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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 20-0143-II
	)	Chancellor Anne C. Martin, Chief Judge
TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,	)	Judge Tammy M. Harrington
	)	Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH, *et al.*,	)	
Intervenor-Defendants.	)	**CONSOLIDATED**

ROXANNE McEWEN, *et al.*,	)	
Plaintiffs,	)	
v.	)	
BILL LEE, in his official capacity as Governor of the State of Tennessee, *et al.*,	)	Case No. 20-0242-II
	)	Chancellor Anne C. Martin, Chief Judge
	)	Judge Tammy M. Harrington
	)	Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH, *et al.*,	)	
Intervenor-Defendants.	)	

PLAINTIFF COUNTIES' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, the Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") and the Shelby County Government ("Shelby County"),

(collectively, "Plaintiff Counties"), submit this consolidated response to the Motions to Dismiss filed by the State Defendants[1] and Greater Praise Intervenor-Defendants[2] and the Motion for Judgment on the Pleadings filed by the Bah Intervenor-Defendants.[3] The motions should be denied for the following reasons:

- Plaintiff Counties' claims are ripe for review because the ESA Program is up and running, and applicants have already been accepted. While the full scope of the ESA program's financial impact on Plaintiff Counties remains to be seen, Plaintiff Counties will bear a financial consequence and are treated differently than other counties in the State as soon as one ESA is awarded. That has happened, and Plaintiff Counties' claims are ripe for decision.
- Plaintiff Counties have standing to assert their Equal Protection, Education Clause, and *ultra vires* action claims because Plaintiff Counties bear the financial burden of the program and are being treated differently than every other county in the State whose school districts lose students to private school. This distinct and palpable injury establishes standing for all of Plaintiff Counties' claims.
- Plaintiff Counties have stated a viable Equal Protection Claim because education and local control over local affairs—two rights on which the ESA Act infringes—are fundamental rights subject to strict scrutiny. Defendants have not attempted to argue that the ESA Act satisfies that standard, nor could they.

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[1] State Defendants include the Tennessee Department of Education ("TDOE") and Education Commissioner Penny Schwinn and Governor Bill Lee in their official capacities.

[2] Greater Praise Intervenor-Defendants include Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

[3] Bah Intervenor-Defendants include Natu Bah, Builguissa Diallo, and Star-Mandolyn Brumfield.

- Plaintiff Counties have stated a viable Education Clause Claim because the Tennessee Constitution does not permit use of public dollars to benefit private K-12 schools.
- Plaintiff Counties have stated a viable claim for *ultra vires* actions because the State Defendants will implement the ESA Program in 2022-23 through direct reimbursements to private schools, which is not authorized by the ESA Act itself.

Defendants' motions should be denied.

STATEMENT OF FACTS

In May 2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, establishing the "Tennessee Education Savings Account Pilot Program," with an effective date of May 24, 2019. 2019 Tenn. Pub. Acts ch. 506. The Act is codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* The Act provides "participating students" with "education savings accounts" that use public funding to pay for private school tuition, fees, and other education-related expenses. Tenn. Code Ann. §§ 49-6-2602(10), -2603(a)(4), -2607(a). The Act imposes this "education savings account" ("ESA") program in only two counties, Davidson and Shelby. (Am. Compl. ¶¶ 24, 40-41.)

The State Defendants are "work[ing] to reinstate the ESA program" now. (*Id.* ¶¶ 42-45; Tennessee Education Savings Account Program Website ("ESA Program Website"), *available at* https://esa.tnedu.gov/ (last visited Aug. 31, 2022).) The ESA Program Website has been updated to include links to Frequently Asked Questions ("FAQs"), an Application Checklist, and an "ESA Program Application for Students," among other things. (*Id.*) The "Intent to Enroll" form, before it was removed from the site, told families that the ESA Program is an available option in August 2022. (Am. Compl. ¶ 45.)

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

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

1. zoned to attend a school in a local education agency ("LEA")[4] with ten or more schools:
    a) identified by the State as priority schools[5] in 2015,
    b) identified by the State as among the bottom 10% of schools[6] in 2017, and
    c) identified by the State as priority schools in 2018, or
2. zoned to attend an ASD[7] school as of the Act's effective date.

Tenn. Code Ann. § 49-6-2602(3)(C).

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

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

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

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

As a result of the "eligible student" definition, the only students who qualify to participate in the ESA Program are those "zoned to attend a school in Metro[politan] Nashville Public Schools, Shelby County Schools, or the Achievement School District." *Metro. Gov't of Nashville & Davidson Cty. v. Tenn. Dep't of Educ.* ("*Metro v. TDOE*"), 645 S.W.3d 141, 145 (Tenn. 2022). Indeed, "[i]t is undisputed by the parties that, absent future legislative action, only Metro Nashville Public Schools, Shelby County Schools, and the Achievement School District fall within the enumerated statutory requirements." *Id.* at 845 n.5; *see also* Tenn. Code Ann. § 49-6-2602(3)(C). (Am. Compl. ¶¶ 40, 115-116.)

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

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

A. House Bill No. 939 Moves Through Committees.

House Majority Leader William Lamberth (R-Portland) filed House Bill No. 939 on February 7, 2019, as a "caption bill" to be held on the House desk. (Am. Compl. ¶ 53.) The bill proceeded to the House Curriculum, Testing, & Innovation Subcommittee on March 19, 2019, after Rep. Mark White (R-Memphis), who represents significant portions of the cities of Germantown and Collierville, filed Amendment No. 1 (HA0188) to the bill, presenting for the first time the substance of the "Tennessee Education Savings Account Act" and beginning the trend of carving out counties from the House bill's application. (*Id.* ¶¶ 54-56.)

In addition to adding a new part to Title 49, Chapter 6 of the Tennessee Code, the Amendment placed several restrictions on ESA eligibility. (*Id.* ¶¶ 55-56.) The amendment defined "eligible student" in Section 49-6-2602(3)(C) to be a student "zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools in

accordance with § 49-1-602(b)(3)." (*Id.* ¶ 56.) As drafted, Amendment No. 1 left the potential to drop or add counties to the Act in the future as school performances declined or improved. (*Id.* ¶¶ 56-57.) The House Curriculum, Testing, & Innovation Subcommittee recommended the bill for passage if amended as set forth in Amendment No. 1, as did the House Education Committee; Government Operations Committee; Finance, Ways, & Means Subcommittee; and Finance, Ways, & Means Committee. (*Id.* ¶ 58.)

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

Rep. White withdrew Amendment No. 1 when House Bill No. 939 was considered on the House Floor for third and final reading. (*Id.* ¶ 60.) The House then approved Amendment No. 2 (HA0445), which Rep. Susan Lynn (R-Mt. Juliet) sponsored. (*Id.*) Amendment No. 2 placed even more limits on the number of LEAs subject to the Act, by changing the definition of "eligible student" to be a student who, among other requirements "[i]s zoned to attend a school in an LEA that had three (3) or more schools identified as priority schools in 2015 in accordance with § 49-1-602(b) and that had three (3) or more schools among the bottom ten percent (10%) of schools as identified by the department in 2017 in accordance with § 49-1-602(b)(3)." (*Id.* ¶¶ 61-64.) This narrowed the applicable counties to only four: Davidson, Hamilton, Knox, and Shelby. (*Id.* ¶ 64.) Importantly, the amendment also defined "eligible student" based on data from specific prior years rather than using current data. With that change, the amendment ensured that no LEAs would ever be added to or removed from the definition without General Assembly action. (*Id.* ¶ 65.)

The intent of these restrictions was not lost on the legislators whose districts were affected. Rep. Jason Powell (D-Nashville), Rep. John Ray Clemmons (D-Nashville), and Rep. Dwayne Thompson (D-Cordova), all expressed concern about the General Assembly's clear

intent to "single[ ] out Davidson County and Shelby County" without their consent. (*Id.* ¶¶ 67-70.)

Even after being narrowed by Amendment No. 2 to LEAs in only four counties, House Bill No. 939 squeaked by with 50 ayes and 48 nays, on April 23, 2019. (*Id.* ¶ 71.) This narrow passage came after the vote was held open for 40 minutes with the House deadlocked. (*Id.* ¶ 72.) Rep. Jason Zachary (R-Knoxville), whose district was affected by Amendment No. 2, candidly admitted that he cast the deciding vote only after then-House Speaker Glen Casada promised him that Knox County would be excluded and "held harmless" from the Senate version of the bill. (*Id.* ¶¶ 73-74.)

In his closing remarks about the ESA Act on the House Floor before the vote, then-Deputy House Speaker Matthew Hill (R-Jonesborough) summarized the House majority's dual motives of unilaterally imposing the ESA Act on "deep blue" Davidson and Shelby counties while "protecting" every other school district from the bill, stating: "Ladies and gentlemen, today on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education." (*Id.* ¶ 75.)

C. Senate Bill No. 795 Moves Through Committees.

Senate Majority Leader Jack Johnson (R-Franklin) filed Senate Bill No. 795, the Senate companion to House Bill No. 939, on February 5, 2019. (*Id.* ¶ 77.) Legislators quickly chiseled away at the bill's application. As promised to Rep. Zachary, Knox County was excluded from the Senate's final version, along with every other Tennessee county except Davidson and Shelby.

First, Sen. Dolores Gresham (R-Somerville), then-Chair of the Senate Education Committee, proposed Amendment No. 1 (SA0312), which is identical to Amendment No. 1 in the House and limited the act to five counties: Davidson, Hamilton, Knox, Madison, and

Shelby, with potential to drop or add counties automatically as school performance declined or improved. (*Id.* ¶¶ 78-79.) The amendment did not apply to Sen. Gresham's district, including her home county of Fayette, despite Fayette County having two out of seven of its schools (28.6%) on the 2017 bottom 10% list and one out of seven of its schools (14.3%) on the 2018 list of priority schools. (*Id.* ¶ 80.)

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

When Senate Bill No. 795 reached the Senate Floor, Sen. Gresham moved her amendment to the heel of the amendments, and the Senate voted to substitute House Bill No. 939 (including House Amendment No. 2) as the companion Senate bill. (*Id.* ¶ 81.) The Senate then adopted Senate Amendment No. 5 (SA0417), which Sen. Bo Watson (R-Hixson) had filed and which stripped the language from House Bill No. 939 and substituted new language. (*Id.* ¶ 82.)

Senate Amendment No. 5 further narrowed the definition of "eligible student" in Section 49-6-2602(3)(C) and limited the number of counties covered by the bill. (*Id.* ¶ 83.) It increased from three to ten the number of schools that had to be identified as priority schools in 2015 and 2018 and increased from three to ten the number of schools that had to be among the bottom 10% of schools in the state in 2017. (*Id.* ¶ 84.) The new language also included within the definition of "eligible student" a student zoned to attend a school in the state's ASD on the act's effective date. (*Id.* ¶ 85.) By narrowing the definition of "eligible student," Amendment No. 5 removed Knox County and Hamilton County from the bill's application. (*Id.* ¶ 86.) Sen. Watson's amendment excluded his home county of Hamilton County, which had five priority schools in 2015 and nine in 2018. (*Id.*)

The only counties with LEAs encompassed by the new definition of "eligible student" in Amendment No. 5 were Davidson and Shelby counties. (*Id.* ¶ 88.) Moreover, the criteria

for defining an "eligible student" in Amendment No. 5 were based on specific numbers of schools in specific prior years; therefore, no LEAs could ever be added to or removed from the definition without amendment of the law. (*Id.* ¶ 89.) Senate Amendment 5, which would later become the version recommended by the Conference Committee Report, also introduced the term "pilot" into the bill for the first time. (*Id.* ¶ 90.) The Senate adopted House Bill No. 939, as amended, with 20 ayes and 13 nays, on April 25, 2019. (*Id.* ¶ 95.)

E. House and Senate Adopt the Conference Committee Report.

When the Senate's version of the bill was transmitted to the House, the House non-concurred in the amendments to the bill adopted by the Senate. (*Id.* ¶ 96.) The Senate refused to recede from the amendments, and the House refused to recede from its non-concurrence. (*Id.*) On April 30, 2019, the House and Senate speakers appointed members to a conference committee to resolve the differences between the two bills. (*Id.* ¶ 97.) The conference committee's final version retained the definition of "eligible student" in the bill as adopted by the Senate, which limited the bill's application to Davidson and Shelby counties and ensured the bill could never apply to any other county. (*Id.* ¶ 98.)

Rep. Patsy Hazelwood (R-Signal Mountain) voted against the bill when it initially passed the House but voted for the conference committee's final version, which excluded her home county of Hamilton. (*Id.* ¶ 99.) She declared the reason for her change of heart on the House Floor on May 1, 2019: "I committed to vote for ESAs if the Hamilton County was excluded from the program. The language that's in this conference report here today does that. As a result, I'm going to be keeping my commitment and I will vote for this bill." (*Id.* ¶ 100.)

Before the Senate's final vote on the same day, Sen. Joey Hensley (R-Hohenwald) asked the bill's Senate sponsor, Sen. Gresham, to confirm that "no other LEA will be able to

grow into the program over the years," explaining, "[I] just want it to be on the record and assured that this conference report continues to prevent any future LEAs from being included in this." (*Id.* ¶¶ 101-02.) Sen. Gresham responded unequivocally: "That's the intent of the General Assembly today." (*Id.* ¶ 103.)[8]

Both the House and Senate adopted the conference committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays. (Am. Compl. ¶ 108.)

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

The ESA Act shifts the cost of funding ESAs onto Plaintiff Counties. But the operational method it uses causes significant harm to MNPS and SCS. Now that the State Defendants are implementing the ESA Act for this school year, the TDOE will reduce MNPS and SCS's allotment of school funding by thousands of dollars for every student participating in the ESA program who are zoned to those LEAs. (*Id.* ¶ 143.) The ESA Act requires the State to deposit those amounts into ESAs for participating students and then forces the LEAs to count those participating students in their enrollments. Tenn. Code Ann. § 49-6-2605(b). (Am. Compl. ¶¶ 11, 20-22.) This "counting requirement" will trigger existing obligations on Plaintiff Counties to provide funding to the LEAs for those students, even though the students no longer attend public schools.

To accomplish implementation for the 2022-23 school year, the State Defendants intend to funnel money directly to private schools while still counting these students as

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

enrolled in the MNPS and SCS districts. (*Id.* ¶¶ 49-50.) But school district budgets have already been proposed, staffing and other school operations projections and preparations have already been made, and Plaintiff Counties have already adopted budgets for this fiscal year. Thus, reducing the LEAs' school funding allotments now will result in an immediate deficit for both LEAs. (*Id.* ¶¶ 174-83.)

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

ESAs are funded by diverting state and local funds from a participating student's public-school district in an amount equal to the district's per-pupil state and local funding required by the state's Basic Education Program[9] ("BEP") or the combined (state and local) statewide average of BEP funding, whichever is lower. Tenn. Code Ann. § 49-6-2605(a). In advance of the ESA Program's 2020 launch, the Tennessee Comptroller of the Treasury issued a Legislative Brief identifying the ESA funding amount as $7,117 for the 2020-2021 school year. ("Understanding Public Chapter 506: Education Savings Accounts") (updated May 2020) (hereinafter "Comptroller Brief"), Ex. I to Am. Compl.)

The Comptroller Brief identified total per-pupil BEP funding for MNPS in 2020 as $8,324 ($3,618 in State funding and $4,705 in local funding) and for Shelby County as $7,923 ($5,562 in State funding and $2,361 in local funding). (*Id.* at 4.) The statewide average, on the other hand, was $7,572. (*Id.*)[10] Because the statewide average was less than either MNPS

[9] The BEP is a statutory formula for calculating kindergarten through grade twelve education funding "necessary for our schools to succeed." Tenn. Code Ann. § 49-3-302(3). Total BEP funding consists of separate contributions by the State and local jurisdictions. The State and local shares vary among school districts based on each local jurisdiction's ability to raise revenue from property taxes. *Id.* § 49-3-307(a)(10), -356. The BEP will be replaced by the Tennessee Investment in Student Achievement formula ("TISA") beginning in the 2023-24 school year. 2022 Tenn. Public Acts ch. 966 ("TISA Public Act"). (Am. Compl. ¶¶ 12-16.)

[10] According to the Comptroller Brief, the LEAs' per-pupil expenditures (both the local match and total expenditures) were based on prior year budgets (2019), while the State's per-pupil

or SCS's funding amounts, the Comptroller noted that ESAs would be funded at the statewide average, minus a 6% administrative fee, totaling $7,117. (*Id.*)

According to the ESA Act, the State will deposit the full ESA disbursement (State and local BEP shares) into a participating student's account. Tenn. Code Ann. § 49-6-2605(b)(1). The State will then subtract that same amount "from the state BEP funds otherwise payable to the LEA." *Id.* In other words, the State will break even: whatever it deposits into an ESA, it takes away from the LEA.

Because the full ESA disbursement equals the combined State *and local* BEP funding per pupil (or the statewide average, which in 2020 was slightly less), MNPS and SCS lose more State funding for an ESA student than if the student left to attend private school without an ESA. To illustrate using the 2020 funding figures, when a *non-participating* student leaves MNPS to attend private school, MNPS loses $3,618 in State BEP funding—the State share for an MNPS student. (Comptroller Brief at 4, Ex. I to Am. Compl.) But when a *participating* student leaves an MNPS school for private school, the Metropolitan Government loses $7,572 in BEP funding—the State and local shares for an MNPS student, which is *more than twice as much money*. (*Id.*) Similarly, SCS would lose only $5,562 in State BEP funding per pupil for a student leaving to attend private school in 2020. (*Id.*) But when a participating student leaves an SCS school for private school, Shelby County loses $7,572 in BEP funding—*an additional 36 percent.* (*Id.*)[11]

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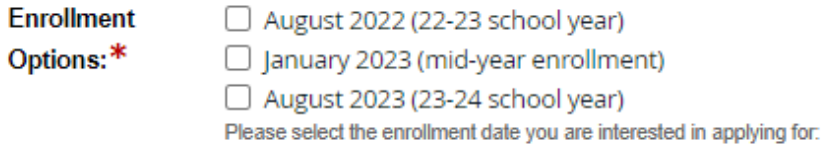
funding was based on current year funding (2020). (Comptroller Brief at 4, Ex. I to Am. Compl.)

[11] The General Assembly's Fiscal Review Committee estimated BEP revenue losses in its Corrected Fiscal Memorandum on the ESA Act (May 1, 2019) ("Fiscal Mem."). (Fiscal Mem. at 4, Ex. J to Am. Compl.) According to the Memorandum, and based on 2020 figures, the ESA Program will generate a $36,881,150 "shift in BEP funding amongst LEAs" in Plaintiff Counties in the ESA Program's first year, when it has a cap of 5,000 students; $55,321,725 in year two (cap of 7,500 students); $73,762,300 in year three (cap of 10,000 students); $92,202,875 in year four (cap of 12,500 students); and $110,643,450 in year five and

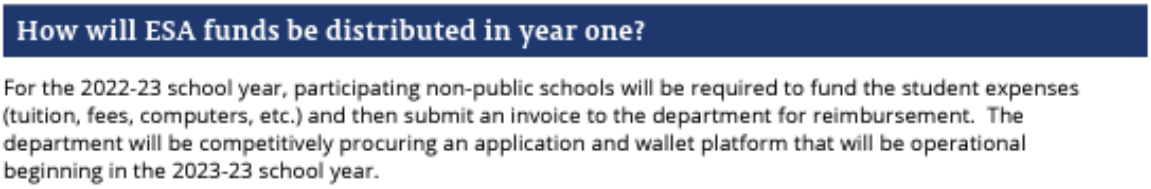
B. State Defendants Are Launching the ESA Program in a Rushed and Haphazard Fashion That Conflicts With the ESA Act's Plain Language.

During the week of July 18-22, 2022, the State Defendants updated the ESA Program Website to make clear that they intend to provide some form of ESA funding for the 2022-23 school year. (Am. Compl. ¶¶ 44-45.) While the site did not provide a specific timeframe for when ESA funds will be available, the Intent to Enroll form was still linked on the site in July 2022 and listed August 2022 as an "Enrollment Option":



(Am. Compl. ¶ 45.) As recently as August 25, 2022, Governor Bill Lee posted a video message to Twitter,[12] in which he noted that the number of applicants and accepted applicants into the ESA Program is rising by the day. State Defendants have every intention of moving forward with the ESA Program, even mid-school year.

To achieve this goal, the State Defendants intend to distribute ESA funds via requests from the participating private schools to the TDOE as opposed to via deposits into participating students' ESAs. (Am. Compl. ¶¶ 49-50.) The ESA Website suggests this is because the State Defendants still must procure contracts for the operational platform that will be utilized for the ESA accounts themselves:



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subsequent years (cap of 15,000 students). Creating further confusion, the Fiscal Memorandum based these figures on an estimated loss of $7,376.23 per pupil, which is not the same figure contained in the Comptroller's Brief.

[12] https://twitter.com/GovBillLee/status/1562921215202926600

(*Id.* ¶ 50.)

In July 2022, the TDOE also included on the ESA Program Website a downloadable FAQs document, which identified the expected ESA amount per-pupil for the 2022-23 school year as "approximately $8,192." (FAQs, Ex F to Am. Compl.) The site's landing page currently lists that same amount in the text accompanying the following graphic:

Each ESA is funded at approximately $8,192 to pay for private school tuition or other approved educational expenses.

(ESA Program Website, *available at* https://esa.tnedu.gov/ (last visited Aug. 31, 2022).)

The FAQs document that was previously linked at the ESA Program Website landing page and attached as Exhibit F to Plaintiff Counties' Amended Complaint is no longer on the site. Instead, a different FAQs document, also labeled 2022-23 on the front cover, is linked, which lists the ESA amount as $7,000—not $8,192 as the original FAQs document stated. (Frequently Asked Questions for Participating Families, *available at* https://esa.tnedu.gov/wp-content/uploads/2022/07/ESA-FAQ-for-Participating-Families_22-23_v2-1.pdf.) This $7,000 figure is also included on the upper part of the graphic on the site's current landing page, as set forth above. (ESA Program Website, *available at* https://esa.tnedu.gov/ (last visited Aug. 31, 2022).)

Because the State has not released the statewide BEP average for years following 2020, Plaintiff Counties and their LEAs, and participating schools and families for that matter, can only rely on the ESA approximation that the State Defendants have published, though the inconsistencies have confused the issue. (Am. Compl. ¶ 138.) Assuming the $8,192

per-pupil figure is correct and was derived from the statewide average of BEP funding,[13] and applying the rationale from the Comptroller Brief, this means that each LEA will lose BEP funding of approximately $8,684 for every participating student—the ESA estimate of $8,192 plus a 6% administrative fee. (Am. Compl. ¶¶ 141-43; Comptroller Br. at 4, Ex. I to Am. Compl. (illustrating that the full statewide average would be deducted from the funds otherwise payable to the LEAs and that ESAs would be funded at the statewide average minus a 6% administrative fee).) SCS's state and local BEP contributions, however, total $8,511, which is less than the statewide average. (Am. Compl. ¶ 145.) Thus, TDOE is requiring SCS to contribute more to ESAs than the ESA Act permits. (*Id.*)

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

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

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

and levying taxes for their school systems). Those obligations do not change under TISA. (Am. Compl. ¶¶ 20.)

The counting requirement also affects Plaintiff Counties' obligations under Tennessee's "maintenance-of-effort" statute.[14] (Comptroller Brief at n.D ("Any additional local funding beyond the required BEP local match will not be included in ESA funding calculations, *but districts must continue to budget sufficient funds to meet maintenance of effort requirements set by the state*.") (emphasis added), Ex. I to Am. Compl.) Local jurisdictions may choose to appropriate more education funding than the BEP requires. Plaintiff Counties do so. (Am. Compl. ¶¶ 127-34.) Because the counting requirement leaves ESA participating students on the school districts' rolls, the maintenance-of-effort statute requires Plaintiff Counties to appropriate their *full* local per-pupil spending for students no longer attending their schools.

The ESA Act includes a grant program—the "school improvement fund"—that if funded[15] would disburse annual grants to MNPS and SCS that in aggregate will be *less than* the total ESA disbursements to participating students. Tenn. Code Ann. § 49-6-2605(b)(2). Even if funded, the grant program will supply school improvement funds to MNPS and SCS only for the first three years. *Id.* § 49-6-2605(b)(2)(A). It only reimburses lost funding resulting from students who attended an MNPS or SCS public school for one full school year

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[14] The State's "maintenance of effort" statute generally requires local governments to appropriate the same per-pupil local funding notwithstanding any increase in state funding in a particular year. Tenn. Code Ann. § 49-3-314(c). For additional information about these requirements, see Tennessee Comptroller of the Treasury Legislative Brief, "Understanding Tennessee's Maintenance of Effort in Education Laws" (Sept. 2015), *available at* https://comptroller.tn.gov/content/dam/cot/orea/advanced-search/2015/2015_OREA_MaintofEffort.pdf.

[15] The grant program is "subject to appropriation" and therefore not guaranteed funding under the ESA Act. While the State argues that "school improvement" can include virtually anything, (State Defs.' Mem. L. at 8), the ESA Act itself sets no standard for how the State must interpret the grant's meaning.

before joining the ESA program. Tenn. Code Ann. § 49-6-2605(b)(2)(A)(i). Thus, school districts would receive no grant funds for ESA students who enter kindergarten or move into Plaintiff Counties. Moreover, this grant program does not release Plaintiff Counties from their financial obligations under the ESA Act's "counting requirement" and therefore does not make Plaintiff Counties whole. Neither the BEP nor the maintenance-of-effort statute allows Plaintiff Counties to offset their education-funding obligations with grant funds received by their school districts. *Id.* § 49-3-314(c) (under State's "maintenance of effort" statute, local legislative bodies must appropriate the same level of per-pupil funding notwithstanding an increase in state funding). (*See also* Comptroller Brief at n.D, Ex. I to Am. Compl.) Thus, regardless of whether school districts receive "school improvement grants" under the ESA Act, Plaintiff Counties must fund the LEAs based on the enrollments that include those students.

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

The Tennessee Supreme Court has already held that the Plaintiff Counties had standing to assert a claim under the Home Rule Amendment, Tenn. Const. art. XI, § 9, because the ESA Act interferes with Plaintiff Counties' local sovereignty. *Metro v. TDOE*, 645 S.W.3d at 150 ("Accordingly, having concluded that Plaintiffs satisfied their burden of establishing standing by alleging the ESA Act violates their constitutionally protected interest in local control of local affairs, we affirm the Court of Appeals' decision that Plaintiffs have standing to challenge the constitutionality of the Act under the Home Rule Amendment."). It would be axiomatic to state that the way in which the Act interferes with Plaintiff Counties' sovereignty is by forcing them to fund a school choice program that no other counties in Tennessee must fund by forcing their LEAs to count in their enrollments

the students attending private schools using ESAs. No party could plausibly dispute that Plaintiff Counties bear the financial burden of the ESA Program at this juncture.

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

School districts use student enrollment projections to determine where to allocate funding to benefit students. (Am. Compl. ¶¶ 198-99.) Both districts have set their respective budgets for fiscal year 2022-23 based on the anticipated BEP funding from the State and funding from the county. (*Id.* ¶¶ 123-34.) MNPS expects to receive $259,346,000 from the State in BEP funding, and SCS anticipates receiving $568,692,000. (*Id.* ¶¶ 125, 132.) At $8,192 per pupil (the TDOE estimated fund amount), MNPS will lose $16.8 million dollars in BEP funds if 2,050 students from MNPS attend a private school. (*Id.* ¶ 150.) For SCS, the funding loss would be $24.2 million dollars if 2,950 students attend a private school. (*Id.* ¶ 151.) If that number is more correctly $8,684 per pupil (the TDOE estimate of $8,192 plus 6%), MNPS will lose $17.8 million dollars in BEP funds if 2,050 students from MNPS attend a private school. For SCS, the funding loss would be $25.6 million dollars if 2,950 students attend a private school.

These cuts will be particularly painful because the districts' operational costs are unlikely to decrease in relation to the loss of funding. (*Id.* ¶¶ 174-83.) Last-minute adjustments to enrollment will affect teacher and other staff moves, technology services availability, food services, transportation, and other operational services, requiring shifts at schools across the affected districts. (*Id.* ¶¶ 179-81.)

Importantly, any reduction of funds that includes the local contribution—as these ESA reductions would—necessarily includes county dollars. Moreover, the only way that a funding gap can be filled is for the county to fill it.

APPLICABLE STANDARD

A motion filed under Rule 12.02(6) of the Tennessee Rules of Civil Procedure tests the legal sufficiency of a complaint, not the strength of the plaintiff's proof. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 432 (Tenn. 2011). "[T]he threshold for surviving a motion to dismiss for failure to state a claim is generally low." *Moses v. Dirghangi*, 430 S.W.3d 371, 375 (Tenn. Ct. App. 2013). The Court may grant Defendants' motions to dismiss only if "the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law." *Moses*, 430 S.W.3d at 375 (citing *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975)). In addition, the Court must construe the complaint liberally, presuming all factual allegations to be true and giving Plaintiff Counties the benefit of all reasonable inferences. *Id.*; *see also Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017).

Like a motion filed under Rule 12.02(6) of the Tennessee Rules of Civil Procedure, a motion for judgment on the pleadings under Rule 12.03 tests the legal sufficiency of a complaint, not the strength of the plaintiff's proof. *Timmons v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. 2000). "[T]he threshold for surviving a motion to dismiss for failure to state a claim is generally low." *Moses*, 430 S.W.3d at 375. "Such a motion admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." *Id.* Thus, the Court may grant the motion only if "the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law." *Id.* at 375 (citing *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975)). In addition, "the court

must accept as true 'all well-pleaded facts and all reasonable inferences drawn therefrom' alleged by the party opposing the motion." *Timmins*, 310 S.W.3d at 838.

Plaintiff Counties seek a declaratory judgment that the ESA Act violates the Equal Protection and Education Clauses in the Tennessee Constitution, and that it is being implemented in an *ultra vires* manner. "A decision on whether to entertain a declaratory judgment falls squarely within a trial court's discretion, which has been described by th[e Tennessee Supreme] Court as 'very wide.'" *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000) (quoting *S. Fire & Cas. Co. v. Cooper*, 292 S.W.2d 177, 178 (Tenn. 1956); *Hinchman v. City Water Co.*, 167 S.W.2d 986, 992 (Tenn. 1943); *Newsum v. Interstate Realty Co.*, 278 S.W. 56, 57 (Tenn. 1925)). In addition, the Declaratory Judgment Act is "remedial" and "is to be liberally construed and administered." Tenn. Code Ann. § 29-14-113, *cited in Brown & Williamson*, 292 S.W.2d at 193; *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008).

LEGAL ARGUMENT

I. PLAINTIFF COUNTIES' CLAIMS ARE RIPE FOR REVIEW.

State Defendants are implementing the ESA Program now. On July 13, 2022, Governor Bill Lee issued a press release declaring that the State would "work to help eligible parents enroll [in the ESA program] this school year." (Am. Compl. ¶ 42; July 13, 2022, Press Release, Ex. D to Am. Compl.) A week later, he issued another press release, with a link to an open letter promising that private schools would have seats available for ESA students this year. (Am. Compl. ¶ 43.) Then, in an August 25, 2022, video message on Twitter,[16] the Governor noted that the number of applicants and ***accepted*** applicants into the ESA Program is rising

[16] https://twitter.com/GovBillLee/status/1562921215202926600

by the day. These are students who will be able to use public funds for private school tuition, at Plaintiff Counties' expense, this fall.

Yet in their motion to dismiss, the Governor and his State Co-Defendants argue that claims challenging the constitutionality and procedural illegality of the ESA Program are not ripe, that is, that there is no live controversy for this Court to resolve. State Defendants cannot have it both ways.

Ripeness is a justiciability doctrine that "focuses on whether the dispute has matured to the point that it warrants a judicial decision." *B & B Enters. of Wilson Cty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010). It involves a two-part inquiry: (1) "whether the issues in the case are ones appropriate for judicial resolution" and (2) "whether the court's refusal to act will cause hardship to the parties." *Id.* As to the first prong, "[a]n issue is not fit for judicial decision if it is based 'on hypothetical and contingent future events that may never occur.'" *State v. Price*, 579 S.W.3d 332, 338 (Tenn. 2019) (quoting *West v. Schofield*, 468 S.W.3d 482, 491 (Tenn. 2015)). "Rather, the issue must be 'based on an existing legal controversy.'" *Id.* (quoting *West*, 468 S.W.3d at 491). The second prong "takes into account 'whether withholding adjudication . . . will impose any meaningful hardship on the parties.'" *Id.* (quoting *West*, 468 S.W.3d at 492). The court, for example, should "decline to act 'where there is no need for the court to act or where the refusal to act will not prevent the parties from raising the issue at a more appropriate time.'" *B & B Enters.*, 318 S.W.3d at 849 (quoting *AmSouth Erectors, LLC v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 WL 21878540, at *6 (Tenn. Ct. App. Aug. 5, 2003)).[17]

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

Despite the school year being underway, the State Defendants are full-speed ahead launching the ESA program. Thus, Plaintiff Counties' claims in this case are not based on a hypothetical future event. On August 25th, Governor Lee celebrated on Twitter that applicants have been awarded acceptance into the program. That acceptance then triggers the ESA Act's reduction of MNPS and SCS's BEP payments to fund the ESA. (Am. Compl. ¶¶ 20-22, 143.) Tenn. Code Ann. § 49-6-2605(a). Defendants say fewer students means fewer costs, but that misunderstands school finance and operations. Schools cannot simply reduce costs in proportion to the number of students that leave. (*Id.* ¶¶ 174-80.) Reduction in funding detrimentally affects MNPS and SCS's ability to operate. (*Id.* ¶ 183.)

Claiming that Plaintiff Counties can fill the gap later only shifts the harm but doesn't solve the problem. LEAs are non-revenue-generating. Any shortfall in funding resulting from the ESA Act will always be the Plaintiff Counties' problem because counties fund their school districts. And Plaintiff Counties must fund at the same level next year even if enrollments decrease due to the maintenance of effort requirement. Tenn. Code Ann. § 49-3-314(c). In fact, the initial reduction in BEP funds, even if the County does not make up a shortfall, necessarily includes the local share of the BEP that *Plaintiff Counties are required by law to contribute*. Tenn. Code Ann. § 49-3-356. That is, to take the LEAs money is to take Plaintiff Counties' money. For Shelby County, the injury is even more egregious because the State Defendants have projected to take more than the ESA Act even permits. (*See* Am. Compl. ¶¶ 141-45.) The only way to conclude that Plaintiff Counties are not injured is to ignore basic principles of school funding.

In addition, whether Plaintiff Counties end up paying for one ESA or 2,500 ESAs goes to the *scope* of injury, not the *presence* of injury. The school system will be forced to operate on fewer funds than it otherwise would, shuffling staff and resources mid-school year. And Plaintiff Counties contributed those funds and intended for them to be used for students

attending the Counties' public schools—not to be diverted to private schools. Now, Plaintiff Counties lose discretion over their funding choices and will be required to fund at the same level next year even if enrollments decrease. These injuries are not hypothetical or speculative; they are the necessary result of a single ESA award. Moreover, the State Defendants' argument fails even more fundamentally because a plaintiff in a declaratory judgment action must establish the existence of a "case or controversy"–not a "present injury." *Colonial Pipeline*, 263 S.W.3d at 837-38 (citing *Cardinal Chem. C. v. Morton Int'l*, 508 U.S. 83, 95 (1993)).

With the TDOE on the verge of taking county money to pay private school tuition in only 2 of the 95 Tennessee counties, and then reimbursing private schools through direct, unauthorized payments, Plaintiff Counties' claims are ripe for review.

II. PLAINTIFF COUNTIES HAVE STANDING TO ASSERT AN EQUAL PROTECTION CLAIM.

"Standing is a judge-made doctrine" that asks whether the party bringing a claim is "properly situated to prosecute the action." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). The issue of standing "is therefore raised by a specific denial or defense (but not an affirmative defense under Rule 8.03) in the answer or responsive pleading, or by a motion to dismiss under Rule 12.02(6) or in proper cases by a motion for judgment on the pleadings under Rule 12.03, or motion to strike under Rule 12.06." *Id.* Where standing is raised in a Rule 12.02(6) motion, as here, "the issue must be framed on the face of the pleadings." *Id.*

"The primary focus of a standing inquiry is on the party, not on the merits of the claims." *Mayhew v. Wilder*, 46 S.W.3d 760, 766 (Tenn. Ct. App. 2001) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). To establish constitutional standing in Tennessee, a plaintiff must show: (1) that it has sustained a distinct and palpable injury, (2)

that the injury was caused by the challenged conduct, and (3) that the injury is one that can be addressed by a remedy that the court is empowered to give. *City of Chattanooga v. Davis,* 54 S.W.3d 248, 280 (Tenn. 2001); *In re Youngblood,* 895 S.W.2d 322, 326 (Tenn. 1995). Defendants challenge only the first of these requirements. (State Defs.' Mem. L. at 10; GP Intervenor-Defs.' Mem. L. at 44; Bah Intervenor-Defs.' Mem. L. at 15.)

A. Plaintiff Counties Suffer a Distinct and Palpable Injury Under the ESA Program.

For the same reason this case is ripe, Plaintiff Counties have standing. Plaintiff Counties' money is the heart and soul of the ESA Act. Without it, based on the State's BEP contribution to MNPS, the State would have a meager $3,300 to send students to private school in Nashville—hardly enough to fund a student's education. Defendants' suggestion that Plaintiff Counties suffer no injury here is to ignore the fiscal realities of the Act entirely.

To illustrate, under general law, in counties whose LEAs are not subject to the ESA Act, counties pay districts the required local contribution under the BEP (plus any additional funding they elect to provide) through their yearly budgeting process. (Am. Compl. ¶ 118 (citing Tenn. Code Ann. § 49-3-356).) Because of the ESA Program, in SCS and MNPS, the State will reduce SCS and MNPS's BEP payments by the amount the State would normally contribute plus the Counties' local contribution, up to the statewide average. Tenn. Code Ann. § 49-6-2605(a). And unlike any other counties in the State, the ESA Act will then require Plaintiff Counties to keep funding their LEAs at the same levels they would have funded if the ESA participating students had never left for private school. *Id.* § 49-3-314(c). The Act accomplishes this through the "counting requirement"—which triggers existing legal requirements to fund based on enrollment figures rather than requiring such funding on the face of the Act itself. *Id.* § 49-6-2605(b)(1)—a shell game at best, but one that does not save the Act from legal scrutiny. (Am. Compl. ¶¶ 20-22.)

B. The ESA Act's Singling Out of Plaintiff Counties Establishes a Distinct and Palpable Injury for Purposes of Plaintiff Counties' Claims.

Plaintiff Counties' distinct and palpable injury discussed above establishes standing for all of their claims. Defendants mischaracterize the impact of the Tennessee Supreme Court's ruling on the remaining claims. The Court did not hold, as Defendants repeatedly suggest, that the ESA Act does not *affect* Plaintiff Counties. Indeed, the Court found the opposite when determining that Plaintiff Counties had standing to assert its Home Rule Amendment claim. *Metro Gov't v. TDOE*, 645 S.W.3d at 150.

The Court certainly did not hold that the Act relieves Plaintiff Counties of their funding obligations when MNPS and SCS students use ESAs to attend private school. The Court, in construing the Home Rule Amendment, merely held that the ESA Act is not "applicable to" Plaintiff Counties under that provision because it triggers Plaintiff Counties' existing obligations to fund LEAs based on enrollment rather than requiring counties to fund the program on the face of the Act. The Court stated:

> We simply do not agree with Plaintiffs that the effects of the interplay between the ESA's counting requirement and the statutes establishing their funding obligations are enough to trigger the application of the Home Rule Amendment. While Plaintiffs may be *affected by the Act*, we do not agree with the dissent that this is enough to render the ESA Act "applicable to" them *for purposes of the Home Rule Amendment*.

Id. at 152-53 (emphasis added).

The Supreme Court has already acknowledged the "interplay" between the ESA Act's counting requirement and the counties' obligation to fund the private school education of ESA students. ***That obligation would not exist absent the Act.***[18] And nothing about the

[18] For the same reason, State Defendants' argument that the ESA Act "does not require any county to take any action whatsoever" is misleading at best. (State Defs.' Mem. L. at 15.) The Act requires LEAs to count students, which then triggers Plaintiff Counties' obligation to fund those students' education. And they must fund that education, despite it no longer taking place inside a public school building. No other counties in the State must fund the

Court's holding that because the funding obligation is not on the face of the Act itself, but is triggered by the LEA's obligation to count the students, negates Plaintiff Counties' standing to assert an equal protection claim, or any claim. Unlike it did with the Home Rule Amendment claim, the Court cannot ignore the realities of school funding in determining that the Plaintiff Counties have standing and have stated an Equal Protection Claim.

Indeed, despite three separate briefs and all Defendants raising the issue (now and at the temporary injunction stage), they cite no case holding that a classification must be overt on the face of a bill to invoke equal protection scrutiny. In fact, U.S. Supreme Court authority holds otherwise.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court analyzed a school funding scheme under the equal protection clause in the Fourteenth Amendment to the U.S. Constitution. The Court devoted an entire section of the majority opinion to ascertaining the precise "class disadvantaged by the Texas school-financing system," to determine whether it was a suspect class to invoke strict scrutiny. *Id.* at 19-29. It began its discussion noting the following:

> The case comes to us with *no definitive description of the classifying facts or delineation of the disfavored class*. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. . . . Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

Id. at 19-20 (emphasis added).

This language completely undercuts Defendants' position that a statute must address or require action of a county on its face to invoke equal protection scrutiny. If the class that

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education of private school students, and that requirement plainly would not exist without the ESA Act.

is burdened by a statute must be identified on the face of the statute to invoke equal protection review, then the Supreme Court would not have conducted a multi-page analysis in *Rodriguez* to determine whether the burdened class was "suspect," rendering it subject to strict scrutiny. Defendants' argument that equal protection scrutiny is irrelevant here because the ESA Act does not on its face regulate county conduct misunderstands equal protection law.

The question, instead, for purposes of equal protection is whether the statute treats similarly-situated groups similarly. *Tester*, 879 S.W.2d at 829 ("A] classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class *upon whom the benefit is conferred*, or who *are subject to the burden imposed*, not given to or imposed upon others should be so preferred or discriminated against.") (emphasis added).

Plaintiff Counties "are subject to the burden imposed" by the ESA Act. Without Plaintiff Counties' money, the program does not get off the ground. The fact that the burden is generated by the ESA Act's counting requirement rather than an explicit statement that Plaintiff Counties must fund the program is beside the point. The question for purposes of standing is whether Plaintiff Counties are injured by the Act.[19] The specific constitutional

[19] The State and Greater Praise Defendants argue in no uncertain terms that there is no standing for *any claim* because the ESA Act does not *on its face* require Plaintiff Counties to do the enrollment counts. They also note that the Metro Nashville School Board ("the Board") was dismissed from this action, and they claim that *McEwen* Plaintiffs do not have standing either. This would of course mean that the State of Tennessee can do whatever it chooses concerning school reform, regardless of its authority and the consequences, and no party could challenge the actions. This surely cannot be the law.

It is also worth noting that the ESA Act itself says that school boards cannot challenge it, and Defendants raised that issue in their original dispositive motions. The trial court dismissed the Board in the first round of proceedings, not because the ESA Act precluded the Board from challenging the law, but because of Plaintiff Counties' contention that MNPS is

injury for purposes of equal protection: the ESA Act triggers this funding requirement for only 2 of the 95 Tennessee counties in Tennessee, while no other counties are obligated to fund private school education—infringing both the right to local sovereignty and the right to education. The ESA Act plainly treats Plaintiff Counties differently than other counties by operation of law—without that differential treatment, the State would have no money to fund its program.

Furthermore, the Tennessee Supreme Court has already recognized in this case the infringement on constitutionally-protected sovereignty that the ESA Act generates. *Metro v. TDOE*, 645 S.W.3d at 150 ("In their claim that the ESA Act is void under the Home Rule Amendment, Plaintiffs have alleged a distinct and palpable injury to the legal interest the *Home Rule Amendment was enacted to protect—local control of local affairs*.") (emphasis added). This infringement occurring in only two counties, absent sufficient justification for the classification at issue, also establishes standing for an equal protection claim just as it did under the Home Rule Amendment. Plaintiff Counties' equal protection claim is premised not only on loss of funding, but on the ESA Act's requirement that Plaintiff Counties fund their school systems differently than any other county. (Am. Compl. ¶¶ 11, 20-22.) In other words, the classification—or the singling out—is the injury. *See Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn.1993) (noting that equal protection requires similar groups to be treated similarly) ("*Small Schools I*"). Because the Plaintiff Counties have alleged an injury that the equal protection clause is designed to protect, standing is established. *See Metro v. TDOE*, 645 S.W.3d at 150 (holding that Plaintiff Counties had

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not a legal entity distinct from the Metropolitan Government itself. The Metropolitan Government believes that is still true under the Metropolitan Charter, but the Tennessee Supreme Court implicitly rejected that argument in its ruling that the ESA Act is not subject to the Home Rule Amendment. Thus, the Court should revisit its prior ruling that the Board is not a proper plaintiff.

standing for the Home Rule Amendment claim because they alleged an injury that the Home Rule Amendment was designed to prevent).

This is no less true for Plaintiff Counties' Education Clause or *ultra vires* action claims. Again, student enrollment counts equal money, which Defendants do not dispute. And that money comes from counties. Greater Praise Defendants' argument that Plaintiff Counties will not pay any more than they would have paid if ESA students had never left their existing school districts is a strawman. The relevant inquiry is whether Plaintiff Counties would have to pay for MNPS students' attendance at private schools (not public schools, as the Education Clause contemplates) *absent the ESA Program*. They would not. A student who elects to leave Franklin High School to attend Battle Ground Academy does not generate any funding requirement for Williamson County. But in Nashville, private school attendance through the ESA Program now costs the county its entire local share, plus any additional funding the County provides, for that student—a distinct and palpable injury that would not occur absent the program's existence. And the injury would not occur *this year* if the State Defendants took the time to procure contracts and establish actual ESAs, rather than rushing the program's implementation through unauthorized direct reimbursements.

Standing is established here on all of Plaintiff Counties' claims.

III. PLAINTIFF COUNTIES HAVE ALLEGED A VIABLE EQUAL PROTECTION CLAIM.

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

as the Fourteenth Amendment to the United States Constitution, despite the[se] historical and linguistic differences." *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003) (citing *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994)); *see also Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994).[20]

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

A. Equal Protection Applies Strict Scrutiny to Fundamental Rights—Those Rights That Are Explicitly or Implicitly Protected by the Constitution.

Under the equal protection framework, one of three levels of scrutiny applies to any legislative enactment being challenged on equal protection grounds. *Gallaher*, 104 S.W.3d at 460. The highest level of scrutiny, commonly referred to as "strict scrutiny," applies to legislation that "interferes with the exercise of a fundamental right" or "operates to the peculiar disadvantage of a suspect class." *Id.* Heightened scrutiny is an intermediate level of

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

scrutiny. *Newton*, 878 S.W.2d at 109 (citing *Small Schools I*, 851 S.W.2d at 152-54). Reduced scrutiny is the lowest level of scrutiny, applying a rational-basis standard. *Id.*; *Gallaher*, 104 S.W.3d at 460. Thus, if a legislative enactment satisfies strict scrutiny, it necessarily satisfies rational-basis scrutiny as well.

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

Both federal and state courts examining equal protection claims hold that where a right is "explicitly or implicitly guaranteed by the Constitution," the right is fundamental. *Tester*, 879 S.W.2d at 828 (citing *Small Schools I*, 851 S.Wd.2d at 152); *see also Norris*, 751 S.W.2d at 841 (examining a Tennessee equal protection claim and stating, "According to the United States Supreme Court, to determine whether a particular right is deserving of the strict scrutiny analysis, the Constitution must be examined 'to see if the right infringed has its source, explicitly or implicitly, therein.'") (quoting *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982)).

B. Education Is a "Fundamental" Right Under the Tennessee Constitution.

The Education Clause in the Tennessee Constitution states the following:

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

Tenn. Const., art. XI, § 12. Unlike the U.S. Constitution, the right to an education is "explicitly guaranteed" by the Education Clause in the Tennessee Constitution. *Tester*, 879 S.W.2d at 828 (noting that a right is "fundamental" under the Tennessee Constitution when it is "either implicitly or explicitly protected by a constitutional provision"; *see also Rodriguez*, 411 U.S. at 33 (holding that education is not a fundamental right under the U.S. Constitution because it is not explicitly or implicitly conferred).

In *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715 (Tenn. 2012), the Tennessee Supreme Court acknowledged this "constitutional imperative" to provide all school-aged children with "the opportunity to obtain an education," holding that that a student had a "constitutionally protected right to a public education," which is implemented through statutory law and thus protected by procedural due process. *Id.* at 731-32.

Nonetheless, Defendants argue that education is not a fundamental right, proclaiming that no court has held as much. But the fact that a court has not ruled on an issue hardly dictates the outcome of the legal question; courts rule on issues of first impression all the time. Nor does the Supreme Court's decision in *Small Schools I* not to address the question of whether education is a fundamental right bolster Defendants' position. There, the Court exercised judicial restraint and did not answer a constitutional question that it did not have to answer because the State's education funding formula easily failed the rational basis test. *Haynes v. City of Pigeon Forge*, 883 S.W.2d 619, 620 (Tenn. Ct. App. 1994) ("As to the constitutional issue, under Tennessee law, our courts do not decide constitutional questions unless the issue's resolution is absolutely necessary for determination of the case and the rights of the parties."). Here, the Court may determine that education is a fundamental right and that strict scrutiny applies, or that the State

Defendants' shameless targeting of two out of 95 counties does not survive rational basis review.

Defendants argue that even if fundamental, the right to an education is a right of students, not of Plaintiff Counties and not of Plaintiff Counties' LEAs'. But this argument fails to recognize the ways in which the impacts to each group overlap. Again, the right to an education is "explicitly guaranteed" in the Tennessee Constitution through the Education Clause. Tenn. Const., art. XI, § 12. Instead of accomplishing this mandate through adequate State funding, the ESA Act fundamentally impairs two LEAs' ability to provide an education by taking millions of dollars from them, and then shifts the burden to Plaintiff Counties to solve the problem. And because the Act infringes on the right to an education, as here, it necessarily impairs the LEAs' ability to educate students and the Plaintiff Counties' ability to fund that education.

C. The Tennessee Supreme Court Has Already Ruled that the ESA Act Infringes on a "Fundamental" Right Under the Tennessee Constitution.

In ruling that Plaintiff Counties had standing to assert a claim under the Home Rule Amendment in this case, the Tennessee Supreme Court recognized the ESA Act's infringement on constitutionally-protected sovereignty:

> In their claim that the ESA Act is void under the Home Rule Amendment, Plaintiffs have alleged a distinct and palpable injury to the legal interest the *Home Rule Amendment was enacted to protect—local control of local affairs*. Accordingly, having concluded that Plaintiffs satisfied their burden of establishing standing by alleging the ESA Act violates their *constitutionally protected interest in local control of local affairs*, we affirm the Court of Appeals' decision that Plaintiffs have standing to challenge the constitutionality of the Act under the Home Rule Amendment.

Metro v. TDOE, 645 S.W.3d at 150 (internal citations omitted) (emphasis added). This conclusion is fatal to Defendants' claims of a wall of separation between Plaintiff Counties, the LEAs they fund, and the students that their LEAs educate. Whether the Act's infringement on education specifically constitutes a right of Plaintiff Counties or not, its

infringement on local sovereignty unquestionably does. And for purposes of the Tennessee Constitution (and U.S. Constitution, for that matter), a right is "fundamental" when it is "either implicitly or explicitly protected by a constitutional provision." *Tester*, 879 S.W.2d at 828 (citing *Small Schools I*, 851 S.Wd.2d at 152); *Rodriguez*, 411 U.S. at 33.

Regardless of whether the General Assembly managed to sidestep Home Rule Amendment applicability through its creative "triggering" of existing funding requirements, the Supreme Court acknowledged that the pleadings in this case established an infringement on the "constitutionally protected interest in local control of local affairs." *Metro v. TDOE*, 645 S.W.3d at 150. Thus, under *Tester*, the ESA Act infringes on a fundamental right that belongs exclusively to local governments, and strict scrutiny applies.

D. <u>The ESA Act Cannot Survive Strict Scrutiny</u>.

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

The State cannot meet this taxing burden. In fact, Defendants do not even try, effectively conceding the ESA Act is not narrowly tailored to any compelling state interest.

The ESA Act makes bold claims about the State's interest and the General Assembly's intentions, stating:

> The general assembly recognizes this state's legitimate interest in the *continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis.* Accordingly, it is the intent of this part to establish a pilot program that provides funding for access to additional educational options to students who

> reside in LEAs that have consistently and historically had the lowest performing schools.

Tenn. Code Ann. § 49-6-2611(a)(1) (emphasis added). Defendants repeatedly ignore the first sentence (the actual pronouncement of the "state's legitimate interest"), instead suggesting that the second sentence (the *means* by which the State seeks to achieve its goal) is the goal itself. Greater Praise Intervenor-Defendants go so far as to argue that "[t]he Counties are trying to substitute their own legitimate state interest for the one chosen by the state." (GP Mem. L. at 23.)

But Plaintiff Counties did not select the "state's legitimate interest in the *continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis*" on its own. Plaintiff Counties pulled the quotation directly from the statute itself. Nor did Plaintiff Counties argue out of whole cloth that the statute's stated *means* for achieving this goal of improving under-performing districts is to take money from them and encourage students to leave them to attend private school. The statute speaks for itself on that point as well. Defendants' attempt to distance themselves from the statute's plain language merely underscores the absurd disconnect between its stated "legitimate interest" and its attempted means of achieving it.

There is no connection, in fact, between the "state's legitimate interest," as that term is used in the statute, and the means for achieving it. Despite the State purportedly having a legitimate interest in *improving the performance of LEAs*, the ESA Act *removes funding* from those LEAs—in this instance, in the middle of a school year. And it permits students to leave the LEA, even students in the highest-performing schools in those LEAs, to use those public funds to attend private schools. Any claim that diverting money and students away from LEAs is narrowly-tailored or even loosely-related to a desire to improve those LEAs' performance is nonsensical.

The outright refusal of legislators to vote for the Act if their own counties were included in its application emphasizes this flaw. If, as the General Assembly contends, the ESA Act was passed to improve the performance of the LEAs to which it applies, then there would have been no need to "protect" other counties from its application. And the bill certainly would not have required back-room deals to pass by a bare majority. The General Assembly had no intention of improving the performance of the LEAs in Davidson and Shelby counties when it passed the ESA Act, nor does the Act have any plausible chance of doing so. Removing BEP funding from an LEA certainly is not the least restrictive means of improving school performance in *that* school district.

Importantly, the ESA Act does not provide students in *low-performing schools* with the right to use public funds to attend private school. It gives *any student* meeting the income threshold the right to do so—even students attending the highest performing schools in MNPS or SCS. Tenn. Code Ann. § § 49-6-2602(3)(C). There is no connection between the purported legitimate purpose of improving historically under-performing schools and the definition of "eligible student" under the Act. The Act did not define "eligible student" based on any data earlier than 2015, and the data used reflects multiple counties with equally-poorly performing schools as a percentage of the district. In fact, Hamilton, Fayette, and Madison counties' school performance declined during the time period on which the General Assembly relied, yet those counties were excluded from the Act's application.

To illustrate, in 2015, 15 out of 151 Davidson County schools (9.9%) and 45 out of 217 Shelby County schools (20.7%) were in a priority status. (Am. Compl. ¶ 31.) The same year, 5 out of 78 Hamilton County schools (6.4%), 4 out of 89 Knox County schools (4.5%), and 2 out of 27 Madison County schools (7.4%) were in a priority status. (*Id.*)

In 2017, the TDOE identified 168 (later reduced to 166) schools from 14 LEAs as bottom 10% schools. (*Id.* ¶ 33.) In 2017, 41 out of 163 Davidson County schools (25.2%) and

65 out of 206 Shelby County schools (31.6%) were on the bottom 10% list. (*Id.* ¶ 34.) The same year, 2 out of 7 Fayette County schools (28.6%), 13 out of 78 Hamilton County schools (16.7%), 7 out of 90 Knox County schools (7.8%), and 8 out of 23 Madison County schools (34.8%) were on the bottom 10% list. (*Id.*) Stated differently, Fayette County had a higher concentration of bottom 10% schools than Davidson County, and Madison County had a higher concentration than Davidson or Shelby counties. (*Id.*)

In 2018, 82 schools comprised the priority list. (*Id.* ¶ 35.) Sixty-four of those schools came from seven LEAs, with the other eighteen schools in the ASD. (*Id.*) In 2018, 21 out of 159 Davidson County schools (13.2%) and 27 out of 200 Shelby County schools (13.5%) were in a priority status. (*Id.* ¶ 36.) The same year, 1 out of 7 Fayette County schools (14.3%), 9 out of 78 Hamilton County schools (11.5%), and 4 out of 21 Madison County schools (19.0%) were in a priority status. (*Id.*) In addition, Hamilton and Madison counties experienced a significant downgrade in 2018 from their previous priority school listings in 2015. (*Id.* ¶ 37.) In other words, Madison and Fayette counties had a higher concentration of priority schools on the 2018 priority list than Davidson or Shelby County, and Hamilton County's concentration was only slightly lower. (*Id.*)

These counties were omitted from the ESA Act's application, not because their districts were performing well, but because the bill would not pass without removing them. (*Id.* ¶ 73 (quoting Rep. Jason Zachary, who cast the deciding vote, as requesting that Knox County be "held harmless" and that he "support[s] the premise of ESA, but [he] couldn't do it unless Knox County was taken out").) Because the General Assembly could have—and should have—taken myriad other steps to help low-performing districts or low-performing students improve, the ESA Act is not narrowly-tailored to its purported interest, or any compelling state interest. Instead, the General Assembly elected to target two counties, by

diverting their BEP funding to private schools, despite those LEAs having the highest number of schools and students in the state to educate, and despite those LEAs performing no worse than three other counties that were "protected" from the bill. And it did so because the bill was so unpopular that it could not pass without removing LEAs in 93 out of 95 counties from its application. These political tactics hardly satisfy the rigorous strict scrutiny standard.

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

Even if rational-basis scrutiny were to apply here, the ESA Act nonetheless violates equal protection. A classification with "no reasonable or natural relation to the legislative objective" does not satisfy the rational-basis test under the equal protection clauses. *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978). "The core concern expressed in this constitutional provision is that legislative classification, to the extent that it exists, not be unreasonable or unfair." *Burson*, 816 S.W.2d at 731. As the Tennessee Supreme Court has described:

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

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

The ESA Act does not meet this standard. As outlined above, there is no logical connection between the State's purported "legitimate interest in the continual improvement

of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis" and the ESA Act's method of purportedly accomplishing that goal. Tenn. Code Ann. § 49-6-2611(a)(1). If the General Assembly had *any interest* in improving school performance in Davidson or Shelby counties, it would not have removed millions of dollars in funding and students from those LEAs—potentially even from their high-performing schools—via the ESA Act.

But even if the Court ignores the purported "legitimate interest" that the State claims to have in this legislation, the Act fares no better. There is no rational basis for the ESA Act's inclusion of all qualifying students in Davidson and Shelby counties, *even those attending high-performing schools*, while excluding qualifying students in other Tennessee counties zoned to low-performing schools. To reiterate, the ESA Program eligibility is not limited to qualifying students in *low-performing schools* across the state. Certainly Fayette, Hamilton, Madison, and myriad other counties would be included if that were the case. There is no rational relationship between the ESA Act's exclusion of qualifying students in low-performing schools in Tennessee outside of Davidson and Shelby counties and any purported desire to provide better educational opportunity to students in low-performing school systems.

Defendants argue that Fayette and Madison counties' LEAs may have been excluded because they are smaller districts. But that renders the classification less rational, not more rational. If, as Defendants contend, ESAs truly are a lifeline to better school performance, then there is no reason why a relatively small *number* of students would not have been provided access, when such access would increase the overall cost of the program marginally but could have a significant impact on a large portion of the small district students' lives. A simple Google search reveals myriad private schools in Madison and Fayette counties. And Fayette County is just across the county line from Shelby County. Additionally, the ESA Act

permits payment of expenses outside of Davidson and Shelby counties. The fact that there are *fewer* private schools in smaller districts than in Nashville and Memphis is hardly a hurdle to implementation.

Nor does the ESA Act's reference to it being a "pilot" program serve as a rational basis because that reference is a fallacy. There was no mention of the term "pilot" until the very last amendment to the Senate bill (SA0417)—the bill whose "eligible student" definition (applying only in Davidson and Shelby counties) was ultimately recommended by the Conference Committee and adopted in both houses. (Am. Compl. ¶¶ 90, 104-05.) But unlike true pilot programs, which do not exist in perpetuity, the ESA Act will remain law and apply only in Davidson and Shelby counties unless and until the General Assembly passes new legislation. *See Easterly v. Harmon*, No. 01A01-9609-CH-00446, 1997 WL 718430, at *1 (Tenn. Ct. App. Nov. 19, 1997) ("As part of this pilot program, the state paid for an additional part-time employee to work in the County Clerk's office *for a short period of time. When the period of time for the pilot program expired*, Easterly maintains that she received the approval of the Commission's budget committee to hire the temporary part-time employee as a permanent full-time employee." (emphasis added)); *State v. Matlock*, No. M200601141CCAR3CD, 2007 WL 1364650, at *2 (Tenn. Crim. App. May 9, 2007) ("On redirect examination, Parker testified that the Defendant would have to wear his GPS monitor *as long as the pilot program is enacted*, and then it would be up to the Legislature to determine whether the program would continue." (emphasis added)); *Smith v. Bd. of Prof'l Responsibility of Sup. Ct. of Tenn.*, 551 S.W.3d 712, 715 (Tenn. 2018) ("Following this program, Attorney completed a *ten-week pilot program* involving cognitive behavior that was led by his probation officer." (emphasis added)).

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

Equal protection "guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Norris*, 751 S.W.2d at 841 (quoting *F.S. Royster Guano Co.*, 253 U.S. at 415). The ESA Act comes nowhere near that. There is no identifiable, rational basis for the ESA Act's application to only Davidson and Shelby counties. Accordingly, Defendants' motions to dismiss and for judgment on the pleadings should be denied.

IV. PLAINTIFF COUNTIES HAVE ALLEGED A VIABLE EDUCATION CLAUSE CLAIM IN COUNT II OF THE AMENDED COMPLAINT.

For the reasons outlined in Section IV.B. of the *McEwen* Plaintiffs' consolidated response to Defendants' motions to dismiss and for judgment on the pleadings, Plaintiff Counties also state a viable claim under the Education Clause (also Count II in the *McEwen* Plaintiffs' Amended Complaint). Plaintiff Counties adopt and incorporate these arguments by reference in the interest of judicial economy.

V. PLAINTIFF COUNTIES HAVE ALLEGED A VIABLE CLAIM FOR *ULTRA VIRES* ACTION IN COUNT III OF THE AMENDED COMPLAINT.

The ESA Act sets up a statutory scheme by which ESAs—that is, actual "accounts"—are created and into which the State deposits money to be used by participating *students and families*. For example, the ESA Act states:

- "'ESA' means an education savings ***account*** created by this part." Tenn. Code Ann. § 49-6-2602(4) (emphasis added).

- "***The department shall remit funds to a participating student's ESA*** on at least a quarterly basis." *Id.* § 49-6-2605(b)(1) (emphasis added).
- "'Eligible student' means a resident of this state who:

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

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

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

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

In a rush to get the ESA Program up and running as quickly as possible, the State Defendants are ignoring these statutory requirements. Instead, they have declared that they will issue reimbursements directly to private schools for the 2022-23 school year, as opposed to making deposits into participating students' ESAs for the students to use to pay education expenses. (Am. Compl. ¶¶ 49-50.) This is because the State Defendants still must procure contracts for the operational platform that will be utilized for the ESA accounts themselves. (*Id.*) But implementing the ESA Program through direct reimbursements to private schools rather than through use of ESAs as the statutory scheme contemplates is *ultra vires*.

Bah Intervenor-Defendants argue that the procedure the TDOE proposes is not *ultra vires* because participating families still dictate where the money goes. (Bah Mem. L. at 15.)

But nothing in the ESA Act permits the TDOE to use whatever processes it chooses *so long as* the participating family has a say in the expenditure. To the contrary, the statutory scheme sets forth very specific requirements about money being deposited into ESAs (actual accounts) and how often the deposits must be made. Tenn. Code Ann. § 49-6-2605(b)(1). Nothing in the statute suggests an alternative method, even if subject to oversight by participating families. The statute also requires TDOE to implement fraud protection measures to prevent misuse of funds. *Id.* § 49-6-2607(b).

Nor is there merit to Greater Praise Intervenor-Defendants' argument that the "accounts" contemplated by the ESA Act are mere "writing on a ledger" and "not a physical depository of dollar bills." (GP Mem. L. at 35.) An "ESA" under the Act "means an education savings account created by this part," and "[t]he department shall ***remit funds*** to a participating student's ***ESA*** on at least a quarterly basis." Tenn. Code Ann. §§ 49-6-2602(4), -2605(b)(1) (emphasis added). Funds are dollars.[21] The statute even contemplates participating families obtaining pre-approval before using "ESA funds" on tuition or other education expenses. *Id.* § 49-6-2607(b). Greater Praise's strained argument does not salvage TDOE's unauthorized, rushed effort to implement an ESA Program without "ESAs."

Notably, the State Defendants' five-sentence argument about the *ultra vires* claim says nothing of ESAs purportedly representing "writing on a ledger" as opposed to actual accounts with funds in them. Instead, the State Defendants merely argue that the TDOE can "maintain accounts and decide the process through which the funds will be paid and verified,"

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[21] *See* Tenn. Code Ann. § 49-6-2607(b) ("The department shall establish and maintain separate ESAs for each participating student and shall verify that the ***uses of ESA funds*** are permitted under § 49-6-2603(a)(4) and institute fraud protection measures."), -2607(c) ("To document compliance with subsection (a), participating schools, providers, and eligible postsecondary institutions shall provide parents of participating students or participating students, as applicable, with a receipt for ***all expenses paid*** to the participating school, provider, or eligible postsecondary institution ***using ESA funds***.") (emphasis added).

citing Tenn. Code Ann. § 49-6-2607(b). (State Defs.' Mem. L. at 18.) Again, the statute to which they cite establishes otherwise. It reads:

> The department shall establish and maintain separate ESAs for each participating student and shall verify that the uses of ESA funds are permitted under § 49-6-2603(a)(4) and institute fraud protection measures. Use of ESA funds on tuition and fees, computer hardware or other technological devices, tutoring services, educational therapy services, summer education programs and specialized afterschool education programs, and any other expenses identified by the department must be preapproved by the department. Preapproval shall be requested by completing and submitting the department's preapproval form. The department shall develop processes to effectuate this subsection (b).

Tenn. Code Ann. § 49-6-2607(b).

This subsection of the ESA Act does not permit the TDOE to dictate the process for *how and to whom funds will be paid*. It requires the TDOE to outline processes to effectuate this "*subsection*," that is, processes to prevent fraud and ensure that funds are being used on appropriate, pre-approved expenses. The State Defendants completely ignore the requirement in Section 49-6-2605(b)(1) for funds to be paid into ESAs, for use by participating families, at least on a quarterly basis—action that cannot occur in the absence of actual accounts. If State Defendants have not acquired the infrastructure for such accounts, then they should not be permitted to move forward with the program. The motions to dismiss and for judgment on the pleadings on the *ultra vires* claim should be denied.

CONCLUSION

Defendants' motions to dismiss and for judgment on the pleadings should be denied. The Amended Complaint states viable Equal Protection, Education Clause, and *ultra vires* claims arising out of the ESA Program's application to only two counties in the State of Tennessee absent a narrowly-tailored compelling interest, the Act's permissive payment of public funds to support private schools, and the State Defendants' rushed effort to implement

the program in a manner that the Act itself does not authorize. Accordingly, the Court should deny Defendants' motions.

Respectfully submitted,

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