UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. Plaintiffs v. Kelly Ayotte, Attorney General of New Hampshire, in her official capacity, Defendant	No. 03-491-JD

DEFENDANT'S OBJECTION TO MOTION FOR ATTORNEYS' FEES, EXPENSES AND COSTS

Defendant, through her counsel, the Attorney General's Office, respectfully objects to Plaintiffs' motion for award of attorneys' fees and expenses under 42 U.S.C §1988 and Fed. R. Civ. P. 54(d)(2) and for costs under 28 U.S.C. §1920, Fed. R. Civ. P. 54(d)(1) and LR 54.1(a), on grounds that Plaintiffs are not "prevailing parties" and, even if they are, the only reasonable fee would be no fee at all.

The attached Memorandum of Law sets forth the specific bases for this objection, addressing the threshold question ordered by this Court on whether Plaintiffs are entitled to fees, expenses and costs in any amount. *See* Order, doc. #37. If the Court does not deny Plaintiffs' motion, Defendant reserves the right to dispute Plaintiffs' request for an award of fees, expenses and costs, including amounts requested, in subsequent proceedings.

WHEREFORE, Defendant respectfully requests that the Court:

A. Deny Plaintiffs' motion and requests for ruling;

B. Find that Plaintiffs are not "prevailing parties" under governing law;

C. Alternatively, find that the only reasonable fee would be no fee at all, even if Plaintiffs are "prevailing parties;" and

D. Grant such other relief deemed just and appropriate.

Respectfully submitted,

KELLY A. AYOTTE
ATTORNEY GENERAL

By her attorneys,

Date: December 20, 2007

By: /s/ Maureen D. Smith
Maureen D. Smith, Bar # 4857
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

Certificate of Service

I hereby certify that the foregoing *Defendant's Objection to Motion for Attorney's Fees, Expenses and Costs* was served this day upon counsel of record through the Court's ECF system.

By: /s/ Maureen D. Smith
Maureen D. Smith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. Plaintiffs v. Kelly Ayotte, Attorney General of New Hampshire, in her official capacity, Defendant	No. C-03-491-JD

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO MOTION FOR FEES AND RULING

I. Introduction

Defendant submits this Memorandum of Law in support of the accompanying objection to Plaintiffs' motion for fees and costs. Defendant asks this Court to deny Plaintiffs' motion on three grounds.

First, Plaintiffs do not qualify as "prevailing parties" under governing law and controlling precedent. Plaintiffs did not succeed in their facial challenge to the Parental Notification Act ("Act") and the Supreme Court awarded costs to Defendant. The case was still on remand awaiting final judicial resolution when it was mooted by intervening legislative repeal of the Act. Thus, there was no judicial resolution that could conceivably qualify Plaintiffs as "prevailing parties" under governing law, despite their

having achieved their ultimate goal through New Hampshire's voluntary repeal of the Act.

Second, Plaintiffs did not obtain any of the relief they requested because they did not succeed in having the Act invalidated in the Supreme Court. The short-lived relief in the form of a permanent injunction issued by the lower court, before the Supreme Court vacated the Court of Appeals judgment in *Ayotte v. Planned Parenthood of Northern New England, et al.*, 546 U.S. 320 (2006)(hereinafter "*Ayotte*"), does not bestow "prevailing party" status. Moreover, the Supreme Court agreed with Defendant that the Act was not unconstitutional, vacated the Court of Appeals' judgment and remanded for further judicial proceedings, which never occurred.

Third, even if Plaintiffs are deemed to have succeeded on any portion of their claim, they are not entitled to fees and costs in any amount, as no significant vindication of civil rights occurred as a result of their challenge. Therefore, the only reasonable fee would be no fee at all.

II. Procedural History

The *Ayotte* decision guides this Court's view of the procedural history of this case. Plaintiffs brought this case as a facial challenge pursuant to 42 U.S.C §1983, seeking to invalidate the Act in its entirety and prevent its enforcement for failure to provide an exception to parental notification where the mother's health was at risk, among other things. *See Complaint* (D.N.H. November 17, 2003); *Ayotte,* 546 U.S. at 324-25. This Court declared the Act to be unconstitutional and permanently enjoined its enforcement. *Ayotte*, 546 U.S. at 325. The First Circuit affirmed. *Id.* However, on appeal, the Supreme Court vacated the Court of Appeals' judgment that "invalidated the

Act," agreeing with New Hampshire that the "lower courts need not have invalidated the law wholesale." *Id*. at 331. As New Hampshire did not dispute its inability to restrict access to abortions necessary for preservation of the life or health of the mother, *id*.at 327, the Court found that the lower courts could issue narrowly tailored declaratory and injunctive relief prohibiting the statute's unconstitutional application in those "few applications [that] would present a constitutional problem." *Id.* at 331.

The Supreme Court remanded the case for "further proceedings consistent with [its] decision." *Id*. at 332. The lower court was to decide whether the Act's legislative history would support keeping the Act intact, subject to "carefully crafted injunctive relief," *id*., which Plaintiffs conceded may resolve the case. *Id*.; Tr. of Oral Arg., 38, 40.

The Supreme Court also allowed Defendant to recover the costs she incurred in the Supreme Court, which totaled $1952.80. *See* Exhibit 1, attached herein (February 21, 2006 letter from William Suter, Clerk, United States Supreme Court, to Kelly A. Ayotte, Attorney General). Plaintiffs paid Defendant's costs in March and April 2006. *See* Exhibit 2, attached herein (correspondence from Plaintffs remitting payments to Defendant).

On remand, Plaintiffs supplemented their Complaint in this Court, again seeking to void the entire Act. *See Supplemental Complaint* (D.N.H. doc 29). Both parties moved for summary judgment, with Plaintiffs reiterating their request that the entire Act be invalidated based on legislative intent. *See Plaintiffs' Cross Motion for Summary Judgment* (D.N.H., doc. 45). Before this Court ruled on the parties' motions for summary judgment based upon the guidance provided in *Ayotte,* the Act was repealed by New Hampshire's legislature. Laws 2007, ch. 265.

On Defendant's motion, this Court dismissed the merits case as moot, but left open the question of fees and costs. *Order* (D.N.H. doc. 63). The parties subsequently filed a joint motion to dismiss the appeal as moot in the Court of Appeals, which was granted on August 17, 2007. The Court of Appeals also granted Plaintiffs' motion to remand their request for fees and expenses, on the understanding that the Attorney General objected on the merits to fees. *Order*, July 20, 2007.

This Court subsequently ordered the parties to address the threshold issue of whether defendant is liable for attorneys' fees and costs in any amount. *Order* (August 17, 2007). On October 17, 2007, Plaintiffs filed a Motion for Attorneys' Fees, Expenses and Costs to recover all costs and fees incurred in this Court, the Court of Appeals and the Supreme Court, accompanied by a Memorandum of Law addressing the statutory "prevailing party" prerequisite. (D.N.H. doc. 72) (hereinafter "*Pls' Mem.*"). Defendant has filed an Objection and this Memorandum of Law on the threshold issue of whether Plaintiffs are entitled to any amount for work on the underlying case. Defendant asks the Court to deny Plaintiffs' motion in its entirety, for the reasons stated below.

III. **Argument**

A. Plaintiffs Are Not "Prevailing Parties"

Plaintiffs are not entitled to any fees, costs or expenses in this case because they are not "prevailing parties" under governing law and rules that allow for such an award. *See* 42 U.S.C. §1988(b); Fed. R. Civ. P. 54(d); LR 54.1(a). Under the "American Rule," attorneys' fees are not awarded to an adverse party absent explicit statutory authority. *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994). While the Civil Rights Attorneys' Fees Awards Act of 1976 provides this Court with discretion to award

attorneys' fees as part of the costs to a "prevailing party," *see, e.g.*, 42 U.S.C. §1988(b), plaintiffs are not entitled to either fees or costs because they do not meet the statutory prerequisite.

A "prevailing party" is one who has derived a benefit from litigation and who can point to a judicial resolution that changes the legal relationship between the parties. *Texas State Teachers Ass'n v. Garland Independent School Dist*., 489 U.S. 792-93 (1989). To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of the claim, e.g., nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)(plaintiff who wins enforceable nominal damage award is a prevailing party under §1988). The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) or comparable relief through a consent decree or settlement. *Maher v. Gagne*, 448 U.S. 122, 129 (1980) *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988)(*per curiam*). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement, *Hewitt*, 482 U.S. at 764; otherwise, the judgment or settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4; *Farrar*, 506 U.S. at 111. Not only did Plaintiffs fail to obtain an enforceable judgment on the merits or comparable relief, the Supreme Court assessed costs against them in Defendant's favor. Therefore, there is no basis for Plainiffs to claim "prevailing party" status for work done in any court.

1. *Legislative action, not judicial imprimatur, resolved this case*.

Because the Supreme Court vacated the Court of Appeals judgment affirming this Court's declaration and the case was subsequently dismissed on the merits before its

conclusion, Plaintiffs never obtained the relief they sought throughout the litigation, i.e., invalidation of the Act in its entirety. In filing their facial challenge to the Act in this Court, Plaintiffs sought both preliminary and permanent relief to prevent enforcement of any part of the Act and a declaration that the Act was void and of no effect. See *Complaint* (D.N.H. November 17, 2003). While Plaintiffs were temporarily successful in the lower courts, the Supreme Court vacated the judgment of the Court of Appeals as unnecessarily broad, remanding for further proceedings to determine legislative intent and, ultimately, the appropriate remedy to "obviate any concern about the Act's life exception." *Ayotte*, 546 U.S. at 332 (remanding for further proceedings on legislative intent). The Supreme Court also left open the possibility of further review by the lower courts on the judicial bypass' confidentiality provision. *Id*. However, no proceedings on remand ever occurred.

After remand to this Court, Plaintiffs again sought the same relief initially rejected by the Supreme Court, i.e., preliminary and permanent injunction against enforcement of any portion of the Act and a declaration that the Act was invalid in its entirety. *See Supplemental Complaint*, June 9, 2006 (doc. 29); *Plaintiffs' Cross-Motion for Summary Judgment* (doc. 45). Plaintiffs did not obtain the relief they sought on remand because the legislature repealed the Act before any further judicial review of the Act occurred. Laws 2007, ch. 265. On July 10, 2007, the merits case was dismissed as moot.

Thus, this Court never had the opportunity to make findings as to legislative intent, to issue declaratory or injunctive relief or to "settl[e] some dispute which *affects the behavior of the defendants towards the plaintiff*." *Hewitt*, 482 U.S. at 761 (emphasis

in original); *Rhodes*, 488 U.S. at 4. Plaintiffs cannot claim that they received "actual relief on the merits of [their] claim" that modified "defendant's behavior in a way that directly benefits the plaintiff," *Farrar, supra* at 111-112, because no final resolution, court order or judicially-sanctioned relief was issued before the case was dismissed.

Moreover, the legislature's repeal of the Act and this Court's subsequent dismissal of the case as moot resulted in a lack of judicial imprimatur necessary for Plaintiffs to claim "prevailing party" status. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609-610 ((2001)("We hold that the 'catalyst theory ' is not a permissible basis for the award of attorney's fees").[1] The *Buckhannon* decision is particularly instructive here because the Court considered whether plaintiffs were entitled to fees after their civil rights challenge was dismissed as moot due to intervening legislative action. There, the plaintiff challenged a state law that required all residents of care facilities to be capable of "self preservation." *Id.* at 600. However, before a final ruling issued, the legislature removed the self-preservation provision and successfully moved to dismiss the case. *Id*. at 601. Although the plaintiff claimed to be the "prevailing party, " the Supreme Court rejected any "nonjudicial" resolution as a basis for a fee award. *Id.* at 606.

The Supreme Court held that there must be a "material alteration of the legal relationship of the parties," *id*. at 604 (quotations omitted), as well as "judicial *imprimatur*" on the change. *Id*. at 605 (emphasis in original). In rejecting the "catalyst theory" as a basis for awarding attorney's fees for nonjuducial action, the Court

[1] Although the issue in Buckhannon was the fee-shifting provisions of the Fair Housing Amendment Act of 1988, the United States Court of Appeals for the First Circuit has held that the Supreme Court's reasoning in "Buckhannon is presumed to apply generally to all fee-shifting statutes that use the 'prevailing party' terminology … ." *Smith v. Fitchburg Pub. Sch*., 401 F3d. 16, note 8 (1st Cir. 2005), *quoting Doe v. Boston Pub. Sch*., 358 F.3d 20, 25 (1st Cir. 2004)]

considered the "disincentive" that the theory "may have upon defendant's decision to voluntarily change its conduct, conduct that may not be illegal." *Id*. at 607-608.

Here, the Act was voided by the legislature, not the courts, so that the "nonjudicial" resolution of Plaintiffs' case cannot provide the basis for a fee award. *See Buckhannon*, 532 U.S. at 606 ("defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur*.")(emphasis in original). Plaintiffs did not achieve any "enforceable judgments on the merits and court-ordered consent decrees [to] create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorneys' fees." *Id*. at 604 (citations omitted). As stated in *Buckhannon,* "[w]e have only awarded attorneys' fees where the plaintiff has received a judgment on the merits … or obtained a court-ordered consent decree," and "[n]ever have we awarded attorneys' fees for a nonjudicial 'alteration of actual circumstances.'" *Id*. at 606. Allowing fees in this case would create a disincentive for legislative change, a result that *Buckhannon* clearly sought to avoid.

Plaintiffs cite no cases to support their conclusion that they are entitled to fees and costs in a case dismissed as moot before final resolution. To the contrary, Buckhannon suggests that awarding fees would be inappropriate in such circumstances. [2] *Id* at 609 ("If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorneys' fees"). *see also Hensley v.*

[2] Plaintiffs' claim that the *Buckhannon* exception does not apply in this case, Pls' Mem. at 5-6, is based upon the erroneous assumption that Plaintiffs had already received court-ordered success on the merits when the legislature repealed the Act. However, Plaintiffs did not prevail, as the Supreme Court assessed costs against them and the Act remained intact on appeal, pending further order on remand.

Eckerhart, 461 U.S. 424, 437 (1983)(a "request for attorneys' fees should not result in a second major litigation"), *cited in Buckhannon*, 532 U.S. at 609.

2. *Plaintiffs did not prevail at any stage of the litigation.*

Plaintiffs claim that they obtained a final ruling on the merits and obtained the relief they sought in bringing the case, citing *Ayotte* and the lower courts' judgments. *Pls' Mem*. at 4-5. Plaintiffs are wrong on both counts.

a. *Plaintiffs did not prevail in Ayotte*

Plaintiffs have no basis for asserting that they prevailed on the merits in the Supreme Court, *Pls' Mem*. at 4-5. In *Ayotte*, the Supreme Court *vacated* the Court of Appeals judgment,[3] *see Ayotte*, 546 U.S. at 332, and allowed Defendant to recover her costs against Plaintiffs. *See* Exh. 1 attached hereto. Costs certainly would not have been awarded to Defendant if Plaintiffs had prevailed, *see* Sup. Ct. R. 43.2 ("If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders"). Moreover, the Supreme Court's own rules would designate Defendant as having prevailed on appeal. *See* Sup. Ct. R. 43.6 ("When costs are allowed in this Court, …[*t]he prevailing side* may not submit a bill of costs")(emphasis added).

Plaintiffs are also wrong in claiming that the Supreme Court found the Act to be unconstitutional, *Pls' Mem*. at 4. Again, the Supreme Court *vacated* the Court of Appeals' judgment, which had affirmed this Court's ruling of unconstitutionality. *Ayotte*, 546 U.S. at 332. The Act survived intact on appeal and Plaintiffs received nothing more

[3] The *Ayotte* decision essentially answered both of the questions presented by Defendant – whether the First Circuit erred in holding the Act to be facially invalid and whether it erred in holding that a facial challenge should not be governed by the "no set of circumstances" standard in Salerno – in her favor. Rather than declare the Act unconstitutional on its face, the court allowed the Act to remain intact subject to the "modest remedy" of "carefully crafted injunctive relief" to prevent "the statute's unconstitutional application.," if supported by legislative intent. *Ayotte*, 546 U.S. at 331.

than the *possibility* that they would ultimately succeed in having the Act invalidated. Of course, this Court's ruling on remand would not necessarily result in invalidation of the entire Act, which was the only relief that Plaintiffs sought throughout the litigation. *See Ayotte*, 546 U.S. at 331 (lower courts need not have invalidated the law wholesale).

To the extent that Plaintiffs can claim any success on appeal, it is *de minimis* I because the principle established on possibly unconstitutional application of the Act had already been conceded by Defendant. *See Ayotte*, 546 U.S. at 327-28. Plaintiffs never sought an injunction to prevent unconstitutional application of the Act. Every pleading reflected their single goal of having the entire Act invalidated. They did not obtain the relief they requested because the Supreme Court did not affirm the lower courts' rulings, declare the Act unconstitutional or invalidate the Act in its entirety; rather, the Court stated a preference for more finely drawn relief. *See Ayotte*, 546 U.S. at 330-31 (describing *Steinberg* decision to invalidate similar statute because parties did not ask for relief more finely drawn and explaining preference for "modest remedy"). Thus, they did not achieve success on the significant issue before the Court – whether the Act could survive the constitutional challenge – because the Act did survive.

b. *Plaintiffs did not obtain the judicial relief they sought*

Plaintiffs also did not "prevail" because they did not receive actual relief on the merits of their claim that materially altered the legal relationship of the parties to Plaintiffs' direct benefit. *See Farra*r, 506 U.S. at 111. Because the Act was never enforced, nor would it have been enforced in an unconstitutional manner, *Ayotte* did not result in a judicially-sanctioned change in Defendant's behavior toward any party at the time it was decided. *See Ayotte*, 546 U.S. at 328 ("New Hampshire has conceded that,

under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.")

Here, Plaintiffs did not succeed in their bid to void the Act, nor did they change Defendant's behavior in any way. A judgment, declaratory or otherwise, "will constitute relief, for purposes of §1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4 (holding plaintiffs not prevailing parties and reversing award of attorneys' fees premised solely on a declaratory judgment that prison officials had violated their constitutional rights); *Hewitt*, 482 U.S. at 764 ("whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement"); *see also Lewis v. Continental Bank Corp*., 494 U.S. 472, 480 (1990) ("An order vacating the judgment on grounds of mootness would deprive Continental of its claim for attorney's fees under 42 U.S.C §1988 (assuming arguendo it would have such a claim), because such fees are available only to a party that 'prevails' by winning the relief it seeks"), *citing Rhodes v. Stewart*, 488 U.S. 1(1988); *Hewitt v. Helms*, 482 U.S. 755 (1987).

Contrary to Plaintiffs' assertion, *Ayotte* did not "permanently enjoin Defendant from enforcing the Act, at least as to minors in need of prompt health- or life- saving abortions," *Pls' Mem*. at 4-5. The Supreme Court left both the scope and issuance of judicial relief to the lower courts, stating that "[s]o long as they are faithful to legislative intent, the *lower courts* can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." *Ayotte*, 546 U.S. at 331 (emphasis added).

Plaintiffs' admission that "the proper scope of the relief remained unresolved when the case ended, " *Pls' Mem*. at 5, illustrates that Plaintiffs cannot demonstrate that

they have "obtain[ed] at least some relief on the merits of [the] claim." *Farrar*, 506 U.S. at 111. Plaintiffs achieved nothing more than a judicial pronouncement on a small part of their overall claim – on the unconstitutional application issue that Defendant conceded throughout the litigation[4] -- unaccompanied by the judicial relief they sought, i.e., invalidation of the Act. That the Supreme Court reaffirmed existing abortion-related precedent and provided guidance to the lower courts in fashioning an appropriate prospective remedy does not entitle Plaintiffs to claim that they have "prevailed" under fee statutes. *See id.* at 112 ("judicial pronouncement that the defendant has violated the Constitution unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party"); *Hewitt*, 482 U.S. at 760; *Rhodes*, 488 U.S. at 4 ("nothing in [Hewitt] suggested that the entry of [a declaratory] judgment in a party's favor automatically renders that party prevailing under section 1998); *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 22 (1st Cir. 2005)(attorneys' fees not awarded where plaintiff acquired judicial pronouncement that defendant had violated the constitution unaccompanied by judicial relief).

c. *The lower court judgments do not bestow "prevailing party" status*

Plaintiffs claim that the decisions of the trial court and the Court of Appeals below declaring the Act's unconstitutionality and issuing a permanent injunction (which was vacated by *Ayotte)* allow them to meet the "prevailing party" test under *Buckhannon*, *Pls' Mem*. at 4. However, those rulings provide no precedent for Plaintiffs because they were vacated by the Supreme Court. *See O'Conner v. Donaldson*, 422 U.S. 563, 577 (1975)(Of necessity, our decision vacating the judgment of the Court of Appeals deprives

[4] See, e.g., Tr. of Oral Arg. at 6, where the NH Attorney General stated that 'the law cannot be applied in a manner to infringe on the minor's health if that rare emergency case arises."

that court's opinion of precedential effect). Moreover, controlling precedent in both the Supreme Court and in this Circuit make clear that obtaining relief on a temporary basis does not bestow prevailing party status to litigants. *See Sole v. Wyner*, __ U.S. __, 127 S.Ct. 2188 (2007); *Rossello-Gonzalez v. Anibal Acevedo-Vila*, 483 F.3d 1 (2007); *see also Public Service of New Hampshire v. Consolidated Utilities and Communications, Inc.*, 846 F.2d 803, 811 (1st Cir. 1988).

In *Sole*, the Supreme Court rejected the notion that prevailing party status could accompany "achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 127 S.Ct. at 2195. The Court noted that the plaintiff's temporary success rested on a premise that the District Court ultimately rejected and that, at the end of the day, the challenged rule remained intact. *Id.* at 2196. The principle established in *Sole* applies in this case because the permanent injunctive relief that Plaintiffs claim they achieved was temporary and the Act remained intact until repealed by the legislature.

In *Rossello*, the First Circuit also refused to award "prevailing party" status to plaintiffs whose initial relief was vacated and whose case was ultimately dismissed. *See Rossello*, 483 F.3d 1 (1st Cir. 2007). There, although plaintiffs claimed that they received some actual relief on their claims, the Court of Appeals affirmed the district court's finding that plaintiffs were not prevailing parties, stating that "[a]lthough Plaintiffs initially received some injunctive relief from the district court, our later vacation of that injunction and dismissal of all claims precludes Plaintiffs from now claiming to be 'prevailing parties' for the purposes of 42 U.S.C. §1988(b)." *Id* at 5; *see also Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-

93(1989). Moreover, Plaintiffs have not argued, nor can they claim, that the lower court rulings changed Defendant's behavior in any way.

Because the Supreme Court vacated the permanent injunction issued by the lower courts and the case was dismissed on the merits before any relief was granted, the short-lived relief obtained by Plaintiffs in the lower courts was "ephemeral" and does not provide a basis for holding that Plaintiffs were "prevailing parties." *See Sole*, 127 S.Ct. at 2196.

B. Fees Should Be Denied Even If Plaintiffs Are Deemed Prevailing Parties

Even if this Court finds that Plaintiffs prevailed on some portion of their claim, the Court should rule that no fees are appropriate in this case.

A decision that Plaintiffs are entitled to fees would be unreasonable because the degree of success that Plaintiffs obtained from the Supreme Court, if any, was insignificant. *See Farrar*, 506 U.S. at 114 ("most critical factor in determining reasonableness of fee award is the degree of success obtained"), *citing Hensley*, 461 U.S. at 436. Just as "the only reasonable fee is usually no fee at all" when a civil rights plaintiff recovers only nominal damages, *see id*. at 115, here, Plaintiffs' failure to secure judicial invalidation of the Act measures Plaintiffs' degree of success as merely technical or *de minimis*.

Plaintiffs vindicated no significant civil rights, nor did they materially alter Defendant's behavior toward them by judicial fiat, as the Supreme Court merely confirmed "settled" law. *See Ayotte*, 546 U.S. at 327-28. The issue on which Plaintiffs claim to have prevailed – that Defendant could not enforce the Act at least as to minors in need of prompt health-or-life saving abortions, *Pls' Mem.* at 4-5 – was viewed by the

Court has having already been conceded by Defendant. *See Ayotte*, 546 U.S. at 326-29. This does not represent a victory on a significant civil rights issue and represents such a minimal level of success that this Court should exercise its discretion to determine that no fees are appropriate. *See Farrar*, 506 U.S. at 121 (a substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical)(O'Connor concurring); *Garland*, 489 U.S. at 792; *Boston's Children First v. City of Boston*, 395 F.3d 10, 18 (nominal award, entitlement to which was conceded by the defendants, represented such minimal success that district court [properly] concluded that only reasonable fee was no fee at all).

Moreover, denying Plaintiffs' fee request would be consistent with the Supreme Court's stated desire to avoid spawning a "second major litigation" over attorneys' fees. *Buckhannon*, 532 U.S. at 609 (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The nuances inherent in determining the degree of Plaintiffs' success, if any, as a gauge to determine fees, would certainly engage the courts in protracted, secondary litigation, as well as create disincentives to legislative action that might benefit the public interest.

IV. **Conclusion**

For the reasons stated herein, Defendant respectfully requests that the Court deny Plaintiffs' Motion for Attorney's Fees, Expenses and Costs and grant such other relief deemed just and appropriate.

Respectfully submitted,

KELLY A. AYOTTE
ATTORNEY GENERAL

Date: December 20, 2007

By: /s/ Maureen D. Smith
Maureen D. Smith, Bar # 4857
Senior Assistant Attorney General
Attorney General's Office
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Defendant's Memorandum of Law In Support of Objection to Motion for Attorney's Fees, Expenses and Costs* was served this day upon counsel of record through the Court's ECF system.

By: /s/ Maureen D. Smith___
Maureen D. Smith

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

RECEIVED
MAR 23 2006

February 21, 2006

2601-093-0218

Mrs. Kelly A. Ayotte
Attorney General
33 Capitol Street
Concord, New Hampshire 03301

2003137
20AC3348

Re: Kelly A. Ayotte, Attorney General of New Hampshire
v. Planned Parenthood of Northern New England, et al.
No. 04-1144

Dear Mrs. Ayotte:

A certified copy of the judgment of this Court in the above-entitled case was mailed to the Clerk of the United States Court of Appeals for the First Circuit today.

The petitioner is given recovery of costs in this Court as follows:

Printing of record:	**$1,652.80**
Clerk's costs:	**300.00** - filing fee paid by Cockle Printing + included in charges on their invoice.
Total:	**$1,952.80**

This amount may be collected from opposing counsel or parties.

Planned Parenthood is paying 1/2 —
* ACLU paying 1/2 — $976.40 ea.

Sincerely,

WILLIAM K. SUTER, Clerk

By Elizabeth Brown
Elizabeth Brown
Judgments/Mandates Clerk

cc: Daniel J. Mullen, Esq.
Clerk, USCA for the First Circuit
(Your docket No. 04-1161)

Jennifer E. Dalven, Esq.

LEGAL DEPARTMENT
REPRODUCTIVE
FREEDOM PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

JENNIFER DALVEN
Deputy Director
T/212.549.2641
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7993

March 13, 2006

Daniel J. Mullen
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301

Re: Ayotte v. Planned Parenthood

Dear Dan:

Enclosed please find a check for $976.40 to cover one-half of the costs ordered by the Supreme Court in Ayotte v. Planned Parenthood. You should receive a check for the other half of the costs from Planned Parenthood in the near future.

Sincerely,

Jennifer Dalven

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
REPRODUCTIVE FREEDOM PROJECT
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Planned Parenthood
Federation of America, Inc.

Public Policy Litigation & Law

April 24, 2006

Daniel Mullen
Office of the Attorney General
State of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Re: *Kelly A. Ayotte, Attorney General of New Hampshire v. Planned Parenthood of Northern New England, et al.*
Supreme Court Docket No. 04-1141

Dear Mr. Mullen,

Enclosed is a check for $976.40, which represents one half of the costs ($1,952.80) awarded by the Supreme Court in the above case.

Sincerely,

Dara Klassel
Attorney for Planned Parenthood of Northern New England

cc: Jennifer Dalven

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