

**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. SCHOPPMAYER JR.,
JOHN LATOUR and ALAN LONG, in their official capacities as
Aldermen of the Fayetteville City Council**

DEFENDANTS

Motion to Intervene

Come now PFLAG Fayetteville/Northwest Arkansas, Anthony Clark, Noah Meeks, and Liz Petray (collectively, "Proposed Intervenors") and for their Motion to Intervene state as follows:

1. On February 24, 2015, in response to efforts by the City of Fayetteville to enact civil-rights protections for their LGBT citizens, the Arkansas General Assembly passed Act 137, which sought to nullify and prevent all municipal ordinances that prohibit discrimination on the basis of characteristics that are not protected by state law.

2. On June 16, 2015, the City Council of Fayetteville referred Ordinance 5781, prohibiting discrimination on the basis of sexual orientation and gender identity, to Fayetteville voters for enactment or repeal in a special election to be held September 8, 2015.

3. On August 31, 2015, Protect Fayetteville, a group opposing Ordinance 5781, joined with a number of individuals also opposed to the Ordinance (collectively, "Plaintiffs") to sue the City of Fayetteville and attempt to preclude the special election.

4. On September 8, 2015, following this Court's denial of Plaintiffs' motion to enjoin the special election, the voters of Fayetteville approved Ordinance 5781.

5. Over the ensuing year and a half, Plaintiffs (supported by the State of Arkansas as Intervenor) continued to challenge Ordinance 5781, eventually securing a decision by the Arkansas Supreme Court that the Ordinance is incompatible with Act 137.

6. The case has now returned to this Court on remand from the Arkansas Supreme Court, with only the City of Fayetteville's constitutional challenge to Act 137 remaining unresolved.

7. Proposed Intervenors, as LGBT residents of the City of Fayetteville, are entitled to intervene as of right because their Fourteenth Amendment right to equal protection of the laws faces imminent potential harm by Act 137; their protection against discrimination in the City of Fayetteville is threatened; their interests are not adequately represented by the existing parties; and their motion is timely in light of the Arkansas Supreme Court's remand.

8. In the alternative, Proposed Intervenors should be permitted to intervene because they possess substantial interests in invalidating Act 137 and maintaining Ordinance 5781, and the City's constitutional challenge of Act 137 in defense of Ordinance 5781 involves common questions of law and fact with those interests.

9. Proposed Intervenors' basis for intervention is set out more fully in the papers submitted in support of this motion.

10. In support of this motion, Proposed Intervenors submit a Brief in Support of the Motion to Intervene and a proposed Answer in Intervention and Counterclaim for Declaratory Relief, attached hereto as Exhibit A.

11. Proposed Intervenors rely on all other documents, papers, and things of record.

12. Proposed Intervenors also rely on the Court's judicial notice of all matters relevant, material, and necessary to decide the issues on this motion.

WHEREFORE, Proposed Intervenors move the Court,

1. For an Order allowing Proposed Intervenors to intervene in this action;
2. For a hearing on the Motion to Intervene, if needed; and
3. For such other, further, and general relief to which they are entitled.

Respectfully submitted this 25th day of April, 2017.


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 25th day of April, 2017 by electronic transmission on the following counsel of record:

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DEFENDANTS

**PFLAG FAYETTEVILLE/NORTHWEST ARKANSAS;
ANTHONY CLARK; NOAH MEEKS; and
LIZ PETRAY**

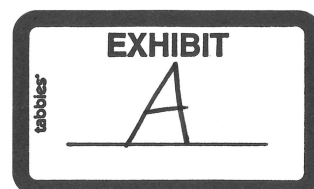
INTERVENOR-DEFENDANTS

**Answer in Intervention and Counterclaim Seeking Declaratory Judgment by
PFLAG Fayetteville/Northwest Arkansas, Anthony Clark, Noah Meeks, and Liz Petray**

PFLAG Fayetteville/Northwest Arkansas, Anthony Clark, Noah Meeks, and Liz Petray (collectively, "Intervenor-Defendants") answer the Plaintiffs' Amended Complaint and deny each and every allegation, except for those matters expressly admitted or qualified. This Answer restates the headings as each appears in the Amended Complaint. Of the original six counts asserted by Plaintiffs in their Amended Complaint, only Count IV remains following this Court's Order of March 1, 2016 as modified by the Arkansas Supreme Court Opinion of February 23, 2017 and the Supreme Court Mandate of March 14, 2017.

PARTIES, JURISDICTION AND VENUE

1. Deny this allegation due to lack of sufficient knowledge or information.
2. Deny this allegation due to lack of sufficient knowledge or information.



3. Deny this allegation due to lack of sufficient knowledge or information.
4. Deny this allegation due to lack of sufficient knowledge or information.
5. Deny this allegation due to lack of sufficient knowledge or information.
6. Admit.
7. Admit.
8. Admit.
9. Admit.
10. Intervenor understand that Defendant Martin W. Schoppmeyer, Jr. is no longer serving on the Fayetteville City Council and that City Council Member Sarah Marsh was elected to take his place. Intervenor otherwise admit the allegation.

11. Admit.

12. Admit.

STATEMENT OF FACTS

13. Admit.

14. Admit that the special election was scheduled for December 9, 2014. Deny this allegation otherwise due to lack of sufficient knowledge or information.

15. Admit.

16. Admit.

17. Admit that the City of Fayetteville bears the expense for special elections. Deny this allegation otherwise due to lack of sufficient knowledge or information.

18. Admit.

19. Admit that Ark. Code. Ann. § 14-1-402 reads as excerpted in the Plaintiffs' Amended Complaint. Deny that this section accurately reflects the Legislature's purpose in enacting Act 137.

20. Admit that Ark. Code. Ann. § 16-123-107 reads as excerpted in the Plaintiffs'

Amended Complaint. Deny that this section contains an exhaustive list of classifications protected by state and federal law applicable in Arkansas. Deny the allegation that the Supreme Court of the United States has not created a protected classification based on gender identity or sexual orientation.

21. Admit that Ordinance 5781 is titled “An Ordinance to Ensure Uniform Nondiscrimination Protections Within the City of Fayetteville for Groups Already Protected to Varying Degrees Throughout State Law.” Deny the allegation that Ordinance 5781 is “otherwise substantially similar in substance and procedure to Ordinance 5703.”

22. Admit that Ordinance 5781 protects lesbian, gay, bisexual, and transgender citizens of and visitors to Fayetteville. Deny the allegation that lesbian, gay, bisexual, and transgender persons have not been recognized as a protected class under either the United States Constitution or the Constitution of the State of Arkansas.

23. Paragraph 23 states a conclusion of law to which no answer is required.

24. Admit.

25. Paragraph 25 states a conclusion of law to which no answer is required.

26. Intervenors understand that Defendant Martin W. Schoppmeyer, Jr. is no longer serving on the Fayetteville City Council and that City Council Member Sarah Marsh was elected to take his place. Intervenors otherwise admit the allegation.

27. Paragraph 27 states a conclusion of law to which no answer is required.

28. Admit.

29. Deny this allegation due to lack of sufficient knowledge or information.

30. Deny the allegation with respect to Separate Plaintiffs Sagan and Phaneuf’s profession due to lack of sufficient knowledge or information. Deny that Ordinance 5781 impedes work by any religious ministers or has a chilling effect on such ministry.

31. Deny this allegation due to lack of sufficient knowledge or information.

32. Admit that Ark. Code. Ann. § 16-123-103(b) reads as excerpted in the Plaintiffs' Amended Complaint.

33. Deny this allegation due to lack of sufficient knowledge or information.

34. Deny this allegation due to lack of sufficient knowledge or information.

35. Deny this allegation due to lack of sufficient knowledge or information.

36. Deny this allegation due to lack of sufficient knowledge or information.

37. Deny this allegation due to lack of sufficient knowledge or information.

38. Paragraph 38 states a conclusion of law to which no answer is required.

39. Paragraph 39 states a conclusion of law to which no answer is required.

40. Paragraph 40 states a conclusion of law to which no answer is required.

41. Paragraph 41 states a conclusion of law to which no answer is required. To the extent that any allegation contained in Paragraphs 38-41 is construed to allege facts, it is denied.

42. Deny this allegation due to lack of sufficient knowledge or information.

43. Admit that the special election was scheduled for September 8, 2015.

44. Deny.

45. Deny.

46. Paragraph 46 states a conclusion of law to which no answer is required.

47. Deny.

48. Deny this allegation due to lack of sufficient knowledge or information.

49. Admit only that Ordinances 5781 and 5703 concern similar subject matter (*i.e.*, protection against discrimination for citizens of and visitors to Fayetteville). Deny all other allegations.

50. Admit.

51. Admit that Opinion No. 2015-088 reads as excerpted in the Plaintiffs' Amended Complaint.

52. Admit that Opinion No. 2015-088 reads as excerpted in the Plaintiffs' Amended Complaint.

53. Admit.

[Intervenors' responses to Paragraphs 54-107 have been omitted, as they are no longer relevant to these proceedings following this Court's Order of March 1, 2016 as modified by the Arkansas Supreme Court Opinion of February 23, 2017 and the Supreme Court Mandate of March 14, 2017.]

COUNT IV

108. Intervenors reallege and incorporate all previous paragraphs of this Answer.

109. Paragraph 109 states conclusions of law to which no answer is required.

110. Deny this allegation due to lack of sufficient knowledge or information.

111. Deny this allegation due to lack of sufficient knowledge or information.

112. Admit that Ark. Code. Ann. § 14-43-610 reads as excerpted in the Plaintiffs' Amended Complaint.

113. Paragraph 113 states conclusions of law to which no answer is required.

114. Admit.

115. Admit that the Arkansas Civil Rights Act protects against discrimination on the basis of race, religion, national origin, gender, and disability. Deny that these are the only bases protected from discrimination under state and federal law applicable to Arkansas.

116. Deny.

117. Paragraph 117 states conclusions of law to which no answer is required.

118. Admit.

119. Paragraph 119 states conclusions of law to which no answer is required.

120. Paragraph 120 states conclusions of law to which no answer is required.

[Intervenors' responses to Paragraphs 121-133 have been omitted, as they are no longer relevant to these proceedings following this Court's Order of March 1, 2016 as modified by the Arkansas Supreme Court Opinion of February 23, 2017 and the Supreme Court Mandate of March 14, 2017.]

134. Deny that Plaintiffs are entitled to any remedy. Otherwise, Paragraph 134 states conclusions of law to which no answer is required. To the extent that any part of Paragraph 134 is construed to allege facts, it is denied.

Defense

Ordinance 5781 is not precluded by Act 137 because Act 137 violates the Intervenors' right to equal protection of the laws, as guaranteed to them by the Fourteenth Amendment to the United States Constitution. In intent and operation, the statute disadvantages lesbian, gay, bisexual and transgender Arkansans by preventing them from obtaining protections against discrimination, and this disparate treatment is not rationally related to any legitimate governmental interest, let alone substantially related to an important interest.

Counterclaim

INTERVENOR-DEFENDANTS

1. Intervenor-Defendant PFLAG Fayetteville/Northwest Arkansas is a local chapter of PFLAG, the United States' largest organization for parents, families, friends, and allies united with members of the lesbian, gay, bisexual, and transgender ("LGBT") community.

2. PFLAG Fayetteville/Northwest Arkansas is headquartered in Fayetteville, Arkansas, and its officers are residents of Fayetteville.

3. PFLAG Fayetteville/Northwest Arkansas provides support to LGBT residents of Fayetteville and their families, friends, and loved ones in dealing with discrimination based on sexual orientation or gender identity.

4. Intervenor-Defendant Anthony Clark is a gay man who both lives and owns a business in Fayetteville, Arkansas.

5. Intervenor-Defendant Noah Meeks is a transgender man who lives and works in Fayetteville, Arkansas.

6. Intervenor-Defendant Liz Petray is a transgender woman who lives and works in Fayetteville, Arkansas.

7. Intervenor-Defendants Clark, Meeks and Petray have all devoted significant time, energy and resources to supporting the passage of Ordinance 5781. Intervenor-Defendants Clark and Meeks spoke out publicly on behalf of Ordinance 5781 during the referendum campaign. Intervenor-Defendant Petray was a paid staffer on the For Fayetteville campaign supporting Ordinance 5781, and she also devoted substantial personal time to securing the Ordinance's passage.

8. The individual Intervenor-Defendants and the community served by PFLAG Fayetteville/Northwest Arkansas stand to be profoundly and personally adversely affected if Act 137 is allowed to stand. Act 137's nullification of Ordinance 5781 would leave them vulnerable to discrimination in housing, employment, and public accommodations.

ACT 137

9. Act 137 provides that "[a] county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law."

10. Sponsors of Act 137 filed this legislation because in 2014, the City of Fayetteville had come very close to enacting local nondiscrimination protections for LGBT residents of and visitors to Fayetteville.

11. Sponsors of Act 137 publicly stated or wrote that the legislation was prompted by the Fayetteville City Council's passage of Ordinance 5703, which prohibited discrimination based on sexual orientation and gender identity.

12. The sponsors and supporters of Act 137 have made clear that they disapprove of LGBT people.

13. The purpose of Act 137 was to thwart protections against discrimination for LGBT Arkansans by precluding the enactment of such nondiscrimination protections at the local level.

14. Arkansas's Civil Rights Act does not include and has never included explicit protections against discrimination based on sexual orientation or gender identity.

15. As far back as 1993 and as recently as 2017, the Arkansas General Assembly has not passed any proposed amendments to the Arkansas Civil Rights Act that would have extended explicit protection against discrimination to the bases of sexual orientation or gender identity.

16. By prohibiting local civil rights protections that go beyond the five classifications covered under the Arkansas Civil Rights Act (race, religion, national origin, gender, or the presence of any sensory, physical, or mental disability), the legislature reordered the political process to ensure that LGBT Arkansans would not even be afforded the opportunity to persuade their neighbors of the worthiness of their cause and translate that dialogue into legal protection at the local level.

17. Act 137 does not address any of the myriad other local laws and regulations that vary from locality to locality and would thereby—under the legislature's own purported logic—adversely affect intrastate commerce in Arkansas.

COUNT I:
ACT 137 VIOLATES INTERVENOR-DEFENDANTS' CONSTITUTIONAL RIGHT TO
EQUAL PROTECTION OF THE LAWS

18. Intervenor-Defendants reallege and incorporate paragraphs 1 through 17 of their counterclaim.

19. Act 137's purpose was to disadvantage LGBT Arkansans by eliminating certain municipal protections that they then enjoyed and reordering the political process so as to preclude them from enacting nondiscrimination laws at the local level going forward.

20. Act 137's effect was to disadvantage LGBT Arkansans by eliminating certain municipal protections that they then enjoyed and reordering the political process so as to preclude them from enacting nondiscrimination laws at the local level going forward.

21. There is no legitimate governmental interest rationally related to Act 137.

22. There is no important governmental interest substantially furthered by Act 137.

23. The Act's stated purpose—to improve intrastate commerce—is pretextual.

24. Intervenor-Defendants are directly harmed by Act 137 because it strips away the security of having legal refuge from invidious discrimination in employment, housing, and public accommodations; implicitly disparages them as unworthy of the State's protection; and prevents them from accessing such protections going forward by way of the local democratic process.

25. Act 137 thus violates Intervenor-Defendants' right to equal protection of the laws, as guaranteed to them by the Fourteenth Amendment to the United States Constitution.

26. Intervenor-Defendants seek a declaratory judgment that Act 137 is unconstitutional.

WHEREFORE, Intervenor-Defendants request that Plaintiffs' Complaint be dismissed with prejudice, that the Court grant declaratory judgment to Intervenor Defendants on their counterclaim, that the Plaintiffs and Plaintiff-Intervenor be responsible for costs of this action, and that such other and further relief be awarded as the Court deems just and proper.

Respectfully submitted this the 25th day of April, 2017.

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