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60CV-24-3420
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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

ORDER GRANTING PRELIMINARY INJUNCTION

Before the Court is Plaintiffs' motion for a preliminary injunction. The Court held a hearing on June 5, 2024, at which it heard argument from counsel and testimony from Plaintiffs Brandyn Gallagher, Kaden McIntosh, and Haley Nicole Prentice. The Court has considered the arguments, the testimony, the relevant law, and the parties' filings, including exhibits attached to those filings. For the reasons stated below, Plaintiffs' motion for a preliminary injunction is granted.

The proof shows that from December 2010 to March 2024, the Department of Finance and Administration ("DFA") permitted applicants to change the gender markers on their driver's licenses and state-issued identification cards by simply asking for that change. *See* Ex. A to Def.'s PI Resp. DFA's policy also allowed applicants to denote their gender as "X." On March 12, 2024, DFA Secretary Jim Hudson "rescinded the DFA policy which allowed the holder of a driver's license or ID card issued by DFA to change the indicated gender on the license or ID card

without any documentation or questions asked, or to designate an "X" in lieu of gender." Ex. B to Def.'s PI Resp. On March 15, 2024, DFA adopted an emergency rule that requires applicants to present an amended birth certificate to change their gender from M to F or vice versa. The emergency rule also eliminated the X option.

On April 30, 2024, Plaintiffs filed a complaint alleging that the emergency rule violates the Arkansas Administrative Procedure Act ("APA"), Ark. Code Ann. § 25-15-201 *et seq.* Plaintiffs sought a preliminary injunction requiring DFA to revert to its previous policy.

The Court is authorized to issue a preliminary injunction under Ark. R. Civ. P. 65(a). 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. Plaintiffs have met this burden.

Ark. Code Ann. § 25-15-207 authorizes the Court to determine the "validity . . . of a rule" in an action for declaratory judgment. "Rule" is defined to mean "an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency and includes, but is not limited to, the amendment or repeal of

a prior rule." Ark. Code Ann. § 25-15-202(9). DFA's actions here squarely fall within the definition of "rule." In correspondence concerning DFA's action, DFA Director Jim Hudson referred to DFA's action as a "new policy." *See* Ex. B to Def.'s PI Resp. Thus, DFA's action here—whether characterized as rescinding an old policy or imposing a new one—is subject to the APA.

Under the APA, an agency typically must provide thirty days' notice and an opportunity for the public to comment on a proposed rule. Ark. Code Ann. § 25-15-204(a). In limited circumstances, agencies may avoid this requirement: "If an agency finds that imminent peril to the public health, safety, or welfare or compliance with a federal law or regulation requires adoption of a rule upon less than thirty (30) days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it may choose, to adopt an emergency rule." Ark. Code Ann. § 25-15-204(c)(1).

Here, the parties agree that federal law or regulation does not require adoption of the rule. Thus, the issue is whether DFA properly certified an imminent peril to public health, safety, or welfare. The proof shows that it has not, and Plaintiffs are likely to succeed on the merits of their claim that the emergency rule is invalid.

DFA violated the APA in that it failed to state its reasons for the emergency rule in writing. The key precedent is *Wagnon v. Arkansas Health Services Agency*, 73 Ark. App. 269, 40 S.W.3d 849 (2001). *Wagnon* emphasized that the statutory requirement to provide written justification for an emergency rule is not a merely technical requirement. Here, as in *Wagnon*, the agency failed to provide a statement

of any substance to support a determination that there is an imminent peril to the public health, safety, or welfare.

Moreover, the Court finds that no such imminent peril exists. In papers submitted in support of the emergency rule, DFA stated that the rule was "necessary in order to administer the Office's responsibilities under Ark. Code Ann. § 27-16-1104(3), which requires that a driver's license or identification card issued by the Office contain the person's gender." Ex. C to Def.'s PI Resp. at 1. The Court has reviewed the statute. The statute does not say that a driver's license must contain a gender marker matching an applicant's gender assigned at birth. Nor does it say anything about whether applicants may or may not self-select their gender. There is no mismatch between the statute and the old policy; the old policy is not contrary to Ark. Code Ann. § 27-16-1104(3).

Plaintiffs have also shown through their declarations and testimony that they will suffer irreparable harm in the absence of an injunction. The Court heard compelling testimony that the gender markers on Plaintiffs' licenses are an important part of their gender identities or gender transitions. Plaintiffs' inability under the emergency rule to obtain a gender marker that matches their gender identity is causing them harm in the form of increased stress and anxiety. These harms are not compensable by money and thus are irreparable.

In sum, Plaintiffs have met their burden to show both a likelihood of success on the merits and irreparable harm. DFA is enjoined from enforcing the emergency rule. This injunction extends until DFA adopts a permanent rule concerning gender

markers. Unless and until it adopts a permanent rule, DFA must adhere to its pre-March 2024 policy of allowing applicants to self-select their gender marker, including gender marker X, without the need to present documentation.

Bond is waived. *See Weathersbee v. Wallace*, 14 Ark. App. 174, 177, 686 S.W.2d 447, 449 (1985).

SO ORDERED this _____ day of June, 2024.

_____
HON. PATRICIA JAMES

Case Title: BRANDYN GALLAGHER ET AL V AR DEPARTMENT OF FINANC

Case Number: 60CV-24-3420

Type: ORDER MOTION GRANTED

So Ordered



Honorable Patricia A James