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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. TENNESSEE DEPARTMENT OF EDUCATION, *et al.*, Defendants, and NATU BAH, *et al.*, Intervenor-Defendants.	)	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith **CONSOLIDATED**

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

<u>PLAINTIFF COUNTIES' REPLY IN SUPPORT OF</u>
<u>MOTION FOR TEMPORARY INJUNCTION</u>

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

(collectively, "Plaintiff Counties"), submit this collective reply to the State Defendants and Intervenor-Defendants' responses to Plaintiff Counties' motion for temporary injunction.

I. <u>Plaintiff Counties' Equal Protection Claim Is Ripe for Review</u>.

Despite pressing forward with the ESA Program mid-school-year, collecting Intent to Enroll forms, posting on social media to boost applications, and traveling across the State to encourage private school participation, the State Defendants now maintain their long-held position that there is no live controversy for the Court to resolve here. The State Defendants' stance is at odds with August 1, 2022, letters that Defendant Tennessee Department of Education ("TDOE") sent to the Metropolitan Nashville Public School System ("MNPS") and Memphis-Shelby County Schools ("SCS") informing the districts to anticipate hundreds of students participating in the ESA program. (Aug. 1, 2022, Letters, attached as collective Exhibit A.) State Defendants' ripeness argument fails, both because there is a present injury to Plaintiff Counties and because present injury is not required to establish ripeness in any event.

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)).

Plaintiff Counties' equal protection claim is not based on some hypothetical future event—the TDOE is full-speed ahead launching the ESA program, even mid-school-year. As soon as one ESA is awarded, the State will reduce MNPS and SCS's BEP payments to fund that ESA. Whether that is one ESA or 5,000 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 at the outset of a school year.

Contrary to Defendants' argument that this harm, if any, is only to the LEAs, reducing LEAs' BEP (or TISA) funding necessarily includes the local contribution that *Plaintiff Counties* provide to their LEAs—by law[1]—up to the statewide average. Aside from a PTO or booster club that raises money for a particular school, LEAs are *non-revenue generating*. If school districts have money, it is because the Counties that fund them, or to a much smaller degree in Nashville, the State, gave it to them. To take money from MNPS or SCS to fund an $8,192 ESA is *necessarily to take money from Plaintiff Counties*.[2] This is particularly true because the LEAs must count ESA students in their enrollments, which means Plaintiff Counties must fund the LEAs for those students in future years. That injury is present the moment an ESA is issued, and State Defendants have made very clear that will happen this school year. If the reduction is great enough, the districts may be forced to seek supplemental

[1] Tenn. Code Ann. § 49-3-356.

[2] The statewide average exceeds the State's contribution to SCS and MNPS by thousands of dollars per pupil. Thus, when the State takes ESA money from the LEAs, it necessarily takes County money.

appropriations from Plaintiff Counties. Then, Plaintiff Counties must appropriate the needed funds or bear the political and public interest consequences of their decision not to.

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 Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008) (citing *Cardinal Chem. C. v. Morton Int'l*, 508 U.S. 83, 95 (1993)). With the TDOE on the verge of taking public money to pay private school tuition in only 2 of the 95 Tennessee counties, a case or controversy is indisputably present here. If the Court does not rule, that will happen. This case is ripe, and the Court should dismiss the State's argument out of hand.

II. <u>Plaintiff Counties Have Standing to Assert an Equal Protection Claim</u>.

"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 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. & Greater Praise Intervenor-Defendants' ("GP") Resps. at 5.)

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. The State also pays the district the required State contribution under the BEP, through quarterly payments. (See Henson Decl. ¶¶ 9-11, attached to Bussell Decl. as Ex. 17.) But in SCS and MNPS, the State will reduce those quarterly BEP payments by the amount the State would normally contribute plus the Counties' local contribution, up to the statewide average. The ESA Act will then require Plaintiff Counties to keep funding the LEAs at the same levels they would have funded if the students had never left. The Act accomplishes this by triggering existing legal requirements to fund based on enrollment figures rather than on the face of the Act itself—a shell game at best, but one that does not save the Act from equal protection scrutiny.

Again, student enrollment counts equal money, which Defendants do not dispute. And that money comes from counties—also undisputed. Defendants' argument, which barely carried the day with a divided Supreme Court under the Home Rule Amendment, suffers a different fate under a different constitutional provision. Despite three separate briefs and all Defendants raising the issue, they cite no case holding that a classification must be overt on the face of a bill to invoke equal protection scrutiny.

In fact, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which analyzed a school funding scheme under the equal protection clause in the Fourteenth Amendment to the U.S. Constitution, completely undercuts Defendants' position. There, the Court devotes 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). If the class that 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 to determine whether the burdened class was "suspect," rendering it subject to strict scrutiny. Defendants' argument that equal protection scrutiny is irrelevant 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:

> [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.

State v. Tester, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 775 (Tenn. 1911) (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. The specific 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.[3] 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.[4]

Furthermore, the Tennessee Supreme Court has already recognized in this case the infringement on constitutionally-protected sovereignty that the ESA Act generates. *Metro. Gov't of Nashville & Davidson Cty. v. TDOE*, 645 S.W.3d 141, 150 (Tenn. 2022) ("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

[3] Defendants argue that injury is lacking here because LEAs lose students, and the funding that "follows" those students, for myriad reasons including change of residence, attendance at charter schools, or the pandemic. First, LEAs do not generally lose funding *immediately* when a student moves out of a district altogether, as they do under the ESA Act. Under normal circumstances, a relocated student is simply excluded from the LEA's count that would generate state and local funding the *following year*. Moreover, this argument misses the point. The constitutional harm here comes not only from the loss of students and loss of accompanying funding. The harm comes from the loss of students to private school and the requirement that Plaintiff Counties fund those students *as compared to their peer counties* who do not. By contrast, the General Assembly passed a *statewide* charter school law that affects all counties funding LEAs (which *include* charter schools) in precisely the same manner. The financial and operational harm that such a law may generate, while likely to constitute *injury*, does not invoke the same *equal protection injury* as the General Assembly's private school funding scheme, which takes funding from only two counties.

[4] State Defendants undermine their argument that Counties have no injury in a later section of their brief. They argue that MNPS and SCS "will be better able to absorb any financial impact associated with the loss" of ESA students, thus justifying the classification. (State Resp. at 10.) But the only reason an LEA could better absorb financial loss than another LEA is if its County picks up the tab. Again, loss to the district necessarily means injury to the County because it's the county's money.

other county. 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. Gov't of Nashville & Davidson Cty.*, 645 S.W.3d at 150 (holding that Plaintiff Counties had standing for the Home Rule Amendment claim because they alleged an injury that the Home Rule Amendment was designed to prevent).

III. **Plaintiff Counties Are Likely to Succeed on the Merits of an Equal Protection Claim.**

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 Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (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)).

Adhering to this principle, in *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715 (Tenn. 2012), the Tennessee Supreme Court ruled that education is a "constitutionally protected right" for due process purposes based on the Tennessee Constitution's Education Clause. *Id.* at 731-32. Attempting to downplay this conclusion, the Greater Praise Intervenor-Defendants argue that the right at issue in *Heyne* was a statutory, not a constitutional right. That ignores the Court's finding that the statutory scheme was the means by which the General Assembly fulfills its "*constitutional imperative*" to provide a free,

public education to school-age children. *Id.*; *see also id.* at 732 ("Having determined that Mr. Heyne has a *constitutionally protected right* to a public education . . . .") (emphasis added).

Small Schools I does not alter the conclusion that education is a fundamental right for equal protection purposes. There, the Court exercised judicial restraint and did not answer a constitutional question that it did not have to answer, as the law failed the rational basis test. Here, the Court can 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 counter that even if fundamental, the right to an education is a right of students, not of Plaintiff Counties' and not of Plaintiff Counties' LEAs'. This argument fails on several fronts. First, it fails to recognize the ways in which the impacts to each group overlap. The right to an education is "explicitly guaranteed" in the Tennessee Constitution through the Education Clause. Tenn. Const., art. XI, § 12 ("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."). 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.

The Tennessee Supreme Court has already recognized in this case the infringement on constitutionally-protected sovereignty that the ESA Act generates:

> 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. Gov't of Nashville & Davidson Cty., 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 plainly acknowledged that the pleadings in this case establish an infringement on the "constitutionally protected interest in local control of local affairs." *Metro. Gov't of Nashville & Davidson Cty.*, 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.[5]

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[5] Defendants also overstate the impact of the Tennessee Supreme Court's rejection of the Home Rule Amendment claim on the remaining claims pending before the Court. The Court did not hold, as Defendants repeatedly suggest, that the ESA Act does not affect Plaintiff Counties and does not require them to take certain action. The Court merely held that the ESA Act is not "applicable to" Plaintiff Counties, as that term is used in the Home Rule Amendment. *Metro. Gov't of Nashville & Davidson Cty.*, 645 S.W.3d at 152-53 ("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*." (emphasis added)). 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.

Defendants' argument also effectively carves out *any* challenge to the ESA Act. The Act itself says that school boards cannot challenge it, though the trial court dismissed the Metro Nashville School

Application of strict scrutiny to the ESA Act is fatal, as Defendants have not attempted to argue that the Act is narrowly tailored to a compelling state interest.

But even if rational basis were to apply, the law does not survive. 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).

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. Further, Defendants' claims of access to private schools is belied by a simple Google search, which reveals myriad private schools in Madison and Fayette counties. The fact that there are *fewer* private schools in smaller districts than in Nashville and Memphis is hardly a hurdle to implementation.

IV. Irreparable Harm Will Ensue if an Injunction Is Not Issued.

A. *Both LEAs and Plaintiff Counties Are Harmed, and Harm to One Causes Harm to Another.*

For the reasons described in Section I and II above, the ESA Act causes immediate harm to *both* Plaintiff Counties and their LEAs. Harm to the LEA transpires immediately upon

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Board for an unrelated reason that the Supreme Court's ruling seemingly implicitly overrules through its finding that Metro Nashville is legally-distinct from MNPS. Regardless, Defendants also now say that because the ESA Act does not regulate Counties (for purposes of the Home Rule Amendment), Plaintiff Counties cannot challenge the law. Unsurprisingly, State Defendants also argue that the *McEwen* Plaintiffs have no standing to challenge the law, which necessarily means the State of Tennessee can do whatever it chooses as it pertains to school reform regardless of the consequences. This certainly cannot be the law.

issuance of one ESA, when BEP dollars are deducted from quarterly payments and operations are affected. Because that ESA is funded by local dollars—dollars that the LEA does not generate itself—the County is necessarily harmed too. Defendants' arguments otherwise seek to complicate a simple issue. Plaintiff Counties will always bear the financial burden of this program. Whether a student leaves using the base amount under TISA, a larger amount due to the particular student's weights under TISA, or the statewide average under the BEP—it's all still county money being dumped into the program. And no counties in Tennessee other than Shelby and Davidson must fund the private education of students who do not attend public schools in their district.

Whether Plaintiff Counties could have pre-planned for the State's rushed, one-month implementation is beside the point. The only solution that such pre-planning would have generated is *more money*—more financial harm.[6] And with every increase in an MNPS or SCS budget, Plaintiff Counties are now locked into funding at that same level due to maintenance of effort requirements.

Moreover, there is no requirement that this funding loss be so high that Plaintiff Counties are threatened with insolvency, nor are Plaintiff Counties suggesting as much. Plaintiff Counties must show only that the harm is irreparable, which is the case when money damages will not "fully compensate" for the injury. *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 468 F. Supp. 3d 940, 951-52 (W.D. Mich. 2020), *appeal dismissed*, 843 F. App'x 707 (6th Cir. 2021). While impending insolvency is an example of such a circumstance, the same is true where damages are difficult to calculate or simply not

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[6] The Bah Intervenor-Defendants' argument that Plaintiff Counties should have planned ahead also ignores the complexities of government finance. School budgets and city budgets are developed far in advance of the July 1 budget deadline under state law. That a divided Supreme Court rejected the Home Rule Amendment claim on May 18, 2022, a mere two weeks before the private school seat assignment deadline contained in former TDOE Deputy Commissioner Amity Schuyler's affidavit, hardly mandated a complete rewriting of those complex budgets for the upcoming school year.

available at all. Despite the Greater Praise Intervenor-Defendants' protestations that any harm is compensable with money damages, this is a declaratory judgment action against the State of Tennessee, which also seeks an injunction. The State Defendants presumably would have asserted sovereign immunity if Plaintiff Counties brought a claim for damages. *See Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992) ("We have held, however, in prior cases that we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer."); *Morton v. State*, No. M200802305COAR3CV, 2009 WL 3295202, at *2 (Tenn. Ct. App. Oct. 13, 2009) ("While the State has consented to suit for damages relative to the categories of claims set forth in Tenn. Code Ann. § 9-8-307(a)(1), it has not waived its immunity from suit for claims for constitutional law violations under the state or federal constitutions."). And even if the Court were to order the State to increase funding *next year* as part of an injunction, if Plaintiff Counties are forced to fill a funding gap for their districts out of anything other than reserves, the maintenance of effort statute would require Plaintiff Counties to fund at that same level in future years. Thus, the harm to Plaintiff Counties is not repaired by a later payment of money to the LEAs.

B. The Grant Program Does Not Alleviate Harm to the LEAs, Much Less the Counties.

Nor does the grant program alleviate the irreparable harm for numerous reasons. It only provides grants for lost BEP funding for the first three years. Tenn. Code Ann. § 49-6-2605(b)(2)(A). It provides no grant funding for students who were not enrolled for one full year immediately before their participating year, such as when a student enters kindergarten or moves into the district, as Greater Praise Intervenor-Defendants readily admit. (GP Resp. at 35.) They argue that this is inconsequential because the LEAs had not planned on that enrollment, but this ignores the reality that districts also do not typically lose BEP funds for students who never darken their school doors.

Moreover, the grant program is "subject to appropriation" under the ESA Act, Tenn. Code Ann. § 49-6-2605(b)(2)(A), and the appropriation for year one looks grim if the program has even greater than 50% enrollment. (Governor's 2022-23 Budget Book at B-108-109, attached as Exhibit B (allocating approximately $29 million, $2.4 million of which is dedicated to "Payroll," for the ESA Program, which is described in the Budget Book as "Non-Public Education Choice Programs); General Assembly Appropriations Bill at 6, attached as Exhibit C (appropriating $29 million).) $27 million barely covers the LEAs' cost for 3,100 ESAs at $8,684 each.[7] And that does not account for any contracting costs, which the State will necessarily incur if it elects to comply with the statute's requirement to set up actual accounts for participating students rather than simply writing checks to private schools.

The TDOE told SCS and MNPS, via letters issued August 1, 2022, that the LEAs will receive $8,192 for each of the 1,871 students currently enrolled at MNPS or SCS and who completed "Intent to Enroll" forms, if the students are accepted into the program. (Aug. 1, 2022, Letters, Ex. A (identifying 499 students in MNPS and 1,372 in SCS).) But the letters do not indicate when the LEAs will receive this grant funding or how long it will take to process requests after the LEAs may apply for the funds. Nor do the letters account for the remaining 314 families, which, if eligible to participate, would not generate grant funds since they are not enrolled in MNPS or SCS schools. Finally, the letters do not state whether the 2,185 families who completed "Intent to Enroll" forms are the only families that may apply to participate in the program, which again, raises questions as to whether the General Assembly's appropriation is sufficient to cover all participants.

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[7] Notably, the grant reimburses the ESA amount, which is $8,192, not the full amount of lost funding, which includes the 6% administrative fee, totaling $8,684.

But even if the grants were sufficient to cover *all* of the LEAs' costs and were issued before they had to scramble to shift operations and resources or seek a supplemental appropriation, the program does nothing to salvage the harm to Plaintiff Counties. Plaintiff Counties are and will always be responsible for funding the school system at the same level they would if ESA students never left for private school—regardless of any influx of money to the LEAs. And city funding is a zero-sum game. As discussed above, this law forces Plaintiff Counties to plan differently, budget differently, and move money differently than every other county in Tennessee for students attending non-public schools. That classification in and of itself is a harm to Plaintiff Counties.

V. The Balance of Harms Weighs In Favor of an Injunction.

The balance of harms also weighs in favor of an injunction here. If the State Defendants launch the ESA program and then it is declared unconstitutional, the individuals that suffer the most will again be the students. While Intervenor-Defendants claim that they are trapped in failing schools, the record establishes otherwise. Certainly as of May 2020, when MNPS and SCS responded to Defendants' motions to stay the injunction the Court originally issued in this case, those parents became aware of the myriad school choice options in MNPS and SCS that were available to their children. (*See* Declarations of Jenai Hayes & Angela Hargrove, filed May 7, 2020, respectively.) Their decision to keep their children in the same schools for the past two years was one of their own choosing and, in fact, completely undermines their claims of continued harm here.

The same remains true today. Both MNPS and SCS have myriad school choice options available to students in their districts—just as they did two years ago. (Metropolitan Nashville Public Schools, "School Options: A School for Every Student," *available at* https://www.mnps.org/learn/register-for-school/school-options; Memphis-Shelby County Schools, School Choice, *available at* https://www.scsk12.org/schoolchoice/.) Despite this,

Intervenor-Defendants Natu Bah, Builguissa Diallo, and Star-Mandolyn Brumfield all filed declarations this week reflecting that their children are still attending the same schools they attended in 2020. If Intervenor-Defendant Parents were "desperately trying to avoid" their children attending failing schools, as their attorneys claim, they certainly could have taken advantage of these many options instead of waiting on two years of court process. Intervenor-Defendants' refrain that students in Memphis and Nashville are ever trapped in their schools is simply false.

Nor does the public interest support implementation of the ESA Program. The State Defendants have not even responded to Plaintiff Counties and the *McEwen* Plaintiffs' stated concern that the State plans to ignore the ESA Act's statutory mandate of establishing actual accounts for students, instead making direct payments to private schools in the upcoming school year. This blatant disregard for rule of law should not be tolerated, and it certainly flies in the face of the public interest to permit such brazen actions to proceed unrestrained. An injunction is needed in the short term, both to prevent the irreparable harm that the program will cause to Plaintiff Counties by design, and to the public as a whole when the State Defendants use whatever means possible, *ultra vires* or not, to achieve their policy goals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via electronic mail (in lieu of U.S. mail by agreement of the parties) and the electronic filing system to the following:

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on this the 3rd day of August, 2022.

/s/ Allison L. Bussell
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