

No. 09-35154

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMERICAN CIVIL LIBERTIES UNION OF OREGON, et al.,

Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Hon. Michael W. Mosman
Case No. CV-08-501-MO

PLAINTIFFS-APPELLANTS' APPLICATION FOR ATTORNEYS' FEES

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This Court's September 20, 2010 opinion gave Plaintiffs-Appellants ACLU of Oregon, Cascade AIDS Project, Planned Parenthood of the Columbia-Willamette, and Candace Morgan ("Plaintiffs") all they sought when it struck down two Oregon statutes as facially unconstitutional on First Amendment grounds and reversed the District Court judgment that dismissed Plaintiffs' case. Therefore, Plaintiffs respectfully request that this Court grant them their reasonable attorneys' fees and expenses, both in the District Court and this Court. This application relies on the attached Declaration of P.K. Runkles-Pearson and its exhibits.

A. This Application Is Timely.

A fee application is timely if filed within 14 days after this Court decides a petition for rehearing. Circuit Rule 39-1.6. This Court denied panel rehearing and rehearing en banc on December 14, 2010. This request is filed within 14 days of that date.

B. Section 1988 Allows Plaintiffs to Recover Reasonable Fees.

Plaintiffs brought claims under 42 U.S.C. § 1983, and their complaint requested reasonable fees and costs under 42 U.S.C. § 1988. Section 1988 allows fees to a party who prevails on a Section 1983 claim in order to "ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v.*

Eckerhart, 461 U.S. 424, 429 (1983) (internal quotation marks and citation omitted).

Plaintiffs are prevailing parties because they prevailed on the merits of their most sweeping claim. This Court measures a litigant's success by the extent to which the litigation altered the relationship between the parties. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This Court also considers the significance of the legal issue on which the plaintiff prevailed and the public purpose the litigation served. *Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996) (court determined that litigation constituted "warning . . . not to treat civilians unconstitutionally" (internal quotation marks and citation omitted)). A party who obtains injunctive and declaratory relief, such as Plaintiffs sought here, may be considered a prevailing party without obtaining any monetary relief. *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (declaratory relief); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1390 (9th Cir. 1995) (injunctive relief).

Plaintiffs' successful challenge to the constitutionality of the statutes in this case materially altered the relationship between the parties by preventing the state from enforcing those statutes; it also served the important public purpose of vindicating First Amendment rights. Thus, Plaintiffs are prevailing parties. As such, they are entitled to a reasonable fee award.

C. Plaintiffs' Requested Fees Are Reasonable.

This Court determines a reasonable fee by deciding whether the hourly rate was reasonable and whether the number of hours expended was reasonable. *Morales*, 96 F.3d at 363-64. This Court also considers a number of other factors, including the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, the amount involved, and the results obtained to determine whether that figure should be adjusted. *Id.* at 364 n.9. As described below, Plaintiffs' requested fees are reasonable under this Court's criteria.

1. Plaintiffs' Requested Hourly Rates Are Reasonable.

In *Sorenson v. Mink*, 239 F.3d 1140 (9th Cir. 2001), the Court held that the market rate "is what a court must use to determine a [reasonable attorney] fee," *id.* at 1149, under the federal civil rights statutes, and it remanded that case "with instructions for the district court to award fees ... according to the market rate," *id.* at 1150. The District of Oregon, which sits in Portland where Plaintiffs' fees were incurred, has routinely based its assessment of what fees are reasonable by referring to "the most recent Oregon State Bar Economic Survey as its initial benchmark, taking into consideration any adjustment for inflation between the date the economic survey was published and the dates the legal services were

performed.” *Elston v. Toma*, No. CV 01-1124-KI, 2005 U.S. Dist. LEXIS 42370, at *6 (D. Or. Mar. 24, 2005) (footnote omitted).¹ The most recent survey was published in 2007.²

In using the Oregon State Bar Economic Survey as a benchmark of appropriate fees, this Court accounts for the fact that attorneys’ fees have usually risen since the most recent survey. This Court has held, in a civil rights case arising in Oregon, that “it was an abuse of discretion ... to apply market rates in effect more than two years *before* the work was performed,” *Bell v. Clackamas County*, 341 F.3d 858, 869 (9th Cir. 2003), and the District of Oregon’s decisions have reflected a similar understanding that Bar surveys may be outdated. In *Arevalo v. Department of Motor Vehicles*, No. CV 00-263-BR, 2002 U.S. Dist. LEXIS 6553, at *11 (D. Or. Mar. 28, 2002), the court noted that “inflation, general economic trends, and the pressures in this market since 1998 [the date of the then-most recent Bar Survey] have led to a marked increase in the hourly rates charged by attorneys.” In that case, the court awarded fees of \$100 more per hour than the survey noted for an attorney of that experience level. *Id.* at *11-12.

Furthermore, the Supreme Court has determined that when a Section 1988

¹ While this Court is not bound by the District of Oregon’s decisions, those decisions provide helpful assessments of reasonable fees in the Portland area.

² Oregon State Bar, Oregon State Bar 2007 Economic Survey, available at www.osbar.org/_docs/resources/07EconSurvey.pdf.

prevailing party recovers fees years after they were incurred, it is reasonable to allow the prevailing party to recover fees at the market rates applicable at the time of the petition, rather than the time the work was performed. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). While Plaintiffs here are not seeking a dollar-for-dollar increase of their fees to the current applicable rates, the principle of compensation for delay is another factor that supports the reasonableness of the fees they are seeking.

Plaintiffs are seeking the following hourly rates for their time expended on this case:

TIMEKEEPER	RATE
P.K. Runkles-Pearson	\$270 (2008) \$295 (2009) \$315 (2010)
Rachel Lee	\$150 (2008)
Crystal Chase	\$150 (2008)
Andrew Shoals	\$150 (2010)

The hourly rates Plaintiffs are seeking are reasonable in light of the 2007 Oregon State Bar Economic Survey, the rise in attorney fees since that survey, and the passage of time since much of the work was performed. Ms. Runkles-Pearson graduated from law school in 2002. She had six, seven, and eight years of experience in 2008, 2009, and 2010. The 2007 Survey (which was outdated by the

time this work was performed) recognized rates for lawyers practicing in the Portland area of up to \$240 for lawyers of six years' experience and up to \$360 for lawyers of seven to nine years' experience. Ms. Lee and Ms. Chase were second-year law students when they worked on this matter, and Mr. Shoals was a first-year law student.³ The 2007 survey does not list rates for law students, but it provides for a range of \$177 to \$216 for lawyers of zero to three years' experience in the Portland area. The rate of \$150 for Ms. Lee, Ms. Chase, and Mr. Shoals is well below that.

2. Plaintiffs Spent a Reasonable Amount of Time on This Case.

This was an unusually complex case that required unusual attention. First, the case was legally and procedurally complex. In the typical First Amendment statutory challenge, the parties agree on what the challenged statute does but contest whether what it does is constitutional. In this case, the parties differed radically on the meaning of the statutes. Thus, the state's defense required Plaintiffs to engage in detailed state law statutory interpretation analysis, including case law and legislative history arguments, while also briefing a large body of First Amendment law and federal procedural law on vagueness, declaratory relief, injunctions, and facial overbreadth. The state increased the amount of time

³ It is reasonable to allow the recovery of Section 1988 fees at market rates for work performed by law students. *Missouri v. Jenkins*, 491 U.S. at 287-88.

required to prosecute the case by resisting Plaintiffs' motion for a preliminary injunction and their motion for ultimate relief, requiring Plaintiffs to brief and argue the matter twice. As the prosecuting parties, Plaintiffs were required to file opening and reply briefs on both motions.

The case was also factually demanding because of the unusual number of Plaintiffs and materials at issue. To demonstrate the broadly unconstitutional reach of the statutes, Plaintiffs were required to muster evidence about what materials the statutes would implicate and what implicated materials each Plaintiff used. Thus, Plaintiffs' counsel presented declarations from each Plaintiff and reviewed substantial numbers of books to determine what material violated the statutes. Plaintiffs also prepared and presented declarations from a medical doctor, a child psychologist, and a child sex educator to demonstrate the serious value of the materials to minors.

The District Court's opinion only intensified those challenges because it did not side squarely with either Plaintiffs or the state. Thus, Plaintiffs' appeal briefed all the complex issues described above and also grappled with the new difficulties in the lower court opinion.

As described below, Plaintiffs' counsel's time was spent reasonably in light of those circumstances.

a. Plaintiffs' Counsel Spent a Reasonable Amount of Time in the District Court.

Plaintiffs' work in the District Court included researching and filing the complaint, briefing and arguing the preliminary injunction, preparing a factual record, and briefing and arguing the motion for ultimate relief. For those tasks, Plaintiffs are seeking fees for the following hours of work performed by Ms. Runkles-Pearson, Ms. Lee, and Ms. Chase.⁴ A detailed accounting of those hours is provided as Exhibit 1 to the Declaration of P.K. Runkles-Pearson.

TIMEKEEPER	DISTRICT COURT TIME
P.K. Runkles-Pearson	241.2
Rachel Lee	110.8
Crystal Chase	13.4
Total	365.4

Those hours are reasonable in light of the tasks performed. Ms. Runkles-Pearson was the primary Oregon attorney on this case. As such, she was primarily responsible for researching and briefing the law of this circuit and of Oregon on all of the substantive and procedural aspects of the matter. Ms. Runkles-Pearson was

⁴ During the District Court proceedings, Ms. Runkles-Pearson's firm shared the representation of all Plaintiffs (including plaintiffs-appellants in case 09-35153) with Michael Bamberger and his colleagues at the firm SNR Denton (then known as Sonnenschein Nath Rosenthal). Mr. Bamberger is filing a separate petition for his firm's fees.

also primarily responsible for researching and briefing the most unique and unusual elements of this case, including the Oregon statutory interpretation issue that became the focus of the state's arguments: the meaning of the statutes in light of Oregon law, including the Oregon Court of Appeals' decision in *State v. Maynard*, 5 P.3d 1142 (Or. Ct. App. 2000). Ms. Runkles-Pearson argued the case for all Plaintiffs on the dispositive motion that gave rise to this appeal. As local counsel, she was primarily responsible for communicating with opposing counsel and filing all documents in the District Court. She also managed the preparation of most of Plaintiffs' factual record, including the expert declarations and the selection of the books used as exhibits.

Ms. Runkles-Pearson ensured that the work was performed efficiently by delegating to Ms. Lee and Ms. Chase any research tasks appropriate to their experience, as well as the initial review of proposed exhibits. Ms. Runkles-Pearson also delegated work to other law clerks and attorneys for whose work Plaintiffs are not seeking fees.

b. Plaintiffs Spent a Reasonable Amount of Time on the Appeal.

Plaintiffs' work in this court included strategic decision making concerning whether to take an appeal; selection of issues and Plaintiffs for the appeal; preliminary motions related to the interaction between this case and the case

brought by other plaintiffs;⁵ preparing the opening brief, reply, excerpt of record, and a letter of supplemental authority; preparing for and presenting oral argument; responding to the state's post-argument motion to certify the question of statutory interpretation to the Oregon Supreme Court; reviewing the state's post-argument motions for panel and en banc rehearing; and preparing petitions for fees and costs. This Court ruled in Plaintiffs' favor on the appeal, as well as on the state's motions for certification and rehearing.

For those tasks, Plaintiffs are seeking fees for the following hours of work performed by Ms. Runkles-Pearson and Mr. Shoals. A detailed accounting of those hours is provided as Exhibit 1 to the Declaration of P.K. Runkles-Pearson.⁶

⁵ Because the District Court's opinion affected different Plaintiffs differently, Ms. Runkles-Pearson's firm continued to represent Plaintiffs ACLU of Oregon, Cascade AIDS Project, Planned Parenthood of the Columbia Willamette, and Candace Morgan on appeal, and Mr. Bamberger and his firm represented the remaining plaintiffs in a separate appeal. The two sets of plaintiffs attempted to keep their separate appeals efficient by filing a combined excerpt of record and coordinating time at oral argument.

⁶ Pursuant to Circuit Rule 39-1.6, a completed Form 9 itemizing the appellate time Plaintiffs' counsel spent on this matter is attached as Exhibit 3 to the Declaration of P.K. Runkles-Pearson.

TIMEKEEPER	APPELLATE TIME
P.K. Runkles-Pearson	145.1
Andrew Shoals	12.1
Total	157.2

Those hours are reasonable in light of the tasks performed. Ms. Runkles-Pearson was responsible for all of the above tasks, except research on the certification motion, which she delegated to Mr. Shoals. Ms. Runkles-Pearson also coordinated efforts with counsel for co-plaintiffs whenever it was efficient to do so. However, throughout the appeal Ms. Runkles-Pearson continued to take primary responsibility for the Oregon statutory interpretation issues that formed the core of this Court’s opinion for both sets of plaintiffs.

D. Plaintiffs’ Requested Expenses Are Reasonable.

Reasonable attorneys’ fees under Section 1988 include out-of-pocket expenses that would normally be charged to a fee-paying client. *Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994). Such expenses are in addition to statutory costs. *Id.* Plaintiffs therefore seek recovery of the \$1,505.58 in expenses set forth in Exhibit 2 to the Declaration of P.K. Runkles-Pearson. Because this Court has already awarded Plaintiffs some amount for photocopying costs pursuant to their cost bill, Plaintiffs do not seek any additional amounts for photocopying.

Plaintiffs also do not seek any amounts for electronic research. The expenses sought include trackable delivery services used to serve papers (FedEx or UPS), transcript fees, filing fees, and the nominal amount Plaintiffs expended to purchase copies of the few exhibits that could not be donated.

E. Conclusion

Plaintiffs' counsel's rates and hours worked are reasonable, considering the prevailing rates in the market, the unusual nature of this case, and the delay in payment. Plaintiffs' expenses are also reasonable. Plaintiffs therefore respectfully request that this Court grant them a reasonable fee award of \$129,288.50 plus reasonable expenses of \$1,505.58.

Dated: December 28, 2010.

STOEL RIVES LLP

s/ P. K. Runkles-Pearson

P. K. Runkles-Pearson, OSB No. 061911

Attorney for Plaintiffs-Appellants

ACLU of Oregon, et al.

CERTIFICATE OF FILING SERVICE

United States Court of Appeals Docket Number: No. 09-35154

I hereby certify that I electronically filed the foregoing PLAINTIFFS-
APPELLANTS' APPLICATION FOR ATTORNEYS' FEES with the Clerk of the
Court for the United States Court of Appeals for the Ninth Circuit by using the
appellate CM/ECF system on December 28, 2010.

I certify that all participants in the case are registered CM/ECF users and
that service will be accomplished by the appellate CM/ECF system.

Dated: December 28, 2010.

STOEL RIVES LLP

s/ P. K. Runkles-Pearson

P. K. Runkles-Pearson, OSB No. 061911

Attorney for Plaintiffs-Appellants

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