UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

BETHANY R. SCAER and STEPHEN SCAER, Plaintiffs, v. CITY OF NASHUA, a municipal corporation, Defendant.	:	Case No. 1:24-cv-00277-LM-TSM

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES PURSUANT TO 42 U.S.C. § 1988

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Plaintiffs Bethany and Stephen Scaer seek an award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. As prevailing plaintiffs, *see* Dkt. 60, Dkt. 54, the Scaers are entitled to a total recovery of $249,960.90, which reflects a reasonable billing rate and hours, with expenses, as detailed in this memorandum.

FACTUAL BACKGROUND

Three times between May 2022 and June 2024, the City of Nashua denied applications from Stephen or Bethany Scaer to fly flags on the Citizen Flag Pole in front of Nashua's city hall. Dkt. 49 at 7, 9; Dkt. 24, ¶ 29, 36, 41, 43; Dkt. 2-2, ¶¶ 30-31, 34-41; Dkt. 2-1, ¶¶ 16-18, 20, 23. Nashua rejected these flags because officials believed the flags were "not in harmony with the message that the City wishes to express and endorse." Dkt. 49 at 9; Dkt. 3-13; Dkt. 2-12; Dkt. 2-10.

On September 6, 2024, Stephen and Bethany Scaer filed suit and moved for a preliminary injunction. Dkt. 49 at 9-10; Dkt. 2; Dkt. 2-14. The lawsuit sought injunctions preventing the City of Nashua from discriminating among applicants' flags on the basis of viewpoint; declaratory judgments stating the Nashua's flag policy and practices violated the First Amendment; nominal damages; and attorney fees and costs pursuant to 42 U.S.C. § 1988. Dkt. 1 at 22-23.

On October 7, 2024, former defendant Donchess purportedly repealed Nashua's previous flag policies and adopted a new policy, allegedly closing the pole as a forum. Dkt. 49 at 10; Dkt. 22. On March 28, 2025, this Court denied the preliminary injunction on the grounds that "the flags displayed . . . pursuant to Nashua's 2022 Flagpole Policy constituted government speech." Dkt. 39.

Plaintiffs appealed. *See* Dkt. 40. During this appeal, Nashua conceded that—if the flags displayed were not government speech—"the City's decision not to allow [the Scaers'] requests to fly flags on a 'Citizen Flag Pole' on City Hall Plaza was . . .

impermissible viewpoint discrimination under the First Amendment." Dkt. 49 at 1; *cf.* Dkt. 54 at 1. On December 22, 2025, the First Circuit reversed and held that "Nashua during the time period at issue was not engaged in government speech as to the Citizen Flag Pole." *See* Dkt. 49 at 1, 23.

On remand, this Court entered an interim declaratory judgment, which declared, among other things, that "[d]uring the time period between the creation of the Citizen Flag Pole program and October 7, 2024, the City of Nashua was not engaged in government speech when it allowed flags, which people had applied to fly, to be displayed" and that "[a]ny resumption of the City's policy [used] during that time would be unconstitutional." Dkt. 54. Nashua was free to "close the Citizen Flag Pole to all private expression or return to the pre-2017 historic use of its flagpoles." *Id.* at 2.[1] The Nashua Board of Aldermen responded by passing Ordinance O-26-001, which codified the 2024 flag policy. Dkt. 56-1 at 4; Dkt. 56-2 at 2-3.

On April 24, 2026, Nashua made an Offer of Judgment pursuant to Rule 68. Dkt. 59 at 3-5. Plaintiffs accepted. *Id.* at 1-2. On June 18, this Court issued an endorsed order approving the Agreement for Judgment, and a final judgment was entered on June 21, resolving the merits under the agreed terms. Dkt. 60.

Under this judgment, Nashua "is ordered to adhere to City Ordinance O-26-001 . . . or a future ordinance that similarly keeps the flag poles in front of City Hall closed to the public . . . and cannot resume its prior practice or policy unless there is a change in the law." Dkt. 59 at 4. This Court also awarded "$17.91 in nominal damages" to Bethany Scaer, "$17.91 in nominal damages" to Stephen Scaer, "costs . . . equal to the amounts incurred by filing the complaint and appellate brief," plus

[1] The First Circuit characterized this pre-2017 historic usage, as "display[ing] only government flags such as the American flag and the New Hampshire state flag." Dkt. 49 at 3; *see also id.* at 13, 19 n.12 (giving examples of government flags).

interest. *Id.* at 3-4. The approved Agreement for Judgment did not resolve attorneys' fees, expressly leaving the issue of fees to later litigation. *Id.* at 4. This Court later granted a 30-day extension on any fee motion. *See* Dkt. 61.

LEGAL STANDARD

A plaintiff that succeeds in remedying a civil rights violation serves "as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 833 (2011) (cleaned up). As a result, Section 1988 allows a prevailing party to recover "a reasonable attorneys fee as part of the costs," 42 U.S.C. § 1988(b), "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010). "[P]revailing parties may not ordinarily be denied fees except in special circumstances making the award unjust." *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1300 (1st Cir. 1997).

To qualify as prevailing, a party must show (1) a material alteration of the parties' legal relationship; and (2) a judicial imprimatur on the change. *Garavanian v. JetBlue Airways Corp.*, 149 F.4th 95, 98-99 (1st Cir. 2025). "Judgments on the merits" and "agreements enforced through a consent decree" both satisfy the imprimatur requirement. *Id.* at 100 (cleaned up); *see also Hutchinson v. Patrick*, 636 F.3d 1, 12 & n.4 (1st Cir. 2011) ("The fact that a party prevailed through a settlement . . . does not weaken her claim to fees" if the settlement is "similar" to "a consent decree") (cleaned up). "A material change occurs when the plaintiff succeeds on any significant issue in litigation which achieves some of the benefit the plaintiff sought in bringing the suit." *Suárez-Torres v. Panaderia y Resposteria España, Inc.*, 988 F.3d 542, 551 (1st Cir. 2021) (cleaned up).

ARGUMENT

I. RULE 68 REQUIRES THIS COURT TO AWARD REASONABLE ATTORNEYS' FEES UNDER SECTION 1988 AS PART OF THE COSTS OF THE JUDGMENT.

Under Rule 68, a defendant may "offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P. 68(a). Plaintiffs "are entitled to attorneys' fees, as part of their *costs* under the Rule 68 settlement, provided that they are entitled to costs under 42 U.S.C. § 1988." *Stefan v. Laurenitis*, 889 F.2d 363, 367 (1st Cir. 1989). Thus, "a valid Rule 68 offer of judgment necessarily includes costs and [a]ttorney's fees either explicitly or implicitly." *Lima v. Newark Police Dep't*, 658 F.3d 324, 331 (3d Cir. 2011). "When, however, the offer of judgment is silent as to fees and costs, they must be fixed by the court *after* the offer of judgment is accepted." *Id.* (emphasis added); *cf. Stefan*, 889 F.2d at 365, 369 (resolving fee motion in Plaintiffs' favor after entry of a Rule 68 judgment that "deliberately left open the question of . . . attorneys' fees"). The approved agreement for judgment in this case explicitly left fees to later determination, *see* Dkt. 59 at 4, Dkt. 61, so this Court has an obligation under the rule to fix fees and costs.

II. THE SCAERS PREVAILED, AS THIS COURT ENTERED JUDGMENT IN THEIR FAVOR AND ORDERED NASHUA TO PAY DAMAGES AND NOT RESUME ITS PRACTICES.

Stephan and Bethany Scaer are prevailing plaintiffs because this Court entered a final judgment which ordered Nashua to pay nominal damages, to maintain certain flag policies and practices in the future, and to never restore its repealed unconstitutional policies.

"First Circuit precedent instruct[s] that a Rule 68 judgment confers prevailing party status to a plaintiff even if the Rule 68 offer states . . . that [the offer] 'is not to be construed either as an admission' of liability 'or that the Plaintiffs have suffered any damage.'" *Walsh v. Bos. Univ.*, 661 F. Supp. 2d 91, 97 (D. Mass. 2009) (citing *Stefan*, 889 F.2d at 369). "The unique features of Rule 68 render Rule 68 judgment a consent judgment of a particular kind." *Fafel v. DiPaola*, 399 F.3d 403, 413 (1st Cir. 2005) (cleaned up). A Rule 68 judgment has "judicial approval" and "oversight," and counts as "a court ordered consent decree such that plaintiff qualifies as a prevailing party." *Walsh*, 661 F. Supp. 2d at 102 (citing *Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009)).

Here, the judgment contains a permanent injunction, binding Nashua's future actions and enforceable through contempt. *See Aronov*, 562 F.3d at 90-91 (labels irrelevant if order "functional equivalent of a consent decree"); *Fafel*, 399 F.3d at 414 (district court has jurisdiction to enforce Rule 68 judgment, if party later violates terms). The judgment also required Nashua to pay nominal damages—all the damages Plaintiffs requested. *See* Dkt. 59 at 3-4; Dkt. 1 at 23. "[A] plaintiff who wins nominal damages is a prevailing party under § 1988" because nominal damages "effect a material change" in the parties' relationship. *Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 125 (1st Cir. 2004) (quoting *Farrar v. Hobby*, 506 U.S. 103, 121 (1992)). Damages "modif[y] the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Farrar*, 506 U.S. at 113. Both the order restricting Nashua's future policies and the nominal damages are material changes with judicial imprimatur.

Additionally, this Court's interim declaratory judgment, Dkt. 54 at 1, also made Plaintiffs prevailing parties. Courts use "interim" declaratory judgment for what is also called a "partial" declaratory judgment. *See, e.g., Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 576-77 (1st Cir. 1999); Dkt. 58 at 10-11 (collecting cases). Such an interim judgment is not temporary—it is final as to the issue declared.

When a party obtains a partial judgment on key legal issues that affords it requested relief, it has prevailed. *See, e.g., Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 908, 911 (8th Cir. 2012); *Neal & Co. v. United States*, 121 F.3d 683, 685 (Fed. Cir. 1997); *Maldonado v. Municipio De Barceloneta*, No. 07-1992(JAG), 2012 U.S. Dist. LEXIS 107366, at *18 (D.P.R. July 30, 2012) (awarding fees after accepted Rule 68 offer and partial judgment). "Parties who receive only nominal damages or partial success are prevailing parties if they succeeded on any significant issue." *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265, 268 (D.N.H. 2008) (citing *Farrar*, 506 U.S. at 109). Here, the interim declaratory judgment resolved the nature of the forum, held that the City engaged in impermissible viewpoint discrimination, and prohibited Nashua from resuming its past policy. Dkt. 54; *cf.* Dkt. 1 at 22-23 (seeking declaratory relief).

The Court's final judgment in May 2026 and its earlier interim declaratory judgment—both separately and together—make Plaintiffs prevailing parties entitled to fees under Section 1988.

III. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES IS REASONABLE.

A. Boston is part of the relevant community for calculating prevailing rates.

A reasonable hourly rate is one "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation" "regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984). The lodestar method—which multiplies the hours reasonably expended by a reasonable rate—yields a presumptively correct fee. *Pérez-Sosa v. Garland*, 22 F.4th 312, 321 (1st Cir. 2022). Upward or downward adjustment of the lodestar is allowed only in "rare circumstances" when the lodestar omits some key factor. *Id.* Courts may apply "out-of-town rates . . . if the complexities of a particular case require the particular expertise of non-local counsel" or "when the case is an undesirable one which capable attorneys within the forum community are not willing" to take. *Williams v. Poulos*, Nos. 94-2057, 94-2058, 1995 U.S. App. LEXIS 10667, at *11-12 (1st Cir. May 12, 1995).

When calculating fees, the First Circuit has treated Nashua and Boston as part of a single "geographic area." *Castañeda-Castillo v. Holder*, 723 F.3d 48, 76 & n.20 (1st Cir. 2013) (citing data from the Bureau of Labor Statistics). Courts in this district look to market rates both from the Boston and the Concord area, noting that the same attorneys often work in both. *See, e.g.*, *Tuck v. Shroyer*, 742 F. Supp. 3d 179, 189 (D.N.H. 2024); *Wells Fargo Bank, N.A. v. Moskoff*, No. 17-CV-136-JL, 2021 U.S. Dist. LEXIS 198519, at *3, *7 (D.N.H. Oct. 14, 2021); *Town of Wolfeboro v. Wright-Pierce, Inc.*, No. 12-cv-130-JD, 2014 U.S. Dist. LEXIS 204405, at *13-14 (D.N.H. Mar. 10, 2014). Because Nashua sits close to the Massachusetts border, many Nashua residents commute to work in the Boston area. Randazza Dec., ¶¶ 44-48; *cf.* McCandless Dec., ¶¶ 21-22. Thus, "[a]lthough this court is located in Concord . . . the relevant community in this case for determining reasonable billing rates includes Boston." *Town of Wolfeboro*, 2014 U.S. Dist. LEXIS 204405, at *13-14.

B. The requested rates are reasonable in both the Boston and Concord areas.

In calculating rates, courts look to factors such as the nature of the work, whether payment was delayed or contingent, the quality of representation, the qualifications of counsel, and the results obtained. *See Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980); *Hutchinson*, 636 F.3d at 16. "In order to provide adequate compensation where the services were performed many years before the award is made, the rates used by the court to calculate the lodestar should be 'current rather than historic hourly rates'." *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989)).

The Scaers seek fees for the time of three attorneys at the following hourly rates: $500 for Mr. Nathan J. Ristuccia and $800 for Mr. Endel Kolde, both of the Institute for Free Speech in Washington, D.C., and $475 for Mr. Roy S. McCandless of Concord, NH. *See* Ex. 1; Ex. 2, Ex. 4. Mr. McCandless' rate is a standard one that he charges clients in New Hampshire. McCandless Dec., ¶¶ 19-25; *cf. Hutchinson*, 636 F.3d at 16 (lawyer's actual billing practice "useful indicator of market value").

Although Mr. Ristuccia and Mr. Kolde have national practices, headquartered in D.C., Plaintiffs request rates based on what is reasonable for a Boston or Concord attorney with the specialized expertise that IFS attorneys bring to constitutional litigation. *See* McCandless Dec., ¶¶ 26-27. Their hourly rates in the D.C. market are significantly higher—around $600 for Mr. Ristuccia and $1,000 for Mr. Kolde, under the matrixes widely used by D.C. courts, *see, e.g.,* U.S. Attorney's Office, D.C., Fitzpatrick Matrix, https://www.justice.gov/usao-dc/media/1395096/dl?inline (last visited June 3, 2026); *see also* Randazza Dec., ¶¶ 34-41; Ristuccia Dec., ¶¶ 36-40—but Plaintiffs do not seek D.C. rates.

Independent studies of prevailing fees in the Boston market demonstrate that the rates Plaintiffs seek are reasonable. Randazza Dec., ¶¶ 35, 37-39. Courts often use such studies to determine market rates. *See, e.g., Muehe v. City of Bos.*, 569 F. Supp. 3d 80, 86 (D. Mass. 2021) (collecting cases using Wolters Kluwer's Real Rate Report to assess fees); *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, No. 11-cv-10230-MLW, 2018 U.S. Dist. LEXIS 111409, at *224-*225 (D. Mass. May 14, 2018) (using a National Association of Legal Fee Analysis survey); *C.K. v. McDonald*, No. 2:22-cv-1791, 2026 U.S. Dist. LEXIS 17154 at *91-92 (E.D.N.Y. January 15, 2026).

Wolters Kluwer's 2024 Real Rates Report, for instance, found that the mean rate for a partner in Boston was $863 per hour, and for an associate was $614. Ex. 7 at 26. Factoring in experience, Boston partners with over 21 years of experience (like

Mr. Kolde) charge $932 on average, and associates with between 3 and 7 years (like Mr. Ristuccia) charge $569. *Id.* at 55, 61.

Likewise, the 2024 National Association of Legal Fee Analysis survey found that the median hourly rate for a plaintiff's attorney in Boston was between $650 and $750, depending on the type of litigation. Ex. 8 at 91-92. Although the NALFA did not analyze partners and associates separately, it found that the 75th percentile of attorneys (presumably all partners, unlike the median) charged between $850 and $950. *Id.* Even the 25th percentile in Boston is between $500 and $600. *Id.* IFS's lawyers' proposed rates are thus on the low side. Randazza Dec., ¶¶ 28, 40-41, 56.

Courts have repeatedly awarded rates in line with Plaintiffs' requests. Indeed, already back in 2011, "the standard billing rate" for an accomplished member of the Boston bar was $725. *Hutchinson*, 636 F.3d at 16. Rates have increased dramatically over the last decade. Randazza Dec., ¶ 39; *see also* Ex. 7; Ex. 8. Thus, recent courts have approved hourly rates well above $900. *See, e.g., Moskow v. Wheeler*, No. 24-cv-10474-GAO1, 2025 LX 341958, at *10 (D. Mass. July 24, 2025) (rates of $630-$780 for associate and $890-$930 for partner "fall in line with rates awarded in other recent cases") (collecting cases); *BioPoint, Inc. v. Dickhaut*, No. 20-10118-RGS, 2023 U.S. Dist. LEXIS 118565, at *3 (D. Mass. July 11, 2023) ($956 for partner and $676 for associate with five years' experience "appropriate and comparable to, if not lower than" rates at similar Boston firms); *United States v. AthenaHealth, Inc.*, No. 17-12125-NMG, 2022 WL 658654, at *7 (D. Mass. Mar. 3, 2022), *aff'd*, 56 F.4th 152 (1st Cir. 2022) (awarding rates of $1,060 for attorneys over 25 years of experience and $490 for attorneys with 4 years of experience or less).

Although rates are somewhat lower in Concord, New Hampshire courts have approved similar rates. *See, e.g., Huntington Distribution Fin., Inc. v. Outdoor Performance LLC*, No. 23-cv-524-SM-TSM, 2024 U.S. Dist. LEXIS 105380, at *12-13

(D.N.H. May 2, 2024) ($625 for a partner and $455 for an associate reasonable); *Tuck*, 742 F. Supp. 3d at 188-89 (rate of $550 reasonable); *Giles v. Saul*, No. 17-cv-659-PB, 2020 U.S. Dist. LEXIS 29027 at *8, *10 (D.N.H. Feb. 20, 2020) ("rate of over $800 an hour" already a "reasonable hourly fee" in New Hampshire in 2020 and "well within the range of fees endorsed by other courts" when client "paid no up-front fee" and attorney "bore the risk that he would not be compensated at all").

Moreover, "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." *Perdue*, 559 U.S. at 553 (cleaned up). This case was legally complex, concerning unsettled questions of law that the First Circuit had to resolve on appeal. *See* Dkt. 49; Randazza Dec., ¶¶ 13, 49-51. When attorneys have "specialized experience in civil rights litigation that distinguished them from typical" counsel, it is reasonable to give "rates are at the high end of [] rates typically approved." *Asseng v. Beisel*, No. 24-700, 2025 U.S. App. LEXIS 4838 at *5-6 (2d Cir. Mar. 3, 2025).

In this case, Plaintiffs retained the Institute for Free Speech, a public-interest law firm that specializes in free speech litigation like this. Randazza Dec., ¶¶ 26-30. The senior IFS counsel on this case, Mr. Kolde, is a skilled constitutional litigator, who has practiced law for 30 years and won multiple civil-rights victories. Kolde Dec., ¶¶ 3-6. Another IFS counsel on the case who edited the briefs and provided strategic input, Mr. Gura, has over 30 years of experience and two major civil-rights victories at the Supreme Court—yet because Mr. Gura did not formally appear, Plaintiffs exercised their billing judgment and refrained from billing any of Mr. Gura's time. Ristuccia Dec., ¶¶ 18, 28-29.

Although Plaintiffs' lead counsel, Mr. Ristuccia, is at an earlier stage in his legal career, he too focuses on First Amendment litigation. *Id.*, ¶¶ 11-15. Indeed, Mr. Ristuccia—a former professor—has over a decade of experience in legal history and has published repeatedly on the history of the First Amendment and other topics. *Id.*, ¶¶ 5-8. Courts consider an attorney's legal scholarship when assessing rates because "[u]sing multiple, highly experienced counsel, even law professors, is not unusual in high-profile novel civil rights cases." *Sharpe Holdings, Inc. v. United States HHS*, No. 2:12 CV 92 DDN, 2015 U.S. Dist. LEXIS 78281, at *9 (E.D. Mo. June 17, 2015); *see also Agudath Isr. of Am. v. Hochul*, No. 20-cv-04834 (KAM)(RML), 2021 U.S. Dist. LEXIS 233088, at *24 (E.D.N.Y. Dec. 6, 2021) (considering counsel's academic work when evaluating rates); *Davis v. City of New Rochelle*, 156 F.R.D. 549, 558 (S.D.N.Y. 1994) (considering counsel's academic articles as part of rate assessment). And Plaintiffs' local counsel, Mr. McCandless, is an experienced New Hampshire attorney who has won multiple constitutional cases. McCandless Dec., ¶¶ 3-17.

Plaintiffs' choice to retain IFS and Mr. McCandless bore fruit, for Plaintiffs obtained the relief sought both on appeal and before this Court. *See* Dkt. 60; Dkt. 54; Dkt. 49.

C. The number of hours worked is reasonable.

Plaintiffs are entitled to compensation for all time "reasonably expended on the litigation." *Webb v. Board of Education of Dyer County*, 471 U.S. 234, 242 (1985). The goal of fee shifting "is to do rough justice, not to achieve auditing perfection." *Fox*, 563 U.S. at 838. "The determination of fees "should not result in a second major litigation" and "should not become green-eyeshade accountants" in evaluating the reasonableness of hours. *Id.* Generally, courts "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Difronzo v. City of Somerville*, 786 F. Supp. 3d 327, 333 (D. Mass. 2025) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)).

Here, Plaintiffs seek fees for 441.4 total hours (Mr. Ristuccia: 330.6; Mr. Kolde: 85.1; Mr. McCandless: 25.7) for the two years of the litigation, and they supported these hours with detailed timesheets. *See* Ex. 1; Ex. 2; Ex. 4; Kolde Dec., ¶¶ 13-15. When multiplied by the request rates, this yields an amount (not including expenses) of $245,660.70 (Mr. Ristuccia: $165,300; Mr. Kolde: $68,080; Mr. McCandless: $12,280.70). *Id.* It would be a "highly atypical civil rights case where a plaintiff's lawyer engages in churning"—spending unnecessary time in hope of inflating fees—because fees are only available at the end of a case and to prevailing parties, making "the payoff [] too uncertain, as to both the result and the amount of the fee." *Nadarajah v. Holder*, 569 F.3d 906, 922 (9th Cir. 2009) (citations omitted).

There is no evidence that Plaintiffs' counsel spent more time than necessary. Rather, they kept discovery minimal, agreed to defer discovery until after the appeal to narrow the issues, voluntarily dismissed the individual capacity claims[2], and sought to settle soon after the First Circuit's decision. *See, e.g.*, Dkt. 41 at 1-2; Dkt. 23. It was Defendant who delayed settlement talks until after its unsuccessful motion to dismiss. *See* Dkt. 56; Ristuccia Dec., ¶¶ 47-48. And Plaintiffs' counsel made "a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" *Riverside v. Rivera*, 477 U.S. 561, 569 n.4 (1986) (citation omitted). They exercised billing judgment throughout, choosing not to record some routine communications and administrative tasks, reviewing records to deduplicate, and removing time they believed was excessive or exclusively about

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[2] Although the individual defendants were dismissed—without opposition from Plaintiffs, *see* Dkt at 46 at 1, 4—Plaintiffs are entitled to fees for pursuing all related positions in litigation, based on a common core of facts. *See, e.g.*, *Lipsett v. Blanco*, 975 F.2d 934, 940 (1st Cir. 1992); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989). Here, Nashua itself argued the individual defendants' claims were so related as to be redundant. Dkt. 47.

the individual defendants—as the numerous entries marked "Not Charged" show. Ristuccia Dec., ¶¶ 22-30; Kolde Dec., ¶¶ 8-15; Ex. 4.

Ultimately, Plaintiffs' counsel obtained excellent results. This Court ordered Nashua to adhere to a viewpoint-neutral flag policy and forbad it from resuming the viewpoint-discriminatory policies and practices that the Court had declared unconstitutional. *See* Dkt. 60; Dkt. 59 at 1, 4; Dkt. 54. Although not labeled a "permanent injunction," this order qualifies as such. *See* Injunction, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "injunction" as a court order that requires a party "to do or refrain from doing a particular thing."); *see also Carson v. Makin*, 596 U.S. 767, 785 (2022) (constitutional analysis "turn[s] on the substance . . . not on the presence or absence of magic words.").

This Court—consistent with the First Circuit's decision—also declared the Citizen Flag Pole served as a forum for private speech and that Nashua engaged in impermissible viewpoint discrimination. Dkt. 54; *see also* Dkt. 49 at 1, 21-21. And the Court ordered Nashua to pay both Plaintiffs nominal damages. *See* Dkt. 60; Dkt. 59 at 1, 3-4. When assessing fees, success is measured not only by "the damages sought" but also "in terms of the significance of the legal issue on which the plaintiff prevailed" and "the public purpose served." *Farrar*, 506 U.S. at 121-22. Here, the Scaers were awarded all the damages they sought. Dkt. 1 at 27. They established that "Nashua during the time period at issue was not engaged in government speech" but was "violat[ing] the First Amendment in picking and choosing among viewpoints." Dkt. 49 at 1, 11-12. They induced Nashua's aldermen to change the law. *See* Dkt. 56-2. And the Scaers ensured members of the public across the First Circuit could use fora like the Citizen Flag Pole on equal footing regardless of views. These are major victories for free speech, *see* Randazza Dec.,

¶¶ 49-52, and the hours submitted for consideration represent the work reasonably necessary to win this result before both this Court and the First Circuit.

D. Plaintiffs are entitled to reasonable expenses as part of the fee award.

Attorney fees awards pursuant to Section 1988 include "reasonable out-of-pocket expenses incurred by the attorney and normally charged to the client." *Poy v. Boutselis*, 352 F.3d 479, 490 (1st Cir. 2003) (citation omitted). Examples of such recoverable costs are "court costs, deposition fees, copying," "expert witnesses fees," "transportation, lodging, parking, food and telephone expenses." *Smith v. City of Bos.*, 496 F. Supp. 3d 590, 599 (D. Mass. 2020) (citation omitted); *see also Baez Rivera v. Coop. Abraham Rosa*, No. 08-2045 (JAG/CVR), 2013 U.S. Dist. LEXIS 205556, at *14 (D.P.R. Apr. 2, 2013) (listing expenses such as "travel costs."); *Hutchinson*, 636 F.3d at 15 ("attorney's travel time" reimbursed).

Plaintiffs request $4,300.20 for their itemized litigation expenses. Ex. 1; Ex. 3; Ex. 5; Ristuccia Dec., ¶¶ 41-46. Those costs were reasonably incurred in litigation and include expenses for travel for the two oral arguments and pro hac vice fees. *Id.*; Randazza Dec., ¶¶ 21, 55. All these expenses were necessary for counsel's representation of Plaintiffs and are expenses customarily billed to paying clients.

IV. THE SCAERS ARE ENTITLED TO COMPENSATION FOR THE TIME SPENT LITIGATING ATTORNEYS' FEES.

The Scaers also request to be reimbursed for attorney time spent on this fee petition. "A prevailing party in a civil rights action normally is entitled to attorneys' fees incurred in the pursuit of fees under section 1988," *Torres-Rivera v. O'Neill-Cancel,* 524 F.3d 331, 340 (1st Cir. 2008), as well as "time reasonably spent in settlement negotiations," *Pérez-Sosa*, 22 F.4th at 322. Because "the purpose of [fee-shifting] statutes [is] to ease litigants' path in vindicating their legal rights, to hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance." *McDonald v. Sec'y of Health & Human Servs.*, 884 F.2d 1468, 1480 (1st Cir. 1989) (cleaned up).

Plaintiffs first recommended that parties engaged in talks to settle the case on January 6, 2026, and sent a settlement proposal (which Nashua did not respond to) on February 3. Ristuccia Dec., ¶¶ 47-48. On May 13, Plaintiffs provided the Defendant with its lodestar calculations and detailed timesheets itemizing the hours, rates, and expenses for each of Plaintiffs' three attorneys. *Id.*, ¶ 50. They supplied additional fee information at Defendant's request a few days later. *Id.* Nashua's counteroffer, a lump-sum that did not reflect any lodestar analysis and which referenced neither specific hours nor rates, was rejected. *Id.*, ¶¶ 51-53. Although inconclusive talks continued, Plaintiffs and Defendant remained far apart on the amount of fees and were unable to agree. *Id.*, ¶¶ 54-56. Despite Plaintiffs' repeated requests, Defendants never explained which of Plaintiffs' itemized hours were supposedly unreasonable, or what hourly rates they would propose as an alternative. *Id.*, ¶¶ 50-56. This intransigence caused negotiations to break down, created significant extra work for Plaintiffs' counsel, and entitles them to fees for the time spent preparing and litigating this motion.

CONCLUSION

The Court should award fees and expenses to the Scaers in the amount of $249,960.90, plus any additional fees incurred in litigating this motion.

Dated: June 15, 2026

Respectfully submitted,

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**Pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that, on June 15, 2026, a true and correct copy of the foregoing pleading was served via CM/ECF upon the counsel of record of all parties.

Executed under penalty of perjury.

Dated: June 15, 2026

s/Nathan J. Ristuccia

§ Not a D.C. Bar Member but providing legal services in the District of Columbia exclusively before federal courts, as authorized by D.C. Ct. App. R. 49(c)(3).