintiffs imply that they are acting now because the State is implementing the ESA Pilot Program faster than legislators intended. *See* Pls.' Mem. of Law in Supp. of Mot. for Temp. Inj. ("Pls.' Mem.") at 1, 5–7. But the General Assembly made it clear in the text of the ESA Pilot Program that the Program could commence in 2020–21. Tenn. Code Ann. § 49-6-2604(b). And as Plaintiffs themselves note, the State has taken "substantial steps to implement" the Pilot Program. Pls.' Mem. at 1. By Plaintiffs' account, those steps started in November of last year. *Id.* at 4. Thus, Plaintiffs could have acted well before now. Instead, Plaintiffs chose to act at a time that will cause maximum disruption to parents.

four factors against one another in determining whether to grant relief. *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

ARGUMENT

Plaintiffs have failed to meet their burden of showing that they are entitled to a temporary injunction. The ESA Pilot Program does not violate the constitutional and statutory provisions raised in their motion. *See* Pls.' Notice and Mot. for Temp. Inj. Pursuant to Tenn. R. Civ. P. 65.04 at 1 (invoking Tenn. Const. Article XI, § 9 and Art. II, § 24 and Tenn. Code Ann. § 9-4-601). As a result, Plaintiffs are not likely to succeed on the merits. *See infra* at Part I. Plaintiffs have also not produced any evidence of imminent or irreparable harm, but instead speculate about what may happen if Tennessee families use the Pilot Program to enroll their children in better-performing schools. *See* Pls.' Mem. of Law in Supp. of Mot. for Temp. Inj. ("Pls.' Mem.") at 30–34. On the other hand, Parents and the many other families who are applying for Education Savings Accounts—the intended beneficiaries of the ESA Pilot Program—would suffer substantial harm if a temporary injunction issues, thus tipping the scales of justice sharply in favor of denying Plaintiffs' motion. *See infra* at Part II.A.

In Part I below, Parents show that the Pilot Program does not violate the Home Rule Amendment because the Program applies to school districts, and school districts (unlike a "county or municipality") do not fall within the scope of the Amendment. *See* Tenn. Const. Art. XI, § 9. Parents also show how the charters for Shelby County and Metro undermine Plaintiffs' claim under the Home Rule Amendment. In Part II, Parents describe the substantial harm that they and their children would suffer if a temporary injunction halts the ESA Pilot Program, and why the balance of harms and the public interest weigh heavily against granting the relief that Plaintiffs seek. Parents also explain why the speculation

and conjecture that Plaintiffs offer about the effect of the Pilot Program does not constitute irreparable harm.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THE ESA PILOT PROGRAM DOES NOT VIOLATE THE HOME RULE AMENDMENT.

Plaintiffs' Home Rule arguments fail as a matter of law. The ESA Pilot Program applies to Local Education Agencies ("LEAs"), Tenn. Code Ann. § 49-6-2602(3)(C), a term that refers to any "public school system or school district created or authorized by the *general assembly*," Tenn. Code Ann. § 49-1-103 (emphasis added). Perhaps the most striking part of Plaintiffs' brief is that, although they invoke the words "district" and "school district" over twenty times, they fail to support or explain even once how the Home Rule Amendment applies to school districts. Plaintiffs premise their entire argument on this unsupported assumption. The State Defendants have shown why the Pilot Program is not a private or local law. Parents incorporate those arguments here and instead focus on why the Pilot Program applies to school districts and not counties.

Stripping away Plaintiffs' repeated attempts to shoehorn school districts into the scope of the Home Rule Amendment, we are left with only a series of bare assertions and broken logic. According to Plaintiffs, because only *public school districts* in Shelby County and Davidson County[2] satisfy the eligibility criteria for the ESA Pilot Program, it somehow follows that there is a violation of the Home Rule Amendment because these two *counties* are "subject to the [Pilot Program]." Pls.' Mem. at 6–7. In other words, Plaintiffs assume that school districts and counties are interchangeable when interpreting Article XI, § 9 while wholly ignoring precedent that undermines their assumption.

In Part A, Parents first explain why the ESA Pilot Program applies to school districts and not counties. In Part B, Parents describe why Plaintiffs' argument falls apart

[2] Parents will refer to the Metropolitan Government of Nashville and Davidson County as "Metro."

when viewed alongside the plain text of the Home Rule Amendment (requiring that an act of the General Assembly be directed to a county "in its governmental or its proprietary capacity" to fall within the scope of the Amendment). *See* Tenn. Const. Art. XI, § 9. In Part C, Parents show how Plaintiffs' Home Rule arguments cannot even withstand the plain terms of the Shelby County Home Rule Charter and Metro's Charter, both of which prohibit the counties from controlling or administering public education.

A. The ESA Pilot Program Applies to School Districts, Not Counties.

The ESA Pilot Program was enacted to improve educational opportunities for children in the state who reside in LEAs that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611. School districts such as LEAs are "mere instrumentalit[ies] of the State created exclusively for public purposes subject to unlimited control of the Legislature." *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959); *see also* Tenn. Code Ann. § 49-1-103 (defining "Local Education Agency"). It is an "accepted fact that public education in Tennessee rests upon the solid foundation of State authority to the exclusion of county and municipal government." *Cagle v. McCanless*, 285 S.W.2d 118, 122 (Tenn. 1955) (emphasis omitted); *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) ("Not only does Article XI, § 12, of the Tennessee Constitution expressly require the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools,' but this Court has recognized for many years that education is a State function."); *accord Rollins v. Wilson Cty. Gov't*, 967 F. Supp. 990, 996 (M.D. Tenn. 1997) ("[E]ducation is, at core, a state rather than a county or municipal function."). When the General Assembly chose to provide better educational options to Parents and families with children trapped in some of Tennessee's worst-performing public school districts, the exercise of legislative authority to create the Pilot Program was a state

matter, and not an act directed at "a particular county . . . in its governmental or its proprietary capacity." Tenn. Const. Art. XI, § 9.

B. School Districts Do Not Fall Within the Scope of the Home Rule Amendment.

In 1953, Tennessee added the Home Rule Amendment to its state constitution to "strengthen local self-government." *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 728 (Tenn. 1991). In pertinent part, the Home Rule Amendment states:

> [A]ny act of the General Assembly private or local in form or effect applicable to a particular *county* or municipality either *in its governmental or its proprietary capacity* shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. Art. XI, § 9 (emphasis added). "The whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975).

In the decade after the Home Rule Amendment passed, the Tennessee Supreme Court twice rejected attempts to expand the scope of the Amendment. First, in *Fountain City Sanitary District v. Knox County Election Commission*, the Court examined the Home Rule Amendment to determine whether it applied to a law amending the powers of a sanitary district. 308 S.W.2d 482 (Tenn. 1957). Noting that the "lead line" of the Amendment is "Home rule for cities and counties," the Court explained that the word "municipality" must be construed "within the general understanding of . . . 'city'." *Id.* at 484. Next, the Court distinguished between governmental entities such as cities, towns, and villages (which are municipalities under the Amendment) to contrast with case law involving school districts, irrigation districts, and soil erosion districts (which are quasi-public corporations) and thus distinguishable from the former. *Id.* at 484–85. Although such districts share certain regulatory characteristics with cities and counties, they are not

synonymous and therefore do not have the same constitutional status. *Id.* Accordingly, the Court held that because neither sanitary districts nor school districts are municipalities, the Home Rule Amendment did not apply.

Two years later, the Court again rejected an attempt to expand the scope of the Home Rule Amendment and held that it does not apply to special school districts. *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959). In *Perritt*, the plaintiffs challenged a private act that sought to enlarge the Huntington Special School District within Carroll County, arguing that it violated the Home Rule Amendment. *Id.* The Court explained that the Amendment did not extend to special school districts because it did "not come within the definition of a municipality as contemplated in said Home Rule Amendment." *Id.* (noting that the Amendment "is not broad enough to cover special school districts").

Plaintiffs do not cite or discuss *Perritt* or *Fountain City Sanitary District*. And the cases Plaintiffs *do* cite fail to support their bare assertion that school districts like LEAs are no different than counties and thus fall within the scope of the Home Rule Amendment. Rather, each case cited by Plaintiffs in support of their argument reflects the unremarkable proposition that laws addressing a county's governmental or proprietary capacity sometimes implicate the Home Rule Amendment. *See* Pls.' Mem. at 20–26 (citing *Doyle v. Metro. Gov't of Nashville and Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971) (upholding law granting power to set court costs for violations of city ordinances); *Farris*, 528 S.W.2d 549 (striking down law regulating county runoff elections); *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (upholding law regulating salaries of court officers in counties with certain populations); *Leech v. Wayne Cty.*, 588 S.W.2d 270 (Tenn. 1979) (striking down law regulating county reorganization and local elections); *Burson*, 816 S.W.2d 725 (upholding law regulating municipal service boards)). None of these cases support Plaintiffs' attempt to expand the Home Rule Amendment beyond its plain text.

The result is no different when Plaintiffs reach for the federal district court opinion in *Board of Education of Shelby County v. Memphis City Board of Education*. 911 F. Supp. 2d 631, 656 (W.D. Tenn. 2012); *see* Pls.' Mem. at 20–23. In that case, the General Assembly authorized municipalities that met certain conditions to "request the county election commission to conduct a referendum" on creating a municipal school district. *Id.* at 653. Once again, the law was not regulating school districts, but rather counties. *Id.* at 639. Notably, the district court recognized the "differences between a local school board and a county legislative body under Tennessee law," namely that "the two entities have separate[] origins, functions, and management." *Id.* at 644–45 (internal quotations and citations omitted). None of the cases that Plaintiffs cite supports their assumption that the Home Rule Amendment applies to laws affecting school districts.

Tennessee is not alone in refusing to apply its Home Rule Amendment to school districts. *See, e.g.*, *State ex rel. Harbach v. Milwaukee*, 206 N.W. 210, 213 (Wis. 1925) (Home Rule Amendment "imposes no limitation upon the power of the Legislature to deal with the subject of education . . . ."); *see also Barth v. Sch. Dist. of Philadelphia*, 143 A.2d 909, 911 (Pa. 1958) ("A School District is a creature or agency of the Legislature and has only the powers that are granted by statute . . . ."); *Gurba v. Cmty. High Sch. Dist. No. 155*, 18 N.E.3d 149, 156 (Ill. App. Ct. 2014) (explaining that a school district has "the somewhat lesser status of a quasi-municipality, acting for the state as its administrative arm overseeing the establishment and implementation of free schools").

C. The Charters for Shelby County and Metro Directly Undermine Plaintiffs' Claim Under the Home Rule Amendment.

The charters for Shelby County and Metro do not permit control of school districts. As Parents show below, to accept Plaintiffs' argument is to accept the proposition that the ESA Pilot Program has taken from the counties something they never had.

The plain text of Shelby County's Home Rule Charter presents a roadblock for Plaintiffs. Under Article VI ("Prohibitions")—the Charter makes it unambiguously clear that "the provisions of this charter shall not apply to county school funds or to the county board of education, or to the county superintendent of education . . . ." Panju Decl., Ex. 1 at 34. In other words, though the Home Rule Amendment allows Shelby County to lay out its "governmental" and "proprietary" powers in its Charter, *see* Tenn. Const. Art. XI, § 9, those powers do not extend to education funding or control of the local school district.

Plaintiffs face a similar roadblock in Metro's Charter. Though that Charter established a school district, it did not remain under Metro's control—rather, the Charter requires that the school district be "administered and controlled" by the Metropolitan Board of Public Education. Panju Decl., Ex. 2, at § 9.01. The Charter contemplates some level of financial relationship between Metro and the school district, but it is the legislature that requires the county to "provide necessary funds to enable the county board to meet all obligations." Tenn. Code Ann. § 49-2-101(1)(A). "The fact that there are financial connections between a local school system and local government does not detract from the essentially separate functions of these two entities." *Hill v. McNairy Cty.*, No. 03-1219-T, 2004 WL 187314, at *2 n.2 (W.D. Tenn. Jan. 15, 2004) (citation omitted) (Panju Decl., Ex. 7). Indeed, as explained by the Tennessee Supreme Court in *Ayers*, even though sometimes budgetary laws concern county government officials, "education is fundamentally a State concern." 756 S.W.2d at 222.

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Plaintiffs' attempt to equate counties and school districts in order to shoehorn the latter into the Home Rule Amendment fails as a matter of law. It finds no support in the Amendment's text, it conflicts with binding precedent, and it contradicts the charters that

govern the counties' affairs. Thus, Plaintiffs have failed to meet their burden of showing a likelihood of prevailing on the merits and the Court should deny their motion.

II. PLAINTIFFS HAVE FAILED TO MEET THE REMAINING REQUIREMENTS FOR OBTAINING A TEMPORARY INJUNCTION.

Just as they have failed to show a likelihood of success on their legal claims, Plaintiffs have also failed to show the other required elements for a temporary injunction. In Part A, Parents explain why the equities and the public interest tip sharply against a temporary injunction. In Part B, Parents lay bare Plaintiffs' attempt to establish irreparable harm relying solely upon speculation and conjecture.

A. The Equities and Public Interest Tip Sharply Against a Temporary Injunction.

Another basis for denying Plaintiffs' motion is that the balance of harms and the public interest weigh heavily against a temporary injunction. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("Even if we assume . . . that plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction."). A temporary injunction would force Parents and their children to endure substantial harm—and it would not serve the public interest.

An injunction here would impose real hardships. Parents' children face real problems in their current public schools and a temporary injunction would deprive Parents of the educational lifeline that they need. For example, Natu Bah's sons attend A. Maceo Walker Middle School, where their academics have deteriorated to "a very basic level." Affidavit of Natu Bah ("Bah Aff.") ¶¶4–6. A mere 17.4% of students at this public school are at or above grade level.[3] And for most of the 2019-20 academic year, Natu's son Mohammed endured verbal and emotional abuse because other students repeatedly bullied him about

[3] *See* A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ., *available at* https://reportcard.tnk12.gov/districts/792/schools/2740/page/SchoolAchievement.

his African background. Bah Aff. ¶¶ 7–8, 14–15. Bria Davis's daughter also experienced bulling at her public school and is no longer progressing academically. Affidavit of Bria Davis ¶¶ 7–9. Star Brumfield's son regularly encountered violence at school during the academic year, and it impacted his desire to learn because he feels unsafe and distracted. Affidavit of Star Brumfield ¶¶ 7–9. And after Builguissa Diallo enrolled her daughter Bintah in a public school for kindergarten, her daughter's reading ability regressed substantially over the course of the 2019-20 academic year—Bintah's ability to read is now behind where she was at the end of pre-K. Affidavit of Builguissa Diallo ¶¶ 4–6.

These are only four families who could benefit from the ESA Pilot Program. There are many more. But Plaintiffs are wholly dismissive of the hardships that a temporary injunction would impose on Parents. *See* Pls.' Mem. at 18, 34. They assert that Parents do not have a "right to utilize" the ESA Pilot Program. That is a non-sequitur. Parents are the *intended beneficiaries* of the ESA Pilot Program, and as detailed above, their hardships are real. Indeed, the hardships Parents would endure under a temporary injunction are far more injurious, consequential, and immediate than the harms Plaintiffs' invoke. *See id.* at 31 (invoking the inability to locally approve the Pilot Program and speculative concerns about the "diversion" of funds). The balance of harms tips sharply in Parents' favor.

Nor is the public interest served by a temporary injunction. To the contrary, it would deny Tennessee families and children the educational lifeline that their representatives in the General Assembly provided them. Plaintiffs' motion comes nearly one year after the ESA Pilot Program was signed into law. It was filed in the midst of a pandemic that forced Tennessee schools to shut down—at a time when Tennessee parents already face adversity and uncertainty in planning for the upcoming school year. A temporary injunction that extinguishes an educational option for low- and middle-income families, during a pandemic no less, is not in the public interest. This Court should not impose such a drastic remedy.

B. Plaintiffs' Speculation and Conjecture Do Not Constitute Irreparable Harm.

Plaintiffs claim two species of irreparable harm, neither of which stands ups to scrutiny. Their first claimed harm—a constitutional violation—simply does not exist. *See* Pls.' Mem. at 30–31 (premising irreparable harm on the constitutionality of the ESA Pilot Program). And their second claimed harm, which boils down to a vague and undefined educational injury to school districts, *see* Pls.' Mem. at 31–32, imagines deleterious effects on the public school *districts* in Shelby County and Davidson County—while ignoring that the *children* currently assigned to those district's public schools are the intended beneficiaries of the Pilot Program. This second harm, which comprises only one paragraph, *see id*, hinges entirely on speculation and conjecture. Plaintiffs offer no support for their claim that the ESA Pilot Program causes irreparable harm if a child leaves a public school. *See id*.

While the ESA Pilot Program may cause some fluctuation in public school enrollment figures, particularly in its early implementation phase, the fact is that enrollment adjustments are part of the public school funding process, and that has been the case long before the ESA Pilot Program ever came into existence.[4] Students may leave their public school for many reasons. A parent might decide to home school her children. Or a family may move to another district—or even out of state. No matter why a student leaves, the reality is that these other educational options do not cause irreparable harm to public school districts: after all, the district is only losing funding for students it is no longer obligated to educate. The same is true here. As the Parents' individual circumstances

[4] The ESA Pilot Program may enroll 5,000 students in 2020-21. Tenn. Code Ann. § 49-6-2604(c)(1). That is 0.5% of Tennessee's total student enrollment in 2019 (973,659 students). *State of Tennessee Report Card*, Tenn. Dep't of Educ., *available at* https://tinyurl.com/vn7jgux.

reveal, *see supra* Part II.A, it is the parents and children who desire to participate in the ESA Pilot Program who would be harmed by an injunction.

CONCLUSION

The ESA Pilot Program fully complies with the Tennessee Constitution and Tenn. Code Ann. § 9-4-601. Parents will endure substantial harm if a temporary injunction bars them from using the Pilot Program and thus the equities and public interest tip strongly in their favor. For these reasons, the Court should deny Plaintiffs' motion for a temporary injunction.

Dated: April 13, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2020, I caused the foregoing **JOINT BRIEF OF INTERVENOR-DEFENDANTS NATU BAH, BUILGUISSA DIALLO, BRIA DAVIS, AND STAR BRUMFIELD IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION PURSUANT TO TENN. R. CIV. P. 65.04** to be served on counsel for Plaintiffs, Defendants, and Proposed Intervenor-Defendants Bria Davis, Star Brumfield, Greater Praise Christian Academy, Alexandria Medlin, and David Wilson, Sr. via the Court's electronic filing system and electronic mail.

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