

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426
21 CVS 500085

2022 JUN 13 P 12:48

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC. et al.,
REBECCA HARPER, et al.,
COMMON CAUSE,
Plaintiffs,
v.
REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House
Standing Committee on Redistricting, et al.
Defendants.

WAKE CO., C.S.C.

**LEGISLATIVE DEFENDANTS'
COMMENTS ON ALLOCATION OF
SPECIAL MASTERS' COSTS**

Pursuant to the Court's May 12, 2022 Notice of Intent to Assess Costs Relating to the Services of the Court Appointed Special Masters, President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, Senator Ralph Hise, Representative Destin Hall, and Speaker Timothy K. Moore, each in their official capacities, (collectively, "Legislative Defendants"), by and through undersigned counsel, provide the following comments regarding the allocation of costs.

INTRODUCTION

Special Masters and their Assistants seek nearly \$200,000.00 in fees and costs for work done over the course of five days. Regardless of whether that amount is excessive or improper (it may very well be in many respects), the Court should decline to enter any fee or cost award at this point because it lacks jurisdiction to do so, pending the outcome of the numerous appeals stemming from the work done by the Special Masters and their assistants. If the Court believes it has

jurisdiction to make an award, it should stay the award pending the outcome of the appeals in this matter. In any event, the invoices submitted by the Special Masters appear to be either excessively vague or otherwise inappropriate and should be subjected to exacting scrutiny by this Court, as detailed below, to protect the taxpayers of North Carolina from excessive charges.

STATEMENT OF FACTS

On February 4, 2022, the North Carolina Supreme Court issued an order striking down North Carolina's Legislative and Congressional Plans under novel theories of the North Carolina Constitution and enjoining the use of those maps for the 2022 election. The North Carolina Supreme Court also ordered that all parties, including the General Assembly, could submit plans for review to the trial court, on or before February 18, 2022, and ordered the trial court to either approve or adopt compliant congressional and state legislative districting plans by noon on February 23, 2022. On February 8, this Court issued an order outlining the process for review of any remedial plan, and an order allowing the parties to submit candidates for a Special Master. All parties submitted names for special masters on February 9, 2022. On February 16, 2022, the Court declined to appoint any special master candidate submitted by the parties, and instead appointed former North Carolina Judges, Thomas Ross, Robert Orr, and Robert Edmunds (the "Special Masters"). These three Special Masters were authorized to hire assistants, which they did, ultimately hiring four additional individuals (the "Special Master Assistants"), two of whom in turn utilized assistants of their own. The four Special Master Assistants hired were Drs. Grofman, Wang, Jarvis, and McGhee.

On February 18, 2022, Legislative Defendants submitted the Remedial Congressional, House, and Senate plans passed by the General Assembly with all required accompanying materials. All three sets of Plaintiffs also submitted alternative plans or districts. Particularly,

Harper Plaintiffs challenged the Remedial Senate and Congressional plans. *Common Cause* Plaintiffs challenged the House and Senate Plans, by way of challenge of only a few county groupings. And *NCLCV* Plaintiffs challenged all three remedial plans in their entirety.

On February 20, 2022, *Harper* Plaintiffs' counsel informed the Court of *ex parte* communications between Special Master Assistants Wang and Jarvis, and Plaintiffs' experts Dr. Mattingly and Dr. Pegden. The next day, Legislative Defendants moved to disqualify these Special Master Assistants. Also on February 21, 2022, the parties all provided comments on the proposed remedial plans provided by the parties on February 18, 2022.

On February 23, 2022, this Court issued an order adopting the recommendations of the Special Masters to uphold the House and Senate maps passed by the General Assembly, but striking down the General Assembly's Congressional maps, replacing them with maps drawn by the Special Master Assistants. All parties immediately appealed from the Court's order. *Harper* Plaintiffs appealed the portion of the February 23, 2022 Order upholding the General Assembly's Remedial Senate Plan. *NCLCV* and *Common Cause* Plaintiffs filed generic notices of appeal to the entire order, but subsequently clarified in their issues on appeal that *NCLCV* Plaintiffs only challenged the portion of the Court's February 23, 2022 Order upholding the General Assembly's Remedial Senate Plan, while *Common Cause* Plaintiffs challenged the portion of the Court's February 23, 2022 Order upholding both the Remedial Senate and House Plans. Legislative Defendants appealed from the portion of the February 23, 2022 Order that rejected the General Assembly's Remedial Congressional Plan and adopted a plan by the Special Masters. Legislative Defendants also appealed from a separate order entered on February 23, 2022 denying Legislative Defendants' motion to disqualify Special Master Assistants Wang and Jarvis.

On May 12, 2022, a Notice of The Court’s Intent to Assess Costs Relating to the Service of the Court-Appointed Special Masters was filed and served on counsel. Attached to this Notice was an accounting of Special Master and Assistant Expenses, and several invoices and time sheets for the Special Masters and Special Master Assistants. The accounting revealed for the first time that the Special Masters had billed the Court at \$690.00 an hour for their time, with their assistants charging \$450.00 an hour, and the assistants’ assistants charging \$75.00 an hour. In total, the Special Masters and the assistants, seek over \$195,000 for five days work.

ARGUMENT

1. The Court Lacks Jurisdiction To Enter an Award on Fees or Costs.

When each party filed their notice of appeal in this matter, this court was divested of subject matter jurisdiction to rule on any fee or cost applications. *Hailey v. Tropic Leisure Corp.*, No. COA19-908, 854 S.E.2d 132, 145-46 (2020). In *Hailey*, a jury returned a verdict holding that the plaintiff was entitled to compensatory and punitive damages. Both parties then filed motions for an award of fees and costs. The defendant also filed a motion for JNOV and to alter the judgment. *Id.* at 135. On 16 August 2018, the court entered its amended judgment on the jury verdict and a JNOV order. *Id.* The parties’ cross-motions for attorney’s fees remained pending. Defendant filed a notice of appeal on 12 September 2018. *Id.* On 20 November 2018, the lower court granted plaintiff’s motion for attorney’s fees, finding that the plaintiff was a prevailing party under 42 U.S.C. § 1988. *Id.*

Based upon these facts, the Court of Appeals vacated the lower court’s order awarding fees to the plaintiff. *Id.* at 145-46. The Court of Appeals held that the lower court “lacked jurisdiction to enter its award of attorney’s fees once defendants filed their first Notice of Appeal from the underlying judgments.” *Id.* The Court of Appeals stated that “generally, a timely notice of appeal

removes jurisdiction from the trial court and places it in the appellate court.” *Id. citing McClure v. Cnty. of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007).

The facts here are similar to those in *Hailey*. Here, there was an order and judgment affirming the General Assembly’s remedial House and Senate Plans as constitutional, while striking down the General Assembly’s remedial Congressional plan and replacing it with a plan drawn by the Special Master Assistants. That same afternoon, all parties appealed some portion of this order. Legislative Defendants also appealed an order entered the same day denying Legislative Defendants’ motion to exclude Special Master Assistants’ Wang and Jarvis. The filing of these four notices of appeal removed jurisdiction from this Court. *Brooks v. Giesey*, 106 N.C.App. 586, 590–91, 418 S.E.2d 236, 238 (1992).

2. The Court Should Seek a Full Accounting of Hours, and Reduce the Bill.

Two of the Special Master Assistants, Drs. Jarvis and McGhee, produced invoices without any accounting for their time, or the time of their assistants. These invoices total \$38,534.07. No one, least of all the taxpayers, should be forced to pay for these invoices without seeing an accounting of the time and work spent by Drs. Jarvis, McGhee, and their assistants. Likewise, Dr. Wang submitted an invoice for \$12,487.50 with seven entries saying nothing but “perform analysis” and another two that simply say “review plans” and “prepare report.” These entries, tell the parties very little, if anything, of the work done by Dr. Wang. What plans did he review? What analysis was he performing? Did others in the Princeton Gerrymandering project assist him? Thus for 3 of 4 of the Special Master Assistants, the parties and those responsible for paying these costs have no way of evaluating the reasonableness or lack thereof, of the fees, and costs which total approximately a quarter of the total bill at \$51,021.57. This is prejudicial to those footing the bill, who should be given the ability to assess the bills for signs of reasonableness, duplicative nature

of any time entries, especially given the exorbitant nature of the total bill for five days of work. The Court should reject these three invoices and require Drs. Jarvis, McGhee, and Wang to produce a proper accounting of their time with the level of detail as done by Dr. Grofman and his assistant.

The Court should also evaluate the reasonableness of the fees submitted by the Special Master like it would an application for attorneys' fees¹ and lower the hourly rate for the Special Masters.. In North Carolina, the reasonableness of attorney's fees in this state is governed by the factors in Rule 1.5 Rules of Professional Conduct. *Ehrenhaus v. Baker*, 216 N.C. App. 59, 96, 717 S.E.2d 9, 33 (2011). These factors relevant to this inquiry include, (1) the novelty and difficulty of the questions involved; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; and (3) the fee customarily charged in the locality for similar legal services. *Id.*

There is no dispute that the questions posed to Special Masters Orr, Edmunds, and Ross were novel and made more difficult by the expedited timeline set by the Supreme Court. Nor do Legislative Defendants' dispute that the time spent in their endeavors was generally reasonable. But, the time span here, five days, did not preclude the Special Masters from other employment. Nor do the Special Masters attest that they were precluded from other employment in the affidavits submitted to the Court. And, while all seasoned jurists, the fee charged in this locality for similar redistricting work is not the \$690.00 per hour charged by the Special Masters. While out-of-state counsel for Plaintiffs with out-of-state funding may charge such rates in these matters, rates in this locality for redistricting work do not rise to that level. Nor are Legislative Defendants aware of any Court in this state granting a fee or cost award with such an hourly rate. Thus, Legislative

¹ Such an analysis is bolstered by the June 8, 2022 filing of affidavits from the Special Masters and Mr. Crowell in Support of the "Fee Requests" which are styled in the same manner as affidavits in support of a typical request for attorney fees.

Defendants respectfully request that this Court reduce the rate charged by the Special Masters to \$500.00 an hour, which is more commensurate with the cost per hour of partners in this area in this line of work.²

In support of this hourly rate, Legislative Defendants submit to the Court an order issued on November 17, 2020 by a three-judge panel in the redistricting matter of *Kelly Alexander v. NCSBE*, 19-CVS-011321 (Wake Ct. Sup.) (Exhibit 1). In this matter, the court awarded fees in the amount of \$500.00 per hour to former North Carolina Court of Appeals and Supreme Court Justice Bob Hunter. While this award was vacated by the North Carolina Court Appeals for jurisdictional and other reasons *see Alexander v. North Carolina State Board of Elections*, 2022- NCCOA-52, 869 S.E.2d 765, the hourly rate charged by Mr. Hunter was not an issue. Mr. Hunter also submitted an affidavit from Special Master Edmunds in this matter who attested that he believed “the rate of \$500.00 per hour for counsel with Mr. Hunter’s experience as requested to be reasonable and a customary rate in the legal market in metropolitan cities in North Carolina...” (Ex. 2, ¶7).

3. Allocation of Thirds is Appropriate.

Once the Court has jurisdiction to rule on the costs for the Special Masters after the appeal, it should allocate the costs according to the success of the parties on the plans challenged and the plans upheld. The Special Masters evaluated three remedial plans enacted by the General Assembly: the Congressional plan, the House Plan, and the Senate Plan. Legislative Defendants prevailed on all but the Congressional plan in this Court. Thus, at most, Legislative Defendants should be obligated for only one-third of the Special Masters’ costs. Each of the Plaintiffs

² Legislative Defendants acknowledge that attorney Michael Crowell filed an affidavit in support of the hourly rate charged by the Special Masters on June 8, 2022. However, Mr. Crowell admits in this affidavit that he has “not litigated redistricting issues myself recently” and that the last voting rights case he litigated concluded 25 years ago. *See Crowell Affidavit* ¶¶3,5. Mr. Crowell also opines that a much lower rate of \$550.00 would also be appropriate. *Id.* at ¶11.

challenged the Remedial Senate Plan, which this Court upheld. Thus, the Court should order Plaintiffs to split the second-third among themselves. Lastly, only NCLCV and Common Cause Plaintiffs challenged the House Plan which passed with broad bipartisan support. The Court should thus order these two sets of Plaintiffs to split the remaining third of the fees and costs.

But even if the Court had jurisdiction to hear issue an order on costs at this stage, which it does not, the Court should stay any order issued now pending the outcome of the pending appeals at both the North Carolina Supreme Court and Supreme Court of the United States. The appeals in both of these instances challenge the Court's order, and particularly whether the Special Masters had the authority to redraw North Carolina's Congressional Plan. Manifest injustice would result if the taxpayers of North Carolina were forced to pay for all or a portion of almost \$200,000.00 in fees and costs of the Special Masters for a Congressional plan were ultimately held unconstitutional by the North Carolina or United States Supreme Courts. As a result, the Court in its discretion should stay any order issued on these fees and expenses, until the appeals are concluded.

CONCLUSION

For the reasons stated herein, Legislative Defendants respectfully request that the Court decline to enter an award of costs until the conclusion of all appeals, or in the alternative to stay any order on costs pending the outcome of all appeals in this matter. Should the Court enter a fee award at this stage in the litigation, Legislative Defendants respectfully request that the Court order the Assistant Special Masters to provide complete billing for subsequent commentary, to the extent they have not already done so, and otherwise apportion the costs as outlined in above.

Respectfully submitted this the 13th day of June, 2022.

/s/ Phillip J. Strach

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Phillip J. Strach (NC Bar No. 29456)

phillip.strach@nelsonmullins.com

Thomas A. Farr (NC Bar No. 10871)

tom.farr@nelsonmullins.com

Alyssa M. Riggins (NC Bar No. 52366)

alyssa.riggins@nelsonmullins.com

4140 Parklake Avenue, Suite 200

Raleigh, NC 27612

Telephone: (919) 329-3800

BAKER HOSTETLER LLP

Mark E. Braden* (DC Bar No. 419915)

MBraden@bakerlaw.com

Katherine McKnight* (VA Bar No. 81482)

kmcknight@bakerlaw.com

1050 Connecticut Ave NW, Suite 1100 Washington DC
20036

* Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

It is hereby certified that on this the 13th day of June, 2022, the foregoing was served on the individuals below by email:

Burton Craige
Narendra K. Ghosh
Paul E. Smith
Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com
Counsel for Plaintiffs Rebecca Harper, et al.

Abha Khanna
Elias Law Group LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
AKhanna@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
Arnold and Porter
Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
elisabeth.theodore@arnoldporter.com
Counsel for Plaintiffs Rebecca Harper, et al.

David J. Bradford
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
dbradford@jenner.com
Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Aria C. Branch
Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, DC 20002
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Terence Steed
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
tsteed@ncdoj.gov
Counsel for the North Carolina State Board of Elections; Damon Circosta, Stella Anderson, Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities with the State Board of Elections

Stephen D. Feldman
Robinson, Bradshaw & Hinson, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com
Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Sam Hirsch
Jessica Ring Amunson
Kali Bracey
Zachary C. Schauf
Karthik P. Reddy
Urja Mittal
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
shirsch@jenner.com
zschauf@jenner.com

*Counsel for Plaintiffs North Carolina League of
Conservation Voters, et al.*

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Southern Coalition For Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
katelin@scsj.org

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com
Counsel for Intervenor Common Cause

Adam K. Doerr
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
Robinson, Bradshaw & Hinson, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
ezimmerman@robinsonbradshaw.com

*Counsel for Plaintiffs North Carolina
League of Conservation Voters, et al.*

/s/ Phillip J. Strach

NELSON MULLINS RILEY &
SCARBOROUGH LLP
Phillip J. Strach (NC Bar No. 29456)
phillip.strach@nelsonmullins.com

Exhibit 1

STATE OF NORTH CAROLINA
WAKE COUNTY

2020 NOV 23 AM 10:57

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 011321

WAKE CO., C.S.C.

KELLY ALEXANDER, JR., *et al.*,)
Plaintiffs,)
v.)
NORTH CAROLINA STATE BOARD)
OF ELECTIONS, *et al.*,)
Defendants.)

ORDER

THIS MATTER comes before the undersigned Three-Judge Panel upon Plaintiffs' Motion to Tax Costs and Attorneys' Fees filed on August 21, 2020.

Factual and Procedural Background

On August 14, 2019, Plaintiffs filed a verified complaint seeking declaratory and equitable relief. Plaintiffs in this litigation raise a facial challenge to the constitutionality of North Carolina Session Law 2018-14 (S.L. 2018-14), which rewrote N.C.G.S. § 7A-133 to separate Mecklenburg County into eight voting subdistricts for the purposes of nominating and electing district court judges. Within the complaint, Plaintiffs requested attorneys' fees and litigation costs pursuant to 42 U.S.C. § 1988.

Defendants filed motions to dismiss the complaint, which came on for hearing before the Honorable Judge Croom on November 18, 2019. The motions to dismiss were denied in part, and Judge Croom transferred the case to a three-judge panel pursuant to N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4) for later resolution of Plaintiffs' request for preliminary and permanent relief. On November 22, 2019, the Court conducted a hearing upon Plaintiffs' motion for a temporary restraining order and for scheduling a hearing on Plaintiffs' motion for preliminary injunction to enjoin the use of S.L. 2018-14 during the

2020 primary and general elections for district court judge in Mecklenburg County, North Carolina.

The Court entered a consent order in this matter on November 27, 2019. As an interim agreement, the parties allowed the State Board of Elections to accept filings for Mecklenburg County district court judge in the 2020 primary and general elections pursuant to N.C.G.S. § 7A-133 as it existed immediately prior to the passage of S.L. 2018-14 wherein Judicial District 26 consisted of all of Mecklenburg County. The consent order expressly remains effective for all Mecklenburg County district court judicial elections in 2020. On July 1, 2020, the North Carolina General Assembly enacted Session Law 2020-84 (S.L. 2020-84)—which eliminated the judicial subdistricts within Mecklenburg County at issue in this case. Furthermore, while S.L. 2020-84 is effective January 1, 2021, it requires that all elections in 2020 be conducted pursuant to the November 27, 2019, consent order entered by this Court.

After the recent legislative development, the Court ordered the parties to brief “what, if any, issues remain in this matter” on July 22, 2020. Plaintiffs and both Defendant groups submitted written arguments. During that briefing period, Plaintiffs filed a Motion for Declaratory Judgment on August 11, 2020, and filed their pending Motion to Tax Costs and Attorneys’ Fees along with a Memorandum in Support of Interim Attorneys’ Fees, Expert Fees, Litigations Expenses and Costs on August 21, 2020. Plaintiffs also filed seven affidavits to support their motion for fees and costs.

State Board Defendants submitted their Brief Opposing the Motion for Attorneys’ Fees on September 21, 2020. In an order filed on September 25, 2020, the Court dismissed as moot Plaintiffs’ facial challenge to the constitutionality of North Carolina Session Law 2018-14 (S.L. 2018-14), but the Court retained jurisdiction over the limited issue of costs and attorneys’ fees raised in Plaintiffs’ motion. Legislative Defendants submitted their

Memorandum in Opposition to Plaintiffs' Motion to Tax Fees and Costs on October 5, 2020.

Plaintiffs submitted a reply brief to Defendants' opposition on October 14, 2020.

Award of Attorneys' Fees and Costs

Generally, a party may only recover attorneys' fees, either as costs or damages, if authorized by statute. *Stillwell Enter., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). To award fees, the trial court must determine (1) that a statutory basis exists for fee recovery, and (2) that the amount requested is reasonable. *Furmick v. Miner*, 154 N.C. App. 460, 462, 573 S.E.2d 172, 174 (2002). In North Carolina, 42 U.S.C. § 1983 and § 1988 can be a proper statutory basis for an award of attorneys' fees, expert witness fees, costs, and litigation expenses. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 593, 525 S.E.2d 481, 485 (2000); *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 65-66, 698 S.E.2d 404, 423 (2010).

Courts must examine federal jurisprudence when analyzing claims for attorneys' fees and costs based on a federal statute. To award such a request in this type of examination, the claimant must be the "prevailing party," and the fee amount must be reasonable. *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012). The Supreme Court has held that a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12, (1992)). Beyond judgment on the merits, parties can prevail through settlement agreements enforced by a consent decree and preliminary injunctions. *See Buckhannon Bd. and Care Home v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604 (2001); *Veasey v. Wilkins*, 158 F. Supp. 3d 466, 470 (E.D.N.C. 2016) (finding that the plaintiff prevailed when a preliminary injunction was obtained and holding that "the key question is whether a

plaintiff succeeded in obtaining a judicially-sanctioned benefit.”); *Messmer v. Harrison*, No. 5:15-CV-97-BO, 2016 U.S. Dist. LEXIS 9572, at * 6 (E.D.N.C. 2016) (explaining that the question of whether a party prevailed is “one of function, not of form”).

Accordingly, the Court finds that Plaintiffs are the prevailing party in this litigation. The consent order provided the preliminary remedy Plaintiffs sought—judicial elections in Mecklenburg County on a county-wide basis. Moreover, the Court’s consent order was incorporated into the session law that completely removed the challenged subdistricts from Mecklenburg County district court judicial elections moving forward. The Court finds that the parties’ legal relationship has been materially altered through relief that modifies Defendants’ behavior toward Plaintiffs in a beneficial manner. Therefore, as the prevailing party, Plaintiffs are entitled to an award of reasonable attorneys’ fees.

Calculation of Reasonable Attorneys’ Fees

“[A] ‘reasonable’ fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case[,]” and “the lodestar method yields a fee that is presumptively sufficient to achieve this objective.” *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010). The lodestar figure is calculated “by multiplying the number of reasonable hours expended times a reasonable rate.” *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013) (quoting *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 243 (4th Cir. 2009)). Moreover, under federal law, a court must apply the factors set forth in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to determine the reasonableness of the hours expended and rate charged. *McAfee*, 738 F.3d at 88 (citing *Robinson*, 560 F.3d at 243-44). Next, “fees for hours spent on unsuccessful claims unrelated to successful ones” must be subtracted, and then “the court should award ‘some percentage

of the remaining amount, depending on the degree of success enjoyed by the plaintiff.”

McAfee, 738 F.3d at 88 (quoting *Robinson*, 560 F.3d at 244).

The United States Court of Appeals for the Fourth Circuit has characterized the twelve *Johnson* factors as follows:

(1) The time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

McAfee, 738 F.3d at 88 n.5.

Here, the Court finds that Plaintiffs' federal and state law claims “involve[] a common core of facts.” *Zoroastrian Ctr. & Darb-E-Mehr of Metro. Washington, D.C. v. Rustam Guiv Found. of New York*, 822 F.3d 739, 754 n.8 (4th Cir. 2016) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)); see *Webb v. Cty. Bd. of Educ.*, 471 U.S. 234, 248-49 (1985). Therefore, the fee award does not need to be itemized by the type of claim, and the attorneys' investigative efforts that led to successful results are fully compensable—regardless of the legal theory pursued. The Court further notes that lawsuits concerning voting rights and elections are considered difficult to prepare. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1996). Moreover, in addition to reasonable fees for attorneys, case assistance from paralegals and law students is also compensable along with expert costs. 42 U.S.C. § 1988 (c); see *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989).

Plaintiffs have filed seven affidavits in support of their request for fees and costs. Two are from the attorneys of record in this matter. They are partners at Higgins Benjamin, PLLC, and both have over forty years of litigation experience. Two more

affidavits are from licensed attorneys familiar with typical billing practices in metropolitan North Carolina areas. They both testified that the fees and costs requested by Plaintiffs in this matter are reasonable. The final three affidavits are from named Plaintiffs in this lawsuit which attest to the quality of representation they received.

In consideration of the time and labor necessarily and reasonably expended by Plaintiffs' counsel, the experience and skill that was required to litigate this matter, the difficult nature of the claims at issue, and the market for similar representation in the state and in this legal field, the Court finds that the hourly rate of \$500 for Mr. Hunter and Mr. Gumbiner is reasonable. Moreover, the Court finds that the hourly rates of \$90 to \$125 for paralegal or law student work and \$300 for expert fees are also reasonable.

Accordingly, in consideration of the itemized fees and expenses chart in Exhibit 2 of Mr. Hunter's filed affidavit, the Court finds that Plaintiffs are entitled to an award of the full, requested amount less the fees charged in connection to their unsuccessful claims—specifically the mootness and declaratory judgment motions. Therefore, the Court concludes, in its discretion, that Plaintiffs are entitled to reasonable attorneys' fees and costs in the amount of \$165,114.44.

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS that:

1. Plaintiffs' request for attorneys' fees and costs incurred while successfully litigating this matter is GRANTED, and Plaintiffs are awarded a total of \$165,114.44 in accordance with the terms of this Order.
2. Defendants are jointly and severally liable for payment of the above-referenced amount within 120 days from the filing date of this Order.

SO ORDERED, this the 17th day of November, 2020.

/e/ Wayland J. Sermons, Jr.

Wayland J. Sermons, Jr., Superior Court Judge

/s/ R. Gregory Horne

R. Gregory Horne, Superior Court Judge

/s/ Lora C. Cabbage

Lora C. Cabbage, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the parties by

emailing a copy thereof to the address below, in accordance with this Court's November 20,

2019 Case Management Order:

Robert Neal Hunter, Jr.
Kenneth J. Gumbiner
HIGGINS BENJAMIN, PLLC
301 N. Elm Street, Suite 800
Greensboro, NC 27401
rnhunterjr@greensborolaw.com
kgumbiner@greensborolaw.com
Counsel for Plaintiffs

Paul M. Cox
NC DEPARTMENT OF JUSTICE
PO Box 629
Raleigh, NC 27602
pcox@ncdoj.gov
Counsel for State Board Defendants

Thomas Farr
Phillip J. Strach
Michael McKnight
Alyssa Riggins
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, PC
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
thomas.farr@ogletree.com
phillip.strach@ogletree.com
michael.mcknight@ogletree.com
alyssa.riggins@ogletree.com
Counsel for Legislative Defendants

This the 23 day of November 2020.



Kellie Z. Myers

Trial Court Administrator

10th Judicial District

kellie.z.myers@nccourts.org

Exhibit 2

STATE OF NORTH CAROLINA
WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 011321

KELLY ALEXANDER, JR., et al.)
)
 Plaintiffs.)
)
vs.)
)
NORTH CAROLINA STATE BOARD OF)
ELECTIONS, et al.)
)
 Defendants.)

**AFFIDAVIT IN SUPPORT OF
INTERIM ATTORNEYS FEES**

AFFIDAVIT OF ROBERT H. EDMUNDS, JR.

Robert H. Edmunds, Jr., upon my oath, declare and says as follows:

1. I am over the age of eighteen (18) and competent to testify as to the matters set forth herein.
2. I am an attorney licensed to practice law in the State of North Carolina. I have practiced law for approximately forty-three years, serving at various times as the United States Attorney for the Middle District of North Carolina, Judge of the North Carolina Court of Appeals, and Associate Justice of the Supreme Court of North Carolina.. I am a member in good standing of the North Carolina State Bar, and the bars of the United States District Courts in North Carolina, the United States Fourth Circuit Court of Appeals, and the Supreme Court of the United States. I am currently counsel in the law firm of Fox Rothschild, L.L.P. My law practice is concentrated in the areas of appellate litigation in the state and federal courts. I have represented litigants in the State and Federal courts, including this Court. The information contained in this Affidavit is based on personal knowledge.

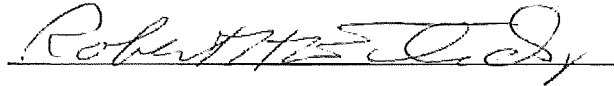
3. I am familiar with the general hourly billing rates for attorneys practicing in the metropolitan areas of North Carolina. I would expect that a litigator in complex civil litigation in the courts in North Carolina, undertaking a matter of public interest representation with little financial backing from the client, would have a billing rate of \$350 or more per hour. My hourly rate here in Greensboro, N.C. is \$650.00 per hour.
4. While sitting as a Justice on the Supreme Court of North Carolina, I had occasion to read briefs filed by Mr. Hunter and hear his oral argument. Later, when Mr. Hunter was serving as a Judge on the North Carolina Court of Appeals, I had numerous occasions to read and review legal opinions he authored for that Court. When Mr. Hunter was appointed to the Supreme Court, I participated in the Court's conferences with him and worked with him on pending cases. As a result, I am intimately familiar with his legal skills.
5. I am more generally aware of Mr. Gumbiner's work and also can see from the billing records provided to me the extent he was involved in this case. Mr. Gumbiner has practiced state and Federal law for many years and enjoys an excellent reputation in the Greensboro bar.
6. This Affidavit is being submitted in support of the Plaintiffs motion for attorney fees. I have read Mr. Robert N. Hunter's affidavit in support of the Motion for Interim Fees and the billing records submitted by attorneys Hunter and Gumbiner, I have read their brief in support of the Motion for Interim Fees.
7. Based on my experience in federal court litigation, I believe the rate of \$500.00 per hour for counsel with Mr. Hunter's experience as requested to be reasonable and a customary rate in the legal market in metropolitan cities in North Carolina, particularly in light of the contingency nature of the representation. I

believe a similar rate is reasonable and appropriate for an attorney with Mr. Gumbiner's experience and expertise.

8. I am of the opinion that the time charged by the attorney was reasonable, considering both the number of hours devoted to the action and also the result obtained.
9. The fees charged by for paralegals of between \$95 and \$125 per hour is consistent with the market rates in this legal community.
10. The fees charged by Theodore Arrington of \$300.00 per hour is reasonable.

FURTHER THE AFFIANT SAYETH NAUGHT

This the 10 day of August, 2020



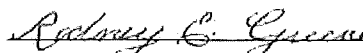
Robert H. Edmunds, Jr.

_____ , being first duly sworn, deposes and says as follows:

STATE OF NORTH CAROLINA COUNTY OF

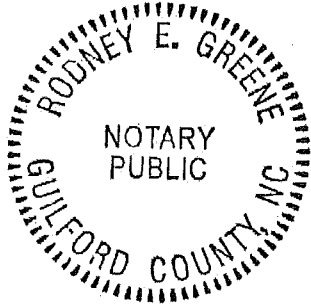
I certify that personally appeared before me this day, acknowledging to me that she voluntarily signed the foregoing Affidavit for the purpose therein stated.

Official Signature of Notary

 August 2020
Sworn to and subscribed before me this 10th of July 2020. (EG)

Notary's Printed or Typed Name: Rodney E. Greene
,Notary Public

My Commission Expires: July 31, 2021



Rodney E. Greene

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing document was served upon the parties by electronic mail as was agreed and consented to by the following:

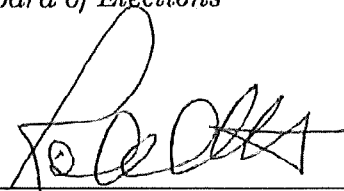
Phillip J. Strach, Esq.
phil.strach@ogletreedeakins.com
Thomas A. Farr, Esq.
tom.farr@ogletreedeakins.com
Michael McKnight, Esq.
michael.mcknight@ogletreedeakins.com
Alyssa Riggins, Esq.
alyssa.riggins@ogletreedeakins.com
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
4208 Forks Road, Suite 1100
Raleigh, North Carolina 27609

Counsel for Legislative Defendants

Paul Cox, Esq.
pcox@ncdoj.gov
North Carolina Department of Justice
114 W. Edenton St.
Raleigh, NC 27603

Counsel for the State Board of Elections

This 21st day of August, 2020.



Robert Neal Hunter, Jr. (NCSB 5679)