UNITED STATES DISTRICT COURT
DISTRICT OF STATE 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 Sur-Reply to Plaintiff's Motion for Attorney's Fees

Plaintiffs acknowledge that they did not receive the only relief that they ever sought in this litigation – facial invalidation of New Hampshire's parental notification statute ("Act"). *Plaintiffs' Reply to Defendant's Objection* ("*Pls' Reply*") at 6. Having conceded failure to obtain judgment in their favor before the case was dismissed, Plaintiffs have no viable claim to "prevailing party" status. *See Defendant's Memorandum of Law in Support of Objection to Motion for Fees and Ruling* ("*Def's Mem*.") at 5-8. Even if this Court were to decide Plaintiffs did prevail, awarding fees in any amount would be unreasonable. *Id.* at 14-15.

Plaintiffs fail to explain in their Reply how, in light of dismissal of the merits case on remand, they could have obtained any actual relief on the merits or the required change in the parties' legal relationship as a result of "judicial imprimatur." *Def's Mem.*, 5-9; *see Farrar v. Hobby*, 506 U.S. 103,111 (1992) (a plaintiff "prevails" when *actual*

relief on the merits of his claim materially alters the parties' legal relationship) (emphasis added)); *Buckhannon Board & Home Care, Inc. v. W. Va Dept' of Health & Human Res*., 532 U.S. 598, 605 (2001)("*Buckhannon*") (rejecting catalyst theory that would allow plaintiffs to avoid the need for enforceable judgment on the merits or court-ordered consent decree to create material alteration of parties' legal relationship and "judicial imprimatur" on the change); *Gay Officers Action League v. Puerto Rico*, 217 F.3d 288, 293 (1st Cir. 2001)(party prevails when actual relief on the merits of his claim materially alters legal relationship by modifying defendant's behavior in a way that directly benefits plaintiff).

Plaintiffs cannot erase the lack of final judicial resolution on the merits. The cases they cite in an effort to avoid that issue actually confirm that attorney's fees must be based upon a judgment in their favor, something that Plaintiffs cannot claim.[1] *See, e.g., Staley v. Harris County, Tex*., 485 F.3d 305, 313-14 (where plaintiff obtained judgment in district court and before appeals panel, so that appeals court refusal to vacate district court judgment allowed "Staley [having] obtained the primary relief she sought [to] therefore remain the prevailing party.").

Here, the decision on appeal speaks for itself. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S, 320 (2006) (hereinafter "*Ayotte*"). The Supreme Court did not affirm the relief granted below, but remanded to this Court for further

[1] Plaintiffs cite to a footnote in *Staley v. Harris County, Tex*., 485 F3d 305, 314, nt. 7 (5th Cir. 2007) as grounds for asserting that the *Buckhannon* holding does not apply to the facts here. *Pls' Reply* at 6-7, nt.5. However, the Fifth Circuit reasoned that *Buckhannon* did not preclude attorney's fees because Staley, unlike the plaintiffs *in Buckhannon*, prevailed in the district court and continued to prevail on appeal "given our opinion today [denying request for vacatur]." Here, in contrast, the lower court judgment for Plaintiffs was vacated by the Supreme Court. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 332 (2006). Thus, *Staley* would support denial of attorney's fees here because Plaintiffs did not obtain "the primary relief" they sought. *Staley v. Harris County*, 485 F.3d at 314, nt.7. In addition, the lack of judicial relief on remand before dismissal on the merits makes the *Buckhannon* holding directly applicable here. *See Buckhannon*, 532 U.S. 598, 605 (2001).

proceedings and determination of remedy. *See Ayotte* at 332; *Defs' Mem*. at 3-4. Regardless of whatever might have happened had the legislature not repealed the Act, Plaintiffs simply do not qualify for attorneys' fees because, as they concede, they did not obtain even a determination of appropriate relief before the legislature repealed the Act. *See Pls' Reply* at 6; *see generally Smith v. Fitchburg Pub. Sch*., 401 F.3d 16, 22 (1st Cir. 2005) (fees not awarded where plaintiff acquired judicial pronouncement that defendant violated the constitution unaccompanied by judicial relief); *Def's Mem*., 5-8.

Plaintiffs now claim that they prevailed because they "maintained" an injunction throughout the litigation or had an "entitlement" to injunctive relief on remand. *Pls' Reply* at 2-3. Neither claim assists them. First, they cannot rely on lower court rulings in their favor. *See Sole v. Wyner*, __ U.S. __, 127 S.Ct. 2188, 2192 (2007) (holding that final decision denying permanent injunctive relief determines who prevails for purposes of §1988); *Rossello-Gonzalez v. Anibal Acevedo-Vila*, 483 F.3d 1, 5-6 (2007) ("although plaintiffs initially received some injunctive relief …, our later vacation of that injunction … precludes plaintiffs from now claiming to be "prevailing parties" under 42 U.S.C. §1988.").[2] Here, the Supreme Court vacated the lower court judgment affirming facial invalidation, allowing Defendant her costs[3] and remanding the merits case for further proceedings. *See Ayotte* at 332. Thus, the lower court ruling provides no precedent, *see*

[2] The holdings in *Sole v. Wyner* and *Rossello-Gonzalez* are directly applicable here, despite Plaintiffs' attempt to distinguish them, *Pls' Reply* at 7, nt. 5, because they are premised on the lack of success on appeal, as opposed to success below.

[3] Plaintiffs' assertion that the Supreme Court's cost award is "irrelevant", *Pls' Reply* at 2, nt. 1, ignores that the costs were based upon the vacation of judgment in Plaintiffs' favor and that the Supeme Court rules themselves suggest that Defendants prevailed, *see Defs' Mem*. at 9. Moreoever, cases cited by Plaintiff do not support their assertion that they prevailed despite being required to pay Defendant's costs. *See, e.g., McDonald v. McCarthy*, 966 F.2d 112 (3d Cir. 1992) (plaintiff successfully defended judgment in his favor on appeal and, as a result, was not precluded from attorney's fees award).

O'Connoer v. Donaldson, 422 U.S. 563, 577 (1975); *Def's Mem*. at 12-13, and cannot be used as a basis for a fee award. *See also Sole v. Wyner*, 127 S.Ct at 2196.

Second, even if Plaintiffs could rely on the lower court rulings, they cannot show that they gained any benefit whatsoever from the early injunctions. At no time did Defendant express any intention to enforce the Act in medical emergency situations to the detriment of pregnant minors. *See Ayotte v. Planned Parenthood, et al.*, No. 04-1144, *Reply Brief of Petitioner* at 11 ("the State has consistently taken a position that its Act ensures that an emergency abortion may be performed on a pregnant minor if necessary to preserve the woman's health"); *see also id*. at 2, 8; Tr. of Oral Arg. at 6, 14. Thus, Plaintiffs received nothing from their short-lived success in the lower courts.

Third, Plaintiffs cannot claim to have prevailed on "entitlement" to injunctive relief that they never sought. *See Pls' Reply* at 2. Plaintiffs' sole request for relief throughout this litigation was facial invalidation of the Act.[4] The Supreme Court did not affirm the lower court's facial invalidation, as Plaintiffs requested; rather, it vacated the lower court judgment, agreeing with Defendant that the lower courts could issue narrowly tailored relief prohibiting the Act's unconstitutional application in those "few applications that would present a constitutional problem."[5] *Ayotte* at 331. Having failed on appeal in their facial challenge, Plaintiffs continued to argue for wholesale

[4] *See, e.g., Complaint* (D.N.H. Nov. 17, 2003); *Planned Parenthood v. Heed*, No. 04-1161 (1st Cir.), *Brief of Plaintiffs-Appellees* at 57 ("this Court should affirm the ruling of the district court's order, declaring the Act unconstitutional and permanently enjoining its enforcement"); *Ayotte v. Planned Parenthood, et al.*, No. 04-1144, *Brief for Respondents* at 29, 49 ("Facial invalidation is the only remedy that protects minors [and] this Court should affirm."); *Supplemental Complaint* (D.N.H. doc 29)(seeking invalidation and permanent injunction against enforcement of Act).

[5] While Plaintiffs claim success on grounds that "all three courts …agreed that an injunction preventing the State from enforcing the Act at least in [certain] instances" was appropriate, *Pls' Reply* at 2, it was Defendant who suggested to the Supreme Court that an injunction against particular applications of the Act would provide a sufficient remedy. *See, e.g., Ayotte v. Planned Parenthood*, et al., No. 04-1144, *Reply Brief for Petitioner* at 5 ("limiting the relief only to the unconstitutional applications will adequately protect the constitutional rights of minors affected by the state statute").

invalidation of the Act on remand. *See Plaintiffs' Cross Motion for Summary Judgm*ent (D.N.H., doc. 45). The Act was subsequently repealed by the legislature. Plaintiffs cannot now obtain "prevailing party" status on the basis of an as-yet undefined and narrow injunction that they never sought or received and that they opposed throughout the merits litigation. *See Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 791 (1989) ("A prevailing party must be one who has succeeded on any significant claim affording it *some of the relief sought*") (emphasis added).

Plaintiffs claim that they nonetheless succeeded on a "significant issue" and achieved the "primary benefit" they sought through the litigation. *See Pls' Reply* at 5-6. However, Plaintiffs do not explain how their efforts to convince the Supreme Court to "reaffirm its prior rulings," *id.* at 6, can form a basis for a fee award when Defendant did not attempt to overturn and, indeed, never disputed the Supreme Court's prior rulings. *See Ayotte* at 327 ("New Hampshire does not dispute, and 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.'")(*citing Casey*, 505 U.S. at 879).

Plaintiffs also fail to explain how their litigation achieved "protection of the health of minors facing medical emergencies," *Pls' Reply* at 6, unless Defendant had claimed that the Act should be enforced in such a way as to endanger the health of pregnant minors, which Plaintiffs do not assert. Indeed, the Supreme Court recognized that "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." *Ayotte* at 328. Plaintiffs cannot be awarded fees on the basis of issues conceded by Defendant. *See*

Boston Children's First v. City of Boston, 395 F.3d 10,13 (1st Cir. 2005) ("nominal award to two of ten original plaintiffs, the entitlement to which was conceded by defendants from the virtual outset in an otherwise unsuccessful lawsuit, will simply not bear the weight of the policy that Congress intended to promote [under §1988]").

Finally, even assuming that Plaintiffs can claim some benefit from having brought a facial challenge to the Act, they have failed to show how they obtained any of the benefits they sought at the time that *Ayotte* was decided.[6] *See Hewitt v. Helms*, 482 U.S. 755, 764 (1987) (whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement); *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988)(*per curiam*) (relief must benefit plaintiff at judgment; otherwise, judgment cannot be said to have to "affected the behavior of the defendant toward plaintiff."). That the parties continued to litigate on remand whether wholesale invalidation of the Act was necessary, *see Def's Mem.* at 3, illustrates that there was no "resolution of dispute which change[d] the legal relationship [with] defendant." *Texas State Teachers Ass'n v. Garland*, 489 U.S. 782, 792-93 (1989) (where judgment forced change in school district policy limiting the right of teachers to communicate, thereby effecting material alteration of legal relationship of parties).[7]

In summary, the most that Plaintiff's can claim here is "the moral satisfaction [that] results from [a] favorable statement of law," which "cannot bestow prevailing party

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[6] Plaintiffs' citation to *Ackerly Comm. of Mass. v. City of Cambridge*, 135 F.3d 210, 215, nt.5 (1st Cir. 1998) does not support its "prevailing party" claim because there, the plaintiff had already received injunctive relief and, on further appeal, received facial invalidation of the challenged ordinance.

[7] Plaintiffs' reliance on *Texas State Teachers Ass'n v. Garland* to claim success in altering the parties' legal relationship, *Pls' Reply* at 5, nt. 4, ignores that the plaintiffs in that case obtained judgment in their favor, resulting in specific policy changes by Defendant. *Id*. at 792-93. Here, Plaintiffs identify no change in Defendant's behavior other than legislative repeal of the Act, which cannot form the basis for fees under the Supreme Court's rejection of the "catalyst theory." *See Buckhannon B. & Care Home v. W.Va. Dep't of Health & Human Services*, 532 U.S. 598 (2001).

status." *Farrar v. Hobby*, 506 U.S. at 112 (1992), *quoting Hewitt v. Helms*, 482 U.S. at 762 ("To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render plaintiff a prevailing party.") This court should rule that Plaintiffs do not qualify as a "prevailing party" under 42 U.S.C. §1988 and, even if they do, that they are not entitled to fees in any amount. To do otherwise would discourage future legislative action in the public interest, a result that the Supreme Court has sought to avoid in fee determinations. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Services*, 532 U.S. 598, 608 (2001)("the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct").

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Defendant's Sur-Reply to Plaintiffs' Motion for Attorney's Fees** was served this day upon counsel of record through the Court's ECF system.

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