

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

9 Puente Arizona, et al.,
10 Plaintiffs,

11 v.

12 Paul Penzone, et al.,
13 Defendants.

No. CV-14-01356-PHX-DGC

ORDER

14
15 Plaintiffs have filed a motion for attorneys' fees and non-taxable expenses.
16 Doc. 708. The motion is fully and extensively briefed, and no party has requested oral
17 argument. The Court will grant the motion in part.

18 **A. Legal Standards.**

19 A party requesting an award of attorneys' fees and non-taxable expenses must
20 show that it is (a) eligible for an award, (b) entitled to an award, and (c) requesting a
21 reasonable amount of fees. *See* LRCiv 54.2(c). Under the general fee-shifting provision
22 for federal civil rights cases, "the court, in its discretion, may allow the prevailing
23 party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "[A]
24 court's discretion to deny fees under § 1988 is very narrow and . . . fee awards should be
25 the rule rather than the exception." *Herrington v. Cty. of Sonoma*, 883 F.2d 739, 743 (9th
26 Cir. 1989) (internal quotation marks omitted).

27 Defendants do not dispute that Plaintiffs are prevailing parties in this case, but
28 they contend that the hourly rates sought by Plaintiffs' attorneys are in some cases too

1 high, the amount of time for which Plaintiffs seek compensation should be reduced, and
2 the overall fee award should be reduced because Plaintiffs did not succeed on all of their
3 claims. Plaintiffs provide a number of declarations in support of their fee request
4 (Docs. 708-1 to 708-15), and Defendants provide an extensive and detailed declaration by
5 attorney William Klain (Doc. 715-1).

6 To determine the reasonableness of requested attorneys' fees, federal courts
7 generally use the "lodestar" method. See *Hensley v. Eckerhart*, 461 U.S. 424, 437
8 (1983); *United States v. \$186,416.00 in U.S. Currency*, 642 F.3d 753, 755 (9th Cir.
9 2011). The Court must first determine the initial lodestar figure by taking a reasonable
10 hourly rate and multiplying it by the number of hours reasonably expended on the
11 litigation. *Hensley*, 461 U.S. at 433. In determining whether the hourly rate or hours
12 expended are reasonable, the Court should consider the *Kerr* factors that have been
13 subsumed within the initial lodestar calculation. See *Kerr v. Screen Extras Guild, Inc.*,
14 526 F.2d 67, 70 (9th Cir. 1975); *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 487
15 (9th Cir. 1988). These factors are: "(1) the novelty and complexity of the issues, (2) the
16 special skill and experience of counsel, (3) the quality of representation, and (4) the
17 results obtained." *Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1262 n.6 (9th Cir. 1987).

18 **B. Lodestar Calculation.**

19 **1. Hourly Rates.**

20 Reasonable hourly rates are not determined by the rates actually charged in a case,
21 but "by the rate prevailing in the community for similar work performed by attorneys of
22 comparable skill, experience, and reputation." *Schwarz v. Sec'y of Health & Human*
23 *Servs.*, 73 F.3d 895, 908 (9th Cir. 1995). The relevant community is generally the forum
24 in which the district court sits, *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454
25 (9th Cir. 2010), but "rates outside the forum may be used if local counsel was
26 unavailable, either because they are unwilling or unable to perform because they lack the
27 degree of experience, expertise, or specialization required to handle properly the case."
28

1 *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (quoting *Barjon v.*
2 *Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)).

3 Plaintiffs seek to recover out-of-state hourly rates for three sets of attorneys in this
4 case: the U.C. Irvine School of Law Immigrant Rights Clinic (“UCI IRC”), the National
5 Day Laborer Organizing Network (“NDLON”), and the law firm of Hadsell, Stormer &
6 Renick LLP (“HSR”). Plaintiffs seek to recover existing hourly rates for three sets of
7 Arizona lawyers: The ACLU Foundation of Arizona (“ACLU-AZ”), attorney Ray
8 Ybarra Maldonado, and the law firm of Quarles & Brady LLP (“QB”). Doc. 708 at 6.

9 Defendants argue that Plaintiffs should be limited to reasonable Arizona rates for
10 all lawyers because they have not shown that it was necessary to use out-of-state counsel.
11 Doc. 715 at 5-6. The Court does not agree. Plaintiffs have submitted persuasive
12 evidence that there were insufficient local counsel with the willingness and requisite
13 “degree of experience, expertise or specialization required to handle properly the case.”
14 *Camacho*, 523 F.3d at 979 (citing *Barjon*, 132 F.3d at 500). Daniel Pochoda, who served
15 as Legal Director of the ACLU-AZ for years and is familiar with the local legal market,
16 attests that there is a limited pool of civil rights attorneys who can handle a case like this.
17 Doc. 708-8 ¶¶ 3-5; *see also* Maldonado Decl., Doc. 708-9, ¶¶ 8-9 (judging that the only
18 option was to look outside Arizona and noting that some attorneys outside of Arizona
19 were unavailable to take the case); Garcia Decl., Doc. 95-2 ¶ 14 (explaining that Puente
20 had been looking for pro bono counsel to bring a challenge since 2013). Mr. Pochoda’s
21 difficulty in recruiting local firms as the case entered the discovery phase supports the
22 need to look outside the state. Doc. 708-8 ¶¶ 6-7. Mr. Klain notes that there are many
23 lawyers in the Phoenix area who do civil rights work, but he did not attempt to locate
24 lawyers or firms to take on this level of litigation against prominent county officials over
25 an extended period of time. Doc. 715-1 ¶¶ 16-19.

26 The Court will award the hourly rates sought by Plaintiffs’ out-of-state counsel,
27 with two exceptions.
28

1 First, the Court will cap out-of-state attorneys' fees at \$750 per hour. The Court
 2 concludes that this cap is reasonable given the fact that rates above this level represent
 3 premium billing in large legal markets – a rate of pay not warranted for counsel who did
 4 not take a leading role in this case. This will reduce fees for the HSR firm by \$6,300 (*see*
 5 Doc. 708-13 ¶ 19: $\$1,100 \times 18 - \$750 \times 18 = \$6,300$).¹

6 Second, the Court will also reduce the hourly rate charged for U.C. Irvine law
 7 students from the requested \$200 to \$125. The Court views \$125 per hour as more than
 8 reasonable for law students who have not yet graduated from law school or passed the bar
 9 exam. UCI IRC seeks to recover \$56,050 for law student time. Doc. 708-6 ¶¶ 17, 25.
 10 Reducing this amount by 37.5% (representing the percentage reduction from \$200 to
 11 \$125 per hour) results in a reduction of \$21,019 for fees sought by UCI IRC.

12 The Court will award Ms. Lai's requested hourly rate of \$565, despite Defendants'
 13 argument that her time in practice is insufficient to justify such a rate. Ms. Lai acted as
 14 the lead attorney in this case and managed the litigation effectively. The Court views her
 15 hourly rate as comparable to rates charged by lawyers handling sophisticated litigation in
 16 Southern California. Doc. 708-6 ¶¶ 3-11.

17 The Court will also accept the hourly rates charged by the Arizona attorneys:
 18 ACLU-AZ, Ray Ybarra Maldonado, and QB. After reviewing the information provided
 19 by these attorneys and Mr. Klain, and based on the Court's familiarity with the Phoenix
 20 legal market, the Court concludes that these hourly rates are reasonable.²

21 2. Compensable Hours.

22 Plaintiffs reduced the time for which they seek compensation to account for partial
 23 success, duplication, and unnecessary work. Plaintiffs explained in their motion that they

25 ¹ Mr. Klain notes that attorney Barbara Hadsell at HSR bills at a rate of \$975
 26 (Doc. 715-1 ¶¶ 32-33), but HSR is not seeking compensation for her time (*see* Doc. 708-
 13 ¶ 19).

27 ² The Court notes that Mr. Klain presents two options for reasonable hourly rates.
 28 Option 1 would award QB and Mr. Maldonado their requested hourly rates and would
 reduce ACLU-AZ's rates by only about 15%. Doc. 715-1 ¶ 54. Defendants view this
 option as reasonable. *See* Doc. 715 at 8.

1 reduced several categories of time by 50% (Doc. 708 at 14-15) and some categories by
2 75% or more (*id.* at 16-17). Plaintiffs further explained that they eliminated excessive,
3 redundant, or otherwise unnecessary work (*id.* at 17-18), did not bill for more than one or
4 two attorneys at any hearing or deposition (*id.*), eliminated time for attorneys or law
5 students that had limited involvement in the case (*id.* at 18), and removed the “great
6 majority” of student time (*id.*). Defendants’ expert added all of the reductions apparent
7 from Plaintiffs’ declarations and concluded that they amounted to an overall reduction of
8 approximately 28%. Doc. 715-1 ¶ 57. But Plaintiffs explained in their reply that the
9 declarations submitted with their motion did not attempt to include all of the hours they
10 had eliminated, as discussed above, and that the total hours removed from their request
11 amounted to 49.3% of the total billed in this case. Doc. 725 at 17.

12 Defendants suggest that the Court make various additional reductions from
13 specific categories of Plaintiffs’ fees. Doc. 715 at 9-11. These proposed reductions are
14 based on Mr. Klain’s opinion that time billed for some activities was not reasonable, or
15 other alleged defects in billing. While the Court does not doubt Mr. Klain’s expertise,
16 and attorneys can have good faith disagreements as to how much time a task should take,
17 the Court cannot conclude that Plaintiffs’ requested hours are unreasonable. This was a
18 complex, difficult case. It involved substantial discovery, numerous motions, an appeal,
19 and complex constitutional issues, and resulted in a declaration that certain applications
20 of Arizona law were preempted and an injunction against the Maricopa County Sheriff’s
21 Office (“MCSO”). Looking at some of the “reasonableness factors” identified by the
22 Ninth Circuit – the quality of representation and the complexity and novelty of the issues
23 presented – the Court does not find a basis for a further downward adjustment of hours.
24 *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016).

25 Looking at other reasonableness factors, however, including the benefit obtained
26 by Plaintiffs and the lack of success on much of the case, the Court concludes that an
27 additional downward adjustment of hours is warranted. *Id.* Plaintiffs lost on their facial
28 preemption claim before the Ninth Circuit, lost their equal protection claim before this

1 Court, withdrew their as-applied equal protection claim, lost their request for an
2 expungement remedy, and lost their request for an injunction against the Maricopa
3 County Attorney's Office ("MCAO"). Plaintiffs also lost on their argument that the
4 County bears *Monell* liability for the MCAO, and withdrew their class claims. On the
5 claim Plaintiffs did win – as-applied preemption – the Court adopted a scope of
6 preemption narrower than Plaintiffs had proposed.

7 The Court concludes that Plaintiffs' lack of success warrants a more substantial
8 reduction than Plaintiffs have offered. Plaintiffs' voluntary 49% reduction, which was
9 entirely warranted given the duplication of much of their work, the number of Plaintiffs'
10 lawyers that attended hearings, participated in conference calls, and attended depositions,
11 and the number of law student hours incurred in the U.C. Irvine clinical program – fails
12 sufficiently to account for the fact that Plaintiffs lost three of their four claims and
13 prevailed only partially on their fourth. As examples, Plaintiffs reduced their time
14 devoted to the preliminary injunction by 50%, even though they lost their preliminary
15 injunction on appeal. Doc. 708 at 14. Plaintiffs also retained 50% of the time they
16 devoted to an unsuccessful sanctions motion and 50% of the time spent unsuccessfully
17 seeking expungement. *Id.* at 15-16.

18 The Supreme Court has explained that, in accounting for partial success, "[t]he
19 district court may attempt to identify specific hours that should be eliminated, or it may
20 simply reduce the award to account for the limited success." *Hensley*, 461 U.S. at 436-
21 37. Rather than attempting an hour-by-hour reduction for the many lawyers and law
22 students who worked on Plaintiffs' case, the Court concludes that a further 25% reduction
23 in the compensable time for all lawyers and law students is required to accurately reflect
24 the mixed success of this case. This reduction constitutes the Court's best judgment
25 regarding the effect Plaintiffs' losses should have on the hours recovered.

26 Because the Court is making an across-the-board reduction, it need not calculate
27 the hours of each lawyer and law student and multiply those hours by the appropriate
28 hourly rate. For ease of calculation, the Court will simply make a 25% reduction in the

1 amount sought by each law group seeking compensation, after taking into account the
 2 hourly rate reductions discussed above. The Court accordingly makes the following
 3 lodestar calculation:

4 Firm	5 Fee Request ³	6 Hourly Rate Adjustment	7 Lack-of-Success Adjustment	8 Lodestar
9 UCI IRC	\$672,454	Less \$21,019	Less 25%	\$488,576
10 ACLU-AZ	\$65,298		Less 25%	\$48,974
11 Maldonado	\$14,561		Less 25%	\$10,921
12 NDLO	\$296,992		Less 25%	\$222,744
13 HSR	\$135,998	Less \$6,300	Less 25%	\$97,274
14 QB	\$196,668		Less 25%	\$147,501
15 Total Lodestar				\$1,015,990

16 The Supreme Court has explained that a lodestar calculation “is more than a mere
 17 ‘rough guess’ or initial approximation of the final award to be made. Instead, [w]hen . . .
 18 the applicant for a fee has carried his burden of showing that the claimed rate and number
 19 of hours are reasonable, the resulting product is *presumed* to be the reasonable fee’ to
 20 which counsel is entitled.” *Pennsylvania v. Delaware Valley Citizens’ Council for Clean
 21 Air*, 478 U.S. 546, 564 (1986), *supplemented by* 483 U.S. 711 (1987) (emphasis in
 22 original) (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

23 The Court concludes that this fee award accurately reflects all of the relevant
 24 factors, including relevant *Kerr* factors. This includes several factors argued by
 25 Defendants.

26 For example, Defendants acknowledge that this case involved an issue of first
 27 impression, but assert that Plaintiffs relied on discovery and rulings from other cases.
 28 Doc. 715 at 19. But that often is true. The Court finds that the issues presented in this
 case were novel and difficult, justifying a substantial fee.

Defendants argue that Plaintiffs’ counsel were not precluded from handling other
 litigation by their involvement here (*id.*), but the Court does not view that as a basis for

³ This column includes Plaintiffs’ adjusted requests from their reply memorandum.
 Doc. 725 at 25.

1 further reducing the hours they devoted to this case. They certainly were unable to work
2 on other matters while they were working on this case.

3 Defendants suggest that further reductions are warranted by considering the
4 experience, reputation, and ability of Plaintiffs' lawyers. *Id.* at 20. The Court does not
5 agree. Plaintiffs' counsel were well qualified to handle this litigation and have been
6 involved in other high-profile civil rights litigation.

7 Defendants suggest that this case cannot be viewed as undesirable because the
8 statutory preemption provision made some success likely. *Id.* at 20-21. But Defendants
9 did not concede this point until after Plaintiffs brought suit, and contested the scope of
10 statutory preemption to the end.

11 Finally, Defendants argue that fee awards in other cases provide no basis for a
12 high award here. *Id.* at 21-22. But neither do they support reducing the fee further.

13 Considering Defendants' arguments and all of the relevant *Kerr* factors, the Court
14 concludes that the lodestar amount calculated above represents an appropriate fee award.
15 This is a substantial award to be sure, but Plaintiffs obtained a significant victory, altering
16 the way MCAO and MCSO prosecute identity theft claims against unauthorized aliens
17 and clarifying the kinds of action preempted by federal law.

18 **C. Other Issues.**

19 The Court will deny Defendants' motion to strike Plaintiffs' reply or file a sur-
20 reply and request for sanctions. Doc. 727. With the exception of the size of the
21 Plaintiffs' own fee reduction – which was described in some detail in Plaintiffs' motion
22 and supplemented only modestly in Plaintiffs' reply – the Court has not considered the
23 reply arguments and declarations to which Defendants object.

24 The Court will not award fees or expenses against the State of Arizona. Plaintiffs
25 did not obtain relief against the State. Similarly, the Court will grant the State's request
26 for relief from taxable costs. Doc. 726.

27 **IT IS ORDERED:**

28 1. Plaintiffs motion for fees and expenses (Doc. 708) is **granted in part**.
Plaintiffs are awarded \$1,015,990 in attorneys' fees and \$20,532.08 in non-taxable

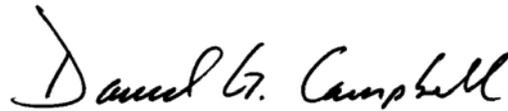
1 expenses against the Maricopa County Attorney in his official capacity, the Maricopa
2 County Sheriff in his official capacity, and Maricopa County.

3 2. Defendants' motion to strike (Doc. 727) is **denied**.

4 3. The State's motion for relief from taxable costs (Doc. 726) is **granted**.

5 4. The Clerk is directed to terminate this action.

6 Dated this 25th day of October, 2017.

7
8 

9
10

11 David G. Campbell
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28