

S.C. NO. M2020-00683-SC-RDM-CV
IN THE SUPREME COURT OF THE STATE OF TENNESSEE

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

Plaintiffs/Appellees,

vs.

TENNESSEE DEPARTMENT OF
EDUCATION, et al.,

Defendants/Appellants.

and

NATU BAH, et al.,

Intervenor-
Defendants/Appellants.

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

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

AMICI CURIAE BRIEF OF McEWEN PLAINTIFFS,
TENNESSEE NAACP, PASTORS FOR TENNESSEE CHILDREN
AND PASTORS FOR CHILDREN IN SUPPORT OF APPELLEES

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I. INTRODUCTION

Amici – the McEwen Plaintiffs, the Tennessee State Conference of the NAACP (“Tennessee NAACP”), Pastors for Tennessee Children, and Pastors for Children – respectfully submit this brief in support of Appellees.

The McEwen Plaintiffs, a diverse group of public school parents, taxpayers and community members in Davidson and Shelby Counties, are directly affected by the Tennessee Education Savings Account Pilot Program (“Voucher Law”), T.C.A. §49-6-2601, *et seq.*, and have a strong legal interest in this case because they are plaintiffs in a lawsuit with overlapping and identical legal questions.

Tennessee NAACP is a statewide civil rights organization that has long advocated for desegregated, adequately resourced public schools for all Tennessee children and opposed the Voucher Law because it diverts critical resources away from neighborhood public schools and promotes discriminatory practices.

Pastors for Tennessee Children is an independent, interfaith ministry that serves Tennessee neighborhood schools through prayer, service and advocacy and opposes private school vouchers because they exacerbate existing inequities in school systems by draining desperately needed funding from public schools.

Pastors for Children is a nationwide network of faith leaders and community partners dedicated to school service and fair and equitable public school funding and opposed to diverting public funding to private schools.

The Chancery Court and Court of Appeals correctly found that Appellees have standing to challenge the Voucher Law and that the Voucher Law violates the Home Rule provision of the Tennessee Constitution. This Court should reach the same conclusion.

First, Appellees allege a distinct and palpable injury that is more than sufficient to show standing. Additionally, while not directly at issue in this appeal, as taxpayers and parents of children enrolled in Metro Nashville Public Schools and Shelby County Schools the McEwen Plaintiffs independently have standing, of which this Court should be mindful in resolving this appeal.

Second, the Voucher Law violates the Home Rule Amendment. Contrary to Appellants' contentions, and as the Court of Appeals correctly recognized, the funding of private school vouchers is not properly characterized as a state function. Additionally, in claiming that the Voucher Law does not affect Shelby and Davidson Counties, Appellants ignore the profound effect the voucher program would have on the counties' ability to maintain adequately funded public schools.

Third, the Appellant *amici*'s assertions regarding the benefits of private school vouchers, while irrelevant to resolving this appeal, are profoundly wrong. The history of private school vouchers is steeped in efforts to preserve racial segregation, and the so-called "broken windows theory" advanced by Catholic Schools has been debunked not only for its failure to prevent crime but also for its horrific and disproportionate effect on Black and Latinx populations. Moreover, private school vouchers are unpopular and rejected by most communities, including those specifically impacted by the Voucher Law. Research shows that

vouchers fail to improve student outcomes and drain money from underfunded public schools, thus negatively impacting schools, students, and communities.

The Chancery Court's and Court of Appeals' orders should be affirmed.

II. ARGUMENT

A. Appellants' Standing Contentions Are Erroneous

Appellants contend no one has standing to challenge the Voucher Law – not the local educational agencies (“LEAs”) whose funding would be slashed, not the counties whose budgets and policies would be negatively impacted, not the parents of children who attend public school in the two targeted counties, and not the taxpayers who would be forced to fund an unconstitutional law. These contentions are misplaced. Not only did the Chancery Court and the Court of Appeals correctly conclude that Appellees have standing, but the McEwen Plaintiffs also have standing to challenge the Voucher Law. While the standing of the McEwen Plaintiffs is not at issue here, this Court should be mindful of how its conclusions regarding Appellees' standing could impact parties not before the Court, such as the McEwen Plaintiffs.

1. Appellees Have Standing

Appellants' contentions that Appellees lack standing are wrong. *Amici* rely on the Court of Appeals' careful reasoning and Appellees' briefing on this point.

Amici note that, on appeal to this Court, the Beacon/IJ Intervenor-Appellants stress their assertion that the Court of Appeals' order relies

on a novel “fiscal effects” test incompatible with the Home Rule Amendment’s requirement that a law be “applicable to a particular county or municipality . . . in its governmental or its proprietary capacity.” *See* Beacon/IJ Br., *passim*.¹ Such contentions rely on a blatant misreading of the Court of Appeals’ order. As discussed *infra*, §II.B.2.a., the Court of Appeals held that the Voucher Law affects the counties not just through fiscal impacts but also by impeding their ability to fulfill their obligations to educate public school students.

2. The McEwen Plaintiffs Also Have Standing

Even if Appellees did not have standing, which they do, the Court should consider the impact its ruling could have on the McEwen Plaintiffs, who have separate standing to bring their claims against the Voucher Law as taxpayers and parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools. *See* McEwen Pls’ App., Ex. 9 at APP505-515.

a. The McEwen Plaintiffs Have Standing as Taxpayers to Challenge the Voucher Law as an Illegal Expenditure of Public Funds

Tennessee courts allow taxpayers to challenge illegal governmental action and the misuse or unlawful diversion of public funds if: “(1) the plaintiff/taxpayers have taxpayer status; (2) the taxpayers allege a specific illegality in the expenditure of public funds; and (3) the taxpayers have made a prior demand on the governmental entity asking it to correct the alleged illegality.” *City of New Johnsonville v. Handley*, No. M2003-

¹ “Beacon/IJ Br.” refers to Intervenor-Defendants/Appellants Bah, Diallo, Brumfield and Davis’s Brief on the Merits, filed with the Supreme Court of the State of Tennessee on November 25, 2020.

00549-COA-R3-CV, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005) (citation omitted). A demand is not required where “the status and relation of the involved officials to the transaction in question is such that any demand would be a formality.” *Badgett v. Rogers*, 436 S.W.2d 292, 295 (Tenn. 1968).

Here, the three elements are easily satisfied. *See* McEwen Pls’ App., Ex. 9 at APP506-509. First, the McEwen Plaintiffs are taxpayers who pay state and local taxes. McEwen Pls’ App., Ex. 1 at APP006-009. Second, the McEwen Plaintiffs allege that the Voucher Law is an illegal expenditure of public funds. McEwen Pls’ App., Ex. 1 at AAP030-035. Specifically, they allege that the Voucher Law violates multiple provisions of the Tennessee Constitution and state law. *See, e.g., Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (holding that taxpayers had standing to challenge the building of a road not authorized by law, “which will result in irreparable injury to the county and taxpayers”). Third, the McEwen Plaintiffs were not required to make a prior demand of governmental officials to remedy this illegal law because such a demand would have been a mere formality and a futile gesture. Former House Speaker Casada went to extraordinary lengths to secure passage of the Voucher Law, Governor Lee signed it as his signature legislative achievement, the State Board of Education adopted administrative rules to implement it, the Tennessee Department of Education expended millions of dollars to administer it, and Education Commissioner Schwinn rushed to implement the voucher program in the subsequent school year. McEwen Pls’ App., Ex. 1 at APP009-011, APP016-020.

b. The McEwen Plaintiffs Have Standing Because They Suffer a Special Injury Not Common to the Public

The McEwen Plaintiffs also have standing to challenge the Voucher Law as parents of children who attend public school in the two targeted counties. *See* McEwen Pls’ App., Ex. 9 at APP509-515. In general, to establish standing, a plaintiff must show: (1) an injury that is “distinct and palpable”; (2) a causal connection between the alleged injury and the challenged conduct; and (3) the injury is capable of being redressed by a favorable decision of the court. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). Individual citizens and taxpayers in Tennessee may challenge governmental actions when they allege a special injury, status or relation that is not common to the body of citizens as a whole. *Badgett*, 436 S.W.2d at 294 (Tenn. 1968); *see also, e.g., Curve Elementary Sch. Parent & Teacher’s Org. v. Lauderdale Cty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980); *Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 645-46 (W.D. Tenn. 2012). In a case where a school board decided to close an elementary school, the Tennessee Court of Appeals explained that public school parents and children suffer “damages and injustices of a different character or kind from those suffered by the citizens at large due to the allegedly unlawful acts of the Board.” *Curve Elementary Sch.*, 608 S.W.2d at 859.

The McEwen Plaintiffs allege that the Voucher Law causes them to suffer injury of a different character and kind from those suffered by the citizens at large. Only in Davidson and Shelby Counties, Basic Education Program (“BEP”) funds that the General Assembly appropriates for public schools will be used to fund private schools. If this diversion of

BEP funds occurs, the McEwen Plaintiffs – unlike parents of public school children in *every* other county in the State – will be forced to send their children to schools that have been deprived of critical resources needed to provide adequate educational opportunities. Additionally, to compensate for this funding shortfall, the McEwen Plaintiffs will have to pay increased local taxes. Thus, the McEwen Plaintiffs suffer special injuries that are unlike that of the public generally, parents in the other 93 Tennessee counties, and citizens in the two targeted counties who do not have children or have children who are not enrolled in public school.

Amici respectfully submit that any ruling from this Court should take into account how such ruling could affect contentions regarding the McEwen Plaintiffs’ standing, which, while not directly at issue in this appeal, could be impacted by the Court’s decision.

B. The Voucher Law Violates the Home Rule Provision of the Tennessee Constitution

Amici support the Chancery Court’s and Court of Appeals’ conclusion that the Home Rule Amendment applies here because the Voucher Law is local in effect, it involves the counties’ governmental or proprietary function, and the statute’s targeting of two counties does not affect the Home Rule Amendment’s applicability. [R. at 1118-24]. *Amici* rely on the reasoning of the Chancery Court, the reasoning of the Court of Appeals, and the briefing of Appellees to rebut the range of fallacious Home Rule arguments made by the State and Intervenor-Appellants but highlight two crucial points below. First, the funding of private school vouchers is not properly characterized as a state function. Second, Appellants’ contentions that the voucher program does not affect

Davidson and Shelby Counties are wrong because they ignore the profound effect the voucher program would have on the counties' ability to fulfill their responsibility, shared with the State, to maintain adequately funded public schools.

1. Funding Private School Vouchers Is Not a State Function

State Appellants claim that education is a state matter and therefore the State, through the Voucher Law, is properly exercising its function of providing education to Tennessee students. State Br. at 28.² Appellants fundamentally misconstrue the State's duty. 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 obligation to fund private schools. Because the purpose and function of the Voucher Law is to fund private schools, it does not implicate a state function at all.

In fact, the Voucher Law impedes the State's fulfillment of its education function by diverting funds from the constitutionally mandated system of free public schools to instead pay tuition at private schools. Appellants erroneously claim these funds may be diverted to the voucher program because providing educational options is part of the State's function. Providing options within the context of the system of free public schools may be a state function. However, when the State chooses to use public dollars to fund private schools, the State is not operating under its Article XI, §12 mandate. As the Court of Appeals

² "State Br." refers to the Brief of Defendants/Appellants Tennessee Department of Education, *et al.*, filed with the Supreme Court of the State of Tennessee on March 8, 2021.

recognized: “[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.” *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, No. M202-000683-COA-R9-CV, 2020 WL 5807636, at *5 (Tenn. Ct. App. Sept. 29, 2020).

The cases cited by the State Appellants to support the proposition that education is a state and not a local matter (State Br. at 28) are inapposite because they involve the State’s role in establishing and maintaining a statewide system of **public schools**. *See, e.g., S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (the Legislature’s plenary authority under the Education Clause derives from its responsibility to “provide for the maintenance, support and eligibility standards of a system of free **public** schools”) (emphasis added); *City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 WL 2051284, at *13-*14 (Tenn. Ct. App. Aug. 25, 2005) (citing *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993)) (“The constitution contemplates that the power granted to the General Assembly will be exercised to accomplish the mandated result, a **public school system . . .**”) (emphasis added). The Voucher Law plays no part in the State’s constitutionally mandated functions of establishing, maintaining or supporting a statewide system of public schools. Thus, as the Court of Appeals held, in establishing the Voucher Law, the State was operating outside the plenary power granted to it by the Education Clause.

2. Appellants' Attempts to Deny the Voucher Law's Effect on the Counties Fail

Appellants' attempts to mask the Voucher Law's detrimental effects on Davidson and Shelby Counties are baseless. The State Appellants incorrectly allege that providing public education is not a local function. State Br. at 28; *see also* Beacon/IJ Br. at 37. The LJC Appellants erroneously claim that the counties will actually gain money under the Voucher Law. LJC Supplemental Br. at 21-22.³ And the Beacon/IJ Appellants portray voucher funds as a "direct benefit" paid to parents with no connection to the targeted districts. Beacon/IJ Br. at 15. These depictions ignore the Voucher Law's funding mechanism, which diverts funds earmarked for public schools in Davidson and Shelby Counties to instead pay private school tuition and expenses.

a. The Voucher Law Affects the Counties in Their Governmental Capacities

As the Court of Appeals held, providing education is in part a local function. *Metro. Gov't*, 2020 WL 5807636, at *5. The Court of Appeals recognized that the Tennessee Supreme Court has declared "that a partnership has been established between the State and its political subdivisions to provide adequate educational opportunities in Tennessee." *Id.* (citation omitted). This partnership has been in effect for over 100 years. *Id.* This Court has recognized that the General Assembly "manifestly vested the authority to appropriate funds for

³ "LJC Supplemental Br." refers to Intervenor-Defendants/Appellants Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.'s Supplemental Brief, filed with the Supreme Court of the State of Tennessee on March 8, 2021.

county purposes (including education)” in county government. *State ex rel. Weaver v. Ayers*, 756 S.W.2d at 221. There is “shared authority” over public education matters “among the State, the local boards of education, and the local legislative bodies.” *Id.* at 222.

As the Court of Appeals explained, local legislative bodies, such as county governments, have both the authority and responsibility to levy taxes to fund public schools and to approve local school district budgets. *Metro. Gov’t*, 2020 WL 5807636, at *5; *see also* T.C.A. §49-3-356(a) (mandating that local governments “appropriate funds sufficient to fund the local share of the BEP”). The Voucher Law implicates the funding of public school districts and thus directly impacts the counties whose responsibility it is to levy taxes and approve the school districts’ budgets. Therefore, the Court of Appeals correctly held that the Voucher Law affects the counties in their governmental capacities. *Metro. Gov’t*, 2020 WL 5807636, at *5. The Voucher Law diverts state BEP funds intended for the school districts in Davidson and Shelby Counties; as a result, each county must raise additional revenue to compensate for state BEP funds lost to the voucher program. Because the Voucher Law impedes the counties’ ability to carry out their obligation to maintain and support public schools, it is local in effect and subject to the Home Rule Amendment.

The Beacon/IJ Appellants claim the Voucher Law cannot affect the counties in their governmental capacities because their municipal charters “do not empower the counties to exercise control or authority over education or school districts.” Beacon/IJ Br. at 35-36. But it is irrelevant whether the counties **control** the public schools. There is no

provision in either charter that negates the counties' role in levying taxes to fund the districts or in approving their budgets. In fact, Nashville's charter explicitly provides that the Metropolitan Government of Nashville and Davidson County shall have the power "to establish, maintain and regulate, free of sectarian influences, a system of free schools." Charter of the Metropolitan Government of Nashville and Davidson County §2.01(6). Moreover, subsequent to the latest amendment of the Shelby County Charter, a court ruled that the Home Rule provision applies to the county in matters involving Shelby County Schools. *Bd. of Educ. of Shelby Cty. v. Memphis Cty. Bd. of Educ.*, 911 F. Supp. 2d 631, 660 (W.D. Tenn. 2012). The counties' charters in no way undermine Appellees' allegations that the Voucher Law affects the counties, and therefore the Home Rule amendment applies.

b. The Voucher Law Results in the Counties' Loss of State BEP Funding

The LJC Appellants falsely claim that the counties will not lose money but will instead gain funds as a result of the Voucher Law. They attempt to disguise the counties' substantial funding loss by conflating funding with spending and by conflating state funds with local funds.

The shared state and local obligation to maintain and support public schools is carried out through the BEP, the state's school funding formula. The BEP formula calculates the yearly BEP allocation for each district. See T.C.A. §§49-3-302, 49-3-351, *et seq.* A district's BEP allocation represents the state contribution plus the required local contribution, *i.e.*, what the State must provide to the district and what the district is required by law to contribute.

A county is responsible for raising revenue to fund the local share of the BEP allocation. If the BEP amount is inadequate to cover the true cost of education, the county must either raise additional revenue to pay for essential educational resources or cut those resources and force its schools, teachers, and students to do without them. The State’s own reports show that both Davidson and Shelby Counties annually have had to raise hundreds of millions of dollars in additional local revenue to fill the gaps caused by inadequate state BEP funding in order to meet federal and state educational mandates and local educational needs.⁴ Even with additional local spending, state reports conclude these districts have insufficient funds to pay for necessary components of an adequate education, such as school counselors and nurses.⁵

The Voucher Law mandates that funds intended for Metro Nashville Public Schools and Shelby County Schools be deducted from those districts’ state BEP allocations to fund vouchers. The amount to be deducted from state BEP funds otherwise payable to each district represents the amount of “*the per pupil state and local funds generated and required through the . . . (BEP) for the LEA* in which the participating student resides . . . not exceed[ing] the combined statewide average of required state and local BEP allocations per pupil.” T.C.A. §49-6-2605(a) (emphasis added). This amount – representing the

⁴ Tenn. Advisory Comm’n on Intergovernmental Relations, K-12 Pub. Educ. Funding and Serv., at 10 n.13 (Jan. 2020), https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2019december/2019Dec_Tab5K-12Funding_ExecSummaryDRAFT.pdf.

⁵ See, e.g., Basic Educ. Program Review Comm. 2019 Annual Report at 43, 46, 51. https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2019-bep/2019_BEP_Report.pdf.

amounts of both the state and local BEP contributions – must be deducted wholly “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) (emphases added). Consequently, far from the “windfall” claimed by the Intervenor-Appellants, each district will lose more state BEP funding per voucher student than it receives from the State for that student.

In their supplemental brief, the LJC Appellants erroneously claim that the districts will actually gain money under the Voucher Law in the form of “remainder funds.” LJC Supplemental Br. at 20-21. This is a red herring in which the LJC Appellants attempt to disguise the districts’ funding loss by conflating the amount the district actually spends on each student with the inadequate amount it receives from the State.

The Comptroller Legislative Brief cited by LJC sets forth the total BEP amounts for each district. LJC App’x 06.⁶ That represents the per-pupil amount the BEP law calculates is required to be spent in each district. For Metro Nashville Public Schools in 2019, the total BEP amount per pupil was \$8,324. The Comptroller’s table separates that amount into the state BEP allocation (*i.e.*, state funding) and the local BEP allocation (local funding – from local taxpayers) because the BEP requires that the state and the locality share the cost of education. The Comptroller also sets forth what each district *spent* per pupil in 2019.

⁶ “LJC App’x” refers to the Appendix to Intervenor-Defendants/Appellants Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.’s Brief of the Appellants, filed with the Supreme Court of the State of Tennessee on March 8, 2021.

That amount represents the actual per-pupil cost of education that year for each district. In 2019, Metro Nashville Public Schools *spent* \$12,895 per pupil. As noted above, state reports have acknowledged that the BEP formula calculates a BEP per-pupil amount that is below the actual cost of education in Metro Nashville Public Schools. Thus, in 2019 the district was forced to spend more than the \$8,324 the BEP determined it is required to spend per pupil.

For each student who would take a voucher, the district would lose \$7,572 in state funding. This is much more than the \$3,618 Metro Nashville Public Schools receives in state funding for each pupil. LJC claims that Metro Nashville Public Schools “received” \$12,895 per pupil in 2019 and therefore would keep the difference between \$12,895 and the voucher amount: \$7,572. LJC Supplemental Br. at 21. That is incorrect. Of the \$12,895 that the district spent per pupil, the district received only \$3,618 in state BEP funds. The amount of local dollars taxpayers had to pay above the BEP state allocation in order to cover the cost of education is wholly irrelevant to the amount of *state* funding the district will lose for each student who would take a voucher. When a child leaves the district with a voucher, she takes more than twice the district’s per-pupil state funding with her. The county therefore must make up the difference with local taxpayer-raised funds, or the district must cut educational resources. The same is true of Shelby County Schools.⁷

⁷ Contrary to Appellants’ contentions, the school improvement fund grants that may be available under the Voucher Law will not compensate for the loss in district funding the Voucher Law will cause. These grants are dependent on state appropriations, which are not guaranteed, are restricted in their uses, and expire after three years. T.C.A. §49-6-2605(b)(2). *See also Metro. Gov’t*, 2020 WL 5807636, at *3. Finally, the districts bear fixed costs that prevent them from reducing expenses

c. The Voucher Program Is a Detriment to the Counties Whether or Not the Funds Pass Through the Counties' Coffers

In an attempt to frame the Voucher Law as a statute with no bearing on local governments, the Beacon/IJ Intervenors erroneously describe the voucher program as “a direct benefit to Tennesseans.” Beacon/IJ Br. at 15. However, the Voucher Law does not use just any state funds. The state funds diverted to the voucher program are initially calculated as part of the funding to operate Metro Nashville Public Schools and Shelby County Schools, and these funds are expressly intended for those school districts.

The Beacon/IJ Intervenors would have the Court believe the fact that the funds may be paid directly to an account for the student rather than passing through the counties' hands means the counties are not affected by the loss of these funds. That is wrong. Whether or not the funds first pass through the counties' coffers, the counties lose money intended for their school districts and must make up those funds by raising additional local revenue. Taking the Beacon/IJ argument to its logical extreme illustrates its fallacy. If the voucher program were to cover enough students to completely drain the districts' state BEP allocations, the counties would be left with no state funds to operate their school districts, unquestionably affecting them.

Because the counties are the entities mandated by law to participate in funding the school districts, the loss of state BEP funds

commensurate with the reduction in enrollment under the voucher program, and the program would concentrate more-costly-to-educate students in the public schools.

increases the burden on the counties in funding their school districts. The Voucher Law thus affects Davidson and Shelby Counties, and the mandates of the Home Rule Provision apply.

C. Appellant *Amici*'s Claims About the Benefits of Private School Vouchers Are Erroneous

1. Vouchers Have a Racist History and Increase School Segregation

The history of the private school voucher movement reveals its roots in anti-integrationist efforts to preserve racial segregation.⁸ The concept of state funding of private school tuition did not develop out of a deep-seated need for family autonomy or dissatisfaction with the public schools, as indicated by the *amicus* briefs supporting the Appellants. Instead, it was conceived “at the margin of race/class conflict, nurtured in the context of a struggle to gain financing for public education from a fiscally conservative power structure, and born out of the racial politics of the Deep South.”⁹

In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), southern states passed dozens of laws attempting to stifle racial integration.¹⁰ Private school voucher plans were prominently featured in this anti-integration legislation and enjoyed broad popular support. Over the years, however, societal changes forced the rhetoric surrounding the

⁸ 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).

⁹ O'Brien, *supra*, at 364.

¹⁰ *Id.* at 392-93.

tuition voucher movement to shift away from its overtly racist beginnings. One important factor contributing to this change was that overt racism proved to be a losing argument with the courts, which repeatedly struck down voucher schemes as unconstitutional. As one court explained:

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” in the South during Jim Crow.¹¹ 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.”¹² 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

¹¹ 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>.

¹² *Id.* at 7.

already in private schools, and diverts funding from all other students who remain in the public school system.”¹³

Several other recent studies have examined the racial composition of private school student populations and illuminated the effects of private school voucher policies. One report showed White students were overrepresented in private schools, while Hispanic and African American students, as well as students from low-income families, were underrepresented.¹⁴ Another 2018 report found that enrollment in the Washington, DC voucher program declined over the years and became less racially diverse.¹⁵ Seventy percent of students participating in the program were enrolled in heavily segregated schools.¹⁶ 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*.”¹⁷ Its analysis of the Louisiana school voucher program confirmed “patterns noted in demographic studies of voucher

¹³ *Id.* at 8.

¹⁴ 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.

¹⁵ 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>.

¹⁶ *Id.* at 19.

¹⁷ 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>.

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.”¹⁸

The racist origins of voucher programs counsel strongly against their continued use. And although proponents of voucher programs no longer espouse a segregationist intent, vouchers continue to have significant segregative effects.

2. *Amici* Catholic Schools’ Repugnant Contentions Are Wrong

Amici Catholic Schools unfairly suggest that public schools, simply by virtue of being public, are to blame for violence and gang activity in their hallways. In reality, the causes of criminal behavior and gang involvement among young people are complex and depend much more on factors such as a student’s socio-economic status and neighborhood.¹⁹ Indeed, looking at the same data that the Catholic Schools *amici* use to paint a terrifying picture of public schools, one sees that an urban setting may be the controlling factor for the presence of gangs, rather than whether the school is public or private.²⁰ In 2015, for example, a higher percentage of students at urban private schools reported gang activity

¹⁸ *Id.*

¹⁹ See, e.g., U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, *Why Do Youth Join Gangs?*, Juvenile Justice Bulletin (Aug. 1998), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/jjbulletin/9808/why.html>.

²⁰ U.S. Dep’t of Educ., National Center for Education Statistics, *Indicators of School Crime and Safety*, Table 8.2 (2018), https://nces.ed.gov/programs/crimeindicators/ind_08.asp#info.

than students at rural public schools.²¹ Given that the Catholic Schools are in the same urban settings in Shelby and Davidson Counties as the public schools they deride, and given the lack of publicly reported data about gang activity and violence in the Catholic Schools, there is little to substantiate the claims that their schools provide a safer environment.

Indeed, the Catholic Schools *amici* do not provide or cite **any data** concerning student arrests, allegations of drug-related or violent crime, gang activity or even reports of bullying at their schools; instead, they merely insist that violence and bullying do not exist – largely because of their embrace of the discriminatory and discredited “‘broken window’ theory.” Catholic Schools Br. at 14.²² The “‘broken window’ theory” – a theory based in policing and criminology, not pedagogy – has been debunked for its failure to actually prevent crime and its horrific and disproportionate effect on Black and Latinx populations.²³ Thus, Catholic Schools’ assertion that the “‘broken window’ theory” has produced a “wholesome” environment on their campuses is likely as specious as claims that the theory reduces crime rates. Moreover, Catholic Schools’ professed reliance on a policing system that so often

²¹ *Id.* at Table 230.20a, https://nces.ed.gov/programs/digest/d18/tables/dt18_230.20a.asp. Similar data was not available for 2017.

²² “Catholic Schools Br.” refers to *Amici Curiae* Brief of Catholic Schools in Shelby County and Davidson County Tennessee in Support of Appellants, filed with the Supreme Court of the State of Tennessee on March 4, 2021.

²³ See e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-city Social Experiment*, 73 U. Chicago L. Rev. 271, 276 (2006); Sarah Childress, *The Problem with ‘Broken Windows Policing’*, Frontline (June 28, 2016), <https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/>.

results in racial discrimination is deeply concerning. Their assertion that Catholic Schools academically benefit “urban minorities,” offered in response to the harrowing picture they paint of gang violence, in Shelby County Schools especially, underscores the racially insensitive idea that gang violence only afflicts “urban minorities” who would therefore benefit under a “we-mean-business” atmosphere at Catholic Schools. Catholic Schools Br. at 11-14.

3. Private School Vouchers Are Unpopular, and Most Voucher Proposals Are Rejected

Amici EdChoice and ExcelinEd imply that the existence of voucher programs in several states proves they are desired by and have positive effects on families and communities. EdChoice/ExcelinEd Br. at 3-5.²⁴ Neither contention is supported by fact.

Year after year, the vast majority of voucher proposals are rejected by state legislatures. For example, in 2020, 23 state legislatures rejected all voucher proposals introduced; 20 more introduced none.²⁵ Tennessee’s own Voucher Law passed with the barest margin in the House, and only after the speaker persuaded one legislator to change his position based on a promise to exclude his district from the program.²⁶

²⁴ “EdChoice/ExcelinEd Br.” refers to the Brief of *Amici Curiae* EdChoice, Inc. and Foundation for Excellence in Education, Inc. in Support of Defendant-Appellants and Intervening Defendants-Appellants, filed with the Supreme Court of the State of Tennessee on March 9, 2021.

²⁵ *Private School Vouchers: Analysis of 2020 State Legislative Sessions, Public Funds Public Schools* (Apr. 5, 2021), <https://pfps.org/private-school-vouchers-analysis-of-2020-legislative-sessions.html>.

²⁶ Marta Aldrich, *Tennessee House Passes Education Voucher Bill for the First Time, Senate Vote to Come*, Chalkbeat (Apr. 23, 2019),

Moreover, when voucher proposals have been put directly to voters, they have consistently been rejected.²⁷

Despite the EdChoice/ExcelinEd *amici*'s assertion that parents desire more vouchers (EdChoice/ExcelinEd Br. at 9-11), data show such programs are often undersubscribed. For example, a 2018 study of Mississippi's Education Savings Account voucher program found that one-third of funds went unused because parents either could not find a private school to meet their children's needs or private schools refused to admit voucher students.²⁸ In fact, Tennessee's existing voucher program, for students with disabilities, attracted just 137 out of 42,000 eligible students in the 2018-2019 school year.²⁹

4. Research Shows Vouchers Negatively Impact Schools, Students, and Communities

The claims of *amici* supporting Appellants that private school vouchers benefit students, schools, and communities are false. The weight of empirical research shows voucher programs fail to improve

<https://tn.chalkbeat.org/2019/4/23/21055514/tennessee-house-passes-education-voucher-bill-for-the-first-time-senate-vote-to-come>.

²⁷ 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>.

²⁸ PEER Committee, *Report to the Legislature: A Statutory Review of Mississippi's Education Scholarship Account Program*, #628 (Dec. 11, 2018), <https://www.peer.ms.gov/Reports/reports/rpt628.pdf>.

²⁹ 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>.

academic outcomes and divert money from already underfunded public schools.

a. **The Research and Analysis Cited by Pro-Voucher *Amici* Are Fundamentally Flawed**

The evidence cited by *amici* to support the contention that Tennessee’s voucher program will improve student achievement is inapposite. *Amici* cite misleading analyses purporting to demonstrate that vouchers positively impact students and schools while ignoring the weight of recent peer-reviewed studies supporting the opposite conclusion.

Contrary to *amici* Catholic Schools’ assertion that private schools will provide a superior education, rigorous research has shown private schools do not actually outperform public schools.³⁰ Moreover, Catholic Schools’ brief cites data about outcomes for students in private schools ***generally***, rather than data on students in private school ***voucher programs***. See Catholic Schools Br. at 10-12. As explained *infra* at §III.C.4.b., numerous reliable studies demonstrate that students in voucher programs do not experience improved outcomes and, indeed, often fare worse compared to their peers in public schools.

The brief of EdChoice/ExcelinEd relies heavily on EdChoice’s own study, *The 123s of School Choice*. They claim this analysis surveys the existing literature and proves that most studies find vouchers have positive effects on both participating students and those in public schools.

³⁰ Christopher A. Lubienski & Sarah Theule Lubienski, *The Public School Advantage: Why Public Schools Outperform Private Schools* (2013).

EdChoice/ExcelinEd Br. at 5-6, 12-14. However, a National Education Policy Center review of a previous edition of *The 123s of School Choice* found the report to be “a misrepresentation of what research has been conducted” on vouchers.³¹

The EdChoice/ExcelinEd *amici* brief also points to a study purporting to show a correlation between voucher participation and decreased criminal activity, cited as proof that vouchers improve civic values. EdChoice/ExcelinEd Br. at 13. However, the researchers themselves acknowledged that an “important limitation” of the study is that the students “were not randomly assigned vouchers to attend private schools.”³² Indeed, erroneously equating correlation with causation is a problem throughout the EdChoice/ExcelinEd brief. Their assertion that the effectiveness of voucher programs can be reliably analyzed with “random-assignment” studies – which compare voucher applicants randomly assigned to the program with applicants who did not receive a voucher – fails to take into account how students who apply for vouchers differ from students who do not. *See* EdChoice/ExcelinEd Br. at 6 & n.2. There are a number of ways students who participate in these programs may differ from students who remain in public schools – such as demographic factors and access to information – and these differences

³¹ T. Jameson Brewer, *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice: 2019 Edition* (EdChoice, April 2019), Nat'l Educ. Pol'y Ctr. 12 (June 2019), <https://nepc.colorado.edu/sites/default/files/reviews/TTR%20Brewer.pdf>.

³² Corey DeAngelis & Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, Univ. Ark. Dept. of Educ. Reform (EDRE), Working Paper No. 2019-03, 24-25 (Feb. 26, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335162Univ.

may correlate with differing achievement. Thus, a mere correlation between voucher use and improved student outcomes cannot establish causation. As explained below, research comparing students who use vouchers to attend private schools to their “closely matched peers attending public schools” finds that voucher students experience worse – not better – academic outcomes.

b. Vouchers Do Not Improve Educational Outcomes

Contrary to the claims of Appellants and their supporting *amici*, research has shown that private school voucher programs do not improve, and indeed often negatively affect, student achievement.

A 2019 evaluation by the U.S. Department of Education found that the Washington, DC voucher program had no statistically significant effect on student achievement in reading or math after three years.³³ 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.”³⁴ The data showed “large negative effects,” especially in

³³ Ann Weber, et al., *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied*, U.S. Dept. of Ed., Institute of Education Science, at 4-8 (May 2019), <https://ies.ed.gov/ncee/pubs/20194006/pdf/20194006.pdf>.

³⁴ Jonathan Mills & Patrick Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement after Four Years*, University of Arkansas Working Paper Series, at 4 (2019), <http://www.uaedreform.org/wp-content/uploads/Mills-Wolf-LSP-Achievement-After-4-Years-final.pdf> (emphasis added).

math.³⁵ A 2019 companion study found that participation in the Louisiana voucher program did not improve rates of college enrollment.³⁶

A 2018 longitudinal study found that low-income students who switched from public to private schools using vouchers experienced, on average, a statistically significant loss in mathematics achievement during their first year of private school compared to matched students who remained in public schools, and this loss remained consistent regardless of the length of time spent in private school.³⁷ And a 2016 study of the Ohio voucher program, funded by voucher advocates, 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, suggesting that the results are not driven simply by the setbacks that typically accompany any change of school.”³⁸ In fact, of nine rigorous, large-scale studies on vouchers conducted since 2015, some conducted by voucher advocates, two showed no effect on learning and seven showed detrimental effects.³⁹

³⁵ *Id.* at 24.

³⁶ Heidi H. Erickson, Jonathan Mills & Patrick Wolf, *The Effect of the Louisiana Scholarship Program on College Entrance* (Apr. 23, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376236.

³⁷ 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’y Anal. & Management* 783, 796 (2018), <https://onlinelibrary.wiley.com/doi/abs/10.1002/pam.22086>.

³⁸ David Filgio & Krzysztof Karbownik, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effect*, Thomas B. Fordham Institute, at 2 (July 2016), https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report_online%20edition.pdf.

³⁹ Christopher Lubienski & Joel Malin, *The New Terrain of the School Voucher Wars*, The Hill (Aug. 30, 2019), <https://thehill.com/blogs/>

c. Vouchers Divert Resources from Public Schools and Do Not Save Them Money

Many U.S. public schools – including Tennessee’s – are chronically underfunded.⁴⁰ Contrary to Appellant *amici*’s claims that vouchers save states and school systems money (EdChoice/ExcelinEd Br. at 14-15), research shows that diverting public education funding to private school voucher programs exacerbates public schools’ severe resource deficiencies. This reality also discredits the EdChoice/ExcelinEd *amici*’s claim that voucher programs benefit and improve the public schools that they starve of essential resources.⁴¹ *Id.* at 11-12.

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.⁴² 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

congress-blog/education/459400-the-new-terrain-of-the-school-voucher-wars.

⁴⁰ Danielle Farrie & David G. Sciarra, *Making the Grade 2020: How fair is school funding in your state?*, Education Law Center (2021), <https://edlawcenter.org/assets/MTG%202020/Making%20the%20Grade%202020.pdf>.

⁴¹ 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 per-pupil spending reduced test scores and college-going rates and had a disproportionate impact on students living in poverty).

⁴² 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/>.

expansion posed “a significant fiscal threat to public schools.”⁴³ Additionally, the funds diverted to voucher programs are often subject to fraud and waste. Indeed, fraudulent spending was uncovered in Tennessee’s existing voucher program for students with disabilities.⁴⁴

Furthermore, private school 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.⁴⁵ Many vouchers do not even cover the full cost of tuition.

Moreover, public education systems bear substantial fixed costs in operating their public schools, such as facilities repair and maintenance, 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 cover the loss of funding diverted to voucher programs.⁴⁶

⁴³ Ellie Bruecker, *Assessing The Fiscal Impact of Wisconsin’s Statewide Voucher Program*, Nat’l Educ. Poly Ctr., at 4-5 (2017), https://nepc.colorado.edu/sites/default/files/publications/PM%20Bruecker%20Funding_0.pdf.

⁴⁴ 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/>.

⁴⁵ Meghan Casey Whittaker, *The Average Voucher Doesn’t Cover Full Cost of Private School, NCLD Data Analysis Shows*, Understood.org (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>.

⁴⁶ See, e.g., Stuart S. Yeh, *The Cost-Effectiveness of Five Policies for Improving Student Achievement*, 28(4) Am. J. Evaluation 416 (2007), <https://journals.sagepub.com/doi/10.1177/1098214007307928>.

Indeed, the Court of Appeals found that the reimbursements contained in the Voucher Law do not “make the counties whole” and are subject to uncertain appropriation. *Metro. Gov’t*, 2020 WL 5807636, at *3.

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

III. CONCLUSION

The order of the Court of Appeals should be affirmed.

DATED: April 7, 2021

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CERTIFICATE OF COMPLIANCE

I, Christopher M. Wood, hereby certify that *AMICI CURIAE* BRIEF OF McEWEN PLAINTIFFS, TENNESSEE NAACP, PASTORS FOR TENNESSEE CHILDREN AND PASTORS FOR CHILDREN IN SUPPORT OF APPELLEES 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 7,485 words.

Dated: April 7, 2021

s/ Christopher M. Wood

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CERTIFICATE OF SERVICE

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