UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. C-03-491-JD
KELLY AYOTTE, Attorney General of New Hampshire, in her official capacity,	)	
Defendant.	)	

MOTION FOR ATTORNEY'S FEES, EXPENSES AND COSTS

The Plaintiffs, through their undersigned counsel, move this Court for an award of attorney's fees and expenses pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 54(d)(2); and for costs pursuant to 28 U.S. C. § 1920, Fed. R. Civ. P. 54 (d)(1), and LR 54.1(a), on the ground that they are prevailing parties in this litigation. As contemplated by the First Circuit Court of Appeals' order remanding the issue to this Court, this motion also covers Plaintiffs' entitlement to recover for their work in the First Circuit and in the United States Supreme Court. The Court of Appeals' order was attached as Exhibit B to plaintiffs' July 27, 2007, motion for an attorney's fees briefing schedule (docket item no. 64).

The grounds for this motion are stated in the attached memorandum of law. Because this Court has ordered bifurcated briefing on the issue of attorney's fees, (doc. # 37), this motion and the supporting memorandum of law relate solely to the issue of plaintiffs' prevailing party status. If this Court rules that Plaintiffs are prevailing parties,

they will submit subsequent briefing setting forth the amount of fees to which they are entitled and the reasons therefor.

WHEREFORE, plaintiffs request that the Court rule that (a) they are prevailing parties entitled to an award of attorney's fees, expenses and costs and (b) award them such fees, expenses and costs in an amount to be subsequently determined.

MEMORANDUM STATEMENT (LR 7.1(a)(2))

The grounds for this motion are stated in full in the memorandum of law submitted herewith.

CONCURRENCE STATEMENT (LR 7.1(c))

From earlier discussions and prior submissions regarding this matter, counsel for the Defendant does not concur in the relief requested in this motion.

Date: October 17, 2007

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 17th day of October, 2007, the foregoing motion was served by the ECF system on Senior Assistant Attorney General Maureen Smith, counsel for Defendant, and to all counsel of record.

/s/ Martin P. Honigberg
Martin P. Honigberg

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PLAINITFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR ATTORNEY'S FEES AND A RULING THAT THEY ARE THE PREVAILING PARTY

Plaintiffs submit this memorandum in support of their motion for attorney's fees and costs under 42 U.S.C. § 1988, pursuant to the Court's directive to address the issue of whether they are "prevailing parties" entitled to a fee award. As explained below, plaintiffs are "prevailing parties" because they succeeded in having a state law declared unconstitutional and won a permanent injunction against its enforcement in at least its unconstitutional applications. Plaintiffs are accordingly entitled to attorney's fees and costs.

BACKGROUND

Plaintiffs brought this challenge to New Hampshire's Parental Notification Prior to Abortion Act, RSA 132:24-132:28 (the Act), seeking to have it declared unconstitutional and enjoined. Although such laws are common, New Hampshire's was

extraordinary in the danger it posed to minors. Contrary to thirty years of Supreme Court precedent, the Act lacked any exception for circumstances in which a prompt abortion was necessary to save the minor's health. Plaintiffs argued that the Act was unconstitutional because (1) it lacked such an exception; (2) its life exception was dangerously narrow; and (3) the judicial bypass procedures failed to protect the minor's confidentiality. But for Plaintiffs' challenge, the Act would have taken effect December 31, 2003.

Plaintiffs fully succeeded in achieving their goal in the courts, which was to prevent the Act from ever being enforced. Indeed, three courts ruled the Act unconstitutional and unenforceable as written. This Court enjoined the Act in its entirety because it lacked a health exception and its life exception was too narrow; the Court did not reach the bypass confidentiality claim. *Planned Parenthood v. Heed*, 296 F. Supp. 2d 59 (D.N.H. 2003). The First Circuit affirmed for largely the same reasons. 390 F.3d 53 (1st Cir. 2004). Finally, in a unanimous opinion, the Supreme Court ruled that the Act could not be enforced without an exception protecting the health and lives of young women needing prompt abortions. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 327 (2006) ("our precedents hold[] that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment for preservation of the life or health of the mother'" (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)) (internal quotation marks omitted). The only question the Court left for resolution on remand was whether the lower courts were correct in enjoining the Act in its entirety because of this defect, or whether they should have ordered a narrower remedy, enjoining only its unconstitutional applications to

minors in need of immediate abortions. *Id.* at 331-32. The Supreme Court remanded the case to the lower courts for a ruling on whether a narrower remedy would be consistent with legislative intent.[1]

The injunction remained in effect during the remand. However, while the issues of remedy and the confidentiality claim were being briefed, the legislature repealed the Act. Consequently, on July 10, 2007, this Court dismissed the case as moot but left the issue of attorney's fees and costs open for consideration. Order, July 10, 2007.[2] On August 17, 2007, the Court ordered bifurcated briefing on the issue of attorney's fees, with initial memoranda addressing whether plaintiffs are prevailing parties and subsequent briefing addressing the amount of fees to which plaintiffs are entitled. This memorandum addresses plaintiffs' entitlement to fees as prevailing parties.

ARGUMENT

PLAINTIFFS ARE PREVAILING PARTIES UNDER 42 U.S.C. § 1988

The Civil Rights Attorney's Fees Awards Act of 1976 provides that "[i]n any action…to enforce a provision of [42 U.S.C.] section[] . . . 1983 . . . the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (emphasis added). In this case, brought pursuant to 42 U.S.C. § 1983, there can be no doubt that plaintiffs are the prevailing parties.

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[1] The lower courts were also to rule, if necessary, on the confidentiality claim. *Id.* at 332.
[2] On July 20, 2007, the Court of Appeals remanded to this Court the issue of plaintiffs' entitlement to attorney's fees for work in the Court of Appeals and the Supreme Court. The Court of Appeals' order was attached as Exhibit B to plaintiffs' July 27, 2007, motion for an attorney's fees briefing schedule (docket item no. 64).

In order to qualify as prevailing parties, plaintiffs must "'succeed on any significant issue in litigation which achieves some of the benefit [they] sought in bringing the suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)); *Accord Boston Children's First v. City of Boston*, 395 F.3d 10, 14 (1st Cir. 2005). Moreover, the benefit the plaintiff achieves must be a judicially sanctioned alteration in the legal relationship of the parties. *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001); *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 22 (1st Cir. 2005); *Boston Children's First*, 395 F.3d at 14. Plaintiffs clearly meet this standard.

Plaintiffs' lawsuit worked a judicially sanctioned change in the legal relationship of the parties that provided plaintiffs all the relief they sought in bringing this case. This Court found the Act unconstitutional and permanently enjoined it. *Planned Parenthood v. Heed*, 296 F. Supp. 2d 59. This enforceable relief, rendered on the merits, is the quintessential type of judicial relief that qualifies a plaintiff as a "prevailing party." *Buckhannon*, 532 U.S. at 604 ("enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees") (*quoting Texas State Teachers' Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

There are no grounds for arguing otherwise. First, the final ruling on the merits – that the Act was unconstitutional because it lacked an exception for circumstances when the minor needs a prompt abortion – was affirmed by the Supreme Court. *See Ayotte*, 546 U.S. at 327. Under the Supreme Court's decision, New Hampshire was permanently enjoined from enforcing the Act, at least as to minors in need of prompt health- or life-

saving abortions. Nothing New Hampshire could do subsequently – including repealing the Act – could alter the force of the Supreme Court's final ruling.

Second, Plaintiffs' prevailing party status is likewise not altered by the fact that the proper scope of the relief remained unresolved when the case ended. The Supreme Court had declared the Act unconstitutional, and had clearly ruled that plaintiffs were entitled to an injunction *at least* as to the unconstitutional application of the Act to minors in need of prompt abortions. 546 U.S. at 327, 331. The only question remaining on remand of the medical emergency claim – whether that injunction should be restricted to those unconstitutional applications or remain in force against the whole Act – is wholly irrelevant to prevailing party status.[3]

Third, Plaintiffs' prevailing party status is not affected by the fact that this case ended without resolution of all Plaintiffs' claims, such as the claims regarding the lack of confidentiality for the judicial bypass. It is well established that a prevailing party need not succeed on every one of its claims, so long as it succeeds in at least one significant claim and achieves some of the relief sought. *Texas State Teachers Ass'n*, 489 U.S. at 791-92. The constitutional necessity of an exception for time-sensitive health and life-saving abortions was a significant issue, if not the central issue, in this litigation and more than meets the "significant claim" test of *Texas State Teachers Ass'n*.

Fourth, the exception to a prevailing party's right to costs and attorney's fees that the Supreme Court identified in *Buckhannon*, 532 U.S. at 60, does not apply. Under

[3] A prevailing party need only achieve "some of the relief" sought in bringing suit. *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (finding plaintiffs prevailed solely on the basis of having obtained only nominal damages); *Diaz-Rivera v. Rivera-Rodriguez*, 377 F. 3d 119, 124-25 (1st Cir. 2004) (finding that plaintiffs prevailed because they won nominal damages, as well as a ruling that defendants' actions violated the Constitution, thus benefiting both the plaintiffs and the public).

Buckhannon, a plaintiff whose benefit in bringing suit results solely from the defendant's voluntary decision to cease its unconstitutional conduct is not a prevailing party. *Id.* Although the constitutional violation in this case ultimately ceased when the New Hampshire legislature repealed the Act, this event occurred *after* plaintiffs achieved court-ordered success on the merits. When a defendant voluntarily ceases unlawful conduct *after* plaintiffs have won a judicial ruling on the merits, plaintiffs' prevailing party status is unaffected. *Staley v. Texas*, 485 F.3d 305, 314 & n.7 (5th Cir. 2007) (en banc), *petition for cert. filed*, 76 U.S.L.W. 3050 (U.S. Jul. 23, 2007) (No. 07-100).

Plaintiffs thus succeeded in having the Act declared unconstitutional, and won a permanent injunction against its enforcement in at least its unconstitutional applications. Plaintiffs are accordingly prevailing parties entitled to attorney's fees and costs under 42 U.S.C. § 1988.

CONCLUSION

For all the foregoing reasons, plaintiffs are the prevailing parties in this case.

Date: October 17, 2007

Respectfully submitted,

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