No. 22-60481

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTHUR DOE; BRENDA DOE; CAROL DOE; DIANA DOE; ELIZABETH DOE
Plaintiffs-Appellees,

v.

LYNN FITCH; SEAN TINDELL, COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; MEGAN COSTILOW, DIRECTOR OF THE MISSISSIPPI SEX OFFENDER REGISTRY; COLONEL RANDY GINN, DIRECTOR OF THE MISSISSIPPI HIGHWAY PATROL; LIEUTENANT COLONEL CHARLES HAYNES, DIRECTOR OF THE MISSISSIPPI BUREAU OF INVESTIGATION,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of Mississippi, Case No. 3:16-cv-789-CWR-FKB

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal does not present issues of importance or complexity. The State appeals from the district court's discretionary award of attorneys' fees and costs to Plaintiffs as prevailing parties in an action under 42 U.S.C. § 1983. The Plaintiffs who sought fees and costs obtained judgment and their removal from the Mississippi sex offender registry, as well as the removal of 24 similarly situated non-parties. As prevailing parties, they were entitled to fees under 42 U.S.C. § 1988. The district court weighed the evidence, made findings, and rejected the State's factual challenges to the fee request. These are straightforward fact issues that require no further examination, let alone oral argument that will continue to increase the attorneys' fees and costs that the State will have to pay.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court act within its discretion when it awarded attorneys' fees to Plaintiffs' counsel for prevailing Plaintiffs in a challenge to Mississippi's requirement that people convicted of having engaged in oral or anal sex register as sex offenders?

INTRODUCTION

This is an appeal from an award of attorneys' fees and costs after the moving Plaintiffs obtained judgment and injunctive relief. That relief secured the removed of four Plaintiffs from the burdens of sex offender registration. And it secured the removal of 24 others from that burden, too.

After the State refused any negotiation over the fees and costs, the prevailing Plaintiffs sought them from the district court. The State then asked the district court to reduce Plaintiffs' lodestar by more than 81%. The district court considered the State's objections and made a smaller cut. The State's argument on appeal is that it just wants more.

This Court reviews fee awards for abuse of discretion. That standard of review disposes of the State's regurgitated objections here. Because this Court provides district courts with tremendous discretion

in setting fee awards and the State's arguments only repeat arguments properly considered and rejected by the district court below, this Court should affirm.

STATEMENT OF THE CASE

I. Mississippi Criminalizes Oral and Anal Sex and Requires Those Convicted to Register as Sex Offenders for a Minimum of Twenty-Five Years.

Mississippi's Unnatural Intercourse statute criminalizes, in relevant part, "the detestable and abominable crime against nature committed with mankind" and subjects those convicted to imprisonment for up to ten years. Miss. Code Ann. § 97-29-59. The Mississippi Supreme Court interprets the Unnatural Intercourse statute to criminalize oral and anal sex. *See, e.g., State v. Davis*, 79 So. 2d 452 (Miss. 1955); *State v. Mays*, 329 So. 2d 65 (Miss. 1976).

Since 1995, when Mississippi enacted the Mississippi Sex Offender Registration Law, Miss. Code Ann. § 45-33-21 *et seq*., Mississippi has required sex offender registration for Unnatural Intercourse convictions. Miss. Code Ann. § 45-33- 23(h)(xi). Mississippi also requires registration for convictions from other jurisdictions which

Mississippi considers the equivalent of an Unnatural Intercourse conviction. Miss. Code Ann. § 45-33-23(h)(xxi).

The requirement to register burdens many aspects of daily life. Those required to register must personally appear to re-register every 90 days and pay a fee. Miss. Code Ann. § 45-33-31. Registrants may not live within 3,000 feet of schools, childcare facilities, childcare homes, or recreation facilities where children are present. Miss. Code Ann. § 45-33-25. Nor may they go to public areas where children are present, including schools, beaches, or campgrounds, without advanced approval from the Mississippi Department of Public Safety. Miss. Code Ann. §§ 45-33-26(1)(a)(i-ii), 45-33- 26(1)(b). They must report any changes to their address or workplace. Miss. Code Ann. §§ 45-33-31, 45-33-35, 45-33-36. Failure to re-register, to pay the fee, or to comply with other aspects of the registration law can result in a fine of up to $5,000 and imprisonment for up to five years. Miss. Code Ann. § 45-33-33(2)(a).

Registrable offenses are categorized into "tiers" that determine how long an individual must register. Mississippi designates Unnatural Intercourse a Tier II offense, requiring at least twenty-five years of registration. Miss. Code Ann. § 45-33-47(2).

Sex offenses that require registration can never be expunged, sealed, destroyed, or purged from someone's criminal record unless the registrant was a minor at the time of the offense. Miss. Code Ann. § 45-33-55.

II. Although the U.S. Supreme Court Banned Statutes Criminalizing Oral and Anal Sex Nearly 20 Years Ago, Mississippi Continues to Enforce the Statute.

In 2003, the United States Supreme Court struck down Texas's sodomy prohibition on due process grounds because the "statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In explicitly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), a prior unsuccessful facial challenge to Georgia's sodomy statute, the Court held that its ruling was not limited to Texas or to laws singling out same-sex couples. The Court also emphasized that the requirement to register as a sex offender in four states, including Mississippi, because of a sodomy conviction highlighted the "consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition" of oral and anal sex. *Lawrence*, 539 U.S. at 576.

While most states that still criminalized oral or anal sex before *Lawrence* repealed or amended those prohibitions in *Lawrence*'s wake, Mississippi clings to its Unnatural Intercourse law. And it continues to enforce it through the registration requirement. When Plaintiffs brought this action, Mississippi forced about 50 people to register solely for Unnatural Intercourse convictions or for out-of-state convictions for oral or anal sex that Mississippi considers equivalent to Unnatural Intercourse.

III. Plaintiffs Try to Resolve the Suit Short of Litigation but the State Refuses.

Counsel for Plaintiffs first approached the Mississippi Attorney General's office in January 2016 to try to resolve this dispute without costly litigation. ROA.1201–1202, 1265, 1565. Those talks lasted through August 2016. ROA.1565.

In those negotiations, the State contended that they could continue to mandate sex offender registration for people with historical sodomy convictions even after *Lawrence* because, according to the State, it could peek behind the conviction to determine whether it involved an element of coercion, conduct with a minor, conduct in public, or compensation, even if the registrant had never been convicted on any of

those elements. The State maintained that position throughout the litigation. *See, e.g.*, ROA.675–680.

IV. Plaintiffs File Suit and Seek Early Summary Judgment but the State Demands Protracted Discovery.

Once it became clear that the parties would not resolve this dispute without litigation, Plaintiffs filed suit. ROA.29–57, 1201–1202, 1265. They asserted two causes of action. The first was a substantive due process claim arguing that *Lawrence* established substantive due process protection for the sex acts criminalized by Mississippi's Unnatural Intercourse statute and that both that statute and the statute requiring registration for Unnatural Intercourse convictions were unconstitutional both as-applied to the Plaintiffs and on their face. ROA.53–54. The second cause of action was intertwined with the first. It asserted that even if one were to accept the State's contention that it could peer behind the conviction to the underlying unproven allegations to determine whether force, minority, public conduct, compensation, or coercion was present, the State did not always require registration for similar conduct involving heterosexual, vaginal-penile sex. ROA.54–55. The second cause of action asserted that differential conduct based

strictly on the sex act violated equal protection. *Id.* Each Plaintiff asserted each cause of action. ROA.53–55.

In another attempt to avoid the time and expenses of litigation – and believing their claims involved disputes of law, not fact – Plaintiffs moved for summary judgment a month after filing their complaint. ROA.138–139.

But the State insisted it needed discovery and the district court denied the motion. ROA.370–372, 476–477. So the parties engaged in costly discovery.

V. Four Plaintiffs Obtain a Stipulated Judgment Against the Mississippi Officials.

After a year and a half of litigation, the parties reached a tentative agreement under which the State would remove all persons from the Mississippi sex offender registry who were convicted under Louisiana's Crime Against Nature by Solicitation law, which Mississippi considered to be a registerable equivalent to Mississippi's Unnatural Intercourse law. The agreement resolved the claims of four of the five Plaintiffs and provided relief to 24 others. ROA.801–807, 1566. The agreement was based in part on rulings from the U.S. District Court for the Eastern District of Louisiana that declared

Louisiana's Crime Against Nature by Solicitation law to violate the Equal Protection Clause of the Fourteenth Amendment, *see Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) ("*Doe I*"), and required Louisiana to remove Crime Against Nature by Solicitation offenders convicted unconstitutionally from Louisiana's sex offender registry, *Doe v. Caldwell*, Civ. Case No. 12-1670 (E.D. La) ("*Doe II*"). ROA.1566. Plaintiffs' counsel here also litigated *Doe I* and *Doe II*. ROA.1566.

The parties finalized the resolution over the following weeks. ROA.1204. On May 10, 2018, the Court entered an agreed order as well as judgment for those four Plaintiffs. ROA.808–816. The agreed order included 11 numbered directives that the State was ordered to undertake related to the removal of the four plaintiffs and 24 others from the Mississippi sex offender registry. ROA.811–815.

This settlement, obtained more than two years after Plaintiffs' counsel first approached the Attorney General's office to attempt to avoid litigation, represented a complete victory not only for the four Plaintiffs with Crime Against Nature by Solicitation convictions but for all others similarly situated who had been forced to register for years because of Crime Against Nature by Solicitation convictions. ROA.1205.

These individuals suffered under the requirement to register as sex offenders long after the case should and could have been resolved.

Plaintiffs, with the State's consent, moved to extend the deadline for Plaintiffs to seek attorneys' fees and costs associated with the partial judgment to 14 days after the district court entered final judgment, which the district court granted. ROA.823–824.

VI. The District Court Finds Mississippi's Unnatural Intercourse Statute Appears to Be Unconstitutional, But Orders the Remaining Plaintiff Seek Post-Conviction Relief.

The parties then litigated the remaining Plaintiff's claims, which focused largely on whether the Mississippi Unnatural Intercourse statute was unconstitutional. Both sides moved for summary judgment. The district court found "that the statute appears to be unconstitutional" and ordered a hearing "to determine whether [the sole remaining Plaintiff] must first seek relief in state court." ROA.1095. After holding that hearing and considering supplemental briefing from the parties, the district court stayed the case "pending a state court ruling determining whether [the remaining Plaintiff] can vacate his conviction through state court remedies." ROA.1174.

VII. The State Declines to Oppose the Remaining Plaintiff's Post-Conviction Relief Petition Despite It Being Filed Years Out of Time.

That remaining Plaintiff, Arthur Doe, then filed a motion for post-conviction relief under Mississippi's Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1, *et seq*. That law limits its application to those in custody, on parole or probation, or in the first five years of sex offender registration. Miss. Code Ann. § 99-39-5(1).

Arthur Doe's conviction was from 1978. ROA.1704. He was no longer in custody or on parole or probation. And he began registering as a sex offender in 2002. ROA.1704. He was thus many years out of time to seek post-conviction relief under Mississippi's Uniform Post-Conviction Collateral Relief Act by 2018, when the district court ordered that he try. Miss. Code Ann. § 99-39-5(1); ROA.1095.

Faced with the possibility of a return to federal court after an order indicating that Mississippi's Unnatural Intercourse statute "appears to be unconstitutional," ROA.1095, the State declined to oppose Arthur Doe's post-conviction relief motion. The state court granted the motion and he was relieved of his registration obligation.

The district court then dismissed Arthur Doe's federal claims as moot on December 21, 2021. ROA.1459.

VIII. Plaintiffs Seek and Are Awarded Attorneys' Fees Through February 2018.

Consistent with their practice throughout this litigation, Plaintiffs' counsel sought to resolve the fees and costs with the State without resorting to motion practice. Plaintiffs made an offer and provided the State their billing records. ROA.1266. Despite promising a response for *months*, the State never offered any substantive response to Plaintiffs' offer. ROA.1196, 1266.

So the four Plaintiffs who obtained judgment timely sought their attorneys' fees and costs under 42 U.S.C. § 1988 by motion. Plaintiffs sought fees and costs only for work through February 2018. ROA.1187. They did not seek fees for the two and a half years of litigation after obtaining judgment for the four prevailing Plaintiffs (other than fees associated with bringing the fee motion). ROA.1187. They did not even seek fees for time up to the district court entering partial judgment on May 10, 2018. ROA.1187. Instead, they segregated their time to work up to and through the agreement in principle with the State to remove

the four prevailing Plaintiffs and 24 others from the Mississippi sex offender registry. ROA.1187.

Plaintiffs presented evidence supporting the reasonableness of the attorney hourly rates they requested and the number of hours spent on the case. The motion and supporting declaration from Plaintiffs' counsel detailed, among other things: (1) the history of the litigation; (2) the background and experience of each timekeeper; and (3) an explanation of how Plaintiffs' counsel reviewed their bills and calculated the hours sought in the request. ROA.1201–1214, 1262–1267, 1284–1287.

Along with setting forth each timekeeper's background and experience, Plaintiffs' out-of-district counsel set forth their standard hourly rates in their home markets and requested that the district court award attorneys' fees at downwardly modified standard rates. ROA.1187–1192. The modified hourly rates that Plaintiffs' out-of-district counsel requested were between 21% and 36% lower than the attorneys' standard rates. ROA.1191.

Plaintiffs offered declarations attesting to the reasonableness of the attorneys' standard rates, the need for Plaintiffs to obtain out-of-

district counsel for this case, and the reasonableness of the rates for Plaintiffs' in-district counsel. ROA.1293–1435.

Exhibits provided with Plaintiffs' counsel's declarations set forth verbatim the billing entries by timekeeper for each date, which detailed the work performed and the time expended on each date. ROA. 1216–1257, 1269–1279, 1281, 1289–1291. Plaintiffs explained that counsel exercised billing judgment to eliminate the possibility of billing for duplicative or unproductive time. ROA.1195. Consistent with district practice, they sought only half-time for their travel. ROA.1195. On top of that, the attorneys and paralegal at Center for Constitutional Rights made an across-the-board 10% reduction from their time to account for any time that might be attributed to duplication of effort. ROA.1195. That reduction accounted for a writedown of more than 78 hours of Plaintiffs' counsel's time. ROA.1196.

Plaintiffs did not seek any enhancement under *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). ROA.1196.

The State opposed the motion, arguing that the hourly rates and number of hours were excessive. It argued Plaintiffs should be awarded rates that are reasonable within the Southern District of Mississippi

but did not provide any evidence to rebut Plaintiffs' showing that they needed out-of-district counsel to obtain adequate representation. ROA.1479–1487. The State also made 2,033 objections to Plaintiffs' 1,069 time entries as being related to supposedly "unsuccessful claims," or being vague, duplicative, or excessive. ROA.1493–1544. The State asked the district court to reduce Plaintiffs' requested lodestar by more than 81%. ROA.1488 (asking district court grant "no more than $75,000" of Plaintiffs' $408,207 lodestar).

Ruling on the fees motion, the District Court addressed each of the State's arguments in a detailed order. ROA.1565–1582.

In setting the hourly rates, the district court considered the attorneys' experience and other recent attorneys' fees cases. ROA.1569–1574. For Plaintiffs' out-of-district counsel, the district court assessed Plaintiffs' counsel's evidence that that out-of-district counsel was necessary to obtain adequate representation. ROA.1570–1572. Applying its discretion, the district court found "that plaintiffs could not have obtained adequate representation in this matter – much less representation of the same quality as that of plaintiffs' out-of-state attorneys – from a team comprised exclusively of in-state lawyers."

ROA.1571. The district court buttressed this finding by relying on Plaintiffs' counsel's experience with similar cases in other jurisdictions. ROA.1571–1572. Still, the district court cut the higher end of Plaintiffs' out-of-district counsel's requested hourly rate from $550 to $450. ROA.1572.

In the end, though, the district court's findings on the need for out-of-district counsel turned out to be academic because the district court found that the rates it awarded for Plaintiffs' out-of-district counsel were reasonable *even within the Southern District of Mississippi*. ROA.1572.

Turning to the number of hours, the district court noted that four of Plaintiffs' attorneys "cut 10% of all [their] attorneys' fees and no attorney has requested fees after February 2018 other than work related to the present application." ROA.1574. The district court still found that Plaintiffs' hours should be reduced for lack of success in invalidating Mississippi's Unnatural Intercourse statute. ROA.1574, 1577–1579. "[R]ather than cosplay as a green-eyeshade accountant," the district court applied an across-the-board reduction to all Plaintiffs' counsel's hours. ROA.1574, 1579.

The district court then analyzed the *Johnson* factors, determined that they were all properly considered in the lodestar analysis, and declined to adjust the lodestar. ROA.1580–1581.

After applying the cuts to Plaintiffs' counsel's rates and hours, the district court awarded fees and costs of $362,921.03. ROA.1582.

SUMMARY OF THE ARGUMENT

The district court's ruling should be affirmed because the district court did not abuse its discretion. As this Court has said again and again: "We cannot overemphasize the concept that a district court has broad discretion in determining the amount of a fee award." *Associated Builders & Contractors v. Orleans Par. Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990); *DeLeon v. Abbott*, 687 F. App'x 340, 342 (5th Cir. 2017); *Alexander v. City of Jackson*, 456 F. App'x 397, 400 (5th Cir. 2011); *Hopwood v. Texas*, 236 F.3d 256, 277 (5th Cir. 2000).

Here, in determining the lodestar, the district court weighed the evidence and made factual findings. It set hourly rates at or below the discounted rates that Plaintiffs requested. And it reviewed the State's objections to Plaintiffs' hours and applied a cut where it found the

State's objections had merit. Those findings do not constitute an abuse of discretion. The amount of the award should be affirmed.

Throughout its Opening Brief, the State simply re-argues points it made below in response to Plaintiffs' motion for attorneys' fees, branding as an abuse of discretion every finding (however reasoned) the district court made. The State ignores the district court's actual analysis, its factual findings, and the reasoning set forth in the order granting the fee motion. The district court did precisely what it was required to do, and it is not this Court's job to reweigh the evidence.

Plaintiffs obtained total relief for four Plaintiffs and 24 nonparties. Each of these 28 people were relieved of the daily burden of sex offender registration. And they obtained that relief only from Plaintiffs' counsel's hard-fought work.

This was not a fight Plaintiffs or their counsel were looking for. The State refused to resolve this dispute short of litigation, demanded the parties engage in protracted litigation in the face of Plaintiffs' initial motion for summary judgment, and vigorously defended its unconstitutional sex offender registration requirement for people who have had oral or anal sex. Having forced Plaintiffs into protracted

litigation, the State cannot now complain that Plaintiffs' counsel spent time to conduct that litigation. "Having wrongfully kicked the snow loose at the top, the [State] must bear the consequences of the avalanche at the bottom." *Schwarz v. Folloder*, 767 F.2d 125, 134 (5th Cir. 1985) (internal citation and quotation marks omitted).

The State's objections are unfounded factually, are not supported by case law, and often defy common sense – like arguing that more than one attendee at any hearing or oral argument is excessive. The district court was not required to make attorneys' fees awards with mathematical precision or render findings on every objection to every billing entry – a monumental task here because the State made 2,033 objections to Plaintiffs' time entries. Instead, the district court, in its discretion, applied an across-the-board reduction for Plaintiffs' lack of success and cut Plaintiffs' counsel's rates – on top of the already-substantial cuts to their rates and the hundreds of hours Plaintiffs' counsel already cut from the fee request. The district court could reasonably conclude that the remaining hours constituted a reasonable number, whether or not a few minutes in a particular billing might have been subject to question.

The State raises no legitimate grounds for challenging the district court's fees and costs award, and the order should be affirmed.

STANDARD OF REVIEW

"A district court's award of attorneys' fees is reviewed for abuse of discretion." *Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23 F.4th 408, 416 (2022). "'A district court abuses its discretion if it (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts.'" *Id.* (quoting *Combs v. City of Huntington*, 829 F.3d 388, 391 (5th Cir. 2016)).

Reviewing courts defer to the district court on such issues because "[a]ppellate courts have only a limited opportunity to appreciate the complexity of trying any given case and the level of professional skill needed to prosecute it." *Hopwood*, 236 F.3d at 277; *see also Associated Builders*, 919 F.2d at 379 (recognizing "'the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983))).

ARGUMENT

The moving Plaintiffs obtained judgment and were entitled to their attorney's fees and costs. The district court properly examined the facts presented and after analyzing the State's arguments and objections, decided to reduce one Plaintiffs' counsel's requested hourly rate and apply an across-the-board 15% reduction to Plaintiffs' counsel's fees. Because the district court thoroughly analyzed the lodestar factors, including the *Johnson* factors, and correctly applied them to these facts, the district court did not abuse its discretion in setting the fee award.

I. The Moving Plaintiffs Obtained Judgment and Were Entitled to Attorneys' Fees.

Four of the five Plaintiffs obtained judgment. ROA.808–809. And they obtained a detailed order from the district court commanding the State to remove those four Plaintiffs, along with 24 putative class members, from the Mississippi sex offender registry and take other remedial action to address other consequences of their wrongful registration. ROA.810–815.

As prevailing parties under section 1988(b), those Plaintiffs were entitled to an award of reasonable attorneys' fees and expenses. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human*

Res., 532 U.S. 598, 605 (2001) (enforceable judgment on the merits creates prevailing-party status).

The State did not challenge the moving Plaintiffs' entitlement to fees in the district court. And while the State's Opening Brief does not directly argue the moving Plaintiffs were not entitled to fees in the district court, it presents various arguments here that appear to question that entitlement.

The State complains that the district court awarded the moving Plaintiffs fees when the district court "never granted summary judgment to any plaintiff." AOB at 1. This is a bizarre complaint. The moving Plaintiffs obtained judgment, full stop. ROA.808–809. It is judgment that matters, not whether that judgment was summary. *See Buckhannon Bd. & Care Home*, 532 U.S. at 603. A plaintiff who wins judgment after trial is no less successful because his judgment wasn't summary. The same is true here.

The State's complaint that the district court awarded the moving Plaintiffs fees when the "district court . . . never granted injunctive relief" is even more bizarre because it is just untrue. AOB at 1. The district court's detailed order is "[a] court order commanding or

preventing an action." Injunction, BLACK'S LAW DICTIONARY (11th ed. 2019). It has a litany of commands to the State that the district court retained jurisdiction to enforce. ROA.810–815. And it is an order the State stipulated to. ROA.809. The district court granted injunctive relief.

The State's related complaint that "[t]he district court . . . never granted class certification," AOB at 1, is at least technically true, but it is an indication of the extent of Plaintiffs' success, not their lack of it. Plaintiffs obtained class relief even without certification: they cajoled the State into including two dozen putative class members in the relief from registration and related relief the State agreed to provide to the four Plaintiffs. And because the extent of the class relief reduced the remaining class members below the threshold for numerosity,[1] Plaintiffs did not renew their motion for class certification. ROA.1547.

[1] Mississippi forced fewer than fifty people to register solely for Unnatural Intercourse convictions or out-of-state equivalents for sexual activity with human beings at the time Plaintiffs filed suit. Five of those were Plaintiffs in this case. After obtaining relief for four Plaintiffs and 24 putative class members, any putative class was reduced to about 20 people.

The district court properly considered this in assessing Plaintiffs' fee motion. ROA.1578.

Plaintiffs obtained widespread relief in the form of a judicially sanctioned change in the legal relationship of the parties. They were entitled their reasonable attorney's fees under section 1988. The State's suggestions to the contrary either ignore or misrepresent the clear record.

II. The District Court Properly Exercised Its Discretion in Determining the Amount of the Fee Award.

None of the State's attacks on the district court's order show an abuse of discretion. The district court did exactly what it was supposed to do. It reviewed Plaintiffs' evidence and timesheets, it calculated the lodestar, and it considered the *Johnson* factors. It applied a 15% reduction to Plaintiffs' hours for lack of success in facially invalidating the Unnatural Intercourse statute. The State's desire for a deeper cut fails to show an abuse of discretion and ignores the State's own actions in creating the work Plaintiffs' counsel needed to expend to secure this important victory.

A. The Lodestar Calculation is Presumptively Reasonable.

Section 1988 allows "the prevailing party" in certain civil rights actions, including suits brought under § 1983, to recover "a reasonable attorney's fee." 42 U.S.C. § 1988. Federal courts awarding attorneys' fees under Section 1988 use the "lodestar" method. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010). Since *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the lodestar method for calculating attorneys' fees has been "'the guiding light of our fee-shifting jurisprudence.'" *Perdue*, 559 U.S. at 551 (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002)).

The lodestar is calculated by multiplying the number of hours an attorney reasonably spent on the case by an appropriate hourly rate – the market rate in the community for this work. *Black v. Settlepou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013). One of the "virtues" of the lodestar is that it "produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue*, 559 U.S. at 551 (original emphasis). "[T]here is a 'strong presumption' that the lodestar figure is reasonable." *Id.* at 554.

In a second step in the lodestar calculation, the court considers whether it should increase or decrease the award. *Hensley*, 461 U.S. at 434; *Johnson*, 488 F.2d at 717–19. *Johnson* identifies several factors that courts should consider in its analysis. Plaintiffs did not seek an enhancement and the district court did not apply one, so these factors, save arguably the 'results obtained' factor, are largely irrelevant to this appeal. ROA.1186, 1580–1581.

The State challenges each of the facets of the lodestar calculation – the hours that are compensable for Plaintiffs' success, the hourly rates that the district court found appropriate, and the number of hours that it determined were reasonably expended on the successful claims. None of these arguments have merit.

B. The District Court Did Not Abuse Its Discretion in Assessing the Extent of Plaintiffs' Success.

In "complex civil rights litigation," a plaintiff may bring "numerous challenges to institutional practices or conditions" but only succeed on some of those challenges. *Hensley*, 461 U.S. at 436. Success on one claim alone suffices to make the plaintiff a prevailing party, even if the plaintiff loses on others. *See Farrar v. Hobby*, 506 U.S. 103, 114 (1992). Work on "unsuccessful claim[s]," however, "cannot be deemed to

have been 'expended in pursuit of the ultimate result achieved.'" *Hensley*, 461 U.S. at 435.

But it's not always that simple. Sometimes the successful and unsuccessful challenges "share a common core of facts or related legal theories." *Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23 F.4th 408, 416 (2022) (cleaned up). In those instances, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S. at 435. "Such a lawsuit cannot be viewed as a series of discrete claims." *Id.*

When the time is difficult to divide, a court evaluates the plaintiff's overall success. Rather than pull apart the billing entries claim-by-claim, "the district court's focus should shift to the results obtained and adjust the lodestar accordingly." *Fessler*, 23 F.4th at 416 (cleaned up). In that respect, the overall-degree-of-success analysis serves as a useful proxy for weeding out the unsuccessful claims that overlap with – but are inseparable from – the successful claims.

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," even if the plaintiff "failed to

prevail on every" claim or "receive all the relief requested." *Hensley*, 461 U.S. at 435 & n.11. That's because "[l]itigants in good faith may raise alternative legal grounds for a desired outcome" and should not be penalized by "the court's rejection of or failure to reach" those other grounds – "[t]he result is what matters." *Id.* at 435 (footnote omitted). The "most critical factor" in determining the amount of the reduction "is the degree of success obtained." *Id.*

Here, the moving Plaintiffs won on both of their causes of action. The State's contention that they prevailed only on their equal protection cause of action but not their substantive due process cause of action is pure imagination. But even if the State were correct that Plaintiffs only prevailed on equal protection, that cause of action was impossible to disentangle from the substantive due process claim. By not seeking compensation for the hundreds of hours spent after the parties settled four of the five Plaintiffs' claims, Plaintiffs provided a clean breaking point at which to segregate time spent on unsuccessful claims. Finally, the district court *did* cut Plaintiffs' hours for lack of success, as the State requested. The district court had enormous discretion to

determine the amount of that cut. The State's desire for more doesn't establish an abuse of that discretion.

1. Plaintiffs Succeeded on Both Causes of Action.

The State's argument accusing the district court of abusing its discretion in relation to Plaintiffs' unsuccessful claims is based on a flawed premise. Each Plaintiff asserted two claims: one for substantive due process and another for equal protection. ROA.53–55. The State contends that the district court abused its discretion because it did not segregate out time spent on the equal protection claim from the supposedly unsuccessful substantive due process claim. AOB 24–28. That's just wrong. The moving Plaintiffs prevailed on both claims. The stipulated judgment proves it.

The judgment is clear: it resolved "*all claims* of Plaintiffs convicted of violating Louisiana's Crime Against Nature by Solicitation ('CANS') statute . . ." ROA.808.[2] Since Plaintiffs asserted only two claims, resolving "all claims" (plural) of those successful Plaintiffs

[2] The State tellingly omits of the partial judgment from its Excerpts of Record.

involved success on both claims. The State's argument that the moving Plaintiffs only succeeded on their equal protection claim is a fiction.

In fact, the judgment was of the State's own making. The parties spent weeks negotiating over its language between the February 22, 2018, settlement conference where the parties agreed to the general terms of the settlement and when they submitted it to the district court several weeks later. ROA.1204. If the State wanted the resolution to run only to the equal protection claim, it should have negotiated for that or included language to that end. It didn't. ROA.810–816 (agreed order with Defendants' counsel's signature). Instead, the negotiated agreement sought to resolve "all claims" of four of the five Plaintiffs. ROA.808.

The stipulated judgment shows that the moving Plaintiffs succeeded on both their substantive due process and equal protection claims. Because the State's argument that the moving Plaintiffs succeeded only their equal protection claim is a fiction, this Court should reject the State's argument that the district court abused its discretion in failing to adequately account for that fiction.

2. Even If They Hadn't Prevailed on Both Causes of Action, the Causes of Action Were Not Distinct Because the Equal Protection Claims Arose Only from the State's Defense to the Substantive Due Process Claim.

Even if somehow the language of the stipulated injunction could be read to mean the moving Plaintiffs were only awarded judgment on their equal protection claim, the claims were intertwined in a way that disaggregation of the work related to each of them would have been impossible even if it were proper.

Unsuccessful claims are unrelated to successful claims only when they are "distinctly different claims for relief that are based on different facts and legal theories." *Hensley*, 461 U.S. at 434. Claims are sufficiently related when they "involve a common core of facts or will be based on related legal theories." *Id.* at 435. The standard for determining this distinct differentiation is whether the claims could have "been raised in separate lawsuits." *Id.* The Supreme Court recognizes that such categorically distinct claims are "unlikely to arise with great frequency." *Id.*

In the end, "[t]he result is what matters." *Id.* "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the

court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id.* "[F]ee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.*

Here, even if the State were correct that the moving Plaintiffs only prevailed on their equal protection claim and failed on their due process claim, the claims "involve a common core of facts [and are] based on related legal theories." *Id.* at 434. Plaintiffs asserted their equal protection claim in *direct response* to the State's defense on the substantive due process claim. It went like this: Plaintiffs told the State it violated their substantive due process rights to force them to register as sex offenders for having been convicted of having had oral or anal sex – at least since the Supreme Court decided *Lawrence v. Texas* in 2003. The State claimed it could still force people to register if the State believed that someone's sodomy conviction involved any of a series of circumstances, even if unproved, including having oral or anal sex in situation involving public acts, minors, compensation, force, coercion, or even sex acts in "inherently coercive environments." ROA.669, 682, 697. Plaintiffs did not accept that the State could go back to years-old

convictions and determine whether such unproven facts existed and base its registration mandates on those facts. But even accepting that the State *could* do what it claimed to be doing consistent with the due process clause, the State didn't mandate sex offender registration for similar activity involving heterosexual, vaginal-penile sex. For instance, heterosexual sex in public is not a registrable offense. *See* Miss. Code Ann. § 45-33-23(h). Heterosexual prostitution is not registrable, either. *See id.* And heterosexual sex involving vague notions of coercion (short of force or minority) or taking place in so-called inherently coercive environments is typically not even a *crime*, let alone a registrable one. *See id.*

Plaintiffs' equal protection claim *only* made sense in relation to Plaintiffs' substantive due process claim and the State's defense to it. Just imagine Plaintiffs asserted the equal protection claim alone: They each have convictions involving having oral or anal sex. Mississippi requires them to register because either they have a conviction from Mississippi courts for having oral or anal sex or they have a conviction from out of state that Mississippi considers to be the equivalent of a conviction for having oral or anal sex. They then file suit claiming that

they shouldn't be made to register as sex offenders because Mississippi doesn't require registration for prostitution. Such a claim would have not just been unsuccessful but would even fail to state a claim because an equal protection claim requires the challenging group and the comparator group be similarly situated in all relevant respects. *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 977–78 (5th Cir. 2022). Comparing people convicted of having oral or anal sex with people convicted of prostitution is comparing apples to oranges. The comparison only makes sense given the State's defense that it retroactively reads the extratextual element of compensation into its Unnatural Intercourse law.

Because Plaintiffs' equal protection claim was *only* cognizable – and ultimately successful – in connection with the State's defenses to the substantive due process claim, the claims aren't just related but are inextricable from each other. The Supreme Court has held that when "[l]itigants in good faith . . . raise alternative legal grounds for a desired outcome, . . . the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Hensley*, 461 U.S. at 435; *see also Allstate Ins. Co. v. Plambeck*, 802 F.3d

665, 679 (5th Cir. 2015) ("[a]n award should not be reduced merely because the plaintiff prevailed on only one of several alternative grounds for the same relief"). Here, Plaintiffs succeeded in getting themselves removed from the burdens of sex offender registration. And they got 24 other people removed, too. Their equal protection claim was in no way "distinctly different" or "based on different facts and legal theories" from their substantive due process claim such that they could have "been raised in separate lawsuits. *Hensely*, 461 U.S. at 434, 435. And, as shown above, the moving Plaintiffs prevailed on both regardless.

3. The District Court's Reduction of the Fee Award Was within Its Discretion and the State Forfeited Below Any Argument That the Award Should Be Cut for Failing to Obtain Facial Invalidation of the Unnatural Intercourse Statute.

Ultimately, though, the issues of whether Plaintiffs succeeded on all their claims or whether the claims were distinct is academic because the district court did exactly what the State claims it should have done: it reduced Plaintiffs' hours because they did not manage to obtain a declaration that the Mississippi Unnatural Intercourse statute is facially unconstitutional. ROA.1577–1579. It did so by applying a pro

rata reduction to Plaintiffs' overall fee request. *See Fessler*, 23 F.4th at 418 (approving "pro rata reductions in the overall fee request" to account for lack of success); ROA.1577–1579.

The district court found that Plaintiffs' claims were related because they involved a common or of facts or were based on related legal theories. ROA.1577–1578. But because "plaintiffs did not prevail in their efforts to invalidate the state statute," it found "a downward adjustment [was] warranted." ROA.1578. "Because it would be impossible to extrapolate the amount of time expended on this issue alone," the district court "reduce[d] plaintiffs' total hours expended." ROA.1578.

This cut came on top of the *hundreds* of hours that Plaintiffs' counsel spent litigating that issue for the remaining Plaintiff but did not seek fees for. That phase of the litigation mainly focused on whether the Mississippi Unnatural Intercourse statute was unconstitutional. *See, e.g.*, ROA.744–756. The district court found "that the statute appears to be unconstitutional" but stayed the case "pending a state court ruling determining whether [Plaintiff Arthur] Doe [could] vacate his conviction through state court remedies." ROA.1174. That Plaintiff

then sought state court remedies even though he was years past the statute of limitations to file such a claim. Seeing the writing on the wall, the State wisely declined to oppose the obviously untimely petition. The state court granted the motion and Arthur Doe was relieved of his registration obligation, mooting his federal claims. ROA.1459.

Despite the success on his petition for post-conviction relief having an obvious connection to the district court's finding "that the [Unnatural Intercourse] statute appears to be unconstitutional," Plaintiff sought no time for litigating the claim for that relief. ROA.1095. They cut *all* their time after February 2018, eliminating hundreds of hours of time related to their work seeking to have the Unnatural Intercourse statute declared unconstitutional. ROA.1187. And they cut their time at *February* 2018 despite the district court not entering partial judgment until *May* 10, 2018. ROA.808–809.

Partial judgment thus served as a clean dividing line between time spent on interrelated claims seeking to have Plaintiffs removed from the registry and time spent trying to facially invalidate the

statute. Plaintiffs sought fees for the former; they segregated time for the latter and didn't seek fees for it.

Despite this, the district court *still* did what the State asked it to do (and continues to ask this Court to do): it reduced Plaintiffs' pre-judgment hours to account for a lack of success on this issue. ROA.1577–1578. It weighed Plaintiffs' successes, including obtaining relief for four of the five Plaintiffs and six times as many other people, against their failure: "On one hand, all plaintiffs (and 24 others) were removed from the MSOR through the efforts of plaintiffs' counsel. On the other hand, however, plaintiffs did not enjoin or otherwise invalidate Mississippi's anti-sodomy law – one of the lawsuit's central issues." ROA.1578.

That is exactly what the district court was supposed to do. *See McClain v. Lufkin Indus.*, 649 F.3d 374, 385 (5th Cir. 2011) ("Calculating fee awards is a holistic endeavor.").

The State just wants more. But the State's desire for a deeper cut does not meet its high burden of showing the district court abused its discretion by not cutting more. The "'district court has [such] broad discretion'" that the breadth of the discretion "'cannot [be]

overemphasize[d].'" *DeLeon*, 687 F. App'x at 342 (quoting *Associated Builders*, 919 F.2d at 379). The district court has "superior understanding of the litigation" and appellate courts "desir[e to] . . . avoid[] frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. District courts are permitted to "take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Fox v. Vice*, 563 U.S. 826, 838 (2011). In fact, there is "hardly . . . a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it." *Id.*

That the district court acted within its discretion is emphasized by the State's failure in this district court to even *request* a reduction based on Plaintiffs' failure to facially invalidate the statute. Instead, it exclusively argued that Plaintiffs failed to succeed on their substantive due process claim. ROA.1468–1470. Thus, the State forfeited any argument that a deeper cut was required based on failure to obtain facial relief. *Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021). But even if the State hasn't forfeited the argument, it cannot

accuse the district court of abusing its discretion for not adopting an argument the State never raised in the first instance.

Whether on account of forfeiture or failure the meet their formidable burden, the State's argument that the district court abused its discretion by failing to make a deeper cut to Plaintiffs' hours on account of not invalidating the Unnatural Intercourse statute should be rejected. The district court acted well within its broad discretion in making the reductions to Plaintiffs' hours that it did for Plaintiffs' failure to succeed on that request for relief.

C. The State's Other Attacks on the District Court's Lodestar Calculation Should Be Rejected.

The State's remaining attacks on the district court's order are also unpersuasive.

Its complaint that the district court awarded Plaintiffs' counsel out-of-district attorneys' rates that are unreasonable for the Southern District of Mississippi misunderstands the district court's order. It found that all the rates it approved were reasonable within the Southern District of Mississippi. ROA.1572. Even so, the district court would have been within its discretion to find that out-of-district

attorneys were necessary for the Plaintiffs to secure adequate representation here.

The district court also acted within its discretion when it considered and rejected the State's arguments that Plaintiffs' counsel engaged in excessive or duplicative billing.

1. The District Court's Determination of the Reasonable Hourly Rates Is Correct and Supported by Unrebutted Evidence.

The State's argument that the district court erred in determining Plaintiffs' out-of-district counsel's reasonable hourly rates starts from another flawed premise: that the district court awarded rates that were unreasonable for the Southern District of Mississippi. It didn't. Plaintiffs sought rates between $225 and $550 an hour for their out-of-district counsel. ROA.1191. Those rates were between 21% and 38% lower than the attorneys' rates in their home markets, New York City and Los Angeles. ROA.1191. The district court further cut the high end of those rates down to $450, awarding Plaintiffs' out-of-district counsel between $225 and $450 an hour. ROA.1572–1574.

While the district court engaged in the analysis for awarding out-of-market rates and found that Plaintiffs' out-of-district counsel were

entitled to some version of those rates, it *also* found the rates it ultimately awarded were reasonable *even within the Southern District of Mississippi*. ROA.1572. It found "all counsel, local and out-of-district, submitted blended or downwardly modified hourly rates of $550 or less, which this Court, and many others in the Southern District have generally deemed a reasonable range." ROA.1572 (citing *Thomas v. Reeves*, No. 3:18-CV-441-CWR-FKB, 2021 U.S. Dist. LEXIS 26320, at *13–*14 (S.D. Miss. Feb. 11, 2021) (collecting cases)). In fact, while the trial court found that $550 was within the reasonable range for the Southern District of Mississippi, it capped Plaintiffs' out-of-district counsel at $450. ROA.1572–1574.

The State now argues the district court should have awarded reasonable rates for the Southern District of Mississippi. AOB 31–35. But it did. ROA.1572. Even if everything the State argues about the supposed impropriety of the district court awarding out-of-district rates were true, that error was harmless given the actual rates applied, and surely did not approach an abuse of discretion because the rates it awarded were reasonable even for the Southern District. This Court

need not go any further to reject the State's arguments as to Plaintiffs' counsel's rates.

But even without that finding, the district court was within its discretion to find Plaintiffs "could not have obtained adequate representation in this matter – much less representation of the same quality as that of Plaintiffs' out-of-state attorneys – from a team comprised exclusively of in-state lawyers." ROA.1571; *see also McClain*, 649 F.3d at 383 (out-of-district rates appropriate where out-of-district attorneys were "necessary to secure adequate representation").

It based this decision in part on the fact that Plaintiffs' counsel brought unique experience to this case. Plaintiffs' counsel had litigated two similar challenges in Louisiana, and Mississippi's insistence that one of the plaintiffs from that case register in Mississippi was the impetus of this case. ROA.1571. This experience is made more evident by the fact that since this case was filed (but before the district court ruled on the motion for attorneys' fees), challenges to registration for pre-*Lawrence* sodomy convictions have been filed in Idaho, Montana, and South Carolina, with Plaintiffs' counsel litigating each of them. ROA.1559 (citing *Doe v. Wasden*, 558 F. Supp. 3d 892 (D. Idaho 2021);

Menges v. Knudsen, 538 F. Supp. 3d 1082 (D. Mont. 2021); *Doe v. Wilson*, No. 3:21-cv-04108-MGL (D.S.C. 2021)).

The district court buttressed its conclusion with its finding that while local attorneys might be able to act as local counsel on this case, "many do not have the support staff or access to substantial resources needed for a case like this." ROA.1571. Many attorneys, even civil rights attorneys, are unwilling to represent sex offenders for either personal or professional reasons given they are such a "reviled class." ROA.1571. And even if there were lawyers willing to and able to litigate "a complex multi-year sex-offender rights case," none would have been willing to do so on a contingent basis, where payment comes many years after the work is performed, if at all. ROA.1571.

The district court also relied on the time that elapsed between the Supreme Court's decision in *Lawrence* and Plaintiffs bringing this case to further support its conclusion that local attorneys were unavailable to bring this challenge. ROA.1572. "[T]his case was brought thirteen years after *Lawrence v. Texas*, 539 U.S. 558 (2003), declared that laws like Mississippi's Unnatural Intercourse statute were unconstitutional."

ROA.1572. If local attorneys were standing by ready to file this case, where were they for more than a dozen years?

The State offered *no* evidence to rebut Plaintiffs' evidence that local attorneys were unavailable to shoulder the burdens of this litigation. If local civil rights attorneys were available and able to take this case, the State could and should have found one to say so. Or it could have even *suggested* the name of a local attorney who might have taken this case. Instead, what the State did offer was thin gruel: a footnote showing that Mississippi attorneys have filed petitions in state court for individual sex offenders to get removed from the registry. ROA.1484. But the district court properly considered and rejected this "false equivalency":

> Obviously, an individual petition in state court is not comparable to a civil rights case challenging an entire registration scheme in federal court. They take different skill and effort. They involve much different relief. They incur different costs. And in only one is payment contingent on victory and delayed by years.

ROA.1572.

This Court has awarded local rates where the moving party offered evidence that out-of-district counsel was necessary to secure adequate representation and the opposing party "provided no rebuttal

evidence." *McClain*, 649 F.3d at 383. The State here provided no rebuttal evidence. And the lack of rebuttal evidence reflects the reality: the absence of in-district counsel willing and able to take on the responsibilities accepted by Plaintiffs' counsel and the reasonableness – even necessity – of Plaintiffs seeking help from out-of-district counsel.

The district court cut Plaintiffs' counsel's requested rates and awarded rates that were reasonable within the Southern District of Mississippi. Even if it hadn't, the district court was within its discretion to rely on its own experience and Plaintiffs' unrebutted evidence to determine that out-of-district counsel was necessary for Plaintiffs to secure adequate representation here. The district court did not abuse its discretion in setting Plaintiffs' counsel's rates.

2. The District Court Did Not Award Fees for Non-Compensable Time.

As with its attack on the district court's findings on hourly rates, the State's challenge to the finding that Plaintiffs' requested hours were reasonable amounts to little more than rearguing the evidence. The district court considered the State's arguments and rejected them. It did not abuse its discretion in doing so. ROA.1574–1580.

The State's arguments downplay the difficulty and complexity of this case, as well as the State's own role in creating the need for the hours Plaintiffs incurred. Plaintiffs didn't want this fight. They first took the issue to the State and tried to negotiate to avoid the need for litigation. ROA.1201–1203. Those negotiations lasted eight months. ROA.1208. Then, once Plaintiffs filed suit, they moved for summary judgment on the theory that this dispute lent itself to an early resolution as it involved a dispute of law, not fact. ROA.1204. The State disagreed, again insisting on a prolonged fight. It represented to the district court that it "need[ed] time for discovery to investigate and test the truth of the factual allegations made by Plaintiffs" and that resolution of the legal issues "without discovery [was] untenable and unfairly prejudicial to Defendants." ROA.325. The district court gave

them that discovery, ROA.476–478, and Plaintiffs gave the State the fight it asked for.

Now having lost the fight, the State switches hats, claiming this case "required purely legal analysis." AOB at 20. The State's about-face is as cynical as it is transparent. When defendants reject reasonable efforts to resolve or streamline litigation, they have only themselves to blame when prevailing plaintiffs recover reasonable fees. But the State insisted on a fight at every turn. Having insisted on that fight, the State shouldn't now be heard to complain that it got punched in the face. *See Schwarz*, 767 F.2d at 134 ("[i]t is unbecoming" for the defendants to insist on litigation "and then to complain when the [prevailing party] hires skillful, experienced and expensive advocates. . . . Having wrongfully kicked the snow loose at the top, the[y] must bear the consequences of the avalanche at the bottom."); *Burgess v. Premier Corp.*, 727 F.2d 826, 841 (9th Cir. 1984) (while defendant "had the right to play hardball in contesting [plaintiffs'] claims, it is also appropriate that [they] bear the cost of their . . . strategy"); *Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) ("petitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable

by making a reasonable settlement offer in a timely manner"); *Graham v. Sauk Prairie Police Com.*, 915 F.2d 1085, 1109 (7th Cir. 1990) ("A defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response."); *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) ("The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response."). In short, this lawsuit was a battle that the State insisted on having and then fought tooth-and-nail on every aspect.

Plaintiffs' effort in this battle was not excessive or duplicative, either. The State just rehashes of the arguments it in claiming that Plaintiffs' efforts were excessive or duplicative. The district court considered and rejected them.

While the district court could not have been expected to address each of the State's 2,033 objections individually, the State's prolix objections were unfounded in any case. It objected to 81 entries (totaling 164.2 hours) as excessive. ROA.1493–1544. It objected to three collective hours spent drafting sets of Interrogatories, Requests for Production, and Requests for Admission as excessive. ROA.1538. It

objected to 24 minutes spent reviewing comments and edits from co-counsel on a reply brief and editing it accordingly as excessive, too, as well as 48 minutes doing the same with an opposition brief. ROA.1538. This is hardly the paradigm of excessive work.

Plaintiffs' work was not duplicative, either. The State objected to 505 entries (totaling 655.1 hours) as duplicative, including virtually every instance in which more than one attorney worked on a motion, discussed settlement, or met with a client. ROA.1493–1544. But the fact that multiple attorneys collaborate on a brief is hardly "duplicative." *See, e.g.*, *DeLeon v. Abbott*, 2015 WL 13308902, at *4 (W.D. Tex. Nov. 30, 2015), *aff'd*, 687 F. App'x 340 (5th Cir. 2017). Courts regularly recognize that more than one attorney, or even a team of lawyers, may be required in a complex matter. *See, e.g.*, *Feld Motor Sports, Inc., v. Traxxas*, LP, No. 4:14-cv-543, 2016 WL 2758183, at * 8 (E.D. Tex. May 12, 2016); *Ali v. Stephens*, No. 9:09-cv-52, 2015 WL 2061981, at *4 (E.D. Tex. Apr. 29, 2015). The district court properly noted that the State objected to "any event where more than one of plaintiffs' attorneys participated, like meetings, certain depositions, court appearances, and settlement hearing . . . as duplicative." ROA.1576. After reviewing the

billing records, the district court found no reduction was warranted. ROA.1576. That finding was not an abuse of discretion.

The State's objections ring particularly hollow given its own staffing practices here. It complained below and continues to complain here that three attorneys billed for the only two depositions that took place in this case.[3] AOB 39; ROA.1476. But the State *also* staffed these depositions with three attorneys: Paul Barnes and Wilson Minor, who litigated this case for the State, and Lora Hunter, an attorney for the State with the Department of Public Safety. ROA.1553–1554. The district court agreed that Plaintiffs' staffing was not duplicative: "there were only two depositions taken in this case, and . . . the case potentially rested on their outcome." ROA.1576.

And the State's criticism that Plaintiffs' counsel engaged in excessive conferencing also lacks merit. The State identifies no specific communications that were unnecessary. Nor could they. Plaintiffs' counsel – busy nonprofit attorneys and solo practitioners facing many

[3] This objection also misrepresents the record. One of the attorneys did not bill for one of the depositions. ROA.1279. Plaintiffs pointed out the State's error in the district court but the State just continues to misrepresent the record. ROA.1553.

demands on their time – did not hold calls to talk in broad generalities, but to work out division of labor for pleadings and other tasks and strategize on difficult decisions and thorny arguments. Courts regularly find "conferences between attorneys to discuss strategy and prepare for oral argument are an essential part of effective litigation." *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986). Multiple courts have found such communication reasonable throughout litigation. *See Berberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985) (awarding attorney time spent in strategy conferences); *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 616 F.3d 1098, 1105 (10th Cir. 2010) (rejecting contention that counsel "may not charge for communications with co-counsel"). As did the district court here, which found "that communication was an effective and essential tool and thus, no reduction is appropriate." ROA.1577.

The district court's careful consideration of the State's objections, and the deference this Court owes to the district court's conclusions on review, compel this Court to reject the State's arguments. The district court scrutinized Plaintiffs' attorneys' entries and the State's objections to them. Given the district court's knowledge of the issues and

proceedings, this Court cannot say that the district court clearly erred when it found that Plaintiff showed the time the incurred in obtaining this victory was reasonably expended.

CONCLUSION

This Court should affirm the district court's order awarding the prevailing Plaintiffs their reasonable fees and costs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 9,653 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

/s/ Matthew Strugar
Matthew Strugar

CERTIFICATE OF SERVICE

I certify that on January 6, 2023, I electronically filed the Brief of Appellees with the Clerk of the Court of the United State Court of Appeals for the Fifth Circuit using the CM/ECF filing system.

/s/ Matthew Strugar
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