

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS  
DIVISION

Kristin Higgins, individually.

VS.

CASE NO. CV 2014- 1846-6

FILED FOR RECORD 2  
2014 OCT 10 PM 1:54  
PLAINTIFF  
WASHINGTON CO. AR.  
CIRCUIT CLERK  
K. SYLVESTER

SONDRA SMITH, in her official capacity as the City Clerk of Fayetteville, 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, JUSTIN TENNANT, MARTIN W. SCHOPPMAYER JR., RHONDA ADAMS, AND ALAN LONG, in their official capacities as ALDERMEN OF THE FAYETTEVILLE CITY COUNCIL; THE HON. PETER LORIS, THE HON. RENEE OELSCHLAEGER and THE HON. MAX DEITCHLER, in their official capacities as the COMMISSIONERS of the WASHINGTON COUNTY ELECTION COMMISSION

DEFENDANTS

**APPEAL FROM CLERK'S CERTIFICATION AND PETITION FOR ISSUANCE OF A WRIT OF MANDAMUS AND FOR DECLARATORY JUDGMENT AND, IN THE ALTERNATIVE, FOR ISSUANCE OF A WRIT OF PROHIBITION**

Come now Plaintiff, Kristin Higgins, a registered voter residing in the City of Fayetteville, Washington County, Arkansas, and for her *Appeal from Clerk's Certification and Petition for Issuance of a Writ of Mandamus and for Declaratory Judgment, and, in the alternative, for Issuance of a Writ of Prohibition*, states as follows:

1. Plaintiff Kristin Higgins is a registered voter residing in Fayetteville, Washington County, Arkansas.
2. Defendant Sondra Smith is the duly elected the City Clerk of Fayetteville, Washington County, Arkansas, and is named only in her official capacity.
3. Defendant Lioneld Jordan is the duly elected Mayor of the City of Fayetteville, Washington County, Arkansas. As the Mayor of the City of

- Fayetteville, Defendant Jordan serves as the chairman of the Fayetteville City Council. Defendant Lioneld Jordan is named only in his official capacity.
4. Defendants Adella Gray, Sarah Marsh, Mark Kinion, Matthew Petty, Justin Tennant, Martin W. Schoppmeyer Jr., Rhonda Adams, and Alan Long, are the duly elected Aldermen, comprising the Fayetteville City Council, and are named only in their official capacities as Aldermen of the Fayetteville City Council.
  5. Defendants The Hon. Peter Loris, The Hon. Renee Oelschlaeger, and The Hon. Max Deitchler, are the duly appointed and serving Commissioners of the Washington County Election Commission and are named only in their official capacities.
  6. As City Clerk, Defendant Smith is obligated to accept, ascertain the sufficiency of, and, where appropriate, certify, each referendum petition pursuant to Arkansas Constit. Amendment 7, Arkansas Code Annotated § 7-9-105, § 7-9-111, § 14-14-915, § 14-14-917, and Fayetteville City Ordinance 36.15.
  7. As Aldermen for the Fayetteville City Council, Defendant Jordan and Aldermen are obligated, pursuant to Arkansas Constitution Amendment 7, Arkansas Code Annotated § 14-55-301 and § 7-9-117, to refer any proposed ordinance to the people for adoption or rejection.
  8. As Commissioners of the Washington County Election Commission, Defendant Election Commissioners are obligated, pursuant to Arkansas Constit. Amendment 7, Arkansas Code Annotated § 7-9-117, to refer any

proposed ordinance to the people for adoption or rejection. On October 9, 2014, the Defendant Election Commissioners voted to place on the ballot at a special election to be held December 9, 2014, a measure to repeal Ordinance No. 5703.

9. This Court has subject matter jurisdiction of the matters stated herein.
10. Challenges to an illegally called special election are properly brought by a writ of mandamus coupled with declaratory judgment. *See Kinchen v. Wilkins*, 367 Ark. 71, 81, 238 S.W.3d 94, 102 (Ark. 2006)(citing *State v. Craighead County Board of Election Commissioners* 300 Ark. 405, 779 S.W.2d 169 (1989)).
11. As a registered voter who resides in the City of Fayetteville, Arkansas, Plaintiff has standing to bring this action pursuant to Ark. Code Ann. §14-14-915(f).
12. Venue lies in Washington County because Plaintiff resides in Washington County, the cause of action arose in Washington County, and Defendants are officers of Fayetteville, Washington County, Arkansas. *See Ark. Code Ann. §16-60-103.*
13. On August 20, 2014, the City Council of the City of Fayetteville, Arkansas, passed Ordinance No. 5703, titled, "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.” See **Exhibit 1**. Ordinance No. 5703 was subsequently revised on September 5, 2014 (see **Exhibit 2**), and on September 8, 2014, to change some of the language in the ordinance. See **Exhibit 3**.

14. Fayetteville City Code 36.15 requires that all referendum petitions “must be filed with the City Clerk within 31 days after the passage of the ordinance to which it relates.” See **Exhibit 4**.
15. Counting the day that Ordinance passed, August 20, 2014, as the first day, 31 days after passage of the Ordinance was September 19, 2014.
16. On September 20, 2014, 802 Referendum Petitions on Ordinance No. 5703 were submitted to Defendant Smith for review and certification. A purported copy of the original Ordinance passed on August 20, 2014 was attached to each of the 802 petitions. See Sample Petition attached hereto as **Exhibit 5**. The revised versions of the Ordinance, dated September 5 and September 8, 2014, respectively, were not attached to the Petitions or noted on the Referendum Petition. See September 5, 2014 and September 8, 2014 revised versions of Ordinance 5703 attached hereto as **Exhibits 2** and **3**.
17. The Referendum Petition provided in pertinent part,  
“We, the undersigned registered voters of the City of Fayetteville, Arkansas respectfully order by this, our petition, that Ordinance No. 5703, passed by the city council of the City of Fayetteville, Arkansas, on the 20<sup>th</sup> day of August, 2014, entitled 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, be referred to the people of

said municipality, to the end that the same may be approved or rejected by the vote of the registered voters of the municipality, at a special election to be held on December 9<sup>th</sup>, 2014, or as otherwise determined by the Fayetteville City Council; and each of us for himself or herself says:

"I have personally signed this petition; I am a registered voter of the City of Fayetteville, Arkansas, and my principal name, date of birth, residence, city of residence and date of signing this petition are correctly written after my signature."

TO HAVE REFERRED TO THE PEOPLE OF THE CITY OF FAYETTEVILLE, ARKANSAS A BALLOT MEASURE FOR OR AGAINST: "REPEAL, IN ITS ENTIRETY, ORDINANCE NO. 5703 WHICH ENACTED CHAPTER 119 OF THE FAYETTEVILLE, ARKANSAS CITY CODE."

See Exhibit 5.

- 18. The Affidavit of Canvasser on each of the Petitions provided,

"I [Name of Canvasser], being first duly sworn, state that the foregoing person(s) signed this sheet, in my presence, and each of them, to the best of my knowledge and belief, has stated his or her name, date of birth, residence, town of residence, and date of signing correctly, and that each signer is a registered voter of the City of Fayetteville. At all times during the circulation of this signature sheet an exact copy of Ordinance 5703, including its exhibit, was attached.  
Signature of Canvasser \_\_\_\_\_ Indicate one:  Paid  
Canvasser  
Residence of Canvasser: \_\_\_\_\_  Volunteer/ Unpaid  
Canvasser  
Subscribed and sworn to before me this \_\_\_ day of \_\_\_\_, 2014.  
\_\_\_\_ Notary"

See Exhibit 5.

- 19. On September 26, 2014, Defendant Smith certified to Defendant Jordan and the Defendant Aldermen, that the Referendum Petition is sufficient pursuant to the requirements of Amendment 7 and Arkansas law. See September 26, 2014 Certification attached hereto as Exhibit 6; see also, September 30, 2014 Memo attached hereto as Exhibit 7. According to

Defendant Smith, petitions containing 5714 signatures were submitted and 4095 signatures were required. Based on Defendant Smith's review of the signatures, the petitions "yielded slightly more than the 4,095 signatures required to call a special referendum election."

20. The list of verified signatures contained several irregularities, including multiple voters whose residential addresses are in cities and towns outside of Fayetteville, Arkansas, signatures that were not accompanied by complete date of birth, address or city of residence of the voter, signatures with the dates of signing occurring after the date of notarization, and signatures with the dates of signing occurring before September 8, 2014, the date of the last revision to the Ordinance. See certified Petitions taken from the September 26, 2014 Excel spreadsheet created by Defendant Smith, collectively attached as **Exhibit 8**.
21. Notwithstanding the Defendant Smith's certification on September 26, 2014, Defendant Smith then, on October 1, 2014, made alterations to the list of verified signatures, adding some names and removing other names verified in error. Specifically, Defendant Smith acknowledged that "[w]e verified the incorrect Kyle Cook." See October 1, 2014 email from Defendant Smith attached hereto as **Exhibit 9**, and Excel Spreadsheet of October 1, 2014 revised Verified Signatures attached hereto as **Exhibit 8**.
22. The City Clerk's certification of the sufficiency of the Petitions and signatures thereon, and the petitions submitted therewith, are void,

erroneous and contrary to the governing law for the reasons hereinafter set forth.

### CLAIMS OF DEFICIENCY

**I. THE BALLOT TITLE FAILS TO COMPLY WITH ARKANSAS CODE ANNOTATED § 7-9-105, AS AMENDED BY ACT 1413 of 2013, AND IS MISLEADING.**

23. Amendment 7 to the Arkansas Constitution reserves to the people “the power, at their own option to approve or reject at the polls any entire act or any item of an appropriation bill.” In order to ensure that the process is fair, the Constitution and the State laws that address this process, require that referendum petitions and ballot titles be: (1) full, (2) fair, and (3) not confusing. See Arkansas Code Annotated § 7-9-105, -106, -107, and -108; see also, *Roberts v. Priest*, 341 Ark. 813, 821, 20 S.W.3d 376, 380 (2000) (“the purpose of the ballot title is to allow a voter to reach ‘an intelligent and informed decision for or against the proposal and to understand the consequences of his or her vote.”); *Walmsley v. Martin*, 2012 Ark. 370 (2012)(“the ballot title is not an extraneous luxury, but is part and parcel of any valid initiative petition”).
24. On August 20, 2014, the Fayetteville City Council passed Ordinance No. 5703. The full text of Ordinance No. 5703, as passed on August 20, 2014, reads,

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.

See **Exhibit 1.**

25. Any referendum petition to refer Ordinance No. 5703 must substantially comply with the requirements set forth in Arkansas Code Annotated § 7-9-105(a), which sets forth the mandatory form for referendum petitions.
26. Act 1413 of 2013 amended Arkansas Code Annotated § 7-9-105(a) to require that referendum petitions include and comply with the following ballot title format,  
  
(... insert popular name and ballot title of referred measure.)  
REFERRED TO THE PEOPLE OF THE STATE OF ARKANSAS, OR  
\_\_\_ COUNTY, ARKANSAS, OR CITY OF \_\_\_ OR  
INCORPORATED TOWN OF \_\_\_\_, ARKANSAS (as the case may  
be);  
(Here insert full text of referred measure.)
27. On August 22, 2014, attorney Stephanie Nichols sent to Defendant Smith and Fayetteville City Attorney, Kit Williams, a draft of a proposed



referendum petition for review and comment. The submitted proposed petition included as a ballot title, the title of the ordinance and requested that Ordinance No. 5703 be referred to the people for approval or rejection at a special election. See August 22, 2014 email attached hereto as **Exhibit 10**.

28. The City Attorney responded to the August 22, 2014 submission, indicating that he "see[s] no problems" with the proposed language. See **Exhibit 10**.
29. On August 23, 2014, attorney Stephanie Nichols submitted to the City Attorney and Defendant Smith a second version of the proposed referendum petition, indicating that local attorney Travis Storey was working on the petition language and specifically requesting, "Do either of you know if the ballot title and popular name is required for a municipal referendum? If it is required, does the petition drafted by Travis seem to present any problems as far as the ballot title/ popular name portion? Do either of you see any other problems?...." The second version of the proposed referendum petition, for the first time, included language to "repeal" Ordinance 5703. See August 23, 2014 email attached hereto as **Exhibit 11**.
30. The City Attorney responded on August 25, 2014, advising that he believed that the ordinance font was reduced too much, making the ordinance not easily readable by every signer and subjecting the petition to attack. He further noted that, although he did not have time to research the ballot title issue further, "I anticipate that title of the ballot issue would tract pretty

closely to the title of the ordinance.” See August 25, 2014 email attached hereto as **Exhibit 12**.

31. Notwithstanding the City Attorney’s suggestions, the final Referendum Petition provides the following language regarding the proposed ballot title,

TO HAVE REFERRED TO THE PEOPLE OF THE CITY OF FAYETTEVILLE, ARKANSAS A BALLOT MEASURE FOR OR AGAINST: “REPEAL, IN ITS ENTIRETY, ORDINANCE NO. 5703 WHICH ENACTED CHAPTER 119 OF THE FAYETTEVILLE, ARKANSAS CITY CODE.””

See **Exhibit 5**.

32. The City Attorney noted in an October 7, 2014 memorandum to the City Council and Mayor Jordan that the referendum proponents had “changed their final Petition language much more significantly” than the two proposed versions which were submitted for his review. According to the City Attorney, the final Petition, by not including the title of the referred ordinance nor of Chapter 119: **Civil Rights Administration**, does not include “proper ballot title language.” See October 7, 2014 Memorandum attached hereto as **Exhibit 13**.
33. Indeed, the Referendum Petition fails to substantially comply with the requirements of Arkansas Code Annotated § 7-9-105(a), as amended by Act 1413 of 2013, because the proposed ballot title does not contain the full text of the referred measure.
34. By failing to include the entire title and text of Ordinance No. 5703 in the ballot title, the Referendum Petition language is deficient and confusing. Indeed, the ballot title contained in the Petition does not even acknowledge

that Chapter 119 addresses civil rights administration.

35. Because the Referendum Petition fails to comply with the requirements of Arkansas Code Annotated § 7-9-105(a), as amended by Act 1413 of 2013, and contains a ballot title that is deficient and confusing, Plaintiff respectfully requests that the Court issue a Writ of Mandamus, striking the Petitions in their entirety and declaring that Defendant Smith's certification is void and without effect.
36. In order to ensure that the ballot language submitted to the voters was clear and not misleading, and on the advice of the City Attorney that the Petition's ballot title did not comply with Ark. Code Ann. § 7-9-105, § 7-9-107(c) or § 7-11-204, on October 7, 2014, the Fayetteville City Council approved a ballot title different than the title contained on the Petition. See **Exhibits 7, 13, and 14.**
37. The ballot title approved by the Fayetteville City Council on October 7, 2014, contained the following language:

**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.

FOR REFERRED ORDINANCE NO. 5703

AGAINST REFERRED ORDINANCE NO. 5703

See **Exhibit 14.**

38. The Fayetteville City Council submitted the above ballot title to the Washington County Election Commission for consideration at its October 9, 2014 meeting.
39. On October 9, 2014, the Washington County Election Commission approved the following language to be placed on the ballot at a special election to be held December 9, 2014:

REPEAL, IN ITS ENTIRETY, ORDINANCE NO. 5703 WHICH ENACTED  
CHAPTER 119 OF THE FAYETTEVILLE, ARKANSAS CITY CODE.  
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

FOR REPEAL OF ORDINANCE 5703

AGAINST REPEAL OF ORDINANCE 5703

See **Exhibit 15.**

40. The language approved by the Election Commission is not the same language submitted by the Fayetteville City Council. Instead, it follows closely the Petition language in that it is a ballot for repeal of the Ordinance. Unlike the Petition's ballot title, however, the Election Commission's approved ballot title does contain the Ordinance's title, as required by law.
  41. The ballot title approved by the Election Commission to vote for repeal or against repeal of Ordinance No. 5703 is confusing and misleading.
  42. Further, the Election Commission's approved language is contrary to the requirements of Ark. Code Ann. and § 7-11-204 and § 7-9-107(c) in that it a "For" vote is not a vote for the referred Ordinance.
  43. In the event that the Court does not strike the Petitions due to their noncompliant and misleading ballot title, Plaintiff alternatively requests that the Court issue a writ of prohibition, striking the ballot language approved by the Election Commission because it fails to comply with the requirements of Arkansas Code Ann. § 7-9-107(c) and § 7-11-204, and is otherwise confusing to voters. Plaintiff requests that the Court direct the Election Commission to, instead, submit a ballot that requests a vote for or against Ordinance No. 5703, such as the ballot title approved and submitted by the Fayetteville City Council.
- II. THE CANVASSER AFFIDAVIT IS NOT COMPLIANT WITH ARKANSAS CODE ANN §§ 7-9-108 and -109, AS AMENDED BY ACT 1413 of 2013.**
44. Each of the Petitions certified by Defendant Smith contained the following Canvasser Affidavit:

I [Name of Canvasser], being first duly sworn, state that the foregoing person(s) signed this sheet, in my presence, and each of them, to the best of my knowledge and belief, has stated his or her name, date of birth, residence, town of residence, and date of signing correctly, and that each signer is a registered voter of the City of Fayetteville. At all times during the circulation of this signature sheet an exact copy of Ordinance 5703, including its exhibit, was attached.  
Signature of Canvasser \_\_\_\_\_ Indicate one:  Paid Canvasser  
Residence of Canvasser: \_\_\_\_\_  Volunteer/ Unpaid Canvasser  
Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2014.  
\_\_\_\_\_  
Notary

See **Exhibit 5.**

45. Act 1413 of 2013 amended Arkansas Code Annotated § 7-9-108(b) to provide,

(b) Each part of a petition shall have attached thereto the affidavit of the canvasser to the effect that the canvasser's current residence address appearing on the verification is correct, that all signatures appearing on the petition part were made in the presence of the affiant, and that to the best of the affiant's knowledge and belief each signature is genuine and each person signing is a registered voter.

(Emphasis added)

46. Similarly, Act 1413 of 2013 amended Arkansas Code Annotated § 7-9-109(a) provide for the following form for the canvasser's affidavit,

I [print name of canvasser], being duly sworn, state that each of the foregoing persons signed his or her own name to this sheet of the petition in my presence. To the best of my knowledge and belief, each signature is genuine and each signer is a registered voter of the State of Arkansas, \_\_\_\_ County, or City or Incorporated Town of \_\_\_\_\_. At all times during the circulation of this signature sheet, an exact copy of the popular name, ballot title, and text was attached to the signature sheet. My current residence address is correctly stated below.

Signature \_\_\_\_\_ Indicate one:  Paid Canvasser

Residence: \_\_\_\_\_ Volunteer/ Unpaid  
Canvasser

Subscribed and sworn to before me this \_\_\_ day of \_\_\_\_, 20\_\_.  
\_\_\_\_\_ Notary

47. Act 1413 of 2013 went into effect April 22, 2013.
48. Nevertheless, the Petitions submitted to Defendant Smith for certification do not meet the requirement that the canvasser verify that his residence address is correct.
49. In *Mays v. Cole*, 374 Ark. 532, 289 S.W.3d 1 (2008), the Arkansas Supreme Court declared that the statutory requirement of attestation in Ark. Code Ann. § 7-9-109 “be strictly followed so that our citizenry can have faith and confidence in the election process and the General Assembly has so mandated.” *Id.*
50. Because none of the canvasser affidavits on the Petitions meet the current statutory requirements, Plaintiff respectfully requests that the Petitions be stricken in their entirety and that Defendant Smith’s certification be declared void and without effect.

**III. THE PETITIONS FAIL TO ATTACH A FULL AND CORRECT COPY OF ORDINANCE NO. 5703, AS REQUIRED BY ARKANSAS CODE ANNOTATED § 7-9-106.**

51. On August 20, 2014, the City Council of the City of Fayetteville, Arkansas, passed Ordinance No. 5703, which reads,

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.

See **Exhibit 1.**

52. Ordinance No. 5703 was subsequently revised on September 5, 2014, to remove the term "physical characteristic" from § 119.04(l) with regard to prohibited representations made in real estate transactions.
53. On September 8, 2014, Ordinance No. 5703 was revised again to change ordinance language in § 119.06(B) to state that "All contractors doing business with the City of Fayetteville shall **comply with** this ordinance." As passed on August 20, 2014, the ordinance stated that, "All contractors doing business with the City of Fayetteville shall **abide by** this ordinance."
54. Arkansas Code Annotated § 7-9-106(b) requires that, "To every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered." (emphasis added)



55. The requirement that a “full and correct copy” of the ordinance be attached is jurisdictional. The full text of the measure must be included in its entirety “in order for the signer to have the opportunity to read it and to inform himself prior to signing the measure.” *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850, 853 (1998).
56. All of the Petitions certified by Defendant Smith contained a copy of Ordinance No. 5703 in the form in which it was passed on August 20, 2014. However, the Ordinance attached to the Petitions has been superseded by revisions made on September 5 and September 8, 2014.
57. None of the Petitions contained the revisions made on September 5, 2014, removing “physical characteristic” from the list of protected traits, or on September 8, 2014, modifying contractor requirements. Further, none of the Petitions acknowledged that these revisions had been made to the Ordinance.
58. Because none of the Petitions attached the most recent version of the ordinance, the Petitions fail to comply with the statutory requirement that a “full and correct copy of the measure on which the referendum is ordered” be attached to the Petition. For this reason, Plaintiff respectfully requests that the Petitions be stricken in their entirety and that Defendant Smith’s certification be declared void and without effect.

**IV. THE PETITIONS FAIL TO ATTACH A LEGIBLE COPY OF ORDINANCE NO. 5703, DEFEATING THE PURPOSE AND INTENT OF ARKANSAS CODE ANNOTATED § 7-9-106.**

59. Arkansas Code Annotated § 7-9-106(b) requires that, "To every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered." (emphasis added)
60. The requirement that a "full and correct copy" of the ordinance be attached is jurisdictional. The full text of the measure must be included in its entirety "in order for the signer to have the opportunity to read it and to inform himself prior to signing the measure." *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850, 853 (1998).
61. All of the Petitions certified by Defendant Smith contained a copy of Ordinance No. 5703 in the form in which it was passed on August 20, 2014. However, the copy attached to the Petition was reduced so that two pages of the Ordinance were printed on each page. The resulting copy of Ordinance No. 5703 attached to the Petition contains such small type that it is virtually illegible to all but those with nearly perfect vision.
62. The proponents of the Petition were warned by the Fayetteville City Attorney that attaching a copy of the ordinance in type too small to be read by most signers would subject the Petition to legal attack. See **Exhibit 12**.
63. Nevertheless, the Petition submitted to Defendant Smith for determination of sufficiency and certification contains a copy of Ordinance 5703 in such small type as it appears to be smaller than 6 pt Arial font.
64. Attaching a copy of the 4 page Ordinance reduced to such small print that it cannot be read an ordinary voter defeats the purpose of Arkansas Code Annotated § 7-9-106(b), rendering it a nullity.

65. Under such circumstances, the Petitions effectively fail to comply with the statutory requirement that a “full and correct copy of the measure on which the referendum is ordered” be attached to the Petition. For this reason, Plaintiff respectfully requests that the Petitions be stricken in their entirety and that Defendant Smith’s certification be declared void and without effect.

**V. THE PETITIONS WERE NOT SUBMITTED TIMELY PURSUANT TO FAYETTEVILLE CITY CODE 36.15.**

66. Fayetteville City Code 36.15 requires that all referendum petitions “must be filed with the City Clerk within 31 days after the passage of the ordinance to which it relates.” See **Exhibit 4**.

67. Counting the day that Ordinance passed, August 20, 2014, as the first day, 31 days after passage of the Ordinance was September 19, 2014.

68. On September 20, 2014, 802 Referendum Petitions on Ordinance No. 5703 were submitted to Defendant Smith for review and certification.

69. The Petitions submitted on September 20, 2014 were not submitted timely pursuant to Fayetteville City Code 36.15 because they were not submitted “within 31 days after the passage of the ordinance to which it relates.”

70. Because the Petitions were not submitted “within 31 days” after August 20, 2014, Plaintiff respectfully requests that the Petitions be stricken in their entirety and that Defendant Smith’s certification be declared void and without effect.

**VI. THE SPECIAL ELECTION DATE NOTED ON THE REFERENDUM PETITIONS IS MISLEADING.**

71. Arkansas Code Annotated § 7-9-111 provides that a special election on a municipal referendum petition must be held not more than 120 calendar days after the date of certification of sufficiency.
72. Arkansas Code Annotated §14-14-915 (b)(3) provides that all referendum petitions must be certified not less than 70 days prior to a regular general election to be included on the ballot. If the adequacy of the petition is determined less than 70 days before the next regular election, then a special election may be called on the referendum measure.
73. Arkansas Code Annotated § 14-14-917(a)(2) provides that “[n]o referendum election shall be held less than 60 days after the certification of adequacy of the petition by the county clerk.
74. Arkansas Code Annotated § 7-11-205 requires that special elections be held on the second Tuesday of the month.
75. The Referendum Petition was certified on September 26, 2014. 120 days from the date of certification is January 24, 2015.
76. The September 26, 2014 certification was less than 70 days before the next regular, general election scheduled for November 4, 2014.
77. Because the certification would necessarily occur less than 70 days before the November general election, and a referendum election could not be held for at least 60 days after certification, the Referendum Petition specified that the matter would be referred “at a special election to be held on December 9, 2014, or as otherwise determined by the Fayetteville City Council.” See **Exhibit 5.**

78. In order to hold a special election on this referred measure on December 9, 2014, as specified in the Referendum Petition, the Washington County Election Commission must have the ballot information by October 10, 2014. See September 30, 2014 City Council Agenda memorandum attached hereto as **Exhibit 16**.
79. The only other date that would meet the requirements of both Arkansas Code Annotated § 7-9-111 and § 7-11-205 is January 13, 2015.
80. At the time that the Referendum Petitions were being circulated for signature and submission for certification, January 13, 2015 was a readily ascertainable possible date for the proposed special election
81. Nevertheless, Plaintiff submits that postponing the special election until 2015 was not contemplated by the language included in the Referendum Petition.
82. Plaintiff submits that the petition language, "or as otherwise determined by the Fayetteville City Council" is unreasonably vague and misleading in light of the fact that the only date a special election could be held other than December 9, 2014, is January 13, 2014.
83. The Referendum Petition sponsor's failure to include the only other possible date of the special election on the face of the Referendum Petition, when it was readily ascertainable, rendered the Petition's language misleading and unenforceable.
84. Because the Petitions are misleading and vague as to the date of the special election, Plaintiff respectfully requests that the Petitions be stricken

in their entirety and that Defendant Smith's certification be declared void and without effect.

**VII. THE CERTIFICATION PROCESS WAS SO IRREGULAR THAT THE PETITIONS ARE PRESUMPTIVELY INVALID.**

85. On September 26, 2014, Defendant Smith certified to Defendant Jordan and the Defendant Aldermen, that the Referendum Petition is sufficient pursuant to the requirements of Amendment 7 and Arkansas law. See **Exhibit 6**; see also, **Exhibit 15**. According to Defendant Smith, petitions containing 5714 signatures were submitted and 4095 signatures were required. Based on Defendant Smith's review of the signatures, the petitions "yielded slightly more than the 4,095 signatures required to call a special referendum election."
86. However, the list of verified signatures contained several irregularities, including multiple voters whose residential addresses may be in cities and towns outside of Fayetteville, Arkansas, signatures that were not accompanied by complete date of birth, address or city of residence of the voter, signatures with the dates of signing occurring after the date of notarization, and signatures with the dates of signing occurring before September 8, 2014, the date of the last revision to the Ordinance. See **Exhibit 9**.
87. On October 1, 2014, Defendant Smith made alterations to the list of verified signatures, adding some names and removing other names verified in error.

Specifically, Defendant Smith acknowledged that “[w]e verified the incorrect Kyle Cook.” See **Exhibit 9**.

88. Upon information and belief, in addition to the above deficiencies, the petition process was also flawed and failed to adhere to the requirements set forth by statute in that:
  - a. The canvassers failed to adequately inform the persons signing the petition as to the substance and effect of the Petition, in violation of Arkansas Code Annotated § 7-9-111 and Arkansas Code Annotated § 14-14-915;
  - b. The canvassers failed to adhere a complete and accurate copy of the ordinance to the Petitions during the signing process as required by Arkansas Code Annotated § 7-9-106;
  - c. Canvassers allowed persons to sign the name of others on the Petitions in violation of Arkansas Code Annotated § 7-9-108(b) and Arkansas Code Annotated § 14-14-915;
  - d. Canvassers failed to fully collect the required information for the persons signing the Petitions, in violation of Arkansas Code Annotated § 7-9-105.
89. Arkansas Code Annotated § 14-14-915 (d) provides that, in the event a petition is determined to be sufficient, the clerk must certify her finding to the county board of commissioners and to the quorum court.
90. Defendant Smith’s jurisdiction over the petitions ceased upon her September 26, 2014, certification of sufficiency.

91. Defendant Smith lacked jurisdiction to make the alterations to the list that she made on October 1, 2014.
92. By Defendant Smith's own admission, the signature list, as certified on September 26, 2014, contained errors and omissions.
93. Included among the errors were signatures of voters whose residence may be located in cities or towns other than Fayetteville.
94. Also included among the verified signatures in error were signatures that were dated after the date of notarization, which is evidence of fraud. See **Exhibit 17**.
95. Defendant Smith also verified in error signatures that did not contain sufficient information to identify the correct voter, as evidenced by Defendant Smith's admission that she certified the wrong Kyle Cook. See **Exhibit 18**.
96. Defendant Smith verified in error signatures that were dated before September 8, 2014, the date of the last revision to Ordinance 5703, evidence of fraud. See **Exhibit 19**.
97. Arkansas Code Annotated § 14-14-915(d) provides that if a petition contains evidence of forgery or that a person has signed a name other than his or her own to the petition, "the burden of proof shall be upon the sponsors of petitions to establish the genuineness of each signature."
98. In light of the above irregularities and evidence of fraud contained on the certified Petitions, Defendant Smith certified the Petitions in error without



first shifting the burden of proof to the sponsors of the petitions to establish the genuineness of each signature.

99. In light of the above errors, Plaintiff respectfully requests that the Petitions be stricken in their entirety and that Defendant Smith's certification be declared void and without effect.

WHEREFORE, Plaintiff prays that the Court issue a declaratory judgment that the Referendum Petitions do not meet the statutory requirements and are unenforceable as submitted; that the September 26, 2014 certification of the Referendum Petition be stricken and declared void; that this Court issue a writ of mandamus to Defendants ordering them to strike and/or remove the referred matter from the ballot of any special election, and that if the matter is included on the ballot, that no tabulation of votes regarding the referendum occur; that a hearing on this matter be set within five days from the date this Petition is filed as required by Arkansas Code Annotated § 14-14-916(a). In the event that the Petitions are not stricken, Plaintiff requests, in the alternative, that the Court issue a writ of prohibition precluding the use of the ballot title approved by the Washington County Election Commission because it is confusing and not in compliance with applicable law, and instead directing that the ballot title include a vote for or against the Ordinance, such as the ballot title approved by the Fayetteville City Council, and for all other legal and proper relief to which the Plaintiff is entitled.

Respectfully submitted,

Kristin Higgins, Plaintiff

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