

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

BETHANY R. SCAER and STEPHEN :
SCAER, :

Plaintiffs, :

v. :

CITY OF NASHUA, :

Defendant. :

Case No. 1:24-cv-00277-LM-TSM

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

REPLY ARGUMENT

I. PLAINTIFFS ARE ASKING FOR MARKET RATES IN THE RELEVANT COMMUNITY, WHICH INCLUDES BOSTON.

Plaintiffs never requested out-of-town rates but rather rates reasonable in this district. Dkt. 63-1 at 15-17. “[T]he relevant community in this case for determining reasonable billing rates includes Boston,” *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 this case occurred in greater Boston. *See* Dkt. 63-5, ¶¶ 42-48; Dkt. 63-2, ¶¶ 21-27. Boston and Nashua are part of one “geographic area” when assessing inflation, cost, and rates. *Castañeda-Castillo v. Holder*, 723 F.3d 48, 76 & n.20 (1st Cir. 2013). Hence, New Hampshire courts consider rates in the greater Boston market when evaluating rates in this forum. *See* Dkt. 63-1 at 14 (collecting cases).

II. ADMISSIBLE EVIDENCE SHOWS THAT THE REQUESTED RATES ARE REASONABLE.

The rates that Plaintiffs seek are reasonable in this forum. Plaintiffs have provided authenticated, admissible evidence demonstrating this: four sworn declarations from practitioners, independent studies of market rates, and extensive case law from the last five years. *See* Dkt. 63-5, ¶¶ 3-5, 21-22, 28, 34-41, 53-56; Dkt. 63-2, ¶¶ 3, 19-27; Dkt. 63-12 at 26, 55, 61; Dkt. 63-13 at 91-92; Dkt. 63-1 at 15-18.

“Courts have differed over whether or to what extent the Federal Rules of Evidence govern disputes over attorneys’ fees.” *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 568 F.3d 345, 352 & n.2 (2d Cir. 2009) (collecting cases). The First Circuit has indicated that the rules do not apply rigidly. *See Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1190 (1st Cir. 1996) (allowing use of judge’s own experience, although the evidentiary rules bar this).

Regardless, independent rates surveys are not hearsay, for they are “[m]arket reports . . . or other [commercial] compilations that are generally relied on by the

public or by persons in particular occupations.” Fed. R. Evid 803(17). Courts regularly use these surveys. *See* Dkt. 63-1 at 15 (collecting cases); *see also Moulton v. Bane*, Civil No. 14-cv-265-JD, 2015 U.S. Dist. LEXIS 158773 at *15 (D.N.H. Nov. 24, 2015) (citing New Hampshire bar survey which found “a median rate of \$298 per hour” already in 2014). Practitioners also use surveys when evaluating what to charge. *See, e.g.*, Dkt. 63-2, ¶¶ 21-27. Additionally, Plaintiffs’ expert Marc Randazza used these surveys, *see* Dkt. 63-5, ¶¶ 9-13, 35-40, as one basis for his opinion—a second reason why they are admissible. *See* Fed. R. Evid. 703 (bases of expert opinion admissible); *cf.* Fed. R. Evid. 807 (trustworthy statements admissible).

Nashua, conversely, has supplied no sworn testimony or studies. Instead, the city cites three unauthenticated representation agreements (arguably hearsay), plus a single unpublished case from over 15 years ago. *See* Dkt. 63-1 at 9. Strikingly, that case drew on a rates survey to support its holding—exactly the sort of survey that Nashua claims is inadmissible. *See Frost v. Town of Hampton*, No. 09-cv-339-JL, 2010 U.S. Dist. LEXIS 43176 at *12 (D.N.H. April 23, 2010).

III. RATES CHARGED BY NASHUA’S DEFENSE ATTORNEYS ARE NOT ANALOGOUS.

Courts have repeatedly awarded fees in the range Plaintiffs seek. *See, e.g.*, *Moskow v. Wheeler*, No. 24-cv-10474-GAO1, 2025 LX 341958, at *10 (D. Mass. July 24, 2025); *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); *BioPoint, Inc. v. Dickhaut*, No. 20-10118-RGS, 2023 U.S. Dist. LEXIS 118565, at *3 (D. Mass. July 11, 2023); *Giles v. Saul*, No. 17-cv-659-PB, 2020 U.S. Dist. LEXIS 29027 at *8, *10 (D.N.H. Feb. 20, 2020).

Nashua seeks to disregard these cases, by noting it paid defense lawyers in the Scaers’ case at a rate of \$450-\$375 for partners and \$275- \$260 for associates, *see*

Dkt. 63-2; Dkt. 63-3.¹ That is irrelevant, for defense counsel are not comparable to Plaintiffs'. "[A]ttorneys are not so fungible." *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1266 (10th Cir. 2023). Thus, courts evaluate reasonable rates by looking at a dozen factors, including success, attorney qualifications and skill, the difficulty of the legal questions, and whether payment was contingent. *Coutin v. Young & Rubicam P.R.*, 124 F.3d 331, 337 n.3 (1st Cir. 1997). Plaintiffs' witnesses did not testify that any lawyer is owed the rates requested; they testified—based on their local knowledge—that the specific lawyers Plaintiffs hired, with their unique experience, qualifications, area of law, payment terms, and results deserve these rates. *See* Dkt. 63-5, ¶¶ 3-5, 9-12, 21-22, 28, 34-43, 53-56; Dkt. 63-2, ¶¶ 3, 19-27.

Nashua lost this case, so the defense lawyers it paid are not analogous.² Its lawyers also do not have the training and specialization in First Amendment law that the IFS attorneys bring. Moreover, "[p]laintiffs' and defendants' civil rights work [] are markedly dissimilar" because, unlike plaintiffs' attorneys, "[a]ttorneys in defendants' civil rights cases are typically paid regardless of their success in a case and . . . on a shorter billing cycle." *Malloy v. Monahan*, 73 F.3d 1012, 1018-19 (10th Cir. 1996); *see also Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988) (rates for "insurance defense work . . . almost universally below the average."); *McDonald v. Kijakazi*, 635 F. Supp. 3d 721, 725 (S.D. Iowa

¹ Nashua also encourages this Court to look to rates that federal courts have awarded to a different IFS attorney: Mr. Alan Gura. Dkt. 64-1 at 12. Already over a decade ago, a court approved a rate of \$500 for Mr. Gura. *Moore v. Madigan*, No. 11-03134, 2014 U.S. Dist. LEXIS 164647, at *50 (C.D. Ill. Nov. 24, 2014). Another court compensated Mr. Gura on the Laffey matrix, *see Heller v. District of Columbia*, 832 F. Supp. 2d 32, 48-49 (D.D.C. 2011), which today would be over \$1200 per hour, *see* Dkt. 63-5, ¶¶ 35-41; Dkt. 63-4, ¶¶ 37-40.

² Nashua now asserts that the case's legal questions were always settled against it, *see* Dkt. 64-1 at 7. This is contrary to evidence, *see* Dkt. 63-5, ¶¶ 24, 50-52, and to Nashua's prior arguments in the case, *see, e.g.*, Dkt. 34 at 1.

2022) (“rates of up to \$1,000” if “significant risk of not being paid”). Thus, an “important factor to consider is how uncertain it was that the case would result in an award,” because Plaintiffs’ counsel³—lacking “a fixed-fee agreement”—risked non-payment, and “any reasonable fee award must take account of that risk.” *Fields v. Kijakazi*, 24 F.4th 845, 855-56 (2d Cir. 2022).

Here, Plaintiffs litigated for two years without payment and had to appeal before eventually triumphing. The risk of non-payment was high, and this—in addition to counsels’ skill, qualifications, and success—justifies the fees requested.

IV. PLAINTIFFS OBTAINED ALL THE RELIEF THEY SOUGHT

“The most critical factor in determining the reasonableness of a fee award is the degree of success obtained.” *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (cleaned up). Here, Plaintiffs obtained excellent results. Dkt. 63-5, ¶¶ 49-52. They received all the relief that they sought, *see* Dkt. 1 at 22-23: a permanent injunction ordering Nashua to no longer employ viewpoint discriminatory policies; a declaratory judgment stating that Nashua’s 2022 policy violated the First Amendment; and nominal damages of \$17.91. *See* Dkt. 60; Dkt. 59; Dkt. 54. Indeed, the expert witness who analyzed the case recommended that this Court use a 1.2x multiplier (which Plaintiffs do not request). Dkt. 63-5, ¶¶ 12-13, 56-57.

The Scaers’ victory was not pyrrhic, for the “recovery of private damages” was never “the purpose of [the Scaers’] civil rights litigation.” *Farrar*, 506 U.S. at 114 (cleaned up). The *Farrar* plaintiff, in contrast, demanded \$17 million in damages as well as an injunction and declarative relief—but lost on all that. *Id.* at 107, 114. The

³ That Mr. McCandless worked pro bono has no impact on the fee award. *See Blum v. Stenson*, 465 U.S. 886, 894-95 (1984); *Castañeda-Castillo*, 723 F.3d at 56 n.4.

Scaers did not fail to prove anything. They won the relief sought and twice induced Nashua to change its laws—thus benefiting all Nashua residents.

V. PLAINTIFFS' HOURS AND EXPENSES ARE NOT EXCESSIVE

Nashua asserts—without citing evidence or discussing the detailed timesheets—the hours billed were excessive. But an expert analysis and other evidence shows that counsel worked efficiently, delegated tasks, and sometimes wrote off time. Dkt. 63-5, ¶¶ 12-13, 22-25, 53-55; Dkt. 63-3, ¶¶ 8-15; Dkt. 63-4 ¶¶ 22-30; Dkt. 63-9.

Also, Plaintiffs reasonably had all their lawyers revise briefs and attend oral arguments. Travel time and expenses are reimbursable, and there is no rule requiring a discounted rate. *Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emplr. v. Ray Haluch Gravel Co.*, 745 F.3d 1, 7 (1st Cir. 2014). Mr. Ristuccia and Mr. Kolde performed the majority of the work and were, respectively, the lead attorney and the most experienced First Amendment specialist. Dkt. 63-2, ¶ 18; Dkt. 63-3, ¶¶ 6, 8; Dkt. 63-4, ¶ 17. Both worked during these hearings, for Mr. Ristuccia delivered the arguments while Mr. Kolde provided strategic advice throughout. *See* Dkt. 63-3, ¶ 8. Mr. McCandless also attended (as the local rules require) and supplied helpful suggestions drawn from his local knowledge. Dkt. 63-2, ¶ 18. Given the role that all three attorneys played, their involvement was appropriate and not excessive.⁴

CONCLUSION

This Court should grant Plaintiffs' motion for attorneys' fees and expenses.

⁴ Nashua brought two counsels to the appellate argument, and six defense attorneys appeared at the district court oral argument, although Nashua admits that no legal conflict existed so all the defendants then in the case could have been represented by the same lawyer. *See* Dkt. 47 at 2-3; Dkt. 31 at 1.

Dated: July 1, 2026

/s/ Roy S. McCandless

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Respectfully submitted,

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**Pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2026, a copy of the foregoing document was served on all counsel of record, using the Court's CM/ECF system.

Dated: July 1, 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).