IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

DORIS IVY JACKSON, et al PLAINTIFFS

VS. CV 2023-3267

ARKANSAS DEPARTMENT OF EDUCATION, et al DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now before the Court the matters presented by Plaintiffs and Defendants at the hearing held June 20, 2023, and based on the files and records of the case, the pleadings of the parties, the testimony, evidence, and arguments presented at that hearing, and all other matters considered, the Court DOTH FIND:

In late February and early March of 2023, the Arkansas General Assembly passed Act 237 of 2023 ("the Arkansas LEARNS Act" or "LEARNS Act"). The legislation was then sent to the Governor, who signed it into law on March 8. The Act contains an Emergency Clause making certain provisions of the Act immediately effective.

Soon after the enaction of LEARNS, the State Board of Education voted to take over the troubled Marvell-Elaine School District in Eastern Arkansas. The State Board and Arkansas Secretary of Education then formally began the process for the State to enter into a "transformation contract" with a private charter school management company to run the District. On May 5, 2023, the State Board of Education voted to enter into such a contract with Separate Defendant Friendship Education Foundation, a charter school management company out of Washington, D.C.

Plaintiffs are multiple residents of the Marvell, AR community or parties otherwise associated with Citizens for Arkansas Public Education and Schools (CAPES), a ballot question committee mounting a voter's referendum that would repeal the LEARNS Act. Defendants are the

Arkansas Department of Education, the Arkansas Secretary of Education, members of the Arkansas State Board of Education, Friendship Education Foundation, and the Marvell-Elaine School District.

This case was filed with the Pulaski County Circuit Clerk on May 8, 2023. Plaintiffs sought declaratory and injunctive relief from this Court, alleging that the LEARNS Act was unconstitutionally enacted by the Legislature. Specifically, Plaintiffs argue that Section 73 of the Act, the aforementioned Emergency Clause, was not passed by a separate roll-call vote as required by the Arkansas Constitution. Though the relief sought was, by its nature, ex parte, this Court directed the Office of Attorney General to submit a Response for the Court to review prior to considering any temporary relief. The State Defendants filed that Response on May 26, 2023.

Having reviewed all the pleadings, this Court entered the Plaintiffs' proposed Order granting a temporary injunction and set the matter for a hearing on June 20, 2023, to determine whether permanent relief was warranted. The Court reasoned that Plaintiffs had successfully met its burden for temporary relief – irreparable harm and a likelihood of success on the merits. Defendants then petitioned the Arkansas Supreme Court for interlocutory relief. On June 2, 2023, the Supreme Court issued a Formal Order denying a stay of this Court's decision but ordering briefing of the matter. On June 15, 2023, the Supreme Court reversed and remanded the case. The Supreme Court vacated this Court's temporary restraining order, finding that it was an abuse of discretion to grant the temporary relief because the Plaintiffs had not met their burden in showing irreparable harm.

This Court held the planned June 20 hearing, treating it as one on the merits of the Plaintiffs' allegations rather than one on whether the now-vacated temporary junction should be permanent. Plaintiffs and Defendants appeared at this hearing, and the Court took evidence and testimony. Also appearing at this hearing was Mr. Michael Cantrell, Assistant Solicitor General, seeking to represent the interests of individual members of the General Assembly. This Court did not permit Mr. Cantrell

to participate in the hearing, reasoning that the Defendants' interests were already sufficiently represented by the Office of Attorney General. The Court specifically asked Mr. Cantrell if he knew of any authority by which he could represent the interests of the members of the Legislature, and he specifically relayed to the Court that he knew of no such precedent.

Finally, Plaintiffs had filed a Motion prior to the hearing, on June 18, 2023, seeking to present additional evidence of irreparable harm. In light of the Supreme Court's remand, this Court found that such evidence could be proffered but would not be considered. For the sake of the record, Plaintiffs delivered that evidence and testimony to the Court's reporter after the Court had retired to chambers.

Despite the understandable interest of many in the results of this controversy – the Court's gallery was at capacity with observers – this remains a very simple case. The issue before the Court is whether the emergency clause of Act 237 is effective. The Court is not tasked with determining whether Act 237 will become law but only determining whether the Act's Emergency Clause was constitutionally enacted.

In order for enacted legislation to become immediately effective, the Arkansas Constitution of 1874, in Article 5, § 1 requires that "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 … shall vote *upon separate roll call* in favor of the measure going into immediate operation, such emergency measure shall become effective without delay." (emphasis the Court's) Without such an emergency clause to the contrary, and without a specified *later* date, the default effective date of ordinary legislation is 90 days after the Legislature adjourns *sine die*.

Where the legislative session of the General Assembly ends sine die – as happened here on May 1, 2023, upon the adjournment of the regular session – the effective date of any otherwise

properly enacted legislation would be ninety (90) days from the date of the adjournment sine die of the General Assembly. Without the emergency clause, the effective date of the legislation would default to that date – August 1, 2023.[1] Yet, the timing is very important to Defendants, as it puts in question the validity of the transformation contract and other pending matters as the 2023-2024 school year approaches.

Plaintiffs' first cause of action arises under the Administrative Procedures Act, which allows for a suit where a harmed citizen may seek a stay of an administrative decision – here, the entry into the transformation contract – where the agency has violated constitutional or statutory provisions. The constitutional provision in question would be the requirement of two votes for an emergency clause. Plaintiff further sought declaratory relief that the emergency clause was invalid because the provisions authorizing transformation contracts were not supported by allegations of a valid emergency. Plaintiffs next argue that entering into the transformation contract would be an *ultra vires* act because the emergency clause being invalid, such a contract would not be authorized by law. Finally, Plaintiffs argue that they have a cause of action under the Arkansas Constitution Article 16 § 13, which authorizes a suit for an illegal exaction.

Though these are all distinct legal theories, the deciding factor for this Court in all of them would be the validity of the emergency clause. If the emergency clause is procedurally invalid, the relevant provisions of the LEARNS Act are not valid until the default effective date of August 1. If the Court finds that the Legislature followed a proper procedure, the only remaining recourse left to the Plaintiffs would be the declaratory judgment request, as it goes to the substance of the underlying emergency.

[1] 90 days after May 1 is technically July 30, but the State considers the 90 days to begin May 2 and considers July 30 not to count because referenda petitions cannot be filed on Sunday. The State's Opinion is that acts without an emergency clause or a specified effective date become effective on August 1, 2023. Office of the Attorney General, Opinion No. 2023-031, May 5, 2023.

Where an act is duly signed by the Governor, deposited with the Secretary of State, and published as a law, it will be presumed that every requirement was complied with in its passage. Helena Water Co. v. City of Helena, 140 Ark. 597, 216 S.W. 26, 27 (1919). When the Legislature is acting in the apparent performance of its legal functions, every reasonable presumption is to be made in favor of its action. State v. Bowman, 90 Ark. 174 (1909). Accordingly, this Court begins its analysis with the presumption that the LEARNS Act was constitutionally passed and enacted. There has been no evidence before the Court that the Act was not signed by the Governor, deposited with the Secretary, and published as a valid law. The presumption remains that this Act was constitutionally passed.

This presumption as to validity is not conclusive and can be overcome. The Courts may look to the journals and other records of the Legislature to ascertain whether or not the constitutional requirements with respect to the passage of bills have been observed. Helena Water Co., *supra*, 216 S.W. at 27. Ultimately, even with the presumption, it is the judiciary's duty to determine the constitutionality of the Legislature's actions. The Supreme Court has highlighted the judiciary's role in cases such as this one, citing with favor a Supreme Court of Kentucky's decision upholding the duty of the courts to "stick our judicial noses" into what is generally considered the business of a legislature. *See* Phillips County v. Huckabee, 351 Ark. 31, 55 (2002), *citing* Rose v. Council for Better Education, Inc., 790 SS.W.2d 186, 208-10 (Ky. 1989). This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public. *Id*.

It is long settled that the judiciary may look beyond the text of the journals of the legislature to determine whether an act has been duly passed. In Chicot County v. Davies, 40 Ark. 200 (1882), the Arkansas Supreme Court found that a bill was read three times in one day in the Senate on the

same day as it passed the House of Representatives, as opposed to the constitutionally mandated three times, on different days, in each House. The Supreme Court, in determining that the legislature had not constitutionally passed the bill, further found it proper for the lower court not to be bound by the journals, finding that while those journals "furnish evidence of legislative proceedings [. . .] Courts are not bound to hold that nothing was done except what appears therein." Id, at 215. The Court, therefore, is not required to accept the legislature's journals as dispositive of two votes having taken place.

This is what the Defendants would have this Court find. Defendants allege that the Act cannot be attacked on procedural grounds because both the House Journal and the Senate Journal – the official records of those bodies – reflect that separate votes were taken in each chamber on the substance of the Act and the emergency clause. Defendants argue that these official records are unassailable. There seems to be no dispute between the parties on what the journals reflect. They both indicate that two separate votes were taken, but the video of the proceedings that was presented at the July 20 hearing clearly show that only one vote was taken. For this Court to proceed as if the Journals were incontrovertible proof of the constitutionality of the LEARNS Act's emergency clause would be to "depend on the fidelity with which a journal clerk has made his entries[]" and "render the laws as uncertain as the terms of a horse trade." *Id*. at 215-216.

The State Defendants included exhibits of the House and Senate Journals with their Response to the Plaintiffs' Amended Motion. The House Journal's record reflects that a separate vote was taken on both the bill proper and the emergency clause. Separate roll calls are listed for both purported votes. The House Journal reflects that the Speaker of the House ordered the clerk to call the roll upon the adoption of the emergency clause, implying that there were indeed two votes. The exhibit constituting the draft of the Senate's Journal presented to the Court indicates separate

motions to vote on the bill and the emergency clause and separate roll call votes. Video recordings are also made of House and Senate proceedings, but Defendants assert through Affidavits of the Chief Clerk of the House and the Secretary of the Senate that these videos are done solely for transparency purposes and do not constitute "records" of the official proceedings of the Legislature.

Defendants also have presented testimony that in the House, voting on a bill and an emergency clause is usually combined unless a single Representative makes a motion that the votes be taken separately. Likewise, Defendants presented an Affidavit from the Senate's Chief Counsel testifying that, "[a]s a matter of internal procedure, Senators have decided to convey their separate roll call votes on emergency clauses in the same utterance as their votes on the underlying bill."

The Court was presented with the video at the July 20 hearing. There is no dispute from the parties that the Journals reflect two votes were taken but that the video of the proceedings clearly show that one vote was taken. Additionally, the Court was presented with testimony from sitting members of both the House and Senate, who each corroborated the video and testified that it accurately reflected the proceedings in each chamber, regardless of what was recorded in the Journals. There is no getting around the fact that the bill and emergency clause were not voted on by separate roll-call votes in either house. The emergency clause simply had not been constitutionally passed when it left the Legislature and made its way to the Governor. The State may defer to the rules of the Legislature, which allow for such a combined vote, but such rules do not insulate the Legislature from the requirements of the Arkansas Constitution.

The Court finds that the Emergency Clause of the LEARNS Act was not enacted pursuant to the requirements of that Constitution. Since that provision of the law is not effective, all provisions of the Act purported to be immediately effective due to the invalid clause are now effective as of the default date the Act would be effective – August 1, 2023.

Defendants have argued an alternate theory and suggested that the Court should view this controversy as presenting a nonjusticiable political question. To be fair, this Court is not in the

position to review the prudence of any specific portion of the LEARNS Act. Whether the Legislature was within its power to enact the provisions of the Act would be a political question. *See*, *e.g.*, State v. Bowman, 89 Ark. 428 (1909), Russell v. Cone, 168 Ark 989 (1925), *et al*. Obviously the Plaintiffs take political issue with the substance of the Act – one of the separate Plaintiffs is a ballot question committee seeking to overturn the Act itself through a voter referendum. Plaintiffs have, however, brought suit alleging unconstitutionality of the Act's enaction and not of specific terms of the enacted legislation. To the extent that this controversy could be viewed as a political question, this Court has made no finding regarding the rules or processes of the legislature other than those processes which have not complied with Article 5 § 1. The question of the Act's constitutionality under that Article is well within the purview of the judiciary and not a political matter.

The question of politics does not end there. The Court should point out that, having found that the emergency clause was not properly enacted, it need not determine whether the stated "emergency" of the clause was a "valid emergency." The listed reasons in the clause – the necessity of developing new rules and procedures prior to the school year and the public peace and health of Arkansas children, among others – would all seem to be issues properly addressed by the Legislature. The Court declines to rule on whether the "emergency" in the emergency clause was valid.

The Court is mindful that the simple issue before it is complicated by the doctrine of separation of powers and the individual rules of the House and the Senate. The legislative branch of government is, of course, separate and distinct from the judiciary, and it is not for the judiciary to tell the legislative branch how to discharge its duties. But the system of checks and balances among the three branches remains, and each branch of government must comply with the Constitution. While each branch promulgates its own rules and is free to discharge its duties as it sees fit, the Constitution places bounds at the outer lanes of each branch's authority.

The Plaintiffs assert that if the emergency clause is invalid, that entry into the transformation contract is an ultra vires act that has resulted in an illegal exaction. Based on this Court's finding that

the emergency clause was not passed in accordance with the Arkansas Constitution, it follows that the State's entry into the transformation contract was ultra vires, since the State would have no authorization to enter into such a contract until the effective date of the Act. Plaintiffs have not, however, shown that there has been an illegal exaction. That question is not properly before the Court, as it seems to be premature. The testimony presented at the June 20 hearing indicates that no action is currently being taken under the contract because of this pending case at bar. There have not been any payments made under the contract yet, so there has been no illegal exaction, and there is no action pursuant to the transformation contract yet for this Court to enjoin.

Having found that the Legislature did not constitutionally pass the LEARNS Act, the Court necessarily rejects the Defendants' position regarding sovereign immunity. It is axiomatic enough that the State may not be made a party to a suit in her own courts. The Plaintiffs could not, for example, seek a monetary judgment against the State under these circumstances. Yet, the State may not resort to a claim of sovereign immunity where the State is acting illegally, and a request for injunctive relief may survive an assertion of sovereign immunity. Arkansas Game and Fish Commission v. Heslep, 2019 Ark. 226, at 5. Here, the Plaintiffs have prayed for injunctive and declaratory relief, seeking that the State follow its own Constitution. Sovereign immunity does not entitle the State to ignore that Constitution.

To the extent that the Defendants' Motions to Quash regarding the testimony of legislative staff, this Court initially ruled that the Defendants had waived such an argument. Now having heard the testimony presented, the Court finds that none of it involved privileged information. To the extent that the Motion to Quash is alleged to prevent anyone from being subpoenaed, the Court finds that Defendants have waived that argument by presenting affidavits of the legislative staff in question. Even if the argument had not been waived, the Court has not been convinced by any pleading that such legislative privilege would extend to the testimony as presented. Both members of the General Assembly who testified merely corroborated the video evidence and testified to their impressions of what happened in the respective chambers that day – that only one vote was taken.

The privilege would be individual to either of them, and they had every opportunity to invoke it. Nonetheless, those legislators only testified as to what happened during the votes and not their legislative work on any substantive issue or position on any legislation. Nor has the Court been presented with a sound theory that such a privilege would apply to the Chief Clerk of the House or the Secretary of the Senate, who are not legislators or staff answerable to individual legislators.

THEREFORE, the Court finds and determines that Section 73 of the Arkansas LEARNS Act, constituting its Emergency Clause, was not properly passed pursuant to the provisions of Article 5, Section 1 of the Arkansas Constitution. The provisions of the LEARNS Act that were meant to be immediately effective are, accordingly, effective as of the default date of such legislation.

IT IS SO ORDERED.

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HERBERT T. WRIGHT, JR. – CIRCUIT JUDGE

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