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

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE

The outcome of this appeal will affect every school-age child in the State of Arkansas. The district court held a race-based provision the Arkansas Public School Choice Act of 1989, ARK. CODE ANN. § 6-18-206, unconstitutional under the Equal Protection Clause and *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). The district court further found the unconstitutional portion of the Act, subsection (f)(1), is not severable from the remainder of the Act and therefore invalidated the whole Act. Both the Plaintiffs and Defendants below have appealed the district court's decision.

Oral argument is necessary because this case involves the constitutionality of state law and presents an issue of first impression in the Eighth Circuit. It is appropriate for this Court to hear this appeal *en banc* because this appeal involves a question of exceptional importance. FED. R. APP. P. 35(a)(2).

The Plaintiffs respectfully request that the Court grant thirty minutes of oral argument per side.

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JURISDICTIONAL STATEMENT

On December 21, 2010, the Plaintiffs filed this action in the United States District Court for the Western District of Arkansas against the Arkansas Board of Education, the Magnet Cove School District, and others, seeking declaratory and injunctive relief under the federal civil rights statutes and state law. The district court had subject-matter jurisdiction over the federal civil rights claims under 28 U.S.C. §§ 1331 and 1343, and supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367. On June 7, 2012, the Plaintiffs voluntarily dismissed the state law claims, leaving only the federal claims.

On June 8, 2012, the district court entered a final judgment granting in part and denying in part the relief requested by the Plaintiffs. The Plaintiffs timely filed a notice of appeal on June 12, 2012. The Arkansas Board of Education and other State of Arkansas defendants (the "State Defendants") filed a notice of cross appeal later that same day. The appeals are from a final judgment that disposes of all parties' claims. This Court has jurisdiction over the appeals under 28 U.S.C. § 1291.

Under Rule 28.1(b) of the Federal Rules of Appellate Procedure, the Plaintiffs are treated as the appellants for the purposes of briefing because they were the first to file a notice of appeal. As required by FED. R. APP. P. 28.1(c), this brief addresses only the issues presented by the Plaintiffs' notice of appeal. The

Plaintiffs will address the issues presented by the cross-appeal in their response and reply brief as provided by FED. R. APP. P. 28.1(c)(3).

STATEMENT OF THE ISSUES

I. Did the district court err in holding that the unconstitutional subsection (f)(1) of the Arkansas Public School Choice Act of 1989, ARK. CODE ANN. § 6-18-206, is not severable from the remainder of the Act?

ARK. CODE ANN. §§ 1-2-117 and -205.

Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006).

U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994).

II. Did the district court err in making a ruling on severability that was not properly presented in a complaint, counterclaim, or cross-claim?

FED. R. CIV. P. 8.

FED. R. CIV. P. 24.

III. Did the district court err in granting party status to the Intervenors because they do not have Article III standing to seek relief in this action?

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Ehlmann, 137 F.3d 573 (8th Cir. 1998).

Masoulf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996).

STATEMENT OF THE CASE

Plaintiffs Ron and Kathy Teague and Rhonda Richardson are the parents of school-age children who were denied a transfer to the Magnet Cove School District. The reason for the denial was a race-based limitation contained in contained in subsection (f)(1) of the Arkansas Public School Choice Act of 1989, ARK. CODE ANN. § 6-18-206. The Plaintiffs, along with other parents, filed this action in the district court to declare that the race-based limitation is unconstitutional under the Arkansas Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Plaintiffs further sought to enjoin the school district and the State Defendants from applying the racial limitation in subsection (f)(1).

The Defendants are the Arkansas Board of Education, its members in their official capacities, the Magnet Cove School District, its members in their official capacities, and the Arkansas Department of Education. Other plaintiffs and defendants were once parties to the action but were dismissed upon joint stipulation of all parties.

The Camden Fairview School District No. 16 of Ouachita County and the El Dorado School District of Union County (the Intervenors) filed a motion for permissive intervention, claiming that they had a defense that shared a common question of law with the main action under FED. R. CIV. P. 24(b)(1)(B). The

motion was unopposed and the district court granted the intervention. The Intervenors filed an answer to the Plaintiffs' second amended complaint in which they asserted as an "affirmative defense" that subsection (f)(1) is not severable from the Arkansas Public School Choice Act of 1989, such that the entire statute must be stricken if subsection (f)(1) were held to be unconstitutional. The Intervenors did not file a complaint, counterclaim, or cross-claim presenting any claims for adjudication.

The parties stipulated to all of the relevant facts. The Plaintiffs filed a motion for entry of judgment for declaratory and injunctive relief, to which the Intervenors and all defendants responded. The State Defendants and Intervenors both filed motions for summary judgment, to which the Plaintiffs responded. In the Intervenors' motion for summary judgment, they requested that the district court declare that subsection (f)(1) cannot be severed from the remainder of the statute. The State Defendants took no position on severability. On April 16, 2012, the United States Magistrate Judge heard oral argument on all dispositive motions.

On June 8, 2012, the district court issued its memorandum opinion and order, in which it held that subsection (f)(1) of ARK. CODE ANN. § 6-18-206 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The district court permanently enjoined the State of Arkansas from applying subsection (f)(1) to transfer applications under the Arkansas Public

School Choice Act of 1989. The district court would have ordered the defendants to permit the Teague and Richardson children to transfer to the Magnet Cove School District, however the court further held that subsection (f)(1) is not severable from the remainder of the Act. Consequently, the district court struck ARK. CODE ANN. § 6-18-206 as unconstitutional in its entirety.

The district court concluded that it "fully expects this case to be appealed in view of the important issues presented in this case." Both the Plaintiffs and the State Defendants appealed to this Court.

Because the district court issued a stay of its judgment pending appeal, the Act and its race-based limitation will continue to be enforced as written. The Plaintiffs have requested that this Court modify the district court's stay so that their children may attend the Magnet Cove School District in the school year 2012-2013 pending this appeal.

STATEMENT OF THE FACTS

The Plaintiffs Teague and Richardson, along with their school-age children, reside within the boundaries of the Malvern School District in Hot Spring County, Arkansas. (J.A. 228-29, 1324; Add. 17.) Prior to the 2010-11 school year, the Plaintiffs filed timely applications to transfer the children to the Magnet Cove School District under Ark. Code Ann. § 6-18-206, also known as the Arkansas Public School Choice Act of 1989. ARK. CODE ANN. § 6-18-206(a)(1); (J.A. 229,

1320, 1324-25; Add. 17-18.) The purposes of the Act, as stated in the Act itself, are to:

(1) help "the students in Arkansas's public schools and their parents . . . become more informed about and involved in the public educational system";

(2) "provide[] [students and their parents or guardians] greater freedom to determine the most effective school for meeting their individual educational needs";

(3) "permit[] students to choose from among different schools with differing assets";

(4) "increase the likelihood that some marginal students will stay in school and that other, more motivated students will find their full academic potential";

(5) "giv[e] more options to parents and students with respect to where the students attend public schools";

(6) "increase the responsiveness and effectiveness of the state's schools";

(7) give "teachers, administrators, and school board members . . . added incentive to satisfy the educational needs of students who reside in the district";

(8) "enhance[] quality and effectiveness of public schools; and

(9) "permit[] a student to apply for admission to a school in any district beyond the one in which the student resides, provided that the transfer by this student would not adversely affect the desegregation of either district."

ARK. CODE ANN. § 6-18-206(a)(2)-(4); (J.A. 1320-21; Add. 13-14.)

In general, the Act enables "any student to attend a school in a district in which the student does not reside, subject to the restrictions contained in this section." ARK. CODE ANN. § 6-18-206(a)(5); (J.A. 1325; Add. 18.) Among those restrictions is subsection (f)(1), which states:

> No student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district . . . .

ARK. CODE ANN. § 6-18-206(f)(1); (J.A. 1321; Add. 14.) This restriction on school choice is itself subject to three exceptions: (1) if the two districts are in the same county and have a racial composition within 25% of the county's overall minority percentage; (2) if neither the resident nor non-resident district has a minority percentage of the student's race greater than 10%; or (3) if the statute conflicts with a desegregation order or court-approved desegregation plan. ARK. CODE ANN. § 6-18-206(f)(2)-(3); (J.A. 1321-22; Add. 14-15.)

The Magnet Cove School District denied the transfer applications. (J.A. 1325, 1330; Add. 18, 23.) On appeal, the Arkansas State Board of Education

affirmed the denial, concluding that subsection (f)(1) of Ark. Code Ann. § 6-18-206 prohibited the transfers. (J.A. 1325; Add. 18.) None of the three exceptions to subsection (f)(1) applied—the Teague and Richardson children were denied a transfer solely because they are white and the Magnet Cove School District had more white students, percentage-wise, than Malvern School District. (J.A. 1325-26; Add. 18-19.) Neither the Magnet Cove School District nor the Malvern School District has ever been subject to a desegregation-related court order. (J.A. 1335-36; Add. 28-29.)

There is no dispute that the Plaintiffs' transfer requests were denied solely on the basis of the children's' race. (J.A. 232, 1330; Add. 23.) There is no dispute that subsection (f)(1) of the Arkansas Public School Choice Act of 1989 is the reason for the race-based discrimination against the Plaintiffs. (J.A. 1325-26; Add. 18-19.)

SUMMARY OF THE ARGUMENT

The district court erred in holding that the unconstitutional racial limitation contained in subsection (f)(1) of the Arkansas Public School Choice Act of 1989 is not severable from the remainder of the Act. First, Arkansas law favors severability, and the numerous codified purposes of the Act can be served without subsection (f)(1). Second, the Intervenors did not properly present the issue of severability to the district court in a complaint, counterclaim, or cross-claim and do

not have Article III standing to seek to strike down the Act. Either of these reasons, by itself, supports reversal of the district court's decision to invalidate the entirety of ARK. CODE ANN. § 6-18-206. This Court should reverse the district court's severability decision, affirm that subsection (f)(1) is unconstitutional, and direct the district court to enter an injunction requiring the defendants to permit the transfer of the Plaintiffs' children to the Magnet Cove School District.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE UNCONSTITUTIONAL SUBSECTION (f)(1) IS NOT SEVERABLE FROM THE REMAINDER OF THE ARKANSAS PUBLIC SCHOOL CHOICE ACT OF 1989.

"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 normal rule is that partial invalidation is the required course, and the remainder of a statute should be left intact. *Id.* This Court looks to state law when determining whether to give effect to the valid provisions of a constitutionally-flawed statute. *See Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 800 (8th Cir. 2006); *Russell v. Burris*, 146 F.3d 563, 573 (8th Cir. 1998). As a pure question of law, the district court's severability decision

is reviewed *de novo*. *See Harrod v. Farmland Mut. Ins. Co.*, 346 F.3d 1184, 1186 (8th Cir. 2003) (pure question of law is reviewed *de novo*).

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." *Russell*, 146 F.3d at 573; *McGhee v. Ark. State Bd. Of Collection Agencies,* 289 S.W.3d 18, 27 (Ark. 2008); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 357 (Ark. 1994). "[I]t 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." *U.S. Term Limits*, 872 S.W.2d at 358. Here, the Act must stand because striking subsection (f)(1) does not impair any legislative purpose of the Act.

A. Subsection (f)(1) does not serve any legislative purpose behind the Act.

The district court erroneously rewrote the Act by deeming its "serious concern" about desegregation to be a completely separate legislative purpose of racial balance. Tellingly, the district court considered subsection (f)(1) to be "the State's well-intentioned effort to avoid racial imbalance in public schools . . . ." (J.A. 1336; Add. 29.) Only by conflating "desegregation" with subsection (f)(1)'s illegitimate scheme of "racial balance" could the district court justify its conclusion

that subsection (f)(1) served any of the purposes of the Act. "Racial balance" is neither a stated purpose of the Act nor a legitimate purpose of any law in any state.

Nine distinct purposes are expressed in subsection (a) of the Act. Racial balance is not among them. The statute's effect on desegregation efforts is, at most, an afterthought in the General Assembly's overarching purpose to improve school quality and parent-student involvement:

Statutory Purpose Set Forth in Text of Arkansas Public School Choice Act of 1989	**Related to or Dependent Upon Racial Limit in subsection (f)(1)?**
Help the students in Arkansas's public schools and their parents become more informed about and involved in the public educational system. ARK. CODE ANN. § 6-18-206(a)(2).	No.
Provide students and their parents or guardians greater freedom to determine the most effective school for meeting their individual educational needs. ARK. CODE ANN. § 6-18-206(a)(2).	No.
Permit students to choose from among different schools with differing assets. ARK. CODE ANN. § 6-18-206(a)(2).	No.
Increase the likelihood that some marginal students will stay in school and that other, more motivated, students will find their full academic potential. ARK. CODE ANN. § 6-18-206(a)(2).	No.
Give more options to parents and students with respect to where the students attend public schools. ARK. CODE ANN. § 6-18-206(a)(3).	No.

Increase the responsiveness and effectiveness of the state's schools. ARK. CODE ANN. § 6-18-206(a)(3).	No.
Give teachers, administrators, and school board members added incentive to satisfy the educational needs of students who reside in the district. ARK. CODE ANN. § 6-18-206(a)(3).	No.
Enhance the quality and effectiveness of public schools. ARK. CODE ANN. § 6-18-206(a)(4).	No.
Permit a student to apply for admission to a school in any district beyond the one in which the student resides, provided that the transfer by this student would not adversely affect the desegregation of either district. ARK. CODE ANN. § 6-18-206(a)(4).	No.

The text of the statute emphasizes parent and student engagement, school quality, school effectiveness, and choice as its primary purposes. ARK. CODE ANN. § 6-18-206(a)(2)-(4). The right to transfer "to attend a school in a district in which the student does not reside" is the only means by which the Arkansas General Assembly sought to accomplish those objectives. ARK. CODE ANN. § 6-18-206(a)(5). Nowhere did the Arkansas General Assembly mention increased racial diversity or racial balance as one of its purposes. Indeed, the three exceptions set forth in subsections (f)(2)-(3) defeat any claim that racial balance was a purpose of the Act. ARK. CODE ANN. § 6-18-206(f)(2)-(3); (J.A. 1321-22; Add. 14-15.) The defendants and Intervenors have established no relationship between a student's race and his ability to enjoy the Act's legislative objectives.

The United States Supreme Court has made it clear that racial balance is not the same as desegregation. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721, 726 (2007). Desegregation refers to the elimination "of policies that separate people of different races into different institutions and facilities." BLACK'S LAW DICTIONARY 477 (8th ed. 2004). Even when subsection (f)(1) is stricken, the statute will continue to provide that a desegregation court order or court-approved desegregation plan will control over a conflicting provision of the Act. ARK. CODE ANN. § 6-18-206(f)(4).

Racial balance, on the other hand, is "an objective this Court has repeatedly condemned as illegitimate." *Parents Involved*, 551 U.S. at 726. The United States Constitution is not violated by racial imbalance that is not traceable to intentional discrimination. *Id.* at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)). Subsection (f)(1) applies to every school district in the State of Arkansas, including those such as Malvern and Magnet Cove that have never been subject to a desegregation-related court order. (J.A. 1335-36; Add. 28-29.) The provision is not tailored to correcting past intentional discrimination.

Subsection (f)(1) simply seeks racial balance, pure and simple, without regard to whether there is any need to remedy past intentional discrimination in either the residential or transferee district. *See Parents Involved*, 551 U.S. at 720. The district court correctly held that it violates the Equal Protection Clause of the

Fourteenth Amendment. But the court erred by equating subsection (f)(1)'s scheme of racial balance with the General Assembly's goal of remedying past intentional discrimination. (*See* J.A. 1343; Add. 36.) The remedial goal is addressed in subsection (f)(3), not (f)(1).

Subsection (f)(1) is not a desegregation statute—it is a racial balance statute. Racial balance was never a stated objective of the Arkansas Public School Choice Act of 1989. Subsection (f)(1) was not enacted to remedy past intentional discrimination. Because subsection (f)(1) does not serve any of the General Assembly's stated legislative goals, this Court should have no trouble holding that the remainder of the Act can be effectuated by severing the unconstitutional race-based provision.

B. The legislative purposes of the Act will be enhanced by severing subsection (f)(1).

Eliminating the unconstitutional racial balance provision of subsection (f)(1) will reinforce the legislative goals of parent and student engagement, school quality, school effectiveness, and choice. Indeed, the Intervenors repeatedly bemoan the fact that they may face movement of students due to the Act's "added incentive to satisfy the educational needs of students who reside in the district." ARK. CODE ANN. § 6-18-206(a)(3). For example, the superintendent of the El Dorado School District speculates that the district will suffer "white flight" if forced to compete with neighboring districts. (J.A. 1339; Add. 32.) The

Intervenors do not address whether the districts can avoid attrition by improving educational opportunities or being more responsive to student needs. (*Id.*)

The trouble with the Intervenors' objection is that the Arkansas Public School Choice Act of 1989 was meant to accomplish the significant movement of students of which they complain. As the district 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." (J.A. 1337; Add. 30.)

By enhancing parent and student choice, the General Assembly has determined, "students in Arkansas's public schools and their parents will become more informed about and involved in the public educational system . . . ." ARK. CODE ANN. § 6-18-206(a)(2). Choice will "enhance[] quality and effectiveness in our public schools . . . ." ARK. CODE ANN. § 6-18-206(a)(4). The General Assembly has spoken through the plain language of the Act.

"There is no right school for every student." ARK. CODE ANN. § 6-18-206(a)(2). Yet the Intervenors seek to hold their students captive. They seek to deprive their students of fulfilling their academic potential through the choice granted by the Act. They resist the responsiveness required by the Act. The legislative purposes of the Arkansas Public School Choice Act of 1989 weigh

heavily in favor of severing the unconstitutional racial limitation contained in subsection (f)(1) while the remainder of the Act continues in effect.

C. The Arkansas General Assembly has expressly provided that Arkansas statutes are presumed to be severable.

A federal court "should be sensitive to . . . expressions of legislative preference for severance." *Advantage Media*, 456 F.3d at 800. The district court ignored the Arkansas General Assembly's preference and failed to address the fact that Arkansas has two comprehensive severability statutes. The first, 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.

ARK. CODE ANN. § 1-2-117. The other, 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.

ARK. CODE ANN. § 1-2-205. 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. ARKANSAS BUREAU OF LEGISLATIVE RESEARCH, LEGISLATIVE DRAFTING MANUAL at 79 (Nov. 2010), *available at* http://www.arkleg.state.ar.us/bureau/legal/Publications/2010%20Legislative%20Drafting%20Manual.pdf (last visited Feb. 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 stand as a whole or not at all. *Id.* The Public School Choice Act of 1989 was adopted after both severability statutes and therefore reflects the general severability provisions of both of them.

The district court failed to respect the preference for severability under Arkansas law. It failed "to preserve as much of a state law as possible by only severing the problematic portions of the law . . . ." *See Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 18 (1st Cir 2007.) It ignored the plain mandates of the Arkansas Code. This Court should correct the district court's mistake and hold that subsection (f)(1) is severable from the Act.

II. THE DISTRICT COURT ERRED IN MAKING A RULING ON SEVERABILITY THAT WAS NOT PROPERLY PRESENTED IN A COMPLAINT, COUNTERCLAIM, OR CROSS-CLAIM.

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. (J.A. 48-52; Add. 1-5.) The Intervenors claimed they had a defense that shared a common question of law with the main action under FED. R. CIV. P.

24(b)(1)(B). (J.A. 50 ¶ 7; Add. 3 ¶ 7.) After obtaining 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 that "if this Court finds the racial restrictions unconstitutional, the Court must also find the 1989 Act unconstitutional in its entirety." (J.A. 111 ¶ 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 it down entirely.

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 an Arkansas statute. *Compare Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 617 (1991) (private litigant using peremptory challenges in federal court a state actor), *with Moose Lodge No. 7 v. Irvis*, 407 U.S. 163, 177 (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 Intervenors 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). The district court erred in considering the Intervenors' position on severability.

III. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION TO GRANT PARTY STATUS TO THE INTERVENORS BECAUSE THE INTERVENORS DO NOT HAVE ARTICLE III STANDING TO SEEK RELIEF IN THIS ACTION.

The Intervenors did not have Article III standing to appear in this case. In this Circuit, "a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24." *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009); *Masoulf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). Because Article III standing is a constitutionally-mandated prerequisite for federal jurisdiction, the issue may be raised for the first time on

appeal or by this Court *sua sponte*. *Meuir v. Greene County Jail Employees*, 487 F.3d 1115, 1119 (8th Cir. 2007); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 365 n.9 (8th Cir. 1988). The district court erred by allowing the Intervenor school districts to appear in this case without making the mandatory showing of Article III standing.

At a minimum, "standing is that plaintiff must have suffered an 'injury of fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotations omitted). An abstract or speculative injury is not enough. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 457 (8th Cir. 2010); *Harley*, 284 F.3d at 906.

In their motion to intervene, the Intervenors do not claim that they have been injured by the Arkansas Public School Choice Act of 1989—to the contrary, they seek to join the State of Arkansas, represented by the Attorney General, to "defend the constitutionality of § 6-18-206(f)(1)." (J.A. 50 ¶ 6; Add. 3 ¶ 6.) They do not claim any interest of their own that is at stake or needs to be protected in the action. (J.A. 48-51; Add. 1-4.) They simply wish to assist the Attorney General in making legal arguments to the district court and this Court. (*Id.*) The Intervenors

have no standing in federal court because they have not suffered an injury in fact by operation of the Arkansas Public School Choice Act of 1989.

As this Court has held, "a disagreement over litigation strategy decisions made by the . . . Attorney General" is not sufficient to confer Article III standing to intervene. *Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998). The Intervenors' assertion that they mean to argue in support of the Act further shows that they have not suffered an injury in fact. *Met. St. Louis Sewer Dist.*, 569 F.3d at 834-35. The Intervenors have plainly failed to meet their burden of showing any injury or causal connection necessary for Article III standing. *See, e.g.*, *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998).

The Intervenors leveraged their intervention status to assert erroneous severability arguments that the district court ultimately accepted over the Plaintiffs' objections and arguments. The State Defendants took no position on severability below, and the Intervenors lacked standing to, in effect, commandeer the Plaintiffs' complaint as a vehicle to attack the totality of an Arkansas statute that they oppose on policy grounds.

The district court erred in granting intervention status to parties who lack Article III standing. This Court should reverse the district court's decision to allow the Intervenors to appear in this action and strike all pleadings, motions, and briefs

filed by the Intervenors in the district court and this Court. Any issue concerning the status of the Act after subsection (f)(1) is struck down should be left to the Arkansas General Assembly or a court in a lawsuit involving the proper parties and claims.

CONCLUSION

For the reasons stated above, the Plaintiffs-Appellants Ron Teague, Kathy Teague, and Rhonda Richardson respectfully request that this Court:

(a) reverse the district court's ruling that subsection (f)(1) is severable from the Arkansas Public School Choice Act of 1989;

(b) reverse the district court's decision to allow the Intervenors Camden Fairview School District No. 16 of Ouachita County and the El Dorado School District of Union County to appear in this action;

(c) strike all pleadings, motions, and briefs filed by the Intervenors in the district court and this Court;

(d) direct the district court to enter an injunction requiring the defendants to permit the transfer of the Plaintiffs' children to the Magnet Cove School District;

(e) affirm the district court's decision in all other respects; and

(f) grant all other relief to which the Plaintiffs-Appellants are entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the undersigned certifies that this brief complies with the applicable type-volume limitations and that, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 5106 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word 2010) used to prepare this brief. I further certify that the electronic version of this brief has been scanned for viruses and is virus-free.

/s/ Jess Askew III
Jess Askew III

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system as follows:

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As provided by Eighth Circuit Local Rule 28A(d), I further certify that upon notification by the Clerk that the brief has been filed, I will transmit one paper copy of this brief and addendum to counsel for each separately-represented party by first-class United States Mail, postage prepaid to their mailing address of record.

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