IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON COUNTY,
METROPOLITAN NASHVILLE BOARD OF
PUBLIC EDUCATION, and SHELBY COUNTY
GOVERNMENT,

Plaintiffs,

v. No. 20-0143-II

TENNESSEE DEPARTMENT OF EDUCATION;
PENNY SCHWINN, in her official capacity as
Education Commissioner for the Tennessee
Department of Education; and BILL LEE, in his
official capacity as Governor for the state of
Tennessee,

Defendants.

GREATER PRAISE CHRISTIAN ACADEMY;
SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL;
CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S
MEMORANDUM OF LAW AND FACTS IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

In May, 2019, the State of Tennessee enacted the Tennessee Education Savings Account ("ESA") Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. The ESA Pilot Program awards an ESA to qualifying students to attend a participating private school. Earlier this month, Plaintiffs filed this action against the state, arguing that the ESA Pilot Program is unconstitutional and that it should be enjoined from starting this August.

Greater Praise Christian Academy and Sensational Enlightenment Academy Independent School (the "Schools") are private schools that serve low-income students who reside in low-performing school districts. Their interests differ from those of any other proposed intervenor-defendants. The Schools filed paperwork to participate in the ESA Pilot Program this August, so they can help even more students receive the quality education they deserve. Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr. (collectively, the "Parents") are parents of low-income students who are not satisfied with the inadequate education being provided by the low-performing public school districts in which they reside. They intend for their children to participate in the ESA Pilot Program this August, so they can attend a private school. The Schools and Parents filed the accompanying Motion to Intervene because they deserve to have their arguments heard and stories told in court. This lawsuit is more than a case between local government and state government over money; it is a case between local governments and local schools and parents about what is best for children.

The Schools and Parents respectfully move this Court to intervene as Defendants in the case. The Schools and Parents meet the standard for intervention by right, pursuant to Tenn. R. Civ. P. 24.01, because they have a substantial interest in the ESA, which is the subject of the action, and a ruling against the ESA would deprive them of funding. In the alternative, the Schools and Parents meet the standard for intervention by permission, pursuant to Tenn. R. Civ. P. 24.02, because their defense and the main action have a question of law in common, *i.e.* the constitutionality of the ESA Pilot Program.

FACTUAL BACKGROUND

The ESA Pilot Program

The ESA Pilot Program "provides funding for access to additional educational options to

students who reside in [public school districts] that have consistently and historically had the lowest performing schools." Tenn. Code. Ann. § 49-6-2611(a)(1). In particular, the pilot program is open to Kindergarten - 12th grade students whose annual household income is less than or equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code. Ann. § 49-6-2602(3).[1] The student must have attended a Tennessee public school the prior school year, must be entering Kindergarten for the first time, must have recently moved to Tennessee, or must have received an ESA the prior year. Tenn. Code. Ann. § 49-6-2602(3)(A). Finally, an eligible student must reside in a neighborhood zoned to attend a school in the Achievement School District, which runs the state's lowest performing schools, or reside in a school district with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code. Ann. § 49-6-2602(3)(C).

The ESA provides each student with his or her per pupil expenditure of state funds from the Basic Education Program (BEP) as well as a portion of the local BEP funds to create an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a). The amount of the ESA will be approximately $7,100 for the school year beginning in August. *See* Education Savings Accounts Explained, available at https://www.schoolchoicetn.com/education-savings-accounts-explained/ (retrieved Feb. 19, 2020). The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational

[1] The maximum eligible income is $43,966 for a household of two, and it increases with household size. *See* 84 Fed. Reg. 54 (Mar. 20, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-03-20/pdf/2019-05183.pdf (retrieved Feb. 19, 2020).

programs, and college admission exams. Tenn. Code. Ann. § 49-6-2603(a)(4). The ESA is different from a school voucher, which can only be used for private school tuition, because of its flexibility in spending and because any unused funds in the individualized account roll over each year. Tenn. Code. Ann. § 49-6-2603(l). Any unused ESA funds remaining after 12th grade may be rolled over into a college fund for tuition, fees, and textbooks at eligible colleges and universities, vocational, technical, or trade schools. Tenn. Code. Ann. § 49-6-2603(g).

A participating private school must be a Category I (approved by the Department of Education), Category II (approved by a private school accrediting agency), or Category III (regionally accredited) private school. Tenn. Code. Ann. § 49-6-2602(9). A participating private school also must administer the state end-of-year Tennessee Comprehensive Assessment Program (TCAP) tests for Math and English Language Arts for students with an ESA in grades 3-11 each year. Tenn. Code. Ann. § 49-6-2606(a).

In order to "assist the general assembly in evaluating the efficacy" of the ESA Pilot Program, "the office of research and education accountability (OREA), in the office of the comptroller of the treasury, shall provide a report to the general assembly" at the end of the third year of the pilot program and each year thereafter. Tenn. Code. Ann. § 49-6-2611(a)(2). The report will include participating student performance, graduation rates, parental satisfaction, audit reports, and recommendations for legislative action if the list of low-performing school districts changes based on the most recent data from the Department of Education. Tenn. Code. Ann. § 49-6-2606(c); Tenn. Code. Ann. § 49-6-2611(a)(2).

Finally, the ESA Pilot Program creates a school improvement fund to pay financially affected school districts for children that they no longer have to educate. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). This ghost reimbursement lasts for three years after children have left the

school system. *Id*. The ESA Pilot Program is capped at five thousand students in year one, rising to fifteen thousand students in year five. Tenn. Code. Ann. § 49-6-2604(c). Any leftover funds from the ghost reimbursement fund must be disbursed as an annual school improvement grant to other school districts that have priority schools. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). After the first three years, the school improvement fund will be disbursed as school improvement grants for programs to support priority schools throughout the state. *Id*.

Greater Praise Christian Academy

Greater Praise Christian Academy ("GPCA") is a nonprofit, private, Christian school in Memphis, Shelby County, Tennessee. Declaration of Kay Johnson, attached as Exhibit A, ¶ 2. GPCA was among the first private schools to submit to the Tennessee Department of Education an Intent to Participate statement for the ESA Pilot Program. *Id.*, ¶ 7. GPCA intends to market itself as a quality educational alternative to low-income families whose children who are zoned to attend the Achievement School District and Shelby County Schools, both of which are included in the ESA Pilot Program. *Id.*, ¶ 6. GPCA intends to abide by the requirements of the ESA Pilot Program. *Id.*, ¶¶ 8-11. [2] GPCA has registered its bank account with Class Wallet, the vendor hired by the department to administer ESA funds. *Id.*, ¶ 12. Any court order in this case enjoining the ESA Pilot Program from operating would cause financial harm to GPCA by depriving it of its substantial interest in the ESA funds needed to provide ESA students with the quality education they deserve. *Id.*, ¶ 13.

Sensational Enlightenment Academy Independent School

Sensational Enlightenment Academy Independent School ("S.E. Academy") is a

[2] GPCA is a Category IV private school in Tennessee and is currently working with the Tennessee Department of Education to become a Category I private school for 2020-2021.

nonprofit, private school in Memphis, Shelby County, Tennessee. Declaration of Kay Pruitt, attached as Exhibit B, ¶ 2. S.E. Academy was among the first private schools to submit to the Tennessee Department of Education an Intent to Participate statement for the ESA Pilot Program. *Id.*, ¶ 7. S.E. Academy intends to market itself as a quality educational alternative to low-income families whose children who are zoned to attend the Achievement School District and Shelby County Schools, both of which are included in the ESA Pilot Program. *Id.*, ¶ 6. S.E. Academy is a Category I private school and intends to abide by the requirements of the ESA Pilot Program. *Id.*, ¶¶ 8-11. S.E. Academy has registered its bank account with Class Wallet, the vendor hired by the department to administer ESA funds. *Id.*, ¶ 12. Any court order in this case enjoining the ESA Pilot Program from operating would cause financial harm to S.E. Academy by depriving it of its substantial interest in the ESA funds needed to provide ESA students with the quality education they deserve. *Id.*, ¶ 13.

Ciera Calhoun

Ciera Calhoun is the parent of several children with whom she resides in Memphis, Shelby County, Tennessee, who are eligible to receive an ESA. Declaration of Ciera Calhoun, attached as Exhibit C, ¶¶ 2-4. Ms. Calhoun intends to apply for her children to receive an ESA as soon as the application period opens. *Id.*, ¶¶ 5-6. Her children include son K.C., who is seventeen years of age or younger, who intends to use the ESA to attend 8th grade at a participating private school in August, and who will have been enrolled in and attending a public school in the Achievement School District for at least one year. *Id.*, ¶¶ 2, 7. A second child is son J.C., who is seventeen years of age or younger, who intends to use the ESA to attend 7th grade at a participating private school in August, and who will have been enrolled in and attending a public school in the Achievement School District for at least one year. *Id.* A third child is daughter

C.C., who is seventeen years of age or younger, who intends to use the ESA to attend 5th grade at a participating private school in August, and who will have been enrolled in and attending a public school in the Achievement School District for at least one year. *Id.* A fourth child is daughter J.C., who is seventeen years of age or younger, who intends to use the ESA to attend 4th grade at a participating private school in August, and who will have been enrolled in and attending a public school in the Achievement School District for at least one year. *Id.* A fifth child is daughter T.C., who is seventeen years of age or younger, who intends to use the ESA to attend 1st grade at a participating private school in August, and who will have been enrolled in and attending a public school in the Achievement School District for at least one year. *Id.* Ms. Calhoun intends to abide by the ESA Program policies. *Id.*, ¶ 8. Any court order in this case enjoining the ESA Pilot Program from operating would prevent her children from attending the school she believes is the best fit for each of them to learn, grow, and thrive as a student and person, and it would cause financial harm to her and her children by depriving them of their substantial interests in each ESA. *Id.*, ¶ 9.

Alexandria Medlin

Alexandria Medlin is the parent of daughter K.M., with whom she resides in Memphis, Shelby County, Tennessee, and who is eligible to receive an ESA. Declaration of Alexandria Medlin, attached as Exhibit D, ¶¶ 2-4. Ms. Medlin intends to apply for K.M. to receive an ESA as soon as the application period opens. *Id.*, ¶¶ 5-6. K.M. is seventeen years of age or younger, intends to use the ESA to attend Kindergarten at a participating private school in August, and would be eligible for the first time to enroll in a Tennessee school by being eligible to enroll in Kindergarten in Shelby County Schools in August. *Id.*, ¶¶ 2, 7. Ms. Medlin intends to abide by the ESA Program policies. *Id.*, ¶ 8. Any court order in this case enjoining the ESA Pilot Program

from operating would prevent K.M. from attending the school Ms. Medlin believes is the best fit for her to learn, grow, and thrive as a student and person, and it would cause financial harm to her and K.M. by depriving them of their substantial interests in the ESA. *Id.*, ¶ 9.

David Wilson, Sr.

David Wilson, Sr. is the parent of son D.W., with whom he resides in Nashville, Davidson County, Tennessee, and who is eligible to receive an ESA. Declaration of David Wilson, Sr., attached as Exhibit E, ¶¶ 2-4. Mr. Wilson intends to apply for D.W. to receive an ESA as soon as the application period opens. *Id.*, ¶¶ 5-6. D.W. is seventeen years of age or younger, intends to use the ESA to attend 9th grade at a participating private school in August, and will have been enrolled in and attending a public school in the Achievement School District for at least one year. *Id.*, ¶¶ 2, 7. Mr. Wilson intends to abide by the ESA Program policies. *Id.*, ¶ 8. Any court order in this case enjoining the ESA Pilot Program from operating would prevent D.W. from attending the school Mr. Wilson believes is the best fit for him to learn, grow, and thrive as a student and person, and it would cause financial harm to him and D.W. by depriving them of their substantial interests in the ESA. *Id.*, ¶ 9.

ARGUMENT

The Schools and Parents should be granted intervention by right, pursuant to Tenn. R. Civ. P. 24.01, because they have a substantial interest in the ESA, which is the subject of the action, and a ruling against the ESA would deprive them of their property. Their action is timely; they have a concrete interest directly affected by the outcome of the case; and their interests would not be adequately represented by the Defendants or by the other proposed intervenors in the case. In the alternative, the Schools and Parents should be granted intervention by permission, pursuant to Tenn. R. Civ. P. 24.02, because their defense and the main action have a

question of law in common, *i.e.* the constitutionality of the ESA Pilot Program.

I. The Schools and Parents are entitled to intervention as of right.

Tenn. R. Civ. P. 24.01 provides for intervention as of right. In pertinent part, it states:

> Upon timely motion any person shall be permitted to intervene in an action . . . when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

Id. The Schools and Parents have a substantial interest in the ESA, which is the subject of the action, and an unfavorable disposition of the action would deprive them of their property. The existing Defendants and proposed intervenor-defendants do not adequately represent their interests. Especially, the Schools have unique interests in obtaining ESAs that are not represented by other parties or proposed parties. The Parents have children zoned to attend the Achievement School District and entering Kindergarten for the first time that are not represented by other parties or proposed parties.

Because "rules governing intervention are construed broadly in favor of the applicants," *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007), the Schools and Parents' motion fits well within the letter of the rule, which tracks Fed. R. Civ. P. 24 almost verbatim. As in the case of interpreting other Tennessee rules, "[f]ederal case law interpreting rules similar to those adopted in this state are persuasive authority for purposes of construing the Tennessee rule." *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 755 (Tenn. 2006). The substantial interest of the Schools and Parents in the ESA constitutes considerably more than "a mere contingent, remote, or conjectural possibility of being affected as a result of the suit," *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 192 (Tenn. 2000). Instead, the interest "involve[s] a direct claim on the subject matter of the suit such that the intervenor[s] will either

gain or lose by direct operation of the judgment." *Id*.

Directly on point to this case is *Brumfield v. Dodd*, 749 F.3d 339, 340 (5th Cir. 2014). There, parents sought intervention to defend a school choice program in Louisiana. The Fifth Circuit, construing the cognate federal rule, held that the parents had a "direct, substantial, and legally protectable" interest in the scholarship program as "their children were its primary intended beneficiaries." *Id*. at 343-44. The Court held that the interest would be impaired because "a decline in prospects for obtaining vouchers may well result" from a negative court order. *Id*. at 344. The Court concluded by saying that, though the parents and the state had the same general objectives, the state might offer inadequate representation of their interest because the state had institutional considerations and was not making all the same arguments. *Id*. at 346. *Brumfeld* squarely addressed the exact same issues presented in this motion, and the court agreed with the parents on every point.

A. <u>The Schools and Parents are acting in a timely manner.</u>

The Schools and Parents are acting in a timely manner, seeking intervention at the very start of the litigation. They are seeking to intervene within weeks of the filing of the Complaint and before any substantive motion practice or discovery. *See In re Estate of Brown*, No. M2005-00864-COA-R3-CV, 2006 Tenn. App. LEXIS 694, at *7 (Tenn. Ct. App. Oct. 27, 2006), attached as Exhibit H (intervention motion untimely when it was filed over four years after the action was commenced). The attorney general has yet to file a responsive pleading on behalf of the Defendants in this case; therefore, the Schools and Parents are seeking to intervene at the true beginning of the lawsuit, and no other party will be prejudiced by a late entry. The Schools and Parents have acted with "proper diligence" by seeking to intervene promptly. *Holland v. Holland*, No. E2011-00782-COA-R3-CV, 2012 Tenn. App. LEXIS 307, at *12-13 (Tenn. Ct.

App. May 15, 2012), attached as Exhibit I.

B. The Schools and Parents have a concrete interest in the case.

The Schools and Parents in this case claim a very concrete interest in the ESAs made available by this law. *See Northland Family Planning Clinic, Inc*., 487 F.3d at 345 (persons and organizations "affected by the law may likely have an ongoing legal interest in its enforcement after it is enacted," such that intervention by right is appropriate). The Schools will receive additional revenue from the ESA Pilot Program, and the Parents will use the pilot program to receive a scholarship to allow their children to enroll in private schools that better serve their needs. "Funds received pursuant to this part . . . [c]onstitute a scholarship . . . ." Tenn. Code. Ann. § 49-6-2603(i).

C. The Schools and Parents' interests will be directly affected by resolution of the case.

As an initial matter, the standard for judging the intervenors' interests is lower in cases such as this one: "The interest requirement may be judged by a more lenient standard if the case involves a public interest question or is brought by a public interest group. The zone of interests protected by a constitutional provision or statute of general application is arguably broader than are the protectable interests recognized in other contexts." *Brumfield,* 749 F.3d at 344, quoting 6 Moore's Federal Practice § 24.03[2][c].

The Court's disposition of this action will definitively determine whether the Parents are forced to keep their children in failing public school systems or whether they can instead use an ESA to access a private school they could otherwise not afford. In the Parents' judgment, these ESA funds open up a whole new possibility of schools for their children to find the best fit for each of them to learn, grow, and thrive as a student and person. If Defendants lose the case, the Parents and their children will lose directly as a result of that judgment; they will be permanently

foreclosed from securing ESA scholarship funds.

Texas v. United States, 805 F.3d 653 (5th Cir. 2015), is a useful guide for the Parents' right to intervene. There, a group of parents sought to challenge a policy decision on the federal government's Deferred Action program for children of undocumented immigrants. The court recognized that, though the children did "not have a not have a legal entitlement to deferred action," they nonetheless, had a sufficient interest as "the intended beneficiaries of the challenged federal policy." *Id*. at 660. Similarly, the children here, as represented by their parents, are the intended beneficiaries of the law. Second, the court recognized an interest in "the employment opportunities that would be available to them if they are granted deferred action and employment authorization," *id*., just as the children here have an interest in the monetary value of the scholarship they would receive. Third, the court cited the "legally protected liberty interest under the Due Process Clause" of the parents in "directing the upbringing of their United States-citizen children." *Id*. The parents here have a similar interest in making these important educational choices on behalf of their children. *See generally Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

Similarly, the Schools have a substantial interest in expanding their student body, growing their revenue, and advancing their missions by serving more families. If the Defendants lose this case, the Schools will lose directly as a result of that resolution. They will be permanently prevented from accepting ESA scholarship funds from current and future students. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (potential loss of revenue is a sufficient interest to establish intervention as of right); *Nat'l Parks Conservation Ass'n v. United States DOI*, No. 16-CV-306-S, 2017 U.S. Dist. LEXIS 224960, at *4 (D. Wyo. Jan. 18, 2017), attached as Exhibit J (same, but citing *United States v. Albert Inv. Co.*, 585 F.3d 1386,

1398 (10th Cir. 2009)).

When the courts of this state heard a previous case brought by rural school districts under the state constitution's education clause, urban school districts, including ones in Davidson and Shelby Counties, were permitted to intervene in the case because they "would be adversely affected by the relief sought by plaintiffs." *Tenn. Small Sch. Sys. v. McWherter*, Appeal No. 01-A-01-9111-CH-00433, 1992 Tenn. App. LEXIS 486, at *3 (Tenn. Ct. App. June 5, 1992), attached as Exhibit K; *see also Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993). In a similar lawsuit two decades later, private schools that would be adversely affected should be allowed to intervene in the case when those very same school districts now act as the Plaintiffs.

D. The Schools and Parents' interests will not be adequately represented by the other parties and proposed parties in the case.

1. Defendants are inadequate to represent the Schools and Parents' interests.

The Schools and Parents' interests are aligned with those of Defendants, but the Schools and Parents are "uniquely situated" to make arguments and offer evidence in defense of their particular interests. *Tigrett v. Cooper*, No. 10-2724-STA-tmp, 2012 U.S. Dist. LEXIS 28638, at *15 (W.D. Tenn. Mar. 2, 2012), attached as Exhibit L. The proposed intervenors are "required only to show that the representation **might** be inadequate." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (bold in original). The standard for showing inadequacy is "minimal;" "[t]he proposed intervenors need show only that there is a potential for inadequate representation." *Id*. *Accord Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (for one prong of the test, it is sufficient "to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments."). Even though the Defendants' interests are generally aligned with those of the Schools and Parents, "the tactical

similarity of the present legal contentions of the parties does not assure adequacy of representation or necessarily preclude the intervenor from the opportunity to appear in its own behalf." *Fund for Animals, Inc.*, 322 F.3d at 737.

At this early stage in the litigation, it is impossible to know what precise arguments Defendants will make in favor of the law. However, the Schools and Parents are uniquely situated to give evidence as to the importance of pilot programs as a legitimate tool for the state to experiment with innovative policy alternatives.

The Schools and Parents also have particular insights and arguments on the Complaint's third claim concerning the public schools clause. The Office of the Attorney General will be limited in the arguments it can make on that clause based on arguments it has made in state court in the past. *See, e.g., City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 Tenn. App. LEXIS 540 (Tenn. Ct. App. Aug. 25, 2005), attached as Exhibit M. The attorney general will also be limited by the positions it has taken in formal opinions. *See, e.g.*, Tenn. Att'y Gen. Opinion No. 16-11 (March 29, 2016); Tenn. Att'y Gen. Opinion No. 13-27 (March 26, 2013).

The Office of the Attorney General will also need to take into consideration its duty to the Department of Education as an institutional client with a vested interest in the public schools clause and the status quo system responsible for educating the overwhelming majority of students in Tennessee. Institutional considerations may limit the evidence that the Defendants may present. Evidence on the quality of educational outcomes in urban public schools in Tennessee will be a central feature of defining the rational basis justifying the classification drawn by the legislature. But the Department of Education and governor may be hesitant to fully expose the failures of these districts because it reflects not only on the local education agency but

also on the state's educational record. Moreover, the Defendants may be hesitant to completely document the local school districts' failures when they must continue to work with them on numerous other issues in their broader relationships. The Parents and Schools, by contrast, have both personal experience and strong incentive to share the complete and honest truth about the failure of these school districts in the lives of their particular children and students. They want their children out and in an alternative setting. They can even argue that the state can fulfill its constitutional responsibility to support "the inherent value of education," Tenn. Const. Art. XI, Sec. 12, through alternative means such as ESA scholarships. These larger institutional dynamics and political concerns are sufficient reason to permit intervention to ensure adequate representation. *See Grutter*, 188 F.3d at 400.

Finally, courts "often conclude[] that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc.*, 322 F.3d at 736. As the D.C. Circuit explained in *Fund for Animals*, even when the government defendant and the proposed intervenor share the same desired legal outcome, the government is charged with representing a broad interest for the general public. The proposed intervenors in that case and this case, by contrast, have a narrow, specific interest in the particular application of the law to their individual circumstances. *Id*. at 737. When proposed intervenors are "concerned with preserving their own rights and opportunities, including their specific [institutional] goals," their interests are sufficiently distinct from those of a government defendant to require separate representation. *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 15 (D.D.C. 2016).

2. <u>The Schools have important interests separate from the other proposed intervenors.</u>

Counsel for the Schools and Parents has great respect for both counsel for Natu Bah and Builguissa Diallo and counsel for Bria Davis and Star Brumfield, who have also sought

intervention as parents. The Schools and Parents support the right of all parents to be heard in this case and urge this Court to allow their intervention.

In particular, the Schools and Parents bring two advantages to the table that make their intervention especially valuable to the case. First, the Schools will lose revenue if an order is entered enjoining the program. The loss of revenue is a direct and concrete interest and injury which is widely recognized for intervention of right. *See supra* at Section II. C, pp. 10-11, citing *Fund for Animals, Inc.*, 322 F.3d at 735 and *Nat'l Parks Conservation Ass'n*, 2017 U.S. Dist. LEXIS 224960, at *4.

Second, some have questioned whether parents, alone, have standing to assert their children's right to benefit from particular educational provisions of law. *See Allen v. Wright*, 468 U.S. 737, 739-40 (1984). *See also Espinoza v. Montana Dept. of Revenue*, U.S. S.Ct. 18-1195, Oral Arg. Trans. at pp. 10-12, Jan. 22, 2020, available online at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1195_ap6b.pdf (questions from Justices Ginsburg, Sotomayor, and Kagan).

The Tennessee ESA Pilot Program provides a scholarship account, not a tax credit, so the funding is directed more by parents than it was in *Espinoza*. However, the money in the program still goes directly from the state to the educational service provider. Though the parent directs the funds, the funds never sit in the parent's bank account. The funds sit in a state account until they are transferred at the parent's direction to the school or other provider. *See* Marta Aldrich, "Tennessee inks $2.5 million contract with Florida company to manage education voucher payments," Chalkbeat.org (Nov. 13, 2019), https://chalkbeat.org/posts/tn/2019/11/13/tennessee-inks-2-5-million-contract-with-florida-company-to-manage-education-voucher-payments/. In other words, the child is always the beneficiary of the funds, and the parent is always the director

of the funds, but neither is ever the distributor or recipient of the funds. Thus, it is the Schools in this case that have a direct financial interest, which confers both unquestionable standing and a concrete interest for purposes of intervention.

3. The Parents have important interests separate from the other proposed intervenors.

The Parents bringing this motion to intervene complement the other proposed intervenors geographically. Proposed intervenors Bah and Diallo are both residents of Shelby County whose children are zoned to attend Shelby County Schools. Proposed intervenors Bria Davis and Star Brumfield are both residents of Davidson County whose children are zoned to attend Metro Nashville Public Schools. On the other hand, Ms. Calhoun's children attend schools in the Achievement School District in Shelby County, and Mr. Wilder's child attends school in the Achievement School District in Davidson County. The Achievement School District operates and oversees schools in the bottom 5% of schools statewide, regardless of where they are geographically located. Tenn. Code. Ann. §§ 49-1-602, 49-1-614. This Court would be underserved without the voices of parents whose children attend the lowest performing schools in the state. The Achievement School District is the third, and often forgotten, school district affected by the ESA Pilot Program, and children in that district bring important arguments that this Court needs to hear about how these badly struggling children need more educational options. In particular, the interest of students in this school district are important for consideration because the first claim of the Complaint in this case asserts that the pilot program is unconstitutional for affecting two counties; however, Ms. Calhoun and Mr. Wilder point out that it is, in fact, three different school districts and potentially more that are the focus of the pilot program.

In addition, the other parent bringing this motion, Ms. Medlin, is the only proposed

parent-intervenor of a child enrolling in Kindergarten for the first time. She, too, brings a unique perspective of a parent who wants her child to begin the Kindergarten-12th grade educational ladder at a private school. Unlike the other proposed student intervenors, Ms. Medlin's daughter will not be left in her current situation if the ESA Pilot Program were to be enjoined. Instead, she will be left worse off by being forced to attend a failing school district that her mother is trying desperately to avoid. Ms. Medlin cannot afford to live in a public school district with high performing schools. Medlin Decl., Exh. D, ¶ 4. The ESA Pilot Program is the lifeline for her daughter K.M. to begin her educational career with the hope of receiving the quality education that she deserves.

Intervention should not be a rush to the courthouse that grants singular preference to whichever set of parties files first. Rather, all proposed intervenors should be required to meet the standards set in law, and all those that do should be granted party status in the case. Here, the Schools and Parents have demonstrated all four elements set forth in Rule 24.01. They have done so, moreover, in ways that are unique and distinct from the other set of proposed defendant-intervenors. In particular, unlike the other proposed parental intervenors, who filed a proposed Answer to the Complaint, the Schools and Parents file, concurrently with this motion, a proposed Motion to Dismiss the Complaint. *See* Proposed Motion to Dismiss under Rules 12.02(8) and 12.02(6), attached as Exhibit F and Memorandum of Law and Facts in support thereof, attached as Exhibit G. The legal arguments made in the proposed Motion to Dismiss deserve consideration by this Court; therefore, the Court should grant the Schools and Parents' Motion to Intervene as of right.

II. <u>In the Alternative, the Schools and Parents are entitled to permissive intervention.</u>

Tenn. R. Civ. P. 24.02(2) provides:

> Upon timely motion any person may be permitted to intervene in an action . . . when a movant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the alternative, the Schools and Parents seek permission from the Court to intervene because of their common question of law, whether the ESA Pilot Program is constitutional. The Schools and Parents also repeat that their extremely early motion to intervene, coming before the filing of a responsive pleading by the Defendants, will not unduly delay or prejudice any of the original parties.

This Court enjoys broad discretion to permit or deny permissive intervention. Like the proposed intervenor in *Kocher v. Bearden*, 546 S.W.3d 78 (Tenn. Ct. App. 2017), the Schools and Parents seek only to add new arguments to the current claims in the case, but the claims, themselves, remain unchanged. *Id*. at 84. They are common questions of law already before the court in the Complaint filed. *Accord In re C.H.*, 2017 Tenn. App. LEXIS 57, at *17 (Tenn. Ct. App. Nov. 22, 2016), attached as Exhibit N ("Permissive intervention is generally not proper when the intervenor seeks to raise new claims or issues against the existing parties."). Because the Schools and Parents are not seeking to raise new claims, permissive intervention is appropriate.

Also, the "principal consideration" for permissive intervention is whether the motion is filed timely. *Commack Self-Service Kosher Meats v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996). The Schools and Parents are acting in a timely manner in this case, within weeks of the filing of the Complaint and before any substantive motion practice or discovery has begun. Therefore, no party will be delayed or prejudiced by this early motion, and the motion should, therefore, be granted.

CONCLUSION

For the foregoing reasons, the Schools and Parents have met the requirements for intervention as of right under Tenn. R. Civ. P. 24.01. In the alternative, the Schools and Parents should be granted permissive intervention under Tenn. R. Civ. P. 24.02. Accordingly, to safeguard their interests from a direct and substantial adverse impact, the motion to intervene should be granted.

Respectfully submitted,

/s/ Brian K. Kelsey
Brian K. Kelsey (TN B.P.R. #022874)
bkelsey@libertyjusticecenter.org
Local Counsel
Daniel R. Suhr (WI Bar No. 1056658)
dsuhr@libertyjusticecenter.org
Lead Counsel, Pro Hac Vice filed concurrently
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone: (312) 263-7668
Attorneys for Intervenor-Defendants
Greater Praise Christian Academy;
Sensational Enlightenment Academy Independent School;
Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been sent to the attorneys listed below via the methods listed below this 21st day of February, 2020.

Robert E. Cooper, Jr., Esq., Director of Law
Lora Barkenbus Fox, Esq.
Allison L. Bussell, Esq.
Department of Law of the Metropolitan Government of Nashville and Davidson County
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
bob.cooper@nashville.gov
lora.fox@nashville.gov
allison.bussell@nashville.gov
Counsel for Plaintiffs Metropolitan Government of Nashville and Davidson County and Metropolitan Nashville Board of Public Education
via Tenn. R. Civ. P. 5.02(2)

Marlinee C. Iverson, Esq., Shelby County Attorney
E. Lee Whitwell, Esq.
Shelby County Attorney's Office
160 North Main Street, Suite 950
Memphis, TN 38103
marlinee.iverson@shelbycountytn.gov
lee.whitwell@shelbycountytn.gov
Counsel for Plaintiff Shelby County Government
via Tenn. R. Civ. P. 5.02(2)

Herbert H. Slatery, III, Esq., Attorney General and Reporter
Stephanie A. Bergmeyer, Esq., Senior Assistant Attorney General
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
Herbert.Slatery@ag.tn.gov
Stephanie.Bergmeyer@ag.tn.gov
Counsel for Defendants Tennessee Department of Education; Penny Schwinn, in her official capacity as Education Commissioner for the Tennessee Department of Education; and Bill Lee, in his official capacity as Governor for the state of Tennessee, Defendants
via Tenn. R. Civ. P. 5.02(2)

Jason I. Coleman, Esq.
7808 Oakfield Grove
Brentwood, TN 37027
jicoleman84@gmail.com via Davidson Co. Chancery Ct. E-filing R. 4.01 and TN S.Ct. R. 46A
Arif Panju, Esq.
Institute for Justice
816 Congress Avenue, Suite 960
Austin, TX 78701
apanju@ij.org
David Hodges, Esq.
Keith Neely, Esq.
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
dhodges@ij.org
kneely@ij.org
Counsel for Intervenor-Defendants Natu Bah and Builguissa Diallo
via Tenn. R. Civ. P. 5.02(2)

Braden H. Boucek
Beacon Center
P.O. Box 198646
Nashville, TN 37219
braden@beacontn.org
Counsel for Intervenor-Defendants Bria Davis and Star Brumfield
via Tenn. R. Civ. P. 5.02(2)

/s/ Brian K. Kelsey
Brian K. Kelsey