No. 15-51241

# In the United States Court of Appeals for the Fifth Circuit

Cleopatra DeLeon; Nicole Dimetman; Victor Holmes; 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; 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
Case No. 5:13-cv-982

## APPELLANTS' REPLY BRIEF

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

## SUMMARY OF THE ARGUMENT IN REPLY

The incongruous award at issue is for a no-discovery preliminary injunction and one appellate brief and argument—not for a complex matter requiring original and novel arguments. The arguments were the same arguments made by other plaintiffs in similar cases. And the timing of this case resulted in its summary affirmance based on *Obergefell*. All of these facts affect what could qualify as reasonable and necessary fees in this case.

The district court abused its discretion in awarding $585,470.30 in attorney's fees, and $20,202.90 in costs. Nothing in Plaintiffs' response brief overcomes the State's arguments showing how the district court abused its discretion in its award. Plaintiffs' arguments fall short in the following ways:

***First***, Plaintiffs improperly try to shift their unmet burden—to show the award is reasonable and necessary—to the State. But it is the party seeking an award of attorney's fees pursuant to the lodestar method that bears the burden of justifying any fee award. *See Saizan v. Delta Concrete Prods. Co., Inc.,* 448 F.3d 795, 799 (5th Cir.2006).

***Second,*** the lodestar is not sufficiently supported. The hourly rates assessed by the trial court are not in line with the prevailing market rates in the San Antonio area for the type of litigation at issue. The excessiveness of the hours billed by Plaintiffs is contrary to the district court's finding that this case did not present any novel issues or require an excessive amount of time.

***Third,*** although Plaintiffs may normally bill clients for extravagant expenses, such as in this case, that does not mean that the State's taxpayers should have to foot the bill for such lavish expenditures.

Accordingly, equity demands that this Court correct the boon in fees and costs provided Plaintiffs and reduce the award of fees and costs to no more than $377,674.20 in attorney's fees and $6,852.96 in costs. The Court should either modify the award, or remand to the district court to further evaluate the billing records in light of the corresponding case law to determine whether the hours billed were reasonably expended.

## ARGUMENT IN REPLY

### I. PLAINTIFFS ERRONEOUSLY ATTEMPT TO PLACE THE BURDEN OF PROOF ON THE STATE.

Plaintiffs bear the burden to show the amount of reasonable and necessary attorney's fees, not the State. *See Saizan,* 448 F.3d at 799. Plaintiffs did not meet that burden and the district court's contrary conclusion was an abuse of discretion.

#### A. Equity Is a Central Component of the Lodestar.

Plaintiffs contend that there is no equitable component in assessing an award of attorney's fees. Resp. at 21-22. To the contrary, equity is the cornerstone of awarding attorney's fees under the Civil Rights Act.

"The court, in its *discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs…" 42 U.S.C.A. § 1988(b) (West) (emphasis added). "Section 1988 was enacted for a specific purpose: to restore the former equitable practice of awarding attorney's fees to the prevailing party in certain civil rights cases…" *Farrar v. Hobby*, 506 U.S. 103 (1992). The Supreme Court has opined that:

> Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to

> enrich attorneys are not consistent with the statute's aim. In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services. *Cf. Horne v. Flores,* 557 U.S. 433 (2009) (payment of money pursuant to a federal-court order diverts funds from other state or local programs).

*Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010).

Indeed, this Court has held that counsel seeking fee awards cannot merely submit a broad summary of work performed and the hours logged, but rather must present "adequate evidence of the hours spent on the case and that those hours were *reasonably* expended." *Ragan v. Comm'r*, 135 F.3d 329, 335 (5th Cir. 1998) (emphasis added). As the fact finder, the district court is not only required to determine whether the total hours claimed are reasonable, but also whether particular hours claimed were "reasonably expended." *La. Power & Light Co.*, 50 F.3d at 325 (citing *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir. 1990), *opinion vacated in part on reh'g,* 903 F.2d 352 (5th Cir. 1990)). Equity is woven into the lodestar analysis, and it is a component that the district court improperly ignored in making the fee award.

### B. Plaintiffs Failed to Provide Reliable Evidence of Comparable Fee Awards.

Plaintiffs argue that the State failed to disclose numerous other cases where the "requested" fees were higher than those awarded by the district court. Resp. at 22. It is not the State's burden to provide evidence to the Court. It was Plaintiffs' burden to provide evidence to the district court to establish that the fees they were requesting were reasonable and necessary. *See Saizan,* 448 F.3d at 799. The cases relied upon by Plaintiffs do not support their contention that the district court's award is consistent—and lower than—most awards in same-sex marriages.

Both *Tanco v. Haslam*[1]*,* No. 3:13-cv-01159, 2016 WL 1171058, at *10 (M.D. Tenn. Mar. 25, 2016), and *Bourke v. Beshear*[2]*,* No. 3:13-CV-00750-CRS, 2016 WL 164626, at *7-8 (W.D. Ky. Jan. 13, 2016), cited by Plaintiffs, were cases from the Sixth Circuit that were consolidated and decided by the Supreme Court in *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015). Unlike this case, both of those cases involved fees for cert petition and reply briefing, merits and reply briefing, argument, and travel to

[1] No. 3:13-cv-01159, 2016 WL 1171058, at *10 (M.D. Tenn. Mar. 25, 2016).

[2] No. 3:13-CV-00750-CRS, 2016 WL 164626, at *7-8 (W.D. Ky. Jan. 13, 2016).

Washington. *See Tanco v. Haslam,* No. 3:13-cv-01159, Doc. 106 (M.D. Tenn. Oct. 8, 2015); ROA.3431-3461. In *Tanco,* the plaintiffs requested 5,974.5 hours in attorney's fees, and in *Bourke,* the plaintiffs sought 3,522.7 hours. *See id.*

*Bishop v. Smith,* 112 F.Supp.3d 1231 (N.D. Okla. 2015), also undermines Plaintiffs' argument of reasonable fees. In *Bishop,* the plaintiffs filed two merits briefs in the Tenth Circuit and one response to a cert petition in the Supreme Court, for which they billed 1,015.9 hours. *See Bishop v. Smith,* No. 4:04-cv-00848-TCK-TLW, Doc. 299 (N.D. Okla. Dec. 5, 2014). Although this figure includes only the amount of time billed for appellate work since the plaintiffs did not seek fees at the trial court, the amount of work that the plaintiffs performed in *Bishop* far exceeds the work performed by Plaintiffs in this case.

The other cases cited by Plaintiffs to justify an award in attorney's fees are not cases involving awards of attorney's fees made by courts, but include requests for fees and settlements, Resp. at 23, which are not considered evidence of reasonable and necessary fees. *DeBoer v. Snyder,* for example, is not only inapposite because it involved a settlement of attorney's fees, *see* ROA.3376, but it also involved a two-week trial, stay

briefing, an appeal to the Sixth Circuit, cert petition and reply, and full merits briefing and argument in the Supreme Court as one of the four cases consolidated in *Obergefell*. *DeBoer v. Snyder,* No. 2:12-cv-10285-BAF-MJH, Doc. 180 (E.D. Mich. July 27, 2015). The plaintiffs in *DeBoer* requested 5,474.2 hours in attorney's fees at $1,915,970, and requested no costs. *Id.*

Similarly, *Wolf v. Walker,* involved a settlement of attorney's fees, and unlike this case, at the trial court level it was resolved on summary judgment after discovery and hearings on summary judgment and a proposed injunction. ROA.3381-3404. On appeal, the plaintiffs requested and the court consolidated the case with *Baskin v. Bogan* for argument disposition, which increased the amount of billable hours requested. ROA.3387.

Prior to the appeal to the Seventh Circuit, *Baskin* was also disposed of on summary judgment after the district court entered a temporary restraining order and preliminary injunction. *Bogan v. Baskin*, 2014 WL 4418688, at *2 (U.S.). On appeal and prior to consolidation with *Wolf*, *Baskin* was formally consolidated with *Fujii v. Commissioner,* No. 14-

2387 and *Lee v. Abbott,* No. 14-2388. *Id.* at 2-3. After appeal, the attorney's fees in *Baskin* were also settled. ROA.3489.

Likewise, *Bostic v. Rainey* is also not comparable to the instant case because it, too, involved a settlement of attorney's fees, which included a merits decision from the Fourth Circuit and cert petition briefing in the Supreme Court. ROA.3481. What's more, the attorney's fees were significantly lower than awarded in this case. The *Bostic* plaintiffs agreed to a settlement of $520,000 in attorney's fees for 2,372 hours. ROA.3482.

Finally, in no way is the instant case similar to that of *Obergefell v. Hodges.* In *Obergefell,* the plaintiffs sought to recover $1,096,142.50 in attorney's fees and $51,360.12 in costs for 3,056.89 hours litigating two cases from the trial court through a final decision in the Supreme Court. *Obergefell v. Hodges,* No. 1:13-cv-00501-TSB, Doc. 87 (S.D. Ohio Sept. 11, 2015). Both the Sixth Circuit and the Supreme Court consolidated *Obergefell v. Hodges* and *Henry v. Hodges* on appeal. *Id.* The stipulated judgment for attorney's fees of $1.3 million settled the attorney's fees for three cases: *Obergefell v. Hodges, Henry v. Hodges,* and *Gibson v. Himes.* RJN, Exh. 6.

By contrast, here, Plaintiffs sought a total of 1,706.8 hours for an award of $713,602 in attorney's fees and $20,202.90 in costs for obtaining a preliminary injunction that the Court summarily affirmed based on *Obergefell*. *See* ROA.3366. This lawsuit did not involve any discovery, depositions, or a trial, but instead involved one hearing on the preliminary injunction and one appellate argument that do not warrant such excessive fees and costs as compared to the fee awards in the other same-sex marriage lawsuits cited by Plaintiffs.

## II. The Lodestar Is Not Sufficiently Supported.

Contrary to Plaintiffs' contentions, the State is not attempting to reweigh the evidence through this appeal. *See* Resp. at 30 and 36. This appeal illustrates the district court's failure to take into consideration prevailing legal authority in assessing the reasonableness and necessity of the fees requested by Plaintiffs. Indeed, it abused its discretion in awarding Plaintiffs every hour requested, in contradiction to prevailing law, and assessing an hourly rate that is not supported by the evidence.

### A. The Evidence to Support the Hourly Rates Awarded Was Insufficient.

Plaintiffs assert that the State did not explain how the district court abused its discretion in determining the hourly rate. Resp. at 32.

Contrary to this assertion, the State's opening brief catalogues why the hourly rate set by the district court was an abuse of discretion. Specifically, because it (i) relied on improper case law to support the hourly rate, (ii) relied on declarations that were unreliable and not supportive of the requested hourly rates, and (iii) failed to take into account prevailing rates in the geographic area through consideration of hourly rates reports assessed by the State Bar of Texas Department of Research and Analysis Hourly Rate Report ("Rate Report") and/or the Texas Lawyer 2015 Annual Salary & Billing Report. BR. at 11-15.

Although the Rate Report is from 2013, the Texas Lawyer 2015 Annual Salary & Billing Report reflects that, based on years of experience and the geographic area, there is only a $47 to $90 difference among the rates between the years 2013 to 2015. BR. at 12.

Plaintiffs improperly cite to *Chacon v. City of Austin, TX*, No. A-12-CA-226-SS, 2015 WL 4138361, at *6 (W.D. Tex. July 8, 2015), to support the district court's refusal to follow the rates in the Texas Lawyer survey. Resp. at 34. Although the court in *Chacon* questioned the accuracy of the two-year-old data, a 2013 survey of hourly billing rates published by the Texas Lawyer, for evidence of 2015 hourly rates, it did not reject the

application of the survey as Plaintiffs suggest, but instead reduced the plaintiff's requested hourly rate because the plaintiff provided no evidence other than the attorney's own affidavit. *Chacon*, 2015 WL 4138361, at *6.[3] Despite Plaintiffs' insistence that the Texas Lawyer survey is unreliable based on the number of survey responses, they have not provided any evidence to the contrary, and the comparison of the Rate Report to the Texas Lawyer survey provides ample evidence that the survey is reliable.

Plaintiffs point to several cases involving more complicated areas of the law than present in our case to support their hourly rates. Resp. at 35-36. Plaintiffs rely upon *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), a voting rights act case to justify higher hourly rates. Resp. at 36. In *Davis,* the court found that "highly experienced voting

[3] The court in *Chacon* also noted that the survey did not account for the years or type of experience of any particular equity partner. *Chacon*, 2015 WL 4138361, at *6. Unlike the Texas Lawyer survey, the Rate Report does provide the years of experience in assessing an hourly rate. *See* State Bar of Texas Department of Research and Analysis 2013 Hourly Fact Sheet, https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27264.

rights attorneys command hourly rates consistent with prevailing market rates for complex litigation." *Davis*, 991 F. Supp. 2d at 845. In making this assessment, the plaintiffs provided evidence from the Federal Judicial Center 2004 District Court Case Weights in which voting rights cases are given a weight of 3.86, and non-employment, "other" civil rights cases, such as the instant case, are given a 1.92 weight. *Id.* at 841 fn 19.

Similarly, the other case cited by Plaintiffs to justify higher hourly rates, *United States v. Cmty. Health Sys., Inc.*, involved an award of attorney's fees in the Houston legal market for a qui tam lawsuit, which involved complex litigation. Civ.A. H-09-1565, 2015 WL 3386153, at *19 (S.D. Tex. May 4, 2015), *aff'd sub nom. U.S., ex rel., Cook-Reska v. Cmty. Health Sys., Inc.*, 15-20312, 2016 WL 873855 (5th Cir. Mar. 7, 2016). Generally, hourly rates for the Houston legal market are much higher than rates in San Antonio.[4] Additionally, as noted in *Davis,* 991 F. Supp. 2d at 845, market rates for complex litigation are higher than non-employment, civil rights cases, such as the instant case. Accordingly, the

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

cases cited by Plaintiffs to support a higher hourly rate are not applicable.

### B. Plaintiffs' Assertion that the Case was Novel and Complex Was Rejected by the District Court and Is Belied by the Record.

Plaintiffs accuse the State of "revisionism" for arguing that Plaintiffs' lawsuit was not the constitutional trailblazing litigation they made it out to be. Resp. at 15-16, 36-40. That argument does not survive first contact with Plaintiffs' own pleadings, much less the district court's rulings. Plaintiffs were not asserting novel constitutional claims. They were following a template created by other parties and courts in other cases. The district court agreed. Addressing the "novelty and difficulty of the questions" presented, the district court declined to grant a lodestar enhancement on that ground, because it found that the case did not present any novel issues. ROA.3505.[5]

The district court was correct. Plaintiffs' lawsuit was just one among dozens across the country (and three in the same district court

[5] Although novelty and complexity are normally part of the *Johnson* factors to be determined by the trial court in adjusting the lodestar, these factors are also important in assessing the number of hours billed by Plaintiffs that make up the lodestar.

challenging the same Texas law) pressing functionally identical constitutional claims. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (appendix to the Court's opinion listing state and federal decisions addressing same-sex marriage); *see also McNosky v. Perry*, No. 1:13-cv-00631 (W.D. Tex.), and *Zahrn v. Perry*, No. 1:13-CV-00955 (W.D. Tex.) (same-sex marriage lawsuits challenging Texas marriage law).

Plaintiffs argue that the litigation template had not been established when they filed their lawsuit, Resp. at 15-16, but that is not true. Numerous, similar constitutional challenges had been on file long before Plaintiffs brought their suit in late October 2013. ROA.21; *see, e.g.*, *Perry v. Schwarzenegger*, No. 3:09-cv-09-2292-JW, ECF No. 1-1 (N.D. Cal. May 22, 2009); *Bishop v. United States ex rel. Holder*, No. 04-cv-848-TCK-TLW, ECF No. 122 (N.D. Okla. Aug. 10, 2009); *Sevcik v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL, ECF No. 1 (D. Nev. Apr. 10, 2012); *Kitchen v. Herbert*, No. 2:13-cv-217, ECF No. 2 (D. Utah Mar. 25, 2013); *Obergefell v. Kasich*, No. 1:13-cv-00501-TSB, ECF No. 1 (S.D. Ohio July 19, 2013).

In any event, by the time Plaintiffs were seeking a preliminary injunction, a number of courts had ruled in their favor on nearly identical constitutional claims. Plaintiffs' counsel repeatedly invoked rulings in

*Bishop*, *Kitchen*, *Obergefell*, and other cases as the model for resolving their constitutional claims.[6] *See* ROA.1734-1736, 1740-1741, 1746. Similarly, on appeal, Plaintiffs urged the court to follow the lead of other courts that had addressed similar claims. *See, e.g.*, Appellees' Br. at 10-11.

Not only were Plaintiffs' claims not novel, Plaintiffs' counsel achieved very little for their clients, despite all the time they logged. The preliminary injunction was immediately stayed by the district court, and the challenged laws remained in effect for over a year, until the Supreme Court decided *Obergefell*. Nevertheless, the district court did not make any reduction to the hours Plaintiffs' counsel claimed, and did not even address the State's objection on this ground. Five hundred sixty-two hours to produce a complaint with boilerplate constitutional claims, a preliminary-injunction motion and reply, and an appellee's brief is excessive, and it was an abuse of discretion for the district court not to

[6] The district court likewise followed the reasoning of other courts in granting the preliminary injunction. *See, e.g.*, *De Leon v. Perry*, 975 F. Supp. 2d 632, 648 (W.D. Tex. 2014) ("[T]his Court joins four recent district court decisions rejecting the argument that *Baker* still has precedential value and bars courts from addressing the issue of same-sex marriage."); *id*. at 656 (following "district courts in the most recent same-sex marriage cases" in concluding that there is no rational basis for state marriage law).

reduce the hours claimed. *See Leroy v. City of Houston*, 906 F.2d 1068, 1079 (5th Cir. 1990).

Plaintiffs also accuse the State of contradiction for ardently defending state law while now pointing out that Plaintiffs' case was neither novel nor complex. Resp. at 16. Plaintiffs are mistaken. Noting the cookie-cutter nature of Plaintiffs' claims is not a concession that the outcome was "preordained," as Plaintiffs argue, Resp. at 37, or that the State's defense of its law was unwarranted, as Plaintiffs suggest, Resp. at 15-16. The Attorney General is responsible for defending duly-enacted State law against constitutional attack, *Terrazas v. Ramirez*, 829 S.W.2d 712, 721-22 (Tex. 1991), and in any event, a claim's validity does not turn on either its novelty or its complexity. Moreover, the marriage laws Plaintiffs and dozens of other plaintiffs challenged were not clearly unconstitutional, as challengers ultimately garnered the support of only a bare majority at the Supreme Court. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

### C. Many of Plaintiffs' Hours Claimed Were Not Reasonably Expended.

The district court must adequately review the pleadings to not only determine whether the total hours claimed are reasonable, but also

whether particular hours claimed were "reasonably expended." *La. Power & Light Co.*, 50 F.3d at 325 (citing *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir. 1990), *opinion vacated in part on reh'g,* 903 F.2d 352 (5th Cir. 1990)). The district court's findings and reasons must be "complete enough to assume a review which can determine whether the court used proper factual criteria in exercising its discretion to fix just compensation." *Brantley v. Surles*, 804 F.2d 321, 326 (5th Cir. 1986). This did not happen here.

Plaintiffs assert that the State is applying after-the-fact nitpicking. Resp. at 44. But Plaintiffs' fee and cost claim is no small matter. They are demanding that Texas taxpayers pay their lawyers extravagant fees and costs for their nominally-successful litigation efforts with money that could otherwise be spent on important programs and social services. *See Perdue,* 559 U.S. 542, 559 (2010) ("[B]ecause state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services."). Moreover, if Plaintiffs had used adequate billing judgment in requesting attorney's fees, the State would not have to expend extra time pointing out the deficiencies in Plaintiffs' fee request. *See Hensley v. Eckerhart,*

461 U.S. 424, 434, 437 (1983), *abrogated on other grounds by Gisbrecht v. Barnhart,* 535 U.S. 789, 795-805 (2002) ("'[B]illing judgment'" is to be exercised "with respect to hours worked," consistent with the requirement that "'[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.'").

Plaintiffs' lack of billing judgment is exemplified in their seeking an award to cover their excessive staffing at the preliminary injunction hearing and Fifth Circuit oral argument. Plaintiffs' response still contends the staffing was justified because the State had more attorneys participate in a telephonic conference. Resp. at 45. The vanishingly small cost to participate in a conference call is no comparison to the considerable expense of attending a live argument in court in another state.

Another example of poor billing judgment is seen in the fees sought regarding the Chris Sevier intervention. However, Plaintiffs failed to address this point in their response. Accordingly, the Court should treat that nonresponse as Plaintiffs' implicit concession that the award of

$5,104 for 13.8 hours for this work was not reasonably billed and was awarded in error by the trial court. *See* BR. at 32-34.

## III. THE DISTRICT COURT DID NOT PROPERLY WEIGH THE EVIDENCE IN AWARDING COSTS TO PLAINTIFFS.

Although Plaintiffs assert that all of the costs they submitted are costs that they typically charge a paying client, Resp. at 56, this does not mean that the client does not object to paying the costs, or that Plaintiffs' counsel does not discount these costs. Although Plaintiffs' counsel may seek attorney's fees and costs for representing pro bono clients, the trial court abused its discretion in awarding Plaintiffs extravagant expenses. The State's taxpayers should not be forced to subsidize Plaintiffs' counsel's tastes for luxury, which includes $381.45/night hotel stays at the W.

Finally, because the State is not appealing the objection relating to social science, it has amended the table below to reflect the addition of $706.60 in expert witness fees for Michael Lamb. Additionally, due to an oversight in the review of Plaintiffs' records, it appears that the State incorrectly labeled Mr. Lane's flight to and from New Orleans as transportation to the moot court in Houston, which the State objects to as excessive and unreasonable. The table below also reflects the addition of $776.80 in travel for Mr. Lane to New Orleans for the Fifth Circuit oral argument:

| SUMMARY OF RECOVERABLE EXPENSES | |
|---|---|
| **CATEGORY** | **TOTAL EXPENSE** |
| Courier Fees | $49.46 |
| Retrieval of Legislative History Documents | $0.00 |
| Duplicating Costs | $0.00 |
| Expert Witness Fees | $5,306.60 |
| Filing Fees | $532.05 |
| Business Meals during Travel | $0.00 |
| Parking for Hearings | $27.00 |
| Fees for Court Reporter Transcript | $82.80 |
| Travel Expenses | $855.05 |
| **TOTAL** | **$6,852.96** |

Plaintiffs did not submit any additional expenses solely for Mr. Lane for the Fifth Circuit oral argument. Plaintiffs' records are devoid of any hotel expenses for Mr. Lane for his stay in New Orleans, and consists only of the other three attorneys whom the State contends the district court abused its discretion in awarding fees and expenses for their passive observance at the oral argument. Accordingly, the table shows that the maximum costs that Plaintiffs should recover is $6,852.96 for costs.

## Conclusion

For the foregoing reasons, the district court abused its discretion in awarding attorney's fees in the amount of $585,470.30, and $20,202.90 in costs. This Court should correct the fees and costs provided Plaintiffs and reduce the award of fees and costs to no more than $377,674.20 in attorney's fees, and $6,852.96 in costs. The Court should either modify

the award, or remand to the district court to further evaluate the billing records in light of the corresponding case law to determine whether the hours billed were reasonably expended.

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## Certificate of Service

I certify that this document has been filed with the clerk of the court and served by ECF on May 16, 2016, upon:

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## Certificate of Electronic Compliance

Counsel also certifies that on May 16, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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