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 McEWEN PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE DEFENDANTS/APPELLANTS' MOTION FOR REVIEW OF STAY ORDER

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I. Interest of *Amici*

Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Sheron Davenport, Heather Kenney, Elise McIntosh, Tracy O'Connor, and Apryle Young (hereinafter the "McEwen Plaintiffs"), as parents and community members in Shelby and Davidson Counties, are directly affected by the Tennessee Education Savings Account Pilot Program ("Voucher Law"), T.C.A. §49-6-2601, *et seq*., and can provide the Court with a distinct perspective on the effects of this unconstitutional law. The Voucher Law applies only to Davidson and Shelby Counties, and the ESA voucher program is funded with taxpayer dollars intended for Metro Nashville Public Schools and Shelby County Schools. The McEwen Plaintiffs are all residents and taxpayers in Davidson and Shelby Counties. Ten of the McEwen Plaintiffs are parents of public school students in Metro Nashville Public Schools or Shelby County Schools. The eleventh plaintiff, Dr. Claudia Russell, spent her entire career as an educator and administrator in Metro Nashville Public Schools. The McEwen Plaintiffs actively advocate for adequate and equitable educational opportunities in Metro Nashville Public Schools and Shelby County Schools. They also represent a diverse cross-section of Davidson and Shelby Counties' residents and public school families.

Further, the McEwen Plaintiffs have a strong legal interest in the instant case, *Metropolitan Gov't of Nashville and Davidson Counties v. Tenn. Dep't of Educ.*, because they are plaintiffs in a lawsuit with

overlapping legal questions.[1] Although the cases have not been formally consolidated, the McEwen Plaintiffs have participated in all proceedings in the *Metro Gov't* case. In addition, the Court of Appeals granted the McEwen Plaintiffs' motion to file an *amici curiae* brief in opposition to Defendants' applications for permission to appeal and motions for review of the Chancery Court's order denying a stay pending appeal. McEwen Pls' App., Exs. 7-8.

The McEwen Plaintiffs, as taxpayers and public school parents, have a stake in the outcome of this case that is distinct from that of the plaintiffs-appellees in *Metro Gov't* (the "Metro Plaintiffs"). Moreover, as the Chancery Court indicated, the outcome of *McEwen v. Lee* is inextricably intertwined with the outcome of the appeal in this case. The McEwen Plaintiffs can provide this Court with information and analysis about irreparable harm resulting from implementation of the Voucher Law from the perspective of directly affected groups that are not currently represented in the *Metro Gov't* case. They will therefore assist the Court in arriving at a more comprehensive understanding of the matters at issue in this case.

II. Introduction

This Court should reject Defendants/Appellants' now ***third*** attempt to stay enforcement of the Chancery Court's injunction

[1] The McEwen Plaintiffs' interest in this proceeding is heightened by the Liberty Justice Center Intervenor-Defendants' motion for this Court to accept jurisdiction, which they did not serve on the McEwen Plaintiffs, In the motion, the Intervenor-Defendants ask this Court, *ex parte*, to dismiss the *McEwen* case in its entirety. Liberty Justice Center Mot. Accept Jurisdiction at 21.

prohibiting the State from implementing the unconstitutional Voucher Law. The Voucher Law was foisted upon Davidson and Shelby Counties, their public schools, and their communities, in spite of their objections and without their constitutionally mandated opportunity for consent. Because Defendants/Appellants do not even attempt to demonstrate that the Chancery Court abused its discretion, or that the Court of Appeals wrongly denied their motion for review, the requested stay should be denied out of hand.

Even if this Court were to engage in *de novo* review, which it should not, Defendants/Appellants have still failed to demonstrate that a stay should be granted. Fundamentally, neither the State nor the Intervenor-Defendants have ever provided evidence – despite numerous opportunities to do so – that is sufficient to demonstrate any harm would result from the Chancery Court's injunction, let alone irreparable harm that could justify the extraordinary remedy they seek. In contrast, the McEwen Plaintiffs have established that they ***would*** suffer irreparable harm in the absence of an injunction, including from the loss of their constitutional right to local approval under the Home Rule provision, as well as the spending of taxpayers' dollars to implement an unconstitutional law.

Nor do any of the other pertinent factors support a stay. As set forth below, Defendants/Appellants have no likelihood of success, nor does the public interest justify a stay of the injunction. To the contrary, preserving the *status quo* ***requires*** that the injunction remain in place. For these reasons, Defendants/Appellants' motion should be denied

Finally, while not separately addressed here to avoid repetitious briefing, the McEwen Plaintiffs join in the Metro Plaintiffs' opposition to Defendants/Appellants' motions to assume jurisdiction. For the reasons set forth in the Metro Plaintiffs' briefing, the motions to assume jurisdiction should also be denied.

III. Statement of Relevant Facts and Procedural History

In May 2019, Tennessee's General Assembly passed the Voucher Law, codified at T.C.A. §49-6-2601, *et seq.*, which creates a private school voucher program in Davidson and Shelby Counties. McEwen Pls' App., Ex. 1 at APP016. Under the eligibility criteria in the statute, the only two counties that can ever be subject to the Voucher Law are Shelby and Davidson Counties. McEwen Pls' App., Ex. 1 at APP017-18; McEwen Pls' App., Ex. 2, at APP053-54. The voucher program established by the Voucher Law is funded through the Basic Education Program ("BEP"), which is 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 Pls' 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 Pls' 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 Pls' App., Ex. 1 at APP020. Although the Voucher Law does not

require the voucher program to begin until the 2021-2022 school year, T.C.A. §49-6-2604(b), the State has rushed to make vouchers available for the 2020-2021 school year despite pending legal challenges. McEwen Pls' App., Ex. 2 at APP050-53.

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. Like the Metro Plaintiffs, the McEwen Plaintiffs 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. McEwen Pls' App., Ex. 1 at APP030; McEwen Pls' App., Ex. 2 at APP065-72; Parent Intervenor-Defs'/Petitioners' App. Supp. Joint Mot. Assume Jurisdiction ("Beacon/IJ Intervenors' App."), Ex. 2. 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 ten of the McEwen plaintiffs are parents of public school students in Metro Nashville Public Schools or Shelby County Schools. McEwen Pls' App., Ex. 1 at APP006-09; McEwen Pls' App., Ex. 2 at APP048; McEwen Pls' App., Ex. 3 at APP092-137. The State and Intervenor Defendants in *Metro Gov't* and *McEwen* are nearly identical.

The Metro Plaintiffs filed a motion for summary judgment on their Home Rule claim. Beacon/IJ Intervenors' App., Ex. 7. The McEwen Plaintiffs filed a Motion for Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04, which detailed the irreparable harm they would suffer if the voucher program were to be implemented in the 2020-2021 school

year. McEwen Pls' App., Ex. 2. Motions to dismiss or for judgment on the pleadings were filed in both cases. On April 29, 2020, the Chancery Court heard extensive oral argument on all the motions in both cases at the same hearing. Beacon/IJ Intervenors' App., Ex. 8. 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 the Defendants from implementing and enforcing the Voucher Law. Beacon/IJ Intervenors' App., Ex. 1. At the same time, the Court issued a separate Order finding the McEwen Plaintiffs' Motion for a Temporary Injunction moot in light of the Summary Judgment Order, Beacon/IJ Intervenors' App., Ex. 20, and stating that "the Court has granted the relief the [McEwen] Plaintiffs [sought] with their motion." *Id.* at APP1260. The Chancery Court took under advisement decisions on all other motions in the instant case and in *McEwen*. Beacon/IJ Intervenors' App., Ex. 1 at APP0031; Beacon/IJ Intervenors' App., Ex. 20 at APP1260.

On May 5, 2020, the State and Intervenor-Defendants filed a Joint Motion for Stay of Injunction During Pendency of Appeal. On May 7, 2020, the Chancery Court held a hearing on the joint motion for a stay pending appeal and considered oral arguments and briefing from both the Metro and McEwen Plaintiffs, as well as from the State and Intervenor Defendants. Beacon/IJ Intervenors' App., Exs. 11-13. The Chancery Court issued a bench ruling denying a stay pending appeal, Beacon/IJ Intervenors' App., Ex. 13 at APP1121-25, and issued an order confirming the ruling on May 13, 2020. Beacon/IJ Intervenors' App., Ex. 14.

On May 6, 2020, the State and the Beacon Center/Institute for Justice Intervenor-Defendants separately filed applications for permission to appeal to the Court of Appeals under Tenn. R. App. P. 9. On May 13, 2020, the Beacon Center/Institute for Justice Intervenor-Defendants filed a Joint Emergency Motion for Review of Stay Order in the Court of Appeals, and on May 14 they filed an amended version of that motion. On May 15, 2020, the State Defendants filed a Motion for Review of Order Denying Stay of Injunction. And on May 18, 2020, the Liberty Justice Center Intervenor-Defendants filed a Motion for Review of Order Denying Stay of Injunction Pending Appeal. The Metro Plaintiffs filed a Response in Opposition to State and Intervenor-Defendants' Applications for Permission to Appeal, Beacon/IJ Intervenors' App., Ex. 16, and a Response in Opposition to State Defendants' and Intervenor-Defendants' Joint Motion to Stay Injunction During Pendency of Appeal. Beacon/IJ Intervenors' App., Ex. 19. The McEwen Plaintiffs also moved for leave to file a Brief of *Amici Curiae* in Opposition to Defendants' Applications for Permission to Appeal and Motions for Review of Stay Order. McEwen Pls' App., Ex. 7. The Court of Appeals granted that motion. McEwen Pls' App., Ex. 8. On May 19, the Court of Appeals issued an Order granting Defendants' applications for permission to appeal and denying a stay of the Chancery Court's injunction order. Beacon/IJ Intervenors' App., Ex. 25.

IV. Defendants Have Not Come Close to Meeting the Heavy Burden Necessary to Justify a Stay

An appellate court reviews an order denying a stay for abuse of discretion. *Open Lake Sporting Club v. Lauderdale Haywood Angling*

Club, 511 S.W.3d 494, 505 (Tenn. Ct. App. 2015) ("A trial court's decision concerning a request to stay enforcement of an order is subject to an abuse of discretion standard of review."). The Chancery Court did not abuse its discretion in denying the stay of its order, and the Court of Appeals correctly rejected Defendants' attempts to stay the Chancery Court's injunction during the pendency of the appeal. Moreover, even if this Court were to consider the matter *de novo*, Defendants have not come close to establishing that ***any*** of the relevant factors justify a stay in this case.

Regardless of the standard this Court applies, Defendants' third bite at the apple should be denied.

A. The Chancery Court Did Not Abuse Its Discretion in Denying a Stay, and the Court of Appeals Correctly Declined to Issue a Stay

Defendants do not contend that the Chancery Court abused its discretion in declining to stay its injunction order. Instead, Defendants contend that no deference should be given to the Chancery Court's or Court of Appeals' decision denying a stay and that *de novo* review is required to preserve the *status quo*. Neither contention is persuasive.

"The determination of whether, and on what terms, to stay an injunction or the denial of an injunction is left to the discretion of the judge." *Gallatin Hous. Auth. v. Pelt*, 532 S.W.3d 760, 769 (Tenn. Ct. App. 2017). An appellate court should not interfere with the trial court's decision to deny a stay unless that decision constitutes an abuse of discretion. *Open Lake Sporting Club*, 511 S.W.3d at 505. The abuse of discretion standard presents a high bar. *See, e.g.*, *Seven-Up Co. v. O–So Grape Co.*, 179 F. Supp. 167, 172 (N.D. Ill. 1959) ("[T]he likelihood of

successfully urging an abuse of discretion in an appellate court is comparable to the chance which an ice cube would have of retaining its obese proportions while floating in a pot of boiling water."). An appellate court will not disturb a trial court's decision "so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted). When reviewing for abuse of discretion, an appellate court cannot substitute its judgment for that of the trial court. *Id.*

It is clear that the trial court considered all relevant facts and law in arriving at its decision denying the stay. In addition to hearing oral argument from all parties in *Metro Gov't* and *McEwen*, the Chancellor "read everything that was submitted . . . including the case law." Beacon/IJ Intervenors' App, Ex. 10 at APP254. Moreover, as discussed below, there was a compelling factual and legal basis for the Chancery Court's ruling. The Court of Appeals similarly rejected Defendants' attempts to stay the injunction after comprehensive briefing from all parties in both *Metro Gov't* and *McEwen*. McEwen Pls' App., Exs. 7-8. Defendants have therefore failed to establish any abuse of discretion.

Nor, as Defendants suggest, is *de novo* review necessary to preserve the *status quo*. Quite the opposite is true. As the McEwen plaintiffs demonstrated in their Motion for a Temporary Injunction, it was the Chancery Court's order ***enjoining implementation of the Voucher Law*** that preserved the *status quo*. McEwen Pls' App., Ex. 2 at APP063, APP078-082. The alternative – that implementation continues, the State issues vouchers, and students enroll in private schools, only to have the law be struck down as unconstitutional after they transition into a new

school – would not preserve the *status quo* but would instead create irreparable disruption. *Id.*; *see Garrett v. Bd. of Educ. of Sch. Dist. of City of Detroit*, 775 F. Supp. 1004, 1013 (E.D. Mich. 1991) (enjoining implementation of male-only academies because although admitting females would delay the academies' start, "greater disruption would result if plaintiffs won this suit and the Academies were then aborted. . . . [I]njunctive relief would fulfill the traditional purpose of preserving the existing state of things until the rights of the parties can be fairly and fully investigated and determined") (internal quotations omitted).

B. Even Considered Under *de Novo* Review, Defendants Have Failed to Justify a Stay

Even if this Court were to engage in *de novo* review of the Chancery Court's and Court of Appeals' orders, which is not the applicable standard of review, Defendants' motions should still be denied. Defendants have failed to establish any of the relevant factors justifying a stay, namely, the likelihood of success on appeal, irreparable harm, injury that outweighs the harm to others, or a public interest supporting a stay.

1. Defendants Have No Likelihood of Success on Appeal

As discussed in Plaintiffs/Appellees' Response in Opposition to State Defendants/Appellants' Motion for Review of Stay Order (the "Stay Opposition"), as well as the McEwen Plaintiffs' filings below, the Voucher Law clearly violates the Home Rule provision.[2] McEwen Pls' App., Ex. 2

[2] For the reasons set forth in Plaintiffs/Appellees' Response in Opposition to State and Intervenor-Defendants/Appellants' Motion to

at APP065-72; McEwen Pls' App., Ex. 5 at APP493-500. The Voucher Law affects Davidson and Shelby Counties in their well-established role in funding public education; and, given this effect on the counties – the relevant inquiry under the Home Rule amendment – it is immaterial that the Voucher Law refers to local education agencies rather than specifically to counties. McEwen Pls' App., Ex. 5 at APP495-500. Additionally, it is undisputed that the Voucher Law did not require or receive local approval. Thus the Chancery Court's decision is consistent with the plain language and intent of the Home Rule provision and is supported by established Tennessee precedent.[3]

2. Defendants Have Failed to Show Irreparable Harm

A stay pending appeal should be denied because Defendants have utterly failed to show any irreparable harm that would be prevented in the absence of a stay. This alone is fatal to their motion. *See State v. Gawlas*, 614 S.W.2d 74, 75 (Tenn. Crim. App. 1980) (noting that "the

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Assume Jurisdiction, the motions to assume jurisdiction should also be denied.

[3] For the reasons set forth in the Stay Opposition, the State's contention that the Chancery Court erred in finding the Metro Plaintiffs have standing, is wrong. *See* Stay Opposition at 17-19. Moreover, even if there were a basis to question the Metro Plaintiffs' standing, it does not follow that the Chancery Court would have denied an injunction. The McEwen Plaintiffs independently established their standing to seek an injunction of the Voucher Law, and the Chancery Court could easily have applied its legal analysis holding the Voucher law unconstitutional to grant the McEwen Plaintiffs' motion for a temporary injunction, which was only found moot because of the injunction entered in *Metro Gov't*.

Advisory Commission Comment to Rule 9 indicates that the procedures outlined in that rule 'are essentially those followed in federal practice . . . under 28 U.S.C. §1292(b)'" and that "federal courts allow appeals from interlocutory orders only 'when they have a final and irreparable effect on the rights of the parties'").

a. The State Has Failed to Establish Irreparable Harm

The State asserts that, absent a stay pending appeal, it will be irreparably harmed because it will be "wrongly enjoined from enforcing one of its duly enacted laws." Defendants' Motion for Review of Orders Denying Stay of Injunction at 13. The voucher program, however, was not mandated by the General Assembly to be available until the fall of 2021. T.C.A. §49-6-2604(b). While the State may ***prefer*** to implement the program earlier than required, no Defendants have argued that the denial of a stay pending appeal would prevent the Voucher Law's timely implementation if – although unlikely – it is upheld on appeal. *See* McEwen Pls' App., Ex. 4 at APP457-58. Furthermore, the State's argument that being enjoined "from effectuating statutes enacted by representatives of its people" constitutes irreparable harm (Defendants' Application for Permission to Appeal at 16) is unpersuasive given the Chancery Court's ruling that the State itself had frustrated the will of the people by enacting the Voucher Law without their constitutionally required consent. Beacon/IJ Intervenors' App., Ex. 5 at APP106.

The State also unsuccessfully attempts to draw a link between itself and the University of Michigan in *Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001). Defendants' Application for Permission to Appeal at 13. In

Grutter, the Sixth Circuit granted a stay pending appeal to prevent the University of Michigan Law School from having to create a new admissions policy, delay making final decisions on candidates, and lose applicants to other schools, "***thus diminishing the University's ability to compete with other selective law schools for highly qualified applicants***." *Id*. at 633 (emphasis added). The Sixth Circuit was clearly persuaded by the harm to the law school's ability to recruit top-notch legal minds from a national pool each year. The facts in *Grutter* – which involved a prestigious university whose reputation and funding depended heavily on its competitive ability to draw highly qualified candidates away from other law schools – are incomparable to the implementation of a program that has neither yet started nor is required to start until the 2021-2022 school year, where students will receive vouchers based on when they apply or by a random lottery. Moreover, by pushing to implement the voucher program a full year in advance, the State Defendants are the architects of any harm they may perceive. The State has pushed forward, spending public money and resources, while fully cognizant of the pending legal challenges to the Voucher Law. This ill-advised implementation of a law that was constitutionally suspect should not be rewarded with extraordinary relief from this Court. This does not constitute irreparable harm, and it is certainly not comparable to the actual irreparable harm recognized by the Sixth Circuit in *Grutter*.

b. Intervenor-Defendants Have Failed to Establish Irreparable Harm as Parents of Children Who May Enroll in the Voucher Program

Intervenor-Defendants did not file a motion asking this Court to stay the Chancery Court's order. However, they contend that, absent a stay, their children will be foreclosed from obtaining a voucher and forced to return to schools in districts where they may face adverse circumstances.

Yet, no Defendant has put forth any evidence demonstrating that even if their child receives a voucher, which is not guaranteed, the child will be accepted at a specific private school or that the private school they wish to attend will offer a superior education or remedy their current concerns.[4] *See* McEwen Pls' App., Ex. 4 at APP458-59. And no Defendant has offered any evidence of attempts to resolve these issues using the mechanisms and alternatives provided within the public school system, such as the robust school choice programs available in each school

[4] Intervenor-Defendants' contention that private schools that accept voucher students will provide a superior education without social obstacles is highly speculative. In fact, the record provides evidence to the contrary. One of the McEwen Plaintiffs, Sheron Davenport, has a son who received a scholarship to attend a private school. While her son was enrolled in the private school, Ms. Davenport was concerned about the lack of individual encouragement that her son received. She was also uncomfortable with the lack of cultural awareness in the school. For example, the school essentially did not recognize Black History Month. When Ms. Davenport's son re-enrolled in public school, he regained his confidence and thrived academically. McEwen Pls' App., Ex. 3 at APP116.

district.[5] In other words, Defendants put forth no evidence at all of "the severity of the potential injury, [or] the probability of its occurrence." Tenn. R. App. P. 9(a). There simply is no evidence that Defendants would suffer irreparable harm absent the voucher program or that allowing the State to continue expending funds and resources on this unconstitutional law would remedy Defendants' concerns.

The Beacon/Institute for Justice Intervenor-Defendants also argue that merely participating in public school choice somehow creates irreparable harm because parents may be "forced to put their children on waitlists." Parent Intervenor-Defendants'/Petitioners' Joint Motion to Assume Jurisdiction Pursuant to Tennessee Code Ann. §16-3-201(d) and Tenn. Sup. Ct. R. 48 at 15. This argument must fail. First, it is abstract and does not establish any irreparable harm. Second, it assumes that similar "harm" does not exist for voucher participants because all students who apply for a voucher will receive one and will be accepted at their preferred private school. This assumption is false because the State has made clear that if the voucher program is oversubscribed, there will be a lottery and a waitlist, and no Defendants have provided any evidence

[5] The declarations of Jenai Hayes, Director of Office of School Choice for Metro Nashville Public Schools, and Dr. Angela Hargrave, Executive Director of the Office of Student Equity, Enrollment and Discipline for Shelby County Schools, set forth the many public school choice options available in each district. Beacon/IJ Intervenors' App., Ex. 11, at 1029-1034, 1040-41. As Ms. Hayes indicates, parents can apply for open seats at schools through August 30, as well as joining waitlists for schools that are at capacity. *Id.*

suggesting that private schools will not use waitlists when admitting students.

Intervenor-Defendants have confused irreparable harm with the notion that individuals have a right – at the public's expense – to anything they feel would be beneficial to their family. This is simply incorrect. While the Tennessee Constitution guarantees all children a right to a public education, Tenn. Const. art. XI, §12, there is no corresponding right to a publicly funded private education. Furthermore, no right is created by an unconstitutional law. *See People v. Weintraub*, 313 N.E. 2d 606, 608 (Ill. App. Ct. 1974) ("[I]f [a] law is unconstitutional, there is no law and there can be no question about proper procedures for protecting [one's] rights under the law because in theory [their] rights have never been threatened or affected . . . .").[6]

None of the Defendants has demonstrated irreparable harm. Therefore, the State's motion for a stay pending appeal should be denied.

3. The Balance of Harm Supports Upholding the Lower Court's Order and Denying the Stay

To justify a stay, Defendants must show "irreparable harm that ***decidedly outweighs*** the harm that will be inflicted on others if a stay is granted." *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927,

[6] Notably, the Liberty Justice Center does not allege that its private school clients would suffer ***any*** irreparable harm if the stay is denied. But even if they did allege harm, it would be purely speculative at best, considering that no school is guaranteed to receive voucher students. Moreover, Intervenor-Defendant Greater Praise Christian Academy is a Category IV private school, which means it is ineligible to participate in the voucher program.

928 (6th Cir. 2002) (emphasis added). As explained above, no Defendant has come close to establishing the irreparable harm necessary to warrant a stay of the lower court's injunction. In contrast, if the Voucher Law is allowed to proceed, the McEwen Plaintiffs would indisputably suffer irreparable harm. *See* McEwen Pls' App., Ex. 2 at APP076-78. First, "[t]he loss of a constitutional right, even for a minimal period[] of time, unquestionably constitutes irreparable injury." *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769-70 (M.D. Tenn. 2014), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (internal quotations omitted). Here, the Chancery Court ruled that the State violated the Home Rule provision when it enacted the Voucher Law. Beacon/IJ Intervenors' App., Ex. 1. If implementation of the Voucher Law is allowed to proceed, the McEwen Plaintiffs will continue to suffer irreparable harm from the loss of their constitutional right to local approval under the Home Rule provision.

Second, if implementation of the Voucher Law is allowed to proceed, the McEwen Plaintiffs will continue to suffer irreparable harm from the spending of taxpayer dollars to implement this unconstitutional law. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (crediting plaintiff's contention that the misappropriation of public funds "will result in irreparable injury to the county and taxpayers"). The Voucher Law has already unlawfully diverted over $1 million in public funds to a private vendor. McEwen Pls' App., Ex. 1 at APP017. If implementation goes forward, the State plans to expend significant funds and staff resources to continue administering the voucher program. State's App., Ex. 4. Specifically, if allowed to proceed, the State plans to hire 20 new employees to

implement the program by July 1, 2020. *Id.* Spending additional taxpayer funds to implement this unconstitutional law unquestionably causes Plaintiffs to suffer irreparable harm.

Importantly, ***no Defendant has ever disputed*** – in the Chancery Court, in the Court of Appeals, or in their motions before this Court – that these two injuries are sufficient to demonstrate irreparable harm to the McEwen Plaintiffs. McEwen Pls' App., Ex. 4 at APP456.

Because Defendants have failed to show any irreparable harm that would be prevented by a stay pending appeal, and because the McEwen Plaintiffs would indisputably be harmed by a stay, Defendants' motions should be denied.

4. Staying the Injunction Is Not in the Public Interest

There is no public interest that justifies staying the Chancery Court's injunction. To the contrary, there is a strong public interest in preventing the implementation of an unconstitutional statute and the expenditure of taxpayer funds thereon. McEwen Pls' App., Ex. 2 at APP081-82. It is also in the public interest to maintain the *status quo* – that is, no voucher program for the 2020-2021 school year – during the pendency of an appeal to avoid disruption to the education of students eligible for vouchers, as well as students enrolled in Shelby County Schools and Metro Nashville Public Schools. *Id.*

First, courts have recognized that there is a public interest in preventing the implementation of an unconstitutional statute. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); *see also Garrett*, 775 F. Supp. at 1014 (adopting plaintiffs' argument "that the

public interest is better served by preventing the opening of an unconstitutional educational facility"). The implementation of the voucher program violates the Home Rule provision of the Tennessee Constitution, as determined by the Chancery Court. Ironically, Defendants contend that if a stay is not granted, the political will of the people of this State will be frustrated. Defendants' Motion for review of Orders Denying Stay of Injunction at 16-17. But recognizing that the Home Rule provision is "designed to empower[] local governments," the Chancery Court ruled that it was ***the State*** that had frustrated the will of the people of Davidson and Shelby Counties when it enacted the Voucher Law without their constitutionally required consent. Beacon/IJ Intervenors' App., Ex. 1 at APP020 (internal quotation omitted). Therefore, it is not in the public interest to allow implementation of this unconstitutional statute.

Second, "[p]ublic interest is near its zenith when . . . seeing that public funds are not purloined or wasted." *Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 576 (6th Cir. 1997) (internal quotations omitted). Defendants have already spent more than $1 million on the voucher program and plan to divert tens of millions more in taxpayer dollars to private schools if the injunction against this unconstitutional program is stayed. McEwen Pls' App., Ex. 2 at APP060-62. It is contrary to the public interest for the government to spend taxpayer dollars on programs that are unconstitutional.

Third, it is in the public interest for this Court to preserve the *status quo* at this juncture. Preserving the *status quo* allows the Court to rule on the merits of the case without harming the interests of any party. *See*

Fannon v. City of LaFollette, 329 S.W.3d 418, 430 (Tenn. 2010); *Memphis Retail Inv'rs Ltd. P'ship v. Baddour*, 1988 WL 82940, at *2 (Tenn. Ct. App. Aug. 10, 1988). Defendants argue "the *status quo* here involves the planned implementation of the legislatively enacted ESA Program." Defendants' Motion for Review of Orders Denying Stay of Injunction at n.9. However, launching an entirely new program a year ahead of schedule is hardly maintaining the *status quo*. The voucher program is not functioning, vouchers have not been issued, and the State has not withdrawn BEP funds from Shelby County Schools or Metro Nashville Public Schools. ***That is the status quo***.

Maintaining the *status quo* benefits students who may get a voucher and private schools that may enroll voucher students, as well as students who remain enrolled in Shelby County Schools and Metro Nashville Public Schools. *See supra*, §IV.B.3. If vouchers are awarded and then taken away when an appellate court upholds the Chancery Court's order, voucher students will scramble to enroll in the appropriate public school – perhaps doing so in the middle of the school year – and could find themselves financially responsible for remaining private school tuition payments they cannot afford. Intervenor-Defendants frequently contend that their children face adverse circumstances at their current schools; however, they ignore the substantial emotional and financial upheaval that will result from a sudden loss of a voucher and abrupt change of school. Participating private schools will find themselves with a sudden shortage of funding and students, coupled with new employment contracts and other financial obligations made in anticipation of the voucher program. Conversely, Shelby County Schools

and Metro Nashville Public Schools will have to enroll these new students midyear without the appropriate funding, and students who remained in public schools would have already suffered from the loss of funding. McEwen Pls' App., Ex. 2 at APP060-62.

Moreover, the Voucher Law does not require the voucher program to begin enrolling students until the 2021-2022 school year. T.C.A. §49-6-2604(b). There has therefore been no showing that a stay is necessary for timely implementation of the Voucher Law. Maintaining the *status quo* during the pendency of the litigation best serves the interests of all parties and the public at large.

Continued implementation of the voucher program is contrary to the public interest. Thus, the Chancery Court's Order enjoining the implementation of the voucher program should not be stayed.

V. Conclusion

Defendants/Appellants' motion for review of the orders denying a stay of the injunction should be denied.

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CERTIFICATE OF COMPLIANCE

I, Christopher M. Wood, hereby certify that *AMICI CURIAE* McEWEN PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE DEFENDANTS/APPELLANTS' MOTION FOR REVIEW OF STAY ORDER 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 5,496 words.

Dated: May 29, 2020

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

CERTIFICATE OF SERVICE

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