

Tennessee’s Education Savings Account Pilot Program: An Equal Protection Violation Under the Guise of “School Choice”

HAYLIE N. LOVELACE*

I. INTRODUCTION	456
II. BACKGROUND.....	459
<i>A. Tennessee’s Education Savings Account Pilot Program ..</i>	<i>460</i>
1. The Unique Educational Landscapes of Shelby County and Davidson County	461
<i>i. Shelby County Schools</i>	<i>462</i>
<i>ii. Metro Nashville Public Schools.....</i>	<i>463</i>
<i>iii. The Achievement School District</i>	<i>464</i>
<i>iv. School Funding Scheme Litigation.....</i>	<i>465</i>
2. Legislative History of the ESA Program	466
3. Judicial Challenges	468
4. Voucher Programs in Other States	471
<i>B. Equal Protection Jurisprudence</i>	<i>475</i>
1. Facially Neutral Laws with Discriminatory Application	477
2. Requirement for Proof of a Discriminatory Purpose ..	478
3. Equal Protection in the School Context	479

* Staff Member, Volume 53, and Notes Editor, Volume 54, The University of Memphis Law Review; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, 2024. Thank you to my faculty advisor, Professor Sonya Garza, whose insightful feedback and mentorship instilled me with confidence in my writing abilities and refined each draft of this Note. Thank you to Ryan Rosenkrantz, Nakota Wood, Noor Jaber, Will Stevens, and Alton Smith for their guidance throughout the editorial process. Finally, thank you to my friends and family for their unwavering support and for always believing in me. This Note would not have been possible without each and every one of you.

III. ANALYSIS.....	482
<i>A. Tennessee’s ESA Program Is Facially Neutral with a Disparate Impact</i>	483
<i>B. The ESA Program’s Disparate Impact Is Coupled with an Overt, Racially Motivated Purpose</i>	487
IV. CALL FOR FEDERAL COURT INTERVENTION TO DECLARE TENNESSEE’S ESA PROGRAM UNCONSTITUTIONAL.....	492
V. CONCLUSION	495

I. INTRODUCTION

The new ABC sitcom mockumentary *Abbott Elementary*,¹ which follows the teachers and administration of an underfunded and predominantly Black Philadelphia public school, has been regarded as “real, relatable, heart-warming, hilarious, and honest” by fans across the country.² However, it has also highlighted one very unsettling fact—that the dismal state of public education in the United States has become laughable. Nonetheless, instead of enacting meaningful education reform to promote better outcomes for public schools, lawmakers across the country are opting for an alternative option that has a history deeply rooted in racism and school segregation: voucher programs.³

Voucher programs are a legislative scheme designed to divert funding away from public schools by subsidizing the tuition of private and religious schools in the name of fostering a parent’s “school choice.”⁴ The school choice rhetoric dates back as far as the start of civil society, but the movement has evolved in its goals and policies

1. A mockumentary is a “facetious or satirical work (such as a film) presented in the style of a documentary.” *Mockumentary*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

2. Lisa Guernsey, *Could Abbott Elementary Fix Our Schools?*, NEW AM. (Mar. 15, 2022), <https://www.newamerica.org/the-thread/could-abbott-elementary-fix-our-schools/>.

3. Amanda Menas, *School Vouchers—An Enduring Racist Practice*, NAT’L EDUC. ASS’N (Sept. 28, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/school-vouchers-enduring-racist-practice>.

4. *Id.*

over time.⁵ While school choice is not a new concept, President Trump's administration was a driving force in fostering a distrustful attitude toward public schools, resulting in many American families turning to private and charter schools to educate their children.⁶ In fact, President Trump's Secretary of Education Betsy DeVos seemingly did everything in her power to "eviscerate public education" by proposing billions of dollars in cuts to her own department, defending larger class sizes, and dismantling afterschool and summer programs.⁷ DeVos even capitalized on the COVID-19 pandemic to further her school privatization efforts by advocating for a \$5 billion tax credit federal voucher program.⁸ Although the federal program was declared "dead on arrival" and was not passed by Congress, many state legislators responded by expanding on existing voucher programs or establishing new ones.⁹ Tennessee was among the more than fifteen states who opted into voucher programs in response to this changing narrative.¹⁰

Tennessee Governor Bill Lee heavily endorsed school vouchers as a means of fostering school choice during his gubernatorial campaign.¹¹ Shortly after his election, the Tennessee Education

5. Stephanie Logan, *A Historical and Political Look at the Modern School Choice Movement*, 27 INT'L J. EDUC. REFORM 1 (2018).

6. See Evie Blad, 'Government Schools' or Public Schools? Trump, DeVos, and the Language of School Choice, EDUC. WEEK (Feb. 5, 2020), <https://www.edweek.org/policy-politics/government-schools-or-public-schools-trump-devos-and-the-language-of-school-choice/2020/02>. President Trump notably referred to public schools as "government schools" during his presidency, which public school supporters viewed as an attempt to "reframe what we understand as our societal obligation to our kids." *Id.* ("[P]ublic school supporters saw it not as a benign descriptor, but as a carefully crafted pejorative.").

7. David Smith, *Betsy DeVos: The Billionaire Republican Destroying Public Education*, GUARDIAN (Dec. 29, 2019), <https://www.theguardian.com/us-news/2019/dec/27/betsy-devos-trump-republicans-education-secretary> (quoting Randi Weingarten, the president of the American Federation of Teachers).

8. Menas, *supra* note 3.

9. Rebecca Klein, *Carrying Betsy DeVos' Torch: More States Push Voucher Programs*, HUFFPOST (Feb. 3, 2021), https://www.huffpost.com/entry/betsy-devos-school-voucher_n_6019bb29c5b668b8db3c89d9.

10. *Id.*

11. Jennifer Pignolet, *What Will Education in Tennessee Look Like Under Bill Lee? Here's What We Know*, COM. APPEAL (Nov. 7, 2018), <https://www.commercialappeal.com/story/news/education/2018/11/07/governor-elect-bill-lee-education-tennessee/1920464002/>.

Savings Account Pilot Program (“ESA Program”) narrowly passed the legislature after undergoing significant alteration to garner support in both the Tennessee House of Representatives (“House”) and Tennessee Senate (“Senate”).¹² The ESA Program initially applied to six Tennessee counties, but it was eventually narrowed to apply only to the two counties serving the highest percentage of Black and Hispanic students in the state—Shelby County and Davidson County.¹³ Despite ongoing legal challenges and evidence of the damaging impacts vouchers have had on learning outcomes nationwide,¹⁴ the ESA Program is being rolled out in Shelby County and Davidson County.¹⁵ By looking at the detrimental impact vouchers have had across the

12. See Jason Gonzalez & Joel Ebert, *Senate Approves Governor Bill Lee’s Voucher Plan Allowing Public Funds for Private School in Nashville*, *Memphis, TENNESSEAN* (Apr. 25, 2019), <https://www.tennessean.com/story/news/education/2019/04/25/tennessee-school-vouchers-senate-floor-vote-bill-lee-education-savings-account-proposal/3566482002/> (discussing the ESA bill’s passage in the Tennessee Senate); see also Jason Gonzalez & Joel Ebert, *House, Senate Far Apart on Voucher Plan: Key Differences Lawmakers Must Address*, *TENNESSEAN* (Apr. 24, 2019), <https://www.tennessean.com/story/news/education/2019/04/24/tennessee-school-vouchers-house-senate-bills/3552509002/> [hereinafter *Key Differences*] (discussing certain counties that were removed from the program to guarantee the support of those counties’ representatives in passing the bill).

13. The original ESA bill applied to Shelby County Schools, Davidson County Schools, Knox County Schools, Jackson-Madison County School Districts, Hamilton County Schools, and the Achievement School District. *Key Differences*, *supra* note 12. While Shelby and Davidson County public schools serve the highest minority populations among the districts initially impacted by the ESA bill, Knox County Schools, Madison-Jackson County School District, and Hamilton County Schools also serve relatively large minority populations. Knox County School’s minority enrollment is 29%, Madison-Jackson County School District’s is 70%, and Hamilton County’s is 49%. TENN. DEP’T OF EDUC., PROFILE & DEMOGRAPHIC INFORMATION (2022) <https://www.tn.gov/content/dam/tn/education/data/district-profile-2021-2022-updated-2023-01-06.xlsx>.

14. Marta W. Aldrich, *Court Declines to Block Tennessee’s Private School Voucher Program*, *CHALKBEAT* (Aug. 5, 2022), <https://tn.chalkbeat.org/2022/8/5/23293616/tennessee-school-voucher-injunction-motions-denied-nashville-shelby>.

15. Marta W. Aldrich, *Private School Vouchers Draw Interest from 2,185 Tennessee Families*, *CHALKBEAT* (July 26, 2022), <https://tn.chalkbeat.org/2022/7/26/23279924/tennessee-school-voucher-participation-interest-nashville-memphis-bill-lee>.

nation, this Note argues that Tennessee's ESA Program, as enacted in 2019, violates the Equal Protection Clause of the Fourteenth Amendment by targeting two of Tennessee's largest and most segregated public school systems, stripping them of funding, and threatening to harm educational outcomes.¹⁶

Part II of this Note will begin with a discussion of the educational landscapes of the school districts affected by the ESA Program, followed by a discussion of its contentious legislative history, the judicial challenges it faced following its passage, and the damaging impacts voucher programs have had on education in other states. Part II will then analyze relevant Equal Protection Clause jurisprudence to identify the appropriate framework to apply to facially neutral laws with special attention to Equal Protection cases in the education sphere. Part III will apply the relevant Equal Protection Clause jurisprudence to assert that the ESA Program constitutes an Equal Protection violation and is therefore unconstitutional. Part IV advocates for federal court intervention in declaring the ESA Program unconstitutional. Part V concludes this Note.

II. BACKGROUND

School voucher programs, from the very start, were designed to separate white and Black students.¹⁷ The first voucher program was established in Virginia in 1959 as a means of maintaining school segregation following the Supreme Court's *Brown v. Board of Education* decision mandating the desegregation of public schools.¹⁸

16. While the ESA Program was amended in 2023 to include Hamilton County, this Note narrows its focus to the ESA Program as it was enacted in 2019. See Jon Styf, *Lee Signs Tennessee ESA Voucher Expansion to Chattanooga Area*, CENTER SQUARE (May 5, 2023), https://www.thecentersquare.com/tennessee/article_802dded2-eb5c-11ed-b250-c76ec0f089e2.html (discussing the ESA Program's expansion to include Hamilton County).

17. Chris Ford et al., *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017), <https://www.americanprogress.org/article/racist-origins-private-school-vouchers>.

18. *Id.* The 1959 Virginia voucher program was established in Prince Edward County as a means of keeping tax dollars from funding integrated schools. *Id.* Eventually, this resulted in the closure of the county's entire public school system. *Id.* During this time, private citizens began building and operating a private school that

While the Supreme Court held this form of voucher program unconstitutional in 1964,¹⁹ such programs remain prevalent today.²⁰ In fact, voucher proponents worked for years to sidestep constitutional obstacles and to “reintroduce them to a public that has consistently been in opposition, using friendly-sounding euphemisms to make them more politically appealing.”²¹ Although harmful voucher programs have been enacted in several states, this Note focuses on Tennessee’s recently enacted ESA Program to illustrate how, despite legislators best efforts, voucher programs may implicate the Fourteenth Amendment by targeting marginalized communities.²²

A. Tennessee’s Education Savings Account Pilot Program

Tennessee’s ESA Program has been riddled in controversy since its inception.²³ Facing pressure from Governor Bill Lee to pass the ESA bill, legislators initially struggled to reconcile a few key differences that impeded the bill’s passage.²⁴ Even after the bill passed, the ESA Program faced legal challenges and the Davidson County Chancery Court blocked it from implementation until 2022.²⁵ After the

was intended only to educate the county’s white children. *Id.* Black families were then forced to seek educational opportunities for their children outside the county, and even across state lines. *Id.*

19. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 229–32 (1964) (holding that Prince Edward County was in violation of the Equal Protection Clause of the Fourteenth Amendment by closing its public schools and subsequently assisting only white children in attending private schools).

20. Ford et al., *supra* note 17.

21. Tim Walker, “Brazen Efforts to Distort the Tax Code”: Betsy DeVos Is Not Giving Up on Vouchers, NAT’L EDUC. ASS’N (Mar. 5, 2019), https://www.nea.org/advocating-for-change/new-from-nea/betsy-devos-not-giving-up-vouchers?_ga=2.266751566.1720265279.1674850788-1463009308.1666891957.

22. See discussion *infra* Section III (arguing Tennessee’s ESA Program violates the Equal Protection Clause of the United States Constitution).

23. See discussion *infra* Section II.A.2 (discussing the ESA Program’s tumultuous legislative history and enactment).

24. See *infra* notes 58–66 and accompanying text (discussing disagreements among lawmakers regarding the number of affected counties under the ESA Program).

25. Kelsey Beyeler, *Lee’s ESA Program Cleared the Tennessee Supreme Court, but More Challenges Remain*, NASHVILLE SCENE (May 24, 2022), <https://www.nashvillescene.com/news/citylimits/lee-s-esa-program-cleared-the->

injunction blocking the ESA Program from implementation was lifted, many questions regarding the potential damaging consequences on Tennessee's largest and most segregated school districts remained.²⁶ These questions have largely been sparked by looking to the disconcerting data gathered from voucher programs in other states including Louisiana, Indiana, and Ohio.²⁷

1. The Unique Educational Landscapes of Shelby County and Davidson County

Despite the Supreme Court's elimination of racially segregated schooling in *Brown v. Board of Education*, Davidson County and Shelby County public schools remain deeply segregated and underfunded.²⁸ In both counties, the rise of school choice in the form of charter schools has only furthered school segregation and educational disparities.²⁹ In fact, the origins of school choice and voucher programs reveal that supporters of school segregation used these programs as tools to avoid the integration ordered by the Supreme Court in *Brown*.³⁰

tennessee-supreme-court-but-more-challenges-remain/article_3d5593a4-dae4-11ec-aabd-bf6950fffe35.html.

26. See discussion *infra* Section II.A.1 (analyzing the demographics of students in Shelby County and Davidson County public schools).

27. See discussion *infra* Section II.A.4 (discussing the impacts of other voucher programs across the country).

28. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that separating public school students on the basis of race is unconstitutional); Laura Faith Kebede, *Memphis School Segregation Worse than 50 Years Ago*, CHALKBEAT (Mar. 29, 2018), <https://tn.chalkbeat.org/2018/3/29/21108492/memphis-school-segregation-worse-than-50-years-ago> (explaining how Memphis schools have grown increasingly segregated over the last 50 years); Luke Rainey, *Why Nashville Schools are Resegregating*, TENNESSEAN (Jan. 2, 2018), <https://www.tennessean.com/story/opinion/2018/01/02/why-nashville-schools-resegregating/107445778/> (“Nashville schools never fully desegregated, and since the late 1990s, they have been steadily re-segregating.”).

29. GARY ORFIELD & ERICA FRANKENBERG, EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 30 (2013).

30. *Id.*; Menas, *supra* note 3 (“The historical origins of vouchers come out of a Virginia county shutting down its public schools and opening white academies to avoid adhering to *Brown v. Board of Education*.”).

i. Shelby County Schools

Shelby County public schools are more segregated now than they were sixty years ago.³¹ Students of color make up 91% of the more than 100,000 students in the Shelby County Schools district, and nearly all of them are Black.³² The rise and fall of a singular public school system in Shelby County explains how school segregation in Memphis increased drastically over time.³³ In 2013, Memphis City Schools and Shelby County Schools merged due to Memphis City Schools' desire for financial stability.³⁴ Before the merger, Memphis City Schools' minority enrollment was 85%, while Shelby County Schools' minority enrollment was only 38%.³⁵

Shelby County's mostly white and more affluent suburbs immediately opposed the merger and eventually convinced the

31. Jeremy Pierre, *Decades After Desegregation, Problems Remain in Local Schools*, FOX13 MEMPHIS (Feb. 5, 2020), <https://www.fox13memphis.com/news/local/decades-after-desegregation-problems-remain-local-schools/I6AT3VJQVZGGN MBVFLYNR3ONAU/>.

32. *Id.* Black students make up 74% of Shelby County Schools' total student enrollment. *Shelby County Schools*, SHELBY CNTY. TENN., <https://www.shelbycountyttn.gov/3732/Shelby-County-Schools> (last visited Dec. 9, 2023).

33. *See infra* notes 34–39 and accompanying text (discussing the merger of Memphis City Schools and Shelby County Schools and its aftermath).

34. Mary K. Keller, *The Disillusionment of School Choice in Memphis Schools: Response to Privatized Sources of Funding and the Spatiality of Inequalities in Public Education*, 52 J. EDUC. ADMIN. & HIST. 141, 141 (2020). The merger was the largest school district consolidation in American history. Sam Dillon, *Merger of Memphis and County School Districts Revives Race and Class Challenges*, N.Y. TIMES (Nov. 5, 2011), <https://www.nytimes.com/2011/11/06/education/merger-of-memphis-and-county-school-districts-revives-challenges.html>. The merger resulted from the actions of the Memphis school board and City Council, as well as a federal court order in an attempt to resolve financing struggles plaguing the two districts. *Id.* Memphis City Schools was comprised of 103,000 students and therefore received more tax dollars, but Shelby County Schools was comprised of 47,000 students and contributed more money per capita. *Id.*

35. Dillon, *supra* note 34. While Memphis is predominantly Black, the racial divide between Memphis City Schools and Shelby County Schools did not adequately reflect the demographic make-up of Shelby County at the time. Today, Shelby County's Black population is 54.6% and its white population is 40.4%. *Shelby County, Tennessee*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/shelbycountytennessee>.

legislature to change an existing state law to allow them to “pull out” of the consolidated school district to form their own.³⁶ To serve their own “self-interest[s] and separation,”³⁷ these suburban towns separated from Shelby County Schools and formed six independent school districts—Arlington Community Schools, Bartlett City Schools, Collierville Schools, Germantown Municipal School District, Lakeland School System, and Millington Municipal Schools.³⁸ As a result, the students making up the six smaller municipality school districts are predominantly white and come from affluent families, while the students making up Shelby County Schools are predominantly Black and live at or below the poverty line.³⁹

ii. Metro Nashville Public Schools

The student demographics of Davidson County public schools reveal a similar trend of segregation.⁴⁰ The Metro Nashville Public Schools district’s minority student enrollment is 70%, comprised of

36. Caroline Bauman, *Memphis-Shelby County Spotlighted in National Report on School District Secession*, CHALKBEAT (June 21, 2017), <https://tn.chalkbeat.org/2017/6/21/21102787/memphis-shelby-county-spotlighted-in-national-report-on-school-district-secession>.

37. Daniel Kiel, *Annulment: Inside the Largest—and Briefest—School District Consolidation in American History*, 50 U. MEM. L. REV. 887, 920 (2020). The rationale offered for opposition to the merger was local control. *Id.* at 927. This rhetoric conveniently allowed the discussion to avoid issues of race and socioeconomic status. *Id.* However, scholars studying the merger have firmly established that the local control justification was meant to distract from these issues, which also played a significant role in opposition to the merger. *Id.* at 928.

38. Laura Testino, *Renaming SCS: District Wants “Memphis” Back, Eight Years After Merger*, COM. APPEAL (Jan. 11, 2022), <https://www.commercialappeal.com/story/news/education/2022/01/11/renaming-scs-district-wants-memphis-back-eight-years-after-merger/7253230002/>.

39. *Id.* This segregation has been further exacerbated by the rise of charter schools in Memphis. TENN. DEP’T OF EDUC., CHARTER SCHOOLS ANNUAL REPORT 8 (2019), <https://www.tn.gov/content/dam/tn/education/documents/2019%20Charter%20Report%20final.pdf>. White students make up 1% of students enrolled in Memphis charter schools, and only 8% in the Shelby County Schools district. *Id.* at 9.

40. *Nashville-Davidson County School District*, PROPUBLICA, <https://projects.propublica.org/miseducation/district/4703180> (last updated Oct. 2018).

42% Black students and 22% Hispanic students.⁴¹ In the years following the *Brown* decision, Nashville struggled to come up with a plan to desegregate its schools.⁴² It finally did so in 1980, and the plan provided a busing option to transport Black students to schools across Davidson County.⁴³ While the busing plan posed logistical challenges for families and educators and “[c]ommunities lost cherished links to local schools,” racial differences in academic achievement dissipated in the short term.⁴⁴ However, that trend quickly reversed as many white Nashville families fled to the suburbs.⁴⁵ Davidson County also saw an increase in the number of charter schools with a majority of students enrolled belonging to minority groups.⁴⁶

iii. The Achievement School District

The ESA Program also extends to students in the Achievement School District (“ASD”).⁴⁷ The ASD was established in 2011 as a way for Tennessee to assume authority over a segment of Tennessee’s lowest performing schools.⁴⁸ Despite the government’s lofty goals and significant spending in forming the ASD, critics argue that it has

41. *Id.*

42. Rainey, *supra* note 28.

43. *Id.*

44. Ansley Erickson, *Nashville Needs New School Desegregation Plan*, TENNESSEAN (Mar. 13, 2016), <https://www.tennessean.com/story/opinion/contributors/2016/03/13/nashville-needs-new-school-desegregation-plan/81549796/>.

45. Rainey, *supra* note 28.

46. *See* TENN. DEP’T OF EDUC., *supra* note 39, at 9 (showing the minority enrollment of Davidson County’s charter schools is 83%).

47. *Gov. Lee’s ESA Bill Passes Tennessee House in Narrow Floor Vote*, NEWSCHANNEL5 NASHVILLE (Apr. 23, 2019) [hereinafter *Narrow Floor Vote*], <https://www.newschannel5.com/news/tennessee-house-to-vote-on-school-voucher-plan>.

48. Joshua Glazer et. al., *Research into Tennessee’s Achievement School District: Autonomy, Incentives, and Guidance for Providers*, TENN. CONSORTIUM 2 (Nov. 2014), https://www.cpre.org/sites/default/files/policybrief/2049_asdreportglazer020915.pdf. The ASD was formed as part of the federal “Race to the Top” initiative. *Id.* The program only extended to schools in the bottom five percent of Tennessee schools, with the goal of returning the schools to local control once test scores improve. *Id.* The ASD includes mostly Memphis-area schools, and two Nashville schools. *Id.*

largely failed.⁴⁹ Evidencing the ASD's failure, four schools returned to Shelby County Schools at the beginning of 2022 despite showing no improvement in their performance because they reached the ten-year limit set forth by the program.⁵⁰ Data gathered on the success of the ASD revealed that only 4.5% of participating students were performing on grade level, while comparatively 11% of students in Shelby County Schools were performing on grade level.⁵¹ The demographics of students within the ASD largely resembles those of Shelby County Schools, with only 2.2% white students and 89.8% Black students.⁵²

iv. School Funding Scheme Litigation

The Tennessee legislature grossly underfunds the state public school systems, leading Tennessee to rank forty-fourth nationally in education funding by spending nearly \$4,000 below the national average of \$15,114 per student.⁵³ Unsurprisingly, Shelby County Schools, Metro Nashville Public Schools, and schools in the ASD are also significantly underfunded.⁵⁴ Shelby County and Davidson County

49. Jackie DelPilar, *Tennessee Spent Nearly \$1B on Underperforming Schools Program, Data Shows It's Not Working*, FOX17 WZTV NASHVILLE (Jan. 10, 2022), <https://fox17.com/news/local/tennessee-spent-nearly-1b-on-underperforming-schools-program-data-shows-its-not-working-achievement-school-district-memphis-shelby-county>. The program has cost taxpayers nearly \$1 billion since its inception, and Governor Bill Lee allotted another \$25 million to its budget in 2020. *Id.*

50. *Id.*

51. *Id.*

52. *Overview of Achievement School District*, USNEWS, <https://www.usnews.com/education/k12/tennessee/districts/achievement-school-district-113092> (last visited Dec. 9, 2023).

53. EDUC. L. CTR., *INEQUITY IN SCHOOL FUNDING: SOUTHERN STATES MUST PRIORITIZE FAIR PUBLIC SCHOOL SPENDING* 4 (2021), https://edlawcenter.org/assets/files/pdfs/publications/leg_cr_school_funding_inequities_report_2021_final.pdf.

54. See Laura Testino, *Tennessee Should Give More School Funding to Memphis Kids, Consider High Concentrations of Poverty, Community Tells State*, COM. APPEAL (Oct. 29, 2021), <https://www.commercialappeal.com/story/news/education/2021/10/29/memphis-school-funding-town-hall-students-need-more-funding/6183117001/> (advocating for more funding for Memphis public schools under Tennessee's new funding formula); see also Kyle Horan, *Nashville Mayor: Vouchers Could Mean Closed Schools, Underfunding*, NEWSCHANNEL5 NASHVILLE (Jun. 1, 2022),

filed suit in 2015 alleging that Tennessee’s funding formula, called the Basic Education Program, underfunded the state’s two largest urban school districts.⁵⁵ This lawsuit is currently at a halt until at least the 2023–2024 school year when the state plans to switch funding formulas to account for the ESA Program,⁵⁶ but the reality remains that public schools in both communities are already underfunded and will continue to be as the funding scheme is redone.⁵⁷ Some proponents argue that the proposed funding formula will “alter the status quo” of woefully underfunding schools in Tennessee, but critics call the new funding scheme “deeply flawed” and argue that it falls short in several key areas—specifically by allocating a lower percentage of state funds to school districts, failing to account for rising property taxes, and failing to implement any meaningful plan to address the teacher shortage plaguing schools.⁵⁸ Rather than addressing these flaws, lawmakers chose to exacerbate the issue by enacting the ESA Program, which stands to drain even more funding from Shelby and Davidson County public schools.⁵⁹

2. Legislative History of the ESA Program

The ESA bill faced intense debate during the 2019 legislative session.⁶⁰ Governor Lee’s first proposal established a statewide ESA

<https://www.newschannel5.com/news/nashville-mayor-vouchers-could-mean-closed-schools-underfunding> (discussing how Nashville public schools are already grossly underfunded and may face closure in light of the ESA Program’s implementation).

55. Testino, *supra* note 54.

56. The new funding formula that has been approved for the 2023–2024 school year, called Tennessee Investment in Achievement, replaces the Basic Education Program. Andy Spears, *The Truth About Tisa*, TENN. EDUC. REP. (Mar. 22, 2022), <http://tnedreport.com/2022/03/the-truth-about-tisa/>. On its face, the new funding formula provides additional funding for economically disadvantaged students attending charter schools specifically, but critics argue that charter schools should receive the same base funding as the public schools. *Id.*

57. See Testino, *supra* note 54.

58. Andy Spears, *Tag Archives: TISA*, TENN. EDUC. REP. (Sep. 26, 2022), <http://tnedreport.com/tag/tisa/>.

59. See discussion *infra* Section II.A.2 (discussing the ESA Program’s legislative history).

60. See *infra* notes 63–70.

Program, directed to students zoned to a district with at least three schools performing in the lower 10% of all schools in the state.⁶¹ The list included: Shelby County Schools, Davidson County Schools, Knox County Schools, Jackson-Madison County School District, Hamilton County Schools, and the ASD.⁶² The number of counties reached under the initial proposal proved to be the greatest point of contention in gaining support among lawmakers who feared that their counties would be detrimentally impacted by the ESA Program.⁶³

Following the proposal, the House and Senate approved markedly different versions of the ESA bill.⁶⁴ The House's bill applied to the state's largest urban school districts in Knox, Hamilton, Shelby, and Davidson Counties, while the Senate's bill only applied to schools in Shelby County, Davidson County, and the ASD.⁶⁵ While the House and Senate versions of the bill contained other key differences,⁶⁶ the number of counties targeted by the program proved to be the biggest stalemate in passing the bill within the House.⁶⁷ Once the bill reached the House floor, the vote was tied until Representative Jason Zachary was promised by House leadership that Knox County would be removed from the House's version.⁶⁸ Representative Zachary told leadership he could not support the bill "unless . . . Knox County was removed and held harmless . . .," indicating lawmakers knew of the

61. Jason Gonzales & Joel Ebert, *Lee Administration Outlines New Details for Controversial Education Savings Account Bill*, THE TENNESSEAN (Mar. 14, 2019) <https://www.tennessean.com/story/news/education/2019/03/14/tennessee-school-vouchers-education-savings-account/3161906002/>.

62. *Narrow Floor Vote*, *supra* note 47.

63. Gonzales & Ebert, *supra* note 12.

64. *Id.*

65. *Id.* (discussing the differences between how outside counties would benefit, testing requirements, accountability measures, requirements for legal residency, and homeschooling). While the House and Senate versions of the bill contained a few key differences, they agreed on the income requirements mandating eligibility for participation in the program and the number of students permitted to enroll. *Id.*

66. *Narrow Floor Vote*, *supra* note 47.

67. *Id.*

68. *Id.*

potential consequences vouchers stood to have on their counties.⁶⁹ The bill then passed the House by a fifty to forty-eight vote.⁷⁰

Controversy continued to follow the bill after its enactment into law. Following the bill's narrow passage, the FBI began interviewing lawmakers to determine whether any "improper incentives" were offered to convince lawmakers to support the bill.⁷¹ Specifically, Representative David Hawk alleged that House Speaker Glen Casada's Chief of Staff approached him and asked what he would want in exchange for his vote on the ESA bill.⁷² Another allegation suggested Casada offered Democratic Representative John Mark Windle a significant promotion in the National Guard for his vote.⁷³ The investigation is ongoing and continues to cast doubt upon the legitimacy of the legislature and its true motives in passing the ESA bill.⁷⁴

3. Judicial Challenges

After the ESA bill passed the legislature, it remained shrouded in controversy. The bill faced opposition from public school parents, community members, and the governments of Shelby and Davidson County.⁷⁵ Two lawsuits were eventually filed against Governor Bill Lee, the Tennessee Department of Education Commissioner, and the Tennessee Department of Education (collectively, the "State")

69. *Id.*

70. *Id.*

71. Phil Williams, *FBI Investigates Controversial Voucher Vote*, NEWSCHANNEL5 NASHVILLE (May 9, 2019), <https://www.newschannel5.com/news/newschannel-5-investigates/fbi-investigates-controversial-voucher-vote>.

72. *Id.*

73. Sam Stockard, *Stockard on the Stump: FBI Expediting Tennessee House Corruption Investigation*, TENN. LOOKOUT (Mar. 25, 2022), <https://tennesseelookout.com/2022/03/25/stockard-on-the-stump-fbi-expediting-tennessee-house-corruption-investigation/>. The promotion offered was from Colonel to General in the National Guard. *Id.*

74. *See infra* note 83 (discussing the special Tennessee Supreme Court appointment that also may have impacted its passage).

75. *Tennessee Court to Hear Argument in Lawsuits Challenging Voucher Program*, ACLU (Apr. 28, 2020), <https://www.aclu.org/press-releases/tennessee-court-hear-argument-lawsuits-challenging-voucher-program>.

challenging the constitutionality of the ESA Program.⁷⁶ Public school parents and community members in Shelby and Davidson Counties brought one of the lawsuits, while the Shelby County and Davidson County governments, as well as the Metropolitan Nashville Board of Public Education brought the other lawsuit.⁷⁷ The Davidson County Chancery Court (“Chancery Court”) eventually ruled that the ESA Program violated the Tennessee Constitution under the Home Rule Amendment.⁷⁸

The Home Rule Amendment requires the State to obtain approval of either the local legislative body or eligible voters in the county or counties before implementing any program applicable only to specific counties.⁷⁹ Although the State defendants argued that the Home Rule Amendment was inapplicable to local school districts, the Chancery Court disagreed and identified “counties or municipalities and their school systems as the same, with inextricably intertwined

76. *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, 2020 Tenn. Ch. LEXIS 1, at *1-4 (Tenn. Ch. May 4, 2020).

77. *Id.*

78. *Id.* at *39.

79. TENN. CONST. art. XI, § 9.

interests.”⁸⁰ As a result, the court enjoined the State defendants from implementing and enforcing the ESA Program.⁸¹

The Tennessee Court of Appeals adopted similar reasoning in affirming the judgment of the Chancery Court as to the constitutionality of the ESA Program.⁸² The State then appealed to the Tennessee Supreme Court (“Court”), which reversed the decisions of the lower courts and lifted the two-year long injunction blocking implementation of the program.⁸³ In a 3-2 decision, the Court declared the ESA Program did not violate the Home Rule Amendment because it only governs the local school districts in the affected counties rather than the

80. *Metro Gov’t of Nashville*, 2020 Tenn. Ch. LEXIS at *31 (citing Bd. of Educ. v. Memphis City Bd. of Educ., 911 F. Supp. 2d 631, 645 (W.D. Tenn. 2012) (“Tennessee law acknowledges that educating children is a collaboration between administrative and financial bodies . . . an injury to the purse is sufficient to establish a ‘close relationship’ between a school board and its students, the controller of that purse also has standing to protect the rights of students.”)). The Chancery Court considered the three components of the Home Rule Amendment relevant for consideration: (1) whether the ESA Program was local in form and effect, (2) whether it is applicable to a particular county, and (3) whether it involves matters of local government proprietary capacity. *Id.* The Chancery Court determined that the Program was local in form and effect by looking to its legislative history, which reveals that it was specifically designed and intended to apply only to Shelby and Davidson Counties. *Id.* at *35. The Chancery Court also found that the Program was applicable to a particular county because school systems cannot be viewed as separate and distinct from the local governments that fund them. *Id.* at *36. Finally, the Chancery Court concluded that the Program involved matters of local government proprietary capacity because “[e]ducation is a governmental function and in the exercise of that function the county acts in a governmental capacity.” *Id.* at *38 (quoting Brentwood Liquors Corp. of Williamson Cnty. v. Fox, 496 S.W.2d 454, 457 (Tenn. 1973)).

81. *Id.* at *44.

82. *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, No. M2020-00683-COA-R9-CV, 2020 Tenn. App. LEXIS 434, at *16-23 (Ct. App. Sep. 29, 2020).

83. *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, 645 S.W.3d 141, 145 (Tenn. 2022). The Court heard argument regarding the ESA Program in 2021 but was delayed in issuing a decision due to the death of Justice Cornelia Clark. Beyeler, *supra* note 25. Justice Sarah Campbell was appointed by Governor Lee following the death of Justice Clark, but she recused herself from the case because she previously worked for the state attorney general. *Id.* Court of Appeals Judge Thomas R. Frierson sat in Justice Campbell’s place. *Id.*

counties themselves,⁸⁴ despite its longstanding precedent recognizing that any statute facially directed at another entity but substantially affecting a county implicates the Home Rule Amendment.⁸⁵ The Court's holding cleared the way for the State to begin rolling out the ESA Program.⁸⁶ Even with the Court's approval, the ESA Program has continued to receive backlash from representatives and community members in Memphis and Nashville.⁸⁷

The ESA Program still faces additional legal challenges, and the affected communities remain concerned that it will have detrimental impacts on their public schools as it drains their funding.⁸⁸ However, another judicial panel appointed by the Court once again refused to block the ESA Program from launching during the 2022–2023 school year and alleged that the plaintiffs are unlikely to succeed in their remaining legal challenges.⁸⁹ Before the start of the 2022–2023 school year, nearly 1,000 families applied to the ESA Program.⁹⁰ As of October 12, 2022, more than 350 applications have been accepted.⁹¹ It does seem, despite public opinion, that this program and its longevity is inevitable.

4. Voucher Programs in Other States

Although supporters of the ESA Program contend that allowing parents to choose an educational path best suited to their students'

84. *Metro. Gov't of Nashville*, 645 S.W.3d at 154.

85. *Id.* at 158 (Lee, J., dissenting).

86. Marta W. Aldrich, *Tennessee Can Begin Rolling Out Private School Voucher Program, Court Rules, Ending 2-Year Block*, CHALKBEAT (Jul. 13, 2022), <https://tn.chalkbeat.org/2022/7/13/23210736/school-vouchers-tennessee-court-injunction-lifted-private>.

87. Aldrich, *supra* note 15.

88. Aldrich, *supra* note 86. Among the remaining legal challenges is that the ESA Program violates the state constitution's equal protection clause, which requires the state to maintain substantially equal educational opportunities for its residents. *Id.*

89. Aldrich, *supra* note 15.

90. Jon Styf, *Nearly 1,000 Families Applied, 350 Accepted into Tennessee's Pilot Educational Savings Account Plan*, CTR. SQUARE (Oct. 12, 2022), https://www.thecentersquare.com/tennessee/nearly-1-000-families-applied-350-accepted-into-tennessees-pilot-educational-savings-account-plan/article_48945416-4a5c-11ed-b4c5-67a0072956f1.html.

91. *Id.*

needs will lead to increased learning outcomes, data derived from other states operating voucher programs shows that such programs tend to harm learning outcomes.⁹² Currently, sixteen states and the District of Columbia provide state-funded vouchers to eligible students.⁹³ Several comprehensive studies analyze the impacts of vouchers on learning outcomes in states with some of the largest voucher programs in the country.⁹⁴ These studies reveal that despite promising increased academic achievement by allowing families to choose a school best suited for their individual child, students using vouchers fair significantly worse academically than their public-school peers.⁹⁵

Louisiana, Indiana, and Ohio's voucher programs have been the subject of several studies illuminating the harmful effects of such programs on academic achievement.⁹⁶ First, data gathered evaluating the impact of Louisiana's voucher program in 2018 revealed that program participation lowers math scores by 0.4 standard deviations,⁹⁷ along with reducing achievement in reading, science, and social studies.⁹⁸ This study also indicated that the decrease in achievement

92. Christopher Lubienski & Peter Weitzel, *The Effects of Vouchers and Private Schools in Improving Academic Achievement: A Critique of Advocacy Research*, 2008 BYU L. REV. 447, 463 (2008).

93. *50-State Comparison: Private School Choice*, EDUC. COMM'N OF THE STATES (Mar. 24, 2021), <https://www.ecs.org/50-state-comparison-private-school-choice/>.

94. See Atila Abdulkadiroğlu et al., *Free to Choose: Can School Choice Reduce Student Achievement?*, in AM. ECON. J.: APPLIED ECON. 175, 198 (2018) (showing the damaging impacts of Louisiana's voucher program on academic achievement); R. Joseph Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, in J. POL'Y ANALYSIS AND MGMT. 783, 803–04 (2018) (showing the negative impacts of Indiana's voucher program on academic achievement and test scores for participating students); DAVID FIGLIO & KRZYSZTOF KARBOWNIK, *EVALUATION OF OHIO'S EDCHOICE SCHOLARSHIP PROGRAM: SELECTION, COMPETITION, AND PERFORMANCE EFFECTS* 39 (2016) (analyzing Ohio's voucher program and its negative impacts on participating student achievement).

95. See *infra* notes 97–109.

96. *Id.*

97. A standard deviation tells “how far a student's standard score is from the average or mean.” *Understanding Test Scores*, ALA. PARENT EDUC. CTR., <http://alabamaparentcenter.com/web/wp-content/uploads/2017/06/Special-Education-V.6-Understanding-Test-Scores-1.18.pdf>.

98. Abdulkadiroğlu et al., *supra* note 94.

across all four subjects increased the likelihood of failing scores by between 24 and 50%.⁹⁹ Louisiana's voucher program extends to disadvantaged students attending public schools graded "C" or below on an achievement-based rating system.¹⁰⁰ 81% of voucher recipients in the state of Louisiana at the time of the study were Black with an average income level falling well below 250% of the poverty line.¹⁰¹ Similarly, participation in Indiana's voucher program also resulted in an average achievement loss of 0.15 standard deviations in mathematics and reading.¹⁰² These statistics directly counter the assumption that participating voucher students benefit in any meaningful way other than by escaping deteriorating public schools.¹⁰³

Another study evaluating the impacts of Ohio's voucher program on the academic achievement of participating students showed "unambiguously negative" results across both mathematics and reading scores.¹⁰⁴ Additionally, data derived on the effects of Ohio's voucher

99. *Id.*

100. *Id.* An achievement-based rating system evaluates schools based on a variety of factors, including student growth scores, student achievement, and education observation scores. *Id.*

101. *Id.*

102. Waddington & Berends, *supra* note 94. More than half of participating voucher students were racial or ethnic minorities, with a higher percentage of Hispanic students than Black students. *Id.* at 792.

103. *Compare* Justin Owen, *Parental Choice Finally Comes to Tennessee*, BEACON (Aug. 24, 2022), <https://www.beacontn.org/parental-choice-finally-comes-to-tennessee/> ("I look forward to watching students begin walking into the doors of schools that meet their needs."), and Kayla Solomon, *Over 40 TN Schools Pledge Support for ESA Program*, FOX13 MEMPHIS (July 20, 2022), https://www.fox13memphis.com/news/over-40-tn-schools-pledge-support-for-esa-program/article_451d6be1-768a-504f-a9ea-1d5bf3e0651b.html ("[I]f a parent now has a choice, another option for the education for their child that they believe is a better option . . . [t]hen it certainly stands to reason that it will benefit that child . . ."), with Andy Spears, *Disproportionate Harm*, TENN. EDUC. REP. (July 28, 2022), <http://tnedreport.com/2022/07/disproportionate-harm/> (discussing how private schools are not required to comply with the academic, accountability, and governance standards that apply to public schools and also may refuse to provide important services to students, such as special education for students with disabilities).

104. FIGLIO & KARBOWNIK, *supra* note 94. While this data show negative impacts on both reading and math scores for participating students, the results showed greater negative impacts on mathematics scores than reading. *Id.*

program showed that it increased school segregation across the state.¹⁰⁵ The study focused on two impacted public-school districts and discovered that white student enrollment significantly dropped since the start of the voucher program.¹⁰⁶ Specifically, in one district, white student enrollment dropped from 26% to 3%.¹⁰⁷ In another district, white student enrollment dropped 7% since the introduction of the voucher program.¹⁰⁸ Voucher programs not only detrimentally impact learning outcomes, but also lead to increased segregation in the school systems that they target.¹⁰⁹

Although voucher programs detrimentally impact learning outcomes and increase school segregation, they continue to spread rapidly across the country.¹¹⁰ Supporters of school vouchers often argue that increased competition between private and public schools will increase the academic achievement of supposedly failing public schools.¹¹¹ However, there is little data to support this contention, and any increase in achievement of public schools impacted by voucher programs as measured by test scores is often modest and statistically

105. Dan Heintz, *Ohio's EdChoice Voucher Program Has Failed*, CLEVELAND (Jan. 19, 2022), <https://www.cleveland.com/opinion/2022/01/ohios-edchoice-voucher-program-has-failed-dan-heintz.html>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Nirvi Shah, *US School Vouchers Programs Have Caught On-But Are They Funneling Public Dollars in Private Schools?*, GUARDIAN (Sep. 7, 2022), <https://www.theguardian.com/education/2022/sep/07/us-school-vouchers-covid-private-schools-parents-new-hampshire>. Several state legislatures enacted voucher programs following the school shutdowns that resulted from the COVID-19 pandemic. *Id.* Experts point to parent frustration stemming from temporary school closures as giving rise to the “unfortunately perfect” timing prompting the spread of voucher programs. *Id.* (quoting Robert Enlow, president and CEO of the advocacy group EdChoice). Other programs were enacted to accommodate parents objecting to pandemic restrictions. *Id.* For example, Florida’s state board of education expanded on an already established voucher program for students who had been bullied to include students who objected to wearing masks at school or to receive regular testing. *Id.*

111. Matt Barnum, *Do School Vouchers ‘Work’? As the Debate Heats Up, Here’s What Research Really Says*, CHALKBEAT (May 31, 2023), <https://www.chalkbeat.org/2017/7/12/21108235/do-school-vouchers-work-as-the-debate-heats-up-here-s-what-research-really-says>.

insignificant.¹¹² School voucher critics point to these inconsistent data points to support their position that the only meaningful way to improve public school systems is to adequately fund them, rather than to divert funds away from them to subsidize private school tuition costs.¹¹³

B. Equal Protection Jurisprudence

The Equal Protection Clause of the United States Constitution's Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."¹¹⁴ However, it is virtually impossible to require equal treatment of all people since nearly all laws classify individuals in some way by imposing burdens on some and benefits on others.¹¹⁵ Accordingly, the United States Supreme Court ("Supreme Court") subjects all classifications to a scrutiny requirement to determine whether there is a sufficient relationship between the law's classification and the government's interest, with some classifications being inherently more likely than

112. *Id.* ("The impact is usually quite small and the exact effects depend on the program."). The study conducted in Louisiana showed a slight improvement in public-school math scores but showed no impact on reading scores. *Id.* One study limited to an analysis of tax-credit funded vouchers in Florida led to small improvements in both reading and math scores. *Id.*

113. Derek W. Black, *Don't Divert Taxpayer Money to Vouchers. It Does More Good at Public Schools.*, USA TODAY (Aug. 16, 2018, 3:15 AM), <https://www.usatoday.com/story/opinion/2018/08/16/spend-taxpayer-money-public-education-not-private-school-vouchers-column/976133002/>. The failure of voucher programs to improve academic achievement of participating students also rests on a myriad of other factors specifically impacting low-income students. *Id.* These factors include, but are not limited to, housing instability, hunger, and a lack of academic support outside of school. *Id.* Additionally, while there is some data suggesting voucher programs improve public school test scores, the lack of funding that results over time threatens to significantly depress public-school student achievement. *Id.*

114. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment was enacted in response to racial discrimination against African Americans. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 645 (Saul Levmore et al. eds., 20th ed. 2019). While the Supreme Court's earliest interpretation of the Fourteenth Amendment suggested that concern with racial classifications captured the entirety of the meaning of the clause, it later extended heightened equal protection scrutiny to classifications ranging beyond race. *Id.*

115. FELDMAN & SULLIVAN, *supra* note 114, 645.

others to lack such a sufficient relationship.¹¹⁶ The Supreme Court applies strict scrutiny to laws that classify based on race or national origin on their face,¹¹⁷ but where a law is racially neutral on its face yet discriminatory in its application, the Supreme Court historically has required proof of a discriminatory purpose to subject such laws to close judicial review.¹¹⁸ The Supreme Court has asserted that discriminatory impact, “[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”¹¹⁹

116. *Id.* When considering an Equal Protection claim, a court will first consider the classification made to identify the appropriate level of scrutiny. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 727 (6th ed. 2019). For example, discrimination based on race or national origin is always subject to strict scrutiny. *Id.* Under strict scrutiny, a law is only upheld if the government can evidence an extremely compelling reason for its action, and it must show that it cannot achieve its objective through a less discriminatory alternative. *Id.* Comparatively, the Supreme Court applies intermediate scrutiny for discrimination based on gender. *Id.* Intermediate scrutiny requires the government to prove that the action is substantially related to an important government purpose. *Id.* Finally, the Supreme Court utilizes the rational basis test for other classifications that do not trigger heightened scrutiny. *Id.* The rational basis test asks the government to prove that its action is rationally related to a legitimate government purpose. *Id.* This is the minimum level of scrutiny that laws challenged under the Equal Protection Clause are required to meet. *Id.*

117. *See generally* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny.’”) (citing *Korematsu*, 323 U.S. at 216 (1944)); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

118. *See generally* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (applying heightened scrutiny to an ordinance requiring operators of laundries operated in buildings not made of brick or stone to apply for a permit to continue operation, which resulted in nearly all applications submitted by laundry operators of Chinese descent to be denied); *Gomillion v. Lightfoot*, 346 U.S. 339 (1960) (applying heightened scrutiny to an Alabama statute redefining the city boundaries of Tuskegee because the Supreme Court determined it was a device to disenfranchise the city’s Black citizens); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) (applying heightened scrutiny to a public school closing scheme where grants of public funds were being provided to white children to attend private schools).

119. CHERMERINSKY, *supra* note 116, at 768 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

1. Facially Neutral Laws with Discriminatory Application

Although the Supreme Court historically exercised restraint in reviewing legislative policy judgments due to a lack of a clear constitutional warrant, it eventually suggested justification for judicial review in the event of a failure of the legislative process.¹²⁰ In *United States v. Carolene Products Company*, Justice Stone explained that the Supreme Court generally presumes that enacted laws are constitutional unless a law interferes with individual rights, restricts the ability of the political process to repeal undesirable legislation, or discriminates against a discrete and insular minority.¹²¹ This established a framework of general judicial deference to the legislature but with particular areas of more intensive judicial review.

In 1976, the Supreme Court for the first time addressed a facially neutral government action with an incidental racially discriminatory effect in *Washington v. Davis*.¹²² In *Davis*, the Supreme Court reviewed the hiring practices of the Washington, D.C. police department after the plaintiff alleged African Americans disproportionately failed the examination utilized in the hiring process.¹²³ The Supreme Court held that facially neutral government action with incidental racially discriminatory effects will only receive more than rational basis review if there is proof of a discriminatory purpose that motivated the action.¹²⁴ The Supreme Court expressed concern for applying heightened scrutiny to such cases and reasoned that such a rule “would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”¹²⁵ While the Supreme Court later recognized that an inference of disparate impact resulting from a government action can be drawn from the inevitability of disproportionate application, it also continually reaffirmed that such an

120. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 213, 219 (1991) (discussing the “dramatic changes that equal protection thought has undergone in the last half century.”).

121. *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

122. *Washington v. Davis*, 426 U.S. 229 (1976).

123. *Id.* at 233.

124. *Id.* at 248.

125. *Id.*

action will not be struck down as unconstitutional without a showing of a discriminatory purpose.¹²⁶

2. Requirement for Proof of a Discriminatory Purpose

Although the Supreme Court declined to strike down the government action in *Davis*, it did not displace its prior decisions suggesting that a racially discriminatory purpose could be inferred despite a law's facial neutrality.¹²⁷ In fact, after *Davis*, the Supreme Court reaffirmed that a racially discriminatory purpose may be inferred circumstantially, even absent the obvious statistical disparities that were prevalent in its prior decisions.¹²⁸ Six months after its *Davis* decision in *Arlington Heights v. Metropolitan Housing Corporation*, the Supreme Court reexamined what types of evidence are sufficient to prove an underlying invidious motivation justifying heightened scrutiny in Equal Protection cases concerning facially neutral laws.¹²⁹ The Supreme Court determined that inquiring into the existence of a discriminatory purpose motivating a facially neutral government action requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."¹³⁰ Subsequently, the Supreme Court expressly identified certain categories of circumstantial evidence justifying more exacting judicial review of facially neutral government action, including "a clear pattern, unexplainable on grounds other than race," the "historical background" of a government action, departures from "normal procedural sequence[s]," and "the legislative or

126. See *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 278 n.25 (1979) (holding that the government action was enacted to serve legitimate purposes despite disparately impacting women); see also *Wayte v. United States*, 470 U.S. 598, 609–11 (1985) (refusing to strike down government action despite finding an inevitability of disproportionate impacts).

127. See cases cited *supra* note 118.

128. FELDMAN & SULLIVAN, *supra* note 114, at 687–689.

129. 429 U.S. 252 (1977). *Arlington Heights* involved a challenge to a city's zoning policy alleging it discriminated against minorities because it prevented the construction of affordable housing for low- and moderate-income tenants. *Id.* at 255. The zoning policy was discussed at a series of three public meetings where the discussion largely concerned "the social issue," which actually referred to "the desirability or undesirability of introducing . . . low- and moderate-income housing . . . that would probably be racially integrated." *Id.* at 256–58.

130. *Id.* at 266.

administrative history.”¹³¹ Once the Supreme Court determines that a plaintiff has successfully identified one of these factors evidencing a racially discriminatory purpose, the burden then shifts to the government to show a racially neutral justification that can rebut the presumption of discriminatory intent.¹³² If the government is unable to do so, the Court will strike down the action.¹³³

3. Equal Protection in the School Context

In 1954, the Supreme Court declared in its famous *Brown v. Board of Education* decision that “in the field of public education the doctrine of ‘separate but equal’ has no place.”¹³⁴ The following year, the Supreme Court decreed that the dismantling of segregated school systems should proceed “with all deliberate speed,”¹³⁵ which inadvertently opened the door to various attempts by states to resist

131. *Id.* at 266–68.

132. FELDMAN & SULLIVAN, *supra* note 114, at 688. In *Arlington Heights*, the Supreme Court found no basis sufficient to shift the burden to the government. *Arlington Heights*, 429 U.S. at 270. While it recognized that the refusal of the city to rezone “arguably” burdened racial minorities, the Supreme Court reasoned that there was “little about the sequence of events leading up to the decision that would spark suspicion.” *Id.* at 269. Although the Supreme Court did not find evidence of a discriminatory purpose in *Arlington Heights*, it later struck down two facially neutral government actions on those grounds. In *Rogers v. Lodge*, the Supreme Court found circumstantial evidence of racially discriminatory vote dilution surrounding an at-large election system. 458 U.S. 613, 618 (1982). In finding evidence of a discriminatory purpose, the Supreme Court upheld an order mandating a switch to single-member districts. *Id.* at 628. Similarly, in *Hunter v. Underwood*, the Supreme Court struck down a provision of Alabama’s state constitution, which disenfranchised voters who were convicted of crimes of “moral turpitude.” 471 U.S. 222, 223 (1985). The Supreme Court looked to the history of the provision and determined that a “zeal for white supremacy ran rampant” at the Alabama Constitutional Convention of 1901. *Id.* at 229. After the burden shifted to the government to show a legitimate interest independent of race, the Supreme Court rejected the government’s claim because it found that the Convention had “selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks” as crimes of “moral turpitude.” *Id.* at 232.

133. FELDMAN & SULLIVAN, *supra* note 114, at 688.

134. 347 U.S. 483, 495 (1954).

135. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

desegregation.¹³⁶ As a result, the Supreme Court continued to encounter the vestiges of de jure segregation in the years following *Brown*.¹³⁷

To resist the Supreme Court's *Brown* mandate, states and municipalities began fashioning programs to undercut school integration efforts without facially discriminating based on race.¹³⁸ One Virginia county went so far as to refuse to levy and collect school taxes, which forced the local public schools to close.¹³⁹ Virginia's constitution was then amended to authorize the General Assembly and local governing bodies to use public funds to provide the county's white students with grants to attend private schools or public schools outside the locality.¹⁴⁰ The Supreme Court determined that denying students the ability to attend public school violated the Fourteenth Amendment and asserted "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."¹⁴¹ Regardless, the states continued to cleverly craft programs and legislation to resist school integration while side-stepping the Equal Protection Clause.¹⁴²

Although the Equal Protection Clause remains the Supreme Court's sole vehicle for analyzing racial discrimination in school contexts, it lacks the same potency under the framework set forth in

136. *Brown I and Brown II*, VA. MUSEUM OF HIST. & CULTURE, <https://virginiahistory.org/learn/historical-book/chapter/brown-i-and-brown-ii> (last visited Dec. 9, 2023).

137. FELDMAN & SULLIVAN, *supra* note 114, at 668–69. De jure segregation refers to segregation mandated by law and enforced by government entities. *Id.*

138. See, e.g., Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 99 (1994) (discussing the efforts of several states in the months following *Brown* to fight the Supreme Court's integration mandate).

139. *Griffin v. Cnty. Sch Bd. of Prince Edward Cnty.*, 377 U.S. 218, 221 (1964).

140. *Id.*

141. *Id.* at 231.

142. See Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, ECON. POL'Y INST. (Nov. 12, 2014), <https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/> (discussing the stain of de jure racial segregation policies).

Washington v. Davis.¹⁴³ Under the *Davis* framework, a party can only make a successful Equal Protection argument alleging racial discrimination in the context of schools by showing a disparate effect coupled with discriminatory intent, which is difficult to demonstrate.¹⁴⁴ Likewise, Equal Protection challenges asserting disparate impacts resulting from public education financing schemes have also failed, leaving minorities and low-income families little recourse to obtain equal educational opportunities for their children.¹⁴⁵ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court declined to identify education as a “fundamental right” under the Equal Protection Clause and asserted that economic status is not a suspect class triggering heightened scrutiny.¹⁴⁶ In doing so, the Supreme Court “all but eliminated education as a protected right under the Constitution.”¹⁴⁷

143. David Burcham, *School Desegregation and the First Amendment*, 59 ALB. L. REV. 213, 216 (1995).

144. See *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 U. KAN. L. REV. 889, 911 (2001) [hereinafter *Constitutional Barriers*] (citing *Washington v. Davis*, 426 U.S. 229, 239–41 (1976)) (explaining the challenges involved in challenging government action targeting education under the Equal Protection Clause).

145. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding wealth is not a suspect classification under the Equal Protection clause triggering heightened scrutiny). In *Rodriguez*, Mexican American parents challenged the Texas public-school financing scheme, which financed school districts based on local property taxes. *Id.* at 5. Because the property values in the plaintiffs’ district were significantly lower than those in other districts, the amount of money collected to educate their students fell well below that collected to educate students in more affluent districts. *Id.* at 8. The plaintiffs then brought suit alleging the disparities disadvantaged a suspect class and impinged on a fundamental right, thereby requiring strict judicial scrutiny. *Id.* at 17.

146. *Id.* at 37.

147. *Constitutional Barriers*, *supra* note 144, at 909. The Supreme Court did not find education to be a “fundamental right” protected by the Constitution, but it has hinted that there may be a minimum level of education required by the Constitution. See *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (“We are reluctant to impute to Congress the intention to withhold from these children . . . access to a basic education.”). The Supreme Court has not clearly defined this minimum level of education required but has seemed to indicate that if the purpose of a state’s action is to eliminate any opportunity for education, then a violation of the Equal Protection Clause could be found. *Constitutional Barriers*, *supra* note 144, at 911.

One year later in *Milliken v. Bradley*, the Supreme Court also refused to mandate that school district lines be redrawn to combat segregation absent evidence that the district lines were the product of discriminatory acts by the school districts.¹⁴⁸ Despite finding the district lines constituted an Equal Protection violation, the Supreme Court's holding cast "serious doubt as to . . . the constitutional right of black students not to be forced to attend segregated schools as a result of state action" by refusing to impose any remedial measures.¹⁴⁹ Therefore, the only remaining option to challenge government action impacting education that results in disparate impacts for minority groups at the federal level is proving discriminatory intent.¹⁵⁰

III. ANALYSIS

Although facially neutral,¹⁵¹ Tennessee's ESA Program violates the Equal Protection Clause of the Constitution due to the disparate educational impacts it will inevitably have on Nashville and Memphis public schools, as well as on the educational outcomes of both participating students and students remaining in public schools.¹⁵² This impact is coupled with discriminatory intent as evidenced by the ESA Program's tumultuous legislative history and the history of voucher programs generally.¹⁵³ In an Equal Protection challenge, the State may assert racially neutral justifications to support the ESA Program, but these justifications are unlikely to rebut the underlying presumption of discriminatory intent. Specifically, the ESA Program's background is likely to "shed some light on the decisionmaker's purposes[.]" and the

148. *Milliken v. Bradley*, 418 U.S. 717, 757 (1974) ("There were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort.") (Stewart, J., concurring).

149. James Freeswick, *Milliken v. Bradley*, 3 HOFSTRA L. REV. 487, 507 (1975).

150. *Id.*

151. The ESA Program does not explicitly mention race in its language and is therefore a facially neutral government action. TENN. CODE ANN. § 49-6-2602.

152. See discussion *infra* Section III.A (discussing the discriminatory impacts the ESA Program stands to have on Shelby County and Davidson County students).

153. See discussion *infra* Section III.B (discussing the discriminatory intent that motivated the ESA Program's passage and implementation).

fact that voucher programs largely fail to provide better educational opportunities is highly probative of the legislature's intent.¹⁵⁴

A. Tennessee's ESA Program Is Facially Neutral with a Disparate Impact

While the ESA Program makes no mention of race on its face, the Tennessee General Assembly purposefully limited it to only include students zoned to attend Shelby County and Davidson County public schools.¹⁵⁵ Shelby County and Davidson County operate the two largest school districts serving minority populations in the state of Tennessee.¹⁵⁶ They also operate two of the state's most underfunded districts.¹⁵⁷ As previously discussed, the two counties previously filed suit alleging that funds have not been properly allocated to their respective districts under the State's funding formula.¹⁵⁸ Interestingly, Governor Lee has labeled Shelby County and Davidson County public-

154. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

155. TENN. CODE ANN. § 49-6-2602(3)(C)(i)–(ii). The ESA statute defines “eligible student” as one who is zoned within a district operating ten or more schools “[i]dentified as priority schools in 2015,” “[a]mong the bottom ten percent . . . of schools,” “[i]dentified as priority schools in 2018,” or “[i]s zoned to attend a school that is in the ASD.” *Id.* The legislature intentionally narrowed the scope of eligibility to remove other counties as a means of gaining support for the bill, leaving only Shelby and Davidson County impacted. *Narrow Floor Vote*, *supra* note 47.

156. *See supra* Section II.A.1. Comparatively, Knox County School's—initially impacted by the ESA Program and the state's third largest public school district—minority enrollment is 32%. TENN. DEP'T OF EDUC., *supra* note 13. Additionally, Tennessee's fourth largest county is Hamilton County, and its public-school district's minority enrollment is 49%. *Id.*

157. Marta Aldrich, *Judge Sets Trial Date for Tennessee's 5-Year-Old School Funding Lawsuit*, CHALKBEAT (Jul. 15, 2020), <https://tn.chalkbeat.org/2020/7/15/21326022/judge-sets-trial-date-for-tennessees-5-year-old-school-funding-lawsuit>.

158. *Id.* In the time since the lawsuit has been filed, the State has approved a new funding plan. Sam Stockard, *Lawmakers: Governor's School Funding Plan Not Likely to Avert State Lawsuit*, TENN. LOOKOUT (Apr. 20, 2022), <https://tennesseelookout.com/2022/04/20/lawmakers-governors-school-funding-plan-not-likely-to-avert-state-lawsuit/>. However, legislators do not expect that the lawsuit will be dropped because the new funding plan is expected to continue underfunding the districts in both counties. *Id.* The litigation is currently on hold to determine how exactly the new legislation will impact funding across the state. *Id.*

schools as “failing despite ‘full funding’” and advocated for the “closure of these ‘failing’ schools.”¹⁵⁹ However, Shelby County and Davidson County stand ready to prove “that Governor Lee and the Tennessee Legislature are the ones who are failing students by their failure to properly allocate funds”¹⁶⁰ Despite this impending lawsuit, the Tennessee legislature and Supreme Court approved the ESA Program which stands to take even more funding from these public-school systems, thereby complicating the issue further before any court has the opportunity to weigh in.¹⁶¹ Ultimately, this will disparately impact students of color remaining in public schools, as shown by the demographics of students attending schools within those districts.¹⁶² It should come as no surprise that ample data supports the notion that adequate funding is the most effective way to improve public-school performance.¹⁶³ Nonetheless, Tennessee is opting to abandon its two largest “priority” school districts by funneling funds away from them.¹⁶⁴

Although proponents of the ESA Program believe it will “level the playing field” by offering low-income students a lifeline to escape failing public schools, it also threatens to harm educational outcomes for both participating students and students remaining within public schools.¹⁶⁵ While the ESA Program has not been fully implemented or operated long enough to gather concrete evidence of its disparate

159. Emma Knapp, *School Choice in Tennessee: A Violation of the State Constitutional Right to a Substantially Equal Education*, 8 LINCOLN MEM’L U. L. REV. 127, 151 (2021).

160. *Id.*

161. Anna Merod, *Pushback Continues for School Choice Program in Tennessee*, K-12 DIVE (July 29, 2022), <https://www.k12dive.com/news/pushback-continues-Tennessee-education-savings-account-vouchers/628372/>.

162. *See* discussion *supra* Section II.A.3.

163. Black, *supra* note 113.

164. *Id.*

165. *Education Savings Account (ESA) Program*, TENN. DEP’T. EDUC. <https://www.tn.gov/education/school-options/esa-program.html>; *see also* Vivian Jones, *Americans for Prosperity, School Choice Groups Assemble Army to Push for Voucher Expansion*, TENNESSEAN (Nov. 7, 2023). Proponents also allege that the ESA Program will improve public-school performance through competition. *Id.* However, data gathered from other states does not show any statistically significant improvements in public school performance due to competition introduced by voucher programs. *Id.*

impact, the Supreme Court has acknowledged that an inference of discrimination can be drawn from “the inevitability of disproportionate impact.”¹⁶⁶ The demographics of students within the affected school districts coupled with the fact that both districts assert that they are already underfunded speaks to the inevitable disproportionate impact the ESA Program will have.¹⁶⁷ Participating students coming from underfunded public schools will inevitably experience losses in academic achievement, while public schools will lose more funding and will struggle to provide remaining students with the resources they require.¹⁶⁸

Additionally, studies clearly show that similar voucher programs in other states harmed learning outcomes for participating students.¹⁶⁹ This undermines the argument that allowing parents to remove their students from the public school system will lead to increased academic achievement for their students.¹⁷⁰ Ironically, while voucher proponents seized on the coronavirus pandemic to push voucher programs in many states, a study conducted by the National Coalition for Public Education revealed that Indiana, Louisiana, and Ohio’s voucher programs harmed student learning outcomes even more than natural disasters, including the coronavirus pandemic and Hurricane Katrina.¹⁷¹ In light of this evidence, it is naïve to believe that voucher programs could benefit participating students in Memphis and Nashville in any meaningful way. It is far more likely that the only benefit conferred upon participating students is that they will have the opportunity to escape their public-school systems before they deteriorate further.

166. Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 342–43 (1986) (citing *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.25 (1979)).

167. See discussion *supra* Section II.A.1.

168. See discussion *supra* Sections II.A.1.iii, II.A.4 (discussing the harmful impacts of voucher programs on academic achievement and the lack of funding provided to Shelby County and Davidson County public schools).

169. See discussion *supra* Section II.A.4.

170. *Id.*

171. *Voucher Impacts on Student Outcomes as Harmful as Natural Disasters*, NAT’L COAL. FOR PUB. EDUC. <https://dianeravitch.net/2022/11/15/josh-cowen-vouchers-are-a-disaster-for-students/> (last visited Apr. 5, 2024).

Similarly, opponents of the ESA Program argue that its rushed implementation “will cause irreparable harm” to public schools and the students remaining in them.¹⁷² The State began implementing the ESA Program after public schools already set their budgets for the 2022–2023 school year and those budgets did not account for the millions of dollars that would be diverted to private schools.¹⁷³ With less funding going toward public schools, student performance is likely to suffer.¹⁷⁴ While some data has been gathered in other states that shows modest improvements in public school performance in response to voucher programs, these improvements are statistically insignificant.¹⁷⁵ Additionally, the studies showing modest improvements in academic achievement were conducted in states already providing more adequate funding to their public schools,¹⁷⁶ so it is impossible to know whether similar improvements will be replicated in Tennessee. For example, Indiana’s school voucher program showed that the competitive effect of vouchers slightly increased public-school performance, but Indiana is ranked fourth nationally in adequate public education funding and these improvements are only expected to last in the short term.¹⁷⁷ Nonetheless, Tennessee lawmakers disregarded these risks and made sure to exclude “every other school district in Tennessee . . . to ‘protect’ those districts from the [ESA Program’s] harmful impact.”¹⁷⁸ Clearly, lawmakers did not hold the same concern for the potential harmful

172. Marta Aldrich, *Private School Voucher Opponents Will Seek to Block Tennessee’s ‘Rushed’ Launch*, CHALKBEAT (Jul. 19, 2022), <https://tn.chalkbeat.org/2022/7/19/23269875/tennessee-private-school-voucher-launch-esa-injunction-governor-lee-memphis-nashville>.

173. *Id.*

174. Daarel Burnette, *Student Outcomes: Does More Money Really Matter?*, EDUC. WEEK (June 4, 2019), <https://www.edweek.org/policy-politics/student-outcomes-does-more-money-really-matter/2019/06>.

175. Ulrich Boser et. al., *The Highly Negative Impacts of Vouchers*, CTR. FOR AM. PROGRESS (Mar. 20, 2018), <https://www.americanprogress.org/article/highly-negative-impacts-vouchers/>.

176. Catherine Winkler, *Research Shows Competition from School Vouchers May Be Limited in the Short Term*, IND. U. BLOOMINGTON (Aug. 3, 2021), <https://education.indiana.edu/news/2021/jul-dec/2021-08-02-research-school-vouchers.html>.

177. *Id.*

178. Merod, *supra* note 161.

impacts the ESA Program could have on Shelby County and Davidson County public schools and instead chose to target them directly.

B. The ESA Program's Disparate Impact Is Coupled with an Overt, Racially Motivated Purpose

In *Davis* and *Arlington Heights*, the Supreme Court seemed to contemplate a subtle standard to determine the presence of a racially discriminatory purpose motivating a facially neutral government action.¹⁷⁹ In both cases, the Supreme Court upheld a standard that allowed inferences of a government action's discriminatory purpose by examining the "totality of [the] circumstances."¹⁸⁰ However, more recent cases have effectively heightened this standard and "ignored the subtlety of *Davis* and *Arlington Heights*, even though they profess to rely on them."¹⁸¹ While this is a lofty standard for a claimant to meet, the ESA Program's legislative and judicial history, along with data showing the failure of voucher programs in other states, evidence a discriminatory purpose that motivated the ESA Program's passage and implementation.¹⁸²

In *Arlington Heights*, the Supreme Court established that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes."¹⁸³ Under this standard, the ESA Program's tumultuous legislative history suggests the State was motivated by a discriminatory purpose in targeting Memphis and Nashville public schools. Lawmakers refused to approve

179. Nelson, *supra* note 166, at 341 ("Neither *Davis* nor *Arlington Heights* . . . seems to require a showing of overt discriminatory purpose in all equal protections claims.").

180. *Id.*

181. Nelson, *supra* note 166, at 341; *Hunter v. Underwood*, 471 U.S. 222, 223 (1985); *Wayte v. United States*, 470 U.S. 598, 608–09 (1985); *Mobile v. Bolden*, 446 U.S. 55, 67–68 (1980); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). In recent cases, it has been difficult for the Supreme Court to discern a discriminatory purpose because legislative intent can only be concretely proven if there is a detailed legislative record, which state legislature rarely have. Nelson, *supra* note 166, at 344. Additionally, public officials rarely publicly admit they are prejudiced in any way, which also makes proving discriminatory purpose difficult in most cases. *Id.*

182. See *supra* Part II (discussing the ESA Program's legislative history, judicial challenges, and damaging impacts of voucher programs in other states).

183. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 267 (1977).

earlier versions of the bill that applied to counties across the state.¹⁸⁴ As a means of garnering support for the ESA Program, certain lawmakers were promised their districts would not be impacted, which clearly indicates the legislature was aware of the “disastrous” and “irreparable” effects the ESA Program could have.¹⁸⁵ Nonetheless, the legislature was not concerned about the adverse impacts the ESA Program could have on Shelby County and Davidson County. As a result, minority students will be disproportionately harmed by the ESA Program and left with fewer resources because of the State’s decision to divert funds away from these public-school systems.¹⁸⁶

Additionally, in considering the factors set forth by the Supreme Court in *Arlington Heights*, the legislative history of the ESA Program evidences a departure from the normal procedural sequence of government action targeted at certain counties under the Home Rule Amendment of the Tennessee Constitution.¹⁸⁷ Although the Tennessee Supreme Court overruled the lower courts’ rulings on the issue and cleared the way for the ESA Program’s implementation,¹⁸⁸ its decision still represented a clear shift in the Court’s handling of the Home Rule Amendment.¹⁸⁹ The Court’s decision rested on distinguishing the Local Education Agencies (“LEAs”) mentioned in the ESA Act from the local governments that fund them.¹⁹⁰ The lower courts previously determined that the “inseparable partnership between the LEAs” and their local governments made the Home Rule Amendment applicable to the ESA Program.¹⁹¹ If the Home Rule Amendment applied to the ESA Program, the State would have been required to obtain approval of either the local legislative body or eligible voters in the affected

184. See *supra* notes 11–16 and accompanying text.

185. Sam Stockard, *Metro, Shelby Seek Voucher Injunction as State Plows Ahead*, TENN. LOOKOUT (July 25, 2022), <https://tennesseelookout.com/2022/07/25/metro-shelby-seek-voucher-injunction-as-state-plows-ahead/>.

186. Andy Spears, *Disproportionate Harm*, TENN. EDUC. REP. (July 28, 2022), <http://tnedreport.com/2022/07/disproportionate-harm/>.

187. *Arlington Heights*, 429 U.S. at 266–68.

188. *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, 645 S.W.3d 141, 154 (Tenn. 2022).

189. *Id.* at 158 (Lee, J., dissenting).

190. *Id.* at 151.

191. *Id.* at 151.

counties before enacting the ESA Program and targeting Shelby County and Davidson County.¹⁹² The Court's holding suggested that because the ESA Act did not mention the counties by name, the Home Rule Amendment was not implicated.¹⁹³ However, the Court's precedent suggests that even where a statute is facially directed at another entity but substantially affects a county, the statute does in fact govern or regulate that county, thereby implicating the Home Rule Amendment.¹⁹⁴ This represents a notable departure from normal procedures required of the Tennessee legislature in enacting laws targeted to individual counties, which evidences discriminatory intent.¹⁹⁵

Public support for the ESA Program often rests on the assumption that it will increase participating students' performance, as well as the performance of students left behind in the public school system.¹⁹⁶ However, looking to data gathered from other states, voucher programs largely fail to deliver on such promises, and often even harm learning outcomes.¹⁹⁷ Despite this growing body of evidence speaking to the dangers voucher programs pose, the Tennessee legislature opted to defund Memphis and Nashville public schools in pursuit of "school choice." The State maintains that school choice is a necessity because the public schools themselves are to blame for failing to achieve adequate learning outcomes for their students.¹⁹⁸ This mindset is problematic and further highlights the

192. TENN. CONST. art. XI, § 9.

193. *Metro. Gov't of Nashville*, 645 S.W.3d at 151.

194. *Id.* at 158 (Lee, J., dissenting) (citing *Chattanooga-Hamilton Cnty Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979)).

195. *See Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266–68 (1977) (holding discriminatory intent can be evidenced by a departure from normal government procedures).

196. *Tennessee Schools Pledge Robust Support for ESA Implementation This School Year*, OFF. OF THE GOVERNOR (July 20, 2022), <https://www.tn.gov/governor/news/2022/7/20/tennessee-schools-pledge-robust-support-for-esa-implementation-this-school-year.html>.

197. *See* discussion *supra* Section II.A.4.

198. Jon Syf, *Nearly 1,000 Families Applied, 350 Accepted Into Tennessee's Pilot Educational Savings Account Plan*, CTR. SQUARE (Oct. 12, 2022), https://www.thecentersquare.com/tennessee/nearly-1-000-families-applied-350-accepted-into-tennessees-pilot-educational-savings-account-plan/article_48945416-4a5c-11ed-b4c5-67a0072956f1.html.

invidious motivations behind the ESA Program. Specifically, placing the blame on Memphis and Nashville public schools fails to account for the undeniable link between poverty and low student achievement.¹⁹⁹ Public schools serving high-poverty and minority populations such as those in Memphis and Nashville already face even greater demands and require more resources, funding, and support than their more affluent counterparts.²⁰⁰ By gambling on the ESA Program, the State is threatening to deepen the education gap by further stripping resources from these schools in spite of the problematic data available on voucher programs nationwide.²⁰¹

Instead of working to fix Memphis and Nashville public schools, the State is offering a “lifeline” only to those families who can afford to supplement the cost of private school tuition with the ESA allocation.²⁰² Although wealth is not a suspect classification recognized by the Supreme Court under the Equal Protection Clause,²⁰³ race is—and the overwhelming majority of students left in the

199. See Tonyaa Weathersbee, *Tennessee’s Return of Four Frayser Schools to SCS Should Curb Experiments on Poor Kids*, COM. APPEAL (Dec. 19, 2021), <https://www.commercialappeal.com/story/news/columnists/tonyaa-weathersbee/2021/12/20/frayser-schools-returning-scs-tennessee-achievement-district-failed-fix/8931666002/> (“Children who are worried about whether the lights will be on when they come home can’t focus on their lessons and their scores like children who don’t have those worries.”).

200. Knapp, *supra* note 159, at 151 (citing Marta W. Aldrich, *Judge Sets Trial Date for Tennessee’s 5-Year-Old School Funding Lawsuit*, CHALKBEAT (June 15, 2020), <https://tn.chalkbeat.org/2020/7/15/21326022/judge-sets-trial-date-for-tennessees-5-year-old-school-funding-lawsuit>).

201. See discussion *supra* Section II.A.4.

202. Betsy Phillips, *Let’s Take a Look at Governor Bill Lee’s Education Savings Account Program*, NASHVILLE SCENE (July 18, 2022), https://www.nashvillescene.com/news/pithinthewind/lets-take-a-look-at-gov-lees-education-savings-account-program/article_6481eb9a-0630-11ed-bc06-771ca3a6e49f.html. In Tennessee, the average tuition among all K–12 private schools is \$10,403. *What’s Driving the Growing Costs for Memphis Private Schools*, MOST (Aug. 29, 2022), <https://www.memphis-scholarships.org/blog/whats-driving-the-growing-costs-for-memphis-private-schools>. This figure excludes other expenses that come with attending a private school, including uniforms, supplies, field trips, athletics, and technology, which if included raises the average by nearly 30%. *Id.*

203. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that poverty is not a suspect classification under the Equal Protection Clause and discrimination against the poor should only receive rational basis review).

Memphis and Nashville public school systems are racial minorities.²⁰⁴ By only offering a voucher allocation that will fail to fully pay for tuition or the additional costs associated with attending a private school, a court could infer that the State's true purpose rests only in abandoning public schools serving marginalized communities while allowing a select few who can afford it to escape before they decline even further.²⁰⁵

The State's true purpose is also evidenced by looking to the number of ESA applications that have been approved for families and students in Nashville and Memphis, respectively. As of August 2022, Tennessee had approved thirty-four applications for Nashville students and families, and only twelve for Memphis students and families.²⁰⁶ This breakdown is unsurprising when considering minorities make up 91% of Shelby County public schools' student population compared to 70% of Davidson County public schools' student population.²⁰⁷ Further, 56% of Shelby County School's student population are from

204. *See supra* Section II.A.1.

205. Along with the ESA Program, Governor Lee has been vocal about his plan "to sprinkle charter school throughout the state that will combat 'leftist academics . . .'" Molly Olmstead, *Where the Right-Wing Attacks Against Education Finally Went Too Far—For Republicans*, SLATE (July 27, 2022), <https://slate.com/news-and-politics/2022/07/tennessee-governor-bill-lee-hillsdale-education-charter-schools.html>. To put his plan into action, he began working with a small Michigan Christian college, named Hillsdale, to bring a new K–12 curriculum to Tennessee. *Id.* Governor Lee came under fire after a recording was released of Hillsdale's president criticizing and shaming public school teachers. *Id.* These statements were made at an event in Franklin, Tennessee, in which the president stated, "you don't have to be an expert to educate a child because basically anyone can do it." *Id.* He rattled off a number of other insults and assumptions, including public school teachers are "trained in the dumbest parts of the dumbest colleges in the country." *Id.* While Governor Lee did not express his agreement with these statements, he failed to interject and consequently was called upon by the media and educational organizations to denounce these remarks. *Id.* Instead, Governor Lee defended Hillsdale's president by asserting that he was criticizing "the influence of left-leaning activists in the public education system" rather than teachers themselves. *Id.*

206. Laura Testino, *Tennessee Education Officials Send First Voucher Approvals to Nashville, Memphis Families*, COM. APPEAL (Aug. 18, 2022), <https://www.commercialappeal.com/story/news/education/2022/08/18/tennessee-private-school-voucher-approvals-nashville-memphis-families-get-first-ones/7832981001/>. The initial number of applications submitted was "split evenly between Memphis and Nashville." *Id.*

207. *See supra* notes 32, 41 and accompanying text.

low-income families; students from low-income families comparatively make up 38% of Metro Nashville's enrollment.²⁰⁸ It follows that Memphis will have less families opting to participate in the ESA Program due to the cost or other factors associated with a greater proportion of marginalized students, such as a lack of access to information or transportation. This also may evidence an unequal application of the ESA Program, which the Supreme Court recognizes as evidence of a discriminatory intent motivating government action.²⁰⁹

IV. CALL FOR FEDERAL COURT INTERVENTION TO DECLARE TENNESSEE'S ESA PROGRAM UNCONSTITUTIONAL

The disparate impact facing Shelby County and Davidson County students, in addition to evidence of discriminatory intent, would subject the ESA Program to federal court review.²¹⁰ While the ESA Program is facially neutral, it stands to have a disparate impact on the affected counties, and its background and application evidence the legislature's discriminatory intent in targeting Shelby County and Davidson County. Further, the State would unlikely be able to rebut the underlying presumption of unconstitutional discrimination by offering racially neutral reasons justifying the ESA Program. This is especially true because the legislature intentionally removed every other Tennessee county besides Shelby and Davidson County to "protect those districts from the Act's harmful impact . . . without any justifiable rationale and without tailoring the program to any educational goal."²¹¹

208. Marta Aldrich & Annie Fu, *Tennessee's Pandemic Test Scores Dropped, but Especially in Memphis and Nashville*, CHALKBEAT (Aug. 13, 2021), <https://tn.chalkbeat.org/2021/8/13/22620297/tennessee-pandemic-test-scores-dropped-most-in-memphis-nashville>. Despite the differences between these statistics, it is important to note that Memphis and Nashville operate public school systems with the highest proportion of economically disadvantaged students in Tennessee. *Id.*

209. *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977) (holding one way to prove discriminatory intent is to show unequal application of a government action that can only be explained by a discriminatory purpose).

210. See discussion *supra* Section III.

211. Merod, *supra* note 161. Another crux of the argument raised by ESA Program opponents is that other worse performing districts in Tennessee were not reached by its final eligibility requirements. Mariah Timms, *Tennessee's School Voucher Program Wins Court Challenge*, TENNESSEAN (Nov. 23, 2022),

Since the Tennessee Supreme Court lifted the previous injunction blocking the ESA Program, the State jumped into action to expedite its implementation for the 2022–2023 school year.²¹² The affected counties responded by filing additional claims against the State, one of which was under the Tennessee's Equal Protection Clause, asserting that this rushed roll out left them with no solutions to “fill the gap in the short term” and account for the millions of dollars drained from their respective districts.²¹³ However, the Davidson County Chancery Court found that the injury alleged by Shelby and Davidson County was merely “speculative” and dismissed these remaining legal challenges because it found the counties lacked standing.²¹⁴

The affected counties may have more success asserting standing to challenge the ESA Program under the Equal Protection Clause at the federal level.²¹⁵ While the Davidson County Chancery Court dismissed the county plaintiffs' claims because the asserted injury was merely “speculative,”²¹⁶ Shelby County and Davidson County public schools have been forced to fill the gaps in funding resulting from the ESA Program's implementation during the 2022–2023 school year.²¹⁷ These districts were already overextended and were not prepared to work around the millions of dollars that were stripped from their funding, which only exacerbated “the detrimental impact on school operations and educational outcomes” and represents a concrete and

<https://www.tennessean.com/story/news/2022/11/23/tennessee-school-voucher-challenge-judges-dismiss/69675084007/>. Therefore, this shows that Tennessee may, in fact, completely lack “any justifiable rationale” or “educational goal” in targeting Shelby and Davidson County. Merod, *supra* note 161.

212. Merod, *supra* note 161.

213. *Id.*

214. Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., No. 20-0143-II, 8 (Tenn. Ch. dismissed Nov. 23, 2022).

215. To establish standing at the federal court level, a plaintiff must assert (1) a concrete and particularized injury, (2) that the injury is traceable to the defendant's conduct, and (3) that a favorable court decision is likely to remedy the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

216. Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., No. 20-0143-II, 8 (Tenn. Ch. dismissed Nov. 23, 2022).

217. Merod, *supra* note 161.

particularized injury.²¹⁸ Additionally, this lack of funding is the direct result of the State forcing the ESA Program on Shelby County and Davidson County. Finally, Shelby County and Davidson County's financial injury is likely to be remedied by a federal court striking the ESA Program down altogether because the funding set aside for voucher allocations would then be put back toward their public schools.

Once standing is established, a federal court may find an Equal Protection violation where the political processes "ordinarily relied upon to protect minorities" fail.²¹⁹ Because the ESA Program targeted Shelby and Davidson County without receiving local approval, the state political process evidently failed to protect the minority students within those districts. The State disregarded the fact that both counties vehemently disapproved of the voucher scheme and side-stepped the Home Rule Amendment, which would have required the legislature to obtain approval by both counties before enacting the ESA Program.²²⁰ Not only does this indicate that the political process failed to protect the minority students within both school districts, but it also indicates that the political process was never even made available to them as a means of contesting the legislation. Instead, the legislature carefully crafted the ESA Program to target both counties in a manner that would not facially implicate the Home Rule Amendment, in addition to engaging in other alleged misconduct to garner enough support for its passage.²²¹

By forcing the ESA Program on Tennessee's two largest school districts comprised of mostly marginalized students, the State seems to be signaling its intent to leave public schools behind, and consequently public school students.²²² The State's only justification for implementing the ESA Program is to provide families more choice to allow them to select the best school for their child.²²³ This justification

218. Mariah Timms & Melissa Brown, *Nashville, Shelby County Seek New Order to Block Gov. Lee's Controversial School Voucher Program*, TENNESSEAN (July 25, 2022), <https://www.tennessean.com/story/news/2022/07/25/nashville-shelby-county-seek-new-order-block-school-vouchers/10144657002/>.

219. U.S. v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

220. TENN. CONST. art. XI, § 9.

221. See discussion *supra* Section II.A.1.

222. See *supra* notes 199–202 and accompanying text.

223. See Kayla Solomon, *Over 40 TN Schools Pledge Support for ESA Program*, FOX13 MEMPHIS (July 20, 2022),

should not supersede the disparate impact the ESA Program will have on the educational opportunities granted to students remaining within these school districts, or the invidious motivations that gave rise to it in the first place. The ESA Program should be struck down entirely under the Equal Protection Clause of the United States Constitution before it has the chance to worsen student outcomes and detrimentally affect these public-school systems and the students within them.

V. CONCLUSION

Voucher programs represent an enduring discriminatory practice that purports to remedy educational inequity by offering families the choice to flee their public-school systems to attend private schools.²²⁴ Despite a growing body of evidence showing the failures of voucher programs in other states, the Tennessee legislature is recklessly opting to gamble with the learning outcomes of the state's largest and most segregated public-school districts.²²⁵ Although the affected counties have been unsuccessful in challenging the ESA Program under various provisions of Tennessee's Constitution, the circumstances surrounding its enactment and its application render it vulnerable to federal court intervention under the Equal Protection Clause of the United States Constitution.²²⁶ Striking the ESA Program down in its entirety would help to protect marginalized students within Shelby and Davidson County and require the State to enact meaningful education reform that does not include imposing greater hardship on public schools that are already overextended.

[https://www.fox13memphis.com/news/local/over-40-tn-schools-pledge-support-esa-program/VPRKYP77G5ARNHU6NWW TRIX6GU/](https://www.fox13memphis.com/news/local/over-40-tn-schools-pledge-support-esa-program/VPRKYP77G5ARNHU6NWW%20TRIX6GU/) (“So if a parent now has a choice . . . it certainly stands to reason that it will benefit that child.”); Bill Lee (@GovBillLee), TWITTER (Aug. 25, 2022, 4:53 PM), <https://twitter.com/govbilllee/status/1562921215202926600> (“Finally, families in Memphis [and] Nashville can pick the best school for their child.”).

224. Menas, *supra* note 3.

225. *See supra* notes 197–202 and accompanying text.

226. *See discussion supra* Section IV.