

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

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

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K. SYLVESTER

vs. Case No.: CV-15-1510-1

THE CITY OF FAYETTEVILLE, ARKANSAS; WASHINGTON COUNTY, ARKANSAS; LIONELD JORDAN, in his official capacity as MAYOR OF THE CITY OF FAYETTEVILLE, WASHINGTON COUNTY, ARKANSAS; ADELLA GRAY, SARAH MARSH, MARK KINION, MATTHEW PETTY, ALAN LONG, AND JUSTIN TENNANT Individually and, in their official capacities as ALDERMEN OF THE FAYETTEVILLE CITY COUNCIL; MARTIN W. SCHOPPEMEYER JR., AND JOHN LA TOUR, in their official capacities as ALDERMEN OF THE FAYETTEVILLE CITY COUNCIL; THE HON. RENEE OELSCHLAEGER, THE HON. MAX DEITCHLER, AND THE HON. BILL ACKERMAN, in their official capacities as the COMMISSIONERS of the WASHINGTON COUNTY ELECTION COMMISSION

DEFENDANTS

BRIEF IN SUPPORT OF
MOTION TO STAY THE ENACTMENT OF ORDINANCE NO. 5718

COMES NOW, Protect Fayetteville, an Arkansas Ballot Question Committee (hereinafter Protect Fayetteville”) Paul Sagan, Peter Tonnessen, and Paul Phaneuf (collectively Sagan, Tonnessen, and Phaneuf are referred to as “Taxpayers”) (with Protect Fayetteville and Taxpayers being hereinafter referred to collectively as “Plaintiffs”), by and through their attorneys of the Story Law Firm, PLLC, and for their Brief in Support of Motion to Stay the Enactment of Ordinance No. 5781, which is being filed pursuant to Ark. R. Civ. P. 65, and states as follows:

I. Introduction

On or around August 20, 2014, the Aldermen of the Fayetteville City Council passed by a 6-2 vote Ordinance No. 5703, which enacted Chapter 119 of the Fayetteville, Arkansas City Code. Thereafter, Separate Plaintiff, Protect Fayetteville formally known as Repeal 119, secured enough signatures to put Ordinance No. 5703 to a vote of the people, who voted to repeal the

ordinance at a special election on December 9, 2015 and on that date, Ordinance 5703 was repealed. On February 24, 2015, Act 137, or the Intrastate Commerce Improvement Act, became law and thereafter went into effect on July 22, 2015. The Intrastate Commerce Improvement Act 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.” Ark. Code Ann. § 14-1-402. Currently, in Arkansas, “the right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right.” Ark. Code Ann. § 16-123-107. Further, the Supreme Court of the United States has not created a protected classification based on gender identity or sexual orientation. The Fayetteville City Council passed Ordinance No. 5781 on June 16, 2015, directly after the City Council voted to suspend the rules requiring by a 6-3 vote, which included the vote of Defendant Jordan, that the ordinance be read on three separate days. The purpose of Ordinance No. 5781 is to “extend existing protections to lesbian, gay, bisexual, and transgender citizens and visitors,” which is a group of people whom are not recognized as a protected class under either the Arkansas Civil Rights Act of 1993, United States Constitution, or the Constitution of the State of Arkansas.

Thereafter, Ordinance No. 5781 was put on the ballot at a special election, which was held on September 8, 2015 costing the taxpayers of the City of Fayetteville approximately \$35,000.00. Ordinance No. 5781 was adopted by the voters of the City of Fayetteville on September 8, 2015, and according to the Defendants, it will be enacted on November 7, 2015.

On September 1, 2015, Arkansas Attorney General, Leslie Rutledge, issued Opinion No. 2015-088, in which she stated, “Act 137 renders unenforceable any ordinance that prohibits

discrimination on a basis not already contained in state law. Because current state law does not prohibit discrimination on the basis of sexual orientation and gender identity, it is my opinion that Act 137 renders the [Fayetteville Ordinance] unenforceable in this respect.” The Attorney General also opined that the Anti-Bullying Statute, codified at Ark. Code Ann. §6-18-514, is not a nondiscrimination law, and even if it was, it would not authorize Fayetteville’s Ordinance 5781 because Act 137 “holds the field with respect to nondiscrimination laws.” The Defendants use Ark. Code Ann. §6-18-514 as the basis for passing Ordinance No. 5781.

II. Standard of Review

In determining whether to issue a preliminary injunction or temporary restraining order, the trial court must consider two things: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *AJ & K Operating Co., Inc. v. Smith*, 355 Ark. 510, 140 S.W.3d 475 (2004). Harm is normally considered “irreparable harm,” as element for issuing preliminary injunction or temporary restraining order (TRO), only when it cannot be adequately compensated by money damages or redressed in a court of law. Rules Civ. Proc., Rule 65. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002).

III. Plaintiffs can show that they have a high likelihood of success on the merits on their claim that the passage of Ordinance No. 5781 violated the Due Process rights of Fayetteville residents.

Plaintiffs have demonstrated a likelihood of success on their claim that the passage of Ordinance No. 5781 violated the due process rights of the residents of Fayetteville, Arkansas. Pursuant to Ark. Code Ann. § 14-55-202, “all bylaws and ordinances of a general or permanent nature shall be fully and distinctly read on three (3) different days unless two-thirds (2/3) of the members composing the municipal council shall dispense with the rule.” The requirements of

Ark. Code Ann. § 14-55-202 are mandatory and, any ordinance passed in violation thereof is void. *Newbold v. City of Stuttgart*, 145 Ark. 544, 224 S.W. 993, 994 (1920). The mayor is the ex-officio president of the council by virtue of his executive position, and is not an elected member of the City Council, and therefore his vote could not be used in amending or repealing any part of an initiated act. Ark. Code Ann. § 14-43-501; *Thompson v. Younts*, 282 Ark. 524, 530, 669 S.W.2d 471, 474 (1984). Additionally, it has been opined that the Mayor may not vote to enact an emergency clause. Atty. Gen. Op. Nos. 96-155, 85-174.

Pursuant to Ark. Code Ann. § 14-43-501, in cities of the first class, the mayor *may* vote when the mayor's vote is *needed to pass* an ordinance, bylaw, resolution or motion. This includes situations when the vote is tied, or when there are not enough council members present at the meeting to pass a measure. *Gibson v. City of Trumann*, 311 Ark. 561, 563, 845 S.W.2d 515, 517 (1993) (emphasis added). In *Gibson*, the Mayor was permitted to vote in order to break a five-to-five tie. *Id.*

Ordinance No. 5781 was proposed at the City Council Meeting on June 16, 2015 and five (5) Aldermen voted "yes" to pass the motion to suspend the rules and go to the third reading, while three (3) Aldermen voted against the motion. Mayor Jordan voted "yes" to suspend the requirement of Ark. Code Ann. § 14-55-202, and it was recorded in the City Council Minutes as a vote of 6-3 for approval. Additionally, the Mayor's vote was not necessary, as all Aldermen were present at the City Council Meeting on June 16, 2015, and the result of the vote to suspend the rules was a 5-3 vote. The motion to suspend the requirements of Ark. Code Ann. § 14-55-202 would not have been approved had Defendant Jordan appropriately refrained from voting on the motion. Accordingly, Ordinance 5781 should be held void, as it was passed after a violation of Ark. Code Ann. § 14-55-202. See *Newbold v. City of Stuttgart*, 145 Ark. 544, 224 S.W.993,

994 (1920). The denial of the third reading of Ordinance 5781 in contravention of Ark. Code Ann. § 14-55-202, was inherently a denial of the citizens of Fayetteville of “an opportunity to be heard at a meaningful time and a meaningful place” prior to the passage of Ordinance 5781.

IV. Plaintiffs can show a likelihood of success on the merits on their claim that the passage of Ordinance No. 5781 violated the constitutional rights of Fayetteville residents.

Plaintiffs have additionally shown a likelihood of success on their claim that the passage of Ordinance No. 5781 violated the constitutional rights of the voters who repealed Ordinance No. 5703 in the special election on December 9, 2014. The act of enacting Ordinance No. 5781 violates Amendment 7 to the Constitution of Arkansas where it provides in part: “No measure approved by a vote of the people shall be amended or repealed by any city council, except upon a ye and nay vote on roll call of two-thirds of all the members elected to the city council.” *Gibson v. City of Trumann* 311 Ark. 561, 845 S.W.2d 515 at 563,517 (1993). In *Gibson*, the City was trying to add and alter the will of the people by changing or modifying the desired outcome of the residents of the City of Trumann when they had by initiative, under Amendment 7 of the Arkansas Constitution, exercised jurisdiction over their elected officials. Likewise, a majority of the voters of Fayetteville, Arkansas voted to repeal Ordinance No. 5703 at a special election on December 9, 2014. Ordinance No. 5703 and the new ordinance, Ordinance No. 5781, are so close in nature, cause and effect, that the proposal of Ordinance No. 5781 is tantamount to an amendment or repeal of what was already repealed, under Amendment 7, and therefore, violates the citizens’ constitutional rights. The act of proposing a new ordinance (Ordinance 5781) after the Plaintiffs and all those who voted to repeal Ordinance 5703 violates every citizen of Fayetteville’s constitutional right reserved to them in Amendment 7. Particularly, the Plaintiffs

allege that their Constitutional rights will be violated if Ordinance No. 5781 is permitted to be enacted on November 7, 2015.

V. Plaintiffs can show a likelihood of success on the merits on their claim that the expenditure of funds to fund the election of Ordinance No. 5781 were illegal, as Ordinance 5781 is, in itself, inherently illegal.

Further, Plaintiffs have demonstrated likelihood of success on their illegal exaction claim, as it is clear that the Defendants' actions amounted to an illegal exaction of taxpayer funds under Ark. Const. Art. 16, § 13, as the Defendants misapplied taxpayer funds when they enacted an ordinance that was substantially similar to an ordinance already repealed by the voters, which was put on the ballot at a special election to be funded by the taxpayers of the City of Fayetteville. The Plaintiffs have shown that they are taxpayers and citizens of the City of Fayetteville, Arkansas, and therefore have standing to bring an illegal exaction claim for the benefit of all taxpayers. The City of Fayetteville and Washington County are proper parties in this suit as the doctrine of sovereign immunity is not applicable in this case. On information and belief, the funds expended by Washington County are to be billed to the City of Fayetteville at the conclusion of the special election, whereupon the City of Fayetteville shall remit payment for the election expenses incurred.

Additionally, the public funds to fund the election are being illegally spent, because Ordinance No. 5781 is inherently illegal. It is clear that the process by which Ordinance No. 5781 was approved violated the due process rights of the citizens of Fayetteville, Arkansas, it violates the 7th Amendment rights of the citizens of Fayetteville who voted to repeal Ordinance 5703, the Intrastate Commerce Improvement Act (Act 137 of 2015) directly prohibits cities from enacting this exact type of ordinance, it was passed in direct violation of Article II, § 24 of the Arkansas Constitution, and it violates 42 U.S.C. § 1983. Irreparable damage would be done to

the taxpayers of the City of Fayetteville, and all similarly situated, by the expenditure of funds by the City of Fayetteville. The use of any funds from the general treasury of the City of Fayetteville, Arkansas constitutes an illegal exaction under Article 16, Section 13, of the Arkansas Constitution.

VI. Plaintiffs can show a likelihood of success on the merits on their claim that Ordinance No. 5781 directly violates Ark. Code Ann. § 14-1-403, Ark. Code Ann. § 14-43-610 and Ark. Code Ann. § 16-123-107, and is therefore unlawful.

Ordinance No. 5781 is invalid on its face, as it intentionally deprives citizens and other persons in Fayetteville of their rights, privileges and immunities by denying them the protected class of “religion” under Ark. Code Ann. § 16-123-102(8) of the Arkansas Civil Rights Act of 1993. Additionally, Ordinance No. 5781 is in direct violation of the freedoms of religion and speech under the First Amendment to the Constitution of the United States and due process and equal protection under the Fourteenth Amendments to the U.S. Constitution. Further, it willfully leaves out the protections provided by Sections 3 and 8 of Article 2 of the Arkansas Constitution, and thus is facially invalid.

Plaintiffs can show that Ordinance No. 5781 is clearly in violation of Act 137 of 2015 (codified as Ark. Code Ann. § 14-1-403). On February 24, 2015, Act 137, or the Intrastate Commerce Improvement Act, became law and thereafter went into effect on July 22, 2015. Act 137 states in part, “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.” Arkansas has established a Civil Rights Act of 1993, which protects five classes against discrimination: race, religion, national origin, gender, and disability. Ordinance No. 5781 attempts to add terms and classes not contained within the Arkansas Civil Rights Act of 1993, and therefore is in violation of Act 137

of 2015. Additionally, the Arkansas Attorney General opined that Act 137 renders Ordinance No. 5781 unenforceable. Accordingly, because Ordinance 5781 cannot be “adopted” until September 8, 2015 or “enacted” until November 7, 2015, Act 137 of 2015 controls, and directly prohibits Ordinance 5781 from becoming law.

Therefore, Ordinance No. 5781 is clearly an unlawful exercise of municipal power because it is “in conflict with an contrary to” Ark. Code Ann. § 14-1-403, as it attempts to add terms and classes not contained within the Arkansas Civil Rights Act of 1993. Since Ordinance cannot be “enacted” until November 7, 2015, Ark. Code Ann. § 14-1-403 controls, and prohibits Ordinance No. 5781 from becoming law. Therefore, Plaintiffs can clearly show that Ordinance No. 5781 violates Ark. Code Ann. § 14-1-403, as it creates a protected classification or prohibits discrimination on a basis not contained in state law, and it cannot be enacted until well after Ark. Code Ann. § 14-1-403 went into effect.

VII. Plaintiffs can show success on the merits on their claim that Ordinance No. 5781 violates Arkansas law because it intentionally left out the protections of Article II, § 24 of the Arkansas Constitution.

When the Fayetteville City Council passed Ordinance No. 5781, it intentionally left out the protection of the right of conscience, which is clearly protected by Article II, § 24 of the Arkansas Constitution. This is in clear violation of Ark. Code Ann. § 14-55-102, which provides that “[m]unicipal corporations shall have power to make and publish bylaws and ordinances, not inconsistent with the laws of this state.” Ark. Code Ann. § 14-55-102. The Fayetteville City Council even had a chance to amend Ordinance No. 5781 to add adequate religious protections when Alderman La Tour proposed an amendment that would have added said protection to the Ordinance at the City Council Meeting on June 16, 2015. However, the motion died for lack of a second, and the City Council therefore intentionally failed to provide adequate religious

protections in Ordinance No. 5781. Accordingly, the Fayetteville City Council intentionally left out this constitutionally protected right of conscious, and therefore Ordinance No. 5781 is inconsistent with state law, and is in direct violation of Ark. Code Ann. § 14-55-102.

VIII. Plaintiffs can show success on the merits on their claim that they were deprived of their rights protected under 42 U.S.C. § 1983.

The proponents of Ordinance No. 5781 clearly acted to willfully deprive citizens and other persons in the City of Fayetteville of their civil rights as aforesaid, and said proponents are therefore liable, each of them individually. Ordinance No. 5781 is intended to deprive citizens and other persons in Fayetteville of their rights, privileges and immunities by denying them the protected class of "religion" under Ark. Code Ann. § 16-123-102(8) of the Arkansas Civil Rights Act of 1993, and by intentionally leaving out that statutory protection. The act of the proponents of the ordinance when they voted in favor of Ordinance No. 5781 was not a *legitimate* act, as the Plaintiffs can clearly show that the process in which the proponents passed the ordinance was unconstitutional. Additionally, for the reasons stated above, the acts of the proponents of Ordinance No. 5781 were blatantly unconstitutional and illegal, and therefore all proponents should be individually liable for their actions. Accordingly, Plaintiffs have shown that they have a likelihood of success on yet another one of their claims.

IX. Plaintiffs can show that immediate, irreparable harm will occur on November 7, 2015 if this Court does not enter a preliminary injunction staying Ordinance No. 5781 from being enacted.

Immediate, irreparable harm will occur on November 7, 2015 should the Court allow Ordinance No. 5781 to be enacted on that date. Particularly, the Plaintiffs' constitutional rights will be violated as of that date, along with all citizens of Fayetteville, Arkansas. The Plaintiffs can clearly show that Ordinance No. 5781 is unconstitutional, as it was unconstitutionally passed

and it is in direct violation of an array of Arkansas statutory and case law on its face. The irreparable harm to the Plaintiffs, should Ordinance No. 5781 be permitted to be enacted as scheduled, will far outweigh the harm, if any, to the Defendants if this preliminary injunction is not granted. In *McCuen v. Harris*, the Arkansas Supreme Court held that when a constitutional mandate was violated, that harm that accrued to the Plaintiff far outweighed the harm that would accrue to the Defendants by granting it. *McCuen v. Harris*, 321 Ark. 458, 467, 902 S.W.2d 793, 799 (1995).

The irreparable harm to the citizens of Fayetteville cannot be adequately addressed by monetary damages, because violations of constitutional rights cannot ever be adequately compensated by a monetary award. Additionally, the irreparable harm to the citizens of Fayetteville cannot be adequately addressed in a court of law due to the time sensitive nature this action. The only adequate remedy available in this situation is the issuance of a preliminary injunction, preventing Ordinance No. 5781 from being enacted as law.

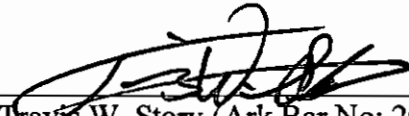
X. Conclusion

The Plaintiffs can show that there is a reasonable probability of their success in the litigation, as it is clear from Arkansas statutory and case law that procedural requirements were not complied with when Ordinance No. 5781 was passed by the Fayetteville City Council, the passage of Ordinance No. 5781 is a violation of Amendment 7 to the Arkansas Constitution, Ordinance No. 5781 fails to protect constitutionally protected rights and is therefore unconstitutional, Ordinance No. 5781 is unenforceable as it violates Ark. Code Ann. § 14-1-403, and the Defendants' actions amounted to an illegal exaction of taxpayer funds under Ark. Const. Art. 16, § 13. Plaintiffs pray that this Court will grant its Motion to Stay the Enactment of Ordinance No. 5781 against the City of Fayetteville during the pendency of this case as there is

no other adequate remedy available. If Ordinance No. 5781 is allowed to become law, it will irreparably harm the rights of all residents of the City of Fayetteville, including the named Plaintiffs, and the registered voters represented by Protect Fayetteville. These parties are without any further redress while this case is proceeding as a recovery of monetary awards is wholly insufficient for the violation of the civil rights, which would occur if Ordinance No. 5781 is allowed to become law. Plaintiffs have shown sufficient chance of ultimate success on the merits of its claims that Ordinance No. 5781 violated the due process, and constitutional rights of the Plaintiffs and those similarly situated. Therefore, the Plaintiffs pray that this Court will grant its Motion to Stay the Enactment of Ordinance No. 5781 against the City of Fayetteville during the pendency of this case, as there is no other adequate remedy available.

Respectfully Submitted,

By:

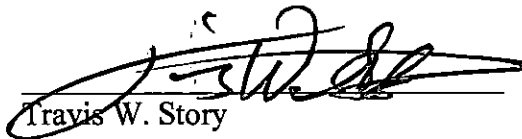

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CERTIFICATE OF SERVICE

I, Travis W. Story, state on oath that I have sent a true and correct copy of the foregoing **Brief in Support of Motion to Stay Enactment of Ordinance No. 5781** by serving the same on the following counsel in this matter on 22 day of October 2015 via Hand Delivery.

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