IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

BRANDYN GALLAGHER, JAVON HANSEN, KADEN MCINTOSH, LYDIA NELSON, and HALEY NICOLE PRENTICE — Plaintiffs

v. Case No. 60CV-24-3420

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION — Defendant

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

For years, transgender, non-binary, and intersex Arkansans applying for a driver's license at the Arkansas Department of Finance and Administration ("DFA" of "Department") were able to change the gender listed on their license, or to indicate that they do not identify with a traditional binary gender, by simply asking. On March 15, 2024, DFA suddenly adopted an emergency rule to eliminate that practice. Now drivers may no longer mark their gender as "X." Nor may they change their gender without presenting an amended birth certificate, which is available in Arkansas only upon a showing of a surgical sex change and in some states is not available at all. In effect, the emergency rule forces Arkansans to carry a driver's license with a gender marker that does not match their gender identity—at great harm to their personal well-being—or to forego a driver's license and all the essential benefits that it confers.

Usually, rulemaking is subject to a notice-and-comment procedure. This procedure requires administrative agencies such as DFA to listen to the concerns of

the affected parties and to address evidence that may counsel against a rule. Emergency rulemaking is proper only in two very specific circumstances: if there is an "imminent peril to the public health, safety, or welfare" or if "compliance with a federal law or regulation requires adoption of a rule" immediately. *Id.* § 25-15-204(c)(1). If the agency so finds, it must "state[] in writing its reasons for that finding." *Id.*

DFA did not make even the slightest pretense of finding, in writing or otherwise, that one of the two requisite conditions exists before passing the emergency rule. Because Plaintiffs are irreparably harmed by the emergency rule and are likely to succeed in their challenge to it, the Court should preliminarily enjoin the rule and require DFA to revert to its pre-rule practice of permitting transgender, nonbinary and intersex applicants to list their gender as M, F, or X upon request.

LEGAL STANDARDS

The Court is authorized to issue a preliminary injunction under Ark. R. Civ. P. 65(a). That rule requires notice to the adverse party, which Plaintiffs have provided here by serving this motion for preliminary injunction alongside their complaint.

To secure a preliminary injunction, a plaintiff must make two showings: that there is "a likelihood of success on the merits" and that "irreparable harm will result in the absence of a preliminary injunction." *Custom Microsystems, Inc. v. Blake*, 344 Ark 536, 541, 42 S.W.3d 453, 456–57 (2001). A "likelihood of success" means a "reasonable probability of success." *Id.* at 542, 42 S.W.3d at 457–58. An "irreparable harm" is a harm that "cannot be adequately compensated by money

damages or redressed in a court of law." *City of Jacksonville v. Smith*, 2018 Ark. 87, at 13, 540 S.W.3d 661, 669.

ARGUMENT

A. Plaintiffs are likely to succeed in their action against the emergency rule.

Plaintiffs are likely to succeed on the single cause of action they have alleged in the complaint: that the rule is invalid because the agency failed to identify a legal basis for its emergency adoption.

Plaintiffs have a statutory cause of action to contest the "validity" of an agency rule: "The validity . . . of a rule may be determined in an action for a declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property." Ark. Code Ann. § 25-15-207(a).

This statute expressly waives the State's sovereign immunity. *See Ark. Dep't of Human Servs. v. Fort Smith Sch. Dist.*, 2015 Ark. 81, at 7, 455 S.W.3d 294, 299. And allegations of "ultra vires" or "illegal actions" by the state are not subject to a sovereign-immunity defense. *See Ark. Dep't of Fin. and Admin. v. Carpenter Farms Med. Grp., LLC*, 2020 Ark. 213, at 7, 601 S.W.3d 111, 117. Because this suit seeks declaratory and injunctive relief for an illegal act—namely, the violation of statutory requirements for adopting emergency rules—the doctrine of sovereign immunity does not apply. *See id.* at 11, 601 S.W.3d at 119 ("Carpenter Farms' claim that the [agency] failed to follow a mandatory provision of the APA is an allegation of ultra vires or illegal action, an exception to sovereign immunity.").

Additionally, a plaintiff need not exhaust administrative remedies before seeking a declaration from the circuit court that the rule is invalid. *See Ark. Dep't of Human Servs. v. Ledgerwood*, 2017 Ark. 308, at 14–15, 530 S.W.3d 336, 346. As the statute states, a "declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question." Ark. Code Ann. § 25-15-207(d).

Because this suit is procedurally proper, the Court need only focus on the merits of Plaintiffs' claim to determine if they are likely to succeed.

Under the statute, Plaintiffs must show (1) that the emergency rule is invalid and (2) that its application or threatened application injures or threatens to harm them in their person, business, or property. Because the second prong of this test is relevant to the question of irreparable harm, which is addressed further below, Plaintiffs focus here on the question of whether the emergency rule is valid.

Analysis of that question is quite simple and straightforward. The Arkansas Administrative Procedure Act sets forth clear requirements for promulgation of agency rules. Normally the agency, thirty days in advance of its intended action, must issue a notice that describes the intended action and indicates the "time, location, and manner in which an interested person may present his or her position" on the agency's proposal. Ark. Code Ann. § 25-15-204(a)(1)(B)(ii). The agency must further "[a]fford all interested persons reasonable opportunity to submit written data, views, or arguments, orally or in writing." *Id.* § 25-15-204(a)(2)(A). It must "fully consider all written and oral submissions respecting the proposed rule before

finalizing" the rule. *Id.* § 25-15-204(a)(2)(C). And it must provide a statement of reasons for the rule's adoption if requested, "incorporating its reasons for overruling the considerations urged against its adoption." *Id.* § 25-15-204(a)(2)(D). The purpose of this notice-and-comment rulemaking is to "provide the public with an opportunity to participate in the rule making process and to enable the agency to educate itself before establishing rules." *Nat'l Park Med. Ctr., Inc. v. Ark. Dep't of Human Servs.*, 322 Ark. 595, 600, 911 S.W.2d 250, 253 (1995).

Two limited circumstances justify allowing a rule to go into effect without public input. The first is when the agency finds an "imminent peril to the public health, safety, or welfare." Ark. Code Ann. § 25-15-204(c)(1). The second is when the agency finds need for immediate "compliance with a federal law or regulation." *Id.* In either case, the statute contains an additional requirement that the agency "states in writing its reasons for that finding." *Id.*

Here, the rule falls because the agency failed to state in writing its reasons for finding an emergency. The papers DFA submitted in support of the emergency rule are attached to this motion as Exhibit A. While those papers state reasons that the rule is needed, they say nothing about why there is an emergency. They do not even make a basic assertion that there is an imminent peril to health, safety, or welfare. They provide no reason to think an imminent peril exists. And they admit that no federal law or regulation compels the rule. Exhibit A at 11 ¶5. Indeed, though the standard rule-submission paperwork prompted DFA to "attach the statement required by Ark. Code Ann. § 25-15-204(c)(1)" (*i.e.*, the statement of reasons for

finding an emergency), *see id.* at 10 ¶3, no such statement is attached. Because the agency did not provide the statutorily required written statement explaining why an emergency exists, the emergency rule was not "adopted and filed in substantial compliance" with § 25-15-204(c)(1), and it is "not valid." Ark. Code Ann. § 25-15-204(h).

Wagnon v. Arkansas Health Services Agency, 73 Ark. App. 269, 40 S.W.3d 849 (2001), makes clear that the rule must be stricken as invalid. There, a state agency passed an emergency rule stating that it "finds that imminent peril to the public's health, safety, and welfare requires adoption of this rule to be effective immediately upon filing." *Id.* at 271, 40 S.W.3d at 851. The Arkansas Court of Appeals affirmed the circuit court's order invalidating the emergency rule. The court stressed that the statutory requirements for emergency rules are not "mere technicalities" and that an agency may not merely parrot that there is an imminent peril to satisfy the statutory requirement. *Id.* at 274, 40 S.W.3d at 852. In particular, it emphasized the purposes of notice-and-comment rulemaking:

> Notice serves three distinct purposes. First, notice improves the quality of agency rulemaking by insuring that the agency regulations will be tested by exposure to diverse public comment. The notice and comment procedure assures that the public and the persons being regulated are given an opportunity to participate, provide information and suggest alternatives, so that the agency is educated about the impact of a proposed rule and can make a fair and mature decision.
>
> Second, notice and the opportunity to be heard are essential components of fairness to affected parties.
>
> Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review.

Id. (quoting 2 Am. Jur. 2d Administrative Law § 166 (1994)). In light of these purposes, the "reasons for departing from the notice requirements 'should be truly emergent and persuasive to a reviewing court.'" *Id.* at 274, 40 S.W.3d at 853 (quoting 2 Am. Jur. 2d Administrative Law § 219).

Here, DFA failed even to include boilerplate asserting an emergency, doing even less than the agency in *Wagnon* to justify its departure from notice-and-comment rulemaking procedures. As in *Wagnon*, the agency "was required to state in writing its reasons for finding that imminent peril to the public health, safety, and welfare required its adoption. This it did not do. It is obvious, therefore, that the emergency rule was not adopted in accordance with the law." *Id.* at 275, 40 S.W.3d at 853. As a result, Plaintiffs are reasonably likely—indeed, more than reasonably likely—to succeed on their claim that the emergency rule is invalid.

While the absence of a writing is sufficient by itself for the Court to find that Plaintiffs are likely to succeed on the merits, Plaintiffs could also succeed on the independent ground that neither of the two statutory conditions permitting an emergency rule is present here. The writing is most likely absent because the emergency is absent.

Most obviously, there is no federal law or regulation compelling DFA to adopt the more restrictive procedure for gender markers. Quite the opposite: the United States State Department permits passport holders to identify their gender as X and does not require an amended birth certificate for passport holders to change the gender on their document. *See* "Selecting Your Gender Marker," U.S. Dept. of

State—Bureau of Consular Affairs, *available at* https://tinyurl.com/y7k55u46 (last accessed Apr. 30, 2024).

Nor is there any imminent peril to the public health, safety, or welfare that requires adoption of the rule on less than thirty days' notice. To the contrary, the old policy has likely enhanced public safety by avoiding conflict between those who do not present as the gender on their driver's licenses and persons inclined to harass (or worse) gender nonconformists.

The absence of an imminent peril is evident in the duration of the old policy. DFA's previous practices were in place for years without creating any public safety hazard. When asked, at a public hearing of the Arkansas Legislative Council Executive Subcommittee on March 14, 2024, to identify an incident that led DFA to find an imminent peril, DFA Director Jim Hudson failed to specify one, instead speculating that "we're avoiding something bad potentially happening in the future." The abstract possibility that something bad will happen in the future does not rise to the level of imminent peril.

Nor does the agency's planned implementation of the rule suggest an imminent peril. Under DFA's stated plan, those with X markers on their driver's licenses will be able to maintain those licenses for as many as eight years. If DFA sees no reason to replace these licenses until as late as 2032, it is difficult to see how they are causing an imminent peril to the public health, safety, or welfare.

Finally, no imminent peril arises from a mismatch between genders on a driver's license and another identity document. Again, this conclusion stems from

application of the policy itself. DFA has no intent to impose changes to existing licenses whose F or M gender marker does not match the marker on the licensee's passport or birth certificate. It simply proposes to hinder transgender people from changing their license in the future. And the policy will in some cases create rather than alleviate inconsistencies between documents. For example, Plaintiff Kaden McIntosh will soon have a Colorado birth certificate that contains an X, yet their Arkansas driver's license will show them as female. The policy's continued forbearance of—and in some cases enabling of—inconsistencies between licenses and other identity documents undercuts any claim of imminent peril arising from the old practice.

B. Plaintiffs will suffer irreparable harm absent a preliminary injunction.

An injunction is warranted because the rule harms Plaintiffs and that harm cannot be compensated by monetary damages.

First, under the Administrative Procedure Act, Plaintiffs are required to show that the "rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property." Ark. Code Ann. § 25-15-207(a). Plaintiffs meet that requirement here. By forcing Plaintiffs to adopt gender markers that do not cohere to their own identities, the rule imposes a dignitary harm—one they are forced to carry around with them and relive every time they use their identification. The emergency rule causes Plaintiffs to suffer the stress and anxiety inherent in being told by the State that a core element of their being is not worth recognizing. Having to carry identity documents that label them with a gender that

does not match their gender identity undermines their ability to socially transition and exacerbates gender dysphoria. And those plaintiffs whose lived gender does not match the gender stated on their driver's license endure a real threat of harassment and even assault—a prospect that carries with it even more stress as well as the possibility of bodily injury. *See* Exhibits B–F (Plaintiff declarations).

These harms qualify as irreparable for purposes of a preliminary injunction. The key question is whether the harm can be "adequately compensated by money damages." *Smith*, 2018 Ark. 87, at 13, 540 S.W.3d at 669. Plainly, Plaintiffs' harm here cannot be. Without an injunction, they face one of two outcomes: (1) they will be required to obtain or maintain a driver's license that does not match their gender identity and that thus injures their dignity and causes them psychological harm, anxiety, and stress about the consequences that could result; or (2) they could forego having a driver's license, limiting their ability to secure benefits such as housing, employment, and travel. Whichever harm they are forced into, money cannot remedy it.

In short, plaintiffs have shown the sort of irreparable harm necessary to obtain a preliminary injunction.

C. The Court should not require a bond.

Under Ark. R. Civ. P. 65(c), the Court "may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The "purpose of a bond is to indemnify the parties enjoined

against damages occasioned by the wrongful issuance of the injunction." *Weathersbee v. Wallace*, 14 Ark. App. 174, 177, 686 S.W.2d 447, 449 (1985). Because DFA will suffer no damages if the emergency rule is enjoined, bond is not necessary here and the Court should impose none. *See id.* (affirming court's refusal to impose bond where no party alleged "damages occasioned by the issuance of the injunction").

D. The Court should hold a hearing at the earliest possible opportunity.

Plaintiffs request a hearing as soon as possible. Plaintiffs will serve Defendant with a copy of the motion for preliminary injunction, supporting exhibits, and this brief alongside the complaint; they expect service to be complete by May 1, 2024. Defendant will then have 10 days to respond to the motion, excluding Saturdays, Sundays, and legal holidays, making the response due by no later than May 15. *See* Ark. R. Civ. P. 6(a), (c). Plaintiffs thus ask the Court to hold a hearing on May 21 or 22, 2024. This hearing date would be at least twenty days from service of the preliminary-injunction motion, as is typically required by Ark. R. Civ. P. 6(c).

Plaintiffs ask the Court to exercise its discretion under Ark. R. Civ. P. 6(c) to modify the twenty-day time period, if such modification is necessary. Plaintiffs agree to expedite the filing of their reply before the hearing, insofar as that is necessary.

CONCLUSION

Plaintiffs will be irreparably harmed by DFA's emergency rule and are likely to succeed in showing the rule invalid because the agency did not indicate in writing

that an imminent peril to public health, safety, or welfare exists. The Court should waive bond, hold a hearing at the earliest possible opportunity, and issue a preliminary injunction that strikes down the emergency rule and requires DFA to return to its previous practice of permitting transgender, nonbinary, and intersex applicants to list their gender as M, F, or X upon request.

Dated: April 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Williams, counsel for Plaintiffs, certify that I served a copy of this Brief in Support of Motion for Preliminary Injunction by serving it on the Defendant with the complaint and summons and also by emailing it on April 30, 2024, to Alicia Austin Smith, Chief Counsel for the Defendant.

JOHN C. WILLIAMS