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

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

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF COUNTIES' MOTION FOR TEMPORARY INJUNCTION

Defendants Tennessee Department of Education, Commissioner Penny Schwinn, in her official capacity as Education Commissioner for the Tennessee Department of Education, and Governor Bill Lee, in his official capacity, ("State Defendants"), oppose Plaintiff Counties' Motion for Temporary Injunction. After losing their strongest claim before the Tennessee Supreme Court, Plaintiff Counties now seek extraordinary relief on a more tenuous claim. The Court should deny Plaintiff Counties' request for a temporary injunction.

STATEMENT OF THE CASE

The Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 to -2612, ("ESA Pilot Program"), enacted by the General Assembly in 2019, offers alternative educational opportunities to the children of low-income families in Tennessee's chronically poorest-performing public school districts. Yet more than three years later, the ESA Pilot Program has not been fully implemented due to this case.

The Metropolitan Government of Nashville and Davidson County ("Metro") and the Shelby County Government ("Shelby County") (collectively referred to as "Plaintiffs"), brought this case against the State Defendants to obtain a declaratory judgment that the ESA Pilot Program is unconstitutional and to enjoin its implementation. (Compl., 1–44.) A third plaintiff, the Metropolitan Nashville Board of Public Education, was dismissed for lack of standing. (Mem. and Order May 4, 2020, 31.)

The State Defendants moved to dismiss the complaint under Tenn. R. Civ. P. 12.02(6). (Def.'s Mot. to Dismiss.) Intervenor-Defendants[1] also filed dispositive motions. Plaintiffs countered with a motion for summary judgment and requested a permanent injunction. (Pl.s' Mot.

[1] "Intervenor-Defendants" are Natu Bah, Builguissa Diallo, Star Brumfield, Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

for Summ. Judg.) Although the Complaint contained three counts, Plaintiffs moved for summary judgment on only one count—the Home Rule Amendment to the Tennessee Constitution. (*Id.*)

On May 4, 2020, the Court granted Plaintiffs' motion and enjoined the State Defendants from implementing the ESA Pilot Program. (Mem. and Order.) The injunction remained in effect for more than two years while the State Defendants sought reversal through the appellate courts. On May 18, 2022, the Tennessee Supreme Court concluded that the ESA Pilot Program is not rendered unconstitutional pursuant to the Home Rule Amendment and vacated the Court's judgment. *Metro. Gov't of Nashville & Davidson Cnty. v. Tennessee Dep't of Educ.*, 645 S.W.3d 141, 154–155 (Tenn. 2022) (hereinafter "*Metro v. TDOE*."). Upon remand, on July 13, 2022, the Court vacated the injunction against implementation of the ESA Pilot Program.

More than 2,000 families have expressed their intent to participate; and more than 80 private schools are interested in enrolling their children. (Ex. 1, Aff. of Eve Carney). Plaintiffs previously asserted their best claim against the ESA Pilot Program and were unsuccessful. Now they seek relief again on a piecemeal basis—raising only one claim as grounds for an injunction—in a transparent attempt to forestall implementation of the ESA Program for as long as possible, whether or not they are ultimately successful. Akin to their Home Rule Amendment claim, Plaintiffs' equal-protection claim fails as a matter of law.

TEMPORARY INJUNCTION STANDARD

Plaintiffs seek to enjoin implementation of the ESA Pilot Program during the pendency of this action pursuant to Tenn. R. Civ. P. 65.04, which states:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.04.

Tennessee courts consider four factors in determining whether to issue a temporary injunction: "(1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." *Moore v. Lee*, 644 S.W.3d 59, 63 (Tenn. 2022). The third factor—likelihood of success on the merits—is often determinative, and a party's "failure to show a likelihood of success on the merits is usually fatal." *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020).

In addition, injunctive relief will not be granted "unless the injury is threatened or imminent and, in all probability, about to be inflicted." *4215 Harding Rd. Homeowners Ass'n v. Harris*, No. M2011-02763-COA-R3-CV, 2012 WL 6571040, at *2 (Tenn. Ct. App. Dec. 14, 2012) (quoting *State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963)). While the decision to grant or deny a motion for injunctive relief is discretionary, the Supreme Court recently observed that "'there is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion or is more dangerous in a doubtful case' than the discretion of granting an injunction." *Moore v. Lee*, 644 S.W.3d 59, 63-64 (Tenn. 2022) (quoting *Mabry v. Ross*, 48 Tenn. 769, 774 (1870)).

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed on the Merits.

Plaintiffs' motion for temporary injunctive relief must be denied because they are unlikely to succeed on the merits of their equal protection claim. To start, they lack standing to challenge the ESA Pilot Program on equal protection grounds. But even if Plaintiffs had the requisite standing, their equal protection claim is unlikely to succeed on the merits.

A. Plaintiffs Fail to Establish Standing to Assert an Equal Protection Claim.

Constitutional standing is a fundamental requirement that a party must establish to present a justiciable controversy. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To establish constitutional standing, a plaintiff must establish three elements: (1) an injury that is distinct and palpable; (2) a causal connection between the alleged injury and the challenged conduct; and (3) injury capable of being redressed by a favorable decision. *Id.* Here, Plaintiffs cannot establish the first of those elements—a distinct and palpable injury.

The proper focus of a standing inquiry is a party's right to bring a particular cause of action. *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020). Parties that assert multiple causes of action must therefore establish standing as to each claim. *See id.*

As political subdivisions of the State, Plaintiffs are "limited to asserting rights that are [their] own." *Hargett*, 414 S.W.3d at 100 ("[T]o demonstrate standing to seek a declaratory judgment, a political subdivision of the state, including a municipality, 'is limited to asserting rights that are its own,' meaning that it cannot merely 'assert the collective individual rights of its residents.'") (quoting Am. Jur. 2d *Municipal Corporations, Counties, and Other Political Subdivisions* § 734, at 817-18 (2010)). For the equal protection claim, Plaintiffs must establish a

distinct and palpable injury to an interest the ESA Pilot Program was adopted to protect; Plaintiffs cannot simply assert that the ESA Pilot Program denies equal protection to LEAs or students.

Yet, that is precisely what Plaintiffs have done. Their equal protection claim is replete with allegations that Metro and Shelby County LEAs and students are being treated differently than other LEAs and students in the state. For instance, they assert that "Fayette, Hamilton, and Madison County *LEAs, and the students in them* do not risk loss of funding[,]" which Plaintiffs attribute to the ESA Pilot Program. (Pls. Memo. 31) (emphasis added). Plaintiffs argue that "[t]here is no justification for treating MNPS and SCS differently than other districts." (Pls. Memo. 32.)

The alleged differential treatment is focused on LEAs and students and not the counties. Tennessee Supreme Court "jurisprudence established beyond refute that the LEAs are distinct from the county or municipal governments." *Metro v. TDOE*, 465 S.W.3d at 153. "The separateness of the Plaintiffs and their respective LEAs is not ameliorated by their financial connections." *Id.* at 154.

Plaintiffs cannot show a distinct and palpable injury to the legal interest the equal protection clause protects. They fail to meet their burden to establish standing.

B. Plaintiffs' Equal Protection Claim is Not Ripe.

Like the doctrine of standing, the doctrine of ripeness is concerned with justiciability. It requires the court to determine whether the claimed injury "has matured sufficiently to warrant judicial intervention." *ACLU v. Darnell*, 195 S.W.3d 612, 620 n.7 (Tenn. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). A case is not ripe for adjudication if it "involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *B & B Enterprises of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn.

2010) (citation omitted). When a claim is not ripe, the court will decline to act as long as dismissal of the claim will not prevent the parties from asserting it at a more appropriate juncture. *Id.* (citations omitted).

Plaintiffs' equal protection claim is unripe. Until the ESA Pilot Program is implemented, it is impossible to know what, if any, fiscal impact it will have on LEAs. Thus, Plaintiffs' allegation that other LEAs "do not risk loss of funding" while their LEAs do (Pls. Memo. 31) is an amorphous distinction. Plaintiffs have not shown—nor could they—that loss of funding is an actual risk to LEAs.

C. The ESA Pilot Program Does Not Violate the Equal Protection Clauses of the Tennessee Constitution.

Even if the Plaintiffs establish standing to assert an equal protection claim, their claim is unlikely to succeed. In evaluating the constitutionality of a statute, "the Court must be controlled by the fact that our Legislature may enact any law which our Constitution does not prohibit, and the Courts of this State cannot strike down one of its statutes unless it clearly appears that such statute does contravene some provision of the Constitution." *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020). The Court must therefore begin with the presumption that the statute is constitutional and "must indulge every presumption and resolve every doubt in favor of [its] constitutionality." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) (citations omitted). Simply put, the Court must uphold the statute if at all possible. *See State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) ("The Court must uphold the constitutionality of a statute wherever possible."). Applying those principles here leads only to the conclusion that Plaintiffs are unlikely to succeed on the merits of their challenge.

1. Rational Basis Applies.

The Tennessee Supreme Court has held that the equal protection clauses of the Tennessee Constitution confer the same protections as the Fourteenth Amendment to the United States Constitution. *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003) (quoting *State v. Tester*, 879 S.W.3d 823, 827 (Tenn. 1994)). That is, they guarantee that "all persons similarly situated shall be treated alike." *Small Schools I*, 851 S.W.2d 139, 153 (Tenn. 1993)). Conversely, things that "are different in fact or opinion are not required by either constitution to be treated the same." Id.

Tennessee has likewise adopted the United States Supreme Court's analytical framework for analyzing equal protection claims. *See State v. Robinson*, 29 S.W.3d 476, 481 (Tenn. 2000). Pursuant to that framework, courts apply one of three levels of scrutiny depending on the nature of the right asserted or the class of persons affected: (1) strict scrutiny, (2) heightened scrutiny, or (3) reduced scrutiny, *i.e.* the rational basis test. *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). Strict scrutiny applies when only the legislative classification at issue operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. *Id.* Heightened scrutiny applies only to classifications involving a quasi-suspect class, such as gender or illegitimacy. *Id.* at 462. Because the General Assembly has the "initial discretion to determine what is 'different' and what is 'the same'" and enjoys "considerable latitude" in making that determination, the rational basis test applies "in most instances." *Small Schools I*, 851 S.W.2d at 153.

Plaintiffs argue that the Court should subject legislative classifications in the ESA Pilot Program to a strict scrutiny analysis because education is a fundamental right guaranteed by the Education Clause of the Tennessee Constitution. (Pl. Mem. 22-26 citing Ed. Clause.) But the Tennessee Supreme Court did not declare education to be a fundamental right in any of the Small

School cases—the trilogy of equal protection cases challenging the State's public education funding system; and in all three cases, the Court applied rational-basis review. *See Small Schools I*, 851 S.W.2d at 152-56; *Small Schools II*, 894 S.W.2d at 738-39 ("It appears that the BEP addresses both constitutional mandates imposed upon the State—the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities."); *Small Schools III*, 91 S.W.3d at 233-34.

But even if education is a fundamental right for purposes of equal protection analysis, it is one afforded to the school children of Tennessee, not the counties. *Small Schools I*, 851 S.W.2d at 151 ("The certain conclusion is that Article XI, Section 12 of the Tennessee Constitution guarantees to the school children of this state the right to a free public education."). Plaintiffs are limited to asserting rights that are their own. *Hargett*, 414 S.W.3d at 100. Because they have no educational rights on which the ESA Pilot Program could infringe, strict scrutiny review of their claim is not appropriate.

2. The ESA Pilot Program is Supported by a Rational Basis.

Because this case does not involve a fundamental right, suspect class, or a quasi-suspect class, the Court must employ rational basis review to analyze Plaintiffs' equal protection claim. Rational basis review is a "relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)). A statute that discriminates in favor of a certain class must be upheld so long as there is some conceivable reason for the distinction, even one that is "fairly debatable." *Dr. Pepper Pepsi-Cola Bottling Co. of Dyersburg, LLC v. Farr*, 393 S.W.3d 201, 210 (Tenn. Ct.

App. 2011); *see also Civ. Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991) ("If any possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable.").

Significantly, the basis for the challenged classification need not be derived from the statute's text or legislative history. "Because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beal v. Benton Cnty.*, No. W2013-01290-COA-R3CV, 2014 WL 287607, at *10 (Tenn. Ct. App. Jan. 27, 2014) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). Because duly enacted legislation bears a strong presumption of validity, a party challenging the rationality of a legislative classification has the burden of negating every conceivable basis that might support it. *Id.* (quoting *Beach Commc'ns*, 508 U.S. 307, 314-15).

Plaintiffs challenge the General Assembly's decision to limit eligibility for the ESA Pilot Program to students who are zoned to attend MNPS and SCS schools. But they do not contend that the ESA Pilot Program should apply statewide; they simply object that the General Assembly should not have drawn the lines where it did. (*See* Pl. Mem. at 28 (noting that Hamilton, Fayette, and Madison counties also have low performing schools)). Several reasons for its doing so are readily apparent. To start, MNPS and SCS are the two largest school districts in the State. It is thus conceivable that their operations will be less affected by the loss of students choosing to enroll in the ESA Pilot Program than would other LEAs in the State. Similarly, it is conceivable that they will be better able to absorb any financial impact associated with the loss of those students. Moreover, because MNPS and SCS are located in the two most populous counties in the State, it is conceivable that they have a greater number of private schools wishing to participate in the ESA

Pilot Program. Indeed, courts in other states have found a rational basis for limiting such programs to large metropolitan school districts. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 1999) ("The General Assembly had a rational basis for enacting the School Voucher Program, which relates to a statewide interest, and for specifically targeting the Cleveland City School District, which is the largest in the state and arguably the one most in need of state assistance."); *see also Davis v. Grover*, 480 N.W.2d 460, 465-73 (Wis. 1992) (upholding a school choice program applying only in Milwaukee).

Plaintiffs also object that the ESA Pilot Program is available to all MNPS and SCS students who meet its eligibility requirements, rather than only those zoned to attend low performing schools. It is unclear how Plaintiffs are denied equal protection by implementation of the ESA Pilot Program on an LEA-wide basis rather than a school-by-school basis. It is nonetheless conceivable that limiting eligibility to students zoned to attend select schools would have undermined the benefits of spreading the ESA Pilot Program's impact across all schools in the State's two largest LEAs. It is likewise conceivable that doing so would have presented greater administrative hurdles or resulted in eligibility disparities between siblings living in the same home.

"Equal protection does not require absolute equality." *Brown v. Campbell Cnty. Bd. of Educ.*, 915 S.W.2d 407, 414 (Tenn. 1995). A statute—or statutory scheme—"is not unconstitutional merely because it results in some inequality." *Small Schools I*, 851 S.W.2d 153. So long as "a reasonable basis exists for the difference in treatment under the statute, or if any set of facts can reasonably be conceived to justify it, the statute is constitutional." *Brown*, 915 S.W.2d at 414. For the reasons set forth above, the ESA Pilot Program withstands rational basis scrutiny. As a result, Plaintiffs are unlikely to succeed on the merits of their equal protection challenge.

II. The Remaining Factors Weigh Against an Injunction.

Even when the movant demonstrates a likelihood of success on the merits, a court must carefully consider the remaining factors before granting a temporary injunction. *See Moore v. Lee*, 644 S.W.3d 59, 67 (Tenn. 2022). In the present case, each of the remaining factors weigh against injunctive relief.

A temporary injunction is appropriate only where it is "clearly shown" that the "*the movant* will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action." Tenn. R. Civ. P. 65.04 (emphasis added). The movants here, Metro and Shelby County, must show that they will be harmed absent an injunction—alleged harm to the LEAs or students will not suffice. Plaintiffs fail to do so. Without a clear showing of some immediate and irreparable harm that is their own, Plaintiffs' claims must fail.

Nor will harm result to others from the ESA Pilot Program's implementation. The ESA Program does not replace or supplant the system of free public schools established by the General Assembly. While ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA, LEAs are relieved of the obligation of teaching those students. In addition, the LEAs to which the ESA Program applies will receive an annual grant equal to the ESA amount for each participating student for the first three years of the program's existence. *See* Tenn. Code Ann. § 49-6-2605.

Conversely, the over 2,000 families wishing to enroll their students in the ESA Pilot Program will most certainly suffer irreparable harm by its continued delay, as will the State, which has an interest in effectuating the will of its citizens as reflected in the legislative acts of their representatives. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("Any time a State is enjoined

by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (Roberts, C.J., in chambers) (cleaned up)). The remaining factors thus weigh heavily against a grant of injunctive relief.

CONCLUSION

For the reasons stated, Plaintiffs' request for temporary injunctive relief must be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Response has been forwarded by electronic mail (in lieu of U.S. Mail by agreement of the parties) and the electronic filing system on this 1st day of August, 2022, to:

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