IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, on her own behalf, and by, for and on behalf of her granddaughter W.H.; Stephanie Huffman and Wendy Rickman; Frank Pennisi and Matt Harrison; Meredith Scroggin and Benny Scroggin, on their own behalves, and by, for and on behalf of their two children, N.S. and L.S.; Cary Kelley and Trina Kelley, on their own behalves, and by, for and on behalf of V.K. and T.K.; Susan Duell-Mitchell and Chris Mitchell, on their own behalves, and by, for and on behalf of their two children, N.J.M. and N.C.M.; Teresa May, on her own behalf, and by, for and on behalf of her two children, C.A.A. and C.L.A.; Curtis Chatham and Shane Frazier; Wendy Wilson and Matthew Dylan Foster, on their own behalves, and by, for and on behalf of their three children, E.M.F., A.P.F., and O.M.F.; and Kaytee Wright,

PLAINTIFFS,

VS.

NO. CV 2008-14284

The State of Arkansas; the Attorney General for the State of Arkansas, Dustin McDaniel, in his official capacity, and his successors in office; the Arkansas Department of Human Services and John M. Selig, Director, in his official capacity, and his successors in office; and the Child Welfare Agency Review Board and James W. Balcom, Chairman, in his official capacity, and his successors in office,

DEFENDANTS.

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

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PRELIMINARY STATEMENT

Come now Plaintiffs and oppose the Motion to Intervene of the Family Council Action Committee ("FCAC") and Jerry Cox, the president of FCAC, as entirely without merit.

FCAC and Cox are seeking to insert themselves as parties into the instant case, which broadly challenges the constitutionality of the Arkansas Adoption and Foster Care Act ("Act 1"). Movants first assert that this Court is required to allow their intervention as defendants because the Office of the Attorney General of the State of Arkansas cannot adequately defend Act 1. This assertion—which must be proven to allow intervention "as of right"—is simply false. As the Attorney General has made clear in his response to the motion to intervene, and as evidenced by his actions to date in this litigation, there is no reason to believe that the Attorney General will not fulfill his legal and ethical duty to fully and vigorously defend the constitutionality of Act 1.

FCAC and Cox also maintain that their efforts in advocating for passage of Act 1 mandate that this Court join them as necessary parties to this litigation pursuant to Arkansas Rule of Civil Procedure 19. There is no basis in law for this argument. Movants' support for and sponsorship of Act 1 as a *ballot initiative* is not an interest that entitles FCAC and Cox to intervene or be joined as necessary parties in the instant case now that Act 1 has become a *law*, any more than dozens of interest groups that may participate in ballot initiatives have a right to intervene in subsequent litigation. Moreover, to the extent that Movants assert that they have "private" interests in defending Act 1 that go beyond the interests of the State, those interests are irrelevant given that neither FCAC nor Cox has any legally recognized or mandated function in the placement of children or in the enforcement of state laws.

FCAC and Cox alternatively request this Court exercise its discretion to allow them to intervene in this case because their political and ideological support for Act 1 has a question of law in common with the instant litigation. But the mere fact that FCAC and Cox campaigned for the passage of the Act 1 ballot initiative does not amount to a question of law related to this litigation. Permissive intervention should be denied because Movants' intervention will not assist the Court and will prejudice Plaintiffs, who are children and families harmed by Act 1, by unnecessarily delaying and needlessly increasing the cost of this litigation. Movants' views concerning Act 1, as well as the views of many other organizations and persons that campaigned for or against Act 1, are properly considered, at most, through their participation as *amicus curiae* and/or fact witnesses, not as parties to this suit.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this case are children, families, and couples who are harmed by Act 1. Defendants in this case include the state of Arkansas, the Department of Human Services, the Child Welfare Agency Review Board, and other government officials charged with the responsibility of enforcing Act 1. Act 1 on its face requires Defendants to categorically exclude all persons in unmarried cohabitating relationships, including gay persons who are not permitted to marry in Arkansas, from providing foster or adoptive homes to children in state care or even to their own relatives notwithstanding the wishes of the children's parents. The effects of Act 1 on the Plaintiffs in this case are real and concrete. For plaintiff-children, Act 1 bars Defendants from acting in plaintiff-children's best interests and approving or recommending them for foster care or adoption with a family, solely because of the cohabiting status of the potential parents. For the adult-plaintiffs, Act 1 categorically bars some from serving as foster or adoptive parents without any individualized assessment of whether they are qualified. For the other adult-plaintiffs, Act 1 requires Defendants to disregard those adult-plaintiffs' parental judgment that, in

the event of their death or incapacity it would be in the best interests of their child to be adopted by a close relative or godparent, solely because that person is living with an unmarried partner.

Movants and proposed Intervenors are the Family Council Action Committee and the President of the Committee. According to its website, the FCAC is "dedicated to promoting, protecting, and strengthening traditional family values through the political process." Family Council of Arkansas – Action Committee, http://www.familycouncil.org/fcac.asp (last visited Feb. 4, 2009). In addition to its interest in the state's amendment excluding gay couples from marriage, the FCAC's other listed interests include the "confirmation of conservative judicial nominees" and "dealing with issues such as the expansion of gambling." *Id.* FCAC is a political-action committee whose purpose is to advance interests in a diverse range of subjects, including marriage, abortion, human cloning, stem cell research, taxes, home schooling, and other issues. *See* Family Council of Arkansas – About Us, http://www.familycouncil.org/index.asp?PageID=2 (last visited Feb. 4, 2009). Neither FCAC nor its President has claimed, nor could they, any statutory or constitutionally mandated or recognized role in the placement of children or in enforcing state laws, including Act 1. There is no relief Plaintiffs could obtain in a judgment against FCAC and Cox if they are allowed to intervene as Defendants.

Just as Movants did, numerous other organizations and individuals expended time, resources and their reputation in the heated campaign on Act 1. These organizations include, *inter alia*, Arkansas Families First, a coalition specifically formed to campaign against Act 1, the Arkansas Advocates for Children and Families, the Arkansas Psychological Association, the Interfaith Alliance, the Arkansas Chapter of the National Association of Social Workers, the Arkansas Chapter of the American Academy of Pediatrics, the Foster Care Alumni Association, the Arkansas Public Policy Panel, Just Communities of Central Arkansas and Voices for

America's Children. *See* Arkansas Families First Coalition, http://arkansasfamiliesfirst.org/outreach/coalition/ (last visited Feb. 4, 2009); Press Release, Voices for Am.'s Children & Ark. Advocates for Children & Families, Advocates Urge Voters to Reject Initiated Act 1 (Oct. 22, 2008), http://www.arktimes.com/blogs/arkansasblog/voices.pdf. Similarly, numerous faith leaders and other prominent public figures, including six retired justices of the State Supreme Court, spoke out against Act 1 and worked towards its defeat. *See* Press Release, Arkansas Faith Leaders Opposing Act 1, http://www.hrc.org/documents/Faith_Leaders_News_Release.pdf; *Retired Judges Oppose Adoption, Foster Parenting Ban*, The Morning News, Oct. 6, 2008.

Act 1 was passed on November 4, 2008 and became law as of January 1, 2009. Plaintiffs filed suit on December 30, 2008. On January 16, 2009, the Attorney General, on behalf of all Defendants, moved to dismiss the entirety of Plaintiffs' complaint primarily on the basis that Act 1 does not violate the federal or Arkansas constitutions. Mot. to Dismiss at 7. FCAC and Cox have moved to intervene as defendants, contending that the Attorney General will violate his duties, which are grounded in the state constitution and statutes, to vigorously defend Act 1 and that FCAC's and Cox's efforts in campaigning for the passage of Act 1 mandate their involvement as necessary parties to this suit. On January 22, 2009, the Attorney General opposed the Motion to Intervene to the extent that it was based on the adequacy of his defense of Act 1, and affirmed that he would "present every valid legal argument in support of the constitutionality of Initiated Act 1." Att'y General's Resp. to Mot. to Intervene ¶ 3.

ARGUMENT

I. FCAC AND COX CANNOT INTERVENE "AS OF RIGHT" PURSUANT TO RULE 24(A).

To intervene as a matter of right pursuant to Arkansas Rule of Civil Procedure 24(a)(2),[1] a proposed intervening defendant must show: (1) a recognized interest in the subject matter of the primary litigation that might be impaired by the disposition of the suit and (2) that such interest is not adequately represented by existing parties. Ark. R. Civ. P. 24(a)(2). FCAC and Cox satisfy neither of these legal requirements.

A. The Attorney General Adequately Represents Any Interests FCAC and Cox Could Have in This Litigation.

Pursuant to Arkansas state law, the Office of the Attorney General is required to defend the interests of the State and its representatives,[2] which in this case mandates defending Act 1 against any constitutional or legal challenge. *See* Att'y General's Resp. to Mot. to

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[1] Arkansas Rule of Civil Procedure 24(a)(2) provides:

> Upon Timely application anyone shall be permitted to intervene in an action: . . . (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 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.

Ark. R. Civ. P. 24(a). Because Arkansas Rule of Civil Procedure 24 mirrors that of Federal Rule of Civil Procedure 24, it is appropriate to look to the application of Federal Rule of Civil Procedure 24 when applying Arkansas Rule of Civil Procedure 24. *See, e.g.*, *Matson* v. *Lamb Assoc.*, 328 Ark. 705, 710, 947 S.W.2d 324, 326 (1997) (citing federal law regarding intervention and noting that Federal Rules of Civil Procedure 24(a) and (b) are identical to Arkansas Rules of Civil Procedure 24(a) and (b)).

[2] *See* Ark. Const. art. 6, § 1 (establishing the position of Attorney General); Ark. Code § 25-16-702 (establishing the Attorney General as the attorney for "all state officials, departments, institutions, and agencies"); Ark. Code § 25-16-703 (mandating the Attorney General defend the interests of the state in all federal courts and "be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved"); Ark. Code § 25-16-704 (requiring the Attorney General to "maintain and defend the interests of the state in all matters" before the Arkansas Supreme Court).

Intervene ¶ 4. Movants' opinion that the Attorney General will disregard his statutory and ethical duties to defend Act 1 because of his personal beliefs is offered without any basis whatsoever, and hardly constitutes the showing required by Rule 24(a). *See* Mem. of Law in Supp. of Mot. to Intervene at 9. The Attorney General has affirmed that his office will "adequately and diligently represent the Defendants as well as the constitutionality of Initiated Act 1." Att'y General's Resp. to Mot. to Intervene ¶ 3. The Attorney General's filing of an exhaustive Motion to Dismiss already demonstrates this to be the case. *Cf. Sanguine, Ltd.* v. *U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (finding inadequate representation when the government "in effect conceded the case" and "stipulated to all of the facts and to the legal conclusions stated in [plaintiff's] motion for an injunction").

Because of the unique constitutional and statutory relationship between the executive and legislative branches, courts have repeatedly held there is an explicit presumption the government will adequately defend its actions and laws against challenge. *See, e.g.*, *Standard Heating & Air Conditioning Co.* v. *City of Minn.*, 137 F.3d 567, 572 (8th Cir. 1998) (there is "a presumption that the government adequately represents the interests of its citizens"). That presumption is particularly appropriate here in light of the weight that Arkansas law places on the Attorney General's role in defending state laws. In fact, when a party challenges the constitutionality of a statute pursuant to the Arkansas Declaratory Relief Act, as plaintiffs have in this case, the Attorney General must be given the opportunity to speak or it is presumed that the constitutionality of the statute or ordinance at issue has not been adequately defended. *See* Ark. Code § 16-111-106(b) (requiring that the Attorney General be served and given an opportunity to be heard in any declaratory judgment action alleging the unconstitutionality of a "statute, ordinance, or franchise"); *Ark. Dep't of Human Servs.* v. *Heath*, 307 Ark. 147, 149, 817

S.W.2d 885, 886 (1991) (reversing order declaring statute unconstitutional because Attorney General had not been given notice of and an opportunity to be heard on the issue and as such the "constitutional arguments were not fully developed").

Indeed, even Movants concede that the existing defendants must defend the validity of Act 1. Mem. of Law in Supp. of Mot. to Intervene at 9 (the Attorney General is "required to make some effort to defend the state's interests in having its laws held constitutional"). Accordingly, because Movants share the same ultimate objective as the defendants, any interests they could have are fully represented. *Coal. of Ariz./N.M. Counties for Stable Econ. Growth* v. *Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (holding that "representation is adequate 'when the objective of the applicant for intervention is identical to that of one of the parties.'") (citation omitted); *cf. Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538-39 (1972) (intervention allowed when government defendant had *distinct and potentially conflicting statutory* duties that could lead to litigation objectives different than that of proposed intervenor) (emphasis added).

Movants attempt to sidestep this dispositive fact by suggesting that the Attorney General will not adequately defend their alleged interests because he does not have the same personal beliefs about the wisdom of Act 1 that they do.[3] Mem. of Law in Supp. of Mot. to Intervene at 9. Movants' presumption about the Attorney General's motives, interests or personal beliefs is irrelevant, and does not in any way constitute the showing Movants require to comply with Rule 24(a). As previously stated, because Defendants and Movants share the same

[3] The fact that the Attorney General questioned the desirability of Act 1 prior to its becoming law has no bearing on his interest in or ability to defend the constitutionality of Act 1 now that it has become law, i.e., to meet "the legal obligation of his office to defend the laws and agencies of the State of Arkansas, within the parameters of the Rules of Professional Conduct." Att'y General's Resp. to Mot. to Intervene ¶ 4.

ultimate objective, Movants' supposed interests are fully represented regardless of Defendants' underlying beliefs. *Coal. of Ariz./N.M. Counties for Stable Econ. Growth*, 100 F.3d at 845. If the Attorney General's personal beliefs were relevant in any challenge to any state law—as Movants contend—then any such action would be subject to delving into irrelevant matters of personal beliefs and litigation over intervention by unlimited "interested parties."

Likewise, Movants' disagreements about the Defendants' litigation strategy is irrelevant to the issue of whether the Attorney General will adequately defend Act 1. Mem. of Law in Supp. of Mot. to Intervene at 9-10. Movants point to certain legal strategies that they would have or will employ that are different than those taken thus far by the Defendants in this case. Movants' Reply to Resp. to Mot. to Intervene at 3. However, litigating an interest *differently* does not equate to litigating it *inadequately*. *See, e.g.*, *Saldano* v. *Roach*, 363 F.3d 545, 555 (5th Cir. 2004) (choosing to vindicate an interest in a different way does not make a party's representation inadequate); *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (differences of opinion concerning litigation tactics do not render representation inadequate); *Sanguine,* 736 F.2d at 1419 ("Of course, representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case."). Otherwise, any interest group or person who wanted to "execute a different legal strategy" than the Attorney General could intervene in a case challenging the validity of a state statute.

In short, both the Attorney General and the Defendants whom he represents have the exact same objective as the Movants—defending the validity of Act 1. Movants therefore cannot satisfy the requirements of Rule 24(a) because there is no support for their claim, based solely on speculation, that the Office of the Attorney General will not adequately defend Act 1 against constitutional challenge. *See DeJulius* v. *Sumner*, 373 Ark. 156 (2008) (holding that an

intervenor's "unsupported allegations that the parties fail[] to protect his interest is insufficient" to satisfy the inadequate representation prong of Rule 24).

B. FCAC and Cox Do Not Have the Requisite Interest in this Litigation for Intervention "As of Right" to Be Warranted.

FCAC's status as the official sponsor of the pre-election Act 1 ballot initiative does not translate into a requirement that the Court grant their motion for intervention. The cases cited by Movants at best support the unremarkable proposition that sponsors of a ballot measure *may* intervene in *pre-election* challenges to ballot initiatives to advance arguments about why the ballot measure should be submitted to the voters. *See Walker* v. *Priest*, 342 Ark. 410, 426, 29 S.W.3d 657, 664 (2000) (finding proposed ballot title sufficiently clear, fair, and intelligible to remain on general election ballot); *Dust* v. *Riviere*, 277 Ark. 1, 2, 638 S.W.2d 663, 664 (1982) (enjoining Secretary of State from placing proposed constitutional amendment on general election ballot); *but see Comm. to Establish Sherwood Fire Dep't* v. *Hillman*, 353 Ark. 501, 512, 109 S.W.3d 641, 647 (2003) (holding sponsor lacked standing to intervene because it was not a local voter and did not purport to represent local voters).[4]

Intervention is permitted in these cases because, during the pre-election period, the official sponsor has statutorily articulated duties and rights associated with the procedural

[4] Moreover, *Walker* and *Dust* do not hold that intervention was required, and involve no discussion of whether intervention was contested by any party. *See Walker*, 342 Ark. at 415 (noting that the ballot measure's sponsors "intervened in this proceeding"); *Dust*, 277 Ark. at 2 (noting simply that several organizations and voters were "allowed to intervene").

role of guiding a petition for initiative through the state law requirements.[5] Accordingly, any legal interest in an initiative that an official sponsor of the initiative may have ceases once the election has taken place.[6] Now that Act 1 has passed, however, the pre-election bases for intervention on which Movants rely are not applicable. Movants are no differently situated than any other Arkansas voter or organization that campaigned or voted for—or against—Act 1. In fact, if Movants are permitted to intervene on the ground that they advocated for the law before the election, any interest group that supported or opposed any legislation prior to its enactment would be granted party status in this or any other lawsuit challenging the validity of a state law once enacted.[7]

Accordingly, Arkansas does not mandate intervention "as of right" to political groups who wish to appoint themselves as defendants of enacted legislation. It is therefore

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[5] A petition's official sponsor is the "person or group" who files the original initiative petition with the Secretary of State. Ark. Code § 7-9-101(8). During the pre-election petition process authorized under state law, the sponsor's duties and rights include, *inter alia*, getting the initiative approved and certified by the Attorney General and the ability to appeal such decision. *See* Ark. Code § 7-9-107(a) (requiring initiative sponsor to submit a draft of the petition to the Attorney General for approval and certification); Ark. Code § 7-9-107(d) (providing sponsors with right to appeal to the Arkansas Supreme Court in the event the Attorney General fails to certify the petition).

[6] This distinction also explains why rejecting Movants' motion would not, as FCAC and Cox claim, vitiate "the constitutional right of the people to affect legislative change through the initiative process." Mem. of Law in Supp. of Mot. to Intervene at 5; *see also* Movants' Ans. in Intervention, Affirmative Defense Thirteen (alleging that the lawsuit abrogates the right of the people to enact social policy by initiative). The current action has nothing to do with the "initiative process" at all, or the right of the people of Arkansas to enact laws, but is a challenge to an already initiated *statute* ably defended by the state's Attorney General. As discussed below, Movants' indication that they wish to inject this issue into the existing dispute between the parties shows that their intervention would unnecessarily delay resolution of Plaintiffs' claims.

[7] For example, other groups and persons entitled to intervene "as of right" in this case were FCAC and Cox to prevail on this argument would include similarly situated non-profit organizations, faith leaders and other prominent public figures that actively opposed Act 1, *see* Factual and Procedural Background *supra*, and the more than one million Arkansas voters who, like Cox, voted on Act 1 in the November 2008 election.

unsurprising that Movants cite no instance where an Arkansas court has permitted the intervention of a sponsor in a case challenging the validity of an act *after* the proposed initiative had been submitted to voters in an election. Courts outside of Arkansas have likewise rejected precisely such claims. *See Providence Baptist Church* v. *Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (holding that "[a]ny substantial legal interest" held by a referendum sponsor "was terminated when the referendum was held and the results certified").

II. FCAC AND COX ARE NOT NECESSARY PARTIES UNDER RULE 19(A).

FCAC and Cox also incorrectly assert they are "necessary parties" under Arkansas Rule of Civil Procedure 19(a) insofar as they possess "an interest relating to the subject matter of the action."[8] Ark. R. Civ. P. 19(a). Movants cite no case in which sponsors were declared "necessary parties" in challenges to statutes *passed* through the initiative process. Rather, they again refer to pre-election challenges similar to the ones distinguished above. *See* Mem. of Law in Supp. of Mot. to Intervene at 6.

Moreover, unlike the facts here, the other cases on which Movants rely held parties were necessary when such parties were the explicit subject matter of the ballot measures, appearing by name on the ballots themselves. *See State ex rel. Robinson* v. *Craighead Bd. of Election Comm'rs*, 300 Ark. 405, 413, 779 S.W.2d 169, 173 (1989) (making no ruling on appeal regarding candidates' eligibility to be included on ballot because the election date had passed

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[8] Arkansas Rule of Civil Procedure 19(a) provides in relevant part:

> 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.

Ark. R. Civ. P. 19(a).

rendering controversy moot and because candidates had not been made parties to the action seeking to remove their names from the ballot); *Scott* v. *McCuen*, 289 Ark. 41, 43, 709 S.W.2d 77, 78 (1986) (court joined state power company as necessary party to an action, begun before the initiative petition had been filed with the Secretary of State, involving a ballot initiative urging revocation of the company's franchise). These cases thus provide no support for Movants' illogical claim that they, entities who advocated for the passage of Act 1, but who are not the subject of Act 1, are necessary parties.

At most, Movants' contention that they are necessary parties is based on the premise that because they invested time, money and reputation into the success of Act 1, the litigation cannot proceed without them. Mem. of Law in Supp. of Mot. to Intervene at 7. For good reason, there is no basis in Arkansas law, or elsewhere, for this proposition. *See, e.g.*, *Arizonans for Official English* v. *Ariz.*, 520 U.S. 43, 65 (1997) (noting that the United States Supreme Court has never "identified initiative proponents as Article-III-qualified defenders of the measures they advocated"). If expenditures of time, money or self-claimed reputational investment in a statute made a group or individual a "necessary party," no lawsuit challenging any state law could go forward without the participation of every citizen of Arkansas who lobbied or campaigned—or even voted—for or against any ballot initiative or legislatively enacted statute. Movants' request for such a counterintuitive interpretation of this limited right is without merit. *See* Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, 7 § 1604 (2008) (designation as a necessary party under Rule 19 is far more limited than joinder pursuant to other rules of civil procedure).

III. FCAC AND COX SHOULD NOT BE GRANTED PERMISSIVE INTERVENTION PURSUANT TO RULE 24(B) BECAUSE THEY CAN PARTICIPATE AS *AMICUS CURIAE*

Permissive intervention may be granted at this Court's discretion "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." Ark. R. Civ. P. 24(b)(2). Permissive intervention should be denied because Movants have no legally identifiable question in common with the constitutional challenges to Act 1 at issue here, and because their intervention would unnecessarily delay the adjudication of Plaintiffs' claims.

FCAC and Cox have identified no legal "defense" in common with Plaintiffs' constitutional challenges to Act 1 and the Defendants' vigorous defense of Act 1. As previously explained, FCAC is a political action committee and neither it nor Cox has any legal role, nor could they, in the placement of children or in the enforcement of the laws of this state. Indeed, their only asserted "common defense" is a political desire in the outcome of this litigation—an interest that they share with every voter and organization in Arkansas that supported or opposed Act 1. Such a diffuse interest cannot satisfy the requirements for permissive intervention, and Movants cite no cases supporting this position.[9]

Movants also erroneously assert that if not permitted to intervene, they will be "left entirely without a voice." Mem. of Law in Supp. of Mot. to Intervene at 8. As numerous

[9] While Movants also argue that they will be able to provide information about the purpose and meaning of Act 1, that does not show a legal claim or defense of theirs in common with this action, but rather simply identifies the legal question *at issue* in the existing dispute between Plaintiffs and Defendants. To the extent any party believes this "information" relevant, Movants can be called as fact witnesses or, as discussed below, the Court may permit them to submit an *amicus* brief.

courts have recognized, however, where a proposed intervenor merely seeks to express its strongly held views of what the law should be, granting permission under appropriate circumstances to file a brief as *amicus curiae* is the proper vehicle to protect that interest. *See, e.g.*, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 159 n.27 (1967) (upholding lower court's decision that appellants would best present their views through *amicus* briefs rather than as full parties under permissive intervention); *McKinstry* v. *Genesee County Circuit Judges*, 669 F. Supp. 801, 803 (E.D. Mich. 1987) ("'a third party can contribute usually most effectively and always more expeditiously by a brief *amicus curiae* and not by intervention'") (citation omitted). If they were to make an appropriate showing at the appropriate time, Movants may have the ability to appear as *amicus curiae.*

Finally, Movants' intervention should be denied because it would unnecessarily delay the resolution of the constitutionality of Act 1, which is already being vigorously defended by the Attorney General,[10] and would increase the cost and burden on the Court and parties. Movants' arguments are either redundant of the arguments already being made by the Attorney General, *see, e.g.*, Mem. of Law in Supp. of Mot. to Intervene at 11 (arguing as Defendants do in the Motion to Dismiss that Act 1 does not violate Plaintiffs' constitutional rights), or are irrelevant to the actual dispute between the parties, *see, e.g.*, Movants' Ans. in Intervention,

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[10] While adequacy of representation is not expressly listed in the factors for consideration under permissive intervention, courts repeatedly have noted its relevance, particularly where the government is defending the action. *See Menominee Indian Tribe* v. *Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (denying permissive intervention in dispute being defended by the government, observing that "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears"); *see also United States Postal Serv.* v. *Brennan,* 579 F.2d 188, 191 (2d Cir. 1978) (noting that adequacy of representation is a relevant factor in permissive intervention analysis); *Tachna* v. *Insuranshares Corp. of Del.*, 25 F. Supp. 541, 542 (D. Mass. 1938) (denying intervention and stating that the permissive intervention inquiry is not limited to only whether intervention will delay or prejudice the adjudication of the parties' rights).

Affirmative Defense Thirteen (arguing that adjudicating the constitutionality of Act 1 *after its enactment* would somehow impair the voters' ability to enact laws through the initiative process). Movants' contention that their interpretation of what Act 1 means has a bearing on this litigation, when the agency charged with enforcement of the statute, and ultimately the courts—not the sponsors of a ballot measure—are responsible for construing its application, similarly shows an intent to distract from the core questions that Plaintiffs, families whose constitutional rights are very much at stake, seek to resolve quickly. Under these circumstances, permissive intervention should be denied.[11] *See Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943) ("Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.").

CONCLUSION

The Attorney General has affirmed that his office will obey statutory and ethical duties to robustly defend the constitutionality of Act 1, and there is no reason to doubt his representations. Like the Movants' claims that Governor Beebe and other Defendants "may have no real desire to defend Act 1," Movants' speculation about the motives of the Attorney General should be summarily dismissed. Reply to Resp. to Mot. to Intervene at 5. Similarly, Movants' desire to execute a "different litigation strategy" is irrelevant because Movants and the Defendants have the same litigation objective: to uphold Act 1.

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[11] Although Movants assert that their participation will not delay the adjudication of this case, such assertion is belied by their stated desire to "call certain witnesses, or depose certain individuals" and execute a different litigation strategy than that of the Defendants. Reply to Resp. to Mot. to Intervene at 3. There can be no reasonable doubt that FCAC's participation in the lawsuit as a party will cause unnecessary delay.

Moreover, although Movants assert that the "efficacy of their constitutional rights is at stake," in fact, they have no constitutional or statutory right or obligation that will be affected by the outcome of this lawsuit. Any unique interest that Movants had as sponsors of the bill expired when the law was passed, and now their alleged interests as a political action committee are no different than those of the multitude of other groups and persons who also expended time, money, and their reputation in the campaign on Act 1.

Act 1 has passed and the issue before the Court is whether the law fits within the four corners of the constitution. Movants' desire to protect the time, resources, and energy that they invested in the passage of Act 1 has nothing to do with the core constitutional issues at stake. Plaintiffs, who are children and families who will be tangibly harmed by the enforcement of Act 1, should not have adjudication of their rights delayed solely so Movants can insert their collateral and admittedly private interests into this case.

For the foregoing reasons, the Motion to Intervene of FCAC and Cox should be denied.

RESPECTFULLY SUBMITTED,

Dated: February 5, 2009

WILLIAMS & ANDERSON PLC, ON
BEHALF OF THE ARKANSAS CIVIL
LIBERTIES UNION FOUNDATION, INC.
Marie-Bernarde Miller (Ark. Bar #84107)
Daniel J. Beck (Ark. Bar #2007284)
111 Center Street
Suite 2200
Little Rock, Arkansas 72201
(501) 372-0800

SULLIVAN & CROMWELL LLP
Garrard R. Beeney
Stacey R. Friedman
Jennifer M. Sheinfeld
125 Broad Street
New York, New York 10004
(212) 558-4000

THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Christine P. Sun
P.O. Box 120160
Nashville, Tennessee 37212
(615) 329-9934
- and -
Leslie Cooper
Rose Saxe
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2605

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail, First Class, postage prepaid on the following:

Martha Adcock
Family Council
414 S. Pulaski, Suite 2
Little Rock, AR 72201

Dustin McDaniel
C. Joseph Cordi, Jr.
Colin R. Jorgensen
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201

Breck Hopkins
Chief Counsel
Arkansas Department of Human Services
Donaghey Plaza West
P.O. Box 1437- Slot S260
Little Rock, AR 72203-1437

Christine Sun
American Civil Liberties Union Foundation
P.O. Box 120160
Nashville, TN 37212

Leslie Cooper
Rose Saxe
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Garrard R. Beeney
Stacey R. Friedman
Jennifer M. Sheinfeld
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

on this 5th day of February, 2009.

Marie-Bernarde Miller