No. 12-15738-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KARLA VANESSA ARCIA, ET AL.,
Plaintiffs-Appellants,
v.
FLORIDA SECRETARY OF STATE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (NO. 12-22282-CIV-ZLOCH)

PRELIMINARY RESPONSE TO APPELLANTS' MOTION FOR ATTORNEY'S FEES

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, Appellee, Florida Secretary of State Kenneth W. Detzner, provides the following list of interested persons:

Advancement Project – Attorneys for Appellants

Antoine, Melande – Appellant

Arcia, Karla Vanessa – Appellant

Atkinson, J. Andrew – Attorney for Appellee

Cartagena, Juan – Attorney for Appellants

Carvin, Michael A. – Attorney for Appellee

Culliton-Gonzalez, Katherine – Attorney for Appellants

Davis, Ashley E. – Attorney for Appellee

De Leon, John – Attorney for Appellants

Detzner, Kenneth, Florida Secretary of State – Appellee

Fair Elections Legal Network – Attorneys for Appellants

Flanagan, Catherine M. – Attorney for Appellants

Florida Immigrant Coalition, Inc. – Appellant

Florida New Majority, Inc. – Appellant

Friedman, Joshua N. – Attorney for Appellants

Goldman, Marc A. – Attorney for Appellants

Gore, John M. – Attorney for Appellee

Hair, Penda – Attorney for Appellants

Hovland, Ben – Attorney for Appellants

Jenkins, Marina K. – Attorney for Appellants

Jenner & Block LLP – Attorneys for Appellants

Jones Day – Attorneys for Appellee

Kanter Cohen, Michelle – Attorney for Appellants

Kaplan, Lindsay Eyler – Attorney for Appellants

Katsas, Gregory G. – Attorney for Appellee

LatinoJustice PRLDEF – Attorneys for Appellants

Law Offices of Chavez & De Leon – Attorneys for Appellants

Masters, Lorelie S. – Attorney for Appellants

National Congress for Puerto Rican Rights – Appellant

Nkwonta, Uzoma – Attorney for Appellants

Nordby, Daniel E. – Attorney for Appellee

Perez, Jose – Attorney for Appellants

Postman, Warren D. – Attorney for Appellee

Project Vote – Attorneys for Appellants

Ramamurti, Bharat R. – Attorney for Appellants

Roberson-Young, Katherine – Attorney for Appellants

Rogers, Kristen M. – Attorney for Appellants

Sen, Diana – Attorney for Appellants

Veye Yo – Appellant

Zloch, The Honorable William J. – U.S. District Court Judge

1199SEIU United Healthcare Workers East – Appellant

PRELIMINARY STATEMENT

On December 8, 2014, Appellants filed a Motion for Attorneys' Fees. Due to the holidays and holiday travel, Appellee, Florida Secretary of State Kenneth W. Detzner ("Secretary"), sought and was granted a short extension to respond to the Motion up to and including today, January 20, 2015.

On January 9, 2015, the Secretary moved to transfer the issue of attorney's fees to the district court or, alternatively, for a 90-day extension of time to respond to the Motion for Attorneys' Fees. The Secretary had recently retained new counsel and determined that, upon conferral and further review, more time would be necessary to fully respond to the Motion, as it is a factually intense endeavor. Appellants opposed.

The Court has not yet ruled on the Secretary's motion to transfer or, alternatively, for a 90-day extension of time. In an abundance of caution, the Secretary files this *preliminary* response to Appellants' Motion for Attorneys' Fees. However, as the factual development necessary to enable this Court to fully assess the reasonableness of Appellants' requested fees is not possible under the current motion schedule, the Secretary still seeks a transfer of the issue to the district court or, notwithstanding the filing of this preliminary response, additional time in which to respond more fully.

PRELIMINARY RESPONSE

The Secretary hereby responds in opposition to Appellants' Motion for Attorney's Fees. Over $360,000 in fees and expenses and over 1,000 hours of work for eight attorneys and two paralegals for this appeal is not reasonable.

"[T]he lodestar computation is a two-edged sword. A fee applicant cannot demand a high hourly rate—which is based on his or her experience, reputation, and a presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law." *Ursic v. Bethlehem Mines*, 719 F. 2d 670, 677 (3rd Cir. 1983). "The primary issue" in this appeal "involve[d] the statutory interpretation" of a single provision of the National Voter Registration Act, which had already been fully researched and briefed in the lower court. *Arcia v. Florida Sec'y State*, 772 F. 3d 1335, 1343 (11th Cir. 2014). Procedural issues and standing and mootness were also addressed. *See id.* at 1340-43; *see also Arcia v. Sec'y of State*, 908 F. Supp. 2d 1276, 1279 (S.D. Fla. 2012) (indicating that standing was also an issue in the lower court), *rev'd by* 772 F. 3d 1335.

Attorneys of such claimed academic and experiential distinction as Appellants' could not have spent so much time and expense to argue these issues in the first instance, let alone reargue them on appeal. Indeed, the Secretary spent a flat $30,000 for his counsels' representation on appeal. The skill of the Secretary's

counsel[1] at least rivals that of Appellants' counsel and they all worked to resolve the exact same issues. The extreme difference between Appellants' requested fees and the Secretary's fees may very well exemplify the effect of fee-shifting – it "removes the interest a paying client would have in ensuring that the lawyer is serving the client economically." *Pa. v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 723, 107 S. Ct. 3078, 3085 (1987).

I. APPELLANTS ARE NOT PREVAILING PARTIES

It is well-settled that in order to recover attorneys fees and costs under 42 U.S.C. § 1988, a plaintiff first must be determined to be a "prevailing party." Plaintiffs here were not "prevailing parties" in the District Court. In order to be deemed prevailing parties entitled to an award of attorneys' fees, the trial court must enter a judgment reflecting this Court's ruling in favor of the plaintiffs-appellants. An enforceable judgment on the merits is essential to create a material alteration of the legal relationship of the parties required to make the plaintiffs "prevailing parties" for purposes of an award of attorneys' fees. *E.g. Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 609, 121 S. Ct. 1835 (2001) (prevailing party status requires a judgment on the merits or some judicial action that materially changes the legal

[1] *See, e.g., Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Mr. Carvin representing petitioner in action challenging constitutionality of Patient Protection and Affordable Care Act).

positions of the parties, such as a consent decree or injunction); *Hanrahan v. Hampton*, 446 U.S. 754, 100 S. Ct. 1987 (1980) (prevailing on appeal alone does not make party a prevailing party); *Sweitlowich v. County of Bucks*, 620 F.2d 33 (3rd Cir. 1980) (plaintiff who obtained reversal on appeal of judgment for defendant not a prevailing party). Accordingly, the case must be remanded to the trial court for entry of a judgment on the merits before the fees petition may be entertained.

Further, as noted in the Secretary's pending motion to transfer, the Appellants' motion for appellate attorneys' fees should be remanded for resolution by the district court for several good reasons. The district court is best situated to hold any required evidentiary hearings, and to conduct the often intense factual analysis necessary to determine the reasonableness of the hours claimed as well as the appropriate market rates in the Southern District of Florida. Further, remand of the pending petition for fees and costs will enable consideration of all attorneys' fees and costs at once rather than on a piecemeal basis, which will serve to substantially conserve judicial time and effort.

II. APPELLANTS' REQUEST IS UNREASONABLE

"The starting point in fashioning an award of attorney's fees" in the Eleventh Circuit "is to multiply the number of hours reasonably expended by a reasonable hourly rate." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (per curiam);

see also Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933 (1983). The Court is an expert on what rate and hours are reasonable. *Norman v. Housing Auth. of the City Montgomery,* 836 F.2d 1292, 1303 (11th Cir. 1988); *Loranger,* 10 F.3d at 782. While the twelve "*Johnson*" factors may be considered, "many of the factors are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley,* 461 U.S. at 434 n. 9 (referring to *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974)). In addition, "with the exception of routine office overhead," "all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under § 1988." *Dowdell v. City of Apopka,* 698 F.2d 1181, 1192 (11th Cir. 1983). Appellants have the burden of establishing that the hourly rate and hours expended are reasonable. *See Norman v. Housing Auth. of the City Montgomery,* 836 F.2d 1292, 1303 (11th Cir. 1988).

A. <u>The Requested Rate is Unreasonable</u>

"A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman,* 836 F. 2d at 1299. Appellants must provide the Court "with specific and detailed evidence from which the court can determine the reasonable hourly rate." *Norman,* 836 F.2d at 1303. If opinion evidence is relied upon to establish the rate, then the weight given to it "will be affected by the

detail contained in the testimony on matters such as similarity of skill, reputation, experience, similarity of case and client, and breadth of the sample of which the expert has knowledge." *Norman*, 836 F. 2d at 1299. "Testimony that a given fee is reasonable," without "speak[ing] to rates actually billed and paid in similar lawsuits," however, is "unsatisfactory evidence of market rate." *Norman*, 836 F. 2d at 1299. Appellants have not met their burden.

Appellants rely upon the affidavit of Randall C. Marshall to support their requested rates. Mt. Attorney's Fees at 184-89. Mr. Marshall does not identify any specific support for the range of rates he attests are appropriate Southern District rates. Aff. Marshall at ¶ 6. Rather, Mr. Marshall just states that he arrived at those rates using his "experience" and "familiarity" with what other attorneys charge and his review of the Daily Business Review, without articulating what any of those rates are, or how the attorneys charging those rates or their cases are comparable to the attorneys and case here. *Id.* at ¶ 5. This is an important omission.

For example, the market rate for civil rights litigation is lower than the market rate charged to high-profile corporate clients reported in the Daily Business Review. *See Pastre v. Weber*, 800 F. Supp. 1120, 1125 (S.D. N.Y. 1991) (finding defendant "should not be required to pay for legal services at the rate Hughes Hubbard would charge to, say, General Motors or IBM," but rather, "only for what

would have been charged by a competent attorney specializing in civil rights litigation"). This is because firms "derive value from undertaking litigation such as this [civil rights litigation] which may indeed far exceed anything we can award." *Id.* Indeed, the Secretary was able to secure skilled counsel in this appeal for a flat $30,000. Mr. Marshall himself, who has "litigated civil rights and civil liberties claims throughout [his] legal career," does not even attest to what rates he charges or has been granted in similar appeals concerning statutory interpretation, or even in more traditionally complex voting rights cases. Aff. Marshall at ¶ 1. This is insufficient. *See Norman*, 836 F. 2d 1292.

Merely to "corroborate" his bare conclusions, Mr. Marshall does specify *declarations* regarding Southern District rates filed in two other cases, but not the rates themselves or any information as to assess whether those cases or attorneys are comparable to this appeal and Appellants' counsel. Aff. Marshall at ¶ 7 (relying upon declarations in *Pottinger, et al. v. City of Miami*, No. 88-2406, and *Spadaro v. City of Miramar*, No. 11-61607). Regardless of what rates were charged or granted in those cases, neither case is comparable to this appeal.

Spadaro involved intentional infliction of emotional distress, violations of § 1983, conspiracy, negligent hiring and supervision, and violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and its Florida equivalent, in an action brought by a prisoner wrongly convicted of rape and murder. *Sparado v.*

City of Miramar, 855 F. Supp. 2d 1317 (S.D. Fla. 2012). *Pottinger* was a class action spanning twenty five years and involved claims of "cruel and unusual punishment, malicious abuse of process, and unlawful searches and seizure, in violation of due process, the right to privacy, and the Equal Protection Clause," and for purposes of the attorney's fee request, involved modification of a sixteen year old class action settlement. *Pottinger*, 40 F. 3d 1155, 1156 (11th Cir. 1994).[2] This appeal did not involve multiple or complex claims, and did not require knowledge of more than twenty years of litigation to modify an old class action settlement, and was therefore nothing like *Sparado* or *Pottinger*.

In their motion, Appellants compare their requested rate with the rates typically charged by their counsel in Washington, D.C. *See* Mt. Attorney's Fees at 14-15. Appellants argue that their counsel's Washington, D.C. rates are "[s]trong evidence of the reasonableness of the rates requested." *Id.* at 14. But what might be charged for representation in Washington, D.C., is irrelevant to the issue of what the prevailing rate is in the Southern District of Florida. *See e.g., ACLU v. Barnes*, 168 F. 3d 423, 437 (11th Cir. 1999). Appellants conceded that they "only

[2] It is noteworthy that attorneys' fees were wholly denied in *Pottinger* for failing to even achieve prevailing party status. *Pottinger*, No. 88-2406, 2014 WL 2890061 (S.D. Fla. June 25, 2014). Apparently, counsel, who the declarant (relied upon by Mr. Marshall) testified deserved rates as high as $600 an hour, negotiated a settlement agreement that "waived any request for attorneys fees." *Id.* at *1; *see also* DE 553-6, filed on May 9, 2014, in *Pottinger* (testifying that $600 was "imminently reasonable").

seek fees based on the lower prevailing rates in the Miami market for similar cases." Mt. Attorney's Fees at 13.

B. <u>The Number of Hours Expended is Unreasonable</u>

"The Supreme Court has clearly stated that '[t]he time that is compensable under § 1988 is that reasonably expended *on the litigation.*'" *Loranger v. Stierheim,* 10 F.3d 776, 782 (11th Cir.1994) (quoting *Webb v. Board of Educ. of Dyer Cty.*, 471 U.S. 234, 242, 105 S. Ct. 1923, 1928 (1985)) (emphasis in original). However, "[i]t does not follow that the amount of time actually expended is the amount of time reasonably expended." *Copeland v. Marshall*, 641 F. 2d 880, 891 (D.C. Cir. 1980) (en banc).

1. Certain hours must be wholly excluded

a. First appeal

Appellants seek fees for a significant number of hours for work done in a separate, premature appeal of the lower court's order denying their motion for preliminary injunction and summary judgment. Mt. Attorney's Fees at 16-17; *see Arcia v. Sec'y Detzner*, No. 12-15220-EE (11th Cir.). That appeal was dismissed with prejudice on Appellants' own, unopposed motion. *Arcia v. Sec'y Detzner*, No. 12-15220-EE (11th Cir. Dec. 3, 2012). These hours should be excluded. *See Loranger v. Stierheim*, 10 F. 3d 776, 782 & n.7 (11th Cir. 1994) (excluding time spent on other actions, including one that was voluntarily dismissed). The Secretary

asks that the Court exclude all time entries predating November 1, 2012 – the date this appeal was filed.

Appellants concededly "filed that appeal without waiting for final judgment." Mt. Attorney's Fees at 16. Appellants argue that the first appeal was necessary and "helped" this current appeal because it "appeared" that the Secretary intended to remove voters prior to the election. *Id.* and *id*. at n.11. Appellants' fear was unfounded and Appellants' haste in jumping the gun neither established that they had made "every effort to obtain relief prior to the general election," nor elicited any "promise[] [by the Secretary] not to [remove] anyone prior to the general election" as Appellants argue. Mt. Attorney's Fees at n.11.

It is evident in the record that Appellants did not make every effort in obtaining relief prior to the general election. In the order Appellants first appealed, the lower court "seriously question[ed]" Appellants' haste because of their "own 3-month delay" in filing their motion. *Arcia v. Sec'y Detzner*, No. 12-22282, DE 111 at 19-20 (S.D. Fla. Oct. 4, 2012). The lower court therefore held that the Appellants' "purported injury" of removal was therefore "not so serious." *Id.*; *see also Id.* at Sec'y Opp. To Mt. Expedite at 4. Prematurely appealing this action did not cure their previous delay.

Nor was the Secretary's representation in the first appeal that there was "*no chance* that a citizen would be erroneously *removed* from the voter rolls before

Election Day" a promise elicited by Appellants. *Arcia v. Sec'y Detzner*, No. 12-15220-EE (11th Cir. Oct. 16, 2012) (quoting the Secretary's Response in Opposition to Appellants' Motion to Expedite at 12). Rather, it was a simple calculation that "November 6 is only 26 days away," "Florida law prohibits removal of an individual from the voter rolls until 30 days after the statutorily required notice is provided," and those notices had "only recently been provided." *Id.* at DE 8 at 12; *see also id.* at 6 and § 98.075, Fla. Stat. (the 30-day post-notice response time is one part of the longer, general timeline for removal).

Appellants' first appeal did not advance any part of this appeal. To the contrary, it required counsel to expend more time than necessary on this appeal in order to respond to this Court's jurisdictional question "whether and to what extent this Court has jurisdiction over the [first] appeal." *Arcia*, No. 12-15738-EE (letter from Clerk) (Dec. 31, 2012); *see also* Mt. Attorney's Fees at 35 (Masters), 46 (Goldman), 80 (Jenkins), 97 (Olson), 102 (Aul) (spending over 43 hours on the issue). Moreover, any work "on a draft appellate brief that they would have needed to file" in the first appeal (but never did), should be reflected in the hours either briefing this appeal, or in the action below. Mt. Attorney's Fees at 16-17. Indeed, any time spent drafting the "lengthy section on preliminary injunction factors" Appellants seek fees for here on appeal, would have already occurred to prepare Appellants' motion filed in the lower court. *Id.* at 17. Neither Appellants nor the

Secretary should be double billed. Attorney's fees requested for work done in the first appeal should therefore be excluded.

b. Amici

The Eleventh Circuit is "loathe" to even "encourage" the practice of having amicus briefing be "underwritten by the other party." *Glassroth v. Moore*, 347 F. 3d 916, 919 (11th Cir. 2003). Indeed, this Court "suspect[s] that amicus briefs are often used as a means of evading the page limitations on party's briefs." *Id.* Attorney's fees and expenses for "work done in connection with supporting amicus briefs" therefore cannot be awarded. *Id.* Appellants nevertheless claim hours for telephone conferences and emails "re amicus issues," and even hours spent "review[ing]" and "work[ing]" on amicus briefs. *E.g.* Mt. Attorney's Fees at 35 (Masters 12/20/2012). *See* Mt. Attorney's Fees at 34-35, 45-46, 66. More than 66 hours are claimed in entries explicitly concerning "amicus" issues. What makes this even more unreasonable is that all but one of those hours are claimed by the two attorneys with the highest requested rates ($500-550 per hour). *See* Mt. Attorney's Fees at 34-35 (Masters), 45-46 (Goldman). Attorney's fees requested for work regarding amicus issues should therefore be excluded.

2. The Remaining Hours Are Unreasonable[3]

This Court "regularly" sees attorneys "spend[ing] more time on a case than it reasonably requires," which is "why applications for attorney's fees to be paid by the other party are reviewed by courts." *Glassroth v. Moore*, 347 F. 3d 916, 920 (11th Cir. 2003). After excluding improper hours, the Court must therefore consider the reasonableness of the balance and, in doing so, is "obligated" to prune out "excessive, redundant, or otherwise unnecessary" hours. *American Civil Liberties Union of Georgia v. Barnes*, 168 F. 3d 423, 428 (11th Cir. 1999). Excessive, redundant, or otherwise unnecessary hours are those "that would be unreasonable to bill to a client and therefore to one's adversary *irrespective of the skill, reputation or experience of counsel*." *Norman v. Housing Auth. of the City Montgomery,* 836 F.2d 1292, 1301 (11th Cir. 1988) (emphasis in original). It is Appellants' burden to

[3] The representation of Appellants' counsel that they exercised billing judgment to exclude hours, Mt. Attorneys Fees at 19, can be "appreciate[d]," but, in the end, the issue is "whether the attorneys who did opt to seek reimbursement for their time should have exercised more billing judgment," *Glassroth*, 347 F. 3d at n.2. The hours alleged to have been excluded were not even hours worked by the primary attorneys and individuals working on this appeal. Indeed, Appellants seek fees for the work of eight attorneys and two paralegals. And to the extent Appellants identify who worked the excluded hours, they were "in-house counsel from four of the organizations that served as co-counsel" and "individuals who worked peripherally on the case." Mt. Attorneys Fees at 19. Appellants' counsel does not disclose how many hours were excluded.

provide time records "with sufficient particularity so that the district court can assess the time claimed for each activity." *Id.* at 1303.

a. General insufficiency

The time records for Appellants' counsel fall far short of Appellants' burden. Appellants' counsel admittedly used block billing more than half of the time. Aff. Goldman at ¶ 13. Upon review, perhaps more often than that. Block billing "mak[es] it difficult to ascertain how much time was spent on each task." *Dial HD, Inc. v. ClearOne Communications*, 536 Fed. Appx. 927, 931 (11th Cir. 2013). Even when set out distinctly, vague entries such as "worked re appeal issues," and "revised" or "worked on" "appellate brief," as claimed here, similarly "do not provide the Court with sufficient information to determine whether such entries are duplicative or excessive." *League of Women Voters of Florida v. Browning*, No. 06-21265, 2008 WL 5733166, *12 (S.D. Fla. Dec. 4, 2008) (applying 30 percent reduction), *adopted as modified by* 2009 WL 701107. This problem is exacerbated by the number of people entering time for the same tasks. For example, on October 14, 2012, Ms. Masters and Mr. Goldman each spent 10 hours editing an initial brief and editing the motion to expedite in the *first* appeal (which should be excluded). Mt. Attorney's Fees at 34 (Masters), 45 (Goldman).

An award for time spent by multiple attorneys requires a showing of "the distinct contribution of each lawyer to the case" and, further, that it "is the customary

practice of multiple-lawyer litigation." *ACLU v. Barnes*, 168 F.3d 423, 432 (11th Cir.1999). As an initial matter, it is not customary – especially for those of alleged skill – to require eight attorneys (two of which are partners with lengthy careers) and two paralegals for a matter of statutory interpretation and jurisdictional issues on appeal. By contrast, retaining a team of attorneys would be "understandable" in "a significant, lengthy employment discrimination case." *Johnson v. Univ. College of UAB*, 706 F. 2d 1205, 1208 (11th Cir. 1983). Nevertheless, Appellants have not shown distinct contributions of their attorneys, primarily because of block billing and vague entries.

The Court does not have to conduct an hour-by-hour review, and may simply reduce the excessive and unnecessary hours across the board. *Bivins v. Wrap it Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008). The general lack of detail and specificity in the voluminous time records submitted by Appellants' counsel makes an across-the-board cut reasonable here. Rather than objecting to each entry individually, the Secretary therefore offers the following examples of unreasonable hours that should result in a substantial across-the-board reduction.

b. Briefs

Appellants filed two briefs in this appeal: an initial brief and a reply brief. The 595 hours (almost 15, 40-hour work weeks) of time their attorneys and paralegals spent on writing and editing those briefs is excessive on its face. Moreover, the

hours spent on brief writing is excessive considering the issues had already been largely briefed in the lower court. Additionally, the hours spent by the two paralegals is excessive on its face and upon closer review.

Two partners, Mr. Goldman and Ms. Masters, claim about 240 hours spent on brief writing. Mt. Attorney's Fees at 33 (Masters summary – 71.5 hours), 44 (Goldman summary – 168.4625). The other six attorneys claim about another 297 hours spent on brief writing for a total of 537 hours of attorney time writing two briefs. *See* Mt. Attorney's Fees (summary forms). The two paralegals claim about 58 additional hours on brief writing. Mt. Attorney's Fees at 96 (Olson summary), 100 (Aul summary). One of the paralegals spent 16.5 hours just "cite check[ing]" the briefs. Mt. Attorney's Fees at 97 (Olson). The second paralegal spent an additional 23.5 hours "cite check[ing]" the briefs. *Id.* at 101-102 (Aul). A whole work week was therefore spent checking citations in briefs that eight attorneys spent 537 hours drafting and revising. This is excessive, redundant, or otherwise unnecessary. *See ACLU of Georgia v. Barnes*, 168 F. 3d 423, 432-33 (11th Cir. 1999) (excluding hours of two of the five attorneys drafting three briefs and noting, but not reaching, issue of "whether assigning five lawyers to drafting briefs reflects a customary practice in cases of this type").

c. Oral argument

Appellants' claim a total of about 86 hours preparing for oral argument. *See* Mt. Attorney's Fees (summary forms). Two partners spent 47.8 hours preparing. Mt. Attorney's Fees at 33 (Masters), 44 (Goldman). Almost another 23 hours spent preparing are claimed by three more attorneys. *Id.* at 64 (Kaplan), 5 (Cohen), 8 (Flanagan). One paralegal spent an additional 14.875 hours preparing. *Id.* at 100 (Aul). There is no explanation for why 86 hours for five attorneys and one paralegal were necessary, where only one attorney actually presented argument. Hours spent preparing for oral argument by those who did not actually present argument should be excluded.

d. Conferences and meetings

Appellants claim about 140 hours for conferences, reported in the time entries as "attend weekly team meeting," or "conference." *See* Mt. Attorneys' Fees at 33 (Masters summary), 44 (Goldman summary), 64 (Kaplan summary), 89 (Rogers summary), 79 (Jenkins summary). Insufficient detail is offered to evaluate whether or not these meetings and conferences were necessary or appropriate.

e. Non-substantive work

An excessive amount of time was spent by attorneys on administrative type and procedural tasks than on substantive legal work. For example, one associate spent 3.5 hours "prepar[ing] brief for filing at CA11," a task that requires converting

the document to .pdf format. Mt. Attorney's Fees at 59 (Friedman 10/16/2012).[4] The same associate spent one hour to "finalize and file CAS and Corporate Disclosure Form," another hour to *again* "finalize[] and file[] CAS and CIS in Eleventh Circuit," and half of an hour to "correspond[] with court regarding schedule." Mt. Attorney's Fees at 59 (Friedman 10/26/2012, 11/21/2012, 1/30/2013). "Drafting paperwork," "update[ing] and circulat[ing] Civil Appeal Statement," "prepar[ing] civil appeal statement," and "review[ing] appellate procedures" and "procedural rules" took another 8 hours. *Id.* (10/7/2012, 10/17/2012 – 10/24/2012, 11/20/2012). Another attorney claims 6.75 hours to "review[] and revise[] press release re oral argument." Mt. Attorney's Fees at 68 (Kaplan 10/9/2013). Excessive hours are also claimed by attorneys for work performed on the "Notice of Appeal," "formatting requirements," and "pro hac vice" motions. *E.g.* Mt. Attorney's Fees at 65 (Kaplan10/5/2012, 10/6/2012). Almost 19 hours are claimed by three attorneys concerning "supplemental authority." Mt. Attorney's Fees at 80-81 (Jenkins 6/19/2013 –6/27/2013), 90 (Rogers 6/20/2013 – 6/27/2013), 6 (Cohen 6/21/2013). Additionally, one paralegal spent at least 4.5 hours on appearance of counsel forms. *See* Mt. Attorney's Fees at 101-02 (Aul).

[4] No "brief" was filed on "10/16/2012" in this appeal or in the first appeal. Only the first appeal was proceeding at that time and the only thing docketed on October 16, 2012, was this Court's Order denying Appellants' motion to expedite. *Arcia,* No. 12-15220 (Order Oct. 16, 2012).

That 4.5 hours *excludes* the block-billed hours that also mention appearance of counsel forms. *See id.* Time spent on pro hac vice forms adds an additional 16.5 hours. *See id.*

The Secretary should not be required to pay hundreds of dollars an hour for Ivy-League attorneys and paralegals to perform hours and hours of non-legal work or insignificant tasks. "A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." *Lang v. Reedy Creek Improvemnet District*, 1997 WL 809200, *7 (M.D. Fla. 1997) (quoting *Ursic v. Bethlehem Mines,* 719 F.2d 670, 677 (3rd Cir.1983).

C. <u>No Other Factor Supports the Requested Rate or Hours</u>

Appellants argue that the novelty and complexity of the issues, and skill of counsel warrant "a particularly substantial fee award." Mt. Attorney's Fees at 9-13. These factors are generally subsumed within the determination of what rates and hours are reasonable. *See Blum v. Stenson*, 465 U.S. 886, 898-99 (1984). Appellants have not met their burden to establish enhancements.

This appeal was not complex; at issue was a matter of statutory interpretation and jurisdictional questions of standing and mootness. Moreover, the primary issue of statutory interpretation and the issue of standing were already fully researched and briefed in the lower court. This action was not novel either. While Appellants may have been the first to prevail, they were not the first to bring an action under the

90-day provision of the NVRA against the Secretary for his efforts to remove non-citizens from the voting rolls. *See United States v. Florida*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012); *see also Mi Familia Vota Education Fund v. Detzner*, No. 12-01294 (M.D. Fla.) (challenging the effort under Section 5 of the Voting Rights Act).

As to skill, Appellants have not offered any specific evidence to assess what "special skill" "require[d] the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel and complex issue." *Blum*, 465 U.S. at 898. Nor did they offer any specific evidence to determine that the "quality of service rendered was superior to that one reasonably should expect." *Id.* at 899. Appellants offer no comparison.

Moreover, the claimed skill of Appellants' counsel should have *decreased* the number of hours spent on this appeal, even if the Court concludes it was complex. "An attorney of great skill" after all, operates "without lost motion or false starts," and does "well just what ought to be done … in a minimum of time." *Norman v. Housing Auth. of the City Montgomery*, 836 F.2d 1292, 1300-01 (11th Cir. 1988). Appellants counsel failed to secure their goal of an injunction prior to the general election, prematurely appealed an interlocutory order, abandoned that appeal, and started again with this appeal. Their "lost motion" and "false starts" created the Court's jurisdictional question Appellants' counsel and staff then spent over 43 hours to resolve. Mt. Attorney's Fees at 35 (Masters), 46 (Goldman), 80 (Jenkins),

97 (Olson), 102 (Aul). The lack of counsel's skill is also apparent from the amount of time spent on pro hac vice motions, appearance of counsel forms, and notices of supplemental authority.

D. <u>Appellants' Request for Expenses is Unreasonable</u>

Appellants seek travel costs and expenses for three attorneys to attend oral argument. Aff. Goldman ¶ 23, Decl. Cohen ¶ 12. Specifically, Appellants seek $1,873.67 for Ms. Masters and Mr. Goldman, and $415.10 for Ms. Cohen. *Id*. Ms. Masters' $220 exchange fee and fare difference for her flight should be excluded. Mt. Attorney's Fees at 124, 131 (attachment to Aff. Goldman). It appears that the original return flight booked was too early. *Id.* at 127 (indicating return flight departing at 1:40 p.m. on the day of oral argument). The Secretary should not have to pay for this mistake. The $37.78 "ProTravel agent fee" to arrange Mr. Goldman's travel should also be excluded. *Id.* at 112, 117. Arranging travel is not a necessary service or a fee reasonably expended on this appeal.

Several food and transportation expenses should be reduced. Ms. Masters also claims $98.66 for dinner one night. Mt. Attorney's Fees at 124, 135 (attachment to Aff. Goldman). An itemized receipt is not provided. Almost $100 for a single meal is excessive and the expense should be reduced. Ms. Masters' cab fare should also be reduced. She spent $46 and $39 for cab fare between the airport and hotel. *Id.* at 124, 134. Mr. Goldman on the other hand, spent only $23 and $25 for cab

fare between the same airport and hotel. *Id.* at 113, 123. Ms. Masters' cab fare expenses should be reduced by the difference.

Finally, Ms. Masters and Mr. Goldman's lodging expenses should be reduced by $200. Each spent $281.37 for one night at the same hotel near the courthouse. *Id.* at 112, 121, 124, 135. Ms. Cohen spent $184.62 for one night at her hotel, which was also near the courthouse. Mt. Attorney's Fees at 9, 11 (Decl. Cohen). In fact, Ms. Cohen spent less on transportation between the courthouse and her hotel than did Ms. Masters. *Compare id. with id.* at 124, 134 (Aff. Goldman – Masters).

CONCLUSION

Appellants are not yet prevailing parties. Nevertheless, Appellants failed to provide the Court with sufficiently detailed hours or supported rates. When using its own experience and expertise to determine a reasonable fee, the Court should take into account that skilled counsel handled this appeal for the Secretary for less than 10% of what Appellants are seeking. *See Norman v. Housing Auth. of the City Montgomery,* 836 F.2d 1292, 1303 (11th Cir. 1988). In light of the foregoing, the Court should deny Appellants' motion on the basis that Appellants are not yet prevailing parties. In the alternative, the Court should exclude the improper fees and expenses identified above and make an across-the-board reduction of the remaining fees in accordance with the arguments set forth herein.

WHEREFORE, the Secretary respectfully requests that this Court deny Appellants' Motion for Attorneys' Fees to the extent objected to herein.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2015, I caused the foregoing document to be filed with the court and served on all parties by filing through the Court's CM/ECF system.

_Ashley E. Davis_____
Attorney