IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH JUDICIAL CIRCUIT, FOURTH DIVISION

DORIS IVY JACKSON, LAVERNE SIMS,
JESSELIA MAPLES, DIAMACIOUS SIMS,
DARRYL HARRIS, SYLVIA MOORE,
DANIELLE WRIGHT, DERASHAUN MCGHEE,
VIVIAN DAVIS, JAMES CARRUTH,
IOLA HOSKINS, STEVEN GRAPPE,
VERONICA MCCLANE, and
CITIZENS FOR ARKANSAS PUBLIC
EDUCATION AND STUDENT (CAPES),
a Ballot Question Committee PLAINTIFFS

v. Case No. 60-CV-23-3267

ARKANSAS DEPARTMENT OF EDUCATION;
JACOB OLIVA, in his official capacity as
Arkansas Secretary of Education;
RANDY HENDERSON, in his official capacity as a
member of the Arkansas State Board of Education;
JEFF WOOD, in his official capacity as a
member of the Arkansas State Board of Education;
ADRIENNE WOODS, in her official capacity as a
member of the Arkansas State Board of Education;
STEVE SUTTON, in his official capacity as a
member of the Arkansas State Board of Education;
O. FITZGERALD HILL, in his official capacity as a
member of the Arkansas State Board of Education;
OUIDA NEWTON, in her official capacity as a
member of the Arkansas State Board of Education;
SARAH MOORE, in her official capacity as a
member of the Arkansas State Board of Education; and
KATHY McFETRIDGE, in her official capacity as a
member of the Arkansas State Board of Education;
LISA HUNTER, in her official capacity as a
member of the Arkansas State Board of Education;
FRIENDSHIP EDUCATION FOUNDATION, and
MARVELL-ELAINE SCHOOL DISTRICT DEFENDANTS

TEMPORARY RESTRAINING ORDER

Before the court is Plaintiffs' Amended Motion for Temporary Restraining Order or, Alternatively, Motion for Preliminary Injunction (Amended Motion) and Plaintiffs' Second Motion for Temporary Restraining Order, or Alternatively, Motion for Preliminary Injunction (Second Motion). Plaintiffs seek immediate injunctive relief prohibiting the Arkansas Secretary of Education Jacob Oliva, the State Board of Education, the Arkansas Department of Education, the Marvell-Elaine School District, and Friendship Education Foundation from taking any action in furtherance of the execution and implementation of a "transformation contract" between the Marvell-Elaine School District and Friendship Education Foundation pursuant to the Arkansas LEARNS Act, Act 237 of 2023, based on Plaintiffs' contention that Act 237 is not yet law. Specifically, in their Second Motion, Plaintiffs bring to light new evidence that, in reliance on the "transformation contract" at issue in this lawsuit, the Defendants have issued contract nonrenewal notices to all licensed and unlicensed Marvell-Elaine School District Employees who are employed on one-year contracts. Plaintiffs have requested that the court temporarily enjoin the Defendants from terminating or nonrenewing the employment contracts for any Marvell-Elaine School District employee based on the "transformation contract" at issue in the present case. Plaintiffs argue that a temporary restraining order is necessary to prevent numerous Marvell-Elaine School District employees, including two of the named Plaintiffs, from losing their jobs before this matter can be heard by the court on June 20, 2023, and decided by the court.

The term "transformation contract" describes a specific legal arrangement between a public-school district and a charter-school management company or other state-approved private entity by which the district agrees to pay funds out of its operating budget in order to pay the charter-school management company to take over management and operations of the district as a whole or some specified part of the district. Plaintiffs' contend that the Arkansas LEARNS Act,

Act 237 of 2023, is the only potential source of statutory authority or the creation of a "transformation contract," and that the LEARNS Act is not yet operative law in the State of Arkansas due to a defective and invalid emergency clause. The court has scheduled a hearing on this matter for June 20, 2023. Plaintiffs have demonstrated a likelihood of success on the merits, given that the emergency clause in the Arkansas LEARNS Act was not passed with the necessary separate roll-call vote that is required in Article 5, Section 1 of the Constitution of the State of Arkansas. Additionally, the Plaintiffs have demonstrated a likelihood of success on their argument that the language in section 73(a), which is the only part of the emergency clause that purports to authorize emergency enactment of the "transformation contract" provisions in the bill, cites only facts that fail to establish an emergency under Arkansas law. Finally, the emergency clause in the bill unconstitutionally attempts to create numerous differing effective dates for various provisions of the bill, and the Plaintiffs have demonstrated a likelihood of success on the merits of their argument that the Arkansas Constitution does not permit such a scheme.

A temporary restraining order, effective only until the court can hear this matter on June 20, 2023, and render its decision on Plaintiffs' pending motions, is necessary to prevent the Defendants from continuing to violate the Arkansas Constitution, the Administrative Procedure Act, and the substantive rights of the plaintiffs. Specifically, the Marvell-Elaine School District, at the direction of Education Secretary Jacob Oliva, who is acting as the district's school board following a state takeover, has issued notices to all district employees who are employed under one-year contracts that their contracts are not being renewed for the 2023-24 school year and that, if they wish to continue working at Marvell-Elaine schools, they must apply for new jobs with Friendship Education Foundation. Waiting until after the June 20, 2023, hearing to decide the issue would subject the Plaintiffs and many other Marvell-Elaine School District employees to

substantial, immediate, and irreparable harm. Specifically, the clock is ticking on the employees' ability to timely appeal these nonrenewal notices. Additionally, the employees who received nonrenewal notices will be forced to make important employment decisions, including applying for, potentially accepting, and even potentially relocating for alternative employment before knowing the court's ruling as to the validity of the "transformation contract" on which their nonrenewal was based.

Without a temporary restraining order, the Defendants' continued efforts to impose a "transformation contract" on the Marvell-Elaine School District, which the Plaintiffs argue is premature, illegal, and invalid, will also result in the reduction of educational resources available to the students in Marvell-Elaine School District through the expenditure of district funds in furtherance of the contract and the potential loss of district personnel due to the nonrenewal letters, will deny the Marvell plaintiffs the opportunity to participate in shaping any future "transformation contract" that could be adopted by the State Board after the LEARNS Act goes into effect, and will deny the CAPES plaintiffs their right, under the Arkansas Constitution, to use the referendum-petition process to delay or stop the LEARNS Act from going into effect.

STANDARD

Pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, the Court may issue a Temporary Restraining Order (TRO) without written or oral notice to the adverse party or its attorney if (a) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (b) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. Ark. R. Civ. P. 65. The order expires at the time

after entry—not to exceed fourteen (14) days—that the court sets, unless before that time the court, for good cause, extend it for a like period. *Id*.

In determining whether to issue a TRO, the Court must consider two things: (1) whether irreparable harm will result in the absence of a TRO, and (2) whether the moving party has demonstrated a likelihood of success on the merits. A.R.C.P. 65; *Three Sisters Petroleum v. Langley*, 348 Ark. 167,72 S.W.3d 95 (2002). "The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief." *Id*. citing *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298,954 S.W.2d 221 (1997).

The Arkansas Supreme Court has held that a state agency or officer may be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *Ark. Game & Fish Comm'n v. Heslep*, 2019 Ark. 226, at 6, 577 S.W.3d 1, 5. A state agency or officer may also be enjoined from pending action that is ultra vires. *Steinbuch v. Univ. of Ark*., 2019 Ark. 356, at 12.

IRREPERABLE HARM

As discussed above, the Plaintiffs have submitted affidavits supporting their assertion that, but for the issuance of a temporary restraining order, the Plaintiffs and many other members of the Marvell-Elaine School District community will suffer immediate, substantial, irreparable harm.

LIKELIHOOD OF SUCCESS

The Arkansas Administrative Procedure Act (APA), Arkansas Code Annotated § 25-15-101, et seq.; the Declaratory Judgment Act, Arkansas Code Annotated §§ 16-111-101, et seq., and Arkansas Rule of Civil Procedure 57. They have further alleged that the Defendants have and are acting ultra vires when asserting authority under the Arkansas LEARNS Act, which the Plaintiffs contend is not yet law due to an invalid emergency clause. If it is discovered that the

Defendants have expended any public money pursuant to and in reliance on the Arkansas LEARNS Act, those payments constitute illegal exactions. An illegal exaction is the imposition of a tax or the expenditure of public funds that is not authorized or which is contrary to law. *Buonauito v. Gibson*, 2020 Ark. 352; *Hartwick v. Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989).

All of these claims hinge on the Plaintiff's contention that the emergency clause in the Arkansas LEARNS Act, Act 237 of 2023, is invalid. The Court finds and concludes that it is. Article 5, Section 1 of the Arkansas Constitution states:

> **Emergency.** If it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay, such necessity shall be stated in one section, and if upon a yea and nay vote two-thirds of all the members elected to each house, or two-thirds of all the members elected to city or town councils, **shall vote upon separate roll call in favor of the measure going into immediate operation**, such emergency measure shall become effective without delay. It shall be necessary, however, to state the fact which constitutes such emergency. Provided, however, that an emergency shall not be declared on any franchise or special privilege or act creating any vested right or interest or alienating any property of the State. If a referendum is filed against any emergency measure such measure shall be a law until it is voted upon by the people, and if it is then rejected by a majority of the electors voting thereon, it shall be thereby repealed. The provision of this sub-section shall apply to city or town councils.

Section 73 of Act 237, entitled "Emergency Clause," was not passed by a separate roll-call vote garnering a two-thirds majority, as is required by Article 5, Section 1 of the Constitution of the State of Arkansas. The Arkansas Supreme Court held in *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12 (2018), that the General Assembly cannot waive by law the State's sovereign immunity granted in the Arkansas Constitution, Article 5, Section 20. In doing so, the court overturned years of precedent and rejected the General Assembly's claim that it could create policy that conflicts with the provisions of the Arkansas Constitution. Worries about upsetting the apple cart by upending precedent were not enough to

override the Arkansas Supreme Court's commitment to enforcing the plain language of Article 5. In fact, the court specifically noted that the language should be interpreted "precisely as it reads." *Id*. Similarly, in *Buonauito v. Gibson*, 2020 Ark. 352, the Arkansas Supreme Court held that the phrase "four-lane highway" in Amendment 91 could not be interpreted to mean a six-lane highway because the Constitution's language was plain and unambiguous.

So too here. The word "separate" cannot mean "the same." In order to pass a valid and enforceable emergency clause, the Arkansas General Assembly was required by Article 5, Section 1 to hold a separate roll-call vote, and they failed to do so.

Second, the facts stated in section 73(a) of Act 237 do not constitute an emergency as outlined in Article 5, Section 1. In *Safe Surgery Arkansas, A Ballot Question Committee v. Thurston*, 2019 Ark. 403 (Dec. 17, 2019), the Arkansas Supreme Court invalidated an emergency clause because it failed to state facts sufficient to meet the constitutional threshold. The Arkansas Supreme Court explained that, "not just any alleged 'fact' qualifies as an 'emergency' under the Arkansas Constitution; emergency clauses are appropriate only '[i]f it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay[.]' In this context, "the word 'emergency' in its most accepted usage means some sudden or unexpected happening that creates a need for action." *Burroughs v. Ingram*, 319 Ark. 530, 534, 893 S.W.2d 319, 321 (1995). In *Safe Surgery Arkansas*, the supreme court rejected the emergency clause because it found that "the only 'sudden or unexpected happening' that could have created the requisite 'need for action' here would be the passage of Act 376 itself."

The only "emergencies" cited in Section 73(a) of Act 237 are emergencies of the legislature's own making. The emergency clause in Section 73(a) of Act 237 reads as follows:

> It is found and determined by the General Assembly of the State of Arkansas that the provision of educational services to children in the State of

> Arkansas impacts the public peace, health, and safety through its effect upon student learning, which is critical for the future success of the state; that the act amends substantial portions of the Arkansas Code as it pertains to prekindergarten through grade twelve (preK-12) education in the State of Arkansas; that these amendments are extensive and will require new rules and procedures to be developed to implement the changes; that many of the changes to the Arkansas Code will require that certain procedures are put in place before the beginning of the 2023-2024 school year; that this act is immediately necessary in order to give local public school districts time to update school district policies to account for changes created by this act to provide necessary educational services; and that this act is immediately necessary in order to give the Department of Education time to promulgate rules necessary to implement this act to provide necessary educational services. Therefore, an emergency is declared to exist, and Sections 1-6, 8, 11-21, 23-31, 35, 37-42, 44, 46-57, and 59 of this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:
>
> (1) The date of its approval by the Governor;
>
> (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or
>
> (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

Therefore, Section 73(a) fails to establish an emergency, and the Arkansas LEARNS Act is not yet effective, meaning that the State Board had no authority to direct the Secretary to enter into a "transformation contract" for Marvell-Elaine School District.

Finally, Section 73 of Act 237 is divided into multiple subsections, each of which purports to be an emergency clause applicable to only certain other sections of the bill. Under this scheme, various provisions of the bill are to go into effect immediately, others are intended to become law at the end of the current teacher contracts for the 2022-23 school year, and other provisions are set to go into effect at various other dates. Article 5, Section 1 does not create a mechanism that would allow for line-item emergency clauses with differing effective dates. Article 5, Section 1 states that a "a measure" that includes a valid emergency clause "shall become effective without delay." The General Assembly made the choice, as a matter of political strategy, to pass the LEARNS Act as one huge, complicated, omnibus bill. In doing so, they

limited their options regarding the use of an emergency clause to create differing effective dates for the various unrelated changes in the bill. Pursuant to the plain language of the Arkansas Constitution, the General Assembly could have chosen to draft an emergency clause that made all provisions of the bill immediately effective, or it could have chosen not to include an emergency clause, but those were the only options. Its attempt to cobble together multiple emergency clauses that each relate to different parts of the bill and each purport to create different effective dates for those provisions is beyond the scope of the authority granted by Article 5, Section 1.

Plaintiffs' Motion for Preliminary Injunction is GRANTED.

IT IS THEREFORE ORDERED THAT:

- Defendants are enjoined from signing, executing, or otherwise entering into a transformation contract between Marvell-Elaine School District and Friendship Education Foundation.
- Defendants are enjoined spending, dispersing, or transferring any public funds in furtherance of the creation or implementation of a "transformation contract" between Marvell-Elaine School District and Friendship Education Foundation.
- Defendants are enjoined from terminating or nonrenewing any Marvell-Elaine School District employee based on the "transformation contract" at issue in this lawsuit or any other provision of the LEARNS Act.
- The time allotted to appeal a notice of contract nonrenewal pursuant to the Arkansas Teacher Fair Dismissal Act or the Public School Employee Fair Hearing

Act is tolled, paused, and enjoined from the date of entry of this order until the date the temporary restraining order is lifted.

- Defendants are enjoined from implementing or enforcing any aspect of the Arkansas LEARNS Act, Act 237 of 2023, until such date that it becomes law.
- Defendant are enjoined from consolidating, dividing, or dissolving the Marvell-Elaine School District.

This order shall expire on June 20, 2023, following the hearing scheduled on Plaintiffs' pending motions, not to exceed fourteen days from the date of its issuance, unless terminated or extended by the Court.

Dated this _____ day of _____ 2019.

Time: _____

_____
CIRCUIT JUDGE

Prepared by:

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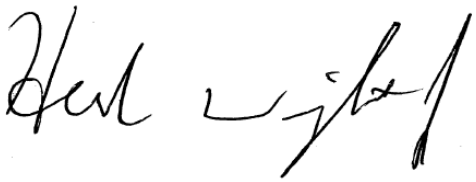
Case Title: DORIS JACKSON ETAL V ARK DPT OF EDUCATION ETAL

Case Number: 60CV-23-3267

Type: ORDER MOTION GRANTED

So Ordered



Honorable Herbert T Wright