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

CAMDEN FAIRVIEW SCHOOL DISTRICT, et al. INTERVENORS

INTERVENORS' BRIEF IN SUPPORT OF THEIR MOTION FOR A LIMITED STAY AND IN RESPONSE TO PLAINTIFFS' AND STATE BOARD DEFENDANTS' MOTIONS FOR STAY PENDING APPEAL

The Intervenors, Camden Fairview School District No. 16 of Ouachita County and El Dorado School District of Union County, through undersigned counsel, file this brief in support of their motion for a limited stay and in response to the Plaintiffs' Amended Motion for Stay Pending Appeal, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 106, June 12, 2012 (hereinafter "Plaintiffs' Amended Stay Motion"), the Plaintiffs' Brief in Support of Motion for Stay Pending Appeal, *id.*, Document 102, June 12, 2012 (hereinafter "Plaintiffs' Stay Brief"), the State Board Defendants' Motion for Stay, *id.*, Document 104, June 12, 2012, and the Brief in Support of State Board Defendants' Motion for Stay, *id.*, Document 105, June 12, 2012 (hereinafter "State Defendants' Stay Brief").

INTRODUCTION

On June 8, 2012, this Court declared that the Arkansas Public School Choice Act of 1989 (hereinafter "the 1989 Act") "is unconstitutional in its entirety." Memorandum Opinion and Order, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 98, June 8, 2012, at 31 (hereinafter "Memorandum Opinion"). As matters now stand, the Intervenors have no intention of filing an appeal in this case. That said, the Intervenors believe it appropriate for this Court to stay its order to the extent such a stay will provide an opportunity for the Arkansas General Assembly and the Arkansas Department of Education to cure the constitutional infirmity identified by this Court. The Intervenors also believe it appropriate to take carefully measured steps to protect the educational status of student transferees who attended school during the 2011-12 school year pursuant to the terms of the 1989 Act. The Intervenors believe an argument can be made that it is in the public interest that those students should be allowed to continue their education in the district chosen, and that they and their resident school districts should be allowed to plan for the 2012-13 school year on that basis.[1]

However, the Intervenors' support for a limited stay should be understood for exactly what it is: a sensible accommodation of the needs and interests of students and school districts whose lives and situations may have been upset by the deliberate, considered actions of the Plaintiffs in this case. This Court reached the only possible conclusion of law on the issue of severability, properly holding that, when read as a whole, "[t]he Arkansas Public School Choice Act of 1989 makes clear that the Arkansas General Assembly's intent in passing the Arkansas Public School Choice Act of

[1] The beneficiaries of any such stay do not, needless to say, include the individual plaintiffs in this case.

1989 was to permit student transfer in order to provide choices for parents and students and to foster better school performance – as long as those transfers do not adversely affect the desegregation of either district." Memorandum Opinion, *supra*, at 29-30.

Severability was an issue the Intervenors had every right to raise. It was one that they did in fact raise in an appropriate and timely fashion. And it was one that was pursued with full and timely notice to all parties in this case.

The Plaintiffs, in their Motion and Brief, simply recycle positions this Court has already repeatedly considered, properly rejected, and should summarily reject again. There is no possibility that the Plaintiffs "will succeed on the merits" in their appeal, which the Court of Appeals for the Eighth Circuit has repeatedly described as "the most important factor" in consideration of a request for a stay. *See, e.g., Brady v. National Football League*, 640 F.3d 785, 789 (8th Cir. 2011). There are also serious questions about the extent to which the individual plaintiffs will suffer "irreparable harm" if their motion for a stay is denied and whether the alleged potential harms to third parties or the public interest justify a stay.[2]

ARGUMENT

The general standard governing requests for a stay focuses on four interrelated factors: the merits of the moving party's case; the possibility of injury to the moving party; the possibility of injury to other parties; and the public interest. *See Brady,* 640 F.3d at 789. The Intervenors believe that the Plaintiffs have virtually no possibility of success on the merits in their appeal, that their

[2] For the sake of brevity, the Intervenors confine their argument here to severability only, taking no position on the constitutionality of § 6-18-206(f)(1). The Intervenors expressly reserve the right to do so on appeal in response to whatever arguments are made by the Plaintiffs and the State Board Defendants on that question.

claims of harm are overblown, and that, to the extent that the rights of others are adversely implicated by this Court's order, these alleged potential harms do not justify a stay.

I. The Plaintiffs Incorrectly Treat This Court's Opinion, Order, and Judgment as Though the Court Entered Two Distinct Injunctions

As a threshold matter, the Plaintiffs treat this Court's Memorandum Opinion as though it granted two separate injunctions. That is, the Plaintiffs refer repeatedly to, for example, "the injunction they sought and obtained at p. 28 of the Opinion." *See, e.g.*, Plaintiffs' Amended Stay Motion, *supra*, at ¶ 19. This appears to be an attempt to separate the Court's finding that the 1989 Act "is unconstitutional in its entirety," Memorandum Opinion, *supra*, at 31, from any discussion of the ability of the named Plaintiffs and, quite possibly, countless others, to exercise the school choice option created by the 1989 Act.

If this indeed is what the Plaintiffs intend, they are simply incorrect, as any careful reading of the Memorandum Opinion makes clear. For example, the Court does state in the text of the Memorandum Opinion that it "hereby permanently enjoins the State of Arkansas from applying . . . § 6-18-206(f)(1) to transfer applications under the Arkansas Public School Choice Act of 1989." *Id.* at 28. The Court then goes on to state in no uncertain terms that, since § 6-18-206(f)(1) cannot be severed from the 1989 Act, it is most certainly not "order[ing] Defendants to permit the transfer of the Teague and Richardson children to the Magnet Cove School District." *Id.*

This is made abundantly clear at the end of the Memorandum Opinion, where the Court specifies the relief it is granting: "Plaintiffs' Motion for Declaratory and Injunctive Relief (Doc. 69) is **GRANTED** as to the declaration of unconstitutionality of the Arkansas Public School Choice Act of 1989 and **DENIED** as to the injunctive relief sought by Plaintiffs." *Id.* at 31 (emphasis in original).

This is a single finding and single declaration of injunctive relief. It is most certainly not a declaration that the Court fashioned and entered two separate injunctions, one at page 28 of the Memorandum Opinion and a separate one at page 31. This reality is repeated in the Court's separate Judgment, within which it states again that the Plaintiffs' motion is "**GRANTED** in part and **DENIED** in part." Judgment, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 99, June 8, 2012, at 1 (emphasis in original).

II. This Court Properly Held that the Severability Issue Was Before It and that § 6-18-206(f)(1) Could Not be Severed.

As the Intervenors have repeatedly noted and argued, the Plaintiffs' characterizations of this case have consistently been misleading, inaccurate, and incomplete. These errors persist in their Amended Motion for Stay and their Brief in Support of that Motion.

As a threshold matter, it is absolutely not true that "[o]nly Intervenors . . . argued for this result." Plaintiffs' Stay Brief at 1. That is, the Intervenors were most certainly not the only parties before this Court who maintained that if § 6-18-206(f)(1) is unconstitutional it could not be severed from the 1989 Act. As this Court expressly recognized, "[t]he Magnet Cove defendants adopt as their own the Motion for Summary Judgment filed by the intervenors." Memorandum Opinion and Order, *supra*, at 14 n. 19. The Magnet Cove defendants did in fact argue both that § 6-18-206(f)(1) is constitutional *and* that it could not be severed from the 1989 Act. *See* Response to Motions for Summary Judgment and/or Declaratory Judgment and Injunctive Relief, Document 81, February 22, 2012, at ¶ 3 ("These separate Defendants pray that the Ark Code. Ann. § 6-18-206(f) be declared constitutional or alternatively, that (f) is not severable from the balance of § 6-18-206 and as a result that the Act in question be determined unconstitutional in its entirely."). The Magnet Cove School

District and its Board may not have briefed the point. They most assuredly did embrace it.

The Plaintiffs are also flatly wrong when they assert that the Intervenors are now, ever have been, or sought to intervene on the assumption that they would be, somehow "aligned" with the State Board Defendants in the manner described by the Plaintiffs. *See, e.g.*, Plaintiffs' Stay Brief at 7 (The Intervenors "are aligned with the state defendants in this case"). The Plaintiffs' highly selective reading of the record in this case blatantly ignores both what the Intervenors made absolutely clear when they sought permission to intervene and the positions the Intervenors have consistently maintained before this Court. For example, it is true that the Intervenors sought permission to intervene "to defend the Public School Choice Act," *id.* at 5, and that the Plaintiffs did not object. *Id.*[3] But it is absolutely not true that the Intervenors ever "join[ed] in all positions advanced by the state defendants." *Id.* It is also absolutely not true that the Intervenors somehow disguised their true purposes and, only after being granted permission to intervene, sprung on an unsuspecting world their intentions to argue that § 6-18-206(f)(1) could not be severed from the 1989 Act. *See id.* at 5 (once again asserting that the severability argument arose "[a]fter receiving leave to intervene").[4]

At the risk of repetition, the Intervenors made their severability argument absolutely clear from the very first moment that they appeared in this case. Motion for Leave to Intervene, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 9, April 21, 2011,

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[3] A more accurate characterization might be that counsel for the Plaintiffs did nothing. *See* Order, *Teague et al. v. Arkansas State Board of Education et. al.*, No. 6:10-CV-6098-RTD, Document 41, July 7, 2011, at 1 ("Plaintiffs did not file a response.") (hereinafter "Intervention Order").

[4] This is, of course, not a new flight of fancy on the part of the Plaintiffs, nor one that the Intervenors have not already noted and dealt with. *See, e.g.,* Intervenors' Reply and Brief in Support, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 91, March 2, 2012, at 3-5 (noting prior attempts by the Plaintiffs to ignore facts amply documented in the record) (hereinafter "Intervenors' Reply and Brief").

at ¶6 ("[t]he *proposed* intervenors also aver that if § 6-18-206(f)(1) is found to be unconstitutional, that section of the statute cannot be severed from the remainder of the School Choice Act") (emphasis added) (hereinafter "Motion to Intervene"). Indeed, the Intervenors argued clearly and forcefully that their desire to press the issue of severability likely distinguished them from both the State Board Defendants and the Magnet Cove Defendants:

> The proposed intervenors believe that the State Board, on the other hand, will defend vigorously the constitutionality of the statute. *See Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 4, Answer, Separate State Defendants, February 14, 2011, p. 5, ¶ 25. The proposed intervenors recognize, however, that the Attorney General of Arkansas is obligated to defend the constitutionality not simply of § 6-18-206(f)(1), but of the entire scheme put in place by the 1989 Act. The Attorney General is charged by law "to maintain and defend the interests of the state in all matters before . . . all . . . federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved." Ark. Code Ann. § 25-16-703(a).
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> Thus, while the proposed intervenors and the State Board will both defend the constitutionality of the statute, the similarities of their arguments diverge if § 6-18-206(f)(1) is declared unconstitutional. In order to fulfill its obligations to defend the statutes enacted by the Arkansas legislature, the Attorney General logically must argue for the severability of § 6-18-06(f)(1). That is, the Attorney General will defend the long standing policy decision by the people of Arkansas to allow school choice. The proposed intervenors, however, will argue that the 1989 Act as a whole must stand and that the limitation on transfers from districts in which the transferring student is in the racial minority cannot be severed from the school choice provisions of the 1989 Act. The proposed intervenors aver that the legislature would not have enacted the 1989 Act in its entirety without the racial restriction. Upon information and belief, both Magnet Cove and the State Board will likely argue that subsection 6-18-206(f)(1) is severable and that the remainder of the statute can stand on its own.

Brief in Support of Motion to Intervene Pursuant to Rule 24(b), *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 10, April 21, 2011, at 15-16 (footnote omitted) (hereinafter "Intervention Brief").

The Plaintiffs try to attach some sort of totemic significance to the fact that the State Board

Defendants have to date taken no position on severability. *See, e.g.*, Plaintiffs' Stay Brief, *supra*, at 2 ("The State of Arkansas took no position on severability in this action, further confirming that the issue was not properly joined."); Plaintiffs' Amended Stay Motion, *supra*, at ¶ 4 (same). There may be any number of reasons why the State Board Defendants to date have not taken a position on severability. Whatever they might be, they are irrelevant. As the Intervenors have already noted, severability is a matter of law, to be considered and resolved by this Court. It is not some sort of factual claim that must be admitted or denied. More to the point, the fact that the State Board Defendants have remained silent does not in any way alter this underlying reality: the Intervenors made it crystal clear from day one that they intended to argue that § 6-18-206(f)(1) could not be severed. They made that point to this Court as an integral part of their explanation of why it was appropriate for them to be allowed to intervene in this case. The Plaintiffs' continuing refusal to recognize this reality, and their allegations that this issue appeared out of thin air, only after permission to intervene was granted are puzzling, to say the least.

Arguments about severability are routinely made and entertained by the courts in cases where the constitutionality of a statute is at issue. Indeed, they are routinely made by parties seeking to defend the measures under attack. So, for example, in the first iteration of this litigation, the Malvern School District defendants made it clear that severability was an integral part of their argument in defense of the 1989 Act. *See* Answer of Separate Defendant Malvern School District to Plaintiffs' Third Amended Complaint, *Hardy et al. v. Malvern School District et. al.*, No. 6:08-CV-6094, Document 46, January 16, 2009, at ¶ 38 ("It was and continues to be the position of the Malvern School District herein that this Court cannot selectively redact [the 1989 Act] and that any ruling by this Court which declares this statute unconstitutional must invalidate the entire School

Choice Act."). This Court recognized this in its memorandum opinion disposing of that case without reaching the constitutional questions. *See Hardy v. Malvern School District*, 2010 WL 956696 *1 (W.D. Ark., Mar. 16, 2010) (characterizing as a "key issue . . . whether subsection 6-18-206(f) is severable"). The Court reiterated this understanding in its Memorandum Opinion in this case. *See* Memorandum Opinion, *supra*, at 3 (noting that the Court "did not [there] reach the issues of whether Ark. Code Ann. § 6-18-206(f) is . . . severable").[5]

This is entirely consistent with the governing precedents cited by this Court. In *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), as part of their defense of the Arkansas constitutional amendment at issue in that case, a group of office holders characterized as the "Unified Members" raised the argument that certain provisions of that amendment could not be severed and that, if those provisions were declared unconstitutional, the amendment as a whole must fail. *See id.* at 357 ("The argument is made by the unified members that . . . the provisions relating to federal legislators and to state office holders and legislators are inextricably linked irrespective of the presence of a severability clause in the Amendment."). In *Faubus v. Kinney*, 389 S.W.2d 887 (Ark. 1965), it was the original defendants in that action who argued that the entire measure in question must fail. *Id.* at 889 ("It is the contention of [defendants/]appellants that, since portions of the sections have been invalidated, the entire sections are likewise void and of no effect.").

Most notably, in *McGhee v. Arkansas Board of Collection Agencies*, 289 S.W.3d 18 (Ark. 2008), it was the Arkansas Financial Services Association (AFSA) that raised the issue of severability as part of its attempt to defend at least a portion of the act in question. *Id.* at 27 (The

[5] Indeed, the fact that severability was before this Court as a "key issue" in the Malvern litigation, but not present in this case until the Intervenors proposed to argue it, likely played a role in this Court's decision to grant the Intervenors permission to intervene.

"AFSA argues . . . to have those portions severed"). The AFSA appeared in that case as a "mere" intervenor. *Id.* at 21 (noting that the AFSA asked for and was allowed to intervene).[6] But, having been granted permission to intervene, the AFSA participated fully in litigation leading to a holding by the Arkansas Supreme Court that the provisions of the act in question "are so intertwined that severance would be inappropriate."[7]

The Intervenors also made it absolutely clear that they intended to defend the act that the General Assembly did in fact approve, and not the bowdlerized version the Plaintiffs have described in their pleadings. That is, the Intervenors promised to and did in fact defend "the 1989 Act as a whole," maintaining and arguing repeatedly "that the legislature would not have enacted the 1989 Act in its entirety without the racial restriction." Intervention Brief, *supra*, at 16.

The 1989 Act did arguably have "two purposes." *See, e.g.,* Plaintiffs' Stay Brief, *supra*, at 12. But those purposes were in 1989 – and have been ever since – subject to an express limitation.

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[6] Indeed, the AFSA filed its motion to intervene only after the case had been heard a first time by the Arkansas Supreme Court and, in the wake of that holding, *see McGhee v. Arkansas State Board of Collection*, 201 S.W.3d 375 (Ark. 2005), had been granted leave to intervene with the avowed intent to defend the constitutionality of the statute at issue. *See McGhee v. State Board of Collection Agencies*, 243 S.W.3d 278, 281 (Ark. 2006) ("Upon remand, [the AFSA] sought to intervene and request a declaration that the [act] was constitutional.").

[7] It is also worth noting that the AFSA made much the same argument the Plaintiffs made here, asking the Arkansas Supreme Court to send the severability matter to another court for resolution. *Compare McGhee*, 289 S.W.3d at 27 (noting the AFSA's argument that "should this court deem any portion of the Act unconstitutional, we should remand the matter to the circuit court to have those portions severed"), *with* Brief in Support of Plaintiff's Response to Intervenors' Motion for Summary Judgment, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 87, February 24, 2012, at 16-17 (asking that the severability issue be certified to the Arkansas Supreme Court) (hereinafter "Plaintiffs' Response Brief"), *and* Plaintiffs' Stay Brief, *supra*, at 2 (same). The Arkansas Supreme Court quite properly declined the invitation. It applied settled rules regarding severability analysis to reach and resolve an issue squarely before it, and found, just as this Court did, "the entirety of the . . . Act unconstitutional." *McGhee*, 289 S.W.3d at 27.

As the Intervenors have consistently stressed: "the 1989 Act stated in no uncertain terms that the putative benefits realized through school choice were to be allowed and pursued *only* if 'the transfer . . . would not adversely affect the desegregation of either district.' H.B. 1173, *supra*, at § 2; Act 609, *supra*, at § 2; Ark. Code Ann. § 6-18-206(a)(3) (1989 Supplement, Part 1)." Intervenors' Response Brief, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD Document 82, February 24, 2012, at 7-8 (hereinafter "Intervenors' Response Brief").

The Plaintiffs have consistently tried to ignore the reality that the section of the 1989 Act setting out "the twin purposes" they champion expressly concluded with the declaration that such goals were to be pursued "provided that the transfer . . . would not adversely affect the desegregation of either district." Act 609, § 2, ¶ 3, 1989 Acts of Arkansas 1346, 1347 (codified as Ark. Code. Ann. § 6-18-206(a)(4)). The Intervenors noted this. *See* Intervenors' Reply and Brief, *supra*, at 11 ("The Plaintiffs attempt to avoid the force of the 1989 Act's legislative history by performing surgery on the 'Legislative Findings and Declaration of Public Necessity' that the Seventy-Seventh General Assembly fashioned when the 1989 Act's sponsors introduced House Bill 1174 and approved Act 609.") (citations omitted). And this Court recognized this in its opinion when it quoted the pertinent language in its entirety, rather than relying on the truncated and misleading versions routinely set forth by the Plaintiffs. *Compare* Memorandum Opinion, *supra*, at 7-8 (quoting Section 2, as codified, in its entirety), *with* Plaintiffs' Response Brief, *supra*, at 10 (quoting only a portion of the legislative findings), *and* Plaintiffs' Stay Brief, *supra*, at 11 ("the twin purposes of the . . . Act").

The Plaintiffs offer in response only the same generic arguments previously made. For example, the fact that the Arkansas General Assembly favors severability as a general matter is helpful, but not dispositive. This is a question of law. It is not to be determined as a matter of

general policy. Rather, it is an inquiry to be undertaken by this Court on the basis of the statute actually before it. This Court recognized this, and applied the correct legal standard, finding that the 1989 Act embraced a single purpose – school choice that would not promote segregation or impede desegregation – and that the various sections of the 1989 Act dealing with such matters were in fact "mutually connected and interwoven." *See generally* Memorandum Opinion, *supra*, at 29-31.

The Plaintiffs respond by offering up, yet again, "two general severability statutes," Plaintiffs' Stay Brief, *supra*, at 8-9 (citing Ark. Code Ann. §§ 1-2-117 and 1-2-205), and a Legislating Drafting Manual that did not exist when the 1989 Act was debated and approved. *Id.* at 9-10.[8] However, the presence or absence of a severability section is irrelevant, either as a matter of what is in the act itself or as a general background principle. As the Arkansas Supreme Court has repeatedly stressed, "the presence of a severability clause is a factor to be considered but, by itself, it may not be determinative." *U.S. Term Limits*, 872 S.W.2d at 358. *See also McGhee*, 289 S.W.3d at 27 ("The mere fact that an act contains a severability clause is to be considered, but is not alone determinative."); *City of North Little Rock v. Pulaski County*, 968 S.W.2d 582, 585 (Ark. 1998) ("Although a severability clause is included in [the] Act . . . that factor alone is not determinative.").[9]

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[8] As the Intervenors previously documented, the first iteration of the Manual quoted by the Plaintiffs was not published until 2000, long after the 1989 Act was considered and approved. *See* Intervenors' Reply Brief, *supra*, at 17. That post-enactment document has absolutely no bearing on what the General Assembly sought to accomplish in 1989, a General Assembly that, as the Intervenors have noted, routinely included severability clauses in the measures it approved. *See* Intervenors' Response Brief, *supra*, at 12 (noting, for example, that the many acts passed in 1989 with severability clauses included Act 607, the measure immediately preceding the 1989 Act in terms of legislative consideration and approval).

[9] Indeed, the Plaintiffs themselves have conceded this. *See, e.g.*, Plaintiffs' Response Brief, *supra*, at 8 (treating severability as a matter of law, quoting *McGhee* to the effect that "[t]he [mere] fact that an act contains a severability clause is to be considered, but is not alone determinative," 289 S.W.3d at 27 (albeit editing out the word "mere")).

Finally, the Plaintiffs argue that this Court has somehow erred by examining the General Assembly's "intent" when it approved the 1989 Act, as opposed to the Plaintiffs' highly selective and factually incorrect characterization of the 1989 Act's "purposes." *See* Plaintiffs' Stay Brief, *supra*, at 11 (claiming that this Court considered the General Assembly's "presumed 'intent'" and that "[l]egislative intent is *not* the legal standard applied under Arkansas law"). This is at best a quibble about word choices that ignores the fact that this Court quoted and applied the correct legal standard and reached the correct legal conclusion. *See* Memorandum Opinion, *supra*, at 29 (quoting the correct tests, as articulated by the Arkansas Supreme Court). More to the point, the Plaintiffs are simply wrong when they assert that considerations of legislative intent are not part of the operative test. While the general rule in Arkansas regarding severability speaks of an inquiry about the "purpose" of the statute, *see U.S. Term Limits*, 872 S.W. 2d at 357, the Arkansas Supreme Court has, time and again, discussed these matters in the light of the need to determine whether "the General Assembly's intent was to pass the Act as a whole or not at all." *McGhee*, 289 S.W.3d at 27. *See also City of North Little Rock*, 968 S.W.2d at 585 (sections "are dependent upon each other and interrelated and evince the General Assembly's intent to pass the act as a whole or not at all").

III. The Named Plaintiffs Do Not In Fact Face "Irreparable Injury"

The Plaintiffs argue, in the light of the factors governing a request for a stay, that "[a]ppellants are irreparably harmed by denial of the ability to transfer pursuant to the injunction that they requested and received at p. 28 of the [Memorandum] Opinion." Plaintiffs' Amended Motion, *supra*, at ¶ 16.[10] The Plaintiffs are correct in one limited respect: to the extent to which they wish

[10] They also reassert the existence of a "statutory right of transfer." Plaintiffs' Amended Motion, *supra*, at ¶ 2. As the Intervenors have documented at length, there is no such "right." *See* Response Brief, *supra*, at 3-7. Rather, the Plaintiffs have the option to apply for, and have applied for, a school

to attend school in a district other than the one in which they reside, this Court's order forecloses granting such a choice transfer pursuant to the terms of the 1989 Act. But, as this Court recognized, and as both the State Board Defendants and the Intervenors have previously noted, that is not the only option available to the Plaintiffs. *See* Memorandum Opinion, *supra*, at 5-7 (noting the various transfer options available); Amended Brief in Support of State Defendants' Motion for Summary Judgment, *Teague et al. v. Arkansas Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 76, January 30, 2012, at 22 (same) (hereinafter "State Board Defendants' SJ Brief"); Intervenors' Response Brief, *supra*, at 6-7 (same); Intervenors' Reply Brief, *supra*, at 19-20 (same). In particular, they have the option of seeking a "legal transfer" pursuant to the provisions of Ark. Code. Ann. § 6-18-316.

This means, as a practical matter, that the Plaintiffs are not helpless in the face of this Court's order. It is true, as both the State Board Defendants and the Intervenors have stressed, that a "legal transfer" is not a matter of absolute right, but rather one to be assessed in the light of "individual needs and circumstances." *See* State Board Defendants' SJ Brief, *supra*, at 22; Intervenors' Reply Brief, *supra*, at 19-20.[11] It is also subject to the limitation imposed by Ark. Code Ann. § 6-18-317(a), which prohibits a transfer that "would negatively affect the racial balance of" a district under a court desegregation order. That said, it is a path open to the Plaintiffs, albeit a more restrictive one

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choice transfer that may or may not be granted, with the race-based limitation articulated in § 6-18-206(f)(1) being only one limiting factor, albeit, as this Court recognized, one that is central to the choice scheme and not severable from it.

[11] In that respect, a "legal transfer" differs from a "school choice" transfer in much the way that a challenge for cause differs from a peremptory challenge in the jury selection process.

than the sweeping choice option created pursuant to the 1989 Act. Any "irreparable injury" imposed on these Plaintiffs by this Court's order is, accordingly, one of their own making.

IV. The Alleged Harms to Third Parties and to the Public Interest Are Overstated and Do Not Justify a Stay

Two additional factors under the *Brady* analysis explore whether there will be "substantial injury" to "other parties interested in the proceedings" and "where the public interest lies." *Brady*, 640 F.3d at 789. The Plaintiffs devote considerable attention to these factors, trying to cast the Intervenors as the parties responsible for inflicting uncertainty and irreparable harm on "thousands" of students and their families and countless public school districts in the State of Arkansas. The Plaintiffs are correct only to the extent that they have identified some possible consequences of this Court's ruling and order. Unsurprisingly, what they fail to appreciate – or at least admit – is that the blame for all of this lies squarely at their feet.

There are two reasons for this.

First, it was the Plaintiffs that initiated the challenge to the constitutionality of § 6-18-206(f)(1) and it was the Plaintiffs who pursued that challenge with full and timely knowledge that there was the very real possibility that a decision to strike § 6-18-206(f)(1) posed the obvious threat that the 1989 Act as a whole would fail. It has been abundantly clear since at least April 21, 2011 that severability was an issue.[12] It was on that date that the Intervenors filed their Motion for Leave to Intervene, serving notice on this Court and all parties to this litigation that, if granted leave to intervene, they would argue "that if § 6-18-206(f)(1) is found to be unconstitutional, that section of

[12] Indeed, it has been clear much longer than that given the reality that severability was, as this Court properly noted on March 16, 2010 in the prior litigation filed against the Malvern School District, a "key issue."

the statute cannot be severed from the remainder of the School Choice Act." Motion to Intervene, *supra*, at ¶ 6. The Plaintiffs concede that they did not object. Additionally, as the Intervenors have already amply documented, their attempts to characterize the severability argument as some sort of post-intervention "surprise" are absolutely without merit.

It is accordingly disingenuous at best for the Plaintiffs to now argue that third parties would be harmed because the Intervenors have, for example, "utterly failed to observe any touchstone of due process in their campaign to strike down the entire Arkansas Public School Choice Act of 1989" and that

> [a]s a consequence the thousands of students across the State who have been snared by the Court's injunction had no warning, no opportunity to 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.

Plaintiffs' Stay Brief, *supra*, at 7-8.[13]

The Intervenors followed the rules. They made a case for intervention that expressly mentioned the severability issue, and were granted status as Intervenors on that basis. As such, they became proper parties, and were entitled to make precisely the defense they proposed to make. *See* Intervention Order, *supra*, at 1 (The Intervenors "shall be allowed to participate in the proceedings to the extent authorized by statute, and to receive such relief as they may be entitled"); Intervenors' Reply and Brief, *supra*, at 4-6 (quoting Wright et. al, to the effect that "the intervenor is treated as if the intervenor were and original party and has equal standing with the original parties"). The

[13] The named Plaintiffs are "members of a group called "Parents for School Choice . . . a group of some 100 people", *see* Memorandum Opinion at 11, and *see* Stipulation of All Parties Concerning Facts and Claims, *Teague et al. v. Arkansas Department of Education et al.*, No. 6:10-CV-6098-RTD, Document 77, at ¶ 25. The Intervenors are accordingly at a loss to understand why counsel for the individual named Plaintiffs now maintain that the risks posed by their pursuit of this litigation did not actually reach a wider audience.

Intervenors are not the parties whose actions have now created "disarray and confusion." Plaintiffs' Stay Brief, *supra*, at 16. It is rather the Plaintiffs who sowed the seeds that have become the reality of an eloquent and completely sound ruling that the 1989 Act could not stand shorn of a provision that "evince[d] the General Assembly's intent to pass the act as a whole or not at all." *City of North Little Rock*, 968 S.W.2d at 585.

In short, the Intervenors did what any responsible parties would have done, had they taken the time and care to explore and understand what the General Assembly actually did in 1989: they defended the 1989 Act as whole, arguing in support of the measure the General Assembly actually intended to and did in fact enact, as opposed to the wishful thinking version embraced by the Plaintiffs.

Second, according to the Plaintiffs, the end of civilization as we know it looms on the horizon for thousands of students and their parents, given the need to wait for the Court of Appeals for the Eighth Circuit to correct our misdeeds. But, to the extent that considerations of third party harm and the public interest are bound up in the Plaintiffs' request for a stay pending appeal, the responsibility for the harms they envision lies with counsel for the Plaintiffs, who refused to even consider an option offered by the Intervenors that would avoid the parade of horribles they now attempt to ascribe to the actions of the Intervenors.

On Monday, June 11, 2012, counsel for the Intervenors sent an email to counsel for the State Board Defendants, the Magnet Cove Defendants, and the Plaintiffs proposing a solution to the questions created by the Court's order. He suggested that the parties seek a stay of the Court's order that would allow all those truly interested in constitutionally sound school choice to draft and secure

passage of such a measure in the 2013 Regular Session.[14] As part of this, he also suggested suspending any appeals of the current decision and order until it became clear whether such a measure could be approved by the General Assembly. In other words, he suggested to the parties precisely the solution that the Intervenors have now modestly proposed to this Court: to hold matters in abeyance, giving the General Assembly the opportunity to cure the problem and moot any need for an appeal, with both the State Board Defendants and the Plaintiffs reserving the right to pursue their appeals in the event that a constitutionally sound solution cannot be fashioned.

That proposal resembles the approach taken by the Arkansas Supreme Court in somewhat similar circumstances, in the wake of a ruling that meant that "our schools are now operating under a constitutional infirmity." *Lake View School District No. 25 of Phillips County v. Huckabee*, 91 S.W.3d 472, 510 (Ark. 2002). Stressing that "[w]e are strongly of the belief that the General Assembly and Department of Education should have time to correct this constitutional disability," the Court in that instance "stay[ed] the issuance of [its] mandate" to give the General Assembly and Department of Education "time to implement appropriate changes." *Id.* at 511.

Counsel for the Plaintiffs refused to consider the proposal and filed their notice of appeal the next day. *See* Notice of Appeal, *Teague et al. v. Arkansas State Board of Education et al.*, No. 6:10-CV-6098-RTD, Document 100, June 12, 2012. The salient point is, of course, that it was the Intervenors who suggested and supported an approach that would have avoided needless litigation

[14] As part of that proposal, counsel for the Intervenors noted prior efforts to amend the 1989 Act to cure any possible constitutional difficulties. In particular, that a measure that would have done so passed the Senate during the 2011 Regular Session, but failed to get out of the cognizant committee in the House due to a lack of time. *See* S.B. 914, An Act Concerning the Arkansas Public School Choice Act of 1989; and for Other Purposes, 88th General Assembly, Regular Session, 2011 (available at http://www.arkleg.state.ar.us/assembly/2011/2011R/Bills/SB914.pdf).

and draconian consequences, in a good faith effort to be aware of and sensitive to the educational needs and interests of all students and parents in this State. And it is the Intervenors who now lay this proposal before the Court, in an attempt to chart a course that would avoid unnecessary litigation and allow the legislative process to craft a solution.[15] It is accordingly counsel for the Plaintiffs – via their rejection of compromise and determination to pursue a stay and appeal that serves only their own narrow needs and interests – who urge this Court to force the parties to travel what the Plaintiffs have characterized as the road to ruin.

CONCLUSION

The Intervenors do not believe that the Plaintiffs have made a legally sound case for a stay within the applicable standards. That said, the Intervenors believe a limited stay is appropriate. Such a stay would suspend proceedings in this matter until the Arkansas General Assembly and Arkansas Department of Education have had a chance to respond to this Court's decision and order. It would also protect the rights and interests of individuals who attended a non-resident school district during the 2011-12 academic year under the terms of the 1989, who would be permitted to attend the same school in 2012-13. Students seeking choice transfers for the first time in 2012-13 would be barred (*i.e.*, no new applications would be approved for 2012-13).

[15] The State Board Defendants seem to lend at least implicit support to this approach, both citing the *Lake View* decision and quoting language from it regarding the wisdom of giving the General Assembly time to respond, without actually embracing that approach in so many words. *See* State Defendants' Stay Brief, *supra*, at 4-5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Whitney F. Moore, do hereby certify that I filed the foregoing on the Court's CM/ECF system which shall send notification of such filing to:

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