

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

PROTECT FAYETTEVILLE, f/k/a REPEAL 119;
PAUL SAGAN; PETER TONNESSEN;
and PAUL PHANEUF
and
THE STATE OF ARKANSAS

PLAINTIFFS

INTERVENOR

vs.

Case No.: CV 15-1510-1

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 TENNANT, MARTIN W. SCHOPPMAYER, JR.,
JOHN LA TOUR, and ALAN LONG, in their official capacities as
Aldermen of the Fayetteville City Council

FILED FOR RECORD
2017 APR - 7 PM 2:54
WASHINGTON CO. AR
CIRCUIT CLERK
K. SYLVESTER

DEFENDANTS

AMENDED ANSWER

Comes now the City of Fayetteville, Mayor Jordan and all named defendants (hereinafter "City of Fayetteville") and for their Amended Answer to what remains of Plaintiff's Amended Complaint after 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, state as follows:

1. Defendants agree that the three named individuals are proper plaintiffs and that Repeal 119 a/k/a Protect Fayetteville is a ballot question committee.
2. Defendants agree that the Arkansas Attorney General was properly allowed to intervene in this suit for the sole purpose of defending the constitutionality of Act 137 of 2015 which is the only issue left to be decided at this point in the case.

3. Defendants agree that the City of Fayetteville is a legal organized properly incorporated First Class City in Arkansas with a mayor – city council form of government.
4. Defendant agrees that all named City of Fayetteville officials were lawfully elected and serving in office when the Uniform Civil Rights Protection Ordinance was passed and referred to the voters.
5. By popular vote, the citizens of Fayetteville enacted this Uniform Civil Rights Protection Ordinance shortly after this suit was filed.
6. Defendant Martin W. Schoppmeyer, Jr. did not run for reelection in 2016, and his replacement, Sarah Bunch, was properly elected in 2016 and is now serving as a Fayetteville City Council Member.

Procedural History

7. Plaintiffs' initial request for a temporary restraining order or injunction to prevent the referendum election for the Uniform Civil Rights Ordinance was denied by the Court, and the election proceeded resulting in a favorable vote of the Fayetteville citizens and the enactment of the ordinance.
8. Defendants filed a Motion to Dismiss All Counts of Plaintiff's Complaint to which Plaintiffs responded.
9. The Attorney General moved to intervene for the sole purpose of defending the constitutionality of Act 137 of 2015.

10. Without objection, the Circuit Court granted the Arkansas Attorney General's Motion to Intervene.

11. The Arkansas Attorney General filed her Response to Defendants' Motion to Dismiss and incorrectly alleged that four other local governments' ordinances that provided some protection for their lesbian, gay and transgender citizens from discrimination were not in effect prior to the effective date of Act 137 of 2015.

12. Defendant City of Fayetteville replied to the Attorney General's Response to correct her mistake and presented certified copies of anti-discrimination ordinances from Pulaski County, Little Rock, Eureka Springs and Hot Springs as exhibits.

13. Because evidence beyond the pleadings had been submitted, the Circuit Judge correctly notified all parties that the Motion to Dismiss would be converted to a Motion for Summary Judgment and gave all parties additional time to present further argument and documents.

14. On January 26, 2016, the Circuit Court conducted a lengthy hearing to consider all parties' motions, argument and documents.

15. On February 3, 2016, the Circuit Court filed its Order Denying Plaintiffs' Motion to Clarify and Express Objection to Conversion to Summary Judgment.

16. On March 1, 2016, the Court filed its Order Granting Defendants' Motion for Summary Judgment in part and denying in part and denying Plaintiffs' and State's Cross-Motions for Summary Judgment.

17. The Court's Order denied Defendants motion "as it pertains to a lack of standing on the part of Protect Fayetteville..."

18. The Court's Order continued: "Because Ordinance 5781 is found not to violate Act 137, the court need not address the constitutionality of Act 137."

19. All six Counts of Plaintiff's Complaint were denied with Summary Judgment granted to Defendant City of Fayetteville and all named defendants on all these counts.

20. The Arkansas Attorney General as Intervenor filed her Notice of Appeal on March 30, 2016 and "specifically appeals the Court's ruling regarding Count IV of the operative complaint and the Court's interpretation of Arkansas Act 137 of 2015."

21. Plaintiffs filed their Notice of Appeal on March 30, 2016 which stated: "The Plaintiff specifically appeals to the court's ruling regarding the Count IV of the operative complaint and the Court's interpretation of Arkansas Act 137 of 2015."

22. In Plaintiffs' four-page argument section of their Appellants' Brief, they merely adopted and incorporated the Attorney General's Brief and repeated general arguments about the interpretation of Act 137 of 2015 and arguments that it was constitutional. There was no mention of any other portions of their complaint nor any argument contesting this Court's granting of Summary Judgment to the City and all named defendants on all claims and Counts of Plaintiffs' Complaint except for Count IV.

23. Answering Plaintiffs' allegations in their Count IV, the City of Fayetteville first generally denies all of the allegations in paragraph 108 unless specifically agreed to herein.

24. Defendants agree with Plaintiffs' allegations in paragraphs 109, 110, 111, and 112.

25. Defendants agree with Plaintiffs' allegation in their paragraph 113 that pursuant to the Arkansas Supreme Court's decision of February 23, 2017, the "Arkansas General

Assembly has passed a law directly prohibiting the City of Fayetteville from passing or enacting (the Uniform Protection of Civil Rights Ordinance)....” This law was enacted with the legislature’s intent to prevent cities from enacting ordinances to protect the rights of gay, lesbian and transgender citizens in violation of the United States Constitution’s Equal Protection of the Laws provision.

26. Defendants agree with Plaintiff’s references to state law in their paragraphs 114, 115 and 116.

27. Defendants agree as alleged in paragraph 117 that the Uniform Protection of Civil Rights Ordinance states: “The right of an otherwise qualified person to be free from discrimination because of sexual orientation or gender identity is the same right of every citizen to be free from discrimination because of race, religion, national origin, gender and disability as recognized and protected by the Arkansas Civil Rights Act of 1993.” (Exhibit B of Plaintiffs’ Amended Complaint).

28. Defendants agree with Plaintiffs’ paragraph 118.

29. Defendants deny Plaintiffs’ allegations in paragraph 119 in that A.C.A. § 14-1-403 (Act 137 of 2015) has been unconstitutionally interpreted to prohibit the Uniform Protection of Civil Rights Ordinance from becoming law.

30. Defendants deny the allegations of Plaintiffs’ paragraph 120 and assert that the unconstitutionality of Act 137 of 2015 prevents it from prohibiting the enforcement of the Uniform Protection of Civil Rights Ordinance.

31. Respecting the decision of the Arkansas Supreme Court, the only issue to be decided by this Circuit Court is the constitutionality of Act 137 of 2015.

32. Animus of the State against citizens with a minority sexual orientation or with gender identity issues different from the majority so motivated the Legislature's enactment of Act 137 of 2015 as interpreted by the Arkansas Supreme Court that it rendered Act 137 of 2015 unconstitutional as a violation of the Equal Protection of the Laws provision of the United States Constitution as well as violations of other federal constitutional provisions and federal laws including the United States Civil Rights Act.

33. The Factual Statement that follows provides evidence that improper animus directed against gays, lesbians and transgender persons undertaken for its own sake demonstrating a bare desire to harm a politically unpopular group motivated the State to enact Act 137 of 2015.

34. Act 137 of 2015's concealed, but apparent, purpose is a status based enactment to prevent gays, lesbians and transgender persons from receiving any local law protection from discrimination and any affirmation of their legal equality from local governments in Arkansas.

35. The Arkansas Attorney General has argued in its briefs in this Court and before the Arkansas Supreme Court that *Romer v. Evans* is distinguishable from our case because Act 137 did not expressly name its targets and that the City of Fayetteville failed to prove that the Arkansas Legislature demonstrated sufficient animus against gays, lesbians, and transgender citizens to render Act 137 of 2015 unconstitutional.

36. The Plaintiffs and State have not and cannot prove that Act 137 of 2015 was enacted without sufficient animus to render it a violation of United States Constitution Equal Protection of the Laws Clause and other Federal Constitutional and Federal Civil

Rights protections. Therefore, a trial on the merits of the constitutionality and legality of Act 137 of 2015 is necessary and appropriate after allowing the Defendants sufficient time to conduct adequate discovery.

Factual Statement

37. On August 5, 2014, the Fayetteville City Council considered a Civil Rights protection ordinance and listened to public comment including State Representative Bob Ballinger who gave his residence as Huntsville and spoke in opposition to the ordinance. (Certified City Council Meeting Minutes for August 5, 2014 meeting: page 10 of 16 attached as First Exhibit to Brief in Support of City's Reply to Plaintiffs' Response to City's Motion to Dismiss)

38. On August 19, 2014, the Fayetteville City Council heard the Civil Rights ordinance for the third and final reading and listened to public comment from about 6:00 p.m. until after 3:30 a.m. on August 20, 2014. Many Fayetteville citizens appeared and informed the City Council that they had suffered discrimination on the basis of their gender identity or sexual orientation in the context of employment or public accommodation. (See Exhibits C, D, E and F the City of Fayetteville's Reply to the State of Arkansas' Response to the City of Fayetteville's Motion for Summary Judgment and the State's Cross-Motion for Summary Judgment on Count IV of the Amended Complaint {hereinafter "City's Reply"} which are affidavits from Mayor Jordan and City Council Members Adella Gray, Sarah Marsh and Mark Kinion.)

39. State Representative Bob Ballinger also attended and spoke at the August 19, 2014 City Council Meeting. (Certified City Council Meeting minutes for the August 19-20, 2014 meeting).

40. Senator Bart Hester tweeted at 10:28 p.m. on August 19, 2014 "Regardless of how Fayetteville City Council votes tonight AR legislature will pass law in Feb/March to nullify this type of ordinance." (Exhibit A to City's Reply)

41. Representative Bob Ballenger drafted upon his official House of Representatives letterhead, signed and obtained the signatures of 16 other State Representatives on a letter dated December 2, 2014 addressed to Mayor Lionel Jordan and the Fayetteville City Council to request its recommendation to repeal "Fayetteville's 'Sexual Orientation Gender Identity' Ordinance...." (Third Exhibit of Brief in Support of City's Reply to Plaintiffs' Response to City's Motion to Dismiss)

42. As predicted by Senator Hester, he and cosponsor Representative Bob Ballinger were able to pass their bill although their proffered Emergency Clause failed and Governor Hutchinson refused to sign Act 137 of 2015 which became law without his signature on July 22, 2015.

43. Prior to Act 137's passage, Eureka Springs passed an ordinance with an Emergency Clause on February 9, 2015 to protect the equal rights of gay, lesbian and transgender citizens. This ordinance was later referred to the voters and ratified by Eureka Springs citizens in a public vote. (Exhibit A to Defendant City of Fayetteville's Response to State of Arkansas' Brief in Opposition to Dismissal of Count IV of Plaintiffs' Complaint {hereinafter "City's Response"})

44. Prior to Act 137 going into effect and becoming law, Little Rock (April 21, 2015); Hot Springs (May 5, 2015); and Pulaski County (May 21, 2015) enacted ordinances to protect citizens dealing with local government contractors from being discriminated against on the bases of their sexual orientation or gender identity. (Exhibits B, C & D of City's Response).

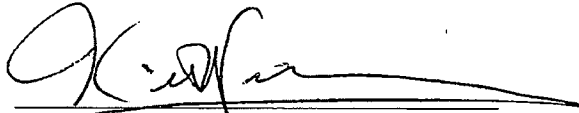
45. On June 16, 2015, the Fayetteville City Council passed Ordinance No. 5781 (the Uniform Protection of Civil Rights ordinance) and referred it to a referendum of the Fayetteville voters. Ordinance No. 5781 became effective before Act 137 of 2015 became effective although a public vote was required before the Fayetteville City Code would include the Uniform Protection of Civil Rights protections.

46. Defendants generally deny all of the allegations of Plaintiffs' Amended Complaint and the Intervenor's pleadings not expressly agreed to herein.

WHEREFORE, Defendant City of Fayetteville and all named defendants pray that a trial on the merits of the constitutionality of Act 137 of 2015 be conducted and that Plaintiffs' Count IV of its Amended Complaint be dismissed because Act 137 of 2015 as interpreted by the Arkansas Supreme Court is an unconstitutional violation of Due Process, Equal Protection and other Federal Constitutional requirements as well as a violation of Federal Law.

Respectfully submitted,

**City of Fayetteville, Arkansas
Mayor Lioneld Jordan and
Aldermen of the Fayetteville City Council**

By: 

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CERTIFICATE OF SERVICE

I, Kit Williams, certify that I have hand delivered or emailed the above Defendant City of Fayetteville's And All City Defendants' Amended Answer and Alteration of the Portion of the City's Motion for Summary Judgment Concerning the Unconstitutionality of Act 137 of 2015 to a Response to Plaintiffs' and Intervenor's Motions for Summary Judgment on this the 7th day of April, 2017, to:

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