

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

JOHNNY THOMAS ORTIZ II; *et al.*,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF
ELECTIONS; *et al.*,

Defendants.

Civil Action No.: 5:24-cv-420-BO

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES AND COSTS**

Plaintiffs Johnny Thomas Ortiz II, Jimmie Gregory Rogers Jr., and Weldon Murphy ("Plaintiffs") submit this Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Costs pursuant to 42 U.S.C. § 1988.

INTRODUCTION & NATURE OF THE CASE

Plaintiffs are North Carolina voters and petition signers who supported Justice for All of North Carolina's ("JFA") petitions for certification as a new political party in North Carolina ahead of the 2024 general election. Plaintiffs prevailed on the full scope of the relief sought in their Emergency Motion for Preliminary Injunction by obtaining an Order directing Defendants to certify JFA as a new political party under N.C. Gen. Stat. § 163-96(a)(2) so that qualified JFA candidates could appear on the November 2024 general election ballot. As the prevailing parties, Plaintiffs are entitled to an award of reasonable attorneys' fees and costs. Plaintiffs respectfully request this Court enter an order awarding \$77,221.00 in attorneys' fees and \$405.00 in costs, totaling \$77,626.00 in fees and costs.

STATEMENT OF FACTS

On July 16, 2024, Plaintiffs filed a Verified Complaint in this Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331, alleging claims under the First and Fourteenth Amendments against Defendants for failing to certify JFA as a new political party, despite the fact that JFA complied with all statutory requirements to place its candidates on North Carolina’s November 2024 general election ballot. [D.E. 1]. On Monday July 22, 2024, Plaintiffs filed an Emergency Motion for Preliminary Injunction and Brief in Support, arguing that the North Carolina State Board of Elections’ (“NCSBE”) actions violated their First Amendment associational and Fourteenth Amendment due process rights. [D.E. 8, 9]. The Emergency Motion for Preliminary Injunction sought an injunction directing Defendants as follows:

- “to certify the petitions filed by Justice for All (“JFA”) as sufficient to qualify JFA as a new political party in North Carolina’s November 5, 2024 general election under N.C. Gen. Stat. § 163-96(a)(2)[;]”
- “enjoin Defendants from enforcing N.C. Gen. Stat. § 163-98 against JFA, insofar as that provision requires a new party to certify its candidates and the candidates to file a notice of candidacy and application to change party affiliation, or take any other action on or before July 1, 2024[;]” and
- “to take any and all action necessary to ensure the inclusion of JFA’s duly nominated candidates on North Carolina’s November 5, 2024 general election ballot.”

[D.E. 8]. In light of the impending election, Plaintiffs also requested that the court issue a decision no later than August 19, 2024. [*Id.*].

The next day, July 23, 2024, the Oversight and Reform Select Committee of the North Carolina House of Representatives held a public hearing where Chairman Hirsch and Executive Director Brinson Bell testified under oath regarding the NCSBE’s decision not to certify JFA as a political party (the “July 23 Hearing”). [D.E. 38-2]. On July 24, 2024, the Court set a hearing on Plaintiffs’ Emergency Motion for Preliminary Injunction for July 30, 2024 in Elizabeth City, and

ordered an expedited briefing schedule. [D.E. 11]. Pursuant to that schedule, on July 26, 2024, Defendants filed their Response in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction. [D.E. 30].

Over the weekend, two Motions for Leave to File Amicus Briefs were filed: one by Speaker Timothy Moore, Representative Grey Mills, and Representative Destin Hall, all in their official capacities; and the other by Clear Choice Action. [D.E. 26, 34]. Both Motions were granted and both Briefs were filed. [D.E. 31, 41].

On Monday, July 29, 2024, Plaintiffs filed their Reply to Defendants' Response to Motion for Emergency Preliminary Injunction, which incorporated new testimony from the July 23 Hearing. [D.E. 38]. That same day, another Motion for Leave to File an Amicus Brief was filed (this time by the North Carolina Republican Party and Republican National Committee), which was granted. [D.E. 37, 47]. Also on July 29, 2024, Dr. Cornel West, Italo Medelius, and JFA moved to intervene in the case as plaintiffs and filed materials in support. [D.E. 44-46].

All parties, including proposed intervenors, were well represented at the July 30, 2024 hearing on Plaintiffs' Emergency Motion for Preliminary Injunction. [*See* D.E. 49]. After oral argument, on August 12, 2024, the Court entered an Order granting the motion to intervene and Plaintiffs' Emergency Motion for Preliminary Injunction in part, D.E. 55 (the "Preliminary Injunction Order"), which set forth the following injunctive relief:

- "The Court ORDERS Allan Hirsch, Jeff Carmon, Stacy Eggers IV, Kevin Lewis, and Siobhan O'Duffy Millen, in their official capacities as members of the North Carolina State Board of Elections, and Karen Brinson Bell, in her official capacity as executive director of the North Carolina State Board of Elections, TO CERTIFY Justice for All of North Carolina as a new political party under N.C. Gen. Stat. § 163-96(a)(2)[;]"
- "Allan Hirsch, Jeff Carmon, Stacy Eggers IV, Kevin Lewis, and Siobhan O'Duffy Millen, in their official capacities as members of the North Carolina State Board of Elections, and Karen Brinson Bell, in her official capacity as executive director of the North Carolina

State Board of Elections, are hereby ENJOINED from enforcing the 1 July filing deadline in N.C. Gen. Stat. § 163-98 as applied to the Justice for All party and its candidates[;]”

- “The Court ORDERS that Allan Hirsch, Jeff Carmon, Stacy Eggers IV, Kevin Lewis, and Siobhan O’Duffy Millen, in their official capacities as members of the North Carolina State Board of Elections, and Karen Brinson Bell, in her official capacity as executive director of the North Carolina State Board of Elections, SHALL include on North Carolina’s 5 November 2024 general election ballot the names of JFA candidates who comply with the terms of this order and who are qualified for the office they seek. Hirsch, Carmon, Eggers, Lewis, and O’Duffy Millen, in their official capacities as members of the North Carolina State Board of Elections, and Brinson Bell, in her official capacity as executive director of the North Carolina State Board of Elections, SHALL take any and all other actions necessary to that end.”

[D.E. 55 at pp. 29-30]. The Court also retained jurisdiction to enforce the terms of the Preliminary Injunction Order and “to grant such further and additional relief as the court deems appropriate, including declaratory relief, injunctive relief, and an award of reasonable attorney’s fees and litigation costs under 42 U.S.C. § 1988.” [D.E. 55 at p. 30].

Plaintiffs timely filed a Consent Motion for Extension of Time to File Motion for Award of Attorneys’ Fees and Costs, which the Court granted [D.E. 87-58]. On September 12, 2024, the Court’s Preliminary Injunction Order became final because the time for appeal expired. *See* Fed. R. App. Pro. 4(a)(1). [D.E. 55].

ARGUMENT

I. Plaintiffs are entitled to an award of fees as prevailing parties under 42 U.S.C. § 1988.

Plaintiffs are prevailing parties under 42 U.S.C. § 1988 because they succeeded in obtaining the injunctive relief sought in their Emergency Motion for Preliminary Injunction.

Prevailing parties in civil rights cases brought to enforce certain constitutional guarantees are generally entitled to recover attorneys’ fees under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1982) (discussing 42 U.S.C. § 1988(b)). A party “prevails” under this statute “when actual relief on the merits of his claim materially alters the legal relationship between the parties

by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (2001). “The plaintiff need not achieve his ‘central’ goal to prevail; instead, if ‘the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit of the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind.” *Tex. St. Tchrs. Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989).

Recently, in *Stinnie v. Holcomb*, 77 F.4th 200, 206 (4th Cir. 2023), *cert. granted sub nom.*, *Lackey v. Stinnie*, 144 S. Ct. 1390 (Mem.) (2024), the Fourth Circuit Court of Appeals, sitting en banc, overruled prior precedent and held that prevailing party status “is satisfied when a plaintiff obtains a preliminary injunction that (a) provides her with concrete, irreversible relief on the merits of her claim by materially altering the parties’ legal relationship; and (b) becomes moot before final judgment such that the injunction cannot be ‘reversed, dissolved, or otherwise undone’ by a later decision.” *Id.* at 216. Both of these elements are met here.

First, the Preliminary Injunction Order provided Plaintiffs with concrete, irreversible relief on the merits such that Plaintiffs’ preferred political party, JFA, is certified under North Carolina law and has a candidate for President on the 2024 general election ballot in North Carolina. That materially alters the relationship between Defendants, who denied to certify JFA in the first instance, and Plaintiffs, who are voters who are now able to join that political party and vote for its candidates. Certification of JFA would not have occurred absent this Court’s preliminary injunction Order. And now that JFA’s Presidential Candidate’s, Dr. Cornell West, name is on the printed ballots, and absentee ballots have been sent out, it is too late for JFA’s candidate to be removed from the ballot. *See* N.C. Gen. Stat. § 163-227.10. The injunctive relief Plaintiffs obtained is thus concrete, and irreversible.

And second, for the same reasons, absentee ballots are out and early voting has begun with the preliminary injunction in place such that now further relief is unnecessary. Thus the Preliminary Injunction Order operated as a final judgment ensuring JFA's candidate(s) could be, and now is, on the November 2024 North Carolina general election ballot. As both conditions are met, Plaintiffs are prevailing parties entitled to attorneys' fees under 42 U.S.C. § 1988.

II. Plaintiffs' requested fees are reasonable.

The first step in determining whether the requested attorneys' fees are reasonable is to calculate the number of hours reasonably expended multiplied by a reasonable hourly rate. *See Rum Creek Coal Sales, Inc v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994) (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)). This is commonly referred to as the lodestar method. *See id.* Twelve factors are considered when assessing reasonableness of the numbers of hours: “(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.” *Id.* at 175 (citations omitted).

Similar factors are subsumed into the reasonableness of the hourly rate¹. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Once the reasonable number of hours is multiplied by the reasonable hourly rate, then the court the court may subtract fees “for hours spent on unsuccessful claims unrelated to the successful ones,” and then “award some percentage of the remaining

¹ Specifically, these include factors (2)-(7), and (9)-(12). *Rivers v. Ledford*, 666 F. Supp. 2d 603, 608 (E.D.N.C. 2009) (citing *Hensley*, 461 U.S. at 430 n. 3).

amount, depending on the degree of success enjoyed by the plaintiff.” *Doe v. Kidd*, 656 F. App’x 643, 652 (4th Cir. 2016). “[A] plaintiff’s degree of success is determined by comparing the ‘scope of the injunctive relief sought to the relief actually granted.’” *Grabarczyk v. Stein*, 32 F.4th 301, 311 (4th Cir. 2022) (quoting *Mercer v. Duke Univ.*, 401 F.3d 199, 205 (4th Cir. 2005)).

Here, Plaintiffs request an award of attorneys’ fees for the 146.5 hours expended in litigating this voting rights case through complaint and expedited preliminary injunction proceedings. (Declaration of Phillip J. Strach, “Strach Decl.” ¶¶14-15). Plaintiffs’ declarations demonstrate that counsel diligently and efficiently represented their clients in this expedited and complex election law case. (Strach Decl. ¶¶12-25; Declaration of Phillip M. Gordon, “Gordon Decl.” ¶¶1-9; Declaration of Bradley K. Overcash, “Overcash Decl.” ¶¶1-6). “Voting suits are unusually onerous to prepare.” *South Carolina v. Katzenback*, 383 U.S. 301, 314 (1966). This time expended includes include approximately 37.5 hours in factual development and drafting the complaint and initial case filing materials; 63.2 hours in expedited preliminary injunction briefing and further factual development; and 45.8 hours in preparing for and attending oral argument, for a total of 146.5 hours. Additionally, counsel for Plaintiffs have billed 15.3 hours to Plaintiffs thus far in preparing this Motion for Fees and Costs. In light of the complexity and time-sensitive nature of this case, a total of 161.8 hours is reasonable.

This amount of hours is supported by the exhibits to the Declaration of Phillip J. Strach, which include redacted invoices² with the specific tasks performed by each timekeeper on a daily basis, the amount of time spent on each task, and the respective fee for each time entry. (Strach Decl. ¶¶1-11, Ex. A). These redacted invoices also show that Plaintiffs exercised reasonable billing judgment and excluded time that was arguably necessary or redundant. *See Rivers v. Ledford*, 666

² Entries for time that was discarded as duplicative or excessive are redacted.

F. Supp. 2d 603, 606 (E.D.N.C. 2009). The total billable time expended in this case was 170.6 hours. In his Declaration, Mr. Strach explains that approximately 24.1 hours were removed from the submitted time entries for work that was arguably duplicative or not essential to obtaining the preliminary injunction in this case. (Strach Decl. ¶14).

Similarly, Plaintiffs' requested rates are reasonable and in-line with market rates for this type of complex voting rights litigation. "The relevant market for determining the prevailing rate is ordinarily the community in which the court where the action is prosecuted sits." *Rum Creek Coal Sales, Inc.*, 31 F.3d at 175 (citing *Nat'l Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir.1988)). "In circumstances where it is reasonable to retain attorneys from other communities, however, the rates in those communities may also be considered." *Id.* at 317. The Fourth Circuit has recognized that this determination is a factual inquiry that "is best guided by what attorneys earn from paying clients for similar services in similar situations." *Id.* Plaintiffs request the following rates:

- \$555 for Lead Counsel and Partner Phillip J. Strach;
- \$485 for Senior Associates Alyssa M. Riggins and Hannah Kays³;
- \$445 for Associate Cassie A. Holt;
- \$280 for paralegals.

The declarations of Mr. Strach, Phillip M. Gordon, and Bradley K. Overcash show that the requested rates are reasonable, particularly for this type of case in this geographic area. (Strach Decl. ¶¶16-25; Gordon Decl. ¶¶6-8; Overcash Decl. ¶¶1-8).

³ Senior Associate Hannah Kays' regular rate was reduced to \$485 for the purposes of this Motion to match Alyssa Riggins.

In sum, Plaintiffs, as prevailing parties, seek reasonable attorneys' fees totaling \$77,221.00 for 161.8 hours of legal work. No further reduction is warranted under the circumstances because Plaintiffs succeeded on all three requests in their Emergency Motion for Preliminary Injunction. [Compare D.E. 8 to D.E. 55 at pp. 29-30]. In other words, because the scope of injunctive relief granted was the same as the scope of injunctive relief requested, Plaintiffs' award should not be diminished by the denial of Plaintiffs' procedural due process claim. At the end of the day, the Court ordered Defendants to certify JFA as a new political party, enjoined enforcement of the July 1 convention deadline, and further ordered Defendants to take all necessary steps to ensure that JFA's candidates appeared on the November 2024 general election ballot. [D.E. 55 at pp. 29-30]. That is the exact relief requested and, as such, Plaintiffs should be awarded the entire amount requested based on their success.

III. Plaintiffs are entitled to reasonable litigation expenses under 42 U.S.C. § 1988 and Plaintiffs' requested costs are reasonable.

A prevailing party is also entitled to an award of reasonable out-of-pocket litigation expenses under §1988. *Daly v. Hill*, 790 F.2d 1071, 1084 (4th Cir. 1986). The expenses Plaintiffs incurred here include the \$405.00 filing fee for the filing of the complaint, which is recoverable as fees of the clerk under 28 U.S.C. § 1920(1). See *M.D. Russell Construction, Inc. v. Consolidated Staffing, Inc.*, 7:19-CV-00221-BO, 2024 WL 4193876, *2 (E.D.N.C. Sept. 13, 2024). As set forth in the Declaration of Phillip J. Strach, the filing fee would have been billed to fee-paying clients and was a necessary cost for the relief obtained. Plaintiffs seek \$405.00 in reasonable litigation expenses under 42 U.S.C. § 1988. (Strach Decl. ¶24).

CONCLUSION

For the foregoing reasons, and as set forth in the materials filed herewith in support, Plaintiffs respectfully request this Court award Plaintiffs \$77,221.00 in reasonable attorneys' fees

and \$405.00 in necessary litigation costs, totaling \$77,626.00 in fees and costs, and grant such other and further relief as the Court deems just and appropriate.

Respectfully submitted, this the 28th day of October, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification to counsel of record.

Dated: October 28, 2024.

By: /s/ Phillip J. Strach
Phillip J. Strach (NC Bar No. 29456)