No. 15-51241

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his official capacity as Governor of the State of Texas; KEN PAXTON, in his official capacity as Texas Attorney General; and JOHN HELLERSTEDT, in his official capacity as Commissioner of the Texas Department of State Health Services,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, NO. 5:13-CV-00982

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CERTIFICATE OF INTERESTED PERSONS

No. 15-51241, *De Leon v. Perry et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs do not agree with the State that this appeal presents issues of importance or complexity. This is an appeal from a discretionary determination of a District Court to award fees and costs to Plaintiffs as prevailing parties in an action under 42 U.S.C. § 1983. In the underlying action, Plaintiffs successfully enjoined Texas laws prohibiting same-sex marriage and denying recognition to same-sex marriages lawfully entered into in other states. As prevailing parties, they were entitled to fees under 42 U.S.C. § 1988. The District Court weighed the evidence on fees and costs, made findings, and rejected the State's factual challenges to the fees request. These are straightforward fact issues that require no further examination, let alone oral argument that will further increase the amount of attorneys' fees and costs that the State will be required to pay.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was the District Court acting within its discretion when it awarded attorneys' fees to plaintiffs' counsel for plaintiffs who prevailed in challenging Texas' same-sex marriage laws?

STATEMENT OF THE CASE

A. Plaintiffs File This Action And Obtain A Preliminary Injunction.

On October 28, 2013, Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss ("Plaintiffs") brought an action against then-Governor Rick Perry and the other named defendants (collectively, the "State")[1] to challenge Texas' laws that prohibited same-sex couples from marrying and denied recognition to same-sex marriages lawfully performed in other states. (Plaintiffs refer to these laws collectively as "Section 32."[2]) Plaintiffs are two same-sex couples; two who sought to be married in Texas, and two who had been married in Massachusetts. They were the first Texans represented by counsel to challenge

[1] The named defendants were Perry, Texas Attorney General Greg Abbott, Commissioner of the Texas Department of State Health Services David Lakey, and Bexar County Clerk Gerard Rickhoff. Defendant Abbott has since been substituted in place of Perry, and Ken Paxton and John Hellerstedt have been substituted in place of Abbott and Lakey, respectively. Fees and costs were not sought against Defendant Rickhoff, who is not a party to this appeal.

[2] The Texas laws at issue included: (1) Family Code § 2.001; (2) Family Code § 6.204; and (3) Article I, § 32 of the Texas Constitution.

Section 32 after the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).[3] ROA.21-22.

When the case was filed, only one federal district court had held that a state law prohibiting same-sex marriages violated the Fourteenth Amendment. In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), a district court had found California's ban on same-sex marriages unconstitutional, but the appeals in that case were decided on other grounds.[4] *See e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (finding that petitioners lacked standing under Article III).

Plaintiffs' lawsuit sought (i) a declaration that Section 32 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1983 and (ii) a permanent injunction barring enforcement of Section 32. ROA.30. On November 22, 2013, Plaintiffs moved for entry of a preliminary injunction enjoining the State from enforcing Section 32. ROA.1024-88.

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[3] *McNosky v. Perry*, No. 1:13-cv-00631 (W. D. Tex.), was filed on July 29, 2013 by *pro se* plaintiffs.

[4] *Windsor*, as well as *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012), and *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), involved challenges to the federal Defense of Marriage Act. In *Obergefell v. Kasich*, No. 1:13–cv–501, 2013 WL 3814262, *6 (S.D. Ohio July 22, 2013), a district court in Ohio issued an injunction to require Ohio to recognize the out-of-state marriage of a terminally ill man so that he would be listed as married to his same-sex spouse on his death certificate. A subsequent order, issued in December 2013, granted declaratory relief and a permanent injunction. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

The work that went into the motion was obvious from the brief in support, which was 49 pages, cited to 73 different cases and more than 25 statutes, as well as to approximately 40 secondary sources – including social science articles and legislative history. The brief argued that Section 32 violated the Plaintiffs' due process and equal protection rights under the Fourteenth Amendment, and explained why Section 32 should be subject to heightened constitutional scrutiny.

Plaintiffs submitted more than 800 pages of evidence in support of the motion, including declarations from each Plaintiff and declarations from expert witnesses in the fields of political science, the history of marriage, economics, and psychology. ROA.178-492. Exhibits included extensive documentation of the legislative history of the challenged laws and substantial historical and social science scholarship. ROA.503-743.

While that motion was pending, district courts in other states began striking down same-sex marriage laws. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014); *see also Bostic v. Rainey*, 970 F. Supp. 2d 456, 470 (E.D. Va. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014); *Lee v. Orr*, No. 13–8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014). Plaintiffs' Reply in Support of Motion for

Preliminary Injunction addressed *Kitchen* and *Bishop*, two cases decided before the Reply was filed.[5]

On February 26, 2014, the District Court granted the motion for preliminary injunction. It held that Plaintiffs established a likelihood of success on the merits because Section 32 denied them equal protection and could not survive even the most deferential rational basis scrutiny. *De Leon v. Perry*, 975 F. Supp. 2d 632, 649-56 (W.D. Tex. 2014). The District Court also held that Section 32 violated due process, because it denied Plaintiffs their fundamental right to marry without satisfying a strict scrutiny analysis. *Id.* at 656-60. The District Court further found that the remaining factors for injunctive relief were satisfied, and therefore issued a preliminary injunction.[6] *Id.* at 663-665.

At the time of the preliminary injunction hearing, the Supreme Court had issued a stay in *Kitchen* pending its decision on *certiorari*. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014). Other district courts had also stayed injunctions in same-sex marriage cases. *Bishop*, 962 F. Supp. 2d at 1296; *Bostic*, 970 F. Supp. 2d at 484. Anticipating the likelihood that the same would happen in this case, Plaintiffs did

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[5] *Bostic*, *Bourke*, and *Lee* were decided after the February 12, 2014 hearing on the Motion for Preliminary Injunction.

[6] The Court also rejected some procedural arguments, holding that Plaintiffs had standing to challenge Section 32 and that the Supreme Court's 1972 summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), was no longer binding precedent. *De Leon*, 975 F. Supp. 2d at 645-49.

not oppose the State's request for a stay of the injunction pending appeal to this Court. ROA.2052. The District Court issued a stay "[i]n accordance with the Supreme Court's issuance of a stay in *Herbert* . . . and consistent with the reasoning provided in *Bishop* and *Bostic*." *De Leon*, 975 F. Supp. 2d at 666.

In the trial court, Plaintiffs were forced to oppose the State Defendants' Motion to Transfer Venue, a motion to intervene by a third-party, and Defendants' efforts to consolidate this action with actions filed in the Austin Division of the Western District of Texas, which were denied. ROA.2591.

B. The State Appeals The Injunction To This Court.

After the injunction issued, the State appealed the order to this Court.

The appeal was fully briefed and attracted significant interest from *amici curiae*. Twenty-six amicus briefs were filed in support of the State, and twenty-eight were filed in support of Plaintiffs. *See generally* docket for *De Leon v. Perry*, Case No. 14-50196 (5th Cir.) ("*De Leon I*").

While the appeal was pending, numerous cases concerning same-sex marriage were decided in this Court's sister circuits. The circuits split on whether same-sex marriage bans were constitutional. *Compare, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *with DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). Even when cases reached the same conclusion, they

employed different reasoning. *Compare Baskin*, 766 F.3d at 656-57 (finding same-sex marriage ban violates equal protection without deciding if it infringes on a fundamental right) *with Kitchen*, 755 F.3d at 1218-30 (holding same-sex marriage bans violate the fundamental right to marry under the Due Process Clause and equal protection). Within this Circuit, appeals also arose from cases in Mississippi (striking down a same-sex marriage ban) and Louisiana (upholding a ban).

Oral argument was held on January 9, 2015. In a rather unusual proceeding, the Court conducted a three-hour oral argument on each of the three same-sex marriage appeals. Each case was given one hour of argument.

C. Plaintiffs Unsuccessfully Seek To Lift The Stay

On October 6, 2014, after Plaintiffs submitted their appellee brief but before Defendants submitted their reply brief to this Court, the Supreme Court denied certiorari in a host of cases out of the Fourth, Seventh, and Tenth Circuits regarding the validity of same-sex marriage bans. *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (Utah); *Walker v. Wolf*, 135 S. Ct. 316 (2014) (Wisconsin); *Rainey v. Bostic*, 135 S. Ct. 286 (2014) (Virginia); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014) (Virginia); *Smith v. Bishop*, 135 S. Ct. 271 (2014) (Oklahoma); *Bogan v. Baskin*, 135 S. Ct. 316 (2014) (Indiana). Notably, as a result of this decision, the stays of injunctions issued in *Kitchen* and other circuits were lifted.

Plaintiffs then brought a motion to lift the stay in this case. ROA.2066-2073. Plaintiffs argued that lifting the stay would prevent the ongoing violation of their constitutional rights. *Id.* However, while that motion was pending, this Court issued a stay in a similar case from Mississippi, reasoning that stay was necessary to prevent "disruption" if some same-sex marriages were held while the appeal was pending and then the laws upheld. *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 58 (5th Cir. 2014). Citing this Court's decision, the District Court denied Plaintiffs' motion. ROA.2267-2272.

After oral argument, the legal landscape changed again. The Supreme Court denied stays in cases arising out of Alabama and Florida where the Eleventh Circuit had declined to issue stays during the pendency of the appeal. *Strange v. Searcy*, 135 S. Ct. 940 (2015); *Armstrong v. Brenner*, 135 S. Ct. 890 (2014). Arguing that the Supreme Court seemed to have little concern for the type of "disruption" that led this Court to issue a stay, Plaintiffs asked this Court to lift the stay. Plaintiffs' Opposed Motion to Lift Stay of Injunction or in the Alternative, for Order re Birth of Child, filed in *De Leon I* (Feb. 12, 2015). Alternatively, the motion asked for limited relief to direct the State to recognize Plaintiff De Leon as the parent of the child to whom Plaintiff Dimetman was about to give birth to ensure that Plaintiff De Leon had legal standing in her child's life from birth. *Id.* That motion was never decided.

D. The Supreme Court Decides *Obergefell v. Hodges*, This Court Affirms The Injunction, The District Court Issues A Permanent Injunction And Enforces It In An Intervention Action.

The Supreme Court granted certiorari to four cases from the Sixth Circuit that raised challenges to state laws similar to Section 32 and on June 26, 2015, held that such laws are unconstitutional. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The District Court immediately lifted its stay on the preliminary injunction. ROA.2392.

This Court then asked the parties in the instant case to identify the most appropriate procedure for resolving the appeal. Plaintiffs urged the court to affirm the injunction and direct entry of judgment in Plaintiffs' favor, and Defendants agreed. The Fifth Circuit adopted those recommendations. *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015). Subsequently, the District Court entered judgment and issued a permanent injunction. ROA.2400.

Despite the permanent injunction, the State was reluctant to comply. Weeks after the District Court issued its injunction, the State refused to issue an amended death certificate recognizing a legal same-sex marriage. ROA.2414. The certificate was issued only after the District Court ordered the State to comply with the judgment and permanent injunction. ROA.2455. At a teleconference of counsel, the District Court also identified numerous examples of Texas' failure to issue birth certificates and even reported that the court had been contacted by

people reporting that some Texas counties were still not issuing same-sex marriage licenses. ROA.3591-3592. In response to the court's inquiries, the Department of State Health Services represented that it was preparing to issue policy guidelines that "will fully be in compliance with Your Honor's final judgment." ROA.3600. The Court then directed the State to file an advisory "notifying the Court they have created, issued, and implemented policy guidelines recognizing same-sex marriage in death and birth certificates" and "assuring the Court that the Department of State Health Services has granted all pending applications for death and birth certificates involving same-sex couples, assuming the applications are complete and qualify for approval." ROA.2558.

E. Plaintiffs Seek And Are Awarded Attorneys' Fees.

After judgment issued, Plaintiffs sought their attorneys' fees and costs under 42 U.S.C. § 1988. Under the lodestar analysis, Plaintiffs presented evidence supporting the reasonableness of the attorney hourly rates they requested and the number of hours spent on the case.

The motion and supporting declaration from Plaintiffs' counsel detailed, among other things: (1) the history of the litigation and appeal; (2) the background and experience of each timekeeper; and (3) a detailed explanation of how Plaintiffs' counsel had reviewed their bills and calculated the hours sought in the request.

In addition to setting forth each timekeeper's background and experience, Plaintiffs set forth their standard hourly rates and requested that the District Court award attorneys' fees at a specific reduced hourly rate, usually hundreds of dollars below their standard rate. ROA.2579-2580.

Plaintiffs also offered declarations from two attorneys who practice regularly in the Western District of Texas and this Court, who attested that the requested hourly rates for Plaintiffs' counsel fell within the range of hourly rates charged by attorneys of similar skill, experience and reputation in connection with civil rights cases. ROA.2944, 2948-2949.

With respect to the requested hours, Plaintiffs' counsel divided their work into ten separate categories or projects, with a corresponding number of hours:

CATEGORY OR PROJECT	**TOTAL TIME**
Pre-Filing Investigation, Preliminary Research, Preparation Of Complaint	179.5
Identify And Work With Experts	35.3
Prepare Preliminary Injunction Motion and Supporting Evidence	249.4
Preliminary Injunction Reply And Hearing/Respond To Texas Values' Amicus Efforts	200.6
Ancillary District Court Proceedings - Motion to Dismiss; Opposing Consolidation/Transfer, Rule 26(f)	104.6
Appellate Briefing/Work with Amici	405.3
Appellate Motions	84.5

Oral Argument Preparation And Attendance	312.1
Post-Oral Argument: Follow Supreme Court Developments/Further Stay-Related Issues/Post-*Obergefell* Work	79.7
Motion for Attorneys' Fees	55.8
TOTAL	1706.8

ROA.2575-2576, 2593-2594.

Exhibits provided with the declaration set forth verbatim the billing entries by timekeeper for each date, which detailed the work performed and the amount of time expended on each date. ROA.2751-2830.

Plaintiffs' counsel explained that they excluded from the request the work of more than 15 attorneys and paralegals who provided short-term assistance during the lawsuit. ROA.2594. In addition, Plaintiffs' counsel scrutinized their bills and removed numerous entries that contained: (1) time incurred dealing with the significant media interest in this case; (2) time spent in teleconferences between attorneys and clients; (3) time spent on an amicus brief in the Fifth Circuit that was never filed; and (4) time incurred to represent the intervenor seeking enforcement of this Court's injunction. ROA.2594-2595. In total, more than 700 hours of time billed on the case – more than 35% of the total hours – were removed from the request. *Id.*

In addition, because Plaintiffs' counsel billed in "blocks" for each particular day, many time entries contained work in the four categories of deleted time as

well as work that was plainly recoverable. In such cases, the time entries were deleted entirely, even if the amount of time expended on the excluded task was only a small percentage of the time expended by that attorney that day. ROA.2596. Plaintiffs also reduced the time incurred by the attorney who argued the Fifth Circuit appeal on several days leading up to and including the oral argument, because he also responded to media inquiries on those days. *Id.* The time on each of the days was reduced by 25%, even though the amount of time spent on media-related tasks was less than 25% of the time incurred on those dates. ROA.2597.

In total, Plaintiffs sought $720,794.00 in attorneys' fees for 1706.80 hours expended by counsel. They also requested costs in the amount of $20,202.90, including expenses for expert witnesses, travel by counsel to arguments in the District Court and this Court, meals by attorneys during travel, filing fees, document retrieval, and copying. ROA.2583, 2604-2605.

The State opposed the motion, arguing that the hourly rates and amount of hours were excessive. It claimed that the hourly rates exceeded the amounts set forth in the 2013 Texas State Bar Rate Report and a 2015 survey of hourly rates by Texas Lawyer Magazine. ROA.3185-3186. In an extensive set of appendices, using codes, the State detailed objections to all but 59 of the billing entries, and

then totaled the time that fell into certain categories of objections.[7] ROA.3194-3195. In total, the State objected to all but 40.2 hours of the already reduced number of hours that Plaintiffs sought. ROA.3194-3254.

Ruling on the fees motion, the District Court held:

> Plaintiffs' counsel has presented the Court with a clear and well-organized motion for fees and costs. The motion shows they have exercised billing judgment to exclude any hours that, even though contemporaneously recorded, they would not have charged to Plaintiffs if they were paying the bill. [Citation] Plaintiffs' attorneys note various instances in which they reduced their billing.

ROA.3500-01.

In setting the hourly rates, the District Court considered the attorney declarations submitted in support of the fees motion, the 2013 Rate Report, and other recent attorneys' fees cases. ROA.3501-02. It set hourly rates 20% lower than the amount requested by Plaintiffs. ROA.3502.

Turning to the number of hours, the District Court held that the total number of hours requested were reasonable. ROA.3502-04. It rejected the State's argument that the time reflected duplicative work. ROA.3503. It proceeded to

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[7] The State created two sets of appendices. One set repeated the billing entries in the same listed that Plaintiffs had used, but listed code letters for different objections next to each entry. ROA.3194-3254. The second set of appendices sorted the entries by objections. ROA.3255-3322. The second set of appendices only included objections to 1,553.4 hours of Plaintiffs' counsel's time entries, but the State did not include separate appendices for its objections on the grounds of vagueness or block-billing. *Id*.

reject other objections that the State asserted, including that it should reject three time entries that contained mention of media-related tasks,[8] all time entries pertaining to gathering and preparing social science evidence in support of the injunction, and time incurred on efforts to expedite the case. ROA.3503-04.

The District Court awarded the full amount of requested costs, finding the amounts reasonable. ROA.3504. It also declined Plaintiffs' request that it increase the lodestar award under the standards set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[9] ROA.3504-06.

SUMMARY OF THE ARGUMENT

This appeal concerns a matter firmly grounded within the district court's discretion, deciding the amount of reasonable and necessary attorney's fees. Here, the district court weighed the evidence and made factual findings. Absent clear error or an abuse of discretion, the district court's ruling should be affirmed. As this Court has said: "We cannot overemphasize the concept that a district court has

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[8] These three time entries contained other tasks unrelated to the media. On two days, the attorney billed a total of 1.4 and 1.9 hours on all matters. ROA.3023, 3053 (1.4 hours on Dec. 23, 2013 and 1.9 on Feb. 9, 2015). On the remaining date that the State identified – Feb. 12, 2014 – the attorney in question billed 8.5 hours, which include preparing for and arguing the preliminary injunction motion. ROA.3019.

[9] Plaintiffs requested that the District Court increase the award only if it reduced the hourly rates and number of hours. Plaintiffs acknowledged that some of the factors a court would consider to determine if a fee award should be increased were already factored into the requested hourly rates and number of hours. ROA.2582.

broad discretion in determining the amount of a fee award." *Associated Builders & Contractors v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990). Here, in determining the lodestar, the District Court set hourly rates for Plaintiffs' counsel 20% below the already discounted rates Plaintiffs requested. As for the reasonable number of hours, the District Court "carefully reviewed the Plaintiffs' attorneys' [billing] entries," found the time "was reasonably expended," "reviewed all of Defendants' objections" and found "they lack merit." ROA.3503-04. Those findings are not clear error or constitute an abuse of discretion. The amount of the award should be affirmed.

Throughout its Opening Brief, the State simply re-argues points it made below in response to Plaintiff's motion for attorney's fees, branding as an abuse of discretion every finding (however reasoned) that the District Court made. The State ignores the District Court's actual analysis, its factual findings, and the reasoning set forth in the order granting the fees motion. The District Court did precisely what it was required to do, and it is not this Court's job to reweigh the evidence.

The State also resorts to revisionism to convince this Court that Plaintiffs' counsel's time was excessive. For instance, the State argues that this case was not novel or complex, because Plaintiffs were "simply following a trail cleared by other courts in other cases." AOB 23. Yet in the first appeal, the State argued:

> Texas's marriage laws do not conflict with any decision of the Supreme Court. The holdings of *Loving*, *Lawrence*, and *Windsor* stop well short of requiring same-sex marriage in all 50 States. The plaintiffs would like this Court to *extend* the holdings of those cases. But a court cannot extend those cases absent a showing that Texas's marriage laws conflict with *the Constitution*, and the plaintiffs have not presented an argument based on the Constitution.

Appellants' Brief filed in *De Leon I* (July 28, 2014). Other than *Windsor*, which did not decide the constitutionality of state laws, the cases that created the trail that Plaintiffs supposedly followed did not exist at the time this case was filed or the preliminary injunction motion was filed. The "other cases" were decided while this case was pending.

More importantly, if this suit's successful outcome was so clearly preordained – as the State now claims – why did it so adamantly defend Section 32 in derogation of its duty to protect its own citizens' federal constitutional rights? The State opposed Plaintiffs' request for a preliminary injunction, appealed that injunction to the Fifth Circuit once it was granted, and refused to recognize valid same-sex marriages even after the District Court issued its permanent injunction. The answer, of course, is that the outcome only became preordained when attorneys' fees were on the table. But having forced Plaintiffs to litigate this case in the District Court and before this Court, the State cannot now complain that Plaintiffs' counsel actually spent time to conduct that litigation.

The State also cannot hide behind misguided notions of equity to evade attorneys' fees. It argues that the fees award is out of line with other same-sex marriage cases – not true. The fees award is substantially *lower* than nearly every other same-sex marriage case in which fees have been litigated or settled.

Nor does equity permit the State to evade an attorneys' fee award because Plaintiffs were represented by pro bono counsel. It is well-settled that prevailing parties may recover fees for the time of counsel that worked pro bono or for non-profit organizations. The overwhelming weight of authority has rejected this argument.

The standard of review is dispositive of the State's regurgitated objections. The State's objections are unfounded factually, are not supported by case law, and often defy common sense – like arguing that more than one attendee at any hearing or oral argument is excessive. The District Court was not required to make attorneys' fees awards with mathematical precision or render findings on every objection to every billing entry – a monumental task here because the State objected to all but 59 billing entries (approximately 40 hours out of the 1700 hours found to be reasonable). Instead, the District Court reduced Plaintiffs' counsel's hourly rates by a substantial amount and knew that Plaintiffs had self-scrutinized the billing records and removed 35% of the billing entries. With that knowledge, the District Court could reasonably conclude that the remaining hours constituted a

reasonable number, regardless of whether a few minutes in a particular billing might have been subject to question.

The same is true for costs. Here, the State is overreaching. Of the $20,202.90 in costs awarded, the State contends that only $5,369.56 is recoverable, $4,600 of which are costs for expert witness fees. AOB 44. Of the remaining amount, the State contends that the total recoverable expenses for travel should be $78.25. AOB 44. The State nowhere explains how Plaintiff's Texas-based attorneys were supposed to have traveled from San Antonio to New Orleans for oral argument on such an amount. Those are just some of the improper arguments about costs that the District Court already rejected.

The State raises no legitimate grounds for challenging the District Court's fees and costs award, and the order should be affirmed.

STANDARD OF REVIEW

Section 1988(b) provides for an award of "a reasonable attorney's fee" to prevailing parties in any action or proceeding to enforce a provision of section 1983. 42 U.S.C. § 1988(b).

As this Court has repeatedly stated, "We cannot overemphasize the concept that a district court has broad discretion in determining the amount of a fee award." *Associated Builders*, 919 F.2d at 379; *accord Barrow v. Greenville Indep. Sch. Dist.*, No. 06-10123, 2007 WL 3085028, at 89 (5th Cir. Oct. 23, 2007) (quoting

Associated Builders). "'In evaluating whether the district court abused its discretion to award attorney's fees, this Court reviews the factual findings supporting the grant or denial of attorney's fees for clear error and the conclusions of law underlying the award *de novo*.'" *Sanchez v. City of Austin*, 774 F.3d 873, 878 (5th Cir. 2014) (quoting *Dearmore v. City of Garland*, 519 F.3d 517, 520 (5th Cir. 2008)); *see Associated Builders*, 919 F.2d at 380 (refusing to overturn award of costs because district court's conclusion that charges were reasonable was "not clearly erroneous"). Subsidiary factual questions include the calculation of a reasonable hourly rate, the determination of reasonable hours, and whether claimed tasks are duplicative or otherwise outside the scope of the claim. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995); *Associated Builders*, 919 F.2d at 379. Reviewing courts defer to the district court on such issues because "[a]ppellate courts have only a limited opportunity to appreciate the complexity of trying any given case and the level of professional skill needed to prosecute it." *Hopwood v. Texas*, 236 F.3d 256, 277 (5th Cir. 2000); *see also Associated Builders*, 919 F.2d at 379 (recognizing "'the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters'") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

ARGUMENT

I. The Lodestar Calculation Is Presumptively Reasonable.

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988 ("Section 1988"), allows "the prevailing party" in certain civil rights actions, including suits brought under § 1983, to recover "a reasonable attorney's fee." In this appeal, the State does not dispute that Plaintiffs are the prevailing party and entitled to attorneys' fees. Instead, the state disputes the amount of the fees and the methodology that the District Court employed in calculating fees.

Federal courts awarding attorneys' fees under Section 1988 use the "lodestar" methodology. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010). Since *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the lodestar method for calculating attorneys' fees has been "'the guiding light of our fee-shifting jurisprudence.'" *Perdue*, 559 U.S. at 551 (quoting *Gisbrecht v. Barnhart,* 535 U.S. 789, 801 (2002)).

The lodestar is calculated by multiplying the number of hours an attorney reasonably spent on the case by an appropriate hourly rate, which is the market rate in the community for this work. *Black v. Settlepou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013); *see also Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999). One of the "virtues" of the lodestar is that it "produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a

comparable case." *Perdue*, 559 U.S. at 551 (original emphasis). "[T]here is a 'strong presumption' that the lodestar figure is reasonable." *Id*. at 554.

In a second step in the lodestar calculation, the court considers whether it should increase or decrease the award. *Hensley*, 461 U.S. at 434; *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds, Blanchard v. Bergeron*, 489 U.S. 87 (1989)). *Johnson* identifies numerous factors that courts should consider in its analysis. The District Court declined to apply an enhancement, so, save for one issue, these factors are largely irrelevant to this appeal.

The State contends that the award below violates some unstated standards of "equity." AOB 7-10. It then challenges each of the facets of the lodestar calculation – the hourly rates that the District Court found appropriate and the amount of hours that it determined were reasonably expended on this case. None of these arguments have merit.

II. The State's Equitable Argument Is Factually And Legally Wrong.

The State begins its Opening Brief with an appeal to an unarticulated standard of equity to argue that the attorneys' fees award in this case is excessive. AOB 7-10. Exactly how this is supposed to fit into the lodestar calculation is unclear, but, regardless, the State is wrong. It suggests two reasons why the award is inequitable: (1) it allegedly is inconsistent with fees awarded in other same-sex

marriage cases; and (2) it does not factor in supposed "noneconomic rewards" that Plaintiffs' counsel received. These arguments are unsupportable on both legal and factual grounds.

A. The Attorneys' Award Is Consistent With – And Lower Than – Most Awards and Settlements Of Attorneys' Fees In Same-Sex Marriage Cases.

Plaintiffs argue that the amount awarded in this case is inequitable because it "is higher than that received by others in similar challenges to state laws." AOB 5; *see also id.* at 8. The State Defendants cite two cases that purportedly involved lower fees awards, but fail to disclose numerous other cases where the requested fees dwarf what Plaintiffs were awarded.

The award of $585,470.30 in attorneys' fees and $20,202.90 in costs is fully consistent – and usually less than – the amounts of attorneys' fees that plaintiffs in same-sex marriage cases have received. Notably:

- The Plaintiffs in the Tennessee same-sex marriage challenge were awarded $1,983.131.29 in attorneys' fees, and $52,916.04 in costs and expenses to the plaintiffs that challenged its law. *Tanco v. Haslam*, No. 3:13-cv-01159, 2016 WL 1171058, at *10 (M.D. Tenn. Mar. 25, 2016).

- In Kentucky, plaintiffs were awarded $1,082,905.10 in attorney fees and $32,727.86 in costs. *Bourke v. Beshear*, No. 3:13-CV-00750-CRS, 2016 WL 164626, at *7-8 (W.D. Ky. Jan. 13, 2016).[10] That was in addition to a previous award of $70,325 in interim fees. ROA.3437.

[10] This amount does not include time incurred by the Stanford Supreme Court Litigation Clinic and outside counsel that provided free legal services. *Bourke*, 2016 WL 164626, at *2 & n.4.

- The Oklahoma plaintiffs were awarded $296,847.50 in attorneys' fees and $1,895.27 in costs incurred on appeal. *Bishop v. Smith*, 112 F. Supp. 3d 1231 (N.D. Okla. 2015).

- Michigan agreed to pay $1.9 million to the plaintiffs in *DeBoer v. Snyder.* ROA.3376.

- Plaintiffs in *Wolf v. Walker* sought fees of $1,237,623 for 2393.09 hours. ROA.3379, 3392. The parties settled for $1,055,000. ROA.3407.

- Plaintiffs in *Obergefell v. Hodges* sought fees of $1,096,142.50 plus a lodestar enhancement. ROA.3411. The parties stipulated to a judgment for attorneys' fees of $1.3 million in fees and expenses. (Appellees' Motion for Judicial Notice ("RJN"), Exh. 6.)

- Plaintiffs in the Virginia case, *Bostic v. Rainey*, documented fees of $1,738,645 for 2,372 hours worked. ROA.3482. The parties settled for $520,000.[11] ROA.3483.

- Indiana settled the fees request in *Baskin v. Bogan* for $650,000. ROA.3489.

As these cases demonstrate, the amount awarded below is fully consistent with – and usually lower – than attorneys' fees awards and settlements in other same-sex marriage cases. *Bishop* is the only one of those cases that involves a lower award, but the *Bishop* plaintiffs only sought fees incurred on appeal. *Bishop*, 112 F. Supp. 3d at 1237 (stating that plaintiffs' counsel "did not seek fees for time spent obtaining this Court's judgment"). Further, the amount awarded did not include fees incurred to prepare the attorneys' fees application. *Id*. at 1253.

[11] Virginia also settled the attorneys' fees in a related case in intervention for $60,000, though the attorneys stated in a consent decree that they had incurred $1 million in fees. ROA.3486.

Notably, the *Bishop* plaintiffs claimed 1015.9 hours incurred on appeal. *Bishop*, 112 F. Supp. 3d at 1239 (listing hours per attorney as 478.4, 108.9, and 428.6). By comparison, Plaintiffs' counsel in this case requested attorneys' fees for 881.6 hours in connection for appellate-related proceedings. ROA.2575-2576 (405.3 for briefing and working with amici, 84.5 for work on appellate motions, 312.1 for oral argument preparation and attendance, and 79.7 for post-oral argument developments). In other words, counsel in *Bishop* spent more hours on their appeal than Plaintiffs' counsel.

Thus, the above cases all involved fees awards larger than the District Court's award below. The same is also true with the two cases that the State mentions in the Opening Brief. For instance, the State places great reliance on *Latta v. Otter*, a challenge to the same-sex marriage ban in Idaho. As the State concedes, the *Latta* plaintiffs were awarded $397,300.00 in attorneys' fees in 2014. AOB 8, citing *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 7245631 (D. Idaho Dec. 19, 2014) ("*Latta I*"). But the State fails to disclose that the 2014 award was *pendent lite*. As Plaintiffs pointed out below – and even attached as an exhibit (ROA.3463) – the *Latta* plaintiffs received a second attorneys' fees award, primarily for fees incurred on appeal. *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2015 WL 4623817, at *6 (D. Idaho Aug. 3, 2015) ("*Latta II*"). In *Latta II*, the

plaintiffs were awarded $220,160. *Id.* Added together, the two *Latta* awards total $617,460, more than the District Court awarded here.

Further, the total hours that the *Latta* court found to have been reasonably expended on the case totaled 1729.8 hours. *Latta I*, 2014 WL 7245631, at *10 (table showing 1,101 total reasonably expended hours); *Latta II*, 2015 WL 4623817, at *5 (table showing 628.8 total reasonably expended hours). Plaintiffs' counsel sought fees for a very similar amount – 1706.8 hours. Thus, *Latta* is completely consistent with the award of attorneys' fees here.

Equally unpersuasive is the State's reliance (AOB 8) on *Searcy v. Bentley*, No. 1:14-cv-00208-CG-N (S.D. Ala.). Again, the State fails to disclose key facts about that case that undermine its arguments.

First, the parties in *Searcy* did not brief the merits of the appeal at the Eleventh Circuit. The appeal was stayed pending the outcome of *Obergefell*, and the injunction summarily affirmed once the Supreme Court issued its opinion.[12] (RJN, Exh. 1.) Here, in stark contrast, full merits briefing and oral argument took place in this Court.

Second, although the State claims that *Searcy* involved "a much more protracted and complex lawsuit" (AOB 8), the District Court docket in the case

[12] *Searcy* did involve stay applications at the Eleventh Circuit and Supreme Court, but those proceedings, by nature, involve much faster briefing and no oral argument.

belies that assertion. It shows that the case was filed in May 2014 (RJN, Exh. 2), well after numerous district courts, including the District Court in this action, had struck down same-sex marriage bans. *Searcy* counsel even provides a declaration stating that "to minimize costs and time," counsel "used legal research and briefing from other similar cases where doing so was relevant and applicable." (RJN, Exh. 4.) Yet even without extended appellate proceedings and existing cases to rely upon for their summary judgment motion, the two attorneys in *Searcy* claimed that they expended 688.4 hours on the case. (RJN, Exh. 3.) That is not appreciably lower than the 769.4 hours that Plaintiffs' counsel incurred for their District Court efforts – efforts that included performing their own legal research, interviewing multiple expert witnesses, preparing expert reports, and analyzing their own social science materials.

Third, the State fails to mention that *Searcy* was only part of the Alabama same-sex marriage litigation. The *Searcy* plaintiffs challenged Alabama's failure to recognize their California marriage, but a separate action – *Strawser v. Strange*, Civ. A. No. 14-0424-CG-C – was brought by same-sex couples who were denied marriage certificates. As the dockets reflect, far more proceedings have occurred in *Strawser* than in *Searcy*, including nearly all post-*Obergefell* litigation. *Compare* RJN, Exh. 2 (reflecting 81 entries, with little but attorneys' fees-related proceedings following *Obergefell*) *with* RJN, Exh. 5 (reflecting 175 entries). No

attorneys' fees motion appears to have been filed yet in *Strawser*, where a motion for permanent injunction is still pending. RJN, Exh. 5. In other words, the $197,000 sought in *Searcy* represents only part of the fees incurred in the Alabama same-sex marriage litigation; the total amount of attorneys' fees incurred in that litigation is unknown, but undoubtedly will be significantly higher.

Accordingly, the State's argument that the award below was inconsistent with other same-sex marriage cases is plainly wrong.

B. Purported "Non-Economic" Benefits Have No Bearing On An Attorneys' Fees Award Under Section 1988.

The State also argues that the award is inequitable because the District Court purportedly failed to consider "noneconomic rewards" that Plaintiffs' counsel received for their *pro bono* work on this case. This argument fails.

As a procedural matter, any such argument has been waived. "A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it." *United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) (citation omitted); Fed. R. App. P. 28(a)(8)(A) (stating that briefs must include "contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies."). Elaborating on this rule, this Court explained:

> It is not enough to merely mention or allude to a legal theory. We have often stated that a party must 'press' its claims. At the very least, this means clearly identifying a theory as a proposed basis for deciding the case – merely intimating an argument is not the same as 'pressing' it. In addition, among other requirements to properly raise

> an argument, a party must ordinarily identify the relevant legal standards and any Fifth Circuit Cases. We look to an appellant's initial brief to determine the adequately asserted bases for relief.

Scroggins, 599 F.3d at 446-447 (citations and quotations omitted); *see also Willis v. Cleco Corp.*, 749 F.3d 314, 319 (5th Cir. 2014) (where plaintiff "fail[ed] to identify a theory as a proposed basis for deciding the claim," the issue "is inadequately briefed, and we hold that it is waived").

Here, the State vaguely alludes to Plaintiffs' receipt of "noneconomic rewards" and cites no authority to support the suggestion that this is a valid consideration when awarding attorneys' fees under § 1988. Having identified no relevant legal standards or applicable cases to support such an argument, the State's argument should be disregarded.

Moreover, the State's argument contravenes established law. The State concedes, as it must, that "the law does provide an award of attorney's fees to attorneys that take on *pro bono* cases." AOB 9. "The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v. Stenson*, 465 U.S. 886, 894-95 (1984). In fact, when Congress enacted Section 1988, the Senate Report approved the "appropriate standards" that had been applied in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974). S. Rep. No. 94-1011 (1976),

reprinted in 1976 U.S.C.C.A.N. 5908, 5912. *Stanford Daily*, in turn, recognized that a court "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act pro bono publico than as an effort at securing a large monetary return." 64 F.R.D. at 681. The House Report noted the irony that the plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), could not recover their attorney's fees, despite the landmark significance of the ruling. H.R. Rep. No. 94-1558, at 4-5 (1976).

Consistent with that precedent and background, courts reject the argument that attorneys' fees should be denied or decreased because a prevailing party was represented pro bono or otherwise had no obligation to pay its own attorney. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71 n.9 (1980) (plaintiffs were represented pro bono by public interest group); *Fairley v. Patterson*, 493 F.2d 598, 605-06 (5th Cir. 1974) (affirming award of fees to attorneys employed by tax-free foundation who would not have received payment from clients); *Copeland v. Marshall*, 641 F.2d 880, 900 (D.C. Cir. 1980) (en banc) (fee award should be based on value of legal services rendered, even if law firm had agreed to handle case pro bono public). At least one court has expressly rejected the State's argument that an award should be reduced because an attorney received accolades for representing a prevailing party. *LV v. N.Y.C. Dep't of Educ.*, 700 F. Supp. 2d 510, 516 n.8 (S.D.N.Y. 2010).

As this authority demonstrates, parties represented pro bono – even in noteworthy cases – have an equal right to recover attorneys' fees under §1988. Any suggestion to the contrary should be rejected.

III. Plaintiffs' Attack On The Lodestar Calculation Should Be Rejected.

The purpose of an appeal is not to reweigh evidence and override the District Court's factual findings and discretionary determinations. *Veasey v. Abbott*, 796 F.3d 487, 503 (5th Cir. 2015) ("We are mindful that it is not our role to reweigh the evidence for the district court."); *United States v. Manners*, 384 F. App'x 302, 307 (5th Cir. 2010) (court would not find an abuse of discretion standard "even though we may have reached a different result"). Nonetheless, the Opening Brief does nothing more than reargue the evidence that the District Court considered. The State offers no valid grounds to dispute the attorneys' fees award.

A. The District Court's Determination Of The Prevailing Market Rates Is Correct And Supported By Evidence.

"[A] district court's determination of a 'reasonable hourly rate' is a finding of fact subsidiary to the ultimate award and is, therefore, reviewable under the clearly-erroneous rubric." *Islamic Ctr. v. City of Starkville, Miss.*, 876 F.2d 465, 468 (5th Cir. 1989), *overruled on other grounds by Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir. 1993); *see also McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 380 (5th Cir. 2011) ("district court's factual findings as to . . . the reasonable rates for attorneys' fees are reviewed by this court for clear error"). To determine the

appropriate hourly rates for Plaintiffs' counsel, the District Court considered evidence submitted by both parties and explained how it concluded that the prevailing rates in the community were 20% below the already-reduced rates that Plaintiffs requested. That finding was not clearly erroneous.

Contrary to the State's arguments, the District Court had ample evidence before it to support its findings. Plaintiffs submitted:

(1) Declarations from its own counsel detailing its attorneys' background, experience, expertise, and customary rates (ROA.2587-2605);

(2) Declarations from two attorneys who practice regularly in the Western District of Texas that attested that the hourly rates requested for Plaintiffs' counsel were within the customary range for attorneys of comparable skill and experience (ROA.2941-2957); and

(3) Examples of several cases where courts applied hourly rates comparable to the rates Plaintiffs requested (ROA.3369-3490).

In addition to the foregoing evidence, the District Court considered two-year old rates from the State Bar of Texas Hourly Rate Report's ("Rate Report") that the State submitted. ROA.2501.

On appeal, the State does not explain how the District Court abused its discretion in reaching the conclusions it reached. Instead, the State suggests that the District Court was required to follow the Rate Report. AOB 13. But this Court has previously held that it is not clearly erroneous for a District Court to refuse to consider a Texas State Bar survey. *Walker v. United States HUD*, 99 F.3d 761, 770 (5th Cir. 1996) (not clear error for court to dismiss 1992 State Bar of Texas survey of attorney rates); *see also Alex v. KHG of San Antonio, LLC*, No. 5:13-cv-0728(RCL), 125 F. Supp. 3d 619, 625 (W.D. Tex. 2015) (citing Rate Report's median rates, but awarding higher rates).

Nor should the Rate Report be controlling. The rates the State seeks to apply are median rates for all attorneys in a particular geographic location based solely on their number of years of experience. But this one-size fits all approach disregards other factors that courts (and clients) consider in assessing an hourly rate – counsel's skill and reputation. *Blum*, 465 U.S. at 895 n.11 (stating that rates should be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation").

The State offers no explanation for why the median rates it cites are the reasonable hourly rates of Plaintiffs' counsel. For instance, why should the District Court have applied a rate of $263 – the median 2013 hourly rate for attorneys in the San Antonio-New Braunfels metro area with more than 25 years of practice –

to Barry Chasnoff, a nationally recognized trial attorney with 40 years of experience, who routinely handles multi-million dollar cases, and is a member of the Texas Bar Foundation, an organization that elects only the top 1/3 of 1% of Texas attorneys to its membership.[13] ROA.2599. Common sense dictates that an attorney of Mr. Chasnoff's skill and reputation would command an hourly rate above the median rate for all San Antonio attorneys with 25 or more years of experience.

Another illustrative example is the rate for attorney Pratik Shah, which the State specifically mentions as being inconsistent with the Rate Report. AOB 13. The State fails to address the evidence offered below regarding Mr. Shah's skill and reputation. ROA.2599-2600. He is the head of an international law firm's Supreme Court practice group, served as an assistant to the United States Solicitor General, and has argued 13 cases before the United States Supreme Court (*id.*) – including one of the Supreme Court cases on which the State relies. AOB 7 (citing *Perdue*, 559 U.S. 542); *see Perdue*, 559 U.S. at 545 (stating that Mr. Shah argued on behalf of the United States). Given that experience, it was not clear error for the District Court to depart from the Rate Report in awarding a higher hourly rate for Mr. Shah – or any other of Plaintiffs' attorneys.

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[13] See Texas Bar Foundation, http://txbf.org/about-us/our-members/.

Even more misguided is the State's contention that the District Court abused its discretion by failing to consider the Texas Lawyer's 2015 Annual Salary & Billing Report. As Plaintiffs argued below, that survey is not credible evidence of counsel's hourly rates. Unlike the Rate Report, which receives survey responses from more than 10,000 attorneys,[14] the Texas Lawyer survey obtained information from 83 law firms. ROA.3347. Of those, only 16 were law firms with more than 50 attorneys and only 12 had their primary location in San Antonio or Austin. *Id*. The Texas Lawyer survey also calculated rates only by firms' "primary Texas locations," not all of their locations and not even all of their Texas locations.[15] The District Court's disregard for the Texas Lawyer survey was amply justified. *See, e.g.*, *Chacon v. City of Austin, TX*, No. A-12-CA-226-SS, 2015 WL 4138361, at *6 (W.D. Tex. July 8, 2015) (refusing to follow rates in Texas Lawyer survey).

Yet, even with those flaws, none of the rates selected by the District Court is more than $75 above the median averages listed in the Texas Lawyer survey for

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[14] State Bar of Texas Department of Research and Analysis 2013 Hourly Rate Sheet, available at https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27264.

[15] Plaintiffs note that the median hourly rates for an equity partner at a Texas firm of 100 or more attorneys is $448, which is more than the amount awarded for any of Plaintiffs' attorneys. ROA.3347.

attorneys at the levels of Plaintiffs' attorneys.[16] Given the detailed skill, reputation, and experience of Plaintiffs' attorneys, the District Court had ample reason to conclude that their hourly rates would be above the median. Thus, the District Court did not clearly err in declining to apply the Texas Lawyer survey's rates.

The rest of the State's argument on hourly rates merits little response. It argues that one of the two declarations from other attorneys is "biased" and not deserving of "weight," but: (1) the weight of evidence is a matter for the District Court; and (2) the State says nothing about the second declarant. That declarant stated that he has 20 years of experience, is a partner at a Texas law firm, and has litigated discrimination cases and appeals, including before this Court. ROA.2946-2947. His customary hourly rate of $430 (ROA.2948) is higher than any rate used by the District Court, even for attorneys with decades more experience. That alone establishes that the District Court did not clearly err in determining hourly rates.

Likewise, the State argues that the District Court wrongly relied on one recent case in determining the hourly rates (AOB 14), but is silent about the other two recent cases that Plaintiffs pointed to as proof that their requested hourly rates were consistent with those used in other district court cases. See ROA.2581; *United States v. Cmty. Health Sys*., No. H-09-1565, 2015 WL 3386153, at *22

[16] In the State's table (AOB 12), it lists the Texas Lawyer annual rate for Mr. Shah as $300 per hour, but the actual rate for an equity partner in that survey is $325 (ROA.3347).

(S.D. Tex. May 4, 2015) (awarding hourly rates of $550 for attorneys with 32 and 29 years of experience, $300 for other attorneys with five or more years of experience, and $125 for paralegals); *Davis v. Perry*, 991 F. Supp. 2d 809, 836 (W.D. Tex. 2014), *rev'd on other grounds sub nom*, *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015) (in voting rights act case, awarding rates of $418 for experienced attorneys and Washington, D.C. partners of national firm, $324 for senior associate, and $252 for fourth-year associates).

Nothing in the State's challenge to the District Court's findings of the reasonable hourly rates establishes clear error. Accordingly, there is no basis to overturn those findings, which are well-supported by the evidence.

B. The District Court Properly Awarded The Requested Hourly Rates.

As with its attack on the District Court's findings on hourly rates, the State's challenge to the finding that Plaintiffs' requested hours were reasonable amounts to little more than rearguing the evidence. The District Court considered the State's arguments and rejected them, and it did not abuse its discretion.

1. The State wrongly downplays the difficulty and complexity of this case.

The State argues that Plaintiffs should not have incurred as much time on this case as they did, because they "were simply following a trail cleared by other courts in other cases." AOB 22. This was not a simple case, the outcome was not

preordained, and the stakes were high. In short, this lawsuit was a battle that the State fought tooth-and-nail to defend on a legal landscape that constantly changed.

The State contends that this case was neither complex nor novel because Plaintiffs "heavily relied on other court decisions striking down similar state laws" illustrated by the fact that Plaintiffs "repeatedly cited *United States v. Windsor*" in the motion for preliminary injunction. AOB 22. Plaintiffs are correct that this case would have been simple if *Windsor* had decided if laws like Section 32 passed constitutional muster. Of course, *Windsor* did not decide that issues; *Obergefell* did – 20 months after this case was filed.

At the time of filing and preparation of the motion for preliminary injunction, no other court had interpreted whether *Windsor* compelled states to strike down same-sex marriage bans. In fact, the State argued to this Court that "*Loving*[*v. Virginia*], *Lawrence*[*v. Texas*], and *Windsor* stop well short of requiring same-sex marriage in all 50 States." Appellants' Brief filed in *De Leon I*, at 4 (July 28, 2014). The State also argued that *Windsor* supported the State's position, because it reinforced the states' right to define marriage. *Id*. at 29-30.

Those arguments belie the State's argument here. If this suit's successful outcome was so clearly preordained—as the State now claims—why did it so adamantly fight against Plaintiffs? The State opposed Plaintiffs' request for a preliminary injunction, appealed that injunction to this Court once it was granted,

and refused to recognize valid same-sex marriages even after the District Court entered the Final Judgment. If the law was as clear as the State now suggests, its defense of this litigation was in bad faith.

The reality was far different from the State's description. The cases that Plaintiffs supposedly "followed" did not exist when this case was filed or the injunction motion was prepared.[17] During the appeal, the legal landscape was ever-changing as new decisions were issued and the federal Courts of Appeals split on whether laws like Section 32 were constitutional. None of those decisions was controlling in this Circuit or reduced the time Plaintiffs were forced to expend on the briefing. What the State calls "following a trail" was, actually, grappling with competing decisions, addressing Supreme Court precedent and decisions of courts grappling with similar issues, and fully articulating the reasons why Section 32 was unconstitutional.

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[17] The only post-*Windsor* case concerning a state law regarding same-sex marriage was *Obergefell v. Kasich*, No. 1:13–cv–501, 2013 WL 3814262 (S.D. Ohio July 22, 2013), a case the State claims Plaintiffs "repeatedly cited" in its preliminary injunction motion. AOB 22. Perhaps citing a case three times constitutes "repeatedly" citing it, but the fact that the case is first cited on page 44 of the 49-page memorandum undermines the State's insinuation that *Obergefell v. Kasich* was a significant precedent. ROA.1084. In fact, *Obergefell v. Kasich* had a very limited scope, because it only addressed Ohio's refusal to recognize a same-sex marriage performed in another state. *Obergefell v. Kasich*, 2013 WL 3814262, at *1.

If anything, the constant decisions from other courts caused Plaintiffs' counsel to expend more time on the preliminary injunction reply and the appellate briefing. As new cases were decided close to filing deadlines, they forced revisions to the briefs. ROA.2776. (time entries on 1/22/14 reflecting revisions to preliminary injunction reply in light of new decision); ROA.2799 (time entries on 9/4/14 reflecting revision of Appellees' Brief in light of new Seventh Circuit decision).

Not only was this case complicated in terms of legal analysis, it involved substantial factual development. The State argued that it was not required to identify any specific state interest that Section 32 purportedly served. In opposition to the preliminary injunction motion, the State argued that "Plaintiffs must 'negative *every conceivable basis* which might support [the law].'" ROA.1614 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993)); *see also id.* (also arguing that the State did not have to provide evidence that Section 32 actually served or the Legislature was motivated by those conceivable reasons for its enactment). On appeal to this Court, the State argued that Plaintiffs had "to refute every defense of traditional-marriage laws in the amicus briefs and academic literature, as well as any possible rationale of which this Court might conceive." Appellants' Reply Brief filed in *De Leon I* (Oct. 10, 2014).

As a result, Plaintiffs were forced to address numerous potential arguments that the State – and the numerous *amici curiae* filing briefs in this Court – did or could have raised. To address these possible issues, Plaintiffs compiled hundreds of pages of social science and historical documents, worked with experts in multiple fields, and attempted to refute every possible reason that a court might conclude Section 32 served a state interest.

Having forced Plaintiffs to argue this case in multiple courts and to address myriad grounds that might be asserted as a basis for Section 32, the State cannot now argue that this case was simple and the outcome preordained. It cannot rewrite the history of this litigation.

2. The District Court did not err in rejecting the State's arguments about "block-billing."

The State argues that the District Court abused its discretion by not excluding time that Plaintiffs' counsel "block-billed" (16-18). That argument has previously been rejected by this Court and cannot be squared with other precedent.

In *Hollowell v. Orleans Reg'l Hosp. LLC*, 217 F.3d 379 (5th Cir. 2000), a losing party made the same argument that the State makes about "block billing":

> Defendants further question plaintiffs' counsel's billing judgment by asserting that counsel "lumped" the time entries, grouping tasks performed into a single bill, thereby preventing the court from evaluating the reasonableness of the bill. Defendants do not cite to specific entries, but rather allege that all of the time entries are lumped together. The district court, however, found the contemporaneous billing records specific

> enough to determine that the hours claimed were reasonable for the work performed. Defendants' blanket allegation that the entries are unreasonable does not persuade us that the district court abused its discretion.

Id. at 392-93.[18] By rejecting the State's objections and expressly finding that Plaintiffs' time was "reasonably expended[,]" the District Court likewise found that it had enough information to determine that Plaintiffs' counsel's hours were reasonable. That conclusion was not an abuse of discretion.

Further, imposing some bright-line rule against awarding fees that are recorded in block-billed records also is inconsistent with this Court's rule that billing records are not necessary to prove the reasonableness of a fee request. *Gagnon v. United Technisource, Inc*., 607 F.3d 1036, 1044 (5th Cir. 2010); *see also Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325 (5th Cir. 1995) (failure to provide contemporaneous billing statements "does not preclude an award of fees per se, as long as the evidence produced is adequate to determine reasonable hours."). If a party seeking fees is not even required to submit its counsel's billing statements, it cannot be the law that a court will only award fees if billing statements have a particular format.

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[18] On pages 20-21, the State cites several cases ostensibly for the proposition that "the Fifth Circuit" recommends reducing awards for block-billing. Yet none of the cases it cites were decided by this Court. All but one of the cited cases are district court orders and the other is the Supreme Court's opinion in *Hensley*, which merely states that courts may reduce an award "[w]here the documentation of hours is inadequate." 461 U.S. at 433.

3. The District Court did not clearly err when it held that Plaintiffs time requested "was reasonably expended" – a finding that defeats the State's challenges to the reasonableness of the hours.

Much of the State's Opening Brief is devoted to repeating the arguments it made below about the number of hours Plaintiffs' counsel expended on the case. These arguments are couched in terms of attacking the hours as "excessive" or "duplicative," claiming that particular tasks were "overstaffed," or dismissing certain attorneys as "passive observers" at the injunction hearing and oral argument before this Court. These arguments have already been considered and rejected by the District Court in "find[ing] Plaintiff has shown the time related to those entries was reasonably expended."[19] ROA.3503. That finding is not clearly erroneous.

The finding refutes the State's arguments about specific categories of time it tries to reargue on appeal. For example, the State parses the District Court's words – that it said "certain tasks *may* not have been completed all at once" (AOB 19 (quoting ROA.3503)) – to argue that the District Court made an improper assumption that work on certain documents was not duplicative. The context proves that the statement is not subject to the State's interpretation. In the paragraph immediately above the finding that the Plaintiffs showed the time was reasonably expended, the District Court wrote:

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[19] Importantly, the District Court also acknowledged that Plaintiffs' counsel had "exercised billing judgment" in excluding more than 700 hours of time billed to the case. ROA.3500-01.

> ***[R]ather than illustrating duplication of effort***, Plaintiff attorneys' entries indicate that certain tasks may not have been completed all at once. For example, several attorneys, including Michael Cooley, Matthew Pepping, and Jessica Weisel, have time entries relating to "research and draft" of sections of the appellees' brief. The Court does not find such entries to be duplicative.

ROA.3503 (emphasis added). The District Court's meaning is plain: in a complex case involving numerous legal and factual issues, work on a single pleading or brief might be apportioned among multiple attorneys who will work on their tasks at different times. That multiple attorneys worked on the complaint, injunction briefing, and appellate brief does not conclusively establish that their work was duplicative. It was not an abuse of discretion to reject the State's objections and was not clear error to find the time was reasonably expended.

Equally misguided is the State's argument that the District Court abused its discretion in "failing to address" the State's objections that Plaintiffs' counsel spent too much time preparing for the preliminary injunction hearing or oral argument. AOB 24. The State appears to suggest that the District Court was required to issue an express finding in response to each objection to a time entry or category, but it cites no authority for such a proposition and Plaintiffs can find none. By carefully reviewing the billing records, finding Plaintiffs' counsel's hours reasonable, and expressly stating that that it "reviewed all of Defendants' objections to Plaintiffs' attorneys' fees, and finds they lack merit" (ROA.3504), the District Court rendered

sufficient findings. The District Court is the best judge to determine the amount of time reasonably expended on this case; it is not for this Court to reweigh the evidence.

In any event, the State's arguments about the injunction hearing and the oral argument reek of after-the-fact nitpicking. For instance, the State contends that the preparation time for the injunction hearing was excessive because the hearing only lasted 1.8 hours. AOB 24. However, as Plaintiffs' counsel explained below, they did not know how long the argument would take when they prepared for the argument. ROA.3372. Plaintiffs were not advised that the State intended to call no witnesses until shortly before the hearing. *Id.* Moreover, given the State's assertion that Plaintiffs had to repudiate every conceivable basis for Section 32, Plaintiffs' counsel had to prepare to address any issue the District Court might have raised. *Id.* To that end, they were forced to incur substantial time, and the District Court did not err in finding that time reasonably expended.

The same is true of the State's contention that certain attorneys who attended the preliminary injunction hearing and the oral argument in this Court were "passive observers." AOB 25-26. That claim was repudiated below, as Plaintiffs' counsel explained the roles performed by those attorneys and why their attendance at the arguments was necessary. ROA.3371-73. For instance, two of the attorneys dismissed as "passive observers" at the appellate argument "were the primary

drafters of Plaintiffs' Appellees' Brief." ROA.3372. In advance of the oral argument, they helped the attorney arguing the case prepare his argument, providing "feedback about key cases and the record." *Id*. At the oral argument, during the arguments in the Louisiana and Mississippi cases, those attorneys identified issues that might arise during Plaintiffs' counsel's argument and prepared potential responses to this Court's questions. ROA.3371-72. Based on that evidence, the District Court did not clearly err in finding that time was reasonably expended. *See Bourke*, 2016 WL 164626, at *3 (rejecting challenge to fees for six attorneys and one paralegal who traveled to Washington, D.C. to assist in preparation and provide feedback at Supreme Court argument).

Indeed, the State's objections to staffing rings particularly false when its own level of staffing is compared to Plaintiffs'. At the preliminary injunction hearing and Fifth Circuit oral argument, Plaintiffs had fewer attorneys than the State required for a telephonic conference concerning the State's lack of compliance with the injunction. ROA.3586-3602. At that hearing, the State was represented by no less than eight attorneys. ROA.3589-90.

Equally unsupportable is the State's attack on a few time entries that it labels vague. Although it cites *Louisiana Power & Light* as authority for the proposition that vague time entries can be rejected, the State omits this Court's actual holding in the case – even though submitted time records were "scanty as to

subject matter[,]" after considering "the time records as a whole" and "the district court's familiarity" with the case, this Court could not say "that the district court clearly erred in refusing to reduce the hours in question for vagueness." *Louisiana Power & Light*, 50 F.3d at 326-27. That result is consistent with the deference the reviewing court will give to the district court's factual determination about the reasonableness of the hours claimed. *Id*. at 324 (stating that court reviews such determinations "for clear error").

That standard of review compels this Court to reject the State's argument. Even assuming, *arguendo*, that some of the time entries are "vague," the District Court "carefully reviewed the Plaintiffs' attorneys entries, and those objected by Defendants as duplicative or vague." ROA.3503. Given its knowledge of the issues and proceedings in this case, this Court cannot say that the District Court clearly erred when it found that "Plaintiff has shown the time related to those entries was reasonably expended." *Id*.

C. The District Court Did Not Award Fees For Non-Compensable Time.

1. There is no requirement that courts reduce hourly rates for time expended when traveling.

Failing to cite any mandatory authority, the State maintains that "[t]he Fifth Circuit has held that time spent for travel should not be billed at the same hourly rate sought for active legal work, and should be reduced by fifty percent." AOB 28-29. The State then argues that this 50% reduction must be applied to entire

days of time billed by Plaintiffs' counsel – including days that included plenty of non-travel related work.

For instance, the State lists 19 hours "billed traveling" by Mr. Shah. AOB 29 (citing chart at ROA.3321). While that may seem like a large number, Mr. Shah has two time entries on the chart, one of which lists 14 hours spent on:

> Travel to Houston; review briefs and materials related to Fifth Circuit appeals of preliminary injunction; conference with N. Lane, M. Pepping, and R. Kaplan of Paul Weiss re: preparation and mooting for upcoming Fifth Circuit argument; telephone conference with all co-counsel re: oral argument strategy.

ROA.3321. This travel was to a key moot court in Houston involving counsel for each of the same-sex marriage cases argued before this Court. ROA.3373. The moot court was attended by non-party attorneys and law professors who helped counsel in the three appeals develop and coordinate their arguments. ROA.3373. The argument that the District Court was required to reduce this time by 50% because counsel had to travel to that moot court makes no sense.

Nor is such a proposition supported by any authority. In each of the cases cited by the State, a district court exercised its discretion to award travel time at reduced hourly rates. *Alex*, 125 F. Supp. 3d at 627; *Bd. of Supervisors of La. State Univ. v. Smack Apparel Co.*, No. 04–1593, 2009 WL 927996, at *6 (E.D. La. Apr. 2, 2009); *Hopwood v. State of Tex.*, 999 F. Supp. 872, 914 (W.D. Tex. 1998), *aff'd in part, rev'd in part*, 236 F.3d 256 (5th Cir. 2000). These cases do not establish a

requirement that a district court reduce travel time; they merely recognize the discretion that courts possess to reduce such time. *See*, *e.g.*, *Alex*, 125 F. Supp. 3d at 627 ("[C]ourts in the Fifth Circuit have held in other contexts that a court has discretion to reduce hours billed to travel time in calculating a fee award.") (quoting *Hilton v. Exec. Self Storage Assocs., Inc*., No. H-06-2744, 2009 WL 1750121, at *12 (S.D. Tex. June 18, 2009)).

If a court has discretion to reduce travel hours, it also has discretion to decline to reduce them. Here, all but approximately 10 of the travel hours was incurred to travel to the Houston moot court on January 6, 2015 and the oral argument in New Orleans on January 9, 2015. The District Court did not err in finding that this travel time was reasonable and should be compensated at counsel's regular hourly rate.

2. The District Court was within its discretion to find reasonable the hours the State claims were incurred on "purely clerical" tasks and alleged "media" time.

Challenging hours that purportedly are not recoverable, the State adopts an all-or-nothing approach. If it identifies any single task in a time entry that it contends falls into a non-recoverable category of time, the State claims the full time entry for falls into that category. The District Court obviously rejected the State's overreaching and it had discretion to do so. As this Court has said, courts are not required to "'reduce the calculation of a reasonable fee to mathematical

precision.'" *Earl v. Beaulieu*, 620 F.2d 101, 103 (5th Cir. 1980) (quoting *Johnson*, 488 F.2d at 720).

The State claims that the District Court abused its discretion in failing to strike 114.8 hours of attorney and paralegal time that allegedly was "purely clerical." But those hours consist of no entries containing even the slightest hint of a "clerical" task.

For instance, one time entry listed is for attorney Matthew Pepping dated January 15, 2014. The full entry lists 2.3 hours expended on:

> Confer with Jessica Weisel regarding reply; Confer with Michael Cooley regarding response to motion to transfer; Confer with court reporter regarding transcript; Analyze Oklahoma decision regarding constitutionality of same-sex marriage bans.

ROA.3272. Nothing in that time entry suggests Mr. Pepping performed any work that was "purely clerical."

Similarly, Plaintiffs also include 12.1 hours of Mr. Pepping's time on November 19, 2013, which describes:

> Revise motion to intervene; analyze responses to state's motion to consolidate; outline response to state's motion to consolidate; coordinate drafting of response with Michael Cooley; analyze and revise response; coordinate filing response with Jami Delgado and courier service; revise motion for preliminary injunction; prepare exhibits to motion for preliminary injunction and cite check same; revise Meyer declaration; finalize Badgett declaration.

ROA.3272. Plaintiffs assume that the State deems this entire entry "purely clerical" because it mentions "coordinat[ing] filing response" with a paralegal and a courier service, but that is no basis to conclude that the communication was clerical in nature. There are often times that attorneys have to interact with couriers, *e.g.*, when the task being performed requires particular knowledge about a case that a secretary or paralegal may not possess.[20]

The same overreach infects the State's challenge for an alleged 11.8 hours of "media"-related time (AOB 35). The entries that purportedly comprise those 11.8 hours consist of:

[20] Plaintiffs also appear to include any time entries that reflect an attorney "fil[ing]" a pleading, e.g., an entry states that the attorney "revise[d]" and filed" a pleading or "prepare[d] for filing." ROA.3273. The District Court likely recognized that this did not mean the attorney actually made copies and inputted the document on the ECF system, but that the attorney performed a final review of the document, made sure the person doing the filing understood what had to be filed, and verified that the document and supporting materials were filed properly. Plaintiffs cite nothing that suggestions those are not proper tasks for an attorney to perform.

Date	Timekeeper	Time	Tasks
12/23/13	Lane	1.4	Review Michael Murphy's notice of appearance; review McNosky motion for summary judgment; review injunction in McNosky; media emails; review defendants' response in opposition to injunction; review notice of non-consent to trial in McNosky; memos regarding recent Ohio ruling; review video of plaintiff's argument against stay in New Mexico SSM case.
2/12/14	Lane	8.5	Prepare for and argue preliminary injunction; media memos, pictures, interview; review Kentucky decision.
2/9/15	Lane	1.9	Numerous client, team memos regarding motion to lift stay; review draft motion, team strategy memos regarding same; review latest news articles; media communications; review Angela Hale's memo regarding filing motion to lift stay; memo to Scott Keller regarding motion to lift stay.

ROA.3278, 3286.

These entries demonstrate that any media-related time expended on these days is a small part of the time expended on these days. Because the entries contain "much more detailed information on legal work performed by the attorney(s) during that time[,]" the District Court declined to reduce the hours.

The District Court also knew that Plaintiffs had written off entire time entries due to the inclusion of even one entry in a category that they did not seek to include in the fees award. *See, e.g.*, ROA.2595-97. Those reductions also included reducing by 25% the hours of the attorney who argued the appeal because he had some interactions with the media. ROA.2596-97. That reduction reduced 44.7 hours to 33.5 hours on four days, even though the attorney attested that media-related activities probably did not last more than an hour each day. ROA.2597.

In the face of those reductions, the District Court could award the full hours for a few entries even if they included a relatively insignificant amount of "clerical" or "media" time. Given the District Court's recognition that Plaintiffs had excluded hundreds of hours of time, its award cannot be considered clear error.

3. The District Court properly awarded time incurred in coordinating amici curiae.

Citing *Glassroth v. Moore*, 347 F.3d 916, 918 (11th Cir. 2003), and *Bishop v. Smith*, the State contends that the District Court abused its discretion in awarding fees for 114.1 hours allegedly incurred "supporting other amici." AOB 36-40. As a factual matter, the majority of the time the State identifies had nothing to do with coordinating amici but was time spent researching and drafting the appellate brief and responding to arguments raised in amicus briefs in support of the State. *See, e.g.*, ROA.3267-69 (Weisel entries on 8/5/14, 8/6/14, 8/7/14, 8/14/14, 8/21/14, and 9/4 totaling 49.1 hours and 12.2-hour Pepping entry on 9/4/14). Time spent

responding to amici is plainly compensable under the cases that the State cites. *Glassroth*, 347 F.3d at 919 ("A reasonable amount of time spent reading and responding to opposing amicus briefs is, of course, compensable"); *Bishop*, 112 F. Supp. 3d at 1246 (responding to opposing amicus briefs is recoverable).

As for time incurred in connection with amicus briefs favorable to its side, there is no logical reason to categorically exclude time spent by a party to coordinate and otherwise interact with amici. Amicus briefs can be important to a case, providing alternative theories, additional facts and data, and expanded arguments that the litigants cannot fit into a merits brief. *Bourke*, 2016 WL 164626, at *6 (awarding fees to same-sex marriage plaintiffs for time incurred in connection with amici); *see also EEOC v. Freeman*, 126 F. Supp. 3d 560, 577-78 (D. Md. 2015) (awarding fees in discrimination case to plaintiff for time incurred in dealing with amici). "Where the law is unsettled and evolving, the issues in a case are complex, or the impact of a case potentially widespread, amici presenting the positions of various interested non-parties could very well be helpful to the proper resolution of a case, and it is reasonable for attorneys to work with amici to ensure strong presentation of the issues." *Freeman*, 126 F. Supp. 2d at 577-78. In cases like this, "[a] paying client would expect an attorney to seek out a variety of amici that could assist in the case's presentation." *Bourke*, 2016 WL 164626, at *6.

For this reason, *Freeman* eschewed *Glassroth*, seeing no "value in a rule that categorically excludes all attorneys' fees incurred dealing with amici." *Freeman*, 126 F. Supp. 2d at 577 & n.19. Instead, it concluded that "whether time spent dealing with amici is reasonable turns on the degree to which amici could be reasonably helpful to the resolution of issues in a case." *Id*.

There can be no doubt that amici could be reasonably helpful to the resolution of this case. This case involved arguments about the history and origins of marriage, the alleged impact of same-sex marriage on children and families, and numerous legal theories such as federalism, applicable levels of scrutiny, animus, and due process. Amici necessarily provided important information to this Court.[21] ROA.2595. Were there any doubt, the Supreme Court's *Obergefell* opinion dispels it, because *Obergefell* cited multiple briefs of amicus curiae.

Consistent with *Bourke* and *Freeman*, this Court should hold that the reasonableness of time spent coordinating or working with amici should be left to the discretion of the trial judge. Where, as here, amici served a legitimate purpose, the prevailing party should be entitled to recover fees related to working with amici.

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[21] Plaintiffs' counsel did not prepare any of the amicus briefs.

IV. The District Court Properly Awarded The Requested Costs.

"All reasonable out-of-pocket expenses, including charges for photocopying, paralegal assistance, travel, and telephone, are plainly recoverable in section 1988 fee awards because they are part of the costs normally charged to a fee-paying client." *Associated Builders*, 919 F.2d at 380 (citing *International Woodworkers of Am. v. Champion Int'l Corp*., 790 F.2d 1174, 1185 (5th Cir. 1986)). Whether these expenses are reasonable is committed to the sound discretion of the trial judge. *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 554 (5th Cir. 1987). Of the $20,202.90 in costs awarded below, approximately $15,500 consisted of costs for expert witness fees and travel expenses.[22] The former is not contested by the State, and the latter was found to be reasonable below. The State, nonetheless, ignores the standard of review and again re-argues its objections to these expenses. The Court should reject its arguments.

First, Plaintiffs engages in more second-guessing about expenses incurred during the case, including disputing the reasonableness of counsel attending the

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[22] In the table of "recoverable expenses" on page 44 of the Opening Brief, the State lists $4,600 in expert witness fees. Plaintiffs sought and were awarded $5,306.60. ROA.2832, 2836. The discrepancy is due to an objection that the State did not make on appeal – that social science evidence was irrelevant to the case, so Plaintiffs could not recover expert witness fees for a social scientist. ROA.3328**.** The District Court soundly rejected this argument. ROA.3503-04 (holding "researching, understanding, and briefing aspects of social science was necessary in this case in order to rebut rationale raised by Defendants as basis for Section 32") (internal quotations omitted).

moot court with the other attorneys arguing similar cases before this Court on the same day, continuing to inaccurately characterize Plaintiffs' attorneys as "passive observers" at argument, and baldly characterizing expenses as "extravagant." AOB 41-42. The District Court considered these arguments and found that Plaintiffs' requested costs "are reasonable" and the State's "objections to such costs lack merit." ROA.3504.

That holding is not clear error. As the State concedes, Plaintiffs are entitled to recover costs that would normally be billed to a paying client. AOB 41-42. Plaintiffs' counsel stated in his declaration that "[a]ll of the costs . . . are costs that [Plaintiff's counsel] typically charges a paying client."[23] ROA.2604.

Nonetheless, the State calculates recoverable expenses of $0 for retrieving legislative history documents cited in Plaintiffs' briefs, $0 for duplicating costs, and only $82.80 for court reporter transcripts. AOB 44. Even more astonishing, the State claims that the total expenses for travel and meals during travel should be $78.25. *Id.* The suggestion is laughable.

Even if the State's arguments did not fail basic logic and contravene the factual record, the State's arguments fail for a second reason—they are legally

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[23] This includes the pro hac vice fees that the State claims should be disallowed. AOB 42-43. For this, the State cites *Davis v. Perry*, 991 F. Supp. 2d at 840, a district court decision which cites no controlling authority that precludes a district court from finding the use of pro hac vice counsel reasonable and fees recoverable if normally paid by counsel's clients.

incorrect. For instance, the State disputes costs of photocopies, claiming they are only recoverable "upon proof of necessity." AOB 43. That is the standard for recovering photocopy charges under 28 U.S.C. § 1920(4), which is used in the cases the State cites. *Fogleman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991); *Lewallen v. City of Beaumont*, No. CIV.A. 1:05-CV-733TH, 2009 WL 2175637, at *16 (E.D. Tex. July 20, 2009), *aff'd*, 394 F. App'x 38 (5th Cir. 2010); *Maurice Mitchell Innovations, L.P. v. Intel Corp.*, 491 F. Supp. 2d 684, 687 (E.D. Tex. 2007); 28 U.S.C. § 1920(4) (permitting recovery of photocopies that "are necessarily obtained for use in the case"). In contrast, 42 U.S.C. § 1988 permits recovery of reasonable out-of-pocket expenses that a client would normally pay. *Assoc. Builders*, 919 F.2d at 380. Thus, cases applying § 1920(4) are irrelevant. *Id.* (section 1988 permits recovery of out-of-pocket expenses including photocopying); *e.g.*, *Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580-81 (9th Cir. 2010) (explaining that costs under section 1988 are not limited to those enumerated in section 1920(4)); *Jane L. v. Bangerter*, 61 F.3d 1505, 1517 (10th Cir. 1995) ("While only those items listed under section 1920 may be awarded as costs, other out-of-pocket expenses incurred during litigation may be awarded as attorneys fees under section 1988.").

As with its attack on the District Court's award of fees, the State's arguments about costs are just more argument already rejected below. This Court has no

reason to second-guess the discretion of the District Court and should affirm the award of costs.

CONCLUSION

The District Court's order granting Plaintiffs' fees and costs should be affirmed.

Dated: April 28, 2016

Respectfully submitted,

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Dated: April 28, 2016

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically filed on the 28th day of April, 2016, using the court's CM/ECF system which will provide a notice of electronic filing to counsel of record. I further certify that on this same date, a copy of this brief was served via First Class U.S. Mail to the following:

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