NO. CV- 16-586

IN THE SUPREME COURT OF ARKANSAS

PROTECT FAYETTEVILLE, f/k/a REPEAL 119, et al.;	**PLAINTIFFS-APPELLANTS**
and	
THE STATE OF ARKANSAS	**INTERVENOR-APPELLANT**
v.	
THE CITY OF FAYETTEVILLE, et. al.	**DEFENDANTS-APPELLEES**

ON APPEAL FROM
THE CIRCUIT COURT OF WASHINGTON COUNTY
THE HONORABLE DOUG MARTIN, CIRCUIT JUDGE

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES, BY THE AMERICAN CIVIL LIBERTIES UNION AND THE ARKANSAS CIVIL LIBERTIES UNION

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INTEREST OF *AMICI CURIAE*

Amicus American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. *Amicus* Arkansas Civil Liberties Union, this state's ACLU affiliate, has approximately 3,000 members throughout the state. *Amici* are committed to advancing the right to equal protection under the law for all people, including lesbian, gay, bisexual and transgender (LGBT) people. They have been counsel in numerous cases involving the equal protection rights of LGBT people in Arkansas and across the country. *See, e.g., Dep't of Human Servs. v. Howard*, 367 Ark. 55 (2006) (striking down regulation prohibiting gay people from serving as foster parents); *Arkansas Dep't of Human Servs. v. Cole*, 2011 Ark. 145 (2011) (striking down law barring cohabiting couples from fostering or adopting children); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that exclusion of same-sex couples from marriage is unconstitutional); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down federal law barring recognition of marriages of same-sex couples); *Romer v. Evans*, 517 U.S. 620 (1996)(striking down state constitutional amendment barring non-discrimination protections for gay people).

Amici agree with the Circuit Court and the City of Fayetteville that the Intrastate Commerce Improvement Act, Ark. Code Ann. § 14-1-401-403, *et seq.*

("Act 137") does not prohibit ordinances that bar discrimination based on sexual orientation and gender identity and, thus, there is no need to reach the question of the constitutionality of Act 137. However, to the extent this Court disagrees and reaches the constitutional question, *amici* write to provide analysis of why, under the United States Supreme Court's precedents, Act 137 violates the right to Equal Protection guaranteed by the Constitution. Under all circumstances, Act 137 and laws like it precipitously enacted in response to anti-discrimination protections have been roundly struck down as unconstitutional in the past.

ARGUMENT

This case bears a worrisome resemblance to a series of decisions, from the era of *de jure* segregation onward, where a locality adopted an anti-discrimination protection only to have it singled out and overridden. In each of those cases, the Supreme Court of the United States unambiguously held that it was unconstitutional to select and suppress municipal laws of this character, whatever the purported state rationale for so doing, or the means of override.

I. Laws enacted with the purpose of disadvantaging minorities are unconstitutional.

The United States Supreme Court has repeatedly made clear that laws enacted in order to disadvantage a particular group are unconstitutional. In *Hunter v. Erickson*, 393 U.S. 385, 386 (1969), the Akron City Council enacted a fair housing ordinance to ensure equal access to decent housing, regardless of race, and established a commission to enforce the antidiscrimination provisions of the law. But after an African American citizen lodged a complaint about racial discrimination by a real estate agent, she was told that the ordinance was no longer operative because the City's charter was amended to require that any such regulation must first be approved by a majority of the electors. The Supreme Court held that the amendment violated the Equal Protection Clause because it singled out "[o]nly laws to end housing discrimination" to "run[] [the] gantlet" *Id.* at 391. The Court also rejected the City's purported justifications and held that "although

the law on its face treats Negro and white . . . in an identical manner, the reality is that the law's impact falls on the minority." *Id.*

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), California enacted legislation to prohibit various types of discrimination in housing, including via restrictive covenants and rentals. But in response, the state constitution was amended to prevent the state or its subdivisions from restricting any person's "absolute discretion" in the sale or lease of property, including on the basis of race. The Supreme Court not only held that the amendment violated the Equal Protection Clause but also that the law "would involve the State in private racial discriminations [in housing] to an unconstitutional degree." *Id.* at 378-79.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Seattle School Board voluntarily adopted a school bussing plan to reduce racial segregation and isolation. But in a reaction against those efforts, a statewide law was passed that forbade local school boards from requiring any student attend any school except for the nearest or next nearest one to where the student resided. The Supreme Court, relying heavily its *Hunter* precedent, struck down the state law because it "imposes substantial and unique burdens on racial minorities" and "uses the racial nature of an issue to define the governmental decisionmaking structure. . . ." *Id.* at 470. The Court rejected the argument that the state law was factually neutral, since it found there was "little doubt" of its underlying discriminatory

purposes. *Id.* at 471. Additionally, the Court expressly criticized the law for being "something more than the 'mere repeal' of a desegregation law by the political entity that created it," since the law "burdens all future attempts" at integration "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483.

In *Romer v. Evans*, 517 U.S. 620 (1996), the city and county of Denver, alongside Boulder and Aspen, enacted anti-discrimination ordinances that covered sexual orientation. But in response, Colorado passed a state constitutional amendment "prohibit[ing] all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians." Id. at 624. The Supreme Court struck down that law as violating the Fourteenth Amendment because it "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" and "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects. . . ." *Id.* at 632. To try to justify the law, the state argued that it was not granting "special rights" to LGBT individuals and that it sought to conserve resources to combat discrimination against other groups. The Supreme Court roundly rebuffed Colorado's arguments as "implausible," and recognized that the amendment actually imposed a "special disability" upon LGBT persons. *Id.* at

631. The Court stressed that "[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 politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 634–35 (internal quotation and citation omitted).

More recently, in *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013), the Court struck down the federal Defense of Marriage Act because the principal purpose and effect of the law was to "disparage and to injure" gay people and their families. *Windsor* is consistent with the Court's longstanding recognition that a law cannot be based on a desire to disadvantage a particular group. *Id.*, at 2694 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.") (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also Romer v. Evans*, 517 U.S. 620, 6334-35 (1996).

This principle was applied to strike down a state constitutional amendment that took away existing non-discrimination protections for gay people and precluded the future enactment of such laws in *Romer* and has been consistently applied by the Supreme Court to laws that deny protections for minorities, whether they are facially discriminatory laws like the one in *Romer* or facially neutral laws enacted with the purpose of targeting a group. *See Washington v. Seattle School*

Dist. No. 1, 458 U.S. 457 (1982) (striking down facially neutral state law enacted to stop school busing for desegregation by prohibiting school districts from requiring students to attend schools that are not nearest to their homes); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking down facially neutral state constitutional amendment enacted to overturn laws banning race discrimination in housing by prohibiting laws that "deny . . . the right of any person . . . to decline to sell, lease or rent [their] property to such person or persons as he, in his absolute discretion, chooses."); *Moreno*, 413 U.S. at 534 (striking down exclusion of households with unrelated members from food stamp eligibility where it was "intended to prevent so-called 'hippies' and 'hippie communes' from participating in the program"). These cases and others evince a robust anti-subordination principle that laws which exist solely to effectuate a caste system cannot stand.

These constitutional principles have deep roots and cannot be easily displaced. For example, in *Washington* and *Reitman*, the fact that the challenged laws were facially neutral did not make them constitutional. As the Court noted in *Washington*, 458 U.S. at 471, "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes." Because the purpose of these laws was to deny protections to minorities, they violated the Equal Protection Clause notwithstanding their facial neutrality. *See also Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 265-66 (1977)

(holding that facially neutral law violates equal protection if "discriminatory purpose" was a "motivating factor" in its enactment). Attempts to override anti-discrimination measures not only remain unconstitutional today but they are also now seen for what they are: injudicious and on the wrong side of history. Act 137 is not materially distinguishable from *Romer*, let alone its antecedents in *Hunter*, *Washington* and *Reitman*.

Were the Court to reach the question of Act 137's constitutionality, prior precedent would weigh solely and heavily on the side of the City of Fayetteville. Should the Court find that Act 137 invalidates Fayetteville City Ordinance 5781, Act 137 should be declared unconstitutional.

II. Act 137 was enacted with the purpose of denying protections to LGBT people.

Like the law concerning the sale or lease of property in *Reitman* and the law addressing school transportation law in *Washington*, Act 137 was enacted with the purpose of denying protections to a minority—in this case, LGBT people.[1] To

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[1] Although this was the intent of the legislature the legislation failed in its drafting to achieve that intended effect; thus, *amici* agree with the Circuit Court and the City that Act 137 does not actually preclude local ordinances barring protections against discrimination based on sexual orientation and gender identity.

ascertain whether there was an impermissible purpose to disadvantage, the Supreme Court has looked to the circumstances surrounding enactment, including the "historical background" and "sequence of events leading up to" the law's passage, and legislative history, including statements from legislators. *Arlington Heights*, 429 U.S. at 564-65; *see also Windsor*, 133 S.Ct. at 2693 ("The history of DOMA's enactment" shows that denying equal treatment to same-sex couples "was more than an incidental effect of the federal statute. It was its essence."). *See, e.g., Reitman*, 387 U.S. at 1631 (noting that challenged law was enacted in response to state laws that prohibited race discrimination in housing); *Romer*, 517 U.S. at 623 ("The impetus for the amendment . . . came in large part from ordinances that had been passed in various Colorado municipalities."); *Moreno*, 413 U.S. at 2826 (referencing statements in the legislative record evidencing intent to exclude a group from government benefit). Bill sponsors and supporters openly acknowledged that Act 137 was conceived of and filed in reaction to Fayetteville's first passage in August, 2014 of Ordinance 119 barring discrimination based on sexual orientation and gender identity and that this law was meant to prevent such protections for LGBT people.[2]

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[2] *See* Arkansas House of Representatives Feb. 13, 2015 debate on the SB202/Act 137, available at http://www.arkansashouse.org/video-library at 10:55:23 and

specifically at 11:21:11 (bill sponsor, Rep. Ballinger, reciting events surrounding passage of LGBT non-discrimination ordinance in Fayetteville and that a new ordinance was under study); *id.* at 11:22:09 and 11:23:17 (Rep. Ballinger discussing "the experience in Fayetteville"); *id.* at 11:13:50 (Rep. Copeland discussing civil rights and stating "I do think there is a stark difference between someone's preferences and then someone's birth"); *id.* at 11:17:26 (Rep. Bentley, speaking for the bill, stating "as we listened to the speeches today, we heard LGBT. We couldn't say the words that that really stands for. . . so let's say what the acronym means, its lesbians, gay, bisexual, transgender, those are the things that we're talking about"); *id.* at 11:18;44 (Rep. Bentley stating "a baker that loves the word of God that's bringing her children up to honor God and to worship God, should [not] have her business destroyed because she doesn't want to bake a cake for somebody that's a transgender trying to marry somebody else."); "Bill to ban anti-discrimination laws at city, county level advances," Arkansas News, Feb. 5, 2015, available at http://arkansasnews.com/news/arkansas/bill-ban-anti-discrimination-laws-city-county-level-advances (reporting that the bill sponsor told a legislative panel that he filed the bill in reaction to Fayetteville's 2014 ordinance barring discrimination based on sexual orientation and gender identity); "Arkansas Legislature Expected to Pass Law

III. Act 137 fails any level of constitutional scrutiny.

The appropriate level of scrutiny for this law with the purpose of denying protections for LGBT people is heightened scrutiny. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014); *Smithkline Beecham Corp. v. Abbot Labs.*, 740 F.3d 471, 484 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).[3] Thus,

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Allowing LGBT Discrimination," Buzzfeed, Feb. 11, 2015, *available at* http://www.buzzfeed.com/dominicholden/arkansas-legislature-expected-to-pass-law-allowing-lgbt-disc#.cjkAdOo95e (in interview, bill sponsor stated "I am singled out as a politician. I am singled out because I am married to one woman"; "I want everyone in the LGBT community to have the same rights I do. I do not want them to have special rights that I do not have."); "Arkansas House Oks Bills on Anti-Discrimination Ordinances, 'Conscience Protection,'" Times Record, Feb. 13, 2015, *available at* http://swtimes.com/legislature/arkansas-house-oks-bills-anti-discrimination-ordinances-conscience-protection (reporting that the Senator who presented the bill on the Senate floor said it would prevent ordinances like the one in Fayetteville barring discrimination based on sexual orientation and gender identity).

[3] The 8th Circuit's decision rejecting heightened scrutiny for sexual orientation classifications – *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir.

a justification "must describe actual state purposes, not rationalizations for actions in fact differently grounded. *United States v. Virginia*, 518 U.S. 515, 535-36 (1996).

Here, the stated purpose related to promoting intrastate commerce is clearly pretextual. This is evident from the historical context and statements of legislators from inception of the idea through the time of enactment. Moreover, it is not plausible that legislators seeking to "improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state" are subject to uniform laws (*see* Ark. Code Ann. § 14-1-402), would single out prohibitions *solely* for non-discrimination laws.

State law expressly gave local governments broad power to enact laws that they deem necessary for their communities, including laws related to the economy. Ark. Code Ann. § 14-55-102 (authorizing municipal corporations to make and publish bylaws and ordinances "which, as to them, shall seem necessary to provide

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2006), *abrogated by Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) – and other similar circuit court decisions preceded the Supreme Court's *Windsor* decision. *See Smithkline,* 740 F.3d at 484 ("we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.").

for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof."). And state law expressly authorizes Arkansas municipalities to enact a wide variety of non-uniform laws that directly bear on commerce, including laws governing sales taxes, property taxes, commercial zoning, building codes, business licenses, and alcohol sales. *See, e.g.*, Ark. Code Ann. § 26-73-113 (municipalities set local sales and use taxes); Ark. Const. art. 12, § 4 and Ark. Code Ann. § 26-25-102 (municipalities can set varying real and personal property tax rates); Ark. Code Ann. § 26-75-601-619 (additional taxes on gross proceeds for hotels, restaurants and other businesses are within discretion of cities); Ark. Code Ann. § 14-232-110 (counties and cities are authorized to impose and collect differing rates and charges for solid waste disposal, water, and sewer services); Ark. Code Ann. § 14-56-402 and 416 (granting powers for zoning to cities and counties, including powers to regulate the uses of land, buildings, and structures; requirements for off-street parking and loading and others restrictions); Ark. Code Ann. § 3-8-201-210 (local control retained over whether and how to allow alcohol sales); Ark. Code Ann. § 26-77-101-204 (cities set requirements (if any) and rates for businesses or occupational licenses and taxes and privilege taxes) and specifically Ark. Code Ann. § 26-77-102 ("Any city . . . shall have the power . . . requiring any person, firm, individual, or corporation who shall engage in, carry on, or follow any trade,

business, profession, vocation, or calling, within the corporate limits of the city or town, to pay a license fee or tax. . . . The license charged and collected shall be for the privilege of doing business or carrying on any trade, profession, vocation, or calling in the city where the trade, business, profession, vocation, or calling is situated. . . [the] sum or amount of money as may be specified by the ordinance for the license and privilege. The council or boards shall have the right to classify and define any trade, business, profession, vocation, or calling and to fix the sum or amount any person, firm, individual, or corporation shall pay for the license required for the privilege of engaging in, carrying on, or following any trade, business, vocation, or calling. . . . The council or boards shall have the full power to punish for violation of these ordinances."), and Ark. Code Ann. § 26-77-105 ("The city . . . shall provide all rules and regulations for the payment of a license for the privilege of engaging in any trade, business, profession, vocation, or calling in the city or town . . . . All persons, firms, individuals, or corporations desiring to engage in any business named in this chapter shall comply with the rules and regulations before engaging in their trade, business, profession, vocation, or calling.").

Act 137, purports to create uniformity in law for the benefit of businesses, yet leaves the State's authorization of a patchwork of local laws intact. The result is unmistakable: anti-discrimination measures are singled out. The State's asserted

uniformity rationale for the law simply cannot be credited. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972) (in striking down under rational basis review a state law barring the sale of contraceptives to unmarried people, Court noted that law is "so riddled with exceptions" that the asserted interest in deterring premarital sex "cannot reasonably be regarded as its aim."); *Moreno*, 413 U.S. at 536-37 (the existence of other statutes related to the asserted government interest "casts considerable doubt" on that rationale being the intent of Congress).

For this same reason, Article 137 cannot satisfy even rational basis review. Courts do not hesitate to strike down a law under rational basis review when the relationship between the classification and the asserted goal "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). *See also Romer*, 517 U.S. at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").

CONCLUSION

For the foregoing reasons, in the event the Court determines that Fayetteville City Ordinance 5781 violates act 137 and reaches the question of the constitutionality of Act 137, *amici* respectfully request that the Court declare the law unconstitutional under controlling precedent and, thus, not a bar to ordinances prohibiting discrimination based on sexual orientation and gender identity.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was served this 24th day of October, 2016 by electronic transmission and U.S. Mail, First Class, postage prepaid on the following counsel of record:

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