IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MEMPHIS A. PHILLIP RANDOLPH INSTITUTE, THE EQUITY ALLIANCE, FREE HEARTS, THE MEMPHIS AND WEST TENNESSEE AFL-CIO CENTRAL LABOR COUNCIL, THE TENNESSEE STATE CONFERENCE OF THE NAACP, SEKOU FRANKLIN, and KENDRA LEE,	)	**Case No. 3:20-cv-00374**
	)	**Judge Richardson**
	)	**Magistrate Judge Frensley**
Plaintiffs,	)	
v.	)	
TRE HARGETT, in his official capacity as Secretary of State of the State of Tennessee, MARK GOINS, in his Official capacity as Coordinator of Elections for the State of Tennessee, and AMY WEIRICH, in her official capacity as the District Attorney General for Shelby County, Tennessee,	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

In their current Motion (Mot. For Att'y Fees, D.E. 159), Plaintiffs seek nearly $100,000 in fees—all for a short-lived preliminary injunction vacated by the Sixth Circuit. For the reasons set forth below, however, Plaintiffs have failed to establish that they are the "prevailing party" pursuant to 42 U.S.C. § 1988(b), a necessary prerequisite for recovery of any fees and costs. Further, even assuming prevailing party status, Plaintiffs' supporting documents reflect significant overstaffing, vague (and in many cases non-existent) descriptions of legal services provided, and billings for unnecessary legal services and other non-compensable activities—all of which warrant

significant reduction in the requested amounts.

PROCEDURAL BACKGROUND

On May 1, 2020, Plaintiffs—two individual voters and five voter-outreach organizations—filed a complaint challenging several of Tennessee's absentee-voting safeguards. (*See generally* Compl., D.E. 1.) That initial complaint did *not* challenge the first-time-voter provision in Tenn. Code Ann. § 2-2-115(b)(7). Six weeks later, on June 12, 2020, Plaintiffs amended their complaint to add a challenge to the first-time-voter provision and to seek preliminary and permanent injunctive and declaratory relief. (*See* Am. Compl., D.E. 39; Mot for Prelim. Inj., D.E. 40.) Plaintiffs argued that, because of the COVID-19 pandemic, the requirement that first-time, mail-registered voters appear in person to vote "severely burdens the fundamental right to vote" and asked this Court to enjoin its enforcement and declare the statute unconstitutional. (Am. Compl., D.E. 39, PageID# 129-30; Mem. in Supp. of Mot. for Prelim. Inj., D.E. 43, PageID# 1679-85.)

On June 26, 2020, Defendants, the Tennessee Secretary of State, the Tennessee Coordinator of Elections, and the District Attorney General for Shelby County, all in their official capacities, opposed the request for preliminary injunctive relief on several grounds. (*See* Prelim. Inj. Resp., D.E. 46.) Defendants argued that Plaintiffs lacked Article III and third-party standing, (*id.* at PageID# 1776-80, 1785-87, 1808 n.27); that Plaintiffs' claims were barred by laches, (*id.* at PageID# 1770-76); that Plaintiffs were unlikely to succeed on the merits of their claims, (*id.* at PageID# 1803-16); and that the harm an injunction would cause to the State and the public interest outweighed Plaintiffs' alleged harms, (*id.* at PageID# 1816-21).

This Court denied Plaintiffs' request for a preliminary injunction with respect to the August 6, 2020 Primary Election, (*see* Mem. Op. D.E. 55, PageID# 2194-2213), but later, on September 9, 2020, granted a preliminary injunction as to the first-time-voter provision only. (*See* Prelim.

Inj. Order, D.E. 80, PageID# 2636-38.) The very next day, Defendants moved to stay the injunction pending resolution of their previously filed motion to dismiss for lack of standing. (*See* Mot. to Stay, D.E. 83, PageID# 2650-51.) And a day after that, Defendants filed a motion to reconsider the injunction. (*See* Mot. to Recons., D.E. 87, PageID# 2672-73.) This Court denied both motions by order dated September 28, 2020. (*See* Mem. Op. Den. Mot. to Recons., D.E. 103, PageID# 2754-79; Order Den. Mot. to Stay, D.E. 107, PageID# 2788-90.)

Defendants then immediately appealed, (*see* Notice of Appeal, D.E. 108), and asked this Court to stay its injunction pending the appeal, (*see* Mot. to Stay Pending Appeal, D.E. 109, PageID# 2794-2807), which was denied on October 8, 2020. (*see* Order Den. Mot. to Stay, D.E. 113, PageID# 2829-32.) Defendants promptly sought a stay from the Sixth Circuit. (*See* Mot to Stay Dist. Ct. Prelim. Inj., Exh. 1.) In denying Defendants' motion, the Sixth Circuit found that after the District Court's injunction, some first-time voters may have already voted absentee and therefore the potential irreparable injury to those voters and the public outweighed Defendants' probability of success on the merits. (See Order Den. Mot. to Stay Dist. Ct Prelim. Inj., Exh. 2., pg. 3.)

On June 22, 2021, after the benefit of full briefing and oral argument, the Sixth Circuit reversed and vacated the preliminary injunction. The Sixth Circuit concluded that after the Tennessee Supreme Court's August 5, 2020 ruling in *Fisher v. Hargett*, 604, S.W.3d, 381 (Tenn. 2020), Corey Sweet—a member of Plaintiff NAACP and the sole identified individual with standing at the time the complaint was filed—no longer qualified to vote absentee and, therefore, no longer had any actual, ongoing stake in the case. (*See* Order Vacating Prelim. Inj., D.E. 146, PageID# 3268-69.) Prior to *Fisher*, Mr. Sweet was eligible to vote by mail pursuant to a June 4, 2020, Tennessee state-court preliminary injunction permitting anyone in Tennessee to vote

absentee who determined it was impossible or unreasonable to vote in person because of COVID-19. (*See id*. at 3268 (citing *Fisher*, 604 S.W.3d at 392).) As a result of the *Fisher* opinion, however, the state-court injunction—the only thing giving rise to Mr. Sweet's alleged injury from the enforcement of the first-time-voter provision—was vacated. And it followed, the Sixth Circuit reasoned, that the relief sought by Plaintiffs no longer had any real impact on Mr. Sweet's legal interests. (*Id*. at 3269.) In other words, Mr. Sweet no longer had a claim for injury as a result of enforcement of the first-time-voter provisions. Consequently, Mr. Sweet's claim—and by extension the NAACP's claims—was moot. (*See id.* at PageID# 3269-3272.)

On June 30, 2021, after the Sixth Circuit vacated the preliminary injunction, Plaintiffs voluntarily abandoned their claims and moved to dismiss their case without prejudice. (*See* D.E. 151.) Defendants opposed without-prejudice dismissals of two counts in Plaintiffs' complaint because this Court had determined—and the Sixth Circuit affirmed—that Plaintiffs failed to show a likelihood of success on the merits of those two claims. (*See* D.E. 154.) This Court, though, granted Plaintiffs' motion and dismissed the case on July 9, 2021. (*See* D.E. 155.) Plaintiffs now seek to recover $99,222.13 in attorney's fees allegedly incurred in obtaining the now-vacated preliminary injunction. (*See* D.E. 156.)

ARGUMENT

Plaintiffs are not entitled to an award of fees in this case because they are not "prevailing parties" under 42 U.S.C. § 1988. Plaintiffs sought preliminary- and permanent-injunctive relief to enjoin the enforcement of Tennessee's first-time voter provision and to have the statute declared facially unconstitutional. (*See* Am. Compl., D.E. 39, PageID# 157, ¶¶ E, J.) While Plaintiffs secured a preliminary injunction, it was only for purposes of the November 3, 2020, general election, and it was subsequently vacated by the Sixth Circuit. And having been unsuccessful in

all their other challenges to Tennessee's absentee-voting safeguards, Plaintiffs voluntarily abandoned their claims and moved to dismiss their case. Under these circumstances, Plaintiffs cannot be considered "prevailing parties" for purposes of awarding attorneys' fees and costs under 42 U.S.C. § 1988. Indeed, Plaintiffs voluntarily "le[ft] the courthouse emptyhanded," *Sole v. Wyner*, 551 U.S. 74, 78 (2007), and achieved neither "enduring" nor "irrevocable" relief, *McQueary v. Conway*, 614 F.3d 591, 598 (6th Cir. 2010).

Now, despite the preliminary nature and limited duration of the preliminary injunction, Plaintiffs seek to portray themselves as the "prevailing party" and ask this Court for nearly $100,000 in attorney's fees. But as the Sixth Circuit has recognized, "the preliminary nature of [that] relief—together with the requirement that a prevailing-party victory must create a lasting change in the legal relationship between the parties . . . will generally counsel against fees in the context of preliminary injunctions." *See McQueary*, 614 F.3d at 601 (cleaned up). That reasoning militates against an award of fees here and this Court should reject Plaintiffs' request. Yet even if this Court concludes that Plaintiffs are prevailing parties and are thus entitled to recover fees, this Court should reduce Plaintiffs' fee award to account for the limited nature of their "success," as well as their significant overstaffing, vague time entries, and other non-compensable activities. Moreover, the Court should deny all fees incurred after August 5, 2020, the date the Tennessee Supreme Court's decision in *Fisher* mooted Plaintiffs' first-time-voter claim.

I. Plaintiffs Are Not Entitled to Attorneys' Fees Under 42 U.S.C. § 1988 because they are not Prevailing Parties.

There "is no common law right to attorney's fees." *McQueary*, 614 F.3d at 596. Instead, "[o]ur legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless of whether he wins or loses." *Fox v. Vice*, 563 U.S. 826, 832 (2011). For that reason, courts do not award fees—even to the winner—absent "explicit statutory

authority." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). Congress created that "explicit statutory authority" when it enacted 42 U.S.C. § 1988. That statute "empower[s] the courts to grant fees" to a prevailing party § 1983 actions. *Id.*

A. Plaintiffs did not obtain the relief sought.

In *McQueary*, the Sixth Circuit stopped short of creating a bright-line rule against fee awards for plaintiffs who obtain only a preliminary injunction. Instead, the court concluded that a "contextual and case-specific inquiry" should be performed. That inquiry, the court explained, will determine whether the case presents an "occasional exception" to the general rule that "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." *See id.* at 604. And while the court declined to set out a bright-line rule, it recognized that "the 'preliminary' nature of the relief—together with the requirement that a prevailing-party victory must create a lasting change in the legal relationship between the parties and not merely 'catalyze' the defendant to voluntary action—will generally counsel against fees in the context of preliminary injunctions." *Id.* at 601.

On remand, the district court in *McQueary* applied the guiding principles set out by the Sixth Circuit. The district court first acknowledged the Sixth Circuit's rejection of a bright-line rule that plaintiff who receive preliminary injunctions without more cannot be prevailing parties. *See McQueary v. Conway*, No. 06-CV-24-KKC, 2012 WL 3149344, at *2 (E.D. Ky. Aug. 1, 2012). The court then noted that the Sixth Circuit "indicated that there should be an exception where the preliminary injunction winner 'receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time.'" *See id.* (quoting *McQueary*, 614 F.3d at 599). To determine whether the plaintiff had "received everything [he] asked for," the court compared the plaintiff's requested relief with the preliminary injunction he ultimately obtained.

See id. at *2. While the plaintiff sought both preliminary- and permanent-injunctive relief in the complaint, the plaintiff only received a preliminary injunction. *Id.* Plaintiff's claims were then mooted by the State legislature voluntarily repealing the challenged provisions. *Id.* As a result, the plaintiff's request for permanent injunctive relief was "never granted." *Id.* And because "Section 1988 requires lasting relief, not the temporary fleeting success that an injunction effective only while the case is pending represents," *see McQueary*, 614 F.3d at 597 (citing *Sole*, 551 U.S. at 83), the district court denied the plaintiffs' request for attorney's fees, *id.*at *3. That denial of fees was upheld by the Sixth Circuit in a second appeal. *See McQueary v. Conway*, 508 F. App'x 522, 524 (6th Cir. 2012).

The Sixth Circuit's instructions in *McQueary* confirm that Plaintiffs here are not entitled to recover their attorney's fees. Like the plaintiff in *McQueary*, these Plaintiffs sought not only preliminary- but also permanent-injunctive relief and a declaration that the first-time-voter provision is unconstitutional. In other words, Plaintiffs sought to permanently prevent Tennessee from enforcing its first-time-voter provisions in all future elections, not just the 2020 elections.

Just like the plaintiff in *McQueary*, however, Plaintiffs here obtained only a preliminary injunction—and just for the November 2020 general election. This means that Plaintiffs' permanent injunction and declaratory relief requests, like the plaintiff's permanent injunction request in *McQueary*, were "never granted." *See McQueary*, 2012 WL 3149344, at *2. Further, the preliminary injunction was ultimately vacated by the Sixth Circuit. All of this taken together is fatal to Plaintiffs' request for attorney's fees. *See McQueary*, 508 F. App'x at 524 (upholding the district court's denial of fees and noting that while the plaintiff sought permanent injunctive relief, the "preliminary injunction itself did not ultimately provide him with [that] relief"). Consequently, Plaintiffs did not obtain court-ordered relief that was enduring, and irrevocable,

providing them with everything they asked for. *Miller v. Caudill*, 936 F.3d 442, 448 (6th Cir. 2019).

B. The Relief obtained by Plaintiffs was neither enduring nor irrevocable

The term "prevailing party" is a "legal term of art," which the Supreme Court has defined as requiring a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 603. This judicially sanctioned change must bring about a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Sole*, 551 U.S. at 82; *see Farrar v. Hobby*, 506 U.S. 103, 111 (1992). This material alteration must "directly benefit [the plaintiff] at the time of the judgment or settlement" and must be "enforceable against the defendant." *Farrar*, 506 U.S. at 111. Finally, the court-ordered change in the legal relationship between Plaintiff and Defendant must be "*enduring and irrevocable*." *McQueary*, 614 F.3d at 598 (emphasis added and internal quotation marks omitted) (quoting *Sole*, 551 U.S. at 86). For the change to have been "enduring," it must have been "irrevocable, meaning it must have provided plaintiffs with everything they asked for." *See Miller*, 936 F.3d at 448. In sum, under Supreme Court and Sixth Circuit precedents, a fee award is appropriate under 42 U.S.C. § 1988(b) when a plaintiff:

- obtains a "judicially sanctioned" change in the legal relationship between the parties;
- that results in a "material" alteration to the plaintiff's "direct benefit";
- which is "enforceable," "enduring," and "irrevocable."

That did not occur here. The preliminary injunction entered by this Court proved to be neither enduring nor irrevocable. The Sixth Circuit reversed and vacated the preliminary injunction. And Plaintiffs never obtained permanent or declaratory relief as to the first-time-voter

provision. Thus, the relief obtained by Plaintiffs here—a preliminary injunction subsequently vacated by the Sixth Circuit—falls far short of the third requirement.

This Court recently followed the Sixth Circuit's guidance in denying a request for attorney's fees where plaintiffs failed to obtain all the relief sought and the preliminary injunction was vacated. In *Jones v. Haynes*, plaintiffs filed suit against the Tennessee Registry of Election finance, alleging violations of their First and Fourteenth Amendment rights. *See* 350 F.Supp.3d 691, 693 (M.D. Tenn. 2018). The plaintiffs sought declaratory and injunctive relief. *See id.* This Court granted a preliminary injunction, barring the State from enforcing the challenged provisions. *See id.* at 694. But shortly after the injunction was issued, the challenged provisions were amended. *See id.* As a result, this Court dismissed the case as moot and dissolved the preliminary injunction. *See id.* The plaintiffs then sought to recover their attorney's fees. In denying the plaintiffs' motion, Judge Crenshaw aptly explained that "[t]he court-ordered change in the legal relationship between the parties must be enduring and irrevocable" to render a plaintiff the prevailing party, *see id.* at 695 (citing *McQueary*, 614 F.3d at 597), "a preliminary injunction does not establish prevailing party status if it is reversed, dissolved, or otherwise undone by the final decision in the same case because Section 1988 requires lasting relief, not the temporary, fleeting success that an injunction represents," *id.* Because the Plaintiffs did not obtain the permanent relief they sought and because the preliminary injunction was vacated by the Sixth Circuit, they were not prevailing parties entitled to recover fees under Section 1988. *See id.* at 695, 697.

Plaintiffs fail to properly apply the Sixth Circuit's guidance in *McQueary* or this Court's recent decision in *Jones*. Instead, they insist that the preliminary injunction provided Plaintiffs with the enduring and irrevocable change in the legal relationship between the parties. (*See* Pls.' Mem. in Supp. of Mot. For Atty's' Fees, D.E. 159.) But ultimately, there was no permanent change

in the State's ability to enforce its first-time-voter provisions. And the change that *was* court-ordered—the State's temporary inability to enforce the challenged provision—was not "enduring." Plaintiffs, then, attempt to conflate the irrevocability of the change in legal relationship between the parties, with the "irrevocable" nature of the votes that were cast absentee. This is not the irrevocability contemplated in order to award fees under § 1988. Irrevocability in this context means that Plaintiffs obtained *everything they asked for* (i.e., preliminary-injunctive, relief, *and* permanent-injunctive relief, *and* declaratory relief), not just a technical victory temporarily suspending the State's ability to enforce the first-time-voter provision. *See Miller*, 936 F.3d at 448 (noting that for the change to have been "enduring," it must have been "irrevocable, meaning it must have provided plaintiffs with everything they asked for"). Because Plaintiffs did not obtain the permanent relief sought and because the preliminary injunction was vacated by the Sixth Circuit, they were not prevailing parties. And it follows that they are not entitled to recover fees under Section 1988. *See Jones*, 350 F.Supp.3d at 695, 697. As a result, Plaintiffs' requests for attorney's fees should be denied.

II. Plaintiffs' Request For Attorneys' Fees and Costs Should Be Reduced.

Even if the Court determines that Plaintiffs are prevailing parties, their fee request should be reduced. Under 42 U.S.C. § 1988(b), a "court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs." Section 1988 was designed to induce representation of meritorious civil rights actions, not to "produce windfalls to attorneys." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 526, 565 (1986)).

Plaintiffs, as fee applicants, "bear[] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S.

424, 437 (1983). They likewise bear the burden of demonstrating entitlement to the requested enhancement of the lodestar amount, which should only be awarded in "rare and 'exceptional' circumstances." *Perdue*, 559 U.S. at 552 (citations omitted).

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. "The court should then exclude excessive, redundant, or otherwise unnecessary hours." *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994) (citations omitted).

Application of these guidelines here confirms that Plaintiffs' fee request must be substantially reduced. As noted in Exhibit A attached to this response,[1] Plaintiffs' counsel have billed for an overstaffed legal team, unknown and vague activities that cannot be reviewed, hours expended after this matter became moot, and hours expended on appeal—where they ultimately lost.

A. Plaintiffs are not entitled to attorney fees for the Sixth Circuit appeal or for hours billed after their claim was no longer justiciable.

Plaintiffs' claim for attorneys' fees includes hours billed after the preliminary injunction was entered and the case proceeded to appeal. But Plaintiffs are absolutely not entitled to attorneys' fees on appeal, even if this Court were to determine that Plaintiffs are prevailing parties based on the September 9, 2020, decision and are thus entitled to fees for their attorneys' work in the district court. "Since the judgment below [was] vacated on the basis of an event that mooted the controversy before the Court of Appeals' judgment issued, [Plaintiffs] [were] not, *at that stage*, [] 'prevailing part[ies]' as [they] must be to recover fees under § 1988." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 483 (1990) (emphasis added); *see also Washington All. of Tech. Workers v.*

[1] Exhibit A is a composite of all requested attorneys' fees as submitted by Plaintiffs' counsel. The line items in dispute have been highlighted.

U.S., 857 F.3d 907, 911-12 (D.C. Cir. 2017); *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 454 (1st Cir. 2009) (explaining that "a party is not a 'prevailing party' at the appeals stage, entitled to attorney's fees for the cost of *appellate* litigation, if the case becomes moot pending appeal" (emphasis in original)).

Likewise, Plaintiffs should not be entitled to receive fees for hours claimed after their case became moot. The Sixth Circuit was clear: after the Tennessee Supreme Court's August 5, 2020, ruling in *Fisher*, Mr. Sweet no longer qualified to vote absentee and, therefore, no longer had any actual, ongoing stake in the case. (*See* Order Vacating Prelim. Inj., D.E. 146, PageID# 3268-69.) As a result of the *Fisher* opinion, the state-court injunction—the only thing giving rise to Mr. Sweet's alleged injury from the enforcement of the first-time-voter provision—was vacated. Thus, the Sixth Circuit found the relief sought by Plaintiffs no longer had any real impact on Mr. Sweet's legal interests. *Id*. at 3269. In other words, Mr. Sweet's claim—and thus the NAACP's claims—were moot. (*See* D.E. 146, PageID# 3269-3272.)

Once the Plaintiffs' claims were mooted and the case became nonjusticiable, the hours expended by Plaintiffs' counsel were *per se* unnecessary. Accordingly, Plaintiffs are not entitled to recover any fees or costs associated with the appeal or for hours unnecessarily billed after *Fisher* mooted their first-time-voter claims. Those impermissibly billed hours are demarcated on Exhibit A to the response.

B. Plaintiffs' legal team was significantly overstaffed.

Plaintiffs' time entries reflect that this case has been overstaffed since its inception. A review of the hours claimed by Plaintiffs illuminates that only three lawyers—Ravi Doshi, Pooja Chaudhuri, and Caleb Jackson—performed the lion's share of the work. Many of the hours spent by the remaining attorneys were unnecessary, including multiple attorneys reviewing documents,

participation in phone calls, and so on. Even considering that Plaintiffs required a local counsel, that still leaves only four attorneys necessary to advance the litigation.

The purpose of Section 1988's award of attorney fees is to induce representation in civil rights cases, not to create a windfall for attorneys. Plaintiffs are simply "not entitled to have any number of well-qualified attorneys reimbursed for their efforts, when fewer attorneys could have accomplished the job." *See Ky. Rest. Concepts, Inc. v. City of Louisville*, 117 Fed. App'x. 415 (6th Cir. 2004). One must wonder if any Tennessee clients would be willing to pay for teams of 10 attorneys if § 1988 did not exist. Plaintiffs' entries reflect significant overbilling, and their fee requests should be reduced by half for that reason alone.

C. Some of Plaintiffs' time entries are unreviewably vague.

Attorneys seeking fees "have an obligation to 'maintain billing time records that are sufficiently detailed to enable courts to review the reasonableness of the hours expended.'" *Smith v. Serv. Master Corp.*, 592 Fed. App'x. 363, 371 (6th Cir. 2014) (quoting *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990)). "Although Plaintiffs' counsel 'is not required to record in great detail how every minute of his [or her] time was expended,' 'at least counsel should identify the general subject matter of [ ] time expenditures,'" *Id.* (quoting *Hensley*, 461 U.S. at 437 n. 12; *see also Wooldridge*, 898 F.2d at 1177; *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1020 (N.D. Ohio 1997)).

Here, a number of Plaintiffs' fee entries are simply unreviewable as noted on Exhibit A, attached to this response. For example: numerous entries simply state "emails" without illuminating their subject matter. Several other entries simply state "telephone conferences." Without detail, it is impossible to scrutinize these claimed hours to determine if they are properly payable. Accordingly, the fee request should be reduced.

D. Even if Plaintiffs are considered prevailing parties, the lodestar should be reduced.

Given the significant overstaffing, vague and unreviewable fee entries, and lack of success on appeal, a significant fee reduction is warranted.

In fee-application disputes where problems such as the ones here require a reduction to the lodestar, courts have typically applied across-the-board reductions as a fair and expeditious solution to determining the sum total of reasonable fees. *See Auto All. Int'l, Inc. v. U.S. Customs Serv.*, 155 Fed. App'x. 226, 228 (6th Cir. 2005) (citing *Coulter v. Tennessee*, 805 F.2d 146, 152 (6th Cir. 1986) (holding that a district court may apply an across-the-board reduction based on "excessive or duplicative hours" and approving a 50% across-the-board reduction where "duplication of effort is a serious problem")).

At a minimum, a 50% reduction to the lodestar is warranted here. The case has not been leanly staffed; Plaintiffs retained more than double the counsel necessary to litigate this matter fully. Their fees post-*Fisher* were unnecessary given the nonjusticiability of the claim. And in any event, Plaintiffs cannot be prevailing parties with regard to hours claimed after the case was appealed given their failure on appeal. And many of their fee entries are so vague as to be unreviewable.

Given these pervasive issues and the extremely limited relief Plaintiffs obtained, a 50% reduction is warranted. That sort of reduction is consistent with reductions imposed or considered by other district courts in this Circuit. *See, e.g.*, *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F.Supp. 843, 848 (N.D. Ohio, 1989) (reducing excessive post-trial briefing and reply brief hours by 50%); *Howe v. City of Akron*, 2016 WL 916701 (N.D. Ohio, 2016) (holding that a 50% reduction is not entirely unwarranted for excessive billing, overstaffing, and vague entries, but ordering a 35%

reduction in hours coupled with a downward modification of hourly rate). Plaintiffs' fee requests should thus be reduced at least by half if they are even considered prevailing parties.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for attorneys' fees should be denied or, alternatively, the fee lodestar should be reduced by a minimum of 50%.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

/s/Alexander S. Rieger
JANET M. KLEINFELTER (BPR #13889)
Deputy Attorney General
Janet.kleinfelter@ag.tn.gov

ANDREW B. CAMPBELL (BPR #14258)
Senior Assistant Attorney General
Andrew.campbell@ag.tn.gov

ALEXANDER S. RIEGER (BPR #029362)
Senior Assistant Attorney General
Alex.rieger@ag.tn.gov

MATTHEW D. CLOUTIER (BPR #036710)
Assistant Attorney General
Matt.cloutier@ag.tn.gov

Office of the Tennessee Attorney General
Public Interest Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-7403

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded electronically and by U.S. Mail to the parties named below.

William L. Harbison
Lisa K. Helton
Christopher C. Sabis
Christina R.B. López
Sherrard, Roe, Voigt & Harbison, PLC
150 3rd Avenue South, Suite 1100
Nashville, TN 37201

Danielle Lang
Caleb Jackson
Molly Danahy
Jonathan Diaz
Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005

Ezra Rosenberg
Pooja Chaudhuri
Jacob Conarck
Lawyers' Committee for Civil Rights Under Law
1500 K Street NW, Suite 900
Washington, DC 20005

Date: September 7, 2021

/s/ Alexander S. Rieger
Alexander S. Rieger
Senior Assistant Attorney General