IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ELECTRONICALLY FILED

GREGORY BOURKE, ET AL. PLAINTIFFS and TIMOTHY LOVE, ET AL. INTERVENING PLAINTIFFS v. STEVE BESHEAR, ET AL. DEFENDANTS	)	CIVIL ACTION NO. 3:13-CV-750-CSR

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REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND MOTION FOR ATTORNEY'S FEES

The sum and substance of Defendant Beshear's Response is "the bill is too high." This argument, without more, is not enough. Attorney fee motions are commonly subjected to a burden-shifting analysis. Once a plaintiff has established a prima facie case, a defendant may contest the reasonableness of the rate with "appropriate record evidence." *Carey v. City of Wilkes-Barre*, 496 F. App'x 234, 237 (3d Cir. 2012). If the defendant "seeks to raise a factual issue . . . he or she must introduce affidavits averring the facts upon which the challenge is based." *Bell v. United Princeton Props., Inc.*, 884 F.2d 713, 720 (3d Cir. 1989). Here, Beshear attaches no affidavits, declarations, or evidence of any kind, aside from a few highlighted versions of what Plaintiffs have already

submitted. In contrast, Plaintiffs have submitted detailed time records, photographic evidence, and eight declarations – including declarations from two seasoned Supreme Court practitioners– in support of their Motion. No competent evidence exists to rebut Plaintiff's evidence, and the Court should accordingly disregard all of Defendant's factual arguments.

1. **The Billing Rates for Supreme Court Counsel Are Reasonable.**

While acknowledging that comparable practitioners may command more than twice the hourly rate sought by Jeffrey Fisher and James Esseks, (Response, DN #110-1, p.17, referring to Ted Olson and Paul Clement), Defendant nonetheless challenges the rates sought here. Without any reference to a governing legal standard, Defendant argues that an attorney should only be awarded a rate that has been previously awarded by another Court. Defendant's argument is wholly incompatible with the lodestar approach and the goals of 42 U.S.C. § 1988. The law provides for an award based upon the prevailing rate, not a prior award. And Defendant has not offered any proof to contradict Plaintiffs' evidence supporting the prevailing rate for these practitioners.

Instead, Beshear relies on the billing rates of Mary Bonauto, counsel for the Michigan case of *DeBoer v. Snyder*. (Id. p.17.) While Ms. Bonauto is an accomplished attorney, she does not claim to be a Supreme Court specialist. In fact, while Bonauto has a long career in LGBT advocacy, this case was her first before the high court. As revealed by their billing records, both Esseks and Fisher spent substantial time assisting Bonauto with preparation for her arguments. In any event, Bonauto's requested rates

are not "evidence of record." *See Smith v. Philadelphia Hous. Auth.*, 107 F.3d 223, 226 (3d Cir. Pa. 1997) (hourly rates that were set for a specific attorney in previous court decisions do not generally constitute record evidence). Nor are they any indication of the unreasonableness of Fisher and Esseks' rates. As discussed in the Motion for fees, the reasonableness of these rates is determined by the market in Washington D.C. for experienced specialist services. (DN #105-1, p.18.) The affidavits supplied in support of the motion reflect that the rates are modest in this market, and Defendant has failed to refute this evidence.

2. **Counsel's Efforts During the Supreme Court Phase of the Litigation Were Reasonable and Not Duplicative.**

A. *The Supreme Court Briefing was Not Overstaffed.*

Beshear does not challenge any time entries made by the five local attorneys prior to the Supreme Court's acceptance of *certiorari*. He instead takes issue with the efforts once the case reached a national stage and was joined with cases and counsel from three other states. Beshear argues that Supreme Court briefing on an issue of national importance should have been confined to only three attorneys, and that local counsel should not have been actively involved in the litigation of their case at the Supreme Court. It is not reasonable to expect local counsel who litigated the case all the way through the *certiorari* stage simply to turn over the case to outside counsel, however experienced, who do not know the clients or the procedural history to that point.

Furthermore, while the undersigned have steadfastly and zealously represented their clients as individuals throughout this litigation, when the Supreme Court granted the writ of *certiorari*, this case became bigger than the named Plaintiffs, Kentucky, or the

Sixth Circuit; it was an issue of national importance. Defendant does not – and cannot – downplay the role of this case in the lives of the families it has affected (and created), nor its role in American history. It would have been wholly irresponsible for any attorney, even a Supreme Court specialist, to "go it alone," as Defendant suggests. *See, e.g., Democratic Party of Wash. State v Reed,* 388 F.3d 1281, 1286-87 (9th Cir. 2004) (In determining award of attorneys' fees, "participation of more than one attorney does not necessarily amount to unnecessary duplication of effort;" "courts must exercise judgment and discretion, considering circumstances of individual case, to decide whether there was unnecessary duplication."); *Berberena v. Coler,* 753 F.2d 629, 633 (7th Cir. Ill. 1985) (the presence of several attorneys at strategy sessions for complex civil rights class action cases may be crucial to the case); *McKenzie v. Kennickell*, 645 F.Supp. 437, 450 (D.D.C. 1986) (awarding attorneys' fees for co-counsel conferences); *Williamsburg Fair Hous. Comm. v. Ross–Rodney Hous. Corp.*, 599 F.Supp. 509, 518 (S.D.N.Y. 1984) ("Multiple attorneys may be essential for planning strategy, eliciting testimony or evaluating facts or law."); *U.S. v. City and County of San Francisco*, 748 F.Supp. 1416, 1420 (N.D. Cal. 1990).

The reliance on the Northern District of Oklahoma's opinion in *Bishop v. Smith* is a comparison of apples to orchards. Counsel doubts the wisdom of that opinion to the extent it stands for the proposition that three attorneys working on an appellate brief is too many. In *Bishop*, the defendant presented testimony that one lawyer could have handled the circuit court briefing and challenged the addition of a distinguished law professor to the case. Despite this evidence, the district court held that although a slight

reduction for duplicative hours was warranted under the circumstances, the law professor's "addition to the legal team was entirely reasonable[.]" (Opinion and Order, DN #85, p.23.) In sum, the Oklahoma District court approved the addition of a distinguished law professor to a legal team so that he could assist two other lawyers in drafting a response brief at the circuit court level. Here, plaintiffs did not seek or obtain the help of Fisher, Esseks, or anyone else at the circuit court level.[1]

In further support of its challenge to duplicative billing, Defendant argues that the issues litigated were not "new and novel" (DN #110-1, p.7) because other courts had already decided similar cases, and some of the most highly regarded legal scholars had already written volumes on the matter by the time the case was briefed. (Id. pp.7-8; 27.) There is some truth to the assertion that much has been written on the issue over the last two years. But not by the United States Supreme Court. All of the opinions, briefs, and thinkpieces identified in Defendant's Response had to be marshalled into a single, fifty-page argument for the nine justices of the Supreme Court. The arguments had to be vetted for the variety of permutations they might spawn, and consequences that might ensue. It is impossible to imagine that one, five, or even ten lawyers could successfully synthesize the incredible surfeit of information necessary to present a complete case to the Supreme Court. It was important to do it right. And we did, with the help of dozens of lawyers. We seek compensation for only nine of them.[2]

[1] In fact, the Kentucky plaintiffs were the only set of marriage equality plaintiffs at the Sixth Circuit (or, for that matter, at the district court) whose legal team included no members of national legal advocacy organizations.
[2] A basic calculation error should be noted in the table found on page 10 of Defendant's Response. The 9.9 hours at $300 per hour for Canon/Landenwich equals $2,970, not $29,070.00, bringing the total challenged to $147,595, not $173,695.

B. *It Was Not Unreasonable for Local Counsel to Accompany Their Clients and Co-Counsel to Washington D.C.*

Contrary to Defendant's assertions, every effort has been made to be conservative in billing for time spent in Washington D.C. in connection with oral arguments. The time records reflect that moot argument sessions in D.C. began the day after attorney Canon arrived. Canon, as counsel of record for Kentucky plaintiffs, attended each moot session. But not all members of the legal team attended every moot; they arrived later in order to assist in preparation for oral argument. Just as it was critical for members of the team to assist in briefing, it was critical for counsel from Kentucky – again, as the only state with both questions before the Court – to be intimately involved in shaping the direction and substance of oral argument. And just as with the briefing, an argument of this magnitude requires more than one lawyer to assist in preparation. There was simply no way to do this without being in Washington D.C., where the moots were held.

These moots allowed for feedback from counsel for all Plaintiffs, in addition to gathering insight from distinguished law professors and former Supreme Court clerks about the nuances of each argument. Counsel did not bill for every hour spent in Washington, but limited the hours to discrete events, all of which advanced the case. Moots and strategy sessions were essential to the preparation of the arguments, and it was important for the Kentucky team to have a voice in those events.

C. *Counsel Should Be Compensated for Time Spent Working Through Conflicts With Counsel for Other Cases.*

This case was involuntarily joined with cases from across the Sixth Circuit. The teams from Tennessee, Ohio, and Michigan each had their own strategies and client

demands. Out of four states' worth of litigation, plaintiffs' teams comprised over thirty advocates. The Supreme Court allowed only one of them to argue each question. This was the hand Plaintiffs were dealt. Since the Kentucky case was the only case containing both questions before the Supreme Court, it had the unenviable task of coordinating arguments and strategy with all three teams from the other Sixth Circuit states. At times, these efforts were full of collegial brainstorming and mutual support. But the issues surrounding the Question 1 argument were, regrettably, time-consuming.

As Defendant correctly speculates, counsel met in Ann Arbor to determine who of the many qualified advocates would argue the first question posed by the Supreme Court in *Obergefell*.[3] Counsel had an obligation to put forth the best advocate on the issue, and Plaintiffs in this case were concerned about the Michigan team's initial selection. What resulted was a compromise resolution that Mary Bonauto would argue the case at the Supreme Court. See n.4. This arduous exercise resulted in a qualified advocate our clients were comfortable with, along with assurances that their case would be fully and adequately presented at the Court. It was absolutely necessary to the integrity of the case.

It is easy to review time spent in retrospect and criticize the necessity of decisions made in the moment. But, "the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time

[3] Not much speculation is needed to reach this conclusion. *See* Chris Geidner, *Marriage Advocates Set For Supreme Court Arguments On April 28*, http://www.buzzfeed.com/chrisgeidner/marriage-advocates-set-for-supreme-court-argements-on-april#.crZeALrdmk (April 3, 2015) ("The agreement between legal teams supporting same-sex couples in Kentucky, Michigan, Ohio, and Tennessee comes after significant behind-the-scenes skirmishes that had the teams initially requesting that five lawyers — instead of three — represent their side during the two-and-a-half hours of arguments on April 28.").

when the work was performed." *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990), *abrogated on other grounds by, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Furthermore, as discussed in Plaintiffs' principal Motion, the fact that Mary Bonauto was selected for the oral argument on Question 1 should come as a relief to Governor Beshear, as Plaintiffs have not sought any of her ample preparation time, nor any time related to the preparation for argument on Question 2 by Douglas Hallward-Driemeier. Plaintiffs had a stake in both those arguments, and had every right to seek compensation for these advocates, but chose not to do so in order to avoid duplicity in billing.

3. Counsel's "Block Billing" Should Not Be Discounted.

The Sixth Circuit has held that so long as the description of the work performed is adequate, block-billing is sufficient. *Smith v. Serv. Master Corp.*, 592 Fed. Appx. 363, 371 (6th Cir. Tenn. 2014). In fact, many district courts have allowed block-billed entries to be compensated at full value. *See, e.g.*, *Renneker v. Comm'r of Social Sec.*, No. 1:10-cv-386, 2011 U.S. Dist. LEXIS 150416, 2011 WL 6950510, at *8 (S.D. Ohio Dec. 8, 2011) (quoting *Robinson v. City of Edmond*, 160 F.3d 1275, 1285 n.9 (10th Cir. 1998)) (finding that block billing of counsel did not require fee reduction because "plaintiff's counsel's billing sheet is not sloppy or imprecise and the Court can discern the type of work that was done and that such work was necessary to the litigation. Further, there is no indication that plaintiff's attorney inflated hours for any specific entry."); *Cummings Inc. v. BP Prods. N. Am., Inc.*, Nos. 3:06-0890, 3:07-0834, 2010 U.S. Dist. LEXIS 19037, 2010 WL 796825, at *6 (M.D. Tenn. Mar. 3, 2010) (no fee reduction for block billing because the

court "was able to clearly ascertain what tasks were performed"); *Fair Housing Advocates Assoc. Inc. v. Terrace Plaza Apartments*, No. 2:03-CV-563, 2007 U.S. Dist. LEXIS 11167, 2007 WL 445477, at *5 (S.D. Ohio Feb. 6, 2007)(no fee reduction for block billing because the entries did not "significantly limit the Court's ability to determine the reasonableness of the time expended" and because all the activities within each entry were 'properly compensable.'").

Here, the time entries submitted by Plaintiffs encompass literally thousands of hours. Where practicable, these entries have been broken up. But the jealous way in which this case consumed the time of all involved – especially with regard to the near-constant communication with clients, the legal team, opposing counsel, and other interested parties – made it almost impossible not to include at least some block billing. Defendant cannot present any facts or evidence to support any argument that these hours were not reasonably spent in furtherance of the case, and thus not "properly compensable."

Furthermore, where entries are block billed, they are not ambiguous. For example, the first entry attacked by Beshear is from attorney Landenwich's time records, which reads: "Correspondence to and from potential marriage license clients; draft, edit, and finalize intervening complaint and motion for preliminary injunction; research re motion to intervene standard." (DN 110, p.23.) The Court can "clearly ascertain what tasks were performed" based on this entry and others like it. The listed tasks are all properly compensable, so there is no justification for reducing the fee. If this Court is inclined to reduce a block billed item, it should do so in the same manner it did in the

previous fee award and reduce only those items that contain a disallowed entry. (See DN #85).

3. **If Ever A Case Warranted A Fee Enhancement, This One Is It.**

Bourke and *Love* are the rare cases that require that Plaintiffs' counsel's lodestar fee be enhanced because of the results, the unpopularity of the case, and fee awards in other cases. Beshear argues this case should not qualify for a fee enhancement because *Blum v. Stenson*, 465 U.S. 886, 898–99 (1984), stands for the broad proposition that "neither the complexity nor novelty of the issues in a case is an appropriate factor in determining whether to increase the basic fee award." (DN 110, p.28.) In *Perdue v. Kenny*, the Supreme Court reaffirmed that a court may grant a fee enhancement for superior attorney performance in rare and exceptional cases only in which the fee applicant has produced specific evidence supporting the enhancement. *Perdue v. Kenny*, 130 S.Ct. 1662, 1672-1674 (2010). In reversing the lower court's fee enhancement for failure to provide adequate justification for the enhancement, the court reaffirmed a prior holding that the —novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel and normally are reflected in the reasonable hourly rate. *Id.* (citing *Burlington v. Dague*, 505 U.S. 557, 562-63 (1992)).

However, *Perdue* recognized that in rare and exceptional circumstances enhancements may be appropriate. In so holding, the Court emphasized that enhancements must be calculated using a method that is reasonable, objective, and capable of meaningful appellate review. *Id.* at 1674. Prior to *Perdue*, this circuit had

recognized and applied twelve factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (affirming award of 75% multiplier to attorneys in a transgender discrimination case few lawyers would have taken and the immense skill requisite to conducting the case properly); *Geier v. Sundquist,* 372 F.3d 784, 792-796 (6th Cir. 2004) (permitting upward adjustment because desegregation case was of great social import); *Meredith v. Jefferson County Bd. of Educ.,* No. 3:02-cv-620-H, 2007 WL 3342282, *12-13 (W.D.Ky. 2007) (awarding 75% multiplier in undesirable and difficult discrimination case where counsel was vilified, suffered adverse public and personal criticism, and succeeded more upon a conviction than skill).

The court in *Perdue* utilized four of the *Johnson* factors to justify an upward departure from the lodestar: 1) amount in controversy and results obtained; 2) undesirability of case within legal community; 3) nature and length of professional relationship between attorney and client; and 4) attorney's fee awards in similar cases. *McAfee v. Boczar*, 738 F.3d 81, 89 (4th Cir. 2013), *as amended* (Jan. 23, 2014) (citing *Perdue*, 130 S. Ct. at 1673). *Perdue* reasoned that the remaining *Johnson* factors should have already been analyzed in the lodestar calculation.

Three of these factors support an enhancement of 75% in this case now before the Court: 1) results obtained; 2) undesirability of case within the legal community; and 3) fees in similar cases. First, the attorneys in this case have achieved a superior, national result by securing legal equality for all married same-sex couples and their children in the United States. These results were life-changing for the Plaintiffs, their children, and countless families throughout the entire country – including families which do not yet

exist.

The undesirability of the case within the legal community is the second relevant factor. Marriage equality has had a long and tortuous path in this country until *United States v. Windsor*. In addition to the hate mail described in the original motion, there was a concern that the Supreme Court would rule against the Plaintiffs and thus undo all the positive results previously achieved across the other circuits. And before the *Bourke* case was filed in the summer of 2013, Kentucky was viewed as an unpopular or even counterproductive venue by advocacy groups spearheading the national movement. Thus, the Kentucky case was left to local counsel to navigate and fund. Thus, the undesirability of these cases also supports a 75% fee enhancement.

Finally, fees awarded in similar cases supports the enhancement. The Chart below summarizes attorney fees paid in same-sex marriage cases from other jurisdictions that were litigated at the circuit court level but did not reach the Supreme Court:

Indiana	*Baskin v. Bogan*	$650,000[4]
Pennsylvania	*Whitewood v. Wolf*	$1,500,000[5]
Virginia	*Bostic v. Rainey*	$520,000[6]
Wisconsin	*Wolf v. Walker*	$1,055,000[7]

[4] Zoe Tillman & Mike Scarcella, *Indiana Pays $650K in Legal Fees to Marriage Law Challengers*, National Law Journal (March 12, 2015), http://www.nationallawjournal.com/id=1202720513873/Indiana-Pays-650K-in-Legal-Fees-to-MarriageLaw-Challengers.

[5] Mike Corones, *Feeling the Cost of Loss in Same-Sex Marriage Suits*, Reuters Data Dive Blog (April 17, 2015), http://blogs.reuters.com/data-dive/2015/04/17/feeling-the-cost-of-loss-in-same-sex-marriage-suits.

[6] Peter Dujardin, *Virginia Settles Claim Over Lawyer Fees in Same-Sex Marriage Case*, Daily Press (Jan. 29, 2015), http://www.dailypress.com/news/dp-nws-gay-marriage-settlement-20150129-story.html.

[7] Steve Friess, *States That Fought Same-Sex Marriage Owe Millions in Legal Fees*, Aljazeera America (Sep. 10, 2015), http://america.aljazeera.com/articles/2015/9/10/states-that-fought-same-sex-marriage-charged-millions-in-attorney-fees.html.

Looking to the other three states whose cases were litigated before the Supreme Court, the costs and fees requested are:

Michigan	$1,915,585 in fees	Settled for amount requested.[8]
Ohio	$1,147,502.60, plus 50% enhancement	pending
Tennessee	$2,398,651, plus indefinite enhancement	pending

The fees sought by plaintiffs' counsel in the Kentucky cases are lower or nearly identical to their counterpart states, even though they successfully litigated two separate cases and were the only counsel before the Supreme Court to raise both issues on review.

CONCLUSION

Counsel in this case does not seek a windfall, but compensation for the effort and consequence of litigating a contentious civil rights case to the Supreme Court and unquestionably prevailing. Defendant Beshear requested this battle, publicly defending his voluntary decision to defend Kentucky's discriminatory laws by arguing that the issues presented "will be and should be ultimately decided by the Supreme Court in order to bring finality and certainty to this matter."[9] According to 42 U.S.C. § 1988(b), counsel for the Plaintiffs finally and certainly prevailed. Beshear must now pay the tab.

[8] Oralandar Brand-Williams, *Michigan Pays $1.9M in Legal Fees For Gay Marriage Case*, The Detroit News (October 7, 2015), http://www.detroitnews.com/story/news/local/oakland-county/2015/10/07/michigan-pays-million-legal-fees-historic-gay-marriage-case/73522282/.

[9] Joseph Lord, *Kentucky Gov. Steve Beshear to Appeal Federal Judge's Same-Sex Marriage Order*, WFPL News (March 4, 2014), http://wfpl.org/kentucky-gov-steve-beshear-appeal-federal-judges-same-sex-marriage-order/; and *see also*, Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. Times, Jan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 13TH day of October, 2015, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF System which will send a note of electronic filing to all registered counsel.

/s/ Daniel J. Canon
Daniel J. Canon

16, 2015, http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html.