IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,	:	
	:	Case No. 2:13-cv-00953
Plaintiffs,	:	
	:	Judge Michael H. Watson
v.	:	
	:	Magistrate Judge Kemp
JON HUSTED,	:	
	:	
Defendant.	:	

DEFENDANTS JON HUSTED'S AND STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO INTERVENING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES [DOC. NO. 53]

I. INTRODUCTION

The purpose of the civil rights fee-shifting provision, 42 U.S.C. § 1988, is to ensure that civil rights claimants are adequately represented, "not to provide a form of economic relief to improve the financial lot of attorneys." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (internal quotations omitted). Accordingly, § 1988 places reasonable limitations on attorney fee awards. Although § 1988 allows fees for a reasonable amount of litigation time, attorneys must exercise judgment regarding how they spend, and bill for, their time. Consistent with the standards and purpose of § 1988, the Court should significantly reduce the Intervening Plaintiffs' fee requests.

The movants sought to intervene in this action on November 27, 2013, to join the Original Plaintiffs' challenge of S.B. 193. The Intervening Plaintiffs filed their motion for a preliminary injunction on December 3 (Doc. No. 30), making substantially the same arguments the Original Plaintiffs had already made in their motion filed on November 10 (Doc. No. 17).

Movants filed their Complaint on December 23 (Doc. No. 42), asserting the exact same causes of action—often using the exact same wording—as in the Original Plaintiffs' Amended Complaint filed on November 8 (Doc. No. 16). Both the Original Plaintiffs and the Intervening Plaintiffs argued that S.B. 193 was unconstitutional as applied to the 2014 election cycle as well as the 2015 and future election cycles. On January 7, 2014, the Court issued a preliminary injunction enjoining the application of S.B. 193 to the 2014 election cycle, but declining to rule on its prospective application to future election cycles. (Doc. No. 47). Intervening Plaintiffs therefore engaged in work limited to a one-month period, which largely duplicated the earlier work of the Original Plaintiffs, and which—to date—has achieved only partial success.

Nevertheless, on February 25, the Intervening Plaintiffs filed the instant motion seeking $61,908.70 in attorneys' fees and $577.00 in costs. Analysis of Intervening Plaintiffs' attorneys' fee submissions demonstrates that counsel have failed to exercise billing judgment in a variety of different areas. Moreover, counsel ask for rates far above what is necessary to encourage competent representation in the local community—and in addition seek an undeserved multiplier. Accordingly, the Defendants oppose the amount of counsel's fee requests and request a substantial reduction to both rates and hours.

II. LAW AND ARGUMENT

As the Sixth Circuit recently acknowledged in *Binta B. ex rel. S.A. v. Gordon* 710 F.3d 608 (6th Cir. 2013), the Court must honor two sides of attorney-fee debates. 710 F.3d at 612. On one side, "§ 1988 plays a critical role in ensur[ing] that federal rights are adequately enforced, and attorneys have every right to be compensated for any fees and expenses they reasonably incur." *Id.* (internal quotation omitted). However, attorney fee cases "all too easily become a way of life for the attorneys involved, and consequently over time it can become

increasingly unclear, for both the attorneys and the courts, precisely what work falls within the ambit of § 1988." *Id.* The Sixth Circuit has further emphasized that "Congress and the Supreme Court have made it abundantly clear that the aim of 42 U.S.C. § 1988 is not for the purpose of aiding lawyers. The purpose of th[e] bill is to aid civil rights." *Id.* (internal quotations omitted).

Section 1988 allows a court to award "reasonable attorney's fees" to a prevailing party. 42 U.S.C. § 1988(b). "A reasonable fee is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 616 (6th Cir. 2007) (emphasis and internal quotations omitted). The standard approach for assessing reasonable attorney fees is determining "the 'lodestar' amount, which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 551-52 (6th Cir. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

Considering these standards, there are at least three ways in which counsel have failed to establish that their fee requests are reasonable. First, counsel seek rates well beyond what was reasonably necessary—in the prevailing legal market—to assure adequate representation in this action. Second, counsel engaged in excessive and unnecessary hours of work that exceed the amount of work reasonably necessary to complete the relevant tasks. Third, counsel's hour claims include work related to claims as to which Intervening Plaintiffs are not prevailing parties. Certainly, counsel have not shown that the multiplier they request is appropriate. Finally, fees for filing the instant motion ("fees for fees") should be limited to 3% of total fees awarded (or actual fees incurred to file the motion, whichever is less).

A. The Court Should Reduce Counsel's Requested Rates to Reflect Reasonable Rates in the Prevailing Market.

Plaintiffs bear the burden of establishing a reasonable hourly rate. *Imwalle*, 515 F.3d at 552. In determining a reasonable hourly rate, it is important to remember the purpose of § 1988. Again, the fee shifting statute does not guarantee the financial well-being of attorneys. *Perdue*, 559 U.S. at 552. Rather, in light of § 1988's overall purpose, the Sixth Circuit has stated, "[h]ourly rates should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation." *Hadix v. Johnson*, 65 F.3d 532, 535-36 (6th Cir. 1995) (finding abuse of discretion because competent representation was "available locally at a significantly lower rate" than a rate at the high end of large Detroit law firms); *see also Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir. 1999) ("We therefore apply the principle that hourly rates should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question.") (internal quotations omitted); *Lamar Advertising Co. v. Charter Tp. of Van Buren*, 178 F. App'x 498, 501-02 (6th Cir. 2006) (citing *Blum v. Stenson*, 465 U.S. 886, 894-95 (1984)) ("[i]n short, a reasonable hourly rate should be sufficient to encourage competent lawyers in the relevant community to undertake legal representation."); *Perdue*, 559 U.S. at 22 (a reasonable fee under the statute "is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case").

To assess reasonably hourly rates sufficient to attract competent counsel, courts will generally "look to [rates] prevailing in the community for similar services by lawyers of *reasonably comparable* skill, experience, and reputation." *Hadix*, 65 F.3d at 536 (internal quotations omitted, emphasis added). At the same time, however, the governing standard is neither the exact rate an attorney could charge to a private client nor the exact rates a firm seeks. *See Coulter*, 805 F.2d at 149. The Sixth Circuit has specifically held that "[t]he appropriate

rate . . . is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 618 (6th Cir. 2007); *Sykes v. Anderson*, 419 F. App'x 615, 618 (6th Cir. 2011) (quoting language from *Gonter*); *see also Moore v. Brunner*, Nos. 2:08-cv-224, 2:08-cv-555, 2010 WL 317017, at *3 (S.D. Ohio Jan. 25, 2010) ("[W]hile this Court does not determine what fees may be billed to Plaintiffs, it must determine what fees are reasonably chargeable to the other side.").

The Sixth Circuit has also explained that reasonable rates under fee statutes differ from "prices charged to well-to-do clients by the most noted lawyers and renowned firms. . . . [A] renowned lawyer who customarily receives $250 an hour in a field in which competent and experienced lawyers in the region normally receive $85 an hour should be compensated at the lower rate." *Coulter*, 805 F.2d at 149; *see also Lavin*, 2013 WL 2950334, at *5 ("[T]he fee-shifting provisions of Section 1988, do not guarantee that attorneys will be able to recover fees in the highest conceivable range charged in their geographic vicinity, nor does it guarantee litigants that they will have free access to the highest paid lawyers in their city."); *cf. also Kentucky Restaurant*, 117 F. App'x at 419 (quoting trial court for notion that "Plaintiffs are not entitled to have any number of well-qualified attorneys reimbursed for their efforts . . . .").

Attorney fees are "calculated according to the prevailing market rates in the relevant community." *Binta*, 710 F.3d at 627. The "prevailing market" is the "venue of the court of record." *Gonter*, 510 F.3d at 618. Contrary to implications in Intervening Plaintiffs' brief, this Court's venue is not limited to downtown Columbus. Rather, the Southern District of Ohio serves 48 of the 88 counties in Ohio. *See* S.D. Ohio Civ. R. 82.1. The Eastern Division, in particular, serves 30 of these counties. *Id.*

In calculating reasonable market rates, the Court may look to a variety of materials including "a party's submissions, awards in analogous cases, state bar association guidelines, and its own knowledge and experience in handling similar fee requests." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 499 (6th Cir. 2011). A review of several election-law fee decisions from this Court—as well as other Ohio courts—provides guidance regarding proper election-law rates, and demonstrates that reduction is warranted in this case.

As recently as October 22, 2013, Magistrate Judge Deavers recommended lowering the requested hourly rates of an attorney with nearly thirty-five years of experience (which ranged from $445 to $465) to $250. *Ohio Right To Life Soc.*, 2013 WL 5728255, at *6. In assessing work done from 2008 until 2010, Judge Deavers reasoned that "$250 was the prevailing market rate within this jurisdiction during the relevant time frame for experienced attorneys litigating election-law actions." *Id.* The Court adopted this recommended rate on January 22, 2014. *Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n*, No. 2:08–cv–00492, 2014 WL 234677, at *2 (S.D. Ohio Jan. 22, 2014).

The Court also held that a $250 hourly rate was appropriate in *Moore v. Brunner*. 2010 WL 317017, at *3. Considering the circumstances of two election-law cases, involving attorneys with over twenty-years of experience, the Court found "that the attorneys' requested hourly rates of $400 and $450 exceed the amount which would be necessary to encourage competent lawyers to undertake this representation." *Id.* The Court ultimately concluded "that an hourly rate of $250 is adequate to attract competent counsel within this Court's venue while avoiding producing a windfall for attorneys." *Id.* The above cases indicate that the rates that counsel seek are higher than what is reasonably necessary to attract competent counsel in the local community.

Intervening Plaintiffs argue that the Court should consider the Ohio State Bar Association's "The Economics of Law Practice in Ohio in 2013." (Doc. No. 54-2[1]). Review of data from this report supports the conclusion that counsel are seeking to charge rates that exceed what is necessary to attract competent counsel in the region. The 2013 survey states that the reported median billing rate of Ohio lawyers was $207, while the average billing rate was $233.[2] (*Id.* at 39.) In determining a reasonable rate, however, it is not the Court's task to simply determine what rates a specific attorney could charge in the private market. *See Coulter*, 805 F.2d at 149; *cf. also Hadix*, 65 F.3d at 536 (criticizing the trial court for using rates consistent with the "high end of range of rates charged by partners in large Detroit law firms"). Although an attorney's private rate is one factor for consideration, the Court must ultimately determine what rates are "sufficient to encourage competent lawyers in the relevant community to undertake legal representation." *Lamar*, 178 F. App'x at 500.

Given the venue of this Court, the use of overall Ohio figures, rather than figures solely for downtown Columbus, is appropriate. This Court's venue is not limited to downtown Columbus, but instead covers a significant cross section of Ohio's population, including urban, suburban, and rural areas. Accounting for the varied characteristics of the Court's venue, it is reasonable to think that reported rates for attorneys across Ohio, rather than just the higher rates in downtown locations, are reflective of the rates that are necessary to encourage competent representation in the prevailing market.

---

[1] Available at https://www.ohiobar.org/NewsAndPublications.

[2] There is an increase—based on a limited sample size of 13 reporting attorneys—for rates in the "civil rights" practice area. (Doc. No. 394-10 at 40.) The median rates in this category are $350 and the mean rate is $412. (*Id.*) The survey does not divide these numbers by years of practice. Given the limited sample size, the value of these numbers is questionable, and should not outweigh this Court's own prior decisions in elections cases.

Considering the Ohio State Bar Association's 2013 survey, in combination with Ohio case law in this area, Plaintiffs' attorneys are asking for rates that are higher than necessary: $300.00 per hour for Ms. Levenson and Mr. Hardiman; $175.00 per hour for Ms. Awan; and $155.00 per hour for Mr. Harvey. Defendants submit that their reasonable rates should be set as follows:

- Ms. Levenson and Mr. Hardiman each have over 35 years of experience. According to the OSBA 2013 survey, the median statewide hourly rate for such an attorney is **$250.00**. (Doc. No. 52-2, PAGID# 919). As this is consistent with this Court's recent findings in other elections cases, Defendants submit that this should be Ms. Levenson's and Mr. Hardiman's rate.
- Ms. Awan has approximately two years of experience. According to the OSBA 2013 survey, the median statewide hourly rate for such an attorney is **$150.00**. *Id*. Defendants submit that this should be Ms. Awan's rate.
- Mr. Harvey was admitted to the bar on November 4, 2013. At the time the work at issue here took place, he therefore had zero years' experience as an attorney. The OSBA 2013 survey does not contain any data regarding attorneys with less than one year of experience. *See id*. For attorneys with 1 to 2 years' experience, the 25th percentile is $133, suggesting that those who have just passed the bar should earn less than that per hour. Defendants submit that the hourly rate for the newly-minted attorney Mr. Harvey should be **$100.00**.

B. Counsel's Hour Requests Reflect Excessive and Unnecessary Billing for the Work in this Case.

Plaintiffs seeking attorney fees bear the burden of establishing "that the number of hours and the rate claimed are reasonable . . . ." *Imwalle*, 515 F.3d at 552. "To justify any award of

attorneys' fees, the party seeking compensation bears the burden of documenting its work." *Gonter*, 510 F.3d at 617. In other words, "[a]ttorneys who seek fees have an obligation to maintain billing time records that are sufficiently detailed to enable courts to review the reasonableness of the hours expended on the case." *Imwalle*, 515 F.3d at 552 (quotation omitted).

As this Court has recognized, in assessing what hours are reasonably expended, "the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Libertarian Party of Ohio v. Husted*, No. 2:11–cv–722, 2013 WL 4833033, at *3 (S.D. Ohio Sept. 11, 2013) ("*LPO*") (quoting *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1173 (6th Cir.1990)). In evaluating the hours they bill, however, attorneys are still expected and required to "exercise 'billing judgment' with respect to hours worked . . . ." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In short, a statutory fee paying defendant is entitled to be treated as a reasonable fee paying client. *See id.* at 434 ("In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's adversary pursuant to statutory authority.") (emphasis in original, internal quotations omitted). Accordingly, "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.*

Although "[t]here is nothing inherently unreasonable about a client having multiple attorneys[,]" a fee application should sufficiently "reflect[] the distinct contribution of each lawyer to the case . . . ." *Am. Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 432

(11th Cir. 1999) (internal quotations omitted). "But the fee applicant has the burden of showing that, and where there is an objection raising the point, it is not a make-believe burden." *Id.* The Sixth Circuit has acknowledged that when the circumstances demonstrate "that 'multiple attorneys spent considerable time doing very similar work,'" reduction of hours is appropriate. *Kentucky Restaurant Concepts Inc. v. City of Louisville*, 117 F. App'x 415, 419 (6th Cir. 2004) (quoting trial court decision); *see also Coulter v. State of Tenn.*, 805 F.2d 146, 152 (6th Cir. 1986) (noting that in cases of multiple representation "there is also the danger of duplication, a waste of resources which is difficult to measure"). The *Kentucky Restaurant* Court positively recited the trial court's reasoning that "Plaintiffs are not entitled to have any number of well-qualified attorneys reimbursed for their efforts, when fewer attorneys could have accomplished the job." 117 F. App'x at 419.

Here, counsel spent more hours than were reasonably necessary under the circumstances of this case. The number of hours submitted reflects a lack of billing judgment and suggests that Defendants are not being billed as reasonable, fee-paying clients. There are a number of factors that contribute to counsel's billing of excessive and unnecessary hours, as set forth below.

1. Excessive legal research

Legal research can no doubt be time consuming, but there are limits to the amounts of time counsel can spend, and reasonably charge a client for, conducting legal research. As one court within this Circuit has recently explained, "while Plaintiffs [have] every right to hire an attorney who would leave no stone unturned [and] explore and investigate every conceivable nuance of the case . . . the Civil Rights fee-shifting statute was not meant to pass such excesses on as costs to a losing Defendant." *Lavin v. Husted*, No. 1:10 CV 1986, 2013 WL 2950334, at *9 (N.D. Ohio June 13, 2013); *see also Ohio Right To Life Soc., Inc. v. Ohio Elections Comm'n*,

No. 2:08–cv–492, 2013 WL 5728255, at *19-21 (S.D. Ohio Oct. 22, 2013) (recommending across the board reduction of hours based in part on excessive amounts of research time) (Report and Recommendation adopted with slight modifications).

Given counsel's purported experience and expertise in election law, the billing entries reflect a surprising number of hours devoted to research:

Date	**Attorney**	**Description**	**Hours**
11/20	Harvey	Researched and started to write memo regarding Rule 24 intervention	6.3
11/21	Harvey	Researched and completed Rule 24 intervention memo	4.7
12/2	Harvey	Researched and outlined 11th Amendment immunity memo	4.4
12/3	Harvey	Completed research and wrote 11th Amendment immunity Memo	7.5
12/20	Levenson	Researched and prepared Complaint	5.4
1/5	Hardiman	Researched case law and prepared for oral argument	4.5
1/10	Hardiman	Reviewed Motion to Expedite Appeal and researched rules and case law	2.2
1/15	Harvey	Researched and outlined a memo regarding the availability of attorneys' fees for a preliminary injunction	2.5
1/23	Harvey	Researched and wrote memo regarding attorneys' fees (several issues)	3.3
1/27	Harvey	Researched and wrote memo regarding attorneys' fees (several issues)	2.0
1/29	Harvey	Researched and wrote memo regarding attorneys' fees (several issues)	7.5
1/30	Harvey	Researched and wrote memo regarding attorneys' fees (several issues)	1.5
1/30	Harvey	Researched and wrote e-mail to co-counsel regarding attorneys' fees (several issues)	2.1
Total[3]			**53.9**

(Doc. Nos. 54-1, 54-3, 54-4, 54-5).

[3] Counsel's use of block-billing makes it impossible to know what portion of the block-billed entries were dedicated to research and what portion to non-research activities. It is counsel's burden to provide clarity and justification for their time entries. *Imwalle*, 515 F.3d at 552.

The almost 54 hours of research—adding up to nearly a week and a half straight—is excessive in light of counsel's purported experience. Surely, the ACLU has intervened in a case and sought attorneys' fees before. No evidence is provided to justify the large number of research hours dedicated to those topics. The research time is doubly excessive in light of the fact that the Intervenor Plaintiffs' had the benefit of the Original Plaintiffs' Amended Complaint and preliminary injunction motion, which should have clued them into the major cases on point. Notably, the three causes of action asserted in Intervenor Plaintiffs' Complaint are identical—even incorporating much identical language—to the Original Plaintiffs' counts regarding S.B. 193. Counsel are experienced in the subject matter of this case and, thanks to their status as intervenors asserting "me too" claims after the Original Plaintiffs (who will no doubt also seek attorneys' fees) had blazed the trail, counsel did not (and had no need to) explore vast new territory. Their research hours should be subject to reduction.

2. Excessive time on pleadings and motions

As various courts have acknowledged, § 1988 does not give attorneys the ability to spend unrestricted time preparing filings. *See, e.g.*, *Ohio Right To Life Soc.*, 2013 WL 5728255, at *19-20 (criticizing the plaintiff's counsel for excessive amounts of time spent drafting various court motions and pleadings); *Lavin*, 2013 WL 2950334, at *9 (recognizing § 1988 does not permit attorneys to "endlessly edit and repeatedly re-draft each document filed").

Upon review of the billing entries, counsel's hours allocated to motion practice are unreasonable, especially in light of the fact that the Original Plaintiffs had previously filed similar documents.

For example, Ms. Levenson spent a total of 16.2 hours drafting the Complaint—which incorporated the exact same three causes of action as the Original Plaintiffs' Amended

Complaint asserted with respect to S.B. 193. (Doc. No. 54-1; *Compare* Doc. No. 42, Counts One, Two and Three *with* Doc. No. 16, Counts Three, Four, and Five). A close comparison of those counts demonstrates that Intervening Plaintiffs merely copied the Original Plaintiffs' language verbatim, (truncating it in a few spots). *Id*. Intervening Plaintiffs' legal allegations with respect to the effect of S.B. 193 are also similar and are certainly not a substantial departure from those of the Original Plaintiffs. Spending over two entire days on a substantially recycled Complaint is not reasonable.

On Intervening Plaintiffs' motion for a preliminary injunction, Mr. Hardiman spent 9.75 hours and Ms. Awan spent 17.8 (Doc. Nos. 54-3, 54-4). This does not include the research conducted by Mr. Harvey. Spending 27.55 hours on a motion which largely retraced the Original Plaintiffs' steps is not reasonable.

In addition to excessive time spent drafting pleadings and motions, Mr. Hardiman attempts to bill an inordinate amount of time for simply reading documents. On December 5, he spent 3.75 hours "reviewing" a "Memorandum Contra [to the Original Plaintiffs'] Second Motion for Preliminary Injunction." (Doc. No. 54-3). It is unclear whether this entry refers to the Secretary of State's or the State of Ohio's memorandum, but those documents contained only 10 and 13 substantive pages, respectively, for a total of 23 pages. (Doc. Nos. 31, 32). Mr. Hardiman provides no explanation for why these pages took nearly four hours to review. Similarly, Mr. Hardiman spent 2.55 hours reviewing a memorandum contra to Intervening Plaintiffs' preliminary injunction motion. (Doc. No. 54-3). The Secretary's memorandum was 2 substantive pages; the State's was 22 (Doc. Nos. 37, 39). He also included reviewing this Court's Opinion and reviewing a motion to expedite the appeal into two block-billed entries of

2.5 and 2.2 hours, respectively. (Doc. No. 54-3). Defendants submit that these lengthy entries simply for reading documents exhibit a failure to exercise billing judgment.

3. Clerical and other minor tasks

As a general matter, attorneys should not bill for non-legal tasks, which others could perform, at a full legal rate. *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288 n.10 (1989) ("'It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers. . . . Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.'") (quoting *Johnson*, 488 F.2d at 717).

In this case, billing entries include attorney hours spent on the finalization and filing of documents, researching court rules, reviewing court dockets, preparing form documents, and compiling attorney time information for purposes of this motion. Counsel's billing of paralegal tasks—often by the most experienced (and expensive) attorneys on their team—includes, but is not necessarily limited to:

Date	**Attorney**	**Description**	**Hours**
1/13	Levenson	Researched appellate rules	.1
1/26	Levenson	Reviewed docket report	.1
1/29	Levenson	Prepared 6th Circuit Notice of Appearance	.2
1/30	Levenson	Telephone call to 6th Circuit Clerk	.1
1/13	Hardiman	Filed Corporate Disclosure Statement and Brief Opposing Motion for Expedited Appeal	.75
2/18	Harvey	Collected, compiled attorney time and declarations	2.9
2/24	Harvey	Cite-checked and edited petition for fees	1.5
Total			**5.65**

(Doc. Nos. 54-1, 54-3, 54-5). Although such entries may appear minor in isolation, they have a cumulative effect. Moreover, these examples are illustrative of the larger problem: counsel have failed to reasonably evaluate the hours they are submitting.

4. Time conferencing with co-counsel

In assessing whether attorneys are exercising appropriate billing judgment—or submitting duplicative hours—the Court should be weary of extensive amounts of time allocated to conferences among co-counsel. *See, e.g., Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996) ("We agree, however, with the district court's findings that some of the attorneys' fees were repetitive and duplicative; in particular, the 'intraoffice conferences' noted by the district court demonstrates duplication of attorneys' time charges."). Case law makes clear that deductions of attorney hours are appropriate for an unreasonable level of conferencing between attorneys. *See, e.g., Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1021 (N.D. Ohio 1997) (holding—even in "a complex first amendment case involving nine plaintiffs"—that "thirty intra-office conferences between attorneys" constituted "excessive and duplicative billing"); *Harkless v. Husted*, No. 1:06–cv–02284, 2011 WL 2149179, at *21 (N.D. Ohio Mar. 31, 2011) (finding an unreasonable amount of hours in part because "Plaintiffs' counsel spent an incredible amount of time emailing, conferencing, meeting, consulting and developing strategy") (Report and Recommendation adopted as modified by *Harkless v. Brunner*, No. 1:06 CV 2284, 2011 WL 2149138 (N.D. Ohio May 31, 2011)); *Clapper v. Clark Development Inc.*, No. 5:09CV0569, 2010 WL 597810, at *2 (N.D. Ohio Feb. 17, 2010) (finding it excessive for "three attorneys to bill for conferring with one another").

Plaintiffs' counsel are billing for a number of conferences with co-counsel, for a total of 6.4 hours. With the exception of one entry on January 30 by Mr. Harvey, the topics of these

conferences are all unlabeled. Counsel therefore fail to justify the reasonableness of this amount of internal conferencing—especially over the short period of time they were involved in the case.

C. Counsel Seeks Payment for Work Incorporating Issues as to which Intervening Plaintiffs are not Prevailing Parties.

"[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (internal quotations omitted). When assessing litigation involving several claims and issues, and only partial success, the Supreme Court has held that "[t]here is no precise rule or formula for making [attorney fee] determinations." *Hensley*, 461 U.S. at 436. On the one hand, "[a] court should compensate the plaintiff for the time his attorney reasonably spent in achieving the favorable outcome, even if the plaintiff failed to prevail on every contention." *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 627 (6th Cir. 2013) (internal quotations omitted). This standard recognizes that attorney hours will often "be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S. at 435.

On the other hand, in cases of partial success, including hours spent on all of the litigation may result in "an excessive amount" of attorney fees. *Id.* at 436. To begin with "[t]he fee award . . . should not reimburse the plaintiff for work performed on claims that bore no relation to the grant of relief: Such work cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011) (internal quotations omitted). "[A] reduced fee is appropriate [where] the number of hours Plaintiff's counsel expended on the litigation as a whole is excessive in relation to the success achieved and the scope of the litigation as a whole." *Ohio Right To Life Soc.*, 2013 WL 5728255, at *10

Here, counsel admit that they sought relief as to the 2014 election cycle and future cycles. (*See* Doc. No. 54, PAGEID# 869; *see also* Complaint, Doc. No. 42, PAGEID# 796-7 (alleging

political disadvantage in 2014 "and beyond"; requesting injunctive relief as to the 2014 elections "or any subsequent elections"); Motion for Preliminary Injunction, Doc. No. 30, PAGEID# 265 (seeking an injunction against "Enforcing Senate Bill 193," in general, as well as against its application to the 2014 election cycle)). And, they admit that the Court granted relief *only* with respect to S.B. 193's application to the 2014 election cycle. (Doc. No. 54, PAGEID# 869; Doc. No. 47). The Court did so on the basis of its findings regarding the retrospective application of S.B. 193; it did not rule on the prospective constitutionality of the law, leaving many of the arguments asserted by the Plaintiffs to be decided in the future. Intervening Plaintiffs nevertheless attempt to bill the full time expended for the preparation of their entire Complaint and preliminary injunction motion, despite the fact that they are not prevailing parties as to many of the claims and arguments asserted in those documents. Intervening Plaintiffs' limited success in this matter to date means that the full fees they seek for researching and preparing those documents must be discounted.

D. The Court Should Deny a Positive Multiplier and Should Make an Across-the-Board Reduction.

Intervenor Plaintiffs' request for a multiplier above and beyond the lodestar amount is unjustified. The United Supreme Court has instructed that "the lodestar method yields a fee that is presumptively sufficient to achieve th[e] objective" of Section 1988. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552, 130 S.Ct. 1662, 1673 (2010). This presumption is a "strong" one *Id*. Enhancements above the lodestar amount may be awarded only in "rare" and "exceptional" circumstances. *Id*. "[T]he lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee . . . an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Id*. at 553 (internal quotations and citation omitted); *see also Bell v. Prefix, Inc.*, Nos. 11-1508, 11-1690, 2013 WL 323005, *2 (6th Cir. Jan.

29, 2013) ("The Supreme Court . . . emphasized that the lodestar amount constitutes the best available mechanism for calculating attorneys' fees.")

"[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant, who must produce "specific evidence" that the enhancement is necessary to provide fair and reasonable compensation. *Perdue*, 559 U.S. at 553 . Intervenor Plaintiffs have failed to meet this burden. Neither the novelty, nor complexity of a case, nor the quality of an attorneys' performance may be used to justify an enhancement of the lodestar. *Id*. That leaves Intervenor Plaintiffs with the fact that this was an expedited election case and that they took the case on contingency to justify their requested 1.4 x multiplier. Those factors hardly make this case "rare or exceptional" to the extent that the strong presumption that the lodestar method is sufficient can be overcome. The requested multiplier should be denied.

In fact, to the contrary, the Court should substantially reduce counsel's hour totals. Although counsel seek rates suggesting considerable expertise in election law, the hours they spent on this case do not reflect such expertise—nor the fact that Intervening Plaintiffs were largely following in the legal footsteps of the Original Plaintiffs. Counsel are clearly qualified; they should have been able to perform the relevant legal tasks in a far more efficient manner. Moreover, their success to date has been limited, yet they seek full recovery of fees. Counsel have failed to demonstrate billing judgment. They cannot satisfy their burden simply by declaring that they reviewed their hours and used proper judgment. Rather, attorney hours are a fact-intensive inquiry, and counsel must sufficiently demonstrate reasonable hours through analysis of their actual time entries. Counsel bill the Defendants as an adversary, not a reasonable fee paying client. Such an approach is inappropriate under § 1988.

The Sixth Circuit "has recognized the propriety of an across the board reduction based on excessive and duplicative hours." *Auto Alliance Intern., Inc. v. U.S. Customs Serv.*, 155 F. App'x 226, 228 (6th Cir. 2005); *see also Coulter*, 805 F.2d at 152 ("Where duplication of effort is a serious problem, as in this case, the District Court may have to make across the board reductions by reducing certain items by a percentage figure, as [the trial court] did here in reducing this item by 50%."). Moreover, a plaintiff's results do not relieve counsel of their burden to exercise billing judgment and eliminate unnecessary hours. *Cf. Saint-Gobain Autover USA, Inc. v. Xinyi Glass N. Am., Inc.*, 707 F.Supp.2d 737, 764-65 (N.D. Ohio 2010) (applying a 50% across-the-board reduction, despite the plaintiffs' "excellent results", to account for billing deficiencies and to avoid an "unreasonably excessive" fee total).

Given the excessive hour totals in this case, a fifty percent, across-the-board reduction of claimed hours would still leave more than enough hours to reasonably compensate counsel for the success they have achieved to date. Defendants submit that the Court should multiply each attorney's claimed hours by .5 and apply their reasonable rates as argued above, yielding the following results:

Attorney	**Reasonable Hours (claimed hours x .5)**	**Reasonable Hourly Rate**	**Total**
Levenson	14.9	$250.00	$3,725.00
Hardiman	24.6	$250.00	$6,150.00
Awan	36.0	$150.00	$5,400.00
Harvey	25.55	$100.00	$2,555.00[4]
Total	101.05		**$17,830.00**

[4] See Section E below regarding further reduction of Mr. Harvey's total.

E. The Court Should Limit Counsel's "Fees for Fees" Requests to Three Percent of the Time Counsel Reasonably Spent on the Main Case.

Within the context of "fees for fees" motions, the Sixth Circuit has recognized that "[a]lthough time spent in preparing, presenting, and trying attorney fee application is compensable; some guidelines and limitations must be placed on the size of the[ ] fees." *Northeast Ohio Coalition for Homeless v. Sec'y of Ohio*, 695 F.3d 563, 573-74 (6th Cir. 2012) (internal quotations omitted). Consequently, the Sixth Circuit has "established a general rule that [i]n the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case when the issue is submitted on the papers . . . ." *Id.* at 574 (internal quotations omitted). Importantly, "protracted fee litigation" does not, in and of itself, constitute an "unusual circumstance" justifying exception to the general rule. *Id.* at 575 (quoting *Auto Alliance*, 155 F. App'x at 229).

In keeping with this guideline, Mr. Harvey's hours should therefore be reduced even further. He expended 22.3 hours related to counsel's attempt to recover fees. Multiplying this amount by .5 (to account for the 50% reduction, yielding 11.15 hours) and subtracting that amount from the total number of reasonable hours in the chart above means that the total number of reasonable hours not expended on fees was 90.4 (101.55-11.15). Three percent of that amount is 2.72 hours. Mr. Harvey's 11.15 hours spent on fee issues should therefore be reduced to 2.72, meaning his overall hours total should be reduced by 8.43 hours, for a new total of 17.12 hours (25.55-8.43), yielding $1,712.00 in fees, for a revised overall total of **$16,987.00**.

III. CONCLUSION

Defendants respectfully ask the Court to reduce attorneys' fees to Intervening Plaintiff's counsel as set forth above.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Richard N. Coglianese
RICHARD N. COGLIANESE (0066830)
Trial Attorney
BRIDGET E. COONTZ (0072919)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
Richard.Coglianese@ohioattorneygeneral.gov

Counsel for Defendant
Secretary of State Jon Husted

/s/ Kristopher J. Armstrong
KRISTOPHER J. ARMSTRONG (0077799)
Trial Attorney
ERIN BUTCHER-LYDEN (0087278)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
Kristopher.Armstrong@ohioattorneygeneral.gov

Counsel for Intervening Defendant
State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2014, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Kristopher J. Armstrong
KRISTOPHER J. ARMSTRONG (0077799)
Assistant Attorney General