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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, *et al.*, Plaintiffs, vs. The State of Arkansas, *et al.*, Defendants.	Case No. CV 2008-14284 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE**

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INTRODUCTION

On December 30, 2008, the plaintiffs filed a complaint with this court, asking it to declare the Arkansas Adoption and Foster Care Act (Act 1) unconstitutional and to enjoin the state of Arkansas and it agents from enforcing Act 1 in the future. The plaintiffs' complaint fails to name Family Council Action Committee (FCAC) or any of its members as defendants. But, as ballot sponsor of Act 1, FCAC is a necessary party to this action. And, additionally, FCAC possesses unique and substantial interests regarding the passage of Act 1, including interests in defending the right of the people to enact ballot initiatives and in describing the purposes behind Act 1. Jerry Cox is the President of FCAC and is an Arkansas-registered voter who personally worked and voted for the passage of Act 1. The existing parties do not share the intervenors' interests. Therefore, as this application is timely, FCAC and Cox are entitled to intervene as defendants to this action as of right, or, alternatively, by permission of this court.

STATEMENT OF FACTS

The Family Council Action Committee (FCAC) is an Arkansas-registered nonprofit association dedicated to promoting, protecting, and strengthening traditional family values through the political process. FCAC is comprised of Arkansas voters who supported and voted for the passage of the Arkansas Adoption and Foster Care Act (Act 1) on November 4, 2008. FCAC is the official sponsor of Act 1, and is responsible for putting Act 1 on the ballot. In his capacity as President of the FCAC, and as an Arkansas voter, Cox is responsible for putting Act 1 on the ballot and for its passage. Act 1 became law on January 1, 2009.

The road to put Act 1 on the ballot and get it passed was a long and arduous one. FCAC and Cox spent countless days, weeks, and months developing the language and ballot title for Act 1, tailoring its applications and effects to pass constitutional muster, getting it placed on the ballot, and advocating for its passage. To get Act 1 on the ballot, FCAC had to conquer the

labyrinth of Arkansas election law requirements, which included: getting approval of the ballot language and title; obtaining over 62,000 signatures of registered voters who wished to have the initiative placed on the ballot; and obtaining final certification by the Secretary of State. Indeed, FCAC estimates that it contributed over 20,600 man hours working to successfully complete this process.

But FCAC and Cox did not contribute solely time and effort to Act 1. Rather, they contributed money and lent their names and reputations to the passage of the initiative. Through donations, FCAC raised $92,715.90 that it spent to pass Act 1. Additionally, FCAC produced numerous mailers and pamphlets, to which it lent its name, advocating for the passage of Act 1.

To get Act 1 on the ballot, FCAC invoked the right of the people under the Arkansas Constitution to change Arkansas law through initiative. In developing and passing Act 1, FCAC and Cox received no assistance from the state of Arkansas, the Arkansas Attorney General, the Arkansas Department of Human Services, or the Child Welfare Agency Review Board. Instead, Arkansas Attorney General Dustin McDaniel, and Governor Mike Beebe publically criticized Act 1 and worked to defeat the efforts to pass it.

ARGUMENT

Because of their unique and substantial interest in ensuring that Act 1 is recognized as constitutional, FCAC and Cox are entitled to intervene under Arkansas Rule of Civil Procedure 24(a).[1] It provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action

[1] Arkansas Rule 24 is patterned after Federal Rule of Civil Procedure (FRCP) 24, and it is appropriate to look to the application of FRCP 24 to determine how the court should apply Arkansas Rule 24. *See, e.g., Bank of Quitman v. Phillips*, 270 Ark. 53, 56, 603 S.W.2d 450, 452 (Ct. App. 1980).

> may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A party seeking to intervene as of right under Rule 24(a) must: (1) possess a *recognized* interest in the subject matter of the pending litigation that (2) *might* be impaired by the disposition of the litigation and (3) is not *adequately* represented by the existing parties. *Matson, Inc. v. Lamb & Assoc. Packaging, Inc.*, 328 Ark. 705, 709, 947 S.W.2d 324, 325 (1997). When these three requirements are met, a court must grant intervention of right. *Milberg, Weiss, Bershad, Haynes, and Lerach, LLP v. State*, 342 Ark. 303, 315, 28 S.W.3d 842, 850 (2000).

FCAC and Cox have a right to intervene because the plaintiffs' action seeks to nullify the exercise of their Amendment 7 right and the fruit of their labors by invalidating Act 1. FCAC and Cox's interest in defending Act 1 is certainly substantial, and is immediately threatened by this action.

I. THIS MOTION IS TIMELY BECAUSE THIS PROCEEDING HAS NOT PROGRESSED BEYOND INTITIAL FILINGS AND BECAUSE IT WAS MADE WITHOUT DELAY.

The timeliness of an intervention motion is determined from all the circumstances of a case. *McLane Co., Inc. v. Davis*, 342 Ark. 655, 660, 33 S.W.3d 473, 475 (2000). Particularly, a Court should consider: 1) how far have the proceedings progressed; 2) has there been any prejudice to other parties caused by the delay; and 3) what was the reason for the delay as delay in asserting a right is a critical factor. *Id.*

This proceeding has not progressed beyond the plaintiffs' filing of their complaint on December 30, 2008. There has been no answer, no discovery, no hearings, and no judgments. Plaintiffs have filed a Motion for Preliminary Injunction and Temporary Restraining Order, but that Motion has not been heard before this Court, and does not have bearing on the progression of the proceedings stemming from the complaint. In such circumstances, where "little or no

litigation has ensued," timeliness is "generally not a consideration." *UHS of Arkansas, Inc. v. City of Sherwood*, 296 Ark. 97, 104, 752 S.W.2d 36, 39 (1988).

As the proposed intervenors have filed this motion for intervention only 17 days since the commencement of this action, there has been no delay. FCAC and Cox obtained a copy of the complaint on December 30, 2008. They immediately consulted their attorneys to determine this action's effect on their interests and promptly filed this motion to intervene. The existing parties will suffer no prejudice if FCAC and Cox enter this action as intervenors.

II. FCAC AND COX HAVE A RECOGNIZABLE INTEREST IN ENSURING THAT THEIR SUBSTANTIAL INVESTMENT IN ACT 1 IS NOT WIPED OUT BY THIS LITIGATION.

When the legality of an initiative has been challenged, Arkansas courts have recognized directly concerned parties' interest in responding to the challenge, and have granted intervention. *See, e.g., Dust v. Riviere*, 271 Ark. 1, 2, 638 S.W.2d 663, 664 (1982). In fact, the courts have traditionally granted intervention to the sponsor of an initiative if the initiative is challenged, *see, e.g., Walker v. Priest*, 342 Ark. 410, 415-416, 29 S.W.3d 657, 658 (2000), particularly where the validity of the initiative's ballot title is challenged. *Id.* As the sponsor of Act 1, FCAC is directly concerned with the outcome of this litigation—its investment of time, effort, and financial resources stands to be entirely eradicated. That would be enough to demonstrate a sufficient interest in intervention, but there is more. Arkansas law directly concerns a sponsor with the fate of its sponsored initiative, recognizing and confirming the interest that a sponsor has in its sponsored initiative.

The plaintiffs' complaint alleges that ballot title of Act 1 is materially misleading. (Pls.' Compl. at ¶¶ 158-165.) For that reason alone, FCAC should be allowed to intervene. *Walker v. Priest*, 342 Ark. 410, 415-16, 29 S.W.3d 657, 658 (2000) (allowing sponsor of initiative to

intervene where ballot title was challenged as materially misleading, and existing defendants were governmental officials). But there are other grounds for intervention.

Arkansas election law grants special status to a sponsor, affording it an opportunity to defend its sponsored initiative. Ark. Code Ann. §§ 7-9-504 –505. This status reflects Arkansas' deep commitment to the constitutional right of the people to affect legislative change through the initiative process. Ark. const. amend. 7 (reserving for the people the right to amend law through initiative). The Arkansas Supreme Court has repeatedly emphasized the importance of the voters' initiative and has gone to great lengths to protect this critical constitutional right. *See, e.g., Cochran v. Black*, 240 Ark. 393, 397-98, 400 S.W.2d 280, 283 (1966); *Leigh v. Hall*, 232 Ark. 558, 566, 339 S.W.2d 104, 109 (1960). The purpose of the initiative process is to "increase the sense of responsibility that the lawmaking power should feel to the people by establishing a power to initiate proper, and to reject improper, legislation." *Ferrell v. Keel,* 105 Ark. 380, 151 S.W. 269, 272 (1912). Simply put, Amendment 7 reserves "the power of the people to pass the laws they wanted." *Id.* If a sponsor of an initiative is not allowed to defend its initiative, its legal interest to effect change through initiative is seriously uncertain.

The special status of initiative sponsors to protect the integrity of an initiative is reflected in Ark. Code Ann. § 7-9-504 which allows a sponsor to cure any legal insufficiencies that the Secretary of State might determine. Ark. Code Ann. § 7-9-505 grants a sponsor the right to go to court to defend the legality of its sponsored initiative when challenged. Here, the plaintiffs, in addition to attacking the substance of Act 1, are challenging the sufficiency of FCAC's initiative petition. (Pls.' Compl. at ¶¶ 158-165.) And, as a non-profit association, FCAC is entitled to intervene in this action for the purpose of defending its interest in Act 1. *See* Ark. Code Ann. §

4-28-507 (according nonprofit associations standing to defend, intervene and participate in legal proceedings).

The sponsor has additional legal interests in the statutory rights to put its initiative on the ballot. Only the sponsor can circulate petitions for signatures, Ark. Code Ann. § 7-9-108; circulate petitions in the correct form, Ark. Code Ann. § 7-9-104; circulate petitions with the proper attachments, Ark. Code Ann. § 7-9-106; properly verify petitions it has circulated, Ark. Code Ann. § 7-9-109; defend the sufficiency of the signatures gathered, Ark. Code Ann. § 7-9-111; and submit a sufficient number of signatures to the Secretary of State, Ark. Code Ann. § 7-9-111. The onus for complying with these requirements is on the sponsor and the sponsor alone. As such, a sponsor's interest in the survival of its sponsored initiative is clearly recognized and requires intervention here. *Matson, Inc. v. Lamb & Assoc. Packaging, Inc.*, 328 Ark. 705, 709, 947 S.W.2d 324, 325 (1997) (allowing intervention if proposed intervenor possesses recognized interest). None of the defendants in their official capacities have an interest to protect these rights and responsibilities.

In fact, as the sponsor of Act 1, FCAC and Cox are necessary parties to this litigation. Under Arkansas Rule of Civil Procedure 19(a):

> a person who is subject to service of process shall be joined as a party in the action if… (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (I) as a practical matter, impair or impede his ability to protect that interest….If he has not been joined, the court shall order that he be made a party…

As demonstrated above, FCAC has concrete legal and tangible interests in the subject of the action—interests that will be destroyed if Act 1 is invalidated.

The Arkansas Supreme Court has found that parties similarly situated to FCAC were necessary parties. In *State ex rel Robinson v. Craighead Bd. of Election Comm'rs*, 300 Ark. 405, 413, 779 S.W.2d 169, 173 (1989), the Arkansas Supreme Court held that a directly concerned

party, a candidate who faced having his candidacy terminated by the removal of his name from the ballot, was a necessary party that needed to be joined to the ongoing action. Additionally, in *Scott v. McCuen*, 289 Ark. 41, 43, 709 S.W.2d 77, 78 (1986) (*overruled on unrelated grounds by Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000)), the Arkansas Supreme Court joined a power company as a necessary party to a ballot challenge because the company's existence was directly at issue.

Act 1, and the concomitant investment that FCAC and Cox have made to see that Act 1 succeeds, are directly placed in jeopardy by this litigation. And FCAC and Cox's investment is substantial. FCAC has invested 20,600 man hours, $92,715.90, and has lent the personal and professional reputations of Cox and other FCAC members to the success of Act 1.[2] An adverse ruling in this litigation will nullify Act 1—make it effectively cease to exist—and will effectively wipe out all of FCAC and Cox's investment and efforts. As such, FCAC and Cox are directly concerned. In addition, because the plaintiffs have requested declaratory relief, it is necessary to join all parties who have any interest that would be affected by the declaration. *Laman v. Martin*, 235 Ark. 938, 940-41, 362 S.W.2d 711, 712-713 (1962) (interpreting and applying Arkansas Code Ann. § 16-111-106, concerning necessary parties to a request for declaratory relief).

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[2] The Arkansas Constitution recognizes protecting one's reputation as an inherent and inalienable right. Ark. const. art. II, § 2. Article II, Section 2 includes protecting reputation in the same class as protecting property. Courts in other states have recognized that protecting one's reputation, like protecting one's property, is a cognizable interest for intervention. *See, e.g., Dodd v. Reese*, 24 N.E.2d 995, 998 (Ind. 1940) (allowing intervention based on reputation interest because of constitutional provision equating reputation and property); *Armada Broadcasting, Inc. v. Stirn*, 516 N.W.2d 357, 361 (Wis. 1994) (finding protecting reputation to be sufficient interest for intervention).

FCAC and Cox must be parties to this action. They have a recognized interest in the subject of this action. And it is more than clear that this action could impair their ability to protect their interest—there is no alternative forum in which they can litigate to protect or redress their interests if the plaintiffs' relief is granted. As such, there could be no greater impediment to FCAC and Cox defending their interest in Act 1. FCAC and Cox would be left entirely without a voice, with no forum to defend their interests against an adverse ruling in this case.

III. FCAC AND COX'S INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES.

When proposed intervenors possess an interest significantly different from that of any existing party to an action, their interests are not adequately represented. *UHS of Arkansas, Inc. v. City of Sherwood*, 296 Ark. 97, 104, 752 S.W.2d 36, 39 (1988). Proposed intervenors need only show that representation of their interests may be inadequate. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 (1972). This minimal burden "implements the basic jurisprudential assumption that the interest of justice is best served when *all* parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 130 (D.C. Cir. 1972). And, ultimately, the burden of persuasion for adequacy of representation falls on the party opposing intervention. *Matson, Inc. v. Lamb & Assoc. Packaging, Inc.*, 328 Ark. 705, 709, 947 S.W.2d 324, 326 (1997).

FCAC and Cox's investment in Act 1 is not shared by any of the existing parties—even in the slightest regard—making their interests significantly different from the other parties' interests. None of the existing parties had involvement in the development of Act 1. None of the existing parties fundraised, campaigned, and navigated the political or regulatory processes to get Act 1 passed. None of the existing parties staked political, professional and personal reputations on the success of Act 1.

In fact, the existing parties' interests in Act 1 are minimal relative to those of FCAC and Cox. Outside of the Arkansas Attorney General, the other parties have an interest only in determining if they must enforce Act 1 in the future, not in defending Act 1. And while the Attorney General is only required to make some effort to defend the state's interests in having its laws held constitutional, Ark. Code Ann. § 25-16-704, his actual defense is discretionary. He is not required to make all of the arguments that a proponent of Act 1 would make, or to take an approach that puts Act 1 above other competing interests that the state might harbor. That is hardly an assurance that he will represent the best interests of Act 1, like FCAC and Cox would.

Similarly, there is no assurance that any of the existing parties would defend FCAC and Cox's private interests in Act 1. They certainly have no duty to do so. The Attorney General has a statutory obligation to defend the interests of public officials, not private interests like those of FCAC and Cox.[3] Coupled with the fact that the Attorney General and Arkansas Governor Mike Beebe, the policy figurehead for the other existing defendants, have publicly expressed disapproval of Act 1,[4] the concern of FCAC and Cox is palpable. Not only do the existing defendants have no duty to defend FCAC and Cox's interests, but they directly oppose them.

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[3] Arkansas statutes establish the Attorney General as the attorney for all state officials and agencies. Ark. Code Ann. § 25-16-702. And Arkansas statutes require the Attorney General to "defend the interests of the state in matters before [the Supreme Court]." Ark. Code Ann. § 25-16-704. The Attorney General also defends the state's interests in all federal courts and is "the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved." Ark. Code Ann. § 25-16-703. There is no statutory duty to defend even the substantial interests of private parties.

[4] John Lyon, *Group Revises Ballot Item to Ban Adoption, Foster Parenting by Gays*, The Morning News, Oct. 24, 2007, at http://www.nwaonline.net/articles/2007/10/24/news/102507lrgayadopt.txt (Arkansas Attorney General McDaniel and Governor Beebe publically disapproving of Act 1); *McDaniel: No Plans to Recuse From Adoption Suit*, Channel 7 News, Jan. 2, 2009, at http://www.katv.com/news/stories/0109/582085.html (indicating that McDaniel's political action committee made a $1,000 contribution to opponents of Act 1).

Moreover, none of the existing parties have any interest in defending the right of the people to invoke the initiative process to change Arkansas law. In fact, the initiative right is a competitor right to the official political power, and is to be exercised by the voters outside the influence or say so of political officials, like the defendants here.

As such, it is likely, not just possible, that the existing parties will not adequately represent FCAC and Cox's interests. Those interests are entirely unrelated, and potentially disparate[5] to the interests of the existing parties. FCAC and Cox must be granted intervention to lend their voices to this action[6] and, thereby, adequately defend their interests.

IV. FCAC AND COX ALSO QUALIFY FOR PERMISSIVE INTERVENTION BECAUSE THEIR DEFENSE OF ACT 1 HAS A QUESTION OF LAW IN COMMON WITH THE LITIGATION HERE.

Alternatively, FCAC and Cox should be permitted to intervene under Arkansas Rule of Civil Procedure 24(b). It articulates the standard for permissive intervention as:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) *when an applicant's claim or defense and the main action have a question of law or fact in common*.... In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(Emphasis added). FCAC and Cox's motion to intervene meets this standard.

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[5] The existing parties may make concessions that do not affect their interests, but that affect FCAC and Cox's interests. Additionally, the existing parties may choose not to make arguments that FCAC and Cox would make in order to protect its interests. Accordingly, the existing parties may, at such junctures, have disparate interests to FCAC and Cox's interests.

[6] It should not go without notice that the perspective that FCAC and Cox can add to this action, in regard to its insight into the purpose and interpretation of Act 1, can be valuable to assist the Court with its decision.

As demonstrated in section I, *supra*, their motion to intervene is made without delay, and will not prejudice the adjudication of the rights of the original parties. Additionally, their defense of Act 1 has questions of law in common with the main action.

The legal questions in the main action surround the constitutionality of Act 1. Specifically at issue is whether Act 1 violates the proposed "right" of cohabiting individuals to adopt or foster children, and the proposed "right" of children to have cohabiting foster parents, or adopted parents. FCAC and Cox will contend that there are no such rights in the Arkansas Constitution, any section of Arkansas statutory or administrative code, or the federal constitution. And, arguing from the background that only they have in the development of Act 1 and the purposes of that act, they will contend that the plaintiffs have attempted to misconstrue Act 1 to apply it in ways that it simply does not apply.

Intervenors are permitted to intervene when they can contribute to the development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *Usery v. Brandel*, 87 F.R.D. 670, 677 (W.D. Mich. 1980). FCAC and Cox can do just that. FCAC and Cox can explain to the purposes of Act 1 in a way that no existing defendant can. And the plaintiffs have made those purposes a significant issue, by attacking FCAC's intentions for putting Act 1 on the ballot and by attaching an FCAC flyer regarding Act 1 to their complaint. (Pls.' Compl. at ¶ 5.) Because FCAC and Cox can contribute to the development of these factual issues regarding the language of Act 1, and because they otherwise meet the requirements of permissive intervention, this court should permit FCAC and Cox to intervene.

V. CONCLUSION

This litigation threatens to nullify FCAC and Cox's substantial interests in Amendment 7, the election laws and Act 1. If FCAC and Cox are not allowed to intervene, they will be left

completely without a voice to defend their interests because there is no forum except this litigation for them to defend their interests. This set of circumstances entitles them to intervention under Rule 24(a). Additionally, because of the common questions of law and fact that their defense of Act 1 shares with the main action, they should be permitted by this court to intervene under Rule 24(b).

For these reasons, FCAC and Cox's Motion to Intervene should be granted.

Respectfully submitted this the 16th day of January, 2009.

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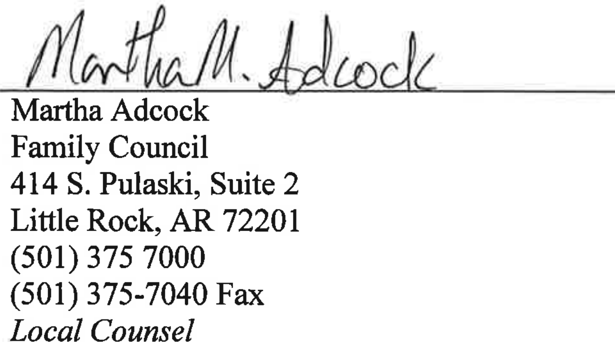

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