

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

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THE METROPOLITAN	)	
GOVERNMENT OF NASHVILLE	)	Case No.
AND DAVIDSON COUNTY, et al.	)	M2020-00683-SC-R11-CV
	)	
Plaintiff/Appellee,	)	Court of Appeals Case No.
	)	M2020-00683-COA-R9-CV
vs.	)	
	)	
TENNESSEE DEPARTMENT OF	)	Davidson County Chancery
EDUCATION, et al,	)	Court Case No. 20-0143-II
	)	
Defendant/Appellant,	)	
	)	On Appeal by Permission
NATU BAH, et al.	)	from the Tennessee Court of
	)	Appeals
Intervenor Defendants.	)	

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AMICUS CURIAE BRIEF OF  
SOUTHERN EDUCATION FOUNDATION

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## **Statement of Amicus Curiae's Interest**

Originally founded in 1867 as the Peabody Fund, the Southern Education Foundation (“SEF” or the “Foundation”) is a 501(c)(3) nonprofit organization supported by partners and donors committed to advancing equitable education policies and practices that elevate learning for low-income students and students of color in the Tennessee and other southern states, including Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and West Virginia. As a leader in education for over 150 years, SEF develops, disseminates, and amplifies research-based solutions and promising ideas for policymakers and grows the capacity of education leaders and influencers to create systemic, positive change in K-12 and post-secondary education. Through its work in research, government affairs, civic engagement and leadership development, the Foundation has long worked to improve educational opportunities for those who most need help. This work includes developing and disseminating research-based solutions for policymakers and grow the capacity of education leaders

and influencers to create systemic change within K-12 and post-secondary education.

SEF believes education equity is essential to achieve quality and fairness in public education. Equity exists when race and income are no longer the most reliable predictors of student success and systems work to ensure that each child receives what they need when they need it, to develop to their full academic and social potential, both for the child's benefit and the benefit of our local and national communities. SEF's mission is to see that every student, regardless of background, has access to an education that propels them toward an opportunity-rich life and thereby advances our nation's potential and ideals.

Public education in the South came about following the Civil War. Private philanthropic funds drafted the legislation, recruited Black elected officials during Reconstruction Period to present legislation by which the citizens, through their taxes, would fund public education. This was done to sustain the work private philanthropy was doing (training teachers, building schools, buying books, etc.) and create in the South what had already been established in the north, specifically,

public funded education. The philanthropic funds responsible for these efforts ultimately consolidated into one fund - the SEF.

Given SEF's legacy in the creation of southern public education, it respectfully submits its position, as a friend-of-the-court, that funding for public education should not be withheld or disproportionately diverted by the voucher program enacted by the Tennessee Education Savings Account Pilot Program (the "ESA Act" or "the Act"). 2019 Tenn. Pub. Acts, ch. 506 (codified at Tenn. Code Ann. § 49-6-2601–2612 (2019)), which is inequitable in that its benefits generally do not inure to Black and low-income students. SEF endeavors, in submitting this brief, to maintain the gains of a century-and-a-half of progress towards equitable public education in Tennessee.

### **Introduction and Summary of Arguments**

The notion of choice, in the abstract, may have an alluring impact. The high level concept of choice-by-voucher occupies a significant position in the discussions about education in Tennessee and around the country. Considered in more detail, however, voucher legislation, like the ESA Act, raises important questions about whether it is creating true choice and whether facilitating unconstitutional ends.

Voucher programs do not invest additional funding into underfunded or underperforming school systems. Rather, by design, these measures divert funding from the public schools. For the students who must remain in public schools, the reduced resources present a very bad “choice”—one that they and their parents, and society at large probably would never choose to make. In assessing these measures, the law must also confront the reality that the public school population disproportionately comprises minority and poor students. A voucher program that structures choices to promote *de facto* segregation contravenes constitutional considerations and threatens to dismantle hard-fought and socially-beneficial historical progress.

SEF offers this brief to provide this Court with helpful information on the historical progress that is jeopardized by the ESA Act and the inequity and inequality that the Act would create.

### **Arguments and Authorities**

#### **1. Diverting Resources Away From Public Schools Is Inconsistent With Equity in Education, Which SEF And Persons Of Color Have Been Pursuing For More Than 150 Years.**

The notion of universal, quality education as a pillar of a free society has roots in late-eighteenth-century Jeffersonian philosophy.

James D. Anderson, *The Education of Blacks in the South, 1860-1935*, at 18 (Univ. N.C. Press 1988); Letter from Thomas Jefferson, Minister to France, United States of America, to George Wythe, J., Virginia High Court of Chancery, (Aug. 13, 1786) (on file with the National Archives), <https://founders.archives.gov/documents/Jefferson/01-10-02-0162>. SEF, in its early years, began doing the hard work of trying to make that ideal more of a reality for everyone following the Civil War. See generally S. Educ. Found., *Southern Education Foundation: 150 Years: Honoring our Past, Reimagining our Future*, <https://www.southerneducation.org/who-we-are-2/timeline/> (last visited Apr. 2, 2021) [hereinafter *SEF Timeline*]. That goal—and the mission to get there—are directly impacted by the voucher program at issue. As is explained below, the voucher program would be a setback for many years of difficult progress in universal free public education and the equality and equity goals it promotes.

The end of the Civil War provided the impetus to establish a system of public education in the South. At the time the Fourteenth Amendment was passed, education of white children in the South was largely privatized, and education of Black children virtually

nonexistent. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-90 (1954). After the Civil War, “Congress saw the provision of public education as a central pillar of state citizenship and a necessity of rebuilding democracy.” Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. Rev. 1385, 1428 (2019).

The movement towards public education in the South drew particular strength from formerly enslaved people, who saw education as essential to true emancipation and possessed a strong desire to see their children educated. Anderson, *supra*, at 22-36. They enlisted assistances from, *inter alia*, Republican politicians, the Freedmen’s Bureau, and missionary societies, and the Union army to establish universal, state-supported public education. *Id.* at 21. Reconstruction conventions and legislatures founded public, state-run schools, facilitating “great advances in literacy for Black students and white students alike.” *Id.* at 24; Charlotte Mostertz, *Teach Your Children Well: Historical Memory of the Civil War and Reconstruction, Public Education, and Equal Protection*, 22 U. Pa. J. Const. L. 589, 594 (2020). Tennessee’s legacy includes these efforts and a post-Civil War

constitution that enshrines the right to free public education. Tenn. Const. art. XI, § 12.

The triumph of public education in the South was undermined by the regime of post-Reconstruction racial segregation. In that era, legislatures left public school systems underfunded and underdeveloped. Anderson, *supra*, at 39-42. The disparities in funding and quality between white public schools and Black public schools also increased sharply, but black children continued to make gains in part because of public education. *Id.*; see also K. Robson, J. Schiess & J. Trinidad, *Education in the American South: Historical Context, Current State, and Future Possibilities* 73 (May 2019) (unpublished presentation for Bellwether Education Partners), <https://files.eric.ed.gov/fulltext/ED596492.pdf> (noting that by 1930, 60% of black children ages 5-20 were in school, compared with 71% of white children, and much higher percentages in cities with large black populations; black illiteracy had dropped from 79.9% in 1870 to 44.5% in 1900; by 1930, illiteracy among black Southerners was down to 16%).

By the 1880s, white attitudes shifted slightly in favor of universal public education, particularly for whites, arising from the Populist

movement, recognitions of the need for Southern industrialization, and some white Southerners' concerns about the African American community's emphasis on education. Anderson, *supra*, at 44-45. As support for universal public education expanded, disagreements arose about the content and quality of that education, and the problems of institutional societal discrimination manifested themselves in those disagreements. Some favored industrial-only education for African-Americans in a way that would reinforce the post-Reconstruction social and political order, while the African American citizens generally favored a more traditional, liberal education. *Id.* at 50-126, 215-17.

Tennessee was an early leader among Southern states in passing a compulsory school attendance law in 1905. *See* S. Educ. Found., *Chart, Schools: Compulsory Attendance 1852-1918*, in *SEF Timeline*, *supra*. Beginning in 1913, the Jeanes Fund supported 125 “lead teachers” working and traveling across the South to improve curriculum and instruction in small, rural schools for Black students, and much of their documented, good work was performed in Tennessee. *Id.* (1913 entry); Layla Treuhaft-Ali, *The Rich Implications of Everyday Things: The Jeanes Teachers and Jim Crow, 1908–1968* (Apr. 3, 2017)

(unpublished senior thesis, Yale College),  
[https://educationstudies.yale.edu/sites/default/files/files/laylaTreuhaft-Ali%20Layla\\_Historythesis\\_2017.pdf](https://educationstudies.yale.edu/sites/default/files/files/laylaTreuhaft-Ali%20Layla_Historythesis_2017.pdf). “Jeanes Teachers” developed child-centered approaches designed to facilitate higher attendance at public schools and love of learning. *Treuhaft-Ali, supra*, at 32 (citing Carrie M. Denney, *Special Report of Jeanes Teacher for School Year 1939-1940, Chester County, Tennessee*, Box 145, Folder 1, SEF Papers). They developed lessons aimed at teaching students—and community members—to thrive independently and economically, not solely as labor in the Jim Crow Era planter system and to be community leaders. *Id.* at 36-37 (noting the work of a Shelby County, Tennessee, Jeanes Teacher), 38 (noting a mentorship program implemented by a Maury County, Tennessee, Jeanes Teacher). As one Tennessee Jeanes Teacher observes, these practices made public schools true community centers “in the fullest sense of the word.” *Id.* at 40-41.

Between 1910 and 1940, the United States experienced the “high school movement” in which overall high school attendance rose from approximately 15% enrollment to 73% enrollment. Claudia Goldin & Lawrence F. Katz, *The Race between Education and Technology* 195

(Harv. Univ. Press 2008). Though this movement generally extended to white Southerners, its boom was far less evident among the South's black population. Anderson, *supra*, at 204-06. In large measure, this disparity arose from the "equal, but separate" holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and a lack of faithfulness to the equality aspect of this since-overruled standard. Anderson, *supra*, at 205-10. Legislatures often closed or declined to fund black high schools, sometimes in favor of funding black elementary schools. *Id.*

When a significant number of African American Southerners began migrating from rural life to urban centers after World War I, white Southern politicians began to favor the existence and funding of a significant number of Black secondary schools. Anderson, *supra*, at 218-21. African American leaders worked to obtain philanthropic donations to assist in the construction and staffing of those schools, without restrictions that the schools be limited to industrial education, which philanthropic societies initially resisted, but ultimately came to accept as African Americans were forced out of the labor market in significant numbers during the Depression. *Id.* at 82-84, 221-28, 245-54.

A significant push for integration began in the 1940s, and as a flowing from those efforts, the Supreme Court showed a willingness to invalidate segregation in Southern graduate and professional schools. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). In its landmark 1954 decision in *Brown v. Board of Education*, the Supreme Court finally enforced the constitutional prohibition against segregation in public schools. These decisions did not, unfortunately, bring full equity in Southern education because of, among other things, the rise of white private school enrollment in the South, beginning in the 1940s.

One reason for the continuing problem was the transfer of Southern white students to private schools beginning in the 1940s in response to such integration decisions. Richard Kluger, *Simple Justice* 256-84 (Alfred A. Knopf, 1975); Sam P. Wiggins, *Higher Education in the South* 169 (McCutchan Publ'g Corp., 1966). Southern state legislatures enacted as many as 450 laws and resolutions between 1954 and 1964 attempting to block, postpone, limit, or evade the desegregation of public schools, many of which expressly authorized the systematic transfer of public assets and monies to private schools.

Thomas V. O'Brien, *The Politics of Race and Schooling: Public Education in Georgia, 1900-1961* 99-198 (Lexington Books, 1999). The intervention of the federal judiciary was required to stop the diversion of funds and assets from private schools. See, e.g., *Brown v. S.C. State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark.), *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959). Nevertheless, private school enrollments by white Southerners of means steadily increased between the mid-1960s and 1980, and there were further public efforts to fund private schools at the expense of public schools.

Public schools thus educate a majority of the South's (and the nation's) African American and low-income students, but they have always faced funding challenges despite this important work. As noted above, those challenges at first required resort to private philanthropy for assistance to supplement state and local expenditures, notwithstanding the recognition of free public education as a constitutional right. Federal funding, including the Elementary and Secondary Education Act of 1965, has also played a significant role in funding Southern public schools. A. Boyle & K. Lee, *Title I at 50 – A*

*Retrospective 1* (Am. Insts. for Rsch., 2015),

[https://www.air.org/sites/default/files/downloads/report/Title-I-at-50-](https://www.air.org/sites/default/files/downloads/report/Title-I-at-50-rev.pdf)

[rev.pdf](https://www.air.org/sites/default/files/downloads/report/Title-I-at-50-rev.pdf) (noting that by 2015, Title I provided funds to more than 56,000 public schools with disadvantaged students, and served more than 21 million children). This funding was necessary to support the public schools, and minority children in particular have benefited from the federal funding. Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 Admin. L. Rev. 997, 1004 (2001). Measures that effectively de-fund public schools are likely to undermine those benefits.

Public education remains a significant force for progress, promoting the twin goals of racial justice and economic equality. Southern private school enrollment is relatively small, and it is predominately white. Robson et. al., *supra*, at 38, 42-49. Children from low-income families are overrepresented in the public school population, and in Tennessee and all Southern states except for two, more students qualify for free or reduced-price lunches than the national average. *Id.* at 42. Therefore, as a matter of equity, funding remains a critical component of the public education system. Per-pupil spending in the

South is below the national average in Tennessee, as it is in practically all Southern states, and much of that funding comes from above-national-average federal funding. *Id.* at 48-49. As explained more fully below, SEF respectfully submits that it is vital that critical funding not be diverted from the public schools through the ESA Act, which is substantially likely to increase inequity and intensify *de facto* segregation.

**2. School Voucher Programs Like Those Authorized By The ESA Act Have Negative Consequences For Black Students**

***A. The ESA Act Would Divert Resources Away From Already Underfunded Public Schools To The Harm Of Black Students.***

While providing a fundamental right to free education, Tennessee falls below the national average in the sufficiency of education provided. Tennessee public schools rank 45<sup>th</sup> out of the 50 states and the District of Columbia in public educational funding per student at \$10,547. M. Hansen, *U.S. Public Education Spending Statistics*, EducationData.org (Oct. 28, 2020), <https://educationdata.org/public-education-spending-statistics>. Even then, Tennessee relies more heavily on federal education funding than the national average, receiving over 11% of its budget from the federal government as opposed to the 8% average. *Id.*

Tennessee also ranks 45<sup>th</sup> in educational spending as a percentage of in-state taxpayer income. *Id.*

Underfunding is also a problem at the county and school district level in Tennessee. For example, in Shelby County, where 56% of the students are defined as economically disadvantaged, a lack of funding has resulted in drastic cuts. Tenn. Dep't of Educ., *Report Card (2020)*, <https://reportcard.tnedu.gov>. In 2015-2016, three hundred and sixty-seven positions were eliminated from Shelby District's general budget and since 2013, seventeen schools in the county have been closed.

(Compl. ¶ 14.)

Despite this problem of critical underfunding, the ESA Act provides that participating students in Shelby and Davidson Counties receive an "education savings account" they can use to pay tuition and other expenses at a participating private school. The student's account would be funded by diverting funds away from the student's public school district in an amount equal to the district's per-pupil state and local funding or the combined statewide average of such funding, whichever is lower. (Compl. ¶ 13.) Thus, the ESA Act expressly contemplates "transfer[ring] critical state and local funding from

struggling public schools to private schools.” (Compl., Introduction.) In fact, it is estimated that the ESA Act would result in the loss to the Metropolitan Nashville Public Schools and Shelby County Schools of at least \$379 million in the first five years of the program alone, losses which would increase in each succeeding year. (Compl. ¶¶ 118-119.)

This diversion of public school funding would necessarily have a disproportionate impact on Black students. As discussed above, private school enrollment in the South burgeoned in response to the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and other court decisions mandating desegregation of public schools, and remains relatively high compared to other parts of the country. Tennessee was no exception to this trend. As of September 2018, approximately 10.8% of K-12 students in Tennessee were enrolled in private schools. See Statistical Atlas, *School Enrollment in Tennessee* (Sept. 4, 2018), <https://statisticalatlas.com/state/Tennessee/School-Enrollment>. This private school enrollment by no means reflects the makeup of the population at large. While Tennessee public schools are comprised of approximately 39% minority students statewide, that number plummets to 16% in private schools. Tenn. Dep’t of Educ.,

*Report Card, supra*; Private School Review, *Private School Minority Statistics in Tennessee* (2021), <https://privateschoolreview.com/minority-stats/tennessee>. The same pattern holds true in Davidson and Shelby Counties: in Metro Nashville school district, public schools average 27.4% white students, while students in private schools in Davidson County average 86% white. Tenn. Dep’t of Educ., *Report Card, supra*; Private School Review, *Top Davidson County Private Schools* (2021), <https://privateschoolreview.com/tennessee/davidson-county>. In Shelby County, public schools are made up of 6.8% white students, while private schools comprise 73% white students. Tenn. Dep’t of Educ., *Report Card, supra*; Private School Review, *Top Shelby County Private Schools* (2021), <https://privateschoolreview.com/tennessee/shelby-county>. Thus, any shift of funding away from public schools in Davidson and Shelby Counties, and towards private schools, would disproportionately benefit white students and harm Black students.

***B. School Vouchers Disadvantage Black Students.***

“From their inception, vouchers were not race-neutral instruments.” M.A. Gooden, H. Jabbar & M.S. Torres, *Race and School Vouchers: Legal, Historical, and Political Contexts*, Peabody J. of Ed.

91:522, 524 (2016). Historically, school vouchers such as those contemplated by the ESA Act have been used as a tool to perpetuate segregation in schools.

Throughout the 1950's, Southern states set up tuition voucher or grant programs that were used to close down public school systems altogether, rather than desegregate—a practice that continued well after *Brown* was decided. Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Under the Lens of Critical Race Theory*, 26 B.U. Pub. Int. L.J. 43, 45-46 (2017). In perhaps the most notorious instance, Prince Edward County in Virginia was ordered to desegregate the public schools and instead, shut its public schools down and opened whites-only private schools funded through tuition grants. In 1956—*after* the Supreme Court's historic edict in *Brown*—the county supervisors had resolved “that they would not operate public schools ‘wherein white and colored children are taught together.’” *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 222 (1964) (citation omitted). While litigation was ongoing, Prince Edward County closed its public schools altogether, and they remained closed for five years. Finally—a full ten years after *Brown*—the U.S. Supreme Court

held that “closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws.” *Id.* at 232. As the Court explained:

Closing Prince Edward’s schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient. Apart from this expedient, the result is that Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support.

*Id.* at 230-31. The Court thus recognized that the use of vouchers—under the guise of “school choice”—was in fact a tool “used to systematically exclude black children from the educational process.” *Gooden et. al., supra*, at 525.

Although the Prince Edward County approach was eventually outlawed, it provided a blueprint for other communities to avoid integration efforts. Between 1954 and 1964:

Southern state legislatures . . . enacted as many as 450 laws and resolutions . . . attempting to

block, postpone, limit, or evade the desegregation of public schools, many of which expressly authorized the systematic transfer of public assets and monies to private schools.

S. Educ. Found., *A History of Private Schools & Race in the American South*,

<https://www.southerneducation.org/publications/historyofprivateschools>

/ (last visited Apr. 6, 2021). “By the end of the 1960s, more than 200

private segregation academies had opened in the South, relying on

vouchers to cover significant percentages of student tuition as well as

on other state resources to operate.” B. Fiddiman & J. Yin, *The Danger*

*Private School Voucher Programs Pose to Civil Rights* (Center for

American Progress, 2019),

[https://www.americanprogress.org/issues/education-k-](https://www.americanprogress.org/issues/education-k-12/reports/2019/05/13/469610/danger-private-school-voucher-programs-)

[12/reports/2019/05/13/469610/danger-private-school-voucher-programs-](https://www.americanprogress.org/issues/education-k-12/reports/2019/05/13/469610/danger-private-school-voucher-programs-)

[pose-civil-rights/](https://www.americanprogress.org/issues/education-k-12/reports/2019/05/13/469610/danger-private-school-voucher-programs-).

These concerns persist today, even in the absence of blatantly anti-integration justifications for school vouchers. See S. Educ. Found.,

*Tradition of Segregation & Resistance in the Deep South States*,

<https://www.southerneducation.org/publications/traditionofsegregation/>

(last visited Apr. 6, 2021) (describing “school choice” as a “more covert

but insidious” form of segregation). As discussed above, the student populations of private schools generally, and in Tennessee and Davidson and Shelby Counties in particular, remain disproportionately white. As recently as 2012, more than 35 “segregation academies”—that is, schools with no more than 2% Black students—still existed. M. Schaffer & B. Dincher, *In Indiana, school choice means segregation*, Phi Delta Kappan (Jan. 27, 2020), <https://kappanonline.org/indiana-school-choice-means-segregation-shaffer-dincher/>. Voucher programs only make the problem of *de facto* segregation worse. For example, in Indiana, the private schools that have benefited from the state’s voucher program “serve smaller percentages of Black students with each passing year. . . . The State of Indiana has actively engaged in a process that has effectively re-created the segregation academies that littered much of the southern United States in response to the 1954 *Brown v. Board of Education* decision.” *Id.* In short, “In nearly every contemplation of school choice since federally-mandated school desegregation, ***the purpose or impact of school choice has been discriminatory.***” Nelson, *supra*, at 52 (emphasis added).

Moreover, the risk that school vouchers will exacerbate the underfunding of public education—thus harming the Black students who remain in the public schools—is real. Again using Indiana as an example, the state legislature has “enact[ed] deep cuts on traditional public school districts” as a result of the voucher program. *Id.*; *see also* C. Ford, S. Johnson & L. Partelow, *The Racist Origins of Private School Vouchers*, Ctr. for Am. Progress (July 12, 2017), <https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/> (“[W]here private school enrollment is higher, support for spending in public schools tends to be lower”).

At the same time, although school vouchers are sometimes promoted as a means of achieving better educational achievement for Black students, that goal has proved to be illusory. In fact, research has established that “African American families are less likely to use school vouchers in the first place, and when they do use them, are more likely to leave.” Gooden et. al. , *supra*, at 532; *see also* Schaffer & Dincher, *supra* (“Black families are less likely than all other groups to use vouchers or keep their children in voucher schools.”). While the reasons

for this are not entirely clear, some possible explanations are “financial barriers, issues of adjustment, and demands on parent time/logistics.” Gooden et. al., *supra*, at 532. For example, economically disadvantaged Black families may have difficulty bearing the burden of transportation to a private school that is not in their neighborhood, or paying additional costs such as school uniforms. Thus, the purported goal of the ESA Act—to help low- and middle-income children in worse-performing schools—is actually less likely to be achieved for Black students than for whites.

**3. The ESA Act Is Part Of A Long-Term National Trend Which, By Advantaging Private Schools, Disproportionately Disadvantages Students Of Color And Low-Income Students.**

Beginning in the 1940’s, the face of federal courts’ dismantling of “separate but equal,” white students left public schools for both traditional and newly formed private schools. Private school enrollment in the fifteen states of the South rose by more than 125,000 students—roughly 43%—in response to U.S. Supreme Court decisions outlawing segregation in graduate and professional schools in the South. S. Educ. Found., *A History of Private Schools & Race in the American South*,

<https://www.southerneducation.org/publications/historyofprivateschools>

(citations omitted).

The South's private school enrollment increased by more than 250,000 students, to almost one million students, from 1958 to 1965. From the mid-1960's to 1980, as public schools in the South began to desegregate slowly through federal court orders, private school enrollment increased by more than 200,000 students across the region—with about two-thirds of that growth occurring in six states: Alabama, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina. *Id.* By 1980, private school enrollment in the South grew from an 11% share of the nation's private school enrollment to 24%. *Id.* The eleven Southern states of the old Confederacy enrolled between 675,000 and 750,000 white students in the early 1980's, and it is estimated that 65 to 75% of these students attended schools in which 90% or more of the student body was white. *Id.* (citations omitted).

Litigation between the IRS and private schools in the South culminated in *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the Supreme Court upheld the application of the IRS' non-discrimination policies to religious schools. As a result of the new

IRS nondiscrimination rules and the *Bob Jones University* case, all private schools in the South began publishing regular statements of non-discrimination in admission, and most began admitting at least a small number of African-American students and other students of color.

Much of the legislation adopted and considered to fund private schools in the Southern states in recent years has been introduced and supported with the stated purpose of improving educational opportunities for low-income students, many of whom are students of color, especially Black and Hispanic students. The Department of Education's February 2020 Best for All Strategic Plan echoes this theme: "The Best for All strategic plan seeks to provide all Tennessee students access to high-quality educational opportunities, regardless of where they live within the state." Tenn. Dept. of Educ., *Best for All Strategic Plan* 18 (2018), <http://bestforallplan.tnedu.gov/wp-content/uploads/2020/02/Best-for-All-Report-2-5-20.pdf>. The Strategic Plan provides that "the state has adopted several strategic goals and policies" for Nonpublic Schools, including: "Creating an Education Savings Account program offered exclusively to Tennessee low-income students & families." *Id.* at 19. In addition, the Strategic Plan touts as a

Policy Advancement: “The Tennessee General Assembly expanded high-quality school choice options for Tennessee families, including the Education Savings Accounts program designed to give more students access to high-quality education options.” *Id.* at 20.

An analysis of demographic and enrollment patterns, in addition to the historical uses of such policies, paints a very different picture. While public schools in the United States served a student body that was approximately 51% white and 48.3% children of color—primarily Hispanic and Black children—nearly three out of every four private school students were white. Comprised of both a wide range of religious schools and a smaller set of independent, nonsectarian schools, the nation’s private schools enrolled over twenty percentage points more white students than public schools.

Most states that have enacted vouchers and tax credit scholarship programs (*i.e.*, public funding for private schooling) in recent years do not collect or publicly provide reliable data on the race and ethnicity of students who attend private schools with public funding. Yet, enrollment patterns in private schools show that they are still overwhelmingly white, even in states where education tax credits

and/or vouchers have been implemented. As a result, economically vulnerable students and students of color are disproportionately represented in public schools and underrepresented in private schools, with a recent analysis concluding that private school enrollment in the United States was 68.6% white and students from low-income families make up only 9% of private school enrollment but over 50% of public-school enrollment. *See* Jongyeon Ee, Gary Orfield & Jennifer Teitler, *Private Schools in American Education: A Small Sector Still Lagging in Diversity* (UCLA Civ. Rights Project, Working Paper, Mar. 5, 2018) (finding that private school enrollment in the United States was 68.6% white and students from low-income families make up only 9% of private school enrollment but over 50% of public-school enrollment).

Tennessee is no exception. As of September 2018, approximately 10.8% of K-12 students in Tennessee were enrolled in private schools. *Statistical Atlas, School Enrollment in Tennessee, supra.* Private school enrollment by no means reflects the makeup of the population at large. While Tennessee public schools are comprised of approximately 39% minority students statewide, that number plummets to 16% in private schools. The same pattern holds true in Davidson and Shelby Counties:

in Metro Nashville school district, white students are 27.4% of total student enrollment, while students in private schools in Davidson County are 86% white. In Shelby County, public schools are made up of 6.8% white students, while private schools comprise 73% white students.

Students from low-income families also make up a significant proportion of Tennessee’s public school enrollment and that of Davidson and Shelby Counties. According to the Tennessee Department of Education, economically disadvantaged students comprise 30.8% of the state’s public school student population, 38.3% of the Metro Nashville school district’s enrollment<sup>1</sup>, and 56% of Shelby County Schools’ enrollment. Given these demographic realities, any shift of funding away from public schools in Davidson and Shelby Counties, and towards private schools, would disproportionately benefit white students and harm students of color and low-income students.

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<sup>1</sup>Metro Nashville Public Schools’ 2018-19 Annual Diversity Report states: “42% of our students are Economically Disadvantaged (ED) according to Direct Certification.” Metro Nashville Public Schools, *2018-19 Annual Diversity Report 2* (2019), <https://static1.squarespace.com/static/57752cbcd1758e541bdeef6b/t/5d82508adf9b752886feda52/1568821399351/2018-19+Annual+Diversity+Report+083019.pdf>.

In light of these public/private school enrollment patterns, public funding of private schools undermines the Supreme Court’s integration decisions, such as *Brown v Board of Education*. Currently, at least nineteen states have statewide programs that provide public funding to support children’s attendance in private schools. These state programs are located in each region of the nation, but they are concentrated in the South. Twelve Southern states have enacted legislation that directly or indirectly funds private schools. This phenomenon is occurring more than 60 years after *Brown v. Board of Education* declared racial segregation in the nation’s public schools “inherently unequal” and a violation of the U.S. Constitution and, in tandem with the Civil Rights Act of 1964 and the Elementary and Secondary School Act of 1965, abolished the legalized separation of white and Black students and prevented taxpayer dollars from going to *de jure* segregated public schools. Diverting public funding toward private schools in this manner harms students of color and low-income students in Davidson and Shelby Counties.

## Conclusion

Under guise of choice, the ESA Act's voucher program promotes inequity and inequality by defunding and depopulating the free public schools, which serve the highest percentages of Tennessee's Black and poor children, and diverting much-needed resources to primarily white private schools. The Act thus falls short of the promise in the Tennessee Constitution that: *"The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools."* Tenn. Const. art. XI, § 12 (emphasis added). That promise was born in Reconstruction as a recognition that we can make progress together as a well-educated and united citizenry. The SEF requests that the Court not reinstate the ESA Act, which would make Constitution's promise of a free, universal education to all of the State's children a hollow one.

This 7th day of April 2021.

Respectfully submitted,

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## Certification of Word Count

The undersigned certifies that this pleading complies with the formatting and word-limitation requirements of Tenn. R. App. P. 22 and Tenn. Sup. Ct. R. 46 § 3.02 and has 6,803 words as counted by Microsoft Word.

This 7th day of April 2021.

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## Certificate of Service

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