

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:18-cv-80771-ROSENBERG/REINHART

ROBERT W. OTTO, PH.D. LMFT,)
individually and on behalf of his patients,)
and JULIE H. HAMILTON, PH.D., LMFT,)
individually and on behalf of her patients,)
)
Plaintiffs,)
)
v.)
)
CITY OF BOCA RATON, FLORIDA, and)
COUNTY OF PALM BEACH, FLORIDA,)
)
Defendants.)

“This case involved complex and unique issues of constitutional law, and required sophisticated skills in both trial and appellate advocacy.”¹

PLAINTIFFS’ OBJECTIONS TO REPORT AND RECOMMENDATION ON MOTION FOR ATTORNEY’S FEES AND NON-TAXABLE EXPENSES AND COSTS

Pursuant to Local Magistrate Rule 4(a)(1) and 28 U.S.C. §636(b)(1)(A), Plaintiffs Robert W. Otto, Ph.D., LMFT and Julie H. Hamilton, Ph.D, LMFT (“Plaintiffs”) hereby respectfully object to the Magistrate Judge’s Report and Recommendation on Plaintiffs’ Motion for Attorney’s Fees and Non-taxable Expenses and Costs (ECF No. 240). For the following reasons, the Report and Recommendation should be overruled.

INTRODUCTION

Plaintiffs brought this civil action in 2018 under 42 U.S.C. § 1983 to challenge the constitutionality of Boca Raton City Ordinance 5407, “Prohibition Of Conversion Therapy On Minors,” and Palm Beach County Ordinance 2017-046, “Prohibition Of Conversion Therapy On Minors” (collectively the “Ordinances”), under various statutory and constitutional provisions, including the First and Fourteenth Amendments to the United States Constitution. (ECF No. 1, ¶ 2.) In extensive litigation that is now in its sixth year, the Court denied Plaintiffs’ motion for

¹ (ECF No. 240, Report and Recommendation on Motion for Attorney’s Fees and Non-taxable Expenses and Costs, at 33-34 (emphasis added).)

preliminary injunction (ECF No. 141), and the Eleventh Circuit reversed, holding that “the challenged ordinances violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny.” *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020), *reh’g den.*, 41 F.4th 1271 (11th Cir. 2022).

After the Eleventh Circuit denied rehearing and this Court entered the preliminary injunction (ECF No. 168), Defendants eventually repealed their respective Ordinances, citing the Eleventh Circuit’s binding opinion that the Ordinances are unconstitutional. (ECF No. 169-1 at 1; ECF No. 174-1 at 3.) After additional proceedings concerning jurisdiction, discovery, and the amendment of Plaintiffs’ complaint (ECF Nos. 172, 176, 182, 195), each Defendant made an offer of judgment to each Plaintiff, for money damages “plus the [Defendant’s] pro rata share of [Plaintiffs’] costs (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) accrued to date for all of [Plaintiffs’] claims for relief.” (ECF Nos. 196-1, 196-2, 203-1, 203-2.) Plaintiffs accepted the offers (ECF Nos. 196, 203), and on April 6, 2023, the Court entered “Final Judgment in favor of Plaintiffs and against Defendants on all of Plaintiffs’ claims for relief” (ECF No. 211 at 1 (cleaned up)), awarding Plaintiffs “damages on all of [their] claims for relief.” (ECF No. 211 at 1–2.) By virtue of the merits-based preliminary injunction, accepted offers of judgment, and final judgment on all their claims, Plaintiffs are prevailing parties under 42 U.S.C. § 1988 and entitled to recover their attorney’s fees and non-taxable expenses and costs for *all* work reasonably performed by their attorneys during the six years of litigation in this case.

Indeed, by obtaining a preliminary injunction on the merits of their claims, final judgment, and damages, Plaintiffs obtained excellent results and secured all the relief they sought in this action. As such, Plaintiffs are entitled to a fully compensatory fee for work on all their claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (“Where a plaintiff has obtained excellent results, his attorney should recover a *fully compensatory fee*. Normally, this will encompass *all hours* reasonably expended on the litigation, and indeed, in some cases of exceptional success an enhanced award may be justified.” (emphasis added)).

The Report and Recommendation significantly erred in a number of respects and failed to follow the commands of *Eckerhart*. Specifically, the Report and Recommendation erred by: (A) categorically excluding all hours for fees-on-fees, even though Defendants failed to liquidate their proposed fee offer to any specific amount, and instead fought vigorously against the award of any

fees (ECF No. 240 at 8-18); (B) categorically excluding all travel time and expenses for Plaintiffs' counsel even though the record demonstrates there was (and is) no local counsel available and willing to competently represent the pariah Plaintiffs in this district in a socially detestable cause like the one in suit (*id.* at 19-20); (C) unreasonably and unjustifiably imposing a twenty-five (25) percent across-the-board reduction on the amount of hours which Plaintiffs' counsel were required to invest in this case (*id.* at 28); (D) significantly and unjustifiably reducing the hourly rates of Plaintiffs' counsel, improperly relying on the Tampa market rather than the correct, Palm Beach County market, and failing to apply current market rates (*id.* at 32-36); (E) refusing to apply a lodestar multiplier where one was warranted and appropriate (*id.* at 36-39); and (F) refusing to award Plaintiffs the expenses incurred for computerized legal research and shipping. (*Id.* at 39-41.)

ARGUMENT

I. THE REPORT AND RECOMMENDATION ERRED BY DENYING PLAINTIFFS' UNQUESTIONABLE RIGHT TO FEES ON FEES.

The Report and Recommendation categorically excluded 169.5 of Plaintiffs' reasonable hours because this time was "incurred after they accepted the Offers [of Judgment]." (ECF No. 240 at 26.) The Report and Recommendation concludes that these are "categorically non-recoverable fees." (ECF No. 240 at 27.) This is erroneous and should be overruled.

A. Defendants Waived the Right to Object to Fees on Fees by Failing to Offer a Liquidated Fees Amount and by Vigorously Contesting All Aspects of Plaintiffs' Fee Motion.

The Report and Recommendation contends that Defendants' Offers of Judgment "unambiguously excluded fees-on-fees," and that Plaintiffs "accepted an offer of judgment that called for a fixed payment plus reasonable attorney's fees and costs accrued to date." (ECF No. 240 at 13.) This is incorrect both factually and legally. First, Defendants did not offer a *fixed* total payment, as the Report and Recommendation implies. (*See* ECF Nos. 196-1, 196-2, 203-1, 203-2.) Rather, the amount of fees was left intentionally open to a contested determination by the Court as to the appropriate amount. (*See, e.g.*, ECF No. 196-1 ("including reasonable statutory attorney's fees when deemed to be a component of costs . . . as determined by the Court" (emphasis added).) Therefore, whatever precatory language Defendants included in the Offers of Judgment and its

import into the fees awardable to Plaintiffs here, there is little question that the Offers of Judgment did not liquidate the awardable fees at a *fixed* amount.

Second, Defendants cannot decline to set a fixed amount of attorney's fees in their Offers of Judgment, attempt to cut off Plaintiffs' entitlement to fees on fees by inclusion of an "accrued to date" provision, then vigorously litigate the amount of attorney's fees to which Plaintiffs are entitled, and expect a windfall by requiring Plaintiffs to extensively litigate the issue of their attorney's fee award *for free*. This is not how prevailing party fee recovery works under §1988.

Initially, the Report and Recommendation suggests, incorrectly, that Plaintiffs omitted any argument regarding Defendants' conduct in failing to offer a liquidated amount for fees and vigorously contesting Plaintiffs' fee award. (ECF No. 13-14 n.4.) In fact, Plaintiffs specifically raised this issue, arguing that fees on fees are recoverable because "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." (ECF No. 235 at 19.)

The Seventh Circuit's decision in *Morjal v. City of Chicago*, 774 F.3d 419 (7th Cir. 2014) explains the problem with Defendants' tactic. Permitting losing defendants to concede entitlement to attorney's fees in an offer of judgment but vigorously challenge the amount would have a "deleterious impact" on the balance between Section 1988 and Rule 68. *Id.* at 421. In effect,

such fee restrictions could allow offering defendants to object to every dollar requested in the fee petition as unreasonable, unnecessarily protracting litigation but avoiding any judgment for the fees incurred by the plaintiffs in establishing the reasonableness of those fees.

Id. This is *exactly* what has occurred here. Defendants did not negotiate, offer, and settle a liquidated, specific fee amount, but rather intentionally left it for subsequent fee litigation to determine a reasonable amount. (ECF Nos. 196-1, 196-2, 203-1, 203-2.) Defendants cannot vigorously contest the amount of fees to which Plaintiffs are entitled, force Plaintiffs to expend significant time and resources fighting that particular battle, and expect all of it to come at no cost to them. As the Seventh Circuit noted, that is not consistent with defendants allowing judgment to be taken against them. *Morjal*, 774 F.3d at 422-23.

And importantly, bad faith or vexatious litigation about the amount of fees is not necessary for the court to award fees on fees where a defendant contests the fee award after attempting to cut off fees with the offer of judgment. *See, e.g., John v. Demaio*, No. 15-CV-6094(NGG)(CLP), 2016 WL 7410656, *3 (E.D.N.Y. Dec. 22, 2016). In *John*, the court noted that other "courts have taken

a broader approach, finding that ‘fees on fees’ may be recoverable whenever the parties fail to settle attorney’s fees before judgment, even if the defendants did not act in bad faith.” *Id.* The reason for this is simple: despite Defendants’ attempt to place a “hard temporal limit” on fees in the Rule 68 offer,

Defendants had the opportunity to resolve the issue of attorney’s fees and costs at the settlement conference or along with the subsequent Offer of Judgment. Defendants’ failure to do so did not deprive the Court of its ability to exercise its discretion under Section 1988 to award attorney’s fees and costs to prevailing parties,

including for work on the fee petition after the acceptance of the offer of judgment. *Id.* (cleaned up). Notably here, Plaintiffs extended Defendants multiple settlement offers on fees and costs, both before and after the Offers of Judgment. And the parties further discussed settlement of Plaintiffs’ fees and costs as part of the pre-filing requirements imposed on fee motions by Local Rule 7.3(b). None of those multiple and extensive efforts were successful in obtaining Defendants’ agreement to a specific fee and cost amount. Defendants are certainly not obligated to settle Plaintiffs’ fee and cost claim, but they cannot choose to reject settlement, thrust the determination of the amount of fees on the Court, require extensive litigation, and then refuse to pay for that additional work.

In addition to the fact that Defendants fought tooth and nail against Plaintiffs’ fee award, courts have held that, as a matter of equity, a plaintiff should be awarded fees for the time spent preparing a fee petition despite language in a Rule 68 offer that limits fees to those accrued as of the date of the acceptance. *Rosado v. City of New York*, No. 11 Civ. 4285(SAS), 2012 WLL 955510, *6 (S.D.N.Y. Mar. 15, 2012). Indeed, “[b]y not settling the attorneys’ fees issue, the [defendant] was put on notice that time spent by counsel in seeking fees would become a component of ‘reasonable attorney’s fees.’” *Id.* See also *Lee v. Santiago*, No. 12 Civ. 2558(PAE)(DF), 2013 WL 4830951, *13 (S.D.N.Y. Sept. 10, 2013) (“Although, by necessity, Plaintiff’s counsel’s work on the fee application occurred after the date of the Offer of Judgment, and Plaintiff is therefore arguably precluded from recovering for it, the Court concludes that it retains discretion to award reasonable compensation for this work.” (cleaned up)).

The Court need not search too deep for evidence demonstrating Defendants’ vigorous and constant contestation of Plaintiffs’ requested fee award. In its Response in Opposition to Plaintiffs’ Motion for Attorney’s Fees and Non-taxable Expenses and Costs (ECF No. 228), the County challenged essentially every component of Plaintiffs’ requested fees and expenses. (ECF No. 228

at 1-31.) All told, the County submitted 248 pages of materials in its vigorous efforts to deny Plaintiffs the attorney's fees and costs to which they are entitled. (*See* ECF No. 228 to 228-15.) The City, for its part, likewise challenged Plaintiffs on just about every issue raised in the fee motion. (ECF No. 229.) And, like the County, the City's vigorous challenge consists of an additional 139 pages of materials. Thus, combined, Defendants required Plaintiffs to review 387 pages of materials and defend against countless challenges to all aspects of the fees to which they are entitled. Although Defendants are certainly entitled to contest every aspect of Plaintiffs' fee and costs claim, Defendants are not entitled to do so at no cost (or entirely at the expense of Plaintiffs).

And, if their original objections to Plaintiffs' requested fees were not enough, Defendants now take the Report and Recommendation's meager award of only thirty-three percent (33%) of the fees requested by Plaintiffs, and themselves object even to that, contending that the Court should impose an additional five percent (5%) reduction. Thus, despite the excellent results Plaintiffs obtained in this litigation, Defendants suggest that Plaintiffs essentially receive 28 cents on the dollar for their fee award. If this is not vigorously contesting a fee award, nothing would ever satisfy the definition. Defendants cannot have it both ways. Having chosen to vigorously and extensively litigate the amount of fees and costs to which Plaintiffs are entitled, Defendants must make Plaintiffs whole for the fees incurred in obtaining a fee and cost judgment.

B. Because Defendants Vigorously Contested Plaintiffs' Fee Motion, It Is Error to Deprive Plaintiffs of their Unquestionable Right to Fees on Fees.

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 contended that the "plain language" of their Rule 68 offers of judgment cut-off Plaintiffs' right to fee on fees. (ECF No. 228, at 22; ECF No. 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); *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.)

C. Allowing Fees on Fees is Consistent with the Terms of the Offers of Judgment.

The Report and Recommendation also errs in concluding that Defendants’ Offers of Judgment unambiguously stated that fees on fees would be excluded. The Offers of Judgment offered a liquidated amount to Plaintiffs for money damages, “plus the [Defendant’s] pro rata share of [Plaintiffs’] costs (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) accrued to date for all of [Plaintiffs’] claims for relief.” (ECF Nos. 196-1, 196-2, 203-1, 203-2.)

Plaintiffs’ “reasonable statutory attorney’s fees” “for all of Plaintiffs’ claims for relief,” were “accrued” prior to the date of the Offers of Judgment, when Plaintiffs prevailed on their claims. Plaintiffs did not assert any new claims for relief after the Offers of Judgment. The only thing that transpired after the Offers of Judgment was vigorous litigation to determine the specific dollar amount *of the fees accrued beforehand*. There is nothing in the Offers of Judgment that purports to waive Plaintiffs’ right to recover fees *for determining the amount of fees accrued prior to the date of the Offers of Judgment*. *See, e.g., Utility Automation 2000, Inc. v. Choctawhatchee Elec. Co-op, Inc.*, 298 F.3d 1238, 1246 n.6 (11th Cir. 2002) (“because costs in actions under 42 U.S.C. §1983 *automatically* include attorney’s fees under 42 U.S.C. §1988, plaintiff was entitled to rely on the plain language of the offer he accepted . . . which entitles him to a reasonable

attorney's fee award in addition to the lump sum named in the offer" (quoting *Erdman v. Conchise Cnty.*, 926 F.2d 877, 879 (9th Cir. 1991)) (cleaned up).

And, even if the Offers of Judgment were ambiguous on this point, such ambiguity would have to be construed against their drafters, the offerors, meaning the Defendants. *See, e.g., Gonzalez v. Chinatown Hotel Corp.*, 808 F. App'x 999, 1002 (11th Cir. 2020). This is particularly true in the case of offers of judgment, "because of their take-it-or-leave-it nature." *Pollack v. Bay Area Credit Serv., LLC*, No. 08-61101-Civ, 2009 WL 2475167, *5 (S.D. Fla. Aug. 13, 2009). In such circumstances, "the plaintiff should not be left in the position of guessing what a court will later hold the offer means." *Utility Automation*, 298 F.3d at 1244. The Court should therefore overrule the Report and Recommendation's categorical exclusion of fees on fees.

II. THE REPORT AND RECOMMENDATION ERRED BY EXCLUDING TRAVEL TIME AND EXPENSES ON THE BASIS THAT LOCAL COUNSEL WAS AVAILABLE.

The Report and Recommendation categorically excludes 86.3 hours of Plaintiffs' requested fee award because it was "incurred for travel time," (ECF No. 240 at 26-27), and because Plaintiffs purportedly failed to show that "competent local counsel was unavailable." (*Id.* at 20.) The Report and Recommendation's sole basis for concluding that competent local counsel was available and willing to handle this case was through judicial notice that "multiple Fortune 100 law firms have offices in Palm Beach County," and that "[t]here is also a chapter of the ACLU and the Christian Legal Society." (*Id.*) It strains credulity to suggest that the existence of the ACLU and large law firms in this jurisdiction diminished the need for Plaintiffs to secure the undersigned as counsel in this highly specialized and very controversial case brought on behalf of extremely controversial clients that even Defendants themselves denigrated as flat-earthers and leech doctors.

First, as Plaintiffs pointed out in their fee petition (ECF No. 235 at 2-3), to Plaintiffs' knowledge, there have been a total of seven (7) cases, outside of the instant litigation, challenging prohibitions on so-called sexual orientation change efforts (SOCE) counseling. *See Pickup v. Brown*, 740 F.3d 1208, 1213 (9th Cir. 2014) (noting that plaintiffs were represented by Liberty Counsel attorneys); *King v. Governor of the State of New Jersey*, 767 F.3d 216, 220 (3d Cir. 2014) (noting that the plaintiffs were represented by Liberty Counsel attorneys); *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 151 (3d Cir. 2015) (noting that the plaintiffs were represented by Liberty Counsel attorneys); *Doyle v. Hogan*, 1 F.4th 249 (4th Cir. 2021) (noting

that the plaintiffs were represented by Liberty Counsel attorneys); *Vazzo v. City of Tampa*, No. 19-14387, 2023 WL 1466603 (11th Cir. Feb. 2, 2023) (noting that the plaintiffs were represented by Liberty Counsel attorneys); *Tingley v. Ferguson*, 57 F.4th 1072 (9th Cir. 2023) (noting that the plaintiffs were represented by Alliance Defending Freedom, a national religious liberties firm similar to Liberty Counsel based in Arizona); *Welch v. Brown*, 834 F.4th 1041 (9th Cir. 2016) (noting that the plaintiffs were represented by Pacific Justice Institute, a national religious liberties firm similar to Liberty Counsel based in Washington). Thus, out of the eight total SOCE cases (including this one) that have ever been litigated throughout history, Liberty Counsel was counsel of record in *six* of them, and the only two other firms in the country that were willing to represent a plaintiff in such a case were national nonprofit law firms similar to Liberty Counsel, both of which are based on the West coast *and would have incurred far greater travel time and costs than Liberty Counsel. The Christian Legal Society has never handled an SOCE counseling ban case*, so its supposed presence in Palm Beach County is irrelevant.

Second, that the American Civil Liberties Union has a chapter in Palm Beach County is equally irrelevant, and it borders on the absurd to suggest that the ACLU would have litigated this case *for the Plaintiffs* rather than against them. Indeed, in one of the other SOCE cases referenced above, the ACLU filed an amicus brief *in opposition to the plaintiffs* in that case. *See Pickup v. Brown*, Case No. 12-17681, ECF No 36, Brief of Amicus Curiae American Civil Liberties Union (9th Cir. 2013). This is not surprising, since the ACLU (including the ACLU of Florida) refers to SOCE counseling by the same derogatory and derisive “conversion therapy” caricature employed by Defendants here, and states that it constitutes “abuse.” (ACLU of Florida, <https://www.aclufll.org/en/news/texas-attempt-tear-parents-and-trans-youth-apart-one-year-later>). Indeed, numerous ACLU chapters have advocated for the exact same laws that Plaintiffs fought successfully to invalidate in this litigation. (*See e.g., 2021 – HB 52 – Conversion Therapy Ban* [“The American Civil Liberties Union of Idaho supports HB 52, which would protect LGBT youth from ‘conversion therapy,’ a range of dangerous and discredited practices that falsely claim to change a person’s sexual orientation or gender identity.”] *available at* <https://www.acluidaho.org/en/legislation/2021-hb-52-conversion-therapy-ban>.) In sum, it is serious error to deny travel time and costs to Plaintiffs’ counsel on the basis that they might have hired the local ACLU to represent them in this case.

Third, the Report and Recommendation’s assertion that there are multiple Fortune 100 law firms with offices in Palm Beach County, and that such presence undermines any need to secure the undersigned for this representation, is equally erroneous and ignores the record in this case and on appeal. Not only has no Fortune 100 law firm ever undertaken a challenge to any SOCE counseling ban (as demonstrated above), but many of those very firms have submitted amicus briefs ardently opposing Plaintiffs’ position. *See Otto v. City of Boca Raton*, No. 19-10604, Brief of Amicus Curiae Born Perfect (11th Cir. 2020) (King and Spalding, LLP submitting amicus brief opposing Plaintiffs’ position); *Otto v. City of Boca Raton*, No. 19-10604, Brief of Amici Curiae The Trevor Project, et al. (11th Cir. 2020) (Gibson, Dunn, and Crutcher, LLP representing amici opposing Plaintiffs’ position). *See, also, King v. Governor of New Jersey*, No. 13-4429, Brief of Garden State Equality (3d Cir. 2014) (Kirkland and Ellis LLP supporting SOCE bans such as the one at issue in the instant litigation).

That large firms (and small ones, for that matter) consider “conversion therapy” kryptonite and will not touch it with the proverbial ten-foot pole is not at all surprising. As shown by Plaintiffs, SOCE counseling is societally despised. The Eleventh Circuit explained the undesirability of this case, observing, “The perspective enforced by these local policies is extremely popular in many communities. And the speech barred by these ordinances is rejected by many as wrong, and even dangerous.” *Otto v. City of Boca Raton*, 41 F.4th 1271, 1272 (11th Cir. 2022) (Grant, J., concurring in the denial of rehearing). (*See also infra* Section V regarding the undesirability of this case; ECF No. 235 at 2-9.)

Finally, the Report and Recommendation’s contention that Plaintiffs did not demonstrate the need for Liberty Counsel attorneys to represent them in this case is factually incorrect. The sworn testimony submitted with Plaintiffs’ fee records—which was entirely un rebutted—demonstrates that there are very few attorneys *in the entire country*, let alone this state, and let alone Palm Beach County, practicing in this area. (*See, e.g.*, ECF No. 221-1, Mihet Declaration, ¶21 (“This is demonstrated by the fact that there are relatively few lawyers in Florida, and even in the United States, who focus their practice in this area of law. *The special qualifications and experience of Plaintiffs’ counsel in constitutional law were necessary in this case.*”) (emphasis added)); *id.* ¶23 (“This case provided little financial incentive because Liberty Counsel represents its clients *pro bono*, and the ability to recover attorney’s fees was always contingent upon prevailing on the merits against government adversaries with government resources. Thus, *there*

are very few attorneys nationwide who would have agreed to represent Plaintiffs in this case.”) (emphasis added).

In sum, the Report and Recommendation’s conclusion that Plaintiffs are not entitled to recover 86.3 hours of travel time, and associated travel expenses, because they failed to demonstrate the need for Liberty Counsel attorneys to travel to the forum to litigate this claim is therefore erroneous and should be overruled.

III. THE REPORT AND RECOMMENDATION ERRED BY APPLYING A TWENTY-FIVE PERCENT ACROSS-THE-BOARD REDUCTION IN PLAINTIFFS’ COMPENSABLE HOURS REASONABLY EXPENDED ON THE LITIGATION.

A. A Twenty-Five Percent Across-the-Board Reduction Is Excessive.

The Report and Recommendation imposed a twenty-five percent (25%) across-the-board reduction in Plaintiffs’ compensable hours on the basis that, *inter alia*, Plaintiffs had purportedly engaged in impermissible block billing (ECF No. 240 at 23-24) and impermissibly included “vague” billing entries failing to justify the task performed on the litigation. (*Id.* at 24-25.) The Report and Recommendation erred both factually and legally, and its twenty-five percent reduction should be overruled.

1. Plaintiffs’ billing records do not show impermissible block billing.

The Report and Recommendation contends that a reduction is necessary because Plaintiffs’ billing records contain “block billing.” (ECF No. 240 at 23-24.) Though noting Plaintiffs’ sworn testimony and indisputable reality evidenced by the billing records themselves that “[s]ome individual time entries group together *multiple sub-tasks* without specific time allocations, *but only where such sub-tasks are closely related and therefore appropriately billed as one task*,” the Report and Recommendation suggests that this reality “misconstrues the problem with block billing.” (*Id.* (emphasis added).) The Report and Recommendation suggests that indisputably related subtasks still constitute “block billing,” and still do not warrant compensation because “each individual task must also be necessary to the representation.” (*Id.* at 24.) The Report and Recommendation’s suggestion that Plaintiffs’ compensable hours must be reduced because *some* entries include multiple subtasks as one entry is incorrect as a matter of fact and law.

This Court’s decision in *Zendejas* is particularly instructive on the issue of purported block billing. As this Court has recognized, “[t]he mere fact that an attorney has included more than one task in a single billing entry is not, in itself, evidence of impermissible block billing. *When those*

tasks are intertwined, including a thorough description of the activities performed clarifies, rather than obscures the record.” Zendejas v. Redman, No. 15-81229-CIV-MARRA/MATHEWMAN, 2019 WL 1429403, *1 (S.D. Fla. Mar. 27, 2019) (emphasis added) (quoting *Williams v. R.W. Canon, Inc.*, 657 F. Supp. 2d 1302, 1312 (S.D. Fla. 2009)). As the Eleventh Circuit has noted, “the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity.” *ACLU of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999). And, “[a]s a general proposition block billing is not prohibited so long as the Court can determine from the time entry the services that were performed.” *Home Design Servs., Inc. v. Turner Heritage Homes, Inc.*, No. 4:08-CV-355-MCR-GRJ, 2018 WL 4381294, *6 (N.D. Fla. May 29, 2018), and “verify the need or relatedness” of those entries. *DJ Lincoln Enter., Inc. v. Google, LLC*, No. 20-CV-14159-Rosenberg/Reinhart, 2022 WL 4287640, *9 (S.D. Fla. July 28, 2022).

Judged against this appropriate standard, Plaintiffs’ records do not contain inappropriate “block billing.” The so-called “block billing entries” demonstrate on their own that the grouped tasks were interrelated and appropriately billed together. For example, the entry for Daniel Schmid on July 12, 2018 states: “Attention to finalizing pleadings re complaint and PI motion, including attention to HGM questions regarding factual claims and cited cases in complaint and PI motion, and discussi[ng] same with HGM; review HGM edits and reviews to pleadings; prepare initial pleadings for filing.” (ECF No. 221-2 at 5.) That time entry was billed for 7.1 hours, but every item in that entry was related to the same task—finalizing the pleadings (Complaint and Motion for Preliminary Injunction)—and preparing them for filing in this action. (*Id.*) It cannot be gainsaid that the final preparation of pleadings to initiate the instant lawsuit was not necessary for the representation and sufficiently interrelated to warrant a single entry. Plaintiffs would have been justified to provide only a streamlined description of “finalizing pleadings with final review for filing.” The fact that Plaintiffs included additional detail to better convey the value provided by counsel during the time claimed in the entry should not be used to penalize Plaintiffs. As this Court recognized in *Zendejas*, this “thorough description of the activities performed clarifies, rather than obscures the record.” 2019 WL 1429403, at *1.

Another example further demonstrates this point. On July 2, 2018, the time entry for Horatio Mihet states: “Receive call from County counsel regarding extension of time to respond to Complaint; review proposed unopposed motion regarding same; communicate with County

counsel regarding same; review as-filed motion; review Order granting both Defendants' motion for extension of time." (ECF No. 221-2 at 8.) An attorney attending to communications with opposing counsel is *per se* necessary to the representation of his client (not to mention required by the ethical duties imposed on attorneys), and seeing to the orderly response from a defendant to Plaintiffs' complaint must be considered reasonable and necessary to the representation. All such grouped tasks in this supposedly "block billed" entry relate to the same task and are indisputably reasonable and necessary to the representation of Plaintiffs in this matter.

Take the entry of July 5, 2018 as further evidence. The entry for Horatio Mihet states, "Review Order permitting discovery prior to PI hearing; formulate discovery strategy; discuss upcoming deposition schedule and strategy with LC team and clients in multiple phone and email communications; formulate written proposal on PI briefing schedule and PI discovery; communicate same to defense counsel." (ECF No. 221-2 at 9.) All of these tasks relate to the Court's entry of an order permitting discovery concerning the preliminary injunction, discussing with co-counsel what the strategy for engaging in such discovery would be, and communicating with opposing counsel about proposals concerning the same. All relate to the same issue and same tasks, and there can be no question that ensuring Plaintiffs' interests are adequately represented in obtaining discovery was ethically required and absolutely necessary to the prosecution of Plaintiffs' claims in this matter.

2. Plaintiffs' billing records are not vague and specifically detail the task performed by the attorney.

The Report and Recommendation suggests that a reduction in Plaintiffs' compensable hours is required because certain entries are vague and do not "explain why all of this work was necessary to their representation." (ECF 240 at 25.) As evidence of purported vagueness, the Report and Recommendation cites to entries that *begin* with "considering strategy," "attention to," "researching," "drafting," and "preparing" and allegedly contain no "further explanation." (*Id.* at 25.) This is simply incorrect as a factual matter. The time entries tell a different story. There are no time entries that list these tasks standing alone, without "further explanation."

Take, for example, the August 17, 2018 entry for Daniel Schmid: "Attention to misc discovery issues; obtain and produce supplemental discovery responses on studies supporting SOCE and misc issues; telephone discussion with HGM re interrogatories and misc issues; attention to producing DVDs to County re Hamilton production." (ECF No. 221-2 at 22.) Thus,

the Report and Recommendation is simply incorrect that the entry merely mentions “attention to” without further explanation. Mr. Schmid provided abundant explanation as to what that entry entailed, and it all related to the production of documents and discovery materials necessary to the litigation.

Or, further, take the August 27, 2018 entry for Roger Gannam: “Drafting and filing of joint discovery memorandum for discovery hearing (3.10); preparation for discovery hearing (0.80); drafting of memorandum of law in opposition to Trevor Project amicus filing (2.50).” (ECF No. 221-2 at 26.) Mr. Gannam did not simply state “drafting” or “preparing” without further explanation. He provided explicit explanation as to what the drafting was—a joint discovery memorandum and memorandum opposing an amicus brief—and what the preparation was for—a discovery hearing with the Court.

Mr. Mihet’s entry for September 13, 2018 further demonstrates that Plaintiffs’ time entries are not vague. Mr. Mihet did not simply state “consider strategy” with no explanation as to what was being considered. He was specific: “Consider strategy for Objection to Magistrate’s recommendation on discovery dispute; discuss same with LC team.” (ECF No. 221-2 at 31.)

The Report and Recommendation also contends that there were “excessive” entries that “*include* discuss with LC team or discuss with legal team.” (ECF No. 240 at 24 (emphasis added).) And, the Report and Recommendation states that the inclusion of such entries warrants a reduction for impermissible vagueness. But, as demonstrated above, the entries including such “discussion” with fellow attorneys do not simply refer to “discuss” standing alone, but are accompanied by a further explanation of what that discussion entailed and demonstrates why it was necessary and appropriate for the representation. Take, for example, Horatio Mihet’s entry of August 17, 2018, stating: “Attend telephonic meet and confer with counsel for Defendants to attempt to resolve various discovery disputes and issues; consider strategy for discovery following meet and confer and discuss same with LC team; review and revise follow up letter to Defendants’ counsel.” (ECF No. 221-2 at 22.) The billed entry was not simply “discussing” issues with co-counsel, but included a lengthy and detailed list of what the discussion entailed, and the tasks performed related to the same issue in the litigation.

Adequate explanation was provided for all time entries involving the challenged terms, and the Report and Recommendation’s contention that these entries were vague and unsupported by further explanation is incorrect. It should be overruled.

3. Because the Report and Recommendation based its twenty-five percent across-the-board reduction on erroneous recitations of Plaintiffs' billing records, the reduction is excessive.

Because the Report and Recommendation largely based its across-the-board 25 percent reduction on incorrectly described "block billing" or "vague" entries, the across-the-board reduction is unsupported and should be overruled. In fact, courts across the Eleventh Circuit have held that a 25 percent across-the-board reduction on the same basis used by the Report and Recommendation is excessive. *See, e.g., Zendejas*, 2019 WL 1429403, *1 (rejecting 25% across-the-board reduction on the basis of purported block billing); *Lockwood v. CIS Servs., LLC*, No. 3:16-cv-965-J-39PDB, 2019 WL 3383628, * (M.D. Fla. June 13, 2019) (rejecting a defendant's request for a 21% across-the-board reduction on the basis of block billing). The Report and Recommendation's 25% across-the-board reduction for time entries that are adequately detailed, explain what tasks were performed, and demonstrate the necessity and reasonableness of those tasks, is excessive and should be overruled.

IV. THE REPORT AND RECOMMENDATION ERRED BY SETTING PLAINTIFFS' HOURLY RATES FROM AN INCORRECT MARKET AND NOT THE RELEVANT MARKET OF PALM BEACH COUNTY AT CURRENT RATES.

The Report and Recommendation awards fees at hourly rates derived from litigation in the Tampa market, rather than the Palm Beach County market, because Tampa rates are purportedly "commensurate with rates charged in that market in 2017-19 for lawyers of similar experience." (ECF No. 240 at 33.) This is erroneous for three reasons: (A) Plaintiffs are entitled to recover at current rates, not historical rates, to adequately compensate them for having to wait almost seven years to be paid; (B) the relevant market is the one in which the matter was tried, not a foreign forum; and (C) the Report and Recommendation fails to consider Plaintiffs' documentary evidence justifying the rates in the relevant market, and improperly awards reduced rates.

A. The Report and Recommendation Erred By Not Awarding Current Market Rates for the Entire Litigation.

The Report and Recommendation admits that the hourly rates sought by Plaintiffs in the fee motion are "within the range of rates for similar lawyers in Palm Beach County," and that "Palm Beach County clients would have paid these requested rates in 2022 to get attorneys who could successfully litigate these issues," which are "complex and unique" and which "required sophisticated skills in both trial and appellate advocacy." (ECF 240 at 33-34.) Nevertheless, the

Report and Recommendation then erroneously fails to award these admittedly reasonable market rates to Plaintiffs for the entire litigation, awarding them only for post-February 2020 work, with the prior work receiving much lower rates. (*Id.* at 32-33.) This is erroneous, and should be overruled.

The instant litigation has spanned almost seven years (thus far), and Plaintiffs risked never receiving compensation for any of that effort. Indeed, prior precedent suggested that the hopes of recovery were slim because no SOCE case had ever successfully obtained an injunction under the First Amendment. (*See* ECF No. 235 at 5.) Under binding law, the appropriate rates to be awarded in this matter are the *current* rates, not historical rates or a combination of past and present rates, because Plaintiffs must be fully compensated for the lengthy amount of time it has taken them to get to a payday.

In determining the appropriate rates, the Supreme Court, the Eleventh Circuit, and this Court have all noted that the delay in payment for civil rights counsel in Section 1988 litigation should be compensated by awarding current market rates, rather than historic rates. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 556 (2010) (“An attorney who expects to be compensated under §1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. Compensation for this delay is generally made ‘either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.’” (quoting *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989)); *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) (“[T]he court must consider the issue of delay in the receipt of payment by counsel for the prevailing party. In this circuit, where there is a delay the court should take into account the time value of money and the effects of inflation *and generally award compensation at current rates rather than historic rates.*” (emphasis added)); *Grey ex rel. Alexander v. Bostic*, 613 F.3d 1035, (11th Cir. 2010) (“The Supreme Court recognized that courts compensating for delay in the payment of fees had done so either by using the current rates for the entire fee calculation, or by using the rates in place when the work was performed and then adjusting that amount to reflect present value.”); *Caruthers v. Israel*, 274 F. Supp. 3d 1345, 1353 n.14 (S.D. Fla. 2017) (same). And, awarding Plaintiffs the current market rates is particularly appropriate where, as here, “the delay is unjustifiably caused by the defense.” *Perdue*, 559 U.S. at 556.

Here, Plaintiffs have waited nearly seven years to even get to the point of fee litigation, and Defendants have fought Plaintiffs tooth and nail throughout the proceedings—including the instant fee litigation. *See supra* Section I. After obtaining a victory at the Eleventh Circuit, Defendants sought to further delay the proceedings by seeking en banc review in the Eleventh Circuit. *See Otto v. City of Boca Raton*, 41 F.4th 1271 (11th Cir. 2022). After that review was denied, Defendants still resisted the entry of the preliminary injunction mandated by the Eleventh Circuit, and required additional litigation to obtain what the Eleventh Circuit explicitly ordered. Then, even after the injunction was entered, at least one Defendant passed a resolution explicitly condemning Plaintiffs and their protected speech. (*See* ECF No. 179 at 6 (noting the unanimously passed resolution from the City stating its “strong disagreement” with the Eleventh Circuit and its “desire to discourage the practice of SOCE on minors.”).) Defendants have steadfastly refused to concede the error of their ways and caused undue delay in the ultimate resolution of Plaintiffs’ claims. Because of that delay, Plaintiffs are entitled to an award based on current rates for their entire work in this long running case. It was error for the Report and Recommendation to base much of Plaintiffs’ award on historical rates, without any compensation for the delay in payment.

B. The Relevant Market for Plaintiffs’ Fee Motion Is The Locality Where the Case Was Litigated, Not Tampa.

Even if historical rates were appropriate, and they are not, the Report and Recommendation still erred in setting those rates. For the majority of Plaintiffs’ requested compensation, the Report and Recommendation essentially adopts Defendants’ contention that “Plaintiffs’ Counsel’s rates should be capped by the rates they requested, and were awarded, in a contemporaneous challenge to an SOCE ordinance in the Middle District of Florida (*Vazzo* litigation).” (ECF No. 240 at 30.) This is error. As a matter of black letter law, “[t]he statute and legislative history establish that ‘reasonable fees’ under §1988 are to be calculated according to the prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). And, “[t]he general rule is that the ‘relevant market’ for purposes of determining the reasonable hourly rate for an attorney’s services is ‘the place where the case is filed.’” *ACLU of Georgia v. Barnes*, 1678 F.3d 423, 437 (11th Cir. 1999) (quoting *Cullens v. Georgia Dep’t of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994)). *See also Sos v. State Farm Mut. Auto. Ins. Co.*, No. 21-11769, 2023 WL 5608014, *21 (11th Cir. Aug. 30, 2023) (noting that the “going rate in the community in the most critical factor in setting the fee rate” and that “the relevant market is the place where the case is filed”).

Indeed, this Court has explicitly rejected contentions that rates should be awarded on the basis of market rates outside of Palm Beach County when the case was filed there. *See City Place Retail, LLC v. Wells Fargo Bank, N.A.*, No. 18-CV-81689-Rosenberg/Reinhart, 2021 WL 3361172 (S.D. Fla. Jan. 12, 2021) (“I find that Palm Beach County comprises a distinct legal market.”). Yet, the Report and Recommendation concludes that Plaintiffs should be awarded fees based on litigation *outside* Palm Beach County. (ECF No. 240 at 30.) This is error, and it ignores the precedents from this Court recognizing a historically higher rate for Palm Beach County than rates in the irrelevant Tampa market. The Report and Recommendation states that “[f]or pre-February 2020 time, I award the rates requested in the *Vazzo* fee request. Based on my personal knowledge of the Palm Beach County legal market, those rates are commensurate with rates charged in that market in 2017-19.” (ECF No. 240 at 33.) That is incorrect and should be overruled.

C. The Rates Awarded in the Report and Recommendation are Inconsistent with the Palm Beach Market and Should Be Overruled.

The evidence is clear that historical rates in Palm Beach County were substantially higher than rates in Tampa, so even if awarding historical rates were proper, which it is not, the Report and Recommendation erred. In *Kleiman v. Wright*, No. 18-80176-Bloom/Reinhart, 2020 WL 1980601 (S.D. Fla. Mar. 17, 2020), Judge Reinhart found that the hourly rates for Palm Beach County for pre-2020 litigation “range[d] between \$600 and \$700 per hour.” *Id.* at *3. Specifically, Judge Reinhart concluded that “*in 2018*, a senior partner from the West Palm Beach office of a national firm of over 1000 lawyers, who was admitted to the Florida Bar in 1987, charged \$670 per hour [and] [a]n associate with 9 years of experience charged \$440 per hour in the same case.” *Id.* (emphasis added).

In sharp contrast, the Report and Recommendation sets the hourly rates as follows:

Attorney	Pre-Feb. 2020 Rate	Post-Feb. 2020 Rate	Set Rate
Mathew Staver	\$500.00	\$760.00	\$552.00
Horatio Mihet	\$425.00	\$700.00	\$562.50
Roger Gannam	\$425.00	\$700.00	\$562.50
Daniel Schmid	\$300.00	\$625.00	\$462.50
Richard Mast	\$325.00	n/a	n/a
Mary McAlister	\$375.00	n/a	n/a

(ECF No. 240 at 34-35.)

Thus, despite having virtually identical credentials to the lawyers for whom Judge Reinhart noted as appropriately billing \$670.00 per hour *in 2018*, the Report and Recommendation erroneously sets the rate for Mr. Staver at \$500.00 for work performed in the same time period. In further error, the Report and Recommendation concludes that an appropriate pre-February 2020 rate for Mr. Gannam (23 years of experience) and Mr. Mihet (21 years of experience) is \$425.00 per hour, or \$15 an hour less than Judge Reinhart noted was appropriately charged by an associate *with less than half the experience* of either Mr. Gannam or Mr. Mihet in 2018. *Compare* (ECF No. 240 at 34), *with Kleiman*, 2020 WL 1980601 at *3. The pre-February 2020 rates for attorneys Staver, Mihet, and Gannam are improper and do not fall within the appropriate range for Palm Beach County attorneys with similar experience in the same time period.

Moreover, the rates awarded for attorneys Schmid, McAlister, and Mast are also inappropriately low and not consistent with Judge Reinhart's prior conclusions in other cases. In 2019, Ms. McAlister had 29 years of experience yet was only awarded \$375.00 per hour, a full \$295.00 per hour less than what Judge Reinhart noted was reasonable in the Palm Beach Market in 2018. *Kleiman*, 2020 WL 1980601 at *3. Mr. Schmid had seven years of experience and Mr. Mast had nine years of experience, yet the pre-February 2020 rates for each attorney was \$300.00 and \$325.00 per hour respectively. (ECF No. 240 at 34-35.) Those rates are \$125.00 and \$100.00 per hour less than the rate for the associate awarded by Judge Reinhart in 2018. *Kleiman*. 2020 WL 1980601 at *3.

Finally, not only are the rates awarded in the Report and Recommendation inconsistent with the Palm Beach County market itself, but even the Report and Recommendation's contention that the market rates for Tampa and Palm Beach County were the same pre-February 2020 is incorrect as a factual matter. A simple comparison between 2020 cases from this Court and the Middle District of Florida demonstrates the discrepancy. *Compare Kleiman*. 2020 WL 1980601 at *3 (awarding top rates of \$675 per hour), *with Fuccillo v. Century Enter. Inc.*, 2020 WL 1431714, at *5 (M.D. Fla. Jan. 15, 2020), *report and recommendation adopted sub nom. Fuccillo v. Silver*, No. 8:18-CV-1236-T-36AEP, 2020 WL 897989 (M.D. Fla. Feb. 25, 2020) (awarding top level partner rates of \$410.00 per hour.) Aside from the error in awarding historical rather than current rates, awarding hourly rates based on an irrelevant market rather than the "distinct legal market" of Palm Beach County, *City Place*, 2021 WL 3361172, at *5, and awarding rates that are not

consistent with prior decisions of this Court for attorneys of similar experience was error and should be overruled.

V. THE REPORT AND RECOMMENDATION ERRED BY DENYING APPLICATION OF A MULTIPLIER FOR THE UNDESIRABILITY OF THE INSTANT LITIGATION.

As the Report and Recommendation itself appropriately recognizes, “[t]his case involved complex and unique issues of constitutional law, and required sophisticated skills in both trial and appellate advocacy.” (ECF No. 240 at 33-34.) That is certainly true, and when combined with the undesirability of the matter and the fact that few—if any—counsel across the country are willing to engage in such litigation, warrants application of Plaintiffs’ requested 1.5 multiplier. (ECF No. 221 at 11-12.) Yet, the Report and Recommendation concludes that a 1.5 multiplier is inappropriate because “Plaintiffs have not offered evidence that other competent counsel refused to take on this case, nor have they shown that competent counsel would not have taken on the case for the lodestar fee.” (ECF No. 240 at 37.) This misses the mark and should be overruled.

An enhancement of the lodestar calculation is permissible and warranted where, as here, “the lodestar does not adequately take into account a factor that may be properly considered in determining a reasonable fee.” *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010). Describing this case as “undesirable” is an understatement. 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). So it was in this case, litigating the rights of political and cultural dissenters—licensed counselors who are open to facilitating the change goals of minors with unwanted same-sex attractions and gender identity issues—against municipal governments that stridently and publicly condemn their work. (ECF No. 221-1, ¶ 22.) Even Defendants’ counsel took a turn, comparing Plaintiffs’ counseling speech to treating blood disorders with leeches. (*Id.* (citing Tr., ECF No. 129, at 197:3–10).) And the undesirability is not limited to Palm Beach County, for opposing counsel in a related litigation challenging an almost identical Tampa ordinance compared the similarly situated counseling plaintiffs there to “those who are convinced the Earth is flat.” (ECF No. 22101, ¶¶ 22.) The Eleventh Circuit also noticed the undesirability of the case, observing, “The perspective enforced by these local policies is

extremely popular in many communities. And the speech barred by these ordinances is rejected by many as wrong, and even dangerous.” *Otto v. City of Boca Raton*, 41 F.4th 1271, 1272 (11th Cir. 2022) (Grant, J., concurring in the denial of rehearing). Then, after finally obtaining a preliminary injunction against enforcement of the unconstitutional Ordinances, the City of Boca Raton went out of its way to remind Plaintiffs that their licensed, professional practices are not welcome, expressly condemning their protected speech by formal resolution. (ECF No. 221-1, ¶ 22.)

Based on the heavy weight of the undesirability factor, the Court would be justified in applying a significant lodestar enhancement multiplier of 2.0 or more. Plaintiffs, however, seek a more modest multiplier of 1.5, which is reasonable under all the circumstances, and supported by cases that have considered both enhancement and undesirability. *See, e.g., Ingraham v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (noting multiplier of 2.5 to 4.0 was reasonable); *Hidle v. Geneva Cnty. Bd. of Educ.*, 681 F. Supp. 752, 756 (M.D. Ala. 1988) (awarding multiplier of 2.0); *Stokes v. City of Montgomery*, 706 F. Supp. 811 (M.D. Ala. 1988) (awarding multiplier of 2.0); *Ryder v. Diversified Ambulance Billing, LLC*, No. 8:09-cv-2058-T-27TGW, 2011 WL 13323560, *3 (M.D. Fla. Sept. 13, 2011) (awarding multiplier of 1.8); *Holman v. Student Loan Xpress, Inc.*, 778 F. Supp. 2d 1306 (M.D. Fla. 2011) (awarding multiplier of 1.77).

VI. THE REPORT AND RECOMMENDATION ERRED BY CATEGORICALLY EXCLUDING PLAINTIFFS’ REQUESTED EXPENSES.

A. The Report and Recommendation Erred by Categorically Excluding Research Expenses.

The Report and Recommendation concludes that “[a]lthough it may have been reasonable for Plaintiffs to incur some research costs in this case . . . Plaintiffs have failed to sufficiently show the amount of research costs they incurred was reasonable and necessary to the representation.” (ECF No. 240 at 41.) This is plainly erroneous. There is no question that Plaintiffs are entitled to recover the expenses they incurred for legal research as part of a Section 1988 fee petition. *See, e.g., Trump v. Clinton*, 653 F. Supp. 3d 1198, 1228 (S.D. Fla. 2023) (noting that legal research expenses are recoverable under attorney’s fees rather than taxable costs). Indeed,

computerized legal research is, like other legal research, part of an attorney’s preparation of a case. . . . That use of a computer is “reasonable, if not essential, in contemporary legal practice” makes no difference: books, typing or word processing, office space, and even paralegal assistance are “reasonable, if not essential,” and their costs are part of the total cost of an attorney’s services. Nor does it matter that attorneys often bill their overhead for computer research as a

separate item: many attorneys also bill typing and paralegal assistance costs separately.

Friedlander v. Nims, 583 F. Supp. 1087, 1089 (N.D. Ga. 1984).

Here, Plaintiffs adequately justified their computerized research as an essential part of their reasonable representation in the instant action, and they should be compensated for the cost of that service. Plaintiffs' sworn testimony and detailed invoices demonstrate that the research billed was *exclusively* for Plaintiffs' file number in this action (ECF No. 235 at 25 (citing ECF No. 221-1, ¶29).) And, the expense receipts provided as part of Mr. Mihet's declaration provide detailed analysis of the billed expenses. (*See* ECF No. 221-3 at 1-2, 60-97.) The Report and Recommendation's denial of expenses for this essential part of Plaintiffs' representation in this matter was in error and should be overruled.

B. The Report and Recommendation Erred by Categorically Excluding Shipping Expenses.

The Report and Recommendation states that "the shipping receipts are inadequate to justify why the shipping charges were necessary to the representation." (ECF No. 240 at 41.) This is also in error. Every receipt provided by Plaintiffs' detailed invoices and billing records contains Liberty Counsel's internal file number providing evidence that the shipping expenses were specifically for the instant litigation. (*See* ECF No. 221-3 at 98-105.) And, the sworn testimony provided by Plaintiffs demonstrates that these expenses were incurred in the normal course of business and "truthfully and accurately describe the expenses we incurred in *prosecuting Plaintiffs' claims*." (ECF No. 221-1, ¶29 (emphasis added).) There is abundant precedent in the Eleventh Circuit that postage and shipping costs are awardable under Section 1988. *See, e.g., Hodges v. Sch. Bd. of Orange Cnty.*, No. 6:11-cv-135-Orl-36GJK, 2014 WL 6455436, * (M.D. Fla. Nov. 13, 2014) ("telephone, fax, *postage*, digital reproduction, internet research, and PACER expenses . . . are generally recoverable under §1988" (citing *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983)); *Am. Charities for Reasonable Fundraising Reg., Inc. v. Pinellas Cnty.*, 278 F. Supp. 2d 1301, 132 (M.D. Fla. 2003) (noting that postage is recoverable under Section 1988). The Report and Recommendation erred by excluding these expenses.

CONCLUSION

For the foregoing reasons, the Report and Recommendation should be overruled and Plaintiffs should be awarded the attorney's fees and nontaxable expenses and costs as requested.

Respectfully submitted,

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