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SCHOOL CHOICE IN TENNESSEE:

A VIOLATION OF THE STATE CONSTITUTIONAL RIGHT TO A SUBSTANTIALLY EQUAL EDUCATION

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I. INTRODUCTION

Most states have experimented with various versions of school choice over the past several years. While a federal right to education is not recognized, all fifty state constitutions provide some variation of an education clause, guaranteeing a state constitutional right to education. In

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Tennessee, satisfaction of the state constitutional right to education requires substantially equal educational opportunities for all students across the state. Despite this constitutional mandate, students in public schools across the state of Tennessee experience vast disparities in educational opportunities. Litigation is currently pending before the Tennessee Supreme Court regarding the constitutionality of the Tennessee Education Savings Account Pilot Program, and the public charter school sector continues to grow. School choice programs are draining traditional public schools of funding. Marginalized students and their families are expected to “choose” their way into the right school, as the Tennessee legislature abdicates its responsibility to provide substantially equal educational opportunities for all students.

This Article examines school choice in Tennessee through the lens of the Tennessee Supreme Court’s rulings in the Small Schools cases, which established the state constitutional right to a substantially equal education. Further, this article examines the discourse surrounding school choice and compares that discourse to the available data on charter schools and traditional public schools.

Applying the holdings in the Small Schools cases to the data comparing charter schools and traditional public schools, this Article concludes that the current state of school choice in Tennessee violates the Tennessee Supreme Court mandate that all students across the state have access to a substantially equal education. Finally, this Article proposes that the only realistic solution to fully address the issue of inequitable educational opportunities across the State of Tennessee is to adequately and equitably fund traditional public schools for the first time in State history.

School choice is being hotly debated across the nation. Stakeholders—ranging from teachers and teacher unions, parents, politicians, charter advocates, and even students themselves—are vigorously contesting the complex issues surrounding school choice. In light of the pending litigation before the Tennessee Supreme Court regarding the Tennessee Education Savings Account Pilot Program¹ the discussion surrounding school choice in Tennessee is not going away any time soon. This paper will examine the impact of school choice on Tennessee students' constitutional

¹ TENN. CODE ANN. § 49-6-2601 (2021).

right to a “substantially equal” education, as defined by the Tennessee Supreme Court in *Tennessee Small School Sys. v. McWherter*.² Specifically, in accordance with the rulings in the *Small Schools* cases,³ it will discuss how funding school choice is contributing to greater disparities in educational opportunities across the State of Tennessee.

Parts I and II provide pertinent background information regarding education and school choice in Tennessee. Part I outlines the history of the constitutional right to education in the state of Tennessee. This Part focuses on the *Small Schools* cases⁴ and how these decisions have defined the right to education under the State Constitution. This litigation specifies that students must have access to a “substantially equal” education across the state of Tennessee. Part II addresses the current state of school choice in Tennessee and is divided into three subsections. The first subsection includes a dive into the

² *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) [hereinafter *Small Schools I*].

³ *Id.*; *Small School Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) [hereinafter *Small Schools II*]; *Tennessee Small School Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) [hereinafter *Small Schools III*] [hereinafter collectively *Small Schools* cases].

⁴ *Id.*

Tennessee Public Charter Schools Act.⁵ The second subsection includes a discussion regarding the proposed Tennessee Education Savings Account Pilot Program⁶ (ESA). Additionally, the second subsection will review the recent Tennessee Court of Appeals decision regarding the constitutionality of the ESA.⁷ The final subsection of Part II examines the funding scheme behind charter schools and the ESA and the implications of that scheme on funding for traditional public schools.

Part III discusses the discourse supporting school choice, as well as why that discourse is inherently wrong. This Part is broken down into three subsections. The first subsection covers desegregation and resegregation. It starts with the United States Supreme Court holding in *Brown v. Board of Education*⁸ and explains how school choice was and still is used to circumvent the mandated integration of public schools. This subsection will discuss segregation both in terms of race and socioeconomic status of students.

⁵ TENN. CODE ANN. § 49-13-101 (2021).

⁶ TENN. CODE ANN. § 49-6-2601 (2021).

⁷ Metro. Gov't of Nashville v. Tenn. Dep't of Educ., No. M2020-00683-COA-R9-CV, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sep. 29, 2020).

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

The second subsection of Part III covers the discourse defending school choice as a means of closing the achievement gap through greater accountability and competition. Within this subsection, this paper will examine disparities between charter schools, private schools, and traditional public schools regarding the student selection process, disparities in disciplinary actions, what test scores reveal regarding the alleged success of charter schools, and disparities among schools regarding services provided for English language learners and students with disabilities.

The third subsection of Part III discusses the discourse defending school choice as a means for giving all families a chance to attend a great school. It exposes how school choice in Tennessee is in reality an illusion of choice for many families. This subsection will explain the process for the closure of neighborhood public schools and the replacement of those schools with charter schools, how choice opportunities are often denied to English language learners and students with disabilities, and how vouchers still do not present any real choice for a majority of families who might be eligible to receive them.

Finally, Part IV concludes by addressing how school choice, through both charter schools and vouchers, results in the loss of Tennessee students' constitutional right to a "substantially equal" education. It will connect both the funding scheme for school choice and the discourse explained in Part III to the inherent inequalities in the Tennessee education system. This section will conclude by arguing that the only long-term remedy to this issue is to adequately and equitably fund traditional public schools in Tennessee for the first time in the State's history.

I. BACKGROUND

A. HISTORY OF THE CONSTITUTIONAL RIGHT TO EDUCATION IN TENNESSEE

In *Small Schools I*, the Tennessee Supreme Court determined that the State's statutory funding scheme for public education was constitutionally impermissible because it resulted in severe disparities in educational opportunities across the State.⁹ Article XI, Section 12 of the Tennessee Constitution¹⁰ provides:

⁹ *Small Schools I*, 851 S.W.2d 139.

¹⁰ Also known as the Education Clause.

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

In reaching its decision, the court noted that the Tennessee Constitution mandates the General Assembly to create “a public school system that provides substantially equal educational opportunities to the school children of Tennessee.”¹¹

The *Small Schools* cases are particularly relevant to charter and voucher programs because of the court’s findings regarding the relationship between school funding and equal opportunities for students. Specifically, the court in *Small Schools I* held that “there is a direct correlation between dollars expended and the quality of education that a student receives” and “the [current] funding system violates the equal protection provisions of Article XI, Section 8 and

¹¹ *Small Schools I*, 851 S.W.2d at 140–41.

Article I, Section 8 of the Tennessee Constitution because the system results in inequalities in the provision of those educational opportunities granted by Article XI, Section 12.”¹² Thus, because of the direct correlation between funding and educational quality,¹³ any program that implicates education funds has the potential to impact equitable educational opportunities.

The statutory funding scheme that the court in *Small Schools I* held unconstitutional divided responsibility between the state board of education, the commissioner of education, the local board of education, and the local superintendent.¹⁴ Approximately 45% of funding for public education in Tennessee came from the state, and the bulk of that funding came from a combination of the Tennessee Foundation Program (TFP) and categorical grants.¹⁵ Local funding for education came from property taxes and other local option taxes, such as beer, liquor, or wheel taxes, and there was not a provision that provided for equalization of any local tax funds between counties.¹⁶ The court found that

¹² *Id.* at 144.

¹³ *Id.*

¹⁴ *Id.* at 142.

¹⁵ *Id.* at 143.

¹⁶ *Id.*

in 1987, per-pupil funding ranged from \$1,823 to \$3,669 depending on the county, and most of this variation was the result of “the state’s higher reliance on local government to fund education and the varying ability of the local government to raise sufficient funds.”¹⁷

The disparity in funds across counties was directly related to each county’s fiscal capacity and resulted in more opportunities for students in wealthy districts compared to students in poor districts.¹⁸ The court determined that, while it is the legislature’s responsibility to determine the manner in which it maintains and supports a free public education system, the court has a “duty to consider whether the legislature, in establishing the educational funding system, has ‘disregarded, transgressed, and defeated either directly or indirectly,’ the provisions of the Tennessee Constitution.”¹⁹ The court found that the legislature did directly defeat such provisions of the Tennessee Constitution because it abandoned its responsibility for providing

¹⁷ *Id.*

¹⁸ *Id.* The disparities across counties included access to laboratory facilities, computers, textbooks, buildings, advanced placement courses, foreign language courses, music and art courses, and physical education programs. Additionally, wealthier districts had newer, safer and cleaner facilities. *Id.*

¹⁹ *Id.* at 148.

students with a substantially equal education, and instead placed that responsibility on local governments.

The court recognized two fallacies regarding the benefits of local control in *Small Schools I*.²⁰ First, that altering the state funding scheme to provide for equalization does not mean that local control has to be reduced.²¹ Second, that only districts with a large tax base can decide how much they want to spend on education, as poor districts “cannot freely choose to tax [themselves] into an excellence for which [their] tax rolls cannot provide.”²² Specifically, the court found that local funding was limited to the economic condition of each county, and counties with low property values and little business activity were incapable of funding the needs of their educational systems.²³ Taking into account such disparities, the court ultimately held that “the disparities in educational opportunities available to public school students throughout the state, found to be constitutionally impermissible, have been caused principally by the statutory funding scheme,

²⁰ *Id.* at 155.

²¹ *Id.*

²² *Id.*

²³ *Id.*

which, therefore, violates the constitutional guarantee of equal protection.”²⁴

Two years later, in *Small Schools II*, the Tennessee Supreme Court held that the Basic Education Program (BEP)²⁵ was an appropriate plan to achieve equalization of funding in public schools and mandated that teachers’ salaries be taken into account for equalization of funding in the BEP.²⁶ The BEP provides for funding equalization by examining forty-two components and providing a proportionate share of the costs to each local system depending on that system’s fiscal capacity.²⁷ *Small Schools II* came to the Tennessee Supreme Court because the BEP previously omitted a component for equalization of teacher salaries.²⁸

The court found this omission of teacher salaries to be a “significant defect in the BEP,” and that “the failure to provide for the equalization of teachers’ salaries according to the BEP formula puts the entire plan at risk functionally

²⁴ *Id.* at 156.

²⁵ The BEP is the funding scheme for public education that emerged after the court’s holding in *Small Schools I*.

²⁶ *Small Schools II*, 894 S.W.2d at 738.

²⁷ *Id.* at 736.

²⁸ *Id.* at 735.

and, therefore, legally.”²⁹ Essentially, the court found that teachers’ salaries were so integral to the disparities in funding that equalization of funding under the BEP would be substantially impaired if teachers’ salaries were not included in the calculation for allocating funds. In *Small Schools III*, the court reiterated the importance of including teachers’ salaries in the equalization formula and held that the BEP must provide for an annual cost review of teachers’ salaries.³⁰ The *Small Schools III* decision focused on the importance that “the educational funding structure be geared toward achieving equality in educational opportunity for students”³¹ Taken together, the *Small Schools* cases reveal that any component that impacts money in schools has the potential to impact equitable opportunities for students.

Ultimately, the *Small Schools* cases connect the state constitutional right to a substantially equal education with the necessity of equitable funding to fulfill that right for all students. The State of Tennessee is under a constitutional mandate to provide students across the State with a

²⁹ *Id.* at 738.

³⁰ *Small Schools III*, 91 S.W.3d at 240–41.

³¹ *Id.* at 243.

substantially equal education, and the Tennessee Supreme Court recognized that equitable funding across school districts is necessary to achieve that mandate.³²

B. CURRENT STATE OF SCHOOL CHOICE IN TENNESSEE

Presently, Tennessee authorizes charter schools through the Tennessee Public Charter Schools Act.³³ While Tennessee does not currently have an active voucher program in place, the State Legislature passed the Tennessee Education Savings Account Pilot Program (ESA) in 2019.³⁴ The Tennessee Court of Appeals recently struck down the proposed ESA as unconstitutional,³⁵ and the State and Governor Lee stated that they intend to appeal the decision to the Tennessee Supreme Court.³⁶ This Part will first discuss the current state of school choice in Tennessee via charter schools. Then, it will cover the proposed voucher program and the recent decision by the Tennessee Court of Appeals. Lastly, this Part concludes with a discussion

³² See *supra* text accompanying notes 9–11, 23–24.

³³ TENN. CODE ANN. § 49-13-101 (2021).

³⁴ TENN. CODE ANN. § 49-6-2601 (2021).

³⁵ *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, No. M2020-00683-COA-R9-CV, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sep. 29, 2020).

³⁶ Megan Mangrum, *Tennessee Court of Appeals upholds decision finding Gov. Bill Lee's education savings account program unconstitutional*, TENNESSEAN (Sept. 29, 2020), <https://www.tennessean.com/story/news/education/2020/09/29/tennessee-court-appeals-upholds-decision-finding-gov-bill-lees-education-savings-account-program-unc/3580229001/>.

regarding the current funding scheme for charter schools, the proposed funding scheme for the ESA, and the implications of both funding schemes on funding for traditional public schools.

a. PUBLIC CHARTER SCHOOLS IN TENNESSEE

The Tennessee Public Charter Schools Act was designed to improve learning outcomes and close the achievement gap, provide options for parents to meet their students' educational needs, encourage innovation in schools, and ultimately "provide an alternative means within the public school system for ensuring accomplishment of the necessary outcomes of education by allowing the establishment and maintenance of public charter schools that operate within a school district structure but are allowed maximum flexibility to achieve their goals."³⁷ Public charter schools in Tennessee must be operated by a non-profit organization,³⁸ but such schools are permitted to contract with for-profit entities for any services except the management and operation of the school.³⁹ Sponsors of public charter schools must apply to the

³⁷ TENN. CODE ANN. § 49-13-102 (2021).

³⁸ TENN. CODE ANN. § 49-13-111 (2021).

³⁹ TENN. CODE ANN. § 49-13-124 (2021).

Local Education Agency (LEA) for authorization, and, after review, an LEA may determine whether they will allow the sponsor to open to a new public charter school or convert an existing public school into a public charter school.⁴⁰ If an LEA denies a sponsor of a public charter school, the sponsor can seek authorization from the State Board of Education.⁴¹

The most recent report available states that there are a total of 110 charter schools in Tennessee.⁴² The majority of the State's charter schools are located in Shelby County, Metro-Nashville, and the Achievement School District.⁴³ Charter schools in Tennessee receive per-pupil state and local funding, passed from the LEA to the charter schools within its jurisdiction;⁴⁴ however, they are not required to follow the same laws, rules, and policies as traditional public schools.⁴⁵

⁴⁰ TENN. CODE ANN. § 49-13-106 (2021).

⁴¹ TENN. CODE ANN. § 49-13-108 (2021).

⁴² TENN. DEP'T OF EDUC., CHARTER SCHOOLS ANNUAL REPORT 2 (2019).

⁴³ *Id.* at 6 (noting that there are fifty-one charter schools in Shelby County, twenty-nine in Metro-Nashville, and twenty-four in the Achievement School District).

⁴⁴ TENN. CODE ANN. § 49-13-112 (2021).

⁴⁵ *See, e.g., Charter Schools FAQ*, TENN. DEP'T OF EDUC., <https://www.tn.gov/education/school-options/charter-schools/charter-school-faq.html> (last visited Nov. 1, 2020) (“[T]he sponsor of a proposed charter school may apply either to the local board of education or the commissioner of education for a waiver of any state board rule or statute that inhibits or hinders the proposed charter school’s ability to meet its goals . . . [c]harter schools are not required to follow local board of education policies, but the policies of the governing body of the charter school.”).

b. THE TENNESSEE EDUCATION SAVINGS ACCOUNT
PILOT PROGRAM AND CONSEQUENT LITIGATION

In the Spring of 2019, Governor Bill Lee signed the ESA into law. As passed, the ESA would allow eligible students in Davidson County, Shelby County, or the Achievement School District to use state and local per-pupil funds to attend participating private schools.⁴⁶ To be eligible for the ESA program, the student must be a Tennessee resident in grades kindergarten through twelve.⁴⁷ The student must also have either previously attended a Tennessee public school for the full school year immediately preceding the school year for which the student receives an ESA, be eligible to enroll in a Tennessee school for the first time, or have received an ESA in the previous school year.⁴⁸ Additionally, eligible students must be a member of a household with an annual income that does not exceed twice the federal income eligibility

⁴⁶ *Education Savings Account (ESA) Program*, TENN. DEP'T OF EDUC., <https://www.tn.gov/education/school-options/esa-program.html> (last accessed Nov. 1, 2020).

⁴⁷ *Id.*

⁴⁸ TENN. COMP. R. & REGS. 0520-01-16-.02 (2019).

guidelines for free lunch.⁴⁹ Upon signing the ESA into law, Governor Lee stated,

Low-income students deserve the same opportunity as every other kid in this state, and we will need a bold plan that will help level the playing field. We need to challenge the status quo, increase competition, and not slow down until every student in Tennessee has access to a great education. We're not going to get big results from our struggling schools by nibbling around the edges. That is why we need education savings accounts in Tennessee this year.⁵⁰

Despite Governor Lee's statement regarding the necessity for the same opportunities for all students across Tennessee, the ESA only applied to three school districts in the State. When the legislature first proposed the bill, it applied to districts statewide.⁵¹ The bill that passed, however, excluded

⁴⁹ *Id.* These requirements are in addition to the requirement that the student be zoned to attend either Shelby County Schools, Metro-Nashville Schools, or a school in the Achievement School District. *Id.*

⁵⁰ *Education Savings Account (ESA) Program*, *supra* note 46.

⁵¹ See Jason Gonzales & Joel Ebert, *Lee administration outlines new details for controversial Education Savings Account Bill*, TENNESSEAN (Mar. 14, 2019), <https://www.tennessean.com/story/news/education/2019/03/14/tennessee-school-vouchers-education-savings-account/3161906002/> ("Under the proposal, eligible students would need to be zoned to a district with at least three or more schools in the bottom 10 percent of all statewide in terms of academic performance. That list would include Shelby County Schools, Knox County Schools, the Jackson-Madison County School District, Metro Nashville Public Schools and Hamilton County Schools, as well as the achievement School District.").

the ESA's application to the majority of districts across the state. This strategy was employed to gain the support of representatives of those districts who wanted to keep vouchers out of their school systems.⁵²

Further, private schools are not mandated to accept ESA funds, and participating students are only able to receive an annual amount up to the amount representing the per-pupil state and local funds as determined by the BEP.⁵³ Thus, it is possible and even likely that the annual tuition for a private school would exceed the amount that an eligible student would be entitled to under the ESA.

In late September 2020, however, the Tennessee Court of Appeals upheld the chancery court's finding that the ESA is unconstitutional.⁵⁴ Specifically, the court found that the ESA, as proposed by the legislature, violated the "Home Rule" provision⁵⁵ of the Tennessee Constitution because it

⁵² Laken Bowles, *Gov. Lee's ESA Bill Passes Tennessee House in Narrow Floor Vote*, NEWSCHANNEL5 NASHVILLE (Apr. 23, 2019), <https://www.newschannel5.com/news/tennessee-house-to-vote-on-school-voucher-plan> ("Representative Zachary was promised Knox County would be taken out of the house's version of the ESA vote in exchange for changing his 'no' vote on the program to a 'yes.'").

⁵³ TENN. COMP. R. & REGS. 0520-01-16-.04 (2019).

⁵⁴ *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, No. M2020-00683-COA-R9-CV, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sep. 29, 2020).

⁵⁵ The "Home Rule" provision states that "any act of the General Assembly private or local in form or effect applicable to a particular county or

mandated the voucher program only in Davidson and Shelby counties. The Home Rule provision requires that a program applicable only to some counties must obtain approval of either the local legislative body or eligible voters in the county or counties that it applies to.⁵⁶ Because the court's decision rested solely on the Home Rule provision, it has no bearing on a voucher program that applies state-wide, and it is likely that this will not be the last time that the Tennessee legislature entertains the idea of a voucher program.⁵⁷ Furthermore, Governor Lee has indicated that he and the State of Tennessee intend to appeal the decision to the Tennessee Supreme Court.⁵⁸ For now, however, the order entered by Davidson County Chancery Court prevents the state from advancing the ESA program any further.⁵⁹ The Tennessee Department of Education is not permitted to take applications at this time or take any action on submitted

municipality either in its governmental or proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected." TENN. CONST. art. XI, § 9.

⁵⁶ *Id.*

⁵⁷ See *supra* text accompanying note 50.

⁵⁸ Mangrum, *supra* note 36 ("A spokesperson for Lee's office confirmed that the state will appeal Tuesday's decision.").

⁵⁹ *Education Savings Account (ESA) Program*, *supra* note 46.

applications, nor is it permitted to answer or return phone calls or emails regarding the program.⁶⁰

c. THE FUNDING SCHEME FOR SCHOOL CHOICE IN
TENNESSEE

Tennessee’s funding scheme for charter schools and proposed funding scheme for the ESA is also referred to as portability, or a “backpack concept.”⁶¹ Under this portability concept, students attending charter schools or receiving a voucher under the ESA bring their per-pupil funding with them to their school of choice.⁶² Funding for public schools, allocated by the yearly BEP calculation, is funneled from LEAs to the charter school or private school based on the per-pupil amount in the LEA where the eligible student resides, or the statewide per-pupil average.⁶³

On its face portability appears to be a logical concept, but in reality, poor school districts are losing significant funding

⁶⁰ *Id.*

⁶¹ Leslie S. Kaplan & William A. Owings, *Funding School Choice: Implications for American Education*, 44 J. EDUC. FIN. 199, 207 (2018).

⁶² *Id.*; see also TENN. COMP. R. & REGS. 0520-01-16-.04 (2019) (“The maximum annual amount to which a participating student is entitled under the Program shall be equal to the amount representing the per pupil state and local funds generated and required through the basic education program . . . for the LEA in which the participating student resides . . .”).

⁶³ TENN. COMP. R. & REGS. 0520-01-16-.04 (2019).

as a result.⁶⁴ High poverty schools face greater demands than more affluent districts, requiring more funding, resources, and supports to provide their students with equal opportunities.⁶⁵ The redistribution of funds to charter and private schools is done on a uniform, per-pupil basis.⁶⁶ This uniform calculation fails to take into account the additional cost of supporting low-income students.⁶⁷ A study by the Center for American Progress found that in 2014 “districts with high poverty concentrations could lose an average of about \$85 per student under a portability scheme whereas the most affluent districts could gain more than \$290 per student”⁶⁸ That is a per-pupil deficit of \$375, which is certainly contrary to the Tennessee Supreme Court’s holdings in the *Small Schools* cases directing that the legislature create an equitable funding scheme in order to provide students across the State with a substantially equal education.

⁶⁴ Kaplan & Owings, *supra* note 61, at 207.

⁶⁵ *See id.* (“Presently, the research consensus holds that high-poverty schools face disproportionate demands in educating low-income students and need more resources and support to help them have an equal opportunity for success in post-secondary education and career.”).

⁶⁶ *Id.*; *see also* TENN. CODE ANN. § 49-13-112 (2021) (explaining how funds are allocated to charter schools).

⁶⁷ Kaplan & Owings, *supra* note 61, at 207.

⁶⁸ *Id.*

Ultimately, the diversion of taxpayer dollars from public to private schools via vouchers “significantly redistribute[s] public funds . . . in ways that deplete resources intended for the general welfare and diminish[es] the equity underpinning every child’s right to a high-quality public education.”⁶⁹ Funds are depleted for public schools through portability because public schools “have a relatively static set of fixed costs, largely because, by design, they serve communities by their entirety.”⁷⁰ When funding is shifted on a per-pupil basis to a charter school or voucher, the cost of operating the public school remains substantially the same.⁷¹ Thus, the per-pupil funding model forces traditional public schools to make tough budgetary decisions as they lose funding to charter and private schools via portability, while still facing substantially the same expenses.⁷² Consequently,

⁶⁹ *Id.* at 212.

⁷⁰ Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 473 (2013).

⁷¹ Brief for Tennessee Education Association as Amici Curiae Supporting Respondent, *Espinoza v. Montana Department of Revenue*, 591 U.S. ____ (2020) (No. 18-1195).

⁷² *See, e.g.*, Kaplan & Owings, *supra* note 61, at 203 (“Because [traditional public schools] have fixed costs for salaries, curriculum materials, and facilities—even though they are sending taxpayers dollars after students who leave for charter schools—costs per remaining [traditional public schools] students rise. This also increases per student payments to charters because states typically tie charter funding per student to district per student funding. A downward cycle result in which the [traditional public school] feels the urgency to cut costs in response to enrollment losses.”).

public schools do not have the funds necessary to serve their students, particularly when they are serving high-poverty populations and a greater number of English language learners and students with disabilities.⁷³ As the court held in *Small Schools I*, the Tennessee legislature has a responsibility to ensure public schools are equitably funded so that all students have access to a substantially equal education. Presently, the legislature is using choice to abdicate that responsibility, foisting it on families to make the right choice instead.

It is no secret that Tennessee has continually failed to adequately fund its public school system.⁷⁴ In June of 2020, Nashville Chancellor Ellen Hobbs Lyle set an official trial date to hear Shelby County and Metro Nashville's case regarding allegations that funds are not presently allocated properly to their respective districts under the BEP.⁷⁵ Upon

⁷³ See discussion *infra* Part III, subsection b.

⁷⁴ Compare *Small Schools II*, 894 S.W.2d 734 (holding that the funding scheme for public education was unconstitutional), *with* Complaint at 8, *Shelby Cty. Bd. of Educ. v. Haslam*, No. 15-1048-III (filed Aug. 31, 2015) (alleging that the state of Tennessee has not fully funded the BEP according to the statutory requirements and the school districts are suffering from a lack of funding as a result, negatively impacting the quality of education that the Districts can provide students).

⁷⁵ Marta W. Aldrich, *Judge sets trial date for Tennessee's 5-year-old school funding lawsuit*, CHALKBEAT TENN. (June 15, 2020), <https://tn.chalkbeat.org/2020/7/15/21326022/judge-sets-trial-date-for-tennessees-5->

filing suit, district leaders in Shelby County argued that “the state grossly miscalculates how much an average teacher costs and doesn’t take into account the financial impact of the growing charter school sector and a host of state-mandated reforms placed on large urban school districts.”⁷⁶ This case is particularly noteworthy because Governor Lee has notoriously labeled traditional public schools as failing despite “full funding” under the BEP, and encouraged the closure of these “failing” schools and the replacement of them with charter schools.⁷⁷ Shelby County and Metro-Nashville schools intend to show at trial in October 2021 that the BEP has never actually been fully funded,⁷⁸ and that Governor Lee and the Tennessee Legislature are the ones who are failing students by their failure to properly allocate funds under the BEP, not traditional public schools.

year-old-school-funding-lawsuit. It should be noted that since setting the trial date, Chancellor Ellen Hobbs Lyle recused herself from the case and, as a result, the trial may be delayed. See Marta W. Aldrich, *Judge’s surprise recusal could delay Tennessee’s long court battle over school funding—again*, CHALKBEAT TENN. (March 2, 2021), <https://tn.chalkbeat.org/2021/3/1/22308499/judges-surprise-recusal-could-delay-tennessees-long-court-battle-over-school-funding-again>.

⁷⁶ Daarel Burnette II, *Shelby County Board of Education files funding lawsuit against state*, CHALKBEAT TENN. (Aug. 31, 2015), <https://tn.chalkbeat.org/2015/8/31/21105581/shelby-county-board-of-education-files-funding-lawsuit-against-state>.

⁷⁷ See *supra* text accompanying note 50.

⁷⁸ See Aldrich, *supra* note 75 (discussing the pending litigation between the school districts and the State).

II. DISCUSSION

A. DISCOURSE BEHIND SCHOOL CHOICE AND WHY IT IS INHERENTLY WRONG

Simply put, the discourse advocating for charter schools and voucher programs primarily claims that public schools are failing children, and charter schools and voucher programs were designed to save children from falling victim to the public school system. This discourse includes misinformation regarding choice as a contributor to desegregation, choice as a means to close the achievement gap, and choice as the only option for all parents to send their children to a great school. In reality, choice has thus far resulted in the resegregation of Tennessee schools, an unchanged achievement gap, and the mere illusion of choice for families across the state.

a. DESEGREGATION AND RESEGREGATION

The waves of education reform centered around school choice began following the Supreme Court's decision in *Brown v. Board of Education*.⁷⁹ In *Brown*, the United

⁷⁹ LOUIS F. MIRON & EDWARD P. ST. JOHN, REINTERPRETING URBAN SCHOOL REFORM: HAVE URBAN SCHOOLS FAILED, OR HAS THE REFORM MOVEMENT FAILED URBAN SCHOOLS? 2 (2003); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

States Supreme Court held that separate educational facilities are inherently unequal and, “[t]o separate [students] from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”⁸⁰ In response to *Brown*, school choice and voucher plans were utilized by supporters of school segregation to avoid the integration ordered by the court.⁸¹ Segregation supporters knew that White students would not choose to attend Black schools, and Black students seeking to attend White schools “had to run a gauntlet of procedural barriers . . . and few families were willing to face these problems.”⁸² As a result of these so-called choice policies, 98% of Black students were still in all-Black schools a decade after *Brown*.⁸³

Over sixty years later, segregation is still ever-present in today’s schools. In Tennessee, the minority enrollment in charter schools is 93%, compared to 65% in

⁸⁰ *Brown*, 347 U.S. at 494–95.

⁸¹ GARY ORFIELD & ERICA FRANKENBERG, *EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 20–21* (2013).

⁸² *Id.*

⁸³ *Id.*

traditional, district-run public schools.⁸⁴ The almost-thirty percentage point difference shows that public charter schools in Tennessee are not abiding by the integration demands of *Brown*. Further, in Knox County alone, the population of Black students in charter schools was 79%, compared to 16% in traditional public schools for the year 2018.⁸⁵ In the same year, the population of White students in charter schools was 15%, compared to 71% in traditional public schools.⁸⁶ These percentages show how choice perpetuates segregation.

Operators of charter schools often hold themselves out as the solution to educational inequality.⁸⁷ But these operators ignore the fact that, without civil rights controls, choice increases segregation and segregation makes schools systematically less successful.⁸⁸ In fact, many charter schools are intentionally set up to serve particular demographics.⁸⁹ These schools use their missions to justify segregation by

⁸⁴ TENN. DEP'T OF EDUC., *Charter Schools Annual Report 8* (2019).

⁸⁵ *Id.* at 9.

⁸⁶ *Id.*

⁸⁷ ORFIELD & FRANKENBERG, *supra* note 81, at 30.

⁸⁸ *Id.*

⁸⁹ See, e.g., KIPP MEMPHIS COLLEGIATE SCHOOLS, <https://www.kipp-memphis.org/campaign-4> (last visited Nov. 1, 2020) (“KIPP has a 20-year track record of helping students in educationally underserved communities”); MEMPHIS DELTA PREPARATORY CHARTER SCHOOL, <https://memphisdeltaprep.org/about-mdp/mission/> (last visited Nov. 1, 2020) (“MDP is committed to closing racial and economic achievement gaps in a meaningful way”).

race and poverty, despite the Court's holding in *Brown* that separate is inherently unequal.⁹⁰ Thus, students in segregated schools across Tennessee do not have access to a substantially equal education because, as *Brown* held, separate cannot be equal.

In 2013, Memphis City Schools and Shelby County Schools merged.⁹¹ The following year, six suburban towns in the new Shelby County Schools formed their own municipality school districts.⁹² The students in the municipality districts are predominately White and middle class or affluent, and the students in Shelby County Schools are predominately Black.⁹³ Additionally, over half of the students in Shelby County Schools live at or below the poverty line.⁹⁴ Along with the neighboring municipality schools, Shelby County Schools also competes with public charter schools and private schools for students.⁹⁵ While segregation was exacerbated in Shelby County Schools by

⁹⁰ See *Brown*, 347 U.S. at 494.

⁹¹ Mary K. Keller, *The Disillusionment of School Choice in Memphis Schools: Response to Privatised Sources of Funding and the Spatiality of Inequalities in Public Education*, 52 J. EDUC. ADMIN. & HIST. 141, 141 (2020).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *id.* at 142 (referring to private schools and charter schools as "competitors in the city's educational market.").

the creation of the municipality districts in 2014,⁹⁶ charter schools are contributing further to segregation.⁹⁷ Only 1% of charter school students in Shelby County are White, compared to 8% in traditional public schools.⁹⁸ This example of Shelby County is just one of many that exemplifies how choice has increased segregation in Tennessee's schools.

b. CLOSING THE ACHIEVEMENT GAP THROUGH

COMPETITION AND GREATER ACCOUNTABILITY

Additionally, school choice and charter school advocates assert that charter schools help create greater accountability for schools, are of higher quality than traditional public schools, and reduce the racial achievement gap.⁹⁹ Advocates for choice utilize data regarding test scores to argue for the closure of public schools and replacement of those public schools with charter schools, despite the evidence that charter schools are performing just as poorly, if not worse, on

⁹⁶ *Id.* at 141.

⁹⁷ See TENN. DEP'T OF EDUC., *Charter Schools Annual Report 8* (2019) (charting the comparison of demographics in charter schools and traditional public schools).

⁹⁸ *Id.*

⁹⁹ See Janelle Scott, *The Politics of Venture Philanthropy in Charter School Policy and Advocacy*, 23 EDUC. POL'Y 106, 118 (2009) ("A key assumption driving these efforts is that "brand-name" schools that operate in a competitive policy environment will not only result in greater accountability and produce higher quality and more choice for parents but also redress the vexing racial achievement gap.").

standardized tests.¹⁰⁰ The push for the closure of “failing” public schools, alongside the replacement of such schools with charter schools and the potential for a voucher program in Tennessee, are combining to privatize education in Tennessee and threatening students’ constitutional right to a substantially equal education. This privatization of education does not hold schools to the same standards as traditional public schools regarding transparency in management and oversight, the student selection process, or the services available to English language learners and students with disabilities.¹⁰¹ Private and charter schools are not closing the achievement gap—they are merely pushing out the students that are more expensive or challenging to educate, which traditional public schools are obligated to serve, to fit their narrative that school choice is better.¹⁰²

Despite the rhetoric behind charter schools as “competitive” and creating “greater accountability” for

¹⁰⁰ TENN. DEP’T OF EDUC., *Charter Schools Annual Report* 13–14 (2019) (comparing End-of-Course and TN Ready assessment data from charter schools and traditional public schools).

¹⁰¹ See Scott, *supra* note 99, at 128, 130 (noting that charter schools are being used as a means for philanthropists to shape public policy without the process that would otherwise be required) (“[Charter schools] limit student access with admissions procedures but also with the implementation of discipline and other school-based policies that result in high numbers of student attrition once students are enrolled.”).

¹⁰² See *id.*

traditional public schools to either step up or shut down, test scores for students attending charter schools in Tennessee are significantly lower than those for students attending traditional public schools.¹⁰³ In fact, students in traditional public schools across the state out-scored students in charter schools on TN Ready¹⁰⁴ exams in English language arts, math, and social studies in 2018.¹⁰⁵ Charter school students outperformed traditional public school students only in science, and, even then, the “outperformance” was by one percentage point.¹⁰⁶ Similarly, on end-of-course exams, the percentages of students scoring on track or mastered were significantly higher for students attending traditional public schools compared to students attending charter schools.¹⁰⁷ Not only are students attending charter schools performing worse on TN Ready and end-of-course assessments compared to traditional public school students, but 20% of charter schools were designated as Priority Schools in 2018,

¹⁰³ TENN. DEP’T OF EDUC., *Charter Schools Annual Report* 13–14 (2019).

¹⁰⁴ TN Ready is the statewide assessment in Tennessee designed to assess student understanding.

¹⁰⁵ TENN. DEP’T OF EDUC., *Charter Schools Annual Report* 14 (2019).

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 13 (charting the End-of-Course assessment scores for charter schools and traditional public schools). Forty percent of students in traditional public schools scored on track or mastering in Biology, compared to twenty-five percent of students in charter schools. *Id.* A similar pattern is evident in the results from the other subjects tested. *Id.*

compared to only 12% of traditional public schools in that same year.¹⁰⁸ A Priority School is one designated by the State of Tennessee as in need of improvement.¹⁰⁹ These lower test scores and Priority School designations indicate that charter schools have not made any progress towards closing the achievement gap. In fact, they appear to be widening it.

c. REAL CHOICE—OR JUST AN ILLUSION?

Proponents for choice argue that “[t]he Education Savings Account program is . . . a program to benefit kids and parents and empower them to make the best decision for their family Ultimately, all parents want their child to go to a good school.”¹¹⁰ Proponents further assert that the ESA is a “lifeline to parents stuck in the worst-performing schools.”¹¹¹ This “life-line” narrative shifts the focus away from the mandate for the State to provide all students with a substantially equal education, and instead puts the weight on parents to “choose” the school that will provide their child with a substantially equal education. The idea that marginalized groups can choose their way out of their

¹⁰⁸ *Id.* at 17.

¹⁰⁹ *Id.*

¹¹⁰ Mangrum, *supra* note 36 (quoting an email from Tennessee director of the American Federation for Children Shaka Mitchell).

¹¹¹ *Id.*

circumstances is a harmful and false assumption.¹¹² Oftentimes, families are limited by access to information or transportation.¹¹³

Additionally, families with limited proficiency in English or limited access to technology have a more difficult time navigating all of the information that is available regarding school choice and public schools.¹¹⁴ It makes far more sense to ensure that all traditional public schools are excellent, rather than present families with an array of options ranging in quality and tell them to choose, particularly when not all families are equipped with the information to choose the “right” one. Tennessee is putting an expectation on parents and families to choose better schools, making it evident that not all schools across the State provide students with substantially equal educational opportunities. Thus, the State’s current choice scheme is not

¹¹² Nicholas J. Eastman, Morgan Anderson & Deron Boyles, *Choices or Rights? Charter Schools and the Politics of Choice-Based Education Policy Reform*, 36 *STUD. PHILOS. EDUC.* 61, 68 (2017).

¹¹³ *Id.* at 68–69.

¹¹⁴ *Id.* at 69.

in accordance with the holdings in the *Small Schools* cases.¹¹⁵

For English language learners and students with disabilities, the illusion of choice is even greater. The Tennessee Public Charter Schools Act¹¹⁶ requires charter schools to provide special education services the same as any other public school, and refusal to enroll students based on their need for special education services is prohibited.¹¹⁷ Despite this requirement, charter schools tend to have “disproportionately low enrollments of special education students, English language learners, and boys, populations generally known to perform more poorly on standardized assessments.”¹¹⁸ In Shelby County alone, only 5% of students in charter schools were English language learners, compared to 8% in traditional public schools.¹¹⁹ Similarly, for that same year, only 9% of students in charter schools were students with disabilities, compared to 12% in traditional public

¹¹⁵ See *Small Schools II*, 894 S.W.2d 734, 734 (1995) (holding that the legislature is responsible for maintaining and supporting a system of free public education which provides students across the State with substantially equal educational opportunities).

¹¹⁶ TENN. CODE ANN. § 49-13-101 (2021).

¹¹⁷ TENN. CODE ANN. § 49-13-111 (2021).

¹¹⁸ Scott, *supra* note 99, at 130.

¹¹⁹ TENN. DEPT OF EDUC., *Charter Schools Annual Report* 9 (2019).

schools.¹²⁰ Additionally, private school students with disabilities are not guaranteed the full range of services and legal protections that public school students are entitled to.¹²¹ The lack of guaranteed services at private schools makes the idea of choice even less so for parents of students with disabilities, particularly when they can be certain their child is entitled to free services in the public school system.¹²² Thus, students in these groups do not find safe havens in charter or private school environments.¹²³

Further, the proposed ESA program only provides eligible families with an amount equaling the average per-pupil funding, totaling approximately \$7,000.¹²⁴ The proposed ESA program does not provide additional funding for students who need special education services. Families who receive an ESA must also separately apply to participating private schools and are not guaranteed

¹²⁰ *Id.*

¹²¹ Eastman, Anderson & Boyles, *supra* note 112, at 69–70.

¹²² Derek Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1360, 1383 (2018).

¹²³ Scott, *supra* note 99, at 130.

¹²⁴ *Frequently Asked Questions for Participating Families: Tennessee Education Savings Account Program*, TENN. DEPT OF EDUC., <https://esa.tnedu.gov/wp-content/uploads/2020/04/ESA-FAQ-for-Participating-Families.pdf> (last visited Nov. 24, 2020).

admission.¹²⁵ Therefore, there is not an incentive for private schools to accept students who require special education services because the school will not receive additional funding to cover the costs of special education services.¹²⁶ Even if a private school decides to accept such students, private schools are not subject to the same mandates as traditional public schools to provide free special education services to students. Parents of students with disabilities can rest assured that traditional public schools must serve their children. Because private schools are not held to that same obligation, the “choice” provided to parents of students with disabilities through a voucher means very little in reality.

With fewer services available for students with disabilities or English language learners, traditional public schools are left to educate much larger populations of high-needs children compared to charter and private schools.¹²⁷ But the enrollment problem does not end there, as charter schools also have more leeway than traditional public schools

¹²⁵ *See id.* (“Admission to a participating private school is a separate process from approval for an ESA. Each private school has its own admission policies and procedures, and families are encouraged to start researching schools after the ESA application is submitted. The award of an ESA does not ensure acceptance to a participating private school.”).

¹²⁶ *See supra* notes 121–23 and accompanying text.

¹²⁷ Scott, *supra* note 99, at 130.

to exclude students after they are enrolled.¹²⁸ One way charter schools exclude students after they enroll is through demerit discipline systems, under which students accumulate minor infractions such as walking out of line or not making eye contact with an adult.¹²⁹ These minor infractions are added up until students are suspended or expelled, likely sending the student back to a traditional public school that is obligated to serve all students in the community, no matter how difficult.¹³⁰

Choice is further diminished because charter schools can push students out through overly harsh disciplinary policies more easily than traditional public schools.¹³¹ While charter schools purport to help students defy the odds, perhaps they should include a disclaimer noting that the opportunity only applies to students who are not too expensive or challenging for them to educate.¹³² Ultimately, school choice in

¹²⁸ Black, *supra* note 122, at 1382.

¹²⁹ *Id.* at 1382–83.

¹³⁰ *Id.* at 1383.

¹³¹ *See id.* (“[P]ublic schools have the power to exclude students, but that power exists within a distinct set of legal parameters. Whereas charters have substantial latitude that, in effect, permits them to serve the students they wish to serve, not all of the students who may wish to come.”).

¹³² *See id.* at 1382–83 (describing the exclusionary practices that charter schools use to avoid educating students who are more costly or challenging).

Tennessee is merely an illusion of choice, particularly for marginalized students and their families.

III. CONCLUSION

A. THE LOSS OF A “SUBSTANTIALLY EQUAL” EDUCATION

The Tennessee Supreme Court was clear in the *Small Schools* cases—this State has an obligation to provide all Tennessee students with access to a substantially equal public education.¹³³ Under Tennessee’s current education system, students across the state do not have access to substantially equal public educational experiences. Many public charter schools are lacking the services necessary for English language learners and students with disabilities. Tennessee schools have high rates of racial segregation, despite over sixty years passing since *Brown*. Public taxpayer dollars are diverted to charter schools, which are then not held to the same standards as traditional public schools to serve the students in their communities. The legislature has attempted to divert public taxpayer dollars even further through the ESA, passing public money into the

¹³³ *Accord Small Schools II*, 894 S.W.2d 734; *Small Schools III*, 91 S.W.3d 232.

hands of private organizations with no accountability.¹³⁴ There are no real choices for marginalized students and their families. School choice has diverted funds away from traditional public schools, forcing them to fail, and funding charter schools that are not serving students any better.

With a plethora of charter schools to “choose” from, students across Tennessee are still “Waiting for Superman.”¹³⁵ The solution is not more choice. The real hero for Tennessee students will be the Tennessee Legislature when it finally steps up to fund its traditional public school system adequately and equitably. If traditional public schools in Tennessee were adequately funded and supported, school choice would become obsolete. Tennessee should reevaluate its goals and work in accordance with the *Small Schools* cases to ensure that all public schools across the state provide their students with a high-quality education. This goal can only be achieved when public education is

¹³⁴ It is of note that many of these private schools have religious affiliations. While this paper has not addressed the constitutionality of using public taxpayer money to assist in funding religious organizations, it is likely that this issue will emerge further as the discussion on vouchers in Tennessee continues.

¹³⁵ Referring to the movie titled the same, which inaccurately paints charter schools as a saving grace for poor students of color.

adequately and equitably funded for the first time in this State's history.