No. 22-60481

IN THE 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

Appeal from the United States District Court
for the Southern District of Mississippi
No. 3:16 cv 789-CWR-FKB

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

This Court should reverse the district court's order awarding plaintiffs $352,143.20 in attorneys' fees. As defendants explained in their opening brief: the district court's order cannot stand because its meager reduction of the fee award failed to adequately account for plaintiffs' lack of success in comparison to the sweeping relief they sought. The district court also abused its discretion in determining that plaintiffs' five attorneys from New York and Los Angeles were entitled to inflated out-of-district rates. And the district court then exacerbated that error by refusing to eliminate any of the plainly excessive and duplicative hours worked by plaintiffs' counsel from the fee award.

The plaintiffs' responses are unavailing. First, plaintiffs argue that the district court's fee award was proper because they really succeeded on both of their claims, as evidenced by the language of the parties' negotiated partial judgment. But the limited relief plaintiffs obtained confirms that they failed to succeed on the central claim of the lawsuit, which alleged that *Lawrence v. Texas* facially invalidated Mississippi's unnatural intercourse statute and sought relief wiping it from the code books. That central claim failed: the statute was neither facially invalidated nor enjoined. Plaintiffs also contend that the district court correctly found that their claims involved a common core of facts and

were based on related legal theories. But they cannot identify any such common facts or adequately explain how their legal theories are interrelated. Their own descriptions of the two claims in their response brief confirm that the claims were distinctly different. Plaintiffs also insist that the district court properly imposed a miniscule pro rata reduction to the fee award to reflect plaintiffs' limited success and that was exactly what defendants said it should have done. That is inaccurate, and in any event, they cannot explain how a slight reduction of the fee award sufficiently accounted for how limited the results they obtained were relative to the broad relief they sought.

Second, the plaintiffs contend that, even if the district court erred in determining they had to retain out-of-state attorneys, that error was harmless because the attorneys' approved out-of-state rates equate to the prevailing market rates in the Southern District of Mississippi. But the authority that the district court and plaintiffs cite for that proposition undercuts plaintiffs' position. Most of plaintiffs' lawyers have nowhere near the litigation experience that might justify $450/hr in-district rates for lawyers with decades of experience in prior Southern District cases.

Plaintiffs also argue that the district court justifiably concluded that there were no Mississippi attorneys available to take their case. But plaintiffs failed to produce sufficient evidence to support that conclusion.

One law professor's speculative declaration on reasons Mississippi attorneys may not have been willing or able to take on this case is not the "abundant" evidence this Court has required to justify out-of-district rates.

Third, plaintiffs argue that defendants' objections to the excessive and duplicative work of plaintiffs' counsel are merely points that the district court considered and rejected. But the district court's error on that front was worse than simply failing to pick apart plaintiffs' time entries. The district court failed to account for the billing practices of plaintiffs' counsel in refusing to make any reduction in its fee award for any of the documented instances where counsel were guilty of overbilling. That was error.

ARGUMENT

I. The District Court Abused Its Discretion By Refusing To Substantially Reduce The Fee Award To Account For The Limited Relief Obtained And The Time Spent on Plaintiffs' Unsuccessful Claim.

The district court abused its discretion by failing to significantly reduce the fee award. Although the district court recognized that a reduction was necessary, ROA.1578, it reduced the number of hours claimed by less than fifteen percent due to lack of success. ROA.1581. The court concluded that the plaintiffs convicted of violating Louisiana's

Crime Against Nature by Solicitation ("CANS") law should be compensated for time spent on their unsuccessful due-process claim because that claim was "interrelated" with their successful equal-protection claim. ROA.1578. As defendants have explained, that conclusion is wrong. The two claims did not involve a common set of facts and relied on distinct legal theories. Def. Br. 26-30. But even if the claims could be viewed as sufficiently related, the district court was required to make a sizeable reduction to the fee award to account for the limited relief obtained by the CANS plaintiffs. Def. Br. 24-26.

Plaintiffs attempt to defend the district court's approach, Pl. Br. 20-39, but their arguments are unavailing.

First, plaintiffs suggest that defendants question whether plaintiffs are "prevailing parties" entitled to fees at all. Pl. Br. 20; *see* Pl. Br. 20-23. This is makeweight. Defendants do not question plaintiffs' entitlement to some fees. *Contra* Pl. Br. 21. Rather, defendants maintain that the district court went wrong when assessing the amount plaintiffs deserved and how much their fee request should be reduced. The errors were basic and far-reaching: the "degree of success obtained" is "the most critical factor" in determining the reasonableness of an attorneys' fees award. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). Yet the district court failed to properly consider the relationship between the fee award and the limited

results obtained by plaintiffs. Def. Br. 22-31. Plaintiffs lost on the central claim in their lawsuit and failed to achieve a ruling that the State's unnatural-intercourse statute is facially invalid. Def. Br. 24-25. The district court's fee award failed to account for those realities, *see* Def. Br. 22-31, and suffered from other elemental errors that infected how the court tallied the fees, *see* Def. Br. 31-41.

Plaintiffs relatedly portray their litigation losses—including denials of summary judgment and class certification—as irrelevant or barely relevant to their fee award because they obtained a "judgment, full stop." Pl. Br. 21; *see* Pl. Br. 21-22. But that sidesteps defendants' point. Plaintiffs' failures to prevail on summary judgment and class certification show that plaintiffs expended many attorney hours on work that the district court erroneously approved as part of their ultimate fee recovery. The same is true for plaintiffs' overall unsuccessful effort to facially invalidate Mississippi's unnatural-intercourse law. That was another reason that a bigger reduction was required. But plaintiffs fail to mention that expensive loss anywhere in their fee-entitlement argument. *See* Pl. Br. 20-23.

Second, plaintiffs contend that a victory "on both of their causes of action" bolsters their fee award. Pl. Br. 27; *see* Pl. Br. 28-29. But the record belies that claim of across-the-board success.

It is true that a negotiated partial judgment "resolved all claims" of the CANS plaintiffs. Pl. Br. 28 (emphasis omitted); *see* ROA.808. But saying that a settlement "resolved" all their claims does not mean that plaintiffs *prevailed* on all claims. To start, plaintiffs admit that defendants have "continue[d] to enforce" the unnatural-intercourse statute in the wake of the settlement. Pl. Br. 5. That alone demonstrates none of the plaintiffs prevailed on "all claims." Indeed, in their fee motion below, plaintiffs painted the partial judgment as across-the-board success. ROA.1549-50. Yet even the district court disagreed. The court rejected the argument that plaintiffs' substantive-due-process challenge succeeded—given their failed effort to "enjoin" or "otherwise invalidate Mississippi's anti-sodomy law." ROA.1578. The district court's overall fee award failed to adequately account for plaintiffs' lack of success. Def. Br. 22-31. But the court never accepted plaintiffs' claim of complete victory.

To be sure, the limited relief that plaintiffs achieved—measured against their legal theories and what they set out to do—show that their "substantive due process claim" was not just "supposedly unsuccessful." Pl. Br. 28. It failed. That claim alleged that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), facially invalidated Mississippi's unnatural-intercourse law, and therefore every person convicted under that law or an equivalent statute from another state

must be removed from the Mississippi Sex Offender Registry (MSOR). ROA.155-62, 542, 555. Plaintiffs' narrower equal-protection claim challenged MSOR's practice of requiring persons convicted under Louisiana's CANS statute to register as sex offenders, but not persons convicted under Mississippi's prostitution laws. ROA.167-69. The negotiated resolution of the narrower claim by the CANS plaintiffs and defendants did not invalidate any state law. The settlement did not require MSOR to remove anyone convicted under Mississippi's unnatural-intercourse statute, or any other States' equivalent laws, from the registry. ROA.810-15. Rather, MSOR agreed to remove only the four CANS plaintiffs and a few others convicted under Louisiana's CANS statute from the registry. ROA.811-812. That limited relief confirms that plaintiffs did not "succeed" on their quest to invalidate state laws by achieving class-wide, facial relief on a substantive-due-process theory.

Further, the fact that litigation continued post-settlement only further undermines plaintiffs' claim to success "on both claims." Pl. Br. 28. Had the settlement produced a robust due-process win, there would have been nothing left to fight about. But long after his co-plaintiffs settled, Arthur Doe continued to press the due-process claim. *See* ROA.729-59. It is hard to figure why Doe kept litigating a due-process

challenge for facial relief if, as plaintiffs now contend, they had already prevailed on that front.

Third, plaintiffs argue that their equal-protection and due-process claims were so "intertwined" that it "would have been impossible" to separate their efforts on the unsuccessful due-process claim from the rest of the work. Pl. Br. 30; *see* Pl. Br. 6, 30-34. But that is not so.

Plaintiffs primarily contend that their two claims "involve a common core of facts" or derive from "related legal theories." Pl. Br. 31 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). But they cannot identify those supposed common facts or explain how the legal theories overlapped. *See* Pl. Br. 31-34. They also cannot refute the stark distinctions between their equal-protection claim (relying on MSOR's policies and practices, and the texts of Louisiana's CANS statute and Mississippi's prostitution laws) and the substantive-due-process claim (turning on an analysis of *Lawrence*). *See* Def. Br. 28-29; *see also* ROA.155-59, 167-69, 546-48, 552-54. And even plaintiffs' own self-serving descriptions of their claims underscore those distinctions. *See* Pl. Br. 6-7. They admit that the due-process theory turned on whether *Lawrence*'s alleged "substantive due process protection" reaches "the sex acts criminalized by Mississippi's Unnatural Intercourse statute" and that they sought invalidation of state laws "both as-applied to the Plaintiffs

and on their face." Pl. Br. 6 (citing ROA.53-54.). As plaintiffs recognize, the equal-protection claim was vastly different. It drew on differences between the application of the Louisiana CANS and Mississippi prostitution laws to acts of sodomy, and attacked defendants' alleged practice of "not always requir[ing] registration for similar conduct involving heterosexual, vaginal-penile sex." Pl. Br. 6 (citing ROA.54-55.).

Plaintiffs try to paper over these problems by urging that claims are unrelated "*only when*" the claims "are 'distinctly different claims for relief that are based on different facts and legal theories.'" Pl. Br. 30 (emphasis added; quoting *Hensley*, 461 U.S. at 434). But that is not the law. *Hensley* explained that even where "claims for relief … involve a common core of facts or [are] based on related legal theories," 461 U.S. at 435, multiplying counsel's time spent "on the litigation as a whole" by "a reasonable hourly rate" can yield "an excessive amount" when plaintiffs "achieved only partial or limited success," *id.* at 436. Again, plaintiffs' substantive-due-process claim was wholly distinct, in theory and kind, from their equal-protection claim. *See supra* 8; Def. Br. 28-29. But even assuming otherwise, the district court failed to follow *Hensley*'s directive to adequately account for plaintiffs' "partial or limited success" when assessing their fee request.

Plaintiffs also insist that their claims were "inextricable from each other" because the "equal protection claim was only cognizable" due to "the State's defenses to the substantive due process claim." Pl. Br. 33. A standalone equal-protection claim would have failed, according to plaintiffs, because "[c]omparing people convicted of having oral or anal sex with people convicted of prostitution is comparing apples to oranges." Pl. Br. 33. Plaintiffs say that such a "comparison only makes sense given the State's defense that it retroactively reads the extratextual element of compensation into its Unnatural Intercourse law." Pl. Br. 33. Plaintiffs pled both claims in their complaint from the outset of the case. ROA.53-55. How they could have come up with the equal-protection claim as a counter to defenses that defendants had not yet asserted is difficult to understand.

Plaintiffs apparently claim that they did so based on pre-litigation settlement discussions. Pl. Br. 5-6. But that creative post hoc narrative conflicts with the fact that one of the plaintiffs in this case (Brenda Doe) had already asserted a virtually identical equal-protection claim in challenging her registration on the Louisiana sex-offender registry. ROA.545-55, 165-69; *see Doe v. Jindal,* 851 F. Supp. 2d 995, 999-1000 (E.D. La. 2012). The equal-protection claim was not a response to the

defendants' defenses. It was a theory that plaintiffs' lawyers developed in Louisiana and then imported to Mississippi.

Even setting this aside, plaintiffs' inextricability theory still lacks merit. The defense to the due-process claim was that the Court's holding in *Lawrence v. Texas* does not facially invalidate Mississippi's unnatural-intercourse statute or any other state laws. Defendants contended that *Lawrence*'s condemnation of state sodomy laws is limited to those laws' application to private sexual activity between consenting adults. ROA.327-328; *see Lawrence*, 539 U.S. at 578 ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives."). The Supreme Court emphasized that its holding did not apply to sexual activity with minors, non-consensual sexual activity, or prostitution. *Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.").

On the CANS plaintiffs, defendants also argued that those plaintiffs had no due-process claim under *Lawrence* because they were convicted of soliciting oral or anal sex for money—misconduct which the

Supreme Court did not rule to be constitutionally protected. ROA.328. The State's defense did not involve "read[ing] the extratextual element of compensation into its Unnatural Intercourse law." Pl. Br. 33. Rather, it was a straightforward reading of *Lawrence*.

Moreover, the CANS plaintiffs' contention that they could not pursue a standalone equal-protection claim (Pl. Br. 32-33) conflicts with what they told the district court. In a summary-judgment motion, the CANS plaintiffs claimed they were "identically situated" to people convicted of prostitution in Mississippi because the CANS statute and the Mississippi prostitution law "include the same elements, require proof of the same intent, and outlaw identical conduct." ROA.167-168; *contra* Pl. Br. 32-33. They did not argue that their equal-protection claim related to the defendants' due-process defenses. ROA.167-169. Their attempt to tether the equal-protection claim to their due-process claim now lacks merit.

Again, plaintiffs asserted "distinctly different claims" based on unrelated legal theories. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *see supra* 8-9, Def. Br. 27-30. The due-process claim asserted that Mississippi's unnatural-intercourse statute is facially invalid under *Lawrence*. ROA.552. That claim sought to force removal from the MSOR of all sex offenders registered for unnatural-intercourse convictions or

equivalent out-of-state convictions. ROA.542, 555. By contrast, the equal-protection claim challenged only whether the MSOR could require people with CANS convictions to register as sex offenders when it did not require people with prostitution convictions to register. ROA.167-69, 553-54. Given the difference between the two claims, work performed by plaintiffs' counsel on the due-process claim was unrelated to the equal-protection claim. *Hensley*, 461 U.S. at 435 (where suit involves distinct claims, "counsel's work on one claim will be unrelated to his work on another claim"). The district court should have thus "divide[d] the hours expended on a claim-by-claim basis." *Id.* But it did not.

Fourth, plaintiffs contend that the district court "did exactly what the State claims it should have done" by imposing "a pro rata reduction" on their fee request. Pl. Br. 34-35; *see* Pl. Br. 34-39. But that slight adjustment—which amounted to less than a fifteen percent cut for plaintiffs' diminished success—is not what defendants claimed the court "should have done." The district court's refusal to substantially reduce the fee award due to plaintiffs' lack of success was the key error that produced plaintiffs' overblown fee award.

The district court failed to adequately account for the results that plaintiffs obtained, considering the overall relief sought and the amount of the fee award. Def. Br. 24-26; *see Migis v. Pearle Vision, Inc.*, 135 F.3d

1041, 1048 (5th Cir. 1998) (holding that district court abused its discretion by "failing to give adequate consideration to the result obtained relative to the fee award, and the result obtained relative to the result sought"). Plaintiffs did not merely lose on "one of the lawsuit's central issues." ROA.1578. They lost on their *central* claim—the claim that *Lawrence v. Texas* facially invalidated Mississippi's unnatural-intercourse and so the MSOR must remove every sex offender convicted of unnatural intercourse (or an equivalent offense in another state) from Mississippi's registry. ROA.29-31, 528-30. No state laws were declared unconstitutional. The district court never ordered the State to permanently remove all persons convicted of unnatural intercourse (or an equivalent out-of-state offense) from the registry. Rather, only the four "named" CANS plaintiffs and several others with CANS convictions were removed from the registry by way of settlement. ROA.1578. Yet despite the limited relief obtained by plaintiffs relative to the sweeping relief they sought, the district court reduced the fee award based on the results obtained only by an unspecified percentage that was something less than fifteen percent. *See* ROA.1581. That error warrants vacatur. *See* Def. Br. 26-31.

Plaintiffs more particular defenses of the district court's limited fee reduction, Pl. Br. 35-39, also fail.

Plaintiffs suggest that the limited reduction was proper because their successful and unsuccessful claims shared "common" facts or "related legal theories." Pl. Br. 35 (citing ROA.1577-1578.). But, again, plaintiffs cannot identify any such common facts. *See supra* 8-9; Def. Br. 28-29. Nor have they shown any significant overlap in the legal theories underpinning their equal-protection and substantive-due-process claims. *See supra* 8-9; Def. Br. 28-29. Even their own account of their pleadings fails to identify those supposed connections. *See supra* 8-9; Pl. Br. 6.

Next, plaintiffs claim they "did not seek fees for" litigating the substantive-due-process claim after the CANS plaintiffs' settlement. Pl. Br. 35; *see* Pl. Br. 35-37. But this ignores the district court's failure to properly reduce the fee request to account for the excessive number of *pre-settlement* hours expended on the failed due-process claim and other issues on which they did not prevail. Counsel spent hundreds of hours researching and developing the due-process claim, preparing and filing a summary-judgment motion, and drafting and filing a class-certification motion. ROA.1493-1544. Yet plaintiffs never prevailed on their due-process claim, and their summary-judgment and class-certification motions were denied after the defendants obtained leave to conduct discovery. The district court's mere "slight reduction" of those hours was error. ROA.1578.

Plaintiffs further tout an "obvious connection" between plaintiff Arthur Doe's "success on his petition for post-conviction relief" and the district court's gratuitous statement that the unnatural-intercourse statute "appears to be unconstitutional." Pl. Br. 36. But that "connection" does not prove that Arthur Doe's state-court relief bolsters the district court's fee award. The district court made no ruling on any pending issue when stating that the "statute appears to be unconstitutional." ROA.1095. And it is beside the point whether the local district attorney (who was not a defendant) "declined to oppose" Doe's state-court petition based on the district court's statement. Pl. Br. 36. Doe achieved relief in state court. ROA.1456. He never prevailed on his due-process claim in federal court. The plaintiffs are not entitled to any fee credit for anything Doe achieved elsewhere. *See Bailey v. Mississippi*, 407 F.3d 684, 690 (5th Cir. 2005) (holding that plaintiffs were not prevailing parties when the "[district] court itself had effected 'no judicially sanctioned change in the legal relationship of the parties'") (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 605 (2001)). The district court plainly abused its discretion by counting Doe's success in state court toward plaintiffs' fee award. *See* Def. Br. 25-26.

Finally, plaintiffs contend that defendants "forfeited any argument" that plaintiffs failed "to obtain facial relief" when challenging the fee

request. Pl Br. 38. That is nonsense. Plaintiffs appear to fault defendants for not using the term "facial relief" in their district-court motions papers. But no such magic words are required. And, in any event, defendants did raise this point below. For example, they specifically disputed that plaintiffs were entitled to recover fees for work spent on their claim "that Mississippi's unnatural intercourse statute is facially unconstitutional under *Lawrence v. Texas*[.]" ROA.1469. Moreover, defendants argued that the fee request should be reduced substantially because the "vast majority of the litigation in this case was engendered by Plaintiffs' unsuccessful claim challenging the facial validity of Mississippi's unnatural intercourse statute[.]" ROA.1488. Defendants successfully defended against that claim and, at every turn, have opposed plaintiffs' recovery of any relief associated with it. They have not "forfeited" any argument.

The district court abused its discretion by failing to substantially reduce the fee award to account for the limited relief obtained by plaintiffs. The fee award should be vacated.

II. The District Court Abused Its Discretion By Approving Out-Of-District Rates And By Refusing To Exclude Excessive And Duplicative Time Entries From Its Fee Award.

A. The District Court Improperly Rested The Fee Award On Inflated Out-Of-District Rates.

The district court abused its discretion by departing from the usual rule of assigning "prevailing market rates" in the Southern District of Mississippi to instead awarding plaintiffs New York and Los Angeles rates. Def. Br. 31-35; *see Blum v. Stenson*, 465 U.S. 886, 895 (1984). Plaintiffs failed to justify the district court's departure by presenting "abundant" evidence that no Mississippi attorneys were willing and able to take on their case. Def. Br. 32-33; *McClain v. Lufkin Industries, Inc.*, 649 F.3d 374, 382 (5th Cir. 2011). The only evidence plaintiffs produced on that front was a single declaration of a Mississippi law professor who speculated that local attorneys would not have taken plaintiffs' case. ROA.1295-1296. The district court's approved out-of-state rates based on that thin proof inflated plaintiffs' fee award exponentially to the tune of at least $150,000. Def. Br. 31-32. That was reversible error.

Plaintiffs defend the district court's approval of out-of-district rates for their out-of-state attorneys. Pl. Br. 40-45. Each defense fails.

To start, plaintiffs contend that any error in affording most of plaintiffs' lawyers out-of-district rates of $450/hour was "harmless" because those rates "were reasonable even for the Southern District." Pl.

Br. 41; *see* Pl. Br. 40-41. For support, plaintiffs rely on the district court's observation that hourly rates up to $550/hour represent "a reasonable range" for in-district rates. Pl. Br. 41 (quoting ROA.1572.). That reliance is flawed. The district court's observation drew on its own prior fee decision in *Thomas v. Reeves*, 2021 WL 517038 (S.D. Miss. Feb. 11, 2021). ROA.1572. But the court's in-district rate findings in that redistricting case undermine plaintiffs' harmless-error theory. The rationale for awarding a $450/hour in-district fee in *Thomas* does not fit here. For example, *Thomas* approved a $450/hour in-district rate for attorney Rob McDuff (one of plaintiffs' local counsel who was assigned that same rate in this case). 2021 WL 517038, at *5. Mr. McDuff's $450/hour in-district rate was based on his "four decades of experience in complex litigation." *Id.* at *4; *see* ROA.1569. The same cannot be said here. Four of plaintiffs' five out-of-state attorneys (Shayana Kadidal, Ghita Schwarz, Alexis Agathocleous, and Matthew Strugar) were allowed $450/hour rates here. ROA.1572-74. But the experience of at least three of those attorneys—Schwarz (23 years), Agathocleous (18 years), and Strugar (17 years)—is incomparable to the "four decades" worth of experience that justified the $450/hour "in-district" rate awarded in *Thomas*. ROA.1572-74. Recasting their lawyers' out-of-district rates as in-district rates fails to show that the district court's rate-setting error was "harmless."

Next, plaintiffs contend that their counsel's "unique experience" in litigating "two similar challenges in Louisiana" and other cases bolster the district court's rate award. Pl. Br. 42. This argument misses the mark. Plaintiffs' counsel's experience litigating and recruiting plaintiffs for those cases may have made them candidates to handle this case, but that provides no support for the district court's finding that there were not any Mississippi attorneys who could have provided "adequate representation" to plaintiffs. *McClain*, 649 F.3d at 383. That is not "abundant and uncontradicted evidence" that "prove[s] the necessity ... of turning to out-of-district counsel" that this Court requires to support out-of-district rates. *McClain*, 649 F.3d at 382.

Nor does Professor Johnson's declaration create the "avalanche of unrebutted evidence" justifying out-of-district rates. *Id.* at 383. Plaintiffs contend that Johnson's views on local counsel's resources, conflicting personal beliefs, and unwillingness to litigate their case "on a contingent basis" carry that burden. Pl. Br. 43. But one professor's speculation is not the kind of record "replete" with a "variety" of testimony necessary to prove that no local "attorneys were willing and able to assist" plaintiffs here. *McClain*, 649 F.3d at 383. And plaintiffs' contention that defendants "could and should have found" them a local attorney does not improve their case for out-of-district rates. Pl. Br. 44; *see* Pl. Br. 44-45. Plaintiffs

must produce "abundant" *and* "unrebutted evidence" to get out-of-district rates. *McClain*, 649 F.3d at 382. Their thin evidence does not fit that bill.

The district court abused its discretion by awarding plaintiffs the higher, out-of-district rates on which their fee award rested.

B. The District Court Improperly Based Its Fee Award On Excessive And Duplicative Time Entries.

The district court further erred by failing to account for the excessive hours that plaintiffs' counsel expended on many tasks and failed to discount their redundant time entries. Def. Br. 35-41. "Fee awards" must "be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). That means counsel must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. And every fee request must reflect "[b]illing judgment," proven by "documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant." *Saizan v. Delta Concrete Prod. Co.*, 448 F.3d 795, 799 (5th Cir. 2006). Here, the district court failed to hold plaintiffs accountable for departures from those principles. Def. Br. 36-41. The errors produced an award based on

over 1000 hours of work that included excessive time spent on motion and discovery practice, and vaguely described conferences, meetings, and telephone calls. Def. Br. 36-38. The district court also grounded its calculations on several instances of multi-lawyer billing that were lumped into the fee award. Def. Br. 39-41. Those missteps warrant vacatur.

To try to counter all this, plaintiffs argue that the district court's fee award excluded their "non-compensable time." Pl. Br. 46 (capitalization omitted); *see* Pl. Br. 46-52. And they primarily expend that defense on casting defendants' appellate position as "little more than rearguing the evidence" (Pl. Br. 46), "rehashes" of prior arguments (Pl. Br. 48), and "prolix objections" that "were unfounded" (Pl. Br. 48). Those assertions are baseless. On appeal defendants are not indiscriminately challenging every time entry that the district court credited in plaintiffs' fee award. Def. Br. 36-41. Defendants' point in emphasizing specific instances where the district court rewarded excessive billing (Def. Br. 37-38) or duplicative time entries (Def. Br. 39-41) is that the court failed to sufficiently discount its fee award based on the billing practices of plaintiffs' counsel. The district court's fifteen-percent reduction (that also supposedly accounted for plaintiffs' lack of success on their main claim) did not account for those problems. ROA.1581. That was a prejudicial

error that plaintiffs cannot fix by pointing to a few examples they think are "hardly the paradigm of excessive work" or show that the defendants used comparable "staffing practices." Pl. Br. 49-50.

Plaintiffs also insist that defendants "have only themselves to blame" for the district court's fee award because they "reject[ed] reasonable efforts to resolve or streamline" the case. Pl. Br. 47; *see* Pl. Br. 46-47. That rationale fails to justify the district court's fee award. The precedents and principles that the district court's fee approach failed to heed apply in fee disputes no matter how or how long parties litigate a case. *See supra* 21.

Finally, plaintiffs accuse defendants of having "switche[d] hats" on whether this case presented a legal or factual dispute. Pl. Br. 47; *see* Pl. Br. 46-47. This accusation is unfounded. Defendants acknowledged from the outset that plaintiffs' claim that *Lawrence v. Texas* facially invalidated state sodomy statutes was "an issue of law." ROA.325. To be sure, Defendants argued that, under a correct interpretation of *Lawrence*, state sodomy convictions are invalid only to the extent they are based on "private, non-commercial, sexual activity between consenting adults[.]" ROA.329. So defendants sought leave to conduct discovery to determine whether there was any person registered with the MSOR based solely on *Lawrence*-protected conduct. ROA.329. However,

defendants made clear that only plaintiff Arthur Doe could potentially argue that he was registered because of such conduct, since the CANS plaintiffs had been convicted of soliciting oral or anal sex for money. ROA.328-29. Thus, defendants have not contradicted themselves by arguing that the CANS plaintiffs' due-process claim involved a purely legal analysis of whether *Lawrence* facially invalidated Mississippi's unnatural-intercourse statute. Def. Br. 29.

In any event, plaintiffs do not explain why this supposed inconsistency would bolster the fee award under review. They do not say whether the case involved both legal and factual disputes at various points And, perhaps most important, they do not acknowledge that—no matter whether their claims ever presented a purely factual or legal dispute—they did not prevail on both of them and failed to achieve the sweeping, class-based relief that they set out for.

CONCLUSION

This Court should vacate the district court's order on attorneys' fees and costs and remand the case for a proper determination of a reasonable fee.

Dated: February 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wilson D. Minor, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: February 10, 2023

s/ Wilson D. Minor
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32, it contains 5,075 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface, including serifs, using Microsoft Word Version 2016, in Century Schoolbook 14-point font, except for footnotes, which have been prepared the same way except in 12-point font.

Dated: February 10, 2023

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