

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

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.

No. M2020-00683-COA-R9-CV

Davidson County Chancery Court
No. 20-0143-II

AMICI CURIAE BRIEF OF McEWEN PLAINTIFFS
IN SUPPORT OF APPELLEES

ROBBINS GELLER RUDMAN
& DOWD LLP
CHRISTOPHER M. WOOD (BPR
No. 032977)
414 Union Street, Suite 900
Nashville, TN 37219
Telephone: 615/244-2203
615/252-3798 (fax)
cwood@rgrdlaw.com

ACLU FOUNDATION OF
TENNESSEE
THOMAS H. CASTELLI (BPR No.
024849)
STELLA YARBROUGH (BPR No.
033637)
P.O. Box 120160
NASHVILLE, TN 37212
Telephone: 615/320-7142
615/691-7219 (fax)
tcastelli@aclu-tn.org
syarbrough@aclu-tn.org

SOUTHERN POVERTY LAW
CENTER
CHRISTINE BISCHOFF*
LINDSEY RUBINSTEIN*
111 East Capitol Street, Suite 280
Jackson, MS 39201
Telephone: 769/524-2013
christine.bischoff@splcenter.org
lindsey.rubinstein@splcenter.org

EDUCATION LAW CENTER
DAVID G. SCIARRA*
WENDY LECKER*
JESSICA LEVIN*
60 Park Place, Suite 300
Newark, NJ 07102
Telephone: 973/624-1815
973/624-7339 (fax)
dsciarra@edlawcenter.org
wlecker@edlawcenter.org
jlevin@edlawcenter.org

Attorneys for *Amici Curiae* McEwen Plaintiffs

*admitted pro hac vice

TABLE OF CONTENTS

| | Page |
|--|------|
| I. INTRODUCTION..... | 3 |
| II. BACKGROUND | 4 |
| III. ARGUMENT | 6 |
| A. Appellants’ Standing Contentions Are Erroneous | 6 |
| 1. Appellees Have Standing..... | 7 |
| 2. The McEwen Plaintiffs Also Have Standing..... | 8 |
| a. The McEwen Plaintiffs Have Standing as Taxpayers to Challenge the Voucher Law as an Illegal Expenditure of Public Funds..... | 8 |
| b. The McEwen Plaintiffs, as Parents of Children Enrolled in Metro Nashville Public Schools and Shelby County Schools, Have Standing Because They Suffer a Special Injury Not Common to the Public Generally | 10 |
| B. The Voucher Law Violates the Home Rule Provision of the Tennessee Constitution | 11 |
| 1. Funding Private School Vouchers Is Not a State Function | 12 |
| 2. Vouchers Are a Direct Detriment to the Counties and Their Communities | 14 |
| C. Appellant <i>Amici</i> ’s Claims About the Benefits of Private School Vouchers Are Demonstrably Incorrect..... | 18 |
| 1. Vouchers Have a Racist History and Increase Segregation..... | 18 |
| 2. <i>Amici</i> Catholic Schools’ Repugnant Contentions Are Wrong | 22 |

| | Page |
|---|-------------|
| 3. Private School Vouchers Are Unpopular, and Most Voucher Proposals Are Rejected | 24 |
| 4. Research Shows Vouchers Negatively Impact Schools, Students, and Communities | 26 |
| a. The Research and Analysis Cited by Pro-Voucher <i>Amici</i> Are Fundamentally Flawed | 26 |
| b. Vouchers Do Not Improve Educational Outcomes | 28 |
| c. Vouchers Divert Resources from Public Schools and Do Not Save Them Money | 30 |
| IV. CONCLUSION | 32 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|-------|
| <i>Badgett v. Rogers</i> , 436 S.W.2d 292 (Tenn. 1968)..... | 7, 9 |
| <i>Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.</i> , 911 F. Supp. 2d 631 (W.D. Tenn. 2012)..... | 9, 22 |
| <i>Cagle v. McCanless</i> , 285 S.W.2d 118 (Tenn. 1955)..... | 12 |
| <i>City of Memphis v. Hargett</i> , 414 S.W.3d 88 (Tenn. 2013)..... | 9 |
| <i>City of New Johnsonville v. Handley</i> , No. M2003-00549-COA-R3-CV, 2005 WL 1981810 (Tenn. Ct. App. Aug. 16, 2005) | 7, 8 |
| <i>Coffey v. State Educ. Fin. Comm’n</i> , 296 F. Supp. 1389 (S.D. Miss. 1969)..... | 19 |
| <i>Curve Elementary Sch. Parent & Teacher’s Org. v. Lauderdale Cty. Sch. Bd.</i> , 608 S.W.2d 855 (Tenn. Ct. App 1980) | 9, 10 |
| <i>Lee v. Macon Cty. Bd. of Educ.</i> , 267 F. Supp. 458 (M.D. Ala.), <i>aff’d sub nom. Wallace v. U.S.</i> , 389 U.S. 215 (1967)..... | 19 |
| <i>Morgan Cty. Bd. of Comm’rs v. Morgan Cty. Bd. of Educ.</i> , No. 03A01-9308-CV-00290, 1994 WL 111457 (Ct. App. Tenn. Apr. 6, 1994)..... | 13 |
| <i>Pope v. Dykes</i> , 93 S.W. 85 (Tenn. 1905)..... | 8 |

| | Page |
|--|--------|
| <i>State ex rel. Brown v. Polk Cty.</i> , 54 S.W.2d 714 (Tenn. 1932)..... | 13 |
| <i>State ex rel. Weaver v. Ayers</i> , 756 S.W.2d 217 (Tenn. 1988)..... | 12, 13 |

STATUTES, RULES AND REGULATIONS

| | |
|-----------------------------|----------|
| Tennessee Constitution..... | i, 8, 11 |
| Article XI, §12 | 11, 12 |

T.C.A.

| | |
|---------------------------------|-------|
| §49-3-101, <i>et seq.</i> | 3 |
| §49-3-302 | 15 |
| §49-3-351, <i>et seq.</i> | 15 |
| §49-3-356 | 4 |
| §49-3-356(a)..... | 13 |
| §49-6-2605(a)..... | 16 |
| §49-6-2605(a)..... | 4, 16 |
| §49-6-2605(b)(1) | 4, 16 |
| §49-6-2605(b)(2) | 17 |

SECONDARY AUTHORITIES

| | |
|--|------------|
| Chicago L. Rev. 271, 276 (2006)..... | 23 |
| Molly Townes O'Brien, <i>Private School Tuition Vouchers and</i> <i>the Realities of Racial Politics</i> , 64 Tenn. L. Rev. 359, 364 (1997) | 18, 19, 20 |

I. INTRODUCTION

Amici, the McEwen Plaintiffs, respectfully submit this brief in support of Appellees. The Chancery Court below correctly found that Appellees have standing to challenge the constitutionality of the Voucher Law and that it 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, the funding of private school vouchers is not properly characterized as a state function. In addition, while the Beacon/Institute for Justice Appellants contend that vouchers constitute a direct state benefit with no impact on Davidson and Shelby Counties, they 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 in any event 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 actually prevent crime but also for its horrific

disproportionate effect on Black and Latinx populations. Moreover, private school vouchers are unpopular and rejected by most communities. 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 Order should be affirmed.

II. BACKGROUND

In 2019, Tennessee's General Assembly passed the Voucher Law, which creates a private school voucher program in Davidson and Shelby Counties. Appendix to McEwen Plaintiffs' Motion to Intervene ("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. McEwen Pls' App., Ex. 1 at APP017-18; McEwen Pls' App., Ex. 6 at APP075-76. 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 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.

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. Appellate Record (“R.”) at 1-44; McEwen Pls' App., Ex. 1. 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. R. at 35-37; McEwen Pls' App., Ex. 1 at APP030. 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. 7 at APP114-59.

On March 27, 2020, the Metro Plaintiffs filed a motion for summary judgment on their Home Rule claim. R. at 448-85. 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 2020-2021 school year. McEwen Pls' App., Ex. 6. Motions to dismiss or for judgment on the pleadings were filed in both cases.

The Chancery Court heard oral argument on the motions in both cases at a hearing on April 29 and, on May 4, 2020, 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 Pls’ App., Ex. 10 at APP558. The Chancery Court took under advisement decisions on all other motions in both cases. R. at 1125-26; McEwen Pls’ App., Ex. 10 at APP558. This Court and the Tennessee Supreme Court denied Defendants’ requests to stay the Chancery Court’s injunction during the pendency of appeal.

III. ARGUMENT

A. Appellants’ Standing Contentions Are Erroneous

According to Appellants, 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 parents of children who attend public school in the two targeted counties, and not taxpayers who would be forced to fund an unconstitutional law.¹ These contentions are misplaced. Not only did the Chancery Court 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 in this appeal, this Court should be mindful of how its conclusions regarding Appellees’

¹ See Response of Defendants-Appellants, Tennessee Department of Education, *et al.*, in Opposition to McEwen Plaintiffs’ Motion for Limited Intervention at 1, 4.

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 and should be rejected.

First, Appellees do allege their own distinct and palpable injury to Shelby and Davidson Counties, not just the affected LEAs. As the Chancery Court correctly reasoned:

Both the government of the political subdivision, whether it be a consolidated city/county government like Metro or a constitutionally chartered home rule government like Shelby County Government, and its companion school board, have the responsibility for providing a public education to their school children. They are not mutually exclusive and one cannot exist without the other.

R. at 1113. The State's suggestion that Appellees "have no role to play in the administration of the school system" (State Br. at 16) defies common sense and established case law, as the Chancery Court correctly found. R. at 1114.

Second, Appellants are wrong that the Voucher Law would cause no budgetary injury. As Appellees persuasively argue: (i) for each voucher awarded, the districts lose significantly more funding than they receive from the State per pupil; (ii) the Voucher Law inflates the calculation of the local share of school funding the counties must appropriate; (iii) the Voucher Law will cost the counties millions of dollars in equitable services and testing expenses; and (iv) the school improvement fund will not compensate for the losses associated with the Voucher Law. *See* Appellees' Br. at 23-27.

Therefore, Appellants' contentions that Appellees lack standing to challenge the Voucher Law should be rejected.

2. The McEwen Plaintiffs Also Have Standing

Even if Appellees did not have standing, 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. M2003-00549-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).

In this instance, 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; *see also City of New Johnsonville*, 2005 WL 1981810, at *13 (affirming trial court’s ruling that “there is no material dispute of fact that some of the plaintiffs are taxpayers of the City of New Johnsonville”). 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, the McEwen Plaintiffs 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 upcoming school year. McEwen Pls’ App., Ex. 1 at APP009-011, APP016-020. A demand to any of the relevant governmental officials to remedy this illegal law would have been futile.

Thus, the McEwen Plaintiffs, as taxpayers, have standing to challenge this illegal governmental action that diverts public funds.

b. The McEwen Plaintiffs, as Parents of Children Enrolled in Metro Nashville Public Schools and Shelby County Schools, Have Standing Because They Suffer a Special Injury Not Common to the Public Generally

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) (recognizing that school children in targeted county have right to challenge education-related law). 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, as parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools, 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, BEP funds that the General Assembly appropriates for public schools will be used to fund private schools that are not accountable to the public. 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, under both of these scenarios, Plaintiffs suffer a special injury that is unlike that of the public generally, parents in the 93 other 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 regarding Appellees’ standing 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 strongly impacted by the Court’s decision.

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

Amici McEwen Plaintiffs support the Chancery Court’s 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 neither the statute's targeting of two counties rather than one nor its inclusion of the Achievement School District affects the Home Rule Amendment's applicability. R. at 1118-24. The McEwen Plaintiffs rely on the reasoning of the Chancery Court and the briefing of Appellees to rebut the range of fallacious Home Rule arguments made by Appellants 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, the assertion that vouchers constitute a direct state benefit with no impact on Davidson and Shelby Counties ignores the profound effect the voucher program would have on the counties' ability to maintain adequately funded public schools.

1. Funding Private School Vouchers Is Not a State Function

The 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 21-25; Beacon/IJ Br. at 20-22. The 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 corresponding 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.

The cases cited by the State Appellants to support the proposition that education is a state and not a local matter (State Br. at 23) are inapposite because they involve the State's role in establishing and maintaining a statewide system of *public schools*. See, e.g., *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) (the State's function is to provide for the maintenance, support, and eligibility standards of a system of free public schools); *Cagle v. McCanless*, 285 S.W.2d 118 (Tenn. 1955) (public education rests upon the solid foundation of state authority). The Voucher Law plays no part in the State's constitutionally mandated functions of establishing, maintaining, or supporting a statewide system of public schools.

Contrary to Appellants' claims, providing education is in part a local function. While the provision of a system of free public schools is ultimately a state constitutional duty, Tennessee law has long recognized that the provision of education is both a state and local matter. *Weaver*, 756 S.W.2d at 225 (finding that education is a partnership between the State and its political subdivisions and that the Tennessee General Assembly has "manifestly vested the authority to appropriate funds for county purposes (including education)" in county government). There is "shared authority" over public education matters "among the State, the

local boards of education, and the local legislative bodies.” *Id.* at 222. 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. *State ex rel. Brown v. Polk Cty.*, 54 S.W.2d 714, 715-16 (Tenn. 1932); *Morgan Cty. Bd. of Comm’rs v. Morgan Cty. Bd. of Educ.*, No. 03A01-9308-CV-00290, 1994 WL 111457 (Ct. App. Tenn. Apr. 6, 1994) (setting forth respective powers and responsibilities of local legislative bodies and boards of education with regard to public schools); *see also* T.C.A. §49-3-356(a) (mandating that local governments “appropriate funds sufficient to fund the local share of the BEP”).

Therefore, a law that implicates the funding of public school districts affects the counties whose responsibility it is to levy taxes and approve the school districts’ budgets. Moreover, the Voucher Law affects the counties’ local finances. Because the Voucher Law diverts state BEP funds intended for the school districts in Davidson and Shelby Counties, each county must raise additional revenue to compensate for state BEP funds lost to the voucher program. Regardless of whether the Voucher Law involves matters of education policy, it clearly is local in effect and subject to the Home Rule Amendment because it implicates county powers and responsibilities.

2. Vouchers Are a Direct Detriment to the Counties and Their Communities

Attempting to mask the effect the Voucher Law would have on Davidson and Shelby Counties, the Beacon/IJ Appellants portray the funds diverted to the voucher program from their school districts’ state BEP allocations as a “direct benefit” paid to parents by the State – with

no connection to the targeted districts. Beacon/IJ Br. at 16-22.² This depiction ignores the Voucher Law's funding mechanism, which diverts funds earmarked for public schools in Davidson and Shelby County to instead pay private school tuition.

As discussed above at §III.B.1, *supra*, funding public school districts is a joint responsibility shared by the State and the counties. That shared obligation 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.³ Even with

² The EdChoice/ExcelinEd *amici* characterize vouchers similarly. EdChoice/ExcelinEd Amicus Br. at 22-25.

³ Tenn. Advisory Comm'n on Intergovernmental Relations, K-12 Pub. Educ. Funding and Serv., at 10 n.13 (Jan. 2020),

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.⁴

The Voucher Law mandates that funds intended for Metro Nashville Public Schools and Shelby County Schools be deducted from those districts' BEP allocations to fund vouchers for private school tuition and expenses. The amount to be deducted from state BEP funds otherwise payable to each district equals "*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 both the state and local BEP contributions – must be deducted "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 necessarily lose more state BEP funding per voucher student than it receives from the State for each student.

To illustrate this point, in the 2019-2020 fiscal year, Metro Nashville Public Schools' BEP per-pupil allocation was approximately

https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2019december/2019Dec_Tab5K-12Funding_ExecSummaryDRAFT.pdf.

⁴ See, e.g., Basic Educ. Program Review Comm. 2019 Annual Report at 43, 46, 51. [https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommittee activities/2019-bep/2019_BEP_Report.pdf](https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommittee%20activities/2019-bep/2019_BEP_Report.pdf).

\$8,198. R. at 21-22. Of that amount, the district received \$3,493 per pupil in BEP state funding and was required to contribute \$4,705 per pupil. *Id.* The \$7,500 per pupil that would be diverted from Metro Nashville Public Schools comes from its state BEP funding. Thus, for every student leaving Metro Nashville Public Schools to participate in the voucher program, the district would lose an amount far exceeding its state funding for that pupil; in fact, twice the per-pupil amount. A similar calculation applies to Shelby County Schools. *See* R. at 22. Losing this disproportionate share of state BEP funds restricts the districts' ability to provide essential resources to their students. In order to compensate for this diversion of funds, either the counties must raise additional revenue, or the districts must cut more educational resources.⁵

The Beacon/IJ Intervenors describe the voucher program as using "State funds to create a direct benefit for parents and children." Beacon/IJ Br. at 21. However, these are not just any "State funds." They are calculated as part of the funding to operate Metro Nashville Public Schools and Shelby County Schools, and they are expressly intended for

⁵ 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. T.C.A. §49-6-2605(b)(2). Restrictions on the grants' use, length, and students covered also prevent them from compensating for the loss in BEP funding. *Id.* And there is no guarantee, after these grants expire in a maximum of three years, that any further grants made available to low-performing Tennessee schools would be awarded to these districts or would compensate for the loss of funding due to the voucher program. Finally, the districts bear fixed costs that prevent them from reducing expenses commensurate with the reduction in enrollment under the voucher program, and the program would concentrate more costly-to-educate students in the public schools.

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 flatly incorrect. 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 Law 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 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 Demonstrably Incorrect

1. Vouchers Have a Racist History and Increase Segregation

The history of the private school voucher movement reveals its roots in efforts to preserve racial segregation.⁶ The concept of state funding of private school tuition did not develop out of a deep-seated need for autonomy or dissatisfaction with the public schools, as indicated by the

⁶ See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 Tenn. L. Rev. 359, 364 (1997).

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.”⁷

In the wake of *Brown v. Bd. of Educ.*, southern states passed dozens of laws attempting to stifle racial integration.⁸ 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 tuition voucher movement to shift 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. Federal courts repeatedly struck down tuition voucher schemes, each time finding the laws 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). *See also, e.g., Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 477 (M.D. Ala.), *aff’d sub nom. Wallace v. U.S.*, 389 U.S. 215 (1967).

Although private school tuition voucher plans were rejected by the courts, efforts to avoid desegregation largely succeeded. “Segregation academies” sprung up in many areas in the wake of desegregation orders.

⁷ *Id.*

⁸ *Id.* at 392-93.

White residential flight also proved an effective method of maintaining segregated schools.⁹ 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.¹⁰ 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.”¹¹ 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.”¹²

Several other recent studies have examined the racial composition of private school student populations, showing the effect of private school and voucher policies. One report showed White students were overrepresented in private schools, while Hispanic and African American

⁹ See *O’Brien*, 64 Tenn. L. Rev. at 392-93.

¹⁰ Chris Ford, *The Racist Origins of Private School Vouchers*, Center for American Progress, 2 (July 12, 2017), <https://cdn.americanprogress.org/content/uploads/2017/07/12184850/VoucherSegregation-brief2.pdf>.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

students were underrepresented.¹³ Low-income families were also underrepresented in private schools.¹⁴

Another 2018 report found that enrollment in the Washington, D.C. 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 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

¹³ See Jongyeon Ee, et al., *Private Schools in American Education: A Small Sector Still Lagging in Diversity*, UCLA Civil Rights Project, 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.

¹⁴ *Id.*

¹⁵ Mary Levy, *Washington, D.C.’s Opportunity Scholarship Program: Civil Rights Implications*, at 6, 16-19 UCLA Civil Rights Project, <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, *Do Private School Vouchers Pose a Threat to Integration?* The Century Foundation (Mar. 21, 2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration>.

¹⁸ *Id.*

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 a student's home life, socio-economic status, and neighborhood.¹⁹ Indeed, looking at the same data that Catholic Schools uses to paint a terrifying picture of public schools, one sees that an urban setting may be the controlling factor for the presence of gangs in schools 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 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, Catholic Schools *amici* do not provide or cite **any data** concerning student arrests, allegations of drug-related or violent crime,

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>; James C. Howell, *Gang Prevention: An Overview of Research and Programs*, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention (Dec. 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/231116.pdf>.

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.

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.

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 windows theory.” Catholic Schools Br. at 13. The “broken windows theory” – a theory based in policing and criminology, not pedagogy – has been debunked for its failure to actually prevent crime and its horrific disproportionate effect on Black and Latinx populations.²² Thus, Catholic Schools’ assertion that the “broken windows 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 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” that would therefore benefit under a “we-mean-business” atmosphere at Catholic Schools. Catholic Schools Br. at 11, 14.

²² 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/>; Bench Ansfield, *How a 50-year-old study was misconstrued to create destructive broken-windows policing,* Washington Post (Dec. 27, 2019), <https://www.washingtonpost.com/outlook/2019/12/27/how-year-old-study-was-misconstrued-create-destructive-broken-windows-policing/>.

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 10. Neither contention is supported by fact.

Year after year, the vast majority of voucher proposals are rejected by state legislatures across the country. For example, in 2019, 27 state legislatures rejected all voucher proposals that were introduced; 13 more states had no voucher legislation introduced.²³ 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.²⁴ Moreover, when voucher proposals have been put directly to voters, they have consistently been rejected.²⁵

Opinion research demonstrates that the public opposes private school vouchers. The long-running PDK Poll of the Public's Attitudes Toward the Public Schools found in 2017 that a majority of respondents

²³ *Private School Vouchers: Analysis of 2019 State Legislative Sessions*, Public Funds Public Schools (Nov. 26, 2019), <https://pfps.org/private-school-vouchers-analysis-of-2019-state-legislative-sessions.html>.

²⁴ Marta Aldrich, *Tennessee House Passes Education Voucher Bill for the First Time, Senate Vote to Come*, Chalkbeat (Apr. 23, 2019), <https://tn.chalkbeat.org/2019/4/23/21055514/tennessee-house-passes-education-voucher-bill-for-the-first-time-senate-vote-to-come>.

²⁵ 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>.

opposed the use of public funds to send students to private schools.²⁶ While EdChoice/ExcelinEd cite a study of parents already participating in voucher programs to show support for schools with religious environments and instruction (EdChoice/ExcelinEd Br. at 18), the broader PDK poll demonstrates that the majority of respondents who opposed use of public funds to support voucher programs grew larger when religious schools were explicitly included.²⁷ Further, “[t]he more Americans know about how voucher programs work, the less likely they are to support them or to say they’d participate in them.”²⁸

Despite the EdChoice/ExcelinEd *amici*’s implication that parents desire more vouchers (EdChoice/ExcelinEd Br. at 17-18), data show that 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.²⁹ 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.³⁰

²⁶ Phi Delta Kappan, *The 49th Annual PDK Poll of the Public’s Attitudes Toward the Public Schools* (Sept. 2017), at K5, https://pdkpoll.org/wp-content/uploads/2020/05/pdkpoll49_2017.pdf.

²⁷ *Id.*

²⁸ *Id.* at K3.

²⁹ 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>.

³⁰ 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>.

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 demonstrably false. The weight of empirical research shows that voucher programs fail to improve 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 pointing to 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.³¹ 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 academically compared to their peers in public schools.

³¹ Christopher A. Lubienski & Sarah Theule Lubienski, *The Public School Advantage: Why Public Schools Outperform Private Schools* (2013).

The brief of EdChoice/ExcelinEd relies heavily on EdChoice’s own study, *The 123s of School Choice*. These *amici* claim this analysis surveys the existing literature and shows that most studies find vouchers have positive effects on both participating students and those in public schools. EdChoice/ExcelinEd Br. at 12-13, 15, 19-22. However, a National Education Policy Center review of last year’s edition of *The 123s of School Choice* found the report to be “a misrepresentation of what research has been conducted” on vouchers.³²

The EdChoice/ExcelinEd *amicus* 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 20. However, the researchers themselves acknowledge that an “important limitation” of the study is that the students “were not randomly assigned vouchers to attend private schools.”³³ 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

³² T. Jameson Brewer, *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice: 2019 Edition* (EdChoice, April 2019), National Education Policy Center, 12 (June 2019), <https://nepc.colorado.edu/sites/default/files/reviews/TTR%20Brewer.pdf>.

³³ 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.

differ from students who do not. *See EdChoice/ExcelinEdBr.* at 13. 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 may correlate with differing achievement. Thus, a mere correlation between voucher use and improved student outcomes cannot establish causation. As further 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 voucher advocates, research has shown time and again that programs diverting public funds to private schools do not improve and, indeed, can negatively affect student achievement.

Researchers comparing students who utilize voucher programs to similarly situated students who remain in public schools repeatedly find that students in voucher programs experience unimproved, or worsened, academic outcomes. A 2019 evaluation by the U.S. Department of Education found that the Washington, D.C. voucher program had no statistically significant effect on student achievement in reading or math after three years.³⁴ A 2019 University of Arkansas study of the Louisiana voucher program found that after four years, voucher students

³⁴ 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>.

“performed noticeably worse on state assessments than their [public school] control group counterparts.”³⁵ The data showed “large negative effects,” especially in math.³⁶ A 2019 companion study found that participation in the Louisiana voucher program did not improve rates of college enrollment.³⁷ A 2018 longitudinal study of the Indiana Choice Scholarship Program 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.³⁸ 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

³⁵ Mills, J., & Wolf, P., *The Effects of the Louisiana Scholarship Program on Student Achievement after Four Years*, University of Arkansas, at 4 (2019), <http://www.uaedreform.org/wp-content/uploads/Mills-Wolf-LSP-Achievement-After-4-Years-final.pdf>.

³⁶ *Id.* at 24.

³⁷ Erickson, H. H., Mills, J., & Wolf, P., *The Effect of the Louisiana Scholarship Program on College Entrance* (Apr. 23, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376236. See also Martin Carnoy, *School Vouchers Are Not a Proven Strategy for Improving Student Achievement*, Economic Policy Institute (2017), <https://www.epi.org/publication/school-vouchers-are-not-a-proven-strategy-for-improving-student-achievement/>.

³⁸ Joseph R. Waddington & Mark Berends, Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School, 37 *Journal of Policy Analysis and Management* 783, 796 (2018). <https://onlinelibrary.wiley.com/doi/abs/10.1002/pam.22086>.

setbacks that typically accompany any change of school.”³⁹ In fact, of nine rigorous, large-scale studies on vouchers conducted since 2015, some conducted by voucher advocates, seven showed detrimental effects and two showed no effect on learning.⁴⁰

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

Many U.S. public schools – including Tennessee’s – are chronically underfunded.⁴¹ Contrary to *amici*’s claims that vouchers save states and school systems money (EdChoice/ExcelinEd Br. at 21-22), research shows that diverting public education funding to private school voucher programs exacerbates public schools’ severe resource deficiencies. This reality also discredits *amici*’s claim that voucher programs benefit and improve the public schools that they starve of essential resources.⁴² *Id.* at 18-20.

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

³⁹ 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.

⁴⁰ 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>.

⁴¹ Danielle Farrie, Robert Kim & David G. Sciarra, *Making the Grade 2019: How fair is school funding in your state?*, Education Law Center (2019), <https://edlawcenter.org/research/making-the-grade/>.

⁴² 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).

school voucher program was 75% higher than the cost of educating a public school student.⁴³ And 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.”⁴⁴

Additionally, the funds diverted to voucher programs are often subject to fraud and waste. An audit of Arizona’s voucher program found parents continuing to receive funds after enrolling their children in public schools or purchasing prohibited items.⁴⁵ Similar fraudulent spending was uncovered in Tennessee’s existing voucher program for students with disabilities.⁴⁶

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

⁴³ Wells, D., *\$10,700 Per Student: The Estimated Cost of Arizona’s Private School Subsidy Programs*, Grand Canyon Institute (2018), <https://grandcanyoninstitute.org/10700-per-student-the-estimated-cost-of-arizonas-private-school-subsidy-programs/>.

⁴⁴ Bruecker, E., *Assessing The Fiscal Impact of Wisconsin’s Statewide Voucher Program* National Education Policy Center, at 4-5 (2017), https://nepc.colorado.edu/sites/default/files/publications/PM%20Bruecker%20Funding_0.pdf.

⁴⁵ Office of the Auditor General – Performance Audit Division, *Department Oversees Empowerment Scholarship Accounts Program Spending, but Should Strengthen its Oversight and Continue to Improve Other Aspects of Program Administration*, Ariz. Dep’t of Educ., 22 (2016), https://www.azauditor.gov/sites/default/files/16-107_Report.pdf.

⁴⁶ 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/>.

at an additional cost to families using private school vouchers.⁴⁷ Many vouchers do not even cover the full cost of private school 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 fully cover the loss of funding diverted to voucher programs.

Finally, voucher programs can concentrate in public schools students with elevated needs who require increased educational resources. Because private schools 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, they are more frequently educated in public schools. Vouchers divert the funds essential to do so.

IV. CONCLUSION

The order of the Chancery Court should be affirmed.

DATED: July 20, 2020

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
CHRISTOPHER M. WOOD (BPR No.
032977)

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

⁴⁷ Whittaker, M. C., *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>.

414 Union Street, Suite 900
Nashville, TN 37219
Telephone: 615/244-2203
615/252-3798 (fax)
cwood@rgrdlaw.com

ACLU FOUNDATION OF
TENNESSEE
THOMAS H. CASTELLI (BPR No.
024849)
STELLA YARBROUGH (BPR No.
033637)
P.O. Box 120160
NASHVILLE, TN 37212
Telephone: 615/320-7142
615/691-7219 (fax)
tcastelli@aclu-tn.org
svarbrough@aclu-tn.org

SOUTHERN POVERTY LAW
CENTER
CHRISTINE BISCHOFF
LINDSEY RUBINSTEIN
111 East Capitol Street, Suite 280
Jackson, MS 39201
Telephone: 769/524-2013
christine.bischoff@splcenter.org
lindsev.rubinstein@splcenter.org

EDUCATION LAW CENTER
DAVID G. SCIARRA
WENDY LECKER
JESSICA LEVIN
60 Park Place, Suite 300
Newark, NJ 07102
Telephone: 973/624-1815
973/624-7339 (fax)
dsciarra@edlawcenter.org
wlecker@edlawcenter.org
ilevin@edlawcenter.org

Attorneys for *Amici Curiae* McEwen
Plaintiffs

CERTIFICATE OF COMPLIANCE

I, Christopher M. Wood, hereby certify that the *AMICI CURIAE* BRIEF OF McEWEN PLAINTIFFS IN SUPPORT OF APPELLEES complies with the requirements of Tennessee Supreme Court Rule 46, §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 7,499 words.

Dated: July 20, 2020

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via electronic filing service and electronic mail to the following on this 20th day of July, 2020:

Stephanie A. Bergmeyer
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
stephanie.bergmeyer@ag.tn.gov

Jason Coleman
7808 Oakfield Grove
Brentwood, TN 37027
jicoleman84@gmail.com

David Hodges
Keith Neely
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
dhodges@ij.org
kneely@ij.org

Braden H. Boucek
B.P.R. No. 021399 Beacon
Center
P.O. Box 198646
Nashville, TN 37219
braden@beacontn.org

Arif Panju
Institute for Justice
816 Congress Avenue, Suite 960
Austin, TX 78701
apanju@ij.org

Brian K. Kelsey
Daniel R. Suhr
Liberty Justice Center
190 South LaSalle Street,
Suite 1500
Chicago, Illinois 60603

Marlinee C. Iverson, Esq.
Shelby County Attorney
E. Lee Whitwell, Esq.
Shelby County Attorney's Office
marlinee.iverson@shelbycountyttn.gov
lee.whitwell@shelbycountyttn.gov

Robert E. Cooper, Jr., Esq.
Director of Law
Lora Barkenbus Fox, Esq.
Allison L. Bussell, Esq.
Department of Law of the
Metropolitan Government of
Nashville and Davidson
County
lora.fox@nashville.gov
allison.bussell@nashville.gov

s/ Christopher M. Wood
CHRISTOPHER M. WOOD