History and Analysis of the Fayetteville, Arkansas Human Civil Rights Ordinance

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History and Analysis of the Fayetteville, Arkansas Human Civil Rights Ordinance

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INTRODUCTION

“The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom.”

- John Locke

Since its formation nearly 250 years ago, the United States has established itself as a beacon of opportunity for individuals from all backgrounds. This opportunity has resulted in the development of the United States as one of the most diverse countries in the world, with the interests of these many individuals manifesting itself in a healthy and open economic environment.

Despite this diversity, over its history the U.S. has faced numerous hurdles when it has come to civil rights and the legal definition and scope of individual liberties. These battles have often been fought on a regional and state-by-state level, including: division of Confederacy and Union states over the status of slavery and the legal definition of African American citizenship in the mid-19th Century; women’s suffrage movement, rooted primarily in Northeastern United States, in the early 20th century; and African American Civil Rights movement born out of the prejudicial and racist legal environment in the southeastern U.S. in the 1960s and 1970s.

With each advancement in individual rights of one demographic group, the landscape of others’ rights is further examined—often the result of a modernizing society that experiences a maturation of social views. The most recent demographic group to experience this change and incremental progression of rights is Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals and unionized couples—representing 9.5 million Americans. (Williams Institute, 2015). This includes the Supreme Court legalizing gay marriage nationwide in June of 2015 by a vote of 5-4. (New York Times, 2015). This groundbreaking ruling has been accompanied by an overarching shift in society’s acceptance of the LGBT community. The approval rate of same-sex marriage has more than doubled
in the last twenty years, reaching an all time high of 60%. (Gallup, 2015). In a Pew Research Center study, 92% of LGBT adults felt that society has grown more accepting and welcoming over the past decade. (Pew Research Center, 2015).

Despite the evolving legal and societal changes in the LGBT movement, there continues to be numerous instances of increase in LGBT discrimination- particularly in the areas of employment, housing, and public accommodations. Nearly two-thirds of LGBT Americans have reported circumstances in which they felt discriminated against. (Human Rights Campaign, 2015). As it stands, the federal government has no clear-cut nondiscrimination protections based on sexual orientation and gender identity, thus leaving the responsibility to the states. Many states have already adopted nondiscrimination laws protecting residents from these forms of discrimination and following the Supreme Courts same-sex marriage ruling, many other states and municipalities have followed suit. In total, seventeen states and the District of Colombia and more than 200 municipalities have adopted such non-discrimination ordinances. (Freedom for All Americans, 2016). This wave of legislation has occurred in our own city, Fayetteville, Arkansas, as defined by the Uniform Civil Rights Protection Act, or Ordinance 5781, where discrimination is prohibited on the basis of sexual orientation or gender identity in employment, public accommodations, property transactions, and contractual agreements. However, this was not the first draft of a nondiscrimination ordinance and the legality of Fayetteville’s ordinance is in question.

There still remains a solid—albeit diminishing— opposition of the LGBT movement and the legalization of gay marriage has fueled the controversy. LGBT nondiscrimination ordinances throughout the country have been largely controversial and in many cases are repealed through elections or lawsuits. In cases where ordinances are approved, many states have begun to take action on LGBT rights by superseding cities’ and local municipalities’ through legislation. This study is an in-depth analysis of the City of Fayetteville, Arkansas’ controversial road to anti-discrimination legislation for the LGBT community.
PART ONE: THE RISE OF ANTI-DISCRIMINATION LAW IN FAYETTEVILLE

Project One America

According to a survey conducted by the Williams Institute, an estimated 35% of the country’s LGBT community lives in the South, with an estimated 79,000 adults in the state of Arkansas alone. (Williams Research Institute, 2016). However, none of these individuals have fundamental civil rights from discrimination because of their sexuality. Arkansas law has no consistent, state-wide nondiscrimination protections based on sexual orientation or gender identity. The state is also considered one of the most underserved states by the national LGBT movement, according to the Human Rights Campaign, the country’s largest LGBT Civil Rights organization. The group, originally titled the Human Rights Campaign Fund, was founded in 1980 and was one of the nation’s first political action committees for gay and lesbian citizens. The organization removed the word “Fund” from its name in 1995 and shifted focus from lobbying towards promoting inclusion and equality. (Human Rights Campaign, 2016).

In a strong effort to increase equality for the LGBT community in the South, the HRC created a three-state task-force in Mississippi, Alabama and Arkansas in 2014 called Project One America. The organization, equipped with an $8.5 million budget for the next three years, began the project with the intent to reverse the notion that Southern states are the “finish line” for LGBT civil rights. Once the states were selected, the Human Rights Campaign began an intensive needs-assessment of each. The survey is the largest survey of its kind in efforts to measure LGBT in Southern societies. A key finding of the survey show that in each of the states, one quarter of the LGBT community have felt discriminated against in certain business transactions.

In an individual state assessment, the quantitative survey of 979 LGBT respondents in Arkansas reported that half had experienced discrimination on the street, 37% reported of harassment at work and one quarter had experienced employment discrimination. In the workplace, 37% of LGBT workers responded that they are not publically open with their colleagues in fear that they will not be considered
for promotions, advancements, or development opportunities. The discrimination is not just at work—43% reported to experience discrimination in public establishments; 45% reported having faced discrimination in school; and 18% reported monthly or more discrimination at various houses of worship.

The survey also found that LGBT citizens are important members of the communities. 58% of the survey respondents have called Arkansas home for over 20 years; 53% of the LGBT respondents volunteer in their community; and 60% donate money to charities and non-profit organizations. The survey also found that 1/3 of respondents were people of faith. (Human Rights Campaign, 2014).

**Analysis and Passage of Ordinance 5703 and Chapter 119**

Less than two weeks after the Human Rights Campaign’s report was released to the public in July 2014, measures were being taken by local municipalities throughout Arkansas. With no clear and definite state anti-discrimination laws or protections for the LGBT community, cities and counties throughout the state began discussions of taking action. On July 15 2014, the Fayetteville City Council introduced and held the first reading for a potential ordinance that would amend the city’s code to provide protections for all citizens from ‘unfair discrimination.’ The ordinance, Ordinance 5703, called for the enactment of a new Chapter into the city code, Chapter 119 – Civil Rights Administration. *To see a copy of the proposed Ordinance 5703 and Chapter 119, see Appendix A.*

*§ 119.01 - § 119.02 Purpose and Definitions*

The purpose of the proposed legislation cited was to “protect and safeguard the right and opportunity of all persons to be free from discrimination based on real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability and veteran status.” The act cites specific instances such as employment, housing and rental transactions, and public accommodation.
transactions that should be available to all citizens without discrimination. Additionally, the act was intended to “promote the public health and welfare” of all individuals who work or live within the city.

Following the purpose of the bill, §119.02 includes relevant definitions of terms used throughout the ordinance. The definitions given are not a complete set of definitions for the entire ordinance, but rather a specific selection of terms that may need more interpretation. Some definitions are fairly straightforward, such as definitions for “Business Establishment,” “Employer,” and “Employee.” However, the ordinance also includes its intended interpretations for terms without concise and comprehensive definitions. “Discriminate, Discrimination or Discriminatory,” consists of “any act, policy or practice that has the effect of subjecting any person to differential treatment” due to a person’s attributes or characteristic listed in the ordinance. Of those listed attributes and characteristics, definitions are given for those subject to a variety of interpretations. “Gender” is defined as an individual’s “actual or perceived sex.” Finally, there are the two definitions for the controversial terms that are seldom used in Arkansas legal code – gender identity and sexual orientation. The ordinance defines gender identity as “a person’s gender-related identity, whether or not that identity is or is perceived to be different from that traditionally associated with the sex assigned to that individual at birth.” Sexual orientation is defined as “actual or perceived heterosexuality, homosexuality or bisexuality.” See Appendix A.

§ 119.03 to § 119.06 Prohibited Acts of Discrimination

The ordinance lists a number of discriminatory actions that would be considered unlawful for an employer or labor organization to conduct, completely or partially, throughout employment procedures for a “discriminatory reason.” Such acts include the failure or refusal to hire and the firing of employees; discrimination in relation to ‘compensation, terms, conditions or privileges or employment,’ including promotions; to discriminate against an individual’s “admission to, or employment in,” any training or apprentice program; to print or publish discriminatory notices or advertisements; and to make discriminatory referrals regarding an individual in the employment process. Also, the ordinance bans actions that would deprive an individual of employment opportunities, limit potential employment
opportunities and or in any way result in an adverse affect for the prospective employee’s application.

The ordinance then lists a number of discriminatory actions that would be considered unlawful if conducted by parties within housing and real estate transactions. This subsection includes actions taken throughout the sale and lease transactions for a reason that is either partially or entirely discriminatory. Such acts include discrimination in the form of “impeding, delaying, discouraging, or limiting or restricting transaction in real estate;” “imposing different terms on real estate transactions;” and to give the perception that “an interest in real estate is not available for transactions” due to a discriminatory reason.

Finally, the ordinance declares that for all business establishments and accommodations that are intended for public use, it is illegal to disallow “directly or indirectly, any person the full enjoyment of the goods, services and facilities, privileges, advantages and accommodations” due to discriminatory reasons. This is the sole section of the bill that makes it illegal to refuse service for discriminatory purposes. The ordinance is binding on the City of Fayetteville and its employees; city government, employees and contractors conducting business with the municipality are held to the same standard as individuals and businesses. After its introduction, the ordinance was amended to include a general exemption for religious beliefs after there was public backlash from local religious institutions. (Fayetteville Flyer, 2014). Also included in the exemptions are procedures regarding a “bona fide” affirmative action policy and occupational qualifications. See Appendix A.

§ 119.07 and § 119.11 — General Exemptions and Administration and Enforcement

The ordinance provides exemptions in which individuals and entities may be able to act in a way that violates Chapter 119 and its provisions. The ordinance states that the chapter does not pertain to any “federal, state or county government office or officer, or any public educational institution within the City.” In addition, practices that may ordinarily be deemed by the ordinance as discriminatory may be exempt if it is an effort to carry out an affirmative action policy by a law. There is also an exemption to protect the freedom of religion and speech for practices of a “permissible bona fide religious or
denominational preference” but that they must demonstrate there is burden of proof that “the discrimination is in fact a necessary result of such a bona fide condition.”

Complaint procedures, administration and enforcement of the ordinance are stated to be overseen by the Mayor. In order to carry out each of these functions, the ordinance creates the position of the Civil Rights Administrator. The position, appointed by the Mayor of the city, would hold the responsibility of “receiving, investigating, and conciliating complaints filed under [Chapter 119].” As it did not prepare a mock complaint form, the administrator is to carry out the responsibility for that as well. Complaints must be received by the administrator’s office no later than six months after the most recent discrimination offense. Once received, the administrator “should first attempt to eliminate the unlawful practice or practices through conciliation and meditation.” If an attempted resolution is deemed unsuccessful and the accused discriminating party was not found to act in “good faith, the complaint may be immediately referred to the City Prosecutor’s office.” *See Appendix A.*

**1.4 Road to the Vote – Response, Public Opinion, and Referendum**

*Initial Response*

When Ordinance 5703 was introduced during its second reading on the August 5, 2014 city council meeting, member of the council listened for hours to public feedback. The first reactions to the ordinance were those in opposition. The primary argument of those against the ordinance was that it infringed upon their First Amendment rights by prohibiting the freedom to express their religious beliefs and faith. In response, the council proposed an amendment to the ordinance to provide an exemption for religious institutions. However, even with the religious exemption, opposition was still strong. Other arguments claimed that the ordinance was equivalent to “opening a door for pedophiles and sexual predators.” Some residents questioned whether the discrimination actually existed and asked for specific examples. A majority of the opposed respondents were leaders of religious organizations, with very few individuals speaking in favor of the legislation. After hours of discussion, the city council held the
ordinance at its second reading until the next City Council meeting. (Fayetteville Flyer, 2014).

Third and Final Reading

In the third and final reading of the ordinance held on August 19\textsuperscript{th}, the expected turnout from citizens was so high that there was discussion of moving the meeting to a larger location than the planned venue of City Hall. While the venue change was not approved, the attendance of the meeting left the chambers at full capacity. The original meeting earlier in the month had had 22 public responses, the August 19 meeting held in City Hall had 73 statements during its time for public comment. Of these residents, 49 were in favor of the ordinance and 24 were opposed. (Fayetteville Flyer, 2014).

A number of opponents’ arguments were similar to those heard in the first meeting, such as allowing predators to enter public bathrooms. Additional arguments were presented that the ordinance could hurt local business by causing companies to start businesses outside of the city. Many respondents asked a similar question – where is the discrimination? To this question, a number of people spoke up on discrimination instances experienced personally or witnessed. One respondent claimed to have lost employment due to his sexual orientation; another resident spoke of fears that a landlord would evict him if they learned he was gay. While many agreed that Fayetteville is a “fair-minded place,” there are “isolated instances of oppression” that warrant city action.

In addition to public comment, several amendments were proposed before the final vote of the City Council. All tax-exempt institutions and places of worship owned by a religious institution were voted by aldermen to be exempt from the ordinance. Alderman Justin Tennant proposed an amendment to allow the citizens to decide the fate of the legislation in a public vote during the upcoming general election. With opposing opinions regarding this amendment, the council voted 2-6 to reject Alderman Tennant’s amendment. However, the public would still have the chance to challenge the new law by issuing a petition to halt the effective date of the ordinance and institute a special election.

After ten hours of discussion and the longest meeting in city council history, the aldermen voted in a 6-2 vote for the passage of the ordinance. Understanding that there were key disagreements amongst
respondents, the law was passed with the anticipation it may need to be amended in order to serve all citizens. Council members against the ordinance claimed that it was “irresponsible” to enact an ordinance that was not complete. However, those who voted for the ordinance agreed that discrimination was an issue to be dealt with urgency, and that it was city council’s responsibility to “take the first step.” (Fayetteville Flyer, 2014).

**Public Sponsors and Advocacy Groups**

Proponents of the legislation registered an Arkansas Ballot Question Committee with the Arkansas Ethics Committee called Keep Fayetteville Fair. The group was established to defend the Civil Rights Administration Ordinance and to campaign for voters’ ballot in the election. The group advocated that their supporters are individuals who “believe all folks who work hard, pay their taxes, serve in our military, and contribute to our community deserve to be treated fairly under law, including our gay and transgender neighbors.” (Keep Fayetteville Fair, 2014). The advocacy group was funded on donations from supporters, including the Pulaski County Democratic Committee, the NWA Center for Equality, and the Human Rights Campaign. The Human Rights Campaign donated money and nonmonetary contributions totaling $166,080.50 from the organization’s Washington D.C. headquarters. (Henry, 2014).

Opponent activists also registered with the Arkansas Ethics Committee and created a Ballot Question Committee called Repeal 119. The advocacy group cited that while they are not in favor of discrimination, they feel that the ordinance “elevates sexual orientation and gender identity” to being a basic human civil right comparable to race, gender and religion. The group states that the ordinance actually increases discrimination by giving sexual orientation and gender identity greater protection and privileges than race, gender and religion. Repeal 119 stated that a vote against the ordinance would: support the local business community by rejecting excess government regulation; defend citizens’ First Amendment right to freedom of speech and religion; protect women and children in public places such as restrooms and locker rooms; and give citizens the right to set their own laws. (Repeal 119, 2014).
Special Referendum Election

With City Council’s August 19 approval, Ordinance 5703 was set to go into effect on September 20, 2014. As Alderman Tennant was denied his request to amend the ordinance by suspending the ordinance’s enactment until the public voted in a special election, opponents had until that date to take significant action. In order for the opponents to receive the public referendum and special election they sought, they had until the enactment date to turn in a petition with the needed 4,095 signatures, equal to fifteen percent of the citizens who voted in the most recent mayoral election. Immediately following the ordinance’s approval, opponent group Repeal 119 began petitioning for the public referendum and collecting signatures of citizens who were in favor of a public vote. (Fayetteville Flyer, 2014).

Collected by the City Clerk’s office, Repeal 119 turned in 5,722 signatures on the first count September 20. The City Clerk’s office had ten days to verify the validity of each signature and to identify duplicate signatures. By September 29, the Office certified there were adequate signatures on the petition, thus suspending the enactment of the ordinance until the public voted in a special election. The election date was approved for December 9, 2014. (Fayetteville Flyer, 2014).

Final Weeks

In the final weeks between the public referendum and the December 9 special election, both proponents and opponents were making significant measures to educate the public. Local government and public leaders were also taking action in the debate. On November 6, 2014, the Fayetteville Chamber of Commerce announced that they were holding a press conference the next day to discuss their Board of Director’s “unanimously adopted” decision to issue “a resolution calling for the Repeal of Ordinance 5703.” The Chamber’s decision to take a stance on the public debate was made for a number of reasons, primarily that the ordinance criminalized civil conduct and was vague and incomplete.

In the announcement of the Chamber’s press conference, the Chamber expressed it was “never good public policy for any governmental entity to adopt rules, regulations, ordinances or laws that are vague, incomplete, fail to include critical definitions for prohibited acts or conduct that may be later be
adjusted as criminal.” In the press conference the following day, the Chamber’s Board of Director’s Chairman, Bill Bradley stated that the purpose was to “announce the plans of an informational campaign to recommend to their members and the public to repeal Ordinance 5703.” Bradley claimed that the “exclusive focus of [the Board’s] informational campaign is that the law is seriously flawed as written.”

The Chamber urged voters to vote in favor of the Ordinance’s repeal on December 9. (City of Fayetteville’s Chamber of Commerce, 2014).

Several actions and statements were made in response to the Chamber of Commerce’s resolution. Proponent advocacy group Keep Fayetteville Fair issued a statement the day of the conference expressing disappointment in the Chamber’s decision to take a stance on such a divisive issue. City Council Alderman Mark Kinion, supporter of the ordinance, stated that he planned to return the $250 endorsement he received from the Chamber of Commerce for his reelection fund. (Fayetteville Flyer, 2014). On November 10, University of Arkansas Chancellor G. David Gearhart issued a letter asking the president and chairman of the Chamber of Commerce to “rescind” its action. Writing as an “ex-officio member of the Board of Directors” he stated that he was not asked his opinion regarding the Chamber’s resolution. The Chancellor wrote that the Chamber “should promote harmony and prosperity, not create crisis” and that the issue has “strained relations among town, gown and individual citizens.” The same day, Mayor Lioneld Jordan also issued a letter requesting the Chamber to rescind its decision to “oppose and lobby” against Ordinance 5703. Jordan also stated that he too, as an ex-officio member of the Board, was not aware nor given any notice of the Chamber’s meeting and decision. To see Chancellor Gearhart and Mayor Jordan’s statements to the Chamber of Commerce, see Appendix B.

Voting Results

Voters cast their ballots on the special election on December 9, 2014 with a turnout of 29.42% of registered Fayetteville voters. The Civil Rights Administration Ordinance was repealed by a vote of 51.65% to 48.35%, a nominal difference of 480 votes. (Washington County, 2014). With such a close margin, many citizens requested a revision of the ordinance to be made. In a statement issued on
December 12, City Attorney Kit Williams declared his disappointment with the outcome of the election, stating that he did not truly believe Fayetteville had a discrimination problem until the “marathon” campaign for Ordinance 5703. Although he did not believe a revision of the original ordinance would be best for the city, the city needed a noncomplex ordinance to “place Fayetteville on the side of equality, justice, love and inclusion.” To see the City Attorney’s statement to City Council, see Appendix C.

Impact – Other Municipalities and State Response

Although it was not upheld by the voters, Ordinance 5703 and the proposed Chapter 119 amendment of the City of Fayetteville code had significant impact in the State of Arkansas. The bill was one of the first of its kind to protect the interests and civil rights of the LGBT community by prohibiting discrimination for two new classes in civil rights. It also presented a problem that was seldom advocated for and scarcely understood in the state. Upon the release of the Human Rights Campaign’s report, local municipalities began to take action by drafting their own versions of nondiscrimination ordinances.

In the months following Fayetteville’s voter repeal of Ordinance 119, cities and counties throughout the state moved forward with their own civil rights legislation. In February 2015, the city of Eureka Springs’ city council voted unanimously to enact Ordinance 2223, which prohibits discrimination based on “real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability or veteran status.” (Eureka Springs, Arkansas, Municipal Code § 7.65). Eureka Springs, quoted as the “Gay Capitol of the Ozarks,” was the first to offer domestic-partnerships and the first to conduct marriages of LGBT couples; however, the city did not have the legal means to protect those individuals until the ordinance was introduced. Based off of Fayetteville’s original legislation, Ordinance 2223 protects all citizens of the city. After city debate, the ordinance was voted on and passed by the citizens on May 12, 2015. (Northwest Arkansas Democrat Gazette, 2015).
The state capitol of Little Rock introduced an anti-discrimination ordinance at the proposal of City Director, Kathy Webb, and was voted on by the Little Rock City Board on April 21, 2015. The ordinance is similar to other municipalities’ in that it prohibits discrimination based on sexual orientation and gender identity; however, its focus centers around workplace and employee discrimination. The ordinance was passed in a 7-2 vote. (Arkansas Times, 2015). A little over a month later, Pulaski County took a stance on the issue when it passed its own anti-discrimination ordinance in a vote 10-5 by members of its Quorum Court on May 26, 2015. Pulaski County, the largest county in Arkansas and home to the city capitol of Little Rock, was the sixth municipality to enact nondiscrimination legislation for its citizens. (Human Rights Campaign, 2015).

However, while local municipalities were making great strides towards inclusion and equality of the LGBT community, the state legislature was making great strides to prevent it. In early 2015, Senator Ben Hester (R-Cave Springs) sponsored and filed Senate Bill 202, *The Intrastate Commerce Improvement Act* with the state senate. The purpose of the bill was to create antidiscrimination legislation that is “uniform” throughout all levels of government within the state. To achieve this, the bill prohibits any city, county, or other political municipality to “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.” On February 24, the bill was passed by the Arkansas General Assembly and created Act 137 of the Arkansas Code. (Arkansas 90th General Assembly, 2016). While intended to be a roadblock for further LGBT nondiscrimination ordinances, the language of the act has created a state wide debate over the intended interpretation. Until clearly interpreted by the highest level of court, municipalities continued to adopt ordinances in line with both the law and the needs of their citizens.
PART TWO: THE UNIFORM CIVIL RIGHTS PROTECTION ORDINANCE

Introduction – The Need for A Fayetteville Civil Rights Protection Ordinance

Following the public’s veto and repeal of Ordinance 5703, proposals were made for a revised version within days. On December 12, 2014, just three days after the special election of the original civil rights ordinance, Fayetteville City Attorney Kit Williams issued a statement and memo to City Council addressing the city’s next steps. In his memo, titled “The Need For A Fayetteville Civil Rights Protection Ordinance,” Williams claimed that he felt that a revision of the original ordinance was “ill-advised” and “would not likely end the divisiveness and bring consensus.” However, the reality of discrimination in Fayetteville had been exposed and the city attorney felt that he had a duty to the citizens who elected him to “unite Fayetteville in freedom and fairness.” The forthcomings from the previous legislative process had made it clear that there was still a need to protect all citizens of Fayetteville, but on its own terms. Therefore, Kit Williams drafted an entirely new anti-discrimination ordinance to better serve the citizens of Fayetteville and provide protection to all. To see the City Attorney’s statement to City Council, see Appendix C.

In his address to the Fayetteville City Council, Williams stated that he intended to create legislation largely accepted by a majority of voters rather than a small minority. Thus, the proposed ordinance would be “laser focused” on the true problems that needed to be addressed. In developing such important and controversial legislation, Williams stated that it would be a mistake to rely upon an ordinance drafted by a Washington D.C.-based special interest group, the Human Rights Campaign. For such a sensitive and debated topic, there must be an understanding of the state and city’s history, law and composition, as well as the utmost concern for all of Fayetteville’s citizens.

In doing so, the City Attorney derived a significant portion of the context from the Arkansas Civil Rights Act of 1993 (ARCA), which after two decades of application and history, is looked to for guidance throughout the state when issues of discrimination must be confronted. Specifically, Williams included exact definitions of “Employee”, “Employer”, “Religion”, and “Place of public resort, accommodation,
assemblage, or amusement” from the A.C.R.A. He also narrowed the scope of the proposed ordinance by integrating the §16-123-103 Applicability, § 16-123-107 Discrimination Offenses, and § 16-123-108 Retaliation statutes from the Arkansas Code. The ACRA provides discrimination protections on the basis of “race, ethnicity, national origin, age, sex, religion and disability.” Because there are no protections from discrimination towards gender identity and sexual orientation in the ACRA, Williams referenced applicable and relevant laws throughout the courts in which transgender individuals have been granted protection, such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

While it was noted that a completely new ordinance would not automatically bring a consensus amongst differing viewpoints, a “shorter, more focused, and clearer” ordinance would give citizens a better understanding of where they stood. Instead of broad definitions, offenses, and applications to interpret, citizens would be able to reference a carefully constructed ordinance, tailored specifically for Fayetteville’s actual problem. In order to have a better understanding of what that problem is, what form it takes, and the best measures for fixing the it, sponsors and proponents of the new ordinance went straight to the source: Fayetteville citizens. Public opinions of residents, businesses, religious leaders of Fayetteville were used to draft an ordinance that took all stances into account.

**The Uniform Civil Rights Protection Ordinance**

After months of provisions and drafts, Ordinance 5871 was ready to be presented to the public. The final draft, entitled *The Uniform Civil Rights Protection Ordinance*, declared the ordinance as an “intent to ensure uniform nondiscrimination protections within the City of Fayetteville for groups already protected to varying degrees throughout state law.” *See Appendix.* The ordinance references, as City Attorney Kit Williams noted, federal and state laws already protecting discrimination including the *Civil Rights Act*, the *Arkansas Civil Rights Act of 1993*, and the *Arkansas Domestic Peace Act*, that already protect Fayetteville citizens from discrimination on the basis of cited protected classes of sexual orientation and gender identity. The ordinance cites that the Arkansas General Assembly has previously
recognized the need for protection the classifications gender identity and sexual orientation in § 6-18-514(b)(1) of the Arkansas Code, Anti-bullying policies. (A.C.A 6-18-514(b)(1). However, the statute in question directly relates to bullying in schools and pertains to students. The ordinance attests that the inclusion of these protected classes in prior legislation is substantive justification for the city of Fayetteville to attempt to prohibit the “isolated but improper circumstances when some person or business might intentionally discriminate against our gay, lesbian, bisexual and transgender citizens.” The Arkansas Domestic Peace Act prevents shelters from discriminating against sexual preference. To see Ordinance 5871 and its provisions, see Appendix D.

After conducting interviews with groups and individuals in Fayetteville, city council members found that most voters supported the original ordinance while a portion felt that it “wasn’t a good fit for the community.” (Fayetteville Flyer, 2015). Additionally, some residents who were for the original legislation claimed they were confused by the language used during campaigning and on the ballot. Based on the responses, city council felt that the issue of gender identity and sexual orientation discrimination is better left up to the community through a special election. The decision for a special election was made in order to respect the vote of those who voted in the original ordinance as well as to provide “clear and transparent” ballot language. (Fayetteville Flyer, 2015). The ordinance states that enactment or rejection of the ordinance was to be decided by the majority of voters on the date of September 8, 2015.

Provisions of the Bill

As stated in Fayetteville City Attorney Kit William’s statement regarding the need for a city civil rights ordinance, parts of the Uniform Civil Rights Protection Ordinance were adopted and incorporated from the Arkansas Civil Rights Act of 1993. In the section entitled “Discrimination Offenses,” the ordinance states that the right to be free from discrimination based on sexual orientation and 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. These rights include: the right to obtain and hold employment; the right to the full enjoyment of the
accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement; the right to engage in property transactions; the right to engage in credit and other contractual agreements; and the right to vote and participate fully in the political process.” See Appendix. Additionally, the ordinance also states that those participating in real estate transactions must engage in conduct on the basis mandated in the Arkansas Fair Housing Act.

Upon its enactment, the ordinance establishes a Civil Rights Commission to review discrimination complaints made with the city. The commission’s duties consist of the review, discussion, and decision of submitted complaints claimed to be in violation of the Uniform Civil Rights Protection Ordinance. The seven-member Commission, appointed by City Council, shall be composed of: two members and representatives of the business community; two owners or property managers of rental property; one citizen with employment or human resource law experience; and two “citizens at large,” with at least one who identifies as a member of the LGBT community. The Civil Rights Commission will have annual meetings with City Council to discuss the complaints received along with their outcomes. The city attorney’s office will support the Civil Rights Commission by receiving complaints on the group’s behalf and assisting in responsibilities.

Discrimination complaint and enforcement procedures are specifically detailed in the ordinance for situations in which an alleged case of discrimination is reported. Upon experiencing or learning of discrimination in violation of the ordinance, an individual, referenced as the “complainant,” has ninety days from receiving the facts of the incident to report it with the city attorney’s office. Once received, the office has two business days to notify the Civil Rights Commission of the complaint. Before any enforcement procedures begin, the city shall make mediation or conciliation efforts between the accused discriminator, referenced as the “respondent,” and the complainant. The resolution measures, which should begin within four days upon receiving the complaint and last no longer than two weeks, are subject to the Confidentiality of communications in dispute resolutions section of the Arkansas Code. (A.C.A 16-7-206).
If the city’s efforts are successful and the discrimination dispute is resolved, the Civil Rights Commission will not proceed with enforcement procedures. However, if the mediation and conciliation efforts do not resolve the dispute, the Commission must determine if the ordinance was violated. After the failed mediation efforts conclude, the Commission will notify parties of a hearing scheduled between five and fourteen days after the conclusion. At the hearing, the Commission will review the initial complaint and accept any additional evidence from the complainant. Next, the respondent will defend, explain, or “rebut any allegations of illegal discriminatory acts” as well as provide any favorable evidence. Once the Commission has heard both party’s argument, a determination must be made if the respondent’s actions were in violation of the ordinance; if so, the complaint and the Commission’s findings are forwarded to the city prosecutor. No violation of the Uniform Civil Rights Protection Ordinance is a misdemeanor or felony. An individual’s first violation will result in a penalty of a $100.00 fine. For additional discriminatory violations, individuals will be subject to a maximum penalty of $500.00, following the Fayetteville City Codes’ §10.99 General Penalty.

Differences from Ordinance 5703

While opponents of the Uniform Civil Rights Protection Ordinance declared that it was simply a reintroduction of the original, there are many differences between the two bills. First and foremost, the original Ordinance 5703 was very vague in terms of discriminatory offenses, entities subject to the ordinance, and enforcement procedures. While Ordinance 5703 and Chapter 119 included vague definitions for protected classes such as “socio-economic status” and “physical characteristics,” the Uniform Civil Rights Protection Ordinance clearly emphasizes and defines its intended classes of “sexual orientation” and “gender identity.” The original nondiscrimination ordinance also did not clearly explain the types of acts that would be determined discriminatory or their associated penalties, whereas Ordinance 5871 adopted the section “Discriminatory offenses” directly from the Arkansas Civil Rights Act of 1993 as well as offenses in real estate transactions from the Arkansas Fair Housing Act. Additionally, as Chapter 119 did not reference penalties, many citizens feared it would be considered criminalized civil
conduct and would strip them of their business licenses. Ordinance 5781 adopted the General Penalty statute from the Fayetteville City Code, limiting the maximum fine to $500.00.

Chapter 119’s poorly defined complaint procedures and enforcement policies were large contributors of the public’s confusion. The ordinance had no clear set of complaint procedures and placed a large amount of responsibility and authority in the hands of the Civil Rights Administrator. In contrast, the Uniform Civil Rights Protection Ordinance was carefully thought out and developed to ensure that the information was easily accessible to the city. The creation of a Civil Rights Commission, a detailed and confidential mediation process, and a specific complaint procedure allowed the city to address concerns while still creating effective legislation.

**TIMELINE**

_City Council Approval_

After months of drafts, discussions and interviews, the Uniform Civil Rights Protection Ordinance was ready for its City Council vote. A co-sponsor of the ordinance, City Council member Adella Gray introduced it on June 3, 2015 in an agenda-setting City Council session. The agenda request was approved and the ordinance was set to have its first reading on the June 16, 2015 city council meeting. Anticipating another large turn out from the public, Mayor Lioneld Jordan established a code of conduct for the meeting, limiting public comment to three minutes per individual.

The meeting began with fourteen proposed amendments to be made to the ordinance by Alderman John La Tour, an active opponent of the city’s original legislation. The amendments were not supported, allowing public discussion to follow with the floor open to Fayetteville residents and visitors. Over fifty individuals spoke, sharing stances, opinions and experiences with the council. Following the public statements, the city council members were able to discuss the ordinance and their opinions. Alderman La Tour reiterated prior arguments and voiced that he felt City Council’s responsibilities should be limited to basic problems, not civil rights.
However, other Aldermen disagreed. The next in line to speak, Alderwoman Sarah Marsh “motioned to suspend the rules and take the ordinance to the second reading” which was voted 7-1 by council members. Immediately following, Alderman Kinion, also motioned to suspend the rules and to take the ordinance to its third and final reading as the ordinance had gone through substantial discussion throughout its production. The motion had a vote of 5-3 from members, thus requiring Mayor Jordan to cast a vote to get to the required six affirmative votes. In its final reading, council members discussed the special election and other specifics until the time came for the final vote. The Uniform Civil Rights Protection Ordinance was passed by city council in a 6-2 vote, with only Aldermen La Tour and Schoppmeyer casting negative votes. Per the ordinance, the legislation would not be enacted unless approved by voters in the September 8 special election. (Fayetteville Flyer, 2015).

Public Opinion

With less than three months between City Council’s approval of Ordinance 5871 on June 16 and the scheduled special election on September 8th, parties on both sides of the legislation began campaigning. Many of the stances and opinions were reiterations from the prior ordinance’s campaign. However, the more clearly defined ordinance allowed many individuals to take a stance when they were once divided or confused.

For Fayetteville was created as an advocacy group in favor of the Uniform Civil Rights Protection Ordinance. By July 23, 2015, the advocacy group had the signatures of 305 local businesses pledging their support for Ordinance 5781. The pledge read: “[Business Name] is an Equality Business. We do not discriminate on the basis of sexual or gender identity. We embrace diversity and inclusion. We respect all of our customers and employees no matter their identity or beliefs because this is our community. We are for Fayetteville. We support the passage of the Uniform Civil Rights Protection Ordinance on September 8, 2015.” (NWA Homepage, 2015). Businesses who made the pledge were encouraged to display a “For Fayetteville” sticker on their windows while signed pledge cards were
displayed in the For Fayetteville campaign office. By August 11, the group had received 400 signatures. (Fayetteville Flyer, 2015).

Formerly known as “Repeal 119,” the opponent advocacy group renamed itself to “Protect Fayetteville” and began campaigning against Ordinance 5871. The Arkansas Ballot Question Committee, was largely responsible for the public referendum of Ordinance 5703 in 2014 as Repeal 119, renamed itself after the city council drafted the new legislation. As before, the group had significant complaints with the proposed ordinance. Similar to the prior arguments of Repeal 119, Protect Fayetteville had strong concerns over the affects on local business, freedom of faith, and protection of women and children. The group stated in a document entitled “What Can Happen Under This Law” that the ordinance “opens the door wide for the LGBT to accuse businesses and individuals of “civil rights” violations if their wants are not satisfied. The group also questioned the bills constitutionality in regards to the recently passed Act 137, stating that the city council is “usurping the authority of the people and the State of Arkansas.” (Protect Fayetteville, 2015)

The group made great efforts to campaign for the public veto of the ordinance by stating potential outcomes from the ordinance, and even held a rally which featured Oregon bakery owners Aaron and Melissa Klein as guest speakers. (KGW News, 2015). The Kleins made headlines in 2013 when they refused to bake a cake for a lesbian couple’s nuptials, claiming that they do not provide for same-sex marriages for religious purposes. As they were not a registered religious institution, the Kleins were found guilty of discrimination by violating civil rights. (Reuters, 2015)

On August 22, 2015, the Fayetteville Chamber of Commerce issued a statement endorsing and supporting the passage of Ordinance 5871. The Chamber stated that it believed Ordinance 5781 had corrected the problems that they previously found with Ordinance 5703 and urged voters to vote “yes” on September 8th. They stated that they believed the ordinance was “good for business and economic development” and “reflects Fayetteville as a welcoming, diverse community.” (City of Fayetteville Chamber of Commerce, 2015).
On August 1, 2015, the day before early voting for Ordinance 5871 was to begin, opponent group Protect Fayetteville took its grievances to court by filing a lawsuit challenging the legislation’s legality. The lawsuit, filed against the City of Fayetteville, Washington County, Mayor Jordan, the City Council Aldermen, and members of the Washington County Election Commission, requested the court to issue a permanent injunction that would stop the special election and remove the ordinance from the September 8 ballot. Upon filing for the injunction, the court scheduled a hearing for September 4. (Fayetteville Flyer, 2015).

On September 3, Washington County Circuit Court judge Doug Martin issued an order denying Protect Fayetteville’s motions and canceling the scheduled hearing. Judge Martin interpreted the plaintiff’s motions as petitions for writs of mandamus, which are defined in § 16-115-101 of the Arkansas Code as “an order of the circuit court granted upon the petition of an aggrieved party or state when the public interest is affected, commanding executive, judicial, or ministerial officer to perform an act or omit to do an act.” (A.C.A §16-115-101). The judge further interprets that, based on the Arkansas Supreme Court ruling in Oliver v. Phillips, 727 F.2d 1103, that any “petition for declaratory relief and motion for writ of mandamus filed one day before an election was moot.” See Appendix. Defined by Black’s Law Dictionary as a “term that means an open question...debatable...unsettled or subject to argument,” the court ruled that there was not enough time to have such discussions prior to the election. (Black’s Law Dictionary, 2016). Judge Martin denied the plaintiff’s motions as they “failed to pursue their petitions expeditiously” and offered “no compelling reason for their delay in filing.” See Appendix. With the lawsuit hearing canceled, early voting was to continue until the special election. On September 8, the Uniform Civil Rights Protection Ordinance was passed by Fayetteville voters. Of the 14,593 ballots cast, 7666 (52.77%) voted in favor of enacting the ordinance while 6,860 (47.23%) were against it. The ordinance was to go into effect on November 6. (Washington County, 2015).
Following the ordinance’s passage, the city accepted applications for members of the Civil Rights Commission. Applications were due to the City Clerk’s office by Friday, October 16, 2015 and only valid for registered Fayetteville voters. After interviewing fifteen applicants, City Council’s Nominating Committee chose seven potential members for the Commission. In a City Council meeting held on November 5, the Commission’s nominees were approved in a 6-1 vote amongst the seven present council members, as Alderman Martin Schoppmeyer was absent from the meeting. Alderman John La Tour was the only member to cast a negative vote. The appointed members of the Civil Rights Commission consisted of: business community representatives Candy Clark and D’Andre Jones; rental property transaction representatives Teresa Turk and Rebekah Champagne; a citizen with civil rights law experience, Henderson Joseph Brown, IV; and two citizens at large, Benjamin Garner Harrison, IV and Carol (Chris) Christoffel. (Fayetteville Flyer, 2015). As of April 2016, the commission received no discrimination offense complaints. (Fayetteville Flyer, 2015).

While the special election results proved a victory for ordinance supporters and the LGBT community of Fayetteville, it did not put an end to the city and statewide debate over discrimination. Now more than ever, the question regarding the legality of Ordinance 5871 and other recently adopted ordinances is in full force. Although the motion to stop the election of the Uniform Civil Rights Protection Ordinance was denied due to the timing of the lawsuit, it was not the end of Protect Fayetteville’s fight to repeal the legislation—their complaints in the case still stood. (Fayetteville Flyer, 2015). With the enactment of Ordinance 5871 scheduled for November 6, opponents kept their stance and continued to work to prove the legislation’s illegality in court.
Part Three: Legality in Question

The Lawsuit

Lawsuit Basics and Complaints

The initial civil suit was filed on August 31, 2015 in the Washington County Circuit Court by attorney Travis Story and Story Law Firm, PLLC on behalf of Protect Fayetteville, formerly known as Repeal 119. The plaintiffs of case number 15-1510-1 were suing the City of Fayetteville, Arkansas; Washington County, Arkansas; Lioneld Jordan as Mayor of the City of Fayetteville; Adella Gray, Sarah Marsh, Mark Kinion, Matthew Petty, Alan Long and Justin Tennant in their aldermen capacities as well as individually; and Honorees Renee Oelschlaeger, Max Deithchler and Bill Ackerman in their capacities as commissioners of the Washington County Election Commission. The suit, titled as “Verified Complaint and Motion for Declaratory Judgment,” was accompanied by six different counts that contributed to the complaint in which the plaintiffs sought judicial relief for. While some counts of the complaint were resolved with Judge Doug Martin’s ruling on September 3, 2015, it is important to understand the entirety of the lawsuit in order to understand where it stands. To see the complete lawsuit and the corresponding complaints filed on August 31, 2015, see Appendix E.

Count I

The first count was entitled “Passage of Ordinance 5871 violated due process of law.” The plaintiffs claimed that the Fayetteville citizens’ rights to due process were violated when the ordinance was passed after all three readings in the same day. Per the Arkansas Code § 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 (2/3) of the members composing the municipal council shall dispense the rule.” (A.C.A. § 14-55-202). As council members voted to suspend the rules during the initial reading of Ordinance 5871, all three readings were conducted on June 16, 2015. The plaintiffs claim that the citizens were not given the opportunity to be heard at a “meaningful time and place” before the council voted. The plaintiffs
requested a declaratory judgment that the Ordinance was void as it was “passed in violation of Arkansas Code Annotated § 14-55-202.” (A.C.A. § 14-55-202). A declaratory judgment is the court’s authoritative opinion regarding the exact nature of the matter that is before the court.

Counts II, III

Counts II and III of the lawsuit pertain to the plaintiffs' request to halt the special election of Ordinance 5871. Count II of the lawsuit is entitled “Passage of Ordinance 5871 Violates the Constitutional Rights of the Voters Who Repealed Ordinance 5703 in the Special Election on December 9, 2014.” It states that the act of passing the Uniform Civil Rights Protection Ordinance violated Amendment 7 of the Arkansas Constitution which states, “No measure approved by a vote of the people shall be amended or repealed by any city counsel, except upon a yea and nay vote on roll call of two-thirds of all the members elected to the city council.” The plaintiffs stated that the ordinance is so similar in nature to the original, voter-repealed ordinance that it violates the citizens’ constitutional rights. Thus, the plaintiffs requested declaratory judgments that Ordinance 5871 was a violation of Amendment 7 as it requires a second vote from voters.

The third count, entitled “Use of Taxpayer Funds for a Special Election for Ordinance 5871 Constitutes an Illegal Exaction and Should Be Prohibited.” The plaintiffs claim that Article 16, section 13 of the Arkansas constitution protects Fayetteville taxpayers from the city’s “misuse of public funds to fund an election in which voters have already spoken.” They claim that “irreparable damage” would be done to the taxpayers through the misapplication of funds. The plaintiffs then requested a permanent injunction that would prohibit Fayetteville and Washington County from “expend any additional funds related to the adoption or enactment of Ordinance 5781.” The requests of Count II and III of the lawsuit were denied by Judge Martin, but the remaining complaints still stood.

Count IV

Count IV of the lawsuit is where the legality of Ordinance 5781 is in question. The title states that the ordinance is “Unlawful as it Directly Violates Arkansas Code Annotated §14-1-103; Arkansas Code Annotated §14-43-610; and Arkansas Code Annotated §16-123-107.” The lawsuit states
that while the city of Fayetteville has legislative power, the ordinance violated the *Reservation of state power* section of the Arkansas Code, which states “Nothing in this subchapter shall limit the power reserved to the General Assembly to specifically limit the exercise of any powers, functions, and authority granted in this subchapter.” (A.C.A. § 14-43-610). This point is a reference to the Arkansas General Assembly’s passage of the Intrastate Commerce Improvement Act earlier in 2015. Following this point, the plaintiffs cite the Intrastate Commerce Improvement Act and the area they believe has been violated by the enactment of Ordinance 5781, that the ordinance “creates a protected classification or prohibits discrimination on a basis not contained in state law.” The plaintiffs then cite the protected classes which are contained in the Arkansas Civil Rights Act of 1993 – race, religion, national origin, gender and disability, then further cite the legal meaning of gender as “on account of pregnancy, childbirth, or related medical conditions. (A.C.A. § 16-123-102; A.C.A. §16-123-107). As gender identity and sexual orientation are not protected classes within the Arkansas Civil Rights Act, the plaintiffs asked for declaratory judgment that Ordinance 5871 is unlawful.

*Count V*

Count V relates to the language used for the title of Ordinance 5871, the Uniform Civil Rights Protection Ordinance, and thus the language used on the ballot for the special election. The main argument revolves around the use of the word “uniform,” which the plaintiffs state is misleading and confusing to voters. They argue that the ordinance is not “uniform” by the adjective’s definition found in Black’s Law Dictionary, meaning “general and uniform when it operates equally upon all persons who are brought within the relations and circumstances provided for.” They further state that the ordinance is not only enacted to help a minority rather than all persons of Fayetteville, but that it is not “uniform” with Arkansas state law, specifically Act 137 and the Arkansas Civil Rights Act of 1993, amongst others. The request of the plaintiffs was a permanent injunction to prohibit the Washington County Election Commission from using the word “uniform” on the special election ballot. Again, this request was denied by Judge Martin due to the timing that the lawsuit was filed.
Count VI

The final count of the lawsuit, “Ordinance 5871 violates 42 United States Code § 1983,” states that the ordinance denies the citizens of Fayetteville of the protected class of “religion.” Specifically, the lawsuit states that the ordinance violated Equal Protection by allowing LGBT individuals to “write their own status in the law while denying that same right to religious individuals and the other protected classes.”

The Intrastate Commerce Improvement Act and Relevant Interpretations

While the Uniform Civil Rights Protection Ordinance was being drafted by Fayetteville city council and lawyers, the Intrastate Commerce Improvement Act had already been passed by the state legislature. As ordinances continued to be adopted and enacted throughout the state in wake of Act 137’s enactment, legality became a large concern. Not only Fayetteville, but all other ordinances that had clauses that prohibited discrimination based on sexual orientation or gender identity were under scrutiny. In response to this concern, City Attorney Kit Williams shared Little Rock City Attorney Tom Carpenter’s City Attorney Opinion justifying the Capitol’s ordinance. To see the official opinion of City Attorney Tom Carpenter, see Appendix F.

In his statement, issued prior to Little Rock’s ordinance approval on April 19, 2015, Carpenter gives his opinion to a question regarding if the city’s proposed ordinance will be valid after the July 22, 2015 enactment of Act 137. In response, he states that it will be valid as it does not “create any protected class, nor does it list any prohibited discrimination not already protected by state law.” He then points to instances of prohibited discrimination in Arkansas law and references Arkansas Code Annotated § 21-12-103 which states that it is illegal for an employer to discriminate based on genetic information. He even lists protections for sexual orientation and gender identity in the Arkansas code, citing the Anti-bullying provisions and even mentions that “Arkansas law expressly permits the change of official birth records for transgender individuals.” He also states that the ordinance is “consistent in interpretation by the
Arkansas Supreme Court of the Equal Protection clause of the Arkansas Constitution. Finally, he states that it is also in accordance with federal law and regulation, citing Supreme Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Little Rock Mayor Mark Stodola stated that lawyers and a law professor have supported Carpenter’s interpretation.

On September 1, 2015, Arkansas Attorney General Leslie Rutledge issued an advisory opinion regarding her interpretation of Act 137 and the legality of recently adopted local ordinances. The advisory opinion was issued in response to Representative Bob Ballinger’s request for her opinion if Act 137 “would prevent the adoption or enforcement, in whole or in part,” of such ordinances. In her response, Rutledge states that she believes Act 137 “renders unenforceable any ordinance that prohibits discrimination on a basis not already contained in state law.” To enforce this point, she argues against the anti-bullying statute and its protection of sexual orientation and gender identity by stating that the statute is not a discrimination law. She includes the definition of bullying as “intentional harassment, intimidation, humiliation, defamation or threat or incitement of violence.” Second, she argues that the anti-bullying statute pertains to students, and not citizens of a city. She concludes by reiterating her opinion that debated ordinances are unenforceable under Act 137 as state law does not prohibit discrimination of sexual orientation or gender identity. It should be noted that advisory opinions are nonbinding interpretations to questions posed by a government office or official. *To see the Arkansas Attorney General Leslie Rutledge’s advisory opinion, see Appendix G.*

**Rulings**

*The City’s Rebuttal*

Even after Protect Fayetteville’s temporary restraining order was denied, the special election was held, and Ordinance 5781 was approved by voters, the lawsuit and its complaints still stood. Once Protect Fayetteville began to individually serve the Mayor and members of city council, the City of Fayetteville issued a Motion to Dismiss the claims presented by the lawsuit on October 2, 2015, followed by a Brief of
Support a few days later. The city claimed that the city council and mayor had immunity in their legislative decisions and thus it was “improper” for them to be included in the lawsuit. In response, Protect Fayetteville’s attorney filed a response to the city’s motion as well as a Motion for Default Judgment, which was denied.

**Motion to Stay**

On October 22, Protect Fayetteville filed a motion for a temporary restraining order to prevent the Uniform Civil Rights Protection Ordinance from being enacted on November 6. In order for a temporary restraining order to be granted, the plaintiff must meet the required burden of proof. The plaintiff must be able to convince the judge that there is a high probability that the complaints would be successful based on its merits and that there would be “irreparable harm” to the plaintiff without the order. In efforts to meet both requirements, the plaintiffs issued a brief detailing circumstances in which they can show success based on merits of their complaints. They also detailed that they can show that “immediate, irreparable harm will occur on November 7” if the court does not enter a preliminary injunction staying Ordinance 5781 from being enacted” by the violation of the citizens’ constitutional rights.

The City of Fayetteville quickly responded to Motion to Stay in a reply from City Attorney Kit Williams. In his brief, Williams stated that most of Protect Fayetteville’s claims “involve undisputed facts” in which the courts are to decide which claims are warranted and which should be dismissed after examination. The brief also addresses Arkansas Attorney General Leslie Rutledge’s advisory opinion regarding Act 137 and states that the act “cannot constitutionally be interpreted” to prohibit the enactment of Ordinance 5871 on the basis of sexual orientation and gender identity. He then questioned Act 137’s constitutionality based on its intended interpretation, but concluded that it is an issue for the courts to decide, referencing U.S. Supreme Court *Romer v. Evans*, 527 U.S. 620 (1996), a ruling on a Colorado law which resembles Act 137. Amendment 2 was added to the Colorado Constitution following the passage of ordinances throughout Colorado municipalities that granted protections based on sexual orientation for housing, employment, education, public accommodations and transactions. Amendment 2 was a public
referendum approved by voters to supersede the local ordinances by prohibiting any municipality from granting homosexuals minority status or protected status or claim of discrimination. After the state judicial process, the amendment was struck down by the Supreme Court as it was found to violate Title VII of the Fourteenth Amendment. The amendment was found to infringe on and burden the fundamental rights of the LGBT community, as it was a targeted classification which could not be “directed to an indefinable legitimate purpose or discrete objective.” Romer v. Evans, 527 U.S. 620 (1996). A hearing was scheduled for November 6 in which both sides of the lawsuit presented their cases. Following the hearing, Judge Doug Martin denied Protect Fayetteville’s temporary restraining order as the two requirements necessary were not met. He dismissed the motion in a formal written order and the Uniform Civil Rights Protection Ordinance was enacted on November 7, 2015.

The next steps in the lawsuit were the pending Motion to Dismiss filed by the City of Fayetteville, and Judge Doug Martin was to hear arguments on December 1, 2015. However, in response to William’s brief questioning the constitutionality of Act 137, the Arkansas Attorney General intervened on behalf of the state in the lawsuit, thus delaying the hearing late in November. In a brief filed with the Washington County Circuit Court, Rutledge defended the Act’s constitutionality stating that it “clearly prohibits Fayetteville’s protections for gay, bisexual and transgender people from discrimination by landlords and employers.” In response, City Attorney Kit Williams requested Judge Martin to rule in favor of the ordinance’s validity by either ruling that it can be legally interpreted or that Act 137 renders unconstitutional. By making this request, the standing Motion to Dismiss became a Motion for Summary Judgment. The State and Protect Fayetteville had 21 days to respond to this motion and issued cross-motions regarding Count IV. A hearing was held on January 26 to hear each party’s arguments.

Summary Judgment

On March 1, 2016, Washington County Circuit Judge Doug Martin issued an order granting the City of Fayetteville’s summary judgment and denying the plaintiffs’ request for a cross-motion. Count I, the claimed violation of due process during the ordinance’s readings, summary judgment was granted to
the defendants as Judge Martin stated that the “language is plain and unambiguous.” Judge Martin ruled that Count II, alleging that Ordinance 5871 violated the rights of citizens who repealed Ordinance 5703, had no merit. He again granted summary judgment to the defendants. Count III, based on the reasons explained by the defendants, was also granted a summary judgment to the defendants.

Count IV, the complaint that addresses the overall legality of the Ordinance in relation to Act 137, required the most interpretation by Judge Martin. To do so, he divided the act into two parts. The first “prong” relates to the interpretation of what “creates a protected classification or prohibits discrimination” in terms of Arkansas state law. First, the defendants’ position and references to the cases and statues that they believe already protect sexual orientation and gender identity were stated and explained. The plaintiffs then cited that “the only protected classifications to be here are those in the Arkansas Civil Rights Act and that sexual orientation and gender identity are not listed. Judge Martin noted that the Civil Rights Act was not mentioned in Act 137 and is to be interpreted as it reads, “giving the language used its plain meaning.” Thus, when interpreted in plain language, Judge Martin found that Ordinance 5781 was not in violation of Act 137.

The second piece of the judge’s interpretation of Act 137 was the intended meaning of the word “basis.” The Attorney General claims that intended definition of “basis” refers to “an area of law in which a prohibition of discrimination is contained,” while the defendants argue it refers to underlying reason of discrimination, such as an individual’s race, age, religion or sexual orientation and gender identity. Judge Martin ruled that the interpretation is most likely that of the defendants if the Act were read in plain language, and after looking into the definition of basis in previous legislation, he was unable to certify the State’s interpretation. As a whole, the act refers to the “reason why a person is discriminated against, not the area of law in which such discrimination occurs.” Upon this declaration, Judge Martin granted summary judgment to the City of Fayetteville and its defendants, and denied the State’s and Protect Fayetteville’s cross-motions.

Count V and Count VI were also granted summary judgment as well, granting full summary judgment to the City of Fayetteville, City Council Aldermen, and Mayor Lioneld Jordan. The Uniform
Civil Rights Protection Ordinance was upheld as lawful in the circuit court. *To see Judge Doug Martin’s Summary Judgment ruling on March 1, 2016, see Appendix H.*
CONCLUSION AND ANALYSIS

Although The Uniform Civil Rights Protection Ordinance was upheld through the summary judgment on March 1, neither the proponents or opponents expected the battle to be over just yet. With the intervention of the State and the constitutionality of Act 137 in question, interpretation was needed from the highest level of the Arkansas judiciary system: The Arkansas Supreme Court. Following the summary judgment, Attorney General Leslie Rutledge stated her plans to appeal Judge Martin’s ruling. On March 31, 2016, she issued a notice of appeal, specifically of the circuit court’s ruling of Count IV of the complaint. The notice reasons the need for the appeal because it involves the interpretation of the Constitution of Arkansas; issues of substantial public interest; and issues of first impression; and because it raises significant issues requiring clarification or development of the law. As one can see in Romer v. Evans, the Court does have the power to invalidate state action for situations in which a “facially neutral law” grants legislative power “in a way that nonneutrally disadvantages a specific group.” (Harvard Law Review, 2015). The final outcome of the ordinance is yet to be determined, but its impact on society has been groundbreaking in terms of Arkansas law and public participation. (Fayetteville Flyer, 2015). To see the Attorney General’s Notice of Appeal, see Appendix I.

States throughout the country are currently experiencing similar debates—but not without a significant amount of backlash. In Mississippi, the Senate approved a religious freedom act entitled Protecting Freedom of Conscience from Government Discrimination Act, which states gender is determined at birth. The law allows churches, religious charities, and private businesses to decline services to LGBT individuals if it is against their religious beliefs on marriage and gender. Diversity focused corporations that conduct business in Mississippi are voicing their dissent—Tyson Foods, Toyota and Nissan all spoke their disapproval over the measure. In North Carolina, House Bill 2, known as the “Bathroom Bill” was passed on March 23, 2016, an unprecedented measure that revoked municipalities existing ordinances and created a state-wide stance on LGBT rights. The state is receiving a tremendous amount of corporate and government objection—PayPal ended a $3.6-million-dollar investment; Google
Ventures’ chief executive boycotted any new investments in the state until the law’s repeal, and many states have banned tax-funded travel until the law is repealed. (New York Times, 2016).

With so much controversy throughout the country, the fate of LGBT civil rights is unclear. Some argue that the time has come for federal reform. The U.S. Equal Employment Opportunity Commission has interpreted that the protected classification of ‘sex’ in Civil Right’s Act of 1964 encompasses sexual orientation and gender identity, as they both relate to the class of sex. (E.E.O.C., 2015). However, there have still been propositions for an overall amendment to Title VII of the Civil Rights Act of 1964 to add sexual orientation and gender identity have been made since the 1990’s. Most recently, house bill H.R.3195, entitled the Equality Act, H.R.3185, was proposed to the House of Representatives in July of 2015. (United States 114th Congress, 2015). The bill proposes the addition of sexual orientation, sex, and gender identity as protected classifications to the Civil Rights Act of 1964 and other federal laws. The bill would provide protection in the areas of employment, public education, public accommodations, housing, jury duty, credit transactions, and federal funding. (Advocate, 2015). It would also clarify the existing federal Religious Freedom Restoration Act to prevent religious discrimination towards LGBT citizens. In a study conducted by the Williams Research Institute, the federal legislation would provide 9.5 million LGBT identifying adults protection. (Williams Institute, 2015). The bill was referred to the Subcommittee on the Constitution and Civil Justice on September 8, 2015 and currently resides on the House floor.

Until this bill and others like it are taken up by the federal government, the issue of LGBT rights will continue to be a matter for the states. As for Arkansas, only time will tell as the citizens await the State Supreme Court ruling. However, through this political process, voices have been heard—from small municipalities to the state legislature. These voices closely mirror civil rights movements throughout American history—voices that have challenged our nation’s society to become the diverse, inclusive union it is today. The road towards equality is not over, and the need for uniform reform is now more apparent than ever.


ORDINANCE NO. 5703

AN ORDINANCE TO AMEND THE FAYETTEVILLE CODE BY ENACTING CHAPTER 119 CIVIL RIGHTS ADMINISTRATION TO PROTECT THE CIVIL RIGHTS OF FAYETTEVILLE CITIZENS AND VISITORS AND TO CREATE THE POSITION OF CIVIL RIGHTS ADMINISTRATOR FOR THE CITY OF FAYETTEVILLE

WHEREAS, the City of Fayetteville seeks to protect and safeguard the right and opportunity of all persons to be free from unfair discrimination based on real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability and veteran status; and

WHEREAS, the City of Fayetteville seeks to promote the public health and welfare of all persons who live or work in the City of Fayetteville and to ensure that all persons within the City have equal access to employment, housing, and public accommodations.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1. That the City Council of the City of Fayetteville, Arkansas enacts Chapter 119 Civil Rights Administration as shown on Exhibit “A” attached hereto.

PASSED and APPROVED this 20th day of August, 2014.

APPROVED:

By: LIONELD JORDAN, Mayor

ATTEST:

By: SONDRA E. SMITH, City Clerk/Treasurer
EXHIBIT A

CHAPTER 119: CIVIL RIGHTS ADMINISTRATION

119.01 Purpose

The purpose of this chapter is to protect and safeguard the right and opportunity of all persons to be free from discrimination based on real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability and veteran status. This chapter's purpose is also to promote the public health and welfare of all persons who live or work in the City of Fayetteville and to ensure that all persons within the City have equal access to employment, housing, and public accommodations.

119.02 Definitions

(A) "Business Establishment" means any entity, however organized, which furnishes goods, services or accommodations to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements consist only of payment of fees or consist only of requirements under which a substantial portion of the residents of the city could qualify.

(B) "Civil Rights Administrator" means the person designated by the Mayor to receive, investigate and conciliate complaints brought under this chapter.

(C) "Disability" or "Disabled" means, with respect to an individual, a physical or mental impairment, a record of such an impairment, or being perceived or regarded as having such impairment. For purposes of this chapter, discrimination on the basis of disability means that no covered entity shall discriminate against a qualified individual with a disability because of that individual's disability. The term "qualified individual with a disability" shall mean an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment positions that the individual holds or desires.

(D) "Discriminate, Discrimination or Discriminatory" means any act, policy or practice that has the effect of subjecting any person to differential treatment as a result of that person's real or perceived race, ethnicity, national origin, age (if 18 years of age or older), gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability or veteran status.

(E) "Employee" means any individual employed by a covered employer.

(F) "Employer" means any person, business or organization which regularly employs five (5) or more individuals, not including the employer's parents, spouse or children. For purposes of this chapter an employer "regularly" employs five (5) individuals when the employer employs five (5) or more individuals for each working day in any twenty (20) or more calendar weeks in the current or previous calendar year. For purposes of this chapter an "employer" is also any person or entity acting on behalf of an employer, directly or indirectly, or any employment agency.

(G) "Familial status" means an individual's status as parent or legal guardian to a child or children below the age of eighteen (18) who may or may not reside with that individual.

(H) "Gender" means actual or perceived sex.

(I) "Gender Identity" means a person's gender-related identity, whether or not that identity is or is perceived to be different from that traditionally associated with the sex assigned to that individual at birth.

(J) "Gender Expression" means a person's gender-related appearance and behavior whether or not that gender expression is or is perceived to be different from that traditionally associated with the person's assigned sex at birth.

(K) "Marital status" means an individual's status as single, married, domestically partnered, divorced or widowed.

(L) "Place of public accommodation" means inns, taverns, hotels, motels, restaurants, wholesale outlets, retail outlets, banks, savings and loan associations, other financial institutions, credit information bureaus, insurance companies, dispensaries, clinics, hospitals, theaters, recreational parks and facilities, trailer camps, garages, public halls, and all other establishments within the City which offer goods, services, accommodations and entertainment to the public. A place of public accommodation does not include any institution, club or other place of accommodation, which by its nature is distinctly private.
119.03 Prohibited Acts of Discrimination - Employment

With regard to employment, it shall be unlawful for any employer or labor organization to engage in any of the following acts wholly or partially for a discriminatory reason:

(A) To fail to hire, refuse to hire or discharge an individual;

(B) To discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion. Nothing in this section shall be construed to require any employer to provide benefits, such as insurance, to individuals not employed by the employer;

(C) To limit, segregate or classify employees in any way which would deprive or tend to deprive any employee of employment opportunities, or which would otherwise tend to adversely affect his or her status as an employee;

(D) To fail or refuse to refer for employment any individual in such a manner that would deprive an individual of employment opportunities, that would limit an individual's employment opportunities or that would otherwise adversely affect an individual's status as a prospective employee or as an applicant for employment;

(E) To discriminate against an individual in admission to, or employment in, any program established to provide apprenticeship or other job training, including on-the-job training programs;

(F) To print or publish, or cause to be printed or published, any discriminatory notice or advertisement relating to employment. This subsection shall not be construed so as to expose the person who prints or publishes the notice or advertisement, such as a newspaper, to liability;

(G) To discriminate in referring an individual for employment whether the referral is by an employment agency, labor organization or any other person.

119.04 Prohibited Acts of Discrimination - Housing and Real Estate Transactions

With regard to housing and real estate transactions, which include both sales and leases, it shall be unlawful to engage in any of the following acts wholly or partially for a discriminatory reason:

(A) To discriminate by impeding, delaying, discouraging or otherwise limiting or restricting any transaction in real estate;

(B) To discriminate by imposing different terms on a real estate transaction;

(C) To represent falsely that an interest in real estate is not available for transaction;

(D) To include in the terms or conditions of a real estate transaction any discriminatory clause, condition or restriction;

(E) To discriminate in performing, or refusing to perform, any act necessary to determine an individual's financial ability to engage in a real estate transaction;

(F) For a property manager to discriminate by refusing to provide equal treatment of, or services to, occupants of any real estate which he or she manages;

(G) To make, print or publish, or cause to be made, printed or published, any discriminatory notice, statement or advertisement with respect to a real estate transaction or proposed real estate transaction, or financing relating thereto. This subsection shall not be construed to prohibit advertising directed to physically disabled persons or persons over the age of fifty-five (55) for the purpose of calling to their attention the existence or absence of housing accommodations or services for the physically disabled or elderly;

(H) To discriminate in any financial transaction involving real estate on account of the location of the real estate, be it residential or non-residential ("red-lining");

(I) For a real estate operator, a real estate broker, a real estate salesperson, a financial institution, an employee of any of these or any other person, for the purposes of inducing a real estate transaction from which such person may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to the race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital
status, socioeconomic background, religion, sexual orientation, disability or veteran status of the owners or occupants in the block, neighborhood or area in which the real property is located or to represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior or a decline in the quality of schools in the block, neighborhood or area in which the real property is located ("block-busting");

(J) Notwithstanding the provisions of subsections (A) through (I), it shall not be an unlawful discriminatory practice for an owner to limit occupancy on the basis of a person's low-income, age over fifty-five (55) years or disability status in accordance with federal or state law;

(K) Notwithstanding the provisions of subsections (A) through (I), it shall not be an unlawful discriminatory practice for an owner, lessor or renter to refuse to rent, lease or sublease a portion of a single family dwelling unit to a person as a tenant, roomer or boarder where it is anticipated that the owner, lessor or renter will be occupying any portion of the single-family dwelling or to refuse to rent, lease or sublease where it is anticipated that the owner, lessor or renter will be sharing either a kitchen or a bathroom with the tenant, roomer or boarder.

(L) Notwithstanding any other provision of this chapter, it is not an unlawful discriminatory practice to apply or enforce the definition of "family" for zoning purposes pursuant to § 151.01 of the Unified Development Code.

119.05 Prohibited Acts of Discrimination - Business Establishments or Public Accommodations

It shall be unlawful for a business establishment or place of public accommodation for a discriminatory reason to deny, directly or indirectly, any person the full enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment or place of public accommodation, unless required by state or federal law.

119.06 City Services, Facilities, Transactions and Contracts

(A) The City of Fayetteville and all of its employees are bound by the provisions of this chapter to the same extent as private individuals and businesses.

(B) All contractors doing business with the City of Fayetteville shall abide by this ordinance.

119.07 General Exceptions

(A) Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that the practice is not intentionally devised to contravene the prohibitions of this chapter and there exists no less discriminatory means of satisfying a business purpose.

(B) This chapter shall not apply to any federal, state or county government office or official, or any public educational institution within the City.

(C) Unless otherwise prohibited by law, nothing contained in this chapter shall be construed to prohibit promotional activities such as senior citizen discounts and other similar practices designed primarily to encourage participation by a protected group.

(D) It shall not be an unlawful discriminatory practice for an employer to observe the conditions of a bona fide seniority system or a bona fide employee benefit system such as a retirement, pension or insurance plan which is not a subterfuge or pretext to evade the purposes of this chapter.

(E) It shall not be an unlawful discriminatory practice for any person to carry out an affirmative action plan as required by state or federal law, or by court order.

(F) Nothing contained in this chapter shall be deemed to prohibit selection or rejection based solely upon a bona fide occupational qualification or a bona fide physical requirement. Nothing contained in this chapter shall be deemed to prohibit a religious or denominational institution from selecting or rejecting applicants and employees for non-secular positions on the basis of the applicant's or employee's conformance with the institution's religious or denominational principles. If a party asserts that an otherwise unlawful practice is justified as a permissible bona fide occupational qualification or a permissible bona fide physical requirement, that party shall have the burden of proving:

(1) That the discrimination is in fact a necessary result of such a bona fide condition; and

(2) That there exists no less discriminatory means of satisfying the bona fide requirement.

(G) If a party asserts that an otherwise unlawful practice is justified as a permissible bona fide religious or denominational preference, that party shall have the burden of proving that the discrimination is in fact a necessary result of such a bona fide condition.
(H) Any age restrictions required by state or federal law or regulations, including for the sale or delivery of alcoholic beverages, are not improper age discrimination under this chapter.

(I) Nothing in this Chapter shall be construed to require any religious or denominational institution or association to open its tax exempt property or place of worship to any individual or group for any ceremony or meeting, except for any activity or service that is supported in whole or part by public funds.

(J) Designating a facility as a gender-segregated space shall not be a violation of this chapter. Nothing in this chapter shall be construed as allowing any person to enter any gender-segregated space for any unlawful purpose.

119.08 Posting of Notices

Every employer or entity subject to this chapter shall post and keep posted in a conspicuous location where business or activity is customarily conducted or negotiated, a notice, the language and form of which has been prepared by the City of Fayetteville, setting forth excerpts from or summaries of the pertinent provisions of this chapter and information pertinent to the enforcement of rights hereunder. The notice shall be in both English and Spanish. If over ten percent of an employer's employees speak, as their native language, a language other than English or Spanish, notices at that employer's place of business shall be posted in that language. At the request of the employer or entity, notices required by this section shall be provided by the City. Notices shall be posted within ten days after receipt from the City.

119.09 Retaliation Prohibited

(A) It is an unlawful discriminatory practice to coerce, threaten, retaliate against, interfere with, discriminate against a person because that person has opposed any practice made unlawful by this chapter, has made a non-frivolous charge or complaint, or has testified truthfully, assisted or participated in an investigation, proceeding or hearing pursuant to this chapter.

(B) It is an unlawful discriminatory practice to require, request or suggest that a person or entity retaliate against, interfere with, intimidate or discriminate against a person because that person has opposed any practice made unlawful by this chapter, has made a non-frivolous charge or has testified truthfully, assisted or participated in an investigation, proceeding or hearing authorized under this chapter.

(C) It is an unlawful discriminatory practice to cause or coerce, or attempt to cause or coerce, directly or indirectly, any person in order to prevent that person from complying with the provisions of this chapter.

119.10 Preservation of Business Records

Where a complaint of discrimination has been filed against a person under this ordinance, such person shall preserve all records relevant to the complaint until a final disposition of the complaint.

119.11 Administration and Enforcement

(A) The Mayor shall designate the Civil Rights Administrator, who shall administer this chapter and be responsible for receiving, investigating and conciliating complaints filed under this chapter. To be considered and administered by the Civil Rights Administrator, complaints must be received in the Civil Rights Administrator's office no more than six months after the alleged discriminatory action or, in the case of ongoing alleged discriminatory actions, no more than six months after the most recent incident of alleged discrimination. The Civil Rights Administrator shall prepare an easy to use complaint form and make the form easily accessible to the public.

(B) The Civil Rights Administrator should first attempt to eliminate the unlawful practice or practices through conciliation or mediation. In conciliating a complaint, the administrator should try to achieve a just resolution and obtain assurances that the respondent will satisfactorily remedy any violation of the complainant's rights and take action to ensure the elimination of both present and future unlawful practices in compliance with this chapter. If the Civil Rights Administrator determines that the complainant is not acting in good faith, the conciliation or mediation may be terminated and the complaint may be immediately dismissed. If the respondent is not participating in good faith, the complaint may be immediately referred to the City Prosecutor's office.

(C) After any attempted conciliation or mediation, the Civil Rights Administrator will refer any unresolved complaint and complainant as needed to the City Prosecutor's Office for appropriate further action, including prosecution.

(D) The filing of a complaint under this chapter does not preclude any other state or federal remedies that may be available to a complainant.
November 10, 2014

Mr. Bill Bradley
Chairman, Fayetteville Chamber of Commerce
123 W. Mountain
P.O. Box 4216
Fayetteville, AR 72702-4216

Mr. Steve Clark
President, Fayetteville Chamber of Commerce
123 W. Mountain
P.O. Box 4216
Fayetteville, AR 72702-4216

Gentlemen:

I would like to respectfully ask that the Chamber of Commerce board of directors rescind its recent action regarding the civil rights ordinance.

Although I serve as an ex-officio member of the board, I was never invited to offer my opinion on the decision to issue a statement about the ordinance. Likewise, other ex-officio members were denied the opportunity to address the issue. However, your media release indicated that the action was unanimously endorsed by the board members. Such a statement created the impression that I was in concurrence with your action.

The failure to include all ex-officio members in the discussion contributes to the perception that the board operated under a veil of secrecy and was opposed to any divergent views. Such a perception undermines the ability of the board to demonstrate that it consistently functions within the best traditions of our city which embraces openness and fair play.

Many people favor allowing the citizens of Fayetteville to decide the issue at the ballot box in December, rather than having pressure exerted by the Chamber. If, indeed, the law is vague and too broad, the court system of Arkansas will clarify the law in due course.

This has become a flash point issue for our city. The Chamber should promote harmony and prosperity, not create crisis. This has strained relations among town, gown, and individual citizens.

Sincerely,

[Signature]

G. David Gearhart
Chancellor
November 10, 2014

Mr. Bill Bradley  
Chairman, Fayetteville Chamber of Commerce Board  
123 W. Mountain Street  
Fayetteville, AR 72701

Mr. Steve Clark  
President, Fayetteville Chamber of Commerce  
123 W. Mountain Street  
Fayetteville, AR 72701

Mr. Bradley and Mr. Clark:

I am writing as an ex-officio member of the Fayetteville Chamber of Commerce Board as I join fellow ex-officio member Chancellor G. David Gearhart in calling for the Board to rescind its decision to oppose and lobby against the civil rights ordinance passed by the Fayetteville City Council that is going for a vote of Fayetteville residents on Tuesday, December 9.

I was surprised to learn of this decision since I received no notification of the Board meeting in which it was considered, and I was certainly disappointed in the announced decision to work for repeal of the ordinance. Had I been notified of the meeting, I would have attended and discussed the reasons why I think a non-discrimination policy enhances our efforts at economic development in Fayetteville. I was also taken aback by the announcement that this was a unanimous decision. Since you list me as an ex-officio member on your website, many citizens might infer that I supported this position. I do not.

Sincerely,

Lioneld Jordan, Mayor
TO: Mayor

CC: City Council

FROM: Kit Williams, City Attorney

DATE: December 12, 2014

RE: Calls for new Anti-discrimination ordinance

The Need For A Fayetteville Civil Rights Protection Ordinance

I was surprised that potential revisions of the Chapter 119 Civil Rights Administration ordinance were presented so soon after the voters repealed it in a close, hard fought campaign. I think an attempted revision of Chapter 119 is ill-advised and presents legal concerns about whether a super majority of Aldermen would be needed to pass a modified version. However, the City Attorney’s Office will continue to assist the Mayor and any Alderman in drafting any Ordinance or Resolution that they desire.

On the other hand, I am elected directly by the Fayetteville citizens and my primary duty must be our citizens first. Fayetteville voters were closely divided on the Civil Rights Administration ordinance and a rehash of that ordinance would not likely end the divisiveness and bring consensus. I believe the City and its citizens will best be served by an ordinance that is accepted and endorsed not by a slim majority of citizens, but by a large consensus. Therefore, I will present a brand new anti-discrimination ordinance that would be much shorter, more focused and clearer than the version revised down from the draft provided by the Human Rights Campaign. I believe that Fayetteville should draft its own
anti-discrimination ordinance and incorporate a lot of the definitions and wording from the Arkansas Civil Rights Act of 1993. This Civil Rights Act was designed, debated and approved by the Arkansas Senate, the Arkansas House of Representatives and the Governor in 1993, and its definitions and provisions have stood the test of time for over 20 years.

My recommendation as City Attorney has always been that ordinances should be closely directed at whatever actual problem that the City Council believes needs remedying. An ordinance should be "laser focused" on the real problem rather than too broadly applicable which is comparable to firing a shotgun into the cloud of issues which can create confusion, conflicting laws and unintended consequences.

It cannot be disputed that federal laws including the Civil Rights Act provide many minority or discriminated against groups protection from much discrimination. The Arkansas Civil Rights Act of 1993 also provides anti-discrimination protections. Fayetteville citizens are protected against discrimination on the basis of race, ethnicity, national origin, age, sex, religion, and disability. Active duty military and veterans not only have protection, but in some cases preference to honor their service.

Transgender persons have been accorded protection from discrimination pursuant to Title VII of the Federal Civil Rights Act of 1964 or the Equal Protection of the Laws clause.

"In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination...Six members of the Supreme Court agreed that such comments were indicative of gender discrimination and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping--failing to act and appear according to expectations defined by gender....A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes....Accordingly, discrimination against a
transgender individual because of her gender-nonconformity is sex discrimination...” Glenn v. Brumby, 663 F.3d 1312, 1316-1317 (11th Cir. 2011) (some citations omitted; emphasis added); Accord, Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); See, Lewis v. Heartland Inns of America, 591 F.3d 1033 (8th Cir. 2009).

Thus, only gay and lesbian Fayetteville citizens can face discrimination that no other citizen would be subjected to without any legal protections. Accordingly, my draft of an anti-discrimination ordinance is focused to protect Fayetteville’s only unprotected citizens and does not include any reference to discrimination already addressed by other Civil Rights laws.

The Source For Definitions And Language To Protect Against Discrimination

As I stated earlier, rather than relying upon a “model ordinance” from a national group with little knowledge or understanding of Arkansas law and Fayetteville history, I believe we should apply the existing applicable definitions and provisions of the Arkansas Civil Rights Act of 1993 for the protection of our gay and lesbian friends, neighbors and co-workers. In place for over 20 years, the definitions and provisions of the Arkansas Civil Rights Act should now be well known, accepted and understood and some have already received judicial scrutiny and interpretation. At 21 years of age, the Arkansas Civil Rights Act is now an “adult”, well-seasoned and tested law. I believe it is a preferable model than one received from a Washington, D.C. special interest group.

I incorporated exactly the definitions of “Employee”, “Employer”, “Religion” and “Place of public resort, accommodation, assemblage or amusement” from the Arkansas Civil Rights Act. I added a single sentence to the last definition of public accommodation: “Furthermore, this shall not mean any religious facility including churches and similar facilities and including their owned and operated schools and day care facilities.”
I then included the fairly long A.C.A. § 16-123-103 **Applicability** statute which limits the reach of the **Arkansas Civil Rights Act** and also limits this proposed Fayetteville Civil Rights Protection ordinance. Churches are basically exempted from employment regulations and this statute also provides other protections for businesses.

I took most of the wording from A.C.A. § 16-123-107 **Discrimination offenses** which would now apply in Fayetteville for discrimination against a gay or lesbian citizen. I also used much of the language in A.C.A. § 16-123-108 **Retaliation** to protect persons from retaliation or threats for good faith reports of discrimination.

I ended the ordinance with a requirement for mediation and conciliation with a referral for a possible revocation of a person’s business license for a person who will not refrain from continuing illegal discrimination. No new position of Civil Rights Administrator would be created. No new committee or commission is created by this ordinance. Like most non development ordinances, its enforcement is statutorily left to the Mayor. “The mayor of the city shall be its chief executive officer and...(i)t shall be his or her special duty to cause the ordinances and regulations of the city to be faithfully and constantly obeyed.” A.C.A. § 14-43-504 **Powers and duties of mayor generally.** The mayor can assign this task to any employee.

**Conclusion**

As a heterosexual who does not discriminate against homosexuals, I assumed there really was not a problem with discrimination against gay or lesbian people in Fayetteville before the marathon City Council meeting opened my eyes. Fayetteville is a wonderfully tolerant and accepting City, but for the rare occasions when the sting of discrimination lashes out against our gay and lesbian friends, neighbors, and co-workers, we should have a simple and straightforward ordinance that places Fayetteville on the side of equality, justice, love and inclusion. I hope the ordinance attached to this memo will unite Fayetteville in freedom and fairness.
ORDINANCE NO. 5781

AN ORDINANCE TO ENSURE UNIFORM NONDISCRIMINATION PROTECTIONS WITHIN THE CITY OF FAYETTEVILLE FOR GROUPS ALREADY PROTECTED TO VARYING DEGREES THROUGHOUT STATE LAW

WHEREAS, laws including the Civil Rights Act (42 U.S.C § 2000e, et seq.), the Arkansas Civil Rights Act of 1993 (A.C.A. § 16-123-101 et seq.) and the Arkansas Fair Housing Act (A.C.A. § 16-123-201 et seq.) provide Fayetteville citizens with protections against discrimination on the basis of race, ethnicity, national origin, age, sex, religion and disability; and

WHEREAS, the General Assembly has determined that attributes such as “gender identity” and “sexual orientation” require protection (A.C.A. § 6-18-514 (b)(1)); and

WHEREAS, Fayetteville citizens deserve fair, equal and dignified treatment under the law; and

WHEREAS, Fayetteville seeks to attract a diverse and creative workforce by promoting itself to prospective businesses and employees as a fair, tolerant and welcoming community; and

WHEREAS, the protected classifications in A.C.A. § 6-18-514 (b)(1) for persons on the basis of gender identity and sexual orientation should also be protected by the City of Fayetteville to prohibit those isolated but improper circumstances when some person or business might intentionally discriminate against our gay, lesbian, bisexual and transgender citizens; and

WHEREAS, in response to the concerns recently expressed by the citizens of Fayetteville on a similar issue, the Fayetteville City Council recognizes their interest in participating in the democratic process and invites the citizens to decide whether gender identity and sexual orientation should also be protected by the City of Fayetteville.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:
Section 1. That the City Council of the City of Fayetteville, Arkansas hereby refers this ordinance to the Fayetteville voters for their enactment or rejection in a Special Election to be held on September 8, 2015. The operative provisions that will be enacted by Fayetteville citizens into the Fayetteville Code if approved by a majority of Fayetteville citizens voting in the election shall be as follows:

"Uniform Civil Rights Protection"

Purpose

Fayetteville is a welcoming, fair and tolerant city which endeavors to ensure that all of its citizens and visitors will be free from unfair discrimination. Since Federal and State law already protect citizens from most discrimination, the Uniform Civil Rights Protection Article shall extend existing protections to lesbian, gay, bisexual, and transgender citizens and visitors as recognized elsewhere in state law.

Definitions

(A) "Employee". This definition adopts and incorporates herein the definition of "Employee" as stated in the Arkansas Civil Rights Act of 1993, A.C.A. § 16-123-102 (4).

(B) "Employer". This definition adopts and incorporates herein the definition of "Employer" as stated in the Arkansas Civil Rights Act of 1993, A.C.A. § 16-123-102 (5).

(C) "Gender Identity" means an individual's own, bona fide sense of being male or female, and the related external characteristics and behaviors that are socially defined as either masculine or feminine. Gender identity may or may not correspond to the sex assigned to the individual at birth.

(D) "Housing accommodation". This definition adopts and incorporates herein the definition of "Housing accommodation" as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (1).

(E) "Place of public resort, accommodation, assemblage or amusement". This definition adopts and incorporates herein the definition of "Place of public resort, accommodation, assemblage or amusement" as stated in the Arkansas Civil Rights Act of 1993, A.C.A. § 16-123-102 (7). Furthermore, this shall not mean any religious facility or other religious institution including their owned and operated schools and daycare facilities.

(F) "Real estate broker or salesman". This definition adopts and incorporates herein the definition of "Real estate broker or salesman" as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (2).
(G) "Real estate transaction". This definition adopts and incorporates herein the definition of “Real estate transaction” as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (3).

(H) "Real property". This definition adopts and incorporates herein the definition of “Real property” as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (4).

(I) “Sexual Orientation” means heterosexuality, homosexuality or bisexuality by practice, identity or expression.

Applicability and Exemptions

(A) The Uniform Civil Rights Protection Article is only applicable to discriminatory actions occurring within the Fayetteville city limits.

(B) This Article adopts and incorporates herein the entirety of A.C.A. § 16-123-103 Applicability of the Arkansas Civil Rights Act.

(C) Churches, religious schools and daycare facilities, and religious organizations of any kind shall be exempt from this Article.

 Discrimination Offense

(A) The right of an otherwise qualified person to be free from discrimination because of sexual orientation and 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.

(B) The Uniform Civil Rights Protection Article adopts and incorporates herein these rights as quoted below:

(1) The right to obtain and hold employment without discrimination;

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(3) The right to engage in property transactions (including sales and leases) without discrimination;

(4) The right to engage in credit and other contractual transactions without discrimination;

(5) The right to vote and participate fully in the political process.
(C) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of sexual orientation or gender identity engage in any conduct likewise prohibited by A.C.A. § 16-123-204 Prohibited Acts of the Arkansas Fair Housing Act on the basis of other enumerated attributes.

(D) No employer shall discriminate against nor threaten any individual because such individual in good faith has opposed any act or practice made unlawful by this section or because such person in good faith made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing related to the Uniform Civil Rights Protection Article.

Establishment and Duties of a Civil Rights Commission

There is hereby established the Civil Rights Commission. The Civil Rights Commission shall review and decide complaints of alleged discrimination in violation of the Uniform Civil Rights Protection Article. The Commission will provide to the City Council an annual accounting of the number of complaints received and the outcomes.

Composition

(A) The Civil Rights Commission shall consist of seven members composed of the following:

(1) Two (2) representatives of the business community;

(2) Two (2) owners or managers of rental property;

(3) One (1) representative with experience in Human Resources or employment law;

(4) Two (2) citizens at large, at least one of whom identifies as gay, lesbian, bisexual, or transgender.

(B) Members will be appointed by the City Council, each for a term of three years. Appointments shall be staggered so that each year either two or three members' terms shall be available for appointment by the Nominating Committee.

(C) Members of the Civil Rights Commission may be removed from office by the City Council for cause upon written charges and after a public hearing.

Meetings

(A) The Civil Rights Commission shall meet for an organizational meeting within 60 days after the citizens enact this ordinance and every year thereafter following the appointment of new members.

(B) Meetings shall be held at the call of the chairperson.
(C) A majority of the membership of the Civil Rights Commission shall constitute a quorum.

(D) All meetings shall be open to the public.

(E) The Civil Rights Commission shall adopt rules necessary to the conduct for its affairs, and in keeping with the provisions of the City's Uniform Civil Rights Protection Article.

Staff Support

The City Attorney's office shall receive complaints on behalf of the Civil Rights Commission and assist the Commission in performing its duties and carrying out its responsibilities.

Complaint Procedure and Enforcement

(A) A person asserting a claim of discrimination, herein referred to as the "Complainant", pursuant to this Uniform Civil Rights Protection Article must present such claim in writing to the City Attorney's office no more than ninety (90) days after the person has knowledge of the facts giving rise to the claim of discrimination. The City Attorney's office will, within two (2) business days, notify the Civil Rights Commission that a complaint was received.

(B) Informal mediation or conciliation between the alleged discriminator, herein referred to as the "Respondent", and Complainant shall be attempted by the City within four business days and before any other enforcement measures can begin. Such mediation or conciliation measures shall be pursued in accordance with the confidentiality protections provided by A.C.A. § 16-7-206. Mediation and conciliation should be concluded within two weeks after the complaint is received unless both parties agree to further efforts.

(C) If conciliation efforts are successful in resolving the complaint, the Civil Rights Commission will be notified of resolution and take no further action.

(D) If conciliation efforts fail to resolve the complaint, the Civil Rights Commission shall notify both parties that a hearing will be conducted at a specified place and time not more than fourteen (14) business days after the conclusion of conciliation efforts but not less than five (5) business days after issuance of notice of the hearing.

(E) Conduct of the Hearing:

(1) The Civil Rights Commission shall review the initial complaint and may receive any additional evidence from the Complainant.
The Respondent shall have an opportunity to explain or provide evidence to rebut any allegations of illegal discriminatory acts. No person shall be compelled to be a witness against himself in any formal or informal hearing.

After considering all the evidence presented, if the Civil Rights Commission determines that the Respondent has violated this Article, the Commission shall forward the original claim and their findings to the City Prosecutor.

Penalty:

1. A person's first violation of this ordinance shall carry a penalty of up to a $100.00 fine. Fayetteville City Code § 10.99 General Penalty shall apply to any subsequent violations.

2. No violation of this Article shall be construed to be a misdemeanor or felony.

Severability

If any part, provision or section of this ordinance is held invalid or unconstitutional it shall be severed from the remainder which shall remain valid and enforceable.

Section 2. That the City Council for the City of Fayetteville, Arkansas hereby determines that if the Fayetteville voters fail to approve the referred ordinance, the ordinance will not go into effect; but if the voters approve the ordinance, the ordinance quoted in Section 1 will be enacted into the Fayetteville Code and become effective sixty (60) days after the approving election.

PASSED and APPROVED this 16th day of June, 2015.

APPROVED:  ATTEST:

By: LIONEL JORDAN, Mayor  By: SONDRA E. SMITH, City Clerk Treasurer
IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

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

vs.

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. SCHOPPMeyer 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

Case No.: CV-15-10-1

VERIFIED COMPLAINT
AND MOTION FOR DECLARATORY JUDGMENT

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 Complaint against The City of Fayetteville (hereinafter “City of Fayetteville”), Washington County, Arkansas (hereinafter “Washington County”), Lioneld Jordan, in his official capacity as Mayor of the City of Fayetteville, Washington County, Arkansas (hereinafter “Mayor”); Adella Gray, Sarah Marsh, Mark Kinion, Matthew Petty, Alan Long, Justin Tennant, individually and in their official capacities as Aldermen of the Fayetteville
City Council (hereinafter “Alderman voting for 5781”), and Martin W. Schoppmeyer Jr., John La Tour, and in their official capacities as Aldermen of the Fayetteville City Council (hereinafter “Alderman voting against 5781”). (hereinafter both the Alderman voting for 5781 and Alderman voting against 5781 shall be known as the “Fayetteville City Counsel”); 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 (hereinafter “Election Commission”) (all collectively known as “Defendants”) states the following:

PARTIES, JURISDICTION AND VENUE

1. Protect Fayetteville is an Arkansas ballot question committee, formerly known as Repeal 119, organized with the Arkansas Ethics Commission on September 15, 2014. Protect Fayetteville is the Sponsor of the successful repeal petition which repealed Fayetteville City Ordinance 5307 on December 9th, 2015, and consists and represents all of the 7,523 registered voters residing in the City of Fayetteville, Washington County, Arkansas whom voted to defeat Ordinance 5703.

2. Plaintiff Paul Sagan is a resident and taxpayer of the City of Fayetteville, Washington County, Arkansas.

3. Plaintiff Peter Tonnessen is a resident and taxpayer of the City of Fayetteville, Washington County, Arkansas.

4. Plaintiff Paul Phaneuf is a resident and taxpayer of the City of Fayetteville, Washington County, Arkansas.

5. Defendant City of Fayetteville is the legally incorporated town under the Arkansas Constitution and by virtue of its population is considered a City of the first class and has the mayor-council form of government pursuant to Arkansas Statute.
6. Defendant Washington County, Arkansas, is a county in Arkansas and is the county seat, which includes the incorporated town of Fayetteville, Arkansas.

7. Defendant Lioneld Jordan is the duly elected Mayor of the City of Fayetteville, Washington County, Arkansas, and is named only in his official capacity as the Mayor of the City of Fayetteville.

8. Defendants Adella Gray, Sarah Marsh, Mark Kinion, Matthew Petty, Alan Long and Justin Tennant are six (6) of the eight duly elected Aldermen, comprising the Fayetteville City Council, and are named only in their official and individual capacities as Aldermen of the Fayetteville City Council.

9. Defendants Martin W. Schoppmeyer Jr. and John La Tour are the other two duly elected Aldermen, comprising the Fayetteville City Council, and are named only in their official capacities as Aldermen of the Fayetteville City Council.

10. Defendant The Hon. Renee Oelschlaeger, The Hon. Max Deitchler, and The Hon. Bill Ackerman, are the duly appointed and serving Commissioners of the Washington County Election Commission and are named only in their official capacities.

11. This Court has jurisdiction over the parties and subject matter of this Complaint, and venue is properly in this Court.

STATEMENT OF FACTS

12. 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.

13. Because Separate Plaintiff Protect Fayetteville (then known as Repeal 119) secured over 4,200 signatures of registered voters of the city of Fayetteville, the issue to "Repeal,
in its entirety, Ordinance No. 5703 which enacted Chapter 119 of the Fayetteville, Arkansas City Code” was to be voted on during a special election held on December 9th, 2014.

14. Thereafter, on October 9, 2014, the Defendant Election Commissioners voted to place the measure on the ballot at a special election to be held on December 9, 2014.

15. At the special election, duly called under the repeal process reserved by the people of Arkansas in the Arkansas Constitution, on December 9, 2014, a majority of voters of the City of Fayetteville, Arkansas voted to repeal Ordinance 5703, also known as Chapter 119 of the Fayetteville, Arkansas City Code. See Ordinance 5703, attached as Exhibit A, and incorporated by reference as if stated word-for-word herein.

16. The law provides that the City of Fayetteville bear the expense for the special election held on December 9th, 2015, which cost the City of Fayetteville approximately $36,000.00 of tax payers’ money.

17. 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.”

18. 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.
19. 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,” and is otherwise substantially similar in substance and procedure to Ordinance 5703, which was repealed by the voters of the City of Fayetteville, Arkansas. See Ordinance 5781 attached as Exhibit B, and incorporated by reference as if stated word-for-word herein.

20. The purpose of Ordinance 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 United States Constitution or the Constitution of the State of Arkansas.

21. Ordinance 5781 is a law that is of a “general or permanent nature.”

22. Ordinance 5781 was passed with a section that reads, “[t]hat the City Council for the City of Fayetteville, Arkansas hereby determines that if the Fayetteville voters fail to approve the referred ordinance, the ordinance will not go into effect; but if the voters approve the ordinance, the ordinance quoted in Section 1 will be enacted into the Fayetteville Code and become effective sixty (60) days after the approving election.”

23. All laws of a general or permanent nature require that the text “be fully and distinctly read on three different days, unless two-thirds of the members composing the council shall dispense with the rule. See Kirby’s Digest § 5473.

24. That the City of Fayetteville has eight (8) duly elected aldermen: Separate Defendants Adella Gray, Sarah Marsh, Mark Kinion, Matthew Petty, Justin Tennant, Martin W. Schoppmeyer Jr., John La Tour and Alan Long.
25. The two-thirds requirement requires six (6) of the eight (8) above individuals to vote affirmatively to suspend the rules.

26. On June 16, 2015, the Fayetteville City Council conducted a first reading of the Ordinance now known as Ordinance 5781. See Pg. 7 of the June 16th, 2015 Fayetteville City Council Meeting Minutes attached as Exhibit C, and incorporated by reference as if stated word-for-word herein.

27. Thereafter, during the same City Council meeting “Alderman Marsh moved to suspend the rules and go to the second reading. Alderman Kinion seconded the motion. Upon Roll Call the motion passed 7-1. Alderman La Tour Voting no.” See Pg. 17 of the Exhibit C.

28. Thereafter, the Ordinance was read for the second time. Id.

29. Thereafter, during the same City Council meeting Alderman Kinion moved to suspend the rules and go to the third and final reading. Alderman Marsh seconded the motion. Upon roll call the motion passed 6-3. Alderman Long, Gray, Marsh, Kinion, and Petty voting yes. Alderman La Tour, Tennant and Schoppmeyer voting no. Mayor Jordan voted yes to suspend the rules. See Page 18 of Exhibit C.

30. Thereafter, the ordinance was read for the third and final time.


32. An ordinance passed in violation of the two-thirds requirement to suspend the rules is void. See *Newbold v. City of Stuttgart et. al.* 145 Ark. 544, 224 S. W. 994 at 994 (1920).
33. The Mayor is not an elected member of the council, but only an ex-officio member by virtue of his executive position. See *Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 at 530 (1984).

34. The Mayor does not have the legal authority to vote upon the third and final reading of the Ordinance when three (3) members of the council voted “no” and all eight (8) members of the council were present.

35. The actions of the Mayor and the rest of the City Council violated the Plaintiffs' due process rights to a third reading of the Ordinance.

36. The Fayetteville City Council consisted of all of the same Aldermen but one, John La Tour, that were on the council when the Ordinance 5703 was proposed and passed.

37. Thereafter, the Defendants Elections Commissions put Ordinance 5781 on the ballot at a special election to be held on September 8, 2015.

38. Ordinance 5781 is almost identical in purpose and effect to that of Ordinance 5703.

39. Separate Defendants The City of Fayetteville, Mayor and Alderman, are refusing to listen to the will of the people which have spoken directly to this issue when by popular vote repealed Ordinance 5703.

40. The Constitution of Arkansas reserves the right of the people to overturn those in elected office, and to repeal previously passed laws.

41. The Residents of the City of Fayetteville are now being forced to stand again and repeat that they do not want, which is substantially the same in cause and effect in law as they previously voted down.
42. On information and belief, the September 8th, 2015 special election to vote on Ordinance 5781 will cost the taxpayers of the City of Fayetteville between $35,000.00 and $40,000.00 and that the City of Fayetteville has approved on August 4th, 2015 the expenditure of up to $40,000.00 from general funds to pay for the special election. See City of Fayetteville Arkansas City Council Meeting August 4, 2015 attached as Exhibit D and incorporated by reference as if stated.

43. Residents of Fayetteville, Arkansas not only have to come out to vote on the same subject matter at yet another special election, but they again must pay for it.

**COUNT I**

**PASSAGE OF ORDINANCE 5781 VIOLATED THE DUE PROCESS OF LAW**

44. Paragraphs 1 through 43 of this Complaint are incorporated herein by reference as if set forth word-for-word.

45. Pursuant to Ark. Const. art. 11, § 8, no person shall be deprived of life, liberty or property without due process of law. The fundamental requirements of due process require opportunity to be heard at a meaningful time and a meaningful place before a person may be deprived of life, liberty or property. *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979).

46. 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.”

47. “The ordinances of a general or permanent nature which must be adopted according to the formalities of section [14-55-202] … refer to those regulations and acts of the council which prescribe a permanent rule of government for the municipality.” *City of Batesville v. Ball*, 100 Ark. 496, 140 S.W. 712, 716 (1911). Ordinances which endure until repealed are

48. In a mayor-council form of government, the mayor is the ex-officio president of the council. Ark. Code Ann. § 14-43-501. Black's Law Dictionary defines ex officio as "by virtue or because of an office; by virtue of the authority implied by office."

49. Additionally, in *Thompson v. Younts*, the Arkansas Supreme Court held that the mayor was not an elected member of the City Council but is only an ex-officio member by virtue of his executive position, and therefore his vote could not be used in amending or repealing any part of an initiated act. *Thompson v. Younts*, 282 Ark. 524, 530, 669 S.W.2d 471, 474 (1984).

50. 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).

51. Under section 5481 of Kirby's Digest, it requires two-thirds of the members composing the council, that is, those who are elected to the council, to dispense with the law requiring all by-laws and ordinances of a general or permanent nature to be fully and distinctly read on three different days. *Newbold v. City of Stuttgart*, 145 Ark. 544, 224 S.W. 993, 994 (1920).

52. *In Newbold*, the Court held that the requirements of Ark. Code Ann. § 14-55-202 are mandatory, and an ordinance passed in violation thereof is void. *Id.*

53. Fayetteville, Washington County, Arkansas is a city of the first class.

54. The City Council of the City of Fayetteville consists of eight (8) aldermen.
55. Ordinance 5781 is an ordinance of a general or permanent nature as it is an act of the Fayetteville City Council, which prescribes a permanent rule of government for the municipality.

56. At its City Council Meeting on June 16, 2015, the Fayetteville City Council proposed the Uniform Civil Rights Protection ordinance, and had a first reading of said ordinance.

57. At the same meeting on June 16, 2015, Alderman Marsh moved to suspend the rules and go to the second reading, which was seconded by Alderman Kinion. Upon roll call the motion passed 7-1, with Alderman La Tour voting no. The proposed Uniform Civil Rights Protection ordinance was read a second time that same evening.

58. Thereafter, at the same meeting on June 16, 2015, Alderman Kinion moved to suspend the rules and go to the third and final reading, which was seconded by Alderman Marsh. Upon roll call, five (5) Aldermen voted "yes" to pass the motion, while three (3) Aldermen voted against the motion.

59. Defendant Jordan, Mayor of the City of Fayetteville, voted "yes" to suspend the rules, and it was recorded as a vote of 6-3 for approval, thus representing 2/3rds vote requirement needed for the motion to pass.

60. After the third reading of the ordinance in the same night, the Uniform Civil Rights Ordinance passed by a 6-2 of the City Council of Fayetteville, and was recorded as Ordinance 5781.

61. Defendant Jordan was not an elected member of the City Council, but is only an ex officio member by virtue of his executive position.
62. Defendant Jordan’s vote was not needed in order to pass the motion, as all Aldermen were present at the City Council Meeting and it was a 5-3 vote.

63. The motion to dispense the rules would not have been approved by (2/3) of the members composing the municipal council as required by Ark. Code Ann. § 14-55-202, had Defendant Jordan refrained from casting a vote on the motion.

64. Accordingly, since Ark. Code Ann. § 14-55-202 is mandatory, and it was not complied with by the Fayetteville City Council at the City Council Meeting on June 16, 2015, Ordinance 5781 should be held void, as it was passed after the violation of Ark. Code Ann. § 14-55-202.

65. Additionally, since the Fayetteville City Council did not comply with the requirements of Ark. Code Ann. § 14-55-202 at the City Council Meeting on June 16, 2015, they violated the due process rights of the citizens of the City of Fayetteville, Arkansas when they passed Ordinance 5781 after three readings in the same day.

66. The citizens of the City of Fayetteville, Arkansas were not afforded an opportunity to be heard at a meaningful time and a meaningful place before the City Council of Fayetteville voted on Ordinance 5781.

67. Plaintiff prays for a Declaratory Judgment that Ordinance 5781 is void because the Mayor is not a member of the City of Fayetteville city council, and therefore cannot be counted towards the 2/3 vote needed to suspend the rules and is therefore void because it did not comply with Ark. Code Ann. § 14-55-202 and thus violated the due process rights of all Fayetteville residents.

COUNT II
68. Paragraphs 1 through 67 of this Complaint are incorporated herein by reference as if set forth word-for-word.

69. The act of passing Ordinance 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 yea 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).

70. The intent of Amendment 7 is to reserve the right of self-governance to the people, where it allows the people to by initiative or referendum to retain ultimate jurisdiction and control over its elected officials.

71. 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.

72. Likewise, Separate Plaintiff Protect Fayetteville as the sponsor of the repeal petition, again under Constitution, Amendment 7, and on behalf of Taxpayers (who also voted for repeal on December 9th, 2015) all those that voted to repeal Ordinance 5703, exercised their rights reserved to them in the Arkansas Constitution to prohibit Ordinance 5703 from becoming law, seek a declaratory ruling that Ordinance 5781 does not comply with the requirements under Amendment 7 to change, modify, or repeal the exercised control that the people have reserved.

73. 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.
74. Understanding that Ordinance 5703 and Ordinance 5781 are so close in nature, cause and affect, that any action by the City of Fayetteville thought its Aldermen is tantamount to a amendment or repeal of what was already repealed, under Amendment 7, and therefore violates the citizens’ constitutional rights in that the only way to modify is by a 2/3rds vote of the elected aldermen of the City of Fayetteville, not by referring the act out to the people again.

75. The Plaintiffs ask this court for a Declaratory Judgment that Ordinance 5781 is in violation of the amendment or repeal provisions contained in Amendment 7 which is applicable because the people of Fayetteville already took the extraordinary act of repealing the original version of the law (Ordinance 5703), and the law in its new reincarnation was not passed by the Alderman, but merely referred the same law back to the people in violation of the Arkansas Constitution.

76. The Plaintiffs prays for a Declaratory Judgment that Ordinance 5781 is in violation of Amendment 7, as it requires the second (2nd) voters of Fayetteville when they have already voted against the original ordinance (Ordinance 5703) at a special election on December 9th, 2014 and any further requirement for the people of Fayetteville to vote again is a violation of their constitutional rights.

COUNT III
USE OF TAXPAYER FUNDS FOR A SPECIAL ELECTION FOR ORDINANCE 5781 CONSTITUTES AN ILLEGAL EXACTION AND SHOULD BE PROHIBITED.

77. Paragraphs 1 through 76 of this Complaint are incorporated herein by reference as if set forth word-for-word.

78. This is an Illegal exaction action pursuant to Article 16, Section 13, of the Arkansas Constitution to protect the taxpayers of the City of Fayetteville, Arkansas from misuse
of public funds to fund an election in which the voters have already spoken, and for which the subject matter is in conflict with state law.

79. Separate Defendants Taxpayers are a citizen of the City of Fayetteville, Arkansas and have contributed tax money to the general treasury. As a taxpaying citizen of the City of Fayetteville, Arkansas, Taxpayers have standing to bring this action pursuant to Ark. Const. Art. 16, § 13, which states, "[a]ny citizen of any county, city or town may institute suit, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." Ark. Const. art. XVI, § 13.


81. An illegal-exaction suit is a constitutionally created class of taxpayers, and suit is brought for the benefit of all taxpayers. Id.

82. One type of illegal-exaction case that arises under Ark. Const. Art. 16, § 13 are "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent. Pledger v. Featherlite Precast Corp., 308 Ark. 124, 823 S.W.2d 852 (1992).


84. 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.
85. The City of Fayetteville has voted to expend funds for the special election to be held on September 8th, 2015 for a vote on Ordinance 5781, which is prohibited under Act 137 codified at Ark. Code Ann. § 14-1-403.

86. Ordinance 5781, as set out in this Complaint and Motion for Declaratory is illegal, because it violates statutes, it violates the due process under the Arkansas Constitution, and violates Amendment 7 of the Arkansas Constitution.

87. On information and belief, Separate Defendant Washington County, by and though its election commissioners, have authorized the expenditure from the Washington County general funds expenditures related to funds for election materials, such as printed ballots, programing, and absentee ballots and postage in preparation for the Special Election to be held on September 8th, 2015.

88. 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.

89. On June 16, 2015, when the City of Fayetteville City Council passed Ordinance 5781 with a requirement that it be referred to the people for an up or down vote on September 8th, 2015, they failed to fund the special election.

90. Subsequently, after all times relevant, Ark. Code Ann. § 14-1-403 was in full force and effect, the City of Fayetteville City Council passed funding for the special election to be held September 8th, 2015.

91. Irreparable damage would be done to the Taxpayers, and all similarly situated, would be incurred by the expenditure of funds by Washington County, Arkansas, by and through the Washington County Election Commission, which would be owed by the City of Fayetteville.
92. The Aldermen of the Fayetteville City Council misapplied taxpayer funds when they enacted Ordinance 5781, which was nearly identical to Ordinance 5703, which the voters of Fayetteville, AR had already voted against. Additionally, the Aldermen of the Fayetteville City Council misapplied taxpayers’ funds when they included in Ordinance 5781, a provision that requires the Fayetteville, AR voters to vote on whether to approve the Ordinance.

93. Further, the Intrastate Commerce Improvement Act, which became law almost four (4) months before the Fayetteville City Council proposed Ordinance 5781, directly prohibits cities from enacting this exact type of ordinance.

94. The Commissioners of the Washington County Election Commission misapplied taxpayer funds when they voted to place Ordinance 5781 on the ballot at a special election to be held on September 8, 2015, costing the taxpayers of the City of Fayetteville significantly more than it would have cost had they placed the vote for Ordinance 5781 on the ballot at the general elections.

95. Plaintiffs bring this suit on behalf of the taxpayers of the City of Fayetteville, Arkansas, and residents of Washington County, Arkansas, as all named Defendants have contributed to the misapplication of taxpayer funds.

96. The use of any funds from the general treasury of the City of Fayetteville or Washington County, Arkansas constitutes an illegal exaction under Article 16, Section 13, of the Arkansas Constitution.

97. Plaintiffs pray that this Court enter a permanent injunction prohibiting the City of Fayetteville and Washington County, Arkansas from expending any additional funds related to the adoption or enactment of Ordinance 5781, including but not limited to, enjoining the
Washington County Election Commission from holding the special election on September 8\textsuperscript{th}, 2015, for attorney fees and costs, and all other relief which the Plaintiffs prove due.

COUNT IV
ORDINANCE 5781 IS UNLAWFUL AS IT DIRECTLY VIOLATES
ARK. CODE ANN. § 14-1-403; ARK. CODE ANN. § 14-43-610;

98. Paragraphs 1 through 97 of this Complaint are incorporated herein by reference as if set forth word-for-word.

99. Generally, Cities, such as the City of Fayetteville have broad powers to issue legislative power concerning its own affairs. See Ark. Code Ann. § 14-43-601-602.

100. The City of Fayetteville has admitted such in a memorandum dated July 17, 2014, assistant City Attorney Blake Pennington authored a memorandum where he, on behalf of the city stated:

101. Generally, ‘a municipality is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs’ and may even legislate on issues designated as ‘state affairs’ as long as the regulation is not in conflict with or contrary to state law. Ark. Code Ann. § 14-43-601 – 14-43-602. (emphasis added). See Memorandum dated July 17, 2014 attached as Exhibit E, and incorporated as if stated word-for-word herein.

102. While the City of Fayetteville may claim broad powers, they are however limited by any action taken by the general assembly, specifically, “Nothing in this subchapter shall limit the power reserved to the General Assembly to specifically limit the exercise of any powers, functions, and authority granted in this subchapter.” Ark. Code Ann. § 14-43-610.

103. The Arkansas General Assembly has passed a law directly prohibiting the City of Fayetteville from passing or enacting Ordinance 5781 when the Arkansas General Assembly
passed Act 137 stating 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.” Ark. Code Ann. § 14-1-403 (a).


107. Ordinance 5781 attempts to add terms and classes not contained within the Arkansas Civil Rights Act of 1993. See Exhibit B.

108. Because Ordinance 5781 calls for a vote of the general electorate of the City of Fayetteville, it by its own terms cannot be “adopted” until September 8th, 2015 and would not take effect until sixty (60) days after successful passage. See Exhibit B.


110. Plaintiffs seek Declaratory Judgment that Ordinance 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, that it would by the terms of the ordinance not be able to be “adopted” until September 8th, 2015 or “enacted” until November 7th, 2015 and that it would at all times,

¹ The code defines disability as the “presence of any sensory, mental, or physical disability”
and points relevant fail to become law regardless of the outcome of a September 8th, 2015 special
election.

COUNT V
THE TITLE OF ORDINANCE 5781 IS MISLEADING
AND THEREFORE THE BALLOT TITLE IS MISLEADING

111. Paragraphs 1 through 110 of this Complaint are incorporated herein by reference
as if set forth word-for-word.

112. The short title for Ordinance 5781, as published to the citizens by the City
Council, was UNIFORM CIVIL RIGHTS PROTECTION. The ballot title for the special
election contains the title of the ordinance – Uniform Civil Rights Protection – which is
misleading and confuses voters by using the word “Uniform” in an unsanctioned manner.

113. From the very first word of its short title, voters will be misled by the term
“uniform.”

114. Ordinance 5781 is not “uniform” by definition. According to Black’s Law
Dictionary, when used as an adjective to describe a statute, “Uniform” means “general and
uniform in its operation when it operates equally upon all persons who are brought within the
relations and circumstances provided for.” Ordinance 5781, to the contrary, will elevate a tiny,
select portion of the citizenry over all others.

115. Ordinance 5781 is not uniform with the law of any other state. Genuine
“Uniform” laws are drafted by panels of distinguished attorneys, judges and law professors from
The National Conference of Commissioners of Uniform State Laws, established in 1892 and
more commonly known as the Uniform Law Commission or (hereinafter “ULC”).
116. The term “uniform” is not an ordinary word; it is a legal term of art that is reserved for laws thoughtfully drafted by the ULC, and therefore in the minds of voters the title “Uniform” confers upon Ordinance 5781 an aura of respectability it does not deserve.

117. Arkansas has adopted about 48 genuine “Uniform” laws. See the list codifications within the Ark. Code Ann. of the “Uniform” laws Arkansas has adopted to date attached as Exhibit F, and incorporated by reference as if stated word-for-word herein.

118. Many, if not most, citizens are familiar with “Uniform” laws because they are exposed to those laws in their daily lives, including in the course of commerce, domestic relations proceedings, and/or estate proceedings; a sampling of those laws includes: Uniform Commercial Code, Uniform Child Custody Jurisdiction and Enforcement Act, Uniform Durable Power of Attorney Act, Uniform Interstate Family Support Act, Uniform Limited Partnership Act, Uniform Partnership Act, Uniform Transfers to Minors Act, and Uniform Trust Code Act.

119. There is no such thing as a “Uniform” Civil Rights Law, either in Arkansas, any other state, or as adopted by the ULC.

120. Ordinance 5781 is not a product of the Uniform Law Commission.

121. Since Ordinance 5781 is not a product of the ULC, it is deceptive and misleading for its proponents to misappropriate that honorific, which will tend to mislead voters into thinking this is a law that has already been approved.

122. For the proponents of Ordinance 5781 to willfully misappropriate the term “Uniform” in its title is the same misrepresentation and causes the same confusion that a mom-and-pop burger shop would have if they called their restaurant “McDonalds²” using the same logo and styling. The voter in this case has an expectation, just like at a fast food restaurant, that

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² McDonalds is a federally registered trademark of the McDonald’s Corporation and its affiliates.
the quality and offerings in a "uniform" law have had the same thought research and vetting as other "uniform" laws.

123. The average voter can easily confuse Ordinance 5781 with true uniform laws, thereby causing confusion and prejudice to voters, because it implies a legitimacy, which is false.

124. Ordinance 5781 is not uniform with Arkansas state law. Ordinance 5781 is an unlawful exercise of municipal power under A.C.A. § 14-43-601 to -602 because it is "in conflict with and contrary to state law" in the form of the Arkansas Civil Rights Act of 1993.

125. Ordinance 5781 is also not uniform with another Arkansas state law. Ordinance 5781 violates the recently enacted Act 137 of 2015, the "Intrastate Commerce Improvement Act", § 14-1-401 et seq. (and following), which states that a "municipality ... shall not adopt or enforce an ordinance that creates a protected classification or prohibits discrimination on a basis not contained in state law." A.C.A. § 14-1-403(a).

126. Act 137 requires that "protected class" and "nondiscrimination" issues be decided uniformly throughout the State of Arkansas: "The purpose ... is to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, ..." § 14-1-402(a). "The General Assembly finds that uniformity of law benefits the businesses, organizations, and employers seeking to do business in the state and attracts new businesses ... to the state." § 14-1-402(b) (emphasis added).

127. Ordinance 5781 is calculated to make Fayetteville different from the general rule in Arkansas, in violation of a State law that expressly requires uniformity.

128. Ordinance 5781 is not uniform with the Little Rock ordinance because that ordinance was limited in scope and applies only to city employees and vendors, whereas 5781
would apply to most employees, tenants and business customers in Fayetteville, as did Chapter 119 rejected by the voters last December.

129. Ordinance 5781 is not uniform with “The Arkansas Civil Rights Act of 1993”, from which Defendant City Attorney Kit Williams claims it is derived and pretends to draw legitimacy. The Civil Rights Act includes protection for individual faith and conscience in its definition of religion: “‘Religion’ means all aspects of religious belief, observance, and practice.” § 16-123-102(8). This is a statutory fulfillment of the state’s constitutional protections in Section 24 of Article 2. Ordinance 5781 intentionally adds those identifying as Lesbian, Gay, Bi-Sexual or Transgendered (hereinafter “LGBT”) to the list of those protected, but it effectively deletes the protection for religious freedom, and imposes a regime of punishments leading to virtually unlimited fines, loss of business license, and imprisonment.

130. Ordinance 5781 is not uniform internally; to the contrary it is intrinsically biased and distorted. It is not “uniform” because it empowers a small class of persons to write their own special status in the law by defining themselves as a protected class while denying that same right to religious individuals and the other classes protected under state law.

131. Ordinance 5781 is not “uniform” because it would punish one clearly protected class – religion – to favor the selfish interests of another non-recognized protected class containing LGBT individuals.

132. Ordinance 5781 is most uniform with Chapter 119, the ordinance rejected by the citizens of Fayetteville in the special election held last December 9, 2014, because it uses the police power of the state to punish individuals who refuse to participate in ceremonies that violate their religious faith.
The Plaintiffs request that this honorable court issue a permanent injunction barring the Election Commissioners of Washington County Arkansas from using the ballot title beginning with the word or containing the word “uniform” as it is misleading and false in its representation, and for any other relief for which the plaintiffs may be entitled.

**COUNT VI**
**ORDINANCE 5781 VIOLATES 42 U.S.C. § 1983**

Paragraphs 1 through 133 of this Complaint are incorporated herein by reference as if set forth word-for-word.

Section 1983 of Title 42, United States Code, provides in pertinent part: “Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress...” (emphasis added).

Ordinance 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 in particular by deleting that statutory protection vis-à-vis LGBT complainants.

Ordinance 5781 is intended to deprive citizens and other persons in Fayetteville of their rights, privileges and immunities to: Freedoms of religion and speech under the First Amendment to the Constitution of the United States; freedoms of speech, religion and conscience under Sections 6, 24 and 25 of Article 2 of the Arkansas Constitution; and due process and equal protection under the Fourteenth Amendments to the U.S. Constitution and Sections 3 and 8 of Article 2 of the Arkansas Constitution.
138. Ordinance 5781 also violates Equal Protection by allowing LGBT identifying individuals to write their own status in the law while denying that same right to religious individuals and the other protected classes.

139. The proponents of Ordinance 5781 acting under color of law are Lioneld Jordan, Matthew Petty, Mark Kinion, Alan Long, Adella Gray, Sarah Marsh, and Justin Tennant and through their actions the City of Fayetteville, and those proponents have 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, and jointly and severally, including the City under Monell v. Department of Social Services, 436 US 658 (1978), to the plaintiffs in compensatory and punitive damages, attorney fees and costs, and are further subject to injunctive and declaratory relief to be determined by the Court.

140. The Plaintiffs pray that this court finds that the Mayor, the Alderman voting for 5781, the City of Fayetteville have deprived their right under the Federal and Arkansas Constitution in violation of Ark. Code Ann. § 16-123-102(8), and 42 U.S.C. § 1983, and prays that this court enjoin any implementation of Ordinance 5781, for its attorneys fees and costs. WHEREFORE, the Plaintiff prays that:

A. This Court grant the Plaintiff’s Emergency Temporary Restraining Orders (“TRO”) filed concurrently with this pleading, and the terms and relief requested in the Plaintiffs TRO are incorporated by reference herein.

B. The Court issue a permanent injunction restraining the Washington County Election Commission from holding a Special Election on September 8th, 2015, or any other date; and from spending any further funds from the general treasury of either Washington County, Arkansas, or the City of Fayetteville.
C. For a Declaratory Judgment that Ordinance 5781 is void because the Mayor is not a member of the City of Fayetteville City Council, and therefore cannot be counted towards the 2/3 vote needed to suspend the rules and is therefore void because it did not comply with Ark. Code Ann. § 14-55-202 and thus violated the due process rights of all Fayetteville residents.

D. For a Declaratory Judgment that Ordinance 5781 is in violation of Amendment 7, as it requires the second (2nd) vote of the residence of Fayetteville when they have already voted against the original ordinance (Ordinance 5703) at a special election on December 9th, 2014 and any further requirement for the voters of Fayetteville to vote again is a violation of their constitutional rights.

E. For a Declaratory Judgment that Ordinance 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, that it would by the terms of the ordinance not be able to be “adopted” until September 8th, 2015 or “enacted” until November 7th, 2015 and that it would at all times, and points relevant fail to become law regardless of the outcome of a September 8th, 2015 special election.

F. The court issue a permanent injunction barring the Election Commissioners of Washington County, Arkansas from using the ballot title containing the title of Ordinance 5781 because its use of the word “uniform” is misleading and false in its representation.

G. The Plaintiffs request that this honorable court issue a permanent injunction barring the Election Commissioners of Washington County Arkansas from using the ballot title beginning with the word or containing the word “uniform” as it is misleading and false in its representation, and for any other relief for which the plaintiffs may be entitled.

H. The Plaintiffs pray that this court finds that the Mayor, the Alderman voting for 5781, the City of Fayetteville have deprived their right under the Federal and Arkansas

I. For attorney fees and costs.

J. For all other relief for which the Plaintiffs may prove proper or appropriate.

K. For any other relief for which the Plaintiffs may be entitled.

Respectfully Submitted,

By:

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[Verifications to follow:]
OFFICE OF THE CITY ATTORNEY
500 West Markham, Ste. 310
Little Rock, Arkansas 72201

Thomas M. Carpenter
City Attorney

April 19, 2015

Honorable Joan Adcock
Director-at-Large, Position 10
6808 Mablevale Pike
Little Rock, Arkansas 72209

CITY ATTORNEY OPINION NO. 2015-001

Re: WHETHER PROPOSED ORDINANCE ON CITY ANTI-DISCRIMINATION POLICIES WILL BE VALID AFTER ACT 137 TAKES EFFECT IN JULY, 2015.

Dear Director Adcock:

This letter contains the opinion of this office to the question you posed about a proposed anti-discrimination ordinance which will be considered by the Little Rock Board of Directors on Tuesday, April 21, 2015.

QUESTION PRESENTED

Whether a proposed ordinance to codify City anti-discrimination practices will be valid after the effective date of Act 137 of 2015 on July 22, 2015.1

SHORT ANSWER

Yes. As to intrastate commerce, the proposed ordinance does not create any protected class, nor does it list any prohibited discrimination not already protected by state law. As to discrimination on activities in interstate commerce, Act 137 by its express terms does not apply.

1 Amendment VII to the Arkansas Constitution provides that no law is effective until 90 days after final adjournment of the General Assembly. The General Assembly is scheduled to adjourn sine die on April 22, 2015, so the effective date of Act 137 will be July 22, 2015.
FACTUAL BACKGROUND

On Tuesday, April 21, 2015, the Board of Directors will consider a proposed ordinance entitled “An ordinance to declare the policy of the City of Little Rock on issues not to be considered in hiring; to declare the policy on companies with which the City contract; to declare an emergency; and, for other purposes.” The ordinance has three basic sections:

1. The first section declares that the City will not discriminate against City vendors “…because of the race, color, creed, religion, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information, political opinions or affiliation of the vendors’ owners.” It also requires that all City departments, divisions, and commissions, comply with this policy;

2. The second section of the ordinance declares that in the delivery of City services, the City will not discriminate “because of race, color, creed, religion, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information, political opinions or affiliation.” It contains a similar requirement for compliance throughout all City departments, division, and commissions; and,

3. The third section notes that the City will not contract with any entity that discriminates “on the basis of race, color, creed, religion, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information.” The section also notes that City bid documents will note this requirement, and will also require that all contracts with the City note the vendor’s agreement to adhere to such a policy.2

The first two sections apply to the City. The third section applies only to vendors who wish to do business with the City and be considered for contracts with the City.

The question of whether the ordinance is contrary to state law arises from the fact that Act 137 of the 90th Regular Session of the Arkansas General Assembly states “A...municipality...shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or

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2 The provision applies to all contracts. So, whether a bid is decided on the lowest responsible and responsive price bid (RFP), or on the basis of the most qualified firm to do the work (RFQ), or even in a sole source bid where it is impractical and unfeasible to bid for a particular good or service, this provision applies.
prohibits discrimination on a basis not contained in state law.” 2015 Ark. Acts 137 § 1 (2015). The title of the Act is the “Intrastate Commerce Improvement Act.” Id. By its express terms, it applies only to contracts that in no way involve interstate commerce.³

**DISCUSSION**

1. *Arkansas law already lists the types of discrimination identified in the proposed ordinance.*

The specific question is whether the proposed ordinance, if passed, would at any time violate Arkansas law as set forth in Act 137 of 2015 (“the Act”). The Act prohibits two actions: (1) The creation of a protected classification; and, (2) A prohibition against discrimination that is not otherwise present in “state law.” The language reads:

14-1-403. Prohibited conduct.

(a) 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.

(b) *This section does not apply to a rule or policy that pertains only to the employees of a county, municipality, or other political subdivision.*


Nothing in the proposed ordinance creates a protected classification of individuals. The issue is whether state law already prohibits discrimination for the reasons listed in the proposed ordinance. It does. Because state law already prohibits each kind of discrimination contained in the proposed ordinance, then the proposed ordinances does not violate the plain words of the Act.

The kinds of discrimination the proposed ordinance would prohibit are:

1. Race;
2. Color;

³ Because the Act applies only to intrastate commerce, any interstate commerce aspect of the ordinance is not under question. Still, as demonstrated in the opinion, provisions of Article II of the Arkansas Constitution, as well as various Arkansas statutes in existence, and the 14th Amendment to the U.S. Constitution clearly establish that the City’s ordinance would not violate the provisions of the Act.
3. Creed;
4. Religion;
5. Sex;
6. National origin;
7. Age;
8. Disability;
9. Marital status;
10. Sexual orientation;
11. Gender Identity; and,
12. Genetic information.4

Race and color are expressly protected in the 1874 Arkansas Constitution:

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous conditions.

Article II, § 3, ARK. CONST. In addition to race, religion, national origin, gender, and disability are expressly protected in the Arkansas Civil Rights Act.

The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender5, 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 (a) (West 2013). Marital status, as part of the broader term “familial status” is referenced in the Arkansas Fair Housing Act.

The opportunity to obtain housing, and other real estate, without discrimination because of religion, race, color, national origin, sex, disability, or familial status, as prohibited by this chapter, is recognized and declared to be a civil right.

4 In the quotations from state law that follows this list, the words contained in the list are in italics.

5 For purposes of this provision, “[b]ecause of gender,” means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions.” Ark. Code Ann. § 16-123-102 (1) (West 2013) (emphasis added).

It shall be unlawful for a public employer to:

(1) Fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of the individual’s age;

(2) Limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee because of the individual’s age ....;

Ark. Code Ann. § 21-2-203 (a) (1) (2) (West 2008). Discrimination by public agencies based upon a person’s creed is expressly prohibited by state law:

(a) Every state agency shall include in its personnel manual a statement that discrimination by any officer or employee based upon race, creed, religion, national origin, age, sex, or gender shall constitute grounds for dismissal.

Ark. Code Ann. § 21-12-103 (West 2008). An employer’s discrimination against a potential employee because of genetic information is prohibited. In fact, it is illegal under state law to even seek genetic information from a potential employee:

(a) An employer shall not seek to obtain or use a genetic test or genetic information of the employee or the prospective employee for the purposes of distinguishing between or discriminating against or restricting any right or benefit otherwise due or available to an employee or prospective employee.

(b) An employer shall not require a genetic test of or require genetic information from the employee or prospective employee for the purpose of distinguishing between or discriminating against or restricting any right or benefit otherwise available to an employee or prospective employee.

(b) (1) “Attribute” means an actual or perceived personal characteristic including without limitation race, color, religion, ancestry, national origin, socioeconomic status, academic status, disability, gender, gender identity, physical appearance, health condition, or sexual orientation.

(2) “Bullying” means the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student or public school employee by a written, verbal, electronic, or physical act that may address an attribute of the other student, public school employee, or person with whom the other student or public school employee is associated and that causes or creates actual or reasonably foreseeable:

(A) physical harm to a public school employee or student or damages to the public school employee’s or student’s property; or ...

(C) a hostile educational environment for one (1) or more students or public school employees due to the severity, persistence, or pervasiveness of the act....

Ark. Code Ann. § 6-18-514 (West Supp. 2015). As to sexual orientation, and marital status, state law again has a statute in place to prohibit such discrimination:

Every shelter shall: (1) Develop and implement a written nondiscrimination policy to provide services without regard to race, religion, color, age, marital status, national origin, ancestry, or sexual preference;


In addition, Arkansas law expressly permits the change of official birth records for transgender individuals:

(d) Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the individual’s name has been changed, the certificate of birth of the individual shall be amended accordingly.
Ark. Code Ann. § 20-18-307(d) (West Supp. 2015). While this statute does not mention discrimination, it is clear that Arkansas does not limit sexual identity to that found at birth.6

In short, the proposed ordinance, which only lists types of discrimination that are already prohibited for one reason or another by state law,7 does not violate the Act. Since the state statutory or constitutional provisions quoted above are already in place, the argument that anything in the proposed ordinance violates state law, and therefore violates the Act, is easily dispatched. After all, “[t]o give the same words a different meaning for each category would be to invent a statute rather than interpret one.” Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2769 (2014), quoting with approval, Clark v. Martinez, 543 U.S. 371, 378 (2005). The City does not create any new form of discrimination in the proposed ordinance.

2. The proposed ordinance complies with the Arkansas Constitution Equal Protection Clause.

As already shown, the proposed ordinance does not list any type of discrimination that is not already a part of Arkansas law. A secondary question is whether the ordinance somehow violates the Equal Protection provision of the Arkansas Constitution. The general provision, more fully cited above, is that “[t]he equality of all persons before the law is recognized, and shall ever remain inviolate....” Article II, § 3, ARK. CONST. In terms of a local governmental interest to prohibit discrimination, what does this mean?

‘[I]f the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare . . . desire to harm a political unpopular group cannot constitute a legitimate governmental interest’ . . . Government cannot avoid the strictures of equal protection simply be deferring to the wishes or objections of some fraction of the body politic.

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7 Sections 1 and 2 of the ordinance mandate that the City not discriminate on the basis of “political opinions and affiliation.” This particular requirement is not passed on to private businesses since it is clear that businesses, including corporations, are entitled to First Amendment rights:

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

Jegley v. Picado, 349 Ark. 600, 635, 80 S.W.3d 332, 352 (2002) (citations omitted) (first emphasis supplied) (second emphasis added). The general question in Jegley was whether it was proper to criminalize same sex consensual behavior. The Arkansas Supreme Court held that it was not, particularly when the same activities by heterosexual couples were not also criminalized.

The key to the equal protection argument is that the Court’s statement effectively provides there is no governmental interest in using taxpayer revenues to fund entities or persons which wish to deny equal protection to some group. The desire to assure that the City revenues do not directly or indirectly support the denial of constitutional rights to the listed groups is the thrust of the proposed ordinance. A legislative body “cannot act, under the cloak of police power or public morality, arbitrarily to invade personal liberties of the individual citizen.” See Jegley, 349 Ark. at 638, 80 S.W.3d at 353. Since a government cannot act in such a manner, the fact that the proposed ordinance merely states that the City will not act in such a manner, directly or indirectly, is certainly consistent with the Arkansas Constitution, i.e. state law.

3. The proposed ordinance is consistent with federal interpretations on certain issues.

Of the twelve practices prohibited in the proposed ordinance by entities that wish to contract with the City, only two – sexual orientation, gender identity – can even be said to raise a question about prohibited discrimination. Race, color, creed, religion, and national origin, have been standard prohibitions since the 13th, 14th, and 15th Amendments to the U.S. Constitution were ratified. The Equal Protection provision of the 1874 Arkansas Constitution, as demonstrated, contained similar protections.8


In terms of sex discrimination, this prohibition does not apply merely to the fact that a person is male or female. For example, the U.S. Supreme Court has expressly held that sexual stereotyping

8 Indeed, Arkansas was one of the first formerly Confederate states to ratify the 13th Amendment after the close of the Civil War. JAMES McPHerson, Battle Cry of Freedom at 840 (Oxford, 1988).
is prohibited under Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). “Such stereotypical attitudes violate Title VII if they lead to an adverse employment decision.” Lewis v. Heartland Inns of America, LLC, 591 F.3d 1033, 1038 (2010). The Eighth Circuit has cited with approval a federal case from the Sixth Circuit that found sex discrimination under Title VII when a firefighter, who wished to identify as female, was targeted for termination because he wished “to express a more feminine appearance.” Id., quoting Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004). Adverse employment decisions “based on ‘gender non-conforming behavior and appearance’ [are] impermissible under Price Waterhouse.” Lewis, 591 F.3d at 1039.

At present, the U.S. Department of Labor is seeking comments on proposed rule changes for the Office of Federal Compact Compliance Programs to assure that Executive Order 13672 (July 21, 2014), is properly implemented. The Executive Order specifically prohibits discrimination on the basis of sexual orientation in federal contracting, which means for contracts that involve the expenditure of federal funds. The Notice of Proposed Rulemaking (NPRM) was issued earlier this year. 80 Fed. Reg. 5246-5279 (January 30, 2015). Not only was the NPRM issued because of the Executive Order, but also because current federal guidelines were woefully out of date and did not take account of changes in federal law, or federal court decisions.9

4. **The proposed ordinance does not require action by any business in Arkansas.**

The proposed ordinance does not require any business, or individual, in Arkansas to take any affirmative act. There is no requirement that any business within the City adopt any personnel policy because of this ordinance. Instead, the ordinance states that discrimination for certain reasons is not allowed, and that if a company wishes to vie for a contract with the City, it must follow the very policies the City follows. In short, the proposed ordinance would define an aspect of a “responsive” bidder in a price bid, and a “qualified” bidder in a services bid, as one that adhered to the City’s requirements against discrimination, and were willing to execute a document to that effect.

**CONCLUSION**

The proposed ordinance does not violate Arkansas law, specifically Act 137 of 2015, because every prohibition against discrimination named is already named somewhere in state law. Further, the proposed ordinance is consistent with interpretation by the Arkansas

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9 These changes included the amendment to Title VII of the Civil Rights Act to Prohibit Sex Discrimination on the Basis of Pregnancy; the Lily Ledbetter Fair Pay Act of 2009; the Family Medical Leave Act of 1993; and cases that identify sexual harassment such as City of Los Angeles v. Manhart, 435 U.S. 702 (1976); and same sex harassment such as Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998). See 80 Fed. Reg. 5246, 5249 and nn. 18-23.
Supreme Court of the Equal Protection clause of the Arkansas Constitution. Finally, the proposed ordinance is also in conformity with federal law and regulations that bar discrimination.

Respectfully submitted,

[Signature]
Thomas M. Carpenter
City Attorney

TMC:ct

cc. Mayor Stodola and Members of the Board of Directors (via email)
    Bruce T. Moore, City Manager (via email)
    James E. Jones, Assistant City Manager (via email)
    William C. Mann, III, Chief Deputy City Attorney (via email)
    Bonnie Engster, Law Office Coordinator
Opinion No. 2015-088

September 1, 2015

The Honorable Bob Ballinger
State Representative
1757 Madison 7150
Hindsville, Arkansas 72738-9558

Dear Representative Ballinger:

You have asked for my opinion regarding the meaning and application of Act 137 of 2015. This Act prohibits “[a] county, municipality, or other political subdivision of the state” from “adopt[ing] or enforc[ing] an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.” You ask whether Act 137 “would prevent the adoption or enforcement, in whole or in part” of ordinances similar to those passed in Little Rock, Fayetteville, Hot Springs, Eureka Springs, and Pulaski County.

RESPONSE

The common thread among the five ordinances you cite is that they all amended their local laws to prohibit certain employers (and others) from discriminating on the basis of sexual orientation or gender identity. I take your questions as asking, in light of Act 137 of 2015, whether such ordinances are enforceable.

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 or gender identity, it is my opinion that Act 137 renders the five ordinances unenforceable in this respect.
DISCUSSION

The Attorney General is not authorized to construe local ordinances. But this Office can discuss a local ordinance when its meaning is clear on its face and when state law necessarily requires a reading of the local ordinance in question. The local ordinances you ask about are, for purposes of this opinion, sufficiently clear that I can discuss how Act 137 would apply.

The common feature of the five recently-enacted ordinances you ask about is that they all updated their local nondiscrimination laws to prohibit businesses from contracting with the locality unless the business signs an agreement that it will not discriminate on the basis of (among other things) sexual orientation or gender identity. Given this common thread, I take your question to be asking whether this specific action by the localities conflicts with Act 137.

Before directly addressing your questions, I will (a) explain how I believe a court would interpret Act 137; (b) provide a few representative examples of nondiscrimination laws in Arkansas; and (c) explain why, notwithstanding the claims of some cities, Arkansas’s anti-bullying statute is not a nondiscrimination statute.

I. The Meaning of Act 137

Act 137’s critical provision states 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.”1 Act 137’s interpretation turns primarily on the meaning of the emphasized clause. Because the ordinances you reference all prohibit “discrimination” on certain bases, I will focus on that part of the emphasized clause.

The primary question regarding Act 137 is what the General Assembly intended by the phrase “prohibits discrimination on a basis not already contained in state law.” (Emphasis added.) Act 137 states that a “political subdivision of the state shall not adopt or enforce an ordinance...[that] prohibits discrimination on a basis not contained in state law.”

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1 Acts 2015, No. 137, § 1 (to be codified at Ark. Code Ann. § 14-1-403(a)) (emphasis added). The Act further provides that this prohibition does not apply to policies that pertain only to a political subdivision’s own employees. See Ark. Code Ann. § 14-1-403(b).
This language indicates that the General Assembly intended Act 137 to “hold the field” with respect to antidiscrimination law. The Act expressly prohibits localities from regulating in that field. More specifically, the Act effectively prohibits cities and counties from prohibiting discrimination in a way that varies from state law. In federal jurisprudence, this kind of preemption is known as “express preemption.” The Arkansas Supreme Court has employed this framework when assessing whether local laws are preempted by state law. By removing the cities’ and counties’ ability to enact antidiscrimination laws at variance with state laws, Act 137 clearly holds the field and leaves no room for political subdivisions to act.


One might accept the foregoing and still argue that the five ordinances you reference are not preempted by Act 137. Indeed, I note that two of the five ordinances you ask about appear to rely on Arkansas’s anti-bullying statute—Ark. Code Ann. § 6-18-514—as the basis for including sexual orientation and gender identity in their nondiscrimination ordinances. But such an argument is mistaken for two reasons.

First, the anti-bullying statute is not a nondiscrimination law as contemplated by Act 137. The state’s anti-bullying statute states that “every public school student in this state has the right to receive his or her public education in a public school educational environment that is reasonably free from substantial intimidation,”

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3 Fayetteville’s ordinance cites the statute twice: “Whereas, the General Assembly has determined that attributes such as ‘gender identity’ and ‘sexual orientation’ require protection {A.C.A. § 6-18-514(b)(1)}....Whereas, the protected classifications in A.C.A. § 6-18-514(b)(1) for persons on the basis of gender identity and sexual orientation should also be protected by the City of Fayetteville to prohibit those isolated but improper circumstances when some person or business might intentionally discriminate against our gay, lesbian, bisexual, and transgender citizens.” Further, a letter opinion from the Little Rock City Attorney specifically relies on the anti-bullying statute to support the claim that that city’s ordinance is in harmony with Act 137: “State law already has specific provisions to prohibit discrimination based upon gender identity and sexual orientation.” Opinion Letter of the Office of City Attorney for the City of Little Rock (dated April 19, 2015).
harassment, or harm or threat of harm by another student." To further that right, the General Assembly specifically defined what is meant by "bullying":

"Bullying" means the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student or public school employee by a written, verbal, electronic, or physical act that may address an attribute of the other student, public school employee, or person with whom the other student or public school employee is associated...."^5

The statute defines an "attribute" as an "actual or perceived personal characteristic including without limitation race, color, religion, ancestry, national origin, socioeconomic status, academic status, disability, gender, gender identity, physical appearance, health condition, or sexual orientation."^6

Several observations—from both the text of the anti-bullying statute and an analysis of the concepts of bullying and discrimination—show that the anti-bullying statute is not a nondiscrimination law within the meaning of Act 137:

1. The statute's text deals entirely with intentional harassment, intimidation, ridicule, and threats of violence. Unlike the foregoing nondiscrimination statutes, the anti-bullying statute is not addressing distinctions made between or among various persons or groups of persons. This is critical because it shows that one can be equally culpable for bullying one person as for bullying all persons. But it is logically impossible for one to equally discriminate against all persons. For if one had a policy that applied equally to all persons (both expressly and in terms of its impact), then—far from being discriminatory—such a policy would be neutral.

2. The anti-bullying statute deals with students who bully other students or public-school employees. The anti-bullying statute is not addressing the employment context. Far from being a nondiscrimination law, such a


The statute is essentially a civil analogue for such crimes as harassing communications and terroristic threatening.

3. The statute says that the bullying “may address” one of the listed attributes. Under the statute, one can bully another entirely without reference to the person’s attributes. In contrast, the only way for a person to violate one of the nondiscrimination statutes noted above is for the person to discriminate on one of the listed bases.

4. Quite apart from the text of the anti-bullying statute, the definitions of bullying and discrimination are entirely separate. When “bully” is used as a verb, it means “1. To threaten, intimidate, embarrass, or pressure (a person) by force, taunt, or derision. 2. To use abusive language or behavior against.” Neither of these concepts is present in the definition of discrimination: “1. The intellectual faculty of noting differences and similarities. 2. The effect of law or established practice that confers privileges to a certain class because of race, age, sex, nationality, religion, or disability…. 3. Differential treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” These definitions show that bullying is not a subset of discrimination and that discrimination is not a subset of bullying. The two concepts are distinct.

But even if one assumed, for purposes of argument, that the anti-bullying statute is a nondiscrimination law, the law would still not authorize the five ordinances. This is because, as noted above, Act 137 holds the field with respect to nondiscrimination laws. Thus, if the local ordinances vary at all from state laws that prohibit nondiscrimination, then the local ordinances are preempted by Act 137, which states that the local ordinances cannot be enforced. Local ordinances that are ostensibly based on the anti-bullying statute cannot vary from it. But, as noted above, the anti-bullying statute only applies to a public-school student and only in the public-school context. Therefore, when the local ordinances take the

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10 Id. at 566.
words "sexual orientation" and "gender identity" entirely out of section 6-18-514’s context, and try to apply them to an area the General Assembly has not, the ordinances are varying from state law and, thus, unenforceable to that extent.

Therefore, because no state law currently prohibits discrimination based upon someone’s sexual orientation or gender identity, I can say that Act 137 renders the local ordinances you ask about unenforceable in this respect.

Sincerely,

Leslie Rutledge
Attorney General

LR:cyh
IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

PROTECT FAYETTEVILLE, f/k/a
REPEAL 119; PAUL SAGAIN;
PETER TONNESSON; and
PAUL PHANEUF

and

THE STATE OF ARKANSAS

VS.

NO. CV 2015-1510-1

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 TENANT, MARTIN W.
SCHOOPMEYER, JR., JOHN LATOUR
and ALAN LONG, in their official capacities
as Aldermen of the Fayetteville City Council

DEFENDANTS

PLAINTIFFS

INTERVENOR

ORDER GRANTING DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT IN PART AND DENYING IN PART
AND DENYING PLAINTIFFS’ AND STATE’S CROSS-MOTIONS
FOR SUMMARY JUDGMENT

Now on this 1st day of March, 2016, comes on for decision the Motion for
Summary Judgment filed by separate defendants the City of Fayetteville, Mayor
Jordan and all Fayetteville City Aldermen ("Defendants"), and the Cross-Motions
for Summary judgment as to Count IV of the Amended Complaint filed by the
plaintiffs and the State of Arkansas, and having reviewed the pleadings and hearing
arguments on January 26, 2016, the court finds that the defendants’ motion should be granted in part and denied in part, and the plaintiffs’ and State’s cross-motions should be denied.

**Standing**

Defendants’ motion is denied as it pertains to a lack of standing on the part of Protect Fayetteville based on the reasoning set out by the supreme court in the case of *Arkansas Hotels and Entertainment, Inc. v. Martin*, 2012 Ark. 335 (2012). Defendants’ motion is denied as it pertains to a lack of standing of the individual plaintiffs because the individual plaintiffs are citizens, registered voters and taxpayers of Fayetteville who claim their constitutional rights have been violated and that they have been damaged by an illegal exaction. See *Jegley v. Picado*, 349 Ark. 600 (2002).

**Count 1 of Amended Complaint** - “Passage of Ordinance 5781 Violated Due Process of Law”

Plaintiffs allege that Ordinance 5781 is invalid because Mayor Jordan voted for a motion to suspend the rules and proceed with a third reading of the proposed ordinance in violation of Arkansas Code Annotated § 14-43-501, thus violating due process of the law.

Arkansas Code Annotated § 14-43-501(b)(1)(B) states “[the] mayor shall have a vote . . . when his vote is needed[,] to pass any . . . motion.” This language is plain and unambiguous and describes precisely the situation complained of: the mayor’s
vote was needed to pass a motion. Without the mayor's vote, the motion would not have passed. Arkansas Code Annotated §14-43-501 clearly allows the mayor to cast such a vote.

Summary judgment is granted as to Count I of the Amended Complaint.

Count II of the Amended Complaint - "Passage of Ordinance 5781 Violates the Constitutional Rights of the Voters who Repealed Ordinance 5703 in the Special Election on December 9, 2014."

Plaintiffs allege that the passage of Ordinance 5781 violated the constitutional rights of the voters who repealed Ordinance 5703 in a special election on December 9, 2014. This claim has no merit and summary judgment is granted as to Count II of the Amended Complaint.

Count III of the Amended Complaint - "Use of Taxpayer Funds for a Special Election for Ordinance 5781 Constitutes an Illegal Exaction and Should be Prohibited”

Plaintiffs allege that the use of taxpayer funds for the special election on Ordinance 5781 constitutes an illegal exaction. Summary judgment is granted as to Count III of the Amended Complaint for the reasons asserted by the defendants.

Count IV of the Amended Complaint - “Ordinance 5781 is Unlawful as it Directly Violates Arkansas Code Annotated § 14-1-403; Arkansas Code Annotated § 14-43-610; and Arkansas Code Annotated § 16-123-107.”

The plaintiffs and the State allege that Ordinance 5781 is unlawful because it violates Arkansas Code Annotated § 14-1-403 ("Act 137"). Defendants argue that Ordinance 5781 does not violate Act 137 or, in the alternative, Act 137 is
unconstitutional because it violates the Equal Protection clauses of the United States Constitution and the Arkansas Constitution. All parties have moved for summary judgment on Count IV of the Amended Complaint.

Act 137 provides that counties, municipalities, and any other political subdivisions of the State of Arkansas “shall not adopt or enforce an ordinance... that creates a protected classification or prohibits discrimination on a basis not contained in state law.” Ark. Code Ann. § 14-1-403(a).

First Prong of Act 137

The first prong of Act 137 prohibits the City of Fayetteville from adopting or enforcing an ordinance that creates a protected classification on a basis not contained in state law. Defendants argue that Ordinance 5781 does not create any such classification because gender identity and sexual orientation were classifications protected on bases contained in state law prior to the adoption of Ordinance 5781.

In support of this argument, the defendants first point to a statute titled “Antibullying policies” which ensures that students and public school employees are reasonably free from substantial intimidation, harassment, or harm of threat by students. See Ark. Code Ann. § 6-18-514(a). Protected classifications under the statute include gender identity and sexual orientation. See Ark. Code Ann. § 6-18-5141(b)(1) and (c).
Defendants also point to the Arkansas Domestic Peace Act, which requires that every shelter for victims of domestic violence develop and implement a written nondiscrimination policy to provide services without regard to race, religion, color, age, marital status, national origin, ancestry or sexual preference. See Ark. Code Ann. § 9-4-106.

Finally, the defendants note that Arkansas law provides that the official state issued birth certificate shall be amended to show a transgender person’s inherent gender as opposed to the sex assigned at birth upon proper and legal documentation. See Ark. Code Ann. § 20-18-307(d).

Thus, the defendants assert that gender identity and sexual orientation were already protected classifications on bases contained in state law prior to Ordinance 5781’s adoption and, therefore, Ordinance 5781 did not create any protected classifications in violation of Act 137.

Plaintiffs and the State respond that the only protected classifications to be considered here are those in the Arkansas Civil Rights Act ("ACRA") and that gender identity and sexual orientation are not protected classifications under the ACRA. The ACRA, however, is not mentioned in Act 137.

Our supreme court has stated:

When reviewing issues of statutory interpretation, we keep in mind that the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually
accepted meaning in common language. When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. When a statute is clear, however, it is given its plain meaning, and this court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. This court is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent.


The language of this first prong of Act 137 is plain and unambiguous and the court must construe it just as it reads, giving the language used its plain meaning. Act 137 does not state that Arkansas’s municipalities are prohibited from creating a protected classification on a basis not contained in the ACRA. Rather, Act 137 states that Arkansas prohibits its municipalities from creating a protected classification “on a basis not contained in state law.” Ark. Code Ann. § 14-1-403(a). Clearly, the classifications of gender identity and sexual orientation were classifications of persons protected on bases contained in state law prior to the enactment of Ordinance 5781. As such, Ordinance 5781 does not create a protected classification on a basis not contained in state law and, therefore, the ordinance does not violate the plain meaning of the language used in the first prong of Act 137.

Second Prong of Act 137

The State argues that the word “basis” contained in the second prong of the
"Prohibited conduct" section of Act 137 (prohibiting discrimination on a basis not contained in state law) refers to the area of law in which a prohibition of discrimination is contained, such as, specifically, discrimination in the area of employment law. Defendants respond that the word "basis" contained in the second prong means the reason why a person is discriminated against, such as their gender identity or sexual orientation.

Construing Act 137 just as it reads, giving the words their ordinary and usually accepted meaning in common language, the court believes the defendants' interpretation is most likely that intended by the legislature. No definition of the word "basis" is provided in the act, however, and the court does not find the State's interpretation entirely unreasonable. As such, the court finds the second prong of the statute open to more than one construction and, thus, ambiguous. See Simpson v. Cavalry SPV I, LLC, 2014 Ark. 363 (2014).

When a statute is ambiguous, the court must interpret it according to legislative intent. Id. When interpreting legislative intent, our supreme court has instructed that courts should perform an examination of the whole act and reconcile provisions of the whole act to make them consistent, harmonious, and sensible in an effort to give effect to every part. Id. In addition, the supreme court "must look at the legislative history, the language, and the subject matter involved." Id.
Act 137 reads in its entirety as follows:

AN ACT TO AMEND THE LAW CONCERNING ORDINANCES OF CITIES AND COUNTIES BY CREATING THE INTRASTATE COMMERCE IMPROVEMENT ACT; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE LAW CONCERNING ORDINANCES OF CITIES AND COUNTIES BY CREATING THE INTRASTATE IMPROVEMENT ACT AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 14, Chapter 1, is amended to add an additional subchapter to read as follows:

Subchapter 4 - Intrastate Commerce Improvement Act

14-1-401. Title.
This subchapter shall be known and may be cited as the “Intrastate Commerce Improvement Act”.

14-1-402. Purpose - Finding.
(a) The purpose of this subchapter is to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, regardless of the counties, municipalities, or other political subdivisions in which the businesses, organizations, and employers are located or engage in business or commercial activity.
(b) The General Assembly finds that uniformity of law benefits the businesses, organizations, and employers seeking to do business in the state and attracts new businesses, organizations, and employers to the state.

14-1-403. Prohibited conduct.
(a) 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.

(b) This section does not apply to a rule or policy that pertains only to the employees of a county, municipality, or other political subdivision.


The State argues that taking into consideration the written purpose and legislative findings of Act 137, the basis referred to in the second prong of the act should be interpreted as referring to "employment discrimination, businesses and employers." State's argument at January 26, 2016, hearing. In response to the defendants' asserted meaning of the word "basis" in the second prong, the State argues, "[t]hat's not what the plain language means. [W]hat it really means is that you can't prohibit in a different way than state law already prohibits." Id.

While trying to reconcile provisions of the whole act to make them consistent, harmonious, and sensible in an effort to give effect to every part, the court must also look to the legislative history, the language, and the subject matter involved in making this determination. As to the language of Act 137, the written purpose by no means requires such a leap by this court as to insert language into the operative section of the act as the State suggests. The "Prohibited conduct" section does not state that a municipality shall not adopt or enforce an ordinance that prohibits discrimination "in the area of employment law," for example, and the legislature should have used such a phrase instead of the word "basis" if that is what the
legislature intended. The court must still consider the ordinary and usual meaning of the language, and to insert the language requested by the State into the statute where the plain language reads otherwise is beyond the scope of this court's authority. Although the court has acknowledged that the State's asserted interpretation is not entirely unreasonable, this court will not go so far as to insert language into a statute in place of other existing language.

Nor can any evidence be found in the legislative history to support the State's assertion of the meaning of the word "basis" in the second prong of Act 137's "Prohibited conduct" section. The legislative history available consists of floor debate and other statements made by the house and senate bills' sponsors of Act 137 and relates solely to the issue of discrimination against Arkansas citizens based on their sexual orientation or gender identity. Nothing relating to the written purpose of Act 137 is found anywhere in the legislative history, and certainly nothing is found to give credence to the State's assertion that the word "basis" should be replaced with language such as "the area of employment law discrimination."

As noted, our supreme court has stated, "This court is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent." Farrell, 365 Ark. at 470. Upon examination of Act 137 as a whole, including the legislative
intent, there is no indication that any drafting error or omission has circumvented the legislative intent.

The plain language of Act 137 is clear, even more so after an examination of the act as a whole. The term "basis" contained in the second prong of the "Prohibited conduct" section of the act means the same as it does in the first prong: the reason why a person is discriminated against, not the area of law in which such discrimination occurs. Thus, just as the first prong of the "Prohibited conduct" section of Act 137 fails to prohibit the City of Fayetteville from adopting and enforcing Ordinance 5781, so must the second. The ordinance prohibits discrimination on bases already contained in state law, in compliance with Act 137.

For these reasons, Ordinance 5781 does not violate Act 137. Because Ordinance 5781 is found not to violate Act 137, the court need not address the constitutionality of Act 137. Defendants are granted summary judgment as to Count IV of the Amended Complaint. Plaintiffs' and the State's cross-motions for summary judgment are denied.

**Count V of the Amended Complaint - "Ordinance 5781 is Unlawful as it Directly Violates Article II, § 24 of the Arkansas Constitution."**

In Count V of the Amended Complaint, the plaintiffs claim that the defendants intentionally omitted "the protection of the right of conscience" when passing Ordinance 5781 and that such omission violates Article II, Section 24 of the
Arkansas Constitution. For the reasons asserted by the defendants, summary judgment is granted as to Count V of the Amended Complaint.

Count VI of the Amended Complaint - "Ordinance 5781 Violates 42 U.S.C. § 1983"

Count VI of the Amended Complaint alleges that Ordinance 5781 is intended to deprive citizens and other persons in the City of Fayetteville of their rights, privileges and immunities by denying them the protected classification of freedom of religion under Arkansas Code Annotated § 16-123-102(8) of the Arkansas Civil Rights Act of 1993, as well as the First and Fourteenth Amendments to the United States Constitution. For the reasons argued by the defendants, summary judgment is granted as to Count VI of the Amended Complaint.

IT IS SO ORDERED.

[Signature]

DOUG MARTIN, CIRCUIT JUDGE

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IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
CIVIL DIVISION

PROTECT FAYETTEVILLE, f/k/a REPEAL 119;
PAUL SAGAIN; PETER TONNESSON; and
PAUL PHANEUF

and

THE STATE OF ARKANSAS

VS.

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

PLAINTIFFS

INTERVENOR

Case No. 72CV-15-1510

DEFENDANTS

NOTICE OF APPEAL

COMES NOW Intervenor the State of Arkansas (the “State”), by and through Arkansas
Attorney General Leslie Rutledge, and for its Notice of Appeal, states:

1. The State hereby notifies this Court and the parties that the State appeals to the
Arkansas Supreme Court from the “Order Granting Defendants’ Motion for Summary Judgment
in Part and Denying Plaintiffs’ and State’s Cross-Motions for Summary Judgment” entered by
the Court on March 1, 2016. The State specifically appeals the Court’s ruling regarding Count
IV of the operative complaint and the Court’s interpretation of Arkansas Act 137 of 2015.

2. The State hereby appeals directly to the Arkansas Supreme Court because this
appeal:
• involves the interpretation or construction of the Constitution of Arkansas, Ark. S. Ct. Rule 1-2(a)(1);

• involves issues of first impression, Ark. S. Ct. Rule 1-2(b)(1);

• involves issues of substantial public interest, Ark. S. Ct. Rule 1-2(b)(4); and

• raises significant issues requiring clarification or development of the law, Ark. S. Ct. Rule 1-2(b)(5).

3. The State designates as the record on appeal all pleadings and other papers filed of record, and the transcript of the hearing held on January 26, 2016.

4. The State has ordered the transcript from the reporter of the proceedings in this case, and has made the financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510(c).

WHEREFORE, the State prays that the Court accepts its Notice of Appeal, and for all other just and appropriate relief.

Respectfully Submitted,

LESLIE RUTLEDGE
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