

S.C. NO. M2020-00683-SC-R11-CV

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

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

Plaintiffs/Respondents,

vs.

TENNESSEE DEPARTMENT OF  
EDUCATION, et al.,

Defendants/Petitioners.

and

NATU BAH, et al.,

Intervenor-  
Defendants/Petitioners.

) Davidson County Chancery Court  
) No. 20-0143-II

) Court of Appeals of Tennessee  
) at Nashville  
) No. M2020-00683-COA-R9-CV

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*AMICI CURIAE* BRIEF OF McEWEN PLAINTIFFS  
IN SUPPORT OF PLAINTIFFS

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## I. INTRODUCTION

*Amici*, the McEwen Plaintiffs, respectfully submit this brief in support of Plaintiffs Metropolitan Government of Nashville and Davidson County and Shelby County Government (the “Metro Plaintiffs”).<sup>1</sup>

“[O]btaining permission to appeal pursuant to Rule 11 is not, by any means, automatic. Instead, this Court must be convinced that an important consideration justifies granting review.” *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997). Here, the Chancery Court and Court of Appeals both correctly held that Metro Plaintiffs have standing to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program (“Voucher Law”) and that it plainly violates the Home Rule provision of the Tennessee Constitution. Because Defendants cannot demonstrate that *any* of the Rule 11 considerations, or any other credible reason, supports this Court’s review, Defendants’ applications for permission to appeal should be denied.

*First*, questions of public interest do not support granting the applications. Private school vouchers were born of racism, created to preserve segregated schools following *Brown v. Board of Education*, and even in the modern era increase racial isolation. No credible evidence supports the contention that voucher programs improve educational outcomes; in fact, students attending private schools using vouchers often have worse educational outcomes compared to their public school

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<sup>1</sup> To promote judicial efficiency, the McEwen Plaintiffs avoid duplicating the Metro Plaintiffs’ briefing and limit their submission to a small number of key points that complement the Metro Plaintiffs’ position.

peers. Private school voucher programs such as the Voucher Law also harm public school students by concentrating in public schools those students with elevated needs who require increased educational resources – students private schools often refuse to educate – while simultaneously draining already inadequate resources from these same public schools. The Chancery Court and Court of Appeals correctly struck down the Voucher Law, and no public interest supports this Court reviewing Defendants’ baseless attempts to revive a program that would cause substantial and irreparable harm to Tennessee students.

**Second**, contrary to Defendants’ contentions, there are no important questions of law for this Court to resolve regarding the State’s ability to fulfill its constitutional duty under the Education Clause. The Intervenor-Defendants’ claim, for example, that this case has far-reaching consequences “for the ability of the state to meet its constitutional obligation to promote education,” could not be further from the truth. As the Court of Appeals correctly held, the Education Clause requires the State to provide an adequate system of “free **public** schools.” *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, No. M202000683COAR9CV, 2020 WL 5807636 at \*5 (Tenn. Ct. App. Sept. 29, 2020); Tenn. Const. Art. XI, §12 (emphasis added). The Voucher Law, which funds private schools **at the expense of public schools**, cannot credibly be characterized as supporting this constitutional mandate.

**Third**, Defendants’ claim that the Court of Appeals ruling would prevent the State from enacting education “pilot programs” is wrong. The Voucher Law is a pilot program in name only, its geographic restrictions

being solely a consequence of the fact that legislators refused to support a voucher program if it would ensnare students in their own districts. And the State has the freedom to innovate in education in any number of ways, so long as such programs comply with all parts of the Tennessee Constitution, which the Voucher Law does not. Providing adequate funding to all public schools, instead of taking resources away from them through initiatives such as the Voucher Law, is but one such “innovation” the State could implement if it truly sought to fulfill its constitutional duty to Tennessee’s children.

The Chancery Court and Court of Appeals correctly struck down the Voucher Law, and Defendants’ applications should be denied.

## II. BACKGROUND

In 2019, Tennessee’s General Assembly passed the Voucher Law, which creates a private school voucher program targeting Davidson and Shelby Counties. Appendix to McEwen Plaintiffs’ *Amici* Brief (“McEwen App.”), Ex. 1 at APP016. By design, the only two counties that can *ever* be subject to the Voucher Law are Shelby and Davidson. McEwen App., Ex. 1 at APP017-18; McEwen App., Ex. 2 at APP053-54. The voucher program established by the Voucher Law is funded through the Basic Education Program (“BEP”), Tennessee’s statutory formula for calculating the amount of funding each public school district must spend to provide an adequate education to its students. T.C.A. §49-3-101, *et seq.*; McEwen App., Ex. 1 at APP013-14, APP019. The BEP amount consists of a share the State must contribute from state funds and a share the county must contribute from local tax dollars. T.C.A. §49-3-356; McEwen App., Ex. 1 at APP014. The Voucher Law mandates that, for

each student who uses a voucher, an amount representing the required state *and* local shares of a school district’s per-pupil BEP allocation must be subtracted “from the State BEP funds otherwise payable to” Metro Nashville Public Schools and Shelby County Schools. T.C.A. §§49-6-2605(a)-(b)(1); McEwen App., Ex. 1 at APP020.

In February and March 2020, respectively, the Metro Plaintiffs and the McEwen Plaintiffs each filed a lawsuit in Davidson County Chancery Court challenging the constitutionality of the Voucher Law. Both lawsuits allege that the Voucher Law violates the Tennessee Constitution’s Home Rule provision because it affects only Davidson and Shelby Counties but did not require or receive local approval from those counties. The McEwen Plaintiffs are residents and taxpayers in Shelby and Davidson Counties, they pay state and local taxes to support their districts’ public schools, and nine of the McEwen Plaintiffs are parents of public school students in Metro Nashville Public Schools or Shelby County Schools. McEwen App., Ex. 1 at APP006-09; McEwen App., Ex. 3 at APP092-137.

On March 27, 2020, the Metro Plaintiffs filed a motion for summary judgment on their Home Rule claim. On April 3, 2020, the McEwen Plaintiffs filed a motion for temporary injunction on claims including Home Rule, detailing the irreparable harm they would suffer if the voucher program were implemented in the 2020-21 school year. McEwen App., Ex. 2.

After hearing argument in both cases jointly, on May 4, 2020, the Chancery Court issued a Memorandum and Order (the “Summary Judgment Order”) granting the Metro Plaintiffs’ motion for summary



judgment and enjoining Defendants from implementing and enforcing the Voucher Law. R. at 1124. The Court also issued a separate Order finding the McEwen Plaintiffs’ motion for temporary injunction moot in light of the Summary Judgment Order, stating that “the Court has granted the relief the [McEwen] Plaintiffs [sought] with their motion.” McEwen App., Ex. 4 at APP447. The Court of Appeals and this Court denied Defendants’ requests to stay the Chancery Court’s injunction during the pendency of appeal.

On September 29, 2020, the Court of Appeals issued a unanimous opinion affirming the Chancery Court’s judgment. *Metro. Gov’t of Nashville & Davidson Cnty.*, 2020 WL 5807636. On *de novo* review, the Court of Appeals concluded that the Metro Plaintiffs had standing to bring their action because they alleged a distinct and palpable injury based on the direct fiscal impact of the Voucher Law on their county budgets. *Id.* at \*2-\*4.

The Court of Appeals also found, again on *de novo* review, that the Voucher Law violated the Home Rule provision. *Id.* at \*4-\*8. Rejecting Defendants’ contention that the Home Rule provision could never apply to the Voucher Law because “[t]he Tennessee General Assembly has exclusive authority . . . to make decisions regarding the provision of education” under Article XI, §12, of the Tennessee Constitution, the Court of Appeals correctly held that the constitutional requirement to “provide for the maintenance, support and eligibility standards of a system of *free public schools*” did *not* give the State plenary authority to support private schools at the expense of public schools. *Id.* at \*5 (emphasis added). Because the State had partnered with local

jurisdictions for over 100 years in an attempt to fulfill its constitutional mandate to provide adequate education, and because the Voucher Law affects the counties in their role of funding public education, the Home Rule provision could indeed apply. *Id.* And, based on well-established authority, the Court of Appeals easily concluded that the Voucher Law violated the Home Rule provision because it was “[1] private or local in form or effect [2] applicable to a particular county or municipality [3] either in its governmental or proprietary capacity.” *Id.* at \*8. As a result, the Voucher Law was “unconstitutional as applied to [the Metro Plaintiffs] due to the lack of the required referendums or votes of the county commissions.” *Id.*

Between November 24 and 25, 2020, Defendants and Intervenor-Defendants filed applications to appeal the Court of Appeals’ order. On December 1, 2020, the Alliance for School Choice, Southern Christian Leadership Conference-Memphis Chapter, and Latinos for Tennessee (“Alliance *Amici*”) lodged an *amici curiae* brief in support of Defendants’ applications. On December 8, 2020, several Tennessee legislators (“Legislators *Amici*”), including Brian Kelsey, who is also counsel to certain Intervenor-Defendants in this case and voted for the Voucher Law, lodged an *amici curiae* brief in support of Defendants.

### III. ARGUMENT

#### A. Defendants’ Assertion that This Case Presents a Question of Significant Public Interest Is Based on the False Premise that Vouchers Benefit Students and Communities

The State Defendants’ assertion that the Voucher Law represents a “major piece of social justice legislation” (State Application at 14) is

false. Private school voucher policies have racist origins, and contemporary voucher programs increase racial segregation. Furthermore, ever-mounting empirical evidence rebuts Defendants' contentions that vouchers will improve educational opportunities and outcomes for Tennessee students.

The question whether private school vouchers constitute good public policy is not before this Court. However, the Court should not grant review under Rule 11 based on the contention that it is in the public interest to determine whether the Voucher Law can be constitutionally resuscitated. In addition to violating the state constitution, the Voucher Law is demonstrably contrary to the best interests of Tennessee students.

### **1. Vouchers Have Racist Origins and Increase School Segregation**

The history of the private school voucher movement reveals its roots in anti-integrationist efforts to preserve racial segregation.<sup>2</sup> In the wake of *Brown v. Board of Education*, southern states passed dozens of laws attempting to stifle racial integration, including numerous private school voucher programs.<sup>3</sup> Over the years, however, societal changes forced the rhetoric surrounding the tuition voucher movement to shift away from its overtly racist beginnings. One important factor was that overt racism proved a losing argument with the courts, which repeatedly struck down voucher schemes as unconstitutional. As one court explained:

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<sup>2</sup> See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 Tenn. L. Rev. 359, 364 (1997). See also Steve Suitts, *Overturing Brown: The Segregationist Legacy of the Modern School Choice Movement* (2020).

<sup>3</sup> O'Brien, *supra*, at 392-93.

The evidence compels our conclusion that the tuition grants have fostered the creation of private segregated schools. The statute . . . encourages, facilitates, and supports the establishment of a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools.

*Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969).

A 2017 report by the Center for American Progress detailed the “[s]ordid history of school vouchers,” starting with the segregation academies designed to avoid desegregation orders during Jim Crow.<sup>4</sup> The report found that private schools tend to have the largest overrepresentation of White students in the country, and “the strongest predictor of white private school enrollment is the proportion of black students in the local public schools.”<sup>5</sup> The report also described Indiana’s private school voucher program as a “case study” for the segregating effects of vouchers, noting that, even without a racial motivation, “Indiana’s voucher program increasingly benefits higher-income white students, many of whom are already in private schools, and diverts funding from all other students who remain in the public school system.”<sup>6</sup>

Several other recent studies have examined the racial composition of private schools and shown the effects of voucher policies. One report showed White students were overrepresented in private schools, while

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<sup>4</sup> Chris Ford, Ctr. for Am. Progress, *The Racist Origins of Private School Vouchers* 2 (July 12, 2017), <https://cdn.americanprogress.org/content/uploads/2017/07/12184850/VoucherSegregation-brief2.pdf>.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 8.

Hispanic and African American students, as well as students from low-income families, were underrepresented.<sup>7</sup> Another 2018 report found enrollment in the Washington, D.C. voucher program had declined over the years and become less racially diverse, with 70% of participating students enrolled in heavily segregated schools.<sup>8</sup> A 2017 Century Foundation study concluded that, “[o]n balance, voucher programs are more likely to increase school segregation than to promote integration or maintain the *status quo*.”<sup>9</sup> Its analysis of the Louisiana voucher program confirmed “patterns noted in demographic studies of voucher users and private school attendance: that black students typically used vouchers to leave public schools where their race was overrepresented, but white students tended to leave public schools where their race was underrepresented.”<sup>10</sup> Although proponents of voucher programs no longer tout a segregationist intent, vouchers continue to have significant segregative effects. The public interest is in no way served by resurrecting a policy that would impose these harmful effects on Tennessee schools.

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<sup>7</sup> Jongyeon Ee, et al., UCLA Civil Rights Project, *Private Schools in American Education: A Small Sector Still Lagging in Diversity* 5 (Mar. 5, 2018), [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/Ee-Orfield-Teitell-Private-School-Report\\_03012018.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/Ee-Orfield-Teitell-Private-School-Report_03012018.pdf).

<sup>8</sup> Mary Levy, UCLA Civil Rights Project, *Washington, D.C.’s Opportunity Scholarship Program: Civil Rights Implications* 6, 16-19, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/washington-d.c.s-voucher-program-civil-rights-implications/Levy-DC-VOUCHER-PAPER-FINAL-TO-POST-030218C.pdf>.

<sup>9</sup> Halley Potter, The Century Foundation, *Do Private School Vouchers Pose a Threat to Integration?* (Mar. 21, 2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration>.

<sup>10</sup> *Id.*

## 2. Vouchers Negatively Affect Educational Outcomes

Contrary to the claims of Defendants and their supporting *amici*, research has shown time and again that voucher programs do not improve, and indeed often negatively affect, the academic achievement of students who use vouchers to attend private schools.<sup>11</sup> A 2019 evaluation by the U.S. Department of Education found that the Washington, D.C. voucher program had no statistically significant effect on reading or math outcomes after three years.<sup>12</sup> A 2019 University of Arkansas study of the Louisiana voucher program found that, after four years, voucher students “performed *noticeably worse* on state assessments than their [public school] control group counterparts.”<sup>13</sup> The data showed “large negative effects,” especially in math.<sup>14</sup> A 2019 companion study found participation in the Louisiana voucher program did not improve rates of

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<sup>11</sup> The Intervenor-Defendants specifically claim the Voucher Law would allow students to attend “high-quality schools like Intervenor-Defendants Greater Praise Christian Academy.” LJC Application for Permission to Appeal at 23. Yet there is no evidence in the record *whatsoever* regarding the quality of Greater Praise Christian Academy, which is classified as a Category IV school and is not even accredited by the State. Tenn. Dep’t of Educ., *NonPublic Schools*, “Current List of Nonpublic Schools” (Nov. 20, 2020), <https://www.tn.gov/education/school-options/non-public-schools.html>. Under the Voucher Law, it is therefore ineligible to participate in the voucher program, raising serious questions as to whether it has standing to participate in this action. T.C.A. §49-6-2602(9) (participating schools must meet the requirements established by the Department of Education and the State Board of Education for Category I, II, or III private schools).

<sup>12</sup> Ann Weber, et al., U.S. Dep’t of Educ., Inst. of Educ. Sci., *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied* 4-8 (May 2019), <https://ies.ed.gov/ncee/pubs/20194006/pdf/20194006.pdf>.

<sup>13</sup> Jonathan Mills & Patrick Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement after Four Years*, Univ. of Ark. Working Paper Series 4 (2019), <http://www.uaedreform.org/wp-content/uploads/Mills-Wolf-LSP-Achievement-After-4-Years-final.pdf> (emphasis added).

<sup>14</sup> *Id.* at 24.

college enrollment.<sup>15</sup> A 2018 longitudinal study found that low-income students in Indiana who switched from public to private schools using vouchers experienced, on average, a statistically significant loss in mathematics achievement during the first year compared to matched students who remained in public schools, and this loss remained consistent regardless of the length of time spent in private school.<sup>16</sup> And a 2016 study of the Ohio voucher program, funded by voucher proponents, found voucher students “fared worse academically compared to their closely matched peers attending public schools” and that “[s]uch impacts also appear to persist over time.”<sup>17</sup> In fact, of nine rigorous, large-scale studies on vouchers in the last five years, some conducted by voucher advocates, two showed no effect on learning and seven showed detrimental effects.<sup>18</sup>

Alliance *Amici*'s assertion that voucher programs are highly desired by parents, and that they are popular due to their effectiveness, is also

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<sup>15</sup> Heidi H. Erickson, Jonathan Mills & Patrick Wolf, *The Effect of the Louisiana Scholarship Program on College Entrance*, Univ. of Ark. Working Paper Series (2019), [http://www.uaedreform.org/wp-content/uploads/Erickson-Mills-Wolf-LSP-Attainment\\_041719-final.pdf](http://www.uaedreform.org/wp-content/uploads/Erickson-Mills-Wolf-LSP-Attainment_041719-final.pdf).

<sup>16</sup> Joseph R. Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 37 J. Pol. Anal. & Management 783, 796 (2018). <https://onlinelibrary.wiley.com/doi/abs/10.1002/pam.22086>.

<sup>17</sup> David Filgio & Krzysztof Karbownik, Thomas B. Fordham Inst., *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effect 2* (July 2016), [https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report\\_online%20edition.pdf](https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report_online%20edition.pdf).

<sup>18</sup> Christopher Lubienski & Joel Malin, *The New Terrain of the School Voucher Wars*, The Hill (Aug. 30, 2019), <https://thehill.com/blogs/congress-blog/education/459400-the-new-terrain-of-the-school-voucher-wars>. See also Martin Carnov. Econ. Policy Inst., *School Vouchers Are Not a Proven Strategy for Improving Student Achievement* (2017), <https://www.epi.org/publication/school-vouchers-are-not-a-proven-strategy-for-improving-student-achievement/>.

belied by empirical evidence. When voucher proposals have been put directly to voters, they have consistently been rejected.<sup>19</sup> Indeed, Tennessee’s existing voucher program, for students with disabilities, attracted just 137 out of 42,000 eligible students in the 2018-19 school year.<sup>20</sup> And the Voucher Law itself was only narrowly approved by the legislature after most representatives received assurances that it *would not* apply to their districts. McEwen App., Ex. 2 at APP053-58.

### **3. Vouchers Harm Public Schools and Their Students by Further Depriving Them of Scarce Resources**

Many U.S. public schools – including Tennessee’s – are chronically underfunded.<sup>21</sup> Contrary to *amici’s* claims that vouchers save school systems money (Alliance Amici Br. at 37-38), research shows that diverting public education funding to private school voucher programs exacerbates public schools’ severe resource deficiencies. Because schools need adequate funding in order to provide all students with the programs and supports necessary for a high quality education,<sup>22</sup> this reality also

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<sup>19</sup> Rob Boston, *The People Have Spoken: Private School Vouchers Have a Long Track Record of Failure at the Ballot Box*, Church and State Magazine (Jan. 2019), <https://www.au.org/church-state/january-2019-church-state/featured/the-people-have-spoken-private-school-vouchers-have>.

<sup>20</sup> Marta Aldrich, *Few Students with Disabilities Use Tennessee Voucher Program, Now in Its Second Full Year*, Chalkbeat (Feb. 28, 2019), <https://tn.chalkbeat.org/2019/2/28/21107276/few-students-with-disabilities-use-tennessee-voucher-program-now-in-its-second-full-year>.

<sup>21</sup> Danielle Farrie, Robert Kim & David G. Sciarra, Education Law Center, *Making the Grade 2019: How fair is school funding in your state?* (2019), <https://edlawcenter.org/research/making-the-grade/>.

<sup>22</sup> See, e.g., C. Kirabo Jackson, et al., *Do School Spending Cuts Matter? Evidence from the Great Recession*, Nat’l Bureau of Econ. Research, NBER Working Paper Series (Jan. 2018), <https://www.nber.org/papers/w24203.pdf> (finding that a drop in



discredits *amici*'s claim that voucher programs benefit and improve the public schools they in fact starve of essential resources. *Id.* at 18-20.<sup>23</sup>

The claim that vouchers save money is a fiction. A 2018 study, for example, found that the cost of educating a student in an Arizona private school voucher program was 75% higher than the cost of educating a public school student.<sup>24</sup> A study of Wisconsin's voucher program showed that public school districts risk losing a significant portion of their state aid as the number of vouchers increases, concluding that the program's expansion posed "a significant fiscal threat to public schools."<sup>25</sup> Furthermore, funds diverted to voucher programs are often subject to fraud and waste; in fact, fraudulent spending has been uncovered in Tennessee's existing voucher program for students with disabilities.<sup>26</sup>

Moreover, public education systems bear substantial fixed costs in operating their public schools, such as facilities repair and maintenance,

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per-pupil spending reduced test scores and college-going rates and had a disproportionate impact on students living in poverty).

<sup>23</sup> To support both these propositions, the Alliance Amici rely on *The 123s of School Choice*, claiming this analysis surveys the existing literature. However, a National Education Policy Center review of last year's edition found the report to be "a misrepresentation of what research has been conducted" on vouchers. T. Jameson Brewer, Nat'l Educ. Policy Ctr., *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice: 2019 Edition* 12 (2019), <https://nepc.colorado.edu/sites/default/files/reviews/TTR%20Brewer.pdf>.

<sup>24</sup> Dave Wells, Grand Canyon Inst., *\$10,700 Per Student: The Estimated Cost of Arizona's Private School Subsidy Programs*, (2018), <https://grandcanyoninstitute.org/10700-per-student-the-estimated-cost-of-arizonas-private-school-subsidy-programs/>.

<sup>25</sup> Ellie Bruecker, Nat'l Educ. Policy Ctr., *Assessing the Fiscal Impact of Wisconsin's Statewide Voucher Program* 4-5 (2017), [https://nepc.colorado.edu/sites/default/files/publications/PM%20Bruecker%20Funding\\_0.pdf](https://nepc.colorado.edu/sites/default/files/publications/PM%20Bruecker%20Funding_0.pdf).

<sup>26</sup> Kimberlee Kruesi, *School Vouchers: State Records Provide Few Details about Funds Misspent by Families*, *Tennessean* (Jan. 15, 2020), <https://www.tennessean.com/story/news/2020/01/15/school-vouchers-tennessee-state-issued-debit-cards-misspending/4483126002/>.

teacher and staff pensions, and long-term contracts. Because voucher students exit their public school districts from different schools, grade levels, and classrooms, districts are not able to proportionately reduce fixed costs to fully cover the loss of funding diverted to voucher programs.<sup>27</sup> Indeed, the Court of Appeals below found that the reimbursements contained in the Voucher Law do not “make the counties whole” and, in any case, are subject to uncertain appropriation. *Metro. Gov’t of Nashville & Davidson Cnty.*, 2020 WL 5807636, at \*3.

Additionally, voucher programs shift significant portions of education costs to families. Whereas public schools provide essential services such as transportation, special education, and free or reduced-price lunches for qualifying students, these services often come at an additional cost to families using private school vouchers.<sup>28</sup>

Finally, voucher programs can concentrate in public schools those students with elevated needs who require increased educational resources. Because private schools – including those permitted to participate in the voucher program under the Voucher Law – may refuse to admit or to provide adequate services for students with disabilities, English learners, and other students who may require additional resources to access equitable educational opportunities, these students are more frequently educated in public schools. Private school vouchers

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<sup>27</sup> See, e.g., Stuart Yeh, *The Cost Effectiveness of Five Policies for Improving Student Achievement*, 28(4) Am. J. Evaluation 416, 425-27 (2007), <https://journals.sagepub.com/doi/10.1177/1098214007307928>.

<sup>28</sup> Meghan Casey Whittaker, *The Average Voucher Doesn’t Cover Full Cost of Private School, NCLD Data Analysis Shows*, Understood (2017), <https://www.understood.org/en/community-events/blogs/the-inside-track/2017/11/21/the-average-voucher-doesnt-cover-full-cost-of-private-school>.

divert the funds essential to provide high need students, and all public school students – including the *McEwen* Plaintiffs’ children – with equitable, high-quality educational opportunities.

The notion that the public interest demands review of the Court of Appeals decision striking down the Voucher Law depends entirely on the premise that implementing the voucher program would advance the interests of the public. However, this assertion is contrary to the abundant evidence demonstrating the negative effects of private school voucher programs on students, schools, and communities. Therefore, “the need to secure settlement of questions of public interest” does not support granting Defendants’ applications. Tenn. R. App. P. 11(a).

**B. Defendants’ Arguments in Favor of Review Are Based on the Incorrect Contention that the Voucher Law Falls Within the State’s Education Clause Duty**

The State Defendants’ argument that this case presents important legal questions revolves around their faulty contentions about the relationship of the Voucher Law to the State’s duty under the Education Clause of the Tennessee Constitution. State Application at 15. Specifically, the State Defendants claim the Court of Appeals’ ruling will allow counties and municipalities to use the Home Rule Amendment to thwart the State’s ability to carry out its constitutional duty under the Education Clause. *Id.* Similarly, the Intervenor-Defendants claim this case has far-reaching consequences “for the ability of the state to meet its constitutional obligation to promote education.” Beacon/IJ Application at 20. The Legislators-*Amici* also contend that the ruling interferes with “extensive authority the General Assembly has under state

constitutional provisions – to provide equal educational opportunity to students in public schools.” Legislators-*Amici* Brief at 13. However, Defendants’ and *amici*’s arguments are based on the flawed assumption that establishing and funding a private school voucher program is part of the State’s power and duty under the Education Clause.

As the Court of Appeals held, this assumption is wrong: “We note that the plenary authority derived from article XI, section 12 relates to public schools, not private ones.” *Metro. Gov’t of Nashville & Davidson Cnty.*, 2020 WL 5807636, at \*5. In their *amicus* brief to the Court of Appeals, the *McEwen* Plaintiffs explained that “the State’s function – indeed, its constitutional obligation – is to provide a system of free public schools. Tenn. Const. Art. XI, §12. It has no corresponding obligation to fund private schools.” *McEwen App.*, Ex. 5 at APP463. Because the purpose and function of the Voucher Law is to fund private schools, and not the public school system, the law does not implicate a state function at all.<sup>29</sup>

Indeed, Defendants and Legislators-*Amici* concede that the State’s constitutional role is to provide a public school system. State Application at 18-19 (quoting *Tenn. Small Sch. Sys. v. McWherter (Small School Systems I)*, 851 S.W.2d. 139, 156 (Tenn. 1993) (“The constitution contemplates that the power granted to the General Assembly will be

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<sup>29</sup> In fact, by diverting BEP funds intended for public schools in the *McEwen* Plaintiffs’ districts to instead fund private schools, the Voucher Law impedes fulfillment of the State’s constitutional duty to establish and maintain a public school system. *McEwen App.*, Ex. 1 at APP020-25, APP030-32. As the Court of Appeals noted, the funds Defendants claim would reimburse the counties are not replacements for BEP funding and are not guaranteed. *Metro. Gov’t of Nashville & Davidson Cnty.*, 2020 WL 5807636, at \*3.

exercised to accomplish the mandated result, a **public school system** that provides substantially equal educational opportunities to the school children of Tennessee.”) (emphasis added)); *id.* at 23 (citing *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (noting “the legislature has ‘plenary and exclusive authority’ to provide for a **public-school system**”) (emphasis added)); *see also* Legislators-*Amici* Brief at 11 (noting that the General Assembly has the “power and authority over **public education**” (quoting *S. Constructors, Inc.*, 58 S.W.3d 706) (emphasis added)). Thus, contrary to Defendants’ contentions, the Court of Appeals did not render a “sketchily-reasoned” decision that the Voucher Law is not a state education function (State Application at 16), but rather one grounded in the plain language of the Education Clause and in the case law interpreting it – precedent upon which Defendants and Legislators-*Amici* themselves rely.

Moreover, because enacting and implementing the Voucher Law is not a state constitutional function, there is no need for this Court to exercise its supervisory authority to correct the standard of review. Defendants erroneously contend that the Court of Appeals’ conclusion that the Voucher Law was outside the scope of the Education Clause, and therefore subject to the Home Rule Amendment, was based on an “unsupported construction” that providing private school vouchers is not part of the State’s constitutional education function. State Application at 27. As explained above, based on the plain language of the Education Clause and longstanding state precedent, that is the only interpretation the Court of Appeals could possibly make. In fact, it is Defendants and

Legislators-*Amici* who strain credulity by arguing that a law funding private schools is somehow part of the State’s plenary power to establish a public school system. Defendants and Legislators-*Amici* cannot rely on a misinterpretation of the Education Clause to argue that this Court must review and overturn the unanimous ruling by the Court of Appeals.

**C. Defendants’ Claim that the Court of Appeals’ Ruling Would Prevent the State from Enacting Education “Pilot Programs” is Unfounded**

Defendants and Legislators-*Amici* contend that the Court of Appeals’ ruling invalidating the Voucher Law under the Home Rule provision deprives the State of its plenary power under the Education Clause to improve education through innovative “pilot programs.” State Application at 16-19; Legislators-*Amici* Brief at 9-13. This contention is baseless. First, the Voucher Law is not even a pilot program. Second, as the Court of Appeals acknowledged, the State has the freedom to innovate in education, such as by enacting pilot programs, as long as it complies with all other provisions of the constitution, including the Home Rule Amendment.

**1. The Voucher Law Is Not a Pilot Program**

As the Court of Appeals held, merely “naming the [Voucher Law] a ‘pilot program’ is not controlling.” *Metro. Gov’t of Nashville & Davidson Cnty.*, 2020 WL 5807636 at \*6. A pilot program is an experiment. Some obvious and typical features of pilot programs include provisions that reflect this experimental nature, such as built-in sunset provisions. The Voucher Law lacks any such provisions.<sup>30</sup>

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<sup>30</sup> Indeed, during debate on the bill, senators acknowledged that it did not have key features of a pilot program and thus was a pilot in name only. Senator Briggs

Nonetheless, the State Defendants attempt to portray the Voucher Law as a pilot program “in substance,” claiming that it would be terminated or expanded depending on its level of success. State Application at 8. However, the State Defendants themselves concede that the only way to either terminate or expand the Voucher Law is through legislative amendment. *Id.* Because subsequent legislation is always an option for terminating or changing a prior law, this possibility does not lend any credence to the claim that the Voucher Law is a pilot program.<sup>31</sup> And in fact, the Voucher Law explicitly prohibits expansion of the voucher program. T.C.A. §49-6-2611(c) (“[I]f any provision of this part is held invalid, then the invalidity shall not expand the application of this part to eligible students other than those identified in §49-6-2602(3)”). Thus, the text of the Voucher Law itself demonstrates it was enacted as a permanent program limited to Davidson and Shelby Counties, not a temporary pilot program subject to expansion or termination – except by the means available to change any other statute.

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(R-Knoxville), for example, noted that the bill was called a pilot program but looked nothing like one, lacking a sunset provision and stringent reporting requirements. Senate floor debate, April 25, 2019. Senator Nicely (R-Strawberry Plains) agreed that because there is no way to “shut [the program] down,” it is not a pilot program. *Id.*

<sup>31</sup> This Court has held that in Home Rule analyses, courts must examine the law as written, notwithstanding hypothetical legislative amendments. *Farris v. Blanton*, 528 S.W.2d 549, 555 (Tenn. 1975) (holding that the Court can only rule on the law as it exists and “cannot conjecture what the law may be in the future”).

## 2. The State Is Free to Innovate in Education in Compliance with the Home Rule Amendment

The State Defendants and Legislators-*Amici* advance the easily disproved position that “if the judgment is allowed to stand, the legislature will be prohibited from enacting incremental education reform or programs that incentivize the lowest-performing schools to improve themselves or that enhance educational opportunities for disadvantaged children.” State Application at 17; *see also* Legislators-*Amici* Brief at 13. Compliance with the Home Rule provision neither interferes with the State’s fulfillment of its Education Clause duty nor bars it from experimenting with pilot or other innovative programs based on myriad criteria that do not run afoul of Home Rule.

In claiming the State has the power to enact the “pilot” voucher program contained in the Voucher Law, the State Defendants rely on this Court’s decision in *Small School Systems I*, which recognized that “an adequate system, by all reasonable standards, would include innovative and progressive features and programs.” 851 S.W.2d at 156.<sup>32</sup> However, the “adequate system” to which that decision referred is a **public** school system, and the Court of Appeals properly ruled that funding private school vouchers is not part of the State’s duty or power under the Tennessee Constitution to maintain and support a system of free public

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<sup>32</sup> Legislators-*Amici* likewise rely on the *Small School Systems* line of cases, though they also concede that those cases refer to the maintenance and support of a system of **public schools**. Legislators-*Amici* Brief at 11.



schools. *Metro. Gov't of Nashville & Davidson Cnty.*, 2020 WL 5807636 at \*5. See §III.B, *supra*.

As the Court of Appeals further ruled, in enacting education programs that do fall within the State's plenary power under the Education Clause, the State likewise must comply with the Home Rule Amendment. *Id.* (“[H]aving plenary authority over public schools does not mean that other provisions of the Tennessee Constitution do not or cannot apply”). This is not difficult. There are myriad ways the State could enact “pilot” education programs or other innovative policy ideas that do not offend the Home Rule provision.<sup>33</sup> The State may enact such programs in any number of arenas, including but not limited to programs that increase the public school options available to families (*e.g.*, intradistrict transfers, magnet schools), curriculum innovations, student assessment, teacher qualifications or evaluations, methods for serving English learners and other students with particular needs, or extra supports for students from low income families, in a manner that does not target one or two counties and thus complies with Home Rule. For example, the program might apply to all underperforming schools or districts generally, to all low-income students or schools serving large numbers of low-income students, or to students who have not yet met state academic standards in one or more subjects. Using such criteria would enable the State to enact innovative, incremental reforms targeting disadvantaged students within the limits of the Home Rule

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<sup>33</sup> Contrary to Legislators-*Amici*'s claim, none of these educational innovations constitutes or requires a “Home Rule exception” to the Education Clause. See Legislators-*Amici*'s Brief at 11.

Amendment. Thus, Defendants' and Legislators-*Amici's* claim that ensuring compliance with the Home Rule Amendment squelches educational innovation contravenes reality.

#### IV. CONCLUSION

For the reasons stated, Defendants' applications should be denied.

DATED: December 17, 2020      Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I, Christopher M. Wood, hereby certify that *AMICI CURIAE* BRIEF OF McEWEN PLAINTIFFS IN SUPPORT OF RESPONDENTS complies with the requirements of Tennessee Supreme Court Rule 46, Section 3, Rule 3.02(a)(1). According to Microsoft Word, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and Certificate of Compliance, the brief contains 5,560 words.

Dated: December 17, 2020

s/ Christopher M. Wood  
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