S.C. NO. M2020-00683-SC-RDM-CV

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Plaintiffs/Appellees, vs. TENNESSEE DEPARTMENT OF EDUCATION, et al., Defendants/Appellants. and NATU BAH, et al., Intervenor-Defendants/Appellants.	Davidson County Chancery Court No. 20-0143-II Court of Appeals of Tennessee at Nashville No. M2020-00683-COA-R9-CV

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MOTION FOR REVIEW OF STAY ORDER

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I. Interest of Amici

Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams,

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

Even if this Court were to engage in de novo review, which it should not, Defendants/Appellants have still failed to demonstrate that a stay should be granted. Fundamentally, neither the State nor the Intervenor-Defendants have ever provided evidence ² despite numerous opportunities to do so ² that is sufficient to demonstrate any harm would U H V X O W I U R P W K H & K D Q F H U \ & R X U W · V L Q M X Q F W L R that could justify the extraordinary remedy they seek. In contrast, the McEwen Plaintiffs have established that they would suffer irreparable harm in the ab sence of an injunction, including from the loss of their constitutional right to local approval under the Home Rule provision, as Z H O O D V W K H V S H Q G L Q J R I W D [S D \ H U V · G R O unconstitutional law.

Nor do any of the other pertinent factors sup port a stay. As set forth below, Defendants/Appellants have no likelihood of success, nor does the public interest justify a stay of the injunction. To the contrary, preserving the status quo requires that the injunction remain in place. For these reaso Q V ' H I H Q G D Q W V $ S S H O O D Q W V · P R W L R Q V

\HDU 0F(ZHQ 3OV· $SS ([0RWLRQ WR GLVP or for judgment on the pleadings were filed in both cases. On April 29, 2020, the Chancery Court heard extensive oral argument on all the motions in both cases at WKH VDPH KHDULQJ %HDFRQ ,- ,QWHUYHQRUV· $S the Chancery Court LVVXHG D 0HPRUDQGXP DQG 2UGHU -XGJPHQW 2UGHUµ JUDQWLQJ WKH 0HWUR 3ODLQ judgment and enjoining the Defendants from implementing and HQIRUFLQJ WKH 9RXFKHU /DZ %HDFRQ ,- ,QWHUY same time, the Court issued a separate Order finding the McEwen 3ODLQWLIIV· 0RWLRQ IRU D 7HPSRUDU\ ,QMXQFW 6XPPDU\ -XGJPHQW 2UGHU %HDFRQ ,- ,QWHUYHQR VWDWLQJ WKDW ´WKH &RXUW KDV JUDQWHG WKH [sRXJKW@ ZLWK W Id. at APP1260. The Chancery Court took under advisement decisions on all other motions in the instant case and in McEwen %HDFRQ ,- ,QWHUYHQRUV· $SS ([DW ,QWHUYHQRUV· $SS ([DW $33

On May 5, 2020, the State and Intervenor-Defendants filed a Joint Motion for Stay of Injunction During Pendency of Appeal. On May 7, 2020, the Chancery Court held a hearing on the joint motion for a stay pending appeal and considered oral arguments and briefing from both the Metro and McEwen Plaintiffs, as well as from the State and ,QWHUYHQRU 'HIHQGDQWV %HDFRQ ,–13. The Chancery Court issued a bench ruling denying a stay pending appeal, %HDFRQ ,- ,QWHUYHQRUV· $S-25, and issued an order DW $33 FRQILUPLQJ WKH UXOLQJ RQ 0D\ %HDFRQ , 14.

On May 6, 2020, the State and the Beacon Center/Institute for Justice Intervenor -Defendants separately filed applications for permission to appeal to the Court of Appeals under Tenn. R. App. P. 9.

Club 6 : G 7HQQ &W $SS ´$ WULDO concerning a request to stay enforcement of an order is subject to an DEXVH RI GLVFUHWLRQ VWDQGDUG RI UHYLHZ µ abuse its discretion in denying the stay of its order, and the Court of $SSHDOV FRUUHFWO\ UHMHFWHG 'HIHQGDQWV· DW &RXUW·V LQMXQFWLRQ GXULQJ WKH SHQGHQF\ RI this Court were to consider the matter de novo, Defendants have not come

successfully urging an abuse of discretion in an appellate court is comparable to the chance which an ice cube would have of retaining its

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42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted). When reviewing for abuse of discretion, an appellate court cannot substitute its judgment for that of the trial court. Id.

It is clear that the trial court considered all relevant facts and law in arriving at its decision denying the stay. In addition to hearing oral argument from all parties in 0 H W U R a n d M c E w e n, the Chancellor

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school [2] would not preserve the status quo but would instead create irreparable disruption. Id.; see Garrett v. Bd. of Educ. of Sch. Dist. of City of Detroit, 775 F. Supp. 1004, 1013 (E.D. Mich. 1991) (enjoining implementation of male-only academies because although admitting females would delay the academies' start result if plaintiffs won this suit and the Academies were then aborted. . . . [I]njunctive relief would fulfill the traditional purpose of preserving the existing state of things until the rights of the parties can be fairly and finally investigated and determined" (inter

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

Even if this Court were to engage in de novo review of the Chancery Court's and Court of Appeals' orders, which should stand in view of Defendants' motions should be denied because they failed to establish any of the relevant factors justifying a stay, namely, the likelihood of success on appeal, irreparable harm, injury that outweighs the harm to others, or a public interest supporting a stay.

1. Defendants Have No Likelihood of Success on Appeal

As discussed in Plaintiffs' Application, Defendants' motions for stay pending appeal to the State Defendants' Application for Permission to Appeal as well as the McEwen Plaintiffs' Application for Permission to Appeal as well as the McEwen Law clearly violates the Home Rule provision. [2] McEwen Pls.' App. (

at APP065 - 0 F (Z H Q 3 O V · $ S S P(4)93-500 D W The $V3 Voucher Law affects Davidson and Shelby Counties in their well -established role in funding public education; and, given this effect on the counties ² y.¿!@O A€7

Advisory Commission Comment to Rule 9 indicates that the procedures

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a. The State Has Failed to Establish Irreparable Harm

The State asserts that, absent a stay pending appeal, it will be

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Denying Stay of Injunction at 13. The voucher program, however, was

Grutter, the Sixth Circuit granted a stay pending appeal to prevent the University of Michigan Law School from having to create a new admissions policy, delay making final decisions on candidates, and lose DSSOLFDQWV WR RWKHU VFKRROV LPSDLULQJ WKH 8QLYHUV to compete with other selective law schools for highly qualified applicants µ*Id.* at 633 (emphasis added). The Sixth Circuit was clearly SHUVXDGHG E\ WKH KDUP WR WKH ODZ-notch VFKRRO·V legal minds from a national pool each year. The facts in *Grutter* ² which involved a prestigious university whose reputation and funding depended heavily on its competitive ability to draw highly qualified candidates away from other law schools ² are incomparable to the implementation of a program that has neither yet started nor is required to start until the 2021-2022 school year, where students will receive vouchers based on when they apply or by a random lottery. Moreover, by pushing to implement the voucher program a full year in advance, the State Defendants are the architects of any harm they may perceive. The State has pushed forward, spending public money and resources, while fully cognizant of the pending legal challenges to the Voucher Law. This ill-advised implementation of a law that was constitutionally suspect should not be rewarded with extraordinary relief from this Court. This does not constitute irreparable harm, and it is certainly not comparable to the actual irreparable harm recognized by the Sixth Circuit in *Grutter*.

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

Intervenor -Defendants did not file a motion asking this Court to VWD\ WKH &KDQFHU\ &RXUW·V RUGHU +RZHYHU W stay, their children will be foreclosed from obtaining a voucher and forced to return to schools in districts where they may face adverse circumstances.

Yet, no Defendant has put forth any evidence demonstrating that even if their child receives a voucher, which is not guaranteed, the child will be accepted at a specific private school or that the private school they wish to attend will offer a superior education or remedy their current concerns.[4] See 0 F (Z H Q 3 O V · $ S S ([-59DAWd 6c3D efendant has offered any evidence of attempts to resolve these issues using the mechanisms and alternatives provided within the public school system, such as the robust school choice programs available in each school

[4] Intervenor - ' H I H Q G D Q W V · F R Q W H Q W L R Q W K D W S U L Y D voucher students will provide a superior education without social obstacles is highly speculative. In fact, the record provides evidence H

928 (6th Cir. 2002) (emphasis added). As explained above, no Defendant has come close to establishing the irreparable harm necessary to warrant a stay of the ORZHU FRXUW·V LQMXQFWLRQ ,Q FRQWUD allowed to proceed, the McEwen Plaintiffs would indisputably suffer irreparable harm. See 0F(ZHQ 3OV· $SS ([-78D First, $33 ´>W@KH ORVV RI D FRQVWLWXWLRQ period of time, Q ILUVW HYH XQTXHVWLRQDEO\ FRQVWLWXWHV LUUHSDUDEOH L Tanco v. Haslam, 7 F. Supp. 3d 759, 769-70 (M.D. Tenn. 2014), UHY·G VXE QRP 'H%RHU Y 772 F.3d 388 (6th Cir. 2014), UHY·G VXE QRP 2EHUJHIHOO Y 135 S. Ct. 2584 (2015) (in ternal quotations omitted). Here, the Chancery Court ruled that the State violated the Home Rule provision when it enacted WKH 9RXFKHU /DZ %HDFRQ ,- ,QWHUYHQRUV· $SS of the Voucher Law is allowed to proceed, the McEwen Plaint iffs will continue to suffer irreparable harm from the loss of their constitutional right to local approval under the Home Rule 004C0049004 q 0.00000912 0 612 794 /F

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

Importantly, no Defendant has ever disputed [illegible] in the Chancery Court, in the Court of Appeals, or in their motions before this Court [illegible] that these two injuries are sufficient to demonstrate irreparable harm to [illegible]

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

4. Staying the Injunction Is Not in the Public Interest

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public interest is b etter served by preventing the opening of an XQFRQVWLWXWLRQDO HGXFDWLRQDO IDFLOLW\µ voucher program violates the Home Rule provision of the Tennessee Constitution, as determined by the Chancery Court. Ironically, Defendants contend that if a stay is not granted, the political will of the SHRSOH RI WKLV 6WDWH ZLOO EH IUXVWUDWHG 'H Orders Denying Stay of Injunction at 16 -17. But recognizing that the +RPH 5XOH SURYLVLRQ LV ´GHVLJQHG WR HPSRZHUµ Chancery Court ruled that it was the State that had frustrated the will of the people of Davidson and Shelby Counties when it enacted the Voucher Law without their constitutionally required consent. Beacon/IJ ,QWHUYHQRUV· $SS APP020[(internal quotation omitted). Therefore, it is not in the public interest to allow implementation of this unconstitutional statute.

6HFRQG ´>S@XEOLF LQWHUHVW. . LV Seeing that QHDU LWV SXEOLF IXQGV DUH QRW SXOOHG RU ZDVWHG µ Chappell v. Montgomery Cty. Fire Prot. Dist. No. 1 , 131 F.3d 564, 576 (6th Cir. 1997) (internal quotations omitted). Defendants have already spent more than $1 million on the voucher program and plan to divert tens of millions more in taxpayer dollars to p rivate schools if the injunction against this XQFRQVWLWXWLRQDO SURJUDP LV VWD\HG -0F(ZHQ 62. It is contrary to the public interest for the government to spend taxpayer dollars on programs that are unconstitutional.

Third, it is in the public interest for this Court to preserve the status quo at this juncture. Preserving the status quo

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CERTIFICATE OF COMPLIANCE

I, Christopher M. Wood, hereby certify that AMICI CURIAE 0F(:(1 3/$,17,))6· 5(63216(,1 23326,7,21 72 67$7('()(1'$176 $33(//$176· 027,21)25 5(9,(: 2) 67$< ORDER complies with the requirements of Tennessee Supreme Court Rule 46, Section 3, Rule

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 29th day of May, 2020:

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