

IN THE CHANCERY COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT
THE STATE OF TENNESSEE

ROXANNE McEWEN, et al.,)	Case No. 20-0242-II
)	
Plaintiffs,)	Hon. Anne C. Martin
)	
vs.)	
)	
BILL LEE, et al.,)	PLAINTIFFS' MEMORANDUM OF
)	LAW IN SUPPORT OF MOTION FOR A
Defendants.)	TEMPORARY INJUNCTION
)	PURSUANT TO TENN. R. CIV. P. 65.04

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I. INTRODUCTION

The Tennessee Education Savings Account Pilot Program (“Voucher Law” or “voucher program”) is an unconstitutional statute that will divert hundreds of millions of dollars from public schools in Metro Nashville Public Schools and Shelby County Schools to private schools. The Voucher Law violates the “Home Rule” and “Appropriation of Public Moneys” provisions of the Tennessee Constitution, among other constitutional and statutory violations. Defendant Department of Education is rushing to offer vouchers to students for the upcoming 2020-2021 school year, a year earlier than planned. Plaintiffs, as taxpayers in Shelby and Davidson Counties and parents of children enrolled in Metro Nashville Public Schools and Shelby County Schools, contend that Defendants must be enjoined from further implementation of the Voucher Law until the Court can issue a final ruling on its constitutionality.

Defendants Department of Education and the State Board of Education plan to offer vouchers “for the 2020-2021 school year in Davidson and Shelby counties.” *Education Savings Account (ESA) Program*, Tenn. Dep’t of Educ., <https://www.tn.gov/education/school-options/esa-program.html> (last visited Apr. 2, 2020). To date, Defendants have taken substantial steps to implement the voucher program. As of March 27, 2020, families may apply for a voucher for the upcoming school year. *Apply Now*, Tennessee Education Savings Account Program, <http://familymembers.esa.tnedu.gov/apply-now/> (last visited Apr. 2, 2020). Applications will be accepted until April 29, 2020, at which point the Department of Education will begin notifying families that their child may use a voucher to attend a private school this fall. *Id.* As of March 2020, at least 52 private schools had

been approved to accept vouchers for the upcoming school year. *See Bd. of Educ. and Dep't of Educ. Budget Hearing Before the S. Educ. Comm.*, 2020 Leg., 111th Gen. Assemb. (Tenn. Mar. 4, 2020) (attached as Ex. 1 to Decl. of Chris Wood). In addition to making applications available and approving private schools, the Department of Education has spent substantial funds and resources implementing the voucher program, including paying a private vendor \$1.2 million and adopting administrative rules to implement the Voucher Law.

The Voucher Law is facially unconstitutional and violates state law. Unless the Court enjoins its continued implementation, Plaintiffs will suffer irreparable harm – outweighing any harm to Defendants – and an injunction is clearly in the public interest. For these reasons, Plaintiffs' motion for temporary injunction should be granted.

II. PROCEDURAL HISTORY

On March 2, 2020, Plaintiffs, who are taxpayers and public school parents in Shelby and Davidson Counties, filed this action in Davidson County Chancery Court, challenging the legality of the Voucher Law passed in May 2019, codified at T.C.A. §49-6-2601 *et seq.*¹

¹ Plaintiffs, who are diverse in terms of their background, race, age, sex, career, income level, and life experience, share a deep commitment to their children, public education, and their communities. Each Plaintiff objects to the use of public taxpayer dollars to fund the voucher program. *See* Plaintiff Affidavits attached hereto (attached as Ex. A).

Plaintiffs have standing to bring this lawsuit because they suffer a special injury under the Voucher Law that is not common to the body of citizens as a whole. *See Badgett v. Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968). Specifically, the Voucher Law provides for diversion of BEP funds intended for Shelby County Schools and Metro Nashville Public Schools, which Plaintiffs' children attend and Plaintiffs support with their state and local tax dollars. Additionally, Plaintiffs have standing because they are taxpayers alleging that the Voucher Law is an illegal expenditure of public funds. *See City of New Johnsonville v. Handley*, 2005 WL 1981810, at *14-*15 (Tenn. Ct. App. Aug. 16, 2005) (explaining the elements required for taxpayer standing to challenge the illegal expenditure of public

Plaintiffs' complaint includes five causes of action challenging the Voucher Law under Tennessee's Constitution and statutes. On March 6, 2020, two parents who qualify for the voucher program, represented by the Institute for Justice, moved to intervene as defendants. On March 13, 2020, two parents and a private school, represented by the Liberty Justice Center, moved to intervene as defendants. On March 16, 2020, two more parents, represented by the Beacon Center, moved to intervene as defendants. On March 16, 2020, Plaintiffs filed their Response in Opposition to the Motion to Intervene filed by the Proposed Intervenor-Defendants represented by the Institute for Justice. On March 18, 2020, the first group of Proposed Intervenor-Defendants filed their Reply in Support of their Motion to Intervene. On March 20, 2020, in a hearing on the Institute for Justice's Motion to Intervene, Plaintiffs, Defendants, and all proposed Intervenor-Defendants agreed on a proposed order for limited intervention, which was entered on the same day. On March 27, 2020, the Intervenor-Defendants represented by the Liberty Justice Center filed a motion to dismiss.

III. STATEMENT OF FACTS

On May 1, 2019, the Tennessee Legislature passed the Voucher Law. On May 24, 2019, Governor Lee signed the bill into law. Pub. Ch. 506 (H.B. 939), 111th Gen. Assemb., Reg. Sess. (Tenn. 2019). The Voucher Law creates an expansive voucher program in Davidson and Shelby Counties that diverts public money appropriated for Metro Nashville

funds) (citing *Cobb v. Shelby Cty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn.1989)) (attached as Ex. B to Wood Decl.). Plaintiffs did not make a prior demand on the General Assembly or Governor to remedy this illegal statute because such a demand would have been a futile gesture and a mere formality. *Badgett*, 436 S.W.2d at 295 (explaining that such demand is unnecessary if it would be futile).

Public Schools and Shelby County Schools to private schools. The voucher program will be administered by Defendants Tennessee State Board of Education Members (“State Board”), Tennessee Department of Education (“TDOE”), and the Tennessee Commissioner of Education (“Commissioner”). T.C.A. §49-6-2603(i); T.C.A. §49-6-2604(a).

A. The State Is Taking Significant Steps to Implement the Voucher Law

Defendants have taken substantial steps to implement the voucher program. In November 2019, the TDOE entered into a \$2.5 million contract with ClassWallet, a private, for-profit company based in Florida. *Dept. of Educ.: Focus Hearing Before the Appropriations Subcomm.*, HH0201, 2020 Leg., 111th Gen. Assemb. (Tenn. Feb. 12, 2020) (attached as Ex. 2 to Wood Decl.). Under this contract, ClassWallet immediately began overseeing online application and payment systems for the voucher program. *Id.* (statement of Defendant Commissioner of Education Penny Schwinn); *see also Bd. of Educ., Education Savings Account: Rule Review Before the Joint Gov’t Operations Comm.*, 2020 Leg., 111th Gen. Assemb. (Tenn. Jan. 27, 2020) (attached as Ex. 3 to Wood Decl.) (statement of Deputy Commissioner of Education Amity Schuyler). In 2019, the TDOE paid ClassWallet approximately \$1.2 million for performance under this contract. (Wood Decl., Ex. 2) (statements of TDOE Chief Financial Officer Drew Harpool). On November 15, 2019, the State Board adopted administrative rules to implement the Voucher Law. Wood Decl., Ex. 3 (statement of State Board General Counsel Angie Sanders). Those rules were approved by the Joint Government Operations Committee on January 27, 2020 and

went into effect on February 25, 2020. *Id.*; Tenn. Comp. R. & Regs. §0520-01-16.02 (attached as Ex. C to Wood Decl.).

The pace at which Defendants are moving to make vouchers available is faster than legislators anticipated when they voted on the bill. Legislators who *supported* the program have stated in committee meetings and hearings that they are surprised to see the program moving at such an accelerated pace. (Wood Decl., Ex. 2 at 19:27-20:50) (conversation between Representative Patsy Hazlewood from Signal Mountain and Charlie Bufalino, TDOE Assistant Commissioner of Policy and Legislative Affairs):

Rep. Hazlewood: Perhaps I'm recalling it incorrectly but when we passed the ESA, the voucher bill, with many modifications and amendments, it was my understanding that the funding - that plan would not go into effect until August of [20]21. I think I heard the commissioner say that we decided we were going to put the people in seats in August [20]20, therefore that was the reason for the speed, if you will, of getting this contract [with ClassWallet]. So, I guess, my question is, who decided and what legislative authority moved the start date back on the legislation that we passed? Or maybe I'm wrong about the start date.

Bufalino: Um, I can speak to the start date portion. The legislation, and I don't have the exact code citation, said that the program shall begin no later than the 2021-[20]22 school year, which allowed the decision for it to start earlier, if that decision was to be made.

Rep. Hazlewood: Alright, thank you. I think the understanding – or, *the conversations I had about that bill were always that it would start in that later year.*

Id. (emphasis added); T.C.A. §49-6-2604(b) (“The program shall begin enrolling participating students no later than the 2021-2022 school year.”).

Soon, Defendants will start awarding up to 5,000 vouchers of approximately \$7,500² each to eligible Tennessee students to use at private schools during the upcoming school year. *See* T.C.A. §49-6-2605 (computing maximum annual amount for participating student). As of March 4, 2020, the TDOE had approved 52 private schools to participate in the voucher program, with seven school applications under review.³ (Wood Decl., Ex. 1) (statement of Commissioner Schwinn). These approved private schools represent 3,000 “voucher seats” for the upcoming school year. *Id.* As of March 27, 2020, the TDOE made voucher applications available on its website so that families can apply for a voucher for this fall.⁴ *Apply Now*, Tenn. Ed. Savings Account, *supra*. The TDOE’s website states that voucher applications will be open until April 29, 2020. *Id.* TDOE will then begin notifying

² According to the Voucher Law, the “maximum annual amount to which a participating student is entitled under the program must be equal to the amount representing the per-pupil state and local funds generated and required through the basic education program (BEP) for the LEA in which the participating student resides, but must not exceed the combined statewide average of required state and local BEP allocations per pupil.” T.C.A. §49-6-2605(a). In 2019, the total amount of state and local BEP allocations approved by the State Board was \$7,332,463,000. *See Tennessee Basic Education Program, 2019-2020 School Year July Final Allocations*, Tenn. Dep’t of Educ., available at <https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/2019-sbe-meetings/july-26%2c-2019-sbe-meeting/7-26-19%20IV%20L%202019-20%20BEP%20Allocations%20Attachment.pdf> (last visited Apr. 2, 2020). The TDOE’s “state report card” for 2019 indicates that the total student enrollment in Tennessee is 973,659. *State of Tennessee Report Card*, Dep’t of Educ., available at <https://reportcard.tnk12.gov/districts/0/page/DistrictProfile> (last visited Apr. 2, 2020). The total statewide per-pupil average of BEP state and local allocations, determined by dividing \$7,332,463,000 (total state and local BEP allocations) by 973,659 (total student enrollment) is \$7,530.82. Therefore, Plaintiffs use this number – \$7,530.82 – as the amount of BEP funds that Metro Nashville Public Schools and Shelby County Schools will lose for every voucher student.

³ Moreover, Defendant Commissioner Schwinn testified on March 4, 2020, that vouchers may also be used to pay for “things like uniforms, potentially there’s a requirement for a computer, transportation costs” at *non-approved private schools*. (Wood Decl., Ex. 1).

⁴ Marta W. Aldrich, *Tennessee begins taking school voucher applications amid court battle, pandemic, and likely recession*, Chalkbeat (Mar. 30, 2020), <https://chalkbeat.org/posts/tn/2020/03/30/tennessee-begins-taking-school-voucher-applications-amid-court-battle-pandemic-and-likely-recession/>.

families that their child may use a voucher to attend a private school for the upcoming school year.

For the school year starting this fall, the 2020-2021 school year, students will be eligible for a private school voucher if they (1) were zoned to attend a public school in Shelby County Schools, Metro Nashville Public Schools, or a school in the Achievement School District (which only includes schools located in Shelby and Davidson Counties); (2) attended a Tennessee public school for the 2019-2020 school year or are eligible to enroll in a Tennessee public school for the first time (for example, students entering kindergarten); and (3) live in a household with an annual income that does not exceed twice the federal income eligibility guidelines for the free lunch program. T.C.A. §49-6-2602(3). Currently, for a family of four to qualify for the voucher program, household income may not exceed \$66,950.⁵ For a family of six to qualify, household income may not exceed \$89,934.⁶

B. The Voucher Law Targets Shelby and Davidson Counties

The only two counties that can ever be subject to the Voucher Law are Shelby and Davidson Counties. The Voucher Law ensures this outcome because the eligibility criteria

⁵ The threshold for eligibility for the federal free lunch program in 2020 is 1.3 times the federal poverty level in 2019. *Child Nutrition Programs: Income Eligibility Guidelines (July 1, 2019-June 30, 2020)*, Food and Nutrition Service U.S. Dept. of Agriculture (last visited Apr. 2, 2020), <https://www.fns.usda.gov/cnp/fr-032019>. The federal poverty level in 2019 was \$25,750 for a family of four and \$34,590 for a family of six. *2019 Poverty Guidelines*, Office of the Asst. Sec'y for Planning and Evaluation, <https://aspe.hhs.gov/2019-poverty-guidelines> (last visited Apr. 2, 2020). The calculations provided above were reached by multiplying the 2019 poverty level income (e.g., \$25,750 for a family of four) by 1.3 then 2, per the statute.

⁶ *Id.*

in the law require that a student be zoned to attend a public school in a district that had ten or more schools that were (1) identified as priority schools in 2015, (2) among the bottom ten percent of schools in 2017, and (3) identified as priority schools in 2018, *or* (4) was zoned to attend a school that was in the Achievement School District on May 24, 2019. T.C.A. §49-6-2602(3)(C). The only public schools that satisfy criteria (1)-(3) are those operated by Shelby County Schools and Metro Nashville Public Schools. The only public schools that satisfy criterion (4) are physically located in Shelby and Davidson Counties.⁷ Because the Voucher Law links its eligibility criteria to facts that existed between 2015-2019, it is impossible for any school – other than those located in Shelby or Davidson Counties – to be subject to the Voucher Law.

When the voucher bill was originally introduced, it applied to five counties in the state: Davidson, Hamilton, Knox, Madison, and Shelby. *See* House Amendment No. 1 to

⁷ In 2015, the only two school districts, excluding the Achievement School District, to have ten or more schools identified as priority schools were Metro Nashville Public Schools and Shelby County Schools, which are located in Davidson and Shelby Counties, respectively. *See* “priority schools” dropdown menu at *2015 School Accountability*, Tenn. Dep’t of Educ., <https://www.tn.gov/education/data/accountability/2015-school-accountability.html> (last visited Apr. 2, 2020). In 2017, the only districts, excluding the Achievement School District, that had ten or more schools that were among the bottom ten percent of schools in the State were Hamilton County Schools, Shelby County Schools, and Metro Nashville Public Schools. *See* Caroline Bauman, *Is your school in Tennessee’s bottom 10 percent? Here’s a list of 166 schools the state says need to improve*, Chalkbeat (Feb. 8, 2018), <https://chalkbeat.org/posts/tn/2018/02/08/is-your-school-in-tennessees-bottom-10-percent-heres-a-list-of-166-schools-that-need-to-improve-academically/>. And in 2018, the only districts, excluding the Achievement School District, that had ten or more schools identified as priority schools were Hamilton County Schools, Shelby County Schools, and Metro Nashville Public Schools. *See* “priority schools” dropdown menu at *2018 School Accountability*, Tenn. Dep’t of Educ., <https://www.tn.gov/education/data/accountability/2018-school-accountability.html> (last visited Apr. 2, 2020). Because Hamilton County Schools did not meet the 2015 requirement, it is not subject to the Voucher Law. Finally, in 2019, the Achievement School District only included schools that were physically located in Shelby or Davidson Counties. *See* *Schools*, Achievement School District, <http://achievementschooldistrict.org/index.php/schools/> (last visited Apr. 2, 2020).

HB 939, HA 0188, 111th Gen. Assemb. (Tenn. 2019) (attached as Ex. D to Wood Decl.). However, it became clear that certain lawmakers, whose votes were crucial to passing the bill, would not support the legislation if their counties were included. Natalie Allison, *Rep. Jason Zachary, Knoxville, on why he flipped his school voucher vote*, *The Tennessean* (Apr. 23, 2019), <https://www.tennessean.com/videos/news/politics/2019/04/23/rep-jason-zachary-knoxville-why-he-flipped-his-school-voucher-vote/3551883002/> (attached as Ex. 4 to Wood Decl.) (video at 00:17-00:41: “I made very clear to the Governor that unless this was streamlined, where Knox County was removed and held harmless, then I couldn’t support the bill, and I was assured that on the House side we will be taken – Knox County will be taken out, Knox County will be held harmless, and Knox County will have some resources to be able to take care of the things that need to be taken care of with our teachers and our raises, and so because of that, as I said in Finance, I can support the bill . . .”). To secure those votes, the eligibility criteria for the number of schools designated as “failing” was changed from the original number of three to the current number of ten. *See* Conference Committee Report on House Bill No. 939/Senate Bill No. 795 (Tenn. May 1, 2019) (attached as Ex. E to Wood Decl.).

Yet, even though the Voucher Law targets only two counties, it does not require, nor was any action taken to secure, local approval of the law by a two-thirds vote of the local governing bodies of Shelby and Davidson Counties, or approval in an election by a majority of those voting in the two affected counties. *See, e.g.,* T.C.A. 49-6-2601 *et seq.*

Legislators from Shelby and Davidson Counties adamantly – and publicly – opposed the Voucher Law. They vocalized their objections in subcommittees, committees,

and on the House and Senate floors. For example, during a House debate on April 23, 2019, Davidson County Representative Jason Powell stated that he and his colleagues from Davidson County wanted “to opt out of this piece of legislation” and that “not one of us is for this piece of legislation, yet this legislation is being directly focused on Davidson County as well as another county.” H. Floor Session 32nd Leg. Day, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (attached as Ex. 5 to Wood Decl.). Shelby County Representative Antonio Parkinson declared:

For the record . . . So that all of the members know where we are implicitly: *we do not like this bill for Shelby County Schools*. We feel like the bill in its posture is putting something on us in Shelby County Schools or Shelby County that most of the members in this body don’t want for their own districts.

H. Floor Session 32nd Leg. Day, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (emphasis in inflection) (attached as Ex. 6 to Wood Decl.). Legislators from Davidson and Shelby Counties emphasized that the diversion of BEP funds would harm public school students in their districts. *See, e.g.*, H. Floor Session 32nd Leg. Day, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (attached as Ex. 7 to Wood Decl.) (statement of Davidson County Representative Jason Powell).

And, the legislators who voted for this bill understood that the bill was intended to apply only to Shelby and Davidson Counties. When debating the bill on the House floor, Rep. Matthew Hill stated:

If this is approved, it will be in our code. It will be part of the Tennessee Code Annotated where this pilot program is allowed to be, and then by default that means where it is not allowed to be. If this is adopted, this pilot program will be allowed in *two counties*. If you do not represent one of those *two counties*, it does not affect your district. . . . It does not affect your county if a student receiving an ESA in one of those two counties comes to

your county. Your LEA is not financially responsible for that. That is part of this amended legislation.

See H. Floor Session 36th Leg. Day, 111th Gen. Assemb. (Tenn. May 1, 2019 at 2:16:23-2:17:18) (emphases in inflection) (attached as Ex. 10 to Wood Decl.).

When discussing the bill in the Senate, State Senator Joey Hensley posited to Senator Dolores Gresham, the Senate Sponsor of the bill, “So, this program statement is set up as a pilot program. It only affects Shelby County LEA and Davidson County LEA. . . . The only way this can ever be expanded past those districts would be if some future legislature saw that it was helping students and then felt like other students could benefit. . . .” S. Floor Session 31st Leg. Day, 111th Gen. Assemb. (Tenn. Apr. 25, 2019) (attached as Ex. 11 to Wood Decl.). Senator Gresham responded, “Senator Hensley’s remarks are absolutely correct. Any changes would be made by a future General Assembly.”⁸ *Id.*

When the vote was called for on the floor of the Tennessee House of Representatives, the bill still applied to Knox and Hamilton counties in addition to Shelby and Davidson Counties. After all votes were initially cast, the votes were tied at 49-49. H. Floor Session 32nd Leg. Day, 111th Gen. Assemb. at 3:06:00-3:44:26 (Tenn. Apr. 23, 2019) (attached as Ex. 8 to Wood Decl.). At that time, then-House Speaker Glen Casada held the vote open for over 38 minutes while he engaged in a lengthy discussion with

⁸ Senator Brian Kelsey, counsel for Intervenor-Defendants Greater Praise Christian Academy, Alexandria Medlin, and David Wilson, Sr., also stated during a Joint Committee Hearing that the two districts are “now the only two that are affected by the bill.” *See Joint Committee Report Hearing*, 111th Gen. Assemb. (Tenn. May 1, 2019) (statement of Senator Brian Kelsey) (attached as Ex. 12 to Wood Decl.).

Representative Zachary of Knox County on a balcony behind the chamber, at which time he promised Representative Zachary that a future version of the bill would exclude his county. *See* Wood Decl., Ex. 8 at 3:05:57-3:06:38 (first 90 seconds of audio depicting then-Speaker Casada calling for members from various counties to discuss their votes over shouting by some lawmakers to take the final vote count); Wood Decl., Ex. 8 at 3:06:39-3:44:13 (remaining 38 minutes of silence while Rep. Zachary’s final vote was secured). After that discussion, Knox County was no longer subject to the Voucher Law, and Representative Zachary switched his vote to support the bill. *See* Wood Decl., Ex. 4. The bill passed with a vote of 50-48. Wood Decl., Ex. 8 at 3:44:26.

The State Board’s administrative rules implementing the Voucher Law, approved by the Joint Government Operations Committee, expressly confirm that a student is eligible for a voucher *only* if the student “[i]s zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019.”⁹ Wood Decl., Ex. C. The voucher application currently available on the TDOE website requires parents to consent to a series of statements, including: “I understand that if I move or relocate outside of Shelby or Davidson Counties, I must notify the participating school and the Department of Education.” *See Apply Now, Tenn. Ed. Savings Account, supra* (video embedded in webpage at 8:00, Item No. 18).

⁹ *See* n.7, *supra* (explaining that all schools in the Achievement School District on May 24, 2019 were physically located in Shelby and Davidson Counties).

C. The General Assembly Did Not appropriate Money for the Voucher Law

During the 2019 legislative session, when the Voucher Law was enacted, the General Assembly failed to make an appropriation for its estimated first year's funding. Pub. Ch. 405 (H.B. 939) at 100, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (attached as Ex. F to Wood Decl.). Defendants were aware that, although vouchers would not be available in the 2019-2020 school year, significant resources would be required in fiscal year 2019-2020 to implement and administer the voucher program. For example, before the bill was passed, Defendant Commissioner Schwinn testified before the Senate Education Committee that funding would be necessary for voucher-related staff positions at the TDOE and contracts with private vendors to administer and implement the program. *See Sen. Finance, Ways, & Means Committee*, 111th Gen. Assemb. at 1:56:52-1:58:48 (Tenn. Apr. 23, 2019) (statements of Defendant Commissioner of Education) (attached as Ex. 9 to Wood Decl.).

Despite the absence of an appropriation, in November 2019, the TDOE entered into a \$2.5 million contract with ClassWallet, a private, for-profit company based in Florida. *See Wood Decl.*, Ex. 2 at 13:50-19:16. Notably, the contract with a for-profit company violates the plain language of the Voucher Law, which only authorizes the TDOE to contract with nonprofit organizations for administration of the program. See T.C.A. §49-6-2605(i). Under this contract, ClassWallet will oversee online application and payment systems for the voucher program. *Id.* at 5:11-5:30.

The TDOE paid ClassWallet approximately \$1.2 million in 2019. *Id.* at 15:25-15:40 (statement of TDOE Chief Financial Officer Drew Harpool). The TDOE made this

payment by diverting money that the General Assembly had appropriated for another, unrelated program – the “Career Ladder” program. *See* Wood Decl., Ex. 3 at 1:00:50-1:02:56 (statement of Deputy Commissioner of Education Amity Schuyler); Wood Decl., Ex. E at 5. The “Career Ladder” program was developed in 1985 and funded to support public school teachers. *See* Wood Decl., Ex. 2 (statement of TDOE Chief Financial Officer Drew Harpool); Carol Furtwengler, *Tennessee’s Career Ladder Program: They Said It Couldn’t Be Done!*, Educational Leadership, http://www.ascd.org/ASCD/pdf/journals/ed_lead/el_198511_furtwengler.pdf (last visited Apr. 2, 2020).

D. The Voucher Law Will Divert Hundreds of Millions of Dollars from Metro Nashville Public Schools and Shelby County Schools to Private Schools

The Voucher Law is funded through the Basic Education Program (“BEP”), which is Tennessee’s “state school fund.” T.C.A. §49-3-101 *et seq.* The BEP computes how many state dollars a public school district must receive each year to be fully funded, and how many local dollars a public school district or locality must contribute. *Id.* Through the BEP, the General Assembly provides funding to maintain and support an adequate and substantially equal education for students in the State’s system of public schools. *Id.*; *see also Tenn. Small Sch. Sys. v. McWhorter*, 894 S.W.2d 734, 738 (Tenn. 1995).

Under the Voucher Law, an amount representing the state and local shares of a school district’s per-pupil BEP allocation – up to the combined statewide average of state and local per-pupil BEP allocations – must be subtracted “from the State BEP funds otherwise payable to” Metro Nashville Public Schools and Shelby County Schools for each student who uses a voucher. T.C.A. §§49-6-2605(a)-(b)(1). The BEP is funded with

taxpayer dollars. Plaintiffs, as taxpayers and parents of public school children in the two targeted counties, pay state and local taxes to support their respective districts' public schools.

For each voucher student, Metro Nashville Public Schools and Shelby County Schools will receive approximately \$7,500 less in state BEP funds. *See* n.2, *supra*. In the first year alone, millions in state BEP funds – an amount that could exceed \$37 million – will be diverted from the public schools operated by the two targeted districts to private schools.

If the maximum number of 5,000 vouchers is reached during the first year vouchers are issued, the program may grow by an additional 2,500 vouchers each year for four years. T.C.A. §49-6-2604(c). If all of those vouchers are issued, ***over \$375 million*** total in public BEP funds will be diverted from Shelby County Schools and Metro Nashville Public Schools. *See* n.2, *supra*.

In year five and thereafter, 15,000 vouchers may be issued each year. T.C.A. §49-6-2604(c)(5). Assuming the same dollar amount per voucher, if all 15,000 vouchers are issued in a given school year, Metro Nashville Public Schools and Shelby County Schools will lose over \$112,500,000 to the voucher program ***every single school year***.

The Voucher Law allows for a separate annual appropriation for “school improvement fund” grants to be awarded to Metro Nashville Public Schools and Shelby County Schools for the first three school years that vouchers are issued. T.C.A. §49-6-2605(b)(2)(A). These funds are “subject to appropriation,” meaning they may not be fully

funded or funded at all for each year they are available. *Id.* The “school improvement fund” grants – part of the unconstitutional Voucher Law – are funded with taxpayer dollars.

Plaintiffs in both counties already report shortages in pencils, paper, textbooks, technology, courses, teachers, nurses, counselors, tutoring, and enrichment, among other resources. For example, in Metro Nashville Public Schools, Plaintiff McEwen’s daughter has not brought home a textbook all year, and the only way for Ms. McEwen to help her daughter with her homework is to go to the public library, which has a complete set of textbooks. Wood Decl., Ex. A, McEwen Aff. ¶13. Plaintiff Williams’ granddaughter’s school regularly asks for community donations for paper, pencils, crayons, printing paper, and uniforms. Wood Decl., Ex. A, Williams Aff. ¶11. Plaintiff Mingrone was told that the district was short 700-800 teachers this school year. Wood Decl., Ex. A, Mingrone Aff. ¶12.

In Shelby County Schools, Plaintiff Young has seen water dripping from the ceiling in her children’s schools, and there have been very hot days when the air conditioning did not work and very cold days when the heat did not work. Wood Decl., Ex. A, Young Aff. ¶9. Plaintiff O’Connor has noted that there are not enough computers in the schools, and the technological infrastructure is insufficient, which is particularly problematic when all students are required to be online for state testing. Wood Decl., Ex. A, O’Connor Aff. ¶13. Plaintiff Kenny’s daughter’s school does not have a full-time nurse, so there is not a nurse in the building at all times. Wood Decl., Ex. A, Kenny Aff. ¶12. The lack of a full-time nurse is of great concern to her as her daughter has a serious allergy. *Id.*

IV. ARGUMENT

Tennessee Rule of Civil Procedure 65.01 provides this Court the authority to issue a temporary injunction to halt Defendants' implementation of the Voucher Law. The purpose of a temporary injunction is to maintain the status quo until a court can resolve the legal questions presented in the case. *Fannon v. City of LaFollette*, 329 S.W.3d 418, 430 (Tenn. 2010); *Memphis Retail Investors Ltd. P'ship v. Baddour*, 1988 WL 82940 (Tenn. Ct. App. Aug. 10, 1988) (attached as Ex. G to Wood Decl.). A temporary injunction may issue when:

it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.04(2); *Keller v. Estate of McRedmond*, 495 S.W.3d 852 n.2 (Tenn. 2016) (quoting Tenn. R. Civ. P. 65.04). In determining whether to grant a temporary injunction, a trial court must consider the following four factors: "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998). "These factors are not prerequisites to issuing an injunction but factors to be balanced." *Id.* at 347-48. The court need not consider each of these factors if fewer factors are dispositive. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *see also Mascio v. Pub. Emps. Ret. Sys.*

of Ohio, 160 F. 3d 310, 312 (6th Cir. 1998) (affirming trial court’s grant of preliminary injunction after concluding plaintiff had shown a substantial likelihood of success on the merits).

Balancing these factors weighs heavily in favor of Plaintiffs. Plaintiffs will succeed on the merits of their claims because the Voucher Law violates the Tennessee Constitution: it violates the “Home Rule” provision because it applies only to Davidson and Shelby Counties but does not require local approval, and it violates the “Appropriation of Public Moneys” provision because it did not receive an appropriation for its estimated first year’s funding and funds appropriated by statute for another purpose have been used to implement it.

Plaintiffs will be irreparably harmed if the Voucher Law is not enjoined. This irreparable harm results from the permanent loss of millions of taxpayer dollars spent to implement the unconstitutional voucher program. Defendants, on the other hand, will suffer no harm if a temporary injunction is granted. In fact, a temporary injunction will prevent the significant disruption that will result if the Voucher Law is found to be unconstitutional after students have begun using vouchers to attend private schools. The balance of harms is clear.

Furthermore, the public has an interest in preventing the implementation of an unconstitutional statute, and the expenditure of taxpayer dollars on this illegal statute. It is also in the public interest to maintain the status quo during the pendency of the litigation to avoid disruption to the education of students eligible for the vouchers, as well as those students who remain enrolled in Shelby County Schools and Metro Nashville Public

Schools. Thus, all relevant factors weigh heavily in favor of granting Plaintiffs’ motion for a temporary injunction.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Constitutional Claims

1. The Voucher Law Is Unconstitutional Because It Applies Only to Davidson and Shelby Counties Without Requiring or Receiving Local Approval

a. The Tennessee Constitution’s “Home Rule” Provision Prohibits the General Assembly from Passing Legislation that Is Applicable to Particular Counties Without Requiring Approval by Those Counties

The Tennessee Constitution prevents the General Assembly from imposing laws on targeted counties or municipalities without requiring local approval of those laws. In relevant part, Article XI, Section 9 (“Section 9”) of the Tennessee Constitution provides:

[A]ny act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

The Home Rule provision was adopted in 1953 by a “constitutional convention that had been rife with concern over state encroachment on local prerogatives.” Elijah Swiney, *John Forrest Dillon Goes to School: Dillon’s Rule in Tennessee Ten Years After Southern Constructors*, 79 Tenn. L. Rev. 103, 118 (2011).¹⁰ The Home Rule provision’s affirmative

¹⁰ “Home Rule” provisions have been adopted in many states to combat the “urban disadvantage” some cities face because they have fewer state representatives and the views of their representatives and their constituents often differ from the views of rural or suburban legislators. See generally Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 La. L. Rev. 1045 (2017) (explaining how “mini-Tenth Amendments” institute a modified federalism

restraint on the General Assembly reflects “[c]oncern about the General Assembly’s abuse of [] power.” *Id.* The drafters of Section 9 included the Home Rule amendment to “strengthen local self-government.” *Civil Service Merit Bd. v. Burson*, 816 S.W.2d 725, 728 (Tenn. 1991). “Section 9 addresses the operation of private acts by vesting ‘control of local affairs in local governments, or in the people, to the maximum permissible extent.’” *Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 651–53 (W.D. Tenn. 2012) (quoting *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975)).

To achieve this goal, the Home Rule provision prohibits the General Assembly from passing laws that target specific counties or municipalities unless the terms of the law require local approval. Thus, “any and all legislation private and local in form or effect affecting Tennessee counties or municipalities, in any capacity, is ***absolutely and utterly void*** unless the Act requires approval of the appropriate governing body or of the affected citizenry.” *Id.* (internal quotations omitted) (emphasis in original).

b. The Voucher Law Is Local in Effect and Application

In ruling on the constitutionality of a statute under Section 9, a court must determine whether the statute, “irrespective of its form, is local in effect and application.” *Farris*, 528 S.W.2d at 551. “[U]nder Section 9, courts ‘must determine whether . . . legislation was ***designed*** to apply to any other county in Tennessee.’” *Id.* at 552 (internal citations omitted) (emphasis added). The plain language of the Voucher Law and its implementing regulations, as well as its legislative history, make clear that the Voucher Law was designed

in states to protect municipalities that might otherwise suffer from the inherently under-representative structure of statewide governments).

to apply only to Davidson and Shelby Counties, and would not have been approved by the General Assembly had any other county been included.

The administrative rules adopted by the State Board and approved by the Joint Government Operations Committee to implement the Voucher Law underscore that its applicability is limited to Davidson and Shelby Counties. The administrative rules confirm that a student is eligible for a voucher *only* if the student “[i]s zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019.” Wood Decl., Ex. C.

Because eligibility for the voucher program is fixed by date, no other district can ever come under the purview of the Voucher Law. *Cf. Burson*, 816 S.W.2d at 729-30 (upholding a statute with a population threshold because population growth could bring other counties under the statute in the future); *Bozeman v. Barker*, 571 S.W.2d 279, 280-81 (Tenn. 1978) (upholding a statute that fixed a minimum salary for court officers in counties with more than 250,000 but less than 600,000 people because it “presently applies to two populous counties” but could “become applicable to many other counties depending on what population growth is reflected by any subsequent Federal Census”); *Doyle v. Metro. Gov’t of Nashville and Davidson Cty.*, 471 S.W.2d 371, 373 (Tenn. 1971) (upholding a statute that applied to “any city having a metropolitan form of government,” although it only applied to Davidson County at the time of its enactment, because it “applie[d] to all those [counties] who desire to come within its purview”).

Thus, the key fact that allowed courts to uphold statutes in other Home Rule challenges – that additional counties could later fall within a law’s eligibility requirements – is missing from the Voucher Law. The Voucher Law is applicable only to school districts with a certain number of low-performing schools *from 2015 through 2019*. Additionally, the statute provides that “if any provision of [the Voucher Law] is held invalid, then the invalidity shall not expand the application of [the Voucher Law] to eligible students other than those identified in §49-6-2602(3).” T.C.A. §49-6-2611(c). Thus, the express language of the Voucher Law makes it impossible for any other county to *ever* become subject to the statute.

Although the Voucher Law’s violation of the Home Rule provision may theoretically be cured through a legislative amendment, the possibility of a future legislative amendment is not enough to satisfy Section 9 requirements. *See Farris*, 528 S.W.2d at 554 (stating that the potential for legislative change is merely a “hypothetical” construction of the statute and cannot satisfy Section 9 requirements); *see also Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 655-60 (citing *Farris* for same proposition).

In addition to the plain language of the Voucher Law and its implementing regulations, the legislative history of the law makes clear the intent to target Davidson and Shelby Counties. The history of the Voucher Law shows that it was originally intended to apply to several counties throughout the state. As introduced, it applied to districts with “three (3) or more schools among the bottom ten percent (10%) of schools,” among other qualifiers. *See House Amendment 1* (bill originally presented in committee) (Wood Decl., Ex. D). Under this design, the Voucher Law applied to five counties. *Id.*

However, when it became clear that the bill would only pass with the support of representatives from some of the five targeted counties, and that those representatives would only vote for the bill if it did not affect their counties or constituents, the law was narrowed to target only Davidson and Shelby Counties.¹¹ Wood Decl., Ex. 4 (comments of Rep. Zachary on supporting bill once his own district, Knox County, was removed). As evident from statements made during the floor debate, the legislators who voted for this bill understood that it was intended to apply only to Shelby and Davidson Counties. Wood Decl., Exs. 10 and 11 (comments of Rep. Hill and Sens. Gresham and Hensley).

While this does not necessarily demonstrate bad faith on the part of the General Assembly, such intent is nevertheless unconstitutional under Section 9. *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 660 (holding statute at issue was unconstitutional and explaining that “[t]he [legislative] history is clear . . . that the bill never would have passed had it not been intended to apply only to Shelby County . . . The Court presumes that the General Assembly did not intend to violate Article 11, Section 9, but the General Assembly did intend the bill to apply only to Shelby County.”).

Thus, by its own terms and by the intent of the General Assembly, the Voucher Law is only applicable to Davidson and Shelby Counties. It is impossible for the Voucher Law, as written, to become applicable to any other counties.

¹¹ Compare House Amendment 1 (stating that the program would apply to districts with *three* or more schools in the bottom ten percent of schools) (Wood Decl., Ex. D) with Majority Report #1 for HB0939/SB0795 (joint committee report comprising the final passed version of the law stating that the program would apply to districts with *ten* or more schools in the bottom ten percent of schools, fixed by date) (Wood Decl., Ex. E).

c. The Voucher Law Did Not Include a Requirement for Local Approval, nor Did It Receive Local Approval by Davidson or Shelby Counties

Even though the Voucher Law is applicable only to Davidson and Shelby Counties, it did not require, nor was any action taken to secure, local approval in the ways prescribed by the Home Rule provision: by a two-thirds vote of the local governing bodies of Shelby and Davidson Counties or approval in an election by a majority of those voting in the two affected counties.¹² T.C.A. §49-6-2601 *et seq.*

In fact, legislators from Shelby and Davidson Counties adamantly opposed the Voucher Law. As quoted and explained above, these legislators vocalized their objections in subcommittees, committees, and on the House and Senate floors. Legislators from Davidson and Shelby Counties strongly opposed the Voucher Law and urged other legislators not to target their two counties, insisting that it would hurt their constituents. Their pleas – and the mandates of the Constitution – were ignored.

d. The General Assembly Cannot Circumvent the Home Rule Provision by Designing the Voucher Law to Apply to Two Counties Instead of One

As the Tennessee Supreme Court has made clear: “[t]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people,

¹² Furthermore, one of the two counties targeted by the Voucher Law – Shelby County – has adopted its own Home Rule, which provides it with heightened protection against targeting by the General Assembly. *See* Tenn. Const. art. XI, §9, ¶4 (“In the event of an affirmative vote by a majority of the qualified voters voting [in an election on the question of whether to adopt a Home Rule for a municipality], such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.”); *see also* *Burson*, 816 S.W.2d at 728-29 (“[O]nce a municipality adopts home rule, the General Assembly cannot pass local legislation affecting it, whether subject to local approval or not, but can ‘act with respect to such home rule municipality only by laws which are general in terms and effect.’”) (citing Tenn. Const. art. XI, §9, ¶4).

to the maximum permissible extent” and prevent the General Assembly from targeting specific counties to impose policies on those counties against their will. *Farris*, 528 S.W.2d at 551. The Tennessee Constitution is the “supreme law of our state.” *Spurlock v. Sumner Cty.*, 42 S.W.3d 75, 78 (Tenn. 2001). The Constitution’s mandates cannot be circumvented by simply introducing a technicality, such as designing the Voucher Law to target two counties instead of one. The instant circumstance is exactly why the Home Rule provision was adopted: to prevent the General Assembly from forcing laws onto targeted counties over their objection and without local approval.

In fact, the Tennessee Supreme Court has held that a law targeting two counties violates the Home Rule provision of the Constitution. In *Leech v. Wayne County*, the Tennessee Supreme Court held that the General Assembly cannot single out ***two counties*** without violating the Home Rule provision, explaining that “[w]here . . . the General Assembly has made a permanent, general provision, applicable in nearly 90 of the counties, giving the local legislative bodies discretion as to the method of election of their members, we do not think it could properly make different provisions in two of the counties” 588 S.W.2d 270, 274 (Tenn. 1979).

In *Farris*, the Tennessee Supreme Court cited a 1968 memorandum opinion which held that a law was “local” and violated the Home Rule amendment because, “[a]t the time of its passage, ***only two counties*** of the state were affected by the population classification set out therein.” 528 S.W.2d at 554 (quoting the matter of *The Appointment of a Process Server*) (emphasis added).

Additionally, the Tennessee Supreme Court has held that if a statute “is *potentially* applicable throughout the state,” it is not local in effect, but if it is not potentially applicable throughout the state, it is constitutionally invalid without a requirement for local approval. *Burson*, 816 S.W.2d at 729 (emphasis in original). As explained above, there is no potential for the Voucher Law to be applicable to any other county in the State because eligibility for the Voucher Law is based on data from 2015-2019. It is impossible for the law to *ever* apply to any counties except Davidson and Shelby, and the law would not have passed if any other county was targeted.

The purpose of the Home Rule is to vest control over local affairs in local government. The Voucher Law is local in effect and application. It was designed to apply only to Davidson and Shelby Counties. Because eligibility under the law is based on facts that are fixed in time, from 2015-2019, it is impossible for the law to apply to any other counties throughout the state. By its own terms, the Voucher Law does not require local approval, nor was it approved by a vote of the local legislative bodies of Davidson or Shelby Counties or by an election in Davidson or Shelby Counties. For these reasons, the Voucher Law violates the Home Rule provision of the Tennessee Constitution.

2. The Voucher Law Is Unconstitutional Because, When the Law Passed, It Did Not Receive an Appropriation for Its Estimated First Year’s Funding

a. The Voucher Law Is Null and Void Under the Tennessee Constitution Because It Did Not Receive an Appropriation for Its Estimated First Year of Funding

The “Appropriation of Public Moneys” provision of the Tennessee Constitution requires the General Assembly to appropriate the estimated first year’s funding for every

law requiring funding that is passed during a legislative session. Article II, §24 of the Tennessee Constitution provides that “[a]ny law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year’s funding.” Despite this constitutional requirement, during the legislative session in which the Voucher Law was passed, the General Assembly did not make an appropriation for the estimated first year’s funding of the law.¹³

To Plaintiffs’ knowledge, Tennessee appellate courts have released only one opinion citing this provision of the state constitution. That case, *State v. Greene*, 2001 WL 112312 (Tenn. Crim. App. Feb. 9, 2001) (attached as Ex. J to Wood Decl.), found that a law passed to criminalize child rape was not funded the year it was passed and thus could not be codified in that year. *See id.* at *11 (“In 1991, the legislature passed a public act to add the criminal offense of child rape to Title 39 of the Code. Because the constitutionally-

¹³ The State may contend that the General Assembly appropriated \$771,300 for the Voucher Law because the Fiscal Review Committee’s Fiscal Memorandum for the Law notes that the Voucher Law will result in an increase in state expenditures of \$771,300 in fiscal year 2019-20. Fiscal Memorandum HB 939-SB 795 (May 1, 2019) (attached as Ex. I to Wood Decl.). But the \$771,300 was never appropriated.

Excerpts from the Governor’s proposed budget for fiscal year 2019-20 included \$25,450,000 for the Voucher Law. Governor’s Proposed Budget Fiscal Year 2019-20 (page B-78) (attached as Ex. K to Wood Decl.). However, the Governor’s proposed appropriation for the Voucher Law was not enacted by the General Assembly. During budget negotiations, the General Assembly decided not to appropriate any money for the Voucher Law, but rather to appropriate \$24,678,700 of the \$25,450,000 originally proposed by the Governor for the Voucher Law to the Department of Corrections for Hepatitis C treatments. *See* Wood Decl., Ex. F, 2019 Tenn. Pub. Ch. 405, at 96.

The \$771,300 merely represents the difference between the appropriations amount initially proposed by the Governor for the Voucher Law, a proposal that was not enacted, and the amount ultimately appropriated for the Department of Corrections. *See* Wood Decl., Ex. F (showing a negative appropriation, denoted by parentheses, to the voucher program), at 100.

required first year's funding was not appropriated during the 1991 legislative session, however, the public act was not codified at that time.”) (citing Tenn. Const. art. II, §24 and T.C.A. §39-12-533 code commission notes (1991)). The facts in the present case mirror the facts in *Greene*.

The Appropriations Act for fiscal year 2019-2020, the fiscal year in which the Voucher Law was passed, contains no appropriation for the Voucher Law. The General Assembly and Defendants anticipated that implementing the Voucher Law would require paying vendors and hiring staff. Yet no appropriation was made for the estimated first year funding of the voucher program.

Defendants spent a substantial amount of money on the voucher program in fiscal year 2019. In November 2019, the TDOE entered into a \$2.5 million contract with ClassWallet. *See* Wood Decl., Ex. 2; *see also* Marta W. Aldrich, *Tennessee inks \$2.5 million contract with Florida company to manage education voucher payments*, Chalkbeat (Nov. 13, 2019), <https://chalkbeat.org/posts/tn/2019/11/13/tennessee-inks-2-5-million-contract-with-florida-company-to-manage-education-voucher-payments/> (attached as Ex. L to Wood Decl.). This contract violates the portion of the Voucher Law which *only* authorizes the Department of Education to contract with *nonprofit* organizations for administration of the program. T.C.A. §49-6-2605(i). Under this contract, beginning in November 2019, ClassWallet assumed responsibility for overseeing all online application and payment systems for the voucher program. Wood Decl., Ex. 2. The TDOE paid ClassWallet approximately \$1.2 million in 2019 for performance under this contract. *Id.* (statements of TDOE Chief Financial Officer Drew Harpool).

According to testimony provided by the Deputy Commissioner of Education before the General Assembly’s Joint Government Operations Committee on January 27, 2020, in order to pay ClassWallet, the TDOE diverted funds from another program to pay voucher-related costs. Wood Decl., Ex. 3 (statement of Deputy Commissioner of Education Amity Schuyler). Specifically, the Deputy Commissioner testified that the TDOE paid ClassWallet using funds that the legislature appropriated for the “Career Ladder” program, which is a career enrichment program passed in 1985 to support public school teachers. *Id.*; Furtwengler, *supra*.

Despite the plain language of the Tennessee Constitution, the General Assembly did not appropriate funds for the estimated first year funding of the Voucher Law in fiscal year 2019. Therefore, the Voucher Law is null and void under Article II, §24 of the Tennessee Constitution.

b. Defendants Illegally Used Funds Appropriated for Another, Unrelated Program to Pay Costs Associated with the Voucher Program

Article II, §24 of the Tennessee Constitution also states that “[n]o public money shall be expended except pursuant to appropriations made by law.” Additionally, under Tennessee law, “[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.” T.C.A. §9-4-601(a)(1).

The Tennessee Attorney General’s Office has “interpreted these restrictions as generally preventing the State from spending money without an appropriation, whether the money was generated by the State’s own taxing powers or received from other sources, such as the federal government.” Tenn. Op. Att’y Gen. No. 04-142 at *2 (Sept. 1, 2004)

(citing Tenn. Op. Att’y. Gen. 00-083 (May 4, 2000)) (attached as Ex. M to Wood Decl.). Collectively, “these provisions were intended to prevent deficit spending and to force the legislature to fund any new programs that it implements.”¹⁴ *Id.*

Because there was no fiscal year 2019 appropriation for the Voucher Law, the TDOE illegally funded the Voucher Law with funds lawfully appropriated to an unrelated program – the Career Ladder Program. Using funds appropriated to the “Career Ladder” program to fund the Voucher Law violates the Constitution’s mandate that “no public money shall be expended except pursuant to appropriations made by law.”

B. Plaintiffs Will Be Irreparably Harmed if a Temporary Injunction Is Not Issued

The TDOE is currently accepting voucher applications for the upcoming school year. When the application deadline ends on April 29, 2020, the TDOE will begin notifying families that their child may use a voucher to attend a private school starting this fall. As Defendants continue to implement the Voucher Law, Plaintiffs will continue to suffer irreparable harm as a result of the implementation of, and the spending of taxpayer dollars on, unconstitutional legislation. Such harm has “no adequate remedy at law” and requires a temporary injunction pending resolution of the issues presented in the case. *See Barnes v. Ingram*, 217 Tenn. 363, 372 (1965). Thus, the need for a temporary injunction to maintain the status quo and prevent further harm to Plaintiffs is manifest and urgent.

¹⁴ The Attorney General’s Opinion also makes clear that “a state agency cannot use a legislative grant of rule-making authority to circumvent” these provisions of the Tennessee Constitution and state law. Wood Decl., Ex. M.

“The loss of a constitutional right, ‘even for a minimal period[] of time, unquestionably constitutes irreparable injury.’” *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769-70 (M.D. Tenn.) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). “This rule has been applied in a variety of constitutional contexts.” *Id.* at n.11. “Thus, ‘when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.’” *Id.* (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)).

As set forth above, Article XI, Section 9 of the Tennessee Constitution requires that any legislation which is “local in form or effect” must provide for local approval, or the law is “void and of no effect.” *See* §IV.A.1., *supra*. Here, it is undisputed that the Voucher Law includes no provision for local approval; and, in fact, legislators from Davidson and Shelby Counties were strongly opposed to the legislation. *See* §III.B., *supra*. Absent a temporary injunction, Plaintiffs will continue to suffer irreparable harm by violation of their constitutional right to local approval of the Voucher Law. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote therefore constitutes irreparable injury.”) (citation omitted).

Plaintiffs, as taxpayers, will also suffer irreparable harm from the unlawful diversion of public funds from the purpose for which they were intended. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (crediting plaintiff’s contention that the misappropriation of public funds “will result in irreparable injury to the county and taxpayers”). “In such cases the taxpayers have such a special interest in the subject matter as will authorize them to

maintain an injunction.” *State ex rel. Baird v. Wilson Cty.*, 371 S.W.2d 434, 439 (Tenn. 1963). Here, the Voucher Law has already unlawfully diverted over \$1 million in public funds to ClassWallet for administration of the Voucher Law. *See* §III.A., *supra*. If fully implemented, **over \$375 million** in public BEP funds will be unlawfully diverted from Shelby County Schools and Metro Nashville Public Schools. *See* §III.D., *supra*. A temporary injunction will preserve the status quo and prevent the continued unlawful and unrecoverable expenditure of taxpayer dollars until such time as the Court is able to rule on the merits of Plaintiffs’ claims.

C. The Balance of Harms Weighs Heavily in Favor of Granting Plaintiffs’ Motion for Temporary Injunction

In contrast to the irreparable harm Plaintiffs would suffer in the absence of an injunction, Defendants will suffer no harm whatsoever from the injunction’s issuance.

The Voucher Law expressly states, “[t]he program shall begin enrolling participating students no later than the 2021-2022 school year.” T.C.A. §49-6-2604(b). A temporary injunction would not impede the statutorily mandated timeline for implementation of the law. And while Defendants may argue that they will be harmed because they entered a \$2.5 million contract with ClassWallet to implement the voucher program for the upcoming school year, that contract was unlawfully entered into to begin with. *See* §IV.A.2., *supra*.

In fact, an injunction is likely to benefit, not harm, Defendants. First, an injunction will prevent the significant disruption to schools, students, and families that would be caused if the Voucher Law is found to be unconstitutional after the beginning of the 2020-2021 school year. One case from within the Sixth Circuit, *Garrett v. Bd of Educ. of Sch.*

Dist. of Detroit, 775 F. Supp. 1004 (E.D. Mich. 1991), is on point. There, plaintiffs sued the Board of Education of the Detroit school district alleging that the board violated the U.S. and Michigan Constitutions as well as federal and state statutes by establishing male-only academies purportedly designed “to address the high unemployment rates, school dropout levels and homicide among urban males.” *Id.* at 1006. In granting a temporary injunction, the District Court noted that although admitting females to the male-only academies would delay their start, “greater disruption would result if plaintiffs won this suit and the Academies were then aborted.” *Id.* at 1013. As in the instant case, “injunctive relief would fulfill the traditional purpose of preserving the ‘existing state of things until the rights of the parties can be fairly and fully investigated and determined.’” *Id.* (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). Indeed, as in this case, because the *Garrett* plaintiffs were likely to succeed on their constitutional claims, “no substantial harm would result from preventing the operation of an unconstitutional school.” *Id.*

Second, even if the Voucher Law was ultimately found to be constitutional, which is unlikely, an injunction that delays implementation of the voucher program until the 2021-2022 school year would still likely benefit Defendants. Reports indicate that the TDOE is troubled by severe staffing shortages,¹⁵ and the State’s smaller, disability-focused voucher program (T.C.A. §49-10-1401 *et seq.*) has been roiled by reports of fraudulent use

¹⁵ See Alex Apple, *240 employees leave Tennessee Department of Education since February*, Fox17 Nashville (Nov. 25, 2019), <https://fox17.com/news/local/240-employees-leave-tennessee-department-of-education-since-february> (“Since February [2019], 240 people have left the department; of those, 149 have resigned, 33 have retired and another 54 have had involuntary terminations.”).

of funds.¹⁶ Legislators who supported the legislation have also expressed concern about the rate at which Defendants are moving to implement and administer it. Wood Decl., Ex. D (conversation between Patsy Hazlewood and Charlie Bufalino), *supra*. Even if the Voucher Law were ultimately upheld, an injunction would allow Defendants to move forward with this program in a responsible, deliberate way.

Third, although Defendants and Intervenor-Defendants may argue that they want the voucher program to start next year, no one has a right to utilize – or a legal obligation to administer – the voucher program for the 2020-2021 school year. The Tennessee Constitution guarantees all children a right to a public education, Tenn. Const. art. XI, §12, but there is no corresponding right to a private education. Moreover, no rights are created under an unconstitutional law. *See People v. Weintraub*, 313 N.E.2d 606, 608 (Ill. App. Ct. 1974) (“[I]f [a] law is unconstitutional, there is no law and there can be no question about proper procedures for protecting [one’s] rights under the law because in theory [their] rights have never been threatened or affected . . .”).

Balancing these harms is not difficult. Both Plaintiffs and Defendants will benefit from a temporary injunction, and in no case will the requested temporary injunction (which is limited in duration) prevent Defendants from meeting their statutorily mandated

¹⁶ *See* Marta W. Aldrich, ‘Everything fell apart.’ *Parents pin voucher program problems on upheaval in Tennessee education department*, Chalkbeat (Feb. 13, 2020), <https://chalkbeat.org/posts/tn/2020/02/13/everything-fell-apart-parents-pin-voucher-program-problems-on-upheaval-in-tennessee-education-department/>; Kimberlee Kruesi, *State voucher violations leave details unknown*, Associated Press (Jan. 15, 2020), [https://apnews.com/28d5cd6f7d25cce5a7a293076ecf1ada?utm_source=newsletter&utm_medium=email&utm_campaign=cb_bureau_tn](https://apnews.com/28d5cd6f7d25cce5a7a293076ecf1ada?utm_source=newsletter&utm_medium=email&utm_campaign=cb_bureau_tn;);

timeframe for implementation of the Voucher Law (should it ultimately be found to be constitutional). Plaintiffs' Motion for Temporary injunction should be granted.

D. The Public Has a Strong Interest in This Court Granting Plaintiffs' Motion for Temporary Injunction

The public interest weighs heavily in favor of granting Plaintiffs' motion for temporary injunction.

First, courts have recognized that there is a public interest in preventing the implementation of an unconstitutional statute. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); *see also Garrett*, 775 F. Supp. at 1014 (adopting plaintiffs' argument "that the public interest is better served by preventing the opening of an unconstitutional educational facility"). The implementation of the Voucher Law violates the Home Rule and Appropriation of Public Moneys provisions of the Tennessee Constitution. Therefore, it is in the public interest to temporarily enjoin implementation of this unconstitutional statute.

Second, "[p]ublic interest is near its zenith when . . . seeing that public funds are not purloined or wasted." *Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 576 (6th Cir. 1997) (internal quotations omitted). Defendants have already spent more than \$1 million on the voucher program and stand to divert tens of millions more in taxpayer dollars to private schools if this unconstitutional program is not enjoined immediately. It is contrary to the public interest for the government to spend taxpayer dollars on programs that are likely to be found unconstitutional.

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

harming the interests of any party. *See Fannon*, 329 S.W.3d at 430; *Memphis Retail Investors Ltd. P'sip*, 1988 WL 82940, at *2 (Wood Decl., Ex. G). There are now two lawsuits challenging the Voucher Law, and dispositive motions have been filed in each case.¹⁷ It is critical for the Court to grant a temporary injunction until it rules on the merits of the Voucher Law. Maintaining the status quo benefits students eligible for vouchers and those who would remain in the targeted school districts. As explained above, voucher applications are currently being accepted until April 29, 2020. If the Voucher Law is not enjoined but is subsequently held unconstitutional, students using vouchers may return midyear to Shelby County Schools and Metro Nashville Public Schools. This will cause significant disruption to their education, as well as to the operation of the districts serving their public school peers and to the daily functioning of the classrooms to which they will return. Maintaining the status quo during the pendency of the litigation best serves the interests of all parties and the public at large.

Continued implementation of the Voucher Law is contrary to the public interest. Thus, the Voucher Law should be enjoined pending resolution of the constitutional and statutory questions presented herein.

¹⁷ Two separate motions to dismiss have been filed in *Metropolitan Government of Nashville and Davidson County v. Tenn. Dep't of Educ.*, Case No. 20-0143-II. Plaintiffs in that action filed a motion for summary judgment on March 27, 2020. In addition, a motion to dismiss was filed in the instant case on March 27, 2020.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a temporary injunction and issue an order enjoining implementation and enforcement of the Voucher Law.

DATED: April 3, 2020

Respectfully submitted,

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THIS MOTION IS SCHEDULED TO BE HEARD ON FRIDAY, APRIL 17, 2020, AT 9:00 A.M. PURSUANT TO LOCAL RULE OF PRACTICE 26.04(g). IF NO RESPONSE IS TIMELY FILED AND PERSONALLY SERVED, THE MOTION SHALL BE GRANTED, AND COUNSEL NEED NOT APPEAR IN COURT AT THE TIME AND DATE SCHEDULED FOR THE HEARING.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via electronic filing service, electronic mail, and U.S. mail to the following on this 3rd day of April, 2020:

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