

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

No. 9:18-CV-80771-ROSENBERG/REINHART

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| ROBERT W. OTTO, PH.D. LMFT, individ-         | ) |
| ually and on behalf of his patients, and JU- | ) |
| LIE H. HAMILTON, PH.D., LMFT, indi-          | ) |
| vidually and on behalf of her patients,      | ) |
|  | ) |
| Plaintiffs,                                  | ) |
|  | ) |
| v.   | ) |
|  | ) |
| CITY OF BOCA RATON, FLORIDA, and             | ) |
| COUNTY OF PALM BEACH, FLORIDA,               | ) |
|  | ) |
| Defendants.                                  | ) |

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**PLAINTIFFS’ CONSOLIDATED REPLY IN SUPPORT OF  
MOTION FOR ATTORNEY’S FEES AND NON-TAXABLE EXPENSES AND COSTS**

Plaintiffs, pursuant to Local Rule 7.1, reply to Palm Beach County’s Response (Doc. 228, “County Response”) and the City of Boca Raton’s Response (Doc. 229, “City Response”) to Plaintiffs’ Motion for Attorney’s Fees and Non-Taxable Expenses and Costs (Doc. 221, “Fee Motion”).

**ARGUMENT**

Plaintiffs prevailed, totally. Defendants’ unconstitutional ordinances were stricken and stand repealed, and Plaintiffs obtained money judgments on all their claims against Defendants. But, with maximal aspersion and minimal analysis, Defendants ask the Court to cut the rates and hours of Plaintiffs’ counsel because they fought too hard, with too many lawyers, who weren’t worth it anyway. According to the City, lawyers like Plaintiffs’ abound in Palm Beach County. And the County goes even farther—cynically impugning Plaintiffs’ counsel’s entire fee petition as a “weapon” because Plaintiffs’ pre-judgment *settlement demand* included increased *damages* for Defendants’ counsel’s repeatedly referring to Plaintiffs as “conversion therapists,” drumming the pejorative parlance of the stricken and abandoned ordinances. What Defendants do not do, however, is make the case that the Court should deny Plaintiffs’ counsel a fully compensatory fee for their excellent results. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). “The result is what

matters.” *Id.* Plaintiffs’ counsel were uniquely up to the task in this difficult and complex case and should be fully compensated.

## **I. Plaintiffs’ counsel achieved an excellent result in uniquely challenging litigation.**

### **A. Counseling ban litigation is uniquely difficult, complex, and societally despised.**

Plaintiffs’ counsel’s firm, Liberty Counsel, has challenged so-called “conversion therapy” bans more than any other firm. Liberty Counsel has filed five of the nine lawsuits challenging counseling bans since 2012.<sup>1</sup> Two other national civil rights firm have also filed challenges—Alliance Defending Freedom (ADF) has filed two,<sup>2</sup> and Pacific Justice Institute (PJI), has filed one.<sup>3</sup> The ninth was filed in Colorado by two Colorado attorneys, although ADF is now lead counsel on appeal.<sup>4</sup> And Liberty Counsel is the only firm to have prevailed in any counseling ban challenge, winning merits judgments both here and in *Vazzo*.<sup>5</sup> But the wins have not come easily.

1. The difficulty of litigating counseling ban challenges is evidenced by the small number of cases filed. Twenty-one States, the District of Columbia, and over 100 municipalities have enacted

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<sup>1</sup> (1) *Pickup v. Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012) (**filed 2012**), *aff’d*, 728 F.3d 1042 (9th Cir. 2013), *amended by, reh’g denied*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 573 U.S. 945 (2014); (2) *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013) (**filed 2013**), *aff’d sub nom., King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *cert. denied sub nom., King v. Christie*, 575 U.S. 996 (2015); (3) *Vazzo v. City of Tampa*, 415 F. Supp. 3d 1087 (M.D. Fla. 2019) (**filed 2017**), *aff’d sub nom., Vazzo v. City of Tampa, Fla.*, No. 19-14387, 2023 WL 1466603 (11th Cir. Feb. 2, 2023); (4) *Otto v. City of Boca Raton, Fla.*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019) (**filed 2018**), *rev’d and remanded*, 981 F.3d 854 (11th Cir. 2020), *reh’g denied*, 41 F.4th 1271 (11th Cir. 2022); (5) *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019) (**filed 2019**), *vacated*, 1 F.4th 249 (4th Cir. 2021).

<sup>2</sup> *Schwartz v. City of New York*, E.D.N.Y. No. 1:19-CV-643 (RJD) (**filed 2019**); *Tingley v. Ferguson*, 557 F. Supp. 3d 1131 (W.D. Wash. 2021) (**filed 2021**), *aff’d*, 47 F.4th 1055 (9th Cir. 2022), *reh’g denied*, 57 F.4th 1072 (9th Cir. 2023), *cert. petition docketed*, No. 22-942 (Mar. 28, 2023).

<sup>3</sup> *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012) (**filed 2012**), *rev’d sub nom., Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by, reh’g denied*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied sub nom., Welch v. Brown*, 573 U.S. 945 (2014).

<sup>4</sup> *Chiles v. Salazar*, No. 1:22-cv-02287-CNS-STV, 2022 WL 17770837 (D. Colo. Dec. 19, 2022) (**filed 2022**), *appeal docketed*, No. 22-1445 (10th Cir. Dec. 21, 2022).

<sup>5</sup> PJI won a preliminary injunction in *Welch* before the Ninth Circuit reversed. *See supra* note 3. ADF’s *Schwartz* case settled after the City of New York repealed its counseling ban. *See supra* note 2.

counseling ban laws like the Boca Raton and Palm Beach County bans,<sup>6</sup> but only nine legal challenges have been filed. Moreover, all nine lawsuits were either filed or taken over by one of only three national civil rights firms, and the majority of the cases were handled by just one firm (Liberty Counsel).

2. The high complexity of counseling ban litigation is illustrated by the constantly differing opinions between the judges who have decided the cases. Beginning, for example, with *Pickup v. Brown* and *Welch v. Brown*, two Eastern District of California judges reached opposite conclusions about the constitutionality of California’s counseling ban, with the *Pickup* judge denying a preliminary injunction and the *Welch* judge granting one. *See Pickup*, note 1, and *Welch*, note 3, *supra*. When Ninth Circuit affirmed the *Pickup* district court and reversed the *Welch* district court, and then denied rehearing, three Ninth Circuit judges joined an opinion dissenting from the denial of rehearing. *See Pickup*, note 1, *supra*.

In this case, as another example, the Court denied a preliminary injunction against the Boca Raton and Palm Beach County ordinances (Doc. 141), but the Eleventh Circuit panel reversed, holding that “the challenged ordinances violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny,” with two judges in the majority and the third judge dissenting in a separate opinion. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). (Doc. 149.) A majority of the full court voted to deny rehearing en banc, 41 F.4th 1271 (11th Cir. 2022), with three judges joining in a separate concurring opinion, and four judges variously joining in two separate dissents, including a 78-page dissent by Judge Rosenbaum.

In another example, *Vazzo v. City of Tampa*, the magistrate recommended granting a preliminary injunction against Tampa’s counseling ban on First Amendment grounds. 2019 WL 12529065, at \*16 (M.D. Fla. Jan. 30, 2019). The district judge, however, entered summary judgment striking the ban on state preemption grounds, avoiding the First Amendment issue, and denied the plaintiffs’ preliminary injunction motion as moot. 415 F. Supp. 3d 1087 (M.D. Fla. 2019). The Eleventh Circuit affirmed the judgment, but on First Amendment grounds, citing its *Otto* decision holding the County and City ordinances unconstitutional. *Vazzo v. City of Tampa, Fla.*, No.

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<sup>6</sup> *Conversion “Therapy” Laws*, Movement Advancement Project, [https://www.lgbtmap.org/equality-maps/conversion\\_therapy](https://www.lgbtmap.org/equality-maps/conversion_therapy) (select tabs “Statewide Bans” and “Local Bans”) (last visited July 19, 2023).

19-14387, 2023 WL 1466603, at \*1 (11th Cir. Feb. 2, 2023) (“[W]e are bound by our prior-panel-precedent rule to affirm the district court’s grant of summary judgment . . .”).

In still another example, *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), the Ninth Circuit upheld the denial of preliminary injunctive relief in a case challenging the State of Washington’s counseling ban. The full Ninth Circuit voted to deny rehearing en banc, 57 F.4th 1072 (9th Cir. 2023), generating a separate dissenting statement by a senior circuit judge,<sup>7</sup> joined by three others, and another separate dissent by a different judge. And the *Tingley* plaintiffs’ certiorari petition to the Supreme Court cites the conflict between the Ninth Circuit’s decision and the Eleventh Circuit’s decision in this case as a primary reason to grant review of the Ninth Circuit’s decision. Petition 14–18, No. 22-942, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-942.html>.

These opposing opinions, dissents, and conflicts are a distinguishing feature of counseling ban litigation since Liberty Counsel’s first case in 2012 and prove the high complexity of the field. To be sure, Liberty Counsel’s successes in *Vazzo* and this case stand out as exceptional.

3. The small number of cases, and even smaller number of firms willing to handle them, also evidence the societal undesirability of counseling ban challenges. As shown in Plaintiffs’ fee motion, civil rights litigation in general “is seen as very undesirable because it stigmatizes an attorney,” and “the results of such litigation tend to arouse the emotions of all concerned, and frequently the attorneys who bring these cases are the subjects of prolonged and vitriolic hostility.” *Gay Lesbian Bisexual Alliance v. Sessions*, 930 F. Supp. 1492, 1497 (M.D. Ala. 1996) (cleaned up). (Fee Mot. 11–12.) All the more so in this case, where Plaintiffs stood up to the official opprobrium decreed by their own local governments, and even opposing counsel. (Fee Mot. 11–12.) Other courts handling counseling ban litigation have observed the same societal disfavor. *See, e.g., Pickup*, 740 F.3d at 1215 (O’Scannlain, J., dissenting) (describing cases as “really about” Califor-

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<sup>7</sup> “As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. Following our court’s general orders, however, I may participate in discussions of en banc proceedings.” *Id.* at 1073 n.1 (statement of O’Scannlain, J., respecting the denial of rehearing en banc) (cleaned up).

nia legislature’s “avoid[ing] First Amendment judicial scrutiny by defining disfavored talk as ‘conduct’” and “insulat[ing] from First Amendment scrutiny California’s prohibition . . . of politically unpopular expression”). But, in this case, Plaintiffs obtained the full protection of the First Amendment against the societal condemnation of their vocational callings: “We understand and appreciate that the therapy is highly controversial. But the First Amendment has no carveout for controversial speech.” *Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 859 (11th Cir. 2020). And,

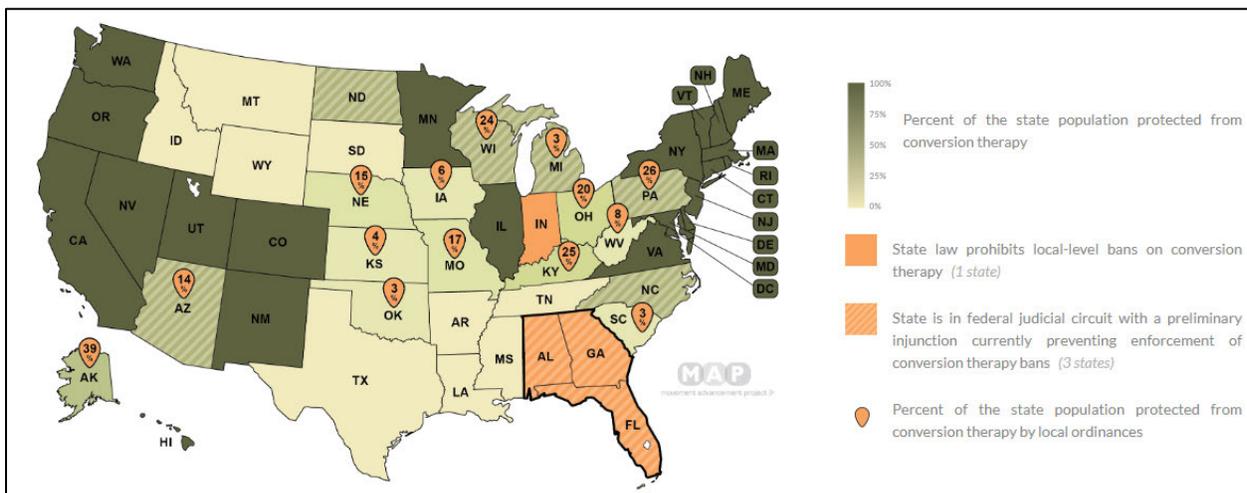
This decision allows speech that many find concerning—even dangerous. . . . People have intense moral, religious, and spiritual views about these matters—on all sides.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

*Id.* at 871–72 (cleaned up).

**B. Liberty Counsel’s excellent result changed the landscape for counseling ban laws.**

Despite the unique difficulty, complexity, and societal undesirability of counseling ban litigation, Plaintiffs here prevailed—completely—and rightfully so. The Eleventh Circuit’s holding that the Boca Raton and Palm Beach County ordinances violated the First Amendment is correct and is now controlling precedent in this Circuit. As graphically shown below, Plaintiffs’ success in this case changed the legal landscape for counseling bans in the United States:



*Conversion “Therapy Laws, supra note 6 (“Local Bans” tab).*

And the effect of Liberty Counsel’s excellent result for Plaintiffs reaches beyond this Circuit. As shown above, the conflict between the Eleventh Circuit’s decision here and the Ninth Circuit’s decision in *Tingley* fuels the *Tingley* plaintiffs’ certiorari petition to the Supreme Court. (Pt. I.A.2, *supra*.) Indeed, in *Tingley*, the Ninth Circuit itself viewed the Eleventh Circuit’s decision in this case as *creating* a circuit split with the Ninth Circuit’s *Pickup* decision characterizing change counseling as conduct instead of speech, 47 F.4th at 1077, despite the Supreme Court’s express abrogation of *Pickup* in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) [hereinafter *NIFLA*]. Thus, the *Tingley* court relied on *Pickup* to uphold Washington’s counseling ban as a constitutionally permissible restriction on conduct and not speech. *Tingley*, 47 F.4th at 1077. But irrespective of whether the Eleventh Circuit’s decision in this case created the circuit split with *Pickup*, or *Tingley* created the circuit split with the Eleventh Circuit, the Eleventh Circuit’s decision changed the landscape, making Supreme Court review of the constitutionality of counseling bans more likely.

## **II. Liberty Counsel deserves a fully compensatory fee for its excellent result.**

### **A. Liberty Counsel’s hourly rates are reasonable and in line with rates awarded to highly qualified counsel by the Court.**

Despite Defendants’ attempts to devalue Liberty Counsel’s services (County Resp. 2–12; City Resp. 4–8), Liberty Counsel’s requested rates are reasonable and in line with rates the Court has recently awarded to highly qualified counsel. As shown in Plaintiffs’ Fee Motion (pp. 8–9), the Court’s recent decision in *DJ Lincoln Enterprises, Inc. v. Google, LLC*, supports the hourly rates requested by Liberty Counsel. *See* No. 20-CV-14159-Rosenberg/Reinhart, 2022 WL 4287640 (S.D. Fla. July 28, 2022), *report and recommendation adopted*, 2022 WL 3754182 (S.D. Fla. Aug. 30, 2022). In *DJ Lincoln*, the Court awarded a range of hourly rates based on the experience and qualifications of the prevailing party’s lawyers, “[t]aking into account the professional biographies submitted in support of [the] fee motion[], the parties’ arguments, and applying [the Court’s] own experience and knowledge.” 2022 WL 4287640, at \*9. The qualifications and experience of Liberty Counsel’s lawyers who worked on this case compare favorably with those of the prevailing party lawyers in *DJ Lincoln*. *Compare DJ Lincoln*, 2022 WL 4287640, at \*7–8, *with* Mihet Decl., Doc. 221-1, ¶¶ 1–8, 19–26. Thus, Liberty Counsel’s requested hourly rates are reasonable and should be accepted by the Court.

1. The Court should reject Defendants’ arguments that the rates Liberty Counsel claims exceed the rates awarded in Palm Beach County to lawyers of similar qualifications and experience.

(County Resp. 5–7; City Resp. 5–6.) First, Liberty Counsel seeks the *local* rates awarded by the Court in *DJ Lincoln*. There, the Court expressly reduced the requested rates as “unreasonably high in comparison with similarly qualified lawyers in Palm Beach County,” and found the prevailing lawyers “fail[ed] to justify these rates by showing a lack of attorneys in Palm Beach County willing to handle this matter.” *DJ Lincoln*, 2022 WL 4287640, at \*8. Thus, if Defendants are arguing that the reduced *DJ Lincoln* rates sought by Liberty Counsel exceed the rates for similarly qualified lawyers in Palm Beach County, then Defendants are arguing that the Court got it wrong in *DJ Lincoln*. Liberty Counsel does not join Defendants in this baseless argument.

The County’s attempt to distinguish the qualifications of Plaintiffs’ lawyers from those of the prevailing *DJ Lincoln* lawyers likewise fails. (County Resp. 6–7.) Liberty Counsel’s senior lawyers are easily as “accomplished” in constitutional law as Google’s lawyers were “in the technology industry,” and have likewise handled “a number of high stakes matters” and “secured victories on a wide array of complex issues.” *Compare DJ Lincoln*, 2022 WL 4287640, at \*7–8, with Mihet Decl., Doc. 221-1, ¶¶ 1–8, 19–26. Moreover, unlike the prevailing lawyers in *DJ Lincoln*, Liberty Counsel has shown there are *no* lawyers in Palm Beach County who have handled counseling ban litigation, let alone won any. (Pt. I.A.1, *supra*.) When this case was filed in 2018, no lawyer outside of Liberty Counsel had any experience in counseling ban litigation, except for PJI’s lone 2012 case in California. Even now, only Liberty Counsel has lawyers in Florida with counseling ban litigation experience (and success), and those lawyers handled this case. Given that the Court reduced the rates requested in *DJ Lincoln* for the lawyers’ failure to show similarly qualified lawyers were not available in Palm Beach County, 2022 WL 4287640, at \*8, Liberty Counsel’s showing that there are no similarly qualified lawyers in Palm Beach County would justify higher rates than those awarded in *DJ Lincoln*.

Liberty Counsel has also shown that this case, like other counseling ban litigation, was uniquely difficult, complex, and undesirable. (Pt. I.A, *supra*.) Thus, Defendants’ litanies of rates awarded in cases *not like this case* to lawyers *not like Plaintiffs’ lawyers* are inapposite. (County Resp. 5–6; City Resp. 5–6.) Defendants make no effort to explain why or how the rates in those cases relate to Liberty Counsel’s attorneys, work, and results.

3. Nor should the Court countenance the City’s disingenuous claim that Liberty Counsel “admits” that national public interest group lawyers were available in Palm Beach County to handle this case. (City Resp. 5.) This is not even a plausible reading of Liberty Counsel’s papers. To be

sure, the Mihet Declaration explains that, in the usual constitutional case of the type handled by Liberty Counsel, local counsel are not available, requiring a party to “engag[e] counsel outside the local jurisdiction, such as counsel from national public interest groups like Liberty Counsel, the Christian Legal Society, or the ACLU.” (Mihet Decl., Doc. 221-1, ¶ 240.) As is clear from the context, Mr. Mihet was referring to *staff* counsel from national rights groups who are not local—e.g., the Christian Legal Society Center for Law and Religious Freedom—not local chapter affiliates. It should also be self-evident that the ACLU would never represent Plaintiffs in a counseling ban challenge regardless of where its lawyers are.

4. Contrary to Defendants’ responses (County Resp. 7–8; City Resp. 6–7), the *Vazzo* fee motion filed by Liberty Counsel nearly four years ago, which was never heard by the *Vazzo* court, is irrelevant to this case. As this Court has held, the relevant community for reasonable rate determination is Palm Beach County, not Tampa. *See DJ Lincoln*, 2022 WL 4287640, at \*8. Moreover, in April 2023 the City of Tampa settled the *Vazzo* plaintiffs’ claim for prevailing party attorney’s fees and costs for \$950,000, which is \$350,000 more than the amount claimed in the 2019 fee motion.<sup>8</sup> Likewise irrelevant is the 2021 fee motion filed by Liberty Counsel in *Maryville Baptist Church, Inc. v. Beshear*, W.D. Ky. No. 3:20-cv-00278-DJH-RSE. Louisville, Kentucky is not in Palm Beach County, Florida, and Defendants do not explain why this Court should pay attention at all to fee litigation in another state.

5. There is no justification for devaluing Plaintiffs’ lawyers’ work on the basis that it was performed pro bono or outside of commercial law. (County Resp. 5, 7.) First, as shown in Plaintiffs’ Fee Motion (p. 7 n.7), Liberty Counsel’s pro bono arrangement with Plaintiffs does not change the reasonable rate analysis. *See Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (“That a nonprofit legal services organization may contractually have agreed not to charge any fee of a civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way.”). Second, in cases where the stakes are comparably high, there is no justification for valuing the work of for-profit lawyers higher than the work of not-for-profit lawyers. Indeed, the Supreme Court counseled against this attitude decades ago:

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<sup>8</sup> *Liberty Counsel Receives \$950,000 Settlement for Counseling Ban Victory*, Liberty Counsel (May 2, 2023), <https://lc.org/newsroom/details/050223-liberty-counsel-receives-dollar950000-settlement-for-counseling-ban-victory>.

Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.

*City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (cleaned up). Thus, while the outcome of “bet the company” litigation is undoubtedly important to the company, the outcome of First Amendment, “bet the Constitution” litigation—especially difficult, complex, undesirable First Amendment litigation—is important to the country. (See Pt. I.A, *supra*.) Cf. *Machesky v. Bizzell*, 414 F.2d 283, 289 (5th Cir. 1969) (“Numerous Supreme Court opinions attest to the fact that First Amendment rights are not private rights of the [litigants] so much as they are rights of the general public.”) Thus, though they do not have quite the same cachet, First Amendment “bet the Constitution” litigators are, at least, no less valuable to their clients (and the public) than “bet the company” litigators, and their recoverable hourly rates should be commensurate.<sup>9</sup>

\* \* \*

Liberty Counsel achieved an excellent result in this case that changed the constitutional landscape for counseling ban litigation. (See Pt. I.B, *supra*.) Cf., e.g., *Gares v. Willingboro Twp.*, No. CIV. 91-4334 (GEB), 1995 WL 125873, at \*8 (D.N.J. Mar. 10, 1995) (“[W]hile Plaintiff was a prevailing party, this litigation did not change the landscape of employment discrimination law.”). Plaintiffs’ lawyers, however, do not seek the highest, “bet the company” rates known to the Court.<sup>10</sup> Rather, they seek rates commensurate with the categories of highly skilled and highly experienced litigators whose track records have been recognized by the Court to justify rates at the

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<sup>9</sup> Cf. *In re Relativity Fashion, LLC*, 565 B.R. 50, 68 (Bankr. S.D.N.Y. 2017) (“The reasonableness of a party’s choice of counsel, and the reasonableness of the attorneys’ fees that are thereby incurred, depends on the complexity and importance of the matter being handled. A complicated, fast-paced, “bet the company” litigation requires counsel of higher caliber (and expense) than a routine case that has little at stake. A party may not need a Ferrari to go to the corner grocery store, but winning a Grand Prix race is a different matter.”).

<sup>10</sup> See *Kleiman v. Wright*, No. 18-80176-CVBloom/Reinhart, 2020 WL 1980601, at \*3 (S.D. Fla. Mar. 7 2020) (citing 2015 fee order for proposition that “[t]he highest rate billed in Palm Beach County is approximately \$850 per hour for high-stakes ‘bet the company’ litigation.”).

higher end of the reasonable range. Defendants offer no persuasive reason to deny Liberty Counsel these rates.

**B. There is no justification for devaluing non-appearing attorneys' work to paralegal rates.**

Contrary to Defendants' responses (County Resp. 2–3; City Resp. 7), the Court should not penalize Liberty Counsel for not seeking pro hac vice admission for every attorney who worked on the case where the only attorneys who *appeared* in the case are members of the Court's bar, and no attorney violated the Court's rules.

The Court's Attorney Rule 4 provides, in pertinent part, "Only members of this Court's bar may *appear* as attorneys before the Court, except when the Court permits an *appearance* pro hac vice." S.D. Fla. L.R., Atty. R. 4(a) (emphasis added). Regarding pro hac vice appearance, the Rule provides, "An attorney who . . . is not admitted to practice in the Southern District of Florida may, upon submission of a pro hac vice motion filed and served by co-counsel admitted to practice in this District, be permitted to *appear and* participate in a particular case." S.D. Fla. L.R., Atty. R. 4(b)(1) (emphasis added). By its plain language, Attorney Rule 4(a) prohibits the *appearance* of attorneys who are not members of the Court's bar, unless permitted to *appear* pro hac vice. Attorney Rule 4(b) provides the pro hac vice process. Every Liberty Counsel attorney who *appeared* in this case on behalf of Plaintiffs is a member of the Bar of this Court. No attorney who worked on the case and who was not admitted to the Bar of this Court *appeared* in the case. Thus, no attorney who worked on the case violated any Local Rule.

It would be unfair to penalize Plaintiffs' counsel with a rate reduction, to paralegal rates, where none of Plaintiffs' attorneys violated any rule. The principal case cited by both Defendants, *Zech v. Commissioner of Social Security*, 680 F. App'x 858 (11th Cir. 2017), does not require the Court to do so. First, *Zech* is an unpublished decision of the Eleventh Circuit which, under Eleventh Circuit Rule 36-2, is "not considered binding precedent." Second, *Zech* is an Equal Access to Justice Act (EAJA) case, which contains an attorney's fee scheme different from 42 U.S.C. § 1988. Third, the *Zech* court did not hold that district courts *must* reduce the rates of counsel who work on a case without seeking permission for pro hac vice appearance, or even that such a reduction is right. Rather, the court explained that the lenient abuse of discretion standard that applied to its review of a fee award "usually implies a range of choices, and we will affirm even if we would have decided the matter the other way." 680 F. App'x at 859. Thus, the court explained, "while

the magistrate judge was not required to award compensation in this manner, his decision represented one choice in a range of permissible options that he was free to choose from.” *Id.* at 860.

Importantly, neither the Eleventh Circuit nor the magistrate judge it affirmed, *see Zech v. Colvin*, No. 14-81426-CIV-BRANNON, 2016 WL 8996959 (S.D. Fla. Mar. 10, 2016), elucidated the factual circumstances on which the court held the rate reduction was not an abuse of discretion. For example, neither decision tells us whether all attorneys who appeared in the case were members of the bar of the Court, and that the work of attorneys who did not seek permission to appear *pro hac vice* was limited to work that did not require an appearance and was always supervised by members of the Court’s bar. And Defendants do not cite any binding or persuasive precedent that the work of non-admitted attorneys should be devalued to paralegal rates under those circumstances. *Cf., e.g., Cunningham v. Berryhill*, No. 17-cv-10022-KMM, 2018 WL 5098890, at \*1–2 (S.D. Fla. Aug. 30, 2018) (adopting magistrate recommendation to reduce plaintiff’s attorneys’ rates where none was admitted to the Court’s bar or sought permission for *pro-hac vice* appearance). In the absence of any Local Rule violation by a Liberty Counsel attorney, and in the absence of binding authority requiring a reduction under the specific circumstances of this case, this Court should not punish Plaintiffs’ counsel with such a reduction.

The better reasoned approach is that taken by the Ninth Circuit in *Winterrowd v. American General Annuity Insurance Co.*, 556 F.3d 815 (9th Cir. 2009). The *Winterrowd* reviewed an arrangement where prevailing plaintiffs, whose counsel of record were in-state and admitted to the bar of the district court, sought fee recovery for an additional non-appearing, out-of-state lawyer who worked on the case under the supervision of the admitted attorneys but “did not physically appear before the [district court], did not sign pleadings in the case before the [district court], had minimal, nonexclusive contacts with the . . . plaintiffs . . . and did not render legal services directly to the plaintiffs,” and was “not admitted *pro hac vice* in connection with the case before the [district court], but no evidence in the record shows that he would not have routinely been so admitted had he applied.” 556 F.3d at 817, 825.

In holding that the plaintiffs could fully recover for the non-admitted attorney’s work, the court reasoned:

Today, largely because of the benefits of modern technology, hundreds of U.S.-based law firms are composed of many hundreds, or even thousands, of lawyers and support personnel contemporaneously doing business in many states and throughout the world. Lawyers throughout the United States regularly participate

in teleconferences and group email sessions with other lawyers in other states, and lawyers and paralegals from one or more firms participate in massive discovery projects arising out of a single case concerning papers and data located in several states. In many such instances, only a small fraction of the lawyers involved in a case are members of the bar of the state where the presiding court sits. Current law does not compel us to be judicial Luddites, and we may properly accommodate many of the realities of modern law practice, while still securing to federal courts the ability to control and discipline those who practice before them.

*Id.* at 819–820. Thus, the court continued,

Our holding does not adversely impact the very important role *pro hac vice* admissions play in our federal court system. An out of state attorney must still apply for *pro hac vice* admission if that attorney appears in court, signs pleadings, or is the exclusive contact in a case with the client or opposing counsel. Moreover, an attorney may not receive attorney's fees under the holding in this case if there is evidence he did not meet the legal qualifications to be admitted *pro hac vice* to the bar of the relevant court had he applied; thus, disbarred, suspended or otherwise unqualified attorneys may not be the beneficiaries of the holding in this case. Although we agree with the dissent that “there is a reason behind” the *pro hac vice* rule, we need not apply the rule in a draconian fashion when the attorney has not “appeared” in front of the court, thus denying the . . . plaintiffs their statutory right to recover fees.

*Id.* at 825–26. On remand, the district judge awarded the plaintiffs a fully compensatory market rate for the non-appearing, out-of-state attorney, without reduction for not seeking permission to appear *pro hac vice*. No. CV 00-0677 CAS (RCx), 2010 WL 11507799, at \*7 (C.D. Cal. Feb. 8, 2010).

The non-appearing, out-of-state Liberty Counsel lawyers for whom Plaintiffs seek fee recovery in this case are analogous in all respects to the non-appearing attorney in *Winterrowd* for whom the plaintiffs there were permitted to recover a fully compensatory market rate. This Court should apply the sound reasoning of *Winterrowd* and likewise allow Plaintiffs a full recovery for their non-appearing lawyers.

**C. Liberty Counsel’s hours worked are reasonable and commensurate with the complexity of the case and intensity of litigation.**

Plaintiffs’ win was hard fought, not only because of the difficulty, complexity, and undesirability inherent in counseling ban litigation (*see* Pt. I.A, *supra*), but also because Defendants pushed back at every point. Every considered allegation, every vetted argument, every fact developed in discovery, and every prepared presentation to this Court and the Eleventh Circuit was important to Plaintiffs’ excellent result, and Plaintiffs’ counsel should be fully compensated for all of it.

**1. The City's drive-by objections are deficient and should not be accepted by the Court.**

The City attempts to cover its purported objections for “Excessive Time,” “Block Billing,” “Double Billing by Multiple Attorneys,” “Billed in the *Vazzo* case,” and “Clerical Tasks” by affixing codes to Plaintiffs’ counsel’s time entries and then, in drive-by fashion, providing a short paragraph for each category that only generally describes why the category is objectionable. (City Resp. 11, 14–15, Ex. C.) But for all these categories, the City fails to provide any specific analysis of why any particular time entry belongs in the objectionable category. In this Circuit, however, “[g]eneralized statements that the time spent was . . . unreasonable . . . are not particularly helpful and not entitled to much weight. As the district court must be reasonably precise in excluding hours thought to be unreasonable or unnecessary, so should be the objections and proof from fee opponents.” *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988). The City’s approach fails to meet this standard, and the Court should disregard the City’s objections.

For example, the City tagged various time entries with “ET” for “Excessive Time” and “DB” for “Double Billing by Multiple Attorneys,” and then addressed both categories in a single, general paragraph seeking a reduction of 30.6 hours. (City Resp. 14–15.) But the City provides no explanation for any claimed “Excessive Time” entry as to why the time is claimed to be excessive, whether in relation to a particular filing, event, or the case as a whole. Furthermore, there is no explanation for the 30.6 hour calculation, given that the total of the City’s “ET” and “DB” tags far exceeds that number.

Similarly deficient are the City’s objections for “BV” time entries the City claims to have been “Billed in the *Vazzo* case.” (City Resp. 15, Exs. C, D.) A cursory comparison of the “BV” entries in this case with the *Vazzo* time entries, however, shows that the entries are not duplicative. For example, attorney Mihet’s June 26, 2018 entry in this case, “Review Supreme Court’s decision in NIFLA; consider implications for SOCE litigation” for 1.70 hours (Doc. 229-3 at 9) is not duplicative of a *Vazzo* entry on the same date with the same description for 0.70 hours (Doc. 229-4 at 2)—a *different* duration. There is no rule against allocating the time entry for a task between two different cases where the task is relevant to both, and the different duration entered in each case is evidence of allocation, not duplication. Moreover, there is no rule requiring fee counsel in a given case to account for every time entry that may also have been partially allocated to other similar cases being handled by the attorney.

The City’s “Block Billing” or “BB” objections suffer from the same deficiency. Moreover, under scrutiny, the City has systematically applied the “BB” objection tag to entries that are facially not improper block billing because the “relatedness” of the grouped tasks is obvious. *See DJ Lincoln*, 2022 WL 4287640, at \*9. For example, the City’s first “BB” tag, on the second page of Plaintiffs’ counsel’s time report, is on attorney Mast’s entry of December 13, 2017, “Receive and review amended County ordinance banning SOCE counseling; consider impact of amendments; discuss same with Julie Hamilton.” (Doc. 229-3 at 2.) All of the grouped tasks relate to the application of the County’s counseling ban ordinance to the Plaintiff Julie Hamilton. None of the tasks is unrelated to any other. Thus, under the applicable standard of relatedness, the entry is not an example of improper block billing. None of Plaintiffs’ counsel’s time entries tagged “BB” by the City run afoul of the applicable standard.

The Court should disregard all of the City’s drive-by “ET,” “BB,” “DB,” “BV,” “TT,” and “CT” objections as deficient for failure to provide sufficient explanation. Moreover, the Court should disregard all of the City’s “BB” objections for the additional reason that they do not identify improper block billing under the applicable standard.

## **2. The County’s billing judgment objections are meritless.**

The County’s objection that Plaintiffs did not produce records of the attorney hours they excluded from their fee motion is meritless. (County Resp. 12–15.) The County cites no binding authority for the proposition that production of excluded hours is a necessary condition to recovering a fully compensatory fee. Plaintiffs’ fee motion, supported by the Mihet Declaration, adequately addresses billing judgment according to Supreme Court requirements. (Fee Mot. 9–11.)

Inexplicably, the County points to a settlement communication between Plaintiffs’ and Defendants’ counsel regarding additional *damages* as evidence of Plaintiffs’ counsel’s lack of billing judgment and “conscious intent to weaponize Plaintiffs’ billing.” (County Resp. 14–15, Ex. 2.) On its face, however, the communication’s only references to attorney’s fees concern fees already expended in seeking compliance with the Eleventh Circuit’s mandate and fees for “substantive work” going forward. The County’s reliance on the inapposite communication betrays the weakness of its billing judgment argument.<sup>11</sup>

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<sup>11</sup> The attached communication was the last in a string of fourteen e-mail messages—the County omitted the prior thirteen from its filing.

### 3. The County's "cookie cutter" documents objection is meritless.

The County objects that Plaintiffs' 60-page, 308-paragraph complaint and near 30-page preliminary injunction motion "should have taken no more than 10–15 hours total to draft" (County Resp. 15–17.) The County bases its argument on the grossly exaggerated claim that the documents are "virtually identical" to the corresponding documents filed in *Vazzo*, challenging Tampa's counseling ban ordinance. (County Resp. 15.) The County's argument cannot be taken seriously.

As shown above, counseling ban cases are uniquely difficult and complex. (Pt. I.A, *supra*.) Thus, while the substance of the laws challenged and the constitutional protections violated across the handful of cases nationwide have similarities, inevitably resulting in similarities across case filings, the plaintiffs and defendants in each case are unique, as are the critical facts supporting each plaintiff's standing and injury, and the critical facts showing each defendant's failure under strict scrutiny. Thus, every case is unique, and the necessary front-end care in drafting—required both to prepare a winning case and to satisfy Rule 11 obligations that attach afresh in every new case—takes time. Counseling ban challenges cannot be brought using "form" or "cookie cutter" filings despite their similarities in some respects. To be sure, a review of the County's exhibits show that more than half of the complaint here was different from the *Vazzo* complaint, and the preliminary injunction motion here was likewise substantially different from *Vazzo* as necessary for this case. (Docs. 228-6 to 228-8.)

The ADA cases cited by the County in support of its "cookie cutter" argument are inapplicable to counseling ban litigation. Those cases address "routine" litigation "evidenced by the boilerplate nature of all legal tasks performed, including drafting of pleadings, discovery, settlement papers, and the dearth of any legal research other than to support counsel's fee application." *Brother v. Miami Hotel Investments, Ltd.*, 341 F. Supp. 2d 1230, 1240 (S.D. Fla. 2004); *see also, e.g., Access for the Disabled, Inc. v. Missouri Mart, Inc.*, No. 8:05CV392 T23MSS, 2006 WL 5432711, at \*3 (M.D. Fla. Dec. 7, 2006) ("This type of litigation is repetitive and form intensive, as demonstrated by the eight other cases filed by Plaintiffs on the same day this case was filed, as well as by the over two-hundred ADA cases filed by Plaintiffs on the Middle District since 2000."). Despite the similarities between the papers in *Vazzo* and this case, neither these two cases nor Liberty Counsel's other counseling ban challenges—totaling five filed over a seven-year period—can be called "routine" or "boilerplate."

In this Circuit, “the measure of reasonable hours is determined by the profession’s judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done.” *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1306 (11th Cir. 1988). Moreover, “[g]eneralized statements that the time spent was . . . unreasonable . . . are not particularly helpful and not entitled to much weight. As the district court must be reasonably precise in excluding hours thought to be unreasonable or unnecessary, so should be the objections and proof from fee opponents.” *Id.* at 1301. The County merely asserts, without citation to any principle or authority, that Plaintiffs’ counsel should have taken only 10-15 hours to draft the complaint and preliminary injunction motion because they were too similar to *Vazzo*’s. But, just as “the time expended by opposing counsel is seldom relevant to a determination of hours reasonably expended on many tasks,” *id.* at 1305, opposing counsel’s mere opinion means little when it comes to how long the prevailing party’s counsel should have worked to win the case.

#### **4. The County’s duplicative work objection is meritless.**

The Court should not accept the County’s objection that two Liberty Counsel attorneys “billed for preparation, travel, and attendance at depositions.” (County Resp. 17.) But cutting hours as duplicative “is warranted only if the attorneys are *unreasonably* doing the *same* work. An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation.” *Johnson v. Univ. Coll. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983). Under this standard, no reduction in Liberty Counsel’s hours is warranted.

Liberty Counsel’s sending two lawyers to the case depositions was both reasonable and necessary. As shown in Plaintiffs’ Fee Motion (pp. 9–10), the parties’ discovery efforts preceding the hearing on Plaintiffs’ motion for preliminary injunction included several vigorously contested discovery disputes, requiring briefing and hearings before the Court and numerous related conferences between counsel. The parties exchanged approximately 18,290 pages of documents in discovery, including approximately 17,400 pages produced by Defendants, which required Plaintiffs’ counsel’s careful review and incorporation into deposition and argument outlines on an expedited preliminary injunction timetable. And given the need for attorneys Mihet and Gannam to divide responsibilities for hearing preparation and presentation on the expedited schedule, which necessarily included incorporation of deposition testimony, it was critical for both of them to be at each deposition even if only one of them was taking or defending.

Specifically, the time entries for two attorneys’ preparing for and attending the same depositions do not reflect the numerous real-time prompts and comments provided by one to the other during questioning (e.g., by handwritten notes and notes typed on a shared computer screen), or the substantive conferences between them on every break, or how their shared participation in the deposition was invaluable to their shared responsibilities in subsequent hearings, trial and appellate court briefing, and in preparing appellate counsel for oral argument. Yet this value added is self-evident to regular practitioners in high stakes, multi-defendant, intensely contentious litigation—almost guaranteed to involve a significant appeal, and more likely than many cases to reach the Supreme Court. And, under the circumstances, the value added by both attorneys’ participation would justify billing all of their time to the hypothetical fee-paying client deemed foundational to the reasonable fee analysis. *See DJ Lincoln*, 2022 WL 4287640, at \*7 (“The Court must consider what a reasonable, paying client would be willing to pay, bearing in mind all of the case-specific variables that courts have identified as relevant to the reasonableness of attorney’s fees . . . .”) (cleaned up)).

**5. The County’s oral argument preparation objection is meritless.**

The County’s objection that Plaintiffs excessively billed for oral argument preparation (County Resp. 17–18) falls similarly flat given the nature, complexity, and relative novelty of the constitutional claims involved in this case. Citing largely to Third Circuit precedent that held oral argument preparation excessive, the County overlooks the more recent and relevant decision by the Third Circuit upholding such preparation in a “complex constitutional case with numerous appellants and amici . . . .” *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 195 F. App’x 93, 100 (3d Cir. 2006). With amici at both the district and circuit level, a statutory challenge of relative novelty in constitutional law, and litigation spanning years, the present case clearly presented a “complex constitutional” question and Plaintiffs’ counsel should not be penalized for their reasonable preparation.

While most of the cases the County cites turn on the excessive nature of “moot court” sessions or argument practice, here Plaintiffs’ appellate team conducted only a three-and-one-half-hour moot court session in preparation for argument, and every time entry on appeal reflects a substantive contribution by each attorney on the team. (DE 221-2 at 59–60) *See ACLU of Ga. v. Barnes*,

168 F.3d 423, 432 (11th Cir. 1999). Here the complex constitutional issues involved in the argument merited the involvement of Liberty Counsel’s small appellate litigation team, which is “the customary practice of multiple-lawyer litigation” in this area of law. *Barnes*, 168 F. 3d at 432.

Further, the importance of preparation was enhanced by the chance of a forthcoming certiorari petition from Defendants to the Supreme Court of the United States. And even on less novel constitutional issues, oral argument preparation fees have been upheld in this Circuit where “the time spent by plaintiff s attorneys preparing for and attending the Eleventh Circuit oral argument was necessary in light of the complexity of the issues to be addressed and the critical importance of the oral argument to the successful prosecution of the case.” *Strickland v. Alexander*, No. 1:12-CV-02735-MHS, 2016 WL 690894, at \*4 (N.D. Ga. Jan. 12, 2016). Plaintiff’s counsel should be allowed to recover the full amount for their oral argument preparation.

**6. The County’s block billing objections are meritless.**

Like the City’s block billing objections (*see* Pt. II.C.1, *supra*), the County’s block billing objections are meritless (County Resp. 18–20), and for the same reason. For example, like the City, the County objects to attorney Mast’s December 13, 2017 time entry, “Receive and review amended County ordinance banning SOCE counseling; consider impact of amendments; discuss same with Julie Hamilton.” (Doc. 228-11 at 1.) As shown above, all of the grouped tasks relate to the application of the County’s counseling ban ordinance to the Plaintiff Julie Hamilton. None of the tasks is unrelated to any other. Thus, under the applicable relatedness standard, *see DJ Lincoln*, 2022 WL 4287640, at \*9, the entry is not an example of improper block billing. None of Plaintiffs’ counsel’s time entries identified as block billing by the County run afoul of the applicable standard.

**7. The County’s vagueness objections are meritless.**

The County urges that “the vagueness problem [with Plaintiffs’ counsel’s time entries] should not be ignored by this Court” without (ironically) identifying a single vague time entry, “in an effort to avoid confusion.” (County Resp. 21.) The Court should reject the County’s *vague* vagueness objection.

**8. The County’s clerical work objection is meritless.**

The County’s objections to time entries containing “clerical work” are not well founded. (County Resp. 22–23.) Many of the flagged time entries appear to be entries for compensable legal work that end with the filing or service of a substantive document. (*See, e.g.*, Doc. 228-13 at 1 (HGM 8.10 entry for June 13, 2018, “Final review and revision of initial pleadings; discuss and

revise same with LC team, finalize and file same.”.) Such objections to entire time entries for related tasks involving substantive document drafting or revision, for the sole reason that they end with the filing or service of the document, do not reflect modern electronic filing practice. The Court’s CM/ECF NextGen Administrative Procedures expressly require electronic filing of all documents with very limited exceptions (§ 3A), require all admitted attorneys to register and train for use of the CM/ECF system (§ 3B), require all attorneys to secure their own login credentials (§ 3C), make attorneys responsible for all documents filed with their credentials (§ 3C), and treat all filings made under the attorney’s credentials as having been signed by the attorney (§ 3C). Indeed, electronically filing a pleading or motion is as natural and appropriate for an attorney as signing the pleading or motion, and generally adds so little time to the attorney’s completion of the document, such that cutting an entire time entry for substantive drafting or revision of the document on the sole basis that the time entry ends with electronic filing (or electronic service by e-mail) would be unreasonable. The Court should reject the County’s “clerical work” objections lodged on these grounds.

**9. The City’s travel time objection is meritless.**

The City’s objection to Liberty Counsel’s travel time should be overruled because the objection is based on the false premise that plenty of lawyers qualified to handle this litigation are already in Palm Beach County. (City Resp. 13–14.) As shown above (Pt. I.A), all counseling ban challenges in the country since 2012 have been filed or taken over by one of only three national law firms, and none of them has an office in Palm Beach County. And at the time this case was filed, only Liberty Counsel (three cases) and PJI (one case) had such experience. Liberty Counsel, headquartered in the Orlando area, is the only such firm in Florida, and is the closest to Plaintiffs. Thus, the travel time of Liberty Counsel’s attorneys—which they minimized where possible (Mihet Decl., Doc. 221-1, ¶¶ 12, 24)—was both reasonable and necessary, and is thus fully compensable.

**D. Plaintiffs are entitled to recover their post-offer fees to litigate their fees.**

Defendants each contend that Plaintiffs’ counsel cannot recover fees for work after they served their respective offers of judgment (County Resp. 21–22; City Resp. 12–13), even though Defendants did not purport to liquidate any specific amount of fees in their offers and are fighting Plaintiffs tooth and nail to reduce what they *did* offer. In light of traditional rules of contract interpretation and persuasive authority, however, Defendants’ attempt to cut-off Plaintiffs’ counsel’s fee-

on-fee recovery is undermined by the plain language and ambiguities in their own offers of judgment.

**1. Section 1983 plaintiffs who accept a Rule 68 offer of judgment may recover attorney’s fees for preparing a post-offer fee petition.**

At the outset, the Eleventh Circuit has universally “allowed parties to recover the cost of establishing their right to, and the amount of attorney’s fees—the right to fees-on-fees.” *Norelus v. Denny’s, Inc.*, 628 F.3d 1270, 1301 (11th Cir. 2010). This includes fees brought under 42 U.S.C. § 1988. *See Jonas v. Stack*, 758 F.2d 567, 568 (11th Cir. 1985) (“[A] prevailing party’s counsel is entitled to reasonable compensation when he litigates his own claim for entitlement to § 1988 fees.”). Not allowing such fees, the Eleventh Circuit has reasoned, “would undermine the congressional policies behind awarding attorney’s fees.” *Norelus*, 628 F.3d at 1301 (citing *Jean v. Nelson*, 863 F.2d 759, 780 (11th Cir. 1988)).

Despite the universal recognition of a prevailing party’s counsel’s entitlement to “fee on fees” under § 1988, Defendants contend that the “plain language” of their Rule 68 offers of judgment cut-off Plaintiffs’ right to fee on fees. (DE 228, at 22; DE 229, at 13.) That is incorrect. Put simply, Rule 68 provides that a plaintiff who accepts an offer of judgment is entitled to “costs then accrued.” Fed. R. Civ. P. 68. In *Marek v. Chesny*, the Supreme Court held that the “costs” referred to in Rule 68 encompass § 1988 attorney’s fees. 473 U.S. 1, 9 (1985). Critically, the *Marek* Court did not address whether § 1983 plaintiffs who *accept* a Rule 68 offer of judgment may recover attorney’s fees for preparing and litigating a post-offer fee petition. Even so, courts routinely find that plaintiffs who accept a Rule 68 offer of judgment are entitled to fees for litigating fees. *See, e.g., Lasswell v. City of Johnston City*, 436 F. Supp. 2d 974, 981–82 (S.D. Ill. 2006) (holding that prevailing civil rights plaintiffs who accepted offer of judgment were entitled to § 1988 attorney’s fees for time spent related to preparing and filing their fee request); *Eccles v. City of Lewiston Libr. Bd. of Trustees*, 2021 WL 277196, at \*6–7 (D. Idaho Jan. 27, 2021) (same); *Walker v. United Fin. Serv.*, 2010 WL 4942008, at \*5 (E.D. Wis. Nov. 30, 2010) (finding that prevailing party who accepted offer “may recover post-offer attorneys’ fees”); *E.E.O.C. v. Hamilton Standard Div., United Techs. Corp.*, 637 F. Supp. 1155, 1158 (D. Conn. 1986) (filing of an offer of judgment did not preclude prevailing plaintiff in civil rights action from recovering attorney fees for services performed after date of the offer where the case ended in a settlement and a stipulated dismissal); *Williams v. Greifinger*, 1999 WL 239684, at \*2 (S.D.N.Y. Apr. 23, 1999) (finding that “it would

be inappropriate to apply Rule 68 to deny plaintiff's counsel fees for time which they spent after the offer was made").

**2. Defendants' Offers of Judgment do not preclude Plaintiffs' right to fees-on-fees.**

Most fatal to Defendants' argument is that their own Rule 68 Offers of Judgment (DE 196-1, 196-2, 203-1, 203-2 [hereinafter the "Offers"]) *failed* to limit attorney's fees to those incurred prior to their respective offers. "As a general matter, courts tend to interpret Rule 68 offers against the defendants, who drafted them, and this orientation has been pronounced with regard to fees, at least in civil-rights cases." Wright & Miller, 12 Fed. Prac. & Proc. Civ. § 3005.1 (3d ed.) (footnote omitted). Where, as here, a court is required to interpret the terms of the Rule 68 offer, courts apply traditional principles of contract law. *See Johnson v. Univ. Coll. of Univ. of Ala.*, 706 F.2d 1205, 1209 (11th Cir. 1983); Robert Rossi, 1 Attorneys' Fees § 6:26 (3d ed.) ("Once accepted, a Rule 68 offer of judgment becomes a settlement agreement, and the usual rules of contract construction apply to interpreting its terms."). "Rule 68 requires that the responsibility for clarity and precision in the offer must reside with the offeror." *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Co-op., Inc.*, 298 F.3d 1238, 1244 (11th Cir. 2002). That being so, "any ambiguity in the terms of an offer must be resolved against its drafter, and therefore, absent a clear indication to the contrary the accepting party cannot be deemed to have received its fees or waived the right to seek them." *Id.* (citation omitted). Contrary to Defendants' contentions, the "plain language" of their Offers do not cut-off Plaintiffs' entitlement to fees for litigating fees. (DE 228, at 21; DE 229, at 13.) Indeed, Defendants' Offers contain at least four flaws and ambiguities that entitle Plaintiffs to recover for time spent litigating both the right to and amount of fees incurred.

*First*, the Offers expressly provide that Plaintiffs may seek "reasonable statutory attorney's fees when deemed to be a component of costs such as under 42 U.S.C. § 1988, as determined by the Court." (Offers 1.) Given that a prevailing party's counsel is entitled to fees-on-fees when he litigates his entitlement to § 1988 fees, *see Jonas*, 758 F.2d at 568, the Offers explicitly allow Plaintiffs' counsel to seek these fees as part their § 1988 recovery. *Cf. Lobianco v. John F. Hayter, Att'y at L., P.A.*, 944 F. Supp. 2d 1183, 1186–87 (N.D. Fla. 2013) (holding that where attorney's fees are allowed to the prevailing party by federal statute, the compensable fees include time spent litigating fees for fees).

*Second*, the Offers only cut off recovery for "costs" that are "accrued to date for all of [Plaintiff's] s claims for relief." (Offers 1.) The Offers do not define "to date" as limiting to the date of

the offer, the acceptance, or even judgment. Indeed, if the Offers had simply limited “costs” to, say, “the date of this offer,” then the Offers might have set a clear and unambiguous limitation of any fees incurred after the dates of the offers. But that is not what the Offers stated; instead, the phrase “accrued to date” is limitless in scope. *Cf. Walker v. United Fin. Serv.*, 2010 WL 4942008, at \*5 (E.D. Wis. Nov. 30, 2010) (concluding that defendant’s offer “includes attorneys’ fees, but does not provide a temporal element for those fees and is, therefore, ambiguous”). And critically, the Offers also included the additional language in parentheses, “including reasonable statutory attorney’s fees *when deemed* to be a component of costs such as under 42 U.S.C. § 1988, *as determined by the Court*” (Offers 1 [emphasis added]), and thus the limitation is far from clear and unambiguous. Because “accrued to date” could apply to Plaintiffs’ “costs” for their “claims for relief” *or* to “reasonable statutory attorney’s fees,” or to both, the Offers are ambiguous.<sup>12</sup> *Cf. Eccles, supra*, 2021 WL 277196, at \*6–7 (finding that such ambiguities in Defendants’ offer of judgment precluded any limitation of the attorney’s fee award to those fees incurred prior to the offer).

*Third*, the inclusion of the phrase “reasonable statutory attorney’s fees *when deemed* to be a component of costs such as under 42 U.S.C. § 1988, *as determined by the Court*” undermines Defendants’ intention that the fees be limited to before the offer. (Offers 1 [emphasis added].) As to this issue, the Ninth Circuit’s decision in *Holland v. Roeser*, 37 F.3d 501 (9th Cir. 1994), is squarely on point. In that case, the court addressed a provision in a Rule 68 offer of judgment that allowed the plaintiffs to recover “costs now accrued and reasonable attorney fees *as determined by the court.*” 37 F.3d at 502 (internal quotation marks omitted) (emphasis added). The issue was whether the plaintiffs could only recover fees incurred before accepting the offer, or if they could also seek fees incurred in preparing their fee motion. *Id.* at 503. Applying the usual rules of contract interpretation for Rule 68 offers of judgment, the court concluded that the phrase “costs now accrued and reasonable attorney fees as determined by the court” was “ambiguous.” *Id.* In so holding, the *Holland* court explained if the offer had simply referred only to “costs now accrued,” then it

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<sup>12</sup> The City’s own supporting authority supports this conclusion. *See Hansraj v. Cooling & Winter LLC*, 2019 WL 13212710, at \*4 (N.D. Ga. Oct. 17, 2019) (“Because the defendants did not include a cut-off date on fees [in their Offer of Judgment], the court finds that it is reasonable to award the plaintiff his reasonable fees expended during the preparation of the fee petition and the motion for fees.”).

would likely constitute a clear and unambiguous limitation on attorney’s fees. But because the offer contained the “additional, ambiguous language ‘costs now accrued *and reasonable attorney fees as determined by the court*[,]’” the court observed, “[o]ne could certainly conclude this fee provision is broader than the cost provision and might extend to those fees not already accrued.” *Id.* at 504 (emphasis in original).

Like the Rule 68 offer of judgment in *Holland*, which contained the additional, ambiguous language “reasonable attorney fees as determined by the court,” 37 F.3d at 504, Defendants’ Offers expressly provide that Plaintiffs may seek “reasonable statutory attorney’s fees *when deemed* to be a component of costs such as under 42 U.S.C. § 1988, *as determined by the Court.*” (Offers 1.) This broadening language shows that that the cost provision “extend[s] to those fees not already accrued,” 37 F.3d at 504, because it requires the Court to “determine[.]” and “deem[.]” Plaintiffs’ entitlement to fees at a future date (Offers 1). Consequently, Defendants’ purported limitation “is no longer clear and unambiguous.” 37 F.3d at 504. Applying the usual rules of contract interpretation for Rule 68 offers of judgment—in which “[a]ny ambiguity in the language of a Rule 68 offer is construed against the offeror,” *Gonzalez v. Chinatown Hotel Corp.*, 808 F. App’x 999, 1002 (11th Cir. 2020)—Defendants’ Offers do not limit the attorney’s fee award to those fees incurred before the offers. *Cf. Duvall v. Portfolio Recovery Assocs., LLC*, 2021 WL 6772976, at \*2 (D. Alaska Apr. 27, 2021) (noting that “even if [Defendant] intended the fee language in its offers to constitute a waiver of post-settlement fees, it was not effective, and Plaintiffs are not precluded from recovering fees incurred after the offers of judgment were accepted”).

*Fourth*, Defendants’ Offers incorrectly lump “costs . . . for all of Otto’s claims for relief” to include “reasonable statutory attorney’s fees.” (Offers 1.) Although the Supreme Court has held that the “costs” referred to in Rule 68 encompass § 1988(b) attorneys’ fees, see *Marek*, 473 U.S. at 9, Defendants’ drafting creates additional confusion by erroneously equating Plaintiffs’ § 1988 fees with their claims for relief. As the Supreme Court explained: “Unlike other judicial relief, the attorney’s fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is *uniquely separable* from the cause of action to be proved at trial.” *White v. N.H. Dep’t of Emp’t Sec.*, 455 U.S. 445, 452 (1982) (emphasis added). Here, Defendants’ offer of judgment is ambiguous because it links “costs” for “all of [Plaintiffs’] claims for relief” with Plaintiffs’ § 1988 fees. (Offers 1.) Because a request for attorney’s fees under § 1988 is collateral to the main

cause of action, attorney’s fees cannot “fairly be characterized as an element of ‘relief’ indistinguishable from other elements.” *White*, 455 U.S. at 452; *accord Lima v. Newark Police Dep’t*, 658 F.3d 324, 332 (3d Cir. 2011) (invoking *White* in rejecting argument that reference to “all of Plaintiff’s claims for relief” in a Rule 68 offer covered attorney’s fees). Therefore, Plaintiffs are entitled to recover post-offer fees because Defendants’ Offers of Judgment erroneously attempt to subsume their § 1988 fees into their claims for relief. *Cf. Barbour v. City of White Plains*, 700 F.3d 631, 634 (2d Cir. 2012) (per curiam) (holding that offer of judgment in civil rights action of \$10,000 per plaintiff “for the settlement of all claims” did not encompass attorneys’ fees, given that attorney’s fees were included within definition of costs in 42 U.S.C. § 1988, that offer did not mention, much less specify amount for, costs, and that attorney’s fees were not fairly characterized as element of damages on substantive claim).

**3. Construing Defendants’ ambiguous Offers of Judgment to deny Plaintiffs’ fees on fees would be “unduly harsh.”**

Defendants’ arbitrary, improper challenges to Plaintiffs’ fee-on-fee request—along with their various meritless attacks on Plaintiffs’ fee petition (*see especially* City Resp. 3–4)—has undermined their obligation to “allow entry of judgment against” them for reasonable attorneys’ fees under § 1988 (Offers 1). Although the purpose of Rule 68 is to promote settlement, “it would be unduly harsh to construe Defendants’ ambiguous Offers of Judgment to deny Plaintiffs’ compensation for their post-judgment collection efforts.” *Valerio v. Total Taxi Repair & Body Shop, LLC*, 82 F. Supp. 3d 723, 740 (N.D. Ill. 2015). Such a result would also set a poor precedent for civil rights attorneys seeking compensation for vindicating their clients’ constitutional rights. As one court observed, “Attorneys will be less likely to take civil rights cases if they know that the time spent establishing and litigating their fees will be uncompensated.” *Lasswell, supra*, 436 F. Supp. at 981–82. “In effect, civil rights attorneys’ hourly rates will be decreased, because a portion of the hours they expend on a case will be uncompensated. Such a result would undercut Congress’ purpose in passing § 1988, that is, to make civil rights cases more attractive to attorneys.” *Id.* (citations omitted); *accord Hutchison v. Wells*, 719 F. Supp. 1435, 1443 (S.D. Ind. 1989) ([F]orcing a civil rights attorney to choose between compensation and his client’s interests in settling thwarts the congressional purpose underlying section 1988. This court declines to adopt such an approach.”). Therefore, in the interest of justice, the Court should allow Plaintiffs to recover attorney’s fees for time reasonably expended establishing their right to such fees.

\* \* \*

In sum, Plaintiffs are entitled to recover post-offer fees because Defendants' Offers of Judgment contain ambiguous additional language, not found in Rule 68, that they may seek "reasonable statutory attorney's fees" to be "determined by the Court." (Offers 1.) As the Seventh Circuit has observed, "[I]f the terms of a Rule 68 offer are not specific and clear, there are opportunities for both confusion and mischief." *Sanchez v. Prudential Pizza, Inc.*, 709 F.3d 689, 691 (7th Cir. 2013). Because any ambiguities must be construed against the drafter, Defendants' Offers did not limit the attorney's fee award to those fees incurred before to the offer. *See Holland, supra*, 37 F.3d at 504. Therefore, the Court should reject Defendants' "mischief"-making and allow Plaintiffs' counsel their entitlement to compensation for litigating their fee petition. *Sanchez*, 709 F.3d at 691. Additionally, Plaintiffs suggest that the lodestar fee should be increased to account for time incurred preparing this reply. *Cf. Eccles, supra*, 2021 WL 277196, at \*6–7 (increasing the initial lodestar calculation to account for time spent preparing plaintiffs' reply to defendant's meritless attempt to torpedo their post-offer fee recovery).

### **III. Liberty Counsel's non-taxable expenses and costs are reasonable and recoverable.**

As shown in Plaintiffs' Fee Motion, § 1988 allows the recovery of all reasonable litigation expenses except routine overhead, and the standard for reasonableness "is to be given a liberal interpretation." *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983). Defendants' objections to Plaintiffs' expense and cost request (County Resp. 27–29; City Resp. 15–17) should be overruled under this lenient standard. Specifically:

1. The City's objections to travel and other expenses based on Plaintiffs' not engaging (non-existent) qualified local counsel to litigate their counseling ban challenge should be denied for the same reasons as their travel time objection should be denied. (*See* Pt. II.C.9.)

2. The County's objections to travel and other expenses based on Plaintiffs' sending more than one attorney to depositions and hearings should be denied for the same reasons as their duplicative work objection should be denied.

3. Defendants' research costs objections should be denied because Plaintiffs' Westlaw charges are reasonably related to research work performed on the case and sufficiently supported by documentation specifically tied to the *Otto v. Boca Raton* file number (17-11). (Mihet Decl., ¶¶ 29–30; Doc. 221-3 at 1–2, 60–97 (057–094).)

4. Defendants' shipping expense objections should be denied because Plaintiffs' counsel's reasonable shipping charges "were necessary to [counsel's] effective representation of Plaintiffs and are of a type routinely and ordinarily billed to clients." (Mihet Decl., ¶¶ 29–30.)

### CONCLUSION

For all of the foregoing reasons, the Court should overrule Defendants' objections and grant Plaintiffs' Fee Motion.

Respectfully submitted,

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