No. 12-2413

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Ron Teague, on and behalf of minor children T.T. and S.T., *et al.*		Plaintiffs-Appellants
v.	No. 12-2413	
Arkansas Board of Education, *et al.*		Defendants-Appellees
Camden Fairview School District No. 16 of Ouachita County, *et al.*		Intervenors below-Appellees

Ron Teague, on and behalf of minor children T.T. and S.T., *et al.*		Plaintiffs-Appellees
v.	No. 12-2418	
Jim Cooper, *et al.*		Defendants-Appellants
Camden Fairview School District No. 16 of Ouachita County, *et al.*		Intervenors below-Appellees

PLAINTIFFS-APPELLANTS' MOTION FOR MODIFICATION OF STAY PENDING APPEAL

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INTRODUCTION

The Plaintiffs' children were denied a school-district transfer based solely upon their race. The basis for the denial was an unconstitutional racial limitation contained in subsection (f)(1) of the Arkansas Public School Choice Act of 1989, ARK. CODE ANN. § 6-18-206. (Doc. No. 98, Mem. Op. & Order at 11-13, 17.) Plaintiffs sued the transferee school district and the Arkansas Board of Education to strike down the unlawful subsection (f)(1) so that their children could enjoy the benefits of the Arkansas Public School Choice Act without regard to their race. (Doc. No. 50, 2d Am. Compl. at 18-19.)

The district court agreed with the Plaintiffs that subsection (f)(1) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Doc. No. 98, Mem. Op. & Order at 28.) Rather than grant the relief requested by the Plaintiffs, the district court struck down the entire Arkansas Public School Choice Act of 1989 and held that subsection (f)(1) is not severable from the remainder of the Act. (*Id.* at 31.) Both the Plaintiffs and the State of Arkansas Defendants appealed the district court's judgment. (Doc. No. 103, Notice of Appeal; Doc. No. 107, State Defs.' Notice of Cross Appeal.)

All parties requested that the district court's judgment be stayed in one way or another pending the appeals. (Doc. Nos. 104, 106, 120, 123, Motions for Stay Pending Appeal.) The Plaintiffs requested that the district court stay only its

injunction against the entire act, and keep in force its injunction against subsection (f)(1), so that they and other similarly situated persons could enjoy the benefits of the Act without regard to their race. (Doc. No. 106, Am. Mot. for Stay Pending Appeal at 6-7.)

Even though the district court agreed that a stay was appropriate, it failed to remedy the constitutional wrong that the Plaintiffs and others continue to suffer. The district court stayed its entire judgment, effectively allowing the entire Act, including subsection (f)(1), to continue to be applied in an illegal and racially discriminatory manner. (Doc. No. 128, Order at 2.)

Subsection (f)(1) violates the Fourteenth Amendment. It should not stand for one moment longer. The district court's stay order breathes new life into subsection (f)(1) and allows unconstitutional discrimination to continue unabated. This Court should correct the district court's mistake and order that only subsection (f)(1) is stayed pending appeal.

STATEMENT OF THE CASE

All parties "agree that the Teague and Richardson's children were denied the opportunity to transfer from the Malvern School District to the Magnet Cove School District solely on the basis of their race." (Doc. No. 98, Mem. Op. & Order at 17.) The Plaintiffs Teague and Richardson filed this action in the district court to enjoin the unconstitutional limitation contained in subsection (f)(1) of the

subsection (f)(1) of the Arkansas Public School Choice Act of 1989, ARK. CODE ANN. § 6-18-206. (Doc. No. 50, Second Am. Compl. at 18-19.) No other party filed a complaint, counterclaim, or cross-claim seeking affirmative relief from the district court. (*See* Doc. Nos. 52, 54, 59, 61, Answers.)

Because the district court agreed with the Plaintiffs that subsection (f)(1) is unconstitutional, (Doc. No. 98, Mem. Op. & Order at 28), the primary question before the Court on the Plaintiffs' appeal is severability. The issue was not presented to the district court in a complaint, counterclaim, or cross-claim. Instead, the Intervenor school districts requested in their motion for summary judgment that the district court declare that subsection (f)(1) cannot be severed from the remainder of the Act. (Doc. No. 74, Intervenors' Mot. Summ. J. ¶ 5.) The Plaintiffs responded by asking the district 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. (Doc. No. 86, Pls.' Resp. to Intervenors' MSJ ¶ 3.) The 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. (*Id.* ¶¶ 12-13.) The State of Arkansas took no position on severability in this action, further confirming that the issue was

not properly joined. (Doc. Nos. 54, 61, Answers of State Defendants.) The district court held that subsection (f)(1) was unconstitutional, but that it could not be severed from the remainder of the Act. (Doc. No. 98, Mem. Op. & Order at 28-31.) The district court did not address the presumption of severability that applies to all Arkansas statutes.

STANDARD OF REVIEW

In determining whether to issue a stay pending appeal, this Court considers:

> (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.
>
> 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).

ARGUMENT

The merits of the severability issue are two-fold: whether the unconstitutional subsection (f)(1) is severable from the remainder of the Arkansas Public School Choice Act, and whether the Intervenor school districts properly presented the question to the district court. Appellants have strong arguments on

both. The irreparable injury point is clear and compelling: absent a stay from this Court, illegal racial discrimination will continue unabated.

The irreparable injury may be cured by issuing a stay as to subsection (f)(1) only. 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 calls for an stay of subsection (f)(1) only, given the unconstitutional discrimination that will result if the entire Act continues to be applied as written.

A. The Plaintiffs are likely to succeed on the merits of their appeal.

1. The Act is severable because its purposes can be served without the unconstitutional provision.

The Plaintiffs have strong arguments on the merits of the Court's severability analysis. The district 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 Arkansas 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, the district court erred in its severability analysis. Federal courts should exercise their powers cautiously, and have a "duty to preserve as much of a state law as possible by only severing the problematic portions of the law . . . ." *Associacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 18 (1st Cir 2007.) "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute . . . *or to sever*

its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) (emphasis added).

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, the district 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. The district court further 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." (Doc. No. 98, Mem. Op. & Order at 24.) This is correct and reiterates a point that the Plaintiffs emphasized in their briefing.

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 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. 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 district court erred in failing to carry this point to its logical result.

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 the district court noted in its Memorandum Opinion. (Doc. No. 98, Mem. Op. & Order at 24.) Severing subsection (f)(1) liberates the remainder of the Arkansas Public School Choice Act of 1989 and enhances the twin goals of the General Assembly.

2. The Intervenors did not and cannot seek affirmative relief.

The Intervenor school districts sought permissive intervention to join with the state defendants to defend the Public School Choice Act, and the Plaintiffs did not object. After receiving leave to intervene, the Intervenors 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." (Doc. No. 52, Intervenors' Ans. at 8 ¶ 1.). The Intervenors did not file any complaint, counterclaim, cross-claim or third-party complaint requesting that the district 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 desired by the Plaintiffs.

The Intervenor school districts 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 Rule 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 the Intervenor school districts 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.

The Intervenor school districts did not try to sue the state defendants or any state actor involved with enforcing the Public School Choice Act. The Intervenors

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 the Intervenor school districts 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

[1] See *Russell v. Burris*, 146 F.3d 563, 566 (8th Cir. 1998) (case under 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.*

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 the Intervenor school districts 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).

The Intervenors 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 of Arkansas who have been snared by the district court's injunction had no warning, no opportunity to be heard, no ability to point out the defects in the position asserted by the Intervenors, and no chance to make contingency plans in case the Act were struck down in its entirety. Appellants have a strong argument for reversal of the severability ruling based on the lack of a procedural basis for the district court's severability ruling.

B. The Plaintiffs will suffer an irreparable injury absent a stay of subsection (f)(1).

Without a stay as to subsection (f)(1) only, the Plaintiffs' children will suffer unconstitutional discrimination based on their race. For a child who is denied the right to attend the school of his or her choice, every day spent in another school cannot be given back. Other than an immediate transfer to the school of choice, there is no remedy for discrimination against the Plaintiffs' children based on their

race. This Court should act immediately to prevent the Plaintiffs' children from suffering from further unconstitutional harm while this appeal is pending. Only by staying the application of subsection (f)(1) can this Court prevent an irreparable harm.

C. No irreparable harm will result from granting a stay of subsection (f)(1).

The Plaintiffs are not aware of any person or entity who would suffer harm of any kind from the granting of the stay requested by the Plaintiffs. Supposing that the school districts or state defendants would suffer some inconvenience from granting a transfer to the Plaintiffs without regard to race, any such inconvenience is drastically outweighed by the irreparable harm that comes from the application of a racially discriminatory law against the Plaintiffs. The balance of the harms overwhelmingly favors the stay requested by the Plaintiffs.

D. The public interest favors a stay.

The Fourteenth Amendment is a powerful, unequivocal expression of the public policy of the United States: a free society cannot tolerate the denial of equal protection of the law based on race. Likewise, the Arkansas Public School Choice Act of 1989 expresses a public policy in favor of school choice by all students in the State of Arkansas. The public interest weighs heavily in favor of a stay of subsection (f)(1) pending appeal.

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 the stay.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs-Appellants Ron and Kathy Teague and Rhonda Richardson respectfully request that this Court modify the district court's stay such that only ARK. CODE ANN. § 6-18-206(f)(1) is stayed pending the Court's consideration of the merits of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 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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