IN THE TENNESSEE COURT OF APPEALS

No. M2022-01786-COA-R3-CV
(consolidated with No. M2022-01790-COA-R3-CV)

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Plaintiffs / Appellants,

v.

TENNESSEE DEPARTMENT OF EDUCATION, *et al.*,

Defendants / Appellees,

and

NATU BAH, *et al.*,

Intervenor-Defendants / Appellees.

On Appeal From the Chancery Court for the Twentieth Judicial District, Davidson County, Nos. 20-0143-II & 20-0242-II

APPELLANTS' (McEWEN PLAINTIFFS) REPLY BRIEF IN RESPONSE TO INTERVENOR-DEFENDANTS/APPELLEES BAH, DIALLO, AND BRUMFIELD

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I. INTRODUCTION

Beyond its ruling on standing, the Chancery Court did not reach the merits of Defendants' motions to dismiss. This Court should decline to do so in the first instance. Nevertheless, the record is clear that McEwen Plaintiffs' claims are adequately stated, and Defendants' contentions provide no basis for dismissal.

II. ARGUMENT

A. The Court Should Allow the Chancery Court to Rule on Defendants' Motions to Dismiss

Bah Intervenors inject grounds for dismissal on which the Chancery Court did not rule. While the Court ***may*** affirm on different grounds from those relied upon by the trial court, *see Cont'l Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986), it should not do so here. The Chancery Court should be allowed to rule on these issues in the first instance. *Cf. Pouyeh v. Pub. Health Tr. of Jackson Health Sys.*, 832 F. App'x 616, 625 (11th Cir. 2020).

B. Plaintiffs Stated a Claim for Violations of the Education and Equal Protection Clauses

Because the Voucher Law diverts public education funding essential to the education rights of students in the districts without even a rational basis, the Amended Complaint sufficiently stated a claim under the Education and Equal Protection Clauses. Moreover, the

Amended Complaint stated a claim that the Voucher Law violates the equal protection rights of McEwen Plaintiffs as taxpayers in the districts.

1. Plaintiffs Stated a Claim that the Voucher Law Violates the Right to an Adequate Education

The Tennessee Supreme Court recognized the goal of the BEP is to address "both constitutional mandates imposed upon the State – the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities." *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) ("*Small Sch. Sys. II*").[1] Thus, the BEP and its replacement, TISA, are the vehicles through which the State purports to provide students in each public school district with constitutionally adequate and equitable educational opportunities. The Voucher Law, by reducing state BEP/TISA funds for the districts – and by doing so in those districts but in no others – violates the guarantees of adequate and equitable educational opportunities under the Tennessee Constitution.

[1] Internal citations and footnotes are omitted and emphasis is added throughout unless otherwise indicated.

As discussed in McEwen Plaintiffs' opening brief, the Amended Complaint alleges, for every voucher student who leaves the district, the districts will lose more per pupil in state funds than they receive from the state for that student.[2] R. at 2050-52¶¶68-72, 76. In addition, the Amended Complaint alleges the myriad ways in which the school improvement funds do not compensate for the loss of state funding as a direct result of the Voucher Law. R, 2054-55¶¶83-86.

Moreover, the Amended Complaint makes additional allegations that the Voucher Law will further reduce funding in the districts, *e.g.*, R. at 2055-56¶¶87-88 (fixed costs not reduced by vouchers); R. at 2056¶89; R. at 2061¶108 (vouchers will likely increase districts' concentration of more-expensive-to-educate students); and R. at 2055¶85 (districts will not recoup funds lost to vouchers if students return midyear).

The Amended Complaint alleges this excessive deduction of state funds, mandated by the Voucher Law, exacerbates the state funding inadequacy that the State has acknowledged prevents the districts' students from receiving adequate educational resources. R, 2053-54¶80.

[2] The claims the districts will receive increased funding at most raise a disputed issue of fact.

These allegations are more than sufficient to state a claim the Voucher Law violates the adequacy requirement of the Education Clause.

Contrary to Bah Intervenors' contention, McEwen Plaintiffs do not assert an adequacy claim against the State based on BEP or TISA. Rather, the allegations of existing state funding inadequacy are necessary to highlight the harm caused by the Voucher Law. The Amended Complaint alleges by mandating the diversion of more BEP/TISA funds from the districts – which will result in even more cuts to desperately needed educational services – to pay for private schools, the State violates its constitutional obligation to provide adequate educational opportunities to the districts' students.

2. Plaintiffs Stated a Claim for Violations of Their Right to Equitable Educational Opportunities and Their Equal Protection Rights as Taxpayers

The Amended Complaint alleges the Voucher Law's diversion of state BEP/TISA funds violates the equity mandate of the Education and Equal Protection Clauses by treating public school students in the districts differently from public school students across the State. R., 2047-49¶¶56-66. Although strict scrutiny applies in the instant case, the Voucher Law does not even survive a rational basis analysis.

a. The Equal Protection Standard

In equal protection cases, strict scrutiny applies when the State interferes with a fundamental right or operates to the particular disadvantage of a protected class. *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). Under strict scrutiny, a statute will be deemed unconstitutional unless it is narrowly tailored to achieve a compelling state interest. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 18 (Tenn. 2000). A statute is not narrowly tailored if there are less intrusive and comparably effective alternative means to achieve the compelling state interest. *City of Memphis v. Hargett*, 414 S.W.3d 88, 102-03 (Tenn. 2013). If neither a fundamental right nor any protected class of plaintiffs is at stake, the rational basis standard applies: the court's inquiry is limited to whether the classification is reasonably related to a legitimate state interest. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993) ("*Small Sch. Sys. I*").

Tennessee precedent provides "rights are fundamental when they are either implicitly or explicitly protected by a constitutional provision." *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (citing *Small Sch. Sys. I*"), 851 S.W.2d 139, 152 (Tenn. 1993)). Since education is explicitly

protected in the Tennessee Constitution, art. XI, §12, it is a fundamental right. Any interference with this right must be adjudicated using strict scrutiny analysis. Rational basis applies to McEwen Plaintiffs' equal protection claims as taxpayers.

b. The Voucher Law Treats Public School Students and Taxpayers in the Districts Unequally

The Voucher Law treats public school students and taxpayers in the districts differently from their counterparts in any other district. First, the Voucher Law actively incentivizes voucher use and the corresponding loss of state funding to public schools in these districts only. Second, the Voucher Law deducts more state BEP/TISA funding for every voucher student than the districts receive from the State per pupil and more than for students leaving for any non-voucher reason. No other district suffers this excessive deduction of state funds when a student leaves. R., 2050-51¶¶68-72. Moreover, in no other district are local taxpayers required to fill a funding hole in their public school budgets caused by the diversion of state funds to private schools. *See* Appellants' (McEwen Plaintiffs) Opening Brief at 14.

Bah Intervenors twist the equity argument by claiming there is equal opportunity for students in these counties to attend either a private or public school. Bah Br. 20.[3] However, the Tennessee Constitution obligates the State to provide equality of educational opportunity in the statewide system of ***public*** schools with no obligation – or authorization – to fund private schools. Thus, the educational opportunity for students in private schools is irrelevant to this case. The relevant inquiry is whether there is equality of opportunity among ***public*** school students throughout the state. As stated above, McEwen Plaintiffs properly alleged disparate treatment of public school students in their districts versus public school students in other districts.

c. The Voucher Law Cannot Survive a Rational Basis or Strict Scrutiny Analysis

Though McEwen Plaintiffs contend strict scrutiny applies to their claims as parents, the Court need not even reach the strict scrutiny analysis because there is not even a rational basis to justify the Voucher

[3] "Bah Br." refers to Response Brief of Intervenor-Defendants/Appellees Bah, Diallo, and Brumfield.

Law's disparate treatment of students in the districts vis-à-vis public school students elsewhere in the state.

Under the rational basis test, there must be "some reasonable basis for the disparate state action." *Small Sch. Sys. I*, 851 S.W.2d at 153, 156 (no proof of "a legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated."); *see also Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 233 (Tenn. 2002) ("*Small Sch. Sys. III*"); *Tester*, 879 S.W.2d at 829. Here, the Voucher Law's disproportionate diversion of state education funds disadvantages students in these public school districts versus those in the rest of the State, leaving them with fewer educational resources and fewer educational opportunities. As in *Small Sch. Sys. I*, Bah Intervenors cannot identify any legitimate state interest in denying children in the districts the educational funding and opportunities afforded to all other public school students in the state. *Id.*

First, the State has no legitimate interest in funding private schools, as discussed *infra* §II.D.1.a. Because the State cannot claim funding private education advances any legitimate state interest, there

can be no proof of any reasonable basis for the disparate treatment of McEwen Plaintiffs' children.

Even if funding private schools could be considered a legitimate state interest, the purported purpose in the statute is merely a pretext and not legitimate. The stated intent of the statute is to improve LEA's "that have consistently had the lowest performing schools on a historical basis" by providing "funding for access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools." T.C.A. §49-6-2611.

However, the the Amended Complaint alleges the Voucher Law does not require schools participating in the program to furnish any proof they provide an adequate level of education, let alone one superior to the schools in Metro Nashville Public Schools or Shelby County Schools. R. at 2059-62¶¶102-111. State Defendants have conceded there is no evidence these private schools provide a better education. R. at 2162. There is no rational basis to divert scarce school funding resources to a program lacking in even minimum standards and safeguards.

Moreover, the Amended Complaint's allegations, citing legislative history, belie the claim the intent was to improve schools in these

districts. Originally, five counties with the lowest-performing schools were targeted in the voucher bill: Davidson, Hamilton, Knox, Madison, and Shelby. R. at 2048¶61. As alleged in the Amended Complaint, and as the Chancery Court found in its decision on the motions to dismiss, the other three counties were removed not for educational reasons but for political reasons – *i.e.*, to secure "yes" votes from the representatives of those excluded districts. R. at 2075; *see also* R. at 2048¶61. Furthermore, the Voucher Law enables students from ***any*** school in the targeted districts to use a voucher, including numerous high-performing public schools, and also students who are themselves high achieving. T.C.A. §49-6-2602.

The failure to include other low-performing districts, coupled with the failure to exclude high-performing schools and students from the targeted districts, are sufficient to allege the Voucher Law is not designed to improve academic achievement and thus does not rest upon any rational basis. Assuming *arguendo* that the purported interest set forth in the statute could be considered legitimate and compelling, the allegations described above that the Voucher Law is both over-inclusive

and under-inclusive are sufficient to claim the Voucher Law is not narrowly tailored to achieve that purported state interest.

Bah Intervenors mischaracterize the Voucher Law as consistent with Tennessee precedent favoring innovation in education. Bah Br. 22. However, the Tennessee Constitution allows tailored or innovative educational options or programs within the state system of ***public*** schools, not by funding ***private*** schools. In *Small Sch. Sys. I,* cited by Bah Intervenors, the Court made clear this innovation was to occur within "a public school system that provides substantially equal educational opportunities to the school children of Tennessee." 851 S.W.2d at 156.

McEwen Plaintiffs' Count I, therefore, sufficiently states a claim.

C. Plaintiffs Stated a Claim Under the Education Clause

The Second Cause of Action adequately states a claim that the Voucher Law violates the Education Clause of the Tennessee Constitution because it contravenes the requirement the State fulfill students' right to a publicly funded education by providing for the maintenance, support, and eligibility standards of "a system of free public schools." R. at 2064-66¶¶119-128; Tenn. Const. art. XI, §12. Because the

Education Clause specifically mandates a system of free public schools, it excludes a separate program of publicly funded private education. Thus, the Legislature is prohibited from exceeding its constitutional mandate by funding private education outside the public school system. The private schools participating in the voucher program are not and cannot be part of the State's system of public schools, as Bah Intervenors concede.

1. The State Must Fulfill the Education Clause's Mandates Solely Through a System of Free Public Schools

a. The Plain Language of Tennessee's Constitution Contemplates *One* Statewide System of *Public* Schools

In interpreting the Tennessee Constitution, the plain language controls. *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983). The plain language of the Education Clause mandates the State discharge its obligation thereunder by establishing and funding a single "system of free public schools." Tenn. Const. Art. XI, §12.

Tennessee courts have long interpreted the Education Clause as requiring the General Assembly to support and maintain a single system of free schools, *i.e.*, the statewide public school system. In the landmark *Small Sch. Sys.* cases, the Supreme Court held the General Assembly's

obligation under art. XI, §12 is twofold: "the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities." *Small Sch. Sys. II*, 894 S.W.2d at 738; *see also Small Sch. Sys. III*, 91 S.W.3d at 241. The Court made clear the coherence of a single statewide system was essential to achieving the second obligation: ensuring substantially equal educational opportunities for all of Tennessee's children. For example, the Court explained the discussion, in the legislative history of the 1978 amendment to the Education Clause, of the "'free hand'" given to the Legislature, referred only to funding public schools, and not to the educational program required, as it was mandated the Legislature provide equal educational opportunities across the State. *Small Sch. Sys. I*, 851 S.W.2d at 151.

Indeed, Tennessee courts have repeatedly recognized, in discharging its constitutional obligation to provide equal educational opportunity, the State's policy is to maintain and support a single statewide system of public education. *Bd. of Educ. of Memphis City Schs. v. Shelby Cnty.*, 339 S.W.2d 569, 578-79 (Tenn. 1960); *see also Richardson v. City of Chattanooga*, 381 S.W.2d 1 (Tenn. 1964); *State v. Mayor &*

Aldermen of Dyersburg, 235 S.W.2d 814, 818 (Tenn. 1951). Moreover, Tennessee courts have consistently ruled maintaining and supporting a system of ***public*** schools, and public schools alone, is a State function under the Education Clause. *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); *Shelby Cnty.*, 339 S.W.2d at 576; *Hamblen Cnty. v. City of Morristown*, 584 S.W.2d 673, 675 (Tenn. Ct. App. 1979). In contrast, as this Court ruled in *Metro. Gov't*, maintaining and supporting ***private*** schools is not a state function. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 2020 WL 5807636, at *5 (Tenn. Ct. App. Sept. 29, 2020), *appeal granted* (Feb. 4, 2021), *aff'd in part and rev'd in part*, 645 S.W.3d 141 (Tenn. 2022) ("[T]he plenary authority derived from article XI, section 12 relates to ***public schools***, not private ones. When encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power.") (original emphasis). Thus, private schools cannot be part of the system of free public schools contemplated by art. XI, §12. Diverting public education funds to schools outside that system both exceeds and undermines the State's Education Clause duty.

b. The Voucher Law Impermissibly Exceeds the State's Constitutional Mandate to Provide a System of Free *Public* Schools

Pursuant to the doctrine of *expressio unius*, the Constitution prohibits the Legislature from exceeding the art. XI, §12 mandate by publicly funding private education outside the system of free public schools.

Expressio unius "is a rule of construction, well recognized by the courts, that the mention of one subject in an act means the exclusion of other subjects." *Southern v. Beeler*, 195 S.W.2d 857, 866 (Tenn. 1946) ("since the statute mentions only one subject, *i.e.*, the division of elementary school funds, we are justified in concluding, inferentially, at least, that high school funds were excluded by this legislative direction"); *see also, e.g.*, *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 185 (Tenn. 2000). Article XI, §12 requires the General Assembly to fund a system of free public schools. Publicly funding private K-12 education impermissibly exceeds that mandate as the Education Clause explicitly requires a system of public schools and necessarily excludes a separate program of publicly funded private education.

In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court struck down a voucher statute under the *expressio unius* principle. The Florida Constitution mandates "a uniform, efficient, safe, secure, and high quality system of free public schools." Fla. Const. art. IX, §1(a). The Court held the Legislature's constitutional mandate to provide free public schools prohibited it from creating a system of funding for nonpublic schools with different academic and antidiscrimination standards. *Bush*, 919 So. 2d at 407.

In *Bush*, the court explained whereas "[t]he second sentence of [the Florida Education Clause] provides that it is the 'paramount duty of the state to make adequate provision for the education of all children residing within its borders,'" the next sentence "provides a restriction on the exercise of this mandate by specifying that the adequate provision required in the second sentence 'shall be made by law for a uniform, efficient, safe, secure and high quality system of ***free public schools***.'" 919 So. 2d at 407 (quoting Fla. Const. art. IX, §1(a)) (original emphasis).

Likewise, in Tennessee's Education Clause, the generalized edict of the first sentence, providing: "[t]he State of Tennessee recognizes the inherent value of education and encourages its support" is defined and

restricted by the more specific succeeding sentence, proclaiming: "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, §12. The Tennessee Supreme Court has explained the Education Clause "expressly recognizes ***the inherent value*** of education ***and then*** requires the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools.'" *Small Sch. Sys. I*, 851 S.W.2d at 150 (first emphasis original). Bah Intervenors do not explain how the Florida Constitution's "paramount duty" language in any way suggests the reasoning in *Bush* is not applicable here. Thus, attempting to provide publicly funded K-12 education by funding private education violates the explicit mandates of Tennessee's Education Clause.

Moreover, additional courts have recognized voucher programs that divert public education funds to private education uses are incompatible with Education Clause requirements that the legislature provide publicly funded education via a statewide system of public schools. In *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999), the Ohio Supreme Court concluded the state constitution's requirement that the General

Assembly provide "'a thorough and efficient system of common schools throughout the State,'" Ohio Const. art. VI, §2, supported the argument "that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state." *Id.* In *Cain v. Horne*, 202 P.3d 1178, 1183 (Ariz. 2009), a challenge to two voucher programs, the Arizona Supreme Court concluded the state constitution's No Aid Clause, prohibiting the appropriation of public funds to private schools, "furthers th[e] goal" of its Education Clause that the state """provide for the establishment and maintenance of a general and uniform public school system."""" *Id.* (quoting Ariz. Const. art. 11, §1).

Finally, Bah Intervenors assert the Voucher Law does not conflict with the Education Clause because public schools still exist as an option for parents, implying the Voucher Law does not negatively impact the opportunity to receive a constitutionally adequate public school education. Bah Br. 27. As explained above, Plaintiffs allege the Voucher Law has significant negative effects on public schools in the districts, and these allegations must be accepted as true.

Moreover, the Florida Supreme Court rejected this identical argument: the State "could fund a private school system of indefinite size and scope as long as the state also continued to fund the public schools at a level that kept them" otherwise compliant with the constitutional requirements that they be "'uniform, efficient, safe, secure, and high quality.'" *Bush*, 919 So. 2d at 409 (quoting Fla. Const. art. IX, §1(a)). The Court held: "because voucher payments reduce funding for the public education system, the [voucher program] ***by its very nature*** undermines the system of 'high quality' free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida." *Id.* The Florida Supreme Court likewise rejected the argument that the voucher program merely "supplement[s] the public education system," holding it "[i]nstead ... diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children." *Id.* at 408-09. This mirrors the Tennessee Voucher Law precisely. Even if the Voucher Law had no effect on the provision of education in public schools, the State's use of public education funds on private schools is

sufficient to state an Education Clause claim because that clause permits only a system of free public schools.

2. The Education Clause's Language Regarding Post-Secondary Education and Its History Demonstrate the Constitutional Violation

Providing publicly funded K-12 education through payment of private school tuition and expenses is irreconcilable with the plain language and intent of art. XI, §12 because §12 specifically limits the State to supporting "free public schools" with respect to K-12 education ***yet provides no such limitation*** with respect to "post-secondary educational institutions." Tenn. Const. art. XI, §12. Specifically, the provision of the Education Clause dealing with higher education states: "The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines." *Id.* Clearly, the Constitution limited the General Assembly's permissible means of providing K-12 education to a system of public schools while permitting the support of public ***or other*** types of higher education institutions.[4] Bah Intervenors do not explain how the

[4] The delegates to the 1978 constitutional convention rejected an amendment that would have inserted the word "public" between the words "such other" and "post-secondary" because they understood, as Delegate Rowe put it, it would mean "the

three sentences of the Education Clause – read collectively, as they must be – can support the conclusion funding private K-12 education is constitutionally permissible when such permission is spelled out in the post-secondary sentence but not in the K-12 sentence. In fact, they misleadingly use an ellipsis to ***omit*** the portion of the higher education sentence specifying the options provided by the state outside K-12 education may "'***include***[e] public institutions.'" Bah Br. at 17-18 n.8.

As explained thoroughly in McEwen Plaintiffs' Chancery Court briefing, R. at 3390-95, the history of the Education Clause reinforces this conclusion. Prior to 1978, the Constitution explicitly mandated segregated schools, and the changes made during the 1978 amendments to the Tennessee Constitution were intended to excise this shameful vestige of the past. R. at 3463-64, 3483-84.[5] Allowing for public funding of private schools would have been antithetical to the elimination of segregated schools that drove the 1978 amendments, as the delegates

State's encouragement and support is ***going to be confined to merely the public***." R. at 3477-78. Thus, the drafters of the 1978 amendments plainly understood including the word "public" necessarily meant excluding private schools from state support.

[5] The Tennessee Supreme Court has previously relied on the record of the 1977 convention in interpreting the Education Clause. *E.g.*, *Small Sch. Sys. I*, 851 S.W.2d at 151.

would have been acutely aware attempts to publicly fund private schools at that time were substantially synonymous with preserving segregation. R. at 3390-95.

3. The State Cannot Fulfill Its Education Clause Obligation Through Private School Vouchers Because They Are Private and Unaccountable

It is uncontested the Voucher Law diverts taxpayer funds to private schools that do not comply with the same standards as Tennessee's public schools and can openly discriminate in admissions and in the provision of educational services. R. at 2058-62¶¶99-111.

Contrary to Bah Intervenors' contentions, Plaintiffs' claim does not rest on the premise that entities participating in the voucher program become public schools. Bah Br. 32. To the contrary, the operative fact is the voucher program's use of ***public*** funds on ***private*** education providers not part of the single constitutionally authorized system of public education. *See, e.g.*, *Dyersburg*, 235 S.W.2d at 818 (discussing the "single state system so essential to the preservation and improvement of the means of educating our youth"). The Voucher Law expressly gives participating private schools "maximum freedom to provide for the educational needs of participating students without governmental

control." T.C.A. §49-6-2609(c); *see also* T.C.A. §49-6-2609(b) (TDOE cannot regulate participating schools), T.C.A. §49-6-2609(a) (voucher schools are autonomous and not agents of the state). Because private voucher schools remain private – and thus outside the reach of legal requirements governing the statewide system of public schools – the voucher program funded with public education dollars violates the Education Clause of the Tennessee Constitution.

D. Plaintiffs Stated a Claim Under the Appropriations Provisions

The Amended Complaint sufficiently alleges the Voucher Law violates the "Appropriation of Public Moneys" provision of the Tennessee Constitution, and contracts made to implement it are also unconstitutional. R. at 2069-70¶¶146-155. There was no appropriation made for the estimated first year's funding of the voucher program. Moreover, TDOE improperly entered into contracts with vendors to implement the Voucher Law using money legislatively appropriated to another, unrelated, program.

1. The Voucher Law Did Not Receive an Appropriation for Its Estimated First Year's Funding

The Amended Complaint alleges the Voucher Law did not receive an appropriation for its estimated first year's funding and is therefore null and void. R. at 2069¶151. In the entire 2019-2020 appropriations bill, Pub. Ch. 405 (H.B. 1508), 111th Gen. Assemb., Reg. Sess. (Tenn. 2019), the Voucher Law is mentioned only once at page 100. On that page, the text indicates the appropriation for the Voucher Law is $0.

Bah Intervenors argue form language found in the appropriations bill transforms the Governor's Proposed Budget into law. Bah Br. 35-36. However, the language to which they refer is vague, and there is no evidence indicating the appropriations bill is not the final authority for appropriations made in the State of Tennessee. At most, there is a disputed fact, and facts must be construed in favor of the nonmoving party.

2. The "Estimate" for the Voucher Law's First Year's Funding Was Meaningless

Even if the Court were to find the Governor's Proposed Budget was a valid appropriation, the amount therein of $771,300 for the "estimated

first year's funding" of the Voucher Law was meaningless and violates the Constitution.

As discussed at length in McEwen Plaintiffs' Chancery Court briefing, before the voucher bill was enacted, the Legislature was aware of the extensive funding necessary to begin to implement the voucher program. R. at 2419-20. In addition, less than two months after the Voucher Law passed, TDOE began discussions with ClassWallet, whose contract alone cost ***$2.5 million***. R. at 2069¶152.

Bah Intervenors argue the Appropriation of Public Moneys provision and related statutes are "balanced-budget" provisions intended to prevent deficit spending. Bah Br. 34-35. Assuming this is true, the "estimated first year's funding" must be a realistic estimate. However, the $771,300 in the Governor's Proposed Budget was a meaningless underestimation of the first year's funding for the Voucher Law. Thus, the Constitution's mandate that "an appropriation [be] made for the estimated first year's funding" was violated.

3. TDOE Impermissibly Paid ClassWallet with Funds Appropriated to the Career Ladder Program

Pursuant to the plain meaning of art. II, §24 of the Tennessee Constitution and T.C.A. §9-4-601(a)(1), in order for public money to be spent, it must only be spent pursuant to a valid appropriation and for no other purpose.

TDOE entered into a $2.5 million contract with ClassWallet to administer the voucher program and paid it $1.2 million in 20198 using money appropriated to another, unrelated, program – the Career Ladder program. R. at 2046-47¶¶54-55.

Bah Intervenors emphasize the Career Ladder program has been discontinued, implying the misappropriation of these funds was inconsequential. This point is irrelevant to the issue of unlawful appropriation and reallocation of public funds.

Bah Intervenors cite a portion of the appropriations bill, Pub. Ch. 405 (H.B. 1508), at 53, which allows a head of a department to transfer funds in the event the government finds a surplus. Bah Br. 38. However, as discussed in McEwen Plaintiffs' Chancery Court briefing, Bah Intervenors failed to discuss the section of the bill providing: "Such

transfer of funds pursuant to this item shall be subject to the approval of a majority of a committee comprised of the Speaker of the Senate, the Speaker of the House and the Comptroller of the Treasury." Pub. Ch. 405 (H.B. 1508) at 53, §15, Item 1; R., at 3422. It is undisputed that no such committee convened or approved the diversion of Career Ladder funds to pay for Voucher Law expenses. Furthermore, TDOE was required to allow the unspent Career Ladder funds to revert to the general fund pursuant to statutory requirements. Pub. Ch. 405 (H.B. 1508), §36, at 73-81.

Plaintiffs' allegations sufficiently state a claim in Count VI of their Amended Complaint.

III. CONCLUSION

The Court should not resolve Appellants' motions to dismiss in ruling on this appeal, but if it does, it should find McEwen Plaintiffs'

claims are adequately stated and remand with instructions such motions be denied.

DATED: October 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 30(e) of the Tennessee Rules of Appellate Procedure, **APPELLANTS' (McEWEN PLAINTIFFS) REPLY BRIEF IN RESPONSE TO INTERVENOR-DEFENDANTS/APPELLEES BAH, DIALLO, AND BRUMFIELD** is produced using 14-point Century Schoolbook typeface and contains 4,991 words. Counsel relies on the word count provided by Microsoft Word word-processing software.

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City of Nashville, Tennessee, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 200 31st Avenue N., Nashville, TN 37203.

2. I hereby certify that on October 10, 2023, I electronically filed the foregoing document: **APPELLANTS' (McEWEN PLAINTIFFS) REPLY BRIEF IN RESPONSE TO INTERVENOR-DEFENDANTS/APPELLEES BAH, DIALLO, AND BRUMFIELD** with the Clerk of the Court for the Tennessee Court of Appeals by using the TrueFiling Electronic Case Filing (ECF) system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 10, 2023, at Nashville, Tennessee.

s/ Christopher M. Wood
CHRISTOPHER M. WOOD