

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN and SHAUNTAE
ANDERSON, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF THEIR
MOTION FOR ATTORNEYS' FEES
AND EXPENSES**

INTRODUCTION

Plaintiffs Christopher Fain and Shauntae Anderson, by and through their counsel, achieved a far-reaching victory on summary judgment. The permanent injunction granted by this Court, which enjoins Defendants from enforcing or applying the West Virginia Medicaid Program's exclusion of insurance coverage for the surgical treatment of gender dysphoria, was not only for Mr. Fain and Ms. Anderson but also extends to a certified class of all transgender West Virginia Medicaid participants. In light of that accomplishment, as the prevailing party in this lawsuit, and as authorized by 42 U.S.C. § 1988, Federal Rule of Civil Procedure 54(d), and Local Rule 54.1, Plaintiffs seek reasonable attorneys' fees in the amount of \$817,661.25, and costs in the amount of \$34,509.32.¹ Plaintiffs respectfully request that the Court grant their motion.

¹ Plaintiffs explain in Section III below how they have allocated their requested costs between the contemporaneously-filed Bill of Costs pursuant to 28 U.S.C. § 1920, and this application pursuant to 42 U.S.C. § 1988.

RELEVANT BACKGROUND

I. INVESTIGATING AND FILING THIS LAWSUIT

On November 12, 2020, Plaintiff Christopher Fain filed this class action challenging the West Virginia Medicaid program's refusal to provide insurance coverage for gender-confirming surgical care to transgender Medicaid participants (the "Exclusion"), while covering the same kinds of care for cisgender participants who require that care for other reasons. (ECF No. 1.)² Mr. Fain alleged that the West Virginia Department of Health and Human Resources, Bureau for Medical Services ("BMS"), Secretary William Crouch, and Commissioner Cynthia Beane (collectively, "Defendants") discriminated on the basis of sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment, Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), and the Medicaid Act's Comparability and Availability Requirements. (ECF No. 1.) As such, on behalf of himself and a proposed class of all transgender West Virginia Medicaid participants denied coverage under the Exclusion, Mr. Fain sought injunctive relief barring Defendants from enforcing the Exclusion, as well as reasonable attorney's fees and costs and such other relief as the Court might deem just and equitable. (*Id.*)

The work on this case started long before November of 2020, with counsel vetting Mr. Fain's allegations, helping him collect relevant documents, and examining relevant case law and facts. (Declaration of Anna P. Prakash ("Prakash Decl.") ¶ 2.) Over the course of several months, Mr. Fain and his counsel, were able to satisfy themselves as to the merits of his claims and those

² Other plaintiffs filed the initial complaint with Mr. Fain. However, at the time of summary judgment and class certification, Mr. Fain, Plaintiff Shauntae Anderson (*see infra* at Pt. VI), and Defendants BMS, Secretary Crouch, and Commissioner Beane were the remaining parties in this case. The claims of separate plaintiffs against different defendants were resolved earlier through a stipulation of dismissal (ECF No. 180) and, in the situation of a plaintiff's untimely death, through dismissal of her claims against another defendant. (ECF No. 214-1; ECF No. 225.) Plaintiffs are ***not*** seeking fees and costs associated with the dismissed plaintiffs and defendants.

of the class, consider strategy, and draft and file the complaint that initiated this lawsuit. (*Id.*)

II. THE PLEADINGS STAGE

Defendants filed a partial motion to dismiss the Complaint, including the class allegations, on January 11, 2021. (ECF No. 25.) Then, weeks later, without leave from this Court, Defendants filed a second motion to dismiss. (ECF No. 32.) Counsel for Mr. Fain, researched, drafted, and filed a response addressing both motions (ECF No. 50) and prevailed. (ECF No. 57.) Plaintiff's counsel later moved to amend the complaint, which the Court allowed, and added Shauntae Anderson as an additional Named Plaintiff. (ECF Nos. 108, 139-140.)

III. CASE PLANNING AND RELATED DOCUMENTS

Plaintiff's counsel drafted and/or prepared an ESI protocol, protective order, deposition protocol order, 502(d) clawback order, and an order regarding virtual depositions. (*See* ECF Nos. 77-78 89-91, 99, 127.) They were able to obtain Defendants' agreement to all but the ESI protocol, filed a motion requesting that Defendants meet-and-confer with them about the same by a date certain—which was granted following a telephonic hearing—and eventually obtained Defendants' agreement on the protocol. (*See* ECF Nos. 77-78 89-91, 99, 127.)

IV. FACT DISCOVERY

Plaintiffs and their counsel efficiently and successfully worked through a vigorous discovery process. (Prakash Decl. ¶ 3.) Among other things, Plaintiffs' counsel drafted and served Defendants with requests for admission, two separate sets of document requests, and three separate sets of interrogatories, all of which were targeted and consistent with Plaintiffs' case strategy of moving for affirmative summary judgment. (*Id.*) After multiple meet-and-confer attempts and correspondence—including negotiating ESI search terms—Plaintiffs' counsel obtained written discovery and close to 22,000 pages of documents from Defendants, which Plaintiffs' counsel

manually reviewed. (Declaration of Avatara Smith-Carrington (“Smith-Carrington Decl.”) ¶ 23.) Plaintiffs produced more than 6,000 pages of documents. (*Id.*) Plaintiffs’ counsel also had to subpoena multiple third-party Managed Care Organizations for the Medicaid program to obtain documents that Defendants were either unwilling or unable to produce and engaged in multiple meet-and-confer conferences with those third parties to secure appropriate responses. (Prakash Decl. ¶ 3.) As for depositions, Plaintiffs’ counsel deposed each Defendant, which included deposing eight separate designees for the Rule 30(b)(6) deposition of the Bureau for Medical Services. (*Id.*)

Plaintiffs’ counsel also assisted Mr. Fain and Ms. Anderson in preserving all relevant ESI (including using vendors where necessary) and responding to requests for admission and documents and interrogatories. (*Id.* ¶ 4.) Additionally, counsel for plaintiffs helped prepare Mr. Fain and Ms. Anderson for their depositions and defended each lengthy deposition. (*Id.*)

V. EXPERT DISCOVERY

Plaintiffs’ counsel also spent time vetting, retaining, and working with experts, producing five reports and rebuttal reports and defending three expert depositions. (*Id.* ¶ 5.) Plaintiffs’ counsel also prepared for and took the deposition of Defendants’ expert. (*Id.*)

VI. CLASS CERTIFICATION AND SUMMARY JUDGMENT

Plaintiffs’ counsel then drafted and filed motions for Rule 23 class certification, affirmative summary judgment, and to exclude Defendants’ expert. (ECF Nos. 248, 250, 254.) Defendants also moved for summary judgment and opposed all of Plaintiffs’ motions. (ECF No. 252, 259, 260, 261.) Plaintiffs filed an opposition to Defendants’ motion for summary judgment, and briefing concluded with Plaintiffs filing replies to their three motions. (ECF No. 262, 263, 265, 266.) The Court heard argument on the motions for more than two hours. (ECF No. 268.)

On August 2, 2022, the Court granted Plaintiffs' motion for class certification (ECF No. 270) and summary judgment (ECF No. 271), denied Defendants' motion (ECF No. 271), and denied Plaintiffs' motion to exclude as moot given that "[r]esolving the Motion for Summary Judgment in favor of Plaintiffs moots this Motion." (ECF No. 271.) Importantly, the Court certified a Rule 23 class of "all transgender people who are or will be enrolled in [W]est Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusion" (ECF No. 270), and granted summary judgment for Plaintiffs and the class on each and every claim, holding:

The West Virginia Medicaid Program exclusion denying coverage for the surgical care for gender dysphoria invidiously discriminates on the basis of sex and transgender status. Such exclusion violates the Equal Protection clause of the Fourteenth Amendment, the Affordable Care Act, and the Medicaid Act. Defendants are enjoined from enforcing or applying the exclusion.

(ECF No. 271.) The Court entered judgment on August 17, 2022. (ECF No. 273.) Plaintiffs now move for their attorneys' fees and costs.³

ARGUMENT

"[A]ttorneys' fees should be granted to compensate the successful attorneys and ensure effective access to the judicial process for persons with civil rights grievances." *McGee v. Cole*, 115 F. Supp. 3d 765, 771 (S.D.W. Va. 2015) (quoting *Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014)) (cleaned up). Indeed, "[i]n any action or proceeding to enforce a provision of

³ Defendants have filed a notice of appeal. (ECF No. 277.) Plaintiffs reserve their right to seek supplemental fees associated with further briefing and argument on this motion, as well as the appeal and any subsequent appeals from this Court and/or the reviewing court. *See Blackburn v. Reich*, 79 F.3d 1375, 1379 (4th Cir. 1996) ("[Fees] are recoverable for all phases of the litigation, and . . . appellate fees can be awarded by a lower court"); *McManama v. Lukhard*, 616 F.2d 727, 730 (4th Cir. 1980) (remanding to the district court "for an assessment of additional attorneys' fees . . . to compensate the plaintiffs for the expense of their success[on] appeal"); *Gen. Motors LLC v. Bill Kelley, Inc.*, No. 2:12-CV-51, 2013 WL 5504445, at *9 (N.D.W. Va. Oct. 1, 2013) (awarding fees for appellate work, submitted by plaintiff in a motion for supplemental fees and costs); *see also, Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 134 (4th Cir. 2001) (awarding "attorney's fees and expenses incurred while pursuing statutory attorney's fees on appeal").

section[] . . . 1983 . . . of this title, . . . 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. § 1988(b); *see also McGee*, 115 F. Supp. 3d at 770. Section 1988(b) also provides a court discretion to award out-of-pocket costs that would normally be charged to a fee-paying client. *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988). In sum, Section 1988 ensures “private citizens have a meaningful opportunity to vindicate their rights”—an indispensable function given that “effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens.” *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 559-60 (1986) (cleaned up).

Here, where (A) Plaintiffs are the prevailing party in this civil rights action; (B) their counsel’s hours and rates are reasonable as guided by relevant factors the Fourth Circuit has established; and (C) their out-of-pocket costs are those that would typically be billed to a fee-paying client, the Court should grant the requested fee and cost award.

I. PLAINTIFFS AND THE CLASS ARE THE PREVAILING PARTY.

As a threshold matter, Plaintiffs and the Class are unquestionably the prevailing party on all three of their claims. (ECF No. 271 (holding that Defendants’ “[E]xclusion violates the Equal Protection clause of the Fourteenth Amendment, the Affordable Care Act, and the Medicaid Act.”).) And the Court has entered judgment granting Plaintiffs complete relief. (ECF No. 273.) *See Grissom v. The Mills Corp.*, 549 F.3d 313, 318 (4th Cir. 2008) (“[A] party in whose favor a judgment is rendered” is a prevailing party for purposes of 42 U.S.C. § 1988). Thus, the only remaining question is whether the requested fees and costs are reasonable. They are.

II. THE REQUESTED ATTORNEYS’ FEES ARE REASONABLE AND SHOULD BE AWARDED.

Courts evaluate fee requests by (A) determining lodestar, *i.e.*, hours reasonably expended

on the litigation multiplied by reasonable hourly rates; (B) subtracting fees for hours spent on unsuccessful claims; and (C) awarding some percentage of the remaining fee, depending on the degree of success the prevailing party obtained. *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *McGee*, 115 F. Supp. 3d at 771; *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013), as amended (Jan. 23, 2014).

A. PLAINTIFFS' COUNSEL'S LODESTAR OF \$817,661.25 IS REASONABLE.

To determine the reasonableness of lodestar, courts have applied the following factors:

(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir. 1978) (following *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)); *see also McAfee*, 738 F.3d at 88 n.5.

Here, these "*Barber*" factors demonstrate the reasonableness of counsel's (1) hours; and (2) rates.

1. Plaintiffs' Counsel's Hours are Reasonable (*discussing Barber factors of the: time and labor expended; novelty and difficulty of the questions raised; attorneys' opportunity costs in pressing the instant litigation; time limitations imposed by the client or circumstances; and nature/length of the attorney-client relationship.*)

Plaintiffs' counsel's **time and labor expended** on this case is significant. Their requested fee results from 2,438.34 of the hours spent on this case. (Declaration of Avatara Smith-Carrington ("Smith-Carrington Decl.") ¶ 20; Declaration of Walt Auvil ("Auvil Decl.") ¶¶ 9-10; Prakash Decl. ¶ 11.) These hours pertain to work performed by Plaintiffs' counsel throughout the course of this litigation, which are explained in detail above and include, among other things: interviewing the clients and researching their claims, preparing and filing the original and amended complaint,

successfully overcoming two motions to dismiss, satisfying the case management and disclosure requirements of Federal Rule of Civil Procedure 26, engaging in extensive written discovery and meeting and conferring with Defendants and third-parties regarding discovery deficiencies, preparing to take and defend more than a dozen depositions in the case, filing motions for summary judgment and class certification, and arguing those motions. (*See supra* at Pt. I-VI.)

Notably, the 2,438.44 hours used to calculate the requested fee are not the only hours counsel spent on this litigation. Rather, the hours used to calculate the requested fee reflect appropriate billing judgment. That is, to ensure reasonableness of the hours claimed in this fee application, Plaintiffs' counsel reviewed and approved the itemized charges for each attorney's time. (Smith-Carrington Decl. ¶ 16; Auvil Decl. ¶ 11; Prakash Decl. ¶ 8.) Plaintiffs' counsel exercised billing judgment in reviewing those entries, and as appropriate, discounted or eliminated unnecessary, duplicative, and excessive time. (Smith-Carrington Decl. ¶ 16; Auvil Decl. ¶ 11; Prakash Decl. ¶ 8.) In fact, counsel has excluded a significant number of hours, including those summarized here:

Lambda Legal: • Eliminated virtually all time related to team meeting attendance for two of its attorneys; • Omitted all time from one of two paralegals who have worked on this case; • Omitted all time from two senior attorneys who reviewed and edited pleadings in the case, including its former litigation director and deputy director for litigation; and • Has not claimed any time relating to the preparation of this motion despite dozens of hours expended to review lengthy time sheets, compile a global costs exhibit, and brief this motion. (Smith-Carrington Decl. ¶ 19.) Ultimately, Lambda Legal has eliminated 312.2 hours of billable time from its request, amounting to a reduction of \$112,917.50 when multiplied by the local prevailing rates for each timekeeper. (*Id.* ¶ 17.)

Nichols Kaster: • Eliminated all time billed by three partners at the firm; • Eliminated all time billed by two paralegals at the firm; • Eliminated all time billed by a class action clerk at the firm; • Has not claimed time for many administrative tasks that allowed for greater communication between all members of the litigation team; and • Has not claimed any time relating to the preparation of this motion despite dozens of hours expended to review lengthy time sheets, review cost receipts, and brief this motion. (Prakash Decl. ¶ 8.) Nichols Kaster has eliminated 204 hours of billable time from its request, amounting to a reduction of \$55,000.00 when multiplied by the local prevailing rates for each timekeeper. (*Id.*)

The remaining 2,438.34 hours, i.e., the hours for which Plaintiffs seek fees, are listed in the timesheets attached to the declarations of Plaintiffs' counsel. (Smith-Carrington Decl. Ex. B-G; Prakash Decl. Ex. A; Auvil Decl. Ex. A.) These hours are summarized here by timekeeper:

Name & Firm	Position	Hours
Walt Auvil, Employment Law Center	Attorney	69.75
Kirk Auvil, Employment Law Center	Attorney	4
Avatara Smith-Carrington, Lambda Legal	Attorney	372.5
Tara Borelli, Lambda Legal	Attorney	544.3
Carl Charles, Lambda Legal	Attorney	111.3
Sasha Buchert, Lambda Legal	Attorney	22.1
Nora Huppert, Lambda Legal	Attorney	46.6
Michèle Clanton-Lockhart, Lambda Legal	Paralegal	144.75
Anna Prakash, Nichols Kaster	Attorney	280.2
Nichole Schladt, Nichols Kaster	Attorney	575.6
Melanie Johnson, Nichols Kaster	Attorney	20.3
Alexandra Smith, Nichols Kaster	Paralegal	164.14
Angela Kittelson, Nichols Kaster	Paralegal	48.5
Cameron Pylka, Nichols Kaster	Paralegal	34.4
Total:		2438.44

(Smith-Carrington Decl. Ex. B-G; Prakash Decl. Ex. A; Auvil Decl. Ex. A.) These hours are reasonable because they were spent on necessary case tasks and reflect considerable discounts due to billing judgment. (Smith-Carrington Decl. Ex. B-G; Prakash Decl. Ex. A; Auvil Decl. Ex. A.)

And these hours are all the more reasonable given the novelty and difficulty of the

questions raised. This matter involved complex constitutional and federal statutory law, with Plaintiffs drawing on case law developed just months before this case was filed, as well as during the pendency of this case. (*See e.g.*, ECF No. 262 at 2 (citing *Kadel v. Folwell*, 446 F. Supp. 3d 1 (M.D.N.C. 2020), *aff'd sub nom. Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422 (4th Cir. 2021), as amended (Dec. 2, 2021); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020).) What is more, this case challenged Defendants' entrenched and systemic way of excluding insurance coverage.

Given this, counsel bore **opportunity costs in pressing the instant litigation**, with their organizations/firms devoting necessary attorney and staff time to ensuring that the rights of Plaintiffs and the class were vindicated. (Smith-Carrington Decl. ¶ 7; Prakash Decl. ¶ 14.) The **nature and length of the attorney-client relationship** underscores this. Plaintiffs' counsel has represented Mr. Fain for two years and Ms. Anderson for almost as long, sought to represent the class from the outset of litigation, and has not yet been compensated for their work. (Smith-Carrington Decl. ¶ 5; Prakash Decl. ¶ 14.) And though it has taken two years, Plaintiffs' counsel litigated this case as efficiently as possible considering the urgency, i.e., **the time limitations imposed by the client or circumstances**, involved. (*See* Declaration of C. Fain, ECF No. 250-1, ¶ 20 ("Medicaid's refusal to cover this medically necessary care increases my symptoms of gender dysphoria and causes me emotional hardship and deeply impacts my self-esteem."); Declaration of S. Anderson, ECF No. 250-2 at ¶ 20 ("At times my spirit feels broken. The emotional toll of being denied surgery, and the gender dysphoria it causes, tears me apart. I would not wish this feeling on anyone else in the world.")) The hours summarized above are reasonable.

2. Plaintiffs' Counsel's Hourly Rates are Reasonable (*discussing Barber factors of the: skill required to properly perform the legal services rendered;*

customary fee for like work; attorney's expectations at the outset of the litigation; amount in controversy and the results obtained; experience, reputation and ability of the attorney; undesirability of the case within the legal community in which the suit arose; and attorneys' fees awards in similar cases.)

Plaintiffs' counsel seek compensation at the following hourly rates:

Attorney, law school graduation year, and requested rate	
Walt Auvil, 1981	\$500.00
Tara L. Borelli, 2001	\$475.00
Anna P. Prakash, 2005	\$450.00
Sasha Buchert, 2005	\$450.00
Carl S. Charles, 2013	\$400.00
Kirk Auvil, 2016	\$300.00
Nicole J. Schladt, 2018	\$300.00
Avatara Smith-Carrington, 2019	\$275.00
Nora Huppert, 2019	\$275.00
Melanie Johnson, 2019	\$275.00
Michèle Clanton-Lockhart, paralegal	\$125.00
Alexandra Smith, paralegal	\$125.00
Angela Kittelson, paralegal	\$125.00
Cameron Pylka, paralegal	\$125.00

(Smith-Carrington Decl. ¶ 18; Prakash Decl. Ex. A; Auvil Decl. ¶ 9-10.) These rates are reasonable.

First, the **skill required to perform the legal services rendered** supports the rates. As discussed above, this case involved complex constitutional and federal statutory claims and support from newly developed case law. It was filed as and later certified as a class action. And the sensitive and deeply personal nature of the subject matter, required both skill and experience to properly address. (Smith-Carrington Decl. ¶ 6; Prakash Decl. ¶ 14.)

Second, the **experience, reputation and ability of Plaintiffs' counsel** supports the rates. Plaintiffs appropriately hired attorneys who have extensive experience in civil rights cases, including representing transgender people facing healthcare discrimination. Moreover, Plaintiffs prudently retained attorneys with substantial class action experience, and local law and procedure

expertise. The experience of Plaintiffs' counsel, particularly in cases challenging discriminatory exclusions in health insurance plans, the science and literature relating to treatment of gender dysphoria, class action procedure, and work with marginalized communities allowed them to perform their duties far more efficiently than counsel with less experience in these specialized areas of law. More specifically:

Lambda Legal: Lambda Legal is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education, and public policy work. (Smith-Carrington Decl. ¶ 2.) Lambda Legal is a 501(c)(3) public interest law firm that does not charge its clients, but relies in part upon fees awarded by the courts. (*Id.* ¶ 5.) The lead attorneys from Lambda Legal who worked on this matter are exceptionally qualified and experienced. In support, Plaintiffs refer the Court to Mx. Carrington's declaration filed in support of Attorneys' Fees and Expenses, the exhibits to Mx. Carrington's declaration filed at class certification, (ECF Nos. 248-4, 248-6 through 248-9) and provide the following summary:

AVATARA SMITH-CARRINGTON (pronouns: they, them) graduated from the University of Maryland Francis King Carey School of Law in 2019, and has practiced law continuously since that time. (Smith-Carrington Decl. ¶ 9.) They have worked full-time at Lambda Legal on civil rights cases for the LGBT community and people living with HIV since 2019. (*Id.*) In addition to serving as lead counsel in this case, they are also counsel in several other matters addressing discrimination on the basis of sex and transgender status. (Smith-Carrington Decl. Ex. A (Smith-Carrington resume).)

TARA L. BORELLI (pronouns: she, her) graduated from the University of California, Berkeley School of Law in 2001, and has practiced law continuously since that time. (*Id.* ¶ 10.)

Ms. Borelli has worked full-time at Lambda Legal on civil rights cases for the LGBT community since 2006. (*Id.*) Ms. Borelli has worked on an extensive number of cases involving equal treatment for transgender people. (*Id.*; *see* ECF No. 248-6 (Borelli Resume).)

CARL S. CHARLES (pronouns: he, him) graduated from the University of Denver Sturm College of Law in Denver, Colorado in 2013, and has practiced law continuously since that time. (*Id.* ¶ 12.) Mr. Charles has practiced civil rights law at several nonprofit legal advocacy groups and government entities, including the Jon L. Stryker and Slobodan Randjelovic LGBT & HIV Project at the American Civil Liberties Union, the New York City Commission on Human Rights, A Better Balance, and Lambda Legal. (*Id.*) Mr. Charles has worked full-time at Lambda Legal on civil rights cases for the LGBT community since 2019. (*Id.*) Mr. Charles has worked on several cases involving equal treatment for transgender people. (*Id.*; *see* ECF No. 248-7 (Charles Resume).)

SASHA BUCHERT (pronouns: she, her) graduated from Willamette Law School in 2005 and has practiced law since 2007. (*Id.* ¶ 13.) Ms. Buchert has maintained a full-time practice in civil rights issues for lesbian, gay, bisexual, and transgender people since 2013. (*Id.*) Prior to joining Lambda Legal full-time in 2017, Ms. Buchert practiced civil rights law at the Transgender Law Center. (*Id.*) Ms. Buchert has worked on several cases involving equal treatment for transgender people. (*Id.*; *see* ECF No. 248-8 (Buchert resume).)

NORA HUPPERT (pronouns: she, her) graduated from Columbia Law School in 2019 and has devoted her legal career to LGBT impact litigation. (*Id.* ¶ 14.) Ms. Huppert has worked on several cases involving equal treatment for transgender people. (*Id.*; *see* ECF No. 248-9 (Huppert resume).)

Nichols Kaster, PLLP: Over the course of its forty-five year history, Nichols Kaster has

earned the reputation of being a top plaintiffs' litigation firm. (Prakash Decl. ¶ 17.) The firm represents everyday people across the country, has been appointed lead counsel or co-counsel on hundreds of class and collective actions, and has recovered significant relief for its clients over the years. (*Id.*) The firm's lawyers are routinely lauded for their work and high quality of representation. (*Id.*) The lead attorneys who worked on this matter from Nichols Kaster are qualified and experienced. In support, Plaintiffs refer the Court to the declaration of Nicole J. Schladt filed at class certification and firm resume (ECF Nos. 248-2, 248-3) and provide the following summary:

ANNA P. PRAKASH (pronouns: she, her) graduated from Cornell Law School in Ithaca, New York, in 2005, and after working for the state and federal governments, she joined Nichols Kaster in March of 2009. (Prakash Decl. ¶ 18.) She became a partner at the firm in 2016. She is one of the leaders of the firm's Civil Rights and Impact Litigation practice group, has led the firm's National Consumer Class Action practice group, has been a member of the firm's National Wage & Hour practice group, and has authored and argued class and individual appeals at the state and federal level. (*Id.*) Ms. Prakash has extensive class action experience and has represented thousands of class and collective members in federal and state courts, including in cases involving marginalized communities and sensitive subject matter. (*Id.*; *see also* ECF No. 248-2 (discussing Ms. Prakash's qualifications); 248-3 (firm resume with attorney profiles).)

NICOLE J. SCHLADT (pronouns: she, her) graduated summa cum laude from the University of Kentucky in 2014 and graduated with honors from Emory University College of Law in Atlanta, Georgia, in 2018. (Prakash Decl. ¶ 19.) Since 2019, Ms. Schladt has practiced law with Nichols Kaster and has primarily handled civil rights class actions and also has experience with cases involving sex discrimination in public institutions. (*Id.*; *see also* ECF No. 248-2 (discussing Ms.

Schladt's qualifications); 248-3 (firm resume with attorney profiles).)

The Employment Law Center, PLLC: The Employment Law Center is a law firm in Wood County, West Virginia. (Auvil Decl. ¶ 1.) The lead attorney from the firm working on this matter has extensive litigation experience:

WALT AUVIL (pronouns: he, him), the owner and sole member of The Employment Law Center, has served as lead counsel on dozens of discrimination cases in courts throughout the State of West Virginia and, and as lead counsel on several class action matters during the past 30 years. (*Id.* ¶¶ 1, 5.) He was admitted to the West Virginia State Bar and the state and federal courts of West Virginia in 1981, and is a founder and past president of the West Virginia Employment Lawyers Association, Chairman of the West Virginia State Bar Labor and Employment Law Committee; and Fellow of the College of Labor and Employment Lawyers, the first such Fellow in West Virginia. (*Id.* ¶¶ 2, 3, 4, 6; *see also* ECF No. 248-1 (as to Mr. Auvil's experience).)

In light of the expertise these attorneys brought to the case, but to avoid unnecessary or duplicative work, counsel allocated responsibilities among several different attorneys when necessary, according to the experience and expertise of each attorney. Lambda Legal took the lead in preparing the complaint and substantive briefing, based on their expertise in the constitutional and federal statutory claims at issue. (Smith-Carrington Decl. ¶ 8) Nichols Kaster actively participated in discovery given the number of depositions and documents and handled the class action components of the case. (Prakash Decl. ¶¶ 3-4.) And the Employment Law Center provided insight and experience on civil rights cases and civil litigation in West Virginia. (Auvil Decl. ¶ 5.)

Third, the requested rates are supported by the customary fee for like work and awards in similar cases. "Reasonable rates are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit

counsel.” *McGee*, 115 F. Supp. 3d at 771 (cleaned up). There are circumstances, however, “where it is reasonable to retain attorneys from other communities [and] the rates in those communities may also be considered.” *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994). Given the issues at stake for Plaintiffs and hundreds of similarly situated transgender West Virginia Medicaid participants, Plaintiffs reasonably retained attorneys from other jurisdictions with specialized expertise in constitutional and federal statutory law. Although several of the attorneys would typically receive higher hourly rates in the markets where they practice,⁴ Plaintiffs seek only the local market rate recently awarded to lawyers of comparable experience in the local market in West Virginia—further underscoring the reasonableness of their application.

To wit, the affidavits of two local attorneys “who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community” support a finding Plaintiffs’ attorneys’ requested rates fall within prevailing market rates. *See Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009). Michael J. Farrell, who has been the managing member of his own firm since 1995 and has 48 years of experience litigating on behalf of clients in the Southern District of West Virginia, attests that he charges \$450.00 per hour for cases he litigates in West Virginia federal courts. (Farrel Decl. ¶¶ 4, 5, 14.) He further attests that he is generally familiar with the hourly rates charged by law firms in the region for complex litigation and finds Plaintiffs’ counsels’ requested rates reasonable. (*Id.* ¶¶ 28, 31-33.) Amy C. Crossan, who is a founding member of her own firm and has 26 years of experience litigating on behalf of plaintiffs in the Southern District of West Virginia, attests that her hourly rate is \$375.

⁴ Legal services and other non-profit organizations are entitled to have fee awards computed on the basis of reasonable market rates even if lower salaries are paid to the organization’s attorneys. *Blum*, 465 U.S. at 895; *accord Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982).

(Crossan Decl. ¶ 10.) She is also familiar with the hourly rates charged by law firms in the region for complex litigation and finds Plaintiffs' attorneys' requested rates comparable to those of similar experience doing similar work. (*Id.* ¶ 21-23.)

Moreover, the rates awarded to comparable attorneys by courts within this district further support a finding that Plaintiffs' attorneys' requested rates are in line with local market rates. *See Gabe v. Dolgencorp, LLC*, No. 5:17-CV-04380, 2018 WL 5985687, at *3 (S.D.W. Va. Nov. 14, 2018) (finding requested hourly rates reasonable in part because they were "in line with hourly rates approved by [the court] in recent cases."). Mr. Auvil's requested rate of \$500.00, for example, falls well within the rates awarded to attorneys with 40+ years of litigation experience. *See e.g. McGee v. Cole*, 115 F. Supp. 3d 765, 775 (S.D.W. Va. 2015) (awarding an attorney with 36 years of experience, an hourly rate of \$500.00 in a successful challenge to state's ban on same-sex marriage); *see also Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-001230, 2022 WL 2541060, at *3 (S.D.W. Va. May 24, 2022) (awarding attorney with 32 years of experience an hourly rate of \$480.00 for work on successful motion to compel deposition); *Greenbrier Hotel Corp. v. Unite Here Health*, No. 5:13-CV-11644, 2017 WL 2058222, at *2-4 (S.D.W. Va. May 12, 2017), vacated on other grounds, No. 16-2116, 2018 WL 272012 (4th Cir. Jan. 3, 2018) (awarding a \$550 hourly rate to an attorney with 50 years of experience following ERISA trial).

The \$450.00 to \$475.00 hourly rates sought by Tara Borelli, Anna Prakash, and Sasha Buchert (who have between 17 to 21 years of litigation experience) likewise fall squarely within the rates awarded within this district. *See e.g. Riddle v. Atkins & Ogle L. Offs., LC*, No. CV 3:19-0249, 2020 WL 3496470, at *2 (S.D.W. Va. June 29, 2020) (awarding an hourly rate of \$450.00 to an attorney with 16 years of experience); *Ramaco Res., LLC v. Fed. Ins. Co.*, No. 2:19-CV-00703, 2020 WL 7048292, at *14 (S.D.W. Va. Dec. 1, 2020) (awarding an hourly rate of \$500 to

attorneys with 18-19 years of experience); *see also Ohio Valley Env'tl. Coal. v. Fola Coal Co., LLC*, No. CV 2:13-16044, 2017 WL 1712525, at *2 (S.D.W. Va. May 2, 2017) (awarding a \$425.00 hourly rate to an attorney with approximately 20 years of experience).

The remaining requested rates of \$400 for Carl S. Charles (who has been practicing law for nine years), \$275 to \$300 for Nicole J. Schladt, Avatara Smith-Carrington, Nora Hubbert, and Melanie Johnson (who have been practicing law for between three to six years), and the \$125 rate for paralegal and staff work are all consistent with awards in this area. *See e.g. Riddle*, 2020 WL 3496470 at *2 (awarding \$400.00 rate to attorney with 10 years of experience); *McGee*, 115 F. Supp. 3d at 775 (awarding \$400 rate to attorney with 12 years of experience); *Gabe*, 2018 WL 5985687 at *2-3 (awarding \$300 rate to an attorney with 8 years of experience); *Ramaco Res., LLC*, 2020 WL 7048292 at *15 (awarding \$300 rate to attorney with 7 years of experience and \$145.00 paralegal).

Finally, the remaining *Barber* factors of the **attorney's expectations at the outset of the litigation, undesirability of the case within the legal community in which the suit arose**; and **amount in controversy and results obtained** all support the requested rates. Plaintiffs' counsel took on this case with the understanding that any fees and costs would be compensable under Section 1988 if Plaintiffs were the prevailing party. (Smith-Carrington Decl. ¶ 5; Prakash Decl. ¶ 14.) Further, the Exclusion at issue was adopted in approximately 2004, but the parties are not aware of a single legal challenge to the Exclusion or the willingness of any other counsel to challenge the state's practice. (Smith-Carrington Decl. ¶ 15; Prakash Decl. ¶ 15.) And, though Plaintiffs are not seeking damages for themselves, they sought life-saving injunctive relief for themselves and the class—relief which this Court granted in full with the summary judgment holding in Plaintiffs' favor on each and every claim.

In sum, Plaintiffs' lodestar of \$817,661.25 is reasonable.

B. BECAUSE PLAINTIFFS SUCCEEDED ON ALL CLAIMS AND HAVE ALREADY ELIMINATED A SIGNIFICANT NUMBER OF HOURS FROM THEIR TIMESHEETS, THE COURT SHOULD AWARD LODESTAR.

Here, given Plaintiffs' complete victory and conservative exercise of billing judgment discussed above, there is no need for further reduction of hours or a percentage discount of lodestar. As such, Plaintiffs respectfully request that the Court award them \$817,661.25 in attorneys' fees based on the hours and rates described above and summarized here:

Name	Hours	Rate	Total
Walt Auvil	69.75	\$500.00	\$34,875.00
Tara L. Borelli	544.3	\$475.00	\$258,542.50
Anna P. Prakash	280.2	\$450.00	\$126,090.00
Sasha Buchert	22.1	\$450.00	\$9,945.00
Carl S. Charles	111.3	\$400.00	\$44,520.00
Kirk Auvil	4	\$300.00	\$1,200.00
Nicole J. Schladt	575.6	\$300.00	\$172,680.00
Avatara Smith-Carrington	372.5	\$275.00	\$102,437.50
Nora Huppert	46.6	\$275.00	\$12,815.00
Melanie Johnson	20.3	\$275.00	\$5,582.50
Michèle Clanton-Lockhart	144.75	\$125.00	\$18,093.75
Alexandra Smith	164.14	\$125.00	\$20,517.50
Angela Kittelson	48.5	\$125.00	\$6,062.50
Cameron Pylka	34.4	\$125.00	\$4,300.00
Fees Subtotal:			\$817,661.25

III. PLAINTIFFS ARE ENTITLED TO REIMBURSEMENT OF THEIR REQUESTED COSTS.

"A prevailing plaintiff in a civil rights action is entitled, under § 1988, to recover those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client" *Spell*, 852 F.2d at 771 (internal quotation marks omitted); *see* 42 U.S.C. § 1988(b). Here, Plaintiffs' counsel have incurred a total of \$34,509.32 in costs compensable under Section 1988, including for example, fees for court filings, their admission to practice before this Court, document management system and legal research fees, expert fees, deposition transcripts,

travel expenses, and charges relating to production of courtesy copies for chambers. (Smith-Carrington Decl. Ex. H;⁵ Prakash Decl. ¶ 20.) Such costs are the kind routinely billed to clients and found recoverable under Section 1988. *See, e.g., Good v. W. Virginia-Am. Water Co.*, No. CV 14-1374, 2017 WL 2884535, at *30 (S.D.W. Va. July 6, 2017) (finding necessary travel, deposition expenses, computer research, postage, court costs, and photocopying to be compensable); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 265 (E.D. Va. 2009) (awarding expert fees). Plaintiffs respectfully request that the Court award the requested costs.

CONCLUSION

For all of the reasons stated above, Plaintiff requests an order awarding \$817,661.25 in attorney's fees and \$34,509.32 in expenses.

* * *

⁵ Exhibit H, the table of costs, includes entries for deposition fees. Plaintiffs' counsel have divided the charges for these deposition fees, seeking two components as taxable costs in a contemporaneously-filed Bill of Costs pursuant to 28 U.S.C. § 1920 (with invoices attached thereto), and seeking the remaining components under 42 U.S.C. § 1988, as explained here:

Section 1920 taxable costs: The two deposition fee components sought in the Bill of Costs consist of fees for (i) the court reporter's attendance at the deposition; and (ii) a copy of the transcript. *See, e.g., Edwards v. McElliotts Trucking, LLC*, No. 3:16-cv-1879, 2018 WL 6531680, at *3 (S.D.W. Va. Dec. 11, 2018), *aff'd sub nom. Edwards v. Cardinal Transp., Inc.*, 821 F. App'x 167 (4th Cir. 2020) (deposition transcript copies recoverable); *Ramonas v. W. Virginia Univ. Hosps.-E., Inc.*, No. 3:08-CV-136, 2010 WL 3282667, at *8 (N.D.W. Va. Aug. 19, 2010) ("Court reporter fees and costs for one original and one copy of the transcript are recoverable under § 1920."). The total costs sought pursuant to Section 1920 are \$12,899.85.

Section 1988 non-taxable costs: Plaintiffs seek the remaining components of their deposition costs, which courts frequently approve for reimbursement, under Section 1988. *See e.g., Coggins v. Davis*, No. CV WGC-05-248, 2007 WL 9782488, at *2 (D. Md. Aug. 22, 2007) (explaining in the context of deposition costs that such expenses are evaluated under a different standard under Section 1988 than Section 1920). The total costs sought pursuant to Section 1988 are \$34,509.32.

Plaintiffs do not seek to double recovery, but should any cost listed in the Bill of Costs be denied under Section 1920, Plaintiffs seek those costs in the alternative under Section 1988.

Dated: September 30, 2022

/s/ Walt Auvil

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically on September 30, 2022 on the following counsel for Defendants in this case:

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Dated: September 30, 2022

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