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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	)	
Plaintiff,	)	
v.	)	**No. 20-312-III**
HERBERT H. SLATERY III, in his official capacity as TENNESSEE ATTORNEY GENERAL and GLENN FUNK, in his official capacity as DISTRICT ATTORNEY GENERAL FOR THE 20th JUDICIAL DISTRICT OF TENNESSEE,	)	
Defendants.	)	

MEMORANDUM AND FINAL ORDER AWARDING PLAINTIFF RECOVERY OF $69,882.37 IN ATTORNEYS' FEES AND EXPENSES

On July 30, 2020, the Court granted summary judgment in favor of the Plaintiff, declaring Tennessee Code Annotated section 2-19-142 unconstitutional both facially, and as applied to the Plaintiff, as violative of the First and Fourteenth Amendments to the United States Constitution and Article I, section 19 of the Tennessee Constitution. In addition the Court granted the Plaintiff recovery of its reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988(b). The Court set up a briefing schedule to quantify those fees. That schedule is completed, and the Court rules upon the papers as follows to quantify the fee recovery.

After considering the arguments of Counsel, the record in this case and the applicable law, it is ORDERED that the *Plaintiff's Motion For Attorney's Fees And Costs*, filed August 14, 2020, is granted and the Plaintiff is awarded $69,882.37, pursuant to 42 U.S.C. § 1988(b) and in accordance with TENN. SUP. CT. R. 8, RPC 1.5, consisting of fees and expenses of $67,009.37 incurred prior to preparation of the August 30, 2020 Reply and an additional 9.7 hours at Daniel Horwitz' reduced rate of $290 per hour, totaling $2,813, in preparing the August 30, 2020 Reply. The Court declines to apply a multiplier as requested by Plaintiff asserted for Defendants' "attempt to chill valid claims for civil rights relief." *See* p. 4, August 14, 2020 *Plaintiff's Memorandum in Support of Its Motion for Attorney's Fees and Costs*.

It is further ORDERED that this is a final order and court costs are taxed to the Defendants.

The Court's reasoning and analysis are as follows.

42 U.S.C. § 1988(b) Authorizes Attorney's Fees And Costs To Prevailing Party

In obtaining a judgment in its favor, the Plaintiff has secured civil rights relief as to the unconstitutionality of Tennessee Code Annotated section 2-19-142 triggering an award of attorney's fees pursuant to 42 U.S.C. § 1988(b).

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964,

> or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (West 2018).

"The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks omitted). Accordingly, the United States Supreme Court has held that "one who succeeds in obtaining an injunction under [§ 1983] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). *See also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("In *Newman*, *supra*, 390 U.S., at 402, 88 S.Ct., at 966, we held that in absence of special circumstances a district court not merely 'may' but must award fees to the prevailing plaintiff"); *Hensley*, 461 U.S. at 429 ("a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.") (internal quotation marks omitted).

In this case, the Plaintiff obtained the entirety of the relief requested in its *Complaint*, filed March 18, 2020, which included both injunctive and declaratory relief that the statute at issue, Tennessee Code Annotated section 2-19-142, is unconstitutional, both facially and as applied. Given this result, the Plaintiff is unquestionably a "prevailing

party" within the meaning of 42 U.S.C. § 1988(b) and is entitled to an award of its reasonable attorney's fees and costs.

TENN. SUP. CT. R. 8, RPC 1.5. Factors

In Tennessee, when assessing the reasonableness of an attorney's fee award, the Court is required to apply the following factors in TENN. SUP. CT. R. 8, RPC 1.5:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent;
>
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and

(10) whether the fee agreement is in writing.

TENN. SUP. CT. R. 8, RPC 1.5 (West 2018).[1] Based upon the evidence in the record filed in support of the fee application, the Court finds that factors 1, 3, 4 and 7 have been proven by the Plaintiff, and all the fees and costs requested are reasonable and were necessary and are awarded. Factors 2, 5, 6, 8-10 are not implicated in this case.

In addition, the Defendants' objections to the fees are

1. the Plaintiff's Legal Team was overstaffed, and

2. the Plaintiff's time entries are unreviewably vague.

Based upon these objections the Defendant asserts the Plaintiff's lodestar (hourly rate x the hours expended) should be reduced by 50%. These objections implicate factors 1, 3, 4 and 7 of Supreme Court Rule 8, RPC 1.5.

The record shows that almost 400 hours were expended on this case by six attorneys—some law students.

In overruling the Defendants' objections, the Court, in the interest of timely issuing this decision and because of the comprehensiveness of the Plaintiff's research and citation to legal authority, adopts the reasoning and authorities of the Plaintiff's *Reply*, quoting and paraphrasing extensively as follows.

[1] There is a debate on whether Tennessee Supreme Court Rule 8, RPC 1.5 should be used when awarding fees under the 42 U.S.C. § 1988(b) statute. Some argue the federal method of the lodestar with enhancements should be used. The decision herein is sufficient to address either or both methods.

Where "a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). "Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Id.* Thus, the Plaintiff's lodestar—the time expended on the litigation multiplied by counsel's hourly rate—is subject to a "'strong presumption'" of reasonableness, *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000) (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)), and deviation from it is proper in only "'rare" and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings," *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1987) (cleaned up). *See also id.* ("the figure resulting from this calculation is more than a mere 'rough guess' or initial approximation of the final award to be made. Instead, we found that '[w]hen ... the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee' to which counsel is entitled.") (quoting *Blum v. Stenson*, 465 U.S. 887 (1984).

As to the Defendants' objections that: the "Plaintiff's Legal Team was Significantly Overstaffed"; "Plaintiff has engaged no less than 6 attorneys (including students) as counsel of record"; and the "Plaintiff is simply 'not entitled to have any number of well-qualified attorneys reimbursed for their efforts, when fewer attorneys could have accomplished the job,'" the Court finds that the record establishes that the Plaintiff was

represented by only two attorneys—Daniel Horwitz and Professor Gautam Hans. Law students who are certified to practice under attorney supervision as part of an approved clinical program pursuant to Tenn. Sup. Ct. Rule 7, § 10.02 and § 10.03 are not themselves "attorneys" as Defendants claim.

The Court further finds that the Plaintiff's billing judgment was objectively reasonable because the bulk of the work was performed by only one attorney—not several, and the Court finds the Plaintiff's Counsel avoided duplication among the attorneys involved.

The Plaintiff's staffing decisions are also reasonable as shown by comparison to the Defendants' staffing. The Defendants had two licensed attorneys—Alexander Rieger and Kelley Groover—appear as counsel of record in this matter, and they also had (at least) two more senior attorneys—Andrew Campbell and Steve Hart—involved in this litigation as well. *See, e.g.*, Exhibit #1 (Jul. 13, 2020 Email); Exhibit #2 (Jul. 12, 2020 Email); Exhibit #3 (Jul. 10, 2020 Email).

The Court further finds that law student James Ryan capably (and successfully) handled the hearing on the Defendants' Motion to Dismiss, and that Attorney Hans capably (and also successfully) handled the hearing on the Plaintiff's Motion for Summary Judgment—both of which involved complex and wholly substantive matters. These facts substantially detract from the Defendants' challenges to the contributions of Professor

Hans and his clinic students as "mostly proofread[ing] and ha[ving] meetings," and are rejected by the Court.

As to the Defendants' objection that: "Many of Plaintiff's Time Entries Are Unreviewably Vague," they present only two specific assertions: (1) that "[m]any of Attorney Hans' time entries simply say 'Correspondence,' 'Correspondence with students,' and 'document review[,]'" and (2) that "[t]he law students fare no better. Defendants should not be expected to pay for entries such as 'Call to discuss how to finish semester assignments,' 'meeting with team and Gautam about new project,' and 'group meeting.'" As to Daniel Horwitz' time entries—which account for most of the Plaintiff's claimed award, and which the Defendants themselves assert encompassed "nearly all of the substantive work" in this case—the Defendants have asserted none of these objections.

The Court rejects the Defendants' challenges regarding Professor Hans' entries and the law students' entries, for the following reasons.

The Court finds that the hours claimed by Attorney Hans are sufficiently reviewable to enable this Court to assess their reasonableness. "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended." *Hensley*, 461 U.S. at 437, n. 12. The Supreme Court has also made clear that "[a] request for attorney's fees should not result in a second major litigation," *id.* at 437, and "[t]o remain faithful to the legislative objectives of § 1988, appellate courts, including this Court, should hesitate to prolong litigation over attorney's fees after the merits of a case have been concluded.

Congress enacted § 1988 solely to make certain that attorneys representing plaintiffs whose rights had been violated could expect to be paid, not to spawn litigation, however interesting, over which claims are 'related' or what constitutes optimal documentation for a fees request." *Id*. at 455 (Brennan, J., concurring in part and dissenting in part). The Court finds that Professor Hans' 33 claimed hours are reasonable. As a clinical professor at an institution of higher education, Professor Hans' FERPA obligations also necessarily limit his ability to describe student correspondence with the heightened detail the Defendants desire.

In addition the Court adopts the authorities cited by the Plaintiff that the Defendants' unspecified objections to entries that the Defendants have failed to identify are improper. *See Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991) ("Defendant's arguments to this court are mere conclusory "In order for courts to carry out their duties in this area, 'objections and proof from fee opponents' concerning hours that should be excluded must be specific and 'reasonably precise.'" *Am. Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) (quoting *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988)). *See also Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. CIV. 09-00429 ACK, 2012 WL 1982433, at *4 (D. Haw. May 31, 2012) ("the party opposing a motion for attorneys' fees bears a burden in opposing these fees as well."). As such, "[t]he party opposing the fee application has a burden of rebuttal that requires submission of evidence to the [trial] court challenging the accuracy and reasonableness of

the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397–98 (9th Cir. 1992) (citing *Blum*, 465 U.S. at 892 n. 5 (1984); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.1987)). By contrast, "[g]eneralized statements that the time spent was reasonable or unreasonable of course are not particularly helpful and not entitled to much weight." *Norman*, 836 F.2d at 1301.

As a consequence, in order to prevent the Plaintiff's asserted time entries from being compensable as part of counsel's lodestar, the Defendants had the obligation "to specifically identify which time entries are not reasonable." *ThermoLife Int'l LLC v. Am. Fitness Wholesalers LLC*, No. CV-18-04189-PHX-JAT, 2020 WL 1694739, at *6 (D. Ariz. Apr. 7, 2020). *See also Rodriguez v. Molina Healthcare Inc.*, 806 F. App'x 797, 804 (11th Cir. 2020) ("Molina, as the party opposing the fee application, had an obligation to identify the hours that should be excluded with some degree of specificity."); *Grace Church of N. Cty. v. City of San Diego*, No. 07CV0419 H(RBB), 2008 WL 11508664, at *11 (S.D. Cal. Sept. 9, 2008) ("The party opposing a fee request bears the burden of highlighting for the Court those billing practices that are excessive or duplicative, and other specific reasons that make it appropriate to reduce the requested fee award."); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, No. CIV.A. MGJ-95-309, 2002 WL 31777631, at *9 (D. Md. Nov. 21, 2002) ("While the fee applicant is under a primary duty to provide sufficient detail to justify a requested attorney's fee award, the party or parties opposing such an award have a concomitant duty to specify with particularity the basis for their objections. To allow this

Court to evaluate the objection fairly, this requires sufficiently detailed references to the challenged time entries and explanation for the basis of the challenge.").

> What is sauce for the goose, however, is sauce for the gander. The Court is forced to note—with disapproval—the too-frequent practice of both the Local and Federal Defendants to challenge the Plaintiffs' petition with their own insufficient detail. Both tended to identify a select few examples of entries or "practices" that were objected to and then make sweeping assertions that the cited defects were representative of a more pervasive problem and demanding that the Court make wholesale reductions. For example, the Federal Defendants presented one chart listing a "few examples" of what was characterized as the Plaintiffs' "practice" of seeking fees for paralegals performing routine office work and another chart listing a "few examples" of alleged duplication of effort in bills submitted by Plaintiffs. (Fed. Defs.' Resp. at 34–35). The Local Defendants, providing only one specific example, objected to "all instances where Plaintiffs seek an award of fees for issues upon which they did not prevail," and stated that "[i]dentifyng other examples will require sifting through all of plaintiffs' counsel's uncollated time records." (Local Defs.' Sur-reply at 5 n. 5). The Local Defendants did not undertake this task, but apparently expected this Court to do so.
>
> This will not do. **It is not the Court's burden to sift through literally hundreds of pages of billing records to look for similar instances of allegedly improper billing entries when the challenging parties have not thought the effort sufficiently important to undertake themselves.**

Thompson, 2002 WL 31777631, at *10 (emphasis added). Myriad additional decisions are in accord.[2]

[2] *Obester v. Lucas Assocs., Inc*., No. 1:08-CV-3491-AT, 2011 WL 13167915, at *5 (N.D. Ga. Dec. 19, 2011) ("the Court declines to lower the lodestar of hours except to the extent that it has identified redundant or excessive hours that properly should be deducted."); *Delevin v. Holteen*, No. CV-12-00118-TUC-FRZ, 2016 WL 10721809, at *4 (D. Ariz. Apr. 26, 2016), *aff'd*, 687 F. App'x 532 (9th Cir. 2017) ("Plaintiffs have the burden of coming forward with specific and detailed objections. *See, e.g., State of Arizona v. Maricopa County Medical Soc*., 578 F.Supp. 1262 (D. Ariz. 1984) ("The party opposing the application must then submit specific and detailed objections. As Circuit Judge Tamn stated in his concurring opinion in *Nat. Ass'n of Concerned Vets v. Sec. of Defense*, 675 F.2d 1319, 1338 (D.C. Cir. 1982) '... Just as the applicant cannot submit a conclusory application, an opposing party does not meet his burden merely by asserting

The Defendants' nonspecific challenge would improperly require the Court "to sift through literally hundreds of [entries] of billing records to look for similar instances of allegedly improper billing entries when the challenging parties have not thought the effort sufficiently important to undertake themselves." *Id.* After identifying as problematic only three specific time entries—cumulatively totaling less than 1.2 hours—submitted by the law students in this matter, the Defendants assert in conclusory fashion only that the three allegedly problematic time entries "are not the exception[.]" *See* Defendants' Response, p. 4. It "is not the Court's burden . . . to look for similar instances of allegedly improper

broad challenges to the application. It is not enough for an opposing party simply to state, for example, that the hours claimed are excessive and the rates submitted too high.' "); *Albano v. Shea Homes Ltd. Partnership*, 2012 WL 4513614, at *4 (D. Ariz. 2012) ("In Arizona, the burden is on the party opposing the fees to show unreasonableness."). Plaintiffs have failed to come forward with specific and detailed objections which would enable this Court to conclude the amount requested by Defendants is not reasonable. As such, the Court determines that Defendants are entitled to an award of attorneys' fees in the amount of $87,436.50 as and for attorneys' fees incurred in prosecuting their motion to dismiss."); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc*., No. CIV.A. 95-2097 (DMC), 2005 WL 1683746, at *2–3 (D.N.J. June 15, 2005) ("In *Bell v. United Princeton Properties, Inc*., 884 F.2d 713, 720 (1989), the Third Circuit held that the opposing party bears the burden of challenging the reasonableness of a fee application with sufficient specificity as to give the applicant notice and an opportunity to respond. Specifically, the Third Circuit stated that: '[A] court may not sua sponte reduce the amount of the award when the defendant has not specifically taken issue with the amount of time spent or the billing rate, either by filing affidavits, or in most cases, by raising arguments with specificity and clarity in briefs (or answering motion papers).... It bears noting that the district court retains a great deal of discretion in deciding what a reasonable fee award is, so long as any reduction is based on objections raised by the adverse party.' *Id.* (Internal citations omitted). The court went on to state that: '[T]he adverse party's submissions cannot merely allege in general terms that the time spent was excessive. In order to be sufficient, the briefs or answers challenging the fee request must be clear in two respects. First, they must generally identify the type of work being challenged, and second, they must specifically state the adverse party's grounds for contending that the hours claimed in that area are unreasonable. The briefs must be specific and clear enough that the fee applicants have a fair chance to respond and defend their request.'"); *Stacy v. Stroud*, 845 F. Supp. 1135, 1144 (S.D.W. Va. 1993) ("Bare assertions by the defendants that certain requests were seemingly excessive are insufficient grounds to disallow time properly spent. Upon review of the petition, the court finds that the hours the defendants objected to as excessive are well within the bounds of reason, and defendants' objections are not persuasive.").

billing entries when the challenging parties have not thought the effort sufficiently important to undertake themselves." *Thompson,* 2002 WL 31777631, at *10. Moreover, the Defendants' failure to identify any other specific entries that it deems problematic improperly deprives the Plaintiff of an opportunity to defend those entries as reasonable. *See Bell v. United Princeton Properties, Inc.*, 884 F.2d 713, 720 (3d Cir. 1989) (holding that a party's opposition to a fee claim "must specifically state the adverse party's grounds for contending that the hours claimed in that area are unreasonable. The briefs must be specific and clear enough that the fee applicants have a fair chance to respond and defend their request."). Accordingly, any claim of unreasonableness regarding anything other than the specific entries that the Defendants have identified as unreasonable is rejected as unsupported. *Id.*

With respect to the three specific entries that the Defendants have identified as problematic, the Court finds that to the extent that any of them are insufficient, the Plaintiff's lead counsel in this matter, Attorney Horwitz, whose billing rate is significantly higher than the students' rates, has already significantly reduced his own compensable hours—none of which the Defendants have challenged—for the specific purpose of addressing any claim of excessiveness or duplication by the clinic's contributors, and this adequately compensates for the three law student entries of a call, a meeting, and a group meeting.

For all of these reasons, the Defendants' challenge to the vagueness of any specified time entry is rejected. No reduction is applied as to the specific and unspecified entries that the Defendants have challenged as they represent a tiny fraction of the Plaintiff's overall claimed award and that substantial reductions have already been made to accommodate any claim of excessiveness and ensure the overall reasonableness of the award sought.

As to the Defendants' call for an across the board reduction of 50%, the Supreme Court has made clear that a full award is justified. *Blum*, 465 U.S. 886 at 901 ("we reiterate what was said in *Hensley*: 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhancement award may be justified.'") (quoting *Hensley*, 461 U.S. at 435). The critical public interest value served by such a standard is similarly well established. *See, e.g.*, *Hescott v. City of Saginaw*, 757 F.3d 518, 525 (6th Cir. 2014).

As to the fee enhancements requested by the Plaintiff to the lodestar, that is appropriate only in exceptional circumstances, such as where the government engages in bad-faith litigation tactics. *See, e.g., Green Party of Tenn. v. Hargett*, 791 F.3d 684, 698 (6th Cir. 2015) ("it was well within the district court's authority to order a fee enhancement based on a party's repeated efforts to circumvent its ruling. . . . Therefore, the district court did not abuse its discretion by awarding plaintiffs a 50% fee enhancement."). Indeed, bad-

faith litigation practices having long justified financial penalties even in the absence of a fee-shifting statute. *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765 (1980) ("In *Link v. Wabash R. Co*., 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962), this Court recognized the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices.").

The Plaintiff asserts that "the Defendants expressly threatened the Plaintiff with a financial penalty and claimed—without qualification—to be 'entitled to' recover the government's legal fees from the Plaintiff. *See Defs. Answer*, p. 7, ¶ 6 (pleading that: 'Defendants are entitled to, and seek herein to recover their attorneys' fees and expenses incurred in this action as provided for by 42 U.S.C. § 1988.')." Plaintiff's *Reply* at 17. The Court finds this is an insufficient basis to establish bad faith. Accordingly no enhancement is awarded.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

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Daniel A. Horwitz
G.S. Hans
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Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson September 11, 2020
Deputy Clerk
Chancery Court