IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

RON AND KATHY TEAGUE, et al. PLAINTIFFS

v. CASE NO. 6:10-CV-6098

ARKANSAS BOARD OF EDUCATION, et al. DEFENDANTS

BRIEF IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL

This Court's Judgment and Memorandum Opinion and Order struck down the entire Arkansas Public School Choice Act of 1989 because of the unlawful race limit contained in subsection (f)(1) of the Act. No party in this case filed a complaint asking for this result. Only Intervenors Camden Fairview School District No. 16 of Ouachita County and El Dorado School District of Union County argued for this result, but they did not file a complaint and could not attack the constitutionality of the entire Act. Further, as this Court noted at page 24 of its Memorandum Opinion, the twin purposes of the Public School Choice Act, parental and student choice and school district accountability, are easily served without the unconstitutional race-based limitation of subsection (f)(1). Accordingly, subsection (f)(1) is severable under Arkansas law.

In responding to Camden-Fairview and El Dorado's Summary Judgment Brief on February 23, 2012, plaintiffs asked this Court to avoid determining unnecessary questions of state law in this case because it is more appropriate for the legislature or judiciary of the State to determine the consequences, if any, of the constitutional invalidity of subsection (f)(1) on the rights of Arkansas schoolchildren to attend the school of their choice. Plaintiffs alternatively requested the Court to rule on the constitutional issue raised by subsection (f)(1) and certify the question of severability to the Arkansas Supreme Court. The State of Arkansas took no position on severability in this action, further confirming that the issue was not properly joined.

By accepting Camden-Fairview and El Dorado's invitation to strike down the entire Act, this Court has "enjoined [the State of Arkansas] from applying" the Act, which creates deep uncertainties for the 15,682 students across Arkansas (as of two years ago) who have exercised a choice transfer as the State defines the term in the Affidavit of James Boardman, Stipulated Exhibit 34. The State does not know which students have transferred under which statute, *id.*, and it cannot tell which students may be impacted by the injunction. As a result, thousands of children in Arkansas public schools are in the dark about their status as transfer students under the Act, just 60 days before a new school year begins. These children, and their families and transfer districts, were not heard in this case and

have been blindsided by the injunction, because Camden-Fairview and El Dorado did not follow basic due process in attempting to strike down the entire Act.

This situation calls out for an immediate stay of the injunction against the entire Act. Not only will this help restore order across the State, but it will permit Appellants Ron and Kathy Teague and Rhonda Richardson to enjoy the benefits of the injunction against enforcement of subsection (f)(1) granted at p. 28 of the Opinion.

STANDARDS FOR STAY PENDING APPEAL

The injunction against the entire Act went into effect on June 8, 2012, when the Judgment was entered, Fed. R. Civ. P. 62(a)(1), and it will remain in effect pending appeal unless stayed by this Court under Fed. R. Civ. P. 62(c) or the Eighth Circuit under Fed. R. App. P. 8(a).

Stay of an injunction is very similar to the grant of a temporary restraining order.

> We consider four factors in determining whether to issue a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."
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> The most important factor is the appellant's likelihood of success on the merits. The movant must show that it will suffer irreparable injury unless a stay is granted. Ultimately, we must consider the relative strength of the four factors, "balancing them all."

Brady v. National Football League, 640 F.3d 785, 789 (8th Cir. 2011) (citations omitted).

Here, the merits of the severability issue are two-fold: whether Camden-Fairview and El Dorado properly presented the question and whether the question was resolved correctly. Appellants have strong arguments on both. The irreparable injury point is clear and compelling: thousands of children in public schools across Arkansas, along with their families and school districts, have been thrown into uncertainty about their status as transferees under the Act for the new school year to begin in August. Appellants would have the immediate right to the transfers they sued to receive; denial of those transfers is irreparable injury to them.

All of this irreparable injury may be cured by an immediate stay of the injunction against the entire Act. On the other hand, granting a stay pending appeal will not cause irreparable injury to any person or entity known to appellants. The public interest clearly calls for a stay of the injunction against the entire Act given the uncertainties and confusion that have resulted.

ARGUMENT

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Intervenors Did Not And Cannot Seek Affirmative Relief

The Camden-Fairview and El Dorado School Districts sought permissive intervention to join with the state defendants to defend the Public School Choice Act, and plaintiffs did not object. After receiving leave to intervene, they filed an Answer to the Second Amended Complaint generally joining in all positions advanced by the state defendants, but adding an Affirmative Defense to the effect that "if this Court finds the racial restrictions unconstitutional, the Court must also find the 1989 Act unconstitutional in its entirety." Answer, Document 52, p. 8, paragraph 1. Camden-Fairview and El Dorado did not file any complaint, counterclaim, cross-claim or third-party complaint requesting that this Court strike down the Public School Choice Act in its entirety. Nor could they, because they had intervened on the basis that they would help defend the statute, not try to strike down more of it than the plaintiffs did.

Camden-Fairview and El Dorado did not sue for the broad relief that they requested from this Court. Even if the Affirmative Defense had been construed as a counterclaim against the plaintiffs, as is permitted by Fed. R. Civ. P. 8(c)(2) in cases of mistaken designation, the effort would have been futile, because the plaintiffs were not proper defendants to an action to strike down an entire state

statute. Plaintiffs did not act under state law, did not deny any protected right of the Camden-Fairview or El Dorado School Districts, and were not capable of providing any relief to them with respect to this Arkansas Act. *Compare Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614 (1991)(private litigant using peremptory challenges in federal court a state actor), *with Moose Lodge No. 7 v. Irvis*, 407 U.S. 163 (1972)(private club not a state actor by virtue of state liquor permit). But this is beside the point, because Camden-Fairview and El Dorado did not mistakenly designate a "counterclaim" as an "affirmative defense." Instead they consciously elected not to sue any party for any relief, and they therefore are not entitled to the enhanced relief – striking the entire Act – that they requested.

Camden-Fairview and El Dorado did not try to sue the state defendants or any state actor involved with enforcing the Public School Choice Act. Camden-Fairview and El Dorado could have pursued such claims by cross-claim against the state defendants or by third-party complaint against other state actors, but they did not. This was consistent with their purpose to help the state defendants uphold the statute. Similarly, the State of Arkansas felt no need to (and did not) take a position on severability of subsection (f)(1).

If Camden-Fairview and El Dorado had tried to sue proper parties for a declaration that the Public School Choice Act is unconstitutional in its entirety

under the state law doctrine of severability, they would have failed. They have no standing in federal court because they have not been injured by operation of the Act.[1] They do not present a ripe or concrete case or controversy against any state actor; to the contrary they are aligned with the state defendants in this case. *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807-08 (2003). They could not assert a present case or controversy for purposes of a declaratory judgment. *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 126-27 (2007). Finally Camden-Fairview and El Dorado did not file any claim setting forth facts on which the relief they requested—striking the entire Act—could be granted. *E.g., Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Camden-Fairview and El Dorado utterly failed to observe any touchstone of due process in their campaign to strike down the entire Arkansas Public School Choice Act of 1989. As a consequence, the thousands of students across the State who have been snared by the Court's injunction had no warning, no opportunity to

[1] See *Russell v. Burris*, 146 F.3d 563, 566 (8th Cir. 1998) (applying Arkansas law):

> Standing is, of course, a threshold issue in every case before a federal court: If a plaintiff lacks standing, he or she cannot invoke the court's jurisdiction. *See Boyle v. Anderson,* 68 F.3d 1093, 1100 (8th Cir.1995), *cert. denied,* 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 214 (1996). In order to invoke the jurisdiction of a federal court, one must meet three requirements. First, a plaintiff must have suffered an "injury in fact," and such an injury must be concrete, particularized, and either actual or imminent. *Id.* at 1100-01. Second, a would-be litigant must make out a causal connection between the alleged injury and the conduct challenged. *Id.* at 1100. Third, he or she must show that the injury is likely to be redressed by a favorable decision. *Id.*

be heard, no ability to point out the defects in the position asserted by Camden-Fairview and El Dorado, and no chance to make contingency plans in case the Act were struck down in its entirety. The irreparable injury they now suffer is due to the procedural irregularities of the intervention and argument of Camden-Fairview and El Dorado. Appellants have a strong argument for reversal of the severability ruling on this ground.

B. The Act Is Severable Because Its Purposes Can Be Served Without the Unconstitutional Provision

Appellants also have strong arguments on the merits of the Court's severability analysis, even if it were appropriate to reach the argument of Camden-Fairview and El Dorado.

The Court failed to address the following argument in its Memorandum Opinion and Order: Arkansas law expressly favors severability. The Arkansas Code contains two general severability statutes. Ark. Code Ann. § 1-2-117 states:

> Except as otherwise specifically provided in this code, in the event any title, subtitle, chapter, subchapter, section, subsection, subdivision, paragraph, subparagraph, item, sentence, clause, phrase, or word of this Code is declared or adjudged to be invalid or unconstitutional, such declaration of adjudication shall not affect the remaining portions of this Code which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this Code.

The other, Ark. Code Ann. § 1-2-205, adopted in 1973, states:

> The provisions of each and every act enacted by the General Assembly after July 24, 1973, are declared to be severable and, unless

> it is otherwise specifically provided in the particular act, the invalidity of any provision of that act shall not affect other provisions of the act which can be given effect without the invalid provision.

These statutes are so emphatic that the official legislative drafting arm of the Arkansas General Assembly has declared that statutes should NOT contain a specific severability provision because the two general ones are so clear. To the contrary, according to the Arkansas Bureau of Legislative Research's 2010 Legislative Drafting Manual, an official government publication located on the State of Arkansas's Legislative website, at page 79 of the PDF document, http://www.arkleg.state.ar.us/bureau/legal/Publications/2010%20Legislative%20Drafting%20Manual.pdf (last accessed on February 21, 2012), a statute should contain a *non*-severability provision if the General Assembly wants legislation to be considered as an integrated unit that must pass muster as a whole or not at all. It says (with emphasis supplied):

> (e) SEVERABILITY CLAUSE.
>
> A severability clause provides that if a part of a law is declared invalid the remaining part stays in force. A general severability clause is not necessary, and should not be used. Arkansas Code § 1-2-117 states that the provisions of the Arkansas Code are severable, and Arkansas Code § 1-2-205 states:
>
> > "The provisions of each and every act enacted by the General Assembly after July 24, 1973, are declared to be severable and, unless it is otherwise specifically provided in the particular act, the invalidity of any provision of that act shall not affect other provisions of the act which can be given effect without the invalid provision".

> (f) NONSEVERABILITY CLAUSE.
>
> If the author does not want specific provisions to be severable, add a section declaring the provision to not be severable. Bills having a statement of nonseverability are rare.
>
> Example:
>
> SECTION 6. The provisions of this act are not severable, and if any provision of this act is declared invalid for any reason, then all provisions of this act also shall be invalid.

The Public School Choice Act of 1989 was adopted after both severability statutes and therefore reflects the general severability provisions of both of them. According to the Bureau of Legislative Research, the Act is supposed to be silent as to severability if the legislature intends its parts to be severable. The Public School Choice Act is severable in all of its provisions according to the General Assembly.

Further, this Court erred in its severability analysis. The Arkansas Supreme Court looks to two considerations to determine severability: "(1) whether a single purpose is meant to be accomplished by the act, and (2) whether the sections of the act are interrelated and dependent upon each other." *McGhee v. Ark. State Bd. Of Collection Agencies,* 375 Ark. 52, 63, 289 S.W.3d 18, 27 (2008). In *U.S. Term Limits, Inc. v. Hill*, the Arkansas Supreme Court provided further guidance, stating "it is important whether the portion of the act remaining is complete in itself and

capable of being executed wholly independent of that which was rejected." 316 Ark. 251, 268, 872 S.W.2d 349, 358 (1994).

At page 7 of its Opinion, this Court quoted the twin purposes of the Arkansas Public School Choice Act of of 1989: providing options for students and parents and making residential districts more accountable to their patrons. At page 24 of its Opinion, the Court stated: "the blanket rule on inter-district transfers based solely on percentages of minority school students in a school district directly contradicts the Legislature's stated goal of permitting students to choose from among different schools with differing assets that meet their individual needs." This is correct and reiterates a point Appellants made in their briefing.

Since the race limit contradicts the Legislature's stated purposes in the Act, it follows logically that the stated purposes can stand nicely without the race limit, and this answers the severability issue under Arkansas law. The Court erred in failing to carry this point to its logical result.

Instead, the Court's severability analysis turned on the presumed "intent" of the General Assembly when it adopted the Arkansas Public School Choice Act of 1989. Opinion at pp. 29-30. Legislative intent is *not* the legal standard applied under Arkansas law. To the contrary, the standard turns on the purpose of the statute and asks whether that purpose can stand without the offending language.

The two purposes of the Arkansas Public School Choice Act of 1989 can be served better without the race-based limitation of subsection (f)(1) than with it. Having a racial qualifier on who may transfer reduces the number of children and parents who "will become more informed about and involved in" their public education. Ark. Code Ann. §§ 6-18-206(a)(2). Lifting this racial limit increases the number of students and parents who may enjoy this benefit of the Arkansas statute. There is nothing about the race of a student or parent that affects his or her ability to enjoy the benefits of becoming more informed and involved in public education.

So too with the second interest of making teachers and schools more responsive and effective in serving the educational needs of students who reside in the district. Ark. Code Ann. § 6-18-206(a)(3). This second purpose of the Public School Choice Act gives leverage to students and parents in schools that may otherwise not respond to their educational needs. *Id.*

Disqualifying students from this added benefit because of their race simply fosters what in many cases may be an unresponsive or ineffective status quo within a school or district. Thus the racial qualifier blunts the force of this state-law benefit. Removing it will increase the responsiveness and effectiveness of the state's school districts to the educational needs of their own residents, regardless of race.

There is no sensible argument that a student's race is inextricably intertwined with his or her ability to enjoy either of these two benefits of the statute. To the contrary, the racial disqualification is in tension with these two purposes of the General Assembly, as this Court noted on p. 24 of the Opinion. Severing subsection (f)(1) liberates the remainder of the Arkansas Public School Choice Act of 1989 and enhances achievement of the twin goals of the General Assembly.

II. IRREPARABLE INJURY ABSENT A STAY

As shown in Table 3 to Stipulated Exhibit 34, the Affidavit of James Boardman, more than 15,600 students across the State had made choice transfers in the 2010-11 school year. The record does not contain any more current data. The State cannot tell which students made transfers under the Arkansas Public School Choice Act of 1989 and which made transfers under other transfer statutes.

The injunction prohibiting the State of Arkansas from applying the Arkansas Public School Choice Act of 1989 creates uncertainty in the following particulars:

- Students who have transferred under the Arkansas Public School Choice Act of 1989:
    - Where do I attend school next year beginning in barely two months?
    - Can I continue under my transfer? If so, isn't that only by virtue of the Arkansas Public School Choice Act of 1989? If the State cannot apply that Act, how can I attend my transfer school under it?

- Can I return to my residential district? The time for registering expired long ago, and I have missed opportunities to register for classes, activities and organizations that I may want. Does my residential district even have room for me? In what school?

- What about the friends I have made at my transfer school? When and how will I see them?

- Transfer Districts

  - Will the transfer students under the Arkansas Public School Choice Act of 1989 attend next year? If so, isn't that only by virtue of the Arkansas Public School Choice Act of 1989? If the State of Arkansas cannot apply that Act, how can students attend under transfers pursuant to the Act?

  - If the transfer students cannot attend next year, do we have too many teachers? What adjustments do we need to make in expectation of decreased enrollment? Could we have issues relating to academic and curriculum standards concerning teacher-student ratios or course offerings?

  - What impact does this have on clubs and activities? Are any transfer students in positions of leadership?

  - What funds will this district receive next year for transfer students under the Arkansas Public School Choice Act of 1989? If we receive those funds ($6,600 per student) from the State, under what authority do we receive them? If the State cannot apply the Act, how can it send us the foundation funding for transfers under the Act?

  - Will our district be liable for per-student foundation funding to the resident districts of transfer students under Ark. Code Ann. § 6-18-202(e) if we keep transfer students next year under the Arkansas Public School Choice Act of 1989?

  - Is our district close to the administrative-consolidation threshold of 350 students set forth in Ark. Code Ann. §§ 6-13-1602 and 1603? Do we need transfers under the Arkansas Public School Choice Act of 1989 to stay above that number?

- If we lose foundation and related per-student funding for transfers under the Arkansas Public School Choice Act of 1989, will we have financial problems that may result in fiscal distress?

- Will we receive students who have transferred away? Who and when? How many? What planning can we do to accommodate them in August 2012? Do we have enough teachers to meet required academic standards?

- Parents of students under Arkansas Public School Choice Act of 1989 transfers:

  - We transferred legally under the Act and want to continue where we are. Can we?

  - Why does the illegality of the race limit in the Arkansas Public School Choice Act of 1989 affect my child's transfer? We transferred notwithstanding that limit.

Appellants are three individuals and admittedly do not represent the interests of the transfer students, parents and districts affected by the injunction against the entire Act. But no one else represents their interests in this case either, and that is the point. The Attorney General represents the State Board Defendants, the Board of Education and the Department of Education. Camden-Fairview and El Dorado represent their own interests. Someone must stand up for these non-parties who are affected by the injunction against the entire Act and the uncertainties it creates, and Appellants do so.

Appellants concede that as a technical matter, the irreparable harm from the injunction suffered by existing transfer students is not irreparable injury "of the applicant" with the meaning of *Brady v. NFL*, 640 F.3d at 789. But Appellants

have their own irreparable harm, because they received the narrow injunction they requested yet cannot enjoy it. This Court's Opinion states that it "would order Defendants to permit the transfer of the Teague and Richardson children to the Magnet Cove School District," Opinion at p. 28, but for the severability issue raised by Camden-Fairview and El Dorado. Appellants have no other transfer option that is not subject to veto by the Malvern School District. Thus Appellants can establish their right to a stay without turning to the injuries suffered by the unknown thousands affected by the broader injunction, but this Court should in all equity consider the impact of the injunction against the entire Act on them in this analysis.

III. IRREPARABLE HARM FROM GRANTING A STAY

Appellants are not aware of any person or entity who would suffer harm of any kind from the granting of the requested stay.

IV. THE PUBLIC INTEREST FAVORS A STAY

This stay involves thousands of children and public school districts across the State who have been thrown into disarray and confusion from a ruling in a case to which they were not parties. Appellants requested that this Court not reach the severability issue because it was not necessary and was not properly presented by Camden-Fairview and El Dorado in this case. Consistent with this posture, the State of Arkansas took no position on severability. Appellants alternately

requested the Court to certify the severability issue to the Arkansas Supreme Court if it felt the issue must be decided. The effect of not reaching the issue or certifying it would have been to avoid the confusion created by the injunction prohibiting the State of Arkansas from applying the Arkansas Public School Choice Act of 1989.

This requested stay will restore the order and expectations of the public that existed before the Court's injunction against the entire Act issued. This is a strong public interest in favor of a stay, and there is no countervailing public interest that would counsel against a stay.

CONCLUSION

For all of the foregoing reasons, this Court should stay its injunction against the State of Arkansas "from applying the Arkansas Public School Choice Act of 1989" during the pendency of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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