IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT — PLAINTIFF

v. — No. 4:82-cv-866 DPM

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, *et al.* — DEFENDANTS

MRS. LORENE JOSHUA, *et al.* — INTERVENORS

KATHERINE KNIGHT, *et al.* — INTERVENORS

REPLY BRIEF IN SUPPORT OF JOSHUA INTERVENORS' MOTION FOR AWARD OF ATTORNEY'S FEES FROM THE STATE OF ARKANSAS

INTRODUCTION

The Joshua Intervenors have achieved notable success against the State in this litigation. The 1989 Settlement Agreement ("1989 Agreement") obligated the State to remedy the effects of past discrimination against the black schoolchildren of Pulaski County, and the Joshua Intervenors have devotedly held the State to that duty. Their accomplishment has been won through tireless and thankless work over two decades, without compensation from the State (though with much criticism and controversy). By these labors the Joshua Intervenors have fully earned the $3,318,061.69 in fees requested and documented in this petition. For over twenty years of fruitful work against the State, this amount represents a reasonable fee—which, after all, is the ultimate consideration under 42 U.S.C. § 1988.

The State's response brief suffers from two overarching flaws. The first is its attitude toward the Joshua Intervenors' performance in this case. Reading the State's response, one would think that Joshua's counsel performed virtually no work that benefited the black schoolchildren of Pulaski County. *See, e.g.*, Response Br. at 35 ("There are no orders entered against the ADE in the last twenty years that the Joshua Intervenors applied for that expand or enforce any remedies imposed on the State which were adopted for the benefit of the class."). The record—historical as well as legal—belies the State's position. It is striking that the State omits any mention of the $263 million benefit that Joshua's counsel helped secure through recent settlement negotiations or the $1.3 billion benefit provided over the course of the litigation. Those payments certainly represent a success. But Joshua's achievement—like the case itself—runs deeper than dollars. The purpose of the 1989 Agreement was to address past discrimination, for which the State was in large part to blame. The State's past wrongs demanded the desegregation remedy encompassed in the 1989 Agreement. Joshua were obliged to monitor and defend that remedy (as confirmed by legal authorities the State fails to correctly cite). Pulaski County's public schools have not been resegregated, as have the public schools of other Southern cities. That is also a significant success—one due largely to Joshua's efforts. Though it may not be found in individual docket entries or specific orders of the Court, it is deserving of recognition.

The second flaw of the response brief is its failure to grapple with the terms of the settlement agreement that the Court approved earlier this year ("Settlement

Agreement"). The Settlement Agreement commits the State to pay Joshua at least $500,000 in attorney's fees. Yet now the State contends that $500,000 is *not* the floor for its fee payment. Instead, the State asserts that $500,000 is a ceiling and suggests that $63,708 is an appropriate payment for over two decades of effort. Furthermore, the Settlement Agreement acknowledges that Joshua was a prevailing party "as to the State with regard to certain motions filed subsequent to the 1989 Settlement Agreement that Joshua joined and which were successful against the State." R. 4937-1, Settlement Agreement at 3. Yet the State now contends that Joshua did not prevail in any aspect of this case and that most of the fee request should be denied as untimely under a laches theory because of prejudice to the State. The State should not be permitted to ignore the terms of its own agreement in this fashion.

This brief proceeds as follows. Part I discusses the attorney's fee provision of the Settlement Agreement, making two major points. First, $500,000 is a floor for a fee payment. Second, the State's laches argument lacks merit and the State waived any timing arguments in the Settlement Agreement. With that foundation laid, Part II establishes that the claimed rates for Joshua's counsel are reasonable—indeed, most of them are mandated, as the law of the case, by the U.S. Court of Appeals for the Eighth Circuit. Part III addresses the State's contentions regarding the time claimed for each of the six aspects of the litigation identified in Joshua's opening brief. The State's argument that Joshua are entitled to compensation for only 212.36 hours is premised on numerous errors of law and fact. Part IV explains

why the Court should apply a fee multiplier of 1.75 in this unique and historical situation. By steadfastly requiring the State to desegregate Pulaski County public schools, the Joshua Intervenors have achieved a success of the sort courts typically acknowledge as worthy of an enhancement. In sum, Joshua stand by their initial position that $3,318,061.69 is a reasonable fee.

I. THE SETTLEMENT AGREEMENT

The State fails to credit two aspects of the Settlement Agreement: its commitment that the State pay Joshua at least $500,000 in fees and its acknowledgement that fees are to be paid for all post-1989 work that resulted in success against the State. Having signed the Settlement Agreement and advocated that the Court approve it, the State cannot now ignore the provisions that require it to pay fees.

A. Fee Amount

The Settlement Agreement, which the Court approved on January 13, 2014, specifically addresses attorney's fees. On that point it reads, in pertinent part:

> The State stipulates that [the] Joshua Intervenors . . . are prevailing parties as to the State with regard to certain motions filed subsequent to the 1989 Settlement Agreement that Joshua joined and which were successful against the State and are entitled to reasonable attorney's fees, in the amount of $500,000 for the Joshua Intervenors . . . unless contested, in which event the Court may award a reasonable fee unless otherwise agreed upon.

R. 4937-1, Settlement Agreement at 3. The plainest interpretation of this language is that the State will pay at least $500,000 and that the Court will adjudicate the reasonableness of any additional contested amount. Otherwise the mention of

$500,000 is superfluous. The provision could have simply named Joshua a prevailing party and stated that a reasonable fee—whether by agreement or contested petition—would be determined at a later date. *Cf. McDonald v. Armontrout*, 860 F.2d 1456, 1457 (8th Cir. 1988) ("Paragraph Twenty-eight of the consent decree obligated the parties to negotiate over fees and expenses and, if no agreement were reached, to submit the matter to the District Court."). Instead, it provides that Joshua are "entitled" to $500,000 in fees.

Mr. Walker clarified any ambiguity on this point at the preliminary-approval hearing on November 22, 2013, less than a week after the parties signed the Settlement Agreement:

> The agreement *sets forth for Joshua minimum payment* and also for Knight, and *that's the state's threshold amount*. The understanding, now that we have gotten to the point where we have negotiated the primary agreement, we'll have further discussions regarding at least the Joshua fee and seek to reach agreement, and, failing that, we'll petition the Court at some point.

R. 5030-1, Transcript of Proceedings of Nov. 22, 2013, at 20 (emphasis added). Counsel for the State registered no objection to this description when the Court offered him that opportunity. *See id.* at 22.

This method for reaching a final fee amount is consistent with the manner in which the Settlement Agreement was negotiated—namely, with the substance of the case in mind first and attorney's fees in mind last. As the Court put it, and as counsel for Joshua and the State confirmed, "the fee issue was in the background and was not a focus of the negotiations or what all of this has been about. Instead the agreements, the proposed agreement on all the substance is what came first."

Id. at 21. The $500,000 provision gave Joshua the certainty of receiving some compensation for counsel's work without having to delay resolution of the case for the full accounting needed to reach a final decision on fees.

Rather than acknowledging its agreement to pay at least $500,000 in attorney's fees, the State says that it has "offered" to pay $500,000 and that Joshua "rejected that offer" by filing a petition. Response Br. at 2. The State treats the Settlement Agreement as a contingent document: Joshua can take the $500,000 or else roll the dice. The State's view is wrong. $500,000 is not an "offer"; it is an agreement, one the Court approved as part of the overall settlement. The State is bound to honor it.

B. Timing of Petition

The State contends that either Fed. R. Civ. P. 54 or the doctrine of laches bars Joshua from seeking fees for most of the work outlined in the opening brief. Once again, the State ignores a relevant portion of the Settlement Agreement in which it waived these arguments—specifically, its own stipulation that Joshua "are prevailing parties as to the State with regard to certain motions filed subsequent to the 1989 Settlement Agreement that Joshua joined and which were successful against the State." Given that stipulation, the only work left to do is to identify the post-1989 motions that "Joshua joined" and that were "successful against the State." Per the State's own agreement, the reasonable time spent on these motions is compensable, regardless of whether timing problems would otherwise preclude an award.

As an initial matter, this is not a Rule 54 case. Rather, as Joshua pointed out in their motion and opening brief, this is a class action to which Fed. R. Civ. P. 23 applies. *See* Motion for Attorney's Fees at 2; Brief in Support at 10. Indeed, the Court applied Rule 23 in approving the Settlement Agreement. *See* R. 4991, Fairness Hearing Transcript at 31, 138. Rule 23 has its own timing provision, which sets no hard deadline but provides only that a motion for fees is appropriate "at the time the court sets." Fed. R. Civ. P. 23(h)(1). Joshua's fee petition is timely under that Rule.[1]

Even if Rule 54 applied to some of the requests in the fee petition, failure to file within the Rule's time limit is not a jurisdictional defect. *See* 10 Moore's Federal Practice § 54.151(1). As a result, the timing requirement may be waived by an opposing party. *See Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1259–60 (3d Cir. 1996) (holding that party waived argument that fee petition was untimely by not raising it in the district court). That is precisely what the State did when it agreed that Joshua are entitled to fees for post-1989 work. By the terms of the State's own agreement, Joshua may move for fees for "certain motions filed subsequent to the 1989 Settlement Agreement that Joshua joined and which were successful against the State."

[1] The Court has not yet set a time for the Joshua Intervenors to submit a fee petition. Notably, the proposed Consent Judgment stipulates that the Court "retains jurisdiction to address the dispute between the Joshua Intervenors and the State" under the attorney's fee provision of the Settlement Agreement. *See* R. 4989-1, Proposed Consent Judgment at 2. Even if the fourteen-day deadline of Rule 54 applied, the Joshua Intervenors have submitted their petition *before* entry of the consent judgment, which would trigger the deadline to apply for fees.

Likewise, the doctrine of laches cannot overcome the State's own agreement. Laches is an affirmative defense "based on the equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief." *Harleysville Worchester Ins. Co. v. Diamondhead Prop. Owners Ass'n*, 741 F.3d 1336 (8th Cir. 2014) (quoting *Felton v. Rebsamen Med. Ctr., Inc.*, 284 S.W.3d 486, 495 (Ark. 2008)). Under the circumstances here, laches does not provide the State relief. When the State signed the Settlement Agreement, it knew it was committing itself to pay fees for Joshua's work on successful post-1989 motions. It also knew the final fee amount remained an open question. Moreover, the State is very familiar with even the older issues in this case—familiar enough to give a reason for why Joshua's fees are not compensable on each issue. Given this situation, the State is not prejudiced by having to defend against Joshua's fee request.

In sum, the State must abide by the terms of its own agreement. In that agreement, the State consented to pay at least $500,000 in fees and waived the timing arguments it now makes. The relevant questions are those typical of any fee request: 1) what is the reasonable rate for Joshua's counsel, 2) how many hours did Joshua's counsel spend litigating matters in which they prevailed or conducting reasonable post-judgment monitoring, and 3) what fee multiplier is appropriate? The remainder of this brief addresses these issues.

II. REASONABLE RATE

The State first challenges the rates that Joshua's counsel claim. The primary thrust of its argument is that the claimed rates exceed those approved in some other Arkansas cases involving different counsel and different contexts. However, for most of the relevant actors, the State's argument is precluded by *Little Rock School District v. Arkansas*, 674 F.3d 990, 998 (8th Cir. 2012), which approved the rates that Mr. Walker, Mr. Pressman, and Ms. Springer request.

The State argues that the "Court of Appeals did not analyze the rates requested by Rep. Walker or Mr. Pressman" and speculates that the Eighth Circuit overlooked the rates because these attorneys' time on the matter at issue was minimal. *See* Response Br. at 7. This argument simply ignores the text of the opinion. The Eighth Circuit summarized each attorney's accolades and decades-long experience in civil rights litigation:

> Mr. Walker has practiced civil rights litigation in Little Rock and throughout Arkansas since 1966. His office has been intimately involved with the instant case, including responsibility for monitoring the implementation of the governing settlement agreement since 1991. He received the top award of the Southern Trial Lawyers Association in 2005. Mr. Pressman began his civil rights work in 1965 for the Civil Rights Division of the United States Department of Justice, working on school desegregation cases in Mississippi, Illinois, and Alabama, before spending twenty-five years with the Center for Law and Education, where he continued to serve as counsel in desegregation cases in Boston and Omaha, among other locations. He has been working with Mr. Walker on the instant case since at least 1997.

Little Rock Sch. Dist., 674 F.3d at 998. The Court then concluded that the "billing rates charged by Mr. Walker and Mr. Pressman thus represent those charged by the

most senior and skillful attorneys in the local community."[2] *Id.* The Eighth Circuit's conclusion is the law of the case and cannot be disregarded simply because some Arkansas district courts have awarded lower rates to other counsel in other contexts. *See First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 620 (8th Cir. 2007) (explaining that when a court—including an appellate court—"decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," thereby preventing relitigation of settled questions).

Furthermore, $400 is commensurate with the rates Mr. Walker has actually been awarded in the past. For example, Judge Holmes awarded Mr. Walker a $375 rate for work done in 2006. *See Martin v. Knight*, No. 03-cv-266, R. 107 at 5 (E.D. Ark. Aug. 7, 2006). A $25 increase in Mr. Walker's rate after eight years is reasonable. Additionally, in its discussion of the Wal-Mart litigation, the State neglects to mention that Mr. Walker submitted a $400 rate. *See Nelson v. Wal-Mart Stores, Inc.*, No. 04-cv-171 (E.D. Ark.), R. 214-3 at 6. The court approved counsel's requested fee without modification. *See id.*, R. 243 at 2.

Just as Mr. Walker's $400 rate is law of the case, so too is Ms. Springer's $125 rate. *See Little Rock Sch. Dist.*, 674 F.3d at 998–99. The State contends that Ms. Springer's rate is excessive because it approaches the rate ($180) paid to attorneys trying capital cases under the Eastern District's Criminal Justice Act

[2] The "local community" that the Eighth Circuit referenced was Little Rock—not Boston. Counsel are not requesting Boston rates for Mr. Pressman, as the State appears to suggest in a footnote. *See* Response Br. at 6 n.2.

("CJA") plan.[3] Even accepting the premise that $125 is inordinately close to $180, CJA rates are not intended to reflect market rates, so it is inaccurate to compare Ms. Springer's requested rate to a CJA rate. *See In re Snyder*, 734 F.2d 334, 339 (8th Cir. 1984) ("Although the compensation allowed by the Act was never intended to fully recompense the lawyer for the time spent on a case, Congress intended that the amount allowed would at least approach the cost of a lawyer's overhead."), *rev'd*, 472 U.S. 634 (1985). Moreover, in the case upon which the State relies for this argument, the paralegal asked for $200, a significantly higher rate than Ms. Springer requests here. *See Ladd v. Pickering*, 783 F. Supp. 2d 1079, 1093 (E.D. Mo. 2011).

Finally, the State argues Mr. Walker, Mr. Pressman, and Ms. Springer may only receive lower past rates for older work. That is not the law. The law is that a district court may "allow compensation based on current rates for past services when payment of attorneys' fees is delayed." *Little Rock Sch. Dist. v. Arkansas*, 127 F.3d 693, 697 (8th Cir. 1997) (Richard Arnold, J.) (citing *Missouri v. Jenkins*, 491 U.S. 274 (1989)). *See also Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 325 (8th Cir. 1993) (holding that the district court abused its discretion by awarding past rates without considering delay factor); *Lewis v. Heartland Inns of Am., L.L.C.*, 764 F. Supp. 2d 1037, 1044 (S.D. Iowa 2011) ("The Court also finds that it is appropriate to award fees at Lewis' counsel's current rates, due to the delay in the payment of such fees.").

[3] At this point of its brief, the State wrongly asserts that Ms. Springer's requested rate is $150. *See* Response Br. at 9. Presumably this error is inadvertent, but it is consequential given the nature of the argument.

Consistent with Eighth Circuit caselaw on both attorney's fees generally and this specific litigation, the Court should approve Joshua's requested rates.[4]

III. REASONABLE TIME EXPENDED

The primary factual question before the Court is whether Joshua's counsel reasonably expended the hours for which they seek reimbursement. The State's position is that only 212.36 hours are compensable because other claimed hours are either insufficiently documented or unrelated to time spent reasonably and successfully against the State. *See* Response Br. at 2. That amount of compensable time—which represents about five weeks of full-time work over a twenty-year period—is absurdly low on its face.

The State is apparently of the position that Joshua may only claim time that was contemporaneously documented.[5] This position is incorrect. Of course, contemporaneous time is the preferable method of recordkeeping. But its lack does

[4] The State does not contest the rate of $300 requested for Austin Porter. Mr. Porter is acknowledged as one of the best civil rights lawyers in Arkansas, and his requested rate is consistent with that of the other attorneys whose affidavits the State has attached to its response. *See* Response Br. at 7 (listing rates).

The State expresses uncertainty about Evelyn Jackson's role and contends that her requested rate ($75) is too high for the period in which she performed work. As Mr. Walker explained in his original declaration, Ms. Jackson represented the Joshua Intervenors at monthly meetings of the Magnet Review Committee from 1993 to 2007. *See* Walker Decl. ¶45. (She has since passed away.) Ms. Jackson had the extensive educational experience necessary for this task. $75 is a reasonable rate for her services. As the State's brief points out, a court awarded Ms. Springer a rate of $85 in 2007, the last year in which Ms. Jackson rendered services. *See* Response Br. at 9. A rate of $75 in today's dollars for Ms. Jackson is comparatively reasonable. Moreover, as discussed above, a rate in today's dollars rather than yesterday's is appropriate to account for delay in payment.

[5] The State argues that Mr. Walker "has not provided any . . . reconstructed time" and that his methodology for calculating time is "speculative." Response Br. at 24. Mr. Walker's time submissions are not "reconstructed" in the sense of presenting discrete events and assigning time spent on them after the fact. But, frankly, such a method is no less "speculative" than an estimate of time based on familiarity with the case and attested to under penalty of perjury. The relevant issue is whether Mr. Walker's claimed time is reasonable.

not require a court to act, for the purpose of a fee award, as if counsel performed no work in a case. *See MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988) (Richard Arnold, J.). Indeed, a court need not even *reduce* hours requested for lack of contemporaneous time (though it has discretion to do so). *See Kline v. W. City of Kan. City*, 245 F.3d 707, 708–09 (8th Cir. 2001) (Morris Arnold, J.). Recordkeeping aside, the ultimate questions are whether the "time expended was reasonable in the context of th[e] litigation," *MacDissi*, 856 F.2d at 1061, and whether the final total constitutes a "reasonable estimate," *Kline*, 245 F.3d at 709. If the Court answers these questions "yes," then it may award fees for counsel's time, whether supported by contemporaneous records or not. The Court may apply its observations of the case and its common sense about the realities of the litigation to determine whether the time claimed is reasonable.[6] *Cf. Apex Oil Co. v. Artoc Bank & Trust Ltd.*, 297 F.3d 712, 717–20 (8th Cir. 2002) (Richard Arnold, J.) (awarding nearly $1 million in reasonable fees, including a multiplier, where attorney kept no contemporaneous time and presented "oversimplified" time records, such as "an entire month's legal work for three principals . . . in blocks of 150 hours with identical descriptions for all three attorneys").

The total time and total fee are not just reasonable—they are conservative, as evidenced by the following:

- Except for Mr. Pressman, who kept quickly assembled contemporaneous records (as explained below), Joshua's counsel have not asked for the considerable time spent on this petition, even though they would be entitled to do so. *See Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239

[6] As the State points out, some federal courts of appeal mandate that attorneys keep contemporaneous time in order to receive fees. The Eighth Circuit is not one of them.

(8th Cir. 1982). Nor have Mr. Bates or Mr. Williams requested time spent preparing the briefing.

- Except for some litigation regarding monitoring, Joshua's counsel have only asked for fees where they clearly received the relief requested, even though they would be entitled to fees for defending the remedy despite limited success. *See Jenkins v. Missouri*, 127 F.3d 709, 718 (8th Cir. 1997) (discussed further below).

- Joshua's counsel have requested only partial time when other defendants were involved. For example, they have not overreached by arguing that the State should pay for the majority of fees incurred during the PCSSD unitary-status hearing. Rather, they have requested only what is necessary to hold the State accountable for its role in that episode.

- As a matter of total work time, counsel's reconstruction is modest. Joshua have claimed just 419 hours per year among five people over the course of twenty years. The hours claimed amount to 6.9 percent of Mr. Walker's time and 9.5 percent of Ms. Springer's time. This estimate is based on reasonable assumptions about each actor's working year: A fifty-hour workweek for Ms. Springer and an especially conservative forty-hour workweek for Mr. Walker, each with two weeks off per year. *See* Walker Decl. ¶39; Springer Decl. ¶8.[7]

- Two respected civil rights attorneys have provided sworn declarations opining that the time expended and the overall fee are reasonable. *See* Br. in Support of Fees exh. 5 (Benson Decl.), exh. 6 (Barrett Decl.).

- The proposed multiplier is requested with genuine conviction as to its merit. It does not produce an inflated request. Indeed, the multiplier is consistent with that awarded in previous civil rights cases where similar factors were present. *See* Br. in Support of Fees at 24–25.

In sum, the hours requested represent a reasonable amount of time necessary to execute counsel's duties to the Joshua class. The State's legal and factual contentions are discussed below, with the litigated motions and monitoring addressed under separate headings.

[7] Mr. Walker, Ms. Springer, and Mr. Pressman have each submitted a supplemental declaration to this Reply. Their declarations attached to the opening brief are cited as "[Name] Decl." Their declarations attached to this Reply are cited as "[Name] Supp. Decl."

A. Litigated Motions

It is well established that the Joshua Intervenors are a prevailing party under the 1989 Agreement. *See* 1989 Agreement at 22 ("The parties also agree for purposes of this settlement that Joshua is a prevailing party for purposes of relief."). Nevertheless, the State argues that Joshua's prevailing-party status "does not extend to other types of post-judgment work" and that "activity that is not directly related to the decree awarded must be treated as new litigation and fees determined accordingly." Response Br. at 3–4. These statements, as well as the implications the State appears to draw from them, contain two defects.

First, the Settlement Agreement itself acknowledges that Joshua "are prevailing parties as to the State with regard to certain motions filed subsequent to the 1989 Settlement Agreement that Joshua joined and which were successful against the State." R. 4937-1, Settlement Agreement at 3. If it is the State's aim to strip Joshua of prevailing-party status in certain matters, the Settlement Agreement forbids it.

Second, and more fundamentally, the State misinterprets cases discussing the award of attorney's fees for litigation conducted after a court-sanctioned settlement agreement. The general rule is that when a party prevails via consent decree, it retains its prevailing-party status during (and thus may be compensated for) work performed to defend the remedy. *See Jenkins*, 127 F.3d at 717. Determining the availability and amount of fees in the post-judgment context is a two-step process. The first step is to determine whether the post-judgment litigation

is sufficiently related to the remedy secured in the consent decree. The legal question is "whether the issues in the post-judgment litigation are inextricably intertwined with those on which the plaintiff prevailed in the underlying suit or whether they are distinct." *Id.* at 717. If the post-judgment issues are distinct, the issue of fees must, as the State puts it, "be treated as new litigation and fees determined accordingly." Response Br. at 4. However, if the post-judgment litigation is inextricably intertwined with the underlying remedy, then prevailing-party status is assured and the court moves to the next step: determining the degree of success and the usefulness of the prevailing party's action. *See Jenkins*, 127 F.3d at 718. A party need not win a discrete issue to be awarded fees (although the total amount may be reduced for limited success). Indeed, in *Jenkins*, the Eighth Circuit awarded attorney's fees for time the plaintiffs spent unsuccessfully opposing a petition for a writ of certiorari before the Supreme Court. The work was compensable because "the plaintiff's attorneys would have been expected or obliged to take the position they took." *Id.*

This explanation is necessary to correct the State's interpretation of the law. Once properly stated, the law is easily applied to this case. The discrete litigation matters for which the Joshua Intervenors seek fees were inextricably intertwined with the underlying case. Moreover, Joshua prevailed in almost all of them—with the exception of some monitoring litigation, Joshua request fees only where they received clear relief. Success in these matters is not an issue. Given this analysis,

the proper focus of the inquiry is limited: whether Joshua reasonably expended the amount of time claimed in its fee petition.

On the issue of reasonably expended time, one other overarching point is in order: there is no rule that prohibits counsel from using another attorney's hours to assist in reconstruction of time. To reach the contrary conclusion, the State reads *Burks v. Siemens Energy & Automation, Inc.*, 215 F.3d 880 (8th Cir. 2000), for far more than it is worth. In that case, a basic discrimination suit, the plaintiff appealed the fee awarded as too low and argued that the court should have compared his fees to the fees charged by defense counsel. The Eighth Circuit said that such a comparison "would not be advisable" and held that the court did not abuse its discretion by failing to make such a comparison. *Burks*, 215 F.3d at 884. It did not affirmatively forbid counsel from comparing his hours to that of other counsel to reconstruct time.

More importantly, *Burks* is not analogous to this case. In *Burks*, the attorney advocated using adversary counsel's records for comparison, even though the court had not yet determined the reasonableness of adversary counsel's time. Here, by contrast, Mr. Walker compares his time to that spent by co-counsel or by school-district attorneys with a similar interest in the matter at issue. In the case of the school-district attorneys, most estimates are based on time that the Court has vetted and determined to be reasonably expended.[8] And it would make little sense

[8] The main exception is the time Joshua submits from Little Rock School District attorneys to cross-check the hours spent on the recent settlement negotiations and on preparation for the fairness hearing. *See* Walker Decl. ¶¶34–35; Brief in Support of Fees exh. 7. For the PCSSD unitary-status

to disregard estimates based upon the contemporaneous time of co-counsel, namely Mr. Pressman.[9] Mr. Walker has worked with Mr. Pressman for a very long period and has close familiarity with their division of labor. Estimates based on Mr. Pressman's contemporaneous time have a strong factual basis.

With these overarching legal points in mind, Joshua proceed to discuss the State's factual contentions about the litigated motions, following the order presented in the opening brief.

1. Compelling the State to conduct required monitoring

The remedy that Joshua secured as a prevailing party in the 1989 Agreement required the State to conduct monitoring.[10] When the State failed to monitor, Joshua's attorneys "would have been expected or obliged to take the position they took"—that is, to contest the State's noncompliance with the 1989 Agreement. *Jenkins*, 127 F.3d at 718. They did so in three specific ways.[11]

First, in the period shortly after Judge Wright ordered the State to comply with the 1989 Agreement by monitoring, Joshua expended significant effort to have

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matter, Joshua also cross-check their claimed hours against PCSSD records, which Joshua previously reviewed in preparing the PCSSD fee matter. *See* Walker Decl. ¶24.

[9] The State asserts that Mr. Pressman reconstructed his time records. *See* Response Br. at 25–26. That assertion is wrong. Mr. Pressman keeps very detailed contemporaneous time, recording his work to the hundredth of an hour. The hours that the State claims Mr. Pressman spent "reconstructing" his time were actually spent preparing his declaration for the fee petition and transcribing his handwritten hours into computerized form. *See* Pressman Supp. Decl. ¶¶2, 20.

[10] *See* 1989 Agreement Part III.A, at 13 ("Monitoring by the State shall be independent of that of the other parties. It is being done to ensure that the State will have a continuing role in satisfactorily remediating achievement disparities.").

[11] The following discussion is limited to monitoring matters that were the subject of litigation. However, the State's monitoring obligations have been a constant source of contention. The State's failure to monitor caused Joshua to expend much additional compensable time, as explained in Part III.B.2 *supra*. That Part provides further detail about the role of monitoring in this case.

the State returned to the case as a party for failure to monitor as required. *See* Walker Decl. ¶¶13, 16. Joshua took depositions on the issue, *see* R. 2149–53; corresponded with the State, *see* Exhibit 5; and filed briefing, *see* R. 2171, 2185. Though the State is correct that the Court declined to bring the State back into the case, it is incorrect that "[n]othing ever came of this motion." Response Br. at 18. The motion and related discovery provided Joshua with valuable information about the State's approach to monitoring. The State's response is based on the misconception that a prevailing party via consent decree can only obtain fees by expanding the remedy. Fees are also available for reasonable defense of the remedy. *See Jenkins*, 127 F.3d at 718. Joshua's attempt to hold the State to its monitoring duties was a reasonable defense.

The second piece of monitoring litigation concerns Joshua's exclusion from meetings at which the State and the districts discussed changes to the State's monitoring requirement. The State's response, though difficult to parse, apparently contends that Joshua was invited to these meetings and simply failed to show up. The State dismisses Joshua's claim by saying "no order issued from the Court on this non-issue." Response Br. at 18. To the contrary, the Court issued an order. *See* R. 3230. The order explained that the State had sought relief from filing a semi-annual monitoring report and that Joshua had opposed the motion because they had "not been involved in regular meetings between the parties to discuss proposed changes in ADE's monitoring and reporting responsibilities." *Id.* at 1 (internal

quotation marks omitted). The Court then relieved the State of the obligation to file a semi-annual monitoring report "subject to the following conditions":

> First, the Court agrees with the Joshua Intervenors that they are entitled to be included in all meetings and, therefore, hereby directs that Joshua be notified of all meetings between the parties to discuss proposed changes in ADE's monitoring and reporting responsibilities.

Id. at 2. Here is the "suggestion of exclusion" that the State fails to find. Response Br. at 18. Joshua's counsel would have been unworthy of representing the class had they allowed the State to revise its monitoring obligations without their involvement. Joshua convinced the Court to require their participation and thereby protected the monitoring remedy.

The State's argument on the final major piece of monitoring-related litigation is equally baffling. As the opening brief explained, in 2000 the State attempted to replace the Allen Letter with another monitoring plan. Joshua, believing the new plan to be inadequate, defended the remedy by opposing the new plan. They were successful in doing so—the Court rejected the new plan. That should be the end of the analysis and fees should be awarded for this work. Indeed, the State admits that this success was preceded by "two years of negotiations with the parties to this case," thus supporting Joshua's claim for time spent enforcing the State's monitoring obligations. Response Br. at 19. Perversely, however, the State argues that its own failure to monitor after this episode means that Joshua failed and may not have fees. *See id.* at 19–20. To the contrary, Joshua were obliged to defend the existing monitoring remedy and are entitled to fees for doing so. *See Jenkins*, 127 F.3d at 718. Indeed, as explained *infra* Part III.B.2, the State's monitoring failures

caused Joshua to spend additional compensable time. *See* Walker Supp. Decl. ¶7 (attached as Exhibit 1).

The record supports the time that Joshua's counsel have claimed for these activities. First, the State contests 21.57 hours Mr. Pressman spent writing a memo about the return of the ADE to the case during early 2001 because it was not followed by a motion specifically requesting ADE's return. *See* Response Br. at 28. However, this time was reasonably expended given the history of the State's recalcitrance on monitoring. *See* Walker Decl. ¶13; *infra* Part III.B.2. It was reasonable to spend time examining whether the State had earned its return by attempting to escape the Allen Letter, even if Joshua decided it was wiser not to file a motion.

Second, records substantiate the 220 hours that Mr. Walker has claimed for monitoring-related litigation. In a letter to Joy Springer dated August 28, 2001, Charity Smith of the ADE invited Joshua "to continue the parties' discussions about monitoring and reporting responsibilities of the Arkansas Department of Education." *See* Exhibit 6. The letter then documented extensive activities that the parties had conducted ancillary to the litigated matters discussed above. The State "submitted to the Court a proposed Monitoring Plan February 1, 1999 [Dkt. 3244]"; "[c]ontinued negotiations at the direction of the Court when the proposed plan was rejected on May 12, 2000"; and "[m]et with the parties in an attempt to resolve objections to the new plan during the 2000-01 school year." *Id.* The time spent

litigating over the State's monitoring requirements was extensive. *See* Walker Supp. Decl. ¶4.

2. 1994 action to enforce 1989 Agreement against the State

This Court found, and the Eighth Circuit agreed, that the State violated the 1989 Agreement with its worker's comp and loss-funding formulas. However, the State argues that the Joshua Intervenors did not achieve success because the worker's comp issue was "not related to anything directly connected to the Joshua Intervenors class" and the loss-funding issue was "unlikely" to have "provided any benefit to any members of the Joshua Intervenors class." Response Br. at 15–16.[12] To the contrary, the benefit to the Joshua class was significant: additional funding for the districts, and thus for the class members. On each issue, the Eighth Circuit determined that the State's actions deprived the districts of rightful funds. *See* 83 F.3d 1013, 1018 (8th Cir. 1996) (stating that the State's worker's comp formula "funds the Pulaski County districts to a lesser degree than other districts in the state"); *id.* at 1019 ("Refusing to credit the Pulaski County districts for students who transfer from the districts for any reason, including M-to-M transfer students . . . deprives these districts of the financial benefit they would receive under the loss-funding program."). Thus, Joshua's success on these issues was significant and fees should be awarded for the reasonable time spent achieving it.

[12] The State also points out that the motion represented only partial success (because the Eighth Circuit reversed the Court on one issue). Mr. Walker's claim accounts for that partial success. He has claimed less time than any of the school-district attorneys who worked on this issue, and the fees awarded to those attorneys reflected their partial success. *See* Walker Decl. ¶20.

Moreover, the record contradicts the State's contention that Joshua did "little more than allow its name to be lent to the motion papers on this issue." Response Br. at 15. In September 1994, the Court held a four-day hearing at which Mr. Walker cross-examined each witness. *See* R. 2376, 2377, 2399, 2402. In preparation, Joshua took depositions, *see* R. 2268–72; Exhibit 7; prepared exhibits, *see* R. 2303; and engaged in discovery with the State, *see* Exhibit 8. Joshua were obliged to review all filings, including the trial and stay-related briefs. Indeed, Mr. Walker co-signed the motion to enforce and is represented as an author of the motion and accompanying brief. *See* R. 2238, 2239. Joshua's request is reasonable given counsel's active role in this aspect of the litigation and the success it achieved for the class. *See* Walker Supp. Decl. ¶3.

3. Litigation over proposed Jacksonville School District

The State contends, essentially, that Joshua were total non-participants in the Jacksonville matter. That is incorrect. Mr. Walker has not claimed to have taken a leading role in the actual litigation of this matter—that is why his time is significantly less (73.8 hours less, to be precise) than the time awarded to the PCSSD. At the same time, the State's sanctioning of a Jacksonville carve-out was a violation of the 1989 Agreement that Joshua were entitled to contest. Indeed, Mr. Walker attended two hearings on the issue and made meaningful contributions at those hearings. *See* R. 3795 at 25–30; R. 3796 at 4–5. Though he did not write the filings, he could not have contributed at the hearing were he unfamiliar with them.

More importantly, much of the heavy lifting occurred outside the formal setting of litigation. Records show that Joshua was monitoring the deannexation issue as early as 2001. *See* Exhibit 9. Joshua met with interested parties on multiple occasions leading up to the motion to enforce, as discussed in Mr. Walker's supplemental declaration and as corroborated by former PCSSD superintendent Don Henderson. *See* Walker Supp. Decl. ¶2; Henderson Decl. ¶3 (attached as Exhibit 4). Indeed, the State misstates the record when it writes that PCSSD's billing records "show that no time was spent conferring with counsel for the Joshua Intervenors on the matter." Response Br. at 13. The records appear as Exhibit A to R. 3805. The following entries show Joshua's participation: 6/9/03, "Review letter from John Walker to Pat Bond"; 6/17/03, "Confer with Dr. Henderson, Dr. Bowles, Mr. Brown, Ms. Springer, Mr. Heller and Steve Jones regarding Jacksonville detachment"; 7/30/03, "Review John Walker correspondence"; and telephone conferences with Mr. Walker on August 12, 17, 18, and 20, 2003.

Meetings about the Jacksonville issue were important to Joshua's eventual decision to join PCSSD in its court challenge and in carrying out Joshua's duties to the class. The State's contention that Joshua did no work is incorrect.

4. Litigation over PCSSD's motion for unitary status

The State argues that it is not liable for any fees stemming from the PCSSD unitary-status hearing because PCSSD was an autonomous actor and because the Eighth Circuit has previously absolved the State from any such fees. The State's position is both factually and legally incorrect.

i. Factual basis

Joshua have already provided a detailed discussion of the State's role in the PCSSD unitary-status matter—the passage of Act 395 of 2007, the State's retention and payment of two experts, and its participation during the trial. But this is really only a partial account of the work the State caused Joshua to incur.

As a windup to Act 395, the State legislature passed § 26 of Act 2126 of 2005, which mandated a study to consider "whether the Pulaski County Special School District should continue in existence" and to "propose a plan to pursue the end of desegregation litigation in Pulaski County." *See* Exhibit 10. ADE was authorized to spend $250,000 on the study and fulfilled its mandate by contracting with William Gordon Associates. *See* Exhibit 11. The Gordon Report concluded that "the three existing school districts have satisfied the desegregative obligations imposed by the constitution and appear to be in substantial compliance with the desegregation obligations contained in their consent decrees." *Id.* at H. This one-hundred page study caused considerable work for Joshua, as the Desegregation Litigation Oversight Committee requested that Mr. Walker respond to the Gordon Report's recommendations. Exhibit 12. Mr. Walker did so in two detailed letters. Exhibit 13.

Furthermore, the docket contradicts the State's contention that it caused Joshua no compensable work. Judge Miller's order of May 19, 2011, released the State from its funding obligations except for M-to-M transfers and required the parties to show cause for why the State should not also be released as to those. R. 4507 at 108. Contrary to its current position, the State rapidly took ownership of

the ruling. In its brief opposing a stay, the State quoted a statement it provided in 2009 at the pre-trial status conference: "The Court can achieve [rapid resolution of the case] by providing firm cutoff dates for the State funding as a consequence of any failure by a district promptly to attain unitary status." R. 4525 at 1. The State then contended that its obligations under the 1989 Agreement were a well-known issue at the PCSSD trial: "Because the cutoff of the extra desegregation distributions by the State to the three Pulaski County school districts was put squarely before the Court in 2009, LRSD's current contention that it had no idea that any change in funding might be ordered is difficult to comprehend." *Id.* at 2. Joshua was the State's direct adversary when moving to stay the Court's order and when offering reasons the State should not be released from M-to-M obligations. *See* R. 4530, 4550. Moreover, the State's post-trial statements confirm its role at the PCSSD hearing.

ii. Legal entitlement to fees

The State contends the Eighth Circuit forbade Joshua from recovering fees for its PCSSD work in *Little Rock School District v. Arkansas*, 674 F.3d 990 (8th Cir. 2012). The State is incorrect. The question the Eighth Circuit addressed was whether Joshua could recover fees for work done solely during the appeals of Judge Miller's order. Notably, Judge Miller's order gave rise to multiple, consolidated appellate cases. In one case, Joshua successfully acted as appellee to defend Judge Miller's conclusion that PCSSD was not unitary. *See Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738, 748–57 (8th Cir. 2011) (No. 11-2304). The Eighth Circuit

awarded Joshua fees for this work. *See* 674 F.3d at 998–99. In a second appellate case, the Eighth Circuit vacated the portion of Judge's Miller's order releasing the State. *See* 664 F.3d at 757–58 (No. 11-2130). The Eighth Circuit awarded LRSD fees but declined to do so for Joshua because Joshua were not a party to the case. 674 F.3d at 996–97. LRSD filed the appeal, and Joshua merely mentioned the State in its appellee brief in the PCSSD case. *See id.* The holding that Joshua were not a party to the appeal against the State is not tantamount to a holding that Joshua may not recover fees against the State in the underlying district court litigation. Indeed, the State's prominence in the appellate litigation and the award of fees against it simply emphasize its role at the district court hearing.

Moreover, the State misreads Joshua's legal argument regarding recovery of fees when actors other than the State cause work. *See* Br. in Support of Fees at 7. Joshua does not base this argument on the particular facts of the Kansas City unitary-status litigation, as the State appears to think. *See* Response Br. at 21–22. Rather, Joshua's argument is based on general legal principles established during the course of the Kansas City case—principles that make a constitutional violator (such as the State) liable for fees even if another party is more directly responsible for the discrete litigation at issue. *See Jenkins v. Missouri*, 73 F.3d 201 (8th Cir. 1996); *Jenkins v. Missouri*, 967 F.2d 1248 (8th Cir. 1992). In these cases, the plaintiffs incurred work due to the actions of intervenors and the office of the desegregation monitor. *See* 73 F.3d at 202 (office of desegregation monitor); 967 F.2d at 1250 (intervenors). In each case, the court held the State liable for fees even

though it did not generate the work—indeed, in the later case the State even adopted the plaintiff's position. The essential logic of these opinions is that, in desegregation litigation, the equities favor payment of fees by a State whose constitutional violations are responsible for the litigation in the first place. *See* 73 F.3d at 204–05; 967 F.2d at 1251.

The equities similarly favor payment of fees by the State for Joshua's work on the PCSSD unitary-status hearing. Indeed, the case for the State's accountability is even stronger here than it was in *Jenkins*. Not only is the State the original constitutional violator—it also bears direct responsibility for the unitary-status hearing. PCSSD formally filed the motion, but the State pushed it to do so and then shepherded it through the proceedings.

The State claims that its role was minimal and that PCSSD "was free to develop its case as it saw fit." Response Br. at 22. For reasons explained in the opening brief, in Mr. Walker's declaration, and above, the State's attempt to wash its hands of the PCSSD matter is difficult to credit. *See* Br. in Support of Fees at 6–7; Walker Decl. ¶¶25–28. To briefly summarize these reasons:

- The State is an adjudged constitutional violator for its past actions in first requiring and then perpetuating school segregation, including segregation in PCSSD. *See Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 778 F.2d 404, 413 (8th Cir. 1985) ("Notwithstanding the state's awareness of the educational disparities between LRSD and the other school districts in the state, it took no remedial action to require adequate educational opportunities for blacks in school districts other than LRSD.").

- The State commissioned a hundred-page feasibility study opining that PCSSD and the districts were unitary. That study required Joshua's review and response.

- The State passed Act 395 of 2007 to spur PCSSD to petition for unitary status. The timing of PCSSD's unitary-status petition—a day before the State-mandated deadline to obtain attorney's fees—is strong evidence that PCSSD would not have filed but for the State's incentive.

- Prior to the trial, the State moved the Court for the initial status conference, told the Court that the districts were unitary, and advocated for the end of its obligations under the 1989 Agreement.

- The State undertook a major litigation expense by authorizing $150,000 to pay PCSSD's experts.[13]

- The State's counsel appeared throughout the unitary-status hearing and made numerous objections and other statements to the Court. As discussed in Mr. Walker's declaration (and as substantiated by the transcript), the State's counsel prepared exhibits, questioned an expert, and objected to Joshua's questions and exhibits.

- The State vigorously defended the Court's *sua sponte* ruling releasing the State from most of its funding obligations and requiring Joshua and the districts to justify the rest. The Eighth Circuit awarded attorney's fees against the State for defending the release on appeal.

In sum, the State was a party to the PCSSD unitary-status hearing in all respects but formal name. Permitting the State—an adjudged constitutional violator—to evade payment of fees where the Joshua Intervenors prevailed would be inequitable and would contradict the policy behind § 1988 of encouraging meritorious civil rights litigation.

[13] The State asserts that it did not actually pay the experts the total amount authorized and that each expert's testimony at the hearing cost only $2,000. *See* Response Br. at 20 n.5. But the State does not explain how much it ultimately paid the experts. Quibbles aside, the State's rebuttal does not address Joshua's main point: the State was willing to pay $150,000—more than twice the amount it believes the Joshua Intervenors earned during two decades of litigation—for PCSSD's expert witnesses. Were PCSSD in fact an autonomous actor at the unitary-status hearing, the State would not have paid these costs.

iii. Reasonable time

Having established that fees are available against the State for the PCSSD matter, the question becomes whether the amount requested is reasonable. Joshua openly acknowledge that PCSSD has previously paid them fees. However, holding the State accountable for its role in the unitary-status hearing would not lead to "double recovery." Response Br. at 23. The State's position to the contrary does not fairly represent the fee payment Joshua received from PCSSD. First, those fees covered the entire period of the litigation after the 1989 Agreement. Second, as the Court previously recognized, the amount of fees PCSSD actually paid was only a third of what Joshua were entitled to request. *See* R. 4807, Order at 2. Joshua simply have not received full compensation from PCSSD for fees accrued during the unitary-status hearing.

According to the State, Joshua put in less than an hour of work related to the State during the unitary-status hearing. *See* Response Br. at 22. Mr. Pressman's supplemental affidavit, which documents contemporaneous time spent on work generated by the State, speaks to the contrary. *See* Pressman Supp. Decl. ¶¶24–31 (attached as Exhibit 3). Moreover, the docket and the transcripts show that Mr. Walker was present throughout the three-week hearing and contributed a significant amount of work to this matter. *See* Walker Supp. Decl. ¶5. When cross-checked against the amount of time PCSSD attorneys spent on the hearing, the amount of time claimed is reasonable. *See* Walker. Decl. ¶24; R. 4802-1 at 3–4.

The State is certainly responsible for work it generated via specific filings, such as the motion for a status conference, as well as for the work generated by the State-funded experts. More generally, the State has an overarching responsibility for this litigation. Without the State's involvement, these proceedings would not have occurred in the first place. Indeed, given the State's essential role, Joshua would be entitled to request that the State pay fees for half of the time spent on the unitary-status hearing. Instead, they request only a third.

5. Proceedings leading to the current Settlement Agreement

The State concedes, as it must, that Joshua are entitled to fees for time spent preparing for trial on the State's motion for release, for negotiating the Settlement Agreement, and for preparations related to the fairness hearing. However, it challenges the amount of time claimed.

Mr. Pressman has submitted detailed contemporaneous records of time spent during this phase of the litigation. The State challenges some expenditures as unreasonable or excessive and suggests, without fully explaining why, that a 70-hour reduction is appropriate. Mr. Pressman's supplemental declaration thoroughly explains why his time was reasonably expended, and Joshua need not repeat those reasons here. *See* Pressman Supp. Decl. ¶¶8–23. Joshua are entitled to receive fees for the full amount of time Mr. Pressman has claimed.

The State also challenges the methodology Mr. Walker uses to reconstruct his time on litigation work—namely, to figure it as a portion of Mr. Pressman's time based on Mr. Pressman's leading role in preparation for trial. As explained above,

this is a permissible means of reconstruction. Moreover, the 180 hours (or about twenty-three full workdays) Mr. Walker claims for negotiating the Settlement Agreement is reasonable given that negotiations for the State's release have recurred throughout the litigation. Though Mr. Walker's original declaration focused on the period from 2008 to present, the State engaged Joshua in discussions about ending its role as far back as 2002. For example, in a letter dated April 24, 2002, Willie Morris of the ADE represented to Mr. Walker that "ADE is diligently seeking a resolve in the [desegregation case]" and proposed to meet with the districts and Joshua on a quarterly basis. *See* Exhibit 14. As another example, the ADE invited Joshua to attend settlement hearings in September 2006. *See* Exhibit 15. As the State admits, the there were negotiations during 2008—indeed, these resulted in a substantive settlement proposals. *See* Exhibit 16. And negotiations in the subsequent period were not as limited as the State represents. *See* Walker Supp. Decl. ¶6. Finally, the time Mr. Walker claims for *all* these negotiations is less than the time billed by LRSD's attorneys for negotiations from August 2013 to November 2013. Notably, many of LRSD's entries reflect Joshua's participation. *See* Br. in Support of Fees exh. 7.

6. Time spent by Joy Springer in litigation

The State attempts to completely erase Ms. Springer's paralegal services, arguing that she did not account for any vacation time during 2012 and 2013, that she claims many hours for time during which Mr. Pressman was not working, and that she does not sufficiently distinguish paralegal tasks from clerical tasks.

Response Br. at 31. Ms. Springer has remedied these issues by providing itemized time records that explain her work during each period of litigation. *See* Springer Supp. Decl. & Attachment D (attached as Exhibit 2). The supplemental declaration and attached records show that the time claimed for paralegal work was reasonably expended against the State.

B. Monitoring

The State concludes that Joshua are entitled to no fees whatsoever for monitoring the State's compliance with the 1989 Agreement. It reaches this conclusion through obfuscation of the law and the history of the case. This subsection discusses the State's legal contentions before addressing its arguments about whether time spent on certain categories of monitoring is compensable.[14]

1. State's legal arguments

The State argues that "[m]onitoring for compliance with the 1989 Settlement Agreement is not compensable under § 1988 after *Buckhannon Board*." Response Br. at 26. The sweeping rule the State attributes to *Buckhannon* is found nowhere within its text. The question presented in *Buckhannon* was whether the "catalyst theory" is a sufficient basis upon which to find a plaintiff a prevailing party. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) ("The question presented here is whether ['prevailing party']

[14] Joshua read the State's brief to conclude that time spent on the following categories of monitoring is attributable to the school districts and is not compensable against the State: 1) attending meetings of the Magnet Review Committee; 2) making physical visits to and attending meetings regarding the magnet and interdistrict schools; 3) reviewing the Project Management Tool; and 4) reviewing class members' concerns about school assignments. *See* Response Br. at 29–31.

includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."). The Court held that fees are permissible only if there has been a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. However, the Court clarified that consent decrees—such as the 1989 Agreement[15]—are such a "judicially sanctioned change" upon which a fee award may be based. *See id.* at 604. *Buckhannon* does not support the State's contention that monitoring after a consent decree is never compensable.

Next, and contradictorily, the State argues that post-judgment monitoring is compensable after all, but only if the plaintiff can "demonstrate some action it took based on the monitoring that resulted in a legal change in the relationship . . . with the defendant." Response Br. at 26. The State cites only *Jenkins* for this rule. But *Jenkins* holds precisely the opposite of the State's rule and was decided before *Buckhannon* to boot. *See Jenkins*, 127 F.3d at 716–17 ("Some types of post-judgment activities are readily seen to be necessary adjuncts to the initial litigation . . . . Thus, monitoring the defendant's compliance with court orders . . . [is] generally compensable as part of the underlying case.").

The State's fundamental error is that it treats monitoring as an activity preliminary to litigation (*i.e.*, activity that should lead to "a legal change in the relationship . . . with the defendant"). Monitoring is what the a party does *after*

[15] *See, e.g.*, *Knight v. Pulaski Cnty. Special Sch. Dist.*, 112 F.3d 953, 954 (8th Cir. 1997) ("A consent decree, embodying the agreement of all the parties, was entered on April 29, 1992.").

prevailing under a consent decree to ensure the consent decree is carried out. *Buckhannon* did not somehow require a plaintiff to show that monitoring led the defendant to undertake additional obligations. *See Cody v. Hillard*, 304 F.3d 767, 773 (8th Cir. 2002) ("Here, the class obtained a court-ordered consent decree . . . . This was clearly a 'judicially sanctioned change' in the parties' relationship that conferred prevailing party status on the class under *Buckhannon*."). Instead, the only requirement is that the monitoring must be reasonably necessary to ensure that the class enjoys the remedy. *See Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 561 (1986) (holding that fees are compensable for work "useful and of a type ordinarily necessary to secure the final result obtained from the litigation" (internal quotation marks omitted)); *Cody*, 304 F.3d at 774 ("A district court may award fees to a prevailing party for reasonable postjudgment monitoring."). *Cody* is dispositive of the State's argument.[16]

Unable to prop itself on the crutch of *Buckhannon*, the State argues that Joshua should not be treated as a prevailing party for purposes of monitoring. *See* Response Br. at 26–28. The gist of the argument seems to be that, because they did not enter the case until its remedial phase[17] (in 1984), and because the Eighth Circuit rejected some of their suggestions for remediating discrimination (in 1985), Joshua did not prevail. But, again, those arguments are willfully blind to the terms of the 1989 Agreement, which stipulated that "Joshua is a prevailing party for

[16] *Accord Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 452 (9th Cir. 2010).

[17] It bears emphasizing that counsel for the Joshua Intervenors (including Mr. Walker) have been involved in desegregation litigation against the State dating all the way back to *Cooper v. Aaron*. *See infra* Part IV.

purposes of relief." 1989 Agreement at 22. The State's argument founders on this provision.

In sum, the State cannot refute the rule that assures the availability of fees for reasonable monitoring after a consent decree. With that rule established, the only remaining task is to determine the number of hours spent on necessary and useful monitoring against the State.

2. Categories of compensable monitoring time

The remainder of the State's argument is devoted to the idea that Joshua's monitoring had nothing to do with the State and is completely chargeable to the districts. To rebut these points, a short account of the history of the State's monitoring obligations is required.

The State's monitoring obligations were established in Part III.A of the 1989 Agreement. According to that provision, the State was required "to monitor, through the ADE, the implementation of compensatory education programs by the Districts." 1989 Agreement Part III.A, at 13. The purpose of this monitoring was "to ensure that the State will have a continuing role in satisfactorily remediating achievement disparities." *Id.* The Agreement further provided that "ADE shall provide regular written monitoring reports to the parties and the court," but the details of the State's obligation were left to a later date: "A State plan for monitoring implementation of compensatory education will be submitted to the parties within 60 days following execution of the settlement agreement." *Id.*

The referenced "State plan for monitoring" was what came to be known as the "Allen Letter." *See* R. 4704-6. The Allen Letter committed the State to "a continuous assessment of the remedial effectiveness of programs supported partially or fully by special state funding resulting from [the desegregation case]." *Id.* at 2. The letter stipulated that these programs include not only compensatory education, but also magnet schools, magnet school transportation, and majority to minority transfers. *See id.* Elaborating further, the Allen Letter stated, "The monitoring process shall be conducted to ensure effectiveness of court order [sic] remedies and will include site visitations, review of plans, [and] review of statistical and administrative data." *Id.* at 4. Monitoring visits were meant to "provide evidence that the school site is representative of the pluralistic nature of the American Society." *Id.* Finally, the Allen Letter committed the State to collect numerous data related to desegregation and to file a monitoring report on a semiannual basis. *See id.* at 5–9. As the Allen Letter explained, the State's monitoring obligation would be "massive and encompassing." *Id.* at 8.

In 1993, Judge Wright held that the State was obliged to follow the Allen Letter's commitments. *See* R. 2045. Judge Wright further required the State to file a semiannual monitoring report and a monthly Project Management Tool. *See id.* However, the State did not comply with these mandates. In 1997, the Office of Desegregation Monitoring slammed the State's monitoring efforts:

> ADE's monitoring reports have been paper nightmares, fraught with mistakes, omissions, inconsistencies, and minutiae that have rendered them difficult to read, understand, or interpret. They have been inflated with graphing so outrageously distended to be baffling if not

> wholly unintelligible. Their interminable, data-laden pages have remained completely unelucidated by context, analysis, interpretation, correlations, conclusions, or evaluation that would render meaning out of the mire. Even though the Allen letter declared that ADE's reports would describe desegregation progress in Pulaski County, the reports have not effectively measured change.

R. 3097 at 46. Undeterred, the State asked to be excused from its semiannual monitoring report and excluded Joshua from meetings at which attempts to change its monitoring obligations were discussed. *See infra* Part III.A.1. Moreover, in 2000, the State attempted, unsuccessfully, to replace the Allen Letter as the governing monitoring document in the case. *See id.* The Allen Letter was *never* replaced. Instead, as the State admits, the State simply stopped monitoring—an admission the record bears out. *See* Response Br. at 19 ("Ultimately, negotiations ceased and ADE did not monitor any of the districts again until a few years ago, and that was on ADE's own initiative."); R. 4897-1, Project Management Tool of 9/30/2013, at 458 (showing nine-year gap in State's monitoring).

In light of this history, the Joshua Intervenors would "have been expected or obliged to" conduct the monitoring they did. *Jenkins*, 127 F.3d at 718. As further elaborated below, each category of monitoring that the State disputes is chargeable to the State. Joshua were obliged to monitor the State's compliance with the 1989 Agreement, and the State's failure to follow its responsibilities under the Allen Letter increased Joshua's time burden significantly. *See* Walker Supp. Decl. ¶7.

i. School visits and meetings

The State contends that Joshua "have provided no explanation for why they seek to charge ADE for monitoring the school district's [sic] operation of their

schools." Response Br. at 29. The State's suggestion that Joshua was monitoring the "operation" of the districts glosses over the real purpose of Joshua's visits: to monitor the State's own commitments under the 1989 Agreement as well as to conduct the extensive monitoring the State neglected to perform.

First, the 1989 Agreement committed the State to taking actions that could only be monitored by visiting the schools. For example, in Part III.G of the 1989 Agreement, the parties stipulated that "remediation of racial achievement disparities shall remain a high priority with the ADE," and the State agreed to "develop and . . . search for programs to remediate achievement disparities between black and white students." To track the effectiveness of the State's efforts to remediate the achievement gap, physical visits to the schools were needed.

Second, the Allen Letter provided the State with comprehensive monitoring duties. *See* R. 4704-6 at 4. This monitoring included visits to schools as well as the collection of numerous data to determine the progress of desegregation. *See id.* at 4–9. When the State failed to monitor as required, it left a void in desegregation oversight. Joshua would have neglected its obligations to the class had they not filled this void. *See* Walker Supp. Decl. ¶7. Joshua's monitoring—in multiple forms, including physical visits to the schools—filled the gap caused by ADE's default. Such monitoring was necessary to hold the State, an adjudged constitutional violator, to task. *Cf. McDonald*, 860 F.2d at 1461 (holding in a prison-conditions case that compensable monitoring included "interviewing prisoners, investigating

complaints, and developing a coherent picture of the conditions and practices on death row vis-à-vis the consent decree").

ii. Magnet Review Committee

The State argues that payment for attendance at Magnet Review Committee meetings would be inconsistent with the 1989 Agreement. *See* Response Br. at 30. The provision it points to, Part II.E.3, provides that the State will "continue to pay . . . [t]he State's share of Magnet Review Committee expenses as currently allocated." Apparently the State reads this clause as an affirmative limitation on any future increase to its obligation to pay for the Magnet Review Committee. This reading is a stretch. In the context of the entire agreement, the clause affords the State an affirmative obligation to pay for the Magnet Review Committee—not protection from future financial obligations. Moreover, the very same subsection provides that the "funds paid by the State under this agreement are not intended to supplant any existing or future funding which is ordinarily the responsibility of the State of Arkansas." 1989 Agreement Part II.E, at 6. The payment of attorney's fees after a loss in civil rights litigation is ordinarily the State's responsibility. The 1989 Agreement does not erect an independent barrier to fees.

The State also argues that it should pay no fees because the Magnet Review Committee's "main responsibility has been to oversee the operation of the stipulation magnet schools" and has been a collaborative effort at best. *See* Response Br. at 30. This argument understates the importance of the Magnet Review Committee to the State's desegregation obligations. The Committee did not

simply oversee operations, but was responsible for "evaluating segregative and desegregative effects of magnet school proposals." *See* 659 F. Supp. 363, 373 (E.D. Ark. 1987) (Exhibit B to Court's order). The 1989 Agreement required the State to fund magnet schools—an essential part of the desegregation remedy—and the Magnet Review Committee oversaw the budgets that were the lifeblood of these schools. The Magnet Review Committee also examined student enrollment and student counts—again, an essential consideration in determining whether the desegregation remedy was effective. *See* Exhibit 17. Indeed, the State's two seats on the Committee evidence its primary role. Joshua's participation in the Magnet Review Committee was therefore closely connected to the State's desegregation obligations.

iii. Responding to class members' concerns about assignments to schools

Joshua had to field many inquiries from class members about why they could not attend specific magnet or interdistrict schools. Joshua had to follow up on these inquiries, frequently by checking with the Magnet Review Committee on student enrollment. The State cannot dispute that Joshua owed a duty to its class members to respond to their concerns about school assignments. A major purpose of this litigation has been to ensure that the class members would be educated in a desegregated environment, and assignments to interdistrict and magnet schools have been central to that endeavor.

Instead, the State contends that the districts operated the schools and that "concerns about the assignment or operation of these schools . . . would have been

directed to the Districts." Response Br. at 31. Again, the State wrongly limits the scope of Joshua's monitoring to the "operation" of the schools. Joshua's monitoring was directed toward assuring an effective interdistrict remedy. Indeed, the State's constitutional violations were the very reason these schools existed in the first place. The State's position essentially ignores its commitment to the interdistrict remedy. Transfers were at the heart of the remedy. Joshua were obliged to monitor whether transfers were effective at achieving desegregation and to respond to class members' concerns that they were not. *See McDonald*, 860 F.2d at 1461.

iv. Review of monitoring reports

The State argues that its semi-annual monitoring reports contained much information about the districts and that time spent reviewing them does not accrue against the State. Response Br. at 30. But the State filed the semi-annual reports to inform the Court and the parties—including Joshua—of the progress of desegregation. *See* R.4704-6 at 9. Joshua were obliged to review the State's work. Moreover, the State does not bother to address the Project Management Tool, which the State was required to file monthly and which is devoted specifically to assessing the State's progress under the 1989 Agreement. Consider, for example, the Project Management Tool from July 2012. *See* R. 4775. This is a 390-page document that addresses, among other matters, the State's fiscal and remedial obligations. There have been over 200 such documents filed over the course of this litigation. And while they are cumulative, it still takes Joshua an appreciable amount of time to review updated information from month to month.

Reviewing the State's assessment of its own performance is undoubtedly a post-judgment action that would be expected of Joshua. The State's cynical suggestion that Joshua "are requesting payment for 220 hours of reading and then discarding these documents," Response Br. at 30, ignores Joshua's duty to remain abreast of the State's efforts to desegregate. Review of the State's reports is a necessary monitoring task for which Joshua are entitled to compensation, even if their monitoring did not lead to specific enforcement action. *See Cody*, 304 F.3d at 774.

3. Reasonable time expended

i. Joy Springer

Ms. Springer has been Joshua's lead monitor for over two decades. In that role, she has performed all the monitoring tasks outlined above and has also overseen other monitors (time for whom is not claimed here). As explained above, each category of monitoring is compensable against the State. Ms. Springer has provided further detail about the time spent in her supplemental declaration. The monitoring time she has claimed—about three-and-a-half hours per week over the past twenty years—is reasonable and should be compensated in full.

ii. Evelyn Jackson

Evelyn Jackson was Joshua's primary monitor at the Magnet Review Committee from 1993 to 2007. *See* Walker Decl. ¶45. As explained above, the work of the Magnet Review Committee is compensable against the State. The 336 hours claimed for Ms. Jackson are based on an estimated two hours to prepare for and

actually attend each monthly meeting. This is a reasonable amount of time, as further confirmed by Ms. Springer's reconstructed records. *See* Springer Decl. Attachment C. These hours should be compensated in full.

iii. John Walker

Mr. Walker's monitoring time—reviewing State reports, conferring with and supervising Ms. Springer, meeting with State officials, consulting with class members, and attending legislative oversight hearings—is reasonable. It represents less than seven hours a month over the course of the litigation. Given Joshua's duties to the class and the burdens placed upon it from the State's failure to monitor, this time was necessary. *See* Walker Supp. Decl. ¶7. It should be compensated in full.

IV. LODESTAR ENHANCEMENT

This is undoubtedly one of those "rare circumstances" in which a fee enhancement is appropriate. *See Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010).[18] On this point, the State is content to denigrate Joshua's achievement and to quibble about one item supporting the enhancement. Contrary to the State's conclusory argument, several factors supporting an enhancement have not been subsumed into the lodestar. Joshua have presented evidence supporting the application of these factors in this case.

[18] Notably, while *Perdue* restates general principles regarding attorney's fees, it focuses only on whether an enhancement is permissible for excellent results. *See Perdue*, 559 U.S. at 554. An enhancement for superior performance may be warranted where expenses are great, litigation is protracted, and where fee payment is exceptionally delayed. *See id.* at 555-56. These factors are present here. Moreover, *Perdue* does not overturn previous cases permitting an enhancement based on other factors. *See id.* at 553–54.

First, the multiplier is consistent with that awarded in other cases and produces a fee commensurate with that awarded in other major desegregation litigation. Multiple cases support this point. *See* Br. in Support of Fees at 24–26.

Second, this case is highly undesirable, as it has subjected Joshua's counsel to enormous challenges as well as to animus in the public sphere. The law recognizes that success in such a context is worthy of a fee enhancement in order to attract competent civil rights counsel. *See Keslar v. Bartu*, 201 F.3d 1016, 1018 (8th Cir. 2000) (Richard Arnold, J., dissenting). Most attorneys do not have to endure personal insults in the state's largest newspaper for their actions in cases. Mr. Walker has endured plenty. *See* Br. in Support of Fees exh. 14.

Third, courts permit an enhancement to account for lost employment due to time spent on civil rights cases. Mr. Walker has pointed to multiple matters that he might have more lucratively pursued rather than fighting this case without any payment. *See* Walker Decl. ¶40. The State focuses on the Wal-Mart case, but its argument misses the point. Mr. Walker is not claiming he worked on the desegregation case to the exclusion of all others or that he was never compensated through other work (including the Wal-Mart case). That much is clear from the total number of hours submitted—less than two years' worth of time over the past two decades, or an average of about 140 hours per year. The point is that Mr. Walker has not been able to take on a full docket of contemporaneously paying cases and has had to pass work to other counsel because of his involvement in this litigation. Failing to acknowledge the sacrifice of regularly paying, lucrative work would

disincentivize accomplished attorneys such as Mr. Walker from taking cases that are in the public interest.

Finally, the State cannot credibly contest the success the Joshua Intervenors have achieved against it this litigation. Their efforts have forced the State to remedy unconstitutional segregation and have secured over a billion dollars in monetary benefit to ensure that remedy. The Settlement Agreement ensures continued payments for the next four years while concluding over a half century of desegregation litigation in Arkansas—a history that ranges from *Cooper v. Aaron* through the individual cases against the districts to the current case. Joshua and their predecessors have been constant in their efforts on behalf of Pulaski County's black schoolchildren—with Mr. Walker fully involved since 1965. By ensuring that the commitments of the 1989 Agreement were maintained, and by achieving the settlement of the case, Joshua have indeed succeeded.

If this is not a case in which a fee enhancement is appropriate, then such cases do not exist. A multiplier of 1.75 is warranted here.

CONCLUSION

The ultimate inquiry in any fee proceeding is reasonableness: Is the fee requested a reasonable reflection of the attorney's contribution? As amply explained in the opening brief, and as further elaborated in this reply, $3.3 million in fees—1.25 percent of the $263 million benefit the State will provide to the class over the next four years, or less than one-quarter of one percent of the benefit provided over the duration of the litigation—is reasonable. The hours submitted are especially

reasonable in light of the long duration of the case, the difficulty of the litigation, and the success Joshua have achieved in holding the State to its obligations to desegregate Pulaski County public schools. Joshua therefore request that the Court award $3,318,061.69 in fees.

Respectfully submitted,

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