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) OPENING BRIEF

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INTRODUCTION

Passed in 2019, the Tennessee Education Savings Account Pilot Program ("Voucher Law"), codified at T.C.A. §49-6-2601, *et seq.*, created a private school voucher program that diverts funding from Metro Nashville Public Schools and Shelby County Schools to private schools in violation of numerous provisions of the Tennessee Constitution.

The McEwen Plaintiffs – public school parents and taxpayers in Davidson and Shelby Counties – filed suit, alleging, *inter alia*, the Voucher Law harms public school students by exacerbating

[1] "McEwen Plaintiffs" refers collectively to Plaintiffs/Appellants Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenney, Elise McIntosh, and Apryle Young. McEwen Plaintiffs are only appealing the dismissal of Claims 1-2 and 6 of the Amended Complaint.

underfunding in their children's school districts and effectuates an unconstitutional diversion of public funds.

After several years of litigation regarding whether the Voucher Law violated the "Home Rule" provision of the Tennessee Constitution, a newly appointed three-judge panel of the Chancery Court, in a 2-1 decision, dismissed McEwen Plaintiffs' Amended Complaint,[2] finding McEwen Plaintiffs had failed to establish their standing and, in the alternative, McEwen Plaintiffs' claims were not ripe.

In doing so, the Chancery Court failed to correctly apply foundational principles of Tennessee law, including by failing to accept McEwen Plaintiffs' allegations as true and by failing to properly apply the legal standards governing standing and ripeness.

On *de novo* review, this Court should reverse the Chancery Court's dismissal, find McEwen Plaintiffs have standing to bring their claims, find their claims are ripe, and remand the case to the Chancery Court so McEwen Plaintiffs' claims can be resolved on their merits.

STATEMENT OF THE CASE

On March 2, 2020, McEwen Plaintiffs, who are taxpayers and public school parents in Shelby and Davidson Counties, filed this action in Davidson County Chancery Court challenging the legality of the Voucher Law passed in May 2019, codified at T.C.A. §49-6-2601, *et seq.* RR. at 1.

[2] "Amended Complaint" refers to McEwen Plaintiffs' Amended Complaint (R. at 2030-73). References to "R. at _" are to pages of the appellate record for Case No. 20-0143-II. References to "RR. at _" are to pages of the appellate record for Case No. 20-0242-II.

On April 3, 2020, McEwen Plaintiffs filed a Motion for a Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04, arguing, *inter alia*, that the Voucher Law violated the "Home Rule" provision of the Tennessee Constitution. RR. at 1076-1127. At the same time, the Metropolitan Government of Nashville and Davidson County and Shelby County (collectively, the "Counties") filed a motion for summary judgment in their own case challenging the Voucher Law, also contending that it violated the Home Rule provision.

On May 4, 2020, the Court issued an Order denying McEwen Plaintiffs' motion as moot, while granting summary judgment in the *Metro. Gov't* case and enjoining Defendants from taking steps to implement the Voucher Law. The Court also granted Defendants permission to seek immediate interlocutory relief from the Court of Appeals pursuant to Tenn. R. App. P. 9(a) – relief Defendants thereafter pursued.

On September 29, 2020, the Court of Appeals issued an opinion affirming the Chancery Court's summary judgment order. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 2020 WL 5807636 (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).[3]

Defendants sought *certiorari*, and on May 18, 2022, the Tennessee Supreme Court issued an opinion affirming in part and reversing in part the judgment of the Court of Appeals. *Metro. Gov't of Nashville &*

[3] Unless otherwise indicated, internal citations and footnotes are omitted and emphasis is added throughout.

Davidson Cnty. v. Tenn. Dep't of Educ., 645 S.W.3d 141, 145 (Tenn. 2022). The Supreme Court held that, while the Counties had standing to bring their Home Rule claims, the Voucher Law did not implicate the Home Rule Amendment and therefore was not unconstitutional on that basis. *Id.*

Meanwhile, McEwen Plaintiffs' case had been stayed pursuant to Tennessee Supreme Court Rule 54. On May 18, 2022, the Supreme Court issued an Order appointing a three-judge panel, and the previously issued stay was lifted.

Thereafter, the Chancery Court issued an order providing a schedule for filing amended complaints in the *McEwen* and *Metro Gov't* actions, as well as for briefing any Rule 12 motions Defendants intended to file. McEwen Plaintiffs filed their Amended Complaint on August 3, 2022, and briefing was completed on Defendants' Rule 12 motions on September 2, 2022. On November 23, 2022, the Chancery Court issued an order granting in part Defendants' motions to dismiss by a 2-1 majority. R. at 3620-45. McEwen Plaintiffs timely filed this appeal thereafter.

STATEMENT OF FACTS

The Voucher Law, T.C.A. §49-6-2601, *et seq.*, enacted in 2019, created an expansive private school voucher program diverting public money appropriated for Metro Nashville Public Schools and Shelby County Schools (the "districts") to private schools and other private education expenses. R. at 2046, ¶52. McEwen Plaintiffs are Tennessee taxpayers who pay state and local taxes in Davidson and Shelby

Counties. R. at 2035-37, ¶¶11-18. In addition, many McEwen Plaintiffs are parents of students enrolled in the districts. *Id.*

The state school funding formula, the Basic Education Program ("BEP"), was enacted to maintain and support public schools as required by the Tennessee Constitution. R. at 2039-42, ¶¶25-37. However, the BEP is insufficient to cover the cost of all components essential to an adequate public school education. R. at 2053-54, ¶¶80-81. The State does not provide the districts with adequate funding for the educational resources necessary to meet their students' needs, which include teachers, guidance counselors, nurses, and interventions for high-need students. *Id.*

The Voucher Law made vouchers available only for those students who are zoned to attend Metro Nashville Public Schools and Shelby County Schools and who meet family income and other criteria. R. at 2047-48, ¶¶56-60. Under the Voucher Law, BEP funds (in 2022-2023) and Tennessee Invest in Student Achievement ("TISA") funds (in 2023-2024 and thereafter) otherwise payable to these districts are deposited into an "Education Savings Account" ("ESA") for each participating voucher student. R. at 2046, ¶52; R. at 2051, ¶73.

For every student who leaves public school to use a voucher – as opposed to any other reason – the districts lose significantly more state BEP/TISA funding than the State provides per pupil under the BEP/TISA. R. at 2050-51, ¶¶68-72. The Voucher Law mandates that an amount representing both the state and local shares of the districts' per-pupil BEP/TISA allocation, up to the combined statewide average of state and local per-pupil allocations, must be subtracted from the state

BEP/TISA funds "otherwise payable to" the districts. T.C.A. §49-6-2605(a)-(b)(1); R. at 2050, ¶68; R. at 2051, ¶73. The voucher amount diverted for each voucher student in 2022-2023 was $8,192. R. at 2050, ¶70. This amount is significantly higher than the state share of the BEP allocation for each of the school districts at issue in this case – for Metro Nashville Public Schools, it is more than twice the amount the district receives in state BEP funds as the state share for 2022-2023 was $3,791.62. R. at 2050-51, ¶¶68-72, 76. Moreover, the Voucher Law requires that only these counties continue to count students who leave the districts to use vouchers as still being enrolled in the districts. R. at 2052, ¶76. Requiring that the districts count voucher students as enrolled increases the amount of money that must be raised from local tax dollars in order to satisfy state "maintenance of effort" requirements. *Id.*

The Voucher Law authorizes grants for Shelby County Schools and Metro Nashville Public Schools from a "school improvement fund" for up to three years. T.C.A. §49-6-2605(b)(2); R. at 2054, ¶83. These grants are expressly subject to an appropriation of funds by the General Assembly each year. *Id.* The Voucher Law restricts the use of these grants, if appropriated, to "school improvement." *Id.*, ¶84. Thus, these grants cannot be used for general operating funds and cannot fully replace the state and local BEP/TISA funds diverted from Shelby County Schools and Metro Nashville Public Schools under the Voucher Law. *Id.*

Even if the General Assembly funds these "school improvement grants" in the maximum possible amounts, they will not compensate the districts for the loss of BEP/TISA funds for each student who uses a

voucher. The grants can equal only the amount of money diverted to ESA voucher accounts for students who "[w]ere enrolled in and attended a school in the [district] for the one (1) full school year immediately preceding the school year in which the student began participating in the program." T.C.A. §49-6-2605(b)(2)(A)(i); R. at 2055, ¶85. This does not include students who are "eligible for the first time to enroll in a Tennessee school" – for example, those entering kindergarten – who are also eligible for the voucher program. T.C.A. §49-6-2602(3)(A)(ii); R. at 2055, ¶85.

The Voucher Law also provides that, when an ESA account is closed for any number of reasons, the remaining funds are returned to the State's BEP/TISA account rather than returned to Shelby County Schools or Metro Nashville Public Schools. T.C.A. §§49-6-2603(e), 49-6-2608(e); R. at 2055, ¶86. Even when a voucher student returns to one of the districts during the school year in which the voucher funds were deducted, and the district resumes full responsibility for educating that student, the funds remaining in the student's voucher account are returned to the State and not to the district. T.C.A. §49-6-2603(e); R. at 2055, ¶86.

School districts bear substantial fixed costs and variable costs that cannot be reduced proportionally when students leave the district to use a voucher. R. at 2055-56, ¶¶87-88. The districts' fixed costs include facilities repair and maintenance, teacher and staff pensions, debt service, and long-term contracts. *Id.* Because participants in the voucher program will exit Shelby County Schools and Metro Nashville Public Schools from different schools, grade levels, and classrooms, the districts

will be unable to proportionately reduce these fixed costs. *Id.* The districts will likewise not be able to proportionately reduce even some variable costs, such as staff, programs, and services. *Id.*

Moreover, the Voucher Law permits participating private schools to refuse to serve high-need students, such as students with disabilities. R. at 2056, ¶89. As a result, it will likely concentrate high-need and more-expensive-to-educate students in the districts' public schools. *Id.*

Private schools participating in the voucher program differ from public schools in many key respects. Unlike laws governing public schools, the Voucher Law does not prohibit participating schools from refusing admission based on disability, religion, English language proficiency, LGBTQ status, or family income level. R. at 2060-62, ¶¶106-107, 109-110. The Voucher Law expressly permits participating private schools to deny special education programs and services to students with disabilities. R. at 2061, ¶108. Moreover, the Voucher Law does not require participating private schools to comply with the governance and accountability mandates of state laws, including the BEP statute, applicable to public schools. R. at 2059, ¶104. In addition, the Voucher Law does not mandate the same student testing or curricular requirements applicable to public schools. *Id.*, ¶¶102-103.

Former House Speaker Glen Casada made extraordinary efforts to secure the passage of the Voucher Law, including holding the floor vote open for 38 minutes while having a private conversation on the House balcony with Representative Jason Zachary, who subsequently switched his vote, allowing passage of the bill. R. at 2048, ¶63. Defendant Governor Lee signed the voucher bill into law (R. at 2046, ¶50); and, even

after the Chancery Court enjoined the State from implementing the Voucher Law, he expressly encouraged parents to continue applying to the program in violation of the court's order (RR. at 3553), prompting the Chancery Court to admonish State Defendants and order them to notify parents the program was enjoined. *See* R. at 190-91. Defendant Education Commissioner Schwinn – who oversaw the state system of public schools, administered Defendant Tennessee Department of Education ("TDOE"), and was responsible for implementing the Voucher Law – moved as quickly as possible to implement the Voucher Law when it was first passed. *See* R. at 2038, ¶21. Defendant members of the State Board of Education, who are statutorily charged with overseeing the State's system of public schools, adopted administrative rules in November 2019 to effectuate the Voucher Law. R. at 2048-49, ¶64. Moreover, the TDOE entered into a contract with an outside vendor called ClassWallet in 2019 to begin implementation of the Voucher Law, even though legislators intended the law not go into effect until the 2021-2022 school year. R. at 682-83. In 2022, after the injunction on the Voucher Law was lifted, State Defendants implemented an extremely rushed process that did not comply with statutory authority so vouchers could be used in the 2022-2023 school year. *See* R. at 2034, ¶6; R. at 2057, ¶¶95-96.

The General Assembly did not make an appropriation for the estimated first year's funding of the Voucher Law during the session in which it was enacted. R. at 2046, ¶53. Despite the absence of such an appropriation, TDOE executed a $2.5 million contract with the private vendor ClassWallet – and paid $1.2 million under this contract before the

original Complaint was filed – to oversee online applications and payment systems for the voucher program. R. at 2046-47, ¶¶54-55. TDOE paid ClassWallet this approximately $1.2 million in 2019 by diverting funds appropriated by the General Assembly for the unrelated "Career Ladder" program for public school teachers. R. at 2046-47, ¶55.

STANDARD OF REVIEW

The Tennessee Supreme Court has articulated the standard of review with respect to standing in this very case:

> The trial court decided the issue of standing on the State's motion to dismiss pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure. The Court reviews the motion to dismiss on the issue of standing *de novo* with no presumption of correctness. *Effler v. Purdue Pharma, L.P.*, 614 S.W.3d 681, 687 (Tenn. 2020). On a motion to dismiss, the Court presumes all factual allegations to be true and construes them in favor of the plaintiff. *Foster v. Chiles*, 467 S.W.3d 911, 914 (Tenn. 2015). This is equally true with respect to factual allegations regarding standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (For the purposes of a challenge to standing "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim."[)].

Metro. Gov't, 645 S.W.3d at 147-48.

As in *Metro. Gov't*, the Chancery Court decided the issue of McEwen Plaintiffs' standing on Defendants' motions to dismiss. R. at 3622-33. This Court, therefore, conducts a *de novo* review with no presumption of correctness as to the Chancery Court's decision. *Metro. Gov't*, 645 S.W.3d at 147-48.

Appellate courts also review issues of ripeness *de novo*. *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003). A court evaluating a motion to dismiss based on lack of ripeness """must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.""" *West v. Schofield*, 468 S.W.3d 482, 489 (Tenn. 2015). The Chancery Court made its ripeness ruling on Defendants' motions to dismiss. Thus, this Court conducts a *de novo* review with no presumption of correctness.

ARGUMENT

I. The Chancery Court Erred in Its Application of the Legal Standards for Standing

While the Chancery Court correctly identified the standard for determining whether a party has standing at the motion-to-dismiss stage, R. at 3622-25, it erred by failing to apply that legal standard and actually accept McEwen Plaintiffs' allegations as true.

> To establish standing, a Plaintiff must allege:
>
> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Metro. Gov't, 645 S.W.3d at 149. Under *Lujan*: "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561; *see also ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006)

(holding plaintiff bears the burden of establishing these "elements 'by the same degree of evidence' as other matters on which the plaintiff bears the burden of proof"). As the Tennessee Supreme Court wrote in *Metro. Gov't*, "[o]n a motion to dismiss, the Court presumes all factual allegations to be true and construes them in favor of the plaintiff." 645 S.W.3d at 147-48 (citing *Foster*, 467 S.W.3d at 914). "This is equally true with respect to factual allegations regarding standing." *Id.* (citing *Lujan*, 504 U.S. at 561). Further, "'[a]t the pleading stage . . . general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Metro. Gov't*, 645 S.W.3d at 148 (quoting *Lujan*, 504 U.S. at 561).

The Tennessee Supreme Court continued: "To determine whether standing exists, a court must focus on the party bringing the lawsuit rather than on the merits of the claim." *Metro. Gov't*, 645 S.W.3d at 148-49 (citing *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020)); *see also Metro. Air Rsch. Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992); *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799-800 (2015)). "The weakness of a claim on the merits must not be confused with a lack of standing." *Id.* at 149 (citing *Ariz. State Legis.*, 576 U.S. at 800); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing "in no way depends on the merits" of the claim).

Here, at the motion-to-dismiss stage, McEwen Plaintiffs' factual allegations must be presumed true and construed in their favor. *Metro.*

Gov't, 645 S.W.3d at 149. As explained below, the Chancery Court did not presume the facts alleged in the Amended Complaint to be true or construe them in McEwen Plaintiffs' favor. Moreover, the Chancery Court failed to appropriately analyze the elements of standing. As the dissent highlights, this was in error: "[A]t this stage, the Court ought to accept these allegations [regarding McEwen Plaintiffs' Equal Protection, Education Clause, and BEP/TISA claims] and move forward in its analysis because the allegations are sufficient for standing." R. at 3642.

II. The Chancery Court Erred in Ruling McEwen Plaintiffs Lacked Standing to Challenge the Constitutionality of the Voucher Law Under the Education and Equal Protection Clauses of the Tennessee Constitution

A. The Amended Complaint Alleges Violations of the Education and Equal Protection Clauses of the Tennessee Constitution

The Tennessee Constitution requires the State to maintain and support a system of public schools that provides adequate and substantially equal educational opportunities to all Tennessee children. Tenn. Const. art. I, §8; art. XI, §§8, 12; *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Sch. Sys. I*"); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) ("*Small Sch. Sys. II*"); *Tenn. Small Sch. Sys. v. McWherter* ("*Small Sch. Sys. III*"), 91 S.W.3d 232 (Tenn. 2002). In the *Small School Systems* rulings, the Tennessee Supreme Court invalidated the State's previous school funding system because it deprived public school students in certain districts of substantially equal educational opportunities. *Small Sch.*

Sys. I, 851 S.W.2d at 156. The Supreme Court recognized the General Assembly's enactment of the BEP statute and funding formula was intended to cure those constitutional deficiencies. *Small Sch. Sys. II*, 894 S.W.2d at 736.

In their First Cause of Action, McEwen Plaintiffs allege the Voucher Law deprives students in Shelby County Schools and Metro Nashville Public Schools of adequate and substantially equal educational opportunities by diverting the BEP/TISA funds appropriated by the General Assembly to maintain and support their schools to instead pay for private school tuition and other private educational expenses. R. at 2062-64, ¶¶112-118.

The Amended Complaint alleges that schools in Metro Nashville Public Schools and Shelby County Schools are underfunded by the State and thus already lack necessary educational resources. R. at 2052-54, ¶¶79-82. The Amended Complaint also alleges that, for every student who leaves one of these districts for a voucher, the district loses significantly more in state funding than it receives per pupil from the State. R. at 2050-51, ¶¶68-72. Further, the Amended Complaint alleges the Voucher Law only applies to and affects Metro Nashville Public Schools and Shelby County Schools students and taxpayers in Davidson and Shelby Counties. R. at 2047-49, ¶¶56-67. When a student leaves a district not subject to the Voucher Law, that district only loses state funding in the amount of its state per-pupil BEP/TISA allocation; but when a student leaves Metro Nashville Public Schools and Shelby County Schools to use a voucher, the districts lose state funding in the amount of their state ***and*** local per-pupil allocations. Additionally, unlike in any

other county, these school districts must count the students who leave the districts to use vouchers as still being enrolled and thus must raise taxes from local taxpayers to satisfy the statutory maintenance of effort requirement. R. at 2052, ¶76.

Moreover, the Amended Complaint sets forth that the districts cannot make up for the loss of state funding caused by the Voucher Law because, *inter alia*, any school improvement grants – which are subject to appropriation – are restricted in their usage, such grants will not compensate for the full loss of state funding to the districts, and the districts bear substantial fixed and variable costs that cannot be reduced proportionally when students leave the district. R. at 2054-56, ¶¶83-88.

McEwen Plaintiffs allege the Voucher Law further deprives students in Metro Nashville Public Schools and Shelby County Schools, and no others, of the resources necessary for equal and adequate educational opportunities, thereby violating their rights under the Equal Protection and Education Clauses of the Tennessee Constitution. Tenn. Const. art. I, §8; art. XI, §§8, 12. Moreover, because the Voucher Law imposes an additional tax burden on McEwen Plaintiffs as taxpayers in Davidson and Shelby County that it does not impose on taxpayers in any other county, it treats McEwen Plaintiffs differently in violation of their equal protection rights as taxpayers.

B. McEwen Plaintiffs Have Standing as Parents

McEwen Plaintiffs have alleged the three requirements for standing as parents: (1) a distinct and palpable injury; (2) a causal connection between the alleged injury and the challenged conduct, *i.e.*,

the Voucher Law; and (3) the ability of a court order to redress McEwen Plaintiffs' injury. *See Metro. Gov't*, 645 S.W.3d at 149.

1. McEwen Plaintiffs Have Pled a Distinct and Palpable Injury

McEwen Plaintiffs have standing as parents because they have pled a distinct and palpable injury: that the rights of their children, students in the two targeted districts, to an adequate and substantially equal education are violated because the Voucher Law diverts public education funding from their ***already*** chronically underfunded public schools to private schools.

McEwen Plaintiffs' injury is palpable and distinct from injury to others because it does not apply to those who are not parents, ***and*** it only affects parents of students in the two districts to which the Voucher Law applies. Whereas parents in Shelby County Schools and Metro Nashville Public Schools suffer diversion of resources from their respective districts, parents in Sullivan County, Knox County, and elsewhere do not. As a result, students in these districts will receive a substantially unequal and inadequate education compared to their peers in other districts. The dissent recognized as much when it found: "the Education Clause affords ***students*** with the right to a free, public education that is adequate and substantially equal." R. at 3629 (emphasis in original). Therefore, students, through their parents, suffer a special injury distinct and palpable from injury to anyone else. This necessarily makes them proper parties to assert violations of the Tennessee Education and Equal Protection Clauses. *Id.*

The McEwen Plaintiffs allege, in a myriad of ways discussed *supra*, how this diversion of public funds from their schools creates a financial loss resulting in fewer resources necessary for a constitutionally adequate education. McEwen Plaintiffs further pled that, even assuming school improvement funds are allocated, such funding does not redress their injury for numerous reasons, also discussed *supra*. With their pleadings necessarily taken as true, McEwen Plaintiffs have alleged a distinct and palpable injury.

2. McEwen Plaintiffs Have Alleged a Causal Connection Between the Injury and the Voucher Law

The requirement for a causal connection between the injury and the challenged conduct is not "onerous" and only requires an allegation the injury is "'fairly traceable'" to the challenged conduct. *City of Memphis v. Hargett,* 414 S.W.3d 88,98 (Tenn. 2013); *Calfee v. Tenn. Dep't of Transp.,* 2017 WL 2954687, at *7 (Tenn. Ct. App. July 11, 2017). The Chancery Court did not address this element of standing, and it is clearly alleged in the instant case. McEwen Plaintiffs' injury – that their schools lose funding – is directly traceable to the diversion of funds from their districts, which is explicitly mandated by the Voucher Law. Thus, McEwen Plaintiffs have alleged a clear, traceable, and causal connection between the Voucher Law and their alleged injury.

3. McEwen Plaintiffs Have Alleged Their Injury Can Be Redressed by Court Order

The third prong of the standing requirement is that a court order is capable of redressing McEwen Plaintiffs' injury. *Metro. Gov't*, 645 S.W.3d

at 149; *Calfee*, 2017 WL 2954687, at *10. In their Amended Complaint, McEwen Plaintiffs seek a court order declaring the Voucher Law unconstitutional and permanently enjoining its implementation. R. at 2071. An order enjoining the law would stop the diversion of funds from their districts – the cause of McEwen Plaintiffs' injury – and thus redress the injury.

C. McEwen Plaintiffs Have Taxpayer Standing to Assert the First Cause of Action

McEwen Plaintiffs have a second, distinct basis for standing stemming from the taxpayer standing doctrine. In fact, they have taxpayer standing to assert their First Cause of Action on two separate grounds: (1) McEwen Plaintiffs allege special injury; and (2) McEwen Plaintiffs allege the Voucher Law calls for an unconstitutional diversion of public (BEP/TISA) funds, and a demand for Defendants to correct or cease the unconstitutionality would have been futile (the exception to the special injury rule). In its decision rejecting McEwen Plaintiffs' taxpayer standing, the Chancery Court ***only*** addressed the second ground for taxpayer standing; the court utterly neglected to address taxpayer standing based on special injury, which has no prior demand requirement.

1. McEwen Plaintiffs Have Taxpayer Standing for Their First Cause of Action Based on Special Injury

McEwen Plaintiffs, as taxpayers, meet the three requirements for standing based on special injury: (a) a distinct and palpable injury; (b) a causal connection between the alleged injury and the challenged conduct,

i.e., the Voucher Law; and (c) the ability of a court order to redress the injury. *See Metro. Gov't*, 645 S.W.3d at 149. No prior demand is required for special injury standing. The court below erroneously failed to address McEwen Plaintiffs' allegations of special injury at all.

a. McEwen Plaintiffs Have Alleged Special Injury as Taxpayers

As the Chancery Court noted, the general rule for taxpayer standing requires plaintiffs to allege a "'special interest or special injury not common to the public generally.'" R. at 3631 (quoting *Fannon v. City of LaFollette,* 329 S.W.3d 418, 427 (Tenn. 2010)). Courts have defined special injury as conduct that "would impose a burden upon taxpayers which would not be imposed upon nontaxpayers." *Parks v. Alexander,* 608 S.W.2d 881, 889 (Tenn. Ct. App. 1980) (citing *Reams v. Town of McMinnville*, 155 Tenn. 222, 225-26 (1927) (conduct must result in additional taxes or additional expenditure of municipal funds)).

McEwen Plaintiffs allege they are taxpayers in Davidson and Shelby counties. R. at 2035-37, ¶¶11-18. Moreover, McEwen Plaintiffs allege a special injury as a result of the Voucher Law. The Amended Complaint alleges an increased tax burden, on taxpayers from Davidson and Shelby counties only, as a direct result of the Voucher Law's unconstitutional diversion of BEP/TISA funds from those counties. For one, the Voucher Law requires that only these counties continue to count students who left the districts to use vouchers as still being enrolled in the districts. Requiring that the districts count such students as enrolled increases the amount of money that must be raised from local tax dollars in order to satisfy state "maintenance of effort" requirements. R. at 2052,

¶76. Moreover, only these two districts lose more in per-pupil funding for students who leave the district to take a voucher than they receive per pupil in state BEP/TISA funds. In order to maintain the same level of services in their schools, local taxpayers must pay more in local taxes. R. at 2050-51, ¶¶68-72. Thus, the Amended Complaint alleges a special injury to McEwen Plaintiffs – distinct from non-taxpayers and all other Tennessee taxpayers except those in Davidson and Shelby counties.

b. McEwen Plaintiffs Have Alleged a Causal Connection Between Their Injury and the Challenged Conduct

As discussed above, establishing a causal connection between a plaintiff's injury and the challenged conduct only requires a showing the injury is "'fairly traceable'" to the challenged conduct. *City of Memphis*, 414 S.W.3d at 98; *Calfee*, 2017 WL 2954687, at *7. Here, McEwen Plaintiffs established that connection. They pled the increased tax burden on McEwen Plaintiffs as Davidson and Shelby County taxpayers is a direct result of the Voucher Law's illegal diversion of BEP/TISA funds otherwise payable to Metro Nashville Public Schools and Shelby County Schools. R. at 2050-52, ¶¶68-76. These allegations more than satisfy the requirement that the injury be "fairly traceable" to the alleged conduct.

c. McEwen Plaintiffs Have Established Their Injury Can Be Redressed by Court Order

McEwen Plaintiffs also satisfy the third element of special injury taxpayer standing: that the injury be redressable by court order. *Metro. Gov't*, 645 S.W.3d at 149; *Calfee*, 2017 WL 2954687, at *10. McEwen Plaintiffs sought an order enjoining implementation of the Voucher Law,

which would halt the diversion of BEP/TISA funds, thereby eliminating the unique tax burden created by the illegal diversion of these funds. Thus, the requested court order would eliminate the injury to McEwen Plaintiffs as taxpayers.

The court completely disregarded McEwen Plaintiffs' standing under the special injury standard and failed to conduct the required three-pronged analysis. This analysis demonstrates McEwen Plaintiffs have standing as taxpayers based on their special injury.

2. McEwen Plaintiffs Have Taxpayer Standing Under the Exception to the Special Injury Rule

As an independent basis for establishing standing as taxpayers, there is no need to allege a special interest or injury if the taxpayer plaintiffs allege an illegal diversion or misuse of public funds. *Badgett v. Rogers*, 436 S.W.2d 292, 294-95 (1968). This illegal diversion or misuse is known as "a specific illegality." *E.g.*, *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn. 1989). Plaintiff must allege that: (1) they are taxpayers; (2) there is an illegal diversion of public funds by public officials; and (3) a demand was made upon those officials to correct the illegal conduct, or such a demand would have been futile. *Id.*; *Badgett,* 436 S.W.2d at 295. There is no dispute McEwen Plaintiffs are taxpayers in Davidson and Shelby counties. R. at 2035-37, ¶¶11-18. The questions in this appeal are whether the Amended Complaint sufficiently alleges conduct that resulted in the illegal diversion of public funds and, if so, whether a demand would have been futile.

a. The Amended Complaint Alleges the Illegal Diversion of Public Funds

The Amended Complaint alleges the Voucher Law mandates the diversion of public funds to the private school voucher program. R. at 2050-52, ¶¶68-76. The Amended Complaint alleges this diversion violates the Equal Protection and Education Clauses of the Tennessee Constitution, Tenn. Const. art. I, §8; art. XI, §§8, 12; thus, this diversion of public funds is illegal. R. at 2062-64, ¶¶112-118. Because the Amended Complaint alleges the Voucher Law requires the illegal diversion of public funds, it satisfies the "specific illegality" prong of the taxpayer standing exception. In fact, Greater Praise Intervenors concede: "The McEwen Plaintiffs did allege unconstitutional expenditure of public funds in their Complaint." R. at 2147.[4] Thus, the court erred in finding there was no specific illegality.

In denying standing on the basis there was no specific illegality, the Chancery Court appeared to make an erroneous distinction between the Amended Complaint's Sixth Cause of Action, the Appropriations claim, and the other constitutional claims alleged by McEwen Plaintiffs, holding only the former alleged a specific illegality. As discussed below in §VII, the allegations in the Sixth Cause of Action assert the State expended public funds in the absence of an appropriation, which is prohibited by

[4] The court therefore erroneously stated: "State Defendants and Intervenor-Defendants also argue that *McEwen* Plaintiffs only made an allegation of 'specific illegality' with respect to Count VI, their appropriations claim." R. at 3632. In addition to Greater Praise Intervenors' concession, the State made only a conclusory statement regarding McEwen Plaintiffs' specific illegality allegations. R. at 2408.

the Tennessee Constitution and state statute. R. at 2069-70, ¶¶146-155. However, the First Cause of Action also alleges the Voucher Law provides for the illegal diversion of public funds, here in violation of the Education and Equal Protection Clauses of the Tennessee Constitution. R. at 2062-64, ¶¶112-118. All the constitutional claims in the Amended Complaint allege an unconstitutional diversion of public funds.

In holding there was no allegation of specific illegality with respect to the First Cause of Action, the court erroneously creates a distinction between allegations that public funds were already illegally diverted and allegations that a law enacted by Defendants calls for the illegal diversion of public funds. R. at 3632-33. However, there is no precedent for such a distinction. Rather, courts distinguish between conduct calling for the illegal diversion of public funds, which would confer taxpayer standing, and conduct ***unrelated*** to the diversion of public funds, which would not confer taxpayer standing. For example, courts have granted taxpayer standing when an ordinance calls for the illegal use of public funds, *Cobb,* 771 S.W.2d at 124, or when officials entered into a contract that would result in the illegal diversion of public funds. *Pope v. Dykes,* 93 S.W. 85 (Tenn. 1905). On the other hand, courts have refused to grant taxpayer standing when plaintiffs allege officials violated the Open Meetings Act, *Bennett v. Stutts*, 521 S.W.2d 575 (Tenn. 1975), or in a suit to declare void an act of the constitutional convention as outside the "call." *Sachs v. Shelby Cnty. Election Comm'n*, 525 S.W.2d 672 (Tenn. 1975). Neither of the latter cases involved diversions of public funds. Here, Plaintiffs allege the Voucher Law unconstitutionally diverts public

funds to the voucher program, and therefore their claims squarely fit into the category of case where taxpayer status is conferred.

b. Any Demand Would Have Been Futile

A requirement of taxpayer standing under the "specific illegality" exception to the general rule governing taxpayer standing is that plaintiffs plead: "the taxpayers have made a prior demand on the governmental entity asking it to correct the alleged illegality." *City of New Johnsonville v. Handley*, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005) (citing *Cobb*, 771 S.W.2d at 126). However, a demand is excused where "the status and relation of the involved officials to the transaction in question is such that any demand would be a formality." *Badgett*, 436 S.W.2d at 295; *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 63 (Tenn. Ct. App. 2001).

McEwen Plaintiffs overwhelmingly established a demand on Defendants would have been utterly futile. Defendant Governor Lee signed the voucher bill into law (R. at 2046, ¶50), and even after the Chancery Court enjoined the State from implementing the Voucher Law, he expressly encouraged parents to continue applying to the program in violation of the court's order (RR. at 3553), prompting the Chancery Court to admonish State Defendants and order them to notify parents the program was enjoined. *See* R. at 190-91.

Defendant Education Commissioner Schwinn – who oversaw the state system of public schools, administered TDOE, and was responsible for implementing the Voucher Law – moved as quickly as possible to implement the law when it was first passed (and again in 2022 the State

implemented an extremely rushed process so vouchers could be used in the 2022-2023 school year). *See* R. at 682-83; R. at 2036, ¶6; R. at 2057, ¶¶95-96. Defendant members of the State Board of Education, who are statutorily charged with overseeing the State's system of public schools, adopted administrative rules in November 2019 to effectuate the Voucher Law. R. at 2048-49, ¶64. Defendant TDOE, which is also responsible for overseeing the State's system of public schools, is responsible for the administration and implementation of the Voucher Law. R. at 2038, ¶21. TDOE executed a $2.5 million contract with a private vendor – and has paid $1.2 million under this contract to date – to oversee online applications and payment systems for the voucher program. R. at 2046-47, ¶¶54-55. Moreover, by the time the Amended Complaint was filed, the record reflects Defendants' zealous and steadfast efforts to defend and implement the Voucher Law at the Chancery Court, the Court of Appeals, and the Tennessee Supreme Court, in spite of McEwen Plaintiffs' repeated efforts to halt implementation of the Voucher Law because of its illegality. R. at 1131-58, RR. at 3552-63; *Metro. Gov't*, 2020 WL 5807636.

The Amended Complaint and the record in this action make clear a demand to any of these governmental officials to remedy this illegal law would have been a futile formality, and there is no credible basis to assert otherwise.

The Chancery Court committed reversible error by improperly concluding McEwen Plaintiffs had failed to adequately allege demand futility. R. at 3632. Specifically, while acknowledging *Ragsdale*, the Chancery Court improperly refused to follow it, holding:

> [E]xtending the rationale of *Ragsdale* to this scenario would swallow the prior-demand requirement entirely. Governors regularly campaign on future legislation and in most cases sign legislation before it becomes law. Agencies and their officials regularly implement new legislation. A house speaker regularly shepherds bills across the finish line. By applying the exception here, this Court would render it no exception at all.

Id. This holding was in error.

First, McEwen Plaintiffs were not asking the Court to "extend[] the rationale of *Ragsdale* to this scenario" because the facts at issue in *Ragsdale* are on all fours with the facts alleged in the Amended Complaint. In *Ragsdale*, plaintiff taxpayers brought an action against the City of Memphis, Shelby County, numerous elected officials, and the owner of a professional basketball franchise seeking declaratory judgment that the actions of the city and county to procure and provide financing for a new basketball arena violated the Tennessee Constitution. 70 S.W.3d at 56. Affirming the Chancery Court on *de novo* review, the Court of Appeals found demand was excused:

> In the instant case, the executives of both City and County have actively participated in the negotiations involving the NBA franchise, have signed required legislation, and have ultimately signed the required contractual documents. Under these circumstances, a prior demand would be a mere formality and should be excused.

Id. at 63. Contrary to the Chancery Court's holding here, the facts alleged by McEwen Plaintiffs, discussed *supra*, are materially indistinguishable from, if not stronger than, those alleged in *Ragsdale*.

Second, the Chancery Court's statement that a finding of demand futility on these facts would "swallow the prior-demand requirement entirely" and "render it no exception at all" is simply wrong. *See* R. at 3632. The prior-demand requirement is alive and well; it just ***does not apply*** to the facts alleged here. It ***does*** apply to situations such as those described by the Supreme Court in *Fannon*, 329 S.W.3d 418, where there is convincing evidence a pre-suit demand would have been effective in securing the sought-after relief.

In *Fannon*, an elected city council member in the City of LaFollette brought a declaratory judgment action against the city, alleging three other members of the council violated the Open Meetings Act in the process of adopting a resolution to increase the pay of various city employees. *Id.* In concluding the plaintiff failed to adequately allege demand futility, the Supreme Court described exactly the type of facts where a demand would ***not*** be futile:

> [T]he Defendants insist that the record does not establish that providing the Council with the opportunity to undertake remedial measures would have been futile. In support of that claim, the Defendants point out that the Council, once made aware of the Plaintiff's challenge, took action to correct the procedural deficiencies at the earliest opportunity.
>
> The Plaintiff filed this suit twelve days after the meeting on June 28, 2007. The record does not indicate that the Plaintiff made a prior demand to correct the illegality or otherwise provide the Council with an opportunity to implement the proper procedure. The Plaintiff did not testify. While the minutes of the June 28, 2007 meeting indicate that the Plaintiff voted "no" on the amendment, he neither complained about the lack of adequate notice for the informal meeting with certain of the city employees nor objected to the

> failure to comply with the provisions of the City Charter. The minutes suggest that the Plaintiff "was not totally against" the resolution and, while preferring a delay on the measure, was ready to vote. He did not assert that the expenditures were illegal. Moreover, because remedial action was taken at a subsequent meeting of the Council, it is not clear that a demand would have been futile. Thus, the record does not support the Court of Appeals' determination that a demand, if timely made by the Plaintiff, would have qualified as a mere formality – without any prospect of remedial action.... Under these unique circumstances, the Plaintiff, in our view, failed to demonstrate standing to sue as a taxpayer.

Fannon, 329 S.W.3d at 428-29. The facts in the instant case are on all fours with *Ragsdale*, and *Fannon* demonstrates the Chancery Court's conclusion that a finding of demand futility on these facts would "swallow the prior-demand requirement entirely" is simply inaccurate. Plainly, given the facts pled in the Amended Complaint, a demand the Voucher Law be halted would have been a futile exercise. McEwen Plaintiffs have established demand futility, and the Chancery Court's holding to the contrary was in error.

III. The Chancery Court Erred in Ruling McEwen Plaintiffs Lacked Standing to Challenge the Voucher Law for Violating the Requirement of a Single System of Public Schools Mandated by the Education Clause of the Tennessee Constitution

A. The Amended Complaint Alleges the Voucher Law Violates the Constitutional Requirement for a Single System of Public Schools

The Tennessee Constitution's Education Clause, article XI, section 12, requires the General Assembly to provide for the maintenance, support, and eligibility standards of "***a system*** of free

public schools." The Tennessee Constitution does not permit the General Assembly to maintain and support schools outside a system of free public schools.

McEwen Plaintiffs' Second Cause of Action alleges the Voucher Law diverts BEP/TISA funds appropriated by the General Assembly to maintain and support Tennessee public schools to instead pay for tuition and other expenses in private schools. R. at 2064, ¶121. The Amended Complaint alleges the private schools authorized by the Voucher Law to participate in the voucher program are not – and cannot, by the express terms of the Voucher Law – be part of the State of Tennessee's system of free public schools. R. at 2065, ¶122. The Amended Complaint further sets forth the many ways the private schools eligible for vouchers are not obligated under the Voucher Law to comply with the laws and regulations applicable to public schools in Tennessee. R. at 2057-62, ¶¶97-111; R. at 2065, ¶¶123-127. Thus, the Amended Complaint alleges the Voucher Law violates the General Assembly's obligation in the Education Clause of the Tennessee Constitution to maintain and support only "***a system***" of "free ***public*** schools." R. at 2066, ¶128.

B. McEwen Plaintiffs Have Standing as Parents

As with the First Cause of Action, McEwen Plaintiffs meet the three requirements for standing as parents to assert their Second Cause of Action: (1) a distinct and palpable injury; (2) a causal connection between the alleged injury and the challenged conduct, *i.e.*, the Voucher Law; and (3) the ability of a court order to redress their injury. *See Metro. Gov't*, 645 S.W.3d at 149.

1. McEwen Plaintiffs Have Alleged a Distinct and Palpable Injury

As stated above, McEwen Plaintiffs have alleged a distinct and palpable injury: their children are harmed by the illegal diversion of funds to support a voucher program in addition to the existing system of public education. McEwen Plaintiffs' injury is not shared by non-parents, or parents in other districts, because Defendants have illegally diverted money from their children's districts – and no others – to fund these separate, private systems of education in violation of the constitutional requirement for a single system of public schools. Consequently, there are fewer funds available to provide these districts' students with the resources they need to access an adequate education. McEwen Plaintiffs have alleged a distinct and palpable injury.

2. McEwen Plaintiffs Have Alleged a Causal Connection Between the Injury and the Voucher Law

As discussed *supra*, Tennessee's causal connection test is not demanding. *See City of Memphis,* 414 S.W.3d at 98; *Calfee*, 2017 WL 2954687, at *7. Here, McEwen Plaintiffs have alleged their injury – illegal diversion of funds – is directly caused by the Voucher Law because it requires the illegal diversion of funds. The diversion harms students when it creates separate systems of education, in violation of the state Constitution's guarantee of a single system of public education, redirecting critical resources away from McEwen Plaintiffs' children's schools. Thus, McEwen Plaintiffs have established a clear causal connection between the harmful diversion of funds and the Voucher Law.

3. McEwen Plaintiffs Have Alleged Their Injury Can Be Redressed by Court Order

As stated above, the third prong of the standing requirement is that a court order is capable of redressing McEwen Plaintiffs' injury. *Metro. Gov't*, 645 S.W.3d at 149; *Calfee*, 2017 WL 2954687, at *10. An order declaring the Voucher Law unconstitutional and permanently enjoining it, as sought by McEwen Plaintiffs, would end the diversion of critical public education funds to separate systems of private education. Thus, a court order in their favor would redress McEwen Plaintiffs' injury.

C. McEwen Plaintiffs Have Standing as Taxpayers

Additionally, McEwen Plaintiffs' have taxpayer standing to assert the Second Cause of Action on two grounds: (1) McEwen Plaintiffs allege special injury; and (2) McEwen Plaintiffs allege the Voucher Law calls for an unconstitutional diversion of public (BEP/TISA) funds, and a demand Defendants correct or cease the unconstitutionality would have been futile.

Regarding special injury standing, as in the First Cause of Action, the Amended Complaint alleges the unconstitutional diversion of public funds resulting in a unique burden on McEwen Plaintiffs as taxpayers in Davidson and Shelby counties. *Supra* at §II.C.1.; R. at 2050-52, ¶¶68-76. In the Second Cause of Action, McEwen Plaintiffs allege the Voucher Law violates the Education Clause's requirement to establish and maintain a single system of free public schools. R. at 2066, ¶128. As discussed above *supra* §II.C.1.a., taking funds from the districts' public schools to fund the voucher program imposes a unique burden on taxpayers in Davidson and Shelby Counties. They must raise local tax dollars for students who

are counted but no longer enrolled and must use additional local dollars to maintain the same level of services in the districts' public schools. Because the Second Cause of Action alleges the challenged conduct imposes a unique burden on McEwen Plaintiffs, it sufficiently alleges special injury under the general rule for taxpayer standing. Further, as discussed *supra* §II.C.1.b., McEwen Plaintiffs' injury as taxpayers – the increased tax burden – is the direct result of the Voucher Law's requirement that funds be redirected from the districts' schools to the voucher program. Thus, McEwen Plaintiffs have established a causal connection fairly traceable to the illegal conduct. Finally, as also discussed *supra* §II.C.1.c., the court order requested by McEwen Plaintiffs would enjoin the illegal diversion of funds, thereby stopping the injury to them as taxpayers. No prior demand is necessary under the special injury rule for taxpayer standing. Again, the court completely failed to address McEwen Plaintiffs' special injury as taxpayers. Because all three elements of special injury standing were adequately pled for the Second Cause of Action, the court erred in failing to find taxpayer standing on this basis.

The allegations under the Second Cause of Action also satisfy the exception to the general rule for taxpayer standing, as conceded by Greater Praise Intervenors. McEwen Plaintiffs allege the Voucher Law calls for the diversion of public funds, intended for public schools, to private schools in violation of the constitutional requirement under the Education Clause that the Legislature fund a single system of public schools. Thus, as in the First Cause of Action, McEwen Plaintiffs sufficiently allege an illegal diversion of public funds. Moreover, as

discussed *supra* §II.C.2.b., McEwen Plaintiffs established a prior demand would have been a mere formality and thus should be excused.

IV. The Chancery Court Erred in Ruling McEwen Plaintiffs Lacked Standing to Challenge the Voucher Law for Violating the Appropriation of Public Moneys Provisions of the Tennessee Constitution and T.C.A. §9-4-601

A. The Amended Complaint Alleges Violations of the Appropriations Provisions of the Tennessee Constitution and Tennessee Statute

Both the Tennessee Constitution and state statute govern the appropriation and expenditure of public moneys. Article II, section 24 of the Tennessee Constitution provides: "Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding." R. at 2069, ¶147. Article II, section 24 of the Tennessee Constitution also provides: "No public money shall be expended except pursuant to appropriations made by law." *Id.*, ¶148. By statute: "[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law." T.C.A. §9-4-60l(a)(l); R. at 2069, ¶149.

In their Sixth Cause of Action, McEwen Plaintiffs allege the Voucher Law was enacted by the General Assembly in its 2019 legislative session. R. at 2069, ¶150. The Amended Complaint further alleges, during the 2019 legislative session, the General Assembly did not make an appropriation for the estimated first year's funding of the Voucher Law. *Id.,* ¶151. The Amended Complaint also states in November 2019

TDOE signed a $2.5 million contract with a private for-profit company, ClassWallet, to undertake the administration of the Voucher Law, and ClassWallet began work under the contract in November 2019. *Id.,* ¶152. Moreover, the Amended Complaint alleges TDOE diverted public funds from an unrelated existing state program supporting public school teachers to instead pay ClassWallet $1.2 million in 2019 for its work on the voucher program. *Id.,* ¶153. Thus, the Amended Complaint alleges TDOE's expenditures for the ClassWallet contract, and any other expenditures for the administration and implementation of the Voucher Law in 2019, without appropriation for the estimated first year's funding of the Voucher Law, render it null and void under article II, section 24 of the Tennessee Constitution and violate T.C.A. §9-4-601. R. at 2070, ¶154.

B. McEwen Plaintiffs Have Standing to Assert the Appropriations Claim as Taxpayers

McEwen Plaintiffs have standing to assert their Sixth Cause of Action based on the "illegal diversion of public funds" exception to the general rule governing taxpayer standing. *Badgett,* 436 S.W.2d at 295. McEwen Plaintiffs' Sixth Cause of Action alleges the TDOE illegally diverted public funds to the voucher program in violation of the Appropriation of Public Moneys provision of the Tennessee Constitution, article II, section 24, and in violation of T.C.A. §9-4-60l(a)(l). R. at 2069-70, ¶¶146-155. The Amended Complaint alleges TDOE entered into a $2.5 million contract with ClassWallet to administer the Voucher Law despite no appropriation being made for the law's estimated first year of implementation and illegally diverted $1.9 million from an unrelated

program to pay ClassWallet. R. at 2046-47, ¶¶54-55. The trial court properly held McEwen Plaintiffs sufficiently alleged a "specific illegality" under the exception to the taxpayer standing rule. R. at 3632. Thus, the only question at issue in this appeal is the requirement for a prior demand. As discussed above *supra* §II.C.2.b., the court erred in failing to hold a prior demand in this case would have been futile. Thus, McEwen Plaintiffs have taxpayer standing in connection with their Sixth Cause of Action.

V. The Chancery Court Erred in Ruling McEwen Plaintiffs' Claims Were Not Ripe

The Chancery Court erred in ruling, in the alternative to its standing determinations, McEwen Plaintiffs' claims should be dismissed as unripe. The ripeness doctrine does not require a harm to have actually occurred if the controversy has sufficient immediacy; but in any case, McEwen Plaintiffs alleged their harms were already occurring when the Amended Complaint was filed. The Voucher Law was in effect, the voucher program was already being implemented, and thus taxpayer funding was already being illegally diverted to it. McEwen Plaintiffs alleged Metro Nashville Public Schools and Shelby County Schools are underfunded and the Voucher Law exacerbates that underfunding. They also alleged the school improvement fund grants at the crux of the Chancery Court's ripeness holding do not make up for the funding loss to the districts affected by the Voucher Law. Even if the grants could make up for that funding loss, which they could not, under the terms of the Voucher Law they last for, at most, three years (through the 2024-2025 school year). On a motion to dismiss, the court must accept the

allegations in the Amended Complaint as true, which the Chancery Court failed to do. Thus, the Chancery Court's ripeness determination should be reversed.

A. The Chancery Court Did Not Apply the Correct Standards to the Ripeness Inquiry

"The justiciability doctrine of ripeness 'requires a court to answer the question of "whether the dispute has matured to the point that it warrants a judicial decision."'" *State v. Price*, 579 S.W.3d 332, 338-39 (Tenn. 2019). "Courts should engage in a two-pronged analysis" to determine whether a claim is ripe. *Id.* First, "[a]n issue is not fit for judicial decision if it is based 'on hypothetical and contingent future events that may never occur.'" *Id.* "The ripeness doctrine, however, does not require the harm to have actually occurred." *Cent. W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App'x 415, 425 (6th Cir. 2007). Second, the Court should consider "'whether withholding adjudication ... will impose any meaningful hardship on the parties.'" *Price*, 579 S.W. 3d at 338. Writing for a unanimous Supreme Court in *Golden v. Zwickler*, 394 U.S. 103 (1969), Justice Brennan adopted the following test:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy [and] reality to warrant the issuance of a declaratory judgment."

Id. at 108 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

The Chancery Court made two grave errors in the standards it applied to the ripeness inquiry. First, the Chancery Court failed to take the well pled allegations in the Amended Complaint as true. As with standing, a court evaluating a motion to dismiss based on lack of ripeness ""must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences."" *West*, 468 S.W.3d at 489. While there may be a factual dispute as to whether the targeted districts will lose funds under the Voucher Law, McEwen Plaintiffs allege multiple reasons those districts will indeed experience a significant funding loss that will cause harm to students. The Chancery Court failed even to acknowledge most of these allegations, let alone presume them to be true, as required on a motion to dismiss.

Second, the Chancery Court failed to recognize an imminent injury is sufficient for ripeness even if it has not yet occurred. "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). McEwen Plaintiffs pled the harms they allege were occurring at the time of the Amended Complaint. However, even if it were true school improvement fund grants meant no funding gap would affect their school districts until the end of the term of those grants, which it was not, the fact they will end after no more than three years

means there is an imminent, non-theoretical controversy for the court to resolve.

B. McEwen Plaintiffs' First Cause of Action is Ripe

1. McEwen Plaintiffs' Amended Complaint Adequately Alleges the Voucher Law Causes the Harms Outlined in the First Cause of Action

McEwen Plaintiffs' First Cause of Action alleges the Voucher Law violates the Education and Equal Protection Clauses of the Tennessee Constitution because: (a) the funding provided by the General Assembly through the BEP is ***already*** insufficient "to provide Shelby County Schools and Metro Nashville Public Schools with sufficient resources . . . essential to provide an adequate education to all students in the districts," R. at 2052-54, ¶¶79-81; and (b) the Voucher Law ***further*** deprives Shelby County Schools and Metro Nashville Public Schools of the funding required to provide their students with a constitutionally mandated adequate education while at the same time concentrating high-need students in the public schools. R. at 2054-56, ¶¶82-89. Moreover, the Amended Complaint alleged the harm to taxpayers of increased tax burden and illegal diversion of tax funds occurred as soon as implementation of the Voucher Law began, which the Chancery Court failed to consider. R. at 2052, ¶76; R. at 2062-64, ¶¶112-18. These are not "'hypothetical and contingent future events that may never occur.'" *Price*, 579 S.W.3d at 338. To the contrary, the Amended Complaint alleges the Voucher Law – which the State began implementing during the 2022-2023 school year, R. at 2057, ¶¶95-96 – exacerbates the

underfunding already occurring in Metro Nashville Public Schools and Shelby County Schools, making an already untenable situation even worse, as well as immediately causing the taxpayer harms alleged. As Chancellor Martin's dissent noted: "[t]he alleged shortfall is created by a statute that is in effect ***at this time***, not in three or more years." R. at 3642 (emphasis in original).

a. School Improvement Fund Grants Do Not Render McEwen Plaintiffs' Claims Unripe

The Chancery Court based its ripeness determination on potential "school improvement fund" grants to the targeted districts the court held would make up for funds diverted away from them by the Voucher Law. However, the Amended Complaint sets forth in detail the multiple reasons these grants do not compensate for the districts' loss of BEP/TISA funding diverted to the voucher program, meaning McEwen Plaintiffs will indeed experience harm under the Education and Equal Protection Clauses due to inequitable and inadequate public school funding. R. at 2054-55, ¶¶83-85. These grants are expressly subject to appropriation. T.C.A. ¶49-6-2605(b)(2); R. at 2054, ¶83. Additionally, the Voucher Law restricts their use to "school improvement," meaning they cannot be used for general operating funds and thus cannot replace the BEP/TISA funds diverted to vouchers. *Id.*, ¶84. Even if maximally funded, the grants will not compensate the districts for each student who uses a voucher because they only cover students who were enrolled in the district the previous year. T.C.A. §49-6-2605(b)(2)(A)(i); R. at 2055, ¶85. When a voucher account is closed, including midyear, the funds are

returned to the State's BEP/TISA account rather than to the district, although the district is responsible for the student's education. T.C.A. §§49-6-2603(e), 49-6-2608(e); R. at 2055, ¶86. Moreover, school districts bear substantial fixed and variable costs that cannot be reduced proportionally when students leave the district to use a voucher. R. at 2055-56, ¶¶87-88. Finally, the Voucher Law permits participating private schools to refuse to serve high-need students, which will likely concentrate more-expensive-to-educate students in the districts' schools. R. at 2056, ¶89. McEwen Plaintiffs' allegations regarding the inadequacy of school improvement grants to negate their harms must be accepted as true in the context of a motion to dismiss, and the Chancery Court's refusal to do so was reversible error. *West*, 468 S.W.3d at 489.

The Chancery Court erroneously ruled: "the actual difference in funding caused by the ESA Act will not occur, if ever, until after three fiscal years because the [Voucher Law] establishes a school improvement fund that will award the affected schools 'an amount equal to the ESA amount for participating students under the program.'" R. at 3638 (quoting T.C.A. §49-6-2605(b)(2)(A)). The Chancery Court failed to acknowledge that these grants are "subject to appropriation," T.C.A. §49-6-2605(b)(2)(A), and therefore are not mandated by law but rather subject to the whims of the Legislature each year. R. at 2054, ¶83. Moreover, the court failed to address – and, in most instances, even to acknowledge – that McEwen Plaintiffs' Amended Complaint alleges in detail the multiple reasons these school improvement grants cannot make up for the districts' funding losses even if they are fully appropriated.

First, even if fully funded, any "school improvement grants" will not compensate Shelby County Schools and Metro Nashville Public Schools for the loss of BEP/TISA funds corresponding to the full number of students who use a voucher. R. at 2055, ¶85. This is because the grants can equal only the amount of money diverted to voucher accounts for students who "[w]ere enrolled in and attended a school in the [district] for the one (1) full school year immediately preceding the school year in which the student began participating in the program." *Id.* (quoting T.C.A. §49-6-2605(b)(2)(A)(i)). That does not include students who are "eligible for the first time to enroll in a Tennessee school" – for example, those entering kindergarten. *Id.* (quoting T.C.A. §49-6-2602(3)(A)(ii)).

This is the only one of McEwen Plaintiffs' allegations about why the grants do not negate their harms the Chancery Court even addressed, stating:

> Plaintiffs nevertheless allege a shortfall will exist between the amount diverted and the amount awarded because of the sub-provisions requiring the student to have actually been calculated into the BEP and ESA formulae. This is not enough, and Plaintiffs' argument continues to rely on speculation. No differential treatment between Plaintiffs' schools and the others of this state or other financial injury can exist under the ESA Act until a funding gap occurs. Similarly, no divestment of the schools of Parent Plaintiffs' children can occur before the alleged funding gap occurs.

R. at 3638-39.[5] However, the fact the school improvement grants, even at maximum funding, cannot compensate districts for the full number of vouchers is not speculative. It is in the terms of the Voucher Law. T.C.A. §49-6-2605(b)(2)(A). The only questions requiring speculation are whether these grants will be funded and, if so, whether the appropriation will be for the maximum amount allowed by the Voucher Law. However, even if the answer to both those questions were yes, the fact the districts will experience a diversion of funds for some voucher students for whom they do not receive a corresponding grant is assured by the terms of the statute. Thus, even assuming maximal school improvement grant funding, the occurrence of the "funding gap" the Chancery Court deemed necessary for ripeness is concurrent with implementation of the Voucher Law.

Moreover, the Chancery Court failed to address or even acknowledge the multiple additional reasons pled in McEwen Plaintiffs' Amended Complaint about why the potential school improvement fund grants do not negate their claims of harm. One such additional reason is that the Voucher Law restricts the use of these grants to "school improvement" only. R. at 2054, ¶84. Thus, the grants, even if available, cannot be used for general operating funds and consequently will not replace the state and local BEP/TISA funds diverted from Shelby County Schools and Metro Nashville Public Schools under the Voucher Law. *Id.*

[5] Although, in citing McEwen Plaintiffs' argument, the Chancery Court listed ¶¶82-89 of the Amended Complaint, the court only summarized and responded to the allegations in ¶85. R. at 3638-39.

Third, McEwen Plaintiffs allege the Voucher Law will concentrate higher need students in public schools, meaning the voucher program will create a strain on necessary resources even if the full amount of funds diverted from the districts were replaced by the school improvement grants, which they are not. R. at 2056, ¶89. As set forth in the Amended Complaint, the Voucher Law permits private schools participating in the voucher program to deny enrollment or services to students with elevated needs, including students with disabilities, who may be more expensive to educate. R. at 2054, ¶89; R. at 2061, ¶108 (citing T.C.A. §49-6-2603(3)). As a result, it will likely increase the concentration of students who are more costly to educate in Shelby County Schools and Metro Nashville Public Schools. *Id.* Due to diversion of BEP/TISA funds to vouchers, there will be significantly less money available to meet the needs of students in the districts; but even if funds were to remain static for up to three years due to school improvement grants, students in the district will experience harm because their already inadequate funds will be stretched even thinner to serve an elevated concentration of high-need students.

As the dissent below emphasized, for purposes of a motion to dismiss, these allegations must be taken as true. R. at 3642 ("[W]hatever the difference in funding turns out to actually be between the diverted funds and the funds awarded by the school improvement fund, Plaintiffs here have alleged that difference to generate a shortfall, and we are obliged to treat such allegations as true under the Rule 12 standard."). The Chancery Court's majority opinion failed to do so, and thus the court

erred in ruling McEwen Plaintiffs' claims were not ripe due to the potential existence of school improvement grants.

b. Even If No Harm Had Yet Occurred Due to School Improvement Fund Grants, the First Cause of Action Would Be Ripe

Even if no injury could occur during the period of school improvement fund grants – which is not the case, as explained above – the harms alleged by McEwen Plaintiffs in their First Cause of Action would be sufficiently imminent to justify judicial intervention. The Chancery Court held, due to the school improvement fund grants, the funding gap caused by the Voucher Law would not occur, "if ever, until after three fiscal years." R. at 3638. The previous section explained why the funding deficit would occur immediately even if school improvement fund grants were fully appropriated for the first three years of the voucher program. This section explains why the First Cause of Action is ripe now, even if it were true the school improvement fund grants made up for that funding deficit and therefore delayed harms from the Voucher Law until the grants expired after the third year.[6]

[6] There is neither any guarantee nor particular reason to think, after the three years in which the Voucher Law mandates any appropriated school improvement funds be granted to the districts with voucher students, any such grants made available to low performing schools in the State generally, under T.C.A. §49-6-2605(b)(2)(B)(ii), would be awarded to these particular districts. To argue otherwise would mean no claim about school funding – or ***any*** lack of state funding that violated a legal right – could be brought before a court because defendants would simply claim the Legislature and state officials could, at some future point, appropriate a grant to make up the shortfall.

A claim is ripe if harm is imminent even if it has not yet occurred. *Pac. Gas & Elec. Co.*, 461 U.S. at 201 ("'One does not have to await the consummation of threatened injury to obtain preventive relief.'"). Under the express terms of the Voucher Law, the school improvement fund grants can last, at most, three years from when the voucher program began operation, T.C.A. §49-6-2605(b)(2)(A), which was in the 2022-2023 school year. R. at 2057, ¶¶95-96. "The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *B & B Enters. of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010). The fact the school improvement fund grants to Metro Nashville Public Schools and Shelby County Schools will last only up to three years is not speculative but rather is spelled out in the Voucher Law itself.

Because McEwen Plaintiffs have sufficiently alleged the injury in the First Cause of Action will occur ***during*** the period of any school improvement grants, *see infra* §V.B.3., they have by extension sufficiently alleged harm at least as great for the period ***after*** those grants cease. Moreover, McEwen Plaintiffs' Amended Complaint alleges reasons those harms can only grow worse without school improvement funds. First, schools have fixed costs they must continue to pay even when a student takes a voucher. R. at 2055-56, ¶¶87-88. McEwen Plaintiffs have alleged in detail why a student's departure does not relieve the districts of all the costs associated with that student. *Id.* Thus, the districts will be unable to rely on reduced costs to cover the loss

of BEP/TISA funds under the Voucher Law. *Id.* This is yet another reason the school improvement grants will not forestall a funding and resource shortfall, ***as well as*** being a reason the harm to students in the affected districts will be even more severe when those grants end.

Further, McEwen Plaintiffs have alleged students who leave the districts to take a voucher may return to the district, but the funding diverted to their voucher does not return with them. R. at 2055, ¶85. When an ESA account is closed for any number of reasons, the remaining funds are returned to the State's BEP/TISA account rather than to Shelby County Schools or Metro Nashville Public Schools. *Id.*, ¶86 (citing T.C.A. §§49-6-2603(e), 49-6-2608(e)). The district must educate the student despite receiving no state funding for doing so, making its funding deficit even more severe.

Thus, contrary to Defendants' claims, it is not the case a district is unharmed when a student takes a voucher. On the contrary, the allegations detailed in this section and *infra* §V.B.1.a. mean severe funding and resource deficits will occur due to the Voucher Law's illegal diversion of funds despite any decreased student count, harming McEwen Plaintiffs as both parents of public school students and as taxpayers.

McEwen Plaintiffs have sufficiently alleged that, even if school improvement fund grants could stave off the injury they claim for three years, a significant threatened injury is imminently on the horizon. Thus, there is a ripe legal controversy.

2. Withholding Judgment Will Impose Hardship on McEwen Plaintiffs

Withholding judgment on the legality of the Voucher Law will impose a meaningful hardship on McEwen Plaintiffs. *Wheeling-Pittsburgh*, 245 F. App'x at 425. In asserting McEwen Plaintiffs would not be prejudiced by dismissal of their claims, the Chancery Court merely declared it found McEwen Plaintiffs' arguments on this point "unpersuasive" with no explanation whatsoever. R. at 3639. Again, the Chancery Court failed in its duty to take McEwen Plaintiffs' allegations in the Amended Complaint as true. McEwen Plaintiffs have sufficiently alleged delaying resolution of their claims will result in their children's schools – which are already underfunded – being further deprived of educational resources. R. at 2052-54, ¶¶79-82. This will cause McEwen Plaintiffs' children to further suffer. Moreover, the harms to taxpayers explained above are concurrent with the implementation of the Voucher Law and continuing. Therefore, McEwen Plaintiffs' First Cause of Action is ripe for adjudication.

C. McEwen Plaintiffs' Second Cause of Action Is Ripe

McEwen Plaintiffs' Second Cause of Action alleges the Education Clause prohibits any funding of private schools because they are outside the single system of public education mandated by the Tennessee Constitution. R. at 2064-66, ¶¶119-128. This violation of the Education Clause was sufficiently imminent to be ripe for judicial intervention as soon as the Voucher Law, which establishes a state program to fund private education, was enacted in 2019. *See Pac. Gas & Elec. Co.*, 461

U.S. at 201 ("'One does not have to await the consummation of threatened injury to obtain preventive relief.'"). If there were any doubt as to the ripeness of the claim at that point, it was erased as soon as the State actually began operating the voucher program. As alleged in the Amended Complaint, according to TDOE's website, it began operating the voucher program during the 2022-2023 school year. R. at 2057, ¶¶95-96.

In their Second Cause of Action, McEwen Plaintiffs allege the plain text of the Education Clause permits the State to fund ***only*** a system of public education, so ***any*** public funds used on private education – no matter the amount, the source, or whether they are made up from another revenue stream – is a violation of the Tennessee Constitution. Further, as explained above, McEwen Plaintiffs allege in detail how this diversion of funds to the voucher program will harm them as parents and taxpayers. Because the State is currently implementing the Voucher Law, *i.e.*, directing public funds to pay for private education, the injury alleged in the Second Cause of Action is current rather than speculative. The second prong of the ripeness inquiry is also satisfied because, as explained above, there is not a "'more appropriate time'" to bring the claim. *Price*, 579 S.W.3d at 339. Thus, McEwen Plaintiffs' claim any public funding of private education violates the express terms of the Education Clause is ripe for judicial review.

D. McEwen Plaintiffs' Sixth Cause of Action Is Ripe

The Sixth Cause of Action alleges the Voucher Law is null and void under the Appropriation of Public Moneys provision of the Tennessee

Constitution and relevant state statute because there was no appropriation for the first year's funding of the law when it was enacted in 2019 and because the expenditure of public funds on TDOE's contract with ClassWallet in 2019 violates constitutional and statutory law. R. at 2069-70, ¶¶146-154. The Chancery Court's ripeness analysis is inapposite to this claim and does not reference the facts or arguments related to it.[7] Moreover, all facts relevant to this claim occurred in the past, in the year the Voucher Law was enacted, and there are no future events that could alter the relevant facts. Thus, this cause of action is in no way dependent on "'hypothetical and contingent future events,'" and there will not be any developments that will make a later point a more appropriate time to raise the claim. *Price*, 579 S.W.3d at 338-39. It is ripe for judicial review.

[7] The Chancery Court frames its discussion of ripeness by summarizing the arguments made by Defendants that "Plaintiffs' equal protection and education clause claims are unripe." R. at 363; *see also* R. at Vol 26, p.29:17-19 (during oral argument on the motions to dismiss, the State made clear its ripeness argument referred to the Education and Equal Protection Clauses).

VI. CONCLUSION

For the foregoing reasons, the Chancery Court's Order should be reversed.

DATED: August 25, 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' OPENING BRIEF is produced using 14-point Century Schoolbook typeface and contains 12,778 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 414 Union Street, Suite 900, Nashville, TN 37219.

2. I hereby certify that on August 25, 2023, I electronically filed the foregoing document: **APPELLANTS' (McEWEN PLAINTIFFS) OPENING BRIEF** 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 August 25, 2023, at Nashville, Tennessee.

s/ Christopher M. Wood
CHRISTOPHER M. WOOD