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8/3/2022 12:14 AM
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IN THE CHANCERY COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT
THE STATE OF TENNESSEE

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

McEWEN PLAINTIFFS' CONSOLIDATED REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION PURSUANT TO TENN. R. CIV. P. 65.04

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I. INTRODUCTION

McEwen Plaintiffs respectfully submit this Consolidated Reply in Further Support of Plaintiffs' Motion for a Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04 (the "Motion"). Despite Defendants' assertions that *McEwen* Plaintiffs simply dislike the Voucher Law, their legal claims rest squarely on the plain text and intent of the Tennessee Constitution.

The Motion established that all four factors the Court must weigh in evaluating whether to grant the temporary injunction strongly support its issuance. Because Defendants have failed to establish that ***any*** of the four factors weigh against the injunction, the Motion should be granted.[1]

II. ARGUMENT

A. Plaintiffs Have Standing to Assert Their Claims

Plaintiffs, as taxpayers and parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools, have standing to bring this lawsuit in two ways. First, Plaintiffs are taxpayers challenging illegal governmental action that unlawfully diverts public funds. Second, Plaintiffs suffer a special injury from the Voucher Law that is not common to the public generally.

1. 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 from their stated purpose if three elements

[1] To the extent not addressed herein, *McEwen* Plaintiffs intend to address the remaining contentions set forth in Defendants' oppositions at the hearing set for August 5, 2022.

exist: "(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*, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005) (attached as Ex. A to the Declaration of Christopher M. Wood in Support of Reply ("Wood Decl.")) (citing *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn. 1989)). As to the third element, 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 the present case, these three elements are easily satisfied. First, Plaintiffs are taxpayers who pay state and local taxes. ¶¶10-14, 16-17, 19;[2] *see also City of New Johnsonville*, 2005 WL 1981810, at *13 (Wood Decl., Ex. A) (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, Plaintiffs allege that the Voucher Law is an illegal expenditure of public funds. ¶¶97-131. Specifically, Plaintiffs allege that the Voucher Law violates multiple provisions of the Tennessee Constitution and state law. *See 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");

[2] "¶" and "¶¶" references are to the *McEwen* Complaint, filed March 2, 2020. Emphasis is added and citations are omitted throughout, unless otherwise noted. While *McEwen* Plaintiffs intend to file an amended complaint on August 3, 2022, the amended complaint's substantive allegations relevant to the Motion remain unchanged.

Lacefield v. Blount, 304 S.W.2d 515, 522-23 (Tenn. Ct. App. 1957) (taxpayer citizen permitted to challenge appropriation made by county); *Stuart v. Bair*, 67 Tenn. 141, 147 (1874) (taxpayer citizens permitted to challenge government action that would have required the payment of taxes and the removal of the seat of justice, its records, and officers).

Indeed, all of Plaintiffs' causes of action allege the need to strike down the Voucher Law, which is an illegal expenditure of public funds. For each of Plaintiffs' causes of action, Plaintiffs have "allege[d] a specific illegality in the expenditure of public funds," as required by Tennessee courts. These specific illegalities are based on violations of the Constitution's Education Clause, Article XI, §12, which is at issue for purposes of the present Motion, as well as the Equal Protection and Appropriation of Public Moneys provisions of the Tennessee Constitution and the BEP statute itself. To suggest that any of Plaintiffs' claims do not allege a specific illegality in the expenditure of public funds is simply incorrect.

Third, 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. Defendant Governor Lee signed the voucher bill into law. ¶47. Defendant Education Commissioner Schwinn – who oversees the state system of public schools, administers the Tennessee Department of Education, and is responsible for implementing the Voucher Law – moved as quickly as possible to implement the Voucher Law ahead of schedule after it was first passed. ¶¶23, 51-52. Defendant members of the State Board of Education, who are statutorily charged with overseeing the State's system of public schools, adopted administrative rules in November 2019 to effectuate the Voucher Law. ¶¶21, 61. Defendant Tennessee Department of Education ("TDOE"), which is also responsible for

overseeing the State's system of public schools, is responsible for the administration and implementation of the Voucher Law. ¶22. TDOE executed a $2.5 million contract with a private vendor – and paid $1.2 million under this contract to date – to oversee online applications and payment systems for the voucher program. ¶¶51-52. Most recently, the State Defendants have recklessly pushed ahead to award vouchers on a timeline they previously represented to the State's courts was not possible, causing chaos and confusion just days prior to the start of the school year. A demand to any of these governmental officials to remedy this illegal law would have been a futile formality, and Defendants cannot credibly assert otherwise.

The Greater Praise Defendants argue that Plaintiffs' Complaint was required to state that a prior demand would have been a futile gesture or a vain formality.[3] Greater Praise Intervenor-Defendants' Response in Opp. to McEwen Plaintiffs' Mot. for Temporary Injunction ("Greater Praise Opp.") at 22-23. However, *Metro. Gov't of Nashville & Davidson Cnty. v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985), upon which they rely, holds that the demand requirement is indeed waived "when it appears that one of the accused

[3] This is exactly what Plaintiffs have done, even though it is not what the case law requires. *See Badgett*, 436 S.W.2d at 295 ("In the instant case, ***no demand upon the city was alleged***; but, in this case, its absence does not undermine the standing of complainant to sue. The Mayor and Finance Director patently have interests contrary to this action. Demand upon them would have been a vain formality."); *Burns v. Nashville*, 221 S.W. 828 (Tenn. 1920) (finding that a demand on the commissioners would have been a "useless formality" when one of the remedies sought was against the commissioners); *Malone v. Peay*, 7 S.W.2d 40, 41-42 (Tenn. 1928) (assuming that because the transaction being challenged was approved by the Attorney General, taxpayers could sue because the officers of the state who would ordinarily bring this suit had "interests antagonistic thereto and would be embarrassed by its maintenance"); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 63 (Tenn. Ct. App. 2001) (stating a demand would be "a mere formality" where city and county executives participated in negotiations, signed legislation, and signed the required contractual documents).

public officers would have had to take the corrective action or would have been intimately involved in doing so, or would have been seriously embarrassed by the action." As set forth above, this is exactly what the Complaint pleads. A demand to any of these governmental officials to remedy this unconstitutional law would have been a futile gesture and a vain formality.

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

2. 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

a. As Parents, Plaintiffs Suffer a Distinct and Palpable Special Injury that Is Caused by the Voucher Law and Will Be Redressed When the Law Is Struck Down

Plaintiffs also have standing to challenge the Voucher Law as parents of children who attend public school in the two targeted counties. 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 State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963); *Patten v. City of Chattanooga*, 65 S.W. 414, 420 (Tenn. 1901) (holding that standing requires "the payment of a tax to increase

[plaintiffs'] tax burdens, or otherwise inflict an injury not common to the body of the citizens"); *Town of Erwin v. Unicoi Cnty.*, 1992 WL 74569, at *1 (Tenn. Ct. App. Apr. 15, 1992) (Wood Decl., Ex. B) (citing *City of Greenfield v. Butts*, 582 S.W.2d 80 (Tenn. Ct. App. 1979)); *Curve Elementary Sch. Parent & Tchr.'s Org. v. Lauderdale Cnty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980) (finding that parents who had children in school affected by allegedly unlawful acts had standing because the parents and their children may suffer damages and injustices different from those suffered by citizens at large); *Bd. of Educ. of Shelby Cnty. v. Memphis Cnty. Bd. of Educ.*, 911 F. Supp. 2d 631, 645-46 (W.D. Tenn. 2012) (recognizing school children in targeted county have right to challenge education-related law).

In the education context, in a case where a school board decided to close an elementary school, the Tennessee Court of Appeals explained:

> [T]he parent members of the Association who have children attending the Curve Elementary School had standing to individually institute this lawsuit [because] the allegations of the complaint place these parents and their children in a position of possibly suffering 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, 608 S.W.2d at 859; *see also Bd. of Educ. of Shelby Cnty.*, 911 F. Supp. 2d at 645-46 (allowing county commissioners to challenge law on behalf of school children in targeted county who "face hindrances in pursuing their own claims" and would be unable to vindicate "their" rights in court).

Here, Plaintiffs allege a special injury that is distinct, palpable, and not common to the public generally. Plaintiffs' injury is caused by the Voucher Law and can only be redressed when the law is struck down. In terms of special injury, Plaintiffs suffer damages and

injustices of a different character and kind from those suffered by citizens at large due to the illegal Voucher Law.

Plaintiffs include parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools. In Davidson and Shelby Counties – and in no other county in the State – BEP funds, which are public funds the General Assembly appropriates to fund public K-12 schools, will be used to fund private schools not accountable to the public. Over the first five years of the program, hundreds of millions of dollars in BEP – and later TISA – funds will be diverted from these two school districts to private schools. *See* ¶69. When this diversion of funds occurs, 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 educational opportunities, due to the diversion of state funds by the Voucher Law. Additionally, to make up for this funding shortfall, Plaintiffs will have to pay increased local taxes. Under both these scenarios, Plaintiffs suffer a special injury different from the public generally and from parents in the 93 other counties in Tennessee. Moreover, Plaintiffs' injury is also unlike other citizens in the two targeted counties who either do not have children or have children who are not enrolled in public school. As a result, Plaintiffs suffer a distinct special injury from the Voucher Law of a different character and kind from that suffered by the public generally.

The Greater Praise Defendants attempt to distinguish *Curve* from the present case by arguing that the *Curve* court allowed parents to challenge violations that directly damaged their children's schools but not to bring claims that affect the citizenry at large. Greater

Praise Opp. at 19-20. This distinction fails because Plaintiffs are not attempting to bring claims that affect the citizenry at large. Rather, Plaintiffs' children – as students enrolled in public schools in the two counties targeted by the Voucher Law – suffer a special injury of a different character and kind from that suffered by the public generally, by public school parents and children who reside in ***every*** other county in Tennessee, and by other citizens in the two targeted counties who either do not have children or have children who are not enrolled in public school.

b. As Parents, Plaintiffs Have Standing to Bring Each of the Claims in Their Complaint Despite Defendants' Unpersuasive Arguments to the Contrary

The State Defendants and Greater Praise Defendants incorrectly argue that Plaintiffs, as parents of school children enrolled in Metro Nashville Public Schools and Shelby County Schools, do not suffer a distinct injury as a result of the Voucher Law. State Dfts.' Response in Opp. to McEwen Pltfs.' Mot. for Temporary Injunction, at 6; Greater Praise Opp. at 19-21. Plaintiffs' injuries are clear. Their children, unlike the children of Tennessee parents in every other county in the State, are enrolled in school districts that will be deprived of state funds for their education because those funds will be diverted to private schools. As a result, Metro Nashville Public Schools and Shelby County Schools – where Plaintiffs' children are enrolled – will have less funding to support the teachers, staff, programs, and other expenditures essential to their education. ¶¶72-73. Losing hundreds of millions of dollars in funding during the next five years will have a devastating impact on the resources available to educate Plaintiffs' children. ¶¶69-73. If a financial loss of this magnitude does not

qualify as "special injury" in the context of educating children, it is difficult to imagine a loss that would qualify.

Thus, Plaintiffs, as parents of public school students enrolled in the two counties targeted by the Voucher Law, suffer a special injury not common to the public generally. Therefore, Plaintiffs have standing to bring their claims.

B. Plaintiffs Are Likely to Succeed on Their Claim that the Voucher Law Violates the Education Clause

As set forth in the Motion, providing publicly funded K-12 education through payment of private school tuition and expenses is irreconcilable with the plain language and intent of Article XI, §12, including because §12 specifically limits the State to supporting "free public schools" with respect to K-12 education, yet provides no such limitation with respect to "post-secondary educational institutions." Mem. at 25-26.

In spite of their vast collective briefing, which spans over 60 pages, Defendants conspicuously fail to so much as acknowledge this distinction, which is dispositive. The State Defendants and Greater Praise Defendants fail to acknowledge this argument ***at all***. The Bah Defendants, while quoting portions of the final clause of §12, excise entirely the phrase "including public institutions of higher learning" and then also ignore the above distinction ***entirely***.

While ignoring this critical distinction, Defendants nonetheless contend that although §12 requires the State to "provide for the maintenance, support and eligibility standards of a system of free public schools," nothing in §12 prohibits the State from exceeding this mandate by also providing publicly funded K-12 education through payment of private school tuition and expenses. This contention cannot be squared with a plain reading of §12

as a whole, which Defendants fail to so much as address. Moreover, Defendants' assertions directly contradict the intentions of the drafters of §12.

The Education Clause, in its current form, was drafted in connection with the 1978 amendments to the Tennessee Constitution. Prior to 1978, the Constitution explicitly mandated segregated schools, stating: "[n]o school established or aided under this section shall allow white and negro children to be received as scholars together in the same school." TENN. CONST. of 1870, art. XI, §12. The intent of the amendments to the Education Clause was to excise this shameful vestige of the past and "eliminat[e] segregated schools." Wood Decl., Ex. C at 469.[4]

Fatal to Defendants' arguments, allowing for public funding of private schools would have been antithetical to the elimination of segregated schools that drove the 1978 amendments to the Education Clause, as the delegates would have been acutely aware that attempts to publicly fund private schools at that time were substantially synonymous with preserving segregation.

Following the U.S. Supreme Court's decision in *Brown v. Board of Educ.,* 347 U.S. 483 (1954), prohibiting *de jure* segregation in public schools, states across the South resolved to defy the Court's order by funneling public dollars to private "segregation academies." In fact, private school vouchers have their roots in this segregationist history as they were "a popular tool for perpetuating the segregation the Court had ruled unconstitutional." Raymond Pierce, *The Racist History of "School Choice,"* Forbes (May 6,

[4] The Tennessee Supreme Court has previously relied on the record of the 1977 convention in interpreting the Education Clause. *E.g.*, *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993) ("*Small Sch. Sys. 1*").

2021), *available at* https://www.forbes.com/sites/raymondpierce/2021/05/06/the-racist-history-of-school-choice/?sh=48b1bdd56795. Prince Edward County, Virginia provides a prime example. In 1959, defying a Fourth Circuit order directing the County to "'take immediate steps'" toward integration, Prince Edward County chose to close its entire public school system and offer white students vouchers rather than operate integrated public schools. Chris Ford, et al., *The Racist Origins of Private School Vouchers*, Ctr. for Am. Progress, at 8 (July 12, 2017), *available at* https://cdn.americanprogress.org/content/uploads/2017/07/12184850/VoucherSegregation-brief2.pdf?_ga=2.51746729.1076406111.1631119616-582938564.1629714016.[5]

From 1954 to 1965, Southern states enacted approximately 450 laws to evade or block desegregation, many of which facilitated the diversion of public education resources to private schools. Steve Suitts, *Overturning Brown: The Segregationist Legacy of the Modern School Choice Movement*, at 13 (2020). By 1965, seven states maintained voucher programs that had the practical effect of incentivizing white flight from newly desegregated public

[5] Instead of levying taxes for public schools, Prince Edward County adopted a "tuition grant program," providing public funds for students to use to attend either a local public or private school. *Id*. Residents raised money to establish a whites-only private school; when the public school system closed down, whites attended the segregated Prince Edward Academy. The U.S. Supreme Court eventually held that the County's program violated the Fourteenth Amendment's Equal Protection Clause and directed the district court to enter an order that the public schools reopen. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty*., 377 U.S. 218, 232-33 (1964).

schools. *Id*. at 17; Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436, 1440 & n.32 (1973).[6]

Against the backdrop of the proliferation of segregation academies across the South, restricting State support of K-12 education to public schools was a necessary element in ensuring that Tennessee's goal of rejecting school segregation would be accomplished. Allowing state funds to support private schools, which had been used to avoid integration, would directly undermine this goal. Any suggestion that the Education Clause's use or omission of the word "public" was done with anything but the most serious understanding of its implications and limitations is a shameful attempt to rewrite the history of desegregation efforts in Tennessee and around the country.

Moreover, the transcripts of the 1977 Constitutional Convention make clear that Defendants' reinterpretation of the Education Clause has no basis in fact whatsoever. While debating the new proposed language of §12, Delegate Pleasant introduced an amendment that would have inserted the word "public" between the words "such other" and "post-secondary." Wood Decl., Ex. C at 408 (*i.e.*, "The General Assembly may establish and support such other [public] postsecondary educational institutions . . . ."). Delegate Pleasant's amendment was roundly rejected by a vote of 3-80, and it was rejected precisely because delegates recognized that inclusion of the word "public" would ***preclude the State from funding private postsecondary education institutions***:

[6] Federal courts struck down these private school voucher programs throughout the 1960s. *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969); *Poindexter v. La. Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. 1967), *aff'd*, 389 U.S. 571 (1968).

> MR. WILDER: If we insert the word as the amendment has suggested, "public", in both of those places, this would preclude any type of aid to students to get education where they can. For instance, take Meharry Medical College, which is one of the great medical colleges of our country that has done work and performed great services for the black constituency; not only of Tennessee, but of the South, and of the nation, having produced a majority of the present black physicians in our country. This institution, which we did, as you know now, the State of Tennessee does support students attending Meharry, which is a private institution. . . . I believe it would be extremely important for us not to include this language in the Committee's report.

Id. at 409. Delegate Rowe made the same observation, stating that inclusion of the word "public" would mean "the State's encouragement and support is ***going to be confined to merely the public***," and that if the State was going to restrict[] the encouragement of the private sector of [postsecondary] education" through the addition of the word "public," he would actively work to defeat the amendments to the constitution on that basis alone. *Id.* at 411. Thus, the drafters of the 1978 amendments plainly understood that including the word "public" necessarily meant excluding private schools from state support.

Feebly, the Bah Defendants nevertheless attempt to shoehorn private school vouchers into the first clause of §12, which provides: "[t]he State of Tennessee recognizes the inherent value of education and encourages its support." Consol. Brief of Intervenor-Dfts. Natu Bah, Builguissa Diallo, & Star Brumfield in Opp. to Pltfs.' Mtns. for a Temporary Injunction ("Bah Opp."), at 10-11, 16. To be sure, this interpretation would have shocked Delegate Helms, who presented the Education Committee's Report at the convention and, when expressly asked about the meaning of this clause, responded that it was largely a historical anachronism:

> MR. HELMS: Let me give you a little background on that. I believe it will clear it up, Delegate Hyder. Education came into the Constitution almost as a memorial. The precedent was set in the ordinances of 1785 and 1787 at the

> time the Northwest Territory was opened up. One of the conditions for becoming a state of the three conditions at that particular time, was to make some provision for education, to have a judiciary and to have a certain number of people, about 60,000. So, it came to be written into the Constitutions of that day, some type of memorializing statement, indicating that you would consider education and give education a place in the state. Constitutions following the Northwest Ordinance precedent, put this in their constitutions. The State Constitution of 1796, first one for Tennessee, did not include such memorializing statements simply because we organized under an ordinance other than the Northwest Ordinance. We did, in the next Constitution in 1834, include this short title, Education is to be Cherished. It is a tribute or memorial to education. We have shortened that memorial by saying that there is an inherent value in education. In other words, it is a good that should be supported by the State. That is the reason, Delegate Hyder, for including that. It is a historical sort of precedent.

Wood Decl., Ex. C at 383. Defendants' contention is also irreconcilable with *Small Sch. Sys. 1*, 851 S.W.2d at 151, which similarly held that "defendants' argument overlooks the plain meaning of Article XI, Section 12. That provision expressly recognizes the inherent value of education ***and then*** requires the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools.'" (Emphasis added.)

Because Defendants' contention – that §12 does not prohibit the funding of K-12 education through payment of private school tuition and expenses – is irreconcilable with a plain reading of §12, as well as the history of §12's drafting, it should be rejected.

C. Defendants' Contentions Regarding *Expressio Unius* Are Misguided

As Intervenor-Parents Bah, Diallo, and Brumfield concede, *expressio unius* is a well known principle of law. Bah Opp. at 13. This longstanding principle is ubiquitous in Tennessee jurisprudence, with courts applying it in a variety of contexts, including education. *Blount Cnty. Bd. of Educ. v. City of Maryville*, 574 S.W.3d 849, 854 (Tenn. 2019) (distribution of public school funds); *Southern v. Beeler,* 195 S.W.2d 857, 867 (Tenn. 1946)

(distribution of public school funds); *see also Coffman v. Armstrong Int'l, Inc*., 615 S.W.3d 888 (Tenn. 2021) (products liability); *Effler v. Purdue Pharma L.P*., 614 S.W.3d 681 (Tenn. 2020) (standing under drug dealer liability act); *Amos v. Metro. Gov't of Nashville & Davidson Cnty.,* 259 S.W.3d 705, 715 (Tenn. 2008) (employee benefits); *Rich v. Tenn. Bd. of Med. Exam'rs*, 350 S.W.3d 919, 927 (Tenn. 2011) (medical license); *State v. Lewis,* 958 S.W.2d 736 (Tenn. 1997) (criminal law).[7] Intervenor-Parents Bah, Diallo, and Brumfield's observation that *expressio unius* has not yet been applied to the Education Clause is of no moment, as these consolidated actions represent the first challenge to a private school voucher law in Tennessee.

In this case, applying the well accepted canon of *expressio unius* is warranted, particularly in light of the history of the 1978 Amendment to the Education Clause of the Tennessee Constitution, set forth above.

Defendants assert the Voucher Law is constitutional because the public school system mandated by the Education Clause is left in place, thus ignoring the proper interpretation of this provision as prohibiting actions that exceed its express mandate. However, Defendants' argument is irrelevant – the Voucher Law violates the plain text of the Education Clause regardless of whether it has any effect on the public school system because, as explained above, the plain text of the constitution allows only for a system of public schools. The Florida Supreme Court rejected the very argument Defendants advance here: that the State

[7] Greater Praise Defendants' contention that applying the doctrine of *expressio unius* would result in the invalidation of charter schools or the Achievement School District ("ASD") is absurd as charter schools and ASD schools are public schools and are part of the state's public school system. Greater Praise Opp. at 6.

"could fund a private school system of indefinite size and scope as long as the state also continued to fund the public schools at a level that kept them" otherwise compliant with the constitutional requirements that they be "'uniform, efficient, safe, secure, and high quality.'" *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006) (quoting FLA. CONST. art. IX, §1(a)). The Court held: "because voucher payments reduce funding for the public education system, the [voucher program] ***by its very nature*** undermines the system of 'high quality' free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida." *Id.* (emphasis added) The Florida Supreme Court likewise rejected the argument, also asserted by Defendants in the instant case, that the voucher program merely "supplement[s] the public education system," holding that it "[i]nstead . . . diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children." *Id.* at 408-09. This mirrors the Tennessee Voucher Law precisely.

Moreover, despite Defendants' attempts to paint the sister court decisions supporting Plaintiffs' position as outliers or stale authority, the most recent court to consider an *expressio unius* challenge to a voucher law, taking into consideration all the precedent Defendants cite, emphatically agreed with the plaintiffs challenging the voucher statute. In *Beaver v. Moore,* the West Virginia Circuit Court permanently enjoined that state's private school voucher law on the basis of *expressio unius*, in addition to other constitutional violations. *Beaver v. Moore*, No. 22-P-24, Final Order Granting Pltfs.' Mot. for Prelim. & Permanent Injunctive Relief & Declaratory Judgment & Ruling on Various Other Mtns.

(W. Va. Cir. Ct. July 22, 2022) (Wood Decl., Ex. D) at 2.[8] West Virginia's Education Clause says: "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, §1. Applying the doctrine of *expressio unius,* the court in *Beaver* ruled that the voucher law impermissibly exceeded the state's Education Clause by "authorizing a separate system of education" that was funded by West Virginia taxpayer dollars. Wood Decl., Ex. D at 14. The court further ruled that the voucher law frustrated the purpose of the Education Clause for several reasons, including that it incentivized decreased public school enrollment, and thus decreased funding, and increased the concentration of high need students in public schools. *Id.* The Tennessee Voucher Law exceeds and frustrates the Tennessee Education clause for similar reasons. Moreover, as noted in *McEwen* Plaintiffs' opening brief, Tennessee's Education clause is even more explicit than West Virginia's in requiring the General Assembly to not only maintain and support a system of free schools but "a system of free ***public*** schools." TENN. CONST. art. XI, §12 (emphasis added).

III. CONCLUSION

McEwen Plaintiffs' Motion should be granted.

DATED: August 2, 2022

Respectfully submitted,

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[8] On August 2, 2022, the West Virginia appellate court denied Defendants' motions to stay the injunction. Wood Decl., Ex. E.

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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 2nd day of August, 2022:

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