IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANIMAL LEGAL DEFENSE FUND, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 18-2657-KHV-JPO**
LAURA KELLY, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Plaintiffs Animal Legal Defense Fund ("ALDF"), Center for Food Safety ("CFS"), Shy 38, Inc. ("Shy"), and Hope Sanctuary ("Hope") hereby respectfully submit this Reply Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Expenses pursuant to 42 U.S.C § 1988. Plaintiffs have adequately documented the reasonable number of hours expended in prevailing on the merits portion of this litigation, shown that their workload allocation was efficient, not duplicative, and presented this Court with ample support for their requested hourly rates.

I. Plaintiffs' Counsel's Lodestars are Reasonable

Plaintiffs' counsel's lodestars here are presumptively reasonable because the number of hours expended on the litigation was reasonable, and the hourly rates Plaintiffs claim are reasonable. *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Malloy v. Monahan*, 73 F.3d 1012, 1017-18 (10th Cir. 1996). Defendants urge this Court to slash Plaintiffs' fee award request by nearly fifty percent, but they rely on inapposite case law and a declaration that largely *substantiates* the

reasonableness of the hours Plaintiffs' counsel expended, and provides no authority for lower hourly rates than Plaintiffs claim.

a. The Hours Expended are Reasonable

Defendants acknowledge that "[i]n determining reasonable attorneys' fees, the essential goal 'is to do rough justice, not to achieve auditing perfection,'" *In re: Motor Fuel Temperature Sales Practices Litig.*, 2016 WL 4445438, *13 (D. Kan. Aug. 24, 2016) (quoting *Fox. v. Vice*, 563 U.S. 826, 838 (2011)). Yet Defendants' approach to determining the reasonable number of hours is a painstaking, seven-color-coded audit that relies on numerous inaccurate characterizations of, and unwarranted deductions about, fee counsels' roles and work, and is unsupported by Tenth Circuit precedent. Defendants' Opposition to Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses ("Defs' Br."), Ex. 1. Defendants' contentions as to a reasonable number of hours are further undercut by their own fee expert, Mr. Anthony Rupp. Defs' Br., Ex. 2 ("Rupp Decl.").

Defendants' central attack is to Plaintiffs' billing judgment. Plaintiffs already aggressively excised hours that were duplicative or non-productive, as evidenced by their opening memorandum, and confirmed by Defendants' yellow highlights on fee counsel's timesheets. As previously noted, Plaintiffs' counsel already reduced their overall raw hours by 13% before their initial submission the Court. Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Costs, Dkt. #79 ("Plfs' Mem.), at 15. To rebut this, Defendants offer several discrete arguments, first claiming the number of billers "necessarily resulted in duplication and inefficiency," because, in Mr. Rupp's estimation, "a billing partner typically would not want to bill a client in full for bringing 10 lawyers up to speed about a matter, multiple sets of eyes reviewing a matter, and for generalized background and training of young lawyers

and law school students." Rupp Decl. ¶ 25. But even a cursory review of Plaintiffs' declarations and timesheets shows this is a highly exaggerated version of Plaintiffs' staffing decisions.

Defendants' suggestion that Plaintiffs overstaffed this case and that they "seek attorney fees for 10 different billers" is misleading. Defs' Br. at 6. First, it is unclear where this number comes from. Plaintiffs have claimed fees for eight attorneys (having already cut all the time for two other lawyers, Chen Decl. ¶21[1]), one paralegal (having cut all the time for another paralegal, Chen Decl. ¶22), and two law students (having cut all the time for one law student, *id*.).

Moreover, Defendants' characterization seems to suggest that ten attorneys worked on *every* aspect of this litigation. But the time sheets Plaintiffs submitted demonstrate that the attorneys were assigned to allotted roles to maximize efficiency. Each counsel played a discrete, non-duplicative role in the litigation. Ms. Howell participated in drafting the complaint, identifying local counsel, and liaising with the Plaintiffs before the filing of the Complaint. Howell Decl. ¶6. Mr. Chen, Ms. Eberly, and Mr. Strugar acted as co-lead counsel, handling the bulk of the litigation (indeed, their collective hours make up 71% of the hours requested in Plaintiffs' fee request). Mr. Moss performed the necessary work of local counsel, "advising co-counsel on local rules and procedure; preparing materials for and coordinating service of process on the defendants; preparing pro hac vice materials for co-counsel;" etc. Moss Decl. ¶6. Mr. Marceau—one of the country's two leading scholars on the legal issues raised in this case (the other being Mr. Chen)—spent a mere 26 hours on the whole case, largely advising on the preparation of the Complaint and consulting at other key turning points. Marceau Decl. ¶7. Mr. Muraskin's and Ms. Anello's roles were similarly discrete, and combined, consumed fewer than 20 hours total. Plaintiffs' counsel were busy litigating and winning the lawsuit as quickly and

[1] All references to Plaintiffs' supporting declarations are to the exhibits attached to their opening memorandum.

efficiently as they could. They did not spend their time "bringing 10 lawyers up to speed" or training young lawyers.

In its essence, a review of Defendants' exercise in hunting through fee counsel's timesheets for alleged "duplication" of effort reveals their true position: that it was only reasonable for Messrs. Chen and Moss to participate in the litigation. The vast majority of Ms. Eberly's and Mr. Strugar's hours are deemed duplicative or otherwise not compensable. This is meritless. The Tenth Circuit has been crystal clear: so long as counsel are not performing redundant work, Plaintiffs' staffing decision is not a reason to slash their attorneys' hours. *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 616 F.3d 1098, 1104 (10th Cir. 2010).

Indeed, *Anchondo* is directly on point. There, the defendant argued that the district court erred in awarding fees for one of the plaintiff's counsel, because another counsel and his firm could have handled the case adequately without the first's added experience. The court was unpersuaded: "This unusual position—basically asserting that highly experienced, nationally prominent lawyers may not work (at least for compensation) on any but the most demanding cases, and even then may not act as co-counsel if another attorney with arguably commensurate experience is available from co-counsel's firm—is not supported by a single on-point authority, and we decline to adopt it here." *Anchondo,* 616 F.3d at 1104. As Defendants do here, the defendant also referred, "in conclusory fashion, to the rule that duplicative work is not compensable, citing *Norman v. Housing Authority of City of Montgomery,* 836 F.2d 1292, 1302 (11th Cir.1988)." *Id.* at 1105. But the court said, "that very case explains '[t]here is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer,'" and found no "violation of this commonsense

principle" in counsel's billing records. *Anchondo*, 616 F.3d at 1105*; see also Fish v. Kobach*, No. 16-2105-JAR, 2018 WL 3647132, at *6 (D. Kan. Aug. 1, 2018) (allowing fee recovery by nine timekeepers, and finding duplication only where "at least seven timekeepers reviewed and revised [a] brief[,] [a]ll ACLU timekeepers and one [law firm] timekeeper worked on the reply brief," and "[s]everal attorneys appeared at the hearing"); *Longdo v. Pelle*, No. 15-CV-01370-RPM, 2016 WL 10591328, at *3 (D. Colo. Sept. 8, 2016) (finding no "instances where the records show duplicate billing for the same task by the same person, as [defendant] argue[d] occurred on some occasions," but instead that "challenged time entries show distinct billing entries for continuing work on ongoing tasks").

Defendants specifically point out the hours billed for drafting and editing the Complaint and preparing and filing pro hac vice applications as an example of overbilling. Defs' Br. at 8-9. Here, they seem to present two distinct arguments. First, that the availability of the complaints in the Utah and Idaho Ag-Gag litigation should have made the drafting of the complaint in the present case more efficient. *Id*. Second, that those cases are not good benchmarks for the reasonableness of the hours claimed here because those cases involved more stages and disputes. *Id*.

As to the first argument, Kansas's Ag-Gag law is actually unique in its wording, presenting, quite candidly, a more challenging effort to plead the case for its unconstitutionality. One need only look at the summary judgment briefing to see how carefully the rather byzantine language of the statute needed to be parsed to explain both how it operates and why it is unconstitutional. Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, Dkt. # 61, at 9-10 (diagram breaking down the statute's provisions). As to the second argument, Plaintiffs fully concede that the Utah and Idaho litigation at the pre-trial and summary judgment

stage was more extensive than the present litigation, which is why counsel's hours in this case are about half of what was sought for attorneys' fees in those cases (479.1 hours for the merits litigation here; 956.65 hours in Utah and 980 hours in Idaho). Plfs' Mem. at 13, 16.

Defendants' position that the vast majority of Mr. Strugar's and much of Ms. Eberly's time should be excluded as duplicative is contradicted even by their own fee expert, who states that he "would be comfortable as a billing attorney exercising the billing judgment to bill…the time of the three 'lead' attorneys (Chen, Strug[a]r and Eberly) local counsel Moss, paralegal Schlemmer and a joint category of 'law student' time." Rupp Decl. ¶27. Defendants' explanation for why the Court should disregard its own expert on this point—that "[h]ours were not excluded where the time entries were specific enough to show that other lawyers performed the primary function of the drafting pleadings, documents, motions or briefs" (Defs' Br. at 8)—makes little sense and does not justify Defendants' liberal green highlighting on fee counsel's time records.

Defendants next contend that Plaintiffs over-litigated a simple, discrete case that Defendants defended conservatively. This is false. The litigation involved four organizational plaintiffs pursuing claims against a 30-year-old statute, involving complicated issues of Article III standing and complex First Amendment issues that were questions of first impression in this jurisdiction. Defendants propounded detailed discovery, and the case required extensive preparation of a pre-trial order and conference, together with briefing cross-motions for summary judgment, among other substantive motions. Plaintiffs' counsel brought extensive expertise and experience that allowed them to litigate—and win—this complex case far more efficiently than other, less experienced attorneys could have. *See, i.e.,* Marceau Decl. ¶9 (detailing "hundreds of hours researching analogous issues, consulting with outside experts, and" speaking to "six of the nation's leading constitutional law experts about the theories and claims" in the case, for which

Mr. Marceau is not seeking fees, despite this work paving the way for "the ultimately successful legal strategy undergirding this important case").

Moreover, as Mr. Vokins attests from personal experience both litigating with and on the other side of the Kansas Attorney General's Office, they employ vigorous litigation techniques. Vokins Decl. ¶5. This case was no exception. Defendants misleadingly suggest that Plaintiffs' "only example" of this assertiveness is the conflict over the Defendants' jury demand. Defs' Br. at 9 n.4. As already detailed in the Plaintiffs' opening memorandum, Plfs' Mem. at 3 & Exh. A, Chen Decl. ¶¶19-20, that is not the case. On numerous occasions, in fact, Plaintiffs sought opportunities to narrow the claims and issues in the case—first, as directed by the Court and consistent with Local Rules, Plaintiffs drafted a detailed Pre-Trial Order, based on the parties' discovery responses, that painstakingly identified numerous undisputed facts, so as to narrow the issues for the coming Motions for Summary Judgment. Defendants disregarded and removed from the draft all the purported undisputed facts, which required the parties to prepare and then respond to much more detailed Statements of Undisputed Material Fact, in their cross motions for summary judgment. Reply Declaration of Alan K. Chen in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Costs, ¶2 (attached as Exhibit A-1) ("Chen Reply Decl."). Second, following this good faith attempt at limiting the disputed issues, in the Fall of 2019 Plaintiffs' counsel carefully considered and prepared a settlement proposal, that would have resolved the parties' dispute. Chen Decl. ¶20. After a few weeks of email exchanges, Defendants rebuffed the settlement proposal, and Plaintiffs went on to win at summary judgment even more than what they sought from Defendants. *Id*. Were it not for these and other tactics on Defendants' part, Plaintiffs could have expended significantly fewer hours on the litigation. As the Tenth Circuit has stated, "'The government cannot litigate tenaciously and then be heard to

complain about the time necessarily spent by the plaintiff in response.'" *McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1147 (10th Cir. 2006) (quoting *City of Riverside*, 477 U.S. at 580 n.11).

Defendants next complain that Plaintiffs' counsel spent too much time on duplicative meetings and conferences, categorizing virtually every phone conference and email correspondence among counsel (even between just two counsel) as non-compensable. But on this, too, the Tenth Circuit has been clear: only *facially excessive* intra- or inter-office conferencing is not recoverable. *Anchondo*, 616 F.3d at 1105. Again, *Anchondo* is squarely on point. When the defendant ACA objected to numerous hours counsel spent conferencing with his co-counsel, the court found "ACA cite[d] no authority for its facially implausible premise that expert co-counsel cannot assist on a case-related matter unless that matter is uniquely addressed to his particular expertise." *Id.* at 1106. Nor did ACA "identif[y] any specific communications between [counsel] that were unnecessary in any broader sense." *Id.* The court categorically rejected the idea that counsel "may not charge for communications with co-counsel." *Id.* at 1105. Here, too, in highlighting virtually *all* phone calls and email discussions among counsel as prohibited conferences, without further explanation, Defendants fail to identify any specific communications that were unnecessary. Nor could they. Plaintiffs' counsel—busy full-time law professors, non-profit attorneys, and a solo practitioner facing numerous demands on their time (Chen Decl. ¶¶12-13, 15; Strugar Decl. ¶2)—did not hold calls to talk in broad generalities, but to work out division of labor for pleadings and other tasks and strategize as to difficult decisions or thorny legal arguments. They are entitled to recover fees for this necessary work. *Anchondo*, 616 F.3d at 1105; *see also Longdo*, 2016 WL 10591328, at *3 (where no clearly duplicative work identified, finding "the relative amounts of time spent communicating among the attorneys

and their assistant [] not unreasonable"). To suggest that these busy lawyers had no reason to litigate this case efficiently, Defs' Br. at 3 n.1, is simply insulting and ungrounded in reality.

Defendants next contend that Plaintiffs' counsel are not entitled to compensation for necessary travel time because, Defendants claim, "there are plenty of Kansas attorneys who could and would have capably represented the plaintiffs in this litigation" (Defs' Br. at 12), making the participation (and thus the travel time) of any non-Kansas attorneys unnecessary. This contention is flatly contradicted by all available evidence, including by Defendants' own fee expert. As Plaintiffs' counsel explain, they make up a small cohort of attorneys who have collectively pursued *every* legal challenge to an Ag-Gag law, of which there have been seven across the country. Chen Decl. ¶12; Eberly Decl. ¶5; Strugar Decl. ¶6; Muraskin Decl. ¶14. Such litigation—the Kansas challenge included—"involves extremely complex and difficult constitutional issues of first impression, requiring the high skills and expertise of Plaintiffs' counsel." Vokins Decl. ¶7. "Plaintiffs' counsels' background and expertise with these 'Ag-Gag' laws is unique." *Id.* To try to get around this, Defendants mischaracterize Mr. Rupp's declaration, claiming that he notes, that "retention of out-of-state lawyers was not required in this case." Defs' Br. at 12. Not so. Mr. Rupp was opining on whether the litigation involved a politically unpopular cause (which is relevant to a possible rate enhancement) (*see* Rupp Decl. ¶¶9-10), not on whether retention of out-of-state counsel was necessary in the first place. And in fact, the rest of Mr. Rupp's declaration makes clear that he *did* believe it reasonable for Messrs. Chen and Strugar and Ms. Eberly to participate and recover fees for their participation in the litigation. *See* Rupp Decl. ¶¶17; 27; *Anchondo*, 616 F.3d at 1105–06 (rejecting as meritless defendant's contention that counsel's participation in the conference was unnecessary and

therefore his travel time to the conference was not compensable).[2] Underscoring the reasonableness of their billings, and as stated in their opening memorandum, Mr. Chen and Ms. Eberly reduced their billable hours for their travel by one half. Chen Decl., ¶19 & Attachment 5; Eberly Decl. ¶10.

Next, Defendants argue that attorneys performed paralegal work that should thus be billed at paralegal rates (Defs' Br. at 13). It is true that, lacking regular access to available paralegals, Plaintiffs' counsel performed some work that could have been performed by paralegals, including proofing and cite-checking briefs, and organizing exhibits. However, Defendants were again overly aggressive here, marking in teal (to designate supposed paralegal activities) Ms. Eberly's substantive work drafting discovery responses, interviewing clients, and finalizing pleadings as paralegal time. *See* Defs' Ex. 1 at 25; 28.

Perhaps the most bizarre argument Defendants present is their attempt to slash away time that ALDF's staff counsel, Ms. Eberly, spent assisting her clients in responding to discovery requests, by claiming that she acted as both client and counsel in these situations, and could not recover fees when wearing her "client" hat (Defs' Br. at 13-14). This argument lacks any bearing in fact or law. The time entries Defendants mark in dark grey show only that Ms. Eberly spent time advising and gathering information *from* clients, including Plaintiffs Shy 38 and Hope Sanctuary, in order to respond to discovery responses. *See* Defs' Ex. 1 at 23-24 ("Conducting research and gathering info to answer interrogatories"; "Conferring with client re discovery responses"; "Sending ROG responses to clients and counsel for review"; "Corresponding with ALDF staff re discovery requests"; "Talking with client re ROG responses"). If Ms. Eberly were

[2] Furthermore, Mr. Chen requested to appear telephonically at the initial scheduling conference, but was directed by Magistrate Judge O'Hara to appear in person. Chen Decl. ¶18 and Attachment 5. For the same reason, Plaintiffs' request for reimbursement of the reasonable travel expenses is permissible under the law of Section 1988.

acting as both client and counsel on these occasions, there would have been no reason for her to "correspond" or "talk" with anyone (other than herself, which she plainly did not do). Responding to discovery is a routine part of a litigator's regular legal practice. Public interest lawyers who are employed by non-profit advocacy groups cannot have their work undermined on the fiction that they are no different from their clients, and as Defendants concede, Defs' Br. at 14, no case has made such a ruling. Defendants' attempt to analogize Ms. Eberly's work to that of a *pro se* attorney, for which the Supreme Court disallowed recovery of fees in *Kay v. Ehrler*, 499 U.S. 432, 436 (1991), is completely off point.

Finally, Defendants claim legal uncertainty over Plaintiffs' counsel's ability to recover for their time spent seeking attorneys' fees, but such fees are unquestionably compensable in the Tenth Circuit. *Iqbal v. Golf Course Superintendents Ass'n of Am.*, 900 F.2d 227, 229 (10th Cir. 1990)[3] (in "fee litigation under statutory fee provisions, courts commonly allow additional attorney's fees for time spent in establishing an original fee entitlement," and the Tenth "[C]ircuit is in accord,") (quoting *Glass v. Pfeffer*, 849 F.2d 1261, 1266 n. 3 (10th Cir. 1988)); *see also Littlefield v. Deland*, 641 F.2d 729, 733 (10th Cir. 1981); *Stroup v. United Airlines, Inc.*, No. 15-CV-01389-DDD-STV, 2019 WL 8359214, at *2 (D. Colo. Sept. 5, 2019) ("The Tenth Circuit generally allows recovery of fees for an attorney's work in seeking attorney's fees"). Defendants point to the parties' pre-motion fee negotiations in a half-hearted attempt to claim that the present motion was premature (and thus to suggest counsel's work here is not compensable), but admit that "the separation now between the parties is pretty much the same" as it was during the negotiations. Defs' Br. at 15-16. Defendants had an opportunity to present

[3] Defendants claim *Iqbal v. Golf Course Superintendents Ass'n of Am.* stands for the proposition that such an entitlement "must be resolved on a case-by-case basis," Defs' Br. at 14-15, but *Iqbal* states that the issue of "attorneys' fees arising out of *an appeal of a statutory fee award* … must be resolved on a case-by-case basis." 900 F.2d at 229–30 (emphasis added).

Plaintiffs with a more reasonable counteroffer but did not, forcing Plaintiffs' counsel to devote time to this (vigorously contested) motion. *Glass*, 849 F.2d at 1266 n.3 (noting that fees for contested fee litigation under fee shifting statutes is reasonable "since it is the adversary who made the additional work necessary" (quoting Prandini v. National Tea Co., 585 F.2d 47, 54 n.8 (3d Cir. 1978)).

Defendants' laundry list of arguments meant to winnow the hours Plaintiffs' counsel spent efficiently litigating this complex, fiercely fought case should be rejected. Plaintiffs' counsel have, as they must, "submit[ted] appropriate documentation to meet 'the burden of establishing entitlement to an award.'" *Vice*, 563 U.S. at 838 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The Court should resist Defendants' invitation to "become green-eyeshade accountants" with Defendants' seven-color-coded key. *Id.*

b. Plaintiffs' Counsel's Claimed Hourly Rates are Reasonable

Neither should the Court entertain Defendants' proposed hourly rates, as Plaintiffs presented ample evidence that their claimed rates are consistent with those of Kansas City attorneys of comparable experience and skill. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Defendants do not contest the reasonableness of Messrs. Marceau's, Strugar's, or Moss' hourly rates, but contend that Mr. Chen's hourly rate should be $450 instead of $600, Ms. Eberly's rate should be $225 rather than $275, and that other of Plaintiffs' counsel's rates should also be lower than claimed. Defs' Br. at 17. Defendants base this contention on the declaration of Mr. Rupp and Tenth Circuit cases they claim are analogous. But neither Mr. Rupp's declaration nor this legal authority justifies the rates Defendants propose.

First, Mr. Rupp's conclusions regarding reasonable hourly rates for Mr. Chen and Ms. Eberly are not persuasive, for several reasons. By his own admission, Mr. Rupp bases his

opinion solely "on [his] knowledge, education, training and experience," (Rupp Decl. ¶1) and not on any external or objective source. While Plaintiffs do not doubt the depth of Mr. Rupp's experience in the Kansas City legal community, in determining reasonable hourly rates Tenth Circuit courts have routinely looked to external sources, including the 2017 Kansas Bar Association (KBA) survey relied upon by Plaintiffs' fee expert Mr. Vokins.

Fish v. Kobach, a 2018 trial court decision, is instructive. In assessing hourly rates for a partner at a large law firm, the Director of the ACLU Voting Rights Project, and the former Legal Director of the Kansas ACLU—each with more than ten years' legal experience—the court relied on the KBA survey in deeming $450 per hour reasonable: "[A]lthough at the uppermost end, these fees are within the KBA survey range of billing rates for general civil trial practice in Kansas, firms with more than 15 attorneys, and equity partners." *Kobach*, 2018 WL 3647132, at *7. This was particularly the case because "Plaintiffs have submitted compelling evidence that voting rights litigation is highly specialized, and there are few if any attorneys in Kansas and Missouri who have previously litigated NVRA claims in federal court," which was why plaintiffs "sought out attorneys with substantial experience litigating cases under the NVRA." *Id.* This specialized knowledge "justif[ied] rates on the high end of the Kansas City market with respect to the partners litigating this matter." *Id.*

Mr. Chen and Ms. Eberly (together with other of Plaintiffs' counsel) possess similar, if even more specialized, expertise than the attorneys in *Fish*—Mr. Chen, particularly. Indeed, Mr. Chen has nearly 35 years of legal experience in constitutional litigation and First Amendment law. Chen Decl. ¶¶5, 12-13. A tenured Professor at the University of Denver Sturm College of Law, Mr. Chen is a preeminent First Amendment scholar called upon to submit briefs to the United States Supreme Court, and one of two leading scholars on the issues presented in this

lawsuit (the other being Plaintiffs' counsel Mr. Marceau). *Id.* ¶¶9, 11. Although Mr. Chen and Mr. Rupp have practiced for roughly the same number of years, their experience, expertise, and national reputation are not comparable, and therefore Mr. Rupp's hourly rate of $425 is not instructive. Rupp Decl. ¶¶2-3, 16.

Neither is Ms. Eberly's experience and expertise comparable to an "associate in Mr. Moss' firm," as Mr. Rupp claims, without further explanation or substantiation. *Id.* ¶15. While a more junior attorney, she too has highly specialized expertise in the particular First Amendment issues at stake here, having spent the bulk of the past three years litigating challenges to Ag-Gag statutes and contributing to the scholarly dialogue on the issue in legal journals, at law schools, and at Continuing Legal Education events. Eberly Decl. ¶¶4-6. Together with other of Plaintiffs' counsel, Ms. Eberly is part of the small cohort of attorneys who are the *only* ones to have litigated the seven constitutional challenges to Ag-Gag laws nationwide.

Defendants' other attempts to undercut the reasonableness of Plaintiffs' counsel's rates are similarly unpersuasive. Defendants attack the validity of Mr. Vokins' opinion on reasonable rates, quibbling with his reliance on the 2019 Missouri Lawyers Media review of rates from attorneys practicing in the greater Kansas City metro area. Defs' Br. at 21. Defendants misleadingly describe the survey as "an article concerning Missouri rates" (*id.*), as if attorneys in the Kansas City area practice exclusively on one side of the state line. *Fox v. Pittsburg State Univ.*, 258 F. Supp. 3d 1243, 1264 (D. Kan. 2017) (rejecting argument that "the relevant market is Kansas City, *Kansas*, not *Missouri*," because "[m]ost of the practitioners in the district practice in both Kansas and Missouri" and "practitioners in the Kansas City metropolitan area do not change their rates based on whether the case is filed in Kansas City, Kansas or Kansas City, Missouri," and "find[ing] the relevant market is the Kansas City metropolitan area, which

includes Missouri and Kansas"); *see also* Vokins Decl., Attachment 2 (Missouri Lawyers Media review stating "attorneys and staff in offices near … the metropolitan Kansas City area in Kansas were counted as in-state rates"); Rupp Decl. ¶¶2-3 (detailing work throughout Kansas and Missouri). Defendants further claim Mr. Vokins does not explain how the information in the external sources supports his conclusions, ignoring Mr. Vokins' explanation that he used the surveys to compare Plaintiffs' claimed rates with the hourly rates for local attorneys with similar experience and background. *See* Vokins Decl. ¶8; *id.*, Attachment 2 (Missouri Lawyers Media review finding median hourly rate in Kansas City was $405 an hour, with median partner charging $475 an hour and median associate, $345 an hour).

Defendants claim their proposed rates are in line with ones recently awarded in the Tenth Circuit, citing *KCI Auto Auction, Inc. v. Anderson*, No. 19-1138-EFM-GEB, 2020 WL 1166184, at *4 (D. Kan. Mar. 11, 2020) and *Fox*, 258 F. Supp. 3d at 1271. But *KCI Auto* involved a simple motion to compel discovery responses arising from an action to enforce a judgment in a breach of contract case, in which fee counsel failed to "provide any evidence or sworn affidavits to support his claim that his rate is in line with the prevailing market rate." *KCI Auto*, at *4. And *Fox*, a 2017 case evaluating rates for work done from 2014 to 2016, found rates of $350-400 reasonable for employment law practitioners with 15 and 17 years of experience, respectively, pursuing a sexual harassment action under Title VII and Title IX. *Fox*, 258 F. Supp. 3d at 1263, 1271. This and other Tenth Circuit authority support *Plaintiffs'* proposed rates, not Defendants'. *See Fish*, 2018 WL 3647132, at *7 (finding hourly rate of $450 reasonable for civil rights attorneys with "more than ten years' experience," practicing "complex voting rights litigation throughout the country.").

And Defendants' contend – again without authority – that Plaintiffs' counsel's proposed rates should be cut because "excepting Mr. Moss, none of the plaintiff lawyers must cover much, if any, overhead with their rate charges." Defs' Br. at 20. First, organizations like Animal Legal Defense Fund and Public Justice employ the same number of attorneys as a mid-sized law firm and have similar overhead costs. Whether these organizations are strictly categorized as law firms makes little difference; surely the budget of the Kansas Attorney General's office is higher than the sum of its staff attorneys. And Mr. Strugar runs a solo practice, which almost certainly involves more per-attorney overhead than any sizable law firm. Regardless, the Supreme Court has rejected Defendants' proposed distinction between nonprofit and law firm counsel: "The prevailing market rate applies "*regardless of whether plaintiff is represented by private or nonprofit counsel*." *Blum*, 465 U.S. at 895 (emphasis added); *id*. at 894 ("It is also clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization"); *accord Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 679 (10th Cir. 2012).

Finally, contrary to Defendants' assertion (Defs' Br. at 20), Mr. Chen's rate should not be lowered because of the participation of Mr. Moss, who served as local counsel in the case. Defendants claim, in conclusory fashion, that "[m]ost of Mr. Moss's work is clearly duplicative." Defs' Br. at 20. Not so. As he explains, Mr. Moss "advis[ed] co-counsel on local rules and procedure; prepar[ed] materials for and coordinat[ed] service of process on the defendants; prepar[ed] pro hac vice materials for co-counsel; … attend[ed] the initial scheduling conference and pretrial conference; and communicat[ed] with the two local plaintiffs." Moss Decl. ¶6. These same tasks were not *also simultaneously* performed by other of Plaintiffs' counsel. Defendants

offer no logical reason or legal authority for adding some portion of Mr. Moss' hourly rate to Mr. Chen's to achieve a reasonable rate for Mr. Chen. The Court should decline this invitation.

Tenth Circuit caselaw and the credible, well-supported expert testimony of Mr. Vokins demonstrate the reasonableness of the hourly rates claimed by Plaintiffs' counsel. Defendants' arguments to the contrary and attempts to justify lower hourly rates are without merit.

II. Plaintiffs are Entitled to an Enhancement

Plaintiffs respectfully request the Court exercise its discretion to apply a modest lodestar enhancement (10%) for five attorneys (Chen, Strugar, Marceau, Muraskin, and Eberly) the merits portion of the litigation, due to the exceptional success Plaintiffs achieved litigating this highly complex challenge to a 30-year-old criminal statute unconstitutionally shielding from scrutiny the state's large and politically powerful agriculture industry. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010). Defendants' attempts to minimize this success and contest the political unpopularity of the issue are without merit.

First, Defendants raise issues on which they claim Plaintiff did not prevail, asserting that Plaintiffs did not actually need "their desired relief concerning K.S.A. § 47-1827(a)," pointing to Defendants' own litigation position that "the statute only prohibited conduct causing or intending to cause physical damage." Defs' Br. at 24. Plaintiffs' consistent claim regarding 1827(a) throughout this litigation has been that this provision was drafted broadly enough to cover their agricultural investigations and thereby caused a chilling effect. That is why Plaintiffs sought (in the alternative) that very relief in their Prayer for Relief. Complaint, Dkt. #1, ¶ 110. Quite obviously, what Plaintiffs achieved was *the Court*'s authoritative statement to this effect—not Defendants' non-binding litigation position.

Defendants also point out that the Court found that one client[4] did not establish one type of Article III standing, as if that makes any substantive difference to the litigation's success. Because standing is critical to facial constitutional challenges such as this one, it was reasonable for Plaintiffs to plead alternative bases for their standing. The fact that the Court found that each plaintiff had standing is what underlies their status as prevailing parties.

Defendants also rely heavily on Mr. Rupp's declaration to contest that this litigation concerns a politically unpopular cause to which in-state attorneys were not eager flock.[5] Mr. Rupp's basic claim is that only hot-button social issues like abortion or school finance are politically unpopular. Rupp Decl. ¶¶9-10. But even on this, his declaration is contradictory or unhelpful. Mr. Rupp claims that "Kansas attorneys are not shy about bringing civil rights lawsuits on politically charged issues from abortion to school finance to state and local executive orders and municipal ordinances." *Id.* ¶10. But the question, for purposes of a possible fee enhancement, is what issues are so politically toxic that local attorneys *are* shy about taking them on (thus necessitating out-of-state counsel with specialized expertise). On this question, Mr. Rupp is silent, while Mr. Vokins points out that "[a]griculture – including meat processing, and cattle and hog ranching – is the state's largest economic driver, employing approximately 250,000 Kansans, and representing over $46 billion in direct economic output." Vokins Decl. ¶13. This is why "finding counsel willing to challenge unconstitutional legislative acts meant to protect agribusiness and punish animal rights activists is particularly difficult." *Id.*

Defendants' points about the length of time since the Kansas Ag-Gag law's passage and the lack of prosecutions under that law (Defs' Br. at 12) also prove Plaintiffs' arguments, not

[4] Defendants falsely claim that the Court found that *both* ALDF and CFS lacked standing under *Havens Realty*, but this holding mentions only CFS. *See* Memorandum and Order sustaining in part and denying in part Plaintiffs' Motion for Summary Judgment, Dkt. #63, at 27-28.

[5] This argument actually appears in the section of Defendants' brief attacking Plaintiffs' counsel's travel time (Defs' Br. at 12), not in that concerning the requested fee enhancement.

their own. That the Ag-Gag law was not challenged until Plaintiffs' counsel stepped up to represent the Plaintiffs here most strongly suggests that no other Kansas counsel was willing and able to do so sooner—not that they would have been able to but were never asked.[6] And that no one has previously been prosecuted under the statute (to the parties' knowledge) is not a sign of the issue being politically neutral and easily handled, but that the law was operating exactly as designed—chilling speech and preventing undercover investigations through the threat of criminal prosecution.

The contention that Plaintiffs' counsel should not be rewarded for their remarkable success here, because any Kansas civil rights attorney could have and would have sooner litigated a First Amendment challenge to Ag-Gag statute, lacks any evidentiary support. Indeed, not until the Supreme Court's decision in *United States v. Alvarez*, in 2012 (22 years after the Kansas Ag-Gag law's passage), did courts have greater clarity on constitutional protections for false speech. And even then, as Mr. Marceau explains, based on his "first-hand efforts to recruit a legal team for the first Ag-Gag filings[,] many lawyers thought that the legal issues were so intractable and time consuming that they would not get involved." Marceau Decl. at ¶9. Only Plaintiffs' counsel would, and did.

And, finally, as Plaintiffs pointed out in their summary judgment briefing, "it was not until 2012 that the Kansas legislature amended the law to expand the meaning of "effective consent." DUF #7. After that amendment, the law specifically dictates that "Consent is not effective if . . . Induced by . . . fraud, [or] deception." § 47-1826(e)(1). The 2012 amendment

[6] Indeed, Defendants' statement that they have "seen no evidence that any Kansas parties unsuccessfully attempted to retain Kansas counsel to prosecute this matter" or "that plaintiffs failed in any attempt to retain Kansas counsel to prosecute this matter" (Defs' Br. 12) is bizarre. How *could* they have seen such evidence? Neither Plaintiffs nor Defendants could possibly know whether unknown parties reached out to unknown lawyers seeking to challenge a criminal statute passed in 1990.

thus broadened the law to explicitly cover undercover investigations (the hallmark of which is the use of deception to secure access or employment, as noted above), coinciding with a wave of other Ag-Gag bills introduced in many states that year." Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Dkt. #54, at 25. They respectfully request a modest lodestar enhancement as a result.

Conclusion

For the reasons set forth herein and in their opening Motion, Plaintiffs respectfully request the Court award Plaintiffs' counsel the fees and costs requested in their Motion, and additionally award Plaintiffs' counsel the fees in the amount of $6045.00, detailed in the chart below, for attorney time spent reviewing the Defendants' Opposition and preparing the present Reply brief. *See* Chen Reply Decl. ¶ 3 and Attachment 1.

Attorney	**Adjusted Hours**	**Rate**	**Lodestar**
Alan Chen (Univ. of Denver)	2.9	$600	$1740.00
Matthew Strugar (Private public interest firm)	2.1	$400	$840.00
Kelsey Eberly (ALDF)	12.6	$275	$3465.00
TOTAL			**$6045.00**

Dated this 10th day of June, 2020

Respectfully submitted,

/s/ Michael D. Moss

Michael D. Moss, KS Bar #22624
Foley & Mansfield, P.L.L.P.
10740 Nall Avenue, Suite 242
Overland Park, KS 66211
913-232-8767
913-800-7238 (fax)
mmoss@foleymansfield.com

Alan K. Chen (*Pro Hac Vice)*
University of Denver Sturm College of Law
(for identification only)
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6283
achen@law.du.edu

Justin Marceau (*Pro Hac Vice*)
Of Counsel, Animal Legal Defense Fund
University of Denver Sturm College of Law
(for identification only)
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6449
jmarceau@law.du.edu

Matthew Liebman
Kelsey Eberly
Amanda Howell
(*Pro Hac Vice*)
Animal Legal Defense Fund
525 East Cotati Avenue Cotati, CA 94931
(707) 795-2533
mliebman@aldf.org
keberly@aldf.org
ahowell@aldf.org

Matthew Strugar (*Pro Hac Vice)*
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
(213) 252-0091 (fax)
matthew@matthewstrugar.com

David S. Muraskin (*Pro Hac Vice)*
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
(202) 232-7203 (fax)
dmuraskin@publicjustice.net

George A. Kimbrell (*Pro Hac Vice*)
917 SW Oak St., Suite 300
Portland, OR 97205
(971) 271-7372
(971) 271-7374 (fax)
gkimbrell@centerforfoodsafety.org

Counsel for Plaintiffs

PLAINTIFFS' INDEX OF EXHIBITS

In compliance with Local Rule 7.6(b), Plaintiffs provide this Index of Exhibits to their Reply Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Costs.

Exhibit A-1, Reply Declaration of Alan K. Chen in Support of Motion for an Award of Attorneys' Fees and Costs

Certificate of Service

I hereby certify that on this date, I electronically filed the with the Clerk of Court the following documents:

Plaintiffs' Reply Memorandum in Support of Motion for an Award of Attorneys' Fees and Costs

Exhibit A-1, Reply Declaration of Alan K. Chen in Support of Motion for an Award of Attorneys' Fees and Costs

All participants in this case are registered CM/ECF users and will served by the CM/ECF system.

Date: June 10, 2020

/s/ Michael D. Moss