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/ COUNTERCLAIMANTS**

INTERVENOR-DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE STATE'S MOTION TO QUASH AND FOR PROTECTIVE ORDER

Intervenor Defendants ("Intervenors") have requested discoverable documents and testimony relating to the central issue in this case—the constitutionality of Act 137—by way of their First Requests for Production propounded to the State of Arkansas (the "State") and subpoenas served on Bart Hester and Bob Ballinger. Not aware of how the State stores its documents, where responsive documents may be located, or the burdens that may be associated with producing materials Intervenors requested, Intervenors offered to work with the State to address these issues to minimize the burden of discovery for all parties. As Intervenors repeatedly told the State, Intervenors wished to reduce discovery burdens consistent with obtaining materials directly relevant to issues this Court will have to decide. In response to this overture, the State

was unwilling to negotiate with Intervenors to minimize the burden claimed by the State, and instead filed a motion seeking to exempt itself altogether from complying with Intervenors' requests for documents. In sum, the State is trying to construct its own discovery dragon so it can then attempt to slay it. The State's description of what Intervenors seek bears little relationship to the discovery Intervenors actually sought.

What began as a garden variety discovery request has transformed, through the State's unwillingness to negotiate and resolve discovery issues, into an unnecessary dispute imposing upon the time of this Court. Despite Intervenors' continued effort to resolve this dispute so that this case can be decided on its merits, the State has stonewalled and by its motion attempts to deny them evidence on the key issue in this case, the purpose and intent in enactment of Act 137. The Court should deny this motion, and order the State to: (1) engage in a reasonable search for relevant materials (Intervenors remain willing to discuss this issue in good faith), (2) produce responsive documents that are located through such a search, and (3) then make Messrs. Hester and Ballinger available for deposition, so that this case can proceed to a decision on the merits.

BACKGROUND

On June 7, 2017, Intervenors served the First Requests for Production upon the State via email, requesting materials in the State's possession related to the adoption of Act 137 and the City of Fayetteville's Ordinance at issue in this case. (Ex. A.) Intervenors also served subpoenas on Bart Hester, who originally filed and sponsored Act 137 in the Senate, and Bob Ballinger, who sponsored Act 137 in the House, requesting testimony and documents related to Act 137 and the Fayetteville ordinances. (Ex. B.)[1] These requests all seek evidence relevant to

[1] On June 22, 2017, the State informed Intervenors that it was authorized to accept service on behalf of Hester and Ballinger. (Ex. C.)

the question of whether Act 137 was adopted for an unconstitutional and discriminatory purpose, as suggested by the public comments of the legislators who sponsored and supported Act 137.

At Intervenors' request, on June 21, counsel for Intervenors and the State had a phone call to discuss how best to identify responsive documents and limit the burden of discovery. The State raised concerns regarding what it contended was the overbreadth of Intervenors' requests and the privileged nature of some of the documents requested.

In response to the State's claim that requested documents may be privileged, Intervenors stated that they did not believe privilege applied so broadly to the requests. Nonetheless, Intervenors invited the State to exchange authority both parties had identified on the issue, and then engage in further discussions to attempt to narrow the dispute about whether a privilege applied, and if so, to what. The State rejected Intervenors' offer, refused to provide any authority for their position, and stated it would take the issue to this Court without further discussion.

In response to the State's concern that the requests were overbroad and would require the State to search the files of *all* of its employees—though the state indicated its Department of Information Systems could run a search for all state employee e-mails, and possibly other records—Intervenors repeatedly clarified that the State did not need to search records for all agencies and employees. Intervenors invited counsel for the State to propose those state entities or employees that were most likely to possess responsive documents. Intervenors further informed the State that they would waive any objections to the search's breadth if the State represented that it "had undertaken good-faith efforts to identify such agencies." (Ex. D, June 23, 2017 Letter.) Although the State is best-positioned to know what State agencies or employees are likely to have responsive documents and could have alleviated the burden of discovery by sharing this

information with Intervenors, the State refused to compile or agree to a suggested list of entities where responsive documents were likely to exist. Instead of proposing a path forward, the State characterized Intervenors' good faith attempt to negotiate the scope of discovery without the need for Court intervention as a demand that the State "re-write the requests for Intervenor Defendants." (Ex. E, June 26, 2017 Letter.) With all respect, that is precisely what Intervenors believe is the obligation of counsel: discuss changes and limitations to propounded discovery in an attempt to reach resolution. While this can be termed "re-writing" the discovery if the State prefers, the fact remains that the State adamantly refused to discuss reaching a resolution of the issues it now brings to the Court.

After the State refused to offer a list of entities likely to possess responsive materials, Intervenors sent a follow-up letter to the State on June 23, which offered to voluntarily restrict its discovery requests to a list of State entities Intervenors believed "may possess responsive documents." (Ex. D at 1–2.) In its June 26 response, the State plainly stated its refusal to negotiate on these issues before the response deadline for Intervenors' request and stated it would seek relief from this Court. (Ex. E at 2.) The State also promised that it would "continue to conduct a diligent search for any non-privileged, responsive documents that may exist and produce them by the applicable deadline." *Id.* On July 5, 2017, Intervenors reiterated that they "would be satisfied (and would not challenge) any effort the State would make to search for responsive documents where you believe they are located." (Ex. F.)

On July 6, the State sent Intervenors an e-mail in which it stated that "[t]he State of Arkansas is making good-faith efforts to identify and narrow the universe of documents that may be responsive to the outstanding Requests for Production and document subpoenas propounded by the Intervenor Defendants in this case. We need additional time to complete that work." (Ex. G.)

The State requested an extension from July 10, 2017 to July 24, 2017. Defendants and Intervenors accepted the State's request for an extension, fully expecting production on the agreed upon adjourned date.

On July 24, 2017, the State produced no documents. Instead, the State filed a motion to quash and for a protective order in which it sought to avoid providing *any* discovery in this case.

ARGUMENT

The State's brief dramatically expands, creates, and asserts evidentiary privileges never before recognized under Arkansas law in an attempt to avoid producing key and undeniably relevant evidence. While the State's arguments are addressed in turn below, the overarching issues raised by the State's motion are not questions of privilege or the proper formulation of discovery requests, but whether (i) the State has an obligation to engage in good faith in the discovery process at all, and (ii) whether this Court should resolve the constitutionality of a statute with the benefit of discovery on the key question of legislative intent. The answer to both issues is clearly yes, and, respectfully, the Court should order that the State produce relevant information.

I. THE REQUESTED DISCOVERY IS HIGHLY RELEVANT TO THIS CASE AND IS REASONABLY CALCULATED TO IDENTIFY ADMISSIBLE EVIDENCE

A. Intervenors' Requests Seek Relevant Evidence on the Key Issue in this Case: The Legislature's Motivation in the Adoption of Act 137

Central to the State's motion is its claim that the evidence requested is not relevant to this case. In support of this position, the State argues that the motivations behind Act 137's adoption are irrelevant so long as the statute appears to be neutral on its face. (State's Br. 10.) This is not the law.

The Supreme Court's equal protection precedents prohibit the government from passing laws or otherwise taking action *motivated* by "a bare . . . desire to harm a politically

unpopular group" such as the LGBT community. *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973); *accord Romer* v. *Evans*, 517 U.S. 620, 633 (1996); *United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013). Even a facially neutral statute is unconstitutional when there is "proof that a discriminatory purpose [was] a motivating factor" in its adoption. *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Accordingly, this Court should have the benefit of discovery relevant to discriminatory purpose and motivation in determining the constitutionality of Act 137.

"In an Equal Protection Clause case, 'proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence.'" *Bethune-Hill* v. *Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) (quoting *Baldus* v. *Brennan*, No. 11-CV-562, 2011 WL 6122542, at *1 (E.D. Wisc. Dec. 8, 2011)). Indeed, materials and testimony from legislators are "essential . . . evidence that lies at the heart of" constitutional litigation concerning the intent with which state action was taken. *Benisek* v. *Lamone*, No. 13-CV-3233, 2017 WL 412490, at *2 (D. Md. Jan. 31, 2017) (granting plaintiffs' motion to compel deposition testimony and document production from non-party state legislators). This evidence is unquestionably relevant even if evidence of legislators' individual motivations "may be neither necessary nor sufficient for Plaintiffs to prevail." *Bethune-Hill*, 114 F. Supp. 3d at 339–40.

Thus, the documents and testimony sought by Intervenors are extremely probative on whether Act 137 was impermissibly motivated by animus. The Supreme Court has held that reports, documents, and other contemporary records reflecting legislative history—precisely the materials Intervenors have requested—"may be highly relevant" in determining whether a piece of legislation was adopted with an "invidious discriminatory purpose." *Arlington Heights*, 429

U.S. at 268. Likewise, the testimony of legislators as to "the purpose of the official action" at issue may be relevant, if not shielded by any applicable privilege. *Id.*

The State notes that "[a]bsent discriminatory effect, judicial inquiry into legislative motivation is unnecessary." (State's Br. 11 (quoting *Crawford* v. *Bd. of Educ.*, 458 U.S 527, 544 n.31 (1982))). But Act 137 has a clear discriminatory effect on the LGBT community, which will lose existing nondiscrimination protections if Act 137 is found constitutional. Plaintiffs have not sought to enjoin any local nondiscrimination ordinances under Act 137 other than those providing protections to the LGBT community. By still permitting local antidiscrimination protections *except* those Fayetteville provides to the LGBT community, the Act impermissibly invites discrimination against some of Arkansas's most historically vulnerable residents. *See Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

The State also contends that the legislative branch may escape constitutional scrutiny merely by writing a facially neutral "statement of legislative purpose," and that other materials and material facts are irrelevant in determining the legislature's purpose in adopting the statute. (State's Br. 14 (quoting *Wisc. Educ. Ass'n Council* v. *Walker*, 705 F.3d 640, 652 n.10 (7th Cir. 2013)).)[2] But obviously a statute adopted for a discriminatory purpose cannot avoid judicial scrutiny by adding a pretextual statement of purpose, and it is unlikely that any act would be accompanied by a statement of purpose that admitted to discriminatory intent. *See, e.g.*, *Asiana Airlines* v. *FAA*, 134 F.3d 393, 400 (D.C. Cir. 1998) ("Of course, a facially neutral statute may be

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[2] The State dramatically misreads *Walker*, which "simply h[e]ld that one statement of a single legislator" was not alone enough to infer discriminatory intent onto the entire legislature. 705 F.3d at 652 & n.10. The materials expressly mentioned by *Walker* as examples of potential evidence of discriminatory purpose—such as legislative reports and documents—are squarely included within Intervenors' document requests. *Id.*

no more than a pretext to mask discriminatory intent and effects . . . ."); *Croft* v. *Governor of Tex.*, 530 F. Supp. 2d 825, 831 (N.D. Tex. 2008) (noting findings of discriminatory intent despite a pretextual neutral purpose). Holding otherwise would allow legislatures to avoid the Constitution's guarantee of equal protection merely by inserting a pretextual preamble.

The State also argues that the requested discovery, which is clearly relevant to this case, should not be provided because Intervenors' counsel believes publicly available information also shows the legislature's discriminatory intent. (State's Br. 27.) Unless the State is conceding the issue of animus, this argument must be rejected, as the Arkansas Rules of Civil Procedure allow discovery into "any matter, not privileged, which is relevant to the issues in the pending actions." Ark. R. Civ. P. 26(b)(1). Intervenors' belief in the strength of its case based on existing public materials cannot and does not diminish its right to acquire further discoverable evidence that will benefit the Court's analysis.

B. The Discovery Request Is Clear, Straight-Forward, and Reasonably Limited in Scope

As discussed above, and as is evident from a review of the request and subpoenas themselves, (Ex. A), Intervenors' requests are designed to capture key evidence at issue in this case. The State argues that the requests are overly broad and would create an immeasurable burden for counsel and other state employees. In support of its argument, the State claims that Intervenors seek to have the State conduct a limitless search from "74,000 separate sources," requiring a review of "nearly every document" it its possession. (State's Br. 9, 15.) But as the State surely must acknowledge, Intervenors have repeatedly made clear this is not what they seek, and the State has refused to accept Intervenors' invitation to negotiate the scope of these requests or to agree to proposed narrowing of the requests in good faith.

The State claims that Intervenors "ha[ve] made clear [they are] unwilling to narrow or revise [their] requests." (State's Br. 8.) This could not be further from the truth. As evidenced by Intervenors' call with the State and subsequent correspondence, Intervenors have been willing to discuss the scope of discovery with the State using methods commonly employed by parties in litigation who are often able to resolve discovery disagreements without recourse to the courts. The State has made clear that it is unwilling to participate.

As with all civil litigants from whom discovery is requested, the State has a better understanding of where at least most of its responsive documents are likely to be located than the party propounding the requests. Negotiation of the scope of discovery between the parties is standard fare in civil litigation. Parties responding to discovery requests are required to conduct a good-faith search for the requested materials wherever they may be located, and a key part of this process involves the negotiation of search methods, terms, and custodians with the requesting party. *See e.g.*, *Prism Techs., LLC* v. *U.S. Cellular Corp.*, No. 12-CV-125, 2013 WL 6712665, at *3 (D. Neb. Dec. 18, 2013) (ordering parties to "meet in good faith in order to 'identify the proper custodians, search terms, and proper time frame'" for responding to document requests); *Venturedyne, Ltd.* v. *Carbonyx, Inc.*, No. 14-CV-351, 2017 WL 2590737, at *1–2 (N.D. Ind. June 15, 2017) (noting that, before seeking relief from the Court, the parties "began negotiating a list of search terms that [defendant] could use to search through its electronically-stored information to produce documents responsive to the revised requests for production").

In another example of the State manufacturing burdens and complications that do not exist, the State objects to specific requests as vague and confusing, such as Intervenors' request for documents "concerning any impact, whether realized or not" that the Fayetteville ordinances "had or might have on the City or residents of Fayetteville." (Ex. A at 4.) The State claims that it

cannot respond to this request because it does not know what "realized or not" means. (State's Br. 9.) But the State never asked Intervenors to clarify. If asked, Intervenors would have clarified that they intended the request to encompass impacts that actually occurred as well as impacts that a state actor thought might occur if Fayetteville's Ordinance remained in place.

Intervenors' requests seek relevant evidence and provide instructions to assist the State in identifying responsive materials. As the written record establishes, Intervenors were fully willing to assist the State in further narrowing or clarifying requests in good faith. Instead of conducting a reasonable search of sources likely to contain relevant material that could have been completed by now, the State has decided to simply not participate in the discovery process to avoid producing key evidence that would prove Intervenors' case and further support the conclusion that Act 137 was adopted with an unlawful discriminatory purpose and impact.

II. NEITHER LEGISLATIVE NOR EXECUTIVE PRIVILEGE BARS INTERVENORS' DISCOVERY REQUESTS

In its brief, the State argues that expansive legislative and executive privileges shield it from providing any discovery, arguing that compliance with the discovery requests would singlehandedly "alter Arkansas's carefully crafted system of separation of power." (State's Br. 2–3.) But far from a broad power to refuse good-faith participation in the discovery process, "the legislative privilege for state lawmakers is, at best, one which is qualified." *Jefferson Cmty. Health Care Ctrs., Inc.* v. *Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (quoting *Perez* v. *Perry*, No. 11-CV-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014)). And the executive privilege claimed by the State simply does not exist: the Arkansas Rules of Evidence foreclose the creation of such a broad common law privilege, and any such privilege would still be inapplicable to Intervenors' discovery requests. In short, the State's privilege arguments are meritless, and the Court should deny its motion.

A. Legislative Privilege Is Inapplicable Here and Is Outweighed by the Importance of Intervenors' Requested Discovery

The Arkansas speech or debate clause on which the State relies provides a defense to *civil liability* to state legislators for legislative acts, but it has never been held to be an absolute bar on discovery from state legislators. *See Massongill* v. *County of Scott*, 337 Ark. 281, 285, 991 S.W.2d 105, 108 (1999) ("Legislative immunity is [the] long-recognized principle in American law that legislators are absolutely immune *from personal liability* for their official and legislative activities." (emphasis added)); *see also Tenney* v. *Brandhove*, 341 U.S. 367, 375 (1951) (stating that the speech and debate provisions adopted by Arkansas and 40 of its sister states "preserve the principle that the legislature must be free to speak and act without fear of *criminal and civil liability*" (emphasis added)). This Court should decline the State's invitation to expand that immunity from personal liability into a shield from all reasonable discovery, especially in a case where the legislature's purpose is the central issue in the litigation.

Due to the lack of any Arkansas authority barring discovery from legislators, the State relies almost entirely on authority from other courts for the proposition that legislative privilege should bar all discovery in this case. But Arkansas has a more liberal discovery regime than many other states, wherein "[n]o other governmental privilege is recognized except as created by the Constitution or statutes of this State." Ark. R. Evid. 508(b). The lack of any clear Arkansas state authority shielding legislative materials from discovery should therefore be the end of this inquiry.

But even if this Court were to consider the parameters of legislative privilege as established by other courts that have confronted this question, the scope of any privilege for state legislators should be qualified and limited only to communications revealing the deliberative process. And even for the limited universe of documents that would fit within this qualified

privilege, disclosure should still be required here because the public interest demands access to evidence of the legislature's discriminatory intent.

Turning first to the scope of the privilege, the State asks this Court to find that Arkansas's legislative immunity provides a blanket exemption from participating in discovery whenever a document or deposition request could potentially capture anything related to the legislature. (State's Br. 16–28.) But courts have "rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege." *Comm. for a Fair & Balanced Map* v. *Ill. State Bd. of Elections*, No. 11-CV-5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) (quoting *Manzi* v. *DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997)) (collecting cases). Instead, "the only evidentiary legislative privilege regarding the production of documents available to state legislators (and other local government officials) is a very narrow and qualified one." *Doe* v. *Nebraska*, 788 F. Supp. 2d 975, 984 (D. Neb. 2011) (collecting cases); *accord, e.g.*, *In re Grand Jury*, 821 F.2d 946, 958 (3d Cir. 1987). This is a "narrowly tailored privilege for confidential deliberative communications," *In re Grand Jury*, 821 F.2d at 958, which applies "only to 'communications involving opinions, recommendations or advice about legislative decisions,'" *Doe*, 788 F. Supp. 2d at 984 (quoting *In re Grand Jury*, 821 F.2d at 959).

Insofar as any discoverable materials could be construed as falling within this limited privilege, the State is also wrong about the operation of the privilege. Far from the near-limitless reading afforded in its brief, the legislative privilege "is, at best, one which is qualified." *Jefferson Cmty.*, 849 F.3d at 624 (quoting *Perez*, 2014 WL 106927, at *2); *accord, e.g.*, *Doe*, 788 F. Supp. 2d at 984. Indeed, this privilege—when it applies—is "strictly construed and accepted only to the very limited extent that" the public benefit from excluding the evidence "transcend[s] the normally predominant principle of utilizing all rational means for ascertaining the truth."

Jefferson Cmty., 849 F.3d at 624 (quoting *Perez*, 2014 WL 106927, at *1); *accord, e.g.*, *In re Grand Jury*, 821 F.2d at 957 (citing *Trammell* v. *United States*, 445 U.S. 40, 50 (1980)); *Rodriguez* v. *Pataki*, 280 F. Supp. 2d 89, 94 (S.D.N.Y. 2003).

In making this determination, courts typically balance several factors: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Doe*, 788 F. Supp. 2d at 985 (quoting *Qamhiyah* v. *Iowa State Univ. of Sci. & Tech.*, 245 F.R.D. 393, 396 (S.D. Iowa 2007)); *accord, e.g.*, *Rodriguez*, 280 F. Supp. 2d at 101. Some courts also consider "the 'seriousness' of the litigation and the issues involved." *Bethune-Hill*, 114 F. Supp. 3d at 338 (quoting *Page* v. *Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014)); *accord, e.g.*, *Benisek*, 2017 WL 412490, at *2.

Each of these factors weighs heavily in Intervenors' favor. As discussed *supra Section I*, this evidence is highly relevant to demonstrating that Act 137 was adopted with an unconstitutional and discriminatory purpose. Although some public evidence of legislative intent exists, the fact that the public record suggests an unconstitutional action cannot be converted into a reason to deny access to relevant evidence of legislative intent that could further support Intervenors' case. *See Bethune-Hill*, 114 F. Supp. 3d at 341 ("[T]he availability of alternate evidence will only supplement—not supplant—the evidence sought by the Plaintiffs. Plaintiffs need not 'confine their proof' [of discriminatory intent] to circumstantial evidence." (quoting *Page*, 15 F. Supp. 3d at 667)). The State has taken an active role in the case by voluntarily joining this litigation as a party to defend the constitutionality of Act 137 and seeking an injunction against the enforcement of the Fayetteville Ordinance. *See Bd. of Supervisors* v. *Davenport & Co.*, 742

S.E.2d 59, 63 (Va. 2013) ("The action of the Board in filing its complaint, which initiated litigation on matters surrounding its legislative actions, also supports a waiver of legislative immunity."). Any concern that disclosure would "hinder frank and independent discussion" is minimized here where legislators themselves do not face personal liability and the privilege would "stand[] as a barrier to the vindication of important federal interests and insulate[] against effective redress of public rights." *Bethune-Hill*, 114 F. Supp. 3d at 334. And finally, the issues at stake in this litigation—namely, Intervenors' right to equal protection under the law—are serious constitutional concerns that decidedly favor disclosure of the materials the State is attempting to withhold. *See United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (finding that state legislative privileges must yield "where important federal interests are at stake").

In sum, the public need for the evidence requested outweighs any interest of the legislature. Many courts have permitted discovery of legislative materials and communications when the constitutionality of a legislative action is at issue. *E.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 336 (collecting cases); *Doe*, 788 F. Supp. 2d at 981 (citing *S.D. Farm Bureau, Inc.* v. *Hazeltine*, 340 F.3d 583, 594–96 (8th Cir. 2003)); *Lilly Inv., LLC* v. *City of Rochester*, No. 14-CV-10712, 2015 WL 753491, at *10 (E.D. Mich. Feb. 23, 2015) (permitting discovery from legislators where plaintiffs sought to "obtain testimony that could reveal evidence relevant to a question of animus, which if elicited would be proof of an essential element of their equal protection claim"); *League of Women Voters of Fla.* v. *Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013).

The State omitted any reference to one key case on point from the United States District Court for the Eastern District of Arkansas: *McLean* v. *Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982). At issue in *McLean* was the constitutionality of a law passed by the Arkansas General Assembly requiring the teaching of creation science and whether the intent

and primary effect of the statute was advancement of particular religious beliefs. *Id.* at 1256–57. Evidence in the case included information about the genesis of the idea for a state law, the actions and inactions of the sponsoring state Senator, drafts and input regarding the legislation (including from constituents), information about the process itself, and testimony of the sponsor (who was not a party to the action). *Id.* at 1262–63, 1263 n.14. This evidence was discovered, introduced, and considered by the Court over the objections of the State as to relevance and legislative privilege. (Ex. H, Transcript of Senator Holsted's Trial Testimony, at 380–81, 393, 401–02.) Senator Holsted was required to give a deposition and to provide documents he generated and received related to the bill. As Judge Overton noted, courts are not bound by legislative statements of purpose or legislative disclaimers. *McLean*, 529 F. Supp. at 1263–64. Instead, "[i]n determining the legislative purpose of a statute, courts may consider evidence of the historical context of the Act, the specific sequence of events leading up to the passage of the Act, departures from normal procedural sequences, substantive departures from the normal, and contemporaneous statements of the legislative sponsor." *Id.* (citations omitted).

Public information confirms that Senator Hester and Representative Ballinger's activities went way beyond those of Senator Holsted's, and were clearly outside the scope of legislative activities. While discovery may reveal additional activities, Hester and Ballinger at least personally attended local public meetings and events and advocated alongside local citizens—including by making statements before the city council, the press, and the public—concerning the specific Fayetteville ordinance at issue in this case and its predecessor ordinance passed by the Fayetteville city council, as well as other local ordinances providing protections against discrimination based on sexual orientation and gender identity. Both similarly made statements surrounding the Act itself. Like Senator Holsted, Senator Hester and Representative

Ballinger should be required to produce documents and provide testimony relevant to the constitutional question in this case.

Here, "given the serious nature of the issues in this case and the government's role in crafting the challenged [legislation], . . . legislative privilege simply does not apply to the documents and other items" sought. *Baldus*, 2011 WL 6122542, at *2. This has been the law applicable to the Arkansas General Assembly and the State of Arkansas for many years, as illustrated by *McLean*. The Court should decline the State's invitation to broaden legislative privilege beyond the limits that have been recognized by other courts and certainly should not extend such privileges to acts that were clearly outside the scope of the witnesses' roles as state legislators.

Finally, any legislative privilege was waived as to any materials shared with or produced by people outside of a legislator's staff. *Fair & Balanced Map*, 2011 WL 4837508, at *10–11; *Almonte* v. *City of Long Beach*, No. 04-CV-4192, 2005 WL 1796118, at *2–4 (E.D.N.Y. July 27, 2005). This includes materials shared between the executive and legislative branches, *Almonte*, 2005 WL 1796118, at *2–4, as well as any communications with Protect Fayetteville and the individual plaintiffs or others as requested under Request 7, since the State cannot invoke legislative privilege against Intervenors as to information it has freely communicated with other non-legislators, *Fair & Balanced Map*, 2011 WL 4837508, at *10. Thus, even if some form of legislative privilege did apply (which it does not), the State has waived the privilege as to much of what it refuses to disclose, as have the sponsors of the Act. As further discussed below, the appropriate response in such a case would have been to prepare a privilege log only including materials actually covered by the privilege, not to patently refuse to participate in discovery.

B. Arkansas Law Does Not Recognize an Executive Privilege, Which in Any Case Would Not Apply to Intervenors' Discovery Request

1. The Arkansas Rules of Evidence Prohibit Judicial Recognition of an Executive Privilege

In claiming a right to exclude executive branch materials from discovery, the State asks this Court to create two new common law privileges under Arkansas law: a deliberative process privilege that covers any materials concerning the development of government policies, (State's Br. 31–33), and an executive communication privilege for direct communications of the governor with her closest aides that concern executive decision-making. (State's Br. 29–31.) The Court should decline this invitation, as the Arkansas Rule of Evidence prohibit judicial creation of new evidentiary privileges. Ark. R. Evid. 501, 508(b).

The State acknowledges there "does not appear to be Arkansas authority directly on point" to its claim of executive communications privilege, and concedes that the deliberative process privilege it seeks to claim would be a creation of the "common law." (State's Br. 29–30.) As the State is aware, the only privileges recognized in Arkansas are those expressly created by the constitution, state statute, or other court rules. *See Johnson* v. *Kelley*, No. CV2015002921, 2015 WL 11623018, at *10 (Ark. Cir. Ct. Dec. 3, 2015); *see also* Ark. R. Evid. 501 (only permitting privileges that are "provided by constitution or statute or by [court rules]"); Ark. R. Evid. 508(b) ("No other governmental privilege is recognized except as created by the Constitution or statutes of this State.")

Facing an almost identical question to the one at bar here, the Supreme Court of New Mexico found that a provision analogous to Arkansas Rules 501 and 508(b) prohibited the recognition of a deliberative process privilege. *Republican Party of N.M.* v. *N.M. Taxation & Revenue Dep't*, 283 P.3d 853, 867 (N.M. 2012). Because Arkansas's evidentiary rules similarly prohibit the recognition of common-law privileges, the Court should hold "that no deliberative

process privilege exists under [Arkansas] law." *Id.* at 868. This view fits squarely within the framework of the Arkansas Rules of Evidence, which demonstrate a strong aversion toward judicially created privileges in favor of those expressly adopted by the legislature. Ark. R. Evid. 501, 508(b).

2. Even If There Were a State Executive Privilege, It Would Not Apply to the Materials Requested by Intervenors

As discussed above, Arkansas law does not recognize any form of executive privilege, and the Court should uphold the Arkansas Rules of Evidence by declining to invent such a privilege. But even if such a privilege were created, it would not apply to the materials requested by Intervenors.

The executive communications privilege is extremely limited. In states that have recognized such a privilege, courts have held that the privilege—similar to the analogous presidential privilege—only applies to materials that meet three limitations: (1) they must be communications, (2) the communications must be exclusively between the governor and her closest advisors, and (3) they must be "relate[d] to the Governor's constitutionally-mandated duties." *Republican Party*, 283 P.3d at 868–70. On this last point, state and federal case law is clear that "the [executive communications] privilege is 'limited to materials connected to [the chief executive's] decisionmaking, as opposed to other executive branch decisionmaking,' and 'should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the [chief executive].'" *Republican Party*, 283 P.3d at 868–69 (last two alterations in original) (citation omitted) (quoting *In re Sealed Case*, 121 F.3d 728, 745, 752 (D.C. Cir. 1997)).

Even if executive privilege were applicable, it would not bar Intervenors' discovery request. Executive privilege—whether based on executive communications or deliberative

process—is both limited and qualified, and that the privilege may only be applied when the public benefit from nondisclosure outweighs the need for the evidence in question. *E.g.*, *Witherspoon* v. *Courtney*, No. 92-CV-665, 1992 WL 357496, at *2 (W.D. Mo. Nov. 12, 1992); *State ex rel. Dann* v. *Taft*, 2006-Ohio-1825, at ¶ 59, 848 N.E.2d 472, 484–85; *Killington, Ltd.* v. *Lash*, 572 A.2d 1368, 1374 (Vt. 1990); *cf. Babets* v. *Sec'y of the Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1264 (Mass. 1988) (refusing to recognize an executive privilege and noting that "existing privileges [must be] strictly construed"). Because the materials sought concern the constitutionality of state law, the public interest weighs in favor of disclosure.

C. The State's Remaining Privilege Arguments Are Meritless, and the Appropriate Method to Assert Privilege Is Through a Privilege Log and, if Necessary, In Camera Review

In addition to its erroneous claims of legislative and executive privilege, the State also argues that it need not respond to Intervenors' document request if even some privileged documents could be covered by the text of the request. (State's Br. 34 (arguing that "a protective order is warranted barring [Intervenors'] requests" if its requests for production could "encompass [privileged] materials").) This view—and the legislative and executive privilege arguments that proceeded it—attempts to turn the normal procedure for discovery on its head. Instead of making a good-faith effort to identify responsive documents, review them for privilege, and then prepare a log identifying any withheld documents and allowing for individualized discussion and review, the State claims that because some documents in its possession may be privileged, it need not engage in discovery at all.

The State's view would prevent discovery in virtually all cases and in all contexts, and is yet another example of the State's seeking to avoid the realities of the discovery process. Consequently, Intervenors respectfully ask that the Court deny the State's motion, order it to conduct a reasonable search for responsive materials, and order it to submit those documents along

with a log of materials it seeks to protect under any claimed applicable privilege. This is established discovery procedure. For example, in *Doe*, the court ordered the state to provide opposing counsel with a privilege log that would allow individualized challenges to privilege claims for every document it claimed was covered by legislative privilege that could ultimately be resolved through in camera review. 788 F. Supp. 2d at 987. This procedure—a time-honored one for resolving discovery disputes—should be followed here as well.

The State's additional privilege claims are likewise without merit. For example, the State claims that because one of Act 137's sponsors is also an attorney for one of the plaintiffs in this case, the attorney-client privilege exempts him from discovery of materials related to his role as a state legislator. (State's Br. 38.) But Arkansas law is clear that when an attorney has important factual evidence concerning a case and is required to produce that evidence or testify, the evidence does not become protected from disclosure merely because the attorney decided to represent one of the parties. *Weathersbee* v. *Wallace*, 14 Ark. App. 174, 177–78, 686 S.W.2d 447, 449 (1985). Indeed, the law requires the attorney in such a case to withdraw from the representation, not for the evidence to become unreachable. *Arthur* v. *Zearley*, 320 Ark. 273, 278–82, 895 S.W.2d 928, 931–33 (1995) ("The general rule is clear and unmistakable. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." (emphasis omitted)).

The State's privilege claim based on the work-product doctrine is equally unreasonable. While the State objects to Intervenors' request because it encompasses materials prepared by the Office of the Attorney General and the Bureau of Legislative Research, (State's Br. 34), the work-product doctrine only serves to protect materials prepared by opposing counsel in anticipation of litigation, *Upjohn Co.* v. *United States*, 449 U.S. 383, 397–400 (1981), and even

then yields where "the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means," Ark. R. Civ. P. 26(b)(3). Here, where the evidence requested concerns the adoption of a statute, the State has done nothing to show how the work-product doctrine could apply to the materials sought be Intervenors' request. The State's motion should be denied in full, and any specific privilege concerns should be adjudicated through the normal process of a privilege log and subsequent in camera review.

CONCLUSION

The discovery process at issue here began with requests by Intervenors that sought to obtain information on the key issue in this case: discriminatory animus and inevitable discriminatory effect in the adoption of Act 137. Intervenors then offered to discuss limiting burdens and addressing the State's concerns. The State—which voluntarily joined this case to defend the constitutionality of Act 137—elected to forego that opportunity. Instead of responding with good-faith negotiation and cooperation, the State seeks a protective order exempting it from normal discovery obligations and asks this Court to expand legislative and executive privilege beyond recognition. This dramatic overreaction and obstruction of the civil discovery process seeks to deny Intervenors (and the Court) crucial evidence in this case to support what the public record already suggests: that Act 137 was enacted in order to license statewide discrimination against the LGBT community. The State's motion to quash and for a protective order should be denied. Intervenors further respectfully ask the Court to order the State to (1) conduct a reasonable search for materials responsive to Intervenors' requests, (2) produce responsive documents located by such a search and a privilege log identifying all documents the State asserts are privileged and naming the applicable privilege, and (3) make Messrs. Hester and Ballinger available at an agreed date and time for depositions after such production.

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