IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARI D. SEARCY & KIMBERLY MCKEAND, individually and as parent and next friend of K.S.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 1:14-cv-208-CG-N**
LUTHER STRANGE, Attorney General of the State of Alabama,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR REASONABLE ATTORNEYS' FEE (DOC. 76)

COME NOW the Plaintiffs, by and through undersigned counsel, and files this their Reply in Support of Plaintiffs' Motion for Reasonable Attorneys' Fee as follows:

I. Strange's Response glosses over the substantial amount of work and time that *Strange* caused.

Following this Court's Order granting Plaintiffs' Motion for Summary Judgment and denying Strange's competing motion, Strange chose to file numerous requests for stay with this Court and appeals with the 11th Circuit and the Supreme Court. In fact, undersigned counsel incurred collectively 216.7 hours of work *after* this Court granted summary judgment to the Plaintiffs. Attorney Kennedy submitted 143.6 hours of work following the order of January 23, 2015 granting summary judgment to the Plaintiffs in this case. Strange passingly acknowledges this and fails to state the work that he created. Undersigned counsel would point out that of the disputed time being 182.3 hours; the bulk of this time occurs after the January 23, 2015 order of this court granting Plaintiff's motion for summary judgment. The dispute is over time that

Strange and his office created under their stand to appeal and delay the enforcement of this court's ruling.

Strange also appears to state that because there were stipulated facts as to the particulars of these Plaintiffs, therefore this case did not require much time. Nothing could be further from the truth. Strange also makes an incorrect inference, being that the Plaintiffs sought a stipulation of the facts of the case (i.e., the Plaintiffs were married in California and have a biological son) in an effort to streamline this case and to *avoid* costly, time-consuming litigation of issues.

In short, the Plaintiffs incurred substantial legal expense in their effort to force the State of Alabama to recognize what was already true—that they *are* married and are entitled to all the benefits and equal protection of the laws of the State of Alabama. They did not seek to be discriminated against. In other words, the State of Alabama forced the litigation in the first place.

The Plaintiffs were forced to retain an expert witness, Dr. Thomas Bennett, who is highly qualified to testify about family and children at substantial expense to the Plaintiffs. The State of Alabama's unwarranted and unconstitutional discrimination against their family caused time and expense.

The Plaintiffs did not choose to have to contest Strange's motion for summary judgment, and they did not choose to have to incur substantial research by their attorneys and their expert witness to counter the opinions offered by Strange's experts. Those costs were created by Strange.

The Plaintiffs did not choose to have to respond to requests for stay before this Court, the 11th Circuit and the Supreme Court of the United States, each of which required substantial briefing on tight time deadlines. The Plaintiffs certainly did not choose to incur the costs

associated with those fights—Plaintiffs had to file these detailed, carefully crafted responses because Strange *chose* to pursue those appellate remedies. It simply is not fair for Strange to then turn around and state that Plaintiffs spent too much time and money opposing Strange's appellate motions and applications that were erroneous on *Strange's* part.

II. The evidence before the Court evidences that $275 is a reasonable hourly rate.

Ed Bowron, the managing member of Burr, Forman's Mobile office states that work of this kind coupled with the complexity and opportunity-cost risk associated with the work directs that $275 an hour is a reasonable fee. In response, Strange summarily and self-servingly states that this was a "simple case," but he makes no effort to explain how it was "simple." To the contrary, the case involved complex notions of due process and equal protection in an emerging area of law with little to no roadmaps or case law.

Further, the case cited by Strange actually *supports* Plaintiffs' claim for $275.00 an hour. Strange's case states that $250-$350 is a fair rate for complex matters. While the *Young* case does state that $200 an hour for a seven-year law firm associate is reasonable as of 2012, undersigned counsel submits that the level of responsibility and personal financial opportunity-cost risk incurred by undersigned counsel is simply not comparable to an associate at a law firm. Again, Ed Bowron's affidavit substantiates the Plaintiffs' claim as well that $275.00 an hour is in line with local market rates for lawyers of Plaintiffs' counsel's experience and ability. Ed Bowron is a well-respected, highly knowledgeable attorney who is responsible for overseeing billing of lawyers of all levels of experience. Strange has not offered any substantial evidence that competes with Bowron's judgment and conclusions.

Strange has not presented any competing evidence or affidavit to refute undersigned counsels' or Bowron's affidavits. There is no competing evidence in the record. Instead, Strange draws facile comparisons to other cases that are not comparable or related whatsoever to this litigation.

Plaintiffs' claimed rate of $275.00 an hour is reasonable, and there is no evidence to suggest otherwise. Plaintiffs have also properly supported this claimed amount with Ed Bowron's affidavit.

On the topic of what a "reasonable amount" is, a Colorado District Court recently stated as follows:

> A "reasonable rate" is defined as the prevailing market rate in the relevant community for an attorney of similar experience. *Missouri v.Jenkins*, 491 U.S. 274, 286 (1989); *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.,* 295 F.3d 1065, 1078 (10th Cir.2002); *Malloy v. Monahan*, 73F.3d 1012, 1018 (10th Cir. 1996). The party requesting fees bears "the burden of showing that the requested rates are in line with those prevailing in the community." *Ellis v. Univ. of Kan. Med. Ctr*., 163 F.3d 1186, 1203 (10th Cir.1998). In order to satisfy this burden, Movants must produce "satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984).

Guardian Life Ins. Co. of Am. v. Wilds, No. 12-CV-01215-WYD-KLM, 2014 WL 5293706, at *8-9 (D. Colo. Oct. 16, 2014) judgment entered, No.12-CV-01215-WYD-KLM, 2015 WL 5534099 (D. Colo. Sept. 21, 2015). It is respectfully submitted that Plaintiffs have met both the burden of production and the burden of persuasion. Ed Bowron's affidavit suffices to show that $275.00 an hour is in line with the prevailing rates in the community. There has been no offer of proof by Strange to the contrary.

III. The hours claimed by the Plaintiffs are reasonable, and there is no evidence in the record to suggest otherwise. Strange's anecdotal comparison to other unrelated litigation is without merit.

Plaintiffs' claim as to the total number of hours expended in this matter are more than reasonable. While Strange does correctly point out that undersigned counsel mistakingly included a claim of 28.2 hours in a single day and correctly notes two other date errors, these three errors are merely clerical mistakes in compiling the bill. Candidly, the date column is the source of the errors—the time entries themselves are not in error. Because the movant is not allowed to substitute or amend evidence in a Reply, undersigned counsel has not included a time sheet correcting these date issues. If the Court is inclined, undersigned counsel will certainly submit the same.

Plaintiffs submit that doing so is actually unnecessary. Despite Strange's invitation to indulge in a line-item by line-item review, the Court is not charged with such responsibility. It is the Court's job to determine a reasonable fee, and audit-proof perfection is not required. *Guardian Life Ins. Co. of Am. v. Wilds*, No. 12-CV-01215-WYD-KLM, 2014 WL 5293706, at *10-11 (D. Colo. Oct. 16, 2014) judgment entered, No.12-CV-01215-WYD-KLM, 2015 WL 5534099 (D. Colo. Sept. 21, 2015)(There the Court held: "Ultimately, the Court's goal is to fix a fee that would be equivalent to what the attorney would reasonably bill for those same services in an open market and fees will be denied for excessive, redundant, and otherwise unnecessary expenses. *Ramos*, 713 F.2d at 553. In reaching a determination the Court 'need not, and indeed should not, become green-eyeshade accountants. The essential goal ... is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.' *Fox v. Vice*, U.S., 131

S.Ct. 2205, 2217 (2011); *Malloy*, 73 F.3d at 1018 ('the district court need not identify and justify every hour allowed or disallowed, as doing so would run counter to the Supreme Court's warning that a request for attorney's fees should not result in a second major litigation').").

Again, Ed Bowron's affidavit substantiates that the total time claimed by undersigned counsel is reasonable and necessary for the results achieved. Strange has not presented any competing affidavit or other evidence to suggest otherwise choosing instead to make conclusory, self-serving conclusions that undersigned counsel spent too much time responding to Strange's arguments and positions in this case. The bottom line is that nearly all of Plaintiffs' time spent litigating this case was spent responding to choices and motions filed by Strange in an effort to discriminate and deny the actualization of equality for Alabama families and in particular these plaintiffs and their family.

IV. When compared to attorneys' fee awards in constitutional challenges of similar same-sex marriage bans in other states, it is evident that Plaintiffs' claim for fees and costs in this matter are more than reasonable.

Successful attorneys in other similar cases in other jurisdictions including those that were handled after the ruling in Alabama have been awarded substantially more than the sum requested by Plaintiffs. Plaintiffs would point to the following cases merely by way of example:

Oklahoma: $298,742.77 (*Bishop v. Smith*, No. 04-CV-848-TCK-TLW (N.D. Okl. May 1, 2015))

Idaho: $397,000 (*Latta v. Otter*, No. 1:13-cv-00482-CWD)(D.C. Idaho December 19, 2014))

Wisconsin: $1,055,000 by agreement (*Wolf v. Walker*, 3:14-cv-00064 (W.D. Wisc. March 27, 2015).

V. The factors to be considered by the Court all weigh heavily in Plaintiffs' favor.

Strange correctly states the *Johnson* factors, but he fails to offer any competing analysis of these factors. It is respectfully submitted that each of these factors actually weighs in favor of Plaintiffs' claim for fees.

(1) The time and labor required:

At the risk of redundancy, Plaintiffs again submit that substantial amounts of time and labor were required because of the aggressive opposition on the part of Strange as well as the rapidly moving litigation in this particular area across the country. Plaintiffs were forced to respond to numerous requests for stay, including emergency applications to the 11th Circuit and the Supreme Court. For sustained periods, undersigned counsel were required to essentially cease working on all other files because of the requirements of this case.

(2) The novelty and difficulty of the questions:

The extension of due process and equal protection rights to same-sex couples and families are both relatively new areas of law and have proven to be some of the most fast paced evolving areas as well. Alabama has offered the most aggressive and intense fight to oppose rulings of the federal courts related to this area of the law. There was little law on the issue of the rights of the minor child to two legally recognized parents in combination to the topics presented in this case, and this required "out-of-the-box" thinking and skills on the part of undersigned counsel. Additionally, the issues in this case were difficult because of the relatively small body of established precedent and the evolution of other cases in other federal districts that presented opposing points of view during the time period where Strange offered the greatest resistance in seeking appellate review and citing the development of new case law in purported support of his position. Throughout the case, there were no directly applicable precedents from the 11th Circuit

or the Supreme Court. In the absence of guiding, binding precedent, undersigned counsel were faced with a rather daunting task, of reviewing the law in the other federal jurisdictions which included the monitoring of day to day developments of new case rulings and arguments afforded by opponents and any suggestion to the contrary ignores reality.

(3) The skill required to perform the legal services properly:

Federal constitutional challenges of state statutes are not easy cases, especially in the absence of guiding precedent within the circuit. This case and the posturing and maneuvers of Strange required counsel of substantial skill and ability. In deed, counsel for Strange are highly skilled, experienced attorneys and undersigned counsel met their opposition with skill and expertise as evidenced by the excellent results obtained for the plaintiffs in this case.

(4) The preclusion of other employment by the attorney due to acceptance of the case:

There are opportunity costs with cases of this type, and undersigned counsel affirm that they both chose to forego other cases and other billable work to allow the time and dedication necessary to litigate this matter to conclusion. Likewise, this matter had contingencies and unknowns associated with it. The affidavits filed by undersigned counsel substantiate the uncertain nature of this case. Simply put, there were no guarantees of success as other Courts in sister districts within the Southern Region of the country upheld state same-sex marriage bans. In fact, numerous organizations discouraged undersigned counsel from bringing this action because the chances of success were not certain in this particularly state.

(5) The customary fee in the community:

Again, Affidavits submitted including the Bowron Affidavit substantiate that $275.00 an hour is customary and reasonable for this type of litigation.

(6) Whether the fee is fixed or contingent:

Again, this factor favors Plaintiffs' claim for fees. This Court has previously held that where a fee is contingent in nature, attorneys are allowed a higher fee from this Court. *Oden v. Vilsack*, Civil Action No. 10-00212-KD-M (August 9, 2013) ("when an attorney accepts a client on a contingent-fee basis, the attorney assumes the risk of nonpayment for expenses and is acting at his own peril. If someone is willing to take the great risk of giving up the sure quantity for the uncertain, and wins, then the uncertain prize should be worth more than the certain one.' Therefore, this risk must be considered when determining the reasonableness of a fee.'" (citations omitted)). Here, undersigned counsel took on substantial risk in bringing this action, including the risks that substantial time and money would be spent for which undersigned counsel would recoup nothing. The Plaintiff's were not prepared nor financially capable of covering the extensive litigation costs associated with this action.

(7) Time limitations imposed by the client or circumstances:

As discussed in the affidavits submitted in support herewith, undersigned counsel worked on very strict time deadlines, especially those set by the 11th Circuit and the Supreme Court. Strange's last-minute requests for stay necessitated undersigned counsel to "drop everything" and work exclusively on responding to those motions. At times undersigned counsel worked all night and into the very early hours of the morning in an effort to meet the strict guidelines imposed by the courts. In other words, the time limitations were substantial, and this factor tips in Plaintiffs' favor.

(8) The amount involved and the results obtained:

This factor tips in Plaintiffs' favor. There can be no doubt that the results obtained were excellent, i.e., a declaration that Alabama's laws that refused to recognize Plaintiffs' marriage

and preventing the full recognition of Searcy's rights as a parent were declared unconstitutional.

(9) The experience, reputation, and ability of the attorneys:

While Strange seems to suggest that undersigned counsel were too inexperienced for this matter, it is respectfully submitted that this factor also tips in Plaintiffs' favor as evidenced by the results obtained and the affidavits filed in support hereof.

(10) The 'undesirability' of the case:

The challenged Alabama constitutional amendment that declared Plaintiffs' marriage as unlawful and not recognized was approved by over 80% of Alabama voters. Likewise, nearly every politician that commented on this case indicated that they supported the same-sex marriage ban. In other words, this was not a popular case, and there is no doubt that many lawyers would not have taken this case for that reason. It is respectfully submitted that undersigned counsel showed some degree of courage in bringing this action, particularly in the face of such adverse response to the ultimate ruling and the aggressive and continuous filings of Strange in an effort to delay, appeal, and reverse the ruling of the Federal Courts, thus this factor too tips in Plaintiffs' favor.

(11) The nature and length of the professional relationship with the client:

Undersigned counsel submits that this factor is neutral. Although it should be noted that the Plaintiffs in this case have sought equal treatment and legal recognition of their family for the last nine years and that it was not until undersigned counsel became involved and initiated the federal litigation in this case that the combined tenacity of the Plaintiffs and legal efforts of undersigned counsel proved to be the most effective team.

(12) Awards in similar cases:

Plaintiffs have addressed this factor elsewhere herein. It is submitted that this factor tips in Plaintiffs' favor.

VI. Conclusion

Strange and the other officials in Alabama including legislators, justices and even the governor, catapulted Alabama into the arena of the most contentious resistance to such a "simple case" referencing the words of the Attorney General's office such that the amount of work and the extent of resources expended to appeal a "losing battle" created the costs incurred as a result of such conduct on the part of the Attorney General's office. Alabama offered the greatest resistance and therefore required in essence the greatest expenditure of time, research and resources to combat the relentless pursuit of discrimination on the part of the state officials involved in this litigation.

After causing the litigation to be lengthier, fiercer, and ultimately more costly than necessary, Strange now asserts that Plaintiffs' counsel spent too much time working on this case. In other words, the losing party is criticizing how much time it took undersigned counsel to redress the unconstitutional discrimination against the Plaintiffs. As mentioned in the principal brief, undersigned counsel submits the following: "[b]y and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have had he been more of a slacker." *Moreno v. City of Sacramento*, 534 F. 3d 1106, 1112 (9th Cir. 2008).

The results of this case touched many lives across the State of Alabama. The government of Alabama strenuously fought the outcome in this case beyond any other states' effort to block

the recognition of same-sex marriage. The State and Strange should not be rewarded by reducing the reasonable fees claimed by the Plaintiffs because the State of Alabama not only caused the litigation, but it also caused the amount of time, money and effort expended by Plaintiffs' counsel. Plaintiffs also submit that their claim for fees is reasonable especially when judged against those paid by Mobile County on behalf of the Probate Court of Mobile County, which has billed Mobile County for $345,000 as of September 1, 2015. http://www.al.com/news/index.ssf/2015/09/alabamas_gay_marriage_loss_cou.html. Plaintiffs won this case, the appeal, and all motions for stay. Undersigned counsel is entitled to be reasonably and fairly paid for their efforts.

Respectfully submitted this 28th day of October, 2015.

/s/ *David G. Kennedy/s/*
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CERTIFICATE OF SERVICE

I hereby affirm that I have this 28th day of October, 2015, filed a copy of the foregoing utilizing the CM/ECF system which will send notice and a copy of the same to all parties and attorneys subscribed thereto.

/s/ David G. Kennedy /s/
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