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IN THE CHANCERY COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT
THE STATE OF TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Plaintiffs, vs. TENNESSEE DEPARTMENT OF EDUCATION, et al., Defendants, – and – NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith **CONSOLIDATED**
ROXANNE McEWEN, et al., Plaintiffs, vs. BILL LEE, in His Official Capacity as Governor of the State of Tennessee, et al., Defendants, – and – NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0242-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith

MCEWEN PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION PURSUANT TO TENN. R. CIV. P. 65.04

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I. INTRODUCTION

The Tennessee Education Savings Account Pilot Program ("Voucher Law" or "voucher program") is an unconstitutional statute to fund a program of private education that is outside the system of free public schools mandated by Article XI, §12 of the Tennessee Constitution. The Voucher Law will divert hundreds of millions of dollars from Metro Nashville Public Schools and Shelby County Schools to private schools, which are not required to comply with the same academic and accountability standards as public schools, and many of which can and do discriminate against Tennessee children and families based on their disability, religion, and sexual orientation, among myriad other factors.

The Education Clause of the Tennessee Constitution guarantees and requires that the State provide an adequate and substantially equal education to all Tennessee children through a system of free public schools:

> The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines.

TENN. CONST. art. XI, §12.

By funding a separate system of unaccountable private schools, at the direct expense of families and students in Davidson and Shelby Counties, the Voucher Law violates the plain language of the Education Clause, exceeds the Legislature's mandate thereunder, and thus is unconstitutional. The Voucher Law is irreconcilable with numerous opinions from Tennessee courts interpreting the State's obligations pursuant to the Education Clause. Courts in several other states have found that similar voucher laws violate similar education

clauses in their state constitutions, including an opinion just weeks ago that enjoined a voucher law in West Virginia.

An injunction now, ***before the school year begins in just a few weeks***, is especially critical because of the unprecedented efforts being taken by the State to implement the voucher program on a timeline that it previously represented to this Court was impossible. The State's misconduct, if not enjoined, is causing and will continue to cause massive confusion to schools that may be attempting to enroll students or remove them from their rolls months after any typical deadlines have passed. Even more alarming is the reckless disregard for families that may be on the hook for thousands of dollars in expenses if they enroll their children in private schools only to find later in the school year that the Voucher Law is unconstitutional and the State is unable to pay for their private schooling. This financial risk has only been exacerbated in recent days as the State has announced that, in light of the inadequate time to ramp up the voucher program, it has developed a half-baked plan to have participating schools invoice the State for voucher student expenses ***after*** the expenses have already been incurred, plainly violating the statute's requirement that the State "establish and maintain separate ESAs for each participating student" and that all expenses must be "preapproved by the department." Further, program implementation now will cause severe disruption to public schools and students should the voucher program be found unconstitutional after the school year begins and voucher students return midyear to public schools.

In order to prevent irreparable harm and preserve the *status quo*, both law and equity require the Court to enjoin implementation of the Voucher Law until the Court can issue a

final ruling on its constitutionality. Unless the Court enjoins the State from continued implementation of the voucher program, McEwen Plaintiffs and other Tennessee families will suffer irreparable harm – outweighing any harm to Defendants, and an injunction is clearly in the public interest. For these reasons, McEwen Plaintiffs' Motion for a Temporary Injunction should be granted.

II. PROCEDURAL HISTORY

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.*[1]

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. At the same time, the Metropolitan

[1] Plaintiffs, who are diverse in terms of their background, race, age, sex, career, income level, and life experience, share a deep commitment to their children, public education, and their communities. Each Plaintiff objects to the use of public taxpayer dollars to fund the voucher program. *See* Plaintiffs' affidavits attached as Ex. A to Decl. of Christopher M. Wood in Support of Plaintiffs' Motion for a Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04, filed April 3, 2020 ("April 3, 2020 Decl."). Plaintiffs have standing to bring this lawsuit because they suffer a special injury under the Voucher Law that is not common to the body of citizens as a whole. *See Badgett v. Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968). Specifically, the Voucher Law provides for diversion of BEP funds intended for Shelby County Schools and Metro Nashville Public Schools, which Plaintiffs' children attend and Plaintiffs support with their State and local tax dollars. Additionally, Plaintiffs have standing because they are taxpayers alleging that the Voucher Law is an illegal expenditure of public funds. *See City of New Johnsonville v. Handley*, 2005 WL 1981810, at *14-*15 (Tenn. Ct. App. Aug. 16, 2005) (explaining the elements required for taxpayer standing to challenge the illegal expenditure of public funds) (citing *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn. 1989)) (April 3, 2020 Decl., Ex. B). Plaintiffs did not make a prior demand on the General Assembly or Governor to remedy this illegal statute because such a demand would have been a futile gesture and a mere formality. *Badgett*, 436 S.W.2d at 295 (explaining that such demand is unnecessary if it would be futile).

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. Specifically, the Court noted that, in "the *Metro* case, the Court has entered a Memorandum and Order finding the ESA Act unconstitutional based upon the Home Rule Amendment, one of the bases for McEwen Plaintiffs' injunction," and therefore, "the Court has granted the relief the [McEwen] Plaintiffs seek with their motion, albeit in the companion *Metro* case." While the Court granted summary judgment in the *Metro. Gov't* case and enjoined 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 that 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). As relevant to this Motion, the Court of Appeals rejected the State's argument that the Home Rule provision did not apply to the Voucher Law "because education is a state function," and "'[t]he Tennessee General Assembly has exclusive authority under the Tennessee Constitution to make decisions regarding the provision of education.'" *Id.*, at *4-*5. Rather, the Court of Appeals held that "the 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." *Id.*

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 & 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.* The Supreme Court remanded the case to the Chancery Court for "entry of a judgment dismissing [the Home Rule] claim, for further proceedings consistent with this opinion, and for consideration of Plaintiffs' remaining claims." *Id.* at 155.

Meanwhile, McEwen Plaintiffs' case had been stayed pursuant to Tennessee Supreme Court Rule 54.[2] *McEwen*, Notice of Stay of Proceedings (Aug. 13, 2021). On May 18, 2022, the Supreme Court issued an Order appointing a three-judge panel, and on June 13, 2022, this Court issued an Order setting a Status Conference for July 13, 2022. Just prior to the Status Conference, the Court issued an Order in the *Metro. Gov't* action vacating the previously-issued injunction.

[2] On March 17, 2022, McEwen Plaintiffs filed a Motion for Determination of Three-Judge Panel Pursuant to Tenn. Sup. Ct. R. 54 §3(a)(5) with the Tennessee Supreme Court seeking appointment of a three-judge panel so the stay in the *McEwen* case could be lifted. On April 1, 2022, the Tennessee Supreme Court denied the motion. *McEwen*, Order (Apr. 1, 2022).

III. STATEMENT OF FACTS

On May 1, 2019, the Tennessee Legislature passed the Voucher Law. On May 24, 2019, Governor Lee signed the bill into law. Pub. Ch. 506 (H.B. 939), 111th Gen. Assemb., Reg. Sess. (Tenn. 2019). The Voucher Law creates an expansive private school voucher program in Davidson and Shelby Counties that diverts public money appropriated for Metro Nashville Public Schools and Shelby County Schools to private schools and a range of other private education expenses. The voucher program will be administered by Defendants Tennessee State Board of Education Members ("State Board"), Tennessee Department of Education ("TDOE"), and the Tennessee Commissioner of Education ("Commissioner"). T.C.A. §49-6-2603(i); T.C.A. §49-6-2604(a).

A. The State Recklessly Rushes to Implement the Voucher Law

Prior to the May 2020 injunction, Defendants had taken certain steps to implement the voucher program. In November 2019, the TDOE (unlawfully) entered into a $2.5 million contract with ClassWallet, a private, for-profit company based in Florida.[3] *Dept. of Educ.: Focus Hearing Before the Appropriations Subcomm.*, HH0201, 2020 Leg., 111th Gen. Assemb. (Tenn. Feb. 12, 2020) (April 3, 2020 Decl., Ex. 2). Under this contract, ClassWallet began overseeing online application and payment systems for the voucher program. *Id*. (statement of Defendant Commissioner of Education Penny Schwinn); *see also Bd. of Educ., Educ. Savings Account: Rule Review Before the Joint Gov't Operations Comm.*, 2020 Leg., 111th Gen. Assemb. (Tenn. Jan. 27, 2020) (April 3, 2020 Decl., Ex. 3)

[3] The contract with a for-profit company violates the plain language of the Voucher Law, which only authorizes the TDOE to contract with nonprofit organizations for administration of the program. *See* T.C.A. §49-6-2605(i).

(statement of Deputy Commissioner of Education Amity Schuyler). In 2019, the TDOE paid ClassWallet approximately $1.2 million for performance under this contract. (April 3, 2020 Decl., Ex. 2) (statements of TDOE Chief Financial Officer Drew Harpool).

On November 15, 2019, the State Board adopted administrative rules to implement the Voucher Law. (April 3, 2020 Decl., Ex. 3) (statement of State Board General Counsel Angie Sanders). Those rules were approved by the Joint Government Operations Committee on January 27, 2020 and went into effect February 25, 2020. *Id.*; Tenn. Comp. R. & Regs. §0520-01-16.02 (April 3, 2020 Decl., Ex. C).

At that time, the pace at which Defendants were rushing to make vouchers available was faster than legislators anticipated when they voted on the bill. Legislators who ***supported*** the program stated in committee meetings and hearings that they were surprised to see the program moving at such an accelerated pace. (April 3, 2020 Decl., Ex. 2 at 19:27-20:50) (conversation between Representative Patsy Hazlewood from Signal Mountain and Charlie Bufalino, TDOE Assistant Commissioner of Policy and Legislative Affairs):

> Rep. Hazlewood: Perhaps I'm recalling it incorrectly but when we passed the ESA, the voucher bill, with many modifications and amendments, it was my understanding that the funding – that plan would not go into effect until August of [20]21. I think I heard the commissioner say that we decided we were going to put the people in seats in August [20]20, therefore that was the reason for the speed, if you will, of getting this contract [with ClassWallet]. So, I guess, my question is, who decided and what legislative authority moved the start date back on the legislation that we passed? Or maybe I'm wrong about the start date.
>
> Bufalino: Um, I can speak to the start date portion. The legislation, and I don't have the exact code citation, said that the program shall begin no later than the 2021-[20]22 school year, which allowed the decision for it to start earlier, if that decision was to be made.

> Rep. Hazlewood: Alright, thank you. ***I think the understanding – or, the conversations I had about that bill were always that it would start in that later year***.

Id. (emphasis added); T.C.A. §49-6-2604(b).

On May 4, 2020, these efforts to implement the voucher program were supposed to come to a stop pursuant to the Court's Memorandum and Order, which stated "that the State Defendants are ENJOINED from implementing and enforcing the ESA Act." *Metro. Gov't*, Memorandum and Order (May 4, 2020), at 31. Yet, in spite of the Court's Order, Defendant Governor Lee ***continued*** to encourage parents to apply for vouchers. *Metro. Gov't*, Pltfs' Resp. in Opp. to State Defs.' and Intervenor-Defs.; Joint Mtn. to Stay Injunction During Pendency of Appeal (May 7, 2020), at 2-3. On May 13, 2020, the Court entered an Order denying Defendants' motion to stay the injunction and reiterating that the State Defendants remained "enjoined from using State resources to process applications, engage with parents and schools, or remit any funds in support of the program." *Metro. Gov't*, Order (May 13, 2020), at ¶3.[4]

At the July 13, 2022 Status Conference, counsel for the State Defendants represented to this Court that State Defendants had complied with the Court's injunction during its pendency and that a decision about the timing for relaunching the voucher program had not yet been made. The State's purported indecision, however, was short-lived.

Just hours after the status conference, Defendant Governor Bill Lee released a statement contending that the Court's order vacating the injunction "removed the final

[4] Defendants' attempts to have the Court's injunction stayed by the Court of Appeals and Supreme Court were all rejected.

roadblock" to implementing the Education Savings Account ("ESA") voucher program and that, "[s]tarting today, we will work to help eligible parents enroll ***this school year***."[5] (Emphasis added.)

The Governor's statement – that the State would attempt to enroll students in voucher schools within a matter of ***weeks*** – was remarkable in that it appeared to directly contradict statements made by the State's counsel to this Court mere hours earlier, as well as directly contradict prior representations made by Defendants in the course of the *Metro. Gov't* appeal. Specifically, in previous attempts to stay this Court's 2020 injunction (all of which were rejected), Defendants argued that "[a]llowing for confirmation of an ESA award and enrollment in a participating school before June 15 ***[wa]s essential*** for the operation of the Program for the 2020-2021 school year." *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dept. of Educ.*, No. M2020-00683-SC-R11-CV, Defs' Mtn. for Review of Orders Denying Stay of Injunction (Tenn. May 21, 2020), at 14 (emphasis added). State official Amity Schuyler stated in an affidavit that the "timeline for successful implementation" by fall 2020 required applications for the voucher program to be submitted in ***early May***. *Metro. Gov't*, Affidavit of Amity Schuyler (Tenn. May 5, 2020), at ¶4. State official Eve Carney testified that preparations would need to begin in ***mid-February to early March 2021*** to enroll students in the voucher program for fall 2021. *Metro. Gov't*, Affidavit of Eve Carney (Tenn. May 7, 2020), at ¶3.

[5] Ex. 1. "Ex." citations are to the exhibits attached to the Declaration of Christopher M. Wood in Support of Plaintiffs' Motion for a Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04, filed herewith, unless otherwise noted.

In spite of these prior representations that voucher rollout would require completed applications and TDOE preparations as much as ***several months*** prior to the start of the school year, as of July 18, 2022 "Intent to Enroll" forms for parents and families, as well as "Intent to Participate" forms for "Independent Schools," were live and active on the State's ESA voucher website.[6]

The State's slapdash attempt to rush the voucher program into effect, on a timeline it previously represented would be impossible, has resulted in a rollout marred by confusion, to say nothing of blatant violations of the Voucher Law itself. For example, the Voucher Law ***mandates*** that the TDOE provide ESA voucher accounts for students; it does not empower the TDOE to pay private schools directly:

> The department ***shall establish and maintain separate ESAs for each participating student*** and shall verify that the uses of ESA funds are permitted under §49-6-2603(a)(4) and institute fraud protection measures. Use of ESA funds on tuition and fees, computer hardware or other technological devices, tutoring services, educational therapy services, summer education programs and specialized afterschool education programs, and any other expenses identified by the department must be preapproved by the department.

T.C.A. §49-6-2607. Apparently recognizing that actual compliance with the Voucher Law is impossible for the upcoming school year, TDOE has instead directed private schools to fund the educational expenses for voucher students themselves and simply promised that the State will pay private schools directly to reimburse them:

> For the 2022-23 school year, participating non-public schools will be required to fund the student expenses (tuition, fees, computers, etc.) and then submit an invoice to the department for reimbursement. The department will be competitively procuring an application and wallet platform that will be operational beginning in the 2023-23 [sic] school year.

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[6] Ex. 2.

Ex. 3 at 12. Nowhere does the Voucher Law allow for such a process.[7]

B. The Voucher Law Creates a Separate System of Publicly Funded Private Schools that Do Not Have to Comply with Public School Academic, Accountability, and Antidiscrimination Standards

Pursuant to the Voucher Law, a student participating in the voucher program uses Basic Education Program ("BEP") funds deposited into an ESA account[8] for tuition in a participating private school and other private education expenses. T.C.A. §§49-6-2603(4). Participating schools are defined as those that meet the requirements established by the TDOE and the State Board for Category I, II, or III private schools. T.C.A. §49-6-2602(9). Category I private schools are those "approved individually by the Department of Education," Category II private schools are those "approved by an agency whose ability to accredit schools in Tennessee is approved by the State Board," and Category III private schools are those that "are regionally accredited." Tenn. Comp. R. & Regs. §0520-07-02-.01-.04.

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[7] TDOE's funding scheme was also outlined in its recent YouTube Webinar for parents and families. *See* Tenn. Dept of Educ., Education Savings Accounts (ESAs): Parent & Families Informational Webinar, at 7:13, YouTube (July 22, 2022), https://www.youtube.com/watch?v=EkxjBjh9JeY ("All ESA funds will be reimbursed directly to schools. ***Parents will not have a wallet*** or a ***need to manage*** funding for the first year. Each parent will need to work with their student's school to determine the best use of the funds and purchasing. Schools will then submit invoices to TDOE for reimbursement.") (emphasis added).

[8] As set forth above, the State intends to violate this portion of the Voucher Law for at least the impending school year. These illegal, *ultra vires* actions by TDOE, exceeding its statutory authority and creating rules absent the proper notice and comment procedure, form the basis of separate legal claims, apart from violation of the Education Clause, that are sufficient bases in and of themselves for this Court to enjoin the State from its current attempts to implement the voucher program. McEwen Plaintiffs intend to include additional details relating to these illegal actions in their amended complaint.

State Board regulations provide that the criteria and procedures used in evaluation of Category II and III are not the same as public schools. Tenn. Comp. R. & Regs. §§0520-07-02-.03, 0520-07-02-.04. The State Board regulations governing approval of accrediting organizations for Category II private schools include criteria for topics such as curriculum and graduation, teacher licensure and evaluation, and testing. Tenn. Comp. R. & Regs. §0520-07-02-.03(4)(c)(8). The regulations for Category III private schools require only regional accreditation, reporting of basic student information to the student's public school district of residence, and a minimum age for students entering kindergarten. Tenn. Comp. R. & Regs. §0520-07-02-.04(2)(a)(8). The criteria used by regional accrediting agencies varies.

Unlike for private schools, Tennessee's regulations governing public schools require the State Board to "adopt academic standards for each subject area, grades kindergarten (K) through twelve (12)" that "specify learning expectations and include performance indicators." Tenn. Comp. R. & Regs. §0520-01-03-.05. The State Board has adopted detailed academic standards in a range of subjects.[9] These standards must be "the basis for planning instructional programs in each local school system." Tenn. Comp. R. & Regs. §0520-01-03-.05.

The Voucher Law also requires participating private schools to administer State tests in only two subjects, Math and English Language Arts. T.C.A. §49-6-2606(a)(1). Unlike public school students, voucher students need not be given a State test in Social Studies and

[9] *See* Tennessee Department of Education, Academic Standards, https://www.tn.gov/education/instruction/academicstandards.html.

Science. The Voucher Law does not require all participating private schools to comply with the governance and accountability mandates of State laws, including the BEP statute, that apply to the public schools.

The Voucher Law requires participating private schools to certify that they will not discriminate against voucher students or applicants on the basis of race, color, or national origin. T.C.A. §49-6-2607(e)(2). However, it does not prohibit participating schools from refusing admission based on disability, religion, sexual orientation or gender identity, or family income level. The Voucher Law explicitly states that accepting ESA voucher money will not require any participating private school to change any part of its "creed, practices, admissions policies, or curriculum in order to accept participating students, other than as is necessary to comply with the requirements of the program." T.C.A. §49-6-2609(c).

Many Tennessee private schools overtly discriminate against students and families based on religion, sexual orientation or gender identity, or other student or family characteristics protected from discrimination in public schools.[10] The Voucher Law allows participating private schools to use public taxpayer dollars to refuse admission to and discriminate against students based on disability, religious beliefs, language ability, lack of

[10] For example, Evangelical Christian School in Memphis, a Category II private school, will only admit students with "one parent professing Christ as Savior." Evangelical Christian School, "How to Apply" (last visited July 22, 2022), *available at* https://www.ecseagles.com/admissions/visit.

Briarcrest Christian School in Shelby County, a Category II, III, and IV private school: (i) immediately expels any student who is pregnant; (ii) expels students for engaging in "inappropriate sexual behavior (including but not limited to premarital sexual relations, homosexuality, bisexuality or transgender related actions"; and (iii) may "decline to tour, process an application, extend an offer to enroll or continue the enrollment of any . . . student" if such student or their parent "is or appears to be failing to conform their actions or statements to biblical principles." https://www.briarcrest.com/admissions/student-and-family-policies/biblical-principles; https://www.briarcrest.com/admissions/student-and-family-policies/code-of-conduct.

financial means, citizenship status, gender identity, sexual orientation, or other factors. Public schools are prohibited by law from refusing admission or discriminating against students or families based on any of these characteristics or factors. Additionally, the Voucher Law does not require participating private schools to afford students the protections against bullying, intimidation, and harassment that public schools must provide under State law. T.C.A. §49-6-4501, *et seq*.

The Voucher Law also expressly permits participating private schools to deny special education programs and services to students with disabilities. T.C.A. §49-6-2603(3) (stating that program participation "has the same effect as a parental refusal to consent to the receipt of services under the Individuals with Disabilities Education Act"). The Voucher Law will thus divert funds appropriated by the General Assembly away from Shelby County Schools and Metro Nashville Public Schools to pay tuition, fees, and other expenses for private schools that are not required to, and emphatically do not, serve all students.

C. The Voucher Law Will Unlawfully Divert Hundreds of Millions of Dollars from Metro Nashville Public Schools and Shelby County Schools to Private Schools

The State intends to fund vouchers for the 2022-2023 school year through the BEP, which is Tennessee's "state school fund."[11] T.C.A. §49-3-101 *et seq*. The BEP computes how many State dollars a public school district must receive each year to be fully funded and

[11] The General Assembly recently amended the Voucher Law as part of its passage of the Tennessee Investment in Student Achievement, 2022 Tenn. Pub. Acts Ch. 966, to be codified at T.C.A. §§49-3-101, *et seq.* ("TISA"). The TISA sets forth a new funding formula for Tennessee public school districts, replacing the BEP. *See* Pub. Ch. 966 (H.B. 2143), 112th Gen. Assemb., Reg. Sess. (Tenn. 2022) ("TISA Public Act"), attached as Ex. 4. The TISA will not, however, be implemented until the 2023-2024 school year. TISA Public Act at §1 (amending T.C.A. §49-3-103(b)). As provided for in the Court's Order of July 20, 2022, McEwen Plaintiffs intend to amend their Complaint in light of TISA no later than August 3, 2022.

how many local dollars a public school district or locality must contribute. *Id*. Through the BEP, the General Assembly provides funding to maintain and support an adequate and substantially equal education for students in the State's system of public schools. *Id.*; *see also Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) ("*Small Sch. Sys. II*").

Under the Voucher Law, an amount representing the State and local shares of a school district's per-pupil BEP allocation – up to the combined statewide average of State and local per-pupil BEP allocations – must be subtracted "from the State BEP funds otherwise payable to" Metro Nashville Public Schools and Shelby County Schools for each student who uses a voucher. T.C.A. §§49-6-2605(a)-(b)(1). The BEP is funded with taxpayer dollars. McEwen Plaintiffs, as taxpayers and parents of public school children in the two targeted counties, pay State and local taxes to support their respective districts' public schools.

For each student who takes a voucher, Metro Nashville Public Schools and Shelby County Schools will receive over $8,000 less in State BEP funds. *See* Ex. 2. In the first year alone, millions in State BEP funds – potentially exceeding $40 million – could be diverted from the public schools operated by the two targeted districts to private schools.

The Voucher Law allows for a separate annual appropriation for "school improvement fund" grants to be awarded to Metro Nashville Public Schools and Shelby County Schools for the first three school years that vouchers are issued. T.C.A. §49-6-2605(b)(2)(A). These funds are "subject to appropriation," meaning they may not be fully funded, or funded at all, for each year they are available. *Id.* The "school improvement fund" grants – part of the unconstitutional Voucher Law – are funded with taxpayer dollars.

IV. ARGUMENT

Rule 65.01 of the Tennessee Rules of Civil Procedure provides this Court the authority to issue a temporary injunction to halt Defendants' implementation of the Voucher Law. The purpose of a temporary injunction is to maintain the *status quo* until a court can resolve the legal questions presented in the case. *Fannon v. City of LaFollette*, 329 S.W.3d 418, 430 (Tenn. 2010); *Memphis Retail Invs. Ltd. P'ship v. Baddour*, 1988 WL 82940 (Tenn. Ct. App. Aug. 10, 1988) (April 3, 2020 Decl., Ex. G). A temporary injunction may issue when:

> it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.04(2); *Keller v. Estate of McRedmond*, 495 S.W.3d 852 n.2 (Tenn. 2016) (quoting Tenn. R. Civ. P. 65.04). In determining whether to grant a temporary injunction, a trial court must consider the following four factors:

> (1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 347 (6th Cir. 1998). "These factors are not prerequisites to issuing an injunction but factors to be balanced." *Id*. at 347-48. The court need not consider each of these factors if fewer factors are dispositive. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985).

Each of these factors weighs heavily in favor of McEwen Plaintiffs.

A. McEwen Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Voucher Law Violates the Education Clause's Mandate of a Single System of Public Schools

The Voucher Law violates the Education Clause of the Tennessee Constitution because it contravenes the requirement that 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." ¶¶109-118.[12] TENN. CONST. art. XI, §12 (emphasis added). The Voucher Law diverts BEP funds that have been appropriated by the General Assembly for the purpose of maintaining and supporting Tennessee public schools to instead pay for tuition at private schools that need not comply with the requirements of the statewide system of public education.[13] The private schools that participate in the voucher program are not and cannot be part of the State of Tennessee's system of public schools. Furthermore, they are not obligated to comply with myriad requirements imposed on the State's system of public schools, including academic, accountability, and nondiscrimination standards.

The well-established doctrine of *expressio unius est exclusio alterius* ("*expressio unius*") means that the expression of one thing necessarily excludes another. 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

[12] "¶" and "¶¶" references are to the *McEwen* Complaint, filed March 2, 2020.

[13] The State school funding formula, the BEP, was designed to fulfill the State's constitutional obligation to provide for the maintenance and support of its system of free public schools. *Small Sch. Sys. II,* 894 S.W.2d at 738. But any use of public funds to support private education outside the system of free public schools would violate the Education Clause.

school system. McEwen Plaintiffs are likely to succeed on their claim that the use of public funds on private schools violates the constitutional requirement that the General Assembly provide education to Tennessee students solely by maintaining and supporting a single system of free public schools.

1. The Tennessee Constitution Requires the State to Fulfill the Education Clause's Mandates Solely Through a System of Free Public Schools

a. The Plain Language of Tennessee's Constitution, as Interpreted Repeatedly by Its Courts, Contemplates *One* Statewide System of *Public* Schools

The plain language of the Education Clause mandates that the State discharge its obligation thereunder by establishing and funding a single system of public education. Article XI, §12, states: "The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." In interpreting the Tennessee Constitution, the plain language controls. *Gaskin v. Collins*, 661 S.W.2d 865 (1983) ("When construing a constitutional provision we must give 'to its terms their ordinary and inherent meaning.'"). If the language used is clear and unambiguous, courts must ascertain the intent of the provision from the language itself. *Hatcher v. Bell*, 521 S.W.2d 799, 802 (1974). Pursuant to the plain language of Article XI, §12, the General Assembly must provide for a single system of public schools. As the Tennessee Supreme Court has declared, the General Assembly enacted the State school funding formula, the BEP, to fulfill its constitutional mandate to provide this system of public schools. *Small Sch. Sys. II*, 894 S.W.2d at 738. Thus, to divert BEP funding to schools outside the constitutionally mandated system of free public schools is unconstitutional.

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 *Tenn. Small Sch. Sys.* line of cases, the Tennessee Supreme Court held that the General Assembly's obligation under Article 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 Tenn. Small Sch. Sys. v. McWherter,* 91 S.W.3d 232, 241 (2002) ("*Small Sch. Sys. III*") ("We have now held on two occasions since 1988 that the legislature's constitutional mandate is to maintain and support a system of public education that affords substantially equal educational opportunities to all students.").

The Court made clear that 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, in reviewing the legislative history of the 1978 amendment to the Education Clause, the Court pointed to the discussion of the "free hand" the Legislature was given regarding the funding of public education programs. The Court made clear that the "free hand" was with regard to funding public schools, not with regard to the educational program required, as it was mandated that the Legislature provide equal educational opportunities across the State. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (1993) ("*Small Sch. Sys. I*"). In *Small Sch. Sys. II,* the Court observed that the BEP consisted of integral components, including funding, governance, and accountability, with "final responsibility upon the State officials for an effective educational system throughout the State." 894 S.W.2d at 739. The Court noted that "[e]ach of these factors relating to

funding and governance is an integral part of the plan and each is indispensable to its success." *Id.* The Court then ruled in both *Small Sch. Sys. II* and *Small Sch. Sys. III* that an earlier iteration of the BEP was unconstitutional because teachers' salaries, an essential component of the statewide system, were not equalized throughout Tennessee. *Small Sch. Sys. II*, 894 S.W.2d at 738; *Small Sch. Sys. III*, 91 S.W.3d at 233-34.

The *Small Sch. Sys.* decisions are consistent with a long line of Tennessee precedent. Tennessee courts have historically recognized that, 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 the Memphis City Schools 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); *State v. City of Knoxville,* 90 S.W. 289, 293 (Tenn. 1905).

Subsequent precedent confirms the principle that the State's obligation is to maintain a single system of public schools and that any education outside or in addition to that is not part of this single constitutionally mandated system. In *Crites. v. Smith,* 826 S.W.2d 459, 467 (Tenn. Ct. App. 1991), the Tennessee Court of Appeals, rejecting a challenge by homeschooling parents, upheld the authority of the State Commissioner of Education to set a strict deadline for notice to local school boards that a parent is withdrawing a child from the public school system. The Court reasoned that the deadline was necessary so as not to disrupt the public school system. The Court noted: "[w]hile absolute freedom and flexibility to attend or not attend public school or home school at will may be desirable to some, it does not comport with the orderly conduct of a school system provided for all the children of the

state." *Id.* Because home schooling occurred outside the public schools, it was clearly not part of the State's system of free schools.

Indeed, the State itself has recognized that the Tennessee Constitution contemplates one system of public education. In a 2018 opinion responding to an inquiry about the relative powers of the State Board and local boards of education, the Tennessee Attorney General concluded:

> Pursuant to [the] constitutional mandate [of Article XI, §12], the legislature has established ***a system of public education***, *see* Tenn. Code Ann. §49-1-101, and has created a state Board of Education, *see id.* §49-1-301. The legislature has given the state Board a broad range of powers and duties, including the authority to set various guidelines and policies for public schools and to establish accreditation and licensing standards for teachers and other educators and administrators. *Id.* §49-1-302 (listing the powers of the Board).

Hon. Antonio Parkinson, Tenn. Op. Atty. Gen. No. 18-34 (2018), at 1 (emphasis added). The Opinion continues: "In short, the legislature has created a state Board of Education composed of appointed individuals and has vested in that Board the ultimate authority to set the "'policies, standards, and guidelines' that govern ***the public school system*** in the State." *Id.* at 2 (emphasis added). This captures the State's own understanding of the means required to fulfill its obligation under Article XI, §12.

Moreover, Tennessee courts have consistently ruled that maintaining and supporting a system of ***public*** schools, and public schools alone, is a State function under the Education Clause. Numerous decisions confirm that maintaining the public education system is a State function. *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (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 the Court of Appeals ruled in *Metro. Gov't*, maintaining and

supporting ***private*** schools is not a State function.[14] 2020 WL 5807636, at *5 ("[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.") (emphasis in original). Thus, private schools cannot be part of the system of free public schools contemplated by Article XI, §12. Diverting the funds intended to maintain and support the public school system to schools outside that system both exceeds and undermines the State's Education Clause duty and is thus unconstitutional.

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 Article XI, §12 mandate by publicly funding private education outside the system of free public schools.

Expressio unius is an axiomatic rule of interpretation in Tennessee. "[I]t 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) ("Now 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) ("It is a well-established canon of statutory construction that

[14] The Supreme Court left the Court of Appeals' ruling on this point of law undisturbed.

'the mention of one subject in a statute means the exclusion of other subjects that are not mentioned.'") (quoting *Carver v. Citizen Util. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997)).

Article XI, §12 requires the General Assembly to fund a system of free public schools. Publicly funding private education exceeds that mandate, as the Education Clause explicitly requires a system of public schools, to the exclusion of a separate program of publicly funded private education. However, a publicly funded system of private education, separate and apart from the system of public schools, is exactly what the Legislature is attempting to establish through the Voucher Law – with wholly different, and minimal, standards regarding academic quality, accountability, and antidiscrimination protections. Moreover, the Voucher Law funds this separate system by diverting funding expressly intended to support and maintain the system of free public schools designated in Article XI, §12, thereby also frustrating the express mandate of the Education Clause. This separate program for funding private education is unconstitutional.

Other state courts have enjoined voucher programs on these very grounds. 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 Supreme Court held that 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.

Recently, a West Virginia court invalidated that state's voucher program on *expressio unius* grounds. In *Beaver v. Moore,* the court found the West Virginia Constitution's

Education Clause requirement of a "thorough and efficient system of free schools" meant that "the state of West Virginia cannot provide for nonpublic education or take any action which frustrates this obligation [to provide a system of public schools]." Ex. 5 at 65. The court further found that private education is not a constitutional interest of the State. *Id.* at 66. Tennessee's Education Clause is even more explicit than West Virginia's in requiring the General Assembly to not only maintain and support a system of free schools but "a system of free ***public*** schools." TENN. CONST. art. XI, §12 (emphasis added). Thus, funding private schools impermissibly exceeds the constitutional mandate.

Additional courts have acknowledged that 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*, for example, the Ohio Supreme Court concluded that 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." 711 N.E.2d 203, 212 (Ohio 1999).[15]

Tennessee's Education Clause explicitly lays out the manner in which the State must fulfill its obligation to provide adequate and equitable educational opportunity to all

[15] Similarly, in *Cain v. Horne*, a challenge to two voucher programs, the Arizona Supreme Court concluded that 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.'" 202 P.3d 1178, 1183 (Ariz. 2009) (quoting ARIZ. CONST. art. 11, §1).

Tennessee children. Interpreting the "plain meaning of Article XI, Section 12," the Tennessee Supreme Court has explained that 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 (second emphasis added). Similarly, in *Bush*, the Florida Supreme Court explained that 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)) (emphasis in original).

Likewise, in Tennessee's Education Clause, the generalized edict of the first sentence, providing that "[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, which proclaims: "[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. By contrast, the provision of the Education Clause dealing with higher education says: "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. Thus, attempting to provide publicly funded K-12 education through payment of private school tuition and expenses is a clear violation of the explicit mandates of Tennessee's Education Clause.

The State and Intervenor-Defendants have previously asserted in this litigation that the Voucher Law does not "impede," "extinguish," or "abolish" the system of public schools because public schools still exist as an option for parents who choose them. *McEwen*, State Defs' Mem. of Law in Support of Their Motion to Dismiss (Apr. 15, 2020), at 13-14; *McEwen*, Beacon Center of Tenn. & Institute for Justice's Mem. of Law in Support of Intervenor-Defendants' Joint Mtn. for Judgment on the Pleadings Under Rule 12.03 (Apr. 15, 2020), at 13-15; *McEwen*, Greater Praise Christian Academy, et al.'s Mem. of Law & Facts in Support of Mtn. to Dismiss Under Rule 12.02(6) (Mar. 27, 2020), at 15. This fact is immaterial to McEwen Plaintiffs' claim that the Voucher Law violates the State's constitutional obligation to maintain a single system of public schools. Use of public education funds for unaccountable private schools, ***in addition*** to the public school system, violates the constitutional requirement that the General Assembly maintain a single system of public education. TENN. CONST. art. XI, §12. As the Florida Supreme Court explained in *Bush*:

> Although parents certainly have the right to choose how to educate their children, [the Education Clause] ***does not***, as the Attorney General asserts, ***establish a "floor"*** of what the state can do to provide for the education of Florida's children. The provision mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.

919 So. 2d at 408 (emphases added). Even if the Voucher Law had no effect on the provision of education in public schools – which the Complaint alleges it does – the State's establishment of, and use of public education funds to support, the private school voucher program is wholly sufficient to state a claim that the Voucher Law violates the Education Clause.

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

It is uncontested that 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. ¶¶85-96. These private schools need not comply with the same academic, accountability, or governance standards as the State's public schools. ¶¶84-89. They can also discriminate against students based on characteristics such as disability, religion, and sexual orientation or gender identity. ¶¶90-95. Additionally, they can refuse to provide essential educational services, such as special education programs for students with disabilities. ¶¶93, 96.

Despite earlier mischaracterizations by Defendants, McEwen Plaintiffs' claim does not rest on the premise that entities participating in the voucher program become public schools. To the contrary, the operative fact is the voucher program's use of ***public*** funds on ***private*** education providers that are 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). The Voucher Law states that it does not give the Department of Education authority to "impose any additional regulation of participating schools or providers," T.C.A. §49-6-2609(b), and explicitly affirms that "[a] participating school or provider is autonomous and not an agent of this state." T.C.A. §49-6-2609(a).

It is precisely because private schools participating in the voucher program "remain private," as defendants have emphasized – and thus outside the reach of legal requirements regarding academic standards, accountability, and non-discrimination that govern the statewide system of public schools – that a voucher program funded with public education dollars violates the Education Clause of the Tennessee Constitution.

B. *McEwen* Plaintiffs Will Suffer Irreparable Harm if a Temporary Injunction Is Not Issued

"The loss of a constitutional right, 'even for a minimal period[] of time, unquestionably constitutes irreparable injury.'" *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769-70 (M.D. Tenn. 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015). "This rule has been applied in a variety of constitutional contexts." *Id.* at 769 n.11. Such harm has "no adequate remedy at law" and requires a temporary injunction pending resolution of the issues presented in the case. *See Barnes v. Ingram*, 397 S.W.2d 821, 825 (Tenn. 1965). Thus, "'when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.'" *Tanco*, 7 F. Supp. 3d at 769 (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)).

As set forth above, Article XI, §12 of the Tennessee Constitution requires the State to provide a "system of free public schools." TENN. CONST. art. XI, §12. The State's relentless attempt to publicly fund private schools and other private education providers violates the constitutional requirement that the General Assembly maintain a single system of public education. *Id.*

Absent a temporary injunction, McEwen Plaintiffs will suffer irreparable harm, *per se*, due to the violation of a constitutional right. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable injury."). Thus, the need for a temporary injunction to maintain the *status quo* and prevent further harm to McEwen Plaintiffs is manifest and urgent.

Moreover, McEwen Plaintiffs, as taxpayers, will also suffer irreparable harm from the unlawful diversion of public funds from the purpose for which they were intended. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (crediting plaintiff's contention that the misappropriation of public funds "will result in irreparable injury to the county and taxpayers"). "In such cases, the taxpayers have such a special interest in the subject matter as will authorize them to maintain an injunction." *State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963). Here, the Voucher Law has already unlawfully diverted over $1 million in public funds to ClassWallet for administration of the Voucher Law. *See* §III. If the State is permitted to continue to implement the Voucher Law for the 2022-2023 school year, funds will be unlawfully diverted from Shelby County Schools and Metro Nashville Public Schools to pay private school tuition. *See* §III.

In addition to the diversion of funds from McEwen Plaintiffs' children's school districts, these districts' planning and budgeting processes will also be thrown into disarray by the rushed rollout of the voucher program – and the attendant loss of students and funding – mere weeks before the school year is set to begin. At this point, myriad decisions, including staffing, have already been made. A temporary injunction will preserve the *status quo* and prevent the continued unlawful and unrecoverable expenditure of taxpayer dollars until such time as the Court is able to rule on the merits of McEwen Plaintiffs' claims.

C. The Balance of Harms Weighs Heavily in Favor of Granting McEwen Plaintiffs' Motion for a Temporary Injunction

In contrast to the irreparable harm McEwen Plaintiffs will suffer in the absence of an injunction, Defendants will suffer no harm from the injunction's issuance.

First, as of July 19, 2022, Intervenor-Defendant Greater Praise Christian Academy is still ineligible to participate in the voucher program as it is a Category IV school. *See* T.C.A. §49-6-2602(9); *see also* "Non-Public Schools List, updated July 19, 2022," *available at* https://www.tn.gov/education/school-options/non-public-schools.html (last visited July 21, 2022) (listing Greater Praise as a Category IV school). Greater Praise cannot be harmed by an injunction against a program in which it is not eligible to participate.

Second, the manner in which the State plans to begin the voucher program violates the Voucher Law itself, and enjoining the State from violating the Voucher Law itself cannot possibly constitute a legitimate harm. As outlined above, TDOE's "FAQ" for participating families states:

> For the 2022-23 school year, participating non-public schools will be required to fund the student expenses (tuition, fees, computers, etc.) and then submit an invoice to the department for reimbursement. The department will be

> competitively procuring an application and wallet platform that will be operational beginning in the 2023-23[sic] school year.

Ex. 3 at 12. Under the State's plan, instead of establishing an individual education savings account for each student, as the Voucher Law explicitly requires, participating schools will accept the student and seek reimbursement from TDOE at a later date, but the Voucher Law requires much more. *See* T.C.A. §49-6-2607(b) ("The department ***shall establish*** and maintain ***separate ESAs*** for ***each participating student*** and shall verify that the uses of ESA funds are permitted under §49-6-2603(a)(4) and institute fraud protection measures. Use of ESA funds . . . ***must be preapproved*** by the department.") (emphases added); *see also* April 3, 2020 Decl., Ex. C (requiring parents and students, not private schools, to "agree to use the funds ***deposited in the ESA***" for approved expenses) (emphasis added). The State Defendants' plan ***does not*** establish individual and separate ESAs for each participating student. It ***does not*** allow for preapproval of expenses by TDOE. Rather, as the private schools are providing the funding, the private schools are essentially providing the account – except without an actual ESA, without TDOE oversight, and without control by the participating student. This clearly contravenes the statute, as well as the Rules of the State Board of Education.[16]

State Defendants are not harmed by an injunction that prevents their attempts to launch a program so hastily that it violates statutory mandates and its own agency rules.

[16] Additionally, the State's new funding scheme appears to violate the Uniform Administrative Procedures Act ("UAPA"), *see* T.C.A. §4-5-202, which requires notice and a hearing when an agency promulgates rules. *See also* T.C.A. §9-6-2610 (requiring State board to promulgate rules under UAPA).

Simply put: like Greater Praise Christian Academy, State Defendants are not harmed when prevented from taking actions that are already foreclosed by the Voucher Law itself.

The Defendants' unlawful planned manner of disbursing voucher funds will also harm students and families that participate in the voucher rollout by exposing them to financial peril. With control of the costs completely in the hands of the private schools, voucher students and families will be financially responsible for costs that exceed the ESA amount with little to no control or foresight as to what those costs may be. *See* April 3, 2020 Decl., Ex. C. In addition, costs that are not preapproved will be deemed an "unapproved expenditure" by TDOE that could result in the account holder being personally financially responsible, removed from the program, and/or reported for fraud. *See* T.C.A. §49-6-2608(a)-(d). Finally, by Defendants' own account, voucher students who accept a seat at a private school could be financially responsible for unpaid tuition costs should the voucher program be found unconstitutional in the middle of the school year. *See Metro. Gov't*, Schuyler Aff., ¶7.

State Defendants are attempting to accomplish a months-long enrollment process in a matter of days. Many private schools, by the State Defendants' own account, have an enrollment deadline of June 1 for the following school year. *Metro. Gov't*, Schuyler Aff., ¶5. Yet State Defendants have given eligible students just weeks after private-school enrollment has ended to gain acceptance. *See* State of Tennessee, "Tennessee Education Savings Account Intent to Enroll," available at https://stateoftennessee.formstack.com/forms/esaintentapply; *see also* April 3, 2020 Decl., Ex. C (requiring proof of acceptance before funds are disbursed). It remains to be seen whether more than a handful of eligible students

can clear this hurdle before the school year begins, yet State Defendants are prepared to expend likely millions of dollars in costs, labor, and litigation to ensure that students receive State funding to subsidize private tuition. The State's transparent attempt to manufacture reliance by families on vouchers for the 2022-2023 school year through a botched and hurried rollout of the voucher program, despite actual notice of impending motions for injunctive relief (of which the State gave parents and families no notice), cannot possibly be rewarded by any balancing of the equities in Defendants' favor.

In fact, an injunction is likely to benefit, not harm, Defendants. An injunction will prevent the significant disruption to schools, students, and families that would be caused if the Voucher Law is implemented now and then found to be unconstitutional after the beginning of the 2022-2023 school year. A case from within the Sixth Circuit, *Garrett v. Bd of Educ. of Sch. Dist. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991), is directly on point. There, plaintiffs sued the Board of Education of the Detroit school district alleging that the board violated the U.S. and Michigan Constitutions, as well as federal and State statutes, by establishing male-only academies purportedly designed "to address the high unemployment rates, school dropout levels and homicide among urban males." *Id.* at 1006. In granting a temporary injunction, the District Court noted that although admitting females to the male-only academies would delay their start, "greater disruption would result if plaintiffs won this suit and the Academies were then aborted." *Id.* at 1013. As in the instant case, "injunctive relief would fulfill the traditional purpose of preserving the 'existing state of things until the rights of the parties can be fairly and fully investigated and determined.'" *Id.* (quoting *DeLorean*, 755 F.2d at 1229). Indeed, as in this case, because the *Garrett* plaintiffs were

likely to succeed on their constitutional claims, "no substantial harm would result from preventing the operation of an unconstitutional school." *Id.*

Moreover, no one has a right to a private school voucher. The Tennessee Constitution guarantees all children a right to a public education, TENN. CONST. art. XI, §12, but there is no corresponding right to a private education. Furthermore, no rights are created under an unconstitutional law. *See People v. Weintraub*, 313 N.E.2d 606, 608 (Ill. App. Ct. 1974) ("[I]f [a] law is unconstitutional, there is no law and there can be no question about proper procedures for protecting [one's] rights under the law because in theory [their] rights have never been threatened or affected . . . ."), *aff'd & remanded sub nom. People v. Meyerowitz*, 335 N.E.2d 1 (Ill. 1975). Therefore, an injunction will not deprive anyone of their constitutional rights.

D. The Public Has a Strong Interest in This Court Granting McEwen Plaintiffs' Motion for a Temporary Injunction

The public interest weighs heavily in favor of issuing an injunction.

First, courts have recognized that there is a public interest in preventing the implementation of an unconstitutional statute. *Martin-Marietta Corp. v. Bendix Corp*., 690 F.2d 558, 568 (6th Cir. 1982); *see also Garrett*, 775 F. Supp. at 1014 (adopting plaintiffs' argument "that the public interest is better served by preventing the opening of an unconstitutional educational facility"). The implementation of the Voucher Law violates the Education Clause of the Tennessee Constitution. Therefore, it is in the public interest to temporarily enjoin implementation of this unconstitutional statute.

Second, "'[p]ublic interest is near its zenith when . . . seeing that public funds are not purloined' or wasted." *Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1*, 131 F.3d 564,

576 (6th Cir. 1997). Defendants have already spent more than $1 million on the voucher program – on a wallet platform that apparently will not even be used[17] – and stand to divert tens of millions of dollars more in taxpayer funds to private schools if this unconstitutional program is not enjoined immediately. It is contrary to the public interest for the State to spend taxpayer dollars on programs that are likely to be found unconstitutional. Moreover, the TDOE has begun implementation of the program in a manner that contravenes the Voucher Law itself. It is in the public interest to prevent these illegal and *ultra vires* actions.

Third, it is in the public interest for this Court to preserve the *status quo* at this juncture. Preserving the *status quo* allows the Court to rule on the merits of the case without harming the interests of any party. *See Fannon*, 329 S.W.3d at 430; *Memphis Retail Invs. Ltd. P'ship*, 1988 WL 82940, at *2 (April 3, 2020 Decl., Ex. G). It is critical for the Court to grant a temporary injunction until it rules on the merits of the Voucher Law. Maintaining the *status quo* benefits students eligible for vouchers and those who would remain in the targeted school districts. As explained above, the State intends to move forward with the voucher program even with the new school year just weeks away. If the Voucher Law is not enjoined but is subsequently struck down as unconstitutional, students may manage to secure a voucher at the last minute only to return midyear to Shelby County Schools and Metro Nashville Public Schools. This will cause significant disruption to all aspects of their

[17] TDOE's FAQ for Families states: "The department ***will be*** competitively procuring an application and wallet platform that will be operational beginning in the 2023-23 [sic] school year." Ex. 3 at 12 (emphasis added). This suggests that TDOE has not already procured such a platform despite its earlier contract with ClassWallet.

education, as well as to the operation of the districts serving their public school peers and to the daily functioning of the classrooms to which they will return.

Maintaining the *status quo* during the pendency of the litigation best serves the interests of all parties and the public at large. Continued implementation of the Voucher Law is contrary to the public interest.

V. CONCLUSION

For the foregoing reasons, McEwen Plaintiffs respectfully request that the Court grant their Motion for a Temporary Injunction and issue an order enjoining implementation and enforcement of the Voucher Law.

DATED: July 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

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