

**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

Reply Brief in Support of Motion to Intervene

Proposed Intervenors PFLAG Fayetteville/Northwest Arkansas (“PFLAG of NWA”), Anthony Clark, Noah Meeks, and Liz Petray (collectively, “Proposed Intervenors”) respectfully submit this brief in reply to the answering briefs of Plaintiffs and Plaintiff-Intervenor the State of Arkansas.

Proposed Intervenors—LGBT Arkansans—have a strong and unique interest in this litigation concerning the constitutionality of legislation passed by the Arkansas General Assembly that would have the effect of disadvantaging the LGBT community by barring local nondiscrimination protections, including Ordinance 5781 as adopted by Fayetteville voters. Plaintiffs and Plaintiff-Intervenor the State have opposed intervention, contending that LGBT individuals “are no different than any state citizen (or Fayetteville citizen) with a political interest in the outcome of this case.” Plaintiff-Intervenor’s Brief at 11; Plaintiffs’ Brief at 7 (“Proposed

Intervenors’ ‘strong interest’ is nothing more than a generalized interest shared . . . by all [] citizens equally.”) But Act 137 plainly does not impact all Arkansans equally—indeed, Plaintiffs and the State have sought to enjoin no local ordinances under Act 137 other than those providing protections for LGBT individuals. Proposed Intervenors’ interest in challenging a law that would nullify a duly enacted ordinance protecting them from invidious discrimination in housing, employment and other areas is hardly a “generalized” interest that is indistinguishable from the interest of politicians or all citizens.

Further, the State of Arkansas’s position that LGBT individuals have no “legally protectable interest” in this litigation because they “are not members of a constitutionally-protected class” plainly conflicts with governing law. Plaintiff-Intervenor’s Brief at 11. The Constitution protects *all* people. The United States Supreme Court has consistently “dr[awn] upon principles of liberty and equality to define and protect the rights of gays and lesbians,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, (2015), holding unconstitutional a number of laws drawing classifications on the basis of sexual orientation. *See also United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). The Arkansas Supreme Court has similarly struck down laws that disadvantaged lesbians and gay men under the Arkansas Constitution. *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); *Arkansas Dep’t of Human Servs. v. Cole*, 2011 Ark. 145, 380 S.W.3d 429 (2011). The State’s misstatement of the law as providing no “legally protectable interest” to LGBT individuals in the face of discriminatory government action demonstrates the vital importance of allowing Proposed Intervenors to participate in this litigation to not only correct Plaintiffs’ erroneous view of the law, but to present their unique experiences and perspectives.

Proposed Intervenors briefly respond to the other arguments made by Plaintiffs and Plaintiff-Intervenor in their oppositions:

Timeliness. Plaintiffs and Plaintiff-Intervenor fail to articulate any prejudice whatsoever that would result from intervention at this stage. Proposed Intervenors' involvement will not delay the litigation, as they will adhere to the schedule set by the Court's order of May 9, 2017, which provided Defendants with 120 days to respond to the State's motion for summary judgment. The sole remaining issue in the case has not been decided by this or any court, and intervention now is timely.

That the ACLU, whose attorneys are among counsel for Proposed Intervenors, previously submitted amicus filings in this litigation is not cause to deny intervention. Given the many legal issues presented at the outset of this litigation, it was not clear that constitutionality of Act 137 would be resolved, as Arkansas law instructs courts to avoid unnecessary determinations of Constitutional questions when the issue in dispute can otherwise be resolved. *Prock v. Bull Shoals Boat Landing*, 2014 Ark. 93, 17, 431 S.W.3d 858, 869 (2014). This is why the ACLU's prior amicus brief addressed the constitutionality of Act 137 "*in the event* the Court reach[ed] the question." Indeed, this Court did not have occasion to reach the question, which no court to date has passed upon. Judicial efficiency is best served by allowing Proposed Intervenors to participate in this litigation now that the Arkansas Supreme Court has made clear that Act 137's language bars Fayetteville's LGBT nondiscrimination protections. If intervention is denied, Proposed Intervenors will be left with an alternative that would be even more time consuming and costly to the State: filing a separate action to challenge Act 137's violation of their constitutional rights.

Adequate Representation. Contrary to the briefing in opposition, the adequacy inquiry does not ask whether an intervenor shares a party's desired outcome, but instead only

requires an intervenor to make the “minimal” showing that the existing parties’ “representation of [intervenor’s] *interest* ‘may be’ inadequate.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972). Once this has been shown, the burden of persuasion to show representation is adequate rests with the party opposing intervention. *Certain Underwriters at Lloyd’s*, 461 S.W.3d 317, 327 (2015). Although the City and its political officials are obliged to defend Ordinance 5781, Proposed Intervenors have a *personal* interest in this case that is not shared by any other party. Not only do they benefit from Ordinance 5781’s nondiscrimination protections in the areas of housing, employment, and public accommodations, they wish to retain the ability to seek additional protections and avoid legal determinations that will prejudice them in the future. In addition, the City has multiple constituencies and concerns. Challenging Act 137—and taking an appeal if it doesn’t prevail at this Court—may or may not be a priority for the City depending on competing demands, and there is no guarantee that future office-holders in the City will continue to take the position of the current administration. Plaintiff and Plaintiff-Intervenor have not met their burden to show Defendants adequately represent the Proposed Intervenors’ personal interests and Defendants have themselves acknowledged that LGBT individuals have a “different perspective and position [than Defendants] regarding the remaining constitutional issues.” Defendants’ Response to Motion to Intervene, ¶ 2.

Burden and cost of litigation. The State argues that allowing members of the LGBT community affected by Act 137 to participate in this litigation may increase the burden and cost of litigation to the parties, as it could result in “unwarranted discovery and motion practice.” Plaintiff-Intervenor’s Brief at 16. The State notes that several of the undersigned counsel zealously—and successfully—represented LGBT individuals in prior litigation where, as here, the State enacted legislation that violated their constitutional rights. To the extent it is relevant to this

litigation, that earlier case concerned a law that targeted the LGBT community by preventing unmarried cohabitating partners from serving as adoptive or foster parents. Despite the State's vigorous defense, the Arkansas Supreme Court unanimously invalidated that law as unconstitutional. *Arkansas Dep't of Human Servs. v. Cole*, 2011 Ark. 145, 3, 380 S.W.3d 429, 431 (2011). While discovery may have been inconvenient for the State, it was necessary to achieve this outcome, which transformed the lives of children awaiting foster parents and adoption throughout Arkansas.

Proposed Intervenors are not vexatious litigants seeking to cause the State inconvenience. They would prefer it if the State did not seek to enforce unconstitutional laws that disadvantage them. But because the State has enacted such a law and seeks through this litigation to nullify their hard-won nondiscrimination protections, Proposed Intervenors should be granted intervention to defend those critical protections.

CONCLUSION

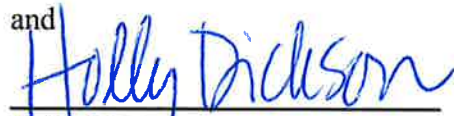
For the foregoing reasons, the Motion to Intervene as of Right of Proposed Intervenors should be granted. In the alternative, they should be permitted to intervene under Rule 24(b).

Dated: May 15, 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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