IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
CIVIL DIVISION

PROTECT FAYETTEVILLE, f/k/a REPEAL 119; PAUL SAGAN; PETER TONNESSON; and PAUL PHANEUF — **PLAINTIFFS**

and

THE STATE OF ARKANSAS — **INTERVENOR**

vs. **Case No. 72CV-15-1510**

THE CITY OF FAYETTEVILLE, Washington County, Arkansas; LIONELD JORDAN, in his official capacity as Mayor of Fayetteville; ADELLA GRAY, SARAH MARSH, MARK KINION, MATTHEW PETTY, JUSTIN TENANT, MARTIN W. SCHOPPMEYER JR., JOHN LATOUR and ALAN LONG, in their official capacities as Aldermen of the Fayetteville City Council — **DEFENDANTS**

PFLAG OF NORTHWEST ARKANSAS; ANTHONY CLARK; NOAH MEEKS; and LIZ PETRAY — **INTERVENOR DEFENDANTS/ COUNTER-PLAINTIFFS**

BRIEF IN SUPPORT OF FAYETTEVILLE'S RESPONSE TO STATE'S MOTION (AND ANY MOTION OR CLAIM BY PLAINTIFFS) TO QUASH CITY'S SUBPOENAS

This brief will only address the issues raised by the Attorney General and/or Plaintiffs in their effort to quash the City's deposition subpoenas for Representative Bob Ballinger and Senator Bart Hester found in section C.1. Argument of its Brief.

The Plaintiffs and Arkansas Attorney General misinterpret the scope of the legislative privilege found in the *Arkansas Constitution* in *Article 5 § 15*:

> **"§ 15. Privileges of members.**
> The members of the General Assembly shall, in all cases except treason, felony, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective houses; and, in going to and returning from the same; and, for any speech or debate in either house, they shall not be questioned in any other place."

This provision is very similar to the *Article 1, § 6 of the United States Constitution*:

"(F)or any speech or debate in either House, (the Senators and Representatives) shall not be questioned in any other place."

The Attorney General begins her argument in her brief about how to interpret *Ark. Const. art. 5, § 15*'s legislative privilege by quoting *Robertson v. Daniels*, 2013 Ark App. 160 (2013), for the proposition that the constitution "grant(s) absolute immunity to members of the General Assembly for any speech or debate in either house." (p. 16) Legislative **immunity** is certainly not the issue for the Motion to Quash as neither legislator has been sued nor faces the possibility of liability for their sponsorship of Act 135 of 2015. That quotation is also pure *dicta* as the issue in that case involved only city board members, not state legislators. The court there found there is no such "absolute privilege for local legislative bodies . . . . " *Id.* at 5.

The Arkansas Supreme Court decision then quoted by the Attorney General, *Massongill v. County of Scott,* 337 Ark. 281 (1999) involved county quorum court members rather than state legislators and did not even refer to the constitutional provision at all. Both of these cases dealt with potential immunity from liability rather than privilege from having to testify. There do not appear to be any Arkansas cases that interpret the meaning and extent of the "speech or debate" clause for state legislators in regard to a privilege not to be questioned. Therefore, the validity and extent of a state legislator's potential privilege from having to testify about certain speeches or actions based upon *Article 5 § 15* of the *Arkansas Constitution* is a matter of first impression in Arkansas.

The Attorney General cites many federal cases and some cases from other states as persuasive authorities about how the Arkansas "speech and debate" constitutional provision

should be interpreted. Reference to these persuasive authorities is proper as long as their constitutional "speech and debate" provisions closely mirror our own. However, it cannot be disputed that it is the Arkansas Courts' duty and responsibility to interpret the *Arkansas Constitution*. Arkansas Courts need not rely upon or agree with out-of-state decisions of legislative privilege. When it comes to determining the proper extent and effect of evidentiary privileges in Arkansas, the proper place to start is the Arkansas Supreme Court adopted **Arkansas Rules of Evidence, Article IV Privileges**.

The general rule is that everyone must testify unless a specific rule, statute or the constitutional provision provides otherwise.

> **"Rule 501. Privileges recognized only as provided.**
> Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:
> (1) refuse to be a witness;
> (2) refuse to disclose any matter;
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing."

The **Arkansas Rules of Evidence** has a specific provision for privileges that a governmental official might claim.

> **"Rule 508. Secrets of state and other official information – Governmental privileges.**
> (a) If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.
> (b) No other governmental privilege is recognized except as created by the Constitution or statutes of this State.
> (c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action."

We have found no precedent that Arkansas legislators have a governmental privilege created under federal law that Arkansas Courts must recognize and apply in a case such as ours in which defendants are merely defending a city ordinance and not seeking affirmative relief against any legislator. Therefore, the governmental privilege of Rule 508 relies solely upon the *Arkansas Constitution* and its *Article 5 § 15* **Privileges of members**: "for any speech or debate in either house, they shall not be questioned in any other place." This phrase appears clear and unambiguous. If a legislator debates or makes a speech in the Senate or House chambers, that Legislator may assert his or her privilege not to be questioned about the speech or debate comments at any other place in the future. Unfortunately, the Attorney General argues in her brief that this legislative privilege should be interpreted in a vastly expanded manner to prevent citizens from questioning legislators and learning what their elected representatives have discussed "with persons outside the legislature – such as executive officers, partisans, political interest groups or constituents – to discuss issues that bear on potential legislation and participating in party caucuses . . . . " (page 21). This proffered interpretation of the Arkansas Constitution legislator privilege provision cannot be reconciled with fundamental constitutional interpretation rules repeatedly affirmed by our Arkansas Supreme Court.

"In construing our state constitution, we give words their plain, ordinary and common meaning." *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 89, 91 S.W. 3d 472, 506 (2002). The plain, ordinary and common meaning of "any speech or debate in either house" should be interpreted as just what it says. The privilege against later questioning is limited to legislators' speeches or debates presented during the legislative process within their chambers.

"The fundamental rule is that the words of the constitution should ordinarily be given their obvious and natural meaning." *Brewer v. Fergus*, 348 Ark. 577, 583, 79 S.W.3d 831, 832

(2002). This "fundamental rule" of construction should prevent the expansive proposed interpretation of "speech or debate in either house" provision proposed by the Attorney General. Her brief's proposed interpretation would basically ignore the limiting language "in either house" and extend the legislator's secrecy privilege so that it "shields legislators' meetings 'with persons outside the legislature – such as executive officers, partisans, political interest groups . . . . (to include) securing Government contracts, preparing so-called 'news letters' to constituents, news releases and speeches delivered outside the Congress' that are political and 'a means of developing continued support for future elections.' " (page 21) (including footnote 4).

The Attorney General's reliance upon *United States v. Brewster*, 408 U.S. 501 (1972), is misplaced and her footnote quote misleading. (page 21). Immediately before her long list of legislators' meetings and speeches supposedly shielded by legislative privilege in footnote 4 of page 21, the Supreme Court said this: "It is well known, of course, that Members of the Congress engage in many activities **other than the purely legislative activities protected by the Speech or Debate Clause**." Id. at 512. (emphasis added). Then immediately after the last word of the Attorney General's quote, the Supreme Court turns the argument of the Attorney General on its head.

> "Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. **But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause**. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things 'generally done in a

session of the House by one of its members in relation to the business before it'."

Id. at 512-513 (emphasis added).

It is also interesting to note that the United States Supreme Court **reversed** the dismissal of a criminal indictment for bribery against Senator Brewster which the District Court had granted based upon the Speech or Debate Clause. The Senator's arguments for a broader interpretation of the Speech or Debate Clause mirrors the Attorney General's and should likewise be rejected.

> "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process – the *due* functioning of the process. Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read." *Id.* at 515-516 (emphasis in original).

What a strange and dangerous interpretation of "speech or debate in either house" the Attorney General's suggestion would be. Our elected representative law makers could never be questioned by our citizens about meetings and political speeches given anywhere to partisan political interest groups, nor inquire about questionable actions in securing government contracts or attempts to develop future election support. The Attorney General's proposed interpretation would make elected officials virtually untouchable, unquestionable overlords who could never be called to account by Arkansas citizens even for speeches and actions far removed from a "speech or debate in either house." The Attorney General's interpretation should be rejected.

Such a proposed interpretation would also violate another fundamental principle in the construction of our Arkansas Constitution.

> "One of the fundamental principles or rules in the construction of a constitution is that effect must be given to every part and that, unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous, meaningless or inoperative." *Heathscott v. Raff*, 334 Ark 249, 256, 973, 803 (1998).

This "**Privileges of members**" provision expressly refers to "during their attendance at the sessions of their respective houses; . . . and, for any speech or debate in either house . . . . " *Arkansas Constitution Article 5 § 16*. The proffered interpretation by the Attorney General ignores these limiting conditions for a legislator's privileges. The Attorney General improperly tries to interpret the "**Privileges of members**" provision by treating as superfluous, meaningless or inoperative the language limiting their privilege to the express location for the privilege "in either house", and "during their attendance at the sessions."

Since the wording of the constitutional provision appears to be clear and unambiguous, the Court need not look to interpretations of similar provisions of the United States Constitution or other states' laws or constitutions. However, if the Court chooses to consider federal interpretations, it will discover that the scope of claimed privilege is not so broad as claimed by the Attorney General.

For example, the statement and testimony of a state senator about the purpose of a bill he sponsored was not only admitted into evidence, but played an important role for the United States Supreme Court's determination that such statute was unconstitutional.

"The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record – apparently without dissent – a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." *Wallace v. Jaffree*, 472 U.S. 38, 43 (1985).

"We must, therefor, conclude that the Alabama Legislature intended to change existing law . . . that it was motivated by the same purpose . . . that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described." *Id.* at 60.

In a concurrence, two justices indicated that a single legislator's statement is certainly relevant to a finding of the legislative purpose of a statute.

"I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose." *Id.* at 65.

It is therefore clear that while the United States Supreme Court might determine that a single legislator's statement made following the enactment of a statute challenged on constitutional grounds "is not necessarily sufficient to establish purpose," such statement is certainly relevant, material and admissible as good evidence of legislative purpose. Thus, the Attorney General's claim that the speech or debate clause would prevent the Court's consideration of statements of Representative Ballinger or Senator Hester is clearly wrong.

The United States Supreme Court has often held that "a law neutral on its face may still be unconstitutional if motivated by a discriminatory purpose." *Crawford v. Board of Education*, 458 U.S. 527, 544 (1982).

". . . (C)ourts refrain from reviewing the merits of their (legislators') decisions, absent a showing of arbitrariness or irrationality. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motiving factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 265-266 (1977).

The United States Supreme Court has informed us where this "circumstantial and direct evidence of intent . . . may be available."

"The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . .

"The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-268

Therefore, it is clear that the United States Supreme Court recognizes and even recommends reviewing "contemporary statements by members of the decisionmaking body" to determine "whether invidious discriminatory purpose was a motivating factor" to enact a challenged statute. The Supreme Court also recommends a review of "(t)he historical background of the decision" to enact statute. *Id.* The City and citizens of Fayetteville are merely

trying to fulfill their duty to investigate these recommended lines of legitimate inquiry into the enactment of Act 137 of 2015.

> "Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment. . . " *Washington v. Seattle School District No. 1*, 458 U.S. 457, 484-485 (1982).

Such inquiry must require the opportunity of the defendants to question the two legislative sponsors about their statements supporting their bill that could reveal the actual intent beyond the language inserted into Act 137 of 2015 trying to make it appear facially neutral. As in *Washington v. Seattle School District No. 1*, this issue is not whether the Arkansas Legislature has the authority to limit the City and citizens of Fayetteville from enacting some ordinances, but "whether the State has exercised that authority in a manner consistent with the *Equal Protection Clause*. . . . (T)he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.* at 476.

Fayetteville's gay, lesbian, bisexual and transgender citizens sought and were granted some limited civil rights protection against job termination, eviction and denial of publicly offered services when the Fayetteville citizens passed and enacted the Uniform Protection of Civil Rights Ordinance. Act 137 of 2015 was passed by the Legislature to remove those citizens' rights to petition their local government to enact such protective legislation and to invalidate already enacted protective ordinances. The common thread of all affected city and county civil rights ordinances is the protection of gay, lesbian, bisexual and transgender citizens.

"At the outset, it is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests." *Id.* at 477.

Barring every minority from seeking relief from their local government by the State legislature, which is openly hostile to LGBT equality and rights, places an unfair burden on minority interests.

"In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 486.

The United States Supreme Court continued to emphasize the need to protect minorities from being blocked from effectively participating in the electoral process to secure protection from discrimination.

"The Court found such a political structure impermissible, recognizing that if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be 'relegated, by state fiat, in a most basic way to second-class status'." *Crawford v. Board of Education*, 458 U.S. 527, 546 (1982).

Act 137 of 2015 has attempted to prevent lesbian, gay, bisexual and transgender citizens from obtaining rights or remedies against discrimination by foreclosing any chance of protection by local government. Although a single statement by either sponsor of Act 137 of 2015 "is not necessarily sufficient to establish purpose," the United States Supreme Court certainly found such legislative statement relevant, material, admissible and persuasive on the issue of the

legislature's true intent when enacting the statute that was then found unconstitutional by the Supreme Court. Only by allowing a deposition of the sponsors of Act 137 of 2015 by the City and citizens of Fayetteville who enacted the Uniform Protection of Civil Rights Ordinance can this court be informed of some of the most important evidence supporting the citizens' equal protection of the law defense of their ordinance.

HISTORY AND EXTENT OF FEDERAL SPEECH OR DEBATE CLAUSE

The historical purpose of the Speech and Debate clause in the United States Constitution "is a product of the English experience. Due to that heritage, our cases make it clear that the 'central role' of the clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile Judiciary'." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). In our case, the Executive is trying to prevent citizen and city defendants from questioning their elected representatives.

> "In reading the clause broadly we have said that legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 503.

The City and citizens of Fayetteville did not file this lawsuit. The City and citizens (not the legislators) are bearing "the burden of defending themselves" against the allegations and arguments of the intervening Plaintiff State of Arkansas. These two legislators need no protection nor defense as the City and citizens of Fayetteville have made no claims against them. The City has not sought damages nor even an injunction against Act 137 of 2015 in our Answer. To deny a subpoena and thus remove the possibility of uncovering vital evidence to prove an unequal protection of the law by the State against the citizens who enacted the civil rights

ordinance would be to change the Speech or Debate Clause from a legitimate shield of defense into a brutal sword to destroy our defense of equal protection and our citizens' current civil rights protections.

As pointed out in the City's Response, "the protection of the Speech or Debate Clause is personal. It extends to Members and their counsel acting in a legislative capacity; it does not preclude judicial review of their decisions in an appropriate case, whether they take the form of legislation or a subpoena." *Eastland* at 515. Because the privilege afforded to legislators "for any speech or debate in either house" is "personal", it must be asserted personally by the legislator and may not be claimed for them by another, even the Arkansas Attorney General. The Attorney General may not prohibit statements that a legislator desires to make. Unless the sponsors of Act 137 of 2015 personally and affirmatively claim the "privileges of members," the whole argument of the Attorney General is without any basis.

The United States Supreme Court has cautioned against extending the United States Constitution Speech or Debate Clause beyond the legislative process in either house.

> "But the Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel v. United States*, 408 U.S. 606, 624-625 (1972).
>
> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings

with respect to the consideration and passage or rejection or proposed legislation . . . " *Id.*

The United States Supreme Court decision in *Gravel v. United States* appears to be a much more realistic and persuasive authority than some of the cases cited by the Attorney General which appear to suggest legislators should be privileged against questioning about statements and speeches far from official proceedings. Most, if not all, of these cases are from other states whose legislative privilege statutes might be very different from our Constitutional provision.

Contrary to the Attorney General's proposed interpretation, "the constitutional protection for acts within the legislative sphere does not extend to "all conduct *relating* to the legislative process, but only to those activities that are 'clearly a part of the legislative process – the *due* functions of the process'." *Brown & Williamson Tobacco Corp. v. Williams* 62 F.3d 408, 415 (D.C. Court of Appeals 1995) (citations omitted; emphasis in original).

> "As with criminal prosecutions, however, the privilege only bars civil suits when the action complained of falls within the legislative sphere. For example, although a congressman cannot be sued for defamatory statements made on the House floor, he has no claim to immunity for a libel action based on his subsequent republication of those statements outside Congress; **those later expressions are no part of the 'legislative process.'**'" *Id.* at 416 (emphasis added).

Therefore, even under the fairly broad interpretation given by the Federal Courts for the United States Constitution Speech or Debate Clause, statements by a legislator outside the house chamber or committee rooms during their sessions are not protected by legislative privilege.

CONCLUSION

The subpoenas for the depositional testimony of Representative Bob Ballinger and Senator Bart Hester should be enforced and not be quashed. If the elected representatives do not personally and affirmatively object to answering a question by asserting legislative privilege, all questions complying with normal discovery parameters should be allowed and should be answered.

If either elected representative attempts to assert a legislative privilege, such privilege should be granted, if at all, only for statements or debate within the House or Senate Chamber and House or Senate Committee Rooms during active sessions or committee meetings.

Since the Court can later decide to strike any question and answer that could offend the Speech or Debate Clause, questions should be answered unless clearly in violation of the Speech or Debate Clause as described in the preceding paragraph.

The City of Fayetteville and all named defendants request that this Court order Senator Bart Hester and Representative Bob Ballinger to attend and testify at their depositions in Fayetteville, Arkansas at a convenient and agreed to time promptly enough to allow transcripts of such depositions to be used for the City's Summary Judgment Motion.

RULE 508 GOVERNMENTAL PRIVILEGES REQUIRES PROTECTIONS OF DEFENDANTS IF PRIVILEGE GRANTED

Finally, Defendants City and citizens of Fayetteville refer again to the Arkansas Rule of Evidences Rule 508 **Government privileges'** final section. Because the City of Fayetteville did not bring their litigation nor seeks any injunction or other relief against plaintiffs, but is merely defending its citizen passed ordinance from the State's attack, a claim of government privilege by the State and sponsors of Act 137 of 2015, if granted, would deprive the Defendants of

material evidence in support of its defense of the Uniform Civil Rights Protection Ordinance. In that case, "the court shall make any further orders the interest of justice require, including . . . finding upon an issue as to which the evidence is relevant, or dismissing the action." Rule 508(c).

If either Senator Hester or Representative Ballinger refuse to be deposed or refuse to answer any question concerning their conception, planning, drafting, supporting, or passing of Act 137 of 2015, such refusal should conclusively presume that the elected representative is withholding important material evidence that would have supported the City of Fayetteville and all defendants in establishment of their equal protection of the laws defense (establishing that such law was intended to or would further an invidious prejudicial purpose against lesbian, gay or transgender persons) such that Plaintiffs' complaint along with the Attorney General's intervention should be dismissed.

Respectfully submitted,

City of Fayetteville, Arkansas
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CERTIFICATE OF SERVICE

I, Kit Williams, certify that I have emailed the above Response to State of Arkansas's Motion to Quash Subpoenas and for Protective Order by Defendant City of Fayetteville, Mayor Lioneld Jordan, Adella Gray, Sarah Marsh, Mark Kinion, Matthew Petty, Justin Tenant, Martin W. Schoppmeyer Jr., John Latour and Alan Long on this the 24th day of August, 2017, to:

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